GOING THROUGH WITHDRAWAL: A LEGAL ROADMAP

FOR ICSID DENUNCIATIONS IN LATIN AMERICA

Abstract

The withdrawal of multiple Latin American countries from the International Centre for the Settlement of Investment Disputes (ICSID) raises important questions regarding the rights of foreign investors with assets in the withdrawing countries. Specifically, what is to be said of ICSID-referencing investment protections enshrined in the dispute resolution provisions of Bilateral Investment Treaties (BITs)? While the Washington Convention, which is the treaty establishing ICSID, contains a process for legal withdrawal, questions remain as to when and which host country obligations are preserved post-ICSID denunciation vis-à-vis investor-state arbitration over foreign direct investment (FDI) disputes. This article contributes an important perspective to the relevant debate by neatly organizing the dominant legal theories. This article aims to provide desperately needed clarity to the distinction between the implications of ICSID withdrawal for ICSID rights and obligations and the implications of withdrawal for BIT rights and obligations. This article's contribution to the debate is timely as *Pan Am. Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, is set to address at least one of the critical questions discussed in the article this spring.

GOING THROUGH WITHDRAWAL: A LEGAL ROADMAP FOR ICSID DENUNCIATIONS IN LATIN AMERICA

I. INTRODUCTION

In establishing the International Centre for Settlement of Investment Disputes (ICSID), capital-exporting nations were able to accomplish through the World Bank Group that which the United Nations, in the 1960s, seemed unable to facilitate: the creation of a neutral forum for the depoliticized resolution of investment disputes.[1] Neutrality was achieved by taking disputes out of the court systems of host countries, the countries in which foreign investors invest.[2] A depoliticized process was achieved, at least in theory, by taking disputes arising from private investments out of the sphere of diplomacy and placing them instead in the sphere of investor-state arbitration.[3] The basic bargain was that host countries would no longer force investors to use only the host country court systems, which investors viewed skeptically, and investors would no longer run to their home country government for protection against the host

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[1] Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 Ga. J. Int'l & Comp. L. 47, 48 (2009). Lowenfeld notes that the World Bank Group was better suited to the task than the United Nations because of a more distinct influence by developed countries in World Bank policy. For a discussion on the desire to depoliticize investment dispute resolution, see Diana M. Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 12 Hofstra J. Int'l Bus. & L. 239, 256 (2012).

[2] Wick, *supra* note 1, at 256. Though this is beyond the scope of this article, I question Wick's general suggestion that "investor-state arbitration…is preferable to regressing to the older method of diplomatic espousal." *Id.* My response is: preferable to whom? To capital-exporting state governments, probably—they are the bearers of political blowback in the case of claims espousal. *Id.* To foreign investors, maybe not—precisely because we are now assessing what options those investors have, given several Latin American countries have abandoned the arbitration rules promised them via bilateral investment treaties. And to the Latin American countries, it likely depends on a country's political and economic strength.

[3] *Id.* As Wick points out, it is important to note that investor-state arbitration, particularly the ability of private investors to avail themselves of legal protections against a state, was a novelty. *Id. See also* Christopher Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 Cornell Int'l L.J. 161, 164 (1996) ("Diplomatic protection eventually became an institutionalized legal technique justified by appeals to treaties, state practice, and legal commentators.").

country.[4]All of this, of course, was enshrined in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention or the ICSID Convention), signed in March 1965.[5] Thus, the Washington Convention created ICSID which was celebrated as a unique step toward greater foreign investment growth and reliability.[6] But not everyone was celebrating.[7]

From the outset, many developing countries were dubious about the ICSID movement, and countries in Latin America were no exception.[8] Indeed, when the Washington Convention opened for signatures in 1965, Latin American countries coordinated as a bloc to withhold ratification of the convention, in what has been called the "No-de-Tokyo."[9] Among others, some of the reasons for such opposition to ICSID included (or, perhaps, *includes*) disinterest in attracting foreign investment, a belief that local courts are the appropriate and capable fora for handling disputes over in-country investments,[10] and a distrust of large multinational corporations and their home countries' politics.[11] However, as Ignacio Vincentelli notes, it is probable that the objecting bloc of countries misunderstood the nature of the Washington Convention.[12] As a starting point, for example, Latin American countries were unwilling to forsake their perceived international rules of sovereignty by committing to Americanized

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[4] Lowenfeld, *supra* note 1, at 51.
[5] About ICSID, https://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Apr. 12, 2014).
[6] Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 San Diego Int'l L.J. 345, 356 (2007).
[7] Lowenfeld, *supra* note 1, at 54.
[8] *See, e.g.*, Wick, *supra* note 1; Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 L. & Bus. Rev. Am. 409, 417 (2010).
[9] Vincentelli, *supra* note 8, at 417.
[10] *See* Katia F. Gómez, Latin America and ICSID: David Versus Goliath? (Nov. 12, 2010) (unpublished manuscript) *available at* http://ssrn.com/abstract=1708325.
[11] Vincentelli, *supra* note 8, at 418.
[12] *Id.*

international investment rules, such as the Hull Doctrine.[13] The Washington Convention, though, had ultimately avoided such a situation by creating an institution, the ICSID, designed not to promulgate substantive obligations, but rather to facilitate the resolution of disputes arising from elsewhere-established obligations.[14] As Professor Lowenfeld put it, the Washington Convention "was to be an arbitration convention, not a convention concerning the international law of investment."[15] However, even if Latin American countries did fully understand the Washington Convention and the proposed function of ICSID, their concerted efforts at early resistance are not at all surprising given the general attitude of such countries in the 1960s toward trade and investment.[16]

