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Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond

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Abstract
A number of commentators, including Michael Hwang and Jennifer Fong who were featured in a recent issue of this journal,[1] have contributed to an ongoing debate about the definition of investment by expressing their support for an objectivist theory or the "outer limits" approach as advocated in *Salini v. Morocco*. However, this article argues that neither the *Salini* test nor the rival subjectivist theory can offer an internally consistent and viable legal framework for determining the existence of an investment. After critically examining existing approaches to defining investments in arbitral practice, international investment treaties, European Union (EU) law, and international trade law, the article considers the role of ordinary and effective interpretation and a telos behind investment treaty instruments in coining a meaningful definition.

What constitutes an investment? The theoretical and practical importance of defining the term "investment" goes beyond an investment's role as a jurisdictional prerequisite for bringing a dispute before a treaty-based tribunal, such as that of the International Centre for Settlement of Investment Disputes (ICSID).[2] It is the notion of investment that forms the cornerstone of the entire system of investment treaty protection: a claimant is entitled to substantive and procedural guarantees under bilateral and multilateral arrangements only if that claimant's enterprise qualifies as an investment. As the definition of an investment marks the outer limits of protection granted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and bilateral investment

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1. Michael HWANG and Jennifer FONG Lee Cheng, "Definition of 'Investment'—A Voice from the Eye of the Storm" (2011) 1 Asian Journal of International Law 99.

2. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 159 (entered into force 14 October 1966) [*ICSID Convention*].

treaties (BITs), and thus controls the extent to which national decision-making is exposed to international review, a clearer understanding of the meaning and scope of the term plays a crucial part in ensuring the legitimacy and effective functioning of the entire network of treaty instruments.[3]

While few would object to extending investment treaty protection to assets embodied in tangible property, the status of less corporeal contractual rights and entitlements remains problematic. Within the latter category, concessions in the transport and natural resources sectors having been traditionally regarded as investments proper, it is the amorphous group of "other" rights having an economic value which have given rise to considerable controversy in arbitral practice. A controversial issue is the ubiquitous references to "claims to money and performance" in the texts of bilateral and multilateral investment agreements as tribunals are now faced with a growing number of disputes involving less investment-like activities in construction, pre-shipment inspection, legal services, salvage of historical artefacts, and, prominently, servicing of sovereign debt. Should these forms of economic activity give rise to the unique right to claim directly against the host state (in most cases without having to exhaust local remedies) as well as be entitled to substantive guarantees of fair and equitable treatment, non-arbitrariness, and sanctity of contract?

This article seeks to contribute to an ongoing debate about the meaning and scope of the term "investment" through a critical evaluation of existing approaches from a historical, normative, and comparative perspective. Without restating criticisms that have already been levelled against the current practice, the article aims to highlight the inherent ambiguity of the term and its implications for an increasingly expanding scope of state responsibility before foreign business actors. After examining the currently prevailing objectivist and subjectivist theories of investment, it draws upon the history of international investment instruments and the principle of ordinary and effective interpretation to argue for a process-oriented definition. Although not without limitations, the process-oriented understanding of investment may yield greater clarity and thus offer an alternative to the existing tension between the definition derived from the ICSID Convention and that contained in BITs. The overlap between "investment" and "trade in goods and services" is also examined, with particular focus on the recent practice of investment arbitration, EU law, and international trade law. Whilst acknowledging that both the ordinary meaning of investment and its process-oriented approach may still fall short of providing a clear-cut answer to the question of whether an investment encompasses sale and services, the article considers a treaty telos as a possible means of identifying the import of the notion of investment and the ways in which it may help demarcate the scope of protection under the ICSID Convention and BITs.

3. The recent report by the European Parliament on the EU investment policy considers the definition of investment as one of the key terms that need clarification. See "EU Investment Policy Needs to Balance Investor Protection and Public Regulation, says International Trade Committee", *European Parliament International Trade Committee Press Release* (17 March 2011), online: European Parliament/News ⟨www.europarl.europa.eu⟩.

I. BETWEEN THE ICSID CONVENTION AND BITS: THE COMPETING NOTIONS OF INVESTMENT

Since its inception, the debate over the meaning of investment under the ICSID Convention and BITs has been largely framed by a clash between the objectivist and subjectivist approaches. The objectivist theory has its roots in an arbitral decision in *Salini v. Morocco*—one of the early ICSID arbitrations—where the tribunal sought to delimit the material scope of the ICSID Convention by introducing a set of criteria which a claimant would need to satisfy in order to establish that the claimant's dispute is in relation to an investment. In considering whether a contract for the construction of a highway constituted an investment, the tribunal drew a distinction between the definition of investment in the applicable BIT and investment as a jurisdictional requirement in Article 25(1) ICSID Convention.[4] Although the disputed agreement could be regarded as "a contractual benefit having an economic value" which gave rise to "a right of an economic nature", the tribunal held that the fact that the state parties to the BIT agreed to regard these assets as an investment was insufficient for satisfying the jurisdictional requirement of "investment" under Article 25.[5] Relying on academic writings and arbitral cases which had earlier addressed the scope of an investment, the tribunal concluded that in accordance with an objective test *implicit* in Article 25(1), an investment would require a commitment of resources, a certain duration, an element of risk, and a contribution to the economic development of the host state.[6] The gist of the objectivist theory of investment is that Article 25(1) ICSID Convention implicitly restricts the jurisdiction of arbitral tribunals by imposing outer limits on the notion of an investment: a certain asset qualifying as an investment under the applicable BIT must also satisfy the jurisdictional conditions of Article 25 and constitute an investment in an objective sense.

Despite its strong influence on the subsequent arbitral practice, the *Salini* test has generated considerable criticism and opposition, including that which is in the form of a competing subjectivist theory which attributes primary importance to the definition of investment in BITs. Indeed, since such treaties invariably contain an asset-based definition of investment, the question arises as to how the existence of the objective notion of investment implicit in the ICSID Convention is to be reconciled with what the state parties to a BIT have explicitly designated as an investment.

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4. *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction of 23 July 2001, ICSID Case No. ARB/00/4 [*Salini*]. Before *Salini*, various tribunals indirectly dealt with the notion of investment as part of examining the jurisdiction *ratione materiae* under Article 25(1) ICSID Convention. See e.g. *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction and Competence of 6 July 1975, ICSID Case No ARB/74/3 (involving a bauxite mining operation); *Société Ouest Africaine des Bétons Industriels v. Sénégal*, Decision of 25 February 1988, ICSID Case No ARB/82/1 (involving a construction of low-income housing units). *Fedax N.V. v. Republic of Venezuela* was the first case involving an objection to jurisdiction of an ICSID tribunal on the ground that the underlying transaction did not qualify as investment (*Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction of 11 July 1997, ICSID Case No. ARB/96/3). Subsequently, the *Salini* test was elaborated in *Joy Mining Machinery Ltd v. Egypt, Award on Jurisdiction*, Decision of 30 July 2004, ICSID Case No ARB/03/11) (2004) 19 ICSID Rev. 486, para. 50 [*Joy Mining*].

5. *Salini*, *supra* note 4, para. 52.

6. *Ibid*., para. 52. The tribunal referred to a decision in *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, Decision on Jurisdiction and Competence of 6 July 1975, ICSID Case No. ARB/74/2.

For instance, in what has become a traditional and most commonly replicated formula, the 2008 German Model BIT describes investment as "every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State".[7] In particular, the term embraces

- movable and immovable property as well as any other rights *in rem*, such as mortgages, liens, and pledges;
- shares of companies and other kinds of interest in companies;
- claims to money which has been used to create an economic value or claims to any performance having an economic value;
- intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights;
- tradenames, trade and business secrets, technical processes, know-how, and goodwill; and
- business concessions under public law, including concessions to search for, extract, or exploit natural resources.

