Aron Broches and the Withdrawal of Unilateral Offers of Consent to Investor-State Arbitration

MATTHEW C. PORTERFIELD – August 11, 2014

During the last decade, a number of States have attempted to limit their exposure to investor-State arbitration under bilateral investment treaties (BITs) and other international investment agreements (IIAs). Several States have terminated BITs as they came up for renewal.[1] The effectiveness of BIT termination, however, is limited by the “survival clauses” that are frequently included in IIAs. These provisions state that even after the treaty is terminated it will continue to apply to investments that were made while the treaty was in force for an additional 10 or 15 years.

A few States—Ecuador, Venezuela and Bolivia[2]—have also withdrawn their consent to investor-state arbitration under the ICSID Convention[3] by denouncing the Convention. Investor-State arbitration, like all arbitration, is predicated on the consent of the parties. In commercial arbitration the consent of both parties is typically provided in a single instrument in the form of an arbitration agreement. In contrast, with investor-State arbitration the State usually provides a unilateral offer of consent to arbitration in an IIA, which the investor “perfects” with its own consent by bringing a claim.[4] According to Aron Broches, the “principal architect”[5] of the ICSID Convention (and arguably the entire investor-state arbitration system), by denouncing the Convention, a State withdraws any unilateral offers of consent to arbitration under the Convention and prevents ICSID from asserting jurisdiction over new claims.[6] Yet as with BIT termination, ICSID denunciation has its limits as a strategy for reducing exposure to investor-State arbitration given that most IIAs provide for alternatives to ICSID, such as the UNCITRAL Arbitration Rules.

Broches’s writings, however, suggest an approach for States that are seeking to limit their exposure to investor-State arbitration that would address both the problems of survival clauses and alternatives to ICSID arbitration: withdrawal of unilateral offers of consent to non-ICSID arbitration. As discussed below, this approach would arguably preclude investors from bringing new claims under IIAs that provide for non-ICSID arbitration and that are either still in force or have applicable survival clauses.

State consent to arbitration under the ICSID Convention

The investor-State arbitration system has its roots in the ICSID Convention, which still accounts for the majority of investor-State proceedings. The drafters of the Convention intended for it to serve primarily as a mechanism for addressing contractual disputes between foreign investors and host States, pre-dating as it did the first investor-state arbitration clause in a treaty by several years.[7]

The creation of a mechanism through which sovereigns would be subject to international claims by private investors was viewed as a significant departure from existing practice.[8] Moreover, the issue of foreign investor rights had been the subject of contentious debate in the United Nations General Assembly, leading to the adoption in 1962 of the Resolution on Permanent Sovereignty over Natural Resources.[9] Operating in this context, Broches, the World Bank’s General Counsel at the time and who would later become ICSID’s first Secretary-General, suggested that States be given significant flexibility in determining the disputes that they would submit to ICSID’s jurisdiction. Broches proposed in an early working paper that the Convention provide for arbitration based on the consent of the parties to a dispute[10] and stressed that the Convention would not involve “compulsory adjudication of disputes.”[11] Instead,

[it] would make available to foreign investors and host governments facilities for ... arbitration of disputes between them. Use of these facilities would be entirely voluntary. No government and no investor would ever be under an obligation to go to ... arbitration without having consented thereto.[12]

Although Broches conceived of ICSID’s jurisdiction from the beginning as being rooted in the consent of States, the relatively low standard he
initially proposed for establishing consent proved to be politically problematic. The working paper and a preliminary draft of the Convention would have permitted State consent to be implied under the doctrine of forum prorogatum if the State accepted ICSID’s jurisdiction over a dispute submitted by an investor.[13] The forum prorogatum provision, however, drew objections during a series of regional consultative meetings on the grounds that it could subject States to inappropriate pressure to accept the Centre’s jurisdiction.[14] Accordingly, the Convention in its final form dropped the forum prorogatum proposal, requiring instead that both parties explicitly consent in writing to ICSID’s jurisdiction over a dispute.[15]

