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DENUNCIATION OF THE ICSID CONVENTION

What are the consequences of consent in a case of denunciation?

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LIST OF ABBREVIATIONS

ICSID	International Centre for Settlement of Investment Disputes.
ICSID Convention/ Convention	The Convention on Settlement of Investment Disputes Between States and National of Other States, finalized on March 18, 1965, entered into force on October 14, 1966.
Center	The International Center for Settlement of Investment Disputes.
VCLT	Vienna Convention on the Law of Treaties (entered into force on January 27, 1980).
Travaux préparatoires	‘Preparatory works’. In interpreting treaties it is often permissible to consult preparatory materials, usually in the event of their being an ambiguity.
BITs	Bilateral Investment Treaty/Treaties.
MITs	Multilateral Investment Treaty/Treaties.
ECT	Energy Charter Treaty.
FDI	Foreign Direct Investment.
p	Page.
para/paras	Paragraph/Paragraphs.
Art./Arts.	Article/Articles.
GDP	Gross Domestic Product.
FET	The Fair and Equitable Treatment

CHAPTER I - INTRODUCTION

1.1 BACKGROUND

In the contemporary world, national markets have witnessed a clear decline after global trade replaced it as a manifestation of development in the world.¹ This development has necessitated cooperation between countries and interdependence with increasing numbers, and to increase this development, the international economy must be developed by relying on attracting foreign direct investment (FDI).² Foreign investment is one of the most important elements of international trade, so its importance required that the protection of foreign investors and their investments was an inevitable matter.³ On this principle, international settlement centers were established to deal with international trade disputes. Where it considered arbitration as one of the most effective methods of resolving international commercial disputes, in addition to the option of litigation as well.⁴

Many arbitration institutions in the world have emerged on this basis. Among these institution is the International Center for Settlement of Investment Disputes (ICSID)⁵, which was established in order to resolve disputes between foreign investors and host States through an agreement on settlement of investment disputes between States and citizens of other States “The ICSID Convention” which entered into force on October 14, 1966.⁶

¹ Sedef Kiliç, ‘Consent: As A Condition For An Arbitration Under The ICSID Convention’ *monaq* (2019) <<https://www.mondaq.com/turkey/arbitration-dispute-resolution/827138/consent-as-a-condition-for-an-arbitration-under-the-icsid-convention>> accessed 26 April 2021.

² Thomas Snider, Sergejs Dilevka and John Gaffney, ‘Protecting Foreign Direct Investment In The Middle East Through Investment Treaties And International Arbitration’ (*Tamimi.com*, 2018) <<https://www.tamimi.com/law-update-articles/protecting-foreign-direct-investment-in-the-middle-east-through-investment-treaties-and-international-arbitration/>> accessed 16 April 2021.

³ Claire de Westgaver, ‘International Investment Arbitration In The Middle East: Year In Review 2016’ <<https://www.bclplaw.com/en-US/insights/international-investment-arbitration-in-the-middle-east-year-in-2.html>> accessed 16 April 2021.

⁴ Sedef Kilic, 2019 (n.1).

⁵ Kaj Hobér, *Investment Treaty Arbitration and Its Future -- If Any*, 7 Y.B. Arb. & Mediation 58 (2015) <<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1030&context=arbitrationlawreview>> accessed 1 April 2021, p1.

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, 4 ILM 524 (1965).

As I belong to the Middle East, I am interested in the issue of arbitration from their side, as arbitration in the Middle East is not new.⁷ Rather, it has a diverse and complex history, whether in commercial or other transactions.⁸ But with the realization of Middle Eastern governments that this modern approach and the migration to arbitration to resolve disputes has become a key element to attract investments and investors to their countries.⁹ Which is increasingly urgent in light of many things, including capital flows emerging in the Middle East and beyond, such as those that originated in the United Arab Emirates for the sake of developing a strong economy or for countries that have been exposed to the crippling effects of war, as they must rebuild their economies, such as Iraq and Syria, for example.¹⁰

Indeed, in light of this, a number of Middle Eastern countries have ratified the ICSID Convention. Most countries have concluded at least 638 investment agreements. Including bilateral investment treaties, free trade agreements and other treaties that contain investment-related provisions. In addition to the establishment of some countries for arbitration institutions. Indeed, it indicates the willingness of the Middle East to come to terms with the needs of stakeholders from foreign investors.¹¹ In fact, the first arbitration against a Middle Eastern country was filed in 2001 by an Italian investor against the United Arab Emirates.¹²

In recent years, major developments have taken place across the arbitration systems in the world. Despite the fact that investors are taking countless factors into their eyes when looking at destinations that correspond to their investment interests. These interests include: the size of the economy, the population, the Gross Domestic Product (GDP) and other things.¹³ This is due to the fact that certain regions of the

⁷ Joanna Jemielniak, *Legal Interpretation In International Commercial Arbitration* (Taylor & Francis Group 2014) <<https://ebookcentral.proquest.com/lib/uu/reader.action?docID=1580882&ppg=32>> accessed 29 April 2021, p13.

⁸ Ibid.

⁹ Thomas Snider, 2018 (n. 2).

¹⁰ Claire de Westgaver, 2017 (n. 3).

¹¹ Ibid.

¹² Ibid.

¹³ Thomas Snider, 2018 (n. 2).

world have been adversely affected by armed conflicts resulting in social and political instability.¹⁴ So, when investing in any field in the Middle East or outside it, foreign investors are keen to protect their investments to the maximum extent possible.

Most of the countries in the Middle East are exposed to the risks that come with civil and non-civil wars, rebellions, social unrest, economic crises and many other forms of instability.¹⁵ As a result, the State may impose or change separate or collective measures in its legislation, which lead the State to deal with investments in a less appropriate way than it promised, whether through the so-called indirect or creeping confiscation by establishing laws or regulations or even changing its legislation to add Tax measures or tariffs.¹⁶ Consequently, negatively affecting the investment and its value.

The foreign investor confronts these changes by filing a claim before the arbitration institutions concerned with binding claims that the defendant country may consider to be huge or without any basis, as happened with some South American countries, which will be mentioned later (*see chapter three*). Some Latin American countries, which were parties to the Convention, were resentful of this mechanism and expressed their denunciation from the ICSID.¹⁷

This matter is not much different from the case of some Middle Eastern countries that are still a party to the ICSID Convention, but we do not know what may happen in the future, especially since only 36% of the cases filed for ICSID have been terminated or canceled.¹⁸ This is what shed light on me in the search for obligations and the rights attached to the withdrawing countries even after their denunciation,

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (2nd edn, Oxford University Press 2012) <<https://ebookcentral.proquest.com/lib/uu/detail.action?docID=1120174&query=Principles+of+International+Investment+Law+>> accessed 25 May 2021, pp 223-223.

¹⁷ José Rivera and Mauricio Azuga, 'Life After ICSID: 10Th Anniversary Of Bolivia'S Withdrawal From ICSID' (2017) <<http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivia-withdrawal-icsid/>> accessed 16 April 2021.

¹⁸ Claire de Westgaver, 2017 (n. 3).

especially when they are given consent to the Center's jurisdiction, which was accepted by the investor.

1.2 PURPOSE OF THE THESIS AND RESEARCH QUESTIONS

The general purpose of this thesis is to identify the extent to which the consent expressed by States may affect arbitration before the Center. In particular, after their denunciation from it and this withdrawal become effective. Where the state withdrawing from the Center can be compelled to stand before its tribunal again by exploiting their "consent" in other treaties, legislation or other contracts.

That is, the thesis focuses on the impact that will have on the States expression of their consent to ICSID jurisdiction, even after their denunciation and the entry into force of this denunciation. Since the research question falls under a very broad topic. Therefore, the thesis will focus on a specific aspect only, meaning that it cannot be said as comprehensive.

The aim is not to analyze and evaluate every legal and practical aspect of states' denunciation of the ICSID Convention and their consent to arbitration before the Center. Yet, what the thesis seeks to achieve is to shed light and focus on some crucial aspects of the obligations and rights imposed on the withdrawing states through their prior consent. In addition to the obligation to appear before the tribunal of the Center when the foreign investor files a dispute to it.

In other words, the purpose of the thesis is to analyze critical aspects of the consequences of giving the approval to arbitrate before the ICSID's tribunals after denunciation in light of the question: ***What are the consequences of consent in a case of ICSID denunciation?***

The next two chapters will be devoted to fulfill the purpose of this thesis, meaning that it will be the initial steps of research and analysis. Therefore, the following

questions must be addressed to the reader's consideration as an analysis of the main research question.

