Limits Of Consent – Arbitration Without Privity And Beyond

Michael D. Nolan, Frédéric G. Sourgens

I. Introduction

It is a truism that the basis for any arbitral proceeding is consent. What constitutes consent, however, has led to significant debate. Nowhere has this debate been more pronounced than in arbitrations involving sovereigns under investment treaties and national laws, leading recently to the denunciation of bilateral investment treaties as well as the ICSID Convention by some states.1 In the phrase of Jan Paulsson, it is “arbitration without privity” that has been a particularly important and controversial issue.2

The Lanco v. Argentina tribunal, over which Bernardo Cremades presided, noted the particular nature of consent in treaty arbitrations in an early ICSID decision.3 The Lanco tribunal stated:

“… consent to ICSID arbitration by a State may come from a bilateral treaty. In this regard, the award in American Manufacturing & Trading, Inc. v. Republic of Zaire (SINZA Award) establishes, on the basis of the provisions of a bilateral treaty with language very similar to the bilateral treaty before us in this case, that consent for the purposes of Article 25(1) is understood to be given by the State party to the dispute in the bilateral investment treaty from the moment the State extends a generic invitation to all the investors who are nationals of the other Contracting State to


3 Lanco International Inc v Argentina, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998.
submit the settlement of their possible disputes to ICSID jurisdiction. In
contract, the consent of the investor who is a national of the other
Contracting State, must be given by the investor in writing, since the
consent of the State is not binding on the investor.4

The implications of such state consent, which the Lanco tribunal points out is
“given from the moment” an investment treaty or legislation enters into force,5 is the
topic of this chapter. It will discuss first the theories of consent in international
investment arbitration.6 Next, it will consider these theories against the jurisprudence of
the International Court of Justice.7 It will then make some suggestions based upon the
lessons of the jurisprudence of the International Court of Justice to state consents to
arbitration for the resolution of investment disputes.8 Finally, it will explore what
consequence the nature of consent has with regard to the denunciation of the ICSID
Convention and of the consent to arbitration itself.9

II. Theories Of Consent

Although there are many ways to treat jurisdictional instruments in international
investment law, perhaps the simplest way is to treat them as “offers” similar to offers to
enter into contracts. As offers, instruments of state consent are inchoate and forward-
looking.10 They operate as an invitation to third parties to accept.11 Consent to arbitrate

4  Lanco International Inc v Argentina, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 43.
5  Lanco International Inc v Argentina, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 43.
6  See Section II infra.
7  See Section III infra.
8  See Section III infra.
9  See Section IV infra.
10 Christoph H. Schreuer, Consent to Arbitration (updated 02/ 2007), Transnational-Dispute Management (2007), at p. 5.
thus becomes a multi-stepped process, beginning with an offer of arbitration by the state which is perfected by means of an acceptance by an investor. It imports the basic legal background of this multilateral action oriented consideration of obligations. It imports the need for action on the part of a counter-party to become legally meaningful. As such, the host state retains an option to revoke a consent offer made by the host state. This theory of consent, in short, is action-oriented – it focuses on the actions of the host state and the actions of the investor.

Similarly intuitive, it is also possible to consider the instrument of consent in and of itself as a standing, independent commitment. This conception of consent looks not to the dynamic relationship a statement of unilateral consent invites. Rather, it focuses on the utterance itself and appreciates it as a completed act entailing a perfected obligations to submit to the judgment of a specified arbiter. So conceived, consent does not require action by a counterparty to be fully operative. As such, it does not bring with it the natural corollary of unilateral revocability by the state prior to the point of third

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13 *See* Nolan/ Sourgens, at pp. 17-22.
party “acceptance”. This theory of consent is act-oriented – it focuses on what the statement of state consent has already achieved.

a) A simple “offer-and-acceptance” model

The offer-and-acceptance model is reflected in Professor Schreuer’s seminal commentary on the ICSID Convention. The basic premise of this approach is essentially contract-based – or more precisely, is analogous to a common law approach to contract formation. According to this approach, 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. In case of a treaty or investment law, its arbitration provision would serve as an offer to the international investor of international arbitration. This offer remains revocable until such time as an acceptance has been communicated.

The basic offer-and-acceptance approach follows the common law of contracts in logic. An offeror remains the master of its offer. As the master of its offer, the host state remains free to alter or revoke its terms until such time as an act of acceptance has

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19 See Schreuer, passim.
21 Schreuer, at p. 1280.
22 Schreuer, at p. 1280; see also Sébastien Manciaux, Informations: La Bolivie se retire du CIRDI, pp. 4-5 available on Transnational Dispute Management.
23 Schreuer, at p. 1280; see also Sébastien Manciaux, Informations: La Bolivie se retire du CIRDI, pp. 4-5 available on Transnational Dispute Management.
been communicated to it.\(^\text{25}\) This revocability of the offer prevails in principle as a matter of common law even in circumstances in which the offer itself states the contrary.\(^\text{26}\)

One exception to the common law rule of revocability is the instance in which there is detrimental reliance by the investor on an offer before a formal acceptance is made.\(^\text{27}\) In the case of offers of arbitration, such detrimental reliance may present issues of proof. Yet, it appears theoretically possible as an extension of the power of the investors ability to accept an offer of arbitration on account of an estoppel.\(^\text{28}\) The application of a jurisdictional estoppel has been admitted as possible in the context of the ICSID Convention.\(^\text{29}\) Its extension could make available arbitration as form of dispute resolution despite an otherwise timely revocation of the offer to arbitrate.\(^\text{30}\)

A different manner to conceive of the same principle is to deem an acceptance to have been made by conduct.\(^\text{31}\) An invitation to invest, including an offer to arbitrate, was issued by a host state.\(^\text{32}\) This led to the investor’s investment or other action.\(^\text{33}\)

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\(^{25}\) See US Restatement (Second) of Contracts § 42 (1981).

\(^{26}\) See US Restatement (Second) of Contracts § 42, comment a) (1981) (stating “but the ordinary offer is revocable even though it expressly states the contrary, because of the doctrine that an informal agreement is binding as a bargain only if supported by consideration”).

\(^{27}\) See Allan Farnsworth, Contracts (Aspen: 1999 (3d ed)), at pp. 190-194.

\(^{28}\) See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge University Press: 2006 (reprint)), at pp. 143-144 (stating “it appears, from the discussion of this principle in the last two mentioned cases, that it precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if, on the faith of that representation, B had so altered his position that the establishment of the truth would injure him”).

\(^{29}\) See Schreuer, at p. 222.

\(^{30}\) See also discussion below of the mailbox rule at [__].


\(^{32}\) See US Restatement (Second) of Contracts § 50, comment b) (1981). Conceiving of an investment treaty or legislation as an invitation to invest would arguably mean that “the offer requires acceptance by performance and does not invite a return promise”. 
itself could be deemed acceptance, if reliance on the offer would be sufficiently well 
established for the investment to be considered performance on the invitation to invest. 
The obvious problem for this mode of formation of an arbitration agreement is the 
requirement that the agreement formed in writing.\textsuperscript{34} Yet, as a matter of theory, at least, in 
the right circumstances, a jurisdictional estoppel or deemed acceptance by conduct should 
be permitted to operate in conjunction with a writing that – by the terms of the basic offer 
and acceptance model – would no longer be in time on account of an intervening 
revocation of the offer to arbitrate.

\textit{b) A firm offer \textit{erga omnes}}

An alternative contractual model conceives of a unilateral arbitral undertaking as 
a “firm” or irrevocable offer for a stated period of time, or for a reasonable period of time 
if no relevant expiry period is stated on the face of the instrument containing the 
jurisdictional provision.\textsuperscript{35} This conception appears to underlie Emmanuel Gaillard’s 
approach to consent in analyzing the effects of denunciation of the ICSID Convention.\textsuperscript{36} 
Professor Gaillard looks to the terms of the consent to determine whether a firm offer has 
been made, stating that “where an unqualified consent exists, as opposed to an agreement 
to consent, the rights and obligations attached to this consent should not be affected” by 
later extrinsic action.\textsuperscript{37} Professor Gaillard’s approach leaves investors with a certain

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\textsuperscript{33} \textit{See} US Restatement (Second) of Contracts § 50, 54 (1981).
\textsuperscript{34} \textit{See} ICSID Convention, Art. 25; New York Convention, Art. II(1).
\textsuperscript{35} Nolan/ Sourgens, at pp. 20-22.
\textsuperscript{36} Gaillard, at p. 6.
\textsuperscript{37} Gaillard, at p. 4.
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amount of indeterminacy, as the construction of consent instruments frequently is a matter of debate.\textsuperscript{38}

Offers to arbitration could also be construed as firm by default. Such an approach is typical of the German law tradition and has also found its way into certain commercial contracts in the United States.\textsuperscript{39} Germany is an archetypical firm offer jurisdiction. Per BGB § 145 (the German civil code), “whoever offers another to conclude a contract is bound by its offer unless the binding nature of the offer is expressly excluded”.\textsuperscript{40} This provision serves as a protection of the offeree while the offer is pending.\textsuperscript{41} It arises dogmatically out of a relationship of trust between the parties created by the offer.\textsuperscript{42} German law permits offers to be made either to a specific person, or generally \textit{ad incertas personas}.\textsuperscript{43} Given the broad application of offers to arbitrate in treaties or investment legislation, these offers likely would have to be construed \textit{ad incertas personas}.