It is the inclusion of this asset-based definition of investment in virtually all BITs that served as a key reason for a departure from the *Salini* test in a number of arbitral cases. Indeed, if a construction contract falls under the rubric of "business concessions" as stated above, and claims arising from such a contract classify as claims to money or performance, is there a need for the objective notion of investment under Article 25(1) ICSID Convention? The principal argument underlying the subjectivist view of investment is that a primary role in setting the outer limits to the notion of investment ought to be attributed to what the state parties to a BIT have defined as an investment. This line of reasoning has been well illustrated in the annulment decision in *Malaysian Salvors*, where an ad hoc committee found the definition of an investment in the BIT, including the reference to claims to money, to be decisive.[8] The tribunal in *Biwater v. Tanzania* also refused to downplay the significance of the definition of investment in the applicable BIT, reasoning that:

> if very substantial numbers of BITs across the world express the definition of "investment" more broadly than the *Salini* test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.[9]

Despite offering a valid criticism of the *Salini* test and of its outer limits approach, the subjectivist interpretation, too, falls short of providing a viable framework for

7. See the 2008 German Model BIT, online: Investment Treaty Arbitration 〈http://ita.law.uvic.ca/investmenttreaties.htm〉 [*German Model BIT*].

8. *Malaysian Historical Salvors v. Malaysia*, Decision on the Application for Annulment of 28 February 2009, ICSID Case No ARB/05/10 at para. 72 [*MHS Annulment*].

9. *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Award of 24 July 2008, Concurring and Dissenting Opinion of Mr Gary B. Born, ICSID Case No ARB/05/22 at para. 314.

defining an investment. Whilst describing what constitutes an investment, BITs do not offer an overarching formula, which could be relied upon in determining whether a certain economic activity that was not mentioned in a non-exhaustive, asset-based definition ought to be regarded as such. Further still, it will be shown below that the subjectivist approach does not facilitate the process of discerning between an investment per se and rights which arise in connection to such an investment. In what follows, a critique of the two competing theories will be offered with the aim of highlighting the inherent ambiguity at the heart of international investment law. After deconstructing the currently prevailing practices from a functional and historical perspective, the limits and virtues of the ordinary and effective interpretation will be discussed as a backdrop of the argument for a purpose-driven elucidation of the meaning of investment.

II. THE LIMITATIONS OF THE OBJECTIVIST AND SUBJECTIVIST VIEWS OF INVESTMENT

A. *Functional Perspective: Defining Investment in the Light of Overlapping Objectives of the ICSID Convention and BITs*

The clash between the objective and subjective approaches to defining an investment may be regarded as a manifestation of a more systemic tension between competing visions of international investment law which lie beneath much of the current discourse. Just as the first arbitral pronouncements on the scope and meaning of the key investment treaty standards, including umbrella clauses and the fair and equitable treatment standard,[10] revealed a fundamental disagreement on the role of international investment treaties in reallocating power in investor-state relationships, so too does the competition between the objective and subjective definitions of the term "investment" raise questions on the overarching goals of investment arbitration and the wider implications of ambiguity surrounding some of the principal terms in international investment treaties.

Yet unlike the debates over the meaning and scope of other key treaty provisions, the competing theories of investment cannot be cast into the rigid categories of pro-investor and pro-state or liberal and moderate interpretation. As far as the

10. For a debate on umbrella clauses, see Andrew NEWCOMBE and Lluis PARADELL, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) at 438; Stephan SCHILL, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties" (2009) 18 Minnesota Journal of International Law 1; Jarrod WONG, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 George Mason Law Review 135; James CRAWFORD, "Treaty and Contract in Investment Arbitration" (2008) 24 Arbitration International 351. A divide over the scope and meaning of the fair and equitable standard has been captured in Campbell McLACHLAN, Laurence SHORE, and Matthew WEINIGER, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 210; Jeswald SALACUSE, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) at 238–43; Stephan VASCIANNIE, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" (1999) 70 British Yearbook International Law 99; Theodore KILL, "Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations" (2008) 106 Michigan Law Review 853.

troublesome category of "claims to money and performance having an economic value" are concerned, both the objective and subjective approaches can yield a definition of investment broad enough to embrace forms of economic activities which many would be reluctant to recognize as such.[11] It is clear that the *Salini* criteria of the commitment of resources, duration, a risk, and the contribution to the economic development can be stretched quite significantly, thus enabling arbitrators to push the outer limits of investment arbitration beyond what might have been intended by state signatories to BITs and the ICSID Convention. The subjective approach, too, lacks the capacity to contain the scope of the unwieldy notion of investment as its asset-based definition expressly covers a variety of resource commitments and rights arising thereof.

Leaving aside criticisms already levelled against both approaches in academic literature,[12] one of the weaknesses of the objective theory is that, by deducing from Article 25 ICSID Convention a definition of investment different from that agreed between state parties in BITs, tribunals and commentators seem to suggest that BITs and the ICSID Convention pursue distinct and even opposing objectives.[13] A similar inclination to draw a contradistinction between BITs and the ICSID Convention may be discerned in the subjective theory according to which bilateral definitions should control interpretation. However, a more persuasive and feasible approach would be to interpret both the Convention and BITs in the light of their concurring function of protecting foreign business abroad. As far as dispute resolution is concerned, international investment treaties and the ICSID Convention equally pursue the objective of providing foreign investments with an effective means of protection. The fact that a BIT or a regional investment agreement such as the North American Free Trade Agreement (NAFTA) are entered into between only a group of states does not transform their investment-protection objective into something qualitatively different from the objectives pursued by the ICSID Convention. Similarly, the fact that the ICSID Convention establishes a procedural framework—in contrast to BITs, which contain substantive standards of investment protection—does not justify concluding that the former pursues a completely different aim. Both the ICSID Convention and other investment treaty instruments overlap in their function of establishing the legal framework for the protection of foreign investments abroad.[14]

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11. For example, the application of the test being largely based on the *Salini* criteria (*Salini*, *supra* note 4), the arbitrator in *Pantechniki v. Albania* concluded that activities under contracts such as for provision of road repair services and sale of equipment may qualify as an investment. See *infra* note 51 and accompanying text.

12. See, for instance, Sébastien MANCIAUX, "The Notion of Investment: New Controversies" (2008) 9 Journal of World Investment & Trade 443; Paolo VARGIU, "Beyond Hallmarks and Formal Requirements: A 'Jurisprudence Constante' on the Notion of Investment in the ICSID Convention" (2009) 10 Journal of World Investment & Trade 753; Devashish KRISHAN, "A Notion of ICSID Investment" (2009) 6 Transnational Dispute Management 1; and Zachary DOUGLAS, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 191–202.

13. Such contradistinction can be discerned in the objectivist approach as expounded by the tribunals in *Salini* and *Joy Mining*. See *Salini* and *Joy Mining*, *supra* note 4.

14. See also Emmanuelle CABROL, "*Pren Nreka v. Czech Republic* and the Notion of Investment Under Bilateral Investment Treaties" in Karl SAUVANT, ed., *Yearbook of International Investment Law and Policy 2009–2010* (Oxford: Oxford University Press, 2010), 217 at 230.

The annulment decision in *Malaysian Salvors* has highlighted this symbiotic relationship of BITs and the ICSID Convention.[15] In its determination of whether a salvage contract constituted an investment, the ad hoc committee found that the salvage contract might be treated as "a business concession granted under contract", and the dispute between the parties as "a claim to money" arising thereof, thus falling within the scope of the BIT definition of investment.[16] The committee proceeded to emphasize that the United Kingdom-Malaysia BIT did not provide any dispute settlement option other than ICSID. Hence, in the tribunal's view, it was implausible to argue that two states would expressly include contracts and claims arising thereof in the BIT definition of covered investment, knowing that such assets would fall outside the remit of ICSID arbitration, which the BIT designated as an exclusive means of dispute resolution.[17] Indeed, it is usually a BIT—or, in some instances, an investor-state contract—that provides for an investor's right to arbitration against the state. Without such instruments, investors would be unable to avail themselves of protection under the ICSID Convention. Although somewhat inadequately, BITs describe what constitutes "investment" whilst also providing for arbitration as a means of dispute settlement through which the term is to be construed, applied, and enforced. The emphasis on differences between BITs and the ICSID Convention is likely to distract from the importance of defining the term in the context of shared systemic objectives underlying the mechanism of investment protection.

B. *Negotiating History and the Ordinary and Effective Interpretation: Investment as "A Commitment of Resources in the Expectation of a Profit"*

Although rationalized by what seems to be a valid concern over the scope of dispute settlement under the ICSID Convention, the objectivity of the *Salini* test—and the ultimate capacity of its four criteria to dispel the ambiguity surrounding the term—is questionable, particularly following the disparate rulings by an arbitrator and an annulment committee in *Malaysian Salvors*, illustrating the elasticity with which the outer limits of investor-state arbitration may be drawn by different panels.[18] The recent award and dissenting opinion in *Abaclat v. Argentina* cast the problematic

15. The ad hoc committee stressed that:
> [i]t is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.

See *MHS Annulment*, *supra* note 8 at para. 73.

