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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*)

LAURA HALONEN*

In an eloquently drafted nod towards a purposive interpretation of the notion of "investment" in investment treaties, the award in *Romak SA v Uzbekistan*[1] takes a substantial stride towards bridging the gap between the jurisdictional requirements *ratione materiae* in ICSID and UNCITRAL arbitrations. The present note summarises the parties' dispute and the award rendered, and provides a short analysis of some of the most interesting features of the case, namely the instrument that defines the term "investment", the Tribunal's own version of the '*Salini* test' and the role that the award may play in developing consistent investment law jurisprudence.

The dispute

Factual background to the proceedings

The claimant in the arbitration was Romak SA (**Romak**), a Swiss *société anonyme* (public limited company), specialising in the international trade in cereals.

Romak's claim arose out of a multiparty contractual arrangement for the importation of wheat into Uzbekistan, entered into in the summer of 1996. The most relevant of these for present purposes was a Supply Contract for wheat between Romak and a state-owned company Uzdon Foreign Trade Company (**Uzdon**), which also required Uzdon to provide a letter of guarantee issued by the National Bank of Foreign Economic Affairs and

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1 *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26 November 2009 (the ***Romak* Award**).

provided for arbitration under the Arbitration Rules of the Grain and Feed Trade Association.[2]

Another agreement was concluded between Romak, Uzdon and Uzkhleboproduct State Joint Stock Company (**Uzkhleboproduct**). This Protocol of Intention on Mutual Cooperation (**Protocol of Intention**) provided the framework for future commercial cooperation, including obligations on Romak to provide Uzkhleboproduct with information and forecasts on grain stocks and promises of preferential status for future imports given to Romak in return.[3]

Romak delivered most of the wheat but was never paid for it. Nor was the letter of guarantee ever issued by the National Bank of Foreign Economic Affairs. The Uzbek authorities subsequently informed Romak that the Supply Contract was invalid.[4]

Romak initiated arbitration proceedings against Uzdon under the Supply Contract. The tribunal constituted under the Arbitration Rules of the Grain and Feed Trade Association found in Romak's favour and awarded it US$10.5 million in damages (the **GAFTA Award**).[5] Uzdon refused to perform the GAFTA Award and Romak's enforcement efforts during the following years were unsuccessful both in Uzbekistan and in France.[6]

The proceedings

Having seen its enforcement efforts thwarted and the amounts owed for the wheat supplied remaining outstanding more than ten years after delivery, Romak turned to investment arbitration, filing its Notice of Arbitration on 20 March 2006. Romak invoked Article 9 of the Bilateral Investment Treaty entered into between the Swiss Confederation and the Republic of Uzbekistan on 16 April 1993 (the **BIT**) and initiated arbitration pursuant to the UNCITRAL Arbitration Rules (**UNCITRAL Rules**).

Romak alleged that Uzbekistan, through the actions of Uzdon, Uzkhleboproduct and the courts had violated several provisions of the BIT, including the Most Favoured Nation clause (Article 3), the umbrella clause (Article 11) and guarantee of fair and equitable treatment (Article 3).[7]

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2 *Romak* Award, paras 34-7.
3 *Ibid*, para 40.
4 *Ibid*, para 49.
5 *Ibid*, paras 52 and 58.
6 *Ibid*, paras 64-70.
7 *Ibid*, paras 126-30, 135, 138.

The Tribunal composed of Fernando Mantilla-Serrano (Chairman), Noah Rubins (appointed by Romak) and Nicolas Molfessis (appointed by Uzbekistan) issued its Award on 26 November 2009, declining jurisdiction to hear the case but ordering each party to bear its own costs and half of the costs of the Tribunal.

The definition of investment in the BIT

The BIT contains a definition of "investment" that is typical of Swiss BITs.[8] Article 1(2) of the BIT provided as follows:

> The term "investments" shall include every kind of assets [sic] 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 performance having and economic value;
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> 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 concessions 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 [sic] in accordance with the law.[9]

Parties' arguments on jurisdiction – Did Romak have a protected "investment"?

Uzbekistan objected to the jurisdiction of the Tribunal on the basis that Romak had no qualifying investment under the BIT. It argued that the activity envisaged under the Supply Contract was the sale of goods, which was to take place entirely outside the territory of Uzbekistan.[10] It also relied on a separate treaty between Switzerland and Uzbekistan entered into at the same time as the BIT on the sale of goods to demonstrate the contracting

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8 See Laurence Burger, "Swiss Bilateral Investment Treaties: A Survey" (2010) 27(5) *Journal of International Arbitration* 473, at 478.

