

UNRAVELING ICSID'S DENUNCIATION: UNDERSTANDING THE INTERACTION BETWEEN ARTICLES 71 AND 72 OF THE ICSID CONVENTION

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I. INTRODUCTION

Before any Contracting State denounced the International Centre for Settlement of Investment Disputes Convention (ICSID Convention),¹ very few academics and commentators bothered interpreting the meaning of its provisions dealing with potential denunciations or, more importantly, the effectiveness of withdrawing from the ICSID Convention. Yet, with the denunciations of Bolivia, Ecuador, and Venezuela, several doubts have arisen and numerous and conflicting interpretations by scholars and practitioners have been put forward. All of them are problematic or unnecessarily complicated.

This article is aimed at addressing, in the simplest way, the doubts as to the meaning of Articles 71 and 72 of the ICSID Convention in relation to the effectiveness of a denunciation. Furthermore, with a logical and objective interpretation of those provisions, and based on the principle of good faith, I conclude that under Articles 71 and 72, a foreign investor is able to accept an offer of ICSID arbitration, in a bilateral investment treaty

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

(BIT) or investment law, within the six-month period set forth in Article 71. Although the latest denunciation occurred already more than two years ago, it appears now is the time when ICSID will be dealing with these provisions.

For the first time in more than forty years since it was opened for signature in 1965, a Contracting State denounced the ICSID Convention on May 2, 2007 when the World Bank, acting as a depositary, received Bolivia's notice of denunciation.² As the World Bank stated on its website, and in accordance with Article 71 of the ICSID Convention, the denunciation took effect on November 3, 2007, six months after Bolivia submitted its notice of denunciation.³ Until Bolivia's denunciation, no State had withdrawn from the ICSID system, but Ecuador followed suit two years later in 2009.⁴ More recently, and several years after the first time the Venezuelan Government gave public signals of its intent to denounce the ICSID Convention,⁵ on January 24, 2012, the World Bank received a third Contracting State's notice of denunciation from the Bolivarian Republic of Venezuela.⁶

Following these denunciations, novel and complex legal issues of systemic importance for the international investment regime arose.⁷ A

2. *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (May 16, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3> (last visited Mar. 21, 2014).

3. *Id.*

4. *See Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (July 9, 2009), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20> (last visited Mar. 21, 2014) (In fact, on July 6, 2009, the World Bank received the notice of denunciation of the ICSID Convention from the Republic of Ecuador—the denunciation took effect on January 7, 2010).

5. On April 28, 2007, during the Fifth Summit of the Bolivarian Alternative for the Americas (ALBA), which took place in Barquisimeto, Venezuela, the Bolivian President proposed the member states (Venezuela, Cuba, Bolivia, and Nicaragua) to withdraw from ICSID. The proposal was supported by all ALBA Members, including Cuba and Venezuela—even though Cuba was not, and is still not, an ICSID Contracting State. Furthermore, on February 12, 2008, the National Assembly of the Bolivarian Republic of Venezuela issued an Accord whereby it encouraged the President of the Republic to withdraw from ICSID. The Accord was published in the Official Gazette of the Bolivian Republic of Venezuela. GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.869, Feb. 13, 2008.

6. *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (Jan. 26, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100> (last visited Mar. 21, 2014) (In fact, on January 24, 2012, the World Bank received the notice of denunciation of the ICSID Convention from Venezuela—the denunciation took effect on July 25, 2012).

7. *Denunciation of The ICSID Convention and BITs: Impact On Investor-State Claims*, U.N. CONFERENCE ON TRADE AND DEV. IIA ISSUES NOTE NO. 2, at 1 U.N. Doc.

great debate has focused around the moment at which a denouncing State can no longer be subject to arbitration under the aegis of the ICSID Convention. Such debate appears particularly relevant when it comes to ICSID arbitration provisions contained in BITs and investment laws. The contradiction that seemingly exists between Articles 71 and 72 of the ICSID Convention has given rise to opposing views about the effectiveness in time of such denunciations.