16. *Ibid*., paras. 59–60.

17. *Ibid*., para. 62. However, see critical comments in M. SORNARAJAH, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010) at 312–13.

18. See *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, Award on Jurisdiction of 10 May 2007, ICSID Case No ARB/05/10. While the tribunal found, after applying the *Salini* test, that a contract for the salvage of historical artefacts was not an investment, the annulment committee found otherwise. The approach adopted by the arbitrator in the annulled award can be compared with the decision in *SGS v. Philippines* (*infra* note 57), where a provision of pre-shipment inspection services was found to qualify as an investment, and with the award in *Pantechniki v. Albania* (*infra* note 51) where a provision of the road repair services was regarded as a form of investment protected by the applicable BIT.

nature of the *Salini* test into renewed focus, with the majority finding the hallmarks approach to be capable of frustrating the intention of the parties and the spirit of the ICSID Convention.[19] The credibility of the objective hallmarks of the test is further undermined by the absence of express provisions on the meaning of "investment" in the ICSID Convention. Indeed, in supporting the objectivist notion of investment, Hwang and Fong argue that "it is difficult to imagine that states had, by signing ICSID, intended to open themselves up to ICSID arbitration on disputes relating to every kind of asset or every kind of investment".[20] However, this assumption is largely unsupported: nowhere does the ICSID Convention contain a definition that would set the boundaries to the jurisdiction of an ICSID panel independently of any bilateral or multilateral treaty. As the text of the ICSID Convention fails to explicate the meaning of the term, one is compelled to look at the negotiation history. The findings are illuminating. The first draft of the Convention defined subject-matter jurisdiction by a strikingly broad reference to "any disputes between Contracting States and the nationals of other Contracting States".[21] The negotiation history reveals that in discussing the subsequent drafts, the delegates purported to specify the subject-matter jurisdiction by reference to the form of arrangement—such as the existence of a direct contract with a host state—and the nature of the dispute—which excluded purely political and commercial matters.[22] It is remarkable that the delegates were barely concerned with an objective definition of investment. Instead of defining investment in terms of its objective economic characteristics, the proposals intended to designate the types of disputes signatory states would wish to submit to arbitration.[23]

As the final version of the Convention abandoned any definition of investment,[24] one is compelled to conclude that an objective meaning of investment is that derived

19. *Abaclat and Others (formerly: Giovanna A. Beccara and Others) v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, 4 August 2011, ICSID Case No. ARB/07/5 at para. 364. The majority of the tribunal found that sovereign debt instruments constituted an investment (para. 387).

20. Hwang and Fong, *supra* note 1 at 107.

21. Julian Davis MORTENSON, "The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law" (2010) 51 Harvard International Law Journal 257 at 281–2.

22. *Ibid*., at 282–5.

23. *Ibid*. See also at 290 (analyzing the history of negotiations and observing that the solution was based on the United Kingdom proposal which deleted the definition of investment and instead added a subsection for a procedure whereby states would notify other signatories of the categories of dispute they would not consider submitting to arbitration).

24. See Aron BROCHES, "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction" (1966) Columbia Journal of Transnational Law 261 at 268. The history of the ICSID negotiation reveals that Broches was personally opposed to a definition and insisted that the precise delimitation of the Centre's jurisdiction ought to be left to the parties. See Christoph SCHREUER *et al*. *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009) at 113–15 [Schreuer *et al*., *Commentary*]. Following Mr Broches's proposal, the Executive Director's Report stated that "[n]o attempt was made to define the term 'investment' given the essential requirement of consent by the parties". See "The Report of the Executive Directors on the ICSID Convention" (1993) 1 ICSID Reports 28. Although the Report does not fully reflect the reality of negotiations, where attempts to define investment were made but were unsuccessful, it has nevertheless been referred to in some arbitral decisions. For criticism of this, see Schreuer *et al*., *Commentary* at 116; Farouq YALA, "The Notion of 'Investment' in ICSID Case Law: A Drifting Jurisdictional Requirement? Some 'Un-Conventional Thoughts on *Salini*, *SGS* and *Mihaly*'" (2005) 22 Journal of International Arbitration 105 at 105–6.

from the ordinary and effective interpretation of the term, as mandated by Article 31 of the Vienna Convention.[25] According to its ordinary meaning, investment is an act of investing money and also the money that is invested, and the act of investing comprises buying something with the hope of making a profit.[26] Consequently, the objectivist understanding of investment may result in *any* commitment of resources with the expectation of a profit being regarded as an investment. Ironically, the same result was reached by tribunals that have dismissed the *Salini* test and established the existence of investment in a salvage operation, an arbitral award, and more recently and controversially, in sovereign debt instruments.[27]

C. *Towards a Process-Oriented Interpretation of Investment: Distinguishing Between an Investment and Rights Arising Thereof*

Broad and inherently ambiguous though it may be, the definition of "investment" based on the ordinary meaning of the term does offer a framework for distinguishing between investment and other non-qualifying forms of economic activity and rights arising thereof. The ordinary interpretation performs an important screening function as it militates against including such transactions as buying a metro ticket under the rubric of investment:[28] clearly, even if the payment for a metro ticket could qualify as a commitment of resources, such transaction involves no expectation of a profit and therefore does not constitute an investment. Beyond its capacity to screen out a wide range of non-qualifying transactions, the ordinary meaning approach implies that investment should be regarded as a process rather than an asset. Only when put to a certain use in the expectation of a commercial return does an asset turn into an investment. The process-oriented view of investment is not only supported by the ordinary meaning of the term but is also preferable because it encompasses various elements of the putative investment activity without losing sight of a core transaction and its economic nature. Thus, it is the acquisition of an asset for the purpose of its commercial exploitation that should be viewed as an investment, and not the asset itself. Similarly, it is not a right to provide water services that forms an investment; rather, an investment comprises the whole operation, including the acquisition of the necessary rights and the deployment of capital, technology, and personnel in exercising those rights.[29]

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25. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

26. *Oxford English Dictionary*, 7th ed. (Oxford: Oxford University Press, 2005) 818–19. A more specific, economic definition of investment is equally broad as it embraces the concept of foreign direct investment (FDI) and portfolio, and other investments in the form of various "assets and liabilities". See IMF *Communication to WTO Working Group on the Relationship Between Trade and Investment*, WTO Doc. WT/WGTI/W/61 (3 November 1998), cited in Krishan, *supra* note 12 at 20. See also Mortenson, *supra* note 21 at 309–10 (noting that investment can plausibly be extended to any economic activity).

27. See *Abaclat v. Argentina*, *supra* note 19 (the majority of the tribunal criticized the *Salini* test and found sovereign debt to constitute a form of investment protected by BITs).

28. Hwang and Fong, *supra* note 1 at 120.

29. See Cabrol, *supra* note 14 at 224–5, arguing that conflating investment and assets is at odds with investment treaties which have the objective of promoting economic relationships between contracting parties.

This process-oriented understanding of investment is very important for both conceptual and practical reasons. The inadequacy of the subjectivist approach to construing investment is that it relies on the definition of the term in BITs, which confusingly embraces both investments per se and rights relating to investments. Indeed, "claims to money and performance having an economic value" cannot be plausibly viewed as a commitment of resources in the expectation of a profit; such claims are not investments per se, but could be regarded as part of an entire investment operation. The fact that claims to money and other cognate rights are listed in the BIT definition of investment does not exempt a putative claimant-investor from establishing that a contract or an operation, which forms the basis of such a claim, constitutes an investment: claims to money are entitled to the protection under the applicable treaty instrument only if they arise from a contract or other undertaking that qualifies as an investment in its ordinary sense.[30]

Although the need to regard investment as an entire operation—the so-called general unity of an investment operation—has already been acknowledged in a number of cases,[31] arbitral practice has not been consistent in distinguishing between an investment and related rights that could possibly arise. The *Saipem v. Bangladesh* tribunal was among the first panels to stress the difference between an overall investment operation and its individual components, including claims arising from a relevant contract.[32] This case concerned a refusal by national courts to recognize and enforce the award rendered by an International Chamber of Commerce (ICC) tribunal in a contractual arbitration. The tribunal held that the right accruing to the claimant under the ICC award arose only indirectly from the investment. Thus, it was not prepared to consider the ICC award itself as constituting an investment.[33] Having correctly emphasized that the notion of investment must be understood as covering all elements of the operation,[34] the tribunal held that both the contract and the construction project itself were the elements of the investment operation, and considered the ICC award as a crystallization of the rights and obligations under the contract.[35]

In contrast, the earlier award in *Joy Mining* provides an example of a failure to distinguish between an investment and investor rights arising by virtue of such an investment. The case concerned a release of bank guarantees under a contract for the provision and technical installation of equipment for a phosphate-mining project.[36] Instead of examining whether an underlying contract qualified as an investment, the

30. *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, Decision of 26 November 2009, PCA Case No. AA280, para. 211 [*Romak v. Uzbekistan*].

