

Article

Investment Misconceived: The Investment-Commerce Distinction in International Investment Law

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I. INTRODUCTION

The question of what constitutes an “investment” “has turned out to be one of the most highly contested” issues in international investment law.¹ Dozens of articles have been written on the subject.² Dozens of cases have litigated and decided the question.³ Still, as one recent award observed, “the meaning of the term is far from . . . clear.”⁴

The lack of clarity surrounding this fundamental threshold question is problematic for at least three reasons. First, it undermines the very object and purpose of the international investment regime. Through international investment law, States promise important substantive and procedural protections to foreign investors in order to encourage investment within their borders and to obtain the same protections for their nationals abroad.⁵ But the international investment regime can neither effectively protect nor promote foreign investment if States and economic actors do not know *ex ante* whether their

¹ Boaz Moselle, *Economics and the Meaning of Investment*, in JURISDICTION IN INVESTMENT TREATY ARBITRATION 7, 8 (Yas Banifatemi & Emmanuel Gaillard eds., 2018).

² See *infra* notes 6, 7, 9, 11, 14, 17.

³ See *infra* notes 4, 13, 16, 48, 49.

⁴ *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 442 (Feb. 8, 2013) [hereinafter *Ambiente Ufficio Jurisdiction*] (“The intensive debate, not to say controversy, regarding the term ‘investment’ which has become manifest in various arbitral decisions dealing with Art. 25 of the ICSID Convention but also in pertinent academic circles, reveals that the meaning of the term is far from being clear.”). See also *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 97 (July 14, 2010) [hereinafter *Saba Fakes Award*] (“As far as the definition of ‘investment’ is concerned, however, the Tribunal observes that, while a number of ICSID tribunals have dealt with this notion, no unanimous approach has emerged so far from the existing case law. The proposed solutions are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals.”).

⁵ See NIGEL BLACKABY AND CONSTANTINE PARTASIDES (WITH ALAN REDFERN AND MARTIN HUNTER), REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION §§ 8.58, 8.59, 8.75, 8.79 (2009).

transactions constitute investments and are thus subject to protection in the first place.⁶

Second, the uncertainty surrounding the definition of “investment” creates significant waste. It contributes to the fact that jurisdictional disputes are often “the focal point” of arbitrations and are “more lengthy and hard-fought than any eventually ensuing merits phase.”⁷ Finally, it undermines the legitimacy of the international investment regime, which is subject to well-deserved criticism for producing inconsistent and arbitrary decisions.⁸ The regime is particularly vulnerable to this charge with respect to case law on the definition of “investment,” which has been described as “so incoherent as to be a free choice for tribunals.”⁹

Much of the debate over the definition of “investment” has centered on whether the term should have any independent and objective meaning at all. Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”) limits jurisdiction to “any legal dispute arising directly out of an investment,” without defining the term “investment.”¹⁰ In light of the additional jurisdictional requirement that parties must “consent in writing” to any ICSID arbitration, many tribunals have held, and many commentators have counseled, that it is appropriate for tribunals to defer to States’ own subjective interpretation of the term “investment,” as reflected in States’ consent documents. In practice, that

⁶ See Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 363, 372-373 (Zachary Douglas et al. eds., 2014).

⁷ See Emmanuel Gaillard, *Introduction*, in *JURISDICTION IN INVESTMENT TREATY ARBITRATION* 1, 1 (Yas Banifatemi & Emmanuel Gaillard eds., 2018).

⁸ See generally Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1568 (2005) (inconsistent awards undermine “the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged”).

⁹ W. Michael Reisman & Anna Vinnik, *What Constitutes an Investment and Who Decides?*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 50, 70 (Arthur W. Rovine ed., 2010). The implications of the “investment” debate extend beyond the present international investment regime as well. The definition of “investment” bears on investor-State reform proposals currently under consideration by UNCITRAL, including on the jurisdictional reach of the proposed Multilateral Investment Court. See, e.g., United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session (New York, 1-5 April 2019), U.N. Doc A/CN.9/970 (Apr. 9, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf; Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, 12981/17 ADD 1 DCL 1 (March 20, 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>. It is also relevant to recently launched international commercial courts, including the Chinese International Commercial Court, whose jurisdiction is defined to exclude investor-State disputes. See Pamela Bookman, *The Adjudication Business*, 45 *YALE J. INT’L L.* (forthcoming 2020) (manuscript at 43), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152&download=yes (discussing the new Chinese International Commercial Court and noting that it “will not hear investor-state disputes”).

¹⁰ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention].

has meant tribunals look to the definition of “investment” in the bilateral investment treaty (“BIT”) giving rise to the arbitration. That definition almost always defines “investment” broadly as including “all assets” or “every asset.”

There are serious problems with that “subjective” approach, however, as other tribunals and commentators have pointed out. Most fundamentally, it violates international law on treaty interpretation by effectively reading the term “investment” out of Article 25 of the ICSID Convention. If, for example, States subjectively defined “investment” so broadly as to encompass activities that manifestly did not qualify as such, the term in Article 25 would be rendered null.¹¹

Determining that the term “investment” must have some objective meaning, however, provides no insight into what that meaning should be. Amid the “intensive debate” over this question,¹² one positive definition and one negative definition have prevailed over the rest. The positive definition, known as the *Salini* test, defines “investment” by certain positive attributes. The original factors of that test include: (i) “a certain duration”; (ii) “a certain regularity of profit and return”; (iii) “assumption of risk usually by both sides”; (iv) “commitment [that] is substantial”; and (v) “significance for the host State’s development.”¹³ While recognized as the “prevailing approach in ICSID practice,”¹⁴ the *Salini* test has remained highly controversial and subject to extensive debate.¹⁵

The negative definition of “investment,” on the other hand, defines the term by what it is not. According to this definition, “the term ‘investment’ does not mean ‘sale’”¹⁶ or “ordinary commercial transaction.”¹⁷ Unlike the *Salini* test, this negative definition of “investment” has been almost entirely uncontroversial and nearly universally accepted. The most prominent commentators have accepted as a matter of faith “that ordinary commercial transactions would not

¹¹ See Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 722-23 (2007).

¹² Ambiente Ufficio Jurisdiction, *supra* note 4, ¶ 442.

¹³ CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, art. 25, ¶122 (1st ed. 2001) [hereinafter SCHREUER I] (emphasis removed). See also *Salini Costruttori, S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) [hereinafter *Salini Jurisdiction*].

¹⁴ Roberto Castro de Figueiredo, *The Investment Requirement of the ICSID Convention and the Role of Investment Treaties*, 26 AM. REV. INT'L ARB. 453, 458 (2015); *id.* at 457 (“[M]ost ICSID tribunals that were required to decide on the fulfillment of the investment requirement of the ICSID Convention followed the objectivist theory and applied the double-barreled test approach in investment treaty disputes.”).

¹⁵ See, e.g., Emmanuel Gaillard & Yas Banifatemi, *The Long March Towards a Jurisprudence Constante on the Notion of Investment*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 97, 97 (Meg Kinnear et al. eds., 2015) (“Rarely has an arbitral award been as celebrated or criticized as *Salini* . . .”).

¹⁶ Malaysian Historical Salvors SDN. BHD. v. Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 72 (April 16, 2009) [hereinafter Malaysian Historical Salvors Annulment].

¹⁷ CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, art. 25, ¶ 122 (2d ed. 2009) [hereinafter SCHREUER II].

be covered by [ICSID]”¹⁸ and that “simple sales and purchases of goods . . . clearly do not qualify as investments.”¹⁹ Even those, such as Judge Schwebel, who favor giving “great weight” to the consent of the contracting parties, agree that “a simple sale of goods and like transient transactions”²⁰ are beyond the scope of ICSID’s jurisdiction.²¹ Indeed, the notion that “investment” excludes “ordinary commercial transactions” may be the only thing on which commentators and tribunals agree.²²

Despite (or perhaps because of) its widespread acceptance, this negative definition of “investment” and its application in practice have been the subject of scant attention and almost no critical analysis. This is surprising because, as this Article demonstrates, the definition has been at least as impactful as the far more scrutinized and debated *Salini* test. It is further surprising because the negative definition of “investment” is fundamentally flawed—historically, as a matter of interpretation, conceptually, and in practice. As I argue in this Article, the one thing in the “investment” debate on which commentators and tribunals agree is at the very root of the “incoherent” jurisprudence on that term.²³

This Article makes the following contributions to the “investment” debate:

First, this Article shows that the putative distinction between commercial and investment transactions has been a driving force behind awards denying jurisdiction on Article 25 “investment” grounds. I conduct a comprehensive review of investor-State jurisdictional awards that have turned on the definition of an Article 25 “investment.” This review demonstrates that, in attempting to give effect to the distinction between commercial and investment activities, tribunals have effectively created a distinct jurisdictional test, which I dub the commercial transaction test. This test ascribes certain positive attributes to investments—based on, but distinct from, the *Salini* factors—in order to distinguish them from mere commercial activities. As measured by the number of negative jurisdictional awards it has justified, this

¹⁸ *Id.*

¹⁹ SCHREUER I, *supra* note 13, art. 25, ¶ 120.

²⁰ Stephen Schwebel, *Does the Consent of the Contracting Parties Govern the Requirement of an ‘Investment’ as Specified in Article 25 of the ICSID Convention?*, in JURISDICTION IN INVESTMENT TREATY ARBITRATION 55, 58-60 (Yas Banifatemi & Emmanuel Gaillard eds., 2018).

²¹ That belief has been so widely adopted that tribunals have invoked it to deny jurisdiction even when the ICSID Convention does not apply. See *infra* Sections III.A.3, III.A.5, III.A.6.

²² Julian Davis Mortenson, *The Meaning of Investment: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 298, 316 (2010) (“If commentators agree on anything in this area, it is that pure trade transactions should not be subject to ICSID jurisdiction.”); see also *Alps Finance and Trade AG v. Slovak Republic*, Award, ¶ 245 (Mar. 5, 2011) (ad-hoc arbitration) [hereinafter *Alps Finance Award*] (“The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment.”); Jeremy Marc Exelbert, *Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End*, 8 FORDHAM L. REV. 1243, 1272 (2016).

²³ See Reisman & Vinnik, *supra* note 9, at 70.

commercial transaction test has had an equal to or greater impact than the far more prominent and scrutinized *Salini* test.

Second, I demonstrate that the commercial transaction test, including its underlying premise that commercial and investment activities are distinct and separable, is fundamentally flawed—historically, as a matter of interpretation, conceptually, and in practice. As an initial matter, the historical premise that underpins it—that “it was always clear [to the Convention’s drafters] that ordinary commercial transactions would not be covered by [ICSID]”²⁴—is wrong. As other scholarship has demonstrated, the negotiating history does not support but rather contradicts this premise.²⁵

I contribute to that scholarship by demonstrating that the investment-commerce distinction is conceptually and interpretationally misconceived as well. There is no principled or textually supportable line to be drawn between commercial and investment activities. They are, rather, inherently intertwined and overlapping. For example, economic principles show that the quintessential commercial transaction—a sale of goods—may constitute an investment, while international commercial law shows that investments are a *type* of commercial transaction. The conceptual flaws of the putative distinction between investment and commercial activities are further evidenced by tribunals’ attempts to draw one. The factors tribunals employ in the commercial transaction test fail to provide a principled or predictable basis for distinguishing between investment and non-investment activities. They instead inject uncertainty into investor-State arbitration.

Third, I examine the potential policy implications of jettisoning the commercial transaction test. Case law and commentary suggest four possible policy functions of the commercial transaction test. The test arguably: (i) enhances the efficiency of the international investment regime; (ii) filters out commercial disputes that could be adjudicated in other dispute resolution centers; (iii) limits conflict with international commercial law; and (iv) limits conflict with international trade law. In none of these roles, however, is the commercial transaction test precise or effective. To the contrary, it is at best a crude instrument for these purposes, all of which would be better pursued through other means. The weak policy rationale for the test supports the legal conclusion that it should be abandoned.

Abandoning the investment-commerce distinction does not require a reversion to the “subjective” approach to defining “investment.”²⁶ The term “investment” in Article 25 should have a fixed boundary that excludes some activity, but that boundary should be principled, predictable and textually defensible. What boundary is left to draw around “investment,” if sales of goods may be included within it? The most obvious answers to that question are the

²⁴ SCHREUER II, *supra* note 17, art. 25, ¶ 122.

²⁵ See Mortenson, *supra* note 22.

²⁶ Nor does this Article support the theoretically bounded (but practically unbounded) definition of “investment” as “any plausibly economic activity or asset.” See Mortenson, *supra* note 22, at 260.

boundaries supplied by the positive definitions of “investment,” including the “ordinary meaning” and the *Salini* test definitions of the term. Economic principles suggest consideration of another negative definition: instead of drawing a distinction between investment and *commercial* transactions, tribunals could draw a distinction between investment and *consumption* transactions.

This basis for this proposal as well as the other arguments summarized above are presented, respectively, in Parts III-V, below.

The background for this discussion is first laid out in Part II, which provides a general overview of the ICSID Convention and the debate over the meaning of its most controversial term.

II. “INVESTMENT” IN ARTICLE 25 OF THE ICSID CONVENTION

A. *The ICSID Convention and Article 25’s “Investment” Requirement*

The ICSID Convention is the centerpiece of the international investment regime. Entered into force in 1966, the Convention established the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”) to conciliate and arbitrate investment disputes between its Contracting States and nationals of other Contracting States.²⁷ The Centre complements other fora established for the resolution of international disputes, while the Convention complements other international arbitration conventions, including, in particular, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).²⁸

Both the ICSID Convention and the New York Convention establish “pro-enforcement” regimes for arbitral awards.²⁹ The New York Convention, however, allows awards to be annulled by the national courts at the seat of the arbitration,³⁰ and permits certain narrow grounds for resisting enforcement, including but not limited to jurisdictional and public policy objections.³¹ The ICSID Convention, on the other hand, precludes the annulment of awards by national courts, limiting the power to annul to ICSID itself,³² and allows no analogous grounds for resisting the enforcement of awards. It requires that each

²⁷ ICSID Convention, *supra* note 10, pmbl.

²⁸ Convention on the Recognition and Enforcement of Arbitral Awards art. 1(3), June 10, 1958, 21 U.S.T. 2517, 333 U.N.T.S. 38 [hereinafter New York Convention].

²⁹ See GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 378 (2012) [hereinafter BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE] (“The New York Convention establishes a ‘pro-enforcement’ approach toward foreign awards.”); *id.* at 377 (“the New York Convention provides for an award’s presumptive recognition, subject to only narrow, enumerated exceptions. Likewise, most arbitration statutes, including the UNCITRAL Model Law, presumptively require the recognition of awards, again subject only to specifically-identified exceptions . . .”).

³⁰ New York Convention, *supra* note 28, art. V(1)(e).

³¹ *Id.* art. V.

³² See ICSID Convention, *supra* note 10, arts. 52-53.

of its 153 Contracting States enforce any investor-State arbitration award issued by the Centre “as if it were a final judgment of a court in that State.”³³

Neither the ICSID Convention nor New York Convention establishes any substantive rights for foreign investors. Those rights are instead established by national legislation, contract, and the over 2,000 bilateral investment treaties (“BITs”) entered into by States.³⁴ Through BITs, which give rise to the majority of ICSID arbitrations,³⁵ States promise certain protections and guarantees to foreign investors of the counter-State Parties. These typically include the guarantee of “fair and equitable treatment,” “national treatment,” and protection against unlawful and uncompensated expropriation.³⁶ Moreover, States consent to arbitrate any claims that may arise from the promised protections directly with foreign investors themselves.³⁷ Most BITs provide investors the option to choose between ICSID arbitration and arbitration pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”).³⁸ Where the investor-claimant chooses UNCITRAL arbitration, the enforcement of the resulting award is subject to the New York Convention or other similar regional conventions.³⁹ Where the investor-claimant initiates ICSID arbitration, the enforcement of the award is subject to the ICSID Convention.⁴⁰

Unlike UNCITRAL arbitrations subject to the New York Convention, ICSID’s jurisdiction is limited to “legal disputes arising directly out of an investment,” which the parties have “consent[ed] in writing” to arbitrate. Article 25(1) of the Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties

³³ *Id.* art. 54(1).

³⁴ See *International Investment Agreements Navigator*, UN CONFERENCE ON TRADE & DEV., <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Nov. 17, 2019). While some investment treaties are entered into on a multilateral basis, for the sake of simplicity I will refer to all investment treaties as BITs.

³⁵ SCHREUER II, *supra* note 17, art. 25, ¶¶ 139, 378.

³⁶ See REDFERN, HUNTER, ET AL., *supra* note 5, §§ 8.59, 8.79, 8.98.

³⁷ *Id.*

³⁸ See Reisman & Vinnik, *supra* note 9, at 70.

³⁹ See, e.g., *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57 (2013) (confirming an UNCITRAL investor-State arbitration award issued against Ecuador pursuant to the New York Convention). Regional conventions include the Inter-American Convention on International Commercial Arbitration, Jan 30, 1975, 1438 U.N.T.S. 245, and the Riyadh Arab Agreement on Judicial Cooperation, Apr. 6, 1983 [unofficial translation available at: *Riyadh Arab Agreement for Judicial Cooperation*, REFworld, <https://www.refworld.org/docid/3ae6b38d8.html> (last visited Nov. 17, 2019)]. See also REDFERN, HUNTER, ET AL., *supra* note 5, §§ 11.36-11.39 (discussing application of the various conventions to the enforcement of arbitration awards).

⁴⁰ States may consent to arbitrate investment disputes pursuant to other international arbitration institutions or rules as well. SCHREUER II, *supra* note 17, art. 25, ¶ 441. Awards issued in these proceedings would also require enforcement pursuant to the New York Convention.

have given their consent, no party may withdraw its consent unilaterally.⁴¹

While Article 25(1) limits ICSID's jurisdiction to legal disputes "arising directly out of an investment," neither it, nor any other part of the ICSID Convention, defines the term "investment."⁴²

B. *The Negotiating History of the ICSID Convention and the Case for a Subjective Definition of "Investment"*

In early ICSID arbitrations, tribunals did not attempt to define the term "investment" in Article 25. They instead consistently deferred to States' own definitions of "investment" in their consent documents when determining jurisdiction.⁴³ As noted, in addition to the requirement that the dispute arise from an "investment," Article 25(1) also requires that the foreign national and the Contracting State "consent in writing" to arbitration. This point is emphasized in the Preamble of the Convention, which recognizes "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."⁴⁴

In principle, State consent may take the form of an arbitration agreement between a State and a foreign national.⁴⁵ In practice, State consent is almost always established by BITs,⁴⁶ which, unlike the ICSID Convention, do define the term "investment."⁴⁷ Such definitions are almost always broad and encompass "every kind of asset" or "all assets," including claims to money and to any performance having a financial value.⁴⁸ Thus, in the first ICSID arbitrations, where foreign nationals brought claims for disputes that arose directly from activities that fit within that wide definition of "investment," tribunals found jurisdiction under Article 25.⁴⁹

Deference to Contracting States' consent documents was generally justified by way of the Convention's negotiating history. According to the

⁴¹ ICSID Convention, *supra* note 10, art. 25(1).

⁴² The Preamble to the ICSID Convention further states, in part, that the Convention was agreed by the Parties "[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein." *Id.* pmbl. The Preamble thus qualifies that the ICSID Convention concerns "private international investment," as opposed to public investment, but provides no further definition of "investment" per se.

⁴³ See Mortenson, *supra* note 22, at 259.

⁴⁴ ICSID Convention *supra* note 10, pmbl.

⁴⁵ Consent to arbitration by the foreign investor, on the other hand, is satisfied when the investor commences arbitration. SCHREUER II, *supra* note 17, art. 25, ¶¶ 416, 448.

⁴⁶ SCHREUER II, *supra* note 17, art. 25, ¶¶ 139, 378.

⁴⁷ *Id.* art. 25, ¶ 140.

⁴⁸ Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 34 (July 11, 1997) [hereinafter Fedax Jurisdiction] (citing Antonio R. Parra, *The Scope of New Investment Laws and International Instruments*, in ECONOMIC DEVELOPMENT FOREIGN INVESTMENT AND THE LAW 27, 35-36 (Robert Pritchard ed., 1996)).

⁴⁹ See, e.g., Biwater Gauff Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶

Executive Directors' Report, which accompanied the final text of the ICSID Convention submitted to the States for ratification,⁵⁰ the decision to not define the term "investment" was a deliberate choice made in light of the "consent in writing" requirement of Article 25. With respect to Article 25, the Executive Directors' Report stated:

No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanisms through which the Contracting States can make known in advance, if they so desire, the class of disputes which they would or would not consider submitting to the Centre . . .⁵¹

The decision to leave "investment" undefined was in fact the result of a compromise reached after several failed attempts to define the term.⁵² Proponents of a narrow definition of "investment" agreed not to restrict the term by way of an incorporated definition, while proponents of a broad definition

312 (July 24, 2008) [hereinafter *Biwater Award*]; *Camuzzi Int'l v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, ¶ 58 (May 11, 2005); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 82 (Apr. 29, 2004); *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, ¶¶ 33, 49 (Mar. 15, 2002) [hereinafter *Mihaly Award*]; *Czechoslovenska Obchodni Banka (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 64, 66 (May 24, 1999) [hereinafter *CSOB Jurisdiction*].

⁵⁰ ICSID, 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 (1965).

⁵¹ *Id.* at 28.

