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Investment status of sovereign bonds: recent developments in the case law of ICSID

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Abstract:

In April 2015, ICSID[1] Tribunal has rendered a decision on jurisdiction in the Postova banka case[2] stating that it does not have jurisdiction to hear the dispute on sovereign bonds (security entitlements) since they are not investments either according to the definition of investment in the applicable investments treaty or according to the meaning of investment as stipulated in the article 25 (1) of the ICSID Convention[3]. Two and four years prior that this decision has been rendered, in the Abaclat[4] and Ambiente Ufficio[5] decisions, ICSID has ruled that it has jurisdiction to hear the claim arising out of sovereign bonds.

This work argues that ICSID has jurisdiction to hear claims arising out of sovereign bonds and security entitlements under the article 25 (1) of the ICSID Convention. It also argues that the broad definitions of investments in the bilateral investment treaties[6] are to be interpreted as their nature is - broadly and that only specific exclusion of sovereign (governmental) bonds (financial instruments) can lead to the non - rebuttable presumption that the parties did not want their protection. Different approach leads to the uncertainty and non - uniformity.

[1] ICSID stands for the International Centre for Settlement of Investment Disputes [Hereinafter *ICSID*].
[2] Poštova banka a.s. and Istrokapital SE v. Hellenic Rep., ICSID Case No. ARB/13/8, [in the text to be referred as Postova banka case].
[3] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17. U.S.T. 1270, 575 U.N.T.S. 159 [Hereinafter *ICSID Convention or Convention*].
[4] Abaclat and Others v. Argentine Rep. (formerly Giovanna a Beccara and others v. Argentine Rep.), ICSID Case No ARB/07/5 [in the text to be referred as Abaclat case].
[5] Ambiente Ufficio SpA and others v. Argentine Rep., ICSID Case No. ARB/08/9 [in the text to be referred as Ambiente Ufficio case].
[6] [Hereinafter *BIT*].

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Introduction:

Sovereign debt has been so tough issue through the history that there was a need for a multilateral agreement which would prohibit the use of force for its recovery. In 1907 the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts was signed. Its article 1 stated that "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals"[7]. What has changed 100 years after is that we are maybe further from the potential war, but still there are much troubles with regard to sovereign debt crisis, one of them being the appropriate forum for creditors. It has always been believed that country is the most reliable debtor. However, the Argentinian financial crisis during 2000s has been so harsh that even the players of a national basketball team have paid on their own the costs of participation in the World Championship in Indianapolis in 2002. Greece has started to sell its islands in order to pay its sovereign debt. In order to preserve its economy apart from other measures, both Argentina and Greece have started debt restructuring. Restructuring for creditors means withdrawing and waiving. Ones accept while others act as nomad forum seekers, desperately trying to find a place to prove their rights. Gelpern observed that "litigation by hold-out creditors against Argentina "has yet to yield a penny"[8]. So the creditors dared to try the International Centre for Settlement of Investment Disputes, seeming more attractive in the terms

[7] Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241;Treaty Series 537.

[8] Anna Gelpren, *What Bond Markets Can Learn From Argentina*, Int'l. Fin. L. Rev. 19, 19 (Apr. 2005) http://www.iie.com/publications/papers/gelpern0405.pdf

of enforcement and neutrality of forum[9]. Gary Born once stated that "At bottom, if generalizations must be made, international arbitration is much like democracy; it is nowhere close to ideal, but it is generally better than the existing alternatives"[10]. When sovereign bond creditors are concerned, ICSID arbitration is like the first class passengers on the Titanic boat. Jurisdiction may be sinking, but there is still some chance for faster and enforceable award.

James Crawford started his essay on the Continuity and discontinuity in international dispute settlement by the following words: "It is common to talk about a new world of international dispute settlement, even a 'brave new world' as seen through the eyes of Miranda in Shakespeare's *Tempest*, used we might say to the detestable Caliban of the old state system. And we do so positively, rather than with the irony of an Aldous Huxley, in whose brave new world the principal character ends killing himself. There is something new in the present state of international dispute settlement, the horde of bilateral investment treaties, and now multilateral investment treaties, the United Nations Convention on the Law of the Sea, which established a complex system of dispute settlement among others" [11]. However, despite the fact that ICSID has created a totally new world

[9] ICSID's awards are equivalent to the national courts' final judgments according to the article 54 of the ICSID Convention. It is the mechanism way better from the courts' one since there is no multinational agreement on the recognition and enforcement of foreign court judgments. Countries usually pay their duties voluntary, so rarely will it even come to the enforcement stage. Also ICSID provides for the neutrality of forum, lack of political influence etc. On the favorability of ICSID forum for holdout creditors Felipe Suescun de Roa, *Investor-State Arbitration in Sovereign Debt Restructuring: The Role of Holdouts*, 30 Journal of International Arbitration 131 (2013) and Peter Griffin & Ania Farren, *How ICSID Can Protect Sovereign Bondholders*, International Financial Law Review, 1, 3 (2005), http://files.bakerbotts.com/file_upload/documents/ICSIDArticle.pdf On the voluntary payment of duties according to ICSID awards (out of 271 ICSID cases registered through January 2010, only 4 have led to the execution proceedings) LUCY REED, JAN PAULSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION, Kluwer Law International 186 (2d. ed. 2011).

[10] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS, 10 (Kluwer Arbitration 2001).

[11] James Crawford, *Continuity and discontinuity in international dispute settlement in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 801, 801 (Christina Binder et. al. Oxford University Press, 2009).

of dispute settlement, fifty years after its creation it is not crystal clear which disputes it is to resolve and what are the boundaries of its jurisdiction. Is ICSID brave enough to accept the claims arising out of sovereign bonds or different members of the Tribunal are ruling differently? The bipolar treatment of sovereign bonds in the ICSID's practice was a motivator for this work. In three ICSID cases the answer to the question may sovereign bonds be disputed before ICSID Tribunal is both yes and no[12].

Abaclat and Ambiente Ufficio decisions arose out of the Argentinian economic crisis and its default as to sovereign debt. Namely, Italian bondholders were not willing to participate in the proposed Argentinian exchange offer, since in their view it was imposing very harsh conditions to claimants. In both cases, the Tribunal found that it has jurisdiction to hear the claim both because the transaction in the case at hand is protected by the applicable BIT as well because it is an investment under the article 25 of the ICSID Convention. The view of the Abaclat Tribunal was followed by the dissenting opinion of Professor Georges Abi-Saab. In the conclusion he has stated that: "The present case is, to my knowledge, the first one to come before an ICSID tribunal in which the alleged investment is totally free-standing and unhinged, without any anchorage, however remote, into an underlying economic project, enterprise or activity in the territory of the

[12] Government financial instruments have also been discussed before ICSID in the following cases: Fedax NV v. Rep. of Venezuela, ICSID Case No. ARB/96/3, Cehoslovenska Obchodni Banka A.S. v. The Slovak Rep., ICSID Case No. ARB/97/4, Oko Pankki Oyj, VTB BankAG and Sampo Bank Plc v. Rep. of Estonia, ICSID Case No. ARB/04/6 and Giovanni Alemanni and others v. Argentine Rep., ICSID Case No. ARB/07/8. Due to the fact that Abaclat, Ambiente Ufficio and Postova banka cases were dealing specifically with sovereign bonds and security entitlements and since they have arisen out of the same case scenario - financial crisis and refusal of the holdout creditors to accept the exchange offer, this work will stick to the analysis of these three cases. It is worth noting that the case Giovanni Alemanni and others v. Argentine Rep. has arisen under the identical case scenario as Abaclat and Ambiente Ufficio case. Nevertheless since this was the last one in the series of the Argentinian cases and for the purposes of this comparative analysis of the two opposing views this work will not deal with this case, but with its predecessors, Abaclat and Ambiente Ufficio.

host State"[13]. His overall conclusion is that both the ICSID Convention and the applicable BIT call for the investment to be made in the territory of the host state, which link lacks. Reading a dissenting opinion in the Ambiente Ufficio case leaves an impression that the arbitrator Santiago Torres Bernárdez was very eager to show how much he disagrees with the majority of the Tribunal. What's more in paragraph 293 of his opinion he stated "I of course disagree"[14]. His overall conclusion was that the Tribunal has no jurisdiction ratione materiae since there is no territorial link to Argentina, purchase of sovereign bonds was not in relation to any particular project and that the view of the majority was too broad since it led to the conclusion that if something is not expressly excluded (following the requirements of article 25 (4) of the Convention) it should be encompassed by the definition of investment as provided in article 25 (1).

Postova banka case[15] steamed from the same case scenario as Abaclat and Ambiente Ufficio case. Following the economic crisis, Greece has initiated restructuring of its sovereign debt passing a legislation which allows for the exchange of bonds condition that the majority of bondholders vote for it. Postova banka has not voted for the restructuring plan and has sought its rights before ICSID due to the retroactive and unilateral amendment of laws. The impression was that the scenario as to the protection would be the same as to Argentinian one[16]. However, the view

[13] Abaclat and others v. Argentine Rep., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion Professor Georges Abi-Saab, para. 118, (Aug. 4, 2011) [Hereinafter *Abaclat Dissenting*] https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95

[14] *Id*. para. 293.

[15] The analysis will not encompass the Tribunal's view as to the jurisdiction ratione materiae over Istrokapital being the joint claimant in this case with Postova banka. Istrokapital's has relied its claim also on the different BIT.

[16] *See e.g.* Ioannis Glinavos, *Haircut Undone? The Greek Drama and Prospects for Investment Arbitration*, 5 J. Int'l Dis. Set., 475 (2014), who has stated that the provisions similar to those discussed in Abaclat can be found in the BITs to which Greece is a signatory and that therefore Greek sovereign bonds can be regarded as investments under the BITs.

of the Tribunal as to the jurisdictional issue was quite different than the view of the majority in Abaclat and Ambiente Ufficio case[17].