1. What is the legal status of withdrawing States after their denunciation takes effect? That is, are they affected by the obligations that were signed before or demanded later?

2. To what extent can "consent" guarantee an effective and appropriate settlement of investment disputes under ICSID tribunal?

The answers to these questions will shed light on the many critical aspects of settling investment disputes by the given consent in the post denunciation period. The thesis will examine how, despite the denunciation of the ICSID Convention by the states concerned, this will not affect the settlement of investment disputes through its tribunals. In light of this, the thesis will present a simplified analysis of both the legal and the practical side. The common denominator between them is that they would not affect the overall situation of resolving investment disputes through ICSID after being denounced by one of the parties.

The main topic of this analysis will be the balance and interaction between the Center's jurisdiction in settling disputes in which parties are withdrawing on the one hand, and the binding appearance of these States due to the "consent" by the other. The analysis of this interaction is of fundamental importance to answer the question, as the enforcement of arbitration before the Center is not binding on the withdrawing party unless its consent is proven. Therefore, the settlement of investment disputes through the ICSID depends on the ratification of the member states and their being parties to it.

The research question is mainly important, because when choosing to invest in a contracting state with ICSID, the investor had certain expectations that were the

reasons for his investment, and the denunciation of some States of the Convention may constitute a frustration of these expectations and then the investors' retreat.

1.3 DELIMITATIONS

As indicated in the previous section, this thesis aims to analyze the aspects concerned with consent to settle an investment dispute between the parties at the Center after the denunciation of the Convention. The following limitations will be explained further below. Initially, the thesis will raise many questions about the fate of ICSID's jurisdiction after the State denounced it.

This is due to the fact that the withdrawing State is not bound by the Convention and the obligations or rights arising therefrom after denunciation from it, so the denunciation of States raises the issue of whether the State is still bound by some obligations under the Convention or only for arbitration before it if it agrees, and if the answer is yes? On what legal basis? when?

This thesis serves this purpose by studying the state's position after denunciation from ICSID and moving from a State that is completely free of the Center's obligations announcing its denunciation from it, to a State committed to some rights and obligations because of its proposition for "its consent to the Center's jurisdiction" in its treaties, agreements, or even its own legislation and this consent was accepted by the investor.

Although the Center does not impose its competence on the States withdrawing after their denunciation except after their consent as indicated in the Convention, we will not present a comprehensive presentation of the provisions of the ICSID Convention even if it is required to explain the purpose of this thesis, that is, it will not contain an in-depth analysis of the legal logic of ICSID from these side. Jurisdiction regarding consent after denunciation from the Center has been a subject saturated with much criticism, and although scholars' arguments about the time and date of consent

deserve more attention, this thesis will not participate in this debate and will only focus on an overview of the Schreuer's factor.

Therefore, it will not examine whether the Center should be governed differently or on the basis of a certain approach. In addition, the thesis will not broadly address questions related to offers that the state gives to investors agreeing to arbitration under any other treaty except for ICSID. However, the term "consent to arbitration" is broad and general, the purpose of this thesis, we will focus only on the consent concerned with the ICSID arbitration that is presented by the withdrawing State and accepted by the investor.

This means that the thesis will analyze the performance and effectiveness of the consent provided by the withdrawing State to the jurisdiction of the ICSID and its availability even after the denunciation of the concerned state.

1.4 METHODOLOGY

The legal analytical method is what I will apply in this thesis for the purpose of analyzing the applicable legal situation.¹⁹ The legal analytical method can be defined mainly as an extension of the legal doctrinal approach, which in turn focuses on clarifying, interpreting and organizing the applicable law by applying reliable and generally accepted legal sources, such as the provisions and principles of law, conventions, case law and legal doctrine.²⁰

However, the legal analytical method differs from the legal doctrinal method in terms of the goal, as its main purpose is not to create the applicable law, but to analyze the

¹⁹ Philip Langbroek and others, 'Methodology Of Legal Research: Challenges And Opportunities' (2017)

<https://www.researchgate.net/publication/322055195_Methodology_of_legal_research_Challenges_and_opportunities> accessed 14 March 2021, p1

²⁰ Emad AlAmaren, Ahmed Hamad and Omar AlMashhour, 'An Introduction To The Legal Research Method: To Clear The Blurred Image On How Students Understand The Method Of The Legal Science Research' (2020)

<https://www.researchgate.net/publication/343625989_An_Introduction_to_the_Legal_Research_Method_To_Clear_the_Blurred_Image_on_How_Students_Understand_the_Method_of_the_Legal_Science_Research> accessed 18 March 2021, p53.

applicable law, such as guiding it using a specific perspective.²¹ The legal analytical method is therefore suitable for this thesis.

Moreover, the legal doctrinal method is bound by reliable and generally accepted legal sources, while the legal analytical method is more free and unrestricted.²² Of course, the use of reliable legal sources is a must when searching for a solution to solve legal problems or even establish the applicable law, while if we want to analyze the applicable law, one can use practically any type of material.²³ Thus, news articles and research or academic writing are examples of sources that can be used when analyzing applicable law. Either experimental research presented through reports or statistics, as well as surveys, and non-binding law.²⁴

Since the thesis revolves primarily around the questions of denunciation of the Center and “consent” of arbitration before it, the legal analytical method must be applied in the context of ICSID and the comments or criticisms about it.

Once again, the purpose of this thesis is to analyze critical aspects of the Center’s jurisdiction by giving consent by the States denunciation from it and approval from the investor. I will do this using a legal analytical method. Therefore, various sources from ICSID will be used as helpful sources in answering the research questions. The thesis will be based mainly on ICSID Convention rules, treaties provisions, ICSID case law, general principles of arbitration law, articles and academic studies.

1.5 OUTLINE AND STRUCTURE OF THE THESIS

The thesis will discuss and analyze the position of “consent” and its impact after States denounce the ICSID and its competence in the settlement of investment disputes.

²¹ Ibid, p52.

²² Ibid, p54.

²³ Ibid.

²⁴ Emad AlAmaren, 2020 (n. 15)

Therefore, it is necessary to devote the second chapter to present the main features of this type of consent, the corresponding aspects and the extent of the need for jurisdiction before the Center after consent.

The second chapter, as we have explained, will explain the main features of consenting to arbitration between investors and states to resolve disputes before the Center under the consent accepted in BITs or so.

In the third chapter, the thesis will analyze the denunciation of the States parties in the Center from it and their impact on the consent of the arbitration of the ICSID, i.e. the current or previous legal status of the arbitration of the countries of appeal that had previously announced their consent will be analyzed. Consequently, the third chapter will deal exclusively with the jurisdiction of ICSID, in addition to presenting Professor Schreuer's factor.

The thesis will then move to partially answer the research question in the last section of Chapter three, which entails the rights and obligations arising from consent under the Convention.

Finally, after analyzing the research question and passing on the topics concerned with it, some brief concluding remarks will be followed in Chapter Four with a final answer to the main question of this thesis.

CHAPTER II - CONSENT TO ICSID ARBITRATION

2.1 INTRODUCTION

This chapter will discuss consent and give an overview on it, what is its basis, or the basis on which it is based through the Convention. In addition to its formal requirements or how to express it, and the three methods that focus on the way of giving consent, whether it is through direct agreements, national legislation, or even investment treaties in their two forms (BITs/MITs). After completing that, this chapter will present the interpretation of the consent and on what the Tribunal depends on while interpreting, and finally, it will discuss the irrevocability of consent after its acceptance by both parties.

2.2 OVERVIEW - THE CONSENT

Arbitration is a method for settling disputes whereby the decision maker derives his authority from the agreement of the parties, by definition.²⁵ So, we can easily note that a general feature of arbitration is the requirement of the “consent” clause and its acceptance by the parties, and that is what arbitration is always based on.²⁶

However, the fact that the parties who apply for arbitration under the auspices of ICSID are always a State (or government entity) on one side, and a foreign investor on the other side that have consented to arbitrate before ICSID, leads to some peculiarities in the giving of consent.²⁷

²⁵ Emmanuel Gaillard and John Savage, Fouchard, Gaillard, Goldman On International Commercial Arbitration (Wolters Kluwer Law International 1999), p7.

²⁶ Benson Lim, ‘Relooking At Consent In Arbitration’

<<http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/>>
accessed 17 May 2021.

