Protection of Foreign Investments through Modern Treaty Arbitration
– Diversity and Harmonisation –

Edited by Anne K. Hoffmann
OF CAPITAL IMPORT:
THE DEFINITION OF “INVESTMENT” IN INTERNATIONAL INVESTMENT LAW
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Lying at the heart of international investment law, the concept of investment remains surprisingly ill-defined. Thus the key multilateral treaty in the field, the ICSID Convention, does not provide for any definition of the concept, and it is well known that this is no coincidence – the question of what might constitute an “investment” was intentionally left open during the negotiations.1 While this does not necessarily mean that the parties to an investment contract or an investment treaty may agree to submit any kinds of disputes to an ICSID tribunal simply because they consider that such disputes should be considered as investment disputes, it does mean that the ICSID Convention leaves considerable leeway for the parties to agree on what should be considered an “investment” for the purposes of the particular investment contract or investment treaty that they may enter into.2

However, it is less than clear where precisely the “outer limits” of ICSID jurisdiction lie, and how far the parties can go in exercising their freedom of contract. The vagueness of the ICSID Convention on this issue has given rise to various approaches to the definition of investment, two of which have become dominant. One has tackled the issue by seeking to establish the ordinary meaning of the term investment as embodied in the ICSID Convention or in international law generally, while the other has approached the issue on the basis of the definition of investment as set out in the applicable bilateral or multilateral investment treaty. As a result, depending on which approach has gained the upper

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1 See the 1965 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 27: “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)).”

2 There is a widely held view that the parties cannot extend the jurisdiction of ICSID beyond the outer limits established in the ICSID Convention by way of a contract or bilateral investment treaty. See, e.g., Joy Mining Machinery Ltd. v. Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 Apr. 2004, paras. 49-50, available at http://www.investmentclaims.com (visited on 24 Sept. 2008) (“The fact that the Convention has not defined the term investment does not mean that ... anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect; jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.”)
hand in practice, doctrine and arbitral jurisprudence often appear to endorse competing and even conflicting notions of what counts or should count as an “investment.”

The purpose of this paper is to outline the principal conceptual approaches to the definition of investment in international investment law, in light of the relevant treaty language and arbitral jurisprudence, and to propose a conceptual approach that may allow all relevant parties — including corporate counsel — to develop a more informed view of the conceptual and practical issues at stake and possible ways to deal with them.

I. THE INTERPRETATION OF THE ICSID CONVENTION

When the ICSID Convention was drafted, the delegates debated the definition of investment at length, without being able to reach an agreement on what an “investment dispute” should mean. They eventually conceded that a precise limitation of the Centre’s jurisdiction on this basis might have unintended consequences and therefore should be left to the parties. Accordingly, the relevant provision of the ICSID Convention — Article 25(1) — now simply says that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment,” without making any attempt to define what “investment” might mean.

For further discussion see, e.g., Aron Broches, The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 Col. J. Transnat'l L. 261, 268 (1979) (“During the negotiations several definitions of ‘investment’ were considered and rejected. It was felt in the end that a definition could be dispensed with ‘given the essential requirement of consent by the parties.’ This indicates that the requirement that the dispute must have arisen out of an ‘investment’ may be merged into the requirement of consent to jurisdiction. Presumably, the parties’ agreement that a dispute is an ‘investment dispute’ will be given great weight in any determination of the Centre’s jurisdiction, although it would not be controlling.”); A. R. Parra, Introduction, in Clarisse Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty (JurisNet, 2006), p. 51 (“In these cases [i.e. cases where disputes arising under the ECT are submitted to ICSID arbitration], the dispute concerned must qualify for coverage, not only under the ECT, but also under the ICSID Convention.”)

The Report of the Executive Directors, supra note 1, at para. 25, similarly cautioned that “[w]hile consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.”

A related, but more complicated question relates to disputes arising out of treaties that establish “pre-investment” obligations such as admission rules. In such disputes no actual investment has yet been made; the claim being raised is precisely that the investor was unlawfully prevented from making an investment. Such rules, which in effect aim to liberalize international capital movements (as opposed to establishing standards of treatment of foreign investors that have been admitted into a country) are not considered in this paper.

See G. Delaume, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1 Int’l Law 64, 70 (1966) (“The term ‘investment’ is not defined in the [ICSID] Convention. This omission was intentional. To give a comprehensive definition, ... would have been of limited interest since any such definition would have been too broad to serve a useful purpose [or] might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the Centre a dispute which would be considered by the parties as a genuine ‘investment’ dispute though such dispute would not be one of those included in the definition in the Convention.”)

This does not necessarily mean the parties to an investment contract or investment treaty may agree on any definition of investment for the purposes of ICSID arbitration; thus disputes arising out of ordinary commercial transactions are generally considered to fall outside the jurisdiction of the Centre. However, in practice the distinction between an “investment” and an “ordinary commercial transaction” is easier said than done, and there has apparently been only one case where the ICSID Secretariat – which is the first instance to determine whether a dispute submitted to the Centre may be considered as one arising “directly out of an investment” – refused to register a request for arbitration on the basis that it did not involve an investment and thus fell manifestly outside the jurisdiction of the Centre. As observed by commentators, it is noteworthy that the Secretary-General reached this conclusion even though the request had been made on the basis of a bilateral investment treaty providing for arbitration of disputes arising out of investments which, as defined in the treaty in question, could be understood as including sale of goods transactions. But even assuming it may often be relatively easy to determine whether the dispute arises out of an investment rather than an ordinary commercial transaction, there may also be more complicated scenarios where the dispute relates to a relatively long-term cross-border business activity but nonetheless one involving sale of goods or services. How is the distinction between an “investment” and an “ordinary commercial transaction” to be made in such circumstances?

