

PERMANENT COURT OF ARBITRATION

PCA Case No. AA280

BETWEEN

ROMAK S.A. (Switzerland)

CLAIMANT

AND

THE REPUBLIC OF UZBEKISTAN

RESPONDENT

AWARD

Members of the Arbitral Tribunal

Mr. Fernando Mantilla-Serrano, Chairman

Mr. Noah Rubins, Co-arbitrator

Mr. Nicolas Molfessis, Co-arbitrator

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I. Introduction

1. The Parties' submissions are referred to as follows:

- (i) 20 March 2006: Claimant's Notice of Arbitration (hereinafter, "NOA")
- (ii) 4 February 2008: Claimant's Statement of Claim (hereinafter, "SoC")
- (iii) 4 February 2008: Respondent's Objections to Jurisdiction of the Arbitral Tribunal (hereinafter, "OJ")
- (iv) 6 June 2008: Claimant's Defense to Respondent's Objections to Jurisdiction (hereinafter, "DOJ")
- (v) 6 June 2008: Respondent's Statement of Defense (hereinafter, "SoD")
- (vi) 22 September 2008: Claimant's Reply to Respondent's Statement of Defense (hereinafter, "RSOD")
- (vii) 22 September 2008: Respondent's Reply to Claimant's Defense on Jurisdiction (hereinafter, "RDOJ")
- (viii) 26 January 2009: Claimant's First Post-hearing brief (hereinafter, "C-PHB1")
- (ix) 26 January 2009: Respondent's First Post-hearing brief (hereinafter, "R-PHB1")
- (x) 13 March 2009: Claimant's Second Post-hearing brief (hereinafter, "C-PHB2")
- (xi) 13 March 2009: Respondent's Second Post-hearing brief (hereinafter, "R-PHB2")

A. Claimant

- 2. **ROMAK S.A.** is a *société anonyme* incorporated in 1969 under the laws of Switzerland, having its headquarters at 110/112 rue des Eaux Vives, CH-1207 Geneva, Switzerland (hereinafter, "**Romak** ").
- 3. Romak specializes in the international trading of cereals. Romak is authorized, as part of its main business, to conduct all financial and commercial operations and equity investments, as well as the purchase, sale, representation and management of securities, movable and immovable interests or participations, in Switzerland and abroad. Romak's

representative in Uzbekistan at the relevant time was Mr. Dan Pletscher, and its Legal and Managing Director is Mr. Jacques Covo.¹

4. Romak is represented in the present arbitration by: Christophe Ayela and Renauld Semerdjian of Cabinet Ayela / Semerdjian & Associés, 43 rue de Courcelles, 75008 Paris, France and by Dr. Walid Ben Hamida.

B. Respondent

5. **THE REPUBLIC OF UZBEKISTAN** is a sovereign State, formerly a member of the Union of Soviet Socialist Republics, which declared its independence on 31 August 1991 (hereinafter, “**Uzbekistan**”). It is represented by His Excellency Sir Islam Abduganievich Karimov, President of the Republic of Uzbekistan, Uzbekistankaya Street 43, 7000163 Tashkent, Uzbekistan.
6. Uzbekistan is represented in the present arbitration by: Jean-Pierre Harb, David Fraser and Christoph Lobier of Baker & McKenzie, 1 rue Paul Baudry, 75008 Paris, France. H.E. Mr. Ravshanbek Alimov, Ambassador of the Republic of Uzbekistan in France, 22 rue d’Aguesseau, 75008 Paris, appeared as agent for Uzbekistan.²

C. The Dispute

7. Romak has initiated this arbitration on the basis of allegations that Uzbekistan violated the Bilateral Investment Treaty entered into between the Swiss Confederation and the Republic of Uzbekistan on the “Promotion and the Reciprocal Protection of Investments” dated 16 April 1993 (hereinafter, the “**BIT**”).³
8. Romak has characterized said violations as follows:⁴
 - *l’obligation de protection des opérations économiques effectuées par des investisseurs Suisses (tel ROMAK) et de respect des engagements, notamment en refusant à l’appui de considérations formelles discutables le paiement du blé livré conformément aux dispositions contractuelles;*
 - *l’interdiction de prendre des mesures injustifiées ou discriminatoires préjudiciables aux investisseurs Suisses (tel ROMAK), notamment en privant ROMAK de l’exequatur de la sentence arbitrale GAFTA en Ouzbékistan;*

¹ SOC ¶¶ 9-10; Exhibits C-2 and C-3.

² Terms of Appointment, at p. 2.

³ Exhibit C-1.

⁴ SOC ¶ 2.

- *l'obligation d'assurer un traitement juste et équitable aux investisseurs Suisses (tel ROMAK), en refusant l'exequatur de la sentence arbitrale GAFTA en Ouzbékistan pour des motifs contestables juridiquement et ce notamment au regard des autres engagements internationaux pris par la République d'Ouzbékistan;*
- *l'interdiction de mesures de dépossession à l'égard des investisseurs Suisses (tel ROMAK), en privant ROMAK du paiement qui lui avait été promis et même garanti par divers organes de l'Etat dont FTC UZDON (ci-après 'UZDON'), et en privant ROMAK de toute chance de pouvoir faire exécuter la sentence arbitrale GAFTA sur le territoire Ouzbek mais aussi à l'étranger;*
- *l'obligation de respecter les autres engagements internationaux signés par la République d'Ouzbékistan (et notamment la Convention de New York).*

9. Uzbekistan contests the jurisdiction of the Arbitral Tribunal on the ground that Romak does not own an investment protected by the BIT. It also contends that the acts alleged by Romak cannot be attributed to Uzbekistan and that, in any event, its State courts have acted reasonably.⁵
10. Uzbekistan further considers that the contractual relationship that underlies the present dispute, as well as the original arbitral award that was rendered in this regard, are purely contractual and commercial in nature, and that therefore neither qualifies as an "investment" subject to protection under the BIT.
11. Uzbekistan also alleges that, in the event the Arbitral Tribunal retains jurisdiction, Uzbekistan has not violated any of its obligations under the BIT.

II. Factual Background to the Present Arbitral Proceedings

12. The factual context of the present arbitral proceedings revolves around the importation of grain into Uzbekistan in the aftermath of the dissolution of the Soviet Union.
13. In summary, Romak and several companies specialized in the trading of grain (**A**) entered into a set of contracts for the supply of wheat (**B**). As a result of difficulties in obtaining payment for wheat deliveries (**C**), Romak initiated arbitration proceedings against its Uzbek counterparty pursuant to the contracts, under the auspices of the Grain and Feed Trade Association (hereinafter, "**GAFTA**") (**D**) and unsuccessfully attempted to enforce the resulting award in several countries including Uzbekistan (**E**).

⁵ OJ, pp. 17 *et seq.*; SOD, pp. 46 *et seq.*

A. The Parties Involved in the Wheat Supply Transactions

14. In addition to Romak, three Uzbek entities were involved in the wheat supply transactions: Uzkhleboproduct (1), Uzdon (2) and Odil (3).

1. Uzkhleboproduct (or Uzdonmakhsulot)

15. Uzkhleboproduct (also occasionally referred to as Uzdonmakhsulot⁶) was the principal State institution with responsibility for cereal production, supply and distribution. It was reorganized into a “State Joint Stock Company” pursuant to Decree of the President of the Republic of Uzbekistan No. 840 dated 22 April 1994⁷ and Decree of the Council of Ministers dated 20 June 1994 (hereinafter, the “**Council of Ministers Decree**”).⁸
16. Uzkhleboproduct’s activities, as set forth in its Charter⁹ and in the above-mentioned Decrees, are wide-ranging and include the production, storage and supply of cereal products to the population of Uzbekistan, as well as various related activities such as the implementation of scientific policies or the development of market relations within the grain sector.
17. Article 4 of the Council of Ministers Decree provides that the State shall hold a 51% participation in Uzkhleboproduct’s capital, and that the remaining shares shall be sold to employees and to the public. In addition, Article 1.5 of Uzkhleboproduct’s Charter provides that Uzkhleboproduct “*ensures performance of the closed circuit: purchase of grain – storing – processing – production of goods – shifting of resources – sale of final products to the population, as well as other consumers*” and “*is the fund-bearer of material-technical resources, allocated by the State for the planned production and supply of the national economy and population of the Republic with grain, wheat flour, groats, bread-bakery, paste and confectionery products, as well as with compound feed.*”
18. Uzkhleboproduct’s Charter further provides that Uzkhleboproduct is a legal entity that owns property and can appear in its own name before State courts and arbitral

⁶ It is common ground between the Parties in these proceedings that Uzkhleboproduct and Uzdonmakhsulot are one and the same entity.

⁷ Exhibits C-7 and R-1.

⁸ Exhibit R-2.

⁹ Exhibits C-8 and R-3.

tribunals.¹⁰ Uzkhleboproduct is individually responsible for its own obligations, pursuant to Uzbekistan's Law on Property dated 31 October 1990,¹¹ the Civil Code of Uzbekistan,¹² and the Law on Joint-Stock Companies and Shareholder Protection, which provides that “[n]either the State nor its agencies shall be liable for obligations of the company, nor shall be the company liable for obligations of the State or its agencies.”¹³

2. Uzdon

19. Uzdon Foreign Trade Company (hereinafter, “**Uzdon**”) was established by Resolution No. 120 of the Council of Ministers dated 4 April 1995 (hereinafter, the “**Uzdon Resolution**”).¹⁴ Uzdon was later transformed into an open joint-stock company. Article 3 of the Uzdon Resolution provides that Uzkhleboproduct is to create a foreign trade firm, Uzdon, which will become one of Uzkhleboproduct's corporate members, and is to assign to this new entity “*the mission of centralizing the import of bread products.*”
20. Uzdon's purpose, as set out under Article 2.1 of its Charter dated 20 November 1995,¹⁵ 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.*”
21. Article 1.2 of Uzdon's Charter provides that Uzdon “*shall constitute a state structural unit of Uzkhleboproduct Corporation, be accountable to it, pay participant's contribution in the established procedure and become a participant in the corporation.*” Article 5.2 of the Charter further provides that Uzdon's general director shall be appointed and dismissed by Uzkhleboproduct.
22. Articles 1.2 and 1.3 of Uzdon's Charter respectively provide that the company will operate in accordance with “*the principles of self-sufficiency, self-financing and self-repayment including currency self-repayment*”, and that it shall have “*separate property, fixed assets and working capital.*” In addition, Article 1.5 of the Charter provides that the State shall not be held liable for Uzdon's obligations.

¹⁰ Exhibits C-8 and R-3, Article 1.3

¹¹ Exhibit R-4, Article 18.

¹² Exhibit R-5, Articles 48 and 80.

¹³ Exhibit R-6, Article 4.

¹⁴ Exhibits C-9 and R-7.

¹⁵ Exhibits C-10 and R-8.

3. Odil

23. Odil is an Uzbek private company with its headquarters in Uzbekistan. It is a subsidiary of Adil, a group specialized in the trading of wheat and incorporated in Kazakhstan shortly after Uzbekistan became independent. Besides the fact that Odil has its offices in a building owned by Uzkhleboproduct and that it is owned by a certain Mr. Kamalovich, the Parties have provided almost no information about this company.

B. The Contractual Structure of the Wheat Supply Transactions

24. The earliest contract referred to by the Parties in the present proceedings, and which lays the foundation for the subsequent transaction involving Romak, was concluded between Uzkhleboproduct and Odil in October 1995 (1). Odil having failed to deliver a final shipment of goods under that contract, Uzkhleboproduct entered into a commission agreement with Uzdun. That commission agreement was intended to remedy Odil's failure by resorting to the services of Romak (2). Eventually, a quadripartite agreement (3), a supply contract (4), a Letter of Guarantee (5) and a protocol of intention on mutual cooperation (6) were concluded.

1. The Supply Contract Between Uzkhleboproduct and Odil

25. Contract No. 6-2/005 dated October 2, 1995 (hereinafter, the “**Odil Supply Agreement**”)¹⁶ was entered into between Uzkhleboproduct¹⁷ as buyer, and Odil as seller, for the supply of 450,000 tons of soft bread third class wheat at a price of US\$120 per ton. Payment for the goods was to be made “*according to loan agreement N° 05/14 as of October 2, 1995.*”
26. The schedule dated 4 October 1995 and attached as Annex No. 1 of the Odil Supply Agreement called for the delivery of the goods in the following installments:

October 1995	–	50,000 tons
November 1995	–	10,000 tons
December 1995	–	150,000 tons
January 1996	–	100,000 tons
February 1996	–	50,000 tons

¹⁶ Exhibit R-52.

¹⁷ Uzkhleboproduct is referred to in the document as Uzdunmakhsulot, which is the Uzbek-language equivalent of the entity's Russian name. See, *supra*, note 6.

27. Odil delivered the first 400,000 tons of wheat, and was apparently paid for the goods by means of a letter of credit. However, Odil was unable to effect delivery of the final shipment of 50,000 tons.

2. The Commission Agreement Between Uzkhleboproduct and Uzdon

28. The “Commission Agreement for the purchase of imported cereal products under the Contract with Romak” (hereinafter, the “**Commission Agreement**”) was entered into between Uzkhleboproduct, as principal, and Uzdon, as commission agent. Romak and Uzbekistan disagree on whether this contract was signed on 10 June or 10 July 1996.¹⁸
29. Pursuant to Article 1 of the Commission Agreement, Uzdon undertook to conclude a contract with Romak for the supply of up to 50,000 tons of wheat, subject to grain import quotas to be allocated by the State in the future. The goods were to be delivered in two installments in July and August 1996, although the seller was entitled to make deliveries ahead of schedule.
30. With respect to payment, Article 2.1 of the Commission Agreement provides that “[p]ayment to the foreign company for the sold and shipped grain, and also for the delivery of the grain to the border of the Republic of Uzbekistan shall be made by Odil or the *PRINCIPAL* [Uzkhleboproduct].”
31. Article 5 lists a range of penalties applicable in case of breach of certain obligations set out in the Agreement.

3. The Quadripartite Agreement Between Romak, Odil, Uzdon and Uzkhleboproduct

32. The agreement between Romak, Odil, Uzdon and Uzkhleboproduct (hereinafter, the “**Quadripartite Agreement**”) ¹⁹ was entered into in or about June/July 1996. It was intended to remedy Odil’s failure to deliver the last 50,000-ton shipment of wheat to Uzkhleboproduct under the Odil Supply Agreement.
33. In substance, the structure of the Quadripartite Agreement, as set out in Article 3, calls for Romak to deliver wheat on behalf of Odil so as to fulfill Odil’s obligations *vis-à-vis* Uzkhleboproduct under the Odil Supply Agreement. Subsequently, Romak would be asked to make additional deliveries of wheat totaling not less than 50,000 tons, which

¹⁸ For Romak the date is 10 June 1996 (Exhibit C-12), for Uzbekistan it is 10 July 1996 (Exhibit R-49).

¹⁹ Exhibits C-17 and R-53.

would in turn be delivered by Odil and would be counted towards the fulfillment of Romak's obligations towards Uzdon under the Romak Supply Agreement described below. These "additional deliveries" were never agreed to or undertaken.

