

Chapter 15

Denunciation of the ICSID Convention and Consent to Arbitration

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I. INTRODUCTION

Disenchantment with investment arbitration has led to a number of reactions by affected states. These include the termination of treaties providing for arbitration.

Article 54 of the Vienna Convention on the Law of Treaties (VCLT)¹ provides that the termination of or the withdrawal from a treaty may take place in conformity with the provisions of the treaty. The ICSID Convention² regulates the withdrawal of States Parties in Articles 71 and 72.

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1. 1155 UNTS 331, 8 ILM 679 (1969). Technically, the Vienna Convention is not applicable to the ICSID Convention since under Art. 4 of the Vienna Convention it applies only to treaties concluded after its entry into force. The Vienna Convention entered into force in 1980, the ICSID Convention entered into force in 1966. But many of the provisions of the Vienna Convention on the Law of Treaties, including Art. 54, are understood to reflect customary international law.
2. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, 4 ILM 524 (1965).

Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin,
The Backlash against Investment Arbitration: Perceptions and Reality, pp. 353–368.

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Under Article 71 of the ICSID Convention, a Contracting State may denounce the Convention by a written notice to the depositary of the Convention.³ Such a denunciation is to take effect six months after receipt of the notice. Article 71 provides:

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

On May 2, 2007, the World Bank received a notice of denunciation of the ICSID Convention from the Republic of Bolivia. Under the terms of Article 71 of the ICSID Convention, this denunciation took effect on November 3, 2007.⁴

On July 6, 2009, the World Bank received a notice of denunciation of the ICSID Convention from the Republic of Ecuador. Under the terms of Article 71 of the ICSID Convention this denunciation took effect on January 7, 2010.

The consequences of a denunciation on prior consent to ICSID's jurisdiction are regulated in Article 72 of the Convention:

Notice by a Contracting State pursuant to Articles 70⁵ or 71 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.

The denunciation of the ICSID Convention by Bolivia has triggered a lively debate on the correct interpretation of Articles 71 and 72, which is reflected in a number of publications.⁶

The present article addresses the effect of a denunciation of the ICSID Convention on the denouncing state's consent to jurisdiction. The central issue is the

3. In accordance with Art. 73 of the Convention, the International Bank for Reconstruction and Development ("the World Bank") shall act as the Convention's depositary.
4. The author of this article prepared an expert opinion in the ICSID case *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia* (ICSID Case No. ARB/07/28) on the request of the Republic of Bolivia. In view of the fact that this case is still ongoing it is not discussed in the present article.
5. Article 70 deals with the exclusion of territories and is not relevant in the context of the present article.
6. Roberto Castro de Figueiredo, *Euro Telecom v. Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration under BITs*, *TRANSNAT'L DISP. MGMT.* (2008); Alejandro A. Escobar, *Bolivia Exposes 'Critical Date' Ambiguity*, 2(3) *GLOBAL ARB. REV.* 17 (2007); Julien Fouret, *Denunciation of the Washington Convention and Non-contractual Investment Arbitration: "Manufacturing Consent" to Arbitration?*, 25 *J. OF INT'L ARB.* 71 (2008); Emmanuel Gailard, *The Denunciation of the ICSID Convention*, *TRANSNAT'L DISP. MGMT.* (2007); Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 251 (C. Binder, U. Kriebaum, A. Reinisch & S. Wittich eds., 2009); Sébastien Manciaux, *Bolivia's Withdrawal from ICSID*, *TRANSNAT'L DISP. MGMT.* (2007); Michael D. Nolan & Frédéric Sourgens, *The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, *TRANSNAT'L DISP. MGMT.* (2007); Christian Tietje, Karsten Nowrot & Clemens Wackernagel, *Once and Forever? The Legal Effect of a Denunciation of ICSID*, *TRANSNAT'L DISP. MGMT.* (2008).

fate of a unilateral offer of consent given by that state through a treaty or legislation that has not been accepted by the investor before the date of the denunciation. The following points concerning the effect of a denunciation of the ICSID Convention on consent are discussed below:

- the six-month period for the effectiveness of the notice of denunciation under Article 71 and the relevant date under Article 72;
- the concept of consent to jurisdiction under the ICSID Convention and its meaning in Article 72;
- the meaning of the phrase “rights or obligations under this Convention . . . arising out of consent” in Article 72;
- the meaning of the phrase “consent . . . given by one of them” in Article 72.