It is arguable and indeed generally accepted that, like any treaty provision, Article 25(1) of the ICSID Convention – including the term “investment” – must be interpreted pursuant to the rules of treaty interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. Accordingly, the term “investment” in Article 25(1) of the ICSID Convention must be interpreted, pursuant to Article 31 of the Vienna Convention, in good faith and in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the ICSID Convention. Together with the context, account must be taken, inter alia, of “any relevant rules of international law applicable between the parties”.

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4 See C. Schreuer, supra note 3, at 135 (“The drafting history leaves no doubt that the Centre’s services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction no matter how far-reaching the parties’ consent might be.”)


6 Id.

7 See Art. 31(1) of the Vienna Convention of the Vienna Convention on the Law of Treaties (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”)

8 See Art. 31(3)(c) of the Vienna Convention.
The question that arises is whether such “relevant rules of international law applicable between the parties,” which must in any event be “taken into account” when interpreting Article 25(1) of the ICSID Convention, include the terms of the applicable bilateral or multilateral investment treaty. In other words, when interpreting the concept of investment in Article 25(1) of the ICSID Convention, should this term be interpreted “taking into account” the corresponding definition of investment in the applicable bilateral or multilateral investment treaty? Or should the two treaties – and accordingly the two terms – be interpreted in isolation from each other? In other words, should the definition of investment in Article 25(1) of the ICSID Convention, as interpreted in light of the relevant rules of international law, control – and possibly trump – the definition of investment as set out in the applicable bilateral or multilateral investment treaty – or vice versa?

Similar but not identical issues of interpretation may arise in the context of investment arbitration outside the ICSID framework. Thus, where the parties to an investment treaty have agreed to refer the dispute to arbitration under the UNCITRAL Arbitration Rules, or the Rules of Arbitration of the Swedish Chamber of Commerce, or indeed any other non-ICSID arbitration rules, the question arises as to whether the fact that the dispute relates to an “investment” treaty has any limiting effect on the jurisdiction of the arbitral tribunal, or whether the parties to an investment treaty may effectively extend the jurisdiction of the arbitral tribunal established pursuant to the treaty to cover any type of commercial disputes – including those that arguably arise out of ordinary commercial transactions – so long as they agree that such transactions should be considered as “investments” for the purposes of the treaty in question. Or, to put it differently, may the term “investment,” as embodied in the applicable investment treaty, ever be interpreted so broadly as to cover what arguably clearly is, in substance, an ordinary commercial transaction rather than an investment? Is such an outcome allowed under the rules of treaty interpretation in the Vienna Convention?

These are complex questions, and it is therefore adusable to approach them in light of concrete examples.9

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9 The most important multilateral investment treaties are the North American Free Trade Agreement (“NAFTA”) and the Energy Charter Treaty (“ECT”). It has been estimated that there are around 2,500 bilateral investment treaties. Some have suggested that these treaties establish a virtually global system for foreign investment protection. Strictly mathematically speaking this is not quite true; assuming there are some 200 independent States in the world, and assuming each of them would enter into a bilateral investment treaty with every other State (except themselves of course), one would reach the figure of 20,100 (which is the triangular number of 200). In other words, there is still plenty of room for additional bilateral investment treaties. (I owe special thanks to my son Jaakko for sorting out the math of this reasoning.)
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II. THE INTERPRETATION OF BILATERAL AND MULTILATERAL INVESTMENT TREATIES

Most bilateral investment treaties do not follow any particular economic or financial theory when defining the concept of investment and often contain a mix of various economic, financial and accounting-based notions of what could or should be counted as investments. Generally, these treaties seek to embrace a broad concept of investment and thereby maximize the scope of foreign investment protection. Indeed, the definitions are often so broad that the argument may be made, and has been made, that they also cover what should otherwise be considered as ordinary commercial transactions.

Two representative examples of such broad approaches are the Swiss 1995 “Model” BIT and the 2004 United States Model BIT.

The Swiss Model BIT provides a definition of the concept of “investment” in its Article 1(2) in the following terms:

“The term ‘investments’ shall include every kind of assets in particular:

(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges and usufructs;
(b) shares, parts or any other kinds of participation in companies;
(c) claims to money or to any performance having an economic value;
(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
(e) concessions under public law, including concessions for search for, extract or exploit natural resources as well as all other rights by law, by contract or by decision of the authority in accordance with the law.”

In economics, the term “investment” is often used in a limited sense to refer to “real” investment such as machines and buildings. “Investment,” in this sense, means investment in “real” economic resources needed in the production of goods and services. In finance, on the other hand, the term is extended to cover financial assets such as stock and bonds. This is often referred to as “indirect investment.” See, e.g., http://www.economist.com/research/economics/alphabetic.cfm?letter=Iinvestment (visited on 20 Sept. 2008). In business administration — including business accounting — the concept of investment is often even broader and includes any kinds of assets, both tangible and non-tangible, having a commercial value such as real and financial assets, intellectual property and good will. Finally, in personal finance a distinction is sometimes made between savings and investment, the former referring to savings kept in the form of cash and the latter to money “investment” in an asset where there is an element of capital risk. For introductory discussion see, e.g., http://en.wikipedia.org/wiki/Investment (visited on 8 Sept. 2008).

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11 The Swiss “Model” BIT is not an “official” model but only a template or working document used by the Swiss Government in negotiations. The document is currently in the process of being updated. The US Model BIT is available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (visited on 21 Sept. 2008).
Thus the Swiss model seeks to incorporate various economic, financial and business accounting concepts of investment. The general economic meaning of the term—investment as a “real” asset—is covered by paragraph (a), whereas paragraphs (b) and (c) extend the definition to cover financial assets. Paragraphs (d) and (e), in turn, incorporate the broader concept of investment as understood, in particular, in the field of business accounting.\textsuperscript{12} No doubt, paragraph (c) in particular, which includes in the definition of investment “claims to money or to any performance having an economic value,” may in certain circumstances be invoked to bring an investment claim arising out of an ordinary commercial transaction.

