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## THE INVESTMENT REQUIREMENT OF THE ICSID CONVENTION AND THE ROLE OF INVESTMENT TREATIES

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### I. INTRODUCTION

The history of the 50 years of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”),<sup>1</sup> which established the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”), cannot be written without reference to the international treaties entered into by States for the protection and promotion of foreign investments (“investment treaties”). Without the extraordinary proliferation of investment treaties, especially bilateral investment treaties (“BITs”), the significance that the ICSID Convention gained in the international community would not be as great. Until 1987, when the first arbitration under the ICSID Convention pursuant to an investment treaty was registered by the Centre,<sup>2</sup> only 20 disputes had been referred to ICSID arbitration and two to ICSID conciliation. By the end of the first half of 2014, 473 cases were registered by the Centre under the ICSID Convention and the ICSID Additional Facility Rules, out of which 73% were submitted pursuant to investment treaties. Investment treaties made disputes referred to ICSID arbitration pursuant to arbitration clauses contained in contracts concluded between the disputing parties the exception.<sup>3</sup>

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<sup>1</sup> Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, 575 U.N.T.S. 159, *reprinted in* 1 ICSID REP. 3 (1993) (entered into force Oct. 14, 1966).

<sup>2</sup> Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, 4 ICSID REP. 245 (1997).

<sup>3</sup> According to statistics released by the Centre, up until June 30, 2014, 73% of the cases registered were based on investment treaties and only 19% were based on investment agreements entered into by investors and host States. *See* THE ICSID CASELOAD – STATISTICS (Issue 2014-2), *available at* [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20(English).pdf). In 2013, 69% of the cases registered were based on investment treaties and 14% on investment agreements. *See* THE ICSID CASELOAD – STATISTICS (Issue 2014-1), *available at* <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2014-1%20English>.

In light of the strong connection between the ICSID Convention and investment treaties, certain decisions rendered by arbitral tribunals constituted under the auspices of the Centre conferred a special role on investment treaties in the interpretation and application of the ICSID Convention. In particular, in the cases of *Mihaly International Corporation v. Sri Lanka* (“*Mihaly*”)<sup>4</sup> and *Biwater Gauff Ltd. v. Tanzania* (“*Biwater*”),<sup>5</sup> given the lack of a definition of the term “investment” in the ICSID Convention, the tribunals viewed the definitions of “investment” contained in investment treaties as evidence of subsequent practice, which could be relied on in determining the meaning of the term “investment” for the purposes of the ICSID Convention. In addition, in the case of *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (“*Fraport*”),<sup>6</sup> the tribunal pointed out that the definition of investment set forth in the BIT serves as *lex specialis* in relation to the ICSID Convention, leading to the idea that, in the case of conflict, the investment treaty would prevail over the notion of investment within the meaning of the ICSID Convention.

The question, however, is whether these two grounds on which the *Mihaly*, *Fraport* and *Biwater* tribunals based their decisions are consistent with the provisions of the Vienna Convention on the Law of Treaties (“Vienna Convention”).<sup>7</sup> In particular, as will be addressed in this article, the decisions rendered in *Mihaly*, *Fraport* and *Biwater* raise the questions as to (i) whether the definitions of investment contained in investment treaties may be applied in the interpretation of the ICSID Convention in the light of Article 31(3)(b) of the Vienna Convention; and (ii) whether investment treaties may amount to a modification of the ICSID Convention between only certain Contracting States by virtue of Article 41(1) of the Vienna Convention.

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pdf. In 2012, 75% of the cases registered were based on investment treaties and 13% on investment agreements. See THE ICSID CASELOAD – STATISTICS (Issue 2013-1), available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2013-%201%20English.pdf>. In 2011, 80% of the cases registered were based on investment treaties and 10% on investment agreements. See THE ICSID CASELOAD – STATISTICS (Issue 2012-1), available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2012-1%20%20-%20English.pdf>. In 2010, 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 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2011-1%20English.pdf>. In 2009, 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 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2010-1%20English.pdf>.

<sup>4</sup> *Mihaly Int’l Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, ¶¶ 28-61 (Mar. 15, 2002), 17 ICSID Rev. 142 (2002).

<sup>5</sup> *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008).

<sup>6</sup> *Fraport AG Frankfurt Airport Serv. Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 305 (Aug. 16, 2007).

<sup>7</sup> Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980).

## II. THE INVESTMENT REQUIREMENT OF THE ICSID CONVENTION

One of the most controversial issues that arose out of the practice of ICSID tribunals is the role of the term “investment,” as employed in Article 25(1) of the ICSID Convention,<sup>8</sup> for the purposes of establishing the jurisdiction of the Centre (the “investment requirement”). Given the lack of a definition of the term “investment” in the ICSID Convention, ICSID tribunals that were required to apply the investment requirement had to decide whether the lack of a definition was intended to confer on the disputing parties absolute freedom to determine whether a dispute arises out of an investment (“subjectivist theory”), or whether the ICSID Convention contains a core notion of investment that cannot be waived by the consent of the disputing parties to the jurisdiction of the Centre (“objectivist theory”).<sup>9</sup>

The subjectivist theory is primarily based on 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”),<sup>10</sup> a document that was prepared by the drafters of the ICSID Convention and submitted to States together with the final text of the ICSID Convention.<sup>11</sup> Paragraph 27 of the Report of the Executive Directors states:

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<sup>8</sup> 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.

<sup>9</sup> In addition to the subjectivist and objectivist theories, the existence of a hybrid theory has been suggested. See Walid Ben Hamida, *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, 55-56 (Todd Weiler ed., 2005). 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 objectivist theory should not be considered as one particular approach towards the content of the investment requirement of the ICSID Convention. ICSID tribunals following the objectivist theory 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.

<sup>10</sup> See 1 ICSID REP. 23 (1993).

<sup>11</sup> See History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States

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)).<sup>12</sup>

According to the interpretation given by the supporters of the subjectivist theory, paragraph 27 of the Report of the Executive Directors reflects a purported real intention of the drafters of the ICSID Convention to grant the disputing parties the discretion to define the content of the investment requirement of the ICSID Convention.<sup>13</sup> For the subjectivist theory, in order to establish the jurisdiction of the Centre, the mere consent of the disputing parties would be enough, given that the consent implies an agreement on the content of the term “investment.”<sup>14</sup> In that the parties had agreed on a specific definition of investment, the task of ICSID tribunals would be to verify whether the dispute complies with the agreed definition and not to investigate whether the dispute in fact arises out of an investment. This would occur especially if the dispute is referred to ICSID arbitration pursuant to investment treaties. For the purposes of Article 25(1) of the ICSID Convention, investment treaties providing for the submission of disputes to the jurisdiction of the Centre constitutes an offer of consent of the State to which the investor adheres.<sup>15</sup> The offer of consent may be,

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and Nationals of Other States (Washington DC, United States: International Centre for Settlement of Investment Disputes, 1968), v. II, at 1041.

