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**THE CONTRIBUTION OF FOREIGN INVESTMENTS
TO THE ECONOMIC DEVELOPMENT OF HOST
STATES AS A JURISDICTIONAL REQUIREMENT
UNDER THE ICSID CONVENTION**

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ABSTRACT

THE CONTRIBUTION OF FOREIGN INVESTMENTS TO THE ECONOMIC DEVELOPMENT OF HOST STATES AS A JURISDICTIONAL REQUIREMENT UNDER THE ICSID CONVENTION

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This thesis addresses the problem concerning the contribution of foreign investments to the economic development of the host State as a jurisdictional requirement under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). The ICSID Convention governs the jurisdiction of the International Centre for Settlement of Investment Disputes for the institution of arbitral proceedings between Contracting States and nationals of other Contracting States. While the institution of arbitral proceedings under the ICSID Convention is contingent upon the consent of the disputing parties, the jurisdiction of the Centre is limited to disputes that fulfill certain requirements. One of the core requirements of the jurisdiction of the Centre is that the dispute must arise out of an investment. Although the ICSID Convention lacks a definition of investment, most arbitral tribunals that had to define the function and content of the investment requirement concluded that the ICSID Convention contains a notion of investment that may not be waived by the consent of the disputing parties. The majority of these decisions considered that the contribution to the economic development of the host State would be one of the elements of such notion of investment. According to these decisions, the economic development requirement, as an element of the investment requirement of the ICSID Convention, could be inferred from the wording of the first recital of the Preamble of the ICSID Convention, which states that the ICSID Convention was concluded considering the role of private international investments in the economic development. It is submitted in this thesis, however, that these decisions were based on a misapplication of the general rule of treaty interpretation of the Vienna Convention on the Law of Treaties, which codified the existing customary international law rule of treaty interpretation, given that they ignore the ordinary meaning of the term “investment” as employed in the ICSID Convention. The general rule of treaty interpretation of the Vienna Convention establishes a method by which each source of the intention of the parties to the treaty plays a relevant role. Above all, treaty interpretation must be based on the text of the treaty, which must be interpreted in accordance with the ordinary meaning of its terms. The use of the object and purpose of a treaty is a second step and may not be relied on in order to contradict the ordinary meaning of the terms employed in the treaty and to confer a special meaning on them.

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ABBREVIATIONS

AJIL	American Journal of International Law
BIT	Bilateral Investment Treaty
BYIL	British Year Book of International Law
ECHR	European Convention on Human Rights and Fundamental Freedoms of November 4, 1950
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
FTA	Free Trade Agreement
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965
ICSID Reports	Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965
ICSID Rev. – FILJ	ICSID Review—Foreign Investment Law Journal
ILC	International Law Commission
ILM	International Legal Materials

ILR	International Law Reports
IMF	International Monetary Fund
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
TDM	Transnational Dispute Management
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
Vienna Convention	Vienna Convention on the Law of Treaties of May 23, 1969
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

1. THE RESEARCH PROBLEM IN CONTEXT

1.1. Investment Arbitration and the International Centre for Settlement of Investment Disputes

Since the end of the 1990s, international arbitration has become one of the main mechanisms for the settlement of disputes between foreign investors and host States.¹ This phenomenon seems to be directly linked to the proliferation, in the same period, of international treaties entered into by States for the protection and promotion of foreign investments (“investment treaties”), most of them bilateral investment treaties (“BITs”), but also bilateral and regional free trade agreements (“FTAs”) containing investment protection rules, such as the North American Free Trade Agreement (“NAFTA”),² and sectorial multilateral investment treaties, such as the Energy Charter Treaty (“ECT”).³ In addition to the substantive rules of protection, most investment treaties grant foreign investors the option to pursue their claims against host States before international arbitral tribunals as an alternative to recourse to local courts and to diplomatic protection afforded by the foreign investors’ home States. As a result, the number of disputes between

¹ See Latest Developments in Investor-State Dispute Settlement – IIA Monitor No. 1 (2012), International Investment Agreements, published by the United Nations Conference on Trade and Development (“UNCTAD”), available at <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf>, (last visited on June 27, 2012).

² North American Free Trade Agreement of December 17, 1992, *reprinted* in 32 ILM 296/612 (1993) (entered into force on January 1, 1994).

³ Energy Charter Treaty of December 17, 1994, 2080 UNTS 95, *reprinted* in 34 ILM 381 (1994) (entered into force on April 16, 1998).

foreign investors and host States referred to international arbitration has increased dramatically in the last years.⁴

The investment arbitration phenomenon brought, on the other hand, new challenges to international arbitration practice, rooted in its commercial dispute tradition. Arbitral tribunals constituted for the settlement of investment disputes became accountable to a much wider audience. Differently from the traditional commercial arbitration, where the decisions rendered by arbitral tribunals have little, if any, publicity and their relevance is, in most cases, essentially limited to the disputing parties, the overwhelming majority of decisions rendered in investment arbitration are made public and their content has consequences not only to the disputing parties, but to a worldwide community.⁵ In investment arbitration, arbitrators have to be concerned not only with the outcome of their decisions and their consequences for the disputing parties, but also, and perhaps more relevant, they must give much more attention to how the decisions are reached. The decisions rendered in investment disputes contribute directly to the consolidation and understanding of the relatively new field of international investment law.

⁴ See Sauvant, Karl P., *The Rise of International Investment, Investment Agreements and Investment Disputes*, in Appeals Mechanism in International Investment Disputes 3 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008).

⁵ See Wälde, Thomas W., *Interpreting Investment Treaties: Experiences and Examples*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 724 (Binder, Christina, Kriebaum, Reinisch, August, and Wittich, Stephan, eds., Oxford: Oxford University Press, 2009), at 725-726. See also Smutny, Abby Cohen, *Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Actual Conduct*, in International Council for Commercial Arbitration Congress Series no. 14: 50 Years of the New York Convention: ICCA International Arbitration Conference 167 (van den Berg, Albert Jan, ed., The Netherlands: Wolters Kluwer, 2009), at 168-170.

However, one of the most distinctive features of investment arbitration lies in its *hybrid foundations*, which stem from the convergence of rules of different source and nature.⁶ While the rule of party autonomy prevails in traditional commercial arbitration, arbitral tribunals in investment disputes are faced with a situation in which their discretion and the autonomy of the parties are limited. Especially in disputes referred to arbitration pursuant to investment treaties, arbitral decisions are not limited to the interpretation and application of private agreements entered into by the disputing parties, but they are also required to interpret and apply international treaties and customary rules of public international law.⁷

⁶ According to ZACHARY DOUGLAS:

“The analytical challenge presented by the investment treaty regime for the arbitration of investment disputes is that it cannot be adequately rationalised either as a form of public international law or private transnational dispute resolution. Investment treaties are international instruments between states governed by the public international law of treaties. The principal beneficiary of the investment treaty regime is most often a corporate entity established under a municipal law, while the legal interests protected by the regime are a bundle of rights in an investment arising under a different municipal law. The standards of protection are fixed by an international treaty, but the liability for their breach is said to give rise to a ‘civil or commercial’ award for enforcement purposes” (Douglas, Zachary, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL 151 (2003), at 152 – footnotes excluded).

⁷ As observed by GUS VAN HARTEN:

“Let us briefly revisit the key distinction between investment treaty arbitration and commercial arbitration. The authority for commercial arbitration flows from the consents of the disputing parties to resolve their dispute through arbitration. The authority for investment arbitration, in contrast, comes from the general consents of states given as part of an international agreement. The general consent, which is both prospective and open-ended, is a sovereign act of the state as legal representative of its territory and population; it is not the act of a mere disputing party, acting in a private capacity. As such, the jurisdiction of investment treaty tribunals originates in a instrument of public international law, not private law, and the law governing the arbitration is that of the treaty rather than a contract. To turn this around by drawing analogies to commercial arbitration is to neglect the sovereign origins of the disputes that trigger investor claims, and of the regime in general” (Van Harten, Gus, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), at 128).

See also Blackaby, Nigel, *Investment Arbitration and Commercial Arbitration (Or the Tale of the Dolphin and the Shark)*, in *Pervasive Problems in International Arbitration* 217 (Mistelis, Loukas A., and Lew, Julian D. M., eds., The Netherlands: Kluwer Law International, 2006), at 222-225; Veeder, V. V., *Introduction to Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games?*, in *International Council for Commercial Arbitration Congress Series no. 14: 50 Years of the New York Convention: ICCA International Arbitration Conference* 91 (van den Berg, Albert Jan, ed., The Netherlands: Wolters Kluwer, 2009); Hanotiau, Bernard, *Investment*

The hybrid foundations of investment arbitration become evident if the dispute is submitted to the jurisdiction of the International Centre for Settlement of Investment Disputes (“Centre” or “ICSID”). The Centre was established in 1966 as an international organization by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)⁸ under the auspices of the International Bank for Reconstruction and Development (“IBRD”), the main international organization of the World Bank Group, and it was designed to provide dispute settlement facilities through the institution and administration of arbitral and conciliation proceedings between a Contracting State of the ICSID Convention and a national of another Contracting State. The Centre became in recent years one of the main international arbitration forums for the settlement of disputes between foreign investors and host States.⁹ By this date, the ICSID Convention has 158 signatories, out of which 148 have the status of Contracting States.¹⁰ Except for a

Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Legal Regime/Framework, in International Council for Commercial Arbitration Congress Series no. 14: 50 Years of the New York Convention: ICCA International Arbitration Conference 146 (van den Berg, Albert Jan, ed., The Netherlands: Wolters Kluwer, 2009); Moss, Giuditta Cordero, *Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 782 (Binder, Christina, Kriebaum, Reinisch, August, and Wittich, Stephan, eds., Oxford: Oxford University Press, 2009), at 784, 792-793; Wilske, Stephan, and Raible, Martin, *The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?*, in The Future of Investment Arbitration 249 (Rogers, Catherine A., and Alford, Roger P., eds., Oxford: Oxford University Press, 2009), at 259-261; Schill, Stephan W., *International Investment Law and Comparative Public Law – An Introduction*, in Investment Investment Law and Comparative Public Law 3 (Schill, Stephan W., ed., Oxford: Oxford University Press, 2010), at 14-17.

⁸ Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, 575 UNTS 159, *reprinted* in 1 ICSID Reports 3 (1993) (entered into force October 14, 1966).

⁹ According to the UNCTAD, out of 450 known investment treaty disputes referred to international arbitration, 279 were referred to ICSID arbitration. These figures, however, do not include contract based disputes and might also not be accurate due to confidentiality agreements. See *supra* note 1, at 2.

¹⁰ According to the last update of April 18, 2012. The list of signatories and Contracting States of the ICSID Convention can be found at the official website of the Centre, at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>>.

few significant exceptions, such as Brazil, Canada,¹¹ India, Mexico, Poland and Russia,¹² most capital-exporting and importing States are parties to the ICSID Convention, proving its wide acceptance and relevance in the international community.

The functions of the Centre in the settlement of disputes are very similar to the role played by traditional arbitral institutions, such as the International Chamber of Commerce (“ICC”) and the London Court of International Arbitration (“LCIA”). As in any other type of arbitration, the institution of arbitral proceedings under the aegis of the ICSID Convention is contingent upon the consent of the disputing parties, given that the mere ratification of the ICSID Convention does not make arbitration compulsory for the Contracting States and their nationals. As stated in the Preamble of the ICSID Convention, “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”¹³

In addition, the rules pertaining to arbitral proceedings instituted under the ICSID Convention confer great latitude of autonomy on the disputing parties.¹⁴ For instance, the constitution of arbitral tribunals under the ICSID Convention

¹¹ Canada signed the ICSID Convention on December 15, 2006, but has not completed the ratification process yet.

¹² Russia signed the ICSID Convention on June 16, 1992. However, it seems very unlikely that Russia will ratify the ICSID Convention in the near future.

¹³ 1 ICSID Reports 3 (1993), at 4.

¹⁴ While the jurisdiction of the Centre is governed by the ICSID Convention and it is limited by requirements which may not be waived by the will of the disputing parties, the adoption of arbitration, as a means of dispute settlement similar to a commercial arbitration model, confers great latitude of autonomy on the disputing parties. See McLachlan, Campbell, *Investment Treaty Arbitration: The Legal Framework*, in International Council for Commercial Arbitration Congress Series no. 14: 50 Years of the New York Convention: ICCA International Arbitration Conference 95 (van den Berg, Albert Jan, ed., The Netherlands: Wolters Kluwer, 2009), at 98-99.

“ICSID tribunals”) does not differ much from the way in which arbitral tribunals are normally constituted in traditional commercial arbitration, once the disputing parties have a significant autonomy in the appointment of the members of ICSID tribunals.¹⁵ While Article 3 of the ICSID Convention provides that the Centre must maintain a Panel of Conciliators and a Panel of Arbitrators,¹⁶ whose members are designated by each Contracting State¹⁷ and by the Chairman of the Administrative Council of the Centre,¹⁸ ICSID tribunals may be constituted by persons who are not members of the Panel of Arbitrators. An arbitrator must be select from Panel of Arbitrators only when the appointment is made by the Chairman of the Administrative Council.¹⁹

But the distinctive feature of arbitral proceedings instituted under the ICSID Convention lies in the fact that the Centre, differently from other arbitral institutions, is an international organization. For this, pursuant to the so-called principle of speciality,²⁰ the functions of Centre are governed by its constitutive treaty, the ICSID Convention, which, as an international treaty, may not be

¹⁵ Pursuant to Article 37(2)(b) of the ICSID Convention, unless otherwise agreed by the parties, “the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties” (1 ICSID Reports 3 (1993), at 13).

¹⁶ Article 3 of the ICSID Convention provides that “[t]he Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators” (1 ICSID Reports 3 (1993), at 5).

¹⁷ Article 13(1) of the ICSID Convention provides that “[e]ach Contracting State may designate to each Panel four persons who may but need not be its nationals” (1 ICSID Reports 3 (1993), at 7).

¹⁸ Article 13(2) of the ICSID Convention provides that “[t]he Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality” (1 ICSID Reports 3 (1993), at 7).

¹⁹ Article 40(1) of the ICSID Convention provides that “[a]rbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman” (1 ICSID Reports 3 (1993), at 14).

²⁰ In accordance with the principle of speciality (or principle of attributed powers), international organizations have limited international personality and their functions must be exercised within the limits of mandate conferred on them by their member States. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of July 8, 1996, ICJ Reports 66 (1996), at 78-79. See also Schermers, Henry G., and Blokker, Niels M., International Institutional Law: Unity within Diversity (Leiden: Martinus Nijhoff Publishers, 4th ed., 2003), at 155-157.

modified by the will of the disputing parties.²¹ To this effect, Article 25(1) of the ICSID Convention provides that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”²²

In addition, the submission of disputes to the jurisdiction of the Centre does not affect only the disputing parties; it creates positive and negative obligations to all Contracting States of the ICSID Convention, which aim at isolating arbitral proceedings instituted under the ICSID Convention from the municipal laws of its Contracting States.²³ By virtue of Article 26 of the ICSID Convention, “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”²⁴ Under this provision, the Contracting States’ local courts must refrain from exercising their jurisdiction over the dispute referred to ICSID arbitration and they are also prevented from interfering in arbitral proceedings instituted under the

²¹ See Wittich, Stephan, *The Limits of Party Autonomy in Investment Arbitration*, in Investment and Commercial Arbitration – Similarities and Divergences 47 (Knahr, Christina, Koller, Christian, Rechberger, Walter, and Reinisch, August, eds., Utrecht: Eleven International Publishing, 2010), at 53-54.

²² 1 ICSID Reports 3 (1993), at 9.

²³ See Delaume, G., *The Finality of Arbitrations Involving States: Recent Developments*, 5 Arb. Int’l 21 (1989); Broches, Aron, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev. – FILJ 321 (1991), at 336; Schreuer, Christoph H., The ICSID Convention: A Commentary (Cambridge: Cambridge University Press, 2001), at 1082-1086. However, if a party seeks the recognition and enforcement of an ICSID award in a non-Contracting State, the provisions of the municipal law of that State and of international treaties to which the non-Contracting State is a party will apply (see Nathan, Kathigamar V.S.K., The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes (New York: Juris Publishing, 2000), at 61).

²⁴ 1 ICSID Reports 3 (1993), at 10.

ICSID Convention.²⁵ Moreover, arbitral awards rendered under the ICSID Convention are not subject to any kind of review by the local courts of the Contracting States;²⁶ and the recognition of arbitral awards rendered under the ICSID Convention by all Contracting States is automatic and the local courts of the Contracting States are prevented from denying the enforcement of the pecuniary obligations imposed by the award.²⁷

But while the submission of disputes to the jurisdiction of the Centre imposes several multilateral obligations, the ICSID Convention creates a *fragmentation* of the decision-making process. The authority to decide whether or not a dispute falls within the jurisdiction of the Centre is conferred on each individual ICSID tribunal without any review mechanism by a central body. In accordance with Article 36(3) of the ICSID Convention, the administrative body of the Centre, the Secretariat, has limited powers; it is only allowed to deny the admission of a request for arbitration when the dispute falls manifestly outside the jurisdiction of the Centre.²⁸ In this sense, Article 41(2) of the ICSID Convention provides that:

²⁵ See Schreuer, C., *supra* note 23, at 347.

²⁶ In this sense, Article 53(1) of the ICSID Convention provides that:

“The award shall be binding on the parties and *shall not be subject to any appeal or to any other remedy except those provided for in this Convention*. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention” (1 ICSID Reports 3 (1993), at 17 – emphasis added).

See Schreuer, C., *supra* note 23, at 1082-1083.

²⁷ Pursuant to Article 54(1) of the ICSID Convention:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state” (1 ICSID Reports 3 (1993), at 17).

See Schreuer, C., *supra* note 23, at 1114-1116.

²⁸ Article 36(3) of the ICSID Convention provides that:

“Any objection by a party to the dispute that that dispute is not within *the jurisdiction of the Centre*, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”²⁹

And given that the application of a treaty provision cannot be dissociated with the manner in which such provision is understood,³⁰ the interpretation of the ICSID Convention on matters concerning the jurisdiction of the Centre is exercised solely by each arbitral tribunal.³¹ The ICSID Convention does not set forth a mechanism whereby ICSID tribunals are required to refer questions of interpretation to the Contracting States of the ICSID Convention or to any other body.³²

“The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register” (1 ICSID Reports 3 (1993), at 13).

²⁹ 1 ICSID Reports 3 (1993), at 14 – emphasis added.

³⁰ See Haraszti, György, Some Fundamental Problems of the Law of Treaties (Budapest: Akadémiai Kiadó, 1973), at 9, 15; Bos, Maarten, *Theory and Practice of Treaty Interpretation*, in The Law of Treaties 327 (Davidson, Scott, ed., Aldershot, Hants, England: Ashgate/Dartmouth, 2004), at 335-337; Orakhelashvili, Alexander, The Interpretation of Acts and Rules in Public International Law (Oxford: Oxford University Press, 2008), at 285. As the International Court of Justice observed in the *Nottebohm* case, “[s]ince the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction” (Judgment of November 18, 1953, ICJ Reports 111 (1953), at 119).

³¹ Arbitral awards rendered under the ICSID Convention are subject to annulment proceedings. The institution of annulment proceedings is, however, contingent upon the request of a disputing party and not by any Contracting State. Pursuant to Article 52(1) of the ICSID Convention, “[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (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” (1 ICSID Reports 3 (1993), at 16).

³² During the formulation of the ICSID Convention, it was suggested that ICSID tribunals would have to refer questions of interpretation in matters of jurisdiction to the International Court of Justice. However, this idea was rejected, once it would not be practicable and could create undesirable delays (see Broches, Aron, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331 (1972), at 368-369; Schreuer, C., *supra* note 23, at 523-524). Article 64 of the ICSID Convention provides that “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of

Accordingly, at the same time that the ICSID Convention creates a multilateral system of dispute resolution through the establishment of an international organization and the imposition of obligations on all Contracting States, the decision as to whether a dispute falls within the jurisdiction is subject to the interpretation given by each individual ICSID tribunal in a proceeding in which only the disputing parties take part and without any mechanism of harmonization of the decisions.

1.2. The Investment Requirement of the ICSID Convention and the Economic Development Requirement

In exercising the authority conferred on them by Article 41(2) of the ICSID Convention, ICSID tribunals have given conflicting interpretations to the jurisdictional requirements set forth in Article 25(1) of the ICSID Convention. One of the most controversial issues raised in the practice of the ICSID tribunals concerns the function and meaning of the term “investment” as employed in Article 25(1) (the “investment requirement”). Given the lack of a definition of the term “investment” in the ICSID Convention and the role played by the consent of the disputing parties for the purposes of establishing the jurisdiction of the Centre,

Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement” (1 ICSID Reports 3 (1993), at 20). This provision, however, does not confer on the International Court of Justice the authority to give preliminary rulings or to review decisions rendered by ICSID tribunals and *ad hoc* committees as a court of appeal, nor does it give to the Centre the possibility of requesting advisory opinions from the International Court of Justice (see Schreuer, C., *supra* note 23, at 1260-1264). Article 64, nevertheless, allows the submission to the ICJ of disputes under Article 27(1) of the ICSID Convention, which authorizes a Contracting State to exercise diplomatic protection in favor of its national if the other Contracting State fails to comply with an ICSID award (see *infra* note 84); and under Article 54(1) of the ICSID Convention, which imposes on all Contracting States the obligation of recognition and enforcement of ICSID awards (see *supra* note 27). Under these circumstances, matters related to the interpretation of the ICSID Convention may be eventually submitted to the International Court of Justice (see Broches, A., *idib.*, at 379-380; Schreuer, C., *supra* note 23, at 1263).

the question as to whether the investment requirement of the ICSID Convention has an objective meaning became debatable in ICSID practice and writings.

In such debate, the majority of ICSID decisions considered that, while the institution of arbitral proceedings is contingent upon the consent of the disputing parties, the term “investment” places an objective limitation on jurisdiction of the Centre. According to these ICSID tribunals, the ICSID Convention contains a notion of investment that may not be waived by the will of the disputing parties and, therefore, must be assessed independently from the consent of the disputing parties.

Based on the distinction between the investment requirement of the ICSID Convention and the consent of the disputing parties to the jurisdiction of the Centre, the majority of the ICSID tribunals that were required to interpret the meaning of the term “investment” as employed in Article 25(1) of the ICSID Convention followed the so-called *Salini* test. According to the *Salini* test, which was named after the decision rendered in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, the notion of investment within the meaning of the ICSID Convention contains certain elements that distinguish an investment from an ordinary commercial transaction. In addition, most ICSID tribunals that followed the *Salini* test considered that, in order to comply with the investment requirement of the ICSID Convention, the dispute must arise out an investment that contributed or would have contributed to the economic development of the host State (the “economic development requirement”).

But the economic development requirement was not only applied in order to place a limitation on the jurisdiction of the Centre. Before the *Salini* test emerged in the practice of ICSID tribunals, the economic development requirement was relied on in the case of *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia* to expand the jurisdictional scope of the ICSID Convention. Even if the dispute does not arise out of an investment within its ordinary meaning, the Centre would have jurisdiction nonetheless if a transaction or activity subject-matter of the dispute contributed or could have contributed to the economic development of the host State.

In both forms, nevertheless, either to expand or to restrict the jurisdiction of the Centre, the existence of the economic development requirement was based on the first recital of the Preamble of the ICSID Convention, which states that the ICSID Convention was concluded “[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein.”³³

It is submitted in this thesis, however, that the ICSID decisions that applied the economic development requirement to expand or to restrict the jurisdiction of the Centre were based on a misinterpretation of the notion of investment within the meaning of the ICSID Convention. Once these ICSID decisions have recognized the existence of a distinction between the investment requirement of the ICSID Convention and the consent of the disputing parties to the jurisdiction of the Centre, the construction of the notion of investment within the meaning of the ICSID Convention is a matter of treaty interpretation. And as such, ICSID

³³ 1 ICSID Reports 3 (1993), at 4.

tribunals are required to interpret the provisions of the ICSID Convention, as an international treaty, in accordance with the general rule of treaty interpretation embodied in the Vienna Convention on the Law of Treaties (“Vienna Convention”).³⁴

³⁴ Vienna Convention on the Law of Treaties of May 23, 1969, 115 UNTS 331, *reprinted* in 8 ILM 679 (1969) (entered into force January 27, 1980).

It seems well settled that the general rule of treaty interpretation of the Vienna Convention reflected the existing customary international law at the time the ICSID Convention was concluded. In the *Territorial Dispute* case, between Libya and Chad, the ICJ applied the rules of treaty interpretation embodied in the Vienna Convention to a treaty concluded in 1955 on the basis that they were the existing international customary law rules of treaty interpretation (see Judgment of February 3, 1994, ICJ Reports 6 (1994), at 21-22). See also *Dispute Regarding Navigational and Related Rights*, Judgment of July 13, 2009, 48 ILM 1183 (2009), at 1200; *Pulp Mills on the River Uruguay*, Judgment of April 20, 2010, available at <<http://www.icj-cij.org/docket/files/135/15877.pdf>>, (last visited on May 4, 2010), at para. 65.

The general rule of treaty interpretation of the Vienna Convention was recognized by the ICJ on several occasions as the codification of the existing customary international law on law of treaties. In this sense, in the *Arbitral Award of 31 July 1989* case, the ICJ observed that the principles of treaty interpretation “are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point” (Judgment of November 12, 1991, ICJ Reports 53 (1991), at 70). See also *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* case, Judgment of February 15, 1995, ICJ Reports 6 (1995), at 18; *Oil Platforms* case, Judgment of December 12, 1996, ICJ Reports 803 (1996), at 812; *Kasikili/Sedudu Island* case, Judgment of December 13, 1999, ICJ Reports 1045 (1999), at 1059; *Sovereignty Over Pulau Ligitan and Pulau Sipadan* case, Judgment of December 17, 2002, ICJ Reports 625 (2002), at 645; *Avena and Other Mexican Nationals* case, Judgment of March 31, 2004, ICJ Reports 12 (2004), at 48; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, Advisory Opinion of July 9, 2004, ICJ Reports 136 (2004), at 174; *Legality of Use of Force* case, Judgment of December 15, 2004, ICJ Reports 1160 (2004), at 1199. See also Vallat, Francis, *The Vienna Convention on the Law of Treaties, 1969*, 40 *Annuaire de l’A.A.A.* XI (1970), at XXIV; Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, (Manchester: Manchester University Press, 2nd ed., 1984), at 19; Jennings, Robert, and Watts, Arthur, *Oppenheim’s International Law* (Harlow, Essex: Longman, 9th ed., 1992), at 1271; Torres Bernárdez, Santiago, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1989 Vienna Convention on the Law of Treaties*, in *Liber Amicorum Professor Seidl-Hohenveldern – in honour of his 80th birthday* 721 (Hafner, G., Loibl, G., Rest, A., Sucharipa-Behrmann, L., and Zemanek, K., eds., The Hague: Kluwer Law International, 1998), at 721; Shaw, Malcolm N., *International Law* (Cambridge: Cambridge University Press, 5th ed., 2003), at 839.

Several ICSID tribunals and *ad hoc* committees have recognized the applicability to the ICSID Convention of the rules of treaty interpretation of the Vienna Convention. In this sense, see *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, Award of September 1, 2000 (excerpts), 17 ICSID Rev. – FILJ 382 (2002), at 388-389; *Zhinvali Development Limited v. Georgia*, Award of January 24, 2003, 10 ICSID Reports 3 (2006), at 69-70; *Tokios Tokéles v. Ukraine*, Decision on Jurisdiction of April 29, 2004, 20 ICSID Rev. – FILJ 205 (2005), at 216; *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction of February 8, 2005, 20 ICSID Rev. – FILJ 262 (2005), at 295-296; *Metalpar S.A. and Buen Aire S.A. v. Argentina*, Decision on Jurisdiction of April 27, 2006, available at <<http://ita.law.uvic.ca/documents/Metalpar-Argentina-Jurisdiction.pdf>>, (last visited on April 1, 2009), at para. 91; *MCI Power Group L.C. and New Turbine, Inc. v. Ecuador*, Award of July 31, 2007, available at <<http://ita.law.uvic.ca/documents/MCI-Ecuador.pdf>>, (last visited on December

While the purpose of treaty interpretation is the search for the intention of the parties to the treaty in order to give effect to the consent of the parties to be bound by the treaty, the search for the intention of the parties under the Vienna Convention is not up to the discretion of the interpreter. The general rule of treaty interpretation embodied in the Vienna Convention establishes a method in which each source of the intention plays a specific role. To this effect, pursuant to Article 31(1) 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.”³⁵ The general

1, 2008), at para. 43; *Phoenix Action, Ltd. v. Czech Republic*, Award of April 15, 2009, 21(3) World Trade and Arb. Materials 729 (2009), at 755; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Decision on Annulment of April 16, 2009, a48 ILM 1086 (2009), at 1095; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay* (“*Bureau Veritas*”), Decision on Jurisdiction of May 29, 2009, available at <<http://ita.law.uvic.ca/documents/BIVACDecisiononJurisdiction.pdf>>, (last visited on April 12, 2010), at para. 59; *Azurix Corp. v. Argentina*, Decision on Annulment of September 1, 2009, available at <<http://ita.law.uvic.ca/documents/Azurix-Annulment.pdf>>, (last visited on September 4, 2009), at para. 83; *Continental Casualty Company v. Argentina*, Decision on Preliminary Objection to Application for Annulment of October 23, 2009, available at <<http://ita.law.uvic.ca/documents/ContCasObjectiontoAppforAnnul.pdf>>, (last visited on December 1, 2009), at para. 23; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine* (“*Inmaris*”), Decision on Jurisdiction of March 8, 2010, 22(5) World Trade and Arb. Materials 1045 (2010), at 1062; *Alpha Projektholding GmbH v. Ukraine*, Decision on Proposal for Disqualification of an Arbitrator of March 19, 2010, 24 ICSID Rev. – FILJ 267 (2009), at 276; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Decision on Annulment of March 25, 2010, available at <<http://ita.law.uvic.ca/documents/RumeliAnnulment.pdf>>, (last visited on July 20, 2010), at para. 70; *Railroad Development Corporation v. Guatemala*, Decision on Jurisdiction of May 18, 2010, available at <<http://ita.law.uvic.ca/documents/051810RDCvGuatemala-SecondDecisionJurisdiction.pdf>>, (last visited on May 30, 2010), at para. 111; *Burlington Resources Inc. v. Ecuador* (“*Burlington*”), Decision on Jurisdiction of June 2, 2010, available at <http://ita.law.uvic.ca/documents/BurlingtonResourcesInc_v_Ecuador_Jurisdiction_Eng.pdf>, (last visited on June 24, 2010), at para. 104; *Saba Fakes v. Turkey*, Award of July 14, 2010, available at <http://ita.law.uvic.ca/documents/Fakes_v_Turkey_Award.pdf>, (last visited on July 20, 2010), at para. 76; *Millicom International Operations B.V. and Sentel GSM SA v. Senegal*, Decision on Jurisdiction of July 16, 2010, available at <<http://ita.law.uvic.ca/documents/Millicomv.SenegalDecisiononJurisdiction.pdf>>, (last visited on September 18, 2010), at para. 58; *Enron Corporation, Ponderosa Assets LP v. Argentina*, Decision on Annulment of July 30, 2010, available at <<http://ita.law.uvic.ca/documents/EnronAnnulmentDecision.pdf>>, (last visited on August 2, 2010), at para. 114; *Duke Energy International Peru Investments No. 1, Ltd. v. Peru* (“*Duke Peru*”), Decision on Annulment of March 1, 2011, available at <http://ita.law.uvic.ca/documents/DukevPeruFinal_1Mar2011_Eng.pdf>, (last visited on March 10, 2011), at para. 85. See also Schreuer, Christoph, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3(2) TDM (2006), at 1-2.

³⁵ 8 ILM 679 (1969), at 691-692.

rule of treaty interpretation of the Vienna Convention reflects the so-called *doctrine of textual approach*, according to which the main source of the intention of the parties to the treaty lies in the actual text of the treaty, which must be understood in accordance with the natural or ordinary meaning of its terms in the context in which they occur.

The decisions that applied the economic development requirement to expand or to restrict the jurisdiction of the Centre failed to observe the method required by the general rule of treaty interpretation of the Vienna Convention. In order to justify the existence of the economic development requirement, these decisions gave primacy to the object and purpose of the ICSID Convention — the contribution to the economic development — as a source of the intention of the Contracting States of the ICSID Convention, to the detriment of the actual text of the ICSID Convention and of the ordinary meaning of the term “investment” as employed in Article 25(1) of the ICSID Convention. Under the general rule of treaty interpretation, however, the use of the object and purpose of a treaty is always a second step and may not contradict the ordinary meaning of the terms employed in the treaty.

2. THE SCOPE OF THE THESIS

2.1. Research Problem and Delimitations

This thesis focuses on the problem developed in the practice of ICSID tribunals concerning the application of the economic development requirement in order to expand or to restrict the jurisdiction of the Centre. The assessment of the research

problem is made through the legal analysis of the ICSID decisions that applied the economic development requirement and their consistency with the general rule of treaty interpretation embodied in the Vienna Convention. For this purpose, the thesis addresses two questions: (a) whether the investment requirement of the ICSID Convention has an objective meaning that distinguishes the compliance with such requirement from the consent of the disputing parties to the jurisdiction of the Centre; and (b) whether, based on this distinction, the ICSID Convention contains a jurisdictional requirement that allows ICSID tribunals to expand or to restrict the jurisdiction of the Centre based on contribution to the economic development of the host State.

This thesis makes an exhaustive research of all published decisions of ICSID tribunals and *ad hoc* committees that dealt with the fulfillment of the investment requirement of the ICSID Convention, and especially those that addressed the existence and application of the economic development requirement.³⁶ Particular attention is also given to the decisions of the Permanent Court of International Justice (“PCIJ”) and of the International Court of Justice (“ICJ”), to the extent that these decisions provided the foundations for the codification of the general rule of treaty interpretation of the Vienna Convention.

It should be noted that this thesis does not address procedural questions that might arise from the application of the economic development requirement. Accordingly, this thesis does not deal with questions as to the correct timing for a disputing party to challenge the jurisdiction of the Centre based on the non-fulfillment of the economic development requirement; whether an ICSID tribunal

³⁶ The research is based on decisions rendered and made public until June 1, 2012.

has the authority to assess the compliance with the economic development requirement on its own initiative; or who bears the burden of proof when the fulfillment of the economic development requirement has to be decided.

2.2. Relevance of the Research Problem

The choice for the problem addressed in this thesis is justified due to the relevance that the topic has gained in the context of investment arbitration. First, the Centre is one of the main forums for the settlement of investment disputes³⁷ and the investment requirement of the ICSID Convention — from which the economic development requirement derives — is one of the core elements of the jurisdiction of the Centre. Secondly, the assessment of the existence of the economic development requirement raises several questions concerning the application to the ICSID Convention of the rules of treaty interpretation of the Vienna Convention that entail a comprehensive study of the topic that has not been made so far. While the economic development requirement was dealt with before, most previous writings did not attempt to demonstrate how its existence may be justified and how its compliance may be assessed in accordance with the general rule of treaty interpretation of the Vienna Convention.

Economic development as a jurisdictional requirement was for the first time addressed in 1996 by Professor CHRISTOPH SCHREUER in his commentary on Article 25 of the ICSID Convention.³⁸ In a passage of his commentary — which

³⁷ See *supra* note 9.

³⁸ See Schreuer, Christoph H., *Commentary on the ICSID Convention: Article 25*, 11 ICSID Rev. – FILJ 320 (1996).

became part of his most famous work “The ICISD Convention: A Commentary”, published in 2001³⁹ — SCHREUER argued that:

“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.’ This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was ‘prompted by the desire to strengthen the partnership between countries in the cause of economic development.’ Therefore, it may be argued that the Convention’s object and purpose require that there must be some positive impact on development.”⁴⁰

But except for this statement, SCHREUER did not proceed to an analysis of the topic in the light of the general rule of treaty interpretation of the ICSID Convention. In addition, while SCHREUER suggested the existence of the economic development requirement, he did not attempt to explain how ICSID tribunals could assess the compliance with such requirement. However, in the recent publication “Principles of International Investment Law”, co-authored by Professor RUDOLF DOLZER, SCHREUER opined that “[i]n case of an investment lawfully admitted and implemented, the very consistency of the project with the legal order of the host state should indicate the contribution to the development of the host state.”⁴¹ In the second edition of his work “The ICISD Convention: A Commentary”, SCHREUER added that:

“Any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection

³⁹ See Schreuer, C., *supra* note 23, at 124-125. See also Schreuer, Christoph H., Malintoppi, Loretta, Reinisch, August, and Sinclair, Anthony, The ICSID Convention: A Commentary (Cambridge: Cambridge University Press, 2nd ed., 2009), at 116-117.

⁴⁰ Schreuer, C., *supra* note 38, at 358 – footnote excluded.

⁴¹ Dolzer, Rudolf, and Schreuer, Christoph, Principles of International Investment Law (Oxford: Oxford University Press, 2008), at 69.

under ICSID, should be treated with some flexibility. It should not be restricted to measurable contributions to GDP but should include development of human potential, political and social development and the protection of the local and global environment.”⁴²

Some authors have uncritically accepted the opinion of SCHREUER on the existence of the economic development requirement. This is the case of MARTIN ENDICOTT⁴³ and WALID BEN HAMIDA.⁴⁴ While both authors admit the existence of the economic development requirement and suggest a criterion based on which the compliance with such requirement may be assessed, they do not demonstrate how their conclusions were reached, especially based on the application of the general rule of treaty interpretation of the Vienna Convention.

The existence of the economic development requirement was also advocated by OMAR E. GARCÍA-BOLÍVAR.⁴⁵ According to GARCÍA-BOLÍVAR, “there is a general acceptance that contribution to economic development of the host State is an element that defines an ICSID protected investment.”⁴⁶ GARCÍA-BOLÍVAR supports his opinion on the idea that economic development was one of the main purposes of the ICSID Convention and the link between the Centre and the IBRD.⁴⁷ For him, “ICSID is not another arbitration Center;”⁴⁸ its “purpose cannot

⁴² Schreuer, C., Malintoppi, L., Reinisch, A., and Sinclair, A., *supra* note 39, at 134 – footnote excluded.

⁴³ See Endicott, Martin, *The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?*, in *Sustainable Development in World Trade Law* 379 (Gehring, Markus, and Segger, Marie-Claire C., ed., The Hague: Kluwer Law International, 2005), at 383.

⁴⁴ See Ben Hamida, Walid, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control*, 24 J. Int’l Arb. 287 (2007), at 293-295.

⁴⁵ See García-Bolívar, Omar E., *Protected Investments and Protected Investors: The Outer Limits of ICSID’s Reach*, 2(1) Trade L. & Dev. 145 (2010), at 153-158.

⁴⁶ *Ibid.*, at 158.

⁴⁷ *Ibid.*, at 153-155.

⁴⁸ *Ibid.*, at 155.

be detached from economic development.”⁴⁹ As to the assessment of compliance with the economic development requirement, GARCÍA-BOLÍVAR notes that:

“[A] hermeneutic analysis of the ICSID law shows that there are ways to ascertain the contribution to economic development of a foreign investment. If an investment is contrary to public interest, has not left any knowledge to the host country, has not enhanced the economy or its productivity or has not increased the standards of living of the host country or the labor conditions, it has probably made no contribution to the economic development of that country.”⁵⁰

Other authors, on the other hand, have denied the existence of the economic development requirement, but none of them attempted to explain why this requirement would not exist under the ICSID Convention in the light of the general rule of treaty interpretation embodied in the Vienna Convention. Professor IBRAHIM FADLALLAH suggests that the economic development requirement is “a political requirement: it is not necessary to make it a legal condition.”⁵¹ DEVASHISH KRISHAN considers that the Preamble of the ICSID Convention does not entail this condition⁵² and, even if the economic development requirement existed, “an economic transaction constituting an investment, by definition, contributes to economic development.”⁵³ Professor EMMANUEL GAILLARD concludes that the reference to economic development in the Preamble of the ICSID Convention would be “a mere acknowledgement that investment fosters

⁴⁹ *Idem*.

⁵⁰ *Ibid.*, at 158. See also García-Bolívar, Omar E., *Economic Development at the Core of the International Investment Regime*, in Evolution in Investment Treaty Law and Arbitration 586 (Brown, Chester, and Miles, Kate, eds., Cambridge: Cambridge University Press, 2011).

⁵¹ Free translation of the French original:

“Le développement est une exigence politique: il n’est pas nécessaire d’en faire une condition juridique” (Fadlallah, Ibrahim, *La Notion D’Investissement: Vers Une Restriction à la Compétence du CIRDI*, in Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner 259 (Aksen, Gerald, Böckstiegel, Karl-Heinz, Mustill, Michael J., Patocchi, Paolo Michele, and Whitesell, Ane Marie, eds., Paris: ICC, 2005), at 267).

⁵² See Krishan, Devashish, *A Notion of ICSID Investment*, in Investment Treaty Arbitration and International Law 61 (Weiler, T., ed., Huntington, New York: JurisNet, 2008), at 74.

⁵³ *Idem* – footnote excluded, emphasis in the original.

economic development. This acknowledgement does not mean that economic development is essential to the notion of investment.”⁵⁴ ZACHARY DOUGLAS points out that the economic development requirement would be “an unworkable criterion for the existence of an investment because of its subjective nature; 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 generate a wide spectrum of reasonable opinion.”⁵⁵ BRIGITTE STERN mentions “the difficulty of integrating the development dimension into the definition of investment by international arbitrators.”⁵⁶

The existence of the economic development requirement was also dealt with by Professor KENNETH J. VANDEVELDE in his extensive work on investment treaties. VANDEVELDE notes that “[i]f all that is required is a potential contribution to development, then the [economic development requirement] adds nothing because every asset will satisfy it. If the inquiry is whether the investment actually does contribute to development in some significant way, then the existence of treaty protection would depend upon the success of a particular investment.”⁵⁷ VANDEVELDE argues, however, that “to accord treaty coverage only to successful investments is inconsistent with the purposes of the BITs.”⁵⁸

⁵⁴ See Gaillard, Emmanuel, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 403 (Binder, Christina, Kriebaum, Reinisch, August, and Wittich, Stephan, eds., Oxford: Oxford University Press, 2009), at 414.

⁵⁵ See Douglas, Zachary, The International Law of Investment Claims (Cambridge: Cambridge University Press, 2009), at 202 – footnote excluded.

⁵⁶ Stern, Brigitte, *The Contours of the Notion of Protected Investment*, 24 ICSID Rev. – FILJ 534 (2009), at 543.

⁵⁷ Vandeveld, Kenneth J., Bilateral Investment Treaties: History, Policy, and Interpretation (New York: Oxford University Press, 2010), at 134.

⁵⁸ *Idem.*

Finally, in an article published in the end of 2008, the economic development requirement of the *Salini* test was discussed by Professor SÉBASTIEN MANCIAUX.⁵⁹ Differently from the previous writings, MANCIAUX bases his analysis on the application of the notion of economic development as a criterion used to determine whether a transaction or activity may qualify as an investment within its ordinary meaning.⁶⁰

The analysis of the economic development requirement is also inserted in a broad debate among scholars regarding the ability of investment arbitration tribunals to effectively observe in practice the hybrid foundations of investment arbitration and the correct use of the general of treaty interpretation of the Vienna Convention in their decision-making function.

In one of the last writings of Professor THOMAS W. WÄLDE, dedicated to the problem of treaty interpretation in investment arbitration, he noted that “[a]t present, one might even talk of a ‘struggle’ for the soul of investment arbitration between international commercial arbitration and (public) international law bars.”⁶¹ This assertion was made in the context of his profound criticism against the inappropriate transplant of a commercial arbitration approach into the field of investment disputes. WÄLDE suggested that “[t]ribunals often do not practise what they preach; reference to the Vienna Rules is now mandatory, but such reference does not mean the Rules are taken and applied seriously,”⁶² and “it is difficult to

⁵⁹ See Manciaux, Sébastien, *The Notion of Investment: New Controversies*, 9(6) J. World Investment & Trade 1 (2008).

⁶⁰ *Ibid.*, at 17.

⁶¹ Wälde, T., *supra* note 5, at 725.

⁶² *Ibid.*, at 730.

find a tribunal which formally and properly applied the Vienna Rules step by step.”⁶³

WÄLDE was not against the participation of commercial arbitration practitioners in investment disputes; he believed that many practitioners from a commercial arbitration background were able to understand the peculiarities of the legal issues pertaining to this new field. His criticism was directed to those who think that the decision-making function in investment disputes is similar to the approach adopted in the commercial arbitration tradition.⁶⁴ According to WÄLDE, the commercial arbitration approach is characterized by the fact that:

⁶³ *Ibid.*, at 746. In the same sense, as noted by MAHNOUSH ARSANJANI and Professor MICHAEL REISMAN:

“International law’s canon for interpreting international agreements is codified in the Vienna Convention on the Law of Treaties. Its provisions have become something of a *clause de style* in international judgments and arbitral awards: whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied. But a failure to apply the rules of interpretation properly may distort the resulting elucidation of the agreement made by the parties and do them an injustice by retroactively changing the legal regime under they had arranged and managed their affairs” (Arsanjani, Mahnouch H., and Reisman, W. Michael, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors Doctrine” and the Use of Legislative History in Investment Treaties*, 104 *AJIL* 597 (2010), at 598-599 – emphasis in the original).

⁶⁴ In the same sense, Professor JAN PAULSSON noted that:

“Some excellent commercial arbitrators seem to have insufficient grounding in public international law. Apart from their unfamiliarity with important recurring issues, they fail to perceive that they are no longer referees in a match which concerns only the participants. Investment arbitrations generate constant public interest. Awards tend immediately to fall into the public domain and contribute to the broad emerging normative tapestry. It may be a serious mistake to perceive one’s duty as selecting which of two parties’ arguments are better. Even if there is a clear winner, its arguments are not necessarily correct; often they are not. This requires discernment and hard study, lest the arbitral tribunal lend its authority to propositions which may be intuitively convenient in the particular, but are unsound in the general. Commercial lawyers venturing into finely balanced matters of public international law may also be tempted, perhaps by an excess of self-confidence, to deliver themselves of a broad general exposition with the intent of clearing up a troubling issue, presuming hubristically, as it were, to do the world a favour by accounting for their brief foray into this new area. This often leads to trouble” (Paulsson, Jan, *Avoiding Unintended Consequences*, in *Appeals Mechanism in International Investment Disputes* 241 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 262-263).

“The essence of international commercial arbitration culture is to provide an effective resolution of dispute between the parties — and nothing further. That culture also brings a strong focus on the facts rather than on the law; that is most visible in the style of reasoning that is meant to assuage the losing party rather than to show in depth and detail how the law is applied and developed. Since awards are as a rule not published, there is little concern by the arbitrators about the legal quality of the award and how it will be seen by a critical professional and academic audience. These practices are now evolving under the pressure that comes with the publication of awards.”⁶⁵

The use of a commercial arbitration approach in investment disputes, however, does not affect only the “style” of the decisions. In certain circumstances, this approach has direct consequences to the outcome of the case, to the extent that it may influence the way in which arbitral tribunals *interpret* the legal instruments applicable to investment disputes.

Professor SORNARAJAH also criticized the adoption of a commercial arbitration approach in investment disputes:

“Further, the tribunals, unlike courts and other tribunals within constitutional systems, are constituted largely of persons having experience in commercial arbitration. Hence, they tend to lean toward commercial solutions based on commercial prudence and give little concern to the predicament of a State faced with fashioning policy in the context of circumstances that may have undergone changes. The pronouncements of commercial arbitrators on substantial issues of international law involved in treaty-based investment arbitration can be open to question. Tribunals can consist of judges or arbitrators inexperienced in matters of international law or without a long period of experience in the field, which makes it difficult to speak authoritatively as representative tribunals of the international community. The further charge, made by some, is that they may have an ideological predisposition toward solutions that favor international business” (Sornarajah, M., *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in Appeals Mechanism in International Investment Disputes 39 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 42 – footnotes excluded).

See also Sornarajah, M., *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, in The Future of Investment Arbitration 273 (Rogers, Catherine A., and Alford, Roger P., eds., Oxford: Oxford University Press, 2009), at 276-277.

⁶⁵ Wälde, T., *supra* note 5, at 725-726 – footnote excluded. The commercial arbitration approach defined by WÄLDE seems to be similar to the “dispute-oriented approach” identified by OLE KRISTIAN FAUCHALD. According to FAUCHALD, in adopting a dispute-oriented approach, a tribunal “restricts its arguments to those presented by the parties to the dispute, [...] restricts its arguments to those strictly necessary to justify its conclusion, [...] bases its decision on an integrated and overall assessment” (Fauchald, Ole Kristian, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EJIL 301 (2008), at 307). See also Legum, Barton, *Trends and Challenges in Investor-State Arbitration*, 19 Arb. Int’l 143 (2003), at 146-147.

In an earlier study, GUS VAN HARTEN observed that arbitral tribunals constituted for the settlement of investment disputes have adopted different interpretative approaches, which could be classified in four categories: commercial arbitration approach; public international law approach; investor (human) rights approach; and public law approach.⁶⁶ While VAN HARTEN admits that a decision might adopt more than one approach, he argues that there is a general tendency in investment treaty arbitration in favor of a commercial arbitration approach.⁶⁷ This approach could be characterized by the fact that it “treats investor and state essentially as equal disputing parties in a reciprocally consensual adjudication.”⁶⁸ For this reason, according to VAN HARTEN, arbitral tribunals adopting a commercial arbitration approach in investment disputes would base their decisions on the idea that “interpretation of the treaty should be based on the intent of the disputing parties, rather than the states parties.”⁶⁹ The consequence of an inappropriate use of a commercial arbitration approach in investment disputes is that arbitral tribunals are likely to misinterpret and misapply the legal norms applicable to the disputes and, thus, render inconsistent decisions.

2.3. Structure of the Thesis

This thesis is divided in two chapters. The first chapter addresses the distinction between the investment requirement of the ICSID Convention and the consent of the disputing parties to the jurisdiction of the Centre and how the application of the investment requirement was dealt with in ICSID practice. As will be shown in

⁶⁶ See Van Harten, G., *supra* note 7, at 121-151. See also Newcombe, Andrew, and Paradell, Lluís, Law and Practice of Investment Treaties: Standards of Treatment (New York: Wolters Kluwer, 2009), at 119.

⁶⁷ See Van Harten, G., *supra* note 7, at 121.

⁶⁸ *Ibid.*, at 124.

⁶⁹ *Idem.*

this chapter, the interpretation of the ICSID Convention in accordance with the general rule of treaty interpretation of the Vienna Convention supports the idea that the investment requirement of the ICSID Convention places an objective limitation on the jurisdiction of the Centre that may not be waived by the will of the disputing parties. This idea was followed in most decisions of ICSID tribunals that had to decide on the fulfillment of the investment requirement.

The second chapter of the thesis is dedicated to the question as to whether the ICSID Convention contains a jurisdictional requirement that allows ICSID tribunals to expand or to restrict the jurisdiction of the Centre based on contribution to the economic development of the host State. It will be demonstrated in this chapter that the fact that one of the main purposes of the ICSID Convention was to foster economic development through the flow of foreign investment into developing economies does not necessarily imply the existence of the economic development requirement. On the contrary, in accordance with the general rule of treaty interpretation codified in the Vienna Convention, constructions that go beyond the text of the treaty are not admitted. For this reason, the existence of the economic development requirement cannot be inferred without an express provision in the text of the ICSID Convention. This conclusion is also confirmed through the analysis of the subsequent practice of the Contracting States of the ICSID Convention.

