ASCERTAINING 'INVESTMENT': A LOOK AT WHAT IS BOTHERING THE ICSID

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ABSTRACT

Supposing for a moment that X, an investor from say Cambodia, visits India to overlook and supervise her investment there and en route gets hit by a motorcyclist while X was taking a sojourn in a tourist village. Will the International Convention on Settlement of Investment Disputes (ICSID) decide to hear the matter? Does it fall under its jurisdiction? The answer is most probably not as, though there is a vague attribution to 'investment' issues in this example, ICSID will refrain from entertaining claims because of the lack of relation between the matter in issue and the investment itself. But supposing again, X was injured en route to her factory or back, then this matter would fall under the ambit of ICSID. Now the confusion is as to what activity can be called an 'investment'. Is the ICSID justified in construing the definition in such a restrictive scope when the Convention itself has refrained from giving a form to it?

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This article, will discuss in depth the central and peripheral issues regarding the confusion that often boggles both the Bilateral Investment Treaty (BIT) parties as well as tribunals regarding what economic enterprise suffices as 'investment'. The author has discussed two very prevalent approaches to this viz *the restrictive and deferential approach. Though there are pros and cons to both, the author has found that every approach has its roots in the consent agreement between the contracting parties itself. Thus, flexibility given to States and flexibility practiced by ICSID in determining the scope of an activity will douse the perplexity and difficulty in adjudging cases before the ICSID Tribunals.*

I. INTERNATIONAL INVESTMENT AGREEMENTS (IIA'S)

International Investment Agreements (IIA's) are paper work that are signed between two countries who agree on protection of their investments made in each others country. The entire mechanism tends to make such Foreign Direct Investments transparent and multifaceted thereby making the policy-drafting regarding investments a thousand fold protected by these agreements. These agreements, in a way, also promote good relations between States and nationals and countries around the world thereby promoting the development of International Law by creating such healthy relations. The need for such a protection has continued to be comprehended soon after the end of the Second World War, when political stability in international relations was the paramount need of the day. Several countries such as the Latin

American states, Asia and Africa were not exactly stable as far as development was concerned. In such scenarios, foreign investments seemed to provide a back-bone for their existence.[1] This not only ensures a stability for their forward development but also a firm holding in their economy.

Boskey and Sella in their article titled *Settling Investment Disputes*[2] have sharply pinned down the advantages of a foreign investment such as it not being only a monetary improvement but also the fact that it provides the country with workforce, technical competency and local managerial skills. Some countries are hesitant to accept public-sector investments with their frills and inadequacy such as sovereignty issues, as against investments from non-governmental sources that are termed 'private'.[3] This can be a reason why nationalization on a large scale is sure to ward off investors, such as what happened during the Cuban nationalisation in 1962, which stalled American investors, thereby causing loss to the Cubans to the tune of $300 million as investment[4] or even the nationalisation by Iran of the Anglo-Iranian Oil Company assets way back in 1952. The Executive Directors believe that private capital will continue to flow to countries offering a favourable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.[5]

[1] JOY CHERIAN, INVESTMENT CONTRACTS AND ARBITRATION (Sweet & Maxwell) (1975).

[2] Finance and Development, THE FUND AND THE BANK REVIEW,129-134 (1965).

[3] From the speech made by G.D.Woods, Former World Bank President, to the Association of Swiss Bankers, Oct 27, 1967.

[4] A.A. FATOUROS, GOVERNMENT GUARENTEES TO FOREIGN INVESTMENT 50 (Columbia Press University) (1962).

[5] ICSID Convention, Regulations And Rules (September 25 2010) http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

II. SOLUTIONS IN THE PAST

In the past, several States have taken concrete measures to protect their nationals who made a foreign investment. Initially, probably the only practical recourse available for investors was to draft a petition to their government of the respective home State for assistance. Their remedy solely depended on whether the host State agreed to arbitrate such investment dispute else, investors could not make claims under the International Law.[6] For this purpose, bilateral treaties,[7] that are even prevalent today, were entered into by parties and clauses that protected the economic and military stability of a nation were added. It prevented expropriation without compensation.[8] And in case of any dispute, an *ad-hoc* arbitral tribunal was set up for resolution. For this purpose, many treaties that were concluded during the closing curtains of the First World War (1914-18) were used to guide such proceedings. Understandably, they were not very effective due to lack of sophistication and unsuitable means of settling investment disputes.[9] Another way of protecting investments by capital-exporting nations, is by way of mild blackmail such as a threat to withdraw aid for the capital-importing country until and unless they fulfil certain restrictions and conditions[10]. But such an antagonistic approach only created an acid environment for future amicable negotiations and possible arbitral dispute settlement.