4. The Supply Contract Between Romak and Uzdon

34. Uzdon and Romak signed a supply contract, and an Addendum thereto, (hereinafter, the "**Romak Supply Agreement**"),²⁰ pursuant to which Romak undertook to deliver up to 50,000 tons of milling wheat. It is common ground between the Parties that the Romak Supply Agreement was entered into in July 1996.²¹
35. The Romak Supply Agreement provides for the supply of a maximum quantity of 50,000 tons of third class milling wheat, to be delivered by 31 December 1996 (with earlier completion allowed), at a price of US\$235 per ton on terms "*C.I.P. (Carriage and insurance paid to) Kazak-Uzbek border station Chengeldy.*"
36. Pursuant to Article 6 of the Romak Supply Agreement, Uzdon must provide a letter of guarantee issued by the National Bank for Foreign Economic Affairs of Uzbekistan and acceptable to Romak's bank, Credit Suisse. Addendum No. 1 provides a model letter of guarantee for this purpose.
37. Article 11 of the Romak Supply Agreement contains an arbitration clause, which envisages the submission of disputes to final and binding GAFTA arbitration.

5. The Letter of Guarantee Issued by Uzdon and Uzkhleboproduct to Romak

38. Uzdon sent a letter to Romak on 10 July 1996, labeled "Letter of Guarantee" (hereinafter, the "**Letter of Guarantee**"),²² signed by Mr. Kadyrov, Chairman of Uzdon, and by Mr. Makhamadzhanov, Director of Uzkhleboproduct. The Letter of Guarantee states in relevant part:

Now therefore we, the Foreign Trade Company "Uzdon", 36 Lakhuty Street, Tashkent, under the order of our superior authority 'Uzkhleproduct' 36 Lakhuty Street, Tashkent Republic of Uzbekistan hereby irrevocably undertake:

To sign the Contract and Addenda No. 1 as well as the Quadripartite Agreement as negotiated and agreed upon in July 1996.

²⁰ Exhibits C-14 and C-15.

²¹ See also the reference in this regard in the "Letter of Guarantee," Exhibit C-16.

²² Exhibits C-16 and R-55.

To open a letter of guarantee of the National Bank for Foreign Economic Affairs of Uzbekistan in accordance with Addendum No. 1 to the above mentioned contract or equivalent or an equivalent NBFEA letter of credit acceptable to your banker(s) as soon as possible, but latest on October 10th 1996.

6. The Protocol of Intention on Mutual Cooperation Between Romak and Uzkhleboproduct

39. On 10 July 1996, Romak, Uzkhleboproduct and Uzdon signed an agreement entitled “Protocol of Intention on Mutual Cooperation between Romak S.A., Geneva and the State Joint-Stock Corporation ‘Uzkhleboproduct’” (hereinafter, the “**Protocol of Intention**”).²³
40. The Protocol of Intention is aimed at establishing long-term commercial cooperation between Romak and Uzkhleboproduct. Notably, it states that Romak will assist Uzkhleboproduct by providing it with market data, forecasts and recommendations on world grain stocks. In exchange, Uzkhleboproduct was to grant Romak preferential status in connection with future grain imports.

C. The Alleged Non-Payment for the Wheat Supplied

1. Romak’s Allegations of Non-Payment

41. Shortly after the conclusion of the aforementioned agreements, Romak began delivering wheat to Uzbekistan. Delivery is reflected in two letters dated 24 July and 12 August 1996,²⁴ and further evidenced by contemporaneous letters from Uzdon.²⁵
42. Romak issued several invoices dated between 8 August and 9 September 1996 in relation to 40,301.58 tons of wheat, delivered between July and November 1996.²⁶ An additional 280 tons were invoiced on 21 January 1997,²⁷ for a total amount of 40,581.58 tons.

²³ Exhibit C-13.

²⁴ Exhibits C-18 and R-56.

²⁵ Exhibits C-21 and C-29.

²⁶ Exhibit C-19.

²⁷ *Id.*

43. As of 10 October 1996, neither Uzdon nor Uzkhleboproduct had implemented financial guarantees in favor of Romak with the National Bank for Foreign Economic Affairs of Uzbekistan, as envisaged in the Romak Supply Agreement and Letter of Guarantee.
44. On 24 October 1996, Uzdon sent a letter to Romak explaining that the letter of credit relating to the Romak Supply Agreement had not yet been opened due to the late allocation of funds for this purpose.²⁸ Uzdon indicated that it would strive to remedy the situation, and to provide a letter of credit by 10 November 1996. Uzbekistan alleges that this letter of assurance was signed by mistake, and that Uzdon in fact intended it to relate to a different delivery.²⁹ Uzbekistan further contends that Uzdon could not have obtained such a letter of credit, given that the underlying Romak Supply Agreement had not been registered with the relevant administrative authorities.³⁰
45. On 24 October 1996, Uzkhleboproduct and Odil signed a document entitled “Reconciliation Report on Grain Deliveries and Payments under Contract N° 6-2/005 Dated 2 October 1995,”³¹ by which “*the parties to Contract N° 6-2/005 dated 2 October 1995 acknowledge that they do not have any claims against each other as to both the quality and the quantity of the products delivered.*” This agreement mentioned a total quantity of grain supply by Odil of 338,017.47 tons in exchange for US\$66,592,796.53, paid by Uzkhleboproduct through the National Bank for Foreign Economic Activities of the Republic of Uzbekistan.
46. In a letter dated 10 February 1997, Mr. Kadyrov of Uzdon indicated to the Control Institution attached to the Office of the President of the Republic of Uzbekistan that “*‘Romak S.A.’ have delivered 40581.6 tons of milling wheat for the amount of USD 10581,6 thousand to the enterprises of GAK ‘Uzkhleboproduct’ under [the Romak Supply Agreement].*”³² Mr. Kadyrov further stated that “[*t*]*he shipping documents for virtually received grain have been handed over to GAK ‘Uzkhleboproduct’, upon which functions of Company ‘Uzdon’ regarding the execution of the corporation’s assignment under this deal have been completed.*” He went on to conclude that “*FTC ‘Uzdon’,*

²⁸ Exhibit C-20.

²⁹ SoD, ¶¶ 101 – 102.

³⁰ SoD, ¶ 103.

³¹ Exhibit R-57.

³² Exhibit C-21.

being an executor, have not received, as well as have not put into its books the grain from the Company 'Romak S.A.', and is not in a position to solve the matter of payment as it is GAK 'Uzkhleboproduct' who is the guarantor and warrantor [sic]."

47. On 15 February 1997, Mr. Kadyrov, acting on behalf of Uzdon, informed Romak that:

Due to uncertainties in respect of allocation by the Government of the Republic of Uzbekistan of Quota to Romak S.A. for the purchase of milling grain in 1997 we kindly ask you to stop as for 31.01.1997 accrual of penalties provided by the clause 10.2. of the contract between Romak S.A. and FTC 'Uzdon' attached to GAK 'Uzkhleboproduct', due to circumstances beyond Uzdon's influence.³³

2. Alleged Intervention of the Office of the President of the Republic of Uzbekistan

48. On 10 March 1997, the Director of Uzkhleboproduct, Mr. Atayev, wrote to the Chief Consultant of the Office of the President of the Republic of Uzbekistan acknowledging that Romak had delivered 40,500 tons of milling wheat.³⁴ In addition, he indicated that this delivery was subject to certain import quotas that had not been allocated to Romak. Mr. Atayev also stated that *"'Uzkhleboproduct' had repeatedly negotiated with Odil in order to settle the 'Romak issue' and informed the Presidency that 'Romak' turned to the Government of the Republic with the request for convertation of the Soums and repayment of the hard currency due to the company [sic]."*
49. On 20 March 1997, the Chief Consultant of the Office of the President of the Republic of Uzbekistan sent a letter to Romak, noting that the Romak Supply Agreement could not be regarded as valid, and that there were no documents establishing Romak's performance thereof.³⁵ The Chief Consultant also indicated that the documents presented by Romak were related to the Odil Supply Agreement, which had been paid in full. He further advised that Romak's deliveries made before 31 December 1996 contravened Uzbek legislation, because a bank guarantee had not yet been issued. The letter referred Romak to Odil's parent company, Adil, to obtain payment for its deliveries.

³³ Exhibit C-22.

³⁴ Exhibit C-25.

³⁵ Exhibits C-26 and R-11.

50. By letter of 25 March 1997 Romak reiterated its request for payment from Uzdon and Uzkhleboproduct.³⁶ On 27 March 1997, the Chief Consultant of the Office of the President reiterated his position.³⁷ He nevertheless informed Romak that the Council of Ministers would raise the matter with Uzkhleboproduct, and added that Romak should continue to correspond with Uzkhleboproduct.
51. On 28 March 1997, Odil wrote to Romak acknowledging its responsibility under the Quadripartite Agreement for payments to Romak. Odil also stated that it would effect payments in the course of 1997.³⁸

D. The GAFTA Arbitration

52. Following its unsuccessful attempts to recover sums due from Uzdon and Uzkhleboproduct, Romak initiated arbitration proceedings against Uzdon under the Romak Supply Agreement, ultimately resulting in an arbitral award in Romak's favor.
53. On 2 April 1997, Romak sent a Notice of Arbitration to Uzdon, with copy to Uzkhleboproduct and the Chief Consultant of the Office of the President of Uzbekistan.³⁹
54. In correspondence with Romak dated 10 April 1997, Uzdon denied all of Romak's claims.⁴⁰ Its primary defense was that the Romak Supply Agreement could not be performed due to "*force majeure*," because the Government of Uzbekistan had not allocated import quotas for the relevant grain purchase. According to Uzdon, the absence of quotas rendered the completion of mandatory formalities an impossibility. Uzdon indicated that Romak ought to request payment directly from Odil or Uzkhleboproduct.
55. Subsequently, Uzdon refused to participate in the constitution of the arbitral tribunal, which was ultimately set up with the assistance of GAFTA. The Parties reiterated their respective contentions in the course of the GAFTA Arbitration, in an exchange of written submissions that took place in May 1997.

³⁶ Exhibit C-24.

³⁷ Exhibit C-27.

³⁸ Exhibit R-58.

³⁹ Exhibit C-28.

⁴⁰ Exhibit C-29.

56. The arbitral tribunal in the GAFTA Arbitration issued a final award on 22 August 1997 (hereinafter, the “GAFTA Award”).⁴¹
57. With respect to the law applicable to the merits of the dispute, the GAFTA tribunal held that in the absence of a specific agreement, the Parties had by implication selected English law. The tribunal also found that the Romak Supply Agreement was valid, and did not rest upon the fulfillment of any further formalities. Moreover, the arbitral tribunal found that Uzdon was obligated to pay for all deliveries effected by Romak which had not been paid by Odil.
58. On this basis, the tribunal ruled that Uzdon was required to make payment for the 40,000 tons of wheat that Romak had delivered, and awarded Romak damages for breach of this obligation in the amount of US\$10,510,629.12, plus interest.
59. Uzdon appealed the GAFTA award before the GAFTA Board of Appeals on 27 March 1998. On 31 July 1998, this appeal was rejected as untimely.⁴²
60. On 28 August 1998, Uzdon challenged the GAFTA Award before the High Court of Justice in London, claiming that the arbitral tribunal had failed to conduct the proceedings in a fair and equitable manner. The challenge was rejected on 28 January 1999.⁴³
61. The High Court held that:

[T]he parties had a reasonable opportunity to put their case and to deal with their opponent's case. The tribunal did act fairly and impartially and did adopt appropriate procedures. Moreover insofar as UZDON complains about the procedure it was either the author of its own problems or chose not to seek to remedy them by deciding not to pursue an appeal. The right to appeal was clearly documented and indeed discussed and I regret to say that I cannot accept UZDON's evidence that it was unaware of the right until it instructed solicitors. ...

It follows that I can also see nothing in the evidence or submissions to suggest that UZDON has suffered any let alone any substantial injustice in not advancing those arguments (so far as it did not in fact do so) before the first tier tribunal. I repeat that UZDON had, but chose not to exercise, its right to advance them on appeal.

⁴¹ Exhibits C-40 and C-48.

⁴² Exhibit C-43.

⁴³ Exhibit C-44.

E. The Enforcement Proceedings

62. Romak sought the assistance of the Swiss authorities for the purposes of reaching a settlement with the Uzbek State. In a letter sent to the Ambassador of the Swiss Confederation on 10 January 1999, the Deputy Prime Minister of the Republic of Uzbekistan advised that Uzdon would not voluntarily implement the GAFTA Award, primarily because the decision was biased and had been rendered against the wrong party, as Odil was in fact responsible for paying Romak.⁴⁴ The Deputy Prime Minister further stated that pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, the “**New York Convention**”), “*in order to have the arbitral award enforced, the party requesting enforcement should present all corresponding documents to the court of the country where the respondent is located.*”
63. Romak attempted to enforce the GAFTA Award before the Uzbek courts (1), and subsequently turned to the French courts (2).

1. Enforcement Efforts before the Courts of Uzbekistan

64. On 9 August 2000, Romak applied to the Commercial Court of the City of Tashkent for the recognition and enforcement of the GAFTA Award.⁴⁵ Romak’s application was drafted in Russian (which was also the language used during the enforcement proceedings).
65. On 2 October 2000, the Commercial Court of the City of Tashkent held that the application for recognition and enforcement of the GAFTA Award should be “*returned to plaintiff,*” on two grounds.⁴⁶ First, because the application for recognition and enforcement of the GAFTA Award in Uzbekistan did not fulfill the requirements of Article IV of the New York Convention, which requires that the party applying for recognition and enforcement produce a translation of the original award and the underlying contract in an official language of the country in which enforcement of the award is sought – such language being Uzbek.⁴⁷ Second, because Romak submitted no evidence to the Court that Uzdon had been duly notified of the appointment of the

⁴⁴ Exhibit R-60.

⁴⁵ Exhibit R-64.

⁴⁶ Exhibits C-45 and R-13.

⁴⁷ The official language of Uzbekistan is Uzbek. Exhibits R-65 and R-66.

arbitrators, in accordance with the requirements of Article V(i)(b) of the New York Convention.

66. Romak appealed the Commercial Court's decision. On 24 November 2000, the Appellate Jurisdiction of the Commercial Court of Tashkent confirmed the decision of the lower court.⁴⁸

2. Enforcement Efforts in France

67. By order dated 7 November 2002, the *Tribunal de Grande Instance* of Paris (first instance court for civil matters) granted *exequatur* with respect to the GAFTA Award, authorizing its enforcement in France.⁴⁹ This decision was confirmed by the Paris *Cour d'Appel* on 27 October 2005.⁵⁰
68. On 28 May 2003, Romak obtained an order for the attachment (*saisie-attribution*) of a bank account in the name of two Uzbek companies, the National Aviation Company of the Republic of Uzbekistan (hereinafter, "NAC") and Ouzaeronavigation.
69. This order was later reversed by the Paris *Cour d'Appel* in a decision of 26 October 2006.⁵¹ The *Cour d'Appel* found that the attached bank account had been opened by NAC on behalf of the Republic of Uzbekistan, and that it therefore could not be seized to enforce an award directed solely against Uzdon.
70. On 27 October 2006, Romak filed a request for a protective attachment (*saisie conservatoire*) of the above-mentioned bank account, which was granted.⁵² This attachment was confirmed by a decision of the Paris *Tribunal de Grande Instance* of 31 March 2008,⁵³ and by the Paris *Cour d'Appel* on 4 December 2008.⁵⁴

⁴⁸ Exhibit C-46.

