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Once and Forever?
The Legal Effects of a
Denunciation of ICSID

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Once and Forever?
The Legal Effects of a Denunciation of ICSID

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A. Introduction

The famous saying by *John H. Jackson* that any attempt to follow the developments of international economic law “is like trying to describe a landscape while looking out the window of a moving train – events tend to move faster than one can describe them”¹ currently appears to be particularly valid in international investment law.² One telling example concerns the attempts by a number of Latin American countries to redesign the landscape of the increasingly established and in recent years widely used mechanisms for the settlement of investment disputes between states and private investors. As what probably can be regarded only a first step in this connection, Bolivia submitted a notice of denunciation of the ICSID Convention to the World Bank on 2 May 2007.

This contribution is intended to provide an assessment of the legal implications arising from this unprecedented move. Thereby, it will be argued that recourse to the ordinary meaning as well as the object and purpose of the respective provisions provide a balanced approach in reconciling the discrepancy between a state’s bilateral investment treaties providing for ICSID arbitration on the one side and the respective state’s denunciation of the ICSID Convention on the other.

B. Background

In late April 2007, the governments of Bolivia, Nicaragua, and Venezuela agreed to withdraw from the ICSID Convention. This decision, being made on the occasion of a president’s summit of the *Alternativa Bolivariana para la America Latina y El Caribe* (ALBA) founded in 2006, can be regarded – in line with for example the current undertaking of founding the *Banco del Sur* – as a further move towards establishing what can be qualified as a “New Regional Economic Order” for the Americas. While Venezuela subsequently announced its withdrawal from the World Bank and the IMF, Bolivia is currently the only country that has implemented the decision with regard to the ICSID Convention. The Bolivian President *Evo Morales* was quoted by the *Washington Post* as denouncing the “legal, media and diplomatic pressure of some multinationals that [...] resist the sovereign rulings of countries, making threats and initiating suits in international arbitration”.³ Faced with criticism not only from foreign business interests, the Bolivian government subsequently added a number of other reasons to justify its decision, among them “ICSID’s alleged bias towards corporations, the lack of substantive appeals mechanism for arbitration rulings, and the confidentiality of arbitration hearings charged with resolving matters of public interest”.⁴

¹ *Jackson*, Legal Problems, XV.

² See also for example *Reinisch*, in: Reinisch/Knahr (eds.), *International Investment Law*, 201 (207) (“a hotspot of international law”).

³ *Vis-Dunbar/Peterson/Cabrera Diaz*, *Investment Treaty News* of 9 May 2007.

⁴ *Cabrera Diaz*, *Investment Treaty News*, 27 May 2007.

From a legal point of view, in accordance with Article 71 ICSID Convention, Bolivia's denunciation of the ICSID Convention became effective on 3 November 2007. With the option to denunciate the ICSID Convention undisputedly being provided for by this provision, Bolivia has ceased to be an ICSID Contracting Party after the respective six-month period commencing with notification of denunciation. Although Bolivia is the first and so far only state to withdraw from ICSID, it is unlikely to be the last. In addition to the above mentioned statement by Nicaragua and Venezuela, attention should be drawn to the fact that recently, in tandem with levying a 99 percent tax on the profits of oil companies, Ecuador announced its intention not to accept jurisdiction of ICSID at least for disputes relating to oil and mining any further.⁵ On 29 October 2007 Ecuador submitted a notice in this regard pursuant to Article 25 (4) ICSID Convention⁶ and has subsequently made known its intention to withdraw from at least nine of its bilateral investment treaties (BITs).⁷

Up to the present, Bolivia, which ratified the ICSID Convention on 23 June 1995, has been party to one concluded ICSID arbitration, *Aguas del Tunari S.A. v. Republic of Bolivia*, Case No. ARB/02/3, while two others are still pending: *Quimica e Industrial del Borax Ltda. and others v. Republic of Bolivia*, Case No. ARB/06/2 and, most recently since 31 October 2007, *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia*, Case No. ARB/07/28.

Of particular relevance for the evaluation of the legal implications of Bolivia's decision is the fact that dispute settlement under the auspices of ICSID is provided for in the majority of its 19 BITs (with the exception of those concluded with China, Cuba, and Sweden). In this connection it is noteworthy that apart from denouncing the ICSID Convention, Bolivia currently seeks to revise or terminate its BITs. According to Bolivia's Chargé d'Affaires for Trade with the Ministry of Foreign Affairs in La Paz, *Pablo Solon*, renegotiation of BITs will concern, *inter alia*, dispute resolution which shall be limited to domestic fora.⁸ Many of Bolivia's existing BITs such as for example the ones concluded with Germany in 1987 and with the United Kingdom in 1988 may be denounced at any time, with 12 months' prior notice (Article 14 (2) Bolivia-Germany BIT, Article 13 Bolivia-UK BIT). However, by virtue of a so-called "survival clause", the provisions of the BITs continue to be effective for a further period of twenty years from the date of termination with regard to investments made prior to that date (Article 14 (3) Bolivia-Germany BIT, Article 13 Bolivia-UK BIT). Consequently, dispute resolution clauses contained in BITs might continue to provide for ICSID arbitration initiated by private investors against Bolivia well beyond the date of denunciation of the ICSID Convention.

In light of these findings, the fundamental question arises how to reconcile the obvious discrepancy between a state's BITs providing for ICSID arbitration on the one side and the respective state's denunciation of the ICSID Convention on the other. Given that Bolivia's withdrawal from ICSID comes at a time of extensive nationalization in economic key sectors in a number of Latin American states, the an-

⁵ See 'Ecuador Reportedly Wants Oil and Mining Disputes Barred from ICSID', Investment Treaty News of 15 October 2007.

⁶ *Peterson*, Investment Treaty News of 30 November 2007.

⁷ *Peterson*, Investment Treaty News of 5 February 2008.

⁸ *Vis-Dunbar/Peterson/Cabrera Diaz*, Investment Treaty News of 9 May 2007.

swer to this question may considerably affect the manner in which disputes between foreign investors and Bolivia, but potentially also other countries in the region will be solved in the near future.

C. Framework of Relevant ICSID Provisions

The competence of the Centre is determined by Article 25 of the ICSID Convention. According to Paragraph 1 of this Article, “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” Thus, consent of each party as well as the host and home state of the investor being contracting parties of the ICSID Convention are necessary requirements for establishing jurisdiction of the Centre. Thereby, it is generally recognized that consent by a state can be given through various instruments including respective provisions in BITs.⁹ Furthermore, in order to initiate ICSID proceedings the investor has to accept the consent. As long as host and home state qualify as contracting states to the ICSID Convention, Article 25 applies and the Centre has jurisdiction on the basis of that article.

Nevertheless, Article 25 does not suffice to establish jurisdiction when the host state ceases to be a Contracting State after denunciation of the ICSID Convention. Based on a reading of Article 25 (1) alone, Bolivia has ceased to be a “Contracting State” in the sense of this provision on 3 November 2007. However, in that case Article 72 provides that notice of denunciation of the Convention by a Contracting State “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.” Consequently, Article 72 constitutes an exception to the Contracting State-requirement under Article 25. The possibility for investors to initiate ICSID proceedings after notice of denunciation of the ICSID Convention thus depends on the existence of “consent” given by the state before the notice of denunciation as well as on the obligations arising out of that consent. Evaluating the legal implications arising out of Bolivia’s denunciation of the ICSID Convention thus once again confirms the continued fundamental importance – highlighted *inter alia* by the tribunal in *Plama Consortium Limited v. Republic of Bulgaria*¹⁰ – of establishing the existence of an arbitration agreement between the parties concerned.

⁹ See, e.g., *Lanco International, Inc. v. Argentine Republic* (Case No. ARB/97/6), para. 43; *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, Decision on Objections to Jurisdiction of 24 May 1999 (Case No. ARB/97/4), para. 38; *Schreuer*, ICSID Commentary, Article 25, paras. 285 *et seq.*

¹⁰ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 198 (“With the advent of bilateral and multilateral investment treaties since the 1980s [...], the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against host states. Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate.”).

D. The Best Things Come in Threes: Possible Interpretations of Article 72 ICSID Convention

Despite the fact that international investment law in general and the investor-state dispute settlement mechanism provided by the ICSID Convention in particular have received considerable attention among practitioners and scholars in recent years due to their increasing practical relevance, the specific legal implications of a state's withdrawal from this regime have so far hardly been addressed in the literature and thus remain to a large extent "unexplored legal territory".¹¹ However, this doesn't really come as a surprise but merely once again – with regard to previous examples one only need to think of the long-time dormant "umbrella clause" – confirms the clearly practice-oriented approach of most legal scholarship in this area of international economic law.

