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## Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked by A.A. Mezgravis and C. González

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# DENUNCIATION OF THE ICSID CONVENTION: TWO PROBLEMS, ONE SEEN AND ONE OVERLOOKED

*Andrés A. Mezgravis\* and Carolina González\*\**

## Summary

*1. Introduction. 2. Two problems: 2.1 The seen problem; 2.2 The overlooked problem. 3. Consequences of denouncing the ICSID Convention: 3.1 The risks of considering alternatives to ICSID arbitration; 3.2 Other practical implications. 4. Conclusions.*

## Abstract

*So far three States have denounced the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). Although the Convention itself regulates its denunciation, different theories with significant discrepancies have emerged regarding the interpretation on the effects of denunciation. All of these theories seem to focus in the formation of consent between States and investors, which is referred to as the “seen problem”. Nevertheless, there is another side of the coin which seems to have been overlooked thus far. Article 72 of the ICSID Convention not only governs the rights of the investors but also the obligations for States. There is an international obligation arising out of consent to ICSID jurisdiction when a State undertakes before another State to provide ICSID arbitration to the nationals of the latter within a Bilateral Investment Treaty (“BIT”) or a Free Trade Agreement (“FTA”). Such State-State obligations which arise out of consent to ICSID jurisdiction, and which are perfected before the Convention’s denunciation, remain valid and enforceable despite denunciation of the Convention. In addition, it could be a serious mistake to assert jurisdiction based on alternative arbitration forums (i.e. UNCITRAL, etc.) in the context of a treaty clearly for ICSID arbitration as the first forum. Depending on the wording of the treaty in question, bringing a claim under another forum in the context of a hierarchy of forums could lead to a risk since the arbitral tribunal could rule lack of jurisdiction.*

## 1. INTRODUCTION

Until a few years ago, the nature and scope of State *unilateral* consent and its eventual revocation seemed to be confined to academic discussions. However, on May 2007, Bolivia became the first State to denounce the ICSID Convention,<sup>1</sup> followed by Ecuador (2009),<sup>2</sup> and most recently, by Venezuela (2012).<sup>3</sup>

Article 72 of the ICSID Convention governs the effect of “consent” to ICSID jurisdiction given before receipt of the Convention’s denunciation by the depositary (World Bank).

Although by the time of writing this article,<sup>4</sup> no ICSID tribunal has yet decided on the interpretation and scope of article 72 of the ICSID Convention,<sup>5</sup> several scholarly articles have been published regarding its interpretation after Bolivia’s denunciation.

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<sup>1</sup> Notified to the World Bank, as depositary of the ICSID Convention on May 2, 2007 becoming effective 6 months after its receipt pursuant to article 71 of the ICSID Convention, that is, on November 3, 2007.

Available at:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=Spanish>

<sup>2</sup> Notified on July 6, 2009, becoming effective on January 7, 2010. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=Spanish>

<sup>3</sup> Notified on January 24, 2012, and will become effective on July 25, 2012. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>

<sup>4</sup> November 13, 2012.

<sup>5</sup> After Bolivia’s notice of denunciation (May 2, 2007) and before it became effective, in accordance with article 71 of the ICSID Convention (November 3, 2007), one case was registered by ICSID. In this regard, see *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia*. ICSID Case No ARB/07/28 which was registered on October 31, 2007 but later discontinued at the request of the claimant, available at: <http://icsid.worldbank.org/ICSID/FrontServlet>. After the denunciation became effective, another case was registered by ICSID, see *Pan American Energy LLC v. Plurinational State of Bolivia*. ICSID Case No ARB/10/8 which was registered on April 12, 2010 and which remains pending, available at: <http://icsid.worldbank.org/ICSID/FrontServlet>. As for Ecuador, only one case was registered by ICSID on December 30, 2009 after Ecuador’s notice of denunciation on July 6, 2009 but before its effectiveness on January 7, 2010. This case was discontinued by an agreement between

As a result, several differing interpretations have emerged focusing particularly on the formation of consent between States and investors referred herein as the “*seen problem*.” All of these interpretations revolve on whether or not they support the contractual nature of the offer to arbitrate made by States and contained in BITs, FTAs or domestic laws and whether or not they support the irrevocability of State consent to arbitrate in some instances.

Nevertheless, another problem seems to be *overlooked: the obligation* which arises out of consent to ICSID jurisdiction when one State undertakes before another State — within the framework of a BIT or FTA— to provide ICSID arbitration to the nationals of the latter. This binding State-State *obligation* already perfected between States before denunciation of the ICSID Convention is, in our view, covered by article 72.

Even though both problems will be treated separately, this article focuses in the “overlooked problem”.