Nonetheless, by the 1980s Latin American countries were slowly but surely joining the Washington Convention.[17] This liberalization of international investment received a shot of adrenaline in the 1990s via the proliferation of bilateral investment treaties (BITs).[18] With 52% of the claims pending at ICSID in 2007 involving Latin American countries,[19] it is evident that the region has engaged in myriad international commitments via the Washington Convention it so stoutly opposed throughout the 1960s and 1970s.[20]

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[13] *Id.* For a discussion on the Hull Doctrine *see* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 639, 644 (1998).
[14] Lowenfeld, *supra* note 1, at 51. Confusion on the part of the Latin American countries would be fully understandable given that substantive obligations were what the developed, capital-exporting countries had hoped to include in the Washington Convention early on. *Id.* at 54.
[15] *Id.* at 51.
[16] *See, e.g.,* David Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y.U. J. Int'l L. & Pol. 345 (Winter 1993).
[17] Vincentelli, *supra* note 8, at 419.
[18] *Id.* at 420; *see also* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 Pac. McGeorge Global Bus. & Dev. L.J. 337 (2007).
[19] Vincentelli, *supra* note 8, at 420.
[20] *Id.*

While this background helps contextualize the relatively recent withdrawals[21] of Latin American countries from the Washington Convention, the focus of this article is on parsing the legal framework for what the withdrawals mean with respect to international obligations and investor rights. First, Part II will explore the obligations accepted by Latin American countries by way of both the Washington Convention and BITs. Part III.A will conduct a legal analysis of withdrawal vis-à-vis the Washington Convention, and Part III.B will conduct a legal analysis of withdrawal vis-à-vis BITs. The goal is to organize legal opinions on the relatively recent withdrawals so as to provide a clear explanation of the basic logic of the dominant legal theories for what ICSID denunciation means.

II. CREATING OBLIGATIONS

Before discussing what ICSID denunciation may mean for a country's relevant international obligations, it is first necessary to understand what those obligations are and how they operate. As noted above, creating a forum for investors and host countries to resolve their disputes by way of arbitration—the now well-known practice of investor-state arbitration—was the primary purpose of the Washington Convention; speaking to the substance of either general international investment law or specific investment agreements was not.[22] But because of this, as will be seen below, the efficacy and utility of the ICSID forum depend on outside agreements that identify both substantive investment terms as well as procedural rights and obligations to resort to ICSID for dispute resolution.[23] It is this two-prong Washington Convention gap that BITs fill, and it is most likely for this reason that Latin America's acceptance of the Washington Convention in the

[21] I will use "denunciation" and "withdrawal" interchangeably to refer to the legal exit of a country from membership in the Washington Convention.
[22] Lowenfeld, *supra* note 8.
[23] *See infra* Part III.

1980s immediately preceded the explosion of BITs in the region in the 1990s, as indicated above.[24] Thus, the state obligations and corresponding investor rights most pertinent to this article's analyses arise from A) the Washington Convention and the resulting ICSID forum, and B) the gap-filling BITs.

A. ICSID Obligations

Another way to view the concept of a country's ICSID obligations is as investors' rights. While many of the obligations of a state party to the ICSID do create rights for other states parties, the specific focus of this article is on the effect of ICSID denunciation on the rights of foreign investors over whom ICSID has gained jurisdiction. This is because the most important and difficult questions arising from ICSID denunciation relate to investors' right to arbitrate directly against host states in case of investment-related disputes.[25] The difficulty of these questions is almost certainly due to the challenges of first impression, because, as Diana Wick explains, the Washington Convention "established ICSID as the first institution designed specifically as a forum to settle investment disputes between a state and private investors of another state."[26]

According to the Washington Convention, in order for such investment disputes to be settled in this forum, "the investor must be a national of an ICSID Convention member state, and…the state where the investment was made must be a member state."[27] However, ICSID's Administrative Council established an Additional Facility in 1978.[28] The purpose of the

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[24] *See supra* Part I.
[25] *See* Antonios Tzanakopoulos, *Denunciation of the ICSID Convention under the General International Law of Treaties*, *in* International Investment Law and General International Law: From Clinical Isolation to Systemic Integration? 75 (Rainer Hoffman & Christian Tams eds., 2011).
[26] Wick, *supra* note 1, at 255
[27] *Id.* at 258.
[28] *Id.* at 259.

Additional Facility is to fill "a 'jurisdictional gap' when either the host state or the investor's home state is not a party to the ICSID Convention."[29] Thus, as long as one of the parties in an investor-state investment dispute is covered by the Washington Convention (i.e., an ICSID member state or a national of an ICSID member state), ICSID is a potential forum for arbitrating that dispute.[30]

The requisite membership alone, however, is insufficient to give ICSID jurisdiction over an investor-state investment dispute.[31] As written in the Preamble of the Washington Convention, "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and *without its consent* be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."[32] The Preamble does clarify, however, "that *mutual consent* by the parties to submit such disputes to conciliation or to arbitration through [the ICSID] facilities constitutes a binding agreement."[33] The Preamble thus establishes up front that consent is a condition precedent to ICSID jurisdiction over any investor-state arbitration.[34] Article 25 of the Washington Convention further expands upon the importance of consent by providing the following:

> The jurisdiction of the Centre shall extend to any 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. When the parties have given their *consent*, no party may withdraw its consent unilaterally.[35]

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[29] *Id.*
[30] *Id.*
[31] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States preamble, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].
[32] *Id.* (emphasis added).
[33] *Id.* (emphasis added).
[34] *Id.*
[35] *Id.* at art. 25 (emphasis added).

