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THE DEFINITION OF INVESTMENT IN INTERNATIONAL INVESTMENT LAW

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Abstract
The definition of investment in international investment law is of fundamental importance to the question of whether a tribunal has jurisdiction over the subject matter of the dispute. This note examines the meaning of investment under international treaties and the ICSID Convention and discusses specific issues that can arise in relation to the definition of investment.
In this article, I treat main approaches to the term 'investment' under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and international investment treaties. Discussion of different trends does not only involve a purely theoretical question; it also creates practical consequences due to the role of investment in the determination of the jurisdiction of investment tribunals. After having analyzed the method adopted by each approach, this article aims to find the most plausible definition for the term 'investment'. It suggests that 'investment' is defined in investment arbitration as dedication of some assets (element of contribution) according to a plan (element of duration) in order to achieve some benefits (element of risk). This approach would fit to the ordinary economic meaning of the term.

Keyword: Investment, International investment law, natural resources, public expenditures, constant development, tribunal, jurisdiction, international treaties, the ICSID, Convention.

Introduction

Investment is a commercial or business activity. Business activities are governed by Commercial Code/law. Commercial law cuts across both the law of obligations and the law of property. That means commercial law includes some part of the law of obligations and the law of property.[1]

For instance, the transactions of business in general and investment in particular require the application of the law of contract since it involves contractual transactions. Properties are the subject of contracts in investment.

Let us consider another example. An investor may import or export products or other goods that are related to his/her investment. An investor should import machineries and equipment for his/her investment. Those machineries and equipment should be transported to Ethiopia. In such a case, a bill of lading may be used.[2] A bill of lading is a receipt for the bailment of a specific object and possesses the quality of being 'negotiable'. Thus, it

represents the goods in some way. It is also a document that contains a contract for the carriage of the goods. In short, it both includes contract and property. This shows that an investment involves the application of the law of contract and property.
Further, we have seen that investment activity is governed by commercial law. Commercial law developed through practice by merchants and the state 'received' it into a legal system.[3] Recently, state regulations grow to regulate the industry and with the creation of public utilities owned by the State have led to the intrusion of public law into the realm of commerce. This shows that commercial law is also a public law.

Investment in the investment law

Public law is a body of law dealing with the relations between individuals and the government. Investors are individuals and the government regulates investment. Therefore, law of investment is a public law.[1]
It defines important terms like investment and investor. International investment agreements are international investment law that define these terms. National laws also devote certain provisions to define investment and investor.[2] In so doing, the investment law regulates investment. For example, many international agreements define investment as something established according to the laws of the host country. The main purpose of such definition is to ensure that investment has been properly registered and licensed in accordance with the laws of the host country. As was have discussed earlier, investment law classifies investment in to varies categories, such as foreign direct investment, portfolio investment, domestic investment etc.

Identification of Characteristics of the Investment

Instead of putting the transaction that constitutes the subject of the dispute to the test under a definition of investment, the approach introduced by Schreuer[3] identifies certain features of 'investment' that are typical to most of the operations and analyses whether the transaction at hand is alike.[4] Accordingly, a certain duration, a certain regularity of profit and return, the assumption of risk, substantial commitment, and the operation's significance for the development of the host state are among the typical features or characteristics of an investment.
This approach was first followed by the Fedax Tribunal. The Tribunal used the features – not elements of investment – that had been identified by Schreuer and concluded that 'the transaction meets the basic features of an investment'.[5] Another case which followed this approach is the CSOB case. The Tribunal noted that suggested elements of 'investment' are not 'formal prerequisites' for a transaction to be deemed as an investment. Accordingly, a transaction may qualify as an investment even in the absence of some of the features determined by Schreuer.
This approach is not analytical: it actually establishes a sample of investment by enumerating some features and asserts that a transaction that is alike would constitute an investment.[6] Thus, rather than provide clarity, it in fact creates obscurity by raising an open-

ended question as to which features of a transaction might still be missing for the operation to be qualified as an investment and under which conditions the likeness to an 'investment' would be kept. This approach does not determine minimum conditions for the notion of investment and it does not establish an applicable test for the purposes of ICSID jurisdiction.

Investment agreements.

There is no single test used by all investment treaties to define the link required between a legal person seeking protection under the treaty and the contracting state under whose treaty the investor asks for protection.[1] Bilateral investment treaties have essentially relied on the following tests for determining the nationality of legal persons: i) the place of constitution in accordance with the law in force in the country; ii) the place of incorporation or where the registered office is; iii) the country of the seat, i.e. where the place of administration is; and iv) less frequently, the country of control. Most investment treaties use a combination of the tests for nationality of legal persons so that a company must satisfy two or more of them in order to be covered. The most common approach is a combination of the place of incorporation or constitution and seat, although the combination of incorporation or constitution and control and also of all three tests is also found.[2]

Additionally, I should also mention that there is no single definition of what constitutes foreign investment. According to Juillard and Carreau, the absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments which contain.[3] The multiplication of definitions of investment thus results from the proliferation of different sources. Customary international law and earlier international agreements did not use the notion of investment but the one of "foreign property" dealing in a similar manner with imported capital and property of long-resident foreign nationals. According to Juillard the static notion of property has been substituted by the more dynamic notion of investment which implies a certain duration and movement.[4]

Traditionally, investments have been categorized as either direct or portfolio investments. During the nineteenth and the early years of the twentieth century, the predominant form of foreign investment was portfolio investment, mainly in the form of bonds issued by governments of developing countries floated in the financial markets. The first half of the twentieth century was marked by the contraction of investment flows brought about by the two Wars, stagnation of direct investment and virtual collapse of portfolio investment in developing countries. The post-war period was characterized by the growing expansion of multinational corporations setting up wholly or majority owned subsidiaries with the consequent change in the form of foreign investments which became predominantly direct in character.[5] The increase of direct investment in several sectors led to the steady evolution of new forms of investment, when the investor enters a country and markets a product or service but does not own the asset.159 A great variety of assets are included today in the definition of investment and broad definitions appeared in national investment codes and international instruments.

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A narrow approach was followed by earlier agreements which were aiming at the gradual liberalization of capital movements and preferred to enumerate the transactions covered by these agreements. Today, most international investment instruments, in particular investment protection treaties, adopt a broad definition of investment (https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf).

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