[6]Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 UC DAVIS J. INT'L L & POLICY 159, (2005).

[7]Introduced in the early 1950's. According to UNCTAD, World Investment Report 2009, there has been an exponential rise in the number of BIT's, with the present number totally upto 2600.

[8] For more on BIT and its characteristic feature, refer, RULDOLF DOLZER & MARGARETE STEVENS, BILATERAL INVESTMENT TREATIES, 1995.

[9]Sassoon, The Convention on the Settlement of Investment Disputes between States and National and other States, 1 ISRAEL LAW REVIEW 27, 28 (1966).

[10]For instance the Foreign Assistance Act 1961 of the United States.

Setting up international insurance agencies with schemes [11] to safeguard the capital-exporting nations also failed during the inception of the idea due to uncited political reasons. These above mentioned back-up measures were only to deal with instances of expropriation, but as seen from above they were not very effective. That is the reason behind why arbitration on a more serious note was resorted to.

Arbitration recognises or rather does not point out the obstructive nature on the part of only one party that creates a conflict between the foreign investor and the host nation. Secondly, it will be better to acknowledge a possible event of an investment dispute by including an arbitration clause in the international investment agreement (IIA). This is preferable due to the multiple complex issues that might ensue as a consequence of misinterpretation.[12]

III. DEBUT OF THE ICSID

Following a string of failed measures to protect investment in foreign countries, in the year 1965, the International Centre for Settlement of Investment Disputes (hereafter, ICSID) was established under the aegis of the Convention on the Settlement of Investment Disputes between two States or Nationals of Other States. The convention is alternatively referred to as the Washington Convention. ICSID was the birth child of the International Bank for Reconstruction and Development (IBRD). The principle motto of ICSID is to invigorate healthy financial and investment relations between two foreign countries. Besides this, the Centre provides conciliation and arbitration measures (by initiation of those mechanisms, and directly involved in multifarious procedural and administrative matters)[13] to

[11]Such as the Australian Export Payments Insurance Corporation.

[12] P.F.Sutherland, World Bank Convention on the Settlement of Investment Disputes, THE INTERNATIONAL AND COMPARATIVE LAW WEEKLY, 28, 367 (1979).

[13]ICSID has a panel of arbitrators and conciliators from which the parties are free to choose. a complete list of all arbitrators and conciliators for all contracting states can be found at

settle ensuing investment disputes between Nation States. The ICSID serves a forum by itself, thereby a country's role is reduced to the extent of just enforcing an award passed by the Centre. This indirectly connotes that ICSID functions well as an independent individual body free from the clutches and perplexity that surrounds differing legal systems around the world.

Though on a cursory glance, one might infer that ICSID is a Centre that takes up the responsibility of deciding investment disputes, the author would like to point out the misconception here. On many surprising occasions, ICSID has detoured from the commonly treaded path for the reason that, that particular dispute brought before it does not fall under the definition of a *foreign investment*, irrespective of what the contract between the arbitrating parties reads. A very commonly cited instance of this nature is the shocking rejection on the part of ICSID to refuse to hear claims was the resultant dispute of U.S.-Congo-Kinshasa Treaty[14] on grounds that their relationship did not suffice the definition of a foreign investment. To recall, the defining feature of an investment is that the investor is guaranteed an expected level of friendly treatment in exchange for the resources, man-power and technical assistance in the needed arenas. When a host country expropriates a factory, repudiates a utility concession agreement, gerrymanders regulations to shut down a business venture, or denies even-handed justice in its domestic court system, foreign

http://www.worldbank.org/icsid/pubs/icsid-10/icsid-10.htm.

