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The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study

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A Preliminary Comment – The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study

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<u>*Introduction*</u>

Bolivia, Cuba, Nicaragua, and Venezuela recently declared their intention to withdraw from the World Bank and IMF.[2] Of these ALBA countries,[3] all except Cuba have ratified the ICSID Convention and been parties to arbitrations under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).[4] On May 2, 2007, Bolivia, following through on its promise, became the first

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[2] *See IMF and World Bank Face Declining Authority as Venezuela Announces Withdrawal*, Venezuela Analysis Report, dated May 4, 2007.

[3] The Alternativa Bolivariana para la América Latina y El Caribe aims to create a Latin American and Caribbean trade bloc based on the shared ideology of Presidents Fidel Castro of Cuba and Hugo Chávez of Venezuela. *See* http://www.alternativabolivariana.org/; *see also* Diego Azzi and David Harris, *ALBA: Venezuela's Answer to Free Trade*, *in* Focus on the Global South, December 2006.

[4] *See* List of Contracting States, www.worldbank.org/icsid/constate/c-states-eng.htm; *compare* Shell Brands International AG and Shell Nicaragua S.A. v. Republic of Nicaragua (Case No. ARB/06/14); Aguas del Tunari S.A. v. Republic of Bolivia (Case No. ARB/02/3); Fedax N.V. v. Republic of Venezuela (Case No. ARB/96/3).

country ever to denounce the ICSID Convention.[5] Venezuela subsequently affirmed that it too intends to denounce the ICSID Convention.[6]

The statements by Venezuela are of particular potential importance as that country continues to nationalize significant foreign investments in the oil, power and telecommunications sectors. So far, arbitrations against Venezuela have been notable mostly for their absence given the aggressiveness of Venezuela's nationalization program.[7] As this article is being published, however, it seems that this has changed. As reported by the BBC on September 13, 2007, ExxonMobil, now has commenced an ICSID arbitration against Venezuela arising out of its Orinoco Belt projects.[8] According to reports, ExxonMobil is seeking compensation estimated at US$750 million.[9] Another

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[5] *See Bolivia Submits a Notice under Article 71 of the ICSID Convention*, ICSID News Release, dated May 16, 2007.

[6] *See Venezuela and Bolivia Threaten to Leave ICSID*, Latin Lawyer Online Report, dated May 3, 2007.

[7] *See The Next Argentina?*, GLOBAL ARBITRATION REVIEW, May 2006:

> "'We used to call it expropriation,' says one UK-based arbitration specialist who has advised clients with operations in the region. 'Nowadays the fashionable word is "renegotiating".'
>
> "Venezuela's playbook consisted mainly of 'divide and conquer' tactics, sources say, coupled with lining up plenty of alternative buyers (in particular, companies from China) for its main asset, oil. It also made clear that anybody starting legal proceedings was out for good; barred from any future contracts in Venezuela. So far nobody has taken Venezuela to the International Centre for Investment Disputes (ICSID) or any other fora.
>
> "…
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> "One US arbitration specialist laments: 'The Venezuelan side negotiated very astutely. It helped that the US oil majors are less good these days at presenting a united front.'"

[8] *See Exxon seeks deal on Venezuela oil*, BBC News Report, dated September 13, 2007.

[9] *See Exxon seeks deal on Venezuela oil*, BBC News Report, dated September 13, 2007.

major oil company, ConocoPhillips, had previously indicated that it may shortly commence an arbitration against Venezuela as a result of the nationalization of its interests in the Petrozuata, Hamaca and Corocoro oil production projects in the Orinoco heavy oil belt.[10]

It is the thesis of this article that, if Venezuela denounces the ICSID Convention, the extent to which international investors should be permitted to rely upon the Convention to commence arbitrations against Venezuela properly should depend upon the interplay between the ICSID Convention and the particular bilateral investment treaties and other instruments by which Venezuela may be argued to have given its consent to ICSID proceedings. In this respect, our view is that analogies to contractual agreements to arbitrate are of some use but also have the potential to confuse. Venezuela has concluded bilateral investment treaties with approximately 25 countries, and Venezuela's Investment Law, Decree 356 of October 3, 1999, also makes reference to ICSID arbitration.[11] These treaties, to some extent the Investment Law, have standing as international legal obligations of Venezuela independent of the ICSID Convention. To the extent that these instruments contain an ICSID consent, this consent itself thus may be viewed as an international legal obligation of Venezuela independent from its obligations under the Convention. This article engages on four levels the interplay between the ICSID Convention's consent and denunciation provisions, on the one hand, and Venezuela's BITs and the Investment Law, on the other. The organization is as follows:

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[10] *See, e.g., Exxon, Conoco Say No to Venezuela Plans*, Reuters News Report, dated June 26, 2007; *see also ConocoPhillips and Venezuela Unable to Reach Migration Agreement; Compensation Negotiations Continue*, ConocoPhillips Press Release, dated June 26, 2007.

[11] *See* Decree No. 356 Having the Rank and Force of Law for the Promotion and Protection of Investments, October 3, 1999. It is referred to hereinafter as the Venezuelan Investment Law, or the Law.

i. Presentation of relevant provisions of the ICSID Convention and its drafting history;

ii. Summary of the scholarly discussion concerning the denunciation of the ICSID Convention and the contract-inspired "offer and acceptance" approach of state consent to ICSID;

iii. Consideration of state consent to ICSID dispute resolution as an international obligation independent of investor acceptance;

iv. Identification of issues that may arise under its BITs and the Investment Law if Venezuela denounces the ICSID Convention.

I. The Treaty Framework Governing Denunciation of the ICSID Convention and Its Drafting History

A) The Applicable Articles

The analysis of consequences of a state's denunciation of the ICSID Convention must begin with the relevant articles of the treaty. The ICSID Convention defines consent to arbitration and the consequences of a state's denunciation at Articles 25(1), 71 and 72. Article 25(1) of the ICSID Convention states:

> "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."

Article 71 of the ICSID Convention states:

> "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."

Article 72 of the ICSID Convention states:

> "Notice by a Contracting State pursuant to Articles 70 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."

B) The History of Provisions Addressing to Consent to Jurisdiction

The drafting of the ICSID Convention, which was ratified by more than 20 states in 1966, began in 1961.[12] Prior to this time, the World Bank and, in particular, the President of the World Bank, had been called upon to facilitate dispute resolution whether by serving in a capacity of full scale conciliators, or, in a larger number of cases, as a designator of impartial arbitrators, umpires or experts.[13] The most famous of these disputes arose about 5 years before initial efforts were made to create the ICSID process, and concerned the nationalization of the Suez Canal by Egypt in 1956.[14]

[12] The official *traveaux préparatoires* begin with a note by General Counsel to the Bank, Aaron Broches. A. Broches, Note transmitted to the Executive Directors, *Settlement of Disputes between Governments and Private Parties*, dated August 28, 1961, *in* HISTORY OF THE ICSID CONVENTION II-1 2 (1970). The first Working Paper with a draft of the Convention was circulated in 1962. *See* Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, June 5, 1962, Art. II(1), *in* HISTORY OF THE ICSID CONVENTION II-1 22 (1970).

[13] As one commentator explained, one of the ideas underlying the proposals for the creation of a centre to arbitrate and resolve investment disputes was to relieve the bank of "extra-curricular burdens it is from time to time asked to assume, and to transfer these burdens to an organ somewhat removed, although linked to the Bank." *See Note by the General Counsel transmitted to the Executive Directors*, dated January 19, 1962, *in* HISTORY OF THE ICSID CONVENTION II-1 7 (1970); *see also* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 456 (2002).

[14] In 1956, Egypt nationalized the Suez Canal in response to a withdrawal of an offer of financial assistance by Great Britain and the United States toward the building of the Aswan Dam. The shares in the Canal were owned by the British government and French shareholders. Egypt offered the shareholders the

During the drafting of the Convention, state consent to international arbitration with a foreign investor typically had been by means of a dispute resolution clause in a concession agreement or other contractual undertaking.[15] A core objective for such contractual dispute resolution clauses was, of course, to accommodate the foreign investor's desire for an alternative to local court proceedings, especially in the context of investments to develop strictly regulated infrastructure projects.[16] Nonetheless, it was not unusual for states, once a dispute actually arose, to invoke their sovereign status in defense to arbitral jurisdiction, arguing that it was unseemly and impermissible for a sovereign to be subject to the judgment of private individuals.[17] A core objective of the drafters of the ICSID Convention was to provide investors a forum in which contractual

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day's closing price for their shares in the Canal on the Paris stock exchange. France and Great Britain responded, as two Great Powers commonly had prior to World War II, with a military expeditionary force to secure the Canal. That turned out to be a political debacle, however, when diplomatic pressure from the United States and the United Nations forced the withdrawal of France and Great Britain from Suez. *See Egypt seizes Suez Canal*, BBC News Report, dated July 26, 1956; *Allied Forces Take Control of Suez*, BBC News Report, dated November 6, 1956; *Jubilation as Allied Forces leave Suez*, BBC News Report, dated December 23, 1956.

[15] *See, e.g.,*SÉBASTIEN MANCIAUX, INVESTISSEMENT ÉTRANGERS ET ARBITRAGE ENTRE ÉTATS RESSORTISSANTS D'AUTRES ÉTATS 122 (2004); A. Broches, *Note transmitted to the Executive Directors, Settlement of Disputes between Governments and Private Parties*, dated August 28, 1961, *in* HISTORY OF THE ICSID CONVENTION II-1 2 (1970).

[16] *See, e.g.,* A. Broches, *Note transmitted to the Executive Directors, Settlement of Disputes between Governments and Private Parties*, dated August 28, 1961, *in* HISTORY OF THE ICSID CONVENTION II-1 3 (1970).

[17] John T. Schmidt provides a list of cases in which states have effectively reneged on their arbitration consent in an investment dispute with an international investor between 1930 and 1963. He list the following cases: Anglo-Iranian Oil Co. Case, I.C.J. Pleadings 11, 40, 258, 267-68 (1952); British Petroleum Exploration Co. (Libya), Ltd. v. Government of the Libyian Arab Republic, Unpublished Private Arbitral Award (1973); Sapphire International Petroleums Ltd. v. National Iranian Oil Co., Private Arbitral Award (1963); Société Europée̍ne d'Etudes et d'Entreprise v. People's Federal Republic of Yugoslavia, Private Arbitral Award (1956); Lena Goldfields, Ltd. v. Government of the Soviet Union, Private Arbitral Award (1930). *See* John T. Schmidt, *Arbitration under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in* Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, 17 HARV. INT'L L. J. 90, n.1 (1976). *See also* A. Broches, *Note transmitted to the Executive Directors, Settlement of Disputes between Governments and Private Parties*, dated August 28, 1961, *in* HISTORY OF THE ICSID CONVENTION II-1 3 (1970). In national court proceedings, similar principles have become known as the "act of state doctrine." *See* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 439-454 (2002).

disagreements with states would be elevated to international legal status, with the hope being that states would thus be deprived of objections of this kind.[18]

Although contract-based disputes between investors and states were predominant at the time, the drafting process of the ICSID Convention shortly followed the entry into force of the bilateral treaty between Germany and Pakistan in 1959. This bilateral treaty is generally regarded as the first of its kind.[19] It marked a period of great interest in such innovative legal agreements to promote foreign investment.[20] The President of the World

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[18] *See, e.g.,* Draft Convention of June 5, 1962, Article II(1), *in* HISTORY OF THE ICSID CONVENTION II-1 22 (1970).