As will be developed in greater depth below, the language of Article 25 appears to make mutual, rather than unilateral, consent the kind of consent that triggers ICSID jurisdiction and which may not be withdrawn unilaterally by any party once established.[36]

As a result, an ICSID member state's ICSID obligations vis-à-vis covered investors appear to be none in the absence of consent.[37] If not generally, this is at least true specifically with respect to the use of ICSID as a forum for investor-state arbitration.[38] That is, until an ICSID member state and a covered investor have consented in writing to submit their dispute to ICSID arbitration, the member state has no ICSID obligations to the investor and the investor has no ICSID rights against the member state.[39] This lack of an inherent obligation to arbitrate, at ICSID or elsewhere, reflects the second, procedural, prong of the Washington Convention gap noted above.[40] This gap is commonly filled via dispute resolution provisions in BITs.

B. BIT Obligations

Shortly after Latin American countries began to come around to the Washington Convention in the 1980s, "the pace of BIT signings increased dramatically and by mid-1996, over one thousand BITs had been signed, with almost every country on the globe a party to at least one such treaty."[41] For Latin America specifically, the trend in "the international investment landscape"[42] mirrored the region's privatization of major sectors, such as energy, and a growing desire "to stimulate economic growth through [foreign] direct investment."[43] The methods by which BITs

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[36] *See infra* Part III.A.
[37] Wick, *supra* note 1, at 257.
[38] *Id.* ("Simply being a state party to ICSID does not mean that the state must consent to the Centre's jurisdiction in investment disputes.").
[39] *Id.*
[40] *See supra* Part II.
[41] Guzman, *supra* note 13, at 652.
[42] *Id.*
[43] Gomez, *supra* note 10, at 2.

purportedly stimulate the import of capital investments are twofold: by 1) providing "investors a group of substantive rights," and 2) including "provisions for dealing with disputes between a state and investors from another state."[44] These two methods by no coincidence address the two prongs of the Washington Convention gap, thus creating an important relationship between ICSID and BITs .[45] Specifically, it is the latter method which serves to fill the procedural void left by the Washington Convention. The procedural void, remember, is the need for consent to arbitrate, and BITs aim to fill this void each time they include "a menu of international arbitral forums where ICSID is one of the options," or the only option, as part of their "provisions for dealing with disputes."[46]

While the substantive investment rights and obligations created within a BIT are of unquestionable importance to encouraging cross-border investment, it is the procedural right to refer disputes to ICSID that concerns this article's analyses.[47] This is because the situation under scrutiny is ICSID denunciation, and ICSID obligations do not deal with substantive investment rights, while a BIT's procedural rights may implicate directly a state's status with ICSID.[48] The United States Model BIT provides a typical example of how such a procedural right is incorporated into an investment treaty.[49] Article 24 of the 2004 U.S. Model BIT ("Model BIT"), for example, states:

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[44] *Id.*
[45] *See supra* Part II.
[46] Gomez, *supra* note 10, at 2.
[47] *See* M. Sornarajah, The International Law on Foreign Investment (3rd ed. 2010).
[48] *See supra* Part II.
[49] Guzman, *supra* note 13, at 654.

> 3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
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> (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
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> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
>
> (c) under the UNCITRAL Arbitration Rules; or
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> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.[50]

The Model BIT's default arbitration provision, then, refers directly to an investor's right to submit claims to an ICSID facility, so long as the requisite membership statuses are met.[51] Importantly, the model language in Article 24(3)(c) uses the word "or," making the forum choices disjunctive and both individually and equally available to a claimant, to the extent that a choice is technically available (e.g., six months have elapsed and the choice's membership requirements are fulfilled).[52] This word choice may have a significant impact on the effects of ICSID denunciation on a denouncing state's *BIT* obligations.[53]

While the "structure of different bilateral investment treaties has a basic similarity,"[54] neither the United States nor any of the rest of the international investment community use the exact model language and structure quoted above in every BIT.[55] Muthucumaraswamy Sornarajah explains that the variability in BIT arbitration provisions creates a spectrum of obligation levels.[56] At the lowest end of the spectrum, BITs "merely direct the parties to arbitration as a way of solving

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[50] Treaty Between the Government of the United States of American and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment art. 24 (2004) [hereinafter 2004 Model BIT] *available at* http://www.state.gov/documents/organization/117601.pdf.
[51] *Id.* For discussion on membership requirements *see supra* Part II.A.
[52] 2004 Model BIT, *supra* note 49, at art. 24.
[53] *See infra* Part III.B.
[54] Sornarajah, *supra* note 46, at 247.
[55] *See, e.g., id.*
[56] Sornarajah, *supra* note 46, at 249.

disputes arising out of foreign investment transactions."[57] In fact, such provisions may be better categorized as hortatory "sense of the parties" language rather than as obligations, because, in such provisions, neither party agrees explicitly to "submit compulsorily to arbitration."[58] At the upper end of the spectrum, however, BITs "entitle the foreign investor to initiate proceedings by himself before an ICSID tribunal."[59] The Model BIT is an example of a BIT falling on the upper end of the spectrum. The Canada-Ecuador BIT perhaps falls somewhere in the middle of the spectrum, as it provides for a right to refer disputes to ICSID only when "both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention." [60] Thus, the Canada-Ecuador BIT places a unique condition precedent on an investor's explicit BIT right to submit disputes to ICSID.[61]

As the Model BIT and the Canada-Ecuador BIT demonstrate, even BITs that reference ICSID explicitly may create varying levels of obligations.[62] Sornarajah summarizes A. Broches's argument that there are essentially four categories of ICSID-referencing language in BITs, which create four distinct levels of obligation.[63] First, an ICSID-referencing BIT arbitration provision may state that an investment "dispute shall, upon agreement by both parties, be submitted for arbitration by the Centre."[64] This type of provision does not constitute consent to ICSID jurisdiction and reserves the host state's right to offer such consent, or not, as a thing to be