9 As set out in paragraph 97 of the *Romak* award.

10 *Romak* Award, paras 98-9.

parties' intention to exclude such activity from the scope of the BIT.[11] It further argued that the GAFTA Award could not constitute an investment under the BIT, as the underlying transaction itself was not an investment.[12]

Uzbekistan also relied on the '*Salini* test',[13] arguing that Romak's sale of goods exhibited no regularity of profit, duration, or sufficient risk and its impact on the economic development of Uzbekistan was negligible.[14]

Romak countered that its contractual rights and the GAFTA Award came within the definition of "investment" in Article 1(2) of the BIT,[15] and the relevance of the '*Salini* test' was limited to ICSID arbitrations, where the claimant had to fulfil the criteria under both, the applicable BIT as well as the ICSID Convention.[16] It further argued that its rights under the agreements, entered into as part of long term co-operation as envisaged in the Protocol of Intention, fulfilled the '*Salini* test'.[17]

The Tribunal's findings

Treaty interpretation

The Tribunal began its analysis by stating uncontroversially that it was to be guided primarily by the provisions of the Vienna Convention on the Law of Treaties, in particular by Articles 31 and 32, in its interpretation of the BIT.[18]

In addition, the Tribunal set out its views on the role of previous tribunals in forming its decision. It was decidedly less bothered by developing a *jurisprudence constante* than some other recent tribunals,[19]

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11 *Ibid*, para 100.

12 *Ibid*, paras 109-10.

13 Set out in *Salini Construttori SpA and Italstrade SpA v Morocco*, Decision on Jurisdiction, ICSID Case No ARB/00/4, 23 July 2001, (2003) 42 ILM 609, paras 52-58 and discussed and refined in numerous subsequent ICSID cases.

14 *Romak* Award, paras 104-5.

15 *Ibid*, paras 101 and 111.

16 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington DC, 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. *Romak* Award, paras 106-7.

17 *Romak* Award, para 108.

18 *Ibid*, para 172.

19 E.g. *Burlington Resources Inc v Ecuador*, Decision on Jurisdiction, ICSID Case No ARB/08/5, 2 June 2010, para 100; *SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No ARB/02/6, 29 January 2004, para 97; *Renta 4 SVSA et al v Russia*, Award on Preliminary Objections, SCC Case No 24/2007, 20 March 2009, para

stating instead that it had "not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of 'arbitral jurisprudence'".[20] According to the Tribunal it was "for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law."[21] As a strict matter of treaty interpretation, the Tribunal noted that previous decisions "cannot be deemed to constitute the expression of a general consensus of the international community, and much less a formal source of international law", their role being restricted to "mere sources of inspiration, comfort or reference to arbitrators."[22] Somewhat paradoxically, the Tribunal backed up this statement by reference to decisions of two previous investment treaty tribunals, which had "arrived to a similar conclusion".[23]

An inherent definition of "investment"

The Tribunal began its consideration of the definition of "investment" by looking at the "ordinary meaning" of the term ("commitment of funds or other assets with the purpose to receive a profit, or 'return,' from that commitment of capital") as well as the term "asset", which appears in Article 1(2) of the BIT ("property of any kind"), citing in both cases Black's Law Dictionary.[24] It then went on to express its disagreement with Romak's submission, which was to simply look at the enumeration of different categories of assets in Article 1(2) and to conclude that as long at the investor's assets fell within one of those categories, it would qualify as an investment under Article 1(2).[25]

It is at this stage that the Award gets more interesting, as the Tribunal embarks upon an explanation of *its* definition of investment in investment treaties in general – since they nearly universally contain a general heading, such as the one that appears at the beginning of Article 1(2) of the BIT ("The term 'investments' shall include every kind of assets [sic]…").

The Tribunal in its following analysis looked first at the text of Article 1(2), moved swiftly to its "object and purpose" and "context", discussed why

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16. See also Gabrielle Kaufmann-Kohler, "Is Consistency a Myth?", in Emmanuel Gaillard and Yas Banifatemi (eds), Precedent in International Arbitration (IAI, 2008).

20 *Romak* Award, para 171.

21 *Ibid*, para 171.

22 *Ibid*, para 170.