The conclusion of Michael Waibel, being the opponent of ICSID's hospitality towards sovereign bonds is that "ICSID Tribunal presently lack authority to adjudicate sovereign debt disputes"[18]. Interestingly, Waibel, uses the term presently. Does it mean that things can change? And what should be done so that this view is changed? One of the major concerns of the investment law experts is the inconsistency of ICSID practice[19]. Lord McNair began his chapter on treaty interpretation by stating "there is no part of the laws of treaties which the text writer approaches with more trepidation than the question of interpretation."[20]. Three Tribunals in the previously described cases have shown us that there can be five or even six opinions on the same or name it for these purposes similar issue. This work will further deal with the question whether and in which circumstances sovereign bonds can be disputed before ICSID. It will deal only with the question of jurisdiction ratione materiae and will not touch upon the issue of jurisdiction ratione paersonae. The issues that it will analyze will be whether sovereign bonds are investments under article 25 (1)

[17] One of the investors in this case, Posotva banka has applied for the annulment of the award under article 52 (3) of the ICSID Convention and until today the annulment procedure is pending.
[18] MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS, 20 (Cambridge University Press 2011).
[19] *See also* Christoph Schreuer, *Why still ICSID* and Stephen Bouwhuis, *Investor - State Arbitration: Some Concerns*, *in* THE FUTURE OF ICSID AND THE PLACE OF INVESTMENT TREATIES IN INTERNATIONAL LAW, 203, 325 (N. Jansen Calamita et. al. eds. British Institute of International and Comparative Law, 2013).
[20] LORD MCNAIR, THE LAW OF TREATIES, 364 (Oxford Clarendon Press, 1961).

of the ICSID Convention, in which cases they can be regarded as investments under the investment treaties and what are the possible solutions to the ICSID's non – uniform approach. In order to reach the conclusion, the first chapter will be an introductory one dealing with the issue what are sovereign bonds, their difference from other debt instruments, sovereign default and what in general is ICSID's jurisdiction. The second one will focus on the question whether sovereign bonds have ICSID's green light. Its first part will cover the topic are sovereign bonds investments under the article 25 (1) of the ICSID Convention, while the second one will deal with the issue of sovereign bonds as investments under the investment treaties. Third chapter will propose possible solutions for overcoming the non – uniform approach. In the conclusion it will be shown that ICSID is a proper place for discussing sovereign bonds, that the broad terms are to be given broad meaning and that explicit exclusion from investment treaties is the only tool which can assure that certain types of transactions have been excluded.

Chapter 1 - Introductory remarks

1. Sovereign bonds and state default

Sovereign bonds are bonds issued by the sovereign authority; most commonly it is government or municipality. Bonds are along with notes, debentures and commercial papers one type of debt instruments. Their joint feature is the existence of claim on the one side and debt on the other side. There is no uniform view as to the distinction among them. In the US bonds are regarded as secured and debentures as unsecured instruments[21]. Some other distinctions can be in the issuer, terms of payment, type of interest and maturity date. The fact that there is no uniform view as to whether bonds and debentures are the same instrument is important in determining whether they are granted protection under the respective investment treaty, since as will be seen certain treaties list only bonds, certain only debentures while others list both. One of the characteristics of bonds and especially sovereign bonds is that they are traded on the secondary market. The first issuance of bonds is done through the intermediary (underwriter) which further sells the bonds on the so called secondary market. As the word itself says the intermediary is just a link between the seller and the buyer. Since the amount of the issued bonds is very large it would from a mere logistical standpoint be impossible for the issuer to organize its whole operation. Thus,

[21] More on differences between bonds and debentures *see* WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS, (Foundation Press, 7th ed. 2012).

it engages the underwriter which purchases all the issued bonds, but further sells them on the secondary market. Had bonds not been sold on the secondary market, the issuer would have most probably not issue them, which was also noticed by the Tribunal in the Ambiente Ufficio case[22]. The term that also appears in relation to the government bonds is security entitlements - those are basically bonds divided in the smaller amount, further sold on the secondary market, but whose rights and property interest are related to the bond. This is essentially what claimants in all cases which will be further discussed held.

Every day we come across lots of news stating that the government *X* has sold *Y* number of sovereign bonds under the price *Z*. What Government is actually doing is that it is increasing its sovereign debt and creating a creditor – debtor relationship between the bondholder and itself. According to the data provided by Kidwell and Peterson, "businesses and the federal governments are the largest net borrowers"[23]. Issuance of sovereign bonds plays an important role in financing country's development. As observed by Gallagher: "If managed appropriately, government borrowing can be an essential ingredient for economic development, and it has been for centuries."[24]. However, not always is government borrowing managed appropriately. The belief is that sovereign bonds are risk free. Nevertheless, it turned out differently in the case of Argentina and Greece. No resources are unlimited. Whoever spends money can go bankrupt as well, be it

[22] Ambiente Ufficio S.p.A. and others v. Argentine Rep., ICSID case No. ARB/08/9, Decision on Jurisdiction and Admissibility, para. 425, (Feb. 8, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2992_En&caseId=C340 [Hereinafter *Ambiente Ufficio Decision*].

[23] DAVID S. KIDWELL & RICHARD L. PETERSON, FINANCIAL INSTITUTIONS, MARKETS AND MONEY, 510 (The Dryden Press 4th ed. 1990).

[24] Kevin P. Gallagher, *The New Vulture Culture: Sovereign debt restructuring and investment treaties*, The Idea's Working Paper's Series, 1, 2 (Feb. 2011), http://www.ase.tufts.edu/gdae/publications/GallagherSovereignDebt.pdf

company or government. Unlike in the bankruptcy proceedings where in case of reorganization the majority of creditors can overrule the minority in the same class, such option does not exist when restructuring of sovereign debt is in question. What states try to do in that case scenario is to restructure its debt so that new maturity date, reduction of the value of debt, reduction of interest rates, swaps and so forth are imposed. Lacking legal ground for that they pass a law resembling the one for reorganization of companies, permitting for consent of (qualified) majority of creditors as to restructuring so that those being in disagreement are obliged by the restructuring plan as well. Even though both Argentina and Greece have been successful in more than 90% of claims, retroactivity, unilaterality and less favorable conditions is what has provoked the minority (in digits being several ten thousands) of Italian and Slovakian bondholders to seek their rights before the ICSID Tribunal.

2. The jurisdiction of ICSID

ICSID is to decide only the disputes arising out of an investment, which was the purpose of establishment of this institution, recognized in the preamble of the ICSID Convention which states that "Bearing in mind the possibility that from time to time disputes may arise in connection with such *investment* between Contracting States and nationals of other Contracting States"[25] (author's emphasize). When exactly will ICSID have jurisdiction is a never ending question or as noted "the schisms which have developed within investment arbitration flow from the divisions between arbitrators who adopt neoliberal views and those who show a fidelity to the principle that undue

[25] *Id.* ICSID Convention, *supra* note 3, Preamble.

expansion of the base on which parties submitted to arbitration is not warranted"[26]. In other words, what is to serve which purpose - is arbitral Tribunal to follow the will of the parties expressed in the investment treaties or the parties are to follow the purpose for which the institution is established. Previously quoted author as an example of expansive interpretation uses exactly the case which was the first one to grant protection to the sovereign debt instruments being further assigned, Fedax v. Venezuela case[27]. As any other arbitral tribunal, ICSID Tribunal has also the authority to decide on its own competence. Such possibility is known as kompetenz – kompetenz. However, prior to coming to the establishment of the tribunal, the Secretary General registering the case has the possibility to reject its registration if the dispute is manifestly outside of the Center's jurisdiction, which powers are granted by the article 36 of the Convention. Once the request has passed the test of the Secretary General, it is up to the Tribunal to determine whether it has jurisdiction to hear the dispute or not.

Among arbitrators and scholars there are divergent opinions how is the jurisdiction of ICSID to be established; whether the claim is to pass so called double – barred test – so that the disputed transaction is an investment within the meaning of article 25 (1) of the ICSID Convention[28] and the meaning of investment under the applicable investment treaty, or it is only up to the parties to determine what is to be an investment. It seems that even a drafters of the

[26] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 17 (Cambridge University Press, 2010).
[27]. *Id.*
[28] Article 25 (1) of the ICSID Convention states that 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.

Convention did not have clear view on this issue. On the one hand Aron Broches when referring to the elements of parties' consent stated that "It goes without saying, […] that this discretion[29] is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purpose of the Convention"[30] while on the other hand he stated that "the requirement that the dispute must have arisen out of an investment may be merged into the requirement of consent to jurisdiction"[31]. There are those stating that each and every claim should pass the double barred test, meaning the test under article 25 (1) of the Convention and under the relevant investment treaty. For example, in the case between Patrick Mitchelle v. Congo it was stated that "the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT"[32]. In one of the rare cases where ICSID has decided that it does not have a jurisdiction to hear the claim, the case of Joy Minig v. Egypt, it was concluded that: "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"[33]. Also, among scholars Dozler & Rudolf observed that: "A dual examination to the term "investment" in the ICSID Convention, referred to as the 'double keyhole approach,' has become

[29] Referring to the discretion of the parties in the investment treaty.
[30] Aron Broche, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Lecture at the Hague Academy of International Law in 1972, in 136 RECUEIL DES COURS DE LA HAYE 362 (Brill Nijhoff 1972).
[31] Aron Broches, *Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l L. 263, 268 (1996).
[32] Patrick Mitchelle v. Democratic Rep. of Congo, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7, para. 31, (Nov. 1, 2006) http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf
[33] Joy Mining Machinery Limited v. The Arab Rep. of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction para. 50, (Aug. 6, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0441.pdf

the norm. Tribunals have to consider whether the case falls within the scope of investment as defined in Article 25 of ICSID Convention and in the BIT"[34]. On the other side, there are views that defining the term investment should be left only to the disputing parties. In the case of Malaysian Historians Salvors, it was stated that "It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction"[35] and in the Biwalter Gulf v. Tanzania where it was stated that "it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States"[36]. There are also scholars sharing almost the same view: "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))"[37]. Abaclat decision made the distinction between general and special jurisdiction, general being the one only creating a framework, while special defining its limits reflected in the consent of the parties, i.e. investment treaties[38].

[34] RUDOLF DOZLER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 62 (Oxford University Press, 2008).
[35] Malaysian Historians Salvors SDN BHD v. The Gov. of Malaysia, ICSID Case No. ARB/05/10, Decision on the application for annulment para. 73, (Apr. 16, 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247
[36] Biwater Gauff (Tanzania) Ltd. v. United Rep. of Tanzania, ICSID Case No. ARB/05/22, Award, para. 312, (July 24, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67
[37] Farouk Yala., *The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement*, 22 J. Int'l Arb. 105, 105 (2005).
[38] Abaclat and others v. Argentine Rep., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, para. 12, (Aug. 4, 2011) [Hereinafter *Abaclat Decision*], http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf

If the view is that double barred test is to be applied, then the question is what the criteria for determining the meaning of the term investment under article 25 (1) of the Convention are. Additionally, in the realm of the wording of the investment treaties it can even be claimed that the triple – barred test is to be passed. The first one being the article 25 (1) of the Convention, the second one being the chapeau definition of the investment treaty and the third one being that the transaction falls under the enumerative definition of the BIT which issues will be covered in the next paragraphs through the analysis of the question whether sovereign bonds are investments under article 25 (1) of the ICSID Convention and under the chapeau and enumerative definitions of investment treaties being applicable in the Abaclat, Ambiente Ufficio and Postova banka cases.

Chapter 2 - Do sovereign bonds have ICSID green light?