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[57] *Id.* at 250.
[58] *Id.*
[59] *Id.*
[60] Agreement Between The Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, art. XIII, Apr. 29, 1996 *available at* http://unctad.org/sections/dite/iia/docs/bits/canada_ecuador.pdf.
[61] *Id.*
[62] Sornarajah, *supra* note 46, at 251.
[63] *Id.*
[64] *Id.* (internal citations omitted).

determined elsewhere than the BIT at hand.[65] To put a finer point on it, the member state has no BIT obligation to consent to ICSID jurisdiction.[66] Second, a provision may call for "sympathetic consideration to a request" for ICSID arbitration.[67] This type of provision also does not create consent to ICSID jurisdiction, but arguably requires a host country to give serious consideration to whether there is a legitimate reason to not offer that consent.[68] Third, an arbitration provision may explicitly require a host state to agree to any covered-investor request to consent to ICSID jurisdiction.[69] Under the structure of this type of provision, a host state is clearly obligated under the BIT to consent to ICSID jurisdiction, though it has apparently not yet done so by the words of the arbitration provision.[70] Fourth, an arbitration provision may state unequivocally that "[e]ach Contracting Party…consents to submit to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration under the" Washington Convention any disputes arising from investments covered by the BIT at hand.[71] This provision type, found in BITs involving the United Kingdom, creates an unambiguous BIT obligation to accept ICSID jurisdiction over covered investment disputes, and perhaps also creates a priori the requisite consent for ICSID to assert that jurisdiction.[72]

As a result, a Contracting Party's BIT procedural obligations vis-à-vis covered investors is quite unsurprisingly linked to the specific language of any given BIT.[73] Those obligations range anywhere from an effort to move disputes into arbitration to a clear requirement to submit to

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* For discussion on the extent to which such a provision creates ICSID consent *see infra* Part III.B.
[73] Sornarajah, *supra* note 46, at 250.

ICSID jurisdiction over covered investment disputes.[74] In addition, even BIT arbitration provisions which reference ICSID explicitly create a range of obligations.[75] For this reason, "care must be taken to examine each provision so as to discover the precise extent of the commitment[s]" contained in any given BIT.[76]

III. THE LEGAL IMPLICATIONS OF WITHDRAWAL

Although Latin American countries eventually made the decision to participate in both the Washington Convention and the proliferation of BITs, albeit cautiously, several countries in the region have resumed a position of criticism and disengagement.[77] More poetically, "the relationship between the ICSID and Latin America has soured."[78] The relationship has soured to the point that, since 2007, Bolivia, Ecuador, and Venezuela have each officially denounced their membership to the Washington Convention, and thus no longer intend to consent to ICSID arbitration.[79] Moreover, there are indications that this may be the beginning of a regional exodus of Latin American countries from the ICSID regime.[80] As Antonios Tzanakopoulos has put it—and as should be obvious by now from this article—"[t]hese unprecedented withdrawals have brought to the forefront a host of legal problems regarding withdrawal from the ICSID

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Vincentelli, *supra* note 8, at 421.
[78] *Id.*
[79] Tzanakopoulos, *supra* note 24, at 75.
[80] Vincentelli, *supra* note 8, at 421. In April 2007, the Presidents of Bolivia, Cuba, Nicaragua, and Venezuela gathered to discuss the Bolivarian Alternative for the People of Our America (ALBA), "which is an alternative agreement from these countries in bloc to the investor-state system of protection encompassing the different BITs and MITs." *Id.* Reflecting the region's return to a 1960s paradigm, Vincentelli reports that Ecuador's President, Rafael Correa, has stated publicly that Ecaudor handed over its sovereignty by joining ICSID. *Id.* at 422. In addition, Argentina has failed to honor many of its record-breaking number and size of ICSID judgments and has hinted at the possibility of ICSID denunciation. *Id.* at 423. *But see* Gomez, *supra* note 10, at 26 ("Inconclusive research suggests that the vast majority of Latin American states are still loyal to ICSID and therefore their BITs continue to reference this international institution as a possible option for investors willing to submit their disputes to a non-national organization.").

Convention and its effects, particularly with respect to *consent* to ICSID arbitration expressed in a Bilateral Investment Treaty ('BIT')."[81]

Per the discussion in Part II.B, it is precisely the issue of consent that so bonds the function of BITs and the requirements of ICSID.[82] But while ICSID and BIT obligations are inextricably linked, the international rights and obligations stemming from each regime are distinct.[83] Therefore, when analyzing the effects of ICSID withdrawal, it is important to conceptualize from which source—the Washington Convention or a BIT—any implicated obligation or right comes. [84] This does not come as naturally as it might sound, because "[t]he main question…is if a withdrawing state's promises to arbitrate under ICSID, which are provided for in various BITs of that state, are enough to establish the jurisdiction of the Centre even after the notification of withdrawal from the Convention."[85] Consequently, "[t]hese legal problems cannot be dealt with in isolation."[86] It is therefore hoped that the utility of the remainder of this article is its attempt to unearth the legal effects of ICSID denunciation by analyzing the relationship between ICSID and BIT obligations while maintaining a clear division between what denunciation means for ICSID obligations and what it means for BIT obligations.

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[81] Tzanakopoulos, *supra* note 24, at 75 (emphasis added).
[82] *See supra* Part II.B.
[83] Sornarajah, *supra* note 46; *see also* supra Part II.
[84] For an overview of the relevant rights and obligation *see supra* Part II.
[85] Tzanakopoulas, *supra* note 24, at 78.
[86] *Id.* at 75.