Of course, even under a firm offer model, offers do not remain outstanding forever.\textsuperscript{44} Rather, unless the document on its face provides for its expiry, the offer remains firm for a reasonable period of time.\textsuperscript{45} In the context of international investment

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\textsuperscript{38} See Guillard, at p. 3 (referring to the “more difficult situation where ICSID arbitration is the only international alternative” provided in the underlying treaty).
\textsuperscript{39} German Bürgerliches Gesetzbuch § 145; U.S. Uniform Commercial Code, § 2-205.
\textsuperscript{40} German Bürgerliches Gesetzbuch § 145 (our translation).
\textsuperscript{41} Hans Brox, Allgemeiner Teil des BGB 29th ed. (Carl Heymanns Verlag: 2005), at p. 96.
\textsuperscript{42} Palandt, Bürgerliches Gesetzbuch 62nd ed. (Beck: 2003), at § 145 no. 3.
\textsuperscript{43} Hans Brox, Allgemeiner Teil des BGB 29th ed. (Carl Heymanns Verlag: 2005), at p. 95 (stating that “there are cases in which a person may not wish to select a specific counterparty and in which an individual communication to a single recipient is not possible. In such circumstances, a declaration to the public at large must be considered as a contractual offer (i.e., offer \textit{ad incertas personas})”) (our translation).
\textsuperscript{44} See German Bürgerliches Gesetzbuch § 147.
\textsuperscript{45} Hans Brox, Allgemeiner Teil des BGB 29th ed. (Carl Heymanns Verlag: 2005), at p. 97.
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agreements, it may be reasonable to view the denunciation period as the period of expiry of the offer to arbitrate. With regard to treaties or laws that contain an offer to arbitrate without stating an expiry period, it may be reasonable to look to such treaties for context, given that the specific factual exigencies of the case are also duly considered.

In light of the competing theories of offer and acceptance as a matter of the law of contract/obligations, a comparative legal solution may suggest itself that would combine the benefits of both offer and acceptance models. The 2004 UNIDROIT Principles offer a possible hybrid approach, stating that offers ordinarily are not considered firm, unless “it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer”. This approach, or one akin to it, may be suited to the question at hand, if an offer-and-acceptance model is chosen, as it allows a reasonable flexibility in approach while also protecting the reasonable expectations of investors in the stability of jurisdictional undertakings of the state.

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46 See, e.g., Bolivia-France BIT, Art. 12 (providing for a denunciation at a year’s diplomatic notice and a survival period of obligations with regard to past conduct for an additional twenty years thereafter). This is not expressly addressed by Prof. Gaillard, but this position appears implicit in his analysis. See Gaillard, at p. 4.

47 Compare U.S. Uniform Commercial Code, § 2-208 (2) (“The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade”).

48 The authors are currently finalizing an article on proof of general principles of law to appear in the World Mediation and Arbitration Review. Problems and concerns with regard to the proof of such general principles will be engaged in detail in that piece.

49 UNIDROIT Principles, Art. 2.1.4 (2)(b).

50 As a matter of international law, it also may well be a close approximation of a general principle of law – although such a claim would have to be tested in each specific circumstance against the specific facts of the case in question. As it stands, this approach could be reconciled with a common law approach on account of theories of promissory or equitable estoppel. It is consistent with the approach taken by German law, if focus is placed on the reasonableness of the expectation for how long an offer would remain open if no period is expressly stated. Similarly, it is consistent with the French approach. See François
c) A binding international commitment to jurisdiction

A different approach to consent looks to what the act of consent itself has done – what its consequence is as such.\(^51\) This different in perspective takes the pragmatic position that an act has occurred. This act in and of itself has legal consequence, which must be considered in its own right. As will be discussed below, it is on account of this switch of perspective that it is possible to resolve the readily apparent inconsistency of treating a consent mechanism that is deemed without privity in the terms of an offer and acceptance between the investor and the host state.\(^52\)

In the case of private action, unilateral statements of consent to arbitration are assessed against the law of obligations (and the arbitration laws) of the relevant municipal jurisdiction. This would include an offer-and-acceptance approach as outlined above, or may include other quasi-contractual legal theories that may give a different meaning to such statements depending on the specific factual circumstances in which they were made.\(^53\)

In the context of state action, however, the law applicable to assessing the significance of such statements is public international law.\(^54\) Two regimes most typically

\(^{51}\) Terré et al, Précis Droit Civil, Les Obligations (Dalloz: 2005), at p. 123. It is broadly consistent with the Civil Code of the Russian Federation. See Civil Code of the Russian Federation, Art. 436. It may be consistent with Middle Eastern legal principles, although the facts of each specific case would have to be carefully evaluated. See C. Mallat, Introduction to Middle Eastern Law (Oxford University Press: 2007), at p. 274. It is arguably inconsistent with the law of the People’s Republic of China. See Ole Lando, Kontraktsretten i Kina (Jurist og Økonomforbundets Forlag: 2008), at p. 54.

\(^{52}\) Nolan/Sourgens, passim.

\(^{53}\) See section III.c below.

\(^{54}\) This principle was confirmed in the context of ICSID arbitration for example in the CSOB v. Slovakia arbitration. See Ceskoslovenska Obchodni Banka AS v Slovakia, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4, dated May 24, 1999, at ¶ 35.
applicable to international obligations arising from a declaration of a state are the law of treaties and the law of unilateral declarations.\textsuperscript{55} Applied to statements of consent to arbitration, both legal regimes attach a specific legal significance and consequence to the underlying declaration by the host state.

Many arbitration consents are included in international investment agreements between states.\textsuperscript{56} On account of the principle of \textit{pacta sunt servanda} codified in the Vienna Convention on the Law of Treaties, such arbitration consents in an investment agreement constitute an independent international obligation in and of themselves.\textsuperscript{57} Although these obligations of course operate only according to their terms, they do not require any further action as a matter of the legal framework of which they form part to become operative.\textsuperscript{58} A consent to arbitration in a typical bilateral investment agreement constitutes an obligation of the signatory state to arbitrate whether or not it is ever perfected.\textsuperscript{59} The fact that the obligation may never be acted upon by an investor does not change its fundamental nature as a legally binding international commitment of a state included in a treaty.

\textsuperscript{55} \textit{See} Nuclear Tests Case (New Zealand v. France), Judgment, 1974 I.C.J. Reports, pp. 457, 472.


\textsuperscript{57} Vienna Convention on the Law of Treaties, Art. 26; \textit{see also} Richard Gardiner, Treaty Interpretation (Oxford University Press: 2008), at pp. 147-161 (discussing good faith in the law of treaties more generally).

\textsuperscript{58} On treaty interpretation, \textit{see generally} Vienna Convention on the Law of Treaties, Art. 31.

\textsuperscript{59} \textit{See} Lanco International Inc v Argentina, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 43 (quoted in the introduction above). The Lanco tribunal to be sure discusses consent in terms of an offer and acceptance, but did so figuratively and did not use the analogy strictly to state that the later agreement between the parties to the dispute on resolution of disputes before the local court somehow revoked the underlying offer. The approach inherent in Lanco thus saw something quite broader and more significant than a simple contractual offer to arbitrate – namely an obligation to abide by the election of an arbitral remedy with regard to treaty claims by the protected investor. \textit{See} Bernardo M. Cremades, \textit{The Resurgence of the Calvo Doctrine in Latin America}, 2(5) Transnational Dispute Management, Nov. 2005, at p. 9.
Arbitration consents not included in the law of treaties have legal significance as unilateral declarations of state.\textsuperscript{60} The legal significance of unilateral declarations is based dogmatically in the principle of good faith – and thus are derived from the same source as the principle of \textit{pacta sunt servanda} in the law of treaties.\textsuperscript{61} Unilateral declarations are binding as a matter of international law, if, viewed in the relevant circumstances of their pronunciation and reception, they evidence a will of the state to be bound.\textsuperscript{62} Although the reception of a unilateral declaration may be a factor in determining whether an

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\item Despite the fact that there is a growing trend of inclusion of arbitral undertakings in international investment agreements, a customary rule of arbitral jurisdiction is not something that has been seriously considered, not the least because of the writing requirement of arbitral consent. It is nonetheless interesting that state practice supporting international arbitration had been growing throughout the 1990s. \textit{See, e.g.,} Campbell McLachlan, Laurence Shore, Matthew Weiniger, International Investment Arbitration, Substantive Principles (Oxford University Press: 2007), at p. 54.
\item \textit{See Nuclear Tests} (Australia v. France; New Zealand v. France), Judgments dated 20 December 1974, I.C.J. Reports 1974, pp. 267-8, 472-3; \textit{compare} ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentaries thereto, International Law Commission (2006), Principle 1 (“ILC Guiding Principles”):

\begin{quote}
“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.”
\end{quote}

\textit{See also} Mark Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff: 2009), at p. 366 (“Three legal bases can be distinguished: the first is contractual and can be found in the particular treaty which the parties have concluded. The second legal basis, equally contractual, is the Convention itself which in Article 26 obliges all States parties to comply with their treaty obligations. The third legal basis is the customary rule underlying \textit{pacta sunt servanda} (Incidentally, \textit{consuetudo est servanda} applies also to all those treaties addressed by Article 26 containing norms declaratory of customary international law.”). \textit{Compare} Oscar Garibaldi, fn 55 (“While it is generally recognized that the principle \textit{pacta sunt servanda} is an expression of the more general principle of good faith, which also underlies the doctrine of unilateral declarations, there is no need to resort to more general theories when nobody disputes that treaties are binding”). As discussed more fully below, it is the doctrine of good faith underlying both the law of treaties and unilateral declarations which requires performance of the underlying treaty obligation such as not to frustrate its fundamental purposes. As explained for example by Sir Gerald Fitzmaurice, this axiomatic obligation is fundamentally beyond the scope of the treaty itself, as a matter of its proper theoretical understanding. Gerald Fitzmaurice, Symbolae Vorzijl (1958), pp. 158 ff.
\item \textit{See, e.g.,} \textit{Case concerning the Frontier Dispute} (Burkina Faso v. Republic of Mali), Judgment of 22 December 1986, I.C.J. Reports 1986, p. 573 (discussing the importance of state intent); \textit{see also} ILC Guiding Principles, Principle 2, comment 2.
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unilateral declaration has an internationally binding character, once it has been determined that an obligation exists, it exists without need for action by any third parties. Thus, an arbitral consent forming part of a unilateral declaration has legal significance in and of itself. One of the most important corollaries of a consent forming part of an international obligation is that it may not be revoked arbitrarily.

