The Implications of *Romak v Uzbekistan* for Defining the Concept of Investment

ILYAS U MUSURMANOV*

Abstract

The definition of 'investment' has become one of the most controversial issues in the determination of jurisdiction on investment arbitration. Several approaches to interpreting the term 'have appeared in international investment arbitration. This article traces recent developments and discusses the case of *Romak v Uzbekistan*, where the respondent argued that delivery of more than 40 000 tons of cereal did not constitute investment in accordance with the applicable Bilateral Investment Treaty ('BIT'). The tribunal in *Romak* advanced a new approach to the interpretation of the term 'investment'. This article analyses the implications of the case for BIT-making, legal doctrine, and international investment arbitration. It argues that the approach applied by the tribunal in *Romak* evinces the likelihood of smoothing differences in various tribunals' interpretation of the term 'investment'.

I Introduction

On 26 November 2009, a panel of arbitrators in the case of *Romak v Uzbekistan*,[1] operating under the United Nations Commission on International Trade Law's UNCITRAL Arbitral Rules, stated that a long-running dispute over non-payment for shipments of wheat was not susceptible to arbitration under the corresponding Switzerland-Uzbekistan BIT.[2] The Tribunal rejected jurisdiction over a claim by holding that Romak's claim failed to qualify as investment within both the BIT and the 'inherent meaning' of the term 'investment'.

The definition of investment is of crucial importance to both parties to an investment regime — the host state and the foreign investor. The history of BIT making and dispute resolution evidence is that on the one hand '[i]t may be tempting for a defendant State to argue, as a basis for an objection to jurisdiction, that either there was no investment whatever or no investment under the definition of the BIT or under the particular

* LLD candidate (Kyushu University, Japan) LLM (Tashkent State Institute of Law, 2008), LLB (University of World Economy and Diplomacy, Uzbekistan, 2005). This article is an updated and supplemented version of a presentation delivered by the author at a symposium held in Sydney on 2 March 2012 entitled 'International Economic Law Research in Progress'. This research was made possible by a scholarship from the Japan International Cooperation Agency (JICA). The author wishes to thank Professor Caslav Pejovic and Professor Han (Kyushu University), Mark Jennings and Professor Giorgio Sacerdoti for helpful comments and advice. Special thanks to Professor Chester Brown, the editors of the AIJL and two anonymous referees for their insightful comments. This article has also been enriched by valuable correspondence with Mavluda Sattorova and Birru Gebeyehu. Views and errors, if any, are solely author's responsibility.

1 *Romak SA v The Republic of Uzbekistan*, (PCA Case No AA280, 26 November 2009) ('*Romak*') [252]. (The three member panel ('*Romak* tribunal') consisted of Chairman, Fernando Mantilla-Serrano, Noah Rubins, selected by the Claimant, and Professor Nicolas Molfessis, chosen by the Respondent).

2 Bilateral Investment Treaty entered into between the Swiss Confederation and the Republic of Uzbekistan on the 'Promotion and the Reciprocal Protection of Investments' (16 April 1993).

contract'.[3] On the other hand, an excessively broad definition brought up by the foreign investor would trigger a host state's undue loss of control over assets in its territory.[4] Consequently, legal certainty as to what can be considered as an 'investment' pursuant to the relevant agreement is in the interests of both the host state and the foreign investor.

This article aims to examine the implications of the *Romak* tribunal's interpretation of the concept of investment. First, it analyses the current situation with respect to the interpretation of the concept. Second, it outlines the *Romak* case and analyses the *Romak* tribunal's approach to interpretation of the concept. Third, it explores the implications of *Romak* for BIT drafting, legal doctrine, international investment arbitration, and for potential disputing parties that may face arbitration under non-ICSID arbitration proceedings.

II Divergent Definitions of Investment

A *Divergence in Interpretation of the Term 'Investment'*

The notion of investment is one of the most disputable issues in the law.[5] Although it is described variously in the sources,[6] it is still very important as it determines whether the

---

[3] P Lalive, 'Some Objections to Jurisdiction in Investor-State Arbitration' in A Van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (ICCA Congress Series No 11, 2003) 376, 384. For further excellent discussion of the difference between objections to jurisdiction and admissibility, *see* J Paulsson, 'Jurisdiction and Admissibility' in G Aksen et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (2005) 601–8; AK Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113 *Penn State Law Review* 1269 (noting that states have argued that 'certain claims are inadmissible; that notwithstanding a tribunal's authority to hear the case, it should decline to exercise it in the given case').

[4] TH Cheng, 'Power, Authority and International Investment Law' (2004) 20 *American University International Law Review* 465, 472.

[5] The literature has recently become extensive: see, eg, J M Boddicker, 'Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration' (2010) 25 *American University International Law Review* 1030; ME Hiscock, 'The Emerging Legal Concept of Investment' (2009) 27 *Penn State International Law Review* 765; D Krishan, 'A Notion of ICSID Investment' (2009) 1 *TDM*; S Manciaux, 'The Notion of Investment: New Controversies' (2008) 9 (6) *The Journal of World Investment and Trade* 1; JD Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257; Mavluda Sattorova, 'Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' (2012) 1 *American Journal of International Law*24; David AR Williams QC and Simon Foote, 'Recent Developments in the Approach to Identifying an 'Investment' pursuant to Article 25 (1) of the ICSID Convention' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011); F Yala, 'The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?' Some Un-Conventional Thoughts on Salini, SGS and Mihaly' (2005) 22 *Journal of International Arbitration* 105.

[6] See Walid Ben Hamida, '*The Mihaly v Sri Lanka*: Some Thoughts Relating to the Status of Pre-investment Expenditures' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 47 (lists a number of sources that describes the notion of investment); P Juillard, 'Chronique "Investissement"', *Annuaire Français du Droit International (AFDI)* (1984) 773 ('untraceable'); P Kahn, 'Foreign Investments in the Developing Countries' (Report for the International Law Association,, 1966) 819 ('inexistent'); JP Laviec, 'Protection et Promotion des Investissements: Etude de Droit International Economique', (Presses Universitaires de France, 1985) 13 ('nebulous'); P Schaufelberger, 'La Protection Juridique des Investissements Internationaux dans les Pays en Développement: Etude de la Garantie contre les Risques de l'Investissement et en particulier de l'Agence Multilatérale de Garantie des Investissements' (Tolochenaz, 1993) 54 ('used in law without an established definition'); Ali Bencheneb, 'Sur Involution de la notion d'investissement' in C Leben, and E Loquin (eds), *Souverainete Etatique Et Marches Internationaux A La Fin Du 20Eme Siecle* (2000) 196 (noting that the notion of investment has lost its 'soul'); Yala, above n 5, 125 (calling it 'drifting').

asset or transaction is protected by the applicable tool. Most importantly, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[7] accepts claims only if the dispute arises directly out of 'an investment'.[8] It is trite to reiterate that the *ICSID Convention* did not set out the meaning of this central condition.[9] During the drafting of the *ICSID Convention*, there were extensive debates regarding the necessity of the notion of investment.[10] In the end, the drafters decided not to define the term 'investment'.[11] This lack of definition has caused confusion. First, arbitrators have not been consistent with their interpretation of the term.[12] Second, case law shows that a specific asset can be considered as an investment under BIT but not under art 25 of the *ICSID Convention*. While non-ICSID arbitrations have only tended to require the asset to correspond to the requirements of the BIT,[13] the arbitrations held under the *ICSID Convention* might require

---

7 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('*ICSID Convention*') <https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

8 UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)* (UN, 2013) ('*UNCTAD Recent Developments in ISDS*') 3–4 (The majority of cases have been brought under the *ICSID Convention* and the ICSID Additional Facility Rules (314 cases) and the UNCITRAL Rules (135). (*A number of cases under the UNCITRAL rules are administered by the Permanent Court of Arbitration (PCA). By the end of 2012, the total number of PCA-administered ISDS cases amounted to 85, of which 47 were pending. Only 18 of all PCA-administered ISDS cases are public*). Other venues are used only marginally, with 27 cases at the Stockholm Chamber of Commerce and eight with the International Chamber of Commerce and four *ad hoc*. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. These numbers represent known treaty-based cases, but do not include confidential treaty-based cases or those based solely on concession contracts).

9 See CH Schreuer, *The ICSID Convention: A Commentary* (Oxford University Press, 1st ed, 2001) [80].

10 The lack of definition is not for want of trying. During the drafting of the Convention, various proposals were tabled by delegates who sought to provide more explicit guidance as to the scope of the Centre's jurisdiction. See Washington Convention, First/Draft. Article 30, 1 *Analysis of Documents Concerning the Origin and Formulation of the Convention* (1970) 116; (the First Draft of the *ICSID Convention* set forth a very general definition: 'any contribution of money or other assets of economic value for an indefinite period, or... not less than five years').

11 Several explanations have been proposed for the absence of a definition. First, the omission of a definition in the *ICSID Convention* is intentional, as it would either have been too broad to serve a useful purpose or too narrow to serve its intention. Additionally, it has been noted that jurisdiction was optional in, and there was no need to give a precise definition. Thus, the scope of the protected investment could be delimited in the contracting parties' consent to arbitration. Second, the representatives of the states could not come to an agreement on the precise definition. Third, the drafters deemed that the non-existence of a definition would be plausible as the nature of the notion of investment is evolutionary: it would be complicated to cover it in a single and static conception. Thus, the *ICSID Convention* would be pertinent to future forms of investment. See generally GR Delaume, 'ICSID and the Translational Financial Community' (1986) 1 *ICSID Review — Foreign Investment Law Journal* 237, 237; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (1993) 1 *ICSID Report* 28, 28 (arguing that demanding consent by both parties makes defining 'investment' itself unnecessary). See also, N Rubins, 'The Notion of 'Investment' in International Investment Arbitration' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer, 2004) 288 (stating that it was convenient for the delegates to omit a definition as it was anticipated that the contracting party to the dispute should in any case make consent to arbitration. Thus, the conditions of that consent would include an implied or explicit concept of 'investment'); WM Tupman, 'Case Studies in the Jurisdiction of the International Centre for Investment Disputes' (1986) *35 International & Comparative Law Quarterly* 813, 816.

