

## NOTES

### CONSISTENTLY INCONSISTENT: WHAT IS A QUALIFYING INVESTMENT UNDER ARTICLE 25 OF THE ICSID CONVENTION AND WHY THE DEBATE MUST END

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Someone should really give those lawyers a pat on the back. And a punch in the face. But a pat on the back first.<sup>1</sup>

*International investment has helped to pave the way for an increasingly globalized world community. Consequently, the International Centre for Settlement of Investor Disputes (ICSID)—existing under the mandate of the World Bank and with the stated purpose of increasing economic development abroad—has become the leading international arbitration mechanism currently available for settling disputes arising out of such investments. It is unsettling, therefore, that the interpretation of “investment” within article 25 of the ICSID Convention (the provision that determines whether an ICSID tribunal may exercise jurisdiction over a dispute) has given rise to a unique interpretive controversy because the ICSID Convention fails to define “investment.”*

*Accordingly, ICSID tribunals (bound neither by precedent nor a definition of “investment” contained within the ICSID Convention) have interpreted the term inconsistently, providing a source of unpredictability for investors and host countries alike, as they are unable to adequately ascertain whether an investment in their eyes is an investment that qualifies for ICSID protection. Given the associated risks with international investment generally, such unpredictability unnecessarily increases the costs of foreign investment, impeding efficient economic growth abroad.*

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1. *Last Week Tonight with John Oliver: Tobacco* (HBO television broadcast Feb. 15, 2015) (referencing Phillip Morris’s threat to bring Australia to ICSID arbitration by way of a favorable investment treaty between Australia and China).

*An unfortunate consequence of this controversy is that many ICSID tribunals have taken an investor-centric view, going so far as to exercise jurisdiction over activities that directly contravene the ICSID Convention's stated purpose.*

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## INTRODUCTION

In the “Wild West” of international investment law, little is certain. It should come as no surprise, therefore, that there exists almost no consensus as to the correct definition of an objectively essential term: “investment.” Of particular concern, however, is that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention” or “the Convention”), which effectively governs the most important arbitration and dispute resolution mechanism for conflicts arising out of international investments, fails to define the term for purposes of determining its own jurisdiction.<sup>2</sup> This has led to International Centre for Settlement of Investment Disputes (ICSID) tribunals frequently

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2. See *infra* Part I.A (providing a detailed discussion of ICSID, its purpose, history, and structure).

interpreting the term inconsistently, fostering an inequitable administration of justice.

There is significant debate among scholars and arbitrators alike as to whether—and how—this word, which itself is found within article 25 of the ICSID Convention,<sup>3</sup> should be interpreted for such purposes. As this Note explores, there are two basic approaches that tribunals have taken to address the matter. First, there is the traditional approach, which involves deferring to a definition of “investment” as consented to by the parties to the dispute (typically found within the relevant bilateral investment treaty language).<sup>4</sup> The second, more restrictive approach, which resulted from the decision rendered in *Salini Costruttori S.p.A. v. Kingdom of Morocco*,<sup>5</sup> is a four-pronged objective test.<sup>6</sup> Used to determine investment qualification, the *Salini* test functions in addition to the requirement that an investment fall under the relevant treaty’s own definition of the term.<sup>7</sup> Tribunals frequently apply variations of this approach—oftentimes removing or adding criteria.<sup>8</sup>

Although other solutions have been suggested,<sup>9</sup> a tribunal has essentially two options at its disposal for the purposes of determining the existence of a jurisdictionally sufficient “investment”: (1) defer to the treaty’s own definition of the term or (2) take the restrictive approach as outlined in *Salini*. Modified approaches typically fall somewhere in between.<sup>10</sup>

This Note seeks to address what is essentially a subject matter jurisdiction question in ICSID arbitration: What is the correct interpretation of “investment” within the meaning of article 25 of the ICSID Convention? Specifically, this Note addresses the varying justifications for the approaches mentioned above, whether there is a superior approach among them and, if not, whether a viable alternative exists. To adequately reconcile the goals of the Convention—and the World Bank by extension—a qualifying investment under article 25 should only have two requirements: (1) the activity or asset comprising it must, at the

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3. Article 25 stipulates an arbitral tribunal’s jurisdictional requirements. *See infra* Part I.B.3.

4. It should be noted, however, that access to a tribunal is not necessarily contingent upon a bilateral investment treaty’s consent to jurisdiction. Written consent via an investment agreement, for instance, is also permissible. *See infra* Part I.A.

5. ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), 42 I.L.M. 609 (2003).

6. *See id.* ¶¶ 52–54.

7. *See infra* Part I.A. This is referred to as the “consent” requirement.

8. *See, e.g.,* *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211–217 (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> (applying only three of the *Salini* factors) [<https://perma.cc/KB6C-XG7R>].

9. *See generally* Helena Jung Engfeldt, *Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media?: Applying an Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction*, 32 BERKELEY J. INT’L L. 44 (2014) (describing an industry specific approach).

10. The most common form of this is found in *Quiborax* and includes removing the requirement that a substantial economic contribution be made to the host country. *See Quiborax*, ICSID Case No. ARB/06/2, ¶ 220. The removal of this prong aligns more with the broader definition of investment. *See infra* Part I.D.

contemplated investment's point of inception, exhibit a cognizable contribution to a host country's economic development and (2) it must, by its very nature, be value creating. In doing so, this Note argues that the Convention's stated goal is one that ought to be protected.

The ICSID Convention was drafted with a single goal in mind: to increase private investment, and thereby economic development, in underdeveloped countries. In furtherance of this goal, ICSID provided the most effective and reliable enforcement mechanism for international disputes currently available. Assuming ICSID's stated purpose should be respected, therefore, the availability of its superior enforcement mechanism should be restricted to those investments that further this objective and, at the very least, exclude those investments that run counter to it. Failing to do so will create an obvious global moral dilemma and present underdeveloped countries with an even more difficult road to development. Indeed, some countries already have experienced as much.<sup>11</sup> As such, this Note proposes that article 25 be viewed as a gatekeeper for protecting the aims of ICSID, and it suggests how the correct objective definition of article 25 can achieve this end.<sup>12</sup>

Part I provides the necessary background material for understanding the function and goals of ICSID arbitration, its procedural mechanism, and the role precedent plays in an award. Part II then discusses *Mitchell v. Democratic Republic of Congo*<sup>13</sup> and *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*<sup>14</sup> as a way of illustrating differing approaches to defining "investment" and how the choice of approach can be outcome determinative. Finally, Part III argues that a holistic approach, emphasizing the Convention's goal of economic development, is the remedy for article 25's inconsistent application and one that can ensure that ICSID's fantastic enforcement mechanism is made available only to those investors for which it was intended.

#### I. WHAT'S THE FUSS ABOUT? A BACKGROUND ON THE ICSID CONVENTION, ARTICLE 25, AND INTERNATIONAL INVESTMENT LAW

This part provides background information that is necessary for determining the correct interpretation of article 25. It begins with a discussion of international investment generally as a policy trigger for ICSID and, therefore, the greater function served by article 25. General

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11. See *infra* Part II.B; see also Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 301, 303–05 (2015) (explaining how "through creative treaty shopping, corporations can attain international legal protection for their contracts with foreign sovereigns" and thereby "trump[] the states' prospective attempts to regulate in the public interest").

12. See *infra* Part III.

13. ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> [<https://perma.cc/JG22-3AGE>].

14. ICSID Case No. ARB/09/02, Award (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> [<https://perma.cc/WBD7-KJHK>].

background information on the Convention follows, including how the arbitration process operates. The general background information is then used to set up a more specific discussion of article 25, which is the focus of this Note. Finally, this part concludes by outlining the general approaches tribunals have taken with respect to interpreting article 25, which, as this Note argues, are best viewed under two general categories.

A. *Understanding the Risks Inherent in International Investment and the Purpose ICSID Serves*

In the paradigmatic international investment, a host government, typically of a less developed, undercapitalized country, seeks to improve the quality of life for its citizens<sup>15</sup> but lacks the immediate necessary resources to do so.<sup>16</sup> Foreign investors have the deep pockets and “know-how” to provide a solution to this dilemma, but they will not do so for free.<sup>17</sup> Like any investor, a foreign investor’s ultimate goal is to generate a profit with the investment.<sup>18</sup> This need for profitability is of paramount importance to the definition of the sovereign-investor relationship within the international investment context.

Profitability<sup>19</sup> is limited by an investment’s associated risks, and, as is the case with foreign investment, there is a significant risk presented by the inherent unpredictability of human and government conduct.<sup>20</sup> This raises the question as to why a prudent investor—or a prudent host country for that matter—would agree to an investment in which a unilateral change of the host country’s policy can effectively nullify their contribution. However, the international investment market has created some countermeasures to these risks.

“Substantive protections” have long existed to limit the impact of these sorts of risks.<sup>21</sup> The most common type of substantive protection is a 1950s creation known as a bilateral investment treaty (BIT).<sup>22</sup> Supplementing investment agreements, BITs are essentially state-to-state agreements in which each country agrees to protect the other’s investors.<sup>23</sup> BITs,

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15. Improvements are often in the form of infrastructure projects (i.e., roads, water, power plants, etc.). See JESWALD W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT* 18–19 (2013).

16. See *id.* at 18.

17. See *id.* at 18–23.

18. See *id.* at 18.

19. As used here, “profitability” encompasses both the host country’s expected benefit as well as the investor’s.

20. See SALACUSE, *supra* note 15, at 25 (“An investor may promise to build a factory in a country but never build it. A host government may enact a low corporate tax rate in one year with the promise never to raise it, yet pass legislation to increase taxes drastically the day after an investor makes an investment. It is the inherent unpredictability of human and government conduct that creates perceived risk for a contemplated investment.”).

21. See Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 262–63 (2010) (explaining the history of substantive protections in international law).

22. *Id.*

23. *Id.* at 263. This protection, by extension, applies to their “investments.” See *id.*

however, do not enforce themselves.<sup>24</sup> Moreover, until the 1990s, an investor lacking a direct cause of action would have to petition his own government to bring a claim on his behalf.<sup>25</sup>

Recognizing this dilemma *ex ante* in the 1960s, the World Bank drafted the ICSID Convention<sup>26</sup> to create a system that protects both investor and sovereign rights arising out of those substantive protections (assuming consent to ICSID's jurisdiction), in which the investor could bring the claim on his own behalf.<sup>27</sup> ICSID implicitly contemplates and attempts to reconcile two distinct and competing interests in its effort to increase "investment" abroad: (1) a foreign government's dual need for both capital and political autonomy over the use of that capital and (2) an investor's desire to mitigate the added investment risks associated with the unpredictability of an unfamiliar government.<sup>28</sup> Put simply, ICSID's original goal was to seek to increase foreign direct investment (FDI).<sup>29</sup>

### B. ICSID: A "BIT" of History

The ICSID Convention was enacted in 1965 to create a dispute resolution mechanism that reconciles the paradigmatic investment risks of both the foreign investor and host country.<sup>30</sup> The Convention has a relatively straightforward framework. Assuming both the host country and foreign investor consent to its jurisdiction,<sup>31</sup> a tribunal will hear a claim, enter a judgment, and ensure that the judgment will be enforced.<sup>32</sup> In a way, a

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24. *See id.* at 262 ("The regime of international investment law is best understood as two interlocking pieces: substantive protections for foreign investors combined with remedial procedures to enforce those protections.").