²⁷ UNCTAD Course Module ‘Dispute Settlement, ICSID: 2.3 Consent to Arbitration’ (2003).
Available at <https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf>[Accessed 18 April 2021] p1.

One of the most obvious features is that the Convention does not require the parties to consent in a specific form or signed document.²⁸ Rather, the host State may present public offers to foreign investors to ICSID arbitration. These offers may be contained in legislation or in a treaty to which the host State is a party. However, in order to complete this consent and consider it correct, the investor must accept these offers in writing and not assume a specific formality even if the expression of consent is through a separate claim.²⁹

From time to time, the interpretation of certain restrictions or conditions to which consent agreements are subjects may raise great difficulties.³⁰ Therefore, the parties must carefully consider the time of consent because once the consent is completed and effective to the jurisdiction of ICSID.³¹ Because, important consequences and obligations will arise, including: the inability to revoke the consent, exclusion of other remedies, and the prohibition of diplomatic protection.³²

2.2.1 PROVISIONS ON CONSENT IN ICSID

There are a variety of provisions in ICSID that discuss consent. As in paragraph 6 of the ICSID Convention preamble,³³ where refers to the “mutual consent between the parties”. Also, Article 25 (1) of the ICSID Convention deals with consent on the part of “the parties to the dispute” as a binding legal condition. It states that it is not permissible to relax or revoke the accepted consent when “the parties have given their consent”. While the second paragraph of the same Article refers to “the date on which the parties consented”.³⁴

²⁸ Christoph Schreuer, ‘Consent To Arbitration’, *The Oxford Handbook of International Investment Law* (2007) <https://www.univie.ac.at/intlaw/wordpress/pdf/88_con_arbitr_89.pdf> accessed 21 May 2021, p831.

²⁹ UNCTAD, 2003 (n. 27) p5.

³⁰ Schreuer, 2007 (n. 28) pp. 35-40.

³¹ Ibid.

³² Christoph Schreuer, ‘Denunciation Of The ICSID Convention And Consent To Arbitration’, *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) <https://www.univie.ac.at/intlaw/wordpress/pdf/denunciation_icsid.pdf> accessed 20 April 2021, pp. 364-365.

³³ See *supra* note 6. Preamble to the Convention on the Settlement of Investment Disputes.

³⁴ ICSID Convention, 1965 (n. 6) art.25 (2)(a).

As for Article 26, it also states that the “consent of the parties” is subject to “consent to such arbitration”, and thus, excludes other remedies.³⁵ Article 27 also revokes diplomatic protection in the event that “one of its nationals and another Contracting State” have consented to arbitration.³⁶ While Article 36 requires that the request for arbitration includes “their consent to arbitration”.³⁷

In addition, Article 44 contains a text stating that the procedures must be carried out in conformity with the arbitration rules in effect on the date on which the parties are “consented to arbitration”. Finally, under Article 46, the tribunal is responsible for determining incidental, additional or counterclaims under the “scope of the consent of the parties”.

All of these provisions clarify one thing, which is the necessity of consent from both parties, its importance in the conflict, and the inability to disavow it by one party. It also indicates the rights that the two parties acquire, as in Articles 36, 44, 46 and others, and the rights they give up, such as those mentioned in articles 26 and 27.³⁸

2.2.2 CONSENT “IN WRITTEN”

Direct agreements were the traditional and early way of agreeing between the parties to consent to the ICSID’s jurisdiction.³⁹ As it was a clause in the footnote of the investment agreement between the two parties⁴⁰, the State and the foreign investor. However, this form of consent has significantly diminished recently, as consent has spread through legislation and treaties.⁴¹ The convention left the free expression of consent largely to the parties,⁴² and since the drafting of the ICSID Convention many

³⁵ Ibid., art.26.

³⁶ Ibid., art.27 (1).

³⁷ Ibid., art.36 (2).

³⁸ See ICSID Convention (n. 6) arts.26-27.

³⁹ Schreuer, 2007 (n. 28) p831.

⁴⁰ Ibid.

⁴¹ UNCTAD, 2003 (n. 27) p2.

⁴² Schreuer, 2010 (n. 32) p357.

treaties, especially bilateral investment treaties, have introduced arbitration consent clauses into force.⁴³

“Consents through BITs has become an acceptable practice”, but the basis at the present time for jurisdiction in the majority of cases administered by ICSID.⁴⁴ However, the consent clauses contained in these treaties related to arbitration are merely offered by the host State and in order to achieve the required mutual consent, the offer requires the acceptance of the foreign investor.⁴⁵

So, consent can only be invoked and enforced through an agreement between the two parties, i.e. the host State and the investor, but what are the requirements for that consent?

The consent must be in writing by both parties.⁴⁶ The executive director’s report relating to the Convention, the official commentator on the Convention, stresses the need for both parties to give their consent by expressing “consent of the parties”.⁴⁷

The report also highlights that consent may be given in the form of a sentence included in an investment agreement or as part of a representative.⁴⁸ However, it also indicates the possibility of drafting a consent agreement by means of a unilateral offer by the host State, which is later accepted in writing by the investor:

*“...Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing”.*⁴⁹

⁴³ UNCTAD, 2003 (n. 27) p2.

⁴⁴ Ibid.

⁴⁵ Schreuer, 2007 (n. 28) p837.

⁴⁶ UNCTAD, 2003 (n. 27) p5.

⁴⁷ Schreuer, 2010 (n. 32) p357.

⁴⁸ Ibid.

⁴⁹ Ibid.

Therefore, the investor may approve in writing separately or at the time of establishing the procedures. However, to the investor, often the idea of “accepting the offer” early is a better procedure.

2.3 THREE WAYS OF GIVING CONSENT

ICSID has established and put together a set of model clauses of consent to draft these contracts for convenience and clarification.⁵⁰ Even though a very common settlement clause already refers to ICSID contracts between States and foreign investors.⁵¹ Although the most obvious way to give a consent is through the consent clauses in direct agreements between the parties.⁵² However, there are three ways to give consent.⁵³

Since the establishment of the Center, consent is taken in the form of an offer made by the host States in its own investment legislation and in return, a consent has to be made by the foreign investor.⁵⁴ The Report of the Executive Directors accompanying the Convention, while not addressing the topic of consent contained in a treaty, clearly envisages the possibility for a state to “offer” to submitting disputes to ICSID in its domestic statutes:

*“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”.*⁵⁵

The first method that this section will present, and that achieves consent for ICSID arbitration is through a settlement clause in an investment agreement between the host State and the investor, that submits future disputes or that have already arisen to

⁵⁰ UNCTAD, 2003 (n. 27) p6.

⁵¹ Ibid., p7.

⁵² Schreuer, 2007 (n. 28) p831.

⁵³ Ibid.

⁵⁴ Schreuer, 2010 (n. 32) p358.

⁵⁵ Ibid.

the Center's jurisdiction (*See* 2.3.1). The second way to grant consent for ICSID's jurisdiction is to submit States in their national legislation consent to the competence of the ICSID (*See* 2.3.2), and finally through the inclusion of the ICSID arbitration clause in a treaty (bilateral or multilateral) between the host State and the state of the investor's nationality (*See* 2.3.3).

2.3.1 DIRECT AGREEMENT

The parties may declare their consent to arbitration with the Center by registering a consent clause to submit future disputes from the investment process to the jurisdiction of ICSID in a direct investment agreement between the host State and the investor.⁵⁶ Nonetheless, granting of consent can be about current or future disputes.⁵⁷

Indeed, the cases presented to ICSID arbitration were often based on agreements between the parties that contain a consent clause for future disputes.⁵⁸

In Amco v. Indonesia,⁵⁹ the investor stipulated that in order to invest and establish a company for the purpose of investing in Indonesia, the Indonesian Foreign Investment Board must consent that any disputes arising about this investment be brought before ICSID, and the Indonesian government has agreed to this condition. Before the Tribunal, the government's declarations of the validity of the consent clause in principle during its application to the parties to the conflict and its subject matter, the Tribunal stated:

“...while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25 (1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in

⁵⁶ Schreuer, C., 2007 (n. 28) p832.

⁵⁷ Ibid.

⁵⁸ Schreuer, C., 2010 (n. 32) p357.