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the parties; see *Corporación Quiport S.A. and others v. Republic of Ecuador*. ICSID Case No. ARB/09/23, available at: <http://icsid.worldbank.org/ICSID/FrontServlet>. As for Venezuela, two cases were registered after its notice of denunciation on January 24, 2012 but before its effectiveness; see *Saint-Gobain Performance Plastics Europe v. Bolivian (sic) Republic of Venezuela*. ICSID Case No. ARB/12/13 available at: <http://icsid.worldbank.org/ICSID/FrontServlet> and *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/18, available at: <http://icsid.worldbank.org/ICSID/FrontServlet>, whereas seven cases have been registered after July 25, 2012 when the denunciation became effective. In this regard, see *Rusoro Mining Ltd. V. Bolivarian Republic of Venezuela*. ICSID Case No. ARB(AF)/12/5 available at: <https://icsid.worldbank.org/ICSID/FrontServlet>; *Ternium S.A. and Consorcio Siderurgia Amazonia S.L v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/19, available at: <http://icsid.worldbank.org/ICSID/FrontServlet> ; *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/20, available at: <http://icsid.worldbank.org/ICSID/FrontServlet> and *Fábrica de Vidrios Los Andes, C.A and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/21, available at: <http://icsid.worldbank.org/ICSID/FrontServlet>; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/22, available at: <https://icsid.worldbank.org/ICSID/FrontServlet>; *Tenaris S.A. and Talta Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/23, available at: <https://icsid.worldbank.org/ICSID/FrontServlet> and *Transban Investment Corp. v. Bolivarian Republic of Venezuela*. ICSID Case No. ARB/12/24 available at: <https://icsid.worldbank.org/ICSID/FrontServlet>.

## 2. THE TWO PROBLEMS

Article 72 of the ICSID Convention provides that:

*“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.”* (Emphasis added).

### 2.1 THE SEEN PROBLEM: “...shall not affect the rights...”

The issues posed by the denunciation of the ICSID Convention, which have been the subject matter of debate among commentators, have focused mainly on the formation of consent between States and investors.<sup>6</sup>

Some of these theories support the *contractual nature* of the offer to arbitrate made by States and contained in BITs, FTAs or domestic laws, while others posit that consent to arbitrate is a *unilateral international obligation*. They can be divided into four different groups: (i) contractual approach but revocable offer;<sup>7</sup> (ii) firm offer;<sup>8</sup> (iii) international obligation derived from a unilateral act of the State,<sup>9</sup> and (iv) contractual approach but irrevocable offer, if it has created legitimate expectations.<sup>10</sup>

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<sup>6</sup> See MEZGRAVIS, Andrés. “The Standard of Interpretation Applicable to Consent and its Revocation in Investment Arbitration.” In: *TDM* 2 (2011), p. 31. The Spanish version can be found in *Revista Internacional de Arbitraje*. Legis, Número 13, Bogotá, julio-diciembre de 2010, pp.118-156. Also in *Revista Ecuatoriana de Arbitraje* (2011), pp. 371-405.

Available at: <http://www.mezgravis.com/publicaciones.php>

<sup>7</sup> SCHREUER, Christoph, *The ICSID Convention: A Commentary*, Cambridge University Press 2001, p. 219, para. 304. In spite of the criticism against this theory, Prof. Schreuer maintains his view in his newest Edition (2009) made with MALINTOPPI, Loretta; REINISCH, August and SINCLAIR, Anthony, pp. 1279 – 1282.

<sup>8</sup> GAILLARD, Emmanuel, *The Denunciation of the ICSID Convention*, N.Y.L.J., 26 June 2007, Vol. 237 N° 122.

<sup>9</sup> NOLAN, Michael and SOURGENS, F.G., “The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study”, In: *TDM*, Provisional Issue, September 2007.

<sup>10</sup> See MEZGRAVIS, The Standard of Interpretation Applicable to Consent..., *op. cit.*, pp. 11-12.

**(i) Contractual approach but revocable offer**

This theory, inspired in a clear-cut contractual perspective (*offer-acceptance*) and advanced by Professor Schreuer, does not confer much legal effect to the “offer” that has not yet been accepted.

In fact, when referring to the interpretation of the word “consent” in article 72 Professor Schreuer points out that, just like contracts are formed by an offer and a matching acceptance, the irrevocability of the offer of consent can only take place once such offer has been accepted and consent has therefore been “perfected.”<sup>11</sup>

Under this theory, article 72 refers to “perfected consent.” Therefore, it would only operate to preserve the rights and obligations of investors in respect of disputes in which both the host State and the investor have consented prior to receipt of the notice of denunciation by the depositary.<sup>12</sup>

Some have criticized this theory stating that using *contractual analogy* leads to the mistaken conclusion of identifying the term “consent” with the notion of “common consent” (consent by both parties to the dispute) or “arbitration agreement.” This identification results in a “false analogy”, because in the ICSID Convention the word “consent” is used to refer to “individual consent” as much as it is used to refer to “common consent.”<sup>13</sup>

**(ii) Firm offer**

Professor Gaillard, without directly rejecting Professor Schreuer’s contractual approach, warns about the particular meaning that should be given to the word “consent” in

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<sup>11</sup> See SCHREUER, MALINTOPPI, REINISCH and SINCLAIR. *The ICSID Convention... op. cit.*, p. 1280, par. 6. Also see SANDER, Barrie. “Venezuela’s denunciation of ICSID: the consequences.” In: *Global Arbitration Review*, February 14, 2012.