⁵² For example, the first draft of the ICSID Convention defined "investment" as "any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years." ICSID, I HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION ON SETTLEMENT OF DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 116; see also Pierre-Marie Dupuy, *About the Definition of an International Investment: The Requirement of a Contribution to the Economic Development of the Host State*, in JURISDICTION IN INVESTMENT TREATY ARBITRATION 37, 41 (Yas Banifatemi & Emmanuel Gaillard eds., 2018).

agreed to allow States to tailor the types of activities they wished to subject to ICSID jurisdiction via the “consent in writing” requirement.⁵³

According to partisans of the so-called subjective approach, this history calls for deferring to the definition of “investment” reflected in the Contracting States’ BITs.⁵⁴

C. *The Vienna Convention on the Law of Treaties and the Case for an Objective Definition of “Investment”*

Proponents of the “objective” view argue that the very inclusion of the term “investment” in Article 25 defies complete deference to the parties’ consent document. They argue that Article 31(1) of the Vienna Convention of the Law of Treaties (“Vienna Convention” or “VCLT”) requires that the term “investment” be given its “ordinary meaning” in its “context and in the light of [the treaty’s] object and purpose.”⁵⁵ While the negotiating history of the ICSID Convention may favor a deferential or subjective approach, that history is not dispositive.⁵⁶ According to Article 32 of the Vienna Convention, recourse to negotiating history is optional (“may be had”) “as a *supplementary* means of interpretation.”⁵⁷ Article 31 of the Vienna Convention—and specifically its requirement that treaty terms be given their “ordinary meaning in their context

⁵³ See Mortenson, *supra* note 22, at 259-260 (“Throughout the lengthy negotiating process, two blocs of countries clashed repeatedly over the scope of ICSID jurisdiction. A group led by developed countries advocated a wide-open jurisdiction over any foreign enterprise, while a group dominated by developing countries pushed to strictly limit ICSID review to narrow categories of economic activity. The jurisdictional maximalists eventually won out, but only after making an important concession. In exchange for a definition of ‘investment’ that would extend jurisdiction to any plausibly economic asset or activity, the Convention created a set of opt-out mechanisms that individual countries could use to tailor the forms of investment eligible for protection in their particular cases.”). See also Ambiente Ufficio Jurisdiction, *supra* note 4, ¶¶ 449-450, 454; SCHREUER II, *supra* note 17, art. 25, ¶ 119; Castro de Figueiredo, *supra* note 14, at 456.

⁵⁴ See, e.g., C.F. Amerasinghe, *The Jurisdiction of the Centre for the Settlement of Investment Disputes*, 19 INDIAN J. INT’L L. 166, 180 (1979).

⁵⁵ See Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁵⁶ But see Schwebel, *supra* note 20, at 63 (“There may be room in some cases of negotiation of multilateral treaties to discount the preparatory work. . . . But in the case of the negotiation of the ICSID Convention, the record is complete, readily available, and sufficiently clear to justify invocation of and reliance upon the *travaux préparatoires*.”).

⁵⁷ VCLT, *supra* note 55, art. 32 (emphasis added). Pursuant to VCLT Article 32, recourse to negotiating history may be had to either confirm an interpretation pursuant to Article 31, or where an Article 31 interpretation “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32; cf. Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT’L L. 780, 781 (2013) (the *travaux* of the Vienna Convention establishes that the Convention’s drafters “sought to secure [the role of negotiating history] as a regular, central, and indeed crucial component of treaty interpretation” and that “[i]n any seriously contested case, interpreters were thus expected automatically to assess the historical evidence about the course of discussions, negotiations, and compromises that resulted in the treaty text”).

and in light of [the treaty's] object and purpose"—remains the mandatory starting point for all treaty interpretation.

While VCLT Article 31 allows some role for the parties' subjective definition of "investment" in the interpretation of the ICSID Convention, it is a limited role at best.⁵⁸ BITs cannot modify or amend the meaning of "investment" in Article 25.⁵⁹ VCLT Article 41(1) only allows bilateral modification of a multilateral treaty if the possibility of modification is provided for by the treaty, or, if neither provided for nor prohibited, such modification "does not affect the enjoyment by other parties of their rights under the treaty or the performance of

⁵⁸ Pursuant to VCLT Article 31(2), "[t]he context for the purposes of interpretation" includes "the treaty's text, including its preamble and annexes," as well as (a) "[a]ny agreement relating to the treaty which was made between all the parties" and (b) "[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." VCLT, *supra* note 55, art. 31(2). BITs and any definition of "investment" contained therein plainly do not constitute the "treaty text." Nor do they constitute an "agreement relating to the treaty between all the parties," or an "instrument . . . accepted by the other parties." They are separate agreements, between a subset (usually two) of the 153 State parties to the ICSID Convention. BITs, therefore, do not form part of the context in which Article 25 of the ICSID Convention must be interpreted.

VCLT Article 31(3) further provides that tribunals shall take into account (a) "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and (b) "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Id.* art. 31(3). BITs are neither of these. An agreement between two of 153 State parties cannot "establish the agreement of the parties regarding [the] interpretation" of the other 151 members. *See* Castro de Figueiredo, *supra* note 14, at 471-472. *See also* Ambiente Ufficio Jurisdiction, *supra* note 4, ¶ 439 ("the limits set by Art. 25(1) ICSID Convention are not subject to consensual change"); *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting opinion of Professor Abi-Saab on Decision on Jurisdiction and Admissibility, ¶ 46 (August 4, 2011) [hereinafter *Abaclat Dissent on Jurisdiction*] ("the term has a hard-core that cannot be waived even by agreement of States parties to a BIT"); SCHREUER II, *supra* note 17, art. 25, ¶ 144 ("The broad similarity of definitions of BITs does not mean that they reflect a general definition for the Convention's concept of investment. Rather, these definitions are part of the specific conditions of consent governing individual relationships."). *But see* Biwater Award, *supra* note 49, ¶ 314 ("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."); Mihaly Award, *supra* note 49, ¶ 58 ("In the absence of a generally accepted definition of investment for the purpose of the ICSID Convention, the Tribunal must examine the current and past practice of ICSID and the practice of States as evidenced in multilateral and bilateral treaties and agreements binding on States, notably the United States-Sri Lanka BIT.").

At most, BITs may constitute "relevant rules of international law applicable in the relations between the parties," pursuant to VCLT Article 31(3)(c). Pursuant to Article 31(3)(c), together with the context, tribunals "shall take[] into account," "[a]ny relevant rules of international law applicable in the relations between the parties." VCLT, *supra* note 55, art. 31(3)(c). BITs may constitute "relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c). The "rules of international law" referred to in that article are recognized as including all sources of international law, as recognized by Article 38(1) of the Statute of the International Court of Justice. *See* RICHARD K. GARDINER, TREATY INTERPRETATION 260-61 (2008). Those sources include "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States" and "judicial decisions and the teachings of the most highly qualified publicists." Statute of the International Court of Justice, art. 38(1), Oct. 24, 1945, 33 U.N.T.S. 993.

⁵⁹ *See* Castro de Figueiredo, *supra* note 14, at 471-472. *Contra* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, ¶ 305 (Aug. 16, 2007) ("In bilateral investment treaties which incorporate an ICSID arbitration option, the word 'investment' is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a *lex specialis* with respect to Article 25 of the Washington Convention.").

their obligations.”⁶⁰ Expanding ICSID jurisdiction beyond Article 25 “investment” would impose additional obligations upon other Contracting States, including a potential increase in financial and enforcement obligations resulting from a larger ICSID caseload.⁶¹

Moreover, complete deference to parties’ subjective definition of “investment” would effectively nullify the term in Article 25. That Article provides that jurisdiction “shall extend to any legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing to submit to the Centre.” Complete deference to definitions of “investment” in Contracting States’ consent documents would destroy the effect of the entire first clause by “merg[ing] the requisite of investment with the condition of consent.”⁶²

At the very least, therefore, the term “investment” must be accorded *some* “objective meaning independent of the parties’ disposition.”⁶³ It cannot be “infinitely elastic” so as to encompass any type of activity that manifestly does not fit within it.⁶⁴ In practice, ascribing an objective meaning to Article 25 “investment” means ensuring that the tribunal has jurisdiction pursuant to the ICSID Convention *and* the consent document. Under this test, States can restrict the definition of “investment” by way of their BITs, but they cannot expand it by consenting to disputes that do not arise directly out of an Article 25 “investment.”⁶⁵ This so-called “double-barreled” test⁶⁶ has more recently become accepted practice.⁶⁷

D. *The Debate over the Objective Meaning of “Investment”*

Determining that the term “investment” has an objective meaning provides no insight into what that meaning is. Thus, even as a consensus has

⁶⁰ VCLT, *supra* note 55, art. 41(1).

⁶¹ Castro de Figueiredo, *supra* note 14, at 480-481.

⁶² Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 403, 410 (2009). Merging the jurisdictional requirement of “investment” with consent is also inconsistent with Rule 2 of ICSID’s Institution Rules, which requires a request for arbitration to identify not just the parties’ consent, but also that the dispute arises directly out of an investment. SCHREUER II, *supra* note 17, art. 25, ¶ 123. *But see* A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 COL. J. TRANSN’L L. 263, 268 (1966) (“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.”).

⁶³ SCHREUER II, *supra* note 17, art. 25, ¶ 123. *See also e.g.*, Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award Rendered, ¶ 31 (Nov. 1, 2006) [hereinafter Mitchell v. Congo Annulment] (“[T]he parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.”).

⁶⁴ Waibel, *supra* note 11, at 722.

⁶⁵ *See, e.g.*, Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 82, 96 (Apr. 15, 2009).

⁶⁶ *See* SCHREUER II, *supra* note 17, art. 25, ¶ 124.

⁶⁷ Castro de Figueiredo, *supra* note 14, at 457.

formed that Article 25 “investment” must have some objective meaning, the debate over that meaning has remained “intens[e].”⁶⁸

Amid that debate, one positive definition and one negative definition have prevailed above the rest. The prevailing positive definition,⁶⁹ known as *Salini* test, defines “investment” by certain positive attributes that are inherent to it. The negative definition of “investment,” on the other hand, defines the term by what it is not.

1. A Positive Definition of “Investment”

Beginning with *Fedax v. Venezuela*⁷⁰ in 1997 and then *Salini v. Morocco* in 2001,⁷¹ tribunals began to apply a multi-part test to determine whether the activity giving rise to the dispute constituted an Article 25 “investment.”⁷² This test, which would become known as the *Salini* test, consists of a descriptive list of features that Christoph Schreuer observed to be “typical to most of the operations” subject to ICSID arbitration.⁷³ While various versions of the test have been applied, the original characteristics identified by Schreuer included: (i) “a certain *duration*”; (ii) “a certain *regularity of profit and return*”; (iii) “assumption of *risk* usually by both sides”; (iv) “commitment [that] is substantial”; and (v) “significance for the host State’s *development*.”⁷⁴ This test gained popularity with time,⁷⁵ becoming what some have described as the “prevailing approach in ICSID practice.”⁷⁶

The *Salini* test has nevertheless remained highly controversial and the subject of significant debate.⁷⁷ The tribunal in *Biwater Gauff v. Tanzania* leveled the most obvious critique against it: “[The *Salini* factors] do not appear in the ICSID Convention.”⁷⁸ Nor are they supported by the negotiation history, which

⁶⁸ *Ambiente Ufficio Jurisdiction*, *supra* note 4, ¶ 442.

⁶⁹ *Castro de Figueiredo*, *supra* note 14, at 458. *See also id.* at 457 (“Most ICSID tribunals that were required to decide on the fulfillment of the investment requirement of the ICSID Convention followed the objectivist theory and applied the double-barreled test approach in investment treaty disputes.”).

⁷⁰ *Fedax Jurisdiction*, *supra* note 48.

⁷¹ *Salini Jurisdiction*, *supra* note 13.

⁷² SCHREUER II, *supra* note 17, art. 25, ¶¶ 154-155, 160.

⁷³ *Id.*, art. 25, ¶ 153; SCHREUER I, *supra* note 13, art. 25 ¶ 122.

⁷⁴ SCHREUER I, *supra* note 13, art. 25 ¶ 122. The tribunal in *Salini* identified them as: (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State’s economic development. *Salini Jurisdiction*, *supra* note 13, ¶¶ 50-58.

⁷⁵ *Mortenson*, *supra* note 22, at 277.

⁷⁶ *Castro de Figueiredo*, *supra* note 14, at 458.

⁷⁷ *Gaillard & Banifatemi*, *supra* note 15, at 97 (“Rarely has an arbitral award been as celebrated or criticized as *Salini* . . .”).

⁷⁸ *Biwater Award*, *supra* note 49, ¶ 312. *See Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 364 (August 4, 2011) [hereinafter *Abaclat Jurisdiction*] (“Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”).

shows that the Convention's drafters considered and rejected proposed definitions of "investment" containing at least some of the factors enumerated in *Salini*.⁷⁹

The genesis of the *Salini* test raises other serious problems as well. As noted, the *Salini* test adopted a descriptive list of features that Schreuer identified as "typical to most of the operations" subject to ICSID arbitration to date. Had other arbitrations been brought with respect to other activities exhibiting other "features" than the ones brought by 2001 when Schreuer wrote his first treatise, the *Salini* test might be broader than it is. Under its inductive logic, however, the limitations it imposes justify themselves through self-perpetuation. Schreuer himself expressed regret that the features he described as "typical"⁸⁰ were being used as a jurisdictional test. In the Second Edition of his Commentary on the ICSID Convention, he called the move "unfortunate," and insisted that "[t]he First Edition of the Commentary cannot serve as authority for this development."⁸¹

Even among those who accept the *Salini* test, there has been significant debate and divergence over how it should be applied. This divergence has extended to tribunals, which tend to rely on, but are not bound by, case precedent.⁸² Some tribunals have interpreted the *Salini* criteria as essential elements of "investment" and have required proof of each before accepting jurisdiction.⁸³ Others have taken a softer "intuitive" approach,⁸⁴ finding that the

⁷⁹ See Mortenson, *supra* note 22, at 260. Mortenson argues that the drafters explicitly rejected "three core criteria" of the *Salini* test, including contribution, duration, and the requirement that the investment be in the public interest. *Id.* at 286, 287, 289. See also *id.* at 286 (noting a tabled proposal to define investment as "any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years" and a proposal to require that investments be "regarded as being of public interest").

⁸⁰ SCHREUER I, *supra* note 13, art. 25, ¶ 122.

⁸¹ SCHREUER II, *supra* note 17, art. 25, ¶¶ 171-174.

⁸² The tribunal in *Saba Fakes v. Turkey* described and adopted a typical approach to precedent when it explained: "The Tribunal is not bound by the decisions adopted by previous ICSID tribunals. At the same time, it believes that it should pay due regard to earlier decisions of such tribunals. The present Tribunal shares the opinion of the Tribunal in the *Bayindir v. Pakistan* case that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case." *Saba Fakes Award*, *supra* note 4, ¶ 96 (citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005) [hereinafter *Bayindir Jurisdiction*]).

⁸³ See, e.g., *Quiborax S.A. & Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (Sept. 27, 2012) [hereinafter *Quiborax Jurisdiction*]; *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007); *Saipem, S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21, 2007); *Jan de Nul, N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (June 16, 2006) [hereinafter *Jan de Nul Jurisdiction*]; *Bayindir Jurisdiction*, *supra* note 82; *Consortio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award for Lack of Jurisdiction (Jan. 10, 2005) [hereinafter *L.E.S.I. jurisdiction*]; *Mihaly Award*, *supra* note 49.

⁸⁴ Gaillard & Banifatemi, *supra* note 15, at 112.

Salini criteria are merely indicative of the existence of an “investment,” and not hard-and-fast requirements.⁸⁵

Tribunals and commentators have also diverged on how to interpret the *Salini* criteria. On the one hand, a liberal interpretation of the *Salini* criteria could encompass virtually any type of economic activity. For example, literally every human activity has a duration and entails some risk.⁸⁶ On the other hand, tribunals seeking to reject a dispute can find ample reason to do so within the test’s parameters. The test’s capacious qualifiers—including a “*substantial*” commitment, a “*certain*” duration, and “*significance*” for the host State’s development,⁸⁷—allow for wide discretion, or, to put it differently, “a free choice for tribunals.”⁸⁸

2. A Negative Definition of “Investment”

While the *Salini* test purports to describe what an “investment” *is*, the negative definition of “investment” purports to describe what it is *not*. According to this definition, an “investment” is not “a simple sale of goods” or an “ordinary commercial transaction.”

In contrast to the *Salini* test, the negative definition has been almost entirely uncontroversial and subject to near-universal acceptance. It has been observed that “simple sales and purchases of goods . . . clearly do not qualify as investments,”⁸⁹ and that “a sale of goods transaction . . . manifestly could not be considered an investment.”⁹⁰ The tribunal in *Alps Finance* described the exclusion of so-called commercial transactions from investor-State arbitration as nothing less than a “constant jurisprudential trend.”⁹¹ Even those, such as Justice

⁸⁵ See, e.g., Hassan Awdi, *Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, ¶ 197 (Mar. 2, 2014) (objective criteria “may be useful to describe typical characteristics of an investment, but they cannot, as a rule, override the will of the parties, given the undefined and somewhat flexible term used by the drafters of the ICSID Convention”); *Abaclat Jurisdiction*, *supra* note 78, ¶ 364 (“The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”); *Biwater Award*, *supra* note 49, ¶ 316 (“The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of ‘investment’ is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.”).

⁸⁶ See e.g., *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, ¶ 367 (Apr. 9, 2015) [hereinafter *Poštová Banka Award*] (“Risk is inherent in life and cannot *per se* qualify what is an investment.”). All for-profit economic activity also involves a “contribution” of some sort. Moreover, if it is voluntarily entered into and is done so with the expectation of “profit” by both sides, it arguably contributes to economic growth and “development.” See *infra* text accompanying note 258.

⁸⁷ (Emphasis added). Notably, none of these qualifiers has an obvious basis in the ordinary meaning of “investment.”

⁸⁸ See Reisman & Vinnik, *supra* note 9, at 70.

⁸⁹ SCHREUER I, *supra* note 13, art. 25, ¶ 120.

⁹⁰ I.F.I. Shihata & A.R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID REV. FOREIGN INV. L.J. 299, 308 (1999).

⁹¹ *Alps Finance Award*, *supra* note 22, ¶ 245.

Schwebel, who favor giving “great weight”⁹² to the consent of the contracting parties, have accepted that “that the term ‘investment’ does not mean ‘sale,’”⁹³ and that “a simple sale of goods and like transient transactions” are beyond the outer limits of ICSID’s jurisdiction.⁹⁴ The notion that “investment” excludes so-called “ordinary commercial transactions” has been so widely adopted that tribunals have invoked it even when the ICSID Convention and its Article 25’s jurisdictional requirements do not apply.⁹⁵ This near-unanimous consensus is remarkable given the spirited debate that surrounds nearly every other aspect of the “investment” question. Indeed, it might be the only point in this debate on which commentators and tribunals agree.⁹⁶

III. THE COMMERCIAL TRANSACTION TEST

In spite (or perhaps because) of its near-universal acceptance, there has been scant examination of how the negative definition of “investment” has been applied and with what effect. The literature has instead focused almost exclusively on the *Salini* test and on the seemingly arbitrary results that tribunals have reached on the “investment” question without examining the role that the commercial-investment distinction has played in those results.⁹⁷

To address this gap in the literature, I have conducted a comprehensive review of published investor-State jurisdictional awards that have turned on the objective definition of “investment.”⁹⁸ That review shows that, in attempting to give effect to the negative definition of “investment,” tribunals have effectively created a distinct jurisdictional test, which I dub the commercial transaction test. This test ascribes certain positive attributes to investments—based on but distinct

⁹² Schwebel, *supra* note 20, at 55.

⁹³ *Id.* at 60.

⁹⁴ *Id.* at 58. See also *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 133, n. 153 (Aug. 6, 2003) [hereinafter *SGS v. Pakistan Jurisdiction*] (“That freedom [of the parties] to define ‘investment’] does not, however, appear to be unlimited, considering that ‘investment’ may well be regarded as embodying certain core meaning which distinguishes it from ‘an ordinary commercial transaction’ such as a simple, stand alone, sale of goods or services.”); *Fedax Jurisdiction*, *supra* note 48, ¶ 28 (“However, under both ICSID and the Additional Facility Rules the investment in question, even if indirect, should be distinguishable from an ordinary commercial transaction. The Tribunal shall consider the question of distinguishing between an investment and an ordinary commercial transaction in this case further below.”); *id.* ¶ 42 (“The nature of the transactions 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.”); *Ambiente Ufficio Jurisdiction*, *supra* note 4, ¶ 470 (“In fact, there are good reasons to leave a single commercial transaction such as the delivery of a single load of cars outside the concept of investment and thus outside the subject-matter jurisdiction of the Centre.”).

⁹⁵ See *infra* Sections III.A.3, III.A.5 & III.A.6.

⁹⁶ See *Mortenson*, *supra* note 22, at 316 (“If commentators agree on anything in this area, it is that pure trade transactions should not be subject to ICSID jurisdiction.”). See also *Exelbert*, *supra* note 22, at 1272.

⁹⁷ See *supra* Section II.D.1.

⁹⁸ This review included all awards published by the Investor State Law Guide database that reference “Article 25” of the ICSID Convention, as of October 1, 2019. Eleven such awards rejected jurisdiction on the basis that the underlying asset or transaction at issue was not an investment in an “objective” sense, independent of how the parties defined the term.

from the *Salini* criteria—in order to distinguish investments from commercial activities.

