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# Notion of investment under the ICSID Arbitration: A jurisdictional dilemma between subjective and objective approaches

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## Abstract:

The notion of Investment is one of the most controversial issues trailing the dispute settlement mechanism of International Center for Settlement of Investment Dispute (ICSID). One notable issue surrounding the controversy is identifying an exact definition of investment for the purposes of ICSID Jurisdiction. While some tribunals tend to give effect to the agreement of the parties contained in their contracts or the underlying bilateral investment treaty as giving rise to the ICSID jurisdiction by consent, others tend to subject parties consent into a filtering mechanism based on a certain developed criteria. The aim of the paper is to add clarity to the corpus juris of investment treaty arbitration and provide guidance to the investment treaty tribunals regarding the determination of notion of investment. In doing so, the paper typifies the problem with the notable case of MHS v Malaysia. It then analyzes the two approaches from subjective and objective perspectives. The paper concludes with the proposition that ICSID notion of investment may not necessary lie with either of the two approaches.

**Keywords :** Investment, treaties, jurisdiction

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## 1. INTRODUCTION:

In 1817, Diana, a British vessel carrying a large wooden cargo containing about 24,000 pieces of antique Chinese porcelain sank near straight of Malacca as it journeyed from China on its way to India. MHS, a United Kingdom based Company, incorporated under the laws of Malaysia as a foreign investor was contracted in 1991 by Malaysian Government to retrieve the treasure. The structure of the contract was such that MHS would only recover its expenditure and make profit if the recovery of the salvage was successful. Ie ‘no finds no pay’ basis.<sup>1</sup> Under a subsequent contract,<sup>2</sup> an auction would be arranged by MHS in Europe, while Malaysian Government will collect the sale proceeds and disburse to the claimant their entitlement of 70% of the proceeds should the amount reach less than \$10m US dollars. If however, the aggregate of the sale is between \$10m to \$20M US Dollars, MHS’s entitlement would reduce to 60% of the sale. Where the aggregate exceeded US\$20 million MHS would be entitled to 50% of the sale proceeds. The salvage took four years, and salvaged items which were not withheld from sale, were auctioned for \$2.98M (US). MHS were accordingly paid the sum of US\$1.2 million which came to 40% of the amount realised from the sale.

MHS having been aggrieved by the amount paid to them invoked the arbitration clause contained in their Contract alleging under payment contrary to the 70% they should have earned, and concealment of salvaged items of Chinese origin worth US\$400,000. The Clause made provision for arbitration under the Malaysian Laws in Kuala Lumpur. MHS lost the arbitration and subsequently made efforts to challenge the award in The Kuala Lumpur regional Centre for arbitration, and subsequently the Malaysian High Court. The Malaysian High Court dismissed the case. MHS further applied to the Chartered Institute of Arbitrators for the review of the award, but however alleged that it was denied the right to be heard before the dismissal of its application by the Institute. Eventually, reallying on the United Kingdom/Malaysia bilateral investment treaty MHS invoked the Jurisdiction of ICSID and filed an ICSID case on 30<sup>th</sup> September 2004. Malaysian Government on the other hand objected to the ICSID arbitration on the ground that ICSID has no jurisdiction over the dispute. According to the Malaysian government, the subject matter of the dispute was not an investment as required under ICSID Convention. The case was simply dismissed for want of Jurisdiction on 17<sup>th</sup> May 2007.

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<sup>1</sup> Contract No. IPL3/1991 dated 3 August 1991 between the Government of Malaysia and Malaysian Historical Salvors Sdn., Bhd. (with Variation Order No. 1/1993 dated 12 April 1993 and Extension of Contract dated 12 July 1994) (“Contract”) cited in Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, (Decision on the Application for Annulment), April 16, 2009 p. 1

<sup>2</sup> Agreement No. PERB/PK/116/1994 dated 22 September 1994 between the Government of Malaysia, Malaysian Historical Salvors and Christie’s Amsterdam B.V. (“Agreement 116/1994”) cited in Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, (Decision on the Application for Annulment), April 16, 2009 p. 1

On 7<sup>th</sup> September 2007, MHS applied to ICSID for the annulment of the award of 17<sup>th</sup> May 2007 pursuant to Article 52 (1) (b) of the ICSID Convention. After constituting an ad-hoc committee, the committee annulled the award on jurisdiction dated 17<sup>th</sup> May 2007.<sup>3</sup> According to the committee, the tribunal had manifestly exceeded its powers by failing to exercise jurisdiction and to have recourse to the treaty definition of investment provided in UK/Malaysia BIT as an investment within the meaning of Article 25 (1) ICSID. In addition, the ad-hoc committee alluded to the failure of the tribunal to take into account the preparatory work (*travaux*) of ICSID as fatal, and the consequent elevation of investment criteria as jurisdictional requirements<sup>4</sup> all as amounting to excess of powers under the ICSID Convention.<sup>5</sup>