25. *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1536 (2005) ("[I]nvestors were forced to lobby their home country to espouse a claim on their behalf at the International Court of Justice . . .").

26. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

27. Of course, the ICSID Convention was actually drafted over several years. *See* CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 1 (2d ed. 2009). ("The Convention's preparation took place in the years 1961 to 1965."). It should also be noted that other types of arbitration mechanisms exist in addition to ICSID.

28. *See* SALACUSE, *supra* note 15, at 330, 343.

29. *See id.* at 343 (explaining how the creation of ICSID was predicated on "resolving disputes between foreign investors and host governments because it believed that problem was impeding the flow of capital necessary for the development of less developed countries").

30. *See supra* Part I.A; *see also* SALACUSE, *supra* note 15, at 25 (explaining how a well-functioning legal system serves to mitigate the risks associated with the unpredictability of human and governmental behavior, thereby allowing investors to isolate the risks they are willing to accept and ensure the relative soundness of their investments).

31. *See* ICSID Convention, *supra* note 26, art. 25(3) ("Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State . . .").

32. *See* ICSID Convention, *supra* note 26, arts. 53–55. In comparison to the other existing arbitration mechanisms (e.g., UNICTRAL and the New York Convention), ICSID makes it inherently more difficult for domestic courts to overturn awards because ICSID awards are not particularly susceptible to public policy arguments. *See* Mortenson, *supra* note 21, at 258, 265–66 (explaining how "[t]he great majority of countries around the world belong to ICSID" as a way to avail themselves of its enforcement mechanism).

tribunal functions similarly to the way in which a traditional court would.<sup>33</sup> There are, however, several key differences.

### 1. Characteristics of an ICSID Tribunal

Tribunals are constituted on an ad hoc basis.<sup>34</sup> Members of a given tribunal are typically appointed by the parties to the dispute,<sup>35</sup> and, although the Convention maintains a panel from which the parties can choose their arbitrators,<sup>36</sup> the parties are free “to appoint conciliators and arbitrators from [elsewhere].”<sup>37</sup> It is not guaranteed, therefore, that the same group of arbitrators will be on more than a single tribunal together.<sup>38</sup>

Decisions rendered by tribunals also are generated on an ad hoc basis.<sup>39</sup> Specifically, arbitral tribunals are not required to rely on precedent in making their determinations.<sup>40</sup> Moreover, the absence of such a requirement extends to a tribunal’s interpretation of the ICSID Convention.<sup>41</sup> Therefore, the dispute resolution mechanism that ICSID contemplates makes the possibility of consistent outcomes inherently difficult.<sup>42</sup> Nonetheless, the Convention contains several mechanisms designed to mitigate concerns over consistency.

One such mechanism is found within article 48(2)–(3).<sup>43</sup> These provisions declare form and substance requirements that an award must satisfy.<sup>44</sup> Expanded upon by Arbitration Rule 47,<sup>45</sup> the three most relevant

33. See Mortenson, *supra* note 21, at 264 (“Over time, these Tribunals have come to act more like formal international courts than like traditional commercial arbitrators.”).

34. ICSID Convention, *supra* note 26, art. 37.

35. See *id.* An arbitral tribunal’s constitution can vary from case to case in that it can either “consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.” *Id.* If the parties do not agree upon a number or method for appointing arbitrators, however, article 37 has a default rule: three arbitrators, whereby each party can designate one, and the final arbitrator is appointed pursuant to the agreement of the parties. *Id.*

36. See SCHREUER ET AL., *supra* note 27, at 44 (“The Panels are lists of persons who may act as conciliators or arbitrators.”).

37. *Id.*

38. But see Mortenson, *supra* note 21, at 264 (explaining how many of the arbitrators are chosen from a “substantially recurring roster of experts”).

39. See ICSID Convention, *supra* note 26, art. 53(1) (requiring only that “[t]he award shall be binding on the parties”); see also SCHREUER ET AL., *supra* note 27, at 1101 (“The first part of Art. 53(1) may also be read as excluding the applicability of the principle of binding precedent to successive ICSID cases.”).

40. See SCHREUER ET AL., *supra* note 27, at 1101.

41. Compare *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211–217 (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> (wherein the arbitral tribunal applied a modified *Salini* test in its interpretation of article 25) [<https://perma.cc/KB6C-XG7R>], with *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 24 (Nov. 1, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> (where the ad hoc committee applied the *Salini* test in its entirety for the same purpose) [<https://perma.cc/JG22-3AGE>].

42. See Franck, *supra* note 25, at 1558–82 (providing a far more detailed discussion on inconsistent decisions).

43. See ICSID Convention, *supra* note 26, art. 48(2)–(3).

44. See *id.* The full text of article 48 states:

criteria are the following: the award must be (1) in writing, (2) exhaustive, and (3) reasoned.<sup>46</sup> The latter requirement, being a “standard feature in contemporary international adjudication,”<sup>47</sup> merely means that a reader must be able to follow the reasoning of the tribunal on both issues of law and fact.<sup>48</sup>

Although this requirement is noble in its aim, the ad hoc nature of the tribunal’s reasoning may potentially undercut any finality the judgment may receive in the event of an annulment proceeding.<sup>49</sup> This is because annulment committees also are constituted on an ad hoc basis,<sup>50</sup> and, while precluded from reexamining the merits of the initial award,<sup>51</sup> an annulment committee may nonetheless reexamine the original award’s substance under the auspices of procedure.<sup>52</sup> Therefore, as was the case in *Mitchell*, an annulment committee may choose to apply an article 25 definition of “investment” that differs from the arbitral tribunal’s, making consistent treatment of the term “investment” in article 25 even more necessary.<sup>53</sup>

As such, and in conjunction with the fact that ICSID does not require tribunals to rely on precedent in forming their ultimate decisions,<sup>54</sup> it is

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(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

*Id.* art. 48.

45. See SCHREUER ET AL., *supra* note 27, at 812 (“The information to be included in an award is set out in more detail in [Rule 47 of] the Arbitration Rules.”).

46. See *id.* Essentially, arbitral tribunals are required to justify their decisions in a similar fashion to the way in which an American judge would write an opinion. See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> (providing a lengthy justification for the enforcement of a hedging agreement) [<https://perma.cc/FX48-UZLW>].

47. SCHREUER ET AL., *supra* note 27, at 819 (noting how this requirement is similar to other contemporary means of international adjudication, including the Statute of the International Court of Justice and its rules, in the International Law Commission’s 1958 Model Rules on Arbitral Procedure, and in the International Chamber of Commerce’s 1998 Rules of Arbitration).

48. See *id.* at 820.

49. See *infra* Part I.B.2 for a discussion on the annulment proceeding process.

50. See *infra* Part I.B.2.

51. It should be noted that there is no appeals process provided for in the ICSID Convention. Rather, there is an annulment process in its place. See ICSID Convention, *supra* note 26, art. 52.

52. See SCHREUER ET AL., *supra* note 27, at 821; see also *infra* Part I.B.2.

53. See *infra* Part I.B.2.

54. See Julian Davis Mortenson, *The Uneasy Role of Precedent in Defining Investment* 6 (Univ. Mich. Pub. Law & Legal Theory Research Paper Series, Paper No. 344, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2286376&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286376&download=yes) (explaining how precedent has an uncertain place within the Vienna Convention on the Law of Treaties for which tribunals are required to follow) [<https://perma.cc/V6LL-PCTT>]; see also SCHREUER ET AL., *supra* note 27, at 1101 (“Nothing in the Convention’s *travaux*

clear that consistent interpretation of the Convention is vital for an ICSID award to be given the effect of finality.

2. The Annulment Process and Article 52:  
Is It a Procedural Check on Justice  
or Is It an Opportunity for Inconsistent Administration of Justice?

Article 52 of the Convention governs annulment proceedings.<sup>55</sup> Similar to that of an appellate mechanism, the annulment process provides a procedural check on an initial tribunal's award.<sup>56</sup> Of primary significance to this Note, however, is the effect that this mechanism can have on an arbitral tribunal's interpretation of the definition of "investment" under article 25. This effect, however, is best understood through a discussion on the ways in which an article 52 annulment proceeding differs from that of a typical appeal.

An annulment proceeding is distinct from that of an appeal in several ways. First, it differs in terms of the result that it provides.<sup>57</sup> Unlike an appeal that modifies a decision, an annulment can only serve to reject or accept a decision.<sup>58</sup> Therefore, parties are free to resubmit their claims after an annulment determination is made.<sup>59</sup> This renders *res judicata* inapplicable.<sup>60</sup>

A second distinction is rooted in article 52's purpose. In particular, article 52 balances the two "potentially conflicting" principles of finality and correctness.<sup>61</sup> Article 52 resolves this conflict in favor of finality because, in international arbitration, the principle of finality is seen as having much greater priority over correctness.<sup>62</sup> As such, a more limited review process is preferred<sup>63</sup> and is restricted to five possible grounds.<sup>64</sup> Of

*préparatoires* suggests that a doctrine of *stare decisis* should be applied to ICSID arbitration." Nonethless, tribunals and ad hoc committees will frequently "refer to and rely on previous decisions," simultaneously acknowledging that they are not bound by them. *Id.*; see also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 76 (Nov. 14, 2005), <http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf> [<https://perma.cc/DW9Y-RYG9>].

55. See ICSID Convention, *supra* note 26, art. 52.

56. See SCHREUER ET AL., *supra* note 27, at 821.

57. See *id.* at 901. The main difference, with respect to process, is that the result of a successful annulment "is the invalidation of the original decision," whereas "[t]he result of a successful appeal is its modification." *Id.* An annulment proceeding, therefore, has only two possible outcomes: void the original decision or leave it in tact. See *id.* *Res judicata*, therefore, would only apply to the latter. See *id.*

58. *Id.*

59. *Id.*

60. See *id.*

61. See *id.* at 903 ("It is designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects.").

62. See *id.* ("Ad hoc committees have emphasized that the annulment process is concerned with the 'process of decision' or 'whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.'").

63. *Id.*

64. The five grounds include:

(a) that the Tribunal was not properly constituted;

those grounds the two most significant for article 25 purposes are “failure to state reasons”<sup>65</sup> and when “the Tribunal manifestly exceed[s] its powers.”<sup>66</sup> By extension, therefore, this includes failing to exercise jurisdiction under article 25 where jurisdiction exists.<sup>67</sup> Accordingly, annulment on these grounds may be due to inconsistent application of the *Salini* test.<sup>68</sup>

Finally, article 52 specifies that an annulment committee must be ad hoc.<sup>69</sup> Unlike the arbitral tribunal, however, annulment committee members are not chosen by the parties but are appointed by ICSID.<sup>70</sup> One might argue that this allows for a more objective review process because the committee is unlikely to have ties to the parties.<sup>71</sup> When considered in conjunction with the rest of the provision, however, it is clear that an annulment committee disagreeing with an arbitral tribunal’s interpretation of “investment” for purposes of determining article 25 jurisdiction can effectively substitute its own definition.<sup>72</sup> Indeed, this has happened before.<sup>73</sup> As such, consensus on the correct interpretation of an article 25 “investment” is all the more necessary.