[19] *See* West Germany-Pakistan, Treaty for the Protection of Investment, Nov. 25, 1959, 457 U.N.T.S. 23.

[20] *See* Jeswald W. Salacose, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,* 24 INT'L L. 655, 657 (1990).

> "Germany, which had lost all of its foreign investments as a result of its defeat in World War II, took the lead in this new phase of bilateral treaty making. After concluding the first such agreement with Pakistan in 1959, Germany proceeded to negotiate similar treaties with countries throughout the developing world, and today it numerically remains the leader, having signed nearly seventy BITS. Switzerland, France, Italy, the United Kingdom, the Netherlands, and Belgium followed in a relatively short time."

As Thomas Wälde has pointed out in a recent article, Bilateral Investment Treaties at the time did not yet contain direct independent rights for investors to proceed to arbitration. *See* Thomas Wälde, *The "Umbrella" Clause in Investment Arbitration—A Comment on Original Intentions and Recent Cases*, 2 J. W. INV. & T. 183, 204 (2005). As Professor Wälde points out, these early treaties nonetheless attempted to find a way to "internationalize" the arbitration commitments states had incurred with private investors. *See id.* at 201-202. The *traveaux préparatoires* of the ICSID Convention discussed below further suggest that the drafters of the Convention, especially the German and Austrian delegates, already had direct arbitration consent borne from treaties in mind when discussing the early drafts of the Convention.

Once the ICSID Convention entered into force, states relatively quickly began introducing ICSID arbitration clauses in bilateral investment treaties. One such example is the BIT between France and Egypt, signed in 1975, that contained such an ICSID provision. *See* France-Egypt 1975 BIT, Art. 7:

> "Chacune des Parties contractantes accepte de soumettre au Centre international pour le règlement des différends relatifs aux investissement (C.I.R.D.I), les différends qui pourraient l'opposer à un resortissant ou à une société de l'autre Partie contractante."

> "Each of the Contracting Parties accepts to submit to ICSID those disputes that may oppose one of the Contracting Parties to a citizen or company of the other Contracting Party." (our translation)

Bank referred to voluntary submission by states to international arbitration both for "a specific dispute" and for a "group of disputes" in an early description of the effort toward creating a forum for the resolution of investor-state disputes.

The President's Note to the Executive Directors of the Bank stated as follows:

> "While, as stated, the international agreement establishing the Center would not of itself oblige members to submit to its jurisdiction, the agreement would provide, first, that once a State had voluntarily agreed to submit a specific dispute or group of disputes to the jurisdiction of the Center, this agreement would be a binding international obligation, and second, that once jurisdiction had thus been established, the private party might proceed against a State directly before the Center, that is to say, without getting its own government to sponsor its case."[21]

The inclusion of standing consent for a group of disputes as part of the ICSID structure reflected the broader foreign policy mission of the Centre. Such a mechanism would allow the Centre to act as an international law buffer between capital exporting states, such as France and Great Britain, and capital importing states, such as Egypt. The Bank's then-President, Eugene Black, served as a conciliator between these three states after France and Great Britain invaded, and later were diplomatically to withdraw from, Egypt over its nationalization of the Suez Canal. Mr. Black's *Note* discussing the means of consent to the jurisdiction of the Centre, in particular his vision of standing consent, appears to have been partly informed by this experience.

Six months after the President laid out this strategic vision for the Centre, the Bank's General Counsel, Aaron Broches, circulated a working paper for discussion.[22]

This provision was later modified in 1987 to strengthen homologation requirements under domestic law in order to be allowed access to ICSID. *See* France-Egypt 1987 BIT Modification.

[21] History of the ICSID Convention II-1 5 (1970).

[22] Hereinafter the "Working Paper."

This turned out to be a conceptual framework for the first draft of the ICSID Convention.[23] Notwithstanding the President's broader remarks, the Working Paper defined arbitration consent as any *undertaking* (not undertakings) in writing *between* the parties to a dispute. It stated as follows:

> "The provisions of this Article shall apply to any undertaking in writing to have recourse to conciliation or arbitration pursuant to the provisions of this Convention for the resolution of any existing or future dispute between a Contracting State and a national of another Contracting State."[24]

The delegate of Germany, then a leading proponent of BITs, noted that this language may not aptly reflect the potential use of such investment treaties as instruments of state consent.[25] These comments are reflected in language in the official "first preliminary draft"[26] of the Convention that is addressed to the jurisdiction of the Centre.[27]

The first preliminary draft, dated August 9, 1963, was circulated 14 months after Mr. Broches' Working Paper. The draft took account of the emerging regime of BITs by

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[23] The Working Paper itself was already written in the form of a Convention draft. Regardless of this format, it is not credited as the "official" first draft of the Convention. The draft officially credited as the first draft of the Convention was the document produced by the drafters in response to Mr. Broches efforts in this Working Paper.

[24] *See* Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, June 5, 1962, Art. II(1), *in* HISTORY OF THE ICSID CONVENTION II-1 22 (1970).

[25] *See, e.g.,* Remark of Mr. Donner of May 6, 1963, *in* HISTORY OF THE ICSID CONVENTION II-1 91 (1970)(discussing Germany's nascent BIT program).

[26] *See* First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article II(2), August 9, 1963, *in* HISTORY OF THE ICSID CONVENTION II-1 148 (1970). All following drafts discussed in this article are numbered by reference to the official preliminary draft rather than the Working Paper.

[27] *See, e.g.,* Remark of A. Broches, Memorandum of the meeting of the Committee of the Whole, May 28, 1963, *in* HISTORY OF THE ICSID CONVENTION II-1 93 (1970)("Mr. Donner's point regarding avoidance of interference with existing bilateral agreements on foreign investment would be met in the next draft").

making clear that the consent of a state to ICSID might be expressed not only in a contract between the investor and the host state but also by a writing such as a BIT to which the investor was not a party. It stated:

> "Section 2. The consent of any party to a dispute to the jurisdiction of the Center may be evidenced by
>
> "(i) a prior written undertaking of such party which provides that there shall be recourse, pursuant to the terms on this Convention, to conciliation or arbitration (hereinafter referred to as an undertaking);
>
> "(ii) submission of a dispute by such party to the Center; or
>
> "(iii) acceptance by such party of jurisdiction in respect of a dispute submitted to the Center by another party."[28]

Subpart (i) reflects the understanding that the consent of the state party to the jurisdiction of the Centre is separate and distinct from the consent of the investor party. The consent of the investor necessary to employ the jurisdiction of the Center once state consent has been given may be executed either by a written undertaking of the investor's own (pursuant to subpart (i)) or by the investor's submission of a dispute to the Centre (pursuant to subpart (ii)). This draft notably extended the logic of the separate and distinct consents by states, on the one hand, and investors, on the other, to ICSID jurisdiction; it allowed investors to give consent to arbitration prior to a state's declaration that it is willing to arbitrate disputes before ICSID. The draft does so in its subpart (iii). That subpart contemplates that the consent to the jurisdiction by the investor-party might be given by its initiation of arbitration in the absence of prior state

[28] *See* First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article II(2), August 9, 1963, *in* HISTORY OF THE ICSID CONVENTION II-1 148 (1970).

consent. It would be up to the state either to accept the jurisdiction of the Centre by participating in the arbitration so commenced by the investor – or not to do so. This extension of jurisdiction in subpart (iii) proved objectionable to delegates.

The negotiations that led up to the second draft of the Convention took another 11 months. State delegates worried with respect to subpart (iii), with apparent good reason, that a refusal to arbitrate a case that had been so commenced could itself be construed to put a state in an unfavorable light in the international investment community.[29] This concern led the drafters to change the consent provisions in the next draft of the Convention, dated September 11, 1964. The second draft eliminated subpart (iii) and retreated to a formulation, without any numbering for subparts, that more closely resembled Mr. Broches' Working Paper than that of the first draft. The provision addressing consent to ICSID jurisdiction was as follows:

> "(1) The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it.
>
> "(2) Consent to the submission of any dispute to the Center shall be in writing. It may be given either before or after the dispute has arisen. Consent by a political subdivision or agency of a Contracting State shall require approval by the State."[30]

[29] *See Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made with Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, July 9, 1964, *in* HISTORY OF THE ICSID CONVENTION II-1 567 (1970).

[30] *See* Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 26, September 11, 1964, *in* HISTORY OF THE ICSID CONVENTION II-1 622 (1970).

Within 2 months of the circulation of the second draft of the Convention, the Austrian delegation noted that the change obscured the fact that states could make general submissions to ICSID jurisdiction. This was the same concern that the German delegation had expressed with respect to Mr. Broches' Working Paper. The comment by the Austrian delegation was as follows:

> "Pursuant to Article 26, paragraph 2, the jurisdiction of the Center depends on the consent of both parties to the dispute, and in particular also the consent of the defending State (same as in the first draft). The new draft, however, no longer provides explicitly the possibility of general statements of submission, as contained in Article 2, paragraph 2 of the first draft. It is doubtful whether this new formulation is an improvement since it should be the goal of the Convention to allow as general an application as possible."[31]

Even though the language of the Convention was not changed back to take account of the comments of the German and Austrian delegations, their concern that the language of the Convention could be read in an overly restrictive manner in the emerging era of standing state consent to arbitration was reflected in commentaries to the Convention. For example, the relevant comment to the October 15, 1963 draft of the Convention clarifies that the jurisdiction of the Centre should be conceived of as broadly as possible: "The term jurisdiction is used in Section 1 and in the title of Article II in its broadest sense to denote the scope of the facilities made available by the Center."[32] In January of 1965, Mr. Broches further clarified that the language of the Convention should

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[31] Letter addressed to the Bank from the Federal Ministry of Finance of the Republic of Austria dated November 13, 1963, *in* HISTORY OF THE ICSID CONVENTION II-2 670 (1970). Article 26 referred to in the text is the precursor to the current Article 25 of the ICSID Convention.

