

# DENUNCIATION OF THE ICSID CONVENTION AND BITS: IMPACT ON INVESTOR-STATE CLAIMS<sup>1</sup>

## Introduction

The withdrawal by the plurinational State of Bolivia and by Ecuador from the International Centre for the Settlement of Investment Disputes (ICSID)<sup>2</sup> as well as the termination of several bilateral investment treaties (BITs) by Ecuador and some other countries<sup>3</sup> raise novel and complex legal issues of systemic importance for the international investment regime. While some countries no longer view ICSID as the preferred means of resolving investor-State disputes,<sup>4</sup> the existing legal framework – depending on its interpretation – may make it difficult for these countries to abrogate it. Governments need to monitor relevant legal developments and consider the available policy options in order to minimize uncertainties.

## Highlights

- Denunciations of the ICSID Convention raise novel legal issues regarding the possibility of initiating new BIT claims against the denouncing State.
- Different interpretations exist but there are good reasons to conclude that no new claims can be initiated by investors against States that have withdrawn from ICSID, despite an offer of ICSID arbitration in the country's BITs.
- An ICSID tribunal is likely to rule on the matter in a case recently brought against the Plurinational State of Bolivia; governments need to monitor the relevant legal developments as they may have important repercussions.
- States may clarify the issue in at least two ways: by taking preventive action in their IIAs or by issuing an agreed interpretation of the ICSID Convention.

<sup>1</sup> This Note draws on the research memorandum by Wolfgang Alschner, Ana Berdajs and Vladyslav Lanovoy, all students of the Graduate Institute of International and Development Studies (IHEID), who prepared it under the aegis of the IHEID's Trade Law Clinic headed by Professor Joost Pauwelyn. In preparing this Note, the UNCTAD secretariat also sought inputs and comments from relevant institutions. This Note was drafted by Sergey Ripinsky, with helpful comments from Anna Joubin-Bret and Elisabeth Tuerk and assistance from Diana Rosert. UNCTAD extends its gratitude to the following external reviewers for their valuable comments: Kate Miles, Sophie Nappert and Federico Ortino.

<sup>2</sup> The Plurinational State of Bolivia's notification of its withdrawal from the ICSID Convention was received by ICSID on 2 May 2007 and took effect on 3 November 2007. Ecuador's denunciation notification was received on 6 July 2009 and took effect on 7 January 2010.

<sup>3</sup> In 2008, Ecuador terminated nine BITs - with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Other denounced BITs include those between El Salvador and Nicaragua, and the Netherlands and the Bolivarian Republic of Venezuela. In 2010, Ecuador's Constitutional Court declared arbitration provisions of six more BITs (China, Finland, Germany, the UK, Venezuela and United States) to be inconsistent with the country's Constitution. It is possible that Ecuador will take action to terminate these (and possibly other) BITs.

<sup>4</sup> Nicaragua and the Bolivarian Republic of Venezuela have also said that they wish to withdraw from ICSID but have not done so to date. Ecuador's Constitutional Court declared arbitration provisions of four more BITs (China, Finland, Germany and the UK) to be inconsistent with the country's Constitution. It is possible that Ecuador will take action to terminate these (and possibly other) BITs.

There are several policy options for addressing the uncertainties that arise when countries withdraw from the ICSID Convention.

This UNCTAD IIA Issues Note looks into the questions that arise in connection with the denunciation of the ICSID Convention and with the termination of BITs. The Convention's provisions on denunciation leave room for contradictory interpretations as to whether the denouncing State remains bound by the Convention only in relation to disputes initiated *before* the denunciation, or also in relation to *future* disputes as long as the State's consent to ICSID arbitration continues to exist in that country's BITs. This latter reading effectively means that for a State to prevent future ICSID claims, it must not only terminate the ICSID Convention but also separately terminate all of its BITs that contain an ICSID arbitration option. Moreover, under this interpretation, exposure to ICSID proceedings will persist as long as the terminated BITs retain their force due to the "survival clauses", i.e. up to 20 years after the termination. The solution to this interpretative puzzle will have far-reaching consequences for the system of international investment dispute settlement.