For the annulment process to effectively function as a procedural check on justice, there must be consistent and fair treatment of article 25. The

- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

ICSID Convention, *supra* note 26, art. 52.

65. This specifically refers to Arbitration Rule 47’s “reasons” requirement. *See supra* note 46 and accompanying text.

66. SCHREUER ET AL., *supra* note 27, at 947.

67. *Id.* This is in light of the fact that there are, as stated, several “accepted” forms of the article 25 test for an “investment.” *See infra* Part I.C.

68. The most significant example of this is found in *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 24 (Nov. 1, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> (where the ad hoc committee annulled the initial tribunal’s definition of “investment” pursuant to differing views on whether the *Salini* test ought to be applied) [<https://perma.cc/JG22-3AGE>].

69. *See* ICSID Convention, *supra* note 26, art. 52(3) (“On receipt of the request [for an Annulment proceeding] the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons.”).

70. *See id.* This approach has its pros and cons. In fact, at least one commentator believes the absence of party-appointed arbitrators makes the committee “less attractive to the parties.” SCHREUER ET AL., *supra* note 27, at 1029. “On the other hand, their distance to the parties gives a higher probability of complete objectivity of every single member and a better basis for rational cooperation among members.” *Id.*

71. *See supra* note 70 and accompanying text.

72. *See* *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 86 (July 3, 2002), 19 ICSID REV. 89 (2004) (explaining how “the failure by a Tribunal to exercise a jurisdiction given it by the ICSID Convention . . . in circumstances where the outcome of the inquiry is affected as a result” is a “manifest excess of powers within the meaning of Article 52(1)(b)”).

73. *See, e.g., Mitchell*, ICSID Case No. ARB/99/7, ¶¶ 24, 38 (determining that the arbitral tribunal’s finding of jurisdiction was inadequate as it was the result of mere deference to the relevant BIT and a failure to consider any objective criteria underlying article 25).

problem is that article 25, by its very nature<sup>74</sup> and in conjunction with the rest of the Convention, makes achieving this goal fairly difficult.

### 3. Accessing Arbitration:

#### What Is an “Investment” Under Article 25 of the Convention?

To access ICSID arbitration, in addition to consenting to jurisdiction,<sup>75</sup> an investor must satisfy several explicit “preconditions” under article 25 of the ICSID Convention before a tribunal will consider the merits of a particular claim.<sup>76</sup> These preconditions pertain to (1) the nature of the dispute (the *ratione materiae*) and (2) the parties (the *ratione personae*).<sup>77</sup>

Of these preconditions, the *ratione materiae* is of paramount importance and is the focal point of this Note. Specifically, article 25 states that “[t]he jurisdiction of [ICSID] shall extend to any legal dispute *arising directly out of an investment*.”<sup>78</sup> Article 25 of the Convention, however, fails to provide any explicit definition of “investment.”<sup>79</sup> While some have suggested that those drafting the Convention deemed such a definition unworthy of consideration,<sup>80</sup> a definition of the term *was* provided for in earlier drafts.<sup>81</sup> As such, there is very little in the Convention that suggests any sort of objective meaning of the term.<sup>82</sup> Moreover, outside of the drafters’

74. See *infra* Part I.E.

75. See *infra* Part I.B.4.

76. See SCHREUER ET AL., *supra* note 27, at 83 (“While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.” (quoting Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 1 ICSID Rep. 23, 28 (1993) [hereinafter Report of the Executive Directors])).

77. See *id.* at 82.

78. ICSID Convention, *supra* note 26, art. 25(1) (emphasis added).

79. See *id.*, art. 25; SCHREUER ET AL., *supra* note 27, at 114 (“[T]he Convention does not offer any definition or even description of this basic term.”). But see Mortenson, *supra* note 21, at 316 (“If commentators agree on anything in this area, it is that pure trade transactions should not be subject to ICSID jurisdiction. (This is despite the fact that drafting attempts to exclude ‘commercial’ assets and transactions were all rejected.)” (footnote omitted)).

80. See *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 51 (July 23, 2001), 42 I.L.M. 609 (2003) (stating that “such a definition had seemed unnecessary to the representatives of the States that negotiated it”).

81. See SCHREUER ET AL., *supra* note 27, at 114–15 (explaining how earlier drafts of the Convention included definitions of the term). Moreover, it is well documented that the first draft of the ICSID Convention defined “investment” in strikingly similar terms to those expounded in the *Salini* test. See *id.*; see also Mortenson, *supra* note 21, at 297–99 (discussing the similarities of this draft to the *Salini* test). Specifically, the first draft of the 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.” 1 ICSID, HISTORY OF THE ICSID CONVENTION 116 (1970). Similarly, in *Salini*, the tribunal includes contribution and duration as two of its four factors. See *Salini*, ICSID Case No. ARB/00/4, ¶ 52 (“[I]nvestment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction.”).

82. See SCHREUER ET AL., *supra* note 27, at 113.

distinction between “investment” and “commercial activity,”<sup>83</sup> the only evidence of any sort of objective meaning for the term is found within the Convention’s preamble and the accompanying Report of the Executive Directors.<sup>84</sup> Both suggest that “investment” should include a contribution to economic development.<sup>85</sup> Whether this language is a clear requirement for purposes of determining article 25 jurisdiction is the subject of considerable debate<sup>86</sup> and is addressed further in Parts II and III of this Note.

By virtue of a lack of legal precedent, article 25 necessarily consists of a dynamic interpretive element.<sup>87</sup> Accordingly, consistent interpretation appears necessary to foster predictable and equitable outcomes.<sup>88</sup> Underlying this concern is the consent requirement.

#### 4. A “BIT” of Consent:

##### A Second Definition of Investment That Also Must Be Satisfied

Article 25’s consent requirement<sup>89</sup> compounds the confusion surrounding the definition of “investment.” ICSID protection is only available if both the host country and the investor consent to ICSID’s jurisdiction<sup>90</sup> and only if such consent is provided for in one of three ways: (1) through a contract between the investor and host state, (2) “through a provision in the host State’s investment legislation that has been accepted by the investor,” or (3) through treaty language.<sup>91</sup> Most current ICSID arbitration arises out of the latter two.<sup>92</sup> Of primary concern to this Note however, are BITs, which provide the most common way for parties to obtain consent.<sup>93</sup> Although

83. *See id.* at 98 (explaining how article 25’s expression “dispute of a legal character” was meant to exclude “commercial claims”); *see also* Mortenson, *supra* note 21, at 298–99.

84. *See* SCHREUER ET AL., *supra* note 27, at 116–17 (“The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble’s first sentence, which speaks of ‘the need for international co-operation for economic development and the role of private international investment therein.’”); Report of the Executive Directors, *supra* note 76, at 25 (explaining how the Convention was motivated by “the desire to strengthen the partnership between countries in the cause of economic development”).

85. *See supra* note 84 and accompanying text.

86. *See* SCHREUER ET AL., *supra* note 27, at 117.

87. *See* Mortenson, *supra* note 21, at 309–10 (“To say that the definition of ‘investment’ has been contentious is an understatement . . .”).

88. *See infra* Parts II–III.

89. *See* ICSID Convention, *supra* note 26, art. 25(1) (“The jurisdiction of the Centre 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.” (emphasis added)).

90. *See id.*

91. *See* SCHREUER ET AL., *supra* note 27, at 119 (listing the three ways in which consent may be given).

92. *Id.* at 192 (stating that recently, consent is usually “expressed through treaties and legislation”).

93. *See* Mortenson, *supra* note 21, at 262 (referring to BITs as “the dominant component of international investment law”). It is worth noting that BITs often provide for a host country’s consent by way of an “umbrella clause,” which is a broad provision that insulates an “investor from breach of any agreements entered into with the host state,” including investment agreements not yet entered into. *See* Arato, *supra* note 11, at 321. An umbrella

BITs are not discussed much in the preparatory works accompanying the Convention,<sup>94</sup> hundreds of BITs now incorporate ICSID clauses.<sup>95</sup> Therefore, a jurisdictionally sufficient dispute typically also must arise out of the definition of “investment” as provided for in the relevant BIT language.

Taking the consent requirement into account then, there are two steps that a claimant must satisfy for their “investment” to qualify for ICSID arbitration. The first requirement, as stated, is that the dispute must arise out of an “investment” as defined in the relevant treaty or contract. Secondly, the claim must arise out of an “investment” consistent with article 25.<sup>96</sup> Collectively, both steps form the “double keyhole” approach.<sup>97</sup>

Although the latter step is the focal point of this Note, both are interconnected, with the former step presenting difficulties of its own. In particular, although an “investment” typically is defined within a particular BIT, the same definition is not necessarily shared by other BITs.<sup>98</sup> More importantly, even if BITs do share the same definition, this does not mean that they are reflective of the Convention’s notion of “investment.”<sup>99</sup> This underscores a fundamental characteristic of BITs: they are freely drafted agreements between two states.<sup>100</sup> As such, the parties may choose to define an “investment” as virtually anything, and, so long as the dispute arises out of an activity that falls under that definition, ICSID’s consent requirement would be satisfied.<sup>101</sup>

As one might infer, article 25 serves as an outer limit on the type of “investment” that parties may consent to for purposes of ICSID jurisdiction.<sup>102</sup>

### *C. Tribunals’ Approaches to Interpreting an Article 25 “Investment”*

As explained in Part I, tribunals have approached the interpretation of article 25 “investment” in two primary ways. The first, and most traditional, approach involves deferring to the relevant BIT language and its definition of the term.<sup>103</sup> The second approach is more restrictive and

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clause’s *ex ante* nature makes BITs incredibly powerful, as “Tribunals have interpreted [them] as effectively internationalizing state contracts.” *Id.*

94. SCHREUER ET AL., *supra* note 27, at 205 (explaining how there was little reference made to BITs in the *travaux préparatoires* to the Convention).

95. *Id.* at 206.

96. *See supra* Part I.B.3.

97. SCHREUER ET AL., *supra* note 27, at 117.

98. It should be noted, however, that most definitions of “investment” found within BITs are remarkably similar. *See id.* at 122–25.

99. *See id.* at 124 (explaining that “if a BIT’s definition of investment goes beyond the requirements of the ICSID Convention there will be no jurisdiction”).

100. *See* SALACUSE, *supra* note 15, at 342.

101. *See* SCHREUER ET AL., *supra* note 27, at 124.

102. *Id.*

103. *See* Mortenson, *supra* note 21, at 269.

involves applying an objective test that was first stated in *Salini*.<sup>104</sup> Finally, tribunals occasionally will modify the *Salini* test.<sup>105</sup>

### 1. Deference

Traditionally, tribunals have taken an approach that can be considered deferential to the language chosen by the parties to a dispute. Emphasizing the parties' intentions, tribunals will look at the language of consent (i.e., the definition found within the relevant BIT) given by the parties to the dispute and, so long as the written agreement recognizes the activity or asset in question as an investment<sup>106</sup> and does not include single commercial transactions,<sup>107</sup> defer to it.<sup>108</sup>

### 2. *Salini*

The *Salini* test—and its variations<sup>109</sup>—function as an objective test with several indicia used to determine whether an “investment” exists for purposes of satisfying article 25.<sup>110</sup> In its original form, the test was satisfied if four factors were present: (1) contributions, (2) a certain duration of performance of the contract, (3) participation in the risks of the transaction, and (4) contribution to the economic development of the host state.<sup>111</sup>

Although this test obtained notoriety by way of the *Salini* award, the sitting tribunal in that case listed the above factors with minimal justification<sup>112</sup> and was satisfied that the claim before it did, in fact, arise out of an article 25 “investment.”<sup>113</sup> Moreover, with the exception of one case,<sup>114</sup> awards preceding *Salini* involved mostly mechanical deference to

104. See SCHREUER ET AL., *supra* note 27, at 129.

105. See, e.g., *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211–217 (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> (applying only three of the *Salini* factors) [<https://perma.cc/KB6C-XG7R>].