[14] Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Zaire, art. I(c), Aug. 3, 1984, S. TREATY DOC. NO. 99-17 [*hereinafter* U.S.-Congo-Kinshasa BIT] (Investment means "every kind of investments . . . including equity . . . ; and includes: tangible and intangible property, including all property rights . . . ; a company or . . . interests in a company or interests in the assets thereof; . . . licenses and permits issued pursuant to law . . . ; [and] . . . any right conferred by law or contract, and any licenses and permits pursuant to law."). Zaire became the Democratic Republic of the Congo in 1997 (refer http://www.harvardilj.org/articles/257-318.pdf)

investors can bring claims before an ICSID tribunal[15] seeking redress for the violations of their rights under international law.

IV. THE PROBLEM AT HAND

What happened in the U.S.-Congo-Kinshasa treaty was that the ICSID refused to recognize the relationship within its definition of 'investment' under Art. 25 of the ICSID Convention.[16] As the cases come in, a spectator can perceive the change in track the ICSID is adopting in the past few years: that is, becoming stricter in their interpretation or rather application of the term 'investment', before accepting a matter for adjudication. Christoph H. Schreuer, *The ICSID Convention : A commentary* 121-25 (2001), opines that *"The concept of investment is central to the Convention. Yet, the Convention does not offer any definition or even description of this basic term. The working paper's draft on jurisdiction did not even contain a reference to investments'.* Though almost all interpreters of the relevant Article under debate have advised against a water-tight construction of the provision, the actions of the ICSID seem to force a contradictory opinion in the recent past. Before the final version of the Convention was passed, it attempted a futile exercise of defining the term 'investment', and later found it highly unsatisfactory.[17] As

[15]Julian Davis Mortenson, The Meaning of 'Investment': ICSID's Traveaux and the Domain of International Investment Law, 1 HARV. L. REV., 51, (2010).

[16] Article 25: (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

[17]A first draft introduced the following definition of the concept: "For the purposes of this chapter (i) "investment" means any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years;". The definition mentioned above was however considered unsatisfactory. The Secretariat of the Convention then presented another definition of the concept :"The term "investment" means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or

the final draft clearly indicates, the Washington Convention conveniently omitted to mention or even at the least hint at a proper reference point to interpret what an investment might be. In the initial years of the inception of the Centre, there was a liberal outlook[18] on the meaning of investment. There was a coherent understanding that the definition was dependent on the nature of the relationship between the investing parties and thus, book-definitions or dictionary results are incapable of defining the concept[19]. It was popular consensus that *prima facie* the contract entered into by the capitol-importing and the investing nations would play a determinative role in the definition of whether it was an 'investment' indeed.

In *E.S.I. Spa, ASTALDI Spa v. Algeria*[20] a July 2006 decision, in its Para. 72 (French), the arbitrators have tried compartmentalising what constitutes an 'investment' as per the contractual agreement:

a. the contractor has realised a contribution in the country concerned,

b. this contribution is made for a certain duration of time and,

c. it incurs a certain risk for the investor.

It does not explicitly state whether economic welfare of a country is being furthered by such an investment. However, from the analysis of those three elements made by the arbitrators, they have added that there is an investment only if the contributions have an economic

in the conduct of an industrial, commercial, agricultural, financial or service enterprise ; (ii) participations or shares in any such enterprise ; or (iii) financial obligations of a public or private entity other than obligations rising out of short term banking or credit facilities" (refer http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w#_ftn3).

[18]Such as including 'any kind of asset' as an investment.

[19]C.F. Amerasinghe, The jurisdiction of the International Centre for the Settlement of Investment disputes, 19 INDIAN JOURNAL INT'L L. 166, 180.

[20]ICSID case no. ARB/05/03.

value attached to them. Further, this economic furtherance should be for a considerable amount of time. The arbitrates go on to say that an element of risk is required in the contract entered. And thus, it would be unfair, if only an insurance contract is brought under the ambit of the Convention, instead of any kind of contract that has a risk for the investing party. This risk, if realized must not be capable of being settled by any domestic jurisdiction but by the ICSID only. This 2006 decision seems to lend the interpretation of the Article 25[21] a broad scope, however not only has the tribunal estranged from such an approach but also, there are certain pitfalls in adopting such a path. By broadly constructing this provision, the case load on ICSID was ever-increasing thereby hampering the working of the ICSID mechanism itself. Many a country taken to ICSID arbitration find themselves obliged to compensate companies for loss incurred on their territories. This situation, and the broadening of the scope of ICSID arbitrations, has brought about some reflexion in a number of states. The Philippines, which had lost a determinative case, decided that they would no longer accept the recourse to arbitration with foreign companies and modified a new BIT [22] agreement accordingly.[23]

V. IDENTIFICATION OF THE CAUSE

This categorization of activities into 'economic' or otherwise reflects a restrictive and tight interpretation. One can argue that this restrictive scope, rather than doing good, will shake the foundation of

[21]The jurisdiction of the Centre shall extend to any legal dispute arising directly out of or in relation to an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.