The US Model BIT is structured somewhat differently. Article 1 (“Definitions”) of the US Model BIT defines the concept of “investment” in the following terms:

“\textit{Investment} means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;\textsuperscript{13}
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;\textsuperscript{14} and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.”

\textsuperscript{12} See supra note 10.
\textsuperscript{13} A note to this paragraph states that “[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.”
\textsuperscript{14} Two notes are attached to this paragraph. The first clarifies that “[w]hether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristic of an investment.” According to the second note, “[t]he term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”
Thus, like the Swiss "Model" BIT, the US Model BIT covers both the economic (paragraphs (a) and (h)) and financial (paragraphs (b), (c) and (d)) aspects of the term, as well as the broader meaning adopted in business accounting (paragraphs (e), (f) and (g)). Similarly, while the US Model BIT does not specifically define interests such as "claims to money" as an investment, it captures within its definition assets such as "contracts" and "intangible property and related property rights," which again in certain circumstances may be invoked to bring an investment claim arising out of an ordinary sales transaction.

Apart from listing examples of the "forms" that an investment may take, the chapeau of the US Model BIT also attempts to set out general "characteristics" of what may be considered an investment within the meaning of the treaty. According to the chapeau, in order to qualify as an investment, the asset in question must have characteristics such as "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." These criteria, together with the requirement of a certain duration, are by no means an invention of the drafters of the US Model BIT; they are often considered as forming part of the "objective" legal definition of the concept of investment and, by implication, the "ordinary meaning" of the term investment in international investment law. The principal invention of the drafters of the US Model BIT is not that they have specifically sought to define the general characteristics of an investment in the document; the more innovative contribution is that they have chosen to omit a further criterion that is often considered by legal scholars and commentators as being part of the general definition, in particular in the context of the ISCID Convention – the requirement that, in order to qualify as an investment, the asset in question must contribute to the economic development of the host State.

Multilateral investment treaties have adopted a similar enumerative approach. Thus Article 1(6) of the Energy Charter Treaty ("ECT") follows the pattern of the Swiss "Model" BIT, as adapted to the subject matter of the ECT:

"Investment means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and moveable and immoveable, property, and any property rights such as leases, mortgages, liens, and pledges;
(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;"

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15 For further discussion see below section III ("Legal Scholarship and Doctrine").
16 For further discussion of this criterion see infra notes 21-22, 31-41 and 54-55 and accompanying text.
(c) claims to money and claims to performance pursuant to a contract having an economic value and associated with an investment;
(d) Intellectual Property;
(e) Returns;
(f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

Unlike the US Model BIT, the ECT definition does not attempt to set out a general definition of investment and limits itself to listing, in a non-exhaustive manner, the various assets that are to be considered as “investments.” Like the Swiss “Model” BIT, it also defines “claims to money and claims to performance” as an investment – provided that such claims (or at least claims to performance) are “associated with an investment.”

Thus the ECT, too, may in certain circumstances be invoked to bring an investment claim arising out of what is arguably an ordinary commercial contract.

Further examples of such enumerative approaches could be provided, but this limited sample already shows that the various attempts to define the concept of investment in bilateral and multilateral investment treaties have not quite settled the issue. The question remains: should one consider each of the types of assets listed in these definitions as constituting an “investment” no matter what, i.e. regardless of whether it might otherwise be considered an ordinary commercial transaction? Or does the fact that none of the various enumerative definitions purports to be exhaustive mean that all of these provisions should be interpreted in light of the ordinary meaning of the term “investment” and, if necessary, restricted in their meaning and scope of application accordingly? In other words, should these definitions be accepted simply as such, on their face, or should they be interpreted in light of a more general or “objective” concept of investment?

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17 Both the circularity and ambiguity inherent in this definition was noted by the Petrobart tribunal; see infra note 47 and accompanying text. For further discussion of Art. 1(6) of the ECT see, e.g., E. Gaillard, Investments and Investors Covered by the Energy Charter Treaty, in Clarisse Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, supra note 1, at 54, 58-66.

18 Most bilateral investment treaties appear to follow the approach adopted in the Swiss “Model” BIT. However, Art. 1139 of Chapter Eleven of the NAFTA is more focused in its definition of the concept of investment and attempts not only to define what “investment” means but also what it does not mean. Thus, it specifically provides that “investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in paragraphs (a) through (h).”
III. LEGAL SCHOLARSHIP AND DOCTRINE

These two conceptual approaches – which may be called, for lack of a better term, an “objective” and a “subjective” approach – are also reflected in legal scholarship and doctrine.\(^{19}\) The “objective” approach seeks to define the general “characteristics” or criteria of investment that may be applied in a variety of contexts to determine whether a particular asset qualifies as an investment. The “subjective” approach, in turn, prefers to focus on how the term “investment” is defined in the particular investment treaty out of which the dispute arises. In other words, while the “objective” approach assumes that the various enumerative lists in investment treaties should be interpreted in light of the ordinary meaning of the concept of investment, the “subjective” approach is based on the assumption that the starting point of interpretation must always be the definition of investment as agreed by the parties in the applicable investment treaty.