### ICSID and BITs: The mechanics of consent

The vast majority of IIAs include an offer of ICSID arbitration. The importance of ICSID derives from the fact that, unlike other international arbitral awards, ICSID awards do not require domestic enforcement procedures in accordance with the New York Convention<sup>5</sup> and, therefore, cannot be refused enforcement *inter alia* on public policy grounds. An ICSID award is equivalent to "a final judgment of a court" in all of the ICSID Contracting States, and therefore is directly executable.<sup>6</sup>

For an investor to start an ICSID arbitration against a State, the State must be a party to the ICSID Convention, a multilateral legal instrument that exists separately from BITs.<sup>7</sup> Membership in ICSID, however, in itself is not sufficient for a State to be sued under ICSID. ICSID's jurisdiction over investor-State disputes rests on the notion of "*consent*", which generally is a cornerstone of international dispute settlement involving States.<sup>8</sup> In addition to ICSID membership, consent to ICSID arbitration must have been given by the State in a contract with a foreign investor, a national law of the State concerned, or an international investment agreement (IIA) such as a BIT.

In the past decade, the great majority of ICSID disputes have been initiated on the basis of IIAs/BITs. According to the leading school of thought, the relevant clause in a BIT represents a *unilateral offer of consent*, which can be accepted by the other disputing party, i.e. an investor. Investors typically express their consent by filing a request for arbitration. In other words, for a case to be taken up by the Centre, the ICSID Convention requires the written consent of both disputing parties. When this happens, the consent is "perfected" and can no longer be revoked unilaterally.<sup>9</sup>

In sum, for an ICSID tribunal to have jurisdiction, both the following conditions must be met: (1) there must be a perfected consent in relation to the dispute; and (2) the respondent State must be a Contracting Party to the ICSID Convention.<sup>10</sup>

<sup>5</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

<sup>6</sup> Article 54(1) of the ICSID Convention.

<sup>7</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965). Currently, the Convention is in force for 144 States.

<sup>8</sup> "No State can, without its consent, be compelled to submit its disputes...to arbitration, or any other kind of pacific settlement." (Permanent Court of International Justice, *Status of Eastern Carelia*, Advisory Opinion, Ser. B, No. 5 (1923), 19).

<sup>9</sup> Article 25(1) of the ICSID Convention. Another school of thought is that «consent» starts to exist only after it is given by both parties to the particular dispute in question.

<sup>10</sup> There are further jurisdictional conditions, including that the dispute must arise directly out of an investment and that the investor must qualify as a national of another ICSID Contracting State, but these are irrelevant in the context of this paper.

## Termination of BITs: Not so fast

It follows from the above that a unilateral offer of consent to ICSID arbitration given in a BIT may be revoked by the State before it is accepted by an investor. However, given that BITs are *international treaties*, this revocation will be subject to the international law of treaties. This effectively means that – unless both contracting parties agree to exclude the ICSID clause from the BIT – a State will have to terminate the whole treaty, as it cannot *unilaterally* terminate an individual provision of a treaty.<sup>11</sup>

A common approach in BITs is to specify a period for its initial duration, often 10 or 15 years.<sup>12</sup> In the absence of exceptional circumstances, a treaty cannot be terminated before the expiry of this initial term.<sup>13</sup> Most BITs specify that at the end of the fixed period, each party may terminate the treaty, usually with one year's written notice.

Most BITs also state that if the agreement is not terminated at the end of the initial fixed term, it shall continue to be in force. While some BITs state that the treaty shall continue to be in force for additional fixed terms, others provide that the treaty shall continue to be in force indefinitely. The latter approach has prevailed since 1995.<sup>14</sup> After an agreement is extended for an indefinite term, either party can terminate it by prior written notice.

BITs also typically include the so-called survival clause, which guarantees that the provisions of the BIT will remain in effect for another 5, 10, sometimes 15 or even 20 years after the termination of the treaty.<sup>15</sup> These clauses guarantee that the international protection for investments will not cease to exist abruptly in the case of treaty termination. For instance, the Ecuador-United States BIT provides:

### ARTICLE XII

[...]

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

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

Thus, even though a State may terminate a BIT, it will often still remain bound by its provisions vis-à-vis investments made prior to the treaty's termination. As in the example quoted, the survival clause is usually not limited to specific BIT provisions, but encompasses the entirety of the agreement, including the investor-State dispute settlement (ISDS) provisions. Therefore, the termination of a BIT is of little immediate significance since the State continues to be bound by it for the period of the survival clause.

Jurisdiction of an ICSID tribunal requires perfected consent for the dispute and ICSID Membership of the respondent State.

The immediate practical impact of terminating a BIT is limited in cases where the BIT has a survival clause.

<sup>11</sup> The relevant rule is enshrined in Article 44(1) of the Vienna Convention on the Law of Treaties: "A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty *may be exercised only with respect to the whole treaty* unless the treaty otherwise provides or the parties otherwise agree." (emphasis added)

<sup>12</sup> Some treaties provide that the BIT shall remain in force indefinitely until one contracting party notifies the other of its intention to terminate it.