<sup>12</sup> Report of the Executive Directors, *supra* note 10, at 28.

<sup>13</sup> See Walid Ben Hamida, *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control*, 24 J. INT’L ARB. 287, 289 (2007); Crina M. Baltag, *Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia*, 4(5) TDM, 2-3 (2007); CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH RUBINS & BORZU SABAHI, *INVESTOR-STATE ARBITRATION* 257 (2008).

<sup>14</sup> See Farouk Yala, *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, 106 (2005); Ben Hamida, *supra* note 13, at 289; Baltag, *supra* note 13, at 2; Brigitte Stern, *The Contours of the Notion of Protected Investment*, 24 ICSID REV.- FILJ 534, 538-40 (2009); Tony Cole & Anuj Kumar Vaksha, *Power-Confering Treaties: The Meaning of “Investment” in the ICSID Convention*, 24 LEIDEN J. INT’L L. 305, 315 (2011). An additional argument that has been suggested is that the employment of the term “investment” in the wording of Article 25(1) of the ICSID Convention was not intended to place a limitation on individual ICSID tribunals, but it was used in order to confer legitimacy on the International Bank for Reconstruction and Development (“IBRD”) to formulate the ICSID Convention. See Gita Gopal, *International Centre for Settlement of Investment Disputes*, 14 CASE W. RES. J. INT’L L. 591, 599 (1982); Devashish Krishan, *A Notion of ICSID Investment*, in *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 61, 63-64 (Todd Weiler ed., 2008).

<sup>15</sup> See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FILJ 232 (1995); RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 131-32 (1995); Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on*

however, contingent upon certain requirements, such as compliance with the definition of investment set forth in the investment treaty, which places a limitation on the scope of application of the investment treaty.<sup>16</sup> As an element of the consent to the jurisdiction of the Centre, if the subjectivist theory is followed, the definition of investment set forth in investment treaties 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.<sup>17</sup> 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 must comply with the requirements set forth in Article 25(1), which are distinct from the consent of the disputing parties and cannot be waived. Accordingly, in disputes referred to the jurisdiction of the Centre pursuant to investment treaties, the investment requirement of the ICSID Convention would have to be fulfilled independently from the definition of investment set forth in the investment treaty, which, for the purposes of the ICSID Convention, is an element of the consent of the disputing parties. This is the so-called *double-barreled test* or *double keyhole approach*, according to which the dispute must comply with the investment requirement of the ICSID Convention and with the definition of investment in the investment treaty independently from each other.

ICSID practice shows that, despite the sharp debate between the subjectivist and the objectivist theories, most ICSID tribunals that were required to decide on the fulfillment of the investment requirement of the ICSID Convention followed the objectivist theory and applied the double-barreled test approach in investment treaty disputes. The majority of these decisions followed the so-called *Salini test*, named after the decision rendered in the case of *Salini Costruttori S.p.A. and*

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*Investment*, 12 ICSID REV.-FILJ 287 (1997); CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 210 (2001); Roberto Castro de Figueiredo, *Euro Telecom v. Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration Under BITs*, 6(1) TDM (2009). On the contrary, see M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 266-67 (1994).

<sup>16</sup> See SCHREUER, *supra* note 15, at 130.

<sup>17</sup> See KATHIGAMAR V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 106 (2000); SCHREUER, *supra* note 15, at 125; Noah Rubins, *The Notion of “Investment” in International Investment Arbitration*, in ARBITRATING FOREIGN INVESTMENT DISPUTES 283, 288-89 (Norbert Horn & Stefan Kröll eds., 2004); Yala, *supra* note 14, at 106; Ben Hamida, *supra* note 13, at 290; Baltag, *supra* note 13, at 3; CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 164 (2007); DUGAN ET AL., *supra* note 13, at 258; Cole & Vaksha, *supra* note 14, at 315.

*Italstrade S.p.A. v. Morocco*,<sup>18</sup> in which the tribunal considered that in order to comply with the investment requirement of the ICSID Convention, the dispute must arise out of a transaction or activity that (i) represents a commitment; (ii) is subject to risk; (iii) has a certain duration; and (iv) contributes to the economic development of the host State, regardless of the fulfillment of the definition of investment contained in the investment treaty.

But while the *Salini* test became the prevailing approach in ICSID practice, investment treaties give little support to the elements of the purported notion of investment applied by the ICSID tribunals that followed the *Salini* test. 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 although some investment treaties contain certain elements of the *Salini* test, none of them restrict their scope to disputes that arise out of an investment that contributes to the economic development of the host State. For instance, the investment chapter of the Chile-United States Free Trade Agreement 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.”<sup>19</sup> Such characteristics of investment may also be found in the definitions of investment contained in model BITs, such as the 2012 United States Model BIT.<sup>20</sup> These instruments, however, represent a very small minority. The overwhelming majority of investment treaties do not require the fulfillment of the elements of the *Salini* test in order for an activity or transaction to qualify as an investment. Accordingly, it is not unlikely that a dispute complies with the definition of investment in the investment treaty pursuant to which the dispute is submitted to the jurisdiction of the Centre, but will not fulfill the elements of the notion of investment within the meaning of the ICSID Convention according to the *Salini* test.

In this context, while admitting the objectiveness of the investment requirement of the ICSID Convention, the decisions rendered in the cases of *Mihaly*, *Fraport* and *Biwater* raise the question as to whether the definitions of

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<sup>18</sup> According to the *Salini* tribunal:

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.

Case No. ARB 00/4, Decision on Jurisdiction of July 23, 2001, 42 ILM 609, 622 (2003).

<sup>19</sup> Free Trade Agreement, U.S.-Chile, June 6, 2003, *available at* [http://www.sice.oas.org/Trade/chiusa\\_e/chiusaind\\_e.asp](http://www.sice.oas.org/Trade/chiusa_e/chiusaind_e.asp), *entered into force* Jan. 1, 2004.