The international obligation approach differs in ascribing immediate meaning to a jurisdictional undertaking. Yet, its practical consequence in many instances goes hand in hand with the firm offer approach. Both approaches do not allow a revocation of arbitral consents while these consents by their terms continue to invite disputes to be resolved in arbitration. Both approaches do so on account of an obligation that is fundamentally beyond the scope of the statement itself. That, however, is where both models part ways. The firm offer approach is still based on a notional understanding of consent as requiring some form of privity. It is exactly to understand how consent without privity operates that a different, international obligation model is required.

III. Jurisdictional Declarations Under Public International Law

The International Court of Justice consistently treats jurisdictional declarations as independent international legal obligations and not primarily as offers to consent to jurisdiction. As the approach taken by the International Court of Justice will show, the different theories of consent are not mutually exclusive; a jurisdictional instrument can

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63 See ILC Guiding Principles, Principle 3, comment (3) (discussing reception as an indicator of the scope of the declaration in question).
64 See ILC Guiding Principles, Principle 10.
65 See section II.b above.
66 See section II.b above.
be both an instrument entailing international obligations in and of itself and an offer to resolve a dispute before a specific dispute resolution body. If used in this fashion, the reference to offer and acceptance is figurative to understand how the Court became seized of a specific dispute under an existing consent to its jurisdiction.

For the reasons set out below, jurisdictional undertakings in the investor-state realm should not be viewed as offers. Rather, the decisions of the International Court of Justice bridge the gap of arbitration without privity between the state and the investor by providing an independent legal background against which state consents to arbitration operate. It is on this basis that state consents to arbitration of investment disputes can thus be understood.

a) Jurisdictional Declarations In The International Court Of Justice

There are four forms of jurisdictional declarations upon which a dispute can be resolved before the International Court of Justice. First, it is possible that a bilateral or multilateral treaty provides for the resolution of a specific dispute by the International Court. Second, two states may submit a dispute to the Court by special agreement. Third, a state may agree to the submission of a dispute to the Court after a state has

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67 See section III.b.
69 See Section III.a.i. Barcelona Traction, Light and Power Company, Limited (Preliminary Objections) (Belgium v. Spain), Judgment of July 24, 1964, I.C.J. Reports 1964, pp. 6, 32 (listing jurisdiction by ad hoc agreement and through treaties as the two core bases of jurisdiction discussed when the Statute of the Court was drafted).
70 See Section III.a.ii. Barcelona Traction, Light and Power Company, Limited (Preliminary Objections) (Belgium v. Spain), Judgment of July 24, 1964, I.C.J. Reports 1964, pp. 6, 32 (listing jurisdiction by ad hoc agreement and through treaties as the two core bases of jurisdiction discussed when the Statute of the Court was drafted).
appealed to the Court for resolution. It has been with regard to the last type of declarations that most of the theoretically interesting issues for the international legal significance of instruments of state consent have arisen. It thus will be discussed last of these four types of jurisdictional declarations – even if such treatment is out of turn as a matter of strict logic.

i) Jurisdictional declarations in international treaties

One of the means by which a state may consent to the jurisdiction of the International Court of Justice is through accession to or ratification of a treaty which calls for the resolution of disputes relating to matter to which it speaks before the Court. As the Court explained in the context of jurisdictional provisions in treaties calling for the resolution of disputes before the Permanent Court of International Justice, the inclusion of treaty consents as a means of vesting the International Court of Justice with jurisdiction was a compromise between those proposing that the Court only have jurisdiction over disputes specifically submitted to it by the parties to the dispute through an ad hoc consent and those proposing a universal compulsory jurisdiction of the Court over international legal disputes. Consequently, consents to jurisdiction in international

73 Statute of the International Court of Justice, Art. 36(1). A jurisdictional consent contained in an exchange of diplomatic notes similarly qualifies as a jurisdictional declaration in a treaty. See Fisheries Jurisdiction, (United Kingdom v. Ireland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, 3, 8-10 (discussing a compromissory clause in an exchange of notes).
74 See Statute of the International Court of Justice, Art. 37.
75 See at Barcelona Traction, Light and Power Company, Limited (Preliminary Objections) (Belgium v. Spain), Judgment of July 24, 1964, I.C.J. Reports 1964, pp. 6, 32:
treaties are not “offers”, much less revocable offers, but instead operate as an independent obligation to submit disputes to the Court.76

Practically, a reference of disputes in a treaty to the Court is uncontroversially a consent to its jurisdiction by all parties to that treaty.77 To the extent that the Court does not have to decide a dispute involving materially the rights of a non-treaty party that has

“"This conclusion finds strong support in a second historical consideration. As is well known, Article 37 represented, so far as treaties and conventions were concerned, a compromise between two extreme and opposed schools of jurisdictional thought. There were, on the one hand, those who wanted to insert in the Statute of the new Court a clause of universal compulsory jurisdiction, automatically applicable to all disputes between parties to the Statute, of whatever kind and howsoever arising. Such a clause would have rendered the insertion of jurisdictional clauses in particular treaties or conventions unnecessary except for any special purpose, and would have rendered a provision such as Article 37 unnecessary also, or caused it to be differently drafted. On the other hand, there were those who were opposed to the idea of compulsory jurisdiction in any form, and considered that the Court should only be competent in cases brought before it with the express consent of the parties, given ad hoc.

"The compromise between these two points of view which Article 37 represented (so far as jurisdictional clauses in treaties and conventions were concerned) involved the rejection of the notion of a universal compulsory jurisdiction; but on the other hand (and for that very reason) it also involved the preservation at least of the already existing field of conventional compulsory jurisdiction. It was a natural element of this compromise that the maximum, and not some merely quasi optimum preservation of this field should be aimed at.”

See also Ambatielos case (Jurisdiction) (United Kingdom v. Greece), Judgment of July 1, 1952, I.C.J. Reports 1952, pp. 28, 39-40. This decision came into some doubt after the Aerial Incident Case, dealing with a declaration lodged with the Permanent Court of International Justice by Bulgaria, which had not been an original member of the UN and the International Court of Justice. In that context the International Court of Justice limited declarations lodged with the Permanent Court of International Justice to original member states of the United Nations. Case concerning the Aerial Incident of July 27th, 1955 (Preliminary Objection) (Israel v. Bulgaria), Judgment of May 26, 1959, I.C.J. Reports, 1959, p. 127. This logic appears to be implicit in the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Report; 1962, pp. 319, 335 (confirming that Ethiopia, Liberia and South Africa were original members of the United Nations). The issue was put squarely before the Court in Barcelona Traction. Barcelona Traction, Light and Power Company, Limited (Preliminary Objections) (Belgium v. Spain), Judgment of July 24, 1964, I.C.J. Reports 1964, pp. 6, 28-30. The Court in Barcelona Traction again confirmed squarely the rule first confirmed in Ambatielos that a reference to the Permanent Court of International Justice constituted a reference to the International Court of Justice without further need of analysis.


not consented to the jurisdiction of the Court.\textsuperscript{78} The consent is subject only to the caveat that no applicable reservation has been entered.\textsuperscript{79} Where a consent is subject to a reservation, the effect of the reservation is treated consistently with how other reservations to substantive provisions of a treaty are construed.\textsuperscript{80} In the face of a potentially applicable reservation, consent is established in each case through a contextual analysis of the relevant treaty provisions at issue.\textsuperscript{81}

The scope of treaty consent as such became an issue in the context of state succession in the War in Former Yugoslavia.\textsuperscript{82} One of the main jurisdictional issues arising out of cases presented to the Court in the context of the Yugoslav War was the status of the Federal Republic of Yugoslavia as a successor state to the Socialist Federal Republic of Yugoslavia and its effect both on the Federal Republic of Yugoslavia’s substantive obligations under treaties to which the Socialist Federal Republic of Yugoslavia was a party and its membership in the United Nations – and the International Court of Justice. In light of the legal difficulties of successor statehood, Yugoslavia re-

\textsuperscript{78} \textit{Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)} (Italy v. France, United Kingdom, and US), Judgment of June 15, 1954, I.C.J. Reports, 1954, pp. 19, 21. A similar issue controversially arose in the context of a recent advisory opinion. In that context, the International Court of Justice took a different view, relying on the distinction between contentious and advisory opinions and proceeded to the merits of the question presented to it. \textit{See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion, I.C.J. Reports 2004, pp. 136, 157.


applied for membership in the United Nations. On account of that change, the Court observed

“The Applicant thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the sui generis position of the Applicant could not have amounted to its membership in the Organization.”

On account of Yugoslavia’s non-membership in the United Nations, and the Statute of the Court, the Court decided that Yugoslavia could not itself invoke treaty consents referring disputes to the International Court of Justice. The Court did, however, allow treaty consents to be invoked against Yugoslavia despite this jurisdictional infirmity barring Yugoslavia itself from bringing claims before the Court.

The Court’s treatment of Yugoslavia underscores the nature of treaty consent as an independent international obligation: an offer of International Court of Justice jurisdiction would have been frustrated by Yugoslavia’s non-membership of the Court at the relevant point in time. An obligation to consent could not be frustrated by this extraneous event.

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The Yugoslav cases illustrate, at least to a point, that under some circumstances, consents to jurisdiction can constitute an obligation even when they bestow no affirmative rights.86

As understood by the International Court of Justice, treaty clauses may create a “complete” consent to jurisdiction, operating per their terms to allow the resolution of disputes between treaty parties. The treaty clauses themselves, in the view of the Court, operate as independent obligations to submit to the dispute resolution forum so chosen applicable from the moment the treaty enters into force without requiring further steps to perfect the consent. As Benedetto Conforti explains

“We intend with this term to refer to cases in which the compromissory clause or the treaty of arbitration are not limited to creating an obligation to provide a consent but in which these clauses foresee directly the obligation to submit to the judgment of an international court (such as the International Court of Justice) that is already constituted and ready to act. Such complete compromissory clauses and arbitral treaties immediately operate on the function contained in the consent a permit a Contracting State unilaterally to serve another Contracting State before an international tribunal competent to hear the dispute.”87

A compromissory clause in a treaty referring a dispute to a distinct body for resolution thus is of special significance. Functionally speaking, with the act of consent in the treaty, the jurisdiction of the dispute resolution body is already vested. The court or tribunal is already competent to act as of that moment in time for the disputes specified


87  Benedetto Conforti, Diritto Internazionale (Editoriale Scientifica: 2006 (7th ed)), at p. 388 (our translation).
in the treaty, taking into account the reservations made by the relevant Contracting States.