31. This is what other commentators have described as "the general unity of an investment operation". See Schreuer *et al.*, *Commentary*, *supra* note 24 at 108–12.

32. *Saipem S.p.A. v. People's Republic of Bangladesh*, Decision on Jurisdiction of 21 March 2007, ICSID Case No ARB/05/7.

33. *Ibid.*, para. 113.

34. *Ibid.*, para. 114.

35. *Ibid.*, para. 127. A similar approach features in *Romak v. Uzbekistan*, *supra* note 30 at para. 211, where the tribunal stressed that "if the underlying transaction is not an investment within the meaning of the BIT, the mere embodiment or crystallization of rights arising thereunder in an arbitral award cannot transform it into an investment".

36. *Joy Mining*, *supra* note 4.

tribunal preferred to scrutinize only the status of the bank guarantees, thus confusing the putative investment operation with a claim to payment under the letters of guarantee.[37] The tribunal's failure to separate the analysis of the underlying investment operation (the provision and technical installation of the equipment) from the examination of the claim to money (the entitlement to the release of bank guarantees) manifests the shortcomings of the *Salini* test which was expressly endorsed by the tribunal and informed its reasoning. Just like bilateral definitions of investment, the objectivist approach is liable to conflate investment and other incidental rights, thus failing to offer a reliable analytical framework for interpreting "investment" and understanding its role in defining the contours of international investment law.

The simultaneous inclusion of various forms of investment as well as rights arising thereof under a single rubric in the texts of BITs, and the frequently ensuing failure to draw a line between an investment as a process and claims to money and performance as its derivatives, are also problematic due to the doubtful practices they seem to perpetuate. The most notable example drawn from the recent arbitral jurisprudence is the award in *ATA Construction v. Jordan*, where an ICSID tribunal was faced with the question of whether a claim arising from the annulment of an arbitral award rendered in a contractual arbitration fell within its jurisdiction under the Turkey-Jordan BIT.[38] A dispute arose in connection with a contract for the construction of a dyke concluded between the claimant and the Arab Potash Company (APC). A contractual arbitration was initiated by APC after a section of the dyke had collapsed during the process of filling it with water. A tribunal constituted in accordance with the contract had not only dismissed APC's claims but also awarded the investor's counter-claim for compensation. Subsequently, the Jordanian Court of Appeal decided to set aside the award on the ground that it contained an error of law, namely, the misapplication of Article 789 of the Civil Code. As a result, the arbitration agreement became a nullity: in accordance with the 2001 Jordanian Arbitration Law, the nullification of the award led to extinguishing the underlying arbitration agreement. After an unsuccessful attempt to reverse the judgment in the Court of Cassation, the contractor instigated arbitral proceedings against Jordan before an ICSID tribunal, contending that the Jordanian courts committed a denial of justice in violation of the Turkey-Jordan BIT of 2006.[39]

As part of establishing its jurisdiction over the dispute, the ICSID tribunal ruled that a right to arbitration under a construction contract constituted an investment.[40]

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37. *Ibid*., paras. 45, 61. For critical comments, see Schreuer *et al*., *Commentary*, supra note 24 at 111–12. See also Christoph SCHREUER and Ursula KRIEBAUM, "The Concept of Property in Human Rights Law and International Investment Law" in Stephan BREITENMOSER *et al*., eds., *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike: Nomos, 2007) at 760–1 (criticizing the awards in *Joy Mining*) (see *supra* note 4) and *Eureko B.V. v. Republic of Poland* for a failure to recognize the general unity of the investment operation. In *Eureko*, the tribunal failed to distinguish between an investment in shares of a privatized enterprise and corporate governance rights arising from the possession of those shares. It held that corporate governance rights constituted an investment. *Eureko B.V. v. Republic of Poland*, Partial Award of 19 August 2005, Dissenting Opinion of Jerzy Rajski at para. 144.

38. *ATA Construction, Industrial and Trading Company v. Jordan*, Award of 12 May 2010, ICSID Case No. ARB/08/2 [*ATA v. Jordan*].

39. *Ibid*., paras. 73–4.

40. *Ibid*., para. 116.

This is not the first time an arbitral award was examined against the jurisdictional requirement of Article 25(1) ICSID Convention. As mentioned above, faced with a somewhat similar jurisdictional issue, the *Saipem v. Bangladesh* tribunal had earlier concluded that an arbitral award could fall within the jurisdiction of a treaty-based tribunal, but only if it constituted part of an entire investment operation which qualified as an investment.[41] The dispute having arisen in connection with a contract for the construction of a pipeline, the *Saipem* tribunal was satisfied that the rights embodied in the disputed contractual arbitration did not arise from the award but were created by the underlying contract which itself constituted an investment.[42] However, this route to establishing jurisdiction was not available to the *ATA v. Jordan* tribunal due to the temporal dimensions of the claim. The underlying contract for the construction of a dyke was concluded in 1998, and the contractual arbitration took place in 2003—prior to the entry into force of the Turkey-Jordan BIT in January 2006. If the *ATA* tribunal were to follow the *Saipem* approach and consider the disputed contractual arbitration as part of an entire investment operation, it would have to dismiss the claim as falling outside the jurisdiction *ratione temporis* because both the conclusion of the contract, the dispute over the collapsed dyke, and the contractual arbitration took place prior to the coming into effect of the applicable BIT. In order to avoid this temporal barrier, the *ATA* tribunal did not elaborate on whether the contractual arbitration was part of an investment operation but instead opted to focus exclusively on the claimant's right to arbitration. It held that the right to arbitration itself was a distinct investment because it fell under the rubric of "claims to legitimate performance having a financial value related to an investment" protected by the BIT.[43] The result defies the ordinary meaning of investment: it indeed stretches language beyond breaking point to conclude that, divorced from an underlying business operation, a right to arbitrate as such constitutes a distinct investment.[44] A more recent award in *GEA v. Ukraine* makes this point strongly: as a legal instrument that provides for the disposition of rights and obligations arising from a certain agreement, an arbitral award cannot in itself constitute an investment where it involves no contribution to, or relevant economic activity in, the host state.[45]

Regrettably, neither the objectivist *Salini* test nor the subjectivist reliance on BIT definitions offers a suitable platform for dealing with claims to money and other cognate entitlements. It would seem that the process-oriented concept of investment—derived from the ordinary and effective interpretation of the term—can provide a more credible and coherent methodology for establishing the existence

41. See *supra* notes 32–4 and accompanying text.

42. As the right to arbitration was extinguished only upon the decision of the Court of Cassation delivered in January 2007, it was found to be within the temporal scope of application of the Turkey-Jordan BIT See *supra* note 38, para. 117.

43. *Ibid*., para. 117.

44. See the objection raised by the respondent in *ATA v. Jordan*, *supra* note 38 at para. 63. However, a recent award in *White Industries Australia Limited v. Republic of India* has adopted a similar approach to *ATA v. Jordan*. *White Industries Australia Limited v. Republic of India*, Final Award, 30 November 2011, para. 7.6, online: 〈http://italaw.com〉.

45. *GEA Group AktienGesellschaft v. Ukraine*, Award of 31 March 2011, ICSID Case No ARB/08/16 at paras. 161–2.

of a qualifying investment, without confusing the latter with various incidental claims. Still, it should be acknowledged that the pervasive ambiguity of the term "investment" is such as to defy a single interpretive solution. Whilst yielding much-needed clarity in distinguishing between an investment and rights arising thereof, the process-oriented approach does not provide clear-cut guidance in determining the scope of investment, and in particular the extent to which sale and services come within the protective scope of the ICSID and BITs.