The central regulation in this regard is obviously Article 72 ICSID Convention. Thereby three different views concerning the regulatory content of this provision appear to be possible:¹²

Following one leading commentator of the ICSID Convention, only disputes in which both the host state and the investor have given mutual consent before notice of denunciation to submit to the Centre would fall within the scope of its jurisdiction. A unilateral expression of consent by the host state in a BIT would not suffice because under this interpretation it does not in itself constitute "consent" but rather an "offer of consent".¹³ It needs to be accepted in writing by the investor. Once accepted, it benefits from the continued validity under Article 72. Consequently, "consent" in Article 72 would in fact be read as "arbitration agreement".¹⁴ Applied to the case of Bolivia, 2 May 2007 would have been the deadline for investors to accept the "consent" as stipulated in most Bolivian BITs. The dispute settlement proceedings initiated by *E.T.I. Euro Telecom International N.V.* against Bolivia on 12 October 2007 and registered with ICSID on 31 October 2007 are likely to provide a forum for putting this line of argumentation to the test in practice.

Under another possible reading of Article 72, investors may still accept the consent given in a BIT until the denunciation becomes effective in accordance with Article 71 six months after receipt of the notice of denunciation by the depositary.¹⁵ According to this view, investors could have accepted a respective consent expressed by Bolivia in a BIT until 2 November 2007. Again, a future decision on objections to jurisdiction by a tribunal in *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia* might have to evaluate possible arguments that could be brought forward in this connection.

¹¹ Schnabl/Bédard, *The National Law Journal* of 30 July 2007.

¹² See also, e.g., Montanes, *I.L.M.* 46 (2007), 969.

¹³ Schreuer, *ICSID Commentary*, Article 72, para. 4; see also, however on the basis of a rather odd legal reasoning Fouret, *Journal of International Arbitration* 25 (2008), 71 (80 *et seq.*).

¹⁴ See also the respective statement by Schreuer, cited by: *Vis-Dunbar/Peterson/Cabrera Diaz*, *Investment Treaty News* of 9 May 2007 ("My reading is that consent under the ICSID Convention is always by agreement. If there is an ICSID clause in a bilateral investment treaty or national legislation, that does not in itself constitute consent. That consent needs to be accepted by the other party.").

¹⁵ Manciaux, *Transnational Dispute Management* 4 (Issue 5, 2007).

Finally, the most far reaching understanding of Article 72 provides for the possibility of accepting a state's consent to ICSID arbitration stipulated in a BIT as long as the respective bilateral agreement remains effective. In support of this view, it has been argued that the legislative history of the ICSID Convention indicates that the word "consent" in Article 72 must be read as "unilateral consent" and not as "arbitration agreement"¹⁶ and that the consent given by the host state under a BIT has to be regarded not merely as a revocable "offer to arbitrate" but rather as an "independent legal obligation" with the result that "protected investors will be unaffected by the denunciation of the [ICSID] Convention not just for 6 months, but for the life of the treaty".¹⁷ Based on this view of the regulatory content of Article 72, investors could thus accept Bolivia's consent even after the denunciation became effective on 3 November 2007, and – in light of the aforementioned "survival clauses" stipulated in BITs – indeed for quite some time to come.

Thus, the unresolved issue of how to interpret Article 72 has considerable repercussions on the future investment climate in Bolivia and arguably other states in Latin America. ICSID provides a very powerful regime for the enforcement of any subsequent award. Even if it is debatable as to whether the ICSID Convention provides the most suitable arbitration procedure for investors in every aspect, any award rendered in *ad hoc* or institutional arbitration other than ICSID requires an exequatur to be effective and might become subject to various uncertainties arising therefrom. Furthermore, non-ICSID arbitration is a possibility only where the relevant BIT or another investment instrument so provides. If a BIT contains a clause providing only for ICSID arbitration, investors may be concerned about whether the host state will adhere to its commitments. Especially where investments have been made with confidence in such a clause, the jurisdictional requirements of the ICSID Convention in case of denunciation are crucial.

E. No Direct Precedent in the History of ICSID Arbitration

In the history of ICSID arbitration only very few cases touch slightly upon this issue. A possible first precedent worth noticing is the very first ICSID arbitration ever conducted — *Holiday Inns v. Morocco* (ABR/72/1). Registered on 13 January 1972, the case was eventually settled amicably between the parties in the course of the summer of 1978.¹⁸ The dispute arose out of a contract, the so-called 'Basic Agreement', which the Moroccan government concluded with *Holiday Inns S.A.*, Glarus, Switzerland, a subsidiary of the American group *Holiday Inns*, and a subsidiary of the *Occidental Petroleum Corporation* on 5 December 1966. Article 14 of the Basic Agreement contained an arbitration clause providing for dispute settlement under the auspices of ICSID, which at the time had just been established. In the aftermath of important political changes in Morocco, irregularities in the exercise of the Basic Agreement on

¹⁶ Gaillard, New York Law Journal of 26 June 2007.

¹⁷ Nolan/Sourgens, Preliminary Comment, 37.

¹⁸ Generally on the background of this dispute and the respective decision on jurisdiction of 1 July 1973 that has not been published see *Lalive*, British Yearbook of International Law 51 (1980), 123 *et seq.*; *Tupman*, International and Comparative Law Quarterly 35 (1986), 813 (817 *et seq.*).

the side of the Moroccan Government culminated in a request for arbitration on 22 December 1971 by the private partners.

Aside from being faced with various legal and practical difficulties, the arbitral tribunal considered the following – and for present purposes solely interesting – objections to jurisdiction from the part of Morocco. It contended that, notwithstanding the consent to ICSID arbitration given in the Basic Agreement in respect of *Holiday Inns S.A.*, the Tribunal was ‘not competent to entertain the Request for Arbitration’ with regard to that company, since neither Switzerland nor Morocco had on the date of signing the Basic Agreement become an ICSID contracting party and since the company did not exist on the date of the Basic Agreement. The Government’s reasoning was based on a restrictive interpretation of the terms ‘national of a contracting state’ as stated in Article 25 (1) and defined in Article 25 (2) (b) ICSID Convention. According to the latter provision a ‘national of a Contracting State’ means ‘any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to [...] arbitration [...]’. For the Moroccan Government this date could only be the date of the Basic Agreement, i.e. 5 December 1966. Since on that date Switzerland had not yet signed the Washington Convention, and since *Holiday Inns S.A.* was not yet legally in existence, it was not a ‘national of another Contracting State’.

The tribunal did not follow this argumentation and interpreted the consent given by both parties in the Basic Agreement as “conditional consent” to become fully binding for the parties to the contract on the date of ratification of the Convention and, respectively, coming into legal existence of the corporation. In a categorical and concise way the Tribunal stated:

“No. 20. The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party. As for the date of consent contemplated by Article 25 (2) b of the Convention, it will automatically be the date on which the two corresponding consents coincide [...]”¹⁹

The tribunal went on to say that the Government did not contest the validity of the Basic Agreement and that it intended to confer jurisdiction to ICSID in respect of *Holiday Inns S.A.* Since the government entered into that Agreement knowing that at the time neither Switzerland nor Morocco itself had ratified the ICSID Convention and that *Holiday Inns S.A.* was still in the process of creation, the tribunal concluded that “the only reasonable interpretation of the Basic Agreement is to hold that the Parties when signing the Agreement envisaged that all necessary conditions for jurisdiction of the Centre would be fulfilled and their consent would at that time become fully effective.”²⁰ Furthermore, the tribunal stated that, “Morocco became a Contract-

¹⁹ *Lalive*, British Yearbook of International Law 51 (1980), 123 (146).

²⁰ *Ibid.*

ing State on June 10, 1967 and Switzerland on June 14, 1968; the Company became a juridical person in 1967. Consequently, it is on the last of those dates, i.e. June 14, 1968, that the Parties ‘have consented to submit the dispute to arbitration’ within the meaning of Article 25 (2) (b) of the Convention. From that date neither Party could unilaterally withdraw its consent as provided in Article 25 (1)”.²¹

The tribunal in *Holiday Inns v. Morocco* thus confirmed that under the ICSID Convention parties may subordinate an arbitration clause to the fulfilment of certain conditions, among them the accession of the home and host state to the Convention. This case concerned directly only the subsequent fulfilment of requirements under the ICSID Convention such as its ratification. Nevertheless, it might be argued that this reasoning of ‘conditional consent’ is equally relevant for – analogous – situations where the respective conditions cease to apply due to a subsequent denunciation of the Convention.

However, such a reversal conclusion is already ruled out by the fact that while the ICSID Convention does not provide for any regulation dealing with the later fulfilment of conditions as being subject to the decision in *Holiday Inns v. Morocco*, it explicitly does so on the basis of its Article 72 with regard to the subsequent withdrawal by the host state. Thus, the mere existence of this provision excludes at least an overall understanding of consent to ICSID arbitration as always ‘conditioned on being a party to the Convention’ and consequently also renders for the present purpose the value of *Holiday Inns v. Morocco* as a precedent rather limited.