CHAPTER I – THE OBJECTIVENESS OF THE INVESTMENT

REQUIREMENT OF THE ICSID CONVENTION

1. ARTICLE 25(1) OF THE ICSID CONVENTION

The question as to the existence of the economic development requirement is directly related to the debate among ICSID tribunals and scholars on the role of the consent of the disputing parties in determining the content of the investment requirement and the relevance of the lack of a definition of the term “investment” in the ICSID Convention. Pursuant to Article 25(1) of the ICSID Convention, which governs the jurisdiction of the Centre to institute arbitral or conciliation proceedings:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”⁷⁰

In the absence of a definition of term “investment” in the ICSID Convention, two basic approaches were developed in ICSID practice: the so-called *subjectivist theory*, according to which the lack of a definition was intended to confer on the disputing parties the discretion to determine whether the dispute arises directly out of an investment; and the so-called *objectivist theory*, according to which the

⁷⁰ 1 ICSID Reports 3 (1993), at 9.

investment requirement of the ICSID Convention contains an objective meaning that may not be waived by consent.⁷¹

The subjectivist theory is primarily based on a statement made in the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“Report of the Executive Directors”),⁷² a document prepared by the drafters of the ICSID Convention and which was submitted to States together with the final text of the ICSID Convention.⁷³ According to paragraph 27 of the Report of the Executive Directors:

“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”⁷⁴

According to the interpretation given by the subjectivist theory, paragraph 27 of the Report of the Executive Directors reflects a purported real intention of the

⁷¹ In addition to the subjectivist and objectivist theories, it has been suggested the existence of a hybrid theory (see Ben Hamida, Walid, *The Mihaly v. Sri Lanka case: Some Thoughts relating to the status of pre-investment expenditures*, in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 47 (Weiler, T., ed., London: Cameron May, 2005) at 55-56). According to this theory, an ICSID tribunal would base its decision on the fulfillment of the investment requirement of the ICSID Convention on the consent of the disputing parties, but would also assess the objective elements of the case. It seems that such theory, however, is in fact an objectivist approach, to the extent that it recognizes the existence of objective limits deriving from the term “investment” set forth in Article 25(1) of the ICSID Convention. The objectivism should not be confused with one particular approach. ICSID tribunals following the objectivism have adopted different criteria as to how the fulfillment of the investment requirement of the ICSID Convention should be assessed and different views as to the content of such requirement.

⁷² See 1 ICSID Reports 23 (1993).

⁷³ See History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“History of the ICSID Convention”) (Washington DC, United States: International Centre for Settlement of Investment Disputes, 1968), v. II, at 1041.

⁷⁴ 1 ICSID Reports 23 (1993), at 28.

drafters of the ICSID Convention to grant the disputing parties the discretion to define the content of the investment of the ICSID Convention.⁷⁵ To the extent that the jurisdiction of the Centre is essentially based on the consent of the disputing parties and that it is up to the disputing parties to determine which disputes they wish to submit to the jurisdiction of the Centre, there was no need for the ICSID Convention to adopt a particular definition of investment. For this reason, the disputing parties have the discretion to determine whether or not a particular dispute arises out of an investment, without any material limitation.

According to the subjectivist theory, therefore, in order to establish the jurisdiction of the Centre, the mere consent of the disputing parties would be enough, insofar as the consent implies an agreement on the content of the term “investment”. Consequently, the fulfillment of the investment requirement of the ICSID Convention is limited to assessing whether the dispute falls within the scope of the consent given by the disputing parties to the jurisdiction of the Centre.⁷⁶ Whereas the parties had agreed on a specific definition of investment, the task of ICSID tribunals is to verify whether the dispute complies with the agreed definition.

⁷⁵ See Ben Hamida, W., *supra* note 44, at 289; Baltag, Crina M., *Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia*, 4(5) TDM (2007), at 2-3; Dugan, Christopher F., Wallace Jr., Don, Rubins, Noah and Sabahi, Borzu, Investor-State Arbitration (Oxford: Oxford University Press, 2008), at 257.

⁷⁶ See Yala, Farouk, *The Notion of “Investment” in ICSID Case Law: A Drifting Jurisdictional Requirement? Some “Un-Conventional” Thoughts on Salini, SGS and Mihaly*, 22 J. Int’l Arb. 105 (2005), at 106; Ben Hamida, W., *supra* note 44, at 289; Baltag, C. M., *supra* note 75, at 2; Stern, B., *supra* note 56, at 538-540; Cole, Toni, and Vaksha, Anuj Kumar, *Power-Confering Treaties: The Meaning of “Investment” in the ICSID Convention*, 24 Leiden J. Int’l L. 305 (2011), at 315. An additional argument that has been suggested is that the employment of the term “investment” in wording of Article 25(1) of the ICSID Convention was not intended to place a limitation of individual ICSID tribunals, but it was used in order to confer legitimacy on the IBRD to formulate the ICSID Convention (see Gopal, Gita, *International Centre for Settlement of Investment Disputes*, Case W. Res. J. Int’l L. 581 (1982), at 14-15; Krishan, D., *supra* note 52, at 63-64).

This would occur especially in cases referred to ICISD arbitration pursuant to investment treaties or to the domestic investment law of the host State, given that, for the purposes of Article 25(1) of the ICSID Convention, these instruments provide an offer of consent of the host State to which the foreign investor adheres.⁷⁷ The investment treaty or domestic investment law, however, may place material limitations on the offer of consent of the host State and, thus, make the submission of disputes to the jurisdiction of the Centre contingent upon the compliance with the requirements set forth therein. In this sense, most investment treaties and domestic investment laws provide for a definition of investment, which places a limitation on their scope of application and, thus, defines the material scope of the offer of consent to the jurisdiction of the Centre.⁷⁸ In this case, an ICSID tribunal would only have jurisdiction to hear the claim pursued by the foreign investor, if the dispute complies with the definition of investment.

To the extent that the definition of investment set forth in the investment treaty or in the domestic investment law of the host State constitutes an element of the consent to the jurisdiction of the Centre, the given definition of investment reflects the agreement of the disputing parties on the content of the term “investment”. Accordingly, if one follows the subjectivist theory, the definition of investment set forth in investment treaties or in the domestic investment law of the host State

⁷⁷ See Paulsson, Jan, *Arbitration Without Privity*, 10 ICSID Rev. – FILJ 232 (1995); Dolzer, Rudolf, and Stevens, Margrete, Bilateral Investment Treaties (The Hague, Netherlands: Martinus Nijhoff Publishers, 1995), at 131-132 Parra, Antonio R., *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Rev. – FILJ 287 (1997); Schreuer, C., *supra* note 23, at 210; Castro de Figueiredo, Roberto, *Euro Telecom v. Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration Under BITs*, 6(1) TDM (2009). On the contrary, see Sornarajah, M., The International Law on Foreign Investment (Cambridge: Cambridge University Press, 1994), at 266-267.

⁷⁸ See Schreuer, C., *supra* note 23, at 130.

would *complement* the ICSID Convention and define the content of its investment requirement.

In opposition to the subjectivist theory, the objectivist theory advocates that the use of the term “investment” in the wording of Article 25(1) of the ICSID Convention was intended to place an objective limitation on the jurisdiction of the Centre.⁷⁹ The objectivist theory is essentially based on the idea that consent alone is not enough to establish the jurisdiction of the Centre; in order to fall within the jurisdictional scope of the ICSID Convention, the dispute has to comply with the requirements set forth in Article 25(1), which are distinct from the consent of the disputing parties. This idea finds support in paragraph 25 of the Report of the Executive Directors⁸⁰ and in the wording of Article 25(1) of the ICSID Convention.

The jurisdictional requirements set forth in Article 25(1) are generally classified as *ratione materiae*, *ratione personae* and *ratione voluntatis* requirements.⁸¹ The *ratione materiae* requirements place a limitation on the jurisdiction of the Centre based on the nature of the dispute. In order to fall within the jurisdictional scope

⁷⁹ See Nathan, K.V.S.K., *supra* note 23, at 106; Schreuer, C., *supra* note 23, at 125; Rubins, Noah, *The Notion of ‘Investment’ in International Investment Arbitration*, in *Arbitrating Foreign Investment Disputes* 283 (Horn, Norbert and Kröll, Stefan, eds., The Hague, Netherlands: Kluwer Law International, 2004), at 288-289; Yala, F., *supra* note 76, at 106; Ben Hamida, W., *supra* note 44, at 290; Baltag, C. M., *supra* note 75, at 3; McLachlan, Campbell, Shore, Laurence, and Weiniger, Matthew, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007), at 164; Dugan, C. F., Wallace Jr., D., Rubins, N. and Sabahi, B., *supra* note 75, at 258; Cole, T., and Vaksha, A. K., *supra* note 76, at 315.

⁸⁰ Paragraph 25 of the Report of the Executive Directors states that:

“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” (1 ICSID Reports 23 (1993), at 28).

⁸¹ See Schreuer, C., *supra* note 23, at 89.

of the ICSID Convention, the dispute must have a legal character⁸² and arise directly out of an investment. Secondly, pursuant to the *ratione personae* requirements, which regulate the personal jurisdiction of the Centre, the dispute must be between a Contracting State or one designated State entity of a Contracting State⁸³ and a national of another Contracting State.⁸⁴ Finally, the Centre may only exercise jurisdiction upon the consent of the disputing parties.⁸⁵

⁸² The requirement that a dispute must have a legal character was envisaged to exclude from the jurisdiction of the Centre purely political and commercial disputes (see Schreuer, C., *supra* note 23, at 103-104). According to paragraph 26 of the Report of the Executive Directors:

“Article 25(1) requires that the dispute must be a ‘legal dispute arising directly out of an investment.’ The expression ‘legal dispute’ has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation” (1 ICSID Reports 23 (1993), at 28).

The fact, however, that a dispute emerges from a political or commercial dispute does not exclude it from the jurisdiction of the Centre. According to SCHREUER:

“Commentators on the ICSID Convention have endeavoured to come to terms with the concept of legal disputes by listing typical factual situations and the questions that they entail. These include expropriation, breach or termination of an agreement or the application of tax and customs provisions. While these descriptions are undoubtedly useful, it must be borne in mind that fact patterns alone do not determine the legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription or policy that is invoked that decides whether a dispute is legal or not. Thus, it is entirely possible to react to a breach of agreement by relying on moral standards, by invoking concepts of justice or by pointing to the lack of political and economic wisdom of such course of action. The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms” (Schreuer, C., *supra* note 23, at 104-105 – footnote excluded).

See also Schreuer, Christoph, *What is a Legal Dispute?*, 6(1) TDM (2009).

⁸³ In accordance with Article 25(3) of the ICSID Convention:

“Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required” (1 ICSID Reports 3 (1993), at 10).

⁸⁴ The requirement that the investor party to the dispute must be a national of another Contracting States is due to the ICSID Convention’s general purpose of *depoliticization* of investment disputes. By virtue of Article 27(1) of the ICSID Convention:

“No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (1 ICSID Reports 3 (1993), at 10).

To the extent that only the Contracting States of the ICSID Convention are bound by its provisions, if the home State of the investor party to the dispute is not a Contracting State, it is not prevented from exercising diplomatic protection. See Broches, A., *supra* note 32, at 356; Schreuer, C., *supra* note 23, at 162-163, 286-288; Castro de Figueiredo, Roberto, *ICSID and Non-Foreign Investment Disputes*, 4(5) TDM (2007), at 11-12.

The wording of Article 25(1) indicates that the ICSID Convention creates a jurisdictional framework based on cumulative and not alternative requirements. A

The ICSID Convention, however, does not provide for any special criterion to determine who may be considered a national of another Contracting State; it only sets forth negative requirements. Pursuant to Article 25(2)(a) and (b) of the ICSID Convention:

“‘National of another Contracting State’ means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention” (1 ICSID Reports 3 (1993), at 9-10).

It seems settled in customary international law and in ICSID practice that the nationality of natural persons must be determined in accordance with the municipal law of each State. In this sense, Article 1 of The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of April 12, 1930, provides that:

“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality” (24 AJIL Sup. 192 (1930), at 192).

International tribunals, however, are not totally bound by municipal law. The acquisition of nationality may be disregarded in cases of lack of a *genuine link* between the natural person and the State (see *Nottebohm*, Judgment of April 6, 1955, ICJ Reports 4 (1955), at 23), as well as in cases of involuntary acquisition and withdrawal of nationality contrary to international law (see Hirsch, Moshe, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), at 75-76; Schreuer, C., *supra* note 23, at 267, 272). See also Castro de Figueiredo, R., *ibid.*, at 22-23, footnote 83.

The nationality of juridical persons, however, has led to some controversies among ICSID writers. While the interpretation of Article 25(2)(b) of the ICSID Convention leads to the conclusion that, for the purposes of establishing the jurisdiction of the Centre, the nationality of the juridical person must be determined pursuant to the place of incorporation test or the place of seat test — the criteria which have been adopted by the ICJ in the *Barcelona Traction* case (see Judgment of February 5, 1970, ICJ Reports 3 (1970)) —, some authors advocate a more flexible approach to the nationality of the juridical person, admitting the use of criteria other than the place of incorporation or seat test. In this sense, see Amerasinghe, C.F., *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 47 BYIL 227 (1974-75), at 258; Amerasinghe, C.F., *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 Vand. J. Transnat'l L. 793 (1976), at 794, 807-809. Other ICSID writers such as BROCHES and SCHREUER admit the use of agreements on nationality for the purposes of fulfilling the requirements of the ICSID Convention (see Broches, A., *supra* note 32, at 360-361; and Schreuer, C., *supra* note 23, at 286). It seems, however, that the use of nationality criteria other than the place of incorporation or seat test is inconsistent with the ICSID Convention. In this sense, see Delaume, G., *ICSID Arbitration and the Courts*, 77 AJIL 784 (1983), at 793-794; Hirsch, M., *supra* note 84, at 84-86; Castro de Figueiredo, R., *ibid.*, at 11-12.

⁸⁵ As stated in the Preamble of the ICSID Convention, “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration” (1 ICSID Reports 3 (1993), at 4).

legal dispute arising directly out of an investment will not fall within the jurisdiction of the Centre unless the disputing parties are a Contracting State and a national of another Contracting State, even if the disputing parties have consented to the jurisdiction of the Centre. By the same token, a dispute between a Contracting State and a national of another Contracting State will also not fall within the jurisdiction of the Centre unless it is a legal dispute arising directly out of an investment. Accordingly, in the absence of any provision in the ICSID Convention providing otherwise, the fulfillment of one of the requirements set forth in Article 25(1) is not sufficient to establish the jurisdiction of the Centre unless the other requirements are met; each requirement must be fulfilled independently from the others.

For this reason, the idea that the consent of the disputing parties would be enough in order for the investment requirement to be fulfilled seems to be inconsistent with the wording of Article 25(1), to the extent that the consent and the investment requirements are two distinct conditions for the establishment of the jurisdiction of the Centre. The fulfillment of one requirement does not imply the fulfillment of another.

In addition, pursuant to Article 31(1) of the Vienna Convention, a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*.”⁸⁶ The reference to the “context” of the treaty reflects one of the major principles of treaty interpretation that was named by GERALD

⁸⁶ 8 ILM 679 (1969), at 691-692 – emphasis added.

FITZMAURICE as the *principle of integration*.⁸⁷ By virtue of this principle, the treaty must be read as a unity and its terms may not be interpreted as autonomous provisions, but as elements of a whole.⁸⁸ As a consequence of the principle of integration, every term employed in the text of a treaty — which, in accordance with the principle of actuality, is the main source of the intention of the parties⁸⁹ — has a function in its context and may not be disregarded. In interpreting a treaty provision, it must be assumed that the parties intended to confer on each term an effective role in the treaty. For this reason, in accordance with the *rule of non-surplus*, the interpreter of a treaty must give a meaning to every term employed in the text of a treaty and assume that there is no pleonasm in the text.⁹⁰

⁸⁷ According to the principle of integration, “[t]reaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles” (Fitzmaurice, G. G., *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BYIL 1 (1951), at 9).

⁸⁸ See Linderfalk, Ulf, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, The Netherlands: Springer, 2007), at 105.

⁸⁹ According to the principle of actuality, “[t]reaties are to be interpreted primarily as they stand, and on the basis of their actual texts” (Fitzmaurice, G. G., *supra* note 87, at 9).

⁹⁰ See Hogg, James H., *The International Court: Rules of Treaty Interpretation II*, 44 Minn. L. Rev. 5 (1959-1960), at 11; Gordon, Edward, *The World Court and the Interpretation of Constitutive Treaties*, 59 AJIL 794 (1965), at 814-815; Haraszti, G., *supra* note 30, at 89-91; Hummer, Waldemar, “Ordinary” versus “Special” Meaning: Comparison of the Approach of the Vienna Convention on the Law of Treaties and the Yale-School Findings, 26 Österreichische Zeitschrift für Öffentliches Recht 87 (1975), at 115.

The rule of non-surplus may also be considered as a consequence of the principle of effectiveness. According to FITZMAURICE:

“Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, *in such a way that a reason and a meaning can be attributed to every part of the text*” (Fitzmaurice, G. G., *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BYIL 203 (1957), at 211 – emphasis added).

See also Thirlway, Hugh, *The Law and Procedure of the International Court of Justice 1960-1989: Part Three*, 62 BYIL 1 (1991), at 44; Wälde, T., *supra* note 5, at 738-739; Orakhelashvili, A., *supra* note 30, at 422.

In the separate opinion to the decision of the PCIJ rendered in the *Lighthouses Case Between France and Greece*, Judge ANZILOTTI asserted that “it is a fundamental rule in interpreting legal texts that one should not lightly admit that they contain superfluous words: the right course, whenever possible, is to seek for an interpretation which allows a reason and a meaning to every word in the text” (Judgment of March 17, 1934, PCIJ Series A/B, No. 62, at 31).

Accordingly, the interpretation given by the subjectivist theory is inconsistent with the general rule of treaty interpretation of the Vienna, to the extent that, in violation of the rule of non-surplus, it makes the term “investment” a superfluous term in the wording of Article 25(1) of the ICSID Convention, without any effective meaning. If one admits that the mere consent of the disputing parties is enough to establish the jurisdiction of the Centre, there would have been no need to employ the term “investment” in the wording of Article 25(1).

In the *North Atlantic Coast Fisheries* case, between the United States and United Kingdom, the arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration (“PCA”) observed that “it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose and the interpretation referred to would lead to the consequence, practically, of reading the words ‘bays, creeks and harbours’ out of the Treaty” (Award of September 7, 1910, 4 AJIL 948 (1910), at 982). The rule of non-surplus was also referred to in more than one occasion in the jurisprudence of the ICJ. In the *Anglo-Iranian Oil Co.* case, between the United Kingdom and Iran, the ICJ had to decide whether the Iranian declaration of acceptance of the compulsory jurisdiction of the PCIJ would confer on the ICJ jurisdiction to hear the claim submitted by the United Kingdom. Iran challenged the jurisdiction of the ICJ on the basis that the declaration would only confer jurisdiction in cases related to the application of treaties accepted by Iran after the date of ratification of the declaration. The United Kingdom, however, contested the interpretation of the declaration given by Iran on the ground that it would deprive some words of meaning. According to the United Kingdom, “a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text” (Judgment of July 22, 1952, ICJ Reports 93 (1952), at 105). In reply, the ICJ stated that:

“It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner” (*ibid*).

While this statement of the ICJ is not conclusive as to the mandatory character of the rule of non-surplus as a customary international law rule of treaty interpretation, in the advisory opinion given in the case concerning the *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization*, based on the rule of non-surplus, the ICJ rejected the interpretation of a treaty according to which some terms of the treaty “would be left without significance” and “[t]he Court is unable to accept an interpretation which would have such a result” (Advisory Opinion of June 8, 1960, ICJ Reports 150 (1960), at 166). This statement of the ICJ indicates the mandatory character of the rule of non-surplus in the interpretation of treaties (see Haraszti, G., *supra* note 30, at 90) and, thus, applicable to the ICSID Convention as a rule of customary international law.

The mandatory character of the rule of non-surplus was also confirmed by the WTO Appellate Body. In the *United States – Standards for Reformulated and Conventional Gasoline* case, the Appellate Body noted that “[o]ne of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility” (Report of the Appellate Body of April 29, 1996, 35 ILM 605 (1996), at 627 – footnote excluded).

2. ARTICLE 1(2) OF THE ICSID CONVENTION

The idea that the disputing parties have the discretion to determine whether or not the dispute arises out of an investment seems also inconsistent with the object and purpose of the ICSID Convention. If the investment requirement could be deemed fulfilled by the mere consent of the disputing parties, disputes arising out of ordinary commercial transactions and not related to an investment could be submitted to the jurisdiction of the Centre.

Pursuant to Article 1(2) of the ICSID Convention:

“The purpose of the Centre shall be to provide facilities for conciliation and arbitration of *investment disputes* between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”⁹¹

Article 1(2) makes clear that the dispute settlement system created by the ICSID Convention was not designed to confer on the Centre jurisdiction over any type of dispute between a Contracting State and a national of another Contracting State, but only over “investment disputes”. It is exactly for this reason that Article 25(1) sets forth, in addition to the consent of the disputing parties, requirements that aim at framing the jurisdictional scope of the ICSID Convention in the light of its object and purpose.

The ICSID Convention envisages the establishment of a dispute settlement mechanism for the resolution of investment disputes with a legal character and not every dispute between a Contracting State and a national of another Contracting

⁹¹ 1 ICSID Reports 3 (1993), at 4 – emphasis added.

State. For this reason, one may not consider that the term “investment” as employed in the wording of Article 25(1) of the ICSID Convention does not have an objective meaning. On the contrary, the function of the investment requirement of the ICSID Convention is to place an objective limitation on the jurisdiction of the Centre with the aim of complying with the object and purpose of the ICSID Convention.

3. ICSID INSTITUTION RULES AND ICSID ADDITIONAL FACILITY RULES

Another argument that has been suggested in favor of the objectiveness of the investment requirement is based on the subsequent practice pertaining to the ICSID Convention, as expressed in the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ICSID Institution Rules”) and in the Rules Governing the Additional Facility for the Administration Of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (“ICSID Additional Facility Rules”).⁹²

The ICSID Institution Rules were adopted by the Administrative Council of the Centre — which, in accordance with Article 4(1) of the ICSID Convention, is the Centre’s plenary body, composed by one representative of each Contracting State⁹³ — upon the express authority conferred on it by Article 6(1)(b) of the ICSID Convention.⁹⁴ The purpose of the ICSID Institution Rules is to regulate the

⁹² See Schreuer, C., *supra* note 23, at 125.

⁹³ In accordance with Article 4(1) of the ICSID Convention;
“The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal’s absence from a meeting or inability to act” (1 ICSID Reports 3 (1993), at 5).

⁹⁴ Article 6(1)(b) of the ICSID Convention provides that:

authority of the Secretary-General of the Centre for the institution of arbitral and conciliation procedures under the ICSID Convention. In accordance with Article 36(1) of the ICSID Convention, requests for the institution of arbitral proceedings must be submitted to the Secretary-General.⁹⁵ By virtue of the Article 36(3) of the ICSID Convention, the Secretary-General has the duty to register the request unless he or she considers that the dispute is manifestly outside the jurisdiction of the Centre.⁹⁶ In exercising such authority, the Secretary-General must reach a decision in the light of the information contained in the request for arbitration. Pursuant to Article 36(2) of the ICSID Convention:

“The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.”⁹⁷

Rule 2(1)(c) and (e) of the ICSID Institution Rules makes further clear that:

“Rule 2
Contents of the Request

(1) The request shall:

[...]

“Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:
[...]

(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings” (1 ICSID Reports 3 (1993), at 5).

⁹⁵ Article 36(1) of the ICSID Convention provides that “[a]ny Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party” (1 ICSID Reports 3 (1993), at 13). For conciliation proceedings, see Article 28(1) of the ICSID Convention (1 ICSID Reports 3 (1993), at 11).

⁹⁶ See *supra* note 28. For conciliation proceedings, see Article 28(3) of the ICSID Convention (1 ICSID Reports 3 (1993), at 11).

⁹⁷ 1 ICSID Reports 3 (1993), at 13. For conciliation proceedings, see Article 28(2) of the ICSID Convention (1 ICSID Reports 3 (1993), at 11).

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

[...]

(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment; [...].”⁹⁸

According to SCHREUER, Rule 2(1) “mandates that a request for conciliation or arbitration must indicate not only particulars concerning the parties’ consent (Rule 2(1)(c)) 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 (Rule 2(1)(e)).”⁹⁹ Rule 2(1) would, thus, make clear that the investment requirement set forth in Article 25(1) of the ICSID Convention is distinct and must be fulfilled independently from the consent of the disputing parties to the jurisdiction of the Centre.

SCHREUER points out that the ICSID Institution Rules do not impose additional jurisdictional requirements and may not be used by an ICSID tribunal as an independent basis for declining jurisdiction over a dispute.¹⁰⁰ Their purpose, according to SCHREUER, “is to enable the Secretary-General to decide whether a

⁹⁸ The current ICSID Institution Rules, adopted on September 29, 2002, and in force since January 1, 2003, are available at <<http://icsid.worldbank.org/ICSID/Index.jsp>>, (last visited on December 1, 2008). The first version of the ICSID Institution Rules was provisionally adopted on February 2, 1967 (see 6 ILM 241 (1967)). The second version of the ICSID Institution Rules was adopted on September 25, 1967 (see 7 ILM 363 (1968)), and revised on September 26, 1984 (see 1 ICSID Reports 153 (1993)). The wording of the Rule 2(1)(c) and (e) remained virtually unchanged since the first version of the ICSID Institution Rules (see Article 3(3) of the provisional ICSID Institution Rules, 6 ILM 241 (1967), at 242; Rule 2(1)(c) and (e) of the 1967 ICSID Institution Rules, 7 ILM 363 (1968), at 363-364, and of its revised version, 1 ICSID Reports 153 (1993), at 153-154).

⁹⁹ Schreuer, C., *supra* note 23, at 125 – footnote excluded.

¹⁰⁰ *Ibid.*, at 456.

request should be registered in accordance with Art. 36(3).”¹⁰¹ The ICSID Institution Rules are not part of or an annex to the ICSID Convention, nor were they designed to modify the provisions of the ICSID Convention, but they aim at implementing the ICSID dispute settlement system based on the interpretation made by the Administrative Council of Article 36(2) in the light of the jurisdictional requirements set forth in Article 25(1) of the ICSID Convention.

SCHREUER also mentions the ICSID Additional Facility Rules as evidence of the objectiveness of the investment requirement of the ICSID Convention.¹⁰² The ICSID Additional Facility Rules were created in order to allow the Secretary-General of the Centre to administer certain proceedings that would fall outside the jurisdictional scope of the ICSID Convention. They were first adopted by the Administrative Council of the Centre on September 27, 1978, for an initial term of five years. On September 26, 1984, the Administrative Council decided to continue the ICSID Additional Facility Rules indefinitely. The ICSID Additional Facility Rules aimed at meeting the concerns over the access to the dispute settlement facilities provided by the Centre, especially due to the small number of States participating in the ICSID Convention at the time it was adopted and to the uncertainties created by the imprecise meaning of the *ratione materiae* requirements set forth in Article 25(1) of the ICSID Convention.¹⁰³

¹⁰¹ *Idem.*

¹⁰² *Ibid.*, at 125.

¹⁰³ See Broches, Aron, *The ‘Additional Facility’ of the International Centre for Settlement of Investment Disputes (ICSID)*, 4 Yearbook Commercial Arbitration 373 (1979), at 374; Toriello, Pierluigi, *The Additional Facility of the International Centre for Settlement of Investment Disputes*, 4 Italian Yearbook of International Law 59 (1978-1979), at 60-62; Schreuer, C., *supra* note 23, at 92.

In sum, under Article 2 of the ICSID Additional Facility Rules, the Secretary-General is authorized to administer arbitral and conciliation proceedings for the settlement of legal disputes that do not fulfill all of the jurisdictional requirements set forth in Article 25(1) of the ICSID Convention, and fact-finding proceedings,¹⁰⁴ which operate outside the framework of the ICSID Convention.¹⁰⁵ In particular, Article 2(b) of the ICSID Additional Facility Rules authorize the Secretary-General to administer “conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because *they do not arise directly out of an investment*, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.”¹⁰⁶ Article 4(3) of the ICSID Additional Facility Rules provides, however, that:

“In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying

¹⁰⁴ Rule 2 of the ICSID Additional Facility Rules provides that:

“Article 2

Additional Facility

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
- (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
- (c) fact-finding proceedings.

The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility” (1 ICSID Reports 217 (1993), at 218).

¹⁰⁵ In accordance with Article 3 of the ICSID Additional Facility Rules, “[s]ince the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein” (1 ICSID Reports 217 (1993), at 218).

¹⁰⁶ *Idem* – emphasis added.

transaction has features which distinguish it from an ordinary commercial transaction.”¹⁰⁷

Accordingly, although Article 2(b) authorizes the Secretary-General to administer disputes that do not arise directly out of an investment, Article 4(3) provides that disputes arising out of ordinary commercial transactions do not fall within the scope of the ICSID Additional Facility Rules.¹⁰⁸ In the comment to Article 4 to the ICSID Additional Facility Rules, it was stated that:

“(iii) Paragraph (3): This provision guards against the use of the Additional Facility for disputes arising out of an ‘ordinary commercial transaction’. While the term is not defined, and hardly capable of precise definition, the Administrative Council in approving the provision recorded the following: ‘Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investments for the purposes of the Convention, which (b) involve long-term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions. Examples of such transactions may be found in various forms of industrial cooperation agreements and major civil works contracts.’

(iv) Paragraph (4): The term ‘investment’ is not defined in the Convention and among the reasons for the proposal to establish the Additional Facility was the concern that a conciliation or arbitration agreement might be frustrated if a Commission or Tribunal declared itself incompetent on the ground that it considered the underlying transaction not to be an ‘investment’. The purpose of paragraph (4) is to avoid such frustration on the one hand and unnecessary failure to use the Convention on the other. Use of the authority given the Secretary-General by this paragraph would be appropriate in borderline cases.”¹⁰⁹

The rationale behind Article 2(b) of the ICSID Additional Facility Rules is that certain disputes, although not related to ordinary commercial transactions, might

¹⁰⁷ *Ibid.*, at 219 – emphasis added.

¹⁰⁸ See Schreuer, C., *supra* note 23, at 135.

¹⁰⁹ 1 ICSID Reports 217 (1993), at 220.

not fall within the jurisdictional scope of the ICSID Convention, to the extent that the transaction subject-matter of the dispute does not constitute an investment for the purposes of the ICSID Convention. The ICSID Additional Facility Rules, therefore, are based on the assumption the term “investment” set forth in Article 25(1) of the ICSID Convention places an objective limitation on the jurisdiction of the Centre that may not be waived by the consent of the disputing parties.¹¹⁰ Otherwise, if one admits that the consent of the disputing parties is enough in order for a dispute to fulfill the investment requirement of the ICSID Convention, there would be no need to include the authorization contained in Article 2(b) of the ICSID Additional Facility Rules.

Both ICSID Institution Rules and ICSID Additional Facility Rules demonstrate the understanding of the Administrative Council that the term “investment” as employed in Article 25(1) of the ICSID Convention has an objective meaning. The question, however, is what interpretative function these instruments have for the purposes of the general rule of treaty interpretation of the Vienna Convention. As they constitute subsequent acts in the application of the ICSID Convention, the ICSID Institution Rules and ICSID Additional Facility Rules could possibly be used in the interpretation of the ICSID Convention in the sense of Article 31(3)(b) of the Vienna Convention. Pursuant to Article 31(3)(b), “[t]here shall be taken into account, together with the context [...] any subsequent practice in the

¹¹⁰ See Toriello, P., *supra* note 103, at 63; Dolzer, Rudolf, *The Notion of Investment in Recent Practice*, in *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* 261 (Charnovitz, Steve, Steger, Debra P., and Van den Bossche, Peter, eds., Cambridge: Cambridge University Press, 2005), at 262.

application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹¹¹

Article 31(3)(b) does not qualify “subsequent practice” as State practice only. For this reason, it seems well settled that the practice of political organs of international organizations, such as the Administrative Council of the Centre, may be taken into account for the purposes of interpreting a treaty provision.¹¹² However, in order to meet the requirements of Article 31(3)(b), the subsequent acts of an international organization in the application of a treaty must establish “the agreement of the parties regarding its interpretation.”

Recourse to the subsequent practice of a political organ of an international organization in the interpretation of a treaty was made by the ICJ in the *Competence of the General Assembly for the Admission of a State to the United Nations* case. In this case, the General Assembly of the United Nations requested the ICJ to give an advisory opinion on the question as to whether, pursuant to Article 4 of the Charter of the United Nations, the General Assembly could only decide on the admission of a new member upon a positive recommendation of the Security Council.¹¹³ In interpreting the Charter, the ICJ relied on the ordinary

¹¹¹ 8 ILM 679 (1969), at 692.

¹¹² See Engel, Salo, “*Living*” *International Constitutions and the World Court (The Subsequent Practice of International Organs under Their Constituent Instruments*, 16 ICLQ 865 (1967); Lauterpacht, Elihu, *The Development of the Law of International Organizations by the Decisions of International Tribunals*, 152(IV) Recueil des Cours 377 (1976), at 447; Sinclair, I., *supra* note 34, at 137-138; Thirlway, H., *supra* note 90, at 50; Greig, D. W., *Intertemporality and the Law of Treaties* (London: British Institute of International and Comparative Law, 2001), at 86-91; Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 2nd ed., 2005), at 49-55; Linderfalk, U., *supra* note 88, at 166; Gardiner, Richard K., *Treaty Interpretation* (Oxford: Oxford University Press, 2008), at 247-249.

¹¹³ Article 4 of the Charter of the United Nations provides that:

meaning of the treaty and on the subsequent practice in the application of Article 4 of the Charter as reflected in the Rules of Procedure of the General Assembly. In admitting the subsequent practice of a political organ of the United Nation in the interpretation of the Charter, the ICJ observed that:

“The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only ‘if the Security Council recommends the applicant State for membership’ (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion.”¹¹⁴

The ICJ, thus, admitted the use of the Rules of Procedure of the General Assembly in the interpretation of the Charter on the basis that the authority to apply Article 4 of the Charter was expressly conferred on the General Assembly by the Members of the United Nations and they would, therefore, establish the agreement of the parties to the Charter.

In this sense, the ICSID Institution Rule may be admitted in the interpretation of the ICSID Convention in the sense of Article 31(3)(b) of the Vienna Convention, once they were adopted by the Administrative Council of the Centre under the

“Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council” (39 AJIL Sup. 190 (1945), at 192).

¹¹⁴ Advisory Opinion of March 3, 1950, ICJ Reports 4 (1950), at 9.

authority expressly conferred on it by Article 6(1)(b) of the ICSID Convention.¹¹⁵

However, one might not have the same conclusion as regards the ICSID Additional Facility Rules.

Differently from the ICSID Institution Rules, in adopting the ICSID Additional Facility Rules, the Administrative Council was not exercising an express authority conferred on it by the ICSID Convention. Article 6(3) of the ICSID Convention provides that “[t]he Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.”¹¹⁶ As SCHREUER notes, “[s]ince the Additional Facility operates outside the Convention, it is difficult to argue that it is ‘necessary for the implementation of the provisions of [the] Convention.’”¹¹⁷ This raises the question as to whether the Administrative Council in adopting the ICSID Additional Facility Rules exceeded the authority conferred on it by the ICSID Convention.¹¹⁸

Secondly, the adoption of the ICSID Additional Facility Rules in 1978 was a majority decision of the Administrative Council; certain Contracting States voted

¹¹⁵ See *supra* note 94.

¹¹⁶ 1 ICSID Reports 3 (1993), at 5-6.

¹¹⁷ Schreuer, C., *supra* note 23, at 31.

¹¹⁸ During the annual meeting of the Administrative Council in which the ICSID Additional Facility Rules were approved, some representatives of Contracting States questioned the authority of the Administrative Council to adopt the ICSID Additional Facility Rules. In particular, the representative of Belgium, MEULEMANS, “announced that his authorities were not convinced that the Administrative Council had the power to create the Additional Facility” (see Summary Proceedings of the Annual Meeting of the Administrative Council (AC/78/17), at 2). The representative of the United Kingdom, KIRBYSHIRE, “said that he still had considerable doubts about the legal competence of the Administrative Council to set up the new Facility” (*idem*). Other representatives of Contracting States defended the authority of the Administrative Council to adopt the ICSID Additional Facility Rules. HANFLAND, the representative of Germany, considered that “the legal concerns of some Representatives could be resolved by a flexible interpretation of the Convention and therefore supported the creation of the Additional Facility” (*idem*). METZ, the representative of France, “observed that since the Additional Facility was only a service rendered by the Secretariat there was no problem in the Administrative Council creating the Facility” (*ibid.*, at 3). See also Toriello, P., *supra* note 103, at 65-70.

against the ICSID Additional Facility Rules and a significant number of Contracting States abstained from voting. In fact, the resolution of the Administrative Council adopting the ICSID Additional Facility Rules was approved by a procedural majority and not by the majority of the Contracting States of the ICSID Convention. While twenty-five Contracting States voted in favor of the resolution, two Contracting States voted against it, twenty-four Contracting States abstained from voting and twenty Contracting States entitled to vote did not attend the annual meeting of the Administrative Council of September 27, 1978.¹¹⁹

Accordingly, even if one considers that the relevant question is not whether the Administrative Council exceeded its authority, but the understanding on which the ICSID Additional Facility Rules were based, the fact that the ICSID Additional Facility Rules were not approved by all Contracting States' representatives at the Administrative Council makes doubtful whether the interpretation of the ICSID Convention may be considered as establishing the agreement of all Contracting States of the ICSID Convention, as required by Article 31(3)(b) of the Vienna Convention.¹²⁰

The use of the ICSID Additional Facility Rules in the interpretation of the ICSID Convention is connected with a question that seems controversial in international law as to whether majority decisions of organs of international organizations may

¹¹⁹ See Summary Proceedings of the Annual Meeting of the Administrative Council (AC/78/17), at 4, footnote 2.

¹²⁰ The fact that the decision of the Administrative Council to continue the ICSID Additional Facility Rules was taken in 1984 apparently without any objection does not seem to change this conclusion. This is so because what is relevant here is the interpretation which led to inclusion of Article 2(b) of the ICSID Additional Facility Rules. This occurred in 1978 and not in 1984. The question, thus, is whether all Contracting States shared such construction of Article 25(1) of the ICSID Convention.

be considered as evidence of subsequent practice in the interpretation of constitutive treaties.¹²¹ In the *Certain Expenses of the United Nations* case, Judge PERCY SPENDER, in his separate opinion, observed that:

“[I]t is not evident on what ground a practice consistently followed by a majority of Member States not in fact accepted by other Member States could provide any criterion of interpretation which the Court could properly take into consideration in the discharge of its judicial function. The conduct of the majority in following the practice may be evidence against them and against those who in fact accept the practice as correctly interpreting a Charter provision, but could not, it seems to me, afford any in their favour to support an interpretation which by majority they have been able to assert.”¹²²

According to SPENDER, in interpreting the Charter of the United Nations, the acts of political organs of the organization may only be taken into consideration on the basis that such organs “are but the mechanisms through which the Members of the United Nations express their views and act.”¹²³ SPENDER’s opinion was a reaction against the use of resolutions of the General Assembly and the Security Council of the United Nations as evidence of subsequent practice, as the ICJ did in the case, without taking into account whether such resolutions were approved by a majority and not by all Member States.¹²⁴

On the other hand, Judge FITZMAURICE noted, in a separate opinion given in the same case, that “even if a majority vote cannot in the formal sense bind the minority, it can, if consistently exercised in a particular way, suffice to establish a

¹²¹ See McGinley, Gerald P., *Practice as a Guide to Treaty Interpretation*, 9 Fletcher F. 211 (1985), at 228-229; Brownlie, Ian, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), at 605, 664.

¹²² Advisory Opinion of July 20, 1962, ICJ Reports 151 (1962), at 191-192.

¹²³ *Ibid.*, at 192.

¹²⁴ See McGinley, G., *supra* note 121, at 215-216.

settled practice which a tribunal can usefully and properly take account of.”¹²⁵ In the case, FITZMAURICE attempted to rely on the practice of the organs of the United Nations, which he considered inconclusive, in order to confirm an interpretation that he had arrived at on the basis of the ordinary meaning of the terms of the Charter’s provisions alone. FITZMAURICE did not attempt, however, to use the subsequent practice as a primary source for the definition of the ordinary meaning of the terms of the Charter, but as secondary source. This approach leads to the idea that the subsequent practice that does not meet the requirements of Article 31(3)(b) of the Vienna Convention — such as the ICSID Additional Facility Rules — may be used, nevertheless, as a supplementary means of treaty interpretation pursuant to Article 32 of the Vienna Convention,¹²⁶ which provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or

¹²⁵ *Supra* note 122, at 201-202.

¹²⁶ According to SINCLAIR:

“[P]aragraph 3(b) of Article 31 of the [Vienna] Convention does not cover subsequent practice in general, but only a specific form of subsequent practice — that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the [Vienna] Convention” (Sinclair, I., *supra* note 34, at 138).

See also Jacobs, Francis G., *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 ICLQ 318 (1969), at 327-329; McGinley, G., *supra* note 121, at 221; Torres Bernárdez, S., *supra* note 34, at 726-727; Gardiner, R., *supra* note 112, at 246; Villiger, Mark E., Commentary on the 1969 Vienna Convention on the Law of Treaties (Leiden: Martinus Nijhoff Publishers, 2009), at 446; Sbolci, Luigi, *Supplementary Means of Interpretation*, in The Law of Treaties Beyond the Vienna Convention 145 (Cannizzaro, Enzo, ed., Oxford: Oxford University Press, 2011), at 159.

(b) leads to a result which is manifestly absurd or unreasonable.”¹²⁷

AMERASINGHE, however, advocates the use of majority decisions taken by organs of international organizations in the sense of Article 31(3)(b) based on the idea of “implied consent”. He argues that:

“Since the parties to the constitution, whether they are original parties or become parties subsequently, have agreed at the time of becoming parties to the constitution to the mechanisms of decision-making by the organization taken under the constitution, even though they have voted against or may disagree with such decisions, as reflecting *proper* conduct on the part of the organization. Hence, that a member state is in an opposing minority and does not immediately agree to or opposes a decision creating practice may be of no consequence, because ultimately the member concerned have agreed, by implication and at the time it became a party to the constitutive treaty, to accept the decision as reflecting the will of the organization, even though it disagreed with it at the time it was made.”¹²⁸

While AMERASINGHE admits that the idea of implied consent does not apply in cases where the practice of the international organization is formed by a simple majority of votes with a substantial opposing minority,¹²⁹ he does not exclude the applicability of such idea when the decision of the international organization is formed by a simple majority with a substantial number of member States abstaining from voting. In this sense, the understanding of the Administrative Council that led to the adoption of the ICSID Additional Facility Rules would be attributable to all Contracting States. However, the idea on which the rule of implied consent advocated by AMERASINGHE is based — the notion of the “will of the organization” — seems to be inconsistent with the requirements of the Vienna

¹²⁷ 8 ILM 679 (1969), at 692.

¹²⁸ Amerasinghe, C. F., *supra* note 112, at 53 – emphasis in the original.

¹²⁹ *Ibid.*, at 53-54.

Convention. Article 31(3)(b) entails the agreement of the parties to the constitutive treaty and not the will of the international organization.¹³⁰ An international organization is not a party to its constitutive treaty and its practice does not have interpretative value on its own under the Vienna Convention, but may only be considered as subsequent practice within the meaning of Article 31(3)(b) if it reflects the common understanding of its member States.¹³¹ For this reason, the ICSID Additional Facility Rules, as the result of a majority decision, may be only be used as a supplementary means of treaty interpretation.¹³²

4. THE DRAFTING HISTORY OF THE INVESTMENT REQUIREMENT OF THE ICSID CONVENTION

The objectiveness of the investment requirement of the ICSID Convention can also be confirmed through the analysis of its drafting history. While the consent of

¹³⁰ See Engel, S., *supra* note 112, at 910; Schermers, H., and Blokker, N., *supra* note 20, at 842.

¹³¹ It seems that the AMERASINGHE's argument is, in fact, based on the idea that the practice of international organizations has an interpretative value on its own. This idea was supported earlier by Professor ELIHU LAUTERPACHT. According to LAUTERPACHT:

“It is probably necessary to recognize that recourse to the practice of international organizations now stands on an independent legal basis; that is to say, that there exists a specific rule of the law of international organization to the effect that recourse to such practice is admissible and that States, on joining international organizations, impliedly accept the permissibility of constitutional development in this manner” (Lauterpacht, E., *supra* note 112, at 460).

Whether or not this rule exists, it was not included in the Vienna Convention. During the formulation of the ILC Draft Articles on the Law of Treaties, the ILC expressly decided to avoid this question. In the commentary to the 1964 version of the ILC Draft Articles on the Law of Treaties, the ILC noted that:

“The problem of the effect of the practice of organs of an international organization upon the interpretation of its constituent instrument raises the question how far individual Member States are bound by the practice. Although the practice of the organ as such may be consistent, it may have been opposed by individual Members or by a group of Members which have been outvoted. This special problem appears to relate to the law of international organizations rather than to the general law of treaties, and the Commission did not consider that it would be appropriate to deal with it in the present articles” (Yearbook of the International Law Commission, 1964, vol. II, at 204).

¹³² As D. W. GREIG observes, “[a] practice which has majority support may be of evidential value under Article 32 of the Vienna Convention, but certainly does not constitute ‘the agreement of the parties’ regarding the treaty’s interpretation” (Greig, D. W., *supra* note 112, at 96).

the disputing parties was one of the key requirements for the establishment of the jurisdiction of the Centre, once the term “investment” was introduced in the draft texts of the ICSID Convention as a jurisdictional requirement, it was never suggested throughout the negotiations and drafting process of the ICSID Convention that the disputing parties would have the discretion to determine whether or not a dispute arises out of an investment. On the contrary, the investment requirement was deliberately introduced to place an objective limitation to the jurisdiction of the Centre.

4.1. The Genesis of the ICSID Convention

The idea behind the formulation of the ICSID Convention is closely linked with the experience of the IBRD in the settlement of disputes between foreign investors and host States. In more than one occasion, the IBRD was requested to assist in the mediation and conciliation of investment disputes and to act as an appointing-authority in arbitral proceedings.¹³³ Based on this experience, on August 28, 1961, the general counsel of the IBRD, ARON BROCHES, submitted to the executive directors of the IBRD a memorandum in which he pointed out that one of the main barriers for the promotion of foreign investment was the lack of suitable international conciliation and arbitration facilities for the settlement of investment disputes. According to BROCHES, recourse to local courts and to diplomatic

¹³³ History of the ICSID Convention, *supra* note 73, at 4, 7. See also Shihata, Ibrahim F. I., *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, With Particular Reference to ICSID and MIGA*, 1 Am. U. J. Int'l L. & Pol'y 97 (1986), at 98-101.

protection was not satisfactory and there was a need for the establishment of an institutional framework for the settlement of investment disputes.¹³⁴

BROCHES' idea obtained support from the president of the IBRD at that time, EUGENE BLACK. In an address made to the Board of Governors of the IBRD, BLACK stated that:

“[O]ur experience has confirmed my belief that a very useful contribution could be made by some sort of special forum for the conciliation or arbitration of these [investment] disputes. [...] The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other specific machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions, and with our member governments, whether something might not be done to promote the establishment of machinery of this kind.”¹³⁵

After preliminary discussions on the convenience of establishing such dispute settlement facilities¹³⁶ — in which it was concluded that there was a general view that States would favor the establishment of an institutional framework —,¹³⁷ the executive directors obtained a formal authorization by the Board of Governors of the IBRD:

“[T]o consider the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between governments and private parties and, if they conclude that such action

¹³⁴ History of the ICSID Convention, *supra* note 73, at 1-3.

¹³⁵ *Ibid.*, at 3.

¹³⁶ *Ibid.*, at 4.

¹³⁷ *Ibid.*, at 13-19.

would be advisable, to draft an agreement providing for such facilities for submission to governments.”¹³⁸

Upon the authorization conferred by the Board of Governors, the executive directors started further discussions on the feasibility of the ICSID Convention and its content.

As mentioned before, one of the peculiarities of the ICSID Convention is that these discussions were not directly held by the Contracting States, but within the structure of the IBRD. The relevance of such peculiarity is that the opinions and possible agreements reached in the context of the discussions carried out by the executive directors did not necessarily represent the intention of the Member Governments of the IBRD. In formulating the provisions of the ICSID Convention, the executive directors, although appointed and elected by Member Governments, did not act under a mandate conferred on them by such States. On the contrary, the decisions taken by the executive directors in the formulation of the ICSID Convention expressed the view of the IBRD and not of the Member Governments.¹³⁹ In this context, it should be remarked that, in accordance with the Articles of Agreement of the IBRD, the Member Governments of the IBRD did not have an equal representation in the board of executive directors.¹⁴⁰ Several executive directors represented more than one Member Government, which did not form a homogenous group and whose opinion could differ. While the formulation of the ICSID Convention may be considered as being within the

¹³⁸ *Ibid.*, at 51.

¹³⁹ As BROCHES observed, “the decisions of the Executive Directors would express the view of the Bank as an institution and would not be binding on member governments who could decide whether or not to sign the Convention” (History of the ICSID Convention, *supra* note 73, at 454).

¹⁴⁰ See Section 4(b) of Article V of the original Articles of Agreement of the IBRD (2 UNTS 134, at 162).

purposes of the IBRD in promoting the flow of foreign investment,¹⁴¹ it was not within the mandate of the IBRD to conclude international treaties on behalf of its Member Governments.¹⁴² Consequently, when interpreting the provisions of the ICSID Convention, one should bear in mind that the documents pertaining to the drafting history of the ICSID Convention do not necessarily correspond to the intention of the Contracting States.

4.2. First Discussions in the Committee of the Whole on Settlement of Investment Disputes

The discussions on the formulation of the ICSID Convention were held in the Executive Directors' Committee of the Whole on Settlement of Investment Disputes ("Committee of the Whole"). The first deliberations were based on a

¹⁴¹ In accordance with Article 1 of the original Articles of Agreement of the IBRD:

"The purposes of the Bank are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate post-war years, to assist in bringing about a smooth transition from a wartime to a peacetime economy" (2 UNTS 134, at 134-136).

¹⁴² As observed by the president of the IBRD, GEORGE WOODS, the successor of EUGENE BLACK, "the approval of the text of the Convention by the Executive Directors would be an action of the Bank and would not commit the governments they represent" (History of the ICSID Convention, *supra* note 73, at 555).

draft of the ICSID Convention, called “Working Paper”, submitted by BROCHES to the executive directors on June 5, 1962.¹⁴³

Although from the outset the ICSID Convention was designed for the establishment of facilities for the settlement of investment disputes,¹⁴⁴ the Working Paper did not contain any reference to the term “investment”. Section 1 of Article II of the Working Paper, which defined the scope of application of the ICSID Convention, provided that:

“The provisions of this Article shall apply to any undertaking in writing to have recourse to conciliation or arbitration pursuant to the provisions of this Convention for the resolution of any existing or future dispute between a Contracting State and a national of another Contracting State.”¹⁴⁵

Furthermore, in accordance with Section 1(1) of Article IV of the Working Paper:

“The jurisdiction of the Center shall be limited to disputes between Contracting States and nationals of other Contracting States and shall be based on consent.”¹⁴⁶

The explanation for the absence of any reference to the term “investment” in the first draft of the ICSID Convention was given by BROCHES in the comment to Section 1 of Article II of the Working Paper. According to BROCHES:

“It will be noted that Section 1 contains no limitation as to the nature of the dispute. Although the Convention and the Center would be intended to be used primarily in connection with what are commonly referred as ‘investment disputes’, there is no need to write a limitation

¹⁴³ *Ibid.*, at 19-46.

¹⁴⁴ *Ibid.*, at 1, 3, 4-6, 6-12.

¹⁴⁵ *Ibid.*, at 22.