106. See *Mortenson*, *supra* note 21, at 269 (“Some Tribunals following the deferential approach have come close to rendering the definition of investment nonjusticiable, asserting that it simply merges with the question of party consent.”); see also *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, ¶¶ 13.5–6 (Nov. 27, 2000), 5 ICSID Rep. 483 (2006).

107. See *Mortenson*, *supra* note 21, at 269 (“[M]ost have agreed that a single commercial transaction (such as the delivery of a single load of cars) would be outside the scope of the Convention . . .”).

108. *Id.*

109. See *infra* Part I.C.3.

110. See SCHREUER ET AL., *supra* note 27, at 129.

111. *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003).

112. *Id.* (explaining that the criteria were based on previous awards that had denied jurisdiction on the grounds that an “investment” did not exist, as well as the Convention’s preamble).

113. *Id.* ¶¶ 52–58.

114. See *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, ¶¶ 34–36 (July 11, 1997), 37 I.L.M. 1378 (1998). Specifically, this was the first case in which jurisdiction was denied for failure to satisfy article 25’s definition of

the relevant BIT's definition of "investment,"<sup>115</sup> making the fact that this test was first articulated in *Salini* all the more surprising. Nonetheless, it has become the standard from which most tribunals begin their analysis, regardless of whether they ultimately choose to apply it.<sup>116</sup>

### 3. Modified *Salini*

Other tribunals have taken approaches that remove<sup>117</sup> or add<sup>118</sup> one or more of the *Salini* factors. Removal is more common, especially of the "contribution to economic development" prong.<sup>119</sup> In removing or adding criteria, the tribunal may apply either a broader or more restrictive definition of "investment."

#### *D. Vienna Convention on the Law of Treaties and Its Effect on ICSID Tribunals' Procedure*

The Vienna Convention of the Law of Treaties, commonly known as "the Vienna Convention," plays a vital role in tribunals' ability to interpret treaties, including the articles of the ICSID Convention.

According to article 31 of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>120</sup> Utilizing this framework, there are "three lines of reasoning that are 'conceivable' in the context of investment treaties."<sup>121</sup> The first is to give meaning to the "object and purpose" of the treaty.<sup>122</sup> This may be accomplished, for example, by focusing on a treaty's

"investment," and it was the award from which the *Salini* Tribunal gleaned its criteria. See *Salini*, ICSID Case No. ARB/00/4, ¶ 52 (discussing *Fedax*).

115. See Mortenson, *supra* note 21, at 259 (explaining that "[h]istorically, Tribunals took a highly deferential approach" in determining whether there was a jurisdictionally sufficient investment).

116. See Alex Grabowski, *The Definition of Investment Under the ICSID Convention: A Defense of Salini*, 15 CHI. J. INT'L L. 287, 295 (2014) ("[E]ven arbitral boards that end up modifying the test regularly use it as the starting point from which to base their analysis, which demonstrates that the test has gained no small degree of legitimacy.").

117. See, e.g., *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 211–217 (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> (applying only three of the *Salini* factors) [<https://perma.cc/KB6C-XG7R>].

118. See, e.g., *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 100 (Apr. 15, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf> (adding a requirement that the investment be "*bona fide*") [<https://perma.cc/N89R-BPD3>].

119. See, e.g., *Quiborax*, ICSID Case No. ARB/06/2, ¶¶ 211–218.

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

121. Joseph M. Boddicker, *Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration*, 25 AM. U. INT'L L. REV. 1031, 1044 n.84 (2014) (quoting Rudolf Dolzer, *The Notion of Investment in Recent Practice*, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 261, 272 (Steve Charnovitz et al. eds., 2005)).

122. See *id.* at 1044.

preamble.<sup>123</sup> The second way is to emphasize the ordinary meaning of the treaty's language with little regard to the treaty's "object and purpose."<sup>124</sup> Third, treaty language may be interpreted in a way that narrowly limits the sovereignty of the states in question—termed *in dubio mitius*.<sup>125</sup> If, however, an article 31 construction yields an ambiguous result, article 32 of the Vienna Convention allows tribunals to consider the preparatory work surrounding the treaty in question.<sup>126</sup>

*E. Ambiguous?: Applying the Vienna Convention:  
Tribunals' Approaches to Article 25 That Encompass  
the "Contribution to Economic Development" and Those That Do Not*

Applying the Vienna Convention to the jurisdictional tests outlined in Part I.C, there are really only two categorical approaches for determining the existence of an article 25 investment that matter with respect to this Note: those approaches that include the requirement that an investment contribute to the economic development of the host country and those that do not.

Application turns on whether "investment" is deemed ambiguous for purposes of the Vienna Convention—if a tribunal treats the term as ambiguous, it cannot take the position that the word should be given its ordinary meaning.<sup>127</sup> Moreover, if a tribunal cannot arrive at a given term's meaning by way of the remaining interpretive techniques found within article 31 of the Vienna Convention, it must apply the Vienna Convention's rules for interpreting ambiguous terms under article 32, including consideration of preparatory documents and preambles.<sup>128</sup> Consequently, of all the article 25 criteria that various tribunals have chosen to utilize, "contribution to economic development" is the only criterion that actually has internal justification found within the ICSID Convention and its preparatory works, and it is the only criterion that does not arise out of an attempt to determine the term's "ordinary meaning."<sup>129</sup>

Reconsidering the approaches discussed in Part I.C helps to clarify this distinction.

### 1. Revisiting the Traditional Approach

The traditional deferential approach encompasses no objective definition of "investment" whatsoever.<sup>130</sup> By deferring to the parties' consent, this approach implicitly rests on the notion that "investment" is clearly defined

123. *See id.*

124. *See id.*

125. *See id.*

126. *See* VCLT, *supra* note 120, arts. 31–32.

127. *See supra* Part I.D (explaining how one of the three approaches a tribunal can take when interpreting terms under the Vienna Convention includes giving the term its ordinary meaning).

128. *See supra* Part I.D.

129. *See supra* note 84 and accompanying text.

130. *See supra* Part I.C.1.

by the ICSID Convention and that its meaning should be gleaned only by the parties' written consent.<sup>131</sup> As such, this approach deems the term unambiguous, thereby not requiring a contribution to economic development.

It should be noted, however, that other deferential approaches might recognize the existence of ambiguity and yet fail to apply the contribution to economic development requirement.<sup>132</sup> Adherents to this approach believe that such was the goal of the Convention and that the goal is distinct from a jurisdictional requirement.<sup>133</sup>

## 2. Revisiting the Modified Approach

In *Quiborax S.A. v. Plurinational State of Bolivia*,<sup>134</sup> the tribunal justified its application of the three *Salini* factors (i.e., contribution, duration, and risk) on the ground that the factors encompassed the "ordinary meaning" of "investment," believing that this is what the term, as laid out in the Convention, was intended to convey.<sup>135</sup> This "modified" *Salini* approach, therefore, effectively contemplates an unambiguous definition of the term and, as such, also excludes the "contribution to economic development" requirement.

## 3. Revisiting *Salini*

In *Salini*, the same criteria used in *Quiborax* (i.e., contribution, duration, and risk) were justified on different grounds. Specifically, the tribunal

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131. See *supra* Part I.C.1.

132. See Mortenson, *supra* note 21, at 300–01, 309–10 (articulating a broad deferential test premised on the parties' consented-to definition of "investment" so as to include any "plausibly economic activity or asset," all the while recognizing the ambiguity that the term presents); see also SCHREUER ET AL., *supra* note 27, at 134 (distinguishing between the purpose of encouraging economic development and a jurisdictional requirement of such).

133. See Victor Pey Casado and Presidente Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008) (explaining that the reference to economic development in the preamble was intended to be a consequence as opposed to a condition of the investment).

134. ICSID Case No. ARB/06/2, Decision on Jurisdiction (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> [<https://perma.cc/KB6C-XG7R>].

135. See *id.* ¶ 212 (taking the position that the "ICSID Convention intended to give to the term 'investment' an 'ordinary meaning' as opposed to a 'special meaning'"). It is also worth noting that in *Quiborax*, the tribunal's justification rests on an incorrect reading of the Vienna Convention. Specifically, the tribunal relied on the Vienna Convention's mandate that words be given their ordinary meaning. See VCLT, *supra* note 120, art. 31(1). What the tribunal failed to consider, however, is that the term "investment" as it exists within the Convention is, by most accounts, ambiguous and without ordinary meaning. See Mortenson, *supra* note 21, at 309–10 (noting that "drafting history remains relevant and potentially decisive for any colorably contentious problem of construction" and that, with respect to the definition of investment offered by the Convention's three authoritative languages, "it would be disingenuous to pretend they are unambiguous"). Because the ICSID Convention's text and its supporting documents at least arguably suggest that there be a cognizable "contribution to economic development," this is the only currently available criterion that is consistent with accepting the term as ambiguous.

recognized them as a byproduct of ICSID “precedent.”<sup>136</sup> Moreover, the contribution to economic development was gleaned from the preamble, therefore implicitly recognizing the ambiguity of the term “investment.” Therefore, the tribunal in *Salini* (and its subsequent adherents) recognized that “investment” is an ambiguous term as used in the ICSID Convention. Approaches adding requirements to the *Salini* test are similar in that they too fall under the category of approach that deems the word “ambiguous” and thereby include the contribution to economic development criterion.<sup>137</sup>

## II. TRIBUNALS, AD HOC COMMITTEES, AND INCONSISTENT APPLICATION OF ARTICLE 25

This part begins with a discussion of two awards: the annulment proceeding in *Mitchell v. Democratic Republic of Congo*<sup>138</sup> and the arbitral tribunal’s decision in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*.<sup>139</sup> Because each decision is predicated on an interpretation of article 25 that directly conflicts with the other (specifically, their respective treatment of the contribution to economic development prong), this discussion illustrates the two divergent views on article 25’s objective requirement for an “investment” and how the outcome of a given award depends on a tribunal’s chosen approach. In discussing each decision, this part considers each respective tribunal’s level of deference to the relevant BIT language, their utilization of ICSID “precedent,”<sup>140</sup> and their consideration of the Convention’s stated object and purpose. Discussion of each award is followed by the positions of those commentators, scholars, and tribunals who agree and disagree with each approach.

### A. *Mitchell v. Congo*:

#### *Finding That an Article 25 Investment Should Contribute to the Development of a Host Country’s Economy*

*Mitchell* is, at least factually, a fairly straightforward case. Patrick Mitchell, an American lawyer, opened a law office in the Democratic

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136. See *supra* note 114. This Note does not address whether “ICSID precedent” is viable justification for a tribunal’s approach to defining an article 25 “investment.” Nonetheless, it is essential that one recognize the difference between the justifications used by the tribunals in *Quiborax* and *Salini*, respectively, as one tribunal implicitly recognizes the term as ambiguous, and the other tribunal treats the term as unambiguous.