All that is required for a dispute to commence is service of a written application.

ii) Jurisdiction by means of special agreement

The Statute of the International Court of Justice provides that “[t]he jurisdiction of
the Court comprises all cases which the parties refer to it”. Many cases are referred to
the Court by means of notification of a special agreement with the Registrar of the
Court. In light of the contractual nature of the special consent, drafted ad hoc for a
specific dispute, it is not surprising that only few cases exist that shed light on the
fundamental nature of such a consent through adversarial proceedings.

When the existence of a special agreement was challenged in the Aegean Sea
Continental Shelf Case, the International Court of Justice analyzed the alleged agreement
consisting of a joint communiqué of the Greek and Turkish governments not signed or
ratified by either party and communicated directly to the press by the Greek government

Statute of the International Court of Justice, Art. 36(1).

The International Court of Justice summarizes that

“The following 16 cases were submitted to the Court by means of special agreements (by
date of their addition to the General List): Asylum (Colombia/Peru); Minquiers and
Ecrehos (France/United Kingdom); Sovereignty over Certain Frontier Land
(Belgium/Netherlands); North Sea Continental Shelf (Federal Republic of
Germany/Denmark; Federal Republic of Germany/Netherlands); Continental Shelf
(Tunisia/Libyan Arab Jamahiriya); Delimitation of the Maritime Boundary in the Gulf of
Maine Area (Canada/United States of America) (case referred to a Chamber); Continental
Shelf (Libyan Arab Jamahiriya/Malta); Frontier Dispute (Burkina Faso/Republic of Mali)
(case referred to a Chamber); Land, Island and Maritime Frontier Dispute (El
Salvador/Honduras) (case referred to a Chamber); Territorial Dispute (Libyan Arab
Jamahiriya/Chad); Gabčíkovo-Nagymaros Project (Hungary/Slovakia); Kasikili/Sedudu
Island (Botswana/Namibia); Sovereignty over Pulau Ligitan and Pulau Sipadan
(Indonesia/Malaysia); Frontier Dispute (Benin/Niger) (referred to a chamber); and
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge
(Malaysia/Singapore).”

International Court of Justice, Basis of the Court’s Jurisdiction, available at http://www.icj-
to establish whether Turkey, the Respondent in the case, had intended to submit to a
dispute to its jurisdiction.\textsuperscript{90} The Court first addressed an objection by Turkey as to the
form of the alleged joint agreement. The Court rejected Turkey’s formal challenge,
noting that “it knows of no rule of international law which might preclude a joint
communiqué from constituting an international agreement to submit a dispute to
arbitration or judicial settlement”.\textsuperscript{91}

The Court did not deem the communiqué in question a sufficient consent to
jurisdiction as a matter of substance. Rather, the Court concluded that Turkey’s
intention, in light of the ongoing negotiations, was not to submit to the Court’s
jurisdiction immediately, but rather to do so only after a specific special agreement was
drawn up.\textsuperscript{92} The nature of this means of invoking the jurisdiction of the Court thus is
contractual in nature. It does require a meeting of the minds. It does require a finding of
an intention to submit the dispute in question to the Court.\textsuperscript{93}

\textbf{iii) Jurisdiction by means of \textit{forum prorogatum}}

\textsuperscript{90} \textit{Aegean Sea Continental Shelf} (Greece v. Turkey), Judgment of December 19, 1978, I.C.J. Reports
1978, pp. 3, 8, 39, 41-44. The case concerns a dispute between Greece and Turkey with regard to the
exploration of the continental shelf under the Aegean Sea.

\textsuperscript{91} \textit{Aegean Sea Continental Shelf} (Greece v. Turkey), Judgment of December 19, 1978, I.C.J. Reports
1978, pp. 3, 39. The Court’s position departs from the requirements in commercial arbitration, in which
there ordinarily will be required a (perhaps minimal) form to be observed for a consent to jurisdiction to be
recognized as sufficient. \textit{See} New York Convention on the Recognition and Enforcement of Foreign
Arbitral Awards, Art. II(2); ICSID Convention, Art. 25(1).

\textsuperscript{92} \textit{Aegean Sea Continental Shelf} (Greece v. Turkey), Judgment of December 19, 1978, I.C.J. Reports
1978, pp. 3, 41-44.

\textsuperscript{93} \textit{Aegean Sea Continental Shelf} (Greece v. Turkey), Judgment of December 19, 1978, I.C.J. Reports
1978, pp. 3, 41-44. In this context, the communications between states negotiating a special agreement still
remain unilateral state acts with specific legal consequences. These legal consequences, however, must be
viewed in their specific context (active negotiation of a consent). It is in this context that they take on a
contractual character that is not typical of other forms of consent, as discussed below.
The first contentious case before the International Court of Justice, the *Corfu Channel* case, brought with it the first substantive jurisdictional challenge, and the first opportunity for the court to address consent by means of *forum prorogatum*. The United Kingdom, acting on the recommendation of the Security Council that the United Kingdom and Albania agree to submit the dispute to the International Court of Justice, instituted proceedings before the Court. Albania objected to the institution of proceedings without prior agreement having been reached, but stated that “it is prepared, notwithstanding this irregularity in the action taken by the United Kingdom, to appear before the Court”. Albania challenged that this statement was a sufficient consent to the Court’s jurisdiction and lodged preliminary objections to that effect. The Court denied the substantive challenge, stating that the “language used by the Albanian Government cannot be understood otherwise than as a waiver of the right subsequently to raise an objection directed against the admissibility of the Application”.

The Court further noted that

“there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12, of April 26th, 1928, 

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94 After the Court’s decision on the Preliminary Objection, the parties to the Corfu Channel Case made a special agreement, removing the case as one of *forum prorogatum*. *The Corfu Channel Case (Merits)* (United Kingdom v. Albania), Judgment of April 9, 1949, I.C.J. Reports 1949, pp. 4, 6. The initial jurisdictional challenge, however, is better discussed under that heading.


96 See *The Corfu Channel Case (Preliminary Objection)* (United Kingdom v. Albania), Judgment on Preliminary Objection of 25 March 1948, I.C.J. Reports 1948, at p. 27.

97 See *The Corfu Channel Case (Preliminary Objection)* (United Kingdom v. Albania), Judgment on Preliminary Objection of 25 March 1948, I.C.J. Reports 1948, at p. 27.

98 See *The Corfu Channel Case (Preliminary Objection)* (United Kingdom v. Albania), Judgment on Preliminary Objection of 25 March 1948, I.C.J. Reports 1948, at p. 27.
The acceptance by a State of the Court’s jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as for instance, the previous conclusion of a special agreement.99

The Court in Corfu Channel focused on consent by means of “two separate and successive acts”.100 An acceptance of the court’s jurisdiction by either party, thus, was considered an independent act. Albania’s act, its waiver of objections, entailed an irrevocable jurisdictional obligation to submit to the jurisdiction of the Court in the context of the dispute at bar.

iv) Unilateral jurisdictional declarations – obligation and offer to resolve disputes

Unilateral declarations by a state accepting compulsory jurisdiction is a typical manner in which disputes arrive before the Court.101 These declarations are treated as unilateral acts of state.102 In the words of Judge McNair, they provide “a standing

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101 Such declarations were first introduced as a manner of consenting to the jurisdiction of an international court under the Statute of the Permanent Court of Justice. Anglo-Iranian Oil Co. Case (Jurisdiction) (United Kingdom v. Iran), Judgment of 22 July 1952, I.C. J. Reports 1952, p. 9, 111 (separate opinion of McNair, J.). Declarations lodged with the Permanent Court of International Justice were transformed into analogue declarations for purposes of the International Court of Justice for the original signatory members of the UN Charter and Statute of the International Court of Justice. See Case concerning the Aerial Incident of July 27th, 1955 (Preliminary Objections) (Israel v. Bulgaria), Judgment of May 26, 1959, I.C.J. Reports, 1959, p. 127. As explained in Military and Paramilitary Activities in and against Nicaragua, an unconditional declaration lodged with the Permanent Court of Justice by an original member of the United Nations is a consent to the jurisdiction of the International Court of Justice even if the state in question never registered its instrument of ratification with the Permanent Court of International Justice. Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) (Nicaragua v. United States), Judgment of November 26, 1984, I.C.J. Reports 1984, at pp. 392, 404-413 (looking both to a grammatical construction of the ICJ Statute and the historical context, reception and course of performance of Nicaragua’s original declaration lodged with the Permanent Court of International Justice).

102 Key invocations of the Court’s jurisdiction by means of a such a compulsory jurisdiction in contentious case are Anglo-Iranian Oil Co. Case (Jurisdiction) (United Kingdom v. Iran), Judgment of 22 July 1952, I.C. J. Reports 1952, p. 93; Nottebohm case (Preliminary Objection), Judgment of 18 November 1953, I.C.J. Reports 1953, p. 111.
invitation made on behalf of the Court to Members of the League of Nations to accept as compulsory, on the basis of reciprocity, the whole or any part of the jurisdiction of the Court as therein defined.”

The dual character of unilateral declarations as an act of consent and as an offer to resolve disputes before the International Court of Justice is evident throughout the jurisdictional decisions of the Court addressing itself to these jurisdictional instruments. Its implications are made clear in the Preliminary Objection in the Case Concerning Right of Passage over Indian Territory arising in the context of a “surprise” application to the Court by Portugal within days of lodging its own declaration accepting the compulsory jurisdiction with the Court and prior to its communication to India.

The Court rejected an objection of unfair surprise, reasoning that

“The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, ‘ipso facto and without special agreement’ by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.”