¹⁴⁶ *Ibid.*, at 33.

to that effect into the Convention, since it is up to the parties to an undertaking to decide whether they want to bring it within the terms of the Convention. Moreover, it is difficult to define the term ‘investment dispute’ with the precision required to avoid disagreements arising as to the applicability of the Convention to a given undertaking. And uncertainty on this score would tend to undermine the primary objective of Article II, namely to give confidence that undertakings to have recourse to the conciliation or arbitration will be carried out.”¹⁴⁷

The first reactions in the Committee of the Whole against the wording of the provisions of the Working Paper were concerned with the scope of the jurisdiction of the Centre.¹⁴⁸ It was suggested that some States would not wish to ratify the ICSID Convention without a precise definition of which disputes would fall within the jurisdiction of the Centre.¹⁴⁹ In the light of these first reactions, in a memorandum of February 18, 1963, BROCHES observed that “[t]here is a general understanding, which could be recorded in a Preamble to the Convention, that the machinery created by the Convention and the rules laid down in the Convention are designed to deal primarily with *investment disputes*.”¹⁵⁰

As a consequence of these first discussions, the term “investment” was included in the First Preliminary Draft of August 9, 1963, and in the Preliminary Draft of October 15, 1963. Section 1 of Article II, the wording of which is identical in both drafts, provided that:

“The jurisdiction of the Center shall be limited to proceedings for conciliation and arbitration with respect to any existing or future *investment* dispute of a legal character between a Contracting State and a national of another Contracting State (or that State when

¹⁴⁷ *Ibid.*, at 22 – emphasis in the original.

¹⁴⁸ *Ibid.*, at 6, 7, 61, 65, 67.

¹⁴⁹ *Ibid.*, at 57.

¹⁵⁰ *Ibid.*, at 83 – emphasis added.

subrogated in the rights of its national) and shall be based on the consent of the parties thereto.”¹⁵¹

However, no definition of the term “investment” was included in the drafts of the ICSID Convention. According to the comment to Section 1 of Article II of First Preliminary Draft and of the Preliminary Draft:

“No detailed definition of the category of disputes in respect of which the facilities of the Center would be available has been included in the Convention. Instead, the general understanding reflected in the Preamble, the use of term ‘investment dispute’, and the requirement that the dispute be of a legal character as distinct from political, economic or purely commercial disputes, were thought adequate to limit the scope of the Convention in this regard. Within those limits Contracting States would be free to determine in each particular case what disputes they would submit to the Center. To include a more precise definition would tend to open the door to frequent disagreements as to the applicability of the Convention to a particular undertaking, thus undermining the primary objective of this article viz., to give confidence that undertakings to have recourse to conciliation or arbitration will be carried out.”¹⁵²

The comment to the First Preliminary Draft and to the Preliminary Draft makes clear that, despite the absence of a definition of investment in the draft text of the ICSID Convention, the inclusion of the term “investment” was intended to place a limitation on the jurisdiction of the Centre based on the nature of the dispute. It also represents an unambiguous departure from the idea contained in the Working Paper to base the jurisdiction of the Centre exclusively on the consent of the disputing parties. For these reasons, it constitutes a persuasive argument against the idea that the real intention of the drafters of the ICSID Convention was to grant the disputing parties absolute freedom to determine whether the dispute arises out of an investment.

¹⁵¹ *Ibid.*, at 148, 202 – emphasis added.

¹⁵² *Ibid.*, at 149, 204.

4.3. Discussions in the Regional Consultative Meetings

The Preliminary Draft of the ICSID Convention served as the basis for the four regional consultative meetings held with legal experts appointed by the Member Governments of the IBRD in Addis Ababa,¹⁵³ Santiago,¹⁵⁴ Geneva¹⁵⁵ and Bangkok.¹⁵⁶ During these meetings, several representatives questioned the lack of a definition of the term “investment” in the Preliminary Draft.¹⁵⁷ As noted by BROCHES, “some delegates felt that the term ‘investment’ should be defined, and as I have indicated to the members of this Board on earlier occasions, we shall probably in the end have to devise a suitable definition of investment, difficult though it may be.”¹⁵⁸

Another issue that arose during the regional consultative meetings, in parallel to the question as to whether the ICSID Convention should contain a definition of investment, concerned the determination of the types of investment disputes that would be covered by the jurisdiction of the Centre.¹⁵⁹ Very often, the need for a definition of investment and the question as to whether the ICSID Convention should be limited to certain types of investment disputes were dealt with in the debates as a single problem. BROCHES, however, identified these issues as “two distinct lines of criticism regarding the category of dispute covered by the Convention.”¹⁶⁰ Indeed, while these two topics — the definition of investment and

¹⁵³ *Ibid.*, at 236-295.

¹⁵⁴ *Ibid.*, at 298-365.

¹⁵⁵ *Ibid.*, at 367-456.

¹⁵⁶ *Ibid.*, at 458-553.

¹⁵⁷ *Ibid.*, at 261, 285-286, 293, 447, 450, 474, 492, 493, 496, 499-500, 502, 537.

¹⁵⁸ *Ibid.*, at 297.

¹⁵⁹ *Ibid.*, at 257, 258, 259, 321, 322, 326, 376, 395, 396, 399, 401, 402, 411, 412, 466, 467, 468, 470, 471, 474, 476, 493, 494, 497, 498-499, 500-501, 502, 504, 537, 542, 550, 551.

¹⁶⁰ *Ibid.*, at 564.

the determination of the types of investment disputes — stem from the same problem, the jurisdictional scope of the ICSID Convention, and are linked with each other, they constitute two distinct questions. If the jurisdiction of the Centre is limited to the settlement of disputes arising out of investments, the determination of the types of disputes is contingent upon the meaning of the term “investment”. However, the limitation to certain types of investment disputes represents an additional limitation that could have been placed on the jurisdictional scope of the ICSID Convention, distinct from the meaning of the term “investment”. For instance, the jurisdiction of the Centre could be limited to disputes arising out of investment agreements or out of investments made in accordance with investment promotion laws. These limitations could have been introduced in the text of the ICSID Convention regardless of the inclusion or not of a definition of investment.

BROCHES observed that some delegations were concerned with the question as to “whether all ‘investment disputes of a legal character’ (assuming that term to be clear enough or, if necessary, clarified) should be within the jurisdiction of the Center, or whether some types or classes of disputes, although admittedly ‘investment disputes of a legal character,’ should be excluded from the jurisdiction of the Center even when the parties to such disputes wished to make use of the Center’s facilities.”¹⁶¹ BROCHES noted further that:

“The following are typical examples of suggested exclusion:

- (i) The jurisdiction of the Center should be excluded in case of disputes arising out of investments made prior to the entry into force of the Convention or some other specified date;

¹⁶¹ *Ibid.*, at 565.

- (ii) The Center should not deal with any disputes other than those arising out of investment made pursuant to an investment agreement, with the host State or in response to special investment promotion legislation;
- (iii) Same as (ii) but with the additional restriction that there must have been agreement at the time the investment was made that recourse would be had to conciliation and/or arbitration pursuant to the Convention;
- (iv) There should be excluded from the jurisdiction of the Center disputes regarding the legality of acts of expropriation or nationalization, as distinguished from disputes regarding the adequacy of the compensation to be paid;
- (v) No recourse should be had to the facilities established under the Convention until all local remedies, administrative as well as judicial, have been exhausted;
- (vi) Proceedings under the auspices of the Center should be limited to questions of ‘denial of justice’.”¹⁶²

It was clear, therefore, that these proposals were concerned with the types of investment disputes that would fall within the jurisdiction of the Centre and not with the need for a definition of investment in the text of the ICSID Convention.

BROCHES demonstrated a strong opposition against the limitation of the jurisdictional scope of the ICSID Convention to certain types of disputes. According to him, “since the jurisdiction of the Center is limited by the overriding condition of consent, the exclusions desired by one or the other delegation could be achieved by a refusal of consent in those cases in which in their view there was no proper case for use of the facilities of the Center.”¹⁶³

In his opinion, the Contracting States of the ICSID Convention would be free to determine which types of investment disputes they would submit to the

¹⁶² *Ibid.*, at 565-566.

¹⁶³ *Ibid.*, at 566.

jurisdiction of the Centre. The only restriction to the types of investment disputes is that, in order to fall within the jurisdiction of the Centre, the dispute must be of a legal character, arise out of an investment and be between a Contracting State and a national of another Contracting State. According to BROCHES, the ICSID Convention should set forth the outer limits within which the disputing parties would be free to exercise the discretion to submit or not a dispute to the jurisdiction of the Centre:

“The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided by the parties’ consent had been attained. Beyond these outer limits no use could be made of the facilities of the Center even with such consent. The question might be asked why, if consent is required and can be refused, the Convention need put any limit at all to the jurisdiction of the Center whether as to parties, subject-matter or otherwise. The answer to this question is that the jurisdiction of the Center should be limited in accordance with the purposes sought to be achieved by the Convention, that is, to provide new procedures for the settlement of investment disputes between States and private parties. [...]”¹⁶⁴

The establishment of facilities for the settlement of investment disputes through the conclusion of the ICSID Convention was not intended and designed to create a system of compulsory jurisdiction. The mere participation in the ICSID Convention does not mean that a Contracting State and its nationals are bound to submit disputes to the jurisdiction of the Centre. Consequently, a precise definition of the jurisdictional scope of the ICSID Convention would not be needed.

¹⁶⁴ *Ibid.*, at 566.

4.4. Discussions in the Legal Committee on Settlement of Investment Disputes

The discussions held in the four regional consultative meetings resulted in the new wording of the jurisdictional provisions employed in the First Draft of September 11, 1964. Article 26(1) of the First Draft provided that:

“The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it.”¹⁶⁵

However, differently from the previous drafts of the ICSID Convention, the First Draft contained a definition of investment. Pursuant to Article 30(i) of the First Draft, “‘investment’ means 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.”¹⁶⁶ In order to conciliate the position of States that demanded a limitation on the types of investment disputes that would fall within the jurisdiction of the Centre, a new provision, which became Article 25(4) of the ICSID Convention,¹⁶⁷ was included in the First Draft. In accordance with Article 29 of the First Draft:

“Any Contracting State may at any time transmit to the Secretary-General for purposes of information a statement indicating in general or specific terms the class or classes of dispute within the jurisdiction of the Center which it would in principle consider submitting to conciliation or arbitration pursuant to this Convention.”¹⁶⁸

¹⁶⁵ *Ibid.*, at 621-622.

¹⁶⁶ *Ibid.*, at 623.

¹⁶⁷ See *infra* note 309.

¹⁶⁸ History of the ICSID Convention, *supra* note 73, at 623.

The regional consultative meetings also led the executive directors to conclude that the establishment of the Centre through an international treaty was desirable.¹⁶⁹ For this reason, on September 10, 1964, a new resolution was approved by the Board of Governors, authorizing the executive directors:

“[T]o formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration [...] tak[ing] into account the views of member governments and [...] keep[ing] in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.”¹⁷⁰

The need for a new resolution was due to the fact that it was thought that the text of the first resolution adopted by the Board of Governors¹⁷¹ was not clear as to whether the executive directors were authorized to formulate a final text of the ICSID Convention and submit it directly to the Member Governments of the IBRD for signature without prior approval of the Board of Governors.¹⁷²

As an alternative to a diplomatic conference, the Committee of the Whole decided to establish the Legal Committee on Settlement of Investment Disputes (“Legal Committee”) constituted by representatives of each Member Government of the IBRD.¹⁷³ The purpose of the Legal Committee was “to provide the Executive Directors with technical advice as well as to enable member governments that are not represented by an Executive Director of their own nationality to participate

¹⁶⁹ *Ibid.*, at 606-607.

¹⁷⁰ *Ibid.*, at 608.

¹⁷¹ See *supra* at p. 56.

¹⁷² See History of the ICSID Convention, *supra* note 73, at 555.

¹⁷³ *Ibid.*, at 605.

directly in the preparation of the convention.”¹⁷⁴ The reason for the establishment of the Legal Committee was due to the fact that, during the regional consultative meeting held in Geneva, some representatives argued that the final draft of the ICSID Convention should have been submitted to a diplomatic conference.¹⁷⁵ In particular, the representative of the Netherlands pointed out that the legal experts at the regional consultative meetings “were attending as guests of the World Bank rather than as national delegations, and were accordingly participating in their capacity as legal experts in order to explore all aspects of the draft Convention without in any way committing their governments to any specific stand.”¹⁷⁶ BROCHES, however, opposed to the idea of convening a diplomatic conference. He believed that a diplomatic conference would result in delays and could put at risk the attempt to conclude the ICSID Convention.¹⁷⁷

The initial idea was that the Legal Committee would be constituted in order to help the executive directors in the draft of the final text of the ICSID Convention. The members of the Legal Committee would not have been appointed by the Member Governments, but by the executive directors.¹⁷⁸ However, due to the fact that the proposed Legal Committee could have been seen as an “intermediate solution [...] between the process of consultation and that of a diplomatic conference,”¹⁷⁹ each Member Government was invited to appoint one

¹⁷⁴ *Ibid.*, at 609.

¹⁷⁵ *Ibid.*, at 375, 453-456.

¹⁷⁶ *Ibid.*, at 375.

¹⁷⁷ *Ibid.*, at 454, 455.

¹⁷⁸ *Ibid.*, at 556.

¹⁷⁹ *Ibid.*, at 455-456.

representative.¹⁸⁰ The task of the Legal Committee was to prepare a draft of the ICSID Convention to be submitted to the executive directors.¹⁸¹

The discussions in the Legal Committee were based primarily on the First Draft of September 11, 1964,¹⁸² and on the comments to the First Draft made by the Member Governments.¹⁸³ These comments demonstrated the lack of unanimity among Member Governments regarding the definition of investment and the determination of which types of investment disputes would fall within the jurisdiction of the Centre. Some States, such as the Republic of China, Thailand and Vietnam, considered that the jurisdictional scope of the Centre as defined in the First Draft was too broad. Their concerns, however, seemed to be related to definition of the types of investment disputes subject to the jurisdiction of the Centre and not to the definition of investment itself.¹⁸⁴ Other States, such as South Africa and the United Kingdom, showed some disagreement with the definition of investment employed in the First Draft.¹⁸⁵ In particular, the United Kingdom considered that:

“[I]t is very difficult to define the word ‘investment’, and the result of including such a definition may be to create difficult for the arbitrators, when deciding whether they have jurisdiction in any particular case. For example, the parties might wish to arbitrate, and the arbitrators might consider that the particular dispute before them was an investment dispute, but nevertheless the latter might feel obliged to refuse to exercise jurisdiction because the facts did not come within the particular definition of ‘investment’ contained in the

¹⁸⁰ *Ibid.*, at 609.

¹⁸¹ *Ibid.*, at 647.

¹⁸² *Ibid.*, at 610.

¹⁸³ *Ibid.*, at 651.

¹⁸⁴ *Ibid.*, at 652-653, 660, 668-669.

¹⁸⁵ *Ibid.*, at 661, 667-668.

convention. For this reason the United Kingdom would prefer to have no such definition in the convention.”¹⁸⁶

The concerns of the Member Governments echoed in the first discussions held in the Legal Committee. The representatives of the Member Governments were divided in two main groups. Apparently, from the documents pertaining to the discussions held in the Legal Committee, the representatives of Australia,¹⁸⁷ Austria,¹⁸⁸ Ceylon,¹⁸⁹ Republic of China,¹⁹⁰ Germany,¹⁹¹ Guatemala,¹⁹² Iran,¹⁹³ Japan,¹⁹⁴ Liberia,¹⁹⁵ Niger,¹⁹⁶ Spain¹⁹⁷ and the United States¹⁹⁸ disagreed with the definition of investment set forth in the First Draft, either because it was too broad or too narrow, but favored the inclusion of a definition. Other Member Governments’ representatives, such as New Zealand,¹⁹⁹ Sweden²⁰⁰ and the United Kingdom,²⁰¹ supported the exclusion of the definition of investment inserted in the First Draft. A third view was expressed by the representative of Portugal, SAPATEIRO, according to which, if the jurisdiction of the Centre was limited to certain types of investment disputes, there would be no need for a definition of investment.²⁰² Due to these controversies, a working group on Article 26 of the

¹⁸⁶ *Ibid.*, at 667-668.

¹⁸⁷ *Ibid.*, at 704.

¹⁸⁸ *Ibid.*, at 709.

¹⁸⁹ *Ibid.*, at 699.

¹⁹⁰ *Ibid.*, at 700.

¹⁹¹ *Ibid.*, at 704.

¹⁹² *Ibid.*, at 703.

¹⁹³ *Ibid.*, at 710.

¹⁹⁴ *Ibid.*, at 707.

¹⁹⁵ *Ibid.*, at 709.

¹⁹⁶ *Ibid.*, at 710.

¹⁹⁷ *Ibid.*, at 705.

¹⁹⁸ *Ibid.*, at 703.

¹⁹⁹ *Idem.*

²⁰⁰ *Ibid.*, at 706-707.

²⁰¹ *Ibid.*, at 702.

²⁰² *Ibid.*, at 708.

First Draft was established with the purpose of reaching an agreed solution for the jurisdictional scope of the ICSID Convention.²⁰³

The discussions held in the working group on Article 26 revealed that the most contentious point among its members was not the definition of investment, but the determination of which types of investment disputes would fall within the jurisdiction of the Centre.²⁰⁴ Several proposals were presented by members of the Legal Committee, either adopting a flexible formula or a narrow one, but very few proposals contained a definition of investment.²⁰⁵ The different proposals were merged into two main ones and submitted to the Legal Committee for deliberation. The first proposal was to maintain the text of Article 26 of the First Draft, including in its wording, if necessary, the rule contained in Article 29 of the First Draft (the first version of Article 25(4) of the ICSID Convention). The second proposal, known as the “Spanish proposal”, restricted the jurisdictional scope of the ICSID Convention to certain types of investment disputes. According to this proposal, the jurisdictional scope of the ICSID Convention would have been defined as follows:

“The jurisdiction of the Centre shall extend to the settlement of any legal dispute between a Contracting State and a National of another Contracting State which directly refers to an investment and has as its object

- (a) compliance with obligations arising out of a contract between that State and a National of another State;
- (b) compliance with guarantee obligation which a State may have given to specific investments;

²⁰³ *Ibid.*, at 711.

²⁰⁴ *Ibid.*, at 829-831.

²⁰⁵ *Ibid.*, at 832-842.

(c) to determine the indemnity to be granted for acts taken by the State in violation of rights lawfully acquired by the National of the other State, provided however, that such acts do not result from

(i) the correct application of the laws in force in the territories of the State at the time the investment was made or

(ii) the correct application of laws of a general character enacted after that time which do not annul or reduce the benefits expressly recognized to the national investor.

(2) Notwithstanding what is stated in paragraph (1) above any Contracting State may at the time of ratification or accession or at any time thereafter notify to the Centre the class or classes of investment disputes in respect of which it would in principle consider submitting or not submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (3).

(3) The submission of any dispute to the Centre shall be in writing and shall state that both parties have consented. Consent may be given before or after the dispute has arisen.”²⁰⁶

In addition to these proposals, a third proposal, known as the “British proposal”, sponsored by twenty-five States,²⁰⁷ was submitted to the Legal Committee with the following wording:

“(1) The jurisdiction of the Centre shall extend to investment disputes between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) Any Contracting State may at the time of ratification or accession or at any time thereafter notify to the Centre the class or classes of investment disputes in respect of which it would in principle consider submitting or not submitting to the jurisdiction of the Centre.

²⁰⁶ History of the ICSID Convention, *supra* note 73, at 828.

²⁰⁷ These States were Australia, Austria, Belgium, Denmark, Finland, Greece, Germany, India, Ivory Coast, Japan, Korea, Liberia, Malaysia, Nepal, the Netherlands, New Zealand, Nigeria, Norway, Sierra Leone, Sweden, Tanzania, Turkey, Uganda, United Kingdom, United States and Yugoslavia. Another four States (Costa Rica, Iran, Lebanon and Madagascar) cosponsored the proposal (*ibid.*, at 821).

Such notification shall not constitute the consent required by paragraph (1).”²⁰⁸

With some amendments, the British proposal was approved by twenty-seven members of the Legal Committee against six votes,²⁰⁹ and became the wording of Article 25 of the Revised Draft of December 11, 1964:

“(1) The jurisdiction of the Centre shall extend to any dispute of a legal character, arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

[...]

(3) Any Contracting State may, at the time of ratification or acceptance of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (1).”²¹⁰

The Revised Draft did not contain any definition of investment. The first discussions held in the Legal Committee²¹¹ and the submission of some proposed definitions²¹² showed some disagreements with the definition of investment inserted in the First Draft of September 11, 1964. However, the documents pertaining to the work of the Legal Committee apparently demonstrate that the definition of investment was actually not subject to any further discussion among the representatives of the Member Governments. This might lead to the conclusion that the main concern of the States was not related to the definition of

²⁰⁸ *Ibid.*, at 821.

²⁰⁹ *Ibid.*, at 826.

²¹⁰ *Ibid.*, at 918.

²¹¹ *Ibid.*, at 699-705, 705-711.

²¹² *Ibid.*, at 837, 839, 843-844.

investment, but to the determination of which types of investment disputes would fall within the jurisdiction of the Centre.²¹³ That is, the concern of the States was whether the jurisdictional provisions of the ICSID Convention should have had a flexible wording or a list of matters that could be submitted to ICSID arbitration.²¹⁴ This conclusion could be confirmed by the fact that neither the British proposal nor the Spanish proposal put forward a definition of investment. Other evidence of such conclusion may be found in the comment made by the representative of Egypt, LOKUR. According to him:

“[I]n addition to the safeguard afforded by the requirement of consent, States ought to be able to define precisely the *kind of disputes* they could conceivably consent to submit to the Center and exclude disputes which could not under any circumstances be subject to arbitration. If this were done, there seemed to be no need to limit the jurisdiction of the Center to ‘legal disputes’ or to define the term ‘investment’.”²¹⁵

In fact, the absence of any definition of investment in the text of the Revised Draft was the only possible solution that could conciliate the different positions as to the definition of investment contained in Article 30(i) of the First Draft. Some States argued that the definition was too broad; others considered it too narrow. But if the ICSID Convention did not have any definition of investment, the States that considered the definition of the First Draft too broad would not be bound by such definition and could adopt a narrower one for the purpose of consenting or not to the jurisdiction of the Centre. On the other hand, for the States that considered the

²¹³ See Hynning, Clifford J., *The World Bank's Plan for the Settlement of International Investment Disputes*, 51 ABA J. 558 (1965), at 560.

²¹⁴ See History of the ICSID Convention, *supra* note 73, at 829-831. According to the chairman of the working group on Article 26, the representative of Tanzania, BOMANI, “two main trends had emerged; one favored a broad and flexible definition of the scope of the jurisdiction of the Center and would leave it to each State to determine the kind of disputes it would consent to submit to the Center; the other one was in favor of limiting the jurisdiction of the Center only to certain specific types of disputes” (*ibid.*, at 831).

²¹⁵ *Ibid.*, at 831 – emphasis added.

definition of the First Draft too narrow, the absence of a definition in the ICSID Convention would not limit the consent of such States to the jurisdiction of the Centre to a given definition. On the contrary, these States would be allowed to base their consent on the ordinary meaning of the term “investment” and not on a special meaning of the term, which would be the result if the ICSID Convention had contained a definition of investment. In any case, however, it was never suggested that the Contracting States of the ICSID Convention would be absolutely free to determine the content of the term “investment” and be allowed to give a definition that goes beyond the ordinary meaning of the term. States seemed to agree with the idea that the inclusion of the term “investment” in the text of the ICSID Convention was intended to define the outer limits of the jurisdiction of the Centre. Consequently, the meaning of investment could be restricted by consent, but never expanded beyond its ordinary meaning.

4.5. Final Discussions in the Committee of the Whole and the Report of the Executive Directors

The Revised Draft prepared by the Legal Committee was submitted to the Committee of the Whole for the formulation of the final text of the ICSID Convention. During the discussions held in the Committee of the Whole, there were some disagreements among some executive directors regarding the wording of Article 25(1) of the Revised Draft.²¹⁶ But these disagreements were in fact related to the determination of the types of investment disputes and not to the need for including a definition of investment. In particular, one executive director, LIEFTINCK, informed that:

²¹⁶ *Ibid.*, at 972-973.

“[H]e had been requested by the Israeli Government to express a strong preference for the ‘closed’ approach which sought to limit the jurisdiction of the Centre by a more or less precise definition of the disputes which could come before it, over the ‘open’ formula favored by the majority of the Legal Committee. The Netherlands and Yugoslavia, however, were more in favor of the ‘open’ formula, the position which he himself would support.”²¹⁷

Another executive director, MEJIA-PALACIO, “recalled that the Colombian Government was opposed to the use of the term ‘legal dispute’ as being too wide, and would prefer a more precise definition.”²¹⁸ Only one executive director, OZAKI, requested that “some examples of what was meant by the term ‘investment’”²¹⁹ were included in the Report of the Executive Directors. In reply, BROCHES observed that:

“[T]he staff had prepared a definition of ‘investment’ and had also brought to the attention of the Legal Committee a number of examples of definitions of that term taken from legislation and bilateral agreements. None of these had proved acceptable. The large majority had, moreover, agreed that while it might be difficult to define ‘investment’, an investment was in fact readily recognizable. The Report would say that the Executive Directors did not think it necessary or desirable to attempt to define the term ‘investment’ given the essential requirement of consent of the parties and the fact that Contracting States could make known in advance within what limits they would consider making use of the facilities of the Centre. Thus each Contracting State could, in effect, write its own definition.”²²⁰

After some technical changes in the wording,²²¹ Article 25(1) of Revised Draft became the final text of Article 25(1) of the ICSID Convention, with the following wording:

²¹⁷ *Ibid.*, at 972.

²¹⁸ *Ibid.*, at 973.

²¹⁹ *Ibid.*, at 972.

²²⁰ *Idem.*

²²¹ *Ibid.*, at 944-945.

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”²²²

No definition of the term “investment” was included. The reason for the lack of definition of investment in the ICSID Convention was given in paragraph 27 of the Report of the Executive Directors.

While it is clear that there were several attempts to define the term “investment” during the drafting history of the ICSID Convention, the final wording of paragraph 27 of the Report of the Executive Directors was the solution reached in order to conciliate final disagreements in the Committee of the Whole. In fact, in the Draft Report of the Executive Directors of January 19, 1965, paragraph 27 of the final text of the Report of the Executive Directors had the following wording:

“26. The Executive Directors did not think it necessary or desirable to attempt to define the term ‘investment’, given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).”²²³

Against this wording, however, one executive director, MEJIA-PALACIO, pointed out that:

“[I]t would not be correct to say, as was done in paragraph 26 that ‘The Executive Directors did not think it necessary or desirable to attempt to define the term ‘investment’’ In his opinion, it was

²²² *Ibid.*, at 1051.

²²³ *Ibid.*, at 957.

difficult to define that term but he could not support the idea that a definition was unnecessary or undesirable.”²²⁴

BROCHES suggested then to reword the sentence to what became the final wording of paragraph 27.²²⁵ In fact, when paragraph 27 states that “[n]o attempt was made to define the term ‘investment’,” it actually means that no attempt was made in the final text of the ICSID Convention and not that no attempt was made during the formulation of the ICSID Convention.

5. ICSID PRACTICE

5.1. The Early Practice

The objectiveness of the investment requirement of the ICSID Convention also finds support in ICSID practice. Since the conclusion of the ICSID Convention, the first writings showed a general understanding that the exclusion of a definition of investment from the final text of the ICSID Convention was intended to avoid any undesirable limitation that a definition might have caused and to grant the disputing parties a great margin of discretion to determine whether a dispute arises out of an investment.²²⁶ Most authors had the opinion that the discretion of the

²²⁴ *Ibid.*, at 1027.

²²⁵ *Idem.*

²²⁶ In this sense, G. R. DELAUME noted that:

“The term ‘investment’ is not defined in the Convention. This omission is intentional. To give a comprehensive definition, such as that which is sometimes found in investment codes, would have been of limited interest since any such definition would have been too broad to serve a useful purpose. In addition to the difficulty of reconciling many different concepts, insistence upon a precise formulation would have been inconvenient in that it might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the Centre a dispute which would be considered by the parties as a genuine ‘investment’ dispute though such dispute would not be one of those included in the definition in the Convention” (Delaume, Georges R., *The Convention on the Settlement of*

disputing parties would not be unlimited and that disputes related to transactions that manifestly do not constitute an investment would not fall within the jurisdictional scope of the ICSID Convention.²²⁷

ARON BROCHES, who designed and conducted the drafting process of the ICSID Convention, in one of his first articles published after the conclusion of the ICSID Convention, noted that:

Investment Disputes Between States and Nationals of Other States, 1 Int'l L. 64 (1966-1967), at 70 – footnote excluded).

See also Delaume, G. R., *ICSID Arbitration in Practice*, 2 Int'l Tax & Bus. Law. 58 (1984), at 64-66; Delaume, G. R., *ICSID Arbitration: Practical Considerations*, 1 J. Int'l Arb. 101 (1984), at 116-120.

²²⁷ According to P. C. SZASZ:

“Despite the primarily subjective meaning of the term ‘investment’ in the context of the Convention, it is clear that it should not be entirely deprived of objective significance. It is easy to conceive of disputes that so obviously do not relate to an investment that, in spite of the desire and express stipulation of the parties, a Commission or Tribunal would have to decide that the Centre lacks jurisdiction — or indeed the registration of the request which must contain ‘information concerning the issues in dispute’ may even be refused by the Secretary-General as manifestly inappropriate” (Szasz, Paul C., *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 Cornell Int'l L. J. 1 (1968), at 14 – footnote excluded).

See also Szasz, P. C., *Arbitration Under the Auspices of the World Bank*, 3 Int'l L. 312 (1968-1969), at 314, and Szasz, P. C., *The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J. L. & Econ. Dev. 23 (1970-1971), at 26, 35-36.

According to C. F. AMERASINGHE:

“Agreement between the parties on whether a transaction is an investment or even on whether a dispute relating to a certain matter arises out of an investment creates a strong presumption that the transaction is an investment or that the dispute arises directly out of an investment. It is only where the transaction is manifestly outside the concept of investment or the dispute manifestly cannot be regarded as arising out of an investment that such an agreement will be of no avail” (Amerasinghe, C. F., *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 5 J. Mar. L. & Com. 211 (1973-1974), 223).

See also Amerasinghe, C. F., *supra* note 84, at 803-804; Amerasinghe, C. F., *Dispute Settlement Machinery in Relations between States and Multinational Enterprises – With Particular Reference to the International Centre for Settlement of Investment Disputes*, 11 Int'l L. 45 (1977), at 48-49; Amerasinghe, C. F., *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 Indian J. Int'l L. 166 (1979), at 180-181.

For other first ICSID writings, see Moore, Michael M., *International Arbitration Between States and Foreign Investors – The World Bank Convention*, 18 Stan. L. Rev. 1359 (1965-1966); Starke, J. G., *The Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States*, in *The Protection and Encouragement of Private Foreign Investment*, 1 (Starke, J. G., ed., Sidney: Butterworths, 1966); Albrecht, William E., *Some Legal Questions Concerning the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 12 St. Louis U. L. J. 679 (1967-1968); Sassoon, David M., *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 1 Isr. L. Rev. 27 (1966).

“During the negotiations several definitions of ‘investment’ were considered and rejected. It was felt in the end that a definition could be dispensed with ‘given the essential requirement of consent by the parties.’ This indicates that the requirement that the dispute must have arisen out of an ‘investment’ may be merged into the requirement of consent to jurisdiction. Presumably, the parties’ agreement that a dispute is an ‘investment dispute’ will be given great weight in any determination of the Centre’s jurisdiction, although it would not be controlling.”²²⁸

The idea that the investment requirement of the ICSID Convention could be merged into the consent requirement could lead to the conclusion that according to BROCHES the term “investment” as employed in the wording of Article 25(1) of the ICSID Convention would not have an objective meaning. BROCHES, however, clarified his position in a later publication. He observed that:

“The fundamental condition is consent, ‘the cornerstone of the jurisdiction of the Centre.’ But consent is not enough. The Centre is an institution of limited jurisdiction, limited by the character of the parties and the nature of the dispute.”²²⁹

As regards the investment requirement of the ICSID Convention in particular, BROCHES explained that:

“There is no shortage of definitions of investment. One finds them in economic literature, but more particularly in national legislation with respect to investment guarantees or incentives for investment, as well as in bilateral investment protection treaties between capital exporting and capital importing countries.

On review, each of these definitions proved either inadequate from a technical point of view or, more significantly, unacceptable to the one or other country or group of countries because it did not coincide with their view of the type of transactions for which they would, in fact, be willing to accept the jurisdiction of the Centre. The latter type of objection reflected a confusion between absolute limits of jurisdiction,

²²⁸ Broches, A., *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat’l L. 263 (1966), at 268 – footnote excluded.

²²⁹ Broches, A., *supra* note 32, at 351-352 – footnote excluded.

to be established in the Convention, and the flexible limits within which cases would actually be submitted to the Centre's jurisdiction, depending on the parties' consent.

In the end, the effort to devise a generally acceptable definition of the term 'investment' was given up 'given the essential requirement of consent by the Parties.'

I believe that this was a wise decision, fully consonant with the consensual nature of the Convention, which leaves a large measure of discretion to the parties. It goes without saying, however — and I have made this remark before in another connection — that *this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.*²³⁰

According to BROCHES, thus, while the exclusion of a definition of investment in the final text of the ICSID Convention was intended to grant a great margin of discretion, the disputing parties would not be absolutely free. The disputing parties could not waive the investment requirement in order to submit disputes that manifestly do not arise out of an investment. However, it was never made clear what the boundaries of such discretion would be.

Especially due to the small number of cases referred to ICSID arbitration in the first years of the Centre, the fulfillment of the investment requirement of the ICISD Convention was not significantly assessed by ICSID tribunals. In fact, during this period, there was no reported case in which the jurisdiction of the Centre was challenged based on the allegation of non-fulfillment of the investment requirement of the ICSID Convention. The very few early cases in which the compliance with the investment requirement was addressed resulted from the application of the Rule 42(4) of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules").²³¹ These cases were *Alcoa*

²³⁰ *Ibid.*, at 362 – footnote excluded, emphasis added.

²³¹ The Rule 42(4) of the ICSID Arbitration Rules provides that:

Minerals of Jamaica, Inc. v. Jamaica (“Alcoa”), *Kaiser Bauxite Company v. Jamaica* (“Kaiser”), and *Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Jamaica* (“Reynolds”) and *Liberian Eastern Timber Corporation v. Liberia* (“LETCO”).

The disputes referred to ICSID arbitration against Jamaica in *Alcoa*, *Kaiser* and *Reynolds* arose out of very similar facts. The claimants had entered into agreements with the Jamaican government for the production of bauxite in Jamaica, which contained a “no further tax” clause. After the enactment of new legislation providing for additional taxes on the production of bauxite, the claimants submitted their claims against the Jamaican government to the jurisdiction of the Centre pursuant to arbitration clauses contained in the agreements. Although the claimants initiated different proceedings, the *Alcoa*, *Kaiser* and *Reynolds* tribunals were composed by the same arbitrators. Once Jamaica failed to take part in the arbitral proceedings, the tribunals had to decide on the jurisdiction of the Centre and on their own competence by virtue of Rule 42(4) of the ICSID Arbitration Rules, and, thus, to decide whether the disputes arose out of an investment for the purposes of the ICSID Convention.

In the decision on jurisdiction of July 6, 1975, rendered in *Kaiser*, while the tribunal recognized the weight of the consent of the disputing parties in determining whether the dispute arose out of an investment, it also assessed the compliance with the investment requirement of the ICSID Convention in light of

“The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations” (1 ICSID Reports 157 (1993), at 173).

the objective elements of the activities carried out by the claimant in the host State:

“The Tribunal finds that the dispute arises directly out of an investment. It is said in the Report of the Executive Directors of the International Bank for Reconstruction and Development accompanying the Convention when submitted to Governments (hereafter called ED Report), para. 27, that no attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties. It follows that the intention of the Convention was that the consent of the parties should be entitled to great weight in any determination of the Centre’s jurisdiction. Moreover, it seems clear to the Tribunal that a case like the present, in which a mining company has invested substantial amounts in a foreign State in reliance upon an agreement with that State, is among those contemplated by the Convention.”²³²

The *Kaiser* tribunal considered that, pursuant to paragraph 27 of the Report of the Executive Directors, there was an intention to give “great weight” to the consent of the disputing parties to the jurisdiction of the Centre in deciding whether the dispute arises out of an investment in the sense of the ICSID Convention. In the case, once the dispute was referred to ICSID arbitration pursuant to an arbitration clause inserted in a contract, there was an implied agreement of the parties that disputes arising out of that contract would be related to an investment for the purposes of the ICSID Convention. Nonetheless, to the extent that the decision referred to the case as one of “those contemplated by the Convention,” it seems that, in the tribunal’s opinion, “great weight” would not mean that the discretion conferred on the parties is unlimited.

²³² Decision on Jurisdiction of July 6, 1975, 1 ICSID Reports 296 (1993), at 303. See also *Alcoa*, Decision on Jurisdiction of July 6, 1975 (excerpts), 4 Y.B. Com. Arb. 206 (1979), at 207. The decision rendered in *Reynolds* has not been published yet. The decisions rendered in the three cases, however, are materially identical.

In *LETCO*, the dispute arose out of an alleged violation of a concession agreement entered into by the claimant and the Liberian government for the harvesting and processing of forest products in Liberia. Like in *Alcoa*, *Kaiser* and *Reynolds*, the dispute was also referred to ICSID arbitration pursuant to an arbitration clause contained in a contract entered into by the disputing parties. However, differently from the previous cases, the *LETCO* tribunal did not base its decision on the consent of the disputing parties in order to conclude whether the dispute fulfilled the investment requirement of the ICSID Convention. On the contrary, in the award, the decision of the tribunal referred exclusively to the objective elements of the activities carried out by the claimant:

“The Concession Agreement between the Government of Liberia and LETCO provides for an extensive outlay of capital by LETCO which was to be dedicated to the harvesting and processing of forest products in Liberia. The Agreement required LETCO to provide ‘all capital at such times and in such amounts as may be required for the economic and profitable development of this concession.’ (Article III(1)). The development of the concession required, among other things, harvesting of timber, the construction and maintenance of a sawmill, the payment of surface rents and stumpage taxes, facilities for its employees including a dispensary, health clinic, education, etc. LETCO claims to have paid out over \$5 million in machinery and equipment alone from 1970 to 1982. Whether this figure is accurate or not is not of great import for the moment; the fact is that Liberia’s own documents indicate that LETCO paid out extensive amounts for the development of the Concession. There is, therefore, no doubt that, based on the Concession Agreement, amounts paid out to develop the Concession, as well as other undertakings, this legal dispute has arisen directly from an ‘investment’ as that term is used in the Convention.”²³³

In addition to these cases, it has been reported that the ICSID Secretary-General, under the screening function conferred on him by Article 36(3) of the ICSID

²³³ Award of March 31, 1986, 2 ICSID Reports 343 (1994), at 349-350.

Convention,²³⁴ refused the registration of a request for arbitration of a dispute arising out of a sale of goods in which the parties had consented to the jurisdiction of the Centre, in the case of *Asian Express International PTE Ltd. v. Greater Colombo Economic Commission*.²³⁵

Based on the few practical application of the investment requirement of the ICSID Convention, most relevant writings published during this period favored the idea that the use of the term “investment” in the wording of Article 25(1) imposes objective limits²³⁶ and very few admitted a pure subjectivist view.²³⁷ However, the very few practical applications of the investment requirement in ICSID cases hindered the development of a clear understanding in ICSID practice as to the meaning of the term “investment” for the purposes of the ICSID Convention.

²³⁴ See *supra* note 28.

²³⁵ See Tupman, Michael, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 35 ICLQ 813 (1986), at 814, footnote 7; Hirsch, M., *supra* note 84, at 59-60.

²³⁶ In one of the most relevant publication on the ICSID Convention of this period, Professor MOSHE HIRSCH noted that:

“The ruling of the tribunal in the *Alcoa* case and the Secretary-General’s decision refusing registration of the request for arbitration in a case dealing with the sale of goods demonstrate the mixed relationship between the consensual and objective elements of the Centre’s jurisdiction. The lack of definition in the Convention and the statement in the Executive Director’s Report regarding the importance of the consent of the parties led to great weight being attached to the consent of the parties in examining the existence of the objective condition (‘investment’) dictated by the Convention. On the other hand, the Centre’s organs acted to limit the consensual latitude of the parties and stressed the objective bounds of the parties’ consent in this matter” (Hirsch, M., *supra* note 84, at 60).

See also Schmidt, John T., *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 Harv. Int’l L. J. 90 (1976), at 98-100; Tupman, M., *supra* note 235, at 813, 815-816, 833-834; Rand, William, Hornick, Robert N., and Friedland, Paul, *ICSID’s Emerging Jurisprudence: The Scope of ICSID’s Jurisdiction*, 19 NYU J. Int’l L. & Pol. 33 (1986-1987), at 35-38; Lamm, Carolyn B., *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID Rev. – FILJ 462 (1991), at 474-475; MacKenzie, Gregory W., *ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 Syracuse J. Int’l L. & Com. 197 (1993), at 222-225; Nathan, Kathigamar V. S. K., *Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention*, 12 J. Int’l Arb. 27 (1995), at 37-40.

²³⁷ See Sutherland, P. F., *The World Bank Convention on the Settlement of Investment Disputes*, 28 ICLQ 367 (1979), at 386; Lopina, David, *The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s*, 4 Ohio St. J. on Disp. Resol. 107 (1988-1989), at 114-117; Chukwumerije, Okezie, *ICSID Arbitration and Sovereign Immunity*, 19 Anglo-Am. L. Rev. 166 (1990), at 168-169.

5.2. The Current Practice: ICSID Arbitration and Investment Treaties

The scarcity of cases referred to ICSID arbitration observed in the first three decades of the existence of the Centre ended with the extraordinary proliferation of investment treaties in the 1990s. In addition to substantive rules of foreign investment protection and treatment, most investment treaties give investors the possibility of submitting disputes against host States to the jurisdiction of the Centre.²³⁸ Soon, disputes referred to ICSID arbitration pursuant to arbitration clauses contained in contracts concluded between the disputing parties became the exception.²³⁹ ICSID practice initiated a new era in its history and the role of the Centre in the settlement of disputes between foreign investors and host States achieved its climax.

But the increase in the number of cases referred to ICSID arbitration led to the emergence of new questions in ICSID practice, especially as regards the content of the investment requirement of the ICSID Convention. If during the early ICSID

²³⁸ See Robin, Patricia McKinstry, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 Am. U. L. Rev. 931 (1983-1984), at 954; Salacuse, Jeswald W., *BIT by BIT: The Growth of Bilateral Investment Treaties and Impact on Foreign Investment in Developing Countries*, 24 Int'l L. 655 (1990), at 672; Parra, Antonio R., *ICSID and New Trends in International Dispute Settlement*, 87 Am. Soc'y Int'l L. Proc. 2 (1993), at 5; Sacerdoti, Giorgio, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 Recueil des Cours 251 (1997), at 436-441; Schreuer, Christoph, *Consent to Arbitration*, in The Oxford Handbook of International Investment Law 830 (Muchlinski, Peter, Ortino, Federico, and Schreuer, Christoph, eds., Oxford: Oxford University Press, 2008), at 831.

²³⁹ According to the statistics released by the Centre, 73% of the cases registered were based on investment treaties and only 21% were based on investment agreements entered into by investors and host States. See The ICSID Caseload – Statistics (Issue 2011-2), available at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English21>>, (last visited on October 27, 2011). In 2010 alone, 69% of the cases registered were based on investment treaties and 14% on investment agreements. See The ICSID Caseload – Statistics (Issue 2011-1), available at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English11>>, (last visited on March 7, 2010). In 2009 alone, 78% of the cases registered were based on investment treaties and 18% on investment agreements. See The ICSID Caseload – Statistics (Issue 2010-1), available at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English>>, (last visited on March 1, 2010).

practice there was no reported case in which the jurisdiction of the Centre was challenged based on the allegation of non-fulfillment of the investment requirement of the ICSID Convention, in this new era it has become usual for host States to argue that the Centre does not have jurisdiction over claims pursued by foreign investors on the ground that the dispute does not arise out of an investment for the purposes of the ICSID Convention. There are two main reasons that may explain this new situation faced by ICSID tribunals.

The first reason is related to a phenomenon that was labeled by JAN PAULSSON as “arbitration without privity”.²⁴⁰ According to PAULSSON, investment treaties and domestic investment laws containing a general offer of consent to arbitration introduced a new idea that clashed with the traditional concept of arbitration. Whereas arbitral proceedings are traditionally initiated pursuant to an arbitration clause contained in a contract entered into by the disputing parties, in the case of investment treaties and domestic investment laws, the host State and the foreign investor are not necessarily in a contractual relationship.²⁴¹ On the contrary, when the host State makes the offer of consent, the identity of the claimant and exactly which disputes will be referred to arbitration are not known. This phenomenon had immediate consequences to the behavior of States in arbitral proceedings initiated under the ICSID Convention.

If a claim is referred to ICSID arbitration by virtue of an arbitration clause contained in a contract concluded between the investor and the State, there is no difficulty to conclude that the State agreed that eventual disputes arising out of

²⁴⁰ See Paulsson, J., *supra* note 77.

²⁴¹ *Ibid.*, at 232.

that contract are related to an investment for the purposes of the ICSID Convention. If the State consents to the jurisdiction of the Centre, it does so on the assumption that eventual disputes will meet the requirements set forth in Article 25(1) of the ICSID Convention.²⁴² While the consent of the disputing parties does not preclude ICSID tribunals from assessing the compliance with the jurisdictional requirements set forth in the ICSID Convention, one could argue that the State is estopped from arguing that the transaction or activity envisaged in the contract is not an investment for the purposes of the ICSID Convention.²⁴³

This conclusion, however, does not necessarily apply to cases referred to ICSID arbitration pursuant to investment treaties. When a State enters into an investment treaty providing for the submission of disputes to the jurisdiction of the Centre, it is unlikely that such State is aware of all potential claims that eventually will be brought before an ICSID tribunal. In this case, a host State may argue that it had not foreseen the possibility of submission of a specific dispute to the jurisdiction of the Centre and that the claim pursued by the foreign investor does not meet all the jurisdictional requirements of the ICSID Convention.

Secondly, differently from the ICSID Convention, most investment treaties contain a definition of investment. The problem is that the definitions set forth in

²⁴² As an ICSID tribunal observed:

“[W]hile the parties to an agreement cannot arbitrarily confer jurisdiction upon ICSID by characterizing as an investment a project that lacks all the characteristic features of an investment, their express designation of ICSID as the arbitral forum in which to settle their potential disputes indicates that the parties themselves perceived their agreement as one relating to an investment” (*RSM Production Corporation v. Grenada*, Award of March 13, 2009, available at <<http://ita.law.uvic.ca/documents/RSMvGrenadaAward.pdf>>, (last visited on April 1, 2009), at para. 236 – footnote excluded).

²⁴³ See Schreuer, C., *supra* note 23, at 126.

such treaties are extremely broad.²⁴⁴ Usual definitions contained in investment treaties such as “any asset” or “claims to money” could qualify any ordinary commercial transaction as an investment.²⁴⁵ Consequently, a dispute arising out of a transaction or activity that would not fall within the ordinary meaning of the term “investment” could be referred to ICSID arbitration if such dispute complies with the definition of investment contained in the investment treaty. The host State may argue, accordingly, that, despite agreeing on a definition of investment in the investment treaty, the dispute arises out of a transaction or activity that is not contemplated by the ICSID Convention.

In this context, the debate on the question as to whether the investment requirement of the ICSID Convention has an objective or subjective meaning gained relevance, to the extent that, when confronted with the definition of investment set forth in an investment treaty, ICSID tribunals were forced to decide whether or not the investment treaty could complement the ICSID Convention, or

²⁴⁴ See Sacerdoti, G., *supra* note 238, at 305-310; Rubins, N., *supra* note 79, at 292-296; Dolzer, R., *supra* note 110, at 263-266; Dugan, C. F., Wallace Jr., D., Rubins, N. and Sabahi, B., *supra* note 75, at 250-253; Yannaca-Small, Katia, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, in Arbitration Under International Investment Agreements: A Guide to the Key Issues 243 (Yannaca-Small, Katia, ed., New York: Oxford University Press, 2010), at 245-248. A typical definition of investment set forth in investment treaties may be found in Article 1(6) of the ECT, according to which:

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

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - (d) Intellectual Property;
 - (e) Returns;
 - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. [...]
- (34 ILM 381 (1994), at 383).

²⁴⁵ See Dolzer, R., and Stevens, M., *supra* note 77, at 25-31; Schreuer, C., *supra* note 23, at 129-130; Castro de Figueiredo, R., *supra* note 84, at 25-26; Vandeveld, K., *supra* note 57, at 122-131.

whether the definition extrapolates the objective limits of the jurisdiction of the Centre.

When a foreign investor submits a claim against the host State pursuant to an investment treaty, the content of the treaty, including the definition of investment contained therein, forms an arbitration agreement between the disputing parties. For this reason, the treaty's definition of investment represents the agreement of the disputing parties on the meaning of investment. Consequently, if one admits the idea that the term "investment" as employed in Article 25(1) of the ICSID Convention does not have an objective meaning, the definition of investment contained in the investment treaty would fill the gap created by the lack of definition in the ICSID Convention. In this case, the assessment of the fulfillment of the investment requirement of the ICSID Convention would be limited to verifying the compliance of the dispute with the definition of investment contained in the investment treaty. On the other hand, if the investment requirement of the ICSID Convention contains an objective meaning, the fulfillment of such requirement would have to be assessed independently from the definition of investment set forth in the investment treaty. In this case, the compliance with the treaty's definition of investment is an element of the consent given by the disputing parties to the jurisdiction of the Centre and it is distinct from the other jurisdictional requirements set forth in Article 25(1) of the ICSID Convention.

5.2.1. The *Fedax* and *CSOB* Decisions

The case of *Fedax N.V. v. Venezuela* (“*Fedax*”) was the first ICSID arbitration in which the jurisdiction of the Centre over an investment treaty claim was challenged on the ground of non-fulfillment of the investment requirement of the ICSID Convention.²⁴⁶ The dispute, referred to ICSID arbitration pursuant to the Venezuela-Netherlands BIT,²⁴⁷ arose out of the non-payment of promissory notes issued by Venezuela and acquired by the claimant by way of endorsement. Venezuela challenged the jurisdiction of the Centre on the ground that the acquisition by endorsement of promissory notes, as a loan, would not constitute an

²⁴⁶ *Antoine Goetz and others v. Burundi* (“*Goetz*”) was the first case referred to ICSID arbitration by virtue of an investment treaty in which the fulfillment of the *ratione materiae* requirements set forth in Article 25(1) of the ICSID Convention was addressed. In the two previous investment treaty claims submitted to the jurisdiction of the Centre, *Asian Agricultural Products Ltd. v. Sri Lanka* (see Award of June 27, 1990, 30 ILM 580 (1991)) and *American Manufacturing & Trading, Inc. v. Zaire* (see Award of February 21, 1997, 36 ILM 1534 (1997)), the ICSID tribunals did not address this question. The dispute in *Goetz* was referred to ICSID arbitration pursuant to the Treaty between the Belgium-Luxembourg Union and the Republic of Burundi Concerning the Reciprocal Protection and Encouragement of Investments of April 13, 1989, by six Belgian shareholders of a local incorporated company which carried out mining activities in Burundi. In this case, the claimants sought the annulment of a decision of the Burundian government, whereby tax benefits granted to the company were cancelled, or the award of compensation for the damages incurred. Although Burundi appointed an arbitrator, it did not file any submission to the tribunal and did not attend any hearing. Accordingly, on the basis of Rule 42(4) of the ICSID Arbitration Rules (see *supra* note 231), in assessing whether the dispute fulfilled the *ratione materiae* requirements of the ICSID Convention, the *Goetz* tribunal decided that:

“As regards the *nature of the dispute*, Article 25 of the ICSID Convention limits the jurisdiction of the Centre to ‘legal disputes ... which relate directly to an investment.’ [...] The dispute also satisfies the condition of a ‘direct link with an investment’: it suffices in fact to have reference to Article 8, paragraph 1, of the Belgium-Burundi investment treaty in order to assert that the dispute before the Tribunal is of the type which this provision defines as disputes relating to investments, in other words disputes concerning ‘the interpretation or the application of any investment authorisation accorded by the authorities of the host State which governs foreign investments’ as well as ‘the allegation that any right conferred or established by the present treaty regarding investments had violated’” (Award of February 10, 1999, 6 ICSID Reports 5 (2004), at 29 – emphasis in the original).