This article explains why, under a good faith interpretation of Articles 71 and 72 of the ICSID Convention, a foreign investor is able to submit a dispute to the ICSID even if such investor has not accepted the relevant so-called offer of ICSID arbitration before the depositary received the respective notice of denunciation. In fact, the investor could accept the offer of arbitration within the six-month period set forth in Article 71. Articles 71 and 72 of the ICSID Convention provide as follows:

Article 71: Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.⁸

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.⁹

II. THREE APPROACHES

Generally speaking, there are three positions as to the date of effectiveness of the denunciation of the ICSID Convention.¹⁰ First, there are the most conservative who argue that the denunciation is effective immediately.¹¹ Others are of the opinion that, even after the denunciation,

UNCTAD/WEB/DIAE/IIA/2010/2 (Dec. 2010), available at http://unctad.org/en/Docs/webdiaeia20106_en.pdf (last visited Mar. 21, 2014).

8. ICSID Convention, *supra* note 1, art. 71.

9. *Id.* art. 72.

10. See Escobar, *supra* note 2, at 18; see also Christian Tietje, Karsten Nowrot & Clemens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, 6 TRANSNAT'L DISP. MGMT., at 8 (Mar. 2009).

11. This first position is basically the one offered by Professor Christoph Schreuer in the first edition of his book. See CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1286 (Cambridge Univ. Press, 2001); see generally Roberto Castro de Figueredo, *Euro Telecom v. Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration Under BITs*, 6 TRANSNAT'L DISP.

there is an additional six-month period during which those offers of ICSID arbitration existing prior to the denunciation can be invoked or accepted.¹² Finally, the less conservative argue that the denouncing State can be validly submitted to ICSID arbitration even after expiration of the six-month period following the denunciation, provided there is a jurisdictional provision in a BIT that allows such a possibility.¹³ There are even those who have analyzed the issue without taking a clear position.¹⁴

III. THE PROBLEM

According to the Vienna Convention on the Law of Treaties (VCLT),¹⁵ the termination of a treaty, a State party's denunciation or withdrawal from it, can only take place as a result of the application of the provisions of the

MGMT. (Mar. 2009); see Julien Fouret, *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: "Manufacturing Consent" to ICSID Arbitration?*, 25 J. INT'L ARB. 71, 84 (2008).

12. See Marco E. Schnabl & Julie Bédard, *The Wrong Kind of 'Interesting': The Investment Climate in Latin America Recalls a Certain Chinese Proverb*, NAT'L L. J., July 30, 2007, available at <http://www.arbitralwomen.org/files/publication/1910231238362.pdf> (last visited Apr. 16, 2014); see also Sebastien Manciaux, *Bolivia's Withdrawal from ICSID*, 4 TRANSNAT'L DISP. MGMT., at 1 (Sept. 2007).

13. Cf. Fernando Mantilla-Serrano, *The Effect of Bolivia's Withdrawal from the Washington Convention: Is BIT-Based ICSID Jurisdiction Foreclosed?*, 22 MEALEY'S INT'L ARB. REPORT 39 (2007); Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, N.Y. L.J., June 26, 2007; see Michael D. Nolan & Frédéric G. Sourgens, *The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, TRANSNAT'L DISP. MGMT., at 14–15 (Sept. 2007); see Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 251, 268–69 (Christina Binder et al., eds., 2009); see Tietje, *supra* note 10, at 9; see generally Gauthier Vannieuwenhuysse, *Bringing a Dispute Concerning ICSID Cases and the ICSID Convention Before the International Court of Justice*, 8 L. & PRAC. INT'L CTS. & TRIBS. 115, 115–41 (2009).