12 Arbitrators interpreted a variety of transactions as 'protected investments' under both bilateral and multilateral agreements. Tribunals stated that 'shares in companies', 'corporations organised under the local law', 'loans agreements', 'promissory notes', 'lease and exploitation of ships', 'money spent in the renovation and development of a hotel', 'construction contracts', 'access to a foreign market', 'market shares', 'capital transferred and deposited in a finance company', 'public concession agreements' and 'PSI service agreements' are all protected investments under those treaties. See generally, Hamida, above n 6, 49–50.

13 K Yannaca-Small, 'Definition of "Investment": An Open-ended Search for a Balanced Approach' in K Yannaca-Small. (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 249–50 (noting that when the dispute is not submitted to the ICSID but to another institution with different

the asset or transaction to qualify as investment, not only under the BITs, but also under the *ICSID Convention*— called by some a 'dual approach'.[14]

Two cases that faced challenges to the existence of an investment were *Fedax*[15] and *CSOB*[16] respectively. In those cases, the matter was settled relatively easily. For instance, in *Fedax*, the jurisdiction of the ICSID Tribunal was disputed on the grounds that the underlying transaction did not meet the requirements of an 'investment' under the *ICSID Convention*.[17] While respecting to a significant degree the discretion of the parties in defining the meaning of the term 'investment', the arbitrators referred in a subtle way to certain objective criteria to determine the definition of 'investment' for the aims of the *ICSID Convention*. As a result, the tribunal ruled that that a loan could constitute an investment under the *ICSID Convention*. However, the tribunal's depiction of basic characteristics of investment[18] as 'a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development'[19] has exerted far-reaching influence on subsequent cases. In this regard, *CSOB* is also of a special importance as the tribunal there applied the finding of *Fedax* and supported the claimant's claims that a loan meets a qualification of an 'investment' within the *ICSID Convention*. In its ruling, the *CSOB* tribunal stressed that 'an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention'.[20] It is essential to mention that these tribunals made their rulings without engaging in a vast

---

rules, such as the International Chamber of Commerce or the Stockholm Chamber of Commerce, or to ad hoc arbitration under the UNCITRAL Rules, the dual approach does not apply, and 'the tribunals applying these Rules have to consider whether there is an investment according to the relevant investment agreement'). See also S Jagusch and A Sinclair, 'The Limits of Protection for Investments and Investors under the Energy Charter Treaty' in C Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* (Juris Publishing, 2006) 73–5 (noting that rules other than ICSID do not 'filter claims through their own autonomous notion of investment as a condition of jurisdiction *ratione materiae*'). However, this situation lasted till the ruling of the *Romak*tribunal.

14 See, eg, *Czechoslovenska obchodny Banka, A. S. v Slovakia (Decision on Jurisdiction)* (ICSID Case No ARB/97/4, 24 May 1999) ('*CSOB case*') [68] (a 'two-fold test'); C H Schreuer et al, *The ICSID Convention: a Commentary* (Cambridge University Press, 2nd ed, 2009) 117 ('dual test'); *Aguas del Tunari v the Republic of Bolivia (Decision on Respondent's Objection to Jurisdiction)* (ICSID case No ARB/02/3, 21 October 2005) ('the jurisdictional keyhole approach'); Williams and Foote, above n 5, 45 ('the two-stage test'); *Malaysian Historical Salvors v Malaysia (Award),* (ICSID Case No ARB/05/10, 17 May 2007) [55] ("double-barreled test"); R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 1st ed, 2008) 62 ('double keyhole approach'); *White Industries Australia Limited v India (Final Award)* (UNCITRAL, 30 November 2011) ('*White Industries*') [7. 4. 9] ('double-check'); *Alps Finance and Trade AG v Slovak Republic (Award),* (UNCITRAL, 5 March 2011) ('*AFT*') [240] ("'double-check'"); *Malicorp Limited v Arab Republic of Egypt (Award),* (ICSID Case No ARB/08/18, 7 February 2011) ('*Malicorp*') [107] ('double test').

15 *Fedax NV v the Republic of Venezuela (Decision on Objection to Jurisdiction)* (ICSID Case No ARB/96/3, 11 June 1997) (1998) 37 ILM 1378 ('*Fedax*').

16 *CSOB* (ICSID Case No ARB/97/4, 24 May 1999).

17 *Fedax* (ICSID Case No ARB/96/3, 11 June 1997) (1998) 37 ILM 1378 [25]. See also, K Yannaca-Small, 'Definition of Investor and Investment in International Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008) 62 (noting that before, 'the ICSID tribunals had examined on their discretion the question whether an investment was involved, and in each case have got the conclusion that the "investment" requirement of the Convention had been met on the basis of a global evaluation of an economic operation often composed of interrelated transactions').

18 The literature is quite divergent in formulating the word ' characteristics' of investment. Descriptions have included 'hallmarks', 'elements', 'criteria', 'benchmarks', 'yardsticks', 'features', and 'indicia'. To avoid opacity, this paper applies the word 'characteristics'.

19 *Fedax* (1998) 37 ILM 1378 [43]. See also C McLachlan, L Shore and M Weiniger., *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) [6. 08]–[6. 10].

20 *CSOB* (ICSID Case No ARB/97/4, 24 May 1999), [64].

debate on the notion of investment. The situation has changed since *Salini*,[21] which is considered as an 'important milestone'[22] in the evolution of the ICSID case law on the concept of investment and has led to the emergence of the so-called '*Salini* test'. In this case, the tribunal, admitting that contracting parties could come to agreement on the type of disputes that could be submitted to arbitration within the agreement, went a step further than *Fedax* and explicitly recognised the existence of objective criteria that should be met if a specific asset needs to qualify as an investment to meet the aims of the *ICSID Convention*. *Salini* was important for ICSID case law because it was the first case that decided to refer to the characteristics of investment while dealing with the definition of investment. The tribunal's four-element definition of investment (contribution, duration, risk, and contribution to development)[23] was subsequently depicted as the '*Salini* test'.[24]

The *Salini* tribunal combined two fundamentally diverging approaches that existed hitherto in the academic literature with respect to the definition of investment within the ICSID Convention. According to the first approach, 'investment' should contain three characteristics: contribution, risk, and duration. The second approach added one more characteristic to the aforementioned three: contribution to development.[25] The *Salini* tribunal's interpretation of the characteristics of the notion of investment has given rise to uncertainty, as evidenced in the decisions of a number of tribunals. Some decisions have been radically opposite to others.

B *Three Main Approaches to Define 'Investment'*

As the *ICSID Convention* does not define the term 'investment', a number of conflicting decisions have been made by tribunals. Gaillard lists three main lines of decision-making: 'two main lines of reasoning and an intermediate approach'.[26]

The first approach — the 'liberal' approach — avoids all generalisations. It just identifies characteristics that have already been reviewed in scholarly writings or previous decisions of arbitral tribunals that have accepted the existence of an investment. The tribunals[27] that leaned towards a liberal and flexible approach in finding an investment

---

21 *Salini Costruttori S. P. A. and Italstrade S. P. A. v Kingdom of Morocco* (2003) 42 ILM 609 ('*Salini* ').

22 E Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in C Binder (ed), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 403.

23 These characteristics are called 'contribution, duration, risk, and contribution to development'. Additionally, for the sake of clarity and convenience, the characteristics of investment are italicised.

24 *Salini* (2003) 42 ILM 609 [54]–[7] See also D Carreau, T Flory and P Juillard, *Droit International Economique* (LGDJ, 3rd ed, 1990) 558–78; C H Schreuer, Commentary on the ICSID Convention (1996) 11 *ICSID Review — Foreign Investment Law Journal*, 318–493; Yala, above n 5, 110 (noting that 'know-how in relation to the work to be accomplished' was never transferred, in spite of the argument of the arbitrators that the claimants could supply 'the Host State of the investment with know-how in relation to the work to be accomplished'). *Contra*, Sattorova, above n 5, 8 (noting that: 'the credibility of the objective hallmarks of the test is undermined by the absence of express provisions on the meaning of "investment" in the ICSID Convention').

25 See generally Gaillard, above n 22, 405–6.

26 E Gaillard, '"Biwater", Classic Investment Bases: Input, Risk, Duration' (2008) 240 *New York Law Journal* 126.

27 See, eg, *CSOB case* (ICSID Case No ARB/97/4, 24 May 1999); *M. C. I Power Group, LC and New Turbine Inc v Republic of Ecuador (Award),* (331 July 2007, ICSID Case No ARB/03/6) [165] (the Tribunal noted that the characteristics 'must be considered as mere examples and not necessarily as elements that are required for its existence'.); *CMS Gas Transmission Company v Argentina* (Decision of the Ad Hoc Committee on the Application of Annulment, 25 September 2007) [71] (the Annulment Committee stressed that 'Article 25 of the ICSID

under art 25(1) stressed that the drafters of the *ICSID Convention* decided not to define the term 'investment' so as to avoid undue restrictions on the parties' understanding of what should constitute an investment. Adjudicators should not apply certain characteristics to define the existence of an investment. On the contrary, they need to consider different characteristics for guidance in identifying the existence of an investment. According to the liberal approach, the characteristics of investment may differ from one case to another. This permits flexibility and gives weight to the parties' understanding of the notion of investment, and is also compatible with the object and purpose of the *ICSID Convention* as expressed in the Report of the Executive Directors.

Professor Schreuer — an active follower of this approach — after reviewing a number of cases, stated that it 'would not be realistic to attempt yet another definition of investment on the basis of ICSID's experience. But it seems possible to identify certain features that are typical to most of the operations in question'.[28] Further, relying on ICSID case law, he stated that in order for the project to meet the requirements of investment, it should first, have a certain duration; second, involve a certain regularity of profit and return; third, possess typically an element of risk for both sides; fourth, involve substantial commitment; and fifth, include an operation which is significant for the host state's development. However, he clarified that these characteristics 'should not be understood as jurisdictional requirements but merely as typical characteristics of an investment'.[29]

In contrast, Gaillard notes that 'this approach ultimately places the concept of investment in art 25(1) as secondary to and dependent upon the concept of consent of the parties'.[30] Another risk of defining the term under art 25(1) solely on the basis of the parties' consent, to his mind, is that it combines the objective requirement of jurisdiction under art 25(1) with the subjective requirement of consent given in the BIT.[31] This *liberal approach* contrasts with *the strict cumulative approach* dramatically.