As measured by the number of negative jurisdictional holdings it has justified, the commercial transaction test has had an effect equal to or greater than the far more scrutinized and debated *Salini* test. Far from being a minor doctrine in international investment law, it has been a driving force behind the denial of jurisdiction on Article 25 “investment” grounds.

A. *Awards Denying Jurisdiction Based on the “Commercial” Nature of the Transaction*

Since the late 1990s, at least eleven investor-State tribunals have rejected jurisdiction over claims because the transaction or asset underlying the claim did not meet the “objective” definition of “investment.”⁹⁹ Eight of those denials were justified in whole or in part by the conclusion that the underlying economic activity was “commercial” in nature or subject to “normal commercial

⁹⁹ I do not count awards that dismissed jurisdiction on grounds that the investment was illegal, not *bona fide* or because of the claimant’s lack of relationship to the investment. I do not count these awards, because they do not turn on the nature of the underlying transaction and whether it is an “objective” investment. Illegal and bad faith investments may not be covered by the ICSID Convention, but they are still investments. See *Quiborax Jurisdiction*, *supra* note 83, ¶ 226 (“An illegal or bad faith investment remains an investment. It may not be a protected investment, *i.e.* deserve protection in the sense that access to treaty arbitration and/or substantive treaty guarantees may not be granted, but that is a different matter.”). See also *Saba Fakes Award*, *supra* note 4, ¶ 112 (“[A]n investment might be ‘legal’ or ‘illegal,’ made in ‘good faith’ or not, it nonetheless remains an investment.”).

Likewise, whether a claimant owns an investment and is therefore a protected *investor* with standing to bring a claim is a different question than whether the asset or transaction at issue is in and of itself an investment. See *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, Second Partial Award on Track II ¶ 7.69 (Perm. Ct. Arb. Aug. 30, 2018) (“An ‘investment’ identifies the subject-matter protected by the Treaty, as distinct from the person making that ‘investment.’”); *Quiborax Jurisdiction*, *supra* note 83, ¶ 233 (“According to Bolivia, a distinction should be made between the objects of an investment, ‘such as shares or concessions . . . and the action of investing.’ The Tribunal agrees. While shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets.”).

Indeed, several awards that dismissed jurisdiction on the ground that the claimant was not an investor, expressly found that the asset or transaction at issue was nevertheless an “investment.” See, e.g., *Société Civile Immobilière de Gaeta v. République de Guinée*, ICSID Case No. ARB/12/36, Sentence, ¶¶ 253, 273, 274 (Dec. 21, 2015) (“Au vu de ce qui précède, le Tribunal arbitral considère qu’un investissement a bien été effectué en lien avec la Cité de Chemins de fer et le Contrat de Bail à Construction au sens du CDI et de la Convention CIRDI . . . [Mais] [p]uisque la Demanderesse n’a pas prouvé qu’elle a effectué un apport substantiel au sens de l’article 25 de la Convention CIRDI . . . le Tribunal arbitral estime que la Demanderesse n’a pas effectué d’investissement en République de Guinée en lien avec la construction de la Cité de Chemins de fer.”); *Quiborax Jurisdiction*, *supra* note 83, ¶¶ 233, 237 (finding that while shareholding in a mining venture constituted an investment, those same shares did not constitute an investment where they were simply received as part of a legal formality, as was the case with respect to one of the claimants in the arbitration).

terms,” while only one¹⁰⁰ turned on a neutral application of the *Salini* test.¹⁰¹ Two others turned on other considerations.¹⁰²

In this sub-Section, I summarize the eight awards that found that the underlying transaction was commercial in nature and therefore not an investment. As discussed in the following sub-Section, these awards demonstrate that the negative definition of “investment” has been operationalized as a distinct jurisdictional test.

1. Joy Mining v. Egypt¹⁰³

In 2004, the tribunal in *Joy Mining v. Egypt* found that an engineering, delivery and maintenance contract did not constitute an Article 25 “investment.” Joy Mining, an English company, had brought an arbitration seeking the release of bank guarantees that it had issued in favor of Egypt as security for its performance of a contract. The contract required Joy Mining to engineer and design a longwall mining system and deliver certain mining materials and equipment.¹⁰⁴ The contract also established technical assistance and maintenance obligations that lasted six months and ten years respectively.¹⁰⁵

In its jurisdictional analysis, the tribunal adopted the theory of “economic unity”¹⁰⁶ and examined the bank guarantees in the broader context of

¹⁰⁰ In *Mitchell v. Congo*, the ICSID Annulment Committee annulled a tribunal’s award finding that a law firm in the Democratic Republic of Congo did in fact constitute an Article 25 “investment.” The basis of the Annulment Committee’s decision was that the law firm in question did not contribute to the host State’s development, which is a factor under the *Salini* test. The Annulment Committee made clear that “the existence of a contribution to the economic development of the host State [is] an essential—although not sufficient—characteristic or unquestionable criterion of the investment . . .” *Mitchell v. Congo Annulment*, *supra* note 63, ¶ 33.

¹⁰¹ I define a neutral application of the *Salini* test according to the elements laid out in *Salini*: (i) a contribution, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State’s economic development. *Salini Jurisdiction*, *supra* note 13, ¶¶ 50-58.

¹⁰² The tribunal in *Mihaly v. Sri Lanka* rejected jurisdiction over a dispute arising from pre-contract expenditures associated with a power-generation project. While the parties had signed a letter of intent, no binding contract was entered into with respect to the project, and thus no investment was found to exist. *Mihaly Award*, *supra* note 49, ¶¶ 59-61. The tribunal, however, did not appear to apply the *Salini* test. In addition, a Stockholm Chamber of Commerce tribunal concluded that funds transferred in a Cypriot bank did not constitute an investment “as the funds were not aimed at being invested in Cyprus,” but in a company located in Poland. The tribunal based its decision on the fact that “[t]he Bank of Cyprus where the funds were located was a go between pending transfer of the funds to Poland,” which occurred “within a very short time period,” and on the fact that the claimants themselves disclaimed that the funds were the investment. See *Czescik & Aleksandrowicz v. Republic of Cyprus*, SCC Case No. V 2014/169, Final Award, ¶¶ 198-99 (Feb. 11 2017).

¹⁰³ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004) [hereinafter *Joy Mining Jurisdiction*].

¹⁰⁴ *Id.* ¶ 37.

¹⁰⁵ *Id.*

¹⁰⁶ The theory of “economic unity” is premised on the fact that “[a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment,” but which should for jurisdictional purposes be examined in the broader context of the overall investment. *CSOB Jurisdiction*, *supra* note 49, ¶ 72. In practical terms, the application of the economic unity theory means that certain transactions, which are found to be merely commercial and thus not investments in and of themselves, may nevertheless be

the “operation . . . as a whole.”¹⁰⁷ The tribunal concluded that the essence of the contract was to replace and procure mining equipment, which was “an element of *normal sales contracts*.”¹⁰⁸ The tribunal found that the addition of other services did “not transform the Contract into an investment”¹⁰⁹ and that the “terms of the Contract are *entirely normal commercial terms*.”¹¹⁰ It noted that “[r]isk there might be indeed, but it is not different from that involved in *any commercial contract*, including the possibility of the termination of the Contract.”¹¹¹ Further, the tribunal noted that it was “mindful that if a distinction is not drawn between *ordinary sales contracts*, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment.”¹¹²

2. Malaysian Historical Salvors v. Malaysia¹¹³

In 2007, the tribunal in *Malaysian Historical Salvors v. Malaysia* denied jurisdiction over a contract for the recovery of shipwreck cargo off the coast of Malaysia on the grounds that the contract was not an “investment” under Article 25 of the ICSID Convention. Pursuant to its contract with Malaysia, the claimant was “to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction and carry out a scientific survey and salvage of the wreck and contents . . . believed to be the Wreck ‘DIANA.’”¹¹⁴ All of the costs of the search and recovery operation were to be borne by the claimant, and the claimant was to be compensated exclusively by a percentage of the proceeds Malaysia obtained by auctioning any recovered cargo. The survey and salvage operation took almost four years and yielded 24,000 recovered items.¹¹⁵

In an award that would later be overturned by the ICSID Annulment Committee,¹¹⁶ the tribunal found that the survey and salvage contract failed to exhibit any of the *Salini* criteria. Specifically, it found that “Claimant’s contributions [were] largely similar to those which might have been made under a *commercial salvage contract*.”¹¹⁷ Moreover, it found that the risks assumed were “no more than *ordinary commercial risks* assumed by many salvors in a

covered by ICSID Convention Article 25 if they are “an integral part” of a qualifying investment. *Id.* See also SCHREUER II, *supra* note 17, art. 25, ¶ 565.

¹⁰⁷ Joy Mining Jurisdiction, *supra* note 103, ¶ 54.

¹⁰⁸ *Id.* ¶ 55 (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ¶ 56 (emphasis added).

¹¹¹ *Id.* ¶ 57 (emphasis added).

¹¹² *Id.* ¶ 58 (emphasis added).

¹¹³ Malaysian Historical Salvors SDN, BHD v. Government of Malaysia, ICSID Case. No. ARB/05/10, Award on Jurisdiction (May 17, 2007) [hereinafter Malaysian Historical Salvors Award].

¹¹⁴ Malaysian Historical Salvors Annulment, *supra* note 16, ¶ 2 (quoting the contract between the parties).

¹¹⁵ Malaysian Historical Salvors Award, *supra* note 113, ¶¶ 7-14.

¹¹⁶ Malaysian Historical Salvors Annulment, *supra* note 16. The Annulment Committee annulled the jurisdictional decision on the grounds that it failed to consider that the contract fell squarely within the definition of “investment” in the applicable BIT. It did not, however, question the tribunal’s analysis as to the relevance of the commercial nature of the contract.

¹¹⁷ Malaysian Historical Salvors Award, *supra* note 113, ¶ 109.

salvage contract,”¹¹⁸ and that “under ICSID practice and jurisprudence . . . an *ordinary commercial contract* cannot be considered as an ‘investment.’”¹¹⁹ Finally, the tribunal found the benefits to Malaysia’s economy “were no different from the benefits flowing to the place of the performance of any *normal service contract*.”¹²⁰

3. Romak v. Uzbekistan¹²¹

In 2009, the tribunal in *Romak v. Uzbekistan* found that a contract for the sale of up to 50,000 tons of wheat over a five-month period did not constitute an investment. While the tribunal was not an ICSID tribunal and was instead constituted pursuant to the UNCITRAL Arbitration Rules, it nevertheless sought to interpret the term “investment” as contained within the Swiss-Uzbek BIT in accordance with Article 25 of the ICSID Convention.¹²² The tribunal found that the transfer of wheat did not constitute a contribution, but was rather “a transfer of title in performance of a *sale of goods contract* [because] Romak did not deliver the wheat as a contribution in kind in furtherance of a venture.”¹²³ The tribunal further concluded that the five-month span of wheat deliveries under the contract did not satisfy the “duration” requirement, as it did “not reflect a commitment on the part of Romak *beyond a one-off transaction*, and is not of the sort normally associated with ‘investments’ according to the common understanding of the term.”¹²⁴ Finally, the tribunal found that the wheat deliveries did not satisfy the requirement of “risk.” It found that “risk assumed by Romak was . . . circumscribed to the possible non-payment of the wheat delivery, which is the *ordinary commercial or business risk* assumed by all those who enter into a contractual relationship.”¹²⁵

4. Global Trading Resource Corp. v. Ukraine¹²⁶

¹¹⁸ *Id.* ¶ 112 (emphasis added).

¹¹⁹ *Id.* (citing Shihata & Parra, *supra* note 90, at 308).

¹²⁰ *Id.* ¶ 144 (emphasis added).

¹²¹ Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Award (Nov. 26, 2009) [hereinafter Romak Award].

¹²² The tribunal reasoned that this was appropriate as the BIT in question allowed for the choice of either UNCITRAL or ICSID arbitration. The tribunal found that it would be inappropriate to ignore Article 25, as that “would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable.” *Id.* ¶¶ 193, 194.

¹²³ *Id.* ¶ 222 (emphasis added).

¹²⁴ *Id.* ¶¶ 226-227 (emphasis added).

¹²⁵ *Id.* ¶ 231 (emphasis added). Interestingly, the tribunal came to this conclusion despite holding “the view that Contracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a ‘pure’ one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term ‘investment.’ However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the Contracting States was to accord to the term ‘investment’ an extraordinary and counterintuitive meaning.” *Id.* ¶ 205.

¹²⁶ Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award (Dec. 1, 2010) [hereinafter Global Trading Resource Award].

In 2010, the tribunal in *Global Trading Resource Corp. v. Ukraine* found that a contract for the delivery of poultry did not qualify as an Article 25 “investment.”¹²⁷ The tribunal found that “the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention.”¹²⁸ The tribunal noted that the “these are each individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis [] under normal CIF trading terms[;] . . . contracts of that kind . . . cannot by any reasonable process of interpretation be construed to be ‘investments’ for the purposes of the ICSID Convention.”¹²⁹ In justifying its refusal to admit the claim, the tribunal cited the Annulment Committee in *Malaysian Historical Salvors v. Malaysia*, which had noted that “[i]t appears to have been assumed by the Convention’s drafters that the use of the term ‘investment’ excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre.”¹³⁰

5. Alps Finance v. Slovak Republic¹³¹

In 2011, the tribunal in *Alps Finance v. Slovak Republic* rejected jurisdiction over an assignment contract that transferred certain receivables from a private Slovak company to the claimant on the basis that neither the assignment contract nor any broader activity it was connected to constituted an “investment.” The receivables consisted of payments owed by a bankrupt company to the assignor.¹³² As in *Romak*, the tribunal was constituted pursuant to the UNCITRAL Rules, but it nevertheless interpreted the underlying BIT’s definition of “investment” in the context of “the practice of investment arbitrations” interpreting Article 25 of the ICSID Convention.¹³³ The tribunal found that even though the assignment contract was an “asset,” and that the BIT in question covered “every kind of asset,” the assignment contract was not an investment because it was:

not a contract with an ongoing duration [but] rather a contract which exhausts its object and purpose by its sole stipulation by the parties and the effects of which—the assignment—take place immediately. In substance, it is a mere *purchase-sale*

¹²⁷ *Id.* ¶ 56.

¹²⁸ *Id.*

¹²⁹ *Id.* (emphasis added).

¹³⁰ *Id.* ¶ 55 (quoting *Malaysian Historical Salvors Award*, *supra* note 113, ¶ 69).

¹³¹ *Alps Finance Award*, *supra* note 22, ¶ 245.

¹³² *Id.* ¶¶ 229–247.

¹³³ *Id.* ¶ 240 (“The present Tribunal is not an ICSID tribunal and its conclusion under the BIT could be viewed as sufficient for denying jurisdiction. However, as earlier observed, the BIT definition of investment is not an entirely self-standing concept, but refers to a more general concept given by international law rules.”). *See also id.* ¶ 239 (The term “investment” in BITs “explicitly or implicitly refers to an ‘objective definition’ [of investment] given by international law...[from] which [tribunals] cannot grossly depart . . . [A]lthough the BIT gives a broad ‘investment’ definition, the two Contracting States must have inevitably intended to refer to what constitutes ‘investment’ under the ICSID Convention” as “the BIT here in question also provides for . . . ICSID arbitration.”).

contract, by which one party sells to the other certain receivables ¹³⁴

The tribunal noted that investments exhibited “operational risk[.]”¹³⁵ but no such risk existed here, ostensibly because “it t[ook] place immediately.”¹³⁶ Moreover, the tribunal noted that “[t]he constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a *mere one-off sale transaction* might qualify as an investment.”¹³⁷ It concluded that if the more complex transaction in *Joy Mining* “was no more than ‘a sale,’” the assignment contract before it was “*a fortiori*” not an investment.¹³⁸

6. Nova Scotia Power v. Venezuela¹³⁹

In 2014, the tribunal in *Nova Scotia Power v. Venezuela* concluded that a coal supply contract, pursuant to which a Venezuelan state company agreed to supply certain quantities of coal at certain prices over the course of four years and the claimant agreed to pay for such coal as delivery was completed, did not constitute an investment by the claimant.¹⁴⁰ The tribunal was constituted pursuant to the ICSID Additional Facility Rules, such that Article 25’s “investment” requirement did not apply.¹⁴¹ The tribunal nevertheless adopted an objective definition of “investment” when interpreting the underlying BIT at issue, concluding that the BIT’s definition “cannot be considered self-sufficient,”¹⁴² and that the term “investment” “requires *contribution, duration and risk*.”¹⁴³ The tribunal found that neither the contribution¹⁴⁴ nor risk elements were present. It reasoned that “[i]t may be that any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an *ordinary commercial transaction*.”¹⁴⁵ The risk identified here was the “simple risk of exposure to a higher price for a product”

¹³⁴ *Id.* ¶ 232 (emphasis added).

¹³⁵ *Id.* ¶ 241.

¹³⁶ *Id.* ¶ 232.

¹³⁷ *Id.* ¶ 245 (emphasis added).

¹³⁸ *Id.* ¶ 244.

¹³⁹ *Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award (30 April 2014) [hereinafter *Nova Scotia Excerpts of the Award*], <https://www.italaw.com/sites/default/files/case-documents/italaw3319.pdf>.

¹⁴⁰ *See id.* ¶¶ 91, 94, 95, 101.

¹⁴¹ ICSID Additional Facility Rules, art. 4(3) (Apr. 2006) [hereinafter ICSID Additional Facility Rules], https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf.

¹⁴² *Nova Scotia Excerpts of the Award*, *supra* note 139, ¶ 77; *see also id.* ¶ 80 (“[T]he Tribunal is not convinced by the Claimant’s argument that because Article 2(a) of the ICSID Additional Facility Rules does not impose additional requirement to establish an ‘investment’ beyond that contained in the BIT (in contrast to Article 25 of the ICSID Convention), the Tribunal should not look any further than the (self-contained) definition of investment in Article 1(f) of the BIT.”).

¹⁴³ *Id.* ¶ 84 (emphasis in original).

¹⁴⁴ *Id.* ¶ 82. *See also id.* ¶ 97 (“A commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment.”).

¹⁴⁵ *Id.* ¶ 105 (emphasis added).

which amounted to “normal commercial terms”¹⁴⁶ and “risk[] any coal buyer could be exposed to in any coal purchase arrangement.”¹⁴⁷

7. Poštová Banka v. Greece¹⁴⁸

In 2015, in *Poštová Banka v. Greece*, the tribunal found that Greek sovereign bonds did not constitute Article 25 “investments” and rejected claims brought by bondholders in connection with Greece’s 2010 sovereign default.¹⁴⁹ In rejecting the bondholders’ claims, the tribunal reasoned that “[a]n investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values.”¹⁵⁰ The tribunal then found that the sale and purchase of sovereign bonds amounted to a mere exchange of values, akin to the sale of goods—that is, “a process of providing money for a given amount of money in return.”¹⁵¹ That distinguished sovereign bonds from an investment, which “is linked with a process of creation of value.”¹⁵² Moreover, the tribunal noted that the Greek State, to whom the bond proceeds flowed, was “not primarily an economic actor engaged in economic ventures.”¹⁵³ Rather, the “State enters into numerous sales contracts to run its different administrations,” which, according to the tribunal, were not value-creating ventures.¹⁵⁴ The tribunal further found that the bonds lacked the requisite “operational risk” as defined by the *Romak* tribunal.¹⁵⁵ Because the profits of the bonds were “ascertained” and did not “depend on the success or failure of the economic venture concerned” (which was non-existent) the bonds merely exhibited *commercial* or sovereign risk, and therefore were not investments in the objective sense.¹⁵⁶

8. Tenaris v. Venezuela¹⁵⁷

In 2016, the tribunal in *Tenaris v. Venezuela* accepted jurisdiction over the claimants’ equity and debt investments in a Venezuelan enterprise that

¹⁴⁶ *Id.* ¶ 107 (emphasis added).

¹⁴⁷ *Id.* ¶¶ 108, 113. Though it defined “investment” in opposition to “commercial” characteristics, it did not reach the question of whether the underlying transaction at issue had “features which distinguish it from an ordinary commercial transaction,” which is a threshold for arbitration pursuant to the ICSID Additional Facility Rules. *Id.* ¶ 146 (quoting ICSID Additional Facility Rules, *supra* note 141, art. 4(3)). See also *infra* Section IV.A.3.

¹⁴⁸ *Poštová Banka Award, supra* note 86.

¹⁴⁹ *Id.* ¶ 371. The tribunal also found that the bonds failed to constitute investments under the applicable BIT. It therefore did not need to reach this question but did anyway. *Id.* ¶ 351.

¹⁵⁰ *Id.* ¶ 361 (emphasis added).

¹⁵¹ *Id.*

¹⁵² *Id.* Notably, three other tribunals addressing the same jurisdictional question have come to the opposite conclusion. See *infra* note 294 and accompanying text.

¹⁵³ *Poštová Banka, Award, supra* note 86, ¶ 362.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* ¶¶ 368-370.

¹⁵⁶ *Id.* ¶ 370.