⁵⁹ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

*good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID Tribunal to have jurisdiction over them”.*⁶⁰

2.3.2 NATIONAL LEGISLATION

This method shows that the host State can generally consent to ICSID’s jurisdiction between it and foreign investors or to certain categories of foreign investors in its national legislation.⁶¹ In order for this consent to be enforceable, it only requires the approval of the foreign investor.⁶²

Article 8 (2) of the Albanian Law on Foreign Investment of 1993 is an example of this national legislation, which provides that:

*‘...the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes’.*⁶³

So, the Tribunal saw that the matter does not require much thought about the validity of the consent or whether it has one or two sides because it becomes effective immediately if the foreign investor requests his claim before ICSID using the relevant national law.⁶⁴ However, it must be noted that not all references to ICSID arbitration in national legislation amount to an offer of approval, so caution and diligence must be exercised in interpreting the legislative provisions of this type.⁶⁵

2.3.3 TREATIES “BITS,MITs”

a) BITS

⁶⁰ Ibid., Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports paras 12-25.

⁶¹ Schreuer, C., 2007 (n. 28) p833.

⁶² Ibid.

⁶³ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2.

⁶⁴ Ibid., Decision on Jurisdiction, Decision on Jurisdiction, 24 December 1996, 14.

⁶⁵ UNCTAD, 2003 (n. 27), p11.

An accepted and common practice is consent via bilateral investment treaties (BITs).⁶⁶ The arbitration clauses before ICSID have been incorporated into many bilateral treaties that may reach hundreds. Now, it can be found in most, if not all, of the new bilateral treaties.⁶⁷

As an example, many BITs contain similar clauses to the one in article 8 of the treaty between the United Kingdom and Sri Lanka of 1980. Article 8 provides:

*“(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (herein referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention ... any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.”*⁶⁸

b) MITs

A number of multilateral treaties in the early 1990s started to include clauses for ICSID’s jurisdiction, with the exact same mechanism found in the BITs.⁶⁹ The treaties offer a consent to ICSID’s jurisdiction by the contracting States to be taken up by investors who are nationals of other States parties to the same treaties.⁷⁰

For example, in Article 26 of the Energy Charter Treaty of 1994.⁷¹ We can clearly note that the text contains consent to jurisdiction of ICSID by the State parties and investors citizens of other States parties.⁷² Schreuer commented on that by stating:

⁶⁶ Schreuer, C., 2007 (n. 28) pps 842-843.

⁶⁷ Ibid.

⁶⁸ Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Republic Of Sri Lanka For The Promotion And Protection Of Investments (adopted 13 February 1980, entered into force 18 December 1980) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2293/download>>.

⁶⁹ Schreuer, C., 2007 (n. 28) p 850.

⁷⁰ UNCTAD, 2003 (n. 27), p23.

⁷¹ Ibid., ‘*The Energy Charter Treaty between the European Communities and 49 mostly European States*’.

⁷² Ibid.

*“The Treaty contains an unconditional consent to ICSID and to the Additional Facility, whichever may be available. The Article specifically requires consent in writing also on the part of the investor. The Article only envisages the submission of a claim by the investor but not by the host States”.*⁷³

2.4 THE INTERPRETATION OF “CONSENT”

When dealing with an interpretation of consent or consent agreements, the Tribunal takes into account the interpretation in a manner similar to the way treaties are interpreted.⁷⁴ Which is in accordance with Article 31 (1) of the Vienna Convention, as follows:

*‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’*⁷⁵

Although the argument that the host State’s consent to ICSID’s jurisdiction should be interpreted in a restricted way so as not to be seen as a diminution of its sovereignty, and its repetition in pleadings before ICSID tribunals.⁷⁶ However, the ICSID tribunals refused to adopt this argument and principles presented by the protesters continuously.⁷⁷ As for example, in *SPP v. Egypt*⁷⁸

An allegation was raised about the ICSID clause in the national legislation that it should be interpreted in a restricted way. Nevertheless, in the end the Tribunal found, even with a sovereign state there is no presumption of jurisdiction, and even if it

⁷³ Ibid.

⁷⁴ Ibid., p33.

⁷⁵ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, available at: <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁷⁶ Schreuer, C., 2007 (n. 28) p861.

⁷⁷ UNCTAD, 2003 (n. 27), p33

⁷⁸ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.

exists, it is given only to the extent agreed upon by the parties.⁷⁹ Therefore, after referring to a number of international provisions and decisions, the Tribunal said:

*“Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if -but only if- the force of the arguments militating in favor of it is preponderant”.*⁸⁰

Further, there is no problem with the interpretation in a restricted or widespread manner, but it is imperative that this interpretation be in accordance with good faith and with the object and purpose of the ICSID Convention. The meaning of a good-faith interpretation is an obligation to avoid unintended or ambiguous interpretations, and to refrain from interpreting words in a way that may lead to bias for one of the parties that may gain him an unfair advantage, or discriminatory to the other party.⁸¹

2.5 THE IRREVOCABILITY OF CONSENT

There are conditions that must be met in order for the refusal of consent to be impossible, as stipulated in article 25 (1) of the convention, which are: If both parties give their consent, if only one party withdraws its consent.⁸²

But let us put before us that the irreversibility of the consent is only after the consent is completed.⁸³ However, in the case of national legislation and the articles of the treaty that provides consent for the competence of the ICSID, and the investor has not approved this consent in writing, here the consent loses the power that makes it irrevocable.⁸⁴

⁷⁹ Ibid., Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 143/4.

⁸⁰ Ibid.

⁸¹ Antony D’Amato, ‘Good Faith’ in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), vol. II, p. 599.

⁸² Schreuer, C., 2010 (n. 32) p363.

⁸³ UNTAD, 2003 (n. 27) p33

⁸⁴ Ibid.

In the case of *CSOB v. Slovakia*⁸⁵, the Tribunal found that although Slovakia published the BIT in the Official Gazette of Slovakia with a notice declaring its entry into force, it never entered into force, but it published a notice of correction in its official newspaper confirming the nullity of this treaty after establishing ICSID procedures.⁸⁶ The Tribunal said:

*“In this connection, it should be noted that if the Notice were to be held to constitute a valid offer by the Slovak State to submit to international arbitration, the corrective notice published by the Slovak Ministry of Foreign Affairs in the Official Gazette on November 20, 1997, asserting the invalidity of the BIT, would be of no avail to Respondent, since Claimant accepted the offer in the Request for Arbitration filed prior to the publication of the corrective notice”.*⁸⁷

The investor may rely on the consent clause to the ICSID’s jurisdiction contained in a treaty or through the legislation of the host State without submitting a written mutual acknowledgment of consent. Although the investor has the freedom to wait and not submit his acceptance of the offer of consent until he sees an invitation to file a claim before the Center, when he does so, he risks the possibility of losing that opportunity by withdrawing the host State to offer it before that time.⁸⁸ Article 72 of the ICSID is very important. All rights and obligations of the denunciation State, including those that arise from the consent, will cease from the effective date of the denunciation if article 72 does not exist.⁸⁹

2.6 CONCLUSION

⁸⁵ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4.

⁸⁶ *Ibid.*, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review-Foreign Investment Law Journal 251, 268-271 (1999).

⁸⁷ *Ibid.*

⁸⁸ Michele Potesta, ‘The Interpretation Of Consent To ICSID Arbitration Contained In Domestic Investment Laws’ *ARBITRATION INTERNATIONAL* (2011) <https://www.researchgate.net/publication/272990851_The_Interpretation_of_Consent_to_ICSID_Arbitration_Contained_in_Domestic_Investment_Laws> accessed 21 April 2021.

⁸⁹ Schreuer, C., 2010 (n. 32) p361.

In short, consent to ICSID arbitration is considered an offer made by the host States through bilateral or multiple investment treaties, their legislation or in an old way through consent agreements, and it does not become binding on both parties only after the investor accepts it, then neither party can pull his consent off from one side. The investor acceptance is required to be in writing regardless of the formality it provides. And when a dispute is over the validity of this consent, the Tribunal shall interpret the consent through a good-faith interpretation and the significance of this consent.

CHAPTER III - DENUNCIATION OF ICSID AND CONSENT

3.1 INTRODUCTION

In this third chapter, the concept of the host State's denunciation from the ICSID Convention will be presented, followed by an explanation of the relationship between the State's denunciation of the Center and its consent to arbitrate before it. Next, will be present Article 72, because it plays a major role in the issue of consent while denouncing ICSID, and understanding the interaction between it and between Article 71, which many scholars mentioned may be contradictory. In addition to mentioning part of Article 25 (1) and its relationship to Article 72.