A. ICSID Implications

There is at least one thing everyone can agree on: "[w]ithdrawal from the ICSID Convention is allowed under the terms of the Convention itself."[87] That the withdrawals of Bolivia, Ecuador, and Venezuela from the Washington Convention are internally permissible underscores why BITs are an integral part of any legal analysis of such withdrawals. To begin, however, it is helpful to unpack a withdrawal from the perspective of the Washington Convention itself.

1. The Relevant ICSID Provisions

The provisions of the ICSID Convention most pertinent to a withdrawal are Articles 25, 71, and 72.[88] First, Article 71 provides: "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."[89] So far, so good—any member state may withdraw from ICSID, and per Article 71, there are no ICSID obligation concerns.[90] Under Article 72, however:

> 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.[91]

This is where withdrawal, while legal, is made to implicate ICSID rights and obligations—specifically, *existing* ICSID rights and obligations.[92] Nota bene that Article 72 is a survival clause (also called a derogation provision)[93] that preserves existing *ICSID* rights and

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[87] *Id.* at 77. Fortifying this right to withdraw is Article 54 of the Vienna Convention on the Law of Treaties. *See* Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 (No. 122) N.Y. L.J. 1 (2007), http://www.shearman.com/en/newsinsights/publications/2007/06/the-denunciation-of-the-icsid-convention.
[88] Wick, *supra* note 1, at 260.
[89] ICSID Convention, *supra* note 30, at art. 71.
[90] *Id.*
[91] *Id.* at art. 72.
[92] *Id.*
[93] Gaillard, *supra* note 86, at 1.

obligations, not those of BITs.[94] Most importantly, the existing ICSID rights and obligations preserved by Article 72 are those that have arisen from consent to ICSID jurisdiction, and thus "[t]he notion of consent to the jurisdiction of the Centre is…at the heart of this derogatory regime."[95] Another important question, however, results from the juxtaposition of "denunciation shall take effect six months after receipt of such notice," in Article 71, against "arising out of consent…given…before such notice was received," in Article 72.[96] Accordingly, the two main questions to be answered, in order to assess whether there are existing rights and obligations to be preserved by Article 72, are: what constitutes consent for the purposes of Article 72, and when must such consent be perfected in order for it and its resulting rights and obligations to be preserved?[97]

2. Understanding 'Consent'

Like with all arbitral tribunals, ICSID jurisdiction "is built upon the consent given by both" parties.[98] The rules for ICSID's consent-based jurisdiction are set out in Article 25:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent 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.[99]

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[94] This provision is also fortified by the VCLT, specifically by Article 70. *See id.*
[95] Gaillard, *supra* note 86, at 2 (internal citations omitted); *see also* ICSID Convention, *supra* note 30, at art. 72.
[96] ICSID Convention, *supra* note 30, at art. 71; *Id.* at art. 72.
[97] *See generally* Wick, *supra* note 1, at 260–62; Wolfgang Alschner, Ana Berdajs & Vladyslav Lanovoy, Legal basis and effect of denunciation under international investment agreements 4–5 (May 9, 2010) (unpublished Trade Law Clinic research paper) (on file with Graduate Institute of International and Development Studies, Geneva) *available at* http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/UNCTAD%20-%20International%20Investment%20Treaties%20Denunciations%20(final%20-%20June).pdf.
[98] Alschner, *supra* note 96, at 9.
[99] ICSID Convention, *supra* note 30, at art. 25.

By the language of Article 25, ICSID is able to exercise jurisdiction over (1) a legal dispute (2) regarding an investment (3) which legal dispute is between covered parties (4) who have consented to ICSID jurisdiction in writing.[100] While denunciation implicates requirements (3) and (4), Article 72 renders requirement (4) the focal point.[101] That is because Article 72 serves to preserve existing rights and obligations flowing from a denouncing state's prior consent, which preservation presumes the presence of such existing rights and obligations.[102] If a denouncing state has an existing obligation to submit to ICSID jurisdiction, that obligation—while at some previous time created by the terms of Article 25—may now be preserved by the mere fact of its existence as a result of consent given before denunciation.[103] Very simply, ICSID cannot exercise jurisdiction over a denouncing state via Article 25, because a denouncing state is to no longer be a covered party; but if that denouncing state has an existing obligation to submit to ICSID's jurisdiction, that obligation will be preserved by Article 72, despite the state's now non-membership.[104] That is precisely why Article 72 was created.[105] Nonetheless, Article 25's consent requirement is useful for interpreting Article 72's consent requirement.[106]

In the main, the differences in current opinions regarding the effects of ICSID withdrawal hinge on "the interpretation of the phrase *consent (...) given by one of them* in…Article 72 of the ICSID Convention," i.e. the phrase that qualifies precisely which existing ICSID rights and obligations may be preserved by Article 72.[107] The two most prominent theories are that of

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[100] Alschner, *supra* note 96, at 11.
[101] *Id.* (noting that membership and consent are implicated by ICSID denunciation).
[102] *See* ICSID Convention, *supra* note 30, at art. 72.
[103] Alschner, *supra* note 96, at 14.
[104] *Id.*
[105] Wick, *supra* note 1, at 261.
[106] *See, e.g.,* Tzanakopoulas, *supra* note 24, at 78–79.
[107] Alschner, *supra* note 96, at 16 (internal citations omitted) (emphasis in original).