An oxymoron in the whole question whether ICSID is an appropriate forum to hear the disputes arising out of sovereign bonds is the fact that the idea of the whole concept of ICSID's forum was also aggravated by the fact that the former president of the World Bank, Eugene Black, who put the idea of ICSID before the World Bank, has served as a conciliator in the settlement of two disputes - Suez Canal and City of Tokyo. City of Tokyo was exactly the dispute about the sovereign bonds, namely the dispute between French holders of municipal bonds and the city of Tokyo. Other controversy is that the founding father of the ICSID Convention, Mr. Broches stated that "There was no doubt that a foreign bond issue by a country constituted an investment by the foreign investors in that country"[39]. Around half century later the concern whether sovereign bonds can be disputed before ICSID was expressed in 2006 in the Financial Times, where it was stated that: "Recovering money through ICSID will be difficult due to the fact that experts in international law doubt that buying a bond qualifies as an investment protected by the bilateral treaties overseen by ICSID"[40]. One month prior that Abaclat decision is to be rendered, renowned scholar and arbitrator, Christoph Schreuer has drawn the conclusion that "pure financial instruments, loans and bonds are already being accepted as investment"[41]. Bakerboots law office

[39] Remarks of Chairman Aron Broches, Settlement of Investment Disputes Consultative Meeting of Legal Experts, Summary Record of Proceedings (27 April – 1 May 1964), in 2 ICSID HISTORY, Pt. 1, Docs. 1 – 43, 458, at 514 (ICSID Publication 1968).

[40] Benedict Mander, *New Tack on Argentina Debt*, Fin. Times, Sept. 28, 2006, http://www.ft.com/intl/cms/s/0/d957dd6c-4f17-11db-b600-0000779e2340.html#axzz3xPqo6ilm

[41] Christoph Schreuer, Lecture at the Int. Acad. Int'l L.: The Development of Investment Arbitration (July 5, 2011).

was optimistic after Argentinian cases as to ICSID's jurisdiction over sovereign bonds, but have warned for careful scrutiny when protection by investment treaties is in question[42]. Next two sub chapters will deal with questions are sovereign bonds investments under the article 25 (1) of the ICSID Convention and in which cases they are protected investments in the investment treaties by analyzing the words of those who have the last word on it – members of the panel.

1. Are sovereign bonds investment under the article 25 (1) of the ICSID Convention?

Not only that there is no definition of the term investment in the whole ICSID Convention, but excluding preamble, the mere term investment appears only once in its whole text, namely in article 25 (1). Nevertheless, its importance is immense and was in simple explained by Zeiler who noticed that "in the first edition of The ICSID Convention: A Commentary (2001), C. Schreuer dedicated more than 250 pages of his 1,500 pages of commentary to Article 25"[43]. While drafting ICSID Convention, drafters were under a great dilemma whether to include the definition of investment in article 25 and what consequences will such inclusion have. The reason why the definition was not included lies in the fact that the negotiators could not agree on its meaning. Also, Mr. Aron Broches, who developed the whole idea of the ICSID Convention was the biggest opponent of its inclusion. As noted by Schreuer, "Mr. Broches advised against limiting or defining disputes since it would be difficult to find a satisfactory definition and since any definition was

[42] *See* Ania Farren & Peter Griffin, *How ICSID can Protect Sovereign Bondholders*, Int'l. Fin. L. Rev. 3 (Sept. 2005), http://files.bakerbotts.com/file_upload/documents/ICSIDArticle.pdf

[43] Gerold Zeiler, *Jurisdiction, Competence and Admissibility of Claims in ICSID Arbitration Proceedings in* ESSAYS IN HONOUR OF CRISTOPH SCHREUER, *supra* note 11 at 76, 77.

likely to lead to jurisdictional controversies"[44] and that he "insisted that the precise definition was best left to the parties"[45]. Therefore, if the reasoning of the members of the drafting commission is to be interpreted in isolation to the further practice it can be concluded that no definition exists and that defining what is an investment is best left to the parties as well that parties have a mechanism to exclude certain investments from ICSID protection by using article 25 (4). Strik has observed that "none of the PIGS[46] countries has made notification under article 25 (4) ICSID Convention that explicitly identifies foreign debt instruments as a class of disputes they would not consider submitting to the jurisdiction of the ICSID Centre"[47]. The same PIGS countries have left very broad definitions of investments in their BITs. The result is that both PIGS countries - Italy and Greece have benefited from the non - use of the article 25 (4) to the certain extent. Italian bondholders (investors) were hosted before ICSID while in the case of Greece (being the host country) ICSID has denied jurisdiction.

However, every word has its inherent meaning and therefore both case law and ICSID Tribunals were faced with the interpretation of the term investment. It seems that there is an agreement that the ordinary commercial transactions cannot be regarded as investments. Morterson pointed out that "most have agreed that a single commercial transaction (such as the delivery of a single load of cars) would be outside the scope of the Convention"[48]. Nevertheless, ICSID would not be ICSID if there is not another discrepancy being what is the difference between portfolio

[44] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 114 (Cambridge University Press 2d ed. 2009).
[45] *Id.* p. 115,
[46] PIGS being an abbreviation for Portugal, Italy, Greece, Spain.
[47] Daniella Strik, *Investment Protection of Sovereign Debt and its Implications on the Future of Investment Law in the EU*, 29 J. Int'l Arb. 183, 187 (2012).
[48] Julian Davis Morterson., *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 Harv. Int'l L.J., 257, 269 (2010).

investment and ordinary commercial transaction. The attempt to that distinction was made in ICSID case Fedax v. Venezuela where the tribunal has stressed out that the issuance of promissory notes is an investment. Mentioned due to public interest reasons since they were raised to "undertake productive works, attend to the needs of national interest and cover transitory needs of the treasury"[49]. Yet, there are opponents as to the view whether even all portfolio investments should fall under the ICSID's jurisdiction which also encompass sovereign bonds disputed in Abaclat, Ambiente Ufficio and Postova banka case. Waibel advocates that ICSID cases Fedax and CSOB[50] were wrongly decided due to the fact that the two tribunals subsumed all portfolio investments under investments[51]. Sacerdoti pointed out that "portfolio capital does not bring with it the access to foreign technology, techniques and markets as FCI does"[52]. On the other side Vandevele stresses out that "portfolio investment can contribute to capital formation and bring foreign exchange into the economy […] enhance access to capital for small firms […] help develop institutions necessary for modern economy"[53]. This bipolar view whether portfolio investments being financial instruments (sovereign bonds) can be regarded as investments under the article 25 (1) of the ICSID Convention has also divided the members of the tribunals in Abaclat, Ambiente Ufficio and Postova banka case.

[49] Fedax N.V. v. The Rep. of Venezuela, ICSID case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, para. 42, (July 11, 1997), http://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf [Hereinafter *Fedax Decision*].
[50] Ceskoslovenska Obchodni Banka, A.S. v. Slovak Rep., ICSID case No. ARB/97/4 was a case in which the Tribunal has decided that it has jurisdiction to hear the claim arising out of loan.
[51] Michael Waibel, *Opening Pandora's Box - Sovereign bonds in International Arbitration*, 101 Am. J. Int'l L. 711, 722 (2007).
[52] Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Lecture at the Hague Academy of International Law, in 269 RECUEIL DES COURS DE LA HAYE 272 (Brill Nijhoff 1997).
[53] KENNETH J. VANDEVELE, BILATERAL INVESTMENT TREATIES, 123 - 124 (Oxford University Press 2010).

Abaclat Tribunal was of the opinion that "the concept of investment as contemplated by the ICSID Convention relates more to the contribution itself" and therefore has drawn the conclusion that the investors have made such contribution when purchasing bonds. Mentioned due to the fact that they have paid certain amount of money for which amount they have got the right for reimbursement from Argentina. The view of the Tribunal was that each transaction should be viewed from the perspective of both the BIT and the article 25 (1) of the Convention and therefore that the investment has to fit into both. The Tribunal has rejected to apply the Salini criteria[54] since in the Tribunal's view if they are to fail those requirements that would be contrary to the spirit of the Convention which is to promote investment. The Tribunal also emphasized that those criteria have never been inserted in the Convention and that they should not create the limits for protection since it is the intention of neither the Convention nor the BITs. Nevertheless, the Tribunal has also stated that even if an objective criteria (being for the tribunal a contribution that extends over a certain period of time and that involves some risk) of the term investment is to be applied, the transaction will fall under the definition.

The remarks of Professor Georges Abi-Saab, the dissenter in Abaclat case as to the requirements under the article 25 (1) are that firstly the "double barred" test should be applied and that whether something is to be regarded as an investment or not is not to be left only to the parties' consent expressed in the relevant investment treaty. He advocates for the distinction between the use of the word investment on the financial and ICSID market and emphasizes that "in financial

[54] Salini criteria being contributions, a certain duration of performance of the contract and a participation in the risks of the transaction as well contribution to the economic development of the host State. Salini Costruttori S.p.A. and Italstrade S.p.A v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, para. 52, (Nov. 9, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0735.pdf

markets, "investment" covers the acquisition of any kind of assets such as deposit accounts, debt and equity securities, credit default swaps and derivatives"[55]. The fact that portfolio investments are "off-the shelf financial products, with their high velocity of circulation and their remoteness, the same as their holders"[56] calls for a scrutiny when their coverage by article 25 (1) is in question. His main objection as to including sovereign bonds in the article 25 (1) protection is that ICSID was established as a forum for the private investment that falls under "the imperium of the host State in terms of legislation and adjudication"[57] being in his example factories and enterprises.

It is worth firstly noting that in the Ambiente Ufficio case for the purposes of concluding what constitutes an investment - bonds or security entitlements, the Tribunal primarily clarified that both bonds and security entitlements (issued on the secondary market) constitute a single economic operation and as such arise directly out of an investment and are therefore covered by both article 25 (1) of the ICSID Convention and the article 1 (1) of the applicable BIT. It relied on the view that the Tribunals are to look not to the single operation, but to the overall transaction and its economic reality and thus observed that viewing differently would disregard the fact that the states itself count on the fact that bonds would be sold on secondary market, since otherwise whole issuance process would be unsuccessful. With regard to the article 25 (1) of the ICSID Convention, the Ambiente Ufficio Tribunal, once concluded that meaning is far from being clear, sought help in the Vienna Convention on the Law of Treaties[58] which is different approach than the one the Tribunal used in Abaclat case, but however led to the same result. It started other way round by

[55] Abaclat Dissenting, *supra* note 13, para. 41.
[56] *Id.* para. 57.
[57] *Id.* para. 54.
[58] [Hereinafter *VCLT*].

firstly analyzing the preparatory work of the VCLT and with that regard concluded that the liberal approach - not giving the definition of the term investment has a counter balance in the article 25 (4) of the ICSID Convention. It further added that the parties' consent is of great relevance as to establishing the meaning of the term investment since they are the ones which can exclude the disputes from ICSID jurisdiction by using the tool of 25 (4). Afterwards, it has analyzed the criteria stipulated in the article 31 of the VCLT, namely ordinary meaning, context, object and purpose and subsequent practice. As to the ordinary meaning it noted that it covers a wide range of economic operations and thus does not restrict inclusion of bonds or security entitlements but is susceptible of including it; as for the context it concluded that the exclusion of definition leading to the possible wide interpretation of the term investment is counter balanced in the possibility of using 25 (4) mechanism, BIT or even national legislation for exclusion of certain investments from protection; as for the object and purpose the interesting observance is that States have nothing to lose accepting the consent - based character of ICSID Convention by the fact that the term investment is understood broadly since they have many ways excluding certain types of investment from their consent; as for the subsequent state practice, the conclusion was that there is not a common one which would exclude sovereign bonds and further turned to the article 38 of the Statute of the International Court of Justice – stipulating for reliance on case law and scholars, particularly Fedax case confirming that financial instruments may constitute investment under the article 25 (1) and even Joy Mining case which even denying jurisdiction has confirmed Fedax methodology as well the scholars advocating for the broad meaning of the term investment . The Tribunal rejected the application of the Salini criteria, but noted that even if it is to be applied sovereign bonds would still meet all the Salini criteria.