II. THE DENUNCIATION’S EFFECTIVE DATE

Article 71 of the ICSID Convention provides that the denunciation of the Convention by a Contracting State takes effect six months after receipt of the notice of denunciation. Therefore, for the period of six months the rights and obligations arising from the Convention continue to apply to the denouncing state, in principle.

Article 72 contains a different rule on the effective date of the denunciation with respect to consent. If consent was given before the notice of denunciation rights or obligations arising therefrom shall remain unaffected. Therefore, Article 72 modifies the general rule of Article 71 in two ways:

- a) The critical date for the denunciation’s effect on consent is not the general rule on the taking of effect of the notice of denunciation (6 months after its receipt) but rather the date of its receipt.
- b) Rights or obligations arising from consent to jurisdiction remain unaffected by the denunciation even beyond the date the denunciation takes effect i.e. beyond the six month period.

Therefore, the date of consent is of decisive importance for the operation of Article 72. That Article will apply only if consent was given before the date of the denunciation.

Article 72 only addresses rights or obligations under the ICSID Convention that arise from consent. Other rights and obligations under the Convention are governed by the general rule of Article 71. The meaning of the phrase “rights or obligations under this Convention . . . arising out of consent” is discussed in section IV of this article.

III. CONSENT TO JURISDICTION UNDER THE ICSID CONVENTION

Article 72 refers to consent given before the receipt of the notice of denunciation. This leads to the question whether, for purposes of Article 72, a clause in a treaty or

in legislation providing for investor-state arbitration amounts to consent. As will be shown below, only a consent agreement between the host state and the investor amounts to consent for purposes of the ICSID Convention.

A. THE RECIPROCAL NATURE OF CONSENT

The requirement of a consent agreement is a general characteristic of arbitration. By definition, arbitration is a method of dispute settlement under which the decision maker derives its power from the parties' agreement.⁷ The parties in ICSID proceedings are always a state (or a state entity) on one side and a foreign investor on the other. It is these two parties that must have consented.

The ICSID Convention, when referring to consent to jurisdiction, stresses the element of mutuality and its reciprocal nature.⁸ The Preamble, in its paragraph 6, refers to "mutual consent by the parties." Article 25(1) speaks of consent by "the parties to the dispute" as an indispensable jurisdictional requirement and states that consent may not be withdrawn unilaterally "when the parties have given their consent." Article 25(2)(a) and (b), dealing with nationality, refers to "the date on which the parties consented." Article 26, dealing with the exclusion of other remedies, also states that "consent of the parties" shall be deemed "consent to such arbitration." Article 27 excludes diplomatic protection provided "one of its national and another Contracting State" have consented to arbitration. Article 36 requires that a request for arbitration contain "their [i.e., the parties'] consent to arbitration." Article 44 provides that the proceedings shall be conducted in accordance with the Arbitration Rules in effect on the date on which "the parties consented to arbitration." Under Article 46, the Tribunal is to determine incidental or additional claims or counterclaims provided they are within the scope of "the consent of the parties."

In a few instances, the Convention also refers to the giving of consent by a party in the singular. The Preamble, in its paragraph 7, states that participation of a state in the Convention shall not "without its consent" be deemed to constitute an obligation to submit to arbitration. Under Article 25(3) "consent by a constituent subdivision or agency" of a state requires the approval of that state. Under Article 25(4) a mere notification by a state of its intent to submit does not constitute consent. Under Article 26, a state may require the exhaustion of local remedies as a condition of "its consent."

These uses of the term "consent" relating to one party only either contain purely negative statements (no obligation to submit without consent, no consent through mere notification of intent), or they spell out conditions for consent (permission by the state, exhaustion of local remedies). Significantly, these provisions

7. See Fouchard Gaillard Goldman on International Commercial Arbitration (Emmanuel Gaillard & John Savage eds., 1999), para. 7.

8. For practical reasons this analysis of the Convention's text includes only references to consent to arbitration but not to conciliation.

do not refer to rights or obligations under the Convention arising from consent. By contrast, all the Convention's provisions spelling out the various rights and obligations arising from consent indicate that consent must be mutual or reciprocal. Therefore, in order to trigger rights and obligations under the Convention, consent must be obtained from both (or all) parties.

The Convention leaves the parties a large measure of freedom in expressing their consent. Traditionally this would take place by way of a direct agreement between the host state and the investor. Consent through a direct agreement may be achieved through a compromissory clause in an investment agreement between the host state and the investor submitting future disputes arising from the investment operation to ICSID jurisdiction. The early cases before ICSID were all based on direct agreements of this kind.