⁴⁹ Exhibit C-49.

⁵⁰ Exhibit C-135.

⁵¹ Exhibit R-15.

⁵² Exhibit R-16.

⁵³ Exhibit C-137.

⁵⁴ Exhibit C-217.

III. Procedural History

A. From the Notice of Arbitration to the Terms of Appointment

71. Pursuant to Article 9 of the BIT and in accordance with the UNCITRAL Arbitration Rules, Romak issued a Notice of Arbitration to the Republic of Uzbekistan on 29 March 2006.
72. Article 9 of the BIT reads as follows:

Article 9

Disputes between a Contracting Party and an investor of the other Contracting Party

(1) For the purposes of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned with a view to solving the case amicably.

(2) If these consultations do not result in a solution within six months the dispute shall upon request of the investor be submitted to an ad hoc arbitral tribunal. Such arbitral tribunal shall, unless otherwise agreed upon by the parties to the dispute, be established under the arbitrations rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) In the event of both Contracting Parties having become members of the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States, disputes may, upon request of the investor, as an alternative to the procedure mentioned in paragraph (2) of this article, be submitted to the International Centre for Settlement of Investment Disputes.

(4) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

(5) The Contracting Party which is party to the dispute shall at no time whatsoever during the settlement procedure or the execution of the sentence allege as a defense its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

(6) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the award rendered by an arbitral tribunal.

73. Uzbekistan received the Notice of Arbitration on 29 March 2006.
74. In its Notice of Arbitration, Romak suggested that the dispute be settled by a sole arbitrator, to be appointed by mutual agreement of the Parties. As Uzbekistan did not agree to this suggestion, a three-member Arbitral Tribunal was constituted in

- accordance with the UNCITRAL Rules. By letter of 18 August 2006, Romak appointed Mr. Noah Rubins as co-arbitrator.
75. By letter dated 8 November 2006, Uzbekistan appointed as co-arbitrator Mr. Nicolas Molfessis.
 76. By letter dated 10 April 2007, pursuant to Article 7(3) of the UNCITRAL Rules, Romak informed the Secretary General of the Permanent Court of Arbitration (hereinafter, the “PCA”) that the two co-arbitrators had failed to agree on the Chairman of the Arbitral Tribunal within the 30-day limit time contemplated in the UNCITRAL Rules, and requested that the Secretary General of the PCA designate an Appointing Authority to appoint the Chairman.
 77. By letter dated 2 May 2007, Uzbekistan confirmed that the two arbitrators had been appointed, but that the Parties had failed to agree on the appointment of the Chairman. Uzbekistan also asserted that any Tribunal constituted under the UNCITRAL Rules would lack jurisdiction, but pointed out that this issue would have to be ruled upon by the Tribunal once constituted. Uzbekistan further stated that it participated in the arbitration “*without having waived its immunity privilege and its rights to challenge the jurisdiction of the arbitral tribunal.*”
 78. On 3 May 2007, the PCA designated Mr. Bernard Hanotiau as appointing authority, charged with selecting the Chairman of the tribunal. On 5 July 2007, Mr. Hanotiau appointed Mr. Fernando Mantilla-Serrano as Chairman of the Arbitral Tribunal. On the same day, the PCA notified the Parties of this appointment.
 79. On 23 July 2007, the Arbitral Tribunal received the file that had been submitted to the PCA as part of the appointment procedure.
 80. On 5 September 2007, the Terms of Appointment and the Procedural Calendar were signed by the Parties and by the members of the Arbitral Tribunal.
 81. The Terms of Appointment provided, *inter alia*, that:
 - The Parties confirm that the members of the Arbitral Tribunal have been validly appointed in accordance with the BIT and the UNCITRAL Rules;
 - The place of arbitration is Paris, France;
 - The proceedings are conducted in English and in French and the Award shall be drafted in English or in French, at the discretion of the Arbitral Tribunal; and

- The International Bureau of the Permanent Court of Arbitration is appointed as Registrar.
82. The Procedural Calendar, as amended, established the following timetable:
- Filing of Romak’s Statement of Claim and Uzbekistan’s Objections to Jurisdiction on 4 February 2008;
 - Filing of Uzbekistan’s Statement of Defense and Romak’s Defense to Uzbekistan’s Objections to Jurisdiction on 6 June 2008;
 - Filing of Romak’s Reply to Uzbekistan’s Statement of Defense and Uzbekistan’s Reply to Romak’s Defense to Uzbekistan’s Objections to Jurisdiction on 22 September 2008;
 - A Conference Call to prepare the Hearing on 14 October 2008;
 - A two-day Hearing in Paris on 6 and 7 November 2008;
 - First Post-hearing briefs on January 26, 2009;
 - Second Post-hearing briefs and Submissions on Costs on March 13, 2009; and
 - Reply to Submissions on Costs on March 18, 2009.
83. On 6 September 2007, after consultation with the Parties, the Arbitral Tribunal issued Procedural Order No. 1 fixing further procedural rules. These documents were communicated to the Parties and transmitted to the Registrar that same day.

B. From the Terms of Appointment to the Hearing

84. The arbitral proceedings were carried out in application of the agreed Procedural Calendar, as modified from time to time by the Arbitral Tribunal with the agreement of the Parties.
85. The Hearing took place in Paris on 6-7 November 2008. In addition to the members of the Arbitral Tribunal and Mr. Paul-Jean Le Cannu, who acted as Secretary, in attendance were, for Romak, Mr. Jacques Covo (Legal and Managing Director), Mr. Renaud Semerdjian (Counsel), Mr. Walid Ben Hamida (Counsel) and Mr. Aurélien Aucher (Counsel), and for Uzbekistan, Mr. Nodirjon Juraev (representative of the Ministry of Justice), Mr. Jean-Pierre Harb (Counsel), Mr. David Fraser (Counsel) and Mr. Alexis Martinez (Counsel).

86. During the hearing, Mr. Adadiy Konstantinovitch Karpukhin and Prof. William B. Simons, appeared on behalf of Uzbekistan as witness and expert, respectively, and were subjected to cross-examination as well as additional questioning by the Tribunal.
87. Each Party presented oral arguments, and then were provided the opportunity to make rebuttal statements. The Arbitral Tribunal, with the agreement of the Parties, submitted questions to be addressed by the Parties in Post-hearing written submissions.
88. Prior to the closing of the Hearing, with express reference to Article 30 of the UNCITRAL Rules, the Arbitral Tribunal asked counsel for the Parties whether they had any objections regarding the manner in which the arbitration proceedings had been conducted. Counsel for the Parties each stated that they had no such objections.
89. The Hearing was recorded, and a verbatim transcript was made by the PCA, which was forwarded to the Parties and to the members of the Tribunal on 24 November 2008. Neither of the Parties objected to the contents of the transcript.
90. The Parties filed Post-hearing written submissions and Submissions on Costs in accordance with the Procedural Calendar as amended.
91. On 29 September 2009, the Arbitral Tribunal declared the arbitral proceedings closed and proceeded to the final deliberations and drafting of the present award.
92. The Parties have agreed to the publication of the present award.⁵⁵

IV. Summary of the Parties' Positions

93. Uzbekistan requests that the Arbitral Tribunal find, as a preliminary matter, that it does not have jurisdiction to hear the claim (**A**). The Parties' contentions on the merits are focused upon whether the acts committed by Uzdon and Uzkhleboproduct, as well as the Uzbek courts' refusal to enforce the GAFTA Award, constitute violations of the BIT by Uzbekistan (**B**).

A. Uzbekistan's Objections to the Jurisdiction of the Arbitral Tribunal

94. With their written submissions concerning jurisdiction, the Parties addressed two separate issues: burden of proof (**1**), and the characterization of the Romak Supply Agreement and of the GAFTA Award as investments for the purposes of determining jurisdiction (**2**). Despite being an issue germane to the merits, the Parties also addressed

⁵⁵ C-PHB1, ¶ 174; R-PHB1, ¶ 89.

in their initial submissions the attributability to the State of Uzbekistan of the acts committed by Uzdon and Uzkhleboproduct (3).

1. Burden of Proof

95. Relying on scholarly writings as well as decisions and awards of arbitral tribunals adjudicating under the ICSID Convention and the UNCITRAL Rules, Uzbekistan's first contention is that Romak bears the burden of proving that this Tribunal has jurisdiction under the BIT.⁵⁶
96. Romak submits that it need only establish the Tribunal's *prima facie* jurisdiction.⁵⁷ Romak argues that the burden of proof contemplated in Article 24 of the UNCITRAL Rules has been interpreted and applied with flexibility. Romak further contends that, in any event, Romak has made an investment within the meaning of the BIT, regardless of which Party bears the burden of proof.⁵⁸

2. The Characterization of the Transaction Between Romak and Uzdon, and of the GAFTA Award, as an Investment

a. The BIT

97. In essence, Uzbekistan argues that Romak has failed to identify an investment within the meaning of Article 1(2) of the BIT,⁵⁹ which provides:

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.*

⁵⁶ OJ, ¶¶ 59 – 62; RDOJ, ¶¶ 42 – 53.

⁵⁷ DOJ, ¶¶ 98 – 103.

⁵⁸ *Id.*, ¶¶ 102 – 103.

⁵⁹ OJ, ¶¶ 63 – 68; RDOJ, ¶ 79 *et seq.*

98. Uzbekistan argues that the sale of goods, the activity envisaged by the Romak Supply Agreement, does not constitute an investment, and that to interpret the term otherwise would expand the notion of “investment” almost infinitely.⁶⁰
99. Uzbekistan further contends that the notion of “investment” in the BIT necessarily involves an element of territoriality. Since the Romak Supply Agreement was carried out entirely outside the territory of Uzbekistan, it cannot constitute an investment for present purposes.⁶¹
100. Uzbekistan supports its limited view of “investment” in part by reference to a separate agreement that Uzbekistan and Switzerland negotiated and concluded at the same time as the BIT, governing the two States’ relations with respect to sales of goods. In Uzbekistan’s view, this second treaty, the Agreement on Trade and Economic Cooperation (hereinafter, the “ATEC”) reflects the intention of Uzbekistan and Switzerland to exclude ordinary sales of goods transactions from the scope of the BIT.⁶²
101. Romak submits that Article 1(2) of the BIT includes a broad definition of investment that includes “*every kind of asset*” having economic value. To illustrate this definition, Romak points to various investment types specifically listed as protected under Article 1(2), including “*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.*” Romak contends that it has made an investment within the meaning of Article 1(2)(c) of the BIT since it is the owner of a “*claim to money,*” including rights under the Romak Supply Agreement and the GAFTA Award.⁶³
102. With respect to territoriality, Romak considers that the BIT imposes no such requirement. Even if investments had to be connected to the territory of the host State, this requirement would be satisfied by virtue of the establishment of Romak’s representative in Tashkent and the delivery and use of the goods in question within Uzbekistan.⁶⁴

⁶⁰ OJ, ¶¶ 69 – 78; RDOJ, ¶¶ 86 – 91.

⁶¹ R-PHB2 ¶¶ 42-68.

⁶² OJ, ¶¶ 101 – 105.

⁶³ DOJ, ¶¶ 121 – 126.

⁶⁴ C-PHB1 ¶¶ 82 – 110 and C-PHB2 ¶¶ 5 – 14.

103. Finally, Romak argues that, contrary to Uzbekistan’s assertions, the signing of the ATEC on the same day as the BIT does not exclude the protection under the BIT claimed by Romak in this arbitration.⁶⁵

b. Previous Arbitral Decisions

104. Uzbekistan submits that the sale of goods contract between Romak and Uzdon does not constitute an investment. Uzbekistan relies in the so-called “*Salini test*,”⁶⁶ pursuant to which an investment will normally exhibit a certain “*regularity of profit and return*,” a certain “*duration of the economic operation*,” the existence of a “*risk assumed by the investor*” and a contribution to the “*economic development of the host State*.”

105. Uzbekistan’s main submissions concerning the “*Salini test*” can be summarized as follows:⁶⁷

(i) The sale of goods contract concluded with Uzdon did not and could not have yielded regular profits and returns, as it was a one-off transaction.

(ii) The one-off sale of goods under the contract in question constitutes such limited economic activity that it does not fulfill the requirement of duration.

(iii) The only risk that Romak assumed was breach by Uzdon of its contractual obligations.

(iv) Romak has not made a significant contribution to the Republic of Uzbekistan’s development, since the impact of a single contract for the sale of goods is negligible.

106. Romak distinguishes between investment treaty arbitration within the ICSID system, in which the claimant must prove that it owned an investment *both* within the meaning of the applicable investment treaty *and* within the meaning of the Washington Convention, and an investment treaty arbitration such as this one, conducted under the UNCITRAL Rules, in which the claimant satisfies the requirement of jurisdiction *ratione materiae*

⁶⁵ DOJ, ¶¶ 248 – 256.

⁶⁶ After the seminal case *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

⁶⁷ OJ, ¶¶ 84 – 100; RDOJ, ¶¶ 104 – 113.

simply by establishing that it has made an investment within the definition of the relevant investment treaty.⁶⁸

107. Because this arbitration is conducted under the UNCITRAL Rules, Romak contends that the *Salini* criteria are inapplicable and irrelevant, having been developed within the context of ICSID case law.

108. Romak argues in the alternative that, even if the “*Salini* test” were applicable, Romak’s contractual relationships with Uzdon and Uzkhleboproduct, and the attendant rights, would qualify as an investment:⁶⁹

(i) the Uzdon-Romak Agreement was part of the “*long term and mutually profitable cooperation*” envisaged in the Protocol of Intention concluded between Romak and Uzkhleboproduct, and was carried out over the course of five months, during which Romak delivered over 40,000 tons of wheat. The profits derived from the deliveries were intended to finance further scientific cooperation pursuant to the Protocol of Intention.

(ii) Although ICSID jurisprudence does not require that a contract have a minimum duration, Romak nevertheless fulfilled this requirement, as Romak’s deliveries of wheat were but the first of a projected series of deliveries, pursuant to the “*preferential right*” accorded to Romak in the Protocol of Intention.

(iii) Romak assumed substantial risk, in light of the investment climate in Uzbekistan at the time. Additionally, Romak bore the risk of knowledge transfer pursuant to the Protocol of Intention, without receiving any direct financial compensation in exchange for the same.

(iv) Romak contributed to the development of Uzbekistan, because cereal supply to the country was far from guaranteed at the time, but was vital to the Uzbek economy and population.

109. Uzbekistan contends that an award may not be construed as an investment on the basis of Article 1(2)(e) of the BIT, on the grounds that an arbitral award cannot, standing alone, constitute an investment.⁷⁰

⁶⁸ DOJ, ¶¶ 105-115 and ¶¶ 185-215.

⁶⁹ DOJ, ¶¶ 230 – 247.

⁷⁰ OJ, ¶¶ 106 – 109.