¹⁵⁷ *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case. No. ARB/11/26, Award (Jan. 29, 2016) [hereinafter *Tenaris Award*].

produced hot briquetted iron (“HBI”), but concluded that the long-term off-take agreement between the claimants and the enterprise, by which the latter agreed to sell certain quantities of HBI at certain prices to the former, was not an “investment” pursuant to Article 25 of the ICSID Convention.¹⁵⁸ In reaching its conclusion, the tribunal required that “the combined effect of the [a]greements [be] *more than an ordinary commercial transaction*.”¹⁵⁹ The tribunal found that the off-take agreement, which was concluded concurrently with the debt and equity investments in the Venezuelan affiliate,¹⁶⁰ “appears to have been a crucial element in the decision to invest.”¹⁶¹ It nevertheless concluded that the off-take agreement “remain[ed], in essence, *a commercial agreement* in respect of the purchase and delivery of product at a known price.”¹⁶²

B. *The Contours of the Commercial Transaction Test*

The above cases reveal that tribunals have operationalized the negative definition of “investment” as a distinct jurisdictional test, which this Article dubs the commercial transaction test. Three characteristics can be ascribed to that test from these awards.

1. The Investment-Commerce Distinction

First, in the eight awards summarized above, the tribunals’ focus on the commercial nature of the underlying transactions is unmistakable. The commercial nature of the underlying subject matter was repeatedly a dispositive factor in the denial of jurisdiction. For example:

a) In *Joy Mining*, the tribunal determined the contracts at issue were “normal sales contracts,”¹⁶³ that the “terms of the Contract are entirely *normal commercial terms*,”¹⁶⁴ and that the risk was “*not different from that involved in any commercial contract*.”¹⁶⁵

b) In *Malaysian Historical Salvors*, the tribunal found that while the claimant faced risk, that risk was no more than “*ordinary commercial risks* assumed by many salvors,”¹⁶⁶ and that the “benefits flowing from the Contract were no different from the benefits flowing to the place of the performance of *any normal service contract*.”¹⁶⁷

¹⁵⁸ *Id.* ¶ 291.

¹⁵⁹ *Id.* ¶ 284 (adopting the standard set forth in *Mytilineos Holdings SA v. State Union of Serbia and Montenegro*, Partial Award on Jurisdiction, ¶ 120 (Sept. 8, 2006) (ad-hoc arbitration)).

¹⁶⁰ *Id.* ¶¶ 45–47.

¹⁶¹ *Id.* ¶ 533.

¹⁶² *Id.* ¶ 291 (emphasis added). The ultimate import of the tribunal’s conclusion is unclear, as it continued to consider the impact of the off-take agreement in its damages analysis. *Id.* ¶¶ 533–549.

¹⁶³ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 55 (emphasis added).

¹⁶⁴ *Id.* ¶ 56 (emphasis added).

¹⁶⁵ *Id.* ¶ 57 (emphasis added).

¹⁶⁶ *Malaysian Historical Salvors Award*, *supra* note 113, ¶ 112 (emphasis added).

¹⁶⁷ *Id.* ¶ 144 (emphasis added).

c) In *Global Trading Resource Corp.*, the tribunal found that “the purchase and sale contracts entered into by the Claimants were *pure commercial transactions* and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention.”¹⁶⁸

d) In *Tenaris*, the tribunal found that an off-take agreement for the purchase of HBI was not an investment but rather “a commercial agreement in respect of the purchase and delivery of product at a known price.”¹⁶⁹

2. The Factors Applied to Distinguish Commercial from Investment Activities

Second, these awards demonstrate that tribunals apply a set of factors to distinguish investments from commercial transactions. The factors ascribe certain positive characteristics to investments in order to distinguish them from commercial transactions. These include the nature of the risk each type of transaction faces, the type of contribution each entails, and the duration each type of transaction exhibits. While these criteria are clearly based on the *Salini* criteria, they are distinct from the *Salini* factors and engineered for the purpose of giving effect to the negative definition of “investment.” These factors are as follows:

a) “Operational” or “Investment” Risk: Six awards distinguished between investments and commercial transactions based upon the nature of the risk each entails. The tribunals in *Romak*, *Poštová Banka* and *Nova Scotia Power* required a showing of not just risk, but “operational” or “investment” risk.¹⁷⁰ All three tribunals were transparent that they did so for the purpose of distinguishing investments from commercial transactions, as the general “risk” criterion was not useful for making that distinction.¹⁷¹ The tribunal in *Alps Finance* also noted that “sharing of operational risk” was inherent in the objective definition of “investment.”¹⁷² The tribunals in *Joy Mining* and *Malaysian Historical Salvors* similarly distinguished between general risk “involved in any commercial contract” and the risk associated with investments.¹⁷³

b) *Value-Creating Venture*: Two decisions distinguished between investments and commercial activities based upon the type of

¹⁶⁸ Global Trading Resource Award, *supra* note 126, ¶ 56 (emphasis added).

¹⁶⁹ Tenaris Award, *supra* note 157, ¶ 291 (emphasis added).

¹⁷⁰ Romak Award, *supra* note 121, ¶¶ 229-230; Poštová Banka Award, *supra* note 86, ¶ 369; Nova Scotia Excerpts of the Award, *supra* note 139, ¶¶ 105-108 (emphasis added).

¹⁷¹ Poštová Banka Award, *supra* note 86, ¶ 369; Nova Scotia Excerpts of Award, *supra* note 139, ¶¶ 105-108; Romak Award, *supra* note 121, ¶¶ 229-230 (emphasis added).

¹⁷² Alps Finance Award, *supra* note 22, ¶ 241.

¹⁷³ Joy Mining Jurisdiction, *supra* note 103, ¶ 57; Malaysian Historical Salvors Award, *supra* note 113, ¶ 112.

contribution they entailed. The tribunal in *Poštová Banka* modified the “contribution” criterion to require not just a “contribution” but a contribution to “an *economic operation creating value*.”¹⁷⁴ *Romak* similarly required a contribution to an economic “venture.”¹⁷⁵

c) *Duration*: Four decisions distinguished between commercial and investment transactions based on the “duration” each entails. The tribunal in *Joy Mining* held that duration criterion was not satisfied, even where the contractual obligations extended for over ten years, because the price of the contract was to be fully paid at an early stage.¹⁷⁶ The tribunal in *Romak* held that a five-month span of wheat deliveries did not satisfy the “duration” requirement, as it did “not reflect a commitment on the part of Romak beyond a one-off transaction.”¹⁷⁷ The claimant in *Malaysian Historical Salvors* did not meet the duration criterion, apparently because the duration was not fixed and depended upon chance.¹⁷⁸ The tribunal in *Alps Finance* found that the requisite duration was not met because the underlying contract did not have “an ongoing duration,” but rather “exhaust[ed] its object and purpose . . . immediately.”¹⁷⁹

While the above factors are based upon the *Salini* test, it is the negative definition of “investment,” and not the *Salini* test, that is driving the analysis and results. This is evident for two reasons. First, nothing on the face of the *Salini* test justifies the exclusion of so-called commercial transactions. The quintessential commercial transaction—a one-off sale of goods—exhibits all of the *Salini* test’s core criteria. A sale of goods involves: (i) a “contribution” (by way of either money from the buyer or goods from the seller) or “commitment” (by way of contract); (ii) “duration” (of the negotiation and performance of a contract); (iii) “risk” (of breach or of monetary losses from the underlying endeavor); and (iv) an expectation of “profits” (otherwise why enter into the transaction?).¹⁸⁰ Such transactions also (v) contribute to economic development by shifting resources from those who value them less to those who value them more.¹⁸¹

Second, to the extent the above-described awards invoke the *Salini* test or its factors, they apply a version of the test that is reverse-engineered for the purpose of distinguishing commercial transactions from investments. As noted, the awards required not just “risk” but “operational risk;” not just a “contribution” but a “contribution to an *economic venture*,” and not just

¹⁷⁴ *Poštová Banka Award*, *supra* note 86, ¶ 361 (emphasis added).

¹⁷⁵ *Romak Award*, *supra* note 121, ¶ 222 (emphasis added).

¹⁷⁶ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 57.

¹⁷⁷ *Romak Award*, *supra* note 121, ¶ 227.

¹⁷⁸ *Malaysian Historical Salvors Award*, *supra* note 113, ¶¶ 110-11.

¹⁷⁹ *Alps Finance Award*, *supra* note 22, ¶ 232.

¹⁸⁰ They may or may not involve regular profits, depending on how the transaction is structured.

¹⁸¹ See *infra* Section IV.C.1.

"duration" but a duration "beyond a one-off transaction"¹⁸² that is not characterized by an upfront payment¹⁸³ or that is fixed.¹⁸⁴ At least one of these modifications was made for the express purpose of distinguishing commercial transactions from investments. As *Romak* stated with respect to general risk: "All economic activity entails a certain degree of risk . . . It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction."¹⁸⁵ These modifications are further evidence that the *Salini* test itself does not require the exclusion of commercial transactions and was not the motivating principle behind these awards. If it did, and if it was, tribunals would not have needed to modify it to achieve that result.

3. "Commercial Transactions" are not Restricted to Sales of Goods

Third, the awards demonstrate that when the above factors are applied, they exclude transactions far broader than a simple sale of goods. Several of the eight claims discussed above did not involve the sale of goods at all but were still dismissed on the basis that the underlying transactions were fundamentally "commercial" in nature.

a) In *Joy Mining*, the tribunal rejected jurisdiction on the basis that a long-term contract to engineer, deliver and support mining equipment was a commercial transaction, although the transaction included engineering and technical support services.

b) In *Malaysian Historical Salvors*, the tribunal similarly rejected jurisdiction on the basis that the salvage contract was merely a commercial transaction, despite the fact that it did not involve the sale of goods at all but was rather for services to be performed within the host State's territory.

c) In *Poštová Banka*, the tribunal rejected jurisdiction over Greek sovereign bonds on the basis that those bonds amounted to a mere commercial exchange, akin to the sale of goods, although the bonds were financial instruments.

* * *

We can thus describe the commercial transaction test as follows: It is a jurisdictional test that (i) applies the negative definition of "investment" ("investment" does not mean "ordinary commercial transactions"), (ii) by ascribing certain positive attributes to investments, including "value creation,"

¹⁸² Romak Award, *supra* note 121, ¶ 227.

¹⁸³ Joy Mining Jurisdiction, *supra* note 103, ¶ 57.

¹⁸⁴ Malaysian Historical Salvors Award, *supra* note 113, ¶¶ 110-11.

¹⁸⁵ Romak Award, *supra* note 121, ¶¶ 229-30.

“operational risk” and certain “duration” characteristics, (iii) which in practice exclude transactions broader than a simple sale of goods.

C. *The Impact of the Commercial Transaction Test*

The commercial transaction test has been a driving force behind awards dismissing jurisdiction on Article 25 “investment” grounds. As shown above, eight of eleven negative jurisdictional awards were motivated by the “commercial” nature of the underlying transaction,¹⁸⁶ while only one was motivated by a neutral application of the *Salini* test.¹⁸⁷

That the *Salini* test would have a limited impact absent another driving principle such as the investment-commerce distinction is not surprising in light of how malleable it is. As discussed above, a liberal but still neutral interpretation of the *Salini* test would encompass a wide range of economic activity, including simple sales of goods. It is thus not surprising that absent some other outside

¹⁸⁶ See *supra* Section III.A.

¹⁸⁷ As discussed above, I do not count awards dismissing jurisdiction on grounds that the claimant lacked a sufficient relationship to the investment, because whether a claimant owns an investment and is therefore a protected *investor* is a different question than whether the asset or transaction at issue is in and of itself an investment. See *supra* note 99. Nevertheless, six awards dismissing jurisdiction on such grounds reference the contribution element of the *Salini* test. See *Capital Finance Holdings Luxembourg S.A. v. Republique du Cameroun*, ICSID Case No. ARB/15/18, Award, ¶¶ 366, 455–457 (June 22, 2017) (finding that the claimant, a Luxembourg holding company, was used to gain treaty protection for the purchase of bank shares by a Cameroun national and thus constituted an abuse of rights; finding also that the circularity of the transaction mean that the claimant made no contribution and thus did not make an investment); *Société Civile Immobilière de Gaeta v. République de Guinée*, ICSID Case No. ARB/12/36, Award, ¶¶ 253, 269, 273, 274 (Dec. 21, 2015) (finding that while a construction contract constituted an investment pursuant to ICSID Convention Article 25, the claimant made no contribution to it and therefore could not be considered an investor in the project); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, ¶¶ 204, 206, 219 (Oct. 17, 2013) (rejecting jurisdiction over shares in a Kazakh bank on the basis that the shell company claimant was not the beneficial owner of the shares; the beneficial owner remained the same despite the share transfer to the claimant, and no cash was exchanged between the buyer and seller; therefore, the shell company claimant made no contribution and incurred no risk when acquiring the shares); *Quiborax Jurisdiction*, *supra* note 83, ¶¶ 223, 237 (finding that while shareholding in a mining venture constituted an investment, those same shares did not constitute an investment where they were simply received as part of a legal formality, as was the case with respect to one of the claimants in the arbitration); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, ¶¶ 310–471, 409 (June 5, 2012) (answering “the question whether CIOC is an investment of Devincci Hourani” by “first enquir[ing] whether Devincci Hourani made any contribution and took any risk,” and finding that where the claimant only made a nominal contribution for the shares, he did not make an investment); *Saba Fakes Award*, *supra* note 4, ¶ 347 (the “‘arrangement’ [was] never intended to give effect [and] did not transfer even the legal ownership of the share certificates . . . to Mr. Fakes. As a result, . . . [the] arrangement does not meet the requirement of a contribution . . . , nor the requirements of duration and risk, since no rights were actually transferred to the Claimant In other words, Mr. Fakes has not made any investment in Telsim which would satisfy any of the three criteria for an investment to exist within the meaning of Article 25(1) of the ICSID Convention.”).

For the reasons described in *supra* note 99, I do not consider it appropriate to count these cases in my analysis; their outcome turned upon the claimants’ relationships to it the asset or transaction at issue, not the nature of the asset or transaction itself. However, even if these six awards were counted, such that a total of seven negative awards were justified on the basis of the *Salini* test and eight based on the commercial transaction test, that would not change my general conclusion that the commercial transaction test has been a driving force behind the awards dismissing jurisdiction on Article 25 “investment” grounds.

limit or organizing principle the *Salini* test does not result in the denial of jurisdiction of an outsized number of claims.¹⁸⁸

This is not to say the *Salini* test is irrelevant. It remains highly relevant in the sense that the “prevailing” positive definition of “investment” is flexible and unrestrictive. In practical terms, however, this flexibility means that its impact as an objective definition of “investment” is limited. If all or nearly all claims pass the *Salini* test, there is little practical difference between applying the *Salini* test and applying a purely subjective interpretation of Article 25 “investment.” In other words, the *Salini* test, on its own, has little bite. The same is not true, however, of the negative definition of “investment.”

The actual impact of the commercial transaction test may in fact be greater than observed in terms of published awards. ICSID’s Secretary General retains the prerogative to refuse the registration of claims that it determines “manifestly could not be considered as an investment.”¹⁸⁹ While claimants have voluntarily withdrawn their claims after being informed by the Secretariat of an impending rejection,¹⁹⁰ and the substance of those claims is unknown, the one claim known to be rejected was rejected because it arose from “a simple sale” of goods.¹⁹¹

Furthermore, the influence of the commercial transaction test is apparent not just from the number of negative jurisdictional awards it has motivated, but also from its application in non-ICSID arbitrations. As discussed above, because non-ICSID investment arbitrations are not subject to ICSID’s Article 25’s jurisdictional requirements, the only definition of “investment” that a transaction must satisfy is the subjective definition contained within the consent document. In both *Romak* and *Alps Finance*, the underlying contracts at issue fit comfortably within the applicable subjective definitions, which defined “investment” as “every kind of asset[.]” including “claims to money or to any performance having an economic value” (*Romak*¹⁹²) and “every kind of asset[.]”

¹⁸⁸ At the same time, it is possible that the *Salini* test has been impactful in other ways not reflected by the number of negative jurisdictional awards it has produced. For example, it is possible that the *Salini* test has narrowed the types of claims that are brought before ICSID tribunals on the front end, thus reducing the need for awards dismissing such claims on the back end. But that seems unlikely for two reasons. First, because it is so elastic and subject to a wide degree of tribunal discretion, its power as a pre-emptive deterrent against non-investment claims should be weak. In light of its elasticity, we would expect claimants to test its boundaries rather than refrain from filing claims. Second, if *Salini* were in fact acting endogenously, we would expect to see at least some outward manifestation of that. Indeed, before it could act as a pre-emptive deterrent against non-investment claims, some body of awards dismissing claims on *Salini* grounds would be required. Moreover, in light of the nature of investor-State arbitration, we would expect that body of awards to be substantial before it would begin to have a deterrent effect against future claims. Instead, what we see is that a neutral application of the *Salini* test has played a role in only a small number of awards (one of eleven) dismissing jurisdiction.

¹⁸⁹ Shihata & Parra, *supra* note 90, at 308.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *Romak Award*, *supra* note 121, ¶ 174 (quoting Swiss Confederation and the Republic of Uzbekistan on the “Promotion and the Reciprocal Protection of Investments” dated 16 April 1993, art 1).

including “claims and rights to any performance having an economic value” (*Alps Finance*¹⁹³). Both tribunals nevertheless rejected jurisdiction on the grounds that the contracts were fundamentally commercial in nature and thus did not satisfy an objective definition of “investment.” That non-ICSID tribunals have begun to apply the commercial transaction test indicates the extent to which it has become not just a dominant definition of “investment” in ICSID arbitration, but influential in international investment law more generally.

IV. THE FLAWS OF THE COMMERCIAL TRANSACTION TEST

In spite of its impact and influence, there has been remarkably little critical analysis of the investment-commerce distinction or the commercial transaction test that implements it.¹⁹⁴ This is particularly surprising because both the distinction and the test are fundamentally flawed—historically, as a matter of interpretation, conceptually, and in practice.

A. *The Commercial Transaction Test is Flawed as a Matter of Interpretation*

1. The “Fundamental Assumption” Behind the Commercial Transaction Test is Historically Wrong

As a historical matter, the test’s fundamental premise—that the Convention’s drafters assumed that ordinary commercial transactions would not be covered by the Centre’s jurisdiction¹⁹⁵—is wrong. As Mortenson has shown, the exclusion of commercial transactions from ICSID jurisdiction “is incompatible with the historical course of negotiations.”¹⁹⁶

The negotiating history shows that the Convention’s drafters purposefully decided against including any definition of the term “investment”—positive or negative.¹⁹⁷ The history further shows that the drafters actively considered definitions of “investment” that included the sale of goods. Those included a proposal from Spain that the term “investment” encompass “money, capital goods and other goods required for the industrial

¹⁹³ *Alps Finance Award*, *supra* note 22, ¶ 230 (quoting the Agreement Between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments art. 1, Oct. 5, 1990, art. 1 [Treaty available at *Czech Republic – Slovakia BIT (1992)*, INVESTMENT POL’Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1227/czech-republic---slovakia-bit-1992> (last visited Nov. 17, 2019)]).

¹⁹⁴ The most incisive analysis of the investment-commerce distinction has focused on the negotiating history of the Convention. See Mortenson, *supra* note 22. Other commentators have addressed it only in passing. See, e.g., Georges Delaume, *ICSID and the Transnational Financial Community*, 1 FOREIGN INVESTMENT L.J. 2, 242 (1986) (remarking that the supply of services is “sometimes on the borderline between investment proper and commercial transactions, which would fall outside the scope of ICSID”); Paul Szasz, *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 CORNELL INT’L L.J. 1, 15 (1968) (unclear whether ICSID jurisdiction encompasses sales contracts).

¹⁹⁵ See, e.g., SCHREUER II, *supra* note 17, art. 25, ¶ 122.

¹⁹⁶ See Mortenson, *supra* note 22, at 298.

¹⁹⁷ See *supra* Section II.B.

development of a country," and from Tunisia that it "comprise[] all categories of goods."¹⁹⁸ These proposals were, of course, rejected with all of the rest. But their tabling further dispels the myth that the drafters proceeded with the universal assumption that such transactions would not be covered by the Centre.

The lack of historical basis for the commercial transaction test is particularly relevant because its premise is so deeply rooted in the presumed intent of the Convention's drafters. Schreuer, reciting the conventional wisdom, has written that "it was always clear [to the Convention's drafters] that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be."¹⁹⁹ Likewise, the Annulment Committee in *Malaysian Historical Salvors* credited the drafters' "fundamental assumption that the term 'investment' does not mean 'sale [or 'like transient commercial transactions']'."²⁰⁰ Remarkably, however, the commentators and tribunals crediting, relying on, and perpetuating this "fundamental assumption" do not cite to any specific documents in the negotiating history of the Convention that support it.²⁰¹

The closest approximation to support of the "fundamental assumption" is a citation to comments by Aaron Broches, the then General Counsel of the World Bank. During the negotiation, Broches noted that it was "generally understood that the scope of the Convention should be limited to legal disputes as distinguished from political or commercial disputes."²⁰² In his dissent in *Abaclat v. Argentina*, Professor Abi-Saab argued that the statement is evidence that the investment-commerce distinction was "clearly on the mind of the drafters of the Convention, particularly its main architect, A. Broches."²⁰³

Broches' comment, however, does not evidence an intent to exclude commercial transactions from ICSID jurisdiction. At most, it is evidence of an intent to exclude commercial *disputes*, which as discussed below, are not equivalent to or co-extensive with commercial transactions.²⁰⁴ In any event, the comment was controversial, Broches later expressed regret at having made it,²⁰⁵

¹⁹⁸ II-2 HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 705, 844 (1968).

¹⁹⁹ SCHREUER II, *supra* note 17, art. 25, ¶ 122.

²⁰⁰ *Malaysian Historical Salvors Annulment*, *supra* note 16, ¶¶ 69, 72.