<sup>13</sup> Such as material breach of the treaty by the other party or a fundamental change of circumstances. See Articles 60-64 of the Vienna Convention on the Law of Treaties.

<sup>14</sup> For details, see UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations, New York and Geneva, 2007), p.21.

<sup>15</sup> Note that where a chapter on investment is integrated in a broader economic agreement such as an FTA, it sometimes does and sometimes does not include a survival clause. See, for example, India-Korea CEPA (2009), which does include a survival clause in Article 10.22, and the Canada-Chile FTA (2008), which does not.

As most ISDS clauses refer to different arbitration forums, investors retain the option of international arbitration even if the ICSID avenue is excluded.

In most BITs the contracting States give their advance consent to several arbitration forums<sup>16</sup>. Thus a possibility for an investor to rely on international arbitration persists even if the ICSID option is excluded. For those BITs that provide recourse only to ICSID,<sup>17</sup> substantive provisions will continue to exist, but whether it will be possible to enforce them through ICSID arbitration in situations where the host country has denounced the ICSID Convention depends on the interpretation of the Convention's provisions on denunciation.

### **Denunciation of the ICSID Convention: Two possible interpretations**

As explained above, after having been unilaterally terminated, the BIT can remain in effect for up to 20 years, with investors able to bring claims with respect to pre-termination investments. In this situation, for a State wishing to avoid having its disputes with investors adjudicated at ICSID, the preferred solution may be to extinguish the second element of the ICSID jurisdiction, namely withdraw from the ICSID Convention and thus cease to be a "Contracting Party" to it. The Plurinational State of Bolivia and Ecuador chose to follow this avenue.

#### **Box 1. Other approaches to remove disputes from ICSID's jurisdiction may prove ineffective**

**Constitutional amendments.** A country may amend its constitution to prohibit the State's participation in international arbitral proceedings relating to commercial or contractual disputes. In fact, the new constitutions of both, the Plurinational State of Bolivia (2009) and Ecuador (2008) frown upon the State's participation in international arbitration. However, it is well-established in international law that domestic law cannot prevail over an international treaty.<sup>a</sup> This principle is equally applicable to provisions of a constitution. Therefore, international treaty commitments must be respected, while they are in force, regardless of the changes in domestic legislation.

**Notification of classes of disputes.** ICSID also provides for the possibility for each State to notify the Centre of the class or classes of disputes that it would not consider submitting to the jurisdiction of the Centre.<sup>b</sup> For example, a State may decide that it does not wish to have disputes in a particular industry or economic sector to be arbitrated at ICSID. This right can be exercised by States at any time.<sup>c</sup> However, a notification of this kind is for information only and does not have legal consequences where the State has given its consent with respect to the said class of disputes. Thus, in most BITs, States consent to a broad range of investment disputes across all economic sectors. A legally binding BIT consent remains in force despite a notification. Consent given validly cannot be defeated by a subsequent notification.<sup>d</sup>

<sup>a</sup> Article 27 of the Vienna Convention on the Law of Treaties.

<sup>b</sup> Article 25(4) of the ICSID Convention.

<sup>c</sup> In 2007, Ecuador notified ICSID that it will no longer consent to ICSID arbitration in relation to energy and mining disputes. It withdrew from the ICSID Convention two years later.

<sup>d</sup> C. Schreuer et al. *The ICSID Convention: A Commentary* (2nd ed, CUP, 2009), p. 347.

This is where the crucial legal question arises. While Article 71 of the ICSID Convention does allow denunciation (providing that it shall take effect six months after the receipt of the notice of denunciation), Article 72 governs the *consequences* of the denunciation in the following terms:

<sup>16</sup> *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, registered on 12 April 2010.

<sup>17</sup> *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, registered on 12 April 2010.

## 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*. (emphasis added)

There is currently no unity of opinion about the meaning of this provision. Some commentators believe that Article 72 refers only to those disputes where consent has been “perfected”, i.e. proceedings initiated by the time of the denunciation.<sup>18</sup> Others argue that the Article encompasses all *unilateral* offers of consent that remain standing after the denunciation (most importantly, consents in BITs that remain in force, and those terminated BITs which remain in effect due to the operation of the “survival clause”), meaning that an investor will be able to give his consent and commence ICSID proceedings even after the denunciation takes effect.<sup>19</sup> The ambiguity in the Article primarily arises from the words “*given by one of them*”, which can be seen as referring to “State or of any of its constituent subdivisions or agencies or of any national of that State” or, alternatively, as meaning that Article 72 applies to *unilateral* State consents, meaning that they can be perfected even after the denunciation.