Although the *Goetz* decision is sometimes cited as it had adopted a subjectivist approach to the investment requirement of the ICSID Convention (see Ben Hamida, W., *supra* note 44, at 289), the decision, in fact, did not address the question as to whether the subject-matter of the dispute was related to an investment for the purposes of the ICSID Convention, nor did the tribunal address the question as to whether the definition of investment of the BIT could supplement the lack of definition of the ICSID Convention. In the decision, the concern of the tribunal was whether the dispute qualified as one of the types of investment disputes envisaged in the BIT and not whether the dispute arose out of an investment.

²⁴⁷ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela of October 22, 1991.

investment for the purposes both of the ICSID Convention and of the BIT. Venezuela, however, did not base its arguments on a potential contradiction of the definition of investment set forth in the BIT with the content of the investment requirement of the ICSID Convention. Nevertheless, in its decision on jurisdiction, the *Fedax* tribunal considered the fulfillment of the investment requirement of the ICSID Convention independently from the definition of investment contained in the BIT. While the tribunal admitted that, based on paragraph 27 of the Report of the Executive Directors, the lack of definition in the ICSID Convention was intended “to leave any definition of the ‘investment’ to the consent of the parties,”²⁴⁸ the tribunal assessed whether a loan could be considered an investment within its ordinary meaning in accordance with the drafting history and practice of the ICSID Convention:

“In light of the above, distinguished commentators of the Convention have concluded that ‘a broad approach to the interpretation of this term in Article 25 is warranted,’ that it ‘is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID,’ or that the parties ‘thus have a large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention.’ Within this broad framework for the definition of investment under the ICSID Convention, the Tribunal also notes that a number of transactions have been identified as qualifying as investments in given circumstances. It has also been noted by commentators of the Convention, and during the history of its negotiation, that jurisdiction over loans, suppliers’ credits, outstanding payments, ownership of shares and construction contracts, among other aspects, was left to the discretion of the parties.”²⁴⁹

While the *Fedax* tribunal recognized the large measure of discretion conferred on the parties by the ICSID Convention, it did not consider that such discretion would be unlimited. In the decision, the concern of the tribunal was whether a

²⁴⁸ Decision on Jurisdiction, of July 11, 1997, 37 ILM 1378 (1998), at 1382 – footnotes excluded.

²⁴⁹ *Idem*.

loan could qualify as an investment within its ordinary meaning, as an objective requirement and independent from the definition of investment set forth in BIT.²⁵⁰ The tribunal noted that “under both ICSID and the Additional Facility Rules the investment in question, even if indirect, should be distinguishable from an ordinary commercial transaction.”²⁵¹ The fact that the tribunal admitted that ordinary commercial transactions would not fall within the jurisdictional scope of the ICSID Convention implies the existence of objective limits that may not be waived by the consent of the disputing parties to the jurisdiction of the Centre. The decision, however, did not directly answer the question as to why the term “investment” would have an objective meaning.

In *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia* (“*CSOB*”), referred to ICSID arbitration in accordance with the Czech Republic-Slovakia BIT,²⁵² the jurisdiction of the Centre over the dispute was also challenged on the ground of non-fulfillment of the investment requirement. Like in *Fedax*, the *CSOB* dispute arose out of a loan. However, differently from what was alleged in *Fedax*, Slovakia expressly argued that the investment requirement of the ICSID Convention could not be fulfilled through the definition of investment set forth in the BIT. The tribunal, although recognized the presumption created by the consent of the parties, agreed with Slovakia and observed that, in order to establish the jurisdiction of the Centre in an investment treaty claim, the investment

²⁵⁰ *Ibid.*, at 1384.

²⁵¹ *Ibid.*, at 1384 – footnotes excluded.

²⁵² Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments of November 23, 1992. Although the *CSOB* tribunal concluded that it was uncertain whether the BIT was in force at the time the dispute was submitted to ICSID arbitration, the tribunal considered that the reference to the BIT made in the agreement entered into by the disputing parties had the effect of incorporating the dispute resolution provisions of the BIT into the agreement (see Decision on Jurisdiction of May 24, 1999, 14 ICSID Rev. – FILJ 251 (1999), at 266, 271).

requirement of the ICSID Convention must be fulfilled independently from the definition contained in the BIT and, consequently, independently from the consent of the disputing parties:

“It follows that an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties. The Parties’ acceptance of the Centre’s jurisdiction with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.

[...]

The Slovak Republic is correct in pointing out, however, that an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre’s jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.”²⁵³

The *CSOB* tribunal based its decision on the assumption that the term “investment” as employed in Article 25(1) of the ICSID Convention places objective limits on the consent of the disputing parties. According to the decision, the investment requirement of the ICSID Convention is “objective in nature” and, for this reason, it cannot be overridden by consent. The *CSOB* decision viewed the definition of investment set forth in the BIT as an element of the consent of the

²⁵³ Decision on Jurisdiction of May 24, 1999, *supra* note 252, at 274.

disputing parties, distinct from the investment requirement of the ICSID Convention.

The *Fedax* and *CSOB* decisions demonstrated a trend towards the recognition of an objectiveness of the investment requirement of the ICSID Convention.²⁵⁴ However, the decisions did not expressly define the content of the term “investment” for the purposes of the ICSID Convention. In *Fedax*, the tribunal referred to “certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development” as the “basic feature of an investment.”²⁵⁵ The tribunal, however, did not refer to these features of the term “investment” as elements pertaining to an existing notion of investment within the meaning of the ICSID Convention. Likewise, the *CSOB* tribunal, although it referred to basic elements of the ordinary meaning of investment, asserted that “these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.”²⁵⁶ The *Fedax* and *CSOB* decisions, nonetheless, seem to have influenced recent ICSID writings.²⁵⁷

²⁵⁴ See also *Wena Hotels Limited v. Egypt*, Decision on Jurisdiction of June 29, 1999, 41 ILM 881 (2002), at 889-890.

²⁵⁵ *Supra* note 248, at 1387.

²⁵⁶ *Supra* note 252, at 282-283.

²⁵⁷ In the most prominent publication on the ICSID Convention, Professor CHRISTOPH SCHREUER opined that:

“The reference to the essential requirement of consent in the Report of the Executive Directors [...] does not imply unlimited freedom for the parties. The drafting history leaves no doubt that the Centre’s services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction no matter how far-reaching the parties’ consent might be” (Schreuer, C., *supra* note 23, at 125).

5.2.2. The *Salini* Test

While the *Fedax* and *CSOB* decisions recognized the objectiveness of investment requirement of the ICSID Convention, it was only in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* (“*Salini*”) that the elements of the notion of investment within the meaning of the ICSID Convention were expressly listed by an ICSID tribunal. The *Salini* case, submitted to ICSID arbitration pursuant to the Italy-Morocco BIT,²⁵⁸ arose out of a contract for the construction of a highway in Morocco, entered into by the claimants and a State-owned company. Morocco argued that the Centre would not have jurisdiction over the dispute, to the extent that the matter was related to the non-performance of a service contract, which could not qualify as an investment. In assessing whether the dispute fulfilled the investment requirement of the ICSID Convention, the *Salini* tribunal noted that:

See also Shihata, Ibrahim F.I., and Parra, Antonio, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Rev. – FILJ 299 (1999), at 307-308; Smutny, Abby Cohen, *Arbitration before the International Centre for Settlement of Investment Disputes*, 1(1) TDM (2004); Rubins, N., *supra* note 79, at 288-289; Dolzer, R., *supra* note 244, at 266; Endicott, M., *supra* note 43, at 391-393; Baltag, Crina M., *The Risk of Investment under the ICSID Convention*, 3(5) TDM (2006); Yala, F., *supra* note 76, at 117; Waibel, Michael, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AJIL 711 (2007), 718-719; Ben Hamida, W., *supra* note 44, at 290; Schlemmer, Engela C., *Investment, Investor, Nationality, and Shareholders* in The Oxford Handbook of International Investment Law 47 (Muchlinski, Peter, Ortino, Federico, and Schreuer, Christoph, eds., Oxford: Oxford University Press, 2008), at 62-65; Reinisch, August, and Malintoppi, Loretta, *Methods of Dispute Resolution* in The Oxford Handbook of International Investment Law 691 (Muchlinski, Peter, Ortino, Federico, and Schreuer, Christoph, eds., Oxford: Oxford University Press, 2008), at 700; Williams, David A. R., *Jurisdiction and Admissibility* in The Oxford Handbook of International Investment Law 868 (Muchlinski, Peter, Ortino, Federico, and Schreuer, Christoph, eds., Oxford: Oxford University Press, 2008), at 872; Dugan, C. F., Wallace Jr., D., Rubins, N. and Sabahi, B., *supra* note 75, at 258; Manciaux, S., *supra* note 59, at 3-5; Douglas, Z., *supra* note 55, at 164-165; Salacuse, Jeswald W., The Law of Investment Treaties (Oxford: Oxford University Press, 2010), at 158-159; Yannaca-Small, K., *supra* note 244, at 248-251; Mortenson, Julian Davis, *The Meaning of “Investment”*: *ICSID’s Travaux and the Domain of International Investment Law*, 51 Harv. Int’l L. J. 257 (2010), at 315-318; Bjorklund, Andrea K., *The Emerging Civilization of Investment Arbitration*, in Building the Civilization of Arbitration 247 (Carbonneau, Thomas E., and Sinopole, Angelica M., eds., London: Wildy, Simmonds & Hill Publishing, 2010), at 258-259; García-Bolívar, O. E., *supra* note 45, at 150-151.

²⁵⁸ Agreement between the Government of the Kingdom of Morocco and the Government of the Italian Republic Concerning the Reciprocal Promotion and Protection of Investments of July 18, 1990.

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

In reality, these various elements may be interdependent. Thus, the risk of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.”²⁵⁹

The *Salini* decision launched the so-called *Salini* test, according to which in order for the dispute to comply with the investment requirement of the ICSID Convention, the transaction or activity out of which the dispute arises must (i) represent a commitment, (ii) be subject to risk, (iii) have a certain duration and (iv) contribute to the economic development of the host State.

The elements of the *Salini* test seem to be primarily based on the description of the notion of investment within the meaning of the ICSID Convention made by Professor CHRISTOPH SCHREUER. In an article published in 1996, SCHREUER described the elements of the notion of investment as follows:

“It would not be realistic to attempt yet another definition of ‘investment’ on the basis of ICSID’s experience. But it seems possible to identify certain features that are typical to most of the operations in question. The first such feature is that the projects have a certain *duration*. Even though some break down at an early stage, the expectation of a longer term relationship is clearly there. The second feature is a certain *regularity of profit and return*. A one-time lump sum agreement, while not impossible, would be untypical. Even where no profits are ever made, the expectation of return is present. The third feature is the assumption of *risk* usually by both sides. Risk is in part a function of duration and expectation of profit. The fourth typical feature is that the commitment is *substantial*. This aspect was very much on the drafters’ minds although it did not find entry into the

²⁵⁹ Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), at 622.

Convention [...]. A contract with an individual consultant would be untypical. The fifth feature is the operation's significance for the host State's *development*. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors' Report [...] suggest that development is part of the Convention's object and purpose. These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."²⁶⁰

Undoubtedly, SCHREUER's elements of the notion of investment had a tremendous impact on ICSID decisions on the fulfillment of the investment requirement of the ICSID Convention and became, so far, the prevailing view in ICSID practice.

The *Salini* test was followed by the ICSID tribunals in the cases of *Joy Mining Machinery Limited v. Egypt* ("Joy Mining"),²⁶¹ *Consorzio Groupement L.E.S.I. – DIPENTA v. Algeria* ("L.E.S.I. – DIPENTA"),²⁶² *Bayindir Insaat Turzin Ticaret Ve Sanayi A.S. v. Pakistan* ("Bayindir"),²⁶³ *Jan de Nul N.V. and Dredging International N.V. v. Egypt* ("Jan de Nul"),²⁶⁴ *L.E.S.I., S.p.A. and Astaldi, S.p.A. v. Algeria* ("L.E.S.I. – Astaldi"),²⁶⁵ *Helnan International Hotels A/S v. Egypt* ("Helnan"),²⁶⁶ *Saipem S.p.A. v. Bangladesh* ("Saipem"),²⁶⁷ *Malaysian Historical Salvors, SDN, BHD v. Malaysia* ("MHS"),²⁶⁸ *Ioaniss Kardassopoulos v. Georgia* ("Kardassopoulos"),²⁶⁹ *OKO Pankki Oyl, VTB Bank (Deutschland) AG and*

²⁶⁰ Schreuer, C., *supra* note 38, at 372 – footnotes excluded, emphasis in the original.

²⁶¹ See Award of August 6, 2004, 19 ICSID Rev. – FILJ 486 (2004).

²⁶² See Award of January 10, 2005, 19 ICSID Rev. – FILJ 426 (2004).

²⁶³ See Decision on Jurisdiction of November 14, 2005, 18(1) World Trade and Arb. Materials 163 (2006).

²⁶⁴ See Decision on Jurisdiction of June 16, 2006, 18(4) World Trade and Arb. Materials 305 (2006).

²⁶⁵ See Decision on Jurisdiction of July 12, 2006, available at <<http://ita.law.uvic.ca/documents/LESIAAlgeria.pdf>>, (last visited on December 1, 2008).

²⁶⁶ See Decision on Jurisdiction of October 17, 2006, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC773_En&caseId=C64>, (last visited on June 1, 2010).

²⁶⁷ See Decision on Jurisdiction of March 21, 2007, 22 ICSID Rev. – FILJ 100 (2007).

²⁶⁸ See Award of May 28, 2007, available at <<http://ita.law.uvic.ca/documents/MHS-jurisdiction.pdf>>, (last visited on December 1, 2008).

²⁶⁹ See Decision on Jurisdiction of July 6, 2007, 19(5) World Trade and Arb. Materials 31 (2007).

Sampo Bank Plc v. Estonia (“OKO Pankki”),²⁷⁰ *Noble Energy Inc. and MachalaPower Cia Ltda v. Ecuador and Consejo Nacional de Electricidad* (“Noble Energy”),²⁷¹ *Víctor Pey Casado and Fundación Presidente Allende v. Chile* (“Pey Casado”),²⁷² *RSM Production Corporation v. Grenada* (“RSM Grenada”),²⁷³ *Phoenix Action, Ltd. v. Czech Republic* (“Phoenix”),²⁷⁴ *Toto Costruzioni Generali S.p.A. v. Lebanon* (“Toto”),²⁷⁵ *Saba Fakes v. Turkey* (“Fakes”),²⁷⁶ *Millicom International Operations B.V. and Sentel GSM SA v. Senegal* (“Millicom”),²⁷⁷ *Nations Energy Inc., Electric Machinery Enterprises Inc. and Jaime Jurado v. Panama* (“Nations Energy”),²⁷⁸ *RSM Production Corporation v. Central African Republic* (“RSM Central African Republic”),²⁷⁹ *Malicorp Limited v. Egypt* (“Malicorp”),²⁸⁰ by the *ad hoc* committee in the case of *Patrick Mitchell v. Congo* (“Mitchell”).²⁸¹ The *Salini* test was also applied by non-ICSID tribunals in the cases of *Romak S.A. v. Uzbekistan*²⁸² and *Alps Finance and Trade AG v. Slovakia* (“AFT”),²⁸³ and in a State-State arbitration involving Italy

²⁷⁰ See Award of November 19, 2007 (excerpts), 22 ICSID Rev. – FILJ 469 (2007).

²⁷¹ See Decision on Jurisdiction of March 5, 2008, 20(3) World Trade and Arb. Materials 261 (2008).

²⁷² See Award of May 8, 2008, available at <<http://ita.law.uvic.ca/documents/PeyLAUDO.pdf>>, (last visited on December 1, 2008).

²⁷³ See *supra* note 242.

²⁷⁴ See *supra* note 34.

²⁷⁵ See Decision on Jurisdiction of September 11, 2009, available at <<http://ita.law.uvic.ca/documents/TotoJurisdiction.pdf>>, (last visited on October 1, 2009).

²⁷⁶ See *supra* note 34.

²⁷⁷ See *supra* note 34.

²⁷⁸ See Award of November 24, 2010, available at <http://ita.law.uvic.ca/documents/NationsResourcesVPanama_Award.pdf>, (last visited on January 12, 2011).

²⁷⁹ See Decision on Jurisdiction of December 7, 2010, available at <<http://italaw.com/documents/RSMv.CentralAfricanRepublicDecision7Dec2010.pdf>>, (last visited on May 6, 2012).

²⁸⁰ See Award of February 7, 2011, available at <http://ita.law.uvic.ca/documents/MalicorpvEgyptAward_7Feb2011.pdf>, (last visited on February 9, 2011).

²⁸¹ See Decision on Annulment of November 1, 2006, available at <<http://ita.law.uvic.ca/documents/mitchellannulment.pdf>>, (last visited on December 1, 2008).

²⁸² See Award of November 26, 2009, 22(1) World Trade and Arb. Materials 195 (2010).

²⁸³ See Award of March 5, 2011, available at <http://ita.law.uvic.ca/documents/AFTvSlovakRepublic_5Mar2011_Part1.pdf> and at

and Cuba.²⁸⁴ Some of these tribunals, relying on SCHREUER's description of the notion of investment, added a fifth element to the *Salini* test based on the regularity of profits. These decisions constitute an overwhelming majority of the decisions rendered by ICSID tribunals in which the fulfillment of the investment requirement of the ICSID Convention was addressed.²⁸⁵

<http://ita.law.uvic.ca/documents/AFTvSlovakRepublic_5Mar2011_Part2.pdf>, (last visited on April 21, 2011). It has been reported that another non-ICSID tribunal applied the *Salini* test in the case of *Pren Nreka v. Czech Republic* in the Award of February 5, 2007 (see Yannaca-Small, K., *supra* note 244, at 257; Cabrol, Emmanuelle, *Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does "Investment" Really Mean "Every Kind of Asset"?*, in *Yearbook on International Investment Law & Policy 2009-2010* 217 (Karl P. Sauvant, ed., New York: Oxford University Press, 2010). The decision of the tribunal, however, has not been made public yet.

In the case of *White Industries Australia Limited v. India*, however, an UNCITRAL tribunal, constituted under the Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments of February 6, 1999, expressly rejected the application of the *Salini* test outside the ICSID Convention:

“As regards the so-called ‘*Salini Test*’ for what constitutes an investment, this test was developed in order to determine whether an ‘investment’ had been made for the purposes of the ICSID Convention. The cases cited by India in support of these requirements were also ICSID decisions.

The present case, however, is not subject to the ICSID Convention. Consequently, the so-called *Salini Test*, and Douglas's interpretation of it, are simply not applicable here. Moreover, it is widely accepted that the ‘double-check’ (namely, of proving that there is an ‘investment’ for the purposes of the relevant BIT *and* that that there is an ‘investment’ in accordance with the ICSID Convention, imposes a higher standard than simply resolving whether there is an ‘investment’ for the purposes of a particular BIT” (Award of November 30, 2011, available at <<http://italaw.com/documents/WhiteIndustriessv.IndiaAward.pdf>>, (last visited on February 21, 2012, at paras. 7.4.8-7.4.9 – emphasis in the original).

²⁸⁴ See Interim Award of March 15, 2005, available at <http://italaw.com/documents/Italy_v_Cuba_InterimAward_15Mar2005.pdf>, (last visited on January, 2012), at para. 81.

²⁸⁵ This does not mean, however, that an ICSID tribunal that adopts an objectivist approach is required to follow the *Salini* test. See *Autopista Concesionada de Venezuela, C.A. v. Venezuela* (“*Autopista*”), Decision on Jurisdiction of September 27, 2001, 6 ICSID Reports 419 (2004), at 439-440; *Zhinvali Development Limited v. Georgia*, *supra* note 34, at 102; *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction of August 6, 2003, 18 ICSID Rev. – FILJ 307 (2003), at 347; *Tokios Tokéles v. Ukraine*, *supra* note 34, at 231-234; *Enron Corporation, Ponderosa Assets LP v. Argentina* (“*Enron*”), Decision on Jurisdiction of January 14, 2004, 11 ICSID Reports 269 (2007), at 281-282; *Biwater Gauff Ltd. v. Tanzania*, Award of July 24, 2008, available at <<http://ita.law.uvic.ca/documents/Biwateraward.pdf>>, (last visited on December 1, 2008), at paras. 310-318; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, Award of October 2, 2006, 18(6) World Trade and Arb. Materials 285 (2006), at 347; *African Holding Company of America, Inc and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of Congo*, Award of July 29, 2008, available at <<http://ita.law.uvic.ca/documents/AfricanHoldingCompanyAward.pdf>>, (last visited on December 1, 2008), at paras. 74-84; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Decision on Jurisdiction of September 24, 2008, 48 ILM 51 (2009), at 70; *Bureau Veritas*, *supra* note 34, at para. 94; *Pantehniki S.A. Contractors &*

The premise of the *Salini* test is founded on the idea that the investment requirement of the ICSID Convention has an objective meaning and it must be fulfilled independently from the disputing parties' agreed definition of investment. The *Salini* test, therefore, follows the approach adopted in the *CSOB* decision — the so-called “double keyhole approach”²⁸⁶ —, according to which in cases referred to ICSID arbitration pursuant to an investment treaty containing a definition of investment, the dispute has to fulfill a double test: it must fall within the treaty's definition of investment and comply with the notion of investment within the meaning of the ICSID Convention in order to establish the jurisdiction of the Centre. As the *Salini* tribunal observed:

“The protection of investments is the basis for the option of choosing the forum stipulated in Article 8.2 of the Bilateral Treaty. This Article, therefore, seeks to define the investments that come under the protection of the Bilateral Treaty.

However, insofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.”²⁸⁷

Engineers v. Albania (“*Pantehnicki*”), Award of July 28, 2009, available at <<http://ita.law.uvic.ca/documents/PantehnickiAward.pdf>>, (last visited on August 21, 2009), at para. 48; *Inmaris*, *supra* note 34, at 1072-1073; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, Award of December 1, 2010, 50 ILM 292 (2011), at 300-301; *Abaclat*, Decision on Jurisdiction of August 4, 2011, available at <<http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>>, (last visited on October 27, 2011), at paras. 343-351.

In the case of *Alpha Projektholding GmbH v. Ukraine* (“*Alpha*”), while the tribunal did not follow the *Salini* test in order to decide whether the dispute met the investment requirement of the ICSID Convention, it assessed the existence of the elements of the *Salini* test “given that the parties have spent considerable time arguing about whether Claimant's investment meets the *Salini* criteria” (Award of November 8, 2010, available at <<http://ita.law.uvic.ca/documents/Alphav.UkraineAward.pdf>>, (last visited on November 11, 2010), at para. 316).

²⁸⁶ See Dolzer, R., and Schreuer, C., *supra* note 41, at 61-62.

²⁸⁷ *Supra* note 259, at 619-620. Similarly, in *Bayindir* the tribunal asserted that:

The objectivist premise on which the *Salini* test is based was further discussed by subsequent ICSID tribunals. In *Joy Mining*, the tribunal pointed out that the absence of a definition of investment in the ICSID Convention does not mean that the term “investment” as employed in its Article 25(1) lacks an objective meaning. According to the tribunal, if the consent of the disputing parties could override the investment requirement of the ICSID Convention, the term “investment” would be meaningless:

“It is common ground between the parties that the jurisdiction of the Tribunal is further contingent upon the existence of an ‘investment’ within the meaning of Article 25 of the ICSID Convention (be it as an independent requirement or as a specification of the concept of investment under the BIT)” (*supra* note 263, at 197).

In *MHS*, the sole arbitrator pointed out that “[f]or jurisdiction to be established, the Claimant must show that the Contract falls within the definition of “investment” as found under Article 25(1) of the ICSID Convention (“Article 25(1)”), as well as the definition of “investment” as contained in the BIT. This two-stage approach is recognized in the ICSID jurisprudence cited by the Parties in this case” (*supra* note 268, at para. 43 – footnote excluded). In *Mitchell*, the *ad hoc* committee observed that:

“In accordance with Article 25(1) of the Convention, the jurisdiction of the Centre depends upon the existence of a dispute ‘arising directly out of an investment.’ Reference to this article at the outset is unavoidable; this is what the Arbitral Tribunal also did, and then went on to observe and recall that there is no definition of investment contained in the Convention. Indeed, in the case at hand the question is not so much one of determining whether there is an ‘arising directly out of’ relationship, but rather whether there is an ‘investment.’ In the opinion of the *ad hoc* Committee, in view of the absence in the Convention of an explicit definition of the concept of investment, it is in the parties’ agreement or in the applicable investment treaty that one should look for such definition, whether it is broad or less broad. In doing so, the fact that a State has not made use of the notification option provided for under Article 25(4) of the Convention may not be understood to mean that that State has taken a certain position regarding the very concept of investment. It is then necessary to verify the conformity of the concept of investment as set out in the parties’ agreement or in the BIT with the concept of investment in the Washington Convention, as this latter results from the interpretation of the Convention in accordance with Article 31.1 of the Vienna Convention on the Law of Treaties, as well as from ICSID case law, to the extent the latter may contribute to defining the concept. Indeed, such concept of investment should prevail over any other ‘definition’ of investment in the parties’ agreement or in the BIT, as it is obvious that the special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged” (*supra* note 281, at para. 25).

In *Phoenix*, the tribunal, referring to the investment requirement of the ICSID Convention noted that it could not “agree with the general statement of the Claimant proffered during the Hearing to the effect that ‘it was the intent of the convention’s drafters to leave to the parties the discretion to define for themselves what disputes they were willing to submit to ICSID.’ There is nothing like a total discretion, even if the definition developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything – like a sale of goods or a dowry for example – is an investment” (*supra* note 34, at 757 – footnote excluded).

“The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.”²⁸⁸

²⁸⁸ *Supra* note 261, at 499. Similarly, in *Pey Casado*, the tribunal considered that:

“[T]here is a definition of investment in accordance with the ICSID Convention and it is not enough to indicate the presence of some of the typical ‘characteristics’ of an investment in order to comply with this objective requirement of the jurisdiction of the Centre. Such an interpretation would deprive of meaning certain terms of Article 25 of the ICSID Convention, which would not be consistent with the requirement of interpreting the terms of the Convention conferring on them an effective meaning (free translation of the Spanish original: “Este Tribunal considera, por su parte, que sí existe una definición de inversión de acuerdo al Convenio CIADI y que no basta con señalar la presencia de algunas de las ‘características’ habituales de una inversión para satisfacer esta condición objetiva de la competencia del Centro. Una interpretación de este tipo significaría privar de sentido alguno a ciertos términos del artículo 25 del Convenio CIADI, lo cual no sería compatible con la exigencia de interpretar los términos del Convenio confiriéndoles un efecto útil” (*supra* note 272, at para 232 – emphasis in the original)).

In his dissenting opinion to the decision on jurisdiction rendered in the case of *Abaclat and Others v. Argentina* (“*Abaclat*”), Professor GEORGES ABI-SAAB argued that:

“This opinion does not withstand scrutiny. That the ICSID Convention does not provide an express definition of investment does not automatically imply that the definition is totally left to the BITs. This is because words have an intrinsic meaning, hence a limited and limiting one, however large and vague it may be (although there is always a penumbra around the limits which provides the margin of interpretation). Without limits, words would be meaningless, because undistinguishable from one another. The intrinsic meaning of a word, which is its ‘ordinary’ meaning, is further specified by the way it is used and the context in which it is used; and if it figures in a treaty, by the object and purpose of the treaty.

[...]

Differently put, the term ‘investment’ in article 25/1 of the ICSID Convention, whilst flexible enough, is not infinitely elastic. It leaves much latitude and a wide margin of interpretation and further specification to States in their BITs; but not to the point of rendering it totally vacuous, without any legal effect. In other words, the term has a hard-core that cannot be waived even by agreement of States parties to a BIT” (Dissenting Opinion of October 28, 2011, to the Decision on Jurisdiction of August 4, 2011, available at <http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf>, (last visited on January 4, 2012), at paras. 40 and 46 – footnotes excluded).

See also *Fakes*, *supra* note 34, at paras. 108-109.

In the decision rendered in *LESI – DIPENTA*, which is materially identical to the decision rendered in *L.E.S.I – Astaldi*, the tribunal relied on the “objective” of the ICSID Convention to conclude that:

“In deciding whether this case deals with an ‘investment’ within the meaning of Article 25.1 of the Convention, the Arbitral Tribunal considered the following elements:

(i) The Convention offers no definition of investment, although that notion is central to the functioning of the applicable regime (see Report of the Executive Directors on the Convention, §27). It is not up to the Arbitral Tribunal to take a general position on this matter, but rather to decide whether, and under what conditions, a construction contract can fulfill the conditions of an investment within the meaning of the Convention.

[...]

(iv) It would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions:

- a) the contracting party has made contributions in the host country;
- b) those contributions had a certain duration; and
- c) they involved some risks for the contributor.”²⁸⁹

²⁸⁹ Unofficial translation, available at <<http://icsid.worldbank.org/ICSID/Index.jsp>>, (last visited on December 1, 2008), of the French original:

“Pour décider si l’on se trouve en présence d’un ‘investissement’ au sens de l’article 25.1 de la Convention, le Tribunal arbitral retient les éléments suivants:

(i) La Convention ne propose aucune définition de la notion d’investissement, pourtant essentielle au fonctionnement du régime applicable (voir Rapport des administrateurs sur la Convention, §27). Il n’appartient pas au Tribunal arbitral de prendre à ce sujet des positions générales mais de décider si, et le cas échéant, à quelles conditions un contrat de construction peut remplir les conditions d’un investissement au sens de la Convention.

[...]

(iv) Or, il paraît conforme à l’objectif auquel répond la Convention qu’un contrat, pour constituer un investissement au sens de la disposition, remplit les trois conditions suivantes ; il faut

- a) que le contractant ait effectué un apport dans le pays concerné,
- b) que cet apport porte sur une certaine durée, et
- c) qu’il comporte pour celui qui le fait un certain risque” (*supra* note 262, at 449-450).

See also *L.E.S.I – Astaldi*, *supra* note 265, at para. 72.

5.2.3 The MCI Decision

While ICSID practice shows that most decisions on the fulfillment of the investment requirement of the ICSID Convention recognized its objectiveness, some ICSID tribunals considered that a dispute would comply with the investment requirement of the ICSID Convention if it falls within the definition of investment set forth in the investment treaty. These decisions were based on the idea that the real intention behind the lack of a definition of the term “investment” in the ICSID Convention was to grant the disputing parties the discretion to determine the content of the investment requirement of the ICSID Convention.²⁹⁰ This

In *Autopista*, while the tribunal considered that the ICSID Convention confers on the disputing parties the “greatest latitude” to define the term “investment”, it observed that such freedom is not unlimited. The tribunal based its decision on the idea that the definition of investment agreed by the parties may not be inconsistent with the “purposes” of the ICSID Convention and deprive the term “investment” of its “objective significance”:

“However essential, consent in and of itself is not sufficient to ensure access to the Centre. Indeed, Article 25 of the ICSID Convention provides for additional objective requirements which must be met in addition to consent. [...].

The Convention does not contain any definition of these objective requirements. The drafters of the Convention deliberately chose not to define the terms ‘legal dispute’, ‘investment’, ‘nationality’ and ‘foreign control’. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention [...].

As a result, to determine whether these objective requirements are met in a given case, one needs to refer to the parties’ own understanding or definition. As long as the criteria chosen by the parties to define these requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties’ choice” (*supra* note 285, at 439-440).

Likewise, in *Enron*, the tribunal asserted that:

“As the ICSID Convention did not attempt to define ‘investment’, this task was left largely to the parties to bilateral investment treaties or other expressions of consent. It has been aptly commented that there is, however, a limit to this discretion of the parties because they could not validly define as investment in connection with the Convention something absurd or entirely incompatible with its object and purpose” (*supra* note 285, at 281 – footnote excluded).

²⁹⁰ See *Lanco International Inc. v. Argentina*, Decision on Jurisdiction of December 8, 1998, 40 ILM 457 (2001), at 472-473; *Philippe Gruslin v. Malaysia*, Award of November 27, 2000, 5 ICSID Reports 483 (2002), at 492; *Generation Ukraine Inc. v. Ukraine*, Award of September 16, 2003, 44 ILM 404 (2005), at 424; *Azurix Corp. v. Argentina*, Decision on Jurisdiction of December 8, 2003, 43 ILM 262 (2004), at 275; *Pakerings-Compagniet AS v. Lithuania*, Award of September 11, 2007, available at <<http://ita.law.uvic.ca/documents/Pakerings.pdf>>, (last visited on December 1, 2008), at paras. 249-254; *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability of January 14, 2010, available at <<http://ita.law.uvic.ca/documents/Lemirev.Ukraine2010.pdf>>, (last visited on April 6, 2010), at

paras. 46-47, 51-55; *ATA Construction, Industrial and Trading Company v. Jordan*, Award of May 18, 2010, 22(5) World Trade and Arb. Materials 945 (2010), at 990.

In *F-W Oil Interests, Inc. v. Trinidad and Tobago*, the tribunal considered that:

“As is so well known that it needs no further demonstration, the term ‘investment’, crucial though it is to the operation of the Centre, is not further defined within the ICSID Convention, but instead was left, quite deliberately, to be given its content through the particular agreements reached between Contracting States, and between them and investors. The answer is therefore to be sought in the present case in the terms of the BIT” (Award of March 3, 2006, available at <<http://ita.law.uvic.ca/documents/FWOilAward.pdf>>, (last visited on November 1, 2009), at para. 104 – footnotes excluded).

While this assertion is clearly based on a subjectivist premise, the tribunal pointed out in a footnote that “the Parties’ freedom in that respect is not absolute” (*idem*). The decision on the fulfillment of the investment requirement of the ICSID Convention, nevertheless, was exclusively based on the definition of investment contained in the BIT upon which the dispute was referred to ICSID arbitration, and there was no attempt in the decision to identify the limits placed on the freedom of the disputing parties.

In *Noble Energy*, referred to ICSID arbitration pursuant to an arbitration clause contained in a contract entered into by the disputing parties, even though the tribunal expressly followed the *Salini* test, its decision relied on a contractual provision whereby the parties agreed that disputes arising out of the contract fulfill the jurisdictional requirements of the ICSID Convention, including the investment requirement:

“It is common ground that the ICSID Convention contains no definition of the term ‘investment’. The Tribunal concurs with earlier ICSID decisions which, subject to minor variations, have relied on the so-called ‘*Salini* test’. Such test identifies the following elements as indicative of an ‘investment’ for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.

[...]

In addition, the Tribunal notes that Clause 11(c) of the Investment Agreement refers to the Concession Contract. Clause 22.2.2.4 of that contract provides that “[t]he Parties recognize and agree that for the purposes of Article 25 of the Convention, any dispute is and shall be regarded as a legal dispute directly arising from an investment between a contractual state and a national of another contractual state” (*supra* note 271, at 300-301).

In *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, referred to ICSID arbitration pursuant to the ECT, the tribunal concluded that the dispute arose out of activities and transactions that “qualify as investments in accordance with Article 1(6) of the ECT and Article 25 of the ICSID Convention” (Award of September 23, 2010, 50 ILM 186 (2011), at 198), giving the idea that the investment requirement of the ICSID Convention is distinct from the investment requirement of the ECT. In assessing the existence of an investment, however, the tribunal relied exclusively on the definition of investment contained in the ECT, implying a subjectivist approach towards the investment requirement of the ICSID Convention (*ibid.*, at 224, footnote 16).

In *GEA Group Aktiengesellschaft v. Ukraine*, referred to ICSID arbitration pursuant to the Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments of February 15, 1993, the tribunal seemed divided in the decision concerning the nature of the investment requirement of the ICSID Convention. The tribunal acknowledged the existing controversy between the objective and subjective approaches towards the investment requirement of the ICSID Convention, but considered that it was not required to take a position in this matter, given that the application of different criteria would lead to the same conclusion (see Award of March 31, 2011, 23(4) World Trade and Arb. Materials 881 (2011), at 907-909). In the decision, the tribunal relied mostly on the definition of investment contained in the BIT in order to assess the existence of an investment, but also made reference to the objective nature of the investment requirement of the ICSID Convention “in deference to the view of some, outlined above, that Article 25 places a limit on the State Parties’ ability to define ‘investment’ in their BIT for the purposes of ICSID jurisdiction” (*ibid.*, at 910), indicating that the approach taken

purported real intention of the Contracting States would have been expressed in paragraph 27 of the Report of the Executive Directors, which states that “[n]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties.”²⁹¹

The most significant decision in favor of the subjectivist theory was rendered in the case of *MCI Power Group L.C. and New Turbine, Inc. v. Ecuador* (“MCI”), referred to ICSID arbitration pursuant to the Ecuador-United States BIT²⁹² due to the alleged expropriation by the Ecuadorian government of investments made in electricity generation. Ecuador argued that the Centre would lack jurisdiction over the dispute, to the extent that, among other grounds, the dispute would not fulfill the investment requirement of the ICSID Convention. Relying essentially on the elements of the notion of investment listed in the *Salini* test, Ecuador argued that the definition of investment contained in the BIT could not modify the content of the investment requirement of the ICSID Convention. The tribunal, however, based on the assumption that the lack of a definition in the ICSID Convention was intended to grant the disputing parties the discretion to determine whether the dispute arises out of an investment for the purposes of the ICSID Convention, concluded that the definition of investment set forth in the BIT could complement the ICSID Convention. This assumption, according to the tribunal, would be founded on paragraph 27 of the Report of the Executive Directors:

in the decision towards the nature of the investment requirement of the ICSID Convention was not unanimous among the members of the tribunal. At least one member of the tribunal, Professor BRIGITTE STERN, acted as an arbitrator in cases where the decision on the fulfillment of the investment requirement of the ICSID Convention followed the *Salini* test (see *Phoenix*, *supra* note 34; *RSM Central African Republic*, *supra* note 279). See also Fellenbaum, Joshua, *GEA v. Ukraine and the Battle of Treaty Interpretation Principles Over the Salini Test*, 27 *Arb. Int’l* 249 (2011).

²⁹¹ 1 ICSID Reports 23 (1993), at 28.

²⁹² Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of August 27, 1993.

“From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term ‘investment’. The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term ‘investments’ because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID.

The BIT indicates in its Article 1 which investments are to be protected under it. Thus, the BIT complements Article 25 of the ICSID Convention, for purposes of defining the Competence of the Tribunal with respect to any legal dispute arising directly out of an investment.”²⁹³

According to this interpretation of paragraph 27 of the Report of the Executive Directors, if the “essential requirement” is the consent of the disputing parties, when such consent exists, there is no need to impose additional restrictions on the jurisdiction of the Centre.

But the use of the Report of the Executive Directors in the interpretation of the ICSID Convention raises the question — which does not seem to have been debated in ICSID practice — as to its nature and interpretative function for the purposes of the general rule of treaty interpretation of the Vienna Convention. This question arises out of the fact that the ICSID Convention was not formulated by its Contracting States, but by the members of the internal organs of the IBRD, and out of the fact that the Report of the Executive Directors was not produced by the Contracting States. Secondly, although the Report of the Executive Directors accompanied the final text of the ICSID Convention, due to the absence of any reference to it in the text of the ICSID Convention, the Report of the Executive Directors may not be considered as part of or an annex to the ICSID Convention.

²⁹³ *Supra* note 34, at paras. 159-160 – footnote excluded.

As the Report of the Executive Directors was produced in connection with the conclusion of the ICSID Convention, one could argue nonetheless that it could qualify as an element of the context of the ICSID Convention in the sense of Article 31(2)(a) or (b) of the Vienna Convention. In accordance with Article 31(2)(a) and (b):

“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”²⁹⁴

But while the Report of the Executive Directors provides for the interpretation of the main provisions of the ICSID Convention, the first difficulty in using it in the sense of Article 31(2)(a) or (b) is that it was not made by “all the parties” nor “by one or more parties” to the ICSID Convention. In accordance with Article 2(1)(g) of the Vienna Convention, “‘party’ means a State which has consented to be bound by the treaty and for which the treaty is in force.”²⁹⁵ To the extent that the Report of the Executive Directors was not made by the Contracting States of the ICSID Convention, but by the members of the Board of Executive Directors of the IBRD, it may not qualify as an element of the context of the ICSID Convention for the purposes of Article 31(2)(a) and (b) of the Vienna Convention.²⁹⁶

²⁹⁴ 8 ILM 679 (1969), at 692.

²⁹⁵ *Ibid.*, at 681.

²⁹⁶ See Linderfalk, U., *supra* note 88, at 135, 148; Gardiner, R., *supra* note 112, at 212.

Moreover, due to the fact that the ICSID Convention was not formulated directly by its Contracting States, the use of the Report of the Executive Directors in the interpretation of the ICSID Convention even as a document pertaining to the formulation of the ICSID Convention in the sense of Article 32 of the Vienna Convention is doubtful. While Article 32 does not list exhaustively the supplementary means of interpretation, one could argue that, since the purpose of relying on preparatory work is to elucidate the intention of the parties to the treaty,²⁹⁷ the Report of the Executive Directors could not be used in the search of the intention of the parties due to the fact that it was not produced by the Contracting States of the ICSID Convention.

This idea raises the question, which seems unsettled in international law, as to whether documents produced in connection with the conclusion of a treaty not formulated by its parties may be included within the notion of preparatory work,²⁹⁸ a term that has been described as “somewhat ambiguous and confusing.”²⁹⁹

²⁹⁷ See McNair, Arnold, The Law of Treaties (Oxford: Oxford University Press, 1961), at 423.

²⁹⁸ As observed by SHABTAI ROSENNE:

“A special problem arises when part of the preparatory work was undertaken in a subsidiary organ composed of individuals not representing States, known technically in United Nations practice as *experts*, for instance the International Law Commission. Although many of these records are normally published, the fact that draft treaty articles were not produced through a process of inter-governmental negotiation may throw some doubt on how far those records can throw light on the intentions of the States whose plenipotentiaries, acting under instructions, negotiated the final instrument, even if the text is identical in all respects with the text produced by the expert body. But this is a theoretical matter which, although it might assume importance in a hotly contested issue of interpretation, ought not to influence the careful preparation of the legislative history of an international instrument. It is interesting to note that, although the United Nations has in recent years cut back on the production of records of many subsidiary bodies, it has been careful to maintain records of treaty-drafting organs” (Rosenne, Shabtai, Practice and Methods of International Law (London: Oceana Publications, Inc., 1984), at 42).

See also Klabbers, Jan, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?*, 50 *Netherlands Int'l L. R.* 267 (2003), at 276-279;

According to GYÖRGY HARASZTI, “the notion of *travaux préparatoires* embraces only material which in the one way or the other may throw light on the joint intention of the parties, i.e. material which owes its existence to the joint activities of the parties or at least to their agreement.”³⁰⁰ This definition would, thus, exclude documents produced in the formulation of a treaty not negotiated and drafted by its parties. This position would deprive the Report of the Executive Directors of any value for the purposes of Article 32 of the Vienna Convention.

Other authors, however, advocate a more flexible concept of preparatory work.

For instance, ULF LINDERFALK argues that:

“When appliers wish to establish the legally correct meaning of a treaty provision, and for that purpose use the preparatory work of the treaty, they always do so on the basis of a specific communicative assumption. This assumption may be stated as follows: the parties to the treaty expressed themselves in such a way that the provision interpreted logically coheres with the preparatory work of the treaty, insofar and to the extent that, by using the preparatory work of the treaty, good reasons can be provided showing a concordance to exist, between the parties to the treaty, with regard to its norm content. Considering this, ‘the preparatory work of the treaty’ cannot be

Linderfalk, U., *supra* note 88, at 242; Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2nd ed., 2007), at 246; Sbolci, L., *supra* note 126, at 151-152.

²⁹⁹ Mehrish, Brijesh Narain, *Travaux Préparatoires as an Element in the Interpretation of Treaties*, 11 Indian J. Int’l L. 39 (1971), at 62. According to HERSCH LAUTERPACHT:

“‘Preparatory work’ in relation to treaties may be understood in two meanings: (1) It may refer to the various written instruments emanating from or recording the declarations of the views of the negotiators of the treaty. Such preparatory work includes diplomatic correspondence by means of which the treaty is negotiated when no special conference has been convened for the purpose. It includes, in other cases, the negotiations preceding the conference; the original and successive drafts of the treaty; the negotiations at the conference and its committees as recorded in the minutes or otherwise; the instructions issued to delegates. (2) It may refer to the expression of opinion of Governments or authoritative members or committees of legislative bodies during the process of obtaining parliamentary approval of the treaty” (Lauterpacht, Hersch, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. R. 549 (1953), at 552, footnote 3).

See also Orakhelashvili, A., *supra* note 30, at 383-384.

³⁰⁰ Haraszti, G., *supra* note 30, at 122. See also Sbolci, L., *supra* note 126, at 154.

confined to only those representations, which emanate directly from the negotiating states.”³⁰¹

LINDERFALK, however, observes that “if a representation emanates from an individual acting in the capacity of an expert, and not of a state representative, that representation cannot unreservedly be said to establish a concordance of the treaty parties.”³⁰²

In this sense, one could argue that the fact that the Report of the Executive Directors was submitted together with the final text of the ICSID Convention to the Member Governments of the IBRD and it appeared in official publications of the ICSID Convention, it could be considered as the authoritative interpretation of the ICSID Convention,³⁰³ once the States that became parties to the ICSID Convention did so on the basis of the explanations given in the Report of the Executive Directors. In addition, one could argue that, although the idea of creating a document that would supplement the text of the ICSID Convention emerged in the very beginning of its formulation,³⁰⁴ the Report of the Executive Directors was only produced after representatives of States participated in the draft of the ICSID Convention. For this reason, the Report of the Executive

³⁰¹ Linderfalk, U., *supra* note 88, at 242.

³⁰² *Idem*.

³⁰³ According to PAUL SZASZ:

“Concurrently with their approval of the Convention, the Executive Directors of the World Bank adopted a ‘Report on the Convention ...,’ which they submitted to the governments of the members of the Bank together with the text of the Convention itself. That Report, which still accompanies the Convention in the official publications of the Bank and the Centre, was designed to provide an authoritative elucidation of many of the more important provisions of the Convention. Thus the Report not only reflects the understanding of the body responsible for the final text of the Convention, but it is also an explanation that was available to (and therefore could not simply be disregarded by) the government of each Contracting State before it decided to sign and to ratify that instrument” (Szasz, Paul C., *A Practical Guide to the Convention on the Settlement of Investment Disputes*, 1 Cornell Int’l L. J. 1 (1968), at 8 – footnote excluded).

³⁰⁴ History of the ICSID Convention, *supra* note 73, at 58-59.

Directors could materially reflect the opinion of those States that participated in the final stage of the formulation of the ICSID Convention. Indeed, as will be seen next, the absence of a definition of investment in the final text of the ICSID Convention was the result of the debate held by representatives of States in the formulation of the ICSID Convention.³⁰⁵

On the other hand, even if one considers that the content of the Report of the Executive Directors could materially reflect the understanding of the Contracting States and, thus, qualify as a preparatory work of the ICSID Convention, it is not clear that paragraph 27 of the Report of the Executive Directors meant that the lack of a definition of the term “investment” in the final text of the ICSID Convention was intended to confer on the disputing parties discretion to determine the content of the investment requirement. While paragraph 27 apparently supports this idea, paragraph 25 of the Report of the Executive Directors seems to contradict it. According to paragraph 25:

“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.”³⁰⁶

Paragraph 25 states, thus, that the consent of the disputing parties alone is not sufficient to establish the jurisdiction of the Centre, which is contingent upon the compliance with the additional requirements set forth in Article 25(1) of the ICSID Convention. Paragraph 25 makes clear that the fulfillment of the *ratione materiae* and *ratione personae* requirements is distinct from the consent of the

³⁰⁵ See *infra* at pp. 75 *et seq.*

³⁰⁶ 1 ICSID Reports 23 (1993), at 28.

disputing parties, an interpretation consistent with the wording of the Article 25(1) of the ICSID Convention. In this sense, to the extent that the reference to “the nature of the dispute” does not refer exclusively to the requirement that the dispute must be of a legal character, but also covers the requirement that the dispute must arise out of an investment,³⁰⁷ paragraph 25 gives an unequivocal support to the objectiveness of the investment requirement of the ICSID Convention. Consequently, if one considers correct the interpretation given by the subjectivist theory to paragraph 27, there would be a contradiction between the two paragraphs of the Report of the Executive Directors.

As seen before, the discussions pertaining to the formulation of the ICSID Convention suggest that paragraph 27 was concerned with the practical consequences of the lack of a definition of investment in the final text of the ICSID Convention and it was a message to those States that feared that the absence of a definition of investment in the final text of the ICSID Convention would make the jurisdiction of the Centre too broad and vague. The absence of a definition was seen as a solution that was reached in order to conciliate the different views expressed by the representatives of States at the Legal Committee. Some States considered that the definition of investment contained in the First Draft of the ICSID Convention of September 11, 1964, was too broad; other States considered it too narrow. However, once the jurisdiction of the Centre is contingent upon the consent of the disputing parties, the States that considered the mere reference to “investment” too vague could adopt a narrow definition of investment as an element of their consent to the jurisdiction of the Centre. For the States that considered the definition of investment set forth in the First Draft too

³⁰⁷ See Broches, A., *supra* note 32, at 340-341; Manciaux, S., *supra* note 59, at 4.

narrow, its exclusion from the final text of the ICSID Convention would allow them to submit to the jurisdiction of the Centre disputes that would comply with the ordinary meaning of investment. As BROCHES noted, an investment was thought to be something “readily recognizable”.³⁰⁸ Accordingly, there would be no need to include a definition and, therefore, to give a special meaning to the term “investment”, if the ordinary meaning of investment was considered flexible enough to confer on the parties a great measure of discretion.

Properly understood, what was meant in paragraph 27 of the Report of the Executive Directors is that the absence of a definition of investment does not prevent Contracting States from restricting the jurisdictional scope of the ICSID Convention giving their consent only to disputes arising out of certain types of investments and through the mechanism set forth in Articles 25(4) of the ICSID Convention,³⁰⁹ if such Contracting States consider that the mere reference to

³⁰⁸ See *supra* at p. 76.

³⁰⁹ Article 25(4) of the ICSID Convention provides that:

“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)” (1 ICSID Reports 3 (1993), at 10).

As Article 25(4) has been construed, notifications made by Contracting States pursuant to this provision are made for the purposes of information only and do not affect the jurisdiction of the Centre (see Schreuer, C., Malintoppi, L., Reinisch, A., and Sinclair, A., *supra* note 39, at 345-347). As stated in paragraph 31 of the Report of the Executive Directors:

“While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not

“investment” in Article 25(1) makes the jurisdiction of the Centre undesirably broad.

6. CONCLUSION

The interpretation of the ICSID Convention in the light of general rule of treaty interpretation embodied in the Vienna Convention leads to the conclusion that the investment requirement of the ICSID Convention has an objective meaning. The wording of Article 25(1) of the ICSID Convention indicates that the jurisdictional requirements of the Centre are cumulative and not alternative. In order to establish the jurisdiction of the Centre over a dispute, each requirement set forth in Article

constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention” (1 ICSID Reports 23 (1993), at 29).

See *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey*, Decision on Jurisdiction of June 4, 2004, 19(3) World Trade and Arb. Materials 204 (2007), at 244-245; *Tza Yap Shum v. Peru*, Decision on Jurisdiction of June 19, 2009, available at <http://ita.law.uvic.ca/documents/TzaYapShum-DecisiononJurisdiction_000.pdf>, (last visited on March 7, 2011), at para. 165; *Murphy Exploration and Production Company International v. Ecuador*, Award of December 15, 2010, 23(2) World Trade and Arb. Materials 439 (2011), at 453-456.