"perfected consent" on the one hand, and that of "unilateral consent" on the other.[108] The perfected consent theory equates Article 72 consent to the generally understood meaning of Article 25 consent.[109] The unilateral consent theory would allow a unilateral expression of consent to ICSID jurisdiction to activate Article 72 safeguarding, regardless of whether the unilateral expression had yet been accepted and thus perfected.[110]

a. Perfected consent

This theory may also be known as the 'mutual consent' theory, and it requires that consent be "given in writing by *both* '*parties to the dispute*.'"[111] The basis of the perfected consent interpretation of Article 72 is that the phrase "one of them," found in the Article 72 passage "rights or obligations…of the [denouncing] 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*,"[112] refers to "the denouncing state, its constituent subdivisions or agencies and its nationals."[113] Notice that this theory implies that nationals are able to consent to ICSID jurisdiction on behalf of a member state.[114]

The bottom line for the perfected consent theory is that a state's written consent to ICSID jurisdiction must be met by an investor's reciprocal written consent to ICSID jurisdiction, and that such coexistence of written consent must occur before the state's withdrawal.[115] Otherwise,

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[108] *Id.*
[109] Tzanakopoulas, *supra* note 24, at 78.
[110] *Id.*
[111] *Id.* (emphasis added).
[112] ICSID Convention, *supra* note 30, at art. 72 (emphasis added).
[113] Alschner, *supra* note 96, at 18.
[114] I have not found supporting research, but this reality signals to me a potentially strong argument that an interpretation that allows an investor to bind the State is incorrect, particularly in light of Article 25(3), which explains how constituent subdivisions and agencies receive authority to consent on the State's behalf, but excludes nationals. ICSID Convention, *supra* note 30, at art. 25.
[115] Alschner, *supra* note 96, at 18.

Article 72 consent is unfulfilled and there is no existing obligation to accept ICSID jurisdiction to be preserved post-withdrawal.[116] A perfected consent interpretation of Article 72 means that neither domestic legislation nor a UK-style BIT arbitration provision—i.e. one where Contracting Parties give explicitly their written consent to ICSID jurisdiction—is sufficient by its own force. This is because despite the State's consent in domestic legislation or a BIT, a specific investor, who is a "part[y] to the dispute," has not given his own reciprocal written consent.[117] Christoph Schreuer believes that investors can avoid the risks of the non-perfected consent in BITs and domestic legislation "by accepting the offer of consent given by a State in general terms or in a special notice to the ICSID Centre," before any dispute has arisen.[118] An investment contract with an arbitration provision providing for ICSID jurisdiction over investment disputes, however, would be sufficient.[119] This is because in a written contract between a State and an investor, both future "parties to the dispute" have provided written consent to ICSID jurisdiction, via the contract itself.[120]

Under the perfected consent theory, the "mere unilateral consent (*offer*) given by the host State and that has not been accepted by the investor does not create any rights or obligations under the ICSID Convention," and any such offer of consent contained in a BIT gives rise to rights and obligations under the BIT only.[121] Two potential arguments this article does not develop are: whether a Schreuer type general acceptance of the State's offer to consent (pre-withdrawal) meets a requirement that consent come from "parties to the dispute," because no dispute yet

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[116] *Id.*
[117] *Id.* at 19; *see also* ICSID Convention, *supra* note 30, at art. 25.
[118] Alschner, *supra* note 96, at 19.
[119] *Id.*
[120] ICSID Convention, *supra* note 30, at art. 25.
[121] Alschner, *supra* note 96, at 19.

exists;[122] and, whether, as Broches argues, a UK-type BIT arbitration provision creates ICSID jurisdiction a priori, such that a State could bring an ICSID claim against a covered investor and/or an investor—who had not previously perfected consent—could bring a claim against a denounced State.[123]

b. Unilateral consent

While perfected consent is a traditional view of arbitral jurisdiction and accords with the language of Article 25, "Article 72 does not expressly refer to such 'mutual consent' as do Articles 25 to 27"[124] In this respect, some commentators argue that Article 72 "has a special meaning…different from that of 'consent of the parties to the dispute' in Article 25."[125] The basis of the 'unilateral consent' theory, is that the phrase "one of them," found in the Article 72 passage "rights or obligations…of the [denouncing] 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*,"[126] refers to the investor and the State.[127] That is, consent "given by one of them" means consent given by either the investor or the State, which consent is sufficient to activate Article 72 preservation.[128] This interpretation is also supported by the difference in language between Article 25 (consent by "the parties to the dispute") and Article 72 ("consent…given by one of them").[129]

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[122] *Id.*
[123] Sornarajah, *supra* note 46, at 251. If Broches is correct, then a denouncing State party to such a provision has an obligation to submit to ICSID jurisdiction and that obligation is preserved post-denunciation per Article 72.
[124] Tzanakopoulas, *supra* note 24, at 79.
[125] *Id.* at 78.
[126] ICSID Convention, *supra* note 30, at art. 72 (emphasis added).
[127] Alschner, *supra* note 96, at 18.
[128] *Id.*
[129] *Id.* at 19.

Under this theory, which is analogous to a contract theory of offer and acceptance, an investor could invoke ICSID arbitration against a denounced state, so long as there was an outstanding offer of consent to ICSID jurisdiction which the investor could accept, e.g. in a BIT or domestic legislation.[130] Unlike under the perfected consent theory, the unilateral theory requires that, in order to release existing obligations to submit to ICSID jurisdiction, a State must not only withdraw under Article 71 of the Washington Convention, but also revoke any outstanding offers to consent to such jurisdiction.[131] In other words, a unilateral consent interpretation of Article 72 renders domestic legislation and BITs sufficient to allow ICSID to actually exercise its jurisdiction over a denounced State. The Graduate Institute's very thorough analysis of ICSID denunciation notes that

> Several articles follow this interpretation of Article 72 of the Convention and conclude that unilateral consent expressed in a treaty, is binding on the denouncing State for the life of the treaty and may be matched by the investor at any time during that period. A minority of commentators reaches the opposite conclusion.[132]

Confusing, though, is the Institute's immediately following statement that "[t]herefore, the question remains whether an expiry of the six-month period in Article 71 would affect the right of the investors to perfect the consent given by the host state."[133] This question would only be relevant under a perfected consent theory. The basis of the unilateral consent theory is that a host State's unilateral offer of consent is sufficient to trigger Article 72 preservation.[134] As a result, after a State's denunciation, the State has a preserved obligation to submit to ICSID jurisdiction

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[130] *Id.*
[131] *Id.*
[132] *Id.* at 20.
[133] *Id.*
[134] *Id.* at 19.

by way of a covered investor's acceptance of the State's unilateral consent, likely found in a BIT or domestic legislation, regardless of the six month period found in Article 71.