So far, the discussions on the correct interpretation of Article 72 have been academic, however an ICSID tribunal in *Pan American Energy LLC v. Bolivia*<sup>20</sup> will probably have to grapple with the issue. The case was initiated more than two years after the Plurinational State of Bolivia’s denunciation of the ICSID Convention had taken effect.<sup>21</sup> The question is thus turning from a theoretical one into a practical one. In the absence of an agreed multilateral interpretation by the ICSID Contracting Parties, arbitral tribunals will be the ones deciding the issue. The way the issue is approached will have important implications not only for the Plurinational State of Bolivia and for Ecuador, but also for any other countries that might consider joining or withdrawing from ICSID in the future.

### Some factors relevant to the interpretation of Article 72

When interpreting Article 72, the arbitrators will have to take into account the historical context of the Convention, which was concluded in 1965 when the BIT movement was still in its very early stages and investment contracts were seen as the primary basis for initiating ICSID proceedings. In an investment contract, both parties – an investor and a State – give their consent at the same time, so that the consent becomes “perfected” at the contract’s conclusion. Arguably, this supports the reading of Article 72 as referring to cases of perfected consent.

With the issue being in front of an ICSID tribunal, the debate about the practical effects of withdrawing from ICSID gains increasing importance.

<sup>18</sup> C. Schreuer et al. *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed, CUP, 2009), p. 1280, paras. 5-6; J. Fouret, Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: “Manufacturing Consent” to ICSID Arbitration?” (2008) 25 *Journal of International Arbitration* 1, 71; E. Schnabl and J. Bedard, “The Wrong Kind of Interesting” (2007) *The National Law Journal*, 30 July 2007.

<sup>19</sup> E. Gaillard and Y. Banifatemi, “The Denunciation of the ICSID Convention” (2007) *New York Law Journal*, Vol. 237, No. 122 (26 June 2007); O.M. Garibaldi, “On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy”, in C. Binder et al., *International Investment Law for the 21st century: Essays in Honour of Christoph Schreuer* (Oxford: OUP, 2009); C. Tietje et al., “Once and Forever? The Legal Effects of a Denunciation of ICSID”, available at <http://www.wirtschaftsrecht.uni-halle.de/Heft74.pdf>.

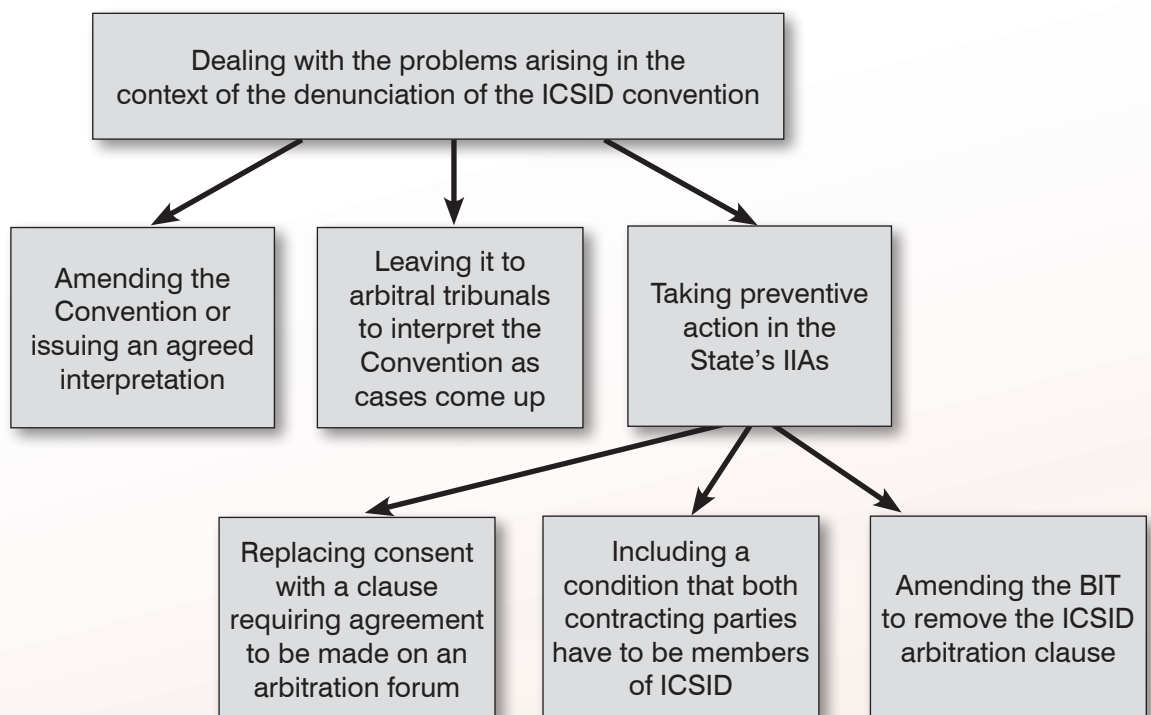
<sup>20</sup> *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, registered on 12 April 2010.