Mr Bernandez, the author of the dissenting opinion in Ambiente Ufficio case, rendered the following conclusion as to the meaning of the term investment under the article 25 (1) of the ICSID Convention. Firstly he determined that bonds and security entitlements do not constitute a single economic unity, since they are different products, issued at different market, in a different point of time, by two different persons. His major objections are that they are not related to the specific project, that the primary holders hold them only for few seconds which excludes risk, i.e. "there was no risk apart from a purely commercial which does not distinct the situation in the case at hand from the pure commercial transaction"[59]. In his view there is no difference from a pure sale. Mr. Bernandez is of the opinion that sovereign bonds cannot be compared to loans, since for loans to be qualified as an investment, they need to be linked to the specific economic activity and not being issued for a general budgetary (public interest) purposes. Then he states that "the term "investment" in Article 25(1) has an objective ordinary meaning"[60]. He is of the view that the majority decision is kind of rejection of the double barred test and that it has only relied on the parties' consent leaving them a discretion to define the investment under the BIT which would prevail over the ordinary one in the article 25 (1). This according to the dissenter leads to the situation that ICSID would be a place for resolving any dispute unless contracted out by the parties. While on the one hand the attitude of the author is clear towards the fact that transaction in the case at hand does not fall under the definition of investment under ICSID and that the meaning of investment under ICSID has limits, on the other hand from this part it is not clear what are the criteria that that transaction does not meet so that it does not fall under the definition of article 25

[59] Ambiente Ufficio S.p.A. and others v. Argentine Rep., ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, para. 180, (May 2, 2013) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3452_En&caseId=C340 [Hereinafter *Ambiente Ufficio Dissenting*].
[60] *Id*. para. 191.

(1) of the ICSID Convention. The author just points out that "Those transactions are not by its very nature ICSID protected investments because they do not meet the objective basic criteria for identifying an investment appurtenant to Article 25(1), as interpreted generally by most of ICSID arbitral decisions and academic commentators"[61]. As to the interpretation of the Convention in light of the supplementary means of interpretation stipulated by the article 32 of the VCTL, the dissenter views that the travaux of the ICSID has sent a message that sovereign bonds and security entitlements are excluded from ICSID protection. This due to the fact that they were not mentioned during negotiations and that up to Abaclat case no case has ever been filed with regard to sovereign bonds. In his opinion the view of the preparatory work was to distinguish between investments and ordinary commercial transactions (in his view sovereign bonds), which would be protected by the customary international law. When interpretation according to the article 31 is in question, he dissents with the majority that the existence of article 25 (4) leaves the room for broad interpretation. While it is a context for interpretation of article 25 (1) its "actual wording of the former does not convey a broad or narrow intent as to the use of the term "investment" in the latter" [62] and adds that "paragraphs 1 and 4 of Article 25 of the Convention deal with a different subject-matters and each is formulated in a self-contained way"[63]. When object and purpose are in question, he objects to the majority since "The paramount aim of the 1965 ICSID Convention of promoting international cooperation for *economic development* disappears altogether from the picture overwhelmed by the above avalanche of unilateral or bilateral consents"[64]. In his view, the purpose of the Convention was economic development and therefore financial instruments, "which are

[61] *Id*. para. 207.
[62] *Id*. para. 232.
[63] *Id*. para. 232.
[64] *Id*. para. 242.

traded between persons alien to any economic activity in the host State cannot be regarded as investments" [65].

With regard to the question whether sovereign bonds are covered by the article 25 (1), the Tribunal in Postova banka case touched upon this issue only due to the fact that the parties have dealt with it, otherwise since the Tribunal found that they are not covered by the relevant BIT it was not worth further analysis. Interestingly, arbitrator Townsend has dissented from this part of the decision. The other two arbitrators have found that under the objective criteria the sovereign bonds in the case at hand would not fall under the definition of investment as defined in article 25 (1) of the ICSID Convention. Namely, the Tribunal has stated that firstly the distinction between an investment and sale is that investment is "a process of purported creation of value"[66] while sale is a "process of exchange of values"[67]. It further made a distinction between the bonds that are used for general purposes and those that are used for funding specific projects, which in the ICSID's history were granted protection. Such lack of specific project raises doubts in the view of the Tribunal whether bonds are to be used for the economic development of the country. What's more it is questionable whether the funds pass through the territory of Greece or are sent to foreign country to pay its debts. When risk is in question, the Tribunal's view is that the transaction in the case at hand lacks it and distinguishes between operational, commercial and sovereign risk and states that "under an "objective" approach, an investment risk would be an operational risk and

[65] *Id*. para. 262.
[66] Poštová banka, A.S. and Istrokapital SE v. Hellenic Rep., ICSID Case No. ARB/13/8, Award, para. 361, n.505, (Apr. 9, 2015), [*Hereinafter* Postova banka Award], https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5752_En&caseId=C2823
[67] *Id*. para. 361.

not a commercial risk or a sovereign risk"[68] as well that "the distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks"[69].

As could have been seen as regards to the question whether sovereign bonds are investments under the article 25 (1) of the ICSID Convention, the view among the members of the Tribunal in the three analyzed cases have varied from the ones being in favor of the parties' consent to the one advocating for the application of the certain objective criteria. The term investment is not defined in the Convention. It is true that words have inherent meaning which differentiates them from other words. However, to what extent are the Tribunals to go when determining this inherent meaning and these criteria and whether objective meaning of investment or the one that arises from the spirit of the Convention should be followed. View of scholars have also varied as to this question. Professor Christoph Schreuer advocated for the following features of investment: duration, regularity of profit and return (emphasizing that lump sum is not impossible but untypical), risk and substantial development of host state[70] but has also stated that "the only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence"[71] being the need for international cooperation and economic

[68] *Id*. para. 369.
[69] *Id* para. 370.
[70] SCHREUER, *supra* note 44, at 128.
[71] *Id*. p. 116.

development. Zachary Douglas believes that the tribunals should focus on determining whether there are proprietary interests in the host territory, whether they involved transfer of funds and whether there is risk which should have both legal and economic characteristics[72]. The impression left in Abaclat is that what suffices is contribution, which can be payment of funds to the host state as is the case in with sovereign bonds. Ambiente Ufficio went even for the more liberal approach advocating that ICSID has nothing to lose if accepting jurisdiction and that there is exclusion method stipulated in the article 25 (4) of the Convention. Authors of ICSID Convention could not have agreed on the definition of investment nor have given any guidelines in the Convention's text. By inserting the article 25 (4) of the Convention they have left the method for exclusion to the parties and given them the authority to create the definition of investment[73]. This view was also followed in the case law, as for example in the CMS Gas v. Argentina where the tribunal stated that since there is no definition of the term investment, defining is left to the bilateral treaties or other instruments on which jurisdiction is based and therefore relied on the definition of investment in the U.S. - Argentina BIT[74]. Imposing certain additional criteria on what can be regarded as investment can lead to the circulus viciosus and the situation that parties include certain type of

[72] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, 163 (Cambridge University Press, 2009).

[73] For example, the government of Guyana has notified ICSID in 1974 that it excludes all the legal disputes arising directly out of an investment relating to the mineral and other natural resources of Guyana. Nevertheless, it has withdrawn the request in 1987.

[74] CMS Gas Transmission Company v. Argentine Rep., ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, para. 71, (Sept. 25, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4

investment in the BIT but then the Tribunal says it cannot be disputed before the Tribunal since it does not satisfy the artificially created objective criteria of the article 25 (1). Mr. Bernandez in the dissenting opinion has advocated for the different subject matters as to the provisions 25 (1) and 25 (4) of the Convention and that therefore they cannot be read in conjunction. However, firstly the fact that both are contained in the same article speaks in favor of dealing with the same subject matter and secondly since both are dealing with the jurisdiction issue they should be read in conjunction. Furthermore, imposing additional criteria can lead to the situation that parties agree on the protection in the investment treaty but ICSID rejects it since it is not covered by the article 25 (1) of the Convention. For example in Postova banka case this could have been the situation had the same Tribunal decided the case under some other BIT explicitly protecting bonds issued by government such as for example Jamaica - Korea BIT[75]. Since the Tribunal was of the opinion that sovereign bonds are not covered by article 25 (1), then the fact that they are covered by the applicable BIT would not matter. Imposing any additional restrictions as to the definition of investment can also lead to the situation that one investment forum accepts jurisdiction and the other does not. Schefer emphasizes the words of Mariel Dimsey, a counsel of the International Chamber of Commerce[76] who stated that the applicability of Salini criteria is questionable and that in one ICC arbitration the Tribunal did not even go into the interpretation of the term investment,

[75] Jam. – S. Korea BIT in states that investment includes among other government - issued securities. Agreement between the Government of The Republic of Korea and The Government of Jamaica for the Promotion and Protection of Investments, art. 1 (1) b, June 10 2003, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1720

[76] [Hereinafter *ICC*].

but relied only on the definition of investment in the relevant BIT[77]. There is no reason why ICSID would not follow this approach. Arbitrators are the ones to resolve the dispute, the same persons who can appear tomorrow before ICC. Number of BITs provide also for resolving disputes before other arbitral institutions being for example ICC or The Arbitration Institute of the Stockholm Chamber of Commerce. Therefore, if they are to follow certain criteria not being the ones stipulated by the parties this leads to the acceptance of jurisdiction of one institution and rejection of other. Such non – uniformity was definitely not a purpose of the investment law.