More recently, this form of consent has been largely displaced by consent expressed through legislation and treaties. Since the ICSID Convention's drafting, numerous treaties, especially bilateral investment treaties (BITs), have entered into force that provide for ICSID arbitration. The consent clauses in these treaties relating to investor-state arbitration are mere offers. In order to achieve the required mutual consent the offer requires acceptance by the investor. Even where consent is based on the host state's legislation or on a treaty, it can only come into existence through an agreement between the parties, that is, the host state and the investor.

Consent through BITs has become accepted practice and is nowadays the basis for jurisdiction in the majority of cases administered by ICSID. This phenomenon has been called arbitration without privity.⁹ The requirement of consent in writing by both parties to the dispute applies also in these cases. Here too, the result is an agreement to arbitrate although it is achieved indirectly and often without direct contact between the parties prior to the institution of proceedings. A unilateral act offering consent to ICSID's jurisdiction is insufficient to establish jurisdiction.¹⁰

At the time of the Convention's drafting, treaties, such as bilateral investment treaties (BITs), containing offers of consent to ICSID's jurisdiction were still unknown. Therefore, the *travaux préparatoires* to the Convention¹¹ hardly refer to this contingency.¹² But the possibility that a host state might express its consent to the Centre's jurisdiction through a provision in its national legislation or through some other form of unilateral declaration was discussed during the Convention's preparation. In response to several questions, the Chairman, Mr. Broches pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties.¹³

9. Jan Paulsson, *Arbitration without Privity*, 10 ICSID REVIEW-FILJ 232 (1995).

10. Aron Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *THE ART OF ARBITRATION, LIBER AMICORUM PIETER SANDERS* 63, 67 (Jan Schultz & Albert van den Berg eds., 1982); George R. Delaume, *How to Draft an ICSID Arbitration Clause*, 7 ICSID REVIEW-FILJ 168, 172 (1992).

11. History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Volumes I–IV (1968–1970).

12. But see passing references to this possibility at vol. II, 274, 400.

13. History of the ICSID Convention, *supra* note 11, vol. II, 274–75.

The Report of the Executive Directors to the Convention, the official commentary to the Convention, refers to the “consent of the parties,” thus stressing the need that both parties give their consent.¹⁴ The Report points out that consent may be given in a clause included in an investment agreement or in a *compromis*. But it also points to the possibility of a consent agreement by way of a unilateral offer subsequently accepted by the investor:

...Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.¹⁵

The investor may accept the offer either through a separate communication in writing or simply at the time of the institution of proceedings. From the investor’s perspective it is wise to accept the offer of consent at an early stage. Consent will be perfected only upon the acceptance of the offer. Consent triggers a number of legal consequences under the Convention, the most important of which is that consent becomes irrevocable. The irrevocability of consent provided for in the last sentence of Article 25(1) operates only after the consent has been perfected through its acceptance by the investor.

Under most treaties offering consent the investor may express its acceptance in a variety of ways other than instituting proceedings.¹⁶ These include a simple written communication to the host state to the effect that consent to ICSID’s jurisdiction in accordance with the legislation or the treaty is accepted. In a number of cases investors had, in fact, expressed their consent separately before submitting their request for arbitration.¹⁷

The exact terms of consent are determined by the combination of offer and acceptance. The investor’s acceptance of consent can be given only within the limits of the offer. But it is entirely possible for the investor’s acceptance to be narrower than the offer and to extend only to certain matters or only to a particular investment operation. Therefore, the provision on consent in legislation or in a treaty does not definitively circumscribe the extent of consent.

Treaties offering consent to arbitration sometimes give the investor a choice between several forms of arbitration. Apart from ICSID arbitration, these may include arbitration under the UNCITRAL Rules, ICC arbitration, arbitration under

14. Report of the Executive Directors on the ICSID Convention, para. 23.

15. *Ibid.*, at para. 24.

16. Some treaties such as Art. 1121(3) NAFTA require that the investor’s consent be included in the submission of a claim to arbitration.

17. *Lanco v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction (Dec. 8, 1998), para. 44; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003), para. 56; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), para. 36; *Pan American v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (Jul. 27, 2006), para. 37; *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award (October 2006), para. 363.

the auspices of the LCIA or arbitration under the rules of some other institution. Consent to ICSID arbitration is only established after the investor has made his or her choice in favor of ICSID arbitration.