110. Relying on previous arbitral decisions, Uzbekistan submits that an arbitral award can be considered an investment only to the extent that the underlying transaction can be defined as an investment.⁷¹
111. Romak disagrees with Uzbekistan’s interpretation of Article 1(2) of the BIT. Romak argues that the scope of application of Article 1(2)(e) is not limited to “*concessions*,” and extends to a separate category of “*other rights*.” According to Romak, arbitral awards fall within the scope of the separate sub-category of “*other rights given by law, by contract or by decision of the authority in accordance with the law*.”⁷²

3. The Attributability to the Republic of Uzbekistan of Uzdon’s and Uzkhleboproduct’s Acts for the Purpose of Jurisdiction

a. Uzbekistan’s Position

112. Uzbekistan claims that for the Arbitral Tribunal to have jurisdiction over this dispute between Romak and Uzbekistan, Uzdon would have to be either a State entity or an entity under the responsibility of Uzbekistan. In Uzbekistan’s view, neither Uzkhleboproduct nor Uzdon falls within these categories.⁷³
113. According to Uzbekistan, in 1994 Uzkhleboproduct became a voluntary combination of enterprises of various forms of ownership involved in the purchase and production of grain and grain products. As such, Uzkhleboproduct functions as an agricultural cooperative. Moreover, Uzkhleboproduct has since its creation functioned as a private corporation and not as a Government body, and is independently responsible for its own obligations under Uzbek law.⁷⁴
114. Uzbekistan further contends that Uzdon is a separate legal entity which is self-financing and manages its own assets. Uzbekistan refers to Article 1.3 of Uzdon’s Charter, which confirms its independence from Uzkhleboproduct and enables Uzdon to engage in independent, conventional commercial transactions.⁷⁵

⁷¹ OJ, ¶¶ 110 – 114; RDOJ, ¶¶ 114 – 122 *et seq.*

⁷² DOJ, ¶¶ 258 – 263.

⁷³ OJ, ¶ 116.

⁷⁴ SoD, ¶¶ 20 – 25, OJ, ¶¶ 7 – 9.

⁷⁵ OJ, ¶¶ 19 – 25; RDOJ, ¶¶ 57 – 61; SoD, ¶¶ 31 – 36.

115. Uzbekistan adds that Uzdon did not have a monopoly on grain importation into Uzbekistan. Other private corporations, including Uzinterimpex, Uzmarkazimpex and Markasanoatexport, performed the same activities and were in competition with Uzdon.⁷⁶ Moreover, Uzbekistan argues that the Ministry of Finance and the State Tax Committee must intervene in every import transaction conducted in Uzbekistan – and not only in those carried out by Uzdon – because the Uzbek currency is not convertible.⁷⁷
116. According to Uzbekistan, Uzdon was originally set up as a foreign trade company, but was transformed into an open joint stock company after the Uzdon Resolution, prior to the Romak transaction. The Republic of Uzbekistan holds no shares in Uzdon, and Uzkhleboproduct only owns 8.4% of Uzdon’s shares. In addition, Uzbekistan asserts that, even if Uzdon is part of Uzkhleboproduct, this does not establish that Uzkhleboproduct controls Uzdon, since (as already described above) Uzkhleboproduct is a voluntary association of independent entities. Uzbekistan contends that, even if the Tribunal were to find that Uzdon is controlled by the Uzkhleboproduct, Romak has failed to demonstrate that Uzkhleboproduct is a company which (i) fulfills a function of the State, and (ii) is not independent from Uzbekistan.⁷⁸
117. Uzbekistan contests the authenticity of a certificate produced by Romak with the letterhead of the Tashkent Bar and the Ministry of Justice, which certifies that Uzkhleboproduct and Uzdon are State entities.⁷⁹

b. Romak’s Position

118. Romak argues that the acts of Uzkhleboproduct and Uzdon can be attributed to the Republic of Uzbekistan because both were State entities that pursued a public purpose at the time the relevant facts occurred.
119. According to Romak, Uzkhleboproduct is a State consortium accountable to the Council of Ministers and controlled by Uzbekistan. The State owned 51% of the shares of Uzkhleboproduct when the entity was transformed into a corporation. Given that (even after reorganization) Uzkhleboproduct was obligated to report regularly to the

⁷⁶ SoD, ¶ 37; OJ, ¶ 26.

⁷⁷ SoD, ¶¶ 38 – 40.

⁷⁸ RDOJ, ¶¶ 62 – 69.

⁷⁹ SoD, ¶¶ 41 – 44.

Council of Ministers of Uzbekistan, the State must have been informed of Romak’s difficulties in obtaining payment for the wheat delivered.⁸⁰

120. With respect to Uzdon, Romak points out that the Uzdon Resolution directed Uzkhleboproduct to establish Uzdon within the State Shareholding Corporation for the purpose of “*attracting foreign investors,*” in particular those specialized in cereal imports.⁸¹
121. In addition, Romak contends that Uzdon is a structural unit of Uzkhleboproduct. Its Charter grants Uzkhleboproduct the right to nominate the General Director, who “*determines the amount and kinds of transactions, agreements and contracts*” to which Uzkhleboproduct can be a party. In support of its allegations, Romak refers to the fact that, in the context of Romak’s transactions with Uzdon, the Letter of Guarantee was signed not only by the chairman of Uzdon, but also by one of the directors of Uzkhleboproduct. Romak also invokes a legal opinion certificate from Mr. Karpukhin of the Tashkent Bar Association,⁸² which it insists is authentic.⁸³
122. Romak further argues that Uzdon’s activities are under the direct supervision of the Republic of Uzbekistan. The Uzdon Resolution established that “*the Ministry of Finance of the Republic of Uzbekistan [is] in charge of providing sufficient financing to the food producer to satisfy the needs of the public.*”⁸⁴
123. In addition, with respect to the companies cited by Uzbekistan to demonstrate the existence of market competition in Uzbekistan, Romak notes that said companies – Markazsanoateksort, Uzinterimpex and O’Zmarkazimpex – were all created after the present dispute arose.⁸⁵

⁸⁰ SoC, ¶ 15; DOJ, ¶ 21; RSoD, ¶¶ 28 – 29.

⁸¹ SoC, ¶ 16 – 19; DOJ, ¶ 24; RSoD, ¶¶ 30 – 31.

⁸² Exhibit C-11.

⁸³ SoC, ¶¶ 20 – 21, 344, 369 – 370; DOJ, ¶ 25; RSoD, ¶¶ 22 – 25.

⁸⁴ SoC, ¶¶ 17 – 26.

⁸⁵ DOJ, ¶¶ 29 – 33.

124. Lastly, Romak insists that Uzdon is not a self-financing entity, and points out that it is merely since 20 May 2007 that Uzkhleboproduct only owns 8.4% of Uzdon's stock. Uzdon's stock was first issued in 2000, well after the disputed facts occurred.⁸⁶

B. Summary of the Parties' Positions on the Merits

125. With respect to the substantive issues in dispute, the Parties have exchanged submissions relating to the applicable law⁸⁷ (1), and as to whether the Republic of Uzbekistan has committed direct violations of its obligations by refusing to enforce the GAFTA Award (2) and through Uzkhleboproduct's and Uzdon's acts (3).

1. The Applicable Law

126. As part of its allegations on applicable law, Romak submits that, by virtue of the Most Favored Nation (hereinafter, "MFN") clause contained in Article 3 of the BIT, the Arbitral Tribunal should hold Uzbekistan accountable, in addition to the BIT, for violations of the more favorable substantive provisions contained in other investment treaties to which Uzbekistan is a party, of international conventions to which the State of Uzbekistan is a party and, in the alternative, of customary international law.⁸⁸

127. Romak refers extensively to Article 11 of the BIT, which Romak characterizes as an observance of obligations or "umbrella" clause. This provision reads as follows:

Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

128. Romak therefore argues that Article 11 covers both contractual undertakings and undertakings assumed through law or regulation.⁸⁹ Romak relies on a number of ICSID awards and decisions in support of its interpretation.⁹⁰

⁸⁶ *Id.*

⁸⁷ Although the contents of the Parties' submissions in this regard properly pertain to "the applicable standards" to be retained by the Arbitral Tribunal, the Tribunal refers to "Applicable Law", which is the expression actually used by the Parties in their submissions.

⁸⁸ SoC, ¶¶ 135 – 139.

⁸⁹ SoC, ¶ 192.

⁹⁰ Notably *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, August 22, 2007; *Fedax v. Venezuela* ICSID Case No. ARB/96/3, Award, March 9, 1998; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on jurisdiction, January 29, 2004; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005.

129. In Romak’s view, Uzbekistan’s other obligations under the BIT are broad in scope, and include the protection of investments, the guarantee of fair and equitable treatment, and the prohibition against expropriation or nationalization without appropriate compensation.⁹¹
130. In addition, Romak relies upon the MFN clause to invoke Article 2(c) of Annex B to the Uzbekistan-Italy BIT, which provides that “[e]ach Contracting Party shall provide effective means for asserting claims and enforce rights related to investments and investment agreements”; Article 4.1 of the Uzbekistan-Austria BIT,⁹² which concerns the transparency of State activities affecting the operation of the BIT; and Article 3(1) of the Uzbekistan-France BIT,⁹³ which provides for the fair and equitable treatment of investments.⁹⁴
131. Romak also invokes Articles III and VII of the New York Convention, as well as customary international law, notably the principles of international law relating to denial of justice.⁹⁵
132. In response to Romak’s allegations concerning applicable law, Uzbekistan submits that the claim brought by Romak is in fact a purely contractual one, and thus does not fall within the scope of the BIT.⁹⁶ Uzbekistan further alleges that Article 11 of the BIT is not an “umbrella” clause and that, in any event, such a clause could not apply since there is no contract between Romak and Uzbekistan.⁹⁷

⁹¹ SoC, ¶¶ 140 – 200.

⁹² Article 4(1) provides that “[e]ach Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or make them publicly available.”

⁹³ Article 3 provides: “chacune des Parties s’engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes du droit international, aux investissements des investisseurs, de l’autre Partie et à faire en sorte que l’exercice du droit ainsi reconnu ne soit entravé ni en droit ni en fait. En particulier, bien que non exclusivement, sont considérées comme des entraves de droit ou de fait au traitement juste et équitable toute restriction à l’achat et au transport de matières premières, et de matières auxiliaires d’énergie et de combustibles, ainsi que de moyens de production et d’exploitation de tout genre, toute entrave à la vente et au transport de produits à l’intérieur du pays et à l’étranger ainsi que toutes autres mesures ayant un effet analogue.”

⁹⁴ SoC, ¶¶ 201 – 204.

⁹⁵ SoC, ¶¶ 206 – 214.

⁹⁶ SoD, pp. 46 *et seq.*

⁹⁷ See, Section 3.b. *infra.*

2. The Uzbek Courts' Refusal to Enforce the GAFTA Award

a. Romak's Position

133. In substance, Romak contends that the Uzbek courts' refusal to enforce the GAFTA Award violated several of Uzbekistan's international obligations.⁹⁸
134. First, Romak asserts that the Uzbek courts wrongly refused to enforce the GAFTA Award based upon Article IV of the New York Convention, which sets out the admissibility requirements for a request to enforce an award. According to Romak, Article V sets out the exclusive grounds for refusing recognition and enforcement of an award. Romak submits that a request for enforcement under Article IV should not be interpreted too strictly, and that a claimant "*should be allowed to complete the conditions for such a request during the proceedings.*" Uzbekistan has thus violated the provisions of the New York Convention.⁹⁹
135. Romak argues that the improper interpretation and application of the New York Convention constitute a breach of the "umbrella" clause found in Article 11 of the BIT, which guarantees the enforcement of arbitral awards.¹⁰⁰ It further claims that the conduct of the Uzbek courts is, likewise, incompatible with Article 3 of the BIT, which is intended to ensure a secure investment environment, the promotion of investments, and fair and equitable treatment before Uzbek courts.
136. Romak also alleges that the Uzbek courts' conduct resulted in the expropriation of its contractual rights, either directly or indirectly.¹⁰¹ Romak draws support from the recent award in *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*,¹⁰² arguing that "*a taking by the judicial arm of the State may also amount to an expropriation.*" Further, relying on *Saipem v. Bangladesh*,¹⁰³ Romak argues that

⁹⁸ SoC, ¶¶ 215 et seq.

⁹⁹ SoC, ¶¶ 230 – 241.

¹⁰⁰ SoC, ¶¶ 244 – 253.

¹⁰¹ SoC, ¶¶ 254 – 264.

¹⁰² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.

¹⁰³ *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007 (the final Award was rendered on 30 June 2009).

the courts' refusal to enforce the GAFTA Award has destroyed Romak's rights and the commercial value of its investment, and therefore constitutes expropriation.

137. Lastly, Romak contends that the Uzbek courts' decision to refuse enforcement of the GAFTA Award contains "*gross defects in its substance*," which resulted in a denial of justice and a violation of principles of international law.¹⁰⁴ Romak asserts that, in contravention of Uzbekistan's international obligations, the Uzbek courts imposed two unreasonable obstacles preventing the enforcement of the GAFTA Award: the obligation to provide an Uzbek translation of the GAFTA Award (although Russian is commonly used by the courts), and the refusal to grant an extension in order to have the GAFTA Award translated into Uzbek.
138. Similarly, Romak argues that these acts amount to unjustified, unfair and inequitable treatment prohibited under Article 3 of the BIT and – by virtue of the MFN Clause – under Article 2(c) of Annex B to the Uzbekistan-Italy BIT. Alternatively, Romak submits that it was denied justice under customary international law, giving rise to corresponding liability under the BIT.¹⁰⁵

b. Uzbekistan's Position

139. Citing *Azinian v. Mexico*,¹⁰⁶ Uzbekistan argues that investors must accept the host State's laws and regulatory framework as they find them, and that a State cannot be faulted for complying with a decision of its courts, unless the court in question has itself breached an international legal standard.¹⁰⁷ On this basis, Uzbekistan alleges that Romak has failed to demonstrate that the treatment accorded by the Uzbek courts amounts to a denial of justice involving a "*clear and malicious misapplication of the law*," or "*pretence of form to achieve an internationally wrongful end*." Just as importantly, a denial of justice cannot be established unless the claimant has sought redress through all levels of the judicial system (or has proven the futility of further appeal). Romak did not appeal to the Supreme Court of Uzbekistan, which could have reversed the decision of the courts below in Romak's favor.

¹⁰⁴ SoC, ¶¶ 266 – 276.

¹⁰⁵ SoC, ¶ 279 *et seq.*

¹⁰⁶ *Robert Azinian and others v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.

¹⁰⁷ SoD, ¶¶ 203 – 205.

140. In any event, Uzbekistan submits, the behavior of the Uzbek courts did not amount to a denial of justice as, *prima facie*, the courts complied with international standards. According to Uzbekistan, not only did the Uzbek courts take reasonable decisions in light of the New York Convention, but Romak could still today resubmit a request for enforcement.¹⁰⁸
141. Uzbekistan stresses that the Commercial Court of Tashkent, and later the Appellate Court, ruled that Romak’s application for recognition and enforcement of the GAFTA Award should be “*returned*” because it failed to meet the requirements of Articles IV(2)¹⁰⁹ and V(1)(b)¹¹⁰ of the New York Convention.¹¹¹
142. As to Article IV(2), Romak failed to produce a translation of the award in the Uzbek language, which is the official language of Uzbekistan. Uzbekistan clarifies that the Uzbek courts did not refuse the enforcement of the GAFTA Award, but merely “*returned*” the application for enforcement to Romak, allowing Romak to resubmit an application with an Uzbek translation, after it had failed to provide a translation within the three-day time limit granted by the Uzbek courts. As to Article V(1)(b), Uzbekistan claims that its courts complied with the New York Convention in requiring that Romak produce evidence that Uzdon has been notified of the appointment of arbitrators.
143. Finally, in Uzbekistan’s view, the argument that the Uzbek courts have expropriated Romak’s alleged investment must fail because Romak retains its right to seek enforcement of the GAFTA Award elsewhere. The Award therefore retains value. In addition, even if the award had been set aside by the Uzbek courts (which it was not) Romak would still be entitled to initiate another GAFTA arbitration.¹¹²

¹⁰⁸ SoD, ¶¶ 211 – 212.