The two approaches are not in open contradiction since only the objective approach seeks to spell out a general theory of what qualifies as an “investment.” The subjective approach is more limited in its ambition and purports to leave the task of definition for the parties. This difference in approach perhaps explains why the objective approach appears to have attracted more attention among legal scholars and commentators, who generally agree that the relevant criteria – assuming they have to be spelled out – include a certain duration, a regularity of profit and return and an element of risk.\(^{20}\) As noted above, a fourth criterion is often added to this list – significance of the investment for the economic development of the host State. Some consider that this criterion is not a creation of doctrine but is in fact embedded in the ICSID Convention, more specifically in its preamble, which refers to the “need for international cooperation for economic development, and the role of private international investment therein.” However, while arbitral tribunals have often paid at least lip service to this criterion – and some more than lip service\(^{21}\) – it remains controversial.\(^{22}\)

Unlike the objective theory, the subjective theory does not approach the definition of investment on the basis of a set of pre-established, “objective” criteria. Instead, it focuses

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\(^{20}\) For further discussion of these “characteristics” of an investment see, e.g., C. Schreuer, supra note 3, at 138-41. Sometimes the requirement of “substantial contribution” is added to the list. Indeed, the drafters of the ICSID Convention at one stage considered including a minimum monetary value (US$100,000) as part of the definition of investment, but this did not find its way into the Convention. See id. pp. 123, 140.

\(^{21}\) See infra notes 31-41 and accompanying text.

\(^{22}\) For further discussion see infra notes 54-55 and accompanying text.
on the specific definition of investment as adopted in the relevant investment treaty. Accordingly, under this approach, what constitutes an investment depends in the first place on what the parties have in fact agreed—regardless of whether the particular form of “investment” at issue might otherwise, under some economic, financial or accounting theory, be considered as an ordinary commercial transaction. Perhaps because of its limited theoretical ambition, the subjective theory has received less attention among legal academics and commentators than the objective theory. However, it has been embraced by certain arbitral tribunals, which have chosen to focus in their determinations on the terms of the treaty rather than on the elaboration and application of a general legal doctrine.

IV. ARBITRAL JURISPRUDENCE

The early ICSID jurisprudence tended to approach the issue on the basis of the “objective” approach. In Fedax, which was the first case where the jurisdiction of ICSID was challenged squarely on the basis that the underlying transaction (promissory notes issued by the Republic of Venezuela) did not qualify as an “investment” within the meaning of Article 25(1) of the ICSID Convention, the tribunal recognized that Venezuela had raised a “legitimate concern” about the interpretation of the ICSID Convention and the Dutch-Venezuelan BIT, the applicable investment treaty. Venezuela argued that the term “investment” should be interpreted in accordance with the rules of treaty interpretation laid down in the Vienna Convention. This, in Venezuela’s view, would accommodate the broad definition of investment in the BIT, which comprised “every kind of asset.”

The tribunal agreed that the general rules of treaty interpretation applied but concluded that, in light of the negotiating history of the ICSID Convention, the term “investment” should be given a “broad reach.” However, in the tribunal’s view, even under the ICSID Convention, an “investment” should be distinguishable from an “ordinary commercial transaction.” This was also required in the case at hand, where the definition was “controlled” by consent of the parties as expressed in the BIT. When reaching the conclusion that the promissory notes at issue in the case should be considered as an “investment” within the meaning of both the ICSID Convention and the Dutch-Venezuelan BIT, the tribunal expressly justified its conclusion on the basis of the objective theory:

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24 Id. para. 19.
25 Id. para. 23.
26 Id. para. 28.
"The nature of the transaction involved in this case, and the fact that they qualify as a foreign investment for the purposes of the Convention and the Agreement, serves to distinguish them from an ordinary commercial transaction. ... The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter. The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and significance for the host State's economic development. The duration of the investment in this case meets the requirement of the Law [on Public Credit] as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has already been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, ... . It follows that, given the particular facts of the case, the transaction meets the basic features of an investment."

The Salini v. Morocco tribunal, which broke new ground in finding that an international construction contract qualified as an investment for the purposes of the ICSID Convention, adopted a similar approach. Having found that the contract met the definition of investment in the Morocco-Italy BIT, which covered "rights to any contractual benefit having an economic value" as well as "any right of an economic nature conferred by law or by contract" provided that such contract had been "approved by the competent authority," the tribunal went on to consider whether the contract in question also met the definition of investment under the ICSID Convention:

"The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be 'in direct relation to an investment' is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective criterion of the Centre. ... The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards

27 Id. para. 43 (footnotes omitted).
denying the Centre’s jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale ..., the awards at hand only very rarely turned on the notion of investment. ... The criteria for the characterization are, therefore, derived from cases in which the transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion of the issue in almost all the cases.

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. ... In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional criterion.

In reality, these various criteria may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.”

The tribunal then went on to apply each of these criteria to the circumstances of the case and concluded that they were all met. Interestingly, the tribunal made no reference to the rules of treaty interpretation in the Vienna Convention when construing the meaning of Article 25 of the ICSID Convention.

While the Salini tribunal found no contradiction between the concepts of investment in the Morocco-Italy BIT and in the ICSID Convention, this does not necessarily mean that the objective and subjective theory always produce the same result. In certain circumstances, the application of one might lead to a dismissal of the claim – often, although not always, for lack of jurisdiction – whereas the application of the other might lead to the opposite outcome. Typically, given the way in which many investment treaties are drafted, the objective approach tends to lead more easily to a dismissal of the case than the subjective approach, which often is more favorable to the claimants (depending, obviously, on the terms of the investment treaty in question). The inherent tension between the two approaches is best illustrated by three recent cases, two of which adopted

29 Id. para. 52 (references omitted). The same tribunal reached the same conclusion on the basis of a practically identical reasoning in a related highway construction case, see Consortium RFCC v. Royaume du Maroc, Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001, available "http://investmentclaims.com (visited on 24 Sept. 2008).

30 Salini v. Morocco, paras. 53-58.
the objective approach and both of which resulted in a dismissal of the claim (one by way of an annulment decision) – *Patrick Mitchell v. Democratic Republic of Congo and Malaysian Historical Salvors v. Malaysia*. The third one – *Petrobart v. Kyrgyz Republic* – adopted the subjective approach and resulted in a favorable ruling to the claimant. It is perhaps not a coincidence that the first two cases were decided by ICSID tribunals, whereas *Petrobart* was handled by an *ECT* tribunal.