<sup>12</sup> Idem. The depositary of the ICSID Convention is the International Bank for Reconstruction and Development, also known as the World Bank.

<sup>13</sup> See GARIBALDI, Oscar. “On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy.” In: *TDM 1* (2009). Available at: [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

article 72. He contends that, regardless of denunciation of the Convention, the possibility of ICSID arbitration will depend on the wording used in “the arbitration clause” contained in the applicable BIT or FTA.<sup>14</sup>

Mantilla-Serrano, following Gaillard’s path, argues that article 72 refers to unilateral or individual consent and not “common consent.” He points out that the contractual notions of offer and acceptance alongside article 25 of the Convention should not come into play, because the binding force of the ICSID Convention after its denunciation is entirely governed by article 72 and not by article 25.<sup>15</sup>

**(iii) *International obligation derived from a unilateral act of the State***

Nolan and Sourgens, on the other hand, contend that State consent expressed in a BIT, FTA or domestic law cannot be considered as a mere offer to arbitrate, not even as firm offer, but rather, as an “independent international obligation.”<sup>16</sup>

Professor Hirsch, who had taken a similar view in the past, states that according to international law, also applicable to domestic legislations, the unilateral State consent to ICSID arbitration may be equivalent to an *irrevocable unilateral act* pursuant to international law and the doctrine of *estoppel*.<sup>17</sup>

This view is inspired on the general principle recognized by the International Law Commission stating that a unilateral declaration intended to produce legal effects to the State making the declaration cannot be revoked arbitrarily.<sup>18</sup> References made in *SPP v. Egypt*,<sup>19</sup> *Amco v. Indonesia*,<sup>20</sup> and the dissenting vote in *Siag & Vecchi v. Egypt*,<sup>21</sup> along

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<sup>14</sup> GAILLARD, The Denunciation of the ICSID Convention... *op. cit.*, *supra* note 8.

<sup>15</sup> See MANTILLA-SERRANO, Fernando. “La denuncia de la Convención de Washington, ¿Impide el recurso al CIADI? In: *Revista Peruana de Arbitraje*, N° 6, 2008, p. 214.

<sup>16</sup> NOLAN and SOURGENS, *The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention...* *op. cit.* *supra* note 9.

<sup>17</sup> See HIRSCH, Moshe. *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*. Martinus Nijhoff Publishers, 1993, pp. 53-54.

<sup>18</sup> Working Group Report of the International Law Commission, 58th Session (1 May to 9 June and 3 July to 11 August of 2006), par. 4.

<sup>19</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*. ICSID Case No. ARB/84/3.

<sup>20</sup> *Amco Asia Corporation and others v. Republic of Indonesia*. ICSID Case No. ARB/81/1.

with the International Court of Justice's decision in *Nuclear Test* all seem to support this theory.<sup>22</sup> While some support this theory, others have criticized it.<sup>23</sup>

**(iv) Contractual approach but irrevocable offer, if it has created legitimate expectations**

For our part, denying the contractual phenomenon that takes place in the formation of consent equates to denying one of the most common and characteristic features of arbitration. Disregarding these features is not only incorrect but can also produce unfair results. We have argued this theory in previously published articles.<sup>24</sup>

As pointed out by Professor Schreuer: "*Like any form of arbitration, investment arbitration is always based on an agreement.*"<sup>25</sup> Just like in commercial arbitration, an arbitration agreement may exist or be entered into without the existence of a previous contractual relationship between the parties.<sup>26</sup>

Nevertheless, article 25 should not come into play when determining whether or not the obligations arising out of consent to ICSID jurisdiction remain in force after its denunciation. In this regard, we agree with some commentators who argue that this matter

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<sup>21</sup> *Waguïh Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt*. ICSID Case No. ARB/05/15.

<sup>22</sup> *Case Concerning Nuclear Test (Australia v. France)*. Judgment of December 20, 1974, ICJ, Rep.1974.

<sup>23</sup> In favor TEJERA, Victorino. "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study." In: *Investment Treaty Arbitration and International Law*. Ian A. Laird and Todd J. Weiler as Editors, JurisNet, LLC, New York, 2009, p. 109- 118. Against this position, see SUÁREZ ANZORENA, Ignacio. "Consent to Arbitration in Foreign Investment Laws." *Investment Treaty Arbitration and International Law*. Ian A. Laird and Todd J. Weiler as Editors, JurisNet, LLC, New York, 2009, pp. 78-79. This author considers that the existence and the scope of consent to investment arbitration contained in a domestic investment law can only be determined in accordance with the framework under which it was issued, in other words, pursuant to domestic law and considers a "fallacy of presumption" to characterize a domestic law as a unilateral obligation governed by international law.