¹⁰⁹ Article IV(2) of the New York Convention reads as follows: “*If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*”

¹¹⁰ Article V(1)(b) of the New York Convention reads as follows: “*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.*”

¹¹¹ SoD, ¶ 213.

¹¹² SoD, ¶¶ 225 – 230.

3. The Responsibility of the Republic of Uzbekistan for Acts Committed by Uzdon and Uzkhleboproduct

a. Romak's Position

144. Romak asserts that Uzkhleboproduct appoints Uzdon's General Director in accordance with Article 5.2 of Uzdon's Charter, and therefore controls Uzdon.¹¹³ Romak recalls that, pursuant to the Commission Agreement, Uzkhleboproduct and Uzdon agreed that the latter would enter into a supply contract with Romak within the framework of the Protocol of Intention. Romak also points out that Uzdon's Letter of Guarantee dated 10 July 1996 was signed by Uzdon's General Director and by Uzkhleboproduct's Director. Romak further emphasizes that Uzkhleboproduct has a public purpose, namely the setting up of a centralized system of payments for, and purchase of, grain and grain products. Uzkhleboproduct itself is accountable to the Council of Ministers, and a majority of its share capital was held by the State at the time the disputed facts occurred.¹¹⁴ Romak concludes that Uzkhleboproduct and the Council of Ministers were therefore informed of Romak's difficulties in receiving payment.
145. Romak contends that Uzdon and Uzkhleboproduct are State organs controlled by the Uzbek State within the meaning of Articles 4 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts. Romak submits that Uzdon and Uzkhleboproduct's internationally wrongful acts can therefore be imputed to the Republic of Uzbekistan.¹¹⁵
146. According to Romak, Uzdon's first violation is its failure to pay for Romak's delivery of 40,000 tons of wheat under the Romak Supply Agreement, although an arbitral tribunal upheld Romak's claim that it should be compensated for the delivery.¹¹⁶ Uzdon's second violation stems from its failure to open a letter of credit, as indicated in its letter dated 10 July 1996, in order to guarantee payment under the Romak Supply Agreement.¹¹⁷ Uzdon also failed to abide by the binding GAFTA Award by attempting,

¹¹³ SoC, ¶¶ 342 – 346.

¹¹⁴ SoC, ¶ 366.

¹¹⁵ SoC, ¶¶ 354 – 364.

¹¹⁶ SoC, ¶¶ 321 – 322.

¹¹⁷ SoC, ¶¶ 329 – 330.

inter alia, to invoke the absence of dates in the contract or the non-attribution of quotas for the year 1997 under the contract.¹¹⁸

147. Romak contends that these acts violated the obligation to observe investment-related commitments, enshrined in Article 11 of the BIT, as well as the guarantee of fair and equitable treatment and the prohibition against unjustified measures contemplated in Article 3, and constituted indirect expropriation, in violation of Article 5 of the BIT.¹¹⁹
148. Romak also highlights that Uzdon never received the funds that Uzkhleboproduct should have allocated to it pursuant to Article 5 of the Uzdon Resolution. In addition to failing to allocate the funds necessary to enable Uzdon to perform the contract, Romak further submits that Uzkhleboproduct failed to guarantee the performance of the Romak Supply Agreement. The existence of the guarantee mechanism, as well as Uzkhleboproduct's failure to comply with it, was expressly acknowledged by Uzdon in its letter to Romak dated 18 February 1997. Romak argues that these acts violated the guarantee of fair and equitable treatment under Article 3 of the BIT, and constitute indirect expropriation, in breach of Article 5 of the BIT.¹²⁰
149. Romak concludes that the Uzbek State, which through Uzkhleboproduct failed to provide Uzdon with the financial capacity necessary to fulfill its mission, acted in collusion with Uzdon and Uzkhleboproduct, allowing them to undermine Romak's contractual guarantees and, ultimately, to prevent the enforcement of the GAFTA Award. According to Romak, the Uzbek State is therefore responsible for breaches of Articles 3(2) and 11 of the BIT. Its acts also constituted indirect expropriation of Romak's contractual rights, including rights arising out of the GAFTA award.¹²¹

b. Uzbekistan's Position

150. Uzbekistan argues that Uzbekistan's treatment of Romak did not violate the standards of protection contained in the BIT. More importantly, Uzbekistan contends that Romak has simply presented contractual claims to this Tribunal, claims which are not cognizable as a matter of international law.¹²² Uzbekistan draws support from cases

¹¹⁸ SoC, ¶¶ 335 – 338.

¹¹⁹ SoC, ¶¶ 323 – 328.

¹²⁰ SoC, ¶¶ 347 – 353.

¹²¹ SoC, ¶¶ 363 – 364.

¹²² SoD, ¶¶ 158 – 163.

such as *Azinian v. Mexico*,¹²³ *ADF v. United States*,¹²⁴ and *Waste Management II*¹²⁵ to argue that a mere breach of contract or “*simple illegality or lack of authority under the domestic law of a State*” are allegations insufficient to support a finding of breach of an investment treaty.

151. Uzbekistan argues that Article 11 of the BIT does not automatically elevate contractual breaches to treaty breaches, and that no breaches of the Quadripartite Agreement or of the Sales Contract could constitute, standing alone, breaches of the BIT:¹²⁶

- Article 11 of the BIT only imposes a guarantee that Uzbekistan will ensure the observance of its commitments towards Swiss investments;
- The commitments to be guaranteed, according to Uzbekistan, are those found in the substantive provisions of the BIT, which do not include contractual obligations; and
- The very position of Article 11 within the text of the BIT – i.e., after the dispute resolution provisions – indicates that its purpose is merely to facilitate the enforcement of the provisions of the BIT.

152. Uzbekistan finds support for its position on Article 11 in *SGS v. Pakistan*,¹²⁷ in which the Tribunal examined the “umbrella” clause in another Swiss BIT which was nearly identical to the clause in the present case. The tribunal in *SGS* considered that “*the text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a state [...] are automatically ‘elevated’ to the level of breaches of international treaty law.*” Uzbekistan further points out that Romak would have to prove that, in agreeing to Article 11 into the BIT, the “*shared intent of the Contracting Parties*” to the BIT was indeed to elevate contract claims to treaty claims. Uzbekistan also relies on the *SGS v. Pakistan* Tribunal’s analysis of the consequences of a liberal interpretation of the umbrella clause, namely the incorporation by reference of an unlimited number of State contracts and other State commitments, the fact that other substantive provisions of the Treaty would become

¹²³ See, *supra* footnote 106.

¹²⁴ *ADF Group Corporation v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003.

¹²⁵ *Waste Management, Inc v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

¹²⁶ SoD, ¶¶ 166 – 171.

¹²⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, August 6, 2003.

superfluous, and the *de facto* nullification of freely negotiated dispute settlement clauses contained in the relevant State contracts.¹²⁸

153. Uzbekistan argues that a similar reasoning was followed by a number of other arbitral tribunals¹²⁹ that examined clauses with comparable wording. Invoking *Salini v. Jordan*,¹³⁰ in which the Tribunal refused to elevate contractual breaches to the level of treaty breaches, Uzbekistan concludes that Romak cannot argue that mere violations of the Quadripartite Agreement or the Romak Supply Agreement amount to breaches of the BIT.¹³¹
154. Uzbekistan considers Romak's presentation of case law in support of its umbrella clause arguments to be misleading, because the cases cited dealt with differently-worded provisions. Moreover, Uzbekistan emphasizes that the interpretation of the umbrella clause in *SGS v. Philippines*¹³² has been criticized by other tribunals on the ground that it would render investment treaties completely useless.¹³³
155. Uzbekistan argues that even if the Tribunal were to hold that Article 11 is an "umbrella" clause that automatically elevates contractual breaches to the international level, Romak cannot invoke Article 11, as it entered into contracts with three private companies (Odil, Uzkhleboproduct and Uzdon) and not with the Republic of Uzbekistan. Uzbekistan relies upon several arbitral decisions¹³⁴ to conclude that umbrella clauses cannot be invoked if either the claimant or the host State were not a party to the agreement allegedly breached.¹³⁵

¹²⁸ SoD, ¶¶ 173 – 175.

¹²⁹ See notably *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006; *Pan American Energy LLC & BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006; *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004; *Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

¹³⁰ *Salini Costruttori SpA v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004.

¹³¹ SoD, ¶¶ 177 – 181.

¹³² *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.

¹³³ SoD, ¶¶ 184 – 192.

¹³⁴ See, *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

¹³⁵ SoD, ¶¶ 194 – 198.

156. Lastly, Uzbekistan contends that Romak cannot argue that Uzdon’s conduct amounts to a breach of the BIT because “*actions of an instrumentality cannot constitute breaches of a BIT where domestic remedies are available.*”¹³⁶ According to Uzbekistan, Romak has not exhausted all available remedies before the Uzbek courts.¹³⁷

V. Analysis by the Arbitral Tribunal

157. At the time of organizing the proceedings and rendering Procedural Order No. 1, the Arbitral Tribunal, together with counsel for the Parties, decided to hear simultaneously the jurisdictional and merits issues raised in the present arbitration, without ordering the bifurcation of the proceedings.

158. This approach has permitted the Arbitral Tribunal to consider the entire scope of the Parties’ submissions, and to form a more accurate and comprehensive opinion on the issues to be adjudicated.

159. Romak initiated these proceedings in order to avail itself of the protection of the BIT. Romak invoked Article 9 of the BIT (see, *supra*, ¶ 72) as the basis for the jurisdiction of the Arbitral Tribunal. There is no dispute between the Parties that Article 9 contains Uzbekistan’s consent to arbitrate, or that Romak accepted this consent in its Notice of Arbitration.

160. Article 9 of the BIT provides the State’s consent to arbitration only for disputes “*with respect to investments between a Contracting Party and an investor of the other Contracting Party.*” Accordingly, in order to accept jurisdiction over the present dispute, the Arbitral Tribunal must be satisfied that Romak is an “investor” and that the dispute submitted to arbitration relates to an “investment” within the meaning of the BIT.

161. Uzbekistan does not contest that Romak qualifies as “*an investor of the other Contracting Party.*” No issue of jurisdiction *ratione personae* has been raised by Uzbekistan as regards the characterization of Romak as an investor. As regards Uzbekistan’s allegations concerning the attribution to Uzbekistan of the acts of Uzdon and Uzkhleboproduct (see, *supra*, ¶¶ 112 *et seq.*) – as well as those stating that “*Romak*

¹³⁶ Uzbekistan relies on *SGS Société Générale de Surveillance S.A. v. Philippines*, *supra*, footnote 132; *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award and Partial Dissenting Opinion, 3 February 2006; and *Salini Costruttori SpA v. Jordan*, see, *supra*, footnote 130.

¹³⁷ SoD, ¶¶ 199 – 202.

was not a victim of expropriation or inequitable proceedings” – while presented by Uzbekistan as arguments undermining the Arbitral Tribunal’s jurisdiction,¹³⁸ in fact pertain to the merits of the dispute and are therefore irrelevant for the purposes of deciding on the Tribunal’s jurisdiction. The BIT does not require that the acts of certain entities be first attributed to the State before jurisdiction can be established, and much less that an actual violation of the BIT be proved. Clearly, in such cases an arbitral tribunal may retain jurisdiction, if only to establish at a subsequent stage whether or not the acts complained of have been proved, constitute a violation of the BIT, or are attributable to the Contracting Party.

162. Accordingly, the jurisdiction of the Arbitral Tribunal *ratione personae* is not at issue in the present arbitration as regards the characterization of Romak as an investor.

163. Rather, the relevant jurisdictional objections raised by Uzbekistan all relate to jurisdiction *ratione materiae*. As noted above (see, *supra*, ¶¶ 94 to 124), Uzbekistan contends that Romak did not own an “investment” as required to establish jurisdiction under the BIT.

164. The Arbitral Tribunal will therefore first set out the legal rules relevant to its decision on issues of jurisdiction (A). It will then address the criteria to be applied for the purposes of determining whether an investment exists under the BIT (B) and will then consider whether Romak owns an “investment” under the BIT (C).

A. The Applicable Legal Rules

165. This Arbitral Tribunal has been constituted under the UNCITRAL Rules. The UNCITRAL Rules expressly grant the Arbitral Tribunal unfettered authority to decide on its own jurisdiction (see, Article 21.1 of the UNCITRAL Rules). With respect to applicable law, the UNCITRAL Rules merely state as follows:

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do

¹³⁸ OJ, ¶¶ 57-58 and 115-138.

so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

166. Both Parties have referred to the BIT (an instrument of international law) as the applicable law in the present arbitration. The BIT does not contain an express choice of law provision.

167. Romak has stated that “*only the requirements of the BIT and of the UNCITRAL Rules shall be applicable for the purposes of determining the scope of the jurisdiction of the Arbitral Tribunal.*”¹³⁹ Uzbekistan’s submission in this regard is that “*only the BIT and relevant international legal principles are applicable.*”¹⁴⁰ At the same time, concerning jurisdiction, the Parties advocate different interpretations of the terms of the BIT. Nevertheless, the Parties are in agreement that the resolution of the issue of jurisdiction requires the construction of the BIT, and both have invoked¹⁴¹ the Vienna Convention on the Law of Treaties (hereinafter, the “**Vienna Convention**”).¹⁴² Both Parties’ submissions have made abundant reference to legal doctrine and arbitration awards (primarily within the ICSID system).

168. Concerning previous decisions by other arbitral tribunals, Uzbekistan summarizes its position by stating that “*decisions of other investment arbitration tribunals interpreting the term ‘investment’ in the context of investment treaty arbitration are relevant in the interests of the development of consistent jurisprudence in this evolving body of public international law.*”¹⁴³ For its part, Romak considers, with particular reference to ICSID cases, that “*there is no legal basis imposing and justifying the application of ICSID jurisprudence, and more specifically the Salini jurisprudence, in the context of arbitral proceedings organized under the UNCITRAL Rules,*” and that “*it is therefore perfectly*

¹³⁹ DOJ, ¶ 105: “*seules les exigences du TBI et celles du règlement de la CNUDCI sont applicables pour déterminer l’étendue de la compétence du Tribunal arbitral.*”

¹⁴⁰ R-PHB1, ¶ 17.

¹⁴¹ OJ, ¶ 66 and DOJ, ¶ 116.

¹⁴² Vienna Convention on the Law of Treaties, signed on May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980).