Withdrawal of treaty-based offers of consent to ICSID arbitration

Although the written consent of both parties is required under the ICSID Convention, it need not be provided simultaneously or in the same instrument, creating the potential for States to make unilateral offers of consent; for example, through domestic legislation. A question was raised during the drafting of the Convention in 1965 concerning whether a State could withdraw such a unilateral offer of consent by denouncing the Convention before a claim had been submitted.[16] Broches responded that a unilateral offer—

would not be binding on the State which had made it until it had been accepted by an investor. If the State withdrawing its unilateral statement [of consent] 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.[17]

At the first annual meeting of ICSID’s Administrative Council in 1967, Broches proposed that BITs provide for investor-State arbitration under the Convention.[18] Over the next few years, States began including unilateral offers of consent to ICSID arbitration in treaties.[19] Broches viewed these treaty-based offers as similarly subject to withdrawal prior to perfection by an investor:

[Investment] treaties evidence the consent of one party only, namely, the host State. Accordingly, until the investor has also signified his consent in writing, the prohibition against unilateral withdrawal of consent does not apply, that is to say, the host State’s consent is revocable under the Convention.[20]

Broches noted that revocation of an offer of consent provided in a treaty’s arbitration clause could violate the treaty, potentially provoking the investor’s home State to seek a retraction of the withdrawal of consent by the host State. Absent such a retraction, however, an attempt by the investor to institute an investor-State claim would be rejected by ICSID’s Secretary-General or would face a jurisdictional objection from the host State if ICSID registered the claim.[21]

Broches’s view that a State may avoid investor-state arbitration under a treaty by withdrawing its offer of consent to arbitration prior to its perfection by an investor rests upon the lack of an arbitration agreement establishing privity between the State and the investor. The duty to provide consent to arbitration is owed under international law to the other State party to the treaty, not to all potential investor-claimants. Accordingly, the issue of whether the withdrawal of the offer of consent violated the treaty could only be addressed through State-to-State proceedings.[22]

Withdrawal of consent to non-ICSID investor-State arbitration

Broches first published his observations concerning the revocability of treaty-based offers of consent to ICSID arbitration in 1982. Over the next several years, it became an increasingly common practice for investment treaties to contain arbitration clauses that provide for alternatives to ICSID—such as arbitration under the UNCITRAL rules—in order to accommodate participation in investment treaties by States that were not parties to the ICSID Convention.[23] Broches’s analysis of the ability of States to revoke unilateral offers of consent to investor-state arbitration would presumably apply with equal force to these treaties.

Investor-State arbitration requires the consent of the parties to the dispute regardless of which arbitration procedure is employed. Arbitration under the UNCITRAL Rules, for example, is only permitted “[w]here parties have agreed that disputes between them . . . shall be referred to arbitration under the UNCITRAL Arbitration Rules. . . .”[24]

An investor must always perfect a State’s treaty-based offer of consent in order to form an arbitration agreement that will provide the basis for an investor-state proceeding. If the State withdraws an offer of consent to arbitration before it is perfected, an investor cannot subsequently form an arbitration agreement by instituting a claim, regardless of which arbitration rules are invoked (ICSID, UNCITRAL, etc.) or whether the investor is attempting to assert rights under a survival clause or an IIA that is still in force.
As Broches recognized, the home State of the investor could employ whatever State-to-State procedures were available to challenge the legality of the withdrawal of consent. Whether a withdrawal of consent would be held to constitute a breach of the State's obligations would depend on the language of the relevant arbitration clause. Although some IIAs provide firm offers of consent to investor-State arbitration, others merely contemplate that the respondent State may provide its consent to arbitration at some point in the future.[25]

Given that investment arbitrators are, at least in the first instance, judges of their own jurisdiction,[26] it would not be unreasonable to anticipate that some arbitrators may be reluctant to dismiss claims for lack of a valid arbitration agreement. States, however, may find a more receptive audience in domestic courts, where they could raise the absence of a valid arbitration agreement as a basis for opposing the enforcement of an award.[27]

A State's withdrawal of a unilateral offer of consent to investor-State arbitration provided in an IIA could, of course, leave investors without a forum for asserting the substantive rights provided in the treaty. As the tribunal in *ICS v. Argentina* observed, however, the default position under public international law is the absence of a forum before which to present claims . . . [a] finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection.[28]

**Conclusion**

States could create a system of investor-State dispute settlement that would not be dependent on their continuing consent to arbitration, *i.e.* a system in which international tribunals exercised compulsory jurisdiction over investor-state disputes and investors were directly vested with rights independent of the existence of an arbitration agreement. Thus far, however, they have not done so.