In *Fedax* and *CSOB*, however, the tribunals considered that the notification made under Article 25(4) of the ICSID Convention has some legal effect. The *Fedax* tribunal pointed out that the notification might be relevant in limiting the agreement on the definition of the term “investment” contained in the investment treaty:

“The Tribunal has also undertaken a close examination of other provisions of the Agreement which are related to the definition of an investment, including Article 5 of the Agreement, under which the Contracting Parties guarantee the transfer of payments related to an investment, including the transfer of interests (Article 5(a)) and funds for the reimbursement of loans (Article 5(d)). The conclusion that the definition of ‘investment’ and the meaning of ‘titles to money’ under the Agreement include loans and related credit transactions is thus reinforced. It must also be noted that the Republic of Venezuela has not exercised its right under Article 25(4) of the ICSID Convention to notify the Centre of any class or classes of disputes it would or would not consider submitting to the jurisdiction of the Centre. This provision allows Contracting States to put investors on notice as to what class of disputes they would or would not consider consenting to within the broad meaning of investment under the Convention” (*supra* note 248, at 1385).

In *CSOB*, the tribunal admitted that the notification made under Article 25(4) may affect the jurisdictional scope of the ICSID Convention:

“It is worth noting, in this connection, that a Contracting State that wishes to limit the scope of the Centre’s jurisdiction can do so by making the declaration provided for in Article 25(4) of the Convention. The Slovak Republic has not made such a declaration and has, therefore, submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention” (*supra* note 252, at 273).

25(1) must be met independently from the fulfillment of the other requirements. This interpretation, which is supported by the subsequent practice of the Administrative Council, complies with the object and purpose of the Centre, which was created in order to provide facilities for the settlement of investment disputes and not of any dispute between a Contracting State and a national of another Contracting State.

The idea that the drafters of the ICSID Convention intended to grant the disputing parties discretion to determine the content of the investment requirement is based on a misinterpretation of the interpretative value of the Report of the Executive Directors. And even if the Report of the Executive Directors could be used as an authoritative interpretation, the analysis of the drafting history of the ICSID Convention demonstrates the non-existence of the supported real intention to grant the disputing parties absolute discretion to determine whether a dispute arises out of an investment. The idea of not including in the text of the ICSID Convention a jurisdictional requirement based on the existence of an investment was given up in the very beginning of its drafting history. In addition, there is no indication that the exclusion of the definition of investment in the final text of the ICSID Convention was meant to give the disputing parties the alleged absolute freedom. While the term “investment” itself confers on the disputing parties a great margin of discretion, the Centre has no jurisdiction to institute arbitral and conciliation proceedings for the settlement of disputes that arise out of something that cannot be defined as an investment.

The objectiveness of the investment requirement of the ICSID Convention also finds support in the practice of ICSID tribunals. Most decisions on the fulfillment

of investment requirement of the ICSID Convention followed the so-called *Salini* test, which is based on the idea that the ICSID Convention contains a notion of investment that may not be modified by the consent of the disputing parties to the jurisdiction of the Centre.

CHAPTER II – ECONOMIC DEVELOPMENT AS AN ELEMENT OF THE INVESTMENT REQUIREMENT OF THE ICSID CONVENTION

1. THE ECONOMIC DEVELOPMENT REQUIREMENT

The first reference to *development* as an element of the notion of investment was made in the *Fedax* case. As seen before, the question that arose in this case was whether the acquisition of promissory notes by way of endorsement could qualify as an investment for the purposes of the ICSID Convention and of the Netherlands-Venezuela BIT.³¹⁰ While the tribunal concluded that the promissory notes, as a loan, were not merely ordinary commercial transactions and qualified as an investment for the purposes of the ICSID Convention and the Netherlands-Venezuela BIT, it noted in addition that the acquisition of the promissory notes was not a short-term volatile investment and served the public interest of the host State. Based on SCHREUER’S description of the features of investment, the *Fedax* tribunal pointed out that:

“The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter — i.e. ‘volatile capital’. The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development. The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The

³¹⁰ See *supra* at pp. 91 et seq.

amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the *development* of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.”³¹¹

The decision is not clear, however, as to whether the absence of a significant relationship between the promissory notes and the development of the host State would affect the jurisdiction of the Centre. The reference to the basic features of the notion of investment listed by SCHREUER was an additional element of the reasoning of the tribunal in order to distinguish the promissory notes from an ordinary commercial transaction; it was not used as a condition upon which the transaction subject-matter of the dispute would qualify as an investment within the meaning of the ICSID Convention. In this sense, the reference to “development” was made as an element that could be applied in order to classify the transaction as something different from an ordinary commercial transaction.

Differently from the *Fedax* case, in the *CSOB* case the contribution to the economic development of the host State was expressly referred to as a criterion to qualify as an investment for the purposes of the ICSID Convention a transaction that, according to the tribunal, could not be considered as an investment within its ordinary meaning:

“It is common ground that the Convention does not define the term ‘investment’ and that various proposals to define it during the drafting negotiations failed. This fact is reflected in the Report of the Executive Directors of the World Bank, which noted that:

³¹¹ *Supra* note 248, at 1387 – footnotes excluded, emphasis added.

27. No attempt was made to define the term ‘investment’ given the essential requirements of consent by the parties, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

This statement also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that ‘the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein.’ *This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.*³¹²

Similarly to the *Fedax* case, in *CSOB* the dispute arose out of a loan.³¹³ While the *CSOB* tribunal indicated that ordinary loans are not investments, it considered that a loan could qualify as an investment within the meaning of the ICSID Convention if the loan represented a substantial contribution to the economic development of the host State:

“The Slovak Republic submits that loans as such do not qualify as investments under Article 25(1) of the Convention, nor under Article 1 of the BIT. It contends further that the loan in the instant case is not an investment because it did not involve a transfer of resources in the territory of the Slovak Republic. As to the first point, *the Tribunal considers that the broad meaning which must be given to the notion of an investment under Article 25(1) of the Convention is opposed to the conclusion that a transaction is not an investment merely because, as a matter of law, it is a loan. This is so, if only because under certain circumstances a loan may contribute substantially to a State’s economic development.* In this connection, Claimant correctly points out that other ICSID Tribunals have affirmed their competence to deal with the merits of claims based on loan agreements.

³¹² *Supra* note 252, at 273 – footnote excluded, emphasis added.

³¹³ See *supra* at pp. 91 et seq.

[...]

In the Tribunal's view, the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. *This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention.* This is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure."³¹⁴

Accordingly, the economic development requirement was applied in the *CSOB* decision in order to expand the notion of investment within the meaning of the ICSID Convention rather than placing a limitation on the jurisdiction of the Centre. The tribunal considered that, while the transaction was not an investment within its ordinary meaning, it could be considered as an investment for the purposes of the ICSID Convention given its contribution to the economic development of the host State. The economic development requirement, accordingly, was used as a subsidiary criterion for the tribunal to determine whether the dispute complied with the investment requirement of the ICSID Convention.³¹⁵

³¹⁴ *Ibid.*, at 275-276, 282 – footnote excluded – emphasis added.

³¹⁵ As GAILLARD observed:

“[W]hen the *CSOB* decision of 24 May 1999 referred to the contribution of the transaction to the economic development of the host State, it was not seeking to impose a new barrier to the jurisdiction of the Centre. Rather, it intended to lighten the reasoning with respect to the traditional criterion of contribution, something not as easily justifiable in the context of a transaction concerning the sharing of non-performing receivables” (Gaillard, E., *supra* note 54, at 412).

The rationale behind the *CSOB* decision seems to be connected with the opinion of DELAUME according to which the notion of investment within the meaning of the ICSID Convention should be based on an economic notion rather than on the traditional concept of investment. DELAUME noted that:

“The Convention was drafted at a time when most investments took the form of concessions, establishment agreements, joint ventures, or loans made by private financial institutions to foreign public entities, and, to a certain extent, arrangements concerning industrial property rights. These types of investment are now

In the *Salini* decision, however, the contribution to the economic development of the host State was referred to as an *additional condition* for a dispute to fulfill the investment requirement of the ICSID Convention:

“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [...]. In reading the Convention’s preamble, *one may add the contribution to the economic development of the host State of the investment as an additional condition.*”³¹⁶

In the decision, the *Salini* tribunal made a clear distinction between the first three elements of the notion of investment within the meaning of the ICSID Convention — contributions, a certain duration of performance of the contract and a participation in the risks of the transaction —, which would be inferred from the meaning of the term “investment”, and the contribution to the economic development of the host State, which would be found in the Preamble of the ICSID Convention. This distinction was also made by the tribunal when it noted that the first three elements of the notion of investment would be interdependent and should be assessed globally, and did not make any reference to the contribution to the economic development as an interdependent element:

supplemented, and sometimes superseded, by new forms of association between States and foreign investors, such as profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants, turn-key contracts, international leasing arrangements, and agreements for the transfer of know-how and technology. Direct investment in the traditional form of contribution of capital and acquisition of title over national resources, to the extent that it is still acceptable to developing nations, accounts only for a decreasing percentage of the arrangements concluded by States and investors for economic development purposes. An economic concept of investment has increasingly replaced the traditional notion of investment in capital; the notion of investment today is directly related to the expected contribution that an association between a foreign party and a State make to the economy of the State concerned” (Delaume, G. R., *ICSID Arbitration: Practical Considerations*, *supra* note 226, at 117).

³¹⁶ *Supra* note 259, at 622 – emphasis added.

“In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers individually here.”³¹⁷

As a condition that must be fulfilled independently from the other elements of the notion of investment within the meaning of the ICSID Convention, the *Salini* tribunal indicated that, differently from the *CSOB* decision, the economic development requirement was intended to place a limitation on the jurisdiction of the Centre and not to expand the meaning of the term “investment” for the purposes of the ICSID Convention. According to this approach, an investment would not comply with the investment requirement of the ICSID Convention if it does not contribute to the economic development of the host State, even if the transaction or activity subject-matter of the dispute qualifies as an investment within its ordinary meaning.

The idea that the jurisdiction of the Centre is limited to disputes arising out of investments that contribute to the economic development of the host State seems to be directly influenced by the opinion of Professor SCHREUER. According to SCHREUER:

“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.’ This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was ‘prompted by the desire to strengthen the partnership between countries in the cause of economic development.’ Therefore,

³¹⁷ *Idem.*

it may be argued that the Convention's object and purpose indicate that there should be some positive impact on development.”³¹⁸

In the first edition of his work, SCHREUER did not explain whether the reference to “economic development” in the Preamble of the ICSID Convention would amount to a requirement that limits the jurisdiction of the Centre to disputes arising out of investments that contribute to the economic development of the host State; or whether such reference would have the purpose of expanding the meaning of the term “investment”, as employed in the ICSID Convention, in order to include transactions or activities that normally could not be considered as an investment within its ordinary meaning.

In the second edition of his commentary on the ICSID Convention, SCHREUER explained, however, that, although the Preamble of the ICSID Convention could allow the inference of such element, “it does not necessarily follow that an activity that does not contribute to the host State’s development cannot be an investment in the sense of Art. 25 and is hence outside the Centre’s jurisdiction.”³¹⁹ According to him:

“A test that turns on the contribution to the host State’s development should be treated with particular care. The reference in the Convention’s Preamble indicates that economic development is among the Convention’s object and purpose. This would support the proposition that an international transaction that is designed to promote the host State’s development enjoys the presumption of being an investment. But it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention’s protection.”³²⁰

³¹⁸ Schreuer, C., *supra* note 23, at 124-125 – footnotes excluded, emphasis added.

³¹⁹ Schreuer, C., Malintoppi, L., Reinisch, A., and Sinclair, A., *supra* note 39, at 117.

³²⁰ *Ibid.*, at 134.

The use of the economic development requirement to either expand or restrict the jurisdiction of the Centre is linked to the question as to whether the elements of the notion of investment listed in the *Salini* test are mere typical characteristics of investment (*typical features approach*) or whether they constitute mandatory requirements (*jurisdictional approach*).³²¹ If they were considered as mandatory requirements, the lack of contribution to the economic development of the host State by the investment out of which the dispute arises would leave the dispute outside the jurisdiction of the Centre. But if those elements were mere typical characteristics, the contribution to the economic development of the host State could be applied as a subsidiary element to qualify as an investment a transaction or activity that fails to meet the other elements of the *Salini* test.

According to SCHREUER, whose description of the notion of investment had a decisive influence on the *Salini* test, the elements “should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”³²² This approach is consistent with SCHREUER’S position that the lack of contribution to the economic development of the host State would not result in the exclusion of the dispute from the jurisdiction of the Centre.

In *Salini*, once the tribunal concluded that all elements were met, the arbitrators were not required to explain what the consequences would be if one or more of such elements were missing and whether the Centre would lack jurisdiction over a dispute if the elements of the notion of investment were not all fulfilled. Several

³²¹ See Dugan, C. F., Wallace Jr., D., Rubins, N. and Sabahi, B., *supra* note 75, at 265-266; Gaillard, E., *supra* note 54, at 407; Stern, B., *supra* note 56, at 535-538.

³²² Schreuer, C., *supra* note 23, at 140.

ICSID tribunals that followed the *Salini* test considered, however, that the elements of the notion of investment constitute mandatory requirements and are not mere typical features. In *Joy Mining*, the tribunal stated that:

“Summarizing the elements that an activity *must have* in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development. To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case.”³²³

In the decisions rendered in *L.E.S.I. – DIPENTA* and *L.E.S.I. – Astaldi*, the tribunals referred to the elements of the notion of investment as “conditions”.³²⁴

Likewise, the *Bayindir* tribunal considered the elements of the notion of investment as “conditions”,³²⁵ and when it analyzed the presence of each element, the tribunal observed that the project “*must* constitute a substantial commitment on the side of the investor,”³²⁶ “*must* have a certain duration,”³²⁷ “*should* not only provide profit but also imply an element of risk,”³²⁸ and “*must* represent a significant contribution to the host State’s development.”³²⁹ In *Helnan*, the tribunal referred to the elements of the notion of investment as “requirements”.³³⁰

In *Pey Casado*, the tribunal asserted that “it is not enough to indicate the presence

³²³ *Supra* note 261, at 500 – footnote excluded, emphasis added.

³²⁴ See *supra* note 262, at 450, and *supra* note 265, at para. 72.

³²⁵ *Supra* note 263, at 199.

³²⁶ *Idem* – emphasis added.

³²⁷ *Idem* – emphasis added.

³²⁸ *Ibid.*, at 200 – emphasis added.

³²⁹ *Ibid.*, at 201 – footnote excluded, emphasis added.

³³⁰ See *supra* note 266, at para. 77.

of some of the typical ‘*characteristics*’ of an investment in order to comply with this objective requirement of the jurisdiction of the Centre.”³³¹

On the other hand, in *Noble Energy*, the tribunal asserted that the elements of the notion of investment listed in the *Salini* test would be “indicative of an ‘investment’ for purposes of the ICSID Convention [...] being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.”³³² Similarly, in *RSM Grenada*, the tribunal pointed out that these elements are “benchmarks or yardsticks to help a tribunal in assessing the existence of an investment” and “need not be met cumulatively.”³³³ Likewise, in *Phoenix*, the tribunal seemed to have considered the elements of the *Salini* test as typical features and not as mandatory requirements:

“The Tribunal wants to emphasize that an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, ‘overlapping’ or implicitly contained in others, and that they have to be analyzed with due consideration of all circumstances.”³³⁴

³³¹ Free translation of the Spanish original:

“Este Tribunal considera, por su parte, que sí existe una definición de inversión de acuerdo al Convenio CIADI y que no basta con señalar la presencia de algunas de las ‘*características*’ habituales de una inversión para satisfacer esta condición objetiva de la competencia del Centro. [...]” (*supra* note 272, at para. 232 – emphasis in the original).

³³² *Supra* note 271, at 300. Although the *Noble Energy* tribunal expressly adopted the *Salini* test, its reasoning seems to contradict the premise on which the *Salini* test is based according to which the fulfillment of the investment requirement should be assessed independently from the consent of the parties. In its decision, assessing whether the dispute met the investment requirement of Article 25(1), the *Noble Energy* tribunal relied on contractual clauses whereby the disputing parties agreed that any dispute would meet the jurisdictional requirements of Article 25 of the ICSID Convention (see *supra* note 290).

³³³ *Supra* note 242, at paras. 241 and 244.

³³⁴ *Supra* note 34, at 767.

In the case of *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine* (“*Inmaris*”), while the tribunal did not apply the *Salini* test, it noted that:

“The *Salini* test may be useful in the event that a tribunal were concerned that a BIT or contract definition of investment was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition. These elements could be useful in identifying such aberrations. Indeed, of late a number of tribunals and *ad hoc* committees have expressed the view that these elements should be viewed as non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention.”³³⁵

In *MHS*, the sole arbitrator — whose award was subsequently annulled by an *ad hoc* committee on the ground of manifest excess of powers³³⁶ — considered that the dichotomy between the typical features approach and the jurisdictional approach is “likely to be academic” and that “it is unlikely that any difference in juristic analysis would make any significant difference to the ultimate finding of the tribunal.”³³⁷ According to the *MHS* award, the use of the typical features approach or of the jurisdictional approach would be just a matter of emphasis employed by the tribunal while deciding whether the dispute fulfills the investment requirement of the ICSID Convention. If the typical features are clearly present or clearly missing, or the objection to the jurisdiction based on the non-fulfillment of the investment requirement is weak, the tribunal would rely on the jurisdictional approach. On the other hand, if the presence of the typical features is not clear, but an overall assessment leads to the conclusion that the dispute is related to an investment, the tribunal would follow the typical features approach. According to the sole arbitrator in *MHS*:

³³⁵ *Supra* note 34, at 1088 – footnote excluded.

³³⁶ See Decision on Annulment of April 16, 2009, *supra* note 34.

³³⁷ See *supra* note 268, at para. 105 – emphasis added.

“The classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an ‘investment’. If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of ‘investment’. However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID ‘investment’.”³³⁸

This view seems to be based on the idea that the elements of the notion of investment proposed by the *Salini* test are normally found in typical investments, but would not be necessarily present in all types of investments, and their primary purpose is to differentiate investments from ordinary commercial transactions. This view would also apply to the economic development requirement, which would be used as a distinctive element of an investment and not to exclude from the jurisdiction of the Centre disputes that arise out of investments that do not contribute to the economic development of the host State.

In his decision, the sole arbitrator considered that “a tribunal ought to interpret the word ‘investment’ so as to encourage, facilitate and to promote cross-border economic cooperation and development”³³⁹ and that “the term ‘investment’ should be interpreted as an activity which promotes some form of positive economic development for the host State.”³⁴⁰ While these assertions might suggest that the contribution to the economic development of the host State was applied to place a limitation on the jurisdiction of the Centre, the reliance on the economic development requirement was used by the *MHS* sole arbitrator in order to expand the meaning of investment for the purposes of the ICSID Convention.

³³⁸ *Ibid.*, at para. 106.

³³⁹ *Ibid.*, at para. 66.

³⁴⁰ *Ibid.*, at para. 68.

In the *MHS* case, referred to ICSID arbitration pursuant to the Malaysia-United Kingdom BIT,³⁴¹ the sole arbitrator had to decide whether a contract entered into by the disputing parties for the location and salvage of the cargo of a British vessel sank in Malaysia in the nineteenth century could qualify as an investment for the purposes of the ICSID Convention. In assessing the fulfillment of the elements set forth in the *Salini* test other than the contribution to the economic development of the host State, the sole arbitrator was not convinced that the activities carried out by the claimant could be differentiated from an ordinary commercial transaction. He pointed out that “the Claimant can only superficially satisfy the so-called classical *Salini* features of investment [regularity of profit and returns, contributions, duration and assumption of risks], in the qualitative sense envisaged under established ICSID practice and jurisprudence.”³⁴² For this reason, “consideration of the remaining hallmarks of ‘investment’ [the economic development requirement] will assume greater significance on the particular facts of the case.”³⁴³ The sole arbitrator noted in addition that:

“The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State’s economy. [...]. Taking into account the entire factual matrix of the case, this feature may be of considerable, even decisive, importance. *This is due in part to the Tribunal’s findings that the other features of ‘investment,’ such as risk and duration of contract, only appear to be superficially satisfied on the facts of this case, and not in the qualitative sense envisaged under ICSID practice and jurisprudence. The Tribunal is therefore left only with the contributions made by the Claimant, and has to determine whether these contributions would represent a significant contribution to the host State’s economic development.*

³⁴¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments of October 21, 1988.

³⁴² *Supra* note 268, at para. 112.

³⁴³ *Idem*.

In unusual situations such as the present case, where many of the typical hallmarks of ‘investment’ are not decisive or appear to be only superficially satisfied, the analysis of the remaining relevant hallmarks of ‘investment’ will assume considerable importance. *The Tribunal therefore considers that, on the present facts, for it to constitute an ‘investment’ under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.*³⁴⁴

The approach followed in the *MHS* decision viewed the contribution to the economic development of the host State as a subsidiary element that could qualify as an investment a transaction or activity that failed to meet the other elements of the *Salini* test. In this sense, similar to the *CSOB* decision, the reliance on the economic development requirement was used in order to expand the meaning of the term “investment” for the purposes of the ICSID Convention and not to create an additional condition for the establishment of the jurisdiction of the Centre.

Similar approach was also followed in the *Mitchell* case, which was referred to ICSID arbitration pursuant to the Democratic Republic of Congo-United States BIT³⁴⁵ due to the seizure by military forces of a law firm owned by a national of the United States in Congo. After the original ICSID tribunal decided that the dispute was within the jurisdiction of the Centre and awarded compensation in favor of the claimant,³⁴⁶ Congo submitted an application for annulment of the award in accordance with Article 52(1) of the ICSID Convention,³⁴⁷ arguing, among other grounds, that the original tribunal manifestly exceeded its powers and failed to state reasons when it decided that the dispute fulfilled the investment requirement of the ICSID Convention. In particular, Congo argued that the

³⁴⁴ *Ibid.*, at paras. 123-124 – emphasis added.

³⁴⁵ Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment of August 3, 1984.

³⁴⁶ The award rendered by the original tribunal on February 9, 2004, has not been published yet.

³⁴⁷ See *supra* note 31.

dispute did not arise out of an investment for the purposes of the ICSID Convention, to the extent that the law firm of the claimant did not contribute to the economic development of the host State.

In the decision on annulment, the *Mitchell ad hoc* committee considered that “the existence of a contribution to the economic development of the host State as an *essential* — although not sufficient — characteristic or unquestionable criterion of the investment.”³⁴⁸ This indicates that the *ad hoc* committee viewed the contribution to the economic development of the host State as a restrictive requirement. If the contribution to the economic development of the host State is “essential”, a dispute that fails to meet such requirement would be outside the jurisdiction of the Centre. And if it is “not sufficient”, even if a transaction or activity contributed to the economic development of the host State, the dispute would not fulfill the investment requirement of the ICSID Convention unless such transaction or activity qualifies as an investment within the ordinary meaning of the term. In the decision, however, the *Mitchell ad hoc* committee seems also to support the view that the economic development requirement could be applied, as a subsidiary element, in order to qualify as an investment a transaction or activity that could not be qualified as investment in accordance with its ordinary meaning:

“As a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the ad hoc Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal

³⁴⁸ *Supra* note 281, at para. 33 – emphasis added.

services in a regular manner or by specifically bringing investors. It does appear, according to the statements of both parties, that some U.S. investors had indeed consulted the ‘Mitchell & Associates’ firm. However, the Award itself is actually mute on this issue. The vague indication set forth in para. 47 of the Award, to the effect that the Arbitral Tribunal had received ample information about the activities exercised by Mr. Mitchell, including in particular the declarations made by former clients of the firm, the agreements concluded with former associates, and income statements, fail to fill this gap. The same holds true as regards the passing reference made in para. 71 of the Award with respect to the loss of clients, according to which ‘many clients had been asking the firm for counseling in relation to requests to be presented to State authorities.’”³⁴⁹

Accordingly, while the *Mitchell ad hoc* committee initially suggested that, consistent with the *Salini* decision, the contribution to the economic development of the host State was restrictive requirement for the establishment of the jurisdiction of the Centre, it also indicated that the economic development requirement could be used as a subsidiary criterion for a dispute to comply with the investment requirement of the ICSID Convention.

The contribution to the economic development of the host was also adopted as a restrictive requirement in the dissenting opinions to the decision on annulment that set aside the *MHS* award and to the decision on jurisdiction rendered in the case of *Abaclat and Others v. Argentina* (“*Abaclat*”), in which the majority of the tribunal decided that a dispute arising out of sovereign debt instruments acquired in the secondary market qualified as investment for the purposes of the ICSID Convention.³⁵⁰

In the dissenting opinion to the *MHS* decision on annulment, Judge MOHAMED SHAHABUDDEEN asserted that “economic development is a *condition* of an ICSID

³⁴⁹ *Ibid.*, at para. 39 – footnote excluded, emphasis added.

³⁵⁰ See Decision on Jurisdiction of August 4, 2011, *supra* note 285.

investment”³⁵¹ and that “[t]he outer limits in this case included a requirement that an investment *must* contribute to the economic development of the host State.”³⁵² In addition, SHAHABUDEEN noted that, if the contribution to the economic development of the host State was not a condition for the establishment of the jurisdiction of the Centre, “there is nothing to separate an ICSID investment from any other kind of investment; in the result, an ICSID arbitration would be indistinguishable from any other kind of arbitration (and there are several) concerning an investment dispute.”³⁵³

Similar understanding was sustained by Professor ABI-SAAB in his dissenting opinion to the *Abaclat* decision on jurisdiction. In the case, referred to ICSID arbitration pursuant to Argentina-Italy BIT,³⁵⁴ the jurisdiction of the Centre was challenged, among other grounds, based on the argument that the transaction out of which the dispute arose — the acquisition of bonds issued by Argentina — did not fulfilled the investment requirement of the ICSID Convention. Dissenting from the majority of the tribunal, Professor ABI-SAAB considered that “[t]he investment that the Convention seeks to encourage by providing it with an international procedural guarantee is that *which contributes to the economic development of the host country*.”³⁵⁵

These decisions show that two different approaches towards the economic development requirement were followed in ICSID practice, which can be named

³⁵¹ Dissenting Opinion to the Decision on Annulment of April 16, 2009, 48 ILM 1105 (2009), at 1105 – emphasis added.

³⁵² *Idem* – emphasis added.

³⁵³ *Ibid.*, at 1108.

³⁵⁴ Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments of 22 May 22, 1990.

³⁵⁵ Dissenting Opinion to the Decision on Jurisdiction of August 4, 2011, *supra* note 288, at para. 50 – emphasis added.

as the *CSOB* approach (or subsidiary approach) and the *Salini* approach (or restrictive approach). The *CSOB* approach considers the contribution to the economic development of the host State as a subsidiary criterion for a dispute to fulfill the investment requirement of the ICSID Convention. Pursuant to this approach, if dispute arises out of a transaction or activity that does not constitute an investment in accordance with the ordinary meaning of the term, the dispute may nevertheless fall within the jurisdiction of the Centre if such transaction or activity contributed to the economic development of the host State. The *Salini* approach views the contribution to the economic development of the host State as a condition for the fulfillment of the investment requirement of the ICSID Convention; even if the dispute arises out of an investment, such dispute would fall outside the jurisdiction of the Centre if the investment did not contribute to the economic development of the host State.

But while different, the two approaches have in common the idea that the investment requirement of the ICSID Convention contains an element — the contribution to the economic development of the host State — that dissociates the meaning of the term “investment” as employed in Article 25(1) of the ICSID Convention from its ordinary meaning. The first three elements listed by the *Salini* test — commitment, risk and duration — are meant to reflect the ordinary meaning of the term “investment”;³⁵⁶ this is not the case of the economic

³⁵⁶ In *Fakes*, the tribunal argued that:

“Second, the present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention. These three criteria derive from the ordinary meaning of the word ‘investment’, be it in the context of a complex international transaction or that

development requirement.³⁵⁷ For the *CSOB* approach, the investment requirement of the ICSID Convention encompasses transactions or activities that, while they are not investments within its ordinary meaning, contribute to the economic development of the host State. For the *Salini* approach, it is not enough for a transaction or activity to be an investment in order to comply with the investment requirement of the ICSID Convention; it must be an investment that contributes to the economic development of the host State. Accordingly, both approaches are based on the assumption that the term “investment” as employed in Article 25(1) of the ICSID Convention has a special meaning that is inferred from the first recital of the Preamble of the ICSID Convention, which states that the ICSID Convention was concluded “[c]onsidering the need for international cooperation for economic development, and the role of private international investment therein.”³⁵⁸

2. THE PREAMBLE OF THE ICSID CONVENTION

The *CSOB* tribunal was the first ICSID tribunal to establish a link between the Preamble and the investment requirement of the ICSID Convention. The tribunal asserted that the Preamble “permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is

of the education of one’s child: in both instances, one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents’ hopes or expectations” (*supra* note 34, at para. 110).

³⁵⁷ See Dugan, C. F., Wallace Jr., D., Rubins, N. and Sabahi, B., *supra* note 75, at 266.

³⁵⁸ 1 ICSID Reports 3 (1993), at 4.

understood in the Convention.”³⁵⁹ In *Salini*, the tribunal observed that “[i]n reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”³⁶⁰ Likewise, the *Mitchell ad hoc* committee asserted that “[t]he 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.”³⁶¹ In *MHS*, the sole arbitrator noted that:

“The Tribunal considers that, taking a teleological approach to the interpretation of the ICSID Convention, a tribunal ought to interpret the word ‘investment’ so as to encourage, facilitate and to promote cross-border economic cooperation and development. Support for such an approach can be found in the *Preamble* to the ICSID Convention (*‘Considering the need for international cooperation for economic development’*) and the Report of the Executive Directors on the Convention on Settlement of Investment Disputes Between States and Nationals of other States (*‘the Report of the Executive Directors’*) dated March 18, 1965, at Paragraph 9, which points out that the idea of ICSID was *‘prompted by the desire to strengthen the partnership between countries in the cause of economic development.’*”³⁶²

In the dissenting opinion to the *MHS* decision on annulment, Judge MOHAMED SHAHABUDEEN considered that “[t]he need for a contribution to the economic

³⁵⁹ *Supra* note 252, at 273.

³⁶⁰ *Supra* note 259, at 622. In *Bureau Veritas*, while the tribunal did not apply the economic development requirement, it noted that:

“The parties cannot adopt a definition of ‘investment’ that relates to activities that manifestly fall outside the scope of what the drafters of the ICSID Convention intended. The meaning of ‘investment’ is subject to objective appreciation, having regard to the objectives of the ICSID Convention, which seeks to promote international cooperation for economic development and the role of private international investment (see the preamble to the ICSID Convention)” (*supra* note 34, at para. 78).

³⁶¹ *Supra* note 281, at para. 28.

³⁶² *Supra* note 268, at para. 66 – emphasis in the original.

development of the host State is consistent with both the formative documents of ICSID and with case law.”³⁶³ Based on the Preamble of the ICSID Convention, SHAHABUDEEN concluded that “the purpose of the ICSID settlement mechanism was to resolve disputes which might arise in connection with ‘such investment,’ that is to say, any ‘investment’ concerning ‘international cooperation for economic development.’”³⁶⁴ In addition, SHAHABUDEEN pointed out that the close relationship between the Centre and the IBRD would confirm the idea that the ICSID Convention was envisaged to stimulate the economic development of States:

“The fifth preambular paragraph of the ICSID Convention states: ‘Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development.’ Development may indeed be widely construed, but its contents, however wide, must be capable of being regarded as contributing to the purpose of the development in view. Development of what? The reference to ‘Reconstruction and Development’ leaves no reasonable doubt that it was the development of States which was being spoken of.”³⁶⁵

Similar approach was taken by Professor ABI-SAAB in his dissenting opinion to the decision on jurisdiction rendered in the *Abaclat* case. According to ABI-SAAB:

“It is most significant that the ICSID Convention was elaborated and the Centre established on the initiative and within the framework of the International Bank for Reconstruction and Development; an institution which concentrated its activities since the early sixties almost exclusively to the second facet of its mandate according to its title, i.e. the ‘development’ of the less developed countries.

The Preamble of the Convention clearly reveals its ‘developmental’ object and purpose, as a means of encouraging ‘international

³⁶³ Dissenting Opinion to the Decision on Annulment of April 16, 2009, 48 ILM 1105 (2009), at 1106.

³⁶⁴ *Ibid.*, at 1107.

³⁶⁵ *Idem.*

cooperation for development, and the role of private international investment therein’; and this by making available ‘facilities for international conciliation or arbitration’, besides the national courts of host States, to settle potential disputes arising from such investments between private foreign investors and those States.

The investment that the Convention seeks to encourage by providing it with an international procedural guarantee is that which contributes to the economic development of the host country, i.e. to the expansion of its productive capacity, a contribution that presupposes a commitment to this task not only of economic resources, but also in terms of duration in time and the taking of risk, with the expectation of reaping profits and/or revenue in return.”³⁶⁶

In the cases of *Joy Mining*,³⁶⁷ *Bayindir*,³⁶⁸ *Jan de Nul*,³⁶⁹ *Helnan*,³⁷⁰ *Saipem*,³⁷¹ *Kardassopoulos*,³⁷² *Oko Pankki*,³⁷³ *Noble Energy*,³⁷⁴ *RSM Grenada*,³⁷⁵ *Toto*,³⁷⁶ *Millicom*,³⁷⁷ *Nations Energy*³⁷⁸ and *Malicorp*,³⁷⁹ the existence of the economic development requirement was also admitted, but the tribunals based their reasoning solely on previous decisions.³⁸⁰

³⁶⁶ Dissenting Opinion to the Decision on Jurisdiction of August 4, 2011, *supra* note 288, at paras. 48-50.

³⁶⁷ See *supra* note 261, at 500.

³⁶⁸ See *supra* note 263, at 199.

³⁶⁹ See *supra* note 264, at 334-335.

³⁷⁰ See *supra* note 265, at para. 77.

³⁷¹ See *supra* note 267, at 127.

³⁷² See *supra* note 269, at 66.

³⁷³ See *supra* note 270, at 477-478.

³⁷⁴ See *supra* note 271, at 300.

³⁷⁵ See *supra* note 242, at para. 240.

³⁷⁶ See *supra* note 275, at paras. 69 and 86.

³⁷⁷ See *supra* note 34, at para. 80.

³⁷⁸ See *supra* note 278, at para. 429.

³⁷⁹ See *supra* note 280, at para. 109.

³⁸⁰ It is generally considered in ICSID practice that previous decisions may serve as guidance and are often observed and followed. As noted in *Saipem*:

“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law” (*supra* note 267, at 118 – footnotes excluded).

See also *AES Corporation v. Argentina*, Decision on Jurisdiction of April 26, 2005, 12 ICSID Reports 308 (2007), at 317-318; *El Paso Energy International Company v. Argentina*, Decision on Jurisdiction of April 27, 2006, 21 ICSID Rev. – FILJ 488 (2006), at 505; *Jan de Nul, supra* note 264, at 328; *Bureau Veritas, supra* note 34, at para. 58; *Caratube International Oil Company LLP v. Kazakhstan* (“*Caratube*”), Decision on Provisional Measures of July 31, 2009, available at <<http://ita.law.uvic.ca/documents/CaratubeDecisiononProvisionalMeasures.PDF>>, (last visited on April 22, 2011), at paras. 69-73; *Bayindir*, Award of August 27, 2009, available at <<http://ita.law.uvic.ca/documents/Bayindiraward.pdf>>, (last visited on September 4, 2009), at para. 145; *Burlington, supra* note 34, at para. 100; *Duke Peru, supra* note 34, at para. 88. See also Paulsson, Jan, *The Role of Precedent in Investment Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* 699 (Yannaca-Small, Katia, ed., New York: Oxford University Press, 2010); Gill, Judith, *Is There a Special Role for Precedent in Investment Arbitration?*, 25 ICSID Rev. – FILJ 87 (2010); Reed, Lucy, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID Rev. – FILJ 95 (2010). Subsequent ICSID tribunals are not bound, however, by previous decisions. In the dispute settlement system established under the ICSID Convention, decisions rendered by ICSID tribunals are not binding except between the parties to the dispute. See Schreuer, C., *supra* note 23, at 1082; Baltag, C., *supra* note 75, at 4-5; McLachlan, C., Shore, L. and Weiniger, M., *supra* note 79, at 70-76; Schill, Stephan W., *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), at 291; Salacuse, J., *supra* note 257, at 155-156.

On the other hand, in accordance with the general rule of treaty interpretation embodied in the Vienna Convention, decisions rendered by ICSID tribunals do not have interpretative value. As discussed before, Article 31(3)(b) of the Vienna Convention provides that the interpretation of treaties must take into account the subsequent practice pertaining to the application of the treaty which establishes the understanding of the parties as to the meaning of the treaty provisions. While Article 31(3)(b) does not qualify the subsequent practice as State practice only, it requires, nonetheless, that the practice must establish the agreement of parties on the meaning of a treaty provision. For this reason, the practice of organs of international organizations pertaining to the application of their constituent treaties may also be considered in the sense of Article 31(3)(b) (see *supra* at pp. 46 *et seq.*). However, the interpretation given by ICSID tribunals does not seem to meet such requirement. While ICSID tribunals are vested, pursuant to Article 41(2) of the ICSID Convention, with the authority to interpret the meaning of the jurisdictional requirements set forth in Article 25(1) (see *supra* at pp. 9 *et seq.*), Contracting States do not participate in the decision-making process of ICSID tribunals and members of ICSID tribunals do not exercise their adjudicatory function as representatives of the Contracting States. The authority conferred on ICSID tribunals is to apply the provisions of the ICSID Convention to a particular case and not to give an authoritative and abstract interpretation of its provisions. Likewise, once the decisions rendered by ICSID tribunals do not qualify as a source of the intention of the Contracting States of the ICSID Convention, they may not be used in the interpretation of the ICSID Convention in the sense of Article 32 of the Vienna Convention.

In *Caratube*, however, the tribunal suggested that previous decisions rendered by ICSID tribunal could be relied on as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention on the basis of Article 38(1)(d) of the Statute of the ICJ:

“On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty’s ‘preparatory work’ and the ‘circumstances of its conclusion’, but indicates by the word ‘including’ that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, these legal materials can also be understood to constitute ‘supplementary means of interpretation’ in the sense of Article 32 VCLT” (*ibid.*, at para. 71).

Similarly, in *AFT*, where a non-ICSID tribunal applied the *Salini* test, the tribunal justified its position on the idea that the decisions that followed the *Salini* test contributed to the development of a “common ground” in international law of what an investment is:

“A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more in general, international customary law. It is now common ground the necessary conditions or characteristics

On the other hand, not all ICSID tribunals that followed the *Salini* test admitted the existence of the economic development requirement. In *L.E.S.I. – DIPENTA*, the tribunal asserted that “it is not necessary that the investment contribute more specifically to the host country’s economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.”³⁸¹

Similar approach was followed in *Phoenix* and in *RSM Central African Republic*.

In *Phoenix*, the tribunal pointed out that “the contribution of an international

to be satisfied for attributing the qualify of ‘investment’ to a contractual relationship include: (a) a capital contribution to the host-State by the private contracting arty, (b) a significant duration over which the project is implemented and (c) a sharing of operational risks inherent to the contribution together with long-term commitments. This is not the case here, the Assignment Contract being far from satisfying, even in part, the above characteristics” (*supra* note 283, at para. 241 – footnote excluded).

Under Article 38(1)(d) of the Statute of the ICJ, however, judicial decisions are classified “as subsidiary means for the *determination* of rules of law” (39 AJIL Sup. 190 (1945), at 223 – emphasis added), but not for the *establishment* of rules of law. See Paulsson, Jan, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) TDM (2006); Gill, J., *ibid.*, at 91.

Similarly, under the dispute settlement system of the World Trade Organization (“WTO”), in the *Japan – Taxes on Alcoholic Beverages* case, the Appellate Body rejected the idea that panel reports adopted by the Contracting Parties to the General Agreement on Tariffs and Trade of 1947 (“GATT 1947”) could constitute subsequent practice in the sense of Article 31(3)(b) of the Vienna Convention. Among other arguments, the Appellate Body observed that:

“Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*” (Report of the Appellate Body of October 4, 1996, available at <www.wto.org>, (last visited on February 1, 2009), at 13 – footnote excluded, emphasis in the original).

³⁸¹ Unofficial translation (*supra* note 268, at para. 13) of the French original:

“Il ne paraît en revanche pas nécessaire qu’il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus” (*supra* note 262, at 450).

See also *L.E.S.I. – Astaldi*, *supra* note 265, at para. 72.

Similarly, in *Alpha*, the tribunal noted that:

“The Tribunal is particularly reluctant to apply a test that seeks to assess an investment’s contribution to a country’s economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of ‘investment’, the criteria of resources, duration, and risk would seem fully to serve that objective. The contribution-to-development criterion, on the other hand, would appear instead to reflect the consequences of the other criteria and brings little independent content to the inquiry. At the same time, the criterion invites a tribunal to engage in a *post hoc* evaluation of the business, economic, financial and/or policy assessments that prompted the claimant’s activities. It would not be appropriate for such a form of second-guessing to drive a tribunal’s jurisdictional analysis” (*supra* note 285, at para. 312 – footnote excluded).

investment to the *development* of the host State is impossible to ascertain — the more so as there are highly diverging views on what constitutes ‘development’.”³⁸² Likewise, in *RSM Central African Republic*, the tribunal noted that:

“However, as noted above, the Tribunal wishes to make certain inflexions in the *Salini* criteria because it believes that the real criterion of contribution to development is too subjective and should be replaced by the criterion of the contribution the economy, itself considered presumed included in the other three criteria. The Tribunal follows the tribunals that have expressed skepticism about this fourth criterion, such as the tribunal in *LESI SpA v. Algeria* [...]”³⁸³

While the concern of these decisions was focused on the question as to whether it would be feasible for an ICSID tribunal to assess the compliance with the economic development requirement and not as to meaning and effect of the reference to “economic development” in the Preamble of the ICSID Convention, the possibility of an ICSID tribunal relying on the Preamble in order to justify the existence of the economic development requirement was expressly rejected in the cases of *Pey Casado* and *Fakes*. In *Pey Casado*, the tribunal observed that:

³⁸² *Supra* note 34, at 759 – emphasis in the original. The *Phoenix* tribunal considered, nevertheless, that:

“A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed” (*idem* – emphasis in the original).

This requirement, however, does not entail the contribution to the economic development of the host State, but it is based on the idea that, in order for a dispute to fall within the jurisdiction of the Centre, it must arise out of an investment which aims at creating an economic activity in the host State.

See also *RSM Central African Republic*, *supra* note 279, at para. 56.

³⁸³ Free translation of the French original:

“Cependant, comme indiqué précédemment, le Tribunal souhaite apporter certaines inflexions aux critères Salini, car il estime qu’en réalité le critère de la contribution au développement est trop subjectif et qu’il doit être remplacé par le critère de la contribution à l’économie, lui-même considéré comme présumé inclus dans les trois autres critères. Le Tribunal suit en cela d’autres tribunaux qui ont manifesté leur scepticisme à l’égard de ce quatrième critère, comme par exemple le tribunal dans l’affaire *LESI SpA c. Algérie* [...]” (*supra* note 279, at para. 56).

“The requirement of contribution to the development of the host State is difficult to ascertain and it is in its opinion a question of the merits of the dispute and not a question of the competence of the tribunal. The fact that an investment may be useful or not for the host State does not disqualify it as an investment. It is true that the preamble of the ICSID Convention mentions the contribution to the economic development of the host State. Nevertheless, such reference is a consequence and not a requirement of the investment: protecting investments, the Convention favors the development of the host State. This does not mean that the development of the host State is a constitutive element of the notion of investment. For this reason, as some arbitral tribunals have pointed out, this fourth element is in fact included in the first three elements.”³⁸⁴

In the same way, in *Fakes*, the tribunal concluded that:

“The Tribunal is not convinced, on the other hand, that a contribution to the host State’s economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment, such as the *Salini* Tribunal, have mainly relied on the preamble to the ICSID Convention to support their conclusions. The present Tribunal observes that while the preamble refers to the ‘*need for international cooperation for economic development*,’ it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments

³⁸⁴ Free translation of the Spanish original:

“La exigencia de una contribución al desarrollo del Estado receptor, difícil de establecer, es en su opinión más una cuestión de fondo del litigio que de competencia del Centro. Una inversión puede resultar o no útil para el Estado receptor sin dejar por ello de ser una inversión. Es cierto que el preámbulo del Convenio CIADI menciona la contribución al desarrollo económico del Estado receptor. Sin embargo, dicha referencia se presenta como una consecuencia, no como un requisito de la inversión: al proteger las inversiones, el Convenio favorece el desarrollo del Estado receptor. Ello no significa que el desarrollo del Estado receptor sea un elemento constitutivo de la noción de inversión. Es por esta razón, como han señalado algunos tribunales de arbitraje, que este cuarto elemento está en realidad englobado en los tres primeros” (*supra* note 272, at para. 232).

expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.”³⁸⁵

These two decisions opposed the idea that the reference to “economic development” in the Preamble of the ICSID Convention would be sufficient to justify the existence of the economic development requirement. While not denying that economic development was one of the goals of the ICSID Convention, the *Pey Casado* and *Fakes* decisions considered that this would not be enough to create an element of the notion of investment within the meaning of the ICSID Convention that restricts the jurisdiction of the Centre to disputes that arise out of investments that contribute to the economic development of the host State.

2.1. The Normative Function of the Preamble

It is well settled in international law that the preamble is part of the treaty and it must be used in the interpretation of the provisions of the treaty as evidence of its object and purpose.³⁸⁶ In this sense, Article 31(2) of the Vienna Convention provides that “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes.”³⁸⁷

³⁸⁵ *Supra* note 34, at para. 111 – emphasis in the original.

³⁸⁶ See Yearbook of the International Law Commission, 1966, vol. II, at 221. See also Sinclair, I., *supra* note 34, at 127-128; Gardiner, R., *supra* note 112, at 196-197.

³⁸⁷ 8 ILM 679 (1969), at 692 – emphasis added. As observed by Judge WEERAMANTRY in the *Arbitral Award of 31 July 1989* case:

“An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty’s objects and purposes even though the preamble does not contain substantive provisions. Article 31(2) of the Vienna Convention sets this out specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court also indicates, as in the case concerning *Rights of Nations of the United States of America in Morocco* and the *Asylum (Colombia/Peru)* case, that the Court

Therefore, the Preamble of the ICSID Convention constitutes part of the context in which the term “investment” set forth in Article 25(1) of the ICSID Convention is employed and, for this reason, it must be considered in the interpretation of the notion of investment within the meaning of the ICSID Convention.

But while it is uncontested that the preamble is part of the treaty, it seems generally considered that the preamble does not have a normative function; it would merely indicate the object and purpose of the treaty.³⁸⁸ Nonetheless, the comparison of the language employed in the Preamble of the ICSID Convention with the wording of Article 25(1) of the ICSID Convention may lead to the conclusion that, in stating the general purpose of the ICSID Convention for the establishment of a dispute settlement mechanism, it was intended to confer on the Preamble a normative function in the delineation of the jurisdictional scope of the ICSID Convention. It may be said, accordingly, that, despite the general idea that a preamble of a treaty does not have a normative function, some parts of the Preamble of the ICSID Convention introduces rules pertaining to the jurisdiction of the Centre. For instance, the seventh recital of the Preamble, which declares “that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any

has made substantial use of it for interpretational purposes. In the former case, a possible interpretation of the Madrid Convention was rejected for its lack of conformity with the preamble’s specific formulation of the purposes of the Convention. In the latter case the Court used the objects of the Havana Convention, as indicated in its preamble, to interpret Article 2 of the Convention. Important international arbitrations have likewise resorted to the preamble to a treaty as guides to its interpretation” (Dissenting Opinion to the Judgment of November 12, 1991, *supra* note 34, at 142 – footnotes excluded).

³⁸⁸ According to FITZMAURICE, “[t]he preamble to a treaty (which does not and should not have direct operative force) has effect as indicating the general purposes and spirit of the treaty, in the light of which the interpretation to be given to particular provisions may be considered” (*supra* note 87, at 10). See also Treviranus, Hans-Dietrich, *Preamble*, III EPIL 1097 (1997), at 1098.

obligation to submit any particular dispute to conciliation or arbitration,”³⁸⁹ has a clear normative content.

The intention of conferring a normative function on the Preamble of the ICSID Convention can be confirmed by the drafting history of the ICSID Convention. The first version of the Preamble appeared in the First Preliminary Draft of August 3, 1963,³⁹⁰ as a consequence of the discussions among the executive directors of IBRD regarding the jurisdictional scope of the ICSID Convention. As seen before, the first draft of the ICSID Convention — the Working Paper of June 5, 1962 — did not make any reference to “investment” and did not contain any jurisdictional requirement based on the nature of the dispute. Some executive directors, however, feared that some States would not be willing to participate in the ICSID Convention unless additional requirements were introduced in order to clearly define the jurisdiction of the Centre.³⁹¹ In the context of these discussions, the idea of introducing such limitations in a preamble was suggested by one of the executive directors, GARLAND. According to him, a “reconciliation of the differing positions might be achieved by inserting a limitation in a preamble, which would have the practical effect of limiting the scope of the convention to industrial disputes; this might be preferable to a definition of ‘industrial dispute’ in the body of the convention.”³⁹² BROCHES accepted this idea. In a working paper submitted to the executive directors, BROCHES concluded that:

³⁸⁹ 1 ICSID Reports 3 (1993), at 4.

³⁹⁰ See History of the ICSID Convention, *supra* note 73, at 19. The Working Paper did not contain a preamble. According to BROCHES, the preamble “had been omitted from the draft under discussion because the draft was really a working paper” (History of the ICSID Convention, *supra* note 73, at 65).

³⁹¹ See *supra* at pp. 58 *et seq.*

³⁹² History of the ICSID Convention, *supra* note 73, at 61.

“There is a general understanding, which could be recorded in a Preamble to the Convention, that the machinery created by the Convention and the rules laid down in the Convention are designed to deal primarily with investment disputes. It is also generally understood that the scope of the Convention should be limited to legal disputes as distinguished from political or commercial disputes, and this could also be suitably expressed in a Preamble. Once this intention is expressed, there seems to be no need to go further and give a precise definition of the disputes for which the services of the Center would be available. To give a precise definition of investment dispute would be extremely difficult. More seriously, it might lead to undesirable jurisdictional controversies in cases where parties have agreed to submit a dispute to conciliation or arbitration under the auspices of the Center, and one of the parties later refuses to carry out the agreement claiming that the dispute is of a kind outside the defined scope of the Convention. If the Convention established compulsory arbitration or conciliation, there would clearly be need for defining the scope of the obligation. But the Convention does not by itself establish any obligation except to abide by agreements freely made. It has been argued, however, that since the very existence of the Convention implies a danger of pressure being exercised on host governments by investors to have recourse to the services of the Center, the scope of activity of the Center should be closely defined in the Convention so as at least to limit the range of situation within which this pressure could be exercised. Even assuming that such a danger exists at all, and this may well be questioned, the Preamble would serve to limit this ‘danger’ to the field of investment disputes.”³⁹³

Given the need of introducing additional jurisdictional requirements in the text of the ICSID Convention, the first version of the Preamble was inserted in the First Preliminary Draft of August 3, 1963, with the following wording:

“The Contracting States

1. CONSIDERING the need for international cooperation for economic development, and the role of foreign investment therein;

2. BEARING IN MIND the possibility that disputes may arise from time to time in connection with such investment between Contracting States and nationals of other Contracting States, and the need for settlement thereof in a spirit of mutual confidence, with due respect for the principle of equal rights of States in the exercise of their sovereignty in accordance with international law;

³⁹³ *Ibid.*, at 83.