The second — 'strict cumulative approach' — entails defining in the abstract the aspects that are of the essence to an investment, so as then to proceed in each case to a process of characterisation. This process follows the classic methodology associating one or several constitutive characteristics with a legal consequence.[32] The starting point for this approach was *Salini*.[33] This is a contrasting approach whereby fixed and cumulative characteristics need to be satisfied for a transaction to be deemed an investment under the *ICSID Convention*.[34] The adherents of this method maintain that there is a true definition of

---

Convention did not attempt to define "investment". Instead this task was left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based'); *Biwater Gauff Ltd v United Republic of Tanzania (Award),* (ICSID Case No ARB/05/22, 24 July 2008) [312] (reasoning that the *Salini* test is 'not fixed or mandatory as a matter of law' nor does it appear in the *ICSID Convention*) [313], [316] (taking into account not only features identified in *Salini* but also the totality of the circumstances, including the BIT); *Inmaris Perestroika Sailing Maritime Services Gmbh and Others v Ukraine (Decision on Jurisdiction),* (ICSID Case No ARB/08/8, 8 March 2010); *Malaysian Historical Salvors Sdn Bhd v Malaysia (Decision on the Application for Annulment*), (ICSID Case No ARB/05/10, 16 April 2009) [79].

28 Schreuer, above n 14, [153].

29 Ibid.

30 Ibid.

31 Gaillard, above n 22.

32 *See for example*, *Malaysian Historical Salvors Sdn Bhd v Malaysia* (Award on Jurisdiction, ICSID Case No ARB/05/10) [70] (naming these approaches as 'jurisdictional and typical characteristic approach' respectively).

33 *Salini* (2003) 42 ILM 609.

34 See above pt II B.

investment; hence the analysis of whether an investment exists under the *ICSID Convention* cannot depend on the recognition of inconstant characteristics generally found in an investment.

Notwithstanding the fact that there is no binding precedent in international investment law, a number of tribunals have espoused this approach. In their decisions, they have stated that art 25(1) has an autonomous meaning under the *ICSID Convention* and refused the subjective approach, according to which investment is what the parties understood it to be. Further, investment under art 25(1) of the *ICSID Convention* needs to satisfy several characteristics. However, the decisions of the tribunals adhering to the *Salini* test illustrate a variation of applying the number of characteristics. While some arbitral tribunals, following the true *Salini* test, require that a transaction satisfy a 'fourfold' or 'four-prong' test —that is: contribution, risk, duration and contribution to the development of the host state[35] — some increase the number of characteristics to five, adding the characteristic 'regularity of profit and return', [36] and there is also one that increased the test to six characteristics, requiring the asset to be invested 'in accordance with the laws of the host state' and to be a 'bona fide investment'.[37] The inclusion of the fifth element, 'contribution to development', in some of these decisions faced strong criticism from some scholars. To their minds, the element 'contribution to development' is contrary to the simple meaning of the term 'investment' and is entirely at odds with the object and aim of the *ICSID Convention*.[38]

And finally, the third — *criteria limited in number* — represents an intermediate approach, which combines both above mentioned approaches.[39] The first two approaches are arguably different and frequently the tribunals' decisions diverge radically on this matter. The third approach is characterised as a traditional or classical approach to the term

---

35 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, 14 November 2005) [130]; *Jan de Nul NV Dredging International NV v Arab Republic of Egypt (Decision on Jurisdiction)* (ICSID Case NoARB/04/13, 16 June 2006) [91]; *Ioannis Kardassopoulos v Georgia (Decision on Jurisdiction)* (ICSID Case No ARB/05/18, 6 July 2007) [116]; *Saipem SPA v The People's Republic of Bangladesh (Decision on Jurisdiction and Recommendation on Provisional Measures)* (ICSID Case No Arb/05/07, 21 March 2007) [99].

36 *Helnan International Hotels, AS v Arab Republic of Egypt (Decision on Objection to Jurisdiction*) (ICSID Case No ARB 05/19, 17 October 2006) (the panel stated that the project for the refurbishment and transformation of a hotel into a five-star tourist site met the requirements of investment according to objective criteria despite their excessive narrowness. The arbitrators accepted the respondent's argument based on the objective criteria, namely, a project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host state's development so as to be qualified as an investment); *Patrick Mitchell v The Democratic Republic of Congo (Decision on Annulment)* (ICSID Case No ARB/99/7, 1 November 2006) (the ad hoc Committee annulled the original award rendered in 2004, declaring that a legal services consultancy based in the Congo was not considered capable of satisfying the jurisdictional criteria of an 'investment' for the purposes of art 25 (1) of the *ICSID Convention*. Patrick Mitchell's law firm was closed by the government. The ad hoc annulment committee, applying the *Salini* test, decided that the law firm was not an investment).

37 *Phoenix Action Limited v Czech Republic (Award)* (ICSID Case No ARB/06/5, 15 April 2009) ('*Phoenix*') [142] (The decision of the *Phoenix* Tribunal evidences that tribunals can and will freely modify the *Salini* test). See generally M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 399; Damon Vis-Dunbar, 'Tribunal Disqualifies "Abusive" Claim by Phoenix Action against the Czech Republic (20 April 2009) < http: //www. iisd. org/itn/2009/04/20/tribunal-disqualifies-abusive-claim-by-phoenix-action-against-the-czech-republic/>; Mahnaz Malik, 'Definition of Investment in IIAs' (IISD, 2009) 10–11, <http: //www. iisd. org/pdf/2009/best_practices_bulletin_1. pdf >; Boddicker, above n 5, 1045–8.

38 Gaillard, above n 22. See also Schreuer, above n 14, [153] (concerning the fifth hallmark, he noted that the wording of the Preamble and the Executive Director's Report suggest that development is part of the Convention's object and purpose).

39 See generally, Gaillard, above n 22, 407.

'investment'. According to this approach, both the objective requirement of an investment under the ICSID convention and the requirement of an investment under the applicable tool should be satisfied. Further, this approach deems that objective criteria identify whether the transaction is 'investment'; however, non-restrictive analysis should be applied. The proponents of this approach advance three following characteristics: contribution, risk and, duration.[40]

This approach excludes 'the contribution to the economic development of the host state' characteristic, arguing that this characteristic does not establish a fourth criterion and the reference to the wording 'economic development' in the Preamble to the *ICSID Convention* does not aim to introduce another characteristic in the term 'investment'.[41] Currently, the development of ICSID case law seems to favour this approach. For instance, the arbitrators of *L.E.S.I.*,[42] *Victor Pey Casado v Chile*,[43] *Pantechniki v Albania,*[44] *Toto v Lebanon*,[45] *Fakes,*[46] *DBAG*,[47] *Quiborax v Bolivia,* and *Electrabel*[48] applied these characteristics (contribution, risk, and duration) in their respective decisions. Most importantly, after the ruling of the *Romak* tribunal, this approach is also finding continuation in non-ICSID arbitral practice.[49]

III *Romak v Uzbekistan* Case and the Definition of 'Investment'

A *The Facts of the Case*

The dispute arose out of Swiss firm Romak's,[50] supply of more than 40 000 tonnes of wheat to Uzbekistan in the second half of 1996 ('Supply Contract'). Romak alleged that it has never been paid for the deliveries in return. After Romak failed to enforce the GAFTA Award[51] in both the Uzbek[52] and French[53] courts it decided to submit an investment claim against

---

40 Gaillard, above n 22 (noting that 'this approach is the most faithful both to the text and the intention of the drafters of the ICSID Convention').

41 Ibid.

42 *L. E. S. I. — DIPENTA v République Algérienne Démocratique et Populaire* (*Decision on Jurisdiction)* (12 July 2006) Part II [13]–[15] (original in French) ('*L. E. S. I.* '). See *Saba Fakes v Republic of Turkey*, (*Award)* (ICSID Case No ARB/07/20, 14 July 2010) [102] ('*Fakes*'), fn 65. See also SH Nikiéma, 'Algeria Prevails in Dispute with Italian Construction Firms' (28 November 2008) <http: //www. iisd. org/>; R Happ and N Rubins, 'Awards and Decisions of ICSID Tribunals in 2006' (2006) 49 *Germany Yearbook of International Law* 623, 635–7.

43 *VictorPey Casado and President Allende Foundation v Republic of Chile (Award)* (ICSID Case No ARB/98/2, 8 May 2008) [232].

44 *Pantechniki SA Contractors & Engineers v Albania (Award)* (ICSID Case No ARB/07/21, 30 July 2009), sole arbitrator, Jan Paulsson ('*Pantechniki*').

45 *Toto Costruzioni Generali S. P. A. v Republic of Lebanon (Decision on Jurisdiction),* (ICSID Case No ARB/07/12, 11 September 2009) ('*Toto* ').

46 *Fakes* (ICSID Case No ARB/07/20, 14 July 2007).

47 *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka (Award),* (ICSID Case No ARB/09/2, 31 October 2012) ('*DBAG*').

48 *Electrabel S. A. v Republic of Hungary (Decision on Jurisdiction, Applicable Law and Liability),* (ICSID Case No ARB/07/19, 30 November 2012) ('*Electrabel*').

49 *AFT* (UNCITRAL, 5 March 2011. See below IV (C).

50 *Romak* (PCA Case No AA280, 26 November 2009), [2]–[4] (Romak was incorporated in 1969 under the laws of Switzerland, with the headquarters in Geneva. Its specialisation is 'international trading of cereals').