14. Keyvan Rastegar employs multiple syllogisms and mechanisms typical of the field of Philosophy of Law and presents the problematic in relation to the language of Articles 71 and 72, although without assuming a clear position regarding which is the moment in which the denunciation of the ICSID Convention becomes effective. See Keyvan Rastegar, *Denouncing ICSID*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 278, 300–01 (Christina Binder et al., eds., 2009). Ramiro Guevara points to a different theory, according to which, "consent to ICSID jurisdiction [is] granted by both States at the time they [ratify] the ICSID Convention and [ratify] each individual BIT." Ramiro Guevara, *An Update of Bolivia's Recent Actions*, 5 TRANSNAT'L DISP. MGMT., at 3 (Apr. 2008). Accordingly, "[j]urisdiction is born because the States themselves grant it. Investors simply avail themselves of it procedurally." *Id.* at 3. Unfortunately this author does not provide further details of this theory, which, in any event, apart from being very interesting, I do not find very convincing.

15. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

treaty in question, or the provisions within the VCLT itself.¹⁶ Pursuant to the VCLT, if a treaty contains a provision concerning its termination, denunciation, or withdrawal, such provision(s) shall be observed.¹⁷ Article 71 of the ICSID Convention indicates the steps that a Contracting State has to observe in order to denounce the convention.¹⁸ According to Article 71, a Contracting State can denounce the ICSID Convention by means of a written notice to the depositary.¹⁹ Then, the depositary shall notify all signatory States of any denunciation under Article 71.²⁰ Also in accordance with Article 71, a denunciation shall take effect six months after receipt of the notice of denunciation by the depositary.²¹ This appears to mean that in the event a Contracting State denounces the ICSID Convention, it will continue to be a Contracting State during the six-month period following the notice date.

So far, there would appear to be no problem in determining the effective date of the denunciation. However, Article 72 of the ICSID Convention gives rise to certain interpretation problems in regard to the timeliness of expressions of consent to the ICSID Convention, particularly in the case of the so-called offers of arbitration contained in investment treaties or investment laws and their acceptance by foreign investors. Hence, Article 72's language is the core of the discussion.²² According to the language set forth in Article 72, the denunciation of the ICSID Convention would not affect the rights or obligations arising out of consent given by the State or the investor before the World Bank receives the notice

16. See *id.* art. 42. Because the VCLT applies only to treaties that are concluded after its entry into force, the VCLT is not directly applicable to the ICSID Convention. In fact, the VCLT entered into force on January 27, 1980 whereas the ICSID Convention entered into force on October 14, 1966. Nevertheless, the VCLT is generally regarded as a codification of customary international law. Therefore, its rules serve as guidance for interpreting Articles 71 and 72 of the ICSID Convention.

17. *Id.*

18. ICSID Convention, *supra* note 1, art. 71.

19. *Id.* art. 71 ("Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. *The denunciation shall take effect six months after receipt of such notice.*") (emphasis added).

20. *Id.* art. 75(f).

21. *Id.* art. 71.

22. *Id.* art. 72. Article 72 reads:

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.*

Id. (emphasis added).

of denunciation.²³ On reading Article 72 textually, it would therefore appear that any expression of consent would have to occur prior to the date upon which the World Bank—as depository—receives the notice of denunciation. That out-of-context reading of Article 72 gives the impression that it clashes with Article 71 of the ICSID Convention.²⁴

While Article 71 provides for a six-month survival period after the denunciation for it to become effective, Article 72 suggests that, in order to secure consent, the investor must give his or her consent prior to the very notice of denunciation.²⁵ Furthermore, Article 72 also suggests that the investor could not give his or her consent to arbitration provision set forth in the ICSID Convention within the six-month survival period, i.e., before the denunciation becomes effective.²⁶ This contradiction between Articles 71 and 72 of the ICSID Convention is what has given rise to conflicting positions regarding the exact date upon which the practical effects of the denunciation occur. As will be seen in Parts V and VI below, there is no such contradiction.