23 *Ibid*, footnote 148.

24 *Ibid*, para 177.

25 *Ibid*, paras 178-9.

a literal, mechanical reading of Article 1(2) would lead to a manifestly absurd or unreasonable result, and spent the majority of its analysis on providing its own definition of investment, using the '*Salini* test' as the starting point.

On the level of textual analysis the Tribunal only contended that since there were categories other than those enumerated in Article 1(2) that could be covered by the BIT, there must have been a general benchmark against which they were measured in order to determine whether they were investments.[26] In its search for the "object and purpose" of the BIT, the Tribunal turned to its preamble, which talks about "foster[ing] the economic prosperity" of the State parties and about "intensifying economic cooperation".[27] However, it found ultimately that this left the meaning of the term "investment" "ambiguous or obscure".[28] A relevant element for putting the BIT in its "context" was in the Tribunal's opinion the other agreement entered into by the contracting states on the same date as the BIT, dealing with trade and governing the sale of goods. This lent support to the argument that the contracting parties intended to differentiate between trade and investment.[29]

The Tribunal then explained why a "mechanical" application of the categories in Article 1(2) of the BIT would also lead to a "manifestly absurd or unreasonable" result, and be thus contrary to Article 32(b) of the Vienna Convention on the Law of Treaties.[30] Such a reading would eliminate any practical limitation on the scope of the concept of "investment" and create an investment of every contract with state entities as well as every award or judgment, making the Tribunal into another instance of review of court decisions concerning the enforcement of arbitral awards.[31]

The Tribunal went on to acknowledge that it was not interpreting the term "investment" under Article 25(1) of the ICSID Convention, but declined to attach much importance to this.[32] Drawing a distinction between the definition in the ICSID Convention (which leaves the term undefined) and investment treaties would lead to unreasonable results, narrowing or widening the substantive protections under a treaty on the basis of the investor's choice of dispute resolution mechanism.[33] This would render meaningless the choice given to an investor between different avenues of

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26 *Ibid*, paras 180 and 188.

27 *Ibid*, para 181.

28 *Ibid*, para 189.

29 *Ibid*, para 182.

30 *Ibid*, para 184.

31 *Ibid*, paras 185-7.

32 *Ibid*, paras 192-194.

33 *Ibid*, para 194.

recourse (either ICSID or UNCITRAL arbitration), as its "investment" may be covered under one but not the other.[34]

After having expressed its aim to be the search for the meaning of the word "investment" in Article 1(2) of the BIT, the Tribunal embarked on this search by setting out the *Salini* test.[35] It then considered criticism of the test in *CSOB*[36] and other cases taking what the Tribunal deemed a "pragmatic" approach, advocating the position that there may be characteristic elements of an "investment", but there are no strict criteria that must be fulfilled in all cases.[37]

It then went on to outline cases that had taken a "conceptualist" approach (like the *Salini* test) but with a trimmed down list of requirements. Quoting from *Lesi-Dipenta v Algeria*[38] and *Pey Casado v Chile*,[39] the Tribunal determined 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*."[40] By contrast, the requirement of contribution towards the host state's development, included in the *Salini* test, was implicitly rejected.

The Tribunal also wanted to reassure that it was not importing anything into the BIT that was not already there as a result of its context, object and purpose. It stated that had the "wording [left] no room for doubt that the intention of the contracting States was to accord to the term 'investment' an extraordinary and counterintuitive meaning", such as including one-off sales agreements within the definition, it would have given effect to it.[41]

Application to the facts of the case

Before applying the definition of investment it had deemed applicable to the circumstances present in the case, the Tribunal set out what the relevant circumstances and instruments were in its opinion. It considered that

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34 *Ibid*, para 195.

35 *Ibid*, para 198.

36 *Ceskoslovenska Obchodni Banka AS v Slovakia*, Decision on Jurisdiction, ICSID Case No ARB/97/4, 24 May 1999, para 64.

37 *Romak* Award, paras 199-200.

38 *Consortium Groupement LESI-Dipenta v Algeria*, Award, ICSID Case No ARB/03/8, 10 January 2005, para 13(iv), quoted at paragraph 202 of the *Romak* Award.

39 *Victor Pey Casado and President Allende Foundation v Chile*, Award, ICSID Case No ARB/98/2, 8 May 2008, para 232, quoted at paragraph 203 of the *Romak* Award.

40 *Romak* Award, para 207 (emphasis in the original).