²⁰¹ See SCHREUER II, *supra* note 17, art. 25, ¶ 122; *id.*, ¶¶ 69, 72; Schwebel, *supra* note 20, at 59-60; Shihata & Parra, *supra* note 90, at 308.

²⁰² II-1 HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 83 (1968). See also *id.* at 149 ("No detailed definition of the category of disputes in respect of which the facilities of the Center would be available has been included in the Convention. Instead, the general understanding reflected in the Preamble, the use of the term 'investment dispute', and the requirement that the dispute be of a legal character as distinct from political, economic or purely commercial disputes, were thought to limit the scope of the Convention in this regard."); *id.* at 203 (same).

²⁰³ *Abaclat Dissent on Jurisdiction*, *supra* note 58, ¶ 45, n. 7.

²⁰⁴ See *infra*, Section V.B.

²⁰⁵ ARON Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 188, 208 (1995). ("The term 'dispute of a legal character'

and it was rejected at least in part because of skepticism that “it was really possible to distinguish between . . . commercial disputes on the one hand, and legal disputes on the other.”²⁰⁶

2. The Commercial Transaction Test is Flawed as a Matter of Textual Interpretation

The commercial transaction test is also flawed as a matter of textual interpretation. As an initial matter, it is flawed as a matter of interpretation because it attempts to define one undefined term by another undefined term. As a comment to the Additional Facility Rules points out, the term “ordinary commercial transaction . . . is not defined, and hardly capable of precise definition . . .”²⁰⁷ Defining “investment” by reference to another undefined term confuses rather than clarifies.²⁰⁸

Moreover, nothing in the ordinary meaning of “investment” excludes commercial transactions, or their quintessential manifestation, the sale of goods.²⁰⁹ The Annulment Committee in *Malaysian Historical Salvors*,

was used in the Preliminary Draft submitted to the regional consultative meetings. The term was not defined, but in a comment to the Draft, a distinction was made between ‘disputes of a legal character’ and ‘political, economic or purely commercial disputes.’ Having drafted this comment myself, I have no difficulty in calling it unfortunate, since the latter class of dispute may well involve legal issues.”)

²⁰⁶ See Mortenson, *supra* note 22, at 298-299. See also *id.* (“This focus on the commercial nature of an activity is incompatible with the historical course of negotiations. The World Bank’s first circulated draft suggested ruling out ‘political, economic or purely commercial disputes’ – caveats that were clearly of concern to some of the leaders of the project, including Broches himself. But when the draft was released to member nations, there was substantial resistance to the idea of excluding ‘commercial’ disputes – both among countries who opposed any limitation on investment and among countries who supported a narrower definition. The basic concern was that any such limitation would turn into a slippery slope excluding all economic activity; even the minimalist Indian delegate expressed skepticism that ‘it was really possible to distinguish between . . . commercial disputes and investment activity that would otherwise come within the Centre’s purview. As a result, all efforts to preclude jurisdiction over ‘merely commercial’ activity were dropped.”). See also II HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 493 (1968) (The delegate from India “was not sure – as seemed to be implied in paragraph of the Comment – that it was really possible to distinguish between political, economic and commercial disputes on the one hand, and legal disputes on the other, since each of the former categories of disputes might in fact have a legal basis. Nor would it be very helpful to try to cover only disputes which were ‘purely legal.’”).

²⁰⁷ *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (Additional Facility Rules)*, ICSID, art. 4, cmt. iii (1978) [hereinafter Comment to Additional Facility Rules], <http://www.sice.oas.org/dispute/comarb/icsid/icsid3.asp> (last visited Nov. 17, 2019).

²⁰⁸ In fact, just as tribunals have invoked “ordinary commercial transactions” in order to define what “investment” is not, the commentary to the Additional Facility Rules invokes concepts of investment to define what “ordinary commercial transactions” are not. See *id.* (“Economic transactions which may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions.”). The circular references between these definitions of “investment” and “commercial transactions” only underscore the futility of using either to define the other.

²⁰⁹ As noted above, nothing on the face of the *Salini* test requires the exclusion of commercial transactions either. As discussed above, commercial transactions, including one-off sales, exhibit all of the *Salini* test’s criteria. See *supra* Section III.B.2.

consistent with basic dictionary definitions,²¹⁰ described the “ordinary meaning” of “investment” as containing three elements: (i) “the commitment” (ii) “of money or other assets” (iii) “for the purpose of providing a return.”²¹¹ The sale of goods, from the perspective of the seller, satisfies this ordinary meaning. From the perspective of the seller, goods in a simple sale transaction are (i) “assets” that are (ii) “commit[ted]” via a contract (iii) “for the purpose of providing a return.” From the perspective of the buyer, a purchase contract may also represent an investment, if, for example, the goods are purchased for the purpose of re-selling them (either combined with other inputs or “as is”) for profit. In that case, the buyer (i) “commits” via a contract (ii) “assets,” in the form of money or otherwise, (iii) to obtain the goods “for the purpose of providing a return.”²¹²

Interpreting Article 25 “investment” broadly and as inclusive of such transactions is consistent with the object and purpose of the ICSID Convention and its negotiating history. The stated purpose of the Convention is “to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”²¹³ Nothing in that stated purpose recommends a restrictive interpretation of “investment.”²¹⁴ To the contrary, as discussed above, the Preamble, Article 25 and the negotiating history of the Convention all strongly suggest that, in light of the additional “consent in writing” jurisdictional requirement, the term “investment” should be interpreted broadly.²¹⁵

3. Subsequent Practice is Mixed

The best defense for the commercial transaction test may lie in subsequent practice, though even subsequent practice is mixed on the question.

On the one hand, as noted above, there is near universal agreement among tribunals and commentators that the term “investment” does not

²¹⁰ See, e.g., BLACK’S LAW DICTIONARY (10th ed. 2009) (investment is “[a]n expenditure to acquire property or assets to produce revenue; a capital outlay”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2002) (investment is “an expenditure of money for income or profit or to purchase something of intrinsic value: [a] capital outlay”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (investment is “[p]roperty or another possession acquired for future financial return or benefit”).

²¹¹ Malaysian Historical Salvors Annulment, *supra* note 16, ¶ 57.

²¹² Moreover, even if the sale transaction is viewed in isolation from the goods being transacted, the transaction will likely have required the (i) “commitment” of (ii) resources or “assets,” including time, to find an appropriate buyer or seller and execute the contract (iii) “for the purpose of providing a return.” See Alan Sykes, *The Economic Structure of International Investment Agreements and Implications for Treaty Interpretation and Design*, 113 A.J.I.L. 482, 518 (2019).

²¹³ ICSID Convention, *supra* note 10, art. 1(2).

²¹⁴ See Reisman & Vinnik, *supra* note 9, at 69 (“ICSID is a service provider whose function has become making available an arbitral option. If parties want this service for transactions that meet other explicit jurisdictional tests, such as nationality, why should an ICSID tribunal refuse them? Should not governments be able to decide for themselves which transactions they want to encourage by promising BIT protection?”).

²¹⁵ See *supra* Section II.B.

encompass “ordinary commercial transactions,” or at the very least a simple sale of goods.²¹⁶ Further support in subsequent practice can be found in ICSID’s Additional Facility Rules, which were adopted by the ICSID Administrative Council in 1978. The purpose of those Rules was to enable the administration of proceedings between States and nationals of other States that fell outside the scope of the ICSID Convention.²¹⁷ Thus, Article 2(b) of the Additional Facility Rules allows for admission of disputes that “do not arise directly out of an investment....”²¹⁸ Yet the Rules also expressly condition jurisdiction on the Secretary General’s determination that the “underlying transaction has features which distinguish it from an ordinary commercial transaction.”²¹⁹

The purpose of the exclusion of “ordinary commercial transactions” was not to clarify that such transactions did not constitute Article 25 “investments.” Indeed one of the purposes of the Additional Facility Rules was to enable the administration of *non-investment* disputes.²²⁰ Rather, the purpose of the commercial transaction exclusion was to emphasize that the Additional Facility was not intended to be an “alternative to existing mechanisms for the settlement of commercial disputes,”²²¹ nor a “mere duplication of facilities for [commercial] dispute settlement.”²²² A non-binding Comment to the Rules, nevertheless, made clear that its drafters were of the mind that investments could be “clearly distinguished from ordinary commercial transactions.”²²³

On the other hand, the subsequent practice of Contracting States suggests that they interpret the term “investment” to include such transactions.

²¹⁶ See *supra* Section II.D.2.

²¹⁷ Comment to Additional Facility Rules, *supra* note 207, Introduction.

²¹⁸ ICSID Additional Facility Rules, *supra* note 141, art. 2(b).

²¹⁹ *Id.* art. 4(3). See also Comment to Additional Facility Rules, *supra* note 207, Introduction (describing the expansion of jurisdiction to “disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction”).

²²⁰ See Comment to Additional Facility Rules, *supra* note 207, Introduction, art. 4, cmt. iv.

²²¹ *Id.* art. 4, cmt. i.

²²² ICSID, ICSID TWELFTH ANNUAL REPORT 1977/78 3 (1978).

²²³ Comment to Additional Facility Rules, *supra* note 207, art. 4, cmt. iii (“Economic transactions which, may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions.”). This comment and the Rules more generally fall short of “agreement between the parties regarding the interpretation of the treaty or the application of its provisions” or “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” pursuant to VCLT Art. 3(a) or (b). As an initial matter, it was “clearly understood that [Additional Facility] proceedings would not be governed by the Convention but would be based solely on contract.” ICSID Twelfth Annual Report 1977/78, *supra* note 222, at 3. The exclusion of “ordinary commercial transactions” thus did not necessarily reflect the Council’s views as to the Convention’s mandates, but rather as to what was appropriate for non-Convention arbitrations. Second, because the Administrative Council is able to approve resolutions, including the Additional Facility Rules, by a mere majority of two-thirds of the members of the Administrative Council, the Council resolutions do not necessarily reflect “an agreement” between all of the parties to the Convention. See ICSID Convention, *supra* note 10, art. 6(1). Finally, the comment accompanying the Additional Facility Rules that investments could be “clearly distinguished from ordinary commercial transactions,” was “non-binding” and not part of the Rules. See ICSID, ICSID Additional Facility Rules,

Most BITs consenting to ICSID arbitration define “investment” in a way that comfortably encompasses so-called “ordinary commercial transactions,” including a simple sale of goods. According to the tribunal in *Fedax*:

A broad definition of investment...is not at all an exceptional situation. On the contrary, most contemporary bilateral treaties of this kind refer to ‘every kind of asset’ or to ‘all assets’, including the listing of examples that can qualify for coverage; claims to money and to any performance having a financial value are prominent features of such listings.²²⁴

Simple sales of goods may constitute investments under such widely adopted definitions, as a “kind of asset” or a “claim to money” or “performance.” In fact, “only exceptionally has a treaty excluded claims to money that arise solely from commercial contracts for the sale of goods or services from the definition of investment”²²⁵ While not conclusive of the meaning of Article 25 “investment,”²²⁶ these bilateral definitions are “a strong indication that [the parties] consider their transaction an investment,”²²⁷ and that the term “investment” in the investor-State arbitration context does not inherently exclude such transactions.

B. *The Commercial Transaction Test is Flawed in Concept*

In addition to the lack of support in the text and historical record of the ICSID Convention, the putative distinction between commercial and investment transactions suffers from fundamental conceptual flaws. There is simply no clear and principled line to be drawn between commercial and investment activities. As international commercial law demonstrates, investment transactions, far from being distinct from commercial transactions, are in fact a *type* of commercial transaction. And as economic principles show, even the quintessential commercial transaction—the sale of goods—may constitute an investment. In other words, the concepts are inherently linked and intertwined, and the notion that a sale or “ordinary commercial transaction” “manifestly could not be considered an investment”²²⁸ is fundamentally misconceived.

1. Economic Principles

<https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx> (last visited Nov. 17, 2019).

²²⁴ *Fedax Jurisdiction*, *supra* note 48, ¶ 34 (citing Antonio R. Parra, *The Scope of New Investment Laws and International Instruments*, in ECONOMIC DEVELOPMENT FOREIGN INVESTMENT AND THE LAW 27, 35-36 (Robert Pritchard ed., 1996)).

²²⁵ *SGS v. Pakistan Jurisdiction*, *supra* note 94, ¶ 133, n. 153.

²²⁶ See *supra* Section II.C.

²²⁷ *SCHREUER II*, *supra* note 17, art. 25, ¶ 129.

²²⁸ *Shihata & Parra*, *supra* note 90, at 308.

The economic concept of investment is instructive in light of its influence on other interpretations of “investment,” including the *Salini* test,²²⁹ and in light of the Convention’s express reference to “economic development, and the role of private international investment therein.”²³⁰

Economic principles do not distinguish between commercial and investment activities. Instead, macroeconomic theory categorizes economic output into two buckets: output destined for consumption and output destined for savings and investment.²³¹ Consumption is composed of all of the new products and services purchased by individuals or households for their own personal use, including durable goods (such as refrigerators and cars) and non-durable goods (such as food and clothing).²³² Investment, on the other hand, is composed of purchases of goods for future use,²³³ or the purchases of “any asset that will produce value in the future.”²³⁴ Macroeconomic theory thus defines investment according to whether a good or service is for end-use (consumption) or for future use (investment).²³⁵

Pursuant to basic macroeconomic models, even a simple sale of goods—the quintessential commercial transaction—may constitute an investment. Investment spending in macroeconomic models of GDP includes spending on business fixed investment as well as spending on inventory.²³⁶ Business fixed investment consists of capital such as machinery, factories, and other long-term assets that are used in the production process.²³⁷ Inventory, on the other hand, includes stocks of inputs (such as raw materials) and final goods ready for sale

²²⁹ Gaillard & Banifatemi, *supra* note 15, at 98.

²³⁰ ICSID Convention, *supra* note 10, pmbl. The economic concept of investment, and more specifically the macroeconomic concept of investment, is thus more relevant in investor-State arbitration than other applications of the term in the context of accounting or securities regulation. For example, in the context of securities regulation, the United States Supreme Court has defined an investment contract as “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” SEC v. W.J. Howey Co., 328 U.S. 293, 298-299 (1946). This securities-focused definition is not appropriate in the investor-State context as it would, *inter alia*, effectively exclude foreign direct investments, in which actors expect profits from their own efforts, not “solely from the efforts of the promoter or a third party.” Moreover, from the perspective of the real economy, financial instruments such as stocks and bonds do not represent “investments” at all “because they don’t represent either the production or the sale of final goods and services” but “[r]ather . . . a promise to pay with interest [or] proof of ownership.” PAUL KRUGMAN & ROBIN WELLS, MACROECONOMICS 194 (3d ed., 2013).

²³¹ See, e.g., Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 QUARTERLY J. ECON. 66 (Feb. 1956) (“Part of . . . output is consumed and the rest is saved and invested.”).

²³² N. GREGORY MANKIW, MACROECONOMICS 25 (5th ed., 2003).

²³³ *Id.* (“Investment consists of goods bought for future use. Investment is also divided into three subcategories: business fixed investment, residential fixed investment, and inventory investment. Business fixed investment is the purchase of new plant and equipment by firms. Residential investment is the purchase of new housing by households and landlords. Inventory investment is the increase in firms’ inventories of goods (if inventories are falling, inventory investment is negative).”).

²³⁴ Moselle, *supra* note 1, at 12 (emphasis removed).

²³⁵ *Id.* at 10. Investment, in other words, “involves giving up something at one point in time in order to get something back at a later point in time.” *Id.*

²³⁶ See, e.g., KRUGMAN & WELLS *supra* note 230, at 190; MANKIW, *supra* note 232, at 25.

²³⁷ MANKIW, *supra* note 232, at 25.

that firms maintain to facilitate business.²³⁸ Such goods are considered an investment according to macroeconomic theory because “like a machine, additional inventory is an investment in future sales.”²³⁹

Thus, before a sale, goods in a so-called simple sale may constitute an investment in the form of inventory to the seller. After a sale, they may constitute an investment to the buyer if the goods are purchased for the purpose of using them as inputs in another process or simply for reselling. Until they are resold, either having been combined with other goods in a production process or alone, such goods would constitute an investment in the form of unsold inventory.²⁴⁰

2. International Commercial Law

While economic principles recognize that even quintessential commercial transactions, such as the sale of goods, may constitute investments, international commercial law recognizes that investments constitute commercial activities.²⁴¹ The international commercial arbitration regime is instructive, as the field has developed a sophisticated understanding of what constitutes a commercial activity, and because tribunals have referenced potential conflict with that regime as a reason to reject jurisdiction over commercial transactions.²⁴²

The New York Convention allows members to declare that the Convention applies only to “relationships...which are considered commercial under the national law of the State making [the] declaration.”²⁴³ In general, national courts in States which have made such a declaration, including the United States, have defined commercial relationships “extremely” broadly,²⁴⁴ including relationships arising from an investment. In fact, investment treaty awards have been enforced pursuant to the New York Convention in the United

²³⁸ KRUGMAN & WELLS *supra* note 230, at 190 (“Inventories are stocks of goods and raw materials held to facilitate business operations.”).

²³⁹ *Id.* at 194; *see also* MANKIW, *supra* note 232, at 462.

²⁴⁰ This basic economic logic applies to both domestically and foreign produced goods. Thus, unsold imported goods located in the territory of a host State may reasonably be considered investments from the perspective of the exporter until the sale is consummated. Once the sale is consummated, they may be considered investments from the perspective of the importer. This is fully consistent with macroeconomic theory, which counts goods imported for business use as investment in the GDP accounting formula. Scott A. Wolla, *How do Imports Affect GDP*, FED RESERVE BANK ST. LOUIS (Sept. 2018), <https://research.stlouisfed.org/publications/page1-econ/2018/09/04/how-do-imports-affect-gdp>.

²⁴¹ Article 31(3)(c) of the VCLT requires to be “taken into account...any relevant rules of international law applicable in the relations between the parties.” VCLT, *supra* note 55. Whether or not international commercial arbitration law is relevant and applicable here and thus must be taken into account is up for debate; regardless, it is informative for the particular discussion.

²⁴² *See infra* note 336 & accompanying text.

²⁴³ New York Convention, *supra* note 28, art. 1(3).

²⁴⁴ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: VOLUME I – INTERNATIONAL ARBITRATION AGREEMENTS 299-300 (2d ed. 2014) [hereinafter BORN ICA Vol. I]. U.S. courts, for example, have found that the term “commercial” is broader than that of “commerce” and includes not just a sale of goods between corporations, but also employee-employer relations, consumer transactions, shareholder disputes construction and leasing agreements, insurance contracts, and maritime agreements. *Id.*

States, where the Convention is limited to “commercial relationships.”²⁴⁵ The disputes arising from those investments were found to arise from a “commercial” relationship between the host State and investor.²⁴⁶

Likewise, the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by sixty States, and whose application is limited to “international commercial arbitration,”²⁴⁷ suggests that commercial activities are inclusive of investment activities. A footnote to the Model Law States:

The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to . . . *investment*; financing; banking; insurance; exploitation agreement or concession ²⁴⁸

This is consistent with the leading commentator’s understanding of “commercial,” as a term that refers to a “relationship involving economic exchange where one (or both) parties contemplate realizing a profit or other benefit,” which should be interpreted “liberal[ly]” and “expansive[ly]” to “include[] all manner of business, financial, consulting, investment, technical and other enterprise.”²⁴⁹

International commercial law thus categorizes investment as a type of commercial activity. It suggests that there is no line between investment and commercial activities, just between commercial activities that are investments and commercial activities that are not investments. This overlap between commercial and investment transactions is likely what has led tribunals and commentators to qualify that Article 25 does not extend to “*mere* commercial transactions”²⁵⁰ or “*ordinary* commercial transactions.”²⁵¹ The qualifications “mere” and “ordinary” can be understood as referring to commercial transactions that are not also investments. But this is just another way of saying that “investments” are not “commercial transactions that are not investments.” It is a

²⁴⁵ See, e.g., *Chevron Corp.*, *supra* note 39, at 57 (confirming an investor-State arbitration award issued against Ecuador pursuant to the New York Convention).

²⁴⁶ The UN Convention on Contracts for the International Sale of Goods does not define “commerce.” Rather, its application is limited to “contracts of sale of goods between parties whose places of business are in different States.” United Nations Convention on Contracts for the International Sale of Goods art.1(1), Apr. 10, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG].

²⁴⁷ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985 with amendments as adopted in 2006), art. 1(1), United Nations documents A/40/17, annex I and A/61/17, annex I, [hereinafter UNCITRAL Model Law]. While the footnote was not formally included in the Model Law text, it “nonetheless represents authoritative guidance as to the intended scope of the term ‘commercial’” and has been expressly adopted by several States in their commercial arbitration laws. BORN ICA Vol. I, *supra* note 244, at 308.

²⁴⁸ UNCITRAL Model Law, *supra* note 247, art. 1(1), n. 2 (emphasis added).

²⁴⁹ BORN ICA Vol. I, *supra* note 244, at 304.

²⁵⁰ *Alps Finance Award*, *supra* note 22, ¶ 105.

²⁵¹ SCHREUER II, *supra* note 17, art. 25, ¶ 122 (emphasis added).

tautology that simply returns us to the question of what an "investment" is in the first place.