In 1969 ICSID published model clauses relating to ICSID for use in BITs.¹⁸ The accompanying commentary characterizes the function of the respective treaty provisions as offers that require acceptance by the respective investors in order to constitute valid consent:

... a dispute cannot be submitted for settlement by either conciliation or arbitration unless both the government and the investor concerned have consented to such submission in writing. . . .¹⁹

Since the actual or potential investors benefiting from investment treaties are not parties to those instruments, it is not possible to provide in them, as may be done in respect of governments (. . .), that the treaty itself constitute the written consent required by the Convention, . . .²⁰

. . . the provisions of the Convention appear to preclude a treaty provision by which an investor would be “deemed” to have consented, without actually having signed an instrument to that effect: for Article 25(1) of the Convention requires that both parties to the dispute must consent to its submission “in writing” . . .²¹

Most investment arbitration cases in recent years are based on consent established through an offer of consent contained in a BIT accepted by the investor through a separate written communication or by instituting proceedings. The first such case, *AAPL v. Sri Lanka*, was decided in 1990.²² Some tribunals have simply applied this principle without discussing its rationale.²³ Other tribunals have explained the nature of consent to jurisdiction through the combination of the offer given by the host state in the BIT and the acceptance by the investor in the request for arbitration.²⁴

18. Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements, 8 *ILM* 1341 (1969).

19. *Ibid.*, Comment 7 at 1343.

20. *Ibid.*, Comment 20 at 1349.

21. *Ibid.*, Comment 21 at 350.

22. *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (Jun. 27, 1990), paras. 2–4.

23. *Fedax v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (Jul. 11, 1997), para. 30; *Maffezini v. Spain*, Decision on Jurisdiction (Jan. 25, 2000), para. 19; *Olguín v. Paraguay*, ICSID Case No. 98/6, Decision on Jurisdiction (Aug. 8, 2000), paras. 26, 27; *Gruslin v. Malaysia*, ICSID Case No. 99/3, Award (Nov. 27, 2000), para. 2.3.

24. *AMT v. Zaire*, ICSID Case No. ARB 93/1, Award (Feb. 21, 1997), paras. 5.17–5.23; *Lanco v. Argentina*, *supra* note 17, paras. 8, 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; *Wena Hotels v. Egypt*, ICSID Case No. ARB 98/4, Decision on Jurisdiction (Jun. 29, 1999), 6 ICSID Reports 87; *Salini v. Morocco*, ICSID Case No. ARB 00/4, Decision on Jurisdiction, (Jul. 23, 2001), para. 27; *Generation Ukraine v. Ukraine*, ICSID Case No. ARB 00/9, Award (Sep. 16, 2003), paras. 12.1–12.8; *Azurix v. Argentina*, *supra* note 17, para. 56; *IBM v. Ecuador*, ICSID Case No. ARB/02/10, Decision

The Tribunal in *AMT v. Zaire* pointed out that a BIT containing an expression of consent to ICSID arbitration did not constitute the necessary consent under the Convention:

The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consents between the Parties. When Article 25 states in paragraph 1 that “the parties” must have consented in writing to submit the dispute to the Centre, it does not speak of the states or more precisely, it speaks of a state and a national of another state. It appears therefore that the two states cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the states.²⁵

In *SGS v. Philippines* the Tribunal spoke of a combination of expressions of consent that constitutes consent in writing in the sense of Article 25(1):

31. In the present case, the Claimant relies upon the consent to ICSID arbitration given by the Philippines in the BIT, combined with its own written consent contained in the Request for Arbitration. It is well established that the combination of these forms of consent can constitute “consent in writing” within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT.²⁶

In ICSID proceedings the claimant may either be the investor or the host state. In actual practice, the request for arbitration nearly always comes from the investor. But cases initiated by host states against investors are possible and have arisen from time to time.²⁷ The reciprocal nature of consent to jurisdiction under the

