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Legal basis and effect of denunciation under international investment agreements*

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Executive Summary

This memorandum is the result of a request submitted by the United Nations Conference on Trade and Development (hereinafter client) in the framework of the Trade Law Clinic at the Graduate Institute of International and Development Studies. The questions submitted by the client relate primarily to the notion of consent to international investment arbitration and the possibility of the termination of such consent either by virtue of withdrawal from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter ICSID Convention) or Bilateral Investment Treaties (hereinafter BITs).

The recent denunciations of ICSID Convention and a number of BITs by Ecuador and Bolivia have given rise to an intense academic debate as to the legal effects of such acts. In practice, the effects of Bolivia's and Ecuador's denunciation of the ICSID Convention seem to be limited by the ICSID Convention itself. It would not affect arbitration clauses contained in BITs that refer to arbitration fora other than ICSID. However, the effects of denunciation regarding arbitration clauses contained in BITs referring to the ICSID arbitration are far from clear. There are many grey areas, which require further clarification, in particular regarding the moment in time when denunciation of ICSID is effective and the effects this has on specific BITs unilateral offers to ICSID arbitration. In other words, may the host State revoke its consent to arbitrate given by BITs through an ICSID denunciation? If so, when?

One of the major question relates to the possibility of investors bringing cases to ICSID after the denunciation notice has been deposited with the World Bank, on the one hand, and after it has taken effect, on the other hand. The answer to this question depends upon an informed interpretation of Articles 71 and 72 of the ICSID Convention. Pursuant to Article 71 of the ICSID Convention the period between the deposit of the notice of denunciation and the moment upon which it becomes effective extends to six months. Most importantly, Article 72 of the ICSID Convention provides that nothing shall affect the rights or obligations of the State or investor arising out of "*consent to the jurisdiction of the Centre*

given by one of them before such notice was received by the depositary". Thus, denunciation of ICSID Convention can take place but it will not be opposable to those investors falling under the scope of Article 72.

The notion of consent in Article 72 is controversial in doctrine. According to a restrictive interpretation, once the denunciation has been received by the World Bank, investors who have not already expressed their consent to jurisdiction cannot initiate arbitration. Hence, consent in Article 72 would imply mutual consent to arbitration, which is perfected when an investor files a notice of arbitration. The opposing view is that consent in Article 72 is simply unilateral consent such as that offered by a State in a BIT. According to this theory, any BIT in which a State offers its consent to ICSID arbitration before it denounces the Convention, continues to protect the relevant investors for the life of the BIT even after the denunciation takes effect. A third *in-between* interpretation holds that investors can initiate ICSID arbitration based on arbitration clauses contained in BITs but only within the period of six months after the notice of denunciation was received by the World Bank. This view is based on the literal interpretation of the ICSID Convention and may be substantiated by relevant rules of the Vienna Convention on the Law of Treaties (hereinafter VCLT). There is no case law in this regard.

The purpose of this memorandum is twofold. First, it aims to give policy-makers and other stakeholders a detailed insight into the effects of ICSID denunciation. Only if States are aware of the potential consequences of their action they can make an informed decision as to whether remain party to ICSID or to denounce the Convention. Second, this memorandum provides an analysis of the varying interpretations and its repercussions on arbitral practice and treaty-making. Some of these interpretations have already been made in the course of the above-mentioned academic debate, others are new and may be raised if a denunciation is addressed or challenged before an international jurisdiction. The goal is thus to anticipate issues that may arise out of denunciation and to propose solutions to solve these problems. Some of the issues addressed in this memorandum are likely to be raised in the two pending cases before the ICSID, namely *E.T.I. Telecom International N.V. v. Republic of Bolivia* and *Pan American Energy LLC v. Plurinational State of Bolivia.*

Introduction

1. In late April 2007, the governments of Bolivia, Nicaragua, and Venezuela expressed an intention to withdraw from the ICSID Convention. This decision was adopted in the framework of a president's summit of the *Alternativa Bolivariana para la America Latina y El Caribe* (ALBA)[1] founded in 2006. It can be regarded together with the emergence of the *Banco del Sur*[2] as a further move towards establishing what can be qualified as a "New Regional Economic Order" for the Americas.[3] There is an increasing perception that international investment arbitration is biased towards investors.[4] In parallel, certain States have resolved to establish an alternative to the ICSID system.[5]

2. On 23 May 2008, the Constitutive Treaty of the Union of South American Nations (UNASUR)[6] was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela, furthering the goal of greater economic integration in South America. Prior to the signature of the UNASUR treaty, ministers from the 12 member States signed a declaration at the First South American Energy Summit in Caracas resolving to draft an Energy Security Treaty within six months, establishing a regional body for the resolution of energy disputes in South America. At a further summit held in October 2008, Chile, Colombia and Peru proposed the creation of a regional centre for arbitration and conciliation. A working group has already been formed to advance the proposed regional centre for arbitration.[7]

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[1] This initiative includes Venezuela, Bolivia, Cuba, Nicaragua, and since January and August 2008 respectively, Dominica and Honduras.

[2] Banco Sur is a monetary fund and lending organization established on September 26, 2009 by Argentina, Brazil, Paraguay, Uruguay, Ecuador, Bolivia and Venezuela.

[3] C. Tietje et al., "Once and Forever? The Legal Effects of a Denunciation of ICSID", *Transnational Dispute Management* (2008), at 5, available at http://www.wirtschaftsrecht.uni-halle.de/Heft74.pdf.

[4] See e.g. T. Yalkin, "International Investment Arbitration Poisoned at the Root", *EJIL Talk*, available at http://www.ejiltalk.org/international-investment-arbitration-poisoned-at-the-root/.

[5] S. Noury and C. Richard, "International Arbitration in Latin America: Overview and Recent Developments", *ILGL International Arbitration* (2009), 282-287.

[6] The goal of UNASUR is to expand and build upon smaller regional organizations such as the Common Market of the South (Mercado Común del Sur) ("Mercosur") and the Andean Community (Comunidad Andina).

[7] F.C. Diaz, "Ecuador prepares for life after ICSID, while debate continues over effect of its exit from the Centre", Investment Treaty News, Sep. 2, 2009, available at http://www.investmenttreatynews.org/cms/news/archive/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre.aspx

3. On May 2, 2007 ICSID received from the Bolivian Ministry of Foreign Affairs Bolivia's notification of its withdrawal from the ICSID Convention. In accordance with Article 71 of the Convention, the denunciation took effect six months after the receipt of Bolivia's notice, i.e. on November 3, 2007.

4. On July 6, 2009, the depositary received a written notice of Ecuador's denunciation of the Convention. In accordance with Article 71 of the Convention, the denunciation took effect six months after the receipt of Ecuador's notice, i.e. on January 7, 2010.

5. Whilst to date only Bolivia and Ecuador have implemented the decision with regard to the withdrawal from ICSID, the possibility of other States adopting similar measures is not excluded. In the long term this may generate far-reaching consequences for the system of international investment dispute settlement as a whole. To this end, the present memorandum is intended not only to address the particular concerns as applicable to the cases of Ecuador and Bolivia, but it also aims at illustrating some common issues arising out such acts and possible responses thereto.

6. In Chapter I, the process of denunciation of the ICSID Convention is considered. The present memorandum addresses Articles 71 and 72 of the ICSID Convention dealing with denunciation together with Article 25 (1) which regulates the jurisdiction of the Centre, in order to answer the following questions that had been submitted by the client:

- *What is the legal basis for each of the steps taken by Ecuador and Bolivia in order to denounce ICSID Convention?*
- *When had the Bolivian and Ecuadorian denunciations of the ICSID Convention taken effect?*
- *What are the rights or obligation under the ICSID Convention preserved following its notice of denunciation and the expiry of six-month period contained in Article 71 of the ICSID Convention?*
- *What are the legal implications of these withdrawals from ICSID Convention? Can the investor still bring cases against the denouncing State?*
- *What constitutes consent to ICSID jurisdiction? When is such consent granted?*

7. Chapter II of the present memorandum sheds light on the relevant provisions of the VCLT, which establishes the legal effects of denunciation of treaties under international law.[8] While according to these secondary rules, the denouncing State would ordinarily be no longer bound by the ICSID arbitration clause, the investor would ordinarily have an interest to be able to initiate arbitration proceedings against the host State in case of injurious acts against its investment. Being a body of secondary rules of international law, which establish how the primary rules contained in a treaty work, the VCLT is applicable to the mechanism and effects of denunciation of the ICSID Convention and BITs as a fall-back regime. Finally, an analogy between unilateral offers to arbitrate contained in BITs and that of unilateral declarations of the compulsory jurisdiction of the International Court of Justice (ICJ) may enlighten us on the understanding of *unilateral* and *perfected* consent, which is analysed in Chapter I of the memorandum.

8. In Chapter III, the memorandum addresses the mechanism and effects of BITs denunciation and the interaction of the latter with ICSID denunciation. This section aims at providing comprehensive answers *inter alia* to the following questions:

- *What is the legal basis for denouncing BITs? What are the effects of denouncing a BIT (e.g. regarding Investor-State Dispute Settlement)?*
- *When does such a denunciation take effect?*
- *What is the relationship between the denunciation of the ICSID Convention and BITs?*

9. In Chapter IV, the present memorandum addresses the applicable rules to establish the legal effect of municipal law over existing international obligations, given that constitutional amendments in Bolivia and Ecuador purported to limit engagements of these countries in the field of international investment arbitration.

[8] Technically, the Vienna Convention is not applicable to the ICSID Convention since under Article 4 of the VCLT it applies only to treaties concluded after its entry into force. While the VCLT entered into force in 1980, the ICSID Convention entered into force in 1966. However, the provisions referred to in this memorandum are understood to reflect customary international law.

10. Finally, while being substantially of a legal nature, the present memorandum provides for a number of policy considerations and recommendations to States aimed at the integrity and coherence of the international system of investment disputes.

Framework of analysis

11. At the outset it is appropriate to introduce a framework of analysis that may facilitate the understanding of rather technical legal arguments. The questions relating to States' consent to international arbitration and subsequent denunciation are rooted in a crucial characteristic of the international investment law system – impartiality of interests. One of the primary functions of law in general is to balance the conflicting interests of different parties. The jurisdiction of ICSID is built upon the consent given by both investor and State. Thus, its functioning and practical importance depends on the mutual acceptance of the system. Ecuador's and Bolivia's acts reflect growing doubts as to whether the current framework of investment law and arbitration practice meets the criteria of impartiality with regard to its substance and application by ICSID tribunals. As a result, the overarching purpose of international investment arbitration under ICSID must be to balance the legitimate interests of the State against those of the investor in order to ensure the acceptance of the system by both actors.[9] Therefore, same considerations are at the heart of an assessment of ICSID and BITs denunciation.

12. As far as host State behaviour is concerned, the denunciation mechanism may fulfil a dual function. First, it is to restrain an *instrumental* use of denunciation to evade unfavourable awards or to avoid arbitration. Of course, States cannot "escape" the jurisdiction of the ICSID Centre in pending proceedings nor can they withdraw their consent unilaterally once the investor has accepted it. Second, such an *instrumental* withdrawal has to be distinguished from a *strategic* withdrawal. The *strategic* withdrawal results from a general policy change, the purpose of which is not to participate anymore in ICSID arbitrations. One of the crucial reasons underlying such a *strategic* withdrawal lies in the fact that the awards rendered under arbitration fora other than ICSID are subject to

[9] A similar policy framework is employed by UNCTAD, "Dispute Settlement Investor State". *UNCTAD Series on Issues in International Investment Agreements* (2003), available at: http://www.unctad.org/en/docs/iteiit30_en.pdf

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The latter provides States with the possibility to request annulment of awards *inter alia* on the basis of public policy.[10] In contrast, pursuant to Article 54 of the ICSID Convention, its awards are equivalent to local judgments and therefore directly executable. Thus, the Convention itself is to preserve this *strategic* policy choice in Articles 71 and 72 while restraining its *instrumental* use.

13. As far as investors' interests are concerned, the Convention needs to mitigate the effects of denunciation. On the one hand, investors should not be caught "off guard" by the denunciation without any possible remedy. In that sense, the notice of denunciation may not simultaneously deprive the investor of the possibility to initiate arbitral proceedings. Otherwise, the Convention would neither ensure investment protection nor would it prevent from the *instrumental* use of denunciation by States. On the other hand, the rights of the investors should not be overprotected. If the Convention provided investors with a mechanism that effectively circumvents the effects of denunciation to the treaty, an ICSID withdrawal would be rendered meaningless altogether for host States thereby severely limiting their policy space. In short, the Convention must give due consideration to investors interests while not overemphasizing them.