C. *The Commercial Transaction Test is Flawed in Practice*

Further evidence of the lack of a principled and predictable division between commercial and investment transactions can be found in tribunals' attempts to draw one. As discussed above, tribunals have attempted to distinguish between commercial and investment activities by ascribing certain positive characteristics to investments that are not found in other commercial transactions. According to this test, an "investment," as opposed to a "mere commercial transaction," entails the presence of: (i) a contribution to a "value-creating economic operation"; (ii) "operational risk"; and (iii) certain durational requirements. Ascribing positive attributes to investments in order to apply the negative definition of "investment" appears counterintuitive, but it nevertheless makes sense when considering that investments are a type of commercial activity.²⁵² In this context, distinguishing investments from *other* commercial activities requires either defining "investment," "ordinary commercial transaction" (which is "hardly capable of precise definition"²⁵³), or *every other* type of non-investment commercial activity, of which there are multitudes.²⁵⁴

As discussed below, however, the factors applied in this commercial transaction test offer no principled, predictable or textually supportable basis for distinguishing investment transactions from other commercial transactions. This is unsurprising in light of the flaws in the test's underlying premise that "ordinary commercial transactions," including sales of goods, cannot constitute investments.

1. The "Value" Theory of Investment

As discussed above, two negative jurisdictional decisions attempted to distinguish investments from commercial activities based upon the type of contribution each entails. According to *Poštová Banka* and *Romak*, investments entail not just a "contribution" but a contribution to "an *economic operation*

²⁵² The commentary to the Additional Facility Rules likewise regresses to circularity when attempting to define "ordinary commercial transaction." Instead of defining the term, which as noted above, it recognizes is "hardly capable of precise definition," it attempts to define "ordinary commercial transactions" by what they are not. It states: "Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions." Comment to Additional Facility Rules, *supra* note 207, art. 4, cmt. iii.

²⁵³ *Id.*

²⁵⁴ See accompanying text of *supra* notes 248 & 249.

creating value”²⁵⁵ or “in furtherance of a venture.”²⁵⁶ The tribunal in *Poštová Banka* explained its value-based theory of investments as follows:

An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchanging values or a subscription to sovereign bonds which is also a process of exchange of values *i.e.* a process of providing money for a given amount of money in return.²⁵⁷

There are, however, two fundamental flaws with this theory. First, it ignores the value created by the exchange of goods or services in a market. When a good is exchanged in a free market, it passes from one who values it less to one who values it more. This efficient allocation itself creates value.²⁵⁸ Second, the value-based theory of investment also ignores the value of goods or services added in anticipation of the exchange, as well as their value to the buyer. In other words, it ignores the value of the goods or services being transacted, and the transaction’s causal role in creating that value. Value creation, therefore, is not a sound basis for distinguishing between sales of goods and investment transactions. Value is created by both.

Proponents of the value-based theory of investment might concede that exchanges create value, but still attempt to differentiate investments from the sale of goods on the basis that investments continue to create value after and in addition to the sale. They might have in mind, for instance, capital investments such as factories and machinery, and the value those investments create after the sale in the production process.²⁵⁹ It is possible that *production*, not value creation, was the concept that the *Poštová Banka* tribunal had in mind.

As an initial matter, it bears emphasis that interpreting Article 25 to be limited to a specific type of investment—capital investment or business fixed

²⁵⁵ *Poštová Banka Award*, *supra* note 86, ¶ 361 (emphasis added).

²⁵⁶ *Romak Award*, *supra* note 121, ¶ 222 (emphasis added).

²⁵⁷ *Poštová Banka Award*, *supra* note 86, ¶ 361.

²⁵⁸ This value is created regardless of whether a good is exchanged on the primary market (and is thus occasioned by new production) or the secondary market (where nothing new is produced). Cooter and Ulen, in their textbook, *Law and Economics*, illustrate this principle with the following example:

Adam who lives in a small town, has a 1957 Chevy convertible in good repair. The pleasure of owning and driving the car is worth \$3000 to Adam. Blair, who has been coveting the car for years, inherits \$5000 and decides to try to buy the car from Adam. After inspecting the car, Blair decides that the pleasure of the owning the car and driving it is worth \$4000 to her
....

According to these facts . . . [the parties] can move a resource (the car) from someone who values it less (Adam) to someone who values it more (Blair). Moving the resource in this case from Adam, who values it at \$3000, to Blair, who values it at \$4000, will create \$1000 in value.

COOTER AND ULEN, *LAW AND ECONOMICS* 78-79 (5th ed., 2008).

²⁵⁹ KRUGMAN & WELLS, *supra* note 230, at 194.

investment—is inconsistent with the text or negotiating history of Article 25, which places no limits or qualifications on the term.²⁶⁰ In any event, a production-based theory would also fail to justify the exclusion of goods. “The notion of production in economics is very broad and essentially involves any transformation, including even the ‘transformation’ of goods today into the same goods tomorrow through storage.”²⁶¹ Goods may therefore contribute to production by being combined with other goods or simply by existing from one day to the next.²⁶² For example, a sale between two firms of intermediate goods, *i.e.*, goods used in the production process, could fall under a production theory of investment: the sale of such goods would occasion their own production (before the sale) and further production of additional goods (after the sale).²⁶³ Like the value-based theory of investment, therefore, a production-based theory of investment offers neither a principled nor textually supportable basis for the exclusion of a sale of goods from the definition of “investment.”

2. The “Operational Risk” Theory of Investment

As discussed above, six awards attempted to distinguish investments from commercial transactions based upon the nature of the risk each entails. According to the tribunals in *Romak* and *Poštová Banka*, investments necessarily entail “operational” or “investment” risk, which is distinguishable from other types of economic risk.²⁶⁴ The *Romak* tribunal explained this theory as follows:

All economic activity entails a certain degree of risk. As such, all contracts—including contracts that do not constitute an investment—carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise

²⁶⁰ See *supra* Section II.B.

²⁶¹ Moselle, *supra* note 1, at 13. See also GERARD DEBREU, THEORY OF VALUE 35, n. 1 (1959) (“The idea that a good or a service available at a certain date (and a certain location) is a different commodity from the same good or service available at a different date (or a different location) is old.”).

²⁶² Moreover, determining what assets are part of the production process would present practical difficulty; assets have “always played a dual role, as both a store of value and a factor of production.” See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 48 (Arthur Goldhammer trans., 2014) (citing gold as an example of a capital asset that may act as a store of value as well as “a factor of production, not only in the manufacture of jewelry but also in electronics and nano-technology”). Not all exchanges involve production. For example, the exchange of used goods on the secondary market does not involve new production. But a production-based theory of investment would also fail to exclude the types of transactions that *Poštová Banka* intended to exclude. A true production-based theory of investment, while excluding secondary sales of used goods, would actually include goods produced in anticipation of a sale, *i.e.*, new goods.

²⁶³ The distinguishing feature between capital investments and intermediate goods used in the production process is the durability and sunk costs of the former. Capital investments are not tied closely to current production; rather they involve an outlay that which is only recouped over time. Intermediate goods, on the other hand, are used up in production. The cost of their purchase is generally recouped upon sale of the product into which they have been incorporated or transformed. Even from a policy perspective, it is unclear why low sunk-costs should be a basis for restricting ICSID jurisdiction. While it is true that lower sunk costs should reduce the sovereign risk associated with an asset, that lower risk should lead to fewer ICSID claims independent of any jurisdictional bar. See *infra* Section V.A.

²⁶⁴ *Romak Award*, *supra* note 121, ¶¶ 229-30; *Poštová Banka Award*, *supra* note 86, ¶¶ 368-69.

stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.

An ‘investment risk’ entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.²⁶⁵

As an initial matter, it is worth noting that this expressly teleological theory has no apparent policy justification. It takes for granted that commercial transactions should be excluded and seeks to identify “an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.”²⁶⁶ The “value” theory arguably (though wrongly) could be justified on policy grounds: it makes policy sense to protect (and therefore incentivize) value-creating activities over non-value creating ones. The risk-based theory, however, offers no such apparent policy rationale. In fact, outside of the jurisdictional tests that apply it, the distinction between commercial and investment risk is irrelevant in investor-State proceedings. Absent specific provisions,²⁶⁷ BITs protect against neither type of risk. An investor can neither recover for non-performance by a contracting party (so-called “commercial risk”) nor for a money-losing enterprise (so-called “operational risk”). Rather, investor-State arbitration is dedicated to protecting against a completely different and unrelated type of risk: sovereign risk (*i.e.*, the risk of State interference).²⁶⁸

²⁶⁵ Romak Award, *supra* note 121, ¶¶ 229-30.

²⁶⁶ *Id.* ¶ 229.

²⁶⁷ A State may consent to ICSID arbitration of contractual disputes between itself and a foreign national by way of a so-called umbrella clause. *See, e.g.*, Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Switz.-Pak., art. 11, July 11, 1995, SR 0.975.262.3 (“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.”) [English translation obtained from *Pakistan-Switzerland BIT* (1995), UNCTAD INVESTMENT POL’Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2721/pakistan---switzerland-bit-1995> (last visited Nov. 17, 2019)]. The validity of such consent, and whether ICSID can hear purely contractual disputes is contested. *Compare* *SGS v. Pakistan* Jurisdiction, *supra* note 94 (finding no jurisdiction over purely contractual claims) with *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, (Feb. 12, 2012) [hereinafter *SGS v. Paraguay* Jurisdiction] (finding that it would have jurisdiction over contractual claims). *See also* *El Paso Energy International Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 65 (Apr. 27, 2006) (rejecting jurisdiction over purely contractual claims); *L.E.S.I. Jurisdiction*, *supra* note 83 (same).

²⁶⁸ *See* *Ambiente Ufficio Jurisdiction*, *supra* note 4, ¶ 485 (“Respondent submits that the risk assumed by the Claimants of not being paid is not different from that involved in any commercial contract between a creditor and a debtor and that such ordinary commercial contracts cannot be considered an investment However, given the risk of the host State’s sovereign intervention, a risk that became manifest in Argentina’s very default and restructuring, what is at stake is not an ordinary commercial risk.”).

In any event, like the "value" theory of investment, the "operational risk" theory seeks to isolate the transaction from the thing being transacted. The theory ignores, for example, that the very "operational" risk it requires is almost certainly present in the production or preparation of the transacted thing before it is sold. Prior to the sale, the producer of goods may not "be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations."²⁶⁹ The same is true with respect to the purchaser after the sale if the purchase was made to further a production process. The purchaser will not "be sure of a return on an investment . . . even if all relevant counterparties discharge their contractual obligations."²⁷⁰

Applying the "operational risk" factor in a way that ignores this broader context leads to absurd results and therefore should be rejected. For example, if the inquiry of whether "operational risk" exists is limited to the transaction without its broader context, then even the purchase of a factory or capital equipment would fail to qualify as an investment. If, on the other hand, the broader context of a transaction is taken into account, then the "operational risk" theory does not actually provide a basis for excluding sales of goods from the definition of "investment," for the reasons discussed above. Thus, as with the "value" theory, a true "operational risk" theory of investment, which considers the overall context of a transaction, encompasses the very commercial transactions, including sales of goods, that it seeks to exclude.

3. The "Duration" Theory of Investment

Finally, as discussed above, four negative decisions distinguished commercial transactions from investment transactions based upon the duration each entails. It is unclear exactly what principle was applied to distinguish the duration of investment activities from that of commercial activities. However, in making their determination, the tribunals considered the point during the transaction at which the claimant was paid (*Joy Mining*),²⁷¹ the overall duration of the obligations (*Romak*),²⁷² whether the duration was fixed or variable (*Malaysian Historical Salvors*),²⁷³ and whether the contract had an "an ongoing duration," or "exhaust[ed] its object and purpose . . . immediately" (*Alps Finance*).²⁷⁴

None of these considerations offer a predictable or principled basis for defining investment activities. It is entirely unclear why the point at which a claimant is paid should factor into the analysis at all, particularly when the performance of the contract continues beyond that payment. Indeed, the

²⁶⁹ See *Romak Award*, *supra* note 121, ¶ 230.

²⁷⁰ See *id.*

²⁷¹ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 57.

²⁷² *Romak Award*, *supra* note 121, ¶ 226-27.

²⁷³ *Malaysian Historical Salvors Award*, *supra* note 113, ¶¶ 110-11.

²⁷⁴ *Alps Finance Award*, *supra* note 22, ¶ 232.

consideration appears to contradict the very concept of investment advanced by the tribunal that applied it. According to the tribunal in *Joy Mining*, the existence of “commercial risk” (or risk of default) is inapposite as to the existence of an investment, which is instead characterized by “operational risk.”²⁷⁵ Yet, upfront payments only eliminate “commercial risk,” not “operational risk.” Economic actors may lose money on transactions even when paid upfront if the cost of subsequent performance exceeds the upfront payment.

It is further unclear why a fixed duration is more indicative of an investment than a variable duration. A variable duration is fully consistent with the notion of an investment as a business enterprise, which is widely accepted.²⁷⁶ Traditional business enterprises typically do not open their doors with the intent to close them and withdraw from the market on a date certain.

Finally, it is entirely unclear what principled and predictable metric could be used to determine the required duration of an investment, or even how the duration of the transaction at issue should be calculated. With respect to the required duration, as discussed above, tribunals have come to vastly different and seemingly random conclusions. The *Salini* award, for example, noted that according to the doctrine, the minimal duration requirement was two to five years.²⁷⁷ Why two years is sufficient, but twenty-three months is not, is unclear, let alone how a tribunal should determine whether two, three, four or five years should be required. The *Bayindir* tribunal seemingly recognized the difficulty of establishing a fixed metric and vaguely counseled that tribunals should not “place the bar very high.”²⁷⁸ How the duration of the transaction at issue should be calculated is equally unclear and susceptible to unpredictable divergence. For example, tribunals have diverged as to whether the calculation of duration should include unexpected delays, pre- or post-contract phases, and/or contract guarantees.²⁷⁹

The inherent difficulty, if not impossibility, of applying principled and predictable standards to the question of duration makes it ill-suited for distinguishing investments from commercial transactions. This is to say nothing

²⁷⁵ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 57.

²⁷⁶ See e.g. *CSOB Jurisdiction*, *supra* note 49, ¶ 72 (“An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.”); *SCHREUER II*, *supra* note 17, art. 25, ¶ 93 (“An investment operation typically involves a number of ancillary transactions.”).

²⁷⁷ *Salini Jurisdiction*, *supra* note 13, ¶ 54.

²⁷⁸ *Bayindir Jurisdiction*, *supra* note 82, ¶ 133.

²⁷⁹ Compare *Joy Mining Jurisdiction*, *supra* note 103 (finding that technical assistance and maintenance obligations that lasted 6 months and 10 years respectively were insufficient to meet the duration requirement) with *Jan de Nul Jurisdiction*, *supra* note 83 (finding a contract to dredge the Suez Canal was of a sufficiently long duration because it lasted for two years, considering the pre-tender and post-Contract execution phases).

of how particularly inappropriate any duration requirement is in light of the Convention drafters' express consideration and rejection of one.²⁸⁰

4. The "Operation" Theory of Investment Generally

Both explicit and implicit in the above factors is the notion that an investment amounts, not just to an asset or sale, but to an operation or venture. As noted above, *Poštová Banka* and *Romak* required a contribution to "an economic operation creating value"²⁸¹ or "venture."²⁸² *Poštová Banka* and *Alps Finance* similarly identified the type of risk associated with an investment as "operational risk."²⁸³ The existence of an operation may also be the only way to make sense of the tribunals' assessment of "duration." For example, an enterprise—or at least a traditional long-term enterprise—would not expect to receive a single up-front payment, but would rather expect to incur upfront sunk costs which it would then expect to recoup later. An enterprise—or at least a traditional brick-and-mortar enterprise—would also not expect to conduct just a single "one-off" transaction.²⁸⁴

Together, these factors suggest that the commercial transaction test is not just based on the negative definition of "investment" (investment does not mean sale or like transient transaction) but also on a positive definition of "investment" as an operation or enterprise within the host State; in other words, a foreign direct investment ("FDI").²⁸⁵ While potentially justifiable on policy grounds,²⁸⁶ that positive definition of "investment" is effectively precluded by the text of Article 25. Article 25 employs the word "direct[]" only once,²⁸⁷ and

²⁸⁰ See Mortenson, *supra* note 22, at 298 ("The World Bank drafters' first attempt to define 'investment' imposed a five-year minimum duration. This limitation was strongly criticized in the Legal Committee and was dropped in the final draft after lingering debate over the issue." (internal citations omitted)).

²⁸¹ *Poštová Banka Award*, *supra* note 86, ¶ 361 (emphasis added).

²⁸² *Romak Award*, *supra* note 121, ¶ 222 (emphasis added).

²⁸³ *Poštová Banka Award*, *supra* note 86, ¶¶ 369-70 (emphasis added); *Alps Finance Award*, *supra* note 22, ¶ 241 (emphasis added).

²⁸⁴ See *Romak Award*, *supra* note 121, ¶ 227.

²⁸⁵ See, e.g., DAVID MILES & ANDREW SCOTT, *MACROECONOMICS* 513 (2d ed. 2015) (Foreign direct investment ("FDI") implies "a lasting interest in an enterprise resident in another economy... a long-term relationship between the investor and the recipient firm, where the investor has a significant influence over the enterprise."). A 10% direct shareholding is generally considered sufficient to establish a foreign direct investment, while a lower shareholding is considered a portfolio investment. See OECD, *OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* 234 (4th ed. 2008), <https://www.oecd.org/investment/fdibenchmarkdefinition.htm> ("Foreign direct investment (FDI) is a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (*direct investor*) in an enterprise (*direct investment enterprise*) that is resident in an economy other than that of the direct investor.") (emphasis in original). See *id.* ("The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship."); IMF, *BALANCE OF PAYMENTS MANUAL* 86 (1993) ("[A] direct investment enterprise is . . . an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise).")

²⁸⁶ See *infra*, Section V.A.

²⁸⁷ ICSID Convention, *supra* note 10, art. 25.

it quite clearly modifies the clause “arising out of” and *not* the term “investment.” As explained by the tribunal in *Fedax*, this textual formulation effectively precludes interpreting Article 25 “investment” as limited to direct investments:

[T]he text of Article 25(1) establishes that the ‘jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.’ It is apparent that the term ‘directly’ relates in this Article to the ‘dispute’ and not to the ‘investment.’ It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction.²⁸⁸

In fact, interpreting Article 25 “investment” as limited to “direct investment” would effectively switch the placement of the term “direct” from its original location, such that it would read as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising ~~directly~~ out of an **direct** investment

Such a reading is precluded by the plain text of the Article and therefore must be rejected.²⁸⁹ In fact, multiple tribunals have accepted jurisdiction over investments, such as debt, that do not constitute FDI.²⁹⁰

5. The Resulting Uncertainty

Because the “duration,” “value creation” and “operational risk” theories of investment fail to provide a principled, predictable or textually supportable basis for distinguishing investments from other commercial transactions, their application in practice injects uncertainty into investor-State arbitration.

Evidence of this uncertainty can be found not only in the analysis of those factors, as shown above, but also in other awards that examined similar

²⁸⁸ *Fedax Jurisdiction*, *supra* note 48, ¶ 24.

²⁸⁹ The object and purpose of the ICSID Convention as expressed in its Preamble also offers little support for interpreting Article 25 “investment” as direct investment. The preamble of the ICSID Convention expressly “consider[s] the need for international cooperation for development, and the role of private international investment therein.” There is good reason to believe that FDI contributes more to economic development than non-direct forms investment, such as financial assets. *See infra* note 307 & accompanying text. However, while the Preamble’s reference to “the need for economic cooperation for development” can be viewed as a basis for *including* FDI under Article 25 “investment,” it cannot be reasonably viewed as a basis for *excluding other* types of investment, which while potentially less beneficial to economic development than FDI, are nonetheless still beneficial. The Preamble simply refers to “the role of private international investment” in international development, without specifying that such investment be direct.

²⁹⁰ *See, e.g.* *Fedax Jurisdiction*, *supra* note 48, ¶ 29 (admitting claims related to state-agency bonds); *Abaclat Jurisdiction*, *supra* note 78, ¶ 367 (admitting claims related to sovereign bonds); *Ambiente Ufficio Jurisdiction*, *supra* note 4, ¶ 472 (same); *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, ¶ 296 (Nov. 17, 2014) [hereinafter *Alemanni Jurisdiction*] (same).

transactions and came to diametrically opposite conclusions as to their nature as “investments.” In *Jan de Nul v. Egypt*, for example, the tribunal found that a contract to dredge the Suez Canal, involving the temporary mobilization of ships, not unlike that in *Malaysian Historical Salvors*, constituted an investment.²⁹¹ In *GEA v. Ukraine*, the tribunal found that a supply and services contract, not dissimilar from that in *Joy Mining*, constituted an investment.²⁹² And in diametric opposition to the award in *Poštová Banka*,²⁹³ three separate tribunals concluded that (Argentine) sovereign bonds were not mere commercial exchanges, but were investments under Article 25.²⁹⁴ Jurisprudence that reaches such disparate and apparently contradictory results is one characterized by a high-degree of uncertainty, or as Reisman and Vinnik describe it, “so incoherent so as to be a free choice for tribunals.”²⁹⁵

The uncertainty and incoherence of the investment-commerce distinction undermine the purpose of the regime,²⁹⁶ which is to encourage investment by creating credible and actionable commitments by the host State.²⁹⁷ Because the commercial transaction test is not “a bright line test that can be readily understood and applied by prospective beneficiaries of the investment treaty at the time they are deciding whether or not to commit resources to a project in the economy of the host State,” it does not serve, but instead undermines, this object and purpose.²⁹⁸ Prospective investors may not invest in States because they are unsure whether their activities will be protected, leading to losses by both the prospective investor and the prospective host State. States, unsure of what transactions are subject to protection, may refrain from taking beneficial regulatory actions in order to avoid triggering borderline claims, or may miscalculate and incur unexpected liability.²⁹⁹ The uncertainty also causes wasteful and unnecessary litigation. In the absence of a principled, predictable and textually supportable rule, investors and States are sure to continue to challenge tribunals’ jurisdiction, further extending the duration of the arbitration

²⁹¹ *Jan de Nul Jurisdiction*, *supra* note 83, ¶ 92.