on Jurisdiction (Dec. 22, 2003), paras. 24–30; *SGS v. Philippines*, ICSID Case No. ARB 02/06, Decision on Jurisdiction (Jan. 29, 2004), paras. 30–31; *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB 02/18 (Apr. 29, 2004, paras. 94–100; *LG&E v. Argentina*, ICSID Case No. ARB/02/01, Decision on Jurisdiction (Apr. 30, 2004), paras. 69–74; *Salini v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004), para. 65; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (Feb. 8, 2005), para. 198; *Impregilo v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/3 (Apr. 22, 2005), para. 108; *Camuzzi v. Argentina I*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (May 11, 2005), paras. 130–32; *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (May 11, 2005), para. 140; *El Paso v. Argentina*, *supra* note 17, paras. 35–37; *Pan American v. Argentina*, *supra* note 17, paras. 33–37; *ADC v. Hungary*, *supra* note 17, para. 363; *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction (Mar. 21, 2007), para. 74; *Kardassopoulos v. Georgia*, ICSID Case ARB/05/18, Decision on Jurisdiction (Jul. 6, 2007), para. 118; *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB 02/18, Award (Jul. 26, 2007), para. 104; *Toto v. Lebanon*, ICSID Case No. ARB 07/12, Decision on Jurisdiction (Sep. 11, 2009), para. 94.

25. *AMT v. Zaire*, *supra* note 24, para. 5.18. See more generally 5.17–523.

26. *SGS v. Philippines*, *supra* note 24, para. 31.

27. Cases initiated by the host state or an agency of the host state are: *Gabon v. Société Serete S.A.*, ICSID Case No. ARB/76/1; *Tanzania Electric Supply Co. Ltd. v. IPTL*, ICSID Case No. ARB/98/8, 8 ICSID Reports 226 (2005); *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3. For a discussion of these cases,

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ICSID Convention means that the institution of proceedings is always contingent upon the mutuality of consent. While the investor may institute proceedings against the host state on the basis of the BIT, thereby signifying its consent, the host state cannot do so without a prior expression of consent on the part of the investor. Therefore, a treaty containing an expression of consent is not a suitable basis for the institution of proceedings against an investor.

Applied to Article 72 this means that consent must be perfected through an acceptance by the investor before the date of the denunciation in order to preserve rights and obligations under the ICSID Convention. A mere offer of consent to arbitration contained in a treaty or in national legislation cannot have this effect.

B. THE DATE OF CONSENT

The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) offer a precise rule concerning the date of consent. Rule 2 of the Institution Rules provides:

- (3) “Date of consent” means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

If the consent clause is contained in an offer by one party, its acceptance by the other party will determine the time of consent. This rule is particularly significant if the host state makes a general offer of consent to ICSID’s jurisdiction in its legislation or in a treaty. In a situation of this kind, the time of consent is determined by the investor’s acceptance of the offer. At the latest, the offer may be accepted through bringing a request for arbitration to ICSID.

An interpretation that accepts an offer of consent contained in a treaty as “consent” for purposes of Article 72 would lead to the absurd result that consent can exist before the date of consent as defined in Institution Rule 2.

Under the ICSID Convention the time of consent is relevant in a number of contexts. Under Article 25(2) the nationality of the foreign investor is determined by reference to the date of consent. Natural and juridical persons must be nationals of another Contracting State on the date the parties consented to submit the dispute to arbitration. If consent is based on a general offer in legislation or in a treaty, the relevant date for the determination of nationality is the date the investor takes up the offer in writing.

Consent to the jurisdiction of the Centre will, unless otherwise stated, exclude other remedies pursuant to Article 26 of the Convention. Therefore, resort to domestic courts or to other forms of arbitration becomes unavailable, in principle, from the date of consent. Similarly, under Article 27(1), diplomatic protection by the investor’s state of nationality is no longer permitted once the parties have

see the chapter by Mehmet Thorat & Thomas Schultz, *THE STATE, A PERPETUAL RESPONDENT IN INVESTMENT ARBITRATION? SOME UNORTHODOX CONSIDERATIONS*, 577.

consented to the jurisdiction of the Centre. If consent is based on a general offer in legislation or in a treaty, other remedies, including diplomatic protection, become unavailable from the date the investor takes up the offer in writing.

Article 44 of the Convention provides that arbitration proceedings will be conducted in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If consent is based on a general offer in legislation or in a treaty the applicable version will be the Arbitration Rules in effect on the date the investor takes up the offer in writing.

An amendment to the Convention will not apply with respect to consent given before the amendment's entry into force. Article 66(2) provides to this effect:

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

Under this provision, which strongly resembles Article 72, rights and obligations under the Convention arising from consent to jurisdiction given before the entry into force of the amendment will not be affected by the amendment. If consent is based on a general offer in legislation or in a treaty, the rights and obligations under the Convention remain unaffected if the investor takes up the offer of consent in writing *before* the amendment enters into force. On the other hand, if the investor takes up the prior offer consent in writing *after* the amendment enters into force all rights and obligations will be determined according to the Convention as amended.