Another possible precedent worth noticing in this connection is *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ARB/74/2). In this case, a dispute arose out of a state contract between *Alcoa* and Jamaica for a long term concession for the mining of bauxite. This agreement contained an arbitration clause referring to ICSID arbitration for any dispute arising under the agreement. After a dispute arose out of the withdrawal of certain tax exemptions, Jamaica, which had ratified the ICISD Convention without making any reservations, notified ICSID in accordance with Art. 25 (4) that any “[l]egal dispute arising directly out of an investment relating to minerals or other natural resources” shall not be subject to jurisdiction of the Centre. The tribunal in considering its jurisdiction over the dispute observed that under Art. 25 (1) no party may withdraw its consent to arbitration unilaterally and that both parties had given consent in the arbitration clause included in the agreement between *Alcoa* and the Government of Jamaica. Thus, the tribunal held that Jamaica’s notification under Art. 25 (4) only operated for the future and was ineffective to abrogate Jamaica’s prior consent to ICSID arbitration. Any other decision, the tribunal added, “would very largely, if not wholly, deprive the Convention of any practical value”.²²

While notification under Art. 25 (4) has a comparable effect on the exempted class of disputes like a denunciation of the convention as a whole, the value of this decision as a precedent is – at first glance – also limited. Since the case concerned an agreement to arbitrate between the parties, the problem of the continued validity of unilateral consent after notification under Art. 25 (4), which could serve as precedent for the denunciation of the Convention, did not arise. If the case would have con-

²¹ *Ibid.*, 146 note 2.

²² See *Tupman*, International and Comparative Law Quarterly 35 (1986), 813 (823).

cerned the denunciation of the Convention instead of notification under Art. 25 (4), the consent of Jamaica would still be valid even under the narrowest understanding of Article 72, since it had been accepted by the other party to the state contract, *Alcoa*, before notification.

Nevertheless, the tribunal in *Alcoa Minerals v Jamaica* unambiguously stressed – by taking recourse in particular to the object and purpose of Article 25 ICSID Convention – the continued validity of a consent to ICSID arbitration stipulated in a state contract between the host state and a private investor, and thus as an irrevocable legal obligation. We will return to that line of reasoning when evaluating the object and purpose of Article 72.

F. The Importance of ICSID’s Decision to Register *E.T.I. Euro Telecom International N.V. v. Republic of Bolivia*: Legal Implications or Idle Speculations?

In light of the lack of direct precedents one might – at first sight – assume that the decision by the ICSID Secretariat to register the request for arbitration by *E.T.I. Euro Telecom International N.V.* potentially provides some indications at least as to the respective view held by the Centre.

Following the formal request for arbitration by *E.T.I. Euro Telecom International N.V.* of 12 October 2007, Bolivia in a letter to the President of the World Bank, *Robert Zoellick*, unsuccessfully voiced its objections to registration by arguing lack of jurisdiction.²³ Thus, the question arises whether the decision by the Secretary-General to register the case (Case No. ARB/07/28) on 31 October 2007 entails any normative predeterminations as to the Tribunal’s decision on jurisdiction. Indeed, it has occasionally been argued that the Secretary-General’s decision – even if it does not preclude a Tribunal from finding that a dispute is outside the jurisdiction of ICSID – has at least to be taken into account by the arbitrators. To mention but one example, in the case of *Holiday Inns v. Morocco*, one of the claimants, *Holiday Inns S.A.*, had apparently submitted that ICSID “had tacitly recognized the validity of its arguments [with regard to the given jurisdiction of the Centre] by the very fact of registration of the request”.²⁴

However, the wording of Article 36 (3) ICSID Convention, stipulating that the Secretary-General is required to register the request unless he concludes that “the dispute is manifestly outside the jurisdiction of the Centre”, strongly indicates that the respective screening power “is not concerned with a final determination” but “merely with the prevention of flagrant misuse of the Centre”.²⁵ Consequently, even if the Secretary-General has certain doubts concerning the jurisdiction of ICSID, he will generally register the request as long as the lack of jurisdiction is not “easily recognizable”.²⁶

²³ See *Vis-Dunbar/Cabrera Diaz/Peterson*, Investment Treaty News of 15 November 2007; on the subsequent NGO campaign in this regard see *Vis-Dunbar*, Investment Treaty News of 11 January 2008; *Vis-Dunbar*, Investment Treaty News of 17 January 2008.

²⁴ *Lalive*, British Yearbook of International Law 51 (1980), 123 (144 note 2).

²⁵ *Broches*, RdC 136 (1972), 331 (368); see thereto also *Reed/Paulsson/Blackaby*, Guide to ICSID Arbitration, 76; *Schreuer*, ICSID Commentary, Article 36, paras. 44 *et seq.*, Article 41, paras. 9 *et seq.*, with further references.

²⁶ *Schreuer*, ICSID Commentary, Article 36, para. 54.

Against this background it is generally held that the registration in accordance with Article 36 (3) does not predetermine a tribunal's subsequent decision on jurisdiction under Article 41 ICSID Convention²⁷ – a perception also continuously adhered to in the practice of ICSID arbitration.²⁸

G. Interpreting the Regulatory Content of Article 72 ICSID Convention

Since the ICSID case law is silent on the respective legal effects of a denunciation of the Convention and because no further legal implications can be deduced from the Secretary-General's decision to register the request for arbitration by *E.T.I. Euro Telecom International N.V.* on 31 October 2007, recourse has to be taken to the principles of treaty interpretation in order to reveal the regulatory content of Article 72.

It has to be noted in this connection that the general rules of interpretation as laid down in the Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) are not directly applicable to the ICSID Convention. Aside from the fact that not all Contracting Parties to the ICSID Convention have also signed and ratified the VCLT, such an approach is already ruled out by Article 4 VCLT, which stipulates that this agreement applies only to treaties concluded after its entry into force on 27 January 1980, and thus not to the ICSID Convention. Nonetheless, taking into account that the respective provisions of the VCLT are generally regarded as being to a large extent merely a codification of customary international law²⁹ and are

²⁷ See thereto for example already Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 38, reprinted in: ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 1081 *et seq.* (“It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration [...] is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competences and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.”); as well as, e.g., *Reed/Paulsson/Blackaby*, Guide to ICSID Arbitration, 76; *Schreuer*, ICSID Commentary, Article 36, para. 59, Article 41, paras. 9 *et seq.*, with further references.

²⁸ See already *Holiday Inns v. Morocco*, Decision on Jurisdiction of 1 July 1973, stating that such registration “does not of course preclude a finding by the Tribunal that the dispute is outside the jurisdiction of the Centre”, cited after: *Lalive*, British Yearbook of International Law 51 (1980), 123 (144 note 2); as well as *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, para. 5.01, reprinted in: I.L.M. 36 (1997), 1531 (1542) (“Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID, because, evidently Article 36 (3) does not confer upon the Secretary-General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not, in any sense, bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof, The Tribunal will still have a number of questions to raise and also to find answers thereto.”).

²⁹ See thereto for example International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (United Nation), Advisory Opinion of 9 July 2004, reprinted in: I.L.M. 43 (2004), 1009 (1036, para. 94); International Court of Justice, *Case Concerning Kasikili/Sedudu Island* (Botswana v. Namibia), Judgment of 13 December 1999, ICJ-Reports 1999, 1045 (1059); WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body of 7 April 2005, WT/DS285/AB/R, para. 159; *Jennings/Watts*, Oppenheim's International Law, Vol. I, Parts 2 to 4, 1271; *McLach-*

in this capacity frequently applied by investment arbitration tribunals,³⁰ they can also serve as a guide in identifying the exact meaning of Article 72 ICSID Convention.

Thereby, while interpreting this provision, it is important to bear in mind that according to consistent jurisprudence of arbitral tribunals in international investment disputes, the interpretation of a respective agreement should not be *a priori* strict or broad – and thus neither in favour nor against the investor – but should be aimed at finding a fair and functional solution that gives due respect to the fundamental principle of good faith and is based on a “balanced approach” to interpretation.³¹

So far largely overlooked in the admittedly only just commencing discussions on this issue, an evaluation of the wording of Article 72 – generally regarded as the starting point of treaty interpretation – illuminates to a certain extent the meaning of “consent” under this provision. Article 72 explicitly refers to “consent given by one of them”. The mere wording of this provision thus clearly leaves open the possibility, even suggests, that “consent” be interpreted in the sense of Article 72 not as “arbitration agreement” and therefore as an offer in need of being perfected on the basis of an acceptance by the investor, but as a unilateral and legally binding undertaking by the host state. Indeed, as emphasized by *Emmanuel Gaillard*, “the absence of limitations in Article 72 shed light on the clear meaning of the word ‘consent’: had the drafters of the ICSID Convention intended to refer to a state’s ‘agreement to consent’ rather than to its ‘consent’, they would have so provided”.³²

However, this finding in itself, based exclusively on a literal interpretation, ultimately clarifies neither the meaning of “consent” in the sense of Article 72, nor the scope of “rights and obligations under this Convention of that State” arising out of it. In particular, recourse to a contextual interpretation gives credit to the proposition that “consent” has to be interpreted as requiring acceptance by the private investor in order to create obligations for the host state under the Convention and therefore to fall under the scope of Article 72. The final sentence of Article 25 (1) stipulates that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally”. On the surface, the wording of this provision indeed strongly suggests that the consent given by a host state only becomes irrevocable and therefore legally binding, and consequently gives rise to “obligations under this Convention of that State” in the sense of Article 72, after being perfected on the basis of an acceptance by the investor. The regulatory content of Article 72 would thus be limited to ensuring that

lan/Shore/Weiniger, International Investment Arbitration, 66; *Watts*, in: Ando/McWhinney/Wolfrum (eds.), *Liber Amicorum Oda*, Vol. I, 251 *et seq.*

³⁰ On the customary international law status and applicability of the means of treaty interpretation as laid down in the Articles 31 and 32 VCLT see, e.g., *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction of 11 May 2005, para. 141; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 296; *National Grid PLC v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006, para. 51.