The MHS plight to have access to ICSID arbitration is undoubtedly one of the most historic, but obviously not the only<sup>6</sup>. MHS initially lost the right to be heard before the tribunal. MHS later, won before the Ad-hoc committee. However, with the dissenting opinion of one of the ad-hoc committee members, the future remains unpredictable particularly in a system that has no binding precedence such as ICSID. Thus, the jurisprudence regarding notion of investment is yet unsettled. The centrality of notion of investment in ICSID jurisprudence can

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<sup>3</sup> Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, (Decision on the Application for Annulment), April 16, 2009

<sup>4</sup> According to the ad-hoc committee in para 80;

“...(b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature;”. These appear to be the point of departure between majority members of the ad-hoc committee ie (Stephen M. Schwebel and Peter Tomka) and the dissenting opinion of Judge Mohamed Shahabuddeen. In his dissenting opinion, Judge Mohamed put it more eloquently as follows:

*“Regretfully, I have to forego the company of my distinguished colleagues. The question which separates me from them is whether a contribution to the economic development of the host State is a condition of an ICSID “investment.” The Committee recalls the argument of the Applicant that it is not. The Committee’s decision agrees with the Applicant’s argument; I am of the opposite view.”* See: Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, (Dissenting Opinion), February 19, 2009 para 2.

<sup>5</sup> Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia, ICSID Case No. ARB/05/10, (Decision on the Application for Annulment), April 16, 2009 para 80.

<sup>6</sup> Of recent, an ICSID tribunal constituted pursuant to Energy Charter Treaty deliberated over similar issues faced by MHS tribunal. The tribunal disagreeing with MHS tribunal awarded as follows:

“There is no test, set of criteria or guidelines that can or should be relied upon in international law to restrict or replace the definition that exists in the ECT. There is no reason to place any such test, set of criteria or guidelines on the language of Article 25 of the ICSID Convention.”

See: RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30), Decision on Jurisdiction, 6 June 2016.

hardly be overstated. Undoubtedly, as it will be shown in the paper, MHS offers a moderate premise to analyse ICSID's jurisdictional dilemma relating to notion of investment.

Drawing on this lengthy, singular, albeit, condecantal introduction with MHS v Malaysia, the paper engages with both objective and subjective approaches to the determination of notion of investment in ICSID jurisprudence. The aim being to add clarity to the *corpus juris* of investment treaty arbitration and suggest guidance to the investment treaty tribunals regarding the determination of notion of investment.

The paper proceeds as follows. After the introduction, section two examines notion of investment under bilateral investment treaties. Section three analyses notion of investment under ICSID with a view to bring to fore, ICSID's notion of investment. Section four evaluates the issues arising out of the intersection between BIT's definition and ICSID's conception of investment . Section five concludes with suggestions on how the ICSID jurisdictional dilemma could be resolved within the framework of Vienna Convention on the law of treaties.

## 2. NOTION OF INVESTMENT UNDER BILATERAL INVESTMENT TREATIES:

Since after the Germany/Pakistan Bilateral Investment Treaty of 1959,<sup>7</sup> Investment treaties becomes the focal tie between foreign Investors and Host Countries.<sup>8</sup> In pure international law context, BIT's are generally regarded as direct successors to the customary international law system of diplomatic protection for aliens. As International Court of Justice attested to the fading role of diplomatic protections and emerging relevance of the BITs in contemporary international law, the court remarked as follows:

*“The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments such as...(ICSID) and also by contracts between States and foreign investors. In that context, the role of*

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<sup>7</sup> Germany- Pakistan Bilateral Investment Treaty is heralded as the first modern BIT. Indeed, prior to it, the treatification of the regime were largely covered by trade facilitation treaties known as treaties of friendship, commerce, and navigation. For a detailed discussion on the History of Investment Treaties, See: Jeswald W Salacuse, *The Law of Investment Treaties* (2 edition, Oxford University Press 2015) 87–105.

<sup>8</sup> There are over 2,500 Bilateral Investment Treaties. See: <http://investmentpolicyhub.unctad.org/IIA> (last visited 15/10/17).

*diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where regimes do not exist or have proved inoperative... ”<sup>9</sup>*

Bilateral Investment Treaties generally contain sections dealing with treaty title, scope of application, conditions of entry, general standards of treatment, monetary transfers, expropriation, treaty exceptions and modifications, and dispute settlement system. Often, BITs define investment under scope of application section in a clear and unambiguous term. Early treaties on one hand seem to adopt a either a narrow or restrictive approach.<sup>10</sup> The restrictive approach may be attributed to the pre 80s notion of investment<sup>11</sup> as reflected in the International Chamber of Commerce guidelines for International Investment which viewed investment fundamentally as bringing capital to the host country and assumption of business role in an enterprise.<sup>12</sup> Indeed, after the World War II, most of the developing Countries were relying on the foreign investment (capital) and technical expertise (both technological and managerial) flowing from the ‘capital exporting Countries’.<sup>13</sup>

Modern bilateral Investment Treaties on the other hand, contains a broader definition of investment covering virtually all forms of existing investments. These includes both movable and immovable property, choses, and contractual agreements and rights. Although there is little variation in the wordings of the treaties, substantially they convey the same meaning. The essence of having definitions in BITs is to ascribe meaning and determine the object to which the rules of the agreement shall apply and the scope of their applicability.<sup>14</sup> Therefore, the scope of the treaty thus depends on the definitions given. The various definition offered in diverse treaties can be summed into three broad categories.<sup>15</sup>

a. Asset-based definition:

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<sup>9</sup> Case concerning Ahmadou Sadio Diallo (Guinea V Congo) ( Preliminary Objections), (ICJ General List No. 103, 24 May 2007 para 88.

<sup>10</sup> Rubins N., The Notion of ‘investment’ in International Investment Arbitration, in N. Horn (ed.,) Arbitrating Investment Disputes, (Netherlands: Kluwer Law International, 2004). P. 292

<sup>11</sup> For a detailed historical account, See: M Sornarajah, *The International Law on Foreign Investment* (4 edition, Cambridge University Press 2017) 8–21.

<sup>12</sup> N.V.S.K. Nathan., ‘Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention’ (1995) 12 J Intl Arb p. 29

<sup>13</sup> Shihata I., Promotion of Foreign Direct Investment-A General Account, with particular reference to the Role of the World Bank Group, 6 ICSID Rev, FILJ 486- 488 (1991).

<sup>14</sup> ‘United Nations Conference on Trade and Development (2007) Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking. (New York and Geneva: United Nations), United Nations Publication, Sales No. E.06.II.D.16’ <[http://unctad.org/en/docs/iteiia20065\\_en.pdf](http://unctad.org/en/docs/iteiia20065_en.pdf)> accessed 22 October 2017.

<sup>15</sup> The Classifications of treaty definitions in this paper are based on the UNCTAD Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking Report. For a slightly different classifications see N. Rubins Supra where he classified treaty definitions into Illustrative list, Exhaustive list, and Hybrid list. See: Rubins N., The Notion of ‘investment’ in International Investment Arbitration, in N. Horn (ed.,) Arbitrating Investment Disputes, (Netherlands: Kluwer Law International, 2004). P. 292

Usually asset-based definition covers ‘all kind of assets mentioned in the definition section. These types of assets include movable and immovable properties and other related or associated rights conferred either by law or contract.<sup>16</sup> The main purpose of asset-based definition is to protect wide range of investments within the contemplation of the parties.<sup>17</sup>

b. Circular definition of investment:

The circular definition, like asset based definition, apart from covering a wide range of forms of investment also contemplates future investments. The essence is to cover foreseeable investments that may come in the future.<sup>18</sup> United States bilateral investment treaties are typical examples of this type of definition style. For instance in US/Bahrain BIT The term Investment is defined as:

*“Investment” of a national or company means every kind of investment owned or controlled directly or indirectly by the national or company, and includes, but it is not limited to, [...]”<sup>19</sup>*

One notable feature identified with this type of definition is, it tend to give arbitrators wide discretion to interpret what amounts to investment within the context of such definition.

c. Closed-list definition:

Closed list is another method employed to define investment. The method consists of numerous lists of things to be protected by the definition. It also excludes certain types of assets/activities that treaty states do not wish to consider as an investment within the treaty definition. In essence, the method while maintaining exhaustive list of investment items, it also makes the notion of investment very precise through the exclusion method. For an illustration of the three treaty definition classifications see the table below.

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<sup>16</sup> ‘United Nations Conference on Trade and Development (2007) Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking. (New York and Geneva: United Nations), United Nations Publication, Sales No. E.06.II.D.16’ (n 15) 8.

<sup>17</sup> Ibid., For instance in Azerbaijan/Finland treaty 2003 the term ‘investment’ is defined as: ‘every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other contracting party in accordance with the laws and regulations of the latter contracting Party including, in particular, though not exclusively:...’ While in Belgium–Luxembourg/Saudi Arabia (2002) BIT, The investment protection is conditioned through either ownership or control in the host country as follows: “[...] the term ‘investment’ means every kind of asset, owned or controlled by an investor of a Contracting Party in the territory of the other Contracting Party according to its legislation and in particular, but not exclusively includes: [...]” See; *ibid* 7–9.