Emmanuel Gaillard limits this line of argument by suggesting that the unilateral consent theory is only fulfilled by a BIT which employs certain language.[135] Specifically, unilateral consent to ICSID jurisdiction is preserved only in the instance of Broches's fourth, UK-type, arbitration provision.[136] In the instance of a BIT arbitration provision such as Broches's first three categorizations, where further agreement is required before a claim may be submitted to ICSID, there is insufficient consent, unilateral or otherwise, to trigger Article 72 protections.[137] Examples of such insufficient language are found in the Model BIT and the Bolivia-UK BIT.[138]

3. The Matter of Timing

Whether Article 72 obligation-creating consent is satisfied unilaterally or only if perfected, the questions remains when such consent must take place vis-à-vis notice of denunciation. There are essentially three possibilities: "(1) …both the state and the investor must consent before the state gives notification of denunciation; (2) …consent can be perfected during the six-month notification period; and (3) …consent may be perfected at any time during the duration of a BIT or other agreement that contains a state's consent."[139] The first option implies a perfected consent interpretation of Article 72 and relies strictly on the language of Article 72 that obligations are preserved only if they arise from "consent to the jurisdiction of the Centre given…before such [Article 71] notice was received by the depositary."[140] The second option seems to also imply a

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[135] Gaillard, *supra* note 86.
[136] *Id.*
[137] *Id.*
[138] *Id.*; *see also* 2004 Model BIT, *supra* note 49.
[139] Wick, *supra* note 1, at 261.
[140] ICSID Convention, *supra* note 30, at art. 71.

perfected consent interpretation of Article 72, but this option relies on language in Article 71 that "denunciation shall take effect six months after receipt of such notice" in order to allow consent to be perfected up to six months after notice.[141] The third option clearly assumes a unilateral consent interpretation of Article 72 and thus renders the six month notice period irrelevant to the question of Article 72 consent-based obligations preservation.

Wick notes that the second option, "that investors can file claims in ICSID during the six-month notification period, but not after, seems to have prevailed."[142] However, like the issue of Article 72 consent interpretation, questions will remain until cases posing these questions are arbitrated and/or litigated. E.T.I. Euro Telecom International N.V. filed a claim against Bolivia four days before the expiry of Bolivia's six month withdrawal notice period, but that case was ultimately discontinued under questionable circumstances.[143] *Pan American Energy LLC v. Plurinational State of Bolivia* was registered in 2010, well after Bolivia's full ICSID withdrawal, and a panel is currently constituted but proceedings are suspended until April 2014.[144]

4. General Observations

ICSID member States may withdraw under the terms of Article 71, but Article 72 preserves any contemporaneous rights and obligations arising out of previously given consent.[145] The two primary issues in analyzing such withdrawal are the definition of consent and when that consent must be perfected. While this section has principally focused on how these issues may be

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[141] *Id.*
[142] Wick, *supra* note 1, at 261.
[143] Gomez, *supra* note 10, at 23.
[144] Pan Am. Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8, (Dec. 20, 2013), Procedural Details *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1020&actionVal=viewCase.
[145] Tzanakopoulas, *supra* note 24, at 77.

resolved by reference to the language of the Washington Convention, it is important to note that many commentators have buttressed their arguments by application of general principles of international law.[146]

B. BIT Implications

At bottom, there are only two possibilities with respect to the effect of ICSID withdrawal on a withdrawing State's obligations under its ICSID-referencing BITs: the obligations can either still be fulfilled or they cannot. The scenario which results from an ICSID withdrawal has less to do with ICSID itself and more to do with the specific language of a BIT.[147] Because how BIT obligations are affected by ICSID denunciation is so dependent on the limitless possibilities of BIT-specific language, this section will simply address a few basic—and perhaps obvious—points about such language.[148]

The basic question, with respect to a denouncing State's BIT obligations, is whether the language of a BIT's arbitration provision gives investors a right to choose ICSID as a forum or instead simply provides ICSID as an exemplary or desirable forum. For example, Article 24 of the Model BIT provides that investors "*may* submit a claim" to ICSID, to the ICSID Additional Facility, under UNCITRAL Arbitration Rules, *or* to another agreed upon arbitration tribunal.[149] To many, ICSID denunciation "is not problematic as long as other fora are still available to the

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[146] *See, e.g.,* Wick, *supra* note 1, at 262–63; *see also* Tzanakopoulas, *supra* note 24; Gaillard, *supra* note 86. The vast majority of reference to international law has been by way of applying the Vienna Convention on the Law of Treaties (VCLT) to the interpretation of the Washington Convention. Note, however, that the United States is not a party to this convention. While most scholars argue that the VCLT is nonetheless customary international law, this is by no means a universal, or even convincing to this author, view. *See, e.g.,* Jack Goldsmith & Eric Posner, The Limits of International Law (2006).

[147] Sornarajah, *supra* note 46, at 249.

[148] *But see* Wick, *supra* note 1, at 258 ("determining consent based on such exact wording is inadvisable because BITs are usually entered into between countries that speak different languages; thus, different conclusions may be reached depending on how the language is translated").