<sup>20</sup> *Available at* <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.



investment in investment treaties should be taken into account in determining the content of the investment requirement of the ICSID Convention, either because investment treaties reveal a common understanding of the Contracting States in respect of the meaning of the term “investment,” or because investment treaties, as international treaties, could amount to the modification of the ICSID Convention between the Contracting States party to the investment treaty.

### III. INVESTMENT TREATIES AS SUBSEQUENT PRACTICE IN THE APPLICATION OF THE ICSID CONVENTION

The idea that the definition of investment contained in investment treaties could be considered as evidence of subsequent practice was first addressed in *Mihaly*.<sup>21</sup> In this case, submitted to the jurisdiction of the Centre pursuant to the United States-Sri Lanka BIT,<sup>22</sup> 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 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.<sup>23</sup>

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.”<sup>24</sup> The 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.

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<sup>21</sup> *Supra* note 4.

<sup>22</sup> Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Sri Lanka, Sept. 20, 1991, *entered into force* May 1, 1993.

<sup>23</sup> *Mihaly*, *supra* note 4, ¶¶ 28-61, 17 ICSID REV. at 872-73. *See also* Rubins, *supra* note 17, at 300-304; Yala, *supra* note 14, at 120-24.

<sup>24</sup> *Mihaly*, *supra* note 4, ¶ 52.

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.*<sup>25</sup>

The tribunal noted further that the evidence of such subsequent practice could 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.<sup>26</sup>

In *Biwater*, an ICSID arbitration pursuant to the Tanzania-United Kingdom BIT,<sup>27</sup> the tribunal adopted a similar approach towards the relevance of the definition of investment contained in the BIT. In rejecting the application of the elements of the *Salini* test as mandatory requirements, the *Biwater* tribunal considered that the lack of a definition of the term “investment” in the text of the ICSID Convention was attributable to 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.<sup>28</sup>

In addition, the *Biwater* tribunal noted that the elements of the *Salini* test contradicted not only the definition of investment contained in the Tanzania-United Kingdom BIT, but they would also be inconsistent with most investment

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<sup>25</sup> *Id.* ¶¶ 32-33 (emphasis added).

<sup>26</sup> *Id.* ¶ 58.

<sup>27</sup> Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments, Tanz.-U.K., Jan. 7, 1994.

<sup>28</sup> *Biwater*, *supra* note 5, ¶ 312 (footnote excluded).

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.<sup>29</sup>

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 as evidence of subsequent practice, as suggested earlier in the *Mihaly* decision, which referred to a “future progressive development of international law on the topic of investment.”<sup>30</sup> In this sense, if investment treaties are taken into account as subsequent practice, the definitions of investment contained in such treaties could be applied as a matter of treaty interpretation in determining the meaning of the term “investment” for the purposes of the ICSID Convention.

In accordance with Article 31(3)(b) of the Vienna Convention, “There shall be taken into account, together with the context ... any subsequent practice in the

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<sup>29</sup> *Id.* ¶ 314. Although not expressly mentioned as subsequent practice, the *ad hoc* committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia* suggested that the definition of investment contained in an 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.

*Malaysian Historical Salvors, SDN, BHD v. Govt. of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, ¶ 73 (April 16, 2009).

<sup>30</sup> *Mihaly, supra* note 4, ¶ 33.

application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>31</sup> Article 31(3)(b) requires the subsequent practice to be “in the application of the treaty” and the establishment of “the agreement of the parties regarding its interpretation” in order to “be taken into account, together with the context.”<sup>32</sup> While investment treaties seem to meet the requirement that the subsequent practice must be “in the application of the treaty,”<sup>33</sup> investment treaties do not easily comply with the condition that the subsequent practice must establish “the agreement of the parties regarding its interpretation.”

As a first element, 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 the definition of investment contained in investment treaties reflects the understanding of the Contracting States in respect of the meaning of the term “investment” for the purposes of the ICSID Convention.<sup>34</sup> 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 in concluding that the Contracting State agrees that these disputes comply with the requirements 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.<sup>35</sup> To conclude otherwise,

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<sup>31</sup> Vienna Convention, *supra* note 7, Art. 31(3)(b).

<sup>32</sup> *Id.*

<sup>33</sup> 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.” ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 166-67 (Peggy Oscarsson trans, 2007) (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.

<sup>34</sup> See LINDERFALK, *supra* note 33, at 167.

<sup>35</sup> In *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, 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,

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 arising out of the investment treaty.<sup>36</sup>

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should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment.

ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 130 (Mar. 8, 2010).

Similarly, in *Alpha Projektholding GmbH v. Ukraine*, the tribunal noted:

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.

ICSID Case No. ARB/07/16, Award, ¶ 314 (Nov. 8, 2010).

In *Abaclat and Others v. Argentina*, 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, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.

ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶ 364 (Aug. 4, 2011).

<sup>36</sup> As observed by Emmanuel Gaillard, “[I]t 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

In accordance with Article 31(1) of the Vienna Convention, which sets forth the general rule of treaty interpretation, “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*.”<sup>37</sup> The reference to “context” reflects one of the major principles of treaty interpretation that was named by Gerald Fitzmaurice as the *principle of integration*, which requires that the treaty must be interpreted as a whole.<sup>38</sup> 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 and be free of contradictions.<sup>39</sup>

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not constitute an investment under Article 25(1) of the ICSID Convention.” Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 403, 410 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009).

In *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay*, 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:

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.

ICSID Case No. ARB/07/9, Decision on Jurisdiction, ¶ 94 (May 29, 2009).

In *Alps Finance and Trade AG v. Slovakia*, 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.” UNCITRAL Ad Hoc Award (redacted), ¶ 239 (Mar. 5, 2011). 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.

<sup>37</sup> Vienna Convention, *supra* note 7, Art. 31(1) (emphasis added).

<sup>38</sup> Pursuant to the principle of integration, “Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles.” Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT’L L. 1, 9 (1951).

<sup>39</sup> See GYÖRGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 108 (1973); OPPENHEIM’S *INTERNATIONAL LAW* 1273 n.12 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); LINDERFALK, *supra* note 33, at 106-107.