Even if the criteria is to be applied its interpretation by the dissenters and the majority in Postova banka are very questionable and deserve scrutiny. Dissenting opinion in Ambiente Ufficio calls for the economic development of the country and stresses out that in the case at hand claimants are aliens to the transaction, i.e. there is no particular project to which their transaction is related to. It is true that the Preamble of the ICSID Convention calls for the economic development. However it does not define it. It is not true that country can only develop from funds invested in the particular, named project. For example, a country can issue bonds or take a loan for the development of a highway, but then be in a position to search for a concessionaire since it is

[77] KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW TEXT CASES AND MATERIALS, 166 (Edward Elgar Publishing Limited 2009).

not able to pay back that loan[78]. Therefore, it cannot be claimed that the economic development is present in the project which led the country to the eve of bankruptcy. Second question is from which perspective the specific project is to contribute economic development. For a country such as Germany for example having around 11.000,00 km of highway, taking a loan for building additional 100 is not an economic development, even though related to the specific project. On the other side for South Sudan which has got its first paved 192 km of highway in 2012 building those 100 km is enormous economic development. Lastly, did in certain cases the potential for the economic development exist even in the beginning of the project. For example underdeveloped countries are only used as cheap labor market in order to achieve targeted goal and none of the developed technology rests in that country but is transferred to the headquarters. Also, if the foreign investor builds another factory for producing garments in Bangladesh, employs Bangladeshi people, but using the benefits of its policy that the minimum monthly wage can be 68 $, does it really benefit the economic development of the country? Furthermore, countries are usually giving certain incentives in order to attract foreign investors which can more be a cost for a country than an introduction to the economic development[79]. Such incentives can also be

[78] For example Croatia has taken a loan for building a highway and less than ten years later is in a position to search for a concessionaire for more than 1000 km of its highway, so that it is able to pay back that loan. Vlada Republike Hrvatske [Government of the Rep. of Croatia], Statement of the Croatian Deputy Prime Minister (Oct 7, 2014) https://vlada.gov.hr/vijesti/opacic-nema-rezanja-novca-za-socijalu-a-koncesija-autocesta-je-nuzna/14936

[79] For example until 2014 in the Rep. of Serbia, 140 foreign companies were granted incentives for new working places in comparison to 117 domestic companies. One foreign factory has got 10,000.00 euros per newly opened working place.

reflected in the exemption from paying land rent (if the land is the ownership of the state), then exemption from profit tax for certain years etc. Therefore, linking funds to the specific project being largely subsidized by a country does not lead to the conclusion that the project is for the economic benefit of the country. The Tribunal in the Postova banka case stresses out the purported creation of value in order to make the distinction between failed investments which can be granted protection. However, irrespective whether investment failed or not, if in the beginning it is clear that it cannot prosper economic development of the country, why would it be granted protection only because it is linked to the specific project. Even more, projects with many incentives lack risk in oppose to the holder of sovereign bond waiting for the country to fulfill its duties. It was the intention of the whole concept of the investment treaties also to promote the flow of the capital between the two states, which is a goal of the World Bank as such. This is a prerequisite for the economic development and how it is to be used it is up to the government to be blamed. Michael Waibel who was cited many times by those dissenting with the view that sovereign bonds are investments states that "The prospective sovereign bondholder does not participate in the elaboration of specific projects, and evaluates the commitment of capital against that background. Neither personnel nor ideas nor production facilities are associated with the bond. Rather, bondholders look solely to the country's creditworthiness"[80]. Such view seems punishable to the bondholders. Firstly, it is rebuttable whether bondholder just looks to the county creditworthiness.

[80] Waibel, *supra note* 51, at 728.

If we take a look which machinery stands beyond the investment funds and the complexity of transactions they are involved in, we cannot state that there is just one click to be done - checking country's rate. Secondly, a large number of purchases of sovereign bonds would not even happen if such machineries did not exist - therefore countries, including Argentina would have been deprived from ones purchasing their bonds and therefore insert cash in its budget. The significant influence of portfolio investment[81] on foreign country development was also observed by OECD at the Global Forum on International Investment which stressed out its contribution to the healthier economy by bringing new instruments such as swaps, futures, options and others for hedging risk[82]. As to the risk element and the fact that purchasers of the sovereign bonds are only to look to the credit rating of the country, this argument does not sound convincing in the realm of the fact that both Argentina and Greece have failed to pay their debt which speaks for itself what is the risk of investing in sovereign bonds. From the time of purchase to the time of maturity, credit rating can change radically, especially for the long - term securities. Argentinian story has lasted for around twenty years. What's more, unlike shareholders bondholders lack voting rights and control over the debtor and therefore have no influence on the management and implicitly on its dis/ability to pay the debt. Lastly, as to the remarks that it is not visible where the funds have gone and if they have even gone outside Argentina for payment of its external debt is unimportant. Country's

[81] Quoted discussion was about portfolio investments in general without relating it to the specific projects.
[82] Kimberly Evans, *Foreign Portfolio and Direct Investment Complementarity, Differences, and Integration* at the Global Forum on International Investment (Dec 5. 2002), http://www.oecd.org/investment/investmentfordevelopment/2764407.pdf

budget is used only for governmental/public purposes. Even if the funds are sent abroad, it is sent in relation to the country's operation - e.g. purchase of a facility that would contribute to the country's development. Additionally, if civil servants in Greece have not been granted salaries for several months, then paying them salaries is country's development. In the end, it is true that money from bonds can be spent on wars as stressed by the dissenter in the Abaclat case[83], however what should be looked at in this case is the mere purpose of bond issuance which was in the Argentinian case a part of restructuring of its economy during the 90' following the debt crisis in the 80' which as aim had economic growth, lessening of inflation, reduction of debt and privatization[84]. In the end of the day, ICSID is a part of World Bank. The whole idea of the World's Bank was financing, helping development of the un(der)developed nations is by granting loans[85]. Therefore, if the believable method of investment of the World Bank are loans, then there should be no doubt that mere grant of funds to the contracting party can be regarded as an investment and disputed before ICSID being created by that same World Bank. Types of investments are changing and adjusting to the need of a market. This was noticed also by the legal advisors of the World Bank. "This lack of definition, which was deliberate, has enabled the Convention to accommodate both traditional types of investment in the form of capital contributions and new types of investment, including service contracts and transfers of technology"[86]. During the 90s there was

[83] Abaclat Dissenting, *supra* note 13, para. 113.
[84] *See* Abaclat Decision, *supra* note 38, paras. 42 – 51.
[85] Articles of Agreement of the International Bank for Reconstruction and Development, June 27 2012.
[86] Georges R. Delaume, 1 *News from ICSID*, 1, 18 (Summer 1984).

an expansion of the trade on stock exchanges and an expansion of the trade of market instruments (shares, debentures, security instruments etc.) as well of the institutional investors. In witness of the previously mentioned, even the reports of the World Bank itself have spoken[87]. There is a whole area of business buying only financial instruments, being investment funds. For example, for Citigroup purchasing bonds is an investment for sure. Depriving those buying financial instruments not related to the specific project from ICSID's jurisdiction deprives one whole industry from appearing before that institution which can have impact on the flow of capital. As another proof that investment is developing, in the recent book on investment treaties, Professor Salacuse distinguishes not only between foreign direct and portfolio investments, but between foreign direct investment, foreign portfolio investment, international loans, international bonds, suppliers' and other credits and other contractual arrangements[88]. Bearing in mind all the above stated, rejecting application of Salini and other criteria was right approach since they are not prescribed by the Convention, so their application can go beyond the consent of the ICSID's signatories and secondly their application does not lead to an accurate result. In the end who knows better what is an investment for than the contracting parties themselves. Next paragraph will deal with the protection of sovereign bonds by investment treaties.

[87] *See* World Bank Discussion Paper 228, *Portfolio Investment in Developing Countries*, (Stijn Claessens & Sudarshan Gooptu eds. 1993), http://wwwwds.worldbank.org/servlet/WDSContentServer/IW3P/IB/1993/12/01/000009265_3970716144554/Rendered/PDF/multi_page.pdf

[88] JESWALD SALACUSE, THE LAW ON INVESTMENT TREATIES, 38 - 41 (Oxford University Press 2d ed. 2015).

2. Sovereign bonds under investment treaties

One of the purposes for concluding the investment treaty is that the parties agree which investment they will recognize as protected ones. In general there are several ways for defining investment. Some investment treaties have an enumerative definition listing certain examples of the investments whose introduction just states that for the purposes of this agreement investment means all kind of assets including but not limiting to and then enumerates certain examples. Such is the one in the Greek Slovakia BIT. The other type of the definition is also the one consisting of the enumerative list of examples but whose introduction is wider imposing criteria that the investment is made in the territory of one country, in accordance with its laws etc. Such definition is the one in the Argentina - Italy BIT. Certain investment treaties explicitly exclude some transactions from the protection. For example, the North Atlantic Free Trade Agreement in the article 1139 excludes from the definition of investment a debt security, regardless of original maturity, of a state enterprise[89]. The definition of the investment in investment treaty is important since it is a prerequisite for establishment of jurisdiction of any tribunal. Have the parties excluded certain investment the Tribunal definitely does not have jurisdiction to hear that claim. At the time when investment treaty is drafted each and every transaction which may constitute an investment

[89] North American Free Trade Agreement, ch. 11, art., 1135, U.S.-Can.- Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

and to which the treaty may apply cannot be foreseen. Dealume advocated for use of broad clauses since the narrow or specific ones can lead to inadvertent exclusion of certain matters that may turn to dispute[90]. Exactly those broad clauses is what has created problems in interpretation - where and what are the limits to all assets, including but not limiting and what is encompassed by general terms as obligations, claims to money etc. In Fedax view, the wording every kind of asset and more particularly though not exclusively was interpreted as "the intent of the parties to give the term investment very broad meaning"[91]. In CSOB case, the ICSID Tribunal found that even though loans were not specifically listed as investment, the Tribunal found that they fall under the definition of assets and monetary receivables or claims[92]. However, as will be seen in the further analysis, sometimes the Tribunal is not satisfied by the broad definition and therefore in the case Postova banka case, the term claims to money and contract having financial value was not enough for the Tribunal to encompass bonds.

With regard to the interpretation of the BIT, the Abaclat Tribunal has concluded that it covers wide range of investments, that its wording is very broad and therefore not intended to be restrictive and that the purpose of the BIT as defined in the preamble was creation of the favorable conditions for the economic cooperation. Then, the Tribunal dealt with the specific terms listed in the BIT. The first conclusion was that lit. c covers financial instruments and the second one that

[90] Dealume, *supra* note 86, at 17.
[91] Fedax Decision, *supra* note 49, paras. 31 and 32.
[92] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Rep., ICSID case no. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, para. 77, (May 24, 1999) http://www.italaw.com/sites/default/files/case-documents/ita0144.pdf [Hereinafter *CSOB Decision*].

due to the fact that the term obligations (as defined in authentic version obligaciones in Spanish and obligazzioni in Italian) "may be understood as referring to an economic value incorporated into a credit title representing a loan"[93] and as a consequence that such obligations would in the English language be called bonds. All mentioned led to the conclusion that sovereign bonds are covered by the Argentina - Italy BIT. The Tribunal rendered the same conclusion when security entitlements related to bonds held by Claimants are in question. This due to the fact that they are an instrument having an economic value as required by the article 1 (1) c of the BIT. Additionally, the Tribunal noted that there is a sufficient link between bonds and security entitlements that the dispute may be considered as arising directly out of an investment. Mentioned, since the structure and the idea of the whole transaction of issuance of sovereign bonds, which was conducted via underwriters was that the bonds are further sold on the secondary market as well that they are both part of the single economic operation. It pointed out the admission of Argentina that the exchange offer could not have been done without tendering of holders of security entitlements. As for the Claimants' contribution, the Tribunal has pointed out that since they purchased and paid the entitlements the contribution exists and that the value is reflected in their right to claim the reimbursement from Argentina. With respect to the issue whether the investment was made in the territory of Argentina, as required by the chapeau of the definition of investment, the Tribunal stated that "the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid or transferred as Respondent claimed"[94]. The Tribunal further concluded that due to the fact that financial instruments were expressly protected by the BIT, it would be contrary to the BIT wording to link investment to a

[93] Abaclat Decision, *supra* note 38, para. 355.
[94] *Id*. para. 374.

specific economic enterprise or operation taking place at the territory of the host state"[95] and that since the funds served to finance Argentina's economic development, that it is irrelevant whether they were used to repay pre – existing debts or were used in government spending and that in both cases it was used for managing finances and as such must be considered to have contributed to Argentina's economic development and thus have been made in Argentina. Regarding forum selection clauses which were in many cases outside of Argentina, the Tribunal was of the view that forum selection clauses are only to serve for the purposes of determining the place for resolving disputes and that they have nothing to do with the place of performance of contractual obligations and even if they did, place of performance has nothing to do with the determination of the place of investment.