Finally, presenting Schreuer's factor and clarifying the direction in which Professor Schreuer tends, which is popular among a number of scholars. After that, I will turn to the obligations and rights that are binding on the contracting party in the convention, which is bound by it even after its denunciation due to its "consent" to the jurisdiction of the Center.

3.2 OVERVIEW - DENUNCIATION OF ICSID

In 1965, the International Center for Settlement of Investment Disputes (ICSID) between investors and states was established with a specific arbitration mechanism for resolving a peculiar type of disputes: the disputes between a state and a foreign investor.⁹⁰ For some States this was not ideal, especially for the South American countries.⁹¹

Since the development of trade relations and with the occurrence of a qualitative shift in the international legislation, especially in arbitration, as the main purpose of BITs

⁹⁰ Emmanuel Gaillard, 'The Denunciation Of The ICSID Convention' *New york Law Journal* (2007) <<https://www.shearman.com>> accessed 13 April 2021.

⁹¹ Nicolas Boeglin, 'ICSID And Latin America : Criticisms, Withdrawals And Regional Alternatives' (2013) <<https://www.bilaterals.org/?icsid-and-latin-america-criticisms&lang=fr>> accessed 23 April 2021.

has become to guarantee the rights of foreign investors.⁹² This protection was represented in many forms and features such as fair and equitable treatment (FET), compensation in this event, confiscation and free transfer of funds, among other things, and the granting of jurisdiction - issuing a ruling on investment disputes to international arbitration forums (such as the ICSID).⁹³

When investors began to file claims before the Center against the host State, often about violating an agreement or treaty, and trying to seek huge compensation, the host States realized that previous concepts of State's sovereignty and local courts no longer existed, or had barely any impact on emerging obligations that it was pledged on their part in the BITs. Thus, these States' dissatisfaction with the ICSID Convention increased.⁹⁴

Some Latin American countries began to strongly criticize international investment laws and regulations after the idea that 'the system favors the rights of foreign investors and undermines national sovereignty' became entrenched.⁹⁵ As a result, some countries have begun withdrawing from the ICSID Convention, following this idea, including Bolivia, Ecuador, and Venezuela. However, Argentina is still struggling to survive. Although it faces different allegations and many Scholars believe that it will face the same fate.⁹⁶

As a result of these successive denunciations, several issues arose around the issues and allegations that followed. Nevertheless, the real obstacle lies in how these issues are addressed, what obligations and rights entail, and on what basis and what is the "consent" position in this regard.

⁹² Jeswald Salacuse, 'BIT By BIT: The Growth Of Bilateral Investment Treaties And Their Impact On Foreign Investment In Developing Countries' (1990) Vol. 24, *The International Lawyer* <<https://www.jstor.org/stable/40706447>> accessed 17 April 2021.

⁹³ Boeglin, 2013 (n. 91).

⁹⁴ Cristián Rodríguez, 'A Technical And Policy Analysis Of The Denunciation Of The ICSID Convention' (LLM, HARVARD LAW SCHOOL 2013).

⁹⁵ Nicolas Boeglin, 2013 (n. 67).

⁹⁶ Ibid.

However, the expectations of these countries that will withdraw or intend to withdraw may sometimes be disappointing. Some countries that had withdrawal or likely to withdraw see that withdrawal from the Center is the only solution to get rid of all the obligations and rights that they have committed towards other countries and the citizens of those countries as a result of their contracting. However, these expectations are totally incorrect, as Bolivia learned the hard way,⁹⁷ denouncing the ICSID Convention is not an immediate escape valve for states. Due to the fact that the world of international investment, even if the state withdraws from the ICSID Convention, this does not prevent the foreign investor from initiating arbitration against it.⁹⁸

In addition, in specific cases, the State's denunciation from the ICSID and the enforcement of this withdrawal does not protect it from arbitration before it.⁹⁹ This is in the event that the state expresses its consent, through other agreements or investment treaties, to the jurisdiction of the Center, so it obligates itself to appear before the Center when a dispute arises between it and the foreign investor.¹⁰⁰

Finally, the only way to continue the dispute settlement mechanism between the foreign investor and the host state through the Center in the long term, and to avoid the withdrawal of more countries, is to achieve the appropriate balance between protecting the rights of both the investor and the host country.¹⁰¹ In addition, it should be noted that at present, only the aforementioned Latin American countries have decided to withdraw from the ICSID Convention in the world.

3.3 CONSENT AND DENUNCIATION

There is a great debate and many questions about the relationship of the consent to the ICSID's jurisdiction by the parties, the fate of this consent and the obligations that arose from it upon the denunciation by the State, whether the host State or the State in

⁹⁷ José Rivera, 2017 (n. 17).

⁹⁸ Ibid.

⁹⁹ José Rivera, 2017 (n. 17).

¹⁰⁰ UNCTAD, 2003 (n. 27) p1.

¹⁰¹ José Rivera, 2017 (n. 17).

which the foreign investor is a citizen, but the question here mostly revolves around the denunciation of the host States and the fate of its consent to Arbitration.

Nevertheless, Article 72 of the ICSID Convention is the focus of the discussion when we discuss consent and States' denunciation of the Center. Although some problems arise regarding the validity of interpretation of Article 72 of the ICSID Convention, most arguments were in regard to the timing of the expression consent to the ICSID.¹⁰² However, so far there is no real problem in determining the effective date of the denunciation, only the timing of the expression of consent.¹⁰³ Especially in cases where the arbitration offers contained in investment treaties or investment laws are available and which the foreign investor has accepted.¹⁰⁴

Any form of expression of consent must take place prior to the date on which the World Bank -in its capacity as depository- will receive the notice of withdrawal from the intending country, as stipulated in article 72.¹⁰⁵ Although, according to the formula stipulated, this notification or correct denunciation will not affect in any way the rights or obligations that the parties incurred through their consent given before the World Bank received the notice of the annulment.¹⁰⁶

Moreover, article 71 provides for a period of six months for the denunciation submitted by the withdrawing State to take effect, but article 72 proposes that in order for the consent to become acceptable, the investor must comply before the notification of the denunciation by giving his consent.¹⁰⁷ It also indicates that consent to the ICSID's jurisdiction stipulated in the ICSID Convention cannot be granted by

¹⁰² Victorino Tejera, 'Unraveling ICSID's Denunciation: Understanding The Interaction Between Articles 71 And 72 Of The ICSID Convention' *LSA Journal of International & Comparative Law* (2014) <<https://core.ac.uk/download/pdf/80038304.pdf>> accessed 16 May 2021.

¹⁰³ Schreuer, C., 2010 (n. 32) p361.

¹⁰⁴ Ibid., p362

¹⁰⁵ Victorino Tejera, 2014 (n.102) p428. .

¹⁰⁶ Ibid.

¹⁰⁷ Schreuer, C., 2010 (n. 32) p364.

the investor during the stipulated six-month period, that is, before the denunciation becomes effective.¹⁰⁸

For example, what was stipulated in article IX of the BIT of April 17, 1998 between Bolivia and the United States in its fourth paragraph to the consent of arbitration under ICSID, among many other options offered to the investor. Article IX (4) provides:

*“[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration” in accordance with such choices and that such consent...shall satisfy the requirement of Chapter II of the ICSID Convention...for written consent of the parties to the dispute.”*¹⁰⁹

Another case where the expression of consent to the jurisdiction of the Centre could hardly be clearer, is the bilateral investment treaty dated March 23, 1987 between Bolivia and Germany when speaking about disputes in its Article 11, which stipulated that: “shall be submitted” to the mediation and arbitration of the Center, because both States have become contracting parties with the ICSID Convention.¹¹⁰

That is to say, it is crucial to ensure that the wording of the arbitration clause in every investment protection treaty constitutes in fact the State’s prior consent of the Center’s jurisdiction when a dispute occurs.¹¹¹ In the event of an unconditional consent, unlike the consent agreement, the rights and obligations associated with this consent will not be affected when the State denies the ICSID Convention.¹¹²

¹⁰⁸ Ibid.

¹⁰⁹ Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment (Adopted 17 April 1998, Entered Into Force 6 June 2001, Terminated on 10 June 2012) <<https://2001-2009.state.gov/documents/organization/43541.pdf>>

¹¹⁰ Treaty Between the Federal Republic of Germany and the Republic of Bolivia Concerning the Promotion and Mutual Protection of Investments (Adopted 23 March 1987, Entered Into Force 09 November 1990, Terminated 13 May 2014) <<https://edit.wti.org/document/show/e157e072-4220-488e-926c-cfb4b50ea448?textBlockId=b32dfaca-fa32-4642-a77e-4b0058fc4003&page=1>>.