14. Throughout this memorandum, the above framework will be used to assess varying interpretations and possible lines of legal argumentation in order to illustrate their policy implications. However, it is crucial to bear in mind that States have different degrees of influence on the application of ICSID Convention on the one hand and BITs on the other. Given that ICSID is a multilateral treaty in force for over forty years now, States have little means to shape unilaterally the understanding of certain provisions of the Convention. So unless all parties to the Convention agree on a specific reading, it will be primarily for international arbitrators to decide on the meaning of certain provisions of the ICSID Convention relating to withdrawal. In that context, the memorandum can illustrate the possible policy implications that varying interpretations may have taking into account the above-mentioned need for impartiality and balancing of interests. BITs, on the other hand,

[10] Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

constitute the main tool for States to shape and change their commitments in international investment law. Their bilateral nature facilitates their adaptation to new circumstances. Indeed, States may change their Model BITs and renegotiate existing BITs. Furthermore, as will be shown below, ICSID together with the thousands of BITs, constitute a closely linked system. Therefore, changes in BITs practice may also have repercussion on the ICSID Convention. Henceforth, as BITs remain the States' main tool to influence the international investment system, the present memorandum can go further than merely assessing policy implications of BITs. Thus, where possible and appropriate, it proposes solutions to amend BITs in order to re-balance or avoid imbalance of conflicting interests within the international investment framework.

I. Denunciation of the ICSID Convention and the Extent of its Effects

15. In this chapter, the concept of denunciation of the ICSID Convention will be discussed. After introducing general aspects of the jurisdiction of the ICSID (A), the relevant provisions of the Convention (B), their interpretation (C, D) and interaction (E) will be further analysed.

A. Jurisdiction of the ICSID Centre and Consent to Submit a Dispute to the Centre

1. Article 25 of the ICSID Convention

16. Article 25 of the ICSID Convention determines the competence of the Centre. According to paragraph 1 of this Article,

> "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."

17. This provision imposes four cumulative conditions for ICSID jurisdiction:

- that the dispute is a legal one;
- that it arises directly out of an investment;

- that it is a dispute between a Contracting State (or an appropriately designated constituent subdivision or agency) and a national of another Contracting State; and
- that both parties consent in writing to submit the dispute to the Centre.

18. Possible denunciation of the Convention affects two of the above listed requirements, namely, that a State ceases to be "a Contracting State" and that the "consent" by both parties becomes questionable. Before continuing with a discussion about the consequences of the denunciation of the ICSID Convention, the meaning of "consent" under the Convention must be clearly determined.

2. Consent of the Parties to Submit a Dispute to the ICSID Centre

19. As demonstrated above, one of the requirements for the jurisdiction of the ICSID Centre is the consent given by both the investor and the host State. Thereby they agree to submit a specific dispute to the ICSID Centre. Thus, crucially, consent to jurisdiction encompasses the element of mutuality and reciprocity. This conclusion may be derived from the interpretation of the text of numerous articles contained in the ICSID Convention[11] and finds support in the ICSID jurisprudence.[12]

20. By analogy to the contract law, the consent given by the host State can be labelled as an '*offer*', the investor's consent as an '*acceptance* of an offer', which finally constitutes a '*consent* or *agreement*' by both parties. Nevertheless, the present memorandum follows the terminology used in the ICSID Convention. The offer and acceptance are therein referred to as '*consents, given by one of the parties*' or '*unilateral consents*' while the final irrevocable agreement by the parties is defined as '*perfected consent*' or simply '*consent*'.

[11] E.g. para. 6 of the Preamble, referring to "mutual consent by the parties"; Article 25 (1) referring to consent by "the parties to the dispute"; Article 25 (2) (a) and (b) referring to "the date on which the parties consented"; Article 26 referring to "consent of the parties".
[12] *AMT v. Zaire*, ICSID Case No. ARB 93/1, Award (Feb. 21, 1997), paras. 5.17-5.23; *Lanco v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction (Dec. 8, 1998), paras. 28-33, 43, 44; *Goetz v. Burundi*, ICSID Case No. ARB 95/3, Award (Feb. 10, 1999), paras. 67, 81; *CSOB v. Slovakia*, ICSID Case No. ARB 97/4, Decision on Jurisdiction (May 24, 1999), paras. 37, 38.

21. It is generally recognized that a State may give its consent to ICSID jurisdiction in four different forms, the last one being most commonly used:

- a contract concluded with the investor that is the other party to the dispute (compromissory clause/ *compromis*);
- a unilateral instrument, such as a letter to the ICSID Secretariat or a letter to the investor;
- a piece of national legislation, such as a law for the promotion of investments;
- a bilateral or multilateral treaty.

22. The latter three forms are not based only on the unilateral declaration of the host State; in addition the investor has to express his own consent to submit to ICSID. This can be done:

- by initiating arbitration proceedings before the ICSID Centre, i.e. by filing a request for arbitration; or
- by depositing a notice to the ICSID Centre or to the host State before the initiation of the proceedings.

23. The consent of the investor is usually given through the request for arbitration. The submission of the notice of consent before the actual dispute arises is aimed to avoid the risk of a State's withdrawal of its own consent. According to Article 25(1) of the ICSID Convention, a State may unilaterally withdraw its consent before the consent is given by the investor but not afterwards. This plays an important role in the case of denunciation of the ICSID Convention. By granting its consent to ICSID jurisdiction earlier in time, the investor ensures that disputes arising out of its investments will be settled by ICSID tribunals and that a host State cannot depart from this by withdrawing its consent through the denunciation of the Convention.

B. Denunciation under the ICSID Convention

24. According to Article 71 of the ICSID Convention,

> "any Contracting State may denounce the Convention by written notice to the depositary of the Convention. The denunciation shall take effect six months after receipt of such notice."

25. Article 25 of the ICSID Convention[13] alone does not suffice to establish jurisdiction when the host State ceases to be a Contracting party after denunciation of the ICSID Convention. However, in that case, Article 72 provides that the notice of denunciation of the ICSID Convention by a Contracting State

> "shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

26. It may be argued that Article 72 constitutes an exception to the requirement of Article 25 insofar as the State has to be a Contracting party.[14] Legal scholars have been in a striking disagreement as to the interpretation of Article 72. This memorandum addresses the existing positions, which draw different consequences of denunciation for both investors and host States.

C. Procedure of Denunciation – Interpretation of Article 71 of the ICSID Convention

27. One of the leading authorities on the ICSID Convention, Professor Schreuer indicates in his Commentary[15] that all the drafts to the ICSID Convention provided for denunciation and that the right to withdraw from the ICSID Convention was always considered to be unconditional. The latter could be exercised by a State at any time without justifying its conduct.

28. The procedure for denunciation presupposes that a notice of denunciation has to be addressed to the World Bank which, under Article 73, is the depositary of the ICSID Convention. The depositary has to notify all the signatory States of a notice of denunciation in accordance with Article 75(f) of the ICSID Convention.

29. According to Schreuer, a denunciation does not affect pending proceedings. Thus, for example, the proceedings that had been commenced against Ecuador before the notice

[13] See supra, para. 16.
[14] C. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge: CUP, 2009), at 1280.
[15] *Ibid.*, at 1278.

of denunciation was deposited will continue and conclude even after Ecuador's denunciation had taken effect.[16] Schreuer further considers that during the six months between the receipt of the notice and its taking of legal effect, the State in question continues to be bound by certain obligations, namely the respect for the ICSID Centre's immunities and privileges (Articles 18-24) and recognition and enforcement of the awards (Article 54).

30. The authors of this memorandum see no reason why the host State should not be bound by all of the obligations and be accorded all the rights under the ICSID Convention in the six-month period. If one takes into consideration only the text of Article 71 of the ICSID Convention, the reasonable interpretation would be that the host State ceases to be a Contracting Party to the ICSID Convention only after the six-month period is elapsed. Even if a notice of denunciation is to be regarded as a unilateral withdrawal of consent in accordance with Article 25 of the ICSID Convention, Article 71 is clear and unambiguous in providing that such withdrawal should only take effect after the six-month period. Beforehand, no special treatment should be accorded to the State. As will be demonstrated in Chapter II, such an interpretation may also find support in Article 70 of the VCLT.

31. In this respect, the decisive element in the debate will be brought by a decision of the ICSID tribunal in *E.T.I. Telecom International N.V. v. Republic of Bolivia*[17]. In this case, the investor perfected the consent given by Bolivia during the six-month period following the notice of denunciation. The tribunal took the case into procedure, but without any prejudice as to the admissibility of the claim. Therefore it may be envisaged that the tribunal will accept its jurisdiction and consider that the perfection of consent by the investor was efficient and that Bolivia is therefore still bound to settle this dispute before the Centre. Another, less likely outcome is that the Tribunal will have no jurisdiction since

[16] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, (Sep. 9, 2008); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5; *Corporación Quiport S.A. and others v. Republic of Ecuador*, ICSID Case No. ARB/09/2; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4; *Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/10.

[17] *E.T.I. Telecom International N.V. v. Republic of Bolivia*, ICSID Case No. ARB /07/28, registered on Oct. 31, 2007.

Bolivia should not have been bound on the basis of consent it has effectively withdrawn with the notice of denunciation.

D. Effects of Consent in the Procedure of Denunciation - Interpretation of Article 72 of the ICSID Convention

32. Article 72 is an expression of the rule, contained in Article 25(1) of the ICSID Convention, that consent, once given, cannot be withdrawn unilaterally. In the absence of Article 72, a host State or an investor's State of nationality could have nullified a consent agreement at any time convenient to it by withdrawing from the ICSID Convention or by excluding the territory in question.

33. As already alluded to, commentators differ in prescribing consequences arising from the denunciation of the ICSID Convention. Some interpretations favour investors' position, while others protect a sovereign host State. Major differences arise out of the interpretation of the phrase "*consent (…) given by one of them*" in the Article 72 of the ICSID Convention.[18]

34. It can be interpreted that this Article refers only to the *perfected consent*, meaning that an investor may not accept the consent given by the host State after the notice of denunciation is received by the World Bank. Another possible interpretation would be that a State is internationally bound by its *unilateral consent*, which has not been necessarily accepted by an investor before the denunciation of the ICSID Convention. It follows that the investor may validly give its own consent and submit the dispute to the ICSID Centre as long as that expression of consent is binding or, at least, until the notice of denunciation takes effect.

35. Before discussing the possibilities in detail, rights and obligations arising out of the consent which are not affected by the denunciation of the ICSID Convention will be addressed.

[18] Schreuer, supra note 14, at 1281.

1. Rights and Obligations Arising out of the "Consent"

36. Under Article 72 of the ICSID Convention, rights and obligations *that arise out of the consent to ICSID's jurisdiction* will not be affected by the denunciation of the Convention. This may lead to the conclusion that there are rights and obligations arising from the Convention, which cease to exist once denunciation becomes effective, and other specific rights and obligations that arise directly from the consent to ICSID's jurisdiction for dispute settlement.

37. These rights and obligations undoubtedly include the Convention's provisions on arbitration and conciliation procedures. They further include the obligation under Article 53 to abide by and comply with an award. The exclusion of alternative remedies (Article 26) and the exclusion of the review of awards (Article 53, first sentence) also arise from the consent. Similar considerations apply to the interpretation, revision and annulment of awards under Articles 50, 51 and 52.[19]

38. The question remains whether a State continues to be bound by the obligation to recognise and enforce arbitral awards rendered by ICSID tribunals, in accordance with Article 54 of the ICSID Convention. Here a distinction should be made between cases, where a denouncing State, in which enforcement is sought, was a party in the proceedings where the award was rendered (for example, it was a host State, against which an investor initiated arbitration) and cases, where denouncing State was not a party to the proceedings (and should grant enforcement because a third State has its assets therein). In the first instance, we should consider recognition and enforcement of the award as an obligation, arising out of the denouncing State's consent to jurisdiction. Therefore, this obligation should be imposed on a State also after the denunciation, in accordance with Article 72 of the ICSID Convention. Should it not be the case, the proceedings that can be held against a State under Article 72 would be meaningless. Conversely, a State that denounced ICSID Convention should not, after the expiration of the six months period, bear the obligation to recognise and enforce other awards, rendered by ICSID tribunals, if it was not party to the

[19] O.M. Garibaldi, "On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy", in C. Binder et al., *International Investment Law for the 21st century: essays in honour of Christoph Schreuer* (Oxford: OUP, 2009), at 261.

proceedings. The obligation to recognise and enforce arbitral awards rendered against other States is a reciprocal obligation arising under the ICSID Convention and only States parties to the ICSID Convention should comply with it.