<sup>18</sup> *Ibid.*,

<sup>19</sup> *Ibid.*,

<b>ASSET BASED STYLE</b>	<b>CIRCULAR STYLE</b>	<b>CLOSED-LIST STYLE</b>
<i>Azerbaijan/Finland BIT</i>	<i>US/BahrainBIT</i>	<i>Canadian Model</i>
<p>Every kind of asset established or acquired by an investor of an contracting party in the territory of the other contracting party in accordance with the Laws and regulations of the latter contracting party including, in particular, though not exclusively;</p> <p>a. movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct, and similar rights;</p> <p>b. shares, stocks, debentures or other form of participation in company;</p> <p>c. Titles or claims to money or rights to performance having an economic value;</p> <p>d. Intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, know-how and goodwill; and</p> <p>e. Concessions conferred by law, by administrative act or under a contract by a competent authority, including concessions to search for, develop extract or exploit natural resources.</p>	<p>Every kind of investment owned or controlled directly or indirectly by the national or company, and includes, but it is not limited to,...</p>	<p>investment means:</p> <p>i. an enterprise;</p> <p>ii an equity security of an enterprise;</p> <p>iii. a debt security of an enterprise...</p> <p>iv.a loan to an enterprise...</p> <p>vi. an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;</p> <p>but investment does not mean,</p> <p>(X) claims to money that arise solely from</p> <p>(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or</p> <p>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, ...</p>

Conversely, the third category of treaty definition can be said to be self explanatory leaving little room for interpretation. This may not however be the case in the event of dispute. Since arbitral tribunals are bound to be confronted with various models of treaties crafted in different drafting styles. Even in the most apt and clarified method, the tribunals may be required to respond to a jurisdictional challenge tied to the notion of investment. Therefore, treaty interpretation is a very crucial phenomenon in the settlement of investment disputes. In the next

section, the paper will examine the various approaches adopted by ICSID tribunals in responding to the jurisdictional challenges predicated upon notion of investment.

### 3. NOTION OF INVESTMENT UNDER ICSID:

Despite the centrality of the notion of investment under ICSID Convention,<sup>20</sup> The Convention does not provide any clear definition of investment either under its Article 25 (1) or any other provision in the Convention. Indeed, Article 25 is important being the provisions dealing with the jurisdiction of ICSID tribunals. Article 25 (1) provides:

*“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.”*

The reference to the term ‘investment’ in the jurisdictional section makes the notion of investment central, more particularly, since the Convention does not define what investment is, what constitutes investment, or what are the indicators to investment activities.<sup>21</sup> The absence of definition of investment clearly posits an interpretative problem in the Convention.<sup>22</sup> As to why the convention does not define investment as crucial as it is, remains a mystery due to the contradictory reports between the documentation of the ICSID history and the content of the Executive Directors report. In one breadth the ICSID history shows various attempts to define investment during the negotiation of the Convention, while on the other hand the executive directors’ report negates such attempt.

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<sup>20</sup> Schreuer, supra P. 121

<sup>21</sup> In an effort to come up with an acceptable definition, ICSID Secretariat proposed the following to replace the wordings of Article 30 supra :

*“The term Investment means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or 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 arising out of short-term banking or credit facilities.”*

See: History, Vol II P. 844 in Schreuer supra.

<sup>22</sup> Berk Demirkol, ‘The Notion of “Investment” in International Investment Law’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2579247 <<https://papers.ssrn.com/abstract=2579247>> accessed 20 October 2017.



The result of the definitional tussle of notion of investment among the ICSID delegates gave birth to a range of arbitral awards that are far from being consistent looking at the ICSID jurisprudence as a whole. The diverse nature of such awards culminates into two broad schools or approaches<sup>23</sup> in the determination of whether disputes submitted before ICSID have passed through the jurisdictional test of Article 25 (1) of the Convention.

### 3.1 Subjective Approach:

Subjective theory is an approach adopted by ICSID tribunals that seeks to merge consent of the parties with the jurisdictional requirement of ICSID. In other words, the jurisdictional requirement regarding notion of investment is deemed satisfied where parties while consenting to the ICSID arbitration, have conveyed their meaning of investment. This approach is anchored on the absence of definition of investment under ICSID, and executive director's report. The position of these tribunal may not be far from the position expressed by Broches. According to Broches:

*'the requirement that the dispute must have arisen out of an investment may be merged into the requirement of consent to jurisdiction'.<sup>24</sup>*

Similarly, the executive director's report while bringing to rest the controversy that trailed the negotiation of ICSID Convention regarding notion of investment summarizes the center's position as follows:

*'No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25 (4)).'<sup>25</sup>*

However, the above, was by no means to suggest that no attempt was made to define investment for the purposes of ICSID jurisdiction. Indeed, the first draft of the Convention under Article 30 defines investment to mean:

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<sup>23</sup> W. Ben Hamida, Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control Ad Hoc Committees's Decision in Patrick Mitchell V. Democratic Republic of Congo (2007) 24 (3) J Intl Arb 287-306.

