



INTERNATIONAL ARBITRATION LAW

BY EMMANUEL GAILLARD

The Denunciation of the ICSID Convention

In April 2007, the member states of the Alternativa Bolivariana para la América Latina y El Caribe (ALBA), namely Bolivia, Venezuela, Nicaragua and Cuba, proclaimed their intention to withdraw from the International Monetary Fund and the World Bank.

Bolivia was the first—and so far only—state to implement this resolution, and submitted a notice of denunciation of the Convention on the Settlement of Investment Disputes between states and nationals of other states (the ICSID Convention) on May 2, 2007 (see ICSID News Release of May 16, 2007, “Bolivia Submits a Notice under Article 71 of the ICSID Convention,” available on the ICSID Web site at www.worldbank.org/icsid).

Right to Denounce

This is the first time a contracting state has denounced the ICSID Convention, which will still be binding upon 143 states after Bolivia’s withdrawal. It remains uncertain whether Venezuela and Nicaragua will follow the same path (Cuba having never signed the ICSID Convention), but this denunciation seems to constitute a new expression of hostility towards international arbitration, which had appeared to have diminished in certain Latin American countries through the adoption of arbitration laws and/or the signature of investment protection treaties containing an investor-state arbitration mechanism.

Under the customary rules of international law, as codified in the Vienna Convention on the Law of Treaties of May 22, 1969 and the Vienna Convention on the Law of Treaties between states and



international organizations or between international organizations of March 21, 1986 (the Vienna Convention), a state has a right to withdraw from a treaty when that treaty so provides. Under Article 54 of the Vienna Convention, “[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the contracting states and contracting organizations.” In the absence of a provision, a treaty “is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty” (Article 56(1) of the Vienna Convention).

A denunciation provision is contained in Article 71 of the ICSID Convention: Any contracting state may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

In accordance with this provision, which is unconditional and requires only a written notification, Bolivia’s denunciation will take effect six months after the receipt of Bolivia’s notice, i.e., on Nov. 3, 2007.

The critical question, therefore, is not whether a contracting state may withdraw from the ICSID Convention but what

consequences are attached to such withdrawal.

Consequences of Denunciation

After a state has given a notice of denunciation and such notice has taken effect it ceases to be a contracting party to the ICSID Convention and no longer has the rights and obligations attached to that status. On the same basis, it cannot be bound by new obligations. The question, however, is what becomes of the denouncing state’s existing rights and obligations under the convention at the time of denunciation. The drafters of the ICSID Convention anticipated this type of difficulty by including a derogation provision in Article 72 to cover the situations where a denouncing state, one of its constituent subdivisions or agencies, or one of its nationals, has given consent to the jurisdiction of the centre prior to the notice of denunciation:

Notice by a contracting state pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that state or of any of its constituent subdivisions or agencies or of any national of that state arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Pursuant to this provision, a state’s withdrawal from the ICSID Convention does not affect its obligations under the convention when it has given consent to the jurisdiction of the centre before its notice of denunciation is received by ICSID. This provision, which ensures that states do not frustrate unilaterally the effectiveness of existing rights and obligations by withdrawing from the convention, is entirely in conformity with the customary rules of international law. Indeed, Article 70(1) of the Vienna Convention indicates that

Emmanuel Gaillard is head of the international arbitration group of Shearman & Sterling and also is a professor of law at University of Paris XII. **Yas Banifatemi**, a partner of the firm’s international arbitration group in Paris, assisted in the preparation of this article.

“[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.” Under Article 70(2) of the Vienna Convention, this regime also applies to the withdrawal of a party from a multilateral treaty (“If a state or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that state or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect”).

Because they concern the jurisdiction of the Centre, a denouncing state’s surviving rights and obligations are by definition limited to such jurisdiction and in no way mean that the derogation contained in Article 72 maintains its status as a contracting party. The notion of “consent to the jurisdiction of the Centre” is thus at the heart of this derogatory regime.