Dissenting opinion of Professor Abi-Saab did not have any objections as to the question whether article 1 (1) c of the BIT covers financial instruments. Where he dissents with the majority is in distinguishing between purchases on the primary market and secondary market due to the fact that on the secondary market there is no involvement of Argentina and therefore no link between the sum received on the primary market and secondary market. He further concludes that "The Tribunal is thus bound to look at the circumstances of the individual purchases of security entitlements, and their traceability to - i.e. the strength or tenuousness of their legal *nexus* with - Argentina, before it can decide whether the dispute over each of them "arises directly out of an investment"[96]. Further he dissents as to the territorial nexus, due to the fact that the bonds lack both legal and material nexus with Argentina. As for the legal nexus with Argentina they have

[95] *Id*. para. 375.
[96] Abaclat Dissenting, *supra* note 13, para. 72.

been sold outside of Argentina, on international financial market with a choice of law and forum selection clauses outside of Argentina and as well that the place of performance is outside of Argentina. He also points out that currency of payment, place of payment and residence of intermediaries are outside of Argentina. As far as material criteria are concerned, the objections lie in the fact that the investment should be made in the territory of the host country which can only be proved as to have been made if it is related to the specific project. With that regard he stresses out that since security entitlements do not form part of an economic project, operation or activity in Argentina "they have no specific economic anchorage in Argentina, allowing them to be seen and considered as an investment in the territory of Argentina"[97]. With respect to the view that funds were made available to Argentina, he objects that firstly it is a simple loan which is an ordinary commercial transaction not being related to the economic project, activity or operation in Argentina and secondly that funds can be used for financing non - productive capacities, such as for example wars, aggression etc.

The Tribunal in Ambiente Ufficio case was of the opinion that the term "obligaciones" in Spanish and "obbligazioni" in Italian also cover bonds since even if the term is translated as obligations (as suggested by Respondent) it still covers bonds since they are also obligations. It also emphasized that it cannot derive a conclusion that not including the words bonds in either Spanish or Italian can lead one to believe that bonds are excluded form BIT. The parties have not explicitly excluded protection of bonds and therefore no one can derive a conclusion that they are not covered by article 1 (1) of the Argentina - Italy BIT as well that had the parties wanted to

[97] *Id*. para. 108.

exclude them they should have done so explicitly. The Tribunal further elaborated on the territoriality requirement, namely whether contribution should be invested in the territory of the host state so that it be qualified as a protected investment under the BIT. In order to determine in whose territory the investment was made, the Tribunal had to determine who is the beneficiary of the investment and which is to be determined by the criteria of contribution to the economic development. The Tribunal further concluded that "the whole bond issuing process had a purpose of raising money for budgetary needs of Argentina and further development of that country"[98]. Therefore, from the view of the Tribunal as long as the invested funds went to the Argentinian budget they satisfy the territoriality requirement.

The first conclusion of Mr. Santiago Torres Bernandez is that neither the term bond nor the term security entitlements appear in the authentic texts of the BIT (Spanish and Italian). As far as the term obligaciones/obbligazioni (obligations in English) and the question whether bonds fall under the article 1 (1) c is concerned his view is that they can be regarded as obligations only if they meet the requirements stipulated in the general (chapeau) definition of the article 1 (asset invested or reinvested in the territory of the contracting party, in accordance with its laws and regulations). Dissenters question as to fulfilment of these conditions is no. The dissenter further analyses the preamble of the BIT which calls for the economic cooperation and making investments and concludes that "the aim of the BIT is the development of investments entailing economic activities of an entrepreneurial character in the territory of the other Contracting Party and not portfolio investments or the acquisition of mere financial products without any rapport

[98] Ambiente Ufficio Dissenting, *supra* note 59, para. 500.

whatsoever with a project, enterprise or activity of the private investor national of one Contracting Party in the territory of the host Party of the investment"[99]. With respect to the requirement that the investment was made in the territory of the host state, Mr. Bernandez points out that Claimants did not prove that the money from sovereign bonds "were destined to "contribute to Argentina's economic development and *were actually made available to it for that purpose*" [100].

The Tribunal in Postova banka case was of the unanimous opinion that sovereign bonds do not fall under the definition of investment as defined in article 1 (1) of the Greek – Slovakian BIT neither the general one protecting every kind of asset nor the one protecting loans, claims to money or to any performance under contract having a financial value. The general methodology that the Tribunal has applied in interpreting the term every kind of asset is that the picked categories must be considered when determining whether transaction falls under the BIT definition and that "in such consideration, the Tribunal must balance the broadness of the categories with the limits that result from their inclusion in the treaty"[101]. Otherwise, any transaction could have potentially fallen under the protection of the BIT. Therefore, the Tribunal's conclusion is that nothing can be regarded as an investment unless it falls in one of the specified, enumerated categories and thus it further analyses each of these. It also notices that "the only reference to bonds in the Slovakia-Greece BIT is in Article 1(1) (b) which refers to "shares in and stock and debentures of a company and any other form of participation in a company"[102]. The fact that the text of the treaty has included debentures (bonds being one kind of) but the ones of the company, omitting the

[99] *Id*. para. 289.
[100] *Id*. para. 310.
[101] Postova banka Award, *supra* note 66, para. 315.
[102] *Id*. para. 333.

government ones which is an implicit conclusion that the parties wanted to exclude sovereign bonds was pointed out. In order to reach a decision, the Tribunal has also made a comparison with the decisions Ambiente Ufficio and Abaclat and their interpretation of the Argentina – Italy BIT. General conclusion with this regard is that the language of the Greece – Slovakia BIT is not wide as the language of Argentina – Italy BIT, since there is no mentioning of general concepts such as obligations, public titles or any right of economic nature conferred under law or contract[103]. When loans named as investment in article 1 (1) c are in question, the Tribunal was also not satisfied with the interpretation that it can cover sovereign bonds. For it sovereign bonds and loans are two totally different categories since loans are issued by banks, it is not easy to change loan creditor as it is when bonds are in question, they are not tradable, there is a contractual privity between borrower and debtor unlike in the case of sovereign bonds[104]. As to the claims to money, since "the text of Article 1(1)(c) of the Slovakia-Greece BIT considers as an investment claims to money or to any performance under contract having a financial value […] the claim to money must arise under a contractual relationship"[105]. Since the sovereign bonds held by Postova banka were acquired at the secondary market, therefore there was no contractual relationship[106].

The Argentina - Italy and the Slovakia - Greece BIT are quite different in their wording. The chapeau of the Argentina - Italy BIT is broader and requires that the investment is made in the

[103] *Id*. para. 307.
[104] *Id*. para. 337, 338.
[105] *Id*. para. 343.
[106] Even though economic development of the host country and its relation to the specific project was an issue raised with regard to the territoriality requirement when dealing with the question of interpretation of the Argentina – Italy BITs in the decisions, since the aspect of the economic development of the contracting party with regard to the specific project has already been discussed in the part dealing with the sovereign bonds and article 25 (1) of the Convention, in this part it would not be repeated.

territory of the contracting party in accordance with its law. What is an investment made in the territory of contracting state was a stumbling block between the majority and dissenters. On the one hand it is enough that it is proved that the contributions are made for the benefit of Argentina (the view of majority in both Abaclat and Ambiente Ufficio) and on the other side in the view of dissenters the fact that bonds are sold on the international market and that they were not directed to the specific project in Argentina lacks territorial link. It is true that sovereign bonds were bought on the international, secondary market. However, it is also true that one transaction cannot go without the other and that if there was no underwriter the issuance of sovereign bonds would not exist which was also pointed by the majority as previously mentioned. Therefore, those two transactions should be looked as one. Once bonds were purchased at the primary market, the funds went to the budget of Argentina. How the funds will be spent is not up to the investor and it should not be deprived of its rights. Relation to the economic project can be a proof of the territoriality requirement, however it is not the only one. Therefore, putting money into the Argentina budget suffices as a proof that the investment was made in the territory of Argentina. Secondary market is a pure change of creditor. Nolan argues that "The fact that state bonds could have been purchased on the secondary market should not defeat an investor's claim that they are protected as a national under a BIT, because as the Tribunal stated in Fedax v. Venezuela, although the identity of the investor will change with every endorsement, the investment itself will remain constant and the

issuer will enjoy a continuous credit benefit until the time the notes become due"[107]. Partially dissenting view to this one is the one stating that only transfer of claims to which the host state has agreed can invoke rights arising out of investment treaty before ICSID[108]. It is true that the purpose of the investment law is not only protection of investors, but of the states as well, however it is also true that capital flow cannot be guaranteed without liberal view as to the change of creditors. If the BIT itself does not prohibit change of the ownership of investment and if it does not make a distinction between the investment directly purchased/made by investor and further acquired, then why would the tribunal paint different BIT's picture. And what is the legitimate reason that any host state is exempted from its duties arising from the investment treaty if the claimant is changed? Put it that way, the rights arising out of an investment treaty cease to exist once the investment is traded on the market. Applying this approach would also deprive the acquirer of shares in the company from the rights arising out of the investment treaty. Therefore, it would be against both the Convention and today's investment regime not to allow for transfer of investment rights along with the transfer of ownership.

[107] Michael D. Nolan, Frederic G. Sourgens & Hugh Carlson, *Leviathan on life-support? Restructuring sovereign debt and international investment protection after Abaclat in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY, 485, 500 (Karl P. Sauvant ed. 2011-2012).

[108] Mihaly International Corporation v. Democratic Socialist Rep. of Sri Lanka, ICSID Case No. ARB/00/2, Award, para. 24, (Mar. 15, 2002), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC606_En&caseId=C189 and CHRISTOPH SCHREUER, THE ICSID CONVENTION - A COMMENTARY, 184 (Cambridge University Press 2001).