41 *Ibid*, para 205.

the GAFTA Award, on its own, "merely constitute[d] the embodiment of Romak's contractual rights" and was thus irrelevant for the exercise.[42] The Tribunal focused instead on analysing those underlying contractual rights.

Looking first at the contribution made by Romak, the Tribunal noted that "a 'contribution' can be made in cash, kind or labor."[43] It went on to find that (a) the supply of wheat did not amount to a contribution, as the Supply Contract envisaged immediate payment at market rate;[44] and (b) no evidence had been submitted that any of the undertakings contained in the Protocol of Intention had been performed.[45]

Secondly, the Tribunal considered that the duration that an investment needed to have was not fixed in absolute terms, but depended on the nature of the transaction.[46] However, Romak's claim again failed on the facts. The five-month span was found to simply reflect the timeframe under the Supply Agreement for the supply of wheat in a one-off transaction.[47]

Finally, the Tribunal noted that all contracts entailed the commercial risk of non-performance by the counterparty – or "the risk of doing business generally"[48] – but this did not suffice for the contract to constitute an "investment". Investment risk was of a different kind: "[T]he 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."[49] Romak's exposure was limited to the value of the wheat delivered and did not qualify as investment risk.

As a result, the Tribunal found that the Claimant had not made a qualifying investment and Uzbekistan had consequently not consented to have the dispute adjudicated by an investment treaty tribunal.[50]

Costs award

Although Uzbekistan had prevailed entirely on jurisdiction, the Tribunal declined to order the Claimant to bear its costs. Thus Romak left the proceedings with the same GAFTA Award in its hand as it had when entering the investment arbitration fray, but at least it was only impoverished further

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42 *Ibid*, para 211.
43 *Ibid*, para 214.
44 *Ibid*, para 215.
45 *Ibid*, para 220.
46 *Ibid*, para 225.
47 *Ibid*, paras 226-7.
48 *Ibid*, para 229.
49 *Ibid*, para 230.
50 *Ibid*, paras 242-3.

by half of the costs of the Tribunal and its own legal representation as a result of that unsuccessful adventure.

Analysis

A debate has been raging among arbitration practitioners and experts of international law on the meaning and effect of the elusive, and perpetually undefined, term “investment” in the branch of international law that draws its name from it.

The *Romak* Award makes a valuable contribution to this debate on two issues: First, it exports the need to define the term from Article 25(1) of the ICSID Convention to bilateral investment treaties. Secondly, it provides another interpretation of the ‘*Salini* test’ among numerous rivals put forward by previous jurisdictional decisions, awards, annulment decisions and academic writings.

The ‘*Salini* test’ applies equally in ICSID and UNCITRAL arbitrations

The battle lines on the notion of ‘investment’ – whether the definition included in an investment treaty is self-sufficient, or whether an investment requires something ‘more’ – have traditionally been drawn in the context of ICSID Convention Article 25, which provides that the Center has jurisdiction to hear “any legal dispute arising directly out of an investment”. The string of decisions discussing the issue has almost exclusively focused on the ICSID Convention, lured perhaps by the enigma of the decision of the drafters of the Convention to deliberately leave the term undefined.[51] Where the issue has arisen in the context of UNCITRAL arbitrations, tribunals have contended themselves with looking at the definition of the term in the investment treaty, and in particular the almost universally appearing ‘laundry list’ of assets,[52] often noting also how “wide” or “broad” the definition is.[53]

The *Romak* award eschews this dichotomy, finding instead that the word “investment” in investment treaties is just as much in need of definition

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[51] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para 27.

[52] Like the one in Article 1(2) of the BIT, quoted above.

[53] See e.g. *Chevron Corp and Texaco Petroleum Corp v Ecuador*, Interim Award, UNCITRAL arbitration, 1 December 2008, paras 177-83; *Saluka Investments BV v Czech Republic*, Partial Award, UNCITRAL arbitration, 17 March 2006, para 203. See also *Berschader and Berschader v Russia*, Award, SCC Case No 080/2004, 21 April 2006, para 112.

as it is in the ICSID Convention. The Tribunal then proceeds to discuss whether a comprehensive, conclusive definition is included in the BIT itself and finds crucially that it is not. Having started with the dictionary meaning of the term "investment",[54] the Tribunal finds that, as the list in Article 1(2) is expressed not to be exhaustive, there must be a benchmark against which those assets that are *not* included in it are measured, to consider whether they amount to investments.[55]