¹⁴³ R-PHB2, ¶ 84.

open at law for the Arbitral Tribunal to choose, purely and simply, to ignore this jurisprudence.”¹⁴⁴

169. As regards the Vienna Convention, the Arbitral Tribunal notes that it only applies to treaties “*which are concluded by States after the entry into force of the present Convention with regard to such States.*”¹⁴⁵ The BIT was signed on April 16, 1993, and, whereas Switzerland acceded to the Vienna Convention on May 7, 1990, Uzbekistan did so only on July 12, 1995. However, the Vienna Convention’s non-retroactivity provision is “[w]ithout prejudice to the application of any rules set forth in [it] to which treaties would be subject under international law independently of the Convention.”¹⁴⁶ The Vienna Convention, and in particular its provisions on the interpretation of treaties, has been accepted by the International Court of Justice and by the international community as a codification of customary international law.¹⁴⁷ Accordingly, the Arbitral Tribunal is satisfied that the application of the Vienna Convention, as relied upon by the Parties, is appropriate in these proceedings and offers salient guidance as to the proper interpretation of the BIT.
170. With respect to arbitral awards, this Arbitral Tribunal considers that it is not bound to follow or to cite previous arbitral decisions as authority for its reasoning or conclusions. Even presuming that relevant principles could be distilled from prior arbitral awards (which has proven difficult with respect of many of the decisions cited by the Parties in these proceedings), they cannot be deemed to constitute the expression of a general consensus of the international community, and much less a formal source of international law. Arbitral awards remain mere sources of inspiration, comfort or reference to arbitrators.¹⁴⁸

¹⁴⁴ C-PHB1, ¶¶ 128 and 130: “*il n’existe aucun fondement légal imposant et justifiant l’application de la jurisprudence CIRDI et plus particulièrement la jurisprudence Salini dans le cadre d’une procédure arbitrale organisée selon les règles de la CNUDCI;*” “*le Tribunal Arbitral peut donc parfaitement choisir, en droit, d’ignorer purement et simplement cette jurisprudence.*”

¹⁴⁵ See, Vienna Convention, Article 4.

¹⁴⁶ See, *idem*.

¹⁴⁷ See, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment *I.C.J. Reports 1994*, pp. 21-22, ¶ 41; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment *I.C.J. Reports 1999*, p. 1059, ¶ 18.

¹⁴⁸ Other arbitral tribunals have arrived to a similar conclusion, see, *Bayindir Insaat Turizm Tecaret Ve Sanayi AS v Pakistan*, Decision on Jurisdiction, ICSID Case No ARB/03/29, 14 November 2005, ¶ 76 (“*The Tribunal agrees that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate*”); and *RosInvestCo UK Ltd v Russian Federation*, Jurisdiction Award, SCC Case No V079/2005, ¶ 49 (“*It is at all events plain that the decisions of other tribunals are not binding on this*

171. Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of “arbitral jurisprudence.” The Arbitral Tribunal’s mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general. It is 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.¹⁴⁹ This is not to say that the Arbitral Tribunal will simply ignore awards rendered by distinguished arbitrators. The Arbitral Tribunal may and will examine them, not for the purposes of extracting from them rules of law, but as a means to provide context to the Parties’ allegations and arguments, and as to explain succinctly the Arbitral Tribunal’s own reasoning.
172. Accordingly, in construing the BIT the Arbitral Tribunal will be guided primarily by the provisions of the Vienna Convention, and particularly by Articles 31 and 32:

ARTICLE 31 – GENERAL RULE OF INTERPRETATION

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

Tribunal [...]. This does not however preclude the Tribunal from considering other arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case”).

¹⁴⁹ As it has been put by one Arbitral Tribunal: “An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.

One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.” AES Corporation v. The Argentine Republic, Decision on Jurisdiction, ICSID Case No ARB/02/17, April 26, 2005, ¶¶ 30-31.

3. *There shall be taken into account, together with the context:*
- (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

ARTICLE 32 – SUPPLEMENTARY MEANS OF INTERPRETATION

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

- (a) *leaves the meaning ambiguous or obscure; or*
- (b) *leads to a result which is manifestly absurd or unreasonable.*

B. The Term “Investments” under the BIT

173. At issue in this case is the meaning of the term “investments” as it is used in the BIT, particularly in Articles 1 and 9 – the alleged basis for this Tribunal’s jurisdiction.

174. Article 1 (“Definitions”) of the BIT states:

“For the purpose of this Agreement:

...

- (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 kinds 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 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 in accordance with the law.”*

175. The Parties disagree as to the meaning and relevance of the enumeration found in Article 1(2) of the BIT. Both Parties agree that the list is not exhaustive – which is confirmed by a straightforward reading of the introductory expression “*and particularly.*” Uzbekistan argues that the “*term ‘include’ indicates that the ensuing enumeration is only part of the definition of the term investment,*” and that the enumeration “*can constitute part of an investment but is not sufficient on its own as a definition of an investment.*”¹⁵⁰ For its part, Romak contends that the expression “*every kind of asset*” is a broad one which, pursuant to its plain meaning, covers the rights underlying its claims. Specifically, Romak submits that it owned an investment under Article 1(2), letters (c) and (e).¹⁵¹
176. The Arbitral Tribunal is therefore required to interpret the term “investments” as found in Article 1(2) of the BIT. In order to do so, it shall resort to the “*ordinary meaning*” of the terms of the BIT “*in their context and in the light of its object and purpose.*”
177. The “*ordinary meaning*” of the term “investments” is the commitment of funds or other assets with the purpose to receive a profit, or “return,” from that commitment of capital.¹⁵² The term “asset” means property of any kind.¹⁵³
178. Romak alleges that the Arbitral Tribunal should simply confirm that the Claimant’s assets¹⁵⁴ fall within one or more of the categories listed in Article 1(2) of the BIT, thus sponsoring a construction of the BIT that puts special emphasis on the literal words in the list of Article 1(2).¹⁵⁵

¹⁵⁰ R-PHB1, ¶¶ 18-19.

¹⁵¹ DOJ, ¶¶ 123-128: “ROMAK a réalisé un investissement au sens de l’alinéa (c) dans la mesure où elle est titulaire d’un droit de créance monétaire et qu’elle est également titulaire d’un droit conféré en vertu des contrats et relations économiques développés avec des entités publiques Ouzbeks conformément à l’alinéa (e). En fin, la sentence GAFTA, elle-même constitue un investissement au regard des critères des alinéas (c) et (e), dans la mesure où son caractère bicéphale la rattache à la fois à la notion de titre de créance et à celle d’une décision de l’autorité en application de la loi” (¶ 128).

¹⁵² “**Investment.** (16c) **1.** An expenditure to acquire property or assets to produce revenue; a capital outlay. **2.** The asset acquired or the sum invested. **3.** Investiture. **4.** Livery of Saisin.” *Black’s Law Dictionary*. Ninth Edition. WEST.

¹⁵³ “**Asset.** (16c) **1.** An item that is owned and has value. **2.** (pl.) The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill. **3.** (pl.) All the property of a person (esp. a bankrupt or deceased person) available for paying debts or for distribution.” *Black’s Law Dictionary*. Ninth Edition. WEST.

¹⁵⁴ i.e., Romak’s claims and rights arising out of the wheat supply transaction and the GAFTA Award.

¹⁵⁵ DOJ, ¶¶ 121-128.

179. The Arbitral Tribunal disagrees with this approach.
180. First, the approach advanced by Romak deprives the term “investments” of any inherent meaning, which is contrary to the logic of Article 1(2) of the BIT. Indeed, as already mentioned, the categories of investments enumerated in Article 1(2) of the BIT are not exhaustive, and do not constitute an all-encompassing definition of “investment.” Both Parties agree that this is the case. Therefore, there may well exist categories different from those mentioned in the list which, nevertheless, could properly be considered investments protected under the BIT. Accordingly, there must be a benchmark against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an “investment” within the meaning of Article 1(2). The term “investment” has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT.
181. Second, such literal application of the terms of the BIT effectively ignores the second sentence of Article 31(1) of the Vienna Convention, which requires the interpreter to take into account, together with the “ordinary meaning” of the terms of the treaty, their context and the object and purpose of the treaty. The BIT’s object and purpose is reflected in its preamble, which declares that the Contracting Parties entered into the BIT “[r]ecognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States” and “[d]esiring to intensify economic cooperation to the mutual benefit of both States”.
182. Furthermore, and shedding more light on the “context” of the list contained in Article 1(2) of the BIT and on the “object and purpose” of the BIT, on the same day the BIT was signed, the Swiss Confederation and the Republic of Uzbekistan also entered into an Agreement on Trade and Economic Cooperation.¹⁵⁶ This treaty specifically regulates the two States’ mutual rights and obligations in relation to contracts for the sale of goods between parties established in the two States (see, particularly, Articles 1, 5.2 and 6). The Arbitral Tribunal is therefore persuaded that the Contracting Parties to the BIT adopted a distinction – also drawn in international practice – between trade and investment, and that a special and discrete treaty was concluded with respect to investment.

¹⁵⁶ *Accord de commerce et de coopération économique entre la Confédération suisse et la République d’Ouzbékistan*, signed on April 16, 1993 and in force since July 22, 1994 (Exhibit R-45).

183. The Arbitral Tribunal therefore considers that a construction based solely on the “ordinary meaning” of the terms of the list contained in Article 1(2) of the BIT, as advocated by Romak, is inconsistent with the given context and ignores the object and purpose of the BIT.
184. In addition, for a number of reasons the Arbitral Tribunal finds that a mechanical application of the categories listed in Article 1(2) of the BIT would produce “*a result which is manifestly absurd or unreasonable.*”¹⁵⁷ Such an outcome is contrary to Article 32(b) of the Vienna Convention.
185. First, said interpretation would eliminate any practical limitation to the scope of the concept of “investment.” In particular, it would render meaningless the distinction between investments, on the one hand, and purely commercial transactions, on the other. As the *Joy Mining* tribunal explained:

*...if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?*¹⁵⁸

186. Second, the mechanical application of the categories found in Article 1(2) would create, *de facto*, a new instance of review of State court decisions concerning the enforcement of arbitral awards. Under the scenario advocated by Romak, any award rendered in favor of a national of a Contracting Party (even one rendered in a purely commercial arbitration procedure) would be considered a “*claim to money*” or, arguably – as pleaded by Romak – a “*right given by decision of the authority.*” The refusal or failure of the host State’s courts to enforce such an award would therefore arguably provide

¹⁵⁷ Vienna Convention, Article 32(b).

¹⁵⁸ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶ 58. See, also *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award on Jurisdiction, July 11, 1997, ¶ 42.

sufficient grounds for a *de novo* review – under a different international instrument and on grounds different from those that would normally apply – of the State courts’ decision not to enforce an award.

187. Finally, the approach that Romak advances would mean that every contract entered into between a Swiss national and a State entity of Uzbekistan (regardless of the nature and object of the contract), as well as every award or judgment in favor of a Swiss national (irrespective of the nature of the underlying transaction), would constitute an investment under the BIT. This in turn would mean that, by entering into the BIT, Switzerland and Uzbekistan have renounced, in respect of every contract entered into with a national of the other Contracting Party, the application of domestic (or the chosen governing) law, and surrendered the jurisdiction of their own domestic courts (or the chosen dispute-resolution forum), even if the contract is a simple one-off sales transaction.
188. Based on the above considerations, Romak’s proposed literal construction of Article 1(2) of the BIT is untenable as a matter of international law. The Arbitral Tribunal must therefore explore the meaning of the word “investments” contained in the introductory paragraph of that Article. As stated above at paragraph 180, the categories enumerated in Article 1(2) are not exhaustive and are clearly intended as *illustrations*. Thus, for example, while many “claims to money” will qualify as “investments,” it does not follow that *all* such assets necessarily so qualify. The term “investments” has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored.
189. In construing the term “investments,” the Arbitral Tribunal will have due regard to the object and purpose of the BIT which, by referring to “*economic cooperation to the mutual benefit of both States*” and to the “*aim to foster the economic prosperity of both States*,” suggests an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions. However, it is also plain that the BIT’s stated object and purpose sheds little light on the meaning of the term “investments,” and “*leaves [it] ambiguous or obscure.*”

190. The Arbitral Tribunal must therefore determine the contours of the term “investments.” In this regard, legal doctrine, as well as the decisions of other arbitral tribunals, may be of assistance in illustrating the reasoning of the Arbitral Tribunal.¹⁵⁹
191. The notion of investment has become one of the most controversial issues in the context of the determination of jurisdiction in investment arbitration.¹⁶⁰
192. The Arbitral Tribunal is very much aware that it is not faced with the preoccupations of other tribunals acting within the framework of the ICSID Convention. These tribunals have deemed it necessary to define “investment” in light of the jurisdictional requirements imposed by Article 25(1) of the ICSID Convention – which, incidentally, does not contain a definition of the term “investment.”
193. However, the Arbitral Tribunal cannot ignore the fact that Article 9(3) of the BIT provides for the possibility to resort to ICSID Arbitration.¹⁶¹ Romak has suggested that the definition of the term “investment” may vary depending on the investor’s choice between UNCITRAL or ICSID Arbitration, and has suggested that the definition of “investment” in UNCITRAL proceedings (i.e., under the BIT alone) is wider than in ICSID Arbitration.¹⁶²
194. The Arbitral Tribunal does not share this view, which could lead to “unreasonable” results. This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both

¹⁵⁹ See, *supra*, footnotes 148 and 149.

¹⁶⁰ See, E. Gaillard, “Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice” in *International Investment Law for the 21st century Essays in Honour of Christoph Schreuer*, Oxford (2009), pp. 403-416; Y. Andreeva, “Salvaging or Sinking the Investment? MHS v. Malaysia Revisited”, *The Law and Practice of International Courts and Tribunals*, Volume 7, No. 2 (2008), p. 161; D. Krishan, “A Notion of ICSID Investment” in *Investment Treaty Arbitration: A Debate and Discussion* (T. Weiler ed.), (2008); S. Manciaux, “The Notion of Investment: New Controversies” in *Journal of World Investment & Trade* (2008), p. 443; D. Carreau, v. Investissements, Rép. Dr. int. Dalloz, Paris (August 2008); A. Rigo Sureda, “La Noción de Inversión Protegida” in *Arbitraje Internacional: Tensiones Actuales* (F. Mantilla-Serrano, coord.), Legis (2007), p. 3; I. Fadlallah, “La notion d’investissement: vers une restriction à la compétence du CIRDI?”, in *Liber Amicorum Robert Briner*, ICC Publishing (2005), p. 259 ; N. Rubins “The Notion of ‘Investment’ in International Investment Arbitration” in *Arbitrating Foreign Investment Disputes* (N. Horn, S. Kröll, eds.), Kluwer (2004), p. 283. See also the commentaries on *Czech Republic v. Pren Nreka*, *infra*, footnote 193.

¹⁶¹ Switzerland became a member of the ICSID Convention on June 14, 1968 and Uzbekistan on August 25, 1995.

¹⁶² C-PHB1, ¶138. See, espousing a similar approach, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, 8 September, 2006, ¶¶ 111 - 125.

absurd and unreasonable. Naturally, there are specific jurisdictional restrictions imposed by the ICSID Convention (for example, the limitation with respect to physical persons who are dual nationals, or to the existence of a “legal dispute”). However, said restrictions do not bear on the definition of “investment”. There is no dispute that the ICSID Convention’s drafters offered no definition for the term “investment.” There is no basis to suppose that this word had a different meaning in the context of the ICSID Convention than it bears in relation to the BIT. Indeed, the drafters appear to have excluded any specific definition from the ICSID Convention precisely to accord contracting parties a great deal of flexibility in their designation of transactions or disputes as investment-related in their instruments of consent.