III. FORMS OF ECONOMIC ACTIVITY CAPABLE OF CONSTITUTING AN INVESTMENT

A. *Is a Sale an Investment? Between Investment and Ordinary Commercial Transactions*

The focus on the unity of an investment and an underlying investment operation being crucial in distinguishing between investment disputes and other non-qualifying claims, the question that inevitably arises at this point is how to ascertain which business operations are eligible and covered by the term "investment". Does this term encompass a commitment of resources in sale and service operations? The ICSID Convention is silent on this matter, and reading new criteria into Article 25 may only exacerbate the existing lack of consistency. As for BITs, their traditional asset-based definitions do refer to certain forms of investment operations, such as "concessions to search for, extract or exploit natural resources"[46] and "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise".[47] Yet, just like the ICSID Convention, BIT definitions are neither exhaustive nor inclusive of an overarching formula which could help identify which business operations are protected as investments.[48] Instead, the traditional asset-based formula merely performs a patterning function[49] by pointing out some of the forms an investment may take as well as the entitlements which may arise from such an investment. While a claim to money and performance "having an economic value" and arising from, for example, an oil and gas concession would be more readily recognized as falling under the rubric of investment, claims arising from a service contract—such as a contract for the salvage of historical artefacts and for the technical installation of equipment—and from a sale-of-goods contract are more problematic because the underlying transactions do not lend themselves so easily to being classified as investments.

Although it could be argued that the vehicle of ambiguity and silence were intended to moderate the scope of investment, the examination of the recent arbitral practice illustrates that the open-ended definition can be exploited by advocates of expansive interpretation, thus reinforcing concerns about lack of clarity as well as

46. See the *German Model BIT*, *supra* note 7.

47. See the Canada Model FIPA, available online: Investment Treaty Arbitration 〈http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf〉 [*Canada Model FIPA*].

48. See Cabrol, *supra* note 14 at 225–7, noting that BITs do not contain a definition of investment but merely describe what forms an investment may take.

49. See Santiago MONTT, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart Publishing, 2009) at 252.

raising questions about the overall design of the existing system. In an attempt to confine the notion of investment to only certain categories of economic activity, it is often argued that "the contracting states clearly did not intend ordinary commercial transactions to be protected".[50] However, not only is the line between ordinary transactions and ordinary investment blurred, but the assumption that ordinary commercial transactions were deliberately excluded also lacks basis in treaty texts and is not supported by the history of investment arbitration or otherwise uniformly shared in arbitral practice. For instance, a sole arbitrator in *Pantechniki v. Albania* held that while the sale of a single tractor could not be labelled an "investment", investment treaty protection ought not to be denied to a transaction involving the delivery of a large number of machines and envisaging a deferral of payments for a substantial period.[51] In contrast, the annulment committee in *Malaysian Historical Salvors* held that the outer limits of an investment were defined by "the fundamental assumption that the investment does not mean sale".[52] Likewise, the *Joy Mining* tribunal refused to characterize a contract for the delivery and installation of mining equipment as a form of investment, with the tribunal's reasoning in the relevant part of the award, however, falling short of a principled analysis. The only explanation it proffered for excluding the sale of goods from the ambit of "investment" was the availability of the United Nations Convention on Contracts for the International Sale of Goods as an instrument governing sale contracts, and of international commercial arbitration as an appropriate avenue for dispute settlement.[53] Unconvincing on its merits, the tribunal's reasoning is also untenable if applied to a commitment of resources under a service contract: the fact that certain services fall within the scope of the General Agreement on Trade in Services (GATS) and under the freedom to provide services, in the EU, can hardly serve as a justification for denying protection under an applicable investment treaty instrument to a commitment of resources in the services sector.

International investment treaties also militate against an outright exclusion of sale and services transactions from the scope of treaty protection. Some international investment agreements expressly provide that the term investment

> does *not* include claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a contracting party to a national or enterprise in the territory of another contracting party.[54]

50. Hwang and Fong, *supra* note 1 at 122.

51. *Pantechniki SA Contractors and Engineers v. Albania*, Award of 28 July 2009, ICSID Case No. ARB/07/21 at para. 44 [*Pantechniki*].

52. *MHS Annulment*, *supra* note 8 at para. 72. For a similar approach, see *Joy Mining*, *supra* note 4 at paras. 55–8.

53. *Joy Mining*, *supra* note 4, para. 58.

54. See the Agreement Between the Government of Australia and the Government of the United Mexican States and on the Promotion and Reciprocal Protection of Investments, 23 August 2005, online: Organization of American States 〈www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Australia_e.asp〉 [*2005 Australia-Mexico BIT*] and the Agreement Between the Czech Republic and the United Mexican States and on the Promotion and Reciprocal Protection of Investments, 4 April 2002, online: Organization of American States 〈www.sice.oas.org/Investment/BITSbyCountry/BITs/MEX_Czech_Rep_e.asp〉 [*2002 Mexico-Czech Republic BIT*].

However, this approach could be contrasted with other BITs that are conspicuously silent on the possibility of sales being recognized as a form of investment.[55] The fact that what seems to be a majority of BITs, including the recently concluded treaties, do not expressly strike out sale of goods—even after some states have set a precedent—may serve as an indication that treaty drafters deliberately continue to leave the door open for any economic activities to be included in the term. This argument could be particularly potent in relation to investment treaties and models that were drafted and adopted more recently, after a number of states had restricted the scope of their treaties by expressly providing that neither sale of goods nor claims arising thereof would be covered as protected investments.[56] Besides, since tribunals seem to be less hesitant to regard service contracts—such as contracts for pre-shipment services[57] and construction[58]—as falling within the rubric of investment, in the absence of a "sale exception" in the applicable BIT, sale of goods could just as plausibly be categorized as an investment. The co-existence of two different trends—one for the exclusion of sale and services and the other for keeping the definition of investment broad and open-ended—exposes the potential for a very broad interpretation, which in turn may have significant implications for the functioning of the entire mechanism of treaty protection, and in particular for its acceptance by host states. The modification by arbitral tribunals of the scope of the latter category of treaties may be contrary to the drafters' intention and lead to case-law riddled by internal inconsistency. Since tribunals have already exhibited their differing preferences for the inclusion of sale and certain services in the scope of protected investment,[59] a brief excursion into the history of investment treaty protection will be undertaken so as to explain the breadth and ambiguity of the term "investment" in relation to various forms of economic activity, including trade in goods and services, and to facilitate identifying alternative interpretative solutions.

B. *Bilateral Definitions in a Historical Perspective*

Analyzed in a historical perspective, the inherently open-ended nature of the term "investment" can be seen both as a drafting solution for which treaty negotiators deliberately opted and a by-product of the evolution of the international system for the protection of foreign business interests. Before the rise of BITs, the remit of customary international law was not limited to the protection of foreign property but included standards of treatment of aliens as regards their life, security, and property more generally.[60] It formed part of the law on state responsibility for injuries

55. For example, a recent model BIT of Germany does not expressly exclude sales. See the *German Model BIT*, *supra* note 7.

56. The abovementioned German Model BIT was adopted after Mexican BITs set a trend for excluding sale of goods from the scope of protected investment. See *ibid.*

57. See *SGS Société Générale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction of 29 January 2004, Separate Declaration of Antonio Crivellaro, ICSID Case No. ARB/02/6.

58. See *Pantechniki*, *supra* note 51.

59. See *supra* notes 51–3 and accompanying text.

60. The fact that the customary international minimum standard draws principal support from an international decision unrelated to investment or property is illustrative. The *Neer Claim*, which serves

to aliens.[61] Early Friendship, Commerce, and Navigation (FCN) treaties similarly envisaged the protection of the *property* and *persons* of foreign nationals.[62] Subsequently, the wave of nationalizations in the first half of the twentieth century, including sweeping repudiations of concession contracts, spurred the adoption of international treaty instruments containing a broader definition of property and the extension of international protection to contractual undertakings.[63] A prominent example is the Abs-Shawcross Draft Convention, which championed the extension of international treaty protection to contractual undertakings with aliens, in addition to safeguarding their property, rights, and interests.[64]

The emergence of BITs and the creation of the ICSID as special vehicles of investment protection changed the semantics of international law on the protection of foreigners abroad. Foreign property, rights, and interests—including those arising from contract—have been lumped together under the rubric of "investment". It is noteworthy that negotiators of early US BITs faced the choice of not defining "investment" at all, primarily due to the concern that new forms of investment might be excluded from the definition if the drafters failed to anticipate them.[65] The breadth of the BIT definition of "investment" and the fact that treaty negotiators left the term open to arbitral interpretation may serve as evidence of the ambitious objective of casting an all-encompassing net over the international protection of foreign businesses abroad.[66]

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as an authority for the standard of minimum protection, concerned Mexico's failure to act upon the killing of a US citizen. *L.F.H. Neer & Pauline Neer (U.S.A.) v. United Mexican States*, [1926] 4 R.I.A.A. 60. For more details, see A.H. ROTH, *The Minimum Standard of International Law Applied to Aliens* (Leiden: A. W. Sijthoff, 1949).