IV. THE “SCHREUER FACTOR”

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, the observations of Professor Christoph Schreuer regarding Article 72 of the ICSID Convention are perhaps what unleashed most controversy regarding the scope of the arbitration provision. In particular, Schreuer rejected the possibility of invoking ICSID arbitration provisions, i.e., accepting offers of arbitration, whether contained in BITs or investment laws, during the six-month period referred to in Article 71 of the Convention, and much less after such period had expired.²⁷ The most basic reason for Schreuer to adopt that view stems from the fact that he deems the expressions of consent by States to ICSID arbitration provision, contained in BITs or investment laws, as mere offers of consent.²⁸ For Professor Schreuer, consent becomes irrevocable only when an investor accepts the offer.²⁹ As will be seen below, that is not the unanimous view among commentators and scholars.

23. ICSID Convention, *supra* note 1, art. 72.

24. *See id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* SCHREUER, *supra* note 11, at 218.

29. *See* SCHREUER, *supra* note 11, at 253.

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.”³⁰ In that regard:

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.³¹

According to Professor Schreuer, pursuant to Article 72 of the ICSID Convention, consent by investors must be given before the denunciation of the ICSID Convention takes place; in other words, before the World Bank receives the respective notice of denunciation, i.e., prior to the six-month period set forth in Article 71.³² The preparatory work for the ICSID Convention would seem to support Schreuer’s position. Although the *travaux* do not give a specific answer to the doubts that have since arose with regard to the interpretation of Articles 71 and 72, it seems clear that Mr. Aron Broches’ inclination was to consider offers of arbitration as not having any effect before they are accepted by the investor.³³ 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.

On February 25, 1965, the 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. At this meeting, Mr. Joaquín Gutiérrez Cano, Executive Director of the World Bank appointed by Italy, Spain, Portugal, and Greece, made an important remark. The Spanish diplomat and politician Gutiérrez Cano put forward the case in which there was no agreement between the State and the foreign investor,

30. SCHREUER, *supra* note 11, at 1280–81.

31. *Id.* (emphasis added).

32. This position is shared by the authors Roberto Castro de Figueroa and Julien Fouret, who, following the Bolivian denunciation of the ICSID Convention, published articles on the issue. They both consider that the consent given by a State through a BIT is but a mere offer of consent and that it does not guarantee ICSID jurisdiction, unless the investor has accepted such offer. See Castro de Figueroa, *supra* note 11, at 9; Fouret, *supra* note 11, at 78, 82, 85.

33. See Nolan, *supra* note 13.

but only a general declaration on the part of the State in favor of submission of claims to the ICSID Convention, and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to ICSID. In this respect, he wondered whether the ICSID Convention would still compel the State to accept the jurisdiction of ICSID.³⁴

To this remark, Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutiérrez Cano would not be binding on the State that had made it until it had been accepted by the investor. If the State withdraws its unilateral statement by denouncing the Convention before any investor has accepted it, no investor could later bring a claim before ICSID. If, however, the unilateral offer of the State has been accepted before the denunciation of the ICSID Convention, then those disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of ICSID.³⁵

Mr. Broches' comments seem to suggest that in order for an investor to preserve access to ICSID arbitration, the investor would need to consent to ICSID arbitration before the World Bank receives the notice of denunciation; however, that may not necessarily be his position. In fact, Mr. Broches' might have been referring to the "denunciation" not as a single event occurring when the World Bank receives the notice of denunciation, but as a complex event taking place throughout the six-month term set forth in Article 71 of the ICSID Convention. If one considers that "denunciation" is a complex and constructive process occurring in several steps that starts with the notice and finishes upon expiration of the six-month term in Article 71, then Mr. Broches' comments no longer reflect a position so conservative as interpreted by Professor Christoph Schreuer in the first edition of his book.

Be that as it may, in the 2009 edition of his *Commentary*, Schreuer admits that there is an alternative interpretation that may be based on a literal reading of Article 72 of the ICSID Convention in the light of Article 25(1). He highlights the fact that while Article 25(1) refers to mutual consent, Article 72 refers to consent given by only one of them. Based on this, Professor Schreuer acknowledges that it may be argued that the phrase "given by one of them" indicates that Article 72 covers a unilateral expression of consent by the host State before its acceptance by the investor.³⁶ This would mean that the mere expression of consent by the

34. ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INV. DISP. BETWEEN STATES AND NATIONALS OF OTHER STATES 1010 (1st ed. 2001).