‘...Jurisdiction of the Centre’

Consent to the jurisdiction of the centre does not arise solely from the fact that a state is a party to the ICSID Convention. The convention is a mechanism offered to disputing parties for the settlement of their investment disputes and which requires for its implementation that consent be given. Article 25(1) of the ICSID Convention establishes the conditions for the jurisdiction of the centre, namely that there exists a “legal dispute arising directly out of an investment, between a contracting state... and a national of another contracting state, which the parties to the dispute consent in writing to submit to the Centre.” Such consent may traditionally be given in an arbitration clause contained in a contract or through a compromise once the dispute has arisen. It may also be given separately by the host state and the investor, the latter accepting, at the time a dispute has arisen, the prior and general consent to arbitration given by the former in a provision of its domestic legislation or in an investment protection treaty.

The Report of the Executive Directors on the ICSID Convention confirms the variety and flexibility of means through which consent to the jurisdiction of the centre may be expressed:

Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in

a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromise regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host state might in its investment protection legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing. (Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between states and Nationals of other states, paragraph 24).

This is the first time a contracting state has denounced the ICSID Convention. But this denunciation seems to be a new form of hostility towards international arbitration, which had appeared to have diminished in certain Latin American countries by adoption of arbitration laws....

This clarification does not specifically refer to bilateral or multilateral investment protection treaties, which were not common in state practice at the time the ICSID Convention was negotiated and adopted. Today, by contrast, one can only take note of the proliferation of bilateral treaties for the protection and promotion of investments, the majority of which contain an investor–state dispute resolution clause providing for ICSID arbitration. In both cases, the consent of the disputing parties to the jurisdiction of the centre is arranged to be given in sequence and in separate instruments (the legislation or the treaty as regards the host state, the request for arbitration or the notice of dispute as regards the investor).

Many bilateral and multilateral treaties offer alternatives to ICSID arbitration, in particular arbitration in accordance with the UNCITRAL Arbitration Rules. Accordingly, in situations in which a state has denounced the ICSID Convention, investors may use the other avenues in order to avoid any uncertainty related to the expression of consent and the time at which it must have occurred. In the more difficult situations where ICSID arbitration

is the only international alternative—the other non-neutral option being that of the courts of the host state—investors will have to consider whether, in the circumstances of the case, ICSID arbitration remains a possibility (where, however, such possibility no longer exists, the investor may consider invoking the most-favored-nation clause of the basic treaty if one is provided for, in order to seek the benefit of the dispute resolution options offered in a third-party treaty (see E. Gaillard, “Establishing Jurisdiction Through a Most-Favored-Nation Clause,” *New York Law Journal*, June 2, 2005); alternatively, the investor’s state of nationality may seek the application of the state-to-state dispute resolution clause contained in the applicable treaty, based on the host state’s withdrawal of the guarantee of an international and neutral forum for the settlement of investment disputes). From that perspective, the crucial question is whether the general consent given by an ICSID contracting party in an investment protection treaty constitutes, for the purposes of Article 72 of the ICSID Convention, “consent given to the jurisdiction of the Centre.”

When the investor has accepted the state’s general consent prior to the receipt of the notice of denunciation by the centre or within the six-month period set forth in Article 72, the effectiveness of the existing rights and obligations should raise little difficulty as the host state is still a contracting party at those times (for the position that the state’s consent must be “perfected” before the notice of denunciation, see Ch. Schreuer, “The ICSID Convention: A Commentary,” Cambridge University Press, 2001, p. 1286). In both these situations, the investor is protected by Article 25(1) of the convention, which defines jurisdiction and provides that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.”

Article 72 of the ICSID Convention may be fully effective in the more difficult situations where the investor’s acceptance of the general offer by the host state contained in an investment treaty occurs after the denunciation of the ICSID Convention has taken effect and the host state has ceased to be a contracting party. The difficulty is more apparent when one considers that many bilateral investment treaties provide that they will remain in effect for 10, 15 or 20 years (or sometimes for an unlimited period of time), with a survival clause

providing that the treaty or certain of its provisions will remain in effect for a further period with respect to investments made prior to the date of termination of the treaty. As a result, in the case of denunciation of the ICSID Convention, a state's consent to ICSID arbitration in such treaties may remain in effect long after it has ceased to be an ICSID contracting party.