[32] Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, October 15, 1963, Art. II, *Comment* 1, *in* HISTORY OF THE ICSID CONVENTION II-1 203 (1970).

not be interpreted to require that consent must be construed as arising exclusively out of one consent document:

> "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."[33]

C) The History of the Provisions Addressed to Denunciation of the Convention

This interplay between the consent and denunciation provisions of the Convention is at the heart of the academic debates about the effect of a state's withdrawal from ICSID and an investor's rights under contracts, investment treaties and investment laws referring to ICSID arbitration. By operation of Article 71, once a state has given notice of its denunciation of the ICSID Convention and that denunciation has become effective, the state ceases to be a party to the ICSID Convention. The state no longer has the rights and obligations of a contracting party and ceases to be bound by new obligations. The crucial question, therefore, becomes the denouncing state's rights and, more importantly, obligations, at the time of the denunciation and their possible legal implications, specifically in the context of a state's consent to ICSID arbitration. These are matters to which Article 72 of the ICSID Convention is addressed.

The drafters discussed the implications of state denunciation for consent at a relatively late point in 1965, only 16 days before the Convention was opened for

[33] *Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention*, January 19, 1965, *in* HISTORY OF THE ICSID CONVENTION II-2 956 (1970).

It should be noted with respect to the last comment, that the law in question formulates its ICSID provision as an offer to investors and thus mirrors the contract model in which the language of the Convention at that point had become entrenched. The language does not suggest that *all* laws by necessity operated as offers (thus the use of "might"), but that it implicitly anticipated most laws to operate in such a way. The language is compatible with laws (or treaties) that do not provide offers, at all, but provide unconditional state consent.

signature, and then only briefly. The discussion began with a hypothetical concerning a binding arbitration agreement between an investor and a state; such an agreement, the drafters agreed, would survive the denunciation of the Convention and continue to compel the signatory state to arbitrate before ICSID even decades after it had communicated its intention to denounce the Convention:

> "Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose- would that dispute still be under the jurisdiction of the Centre?
>
> "Mr. Broches replied that if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre."[34]

Next, the drafters discussed a scenario in which an arbitration agreement between a denouncing state and an investor was terminable at the state's discretion. In this far from usual situation, Mr. Broches explained that the underlying consent document would operate only until terminated:

> "Mr. Mejia-Palacio stated that in certain cases agreement had no definite duration but provided that they could be terminated by denunciation.

[34] *See* Mr. Broches' Remark of March 3, 1965*, in* HISTORY OF THE ICSID CONVENTION, VOL. II-2 1009-1010 (1968).

A similar principle was applied by a tribunal in the context of a notification by Jamaica that investments arising out of minerals or natural resources would not be subject to ICSID jurisdiction in *Kaiser Bauxite v. Jamaica*. The tribunal found "that the Government could not withdraw, and did not by its notification of May 8, 1974 validly withdraw its consent to arbitration given in the 1969 and 1972 Agreements. In addition to the reasons already given, the Tribunal considers that any other interpretation would very largely, if not wholly, deprive the Convention of any practical value for Contracting States and investors and this cannot have been intended." Kaiser Bauxite v. Jamaica, ICSID Case No. ARB/74/3, Decision on Jurisdiction, July 6, 1975, at ¶24, 1 ICSID REP. 296, 304. For a fuller discussion of the case in its historical context, *see* John T. Schmidt, *Arbitration under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in* Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, 17 HARV. INT'L L. J. 90 (1976).

> "Mr. Broches remarked that in the case of an arbitration clause which could be terminated by one of the parties, the jurisdiction of the Centre would come to an end on termination of the clause."[35]

Finally, the drafters discussed a scenario in which an investment law of a denouncing state was the basis for the Centre's jurisdiction; in this situation, Mr. Broches explained that the unilateral declaration by the state may be withdrawn by the state's denunciation of the Convention prior to the acceptance by an investor:

> "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 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?
>
> "Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which 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 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."[36]

Mr. Gutierrez Cano's question may have been imprecise, in as much as it would not be the Convention that would compel the state to arbitration, but the underlying

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[35] HISTORY OF THE ICSID CONVENTION, VOL. II-2 1010 (1968).

[36] HISTORY OF THE ICSID CONVENTION, VOL. II-2 1009-1010 (1968).

instrument of consent. His question therefore really concerned whether a denunciation of the Convention would be a valid jurisdictional defense to later invocations of this underlying instrument of state consent to ICSID jurisdiction.

Mr. Broches appears to incorporate into the premise of his response to Mr. Gutierez Cano's question the – rather odd – assumption that had been a part of the discussion of contract-based consent to ICSID jurisdiction that immediately preceded it. That is, that – as with the arbitration clause that had been hypothesized – the state in question could terminate unilaterally and at will its consent to arbitrate embodied in the investment laws or BIT.[37]

Mr. Broches' comment in response to this question about state consent to arbitration in the BIT context has been treated, without reference to the context in which it was given, as consistent with a view that states retain for themselves under BITs the right freely to revoke or withdraw their "offer" to arbitrate prior to "perfection" of the agreement to do so by the investor's own consent or acceptance.[38] It is a submission of this article, however, that the context of Mr. Broches' remark makes it unclear whether he intended to address only hypothetical investment laws (and BITs) that, like the odd contractual arbitration clause, were structured to be revocable at any time at the discretion of any one of the parties. A further submission of this article, developed below, is that, if Mr. Broches intended to speak generally about all statements of consent to ICSID jurisdiction in BITs and other non-contractual unilateral instruments, as he has been

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[37] Such an investment law provision or BIT arbitration clause could have taken the following form: "Ruritania offers international investors to resolve investment disputes between them under the auspices of the ICSID Convention. Such offer shall constitute 'consent in writing' on the part of Ruritania upon its acceptance by the investor."

[38] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285-6 (2001).

understood by some commentators to have done,[39] he failed to take account of the separate and distinct nature of state consent to arbitration. This is the concept that had been clarified in the drafting of the Convention that followed his Working Paper and to which the German and Austrian delegates had addressed themselves. It is also a concept that has been developed in the law respecting state treaty obligations in the years since the ICSID Convention was drafted.

II. The Offer-and-Acceptance Approach to Consent and Denunciation

The interplay between Arts. 25(1), 71 and 72 has received relatively little scholarly attention. This is understandable, of course, given that Bolivia only recently became the first state ever to withdraw from the ICSID Convention. The work that has been done both before and after Bolivia's withdrawal from the ICSID Convention appears to proceed on the basis of an analogy of ICSID consent to the private law of contract formation. State undertakings to arbitrate before ICSID are considered "offers" to arbitrate in the same sense that a private party might extend an offer to enter into a contract with another private party. The commencement of an arbitration by an investor is understood as being a typical way in which the state's "offer" may be "accepted."

A) The Basic Offer and Acceptance Approach

Christoph H. Schreuer explains in his leading commentary to the ICSID Convention that, as with any contract-based arbitration, the claimant (*i.e.*, the investor) and the respondent (*i.e.*, the host state) must have between them a written agreement to arbitrate for jurisdiction to be found to exist.[40] Professor Schreuer elaborates that the

[39] *See* Christoph Schreuer, The ICSID Convention: A Commentary 1285-6 (2001).

[40] *See* Christoph Schreuer, The ICSID Convention: A Commentary 1285 (2001); *Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions*, Investment Treaty News, May 9, 2007.

consent of both parties can be embodied in two distinct instruments.[41] One of these instruments functions as an "offer" to arbitrate, generally extended by states.[42] As Professor Schreuer observes, host states may extend such offers to arbitrate by means of national investment laws or international investment treaties.[43]

These offers to arbitrate operate in Professor Schreuer's view analogously to offers in contract law: they have to be "accepted" by a counterparty to bind the offeror.[44] Once the offer is accepted by the counterparty, consent is in Professor Schreuer's words "perfected," meaning that a contract is formed between them that constitutes the

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[41] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 192 (2001).

[42] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 218-219 (2001):

> "Just as in the case of legislative provisions for the settlement of disputes by ICSID, a provision on consent in a BIT can be no more than offer that must be accepted. … The irrevocability of consent provided for in the last sentence of 25(1) operates only after the consent has been perfected through its acceptance by the investor."

See also Christoph Schreuer, *Consent to Arbitration*, TDM at p. 7:

> "A provision on consent in a BIT is merely an offer by the respective States that requires acceptance by the other party. That offer may be accepted by a national of the other State party to the BIT."

See also CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1286 (2001):

> "Consent is only perfected after it has been accepted by both parties. Therefore, a *unilateral offer* of consent by the host State through legislation or a treaty before a notice under Arts. 70 or 71 would not suffice. The effect of continued validity of consent would only arise if the offer *was accepted in writing by the investor* before the notice of denunciation or exclusion." (emphasis added)

[43] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001); *Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions*, Investment Treaty News, May 9, 2007.

[44] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 206 (2001):

> "While a host State may express its consent to ICSID's jurisdiction through legislation, the investor must perform some reciprocal act to perfect consent. Even where consent is based on the host State's legislation, it can only come into existence *through an agreement between the parties*." (emphasis added).

agreement to ICSID jurisdiction.[45] Without such an acceptance by the investor, there cannot be, in Professor Schreuer's view, any satisfaction of the requirement of "consent in writing to submit to the Centre" expressed in Article 25(1) of the Convention. The conception leads to an important consequence. The "offer" to arbitrate is not itself "consent in writing to submit to the Centre." It is an *offer* to "consent in writing to submit to the Centre." Thus, prior to being accepted, the "offer" does not on its own bind the state to arbitrate before ICSID, as the offer could always be withdrawn.[46]

A denunciation of the ICSID Convention is a well-publicized statement that is inconsistent with any prior offers to consent to ICSID arbitration. The contract law analogy of offer-and-acceptance leads to another logical result: well-publicized representations satisfying the formal conditions of municipal and international law[47] that are inconsistent with the original offer prior to its acceptance by an investor will operate as a withdrawal of the offer with respect to any such investor who had not previously accepted the offer. Professor Schreuer reportedly has recently affirmed his view, following Bolivia's denunciation of the Convention, that state denunciation of the Convention immediately negates an investor's ability to accept a prior offer of the state to submit to ICSID arbitration.[48] His offer-and-acceptance approach thus would make unavailable to many investors, following state denunciation of the ICSID Convention,

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45 *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001).

46 *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 253 (2001):

> "The investor may accept the offer of consent simply by instituting proceedings before the Centre but in doing so runs the risk that the offer may be withdrawn at any time before then."