51 Ibid [52]–[61] (After Romak's efforts to get payment failed, in 1997, it started GAFTA arbitration. The GAFTA tribunal decided in favour of Romak and ordered Uzdon to pay more than US$10 000 000 for the deliveries ('GAFTA Award').

52 Ibid [62]–[66] (On 9 August 2000, Romak referred to the Commercial Court of the City of Tashkent ('CCCT') for recognition and enforcement of the GAFTA Award. Its application was written in Russian. On 2 October 2000,

Uzbekistan to the Permanent Court of Arbitration ('PCA').In its claim, Romak alleged that Uzbekistan breached a BIT between two countries.[54] The two sides' opinions diverged, however, regarding the liability of Uzbekistan to be engaged in this dispute. While authorities of Uzbekistan rejected the claim, stating it as 'a purely private dispute between a Swiss company and a private Uzbek company, Uzdon', [55] Romak argued that Uzdon was itself a state organ controlled by Uzbekistan, therefore its international wrongdoings should be attributed to Uzbekistan.[56] Romak alleged that Uzbekistan breached art 1(2) of the Swiss-Uzbekistan BIT, [57] in relation to an investment by Romak in the terms of art 1(2) paragraphs (c) and (e), '*claims to money or to any performance having an economic value*' and '*rights given by law, by contract or by decision of the authority in accordance with the law*' respectively.[58] That is, according to Romak, it had invested in accordance with the BIT since it was the owner of a 'claim to money', rights under the Supply Contract and the GAFTA Award. Further, Romak insisted that Uzdon was itself a subsidiary of a state-owned company that operated as the Republic's grain ministry, which had solicited the cereal shipment on behalf of the state. Additionally, Romak complained that the courts of Uzbekistan rejected enforcement

---

the CCCT returned the application stating that application did not correspond to the requirements of art IV of the *New York Convention*, which demands that the Party should provide a translation of the original award and the contract in an official language of the country where it is sought, ie Uzbek. Second, the CCCT explained its return with the fact that Romak could not show any evidence that Uzdon had been duly notified of the appointment of the arbitrators, referring of art V (i) (b) of the *New York Convention*. Romak appealed the CCCT's decision, but on 24 November 2000 the Appellate Jurisdiction of the CCCT reasserted the decision of the lower court).

53 Ibid [67]–[70]. (Romak sought to enforce the GAFTA Award in a French court in 2002, which authorised the enforcement of the GAFTA Award in France. Subsequently, Romak obtained an order for the attachment of a bank account in the name of two Uzbek companies, the National Aviation Company of the Republic of Uzbekistan and Uzaeronavigation. However, French appellate court found that these bank accounts had been opened on behalf of Uzbekistan, therefore they could not be seized to enforce an award directed solely against Uzdon). See generally — about GAFTA arbitration — M L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008); Amrapali Choudhury, 'GAFTA Arbitration — Recent Developments' (2009) 4 (6) *International Arbitration Law Review* [I cannot find this article. Please confirm the reference.].

54 *Agreement on the Promotion and the Reciprocal Protection of Investments between the Swiss Confederation and the Republic of Uzbekistan*, signed 16 April 1993 (entered into force 5 November 1993) ('Swiss-Uzbekistan BIT').

55 *Romak* (PCA Case No AA280, 26 November 2009) [20]–[2] (Uzdon or Uzdon Foreign Trade Company was assigned with 'the mission of centralizing the import of bread products'. Uzdon's purpose is 'to ensure the centralized import of grain products and other types of raw materials and materials in sufficient amount, of proper assortment and quality').

56 Ibid [145].

57 Swiss-Uzbekistan BIT, art1 (2) :

The term 'investments' shall include every kind of assets and particularly:

a. movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
b. shares, parts or any other kind of participation in companies;
c. claims to money or to any performance having an economic value;
d. copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), technical processes, know-how and goodwill;
e. concessions under public law, including concession to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law'.

58 *Romak* (PCA Case No AA280, 26 November 2009) [99].

of the GAFTA award in its favour. This non-enforcement of the award also breached other provisions of the Swiss-Uzbekistan BIT.[59]

Uzbekistan contested the claims of Romak, asserting that Romak failed to identify an investment according to the BIT, maintaining that the sale of goods does not establish an 'investment'.[60]

B *The Quest for an 'Inherent Meaning' of Investment*

The Swiss-Uzbekistan BIT provides a broad definition of investment, but one which is standard when compared to the majority of European BITs.[61] Hence, the tribunal did not encounter an exceptional clause.[62]Although the BIT included an open-ended definition of 'investment', which applied to *every kind of asset*, the tribunal concluded that this wording should not have been interpreted literally to transform *any asset* into an investment compliant to the protection under the BIT. More precisely, the tribunal stated that lists of categories of investments are frequently not exhaustive but serve to 'illustrate' what an investment can be.[63] Then the tribunal started its analysis by setting out that it would be guided mainly by the ordinary rules of interpretation of the *Vienna Convention on the Law of Treaties*,[64] in particular by arts 31 and 32, to interpret the term 'investment' in the BIT. Despite the presence of the definition in the BIT, the arbitrators decided to seek out the ordinary meaning of the term 'investment'. Further, the arbitrators referred to *Black's Law Dictionary*'s determination of investment, and specified that an 'investment is the commitment of funds or other assets with the purpose to receive a profit, or return from that commitment of capital', and an 'asset', a 'property of any kind'.[65]

The tribunal then turned to the Preamble of the BIT, and stressed that the object and purpose of signing a BIT[66] was not trade and therefore purely commercial sales transactions fell outside the scope of this BIT.[67] Indeed, the arbitrators considered that a lot of 'claims to money' could constitute an 'investment', however, they pointed out that not 'all such assets necessarily so qualify'.[68] Thus, the tribunal came to conclusion that the claimant's literal and wide interpretation had been 'manifestly absurd and unreasonable'.[69]

---

59 Ibid [99].

60 Ibid [10] (Uzbekistan emphasised that the interpretation of the term would expand the notion almost without bounds).

61 K Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010) 122–3; L Burger, 'Swiss Bilateral Investment Treaties: a Survey' (2010) 27 *Journal of International Arbitration* 473, (noting that the definition of investment in the Swiss-Uzbekistan BIT is a typical of Swiss BITs). See also, Jean-Christophe Liebeskind, 'The Legal Framework of Swiss International Trade and Investments' (2006) 7 *Journal of World Investment and Trade* 469.

62 See generally on exceptional clauses A Parra, 'The Scope of New Investment Laws and International Instruments' in R Pritchard (ed), *Economic Development Foreign Investment and the Law* (Kluwer, 1996) 33–6.

63 *Romak* (PCA Case No AA280, 26 November 2009) [188].

64 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

65 Ibid [177].

66 The Swiss-Uzbekistan BIT, Preamble: the Contracting Parties entered into the BIT, 'Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States' and 'Desiring to intensify economic cooperation to the mutual benefit of both States'. Thus, the Tribunal concluded that the purposes were investment but not trade.

67 In Uzbekistan's view, this treaty, the Agreement on Trade and Economic Cooperation (ATEC) reflected Uzbekistan's and Switzerland intention to exclude ordinary sales of goods transactions from the scope of the BIT.

68 *Romak* (PCA Case No AA280, 26 November 2009) [188].

69 Ibid [184].

The tribunal understood the undesirable consequences that could have followed if it had followed *Romak*'s literal approach. Any practical utility of the notion of investment could have been eliminated by assimilating any 'claim to money' or contract with the concept of investment.[70] Besides, any rejection to enforce an arbitral award could have amounted to a breach of BIT clauses.[71] As a result, the Tribunal decided that the term investment has an 'intrinsic meaning', independent of the categories listed in art 1(2) of the BIT.[72] It had therefore to be defined with due regard to the object and the goals of the BIT. Although the Tribunal stated that 'this meaning cannot be ignored', it could not be discovered solely by applying the rules of interpretation. Thus, the Tribunal admitted that 'the object and purpose of the BIT sheds little light on the meaning of the term "investments"', and 'leaves [it] ambiguous or obscure'.[73] The Tribunal subsequently turned to the provision on arbitration of the applicable BIT.[74] This allowed the Tribunal to apply a more suitable approach based on the ICSID case law.

C *The Application of ICSID-like Features in the Proceeding*

The Swiss-Uzbekistan BIT provided a dual option for disputing parties to submit a claim. An aggrieved party had a choice between an ad hoc UNCITRAL or ICSID arbitration.[75] The reason for Romak's choice of an ad hoc tribunal under the UNCITRAL Arbitration Rules was that ad hoc tribunals had not applied ICSID case law with respect to defining whether an asset or transaction was an 'investment' in their decisions. However, Uzbekistan's opinion was different, namely that the tribunal should still apply the relevant ICSID case law. The arbitrators' finding on this point was surprising, and at the same time very important. Although the dispute was decided under the UNCITRAL Arbitration Rules, the Tribunal rejected Romak's arguments to the contrary and chose to apply the *Salini* test to define whether the Swiss firm had made an investment in Uzbekistan.[76] The tribunal was fully aware of the inconsistency in ICSID case law and legal doctrine[77] concerning the characteristics of investment. It was also aware of the existence of another test;[78] however, it cautiously avoided entering the debate concerning interdependency or the compulsory nature of characteristics listed in the *Salini* test.[79] It outlined cases that had followed the *Salini* test approach, but with a reduced list of characteristics. The tribunal stated that the term 'investment' in the BIT had an inherent meaning 'entailing a contribution that extends over a certain period of time and that involves some risk'.[80] Thus, the Tribunal espoused a 'criteria limited in number' approach, which rejects 'contribution to development' as a characteristic of investment.

---

70 Ibid [184].
71 Ibid.
72 Ibid [188].
73 Ibid [189].
74 Swiss-Uzbekistan BIT art 9 (3).
75 Ibid art 9.
76 *Romak* (PCA Case No AA280, 26 November 2009) [198].
77 See generally, Gaillard, above n 22. See also Schreuer, above n 14.
78 See above pt II B.
79 *Romak* (PCA Case No AA280, 26 November 2009) [199]–[200].
80 Ibid [207].