35. *Id.*

36. *See id.*

host State remains unaffected by a notice under Article 71 of the ICSID Convention.³⁷ Schreuer also points out that:

Under this [alternative] interpretation, the investor would retain the right to accept the host State's offer of consent, as long as the offer continues to exist, even after a notice under . . . Art[icle] 71. The expiry of the six-month period in Art[icle] 71 would not affect this right The investor's right to accept the offer of consent would remain until the State withdraws the offer. In order to escape the effect of Art[icle] 72, the State would have to revoke its consent separately. In the case of an offer of consent contained in domestic legislation, the legislation would have to be repealed or amended. In the case of an offer of consent contained in a treaty, its withdrawal would be considerably more difficult and would have to conform to the law of treaties.³⁸

This alternative interpretation recognized by Professor Schreuer seems to be in line with the position of Emmanuel Gaillard, Fernando Mantilla-Serrano, and Oscar Garibaldi, among others.³⁹

V. THIS ARTICLE'S SUBMISSION

It is this article's submission that a good faith interpretation of Articles 71 and 72 of the ICSID Convention allows for the conclusion that a foreign investor can submit a dispute to ICSID arbitration even if the offer was not accepted by the investor before the depositary received the notice of the denunciation. Indeed, the investor would have the possibility to state his or her consent, thereby accepting the offer of arbitration contained in a BIT or in a domestic investment law, and thus perfect the arbitration agreement within the six-month period referred to in Article 71 of the ICSID Convention. Such a conclusion is based on Article 71 itself, which is clear in establishing that the denunciation of the ICSID Convention shall take effect six months after receipt of the notice.⁴⁰ Any other interpretation would strip the second part of Article 71 of the ICSID Convention of any practical meaning and *effet utile*.

In fact, Article 72 of the ICSID Convention indicates that the notice by a Contracting State pursuant to Article 71, i.e., the notice of denunciation of the ICSID Convention, shall not affect the rights or obligations under the

37. SCHREUER, *supra* note 11, at 1280.

38. *Id.*

39. See generally Gaillard, *supra* note 13; see generally Mantilla-Serrano, *supra* note 13; see generally Garibaldi, *supra* note 13.

40. ICSID Convention, *supra* note 1, art. 71.

Convention of that denouncing State or of any national of that State.⁴¹ Such rights and obligations under the ICSID Convention are those arising out of the consent to the jurisdiction of the ICSID given by the State that is denouncing the ICSID Convention or given by any national of that State *vis-à-vis* a host State, before the notice of denunciation was received by the depositary.⁴²

Thus, for example, a Contracting State, “Denunciationland,” could enter into a contract that includes an ICSID arbitration clause and some months later denounce the Convention. If this were to happen, any disputes arising out of that contract would still be subject to arbitration before ICSID. By the same token, before Denunciationland denounces the ICSID Convention, a national of Denunciationland could enter into a contract with another as a Contracting State in which they establish the ICSID arbitration as the dispute resolution mechanism. If, after the execution of this hypothetical contract, Denunciationland were to denounce the ICSID Convention, those disputes arising out of the contract between the Denunciationland national and the host State would continue to be subject to the ICSID arbitration provisions. In other words, the meaning of Article 72 is that the denunciation of the ICSID Convention does not affect those ICSID arbitration agreements where one of the parties is the denouncing State or one of its nationals, provided that such arbitration agreements have been entered into before Denunciationland has sent the notice of denunciation of the Convention. In this regard:

There is general agreement that, at least if both parties to the dispute have given their consent to ICSID jurisdiction before the notice of denunciation is received by the World Bank, the dispute may be submitted to ICSID at any time thereafter, even after the notice of denunciation has taken effect under Article 71.⁴³