<sup>21</sup> Another case, *E.T.I. Telecom International N.V. v. Bolivia*, ICSID Case No. ARB/07/28, was registered on 31 October 2007, i.e. after the receipt of the Plurinational State of Bolivia’s denunciation notice, but these proceedings have been discontinued at the claimant’s request in October 2009, to be pursued under *ad hoc* rules before the same panel.

An important clarification comes from the rule found in Article 25(1) of the Convention: “When the parties have given their consent, no party may withdraw its consent unilaterally.” This implies that before the consent is perfected, unilateral withdrawal of consent is possible. Given that one prerequisite for valid consent by a State is that it has to be an ICSID Contracting Party, the fact that the State ceases to be a Contracting Party may be interpreted as a way to revoke the State’s unilateral consent to ICSID arbitration.

This understanding appears to be consistent with the negotiating history of the Convention, where Mr. Broches, the World Bank’s General Counsel and the Convention’s “principal architect”,<sup>22</sup> stated that the consent would not be binding until it had been accepted by an investor. If the State were to withdraw its unilateral consent by denouncing the Convention before it had been accepted by any investor, no investor could later bring a claim before the Centre.<sup>23</sup>

**Figure 1.**



The opposite interpretation would suggest that where a State wishes to cancel ICSID arbitration option, it would need not only to denounce the ICSID Convention *but also to terminate its IIAs that contain consent to ICSID arbitration*. When there is no agreement with the other contracting party, the State would have to denounce the relevant investment treaty *as a whole* as it is impossible to unilaterally terminate a discrete provision of a treaty. This approach would not be functional, given that most BITs contain important substantive protections and offer options for arbitration other than ICSID. Metaphorically, to get rid of the top floor, one would be asked to destroy the whole building.

<sup>22</sup> C. Schreuer et al, *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed, CUP 2009), p. 2.

<sup>23</sup> *Ibid.*, p. 1279. Under this analysis, an investor would be able to bring a claim during the six-month period that must expire before the denunciation takes effect (Article 71 of the ICSID Convention).

## Policy and legal options

The above discussion suggests that even though there are good reasons to believe that after a withdrawal from ICSID, new arbitration claims cannot be initiated against the withdrawing State, there is still some uncertainty in this respect. The uncertainty could be resolved either through an amendment<sup>24</sup> or an agreed multilateral interpretation of Article 72 by the ICSID Contracting States<sup>25</sup> or through a consistent line of arbitral awards<sup>26</sup> (fig. 1). Some other ways to remove investment disputes from ICSID's jurisdiction in the presence of prior treaty consent appear, however, to be ineffective (box 1).

States may also consider adapting the relevant provisions in their IIAs in order to mitigate the risk of a contradiction between prior IIA consent to ICSID arbitration and subsequent denunciation of the ICSID Convention (fig. 1). In particular, as has already been done in some BITs, the contracting parties – instead of giving consent to ICSID arbitration – can express an *intent* to give consent to international arbitration. Once a dispute arises, both investors and the State have to agree to submit the dispute to a particular forum. The BIT between the Plurinational State of Bolivia and the United Kingdom provides a relevant example. According to its Article 8(1), either disputing party may initiate international arbitration proceedings. Yet, as Article 8(2) specifies, “[w]here a dispute is referred to international arbitration, the investor and the Contracting Party [...] *may agree* to refer the dispute either to [ICSID, ICC or *ad hoc* arbitration under the UNCITRAL Rules].” (emphasis added) The BIT further provides that if no agreement is reached, the dispute is submitted to international arbitration under the UNCITRAL Rules.

Another way to clarify the issue, followed in some BITs,<sup>27</sup> is to include an explicit condition whereby a State's consent to ICSID arbitration will be valid only where the relevant treaty partners are contracting parties to the ICSID Convention. For instance, the BIT between Canada and Ecuador provides:

Article XIII. Settlement of Disputes between an Investor and the Host Contracting Party

[...]

4. The dispute may, at the election of the investor concerned, be submitted to arbitration under:

The International Center for Settlement of Investment Disputes (ICSID) [...], *provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention*, or [...]

5. Each Contracting Party hereby gives its unconditional consent to

A tentative analysis suggests that withdrawal from ICSID precludes new arbitration claims – but uncertainties remain.

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