<sup>24</sup> Aron Broches, *Selected Essays: World Bank, Icsid, and Other Subjects of Public and Private International Law* (Martinus Nijhoff Publishers 1995) 168.

<sup>25</sup> 'Report of the Executive Directors on the ICSID Convention' para 27

<<https://icsid.worldbank.org/en/Pages/icsiddocs/REPORT-OF-THE-EXECUTIVE-DIRECTORS-ON-THE-ICSID-CONVENTION.aspx>> accessed 22 October 2017.

“...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;”<sup>26</sup>

Indeed, the above article could not escape the criticism of the ‘stakeholders’ principally the state delegates, despite acknowledging the necessity of agreeing on a commonly accepted definition. Having failed to come up with a definition despite several attempts, the Convention left the parties with the option to determine the type of investments they will submit to ICSID’s Jurisdiction.

The failure to define investment within the convention led to the emergence of subjective approach in conferring jurisdiction on ICSID tribunals. The subjectivist’s construction of investment lies in the consent of parties to agree on the kinds of transactions/activities they can recognize as investment on one hand, and the freedom to make known in advance the kind of transactions/activities they do not wish to consider as investment on the other hand all of which are provided for under the Convention. The approach seem to negate the existence of any autonomous or independent notion of investment under ICSID, different from the consent of the parties. Indeed, the approach confirms the mystery and continued relevance of ‘party autonomy’ in ICSID arbitration, as revealed in *Pantechniki v Albania*.<sup>27</sup>

Examining the subjective approach in the light of arbitral awards would reveal a list of ‘precedence’ that backs the subjectivist’s perception of investment under ICSID. There is no definite pattern of categorizing the arbitral awards that relies on the subjectivists’ theory in resolving jurisdictional challenges. This is due to the peculiarity of each case and the different analytical approach adopted by the arbitral tribunals. There is however, large number of ICSID awards that generally analyses the notion of investment under ICSID. Some of the notable cases that adopted the subjectivist’s reasoning include: In **Generation Ukraine Inc. V Ukraine** the tribunal while considering US/Ukraine BIT relies totally on the BIT definition of ‘investment’ and absence of same in the ICSID Convention. The tribunal held as follows:

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<sup>26</sup> History, Vol. I, P. 166 in Schreuer, *Supra* P. 122.

<sup>27</sup> According to the tribunal, ‘For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it.’ ‘*Pantechniki v Albania* ICSID (Case No Arb/07/21) Award, 30 July 2009’ para 42 <<https://www.italaw.com/sites/default/files/case-documents/italaw4321.pdf>> accessed 22 October 2017.

*'The tribunal accepts that Generation Ukraine's shareholding interest in Heneratsiya prima facie constitutes an investment within the meaning of Article 1 (1) (a) (ii) of the BIT which includes 'shares of stock or other interests in a company.'*<sup>28</sup>

Another award that adopts subjective approach is *Middle East Cement Shipping & Handling Co. S.A. V Egypt*.<sup>29</sup> The tribunal relying on Greece/Egypt BIT held that leased property of in form of a ship is a protected investment under the BIT, and therefore becomes an investment under ICSID by virtue of the BIT definition. Of recent, Inmaris tribunal following Pantechniki tribunal, alluded to the relevance of party autonomy while applying subjective approach to the determination of notion of investment.<sup>30</sup> In otherwords, the principle of party seem to be the theoretical basis of applying subjective approach by the tribunals following the subjective approach.

### **3.2 Objective Approach:**

Objective approach on the other hand denotes the existence of an independent ICSID notion of investment in accordance with the object and purpose of the entire ICSID Convention. According to Professor Schreuer:

*'The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence, which speaks of 'the need for international co-operation for economic development and the role of private international investment therein'. This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was 'prompted by the desire to strengthen the partnership between countries in the cause of economic development'.*<sup>31</sup>

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<sup>28</sup> Generation Ukraine Inc. v Ukraine ICSID (Case No. Arb/00/9) September 16, 2003 para 8.5

<sup>29</sup> Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID (Case No. ARB/99/6) November 28, 2000.