47 In the case of a domestic investment law, the municipal requirements of a repeal of this law will have to be met. In terms of international treaty law, the conditions for denunciation of a BIT may further have to be met. If the consent is withdrawn by denunciation of the ICSID Convention, the only formal requirement, according to the offer-and-acceptance approach, is that imposed by the Convention: a formal writing denouncing the Convention with a year's notice.

both the 6-month notice period specified in Article 71[49] and the existing-consent exemption specified in Article 72.[50]

C) The Firm Offer Approach

Emmanuel Gaillard in a recent article addressed the interplay between state consent to ICSID and a possible subsequent denunciation of the ICSID Convention. With respect to Article 72, Professor Gaillard draws a distinction between a state's "unqualified consent" and an "agreement to consent" to ICSID jurisdiction in bilateral

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48 *See Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions*, Investment Treaty News, May 9, 2007 (quoting Professor Schreuer). *See generally* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001).

49 *See* ICSID Convention, Art. 71 ("The denunciation shall take effect six months after receipt of such notice."); *see also* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001)("The provision in Art. 71 that the denunciation of the Convention by a State will take effect only six months after notice has been given, does not afford an opportunity to perfect consent before the expiry of this time limit.").

Another proponent of an offer-and-acceptance approach, Sébastien Manciaux, in a recent article on Bolivia's withdrawal from the ICSID Convention has argued that an investor may accept the state's offer of arbitration through to the end of the six month time limit specified in Article 71 of the ICSID Convention. *See* Sébastien Manciaux, *Informations: La Bolivie se retire du CIRDI*, pp. 4-5 *available on* Transnational Dispute Management:

> "Dans l'hypothèse où un investisseur préfèrerait un arbitrage Cirdi ou dans celle où le TBI qui le concerne ne proposerait quie l'arbitrage Cirdi (ce qui serait le case des deux TBI liabt la Bolivie au Chili d'une part, à la Corée du Sud d'autre part), il est encore temps—et jusqu'au 2 novembre prochain inclus—pour cet investisseur de donner son consentement en faveur de l'investisseur avant cette date constituera en effet ce (double) consentement en faveur de l'arbitrage Cirdi qui, une fois donné, ne peut être retiré unilatéralement d'après les termes memes de l'article 25 de la Convention de Washington."

50 *See* ICSID Convention, Art. 72 ("Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention 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"); *compare* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001):

> "In order to benefit from the continued validity under Art. 72, consent must have been given before the denunciation of the Convention or exclusion of territory. Consent is only perfected after it has been accepted by both parties. Therefore, a unilateral offer of consent by the host State through legislation or a treaty before a notice under Arts. 70 or 71 would not suffice."

investment treaties.[51] In his view, the underlying treaty language dictates whether a provision is an expression of "unqualified consent" or an "agreement to consent."[52] Professor Gaillard concludes that, if a clause in a bilateral investment treaty constitutes unqualified ICSID consent, an investor could rely on such consent to commence an arbitration against the state even after it has denounced the ICSID Convention.[53] If the language constitutes an agreement to consent to ICSID jurisdiction, however, he concludes that Article 72 is inapplicable, meaning that an investor could no longer rely on the treaty provision to gain access to ICSID after the state's denunciation of the Convention.[54]

Professor Gaillard appears to accept the offer-and-acceptance conception of ICSID jurisdiction, and it is on this basis that the distinction between "agreement to consent" and "unqualified consent" proceeds. For example, Professor Gaillard states as follows in summarizing the history of the Convention:

> "Such consent may traditionally be given in an arbitration clause contained in a contract or through a compromise once the dispute has arisen. It may also be given separately by the host state and the investor, the latter accepting, at the time the dispute has arisen, the prior and general consent to arbitration given by the former in a provision of its domestic legislation or in an investment protection treaty."[55]

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[51] *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, at p. 8.

[52] *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, at p. 8.

[53] *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, at p. 8.

[54] *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, at p. 8.

[55] *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L. J., 26 June 2007, at p. 7. Thomas Wälde has addressed the same issue in a similar fashion in Thomas Wälde, *Investment*

Indeed, what Professor Gaillard describes as "unqualified consent" — language in a treaty that unequivocally refers disputes to ICSID — seems to be equivalent in substance to the contract law concept of "firm offer." In the law of private contract formation, a "firm" offer is an offer that on its terms has become irrevocable. As a leading U.S. treatise on contracts explains, a firm offer "need only be in a signed writing which by its terms gives assurance that it will be held open. It is then irrevocable during the time stated or if no term is stated for a reasonable time."[56] Firm offers require the same type of commitment on the part of an offeror that Professor Gaillard's "unqualified consent" would require from a state: a writing that by its terms is irrevocable. Moreover, an offeror's actions inconsistent with a "firm" offer may, far from revoking the offer, make the offeror liable to the offeree for any damage suffered by the inconsistent actions. Similarly, Professor Gaillard's reasoning might, if extended, support the claim that a state, having given unqualified consent to arbitration, exposes itself to additional liability if an investor incurs greater arbitration expenses or suffers some other harm as a result of the state's attempted revocation of its unqualified consent. Thus, Professor Gaillard's conception of state consent in light of the state's denunciation of the Convention is consistent with an offer-and-acceptance approach to consent and allows for treaty language nevertheless to bind a state to arbitration before the Centre after the denunciation has become effect.[57]

Arbitration under the Energy Charter Treaty- From Dispute Settlement to Treaty Implementation, 12(4) ARB. INT'L 429, 450 n. 81 (1996).

[56] ALAN FARNSWORTH, THE LAW OF CONTRACTS 183 (1999)(punctuation omitted). This is the approach of the United States Uniform Commercial Code.

[57] A further approach has been developed to respond to problems of "inchoate" state consent. Thus far, two examples of such state consent have typically been discussed. The first concerns domestic

III. **The International Obligation Approach to State Consent**

Any "offer-and-acceptance"-based understanding of consent to ICSID jurisdiction carries with it the implication that a state does not consent in writing to the jurisdiction of the Centre and only becomes bound when its offer is accepted by an investor, thus resulting in a binding arbitration agreement. Professor Orrego was faced with this implication in the context of Article 25(2) of the ICSID Convention in his dissent in *Siag & Vecchi*.

The *Siag & Vecchi* arbitration on its face was brought by an Italian claimant, Mr. Waguih Siag, against Egypt, invoking ICSID jurisdiction by reference to the BIT between

legislation containing a broad commitment to arbitrate, which fails to specify the procedural regime governing arbitration. This scenario has been discussed by Thomas Wälde in his *Expert Opinion in the case before the U.S. Bankruptcy Court between Yukos and the Russian Federation*, February 7, 2005. Professor Wälde suggests that such provisions be treated as "*clauses blanches*," meaning that they should be construed as providing sufficient consent to arbitration needing of supplementation. *See id.* at section IV. Professor Wälde suggested that the Russian clause at issue be supplemented by the court to refer to *ad hoc* arbitration governed by the UNCITRAL Arbitration Rules. *See id.* at section IV(4).

This approach may be considered applicable in the case of a state's ICSID withdrawal. Existing consent would be deprived of the arbitral regime, thus making it "inchoate" consent analogous to a law that failed to specify the respective arbitral institution and seat of arbitration discussed above. The most likely practical outcome, if this position were applied, is that the underlying consent would allow for arbitration under the ICSID Additional Facility on the UNCITRAL Arbitration Rules. In a recent article Sébastien Manciaux has argued that the ICSID Additional Facility is not available as an alternate forum, as the Additional Facility requires its own independent arbitration consent from states. *See* Sébastien Manciaux, *Informations: La Bolivie se retire du CIRDI*, p. 4, n. 11 *available on* Transnational Dispute Management.

The second situation in which an "inchoate" consent has been found is in the case of an investment treaty, such as the ECT, that was signed but not ratified. The question there is one of provisional application. *See, e.g.,* Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision of Jurisdiction, dated July 6, 2007, at ¶¶ 205-248. Concepts of provisional application may be analogized to situations of a denunciation of the ICSID Convention by a state that has given consent to ICSID arbitration in its Bilateral Investment Treaties and Investment Laws.

We understand that both approaches are currently being developed by other authors. We thus look toward their treatments of these topics and in the hope that we may respond to them in the final version of this Article.

Italy and Egypt.[58] As Professor Orrego explained, this situation was complicated as follows:

> "[The Claimant] Waguih is presently an Italian national who shows little or no connection with Italy, who further alleges now not to be Egyptian because he is Lebanese, but who claimed at all relevant times to be Egyptian, and whose links with Lebanon are not quite evident either."[59]

This situation put the nationality of Mr. Siag, and his entitlement to claim under the Italian BIT, plainly at issue in the case. In fact, as Professor Orrego points out, his claim under a BIT is downright counter-intuitive, as his original investment "benefited from Egyptian legislation granting exclusive rights to Egyptian citizens."[60]

Mr. Siag met the national requirements of the Convention on account of the so-called negative nationality test: in order to qualify as a national of another ICSID Contracting State, Mr. Siag had to show that he was an Italian and not an Egyptian national (a) when the parties consented to the jurisdiction of the Centre, and (b) when the request was registered.[61] As Institutional Rule clarifies, "consent" here is defined as the *later* date of state or investor consent to the jurisdiction of the Centre.[62]

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[58] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, ¶ 1, available at www.investmentclaims.com.

[59] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 62], available at www.investmentclaims.com.

[60] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 63], available at www.investmentclaims.com.

[61] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com.

[62] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com.

In practice, as Mr. Siag had not previously indicated whether he would consent to ICSID jurisdiction, this test required him to show that he was not a national of Egypt on the date on which he registered his request for arbitration with the Centre in 2005. He did not have to prove however that he was not an Egyptian national in 1989 when the original investment was made and when the BIT between Italy and Egypt entered into force.[63] As by his own allegations, Mr. Siag lost his Egyptian nationality only in 1990,[64] he would not have been able to meet such a jurisdictional burden. Professor Orrego concludes that this was a misinterpretation of the Convention in the context of state consent expressed in a bilateral investment treaty.[65]

As Professor Orrego explains, the Convention was drafted against the historical backdrop of contractual consent to arbitration.[66] Thus, both the Convention itself and the Institutional Rules were drafted with a contractual type of consent in mind.[67]

Professor Orrego is careful to point out that this bias is linguistic only. It does not change or affect the nature of international obligations incurred by states in their ICSID

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[63] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, ¶¶ 1, 17, available at www.investmentclaims.com.

[64] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007,¶ 29, available at www.investmentclaims.com.

[65] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com.

[66] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com:

> "The Convention was quite evidently envisaging the most common situation foreseeable that is an agreement in which both parties express simultaneously their consent to arbitration. Bilateral Investment Treaties were not yet common at all."