[22]Bilateral Investment Treaty.

[23]http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w#_ftn6

international investment regime as there are other commercial activities/ventures that fall outside the scope of this interpretation.

The cause for such stringency can be attributed to myriad reasons:

- Firstly, there is a common misconception that the drafters of the Convention were unsure themselves when it came to defining the term 'investment'. The truth of this statement would require a study of the history behind drafting of the Convention[24]. The fact is, the drafters did not intend to restrict the meaning of 'investment' and hence refrained from defining it. It was hoped to be concluded on a case-to-case basis.
- Secondly, many a times, some tribunals feel that defining the term 'investment' is unjustified as it overlaps with the question of consent of the parties. This is what happened in *Grusiin v Malaysia* ICSID Case No. ARB/99/3, Award, pp. 13.5-13.6 (Nov. 27, 2000)
- Thirdly, the consent theory behind Art. 25 determines the jurisdiction of ICSID. If the consent document (contract) or the BIT agreement between the parties contains a definition of 'investment', then the Tribunals follow that definition. Cases refer *Parkerings-Compagniers v Republic of Lithuania*.[25]

VI. OBJECTIFYING 'INVESTMENT' : RIGHT APPROACH?

Christoph Schreuer[26] objectified this definitive approach and laid down five points that are necessary and characteristic for an activity to constitute an 'investment':

- Certainty of duration
- Regularity of profits and returns
- Assumption of risk
- Commitment by the investor

[24]David Sassoon, Convention on Settlement of Investment Disputes, 13 J. BUS. L. 334, 337 (1966).

[25]ICSID Case No. ARB/05/8 Awards, pp. 249-54 (Aug. 14, 2007).

[26]CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press) (2001).

- Substantial changes in the host State as regards development

Schreuer opines that this marginalization should not be characteristic of jurisdiction but regular features that determine an 'investment'. These guidelines only further curtail the extent of the debated word. This approach was adopted in the celebrated *Salini Costruttori v. Morocc case,*[27] where this exclusiveness of interpretation was applied. The factual situation is that the Moroccan company refused to pay the money due from them according to the contract and therefore, was taken before the ICSID. The tribunal, rather than treating Schreuers parameters as merely determinative, suggested that they be made 'mandatory' for defining 'investment' or rather, making it as a 'test' for determination.

In *Alcoa v Jamaica,*[28] Alcoa Minerals, a US company, entered into an agreement with the government of Jamaica, which has ICSID arbitration clause. Jamaica undertook to give Alcoa bauxite-mining rights and tax concessions for twenty years. Alcoa agreed to construct an alumina refining plant, which would operate to extract alumina from the mineral bauxite. Alcoa filed for ICSID arbitration alleging that the collection of additional tax constitutes breach of agreement.[29] The Alcoa tribunal considered the jurisdiction where 'a [private] ... company has invested substantial amounts in a foreign State in reliance upon an agreement with that State'. Therefore, the tribunal held that the contribution of capital was a type of 'investment'.[30]

[27]ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).
[28]Case No ARB/74/2,4 Y.B. Com. Arb.206 (1979).
[29]W.M. Tupman, Case Studies in the Jurisdiction of the International Centre for lnvestment Disputes, 35 ICLQ., 815, 816.
[30](September 12, 2010) http://dergiler.ankara.edu.tr/dergiler/38/281/2553.pdf.