137. Arguments can be made for many of the criteria used by tribunals, and an investment’s characteristics can be disputed indefinitely, with many compelling arguments made on both sides. They are not, however, the focus of this Note. This Note instead focuses on the only criterion that is meant to apply to the Convention’s definition of the term in the event of ambiguity.

138. ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> [<https://perma.cc/JG22-3AGE>].

139. ICSID Case No. ARB/09/02, Award (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> [<https://perma.cc/FX48-UZLW>].

140. As previously stated, although ICSID tribunals are not required to rely on previous awards rendered by tribunals, they nonetheless do so, in particular when performing an article 25 analysis. See *supra* note 39 and accompanying text.

Republic of the Congo (DRC).<sup>141</sup> After several years, however, the Congolese government, suspicious of Mitchell, shut down his operation.<sup>142</sup> In response, Mitchell brought an ICSID claim against the Congolese government for damages resulting from this intrusion via the protection afforded by the United States-Congo BIT.<sup>143</sup> The arbitral tribunal, failing to apply the *Salini* test and instead choosing to defer to the definition of “investment” as provided for in the US-Congo BIT,<sup>144</sup> determined that Mitchell’s law office qualified as an “investment” for article 25 purposes and subsequently issued an award in Mitchell’s favor.<sup>145</sup> The ad hoc annulment committee disagreed.

The annulment committee, while briefly referencing the four *Salini* elements,<sup>146</sup> emphasized one criterion in particular: contribution to a host country’s economic development.<sup>147</sup> In doing so, the committee stressed the purposes and aims of the ICSID Convention.<sup>148</sup> True to the traditional *Salini* approach,<sup>149</sup> the committee reasoned that because the preamble explicitly “consider[s] the need for international cooperation for economic development, and the role of private international investment therein,”<sup>150</sup> Mitchell’s operation must either contribute in some way to the host country’s economic development or at least encompass the “the interests of the State” if it were to qualify for ICSID arbitration.<sup>151</sup>

Contrary to the arbitral tribunal’s finding, the ad hoc committee determined that Mitchell’s operation accomplished neither objective and that the firm—as described within the initial award—lacked a cognizable connection to the DRC.<sup>152</sup> Consistent with their reliance on the

141. See *Mitchell*, ICSID Case No. ARB/99/7, ¶ 48. Some of his work included providing counsel to foreign investors, suggesting that he likely advised them to structure their investments in ways that were potentially deleterious to the Congolese government. See *id.*

142. *Id.* ¶ 52 (acknowledging, although disagreeing, with the Congolese position in that the seizure of Mitchell’s property was justified for reasons related to the security of the DRC).

143. See *id.*

144. *Id.* ¶¶ 40–43 (choosing instead to apply a broad deferential approach for determining the existence of an article 25 investment by deferring to the BIT’s definition of the term).

145. *Id.*

146. *Id.* ¶ 27.

147. See *id.* ¶ 33 (“The *ad hoc* Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential . . . characteristic . . . of [an] investment.”).

148. *Id.* ¶ 28 (“The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25, which makes it needless to mention that the Convention was concluded under the auspices of the International Bank for Reconstruction and Development itself.”).

149. See *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) 42 I.L.M. 609 (2003) (discussing the contribution to economic development prong).

150. *Mitchell*, ICSID Case No. ARB/99/7, ¶ 28 (quoting the preamble). Moreover, this is consistent with the Vienna Convention’s treatment of ambiguous terms under its own article 32. See *supra* Part I.D.

151. See *Mitchell*, ICSID Case No. ARB/99/7, ¶ 39.

152. *Id.*

Convention's preamble, the committee explained that, because the investment in question was one of services, qualification under article 25 necessarily required that Mitchell demonstrate that he "concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors,"<sup>153</sup> and that Mitchell failed in this respect.<sup>154</sup> Specifically, the committee explained that the physical location of the offices and the money Mitchell invested were ancillary to the operation's function.<sup>155</sup> Granting jurisdiction to this claim, they reasoned, would necessarily create "a risk of genuine abuses, to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID."<sup>156</sup>

Moreover, the committee, in critiquing the arbitral tribunal's reasoning, emphasized the importance of a territorial nexus in relation to a services investment, noting that

[t]he [initial] Award is incomplete and obscure as regards [to] what it considers an investment: it refers to various fragments of the operation, without finally indicating the reasons why it regards it overall as an investment, that is, without providing the slightest explanation as to the relationship between the "Mitchell & Associates" firm and the DRC.<sup>157</sup>

This underscores an important distinction that tribunals (and ad hoc annulment committees) must make when performing an article 25 analysis. As this committee articulated, determining the existence of an investment necessarily requires that the tribunal distinguish between "the economic operation or project" and the "rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another."<sup>158</sup> In essence, an asset or activity that is ancillary to an investment may have a territorial nexus to a given state, while the investment itself might not.

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153. *Id.* at ¶ 38–39 (explaining how it is the services that would or would not qualify as an investment, not the office's physical location).

154. *Id.* ¶ 39. It is also worth noting that both parties to the dispute did, in fact, agree that Mitchell provided consultation to foreign investors. *Id.* Arguably, this might have been viewed as satisfying the ad hoc committee's requirement. Nonetheless, as the committee went on to explain, this information was excluded from the arbitral tribunal's reasoning and spoke to the merits of the case (something article 52 precludes them from reconsidering). *Id.* It thereby gave rise to an absence of reasons sufficient for annulment under article 52. *See supra* Part I.B.2. Moreover, even if one were to find the committee's decision unjust (in the moral sense of the word), its basis was no different than the dismissal of an otherwise meritorious claim in the U.S. legal system on procedural grounds. Nonetheless, had the information concerning Mitchell's consultation of foreign investors been included, his claim still would have failed. As the committee went on to explain, Mitchell placed all of his proceeds in a U.S. bank account. *Mitchell*, ICSID Case No. ARB/99/7, ¶ 44 ("[B]y removing his income from [DRC's] tax system he 'knowingly and voluntarily acted against' DRC's development.").

155. *Mitchell*, ICSID Case No. ARB/99/7, ¶¶ 38–39.

156. *Id.* ¶ 40.

157. *Id.*

158. *Id.* ¶ 38.

In this particular case, the committee, by making such a distinction, put to rest potential questions regarding, for example, the firm's office or Mitchell's personal capital expenditures.<sup>159</sup> In the committee's own words:

In this case, by the nature of things, it is the services of the "Mitchell & Associates" firm that would or would not constitute the investment within the meaning of the Convention and the Treaty . . . that Mr. Patrick Mitchell made with a view to establishing and exercising his profession in the DRC. It is true that the latter would be protected by the Treaty, but because it *related* to the operation or project constituting the investment. However, nothing is said in the Award about the *content* of the services of the "Mitchell & Associates" firm that would justify the decision to qualify them as an investment.<sup>160</sup>

Thus, in the committee's view, when it comes to a services contract, establishing a physical presence within a host state, such as by maintaining an office, is not itself sufficient for determining a jurisdictional nexus.

This decision, therefore, illustrates a somewhat holistic approach to an article 25 "investment" analysis, which is consistent with the spirit of the Convention. Although it did not say so outright,<sup>161</sup> the committee focused its analysis heavily on the single criterion that is justified by the text of the Convention (specifically, its preamble) instead of giving equal weight to each of the *Salini* elements.<sup>162</sup>

#### B. Deutsche Bank AG v. Sri Lanka: *Why Economic Development Is Not Necessary for Purposes of Satisfying Article 25*

The dispute in *Deutsche Bank*<sup>163</sup> arose out of a one-year oil hedging agreement (concluded in 2008) between Deutsche Bank and Sri Lanka's national petroleum corporation, Ceylon Petroleum Corporation (CPC).<sup>164</sup> The terms of the agreement included a strike price of \$112.50 per barrel of oil and applied to a strike volume of 100,000 barrels of oil.<sup>165</sup> Payments were to be made every fourteen days.<sup>166</sup> In essence, if the average price of oil exceeded \$112.50 for a given fourteen-day period, Deutsche Bank would pay Sri Lanka for that difference in price.<sup>167</sup> Alternatively, if the

159. *See id.* The annulment committee also rejected the arbitral tribunal's inclusion of "non-reinvested" returns as evidence of an investment. *See id.* ¶ 43.

160. *Id.* ¶ 38 (emphasis added).

161. The committee did, in fact, adhere strictly to *Salini*. *See id.* ¶ 33 (noting how the "contribution to the economic development" criterion is not itself "sufficient" for determining the existence of an article 25 investment).

162. *See supra* note 148 and accompanying text.

163. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> [<https://perma.cc/FX48-UZLW>].

164. *Id.* ¶¶ 12–14. It is also worth noting that Sri Lanka owned 100 percent of the corporation. *See id.* ¶ 13.

165. *Id.* ¶ 30.

166. *Id.*

167. For example, if the average price of oil was \$132.50 for a given fourteen days, Deutsche Bank would have to pay Sri Lanka \$2 million for that period of time

price were lower than \$112.50, Sri Lanka would make a payment to Deutsche Bank.<sup>168</sup>

At the time the agreement was entered into, the price of oil stood at \$137.52 per barrel (peaking at \$140.24).<sup>169</sup> Contrary to what Sri Lanka had hoped, however, only the first payment under this agreement was profitable for them,<sup>170</sup> occurring in September of 2008 and in the amount of \$35,523.81.<sup>171</sup> Shortly thereafter, the price of oil dropped dramatically and Sri Lanka found itself making two payments of \$1,659,636.36 and \$4,507,857.14.<sup>172</sup> In December, Sri Lanka (by extension of the CPC) terminated the agreement, thereby prompting Deutsche Bank, via the German-Sri Lanka BIT, to bring an ICSID claim against them.<sup>173</sup> The arbitral tribunal determined that the hedging agreement satisfied the definition of investment both within the meaning of the BIT and article 25 and issued an award in Deutsche Bank's favor.<sup>174</sup>

In finding for Deutsche Bank and determining that the hedging agreement was an investment within the meaning of article 25, the tribunal effectively rejected the traditional *Salini* test. Specifically, the tribunal, like in *Quiborax* only utilized three of the *Salini* factors: (1) substantial commitment or contribution, (2) duration, and (3) assumption of risk.<sup>175</sup> The tribunal rejected both the contribution to economic development and the regularity of profit and return factors, citing recent ICSID case law as its justification.<sup>176</sup>

In spite of the fact that the hedging agreement involved no contribution of capital or resources, the tribunal determined that, by committing to pay Sri Lanka for the difference in market price and strike price of oil (assuming the price of oil exceeded the strike price, a figure that was capped at \$2.5 million), Deutsche Bank satisfied the "contribution" requirement.<sup>177</sup> The fact that the contribution was, by its very nature, contingent upon prices determined by a market over which neither party exercised control did not affect the outcome.<sup>178</sup>

The tribunal next determined that the remaining two criteria were also satisfied.<sup>179</sup> The tribunal noted that the "duration" criterion was flexible<sup>180</sup>

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(\$132.50 – \$112.50 = \$20 (\$20 more than the strike price), and  $\$20 \times 100,000 = \$2,000,000$ , where the figure is calculated on the basis of 100,000 barrels of oil).