195. On this basis, it would be unreasonable to conclude that the Contracting Parties contemplated a definition of the term “investments” which would effectively exclude recourse to the ICSID Convention and therefore render meaningless – or without *effet utile* – the provision granting the investor a choice between ICSID or UNCITRAL Arbitration. As already noted, this would run counter to the rule of construction requiring the interpreter to infer that a State party to two or more treaties which employ the same term in the same (or a similar) context intended to give said term the same (or at least a compatible) meaning in all the treaties.¹⁶³
196. In the realm of investment arbitration, ICSID Awards are by far the most numerous awards in the public domain.¹⁶⁴ As explained above, the Arbitral Tribunal considers that 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.
197. Two approaches can be identified in this regard.¹⁶⁵ Certain arbitral tribunals have taken a “conceptualist” approach and have considered that there exists a definition of investment that entails certain elements which must be present in order to assert jurisdiction *ratione materiae*. Other tribunals have resorted to a more “pragmatic”

¹⁶³ “It can hardly be supposed that Greece should at the same time have intended to give a scope to its reservation of ‘disputes relating to the territorial status of Greece’ which differed fundamentally from that given to it both in the General Act and in its declaration under the optional clause.” (Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, p. 3, ¶ 57).

¹⁶⁴ This is no doubt why both Romak and Uzbekistan have made multiple references to ICSID Arbitral Awards in their submissions.

¹⁶⁵ The doctrine has already attempted to establish categories on the approach to the notion of investment, see, *supra*, footnote 160.

approach which avoids any generalization, and considers the presence of certain elements typical of investments – even if they are not always present in every investment – to suffice for the purpose of establishing jurisdiction.

198. The *Salini* arbitral tribunal was among the first to attempt a definition of “investment” providing a list of the hallmarks of “investment.” Its conclusions, which were discussed at length by the Parties in the present proceedings and referred to by them as the “*Salini* test,” were expressed as follows:

The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transaction [citations omitted]. In reading the Convention’s Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

*In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.*¹⁶⁶

*Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with minimal length of time upheld by the doctrine, which is from 2 to 5 years [citations omitted].*¹⁶⁷

199. The pragmatic approach to identifying the existence of an investment was described by another arbitral tribunal as follows:

*This statement also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that ‘the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein’. This language permits an inference 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.*¹⁶⁸

Finally, applying the definition of an investment proffered by the Slovak Republic (para. 78, supra), it would seem that the resources provided

¹⁶⁶ *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, supra*, footnote 66, ¶ 52.

¹⁶⁷ *Idem*, ¶ 54.

¹⁶⁸ *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶ 64.

*through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.*¹⁶⁹

200. This latter approach has been followed by several tribunals, which have expressly or impliedly criticized the strict application of the “*Salini test*.”¹⁷⁰
201. Other tribunals have espoused the “conceptualist” approach in *Salini*, but have nevertheless refused to endorse all of the constitutive elements invoked in that award.¹⁷¹
202. In particular, the tribunals in *LESI-Dipenta v. Algeria* and *Pey Casado v. Chile* revisited *Salini* in the following terms:

[...] it seems that, in conformity with the objectives of the Convention, for a contract to be deemed an investment it must fulfill the following three conditions;

a) the contracting party has made a contribution in the country in question,

b) this contribution must extend over a certain period of time, and

c) it must entail some risk for the contracting party.

However, it does not seem necessary to establish that the contract addresses economic development of the country, a condition that is in any

¹⁶⁹ *Idem* at ¶ 90.

¹⁷⁰ *MCI Power Group, LC and New Turbine, Inc v. Ecuador*, ICSID Case No. ARB/03/6, Award of July 31, 2007, ¶ 165; *CMS Gas Transmission Company v. Argentine*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, September 25, 2007, ¶ 71; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008, ¶ 312-317; *Malaysian Historical Salvors SDN v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision of the ad hoc Committee on the Application for Annulment, April 16, 2009, ¶ 78-79 (citing *Biwater v. Tanzania*).

¹⁷¹ *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award of January 10, 2005, ¶ 13(iv); *LESI, SpA and Astaldi, SpA v People's Democratic Republic of Algeria*, Award on Jurisdiction of July 12 2006, ICSID Case No. ARB/05/3, ¶ 72(iv); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID CaseNo. ARB/03/29, Award on Jurisdiction of November 14, 2005, ¶ 130; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No.ARB/04/13, Award on Jurisdiction of June 16, 2006, ¶ 91; *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 99; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award on Jurisdiction of July 6, 2007, ¶ 116.

case difficult to establish and is implicitly covered by the three conditions adopted herein.¹⁷²

203. This was also the view of the *Pey Casado* tribunal:

*This Tribunal considers that a definition of investment does exist within the meaning of the ICSID Convention and that it does not suffice to note the existence of certain ‘characteristics’ which are typical of an investment to satisfy this objective requirement of the Centre’s jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning, something that would be incompatible with the obligation to interpret the terms of the Convention in accordance with the effet utile principle, as was rightly stated by the award rendered in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case on August 6, 2004. According to the Tribunal, this definition, by contrast, only includes three elements. The requirement of a contribution to the development of the host State, which is difficult to establish, appears to allude to the merits of the dispute rather than to the Centre’s jurisdiction. An investment may or may not prove to be useful to the host State without losing its status as such. It is true that the preamble of the ICSID Convention makes reference to the contribution to the economic development of the host State. This reference is nevertheless presented as a consequence, and not a condition, of the investment: by protecting investments, the Convention foments the development of the host State. That does not mean that the development of the host State is a constitutive element of the notion of investment. This is why, as has been pointed out by certain arbitral tribunals, this fourth condition is in reality covered by the first three.¹⁷³*

204. The approach of the *Lesi-Dipenta* and *Pey Casado* tribunals is reminiscent of an earlier and more general doctrinal analysis of the term “investment.”¹⁷⁴

205. There is some debate as to whether, from a purely subjective perspective – and by analogy to the freedom of contract normally enjoyed by private parties – an investment will consist of whatever the contracting States have decided to label as such in the treaty they have concluded.¹⁷⁵ Operating under the UNCITRAL Rules, this Arbitral

¹⁷² *Consortium Groupement LESI-Dipenta v. People’s Democratic Republic of Algeria*, see *supra*, note 171, ¶ 13(iv).

¹⁷³ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of May 8, 2008, ¶ 232.

¹⁷⁴ See, D. Carreau, T. Flory and P. Juillard, *Droit International Economique*, LGDJ (3rd ed. 1990), ¶ 940. The 2007 edition (Daloz) of this treatise has been revised and no longer contains this paragraph; E. Gaillard, *CIRDI – Chronique des sentences arbitrales*, JDI (1999), p. 273, particularly pp. 291 - 293.

¹⁷⁵ An illustration of this debate is found in: *CSOB v. the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶¶ 66-68; *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 52.;

Tribunal does not need to engage in a discussion of the interplay of the ICSID Convention and the instrument providing consent to arbitration. However, we are of the view that contracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a “pure” one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term “investment.” However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term “investment” an extraordinary and counterintuitive meaning. As explained above, the wording of the BIT does not permit the Arbitral Tribunal to infer such an intent in the present case.

206. The point of departure for the Arbitral Tribunal remains the ordinary meaning of the term “investment” (see, *supra*, ¶ 177), which entails expenditure or contribution, as well as the purpose of obtaining an economic benefit the existence and extent of which is, by definition, uncertain. However, as stated above (see, *supra*, ¶¶ 181, 188 and 189), the Arbitral Tribunal needs to construe the term “investments” in its context and in light of the object and purpose of the BIT. In this regard, the Arbitral Tribunal attaches importance to the BIT’s preamble (see, *supra*, ¶¶ 181 and 189), and also to the definition of the term “returns” (Article 1(3)), the repeated references to “territory”¹⁷⁶ in relation with the investment (particularly at Article 2), and the description of the protection offered at Article 3(1), all of which denote an economic activity involving some permanence or duration in relation to the host State.
207. The Arbitral Tribunal therefore considers that 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. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals (see, *supra*, ¶¶ 198 - 204) which consistently incorporates contribution, duration and risk as hallmarks of an “investment.” By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of “investment,” the fact that it falls within one of the categories listed in

¹⁷⁶ With respect to the references to “territory” in the BIT, Uzbekistan developed at the Hearing an argument in relation to investments under the BIT requiring an economic activity within the boundaries of the State. The Arbitral Tribunal will deal with this argument under “Additional Considerations” at page 59 of the award.

Article 1 does not transform it into an “investment.” In the general formulation of the tribunal in *Azinian*, “labeling... is no substitute for analysis.”¹⁷⁷

208. It is on the basis of the plain meaning of the term “investment” that the Arbitral Tribunal will now consider whether Romak owns an investment under the BIT.

C. The existence of an “investment” under the BIT

209. Romak has characterized its investment in Uzbekistan in the following terms:

*ROMAK has made an investment within the meaning of paragraph (c) to the extent that it holds a right to money, and also holds a right conferred by virtue of contracts and economic relations entered into with Uzbek public entities, in accordance with paragraph (e). Finally, the GAFTA Award itself constitutes an investment pursuant to the requirements of paragraphs (c) and (e), to the extent that its bicephalous nature simultaneously links it to the notion of a right to money, and that of a decision of the authority in accordance with the law.*¹⁷⁸

210. The Arbitral Tribunal need not rule in abstract whether an arbitral award in itself can be considered an investment under the BIT, a matter which should be analyzed in light of the meaning of the term “investment” as it has been determined by this Arbitral Tribunal (see, *supra*, at ¶¶ 206 and 207), and which is necessarily dependent on the specific facts of the case.

211. On the basis of the allegations made and the evidence produced by the Parties in the present arbitration, the Arbitral Tribunal has come to the conclusion that the GAFTA Award is so inextricably linked to the Romak Supply Agreement that any determination as to whether Romak holds an investment under the BIT cannot be made without reference to the entire economic transaction that is the subject of these arbitral proceedings.¹⁷⁹ The GAFTA Award merely constitutes the embodiment of Romak’s contractual rights (as determined by the GAFTA Arbitral Tribunal) stemming from the

¹⁷⁷ *Azinian v. United Mexican States*, *supra*, footnote 106, ¶ 90.

¹⁷⁸ See, DOJ, ¶ 128: “ROMAK a réalisé un investissement au sens de l’alinéa (c) dans la mesure où elle est titulaire d’un droit de créance monétaire et qu’elle est également titulaire d’un droit conféré en vertu des contrats et relations économiques développés avec des entités publiques Ouzbeks conformément à l’alinéa (e). En fin, la sentence GAFTA, elle-même constitue un investissement au regard des critères des alinéas (c) et (e), dans la mesure où son caractère bicéphale la rattache à la fois à la notion de titre de créance et à celle d’une décision de l’autorité en application de la loi.”

¹⁷⁹ *Holiday Inns v. Morocco*, Decision of jurisdiction of 12 May 1974, reported in Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, *British Yearbook of International Law* 1980, p. 159.

wheat supply transaction entered into by Romak.¹⁸⁰ If the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment.

212. The Arbitral Tribunal will therefore address the issue of whether what Romak refers to as “*contracts and economic relations entered into with Uzbek public entities*” constitute an investment under the BIT; that is, whether they involved a contribution that extended over a certain period of time and entailed some risk.

1. Contribution

213. The Parties have addressed the notion of “contribution” under the heading “*regularity of profits and return.*”¹⁸¹

214. The Arbitral Tribunal interprets the term “contribution” in broad terms. Any dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance, can be a “contribution.” In other words, a “contribution” can be made in cash, kind or labor.

215. As alleged by Romak, its expenditure encompassed, on the one hand, the performance of the Romak Supply Contract (which involved the transfer of title over 40,581.58 tons of milling wheat) and, on the other, the performance of Romak’s obligations under the Protocol of Intention (see, *supra*, at ¶¶ 12-40) which, in the words of Romak, “*institutes true cooperation between the OUZKHLEBOPRODUCT State Group and ROMAK.*”¹⁸² With respect to the supply of wheat itself, this can hardly be considered a contribution, given that immediate payment at a market rate was envisaged under the Romak Supply Contract.

¹⁸⁰ Directly on point in this regard was the decision of the tribunal in *Saipem v. Bangladesh*, which was faced with an ICC Award rendered on the basis of a rather traditional investment contract: “*the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.*” *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, ¶ 127.

¹⁸¹ See, OJ, ¶¶ 84-87; DOJ, ¶¶ 230-234; RDOJ, ¶¶ 230-234.

¹⁸² See, C-PHB1, ¶168: “*institue une véritable coopération entre le Groupement d’Etat OUZKHLEBOPRODUCT et ROMAK.*”

216. As a result, the Protocol of Intention (Exhibit C-13) takes on particular importance. The Arbitral Tribunal considers it appropriate to reproduce the full text of this one-page document:

*Protocol of Intention
on mutual cooperation between Romak S.A., Geneva and
the State Joint-Stock Corporation "Uzkhleboproduct"*

*"Considering establishing of friendly relations between SJSC
"Uzkhleboproduct" and Messrs. Romak S.A., Geneva and for the purpose
of long-term and mutually profitable cooperation the parties have signed
the present protocol on following:*

*Messrs. Romak S.A., Geneva, will be assisting Corporation
"Uzkhleboproduct" in studies of cereals markets, outlooks and forecasts
of grain world stocks, as well as of some of the CIS. countries, will be
preparing and presenting to corporation as per their request operative
information on the formation of exchange prices, recommendations as
well as any other information regarding grain imports possibilities with
the consideration of the optimal transportation routes to the Uzbek
border, regulations on the insurance of goods as well as inspecting of
cereals.*

*While planning and distributing grain import volumes for 1996-1997,
as well as export quotas to be allocated for coming imports of necessary
grain products The state Joint-Stock Corporation "Uzkhleboproduct" will
be giving Romak S.A., Geneva, its preference and presenting appropriate
bids.*

*The parties have agreed to organise meetings in form of seminars in
order to discuss the current matters and exchange experience in the field
of grain markets and international trade at least twine an year.*

Place and date of signing: Tashkent, 10th of July 1996.

SJSC "Uzkhleboproduct"

Romak S.A., Geneva

Sh. Makhamadjanov

Dan Pletscher

FTC "UZDON"

B. Kadyrov [sic]

217. Mindful of the importance that Romak has attached to the Protocol of Intention, at the close of the oral hearings the Arbitral Tribunal expressly invited the Parties to inform the Tribunal of any steps taken to perform the obligations reflected in that Protocol.