In that sense, the ICSID Convention “puts no time limit on that party’s right to consent or the denouncing State’s obligations derived from its pre-notice consent.”⁴⁴

But the key to unravel all controversy in regard to the denunciation of the ICSID Convention and to understand the interaction between Articles 71 and 72 is to keep in mind that Article 72 does not exclude or prohibit the possibility that arbitration agreements will be perfected during the survival

41. ICSID Convention, *supra* note 1, art. 72.

42. *See generally id.*

43. Garibaldi, *supra* note 13, at 260.

44. *Id.* at 270.

period set forth by Article 71 of the ICSID Convention.⁴⁵ It is simple: Article 72 does not contemplate the case of arbitration agreements that are entered into during the six-month survival period.⁴⁶ That case is contemplated in Article 71. Furthermore, the language of Article 72 does not mean that the force of the ICSID Convention ceases immediately upon receipt of the notice of denunciation by the depositary. In other words, there is no justification to afford some kind of *a contrario sensu* interpretation to Article 72 of the ICSID Convention. In that connection, Article 71 provides that the denunciation shall take effect six months after receipt of such notice by the depositary. Therefore, during the six-month period of Article 71, it is also possible to perfect ICSID arbitration agreements.

History has shown that at the time of the drafting of the ICSID Convention, offers of arbitration arising out of BITs were by no means the focus. Indeed, consent to submission to arbitration was typically given simultaneously by both parties, either by way of an arbitration clause in a State-contract with regard to future possible disputes, or in the form of a *compromis* concerning a dispute that had already arisen.⁴⁷ It is quite probable that this is why the discussions of the different committees, both the Legal Committee and the Committee of the Whole, did not directly tackle the case of potential acceptance of an arbitration offer in a BIT during the six-month period set forth in Article 71 of the ICSID Convention. Yet, importantly, nowhere does the text of the ICSID Convention, nor its preparatory work, contemplate a prohibition against accepting offers of arbitration during the aforementioned six-month period.⁴⁸ Therefore, an objective and good faith interpretation of Article 72 in the ICSID Convention should not extract a prohibition where no such prohibition exists, either in that provision or in the entire text of the ICSID Convention.

Although it is true that Article 72 refers expressly to consent given before a notice of denunciation is received, the provision does not proscribe the possibility of accepting the offer after the denunciation.⁴⁹ It simply does not regulate that situation. Again, there is no reason to interpret Article 72 of the ICSID Convention *a contrario*. Likewise, Article 71 does in fact regulate the period of time following the denunciation and expressly establishes that the Convention shall remain in force for six months after

45. See ICSID Convention, *supra* note 1, art. 72.

46. See *id.*

47. See Tietie, *supra* note 10, at 19.

48. See generally ICSID Convention, *supra* note 1.

49. *Id.* art. 72.

the denunciation.⁵⁰ By the same token, because Article 71 also provides that the denunciation takes effect six months after receipt of the notice, it is safe to assume that in absence of specific circumstances, once the six-month survival period has expired, it is no longer possible to accept any offer of arbitration.

Therefore, it is this article's submission that Articles 71 and 72 are aimed at regulating two different realities. Whilst Article 71 determines the exact date upon which the denunciation of the ICSID Convention becomes effective, i.e., as of six months after receipt of the notice of denunciation by the World Bank, Article 72 constitutes an expression of the final part of Article 25(1) of the ICSID Convention according to which—once the parties have given their consent—no party may withdraw its consent unilaterally.⁵¹ The latter provision is just a manifestation of the rule of international law whereby an arbitration agreement is autonomous in relation to the other provisions of a treaty. In the absence of Article 72, a host State or an investor's State of origin could have nullified a consent agreement at any time convenient to it by withdrawing from the Convention.⁵² Article 72 is also deemed an exception to the nationality requirement established in Article 25(1) of the ICSID Convention.⁵³ In other words, Article 72 is not aimed at mere offers of arbitration, but at agreements *per se*. Article 72 is the additional legal safeguard to contractual arbitration clauses.⁵⁴

Put in another way, all Article 72 determines is that if Denunciationland were to denounce the ICSID Convention, those ICSID arbitration clauses to which Denunciationland is a party, or those agreements in which one of the parties is a Denunciationland national investor—which have been perfected before Denunciationland sent the notice of denunciation to the World Bank—would not be affected by the fact that after the conclusion of such agreement to arbitrate, Denunciationland issued its notice of denunciation.