[149] 2004 Model BIT, *supra* note 49, at art. 24.

investor," such as is the case in the Model BIT.[150] As a practical matter, this is true; but as a matter of rights, there is more to the story.[151] If an investor has been provided an offer to arbitrate at ICSID, the investor's right to accept that offer is in no way undermined by the existence of a menu of other fora options. Whether ICSID is the only forum or one of many fora, an investor "may" choose in case of a dispute, a host State has the obligation to honor the choice. This obligation is created by Broches's type three and four ICSID-referencing arbitration provisions.[152] The third type requires that a host assent to a covered investor's request to arbitrate at ICSID, and the fourth type explicitly offers consent to so arbitrate, if necessary.[153]

If, however, a BIT's arbitration provision is at Sornarajah's low end of the spectrum, it is unlikely that a State has any BIT obligation to submit to ICSID jurisdiction.[154] Specifically, Broches's first two arbitration provision types do not appear to create a BIT obligation to submit to ICSID arbitration.[155] The first type conditions ICSID arbitration on "agreement by both parties," i.e. the host State and the investor.[156] Thus, post-ICSID denunciation, the denouncing State may simply refuse to agree to ICSID arbitration without fear of for that reason breaching any BIT obligation.[157] Broches's second type of provision raises the bar only slightly by requiring the host State to give "sympathetic consideration to a request" for ICSID arbitration, but still ultimately fails to codify an affirmative obligation to accept ICSID as the forum for

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[150] Alschner, *supra* note 96, at 37.
[151] For another example of side-stepping the issue of BIT obligations and conflating such obligations with Washington Convention consent requirements *see* Gaillard, *supra* note 86, at 2 ("in situations in which a state has denounced the ICSID Convention, investors may use the other avenues [provided for in the BIT] in order to avoid any uncertainty related to the expression of consent and the time at which it must have occurred").
[152] Sornarajah, *supra* note 46, at 251.
[153] *Id.*
[154] *Id.* at 250.
[155] *Id.* at 251.
[156] *Id.*
[157] *Id.*

arbitration.[158] Again, under this arbitration provision structure, a State may withdraw from ICSID without forcing itself to breach its ICSID-referencing BIT obligations.

To summarize, in a BIT's arbitration provision, "[w]here 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."[159] If a BIT's arbitration provision affords covered investors the right to select ICSID as a forum for investment arbitration, ICSID denunciation puts the denouncing State at risk of breaching its BIT obligation to submit to ICSID jurisdiction.[160] The denouncing State, of course, could agree to ICSID arbitration, but a denouncing State would no longer be an ICSID member and arbitration would thus be available only under the Additional Facility (assuming the investor's home state remains an ICSID member).[161] It is nonetheless reasonable to assume that if a State has withdrawn from ICSID it is unlikely to agree to ICSID arbitration. And since it is the dispute resolution provision that the denouncing State may ultimately breach due to denunciation, the investor will likely need an alternate route other than arbitration in order to pursue its claim of a right to submit the underlying investment dispute to ICSID. One possibility is for investors to lobby their home government to bring a state-state arbitration claim against the host State on the basis of the host State's nullification of certain investment guarantees.[162] An additional possibility is for the investor to pressure its home government to otherwise engage the host State diplomatically. Both of these options undermine the goal of investor-state arbitration to depoliticize investment

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[158] *Id.*
[159] Gaillard, *supra* note 86, at 3.
[160] For a discussion on the types of BITs to which Bolivia, Ecuador, and Venezuela are parties *see* Wick, *supra* note 1, at 264–68.
[161] Alschner, *supra* note 96, at 37.
[162] Gaillard, *supra* note 86, at 2.

disputes.[163] The fact is, if a State withdraws from ICSID and has promised foreign investors that ICSID is an available forum for dispute resolution, investors are unlikely able to hold the State to its promise without involving the investor's home government.

IV. CONCLUSION

Several Latin American countries have recently reverted to a position of resistance toward westernized international economic institutions.[164] This gradual disengagement from a developed-nation-dominated system is most potently demonstrated by the withdrawals of Bolivia, Ecuador, and Venezuela from ICSID.[165] The effects of these withdrawals vis-à-vis the international obligations to investors that withdrawing countries have assumed over the past few decades are complicated by the widespread use of BITs and the inclusion of provisions in those BITs which reference explicitly ICSID arbitration.[166] How these effects are determined hinges on the interpretation of language in both the Washington Convention and in the BIT arbitration provisions themselves.

In analyzing the legal effects of ICSID withdrawal, one must be careful to distinguish the effects upon ICSID obligations from those upon BIT obligations. Admittedly, these distinct sets of obligations are easy to conflate, because the analysis of one involves consideration of the other. That is, to determine if there are existing obligations for Article 72 of the Washington Convention to preserve post-withdrawal, it is necessary to know whether the language of existing BITs have created the requisite consent to ICSID jurisdiction. Similarly, in order to determine if a State will be in breach of its BIT obligations to agree to ICSID arbitration, it is necessary to

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[163] Wick, *supra* note 1, at 267.
[164] *See supra* Part III.
[165] *Id.*
[166] *Id.*

know whether ICSID jurisdiction has been preserved by Article 72 of the Washington Convention. Therefore, investors with assets in denouncing Latin American countries should carefully examine the language of their relevant BITs first and then determine whether ICSID remains available, or whether they will be forced to 1) choose another forum for dispute resolution, or 2) lobby their home government to compel the host State to abide by its original promise. Finally, for any Latin American country considering an ICSID denunciation, that country should review its relevant BITs and investment contracts and consider 1) to what extent it has obligated itself to agree to ICSID arbitration, and 2) how long it would take for such obligations to expire.[167]

[167] *Id.*