In *Patrick Mitchell v. Democratic Republic of Congo*, which arose out of the seizure by the Government of the Democratic Republic of Congo of the assets of a local branch of a United States law firm, the arbitral tribunal found jurisdiction under the ICSID Convention and the United States-Zaire BIT. The tribunal granted Mr Mitchell’s expropriation claim and awarded compensation.31 The respondent State sought annulment of the award on a number of grounds, including, inter alia, on the basis that the activity of the Mitchell law firm did not qualify as an investment because it did not contribute to the economic and social development of the host State. The *ad hoc* committee established to consider the request agreed.32 The *ad hoc* committee noted that, while the BIT contained an “*enumerative and non exhaustive*” approach to investment, it “[*did*] *not contain, properly speaking, a definition of investment as such.*”33 The *ad hoc* committee then went on to consider the definition of investment under the ICSID Convention:

“There are four characteristics of investment identified by ICSID case law and commented on by legal doctrine, but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work; indeed, in several ICSID cases the investor’s commitment mainly consisted in its know-how. Other characteristics of investment are the duration of the project and the economic risk entailed, in the sense of an uncertainty regarding its successful outcome. The fourth characteristic of investment is the contribution to the economic development of the host country […]”34

The *ad hoc* committee focused in its analysis on the fourth criterion, as this had been the key point in the argument before the committee. In the view of the *ad hoc* committee, this criterion was a specificity of the ICSID Convention and had to be taken into account,

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33 Id. para. 26.
34 Id. para. 27 (footnotes omitted).
"quite independently of any provisions of agreements between the parties or the relevant bilateral treaty."\textsuperscript{35} Whatever the terms of the applicable investment treaty, the parties "[could] not open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment."\textsuperscript{36} In the ad hoc committee’s view, there was no room for such a subjective approach because the ICSID Convention "has supremacy over an agreement between the parties or a BIT."\textsuperscript{37} In any event, the ad hoc committee noted that this was not an issue before it, since the applicable investment treaty also recognized in its preamble that "agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties."\textsuperscript{38}

The ad hoc committee eventually concluded that the arbitral tribunal had failed to properly explain why the services provided by the law firm could be considered as an "investment" and annulled the award, inter alia, on this basis.\textsuperscript{39}

Similarly, in \textit{Malaysian Historical Salvors v. Malaysia}, which involved a dispute arising under the Malaysia-United Kingdom BIT, an ICSID arbitral tribunal (a sole arbitrator) dismissed the claim on the basis that the claim did not relate to an "investment" within the meaning of Article 25(1) of the ICSID Convention.\textsuperscript{40} Making only a passing reference to the rules of treaty interpretation in the Vienna Convention, the tribunal developed what it termed a "teleological" approach to the interpretation of Article 25(1), largely on the basis of an extensive analysis of case law. Like the Mitchell ad hoc committee, the tribunal found that the term "investment" "\textit{should be interpreted as an activity which promotes some form of positive economic development for the host State.}"\textsuperscript{41} The tribunal then examined each of the objective criteria of investment that it had distilled from its analysis of case law and concluded that these criteria, in particular the requirement that the contract in question must make a significant contribution to the economic development of the Respondent, had not been met.\textsuperscript{42}

\textsuperscript{35} Id. para. 29.
\textsuperscript{36} Id. para. 31.
\textsuperscript{37} Id.
\textsuperscript{38} Id. para. 32.
\textsuperscript{39} Id. para. 41.
\textsuperscript{40} \textit{Malaysian Historical Salvors v. Malaysia}, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, available at "http://www.investmentclaims.com" (visited on 24 Sept. 2008).
\textsuperscript{41} Id. para. 67.
\textsuperscript{42} The tribunal’s decision was recently (after the present paper was drafted) annulled by an ICSID annulment committee; see \textit{Malaysian Historical Salvors v. Malaysia}, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 Apr. 2009, available at "http://www.investmentclaims.com" (visited on 29 Aug. 2009). The ad hoc committee considered that the tribunal had erroneously focused on the objective definition of investment only and disregarded the terms of the applicable BIT, concluding that “the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction.” Id., para. 74.
While the Mitchell ad hoc committee and the Malaysian Historical Salvors tribunal appeared to favor the objective theory, the ECT tribunal in Petrobart v. Kyrgyz Republic adopted a different approach. This case involved a contract between Petrobart, a company registered in Gibraltar, and KGM, a company owned by the Kyrgyz State, for the supply of gas condensate. When KGM failed to pay for the deliveries, Petrobart initiated court proceedings to recover the receivables. Although Petrobart eventually secured a favorable ruling, KGM was able to obtain a stay during which its assets (but not its liabilities) were transferred to another company. KGM was subsequently declared bankrupt. Petrobart then initiated an UNCITRAL arbitration under the Foreign Investment Law, but its claims were dismissed on the basis that the dispute arose out of an ordinary international sales transaction and did not meet the criteria of an investment dispute. Petrobart then initiated another arbitration under the ECT.

In the ECT arbitration, the Kyrgyz Republic contested that Petrobart had made an investment under the ECT. The tribunal first noted that the contract “did not involve any transfer of money or property as capital in the business in the Kyrgyz Republic but was a sales contract.” However, while noting that the UNCITRAL tribunal had found that the transaction in question did not constitute a foreign investment under the Foreign Investment Law, the ECT tribunal stressed that the question before it was whether the transaction could constitute an investment according to the ECT. This was the crux of the tribunal’s reasoning:

“There is no uniform definition of investment, but the meaning of this term varies… While in ordinary language investment is often understood as being capital or property used as a financial basis for a company or a business activity with the aim to produce revenue or income, wider definitions are frequently found in treaties on the protection of investments, whether bilateral (BITs) or multilateral (MITs).