103 Anglo-Iranian Oil Co. Case (Jurisdiction) (United Kingdom v. Iran), Judgment of 22 July 1952, I.C.J. Reports 1952, p. 93, 116 (separate opinion of McNair, J.)
104 Case Concerning Right of Passage over Indian Territory (Preliminary Objection) (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, p. 125.
105 Case Concerning Right of Passage over Indian Territory (Preliminary Objection) (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.
India’s objection, put in terms of a contractual offer and acceptance model, was that there was no “meeting of the minds” with regard to the Court’s jurisdiction. This, however, was irrelevant to the Court’s jurisdictional analysis, as an obligation to submit to the Court’s jurisdiction, the consensual bond between the several declarant states, was found to exist as of the day the relevant declaration is lodged with the Court, not when it is invoked. Consequently, as the Court confirmed in a later decision, the denunciation of the instrument of consent or its expiration after a dispute had validly been submitted to the Court by reference to a declaration accepting the compulsory jurisdiction of the Court could not have any effect whatever on its jurisdiction over the dispute submitted to it.

If viewed from an offer-and-acceptance perspective, it is interesting that the Court in essence instituted a rule akin to the “mailbox rule”, which provides that “an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession, without regard to whether it ever reaches the offeror”. What is important is that the offer to submit a specific dispute to the jurisdiction of the Court be accepted while standing. Although this conception is not theoretically in keeping with the decision of the Court –

106 Implicitly, India would have notified the Court of a modification of its consent prior to Portugal being able to institute proceedings to exclude the dispute from the jurisdiction of the Court had it been given the opportunity to do so. There was thus no true meeting of the minds. Nor could this fact have been lost on Portugal, given the haste with which it acted.

107 Case Concerning Right of Passage over Indian Territory (Preliminary Objection) (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.


stating clearly that consent exists per the time of the declaration, not because of its contractual “acceptance” – it is helpful in understanding, practically, how and until what time an unqualified consent can be modified by a state to avoid a dispute being submitted to the International Court of Justice.

The Case Concerning Right of Passage over Indian Territory has had a practical impact on the drafting of declarations submitting to the compulsory jurisdiction of the Court. In order to avoid facing similar unexpected applications, declarations made express additional reservations with regard to disputes brought to the Court pursuant to newly registered consents to compulsory jurisdiction. Such reservations are currently in place for Australia, Bulgaria, Cyprus, Germany, Hungary, India, Japan,

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110 Case Concerning Right of Passage over Indian Territory (Preliminary Objection) (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.

111 In the context of State action, it is difficult though not impossible to envision acts of reliance by one state on the jurisdictional consent of another, making this corollary of the decision less practically meaningful in the state context. In the Investor-State context, however, it is routine and may even be the act of making the investment. Functionally, such an act of reliance could be analogized to such a “mailbox rule” – there would be a step taken on the basis of the declaration/off offer of the first state, after which modification of the declaration should be impermissible, depending on the context of the declaration itself. See generally [] above and [] and [] below. See also Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) (Nicaragua v United States of America), Judgment, I.C.J. Reports 1984, at p. 392, 412-413 (basing jurisdiction not on a contractual relationship, but on a quasi-contractual theory of consistency of action).

112 Mauritius, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated September 23, 1968, at (vii):

“disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of the dispute; or where the acceptance of the Court’s compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.”

113 Australia, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated March 22, 2002, at (c).

114 Bulgaria, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated June 24, 1990.

115 Cyprus, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated September 3, 2002, at II(i).
Malta, Mauritius, New Zealand, Nigeria, the Philippines, Poland, Portugal, Slovakia, Somalia, Spain, and the United Kingdom. From a practical point of view, these reservations serve to establish a greater control by the declarants over which disputes they will consent to the jurisdiction of the Court – i.e., the declarant states have successfully avoided “surprise” application by third states newly accepting the Court’s compulsory jurisdiction. Theoretical, however, the implication is

Germany, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated May 1, 2008, at 1(iii).

Hungary, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated October 22, 1992, at (d).

India, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated September 18, 1974, at (5).

Japan, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated July 9, 2007.

Malta, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated December 6, 1966, at (viii).

Mauritius, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated September 23, 1968, at (vii).

New Zealand, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated September 22, 1977, at (2).


The Philippines, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated January 18, 1972.

Poland, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated March 25, 1996, at (e).

Portugal, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated February 25, 2005 at (ii).

Slovakia, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated May 28, 2004, at (2).

Somalia, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated April 11, 1963.

Spain, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated October 29, 1990.

United Kingdom, Declaration Recognizing the Jurisdiction of the Court as Compulsory, dated July 5, 2004.
quite to the opposite: states have accepted that jurisdictional declarations constitute international obligations that have immediate effect unless such effect is expressly excluded by their terms.

The subject matter of disputes submitted to the International Court also has been more carefully curtailed in substance. The Court discussed one such example of a reservation specifically removing anticipated future fisheries disputes from the scope of a jurisdictional declaration in the *Fisheries Jurisdiction* case between Spain and Canada.  

Canada’s reservation at issue was lodged with the Court on the same day that legislation concerning fisheries protection, an amendment to the Coastal Fisheries Protection Act extending its geographical scope of application to include the Regulatory Area of the Northeast Atlantic Fisheries Organization (NAFO), was introduced in parliament.  

The substantive dispute in *Fisheries Jurisdiction* concerned the boarding and arrest of a vessel in the NAFO Regulatory Area by Canada pursuant to the terms of the amended Coastal Fisheries Protection Act.  

Spain asserted on several grounds that the reservation introduced by Canada was not applicable to the dispute – assertions that were rejected by the Court.

This result shows that, in the specific context of unilateral declarations lodged with the Court accepting its compulsory jurisdiction, it is permissible for a State to

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frustrate the jurisdiction of the Court “ahead of time”, i.e., while contemplating a measure that is likely to lead to international disputes in the future. This possibility may be viewed as inimical to the good faith basis of unilateral declarations themselves which, one might argue, would require the maintenance in place of previously accorded jurisdiction exactly for the anticipated disputes which a state knowingly is about to engage. This argument, has intellectual appeal, but potentially misconstrues one of the fundamental aspects of the jurisdictional analyses applied by the Court: that of context.

The decision in *Fisheries Jurisdiction* confirms the specific context and the specific expectations that have been created in the realm of unilateral declarations accepting the compulsory jurisdiction of the Court. As the Court stated in the *Right of Passage* case, there is no impediment other than those listed in the unilateral declarations themselves to their immediate complete denunciation. This creates a contextual expectation, already foreshadowed in the *Right of Passage* case, that a dispute could well be strategically carved out of the Court’s jurisdiction.

This expectation is historically rooted in a compromise, discussed in the *Barcelona Traction* case, which excluded both complete compulsory jurisdiction of the Court and a requirement of ad hoc consent to the submission of every dispute to the

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136 Notably, even its advocates explain that context is the core aspect to be taken into consideration in assessing jurisdiction. *Anglo-Iranian Oil Co. case (Jurisdiction)* (United Kingdom v. Iran), Judgment of July 22, 1952, I.C.J. Reports 1952, p. 93, 127 (Alvarez J., dissenting) (stating that “[t]he scope of this adherence is not to be restricted by giving too great an importance to certain grammatical or secondary considerations. Justice must not be based upon subtleties but upon realities” (emphasis in original)).

137 *Case Concerning Right of Passage over Indian Territory (Preliminary Objections)* (Portugal v. India), I.C.J. Reports 1957, pp. 125, 142.

The tightrope of this compromise recognizes the legal obligations entailed by jurisdictional declarations but, absent reliance, allows declarant states to modify or denounce these obligations until the consent has been engaged through state action.

In sum, consent to jurisdiction as a matter of international law is an obligation, even where it is only unilaterally expressed. The obligation that was undertaken is one that must be viewed in the specific context in which it was given. It is governed by the rules of good faith. It does not operate as a mere “offer” inviting “acceptance”, by analogy to municipal laws of contract. Rather, the obligation itself invites action to be taken by third states similarly to accept the compulsory jurisdiction of the court and to submit disputes within the scope of the consensual bond already created by their respective declarations with the International Court of Justice.

b) **Commitments Without Privity And An “Offer” Of Arbitration In Investor-State Arbitration**

Jurisdictional undertakings in investor-state arbitration are international legal instruments. As the passage from the *Lanco* decision on jurisdiction from which this inquiry took its start noted, they, too, are international law declarations of consent.\(^{140}\) As the *Lanco* decision also made clear, they, too, create international legal obligations at the time of their making.\(^{141}\) As the *Lanco* decision further elaborated, such a consent is not withdrawn if the investor and the host state later enter into a contract calling for the

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\(^{140}\) *Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 43.

\(^{141}\) *Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 43.
resolution of disputes before local courts. The consent they entail, too, therefore should be treated in a manner similar to international legal undertakings lodged with the International Court of Justice.

Jurisdictional undertakings create a consensual bond. As the International Court of Justice explained, this bond “comes into being between the States concerned.”

In the investor-state context, this consensual bond can be created in different ways. It can be created in bilateral investment treaties between the two contracting parties. It can be created in multilateral investment treaties between all contracting parties, meaning that the consent theoretically creates a jurisdictional bond even with regard to states that are not immediately affected by a measure. It can be created in investment legislation to the international community at large, or any defined sub-set thereof (e.g., ICSID Member States). It can also be created by special agreement.