Under Article 72 a denunciation of the Convention will not affect the rights and obligations under the Convention arising from consent given before the date of receipt of the denunciation. If consent is based on a general offer in legislation or in a treaty, the rights and obligations under the Convention remain unaffected if the investor takes up the offer in writing *before* the notice of denunciation is received. On the other hand, if the investor attempts to take up the prior offer of consent *after* the date of receipt of the denunciation, the Centre will be without jurisdiction.

C. THE IRREVOCABILITY OF CONSENT

Article 25(1), last sentence provides for the irrevocability of consent in the following terms:

When the parties have given their consent, no party may withdraw its consent unilaterally.

The irrevocability of consent provided for in the last sentence of Article 25(1) operates only after the consent has been perfected through its acceptance by both parties. The provision refers to consent given by "the parties" in the plural and to unilateral withdrawal. This is confirmed by the Preamble's reference to "mutual

consent” and to the nature of consent as a “binding agreement.” Similarly, the Report of the Executive Directors to the Convention stresses the mutuality of consent and the impossibility of its unilateral withdrawal:

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

The binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim *pacta sunt servanda* and applies to undertakings to arbitrate in general.²⁸ It applies not only where the consent to jurisdiction is contained in a compromissory clause contained in an investment contract but also where an offer of consent is contained in national legislation or a treaty that has been accepted by the investor.

The irrevocability of consent operates after the consent has been perfected. In the case of national legislation and treaty clauses offering consent to ICSID jurisdiction, the investor must have accepted the consent in writing to make it irrevocable. Therefore, it is inadvisable for an investor to rely on an ICSID consent clause contained in the host state’s domestic law or in a treaty without making a reciprocal declaration of consent. The investor may wait with its acceptance of the offer of consent until it institutes proceedings before the Centre. But in doing so it runs the risk that the offer may be withdrawn before then.

Article 72 of the ICSID Convention constitutes a special application of the principle of irrevocability, expressed in more general terms in the last sentence of Article 25(1). When the parties have given their consent, no party may withdraw its consent unilaterally by direct or indirect means. This includes an attempted withdrawal of consent by way of a denunciation of the Convention. Without Article 72 of the ICSID Convention, all rights and obligations of a denouncing state, including those that arise from consent, would cease from the date the denunciation takes effect.²⁹ This would include the obligation not to seek another remedy and the obligation to abide by and comply with an award.

At the same time, the provision against unilateral withdrawal of consent, as contained in the last sentence of Article 25(1) and as specified in Article 72 of the ICSID Convention, can only apply to perfected consent, that is, consent expressed

28. See George R. Delaume, *The Finality of Arbitrations Involving States: Recent Developments*, 5 *ARB. INT’L* 21, 24 *et seq.* (1989).

29. See also Art. 70 of the Vienna Convention on the Law of Treaties:
Article 70 Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
 - (a) releases the parties from any obligation further to perform the treaty;
 - (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

by both parties. It would run counter to the system of the Convention to provide for the irrevocability of a mere offer of consent to jurisdiction that has not been taken up by the other party.

IV. RIGHTS OR OBLIGATIONS UNDER THE CONVENTION ARISING OUT OF CONSENT

Under Article 72 the denunciation of the ICSID Convention shall not affect the *rights or obligations under the Convention arising out of consent* to ICSID's jurisdiction given before receipt of the notice of denunciation. Therefore, in order to benefit from Article 72, a right or obligation must cumulatively meet two requirements: it must (a) arise out of consent and it must (b) be a right or obligation under the ICSID Convention.

Consent, once given, triggers a number of rights and obligations under the Convention. First and foremost among these is the right to institute proceedings (Article 36) and to participate in the constitution of the tribunal (Article 37) and in the proceedings (Articles 41, 44). Another right arising from consent is access to the post-Award remedies provided for in Articles 49(2), 50, 51 and 52. An important obligation arising from consent is the duty to abide by and comply with an award (Article 53). Another obligation arising from consent is the duty to refrain from resorting to other remedies, including diplomatic protection (Articles 26, 27). It is these rights and obligations to which the intertemporal rule of Article 72 applies.

Other rights and obligations under the Convention do not arise out of consent and, hence, do not fall under Article 72 but under the general rule of 71. Among these general rights and obligations of the Contracting States under the Convention, not arising from consent, are the participation in the Administrative Council (Articles 4–7), the right to nominate persons to the Panels of Conciliators and Arbitrators (Article 14), the duty to contribute to the Centre's costs (Article 17), the duty to respect the immunities and privileges foreseen in the Convention (Articles 18–24) and the duty to recognize and enforce awards (Article 54). It is these latter rights and obligations that continue in effect until six months after receipt of the notice of denunciation in accordance with Article 71.