The term investment must therefore be interpreted in the context of each particular treaty in which the term is used. Article 31(1) of the Treaty on the Law of Treaties provides, as the main rule of treaty interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. It is obvious that, when there is a definition of a term in the treaty itself, that definition shall apply and the words used in the definition shall be interpreted in the light of the principle set out in Article 31(1) of the Treaty on the Law of Treaties.”

44 Id. p. 69.
45 Id.
The tribunal then turned to the definition of investment in Article 1(6) of the ECT. Pursuant to this clause, 'investment' means “every kind of asset, owned or controlled directly or indirectly by an Investor,” including, inter alia, “claims to money and claims to performance pursuant to a contract having an economic value and associated with an investment” and “any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.”

The tribunal noted that, in Petrobart’s view, the contract, the claim and the Bishkek court’s judgment were all assets under Article 1(6) of the ECT. The tribunal disagreed, finding that “a correct legal analysis leads to the conclusion that the Contract and the judgment are not in themselves assets but merely legal documents or instruments which are bearers of legal rights, and these legal rights, depending on their character, may or may not be considered as assets.” It then went on to state:

“The relevant question which requires consideration is therefore whether the rights provided for in the Contract and confirmed in the judgment constituted assets and were therefore an investment in the meaning of the Treaty. In other words, the question is whether Petrobart’s right under the Contract to payment for goods delivered under the Contract was an asset and constituted an investment under the Treaty.

Item (c) of Article 1(6) of the Treaty provides that as assets constituting an investment are to be counted ‘claims to money and claims to performance pursuant to contract having an economic value and associated with an investment.’

In various BITs and MITs, claims to money are mentioned among assets which are to be regarded as investments. There is also case-law dealing with the interpretation of such treaty clauses. It follows from such case-law that investment is often a wide concept in connection with investment protection and that claims to money may constitute investments even if they are not part of a long-term business engagement in another country.

It is thus not unusual that claims to money, even if not based on any long-term involvement in a business in another country, are included in treaties within the concept of ‘investment.’”

The tribunal noted that the wording of Article 1(6)(c) of the ECT presented “certain ambiguities” as it was not entirely clear whether the terms “pursuant to contract having

46 Id. p. 70.
47 Id. p. 71-72.
an economic value and associated with an investment" related only to “claims to performance” or also to “claims for money.” If the latter, the tribunal felt it was faced with the logical problem that the term “investment” was not only the term to be defined, but was also used as one of the terms whereby the term itself was to be defined and thus created some doubt because of the circularity of reasoning. However, drawing on the language of Article 1(6)(f) of the ECT, which defined as investment “any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector,” and noting that “Economic Activity in the Energy Sector” was defined in Article 1(5) of the ECT, inter alia, as “economic activity concerning the [...] trade [...] or sale of Energy Materials and Products,” the tribunal concluded that “a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the treaty.” In the tribunal’s view, this must include the right to be paid for such a sale.

Thus, unlike the UNCITRAL tribunal which had previously considered the same dispute, the ECT tribunal found the right under the contract to payment for goods delivered to be an asset and, accordingly, an investment. The tribunal effectively treated Petrobart’s outstanding money claim as a capitalized asset – and, accordingly, as an investment.

V. ANALYSIS

This brief review of legal commentary and arbitral jurisprudence suggests that neither of the two dominant doctrinal approaches to the definition of investment is wholly satisfactory. The problem with the objective approach is that its purportedly objective criteria tend to become quite subjective in their actual applications. Questions such as whether the contribution at issue was of an adequate duration, whether the contribution itself was sufficiently “substantial,” and whether it has contributed “significantly” to the economic development of the host State, tend to leave a broad margin of discretion for arbitrators. As a result, it is perhaps not surprising that arbitral tribunals are tempted to pay only lip service to these criteria and simply conclude, after a rather perfunctory analysis, that they have all been met, or in some instances take them more seriously, which may lead to an abstract exercise of largely unfettered discretion.

48 Id. p. 72.
49 Id.
50 As noted by the tribunal in Biwater Gauff (Tanzania) Ltd. v. Tanzania, Award, 24 July 2008, available at “http://www.investmentclaims.com (visited on 24 Nov. 2008), para. 314 (“[T]he Salini Test itself is problematic if, as some tribunals have found, the ‘typical characteristics’ of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks arbitrary exclusion of certain types of transactions from the scope of the Convention.”)
Similarly, the subjective approach seems incapable of drawing any firm conceptual
distinction between an investment and an ordinary commercial transaction. Under this
approach, if the parties have agreed, for instance, that any “money claims” should be
considered as an investment, then it follows that any money claims should indeed be
considered as an investment, even if they may in fact arise out of what appears to be an
ordinary commercial transaction. As a result, the subjective approach tends to lead to a
slippery slope where anything may eventually go – where any transaction may count as
an investment and where arbitral tribunals are unable to set any limits on their subject
matter jurisdiction.

Recent jurisprudence suggests that these concerns, while perhaps not necessarily
alarming, are not entirely unjustified. Is there any way to address these concerns and
perhaps find a saving construction? Or is this rather a matter where only a rocket scientist
might be able to help?