³¹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 300; see also for example *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 307; *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 34; as well as *Douglas*, *Arbitration International* 22 (2006), 27 (51); *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 21 *et seq.*

³² *Gaillard*, *New York Law Journal* of 26 June 2007.

the respective host state is also barred from indirectly revoking its consent to jurisdiction unilaterally by way of denunciation of the ICSID Convention.³³

While at first sight quite convincing and, in particular, not objectionably rendering the regulatory content of Article 72 superfluous but merely limiting its scope of application to very specific factual and legal circumstances, such an interpretation can nevertheless not that easily be subscribed to. It does not sufficiently take into account the object and purpose of the ICSID Convention that necessarily requires also that attention be paid and due regard given to the structural changes in international investment law that took place since its entry into force.

In order to illustrate this proposition, it is necessary to at least briefly recall the prevailing legal mechanisms underlying investor-state arbitrations in the beginning of the 1960s. In light of the well-known aversion of foreign private investors to subject themselves to the domestic courts of the host state in cases of investment disputes³⁴ as well as the disadvantages associated with the exercise of diplomatic protection by the home state,³⁵ companies and individuals have since the 1930s strived successfully for the option of taking recourse to international mixed arbitration for the settlement of investment disputes. Originally, the respective arbitration clauses were regularly incorporated in the state contracts between the host state and the private investor.³⁶ Against this background and while previous dispute settlements were decided by *ad hoc* arbitration tribunals,³⁷ the adoption of the ICSID Convention in 1965 was – as also expressed in the Preamble – primarily aimed at providing the investor and the host state with an effective institutional forum for the settlement of investment disputes. In particular in light of the not-infrequent practice of host states refusing to proceed with the arbitration despite a respective clause in a state contract, it was the object and purpose of the Convention to create – on the basis of international legal obligations of the host states – a stable legal environment that secures the respective normative expectations of the investor with regard to the possibility of having access to international arbitration.³⁸ This central aim of the ICSID Convention as well as the

³³ Schreuer, ICSID Commentary, Article 25, para. 398 and Article 72, para. 2; *Fouret*, Journal of International Arbitration 25 (2008), 71 (75); see also generally *Sutherland*, International and Comparative Law Quarterly 28 (1979), 367 (382).

³⁴ See thereto for example *Vagts*, RdC 203 (1987), 9 (82); *Sacerdoti*, RdC 269 (1997), 251 (413 *et seq.*); *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 252 *et seq.*; *Schreuer*, in: Hummer (ed.), Paradigmenwechsel, 237 (249); *Böckstiegel*, in Schlemmer-Schulte/Tung (eds.), Liber Amicorum Shihata, 51 (60 *et seq.*); *Igbokwe*, Journal of International Arbitration 14 (No. 1, 1997), 99 (110).

³⁵ *Tietje*, Grundstrukturen und aktuelle Entwicklungen, 7 *et seq.*; *Schreuer*, in: Neuhold/Hummer/Schreuer (eds.), Österreichisches Handbuch des Völkerrechts, Vol. 1, 490 (499); *Weil*, in: Schlemmer-Schulte/Tung (eds.), Liber Amicorum Shihata, 839 (841 *et seq.*); *Happ*, Schiedsverfahren, 72 *et seq.*

³⁶ See, e.g., *Verdross*, ZaöRV 18 (1957/58), 635 (641 *et seq.*); *Rengeling*, Privatvölkerrechtliche Verträge, 57 *et seq.*; *Diehl*, in: Reinisch/Knahr (eds.), International Investment Law, 7 (16).

³⁷ *Sacerdoti*, in: Charnovitz/Steger/Van den Bossche (eds.), Essays in Honour of Florentino Feliciano, 276 (279).

³⁸ See Note by *Aron Broches*, General Council, transmitted to the Executive Directors: “Settlement of Disputes between Governments and Private Parties”, in: Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention, Vol. II, Part 1, Washington, D.C. 1968, p. 1-3; *Nolan/Sourgens*, Preliminary Comment, 6 *et seq.*; *Sutherland*, International and Comparative Law Quarterly 28 (1979), 367 (373).

legal implications arising from it have subsequently been stressed, *inter alia*, by the tribunal in the above cited case of *Alcoa Minerals of Jamaica, Inc. v. Jamaica*. In addition, concerning these findings and the regulatory function and importance attached to the already mentioned final sentence of Article 25 (1) in this connection, it is worth quoting *Aron Broches* himself:

“It [Article 25] also states that when both parties have given their consent, no party may withdraw its consent unilaterally. This last provision, which makes consent once given irrevocable, is probably the most important provision of the Convention. There are numerous examples of agreements between governments and foreign investors containing arbitration clauses which have been frustrated as a result of unilateral action by the government terminating the agreement, including the arbitration clause. One of the best-known examples is that of the 1933 concession of the former Anglo Iranian Oil Company. That concession contained an arbitration clause, and when Iran cancelled the concession in 1951 and the Company wanted to go to arbitration, it was met by the argument, among other things, that the arbitration clause forming part of the concession had equally been annulled. Under the Convention, mutual consent has the effect of elevating the agreement between a private company and a State to have recourse to ICSID conciliation or arbitration to the level of an international legal obligation, and to that extent the Convention constitutes the private company a subject of international law.”³⁹

This statement is potentially revealing also with regard to another aspect – so far unnoticed in the literature – that might be worth taking into account when interpreting the final sentence of Article 25 (1) ICSID Convention. This provision, which serves as the primary indication for a restrictive interpretation of Article 72, was drafted at a time when *ad hoc* agreements and respective clauses in state contracts provided the exclusive basis for mixed international arbitrations in the area of investment law. In this connection, it should be emphasized that it originates from a proposal drafted by Mr. *Burrows*, representative of the United Kingdom in the Legal Committee, and sponsored by twenty-eight other countries⁴⁰ with the representative of Sierra Leone in the subsequent discussion on 30 December 1964 explicitly noticing that within “the British proposal” the “only addition was the statement that when the parties have consented, no party may withdraw its consent unilaterally”.⁴¹ Albeit certainly speculative, it might nevertheless not be too far fetched to presume that the British proposal was strongly inspired by the not too distant experience with the Anglo Iranian Oil Company and the United Kingdom’s subsequent defeat at The Hague in July 1952.⁴² This detail would serve as a further indication that the final sentence of

³⁹ *Broches*, RdC 136 (1972), 331 (352).

⁴⁰ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 821.

⁴¹ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 822.

⁴² International Court of Justice, *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran), I.C.J. Reports 1952, 93; see thereto for example *Schwarzenberger*, *Foreign Investments*, 66 *et seq.*; *Dolzer*, in: *Bernhardt* (ed.), *E.P.I.L.*, Vol. I, 167 *et seq.*

Article 25 (1) ICSID Convention was indeed meant to apply to the then common *ad hoc* agreements and arbitration clauses in state contracts between the host state and the investor, and that therefore at least no decisive implications should be inferred from this provision when interpreting “consent” as well as “rights and obligations under this Convention” in the sense of Article 72.

In line with this finding, as the respective discussions on draft Article 73, now Article 72, themselves show, it was the additional legal safeguards to contractual arbitration clauses as intended by the ICSID Convention that were originally meant to be further strengthened by this provision by also not being affected by a subsequent denunciation of the Convention on the side of the host state:

“54. Mr. Broches replied that the intention of Article 73 [Article 72 ICSID Convention] in the text submitted to the Directors was to make it clear that if a State has 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.

[...]

57. Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no dispute were pending. If, say ten years later a dispute arose – would that dispute still be under the jurisdiction of the Centre?

58. Mr. Broches replied that if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its dispute with that company under that agreement to the Centre.

[...]

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.

67. Mr. Machado stated that the fact that sovereign States would be parties to the Convention would create additional difficulties. [...] He therefore suggested that the provision be amended to say that denunciation shall not affect obligations arising out of proceedings or conciliation or arbitration which had started before the Centre and before notice of denunciation had been received.

68. Mr. Woods pointed out that this proposal would frustrate the main purpose of the Convention.

69. Mr. Mejia-Palacio agreed that if a State had undertaken to go before the Centre it could not unilaterally decide that its undertaking had come to an end, but both in international law and domestic law every obligation comes to an end either because it is fulfilled or because the parties have agreed to terminate it or by prescription. Therefore, he had suggested

that some way be found for setting a time limit, as wide as necessary, after which an undertaking to submit to the jurisdiction of the Centre could come to an end.

70. Mr. Broches pointed out that the provision in discussion had not been questioned at any of the regional meetings or in the Legal Committee. It was a basic essential provision. The Convention establishes the principle that agreements to arbitration cannot be broken by one of the parties. The provision under discussion only drew the necessary consequences in case of denunciation of the Convention: the denouncing State could not incur any new obligations but the existing obligations would remain in force.