<sup>24</sup> See MEZGRAVIS, Andrés. "The Standard of Interpretation Applicable to Consent...", *op. cit.* The Spanish version can be found in *Revista Internacional de Arbitraje*. Legis, Número 13, Bogotá, julio-diciembre de 2010, pp.118-156. Also in *Revista Ecuatoriana de Arbitraje* (2011), pp. 371-405. Available at: <http://www.mezgravis.com/publicaciones.php>.

<sup>25</sup> SCHREUER, Christoph. "Consent to arbitration (updated 02/2007)". In: *TDM* 5 (2005), p.1. Available at: <http://www.transnational-dispute-management.com/article.asp?key=555>.

<sup>26</sup> Such is the case for commercial arbitrations arising out of, for example, tort cases to determine liability or damages. And that is the case for most investment arbitrations which arise to determine the potential international liability of a State.



is fully governed by article 72.<sup>27</sup> But this does not mean that the contractual approach should not come into play when determining the formation of consent between States and investors.<sup>28</sup>

With the exception of mandatory arbitrations on specific subject matters, every arbitration (whether commercial or investment) presupposes an arbitration agreement. Consequently, in investment arbitration, there is no reason to deny the recognition of the principle of *autonomy* and *independence* of the arbitration agreement, universally admitted in commercial arbitrations.<sup>29</sup> Despite the existing differences between commercial and investment arbitration, they both have the same starting point: an arbitration agreement.<sup>30</sup>

From our perspective, *strictu sensu*, a State's unilateral offer to arbitrate is part of a bilateral or multilateral negotiation process between States. Since the primary goal of that offer is to create an act not *unilateral* in nature, then it should be considered to be definitely closer to being an act of a *conventional* nature, because the fundamental purpose of that act transcends the unilateral framework in which it is created.<sup>31</sup>

In other words, the fundamental purpose of such State act transcends its simple unilateral character into a conventional one.<sup>32</sup>

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<sup>27</sup> MANTILLA SERRANO, Fernando. "La denuncia de la Convención de Washington...", *op cit.*, p. 214.

<sup>28</sup> Against this view, see MANTILLA SERRANO, Fernando. "La denuncia de la Convención de Washington...", *op cit.*, p. 214.

<sup>29</sup> YOUSSEF, Karim. *Consent in Context: Fulfilling the Promise of International Arbitration (Multiparty, Multi-Contract, and Non-Contract Arbitration)*, West Thomson, 2009, pp. 55-56 citing Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and German Law*, 1989, p. 96.

<sup>30</sup> MEZGRAVIS, Andrés. *The Standard of Interpretation Applicable to Consent...*, *op.cit.*, p. 13-14.

<sup>31</sup> *Idem*.

<sup>32</sup> In this sense, the International Law Commission Special Rapporteur refers to unilateral acts which can be placed within a conventional framework and thus excluded from the scope of the study, and mentions the following examples: (a) **acts linked to the law of treaties**; (b) acts related to the formation of custom; (c) acts which constitute the exercise of a power granted by a provision of a treaty or by a rule of customary law; (d) acts of domestic scope which do not have effects at the international level; (e) **acts which form part of a treaty-based relationship, such as offer and acceptance**; (f) **acts relating to the recognition of the compulsory jurisdiction of the International Court of Justice**, in accordance with Article 36 of its Statute; (g) acts which are of treaty origin but which are unilateral in form in relation to third States; and (h) acts performed in connection with proceedings before an international judicial body and acts which may enable a State to invoke estoppel

Under international contractual principles, the offer not yet accepted can be *irrevocable* in some cases. Aside from the obvious cases,<sup>33</sup> in our view, what makes an offer irrevocable are the legitimate expectations that offer has created.

The offer to arbitrate is irrevocable, even when there is no express provision ratifying it or a fixed term for its acceptance; provided the investor could reasonably assume that the offer was firm and has relied upon it when making his investments. As pointed out by Paulsson: “*The respect for the legitimate and pre-established expectations is an essential requisite [to keep] healthy international relations.*”<sup>34</sup>

The principle of “legitimate reliance” is modernly considered as one of the principles, not just of international law, but also of the regulatory activity of public entities which must act in good faith within a legally sound framework and comply with the legitimate expectations created in their citizens by their administrative or regulatory action.<sup>35</sup>

The good faith principle is not only the foundation of “*actos propios*” (“*venire contra factum proprium*”) and *estoppel*, but also of the universal rules of interpretation and integration of contracts providing for the irrevocability of the offer in the aforementioned cases.

In short, the revocation of a State’s unilateral consent is arbitrary and, thus ineffective, when that offer created legitimate expectations in the investors when making their investments.