143 Case Concerning Right of Passage over Indian Territory (Preliminary Objection)(Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.
144 Case Concerning Right of Passage over Indian Territory (Preliminary Objection)(Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.
145 See, e.g., France-Bolivia BIT, Art. 8.
146 Typically, the consent itself limits the scope of the dispute that can be submitted to international arbitration. See NAFTA, Art. 1120. Notably, NAFTA does extend the consent to allow submissions on legal questions by other NAFTA Parties not involved in the dispute. NAFTA, Art. 1128 (“On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement”).
147 Venezuelan Investment Law, Art. 22.
148 The discussion below is less relevant to the creation of jurisdiction by special undertaking. This jurisdiction by means of a contractual agreement is fundamentally contractual in nature and has been recognized as such in public international law. See Aegean Sea Continental Shelf (Greece v. Turkey), Judgment of December 19, 1978, I.C.J. Reports 1978, pp. 3, 41-44.
The initial jurisdictional bond obligating the host state to submit disputes to international arbitration may be viewed as having been created when the undertaking is made, as opposed to when it is invoked.\textsuperscript{149} In the treaty context, the clause submitting to the jurisdiction of a specific forum of itself creates the state consent.\textsuperscript{150} The same is true in the context of unilateral acts.\textsuperscript{151} The International Court of Justice was express that it is the time when the consent is made that creates the consent, stating “[f]or it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.”\textsuperscript{152}

In the context of ICSID arbitration a treaty consent operates as a “complete” consent. In that context, a jurisdictional undertaking by a state does not operate as a “consent to consent” to an unspecified dispute resolution mechanism. Rather, it operates

\begin{itemize}
  \item \textsuperscript{149} See \textit{Lanco International Inc v Argentina}, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 40 (referring to “the consent of the State which comes directly form the ARGENTINA–U.S. Treaty”).
  \item \textsuperscript{150} See \textit{Benedetto Conforti, Diritto Internazionale} (Editoriale Scientifica: 2006 (7th ed)), at p. 388.
  \item \textsuperscript{151} See \textit{Anglo-Iranian Oil Co. Case (Jurisdiction)} (United Kingdom v. Iran), Judgment of July 22, 1952, I.C.J. Reports 1952, pp. 93, 116 (separate opinion of McNair, J.)
  \item \textsuperscript{152} Case Concerning Right of Passage over Indian Territory (Preliminary Objection) (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146. It may be argued that the nature of the consent to investor-state arbitration is different from consent in the context of state-to-state disputes. In one important respect, this distinction holds true as a matter of definition – in the state-to-state context the consent operates to the extent that the dispute is directly between the consenting parties. \textit{Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)} (Italy v. France, United Kingdom, and US), Judgment of June 15th, 1954, I.C.J. Reports, 1954, pp. 19, 21. \textit{Compare Certain Phosphate Lands in Nauru (Preliminary Objections)} (Nauru v. Australia), Judgment of June 26, 1992, I.C.J. Reports 1992, p. 240 (holding that a dispute was within the jurisdiction of the Court where the Respondent was the factually primary party in interest in a dispute). The obligation to consent as matter of international law operates analogously to a state-to-state consent, be it for a third party beneficiary. \textit{See below} at [__]. To the extent that much were made of the distinction between a direct consent obligation and one found in a BIT made for a third party, this distinction would arguably cut in favor of viewing it as a substantive protection rather than a true jurisdictional provision, \textit{i.e.}, if it is not a public international law consent it operates similarly to the other provisions of the BIT dealing with investor rights. Such a substantive obligation could not be frustrated by other state acts just the same as the expropriation provisions of the treaty could not be frustrated, either, without amounting to an (actionable) breach of the treaty.
\end{itemize}
as a direct obligation to submit to a readily available dispute resolution body and permits the investor unilaterally to serve the consenting state.153 Certainly, for the investor to benefit from the existing consent, the investor will also have to consent to ICSID jurisdiction and in that sense accept the offer of arbitration contained in a treaty.154 That, however, does not affect the existing state of obligations as they exist on the international legal plane between the ICSID Member States.

The jurisdictional bond created by undertakings of consent contained in investment treaties and investment legislation in the investor-state context, dogmatically, is a bond between the host state of the investment and the home state of the investor. Treaty obligations are “binding upon the parties to it and must be performed by them in good faith”.155 Unilateral acts similarly are binding on the international legal plane, i.e., are obligations that are owed to other states. Understanding state consent in investor-state arbitration therefore must divorce itself from contemplating it from the investor’s point of view. This point of view, important though it is in every practical regard, is not dogmatically relevant to the understanding of state consent, as such.156

If state consent does not operate immediately vis-à-vis the investor, the question is “how does it operate?” The problem of engagements without privity, which for a

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153 See Benedetto Conforti, Diritto Internazionale (Editoriale Scientifica: 2006 (7th ed)), at p. 388.
154 ICSID Convention, Art. 25(1).
156 It is of course relevant to establish whether an arbitral tribunal has jurisdiction. See ICSID Convention, Art. 25(1). It is further an important factor in establishing the proper context for understanding the jurisdictional declaration of the host state. See SOAB1 v. Senegal, ICSID Case No. ARB/82/1, Award, dated February 25, 1988, at ¶ 4.10. It is not, however, relevant to establishing the consent as such, and only to the question whether it has been triggered or invoked.
significant time created a near absolute bar to the creation of contractual rights for third parties,\(^\text{157}\) has been instructively resolved by Grotius. As Reinhard Zimmermann explains

“...A contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance’. This is how BGB (§328 I) introduces its title on contracts in favour of third parties. For a Roman lawyer such a statement would have been inconceivable. ‘... vulgo dicitur’, said Gaius (II 95), ‘per extraneam personam nobis adquiri non posse’. Roman law generally refused to acknowledge the validity of agreements in terms of which third parties intend to acquire rights. It is safe to assume that in early Roman law ‘privity of contracts’, in this sense, was so much a matter of course that it hardly needed to be emphasized: legal acts and their effects were seen as a unity.”\(^\text{158}\)

This description of privity underlies the instinctive appeal of the offer-and-acceptance model of consent. It is, however, exactly inapposite to the legal situation that investor-state consent instruments pose.

Grotius resolved this problem of privity:

“Disputes also frequently arise concerning 1 the accepting of a Thing for another. In which Case we must distinguish between a Promise made to me of something to be given to another, and a Promise made directly to him to whom the Thing is to be given. If the Promise be made to myself, without considering whether I have any Interest in it, a Consideration that the Roman Law 2 has introduced, I look upon it, that by the Law of Nature I acquire a Right of accepting, that thereby the Right of demanding the Performance of the Promise may pass to another, if he also will accept of it; so that the Promiser has no Right in the mean Time to revoke it; but I, who received the Promise, may, if I please, remit it. For this Sense is not against the Law of Nature, and also very agreeable to the Words of such a

\(^{157}\) Reinhard Zimmermann, The Law of Obligations Roman Foundations of the Civilian Tradition (Juta & Co. Ltd: 1990), at p. 34.

\(^{158}\) Reinhard Zimmermann, The Law of Obligations Roman Foundations of the Civilian Tradition (Juta & Co. Ltd: 1990), at p. 34.
Promise; nor is it a Matter of Indifference, whether another obtains a Favour by my Means or not.”

Grotius solution provides “that the third party does not (directly) acquire a right under the contract between the other two, but that a declaration is required to accept the benefit”. As such, there is a relevant act of acceptance. This act of acceptance, however, is not forming a contract, but merely laying claim to the benefits bestowed on a party as a beneficiary under an existing contract.

Applying Grotius’ solution to the problem of privity in the investor-state context, state consent to arbitration is independent of the investor’s consent to arbitration. The consent, as an obligation of international law, exists between the respective host and home states. It creates a jurisdictional bond as of the time of its making. The investor’s declaration that it accepts the benefit is the invocation of the consent, the act of its perfection to allow the arbitral tribunal to resolve a specific dispute. The state consent exists and operates irrespective of the acts of the investor. It is binding vis-à-vis the respective home state of the investor. It bestows benefits on investors but exists and operates independently of their actions.

Viewed in this light, the investor’s consent to arbitration serves as the notification necessary to come within the benefit of the right obtained for it by its home state. It serves to perfect the jurisdiction of the dispute resolution body before which the investor

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has the option to appear.\textsuperscript{162} It serves to bind the investor to the conditions attached by the consent on its future action – \textit{i.e.}, it limits the investor’s available remedies. All these aspects of the investor’s consenting are important from a practical point of view, as well as from a procedural standpoint. They are not, however, acts that modify or affect the preexisting state consent.

The offer and acceptance model has a figurative role to play to explain when the jurisdiction of an arbitral tribunal has been seized or invoked. In that sense, it might be used to describe when the jurisdictional bond between the \textit{investor} and the host state was created. It is typically in this figurative sense that an offer and acceptance approach is used.\textsuperscript{163} But the risk is that this usage may obscure fundamental questions concerning the timing and substance of the state consent itself. It may be lost, for example, that state consent exists without privity and beyond privity. The implications of this understanding of consent, a consent that is without privity not only in an evocative phrase, but in actual substance, are set out in the following sections.

\textbf{IV. Denunciation Of Obligations And Consent}

The nature of state consent may be importantly at issue when an instrument of consent or a framework agreement in which it operates is denounced by a contracting party. In the context of investor-state arbitration, the issue of denunciation of both types of agreements has ceased to be a merely academic issue. Bolivia and Ecuador recently

\textsuperscript{162} See, \textit{e.g.}, \textit{Lanco International Inc v Argentina}, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at § 33 (stating that “the consent of the investor, along with that of the Argentine Republic, expressed in Article VII(4), creates the consent needed to provide ICSID with jurisdiction over this dispute, pursuant to Article 25(1) of the ICSID Convention”).

\textsuperscript{163} See, \textit{e.g.}, Bernardo M. Cremades, \textit{The Resurgence of the Calvo Doctrine in Latin America}, 2(5) Transnational Dispute Management, Nov. 2005, at p. 9.
became the first two states to denounce the ICSID Convention.164 The Russian Federation recently terminated provisional application of the Energy Charter Treaty.165 Ecuador is currently considering denouncing bilateral investment treaties containing consents to investor-state arbitration.166

In light of these developments, the literature on the effects of denunciation – and consequently on the nature of consent – has increased significantly. Despite this increase in engagement of the issue in doctrine, the issue remains largely unresolved with only sparse jurisprudence discussing the effects of denunciation of consent instruments and none dealing with the denunciation of the ICSID Convention. This section addresses how these issues should be approached in light of the nature of jurisdictional undertakings as independent international obligations creating a consensual bond between the respective home and host states.

a) Recent Arbitral Awards


“On 20 August 2009 the Russian Federation has officially informed the Depository that it did not intend to become a Contracting Party to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects. In accordance with Article 45(3(a)) of the Energy Charter Treaty, such notification results in Russia's termination of its provisional application of the ECT and the PEEREA upon expiration of 60 calendar days from the date on which the notification is received by the Depository. Therefore, the last day of Russia's provisional application of the Energy Charter Treaty and the PEEREA was 18 October 2009.”