Turning to the analysis of the wording of the enumerative definition, the following groups can be distinguished - those explicitly protecting government bonds/securities, those explicitly excluding it, those explicitly including only corporate bonds and those being silent as to the types of bonds protected[109]. As for the ones explicitly excluding protection, the situation is clear – what is explicitly excluded is not an investment. As for those explicitly including sovereign bonds the situation can be interesting if the definition of investment also encompasses the chapeau one such as Argentina - Italy BIT. In that case the situation can be that even though e.g. government bonds are explicitly protected they will lack protection since in the tribunal's view the territoriality requirement lacks. Therefore, viewing primary and secondary market as one is the only way by which explicitly protected transactions will not lack protection. There still rests the group of treaties leaving certain ambiguity by protecting only corporate bonds. The same concern was raised in the UNCTAD's article on sovereign debt restructuring and international investment agreements where it was stated that "It is also questionable whether a treaty covers sovereign debt obligations where its definition of investment, while being open-ended, expressly refers only to "debentures in a company" and "claims to money ... related to a business."[110]. So, the question as to the Greek - Slovakian treaty is whether debentures of a company exclude sovereign bonds from protection and whether such definition is an obstacle that sovereign bonds are covered by the other

[109] More on treaties protecting bonds and/or loans/debts *See* Nolan, Sourgens & Carlson, *supra* note 107 at 502 – 504.

[110] UNCTAD, *Sovereign Debt Restructuring and and International Investment Agreements*, (July 2, 2011) http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf

definition being that of loans, claims to money etc. Firstly, there is no reason why this provision would be given a negative mirror effect in the sense that if one has explicitly protected financial instruments of a company, it has excluded the governmental ones. Company bonds and government bonds are different not reverse terms. If the narrow approach by the Tribunal is adopted, then one may claim also that corporation bonds are excluded since corporations and companies are not synonyms and both can issue bonds. Governments and companies do not issue the same financial instruments, the former one do not issue those granting voting rights, therefore since the only distinction between financial instruments is not in the issuer including one does not exclude the latter. Even if the wording is to be looked that strictly, there is no uniform view that debentures and bonds are synonyms. For example Investopidia states that debentures and bonds are types of debt instruments and that in the United States for example they refer to two separate kinds of debt based securities[111]. There are also definitions claiming that debentures can only be issued by a company[112]. Also there are BITs granting protection to both bonds and debentures[113].

[111] Sean Ross, *What is the Difference between a Debenture and a Bond*, *in* Investopedia, http://www.investopedia.com/ask/answers/122414/what-difference-between-debenture-and-bond.asp last visited on March 25th 2016.

[112] OXFORD DICTIONARY OF ENGLISH, 447 (Oxford University Press 2d. ed. 2005).

[113] For example U.S. - Rwanda BIT, U.S. - Uruguay BIT, Austria - UAE BIT, Austria - Yemen BIT grant protection to both bonds and debentures.

Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, art. 1 (c), (Feb. 19, 2008), ("bonds , debentures, other debt instruments, and loans"), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2241

Treaty between the United States of America and the Oriental Republic of Uruguay concerning the encouragement and reciprocal protection of investment, art. 1(c) ("bonds, debentures, other debt instruments, and loans"), (Nov. 4, 2005), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2380

Agreement between the Republic of Austria and the United Arab Emirates for the promotion and protection of investments, art. 1 (2) (c) (bonds, debentures, loans and other forms of debt and rights derived there from), (June 17, 2001) http://investmentpolicyhub.unctad.org/Download/TreatyFile/224

Additionally, the BIT protects shares in and stock and debentures of a company and any other form of participation in a company, so anything that is not share, stock or debenture should be a form of participation which can be regarded only as instruments giving voting rights. Through the text of the decision the term bond has been used, not debentures and both claimant and respondent have admitted that claimant had bonds[114]. Due to the fact that the types of the financial instruments that can be issued by the governments and by the companies do not clash in 100%, due to the fact that the issuer is not the only *differencia specifica* among financial instruments and due to the fact that there is no unanimous view that bonds and debentures are synonyms this definition cannot be looked as two sides of coin - one protecting company's financial instruments and the other excluding governmental ones. Though, the view that "investment tribunals have opted for broad meaning when Treaty claims contain no qualification, assuming that if parties wanted to exclude something they would have done it expressly"[115] should have been followed in the case at hand and therefore bonds can be understood as falling under the definition of loans or claims to money[116]. This especially since investors were involved in the process of neither negotiation nor drafting of the treaty, then the only accurate interpretation can be the broadest one possible so that the legitimate expectations of the investors are achieved.

Agreement between the Republic of Austria and the Republic of Yemen for the promotion and protection of investments, art. 1 (2) (c) ("bonds, debentures, loans and other forms of debt and rights derived therefrom"), (May 30, 2003), http://investmentpolicyhub.unctad.org/Download/TreatyFile/228

[114] Postova banka Award, *supra* note 66, para. 44.

[115] HAI YEN TRINH, THE INTERPRETATION OF INVESTMENT TREATIES, 18 (Brill Nijhoff, 2014).

[116] *Contra* Strik, *supra* note 47 at 185.

The Tribunal's view that the transaction cannot be regarded as loan, claim to money or any performance under contract having financial value seems wrong due to the fact that it did not take the nature of the transaction into consideration. First of all, in paragraph 53 of the decision it is stated that the Greek Law 2198 of 1994 was created in order to monitor the *loans* on behalf of Government of Greece[117] (author's emphasize). The law covered also the holders of sovereign bonds as could have been deducted from the same paragraph. Therefore, the mere Greece has named this transaction a loan. There is a thin line between a loan and a bond which is also supported by Montanaro who states that "given the similarities between bonds and loans, a more flexible teleological interpretation would have led the Tribunal to conclude that Article 1 (1) (c) of the Greece–Slovakia BIT also covered sovereign bonds"[118]. They are both relation between creditor and debtor and in the end of a day they are both claims to money. The Tribunal's approach as to lack of privity, due to which the transaction cannot have contractual nature and therefore be considered as loan or claim to money, does not stand since as already explained sovereign bonds would have hardly been issued if underwriters did not exist. What's more the issuance of Greek sovereign bonds was created with the idea that they are traded on secondary market.

The Tribunal's conclusion that the wording of the Argentina - Italy BIT is wider than the wording of the Slovakia - Greece one since obligations and any right of an economic nature is wider than the term claims to money does not sound convincing in the context in the case at hand.

[117] Postova banka Award, *supra* note 66, para. 53.
[118] Francesco Montanaro, *Case comment - Postova banka and Istrokapital vs. Hellenic Republic, Sovereign Bonds and the Puzzling Definition of 'Investment' in International Investment Law,* 30 ICSID Rev., 549, 555 (2015).

In proving its statement the Tribunal has referred to the context that the former BIT also covers private or public titles. What it forgets to do is to look at the context in the case at hand - does it really matter and to what extent whether obligation is wider term than claims to money. What matters is that claims to money cover the features of Greek sovereign bonds. Under international law the task of a court is to interpret the treaties not to add additional meaning to the words being contrary to letter and spirit or to revise them[119]. The Tribunal's analysis (or revision of the meaning of the term obligation as opposed to claim to money) lacks the explanation what are the features of obligations that make it wider term than the term claims to money which matter for the context. The distinction can be that obligation can be also specific performance - duty to do or to restrain from doing something, being non – pecuniary obligation, but does it really matter when comparing two pecuniary obligations which both are claims to money? As the Tribunal has easily put the terms bonds and debentures in the same basket why in that case hasn't it followed the reasoning that "all debentures are bonds but not all bonds are debentures"[120]. Such approach of the Tribunal, being different interpretation of quite similar terms applicable to the same case scenario raises the issue of precedent, legal security and uniformity of interpretation.

[119] On the difference between interpretation and exceeding judicial functions see also Report of the International Court of Justice, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, at 229 – 230 (1950).
[120] Ross, *supra* note 111.

Chapter 3 - Possible solutions for overcoming the non – uniform approach

When Abaclat case was decided, it could have been heard that the law firm White & Case has obtained the landmark decision in the sovereign bonds case[121]. Binding precedent does not exist in ICSID arbitration. Article 53 (1) of the ICSID Convention states that "The award shall be binding on the parties"[122]. Schreuer suggests that the binding force of the award is limited to the parties. It does not extend to other cases before different tribunals and does not create binding precedents"[123]. Lack of binding precedent should not lead to non - uniformity and non - reliance on previous decisions. This would be contrary to the principles of international law. Article 38 of the Statute of the International Court of Justice stipulates application of judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. In its article on the use of precedents in investment treaty arbitration awards, Patrick Norton speaks about the duty of investment tribunals to follow earlier decisions[124]. He observes that "several tribunals have noted that a tribunal has an obligation to follow a consistent line of earlier decisions"[125]. As examples he gives the rulings in Sapiem case in which the harmonious development of investment law and certainty of the rule of law were stressed out. Also, the presiding of the Tribunal in Saipem case stated that "it seems well settled that they have

[121] Press Release, White & Case Obtains Landmark Decision in Sovereign Bonds Case (Aug. 10, 2011), http://www.whitecase.com/news/white-case-obtains-landmark-decision-sovereign-bonds-case
[122] *Id.* ICSID Convention, *supra* note 3.
[123] DOZLER & SCHREUER, *supra* note 34 at 286.
[124] Patrick M. Norton, *The use of precedents in investment treaty arbitration awards,* 25 Am. Rev. Int'l. Arb. 167, 175-176 (2014).
[125] *Id.* at 175.

a *moral* obligation to follow precedents so as to foster a normative environment that is predictable"[126]. Simoes has noticed that in the two ICSID decisions, in which the same arbitrator was in both panels, opposing conclusion has been made as to the same issue arising out of the same facts, namely LG&E v. Argentine Republic and CMS v. Argentine Republic decisions. In her view the investor state arbitration is neither foreseeable nor constant as used to be predicted. She has also worried that in the three that time pending disputes before ICSID Tribunal raised by the Italian bondholders possibly the different result will arise[127]. Her predictions were not true as to those three cases, but became true when Greek bonds came at stake. In the realm of the previously discussed decisions it seems that there is neither uniformity nor consensus within ICSID as to 1) what is investment under article 25 (1) of the ICSID Convention and 2) how are the provisions of the investment treaties to be interpreted. Now the question is, how is this non uniformity to be overcome?

Juillard noticed that the arbitral tribunals have not explained the value of the decisions which were taken into account and asks whether they should be treated as elements of facts or sources of law[128]. Therefore, giving a value to previous decisions which would be in-between binding precedent, i.e. sources of law and inter partes effect is a possible solution. The Tribunals can take into consideration as elements of facts previous decisions so that they come to the same conclusion as previous ones. For example had the Tribunal in Postova banka case taken as element of fact the decision in Amaclat and Ambiente Ufficio that sovereign bonds are investments under

[126] Gabrielle Kaufmann - Kohler, *Arbitral Precedent, Dream, Necessity or Excuse*, 23 Arb. Int'l, 357, 374 (2007).
[127] Joanna Simoes, *Sovereign Bond Disputes before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 L. Bus. Rev. Am., 683, 713 (2011).
[128] Patrick Juillard, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 81, 102 (Karl P. Sauvant with Michael Chiswick – Patterson eds., Oxford University Press, 2008).

article 25 (1) of the ICSID Convention, then the uniformity would have been achieved. The opponent side of this approach lies in the fact that such methodology can be dangerous since it will not allow the development of investment law. Has the situation been different and has Postova banka case been decided prior than Abaclat and Ambiente Ufficio and taken as a fact, then sovereign bonds would never have a chance being disputed before ICSID.