A typical example of such a situation may be found, for instance, in the Germany-Guyana BIT.<sup>40</sup> 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.<sup>41</sup>

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. To the extent that the BIT does not make submission to the jurisdiction of the Centre contingent upon the fulfillment of any other requirement, one may conclude that the Contracting State assumes that 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.<sup>42</sup> 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 constituted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”). If the disputing parties cannot reach an agreement, the dispute must be referred to arbitration under the UNCITRAL Rules.<sup>43</sup> In this case, there is no clear indication that the Contracting

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<sup>40</sup> Treaty between the Federal Republic of Germany and the Co-operative Republic of Guyana concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Guy., Dec. 6, 1989, 1909 U.N.T.S. 3.

<sup>41</sup> *Id.* Art. 11(2).

<sup>42</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33.

<sup>43</sup> Article 8(1), (2) and (3) of the Argentina-United Kingdom BIT provides:

- (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:

State has agreed that all disputes referred to arbitration pursuant to the investment treaty will comply with the requirements of the ICSID Convention. In particular, the Contracting State may not agree to submit a dispute to the jurisdiction of the Centre because it does not consider that such dispute arises out of an “investment” for the purposes of the ICSID Convention. Accordingly, investment treaties that do not establish an 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 under the Vienna Convention if the investment treaty provides that the submission of the dispute to the jurisdiction of the Centre is contingent upon compliance with the requirements set forth in the ICSID Convention. One example of such an investment treaty is the Czech Republic-Ireland BIT.<sup>44</sup> Pursuant to Article 8(2)(a) of that 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*.<sup>45</sup>

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- (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.

<sup>44</sup> Agreement between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments, Czech-Ir., June 28, 1996, 2079 U.N.T.S. 3.

<sup>45</sup> *Id.* Art. 8(2)(a) (emphasis added).



Although the BIT provides for an unconditional offer of consent, the wording “having regard to the applicable provisions of the [ICSID Convention],” quoted above, 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 necessarily comply with the requirements of the jurisdiction of the Centre.

In sum, 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 contained in 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, a “party” means a State which has consented to be bound by the treaty and for which the treaty is in force.<sup>46</sup> Consequently, the investment treaty may only qualify as subsequent practice of a Contracting State under 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 reason, an investment treaty such as the Argentina-United States BIT<sup>47</sup> would not fulfill the requirements of Article 31(3)(b) of the Vienna Convention, since Argentina was not a Contracting State of the ICSID Convention at the time of the conclusion of the BIT.<sup>48</sup> 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. For instance, Contracting States such as Fiji, Micronesia, Samoa, the Solomon Islands and South Sudan are not parties to investment treaties,<sup>49</sup> 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) of the Vienna Convention.

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<sup>46</sup> Vienna Convention, Art. 2(1)(g)

<sup>47</sup> Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993).

<sup>48</sup> 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, 30 days after the deposit of its instrument of ratification. *See* ICSID Database of Member States (2015).

<sup>49</sup> According to the database of the United Nations Conference on Trade and Development (“UNCTAD”). *See* <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>.

In the comments to Article 27(3)(b) of the Draft Articles on the Law of Treaties of the International Law Commission (“ILC Draft Articles on the Law of Treaties”), the draft version of Article 31(3)(b) of the Vienna Convention,<sup>50</sup> the International Law Commission (“ILC”) noted that “[i]t considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole.’”<sup>51</sup> 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.”<sup>52</sup> Accordingly, the fact 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 nevertheless accepted the practices 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 had acquiesced in such practice. In that case, which

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<sup>50</sup> 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 with 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 establishes the understanding of the parties regarding its interpretation.” Report of the Int’l Law Commission to the General Assembly on the Work of its Eighteenth Session, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* [1966] 2 Y.B. INT’L L. COMM. 172, 218.

<sup>51</sup> *Id.* at 222.

<sup>52</sup> *Id.* 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 1964 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.” Report of the Int’l Law Commission to the General Assembly Covering the Work of its Sixteenth Session, U.N. Doc. A/5809 (1964), *reprinted in* [1964] 2 Y.B. INT’L L. COMM. 173, 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* T. O. ELIAS, THE MODERN LAW OF TREATIES 76 (1974); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138 (2d ed. 1984); Gerald P. McGinley, *Practice as a Guide to Treaty Interpretation*, 9 FLETCHER F. WORLD AFF. 211, 216-17 (1985); LINDERFALK, *supra* note 33, at 167; RICHARD K. GARDINER, TREATY INTERPRETATION 235-36, 239 (2008); ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 356-57 (2008); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 429 (2009).

involved a dispute over the sovereignty of three islands in the Beagle Channel between 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. According to Chile, due to Argentina's silence, this subsequent practice would qualify for the purposes of Article 31(3)(b) of the Vienna Convention. For its part, Argentina alleged that it could not be deemed to have accepted the Chilean practice due to its lack of protest, unless such practice had been expressly 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 the 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.<sup>53</sup>

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:

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:

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<sup>53</sup> Beagle Channel (Arg.-Chile), Award of Feb. 18, 1977, 21 R.I.A.A. 53, 187 (Perm. Ct. Arb. 1977). See also LINDERFALK, *supra* note 33, at 174-77.

(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.*<sup>54</sup>

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 public nature of investment treaties providing for ICSID arbitration, it seems unlikely that any Contracting States are unaware of the practice reflected in these treaties. The concluding of investment treaties nowadays plays a relevant role in the relations between States, and even for those States that have not concluded any such treaties, this option is not unknown. In this sense, one could argue that the Contracting States that have not concluded investment treaties would be deemed to have accepted the practice in these treaties, to the extent that they have not lodged any formal protest against the terms of investment treaties providing for ICSID arbitration.

However, the fact that all Contracting States may be deemed to be aware of investment treaties does not necessarily mean that, 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.<sup>55</sup> Hence, the acceptance of the practice in the application of the investment requirement of the ICSID Convention by a Contracting State could only occur if the Contracting State had an obligation to protest against the potential misuses of the ICSID Convention. But this obligation to protest does not arise unless a Contracting State is directly affected by such misuse. This would be the case where 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 arise by the mere conclusion by certain Contracting States of an investment treaty providing for submission to the jurisdiction of the Centre of disputes that do not comply with the jurisdictional requirements of the ICSID

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<sup>54</sup> American Law Institute, *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 147(1)(f) (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 wording. In accordance with its § 325(2), which was based on Article 31(3) of the Vienna Convention, “Any 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 (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 147(1)(f) (emphasis added). The reference to “subsequent practice between the parties” in the Third Restatement suggests that, in order for the practice of fewer than 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.

