A New Step Towards a Single and Common Definition of an Investment? – Comments on the Romak versus Uzbekistan Decision

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The 2009 award rendered in the case opposing Romak S.A. to the Republic of Uzbekistan seems to be an important step towards the development of a single and common definition of the term “investment” in the context of investment arbitration.

The case concerned the Swiss trading company Romak, which was never paid for deliveries of wheat to Uzkhleboproduct, Uzbek’s principal State institution with responsibility for cereal production, supply and distribution. The Swiss company launched an investment arbitration against the Republic of Uzbekistan on the basis of the Agreement concluded between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and the Reciprocal Protection of Investments (the “Swiss-Uzbek BIT”) concluded in 1993, alleging that its contract amounted to an investment under the terms of this agreement.

This award is of interest in a number of respects. First of all, the arbitral tribunal had to determine whether wheat deliveries could constitute an “investment” under that BIT. Considering the “one-off” nature of sales of goods, it would seem difficult to consider that deliveries of wheat hardly qualify as an “investment”. However, in this case the Tribunal had to deal with a BIT, which defined an “investment” in the broadest terms possible by including in the definition “any kind of assets”, notably “claims to money or to any performance having an economic value”. The main stake was thus to determine the contours of the term “investments” in the context of that BIT. One could have reasonably expected that the tribunal would have relied only on the BIT to identify the existence of an “investment”, and thus set aside the approaches concerning the controversial definition of an investment developed in the framework of ICSID arbitration.

Rather, the arbitral tribunal seems to have adopted a surprising solution: although it has clearly recalled that it was definitively not linked by previous arbitral decisions, it nevertheless relied extensively on prior ICSID cases to draw the “contours of the term investment” and came to the conclusion that the term “investment” under a BIT

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“has an intrinsic meaning entailing a contribution that extends over a certain period of time and that involves some risk”.4

This finding begs the question whether the language defining an investment in individual BIT has any inherent importance. The definition of “investment” under the Swiss-Uzbek BIT was very broad but fairly standard. One may therefore expect that the Romak definition of what constitutes “the intrinsic meaning” of an investment may be extended to other BITS that define “investment” similarly. Does this “intrinsic meaning” limit the right of states to define broadly the category of investments that may be the subject of arbitration between one contracting State and an investor of the other?

Finally, it must be kept in mind that the present UNCITRAL arbitration arose out of the non-enforcement in Kazakhstan of a Grain and Feed Trade Association (“GAFTA”) award rendered in London in 1997. The Swiss company alleged that a commercial transaction amounted to an investment and that the refusal to enforce the GAFTA award was tantamount to a breach of the Swiss-Uzbek BIT. As a consequence, the ad hoc tribunal was confronted with the question as to whether investment tribunals may serve to review or enforce commercial awards. At stake was therefore the possible but unwanted creation of a review process for international commercial arbitral awards.

The Romak decision is undoubtedly an important contribution to investment treaty arbitration. This decision not only puts an end to the “Romak saga” (I), but sheds light on the difficulties of defining the notion of an “investment” within the context of investment protection treaties. The Romak tribunal suggests that a single and common definition of the term investment can be drawn on the basis of the “inherent meaning” of the term (II). However, one can wonder whether this attempt to formulate a kind of universal definition of an “investment” does not raise questions concerning the freedom of contracting States to BITS to determine the scope of investments, and the possibility to qualify sales contracts as investments (III).

I. THE ROMAK SAGA

1. SUMMARY OF THE FACTS

In 1995, Odil, an Uzbek private company, and Uzlhleboproduct, an Uzbek State Joint-Stock Company, concluded an agreement concerning the supply of 450,000 tons of soft bread third class wheat. According to this “Odil Supply Agreement”, Odil, the seller, was supposed to successively deliver, between October 1995 and February 1996, the agreed quantities at the price of US$ 120 per ton. However, at the beginning of 1996, Odil failed to deliver the last 50,000 tons. Hence, Uzlhleboproduct entered into contact with another Uzbek company, Uzdon Foreign Trade Company, which acted as agent to find another supplier. Finally, Uzdon negotiated with a Swiss Geneva based entity, Romak S.A., specialized in the international trading of cereals, which agreed to enter into the deal.

4 Romak S. A. v. the Republic of Uzbekistan, award, ¶ 207.