While this is in itself logical and persuasive, the Tribunal puts less – perhaps too little – emphasis on analysing what is the role of the assets that *are* included in the list. At the end of the day inclusion in the list appears to count for very little, if anything at all. Whether an asset is included in the list or not, it has to fulfil the supplementary criteria, the 'slimmed down *Salini* test', that the Tribunal finds applicable. What is therefore the *effet utile* of the illustrative list that the contracting parties have decided to include in their definition of "investment"? It is commendable for investment treaty tribunals to take a step back and consider the 'big picture' of the aims behind investment protection, but perhaps this time the step was slightly too big, leading the *Romak* Tribunal to lose sight of the 'little picture' of the text of the treaty it was called upon to interpret. Should there not at least be a *presumption* that when an asset fits into the list, it is protected?

The Tribunal's analysis appears, at least to some extent, to be driven by its reluctance to find that the GAFTA Award, undoubtedly a "claim to money" under Article 1(2)(c) of the BIT, in and by itself amounted to a protected investment.[56] However, even if the Tribunal had adopted a presumption in favour of inclusion on the basis of the inclusion of the asset in the list, this could have been overturned, if the Tribunal so wished, by its existing analysis on the linkage between the GAFTA Award and the Supply Agreement.[57]

Bringing the definition of the term "investment" in investment treaties closer to that found in the ICSID Convention is positive. While the discussion of the definition in case law and academic contributions has thus far taken place almost exclusively in the context of Article 25(1) of the ICSID Convention, there is no compelling reason for this to be so. One may

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54 *Romak* Award, para 177.

55 *Ibid*, para 180.

56 See *ibid*, paras 186-7.

57 *Romak* Award, paras 209-12. The Tribunal also did not consider the difference with the text of the BIT and other investment treaties, such as NAFTA Article 1139, which include an exclusive list of assets that constitute investments complemented by a list of express exclusions, including in particular "claims to money that arise solely from commercial contracts …".

wonder whether the development of the 'objective' test under Article 25 stemmed exactly from tribunals' reluctance to hear disputes arising from transactions that fitted neatly into the list in an investment treaty, but did not appear to be investments in the conceptual sense of the word.

But as a result of this development little, if anything, is left of the two-stage test widely accepted since *Salini*, whereby in ICSID cases an investment must separately satisfy the definition of investment in the investment treaty and the ICSID Convention.[58]

The *Romak* Tribunal appears to suggest good riddance to the two part test, and saying that it is about time to collapse the issue of "investment" in the ICSID Convention into the question of consent as provided in the investment treaty. This approach has a lot to recommend for it: increased clarity and removal of overly technical distinctions is to be applauded. The fact that the success or failure of an investor's claim is dependent upon the dispute resolution mechanism he chooses to invoke is unattractive.

However, the *Romak* Tribunal's reasoning for arriving at the conclusion that the definition of "investment" is the same in the BIT and the ICSID Convention is problematic. The Tribunal stated that it did not accept that whether a claimant went to ICSID with its claim could have an impact on the definition of the term "investment".[59] According to the Tribunal "[t]his view would imply that the substantive protection offered by the BIT would be narrowed or widened … merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the [BIT]."[60]

This is not what the effect of separate jurisdictional requirements under the two instruments would entail. The *substantive* provisions stay the same, it is only the *jurisdiction* to hear a case based on them that is affected. It has long been recognised that ICSID *is* different, and has jurisdiction only if the specific rules in the ICSID Convention are fulfilled *in addition* to those found in the document that provides the underlying consent to arbitrate.[61] As an example, one may refer to the definition of "investor" in Article 1(1) of the BIT, which in the case of natural persons only refers to their being nationals of the contracting state. The definition does not include the second, negative, requirement that is present in Article 25(2) of the ICSID Convention of excluding dual nationals. Hence a dual Swiss-Uzbek national could possibly

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58 *Salini v Morocco*, note 13 above, para 44.

59 *Romak* Award, para 193.

60 *Ibid*, para 194.

61 See e.g. Bertold Goldman, "Observations" in CREDIMI, *Investissements Etrangers et Arbitrage entre Etats et Personnes Privées: La Convention de la BIRD du 18 mars 1965* (Pedone, 1969).

bring a claim for violation of his rights under the BIT against either state in UNCITRAL proceedings in appropriate circumstances, but never before an ICSID Tribunal. Thus the issue of ICSID jurisdiction does necessarily endure as a separate requirement, and cannot be wholly done away with by focusing solely on the question of consent.