<sup>55</sup> See I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 *BRIT. Y.B. INT’L L.* 143, 146-47 (1954); Jörg Paul Müller, *Acquiescence*, 1 *EPIL* 14, 14 (1992).

Convention in accordance with the interpretation given to the ICISD Convention 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 under Article 32 of the Vienna Convention.<sup>56</sup> Especially in the case of general multilateral treaties with a great number of parties, such as the ICSID Convention, the fact that the subsequent practice is not attributable to all parties to the treaty but to a great majority favors the use of such subsequent practice in the interpretation of the treaty, even though not all elements of Article 31(3)(b) of the Vienna Convention are met.<sup>57</sup>

But even as a supplementary means of interpretation, the reliance on investment treaties in the interpretation of the ICSID Convention as subsequent practice faces other problems. The first one lies in the fact that investment treaties do not have a uniform definition of investment.<sup>58</sup> In order to meet the

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<sup>56</sup> Article 32 of the Vienna Convention provides:

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

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, *supra* note 52, at 138.

See also Francis G. Jacobs, *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, 327-29 (1969); McGinley, *supra* note 52, at 221; Santiago Torres Bernárdez, *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 HONOR OF HIS 80TH BIRTHDAY 721, 726-27 (Gerhard Hafner et al. eds., 1998); GARDINER, *supra* note 52, at 246; VILLIGER, *supra* note 52, at 446; Luigi Sbolci, *Supplementary Means of Interpretation*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 145, 159 (Enzo Cannizzaro ed., 2011).

<sup>57</sup> Fitzmaurice favored such a flexible approach in relation to general multilateral treaties. According to him, “It 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.” G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 203, 223 (1957).

<sup>58</sup> See U.N. Conf. on Trade and Development, *Scope and Definition: A Sequel* (2011), UNCTAD/DIAE/IA/2010/2, available at [http://www.unctad.org/en/docs//diaeia20102\\_en.pdf](http://www.unctad.org/en/docs//diaeia20102_en.pdf).

requirements of Article 31(3)(b) of the Vienna Convention, the subsequent practice must establish “the agreement of the parties regarding its interpretation.”<sup>59</sup> Accordingly, one would have to demonstrate that, while investment treaties have different definitions of investment, there is a core notion of investment that is common to every investment treaty – a “developing consensus in parts of the world as to the meaning of ‘investment,’”<sup>60</sup> as referred to by the *Biwater* tribunal – which establishes a common understanding in respect of the meaning of the term “investment” for the purposes of the ICSID Convention. However, as far as we are aware, there is until now no major study that indicates the existence of a core notion of investment present in every investment treaty that qualifies as a subsequent practice in the application of the ICSID Convention according to Article 31(3)(b) of the Vienna Convention. Given the extraordinary number of investment treaties concluded in the last decades,<sup>61</sup> a comprehensive research on the definitions of investment set forth in investment treaties is not an easy task.

The difficulty of determining a common understanding in respect of the meaning of the term “investment” also arises out of the fact that most investment treaties do not define an activity or transaction that qualifies as an investment, but focus on the *forms* that the investment may adopt. A typical definition of investment set forth in investment treaties may be found in Article 1(6) of the Energy Charter Treaty (“ECT”), which, instead of describing an activity or transaction, presents a list of assets that can be considered as an investment:

“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....<sup>62</sup>

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<sup>59</sup> Vienna Convention, *supra* note 7, Art. 31(3)(b).

<sup>60</sup> *Supra* note 5, ¶ 314.

<sup>61</sup> According to the database of the UNCTAD, the number of investment treaties exceeds 3,000 agreements, most of them BITs. See <http://investmentpolicyhub.unctad.org/IIA>.

<sup>62</sup> 34 ILM 381, 383 (1994).

The approach taken by the ICSID tribunals that followed the *Salini* test does not take into account the form in which the investment is made. The *Salini* test aims at describing the investment as an activity or a transaction that must contain certain elements, but it is not concerned with the investment as an asset.

The second problem is that, for the purposes of Article 31(3)(b) of the Vienna Convention, the subsequent practice may only be used in the *interpretation* of a treaty and not in the *modification* of its provisions.<sup>63</sup> This issue becomes relevant to the extent that most investment treaties contain definitions of investment that are extremely broad.<sup>64</sup> Usual definitions contained in investment treaties such as “any asset” or “claims to money” could qualify any ordinary commercial transaction as an investment.<sup>65</sup> Investment treaties as subsequent practice may not be relied on, however, to give a meaning to the term “investment” set forth in Article 25(1) of the ICSID Convention that is entirely dissociated from the ordinary meaning of the term. Otherwise, one would have to admit that the subsequent practice of the Contracting States could lead to the modification of the ICSID Convention.

The use of subsequent practice as a means of modification of treaty provisions was allowed by the ILC in the ILC Draft Articles on the Law of the Treaties. Article 38 of the ILC Draft Articles on the Law of the Treaties provided that “[a] treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.”<sup>66</sup> However, the

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<sup>63</sup> See LINDERFALK, *supra* note 33, at 167-69.

<sup>64</sup> See Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 305-10 (1997); Rubins, *supra* note 17, at 292-96; Rudolph Dolzer, *The Notion of Investment in Recent Practice*, in LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 261, 263-66 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005); DUGAN ET AL., *supra* note 13, at 250-53; Katia Yannaca-Small, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 243, 245-48 (Katia Yannaca-Small ed., 2010).

<sup>65</sup> See DOLZER & STEVENS, *supra* note 15, at 25-31; SCHREUER, *supra* note 15, at 129-30; Roberto Castro de Figueiredo, *ICSID and Non-Foreign Investment Disputes*, 4(5) TDM 25-26 (2007); KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 122-31 (2010).

<sup>66</sup> [1966] 2 Y.B. INT’L L. COMM. 236. The first version of Article 38 of the Draft Articles appeared in the Third Report presented by Waldock at the ILC as a rule of treaty interpretation. Pursuant to Article 73(c) of the Third Report, “The interpretation at any time of the terms of a treaty under articles 70 and 71 shall take account of ... (c) any subsequent practice in relation to the treaty evidencing the consent of all the parties to an extension or modification of the treaty.” [1964] 2 Y.B. INT’L L. COMM. 53. In his commentary, however, Waldock did not present any evidence of the customary international law status of such rule. See [1964] 2 Y.B. INT’L L. COMM. 61-62. After discussions at the ILC, it was decided that Article 73 of the Third Report was in fact not related to treaty interpretation, but to the modification of treaties. Consequently, in the 1964 Draft Articles on the Law of Treaties, the rule contained in Article 73(c) of the Third

customary international law status of this rule, which was not adopted in the Vienna Convention, is extremely doubtful.