¹¹¹ Schreuer, C., 2010 (n. 32) p362.

¹¹² Ibid.

This is to avoid the bad situation in which the investor may be placed in the treaty in which the host State unilaterally frustrates its commitment to submit to ICSID arbitration, even if this pledge is contained in a treaty,¹¹³ it will remain in place for years even after withdrawal from the ICSID Convention within the limits of the pledge only. This interpretation is consistent with both the text and the purpose of article 72.¹¹⁴

3.4 THE ARTICLE 72 OF ICSID

Although the text of Article 72 (No. 73 before)¹¹⁵ was discussed only once, in an advanced stage of drafting the Convention. We see great agreement with this conclusion by *travaux préparatoires* to the interpretation of Article 72 of the Convention.¹¹⁶ As the discussion made it clear that the declaration of consent from the host State only -that is, from one side- and that the investor did not accept it is not binding and will be ineffective through denunciation:

“61. Mr. Gutierrez Cano said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?”¹¹⁷

62. Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral

¹¹³ Victorino Tejera, 2014 (n.102) p438.

¹¹⁴ Ibid., p439.

¹¹⁵ Schreuer, C., 2010 (n. 32) p365.

¹¹⁶ Ibid., p366.

¹¹⁷ Ibid., p365.

*statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.*¹¹⁸

66. Mr. Woods thought it important to clarify all the implications of Article 73 before proceeding further. For his part he thought Article 73 expressed a basic principle, i.e., that if an agreement was in force at the time the State party to that agreement denounced the Convention, obligations under that contract to have recourse to arbitration would continue after denunciation.”¹¹⁹

This discussion ended with what we today call Article 72 of the Convention, the meaning of which is that the offer of consent from one side through a “public state” to withdraw from the Convention will not survive, and that preserving the rights or obligations after the denunciation of the host State requires the prior consent of the other party - the investor. - It is done through an agreement between the host State and the investor, because the withdrawal of the host State after the unilateral offer before the approval of the investor prevents him from bringing a claim against it later.¹²⁰

Therefore, the preliminary work to the convention confirms the meaning of Article 72 resulting from the ordinary meaning of the provision reached in the context of the convention.

3.4.1 THE INTERACTION BETWEEN ARTICLES 71 AND 72

Articles 71 and 72 discuss the matter of denunciation from the Center while consenting to its jurisdiction, so this section is important to understand the interaction these articles have. Although the Investment Disputes Settlement Agreement is facing

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid., p365.

a controversy over the existence of a contradiction between these two articles, this controversy does not find a basis as each of these two articles discusses different cases.¹²¹

In accordance with Article 71, as soon as the State intending to withdraw from the ICSID, announces and notifies the Center of the withdrawal, it is considered a contracting party only during the next stipulated six-month period. Thus, the investor is still able during that period to accept the offer of consent to the ICSID's jurisdiction.¹²² However, upon reading article 72, acceptance by the investor to offer consent to the ICSID arbitration must take place before the depositary receives the notice of withdrawal from the State wishing to withdraw. Therefore, the fact that articles 71 and 72 simply organize two different cases does not indicate a contradiction between them.¹²³

We must bear in mind that article 72 of the ICSID Convention does not prohibit consent to ICSID arbitration from existing during the stipulated six months.¹²⁴ Although article 72 indicates the obligation to grant consent prior to receiving the notification of denunciation from the host State, this does not mean that consent is prohibited after the depositary receives the notification of denunciation. In fact, there is no text in ICSID that prohibits this matter at all. So, there is no reason or grounds to interpret article 72 otherwise.¹²⁵

In addition, the text of article 71 confirms this conclusion by confirming that the ICSID Convention remains in effect for a period of six months after the notice of denunciation.¹²⁶

3.4.2 UNDERSTAND THE INTERCONNECTEDNESS OF THE ARTICLES 72 and 25

¹²¹ Ibid., p368.

¹²² Victorino Tejera, 2014 (n.102) p424.

¹²³ Ibid., p427.

¹²⁴ Ibid., p428.

¹²⁵ Ibid.

¹²⁶ Ibid.

It is often taken with the vision of Aron Broches¹²⁷ centered around the last sentence of Article 25(1) and in Article 72:

*“if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose.”*¹²⁸

Many believe that the combination of Articles 72 and 25 (1) when discussing the topic of consent includes a kind of “stability clause”.¹²⁹ This is represented in the fact that the host State cannot arbitrarily revoke its unilateral consent to the Center’s jurisdiction after it has offered it to a foreign investor. Because, once this kind of stability had been lacking, any contracting state could cancel the offer or agreement to consent at any time it desired.¹³⁰

This means that although the state and its citizens will not be a contracting party to the convention when they withdraw from it. However, due to their agreement to arbitration before their withdrawal, because of this consent is what is called “*permanence of the consent to ICSID arbitration*”,¹³¹ the withdrawing State and its citizens will remain bound by the ICSID Convention on Arbitration and thus the terms of Article 25 (1) related to the parties that can raise their disputes before the ICSID Tribunals will suffer from an important exception. The exception will be that the parties who have already initiated the ICSID proceedings, and the parties that have previously consent to arbitration, will be able to submit their dispute to the Tribunal even though the requirement of *rationae personae*, or “*nationae*” do not met.¹³²

3.4.3 “SCHREUER FACTOR”

¹²⁷ Mr. Aron Broches was the General Counsel of the World Bank and also President of the Legal Committee on the Settlement of Investment Disputes at the time when the ICSID Convention was prepared, and he is regarded as the drafter of this international treaty.

¹²⁸ Schreuer, C., 2010 (n. 32) p367.

¹²⁹ Victorino Tejera, 2014 (n.102) p430.

¹³⁰ Ibid.

¹³¹ Georges R. Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. Int’l Arb. 101, 108 (No. 2, 1984).

¹³² Ibid.

Coming to the denunciation and the interpretation of the interaction and the interconnectedness of the articles above, Professor Christoph Schreuer took a position where he made his own vision. Schreuer considers that the expressions of States' consent to the ICSID's jurisdiction, contained in BITs or other investment treaties, are mere offers of consent.¹³³ That was his primary justification for rejecting the idea of the possibility of invoking ICSID arbitration provisions, i.e. accepting arbitration offers, whether contained in investment treaties or BITs during the six-month period referred to in Article 71 of the Convention, or after this expired period.¹³⁴ However, some have argued that Schreuer's remarks about Article 72 of the ICSID have often sparked controversy over the scope of the arbitration provision.¹³⁵

Professor Schreuer's opinion, in accordance with article 72 of the ICSID Convention, investors must give their consent to arbitration with the Center before denunciation from it. That is, before the World Bank receives the relevant notice of denunciation and the six-month period stipulated in article 71.

Although Travaux does not give a clear and specific answer against the questions or doubts that have arisen since then regarding the interpretation of articles 71 and 72. The preparatory work for ICSID was supportive of Schreuer's position. In addition, it is easy to note that Mr. Aaron Bruch tended not to consider any arbitration proposals presented by the State until the investor accepted them.¹³⁶

Furthermore, Mr. Joaquin Gutierrez Cano,¹³⁷ at the meeting held on February 25, 1965 to assess what ultimately became the ICSID.¹³⁸ He made an important note, which is the situation in which there was no agreement between the State and the foreign investor, but only a general declaration by the State in favor of submitting

¹³³ Schreuer, C., 2010 (n. 32) p356.

¹³⁴ Ibid., p357.

¹³⁵ In light of the singularity of the first edition of his book, *The ICSID Convention: A Commentary*, and his reputation as an authority in the field.

¹³⁶ Victorino Tejera, 2014 (n.102) p428.

¹³⁷ The Executive Director of the World Bank, appointed by Italy, Spain, Portugal, and Greece, made an important remark.