61. C.F. AMERASINGHE, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon Press, 1967); also Georg SCHWARZENBERGER, "The Protection of Human Rights in British State Practice" (1948) 10 The Review of Politics at 174. The 1929 Draft Convention on the Treatment of Foreigners, prepared by the League of Nations and the International Chamber of Commerce (ICC), extended protection not only to economic rights but also to civil and legal rights. See A.K. KUHN, "The International Conference on the Treatment of Foreigners" (1930) 24 American Journal of International Law 570 at 571; Gus VAN HARTEN, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007) at 19.

62. Robert WILSON, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 American Journal of International Law 83 at 98, 102 (referring to the 1949 Treaty of Friendship, Commerce, and Economic Development with Uruguay containing the provision guaranteeing the protection for the "persons, rights and property").

63. Nicholas DOMAN, "Postwar Nationalization of Foreign Property in Europe" (1948) 48 Columbia Law Review 1125; see also M. DOMKE, "American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis" (1956–57) 105 University of Pennsylvania Law Review 1033 at 1038 (noting that a revision of the existing instruments was proposed to the effect that the definition of property should cover all types of property).

64. See Georg SCHWARZENBERGER, "The Abs-Shawcross Draft Convention: On Investments Abroad: A Critical Commentary" (1960) 9 Journal of Public Law 147 at 152.

65. Kenneth VANDEVELDE, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009) at 114 (shedding light on the position of the US government in negotiating its earlier BITs). The history of the ICSID Convention, too, supports the view that the negotiating committee and its chairperson favoured an open-ended approach (see *supra* notes 21–2).

66. See Marc POIRIER, "The NAFTA Chapter 11 Expropriation Debate Through the Eyes of the Property Theorist" (2003) 33 Environmental Law 851 at 876, observing that:

> like medieval merchants who developed the law merchant and the law of insurance to facilitate commercial relations … foreign investors have an interest in developing a property rule around regulatory takings that is (1) clear, (2) portable to different cultures worldwide, (3) protective of their investments to the maximum extent possible.

It could be argued that the inclusion of "claims to money and to performance having an economic value"[67] and "investment returns"[68] in the definition of investment indicates that BITs have been designed to ensure that international protection is available to the widest range of foreign business interests at different stages of their operation abroad—from the commitment of capital to the repatriation of its yields.

In practice, however, the breadth of bilaterally agreed definitions of investment is such that it blurs the boundaries of investor-state arbitration because a dispute arising from virtually any economic transaction could potentially qualify as an investment claim and be brought directly against the host state—a privilege that is unavailable in other areas of international economic law. Due to their broad compass, investment treaty instruments could be deployed to protect resource commitment in sale of goods and services, unless an express provision to the contrary is made, as is the case with selected BITs and Free Trade Agreements (FTAs).[69] Again, the history of BITs helps to explain the troublesome breadth of the notion of investment as regards the forms of economic activities it embraces. Early international instruments on the protection of foreign interests abroad did not differentiate between goods, services, and foreign direct investment (FDI). The first model BITs were negotiated and drafted before the dawn of economic liberalization and large-scale privatizations, at a time when foreign investment was limited primarily to concessions in natural resources and long-term utilities.[70] Access to concessions, protection against expropriation, and restrictions on the repatriation of returns were among the predominant concerns in the drafting of model clauses.[71] These concerns are mirrored in a typical BIT definition of investment, which invariably refers to investor rights, investor property, and investment returns, without, however, defining the types of transactions or forms of activities entitled to protection. Treaty drafters—at least in some cases—intentionally left the definition open to allow its flexible interpretation, fearing that precision in the wording of the relevant provisions might prevent future investors from committing resources in areas not covered by a treaty.[72] Although some of the contemporary model BITs—such as the US 2004 Model BIT—evidence a move

67. See e.g. Article 1(a)(iii) of the Netherlands Model BIT (1997), reprinted in Douglas, *supra* note 12 at 547.

68. See e.g. Article 1(6)(e) of the Energy Charter Treaty, December 1994, 2080 U.N.T.S. 100 (entered into force April 1998) [*1994 Energy Charter Treaty*]. See further Article 1(2) of the Japan-Korea BIT, whereby investments include "the amounts yielded by an investment, in particular, profit, interest, capital gains, dividends, royalties and fees". Agreement Between the Government of Japan and the Government of the Republic of Korea for the Liberalization, Promotion, and Protection of Investment, 22 March 2002, online: UNCTAD 〈www.unctad.org/sections/dite/iia/docs/bits/korea_japan.pdf〉.

69. See e.g. Article I(xi)(i) of the *2005 Australia-Mexico BIT* (*supra* note 54) providing that investment does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a contracting party to a national or enterprise in the territory of another contracting party. A similar provision is contained in the *2002 Mexico-Czech Republic BIT* (*supra* note 52). See also Jeswald SALACUSE, *The Law of Investment Treaties* (Oxford: Oxford University Presss, 2010) at 162 (concluding that "by extending the treaty's application to 'any kind of assets' the definitions are designed to protect as wide a range of investment forms as possible").

70. William CULBERTSON, "Foreign Interests in Mexico" (1938) 17 International Affairs 769.

71. See Vandevelde, *supra* note 65 at 21; also Surya P. SUBEDI, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008) at 114–15.

72. Vandevelde, *supra* note 65 at 21.

towards a more elaborate and specified definition of investment, other states seem to favour the traditional open-ended approach.[73]

It is also interesting that as predecessors of modern BITs, FCNs were originally intended to promote international commerce,[74] and only following the emergence of bilateral trade agreements and the General Agreement on Tariffs and Trade (GATT) were they "retooled to fit the newly crystallized investment need".[75] The range of activities covered by FCNs cut across commerce and industry generally.[76] The subsequent spread of liberalization and privatization processes opened up foreign markets to a larger category of foreign business actors who could benefit from the existing protection standards. A new generation of investment treaty instruments, including the failed Multilateral Agreement on Investment, pursued not only the aim of the protection of foreign investment but also that of liberalization and improving access to markets.[77] This, in turn, points to a partial overlap in the material scope of BITs, trade agreements, and regional economic integration instruments.[78] Consequently, the notion of investment emerges as a poorly defined conglomerate of rights relating to the protection of foreign property abroad and the promotion of the liberalized movement of capital, services, and goods.[79] The growing tendency to extend the benefits of

73. See, for example, the case of the UK, as explained in Douglas, *supra* note 12 at 559–67, and German Model BITs (see *supra* note 7).

74. The primary purpose of FCNs was to establish closer commercial and political relations between the contracting parties. See Herman WALKER Jr., "Treaties for Encouragement and Protection of Foreign Investment: Present United States Practice" (1956) 5 American Journal of Comparative Law 229 at 231; Kenneth VANDEVELDE, "A Brief History of International Investment Agreements" (2005) 12 University of California Davis Journal of International Law & Policy 157 at 158.

75. Walker, *supra* note 74, at 231.

76. *Ibid.*, at 232.

77. Giorgio SACERDOTI, "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1998) 269 Recueil des Cours de l'Académie de Droit International 251 (n.74) 265; Peter MUCHLINSKI, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) 34 International Lawyer 1033 at 1038; Robert ECHANDI, "Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking" in Katia YANNACA-SMALL, ed., *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford University Press, 2010), 1 at 8 (noting that "greater market access through market presence, and not just protection for private property, is gradually becoming part of the main interest of international investors when seeking the application of an IIA"). The fact that investment protection chapters are increasingly included in FTAs is also illustrative.

78. Ignacio GOMEZ-PALACIO and Peter MUCHLINSKI, "Admission and Establishment" in Peter MUCHLINSKI, Federico ORTINO, and Christoph SCHREUER, eds., *The Oxford Handbook on International Investment Law* (Oxford: Oxford University Press, 2008) 229 at 232 (noting that a right of admission ensures access to cross-border provision of goods and/or services and this represents the case of not so much investment but trade).