²⁹² *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶ 153 (Mar. 31, 2011) (finding that a contractual arrangement whereby the claimant supplied over one million metric tons of diesel and naphtha, catalysts and other materials, together with “know-how on logistics, marketing, and the mobilisation of repairs and other services” for a period of three years “was clearly a complex relationship going far beyond a simple sale of raw materials” that constituted an Article 25 “investment”).

²⁹³ *Poštová Banka Award*, *supra* note 86, ¶ 371.

²⁹⁴ See *Alemanni Jurisdiction*, *supra* note 290, ¶ 296; *Ambiente Ufficio Jurisdiction*, *supra* note 4, ¶ 472; *Abaclat Jurisdiction*, *supra* note 78, ¶ 367.

²⁹⁵ Reisman & Vinnik, *supra* note 9, at 70.

²⁹⁶ Douglas, *supra* note 6, at 372 (emphasizing the importance that jurisdiction tests be “conducive to a relatively high degree of legal certainty”).

²⁹⁷ See Jeswald Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 HARV. INT’L L.J. 127, 130 (2017) (“A principal purpose of investment treaties and the main reason that developing countries sign them is to promote investment. Thus, the title of virtually all bilateral investment treaties states that it is a ‘treaty for the promotion...of investment’ or a ‘treaty for the...encouragement of investment.’”) (internal citations omitted).

²⁹⁸ Douglas, *supra* note 6, at 372.

²⁹⁹ There is an empirical debate as to whether BITs and ICSID actually promote foreign investment. See *infra* note 318.

and raising the overall costs of the process.³⁰⁰ Finally, the uncertainty and unpredictability undermine the legitimacy of the system, which is already subject to criticism for producing inconsistent decisions that cannot be justified *inter se*.³⁰¹

The commercial transaction test is even more problematic in the context of non-ICSID arbitrations, in which Article 25's jurisdictional requirements do not apply, and particularly when the parties have manifestly agreed to arbitrate the very disputes the test excludes. Applying the commercial transaction test in such circumstances not only causes uncertainty but also undermines the ability of States to effectively bind themselves through international agreements.

In sum, it is not just the disagreement over the meaning of "investment" that is the cause of so much of the uncertainty and incoherence surrounding the interpretation of that term. What commentators and tribunals agree on is also the problem.

V. POLICY CONSIDERATIONS

It is clear that the commercial transaction test is fundamentally flawed—historically, as a matter of interpretation, conceptually, and in practice. It does not fulfill the intent of the Convention's drafters, is not textually supportable, and does not apply a principled or predictable distinction between investment and other commercial activities. It is, simply put, legally unsustainable.

But is there a policy case for maintaining the commercial transaction test nonetheless?³⁰² Case law and commentary suggest four possible justifications: (i) to promote the efficiency of the investment regime; (ii) to filter out commercial disputes that could be adjudicated in other dispute resolution centers; (iii) to limit conflict with international commercial law; and (iv) to limit conflict with international trade law. In none of these roles, however, is the commercial transaction test precise or effective. To the contrary, it is at best a crude instrument for these purposes, all of which would be better pursued through other means. When considered against the uncertainty costs that the test

³⁰⁰ See Gaillard, *supra* note 7, at 1.

³⁰¹ See generally Franck, *supra* note 8 (discussing the inconsistency of the investor-State arbitration regime).

³⁰² As discussed above, commercial transaction is a vague term that is inherently intertwined with the concept of investment. Assessing the impact of subjecting such transactions to ICSID arbitration poses a challenge precisely because it is unclear what constitutes a commercial transaction as opposed to an investment. At the same time, it is clear that because tribunals believe such a distinction exists, eliminating the commercial transaction test would have some impact, though it is unclear with respect to what exact transactions. For the sake of simplicity, I focus the below analysis on the sale of goods, which appear to fall within most commentators' and tribunals' concept of "commercial transaction." I use the terms "sale of goods" and commercial transaction interchangeably, without prejudice to whether either constitutes an investment in any particular instance.

generates, the weak policy case for the commercial transaction test supports the legal conclusion that that it should be abandoned.

A. *Economic Efficiency*

The primary policy argument against a broad interpretation of Article 25 “investment” is that it would effectively expand ICSID’s jurisdiction and potentially lead to the filing of additional claims. States would thus either incur additional litigation costs and potential adverse judgments or forgo implementing beneficial regulations to avoid arbitration.³⁰³ These costs, in terms of both litigation costs and regulatory chill, would outweigh any benefit that accrues from subjecting additional transactions to ICSID jurisdiction.

The exclusion of some transactions from ICSID arbitration could in fact be justified on economic efficiency grounds. The principal economic function of the international investment regime is to promote foreign investment by lowering sovereign risk and its associated costs.³⁰⁴ To achieve this function, international investment law forces States to either “abstain from certain policy measures [they] would otherwise take, and/or compensate investors for certain measures” that they do take.³⁰⁵ In either scenario, States bear a cost by acceding to the regime. From the perspective of the State, acceding to the regime only makes sense if these costs are outweighed by the benefits of increased investment and the associated positive externalities. Moreover, the regime is efficient as a whole only if its transaction costs (e.g. litigation and other transaction costs) are lower than the overall benefits (to States and investors) achieved by it.³⁰⁶

In this context, it could indeed make sense to focus the protection of the regime on certain types of investments to the exclusion of other types. For example, it may make sense to focus protection on FDI, which is understood to yield more positive externalities to States in the way of employment, taxes, and technology transfer.³⁰⁷ Moreover, because of high sunk costs, FDI is not easily dischargeable, is subject to relatively more sovereign risk, and is thus more likely to benefit from investment protection. Conversely, it could make sense to

³⁰³ Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT’L L. 1, 1 (2015).

³⁰⁴ See Sykes, *supra* note 212, at 491.

³⁰⁵ Henrick Horn & Pehr-Johan Norback, *A Non-Technical Introduction to Economic Aspects of International Investment Agreements* (Research Inst. Industrial Econ. IFN Working Paper No. 1250, 2018), <https://www.ifn.se/wfiles/wp/wp1250.pdf> (emphasis removed). See also Puig, *supra* note 303, at 46 (noting that investment treaty claims may “subject governments to constant pressure, particularly given the destabilizing strain that accompanies parallel, sequential or combined legal actions. The need to defend ‘policy space’ more frequently, often in strategically staged proceedings, may result in risk aversion, rights accretion or regulatory chill.”).

³⁰⁶ See Horn & Norback, *supra* note 305, at 14.

³⁰⁷ It is for these reasons, that in his dissenting opinion in *Abacat*, Georges Abi-Saab called FDI the “‘ideal type’ of investment (in the Weberian sense of the term) for ICSID purposes.” *Abacat* Dissent on Jurisdiction, *supra* note 58, ¶ 55. See also Salacuse, *supra* note 297, at 135 (noting that development country governments consider FDI more valuable than other forms of capital because of the benefits it offers to local economics in the form of jobs, exports, increased productivity, technology transfer and growth).

exclude certain transactions, like sales of goods. Such transactions arguably offer less in the way of positive externalities than FDI. Moreover, because of their low sunk costs and short duration, they are subject to less sovereign risk and are less likely to benefit from investment protection.³⁰⁸

If the goal is to promote the overall efficiency of the international investment regime, however, the commercial transaction test is not a necessary or appropriate tool for doing so. As an initial matter, there are several reasons to believe that the commercial transaction test has a limited impact on the overall number of investment arbitrations, and therefore that abandoning it would not dramatically increase the overall investor-State caseload or its associated costs.

First, if it is true that sovereign risk with respect to so-called commercial transactions is relatively low, then we would not expect to see a significant number of claims arise from them. International investment arbitration addresses and compensates for sovereign risk. If commercial transactions are subject to less sovereign risk, relatively few acts of sovereign interference should occur, and relatively few arbitrations should result.³⁰⁹

Second, recoverable damages arising from commercial transactions—or at least the simple sales of goods—are likely to be relatively limited as compared with other types of transactions.³¹⁰ Unlike with respect to direct investments, the sunk costs of goods are low,³¹¹ and the seller's expectation damages are limited to losses stemming from the discrete goods or contract at issue. Moreover, assuming an obligation to mitigate damages, the relative mobility of goods and the availability of alternative markets mean that the damages related to sales of goods should be further limited as compared to fixed investment. When considered against the cost of ICSID arbitration, which can reach millions of dollars,³¹² these factors should further limit the number of additional investment arbitrations resulting from abandoning the commercial transaction test.

Third, most claimants already have the ability to avoid any Article 25 jurisdictional restrictions, including the commercial transaction test, by simply choosing to arbitrate their investor-State claims pursuant to the UNCITRAL Rules.³¹³ ICSID arbitration does offer some advantages over UNCITRAL arbitration, particularly in terms of enforcement, but those advantages are limited. The ICSID Convention requires that Contracting States enforce ICSID

³⁰⁸ See Sykes, *supra* note 212, at 519.

³⁰⁹ But see *infra* notes 324 & 325 & accompanying text discussing “umbrella clauses” and the exception to this general proposition.

³¹⁰ Sykes, *supra* note 212, at 519.

³¹¹ *Id.*

³¹² SCHREUER II, *supra* note 17, art. 59.

³¹³ See Reisman & Vinnik, *supra* note 9, at 70. As noted above, UNCITRAL tribunals have imported ICSID jurisprudence on the question of Article 25 “investment” even where they are not subject to the restrictions of that Article, but those instances appear limited. See, e.g., Alps Finance Award, *supra* note 22, ¶ 245; Romak Award, *supra* note 121.

awards as “as if [they] were a final judgment of a court in that State.”³¹⁴ Non-ICSID awards, on the other hand, are subject to enforcement pursuant to the New York Convention, which sets forth certain grounds for resisting enforcement of an award. But those grounds are “narrow,” and the burden of proof they require is “heavy.”³¹⁵ Indeed, with respect to the relatively small number of arbitral awards that are not complied with voluntarily, the “overwhelming majority” are recognized and enforced.³¹⁶ The commercial transaction test may therefore be simply “pric[ing] [ICSID] out of the market”³¹⁷ in favor of arbitration under the UNCITRAL Rules without significantly reducing the overall number of investment arbitrations. Thus, while jettisoning the test might shift investment claims back to ICSID from UNCITRAL, it should have a more limited impact on the overall number of investment arbitrations.

Moreover, there are several reasons to believe that States are better positioned than tribunals to weigh the costs and benefits of subjecting specific transactions to investment protection and to implement the exclusion of transactions whose protection they determine to be inefficient.

Whether the costs of subjecting certain transactions to ICSID jurisdiction outweigh the benefits is a complex question. Scholars continue to debate the question of whether and how investment treaties stimulate foreign investment and capital flows,³¹⁸ and the literature on how economic interests

³¹⁴ ICSID Convention, *supra* note 10, art. 54(1).

³¹⁵ See *Int'l Trading & Indus. Inv. Co. v. Dynacorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (“[Because] the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature.”); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 64 (D.D.C. 2013) (“The party resisting confirmation bears the heavy burden of establishing that one of the grounds for denying confirmation in Article V applies.”); see also BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, *supra* note 29, at 378 (“[T]he [New York] Convention establishes a ‘pro-enforcement’ approach toward foreign awards.”); *id.* at 377 (“[T]he New York Convention provides for an award’s presumptive recognition, subject to only narrow, enumerated exceptions. Likewise, most arbitration statutes, including the UNCITRAL Model Law, presumptively require the recognition of awards, again subject only to specifically-identified exceptions.”).

³¹⁶ BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, *supra* note 29, at 377.

³¹⁷ See *Reisman & Vinnik*, *supra* note 9, at 70.

³¹⁸ Various studies have reached different conclusions on the matter, though “on balance . . . one may say that the more recent of these studies tend to show a positive correlation” between BITs and foreign investment flows. Salucuse, *supra* note 297, at 132. See, e.g., Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment?: Only a Bit... and They Could Bite*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT 349 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (finding no causation between BITs and foreign investment); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005) (finding strong correlation between BITs and FDI); Salucuse, *supra* note 297, at 132 (finding a positive correlation between total capital flows and BITs); Jeswold Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67 (2005) (finding a positive correlation between the existence of BITs between the U.S. and developing countries and the capital flows to developing countries, but finding less evidence as to correlation with respect to BITs concluded with other OECD countries); Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment*, 42 LAW & SOC’Y REV. 805, 807 (2008) (finding no correlation).

implicate treaty design is still in its “nascent” stages.³¹⁹ Evaluating whether the coverage of specific transactions is efficient requires weighing both the opportunity costs of foregone regulation³²⁰ against the benefits of such coverage. With respect to sales of goods in particular, the benefits would include not just increased incidence of those transactions and the value they generate, but their support of FDI,³²¹ which is highly dependent upon other flows of goods and capital.³²²

States are in a better position to conduct this cost-benefit analysis than tribunals, particularly because the calculus may depend on each jurisdiction’s relative level of economic development, place in the international economy, and the strength of their domestic legal system. Their preferences, moreover, may change over time, as these factors evolve.³²³

States’ preferences may also depend upon other treaty obligations they have assumed, and in particular, whether the BIT at issue has a so-called umbrella clause. While “relatively uncommon”³²⁴ and controversial, at least some tribunals have found such clauses to convert contractual rights into actionable treaty rights.³²⁵ Where such a clause applies and is interpreted to convert breaches of contract into breaches of the treaty, the cost of consenting to the arbitration of so-called commercial transactions would likely be higher, as more contracts would be covered by the umbrella clause, and therefore more commercial disputes would be converted into treaty claims. On the other hand, where no such clause applies or it is not given such effect, the cost would likely be lower, because only pure treaty claims arising from such contracts would be subject to ICSID.

³¹⁹ Horn and Norback, *supra* note 305, at 4. See also Sykes, *supra* note 212, at 482.

³²⁰ Puig, *supra* note 303.

³²¹ See Salacuse, *supra* note 297, at 134; CARMEN REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 31 (2009) (“In practice, the three types of capital flows [debt, equity, and FDI] are often interlinked (e.g., foreign firms will often bring cash into a country in advance of actually making plant acquisitions).”).

³²² FDI and the sale of goods are so inter-dependent that half of all international trade in goods is between affiliates of multinational corporations. See European Commission, COM(2010)343 Final, 7 July, 2010, Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, “Towards a Comprehensive European International Investment Policy”, at 3.

³²³ For example, prior to the 1980s, many governments preferred indirect investment as opposed to direct investment so as to maintain domestic ownership of industries. Reinhart & Rogoff, *supra* note 321, at 31, n. 13.

³²⁴ See Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351, 372 (2016).

³²⁵ For background on and a taste of the debate over umbrella clauses, see Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty*, 5 J. WORLD INV. & TRADE 555 (2004); John P. Gaffney & James L. Loftis, *The “Effective Ordinary Meaning” of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims*, 8 J. WORLD INV. & TRADE 5 (2007); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Period, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 249-55 (2004); Stephan Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1 (2009); 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*, 14 GEO. MASON L. REV. 135 (2006).

States are also better positioned to implement the exclusion of certain transactions, though the negotiation of such exclusions would no doubt involve its own costs. As discussed above, pursuant to the “double-barrel” test, States may narrow the definition of Article 25 “investment”³²⁶ by way of the definitions of “investment” in their respective consent documents. Those definitions are almost always more robust and granular than the undefined term in the ICSID Convention. States may therefore use these definitions to carefully excise specific transactions in a way that avoids the uncertainty of the commercial transaction test.

B. *The Exclusion of Commercial Disputes*

The exclusion of commercial transactions from ICSID jurisdiction has also been justified as means to exclude commercial *disputes* from the Centre. According to the Comments to the Additional Facility Rules, the purpose of the commercial transaction exclusion in that forum was to emphasize that the Additional Facility is not an “alternative to existing mechanisms for the settlement of commercial disputes.”³²⁷ The tribunal in *Joy Mining*—the first to reject jurisdiction on the basis of the commercial transaction test—appears to have employed similar reasoning. In rejecting jurisdiction over a so-called commercial transaction, it asked rhetorically:

[I]f a distinction is not drawn between ordinary sales contracts, even if complex, and an investment...what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?³²⁸

This reasoning fails to provide a basis for the exclusion of commercial transactions for the same reason that a proposal in the *travaux* to exclude commercial disputes fails to provide such a basis:³²⁹ it conflates the type of economic activity with the type of cause of action it gives rise to.

The “commercial” nature of international commercial arbitration refers to the type of relationship between the disputing parties, not the type of claims which either party may bring, which may include contractual, statutory or other claims.³³⁰ With limited exceptions, international investment arbitration is not

³²⁶ See *supra* notes 65-67 & accompanying text.

³²⁷ Comment to Additional Facility Rules, *supra* note 207, art. 4, cmt. i.

³²⁸ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 58.

³²⁹ See *supra* notes 202-204 & accompanying text.

³³⁰ Cf. BORN ICA Vol. I, *supra* note 244, at 304 (“The commercial relationship requirement [of the New York Convention] focuses only on the nature of the underlying relationship between the parties, and not on whether the parties are asserting contract claims, statutory claims, or other types of claims . . .”).

concerned with disputes arising in a commercial relationship; it addresses disputes that arise between a State and private actor in a sovereign-subject relationship.³³¹ Each mechanism thus deals with a distinct type of risk arising from a distinct type of relationship: international commercial arbitration addresses commercial risk that arises between two parties in a commercial relationship; international investment arbitration addresses sovereign risk that arises in a sovereign-subject relationship.³³² As numerous tribunals have pointed out, commercial and sovereign risk are distinct, such that the same activity can be subject to both risks, one or the other, or neither.³³³ Sovereign risk may arise in the context of a purely commercial relationship, where the State interferes with a private party's ability to perform its contractual obligations. Commercial risk, on the other hand, may arise in a contractual relationship between a private party and a State, where the State defaults on its contractual obligations.³³⁴

Because the commercial transaction test relies on a type of transaction as a proxy for a type dispute, it is both over- and under-exclusive as a tool for filtering out commercial disputes. It is over-exclusive because it excludes sovereign-subject disputes arising from transactions that are "commercial" in nature. It is under-exclusive because it does not exclude commercial disputes where the underlying transaction is an investment.³³⁵ If the intent is to exclude commercial disputes from ICSID arbitration, the better way is for tribunals to

³³¹ See GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 45 (2007) ("[Investment treaty arbitration] is predominantly used to resolve disputes arising from the exercise of public authority. Put differently, the subject-matter of investment treaty arbitration is a class of disputes arising from the state's relationships with individuals who are subject to the exercise of public authority by the state. This is very different from the consensual arbitration of conventional international disputes (between states) or commercial disputes (between private parties) in which both disputing parties are equally capable of possessing legal rights and obligations."). See also Douglas, *supra* note 6, at 363, 383 ("[T]he *raison d'être* of an investment treaty is precisely to reduce the sovereign risk associated with a [S]tate's enforcement jurisdiction."). While some BITs contain umbrella clauses which consent to investor-State arbitration of contractual disputes between State entities and foreign investors, such clauses are the exception to the general rationale of the investor-State regime, which is to protect against sovereign risk. See also Arato, *supra* note 324 (discussing the ways that international investment law governs contracts with States).

³³² See Douglas, *supra* note 6, at 386 ("[I]nvestment treaties . . . are not concerned with commercial risk.").

³³³ See, e.g., *Compañía de Aguas del Aconquija SA & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 60, (July 3, 2002) ("[A] particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract."); *id.* ("[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law, in the case of the Concession Contract, by the proper law of the contract."); *Jan de Nul Jurisdiction*, *supra* note 83, ¶ 80 ("Accordingly, the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims.").

³³⁴ See, e.g., *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107 (D.C. Cir. 2017) (affirming district court award enforcing an international arbitration award against Belize issued by the London Court of International Arbitration for breach of contract).

³³⁵ The commercial transaction test would exclude some commercial disputes that would otherwise be admitted pursuant to umbrella clauses, namely, commercial disputes that arise from a commercial transaction with the host State.

directly examine the nature of the dispute and determine whether it arises from a commercial relationship or a State exercising its sovereign powers.

C. *Avoiding Conflict with International Commercial Law*

Relatedly, at least one tribunal has justified the exclusion of “commercial transactions” from ICSID jurisdiction as necessary to avoid conflict with international commercial law. The tribunal in *Joy Mining* stated:

International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order.³³⁶

If the goal, however, is to prevent conflict with commercial law, the commercial transaction test is the wrong tool for doing so. The potential for conflict between negotiated contract terms and investment law protections exists independent of whether so-called commercial transactions are subject to investor-State arbitration. That is because international investment law applies to at least some “non-commercial” contracts (*i.e.*, so-called “investment contracts”) between States and foreign nationals.³³⁷ Indeed, investment treaties are understood to have generated a “rudimentary, yet broad, law of contracts”³³⁸ that has the potential to intersect and conflict with private international law and party choice.³³⁹ For example, a conflict may arise where a contract designates a commercial arbitration center or national court as the exclusive forum for dispute resolution, but the governing treaty contains an umbrella clause that elevates contractual breaches to breaches of treaty and allows recourse to ICSID.³⁴⁰ A similar conflict may arise with respect to the calculation of damages, where a contract specifies liquidated damages in the case of breach, but international investment law provides a standard of fair market value.³⁴¹

³³⁶ *Joy Mining Jurisdiction*, *supra* note 103, ¶ 58.