Per a recent article in the Wall Street Journal, this action did not affect the right of investors to bring claims against the Russian Federation pursuant to the Russian Federation that were pending prior to Russia’s notification terminating the provisional application of the Energy Charter Treaty. See Gregory L. White, Yukos Shareholders Win Right to Bring Claim, The Wall Street Journal News Report, dated November 30, 2009. The decision of the arbitral tribunal was not available as of the date of submission of this chapter.

The recent arbitral award in *Rumeli v. Kazakhstan* has shed light on the question of denunciation of consent instruments, if only in passing.\textsuperscript{167} The analysis employed in that case is fundamentally in line with the international obligation approach to consent and its basis in the principle of good faith. The dispute in *Rumeli v. Kazakhstan* concerned an investment by Rumeli made in Kazakhstan originally in 1998 in KaR-Tel, a telecommunications company formed by Rumeli with a Kazakhstan joint venturer.\textsuperscript{168} On May 20, 1999, KaR-Tel executed an investment contract with the Kazakh government.\textsuperscript{169} Its object was “the creation and exploration of digital cellular radiotelephone connection of the GSM (900) standard on the territory of the Republic of Kazakhstan.”\textsuperscript{170} The tribunal noted that “It granted KaR-Tel tax and other benefits. The term of the Investment Contract was set to expire on July 31, 2009.”\textsuperscript{171} The contract was terminated by the Kazakh government on March 27, 2002.\textsuperscript{172} Rumeli filed a Request for Arbitration on July 20, 2005.\textsuperscript{173}

\textsuperscript{167} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008. The arbitrators in *Rumeli* were Professor Bernard Hanotiau, The Hon. Marc Lalonde and Stewart Boyd.

\textsuperscript{168} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 3-7.

\textsuperscript{169} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 3-7.

\textsuperscript{170} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 7.

\textsuperscript{171} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 7.

\textsuperscript{172} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 114.

\textsuperscript{173} *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 14.
Rumeli relied in part on Kazakhstan’s Foreign Investment Law of December 27, 1994 as a basis for jurisdiction.\textsuperscript{174} The Foreign Investment Law was repealed on January 8, 2003, i.e., prior to the institution of proceedings in 2005.\textsuperscript{175} The law provided for a survival period stipulated in the law for investments benefiting from an investment contract in its Article 6(1).\textsuperscript{176} On the basis of both Article 6(1) and the principle of good faith, the Tribunal held that the Foreign Investment Law was a valid basis for jurisdiction in the arbitration.

The Tribunal reasoned as follows:

“Under Article 27 of the FIL, a foreign investor is expressly permitted to choose ICSID arbitration as the means for solving disputes with the Republic relating to investments and, once that choice has been made, the consent of the Republic of Kazakhstan ‘shall be presumed to have been granted’ (Article 27(3)). The fact that the Foreign Investment Law was repealed as of January 8, 2003, does not have an impact on ICSID jurisdiction. The FIL was indeed valid and effective at all times relevant to this dispute. Article 6(1) of the Law provides that ‘[i]n the case of a deterioration of the position of a foreign investor, which is a result of changes in the legislation and (or) entering into force and (or) changes in the provisions of international treaties, to foreign investments during ten years the legislation shall be applied which had been current at the moment of making the investment, and with respect to the investments which are carried out in accordance with the long-term (more than ten years) contracts with the authorized State bodies, until the expiry of the effect of the contract, unless the contract stipulates otherwise.’ In other words, Article 6(1) grants foreign investors protection against adverse changes in legislation for a period of ten years from the moment they made their investment, or for the entire duration of the contract exceeding ten years entered into with authorized State bodies. This is the case here. The relevant investments were made by Claimants from 1998 to 2002, and the

\textsuperscript{174} Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 12.

\textsuperscript{175} Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 221.

\textsuperscript{176} Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 221.
Investment Contract entered into between Claimants and Respondent on May 20, 1999, was valid until June 31, 2009, i.e., for a period of more than ten years.

“Respondent has expressed its consent to ICSID arbitration on December 28, 1994, the date of the entry into force of the FIL, and it remains applicable to the dispute pursuant to Article 6(1). On the other hand, Claimants have consented to ICSID jurisdiction by filing their Request for Arbitration. The Arbitral Tribunal has therefore jurisdiction under the FIL.

“Besides Article 6(1), it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium.”

In order to reach its conclusion, the Rumeli tribunal looked to the host state consent as an act independent of the consent of the investor. This point of departure critically allowed the tribunal to come to the conclusion that it had jurisdiction, despite the denunciation of the Foreign Investment Law.

The tribunal’s reasoning was based on three separate grounds. First, the survival period in Article 6(1) kept in place the consent to arbitration in Article 27 of the Foreign Investment Law. Second, the consent was applicable because the law was in effect at the time that the underlying events occurred, i.e., state consent was determined at the time of the injury, not the time of the commencement of legal proceedings. Third, the

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177 Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 333-335.
178 Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 334.
179 Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 333.
180 Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶ 333.
principle of good faith in the context of investor-state arbitrations prohibits the removal of accrued investor rights by a host state government.\(^\text{181}\)

\textit{b) Denunciation of the ICSID Convention}

Both Bolivia and Ecuador have denounced the ICSID Convention.\(^\text{182}\) After Bolivia’s denunciation of the ICSID Convention, but days before the denunciation could take effect on November 3, 2007, E.T.I. Euro Telecom International N.V. instituted ICSID proceedings against Bolivia.\(^\text{183}\) The claim filed by Química e Industrial del Bórax Ltda against Bolivia which is currently pending was registered on February 6, 2006, prior to the date of the Bolivia’s denunciation of the ICSID Convention.\(^\text{184}\) E.T.I. Euro Telecom International NV and Bolivia agreed to a removal of their investment arbitration from the auspices of the ICSID and reportedly have agreed to a resolution of the dispute by the same tribunal in \textit{ad hoc} arbitration.\(^\text{185}\) As of the date of writing this article, there is no case pending that was registered after the denunciation of the ICSID Convention. This means that for the foreseeable future, there will be limited guidance on the effect on consent of such a denunciation.

\[^{181}\text{Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 335. Compare Nolan/ Sourgens, at p. 27 (“sovereigns must act in keeping with substantive notions of good faith and non-contradiction”).}\]

\[^{182}\text{Bolivia Submits a Notice under Article 71 of the ICSID Convention, ICSID News Release, dated May 16, 2007; Ecuador Submits a Notice under Article 71 of the ICSID Convention, ICSID News Release, dated July 9, 2009.}\]


\[^{184}\text{ICSID List of Cases, ICSID Case No. ARB/06/2, available at http://icsid.worldbank.org/ICSID/FrontServlet.}\]

\[^{185}\text{Luke Eric Peterson, Telecom Italia subsidiary agrees to withdraw ICSID claim against Bolivia, but case to proceed under other auspices, lareporter.com, November 2009.}\]
Although the arbitration instituted Química e Industrial del Bórax Ltda may provide some opportunity to discuss the implications of denunciation of the ICSID Convention, the jurisprudence of the International Court of Justice gives a ready answer to the implication of denunciation after proceedings are instituted. The Court stated

“When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court – which was the case between Guatemala and Lichtenstein on December 17th, 1951 – the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of jurisdiction already established.”

On account of this elaboration of similar issues by the International Court of Justice, that arbitration may not address the larger issues of the limits of consent.

a. Articles 71 and 72 of the ICSID Convention and their history

Fully to understand the effect of denunciation of the ICSID Convention on the consent supplied in jurisdictional declarations of host states, the text of the ICSID Convention will have to be considered in its historical context. The relevant provisions of the ICSID Convention state:

“Article 71

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“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

“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.”

Because of the limited drafting history of Articles 71 and 72, the provisions must be understood in the context of the more extensive discussions regarding “consent” under the ICSID Convention. The understanding of consent that crystallizes from these materials confirms that although consent was conceived of as primarily through the lens of a special agreement between the host state and the investor, the principal focus was the provision of a dispute resolution forum that would prevent the frustration of consents to arbitration previously given by the host state and was adapted to allow for treaty and legislative consents to arbitration.

i. Drafting history of “consent” in the context of the ICSID Convention

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. A core objective for such contractual dispute resolution clauses was, of course, to accommodate the foreign

187  ICSID Convention, Arts. 71-72.
investor’s desire for an alternative to local court proceedings, especially in the context of
investments to develop strictly regulated infrastructure projects. 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. A core objective of the
drafters of the ICSID Convention was to provide investors a forum in which contractual
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.

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. It marked a period of great interest in such

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189 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

190 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 Libyan Arab Republic, Unpublished Private
Arbitral Award (1973); Sapphire International Petroleums Ltd. v. National Iranian Oil Co., Private Arbitral
Award (1963); Société Européene 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,
proceedings, similar principles have become known as the “act of state doctrine.” See ANDREAS

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

192 See West Germany-Pakistan, Treaty for the Protection of Investment, Nov. 25, 1959, 457
U.N.T.S. 23.
innovative legal agreements to promote foreign investment.\footnote{See Jeswald W. Salacose, \textit{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).} The President of the World 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

\textit{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. \textit{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 ressortissant 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)

This provision was later modified in 1987 to strengthen homologation requirements under domestic law in order to be allowed access to ICSID. \textit{See} France-Egypt 1987 BIT Modification.
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.194

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.195 This turned out to be a conceptual framework for the first draft of the ICSID Convention.196 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:

195  Hereinafter the “Working Paper.”
196  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.
“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.”