The tribunal, in the usual way, declined to develop *jurisprudence constante,* [81] stating that it had 'not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of 'arbitral jurisprudence'. The Tribunal went on to say that it was not bound by previous ICSID cases, [82] and it was not going to interpret the definition of 'investment' under art 25(1) of the *ICSID Convention*.[83] The Tribunal's finding of an inherent meaning of investment in the BIT guided it in its decision on whether the supply of cereal could qualify as investment according to characteristics it identified, namely, contribution, risk, and certain duration.[84]

First, the Tribunal looked at the contribution made by Romak and found that wheat deliveries did not amount to a 'contribution', as they were merely 'an exchange of goods in the expectation of full payment, not the in-kind transfer of assets for aims of promoting any economic venture'.[85] Then the tribunal turned to the characteristic of 'duration'. The tribunal did not indicate the 'fixed minimum duration' it would take for the transaction to be qualified as 'investment'.[86] It only asserted that duration should be seen in light of 'the investor's overall commitment', and any other circumstances.[87] Although the *Romak* deliveries of grain encompassed a five month time period, the Tribunal ruled that they were just a one-off transaction, not a lasting commitment.[88]

The last characteristic the Tribunal analysed was 'risk'. The Tribunal noted that all contracts involved the commercial risk of non-fulfilment or 'the risk of doing business generally', [89] however, this was not sufficient for the Supply Contract to constitute an 'investment'. The tribunal went on to state that investment risk was of a different type: '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'.[90] Again, Romak's activity failed to meet this characteristic in the tribunal's view, as the claimant's exposure was confined to the value of the wheat delivered.[91]

---

81 See generally A Rigo Sureda, 'Precedent in Investment Treaty Arbitration' in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 830; G Kaufmann-Kohler, 'Is Consistency a Myth?' in E Gaillard and Y Banifatemi (eds), *Precedent in International Arbitration* (IAI, 2008). See also, Bjorklund, above n 3, 1273 (noting that: 'notwithstanding the general rule in public international law that case law has no precedential value, arbitral awards are increasingly used as persuasive authority both by advocates and by tribunals'); T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 *Fordham Journal of International Law* 1014; JP Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 *Journal of International Arbitration* 129; J Paulsson, 'Awards — and Awards' in AK Bjorklund et al (eds), *Investment Treaty Law: Current Issues III* (2008) 95; C Schreuer and M Weiniger, 'A Doctrine of Precedent' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1188.

82 *Romak* (PCA Case No AA280, 26 November 2009), [171].

83 Ibid [192]–[194].

84 Ibid [207].

85 Ibid [222]. The tribunal quoted *Salini* and stated that 'a "contribution" can be made in cash, kind or labor': [214]; the tribunal found that the Supply Contract considered instant payment at market rate: [215]; the Tribunal found that no evidence had been submitted that any of the commitments stipulated in the Protocol of Intention had been carried out: [220].

86 Ibid [225].

87 Ibid.

88 Ibid [227].

89 Ibid [229].

90 Ibid [230].

91 Ibid [231].

IV The Implications of *Romak* for the Definition of Investment

The *Romak* Tribunal reiterated several times that the development of consistent arbitral jurisprudence was outside the scope of its concern and 'mission'.[92] Nonetheless, recent rulings of both ICSID and non-ICSID tribunals and changes in BIT drafting that have taken place since *Romak* illustrate that the case has exerted some influence on the field.

A *Implications for BIT Drafting*

In its most recent study, UNCTAD notes that the approach to the concept of investment to be taken by tribunals is not yet resolved, and 'if a government wishes to make sure that objective characteristics of an investment be considered by a tribunal, it is well-advised to include them in the definition'.[93] It is premature to say that the results of *Romak* contributed extensively to BIT drafting. The characteristics mentioned in this case were already known, and some of them had already been applied in a number of bilateral and regional[94] investment treaties and in the draft of the failed Multilateral Agreement on Investment ('MAI'). Indeed, definitions of investment that apply a description of what characteristics an asset should possess to qualify as investment are yet to gain general acceptance in BIT drafting. However, a recent proliferation of investment-state disputes shows that both developed and developing states are concerned about the consequences of including a too broad definition of investment in their respective BITs.

The idea of providing a definition of investment with a list of restrictive characteristics was first considered in the stillborn negotiations of the MAI. It appears that the MAI negotiators might have foreseen the implications of a broad definition of investment and accordingly were right when they suggested restricting the term 'investment' to certain characteristics.[95] The draft MAI included a footnote indicating that a protected asset must possess 'the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[96]

However, the USA 2004 Model BIT was one of the first that implemented a formulation of the term 'investment' that restricted the term to certain characteristics such as contribution, profit, and risk.[97] Likewise, recently released, newly updated and revised, the USA 2012 Model BIT contains a similar list of characteristics that an asset must meet

---

92 Ibid [170]–[171].

93 UNCTAD Series on Issues in International Investment Agreements II: *Scope and Definition* (UN, 2011) 42.

94 See, eg, the ASEAN *Comprehensive Investment Agreement* (concluded in February 2009). Article 4 (c) of the Agreement provides a traditional formulation of the investment definition, which is clarified by the accompanying footnotes. The footnote provides that the asset that exhibits the characteristics of an investment is a protected investment. The characteristics are commitment of capital, the expectation of gain or profit, or the assumption of risk.

95 The *Multilateral Agreement on Investment*, draft consolidated text (DAFFE/MAI (98) 7/REV1, 22 April 1998).

96 Sol Picciotto, 'Linkages in International Investment Regulation: the Antinomies of the Draft Multilateral Agreement on Investment' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 731, 756.

97 The definition of investment in this Model BIT provides that '"[i]nvestment" means every asset that … that has the characteristics of an investment, including such characteristicsas the commitment of capital or other resources, theexpectation of gain or profit, or the assumption of risk'. See, eg, Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment, (signed 19 February 2008) s A, art 1.

to be considered an investment.[98] The approach of the USA with regard to restricting theterm 'investment' was followed by several states in their corresponding BITs. For example, in its BIT with Peru, Japan applied a similar formulation of the term, providing that for an asset to be a covered 'investment', it should possess such 'characteristics of an investment' as 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[99] Likewise, the Colombian Model BIT also lists these characteristics as the minimum ones.[100]

In a similar vein, it is worth noting that the respondent in *Romak*, Uzbekistan, seems to have learnt a lesson because it started to insert a definition of investment which focuses and controls the scope of the term 'investment' by using an express reference to characteristics associated with an investment.[101] Certainly, the characteristics mentioned in the BITs and the MAI (contribution, profit, and risk) do not include 'duration' — a characteristic listed by the *Romak* Tribunal.[102] Nonetheless, to the author's mind, the inclusion of a qualification that a transaction or asset should have the characteristics of an investment in BITs is an important step for states to protect themselves from frivolous or *mala fide* claims.[103] And if the requirement for an asset to have the characteristics of an investment is in the BIT itself, this test would need to be satisfied not only before ICSID but also before non-ICSID tribunals.

Romak also generated debates in the EU states in connection with the potential EU International Investment Agreement ('EUIIA').[104] For instance, Hunter, in his research

---

98 The USA 2012 Model BIT was released on 12 April 2012: s A, art 1: '"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.' See also Mark Kantor, 'Little Has Changed in the New US Model Bilateral Investment Treaty' (2012) 27*ICSID Review — Foreign Investment Law Journal* 335 (reviewing the material changes made and the material proposals that were not accepted by the US Government).

99 *Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment* (signed 22 November 2008, entered into force on 10 December 2009) art 1 (1). See also Shotaro Hamamoto 'A Passive Player in International Investment Law: Typically Japanese?' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

100 See, eg, Agreement between The Belgium-Luxembourg Economic Union on the one hand, and the Republic of Colombia, on the other hand, on the Reciprocal Promotion and Protection of Investments (signed on 4 February 2009) art I (2. 3). See also JA Rivas, 'The Colombian BIT Model: A Balanced Treaty with NAFTA, OECD and Colombian Constitutional Elements' (Paper presented at the 12th Investment Treaty Forum, Investment Treaties: Host State Perspectives, London, 15 May 2009) 4.

101 Agreement between the Government of the Republic of Uzbekistan and the Government of the People's Republic of China on the Promotion and Protection of Investments (signed 19 April 2011) art 1 (1). The definition of investment in this BIT provides that 'the term "investment" means every kind of assets that has the characteristics of an investment […]'. The characteristics of investment are listed as: 'the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk'. See further Vivienne Bath, 'The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 68–88; and Nils Eliasson, 'China's Investment Treaties: A Procedural Perspective' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 91–110.

102 See, eg, O J Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijihoff, 2011) 131 (noting that characteristic of duration is 'the most clear-cut of the requisitions laid down by legal doctrine. However, when one includes in the assessment the preparation period of an enterprise during the pre-tender stage, the door is opened to complete volatility of the results achievable').

103 Bjorklund, above n 3, 1285–6 (providing a review and implications of several frivolous claims).

104 Taking into account that the EU Treaties do not explicitly define FDI, in its recent report on the EU investment policy the European Parliament considered that the definition of investment in the treaties should be clear and avoid 'speculative forms of investment', which are defined by the Commission as unprotected. European Parliament International Trade Committee, 'EU Investment Policy Needs to Balance Investor Protection and

with regard to a possible definition of 'investment', under a new EUIIA, proposes to deal with the dynamic limits of the definition of 'investment' in investment treaty practice and to clarify the EU approach with respect to borderline cases such as sales contracts, using *Romak* as an example.[105] According to Hunter, the definition of 'investment' may provide a diplomatic solution to the ongoing search for a balance between avoiding undue burden in domestic policy and liability, on the one hand, and protection for outgoing investors on the other.[106]

B *Implications for Legal Doctrine*

The decision of the *Romak* Tribunal is yet to gain the academic recognition and popularity in references and quotations that the rulings of the tribunals in *Barcelona Traction*, [107]*Mafezzini v Spain*,[108]and *Salini*[109]have reached, albeit unintentionally. The arbitrators of *Romak* did not invent anything new when they decided to look for the 'inherent meaning' of the term 'investment' and applied a reduced version of the *Salini* test that requires the operation, transaction or asset to qualify as investment to meet the characteristics of contribution, a certain duration, and risk.