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in a trial. (Emphasis added). United Nations A/CN.4/486, p.18 par. 96. Available at International Law Commission 55th session, Geneva, 20 April-12 June 1998 New York, 27 July-14 August 1998, A/CN.4/486, p. 18, par. 96 <http://untreaty.un.org/ilc/sessions/50/50docs.htm>. See BONDÍA GARCÍA, David. *Régimen jurídico de los actos unilaterales de los Estados*. J.M. Bosch Editor, Barcelona, 2005.

<sup>33</sup> When the offer expressly provides for its irrevocability for a certain period of time.

<sup>34</sup> PAULSSON, Jan. “El Poder de los Estados para hacer Promesas Significativas a los Extranjeros”, In *TDM* 1 (2009), p. 21. Available at: <http://www.transnational-dispute-management.com/article.asp?key=1301>

<sup>35</sup> In this regard, see GONZÁLEZ PÉREZ, Jesús. *El Principio General de la Buena Fe en el Derecho Administrativo*. Editorial Civitas, Segunda Edición, Madrid, 1989 and GARCÍA LUENGO, Javier. *El principio de protección de la confianza en el Derecho Administrativo*. Editorial Civitas, Madrid, 2002.

In fact, a State can hardly contend that a law, whose main purpose is to promote foreign investments by affording them with protection through an offer to international arbitration, could not create any legitimate expectations in foreign investors who actually made their investments before the revocation of such offer.

Therefore applying the rules of contractual interpretation to ICSID jurisdiction arbitration agreements would lead to different results; as opposed to applying principles concerning the interpretation of laws, or treaties, or even the rules of interpretation applicable to unilateral acts of States.

For instance, under the *contra proferentem* principle, universally accepted in contract law, the interpretation of an ambiguous term is construed against the party who has drafted the statement. In contrast, if the rules of interpretation of treaties, laws or unilateral acts were applied to the same ambiguous or obscure statement made by the State, very different results would occur.<sup>36</sup>

## **2.2 THE OVERLOOKED PROBLEM: “...shall not affect... obligations”**

As explained before, we agree with Professor Schreuer as to the contractual nature of the offers to arbitrate made by States but, in our view, such offers may be irrevocable in some instances, that is, when they have created legitimate expectations.

So far, all the attention has focused on the revocation of the *rights* deriving from investor consent and even *obligations* arising for States once the investor has consented or has made its investments with the legitimate expectation of having access to international arbitration. The entire focus has been limited to the *relationship between the host State and the investor*. Specifically, if the host State has perfected an obligation concerning the jurisdiction of ICSID to the investor who is the "direct beneficiary" of BIT or FTA.<sup>37</sup>

Nevertheless, article 72 not only refers to *rights* —of investors— or *obligations* directly perfected with the investors. Article 72 also refers to *obligations* concerning the jurisdiction of ICSID perfected between States before denunciation of the Convention.

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<sup>36</sup> See MEZGRAVIS, Andrés. The Standard of Interpretation Applicable to Consent..., *op. cit.*, pp. 6 and 22-23.

<sup>37</sup> MANTILLA SERRANO, Fernando. “La denuncia de la Convención de Washington..., *op. cit.*, p. 211.

Little attention has been given to these latter obligations which are not dependent on investor consent.

Precisely, the generality of BITs contain bilateral obligations (State-State) by which a State undertakes (before any potential denunciation of the ICSID Convention) to offer ICSID arbitration to nationals of another State Party of said BIT for as long as said treaty remains binding and enforceable. This obligation —consent to ICSID jurisdiction— is perfected with the ratification of the BIT by both States.

Having said that, the rights deriving to investors when accepting an offer to arbitrate as well as the bilateral obligations (State-State) should be analyzed as two sides of the same coin.

***(i) The first side of the coin:***

Based on Professor Schreuer's view regarding the contractual nature of offers to arbitrate made by States, some commentators assert that article 72 refers only to "perfected consent" (host State and investor) and constitutes an expression of article 25(1) which provides that once given, consent may not be withdrawn unilaterally.<sup>38</sup> In other words, under this view, article 72 only applies if investors consent before notice of denunciation takes place, and offers to arbitrate contained in BITs would expire unless the investor's acceptance occurs before the date of said notice.<sup>39</sup>

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<sup>38</sup> In this regard, see SCHREUER, MALINTOPPI, REINISCH and SINCLAIR, *The ICSID Convention... op. cit.* p. 1280, par. 2 and SCHREUER, Christoph. "Denunciation of the ICSID Convention and Consent to Arbitration". In: *The Backlash Against Investment Arbitration*. Ed. Michael Waibel, The Netherlands, 2010. Also in favor of this position FOURET, J. *Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: "Manufacturing Consent to ICSID Arbitration"?* 25 *Journal of International Arbitration* 71 (2008); CASTRO DE FIGUEIREDO, R. "Euro Telecom v Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration under BITS." In: *TDM*, March (2008) and ATAMAN-FIGANMEŞE, İnci. "Manufacturing Consent to Investment Treaty Arbitration By Means of the Notion of "Arbitration Without Privity."" In: *Annales XLIII*, N. 60, 2011.