Indeed, on reflection, rocket science – or perhaps more accurately, quantum physics
– seems to provide a parallel that might be of some assistance. Namely the conflict
between the “objective” and “subjective” approaches to the concept of investment in the
field of international investment law seems rather similar to the debate that has been
going on for the last eighty years or so in the field of quantum physics, where the debate
has focused on the dual nature of a particle such as a photon or an electron, or indeed
any baryonic (massive) particle. They all can be characterized, precisely, as particles –
as localized “units” with a certain local effect – or as an unobservable wave propagating
in space. The two notions seem conceptually incompatible, but physicists have resigned
to accept that, in a sense, both are “correct” – when not observed or interfered with,
particles behave like a wave; but when you try to measure them, they turn into a localized
particle. The scientific jury is still out as to whether only one of these descriptions – that
is, the local effect – can be considered as “real” and, accordingly, whether the wave nature
of particles – that is, their unobservable modality – is simply a matter of mathematical
symbolism with no underlying “reality,” or whether their wave nature represents another,
“virtual” form of reality – or indeed whether both may be true in the sense that, what we
are used to refer to as the “nature,” in fact exists, somewhat unnaturally, in a superposition
of two contradictory states.51

In a similar manner (although perhaps less scientifically), one can often characterize
international business activity either as an ongoing process of commercial transactions
– as a “wave” or stream of commerce – or as a fixed or localized set of assets and liabilities.
Depending on whether one focuses on the flow of revenue in the stream of commerce,

51 For a basic introduction to these issues see, e.g, A. Rae, Quantum Physics: Illusion or Reality (2nd ed., 2004).
or on the assets fixed in a particular place at a particular time, the business activity in question may or may not be seen as an investment. If one focuses on the revenue stream, the argument that the business activity in question amounts to an "investment" becomes harder. Conversely, many if not all cross-border business operations can often also be conceptualized as a localized effect — as a fixed set of assets and liabilities located in the host State — and thus can more easily be characterized as a foreign "investment." This cash flow/asset duality is reflected in business accounting, where typically two principal types of financial statements are produced — the income statement and the balance sheet. While the former measures business activity as a process of recording the flow of revenue and expenses over a period of time, the latter captures it as a snapshot frozen in time — thus also capturing (a bit like a particle collider) owner’s equity or any other form of risk capital that may have been invested in the enterprise. The conceptual ambiguity inherent in any business activity means that virtually any ongoing business activity — even if not incorporated — may not only be presented as a flow of revenue and expenses, but may also be captured in the form of a balance sheet.

How does this help in defining the concept of investment? It does by allowing one to focus on the substance of the definition rather than its form. Since depending on the nature of the business activity in question, a balance sheet may or may not show the owner’s equity (or more generally, owner’s capital contribution) — the risk capital invested by the owner in the business. Not all business activities are supported by owner’s capital contribution, and those that are not (and accordingly balance their books by profit or loss rather than owner’s equity) cannot be considered, from an accounting point of view, as investments. They are rather businesses engaged in ongoing sale of goods and services, without any equity investment or capital contribution on the part of their owner. Therefore, they cannot conceptually be considered as investments.

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52 This is elementary accounting; see, e.g., R. F. Meigs & W. B. Meigs, Accounting: The basis for Business Decision (8th ed., 1992), at 83 ("A balance sheet shows the financial position of a business at a particular date. An income statement, on the other hand, shows the results of business operations over a span of time.") (emphasis omitted)

53 Interestingly, the definition of investment in Art. 1139 of the NAFTA appears to be driven by this type of accounting-based thinking. Thus, as noted in note 18, supra, it not only seeks to define what investment means, but also what it does not mean, expressly excluding commercial contracts for the sale of goods or services and trade financing outside the definition. But also in its positive definition of investment, Art. 1139 focuses on the importance of a capital contribution, specifically mentioning as investments an enterprise; an equity security of an enterprise; a long-term debt security of an enterprise; a long-term loan to an enterprise or a loan by an enterprise to its affiliate; an interest in an enterprise that entitles the owner to share in income or profits; an interest in an enterprise that entitles the owner to share in the assets of the enterprise on dissolution; real estate or other tangible or intangible property acquired in the expectation or used for the purpose of economic benefit or other business purposes; and interests arising from the commitment of capital or other resources to economic activity, e.g. under contracts involving the presence of the investor's property in the territory of a party, including turnkey or construction contracts or concessions, or contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.
If such a substantive or accounting-based approach were to be adopted to define the concept of investment in international investment law, what would it mean in practical terms? Nothing drastic, it appears. While it would have certain accounting implications (to be discussed below), it would not necessarily mean any substantial change to the way in which arbitral tribunals approach their task or reach their decisions. Arbitral tribunals would remain entirely free to choose whether to approach the definition of investment in the applicable multilateral or bilateral investment treaty from the point of view of the objective or the subjective theory – or indeed both. Since once arbitral tribunals start focusing on the substance of the definition of the investment rather than its form, it no longer matters which one of the two methodological approaches – objective or subjective – they adopt to the definition of investment; the end result would be the same. In other words, the accounting-based approach would not only simplify arbitral decision-making by allowing arbitral tribunals to focus on the substance of the issue rather than its form; it would also eliminate the perceived side effects of the two competing approaches.

The accounting-based approach would eliminate the potentially harmful side effect of the objective theory by enabling arbitral tribunals to make their determinations on the basis of a simple substantive criterion – that is, whether any capital contribution has in fact been made to the business activity in question – rather than on the basis of the various purportedly objective but nonetheless abstract and as such potentially arbitrary criteria. In the process, the arbitral tribunal would also automatically determine whether the objective requirements for investment have been met and thus also comply with the requirements of the objective theory. If it eventually turned out that a capital contribution had in fact been made to the business activity in question, the objective criteria of investment – a certain duration (a capital contribution such as owner’s equity supports ongoing business activity and thus excludes one-off transactions), an expectation of profit and return (which is the very rationale of equity investment and other forms of owner’s capital contribution), and an element of risk (owner’s equity by definition – *sic!* – constitutes risk capital) – would also be met, and indeed by definition.