Article 38 of the ILC Draft Articles was inspired by the idea advocated by Fitzmaurice that the subsequent practice of States could be used not only in the interpretation of treaties, but could also lead to the modification of treaty provisions. According to Fitzmaurice:

Yet it is difficult to deny that the meaning of a treaty, or of some part of it (particularly in the case of certain kinds of treaties and conventions), may undergo a process of change or development in the course of time. Where this occurs, it is the practice of the parties in relation to the treaty that effects, and indeed *is*, that change or development. In that there is no doubt about the standing of the principle, as an independent principle, which, in a proper case, it may be not only legitimate but necessary to make use of; for what is here in question is not so much the meaning of an existing text, as a *revision* of it, but a revision brought about by practice or conduct, rather than effected by and recorded in writing.<sup>67</sup>

Fitzmaurice admitted, however, that this idea “is not based on any finding of the Court itself, but constitutes an attempt to suggest the appropriate juridical basis for certain ideas expressed by some of the Judges ..., which, properly understood, seem to merit consideration.”<sup>68</sup>

At the time that the codification of the law of treaties was being carried out by the ILC, there was no decision of the International Court of Justice (“ICJ”) or of its predecessor, the Permanent Court of International Justice (“PCIJ”), admitting the use of subsequent practice as a means of treaty modification.<sup>69</sup> The only

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Report became Article 68(b), which provided that “[t]he operation of a treaty may also be modified ... (b) by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions.” [1964] 2 Y.B. INT’L L. COMM. 198.

<sup>67</sup> Fitzmaurice, *supra* note 57, at 225 (emphasis in the original).

<sup>68</sup> *Id.* at 212, n.1.

<sup>69</sup> The voting system of the Security Council of the United Nations is often cited as an example of treaty modification by subsequent practice. See HARASZTI, *supra* note 39, at 144; MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 201 (2d ed. 1997); Karol Wolfke, *Treaties and Custom: Aspects of Interrelation*, in ESSAYS ON THE LAW OF TREATIES: A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERDAG 31, 34 (Jan Klabbers & René Lefeber eds., 1998). In accordance with Article 27(3) of the Charter, decisions of the Security Council involving matters other than procedural ones require the affirmative vote of nine members including the concurring votes of the permanent members. But while Article 27(3) requires the concurring vote of the permanent members of the Security Council, due to the temporary absence of the Soviet Union in the Security Council, the voting practice in this period led to the idea that the abstention by one of the permanent members would not be a bar to the Security Council taking a decision. According to such understanding of the Charter, Article 27(3) would not require the affirmative vote of permanent members, but only the absence of a negative vote. In the *Legal Consequences*



relevant decision admitting the modification of treaties by subsequent practice was the arbitral award rendered in 1963 in the *Air Transport Arbitration*. In that decision, which was expressly cited in the commentary to Article 38 of the ILC Draft Articles on the Law of Treaties,<sup>70</sup> the tribunal considered that:

As the Tribunal sees it, it is from another aspect that careful consideration must be given to the conduct of the Parties and to the attitude adopted by each of them, in particular from the time when the first differences of opinion as to principle arose regarding the application of the Agreement.

This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as possible source of subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.<sup>71</sup>

At the United Nations Conference on the Law of Treaties held in Vienna between 1968 and 1969 (“Vienna Conference”), Article 38 of the ILC Draft Articles on the Law of Treaties was rejected by the majority of States present.<sup>72</sup> While the mere fact that Article 38 was not adopted in the Vienna Convention does not necessarily mean that it does not reflect the existing customary

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*for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* case, in which the legality of a resolution of the Security Council that was not approved by the affirmative vote of all permanent members was challenged, the ICJ concluded that this was a case of interpretation and not of modification of the Charter by subsequent practice. According to the ICJ:

However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences general practice of that Organization.

Advisory Opinion of June 21, 1971, ICJ REPORTS 16, 22 (1971).

See C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 54-55 (2d ed. 2005); D.W. GREIG, INTERTEMPORALITY AND THE LAW OF TREATIES 94-95 (2001); GARDINER, *supra* note 52, at 245.

<sup>70</sup> See [1966] 2 Y.B. INT’L L. COMM. 236.

<sup>71</sup> Award of Dec. 22, 1963, 3 ILM 668, 713 (1964) (footnote excluded).

<sup>72</sup> Fifty-three States voted against the inclusion of Article 38 of the Draft Articles on the Law of Treaties in the Vienna Convention, 15 States voted in favor of Article 38, and 26 States abstained from voting. See PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 138 (1995).

international law,<sup>73</sup> the views expressed by the States demonstrated a general disagreement with the possibility of treaty provisions being modified by subsequent practice.<sup>74</sup> Most States attending the Vienna Conference did not consider that the modification of a treaty by subsequent practice constituted a rule of customary international law. Moreover, these States viewed Article 38 of the ILC Draft Articles as a violation of the principle of *pacta sunt servanda* and of the municipal law of many States. As observed by the French representative at the Vienna Conference:

The formulation of article 38 was open to three main objections. First, many international agreements contained specific provisions on the conditions of their revision: to admit that the parties could derogate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning. Secondly, adoption of the article might raise serious constitutional problems for many States: the principle of formal parallelism required that modifications of a treaty at the domestic level should follow the same procedure as the original text. If the manner in which the responsible officials applied the treaty was in itself capable of leading to modification, that requirement of parallelism could hardly be met. Moreover, it was doubtful whether the precise and strict conditions laid down in article 6 and the following articles of the draft, on consent to be bound by a treaty, would retain any meaning if the treaty could be subsequently modified in the manner provided for in article 38. Thirdly, the rule proposed in article 38 would hardly conform with the harmony of international relations. Indeed, if States were given the impression that any flexible attitude towards the application of a treaty was tantamount to agreement to modify the treaty, they would tend in future to become much more circumspect and rigid in their attitudes.<sup>75</sup>

For this reason, to the extent that the rule of Article 38 of the ILC Draft Articles on the Law of Treaties does not seem to reflect customary international law and, thus, is inapplicable to the ICSID Convention, one may not argue that investment treaties, as subsequent practice, could modify the provisions of the ICSID Convention.