3. RECOGNIZING that while such disputes would usually be subject to national legal processes (without prejudice to the right of any State to espouse a claim of one of its nationals in accordance with international law), other methods of settlement of such disputes may be appropriate in certain cases;

4. ATTACHING PARTICULAR IMPORTANCE to the establishment of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

5. RECOGNIZING an undertaking to submit such disputes to conciliation or to arbitration through such facilities as may be established as a legal obligation to be carried out in good faith, which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

6. DECLARING that no Contracting State shall by the mere fact of its acceptance of this Convention be required to have recourse to conciliation or arbitration in any particular case, in the absence of a specific undertaking to that effect,

HAVE AGREED as follows:³⁹⁴

The comment to Section 1 of Article II of the First Preliminary Draft, which defined the jurisdiction of the Centre, suggested a direct link between the Preamble and jurisdiction of the Centre:

“No detailed definition of the category of disputes in respect of which the facilities of the Center would be available has been included in the Convention. Instead, *the general understanding reflected in the Preamble, the use of the term ‘investment dispute’, and the requirement that the dispute be of a legal character distinct from political, economic or purely commercial disputes, were thought adequate to limit the scope of the Convention in this regard.* Within those limits Contracting States would be free to determine in advance in each particular case what disputes they would submit to the Center. To include a more precise definition would tend to open the door to frequent disagreements as to the applicability of the Convention to a particular undertaking, thus undermining the primary objective of this

³⁹⁴ *Ibid.*, at 134-135.

Article viz., to give confidence that undertakings to have recourse to conciliation or arbitration will be carried out.”³⁹⁵

This comment, thus, confirms the idea that can be inferred from the text of the ICSID Convention that the Preamble was intended to have a normative function.

Nevertheless, the fact that it was intended to confer a normative function of the Preamble of the ICSID Convention does not necessarily lead to the conclusion that the ICSID Convention contains a requirement that expands or restricts the jurisdiction of the Centre based on the contribution to the economic development of the host State. Undoubtedly, economic development through the flow of foreign investments was one of the main purposes of the ICSID Convention.³⁹⁶

However, the first recital of the Preamble does not expressly allow ICSID tribunals to deny the jurisdiction of the Centre because the dispute arises out of an

³⁹⁵ *Ibid.*, at 149 – emphasis added.

³⁹⁶ As stated in paragraph 9 of the Report of the Executive Directors:

“In submitting the 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 atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it” (1 ICSID Reports 23 (1993), at 25).

See also Sassoon, D., *supra* note 227, at 29; Delaume, G. R., *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *supra* note 226, at 65-66; Farley, Andrew, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 5 Duq. U. L. Rev. 19 (1966-1967), at 20; Albrecht, W., *supra* note 227, at 679; Szasz, Paul, *Arbitration Under the Auspices of the World Bank*, *supra* note 227, at 312-313; Schwarzenberger, Georg, *Foreign Investments and International Law* (London: Stevens & Sons Ltd. Library of World Affairs, 1969), at 138; Siller, Stephen I., *Settlement of International Investment Disputes: A Functional Approach*, 38 Brook. L. Rev. 693 (1971-1972), at 712; Vuylsteke, Charles, *Foreign Investment Protection and ICSID Arbitration*, 4 Ga. J. Int'l & Comp. L. 343 (1974), at 343; Amerasinghe, C.F., *supra* note 84, at 794; Schmidt, J., *supra* note 236, at 91-92; Shihata, I., *supra* note 133, at 100; Tupman, M., *supra* note 235, at 813; Chukwumerije, O., *supra* note 237, at 167; Toope, Stephen J., *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge: Grotius Publications, 1990), at 219-221; Hirsch, M., *supra* note 84, at 19-20; Nathan, K.V.S.K., *supra* note 23, at 51; Schreuer, C., *supra* note 23, at 4; Castro de Figueiredo, R., *supra* note 84, at 1; García-Bolívar, O. E., *supra* note 45, at 153-155.

investment that do not contribute to the economic development of host States.³⁹⁷

Likewise, the first recital of the Preamble does not extend the jurisdiction of the Centre to disputes arising out of transactions or activities that, although are not investments within the ordinary meaning of the term, contributed to the economic development of the host State.

Accordingly, the first recital of the Preamble alone would not be sufficient in order for an ICSID tribunal to justify the existence of the economic development requirement. As a consequence of the rule of *expressio unius est exclusion alterius*,³⁹⁸ it must be assumed that the requirements set forth in Article 25(1) of the ICSID Convention are exhaustive and ICSID tribunals may not rely on grounds not expressed in the ICSID Convention to deny the jurisdiction of the Centre. This assumption also advocates against the idea that the existence of the

³⁹⁷ This seems to be what the *Pey Casado* tribunal meant when it observed that the reference to “economic development” in the Preamble “is a consequence and not a requirement of the investment: protecting investments, the Convention favors the development of the host State” (free translation of the Spanish original quoted above, see *supra* note 272). See Gaillard, E., *supra* note 54, at 414.

³⁹⁸ The rule of *expressio unius est exclusion alterius* (or interpretation *per argumentum contrario*) derives as a rule of treaty interpretation from the principle of ordinary meaning. Pursuant to this rule, the interpreter must assume that the enumeration of conditions in a treaty creates a presumption against the existence of other conditions which are not expressed in the text of the treaty (see Hogg, J., *supra* note 90, at 13; Jennings, R., and Watts, A., *supra* note 34, at 1279-1280; Linderfalk, U., *supra* note 88, at 302; Wälde, T., *supra* note 5, at 740). The ICJ relied on the rule of *expressio unius est exclusion alterius* in the advisory given in the case concerning *Conditions of Admission of a State to Membership in the United Nations*. In this case, the ICJ had to decide whether the admission of new members of the United Nations could be refused on the basis of conditions not listed in the Charter. The ICJ concluded that the enumeration of the conditions for the admission of new members in Article 4(1) of the Charter must be assumed to be exhaustive:

“The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused; for the text does not differentiate between these two cases and any attempt to restrict it to one of them would be purely arbitrary” (Advisory Opinion of May 28, 1948, ICJ Reports 57 (1948), at 62).

The rule of *expressio unius est exclusion alterius*, however, does not create an absolute presumption and it may be refuted by the application of other rules, such as the rule of necessary implication.

economic development could be justified based on the application of the doctrine of implied powers to the ICSID Convention.

The doctrine of implied powers, developed by the ICJ in its advisory opinion function, has been used in the interpretation of constitutive treaties in order to determine the powers of international organizations. According to this doctrine, which derives from the rule of necessary implication,³⁹⁹ an international organization would be deemed to have any power necessary for the fulfillment of its functions and purposes.⁴⁰⁰ In this sense, one could argue that, in light of the ICSID Convention's declared purpose of promoting economic development, an ICSID tribunal would have the implied power to deny the jurisdiction of the Centre over a dispute that arises out of an investment that does not contribute to the economic development of the host State.

The doctrine of implied powers was first used by the ICJ in the interpretation of the Charter of the United Nations in the *Reparation for Injuries Suffered in the Service of the United Nations* case.⁴⁰¹ In this case, which arose out of the murder of United Nations' agents in Israel, the ICJ had to give an advisory opinion, upon the request of the General Assembly of the United Nations, on the questions as to whether the United Nations had the capacity to bring an international claim against governments for the reparation of damages caused by injuries suffered by

³⁹⁹ The rule of necessary implication is a method of treaty interpretation which allows the interpreter to infer by implication the intention of the parties not expressed in the text of the treaty. See Hogg, James F., *The International Court: Rules of Treaty Interpretation*, 43 Minn. L. Rev. 369 (1958-1959), at 409 *et seq.*; Linderfalk, U., *supra* note 88, at 287.

⁴⁰⁰ See Gordon, E., *supra* note 90, at 816-818; Lauterpacht, E., *supra* note 112, at 423; Greig, D. W., *supra* note 112, at 60-66.

⁴⁰¹ See also the Advisory Opinion of July 23, 1926, given by the PCIJ in the case concerning the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ Series B, No. 13, at 18.

its agents during the performance of their duties; and as to how such capacity could reconcile with the rights of the State of the national who suffered the injuries. In relation to the question as to whether the United Nations could bring an international claim, the ICJ concluded that, although the Charter did not expressly confer international personality on the United Nations, such international personality could be inferred by necessary implication. In this sense, the ICJ decided that:

“In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

[...]

[...]. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.”⁴⁰²

In addition, the ICJ concluded that the United Nations had the capacity to bring an international claim on behalf of its agents against a State for injuries suffered during the performance of their duties, even though such power was not expressly conferred on the organization by its constitutive treaty. The ICJ based its decision

⁴⁰² Advisory Opinion of April 11, 1949, ICJ Reports 174 (1949), at 179-180.

on the idea that an international organization must have all the powers necessary for the performance of its duties. According to the ICJ:

“The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁴⁰³

In the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case, the ICJ also based its decision on the doctrine of implied powers. In this case, the question that the ICJ had to answer was whether the General Assembly of the United Nations could refuse the payment of compensation awards rendered by the United Nations Administrative Tribunal in favor of the organization’s former employees. In giving its advisory opinion, the ICJ had to decide whether the General Assembly had the authority to establish an administrative tribunal for adjudication of disputes between the United Nations and its employees. The ICJ concluded that, despite the lack of an express provision in the Charter, the establishment of an administrative tribunal was essential to ensure the performance of the United Nations’ duties by its employees:

“In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the

⁴⁰³ *Ibid.*, at 182.

Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.”⁴⁰⁴

In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, upon the request of the World Health Organization (“WHO”), the ICJ was asked whether the use of nuclear weapon in armed conflict would be contrary to international law. The ICJ, however, refused to give the advisory opinion requested, to the extent it considered that the matter would fall outside the competence of the WHO. According to the ICJ, while the WHO has the authority to deal with the effects of the use of nuclear weapons, it would not have the power, as a specialized agency, to discuss the legality of such weapons. The authority to discuss the legality of the use of nuclear weapon could not be inferred by necessary implication:

“The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers. [...].

In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons — even in view of their health and environmental effects — would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.”⁴⁰⁵

⁴⁰⁴ Advisory Opinion of July 13, 1954, ICJ Reports 47 (1954), at 57.

⁴⁰⁵ *Supra* note 20, at 79.

The decisions of the ICJ show that certain powers of international organizations not expressly conferred by their constitutive treaties may be inferred by implication. The doctrine of implied powers, however, is not unlimited. According to the ICJ, it must be demonstrated (i) that such implied power derives from a purpose intended by the parties to the treaty; and (ii) that the fulfillment of such purpose would be impaired if the international organization does not exercise the implied power. Accordingly, in order to justify the existence of an implied power, it must be proved that the international organization will not be able to fulfill its purpose and functions unless such power is granted. While there is a degree of subjectivity in the question as to whether the exercise of an authority not expressly conferred is effectively necessary, the doctrine of implied powers creates a presumption against the implication of any authority. At the same time that the ICJ admitted the application of the doctrine of implied powers, it also reaffirmed that international organizations are governed by the principle of speciality. For this reason, the lack of an express provision in the constitutive treaty may be evidence of the intention of the member States not to grant such implied authority.⁴⁰⁶

In light of the decisions of the ICJ, it does not seem possible to justify the existence of the economic development requirement by the application of the doctrine of implied powers. Although the establishment of the Centre was intended to promote economic development through the flow of foreign investment into developing economies,⁴⁰⁷ the ICSID Convention does not confer on the Centre any positive obligation towards the economic development of its

⁴⁰⁶ See Hogg, J., *supra* note 399, at 441; Schermers, H., and Blokker, N., *supra* note 20, at 179-180; Amerasinghe, C. F., *supra* note 112, at 48-49.

⁴⁰⁷ See *supra* note 396.

Contracting States. In fact, the purpose of the ICSID Convention was to create a favorable climate for the flow of foreign investment by fulfilling the lack of adequate facilities for the settlement of investment disputes in an international forum. It is not the function of the Centre to effectively take measures intended to foster the economic development of its Contracting States. It is the existence of the Centre that was intended to promote the economic development of the Contracting States and not its actions. For this reason, the fulfillment of the purposes envisaged by the ICSID Convention would not be impaired by the absence of the authority of an ICSID tribunal to deny the jurisdiction of the Centre over a dispute that arises out of an investment that does not contribute to the economic development of the host State. On the contrary, the purpose of the ICSID Convention to create a favorable climate for the flow of foreign investment may be achieved independently from this requirement.⁴⁰⁸

2.2. The Interpretation of the Term “Investment” in the Light of the Object and Purpose of the ICSID Convention

In the absence of an express provision in the text of the ICSID Convention, the decisions that admitted the existence of the economic development requirement, either to expand or to restrict the jurisdiction of the Centre, were based on the idea that the contribution to the economic development of the host State constitutes an

⁴⁰⁸ As noted by ALEXANDER ORAKHELASHVILI:

“More specifically, implied powers of international organisations are the incidence of effective interpretation of their constituent instruments. The principle of effectiveness requires implying those ‘extensions’ of treaty provisions and obligations which follow from the expressly stated ones. Thus, implied powers as an aspect of effectiveness refer to those extensions of expressly delegated powers which are necessary for their effective implementation. *The doctrine of implied powers cannot be understood to imply the presence of certain powers simply for the sake of increasing the overall effectiveness of international institutions*” (Orakhelashvili, A., *supra* note 30, at 431 – emphasis added).

element of the notion of investment within the meaning of the ICSID Convention. According to this construction, the economic development requirement would not be an autonomous jurisdictional requirement, but an element of the meaning of the term “investment” for the purposes of the ICSID Convention. This is the essence of the economic development requirement according to both approaches. For the *CSOB* approach, even if a transaction or activity is not an investment within its ordinary meaning, such transaction or activity may be nonetheless considered as an investment for the purposes of the ICSID Convention if it contributes to the economic development of the host State. For the *Salini* approach, even if a transaction or activity is an investment within its ordinary meaning, such transaction or activity is not an investment within for the purposes of the ICSID Convention unless it contributes to the economic development of the host State. In both approaches, this element of the notion of the investment would find support in one of the main objectives and purposes of the ICSID Convention, namely the economic development through the flow of foreign investments into developing countries.

The problem of this construction of the investment requirement, however, is that it assumes that the Contracting States, despite the lack of a definition of investment in the ICSID Convention, intended to confer a special meaning on the term “investment”. In extending the jurisdiction of the Centre to disputes that arise out of a transaction or activity that it is not an investment within its ordinary meaning, the *CSOB* approach considers that, for the purposes of the ICSID Convention, the meaning of the term “investment” is wider than its ordinary meaning. Likewise, if for the *Salini* approach it is not enough for a transaction or activity to qualify as an

investment within its ordinary meaning, but it must contribute to the economic development of the host State in order to fulfill the investment requirement of the ICSID Convention, the elements of the notion of investment within the meaning of ICSID Convention are not exclusively based on the ordinary meaning of the term “investment”. And, for both approaches, the source of the intention to confer this special meaning on the term “investment” would be found in the first recital of the Preamble of the ICSID Convention, which indicates that the contribution to economic development is within the object and purpose of the ICSID Convention.

The opinion of SCHREUER on the meaning of the term “investment”, which served as the basis for the *Salini* test,⁴⁰⁹ is clear in the sense that the contribution to the economic development of the host State constitutes a special feature of the investment requirement of the ICSID Convention and not an element of the term “investment” within its ordinary meaning. According to SCHREUER, the economic development requirement “is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors’ Report [...] suggest that development is part of the Convention’s object and purpose.”⁴¹⁰ This construction of the ICSID Convention, however, is inconsistent with the general rule of treaty interpretation embodied in the Vienna Convention.

The Vienna Convention settled a dispute over the existence and content of the rules of treaty interpretation in customary international law. At the time that the Vienna Convention was formulated, there were essentially three major approaches to the interpretation of treaties, which were identified as the “textual approach”,

⁴⁰⁹ See *supra* at pp. 96 *et seq.*

⁴¹⁰ Schreuer, C., *supra* note 23, at 140 – footnote excluded.

“intentions approach” and “teleological approach”.⁴¹¹ These three approaches diverge from each other in the question as to the relevance of the elements that may be taken into consideration in interpreting a treaty. According to the intentions approach, in order to establish the correct meaning of a treaty, the process of treaty interpretation should aim at achieving the real intention of the parties to the treaty as a subjective element distinct from its text. In this sense, the intentions approach advocates a liberal recourse to elements extraneous to the text of the treaty, especially to the preparatory works of treaties, even if the text of the treaty is unambiguous. The teleological approach, on the other hand, focuses on the declared and apparent objects and purposes of a treaty as the main source of treaty interpretation. According to this approach, treaties, especially general multilateral treaties, are “living documents” that have their existence detached from the initial intention of their parties. Hence, this approach advocates the use of teleological constructions that may go beyond the text of the treaty.

Finally, for the textual approach, which was adopted in the Vienna Convention, treaty interpretation should be primarily based on the text of the treaty, as the main source of the intention of the parties. For this reason, the textual approach, which is based on two major principles of interpretation — the principle of

⁴¹¹ See Fitzmaurice, G. G., *supra* note 87, at 1-6; Fitzmaurice, G. G., *supra* note 90, at 204-209; Neuhold, Hanspeter, *The 1968 Session of the United Nations Conference on the Law of Treaties*, 19 *Österreichische Zeitschrift für Öffentliches Recht* 59 (1969), at 72-73; Jacobs, F., *supra* note 126, at 318-320; Mehrish, B., *supra* note 299, at 39-54; Sinclair, I., *supra* note 34, at 114-115; McRae, Peter, *The Search for Meaning: Continuing Problems with Interpretation of Treaties*, 33 *Victoria U. Wellington L. Rev.* 209 (2002), at 211-223; Orakhelashvili, A., *supra* note 30, at 304-305; Villiger, M., *supra* note 126, at 421-422; Fitzmaurice, Malgosia, and Merkouris, Panos, *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, in Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On 153 (Fitzmaurice, Malgosia, Elias, Olufemi, and Merkouris, Panos, eds., Leiden: Martinus Nijhoff Publishers, 2010), at 155.

actuality and the principle of the natural meaning⁴¹² —, admits very limited recourse to elements extraneous to the text of the treaty, such as the preparatory works of treaties, only allowed in cases in which the text of the treaty is not conclusive, and rejects teleological constructions that go beyond the text of the treaty. This approach is reflected in the general rule of treaty interpretation set forth in Article 31(1) of the Vienna Convention, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴¹³

The doctrine of textual interpretation, embodied in the Vienna Convention, finds support in the practice of the PCIJ and of the ICJ. According to GERALD FITZMAURICE, whose work inspired the codification of the general rule of treaty interpretation by the International Law Commission (“ILC”):

“Doctrine of textual interpretation. The thought of the majority [of the ICJ] could be summed up by saying that in their view the intentions of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text, and not in any extraneous source. Furthermore, treaties must be interpreted as they stand, and subject to the limitations inherent in the fact that they only contain so many articles, phrases, and words. The intentions or presumed intentions of the framers cannot be invoked to fill in gaps, or import into the treaty something of which is apparently plain, or to give them a sense different from that which they possess according to their normal and natural meaning. In short, the attitude of the Court to a text is not, primarily, to ask itself what was this text *intended* to mean (still less of course

⁴¹² FITZMAURICE defined the principles of actuality and natural meaning as follows:

“I. *Principle of Actuality.* Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural Meaning.* Particular words and phrases are to be given their normal, natural, and unstrained meaning, in the context in which they occur”

(Fitzmaurice, G. G., *supra* note 87, at 9).

⁴¹³ 8 ILM 679 (1969), at 691-692.

what *ought* it to mean, or to be made to mean), but what does it in fact mean on its actual wording?”⁴¹⁴

In the advisory opinion given in the *Polish Postal Service in Danzig* case, the predecessor of the ICJ, the PCIJ, observed that “[i]t is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.”⁴¹⁵ This approach was followed by the ICJ in the decisions prior to the conclusion of the Vienna Convention. As the ICJ observed in the *Competence of the General Assembly for the Admission of a State to the United Nations* case:

“The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. [...].

[...]

When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. [...].”⁴¹⁶

⁴¹⁴ Fitzmaurice, G.G., *supra* note 87, at 7 – footnote excluded, emphasis in the original. According to the ILC, “the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain” (Yearbook of the International Law Commission, 1964, vol. II, at 220-221 – footnote excluded).

⁴¹⁵ Advisory Opinion of May 16, 1925, PCIJ Series B, No. 11, at 39.

⁴¹⁶ *Supra* note 114, at 8.

The doctrine of textual interpretation was reaffirmed in subsequent decisions of the ICJ. For instance, in the case concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, the ICJ stated that:

“The words of Article 28(a) must be read in their natural and ordinary meaning, in the sense which they would normally have in their context. It is only if, when this is done, the words of the Article are ambiguous in any way that resort need be had to other methods of construction. [...]”⁴¹⁷

In the case concerning the *Temple of Preah Vihear*, the ICJ noted that “the Court must apply its normal canons of interpretation, the first of which, according to the established jurisprudence of the Court, is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur.”⁴¹⁸

While the purpose of treaty interpretation is the search for the intention of the parties to the treaty in order to give effect to the consent of the parties to be bound by the treaty, Article 31(1) of the Vienna Convention establishes a method in which each element plays a relevant role as a source of the parties’ intention.⁴¹⁹ Above all, under the general rule of treaty interpretation, the primary source of the intention of the parties are the actual terms employed in the treaty — the text of the treaty —, which must be assumed to have been employed in the light of its

⁴¹⁷ *Supra* note 90, at 159-160.

⁴¹⁸ Judgment of May 26, 1961, ICJ Reports 17 (1961), at 32.

⁴¹⁹ See Orakhelashvili, Alexander, *The Recent Practice on the Principles of Treaty Interpretation, in 40 Years of the Vienna Convention on the Law of Treaties* 117 (Orakhelashvili, Alexander, and Williams, Sarah, eds., London: British Institute of International and Comparative Law, 2010), at 121-122.

ordinary or natural meaning.⁴²⁰ The interpreter may only give to a term a meaning that differs from its ordinary meaning — a special meaning — if the parties to the treaty intended to do so. In this sense, Article 31(4) of the Vienna Convention provides that “[a] special meaning shall be given to a term if it is established that the parties so intended.”⁴²¹ This situation occurs especially in treaties containing a definition of a term,⁴²² such as, for instance, investment treaties setting forth a definition of investment. In this case, the definition of investment of the treaty prevails if it does not correspond to the ordinary meaning of the term “investment” because the parties expressly intended to confer a special meaning on the term. But the interpreter of a treaty may not rely on its object and purpose in order to demonstrate that the parties intended to confer a special meaning on a term.

Under the general rule of treaty interpretation of the Vienna Convention, the reference to the object and purpose of a treaty — which provides for a teleological element in treaty interpretation and is also linked to the principle of effectiveness,

⁴²⁰ As observed by the ICJ:

“The Court will thus proceed to the interpretation of Article 35, paragraph 2, of the Statute, and will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose. *Interpretation must be based above all upon the text of the treaty.* As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion” (*Legality of Use of Force*, *supra* note 34, at 1199 – emphasis added).

See also *Territorial Dispute*, *supra* note 34, at 21-22.

As observed by the ILC, “the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. [...]. [T]he parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them” (Yearbook of the International Law Commission, 1964, vol. II, at 220-221).

⁴²¹ 8 ILM 679 (1969), at 692.

⁴²² See Gardiner, R., *supra* note 112, at 296.

or the principle *ut res magis valeat quam pereat*⁴²³ —is not an autonomous source of the intention of the parties; its use is a second step and contingent upon the ordinary meaning of the terms and may not be used to override the text of the treaty.⁴²⁴ Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms [...] in the light of its object and purpose”⁴²⁵ and not that the treaty shall be interpreted in the light of its object and purpose.⁴²⁶ The general rule of treaty interpretation of the Vienna Convention provides for an order of factors of interpretation that do not operate independently from or alternatively to the ordinary meaning of the text.⁴²⁷

⁴²³ See Linderfalk, U., *supra* note 88, at 204-205; Gardiner, R., *supra* note 112, at 189; Fitzmaurice, M., and Merkouris, P., *supra* note 411, at 155-156.

⁴²⁴ According to SINCLAIR, “[i]t is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified” (Sinclair, I., *supra* note 34, at 130 – emphasis in the original). In the same sense, GARDINER points out that:

“[I]n the Vienna rules, object and purpose function as a means of shedding light on the ordinary meaning rather than merely as an indicator of a general approach to be taken to treaty interpretation. The main issues relating to ‘object and purpose’ are what these terms signify, how they are to be identified, and what use it to be made of them. Also within the ambit of this concept is the second meaning of the ‘principle of effectiveness’. This is the notion that an objective of treaty interpretation is to produce an outcome that advances the aims of the treaty, a notion which is obviously dependent on identifying the object and purpose of the treaty. It is to be noted, however, that this element of the rule is not one allowing the general purpose of a treaty to override its text. Rather, object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light. However, the precise nature, role, and application of the concept of ‘object and purpose’ in the law of treaties present some uncertainty and it has been described in the title of the leading study of the topic (to which reference should be made for a full account of its history and the concepts involved) as an ‘enigma’.” (Gardiner, R., *supra* note 112, at 190).

See also Linderfalk, U., *supra* note 88, at 203; Villiger, M., *supra* note 126, at 428; Orakhelashvili, A., *supra* note 419, at 131.

⁴²⁵ 8 ILM 679 (1969), at 691-692.

⁴²⁶ See Linderfalk, U., *supra* note 88, at 203-204.

⁴²⁷ Criticizing the view that Article 31(1) of the Vienna Convention provides for a “holistic rule of interpretation”, ALEXANDER ORAKHELASHVILI points out that:

“What stands out in this approach is the prejudice against the relevance of the text, manifested by the use of the adjective ‘raw’. There is in reality no legal concept of raw text. There is instead the concept of plain and ordinary meaning under Article

The practice of the ICJ shows that the reliance on the object and purpose of the treaty is a second step and may not contradict the textual interpretation in accordance with the ordinary meaning of the treaty's terms. In the *Kasikili/Sedudu Island* case, the ICJ relied on object and purpose of a treaty in order to “clarify the meaning to be given to its terms,”⁴²⁸ given the various meaning that could be conferred on the term “main channel” as employed in the Treaty of July 1, 1890, concluded between the United Kingdom and Germany. A similar approach was followed in the *LaGrand* case, in which the ICJ had to decide whether provisional measures ordered under Article 41 of its Statute should be binding.⁴²⁹ After considering the ordinary meaning of term “indicate” as employed in Article 41 was not conclusive, the ICJ relied on the object and purpose of the Statute in order

31 of the Vienna Convention. This provision speaks of ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Thus, the ultimate task is to use context and object and purpose to find the meaning of the text. This is substantially different from the Panel’s projection of ‘one holistic rule of interpretation than a sequence of separate tests to be applied in a hierarchical order’. As for the Panel’s observation that ‘Text, context and object-and-purpose correspond to well established textual, systemic and teleological methodologies of treaty interpretation’, these relevant factors of interpretation do not really refer to different methods that operate independently from, or as an alternative to, each other. These factors refer only to the methods of interpretation that are laid down in strict order of hierarchy under Articles 31 and 32 of the Vienna Convention. As the consistent jurisprudence of the Appellate Body demonstrates, neither context nor object and purpose are viewed as alternative to the plain textual meaning of words, which they would have to be unless their relevance was subordinated to that of the ordinary meaning of words

[...]

The essence of a ‘holistic’ approach seems to be the balance of interpretative outcomes under particular methods of interpretation. The ‘holistic’ approach in essence reflects the possibility of political factors impacting on the process of interpretation, and also the possibility that the decision-maker replaces the outcome of consensual agreement between States with what this outcome should be according to his own perception. In other words, the essence of the ‘holistic’ approach is about blurring the distinction between law and politics, and about promoting subjectivism in the process of interpretation” (Orakhelashvili, A., *supra* note 30, at 310-311).

⁴²⁸ *Supra* note 34, at 1072.

⁴²⁹ Article 41 of the Statute of the International Court of Justice provides that:

“Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council” (39 AJIL Sup. 215 (1945), at 224).

to conclude that the interpretation of the term “indicate” would entail that provisional measures ordered are binding on the parties.⁴³⁰

The practice of the ICJ also shows that the object and purpose of a treaty cannot be used as an independent source of the intention of the parties in the interpretation of treaty provisions.⁴³¹ In the *Oil Platform* case, in interpreting the Treaty of Amity, Economic Relations and Consular Rights of August 15, 1955, concluded between Iran and the United States, the ICJ considered that, while it would take into account the object and purpose the interpretation of the treaty’s provisions, it could not rely on the object and purpose as an independent source in disregard of the other provisions of the treaty:

“In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.”⁴³²

In the practice of the PCIJ and of the ICJ prior to the codification of the general rule of treaty interpretation of the Vienna Convention, the principle of effectiveness was also applied as a secondary element in the interpretation of treaties. In the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ, interpreting the special agreement entered into by France and Switzerland, considered that “in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have

⁴³⁰ See Judgment of June 27, 2001, ICJ Reports 466 (2001), at 502-503.

⁴³¹ See Gardiner, R., *supra* note 112, at 197-198.

⁴³² *Supra* note 34, at 815.

appropriate effects.”⁴³³ In the *Corfu Channel Case*, the ICJ, in interpreting the special agreement entered into between Albania and the United Kingdom, considering that the text of the special agreement would give rise to certain doubts, applied the principle of effectiveness in order to adopt the interpretation that would give effect to the provision contained in the special agreement:

“In the first question of the Special Agreement the Court is asked:

(i) Albania under international law responsible for the explosions and for the damage and loss of human life which resulted from them, and

(ii) is there any duty to pay compensation?

This text gives rise to certain doubts. If point (i) is answered in the affirmative, it follows the establishment of responsibility that compensation is due, and it would be superfluous to add point (ii) unless the Parties had something else in mind than a mere declaration by the Court that compensation is due. It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. [...].”⁴³⁴

In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, the ICJ observed that the principle of effectiveness would not have the ability to allow an interpretation that is inconsistent with the text of the treaty:

“The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their *letter* and *spirit*.”⁴³⁵

In the *South West Africa* cases, the ICJ refused to follow a teleological approach in the interpretation of treaty provisions:

⁴³³ Order of August 19, 1929, PCIJ Series A, No. 22, at 13.

⁴³⁴ Judgment of April 9, 1949, ICJ Reports 4 (1949), at 23-24

⁴³⁵ Advisory Opinion of July 18, 1950, ICJ Reports 221 (1950), at 229 – emphasis added.

“It may be urged that the Court is entitled to engage in a process of ‘filling in the gaps’, in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. [...]”⁴³⁶

In the light of Article 31(1) of the Vienna Convention and of the practice of the PCIJ and of the ICJ prior and subsequent to the codification, it is well settled that the general rule of treaty interpretation of the Vienna Convention does not admit any construction that goes beyond the text of the treaty. If the main source of the intention of the parties is the text of the treaty, which must be interpreted in accordance with its ordinary meaning, in order for the object and purpose of a treaty to have the effect of conferring a special meaning on a term, one would have to admit that the object and purpose could contradict the ordinary meaning of the term and, thus, contradict the text of the treaty. For this reason, although one of the main purposes of the ICSID Convention is the promotion of economic development through the flow of foreign investments, the object and purpose of a treaty may not be used to contradict the ordinary meaning of its terms and be used to confer a special meaning on a term “investment”.

This construction may also be confirmed by the drafting history of the ICSID Convention. There is no indication that the Preamble of the ICSID Convention was ever intended to create a jurisdictional requirement whereby an ICSID tribunal would be allowed to deny the jurisdiction of the Centre based on the

⁴³⁶ Judgment of July 18, 1966, ICJ Reports 6 (1966), at 48.

argument that the dispute arises out of an investment that does not contribute to the economic development requirement of the host State.⁴³⁷ Likewise, the drafting history of the ICSID Convention shows that it was not intended to confer on the meaning of the term “investment”, as employed in the wording of Article 25(1) of the ICSID Convention, an element that could justify the existence of the economic development requirement.⁴³⁸

The teleological character of the decisions that admitted the existence of the economic development requirement is evident. In the dissenting opinion to the *MHS* decision on annulment, Judge MOHAMED SHAHABUDEEN asserts that “[i]f it is agreed that there are outer limits to an ICSID investment outside of the will of the parties, it is not arguable that those limits do not comprise a requirement for contribution to the economic development of the host State.”⁴³⁹ While Judge SHAHABUDEEN admits that the economic development requirement “is not expressly laid down in the relevant texts,”⁴⁴⁰ he argues nonetheless that “a thing which is not expressly stated is yet law *if it can be worked out from the context*.”⁴⁴¹ But the meaning of “context” in the dissenting opinion does not seem

⁴³⁷ See History of the ICSID Convention, *supra* note 73, at 83, 135, 188, 293, 363, 451-453, 542.

⁴³⁸ *Ibid.*, at 623, 843-844. From the documents pertaining to the drafting history of the ICSID Convention, it seems that the idea that the jurisdiction of the Centre would be limited to disputes that arise out of investments which contribute to the economic development of the host State was suggested only once. During the discussions held in the Legal Committee, the representative of Spain, MELCHOR, suggested that:

“[O]nly ‘direct’ investors should be permitted to appear before the Centre. A State should know by whom it can expect to be sued in connection with specific investments. And *the investments to be covered by this Convention should be those direct investments that facilitate the economic development of the country*. The reference to direct investments would have the advantage of preventing shareholders of a company from suing the foreign State where the company’s investment was made” (*ibid.*, at 705 – emphasis added).

It seems, however, that the suggestion of the Spanish representative was never taken into account, once the final text of the ICSID Convention does not make any distinction between direct investment and other forms of investments. See *Fedax*, *supra* note 248, at 1383.

⁴³⁹ *Ibid.*, at 1106.

⁴⁴⁰ *Idem.*

⁴⁴¹ *Idem* – emphasis added.

to correspond to what the term means in Article 31(1) of the Vienna Convention.⁴⁴² Most arguments used by Judge SHAHABUDEEN in support of his interpretation are based on a purported real intention of the Contracting States not expressed in the text of the ICSID Convention, relied on as a primary means of treaty interpretation, which he inferred from the object and purpose of the ICSID Convention.

The first ground on which the dissenting opinion is based is the Preamble of the ICSID Convention. Judge SHAHABUDEEN considered that the reference to “economic development” in the Preamble evidences the fact that the ICSID Convention does not “contemplate economic development of entities divorced from the economic development of States.”⁴⁴³ According to him, “[a]n ICSID investment might indeed be made in favour of private entities but not for their own enrichment exclusively: only on the basis that, though made in favour of private entities, such an investment would — not might — promote the economic development of the host State.”⁴⁴⁴ In order to support this argument, the dissenting opinion relies on the fact the Centre was established under the auspices of the

⁴⁴² The Vienna Convention adopts a narrow meaning of “context”, which is intended to express the rule derived from the principle of integration, according to which the terms of a treaty must be interpreted as a whole (*supra* note 87). The term “context” does not mean that a treaty must be interpreted in accordance with its historical or political context and the circumstances surrounding its conclusion. In accordance with Article 31(2) of the Vienna Convention:

“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” (8 ILM 679 (1969), at 692).

See Jabobs, F., *supra* note 411, at 335; Sinclair, I., *supra* note 34, at 127; Gardiner, R., *supra* note 112, at 177-178; Wälde, T., *supra* note 5, at 754; Orakhelashvili, A., *supra* note 30, at 340.

⁴⁴³ *Supra* note 363, at 1107.

⁴⁴⁴ *Idem*.

IBRD and on statements made in the Report of the Executive Directors,⁴⁴⁵ according to which the conclusion of the ICSID Convention envisaged the promotion of economic development.⁴⁴⁶

Moreover, Judge SHAHABUDEEN considered that the economic development requirement could be inferred from the idea that no State would agree to incur the financial burden resulting from the establishment of the Centre if there were no benefits to the economic development of the host State. According to him, “[a] *reasonable inference* is that Contracting States did not agree that these burdens on them would apply to benefit transactions which did not promote the economic development of the host State.”⁴⁴⁷ However, this inference constitutes an attempt to justify the existence of purported real intention of the Contracting States not expressed in the text of the ICSID Convention. In addition, the dissenting opinion relies at this point on the opinion of SCHREUER that “it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction.”⁴⁴⁸ This demonstrates the confusion between the questions as to whether ordinary commercial transactions would fall within the jurisdiction of the Centre and whether an activity or transaction must contribute to the economic development of the host State in order to comply with the investment requirement of the ICSID Convention. The fact that an investment is considered not to have

⁴⁴⁵ *Idem.* Similarly, in his dissenting opinion to the *Abaclat* decision on jurisdiction, Professor ABI-SAAB argued that:

“It is most significant that the ICSID Convention was elaborated and the Centre established on the initiative and within the framework of the International Bank for Reconstruction and Development; an institution which concentrated its activities since the early sixties almost exclusively to the second facet of its mandate according to its title, i.e. the “development” of the less developed countries” (*supra* note 288, at para. 48).

⁴⁴⁶ See *supra* note 396.

⁴⁴⁷ *Supra* note 363, at 1107 – emphasis added.

⁴⁴⁸ *Idem.*

contributed to the economic development of the host State does not necessarily make such investment an ordinary commercial transaction.

The dissenting opinion recognizes nevertheless that the documents pertaining to the drafting history of the ICSID Convention do not contain any indication that the existence of a jurisdictional requirement based on the contribution to the economic development of the host State was intended.⁴⁴⁹ Despite this fact, Judge SHAHABUDDEEN concluded that, if the existence of the economic development requirement could not be justified, there would be “nothing to separate an ICSID investment from any other kind of investment; in the result, an ICSID arbitration would be indistinguishable from any other kind of arbitration (and there are several) concerning an investment dispute.”⁴⁵⁰ This argument confirms that the interpretation advocated in the dissenting opinion lies in the idea that the purpose of fostering economic development would have the effect of conferring a special meaning on the term “investment”, necessary to “call back the organization to its original mission.”⁴⁵¹ This is expressly admitted:

“The effect of reasoning opposed to that advanced above is that, if it happens that an investment does not play a role in the economic development of the host State, that investment is nonetheless fully entitled to claim the protection of ICSID if it meets dictionary criteria of what is an investment. That is strange: *one would have thought that an ICSID investment was a special kind of investment.* A microscopic approach could no doubt reach a different result, but such a result would be at variance with the discernible motivation of the ICSID scheme which, in my opinion, was designed to contribute to the economic development of host States. That purpose is not satisfactorily put by merely stating that an ICSID investment plays a

⁴⁴⁹ *Ibid.*, at 1108.

⁴⁵⁰ *Idem.*

⁴⁵¹ *Ibid.*, at 1107.

role in the economic development of the host State; it has to be stated that such development is a condition of an ICSID investment.”⁴⁵²

The basis of the dissenting opinion — the special meaning conferred on the term “investment” — is very similar to the arguments used in other decisions that admitted the economic development requirement. In *CSOB*, the tribunal considered that the wording of the Preamble of the ICSID Convention “permits an *inference* that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”⁴⁵³ In the *Salini* decision, the tribunal made a clear distinction between the elements that “[t]he doctrine generally considers that investment infers”⁴⁵⁴ — which would be based on the ordinary meaning of investment — and the economic development requirement as an additional element, the existent of which would be detached from the other elements and could be inserted in the notion of investment “[i]n reading the Convention’s preamble.”⁴⁵⁵ In *Mitchell* likewise, the *ad hoc* committee supported its decision on the idea that “[t]he 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,”⁴⁵⁶ and made no reference to the ordinary meaning of investment. In the *MHS* award, the sole arbitrator expressly stated that the existence of the economic development requirement could be justified “taking a teleological approach to the interpretation of the ICSID Convention.”⁴⁵⁷ In his dissenting

⁴⁵² *Ibid.*, at 1109 – emphasis added.

⁴⁵³ *Supra* note 252, at 273 – emphasis added.

⁴⁵⁴ *Supra* note 259, at 622.

⁴⁵⁵ *Idem.*

⁴⁵⁶ *Supra* note 281, at para 28.

⁴⁵⁷ *Supra* note 268, at para. 66.

opinion to the *Abaclat* decision on jurisdiction, Professor ABI-SAAB noted that “[t]he Preamble of the Convention clearly reveals its ‘developmental’ object and purpose, as a means of encouraging ‘international cooperation for development, and the role of private international investment therein’.”⁴⁵⁸

What is common in all these decisions is that none of them attempted to justify their interpretation in accordance with the ordinary meaning of the term “investment” as employed in Article 25(1) of the ICSID Convention. Their grounds were limited to the idea that the purpose of the ICSID Convention envisages the economic development of its Contracting States. Even though most decisions were allegedly applying the general rule of treaty interpretation of the Vienna Convention,⁴⁵⁹ these decisions engaged in a teleological interpretation that goes beyond the text of the ICSID Convention.⁴⁶⁰ As the ICJ observed in the

⁴⁵⁸ *Supra* note 288, at para. 49.

⁴⁵⁹ See *Mitchell*, *supra* note 281, at para. 25; *MHS*, *supra* note 268, at para. 65, and *supra* note 363, at 1105.

⁴⁶⁰ In the *AFT* decision, the *ad hoc* tribunal adopted a similar teleological approach to the one adopted in the decisions that admitted the existence of the economic development requirement. In interpreting the meaning of the term investment contained in the Agreement Between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments of October 5, 1990, the tribunal relied on the preamble of the BIT in order to add an element to definition of investment:

“According to Article 31(1) of the Vienna Convention, the treaty must be interpreted not only pursuant to its ‘ordinary meaning’, but also taking into account the general context, the object and the purpose of the treaty. As seen before, the object and purpose of the BIT, as reflected in its preamble, is to intensify the economic cooperation to the mutual benefit of both States and attract foreign investments with the aim to foster their economic prosperity. It is hard to see how the Assignment Contract might have contributed to either the mutual economic cooperation between States or to the growth of Slovak economic prosperity. It was a rather a private, neutral and speculative business, having no impact on the State economy” (*supra* note 283, at para. 236).

This type of approach can be compared with the interpretative approach adopted by the European Court of Human Rights (“ECtHR”) in the interpretation of the European Convention on Human Rights (Convention on Human Rights and Fundamental Freedoms of November 4, 1950, 213 UNTS 222, (entered into force September 3, 1953) (“ECHR”)), which, however, is inconsistent with the rules of treaty interpretation embodied in the Vienna Convention (see Sinclair, I., *supra* note 34, at 131-135). The decision rendered in the *Golder* case is one example of the interpretative approach adopted by the ECtHR. In this case, the majority of the ECtHR decided that Article 6.1 of the ECHR implied the right of access to courts, although such right was not expressly conferred by the ECHR. While recognizing the applicability of the rules of treaty interpretation of the

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania case, “[i]t is the duty of the Court to interpret the Treaties, not to revise them.”⁴⁶¹

2.3. Interpretation in Good Faith

In the dissenting opinion to the *MHS* decision on annulment, Judge SHAHABUDDEN asserted that “[a] reasonable inference is that Contracting States [of the ICSID Convention] did not agree that these burdens [— arising out of the expenditures of the Centre —] on them would apply to benefit transactions which did not promote the economic development of the host State.”⁴⁶² The reliance on a “reasonable inference” raises the question as to whether the existence of the economic development requirement could be justified in interpreting the ICSID Convention in the light of the principle of good faith in accordance with the general rule of treaty interpretation of the Vienna Convention.

The application of the principle of good faith is usually found in the practice of ICSID tribunals in the interpretation of arbitration agreements, but not in the interpretation of the ICSID Convention. In the case of *Amco Asia Corporation and Others v. Indonesia* (“*Amco*”), the tribunal noted that:

Vienna Convention, the majority of the ECtHR, based on the object and purpose of the ECHR, but against its text, concluded that the existence of the right of access to courts could be justified by inference (see Judgment of February 21, 1975, 57 ILR 201 (1980), at 212-218). See Letsas, George, *Intentionalism and the Interpretation of the ECHR*, in Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On 257 (Fitzmaurice, Malgosia, Elias, Olufemi, and Merkouris, Panos, eds., Leiden: Martinus Nijhoff Publishers, 2010), at 259-263; Fitzmaurice, Malgosia, *Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights*, in 40 Years of the Vienna Convention on the Law of Treaties 54 (Orakhelashvili, Alexander, and Williams, Sarah, eds., London: British Institute of International and Comparative Law, 2010).

⁴⁶¹ *Supra* note 435, at 229.

⁴⁶² *Supra* note 363, at 1107.

“In the first place, like any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.

Moreover — and this is again a general principle of law — any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.”⁴⁶³

In the decision, the *Amco* tribunal did not apply the principle of good faith in the interpretation of the ICSID Convention, but relied on it in the interpretation of the extension of the parties’ consent to the jurisdiction of the Centre. The question before the tribunal was whether there was an agreement to consider a locally incorporated company as a national of another Contracting States for the purposes of the second clause of Article 25(2)(b) of the ICSID Convention.⁴⁶⁴

The principle of good faith was also mentioned in the award rendered in the case of *Société Ouest Africaine des Bétons Industriels v. Senegal* (“*SOABI*”). In the award, the tribunal observed that:

“In the Tribunal’s opinion, an arbitration agreement must be given, just as with any other agreement, an interpretation consistent with the

⁴⁶³ Decision on Jurisdiction of September 25, 1983, 1 ICSID Reports 389 (1993), at 394 – emphasis in the original.

⁴⁶⁴ As mentioned earlier, pursuant to the ICSID Convention, the nationality of juridical persons is defined in accordance with the place of incorporation or set criterion (see *supra* note 84). The second clause of Article 25(2)(b) provides, nevertheless, that “[n]ational of another Contracting State’ means [...] any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention” (1 ICSID Reports 3 (1993), at 9-10). It has been disputed in ICSID practice, however, whether the mere consent to ICSID arbitration entails an implied agreement to treat a locally incorporated company as a national of another Contracting States or whether the second clause of the Article 25(2)(b) entails an express agreement of the disputing parties (see Schreuer, C., *supra* note 23, at 296-301; Castro de Figueiredo, R., *supra* note 84, at 9, footnote 28).

principle of good faith. In other words, the interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings. It is this principle of interpretation, rather than one of *a priori* strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.”⁴⁶⁵

Similarly to the *Amco* decision, in *SOABI* the tribunal did not apply the principle of good faith in the interpretation of the ICSID Convention, but of the arbitration agreement that provided for the consent of the disputing parties to the jurisdiction of the Centre.⁴⁶⁶

In commercial arbitration practice, it has been suggested that, in interpreting an arbitration agreement, the principle of good faith allows an arbitral tribunal to give primacy to true intention of parties over the declared intention if it is proved that the parties intended something different from what is stated in the arbitration agreement:

“The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith. This principle does not of course mean, as is sometimes suggested, that to challenge the existence or validity of an arbitration is necessarily an act of bad faith. In order for there to be bad faith, the existence and validity of the agreement on which a party seeks to renege must have been previously established. In fact, *this rule of interpretation means that a party’s true intention should always prevail over its declared intention, where the two are not the same*. An example of bad faith will be the conduct of a party relying on an argument of pure form, which is wholly out of context or plainly contrary to the structure or the purpose of the agreement, in a bid to evade obligations which it had clearly undertaken to perform but which were expressed in ambiguous terms. Here, ‘interpretation in good faith’ is simply a less technical way of saying that ‘when interpreting a contract, one must look for the parties’ common

⁴⁶⁵ Award of February 25, 1988, 2 ICSID Reports 190 (1994), at 205-206.

⁴⁶⁶ See also *CSOB*, *supra* note 252, at 263; and *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, Award of August 18, 2008, 20(6) World Trade and Arb. Materials 189 (2008), at 223-224.

intention, rather than simply restricting oneself to examining the literal meaning of the terms used.’ However, the moral connotation of the expression ‘interpretation in good faith’ is more in keeping with the tenor of general principles of law.”⁴⁶⁷

Accordingly, one could argue that, in the light of the principle of good faith, the Contracting States of the ICSID Convention reasonably expected that, given the object and purpose of the ICSID Convention to promote the economic development and the consequences of their obligations under the ICSID Convention, the contribution to the economic development of the host State would be an element of the jurisdiction of the Centre, even though there is no declared intention in the ICSID Convention that entails the economic development requirement. In other words, States grant access to the ICSID dispute settlement system in exchange for the contribution to their economic development by the transaction or activity carried out by the investor.⁴⁶⁸

⁴⁶⁷ Gaillard, Emmanuel, and Savage, John, Fouchard Gaillard Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999), at 257-258 – emphasis added.

⁴⁶⁸ According to OMAR E. GARCÍA-BOLIVAR:

“At a fundamental level, the arguments put forward in this chapter are grounded in the nature of the State itself. Inarguably, the welfare and development of their nationals and residents is of primary concern to States. It is also clear that in promoting that development, significant amounts of capital can be required. Accordingly, a range of strategies is often adopted by States to attract that capital, a key one of which is enhancing the domestic investment climate through entering into international legal instruments that provide protection to foreign investment. In concluding international investment agreements (IIAs), States agree to grant international protection to foreign investments — and, in return, they expect to attract the capital needed to promote their economic development. For host States, this assumption is a central, if often unarticulated, rationale behind the conclusion of the agreement. For this reason, it is important to consider the intention of States when entering into IIAs and to gain a proper understanding of why the treaties were concluded. This understanding could, in turn, influence the interpretation of the IIAs’ provisions under international law. The argument presented in this chapter is that this type of analysis should play an important role in the interpretation and application of IIAs, and in adjudicating fair solutions to the disputes that might arise between investors and States” (see *supra* note 50, at 586-487).

See also Mortenson, J., *supra* note 257, at 258.

Under the general rule of treaty interpretation, however, the principle of good faith does not have such effect. To allow the interpreter of a treaty to disregard the ordinary meaning of the text based on the idea that treaty interpretation should seek what the parties to the treaty reasonably expected would result in a direct contradiction with the principles of actuality and of ordinary meaning.⁴⁶⁹ The reference to “good faith” in Article 31(1) of the Vienna Convention has been interpreted as an indication that the task of treaty interpretation is to give effect of the intention of the parties.⁴⁷⁰ Interpretation in good faith would also be one of the grounds in the Vienna Convention for the application of the principle of effectiveness.⁴⁷¹ In any case, interpretation in good faith does not have an independent function in the general rule of treaty interpretation.⁴⁷²

⁴⁶⁹ According to FRANCIS G. JACOBS:

“Taken in its broadest sense, the principle of good faith when applied to interpretation of treaties would amount to no less than a direct contradiction of the ordinary meaning rule. In its broadest sense the principle would require that the spirit of the agreement should prevail over the text, and it is invoked specifically to justify a departure from the literal terms of the document: *semper in fide quid senseris, non quid dixeris cogitandum*.

Taken in the context of Article 27 of the Draft Convention, it is clear that the principle of good faith has a more restricted scope. What is less clear, at first sight, is what its precise significance is intended to be. Used as an integral part of the textual approach, it is presumably intended to restrain an excessive literalism. On the other hand, it is not to be construed too narrowly as merely to preclude a State from relying on an error in the wording of the text, since this eventuality provided for by Article 74; nor even as simply precluding a State from relying on an error of substance in the treaty, a situation regulated by Articles 45 and 42.

The role of good faith between these extremes must remain, in the absence of any direct guidance from the Commentary or from the practice of international tribunals, a matter for speculation. It might be taken more narrowly, as precluding a State from exploiting an ambiguity in the text or a genuine misunderstanding between the parties. Alternatively, more broadly, a State might be precluded, in certain circumstances, from advancing an interpretation contrary to its own previous practice, or contrary to the shared expectations of the parties” (Jacobs, F. G., *supra* note 126, at 333 – footnotes excluded).

⁴⁷⁰ See Vitányi, Bela, *Treaty Interpretation in the Legal Theory of Grotius and Its Influence on Modern Doctrine*, 14 *Netherlands Yearbook of International Law* 41 (1983), at 62; Gardiner, R., *supra* note 112, at 148.