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. These comments are reflected in language in the official “first preliminary draft” of the Convention that is addressed to the jurisdiction of the Centre.

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 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

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198 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).


200 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”).
“(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.”201

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 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. 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.”

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.”

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.” In January of 1965, Mr. Broches further clarified that the language of the Convention should not be interpreted to require that consent must be construed as arising exclusively out of one consent document:

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“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.”

ii. 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 signature, and then only briefly. The discussion began with a hypothetical concerning a


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.
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.”

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.

207 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,
“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.”

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.”

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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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. Gutierrez 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.

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. 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

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210 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.”

jurisdiction in BITs and other non-contractual unilateral instruments, as he has been understood by some commentators to have done,\(^{212}\) 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.

b. State consent is unaffected by denunciation of the ICSID Convention

A reading of Articles 71 and 72 in their historical context confirms that a state consent to ICSID arbitration given prior to the denunciation of the ICSID Convention remains intact thereafter per its terms. The obligations pursuant to the ICSID Convention that accrued prior to its denunciation remain intact. A host state’s consent can be viewed as an independent obligation that must be given effect even after the denunciation of the Convention. Put differently, if this reasoning were to be applied, an investment dispute could still be registered today at the ICSID against Bolivia to the extent that the underlying consent instrument referring a dispute to the Centre remains in force.

This understanding of consent is reflected in jurisprudence of the International Court of Justice. Per the Court’s decision for example in the *Case Concerning Right of Passage over Indian Territory*, the international legal obligations of consent arise when the consent is made.\(^{213}\) Similarly, the Court’s explained in *Nottebohm* when such an


\(^{213}\) *Case Concerning Right of Passage over Indian Territory (Preliminary Objection)* (Portugal v. India), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.
Notably, in the one case bearing resemblance to the denunciation of the ICSID Convention, if a distant one, the International Court of Justice did not decline to exercise its jurisdiction. This case is the *Genocide case* discussed in the context of state successions. It is striking that as of the date that proceedings were instituted against Yugoslavia on March 20, 1993, the then-Federal Republic of Yugoslavia was not considered to be a member of the United Nations, and as such not a member of the Statute of the International Court of Justice. The Federal Republic of Yugoslavia was only readmitted to the United Nations on November 1, 2000. Nevertheless, the International Court of Justice, when challenged on this basis by the Federal Republic of Yugoslavia after its re-admission to the United Nations did not reconsider its earlier pronouncement that it had jurisdiction. In fact, the underlying application noted that although the Federal Republic of Yugoslavia was not the successor state to the Socialist Federal Republic of Yugoslavia, and as such not a member of the Court, its affirmation of

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The consequence that the international legal obligation to submit to ICSID arbitration survives a denunciation of the ICSID Convention is consistent with the drafting history of the ICSID Convention detailed above. One of the fundamental principles of the ICSID Convention was to prevent the frustration of existing state consents to arbitration. The drafting history of Articles 71 and 72 confirms that existing instruments of consent would not be disturbed by the denunciation of the Convention. The drafting history of the Convention sheds light on the fact that the drafters did consider state consent could operate as an independent obligation. Consequently, it is consistent with the drafting history of the ICSID Convention that a denunciation of the Convention itself does not undo existing consents to arbitration contained in international legal instruments.

A conception that the denunciation of the ICSID Convention undoes such consents is principally based on an operational conception of consent as deriving from a state offer to arbitration that is accepted by the investor. In short, this model assumes that there exists privity between the host state and the investor. But privity is exactly no longer required for state consent to operate. This conception fundamentally ignores the revolution of arbitration without privity that is the current network of international legal consents to ICSID arbitration.
By misconstruing consent, the offer and acceptance model runs afoul of the basic principle of *pacta sunt servanda* codified at Article 26 of the Vienna Convention on the Law of Treaties. If a state has undertaken to arbitrate investor-state disputes before ICSID, it cannot frustrate that commitment by rendering ICSID arbitration impossible through a denunciation. As the International Law Commission noted:

“(2) There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*. Thus, speaking of certain valuations to be made under articles 95 and 96 of the Act of Algeciras, the Court said in the *Case concerning Rights of Nationals of the United States of America in Morocco* (Judgment of 27 August 1954): ‘The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith’. Similarly, the Permanent Court of International Justice, in applying treaty clauses prohibiting discrimination against minorities, insisted in a number of cases, that the clauses must be so applied as to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous precedents could also be found in the jurisprudence of arbitral tribunals. To give only one example, in the *North Atlantic Coast Fisheries* arbitration the Tribunal dealing with Great Britain's right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to United States nationals by the Treaty of Ghent, said:

“‘...from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty’.

“...

“(4) Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The
Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.\(^{220}\)

Consequently, a denunciation of the ICSID Convention could not have the effect of depriving a consent to arbitration contained in an instrument subject to *pacta sunt servanda* or similar good faith principle applying mutatis mutandis to unilateral declarations of its force. Conceiving of an obligation to arbitration as maintaining in place the ICSID Convention by operation of Article 72 thus gives effect to the entire network of legal obligations between the affected states. It avoids having to answer the question whether a state having outstanding for example clear treaty consents to ICSID arbitration at all can denounce the ICSID Convention, or whether it has a legal obligation under such a treaty not to do so. As such, it is the most economical and most logical answer to the question of theoretical implications of consent on denunciation of the ICSID Convention.

The consequence of such an understanding of consent is that it can only be undone on the terms of the consent instrument itself. Several states are currently contemplating denouncing the underlying consent instruments themselves. The effect of such a denunciation is discussed in the next section.

c) *Denunciation of instruments of consent*

It is the consequence of the preceding discussion that the bond of consent contained in jurisdictional undertakings can be terminated only on their own terms rather than by any other means to undercut the jurisdictional commitment. The protections an

\(^{220}\) Yearbook of the International Law Commission vol. II (1966), p. 211.
investor derives from an instrument of consent thus is only as strong as the terms of the consent allow them to be. As the examples of the compulsory jurisdiction of the Court show, it is to be expected that jurisdictional declarations lodged with the International Court of Justice can be terminated “strategically”. To the extent the consensual bond created by the investment treaty or investment law similarly provides for easy revision, the same may be true of consents in investment arbitration.

The drafters of investment consents have chosen a fundamentally different route. International consents to investment arbitration almost universally have significant survival periods protecting investments that were made while the treaty was in effect.221 It is not atypical that these protections have a survival period of 10 to 15 years.222 These survival periods as a matter of course by their terms apply to the treaty as a whole, including its consent provisions.223 The survival of consent beyond the denunciation of the underlying treaty or investment law has become part and parcel of international state practice. It has done so on the logic, expressed by the Rumeli tribunal that “a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium.”224

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221 See, e.g., Sweden-Ecuador BIT; Canada-Ecuador BIT; Netherlands-Ecuador BIT; United-Kingdom-Ecuador BIT; United States-Ecuador BIT.

222 See, e.g., Sweden-Ecuador BIT (15 years); Canada-Ecuador BIT (15 years); Netherlands-Ecuador BIT (15 years); United-Kingdom-Ecuador BIT (15 years); United States-Ecuador BIT (10 years).

223 See, e.g., France-Bolivia BIT, Art. 12 (stating that “at the expiry of the period of validity of the present accord, the investments made while it was in force shall continue to benefit of the protection of its provisions for an additional period of twenty years” (our translation; emphasis added))

224 Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, dated July 21, 2008, at ¶¶ 333-335.
The application of the principle of estoppel in the context of investor-state consent is a hallmark of what sets such consents apart from many other jurisdictional instruments used in state practice. Thus, the authors have set out above that such a principle as a general matter would not be applicable with regard to declarations of compulsory jurisdiction before the International Court of Justice, absent specific conditions militating to the opposite conclusion. The difference between both cases goes to the heart of the nature of consent in investor-state arbitration: consent in the investor-state context is a protection of the investor’s right, operating as a matter of international law and susceptible to invocation directly by the investor. Declarations of compulsory jurisdiction are means for the pacific resolution of disputes between, theoretically at least, equal sovereign states, meaning that they do not and cannot operate as a protection, but as a jurisdictional bond between legal equals.

This fundamental nature of consent to investor-state arbitration as a protection has been amply underlined in doctrine and, arguably, state practice. Thus, the OECD has noted in a published study that “[m]echanisms for the settlement of disputes between the Host State and the Foreign Investor are a necessary condition for the implementation of the provisions and guarantees” in the investment protection instrument. Judge Schwebel noted in a similar vein that the institution of international arbitration as a dispute resolution mechanism “is consistent with the advancement of human rights internationally, including the human right to own and enjoy the use of property”.

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225 See above __.
letter of submittal to the US Senate of the US Argentina BIT, the treaty at issue in the
*Lanco* arbitration, underscores:

“The conclusion of this treaty, which contains *an absolute right to international arbitration of investment disputes*, removes U.S. investors from the restrictions of the Calvo Doctrine and should help pave the way for similar agreements with other Latin American states.”228

V. Conclusion

Having considered the nature of consent as a matter of international law, it becomes clear that state consent to investor-state arbitration is an independent legal obligation. It follows that the operation of the state’s consent must be irrespective and independent of actions of the investor, and that the state’s consent embodied in many investment-protection treaties may not be undone immediately by denunciation simply because there has not been “acceptance” by a particular investor of an “offer” to arbitrate. Rather, the consent to arbitration by a host state in the context of investment-protection treaties and laws has more definite legal consequence. It creates a legal bond – and one strong enough to create a reliance interest in international investors making an investment decision.

This understanding of instruments of state consent is consistent with their fundamental and express purpose. Such consents by their nature are an insurance policy for international investors, providing an international forum should their investments be subjected to unfair treatment or expropriation after a change in the political proclivities of

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a host state. As such, instruments of consent have be sufficiently robust to endure a political change in the host state, even fundamental or cataclysmic change, given that exactly such worst-case scenarios may be among those intended to be protected against.