71. Mr. Woods asked for a show of hands for those in favor of leaving the substance of Article 73 as it was and announced that the consensus was to leave Article 73 unchanged.⁴³

Thus, it is important to highlight with regard to the understanding of Article 25 as well as Article 72 ICSID Convention that, first, during the drafting phase of this agreement, consent by the host state to international mixed arbitration of investment disputes was typically stipulated in a state contract with the private investor, and that, second, it was and still is the main purpose of the Convention to provide for additional legal safeguards to ensure that the host states in fact honour their respective consent to submit investment disputes to international arbitration.

Yet, at least equally important to emphasize is the well-known fact that at the time of the adoption of the ICSID Convention, BITs were not at all common in state practice. Admittedly, the first BIT ever was signed as early as 25 November 1959 between Germany and Pakistan. However, this BIT neither included any provision on investor-state arbitration nor had it been possible to foresee the extraordinary future of this type of investment agreement.⁴⁴ It thus hardly comes as a surprise that – although the issue of bilateral investment treaties in general and their potential relationship to the ICSID Convention had been raised⁴⁵ – it was, being in the eyes of the drafters understandably devoid of major practical significance, compared to a considerable number of other subjects apparently treated rather lightly.

While the regulatory interplay of the Articles 25 and 72, in line with the object and purpose of the ICSID Convention, constituted an effective – albeit in practice never tested – normative framework within the international legal environment of investment protection prevailing in the middle of the 1960s and being characterized by arbitration clauses included in contracts between the host state and the private investor, international investment law has since then undergone considerable structural changes. These transformation processes find its most vivid expression in the rise of international investment agreements in general as well as of bilateral investment treaties in particular.

⁴³ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 1009 et seq.

⁴⁴ See for example *Muchlinski*, *Multinational Enterprises*, 695 (“Early BITs did not cover the issue of disputes between the host state and the investor.”).

⁴⁵ See, e.g., ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 1, 1968, p. 91 and 93.

More specifically, these developments have in recent years led to a fundamental shift concerning the legal basis for investor-state arbitration.⁴⁶ According to an evaluation by ICSID, by the year 1996 more than 900 of the 1,100 BITs then in existence provided for arbitration under this Convention. Despite a number of recent indications – last but not least Bolivia’s withdrawal from the ICSID Convention itself – that some host states are starting to adopt a more restrictive approach to investor protection in general and mixed investment arbitration in particular,⁴⁷ this trend has since then further intensified. The overwhelming majority of the more than 2,500 BITs⁴⁸ currently in existence include investor-state dispute settlement provisions that frequently refer to existing arbitration rules, in particular ICSID.⁴⁹ The consequences of these new regulatory schemes are well-known. Although arbitration clauses in state contracts between the host state and the private investor are still quite common as a basis for the settlement of investment disputes,⁵⁰ during “the last 10 years most cases were brought on the basis of treaty provisions”.⁵¹ According to recent data provided by UNCTAD, the number of known treaty-based mixed arbitration proceedings had by the end of 2006 reached 259. Thereby, more than half of these cases (161) had been filed with ICSID.⁵²

This shift in the legal basis for investor-state dispute settlements is noteworthy with regard to the issue discussed here, because it has major repercussions for the procedure by which consent to arbitration is established. At the time of the drafting and entry into force of the ICSID Convention, consent was typically given by both parties either by way of an arbitration clause in a respective state contract with regard to future possible disputes or in the form of a *compromis* concerning a dispute which has already arisen.⁵³ Thus, the mutual consent was most commonly given at the same time. To the contrary, the consent given by the host state is now frequently stipulated already in the BIT with the home state while the consent of the investor is in these cases only subsequently expressed once a dispute arises. As already pointed out,⁵⁴ these

⁴⁶ See for example *Diehl*, in: Reinisch/Knahr (eds.), *International Investment Law*, 7 (16).

⁴⁷ See, e.g., *Schreuer*, in: Hofmann/Tams (eds.), *International Convention*, 15 (24 *et seq.*); *Choi*, *Journal of International Economic Law* 10 (2007), 725 (740).

⁴⁸ See UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, 2007, p. 16.

⁴⁹ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in International Rulemaking*, 2007, p. 100 *et seq.*; see also *Füracker*, *Zeitschrift für Schiedsverfahren* 4 (2006), 236 (237); *Tietje*, in: Leible/Ruffert (eds.), *Völkerrecht und IPR*, 193 (204)

⁵⁰ *Böckstiegel*, *Arbitration International* 23 (2007), 93 (99).

⁵¹ *Schreuer*, in: Hofmann/Tams (eds.), *International Convention*, 15 (20); see also for example *Füracker*, *Zeitschrift für Schiedsverfahren* 4 (2006), 236 (237); *Diehl*, in: Reinisch/Knahr (eds.), *International Investment Law*, 7 (17).

⁵² UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, 2007, p. 18.

⁵³ See also, e.g., Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 24, reprinted in: ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 1077; as well as *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 52 (“The drafters of the ICSID Convention envisaged the possibility of a State giving its consent in advance to ICSID arbitration, albeit they envisaged this happening through investment legislation rather than BITs: [...]”).

⁵⁴ *Nolan/Sourgens*, Preliminary Comment, 23 *et seq.*

changes in the structure and chronology of consenting to ICSID arbitration and their possible repercussions on the interpretation of the Convention have, albeit in a different context, recently been emphasized by *Francisco Orrego Vicuña* in his partial dissenting opinion in *Waguïh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, which is worth quoting at some length:

“The drafting history of Article 25(2)(a) is unequivocal about the concern expressed by many countries that did not want to be taken to international arbitration by investors who were their nationals, even if holding the nationality of another Contracting Party as well. [...]

It is in this context that the situation of Waguïh appears to be at odds with the meaning of the Convention. The investor was Egyptian at the time the investment was made, benefited from Egyptian legislation granting exclusive rights to Egyptian citizens [...].

The fact that Waguïh later acquired a different nationality (Italy) and allegedly lost his original nationality (Egypt) because of acquiring that of a third State (Lebanon), cannot in my view prevail over the precise prohibition of the Convention. It is on this point where I believe the Convention goes beyond the strict technical situations of dual nationals and the dates used to this effect and covers additional situations that could contradict the prohibition in question, not to mention the fact that otherwise there could be uncontrollable abuse arising from acquisition or loss of nationalities.

I’m intrigued by the question of the dates the Convention uses to establish the eligibility of the claimant. This problem has not been argued or pleaded in this proceeding and in that respect the Decision is right in not considering it. However, I believe it is right on my part to raise the question even if no answer is readily available for the moment.

Article 25(2)(a) of the Convention contains both the positive and the negative test in respect of who is an eligible claimant. The negative test, which is the one that matters here, establishes that a national of another Contracting State does not include as far as jurisdiction is concerned any person who on two dates had the nationality of the host and respondent State. The first is the date ‘on which the parties consented to submit such dispute to conciliation or arbitration’. The second is the date of registration. My query relates to the first date. The Convention was quite evidently envisaging the most common situation foreseeable that is an agreement in which both parties express simultaneously their consent to arbitration. Bilateral Investment Treaties were not yet common at all. In that context, it made sense that the dates indicated would require the compliance with the negative test at the time that both parties expressed their consent and later at the time of registration, without further elaboration.

This understanding changed when Bilateral Investment Treaties became widespread, as then the common situation became one where the State expresses its consent in the treaty and later the investor expresses its own consent in either a separate instrument or by simply applying to the Centre for the registration of its claim. At that point the expression of consent became decoupled and separated by a lapse of time, many times long.

It has been often understood that the consent of the State was an offer, which upon acceptance by the investor became the consent to arbitration. [...]

Yet, the date in which the State expresses its consent in the treaty is not just an offer. It is much more than that and it has specific legal effects, including obligations of the host State under the treaty and the prohibition to exercise diplomatic protection by the other Contracting Party. The date of expression of consent for the State is that of the entry into force of the treaty or some other instrument which embodies that consent. When this consent is later matched by the consent of the foreign investor, the required conditions for submitting the dispute to arbitration are met, but the respective expressions of consent do not appear to change their dates. It is the operation of the principle of *pactum de contrahendo*, which not because it materializes at a different date it loses its mandatory nature.

The drafting history of the Convention also evidences that the Bank's General Counsel was aware of the possibility of differed expressions of consent. [...]

In the light of this meaning, could it be held that the safeguard the State had under the Convention not to be taken to arbitration by those who were its own nationals at the time of expressing its consent, or at any rate at the time the investment was made, simply vanished? Could it be right that thereafter the process of eligibility would be controlled solely by the investor in the light of the situation prevailing at the time of acceptance or consent, in disregard of the equivalent right of the State?

This would certainly be at odds with the absolute prohibition of the Convention noted above [...]

In this context, an alternative reading of the Convention to the effect that the negative test applies not only at the date in which the investor consents but also at that in which the State consents, or at the date the investment was made as some treaties require, would be plausible and much in harmony with the meaning of the Convention in the light of its drafting history.”⁵⁵

Although these findings concern the nationality of the investor under Article 25 (2) of the Convention and are thus – at first sight – unrelated to the present issue of a state's withdrawal from the Convention, they are not only worth taking recourse to because of their stressing of the fundamental changes in the structure and chronology of consenting to ICSID arbitration that occurred in the decades following the entry into force of the Convention. Rather and more important, *Francisco Orrego Vicuña* also strongly indicates that these subsequent developments in the realm of international investment law have to be taken into account when interpreting this agreement.