⁴⁷¹ As noted by ROBERT JENNINGS:

“The qualification ‘in good faith’ is the central component of the principle of *pacta sunt servanda*: it comprises and qualifies *inter alia* the principle of effectiveness — *ut res magis valeat quam pereat*. The ‘terms of the treaty ... in their context’, that is to say the text, is indeed the primary place, but to be viewed ‘in the light of’ the

The principle of good faith is also linked to the idea that interpretation of treaties must be reasonable, in the sense that it prevents a party to the treaty from an interpretation that results in abuse of rights.⁴⁷³ To this effect, the principle of good faith directs the interpreter to adopt an interpretation that will not create ambiguities or lead to a result that is manifestly absurd or unreasonable.⁴⁷⁴ That is to say that, if the interpretation of the text of a treaty is clear enough in accordance with the ordinary meaning to be given to its terms in their context, the interpreter in good faith should not rely on a different interpretation that leaves the text of the treaty unclear.⁴⁷⁵

The practice of the ICJ, however, does not provide for a clear picture of the application of the principle of good faith in the interpretation of treaties. The ICJ has usually referred to principle of good faith as “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source,”⁴⁷⁶ which “obliges the Parties to apply it in a reasonable way and in such a

object and purpose of the treaty. Thus, the list of factors approach is rejected; but the rule adopted, though primarily textual, also incorporates with it, the principles of the ‘object and purpose’ and of the intention of the parties, both of these firmly coupled to the agreed text as the accepted expression of them. Thus, the object and purpose, and the intention of the parties, are to be collected, primarily, from ‘the terms of the treaty in their context’. [...]” (Jennings, Robert Y., *Treaties*, in International Law: Achievements and Prospects 135 (Bedjaoui, Mohammed, ed., Dordrecht: Martinus Nijhoff Publishers, 1991), at 145 – footnotes excluded).

See also Gardiner, R., *supra* note 112, at 148; Orakhelashvili, A., *supra* note 30, at 396-398.

⁴⁷² See Gardiner, R., *supra* note 112, at 152.

⁴⁷³ According to SINCLAIR, “[i]t is often said that that the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to result which is manifestly absurd or unreasonable” (Sinclair, I., *supra* note 34, at 120). See also Gardiner, R., *supra* note 112, at 151, 157.

⁴⁷⁴ See Linderfalk, U., *supra* note 88, at 45.

⁴⁷⁵ In the dissenting opinion given in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge KREČA noted that “interpretation in good-faith implies that ‘if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter’” (Order of September 13, 1993, ICJ Reports 325 (1993), at 459).

⁴⁷⁶ *Nuclear Tests* case, Judgment of December 20, 1974, ICJ Reports 253 (1974), at 268.

manner that its purpose can be realized.”⁴⁷⁷ But the application of the principle of good faith in the interpretation of treaties is scarce. The reference to good faith is normally linked with the duty of States to perform their legal obligations in good faith,⁴⁷⁸ as required by Article 26 of the Vienna Convention.⁴⁷⁹ HUGH THIRLWAY, analyzing the practice of the ICJ on the interpretation of treaties from 1960 to 1989, observed that:

“One further preliminary remark is necessary: no reference will be found in the discussion below to the requirement stated at the outset of Article 31 of the Vienna Convention that ‘A treaty shall be interpreted in good faith...’. The simple and sufficient reason for this is that the Court has not, during the period under consideration, had to examine the significance of this requirement, whether under the Vienna Convention or in the general law of treaties. It is also to be observed that what may be in question is the good faith of the parties; an interpretation by the Court in which the Court itself was animated by something other than good faith is not to be thought of. [...]

It is however difficult to conceive circumstances in which the Court would find it necessary to reject an interpretation advanced by a party on the sole ground that it was not made in good faith. Such interpretation would almost certainly offend at the same time against some specific canon of interpretation; and the Court will be slow to accuse a State in its judgment of bad faith.”⁴⁸⁰

The lack of application of the principle of good faith in the interpretation of treaties in the practice of the ICJ indicates that such principle, pursuant to the general rule of treaty interpretation of the Vienna Convention, does not play a role as a factor of interpretation that is independent from or alternative to the text of the treaty.

⁴⁷⁷ *Gabčíkovo-Nagymaros Project* case, Judgment of September 25, 1997, ICJ Reports 7 (1997), at 79.

⁴⁷⁸ See Gardiner, R., *supra* note 112, at 157.

⁴⁷⁹ Article 26 of the Vienna Convention provides that “[e]very treaty in force is binding upon the parties to it and *must be performed by them in good faith*” (8 ILM 679 (1969), at 690 – emphasis added).

⁴⁸⁰ Thirlway, H., *supra* note 90, at 17-18 – footnotes excluded.

Accordingly, while one may argue that it is a reasonable inference that States would not agree to be bound by the ICSID Convention unless the jurisdiction of the Centre is limited or extends to disputes that arise out of transactions or activities that contribute to the economic development of the host State, such inference is not enough to create a requirement that contradicts the text of the ICSID Convention. Even though, in the light of the policies and goals that led to the conclusion of the ICSID Convention, it would be desirable to limit or to expand the jurisdiction of the Centre to dispute arising out of transactions or activities that contribute to the economic development of the host State, the interpretation of the ICSID Convention may not disregard the hierarchy of elements provided for in the general rule of the Vienna Convention in order to achieve a result that the interpreter might consider more desirable or consistent with the reasonable expectation of the Contracting States of the ICSID Convention.⁴⁸¹

⁴⁸¹ As observed by ALEXANDER ORAKHELASHVILI:

“With the adoption of articles 31 and 32 of the VCLT, the hierarchically arranged rules of interpretation have overtly replaced the relevance of the imaginative impact as the schools of interpretation independently had. If the aim of interpretation is to locate the parameters of an original agreement, then the hierarchically arranged rules of interpretation are what matter, and the international community seems to be agreed on this point. What is more is that unless there is some hierarchical ordering, allocating preference to some interpretative factors over others, the choice of these factors becomes essentially a matter of subjective policy choice and perception, which could entail interpretative outcomes that do not reflect the original consensus of States parties to a pertinent treaty and end up projecting binding treaty obligations to which States parties never agreed” (Orakhelashvili, A., *supra* note 419, at 418-419).

3. ARTICLE 25(1) OF THE ICSID CONVENTION

3.1. Territoriality of the Investment under the ICSID Convention

Another problem of the decisions that, following the *Salini* approach, applied the economic development requirement in order to restrict the jurisdiction of the Centre is that the existence of such requirement was based on assumptions that are inconsistent with Article 25 of the ICSID Convention.

The first inconsistent assumption is that the economic development requirement implies that, in order to fall within the jurisdiction of the Centre, the investment must be made in territory of the State party to the dispute. In the *Salini* approach, the economic development requirement is defined as “the contribution to the economic development of *the host State of the investment* as an additional condition.”⁴⁸² The term “host State” means the State that is receiving the investment and it was used in the decisions that followed the *Salini* approach to refer to the State party to the dispute. Accordingly, if the investment must contribute to the economic development of the State party to the dispute as the State that is receiving the investment, the investment must be made in the territory of the State party to the dispute.

⁴⁸² *Salini*, *supra* note 259, at 622 – emphasis added. Similarly, in *Joy Mining*, the tribunal pointed out that the investment “should constitute a significant contribution to the host State’s development” (*supra* note 261, at 500 – footnote excluded). In *Bayindir*, the tribunal considered that the investment “must represent a significant contribution to the host State’s development” (*supra* note 263, at 201 – footnote excluded). In the dissenting opinion to the *MHS* decision on annulment, Judge MOHAMED SHAHABUDEEN asserted that “economic development is a condition of an ICSID investment” (Dissenting Opinion to the Decision on Annulment of April 16, 2009, 48 ILM 1105 (2009), at 1105 – emphasis added) and that “[t]he outer limits in this case included a requirement that an investment must contribute to the economic development of the *host State*” (*idem* – emphasis added.).

In his dissenting opinion to the *Abaclat* decision, Professor ABI-SAAB considered that “[t]he investment that the Convention seeks to encourage by providing it with an international procedural guarantee is that which contributes to the economic development of *the host country*.”⁴⁸³ In addition, Professor ABI-SAAB made an express reference to an inherent territorial requirement in the notion of investment within the meaning of the ICSID Convention that entails the investment to be made in the territory of the State party to the dispute:

“A territorial link or nexus is inherent in the concept of ‘investment’ in article 25 of the ICSID Convention. The whole idea behind the Convention was to encourage the flow of private foreign investment to developing countries by offering an international guarantee in the form of an alternative neutral adjudication of disputes arising out of such investment in the territory of the host States, typically subject to its laws and courts.”⁴⁸⁴

The Report of the Executive Directors contains several references that suggest the existence of a territoriality requirement that entails the investment to be made in the territory of the State party to the dispute. First, in its paragraphs 9 and 12, which state the general purposes behind the conclusion of the ICSID Convention, the Report of the Executive Directors the ICSID Convention envisages the flow of foreign investments into the territory of its Contracting 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 atmosphere of mutual confidence and thus *stimulating a larger flow of private international capital into those countries which wish to attract it*.

⁴⁸³ *Supra* note 288, at para. 50 – emphasis added.

⁴⁸⁴ *Ibid.*, at para. 74. See also Waibel, M., *supra* note 257, at 727.

[...]

The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and *stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.*⁴⁸⁵

In addition, the Report of the Executive Directors employs several times the term “host State” as a reference to the State party to the dispute. In its paragraph 13, the Report of the Executive Directors states that “the provisions of the Convention maintain a careful balance between the interests of investors and those of *host States*” and that “the Convention permits the institution of proceedings by *host States* as well as by investors.”⁴⁸⁶ Similar references are also made in paragraphs 24 and 33 of the Report of the Executive Directors.⁴⁸⁷

As discussed before, however, the Report of the Executive Directors is not part or an annex to the ICSID Convention and has very limited value in the interpretation of the ICSID Convention.⁴⁸⁸ Accordingly, one may not infer from the Report of the Executive Directors a jurisdictional requirement that is not set forth in the ICSID Convention.

The ICSID Convention does not have any provision that requires the investment to be made in the territory of the State party to the dispute and makes no reference in its text to the term “host State”. The only reference from which a territoriality

⁴⁸⁵ 1 ICSID Reports 23 (1993), at 25 – emphasis added.

⁴⁸⁶ *Idem* – emphasis added.

⁴⁸⁷ *Ibid.*, at 28 and 30.

⁴⁸⁸ See *supra* at pp. 105 *et seq.*

requirement of the investment may be inferred is contained in the first recital of the Preamble of the ICSID Convention, which refers to “the role of private *international* investment”⁴⁸⁹ and not merely to “investment” as Article 25(1) of the ICSID Convention does. Although the reference to “international investment” in the Preamble of the ICSID Convention has relevant consequences in the assessment of compliance with the investment requirement of the ICSID Convention, it does not create a requirement that entails the investment to be made in the territory of the host State.

While Article 25(1) of the ICSID Convention refers to “investment” without a qualification as to its territoriality, the use of the term “international investment” in the Preamble of the ICSID Convention indicates that the investment requirement of the ICSID Convention contains an element that places a territorial limitation on the jurisdiction of the Centre. As mentioned earlier, the reference to “context” in Article 31(1) of the Vienna Convention reflects the so-called principle of integration, pursuant to which the treaty must be interpreted as a whole.⁴⁹⁰ A rule that derives from this principle is that a term used on different occasions in a treaty must be assumed to have a consistent meaning.⁴⁹¹ By the same token, the use of similar but not identical terms in a treaty indicates that the parties intended to confer different meanings on these terms.⁴⁹² Applying this rule in the interpretation of the ICSID Convention, one could assume the meaning of the term “investment”, as employed in Article 25(1), is distinct from the meaning

⁴⁸⁹ 1 ICSID Reports 3 (1993), at 4 – emphasis added.

⁴⁹⁰ See *supra* at p. 36.

⁴⁹¹ See Haraszti, G., *supra* note 30, at 108; Jennings, R., and Watts, A., *supra* note 34, at 1273, footnote 12; Linderfalk, U., *supra* note 88, at 106-107.

⁴⁹² See Jennings, R., and Watts, A., *supra* note 34, at 1273, footnote 12; Linderfalk, U., *supra* note 88, at 108-109.

of the term “private international investment” contained in the first recital of the Preamble. This idea, however, would lead to the conclusion that the ICSID Convention refers to two distinct things in the Preamble and in Article 25(1). But while the use of similar but not identical terms may indicate the intention of the parties to confer on them distinct meanings, another rule that also derives from the principle of integration is that it must be assumed that different provisions of a treaty do not contradict one another.⁴⁹³

As seen before, the wording of the Preamble and of Article 25(1) of the ICSID Convention indicate the intention, which may be confirmed by the drafting history of the ICSID Convention, to confer on the Preamble a normative function in the delineation of the jurisdictional scope of the ICSID Convention.⁴⁹⁴ And in the Preamble, the term “investment” is used in its second recital⁴⁹⁵ in direct reference to the term “private international investment”:

“The first recital, which recognizes ‘the need for international cooperation for economic development, and the role of private *international investment* therein’ as the main purpose of the ICSID Convention, is the single express reference in the whole ICSID Convention to ‘economic development’, adopted by the *Salini* test, and to ‘international investment’. However, the following recitals cannot be understood without any reference to the first recital and especially to ‘international investment’. The second recital refers to ‘the possibility that from time to time *disputes may arise in connection with such investment* between Contracting States and nationals of other Contracting States.’ It is clear that the reference in the second recital to ‘such investment’ is a direct allusion to ‘international investment’ contained in the first recital. Furthermore, the third and fourth recitals of the preamble recognize ‘that while *such disputes* would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases [and the] particular importance to the availability of facilities for

⁴⁹³ See Vitányi, B., *supra* note 470, at 54-55; Linderfalk, U., *supra* note 88, at 107-108.

⁴⁹⁴ See *supra* at pp. 145 *et seq.*

⁴⁹⁵ See 1 ICSID Reports 3 (1993), at 4.

international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit *such disputes* if they so desire.’ The expression ‘such disputes’ contained in the third and fourth recitals is an allusion to the second recital. Consequently, it is not difficult to conclude that, although the first recital is the single indication of the foreign character of the notion of investment, the subsequent recitals of the ICSID Convention’s preamble are referring to *disputes in connection with international investment*.⁴⁹⁶

In this sense, the use of the term “investment” in the second recital, with the purpose of placing objective limits on the jurisdictional scope of the ICSID Convention, is a direct reference to the term “private international investment”. This indicates that the term “investment” was, in fact, employed in the ICSID Convention, including Article 25(1), with the same meaning. Otherwise, one would have to assume the existence of contradictory provisions in the ICSID Convention, to the extent that it would be dealing with two different things.

For this reason, the reference to “international investment” in the Preamble of the ICSID Convention creates a territorial requirement as an element of the investment requirement of the ICSID Convention. Within its ordinary meaning, the term “international investment” may be interpreted as a synonym for *foreign investment*, used in opposition to the concept of *domestic investment*,⁴⁹⁷ entailing

⁴⁹⁶ Castro de Figueiredo, R., *supra* note 84, at 34-35 – footnotes excluded, emphasis in the original.

⁴⁹⁷ This interpretation is confirmed by the drafting history of the ICSID Convention. In the first version of the Preamble, inserted in the First Preliminary Draft of August 3, 1963, the first recital referred to “foreign investment” (see In the Preliminary Draft of October 15, 1963, the wording of the first recital was, however, modified; in this version, it referred to “international investment” (*ibid.*, at 187). The reference to “international investment” was repeated in the First Draft of September 11, 1964 (*ibid.*, at 611), and in the Revised Draft of December 11, 1964 (*ibid.*, at 911). It was only in the final text of the ICSID Convention that the term “private” was inserted (*ibid.*, at 1043). But the discussions among the drafters of the ICSID Convention indicate that the modification of the first version of the Preamble was not based on the idea that “international investment” is something dissimilar from “foreign investment”. In the final discussions in the Committee of the Whole, an executive director, MACHADO, suggested that the first recital of the Preamble should have referred to “private foreign investment” (*ibid.*, at 1020). In reply, BROCHES “explained that in recent years there had been a tendency to shy away from the use of the word ‘foreign’ in connection with investments” (*idem*). This explanation evidences the fact that

a transfer of capital from one country into another.⁴⁹⁸ This does not mean, however, that the investment must be made in the territory of the State party to the dispute. Provided that the transaction or activity is a foreign investment, there is nothing in the ICSID Convention that prevents from being submitted to the jurisdiction of the Centre a dispute that arises out of an investment made in the territory of a third State.

Differently from the ICSID Convention, however, most investment treaties contain a territoriality requirement that limits their scope to investments made in the territory of the contracting parties.⁴⁹⁹ For instance, Article 26 of the ECT, which provides for arbitration as a mechanism for the settlement of disputes between a Contracting Party to ECT and an investor of another Contracting Party, applies to “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the *Area* of the former.”⁵⁰⁰ But for the purposes of the ICSID Convention, the restriction contained in the investment treaties as to the territoriality of the investment is a matter of the scope of the consent given by the State party to the dispute and not a question as to whether the dispute complies with the investment requirement of the ICSID Convention.⁵⁰¹

“international investment” and “foreign investment” were not deemed to be two distinct things. The Report of the Executive Directors also refers, on several occasions, to “foreign investors” and not to international investors. See paragraphs 3, 6 and 9 of the Report of the Executive Directors, 1 ICSID Reports 23 (1993), at 23-25.

⁴⁹⁸ See Sornarajah, M., *supra* note 77, at 4; Castro de Figueiredo, R., *supra* note 84, at 4; Salacuse, J., *supra* note 257, at 27-28.

⁴⁹⁹ See McLachlan, C., Shore, L. and Weiniger, M., *supra* note 79, at 180; Schreuer, C., Malintoppi, L., Reinisch, A., and Sinclair, A., *supra* note 39, at 138; Salacuse, J., *supra* note 257, at 169-170.

⁵⁰⁰ Article 26(1) of the ECT (34 ILM 373 (1995), at 399 – emphasis added).

⁵⁰¹ Schreuer, C., Malintoppi, L., Reinisch, A., and Sinclair, A., *supra* note 39, at 139-140.

The issue of the territoriality of the investment was discussed in the *Fedax* case. As seen before, the dispute in this case arose out of promissory notes that were acquired by the claimant by of endorsement.⁵⁰² Among other reasons, Venezuela challenged the jurisdiction of the Centre on the basis that the claimant did not make an investment in the territory of Venezuela. The tribunal, however, rejected Venezuela's contentions based on the idea that, while the transaction might not have involved the physical transfer of funds into the territory of the host State, the relevant question was whether the funds were made available to and utilized by Venezuela. But in assessing the territoriality issue, the tribunal was not considering this issue as a requirement of the ICSID Convention, but as requirement of the Netherlands-Venezuela BIT:

“Like a number of other bilateral investment treaties and multilateral arrangements, the Agreement [the Netherlands-Venezuela BIT] contains several references to investments made ‘in the territory’ of the Contracting Parties. In this context, the Republic of Venezuela has argued that Fedax N.V. does not qualify as an investor because it has not made any investment ‘in the territory’ of the Venezuela. While it is true that in some kinds of investments listed under Article 1(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. The same is true of many important offshore financial operations relating to exports and other kinds of business. And of course, promissory notes are frequently employed in such arrangements. The important question is whether the funds made available are utilized by beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory

⁵⁰² See *supra* at pp. 91 *et seq.*

notes, received an amount of credit that was put to work during a period of time for its financial needs.”⁵⁰³

The issue of the territoriality of the investment also arose in the cases of *SGS Société Générale de Surveillance S.A. v. Pakistan* (“*SGS Pakistan*”) and of *SGS Société Générale de Surveillance S.A. v. Philippines* (“*SGS Philippines*”). In *SGS Pakistan*, referred to ICSID arbitration pursuant to the Switzerland-Pakistan BIT,⁵⁰⁴ the jurisdiction of the Centre was challenged because the transaction out of which the dispute arose “did not constitute an investment within the territory of Pakistan within the meaning of Article 2(1) of the [Switzerland-Pakistan] BIT [and not within the meaning of the ICSID Convention] because SGS’s obligations were performed outside Pakistan.”⁵⁰⁵ In *SGS Philippines*, like in the *Fedax* case, the territoriality of investment was discussed by the tribunal as a requirement of the investment treaty, the Switzerland-Philippines BIT,⁵⁰⁶ and not of the ICSID Convention:

“In accordance with Article II, the BIT [the Switzerland-Philippines BIT] applies to ‘investments in the territory of the one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement’. The language is clear in requiring that investments be made ‘in the territory of’ the host State, and this requirement is underlined by other references to the territory of the host State in the BIT (see Preamble, para. 2, Articles II(1), (2), IV(1), (2), (3), VIII(2) and X(2)). In accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT. For example the construction of an embassy in a third State, or the provision of security services to such an embassy, would not

⁵⁰³ *Supra* note 248, at 1386 – footnotes excluded.

⁵⁰⁴ Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments of July 11, 1995.

⁵⁰⁵ *Supra* note 285, at 330.

⁵⁰⁶ Agreement between the Swiss Confederation and the Republic of Philippines on the Promotion and Reciprocal Protection of Investments of March 31, 1997.

involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT.”⁵⁰⁷

In *Fedax*, *SGS Pakistan* and *SGS Philippines*, accordingly, the issue of the territoriality of the investment was addressed as a requirement of the relevant investment treaty and not as an element of the investment requirement of the ICSID Convention. None of these tribunals suggested that the ICSID Convention requires the investment to be made in the territory of the State party to dispute.

3.2. Foreign Direct Investments and Foreign Portfolio Investments

In his dissenting opinion to the *Abaclat* decision on jurisdiction, Professor ABI-SAAB questioned whether the acquisition of bonds, as a foreign portfolio investment, could fulfill the investment requirement of the ICSID Convention. According to Professor ABI-SAAB, the mere availability of funds resulting from the bonds issuance was not enough; in order to fulfill the economic development requirement, the funds had “to be concretely traced, even at several removes, to a particular productive project or activity in the territory of the host country.”⁵⁰⁸

Professor ABI-SAAB’s dissenting opinion was based on the idea that the investment requirement of the ICSID Convention limits the jurisdiction of the Centre to disputes arising out of foreign direct investments. According to him, “[d]irect foreign investment is then the ‘ideal type’ of investment (in the Weberian sense of the term) for ICSID purposes,”⁵⁰⁹ a notion of investment that would

⁵⁰⁷ Decision on Jurisdiction of January 29, 2004, 8 ICSID Reports 518 (2005), at 545 – footnotes excluded.

⁵⁰⁸ *Supra* note 288, at para. 113.

⁵⁰⁹ *Ibid.*, at para. 55.

be consistent with his “ideal” of economic development: “the expansion of [the host State’s] productive capacity, a contribution that presupposes a commitment to this task not only of economic resources, but also in terms of duration in time and the taking of risk, with the expectation of reaping profits and/or revenue in return.”⁵¹⁰

Accordingly, Professor ABI-SAAB would only admit that foreign portfolio investments could contribute to the economic development of the host State if it could be established a direct link between the funds resulting from such investments and “a particular productive project or activity in the territory of the host country,”⁵¹¹ once the funds resulting from the transaction “can be used to finance wars, even wars of aggression, or oppressive measures against restive populations, or even be diverted through corruption to private ends.”⁵¹²

Professor ABI-SAAB’s dissenting opinion is based, however, on a misleading assumption that the term “investment” for the purposes of the ICSID Convention envisages foreign direct investments and excludes foreign portfolio investments.

According to him:

“A clear distinction has to be made between the use of the term ‘investment’ in the financial context and in the ICSID context. In financial markets, ‘investment’ covers the acquisition of any kind of assets such as deposit accounts, debt and equity securities, credit default swaps and derivatives.

⁵¹⁰ *Ibid.*, at para. 50.

⁵¹¹ *Ibid.*, at para. 113.

⁵¹² *Idem.*

This over-wide financial concept of investment is fundamentally different from the concept of investment envisaged when drafting the ICSID Convention and followed in its context since. [...].”⁵¹³

As Professor ABI-SAAB explains, the ICSID dispute settlement system “is basically needed by private foreign direct investment, for it is this type of investment that once it is carried out in the host country, for example by building factories or establishing enterprises, falls under the imperium of the host State in terms of legislation and adjudication.”⁵¹⁴ This, according to dissenting opinion, would create a presumption against the submission to the jurisdiction of the Centre of disputes arising out of foreign portfolio investments:

“Direct foreign investment is then the ‘ideal type’ of investment (in the Weberian sense of the term) for ICSID purposes. But does it exhaust the ambit of ICSID jurisdiction *ratione materiae*? And if not, how far can an alleged investment depart from the ideal type and still be covered by the Convention, i.e. and still be considered as falling within the objective outer-limits set by article 25?

This question arises particularly in relation to ‘portfolio investments’ and other financial negotiable products traded in the financial markets, which cover a wide spectrum ranging from standardized instruments such as shares, bonds and loans to structured and derivative products, such as hedges (of currencies, oil, etc.) and credit default swaps.

Such widely dispersed off-the shelf financial products, with their high velocity of circulation and their remoteness, the same as their holders, from the State in whose territory the investment is supposed to take place (being traded within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State), seem at first blush to be worlds apart from the direct foreign investment model, which is usually long negotiated and extensively embedded in the legal environment of the host State.

This raises acutely the question of the conformity of these financial products with the requirements of article 25 and evokes a kind of informal presumption that, because of their intrinsic characteristics

⁵¹³ *Ibid.*, at paras. 41-42.

⁵¹⁴ *Ibid.*, at para. 54.

described above, they are excluded *per se*, i.e. automatically, from the protected or covered investments under the Convention.”⁵¹⁵

Article 25(1) of the ICSID Convention does not make, however, any distinction between foreign direct investments and foreign portfolio investments. The reference to “directly”⁵¹⁶ in the wording of Article 25(1) does not qualify the term “investment” as to limit the jurisdiction of the Centre to disputes arising out of foreign direct investments. As the *Fedax* tribunal observed:

“In addition to the background of Article 25(1) of the Convention, there is also a problem of textual interpretation that the Tribunal must consider. The Republic of Venezuela has made the argument that the disputed transaction is not a ‘direct foreign investment’ and therefore could not qualify as an investment under the Convention. However, the text of Article 25(1) established that the ‘jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.’ *It is apparent that the term ‘directly’ relates in this Article to the ‘dispute’ and not to the ‘investment.’ It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction.* This interpretation is also consistent with the broad reach that the term ‘investment’ must be given in light of the negotiating history of the Convention”⁵¹⁷

The distinction between foreign direct investments and foreign portfolio investments is also not made in most investment treaties, which might play a supplementary role in the interpretation of the ICSID Convention as an element of the subsequent practice of the Contracting States.⁵¹⁸ The broad definitions of investment contained in these treaties may evidence the idea shared by most of the Contracting States of the ICSID Convention that foreign investments, regardless

⁵¹⁵ *Ibid.*, at para. 55-58.

⁵¹⁶ 1 ICSID Reports 3 (1993), at 9.

⁵¹⁷ *Supra* note 248, at 1383 – emphasis added.

⁵¹⁸ See *infra*, at pp. 210 *et seq.*

of the type, direct or portfolio investments, do contribute to the economic development of the host State.⁵¹⁹

As economic development through the flow of foreign investments into developing economies was one of the main goals of the ICSID Convention,⁵²⁰ the rationale behind its conclusion was clearly based on the idea that foreign investments were a valuable source in order for developing economies to tackle their shortage of resources needed in the process of economic growth. Those who supported the conclusion of the ICSID Convention often relied on the benefits brought by foreign investments to developing economies. In the address made at the Annual Meeting of the Board of Governors of the IBRD of September 30, 1963, the president of the IBRD pointed out that:

“My enthusiasm for the proposal to establish a conciliation and arbitration center is simply a reflection of my interest in exploring all possible ways in which the Bank can help to widen and deepen the flow of private capital to the developing countries. It is not the business of the Bank, nor of its President, to tell the developing nations within the Bank’s membership that they must accept private capital from abroad as a partner in their development efforts or what kind of price it is reasonable for them to pay in order to achieve such a partnership. Those are issues which our members, as sovereign nations, must decide for themselves. Whatever decisions they make, the Bank, as a non-political international organization, must and does accept without reservation. For my part, however, I believe that, to a great extent, the attitudes of many of the less developed countries toward foreign private investment are based on the outdated past rather than on present facts. And I am convinced that those of our members who adopt as their national policy a welcome for international investment — and that means, to mince no words about it, giving foreign investors a fair opportunity to make attractive profits — will achieve their development objectives more rapidly than those who not. For a country which is known to be hospitable to private investment will have access over the years to a much larger and more *stable pool of capital* than its neighbor which relies solely on

⁵¹⁹ See Vandeveld, K. J., *supra* note 57, at 122-126.

⁵²⁰ See *supra* at p. 150.

government-to-government aid. It will have access, too, to a much larger *pool of industrial personnel* — managerial, administrative and technical — and to a much larger *mass of scientific and technological information* than it could possibly acquire in any other way. Most important of all, its economy will be stimulated and invigorated by the many different contacts, at many different levels, which a hospitable investment climate will make possible between enterprises and individuals within its own borders and those within the borders of the industrialized countries. None of these advantages is likely to be fully available to any nation whose government, however well motivated and however well administered, decides to relegate the private sector to a subordinate role.”⁵²¹

In another address made to the Board of Governors on September 7, 1964, few days before the adoption of the resolution of the Board of Governors that authorized the executive directors to formulate the ICSID Convention,⁵²² the president of the IBRD, encouraging the members of the IBRD to vote in favor of the proposal to establish the ICSID dispute settlement system, emphasized the benefits provided by foreign investments:

“The foreign investor, made to feel welcome, can be a most effective instrument of economic growth, not only because of the *capital and technology* he can provide, but equally because of the help he can extend in *training the labor force and developing local managerial and supervisory skills*. Consequently, we regard it as one of the important responsibilities of the Bank and IFC to do what we can to facilitate such investment.

One possible measure to that end is multilateral investment insurance, the feasibility of which we have studied in the past and to which, at the request of the recent United Nations Conference on Trade and Development, we shall again be turning our attention. Another approach, which we have actively sponsored, is the establishment of international machinery which would be available to deal on a voluntary basis with investment disputes between governments and nationals of other states. This is proposed in the draft Convention on the Settlement of Investment Disputes on which the Executive Directors have submitted a report to you. If you agree, the Executive Directors, assisted by a committee of legal experts designed by interested governments, propose to work out a final text for

⁵²¹ History of the ICSID Convention, *supra* note 73, at 183 – emphasis added.

⁵²² See *supra* at pp. 66 *et seq.*

submission of governments in 1965 and I hope, early in 1965. This proposal, in my view, holds great promise. I recommend it and urge your unanimous approval of it.”⁵²³

In those speeches, no distinction was made between the roles played by foreign direct investments and by foreign portfolio investments in developing economies.

Like other institutions, such as the IBRD, ICSID dispute settlement system is a legacy of the postwar era. While the origins of the term “economic development” date from the nineteenth century, it was only after the World War II that its concept was developed and gained importance in the international community. At that time, the promotion of economic development became a goal of the international community,⁵²⁴ especially due to the decline of the former colonial powers, such as Great Britain and France, which resulted in the process of decolonization in Africa and Asia; and to the rise of communist governments supported by the Soviet Union, which led to the emergence of a new balance of power in international relations.⁵²⁵ The new goal of the international community was reflected in the establishment of the postwar institutions. Article 1(3) of the Charter of the United Nations included within “[t]he purposes of the United Nations” the achievement of “international co-operation in solving international problems of an economic [...] character.”⁵²⁶ The constitution of the IBRD, with

⁵²³ History of the ICSID Convention, *supra* note 73, at 605 – footnote excluded, emphasis added.

⁵²⁴ See Arndt, Heinz Wolfgang, Economic Development: The History of an Idea (Chicago: The University of Chicago Press, 1987), at 1; Meier, Gerald M., Biography of a Subject: An Evolution of Development Economics (Oxford: Oxford University Press, 2005), at 3, 41 *et seq.*

⁵²⁵ Arndt, H. W., *supra* note 524, at 43-45, 49-50.

⁵²⁶ 39 AJIL Sup. 190 (1945), at 191.

the purpose of encouraging “the development of productive facilities and resources in less developed countries,”⁵²⁷ also evidences this new goal.

At the outset, economic development was meant to describe a process that envisages the enhancement of life standards, which is mainly fostered by economic growth, defined in technical terms as the increase of the national gross product and income per capita rate of a country.⁵²⁸ Early theories of economic development, which emerged in reaction to the neoclassical economic thought, advocated the idea that the economic growth could only be achieved through the industrialization of developing economies.⁵²⁹ At this time, it was thought that the major problem for the industrialization of developing economies — and, consequently, for economic development — lies in the fact that developing economies were deficient in capital accumulation. Developing economies have, in general, low rates of savings, impairing capital accumulation and making investment scarce.⁵³⁰ In this scenario, foreign investment was seen as a relevant source for developing countries to overcome their lack of domestic savings and, thus, provide the needed investments for the industrialization of their economies (physical capital). Foreign investments would also increase the supply of foreign exchange and help developing economies, generally constrained by balance-of-payments problems,⁵³¹ to meet the import needs of the industrialization process.⁵³² Foreign investments, moreover, could also contribute to the economic development of the host State by providing human capital and technology. By the

⁵²⁷ See Article 1 of the original Articles of Agreement of the IBRD (2 UNTS 134, at 134).

⁵²⁸ See Arndt, H. W., *supra* note 524, at 2, 50-54; Meier, G. M., *supra* note 524, at 4.

⁵²⁹ See Arndt, H. W., *supra* note 524, at 74-76.

⁵³⁰ See Arndt, H. W., *supra* note 524, at 3, 54-57; Meier, G. M., *supra* note 524, at 55 *et seq.*

⁵³¹ See Arndt, H. W., *supra* note 524, at 77; Meier, G. M., *supra* note 524, at 90.

⁵³² See Meier, G. M., *supra* note 524, at 108-109.

end of the 1950s and beginning of the 1960s, the lack of physical capital accumulation was not seen as the only cause of underdevelopment. While economic growth was still considered the key factor for economic development, the debate among development economists shifted its focus on physical capital accumulation, as the main source for economic growth, to the problems related to the lack of human capital and technology in poor countries. It was generally considered that developing economies had poor skilled workers and access to technology, which undermined the process of economic growth.⁵³³ In this sense, foreign investments, especially in the case of foreign direct investments, were a source for human capital and technology, providing the training of labor forces and the use of new techniques.⁵³⁴

In this scenario, there is a general idea that foreign direct investments will always contribute in some way to the economic development of the host State by providing physical capital, human capital or technology, while the contribution of foreign portfolio investments to the economic development, on the other hand, due to the short-term character of such investments, is controversial.⁵³⁵

Foreign direct investments, unlike portfolio investments, are more likely to create positive externalities in the host economy than portfolio investments. First, foreign direct investments involve new economic activities in the host economy, increasing the level of productivity and employment, benefiting other sectors of the economy by the rise of the income of the workers and revenue of the host State. Secondly, the establishment of new economic activities involves the

⁵³³ See Arndt, H. W., *supra* note 524, at 3, 60-72.

⁵³⁴ See Arndt, H. W., *supra* note 524, at 3; Meier, G. M., *supra* note 524, at 98, 110.

⁵³⁵ See Meier, G. M., *supra* note 524, at 151.

training of the labor force and the use of new technology, which may be applied in other economic activities and by domestic investors. Thirdly, foreign direct investments in infrastructure projects also benefit other economic sectors by reducing costs in other activities. Finally, new economic activities may increase the demand for goods and services in the host economy.⁵³⁶

Foreign portfolio investments, on the other hand, do not generally involve the contribution in human capital and technology nor the establishment of an economic activity by the foreign investor. The most typical form of portfolio investments is the acquisition of shares in a company in an amount that does not give to the investor control over the company. Foreign portfolio investments provide nevertheless the host economy with financial resources coming from abroad that may be essential for the economic development process. The flow of foreign portfolio investments into the host State increases its foreign exchange reserves and, thus, mitigates problems pertaining to the balance-of-payments deficit. Foreign portfolio investments, moreover, increase the level of credit available in host economy and, thus, contribute to the creation of other economic activities.⁵³⁷ All these factors show that foreign portfolio investments do contribute to the economic development of the host State. In fact, the argument against foreign portfolio investments lies in the idea that the volatility of this type of investment and speed in which they may exit the host economy might cause more harmful effects than benefits, leading developing economies into financial

⁵³⁶ *Ibid.*, at 109-111.

⁵³⁷ See Vandeveld, K. J., *supra* note 57, at 123-124.

crises, and not in the idea that such investments are not capable of providing elements necessary for the economic development.⁵³⁸

Accordingly, in addition to the fact that the ICSID Convention does not make any distinction between foreign direct investments and foreign portfolio investments, the idea espoused in Professor ABI-SAAB's dissenting opinion to the *Abaclat* decision that only foreign direct investments can contribute to the economic development of the host State is not accurate. Professor ABI-SAAB's dissenting opinion is in fact based on a misconception of economic development — “the expansion of its productive capacity”⁵³⁹ —, which disregards the benefits of foreign portfolio investments to the host State's economy.

3.3. The Requirement of Significant Contribution to the Economic Development of the Host State

Another difficulty of some of the decisions that admitted the existence of the economic development requirement is how the compliance with such requirement should be assessed by ICSID tribunals. In particular, some decisions considered the mere contribution to the economic development of the host State is not sufficient for a dispute to comply with the investment requirement of the ICSID Convention; the contribution to the economic development must be significant.

Most decisions that applied the economic development requirement did not directly address this question, especially because the tribunals considered that the

⁵³⁸ See Meier, G. M., *supra* note 524, at 153-155.

⁵³⁹ *Supra* note 288, at para. 50.

contribution to the economic development of the host State was evident. In *Salini*, which involved the construction of a highway in Morocco, the tribunal laconically stated that “the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest.”⁵⁴⁰ In *Jan de Nul*, which involved a contract for the dredging of the Suez Canal, the tribunal asserted that “one cannot seriously deny that the operation of the Suez Canal is of paramount significance for Egypt’s economy and development.”⁵⁴¹ Likewise, in *Helnan*, where the dispute arose out of investments made in the hotel industry of Egypt, the tribunal pointed out that “[a]s for the contribution to the development of the EGYPT’s development, the importance of the tourism industry in the Egyptian economy makes it obvious.”⁵⁴² In *Toto*, which involved the construction of a highway in Lebanon, while the tribunal did not mention the criterion on which the decision on the fulfillment of the economic development requirement was made, it concluded that “[t]he project at hand is a major construction work that will facilitate land transportation between Lebanon, Syria and other Arab countries and thus increase Lebanon’s position as a transit country for goods from and to Middle East countries.”⁵⁴³ In *Millicom*, the tribunal decided that “the setting up and financing of a company operating a mobile telephone network [...] allowed for encouraging the economic development of Senegal through the concessionary company.”⁵⁴⁴ Given that the investments in these cases were made in relevant sectors of the

⁵⁴⁰ *Supra* note 259, at 623.

⁵⁴¹ *Supra* note 264, at 335.

⁵⁴² *Supra* note 266, at para. 77.

⁵⁴³ *Supra* note 275, at para. 86.

⁵⁴⁴ See *supra* note 34, at para. 80.

countries' economies, it was not difficult for these tribunals to conclude that a particular investment contributed to the economic development of the host State, regardless of their individual characteristics.

In other cases, however, the question as to whether the dispute complied with the economic development requirement was not straightforward. In *Mitchell*, which arose out of the seizure by military forces of a law firm owned by a national of the United States in Congo, the *ad hoc* committee considered that:

“[T]he existence of a contribution to the economic development of the host State as an essential — although not sufficient — characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.”⁵⁴⁵

In *Joy Mining*, however, the tribunal pointed out that the investment “should constitute a *significant* contribution to the host State’s development.”⁵⁴⁶ And in assessing whether the investment contributed significantly to the economic development of the host State, the tribunal made a direct link with the amount of money involved in the transaction:

“The duration of the commitment is not particularly significant, as evidenced by the fact that the price was paid in its totality at an early stage. Neither is therefore the regularity of profit and return. Risk there might be indeed, but it is not different from that involved in any commercial contract, including the possibility of the termination of the Contract. The amount of the price and of the bank guarantees is relatively substantial, as is probably the contribution to the

⁵⁴⁵ *Supra* note 281, at para. 33 – emphasis added.

⁵⁴⁶ *Supra* note 261, at 500 – emphasis added.

development of the mining operation, but it is only a small fraction of the Project. Certainly there is nothing here to be compared with the concept of ‘contrats de développement économique’ or even contracts entailing the concession of public services.”⁵⁴⁷

Similarly, in *MHS* the sole arbitrator, in opposition to the approach followed in *Mitchell*, asserted that:

“The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State’s economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an ‘investment’. [...]. The Tribunal is therefore left only with the contributions made by the Claimant, and has to determine whether these contributions would represent a significant contribution to the host State’s economic development.”⁵⁴⁸

In addition, the sole arbitrator noted that:

“Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a contract an ‘investment’ within the meaning of Article 25(1). As stated by Schreuer, there must be positive impact on a host State’s development.”⁵⁴⁹

The view espoused by the sole arbitrator was supported by the dissenting opinion to the *MHS* decision on annulment given by Judge SHAHABUDEEN. According to the dissenting opinion, the sole arbitrator “was correct in finding that the contribution to the economic development of the host State had to be substantial or significant.”⁵⁵⁰ As the argued:

⁵⁴⁷ *Ibid.*, at 501-502.

⁵⁴⁸ *Supra* note 268, at para. 123.

⁵⁴⁹ *Ibid.*, at para. 125.

⁵⁵⁰ *Supra* note 363, at 1105.

“As recalled above, Article 31(1) of the Vienna Convention enjoins a search for the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Whatever the strict sequence of the statutory steps, the search for the ‘ordinary meaning’ of ‘investment’ sooner or later throws the searcher back on the understanding of the international legal community. The international legal community would have rejected out of hand the idea that any contribution to the economic development of the host State, however miniscule that contribution is, is sufficient to qualify the whole outlay as an ‘investment’ within the meaning of Article 25(1) of the ICSID Convention. I am confident that the common understanding would have preferred the notion of a ‘substantial’ or ‘significant’ contribution, as the Tribunal did.”⁵⁵¹

The majority of the *MHS ad hoc* committee concluded, however, that the idea advocated by the sole arbitrator constituted a manifest excess of power in the sense of Article 52(1)(b) of the ICSID Convention, once this idea places a condition on the jurisdiction of the Centre that is not found in the text of the ICSID Convention.⁵⁵² While the *MHS* sole arbitrator observed that requirement of significant contribution does not mean that investments of relatively small cash sums can never amount to an ‘investment’,⁵⁵³ the majority of the *ad hoc* committee considered that the requirement of significant contribution adopted in the decision of the sole arbitrator had the effect of introducing a monetary floor for the submission of disputes to the jurisdiction of the Centre, a requirement that is not set forth in Article 25(1) of the ICSID Convention. According to the decision of the majority, this interpretation of the ICSID Convention could be confirmed by the fact that, during its drafting process, a monetary floor for the submission of disputes to the jurisdiction of the Centre was rejected and excluded from the final text of the ICSID Convention. For this reason, the sole arbitrator could not have

⁵⁵¹ *Ibid.*, at 1109.

⁵⁵² See *supra* note 34, at 1101.

⁵⁵³ *Supra* note 268, at para. 139.

relied on a purported requirement of significant contribution in order to deny the jurisdiction of the Centre.⁵⁵⁴

The first recital of the Preamble of the ICSID Convention states that the ICSID Convention was concluded considering “the *role* of private international investment” in the economic development. In considering the “role” of foreign investments to the economic development, the Preamble does not qualify the contribution made by the investment. It does not entail that the contribution must be significant or that the economic development must have effectively occurred.

In addition, the main problem of admitting the requirement of significant contribution is that this requirement has the effect of placing a jurisdictional bar based on the size of the investment. There is nothing in the wording of Article 25(1) of the ICSID Convention that the jurisdiction of the Centre is limited to disputes arising out of an investment of a particular size, excluding small and medium investments from the jurisdictional scope of the ICSID Convention. And as pointed out by the *MHS* decision on annulment, the drafting history of the ICSID Convention confirms that the idea to place a monetary floor on jurisdiction of the Centre was rejected.⁵⁵⁵ Section 1(3) of Article IV of the Working Paper of June 5, 1962, the first draft version of the ICSID Convention, provided that:

⁵⁵⁴ See *supra* note 34, at 1096-1097.

⁵⁵⁵ See Schreuer, C., *supra* note 23, at 123; Mortenson, J., *supra* note 257, at 297-298. As stated by PAULSSON, acting as the sole arbitrator in *Pantechniki*:

“The monetary magnitude of investments cannot be accepted as a general restriction. It was considered but rejected in the course of preparing the ICSID Convention. Any State might of course adopt a policy of never giving its consent to ICSID arbitration with respect to investments below a certain magnitude. (The expense of ICSID arbitration at any rate constitutes an important practical obstacle to small claims; there need be no fear of crashing floodgates.) But other States may precisely want to benefit from the aggregate investment flows of attracting the small to middle sized

“Except otherwise agreed between the parties, the Center shall not exercise jurisdiction in respect of disputes involving claims of less than the equivalent of one hundred thousand United States dollars determined as of the time of submission of the dispute.”⁵⁵⁶

This provision was excluded from the subsequent drafts and was not included in the final text of the ICSID Convention. Therefore, there is nothing in the text of the ICSID Convention that could justify the existence of a monetary floor on the jurisdiction of the Centre.

It must be noted, however, that the requirement of significant contribution to the economic development of the host State would only place a monetary floor on the jurisdiction of the Centre if the economic development requirement is applied in order to restrict the jurisdictional scope of the ICSID Convention and not to expand it. If the economic development requirement is applied following the *Salini* approach, as an additional condition in order for a dispute to fulfill the investment requirement of the ICSID Convention, the requirement of significant contribution would exclude small and medium investments from the jurisdiction of the Centre.

On the other hand, following the *CSOB* approach, such exclusion would not happen, given that this approach is only applied in order to expand and not to restrict the jurisdiction of the Centre. For this approach, regardless as to whether the transaction or activity contributed to the economic development of the host State, the dispute would still fall within the jurisdiction of the Centre if the

businesses which have contributed so notably to the development of economies such as those of Germany and Italy. This is *their* policy choice; not that of ICSID arbitrators” (*supra* note 285, at para. 45 – emphasis in the original).

⁵⁵⁶ History of the ICSID Convention, *supra* note 73, at 34.

transaction or activity out of which it arises qualifies as an investment within the ordinary meaning of the term.

4. INVESTMENT TREATIES AS SUBSEQUENT PRACTICE IN THE APPLICATION OF THE ICSID CONVENTION

In case of *Biwater Gauff Ltd. v. Tanzania* (“*Biwater*”), referred to ICSID arbitration pursuant to the Tanzania-United Kingdom BIT,⁵⁵⁷ the notion of investment within the meaning of the ICSID Convention advocated in the *Salini* test — including the economic development requirement — was expressly rejected by the tribunal. According to the *Biwater* tribunal, the exclusion of a definition of the term “investment” in the text of the ICSID Convention was made with the idea that the Contracting States of the ICSID Convention would subsequently agree on a definition of investment:

“In the Tribunal’s view, there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of ‘investment’ were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States.”⁵⁵⁸

In addition, the *Biwater* tribunal noted that the elements of the *Salini* test contradicted not only the definition of investment contained in the Tanzania-

⁵⁵⁷ The Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of January 7, 1994.

⁵⁵⁸ *Supra* note 285, at para. 312 – footnote excluded.

United Kingdom BIT, but they are also inconsistent with most investment treaties, which set forth definitions of investment that are broader than the *Salini* test:

“Further, the *Salini Test* itself is problematic if, as some tribunals have found, the ‘typical characteristics’ of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of ‘investment’ (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of ‘investment’ more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.”⁵⁵⁹

The reliance of the *Biwater* decision on “a developing consensus in parts of the world as to the meaning of ‘investment’” leads to the idea that the definitions of investment set forth in investment treaties could be considered by ICSID tribunals in determining the content of the investment requirement of the ICSID Convention as evidence of the subsequent practice of the Contracting States.

⁵⁵⁹ *Ibid.*, at para. 314. Although not expressly mentioned as subsequent practice, the *MHS ad hoc* committee suggested that the definition of investment contained in investment treaty should be considered in the interpretation of the investment requirement of the ICSID Convention. In particular, the *ad hoc* committee pointed out that:

“While it may not have been foreseen at the time of the adoption of the ICSID Convention, when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms such as those illustrated by the above-quoted Article 1 of the Agreement between Malaysia and the United Kingdom. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, which are in force, of themselves endow ICSID with an important jurisdictional reach. It is those bilateral and multilateral treaties which today are the engine of ICSID’s effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution” (*supra* note 34, at 1098).

As pointed out by the *Biwater* tribunal, the elements of the notion of investment advocated by the *Salini* test, including the economic development requirement, are not found in most investment treaties. With very few exceptions, most investment treaties set forth definitions of investment that are broader in scope than the elements of the *Salini* test. And while some investment treaties contain certain elements of the *Salini* test, none of them restricts its scope to disputes that arise out of an investment that contributes to the economic development of the host State or extends the scope to the disputes arising out a transaction or activity that, although it is not an investment within the ordinary meaning of the term, contributed to the economic development of the host State. For instance, the investment chapter of the Chile-United States FTA provides in its Article 10.27 that “investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”⁵⁶⁰ Such characteristics of investment may also be found in the definitions of investment contained in recent model BITs, such as the 2012 United States Model BIT⁵⁶¹ and the 2007 Norwegian Model BIT.⁵⁶² These instruments, however, represent a very small minority. The overwhelming majority of investment treaties do not entail the fulfillment of the elements of the *Salini* test in order for an activity or transaction to qualify as an investment.

⁵⁶⁰ Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile of June 6, 2003, available at <http://www.sice.org/Trade/chiusa_e/chiusaind_e.asp>, (last visited on June 1, 2009), (entered into force January 1, 2004).

⁵⁶¹ Available at <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>, (last visited on June 1, 2012).

⁵⁶² Available at <<http://ita.law.uvic.ca/documents/NorwayModel2007.doc>>, (last visited on June 1, 2009).

Before the *Biwater* decision was rendered, the view that the definition of investment contained in investment treaties should be considered as evidence of subsequent practice was suggested in the case of *Mihaly International Corporation v. Sri Lanka* (“*Mihaly*”). In this case, submitted to the jurisdiction of the Centre pursuant to the Sri Lanka-United States BIT,⁵⁶³ the tribunal had to decide whether expenditures incurred by the claimant in the development of a project that was never initiated could qualify as an investment for the purposes of the ICSID Convention. The dispute arose out of the non-conclusion by Sri Lanka of a contract for the construction of a power plant in the country, after negotiations between the disputing parties failed. The claimant alleged that the failure of Sri Lanka to conclude the contract violated the provisions of the BIT. Sri Lanka, however, argued that the dispute would not fall within the jurisdiction of the Centre, to the extent that the expenditures incurred by the claimant in the development of the project would be mere pre-investment expenditures and would not qualify as an investment for the purposes of the ICSID Convention, unless the host State had committed itself through a contract or had consented to receive or to admit the investment in the country. The tribunal concurred with the arguments of Sri Lanka and dismissed the case on jurisdictional grounds.⁵⁶⁴

In reaching its decision, the tribunal considered the investment requirement of the ICSID Convention “as an objective requirement” and the definition of investment set forth in the BIT “as part of the consent of the disputing Parties.”⁵⁶⁵ The

⁵⁶³ Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment, of September 20, 1991.

⁵⁶⁴ See Award of March 15, 2002, 41 ILM 867 (2002), at 872-873. See also Rubins, N., *supra* note 79, at 300-304; Yala, F., *supra* note 76, at 120-124.

⁵⁶⁵ *Supra* note 564, at 875.

tribunal noted nevertheless that the meaning of the term “investment”, as employed in Article 25(1) of the ICSID Convention, could be determined by the subsequent practice of the Contracting States:

“The most crucial and controversial contentions of the Parties were concentrated upon the existence *vel non* of an ‘investment’ for the purpose of Article 25(1) to found the jurisdiction of ICSID Centre and the Tribunal. *A fortiorissime*, without proof of an ‘investment’, there can be no dispute, legal or otherwise, arising directly or indirectly out of it, which could be submitted to the jurisdiction of the Centre and the Tribunal.