168. See *Deutsche Bank*, ARB/09/02, ¶ 30.

169. *Id.* ¶ 28.

170. See *id.* ¶¶ 37–44.

171. *Id.* ¶ 37.

172. *Id.* ¶ 38.

173. See *id.* ¶¶ 41–44. It is also worth noting that Deutsche first brought a claim in Sri Lanka's national court system. See *id.* ¶¶ 45–50.

174. See *id.* ¶¶ 283–348.

175. *Id.*

176. *Id.*

177. See *id.* ¶¶ 297–300.

178. See *id.* ¶¶ 323–346 (taking the position that the hedging transaction was more than speculation and that hedging agreements are permissible under article 25 of the Convention).

179. See *id.* ¶¶ 301–304.

180. See *id.* ¶ 303.

and that a year-long contract (as contemplated by the agreement) was sufficient to establish as much.<sup>181</sup> The tribunal determined that the “risk” requirement was satisfied based on the fact that Deutsche Bank risked losing \$2.5 million.<sup>182</sup>

In rejecting the contribution to economic development factor,<sup>183</sup> the tribunal deemed it “unworkable owing to its subjective nature.”<sup>184</sup> The tribunal also stressed that “the existence of an investment must be assessed at its inception and not with hindsight”<sup>185</sup> and that “whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host State can often be a matter of appreciation and can generate a wide spectrum of reasonable opinions.”<sup>186</sup>

Almost in complete opposition to the approach applied in *Mitchell*, the tribunal in *Deutsche Bank* utilized a broad, investor-centric interpretation of “investment,” relying only on the elements of contribution, risk, and duration. Moreover, in so doing, the tribunal determined that the most significant quality of an investment is an investor’s commitment, independent of its effect (intended or otherwise).<sup>187</sup>

### C. Support for the Approach in *Mitchell* (as Opposed to *Deutsche Bank*)

As explained in Part I.B.3, it is the source of considerable debate as to whether there exists an objective article 25 definition of “investment.”<sup>188</sup> Whether such a definition encompasses the requirement that an investment contribute to the host country’s economic development is the source of even further contention.<sup>189</sup> Nevertheless, many tribunals, as the ad hoc committee in *Mitchell* explained, answer both questions affirmatively by rejecting arguments like those found in *Deutsche Bank*, finding such a requirement is too “subjective” and “unworkable.”<sup>190</sup> Moreover, in the words of the dissenting opinion in *Deutsche Bank*, this requirement

181. *See id.* ¶ 304 (“The Arbitral Tribunal is persuaded that the duration criterion is satisfied in this case. The Hedging Agreement commitment was for twelve months. Moreover, Deutsche Bank had already spent two years negotiating the Agreement. The fact that it was terminated after 125 days is irrelevant.”).

182. *See id.* ¶ 302.

183. This Note will not address the “regularity of profit and return” criterion that the tribunal recognized as an additional *Salini* element. However, for purposes of clarity and closure, the tribunal’s own words best articulate why further discussion is unwarranted: “[S]ome investments can [satisfy this criterion] although they were loss leaders. Others may . . . be contingent on extraneous events . . . . The criterion should rather be qualified as an expectation that the investment will be profitable.” *See id.* ¶ 305. Moreover, unlike the contribution to economic development requirement, like the other *Salini* elements, “regularity of profit and return” has no textual basis. *See supra* Part I.E.

184. *Deutsche Bank*, ICSID Case No. ARB/09/02, ¶ 306.

185. *Id.* ¶ 295.

186. *Id.* ¶ 306.

187. *See id.* ¶ 307 (“What is important is the commitment of the investor and not whether he positively contributed to the economic and social development of the host State.”).

188. *See supra* Part I.B.3.

189. *See supra* Part II.B.

190. *See supra* Part II.A.

“preserves a vital link between an investment and the intended purpose of the Convention” that is “emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention.”<sup>191</sup> The justification for this position, therefore, has two basic grounds—text and purpose.

### 1. Text

The textual argument consists of three primary layers. First, the preamble itself clearly acknowledges that the Convention’s purpose is to encourage economic development.<sup>192</sup> In the words of a supporter of the *Salini* test, “It would be odd to expand the organization’s jurisdiction beyond the bounds necessary to do that.”<sup>193</sup> This is further supported by the Vienna Convention, which requires that tribunals consider a treaty’s preamble when construing its terms.<sup>194</sup> Moreover, because an article 25 “investment” is undefined and its meaning is so widely disputed, there is a strong argument that it is ambiguous.<sup>195</sup> As such, the Vienna Convention would require tribunals to consider the drafting history that discusses the preamble while interpreting the term.

The second layer also is rooted within the Vienna Convention. Specifically, because tribunals are required to consider the context, circumstances, and preparatory documents used in connection with a treaty when resolving cases of textual ambiguity, proper consideration must be given to the ICSID Convention’s drafting history.<sup>196</sup> Under this theory, therefore, because the ICSID Convention’s drafting history explicitly contemplates the goal of economic development in numerous drafts,<sup>197</sup> consideration of a potential investment’s effect on economic development ought to be considered when determining the existence of an investment as contemplated by article 25.<sup>198</sup>

The third layer is found within the Report of the Executive Directors of the World Bank that accompanied the Convention. It explicitly states:

In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an

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191. *Deutsche Bank AG v. Democratic Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Dissenting Opinion, ¶ 46 (October 23, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1273.pdf> [<https://perma.cc/TR6F-L43N>]. The tribunal also noted that “[w]hether a financial transaction is an investment must be judged at the time of its inception.” *Id.* ¶ 52.

192. See ICSID Convention, *supra* note 26, pmb1.

193. Grabowski, *supra* note 116, at 304.

194. See VCLT, *supra* note 120, art. 31.

195. See *supra* note 135.

196. See Grabowski, *supra* note 116, at 304.

197. See, e.g., 1 ICSID, *supra* note 81, at 2, 18, 20 (considering “economic development” in the early preamble drafts).

198. See Grabowski, *supra* note 116, at 304.

atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.<sup>199</sup>

As such, by again viewing the Vienna Convention's article 31 as somewhat of a bootstrapping mechanism (similar to the preambular justification argument), proponents are able to argue that this too is a source of support for the contribution to development criterion.<sup>200</sup>

## 2. Purpose

Lastly, there is the more purpose-based argument. ICSID exists under the mandate of the World Bank.<sup>201</sup> In addition to providing facilities for ICSID arbitration, there is a strong argument that the threat of losing future World Bank financing offers additional compliance incentives for host countries.<sup>202</sup> Furthermore, on a structural level, the "principal office of the International Bank for Reconstruction and Development," one of the World Bank's subsidiaries, is explicitly mentioned in the Convention as the seat of ICSID.<sup>203</sup> Because the World Bank has the clear goal of furthering economic development abroad, therefore, it is argued that its association with ICSID would make little sense if an activity hindering such development were to come under its protection.<sup>204</sup>

Finally, an argument used by tribunals declining to apply the contribution to economic development criterion simultaneously serves as the criterion's implicit support.<sup>205</sup> These tribunals reason that the criterion is implicitly found within the other characteristics of *Salini* and that because it is implied, application based on it is unnecessary.<sup>206</sup> Ironically, by rejecting the prong, they implicitly advocate for its inclusion.

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199. Report of the Executive Directors, *supra* note 76, at 25.

200. See Grabowski, *supra* note 116, at 304.

201. *ICSID and the World Bank Group*, ICSID (Dec. 17, 2015), <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/ICSID%20And%20The%20World%20Bank%20Group.aspx> (listing ICSID as one of five organizations under the World Bank's mandate) [<https://perma.cc/8DFJ-EUPX>]. The same page also states that "[e]ach of the five World Bank Group organizations contributes to the overall goal of poverty reduction through its particular work." *Id.*

202. See Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 372 (2007) ("[T]here may be institutional gravitas that creates an incentive for sovereigns to comply with ICSID awards, lest they have difficulty securing future World Bank financing."). *But see* SCHREUER ET AL., *supra* note 27, at 1108 (acknowledging that this is an "untested assumption").

203. ICSID Convention, *supra* note 26, art. 2.

204. See Grabowski, *supra* note 116, at 304–05.

205. See, e.g., *Consortio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, pt. II, ¶ 13 (Jan. 10, 2005), <http://www.italaw.com/sites/default/files/case-documents/italaw4321.pdf> (taking the position that contribution to economic development is "implicitly covered by the other three [*Salini*] criteria") [<https://perma.cc/H72S-FL48>].

206. *Id.*

*D. Support for the Approach in Deutsche Bank  
(as Opposed to Mitchell)*

Several scholars and tribunals alike, however, disagree with an outcome like the one that resulted in *Mitchell*. In particular, those who oppose it argue for an overly inclusive definition of “investment.”<sup>207</sup> Submitting that the *Salini* test—particularly its contribution to economic development factor—is too rigid and formalistic, proponents of the broad approach have three main justifications for their support: (1) that the drafters of the Convention expressly considered and rejected a definition for “investment,” thereby precluding the use of any objective criteria for determining whether an “investment” exists under the Convention;<sup>208</sup> (2) the practical difficulty of administering a contribution to economic development criterion;<sup>209</sup> and (3) that such an approach discourages investment.<sup>210</sup>

1. The Drafters of the Convention Expressly Considered  
and Rejected a Definition for “Investment”

One argument made by scholars and tribunals who disagree with an economic contribution requirement is that, when the Convention was drafted, several specific definitions of “investment” were considered and rejected.<sup>211</sup> In other words, if the drafters had wanted a definition that included such criteria, they could have included them.<sup>212</sup>

As argued by Julian Mortenson, a proponent of a broad article 25 definition, among the definitions considered by the Convention were those that included three factors on which “restrictive” tribunals rely: substantiality of contribution, duration, and whether the activity was commercial.<sup>213</sup> Mortenson argues that the drafters’ choice to leave the term open and include a consent requirement via article 25(4), allowing parties to tailor a definition of “investment” specific to their particular interests, suggests that there should be an almost entirely deferential approach to article 25 “investment” determinations.<sup>214</sup> Their intended “formula,” Mortenson explains, “was a broad and open-ended reference to ‘investment’

207. See Mortenson, *supra* note 21, at 315 (arguing for a test that accepts any activity or asset that is “colorably economic in nature” as an “investment”).

208. *Id.* at 297–301.

209. See *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶ 306 (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> (considering the criterion “unworkable owing to its subjective nature” as well as unfairly involving “a post hoc evaluation of the claimant’s activities”) [<https://perma.cc/FX48-UZLW>]; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 85 (Apr. 15, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf> (referring to the criterion as “impossible to ascertain”) [<https://perma.cc/N89R-BPD3>]; see also Boddicker, *supra* note 121, at 1055 (also taking the position that the criterion is “unworkable”).