39. Regardless denunciation, the State is accorded these rights and has to abide by these obligations. Furthermore, its obligation to submit investment disputes to the ICSID Centre and the duration of this obligation will depend upon the interpretation of Article 72 of the ICSID Convention. Possible interpretations are presented in the following paragraphs.

2. Possible Interpretations of "Consent…given by one of them"

40. The expression *"[c]onsent…given by one of them"* contained in Article 72 of the ICSID Convention can be interpreted in two different ways: (1) both, the investor and the host State, have to consent to ICSID jurisdiction before the depositary receives the notice of denunciation (the so-called *perfected consent* has to be achieved)[20] and, (2) only the denouncing State has to express its unilateral consent[21]. In the former instance, the term *one of them* would refer to the denouncing State, its constituent subdivisions or agencies and its nationals (mentioned beforehand in Article 72).[22] In the latter instance, *one of them* would refer to both, investor and the host State.

1) Consent Means Perfected Consent by the Parties

41. According to Schreuer's Commentary of the ICSID Convention,

> "the intention of Article 72 was to make it clear that if a State had consented to arbitration, the subsequent denunciation of the Convention by that same State would not relieve it from its obligation to go to arbitration if a dispute arose."

42. If the unilateral consent of a State has been met with the unilateral consent given by an investor before the denunciation of the ICSID Convention, disputes arising between the State and the investor after the date of denunciation would still fall within the jurisdiction

[20] Tietje et. al, supra note 3, at 8.
[21] E. Gaillard, "The Denunciation of the ICSID Convention", *New York Law Journal*, Vol. 237, no. 122 (2007); M. D. Nolan and F. Sourgens, "The Interplay between State Consent to ICSID Arbitration and Denunciation of the Convention: The (Possible) Venezuela Case Study", *Transnational Dispute Management* (2007), at 37.
[22] C. Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration", in M. Waibel et al., The *Backlash against Investment Arbitration: Perceptions and Reality*, (Kluwer Law International, 2010), at 366.

of the ICSID Centre. Existing *perfected* consent will benefit from Article 72 and will hence not be affected by a denunciation under Article 71. This will be the case if an investment contract between the investor and the host State contains an arbitration clause or if an offer of consent in domestic legislation or in a treaty such as a BIT was accepted by the investor before the notice of denunciation. However, this interpretation does not necessarily expose investors to the danger that a State will simply withdraw access to ICSID after investors made their investments. According to Schreuer, the investor may perfect consent not only by submitting a request for arbitration once a dispute has arisen, but also at an early stage, by accepting the offer of consent given by a State in general terms or in a special notice to the ICSID Centre.

43. A mere unilateral consent (*offer*) given by the host State and that has not been accepted by the investor does not create any rights or obligations under the ICSID Convention. Any rights and obligations that might arise from an offer of consent contained in the BITs would arise from the BIT but not under the ICSID Convention.

2) Consent Means Unilateral Consent by the Host State

44. This interpretation is based on a literal reading of Article 72 in the light of Article 25(1) of the ICSID Convention. Article 72 refers to *"consent...given by one of them"*. By contrast Article 25(1) refers to consent by *"the parties to the dispute"*. It may be argued that the phrase "given by one of them" indicates that Article 72 covers a unilateral expression of consent by the host State before its acceptance by the investor. This would mean that the mere offer of consent by the host State remains unaffected by a notice under Article 71.

45. Under this interpretation, the investor would retain the right to perfect the consent of a host State (to accept the host State's offer of consent) as long as the offer continues to exist, even after a notice of denunciation under Article 71.

46. In order to evade the effect of Article 72, the State would have to specifically revoke its given unilateral consent. In the case of its unilateral consent contained in

domestic legislation, the legislation would have to be repealed or amended. In the case of an offer of consent contained in a treaty such as BIT, its withdrawal would be considerably more difficult and would have to conform to the law of treaties as will be discussed in detail in Chapter III of the memorandum.

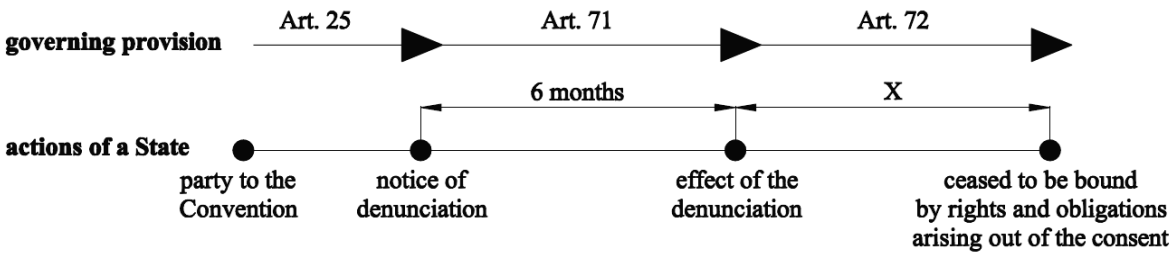
47. Several articles follow this interpretation of Article 72 of the Convention and conclude that unilateral consent expressed in a treaty, is binding on the denouncing State for the life of the treaty and may be matched by the investor at any time during that period.[23] A minority of commentators reaches the opposite conclusion.[24]

48. Therefore, the question remains whether an expiry of the six-month period in Article 71 would affect the right of the investors to perfect the consent given by the host State. A clarification to these matters may be brought with the decision of the tribunal in *E.T.I. Telecom International N.V. v. Republic of Bolivia* and, more recently, in *Pan American Energy LLC v. Plurinational State of Bolivia*[25], which was registered with ICSID on 12 April 2010, i.e. after the expiration of the six-month period from the denunciation of Bolivia.

E. Interplay of relevant provisions of the ICSID Convention

49. When a State denounces ICSID Convention, three provisions of the Convention are closely interrelated: Articles 25(1), 71 and 72. They have to be considered together. A time chart is intended to visually represent the process underlying the denunciation.

[23] Garibaldi, supra note 19, at 262; Nolan and Sourgens, supra note 21, *Transnational Dispute Management* (2007), at 15-16; Titje et. al, supra note 3, at 9.
[24] E. Schnabl and J. Bedard, "The Wrong Kind of Interesting", in *The National Law Journal* 2007); Schreuer, supra note 22, at 367.
[25] *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, registered on 12 April 2010.



Explanatory note of the time chart: after a State becomes a Contracting Party to the ICSID Convention, its consent to the jurisdiction of the ICSID Centre is governed by Article 25(1). From the moment when the notice of denunciation is received by the Centre, Article 71 of the Convention sets six-month period, at the expiration of which a State ceases to be a Contracting Party. However, because of Article 72, a State is still bound by rights and obligations that are arising out of the consent to ICSID jurisdiction that was given before the notice of denunciation. The duration of time before a State ceases to be bound by these rights and obligations (X) depends on the interpretation of the phrase "consent…given by one of them" in Article 72.

II. Consent and Denunciation under General International Law

50. As demonstrated in Chapter I, the scope of denunciation of ICSID Convention and the consequences arising thereof, namely with regard to the consent to jurisdiction, are subject to extensive debate. Considering that ICSID is not a procedural convention that once denounced may have impact on State's obligations contained in other treaties. [26] In the history of ICSID arbitration no cases have dealt with denunciation. Thus, although Articles 71 and 72 of the ICSID Convention regulate its denunciation, the former providing for the time-framework of 6 months and the latter preserving the rights and obligations of the denouncing State as arising out of consent given before the notice of denunciation, it is crucial to contextualize such a procedure and, in particular, its effects under general international law.

51. In fact, Article 42 of the ICSID Convention upholds the applicability of the VCLT and other secondary rules of general international law. This is further confirmed by a consistent ICSID case law, which applies the VCLT to both the ICSID Convention and the BITs in different aspects, such as in treaty interpretation. Therefore, the Convention and the

[26] J. Fouret, "Denunciation of the Washington Convention and Non-contractual investment arbitration: 'manufacturing consent' to ICSID Arbitration?", *Journal of International Arbitration*, Vol. 25 (1), 71-87 (2008), at 72.

applicable rules of customary international law are analysed in this part.[27] These rules will apply to the effects of denunciation, first with regard to the admissibility of arbitration proceedings brought after notice of denunciation and, second, in cases where there is silence or the treaty fails to provide for a clear and unambiguous framework of denunciation. In addition, the VCLT rules of interpretation, in particular Article 31(3)(c) may provide valuable guidance for arbitrators in dealing with consent to arbitration expressed in the BITs as well as ICSID denunciation.

A. Forms and Effects of Denunciation under General International Law

52. As stated by the Permanent Court of International Justice (PCIJ) in its advisory opinion on the *Status of Eastern Carelia*, the fundamental legal principle underlying the settlement of disputes involving sovereign States is that "no State can, without its consent, be compelled to submit its disputes…to arbitration, or any other kind of pacific settlement."[28] Indeed, the principle of consent is a corollary of the principles of sovereignty and equality of State, which in turn constitute the "basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having uniform legal personality"[29]. A presumed consent would not be regarded as sufficient because any restriction upon the independence of a State not previously agreed to cannot be presumed by courts.[30]

53. Under international law, a treaty may be terminated or a party may withdraw from it in accordance with the provisions of that same treaty or by consent of all the parties.[31] Denunciation may be regarded as a hybrid option between the suspension and the termination of the treaty, involving the situation where the substantial obligations remain in place but cease to exist for the 'denouncing' State, a former party to the treaty.[32] Put otherwise, denunciation denotes a unilateral act by which a party terminates its

[27] Garibaldi, supra note 19, at 256.
[28] PCIJ, *Status of Eastern Carelia*, Advisory Opinion, Ser. B, No. 5 (1923), 19.
[29] I. Brownlie, *Principles of Public International Law*, (Oxford: OUP, 2003), at 287.
[30] PCIJ, *The Case of the S.S. "Lotus" (France v. Turkey)*, Series A, No. 10 (1927), 18.
[31] Article 54 (a) VCLT.
[32] Fouret, supra note 26, at 71.

participation in a treaty. In case of a bilateral treaty, denunciation is equivalent to the termination of the treaty.

54. Unless the treaty otherwise provides, upon termination the parties are discharged from any remaining obligation to perform it. Importantly, Article 70(1) of the VCLT stipulates that, in the absence of any transitional provisions, if a treaty is terminated under its provisions or in accordance with the Convention the parties are released from any obligation further to perform it, but that this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty *before its termination*.[33] Indeed, under Article 70(2) of the VCLT, this regime also applies to the withdrawal of a party from a multilateral treaty:

> "If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the *relations* between the State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect." (*italics* added)

55. This provision is relevant for the purposes of consistent interpretation of denunciation of the ICSID Convention. Since such relations concern the jurisdiction of the ICSDI Centre, the surviving rights and obligations of the denouncing State are by definition limited to such jurisdiction and in no way mean that the derogation contained in Article 72 maintains its status as a Contracting party.[34] It would seem that the interpretation derived from interplay of Articles 71 and 72 *vis-à-vis* Article 25 of the ICSID Convention shall follow a similar approach to that contained in Article 70(1) of the VCLT. Accordingly, the consent could be perfected subsequently to the notice of denunciation but before the actual taking of legal effect of that same denunciation after the expiry of a six-month period. Other interpretations suggest, on the one hand, that Article 72 only refers to a perfected consent before the notice of denunciation, and on the other hand that the unilateral consent is protected by Article 72 and survives denunciation of the ICSID Convention. Nevertheless, these interpretations would respectively render meaningless the six-month delay contained in Article 71 or go beyond the rule contained in Article 70 of the VCLT (refer to Chapter I).

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[33] Article 70 VCLT. See A. Aust, *Modern Treaty Law and Practice*, (Cambridge: CUP, 2007) at 303; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, (Oxford: Clarendon Press, 1994) at 9.
[34] Gaillard, supra note 21.