Article 72 preserves the *rights or obligations under the Convention arising out of consent* from the consequences of the denunciation. As outlined above, the host state's offer of consent perfected through the investor's acceptance creates a number of important rights and obligations under the ICSID Convention. By contrast, a mere offer of consent, as contained in many BITs, does not create any rights or obligations under the ICSID Convention. None of the provisions of the ICSID Convention creates any right or obligation arising from a mere offer of consent contained in a treaty that has not been accepted by the investor. In particular, a mere offer of consent does not have the effect of submission to the jurisdiction of ICSID required by Article 25(1) of the Convention.

Article 72 states that rights or obligations under the Convention arising from consent given before receipt of a denunciation shall remain unaffected by that

denunciation. Since no rights or obligations can arise from unilateral offers of consent, Article 72 would be rendered effectively meaningless if the term “consent” as used therein were construed to mean such unperfected offers.

The BITs of a denouncing state continue to be in force after receipt of a notice of denunciation. These treaties are sources of rights and obligations between the respective parties to them. But any of these rights or obligations would arise from the BITs and not from the ICSID Convention. Article 72 of the ICSID Convention preserves the rights or obligations *under the Convention* that had arisen from consent given before the notice of denunciation. The existence of an offer of consent in a BIT alone does not give rise to any rights or obligations under the Convention. The BITs give potential claimants the right to accept the offer contained therein. But these are rights under the BIT and not under the ICSID Convention. Therefore, unless the offer of consent contained in a BIT has been accepted by the investor prior to the ICSID Convention’s denunciation, no rights or obligations under the Convention exist that could be preserved by Article 72.

This result is confirmed by the *travaux préparatoires* to Article 72 of the Convention. The text of what eventually became Article 72 (still numbered 73 at the time) was discussed only once, at an advanced stage of the Convention’s drafting. The discussion shows that a unilateral statement of consent by a state that has not been accepted by the investor is not binding and that it will be made ineffective by a denunciation:

61. Mr. *Gutierrez Cano* said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?

62. Mr. *Broches* replied that a general statement of the kind mentioned by Mr. *Gutierrez Cano* would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.

[. . .]

66. Mr. *Woods* thought it important to clarify all the implications of Article 73 before proceeding further. For his part he thought Article 73 expressed a basic principle, i.e., that if an agreement was in force at the time the State party to that agreement denounced the Convention, obligations under that contract to have recourse to arbitration would continue after denunciation.³⁰

30. History of the ICSID Convention, *supra* note 11, vol. II, part 2, 1010.

This discussion on what eventually became Article 72, as reproduced in the Convention's History, demonstrates that the preservation of rights or obligations after a denunciation requires prior consent perfected through an agreement between the host state and the investor. A unilateral offer of consent through a "general statement"³¹ would not survive the Convention's denunciation. If the state denounced the Convention before the unilateral offer had been accepted by the investor, the investor could not subsequently bring a claim.

Therefore, the *travaux préparatoires* to the Convention confirm the meaning of Article 72 resulting from the provision's ordinary meaning reached in the context of the Convention. The concept of "consent" in Article 72 refers to an agreement on consent between the host state and the investor. It does not cover a mere offer of consent on the part of the host state that has remained unaccepted at the time of the denunciation.

V. CONSENT "GIVEN BY ONE OF THEM"

Article 72, after referring to "consent to the jurisdiction of the Centre" adds the words "given by one of them." At first sight, these words may create the impression that the term "consent" preceding them refers to a unilateral act. However, a more careful analysis of the context of the phrase "given by one of them" reveals that it does not refer to the potentially opposing parties to ICSID proceedings (the host state and the investor). Rather, the phrase refers to the range of possible parties to a consent agreement on the side of the denouncing state. The enumeration of these possible parties in Article 72 makes this clear. The possible parties listed in Article 72 are (a) that (i.e., the denouncing) state, (b) any of its (i.e., the denouncing state's) constituent subdivisions or agencies, and (c) any national of that (i.e., the denouncing) state. The enumeration of these three potential types of parties in Article 72 is similar to Article 25(1). But that provision is different in that it refers to a state, to a constituent subdivision or agency of that state and to a national of *another* state.