<sup>39</sup> There is also an intermediary view which asserts that consent by the investor can also take place during the 6-month period provided for in article 71, that is, before the denunciation becomes effective. In this regard, see MANCIAUX, Sebastien. "Bolivia's Withdrawal from ICSID. In: *TDM*, September (2007). For a detailed analysis on the potential interpretations on Article 72 of the Convention which thus far have focused on the first side of the coin, as referred herein, see TIETJE, Christian, NOWROT, Karsten and WACKERNAGEL, Clemens. "Once and Forever? The Legal Effects of a Denunciation of ICSID". In: *TDM* (2009).

These commentators also state that some comments of the drafting history of the Convention support their view.<sup>40</sup> Particularly two interventions that read as follows:

“61. Mr. Gutierrez Cano said that...the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor **but only a general declaration** of the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?”

62. Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws **its unilateral statement** by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.”<sup>41</sup> (Emphasis added).

As can be noted, these interventions clearly refer to "general statements" and "unilateral acts" of States but not "obligations." It is worth highlighting that neither general statements nor unilateral acts can be equated to perfected obligations.

As previously indicated, some unilateral acts can lead to international obligations, but not every international obligation derives from a unilateral act. Far from being a unilateral act, obligations contained in BITs, in particular those whereby a State undertakes to offer arbitration to the nationals of another State, are perfected bilateral obligations which cannot be broken by either State. As Mr. Broches points out, the provision under discussion (current article 72) only drew the necessary consequences in case of denunciation of the Convention: “the denouncing State could not incur any new obligation but the **existing obligations** would remain in force.”<sup>42</sup> (Emphasis added).

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<sup>40</sup> See SCHREUER, MALINTOPPI, REINISCH and SINCLAIR, *The ICSID Convention... op. cit.* p. 1279.

<sup>41</sup> SCHREUER, *Denunciation of the ICSID Convention and Consent to Arbitration... op. cit.*, p. 365.

<sup>42</sup> Convention on the Settlement of Investments Disputes between States and Nationals of Other States. Documents Concerning the Origin and the Formulation of the Convention. Volume II, Part 2, p. 1011, para. 70.

Moreover, Professor Schreuer acknowledges that it could be argued that:

“(…) the phrase “*given by one of them*” indicates that article 72 covers a unilateral expression of consent by the host State before its acceptance by the investor. This would mean that the mere expression of consent by the host State remains unaffected by a notice under Art. 70 or 71.

Under this interpretation the investor would retain the right to accept the host State’s offer of consent, as long as the offer continues to exist, even after a notice under Art. 70 or 71. The expiry of the six-month period in Art. 71 would not affect this right. Art. 72 designates the date of the notice as the only relevant date. The investor’s right to accept the offer of consent would remain until the State withdraws the offer. **In order to escape the effect of Art. 72, the State would have to revoke its consent separately.** In the case of an offer of consent contained in domestic legislation, the legislation would have to be repealed or amended. **In the case of an offer of consent contained in a treaty, its withdrawal** would be considerably more difficult and **would have to conform to the law of treaties.**”<sup>43</sup>(Emphasis added).

However, Professor Schreuer rejects the above interpretation because, in his opinion, the phrase "*given by one of them*" relates to the denouncing State, its constituent subdivisions or agencies and its nationals and not to the *relationship between* the host State and the investor.<sup>44</sup>

As previously stated, if the analysis is limited to the relationship between the host State and the investor, then only one side of the coin would be seen.

***(ii) The other side of the coin:***

In light of the foregoing, if denunciation of the ICSID Convention becomes effective after perfection of the above State-State obligation, then, in accordance with the provisions of article 72, said denunciation should not affect such State-State obligation, which was perfected before denunciation took place. Consequently, the mere analysis from the perspective of the revocation or the rights of investors (host State-investor relationship) seems to overlook the other side of the coin: the *obligation* arising out of consent to ICSID jurisdiction when a State undertakes before another State to provide ICSID arbitration to the nationals of the latter within a BIT or FTA.

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<sup>43</sup> SCHREUER, MALINTOPPI, REINISCH and SINCLAIR, *The ICSID Convention... op. cit.* p. 1281, para. 8-9.

<sup>44</sup> Id. at para. 10.

As some commentators have pointed out, plain reading of article 72 leads to the conclusion that the consent referred to in said article does not require investor's acceptance to achieve the status of "consent."<sup>45</sup>

The drafting history of the Convention does not contradict this view. On the contrary, said drafting history confirms the above approach. In fact, the drafters considered the possibility that, despite its withdrawal from the Convention, a State could still remain bound to submit its potential disputes with investors to ICSID. In this regard, Mr. Broches replied that the intention of the text submitted to the Directors was to make it clear that if a State had consented to arbitration, the subsequent denunciation of the Convention by that State would not relieve it from its *obligation* to go to arbitration if a dispute arose.<sup>46</sup>

From our perspective, a bilateral international *obligation* that arises out of consent to ICSID jurisdiction when one State undertakes before another State to provide ICSID arbitration to the nationals of the latter, cannot be confused with mere "general statements" or "unilateral acts of States."