¹³⁸ Executive Directors of the International Bank for Reconstruction and Development (World Bank) met as a Committee of the Whole on the Settlement of Investment Disputes and evaluated what eventually became the ICSID Convention.

disputes to the ICSID, and follows that the denunciation from the Convention by that State, before actually submitting any claim to the ICSID. In this, he wondered whether the State concerned was obligated by the Center to accept its jurisdiction.¹³⁹

Mr. Bruch commented on this remark with an answer stating that this case mentioned by Mr. Gutierrez Cano that the State that did so will not be bound by anything until the investor accepts its offer.¹⁴⁰ That is, if the State withdraws its unilateral offer by denunciation from the center before any investor accepts that offer, no investor will be able to file a lawsuit later before the ICSID.¹⁴¹ Conversely, if the unilateral offer of the State is accepted before withdrawing from the ICSID Convention, those disputes arising between the State and the investor after the date of denunciation will remain within the jurisdiction of the ICSID, even later on.¹⁴²

So, it can be advisable to say that the investor must consent to the Center's jurisdiction before the World Bank receives the notice of denunciation in order to be able to access the arbitration of ICSID.¹⁴³

In addition, Victorino Tejera¹⁴⁴ commented in his article on that subject, that Mr. Bruch may have been referring to the denunciation as a complex event that occurs throughout the six-month period stipulated in Article 71 of the ICSID Convention, and not as a single event occurring when the World Bank receives a notice of Conviction.¹⁴⁵

Schreuer interpreted Article 72 of the ICSID Convention based on its verbatim reading and in light of Article 25 (1) of the same Convention which states:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent

¹³⁹ Victorino Tejera, 2014 (n.102) p429.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., p430.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ He is a PhD Candidate in International Law at the Graduate Institute of International and Development Studies in Geneva.

¹⁴⁵ Victorino Tejera, 2014 (n.77).

*subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”*¹⁴⁶

As we can see from the text above and as Schreuer indicated, the text indicates mutual consent, while Article 72 refers to the consent granted by only one of them.¹⁴⁷ On this basis, Professor Schreuer acknowledged that it can be argued that the phrase “given by one of them” indicates that Article 72 covers the case in which there is a one-sided expression on the part of the host State and before the investor accepts it, which means that this case is not affected by the notice of denunciation mentioned under Article 71.¹⁴⁸

According to Schreuer, Article 71 of the ICSID Convention, which indicates that the denunciation by a Contracting State shall take effect only six months after receipt of such notice: *‘[D]oes not afford an opportunity to perfect consent during this [six-month] period’*¹⁴⁹. And he continues in this regard by saying:

*“An investor’s attempt to accept a standing offer of consent by the host State that may exist under legislation or a treaty after receipt of the notice [under Article 71] would not succeed. In order to be preserved by Art[icle] 72, consent would have to be perfected prior to the receipt [by the World Bank] of the notice of denunciation.”*¹⁵⁰

The interpretation adopted by Professor Schreuer was favored and supported by a number of Scholars.¹⁵¹ Besides, it is to be the position to which I am inclined in this thesis.

¹⁴⁶ See ICSID Convention, 1969 (n. 6) art.25(1).

¹⁴⁷ Schreuer, C., 2010 (n. 32) p363.

¹⁴⁸ Ibid., p364.

¹⁴⁹ Schreuer, C., 2010 (n. 32) p228.

¹⁵⁰ Ibid., p229.

¹⁵¹ Ibid., Among them: Emmanuel Gaillard, Fernando Mantilla- Serrano, and Oscar Garibaldi.

3.5 RIGHTS OR OBLIGATION UNDER THE CONVENTION ARISING OUT OF CONSENT

With the end of this chapter and the two chapters above, we can partially answer the proposed research question, but before that I will present the rights and obligations under ICSID that arise due to the denunciation from it after giving the consent in light of Professor Schreuer's conclusions, and accordingly we can evaluate the final answer in the final chapter that follows.

At the outset, I will highlight again that rights or obligations under the convention arising from consent to ICSID's jurisdiction provided before receiving the denunciation notice will not be affected under Article 72.¹⁵² That is, the obligation or the right, in order to be binding and not affected by the denunciation, shall fulfill two basic requirements, namely: '(a) arise out of consent and it must (b) be a right or obligation under the ICSID Convention'.¹⁵³

Basically, consent, once granted, leads to a number of rights and obligations under the ICSID Convention. These rights or obligations may be procedural, such as the right to file a lawsuit and institute proceedings mentioned in (Article 36)¹⁵⁴ and to participate in the formation of the Tribunal in (Article 37)¹⁵⁵ and in the procedures stipulated in (Articles 41 and 44)¹⁵⁶. As for other rights arising and to which the time rule mentioned in Article 72 applies, they include access to remedies after the arbitration decision stipulated in Articles 49 (2), 50, 51 and 52¹⁵⁷. Abstaining from resorting to other remedies, including protection Diplomacy (Articles 26 and 27)¹⁵⁸, a duty arising from consent and also one of the important obligations arising from consent is the duty to adhere to and comply with the arbitration award (Article 53)¹⁵⁹.

¹⁵² Schreuer, C., 2010 (n. 32) p364.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

As for the general rights and obligations under the Convention presented to the States parties that do not arise from consent, such as participation in the Administrative Council (Articles 4-7), the right to nominate people in the conciliation committees and arbitrators (Article 14), the duty to contribute to the costs of the Center (Article 17), the duty to respect The immunities and privileges stipulated in the agreement (Articles 18-24) and the duty to recognize and implement arbitration decisions (Article 54).¹⁶⁰ Does not fall under Article 72 because it did not arise from consent but in accordance with the general rule of 71. Hence, these latter rights and obligations remain in effect until six months after receiving the notice of denunciation in accordance with Article 71.¹⁶¹

Article 72 preserves the rights or obligations stipulated in the convention arising from consent to the consequences of withdrawal. As I explained previously in Chapter Two (*see* 2.2.2), the rights and obligations under the ICSID convention, which are also important, are not created until after the host State submits its consent to arbitration in the Center and enforces its effectiveness through the acceptance of the investor. Therefore, offers of consent that appear in many BITs that are devoid of the consent of the other party do not create any rights or obligations under the ICSID.

In other words, there is no provision in the ICSID Convention that creates or anticipates any right or obligation arising from a mere offer of consent contained in an investment treaty that has not been approved by the investor.¹⁶² That is, the mere “offer of consent” has no effect nor any provision to submit to the jurisdiction of ICSID based on Article 25 (1) of the Convention itself.¹⁶³

If the term “consent” as used in it is interpreted to mean such unfulfilled and unacceptable offers, this means that Article 72 will be effectively meaningless. Because, Article 72 provides that rights or obligations under the agreement arising from consent granted prior to receiving the withdrawal shall remain unaffected by

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid., p 365.

¹⁶³ Ibid.

such withdrawal; because no rights or obligations can arise from offers of unilateral consent.¹⁶⁴

As for BITs in which the withdrawing States are a party, they remain in effect even after the Center receives the notice of denunciation, and these treaties are a source of rights and obligations between the parties registered in them.¹⁶⁵ However, these rights and obligations arise from the BITs and not from the ICSID Convention. The presence of an offer of consent in a BITs alone does not create any rights or obligations under the Convention. Rather, treaties grant potential investors the right to accept the offer contained in them. However, these are rights under BIT and not under the ICSID Convention. If the consent offer contained in the BIT is not accepted by the investor prior to revoking the ICSID, then there are no rights or obligations under the Convention that can be preserved under Article 72.¹⁶⁶

3.5.1 FUTURE PREDICTED OR PENDING PROCEDURES AFTER DENUNCIATION

As we have explained previously, States that have denounced the ICSID and that have already consent to arbitrate it in the future are bound by this consent even decades after their denunciation. Based on the principle of respecting the consent granted to arbitration. The denunciation from the Center with the consent to refer to it does not affect the future arbitration under the Center, regardless of the withdrawal from the State not being a contracting party.¹⁶⁷

¹⁶⁴ Ibid., p366.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Julien Fouret, 'Denunciation Of The Washington Convention And Non-Contractual Investment Arbitration: "Manufacturing Consent" To ICSID Arbitration?' *Journal of International Arbitration* <<https://www.kluwerarbitration-com.ezproxy.its.uu.se/document/ipn28224?title=Journal%20of%20International%20Arbitration>> accessed 17 May 2021, p72.