1. Termination on the Basis of the Provisions in the Treaty

56. As illustrated in the ICSID Convention and the majority of the BITs that shall be addressed in the course of this study, the conditions of the termination of such instruments are clearly specified by the parties.[35] The situation is different where a treaty contains no provision regarding its termination. According to the VCLT, the presumption then is that the treaty is not subject to denunciation or withdrawal.[36] Nevertheless, in such a case, the existence of a right of denunciation depends on the intention of the parties, which may be inferred from the terms of the treaty and its subject matter.[37] In most of the circumstances denunciation is conditional upon a reasonable period of notice.[38]

2. Termination of the Treaty Containing no Provision on Denunciation

57. Article 56 of the VCLT provides for another possibility to denounce a treaty. Under Article 56 a State may withdraw from a BIT absent a specific right to do so, if:

> (*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
> (*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

58. Given the fact that most BITs contain denunciation provisions, it may be argued both that the parties intended to include this possibility also in the BIT at issue or that BITs by their nature implicitly allow for denunciation. Pursuant to Article 56(2) of the VCLT the notice of denunciation has to be given at least 12 months before withdrawing in these cases. The practice of BITs differs in this regard frequently providing for shorter periods of time between the deposit of the notice of denunciation and the actual taking of effect.

B. Interpreting Consent to Arbitration according to the VCLT

59. The general rule of interpretation contained in Articles 31 and 32 of the VCLT may be particularly useful for the purposes of determining the meaning and extent of consent as

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[35] Article 54(a) VCLT.
[36] See Article 56 VCLT. See, ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Rep. 1984, 392 at 419-420, para. 63; See also, ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Rep. 1980, 73 at 94-96.
[37] Brownlie, supra note 29, at 592.
[38] *Ibid.*, at 593.

referred to in Article 72 of the ICSID Convention.[39] In accordance with the case law of the arbitral tribunals, the interpretation of a respective agreement should not be *a priori* strict or broad – and thus neither in favour or against the investor – but should be aimed at finding a fair and functional solution that gives due respect to the fundamental principle of good faith and is based on a balanced approach to interpretation.[40]

60. Articles 31 and 32 of the VCLT contain different means of interpretation. As a starting point Article 31(1) provides that a treaty shall be interpreted in good faith and in the light of the ordinary meaning of its terms. However, literal interpretation of the terms such as consent in Article 72 is highly ambivalent. Article 72 explicitly refers to "consent given by one of them". As it has been demonstrated in the previous chapter, while seemingly opening the possibility for embracing the mere offer of consent, such an interpretation could lead to a result which is excessively demanding for a state, which would have to be bound by its obligations long after having denounced the treaty. The literal interpretation, referred to in Article 31(1) does not clarify either the scope of "rights and obligations under this Convention" referred to in Article 72.

61. Article 31(1) and 32 of the VCLT further refer to the contextual interpretation. In this perspective, it may be argued that 'consent' has to be interpreted as requiring acceptance by the investor in order to create obligations for the host State under the Convention and therefore to fall under the scope of Article 72.[41] This is particularly true given in light of the final sentence of Article 25(1) of the ICSID Convention providing that "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally". Such an interpretation would ignore the fact that today legal mechanisms for investor-state arbitrations are substantially different from those in the 1960s.

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[39] They have been abundantly referred to in investment arbitration; see e.g. *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction of 11 May 2005, para. 141; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 296; *National Grid PLC v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006, para. 51.

[40] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 300; see also, e.g. *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 307; *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 34.

[41] Tietje et. al, supra note 3, at 14.

62. Article 31(3) (a) and (b) of the VCLT cannot provide any further support to the task of interpreting relevant provisions of the ICSID Convention. In order to constitute a subsequent agreement as to interpretation of the ICSID Convention in the sense of Article 31(3)(a), such an agreement would have be concluded by all the parties or at least tacitly approved. As to the subsequent practice in the sense of Article 31(3)(b), again it would have to be embraced by all the States parties to the ICSID Convention or at least acknowledged without opposition.

63. By contrast, Article 31(3)(c) of the VCLT may provide some further guidance for the purposes of interpretation. It stipulates that in the process of interpretation of a given treaty "any relevant rule of international law applicable in the relations between the parties" shall be taken into account. As stated by the ICJ in the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, "interpretation cannot remain unaffected by the subsequent development of law" but that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation".[42] To this end, an impressive number of BITs and other international agreements that contain investment provisions, namely those relating to investor-state dispute settlement and specifically to ICSID arbitration should, in the wording of Article 31(3)(c), be regarded as other "relevant rule[s] of international law applicable in the relations between the parties". Thus, it would seem reasonable that the interpretation of Article 72 of the ICSID Convention, namely where referring to the scope of "obligations under this Convention", shall take into consideration the substantive developments brought by BITs arbitral clauses.

64. Finally, for the determination of the best interpretation of Articles 71 and 72 of the Convention it might be helpful to briefly recall the history and the *travaux preparatoires* of

[42] *Ibid.*, 16, 31. See also, *Pope & Talbot Inc. v. Canada*, Award on the merits, (Apr. 10, 2001) and Award in respect of damages, (May 31, 2002), 41 ILM 1347 ; WTO Panel, *EC- Measures Affecting the Approval and Marketing of Biotech Products*, (21 Nov. 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R; ICJ, *Oil Platforms (Iran v. United States of America)*, Judgment of 6 November 2003, ICJ Rep. 2003, 161, para. 40, 41 and 78.

the ICSID Convention[43], which are used as yet another means of interpretation whenever a meaning of particular provision is ambiguous or obscure.

65. The adoption of the ICSID Convention in 1965 was – as also expressed in its Preamble – primarily aimed at providing the investor and the host state with an effective institutional forum for the settlement of investment disputes. The purpose of the Convention was to create a stable environment that secures the respective normative expectations of the investor with regard to the possibility of having access to international arbitration.[44] Originally, the arbitration clauses were incorporated in the state contracts between the host State and the investor. Therefore, Article 72 was drafted at the time when *ad hoc* agreements and respective clauses in state contracts provided the exclusive basis for international arbitration. It was a legal safeguard (additional to the final sentence of Article 25(1) of the Convention) to contractual arbitration clauses, so as to make these provisions unaffected by a subsequent denunciation of the Convention on the side of the host State. Mr. Broches clarified at that time that the intention of Article 72 of the Convention was to make it clear that if a State has consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if the dispute arose.[45]

66. It is therefore important to emphasize that at the time of the adoption of the ICSID Convention, BITs were not at all common in state practice. International investment law has since then undergone considerable structural changes; most vivid expression of which are indeed BITs. This development has major repercussions on the procedure by which consent to arbitration is established. While in past, the consent was mostly given at the same time (by the conclusion of the investor-state contract), today State's consent is

[43] History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. I-IV (1968-1970), in particular vol. II, at 274-275. See also, Report of the Executive Directors on the ICSID Convention, para. 23.
[44] A. Broches, "Settlement of Disputes between Governments and Private Parties" in *Convention on the Settlement of Disputes between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention*, Vol. II, Part 1, Washington, D.C. 1968, p. 1-3.
[45] *Convention on the Settlement of Disputes between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention*, Vol. II, Part 2, Washington, D.C. 1986, p. 1009.

frequently stipulated already in the BIT. This might, because of the long-lasting obligations under the BITs, shift the burden under the Convention to the States.

67. Therefore, one should not rely blindly on the purpose that Article 72 was given in 1965, but may be rather inclined to follow the dynamic-evolutionary interpretation of the ICSID Convention and accord consequences to Article 72 that are in conformity with present-day conditions of consenting to ICSID arbitration without running contrary to the original and current object and purpose of the Convention.

C. Analogy between the Denunciation of the Optional Clause Declarations of the ICJ and the Consent to Arbitration

68. This section briefly addresses the issue of denunciation of the optional clause declarations under the ICJ Statute, which may provide valuable guidance for understanding the effects of the denunciation of international investment agreements, in particular for the purposes of initiating proceedings against the denouncing State. These Optional Clause declarations may be regarded as having a treaty character in two ways:

i) they are documents originating from a treaty system (the Charter of the United Nations and the Statute of the ICJ, which is an integral part of the former); and

ii) according to the jurisprudence of the Court they give rise to a consensual relationship under the terms of Article 36(2) of the ICJ Statute.

69. In the *Right of Passage* case the Court found that the termination clauses in declarations of acceptance of compulsory jurisdiction are consistent with Article 36 of the Court's Statute.[46] Put otherwise, States have an inherent power to denounce, partially or totally, their Optional Clause declarations, as long as in doing so they respect in good faith the terms of the declaration itself.[47] In the *Nicaragua* case the Court denied the existence of a right of immediate termination for declarations of indefinite duration and introduced the element of reasonable time on the basis of requirements of good faith in the regime

[46] ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment of 26 November 1957, ICJ Rep. 1957, 125.

[47] J.J. Quintana, "The Nicaragua Case and the Denunciation of Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", *Leiden Journal of International Law*, Vol. 11 (1998), p. 101.

governing the denunciation of declarations of acceptance of its compulsory jurisdiction.[48] In other words, the Court rejected an *instrumental* use of denunciation.

70. For a denunciation to be valid with regard to an instant case coming to the Court, it would be necessary for the declaring State to take the termination action timely, that is, before another State Party to the system seizes the Court of the matter. In other words, no denunciation, no matter how valid it could be at face value, may be ever held to have retroactive effects and the Court's settled jurisprudence along the lines of the *Nottebohm* case makes this abundantly clear.[49]

71. More generally, regarding the effect of denunciation of a treaty in the *Jurisdiction of the ICAO Council* case, the Court stated that:

> "nor in any case could a merely unilateral suspension per se render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdiction clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative – i.e. whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.[50]

72. The Court observed later that it would be "destructive of the whole object of adjudicability" and "a wholesale nullification of the practical value of jurisdictional clauses" if a party were allowed "first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension."[51] In analogy, the same may be argued with regard to the situation in which the Contracting Party having denounced the ICSID Convention, and having *a priori* in a BIT provided only for such an option for the

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[48] *Ibid.*, p. 118. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Rep. 1984, at 419-421.
[49] ICJ, *Nottebohm case (Liechtenstein v. Guatemala)*, Preliminary Objections, Judgment of 18 November 1953, ICJ Rep. 1953, 111, 122.
[50] ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, ICJ Rep. 1972, at 53-54.
[51] *Ibid.*, at 64-65.

dispute settlement, amounts to nullification of the practical value of the arbitration clause in the BIT, as will be discussed in more detail below. If the wording of the BIT provision referring to ICSID is sufficiently clear, providing for prior consent to such arbitration, then it is difficult to see why the denunciation from ICSID should have any effect on the continuing availability of ICSID for the protection of the rights and obligations contained in a BIT.[52] It must be emphasised that in accordance with Article 43 of the VCLT, a State that has denounced the convention, continues to be bound by its remaining obligations under international law.[53]

III. Denunciation of BITs and Interaction with the ICSID Convention

73. After having presented the denunciation mechanism in the ICSID Convention and under international law, the focus now turns to BITs. As stated above, BITs constitute the primary tool for States to control and manage their commitment to international arbitration. Therefore, this chapter will provide concrete recommendations on how risks and unintended consequences of the BIT provisions can be avoided and how BITs can be employed to reinforce or, alternatively, to prevent ICSID denunciation.

74. This chapter is organised in two sections. Section one looks at the mechanisms and effects of BITs denunciation. It will be shown that while most BITs provide for the possibility of withdrawal, the immediate effects of denunciation are limited since so-called survival clauses "lock in" the substantive investment protection for a period up to 15 or 20 years after the termination of the BIT. Section two then analyses the relationship between denunciation of ICSID Convention and certain BIT provisions. Focusing first on the repercussions of an ICSID withdrawal on BITs, the relevant Investor-State Dispute Settlement (ISDS) provisions will be discussed as well as the possibility to "import"

[52] *Cf.* Article 8 of the Bolivia-UK BIT which provides that disputes "shall… be submitted to international arbitration if either party to the dispute so wishes" (…) "[w]here the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute". This wording, for example, seems to suggest that a further agreement is necessary before the initiation of ICSID arbitration.

[53] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion of 21 June 1971, ICJ Rep. 1971, 16 and 54.

consent to other arbitration fora by virtue of the Most-Favoured Nation (MFN) obligation. Finally, the direction will be reversed looking at the impact of BITs on ICSID Convention thereby linking it back to Chapter I on ICSID denunciation. Since consent to international arbitration is usually given in the form of BIT, it will be shown how these treaties can, on the one hand, potentially preclude States from denouncing ICSID Convention or, on the other hand, condition and limit the access to ICSID arbitration.

75. The universe of almost 3000 BITs worldwide is both uniform and diverse in nature. It is uniform to the extent that most of the BITs follow a similar structure and are often negotiated on the basis of standardised "model-BITs". Core provisions including MFN, recourse to international arbitration, survival clauses are found in the majority of them. However, the bilateral nature of BITs gives also rise to great diversity. In every negotiation the specific BIT provisions can be adjusted to fit best the relations between the two parties. As a result, not only can BIT clauses vary between different signatories, but also the same country may have a network of very different BITs. Ecuador's BIT with the United States, for instance, includes four different fora of international arbitration, while the Ecuador-Peru BIT allows only for arbitration under ICSID.