As mentioned above, it was and still is the object and purpose of the ICSID Convention to create – on the basis of international legal obligations of the host states – a stable legal environment that secures the respective normative expectations of the for-

⁵⁵ *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction of 11 April 2007, Partial Dissenting Opinion by *Francisco Orrego Vicuña*, p. 63-65.

eign investor with regard to the possibility of having access to international arbitration. However, while the regulatory interplay of the Articles 25 and 72 – in line with this object – constituted an effective normative framework within the international legal environment of investment protection prevailing in the middle of the 1960s, this obviously appears to be no longer the case under the subsequently developed and now prevailing scheme and chronology of consenting to ICSID arbitration. In particular, contrary to the purpose of Article 72 of the Convention as envisioned by the drafters, statically applying this regulatory interplay to the currently widespread practice of decoupled consent by qualifying an arbitration clause stipulated in a BIT as a mere offer to consent would today potentially enable Contracting Parties to escape ICSID arbitration if they are only bold enough to withdraw from the Convention in due time. Moreover, such an understanding does not sufficiently take into account the continued and frequently emphasized importance attached to a potential recourse to ICSID arbitration as an “important element of the legal security required for an investment decision”⁵⁶ and thus fails to adequately appreciate the object and purpose of the ICSID Convention as a whole.

The qualification – here argued for – of a consent given by the host state in the arbitration clause of a BIT as a binding and irrevocable legal declaration of submission to arbitration under the ICSID Convention is perfectly in conformity with, indeed strongly indicated by the object and purpose of the Convention. Nevertheless, it is admittedly – at first sight – hardly reconcilable with the reference to “rights and obligations under this Convention” in Article 72 in connection with the wording of the final sentence of Article 25 (1).

However, it is at this stage that the principle of dynamic-evolutionary treaty interpretation has to be taken into account. The importance of this interpretative approach has frequently been emphasized with regard to multilateral treaties, in particular the Charter of the United Nations, but also conventions aimed at the protection of human rights.⁵⁷ The essence of dynamic treaty interpretation has been vividly expressed, for example, by the European Court of Human Rights in the case of *Tyrer v. United Kingdom* in which the Court emphasized that the European Convention for the Protection of Human Rights and Fundamental Freedoms “is a living instrument which [...] must be interpreted in the light of present-day conditions”.⁵⁸ While it might be a little bit too far fetched to assign to the ICSID Convention a status within the realm of international investment law that is similar to the importance of the United Nations Charter in general international law, the frequent recourse to this principle of treaty interpretation in the human rights context provides a viable basis of comparison. Out of countless possible examples, one only needs to draw the attention to the

⁵⁶ Schreuer, in: Hofmann/Tams (eds.), *International Convention*, 15 (29), see also, e.g., Nolan/Sourgens, *Preliminary Comment*, 31 *et seq.*; Wälde, *Journal of World Investment & Trade* 6 (2005), 183 (190); Choi, *Journal of International Economic Law* 10 (2007), 725 (735).

⁵⁷ See, e.g., Dahm/Delbrück/Wolfrum, *Völkerrecht*, Vol. I/3, 648 *et seq.*; Ress, *Interpretation*, in: Simma (ed.), *Charter of the United Nations*, Vol. I, paras. 19 *et seq.*; Verdross/Simma, *Universelles Völkerrecht*, § 782, each with further references.

⁵⁸ European Court of Human Rights, *Tyrer v. United Kingdom*, Application no. 5856/72, Judgment of 25 April 1978, para. 31; see also for example on the perception of the United Nations Charter as a “flexible, living constitution” Delbrück, in: Akkerman *et al.* (eds.), *Liber Amicorum Discipulorumque Bert V.A. Röling*, 73 (79).

above cited statement by *Aron Broches* in order to illustrate that the ICSID Convention was and still is intended to be clearly individual-oriented. It is thus hardly surprising that the Convention has already frequently been compared to parallel developments in the field of human rights.⁵⁹ Against this background, it seems to be more than appropriate to apply the principle of dynamic treaty interpretation also to the ICSID Convention and thereby provide an understanding of the regulatory interplay of its Articles 25 and 72 in conformity with present-day conditions of consenting to ICSID arbitration that does not run contrary to the original and current object and purpose of the Convention.

An interpretation that regards consent to arbitration given by the host state in a BIT as an obligation under the ICISD Convention in the sense of Article 72 and thus being unaffected by a subsequent denunciation is further supported by the required broader approach to contextual treaty interpretation as stipulated in Article 31 (3) VCLT. In particular, Article 31 (3) (c) VCLT proscribes that also “any relevant rule of international law applicable in the relations between the parties” shall be taken into account. Under customary international law, it is generally recognized that this means of interpretation is not limited to the rules of international law applicable at the time the treaty was concluded.⁶⁰ Rather, it applies in particular to subsequently emerging norms of international law and is thus, as for example the International Court of Justice has stressed in the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, reflecting the perception that “interpretation cannot remain unaffected by the subsequent development of law” but that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation”.⁶¹

In this connection, attention has again to be drawn to the extraordinary number of international investment agreements that have entered into force since the adoption of the ICSID Convention, in particular the more than 2,500 BITs, but also the more than 240 other international agreements that deal with economic activities and also contain investment provisions.⁶² All of these agreements are at least primarily also aimed at the promotion of foreign investment and, in order to reach that goal, at providing private investors with additional legal safeguards.⁶³ This is in particular the case with regard to the investor-state dispute settlement provisions included in the vast majority of these agreements that frequently refer to ICSID arbitration. On the importance of these arbitration clauses in the overall scheme of bilateral and other investment-related agreements for the private investors, it appears to be worth citing a statement by *Thomas W. Wälde*:

⁵⁹ See, e.g., *Lauterpacht*, *Indiana Journal of Global Legal Studies* 4 (1997), 259 (274).

⁶⁰ See for example *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Parts 2 to 4, 1275; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/3, 643 *et seq.*

⁶¹ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, 31.

⁶² UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*, 2007, p. 16.

⁶³ See for example *Spiermann*, *Arbitration International* 20 (2004), 179 (183 *et seq.*); *Spiermann*, *European Journal of International Law* 18 (2007), 785 (811); *Kettemann*, in: *Reinisch/Knahr* (eds.), *International Investment Law*, 151 (162 *et seq.*).

“The very *raison d'être* of investment treaties and, in particular, of the innovation of direct investor arbitration against States is the perception, held for a long time and universally, that a foreign investor does not, and cannot be expected to have, confidence in the impartiality of domestic courts, in particular in countries with recognized low quality of governance. Sending investor claims back to domestic courts is the very opposite of what the drafters of all investment treaties intended and what all professionally informed investors expect. Investment treaties fall and stand with their recourse to international arbitration. If domestic courts were seen as acceptable – and not under the sway of the host-State government, its political process and frequent anti-foreign investor sentiment whipped up for manifold reasons – such treaties would be largely unnecessary.

It is the ability to access a tribunal outside the sway of the host State which is the principal advantage of a modern investment treaty. This advantage is much more significant than the applicability to the dispute of substantive international law rules.”⁶⁴

Interpreting Article 72 in light of this dense legal network of international investment agreements subsequently being concluded between the Contracting Parties clearly underlines the need for a reconceptualised understanding of the scope of “obligations under this Convention” unaffected by a denunciation.

Nevertheless, in anticipation of possible objections to this interpretation, two issues have to be addressed. A first possible objection concerns the discussions on unilateral declarations on the part of the host state in favour of submitting investment disputes with private investors to ICSID arbitration at the time of the drafting of the Convention as well as subsequent developments in the early years of its operation. As recently emphasized in the literature, some statements made in the process of drafting the ICSID Convention indeed give credit to the proposition that the drafters intended to deny legal relevance to unilaterally expressed consent on the side of the host state prior to its acceptance by the foreign investor.⁶⁵

The first instance mentioned in this connection relates to the fact that while the first draft of the Convention of 9 August 1963 explicitly stipulated in Article II Section 2 (i) the possibility of consent given in the form of “a prior written undertaking” of any party,⁶⁶ this section was no longer included in the subsequent draft of 11 September 1964.⁶⁷ This modification faced criticism by the Austrian Federal Ministry of Finance, which noted in a communication of 13 November 1964 that the new draft “no longer provides explicitly the possibility of general statements of submission” and stated that it “is doubtful whether the new formulation is an improvement since it should be the goal of the Convention to allow as general an application as possible”.⁶⁸

⁶⁴ *Wälde*, Journal of World Investment & Trade 6 (2005), 183 (190).

⁶⁵ *Nolan/Sourgens*, Preliminary Comment, 11 *et seq.*

⁶⁶ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 1, 1968, p. 148.

⁶⁷ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 1, 1968, p. 622.

⁶⁸ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 670.