<sup>30</sup> In Inmaris, the tribunal provided the party autonomy justification as follows:

*"...The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, inter alia, ICSID arbitration, that means that they believe that that activity constitutes an "investment" within the meaning of the ICSID Convention as well. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment."*

See: Inmaris v Ukraine ICSID Case No. Arb/08/8 (Decision on Jurisdiction) March 8, 2010 para 130

<sup>31</sup> C.H. Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2001), P. 124-5

Indeed, the objective construction of notion of investment derives its root from the absence of definition of investment under ICSID read along with ICSID Preamble, Executive director's report, and Institution Rules made pursuant to the ICSID Convention. The later, mandates parties while submitting dispute to ICSID to attach statement of particulars regarding the dispute as arising directly out of an investment. This approach supports the position of objectivists on the need to examine the nature of the dispute submitted by the parties, in the context of the purpose and the aim of the Convention.

The objectivists approach has been widely adopted by various ICSID arbitral tribunals. In **Joy Mining Machinery Limited V The Arab Republic of Egypt** the tribunal has aptly summarized the approach in its award on jurisdiction as follows:

*'The fact that the Convention has not defined the term investment does not mean, however, that anything consented by the parties might qualify as an investment under the Convention. The Convention itself in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated, In other words, it means that there is a limit to the freedom with the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.'*<sup>32</sup>

Relying on the pursuit to hatch objective notion of investment under ICSID, typical characteristics of investment became the pinnacle of this approach. The five typical characteristics, as outlined by Professor Schreuer are, first, duration of projects, second, certain regularity of profit and return, third, assumption of risk, fourth, substantial commitment and fifth, host states development. It must however be mentioned, that Professor Schreuer also distills these elements from **Fedax v Venezuela**,<sup>33</sup> and **Salini v Morocco**<sup>34</sup> where both tribunals relied on the same characteristics, though with little variation, in determining the jurisdictional challenges. Indeed, the five typical characteristics of investment have now dominated this school of thought.<sup>35</sup>

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<sup>32</sup> Joy Mining Machinery Limited v The Arab Republic of Egypt para ICSID, (Case No. ARB/03/11) August 6, 2005 paras 49-50

<sup>33</sup> Fedax v Venezuela, ICSID (Case No. ARB/96/3), Decision on Jurisdiction, July 11, 1997

<sup>34</sup> Salini Costruttori S. P.A. V Kingdom of Morocco, ICSID (Case No. ARB/00/4) Decision on Jurisdiction, July 16, 2001

<sup>35</sup> In Lesi – Dipenta v Algeria ICSID (Case No. ARB/03/08) January 10, 2005 para II.13 (iv), the tribunal while opining that notion of investment under ICSID is objective has this to say:

The totality of the cited arbitral awards under this heading clearly portrays the trend ICSID notion of investment had taken over time. The objectivists approach regarding interpretation of article 25 (1) ICSID appears to have dominated the ICSID jurisprudence in terms of wider support from the ICSID historical documents, and line of arbitral awards. Thus, interpreting article 25 (1) ICSID in the light of its object and purpose epitomizes ICSID jurisdictional jurisprudence constante. However, opponents of objective approach faulted the approach on two strands. The first fallacy is the theme upon which the approach is propounded, while the second fallacy is the content of the approach. In other words, the inconsistency regarding the characteristics of investment alluded to by some of the tribunals.

#### **4. THE INTERSECTION BETWEEN BIT'S DEFINITION OF INVESTMENT AND ICSID CONCEPTION OF INVESTMENT:**

Flowing from the two approaches analysed in section three, It can be observed that the matrix of issues surrounding article 25 (1) ICSID, can be understood along two polar ends of notion of investment. Namely, expansionists end and restrictionists end. While expansionists tend to welcome any attempt in expanding the ICSID notion of investment, restrictionists on the other hand tends to confine the notion to manifest transactions as investment under ICSID. Indeed much as the two approaches arguably might not reflect the correct jurisprudence of notion of investment, they however find support within the ICSID Jurisprudence. The postulation made herein is to look at the hallmark principles in the ICSID Convention, and evaluate such principles along the entire objective of the Convention. Recourse to the ICSID objective becomes necessary due to the fact that, literal or good faith rule of interpretation is far from resolving the definitional dilemma due to the absence of any definition to be literally interpreted.

##### **a. Expansionism:**

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“It would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions: a)the contracting party has made contributions in the host country; b)those contributions had a certain duration; and c)they involved some risks for the contributor. On the other hand, it is not necessary that the investment contribute more specifically to the host country’s economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.”

Careful examination of the ICSID Convention would reveal that consent of the parties to submit disputes to the centre is at the heart of every claim brought pursuant to the provisions of the convention. In this regard, article 25 (1) sanctions the jurisdiction of the centre to legal investment disputes consented by the parties. The requirement of consent though crucial can be expressed through various means provided by the Convention. Here, there are three broad means of expressing consent to ICSID jurisdiction namely, - through direct agreement, host country legislation or through Investment treaties (both BITs and MITs).