A. BITs and Their Denunciation

1. Denunciation Mechanisms Contained in the BITs

76. As mentioned in Chapter II, the VCLT stipulates in Article 54(a) that the termination of a treaty has to be made in conformity with the provisions on withdrawal in that treaty. Most of the BITs provide for such a specific provision.[54] The Ecuador-USA BIT (1997) constitutes one example:

> ARTICLE XII
>
> 1. This Treaty shall enter into force thirty days after the data of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

[54] R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, (The Hague, Boston: M. Nijhoff, 1995), at 44-47.

> 2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

77. Typically, upon ratification, BITs are effective for a specified period, here ten years, and are automatically renewed after this period expires. Either party may prevent such renewal through a written notice. Furthermore, either party can, *in casu* conditioned on the fact that the first ten years have elapsed, denounce the treaty at any time in writing. The denunciation takes effect after a specified period, in this case one year. Hence, since most BITs explicitly allow for their termination, the denunciation is a legitimate unilateral act by a Contracting Party if done in accordance with the provisions set out in the treaty. If the treaty does not provide a denunciation mechanism, parties may fall back on the customary rules of treaty denunciation in the VCLT as illustrated in Chapter II.

2. Survival Clause

78. The fact that BITs and international law provide mechanism for BIT withdrawal must be distinguished from the practical effects of such withdrawal. While a State is no longer obliged to provide protection for investment made after the denunciation has taken effect, it may still be bound by the BIT in respect of an investment made prior to the termination of the treaty due to the so-called "survival clause". Such a clause is found in the majority of the BITs and guarantees that the provisions of the BIT remain in effect for another 5, 10 or sometimes even 20 years after the termination of the treaty. Hence, even though a State may denounce a BIT, it may still be bound by its provisions at least *vis-à-vis* some investors. This applies not only to instances of denunciation, but also if a BIT lapses or is not renewed. Furthermore, in terms of the scope of each individual survival clause, it is necessary to determine what obligations continue, who are the beneficiaries and for how long.

79. In most cases, the survival clause is not limited to specific BIT provisions, but encompasses the entirety of the agreement including the possibility to have recourse to arbitration. However, some BIT may carve out some provisions from the scope of the survival clause. The Ecuador-USA BIT contains no such limitation:

ARTICLE XII
3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

80. In other words, after termination of the BIT, all the State's obligations deriving from the treaty are "locked in" for certain investors. As a consequence, these investors may take a host State to international arbitration pursuant to a substantive violation of a BIT obligation, here, for up to ten years after the BIT has terminated. Therefore, it is of little immediate significance that a State denounces a BIT since it continues to be bound by it for the time of the survival clause.

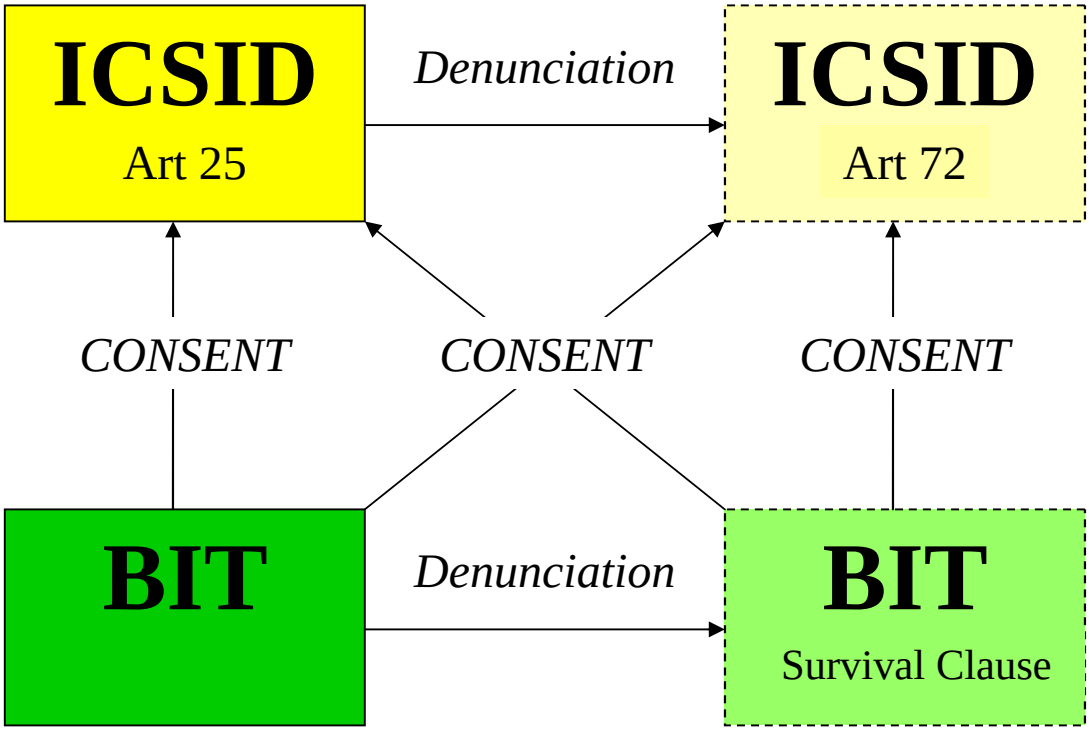

Figure: The graphic illustrates two points: (1) both ICSID Convention and BIT contain a mechanism that preserves (certain) rights and obligations under the original treaty even after it is denounced; (2) the fact that ICSID Convention or a BIT is denounced does not fundamentally alter the relationship between the two - a terminated BIT contains the offer of consent to arbitration by virtue of its survival clause in the same manner as a treaty in force and regardless whether it triggers ICSID's jurisdiction *via* Article 25 or 72.

81. The second important element depending on the exact wording of the survival clause concerns the scope of investments covered. In case of the Ecuador-USA BIT the clause governs "investments made or acquired prior to the date of termination of this Treaty". Hence, an investment made after the notification of denunciation, but before the termination takes effect, which according to Article XII (2) amounts to one year, would fall under the scope of the clause. Alternatively, other BITs may limit such scope to investment undertaken prior to the notification of denunciation.

82. Finally, the duration and the starting date for the additional protection have to be identified. In the Ecuador-USA BIT it covers a "further period of ten years from such date of termination." Again, other BITs may contain a broader or narrower time coverage.

83. While these differences in wording are important *a priori*, their practical implications might be reduced by the MFN obligation. This obligation to grant investors and investment of the Contracting States a treatment that is no less favourable than that accorded to both types of beneficiaries from third parties, has become an integral part of most BITs. Investors may thus seek to obtain the most favourable, here, longest period of protection after termination of a BIT afforded to any other investor. Instead of ten years as the Ecuador-USA BIT provides, a tribunal may award protection up to fifteen years as given in the Ecuador-UK BIT. Hence, States may be confronted with claims after the termination of a BIT for a much longer period of time than they initially expected or intended by virtue of the MFN.

84. Conversely, Schill has argued that the temporal dimension of a treaty creates an inherent limit on the application of MFN.[55] According to him, a MFN clause can only be as broad as the scope of a treaty permits. In other words it is limited by *ratione materiae*, *ratione personae* and *ratione temporis*. As for the latter, MFN for instance may not cover investments made before the ratification of the treaty, unless a treaty specifically provides

[55] S. W. Schill, "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses", *Berkeley Journal of International Law*, Vol. 27, No. 2 (2009), p. 532.

so.[56] However, no arbitral tribunal has yet addressed specifically the time scope of the survival clause. Absent a limitation in the wording of an MFN clause, it may also be argued that the survival clause is part of the substantive provisions of the entire treaty and is therefore explicitly covered by the MFN obligation. In short, investors may use the MFN obligation to attempt to obtain longer protection after denunciation as contained in the original treaty.

B. Denunciation of ICSID and BITs

85. ICSID Convention and BITs are closely interrelated. The link connecting the two is a State's offer of consent to international arbitration in a BIT that opens the door for ICSID's jurisdiction. The present section looks first at the impact of ICSID denunciation on BITs. It will be shown how withdrawal from ICSID Convention closes the door for investors precluding them from taking their claims to international arbitration before ICSID tribunal. It will also be illustrated how the MFN clause can be used as a back-door to other arbitral fora if they are not provided for in the original BIT.

86. In the second part the focus addresses the way in which BITs may keep the door to ICSID's jurisdiction open, or alternatively, how BITs can assure that this door purposefully shut by way of denouncing ICSID Convention remains closed.

1. Impact of ICSID Convention on BITs

1) Consent and Arbitration Clauses

87. Providing individual investors with the possibility of bringing investment claims against the host State to international arbitration has been widely acknowledged as a major achievement of BITs. Absent such a possibility, investors may either call upon their home State to exercise diplomatic protection or resort to the legal system of the host State. Both

[56] This issue was addressed in the case *Técnicas Medioambientales Tecmed, S.A. v. Mexico,* ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

options seem less attractive than the possibility of international arbitration where both investor and State are on an equal footing and on a neutral international terrain.[57]

88. BITs contain the offer of consent by the host State to the investor to go to international arbitration if a dispute arises under the BIT. The offer of consent is thus given in an international treaty binding on the parties. Hence a State cannot simply withdraw this offer unilaterally, but must either re-negotiate or denounce the BIT. In the latter case the offer of consent by the host State remains valid as long as the BIT provisions are in effect, which means until the expiry of the survival clause.

89. The possibility of investors bringing a State to international arbitration is contingent on the exact scope of the offer of consent given by that State in its BIT. In most of the BITs the Contracting States give their offer of consent to multiple fora and rules of international arbitration.[58] There is no hierarchy between these institutions and one forum is not *per se* more favourable than another. In most of the BITs it is at the discretion of the investors to choose the forum they want the dispute to be brought before by accepting the State's offer of consent.

90. Nonetheless, the offer of consent to arbitration under the terms of ICSID Convention is different from other fora in the sense that it is not a sufficient condition to enable investors to engage international arbitration. As it has already been illustrated in the first chapter of this memorandum, States must also be parties to ICSID Convention in order to fall under its jurisdiction. In contrast, to fall under the jurisdiction of other fora of arbitration such as United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC) tribunals, it is sufficient for investors to accept the unilateral offer of consent by a host State in a BIT. Hence, in case of ICSID denunciation the first criterion to fall under the jurisdiction of ICSID is fulfilled - the offer of consent in a BIT remains valid. Yet, the dispute does not meet the second criterion in

[57] See, I.Shihata, "Forword" in Schreuer, supra note 14, pp. xv-xvi; S. B. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" *Global Business & Development Law Journal,* Vol. 19 (2007), pp. 343-345; UNCTAD, supra note 9, pp. 11-13.

[58] Among the most popular are ICSID, UNCITRAL, International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC) and the London Court of International Arbitration (LCIA).

Article 25 of the ICSID Convention as the host State is no longer party to the Convention. Article 72 of the ICSID Convention provides for an exception to this rule preserving the rights of some investors arisen out of "consent". Depending on the two conflicting interpretations of this provision the size of this group differs.[59] Yet, for all other investors the offer of consent to ICSID becomes meaningless, if either home or host State is not a member of the Convention anymore. As a result, some if not the majority of investors are deprived of the possibility to bring their claim before ICSID.

91. To take into account the additional condition associated with ICSID arbitration, some BITs provide for a "fall-back" rule. Disputes involving investors whose home State or host State is not a party to the ICSID Convention can nevertheless be undertaken by the Centre, however, not under ICSID arbitration rules, but under ICSID Additional Facility Rules (AFR). This distinction is important insofar as an offer of consent given to ICSID does not automatically include an offer of consent under the AFR. So, unless such consent is given to both ICSID and AFR in a BIT, an investor cannot engage the AFR, in case a home or host State denounces ICSID Convention. To avoid such a situation, States can include the AFR as a "fall-back" mechanism in the case of an ICSID denunciation.

92. In conclusion, the unilateral offer of consent by host States enabling investors to have recourse to international ISDS is regarded as an important achievement of BITs. The withdrawal from ICSID renders the offer of consent to this particular forum meaningless for investors not falling under Article 72 of the ICSID Convention, considering that ICSID jurisdiction requires home and host States to be party to the Convention. Arguably, this situation is not problematic as long as other fora are available to the investor. However, some BITs provide only recourse to ICSID.[60] In these cases much of the protection of the treaty is diminished in the sense that substantive provisions may still exist, but they cannot be enforced through international arbitration.