If the BIT or FTA were ratified before the denunciation of the ICSID Convention, such State-to-State bilateral obligations perfected between the States party to the BIT or FTA in question remain enforceable in accordance with article 72 of the ICSID Convention.

It is important to clarify that interpreting the denunciation of the ICSID Convention and interpreting the revocation of an offer to arbitrate contained in a BIT, FTA or domestic law are two distinct matters.

The ICSID Convention *per se* does not afford investors with any right to ICSID jurisdiction nor do Contracting States undertake any duty to offer international arbitration to investors when becoming an ICSID Member State.<sup>47</sup>

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<sup>45</sup> MANTILLA SERRANO, Fernando. "La denuncia de la Convención de Washington...", *op cit.*, p. 209

<sup>46</sup> Id. at p. 1009, para. 54.

<sup>47</sup> Although consent of the parties is an essential requirement for ICSID jurisdiction, consent alone is not enough. Jurisdiction of the Centre is further limited by reference to other requisites such as "*ratione materiae*", "*ratione personae*," and even "*ratione temporis*". See Article 25 of the ICSID Convention and also MEZGRAVIS, Andrés. "Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI."

It is the Contracting State —on its own— which later affords investors such possibility through the “immediate and direct” or “progressive and indirect” formation of the arbitration agreement.<sup>48</sup> In this regard, it is feasible that the “meeting of the minds” — between the host State and the investor to create the arbitration agreement— could not be perfected by the effective date of denunciation of the ICSID Convention.

However, the still non created arbitration agreement cannot affect the effectiveness and enforceability of already perfected State-State obligations arising out of consent to ICSID jurisdiction prior to the Convention’s denunciation. In other words, consent to ICSID jurisdiction contained in a BIT or FTA is *first* a State-State bilateral obligation which becomes binding and enforceable once the BIT or FTA enters into force, and *then* is an arbitration offer from one State to the nationals of the other State.<sup>49</sup>

Therefore, this State-to-State obligation perfected between them prior to denouncing the ICSID Convention is covered by article 72. Moreover, fundamental principles of both domestic law systems and international law support this view. For example, *pacta sunt servanda* clearly provides that obligations between States and, in general, must be kept and performed in *good faith*, that is, taking into account the consequences of the parties’ commitments.<sup>50</sup>

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In: *Academia de Ciencias Políticas y Sociales*. Serie Eventos 18, Caracas, 2005, pp. 374- 396. Available at: <http://www.mezgravis.com/publicaciones.php>.

<sup>48</sup> By “immediate and direct” we refer to an investment contract, whereas by “progressive and indirect” we are referring to the offer to arbitrate made by a State and contained in either a BIT, FTA or a domestic law and which is later accepted by the investor.

<sup>49</sup> Since it is a State-State obligation which is perfected between States, then it may appear, as some commentators point out, that only the non-denouncing State party to the BIT would be entitled to enforce the obligation of providing a neutral forum to resolve disputes such as arbitration by resorting to State-to-State arbitration provided in most BITs. In this regard, see GAILLARD, *The Denunciation of the ICSID Convention... op. cit.*, p. 3, who states that the solution would be to use the most-favored nation clause contained in most BITs, but such procedural use of MFN clauses is still highly debatable among tribunals. From our perspective, the investor as the direct beneficiary of such arbitration offer may also accept such offer and then enforce it directly without the assistance of its home State.

<sup>50</sup> Article 26 of the Vienna Convention provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” See, generally, BROWNLIE, Ian. *Principles of Public International Law*. Oxford University Press, Seventh Edition, 2008 and WEHBERG, Hans. “Pacta sunt Servanda”. In: *The American Journal of International Law*, Vol. 53, No 4, 1959, pp. 775-786.



For all these reasons, the ICSID Convention's mere denunciation cannot be regarded as an automatic revocation of the denouncing State's already perfected obligations arising out of consent to ICSID jurisdiction. It is true that article 71 affords Contracting States with the legitimate right to denounce the Convention. But it is also true that the consequences of such denunciation cannot affect the enforceability of independent and autonomous State-State obligations arising out of consent to ICSID jurisdiction perfected before the Convention's denunciation.

Under this interpretation it is also admitted that article 72 constitutes a limited exception to the nationality requirements of Article 25(1) for the Centre's jurisdiction. Under the latter provision, a dispute must arise between a Contracting State and a national of another Contracting State; thus, if consent was given before the notice of denunciation, a former Contracting State or a national of a former Contracting State may be a party to a dispute.<sup>51</sup>

### **3. CONSEQUENCES OF DENOUNCING THE ICSID CONVENTION**

Becoming a Contracting State of the ICSID Convention definitely entails a series of rights and obligations.