210. See Mortenson, *supra* note 21, at 282–83.

211. See *id.* at 280–81.

212. See *id.* at 280–96.

213. See *id.* at 297–301.

214. See *id.* at 300 (stating that the drafters likely intended to limit the term to any “plausibly economic activity or asset”).

without limitation, combined with specific procedural mechanisms that allowed each state to create an individualized definition of ‘investment’ after the Convention was ratified.”<sup>215</sup> Similarly, some tribunals have concluded that contribution to economic development is a *goal* of the Convention, as opposed to a requirement therein.<sup>216</sup>

## 2. The Practical Difficulty of Administering a Test That Requires a Contribution to Economic Development

As the tribunal in *Deutsche Bank* believes, a contribution to economic development requirement would also be difficult to administer.<sup>217</sup> Others share this view.<sup>218</sup> One argument in support of this position is that there are different views as to what constitutes “development,” and that the issue with “trying to define ‘development’ is exacerbated by the radically different states of development that exist in the world.”<sup>219</sup> Because some countries are more developed than others, the jurisdictional bar for claims brought against more developed countries would necessarily be higher.<sup>220</sup> Due to such subjectivity, proponents of abandoning this factor believe tribunals are “ill-equipped to make the kinds of judgments necessary to determine whether an investment has made a contribution to development.”<sup>221</sup>

## 3. An Approach Requiring a Contribution to Economic Development Will Discourage Investment

Also of critical concern to those who view the development factor unfavorably is how such a requirement would affect potential investors’ general incentive to invest in foreign countries. Mortenson argues that the Convention’s drafters chose to exclude a definition of “investment” out of fear that it would undermine the Convention’s stated purpose of advancing development abroad.<sup>222</sup> Under this view, the drafters’ reluctance to define

215. *Id.* at 290; see also Perry S. Bechky, *International Adjudication of Land Disputes: For Development and Transnationalism*, 7 *LAW & DEV. REV.* 313, 317 (2014) (“Contribution to development is not part of the ‘ordinary meaning’ of the word ‘investment.’ By reading this test into Article 25, Tribunals are displacing the judgment of Member States about how best to use ICSID.”).

216. See *supra* note 133; see also *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 222 (Sept. 27, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf> [<https://perma.cc/KB6C-XG7R>].

217. See *supra* note 209 and accompanying text.

218. See Boddicker, *supra* note 121, at 1054–55 (“Economic development is a nebulous concept, one that is not readily quantifiable and, moreover, is subject to divergent viewpoints.”); see also Bechky, *supra* note 215, at 318 (noting how such a requirement “adds cost and unpredictability to ICSID arbitration”).

219. Bechky, *supra* note 215, at 317 (asking if it is “even possible for an investment to contribute to the development of a country that is already developed”).

220. *Id.*

221. *Id.*

222. See Mortenson, *supra* note 21, at 282–83 (“The Comment also reiterated the staffers’ overarching concern that “[t]o include a more precise definition would tend to open the door

the term stemmed from their concern that uncertainty—as to whether an investment qualifies for ICSID protection independent of the parties’ own definition—would discourage potential investors from investing in foreign countries.<sup>223</sup> Such discouragement, Mortenson argues, would be inconsistent with the Convention’s goals.<sup>224</sup>

Similarly, another scholar, Perry Bechky, argues that a broad approach excluding the contribution to economic development requirement is the only approach that can adequately respect the autonomy of parties to a BIT and afford them their “day in court.”<sup>225</sup> This would arguably further the goal of predictability because the parties would be responsible for only what they explicitly consented to and would not be at the mercy of a tribunal that may or may not choose to consider whether there was a contribution to economic development.

### III. THE REMEDY

The problem is clear: initially developed as a mechanism to further economic development abroad by balancing investor and host state interests,<sup>226</sup> ICSID arbitration has since shifted its focus toward investor expectations, now protecting endeavors that contravene the Convention’s original stated purpose.<sup>227</sup> Consider *Deutsche Bank*, for example. That the tribunal deemed a hedging agreement worthy of protection under article 25 should have, from the moment the award was rendered, sparked uproar in the international legal community. It did not.

Not only is a hedging agreement not an investment under any ordinary sense of the word—because it does not create value, it merely allocates payments—but such an agreement also may put a developing country’s economic interests in serious jeopardy.<sup>228</sup> Part III therefore argues that outcomes such as this one can be avoided if article 25 is viewed as a gatekeeper that protects only investments that contemplate contributing to a host country’s economic development.

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to frequent disagreements as to the applicability of the Convention to a particular undertaking, thus undermining the primary objective’ of advancing development by creating assurances for foreign investors.” (quoting 2 ICSID, HISTORY OF THE ICSID CONVENTION 204 (1968)).

223. See Boddicker, *supra* note 121, at 1055.

224. *Id.*

225. See Bechky, *supra* note 215, at 318. Additionally, Bechky argues that this impacts small investors “who have the greatest need for the assurance ICSID provides,” thereby impeding investment and, consequently, development. *See id.* Bechky, however, provides no support for this statement. *See id.* Moreover, given the large risks associated with international investment generally, *see supra* Part I.A, and excluding the exorbitant costs of international arbitration, *see Franck, supra* note 25, at 1592, any discouragement that small investors might face is probably hypothetical.

226. See ICSID Convention, *supra* note 26, pmbl.

227. ICSID arbitration is quite expensive. *See Franck, supra* note 25, at 1592 (noting that such “litigation can easily cost more than U.S. \$1 million a year”).

228. If one chooses to accept an article 25 “investment” as an unambiguous term (which itself is a dubious proposition), this would contravene the Vienna Convention. *See VCLT, supra* note 120, art. 31.

Given the two sides illustrated in Part II, Part III argues for an interpretative approach that includes a contribution to economic development analysis. Specifically, Part III argues that contribution to economic development should be the *only* objective criterion of the *Salini* factors used by tribunals to establish a qualifying investment.

First, Part III.A addresses the arguments made by proponents of a broad interpretation of an article 25 “investment” (as outlined above in Part II.D), and it explains why those arguments fail. Part III.B then offers a new approach requiring that an article 25 “investment” include a contribution to economic development requirement to remain consistent with the Convention’s primary object and purpose. Part III.B also proposes that any protected investment be one that is value creating (as opposed to value distributing). In doing so, Part III offers a viable solution for tribunals trying to effect justice and limit ICSID’s enforcement mechanism to only those claims that it was originally intended to protect.

*A. Addressing the Critics  
of the Contribution to Economic Development Criterion*

Before explaining why the article 25 approach for which this Note advocates is the appropriate one, it is first important to dismiss the arguments favoring the alternative approaches outlined above—namely, the arguments in favor of excluding the contribution to economic development requirement. As explained in Part II.D, there are three main justifications for its exclusion: (1) the ICSID Convention fails to define “investment” and, as such, any objective criteria may not be read into the definition; (2) such an approach creates practical difficulties making consistent administration a difficult task for tribunals; and (3) such a requirement would discourage investment. Each argument, however, fails in its own right. Furthermore, this part explains why future tribunals should no longer view the remaining *Salini* criteria as formal requirements.

1. That the ICSID Convention Does Not Define “Investment”  
Does Not Mean Article 25 Lacks Independent Criteria

First, it is undisputed that the ICSID Convention fails to explicitly define “investment” for purposes of determining its own jurisdiction.<sup>229</sup> However, to assume that the Convention contains no outer limit on states’ agreed-upon definitions of “investment” is to accept a logical inconsistency. Even the most fervent opponents of the contribution to economic development requirement concede that the Convention—with its title, text, and purpose explicitly contemplating “investment”—means to, at the very least, exclude *some* types of commercial activity, such as one-time purchases.<sup>230</sup> Nevertheless, an exclusion of such commercial activity is not found within

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229. See *supra* note 79 and accompanying text.

230. See *supra* note 79.

the language of article 25;<sup>231</sup> rather, it is inferred as an obvious limitation gleaned from basic common sense.<sup>232</sup>

How, then, can those arguing for the broadest interpretation of an article 25 “investment” claim that the Convention’s absence of an explicit definition supports the conclusion that the correct meaning of the term is to be gleaned merely through the states’ written consent, while at the same time taking the position that an article 25 “investment” also excludes certain types of commercial activity independent of the parties’ consent?<sup>233</sup>

While it is true that the Convention’s drafting history is full of failed attempts to define the term,<sup>234</sup> it is inconsistent logic to argue that article 25 has some objective limitation to be inferred from a source other than the provision’s explicit language (i.e., excluding certain types of commercial activity) while simultaneously maintaining that the provision’s lack of explicit definition for “investment” supports a rejection of other types of objective criteria (i.e., a contribution to economic development requirement).<sup>235</sup> Unless “investment” is to function merely as a *fill-in-the-blank* term, enabling countries and investors alike to gain easy access to the most powerful enforcement mechanism in international arbitration, the argument—that absence of definition allows for any definition the states wish to impose<sup>236</sup>—must be viewed as invalid.<sup>237</sup>

Because it is widely accepted that there exists at least one implied limitation on an article 25 “investment,” the argument that the Convention’s failure to include a definition for “investment” affirmatively establishes that a contribution to economic development requirement may not be read into the Convention cannot hold water.

## 2. The Contribution to Economic Development Requirement Is Not Overly Difficult for Tribunals to Administer

While it is true that a test requiring the use of judgment and careful consideration of the facts is more difficult to administer than a bright-line test that requires little analysis, ICSID arbitration, much like any other area of law, requires the rendering of such careful judgment. While those opposing the contribution to development requirement argue that such a test

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231. *See supra* note 79.

232. *See supra* note 79.

233. *See supra* note 79.

234. *See supra* Part II.D.2.

235. *See supra* Part II.D.2.

236. *See supra* Part I.E.1.

237. More importantly, it would contravene a rule of the Convention that requires that an “investment” satisfy a definition that is independent of the party’s consent. *See SCHREUER ET AL., supra* note 27, at 117 (explaining that “a request for conciliation or arbitration must indicate not only particulars concerning the parties’ consent but also, as a separate requirement, information concerning the issue in dispute indicating that there is a legal dispute arising directly out of an investment”).

is necessarily subjective and not “readily quantifiable,”<sup>238</sup> this requirement, as articulated in the dissenting opinion in *Deutsche Bank*, “preserves a vital link between an investment and the intended purpose of the Convention.”<sup>239</sup> More importantly, this link ought to be respected.

Consider the actual outcome in *Deutsche Bank*. Application of a broad article 25 test,<sup>240</sup> by giving meaning to the definition of “investment” as was consented to by the parties, led to a finding of ICSID jurisdiction over a dispute arising out of a hedging agreement.<sup>241</sup> It is difficult to imagine that a hedging agreement, which poses the obvious risk of hindering an already underdeveloped country’s economic development, would be consistent with the purposes and aims of the Convention.

Had the tribunal chosen to apply a contribution to economic development requirement, the article 25 analysis could not have been very complicated. Concerns over subjectivity and whether the requirement was “readily quantifiable” would have been quickly put to rest. In particular, the hedging agreement limited Deutsche’s exposure to \$2.5 million while leaving Sri Lanka—a country with limited economic resources to begin with—exposed to considerably greater financial risk.<sup>242</sup> Such limitation and exposure runs directly counter to the Convention’s stated purpose because the very nature of the agreement involved one party benefitting at the other’s expense.<sup>243</sup> Allowing article 25 to function as a gatekeeper for investments, therefore, would serve a distinct policy purpose by excluding activities deleterious to the ICSID Convention’s stated objective.