[67] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com.

consent. Thus, he explains that a state's consent to ICSID is more than an "offer" as the term has come to be understood. It is an obligation:

> "Yet, the date in which the State expresses its consent in the treaty is not just an offer. It is much more than that and it has special legal effects, including obligations of the host state under the treaty and the prohibition to exercise diplomatic protection by the other Contracting Party. The date of expression of consent for the State is that of the entry into force of the treaty or some other instrument which embodies that consent. When this consent is later matched by the consent of the foreign investor, the required conditions for submitting the dispute to arbitration are met, but the respective expressions of consent do not appear to change their dates."[68]

On the basis of this analysis, Professor Orrego concluded that the state's BIT commitment constituted its consent to the jurisdiction of the Centre and therefore should be considered a relevant date to establish a claimant's nationality.

Professor Orrego's analysis is compelling. It is also consistent with the observation of the Austrian delegation that the Convention language no longer expressly addresses situations of standing consent as it did in a previous draft of the Convention.[69] If this lacuna is filled as Professor Orrego suggests, the result is consistent with the

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[68] *See* Waguih Elie Georg Siag & Clorinda Vecchi v. Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 15, 2007, Partial Dissent of Francisco Orrego Vicuña, [p. 64], available at www.investmentclaims.com.

The underlying treaty contained the following language concerning the exercise of diplomatic protection:

> "Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by, or to comply with, the award rendered by the Arbitral Tribunal."

Agreement for the Promotion and Protection of Investments between the Republic of Italy and the Arab Republic of Egypt, Art. 9(3).

This provision stands in the context of an option by the investor to resolve investment disputes either in the domestic courts of the host state or via arbitration. If the investor chooses to submit disputes to the domestic courts, he or she will have to exhaust local remedies before diplomatic protection will be available to the investor. *See, e.g., Case Concerning Elettronica Sicula S.p.A.* (U.S. v. Italy), 1989 I.C.J. 15, 42-44.

various remarks of the World Bank President and state delegates, as well as the official first draft of the Convention discussed above. The result is that a state prospectively a party to a future dispute, or group of disputes, could give binding consent in writing to their arbitration before ICSID independently of the investor.[70] If this analysis is correct, an alternative approach to the offer-and-acceptance conception of consent needs to be developed properly to understand the standing ICSID consent that states today, though not at the time the ICSID Convention was drafted, frequently express in their bilateral investment treaties and investment laws.

A) General Principles and Relevant ICJ Discussions

Sovereign action is fundamentally different from private action. Historically, the notion of sovereign power was premised on its exercise in keeping with the fundamental obligations of natural law.[71] Although this conception based on natural law has become of mainly historical relevance, sovereign action on the international plane even today is premised on the fundamental idea that sovereigns must act in keeping with substantive

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[69] *See* Letter addressed to the Bank from the Federal Ministry of Finance of the Republic of Austria dated November 13, 1963, *in* HISTORY OF THE ICSID CONVENTION II-2 670 (1970). *Compare* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 240-1 (1995):

> "BITs most often do not require any State-investor contract at all. … Doubtless there are persons still with us who cannot shake off a mindset crystallized in the 1970s that recoils when faced with the prospect that a State might have to account for its actions before an international tribunal. Such ideologues, if given the power to write BITs as they fancy, would doubtless have charted the road to arbitration through the eye of the thinnest needle. But that is not what happened. With most BITs, the investor is standing on a broad highway."

[70] *See* First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article II(2), August 9, 1963, *in* HISTORY OF THE ICSID CONVENTION II-1 148 (1970).

[71] *See, e.g.,* JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE 1.8 (1576); JEAN BODIN, JULIAN H. FRANKLIN ED., ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 45 (1992).

notions of good faith and non-contradiction.[72] In the words of the International Court of Justice:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[73]

In this sense, promises made by sovereigns are qualitatively different from those made by private individuals, as axiomatically *all* promises of the sovereign on the international stage are binding as a matter of international law.

This concept has been concretely expressed in the international law of unilateral declarations.[74] As already discussed, unilateral declarations are juridical acts imputable to the state acting within its sovereign capacity that sufficiently advertised the state's

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[72] *See* NGUYEN QUOC DINH, PATRICK DAILLIER, ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 352 (7th ed. 2002).

[73] Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. REP. 457, 473.

[74] For an article somewhat critical of the underlying source material used in this section to establish the law of unilateral declarations, *see* W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VANDERBILT J. TRANSNAT'L L. 729, 743-754 (2002). The position taken in this article, however, is not exclusive to the "French" understanding of international law. For example Ian Brownlie confirms that "a state may evidence a clear intention to accept obligations vis-à-vis certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from the states concerned." *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 613 (6th ed. 2003). With regard to the *Nuclear Test Case*, Ian Brownlie noted that "in any event the principle recognized in the *Nuclear Test* cases was applied by the International Court of Justice in the *Nicaragua* case (Merits) and also by a Chamber of the Court in the *Case Concerning the Frontier Dispute* (Burkina Faso v. Mali)." *See id.* at 614 (citations omitted).

This article tends to discuss the law of unilateral declarations, rather than the law of treaties, because the former may be regarded as a "reduction to first principles" of the latter. Thus, if the law of unilateral declaration mandates that a state keep its unilateral promise, a promise in a treaty would, on the basis of the same fundamental reasoning, arrive at the same conclusion.

willingness to be bound.[75] Unilateral declarations are binding whether or not there is a showing of reliance on the part of any other state by virtue only of the fact that they were made.[76] Moreover, unilateral declarations also cannot be easily withdrawn by states—even though a state in the final analysis is always free to revoke them so long as its method of revocation does not violate its obligations of good faith.[77] This binding nature is premised immediately on the need for legal stability in international law, which itself can be understood as an expression of the underlying duty of substantive good faith and non-contradiction owed by sovereigns.[78]

Unilateral declarations have been the subject of several decisions of the International Court of Justice. In the *Nuclear Test Case* quoted above, New Zealand claimed that France had incurred an international obligation by means of a unilateral declaration that it would cease atmospheric tests of nuclear weapons in the South Pacific. The unilateral declaration on which New Zealand relied was contained in diplomatic notes:

> "In view of the foregoing, the Court finds that the communiqué issued on 8 June 1974(paragraph 35 above), the French Embassy's Note of 10 June 1974 (paragraph 36 above) and the President's letter of I July 1974 (paragraph 38) conveyed to New Zealand the announcement that

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[75] *See* Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, Droit International Public 360 (7th ed. 2002):

> "Pour qu'il en soit ainsi, il faut, comme pour tout autre acte juridique, que soient demontrées l'imputabilité de l'acte á l'État, agissant dans les limites de sa capacité, et une publicité suffisante de la volonté de l'État."

[76] *See* Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, Droit International Public 360 (7th ed. 2002).

[77] *See* Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, Droit International Public 365 (7th ed. 2002).

[78] *See* Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Rep. 457, 473.

> France, following the conclusion of the 1974 series of tests, would cease the conduct of atmospheric nuclear tests. Special attention is drawn to the hope expressed in the Note of 10 June 1974 'that the New Zealand Government will find this information of some interest and will wish to take it into consideration,' and the reference in that Note and in the letter of 1 July 1974 to 'a new element' whose importance is urged upon the New Zealand Government. "The Court must consider in particular the President's statement of 25 July 1974 (paragraph 40 above) followed by the Defence Minister's statement of 11 October 1974 (paragraph 43). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression 'in the normal course of events [normalement].'"[79]

The International Court next explained that, because the underlying statements were made by the French President, they "are in international relations acts of the French State."[80] The Court continued:

> "The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed."[81]

After having established that France had indeed incurred an international obligation, the Court next looked to the fact that no breach of the obligation had occurred.[82] As no breach

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[79] *See* Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Rep. 457, 472.

[80] Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Rep. 457, 474.

[81] Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Rep. 457, 475.

[82] *See* Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Rep. 457, 475.

had as of yet occurred, the Court refused to issue a final judgment, but invited New Zealand to re-open the case if nuclear testing resumed.[83]

The *Nuclear Test Case* is a good example of the differences between private and public relationships. From the point of view of private law, France at most made an offer to contract regarding future nuclear tests. Such an offer ordinarily could be revoked if no contract were formed. As the Court set out, these concerns of private law are of only limited application to sovereigns. Sovereigns are bound by their declarations due to their fundamental obligations of "substantive" good faith. Good faith is revealed in the ICJ's decision in the *Nuclear Test Case* as a substantive principle of public international law, imposing fundamental obligations on sovereigns, rather than merely as an interpretive principle for understanding treaty obligations.

It follows, if undertakings to arbitrate investment disputes with private investors in bilateral investment treaties and national investment laws are understood as independent international obligations, that a state's consent to ICSID arbitration operates as more than an offer to arbitrate. An implication is that denunciation by a state should not necessarily be viewed as immediately putting an end to the investor's ability to invoke ICSID jurisdiction for an arbitration against that state.

B) Understanding Investor Expectations

Understanding state consent to ICSID arbitration as an independent international obligation also may lead to fuller protections of the reasonable investment-backed

[83] *See* Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. REP. 457, 475. This Solomonic decision was in part motivated by France's denunciation of its consent to ICJ jurisdiction, which formed the basis for jurisdiction in the *Nuclear Tests Case*. The Court thus allowed New Zealand to thwart any jurisdictional defense on the part of France that it no longer consents to ICJ jurisdiction. This denunciation refers to declarations of compulsory jurisdiction lodged with the Court in accordance with Art. 36(2) of the Statute of the International Court of Justice. Art. 36(3) of this Statute expressly allows states to limit their declarations in time. This has been interpreted to allow for very short notice periods for such a denunciation to take effect. *See* NGUYEN QUOC DINH, PATRICK DAILLIER, ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 899 (7th ed. 2002).

expectations of investors. Investors look to a potential state's legal infrastructure to protect them against regulatory risks and the risk of wrongful interference with their investment by the host state. Historically, investors used stabilization agreements in order to protect their investments against a change in the relevant host-state regulations on point. More recently, investors have relied on generally applicable treaties and investment laws.[84]

Although investors may view certain state pronouncements as "offers" in a commercial sense, the broader protections afforded them in investment treaties and laws are different. They set the framework within which investors negotiate with respect to, access financing for, make and maintain their investments. These are all actions that typically do not merely preceed the occurrence of a dispute but also reflect an expectation that the most likely results will be favorable. Indeed, investment would not be made if the expectation of the investor were otherwise. But this does not change the fact that the possibility that the future availability of neutral international dispute resolution mechanisms should events unfold differently is a condition in which the investment is made. A state's consent to arbitration thus might be better understood as a condition of international investments made and maintained after the consent has been given.