However, for the present purposes this instance can in itself not be relied upon as an argument against the possible binding character of unilateral statements of consent. Not only did it take place prior to the United Kingdom proposing the incorporation of the final sentence of Article 25 (1). Rather, as has been convincingly demonstrated in the literature,⁶⁹ it exclusively concerned the issue as to whether consent to ICSID arbitration always requires an expression by both parties in a single document and thus a question which was subsequently clearly answered in the negative.⁷⁰

A considerably more notable discussion in this regard concerned directly the fate of unilateral statements of consent in case of a subsequent withdrawal from the Convention. During the above-mentioned evaluation of Article 72 by the Committee on 25 February 1965, the following short dialogue took place which, in light of Bolivia's denunciation after more than forty years of living in the shadows, has the potential to rise to fame among practitioners and scholars of international investment law:

“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 of 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?

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 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.”⁷¹

This dialogue seems to provide a clear and compelling answer to the legal issues raised in connection with Bolivia's denunciation of the Convention. In an attempt to relativize the statement, it has been argued in the literature that from the context of the respective discussion it could be inferred that *Aron Broches'* remark was merely “intended to address only hypothetical investment laws (and BITs) that, like the odd contractual arbitration clause [referred to by Mr. Mejia-Palacio prior to this dialogue], were structured to be revocable at any time at the discretion of any one of the parties”.⁷² One may underline this conclusion also by referring to the Report of the Executive Directors on the ICSID Convention published on 18 March 1965, which

⁶⁹ *Nolan/Sourgens*, Preliminary Comment, 12 *et seq.*

⁷⁰ See, e.g., ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 956, 1077.

⁷¹ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 1010.

⁷² *Nolan/Sourgens*, Preliminary Comment, 16.

mentions only unilateral consent included in domestic investment promotion legislation of the host state.⁷³

The conclusion that consent is only revocable if the respective law governing the consent of the host state provides for this possibility is also not called into question by the fact that following the adoption of the first BITs in the late 1960s that included ICSID arbitration clauses⁷⁴ *Aron Broches* repeated his opinion, this time with explicit reference also to BITs:

“In most cases, both parties will give their consent in a single instrument, such as a compromissory clause in an investment agreement or a *compromise*. There are, however, other possibilities; for instance, the consent of the State may be embodied in its investment promotion law, or in an investment protection treaty with another State, which provides that investors meeting certain conditions or falling within certain categories will have the right to submit investment disputes with the host State to the Centre. The consent of the investor may be evidenced by an express statement to that effect made to the host State, or it may be given at the time when the investor institutes proceedings against the host State. It must, however, be remembered that each party’s consent becomes irrevocable only after both parties have given it. Therefore, in the examples last mentioned, the host State could withdraw its consent as long as the investor had not equally consented.”⁷⁵

The quoted passage of *Broches’* famous article in the *Recueil des Cours* cannot be taken as an argument in favour of revocability of consent stipulated in a BIT. *Broches* was of course right stating that in theory the host State may withdraw its consent to arbitration within the limits of Art. 25 (1) ICSID Convention. However, he did not touch upon the crucial question as to whether there are further limitations outside the ICSID Convention that must be taken into account. The relevance of this question becomes evident if one considers the introductory part of the “Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements” issued by ICSID as early as September 1969 which addresses the relationship between arbitration clauses stipulated in BITs and the ICSID Convention:

“7. From the point of view of the Convention, formal parity [...] is less important than reciprocity or mutuality between each government and the foreign investors with which it might have disputes. In particular, pursuant to Articles 28(2) and 36(2) of the Convention, a dispute cannot be submitted for settlement by either conciliation or arbitration unless both the government and the investor concerned have consented to such submission in writing, and under Article 25(1) the consent of

⁷³ ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention, Vol. II, Part 2, 1968, p. 1077.

⁷⁴ *Van Harten/Loughlin*, European Journal of International Law 17 (2006), 121 (123). The first one appears to be a BIT between the Netherlands and Indonesia, signed in 1968, followed by the signing of BITs between Italy and Chad as well as Côte d’Ivoire in June and July 1969.

⁷⁵ *Broches*, RdC 136 (1972), 331 (353).

either party remains revocable (as far as the Convention is concerned) until the other party has also given its agreement to such a submission. [...].”⁷⁶

As clearly stated, the possibility of revoking consent is given within the limits of Art. 25 (1) ICSID only “as far as the Convention is concerned”. Thus, the Convention does not – and may not – say anything about the applicable law concerning the possibility of revoking consent; the Convention only deals with the consequences of existing consent or consent that has been revoked, but it does not deal with the question of whether the consent may be revoked as such. This question is exclusively dealt with under the law applicable to the consent given. With regard to state contracts, this could be the applicable domestic law of the host state which might allow revoking consent even though the ICSID Convention would not recognize this. The same holds true concerning a national investment law. Consequently, if a BIT is at stake the question of whether the consent given by the respective arbitration clause in the BIT may be revoked has to be decided on the basis of the law applicable to the BIT, which is public international law, namely the BIT itself and applicable further rules in the sense of Art. 38 (1) ICJ-Statute. Thus, if the respective BIT provides for consent this may only be revoked by bringing to a final end the legal effects of the BIT.

The second possible objection worth discussing in the course of this contribution relates to the more general issue of which approach should be adopted when interpreting investment treaty obligations. It goes without saying that the proposed understanding of the Articles 25 and 72 ICSID Convention exclusively benefits the interests of private investors to the disadvantage of Bolivia and other Contracting Parties that might follow its lead in the future. It is thus indeed susceptible to bias and adhering to the occasionally expressed view that investment treaty obligations are exclusively aimed at promoting investment as well as protecting foreign investors and therefore ultimately have to be interpreted in favour of the private party to the dispute – a perception that has also been mentioned by Bolivia in order to justify its decision.

While the opposite principle of *in dubio mitius* has lost most of its former relevance in the realm of treaty interpretation in public international law in general as well as in international investment law in particular,⁷⁷ it has rightly been pointed out in the literature that the understanding of investment treaty obligations requiring a broad interpretation is “equally fallacious”⁷⁸ and would be clearly detrimental to the overall stability of the fragile international framework of investment law.⁷⁹ Indeed, as

⁷⁶ Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements, ICSID Document ICSID/6, reprinted in: I.L.M. 8 (1969), p. 1341, 1343.

⁷⁷ *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Parts 2 to 4, 1278 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/3, 648; *Bernhardt*, in: *Bernhardt* (ed.), *Encyclopedia of Public International Law*, Vol. II, 1416 (1419); *Douglas*, *Arbitration International* 22 (2006), 27 (51).

⁷⁸ *Douglas*, *Arbitration International* 22 (2006), 27 (51); see also generally for example *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 21 *et seq.*

⁷⁹ See also for example *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 300 (“an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations”).

already pointed out, the interpretation of international investment agreements such as BITs but in particular also the ICSID Convention should be aimed at finding a fair and functional solution and thus necessarily has to be based on a balanced interpretative approach.

However, aside from recalling the well-known fact that investment arbitration is also “in the longer term interest of the host State”,⁸⁰ it is submitted that the interpretation of Article 72 ICSID Convention argued for here does not fall victim to a false one-sided approach to treaty interpretation for at least two reasons.

First, the dangers connected with such a broad interpretative understanding are particularly imminent with regard to the substantive rights and obligations enshrined in investment treaties while the present issue relates exclusively to jurisdiction. Second, and even more important, the approach suggested here is far from always favouring the foreign investor even with regard to the matter of jurisdiction. Indeed, the above quoted excerpts from *Francisco Orrego Vicuña’s* partial dissenting opinion in *Waguib Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* demonstrate that reliance on the principle of dynamic treaty interpretation and thus the perception of the ICSID Convention as a ‘living instrument’ can also result in an interpretation clearly favourable to the host state. In sum, far from falling victim to or disregarding the risks sometimes associated with an interpretation according to the object and purpose of a treaty,⁸¹ it provides a balanced interpretative approach of upholding the original and still current objects and purposes of the ICSID Convention by taking into account subsequent developments in the realm of international investment law.

H. BITs as Basis: Bolivia’s Continued Consent to ICSID Arbitration

In light of these findings, the decisive issue is thus under what conditions a reference to ICSID arbitration in a BIT constitutes a respective binding consent by the host state that remains unaffected by the country’s denunciation of the ICSID Convention. The consent expressed in a BIT needs to be unconditional and especially must not require any further action on the part of the State.⁸² In the first place this depends on the – varying – wording used in the arbitration clauses in the BITs.

I. Arbitration Clauses in Selected Bolivian BITs

1. BIT between the Netherlands and Bolivia

To begin with, against the background of the recently registered request for arbitration by *E.T.I. Euro Telecom International N.V.* being based on the ‘Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of

⁸⁰ *Schreuer*, in: Hofmann/Tams (eds.), *International Convention*, 15 (29); see also, e.g., *Choi*, *Journal of International Economic Law* 10 (2007), 725 (735).

⁸¹ See thereto for example *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 193; *Brownlie*, *Principles of Public International Law*, 607.

⁸² Generally on this issue *Schreuer*, *ICSID Commentary*, Article 25, paras. 285 *et seq.* with numerous further references.

the Netherlands and the Republic of Bolivia’,⁸³ this Netherlands-Bolivia BIT and the wording of its arbitration clause is currently of particular practical relevance.