When one is interpreting Article 72 of the ICSID Convention, the preparatory works are helpful. During the meeting of the Committee of the Whole on Settlement of Investment Disputes of February 25, 1965, Mr. Aron Broches indicated that the intention of that provision—which in the

50. *Id.* art. 71.

51. *Id.* art. 25(1).

52. SCHREUER, *supra* note 11, at 1280.

53. Tietje, *supra* note 10, at 7.

54. According to Tietje, Nowrot, and Wackernagel, the purpose of the current Article 72 of the ICSID Convention is to strengthen the contractual arbitration clauses in order for them not to be affected in the event of a denunciation of the ICSID Convention. *See id.* at 17.

draft Convention at the time was Article 73—was to make it clear that if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the ICSID Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose.⁵⁵ This indication serves as guidance when trying to understand the reach of Article 72. In addition, it could be argued that Article 71, by establishing the six-month period, covers precisely the case of offers of consent to arbitration. Moreover, the ICSID Convention does not contemplate a prohibition on accepting offers of arbitration during the six-month period of Article 71. Thus, such offers can be accepted within the six month period.

VI. A USEFUL EXERCISE OF INTERPRETATION

The following exercise may be useful to understand and explain the interaction between Articles 71 and 72 of the ICSID Convention: first, let us separate the two parts of Article 71. Doing so reverts to the original version of the two provisions embedded in the current Article 71, which throughout many preparatory documents of the ICSID Convention, was kept as two separate provisions.⁵⁶ The result would be as follows:

- 1) Any Contracting State may denounce this Convention by written notice to the depositary of this Convention; and⁵⁷
- 2) The denunciation shall take effect six months after receipt of such notice.⁵⁸

Secondly, let us put the current Article 72 between the two parts (or provisions) in Article 71. The result would read as follows:

- 1) Any Contracting State may denounce this Convention by written notice to the depositary of this Convention.⁵⁹
- 2) Notice by a Contracting State pursuant to [the foregoing provision] 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

55. ICSID, *supra* note 34, at 1009.

56. *Id.* at 301; ICSID Convention, *supra* note 1 (Reference, more precisely, is made to the First Draft of the ICSID Convention prepared by the World Bank (Doc. 43) on September 11, 1964, as well as to the Revised Draft of the ICSID Convention on December 11, 1964, prepared by the Legal Committee on the Settlement of Investment Disputes (Doc. 123)).

57. ICSID Convention, *supra* note 1, art. 71.

58. *Id.*

59. *Id.*

- arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary; and⁶⁰
- 3) The denunciation shall take effect six months after receipt of such notice.⁶¹

This sequence seems quite logical. First, the denunciation is contemplated. Second, everything related to arbitration clauses or agreements in force at the time of the denunciation is dealt with. Finally, a survival clause is provided, which is typical of investment promotion and protection instruments in which ICSID offers can be accepted. Hence, Article 72 serves to complement the first part of Article 71, but only partially.⁶² In other words, Article 72 does not regulate the case of the investors that may accept an offer of ICSID arbitration during the six-month period referred to in the second part of Article 71, and it is precisely that second part of Article 71 of the ICSID Convention that regulates that case or situation.