Other possible solution when determining what is an investment under article 25 (1) of the ICSID Convention is in question is that the definition of the term investment is included in it. It may not be the one describing what an investment is, but the negative one describing what investment is not and that all the rest can prescribed by the investment treaty to be an investment. For example, there is a general view that ordinary commercial transactions may not be disputed before ICSID. Such definition will bring certainty and less discretionary powers to the Tribunal. The other option is that the Convention is amended so as to provide that the investment can be anything that the parties agree on in the investment treaty. Such stipulation will exclude double barred test and would also limit the powers of the Tribunal as to deciding on jurisdiction. The third option, which is also recognized by Schreuer[129] is that interpretative body, such as the one resembling the Court of Justice of the European Union is established whose task would be to give a preliminary ruling on the interpretation of law. While on the one side it is true that this body is functioning well within the European Union[130], providing uniform application of the EU Law among member states, on the other side the concept of the EU Law and ICSID are different. EU

[129] Christoph Schreuer, *Why Still ICSID, in* 4 THE FUTURE OF ICSID AND THE PLACE OF INVESTMENT TREATIES IN INTERNATIONAL LAW, 203, 208 (N. Jansen Calamita et. al. eds. British Institute of International and Comparative Law, 2013).
[130] [Hereinafter *EU*].

Law primarily consists of various acts, being in the first place regulations and directives which are to be applied or transposed to the national systems. They are to be interpreted by at this time 28 different member states. On the other side ICSID is just a facility for resolving disputes which are resolved by arbitrators[131], who are to apply the rules. Unlike in the EU where the law is to be applied by many different institutions and servants of member states belonging also to the different legal systems, coming from different background, before ICSID the law is applied by the renowned experts in international law. Do they really need additional body for interpretation? This issue raises also the question of abolishment of the purpose of any dispute settlement body since the idea of any international body is having one single entity for resolving international disputes. If the opinion of any of these bodies is subject to preliminary scrutiny then what is firstly the purpose of such body and secondly why then not introducing the appeal mechanism. Also, why should that preliminary body be more competent to decide on jurisdiction related issue than the nominated arbitrators. It would deny the kompetenz kompetenz powers of the arbitral Tribunal being the only one which should decide on its competence to hear the claim. Also, who will be authorized to submit request for interpretation - only arbitrators or parties. Moreover, can the decision of such interpretative body be subject to scrutiny, i.e. revision in the annulment proceedings. Lastly, would such procedure be contrary to effectiveness since it would delay the proceedings while waiting for the decision.

[131] *See* remark of Aron Broches who has stated at his lecture in The Hague Academy of International Law that "The Centre does not itself conciliate or arbitrate but that it is conducted by conciliators and arbitrators appointed in accordance with the provisions of the Convention", BROCHES, *supra* note 30 at 339.

As far as BITs are concerned, it is always advisable that the precise definition, no matter how long and exhaustive it may be is inserted[132]. However, until such preciseness is reached other options should be conceived. As far as the non - uniform language of BITs is concerned, one option is the introduction of the standardized language. Such standardized language will lessen the asymmetrical interpretation of quite similar terms being claims to money and obligations. On the other side it can be claimed that such standardized language interferes in the party autonomy and that at this stage when there are around 3000 BITs in the world the revision would be almost impossible. What seems more sustainable is the conclusion of the convention on the interpretation of the investment treaties. It would firstly replace the ambiguous view as to which rules are to be applied on the interpretation of investment treaty. VCTL has even become kind of customary law for treaty interpretation[133], however there are opposing view as to whether it is the most appropriate tool for bilateral treaties. Salacuse states that "the basic rules of investment treaty interpretation are found in articles 31, 32 and 33 of the VCLT"[134] while Gary Born propagates that VCLT should be excluded from the interpretation of investment treaties and that they should have their own rules for interpretation since VCLT does not differ between multilateral and bilateral treaty and that therefore it would not make sense to use the same tool for large scale conventions such as Statute of Rome for example and bilateral treaties due to the fact that the latter deserve resolving of a very specific question [135]. Bearing in mind the specificity and diversity of BITs, the view that VCLT is the most appropriate interpretation tool does stand scrutiny since its rules are too broad and

[132] It was suggested by the ICSID's legal advisors that the parties stipulate that certain transaction falls under the definition of article 25 (1) of the Convention. Delaume, *supra* note 86 at 18.
[133] *See* Kasikili/Sedudu Island (Botswana v. Namibia), 1999 I.C.J. para. 18 (December 13) (Judgement).
[134] SALACUSE, *supra* note 88 at 156.
[135] Gary Born, *Should Investment Treaties have their own rules of interpretation,* Kluwer Arbitration Blog, Feb. 13 2015,http://kluwerarbitrationblog.com/2015/02/03/should-investment-treaties-have-their-own-rules-of interpretation/

general, since the first investment treaty was signed ten years prior to VCLT[136] and at the time of its conclusion more than 70 investment treaties were yet in force and since the wording of the investment treaties is very specific. Therefore they deserve their own tool of interpretation. Such tool will also help determining whether and to what extent terms as claims to money and obligations differ and what one can cover what other. It would also help in determining whether inclusion of company debt instruments can per se exclude governmental ones.

The other option which would unify all these BITs is the conclusion of the multilateral agreement on investment. Even though it is hardly believable that all countries will agree on the wording of such treaty, especially in the realm that such attempts have yet failed, it also does not sound impossible due to the following. The general goal of each investment treaty is the same - flow of capital and protection of investment. The wording of investment treaties is less or more similar. Countries are always left with the option to exclude some disputes from protection and such reservation should be left to them. Many other multilateral conventions dealing with substantive issues have yet succeeded, for example the United Nations Convention on Contracts for the International Sale of Goods. If moving investment protection from bilateral to multilateral protection will help uniform application and lessen concerns both to contracting parties and investors as to what they can count on, then the price to be paid - potentially long lasting and tough negotiations is worth.

[136] The first investment treaty was signed in 1959 between Germany and Pakistan, while VCLT was signed in 1969.

It is interesting to note that there is no internationally recognized definition of sovereign bonds[137]. Lacking such universally recognized terms leaves no doubt that sovereign bonds should not be compared to the companies' ones and that including ones does not mean excluding others and vice versa. In the realm of such inconsistency whether and when ICSID should open the door to sovereign bonds will be the subject matter of (consistent) conclusion of this work.

[137] There were certain attempts to regulate the field of sovereign debt on an international level, which attempts have not yet succeeded. The draft of the Convention on Succession of States in Respect of State Property, archives and Debts (which has not yet entered into force) in article 33 defines state debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law". Vienna Convention on Succession of States in respect of State Property, archives and Debts, art. 5, Apr. 8, 1983, 20 U.N. Chron. 59.

Chapter 4 - Conclusion

This paper shows that recent ICSID practice on sovereign bonds has enriched us with the answer that sovereign bonds and security entitlements can and cannot be regarded as investments. In the realm of the purpose, text and context of the ICSID Convention the view that sovereign bonds cannot be regarded as investments seems misleading. In the realm of the treaty interpretation when clashing a broad definition of investment, arbitral Tribunals are to interpret it as its name suggests – broadly. Corporate bonds are not an opposite to the government bonds, so protection of once does not mean exclusion of others and vice versa.

Abaclat and Ambiente Ufficio cases have shown that the Tribunal is not to go into an in depth analysis whether transaction falls under the meaning of the term investment under article 25 (1) of the Convention but to make a balance between the parties' agreement and major features and objectives of the term investment under article 25 (1) of the Convention. Postova banka case has shown that the Tribunal is to pay due attention to objective, artificially created criteria. The purpose of ICSID was to offer the investors an opportunity for resolving their disputes. It is not a question whether ICSID's jurisdiction is too broad if it accepts sovereign bonds, it is a question whether accepting jurisdiction is within the purpose of the forum and rules of the Convention. The text of the ICSID Convention does not define the term investment. The context of the ICSID Convention states that there is a need for cooperation and private international capital flow so that economic development is achieved. Absent of an agreement on the definition of investment the

voice of the one submitting the dispute as to what is an investment is to prevail. The limits of such voice exist, however as long as there is a capital flow and potential achievement for economic development such voice is not to be further restricted. Economic development is an abstract term. How will the country decide to develop its economy is up to its sovereign rights, but what matters for the purposes of ICSID is whether there is a prerequisite for such economic development. One country may decide to issue sovereign bonds, other may decide to accept a foreign investor willing to build a hydro power plant. What is a common denominator for both purchaser of the sovereign bond and builder of hydro power plant is that they are both injecting funds into the state but in a different way. Purchaser of sovereign bonds gives state cash as a purchase price while other gives it cash as payment of taxes and revenues. How will the country spend them is not the reason for depriving investor of its rights. ICSID should accept its jurisdiction both over the ones building factories but as well over the ones purchasing the financial instruments of both these factories and the state.

Abaclat and Ambiente Ufficio cases have shown that when left with the broad categories, the Tribunals should interpret them within their meaning – broadly and that if parties wanted to exclude something they should have done so specifically. Postova banka case has shown that the Tribunal is to look the into deeper context of non - explicit exclusion and derive the meanings of words from it. In the ideal world of the investment treaties contracting parties specifically include or specifically exclude certain transaction as investment leaving not much thinking to the one deciding the dispute. The reality is not an ideal world. For the purposes of interpretation of investment treaty it matters whether transaction falls in the meaning of the definition and it is where the task of the tribunal stops. Sovereign bonds are obligations as well claims to money as

well loans, therefore they deserve protection under the treaties naming these and similar categories. Broad definition can be even broader by inserting the words all assets, including but not limiting to. Had the parties not wanted certain assets, they should have specifically excluded them. If they did not then one should bear the consequences of such non – exclusion as well of the broad and broader definition. Including one feature of a particular financial instrument is not enough so that *different, not reverse* feature is regarded as being excluded. Therefore, if government bonds are to fall under any definition of the investment treaty also explicitly protecting only corporate bonds, then they should be regarded as investments under that treaty.

Abaclat, Ambiente Ufficio and Postova banka cases are a battle of narrow and broad interpretational approach. Ruling differently, they have created kind of sovereign bonds labyrinth which should for sure have an impact on further behavior of all players - ICSID, states, investors and investment community. ICSID should consider defining the term investment. States should pay more attention when drafting investment treaty clauses, so that they explicitly state what they want and what they do not want to protect. Investors should pay more attention when submitting claims whether a transaction is explicitly included or excluded and whether inclusion of one type of the transactions can lead to the conclusion that the other type is excluded. Investment community is to agree on the rules for interpretation. Until that happens, ICSID is to strive to achieve more consistent approach and open the door to the sovereign bond claims.

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