We can also confirm this by shedding light on the *Quiborax S.A. and Non Metallic Minerals S.A.* case.¹⁶⁸ Although more than ten years have passed since Bolivia withdrew from the convention, the ICSID's case concerning it is still active.¹⁶⁹

Arbitration was filed against Bolivia at the ICSID on October 5, 2005, that is, almost two years before Bolivia denunciation from the ICSID Convention, from the Chilean company *Quiborax* requesting in its claim a huge compensation due to the cancellation of mining concessions in the province of Potosí that it had obtained from The Bolivian government. In September 2015, the Tribunal decided in favor of *Quiborax* to pay the company approximately \$ 50 million USD. Although Bolivia has submitted a request to cancel this award, the case is still pending till now by an award of the annulment committee.¹⁷⁰

Although, some might find it surprising that Bolivia is still subject to ICSID's jurisdiction, even ten years after its denunciation. Whereas the prevailing opinion, which has become popular, is that the claims filed at the ICSID against a specific country are not affected by the subsequent denunciation of the Convention by that country in accordance with the provisions of Article 72 of the ICSID.¹⁷¹ On this principle and on this basis, we can say that the future arbitration concerned in this context or the pending procedures will not be affected by the denunciation and will result in the obligations mentioned above, which I will present more clearly below.

a. Prohibition of recourse to diplomatic protection

The possibility of a state resorting to diplomatic protection would eliminate the entire mechanism for which the Convention existed. Although this prohibition constitutes a form of lack of respect for the sovereignty of the State concerned, failure to respect this principle will expose the Convention to be useless and not fulfill the purpose entrusted to it by the foreign investor. Besides, standing on the position of

¹⁶⁸ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2.

¹⁶⁹ Ibid., Award on jurisdiction, 16 September 2015.

¹⁷⁰ José Rivera, 2017 (n. 13).

¹⁷¹ Julien Fouret, 2021 (n. 167) p76.

“incompatible with the object and purpose of a treaty”¹⁷², as mentioned in the Vienna Convention on the Law of Treaties.¹⁷³

b. Internal procedures described in the Convention

The various internal procedures stipulated in the Center Agreement will continue to apply to the dispute presented to it between the withdrawing state and the foreign investor, whether suspended or future.¹⁷⁴ These procedures are formulated in order to appropriately settle investment disputes. These procedures include clauses that concern the provisions of interpretation, review and cancellation procedures that outweigh the rest in importance.¹⁷⁵ It is surprising that these judgments are one of the main features of ICSID arbitration.¹⁷⁶

In other words, if these features are ignored and not implemented, then the agreement goes from being a forum for resolving international disputes between contracting states and foreign investors from other contracting states to additional establishment rules. Thus, it will become useless because these facility rules are designed to be open to non-contracting or former parties.¹⁷⁷ As for ‘*The impossibility to fully withdraw unilaterally, once consent is given, will thus be rendered useless as these Facility Rules are designed to be open to non-contracting or former parties.*’¹⁷⁸

c. Exclude alternative remedies

Exclusion of alternative remedies is a binding obligation only on the Contracting States that are party to the Convention. As such, there is nothing to prevent withdrawing states from submitting to alternative remedies in all their forms. However, the exclusion of alternative remedies clause remains in effect even for

¹⁷² The Vienna Convention (n. 75) Art.19 (c).

¹⁷³ Julien Fouret, 2021 (n. 167) p76.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., *These include the interpretation (Article 50), the revision (Article 51) and most importantly the annulment procedure (Article 52).*

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., p77.

¹⁷⁸ Ibid.

withdrawing states that are no longer party to the convention by virtue of “consent”.¹⁷⁹

That is, the obligations that include excluding alternative remedies and some other provisions that “arise from consent”, such as a commitment to comply with and comply with the arbitration award,¹⁸⁰ remain in effect for states parties during their contracting or withdrawal in the event that they give consent.¹⁸¹

Often the above-mentioned obligations detailed in the agreement depend on the term “contracting state” as a condition for it to be binding. In other words, obligations are often imposed and binding only on the countries that are party to the ICSID Convention. In addition to adopting the term “parties” sometimes, only then does the obligation depend on the consent of the parties in order for it to be binding.¹⁸²

Most of the rights and obligations that a contracting state undertakes in the Convention will vanish with the denunciation of this state. In order to ensure the survival of these rights and obligations, or to protest the dispute before the center, this “consent” must be present as a condition, and therefore consent obliges states to fully respect the Convention even after the withdrawal is completed. As a result, most provisions remain in effect thanks to “consent”, although the State should be considered a non-binding pre-party to the convention.¹⁸³

3.6 CONCLUSION

A summary of what was stated in this chapter, which aimed to clarify the role of the denunciation of the State that is a party to the center, and the implications of its consent to arbitration at the Center even though it is no longer a party to it. Nevertheless, we can say that the obligations and rights arising from the “consent” provided by the host State and accepted by the investor are not affected by its fate when the State withdraws from the ICSID Convention.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid., p86.

¹⁸³ Ibid.

In addition to the interpretation of the term consent mentioned in Article 72 and a distinction between the obligations that arise from this relevant term or any other obligations. Thus, we have arrived at a partial answer to the question for which this thesis was written.

CHAPTER IV- CONCLUSIONS AND REMARKS

Overall, this thesis attempted to contribute in answering specifically the question about the subject of the consent to the Center's jurisdiction. Despite the denunciation from it by a certain State. Besides, clarifying the effects that derive from this consent and which would not have existed in the event of the State's denunciation concerned without its consent.

After completing the introductory chapter and clarifying the significance and organization in which the thesis will be written. In the second chapter the thesis starts to clarify consent in a way that contributes to laying the foundation for this thesis. It comes to light that consent often comes in one of three typical forms. The most prominent of which is in the form of a clause under the BITs.

In sum, and according to what has been presented under the provisions of the ICSID Convention on consent. In addition to the position of Professor Schreuer, these treaties only come in the form of offers by the host State, meaning that they are not yet binding. However, in order for this consent to be bound and effective, the foreign investor must declare his acceptance of this offer in any way, provided that in written form. Only then is it impossible to abolish or foil it unilaterally.

Next, the thesis moved in chapter three to give an overview of the denunciation from the ICSID Convention. And highlighted in particular the denunciation of States that had already given their consent to the ICSID's jurisdiction. And this consent was accepted by the foreign investor, so then became bound. That is, the offer of consent was accepted by the foreign investor before it was withdrawn by the concerned State's through the denunciation from the Center.

Accordingly, we have illustrated Article 72 of the ICSID Convention in a manner consistent with the content and its relationship to the thesis subject with reference to interpretations that are compatible with the preparatory work of the Center.

Finally, the last section of the third chapter presented what might be a semi-answer to the question posed to this thesis, which was the obligations and rights that arose from this consent. Besides, the fate of future or pending claims that the foreign investor will raise before the Center against the withdrawing State.

Coming to the thesis' question, which is: ***What are the consequences of consent in a case of ICSID denunciation?***

After research and reading, in addition to collecting and sorting information in the above. I can come up with an answer provided that consent is an arrangement that comes out of the will of the parties. Meaning that the host or concerned State in the matter would not be obligated towards the Center by any obligations or rights regarding its consent, or the provisions of the Convention, unless it offers this consent from its side and this consent obtains an approval from the investor side.

In this case, the host State would be bound by several obligations and rights, which are not binding on another non-contracting or withdrawing State, and it may not evade them after that by attempting to withdraw or foil this consent unilaterally.

Even after denunciation of the ICSID Convention and it became effective, the foreign investor still has the ability to file his claims against this State before the Center to settle the dispute or continue settling it, if it was previously submitted through the consent.

Therefore, the denunciation of the Center after consenting to its jurisdiction would not be the ideal idea. Especially for those developing countries or countries of the Middle East, as the foreign investor will not see that his investment has a place for those countries that are completely isolated from the Convention.

That is due to the fact that the ICSID Convention guarantees a form of protection and stability for investors, so it is an attractive mechanism in their view. In doing so, it contributes significantly to enhancing international investment, unlike national legislations.

Although the center's arbitration mechanisms and the consent clauses are among the things that stimulate and protect investment. We aspire to see more development, albeit slow, due to the fact that we are witnessing accelerations and significant growth of the consent clauses in investment treaties, which are multiplying day by day despite the fact that they contain wide-ranging provisions to protect Investment. Thus the presence of more ambiguous conditions, which may make things difficult for the host States. Such a case would lead them to resort to withdrawing from the agreement or withdrawing the offers of consent that they may present.

Therefore, working on balanced treaties between the host States and the foreign investor is the only solution to ensure the effectiveness of this mechanism, that is, the mechanism for settling disputes between the host countries and foreign investors via ICSID.

تم بحمد الله ومُنَّته

Done in English, 2021

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