Years After Denunciation

The notion that a dispute could be brought before ICSID years after the denunciation of the ICSID Convention was raised during the negotiations of the convention. The statement made by Mr. Broches, the general counsel of the International Bank for Reconstruction and Development (IBRD) and the chairman of the Legal Committee during the negotiations of the convention, was unambiguous in that respect: "if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that state would still be bound to submit its disputes with that company under that agreement to the Centre." (Documents concerning the Origin and the Formulation of the Convention, Memorandum of the Meeting of the Whole, Feb. 25, 1965, Vol. II, Part 2, ICSID Publications, 1968, p. 1010). A few delegates engaged at that point in a discussion on the possibility of including limitations in draft Article 73 (later renumbered as Article 72). One delegate emphasized the situations where the host state would make a "general declaration ...in favor of submission of claims to the Centre" and inquired whether a time limit should be introduced in the convention in order to avoid the situation where states would "be bound indefinitely" (Question by Mr. Gutierrez Cano, *ibid.*).

Another delegate was concerned by the fact that "the Centre would continue to have jurisdiction over disputes which arose after the state had ceased to be a member of the centre [which] would in fact compel the state to remain forever in an organization to which it did not want to belong" and suggested that the unaffected rights and obligations in draft Article 73 be limited solely to "obligations arising out of proceedings or conciliation or arbitration which had started before the Centre and before notice of denunciation had been received" (Question by Mr. Machado, *id.*, pp. 1010-1011). None of these limitations were included in the text of draft Article 73, later adopted as Article 72, based on the fact that a "general statement [...] would not be binding on the state which had made it until it had been accepted by an investor" and that draft Article 73 "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" (*Id.*, p. 1011). These discussions and 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.

Expression of Consent

As a result, a denouncing state's consent to the jurisdiction of the centre based on an investment protection treaty depends on the terminology used in the arbitration clause contained in that treaty. In the case of Bolivia, for example, Article 11 of the BIT with Germany of March 23, 1987 provides that, after both states have become ICSID contracting parties, the dispute "shall be submitted" to ICSID mediation and arbitration. Article IX of the Bolivia-US BIT of April 17, 1998 provides for ICSID arbitration as one of the many options offered to the investors, Article IX(4) stating that "[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration" in accordance with such choices and that such "consent...shall satisfy the requirement of Chapter II of the ICSID Convention...for written consent of the parties to the dispute."

The expression of consent to the jurisdiction of the centre could hardly be clearer.

Article 8 of the Bolivia-Uk BIT of May 24, 1988, on the other hand, provides that disputes "shall...be submitted to international arbitration if either party to the dispute so wishes" but adds that "[w]here the dispute is referred to international arbitration, the investor and the contracting Party concerned in the dispute may agree to refer the dispute either to [ICSID or ICC or ad hoc arbitration]," which is an indication that a further agreement is necessary before the initiation of an ICSID arbitration (with UNCITRAL arbitration being the fallback position if no agreement is reached after a period of six months from written notification of the claim).

In other words, for the purposes of Article 72, it is important to ensure that the wording of the arbitration clause in each investment protection treaty in effect constitutes a state's prior consent to the jurisdiction of the centre. Where an unqualified consent exists, as opposed to

an agreement to consent, the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention.

This interpretation is in conformity with both the text and the purpose of Article 72, which is to avoid the situation where a state unilaterally frustrates its undertaking to submit to ICSID arbitration, even where such undertaking is contained in a treaty which remains in existence for years after the denunciation of the ICSID Convention. In accordance with the well-established principles of international law, a denouncing state's surviving obligations result from an undertaking, and only to the extent of such undertaking, contained in the derogation regime of Article 72.