Maybe here again the *Romak* Tribunal could have taken a less extreme position of working from presumptions. It could well be that there should be a presumption that the drafters of the BIT intended it to contain identical definitions for terms also used but not defined in the ICSID Convention, but this presumption could be replaced by contrary wording. In such a case, however, the definition in the BIT could diverge from that in the ICSID Convention and an investor may not have the avenue of bringing an ICSID case open to him, even when his rights are protected under the BIT.

Slimming down the *Salini* test

Once the Tribunal had decided that the definition of "investment" was the same in UNCITRAL and ICSID proceedings, it remained to determine what such definition was, and so the much discussed, embattled but enduring '*Salini* test' entered the fray.

It is not within the remit of this short note to examine the history and development of the definition of "investment" under Article 25(1) of the ICSID Convention colloquially known as the '*Salini* test'. Suffice to remind the reader that the tribunal in the case of *Salini v Morocco* provided the first (published) in-depth arbitral analysis of the concept of 'investment' in the ICSID Convention and concluded that the general characteristics required were contributions, duration, participation in the risks and contribution to the economic development of the host state.[62] Since *Salini* there has been a succession of cases adding their weight into the debate on the proper role and scope of the test[63] – it has even been the central element in two decisions

62 *Salini v Morocco*, note 13 above, para 52.

63 E.g. *Joy Mining Machinery Ltd v Egypt*, Award on jurisdiction, ICSID Case No ARB/03/11, 30 July 2004, (2004) 19 ICSID Review — Foreign Investment Law Journal 486; *Jan de Nul NV and Dredging International NV v Egypt*, Decision on jurisdiction, ICSID Case No ARB/04/13, 16 June 2006; *Malaysian Historical Salvors Sdn Bhd v Malaysia*, Award on jurisdiction, ICSID Case No ARB/05/10, 10 May 2007. A fifth requirement, regularity of profit, was included and discussed in the 2001 edition of Professor Schreuer's Commentary on the ICSID Convention: Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP, 2001), at 140, and adopted in *Helnan International Hotel AS v Egypt*, Decision on jurisdiction, ICSID Case No ARB/05/19, 17 October 2006, para 77.

annulling ICSID awards with near-diametrically opposed results.[64] The notion of 'investment' in general, and the *Salini* test in particular, have also generated a vigorous academic debate.[65]

Instead of engaging in an economic analysis of what constitutes investment, or looking at the dictionary definitions of the key terms "investment" and "asset" it had set out earlier, the *Romak* Tribunal chose to justify its adoption of a test consisting of three requirements, namely contribution, duration and risk, by quoting extensively from previous decisions that had arrived at the version of the test in question.[66] Presumably this was done in order to indicate that the Tribunal agreed with the reasoning in those decisions. The only additional analysis the Tribunal saw fit to engage in was to buttress this by a selection of quotations from the preamble and various provisions of the BIT, in a paragraph that perhaps did not convince with its analytical eloquence quite to the extent that some of the other sections did[67] – due to the selective nature of the quotations as well as the paucity of analysis on the impact of these terms on the definition of "investment".

The plausibility of the version of the *Salini* test that found favour with the *Romak* Tribunal is buttressed by a second recent decision that espoused a similar slimmed down three requirement test, albeit in this case in the context of Article 25(1) of the ICSID Convention.[68]

Perhaps these are the first signs of a *jurisprudence constante* finally beginning to form on the definition of investment applicable in international investment arbitration.

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64 *Mitchell v Congo*, Decision on the Application for Annulment of the Award, ICSID Case No ARB/99/7, 27 October 2006; and *Malaysian Historical Salvors Sdn Bhd v Malaysia*, Decision on the Application for Annulment, ICSID Case No ARB/05/10, 28 February 2009.