Lastly, temporal concerns, such as those put forth by the majority in *Deutsche Bank*,<sup>244</sup> are similarly without merit. In particular, the majority of the tribunal was concerned that a failed investment, with the clear goal of furthering economic development in a host country, would be excluded if the investment fell short of accomplishing that end.<sup>245</sup> However, as the dissenting opinion properly recognized, the time of a financial transaction’s inception should be the focal point of the analysis.<sup>246</sup> Therefore, a tribunal needs only to look to and judge the activity as it was conceived. Accordingly, while applying such a criterion may involve some discretion,

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238. See Boddicker, *supra* note 121, at 1054–55; see also *supra* Part II.D.2 (discussing the practical difficulties associated with administering a contribution to economic development criterion).

239. *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶ 306 (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> [<https://perma.cc/FX48-UZLW>]; see also *supra* note 191 and accompanying text.

240. Recall that the tribunal in *Deutsche Bank* applied the remaining three *Salini* factors: contribution, risk, and duration. See *supra* Part II.B.

241. See *Deutsche Bank*, ICSID Case No. ARB/09/02, ¶¶ 293–312.

242. See *supra* Part II.B (discussing the lopsided nature of the parties’ risk exposure relative to one another).

243. See ICSID Convention, *supra* note 26, pmbl.

244. See *supra* note 209 and accompanying text (referencing a post hoc evaluation of the claimant’s activities).

245. See *supra* note 209 and accompanying text.

246. See *supra* note 191 and accompanying text.

the administrative problems in applying a contribution to economic development criterion are likely overstated.

### 3. A Contribution to Economic Development Criterion Will Not Discourage Investment

Finally, those arguing that a contribution to economic development requirement will discourage investment are mistaken. First, they rely on the assumption that a contribution to economic development is difficult to quantify and inherently subjective.<sup>247</sup> They argue that whether a given investment satisfies this criterion would be unclear, leading to more unpredictability for the investor and thereby increasing the risks attached to a given project.<sup>248</sup> In support, one proponent points to the Convention's drafting history, correctly asserting that a significant concern of the drafters' in defining "investment" too precisely was that it would lead to frequent disputes over the Convention's applicability, thereby discouraging investment and undermining the Convention's purpose.<sup>249</sup>

However, consider the language of the drafting history used by one scholar in furtherance of this position: "[T]o include a more precise definition would . . . undermin[e] the [Convention's] primary objective' of *advancing development* by creating assurances for foreign investors."<sup>250</sup> If anything, however, this language expresses concern that a more precise definition would ultimately discourage a particular type of investment—that which *advances development*. Therefore, the drafters' expressed concern over including too precise a definition referred to *types* of activity that would already have furthered this stated purpose. It is thus more logical to read this language as addressing concern over a precise definition insofar as it applies to a "type" of activity (i.e., a power plant, loan, service agreement, etc.) as opposed to concern over the activity's *purpose*. To consider otherwise is to render the comment's language incomprehensible.

### 4. Side Issue: The Problem with *Salini* and Its Subsequent Variations

Finally, *Salini* and its variants present a separate problem. Although the *Salini* test should be lauded for its inclusion of the requirement that an investment contribute to a host country's economy, the remaining requirements (specifically, duration and risk) are descriptive terms used to define an "investment" in the ordinary sense of the word.<sup>251</sup> By having a test that embodies the ordinary definition of "investment" in the form of rigid requirements, adherents to *Salini* implicitly apply article 31(1) of the

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247. See *supra* Part II.D.2.

248. See *supra* Part II.D.2.

249. See Mortenson, *supra* note 21, at 282–83.

250. *Id.* (emphasis added) (quoting 2 ICSID, *supra* note 222, at 204).

251. Unlike the other two requirements, the contribution requirement is implied in the contribution to economic development criterion.

Vienna Convention,<sup>252</sup> because they are reading article 25's "investment" as a word that is unambiguous and without special meaning, thereby contradicting any preambular justification for article 31(2) and (4).<sup>253</sup> Doing so also contradicts a similar justification for the contribution to economic development criterion under article 32.<sup>254</sup> As such, requirements in *Salini* and its variations embodying the ordinary sense of "investment," although useful guidelines, should not be formal requirements.

*B. The Proper Test: Value Creating  
and a Contribution to Economic Development in the Host Country*

The proper article 25 approach emerges from a textual interpretation of the Convention, the Convention's stated purpose, and a dose of reality. As explained above,<sup>255</sup> treaty shopping and unequal bargaining positions, with respect to investment contracts, expose countries to great economic and political risk. An approach that protects against this kind of outcome and comports with the Convention's goal of furthering development makes the most sense. The proper test should therefore consist of only two requirements. Specifically, in addition to not being merely a commercial transaction, the asset or activity in question should (1) contribute to the economic development of the host country and (2) be value creating (as opposed to a hedging agreement that merely allocates value).

1. An ICSID Investment Should Contribute  
to Economic Development and Have a Territorial Nexus

Recognizing the goals of the Convention and its purpose, each qualifying "investment" should contribute to a host country's economic development.<sup>256</sup> This is not to say that a failed investment contemplating this goal ought to be excluded. Rather, such an investment should be judged at the time of its inception, irrespective of whether it ultimately succeeded in achieving that end.<sup>257</sup>

As explained in Part II.C, the inclusion of this prong, unlike the other *Salini* elements, has found express support within the Convention's preamble and preparatory documents.<sup>258</sup> Because the Vienna Convention requires consideration of these textual sources when interpreting an ambiguous term,<sup>259</sup> choosing to ignore the implications arising out of these textual sources would violate the Vienna Convention.

252. *See supra* Part I.E.3.

253. *See* VCLT, *supra* note 120, art. 31(2), (4) (giving "special meaning . . . to a term if it is established that the parties so intended").

254. *Id.* art. 32 (deeming a term effectively ambiguous after the four suggested interpretative tools in article 31 have been exhausted).

255. *See supra* note 11 and accompanying text.

256. *See supra* Part II.C.

257. *See supra* note 191 and accompanying text.

258. *See supra* Part II.C; *see also supra* Part I.E.2.

259. Considering how many qualified legal minds sitting on ICSID tribunals have chosen to interpret the word differently (i.e., applying different "investment" qualification tests), the ambiguity of the term cannot be disputed.

More importantly, failing to include this prong jettisons basic common sense. Casting aside concerns of “subjectivity” and “workability,”<sup>260</sup> one cannot seriously take the position that the ICSID Convention, when its very first sentence expressly acknowledges that it was created in recognition of “the need for international cooperation for economic development,”<sup>261</sup> authorizes jurisdiction for a dispute arising out of an investment that, when successful in the eyes of the foreign investor making it, would have the exact opposite effect of contributing to economic development. Yet this is exactly what occurred in *Deutsche Bank* when the arbitral tribunal granted jurisdiction over an oil hedging agreement that, if successful in the eyes of Deutsche Bank, would have had (and did have) the effect of causing at least some harm to Sri Lanka’s economic development.<sup>262</sup> This type of jurisdictional grant is an undesirable outcome. In the interest of protecting against such a possibility, and respecting the Convention, tribunals should thus be required to include a contribution to economic development analysis when determining whether they have jurisdiction under article 25.

Underlying this requirement is that a cognizable territorial nexus should exist between the host state and the investment. In fact, this want of territorial nexus has implied support within the Convention and is arguably what justified the ad hoc annulment committee’s application of the contribution to economic development requirement in *Mitchell*.<sup>263</sup> Specifically, although the Convention “does not contain an indication that an investment must be located physically in the host state,” the Report of the Executive Directors and the Convention’s primary purpose refer to “a larger flow of private international investment into the territories of participating countries.”<sup>264</sup> Therefore, although physical location is not explicitly required by the Convention for a grant of jurisdiction, the requirement that the investment must “flow” somewhere necessitates at least some connection to the host state. Absent such a connection, triggering access to ICSID arbitration via the relevant BIT for many intangible investments (e.g., services or financial products such as bonds) would be rendered practically impossible. Some territorial connection (at least in terms of impact)<sup>265</sup> may therefore be read into the Convention and, by extension, into the contribution to a host country’s economic

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260. See *supra* Part II.D.2.

261. See ICSID Convention, *supra* note 26, pmb1.

262. See *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶ 574 (Oct. 31, 2012), <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf> (awarding Deutsche Bank \$60,368,993 plus interest) [<https://perma.cc/FX48-UZLW>].

263. *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 39 (Nov. 1, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf> (noting how, in an investment consisting of services, it is insufficient for the services to merely take place in the location of the host country, but rather the services must either further the state’s interests or contribute to the country’s economic development) [<https://perma.cc/JG22-3AGE>].

264. See SCHREUER ET AL., *supra* note 27, at 137.

265. See *id.* at 140.

development requirement. Failing to do so risks obfuscating both the Convention's stated purpose and the Convention itself.<sup>266</sup>

## 2. An Investment, as Contemplated, Must Be Value Creating

Whether an activity or asset is one that creates value should also inform a tribunal's jurisdictional determination. Again, such a judgment should not necessarily be made *ex post*,<sup>267</sup> but rather *ex ante* because an investment's ultimate success or failure is not relevant when determining investor and investee rights.<sup>268</sup>

Consider again the result in *Deutsche Bank*. A hedging agreement that involves no contribution of capital and, as contemplated, cannot "create" value for a country, but rather can only "distribute" it, is inconsistent with the notion of "investment" found within the Convention, as it does not adequately balance the interests of the investor and host state as is stressed by the Report of the Executive Directors.<sup>269</sup> This is obvious when one considers the very nature of a hedging agreement. A hedging agreement is effectively a bet that, if successful in the eyes of one party, is necessarily a failure for the other. Balancing the goals of the "investor" and the host country would therefore be impossible: their interests are in direct conflict with one another—as opposed to the paradigmatic investment described in Part I, where a successful investment results in simultaneous benefit to both investor and host country.

The language of the preamble further supports imposing a value-creating requirement. In particular, the preamble contemplates international "cooperation" as its goal.<sup>270</sup> Instead of facilitating cooperation—as is expressly advocated for in the preamble—a hedging agreement that fosters competing interests would necessarily preclude the realization of this goal.

Therefore, for ICSID to truly serve its purpose, the correct definition of "investment" should be broad enough to encompass as many activities and assets<sup>271</sup> as the parties might otherwise consent to, so long as the investment contributes to the economic development of the host country and, in addition, is an activity or asset that is value-creating, at least at its point of inception.

## CONCLUSION

Although there is still no consensus on the matter, a fair test for an article 25 "investment" that is consistent with the Vienna Convention, the text of

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266. Whether the contribution is substantial, however, is a different topic and beyond the scope of this Note.

267. This, however, would not include activities made with fraudulent intentions.

268. Moreover, this can be easily dealt with by treaty.

269. See Report of the Executive Directors, *supra* note 76, at 25 (stating that the "provisions of the Convention maintain a careful balance between the interests of investors and those of host States").

270. See ICSID Convention, *supra* note 26, pmb1.

271. This is similar, in a way, to Julian Mortenson's idea of including any asset or activity that is plausibly economic in nature. See *supra* note 132.

the ICSID Convention, and is consistently applied by arbitral tribunals will serve to provide ICSID access (and access to its enforcement mechanism) only to those whom it was intended to serve. Moreover, such a test would best mitigate the paradigmatic foreign investor-host state dilemma by creating more clarity with respect to investor expectations and better protection for host countries. By treating “contribution to economic development” as the only objective criterion that matters for determining an article 25 investment, tribunals can best reconcile those competing interests.