[59] In case consent is to mean perfected consent only those investors that have accepted the offer of consent by the host State fall under Article 72. As for consent meaning the unilateral offer of consent, this encompasses all investors covered by the offer of consent in a BIT, subject to the specific conditions of the respective ISDS provision. This latter interpretation will be discussed in greater detail in the last part of this chapter.
[60] E.g. Ecuador-France BIT, Ecuador-Chile BIT.

93. One way to circumvent such an impasse lies in granting the investor access to other fora of arbitration through the application of an MFN clause. Thereby, a BIT may "import" the offer of consent given in another treaty. Since this practice is highly contested, the rest of the section will delineate limits to such an incorporation of consent by reference.

2) Consent by Reference – MFN as a Back Door to Arbitration

94. In the context of treaty denunciation, the MFN provision may be of particular interest to investors. Aside from the possibilities of "importing" an extension of the scope of the survival clause as briefly discussed above, the MFN clause could be used to make more extensive and alternative ISDS available to investors.

95. Traditionally, the MFN provision was used by investors to obtain substantive protection standards of treatment such as fair and equitable treatment accorded to nationals of other countries.[61] However, recent developments in international arbitration jurisprudence have significantly broadened the application of the MFN provision. In particular, the clause was used to extend to procedural rights such as the recourse to ISDS.[62] Therefore, in case of a State's denunciation from ICSID Convention the recourse to a MFN clause could become a "back door" for investors in order to get access to alternative forms of ISDS.

96. It must be emphasized that, particularly in the case of an MFN obligation, the exact wording of a clause is crucial in the determination of its scope. Some MFN articles may be broad and relatively vague and others may be very specific limiting MFN to a number of treaty provisions. Every interpretation of such a clause must be treaty based.

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[61] See e.g. *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sep. 11, 2007); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1.

[62] Recourse to arbitration is generally regarded as a procedural right. However, the distinction between substantial and procedural provisions has been challenged. It was argued that the protection afforded by ISDS can also been seen as substantive right. See Schill, supra note 55. Furthermore, following the logic of *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079 / 2005, one may think of substantive and procedural rights as a hierarchical relationship. If substantive issues are covered by MFN then it should definitely apply to "only" procedural protection.

97. The first landmark case to use the MFN clause to expand the ISDS clause to procedural matters was *Maffezzini v. Spain.*[63] In that case, an investor could circumvent an obligatory 18 month waiting period before having recourse to international arbitration in the Spain-Argentina BIT by reference to the more favourable BIT between Spain and Chile where such a requirement was absent. Many tribunals have followed the reasoning in *Maffezzini v. Spain* and accepted an application of MFN to procedural issues.[64] While the case *Maffezzini v. Spain* dealt with an issue of admissibility of claims, tribunals have been much more cautious to expand MFN to jurisdictional matters.[65] Most tribunals rejected such a possibility according special weight to state sovereignty.[66] Accordingly, a state is not subject to the jurisdiction of an international tribunal without its specific consent.

98. Yet, even if an MFN clause is found to apply to jurisdiction, it may be difficult to justify that the consent to jurisdiction given to a particular forum is more favourable than another. As stated in *Plama Consortium Limited v. Republic of Bulgaria* the tribunal would be likely to ask "which [forum] is more favourable?"[67]. Consequently, no investor has yet successfully used an MFN clause to gain access to alternative ISDS fora. However there is no rule of precedent between arbitral tribunals and issues relating to forum shopping in the specific context of treaty denunciation have not yet arisen. So it will be at the task of a future tribunal to address the matter.

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[63] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000).

[64] See e.g., *Camuzzi International S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/7, Decision on Jurisdiction (Jun. 10, 2005). *National Grid PLC v. Republic of Argentina*, UNCITRAL Arbitration, Decision on Jurisdiction (Jun. 20, 2006). *AWG Group Ltd v. The Republic of Argentina*, UNCITRAL, Decision on Jurisdiction (Aug. 3, 2006). *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua, S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006).

[65] Only two tribunals, *RosInvestCo UK Ltd. v. The Russian Federation* and *Renta 4 S.V.S.A., et al v. The Russian Federation* accepted to extend the jurisdictional base through an MFN clause beyond expropriation claims included in the ISDS provision of the original treaties.

[66] See, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), para. 160(3).

[67] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), para. 208f.

2. Impact of BITs on ICSID

99. Having analysed the impact of ICSID denunciation on BITs that precludes investors from the possibility of taking their claims to international arbitration, we now turn in the other direction. This section addresses the way BITs may influence the effects of ICSID denunciation.

100. The linkage between BITs and ICSID Convention, as already elaborated above, arises from the fact that a State's offer of consent enshrined in a BIT opens the possibility for an investor to access ICSID's jurisdiction. This offer of consent to ICSID in a BIT can be expressed unconditionally or conditionally. As for the conditionality, one may distinguish between limits on the consent to jurisdiction on the one hand, and admissibility criteria such as time limits or the exhaustion of local remedies on the other hand. For the purpose of this section only the former category, that is the limitations on the consent for jurisdiction are considered.

101. Conditions limiting the State offer of consent to ICSID come in two forms. First, the offer of consent itself may be conditioned to an intention of consent and second, conditions may be included in connection to ICSID membership.

1) Conditioning the Offer of Consent

102. With regard to the offer of consent, States may bind themselves to different degrees. The broadest form of consent is an unconditional one that, once accepted by the investor, automatically triggers ICSID's dispute settlement. In these cases, States do not have a possibility of preventing investors from engaging ICSID arbitration. For example, the Ecuador-US BIT contains such a wording in Article VI(3)a):

> "the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes ("Centre")".

103. In other instances, States may introduce additional requirement before a case can be brought to ICSID. These BITs contain a mere *intent* on the part of the State to give consent to international arbitration. Then, once a dispute arises, both investors and State have to

agree to submit the dispute to a particular forum. Hence, the BIT does not enable investors to accept an offer of consent by the State to access arbitration. Instead, the BIT mandates a perfected consent in order to go to international arbitration. The Bolivia-UK BIT contains such an example. According to Article 8(1) of that BIT either party to the dispute may bring a claim to international arbitration. Yet, as Article 8(2) specifies, "[w]here a dispute is referred to international arbitration the investor and the Contracting Party may agree to refer the dispute either to [ICSID, ICC or ad hoc arbitration]." It must be noted though, that in these instances a BIT may provide a "fall-back rule". In the case of Bolivia-UK BIT where it provides that if no agreement is reached the dispute is submitted to international arbitration under UNCITRAL.

2) Conditioning Based on ICSID Membership

104. The second category of conditioning the offer of consent to ICSID jurisdiction is a subtler one. It relates consent to membership of the ICSID Convention. Some BITs require both parties to be also party to the ICSID Convention (see Annex). Accordingly, the offer of consent to ICSID arbitration remains valid as long as the party involved is also a Contracting Party to the ICSID Convention. Hence, once the denunciation of ICSID Convention takes effect, the offer of consent in a BIT is effectively revoked.

105. A special case is the Ecuador-US BIT. In its Article VI(3)a)i) the BIT conditions the offer to consent to ICSID jurisdiction by limiting recourse to it "provided that the Party is a party to such Convention". The singular in this case may imply that it is sufficient for the offer of consent to remain valid as long as "the Party" against which investors bring their claims is a member to ICSID Convention. Accordingly, even if a home State of an investor denounces ICSID Convention, the offer of consent in the Ecuador-US BIT would remain valid in respect of claims against the host State.

106. Other BITs condition the offer of consent to ICSID by stating that the Contracting party involved has to "have acceded" to ICSID Convention, for example Bolivia – Netherlands BIT in its Article 9(6). Similarly, the Bolivia - German BIT provides that each

Contracting State has "become party" to ICSID Convention. Commentators have taken such wording to imply that it is sufficient that the States have at some point ratified the ICSID Convention.[68] Once they have done so, the offer of consent became valid and remains so regardless whether they are still party to the ICSID Convention. Hence, in these cases, ICSID denunciation would not affect the offer of consent.

107. However, arguably, every offer to ICSID consent is implicitly conditioned since membership to ICSID is a requirement for the Centre's jurisdiction in accordance to Article 25 of the ICSID Convention. In other words, even if it is not explicitly mentioned, an investor cannot take a host State to arbitration despite its unconditioned offer of consent in a BIT, unless both home and host States are parties to ICSID Convention.

108. As long as States are ICSID members, any membership-related conditioning is without practical implications. However, this may change in two ways once a State decides to withdraw from ICSID. First, the commitment to consent to international arbitration in a BIT may preclude a State from withdrawing from ICSID Convention. Second, if "consent" in Article 72 of ICSID Convention is to mean the offer of consent, the BIT determines how long and to what extent a State is still bound by ICSID Convention even after denouncing it. However, it must be stressed that both of these issues are highly contentious and may be rejected before an arbitral tribunal.

3) BITs Precluding ICSID Denunciation

109. The bilateral obligations agreed upon in a BIT may preclude the Contracting States to denounce the ICSID Convention pursuant to the principle of *estoppel*.[69] According to Article 26 of the VCLT treaties are binding upon the parties and must be applied in good faith. By ratifying a BIT, the Contracting States create legitimate expectations that the

[68] Titje, supra note 3.
[69] Regarding the standard of estoppel, see A. Mitchell, "Good Faith in WTO Dispute Settlement", *Melbourne Journal of International Law*, Vol. 6 (2006), at 339-373; J. Cameron and K. R. Grey, "Principles of International Law in the WTO Dispute Settlement Body", *International and Comparative Law Quarterly*, Vol. 50 (2001), pp. 248-298.

terms of the BIT are observed, among them the right of investors to engage international arbitration by accepting an offer of consent. Furthermore, States as well as investors in this case are free to waive certain rights granted by multilateral treaties. For instance, the right of receiving a confidential award from an ICSID tribunal may be waived if both parties agree that the award is to be made public. Similarly, while a State may have the right according to the ICSID Convention to denounce the Convention, it may commit in a BIT that it shall not do so. Having made such a commitment, States may have restricted or waived their right to denounce ICSID Convention. Hence, in these cases, the commitment in the BIT may preclude or estop the respective State from denouncing ICSID Convention.

110. The commitment and legitimate expectations created in a BIT that investors will be able to have recourse to ICSID depend on the exact wording of the offer of consent in a BIT. For a country to be estopped it:

- must have made an unambiguous , voluntary, authorised and unconditional statement of fact;
- must have given rise to legitimate expectations that another party acted and relied upon in good faith so that the other party would suffer injury if this expectation was groundless.

111. It is evident that an investor having made an investment relying on the security of ISDS in a BIT suffers injury when it is precluded from having recourse to ICSID arbitration. Instead, the crux of the matter is whether the statement in a BIT was indeed unconditional and created such legitimate expectations. Provisions such as those of the Bolivia – Netherlands BIT do not condition the offer of consent and require only to have acceded to ICSID at one point in time may meet the criteria of estoppel.

112. So what happens if a State such as Bolivia was indeed estopped from denouncing the ICSID Convention? The denunciation in this case would still be consistent with the ICSID Convention itself; however, it may constitute a violation of a BIT giving rise to State responsibility. Interestingly, however, such responsibility would arise *vis-à-vis* the other Contracting Party to the BIT and not to the individual investors. Regarding the

doctrine of estoppel, it remains unclear whether it protects only the legitimate interest of the host State or also that of the investor.

113. In the alternative, if a particular BIT provides exclusively for ICSID arbitration and the party had effectively withdrawn from the latter, an argument can be made that the right of denunciation by that same party has been manifestly abused. Indeed, it can be regarded as a general principle of international law or as a part of customary international law that States parties to a treaty shall fulfil in good faith the obligations assumed in a manner, which would not constitute an abuse of right. A number of States have argued for the applicability of abuse of rights doctrine in international law[70], and in a few cases the principle was referred to by international jurisdictions.[71] The effect of application of such principle would be that the State is precluded from denying its consent to those disputes brought by the investors arising under the BIT on the mere basis that it had withdrawn from the ICSID Convention. An arbitral clause under a given BIT, being a separate treaty obligation, cannot be undermined by State's action under another treaty. This would violate the *droits acquis* of another State and its investors, and namely undermine the *effet utile* of the BIT, particularly in cases where ICSID is referred as the only possible arbitration mechanism for settlement of disputes.