79. The fact that the notion of investment is parasitic on various forms of business activities is evidenced in Sacerdoti's work on Bilateral Treaties and Multilateral Instruments. See Sacerdoti, *supra* note 77. When dealing with different aspects of foreign investment, the author has considered BITs as well as European Community (EC) treaty provisions on establishment and free movement of capital. See also Katia YANNACA-SMALL, "Definition of 'Investment': An Open-Ended Search for a Balanced Solution" in Yannaca-Small, ed., *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford University Press, 2010) at 244 (noting that a definition of investment depends on the objective pursued by a certain investment treaty instrument, and indicating that liberalization of capital movements has been one of the reasons for the replacement of the static notion of property by the dynamic notion of investment). See further Steffen HINDELANG, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (Oxford: Oxford University Press, 2009) (analyzing the protection of foreign investment under the EU regime of free movement of capital).

investment-protection instruments to service contracts and, in certain industry sectors, to sale contracts,[80] exposes the problem with the original drafting, which was driven by a preoccupation with the protection of foreign interests engaged in a wide range of economic activity.[81] While the international regulation of trade in goods and services has developed into a separate area of international economic law, the open-ended definition of investment in BITs may be deployed in regulating "the exercise of sovereign authority over international business in general".[82] The fact that the term "investment" is open to a very broad interpretation can be regarded as a reflection of the current stage in the historical transformation of international law where the protection of the property of aliens has been superseded by a set of multilevel economic objectives, leading to the emergence of different international mechanisms and institutions with distinct but at times overlapping agenda. The overlap can be seen not only in the material scope of international trade and investment protection but also on the level of key provisions, the most apposite example being the national treatment standard guaranteed by both investment treaty instruments and international trade agreements.[83] A focus on the convergence and divergence of the international trade and investment fields[84] not only explains the breadth and ambiguity of the term "investment" but also offers a useful analytical framework for identifying interpretative methodologies that can potentially alleviate existing inconsistency and disagreement in arbitral practice.

IV. DEFINING INVESTMENT: LESSONS FROM EU LAW AND INTERNATIONAL TRADE REGULATION

Although the history of convergence and divergence between the international trade and investment law points to the fact that the two regimes have evolved to pursue distinct but complementary objectives, in searching for an alternative approach to defining investment one may look at the related disciplines of EU law and international trade regulation. While the World Trade Organization (WTO) has not yet succeeded in concluding a multilateral instrument on foreign investment beyond the Agreement on Trade-Related Investment Measures,[85] foreign investment in

80. See, for instance, Article 1 of the 1994 Energy Charter Treaty where an investment is defined by reference to economic activity in the energy sector, including "*trade*, marketing, or sale of Energy Products and Materials" (emphasis added). See *supra* note 66. See Emmanuel GAILLARD, "Investment and Investors Covered by the Energy Charter Treat'" in Clarisse RIBEIRO, ed., *Investment Arbitration and the Energy Charter Treaty* (JurisNet, 2006) at 64–5.

81. See Vandevelde, *supra* note 65.

82. See Van Harten, *supra* note 61 at 80.

83. See Nicholas DIMASCIO and Joost PAUWELYN, "Non-discrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin" (2008) 102 American Journal of International Law 48.

84. *Ibid*., at 53–8.

85. See Subedi, *supra* note 71 at 37–8. Investment, along with other "Singapore Issues"—including transparency, competition, and transparency in government procurement—were dropped from the negotiation agenda after derailing the WTO's September 2003 Cancún Ministerial Meeting. For discussion, see Pierre SAUVÊ, "Multilateral Rules on Investment: Is Forward Movement Possible?" (2006) 9 Journal of International Economic Law 325, and Fiona BEVERIDGE, "Foreign Investment in the WTO" (2006) 57 Northern Ireland Legal Quarterly 513 at 529–34.

services falls within the ambit of the GATS.[86] Of four modes of supply in Article I(2) GATS, supply through commercial presence and presence of natural persons in the territory of other Member States come within the scope of investment treaty protection.[87] Of particular interest is the fact that Member States can limit their commitments to specific modes of supply. A similar approach could be adopted in international investment agreements whereby states may opt for delimiting "protected investment" to a commitment of resources only through, for example, commercial presence because such a mode of supply entails lasting economic relations. The emphasis on the need to establish lasting economic relations can already be discerned in the investment chapters of the recent FTAs. For instance, according to Article 45 of the Mexico-EFTA FTA:

> [an] investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.[88]

Beyond regional FTAs, a similar focus on "lasting economic relations" features strongly in the definition of FDI in EU law on the free movement of capital and the freedom of establishment.[89] As far as capital movements are concerned, the nomenclature laid down in Directive 88/361(now repealed) and subsequently reinforced in the case-law of the European Court of Justice distinguishes three principal categories of foreign direct investment:

(1) establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings;

(2) participation in new or existing undertakings with a view to establishing or maintaining lasting economic links; and

(3) long-term loans with a view to establishing or maintaining lasting economic links.[90]

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86. *General Agreement on Trade in Services*, 15 April 1994, 1869 U.N.T.S. 183 (entered into force on 1 January 1995) [*GATS*].

87. The other two modes of supply are consumption abroad and cross-border supply. See *ibid*.

88. *Free Trade Agreement Between The EFTA States and The United Mexican States*, 27 November 2000, online: Organization of American States 〈www.sice.oas.org/Trade/mexefta/MX_FTA.pdf〉. See also Rudolph DOLZER, "The Notion of Investment in Recent Practice" in Steve CHARNOVITZ, Debra P. STEGER, and Peter VAN DEN BOSSCHE, eds., *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge: Cambridge University Press, 2005), 261 at 265. This definition is indeed exceptional as it not only defines investment, which is something the majority of BITs fail to do, but also does so in sufficiently precise terms by indicating the form of investment, and its legal and temporal characteristics. The fact that only a minority of BITs contain more narrowly defined investment provisions only accentuates the breadth of the term "investment" under the ICSID Convention and a great many BITs.

89. See *Gebhard v. Consiglio dell'Ordine degli Avvocati v. Procuratori di Milano* (Case C-55/94), [1995] ECR I-4165 at para. 25, stating that:
> the concept of establishment within the meaning of the Treaty is … a very broad one, allowing a Community national to participate, *on a stable and continuous basis*, in the economic life of a Member State other than his State of origin and to profit therefrom. (emphasis added)

90. Council Directive 88/361/EEC (now repealed).

If modelled on the EU's preference for the protection of capital movements leading to lasting economic relationships, the definition of investment in BITs would enable screening out commercial activities characterized by a limited or non-engagement of a putative investor beyond the supply of service.[91] The essence of this approach is in its focus on the nature of a supplier's involvement in a putative investment project. For instance, if remuneration is obtained from the construction of a plant, and not from the profits generated by the commercial exploitation of the plant, the operation should not be characterized as an investment. The key requirement is the investor's participation in a project after that investor has realized an immediate interest in selling goods or delivering services. From the pool of investment projects examined in existing arbitral awards only few would satisfy the strictly defined commitment-of-resources requirement. Production-sharing and concession contracts are the prime examples of projects with the sustained involvement of an investor: in both categories of contract, a putative investor becomes entitled to a share of profit after the project has moved to the exploitation phase. In contrast, road construction, pre-shipment inspection, and salvage contracts may not pass the test due to the lack of investor engagement in the post-delivery phase.

Among the existing frameworks for defining investment as discussed above, the definition of FDI in EU law and in the recent EU FTAs is not only consistent with the ordinary meaning of investment but also seems capable of offering a set of meaningful criteria which is compatible with the letter and, importantly, with the spirit of investment treaty instruments. Indeed, the requirement that a commitment of resources entail lasting economic links better accommodates the expressly stated—in most cases—but nevertheless much debated economic development objective of the ICSID Convention and BITs,[92] without detracting from or undermining the objective of promoting capital flows and business initiative by enabling foreign companies to take part in a variety of economic projects. At a time when the EU is revisiting its international foreign investment policy, it is interesting to consider whether a definition of investment in new EU BITs and FTAs, including those with Singapore, ASEAN, and India, will reflect the *acquis*.

Despite offering what seems to be a further refinement of the definition of investment as "any commitment of resources in the expectation of a profit", the

91. It is interesting that such an approach had been advocated in academic literature—see Yala, *supra* note 24—but failed to receive any significant attention.