Julien Fouret argues that it would seem contrary to the principle of good faith in international law for a party, knowing that a State has denounced the ICSID Convention, to perfect its consent during the six-month period of Article 71.⁶³ It is this article's submission that the correct conclusion should be exactly the opposite. That is, what appears contrary to the principle of good faith is that Denunciationland denounces the ICSID Convention from one day to the next, negatively affecting foreign investors who invested in Denunciationland when the rules in force at the time of their investment provided for access to ICSID arbitration. Should that be the case, investors would be suddenly deprived of a dispute settlement mechanism that was available for them at the time of their investment. A good faith interpretation cannot lead to that result. Thus, the six-month period in Article 71 must be available for those investors who wish to accept an offer of ICSID arbitration before such period expires.

VII. OTHER VIEWS

For the sake of brevity, and perhaps running the risk of oversimplifying, it can be said that the core of the different views regarding the effectiveness of the denunciation lies in the diverging conception of the nature of provisions contemplating ICSID arbitration in BITs. Those views

60. *Id.* art. 72.

61. *Id.* art. 71.

62. For a contrary position, *see* Fouret, *supra* note 11, at 73–74.

63. *Id.* at 84.

differ between, on the one hand, those who consider that with the notice of denunciation of the ICSID arbitration clause ceases to be an option and, and on the other hand, those who consider that the ICSID arbitration provision would still be available even after the six-month period in Article 71 has elapsed, as long as the language of the respective BIT allows such a possibility.

Under the first approach—or Schreuer’s original or 2001 position—States’ expressions of consent to ICSID arbitration in BITs constitute “offers of consent.” Conversely, the alternative approach considers States’ expressions of consent to ICSID arbitration in BITs as “consent” under Article 25(1) of the ICSID Convention, i.e., a consent that becomes irrevocable once given. This is what Mr. Oscar Garibaldi calls a choice of paradigms between accepting the “contract analogy” theory as opposed to the view that a State is internationally bound by its unilateral expression of consent.⁶⁴ Under the latter approach, the phrase given by one of them in Article 72 would refer to an expression of consent by the host State that remains unaffected by a notice under Article 71 of the ICSID Convention.⁶⁵

In the author’s view, the possibility of accepting offers of arbitration after the expiry of the six-month period of Article 71 seems a bit too audacious. Nevertheless, the arguments that support the position of Garibaldi, Gaillard, Mantilla-Serrano, and others are quite convincing. Indeed, this article is not aimed at addressing or refuting such position. Suffice it to say that a diligent practitioner must bear in mind that, in spite of those solid arguments, the Secretary-General of ICSID could refuse to register the request for arbitration if, in his or her view, the dispute is clearly outside the ICSID’s jurisdiction.⁶⁶ That is a practical reason that militates against allocating all hopes to the latter approach.

VIII. CONCLUSION

There appears to be a contradiction between Articles 71 and 72 of the ICSID Convention. Pursuant to the former, if a State denounces the ICSID Convention, it will continue to be a Contracting State during the following six-month period. Thus, it seems as if an investor should be able to accept an offer of consent to the ICSID within that period. Nonetheless, when reading Article 72 textually, it appears like any acceptance of an offer of consent to the ICSID Convention would have to occur before the depository

64. *Id.* at 255–56 (But Garibaldi considers that treating this matter as a mere choice of paradigm is an untenable position.).

65. *See Id.*

66. *See ICSID Convention, supra* note 1, art. 36(3).

receives the notice of denunciation. Yet, there is no contradiction between the two norms. Articles 71 and 72 simply regulate two different situations.

The key to understanding the interaction between the two provisions is to keep in mind that Article 72 does not prohibit ICSID arbitration agreements from being perfected during the six-month survival period. Although Article 72 refers to consent given before a notice of denunciation is received, the provision does not proscribe consent subsequent to reception of the notice of denunciation by the depository. Nowhere in the ICSID Convention is such a prohibition stated. Furthermore, there is no reason to interpret Article 72 of the ICSID Convention *a contrario*. Thus, it is possible to accept offers of consent to ICSID arbitration during the six-month survival period. The text of Article 71 reinforces this conclusion by establishing that the ICSID Convention shall remain in force for six months after denunciation.