Neither Party asserted that the ICSID Convention contains any precise a priori definition of ‘investment’. Rather *the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.*”⁵⁶⁶

The tribunal noted further that the evidence of such subsequent practice would be found in the decisions of ICSID tribunals and in investment treaties:

“In the absence of a generally accepted definition of investment for the purpose of the ICSID Convention, the Tribunal must examine the current and past practice of ICSID and the practice of States as evidenced in multilateral and bilateral treaties and agreements binding on States, notably the United States-Sri Lanka BIT. It is for the Tribunal to determine the meaning or definition of ‘investment’ for this purpose as a question of law. Opinions of experts on the theory and practice of multinational corporations are not to be identified with the teachings of the most highly qualified publicists of the various nations, which as such constitute subsidiary means for the determination of rules of law. Only subject to Article 59 of the Statute of the International Court of Justice are judicial decisions to be considered as such subsidiary sources of law.”⁵⁶⁷

The analysis of investment treaties as an element of subsequent practice in the interpretation of the investment requirement of the ICSID Convention may serve

⁵⁶⁶ *Ibid.*, at 872 – emphasis added.

⁵⁶⁷ *Ibid.*, at 876.

two purposes. First, the definitions of investment contained in such treaties might also provide elements for the achievement of the ordinary meaning of the term “investment” for the purposes of the ICSID Convention. This analysis is also relevant especially due to the fact that the meaning (or meanings) of the term “investment” existing in 1965, when the ICSID Convention was concluded, might have changed. The possibility of temporal variations of the ordinary meaning of a term raises the question as to whether the term “investment”, as employed in the ICSID Convention, should be interpreted in accordance with the ordinary meaning it had at the time of the conclusion of the ICSID Convention, or with the current ordinary meaning of the term if such meaning changed.

Pursuant to the sixth major principle of treaty interpretation identified by FITZMAURICE, the so-called principle of contemporaneity, “[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.”⁵⁶⁸ The principle of contemporaneity is founded on the idea that, if the purpose of treaty interpretation is to reveal the intention of the parties, the text of the treaty, as the main source of the intention of the parties, has to be understood in accordance with the meaning the parties intended to give to the terms. Accordingly, the starting-point of the interpretation of a treaty must be based on the ordinary meaning its terms had at the time that the treaty was originally concluded.⁵⁶⁹

⁵⁶⁸ *Supra* note 90, at 212.

⁵⁶⁹ See Haraszti, G., *supra* note 30, at 89; Sinclair, I., *supra* note 34, at 124; Thirlway, H., *supra* note 90, at 57; Brownlie, I., *supra* note 121, at 604; Shaw, M., *supra* note 34, at 840.

The principle of contemporaneity finds support in the practice of the ICJ. In the *Rights of Nationals of the United States of America in Morocco* case, in determining the meaning of certain terms employed in two treaties concluded between Morocco and the United States in 1787 and 1836, the ICJ observed that “in construing the provisions of Article 20 — and, in particular, the expression ‘shall have any dispute with each other’ — it is necessary to take into account the meaning of the word ‘dispute’ at the time when the two treaties were concluded.”⁵⁷⁰

This does not mean, however, that the interpreter is prevented from taking into account temporal variations of the ordinary meaning of the terms of a treaty. The question as to whether one should interpret a term of a treaty in accordance with the ordinary meaning existing at the time of the conclusion of the treaty, or with its current ordinary meaning, is contingent upon the specific wording adopted in the treaty. Generic terms employed in treaties with continuing duration are assumed to be intended to follow temporal variations of their ordinary meaning.⁵⁷¹

In the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, interpreting the Covenant of the League of Nations, which was concluded in 1919, the ICJ observed that:

“Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its

⁵⁷⁰ Judgment of August 27, 1952, ICJ Reports 176 (1952), at 189.

⁵⁷¹ See Greig, D. W., *supra* note 112, at 55; Linderfalk, U., *supra* note 88, at 87; Dupuy, Pierre-Marie, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, in The Law of Treaties Beyond the Vienna Convention 123 (Cannizzaro, Enzo, ed., Oxford: Oxford University Press, 2011), at 131.

conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant — ‘the strenuous conditions of the modern world’ and ‘the well-being and development’ of the peoples concerned — were not static, but were by definition evolutionary, as also, therefore, was the concept of the ‘sacred trust’. The parties to the Covenant must consequently be deemed to have accepted them as such.”⁵⁷²

Likewise, in the *Aegean Sea Continental Shelf* case, the ICJ concluded that the use of a generic term creates the presumption that such term was employed with the intention to follow temporal variations of its ordinary meaning. In this case, the ICJ had to decide whether the expression “the territorial status”, contained in the instrument of accession of Greece to the General Act for the Pacific Settlement of International Disputes of 1928, could be deemed to refer to the rights over the continental shelf. This question arose out of the fact that, at the time that Greece acceded to the General Act in 1931, the concept of continental shelf had not been developed in international law. The ICJ, however, noted that:

“Once it is established that the expression ‘the territorial status of Greece’ was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.”⁵⁷³

In the *Kasikili/Sedudu Island* case, the ICJ noted that “[i]n order to illuminate meaning of the words agreed upon in 1890, there is nothing that prevents the

⁵⁷² Advisory Opinion of June 21, 1971, ICJ Reports 16 (1971), at 31.

⁵⁷³ Judgment of December 19, 1978, ICJ Reports 3 (1978), at 32.

Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties.”⁵⁷⁴

In the *Case Concerning the Dispute Regarding Navigational and Related Rights*, the ICJ interpreted a term employed in a treaty concluded in 1858 in accordance with its current ordinary meaning and not with the meaning the term had at the time that the treaty was concluded. In this case, the question before the ICJ was whether the term “comercio”, as employed in a treaty concluded by Costa Rica and Nicaragua in 1858, should be interpreted as referring exclusively to commerce of goods or could be deemed to include services providing the transport of persons. The ICJ decided that, once “comercio” was a generic term, used in a treaty entered into for an unlimited duration, it had to be understood in the light of the ordinary meaning of the term existing at the time of the application of the treaty. According to the decision:

“It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties’ common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning [...].

This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3)(b) of the Vienna Convention, can result in a

⁵⁷⁴ *Supra* note 34, at 1060.

departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.”⁵⁷⁵

Referring to the *Aegean Sea Continental Shelf* case, the ICJ noted that the decision given in that case “is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”⁵⁷⁶

The practice of the ICJ allows the conclusion that the term “investment”, as employed in the text of the ICSID Convention, may be deemed to have been used as a generic term and, for this reason, there is the presumption that its terms must be interpreted in accordance with the ordinary meaning existing at the time of the application of the ICSID Convention. But whether or not the definitions of investment contained in investment treaties may be used in the determination of the current ordinary meaning of the term “investment” is contingent upon the question as to whether these treaties qualify as subsequent practice for the purposes of the Vienna Convention.

⁵⁷⁵ *Supra* note 34, at 1203-1204.

⁵⁷⁶ *Ibid.*, at para. 1204. See also *Pulp Mills on the River Uruguay*, *supra* note 34, at para. 204.

In accordance with Article 31(3)(b) of the Vienna Convention, “[t]here shall be taken into account, together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁵⁷⁷ While investment treaties seem to meet the requirement that the subsequent practice must be “in the application of the treaty”,⁵⁷⁸ investment treaties do not easily comply with the condition that the subsequent practice must establish “the agreement of the parties regarding its interpretation.”

The first element of this condition is that the subsequent practice must establish an “agreement”; it must demonstrate a common understanding of the parties as to the meaning of the interpreted treaty.⁵⁷⁹ For the purposes of the Vienna Convention, in order for investment treaties to be considered subsequent practice in the application of the investment requirement of the ICSID Convention, it must be demonstrated that in these treaties the Contracting States share a common understanding as to the meaning of the term “investment” set forth in Article 25(1) of the ICSID Convention. This condition may be deemed to be fulfilled by the fact that when a Contracting State enters into an investment treaty that provides for the submission of disputes to the jurisdiction of the Centre, it is aware of the requirements set forth in the ICSID Convention. Accordingly, if the Contracting State agrees that the disputes arising out of the investment treaty may be submitted to the jurisdiction of the Centre, there is no difficulty to conclude that the Contracting State agrees that these disputes comply with the requirements

⁵⁷⁷ 8 ILM 679 (1969), at 692.

⁵⁷⁸ As noted by LINDERFALK, “it can be considered an ‘application’ [...] when the provisions of a treaty are the cause for concluding a new international agreement or the cause for the way the new agreement is drafted” (Linderfalk, U., *supra* note 88, at 166-167 – footnote excluded). When an investment treaty is concluded providing for the submission of disputes to the jurisdiction of the Centre, such treaty is drafted in the light of the provisions of the ICSID Convention.

⁵⁷⁹ See Linderfalk, U., *supra* note 88, at 167.

of the ICSID Convention. In this sense, if the Contracting State agrees in an investment treaty that a dispute arising out of an investment as described in the treaty may be referred to ICSID arbitration, the Contracting State is in agreement that the definition of investment set forth in the investment treaty complies with the investment requirement of the ICSID Convention.⁵⁸⁰ To conclude otherwise,

⁵⁸⁰ In *Inmaris*, the tribunal observed that:

“Rather, in most cases — including, in the Tribunal’s view, this one — it will be appropriate to defer to the State parties’ articulation in the instrument of consent (e.g. the BIT) of what constitutes an investment. The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means that they believe that that activity constitutes an ‘investment’ within the meaning of the ICSID Convention as well. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment” (*supra* note 34, at 1087).

Similarly, in *Alpha*, the tribunal noted that:

“Of course, the Tribunal does not contend that *any* definition of ‘investment’ that might be agreed by States in a BIT (or by a State and an investor in a contract) must constitute an ‘investment’ for purposes of Article 25(1). To cite the classic example, a simple contract for the sale of goods, without more, would not constitute an investment within the meaning of Article 25(1), even if a BIT or a contract defined it as one. However, when the State party to a BIT agrees to protect certain kinds of economic activity, and when the BIT provides that disputes between investors and States relating to such activity may be resolved through ICSID arbitration, it is appropriate to interpret the BIT as reflecting the State’s understanding that that activity constitutes an ‘investment’ within the meaning of the ICSID Convention as well. That judgment, by States that are both parties to the BIT and Contracting States to the ICSID Convention, is entitled to great deference. A tribunal would have to have very strong reasons to hold that the States’ mutually agreed definition of investment should be set aside” (*supra* note 285, at para. 314 – footnote excluded, emphasis in the original).

In *Abacat*, in opposition to the *Salini* test, the tribunal observed that:

“If Claimants’ contributions were to fail the *Salini* test, those contributions — according to the followers of this test — would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants’ contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention’s aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina’s and Italy’s express agreement to protect the value generated by these kinds of contributions. In other words — and from the value perspective — there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because — from the perspective of the contribution — the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should,

one would have to assume that the Contracting State acted in a contradictory manner, to the extent that there would be a conflict between the definition of investment set forth in the investment treaty and the provision allowing investors to submit to ICSID arbitration disputes that comply with the requirement of the investment treaties, including the definition of investment.⁵⁸¹ As seen before, a rule that derives from the principle of integration is that the provisions of a treaty form a unity that must be assumed to have a consistent meaning and be free of contradictions.⁵⁸²

however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create” (*supra* note 285, at para. 364).

⁵⁸¹ As observed by GAILLARD, “it is thus difficult to imagine that the drafters of investment protection treaties who included the ICSID option after having broadly defined covered investments could have envisaged that some of the transactions so defined could nonetheless be excluded from the Centre’s jurisdiction because they do not constitute an investment under Article 25(1) of the ICSID Convention” (Gaillard, E., *supra* note 54, at 410).

In *Bureau Veritas*, after the tribunal concluded that the dispute complied with the definition of investment set forth in the investment treaty which provided for the submission of disputes to the jurisdiction of the Centre, it noted that:

“Having concluded that BIVAC made an ‘investment’ within the meaning of the BIT, the question arises whether a different conclusion arises in relation to the meaning of ‘investment’ in the ICSID Convention. At a formal level, the question may be put as follows: does the definition in the BIT exceed what is permissible under the Convention? Framed in that way the answer is self-evidently negative. The definition in the BIT follows the approach adopted in many other BITs concluded around the world. Paraguay would have to argue that its own BIT is inconsistent with the requirements of the ICSID Convention. Sensibly, it has chosen not to go down that path” (*supra* note 34, at para. 94).

In *AFT*, on the other hand, where a non-ICSID tribunal applied the *Salini* test in the assessment of the compliance with the definition of investment contained in the Slovak-Switzerland BIT, the tribunal considered that the ICSID arbitration option given to investors meant that “although the BIT gives a broad ‘investment’ definition, the two Contracting States must have inevitably intended to refer to what constitutes ‘investment’ under the ICSID Convention as concretely applied in the relevant case-law” (*supra* note 283, at para. 239). The difficulty of the decision is that, when the Slovak-Switzerland BIT was concluded in 1990, there were very few cases concerning the notion of investment within the meaning of the ICSID Convention and the decisions that indicated the existence of such notion of investment were rendered years after the conclusion of the BIT (see *supra* at pp. 29 *et seq.*).

⁵⁸² See *supra* note 491.

A typical example of such situation may be found, for instance, in the Germany-Guyana BIT.⁵⁸³ In accordance with its Article 11(2):

“If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of either of the parties to the dispute be submitted for arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.”⁵⁸⁴

It may be inferred from the language of the BIT that the Contracting State party to the investment treaty considered that all disputes referred to ICSID arbitration pursuant to the BIT would comply with the requirements of the ICSID Convention and, for this reason, one may consider that the Contracting State assumes that the disputes that fulfill the definition of investment of the BIT also meet the investment requirement of the ICSID Convention.

On the other hand, a typical example of a situation where the submission of a dispute to the jurisdiction of the Centre is contingent upon the agreement of the disputing parties may be found in the Argentina-United Kingdom BIT.⁵⁸⁵ Pursuant to Article 8 of the BIT, the investor has the option of submitting disputes to international arbitration. However, by virtue of Article 8(3), if the dispute is referred to international arbitration, the disputing parties have to agree either to submit the dispute to the jurisdiction of the Centre or to an *ad hoc* arbitral tribunal

⁵⁸³ Treaty between the Federal Republic of Germany and the Co-operative Republic of Guyana concerning the Encouragement and Reciprocal Protection of Investments of December 6, 1989 (entered into force March 8, 1994).

⁵⁸⁴ Available at <http://www.unctad.org/sections/dite/ia/docs/bits/germany_guyana.pdf>, (last visited on June 1, 2009).

⁵⁸⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland the Government of the Republic of Argentina for the Promotion and Protection of Investments of December 11, 1990 (entered into force February 19, 1993).

constituted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL tribunal”). If the disputing parties cannot reach an agreement, the dispute must be referred to a UNCITRAL tribunal.⁵⁸⁶ In this case, there is no clear indication that the Contracting State agreed that all disputes referred to arbitration pursuant to the investment treaty would comply with the requirements of the ICSID Convention. In particular, a Contracting State may not agree to submit a dispute to the jurisdiction of the Centre precisely because it does not agree that such dispute arises out of an investment in the sense of the ICSID Convention. For this reason, investment

⁵⁸⁶ Article 8(1), (2) and (3) of the Argentina-United Kingdom BIT provides that:

“(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules” (available at <http://www.unctad.org/sections/dite/ia/docs/bits/uk_argentina.pdf>, (last visited on June 1, 2009)).

treaties that do not establish the unconditional offer of consent may not be considered as subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention.

Investment treaties would also not qualify as subsequent practice in the application of the ICSID Convention in the sense of the Vienna Convention if the investment treaty provides that the submission of the dispute to the jurisdiction of the Centre is contingent upon the compliance with requirements set forth in the ICSID Convention. One example of such investment treaties is the Czech Republic-Ireland BIT.⁵⁸⁷ Pursuant to Article 8(2)(a) of the BIT:

“If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case either to: (a) the International Centre for Settlement of Investment Disputes (ICSID) *having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965.*”⁵⁸⁸

Although the BIT provides for an unconditional offer of consent, the wording “having regard to the applicable provisions of the [ICSID Convention]” suggests that this option is only available if the dispute fulfills the requirements of the ICSID Convention. In this case, it could be suggested that the Contracting State did not consider that all disputes arising out of the investment treaty would comply with the requirements of the jurisdiction of the Centre.

⁵⁸⁷ Agreement between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments of June 28, 1996 (entered into force August 1, 1997).

⁵⁸⁸ Available at <http://www.unctad.org/sections/dite/ia/docs/bits/czech_ireland.pdf>, (last visited on June 1, 2009) – emphasis added.

Accordingly, an investment treaty will qualify as subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention if the offer of consent to the jurisdiction of the Centre provided by the Contracting State in the investment treaty is not contingent upon any further subsequent action of acceptance by the disputing State, but it is entirely up to the investor and such choice is not expressly limited by the fulfillment of requirements other than those set forth in the investment treaty.

Moreover, the second element entailed by Article 31(3)(b) of the Vienna Convention is that the subsequent practice must establish the agreement of the “parties”. For the purposes of the Vienna Convention, “‘party’ means a State which has consented to be bound by the treaty and for which the treaty is in force.”⁵⁸⁹ Consequently, the investment treaty may only qualify as subsequent practice of a Contracting State in the sense of the Vienna Convention if the State party to the investment treaty was a Contracting State of the ICSID Convention at the time that the treaty was concluded. For this reasons, investment treaties such as the Argentina-United States BIT⁵⁹⁰ would not fulfill the requirements of Article 31(3)(b) of the Vienna Convention in relation to Argentina, once Argentina was not a Contracting State of the ICSID Convention at the time of its conclusion.⁵⁹¹

⁵⁸⁹ Article 2(1)(g) of the Vienna Convention, 8 ILM 679 (1969), at 681.

⁵⁹⁰ Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of November 14, 1991 (entered into force October 20, 1994).

⁵⁹¹ The Argentina-United States BIT was concluded on November 14, 1991. Argentina, however, only became a Contracting State of the ICSID Convention on November 18, 1994, thirty days after the deposit of its instrument of ratification (see <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=ViewContractingStates&range=A~B~C~D~E>>, (last visited on February 1, 2009).

In addition, this second element requires that the subsequent practice must establish an agreement that is attributable to all parties to the treaty. This seems to be the main difficulty of admitting the definitions of investment set forth in investment treaties as subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention. Contracting States such as Bahamas, Fiji, Micronesia, Samoa and the Solomon Islands,⁵⁹² and other Contracting States, while parties to investment treaties, might not be parties to investment treaties that fulfill all the elements of Article 31(3)(b).

In the comments to Article 27(3)(b) of the ILC Draft Articles on the Law of Treaties, the draft version of Article 31(3)(b) of the Vienna Convention,⁵⁹³ the ILC noted that “[i]t considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as whole’.”⁵⁹⁴ The ILC explained, however, that it was not required that “every party must individually have engaged in the practice [but] it suffices that it should have accepted the practice.”⁵⁹⁵ Accordingly, the fact

⁵⁹² According to the databases of the Centre (see <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main>>, (last visited on February 1, 2009)), of the Organization of American State's Foreign Trade Information System (see <<http://www.sice.org>>, (last visited on February 1, 2009)), and of the United Nations Conference on Trade and Development (see <http://www.unctadxi.org/templates/DocSearch___779.aspx>, (last visited on February 1, 2009)).

⁵⁹³ The wording of Article 27(3)(b) of the ILC Draft Articles on the Law of Treaties was adopted in Article 31(3)(b) of the Vienna Convention without few modifications. Article 27(3)(b) provided that “[t]here shall be taken into account, together with the context [...] [a]ny subsequent practice in the application of the treaty which established the understanding of the parties regarding its interpretation” (Yearbook of the International Law Commission, 1966, vol. II, at 218).

⁵⁹⁴ Yearbook of the International Law Commission, 1966, vol. II, at 222.

⁵⁹⁵ *Idem*. This comment was meant to explain the effects of the changes made in the wording of the earlier version of Article 27(3)(b) of the ILC Draft Articles on the Law of Treaties. In the 2004 version of the ILC Draft Article on the Law of Treaties, Article 69(3)(b) provided that “[t]here shall also be taken into account, together with the context [...] [a]ny subsequent practice in the application of the treaty which clearly establishes the understanding of *all* the parties regarding its interpretation” (Yearbook of the International Law Commission, 1964, vol. II, at 199 – emphasis added). The exclusion of “all” in the final draft was intended to avoid the idea that each party must have actively contributed to the subsequent practice in order to be considered. See also Elias, T. O., *The Modern Law of Treaties* (Leiden: A.W. Sijthoff, 1974), at 76; Sinclair, I., *supra* note 34, at 138; McGinley, G., *supra* note 121, at 216-217; Linderfalk, U., *supra* note 88, at 167; Gardiner,

that not all Contracting States of the ICSID Convention have concluded investment treaties that meet the requirements of Article 31(3)(b) of the Vienna Convention is not conclusive. The subsequent practice reflected in investment treaties could still fall within the meaning of Article 31(3)(b) of the Vienna Convention if one considers that the Contracting States that have not actively contributed to the subsequent practice have accepted nevertheless the practice of the other Contracting States. But it is not clear whether Article 31(3)(b) of the Vienna Convention entails a positive acceptance of the subsequent practice or whether such acceptance may be inferred from the silence of the parties that have not actively participated in such practice.

In the *Beagle Channel Arbitration*, the tribunal considered that the subsequent practice of one of the parties could only be considered in the interpretation of a treaty if the other party has acquiesced in such practice. In this case, which involved the sovereignty over three islands in the Beagle Channel disputed by Argentina and Chile, the tribunal had to interpret a boundary treaty concluded by the parties in 1881. In support of its territorial claim, Chile argued that the subsequent practice favored its interpretation of the treaty. In particular, Chile claimed that after the conclusion of the treaty it adopted several acts of jurisdiction in the disputed islands that were never contested by Argentina. For this reason, due to the silence of Argentina, this subsequent practice would qualify for the purposes of Article 31(3)(b) of the Vienna Convention. For its turn, Argentina alleged that it could not be deemed to have accepted the Chilean practice due to the lack of protest, unless such practice has been expressly

R., *supra* note 112, at 235-236, 239; Orakhelashvili, A., *supra* note 30, at 356-357; Villiger, M., *supra* note 126, at 429.

accepted. The tribunal, however, concurred with the Chilean interpretation of Article 31(3)(b) of the Vienna Convention, concluding that the “agreement” required by Article 31(3)(b) may be deemed to exist if one of the parties to treaty fails to protest against the acts of the other party. According to the decision:

“[T]he Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged ‘agreement’ between the Parties. The terms of the Vienna Convention do not specify the ways in which ‘agreement’ may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.”⁵⁹⁶

This conclusion also finds support in the American Law Institute’s Second Restatement of the Law on the Foreign Relations Law of the United States (“Second Restatement”). Although in the Second Restatement there was no distinction between primary and supplementary rules of treaty interpretation, its § 147(1)(f) provided that:

“International law requires that the interpretative process ascertain and give effect to the purpose of the international agreement which, as appears from the terms used by the parties, it was intended to serve. The factors to be taken into account by way of guidance in the interpretative process include:

[...]

⁵⁹⁶ Award of February 18, 1977, 52 ILR 93 (1979), at 224. See also Linderfalk, U., *supra* note 88, at 174-177.

(f) the subsequent practice of the parties in the performance of the agreement, or *the subsequent practice of one party, if the other party or parties knew or had reason to know of it.*⁵⁹⁷

If it is admitted that the tacit acceptance of the subsequent practice suffices for the purposes of Article 31(3)(b) of the Vienna Convention, one could argue that the practice reflected in investment treaties has been accepted by all Contracting States of the ICSID Convention, even though not all Contracting States have concluded investment treaties providing for ICSID arbitration. Given the extraordinary number and publicity of investment treaties providing for ICSID arbitration, it seems unlikely that not all Contracting States are aware of the practice reflected in these treaties. The conclusion of investment treaties plays nowadays a relevant role in the relations between States, and even for those States that have not concluded any of these treaties, this option is not unknown. In this sense, the Contracting States that have not concluded investment treaties would be deemed to have accepted the practice in these treaties, to the extent that it has not been reported so far any formal protest against the terms of investment treaties providing for ICSID arbitration.

Nonetheless, the fact that all Contracting States may be deemed to be aware of investment treaties providing for ICSID arbitration does not necessarily mean that,

⁵⁹⁷ American Law Institute, Restatement of the Law: Second. Foreign Relations Law of the United States (St. Paul, Minnesota: American Law Institute Publishers, 1965), at 451 – emphasis added. It should be noted, however, that the Third Restatement of the Law on the Foreign Relations Law of the United States (“Third Restatement”) did not adopt the same language. In accordance with its § 325(2), which was based on Article 31(3) of the Vienna Convention, “[a]ny subsequent agreement between the parties regarding the interpretation of the agreement, and *subsequent practice between the parties in the application of the agreement*, are to be taken into account in its interpretation” (American Law Institute, Restatement of the Law: Third. Foreign Relations Law of the United States (St. Paul, Minnesota: American Law Institute Publishers, 1987), at 196 – emphasis added). The reference to “subsequent practice between the parties” in the Third Restatement gives the idea that, in order for the practice of not all of the parties to be taken into account in the interpretation of a treaty, the other parties must have at least positively accepted it.

in the absence of protest, they acquiesced in the practice reflected in those treaties. Acquiescence may only result from the absence of protest in a case in which there is an obligation to protest.⁵⁹⁸ For this reason, the acceptance of the practice in the application of the investment requirement of the ICSID Convention by a Contracting State would only occur if there were in the ICSID Convention an obligation for the Contracting States to protest against the potential misuses of the dispute settlement facilities of the Centre. But this obligation to protest does not arise unless a Contracting State is directly affected by the misuse of the dispute settlement facilities of the Centre. This would be the case where, due to the misuse of the Centre, a Contracting State is required to do or to refrain from doing something, contrary to its interpretation of the ICSID Convention. This situation does not seem to occur by the mere conclusion by certain Contracting States of an investment treaty providing for the submission to the jurisdiction of the Centre of disputes that do not comply with the jurisdictional requirements of the ICSID Convention in accordance with the interpretation given by other Contracting States.

On the other hand, while investment treaties might not qualify as subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention, they may still be considered in the interpretation of the ICSID Convention as a supplementary means of treaty interpretation in the sense of Article 32 of the Vienna Convention.⁵⁹⁹ Especially in the case of general multilateral treaties with a great number of parties, such as the ICSID Convention, the fact the subsequent practice is not attributable to all parties to the treaty, but to a great majority, favors

⁵⁹⁸ See MacGibbon, I. C., *The Scope of Acquiescence in International Law*, 31 BYIL 143 (1954), at 143, 146-147; Müller, Jörg Paul, *Acquiescence*, I EPIL 14 (1992), at 14.

⁵⁹⁹ See *supra* note 126.

the use of such subsequent practice in the interpretation of the treaty, even though not all elements of the Article 31(3)(b) of the Vienna Convention are met. It seems that FITZMAURICE favored such flexible approach in relation to general multilateral treaties. According to him, “[i]t is, of course, axiomatic that the conduct in question must have been that of both or all — or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one.”⁶⁰⁰

In this sense, the fact that investment treaties do not entail the contribution to the economic development of the host State in order for an activity or transaction to qualify as an investment may be taken into account in order to confirm the interpretation that the economic development requirement is not an element of the notion of investment within the meaning of the ICSID Convention.

5. CONCLUSION

As discussed in this chapter, the decisions that admitted that the ICSID Convention allows ICSID tribunals to expand or to restrict the jurisdiction of the Centre on the basis of the contribution to the economic development of the host State are based on an interpretation of the ICSID Convention that is inconsistent with the general rule of treaty interpretation of the Vienna Convention. In the absence of an express requirement, the economic development requirement is founded on the idea that the investment requirement of the ICSID Convention has a special feature that distinguishes the notion of investment within the meaning of the ICSID Convention from the ordinary meaning of the term. While the

⁶⁰⁰ *Supra* note 90, at 223.

conclusion of the ICSID Convention envisaged the promotion of the economic development of its Contracting States, the object and purpose of the ICSID Convention, under the general rule of treaty interpretation of the Vienna Convention, may not be relied on in disregard of the ordinary meaning of the term “investment”. In addition to the fact that some of the decisions were based on grounds that contradict Article 25(1) of the ICSID Convention, the subsequent practice of the Contracting States of the ICSID Convention, relied on as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention, confirms the construction that the contribution to the economic development of the host State is not an element of the notion of investment within the meaning of the ICSID Convention.

CONCLUSIONS

1. INTERPRETATIVE APPROACHES AND FRAGMENTATION IN THE ICSID DECISION-MAKING PROCESS

The decisions that admitted the existence of the economic development requirement either to expand or to restrict the jurisdiction of the Centre reveal an inherent problem of the dispute settlement system established by the ICSID Convention that derives from its hybrid foundations: the *fragmentation* of the ICSID decision-making process. Although the ICISD Convention envisages a system for the settlement of disputes between two opposing sides, the effects of the submission of a dispute to the jurisdiction of the Centre are not limited to the disputing parties; the ICSID Convention imposes multilateral obligations that potentially affect all Contracting States. But while the ICSID Convention establishes a multilateral system, the dispute settlement procedure is essentially confined to the parties to the dispute. Except for the authority conferred on the Secretariat of the Centre by Article 36(3) of the ICSID Convention to refuse registration of a request for arbitration if the dispute is manifestly outside the jurisdiction of the Centre,⁶⁰¹ the ICSID Convention does not set forth any mechanism whereby questions relating to the jurisdiction of the Centre may be referred to a central body.⁶⁰² On the contrary, pursuant to Article 41(2) of the ICSID Convention, each ICSID tribunal has the express authority to determine

⁶⁰¹ See *supra* note 28.

⁶⁰² See *supra* note 32.

whether or not a dispute falls within the jurisdiction of the Centre,⁶⁰³ and the decisions rendered by ICSID tribunals on the jurisdiction of the Centre are not subject to review by a central body.⁶⁰⁴

The decisions that admitted the existence of the economic development requirement were based on the assumption that the investment requirement of the ICSID Convention is distinct from the will of the disputing parties and must be fulfilled independently from the consent to the jurisdiction of the Centre. This construction of the ICSID Convention, which, as discussed in Chapter I, is consistent with the general rule of treaty interpretation of the Vienna Convention, is a recognition that, although arbitral proceedings are instituted under the ICSID Convention for the settlement of a dispute between two sides, the exercise of the jurisdiction of the Centre is contingent upon the compliance with jurisdictional requirements that govern a multilateral dispute settlement system. Regardless of the consent of the disputing parties, arbitral proceedings may not be instituted under the ICSID Convention if the jurisdictional requirements set forth in Article 25(1) of the ICSID Convention are not fulfilled.

⁶⁰³ See *supra* at pp. 9 *et seq.*

⁶⁰⁴ See Schill, S., *supra* note 380, at 293. In accordance with Article 52(3) of the ICSID Convention, the disputing parties do not participate in the appointment of the members of *ad hoc* committees. The three members of an *ad hoc* committee are chosen from the Panel of Arbitrators by the Chairman of the Administrative Council of the Centre. Article 52(3) provides that:

“On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)” (1 ICSID Reports 3 (1993), at 17).

But while the decisions that admitted the existence of the economic development requirement recognized the objectiveness of the investment requirement of the ICSID Convention, they are based on a misapplication of the general rule of treaty interpretation of the Vienna Convention. As demonstrated in Chapter II, in the absence of an express requirement that allows ICSID tribunals to deny the jurisdiction of the Centre to disputes that arise out of investments that do not contribute to the economic development of the host State, or to extend the jurisdiction to disputes that arise out of transactions or activities that, although not an investment, contributed to the economic development of the host States, these decisions viewed the contribution to the economic development of the host State not as an autonomous jurisdictional requirement, but as an element of the notion of investment within the meaning of the ICSID Convention. The problem of this construction of the investment requirement of the ICSID Convention is that it disregards the ordinary of term “investment” and confers on this term a special meaning based on the object and purpose of the ICSID Convention. This construction is inconsistent with the general rule of treaty interpretation of the Vienna Convention, once the use of the object and purpose of a treaty is a second step in the interpretation process and may not contradict the ordinary meaning of a term.

The inconsistent decisions rendered by the ICSID tribunals and *ad hoc* committees that admitted the economic development requirement is a downside of the ICSID dispute settlement system that derives from the fragmentation of the ICSID decision-making process. This downside threatens the functionality of the system. Under the *CSOB* approach, disputes that were not supposed to be

submitted to the Centre because they do not arise out of an investment may be submitted nevertheless if they arise out of transactions or activities that contributed to the economic development of the host State. On the other hand, under the *Salini* approach, disputes that were supposed to be submitted the jurisdiction of the Centre may be excluded from the jurisdiction of the Centre if they arise out of investments that do not contribute to the economic development of the host State. In both cases, there is a misuse of the ICSID dispute settlement system.

2. HARMONIZATION IN THE ICSID DECISION-MAKING PROCESS

The problem of inconsistent and divergent decisions in investment treaty arbitration has led to the idea of establishing an appellate system against decisions rendered by arbitral tribunals constituted for the settlement of investment disputes.⁶⁰⁵ In a discussion paper prepared by the Secretariat of the Centre with the purpose of initiating discussions for the improvement of the ICSID dispute

⁶⁰⁵ See Laird, Ian, and Askew, Rebecca, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7 J. App. Prac. & Process 285 (2005), at 294-297; Bishop, Doak, *The Case for an Appellate Panel and its Scope of Review*, in Investment Treaty Law: Current Issues Volume 1 15 (Ortino, Federico, Sheppard, Audley, and Warner, Hugo, eds., London: British Institute of International and Comparative Law, 2006), at 15-16; Kaufmann-Kohler, Gabrielle, *Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?*, in Pervasive Problems in International Arbitration 257 (Mistelis, Loukas A., and Lew, Julian D. M., eds., The Netherlands: Kluwer Law International, 2006), at 274-276; Schreuer, C., *supra* note 34, at 20-22; Gantz, David A., *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 Vand. J. Transnat'l L. 39 (2006), at 40-49; Tams, Christian J., *An Appealing Option? The Debate About an ICSID Appellate Structure*, 4(5) TDM (2007), at 8-9; Legum, Barton, *Options to Establish an Appellate Mechanism for Investment Disputes*, in Appeals Mechanism in International Investment Disputes 231 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 231-233; Qureshi, Asif H., and Khan, Shandana Gulzar, *Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View*, in Appeals Mechanism in International Investment Disputes 267 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 268-271; Reinisch, August, *The Future of Investment Arbitration*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 894 (Binder, Christina, Kriebaum, Reinisch, August, and Wittich, Stephan, eds., Oxford: Oxford University Press, 2009), at 908-911.

settlement system, it was suggested that the establishment of an appellate system had been considered “desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-State arbitrations initiated under investment treaties”⁶⁰⁶ and, consequently, “enhance the acceptability of investor-to-State arbitration.”⁶⁰⁷

The discussion paper recognizes that the main problem of creating an appellate system lies in the text of the ICSID Convention. In particular, Article 53(1) of the ICSID Convention states that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”⁶⁰⁸ For this reason, the creation of a system that allows disputing parties to appeal against ICSID awards would require the amendment of Article 53(1).⁶⁰⁹ However, in accordance with Article 66(1) of the ICSID Convention, in order for any amendment of the ICSID Convention to come into effect, it must have the consent of all Contracting States.⁶¹⁰ As admitted in the

⁶⁰⁶ Discussion Paper on Possible Improvements of the Framework for ICSID Arbitration, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14, (last visited on August 20, 2009), at para. 6.

⁶⁰⁷ *Ibid.*, at para. 22.

⁶⁰⁸ 1 ICSID Reports 3 (1993), at 17.

⁶⁰⁹ See Schreuer, C., *supra* note 34, at 22; Tams, C., *supra* note 605, at 16; Reinisch, A., *supra* note 605, at 910-911.

⁶¹⁰ Pursuant to Article 66(1) of the ICSID Convention:

“If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment” (1 ICSID Reports 3 (1993), at 20).

discussion paper, given the wide participation of States in the ICSID Convention, it would be unrealistic to pursue any amendment of the ICSID Convention.⁶¹¹

In order to avoid the need of any formal amendment of the ICSID Convention, the discussion paper suggests that the wording of Article 53(1) could be modified through the conclusion of subsequent investment treaties, in accordance with Article 41 of the Vienna Convention.⁶¹² In this sense, the discussion paper suggests that:

“In accordance with the general treaty law rules reflected in Article 41 of the 1969 Vienna Convention of the Law of Treaties, the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention.”⁶¹³

⁶¹¹ See *supra* note 606, at para. 3.

⁶¹² *Ibid.*, at Annex, para. 2.

Pursuant to Article 41(1) of the Vienna Convention:

“Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole” (8 ILM 679 (1969), at 695).

Article 41(1) of the Vienna Convention reflects the practice of States and, thus, may be considered to constitute the codification of customary international law (see Sinclair, I., *supra* note 34, at 108; Villiger, M., *supra* note 126, at 531-532). Article 41(2) of the Vienna Convention, however, because of its procedural nature, falls into the category of progressive development of international law (see Villiger, M., *supra* note 126, at 538). Article 41(2) provides that “[u]nless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides” (8 ILM 679 (1969), at 695). See Vierdag, E. W., *The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention*, 76 AJIL 779 (1982), at 793.

⁶¹³ *Supra* note 606, at Annex, para. 2 – footnotes excluded.

But apart from the difficulties of modifying the ICSID Convention, as a constitutive treaty of an international organization, between certain of its parties only,⁶¹⁴ the creation of an appellate system under the auspices of the Centre, which was denominated in the discussion paper as the “ICSID Appeals Facility”, presupposes the adoption of procedural and institutional rules and, most important, the establishment of an appellate organ. According to the proposal made by the Secretariat in the discussion paper, the ICSID Appeals Facility would be created by a resolution of the Administrative Council of the Centre, which would adopt the ICSID Appeals Facility Rules.⁶¹⁵ These Rules would establish the Appeals Panel, which would comprise a list of 15 persons elected for a defined term by the Administrative Council upon the designation of the Secretary-General of the Centre.⁶¹⁶ The appeals tribunals would be constituted by three members of the Appeals Panel, appointed by the Secretary-General for each case.⁶¹⁷

The proposal for the creation of an appellate system made by the Secretariat was designed in a way to avoid the need of any amendment of ICSID Convention. However, a question that is not addressed in the proposal is whether the

⁶¹⁴ While the ICSID Convention is silent about the conclusion of subsequent agreements intended to modify its provisions between certain of the Contracting States, the modification of provisions that govern the jurisdiction of the Centre seems to be inconsistent with the institutional nature of the ICSID Convention. In addition to the fact the submission of a dispute to the jurisdiction of the Centre creates multilateral obligations, the Centre, as an international organization, may only exercise its functions within the limits of the mandate conferred on it by its members under its constitutive treaty. Accordingly, the modification of a provision of the ICSID Convention that has the effect of expanding the jurisdiction of the Centre has also the effect of expanding the mandate conferred on the Centre. In this sense, the modification of the jurisdiction of the Centre between certain of the Contracting States does not seem possible, to the extent that the modification of the mandate of an international organization requires the consent of all member States and not of certain of them only (see Amerasinghe, C.F., *supra* note 112, at 452-453). It is for this reason that Article 66(1) of the ICSID Convention, which regulates the amendment procedure of the ICSID Convention, requires that any amendment of the ICSID Convention may only enter into force after all Contracting States have consented to be bound by it (see *supra* note 610).

⁶¹⁵ See *supra* note 606, at Annex, para. 1.

⁶¹⁶ *Ibid.*, at Annex, para. 5.

⁶¹⁷ *Ibid.*, at Annex, para. 6.

Administrative Council would have sufficient authority to create this system. As discussed before in the context of the adoption of the ICSID Additional Facility Rules, the authority of the Administrative Council is not unlimited; it may only exercise powers and functions set forth in the ICSID Convention.⁶¹⁸ In the absence of a provision that expressly authorizes the Administrative Council to create an appellate system, the Administrative Council would have to act under Article 6(3) of the ICSID Convention, which confers on the Administrative Council the general authority to adopt any measure necessary for the implementation of the provisions of the ICSID Convention.⁶¹⁹ However, it seems difficult to admit that the creation of an appellate system could be considered a necessary measure within the meaning of Article 6(3), to the extent that it envisages the establishment of a mechanism that is not provided in the ICSID Convention. On the contrary, the introduction of an appellate mechanism against ICSID awards goes against the ICSID Convention itself. Consequently, the Administrative Council would extrapolate its powers and functions.⁶²⁰

In addition to the legal problems it would have for its implementations, the creation of an appellate system under the auspices of the Centre could have more disadvantages than benefits. It would certainly create additional costs for the disputing parties and delays in the decision-making process under the ICSID

⁶¹⁸ See *supra* at pp. 49 *et seq.*

⁶¹⁹ Article 6(3) of the ICSID Convention provides that:

“The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention” (1 ICSID Reports 3 (1993), at 5-6).

⁶²⁰ See Juillard, Patrick, *Variation in the Substantive Provisions and Interpretation of International Investment Agreements*, in Appeals Mechanism in International Investment Disputes 81 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 100.

Convention.⁶²¹ It seems that it was because of these issues that the Secretariat decided not to put forward its proposal for the appellate system. In a subsequent paper prepared by the Secretariat, it was stated that:

“The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper. The Secretariat will continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.”⁶²²

As an alternative to the establishment of an appellate system, it was suggested the creation of a system of preliminary rulings, whereby ICSID tribunals could request the opinion of a permanent body on legal issues pertaining to pending decisions and that could avoid the need of amending the wording of Article 53(1) of the ICSID Convention.⁶²³ This idea was first suggested by Professor GABRIELLE KAUFMANN-KOHLER, who observed that:

⁶²¹ See Laird, I., and Askew, R., *supra* note 605, at 298; Tams, C., *supra* note 605, at 19-20; Yannaca-Small, Katia, *Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective*, in Appeals Mechanism in International Investment Disputes 223 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008), at 225.

⁶²² Suggested Changes to the ICSID Rules and Regulations – Working Paper of the ICSID Secretariat of May 12, 2005, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement22>, (last visited on August 20, 2009), at para. 4.

⁶²³ See Kaufmann-Kohler, Gabrielle, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, in Annulment of ICSID Awards 189 (Gaillard, Emmanuel, and Banifatemi, Yas, eds., Huntington, New York: Juris Publishing, Inc., 2004), at 221; Tams, C., *supra* note 605, at 47-48; Schreuer, Christoph H., *Preliminary Rulings in Investment Arbitration*,

“Another possible solution may be to introduce a consultation mechanism at the level of the arbitration proceedings. Any ICSID tribunal could request guidance about legal issues from a permanent consultative body. A possible model may be provided by the procedure of Article 234 (formerly 177) of the EEC Treaty, pursuant to which national courts of Member States request interpretative rulings from the European Court of Justice on matters of European law. If properly designed, such a mechanism would ensure consistency, without the drawbacks of a full-fledged appellate procedure.”⁶²⁴

The creation of a system of preliminary rulings would avoid the need of any formal amendment of the ICSID Convention and could qualify as a measure necessary for the implementation of the ICSID Convention in the sense of its Article 6(3). This system could be introduced by the amendment of the ICSID Arbitration Rules. However, the problems of additional costs to be incurred by the disputing parties and of delays in the decision-making process under the ICSID Convention still remain. Moreover, the establishment of a preliminary rulings procedure and the authoritative status of such preliminary rulings for matters concerning the interpretation of the ICSID Convention might raise the question as to whether Contracting States not involved in a particular dispute would have the right to intervene in such procedures.

But moving away from the ideas of establishing an appellate or a preliminary rulings body, another solution for the problem of inconsistent decisions on issues pertaining to the application of the ICSID Convention could be the adoption of resolutions by the Administrative Council of the Centre containing an authoritative interpretation of the ICSID Convention. While this solution has received no attention in the debate on the harmonization in the ICSID decision-

in Appeals Mechanism in International Investment Disputes 207 (Sauvant, Karl, ed., Oxford: Oxford University Press, 2008).

⁶²⁴ Kaufmann-Kohler, G., *supra* note 623, at 221

making process, the adoption of interpretative resolutions has the advantage of not creating additional costs and delays. It also has the advantage of not requiring any amendment of the ICSID Convention or of the ICSID Arbitration Rules.⁶²⁵ The authority of the Administrative Council to adopt interpretative resolutions may be justified under Article 6(3) of the ICSID Convention.⁶²⁶ The correct application of the provisions of the ICSID Convention, especially of those governing the jurisdiction of the Centre, qualifies as a measure necessary for its implementation. The initiative for the adoption of interpretative resolution could come from the Secretariat of the Centre. The Secretariat could identify which issues have been controversial in the decisions of ICSID tribunals and *ad hoc* committees, such as the content of the investment requirement of the ICSID Convention, and suggest the adoption of an authoritative interpretation by the members of the Administrative Council in its annual meeting.⁶²⁷

⁶²⁵ See Pan, Eric J., *Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes*, 38 Harv. Int'l L. J. 503 (1997), at 517-581.

⁶²⁶ See Clapham, Jason, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?*, 26 J. Int'l Arb. 437 (2009), at 464.

⁶²⁷ Pursuant to Article 7(1) of the ICSID Convention, “[t]he Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council” (1 ICSID Reports 3 (1993), at 6). The procedures of the Administrative Council are governed by the Administrative and Financial Regulations of the Centre. The agenda of the annual meeting of the Administrative Council is defined in accordance with Regulation 3 of the Administrative and Financial Regulations, which provides that:

“Regulation 3

Agenda for Meetings

- (1) Under the direction of the Chairman, the Secretary-General shall prepare a brief agenda for each meeting of the Administrative Council and shall transmit such agenda to each member with the notice of such meeting.
- (2) Additional subjects may be placed on the agenda for any meeting of the Administrative Council by any member provided that he shall give notice thereof to the Secretary-General not less than seven days prior to the date set for such meeting. In special circumstances the Chairman, or the Secretary-General after consulting the Chairman, may at any time place additional subjects on the agenda for any meeting of the Council. The Secretary-General shall as promptly as possible give each member notice of the addition of any subject to the agenda for any meeting.
- (3) The Administrative Council may at any time authorize any subject to be placed on the agenda for any meeting even though the notice required by this Regulation shall not have been given” (1 ICSID Reports 35 (1993), at 37).

As a matter of interpretation and not of modification, interpretative resolutions have immediate effect not only on future disputes submitted to the Centre, but also on those in which a final decision is pending. If adopted without opposition by the Administrative Council, as the political organ of the Centre composed by one representative of each Contracting State, interpretative resolutions may be deemed to constitute an interpretative agreement in the sense of Article 31(3)(a) of the Vienna Convention. Pursuant to this provision, the interpreter of a treaty must take into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”⁶²⁸ The “subsequent agreement” mentioned in Article 31(3)(a) does not entail the formalities required for the conclusion of treaties.⁶²⁹ On the other hand, however, in order for an interpretative agreement to fall within the meaning of Article 31(3)(a), it must constitute the agreement of *all* parties to the treaty.⁶³⁰ Nevertheless, interpretative resolutions approved not by all members of the Administrative Council, but by a substantive majority, may still be used in the interpretation of the ICSID Convention in the sense of Article 32 of the Vienna Convention.⁶³¹

Interpretative resolutions adopted by the Administrative Council would not be free from individual interests of each Contracting State of the ICSID Convention. To the extent that there is nothing in the ICSID Convention that prevents a Contracting State from participating in the deliberations of the Administrative Council that might directly affect the outcome of a dispute in which such

⁶²⁸ 8 ILM 679 (1969), at 692.

⁶²⁹ See Linderfalk, U., *supra* note 88, at 162; Gardiner, R., *supra* note 112, at 216-220.

⁶³⁰ See Linderfalk, U., *supra* note 88, at 162-163.

⁶³¹ See *supra* note 126.

Contracting State is a disputing party, some Contracting States might advocate a more restrictive approach towards the jurisdictional scope of the ICSID Convention than others.⁶³² But while one can fear the political interferences in this mechanism, Contracting States should not be viewed as disputing parties, but as States whose intention is the essence of the dispute settlement system established under the ICSID Convention. A decision on the fulfillment of the requirements set forth in Article 25(1) of the ICSID Convention is not limited to the question as to whether a particular ICSID tribunal has the authority to entertain a claim referred to it, but it also involves the question as to whether the Centre, as an international organization, is acting within the mandate that was conferred on it by the Contracting States of the ICSID Convention. In addition, the problem of interference in the approval of interpretative resolution is mitigated by the fact that this mechanism may not be used in a way that would lead to a *de facto*

⁶³² This problem may be illustrated by the case of *Pope & Talbot Inc. v. Canada* (“*Pope & Talbot*”), submitted to an UNCITRAL tribunal under the NAFTA investment chapter. In this case, one of the key questions to be decided by the tribunal was whether the reference to fair and equitable treatment in Article 1105(1) of the NAFTA provides for a standard of treatment in addition to the minimum standard of treatment required by customary international law (see 32 ILM 612 (1993), at 639). In its partial award of April 10, 2001, the *Pope & Talbot* tribunal answered the question in the affirmative and concluded that Canada had failed to provide a fair and equitable treatment to the claimant (see Partial Award of April 10, 2001, 13(4) World Trade and Arb. Materials 61 (2001), at 108-117). However, before a final decision was made, on July 31, 2001, the NAFTA Free Trade Commission — which is formed by representatives of each NAFTA Contracting Party — issued an interpretative declaration stating that the reference to fair and equitable treatment in Article 1105(1) does not entail a treatment in addition to the one required by customary international law (see Notes of Interpretation of Certain Chapter 11 Provisions of July 31, 2001, 13(6) World Trade and Arb. Materials 139 (2001), at 140). By virtue of Article 1131(2) of the NAFTA, interpretative declarations made by the Free Trade Commission are binding on arbitral tribunals constituted under the NAFTA investment chapter (see 32 ILM 612 (1993), at 645). In its subsequent decision, however, the *Pope & Talbot* tribunal seemed very reluctant to comply with the declaration, especially because Canada, a party to the dispute, had participated in the decision of the Free Trade Commission on the interpretation of Article 1105(1). Apparently, the tribunal saw the interpretative declaration as a deliberate act of Canada to interfere in the outcome of the dispute (see Partial Award of May 31, 2002, 41 ILM 1347 (2002), at 1350-1352). The tribunal considered that it would not be bound by the interpretative declaration if such declaration had the effect of a *de facto* amendment of Article 1105(1) (*ibid.*, at 1352-1353). The tribunal, however, avoided any decision on this problem, once it considered that its interpretation of Article 1105(1), on which the previous decision was based, was not inconsistent with the interpretative declaration on Article 1105 and, thus, even if the tribunal were bound by such declaration, its decision would remain the same (*ibid.*, at 1357-1358). See also Roberts, Anthea, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 104 (2010).

amendment of the ICSID Convention. The Administrative Council does not have the authority to modify the ICSID Convention; it may not create requirements for the establishment of the jurisdiction of the Centre that are not set forth in the ICSID Convention. For this reason, ICSID tribunals and *ad hoc* committees may disregard interpretative resolutions of Administrative Council that are, in fact, disguised amendments of the ICSID Convention.⁶³³

For these reasons, the adoption of interpretative resolutions by the Administrative Council, as a source of the intention of the Contracting States, may represent a feasible mechanism against the problems caused by the fragmentation of the ICSID decision-making process and misinterpretations made by ICSID tribunals and *ad hoc* committees, assuring the integrity of dispute settlement system established under the ICSID Convention. While this solution might be implausible, it is no less plausible than the idea of establishing an appellate or a preliminary rulings body.

⁶³³ Disputes among Contracting States in relation to the adoption of interpretative resolutions by the Administrative Council could be submitted to ICJ pursuant to Article 64 of the ICSID Convention (see *supra* note 602).

LIST OF DECISIONS

(LISTED IN CHRONOLOGICAL ORDER)

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