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[84] *See, e.g.,* Jan Paullson, *Arbitration Without Privity*, 10 ICSID REV. 232, 255 (1995):

> "This proliferation [of treaties] coincides with a fundamental convergence of views as to the need for legal security. As Antonio Parra writes in a recent essay: 'The new investment laws, bilateral treaties and multilateral instruments reflect a remarkable consensus on questions that not long ago were controversial.' One of the manifestations of this development is nothing less than a new dimension for international arbitration, requiring a new understanding of the process." (quoting Antonio Parra, *The Scope of New Investment Laws and International Instruments*, *in* ROBERT PRITCHARD ED., ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 27 n.1 (1996)).

From an international legal perspective, it would be in violation of a state's fundamental duty of good faith to allow it, by denunciation of the ICSID Convention, to render a practical nullity, or to change the extent or character of, engagements making available neutral international dispute resolution of investment disputes after other states' nationals had made or maintained investments on the basis of such engagements.[85] Viewing state consent to ICSID arbitration as an "offer" to arbitrate that is capable of being accepted by an investor only after a particular dispute has arisen, fails to appreciate the significance to investors of the *potential* availability of ICSID arbitration. [86]

C) The Relevant ICSID Awards

ICSID tribunals have, in contexts distinct from denunciation of the Convention, understood state consent to ICSID as an international obligation operating independently of any action by an investor. For example, in *CSOB*, the Tribunal noted "since Claimant by its Request for Arbitration, dated April 18, 1997, submitted the instant dispute to ICSID, Claimant would be deemed *to have accepted* ICSID jurisdiction on that date, *Respondent having already unequivocally consented to it*."[87] Again, although it is

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[85] The ICJ although addressing France's nuclear test program in the Pacific, made the observation apt in the current context as well, that "a state having made a unilateral declaration should be viewed as 'bound to assume' that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of security of international intercourse, and the confidence and trust which are so essential in relations among States."

[86] The contract law doctrine of promissory estoppel addresses similar concerns. It operates as a restraint upon the ability of a private actor to withdraw an offer without liability if the offer has occasioned reasonable detrimental reliance prior to formation of a binding agreement. *See* ALAN FARNSWORTH, THE LAW OF CONTRACTS 91-101 (1999); *cf.,* Ceskoslvenska Obchodni Banka v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ¶47 ("An essential element of estoppel is that there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement"). The view of offer and acceptance in the investment treaty context that appears to permit denunciation to be effective at any time prior to acceptance of an offer to arbitrate in connection with a particular dispute— *see, e.g.,* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1285 (2001)—does not protect comparable concerns from these addressed as a matter of international law.

tempting to attach legal significance to the "acceptance" language, the act of acceptance does not modify state consent. The act of acceptance modifies only investor consent.

This is confirmed when the *CSOB* tribunal notes that "under some laws the offer is deemed accepted as soon as the foreign investor files an investment application pursuant to such a law, *regardless of whether the application includes a reference to the arbitration provision* contained in the law."[88] The *CSOB* tribunal here points out that state consent itself may be on its face conditional; it is careful to explain, however, that, even where it is conditional, the contingent nature of consent does not mean that the investor of necessity will have to accept ICSID jurisdiction for the state's offer to arbitrate to mature into a consent in writing to arbitrate. To the contrary, it states that, with respect to most investment laws at least, consent in writing binds the state with regard to an investment regardless of the investor's consent or even reference to ICSID arbitration.[89] Both *CSOB* and Professor Orrego's *Siag* dissent discussed above indicate that there is support for an international obligation approach to consent in the broader ICSID jurisprudence with regard to consent under Article 25(1). There is also support for it in the ICSID Convention itself.

The first and most straightforward observation under the international obligation approach is that at the very least, ICSID state consent expressed in a treaty or in an investment law remains undisturbed by the notice of denunciation and for the duration of

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[87] *See* Ceskoslovenska Obchodni Banka AS v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ¶ 38 (emphasis added).

[88] *See* Ceskoslovenska Obchodni Banka AS v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ¶ 44 (emphasis added).

[89] *See* Ceskoslovenska Obchodni Banka AS v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ¶ 44.

the 6-month notice period set out in Article 71. This interpretation also is consistent with the drafting history of the Convention.

The early drafts of the Convention shed light on the concerns that gave rise to the period of 6 months specified in Article 71. The period was originally meant to address situations in which a state had objected to a modification of the Convention, which nevertheless had been passed by the Contracting States to the Convention.[90] In those circumstances, a state was to be given a chance to escape unwanted changes in the Convention by making the period for denunciation of the Convention equal to the 6 month period for modifications to become effective.[91] The logic was that any obligation incurred by the state in this pendency period would still be governed by the old, unmodified Convention, even if this obligation had consequences under the Convention beyond the notice period.[92] Concretely, if a state would be subject to suit *after* both its denunciation and the modification, this obligation would be considered to have been

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[90] *See, e.g.,* Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, October 15, 1963, Article IX, *Comment*, *in* HISTORY OF THE ICSID CONVENTION II-1 229 (1970).

> "No provision is made regarding States which oppose the amendment after its adoption. It would, however, always be open to a State to declare its withdrawal from the Convention under Section 5 of Article XI. The period specified for effectiveness of the denunciation could be made to conform to the period required for the effectiveness of the amendment adopted, thus permitting a State which wished to denounce the treaty to do so immediately following adoption of the amendment and thereby avoid becoming subject to the Convention as amended. The proviso in Section 2 ensures that amendments will not have retroactive effect." *Id.*

[91] *See* Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, October 15, 1963, Article IX, *Comment*, *in* HISTORY OF THE ICSID CONVENTION II-1 229 (1970). Given the requirement under Article 66(1) that agreement must be ratified by all contracting states, the concern about amendments that was at the core of the drafter's discussion of denunciation has been described by a leading commentator as otiose. *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1283-4 (2001).

[92] *See* Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, October 15, 1963, Article IX, *Comment*, *in* HISTORY OF THE ICSID CONVENTION II-1 229 (1970).

incurred before the denunciation had become effective and would thus be governed by the Convention as it stood before its modification.[93]

The offer-and-acceptance approach avoids this consequence solely on account of the fact that the denunciation is considered inconsistent with an offer to arbitrate and thus denies the investors the capacity to accept it. State consent, if one understands it as an independent international obligation, is already fully effective as a matter of the international law of treaties or unilateral declarations. Thus, the investor does not need to "accept" an "offer," relieving him of the worry about the continued willingness to arbitrate before ICSID by the state on its instrument of ICSID consent. During this 6 month period, investors remain free to consent prospectively to ICSID arbitration. Once an investor has so consented, the later effectiveness of denunciation of the Convention by the host state will, by operation of Article 25(1), be ineffective with regard to that investor.[94]

A more interesting question concerns the application of Article 72 if state consent is understood as an independent international obligation. Article 72 renders denunciation ineffective where the state has already given consent to arbitrate. If understood as independent international obligations, both treaties and investment laws embody such

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[93] It should be noted that there are strong arguments to suggest that the nationals of a denouncing state do not have the benefit of continuing ICSID protection after the denunciation has taken effect. From that point onward, the denouncing state has effectively released its rights under the Convention and can only be called to account for its residual prior obligations. In the case of Venezuela, this principle has interesting possible implications. Venezuela is a capital exporting country throughout the Americas. It has entered into bilateral investment treaties with Argentina, Bolivia, Brasil, Chile, Ecuador, Paraguay, Peru, and Uruguay (though not the United States). These treaties contain ICSID arbitration provisions. Depending on how these treaties are interpreted, it is possible that investors from these countries in Venezuela could benefit from ICSID arbitration, due to Venezuela's residual obligation to arbitrate before ICSID arising out of these treaties. The inverse, however, would not necessarily be true, meaning that Venezuelan investors in these countries may lose their right to arbitrate in ICSID their investment disputes with the respective state. This apparent asymmetry means that states cannot use denunciation while still enjoying the benefits of the earlier, unmodified version of the Convention.

[94] *See* ICSID Convention, Art. 25(1)("When the parties have given their consent, no party may withdraw its consent unilaterally.")

consent. When such a treaty or law is in place, the result may be that protected investors will be unaffected by the denunciation of the Convention not just for 6 months, but for the life of the treaty or law. This is a point of potentially great importance in light of the comparatively long "tail periods" that are typically applicable when a state withdraws from a bilateral investment treaty.[95]

This approach may be challenged by reference to the conversation between Messrs. Gutierrez Cano and Broches discussed above. In their conversation, Mr. Broches suggested that general declarations of states to consent to jurisdiction of the kind referred to by Mr. Gutierrez Cano would be withdrawn by operation of a denunciation of the ICSID Convention.[96] As previously discussed, it appears from context that Mr. Broches may have understood Mr. Gutierrez Cano to be referring to legislation offering ICSID arbitration, not legislation consenting to ICSID arbitration.

If Mr. Broches' statement made a broader claim concerning standing state consent in general, the international obligation approach disagrees with the premise on which it is implicitly based: one would then have to construe his statement to limit the ability of states only to make prospective standing "offers" to arbitrate investment disputes before ICSID, even if the language of the underlying instrument of consent manifestly indicates that the state wished to incur a broader obligation to consent. The law of treaties and the

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[95] *See, e.g.,* Venezuela-Netherlands, Bilateral Investment Treaty, Art. 14(2)(providing that the treaty is valid for 10 year periods at a time unless denounced at least six months before the expiry of the validity period); Venezuela-France, Bilateral Investment Treaty, Art. 12 (providing that the treaty cannot be denounced for 15 years after entry into force, *i.e.*, 2019, and thereafter only with a 1 year notice); Venezuela-Sweden, Bilateral Investment Treaty, Art. 10 (providing that the treaty cannot be denounced for fifteen years after its entry into force and thereafter only with a 1 year notice, provided that the treaty remains in force for a further 15 after denunciation for investments in place prior to denunciation).

[96] *See* discussion at Section I above; *see also* HISTORY OF THE ICSID CONVENTION, VOL. II-2 1009-1010 (1968).

law of unilateral declarations have developed since Mr. Broches' remarks in such a way that this broader statement is no longer plausible.

As a matter of construction, language in a treaty that unequivocally expresses an obligation of the signatory state in question could not in good faith be interpreted to constitute an "offer" only. Further, the widespread use of ICSID arbitration provisions in investment laws and BITs meant that ICSID has become a far more common forum than anticipated at the time the comment was made. To the extent that the comment reflected a certain hesitancy that the ICSID mechanism was so unusual and novel as to require as a matter of overall fairness that states be allowed to withdraw their consent immediately once they understood its practical application, it is squarely outdated in light of the growing and well publicized case law the Centre has developed.