Therefore, Article 72 lists the types of persons that may become parties to ICSID proceedings on the side of the denouncing state. Each of them may give consent to ICSID's jurisdiction. Each of them will have the rights or obligations arising from consent preserved despite the Convention's denunciation, provided the consent was perfected before receipt of the notice of arbitration.

Article 66(2) of the ICSID Convention is similarly phrased as Article 72 but does not include the words "given by one of them." Article 66 deals with the Convention's amendment. Unlike Article 72, it does not deal with the termination of the Convention with respect to a single state but with its modification in relation to all states. Therefore, a reference to consent "given by one of them" would be

31. The absence in the Convention's *travaux préparatoires* of any reference to an offer of consent contained in a treaty has historical reasons. At the time of the Convention's drafting, treaties containing ICSID clauses were still unknown.

inappropriate. Article 66(2) might conceivably have been supplemented by the words “given by any of them.”

The words “given by one of them” were inserted at a late stage of the drafting of what became Article 72. In the Modified Articles of the Revised Draft Convention of 1 March 1965, Article 72 still contained the phrase “given by it.”³² The final text was submitted shortly thereafter on March 18 1965. In the final text “given by it” was substituted by the phrase “given by one of them,” apparently without any discussion or other indication of the motives underlying this change. Therefore, the history of the ICSID Convention gives no clear indication as to the motives behind the insertion of these words.

Without the substitution of “given by it” by “given by one of them,” Article 72 would be less clear and could have led to misunderstandings. The question would have arisen whether rights and obligations arising from consent, preserved despite the Convention’s denunciation, only included consent to which the denouncing state itself is a party or also included consent given by one of its entities and nationals. In particular, nationals of the denouncing state who had consent agreements with nondenouncing host states would have been confronted with the argument that they no longer qualified as nationals of a Contracting State and hence no longer had access to ICSID’s jurisdiction. The phrase “given by one of them” ensures that a national of a denouncing state who accepts the offer of consent in a BIT before the notice of denunciation will continue to enjoy the rights and obligations resulting from the consent.

The phrase “given by one of them,” by including consent given by a national of the denouncing state, also demonstrates the necessarily mutual character of consent as used in Article 72. It is difficult to see how the term “consent,” in that Article, could include a mere unilateral declaration of consent by a foreign investor that would be preserved despite the denunciation. By referring to rights or obligations under the Convention arising from consent given by a national of the denouncing state, the Convention unmistakably indicates that what is required under Article 72 is a consent agreement between an investor and a host state.

VI. CONCLUSIONS

Articles 71 and 72 of the ICSID Convention, dealing with the Convention’s denunciation, contain two different critical dates for the effects of the denunciation. Under Article 72 the critical date for the continued validity of the effects of consent is the date of receipt of the notice of denunciation. Under Article 71 the critical date for all other matters is six months after receipt of the notice of denunciation.

The concept of consent to jurisdiction under the ICSID Convention is based on the need for an agreement between the parties to the proceedings, that is, a host state and a foreign investor. A consent agreement may be reached by way of a

32. History of the ICSID Convention, *supra* note 11, vol. II, part 2, 1016.

direct contract between the state and the foreign investor. It may also be reached by way of legislation or a treaty provision under which the state holds out an offer of consent to foreign investors. But a provision in legislation or in a treaty providing for ICSID jurisdiction does not represent valid consent unless and until it has been accepted in writing by the investor.

Numerous ICSID tribunals have accepted and applied the principle of consent through an offer made by the host state in a treaty that is subsequently accepted by the investor.

ICSID's Institution Rules provide that in the case of separate declarations of consent by the parties, the date of consent is determined by the date on which the second party acted. The date of consent is relevant for a number of issues under the ICSID Convention. One of these issues arises under Article 72: a denunciation will not affect the rights or duties under the Convention arising from consent given before the receipt of the notice of denunciation.

The ICSID Convention provides in Article 25(1) that consent given by the parties may not be withdrawn unilaterally. Article 72 is an application of that principle. Consent by the parties may not even be withdrawn unilaterally by way of the Convention's denunciation. However, this preservation of consent requires that consent has been given by both parties.

Article 72 of the ICSID Convention preserves rights or obligations under the Convention arising out of consent. This clearly indicates that only perfected consent is thus covered. A mere offer of consent contained in a BIT or other treaty does not create any rights or obligations under the Convention.

The phrase "given by one of them" in Article 72 does not refer to one or the other party to ICSID proceedings. Rather it refers to the denouncing state, its entities and nationals.