In this context, where parties consented to treat certain types of transactions as investment, ICSID tribunals are under legal obligation to pronounce same as investment. This approach can be seen more glaringly where such consent is expressed through bilateral or multilateral investment treaty. In other words, this is in consonance with the subjective approach which accords more priority to the consent however expressed.

The second point supporting the expansionist approach from the realm of consent, though outside the Convention but contained in the additional facility rules is the power given to the parties to submit disputes that do not emanate directly out of an investment. Article 2 (b) of the ICSID additional facility rules provides in this regard:

*'The Secretariat of the Centre is hereby authorized to administer, ...conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the centre because they do not arise directly out of an investment, ...'*

The totality of this reasoning suggests the desirability of accommodating as many investment disputes as possible and strengthening the ICSID body as the largest dispute resolution mechanism governing investment disputes.

b. Restrictionism:

The restrictionist hallmarks on the other hand, can be seen in the various ICSID provisions. For the purpose of this work, two significant hallmarks will be evaluated. The first, is the power of the Secretary General of ICSID to screen disputes under Article 36 (6) of the Convention.<sup>36</sup> The restrictionist reasoning from this provision is to suggest a dichotomy between the ICSID conception of investment independent from the parties' contemplation of notion of investment in certain cases. What parties may assume as investment in their interactions and dealings may not necessarily qualify as investment in the eyes of ICSID jurisprudence. While commenting on this provision, professor Schreuer opined that the rationale for the screening was *'to deal with unfounded proceedings*

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<sup>36</sup> See article 36 (6) ICSID Convention which provides as follows:

*'The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre.'*

*at an early stage*'. He further relied on paragraph 20 of the executive directors report on the Convention, which reiterated the same position and further explained that the purpose for such power was to avoid the possibility of setting in motion the machinery of the Centre for cases outside the jurisdiction of the centre, and further to avoid embarrassment to the parties (particularly the state).

The second hallmark supporting the restrictionist view point is contained under Article 25 (4) which empowers the state to reserve certain disputes from submitting to ICSID jurisdiction. The article provides:

'Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre....'

The restrictionist view point regarding this article clearly suggests that the right of the parties to submit or withhold their consent explains the reluctance of the Convention to force nature/types of disputes on parties on a pure consensual instrument. Similarly, this reasoning infringes on the positivist construction of 'consent' under the ICSID Convention, regardless of the vehicle such consent is conveyed. In other words, consent should not be construed in abstract sense, rather in the context of ICSID jurisprudence.

Moreover, the nexus between article 25 (4) and the ICSID jurisdictional dilemma is evidently documented in the History of the Convention itself. As pointed out in the Commentary to the Convention, Schreuer gave account of the episode as follows:

*'The possibility for states to make known in advance which classes of disputes they would or they would not consider submitting to ICSID's jurisdiction arose from the more general debate about the scope of the Centre's jurisdiction. Especially representatives of capital importing countries were in favour of a strict limitation of the types of disputes that the Centre might be allowed to take up...'*

Discerning from the two contradictory positions, it can be argued that the foundations of both view points can be traced back to the history of the ICSID Convention itself, which reflects the tension then between developed and developing countries. The question remains whether ICSID dispute resolution mechanism should be a battle ground between political ideologies that preoccupied the earlier negotiations at the expense of legal rights and obligations of the parties to on going disputes pursuant to the Convention. From a legal view point, the

determination of legal right if ridiculed with ideological formulations may only lead to the erosion of the legal structure established by the dispute settlement mechanism of the convention.

#### 4.1 Is BIT Definition a Negotiated Definition?

Generally, Bilateral Investment treaties are products of long term negotiation between two Countries.<sup>37</sup> The trend in negotiating bilateral Investment treaties is characterised with agreements, disagreements, modifications, alterations, and in some cases non agreement at all.<sup>38</sup> One essential feature that may be attributed to the treaty definition of investment is the conflicting interest dilemma between the two investment treaty states.<sup>39</sup> Balancing the competing interest is one of the most critical aspect in drafting Bilateral Investment treaties.<sup>40</sup> While this might look problematic the dilemma is only limited to the negotiation stage and should not be seen to proceed to the dispute resolution stage. In essence, once a treaty is signed, pre-treaty negotiating issues should not be seen to be resurrected by Arbitral tribunals.

Moreover, there are various negotiating/drafting mechanisms implored by 'the actors' to tackle such a problem. One of such mechanisms is inserting a consultative mechanism clause in the bilateral Investment treaty.<sup>41</sup> The consultation clause has the effect of allowing the parties to periodically review the definitions contained in the

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<sup>37</sup> For further readings on negotiating Treaties See: Odee S.J., Latin American Trade Negotiations with the United States, International Organization, Vol 34 No. 2 (Spring 1980), pp. 207-228 visited at <http://www.jstor.org> (last visited 15/10/17). See: Vandeveld K.J., A Brief History of International Investment Agreements, HeinOnline -- 12 U. C. Davis J. Int'l L. & Pol'y 157 2005-2006.