As mentioned, arbitrators have applied this 'criteria limited in number' approach in a number of cases. Likewise, a number of distinguished scholars have advanced this reduced version of the *Salini* test as the most relevant one. For example, Gaillard openly expressed his support for this approach. According to him, this approach is 'the most faithful both to the text and the intention of the drafters of the ICSID Convention'.[110]

The 'criteria limited in number' approach has been espoused by Douglas, opining that:

> the open-textured nature of the standard formulation in investment treaties defining 'investment' to be 'any asset' and then providing a non-exhaustive list of assets that might qualify as an investment preserves the ordinary meaning of the term 'investment' and therefore its consistency with the characteristics that must be attributed to the same term as employed in Article 25 of the ICSID Convention.[111]

Further, Douglas suggests two new rules for the term 'investment', accompanied by a comprehensive analysis of the authorities:

> Rule 22: The legal materialization of an investment is the acquisition of a bundle ofrights in property that has the characteristics of one or more categories of an investmentdefined by the applicable investment treaty where such property is situated in theterritory of the host state or is recognized by the rules of the host

---

Public Regulation, says International Trade Committee', (Press release, 17 March 2011) <http: //www. europarl. europa. eu/news/en/pressroom/content/20110314IPR15476/>.

105 Robert Hunter (Paper presented at British Institute of Comparative and International Law, 17th Investment Treaty Forum Public Conference: International Investment Law and its Intersections, London, 9 September 2011).

106 Ibid.

107 *Case Concerning Barcelona Traction, Light and Power Company* (1970) ICJ Rep 44.

108 *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID CASE No. ARB/97/7, 9 November 2000).

109 (2003) 42 ILM 609.

110 Gaillard, above n 26, 3. The decision of the *Fakes* tribunal, where he was a President, is a vivid example of his espousal of this approach.

111 Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), 343.

> state's privateinternational law to be situated in the host state or is created by the municipal law of thehost state.[112]
>
> Rule 23: The economic materialization of an investment requires the commitment ofresources to the economy of the host state by the claimant entailing the assumption ofrisk in expectation of a commercial return.[113]

His Rule 23 buttresses only three characteristics of the *Salini* test, that is, contribution, risk, and expectation of a commercial return. He did not include 'a certain duration' as a characteristic, a characteristic which was listed in the reduced version of the *Salini* test, and supported by Gaillard and by a number of tribunals favouring the 'criteria limited in number' approach.[114] Rather he favoured a characteristic of 'expectation of a commercial return'. Like Gaillard, Douglas also declined to include the characteristic of 'contribution to economic development'.[115]

In contrast, there are also supporters of the fourfold *Salini* test. Hwang (who was a sole arbitrator in the first stage of the notorious *MHS* arbitration) and Fong favour a standpoint according to which the term 'investment' under art 25(1) of the *ICSID Convention* should consist of the characteristics of 'commitment', 'duration', 'risk', and 'significant contribution to economic development'.[116] Additionally, these scholars suggest subsuming a characteristic of 'good faith' under the fourth characteristic, or considering it separately as a common principle applicable to the interpretation of treaties.[117] They believe that this fourfold *Salini* test can operate 'as a useful and general outer limit to the BIT definition of investment'.[118] They went on to say that the way these four characteristics are treated may become an academic distinction, be it either 'jurisdictional (assessed cumulatively) or merely as typical characteristics'.[119]Most importantly, adjudicators should consider the level of fulfilment of the characteristics, and where any of the characteristics are not satisfied or only tangentially satisfied, the tribunal ought to balance the fulfilment of the other characteristics against any characteristics that are not satisfied in its decision whether it has jurisdiction. Where none of the characteristics is satisfied or if all of the characteristics are satisfied, the residual consideration of the tribunal would be whether:

---

112 Ibid [161].

113 Ibid [189].

114 Ibid (emphasising that whatever may be the term 'investment', it ought to be certain so that investors will know at the time of investment whether they are making an investment to which the *ICSID Convention* applies).

115 The debate about whether the characteristic of 'contribution to economic development' is necessary or superfluous is out of the scope a present paper. However, literature focusing on or discussing it has become abundant. See, eg, M Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 645–6 (criticising 'a system that has been built up on the promise of economic development as the *quid pro quo* for surrendering sovereignty'); Voss, above n 102, 134–7; M Jezewski, 'Development Considerations in Defining Investment' in M-C Cordonier Segger et al (eds), *Sustainable Development in World Investment Law* (Kluwer, 2011); T Moran, *Harnessing Foreign Direct Investment for Development: Policies for Developed and Developing Countries*, (Center for Global Development, 2006).

116 MSC Hwang and JLC Fong, 'Definition of "Investment" — A Voice from the Eye of the Storm' (2010) 1 *Asian Journal of International Law* 99, 30.

117 Ibid.

118 Ibid.

119 Ibid.

> 1. Despite the satisfaction of all the hallmarks, the investment is neverthelesscontrary to the purpose of the ICSID Convention and the consent of thecontracting state to ICSID jurisdiction; or
>
> 2. Despite the non-satisfaction of all the hallmarks, the investment is stillconsistent with the purpose of the ICSID Convention and the consent of thecontracting state to ICSID jurisdiction.[120]

Voss takes a contrary stand, and after analysis of a number of investment agreements and investment arbitrations, expresses his doubts about the level of circumscription of the parties' discretion by objective requirements of investment. He criticises the *Salini* test and urges recall of three aspects in the event of espousal of that test:

> [f]irstly, the terms which circumscribe the characteristics are broad and malleable. Secondly, these characteristics are not rigid jurisdictional requirements. And thirdly, as nearly all tribunals emphasize, they are interdependent and thus, have to be assessed in their entirety.[121]

He went on to state that the *Salini* test can barely be seen as more than 'a mere practical tool for differentiation'.[122]

Some scholars believe that an attempt to formulate and apply objective criteria so as to define 'investment' in the *ICSID Convention* distorts the way in which 'investment' in art 25(1) was meant to be understood and interpreted. They advance a view that it is necessary to return to the BIT definition of 'investment' that:

> embodies the crucial reminder that the duty to ascribe a 'core meaning' to 'investment' in the ICSID Convention capable of universal application to ICSID arbitrations, or to confirm that objective criteria exist, falls upon the contracting states to the ICSID Convention, not the tribunal.[123]

In contrast, Krishan suggests that the term 'investment' under the *ICSID Convention* should be compatible with what is treated as an investment under a state's capital account, as well as the IMF's description of investment as direct, portfolio, and other investment.[124]

In this regard, Coppens argues that a host state's insertion of '[w]hichever specific criteria' it 'considers as essential in an investment, it can introduce it in the negotiation of

---

120 Ibid 31.

121 Voss, above n 102, 138.

122 Ibid 138. See also, A Martin, 'Definition of "Investment": Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?' (2011) 11 (2) *Global Jurist (Topics)* Article 3, <http: //www. bepress. com/gj/vol11/iss2/art3> ('[t]he approach followed in the MHS Annulment Decision and CSOB, which by contrast valued (as in Fedax) the contractual freedom of the parties to recognise an "investment" as a "strong presumption" under the ICSID Convention, seems more convincing and suggests that a persistent objector to Salini criteria could be found').

123 See, eg, Jean Ho, 'The Meaning of "Investment" in ICSID Arbitrations' (2010) 26 *Arbitration International* 633, 646–7. See also Mavluda Sattorova, 'From Expropriation to Non-Expropriatory Standards of Treatment: towards a Unified Concept of an Investment Treaty Breach', (Thesis submitted to the University of Birmingham, October 2010) (arguing that, 'until states agree on a more exacting definition of investment, the law as it stands today allows claims brought directly against host states in connection with any commitment of resources in the expectation of a profit') 58.

124 D Krishan, 'A Notion of ICSID Investment' in TJ Weiler (ed), *Investment Treaty Arbitration and International Law* (Jurisnet, 2008) 61.

the BIT' may help move 'the emphasis away from interpreting a variety of jurisdictional conditions into the notion of investment towards a pragmatic ordinary meaning supplemented by detailed provisions of the BIT' which according to him 'seems to be the best guarantee for a better balance between investors and host states'.[125] He also suggests '[t]aking the enterprise, that is the legal entity operating within a country, and not the contract, as the benchmark for an investment', although he admitted that this would 'not solve all issues, but it is a perspective that can provide more clarity in situations where the current case law gives very diverse answers'.[126]

C *Implications for International Investment Arbitration*

Indeed, the approach chosen by the *Romak* tribunal with respect to the interpretation of the term 'investment' has not proliferated yet. Different approaches have continued to be adopted in the decisions rendered afterwards, although most recent awards seem to favour the reduced three characteristics test. For example, the tribunal in *Fakes* supported a minimalist approach and clearly dismissed the method taken by the panel in *Phoenix*.[127] The tribunal noted that there is an objective definition of the term 'investment' in the *ICSID Convention* that cannot be determined 'simply through […] the parties' consent'.[128] The arbitrators declared that characteristics of contribution, a certain duration, and risk are both 'necessary and sufficient' to define an investment, albeit in the context of art 25(1) of the *ICSID Convention*.[129] The tribunal in *Malicorp* encountered the issue whether the contract alone was sufficient to qualify as an investment under the *ICSID Convention* and the relevant BIT.[130]The tribunal carried out a 'double test', [131] to decide whether a proceeding based on breach of treaty was admissible, although it noted that characteristics listed in the *Salini* test are 'not at all absolute and must be regarded as attempts to pin down the notion'.[132] Nevertheless, the tribunal relied on the contribution criterion in order to accept that the dispute arose out of an investment.[133] In *AFT v Slovak Republic*, the tribunal found that the acquisition of certain 'receivables' from a private company did not qualify as an 'investment'. The tribunal considered various characteristics applied to 'investments' under the applicable BIT, and under international law more generally. It held that the contract in question was a one-off sale-purchase agreement that failed to meet the criteria normally attributed to an 'investment' under international investment law. The tribunal, following *Romak,* concluded that when the asset arises from a contract, the contract itself should

---

125 Govert Coppens, 'Treaty Definitions of "investment" and the Role of Economic Development': a Criticial Analysis of the Malaysian Historical Salvors Case' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 185.