114. In fact, a similar argument was contended by Belgium in the case of the *Electricity Company of Sofia*.[72] Belgium argued that Bulgaria denounced a treaty of compulsory judicial settlement for the reason that Belgium was about to submit an application to the Court under that Treaty and that the action taken by Bulgaria constituted therefore an abuse

[70] *Fisheries case (UK v. Iceland)*, "Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom", 14 April 1972, ICJ Pleadings 1975 (Vol. 1) 265, paras. 153-154.; *Case of Certain Norwegian Loans (France v. Norway)*, ICJ Rep. 1975, 9, 73; *South West Africa case (Ethiopia v. South Africa, Liberia v. South Africa)* (Second Phase), ICJ Rep. 1966, 6, 10, 480-483; *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Second Phase), ICJ Rep. 1970 (Vol. 1) 3, 17.

[71] PCIJ, *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Ser. A, No. 7 (1926), 30; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Ser. A/B, No. 46 (1932), 167. See also, *Canada v. France Arbitral Award*, 82 I.L.R. 590 at para. 28. See also, WTO Appellate Body, *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States)* (1998), WTO Doc. WT/DS58/AB/R, para. 158.

[72] PCIJ, *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Preliminary Objection, Series A/B, No. 77 (1939), 98.

of the power of denunciation. Although the Court did not uphold this point, it shows that the doctrine of abuse of rights may be relevant in addressing the right to denunciation.

115. More recently, the WTO Appellate Body applied the abuse of rights doctrine in the *Shrimp-Turtle* case. It held that

> "to permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members"[73].

116. If transposed to our case study, such reasoning could dovetail with an interpretation according to which Ecuador and Bolivia would have to curtail their right to denunciation of ICSID. This would hold true at least *vis-à-vis* those Members to the ICSID Convention, which are specially affected with regard to their substantive rights and obligations arising under respective BITs with Ecuador and Bolivia. In conclusion to this section, it may be contended that doctrines such as estoppel and abuse of rights could be used by arbitrators to prevent the *instrumental* use of the denunciation mechanism.

4) BITs Limiting the Scope of Application of Article 72 of the ICSID Convention

117. In Chapter I of this memorandum, two different interpretations of the term "consent" in Article 72 of the ICSID Convention were presented. If the consent in Article 72 means unilateral consent, the latter is contained in a BIT that determines the scope and the length of the State's commitment to ICSID jurisdiction. Hence, a State may be bound as long as the BIT provisions remain in force, which may extend, by virtue of the survival clause from 10 to 20 years after a BIT is denounced. As a result, it is advisable to use the BIT as a tool to limit this commitment by a State.[74]

118. In order to limit the offer of consent given to investors to bring their claim to ICSID, a State can employ the two kinds of conditioning presented above. First, a State can

[73] WTO Appellate Body, supra note 71, paras. 125-145.
[74] A first categorization was done in Titje, supra note 3.

provide for intent to consent. In that case, once a dispute arises, both States and investors must give their consent in order to fall under the jurisdiction of ICSID. Whilst Article 72 locks in only the unilateral consent given before the notice of denunciation, the mere intent to give consent is insufficient to fall under its scope.[75]

119. An easier and arguably less contentious remedy would be to simply limit the offer of consent given to ICSID jurisdiction in a BIT with an additional membership criterion. In light of the practice of numerous BITs, a consent clause could include the expression "provided that both Contracting Parties are parties to ICSID". Hence, once a State withdraws from ICSID Convention, the condition that it had attached to its offer is no longer fulfilled. As a result, this membership-conditioned consent would not fall anymore under Article 72 of the ICSID Convention.

IV. Impact of the Constitutional Amendments in Bolivia and Ecuador

120. This chapter addresses another relevant aspect raised by the attitude of Latin American States towards the existent ISDS mechanisms. The problem is illustrated in the new Ecuadorean constitution, approved by referendum on 28 September 2008, which comprises specific rules addressing international arbitration and international treaties. It includes an express prohibition for Ecuador to enter into international treaties or instruments waiving jurisdiction with a view towards international arbitration involving contractual and commercial issues. In Article 422 it states:

> It shall not be possible to enter into international treaties or instruments in which the Ecuadorean State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individuals or corporations.
>
> Excepted from the foregoing are international treaties and instruments providing for dispute resolution between States and citizens of Latin America by regional arbitral venues or by jurisdictional organisations designated by the signatory countries. Judges from the States that as such or as nationals of those States are parties of the dispute cannot participate.

[75] Even if the State would agree that the dispute should be brought to ICSID, the tribunal would not accept jurisdiction as the State is no longer member of ICSID to meet the requirements under ICSID Article 25, nor does the conditional offer of consent meet the conditions of Article 72.

> In the case of disputes relating to the foreign debt, the Ecuadorean State shall promote arbitral solutions in terms of the origin of the debt, subject to principles of transparency, equity and international justice.

121. At the same time, a new Bolivian Constitution was approved in a referendum held on 25 January 2009 and came into force on 7 February 2009. Article 366 of that Constitution provides that all foreign companies operating in the oil and gas sector are "subject to the sovereignty of the State" and that under no circumstances will a foreign tribunal be recognised nor can international arbitration or diplomatic interventions be resorted to.

122. These limitations, while having an effect of weakening international arbitration, in particular, investor-State arbitration, do not affect the international treaties currently in force. It is a quintessential principle of international law that in the relations between States Parties to a treaty, the provisions of domestic law cannot prevail over those of the treaty. Moreover, a party to the treaty must ensure that the organs of internal law apply and give effect to the treaty.[76] The principle is also applicable to the provisions of a constitution.[77] This rule was described by the PCIJ as 'self-evident' in the *Exchange of Greek and Turkish Populations* Advisory Opinion.[78]

123. In contrast, the above-mentioned constitutional amendments will affect the future negotiations conducted by Bolivia and Ecuador. For example, from now on, Ecuador is only allowed to enter into treaties to resolve disputes:

- between States and individuals (i.e. not companies);
- in Latin America;
- by regional venues or by regional jurisdictional bodies; and
- relating to the foreign debt.

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[76] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff Publishers, 2009), at 370.
[77] PCIJ, *Treatment of Polish Nationals in Danzig case*, (1932) Series A/B no. 44, 24.
[78] PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion (1925), Series B, No. 10, 20. See also, the Belgian Court of Arbitration, *European School v. Hermans-Jacobs and Heuvelmans-Van Iersel* case, ILR 108 (1998) 643.

Conclusions

124. The impressive increase in foreign investment in Latin America since the early 1990s has been recently challenged by the political backlash against international arbitration leading to "nationalistic" legislative reforms and judicial decisions as well as radical measures such as withdrawal from ICSID and termination of BITs. These measures have led to a number of legal and policy considerations, which may have far-reaching repercussions on the entire system of settlement of international investment disputes. Accordingly, the conclusions of this memorandum are divided into policy observations and answers to questions submitted by the client.

A. Policy observations

125. Having presented varying interpretations of the denunciation mechanism of the ICSID Convention and the inter-linkages between BITs and ICSID, we now turn to assess the policy implications of these findings using the framework of analysis elaborated in the introductory chapter. The issue of denunciation touches upon the fundamentals of international investment arbitration – the expression and withdrawal of consent. Both investors and States have diverging interests in this regard. While States attempt to retain the possibility of denouncing ICSID Convention, investors seek to obtain a reliable commitment that they may bring claims to international arbitration. The denunciation mechanism must balance these two interests since the mutual acceptance of ICSID by consent of both investors and States is constitutive to the overall success of the system. Hence, two fundamental questions remain to be answered. Which interpretation of Article 72 may be more beneficial to investors and which one may favour the host States? And how can a potential bias be balanced out in order to strengthen the impartiality of international investment arbitration?

1. Consent in Article 72 meaning perfected consent: an interpretation favouring the host State?

1) Skewed at first sight in favour of the host state ….

126. The first interpretation of Article 72 seems to be biased in the favour of investors. The time point significant for the consideration of Article 72 is the moment the notice of

denunciation is received. Hence, it is in the full discretion of the denouncing State to determine when this notice is deposited. In other words, by controlling the event that triggers the article, the denouncing State also determines what kind of investment falls under the scope of the article and which one does not. Hence, the mechanism contained in Article 72 provides incentives for an *instrumental* use of denunciation.

127. As a result, investors are exposed to legal insecurity. If a State has not announced its intent to withdraw in advance, the moment investors can take notice of the denunciation, they are already precluded from accepting the offer of consent in order to fall under Article 72. In order to avoid such a situation, investors have an incentive to give an *a priori* acceptance of a State's offer of consent when making an investment to ensure that dispute that may arise are subject to ICSID jurisdiction. This perfected consent would than qualify for Article 72. As a consequence, if all investors accept ICSID jurisdiction at the moment of investing and "lock in" the consent before denunciation, a State may be bound indefinitely by the perfected consent pursuant to Article 72. A State may thus still withdraw from ICSID, yet this withdrawal is of only minor consequences. In short, a solution initially perceived in favour of the host State, may generate adverse incentives to investors. Namely, it could lead to a practice of *a priori* perfected consent thereby effectively limiting the host state's policy.

2) …. but balanced out by Article 71

128. However, the effects of Article 72 can be balanced out by Article 71. First, if it is understood that the offer of consent by host States can be accepted by the investor after the notice of denunciation has been deposited but before the termination of the treaty takes effect, then an investor has a window of opportunity of six months to react to denunciation. Second, provided that the investor initiates proceedings during this period of time, the State must be bound by its obligation under ICSID Convention in respect of the pending case until the award has been rendered and observed. If the investor can be certain that this option is preserved under Article 72, he will have little incentive to accept consent *a priori* in order to benefit from Article 72. This, in turn, would be advantageous to host States. In

short, Article 71 can provide a safeguard from *instrumental* use of denunciation by host States while reducing incentives to "lock in" the consent before denunciation.

2. Consent in Article 72 to mean unilateral consent: an interpretation favouring investors?

1) Skewed in favour of the investor….

129. As for the second interpretation of consent as an unilateral consent, the balance of Article 72 seems to be on the side of the investor. Once consent is given by the host State, it binds the State even after denunciation of ICSID takes effect. As long as such consent is effective, an investor may at any time accept the unilateral offer of consent and initiate arbitral proceedings. Considering that consent is usually given in a BIT, a State may be bound by the consent given to ICSID up to 20 years by virtue of a BIT survival clause, after the BIT has been terminated.

2) …. but balanced out by BITs

130. However, the fact that the consent that is "locked in" by Article 72 is usually expressed in a BIT has a distinct advantage as well. States may condition the consent they give to arbitration so as to not impede the functioning of the ICSID system once they are still part of it, yet assuring that withdrawal from ICSID means a withdrawal of consent as well. Since States negotiate BITs, such conditioning is highly feasible and involves no costs to the system. In short, while the interpretation of consent may be skewed against the host State, awareness in BIT negotiation can re-balance the system without detrimental effects to the overall investment arbitration.

131. In short, while one interpretation may favour one interest in detriment of another, other tools are susceptible of re-balancing the international investment system. Therefore, it is important for policy-makers and arbitrators to be aware of the diverging interpretations presented in this memorandum and to be conscious of the mechanisms that the ICSID Convention as well as BITs can provide in order to rectify imbalances.

B. Policy Recommendations

132. As this memorandum illustrated, the issues arising in connection with ICSID and BIT denunciation are complex ones and much remains uncertain, subject to conflicting

interpretations. For these reasons, it may be desirable to provide policy makers with a tool kit of options in order to safely navigate through the troubled waters of investment treaty denunciations.

1. ICSID Interpretations – a multilateral response

133. Much of this memorandum was concerned with the two conflicting interpretations of Article 72 of the ICSID Convention advanced by the scholarly community. If the parties to the Convention do not want to depend on arbitrators to decide upon the meaning of that provision, they can advance an authoritative interpretation of the Convention that would be binding on the arbitrators. However, such an interpretation cannot be advanced unilaterally. All the contracting parties have to consent for the interpretation to qualify as an "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" pursuant to Article 31 3(a) of the VCLT.

134. As for the substantive content of such an interpretation, policy makers should be guided by the above mentioned policy observations.

2. What can States do unilaterally?

135. The main tool for States to manage their commitments to international investors is BITs. Therefore, States can address specific problems by modifying their BIT practice. So what are the potential dangers arising out of treaty denunciation and how can States respond?

Problem 1: *Following the interpretation of Article 72 ICSID Convention as unilateral consent, States are bound by the consent given in a BIT as long as the BIT remains in force – which may be much longer than originally intended.*

As States usually give consent to international arbitration in BITs, this consent, if not conditioned, remains valid as long as the BIT is in effect. While a BIT can be denounced as well, the investment protection of a BIT lasts even after a BIT is terminated by virtue of the survival clause. Consequently, the survival clauses in BITs "lock in" a state's consent to international arbitration for sometimes up to twenty years after the termination of a BIT. As

a result, States may be bound by the commitments under ICSID much longer than they originally intended, severely restricting their policy choices.