<sup>38</sup> See the following: WTO, *Ministerial Declaration: Ministerial Conference Fourth Session Doha, 9-14 November 2001*, WT/MIN(01)/DEC/1 20 (Nov. 14, 2001), at ¶ 20-22 [hereinafter *Doha Ministerial Declaration*]. Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Lessons for the Regulation of International Business*, in *Foundations And Perspectives of International Trade Law* 114 (Ian Fletcher et al. eds., 2001). And Dolzer R and Stevens M., *Bilateral Investment Treaties.*, (Hague, Netherlands:Kluwer Law International, 1995). P. 14 where he opined that individual concern have led to variations in the US Model Agreement in United States/Poland Treaty to the extent of changing the title of the treaty from 'bilateral Investment Treaty' to a 'business and economic relations' treaty. See: Lewis, *The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in thye U.S. Bilateral Investment Treaty Program*, 22 Law & Pol' y Int' l Bus. 534 (1991) In Dolzer, *Ibid.*,

<sup>39</sup> According to Salacuse, the objectives behind negotiating bilateral investment treaties among state are primarily investment protection and promotion. While secondary objectives includes market liberalization, relationship building, domestic investment encouragement, and improved governance and rule of law. See: Jeswald W Salacuse, *The Law of Investment Treaties* (2 edition, Oxford University Press 2015) 124-140

<sup>40</sup> *Ibid.*,

<sup>41</sup> *Ibid.*,



BIT with a view to remove unsatisfactory provisions, if any. Similarly, parties have option at the negotiation stage to exclude certain types of investment or limit the application of the BIT to a specifically defined types of investment. For instance while negotiating the definition of Investment in the MHS case, the Claimants made a proposal to broaden the meaning of investment under Article 1 of the UK/Malaysia BIT and the Respondent resisted the move and proposed a restriction to the definition to cover only investments in Malaysia.<sup>42</sup> To this end, it is submitted that in view of the freedom of the parties to choose either broad or narrow definition of investment, to adopt, amend, or halt BIT model agreements, BIT definitions of ‘Investment’ are negotiated definitions with full intent and purpose to acquire their intended meanings.

### 4.3 Conclusion

Generally, Claimants before ICSID tribunals must show that their underlying contract (if applicable) falls within the definition of investment as contained in both Article 25 (1) ICSID and Bilateral Investment Treaty. This proposition need to be understood as a golden thread that runs through the entire jurisdictional phase. As in *MHS v Malaysia*, the proposition was deduced from the submissions of the parties while relying on the ICSID decided cases.<sup>43</sup> The exercise of establishing the jurisdiction is quite significant in view of the tribunal’s conclusion on the ‘critical cases’ as an elimination process through which the award is arrived at.

In addition, the approach adopted by MHS tribunal regarding the dichotomy between ‘jurisdictional’ and ‘typical characteristic’ approaches as parameters of assessing hall marks of Investment is undoubtedly significant. However, the conclusion reached by the tribunal appear to confer supremacy on paragraph 50 of Joy Mining, and Salini’s double-barrelled test. Indeed, the fate of investor/state definition of an ‘investment’ not as contained in a BIT but as defined by parties contracts may likely suffer same fate as BITs definition, something akin to defalcation of shared expectations of two contracting parties by a tribunal that ought to uphold and respect such expectations.

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<sup>42</sup> Record of negotiations held on 5<sup>th</sup> -8<sup>th</sup> December 1977 attached as an annexure to the respondents memorandum on jurisdiction.

<sup>43</sup> While the Claimant relies mainly on *Alcoa Minerals, Salini and L.E.S.I.-DIPENTA*. The Respondent relies on *Joy Mining* as well as *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (“*Mihaly*”), *Jan de Nul N.V. Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13) (“*Jan de Nul*”) and *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (“*SGS v Pakistan*”)

In this context, it is recommended that Article 31 (1) of Vienna Convention on the Law of Treaties can aid the ICSID tribunals not just to engage in literal interpretation (which some of the tribunals reluctantly discard on the ground that there was no definition to be literally interpreted) but to do so in accordance with the object and purpose of the ICSID Convention. Thus, taking into account the travaux and other relevant negotiation documentations of the treaty.<sup>44</sup> In this regard, not only subjective or objective approaches are relevant, rather, good faith ordinary meaning, in accordance with the treaty's object and purpose can harmonize both objective and subjective approaches and provide much needed guidance than either subjective or objective approaches in isolation.

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<sup>44</sup> See Articles 32 and 33 of the Vienna Convention on the Law of Treaties..

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