In *PSEG Global Inc. and Konya Ilgin Elektrik Uretim v Ticaret Limited Sirketi v. Republic of Turkey*[31] popularly dubbed as 'Turkey Case', the tribunal was once again confronted with the tedious task of defining 'investment'. The definition of 'investment' is provided in Article I(1)(c) of the Treaty between the United States of America and the Government of the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (Treaty). The dispute in this case was raised by the Respondents who claimed that there was no investment as such as the subject matter for construction was still under negotiations and thus no consensus had been reached yet. The tribunal ruled otherwise stating that the Turkish Council of States (*Danistay)* had approved the concession contract. The language of the contract and mode of negotiations conveyed the intentions of the parties to confirm the deal. As a result of the contract being in existence, valid and binding on the parties, the tribunal held the contract between the Claimants and Respondents as satisfying the requirement of 'investment'. The ICSID has resorted to *Salini* case, and since 2006 has rejected only two cases on that basis.[32]

VII. CONCLUSION

The ICSID renders financial interests such as promissory notes, loans, stocks and shares etc., as uncertain regardless of their price and value. Does that mean that these instrument are likely to be shelved as well? [33] The alternative available to such unfortunate investors is ad-hoc arbitrations or the International Chamber of Commerce, but this may be implausible if the Contract specifies ICSID as the forum.

[31]ICSID Case No. ARB/02/5, Award of 19 January 2007. (September 13, 2010) http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewPleadings&PleadingNo=10.

[32]Biwater Gauff (Tanz.), Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) and Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, (May 17, 2007).

[33] Michael Waibel, Opening Pandora's Box: Sovereign Bonds in International Arbitration, 101 AM. J. INT'L L. 711, 718–32 (2007).

In the background of all this confusion, there arises a question as to who decides the admissibility of a dispute under the care of ICSID regarding 'investment': the tribunal itself or do the States categorize their disputes to be subject to ICSID, according to the issues and the present scenario such as in United Kingdom. This is where the concept of *deference* can be contemplated.[34] By this, the tribunals can defer the State's legal interpretation of their contractual terms and policies. The advantage of this option is that it offers the parties to flexibly interpret the clauses (such as whether their economic enterprise is an 'investment') at that moment and situation and at the same time, have the backing of the ICSID. Secondly, this approach can change the landscape of the investment law regime as State's can experiment their policies and reduce the number of uncertain approaches, as multifarious economic activity can be tested for protection. This flexibility ensures the sanctuary of ICSID's purpose '*to promote economic development by increasing the flow of foreign investment into interested host countries.*'

Another reason for adopting the differential approach is that many States are beginning to question the efficacy of BIT's and its legitimacy. Deference to the state's definition ensures their claim to legitimacy and competence on this debated issue in a pluralist world. This approach has been doctrinally dealt with in the *Vienna Convention on the Law of Treaties,* wherein States interpretation is called for in cases of ambiguity in definition. The doctrinal bite to the deferential approach is due to Vienna's Convention injunction to interpret treaty terms in light of the agreement's object and purpose and the fact that 'subsequent state practices that are counted'.[35]

The author would like to conclude this rather extensive discussion by summing up in brief the deferential approach as follows and suggestions as to why the restrictive approach might work:

[34]Julian Davis Mortenson, The Meaning of 'Investment': ICSID's Traveaux and the Domain of International Investment Law, 1 HARV. L. REV., 51 (2010).
[35]The Vienna Convention, art. 31 (1) and (3).

- This proposition upholds the objective of the ICSID Convention and protect the transnational investments to a larger extent.
- It extends the scope of the ICSID protection to BIT's thereby bringing under its umbrella several new economic activities that can potentially be 'investment'. Though this will be defeated when BIT mentions ICSID as a forum.
- It enables State policy flexibility, giving them time and choice for deciding their course of action.

Another suggestion that would work is for the ICSID to refrain from entertaining purely trade activities though this is purely a theoretical suggestion as practically no BIT would include just trade activities. Now, given that many States do not actually comprehend the effect of the BIT's they sign, a restrictive approach will help sieve the provision, to prevent other unforeseeable complication arising out of the BIT. The tribunals mode of ensconcing restrictive definitions will render those provisions non-amendable, thus forming the perfect case of difficulty of unalterable multilateral treaties.

The best recourse above all, would be for the Sates to refrain from giving absurd, vague and unalterable definitions of 'investment' as a consequence of which both, the States are at a loss for remedy and the ICSID is rendered helpless. I would like to add that ICSID should not be a stumbling block in the route of State's interpretation and inclusion of various economic activities to be considered as 'investment', thereby making ICSID wholly beneficial to those who subject themselves to it.