126 Ibid 188.

127 *Phoenix* (ICSID Case No ARB/06/5, 15 April 2009) (found that good faith and legality are jurisdictional requirements for access to ICSID arbitration).

128 *Fakes* (ICSID Case No ARB/07/20, 14 July 2010) [108].

129 Ibid [110]. See also, Andrew Newcombe, *Fakes vs. Phoenix* (3 August 2010) Kluwer Arbitration Blog<http: //kluwerarbitrationblog. com/blog/2010/08/03/fakes-vs-phoenix/>.

130 *Malicorp* (ICSID Case No ARB/08/18, 7 February 2011).

131 Ibid [107].

132 Ibid [109].

133 Ibid[113]: an investment, according to the tribunal, 'entails the promise to make contributions in the future for the performance of which that party is henceforth contractually bound. '

qualify as an investment.[134] For that purpose the contract must meet certain minimum characteristics, such as duration, contribution and risk.[135]

The tribunal in *GEA* also dealt with the issue of defining 'investment'. In concluding that an arbitral award from a different arbitration could not be considered a protected investment,[136] the tribunal highlighted the controversy existing in the field and noted the contrast between an 'objective' meaning and a 'subjective' definition.[137] However, the tribunal decided to avoid taking sides by stating that whatever test was applied, 'each leads to the same conclusion with respect to each of the alleged "investments" in question'.[138]

Another controversy was generated by the tribunal's decision in *Abaclat*[139] where a majority granted jurisdiction, having deemed that sovereign debt instruments constituted a protected investment under the relevant BIT and the *ICSID Convention*. A majority of the tribunal refused to apply the *Salini* test, motivated by its non-existence in the *ICSID Convention* and noting that:

> [w]hile being controversial and having been applied by tribunals in varying manners and degrees, the tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which [neither] the Convention itself nor the Contracting Parties to a specific BIT intended to create.[140]

The tribunal in *White Industries* excluded the applicability of the *Salini* test, noting that the dispute was 'not subject to the ICSID Convention', and the *Salini* test, which 'imposes a higher standard' for defining investment under the *ICSID Convention* was 'simply not applicable'.[141] Nevertheless, the tribunal noted that White Industries' commitment under the contract[142] 'extended far beyond the provision of equipment and technical services' as White Industries provided its own working capital, equipment and technical know-how, hired and trained local workers, and bore the financial risk of rising costs and penalties for inadequate performance under the eight-year contract.[143]Thus, despite the fact that the

---

134 *AFT* (UNCITRAL, 5 March 2011).

135 Ibid [241]. Interestingly, the tribunal concluded that this is also the outcome under customary international law. 'A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more in general, international customary law. It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of "investment" to a contractual relationship include: (a) a capital contribution… (b) a significant duration … and (c) a sharing of operational risks'Additionally, the tribunal held [245]: 'The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment. The Tribunal cannot ignore the general consensus formed around the above doctrine': at [245].

136 *GEA Group Aktiengesellschaft v Ukraine (Award)* (ICSID Case No ARB/08/16, 31 March 2011) ('*GEA*') [162].

137 Ibid [141]–[142].

138 Ibid [143].

139 *Giovanna a Beccara v Argentine Republic* (Decision on Jurisdiction), (ICSID Case No ARB/07/5, 4 August 2011) ('*Abaclat*').

140 Ibid [364].

141 *White Industries* (UNCITRAL, 30 November 2011) [7. 4. 9].

142 Ibid [3. 2. 13].

143 Ibid [7. 4. 10].

dispute did not arise under the *ICSID Convention*, the tribunal deemed that the investment would satisfy the *Salini* test.[144]

The tribunal in *Caratube* dismissed Caratube's USD 1 billion claim against Kazakhstan on jurisdictional grounds having established that the US national in question did not control the claimant firm. The tribunal understood the 'investment' as 'an economic arrangement requiring a *contribution* to make *profit*, and thus involving some degree of *risk*'.[145] The tribunal did not find any 'plausible economic motive'[146] to explain the US national's investment in Caratube, any proof of a *contribution* of any kind[147] or any risk undertaken by the US national, and no capital flow between the US national and Caratube.[148]

However, most recent decisions seem to concentrate their attention principally on the three characteristics test, namely contribution, risk and duration. For instance, in October 2012, the tribunal in *DBAG*[149] noted that the development of ICSID arbitral practice suggested that only three characteristics were appropriate for the purpose of defining an investment, being contribution, risk and duration.[150] Conversely, the tribunal rejected a usage of 'a contribution to the economic development of the host State and a regularity of profit and return' criteria as additional characteristics.[151] The tribunal held that all three above characteristics were fulfilled[152] with respect to the hedging agreement at issue.[153]

Likewise, the tribunal in *Quiborax* followed a similar approach and held that the contribution of resources, risk and duration are 'all part of the ordinary definition of an investment'.[154] The tribunal also found that a contribution to the development of the host State, conformity with the laws of the host State and respect of good faith characteristics are not part of objective definition of investment.[155]

The tribunal in *Electrabel* took a similar view and noted that '[w]hile there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment'.[156] The tribunal also held

144 Ibid [7. 4. 19].

145 *Caratube International Oil Company LLP v Republic of Kazakhstan (Award),* (ICSID Case No. ARB/08/12, 5 June 2012) [360]–[361], [408] ('*Caratube*') (emphasis added).

146 Ibid[455].

147 Ibid[450] (the US national's personal guarantees for a loan obtained by the firm from a Lebanese bank were not deemed as constituting a sufficient contribution).

148 Ibid[455].

149 *DBAG* (ICSID Case No ARB/09/2, 31 October 2012).

150 Ibid [295].

151 Ibid[295] (The tribunal also noted that 'the existence of an investment must be assessed at its inception and not with hindsight').

152 Ibid [296].

153 Ibid [12]–[44] (The hedging agreement at issue was concluded to protect Sri Lanka against the influence of rising oil prices); [297] (The tribunal held that the hedging agreement involved a contribution to Sri Lanka (noting that a contribution can take any form and it is not confined to financial terms but also includes know-how, equipment, personnel and services); [303]–[304] (The tribunal found that the investment was of a certain duration, even if the commitment was originally for twelve months and despite the fact that it was terminated after 125 days, noting that short-term projects are not deprived of "investment" status solely by virtue of their limited duration and that duration should be analysed in light of all the circumstances and of the investor's overall commitment).

154 *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Decision on Jurisdiction),* (ICSID Case No ARB/06/2, 27 September 2012) ('*Quiborax*') [219], [227].

155 Ibid [220]–[6].

156 *Electrabel* (ICSID Case No ARB/07/19, 30 November 2012) [4. 43].

that, while the economic development of the host state was 'one of the objectives of the *ICSID Convention* and a desirable consequence of the investment, it was 'not necessarily an element of an investment'.[157]

Arbitral decisions continue to show divergence between different tribunals and among adjudicators sitting on the same tribunal. Even though most recent decisions, such as *DBAG*, *Quiborax,* and *Electrabel*, seem to follow the three characteristics approach, these arbitral decisions cannot be a solid proof of the emergence of *jurisprudence constante* or that the arbitrators are starting to apply consistent interpretations with respect to the concept of 'investment'. Arbitral practice is still divergent and, taking into account the current fragmentation of international investment arbitration, the application of the *Romak* tribunal's interpretation of investment may be a good leverage for the disputing parties to influence the arbitrators in their interpretation of whether the ICSID or non-ICSID tribunal has jurisdiction over a case, and whether the transaction or an asset is a 'protected investment'.

The *Romak* Award may also become an important tool to structure a strategy to defend interests of the state before international arbitration tribunals. In this sense, Voon and Mitchell, while analysing Philip Morris Asia Ltd's launching of an investment claim against Australia under the Hong Kong–Australia BIT in relation to the Australian Government's plan to pursue mandatory plain packaging of tobacco products, proposed a number of suggestions which Australia would need to apply in order to succeed. Australia would need to advance a more restrictive meaning of investment for the purposes of the applicable BIT. It also would need to take into account recent arbitrations held under UNCITRAL Arbitration Rules which reached this conclusion, in particular, *Romak*, to show that the term 'investment' has an inherent meaning that involves something more than a mechanical application of the asset types identified in art 1(e) of the Hong Kong–Australia BIT to the facts of the case. Another suggestion was that 'Australia would most likely have to establish that the meaning given to "investment" in the Hong Kong–Australia BIT is informed by the ICSID arbitral awards … on the basis that such awards provide subsidiary means of interpreting this treaty term or that they shed light on the ordinary meaning, context or purpose of the the term.[158]

D Implications for Potential Disputing Parties: ICSID-like Features in non-ICSID Arbitration Proceedings

The disputing parties' choice between ad hoc and institutional arbitration, or between the different arbitration institutions, is frequently strictly limited by the boundaries of their prior written consent.[159] Commonly, BITs provide that in the event of non-resolution of a

---

157 Ibid.

158 T Voon and A Mitchell, 'Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia' (2011) 14 *Journal of International Economic Law* 515, 522–3 (however, the authors expressed the opinion that the likelihood of Australia prevailing is 'relatively modest'). See also, T Voon and A Mitchell, 'Implications of International Investment Law for Tobacco Flavouring Regulation' (2011) 12 *Journal of World Investment & Trade* 65.