This is not to say that investment laws that qualify as unilateral declarations will remain binding instruments of state consent in perpetuity. Such a result would accord a more permanent status to such declarations than even most treaty obligations. The fact that unilateral declarations expressed in investment laws can be withdrawn does not, however, indicate how they can be withdrawn. This analysis is by its nature fact specific and will have to take into account what the "good faith" obligation of the particular state towards the relevant portion of the international community. This analysis may be influenced by other substantive provisions in the law, such as most favored nation clauses, which may, or may not, import the longest tail period of that country's investment treaties into the investment law. Such analysis is beyond the scope of this article.

An understanding of state consent to ICSID arbitration as an independent international obligation leads to the further conclusion about those instruments that

identify ICSID as only one of several possible arbitral fora.[97] Such provisions would create an obligation of the state to give effect to the later election of the investor to pursue a claim at ICSID. They are thus not optional provisions in the sense that the *state* has any discretion to resist them. For the state, they are mandatory as a matter of international law to the same extent as if no election had been offered. Only those provisions that would be construed to grant the host state discretion to give future consent to ICSID jurisdiction would not be permanently protected under Article 72.[98]

IV. Issues that May Arise Under Venezuela's BITs if it Denounces the ICSID Convention

A) Venezuela's Bilateral Investment Treaty Obligations

To illustrate some basic points, this article addresses two of Venezuela's approximately 25 bilateral investment treaties,[99] the France-Venezuela BIT and the Netherlands-Venezuela BIT. The former states in relevant part:

> "Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment où il a été soulevé par l'une ou l'autre des parties au différend, il est soumis à la demande du national ou de la société en question soit à la juridiction compétente de l'Etat dans lequel l'investissement a été réalisé soit à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements

[97] *See, e.g.,* Venezuela-Sweden, Bilateral Investment Treaty, Art. 7 (providing for UNCITRAL arbitration if ICSID is not available "for any reason"); Venezuela-Switzerland, Bilateral Investment Treaty, Art. 9(3)(providing for UNICTRAL arbitration, if the parties to the dispute so agree); Venezuela-Canada, Bilateral Investment Treaty, Art. XII(4)(providing for ICSID Additional Facility if ICSID is unavailable and UNCITRAL if both ICSID and the Additional Facilities are unavailable).

[98] Considering the nature of a withdrawal, it may be possible to argue that failure to elect ICSID in the Art. 71 notice period is an implicit waiver of the right to ICSID arbitration. This argument will be discussed in a later article.

[99] *See* UNCTAD Investment Treaty Database, Venezuela, available http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

> (CIRDI), créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signée à Washington le 18 mars 1965. Cette option relève du choix du national ou de la société intéressé. Une fois l'option effectuée en faveur de l'arbitrage, celle-ci devient définitive."[100]

The Netherlands-Venezuela BIT states in relevant part:

> "Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration Of conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.
>
> "As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph l of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules)."[101]

1) The Basic Offer and Acceptance Approach

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[100] *See* Venezuela-France, Bilateral Investment Treatment, Art. 7.

> "If such a dispute cannot be resolved in six months from the moment it has been raised by one party to the dispute to the other, the dispute shall be submitted at the investor's election either to the competent courts of the host state or to arbitration before the Centre for the Settlement of Investment Disputes between States and Nationals of other States (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, open for signature on 18 march 1965 in Washington, D.C. The option resides with the investor. Once an option to arbitrate has been exercised, it becomes definitive." (our functional translation).

[101] Venezuela-Netherlands, Bilateral Investment Treaty, Art. 9.

The basic offer-and-acceptance approach would interpret the undertaking on the part of Venezuela to arbitrate before ICSID in both the French and Dutch treaties as offers. As discussed previously, this means that a denunciation of the ICSID Convention could be regarded as negating an investor's ability to accept this offer. Therefore, an investor arguably could not "perfect" ICSID consent once denunciation of the Convention has been received by the Centre.

The offer-and-acceptance approach is further challenged when applied to the Dutch BIT's provision for arbitration pursuant to the ICSID Additional Facility. On its face, the provision only applies until Venezuela signed the Convention.[102] As Venezuela signed the Convention after the entry into force of the Dutch treaty, the "offer" may have lapsed. The offer arguably was contingent upon the non-occurrence of a subsequent event, *i.e.*, Venezuela's ratification of the ICSID Convention.[103]

2) The "Firm Offer" Approach

The "firm offer" is equally difficult to apply. On its face, the French treaty appears to extend to investors a "firm offer" to choose ICSID as a forum for disputes. It thus would be protected by Article 72 of the Convention, meaning that Venezuela's denunciation of the ICSID Convention would not affect the rights of French investors in

[102] Venezuela-Netherlands, Bilateral Investment Treaty, Art. 9:

> "As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph l of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). "

[103] Alternatively, the offer of participation in ICSID Additional Facilities arbitration might be understood in a more functional way. That is, there could be said to have been an indication that the parties wished to provide for arbitration under the Additional Facilities in case the ICSID mechanism was unavailable due to Venezuela's status as a non-signatory to the ICSID Convention. The provision, therefore, could apply whenever Venezuela is not a signatory to the Convention, arguably including the period after a denunciation of the Convention by Venezuela.

Venezuela to ICSID arbitration. Such an interpretation of the treaty can rely on the language that the investor has an "option" of ICSID arbitration for the life of the treaty.[104]

The language of the French treaty, however, arguably does not qualify as a "firm offer." ICSID is not a strictly "mandatory" forum for the investor— the treaty expressly gives the choice of Venezuelan court proceedings. In terms of Professor Gaillard's "agreement to consent" language, the final provision of the dispute resolution clause gives expression to this problem. It provides that "once an option to arbitrate has been exercised, it becomes definitive."[105] This could suggest that the treaty provides for such an "agreement to consent" rather than unqualified consent; Venezuela, pending the investor's election, might be argued to have failed to give its definite and irrevocable consent and merely have agreed to consent at a later time. If this reading of the treaty prevailed, French investors in Venezuela would benefit only from the 6-month notice period of Article 71.

The Dutch treaty may present similar difficulties. The provision referring to ICSID is clearly mandatory, if Venezuela is a signatory to the Convention.[106] Nevertheless, the article read in its entirety suggests that the Netherlands and Venezuela intended for there to be an alternative dispute resolution forum to ICSID, if Venezuela was not a signatory to the ICSID Convention. This arguably might be said to defeat the mandatory nature of the clause as a whole. Therefore, it is unclear whether the provision under the "firm offer" approach would qualify as a firm offer or not.

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[104] *See* Venezuela-France, Bilateral Investment Treatment, Art. 7.

[105] Venezuela-France, Bilateral Investment Treaty, Art. 7.

[106] Venezuela-Netherlands, Bilateral Investment Treaty, Art. 9 (quoted above).

This means that the treaty's status under Article 72 is in question. Nevertheless, it would appear that Dutch investors should also benefit from the 6-month notice period under Article 71.[107]

3) Consent to ICSID Arbitration as an Independent International Obligation

A conception of state consent to ICSID arbitration as an independent international obligation, like the firm offer approach, places emphasis on the language in the underlying treaties. The results could differ, however. The international obligation approach *prima facie* considers language such as the one found in the French treaty as imposing an international obligation on Venezuela to allow for ICSID arbitration. This difference results because the international obligation approach does not look to the

[107] As there is some confusion whether the firm offer approach would protect investors under Article 72, it may be prudent for these investors to accept the offer of arbitration before the 6 month period of Article 71 has run. Investors can do so by sending a letter to the ICSID Secretariat and the Venezuelan Government, accepting the jurisdiction of the Centre. In the *SPP* case, the claimant sent such a letter to the Egyptian government stating:

> "We hereby notify you that we accept and reserve the opportunity of availing ourselves of the uncontestable jurisdiction of the International Center for the Settlement of Investment Disputes, under the auspices of the World Bank, which is open to us as a result of Law No. 43 of 1974, Article 8 of which provides that investment disputes may be settled by ICSID arbitration."

In the Venezuelan context, the letter may have to express more clearly that the investor wishes to resolves disputes at ICSID exclusively to strengthen its argument that the letter constitutes its consent in writing to the Centre's jurisdiction. Such an approach is also advocated in a recent article following a simpler offer-and-acceptance approach. *See See* Sébastien Manciaux, *Informations: La Bolivie se retire du CIRDI*, p. 5, n. 11 *available on* Transnational Dispute Management:

> "On rappellera à ce sujet que le consentement à l'arbitrage Cirdi peut être donné par avance, et pas seulement par les Etats (même si en pratique ils sont les seuls à le faire), sans qu'il soit besoin de préciser la nature précise du différend en cause (par hypothèse par encore né). L'apparentement de ce double consentement donné par avance à la compétence du Cirdi avec une clause compromissoire classique est ici partent. Le consentement à l'arbitrage Cirdi doit en effet être distingué de la requête d'arbitrage et seule cette dernière doit indiquer la nature précise du différend qui s'est noué entre les parties. La Convention de Washington distingue clairement ces deux actes, même si l'on constate que dans la pratique du Cirdi il a été admis que le même instrumentum puisse à la fois contenir le consentement de l'investisseur à la compétence du Cirdi et sa requête aux fins d'arbitrage."

exclusivity of the remedy, but to the ICSID provision itself. Practically speaking, more treaties might be viewed as subject to the protection of Article 72 if state declarations in BITs and investment laws are viewed as international obligations that exist independent of investor acceptance.

Viewing state consent to ICSID arbitration as an independent international obligation, one would ask with respect to the Dutch treaty whether Venezuela's undertaking to arbitrate investment disputes before ICSID after its ratification of the ICSID Convention is made conditional by the later provision in the treaty concerning the use of the Additional Facilities. In other words, the concern would be whether Article 9 (2) of the Dutch treaty implicitly reserves a right for to derogate from its obligations under Article 9(1) by denouncing the ICSID Convention.