#### IV. INVESTMENT TREATIES AS TACIT MODIFICATIONS OF THE ICSID CONVENTION BETWEEN ONLY CERTAIN OF THE CONTRACTING STATES

In *Biwater*, in addition to the idea that the definitions of investment contained in investment treaties could constitute the subsequent practice of the Contracting States in the application of the ICSID Convention, the tribunal pointed out that, in

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<sup>73</sup> See VILLIGER, *supra* note 69, at 200.

<sup>74</sup> See United Nations Conference on the Law of Treaties, First Session, Vienna, Mar. 26-May 24, 1968, U.N. Doc. A/Conf. 39/11, at 207-215. See also ELIAS, *supra* note 52, at 98-100.

<sup>75</sup> U.N. Conference on the Law of Treaties, *supra* note 74, at 208. See also J.S. Stanford, *The Vienna Convention on the Law of Treaties*, 20 U. TORONTO L.J. 18, 32 (1970).

determining the content of the investment requirement of the ICSID Convention, ICSID tribunals should consider “the nature of the instrument containing the relevant consent to ICSID”:

The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of “investment” is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including *the nature of the instrument containing the relevant consent to ICSID*.<sup>76</sup>

The *Biwater* tribunal did not explain, however, why the nature of the instrument of consent would be relevant for the purposes of assessing compliance with the jurisdictional requirements of the ICSID Convention. Nonetheless, this argument seems to be connected with the idea suggested by the tribunal in the case of *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (“*Fraport*”) that the definition of investment set forth in the BIT serves as “*lex specialis*” in relation to Article 25(1) of the ICSID Convention.<sup>77</sup> This suggests that the investment treaty, in case of conflict, would prevail over the notion of investment within the meaning of the ICSID Convention.

In *Fraport*, the case was submitted to the jurisdiction of the Centre pursuant to the Germany-Philippines BIT.<sup>78</sup> Philippines challenged the jurisdiction of the Centre on the ground that the dispute arose out of an investment that was not made in accordance with its municipal law and, consequently, would not comply with the definition of investment contained in the BIT. Although the fulfillment of the investment requirement of the ICSID Convention was not a central issue in the decision, the tribunal pointed out:

It is further observed that the boundaries of this Tribunal’s jurisdiction are delimited by the arbitration agreement, in the instant case, both the BIT and the Washington Convention. Article 25 of the Washington Convention, which provides, *inter alia*, parameters of jurisdiction *ratione materiae*, does not define “investment,” leaving it to parties who incorporate ICSID jurisdiction to provide a definition if they wish. In bilateral investment treaties which incorporate an ICSID arbitration option, the word “investment” is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a *lex specialis* with respect to Article 25 of the Washington Convention.<sup>79</sup>

Although investment treaties are not expressly intended to modify the provisions of the ICSID Convention, one could argue that an investment treaty could be considered as a tacit modification by subsequent agreement in relation to certain provisions of the ICSID Convention and to the parties to the investment

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<sup>76</sup> *Supra* note 28, ¶ 316 (emphasis added).

<sup>77</sup> *Fraport*, Award, *supra* note 6, ¶ 305.

<sup>78</sup> Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments of Apr. 18, 1997, 2108 U.N.T.S. 19.

<sup>79</sup> *Fraport*, Award, *supra* note 6, ¶ 305.

treaty.<sup>80</sup> This question would only be relevant in cases where the investment treaty has the effect of expanding the jurisdiction of the Centre. If the investment treaty makes the jurisdictional scope of the ICSID Convention narrower, this would constitute a matter of consent to the jurisdiction of the Centre and not of modification.

The modification of multilateral treaties between certain of the parties only is governed by the Vienna Convention. 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.<sup>81</sup>

The ICSID Convention does not expressly authorize the conclusion of subsequent agreements intended to modify its provisions between certain of the Contracting States, but it does not expressly prohibit such modifications. However, the modification of the provisions that govern the jurisdiction of the Centre seems to be inconsistent with the institutional nature of the ICSID Convention.

The purpose of Article 25(1) of the ICSID Convention, which sets out the jurisdiction of the Centre, is not limited to determining the circumstances in which a Contracting State and a national of another Contracting State may refer a dispute to ICSID arbitration. As an international organization, the Centre may only exercise its functions within the limits of the mandate conferred on it by its

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<sup>80</sup> See Thomas W. Wälde, *Interpreting Investment Treaties: Experiences and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, *supra* note 36, at 768.

<sup>81</sup> 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, *supra* note 52, at 108; VILLIGER, *supra* note 52, at 531-32. 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, *supra* note 52, 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.” See Egbert Vierdag, *The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention*, 76 AM. J. INT’L L. 779, 793 (1982).

members under its constitutive treaty.<sup>82</sup> Accordingly, the modification of a provision of the ICSID Convention that has the effect of expanding the jurisdiction of the Centre also has the effect of expanding the mandate conferred on the Centre. In this sense, the modification of the jurisdiction of the Centre between only 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 only certain of them.<sup>83</sup> It should be noted 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. Pursuant to Article 66(1):

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.<sup>84</sup>

In addition, the expansion of the jurisdictional scope of the ICSID Convention between only certain of the Contracting States through the concluding of an investment treaty does not seem to fulfill all the requirements of the Vienna Convention. In particular, Article 41(1)(b)(i) of the Vienna Convention requires that, in order to be valid, the modification should “not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.”<sup>85</sup> While one could argue that a modification with the effect of expanding the jurisdiction of the Centre would be limited to the Contracting States that entered into a new treaty and their nationals, such modification, in fact, creates additional obligations for the other Contracting States of the ICSID Convention. First, the expansion of the jurisdiction of the Centre may lead to the increase in the number of cases referred to ICSID arbitration and, thus, to the increase in the expenses of the Centre; the Contracting States could suffer an increase of their financial burden.<sup>86</sup> Secondly, and most important, while the

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<sup>82</sup> 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 the 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, 78-79 (1996). See also HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 155-57 (4th ed. 2003).

<sup>83</sup> See AMERASINGHE, *supra* note 69, at 452-53.

<sup>84</sup> 1 ICSID REP. 3, 20 (1993).

<sup>85</sup> Vienna Convention, *supra* note 7, Art. 41(1)(b)(i).