According to Article 9 (2) of the BIT the investor may after expiry of a six month waiting period initiate arbitral proceeding. Article 9 (6) of the authoritative English text of the treaty adds that “[i]f both Contracting Parties have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, any disputes that may arise from investment between one of the Contracting Parties and a national of the other Contracting Party shall, in accordance with the provisions of that Convention, be submitted for conciliation or arbitration to the international Centre for Settlement of Investment Disputes.” Consequently, the only requirement for ICSID jurisdiction contained in the arbitration clause is that both states “have acceded” to the Convention. This requirement is also fulfilled in case of denunciation of the Convention by one of the states since at least it has at some prior point of time “acceded” to the Convention. Consequently, the consent to ICSID jurisdiction given in Article 9 (2) in connection with 9 (6) has been unconditional as of the date of accession of both contracting states to the ICSID Convention. It thus constitutes “consent” perpetuated by Article 72 of the Convention and can be accepted for the whole duration of the BIT.

2. *BIT between Germany and Bolivia*

The arbitration clause included in the ‘Treaty Concerning the Promotion and Mutual Protection of Investments’ between Bolivia and Germany is quite similar to the one stipulated in the Netherlands-Bolivia BIT. According to Article 11 (3) of the German-Bolivian BIT disputes between a Contracting state and an investor shall be submitted to ICSID arbitration if both states ‘have become’ ICSID Contracting parties.⁸⁴ Since this requirement is fulfilled the respective clause is now unconditional. This means that as of the date where Bolivia as well as Germany have ratified the ICSID Convention any dispute with an investor of the other Contracting party has to be submitted to ICSID and the consent in the BIT remains unaffected by Bolivia’s denunciation of the ICSID Convention.

3. *BIT between the United Kingdom and Bolivia*

Unlike the aforementioned BITs, the ‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments’ does not stipulate in its respective arbitration clause a similar unequivocal language. Article 8 (1) of the BIT provides that after a six month waiting period “a claim be submitted to international arbitration if either party to the dispute so wishes”. However, Article 8 (2)

⁸³ See *Vis-Dunbar/Cabrera Diaz/Peterson*, Investment Treaty News of 15 November 2007.

⁸⁴ According to the German version of the treaty as being under Article 14 (3) of the BIT next to the Spanish version one the two authentic texts: “Für den Fall, daß beide Vertragsparteien Mitglieder des [ICSID] geworden sind, werden Meinungsverschiedenheiten [...] dem [ICSID] unterbreitet werden.”

adds that “Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned may agree to refer the dispute either to: [ICSID, ICC or ad hoc arbitration].” This provision further stipulates that in case no agreement has been reached between the parties within six month regarding the kind of international arbitration, the dispute shall be bound to submit it to arbitration under the UNCITRAL arbitration rules. As a result, consent to ICSID arbitration is not unconditional, since it does not depend solely on the investor whether ICSID proceedings are initiated or not. While the investor has the right to one form of international arbitration, its consent to ICSID arbitration is not mandatory for the host state. The state still has to accept ICSID arbitration as the method of dispute settlement for the concrete case. Thus, with regard to the BIT with the UK, Bolivia’s move to withdraw from ICSID has been effective.

II. The Potential Relevance of MFN Clauses

Finally, against the background of this variety in the phrasing of the dispute settlement provisions in the BITs concluded by Bolivia, it should at least briefly be pointed out that the legal implications of this country’s withdrawal from the ICSID Convention also extend to another well-known and at present controversially discussed issue of international investment law: the potential applicability of Most-Favoured-Nation clauses – stipulated in most BITs – not only to substantive provisions on investment protection but also to regulations on dispute settlement.

Arbitration tribunals confronted with this issue have so far not been able to provide for a coherent and uncontested position. Two different lines of argumentation can be identified in this regard. While the tribunal in *Plama Consortium Limited v. Republic of Bulgaria*⁸⁵ – in line with the foregoing findings in *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan*⁸⁶ – held that the respective MFN clause in a BIT does not permit to import dispute settlement mechanisms from other BITs, the arbitrators in *Emilio Agustín Maffezini v. Kingdom of Spain*⁸⁷ adopted a broader interpretative approach in this regard. In light of the disputed character of this issue, it hardly comes as a surprise that it is also currently subject to an intensive debate among scholars and practitioners.⁸⁸

⁸⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

⁸⁶ *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 November 2004.

⁸⁷ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000; see also *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision of 3 August 2004; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Case No. ARB (AF)/00/2, of 29 May 2003; *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005.

⁸⁸ See, e.g., *McLachlan/Shore/Weiniger*, International Investment Arbitration, 254 *et seq.*; *Teitelbaum*, Journal of International Arbitration 22 (2005), 225; *Lew*, in: Horn (ed.), Arbitrating Foreign Investment Disputes, 267 (279 *et seq.*); *Schreuer*, in: Hofmann/Tams (eds.), International Convention, 15 (21 *et seq.*); *Gaillard*, New York Law Journal of 2 June 2005; *Schöbener/Markert*, Zeitschrift für Vergleichende Rechtswissenschaft 105 (2006), 65 (86 *et seq.*); *Hsu*, Journal of World Investment & Trade 7 (2006), 25; *Kurtz*, Journal of World Investment & Trade 5 (2004), 861; *Fietta*, International Arbitration Law Review 8 (2005), 131; *Stern*, in: Charnovitz/Steger/Van

I. Outlook: Forward into the Past?

While it was the primary aim of this contribution to provide an assessment of the specific legal implications arising from Bolivia's decision to withdraw from the ICSID Convention, it should at least briefly be highlighted that this unprecedented move might potentially also have wider ramifications with regard to the legal framework on international investment protection as a whole.⁸⁹

It hardly needs to be emphasized that the evolution of international investment law has always been "influenced decisively by constantly changing political attitudes towards direct investment".⁹⁰ Indeed, prudence is appropriate when viewing the development of international economic law in general and the legal regime of foreign investments in particular merely as a kind of linear 'narration of progress'. In the last two decades a number of developments – first and foremost the enormous growth in the number of BITs providing for investor-state arbitration – were frequently perceived to point towards the ideological controversies and normative uncertainties – being equally characteristic for the entire previous international legal framework on foreign investments in particular in the 1960s and 1970s⁹¹ – having lost most of their impact on the discussions in this central area of international economic law. However, more recently there appear to be some indications that international investment law as a whole or at least with regard to certain aspects becomes again increasingly controversial.⁹² Aside from the renewed suspicion displayed by a number of Latin American countries, the current discussions on the potential risks connected with the activities

den Bossche (eds.), *Essays in Honour of Florentino Feliciano*, 246 *et seq.*; *Kreindler*, *Arbitration International* 23 (2007), 43 (48 *et seq.*); *Radi*, *European Journal of International Law* 18 (2007), 757.

⁸⁹ See also, e.g., *Schreuer*, in: Reinisch/Knahr (eds.), *International Investment Law*, 3 (5) ("the symbolic significance of this step should not be underestimated").

⁹⁰ *Behrens*, *Archiv des Völkerrechts* 45 (2007), 153 (155).

⁹¹ See thereto in particular the proposition made by the United States Supreme Court in his judgment of 23 March 1964 in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 *et seq.* (1964) ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. [...] It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."); as well as from the literature for example *Sornarajah*, *International Law on Foreign Investment*, 1 ("Few areas of international law excite as much controversy as the law relating to foreign investment."); *Fikentscher*, *Wirtschaftsrecht*, Vol. 1, 264; and *Lowenfeld*, *International Economic Law*, 416 ("[...] by the mid-1970s the customary international law of the protection of international investment was made up of numerous ingredients and influences. States often preached one thing in the United Nations and practised another in bilateral and multilateral agreements [...]. Scholarly support could be found all along the spectrum between complete denial that international law applied to protection of international investment to continuing prevalence of the Hull formula and its antecedents.").

⁹² See thereto also recently for example *Schreuer*, in: Reinisch/Knahr (eds.), *International Investment Law*, 3 (5) ("The future of investment arbitration is by no means certain. The enthusiasm of States, especially those that have been on the losing side in several major cases, has been severely dampened. Even former champions of investors' rights, such as the United States, have lost much of their eagerness after finding themselves in the role of respondents."); as well as, e.g., *Schreuer*, in: Hofmann/Tams (eds.), *International Convention*, 15 (24 *et seq.*); *Choi*, *Journal of International Economic Law* 10 (2007), 725 (740).

of sovereign wealth funds taking place primarily in a number of industrialized countries provides but one further vivid example in this regard.⁹³

While any precise predictions about the possible and plausible future shape of international investment law as a whole seem impossible to make, it is submitted that recourse to an interpretation based on the object and purpose of the respective treaty – including the perception of agreements such as the ICSID Convention as ‘living instruments’ – will provide the international legal framework on foreign investment with the necessary flexibility in order to cope in a balanced, acceptable and thus legitimate way with the challenges it is currently confronted with and likely to face in the foreseeable future.

⁹³ On a legal evaluation of these discussions see, e.g., *Tietje*, *Beschränkungen ausländischer Unternehmensbeteiligungen*, 2 *et seq.*; *Krolop*, *Zeitschrift für Rechtspolitik* 41 (2008), 40 *et seq.*

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