³³⁷ Arato, *supra* note 324, at 352.

³³⁸ *Id.*

³³⁹ Arato identifies at least three areas where international investment law may intersect and conflict with contracts: forum selection clauses, fair and equitable treatment, and damages. *See id.*

³⁴⁰ Investment tribunals have diverged on how to handle such cases. *Compare* *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 128 (Jan. 29, 2004) (giving precedent to the contract’s exclusive forum selection clause) *with* *SGS v. Paraguay Jurisdiction*, *supra* note 267, ¶¶ 131, 138-142 (privileging the treaty clause providing a right to ICSID arbitration).

³⁴¹ Tribunals have diverged on this question as well. *Compare* *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 304 (Sept. 28, 2007) (applying international law principles on damages in the context of a contractual arrangement); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 268 (May 22,

Excluding so-called commercial contracts may isolate some contractual arrangements from the contract law that investment treaties create.³⁴² But it does not actually keep international private law “separate” from investment treaty law,³⁴³ which will apply to other privately negotiated contracts regardless. Nor does it contribute to “a stable legal order.” In fact, it does nothing to solve the underlying tension between the protections provided by investment treaties and the agreements of private parties. A more complete way of addressing that tension would be to exclude commercial (e.g., contractual) disputes (not transactions) from ICSID arbitration. Short of that, resolving this tension will require a more nuanced and thoughtful consideration for how the two systems interact and inter-relate.³⁴⁴

D. *Avoiding Conflict with International Trade Law*

Finally, the commercial transaction test is arguably justifiable as a means of avoiding conflict with international trade law. The potential for conflict with trade law is particularly salient because both trade and investment law address the same types of acts (sovereign) and provide the same or similar guarantees, including national treatment and most-favored nation treatment.³⁴⁵ If they covered the same subject matter (for example, the cross-border trade of goods), inefficient and inconsistent parallel proceedings could result.³⁴⁶

In addition to causing inefficiencies and inconsistencies, such parallel proceedings could also erode the different approaches to dispute resolution and remedies taken by the two regimes. Investor-State arbitration provides standing to aggrieved private actors to bring claims directly against the State and offers both monetary and sometimes injunctive relief to damaged parties. The WTO dispute settlement procedure, on the other hand, grants no standing to private parties and does not allow damages to private parties harmed by impermissible trade restrictive measures.³⁴⁷ Instead, complaints of violations may be submitted by State members only, and the relief made available is restricted to “voluntarily

2007) (same); and CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005) (same) with Kardassopoulos v. Republic of Georgia, ICSID Case No. ARB/05/18, Award, ¶¶ 480-481 (Mar. 3, 2010) (finding a presumption that international law principles apply absent an express statement in the contract to the contrary).

³⁴² Arato, *supra* note 324, at 352.

³⁴³ Joy Mining Jurisdiction, *supra* note 103, ¶ 58.

³⁴⁴ For thoughtful analysis on this question, see generally Arato, *supra* note 324, and Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1 (2019).

³⁴⁵ See Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin* 102 AM. J. INT'L L. 48 (2008).

³⁴⁶ See Puig, *supra* note 303, at 16-17.

³⁴⁷ The WTO Agreements, including specifically the General Agreement on Tariffs and Trade (GATT) and the Agreement on Government Procurement (GPA), require Contracting States to establish domestic procedures for the challenge of certain State measures. See General Agreement on Tariffs and Trade, 1994 art. X.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994]; and Agreement on Government Procurement art. XVIII, Apr. 12, 1979, 1235 U.N.T.S. 258. Most adjudication of trade disputes happens before such tribunals rather than the WTO. See PETROS MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE*, VOL. 2, 65, 688-691 (2016).

agreed compensatory market access” by the violating State, or, failing that, “the prospective suspension of [trade] concessions” by the aggrieved State.³⁴⁸ The substantive overlap in trade and investment regimes allows aggrieved private actors to bridge this divide and privatize what would otherwise be considered a public inter-State trade dispute by bringing the action before an investor-State tribunal.³⁴⁹

But if the potential for conflict between international investment and international trade law is a concern, the commercial transaction test is an inadequate tool for addressing it. The international trade and investment regimes have already been moving toward convergence (and thus potential conflict), and will likely continue to do so regardless of the definition of “investment” adopted by ICSID tribunals.³⁵⁰ This convergence is evident in the legal architecture of the regimes³⁵¹ and in the emergence of parallel trade and investment proceedings that have already been brought with respect to lumber,³⁵² tobacco, and soft-drink regulations.³⁵³

Indeed, these parallel proceedings demonstrate that cross-border sales of goods may be subject to investment arbitration regardless of whether the commercial transaction test is applied or not. The Mexican soft-drink related dispute is illustrative. In the early 2000’s, Mexico imposed certain import requirements and a 20% excise tax on soft drinks containing a sweetener other than sugar, including high-fructose corn syrup (“HFCS”).³⁵⁴ This measure was successfully challenged by the United States through the WTO dispute settlement body,³⁵⁵ resulting in a settlement framework on market access, which

³⁴⁸ Gaetan Verhoosel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT’L ECON. L. 493, 494 (2003).

³⁴⁹ ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 18 (2009). See also Van Harten, *supra* note 331, at 97 (“the claimant is no longer a publicly representative entity but a private party with full custody of the claim, who can decide the manner and extent to which international adjudication will be used to resolve a regulatory dispute”).

³⁵⁰ See Puig, *supra* note 303, at 12 (“The legal frameworks have adapted—albeit slowly—to the ‘convergence’ between trade and investment and the needs of supply-chain trade.”).

³⁵¹ For example, multiple multilateral free trade agreements contain within them investment chapters providing similar guarantees to international investment as stand-alone bilateral investment treaties. See Mark Wu, *Property, Investment and the Scope of Investment Protection Obligations*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 169, 177 (Zachary Douglas et al. eds., 2014); see generally DiMascio and Pauwelyn, *supra* note 345 (discussing the similarities and differences in the application of National Treatment in the trade and investment regimes). Moreover, the WTO framework has also moved expressly into the governance of investment-related matters by way of three different agreements concluded during the Uruguay Round, including the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

³⁵² See L. Guglya, *The Interplay of International Dispute Resolution Mechanisms: The Softwood Lumber Controversy*, 2 J. INT’L DISP. SETTLEMENT 175 (2011).

³⁵³ See Wu, *supra* note 351, at 170-171, nn. 9 & 10.

³⁵⁴ This tax was preceded by the imposition of anti-dumping duties on high fructose corn syrup (HFSC) imported from the U.S. Those measures were successfully challenged by the United States in the WTO and thereafter withdrawn by Mexico. See Panel Report, *Mexico – Anti-Dumping Investigation on High Fructose Corn Syrup from the United States*, WTO Doc. WT/DS132/ (adopted Feb. 24, 2000).

³⁵⁵ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006).

included Mexico's withdrawal of the 20% tax.³⁵⁶ At the same time, four U.S. companies initiated three separate investor-State arbitrations against Mexico for the import requirements and excise tax, arguing that the tax violated Mexico's national treatment obligations under NAFTA's Chapter 11.³⁵⁷ In particular, the claimant in *Cargill v. Mexico* asserted that Mexico's 20% tax on soft drinks containing HFCS discriminated against its investment in Mexico, whose business was to import HFCS from its parent company in the U.S. and then sell the product to Mexican bottling companies.³⁵⁸

Mexico did not dispute that Cargill's Mexican subsidiary, which was headquartered in Mexico and employed over 1,000 people, amounted to an investment.³⁵⁹ Mexico did, however, argue that the tribunal lacked jurisdiction over claims for any losses related to Cargill's activities as a producer and exporter of HFCS. In other words, Mexico argued for separating Cargill's foreign direct investment from the goods that it imported, and for limiting the tribunal's jurisdiction to the former. The tribunal rejected that argument, however, and found that Cargill's investment included its "sale into and distribution of HFCS within the Mexican market," and that the excise tax prevented the claimant from operating that investment.³⁶⁰ The tribunal further noted that "there is no express or implied presumption that measures dealing with goods cannot *ipso facto* be alleged to be measures 'relating to' investors or investments."³⁶¹ It held that the import business of the Mexican affiliate and the production and export business of the U.S. parent company were just two "side[s] of the [same] coin."³⁶² It accordingly awarded the claimant \$77.3 million in damages,³⁶³ which included losses suffered by both the U.S. export company and the Mexican import company.³⁶⁴

While controversial,³⁶⁵ the decision in *Cargill* demonstrates that where an exporter of goods maintains a purchasing entity in the importing State, that

³⁵⁶ See Letter from Ambassador Richard T. Crowder to Undersecretary Angel Villalobos, U.S. TRADE REPRESENTATIVE (July 27, 2006), www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file694_10810.pdf.

³⁵⁷ See *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009) [hereinafter *Cargill Award*]; *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (Nov. 21, 2007) [hereinafter *ADM Award*]; *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Award (Aug. 18, 2009) [hereinafter *Corn Products Award*].

³⁵⁸ While Mexico argued that the tax was a valid trade counter-measure instituted in response to U.S. dumping of HFCS in the Mexican market, all three tribunals, including the tribunal in *Cargill*, rejected that argument and found for the claimants and awarded damages. *Cargill Award*, *supra* note 357, ¶ 559 (awarding \$77.3 million); *Corn Products Award*, *supra* note 357 (awarding \$58.4 million); *ADM Award*, *supra* note 357, ¶ 304(4) (awarding \$33.5 million).

³⁵⁹ *Cargill Award*, *supra* note 357 ¶ 167.

³⁶⁰ *Id.* ¶¶ 519-526.

³⁶¹ *Id.* ¶ 153.

³⁶² *Id.* ¶ 525.

³⁶³ *Id.* ¶ 559.

³⁶⁴ *Id.* ¶¶ 519-26.

³⁶⁵ For critical takes on the decision, see Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35, 48 (2013), which argues that the *Cargill* award is disconnected from the policy goal of promoting and protecting FDI; Matthew Kronby, *Cargill v.*

entity may challenge measures that regulate the goods that it imports. A broader definition of “investment” that includes imported goods as investments in and of themselves would of course increase the opportunity for challenging such regulations. Davies argues that if the facts of *Cargill* were changed such that Cargill did not have a local Mexican subsidiary, “the effect would most likely be to remove the existence of any investment”³⁶⁶ and thus divest the tribunal of jurisdiction. Yet, in a world where half of all trade consists of intermediate goods and services traded among affiliates of the multinational companies,³⁶⁷ imported goods are likely to be subject to investor-State arbitration regardless of whether Article 25 excludes such goods as investments in their own right.

In this context, the potential for conflict with international trade law requires thoughtful consideration of how the two regimes may and should interrelate. Specifically, the fundamental characteristics of the international investment regime and the fundamental nature of goods generally suggest how the effects of extending jurisdiction to imports even absent a local enterprise may be limited.³⁶⁸ First, investor-State arbitration requires a territorial link between the investment and the host State respondent.³⁶⁹ Imported goods would develop a territorial nexus sufficient to subject to them jurisdiction only once they had entered into the host State (and passed any tariff barrier) or if the contract for the exported goods was subject to the local law of the host State.³⁷⁰ Second, even with respect to goods that meet the territorial requirement, damages are likely to be relatively limited, as discussed above.³⁷¹ Third, unlike the WTO’s enforcement mechanism, investor-State arbitration is fundamentally backward-looking.³⁷² Whereas adverse WTO decisions provide market access

Mexico: *The Territorial Scope of Damages Under the NAFTA*, 8 GLOBAL TRADE & CUSTOMS J. 359, 360 (2013), which argues that the tribunal’s reasoning was “not entirely persuasive” and Puig, *supra* note 303, at 27, which argues that *Cargill* sets a “very bad precedent” because “it allows investors to convert losses suffered by production facilities in one NAFTA country into losses suffered in another, and goes beyond the jurisdictional authority of investor-State tribunals on investment into trade.”

³⁶⁶ Arwel Davies, *Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?*, 15 J. INT’L ECON. L. 793, 822 (2012).

³⁶⁷ See *Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, “Towards a Comprehensive European International Investment Policy”*, at 3, COM (2010) 343 final (July 7, 2010).

³⁶⁸ As discussed above, the limited duration of commercial contracts, including imports, should translate into less risk of sovereign interference. See *supra* Section V.A.

³⁶⁹ See Douglas, *supra* note 6, at 382-83 (definitions of “investments” that include “claims to money” or “claim to performance” “must be read in their proper context, which is to define the rights and interests that qualify as *assets* that might qualify as investments *in the host state*.... [t]his territorial link [to the host state] is necessary because a state’s jurisdiction in international law to enforce its laws and regulations is territorial and the *raison d’être* of an investment treaty is precisely to reduce the sovereign risk associated with a state’s enforcement jurisdiction.”).

³⁷⁰ See LAWRENCE COLLINS, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 1117 (14th ed. 2006) (noting that the *situs* of a chose-in-action is the country in which it is properly recoverable or can be enforced). Claims for tariffs imposed at the border should not be actionable. This is consistent with the application of National Treatment in the GATT 1994, *supra* note 347. See DiMascio & Pauwelyn, *supra* note 345, at 47-48.

³⁷¹ See accompanying text of *supra* notes 310-311; see also Sykes, *supra* note 212, at 519.

³⁷² See Wu, *supra* note 351, at 174-75 (“the international trade regime seeks to promote trade liberalization through ‘reciprocal and mutually advantageous arrangements directed toward the reduction of tariffs and other barriers to trade.’ The international investment regime, on the other hand,

prospectively, investor-State enforcement aims to compensate for harmful actions that occurred in the past.³⁷³

Together, these principles suggest that actions related to imported goods should be admissible but limited to circumstances in which the imports suffered some adverse action in the territory of the host State. The admission of imports to ICSID jurisdiction should *not* be used as an opportunity to challenge prospective harm that *could* be incurred if the import were to pass the border as a result of a policy already in place. Again, the *Cargill* arbitration is illustrative. In that case, Cargill was awarded future lost profits on products that it had expected to import but did not in light of the Mexican government's 20% excise tax on non-sugar sweeteners. The tribunal awarded damages on these hypothetical imports because the basis of jurisdiction was Cargill's business subsidiary in Mexico. According to the tribunal, it made sense to award lost profits on Cargill's import operation generally (as opposed to actually realized imports) because the investment here was defined as the enterprise. If, counterfactually, Cargill had not maintained a physical operation in Mexico but its claims were nevertheless admitted on the grounds that its imports of HFCS were protected investments, the principles outlined above suggest that its damages should have been limited to any actual losses suffered on imports already in the country, when the Mexican measures were passed. Moreover, any damages awarded should have been reduced to the extent the imported HFCS could have been sold elsewhere.

VI. CONCLUSION

Amid "[t]he intensive debate, not to say controversy, regarding the term 'investment,'" ³⁷⁴ tribunals and commentators have agreed on at least one thing: "ordinary commercial transactions" ³⁷⁵ like "simple sales and purchases of goods . . . clearly do not qualify as investments." ³⁷⁶ As this Article has shown, this consensus has been highly influential. In terms of the number of negative jurisdictional awards it has justified, the investment-commerce distinction has

seeks to promote greater cross-border investment, through recognizing that 'reciprocal protection under international agreement of such investments will be conducive to [its] stimulation.'" (quoting GATT 1994 preamble and United Kingdom of Great Britain and Northern Ireland 2005 Model Bilateral Investment Treaty, preamble, respectively)). See also DiMascio & Pauwelyn, *supra* note 345, at 88 ("International trade agreements . . . [seek] to liberalize market access for foreign goods and services in order to boost overall welfare through a more efficient allocation of the world's resources. International investment agreements, primarily BITs, provide stable legal standards and an autonomous enforcement system to reduce the risk premium for individual investors, thereby promoting greater flows of capital across borders and the economic development of host countries.").

³⁷³ See, e.g., DiMascio & Pauwelyn, *supra* note 345, at 81 ("the overall history of investment treaties demonstrates that the national treatment provisions were inserted into most BITs to protect individual foreign investors from targeted attacks by their host governments."). While investor-State arbitration provides for expectation damages, including for future lost profits, such damages are still the result of a harm realized in the past.

³⁷⁴ Ambiente Ufficio Jurisdiction, *supra* note 4, ¶ 442.

³⁷⁵ SCHREUER II, *supra* note 17 art. 25, ¶ 122.

³⁷⁶ SCHREUER I, *supra* note 13, art. 25, ¶ 120.

had an impact equal to or greater than the other dominant definition of "investment," the *Salini* test.

Yet the investment-commerce distinction is fundamentally flawed—as a matter of history, interpretation, concept, and practice. Contrary to statements in the literature and case law, there was no fundamental assumption on the part of the Convention's drafters that commercial transactions would be excluded from ICSID. Nor does the Convention's text require that result: at least some so-called commercial transactions fit comfortably within reasonable textual interpretations of the term "investment." Conceptually, investment and commercial transactions are inherently intertwined: investment is in fact a *type* of commercial activity, and even the sale of goods may constitute an investment pursuant to economic principles. Finally, the commercial transaction test used to apply the distinction in practice provides no principled, predictable or textually supportable basis for distinguishing between investment and non-investment transactions. Nor does it effectively implement any policy goal; it merely sows confusion and uncertainty.

If the one thing that tribunals and commentators have been able to agree on with respect to the definition of "investment" is misconceived and is at the root of the uncertainty surrounding that term, where does that leave the "investment" debate?

It should not, I would argue, lead it back to the subjective approach to the definition of "investment." The term "investment" can and should have a fixed boundary even without the investment-commerce distinction. The positive definitions of "investment"—the "ordinary meaning" and the *Salini* test definitions—offer two such potential boundaries.

To those who maintain that those positive definitions do not provide a sufficiently hard boundary for the term and leave it vulnerable to "infinitely elastic" interpretations,³⁷⁷ I suggest consideration of another negative definition: one that defines "investment" not vis-à-vis commercial transactions, but instead vis-à-vis *consumption* transactions.

As discussed above, the fundamental distinction drawn in economics is not between investment and commerce, but between investment and *consumption*. While consumption transactions include outlays for personal end-use, investments are purchases for future use that "will produce value in the future."³⁷⁸ This distinction, of course, recalls one of the main factors used in the commercial transaction test: the creation of value.³⁷⁹ As I argued above, the problem with that factor is not that it is inconsistent with the definition of "investment," but rather that it is misapplied to exclude transactions that actually *do* create value and that *do* constitute investments. A true application of the

³⁷⁷ Waibel, *supra* note 11, at 722.

³⁷⁸ Moselle, *supra* note 1, at 12 (emphasis removed).

³⁷⁹ See, e.g., *Poštová Banka Award*, *supra* note 86, ¶ 361 (requiring a contribution to "an economic operation creating value").

“value creation” factor is fully consistent with the investment-consumption distinction.

The focus on future value creation is also consistent with the “ordinary meaning” definition of “investment,” which requires a present outlay (i.e. “commitment of money or other assets”) in order to create value in the future (i.e., “for the purpose of providing a return”).³⁸⁰ It can help inform the outer boundary of that definition by clarifying that not “any kind of asset or economic transaction”³⁸¹ qualifies as an investment, and that, in particular, end-use consumer transactions do not qualify.

In principle, all of the activities found to be commercial transactions in the cases described in Part III would constitute investments under this approach. The engineering, delivery and maintenance of a longwall mining system (*Joy Mining*), efforts to recover shipwreck cargo (*Malaysian Historical Salvors*), the delivery and sale of wheat (*Romak*) and poultry (*Global Trading*), the purchase of receivables (*Alps Finance*), the purchase of coal for commercial power generation (*Nova Scotia Power*), government bonds (*Postova*), and the purchase of hot briquetted iron (*Tenaris*)—none of these were for the personal end-use of the claimants. They were rather aimed at some future use or return.

This does not necessarily mean, however, that each of the associated claims would be covered by ICSID’s jurisdiction. A definition of “investment” based on the investment-consumption distinction would require that an actual outlay or purchase was made, not just intended or promised—a factor that could exclude some contracts. Moreover, jurisdiction would require that the investment was in the territory of the Respondent State—a factor that, as discussed above, could exclude the cross-border sale of goods (like the wheat and poultry at issue in *Romak* and *Global Trading*), regardless of whether those goods were found to constitute investments. And of course, they would be subject to all of ICSID’s other jurisdictional requirements, including “consent in writing.”

Replacing the investment-commerce distinction with an investment-consumption distinction would not solve all of the disagreements in the investment debate. Certainly, creative lawyers would find ways to argue over this definition as well. But it has sufficient qualities, at least facially, to warrant further exploration. In contrast to the subjective approach, it provides an objective and independent meaning to the term “investment,” respecting the text of the Convention and the principles of treaty interpretation required by the VCLT. In contrast to the *Salini* test, the investment-consumption distinction is at least in theory predictable and cannot be stretched or shrunk by tribunals at their whim. And finally, in contrast to the investment-commerce distinction, it

³⁸⁰ *Malaysian Historical Salvors Annulment*, *supra* note 16, ¶ 57.

³⁸¹ *Romak Award*, *supra* note 121 ¶ 205. *See also* Mortenson, *supra* note 22, at 260 (suggesting investment be defined as “any plausibly economic activity or asset”).

defines investment's outer boundary based on basic economic principles, rather than vague intuitions.

Regardless of whether this or another definition of "investment" is adopted, the current distinction drawn by ICSID tribunals between commercial and investment transactions should be abandoned.