218. Romak has alleged that, in furtherance of the Protocol: (i) Mr. Dan Pletcher (Romak’s director) established residence in Tashkent (Uzbekistan), and that (ii) the Romak Supply Contract was entered into. For its part, Uzbekistan insists that the Protocol of Intention was never performed.
219. The Arbitral Tribunal notes that the Protocol of Intention in essence envisages that: (i) Romak will provide technical and marketing assistance, (ii) Uzkhleboproduct will give preference to Romak when presenting bids for the future supply of “*grain products*,” and (iii) the Parties will meet twice a year to “*discuss the current matters and exchange experiences*.” The Protocol creates no binding obligation for the Uzbek parties to enter into future contracts with Romak, whether for the supply of wheat or otherwise.
220. No evidence has been submitted that substantiates the performance of any of the undertakings contained in the Protocol of Intention. As regards Mr. Pletcher, no evidence has been submitted corroborating either his stay in Tashkent, or any expenses incurred in connection with his presence there. In fact, as Uzbekistan has pointed out,¹⁸³ during the relevant years (1996-1997), correspondence with Mr. Pletcher was addressed solely to his office in Geneva. It is apparent that the Romak Supply Agreement itself was entered into in furtherance of the Quadripartite Agreement, and not as a result of a “bid” envisaged in the Protocol of Intention (see, *supra*, at ¶¶ 32-33).
221. The Arbitral Tribunal finds that Romak made no contribution in furtherance of the Protocol of Intention, which – as its title suggests – seems never to have evolved from the status of a mere statement of aspiration, and was never acted upon by the Parties.
222. The only possible contribution established in the evidentiary record is the actual transfer of title over the 40,581.58 tons of wheat, the delivery of which has never been contested. However, as noted above, there is a difference between a contribution in kind and a mere transfer of title over goods in exchange for full payment. Romak’s delivery of wheat was a transfer of title in performance of a sale of goods contract. Romak did not deliver the wheat as contribution in kind in furtherance of a venture. Accordingly, the Arbitral Tribunal does not consider that Romak made a contribution in relation to the transaction in question.

¹⁸³ See, R-PHB2, ¶104.

2. Duration

223. Romak has alleged that “*the supply agreement entered into by ROMAK was duly performed, and it solely consisted of a first order,*” and – with reference to the Protocol of Intention – that “*it would seem that the commercial relationship was intended to last for several years, with ROMAK enjoying a preferential right with regard to future grain imports.*”¹⁸⁴
224. The Arbitral Tribunal has found that the Protocol of Intention was never implemented, and that no expenditure was incurred in connection with it. The only potentially relevant event that has been borne out by the evidence is the delivery of wheat, which took place between July and November 1996.¹⁸⁵
225. The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of “investment” status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.
226. In the instant case, Romak’s wheat deliveries spanned a five-month period. Romak made no deliveries, whether under the Romak Supply Agreement or otherwise, before July 1996 or after November 1996. Indeed, Romak had no history of a prior, let alone continuing, economic relationship with Uzbekistan. The evidence in the record of this arbitration indicates that the supply of up to 50,000 tons of wheat was Romak’s first and last economic transaction in relation to Uzbekistan. Moreover, the five-month span simply reflects the timeframe agreed under the Romak Supply Agreement for the sale of up to 50,000 tons of wheat.
227. In light of the facts before it, the Arbitral Tribunal considers that the duration of Romak’s wheat deliveries does not reflect a commitment on the part of Romak beyond a one-off transaction, and is not of the sort normally associated with “investments” according to the common understanding of the term.

¹⁸⁴ See, DOJ, ¶236: “*l’accord d’approvisionnement conclu par ROMAK s’est exécuté dans le temps et il s’agissait seulement d’une première commande;*” “*il apparaît que les relations commerciales étaient vouées à durer plusieurs années, ROMAK bénéficiant d’un droit de préférence dans l’importation de grain pour le futur....*”

¹⁸⁵ See, Exhibit C-19.

3. Assumption of Risk

228. Romak considers that by accepting to engage in a contractual relationship with “*public entities of a state in relation to which international observers have alerted foreign investors to the absence of true financial security,*” Romak assumed a risk that ultimately materialized, and was fatal to its investment.¹⁸⁶
229. All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.
230. An “investment risk” entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.
231. It is clear from the evidence in the record of this arbitration that, at the time it entered into the wheat supply transaction, Romak knew that its exposure was limited to the value of the wheat to be delivered. Indeed, Romak sought to avoid even this risk by providing, in the Romak Supply Agreement, for payment by means of a “*letter of guarantee*” or “*letter of credit.*”¹⁸⁷ The risk assumed by Romak was therefore circumscribed to the possible non-payment of the wheat delivery, which is the ordinary commercial or business risk assumed by all those who enter into a contractual relationship.
232. On this basis, the Arbitral Tribunal considers that Romak’s economic activity did not involve the risk normally associated with an investment.

D. Additional considerations

233. Uzbekistan has also raised the issue of “territoriality” as a bar to this Tribunal’s jurisdiction. The Arbitral Tribunal, with the agreement of the Parties, granted the

¹⁸⁶ See, DOJ, ¶ 238: “*entités publiques d’un état pour lequel les observateurs internationaux ont pu alerter les investisseurs étrangers sur l’absence de véritable sécurité financière,*”

¹⁸⁷ See, Article 6, Exhibit C-14.

Parties the opportunity to develop further their arguments on this issue in post-hearing briefs.

234. Uzbekistan submits that, in order for an asset to be protected as an investment by the BIT, it must be located within the territory of Uzbekistan.¹⁸⁸ Uzbekistan emphasizes that Romak delivered the wheat not in Uzbekistan, but at Chengeldy,¹⁸⁹ a railway station located in Kazakhstan. The price was agreed in accordance with Incoterms to be CIP (Carriage and Insurance Paid) to Chengeldy.¹⁹⁰
235. Romak argues that the BIT does not require that the economic activity take place physically within the boundaries of Uzbekistan in order to be considered an “investment.” Romak further contends that, even if the BIT did contain a “territoriality” requirement, that requirement ought to be construed in a very flexible manner, and should be satisfied where the investment contributes to the prosperity of the host State.¹⁹¹ Romak contends that such requirement has been fulfilled in the instant case.
236. In light of the evidence in the record, the Arbitral Tribunal has no doubt that the delivery of the wheat supplied by Romak took place outside Uzbekistan. Further, the Arbitral Tribunal has no doubt that Romak and the Uzbek parties involved knew that the final destination of the wheat was Uzbekistan.
237. Although the BIT contains numerous references to the “territory” of the Contracting States, the Arbitral Tribunal notes that Article 1(2) of the BIT, which defines the term “investments,” does not. The Arbitral Tribunal can identify no treaty provision requiring that the investor’s contribution physically take place within the boundaries of the host State to trigger substantive protection. Uzbekistan relies particularly on the Preamble of the BIT, which refers to the intention of the Contracting Parties “*to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party*”. However, the Preamble does not impose any independent requirement for purposes of establishing the existence of an

¹⁸⁸ See, R-PHB1, ¶¶ 66-82; R-PHB2, ¶¶ 42-68.

¹⁸⁹ See, Exhibit C-14, Article 5.1: “5.1 USD235,-- (TWOHUNDREDTHIRTYFIVE) PER METRICTON C.I.P. (CARRIAGE AND INSUARANCE PAID TO) KAZAK-UZBEK BORDER STATION CHENGELDY. THIS PRICE IS BASED ON RAILWAY RATES IN FORCE DURING JUNE 1996. IN CASE OF ANY INCREASE NEW RATES THE UNIT PRICE TO BE INCREASED ACCORDINGLY WITHIN THE EXISTING VALUE OF THE BANK GUARANTEE(S)/ LETTER OF CREDIT(S).” [sic]

¹⁹⁰ Idem, Article 10.3: “10.3 INTERPRETATION OF TRADING TERMS AS PER INCONTERMS”. [sic]

¹⁹¹ See, C-PHB1, ¶¶ 82-110; C-PHB2, ¶¶ 5-14.

“investment.” The Tribunal considers that, unless contracting States have made “territoriality” an express pre-requisite for treaty coverage (which is not the case in the BIT), references to “territory” normally refer to the benefit that the host State expects to derive from the investment.¹⁹² As already stated, in construing the term “investment” the Arbitral Tribunal has taken the Preamble of the BIT into consideration and concluded that, pursuant to the BIT, an “investment” requires a contribution that extends over a certain period of time and entails some risk. It is in light of these three elements (contribution, duration and risk) that the BIT’s reference to “territory” – which involves a benefit to the host State – has been analyzed.

238. The Parties have also engaged in a debate regarding the “territoriality” of the GAFTA Award. The Arbitral Tribunal has already stated that the wheat supply transaction and the GAFTA Award are inextricably linked, and cannot be dissociated when determining whether Romak owned a protected investment (see, *supra*, at ¶ 211). There is therefore no need to analyze the GAFTA Award separately.

239. Finally, Romak has invoked two French decisions by the Paris *Cour d’Appel*¹⁹³ in support of its argument that the “territoriality” requirement should not be “imposed” on Romak. The Arbitral Tribunal fails to see the relevance of these decisions to the issue of “territoriality”. It appears that Romak relies in these decisions in order to advocate an all-encompassing and broad notion of “investment” within the meaning of the BIT.

240. The Arbitral Tribunal notes that the decision of December 8, 2008, rendered in connection with the *saisi conservatoire* obtained by Romak (see, *supra*, ¶ 70), refers to the BIT. However, the Paris *Cour d’Appel*’s decision is limited to a *prima facie* analysis of matters relevant to the review of the interim measures that had been granted by the Paris *Tribunal de Grande Instance* in application of French Law. It is therefore irrelevant to the issue of the present Arbitral Tribunal’s jurisdiction to adjudicate on this dispute.

¹⁹² Some arbitral tribunals have come to a similar conclusion even where the applicable treaty includes a territorial element within the definition of investment. See, *LESI-Dipenta v. Algeria*, ¶ 14(i) (and in the same terms *LESI, SpA and Astaldi, SpA v Algeria*, ¶ 73(i)), *supra*, note 171; *Pey Casado*, ¶¶ 374-375, *supra*, note 173; *Fedax*, ¶ 41, *supra*, note 158; and *CSOB*, ¶¶ 76-78, *supra*, note 168.

¹⁹³ Decision of the Paris *Cour d’Appel* (1st Section C) of September 25, 2008 (Exhibit C-216); Decision of the Paris *Cour d’Appel* (8th Section B) of December 4, 2008 (Exhibit C-217). See also the commentaries on the September 25, 2008 decision by P. Duprey in *Journal of International Arbitration* 26(4), 2009, p. 591; I. Fadlallah in *Revue de l’Arbitrage* No. 2, 2009, p. 337; and E. Silva Romero in *Spain Arbitration Review*, No. 6, 2009.

241. The decision of September 25, 2008 (which is unrelated to this dispute) dismissed a recourse seeking to set aside an arbitral award. There, the Paris *Cour d'Appel* stated that, with respect to jurisdiction, the “*only test consists in determining whether the underlying transaction falls within the framework of the treaty.*” This is exactly what the Arbitral Tribunal has done in the present Award. As explained above (see, *supra*, ¶¶ 173-208), the Arbitral Tribunal has discharged its mission to construe the agreement to arbitrate invoked by the Claimant and contained in the BIT, and has done so in application of public international law rules as embodied in the Vienna Convention – an instrument relied upon both by Romak and Uzbekistan. The Tribunal has therefore addressed and answered the question raised by the Parties, namely whether the claim brought by Romak falls within the jurisdiction of the Arbitral Tribunal as determined by the BIT.

E. Conclusion

242. In summary, Romak did not own an “investment” within the meaning of Article 1 of the BIT. Romak’s rights were embodied in and arise out of a sales contract, a one-off commercial transaction pursuant to which Romak undertook to deliver wheat against a price to be paid by the Uzbek parties.

243. In the absence of any investment underlying the dispute, Uzbekistan has not consented to arbitrate this dispute in accordance with Article 9 of the BIT, and the Arbitral Tribunal does not have jurisdiction in the present matter.

VI. Costs

244. The BIT is silent with respect to the allocation of the arbitration costs and the costs of legal representation of the Parties.

245. In the UNCITRAL Arbitration Rules, which are applicable in the present case, provisions on costs are contained in Articles 38 to 40. These Articles provide:

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*
- (b) The travel and other expenses incurred by the arbitrators;*

...

- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; ...*

Article 39

- 1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.*

...

Article 40

- 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
- 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs between the parties if it determines that apportionment is reasonable.*

...

246. The Arbitral Tribunal has fixed the costs of the arbitration in the amount of € 293,462.27 (including VAT). Said amount includes both arbitrators' fees and the expenses of the Arbitral Tribunal, as follows:

- Noah Rubins: € 32,549.28.
- Nicolas Molfessis: € 75,598.96.
- Fernando Mantilla-Serrano: € 162,203.91.
- Expenses of the Arbitral Tribunal: € 7,915.02.
- Fees and expense of the PCA acting as registrar: € 15,195.10.

247. The Parties have contributed in equal shares to the advance on costs.

248. When deciding how the arbitral costs should be apportioned between the Parties, the Arbitral Tribunal notes its discretion to allocate costs and expenses in accordance with the UNCITRAL Rules, a discretion that is complete with respect to the cost of legal

representation of the Parties. In determining the proper allocation of costs, the Arbitral Tribunal has considered all of the circumstances of the case at hand.

249. Firstly, it should be noted that the Respondent has prevailed entirely as a matter of jurisdiction. The question is whether, as a consequence, the Claimant should bear more than half of the arbitration costs and/or pay the Respondent's legal fees and expenses.
250. The Arbitral Tribunal has reviewed a number of arbitral awards in investment treaty disputes. These awards indicate that, in this field, a general trend has developed that arbitration costs should be equally apportioned between the Parties, irrespective of the outcome of the dispute. One of the reasons for this, as stated in several awards, is that investment treaty tribunals are called upon to apply a novel mechanism and substantive law to the resolution of these disputes (see, for example, *Azinian v. Mexico*,¹⁹⁴ *Tradex v. Albania*,¹⁹⁵ and *Berschader v. Russia*¹⁹⁶). Thus, the initiation of a claim that is ultimately unsuccessful is more understandable than would be the case in commercial arbitration, where municipal law applies. With respect to the present dispute, to the Tribunal's knowledge, there has never been an investment treaty claim decided outside the ICSID system in relation to the enforcement of an arbitral award. Other cases, such as *Saipem*, share similar factual elements with the present dispute, but offered no direct analogy.
251. Clearly, the general practice in investment treaty arbitration disfavoring the shifting of arbitration costs against the losing party does not always apply. In particular, deficiencies in the presentation of a case or obstructive behaviour, which lead to an unjustified increase of the costs of the proceedings, not infrequently justify apportioning the arbitration costs in another way.
252. In the present case, neither of the Parties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both Parties worked ably, diligently and efficiently in defense of their clients' respective interests. Nor are there any other reasons that support such apportionment. Each of the Parties shall therefore be liable to pay half of the arbitration costs. Each Party shall also bear its own

¹⁹⁴ *Azinian and others v. United Mexican States*, *supra*, footnote 106.

¹⁹⁵ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999.

¹⁹⁶ *Vladimir Berschader and Moise Berschader v. Russian Federation*, The Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2004, Award of 21 April 2006.

costs for legal representation and other costs incurred in connection with presenting its case.

VII. Decision

The Arbitral Tribunal, for the reasons stated above:

- 1) DISMISSES Romak's claims for lack of jurisdiction; and
- 2) ORDERS that the Parties shall bear the arbitration costs of € 293,462.27 in equal shares, to be satisfied out of the advance on costs already paid by the Parties. Each Party shall bear its own costs for legal representation and assistance.

Issued in Paris, France.

Date: November 26, 2009.

Noah Rubins
Co-arbitrator

Nicolas Molfessis
Co-arbitrator

Fernando Mantilla-Serrano
Chairman