Solution 1: *States could condition their consent to international arbitration and restrict the duration of BITs.*

- In the BITs, States could condition their offer of consent by ICSID membership using similar wording as "provided that both Contracting Parties are parties to the ICSID Convention".
- States could limit the duration of the survival clause to five years to avoid an unduely loss of policy space by "locking in" international obligation long after the BIT was denounced.

Problem 2: *Investors may match States' offer of consent once investment is made even before a dispute arises.*

If ICSID denunciation becomes a wide spread concern, investors will seek new ways to secure their access to international arbitration. Especially in cases of BITs that provide only for ICSID arbitration, concerned investors may engage in the practice of giving *a priori* consent to ICSID for any future dispute once an investment is made, in order to avoid being "caught off-guard" by the act of denunciation. This, however, deprives States by virtue of *any* interpretation of Article 72 ICSID Convention of the policy option to withdraw their consent *vis-à-vis* those investors. In other words, the act of denouncing would be rendered meaningless.

Solution 2: *If States have specific policy concerns against ICSID arbitration, they can provide investors with alternative ISDS fora in their BITs, which would discourage the practice of investors giving a priori consent to ICSID.*

- ISDS provisions in BITs could include ICSID Additional Facility Rules as a "fall back" mechanism in case of an ICSID denunciation to guarantee their investors recourse to international arbitration.
- States could include alternative arbitral fora in their BITs such as UNCITRAL, ICC, SCC and others.

Problem 3: *The MFN clause may be used by investors to limit the significance of ICSID or BIT denunciation.*

First, investors may attempt to use the MFN clause in a BIT in order to obtain longer periods of investment protection after a BIT is denounced by reference to a more extensive survival clause in a third BITs. Second, investor may try to gain access to alternative ISDS fora in a third BIT by virtue of the MFN obligation, if the original treaty only provided for ICSID arbitration and ICSID was denounced.

Solution 3: *States could limit the scope of application of the MFN provision.*

- In order to avoid incorporation of longer time periods through MFN, States could strive to achieve coherence in their BIT language with regard to the survival clause and exclude that provision from the scope of MFN.
- States could clarify the scope of the MFN obligation to prevent tribunals from reading it as "consent through reference".

C. Answers to Questions Submitted by the Client

136. Although issues discussed in the framework of the present memorandum are not crystal clear and to date find no support in the case law, it is our task to provide the client with succinct and as far as possible straightforward interpretations regarding the questions presented:

- ***What is the legal basis for each of the steps taken by Ecuador and Bolivia in order to denounce ICSID?***

Legal basis for the denunciation of ICSID Convention is contained in Article 71 of the Convention, which states:

> "any Contracting State may denounce the Convention by written notice to the depositary of the Convention. The denunciation shall take effect six months after receipt of such notice."

- ***When had the Bolivian and Ecuadorian denunciations of the ICSID Convention taken effect?***

Both denunciations took effect six month after the receipt of the notice of denunciation. The denunciation made by Bolivia took effect on November 3, 2007 and the one made by Ecuador on January 7, 2010.

- ***What are the rights or obligations under the Convention preserved following its notice of denunciation and the expiry of six-month period contained in Article 71 of the ICSID Convention?***

Article 72 preserves:

> "the rights or obligations under this Convention … arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

There are rights and obligations arising from the Convention, which cease to exist once denunciation becomes effective, and other specific rights and obligations that arise directly from the consent to ICSID's jurisdiction for dispute settlement. The latter undoubtedly include the Convention's provisions on arbitration and conciliation procedures. They further include the obligation under Article 53 to comply with an award. The exclusion of alternative remedies (Article 26) and the exclusion of the review of awards (Article 53, first sentence) also arise from the consent. Similar considerations apply to the interpretation, revision and annulment of awards under Articles 50, 51 and 52 of the Convention. The question remains whether a State continues to be bound by the obligation to recognize and enforce arbitral awards rendered by ICSID tribunals, in accordance with Article 54 of the Convention. The position taken by the authors of this memorandum is that a denouncing State is still bound to recognize and enforce awards that were rendered in arbitral proceedings against it. However, a State is no longer bound to enforce or recognize awards that were rendered against a third State, which has some assets in the denouncing State. This obligation is a reciprocal obligation arising under the Convention and only States parties to the Convention should comply with it.

- ***What are the legal implications of these withdrawals from ICSID? Can the investor still bring cases against the denouncing State?***

From the moment when the denunciation takes effect, a State is no longer a Contracting Party to the ICSID Convention and is no longer subject to rights or obligations under the

Convention, apart from those that arise out of the 'consent' under Article 72 of the Convention. The possibility of the investor to bring a claim against a denouncing State before an ICSID tribunal will depend on the interpretation of the word 'consent' in Article 72. An investor will always be able to bring a case if he perfected the consent given by the host State before the notice of denunciation or even before the expiration of the six-month period. He can also bring a case afterwards, if the 'consent' in Article 72 is read as 'unilateral consent' given by the host State. However, this cannot be the case if Article 72 is read as meaning 'perfected consent', given by both investor and a host State before the denunciation takes effects.

Importantly, if relevant BITs provide for other dispute settlement mechanisms such as UNCITRAL arbitration, investor could still have recourse to these tribunals outside the sphere of ICSID.

- ***What constitutes consent to ICSID jurisdiction? When is such consent granted?***

Consent to ICSID jurisdiction is governed by Article 25(1) of the Convention. According to this provision, one of the requirements for the jurisdiction of the ICSID Centre is the consent given by both the investor and the host State. It is generally recognized that a State may give its consent to ICSID jurisdiction in four different forms: a contract concluded with the investor that is the other party to the dispute (compromissory clause/ *compromis*); a unilateral instrument, such as a letter to the ICSID Secretariat or a letter to the investor; a piece of national legislation, such as a law for the promotion of investments; a bilateral or multilateral treaty, which is most commonly used.

In addition, the investor has to express his own consent to submit a case to ICSID jurisdiction. This can be done either by initiating arbitration proceedings before the Centre, i.e. by filing a request for arbitration or by depositing a notice to the Centre or to the host State before the initiation of the proceedings.

- ***What is the legal basis for denouncing BITs?***

Most of the BITs contain specific provisions on denunciation. In the case where the provision on denunciation is inexistent or is unclear, the legal basis for denunciation is found under general international law, namely Article 56 of the VCLT.

- ***What are the effects of denouncing BITs?***

Generally, BITs contain survival clauses, i.e. provisions that enable the protection of investments concluded before the termination for a period between 5 to 20 years following the taking of legal effect of denunciation. In other words, investor may bring a dispute under arbitration clauses of the BIT, if it had done that same investment before the denunciation of the treaty took effect.

- ***When does denunciation of BITs take effect?***

Most of the BITs provide that the denunciation takes effect from 6 months to 1 year after the deposit of the notice of denunciation. In case the BIT does not provide for the time period in which the denunciation becomes effective, under Article 56(2) of the VCLT, the notice of denunciation has to be given at least 12 months before the termination of the treaty.

- ***What is the relationship between the denunciation of ICSID and BITs?***

The relationship is one of mutual influence through the expression of consent to arbitration. The denunciation of ICSID has an impact on the BITs, in the sense that it may preclude investors bringing the dispute before the ICSID jurisdiction, even if such a mechanism is expressly provided under a given BIT. This is particularly problematic in the case of BITs providing ICSID as the only arbitration forum. Such a situation may be avoided by resorting to MFN clauses. An argument may be made that by virtue of these clauses, the investor can invoke a more favourable arbitration clause under another BIT concluded by the host State. As far as the impact of denunciation of BITs on ICSID is concerned, it was demonstrated that a given BIT may condition the offer of consent provided therein, either individually or in combination, to: a) expression of intent to give consent to arbitration; b) requirement of membership to ICSID.

- ***What is the impact of constitutional amendments in Bolivia and Ecuador on the respective obligations under International Investment Agreements?***

Under Article 27 of the VCLT, a State may not invoke a provision of its internal law to evade its obligations under the treaty. However, the constitutional amendments have a considerable impact on the future negotiation capacity of the States with regard to conclusion of new international investment agreements.

Annex

Figure 1: Tables with BITs concluded by Bolivia and Ecuador

Bilateral Investment Treaties Concluded by Bolivia				
Contracting parties	**Available dispute settlement fora**	**Survival clause**	**Status of the BIT**	**Conditioning Consent to ICSID**
Argentina	ICSID, AFR & UNCITRAL	15 years		membership of both States
Belgium/Luxembourg	ICSID, AFR, ICC, SCC	10 years		membership of both States
Chile	ICSID	15 years		no pre-condition
China	Ad hoc arbitration (which may take into account ICSID) / limited *ratione materiae* to the amount of compensation	10 years		no pre-condition
Cuba	UNCITRAL	10 years		
Ecuador	ICSID, UNCITRAL	10 years		no pre-condition
France	UNCITRAL, ICSID	10 years		no pre-condition
Germany	ICC, ICSID	20 years		membership of both States
Italy	UNCITRAL, ICSID	5 years		adherence of both States
Korea	ICSID or ad-hoc	10 years		membership of Bolivia

Netherlands	Ad hoc, ICC, ICSID	15 years		accession of both States
Peru	Ad hoc, ICSID	15 years		membership of both States
Spain	UNCITRAL, ICSID and AFR	10 years		adherence of both States
Sweden	UNCITRAL	20 years		
Switzerland	Ad hoc, ICC, ICSID	10 years		adherence of both States
UK	ICSID, AFR, ICC, UNCITRAL	20 years		no pre-condition
Uruguay	ICSID, AFR & UNCITRAL	10 years		membership of both States
US	ICSID, AFR & UNCITRAL; any other arbitration mutually consented by the parties	10 years		no pre-condition
Venezuela	ICSID, AFR & UNCITRAL	10 years		no pre-condition

Bilateral Investment Treaties Concluded by Ecuador				
Contracting parties	**Available dispute settlement fora**	**Survival clause**	**Status of the BIT**	**Conditioning Consent to ICSID**
Argentina	ICSID, AFR & UNCITRAL	15 years		membership of both States
Bolivia	ICSID, UNCITRAL	10 years		no pre-condition
Canada	ICSID, AFR & UNCITRAL	15 years		membership of both States

Chile	ICSID	10 years		no pre-condition
China	Ad-hoc arbitration (which may follow ICSID rules)/ ratione matariae limited to issues of compensation	10 years		no pre-condition
Costa Rica	ICSID, AFR & UNCITRAL	10 years		membership of both States
El Salvador	ICSID	10 years	Terminated	no pre-condition
Nicaragua	ICSID	10 years	Terminated	no pre-condition
Dominican Republic	ICSID	5 years	Terminated	no pre-condition
France	ICSID	15 years		membership of both States
Germany	ICSID	15 years		no pre-condition
Netherlands	ICSID, UNCITRAL or ad-hoc	15 years		membership of at least one of the parties
Romania	ICSID, AFR & UNCITRAL	10 years		adherence of both States
Paraguay	ICSID, UNCITRAL	10 years	Terminated	no pre-condition
Peru	ICSID	10 years		no pre-condition
Spain	UNCITRAL, ICSID	10 years		adherence of both States
Sweden	ICSID, UNCITRAL	15 years		no pre-condition
Switzerland	Ad hoc arbitration	10 years		
Venezuela	ICSID, AFR & UNCITRAL	10 years		adherence of both States

UK	ICSID	15 years		membership of both States
US	ICSID, AFR & UNCITRAL; any other arbitration mutually consented by the parties	10 years		membership of at least one of the parties

Figure 2: Possible scenarios for different types of investors

	ICSID Article 71	**ICSID Article 72** Consent=perfected consent	**ICSID Article 72** Consent=unilateral consent
Investors having perfected a host state's offer of consent upon making an investment prior to notice of ICSID denunciation is received	+	+	+
Investors having perfected consent after the notice of ICSID denunciation is received but before the denunciation takes effect	+	-	+
Investors having perfected consent after the ICSID denunciation takes effect	-	-	+
Investors having perfected consent, *conditioned by ICSID membership in a BIT*, after the notice of ICSID denunciation is received but before the denunciation takes effect	+	-	-
Investors having perfected consent, *conditioned by ICSID membership in a BIT*, after the ICSID denunciation takes effect	-	-	-

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