65 E.g. Noah Rubins, "The notion of 'Investment' in International Investment Arbitration" in Norbert Horn and Stefan Kröll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer, 2004) 283; Farouk Yala, "The Notion of 'Investment' in ICSID Case Law: a Drifting Jurisdictional Requirement? Some 'Unconventional' Thoughts on Salini, SGS & Mihaly", (2004) 1(4) TDM; Rudolf Dolzer, "The Notion of Investment in Recent Practice", in Steve Charnovitz et al (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP, 2005) 261; Sébastien Manciaux, "The Notion of Investment: New Controversies" (2008) 9(6) *The Journal of World Investment & Trade* 443; Devashish Krishan, "A Notion of ICSID Investment" in Todd Grierson Weiler (ed), *Investment Treaty Arbitration and International Law* (JurisNet, 2008) 61; Emmanuel Gaillard, "Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice" in Christina Binder, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009) 403; Devashish Krishan, "A Notion of ICSID Investment" (2009) 6(1) TDM.

66 *Romak* Award, paras 202-4, 207.

67 *Ibid*, para 206.

68 *Fakes v Turkey*, Award, ICSID Case No ARB/07/20, 14 July 2010, para 110.

In terms of its application of the definition to the facts, the *Romak* Tribunal appeared to be, interestingly, more concerned with the fulfilment of the applicable criteria *de facto* than *de jure*. The Tribunal could dispose of the role of possibly the most problematic aspect of the claimant's involvement with the host state, the Protocol of Intention, by determining that its terms, which envisioned long term co-operation, had not been performed.[69] In the context of the case this may be a satisfactory result, but it may be contrasted with other investment arbitrations where tribunals have interpreted the issue solely on the basis of the terms of the instrument that is put forward as the investment.[70] Applying the *Romak* Tribunal's approach may lead to injustice in particular in circumstances where there is no contribution, risk or duration as a matter of fact as a result of actions of the host state shortly after the execution of the instrument that forms the purported investment, and which allegedly violate treaty rights.

The *Romak* Tribunal ultimately found that the various assets and contracts of the claimant failed to satisfy any of the three criteria it deemed applicable.[71] A more difficult situation would have been present if two of the three criteria had been present. The Tribunal was not entirely clear on whether it considered the criteria as mandatory, cumulative requirements, or typical features of investments. Arguably it did not need to take a view on this as the claimant's assets fell far short of the criteria, and therefore did not satisfy the definition of an investment in either case.

The role of the *Romak* Award in developing *jurisprudence constante*

The *Romak* Tribunal went to some lengths to stress that it was *not* concerned with contributing to the development of consistent jurisprudence, nor was it bound to follow previous decisions on the topics argued by the parties.[72] It stated that it was tasked instead with a mission that was "more mundane but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended

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69 *Romak* Award, para 220.

70 E.g. *RSM Production Corporation v Grenada*, Award, ICSID Case No ARB/05/14, 11 March 2009, paras 246-252.

71 *Romak* Award, paras 213-32. Interestingly, however, after having found that the Protocol of Intention did not fulfil the first of this criteria, the Tribunal did not even consider whether it fulfilled the other two.

72 *Romak* Award, paras 170-1. See also e.g. para 192.

consequences that this Arbitral Tribunal's analysis might have on future disputes in general."[73]

The repeated insistence on the Tribunal's limited mandate, and refusal to recognise any legal value attaching to the findings of previous tribunals or a duty to contribute to the coherent development of the law, is accompanied by heavy citing to such earlier decisions of fellow tribunals. The Tribunal gives the following explanation for this behaviour: "certain Awards cited by the Parties appropriately summarize the methods that have been used in the past in order to give content to the term 'investment,' and help to explain the reasoning of this Arbitral Tribunal in the case at hand."[74] This is not entirely convincing, in light of the sheer number of quotations and citations – including string citations (which are unnecessary if the Tribunal is only interested in summarising methods and explaining reasons) – used in the *Romak* Award. The approach becomes even less plausible when the Tribunal clearly uses the reason that "a general trend" has developed in case law for one of its key decisions, namely the refusal to shift costs.[75] A cynic may conclude that the refusal to give any weight to *jurisprudence constante* was simply dictated by the practical desire to avoid having to distinguish a significant amount of jurisprudence that does not support the Tribunal's findings on important questions, such as the finding that the definition of "investment" is identical in investment treaties and the ICSID Convention.

Whatever the reasons for the *Romak* Tribunal's desire to remain outside the developing jurisprudence of international investment law, it will undoubtedly fail. The Award is on the whole well-reasoned, persuasive and eloquent, making it prime material for citation in future cases, whether tribunals are looking for *jurisprudence constante*, or simply handy summaries of applicable reasoning.

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[73] *Ibid*, para 171.

[74] *Ibid*, para 196.

[75] *Ibid*, para 250.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

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Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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