B) The Venezuelan Investment Law

The Venezuelan Investment Law provides substantive protections to foreign investors, as well as an investment dispute resolution clause. The dispute resolution clause, codified at Article 22 of the Law, states:

> "Any dispute arising between an international investor whose country of origin has in effect an agreement for promotion and protection of investments with Venezuela or any disputes to which the provisions of the Articles of Association of the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using the systems of litigation provided for in the Venezuelan laws in force, when applicable."[108]

[108] Venezuelan Investment Law, Art. 22 (official English translation)(hereinafter "Art. 22"). The Spanish original states as follows:

> "Las controversias que surjan entre un inversionista internacional, cuyo paìs de origen tenga vigente con Venezuela un tratado o accuerdo sobre

This clause has led to debate among practitioners.[109] Some maintain that the clause is little more than a reiteration of existing obligations; others argue that it constitutes binding ICSID consent, both as a matter of Venezuelan law and as a matter of international law.[110]

Andrés Mezgravis, a Venezuelan arbitration practitioner as well as professor of law at the Universidad Central de Venezuela and the Postgraduate School at the Universidad Católica Andrés Bello, outlines the domestic law argument favoring an interpretation of the Law as providing ICSID consent.[111] He sets out that laws are generally interpreted narrowly, if the language of the statute otherwise contradicts other norms expressed in the statute or its fundamental legislative purpose.[112] He continues that a broad interpretation is appropriate in the converse situation in which the language of the statute does not bear out the underlying legislative intent or does not do justice to the

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> promoción y protección de inversions, o las controversias respecto de las cuales sean applicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relatives a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respective tratado o acuerdo, si así éste lo establece, sin perjuicio de la possibilidad de hacer uso, cuando proceda, de las vias contenciosas contempladas en la legislación venezolana vigente."

[109] Evidence of the sophistication and passion of this discussion can be found on OGEMID and its posts reaching as far back as December 2006.

[110] The OGEMID discussions have led to very insightful article by Mr. Guillaume Lemenez de Kerdelleau recently published in Transnational Dispute Management, supporting a reading of the law as ICSID consent. *See* Guillaume Lemenez de Kerdelleau, *State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law*, TDM.

[111] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 389 (2005).

[112] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 389 (2005)(quoting NICOLAS COVIELLO, DOCTRINA GENERAL DE DERECHO CIVIL 87 (1949)).

fundamental purpose of the law.[113] Professor Mezgravis notes that in the case of Article 22, a narrow interpretation would neuter the ICSID specific language as being merely reiterative.[114] This, he argues, is inconsistent with the overall legislative purpose to protect foreign investment and thus, as a matter of Venezuelan law, may be regarded as sufficient reason to disfavor the narrow interpretation.[115]

Professor Mezgravis further argues that there are reasons based on the Venezuelan constitution for a narrow interpretation of the Investment Law to be disfavored.[116] As he explains, the Venezuelan Constitution in Article 258 establishes a general preference for the resolution of disputes by ADR methods.[117] In the case of Article 22, the consequence of a narrow reading is that investment disputes will be settled by the Venezuelan courts, not by the referenced arbitral body. As the Venezuelan Supreme Court noted in an early challenge of the Article 22 of the Investment Law, it has to be read in light of this constitutional preference for arbitration.[118] Thus, the narrow interpretation is to be rejected as a matter of Venezuelan constitutional law.

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[113] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 389 (2005)(quoting NICOLAS COVIELLO, DOCTRINA GENERAL DE DERECHO CIVIL 87 (1949)).

[114] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 390 (2005).

[115] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 390 (2005).

[116] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 390 (2005).

[117] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 390 (2005).

[118] *See* Andrés A. Mezgravis, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI, in* IRENE DE VALERA, ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL- REFLEXIONES TEÓRICAS Y EXPERIENCAS PRACTICAS 355, 391 (2005)(quoting the Venezuelan Supreme Court decision of February 14, 2001):

Commentators have argued in the alternative that Article 22 constitutes consent by Venezuela to ICSID arbitration as a matter of international law. Professor Brewer-Carías, for example, points to the *SPP* case.[119] The case presented the question of whether a national investment law constituted consent to international arbitration before ICSID. The Egyptian law at issue provided:

> "Investment Disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between States and Nationals of other countries to which Egypt has adhered by virtue of Law 90 of 1971, where such Convention applies."[120]

The Tribunal concluded that this language was sufficient to constitute Egypt's consent in writing to international arbitration.[121] Commentators addressing the Venezuelan Investment Law have relied on the similarity of the statutory language in the *SPP* award

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> "Asimismo, el actual Tribunal Supremo de Justicia, al resolver un recurso de nulidad interpuesto precisamente contra la Ley de Inversiones, tuvo opoetunidad de pronunciarse sobre el referido artículo 22 y señalo que este texto legal: '*promovió y desarrolló el mandato constitucional en referencia (art. 258), al establecer el arbitraje como parte integrante de los mecanismos de solución de controversias que surjan entre un inversionista nacional, cuyo pais de origen tenge vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o de las controversias respectas de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relatives a Inversiones entre Estados y Nacionales de Otros Estados (CIADI).*'"

[119] *See* Allan Brewer-Carías, *Agunos Comentarios a la Ley de Promoción y Protección de Inversiones: Contratos Públicos y Jurisdicción* , *in* Irene de Valera, Arbitraje Comercial Interno e Internacional- Reflexiones Teóricas y Experiencas Practicas 281, 287 (2005).

[120] *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction, April 14, 1988, at ¶ 71, 3 ICSID Rep. 131, 145 (quoting Art. 8 of Egyptian Law. No. 43).

[121] *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction, April 14, 1988, at ¶ 121, 3 ICSID Rep. 131, 163.

and the Venezuelan Investment Law to support the conclusion that Article 22 also should be read as a unilateral declaration consenting to ICSID jurisdiction quite apart from the domestic interpretation of the act.[122]

1) The Offer-and-Acceptance Approach

Assuming for argument's sake that the Venezuelan Investment Law is an instrument of consent to ICSID jurisdiction on the part of Venezuela, it can be analyzed in light of the three approaches to consent and denunciation. The offer-and-acceptance approach would consider any consent to ICSID jurisdiction expressed in the Investment Law as an offer on the part of Venezuela to arbitrate before ICSID. As with offers found in treaties discussed above, the denunciation of the ICSID Convention by Venezuela could be argued to negate the ability of investors who had not previously accepted an offer to require Venezuela to submit even pre-denunciation disputes to ICSID arbitration.

2) The Firm Offer Approach

If the firm offer concept is applied, state consent is subject to the protection of Article 72 only if the consent is deemed mandatory. Again, the *SPP* case is helpful. In *SPP* the Tribunal established that language suggesting an imperative to arbitrate operate as consent pure and simple.[123] Importantly, the Tribunal concluded that the underlying verb need not be in the imperative verb form in the original language, so long as it conveyed an imperative at all.[124]

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[122] *See* Allan Brewer-Carías, *Agunos Comentarios a la Ley de Promoción y Protección de Inversiones: Contratos Públicos y Jurisdicción , in* Irene de Valera, Arbitraje Comercial Interno e Internacional- Reflexiones Teóricas y Experiencas Practicas 281, 287 (2005).

[123] *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction, April 14, 1988, at ¶¶ 74-81, 3 ICSID Rep. 131, 147-149.

[124] *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Second

Applying this guidance to the Venezuelan Investment Law, the underlying Spanish verb tense could be key to deciding whether the Law can be construed as mandatory ICSID consent. The Spanish predicate referring to ICSID arbitration is "serán." The Spanish original therefore uses the future tense. This tense in Spanish, although not the imperative of the verb to be ("sean"), indicates an obligation rather than an option. This character of the verb has been aptly captured in the English translation to "shall" (not "must"), although a translation of "will be submitted" may capture the original verb tense better. Under both the *SPP* and, consequently, the firm offer tests, this language would therefore suggest that the Venezuelan investment law operates as a firm offer and is protected by Article 72.[125]

3) The International Obligation Approach

> "The Tribunal accepts that *tatimmu* is not the most imperative verb form available in the Arabic language. (Nor, for that matter, is "shall be" the most imperative verb form in the English language, although it is nevertheless mandatory.) The first paragraph of Article 8, however, is only mandatory to the extent that any of the three methods of dispute settlement mentioned therein is applicable to a particular dispute. Thus if the parties to the dispute have not agreed on a method of dispute resolution, if there is no applicable bilateral treaty in force, and if the Washington Convention is not applicable, Article 8 does not mandate dispute settlement. In such circumstances, the dispute will remain unresolved for lack of an agreed-upon method of settlement unless the claimant elects to seek a remedy in the domestic courts. This conditional aspect of Article 8, which qualifies the mandatory nature thereof, fully explains the use of the verb *tatimmu* rather than a more imperative form in the first paragraph of Article 8."

[125] The Venezuelan Investment Law differs from the French-Venezuelan Bilateral Investment Law Treaty with regard to the exclusivity of ICSID in that the Law does not make litigation in the national courts a primary remedy—*i.e.*, it does not state "shall be submitted to arbitration or court proceedings— but leaves domestic courts open as a residual remedy for investors—*i.e.*, the provision does not prejudice domestic proceedings. This follows the facts in *SPP*. There, the sole remedy provided was arbitration; the tribunal implied the residual domestic court remedy if no other forum was available. *See* Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction, April 14, 1988, at ¶ 79, 3 ICSID Rep. 131, 148.

The Venezuelan Investment Law is an international obligation on the part of Venezuela to consent to ICSID jurisdiction. As discussed above, this obligation is mandatory rather than optional. Therefore, by operation of the international obligation approach, the Law falls under both Article 71 and 72, meaning that protected investors should be unaffected by a potential denunciation of the ICSID Convention by Venezuela.

In the context of the Venezuelan Investment Law, the application of both Article 71 and 72 could have slightly different effects. Under Article 72, existing consent is made immune from a denunciation of the Convention. Article 72 would thus protect the investor so long as the Investment Law was still in effect and consent to ICSID arbitration would only otherwise have been vitiated by Venezuela's denunciation from the Convention. If the Investment Law is renounced effectively as an international obligation, Article 72 may protect only those disputes that had arisen when the Investment Law was still in effect.[126]

Conclusion

The article has considered the interplay between the ICSID Convention's consent and denunciation provisions, on the one hand, and instruments of state consent, on the other. As this Article has shown, each of these approaches encounters its own set of

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[126] *See* Investment Law, Art. 22:

> "Any dispute arising between an international investor … shall be submitted." (official English translation)
>
> "Las controversias que surjan entre un inversionista internacional serán sometidas" (Spanish original)

The Spanish verb tense here is the present subjunctive. Although this verb tense implies the future (in the sense of "may arise" in English), the Law studiously avoids the future tense here. The future tense is later used with regard to submission to arbitration. Arguably, the language supports both a view that all future disputes arising out of an investment are covered, or that only present disputes are covered. Considering the ambiguity here, it may be possible for a Tribunal to hold that investors that had ample opportunity to reserve prospective jurisdiction under the Law but failed to do so would not be given the grammatical benefit of the doubt.

interpretive challenges. In light of Bolivia's recent denunciation of the ICSID Convention, these approaches may be scrutinized carefully by not only scholars and practitioners engaged in academic debate but also, perhaps, arbitral tribunals.

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