<sup>86</sup> All the expenses of the Centre are currently sponsored by the IBRD in accordance with the Memorandum of Administrative Arrangements Agreed between the International Bank for Reconstruction and Development and the International Centre for Settlement of

primary obligation to comply with an arbitral award rendered under the ICSID Convention is limited to the disputing parties,<sup>87</sup> the submission of a dispute to the jurisdiction of the Centre affects not only the Contracting State party to the dispute and the Contracting State of the national party to the dispute, but it creates positive and negative obligations for all Contracting States.<sup>88</sup>

One of the main features of the dispute settlement mechanism established under the ICSID Convention is its multilateral regime, which aims at excluding the applicability of the municipal law of Contracting States and international treaties to which Contracting States are parties, as well as the jurisdiction of local courts.<sup>89</sup> By virtue of Article 26 of the ICSID Convention, “Consent 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.”<sup>90</sup> Under this provision, the Contracting States’ local courts must refrain from exercising their jurisdiction over disputes referred to ICSID arbitration and they are also prevented from interfering in arbitral proceedings instituted under the ICSID Convention.<sup>91</sup> Moreover, arbitral awards rendered under the ICSID Convention are not subject to any kind of review by the local courts of the Contracting States.<sup>92</sup> To this effect, Article 53(1) of the ICSID Convention provides:

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

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Investment Disputes of Feb. 13, 1967. See ICSID FIRST ANNUAL REPORT 1966/1967, at 15-16. However, if the expenses of the Centre exceed the contributions made by the IBRD, or if the agreement between the IBRD and the Centre is terminated, the Contracting States of the ICSID Convention will be responsible for financing the activities of the Centre. In accordance with Article 17 of the ICSID Convention:

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

See also SCHREUER, *supra* note 15, at 64-66.

<sup>87</sup> See SCHREUER, *supra* note 15, at 1080.

<sup>88</sup> See Roberto Castro de Figueiredo, *Fragmentation and Harmonization in the ICSID Decision-Making Process*, 11(1) TDM 7-17 (2014).

<sup>89</sup> See George Delaume, *The Finality of Arbitrations Involving States: Recent Developments*, 5 ARB. INT’L 21 (1989); Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. - FILJ 321, 336 (1991); SCHREUER, *supra* note 15, at 1082-86. However, if a party seeks the recognition and enforcement of an ICSID award in a non-Contracting State, the provisions of national law of that State and of international treaties to which the non-Contracting State is party will apply. See NATHAN, *supra* note 17, at 61.

<sup>90</sup> ICSID Convention, *supra* note 1, Art. 26.

<sup>91</sup> See SCHREUER, *supra* note 15, at 347.

<sup>92</sup> *Id.* at 1082-83.

enforcement shall have been stayed pursuant to the relevant provisions of this Convention.<sup>93</sup>

In addition, Article 54(1) of the ICSID Convention provides:

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.<sup>94</sup>

As this provision has been construed, 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.<sup>95</sup>

Accordingly, the multilateral regime of the dispute settlement system established by the ICSID Convention creates several obligations that are not limited to the Contracting State party to the dispute and to the Contracting State of the national party to the dispute. For this reason, the modification of the ICSID Convention by an investment treaty entered into by only certain of the Contracting States that has the effect of expanding the jurisdiction of the Centre to disputes that would not be covered by Article 25(1) of the ICSID Convention creates, consequently, additional obligations for all Contracting States, in contradiction of Article 41(1)(b)(i) of the Vienna Convention.<sup>96</sup> If tacit modifications to the ICSID Convention between only certain of the Contracting States through an investment treaty were allowed, the Contracting States that are not parties to such investment treaty would have to perform the obligations that derive from the multilateral regime of the ICSID Convention in disputes that were not meant to be covered by the jurisdiction of the Centre pursuant to Article 25(1) of the ICSID Convention. If the scope of the investment requirement of the ICSID Convention is expanded by the investment treaty, there is also an extension of the scope of the obligations that are imposed on all Contracting States and not only on those that are party to the investment treaty. In particular, there would be an extension of the obligation placed on local courts to refrain from interfering in arbitral proceedings instituted under the ICSID Convention and of the obligation to automatically recognize ICSID awards. This leads to the conclusion that the ICSID Convention is not subject to modifications between only certain of the Contracting States through investment treaties.

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<sup>93</sup> ICSID Convention, *supra* note 1, Art. 53(1).

<sup>94</sup> *Id.* Art. 54(1).

<sup>95</sup> See SCHREUER, *supra* note 15, at 1114-16.

<sup>96</sup> See VILLIGER, *supra* note 52, at 534.

## V. CONCLUSION

While the ICSID Convention and investment treaties providing for ICSID arbitration have a strong connection, the use of investment treaties in the interpretation and application of the ICSID Convention has some limitations that cannot be ignored.

As addressed in this article, the definitions of investment contained in investment treaties may reveal the common understanding of the Contracting States of the ICSID Convention in respect of the meaning of the term “investment.” This common understanding seems to be what the *Mihaly* tribunal referred to as the “future progressive development of international law on the topic of investment,”<sup>97</sup> and the *Biwater* tribunal as the “developing consensus in parts of the world as to the meaning of ‘investment.’”<sup>98</sup> However, reliance on the definitions of investment set forth in investment treaties as a general rule of treaty interpretation of the Vienna Convention finds some difficulties. Not all Contracting States of the ICSID Convention have entered into investment treaties, not all investment treaties qualify as subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention, and the definitions of investment are not uniform in all investment treaties. Investment treaties may, however, be used in the construction of the ICSID Convention as a supplementary means of interpretation under Article 32 of the Vienna Convention.

In addition, the definitions of investment contained in investment treaties do not have the effect of modifying the jurisdictional scope of the ICSID Convention as a tacit modification between certain Contracting States only. While investment treaties are confined to the parties to the treaty and their nationals, and arbitral awards rendered under the ICSID Convention are binding only on the disputing parties, the submission of a dispute to the jurisdiction of the Centre under the ICSID Convention creates multilateral obligations for all Contracting States, and not only for the Contracting State party to the dispute and the Contracting State of the national party to the dispute. In this sense, investment treaties cannot amount to a tacit modification of the ICSID Convention between the Contracting States party to the investment treaty pursuant to Article 41(1) of the Vienna Convention, in order to extend the jurisdictional scope to disputes that would not fall within the jurisdiction of the Centre in accordance with Article 25(1) of the ICSID Convention.

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<sup>97</sup> *Supra* note 23, at 872.

<sup>98</sup> *Supra* note 5, ¶ 314.