92. For criticism of arbitral approaches to the requirement that an investment contribute to economic development, see Manciaux, *supra* note 12 at 458; Mary HISCOCK, "The Emerging Legal Concept of Investment" (2009) 27 Penn State International Law Review 765 at 778–9, citing Marek JEZEWSKY, "There is No Freedom Without Solidarity: Towards New Definition of Investment in International Economic Law", Paper given at Society of International Economic Law (SIEL) Inaugural Conference 2008 (arguing that the criterion of benefiting the host state should not be limited to economic benefit alone but should include contribution to areas of social policy and human rights). See also Valentina VADI, "Investing in Culture: Underwater Cultural Heritage and International Investment Law" (2009) 42 Vanderbilt Journal of Transnational Law 853 (examining the development criterion in operations involving the protection of historical artefacts), and Walid Ben HAMIDA, "Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control" (2007) 24 Journal of International Arbitration 287 at 294 (criticizing the annulment decision in *Patrick Mitchell* for the failure to give precise meaning to the economic development criterion). The contribution to the economic development criterion has been tersely rejected in the recent case of *Fakes v. Turkey*, Award of 12 July 2010, ICSID Case No. ARB/07/20 at para. 111.

emphasis on lasting economic links is also liable to generate many questions and criticisms. It could be argued, for instance, that by limiting the notion of investment to business projects that lead to the establishment of lasting economic links, the EU law and the relevant FTAs deny protection to smaller investments. Likewise, the notion of lasting economic links may be as open-ended and elastic as the duration and the contribution to the development criteria of the *Salini* test: it remains unclear just how long a project should be to qualify as an investment. Finally, if a BIT or FTA were to protect FDI as well as portfolio investment, the "lasting economic links" criterion would fall short of providing an overarching framework for the latter category of resource commitment.[93]

Still, the definition of investment in EU law and international trade instruments can be instructive. While the ordinary meaning of investment—denoting a commitment of resources in the expectation of a profit—remains what seems to be the only objective benchmark and the lowest common denominator, a more exacting and internally coherent definition could be coined by reference to the rationale behind investment treaty protection. Just as the determination of the scope of free movement of goods in EU law has been informed by the need to dismantle discriminatory barriers to intra-Union trade and to ensure the competitiveness of the internal market, the setting of outer limits to investment treaty protection would similarly require identifying its telos.[94] Importantly, in the light of the historical convergence and divergence of the international trade and investment regimes, there may well be a case for the use of what has been referred to as a dynamic method of interpretation,[95] whereby in ascertaining the key object and purposes of investment treaty instruments—along with the ordinary and effective meaning of their terms—due account is taken of the fact that international investment law is complemented, on different levels and in connection with its pursuit of distinct goals, by other forms of international regulation and dispute settlement. A key question to answer is whether the mechanism of investment protection, with a right to claim directly against the host state, the dispensation with local remedies, and the subjecting of a state's conduct to far-reaching standards of treatment, should be open to any resource commitment or confined to certain qualifying forms of economic activity. According to analyses undertaken in a somewhat different context, one of the

93. At the moment, some BITs concluded by EU Member States protect portfolio investment. See e.g. the *Agreement for the Promotion and Protection of Investments (with Exchange of Letters) Between the Belgo-Luxembourg Economic Union and Bangladesh*, 22 May 1981, online: International Institute for Sustainable Development 〈www.iisd.org/pdf/2006/investment_bangladesh_Belgium.pdf〉. However, in its recent report, the European Parliament insisted on excluding speculative investments from the scope of treaty protection. International Trade Committee of the European Parliament, *Report on the Future European International Investment Policy*, 22 March 2011 (2010/2203(INI)).

94. For a teleological interpretation, see Antony ARNULL, *The European Union and Its Court of Justice*, 2nd ed. (Oxford: Oxford University Press, 2006), and Gerald Gray FITZMAURICE, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 British Yearbook of International Law 1 at 3–5. For a critique of the teleological interpretation, see Alexander ORAKHELASHVILI, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008) at 302–12. It is important to stress that a dynamic method should be used alongside the analysis of the text of the treaty and its ordinary and effective meaning, and not in lieu of the latter.

95. Fitzmaurice, *supra* note 94, at 8.

principal distinctive features of investment treaty protection is that, unlike trade in goods, investment is characterized by a greater degree of involvement in the host state's economic and social fabric, thus justifying the need for international guarantees of access to third-party dispute settlement and effective remedies.[96] The emphasis on the degree of involvement again evokes the "lasting economic links" criterion in the definition of investment in EU FTAs and capital-movement guarantees.

The emphasis on lasting economic links can also be instructive in shaping the scope of future investment treaty policies in relation to financial security instruments, including sovereign bonds.[97] Not only does it highlight the significance of economic development objectives behind the ICSID Convention and BITs but also, viewed against the backdrop of recent bondholder claims, the "lasting economic links" criterion signals the need to consider the extent to which purely financial instruments can and should at all be captured by a single treaty definition.

Ascertaining the objects and purposes behind the mechanism of investment protection in the light of its place in the broader framework of international economic regulation may play an important part not only in the interpretation of the term "investment" in arbitral practice but also in the drafting of revised and new treaty instruments. Indeed, the existing ambiguity of the term "investment" being to a certain extent a by-product of the ongoing evolutionary process in international economic law, the use of the dynamic and purposive interpretation may be limited to the current stage of the development of investment treaty law, and its relevance as an auxiliary interpretive method is likely to decrease once a distinctive nature and function of investment protection are adequately captured by states in their consensual arrangements.

V. CONCLUSION

This article intended to examine the definition of "investment", with particular focus on claims to money and performance having an economic value and the distinction between investment and trade in goods and services. It is argued that neither the objectivist approach, with its emphasis on the outer limits of investment, nor the subjectivist reliance on bilateral definitions are capable of providing a workable framework within which the eligibility of a certain claim to protection under the ICSID and BITs could be decided. Whilst stressing that the ordinary meaning of investment advances the task by supporting a process-oriented analysis, the article draws upon a history of BITs in exploring the extent of protection granted to resource commitment in services and the sale of goods as possible types of investment. It concludes that behind the flexibility of the open-ended definition of investment lies an ambitious and inadequately formulated promise to protect the commitment of resources in, and in some cases ensure access to, various sectors of economic activity. The ambiguity

96. See *supra* note 83, for the analysis of the national treatment standard in international trade and investment instruments.

97. See *supra* note 19. The involvement of purely financial instruments, including sovereign bonds, in the social and economic fabric of host states is questionable, thus suggesting the possibility of such instruments being expressly excluded from the scope of protected investment.

surrounding the term "investment" can be explained as a product of the evolutionary transformation of international law where the protection of the property of aliens has been subsumed in a set of multilevel economic objectives pursued under different international instruments.

Since the ambiguity of the currently prevailing open-ended definition of investment can be deployed in extending investment treaty protection to a wide range of economic interests and thus deepen a growing discontent with investment arbitration,[98] the article has endeavoured to explore alternative approaches. The uniqueness of investor-state arbitration and the magnitude of exposure of the host states to international responsibility under demanding disciplines of investment treaties justify the need for a clarification of what investment treaty protection is about. It is suggested that the existing uncertainty about the subject matter of investment treaty protection may be addressed through the articulation of treaty objectives, including the objective of economic development, viewed in the light of the historical convergence and divergence between international trade and investment instruments. Drawing on the EU law on freedom of establishment and capital movement and the definition of investment in recent EU FTAs, which illustrate the option of delimiting investment to activities that entail lasting economic links with the host economy, the article considers the possibility of harnessing a telos behind international investment instruments as a means of streamlining divergent arbitral practices and introducing clarity about the scope of investment protection in existing and future international agreements.

98. See Anne VAN AAKEN, "Perils of Success? The Case of International Investment Protection" (2008) 9 European Business Organization Law Review 1; Asha KAUSHAL, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime" (2009) 50 Harvard International Law Journal 491. It is also noteworthy that Australia has recently announced that it will not pursue provisions on investor-state arbitration in its international agreements. See Luke PETERSON, "In Policy Switch, Australia Disavows Need for Investor-State Arbitration Provisions in Trade and Investment Agreements", *Investment Arbitration Reporter* (14 April 2011), online: 〈www.iareporter.com/articles/20110414〉.