159 See C Schreuer, 'Consent to Arbitration' in PT Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (Oxford Unversity Press, 2008); OM Garibaldi, 'On the Denunciation of ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in C Binder et al (eds), *International Investment Law for the*

dispute, it should be submitted to arbitration in accordance with the provisions of the *ICSID Convention* or UNCITRAL Arbitration Rules. Recent studies of the existing plethora of BITs illustrate that although the ICSID forum is the most popular one, not all BITs provide the option to submit a dispute to the ICSID tribunal.[160] Nevertheless, recent non-ICSID arbitral decisions indicate that features inherent to ICSID arbitral practice are being utilised. This happens despite the facts that the applicable BIT does not have an option for ICSID arbitration, or the disputing parties consented deliberately to a non-ICSID forum, in order to avoid the higher standards imposed by the ICSID with respect to the concept of investment.

The analysis of non-ICSID cases concerning the application of features inherent to ICSID arbitral practice does not show unity among non-ICSID tribunals. Indeed, the *Romak* tribunal was not the first, nor the last to apply ICSID-like features in non-ICSID arbitral proceedings. For example, the tribunal in *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and The Republic of Serbia* came to the conclusion that the '*ratione materiae* test for the existence of an investment in the sense of Article 25 of the ICSID Convention is one specific to the ICSID Convention and does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID'.[161] It should be noted that the Greek–Yugoslavia BIT applicable in this case also provided for resort to the ICSID forum.[162] In a similar vein, the Swiss–Uzbekistan BIT,[163] applicable to *Romak*, provided for resort both to ad hoc and ICSID arbitration; however, the tribunal's ruling was opposite to the *Mytilineos* tribunal's decision. Despite the objections of the Claimant, the *Romak* tribunal, after considering ICSID jurisprudence and distinguishing between the two approaches to identifying an investment,[164] concluded 'the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk'.[165]

The tribunal in *AFT* went further and noted that the reference to the ICSID arbitration in an applicable BIT[166] means that 'the two Contracting States must have inevitably intended to refer to what constitutes "investment" under the ICSID Convention as concretely applied in the relevant case-law'.[167] This statement was earlier elaborated by Douglas, who set out what he considers to be a pertinent general test of what constitutes an 'investment'. This test is said to be applicable in all investment treaty claims, irrespective

21st Century: Essays in Honour of Christoph Schreuer (Oxford Unversity Press, 2009) 251–77; Yas Banifatemi, 'The Law Applicable in Investment Treaty Arbitration', in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, (Oxford Unversity Press, 2010) 191–210.

160 See in general, J. W. Salacuse, *The Law of Investment Treaties*, (Oxford Unversity Press, 2010), Chapter 15; K. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, (Oxford Unversity Press, 2010) ch 15.

161 *Mytilineos Holdings SA v (1) The State Union of Serbia and Montenegro and (2) The Republic of Serbia* (Partial Award on Jurisdiction, 8 September 2006, UNCITRAL) [117] ('*Mytilineos tribunal*). See also Rubins, above n 11, 290.

162 The Greek-Yugoslavia BIT (25 June 1997) art 9 (3) (a).

163 The Swiss-Uzbekistan BIT, Article 9.

164 *Romak* (PCA Case No AA280, 26 November 2009) [197]–[204].

165 Ibid [207] (emphasis added).

166 The Czech and Slovak-Swiss BIT, concluded 5 October 1990 (entry into force 7 August 1991) art 9 provides both for ad hocand ISCID arbitration.

167 *AFT* (UNCITRAL, 5 March 2011) [239].

of whether they are brought under the *ICSID Convention*, the UNCITRAL Rules, or any other rules of arbitration.[168]

Conversely, the tribunal in *White Industries* sided with decision of the *Mytilineos* tribunal and rejected both the approach of the above-mentioned tribunals and of Douglas. In particular, the tribunal clarified that the dispute was 'not subject to the ICSID Convention', and stated that the *Salini* test, which 'imposes a higher standard' for defining investment under the *ICSID Convention* was 'simply not applicable'.[169]

Thus, the examination of recent decisions of non-ICSID tribunals in regard to the application of features inherent to ICSID arbitration also demonstrates non-coherence and non-uniformity in the field. Nevertheless, the discrepancy between the approaches and some non-ICSID tribunals' disposition to apply features inherent to ICSID arbitration in non-ICSID arbitration proceedings raises the question whether there are compelling reasons to make a strict distinction between the concept of an investment under the *ICSID Convention* and the concept of an investment under BITs. Recently concluded BITs illustrate the intention of contracting parties to avoid such a distinction.[170]

The author's opinion is similar to Halonen and Burda with respect to the importance and value of *Romak* to this debate. In particular, this award is important because of its exhortation of the necessity to determine the application of art 25(1) of the *ICSID Convention* to BITs, its interpretation of the *Salini* test,[171] and its decision 'to establish a link between ad hoc and ICSID disputes and to reveal that this "inherent meaning" is finally irrespective of the choice of the dispute resolution mechanism'.[172]

V Conclusion

The review of existing case law shows that both ICSID and non-ICSID tribunals are far from consistent in their interpretation of the term 'investment'. This field of international law is incoherent, as arbitrators take different approaches to the definition of 'investment' Indeed, the drafters of the *ICSID Convention* also contributed to the debate by avoiding the inclusion of a definition or the listing of certain characteristics of investment. This led to a number of conflicting decisions by tribunals, which were sometimes completely the opposite of each other.[173] Previous case law with respect to the notion of 'investment' ranges from demonstrating a very liberal to a strict and narrow vision.

---

168 Douglas, above n 111, ch 5, (an 'investment' should have certain legal and economic characteristics that were described in rr 22 and 23.

169 *White Industries* (UNCITRAL, 30 November 2011) [7. 4. 9].

170 See above Part 4 A above.

171 L Halonen, 'Bridging the Gap in the Notion of 'Investment' between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (*Romak SA v Uzbekistan*)' (2011) 29 *Association Suisse de l'Arbitrage* 312, 320.

172 J Burda, 'A New Step Towards a Single and Common Definition of an Investment? — Comments on the Romak versus Uzbekistan Decision' (2010) 11*The Journal of World Investment and Trade* 1085, 1100.

173 See, eg, E Cabrol, '*Pren Nreka v Czech Republic* and the Notion of Investment under Bilateral Investment Treaties" in KP Sauvant (ed), *Yearbook on International Investment Law and Policy 2009–2010* (Oxford University Press, 2009) 230 (noting that the *ICSID Convention* and other investment treaties overlap in their function of establishing the legal framework for the protection of foreign investments abroad).

Taking into account that the overwhelming majority of BITs refer to the *ICSID Convention* to settle disputes and that the ICSID venue is the most popular one in which to submit claims, arbitrators should aspire to a consistent approach with respect to the definition of investment. Even though Professor Sornarajah criticised the arbitrators in *Romak* for going through the motions of deciding the dispute, and even called them 'neophyte' for elaborating on whether a sales contract could be regarded as an investment,[174] the approach applied by the non-ICSID tribunals evinces the likelihood of creating a bridge that will smooth differences between the various tribunals' interpretation of the term 'investment'. It also demonstrates that non-ICSID tribunals face similar problems in trying to define the distinction between an 'investment' and a 'commercial transaction for the supply of goods and services'.

Both business and academic circles have expressed concern with the current incoherence of the law in this field. They are united in believing that private international investment cannot flourish in the absence of security, stability and predictability.[175] However, the ways they suggest to bridge the gap diverge. Since there is no convergence regarding the term 'investment' and the approach to defining it, it is hard to imagine consistent jurisprudence on the subject. On the contrary, if the divergence mirrors the personal ideological positions of individual adjudicators,[176] then inconsistent rulings will persist, at least until systemic and institutional solutions can be reached.

So what are the implications of *Romak*? Will this case be able to create a bridge that smooths the distinction between ICSID and non-ICSID decisions? Time, of course, will clarify. Nevertheless, taking into account current inconsistency and incoherence in the field and the increasing number of investor-state investment disputes[177]it is highly recommended for governments to be more cautious while negotiating their BITs: a) to exclude assets from the definition that do not bring substantive and long-term economic utility; b) to include corresponding safeguards and exceptions that will permit them to deviate from BIT duties in the event of a situation arising; c) to include objective characteristics of an investment in the definition to ensure that they will be considered by a tribunal. Further, to the author's mind, the inclusion in BITS of a qualification that the transaction or asset should have the characteristics of an investment is an important step for states to protect themselves from 'frivolous' claims. Taking into consideration that the

---

174 Sornarajah, above n 115, 644–5. (Sornarajah was vexed that a developing state, which 'had needlessly to defend', was obliged to pay half of the costs of arbitration in an case where 'there was no investment that was capable of protection under the treaty'). See also D Smith, 'Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration' (2011) 51 *Virginia Journal of International Law* 749, 779–81 (according to his study with respect to cost and fee allocation of the 31 awards from 2008 and 2009, the majority of winning parties did not recover arbitral costs or legal fees).

175 See generally SW Schill, *The Multilateralization of International Investment Law* (Cambridge Uuniversity Press, 2009) 68–9; Gaillard, above n 22, 416 (hoping that diverging trends will be harmonised); Boddicker, above n 5, 1071; Burda, above n 172, 1100–1.

176 Cf Sornarajah, above n 115, 647–8 (stating that 'the rot is setting in at the very core of arbitration', as 'a small clique of persons act as counsel on the sides of both claimants as well as respondent States and also sit as arbitrators'. He went on to state that these arbitrators 'also become the "highly qualified publicists" in the area, writing up their opinions as articles to be published in glossy journals run by their clique'). See also S Luttrell, 'Bias Challenges in Investor-State Arbitration: Lessons from International Commercial Arbitration', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge Uuniversity Press, 2011) 445; A Sheppard, 'Arbitrator Independence in ICSID Arbitration' in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 131.

177 UNCTAD Recent Developments in ISDS, above n 8, 3–4.

requirement of the asset to have the characteristics of an investment is in the BIT itself, this test would need to be satisfied not only before ICSID but also before non-ICSID tribunals.

The path towards consistency and the implementation of reforms takes time, and may not be possible in the current environment. For the time being, in light of the importance which both investors and states place upon the stability and predictability of international investment law, achieving greater coherence is a purpose towards which it is worth striving.