The proposed definition would not meet the requirement that, in order to qualify as an investment, an asset would have to make a “significant contribution” to the economic development of the host State. As noted above, this requirement has often been mentioned as part of the objective theory. However, this requirement is not uncontroversial and, for instance, has not been included in the US Model BIT. It is also included in very few, if any, of the numerous bilateral investment treaties. It is indeed a fair question whether it is reasonable to require from private investment that it must “significantly” contribute to the economic development of the host State in order to qualify as an investment. One

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54 See supra note 22.
would rather think that this is the very purpose of public investment. Unlike private investment, which is and must be driven by profit in order to be viable, the very purpose of public investment is to contribute to the economic development of the host State by way of enhancement of its infrastructure, in order, precisely, to create more attractive conditions for private investment. To require that private investment should assume the burden of such economic development, which only indirectly contributes to profit, in order to qualify as an “investment” for the purposes of investment protection, is hardly a reasonable proposition and indeed more likely to discourage rather than promote foreign private investment. The more reasonable reading of the preamble of the ICSID Convention would appear to be that the ICSID Convention seeks to promote foreign private investment because such investment, as a whole (i.e. on the macroeconomic level rather than each investment individually), tends to contribute to the economic development of the host State.55

Similarly, apart from meeting the core requirements of the objective theory, the accounting-based approach would also balance the sliding scale of the subjective theory by allowing arbitral tribunals to get a firmer grasp of the fundamental conceptual distinction between investments and ordinary commercial transactions. If the business activity in question does not involve any commitment of own capital in the form of owner’s equity or another form of risk capital, it cannot be characterized as an investment in any substantive sense. Nonetheless, despite this conceptual limitation, the proposed approach would not substantially limit the parties’ freedom to define the concept of investment in the way they wish and thus would respect the healthy core of the subjective theory. Investment could continue to take any form the parties to an investment contract or investment treaty may agree it could or should take – so long as it involves a commitment of owner’s capital for income-producing purposes. Whether or not such a commitment exists would thus serve as the ultimate criterion for distinguishing between an investment and an ordinary sales transaction.56

Thus the proposed approach would not, and indeed could not, affect in any way the applicable rules of treaty interpretation. It would only provide a saving construction that would allow international arbitral tribunals to sever the justifiable applications of these

55 For a reasoning along these lines see, e.g., L.E.S.I.-DIPENTA v. Algeria, ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007, available at "http://www.investmentclaims.com (visited on 25 Sept. 2008) ("Il paraît conforme à l'objet auquel répond la Convention qu'un contrat, pour constituer un investissement au sens de la disposition, remplit les trois conditions suivants ; il faut a) que le contractant ait effectué un apport dans le pays concerné, b) qu'il apport porte sur une certaine durée, et c) qu'il comporte pour celui qui le fait un certain risque. Il ne paraît en revanche pas nécessaire qu'il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus.")"

56 Such a commitment of risk capital is implicit in the concise definition of “investment” in the International Valuation Standards, available at "http://www.ivsc.org/standards/index.html (visited on 1 Oct. 2008) ("Investment: Using a capital sum to acquire an asset which is expected to produce an acceptable flow of income and/or appreciate in capital value.")"
rules from their unjustifiable applications, when interpreting the various definitions of investment embodied in bilateral and multilateral investment treaties, including the virtual definition embedded in the ICSID Convention.

However, as noted above, although the accounting-based approach would not necessarily have any substantial effect on the way in which arbitral tribunals reach their decisions, it would have certain implications for business accounting. Businesses would have to pay greater attention to the way in which they structure their cross-border business activities and how they account for such activities. In order to be able to argue that the business activity in question constitutes an investment in a legal sense, they should consider making a capital contribution to each such business activity – which does not necessarily require incorporation of the business activity in question as a separate legal entity – and to establish a separate accounting for each such business activity. These arrangements, once in place, would make it substantially easier and in any event conceptually accurate for the owner to argue, in case of a dispute with the host State, that the business activity in question constitutes an investment and not merely a cross-border business activity for the sale of goods or services. No less importantly, the arrangements would also facilitate the demonstration and quantification of any claims arising out of the governmental measures forming the subject matter of the dispute.

These are important implications which would facilitate the making of an investment arbitration case in any event, if and when necessary, regardless of whether the arbitral tribunal would eventually adopt the accounting-based approach in so many words. As such, they are worth considering by investors and their corporate counsel when structuring their foreign investments.
VI. CONCLUSION

There are currently two conceptual approaches to the definition of the notion of investment in international investment law. One of them is based on an attempt to develop general, purportedly “objective” criteria that could be applied across the board, regardless of the context. The other, a more “subjective” approach, prefers to focus on the definition that the parties have in fact agreed in the applicable bilateral or multilateral investment treaty. While these two approaches do not necessarily always lead to a different outcome, in certain circumstances they may, and in hard cases where the existence of an investment constitutes the very subject matter of the dispute, they often do.

Moreover, and perhaps more problematically, both approaches remain unsatisfactory in the sense that they tend to lead to conceptual difficulties in their applications. The objective approach tends to provide the arbitral tribunal with virtually unfettered discretion when determining whether or not the abstract criteria of investment have been met in any particular case. The subjective approach tends to lead to a slippery slope where the arbitral tribunal may be ultimately unable to draw any firm conceptual distinctions between an investment and an ordinary commercial transaction.

These conceptual issues may be addressed and largely eliminated if the concept of investment is defined by reference to the way in which the investor has in fact accounted for, or at least could have accounted for, its business activities. It is suggested that any ongoing cross-border business activity that may be presented in the form of a balance sheet that shows owner’s equity (or another form of owner’s capital contribution) may be considered an investment in the legal sense. This is not a mere accounting device since in order for the investor to be able to show owner’s equity or another form of capital contribution in its books, such a commitment of own capital must in fact have been made. Businesses engaged in ongoing cross-border business activities are well advised to structure their business activities and account for them accordingly, lest they run a substantially higher risk that they will be unable to draw on the legal protections available under the applicable bilateral or multilateral investment treaty.