Instead, States continue to rely on the consent-based system that Broches viewed as necessary given the political sensitivity of permitting foreign investors to bring direct claims against sovereigns. This deferential approach to the jurisdiction of tribunals in investor-State proceedings provides States with the option of withdrawing their unilateral offers of consent before they are perfected. If investor-State tribunals were to assert jurisdiction based on withdrawn offers of consent, they would be exercising the type of compulsory jurisdiction that States, as Broches anticipated, have not been willing to confer on them.

*Author: Matthew C. Porterfield is a senior fellow and adjunct professor at the Georgetown University Law Center’s Harrison Institute for Public Law.*

**References**


Almost three-quarters of the investor-state disputes registered by ICSID have been based on consent provided in an IIA. The other cases were based on consent to arbitration provided either in a contract between the investor and the host-State (19%) or in the domestic law of the host-State (8%). The ICSID Caseload—Statistics (Issue 2014-1), at 10, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.


[6] See ICSID, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Vol. II-2, at 1010 (1968) (remarks of Mr. Broches). See also Christoph H. Schreuer, The ICSID Convention: A Commentary, at 1280 (2d ed. 2009) (“An investor's attempt to accept a standing offer of consent by the host State that may exist under . . . a treaty after receipt of the notice of . . . denunciation . . . would not succeed.”) Some commentators, however, contend that an unqualified offer of consent to ICSID arbitration in a treaty remains effective notwithstanding a State's denunciation of the Convention. See, e.g., Emmanuel Gaillard, The Denunciation of the ICSID Convention, New York Law Journal (June 26, 2007) (“where an unqualified consent exists [in an IIA] . . . the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention.”), available at http://www.shearman.com/files/Publication/a4ce24f1-83de-445d-a50a-b82ba89e/Presentation/PublicationAttachment/cc3c9a-ca49-4eaa-b3f5-d0a26ba680c/IA_NYJ%20Denunciation%20ICSID%20Convention_040308_17.pdf.


[8] See Anne K. Hoffmann, The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty, 22 ICSID Review 69, 76-77 (2007) (“the right of private investors to sue foreign governments . . . was not only not anticipated, it was outright unthinkable for many of the scholars addressing this issue even in the early second half of the [20th] century.”)


[12] Id.

[13] See Working Paper, supra, Article IV(1)(2) (“The consent of any party to a dispute to the jurisdiction of the Center may be evidenced by . . . the acceptance by such party of the jurisdiction of the Center in respect of a dispute submitted to it by another party.”)


[15] See ICSID Convention, Article 25(1) (“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”) (emphasis added), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.


[17] Id. at 1010 (emphasis added).


[21] Id.

[22] Broches similarly indicated that if a BIT requires a State provide its consent to arbitration at the request of an investor and the State refuses to do so, that refusal could only be challenged in state-to-state proceedings. See id. at 449-50.

[23] See Parra, supra, at 199:

In the first half of the 1980s, as the circle of countries entering into BITs grew to include more non-parties to the ICSID Convention, BITs started to appear with provisions on the settlement of investment disputes referring to other forms of arbitration, mainly arbitration under the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules.


[25] See Broches, Bilateral Investment Treaties, at 448-450. See also Planet Mining Pty v. Republic of Indonesia, Decision on Jurisdiction, ICSID Case No. ARB/12/14 and 12/40, para. 198 (Feb. 24, 2014) (“the Tribunal holds that . . . the Australia-Indonesia BIT contains no standing offer to arbitrate Planet’s claims before ICSID. Planet is therefore only entitled to resort to ICSID arbitration if Indonesia’s consent was given through a further act.”), available at http://www.italaw.com/sites/default/files/case-documents/italaw3104.pdf.

[26] See, e.g., UNCITRAL Arbitration Rules (2010), Article 23(1) (“The arbitral tribunal shall have the power to rule on its own jurisdiction . . .”)

[27] See Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked. . . if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . the [arbitration] agreement is not valid . . .”), available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.