Article 71 provides that denunciation becomes effective 6 months after receipt of the notice of denunciation.<sup>52</sup> Therefore, once denunciation becomes effective, the denouncing State ceases to be a Contracting State and loses the rights and obligations derived from membership status such as: (i) not being bound to recognize or enforce ICSID arbitration awards rendered against other Contracting States;<sup>53</sup> and (ii) no right to make

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<sup>51</sup> SCHREUER, MALINTOPPI, REINISCH and SINCLAIR. *The ICSID Convention...* op. cit. p.1280, para.3.

<sup>52</sup> Article 71: "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice."

<sup>53</sup> Article 54(1): "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State..."

appointments to ICSID panels<sup>54</sup> or hold representation in the ICSID Administrative Council.<sup>55</sup>

Nevertheless, the non-Contracting State will still be bound by the obligations arising out of consent to ICSID jurisdiction, provided such obligations were perfected before denunciation.

### 3.1 THE RISKS OF CONSIDERING ALTERNATIVES TO ICSID ARBITRATION

Within their dispute resolution clauses, most BITs and FTAs establish different arbitration forums like ICSID, ICSID Additional Facility, *ad hoc* arbitration under the Rules of Arbitration of the United Nations Commission on International Trade Law (“UNCITRAL”) and the Arbitration Institute of the Stockholm Chamber of Commerce, just to name the most popular examples.<sup>56</sup>

Some treaties provide for different arbitration forums as “alternatives” within the investor’s discretion,<sup>57</sup> whereas others provide for a hierarchy of forums whereby some have priority over others, that is, the investor must *first* exhaust a particular forum to submit its disputes and can only make use of the remaining forums in the event of unavailability of

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<sup>54</sup> Article 13(1): “Each Contracting State may designate to each Panel four persons who may but need not be its nationals.”

<sup>55</sup> This means that, after the effective date of denunciation, the now called non-Contracting States have no participation in the election of the ICSID Secretary General, the adoption of ICSID rules and regulations or the approval of ICSID’s budget and annual report, among other things. In this regard, see articles 4, 5, 6, 7 and 8 of the ICSID Convention. In this connection, see ESCOBAR, Alejandro. “Bolivia Exposes Critical Date Ambiguity”. In: *Global Arbitration Review*, Volume 2, Issue 3 June/July 2007.

<sup>56</sup> See, among other examples, article 11 of the BIT between Bolivia and Spain providing for *ad hoc* UNCITRAL arbitration or ICSID arbitration in the investor’s discretion and article 8 of the BIT between Venezuela and Barbados providing for ICSID arbitration as the first venue, ICSID Additional Facility if Venezuela has not yet become an ICSID Contracting State, and finally, *ad hoc* UNCITRAL arbitration if neither ICSID or ICSID Additional Facility are available.

<sup>57</sup> See for example, article 11 of the BIT between Bolivia and Spain and article 9.2 of the BIT between Venezuela and Russia, although article 9.3 appears to suggest the need for the Russian investor to negotiate the arbitral forum with Venezuela (*i.e.* *ad hoc* UNCITRAL arbitration or Stockholm Chamber of Commerce arbitration) for at least 3 months following the notice of dispute.

the first forum. The latter example is the case for the majority of BITs ratified by Venezuela.<sup>58</sup>

For example, article 8 of the Venezuela-Barbados BIT reads:

“1. Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the him (sic) shall, ***at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation...***

***2. As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).”*** (Emphasis added).

A plain reading of the above provision clearly shows that ICSID arbitration is the *first* forum where investors would have to file their claims, because Venezuela already became a Contracting State of the ICSID Convention. In this regard, it is worth clarifying that by the time of signature of this BIT, Venezuela had not yet become a Contracting State of said Convention.<sup>59</sup>

In this example, it seems incorrect to assert that ICSID Additional Facility or UNCITRAL would be applicable in spite of the clear intention by Barbados and Venezuela to provide for ICSID arbitration as the *first* forum. Two reasons stand out.

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<sup>58</sup> Out of the 25 ratified BITs (including the BIT with the Netherlands which was terminated effective as of November 1, 2008), the majority, that is, 16, contain dispute resolution clauses providing for a hierarchy of arbitral forums (*i.e first* ICSID, *second* ICSID Additional Facility and *third* UNCITRAL *ad hoc* arbitration) while only 3 BITs can be regarded as alternative within the investor’s discretion (*i.e* BITs with Iran, Argentina and Russia, although the latter appears to require some level of cooperation from the host State). On the contrary, in Ecuador’s and Bolivia’s case, most BITs provide for alternative arbitration forums in the investor’s discretion.

<sup>59</sup> This BIT was signed on July 15, 1994. By that time, Venezuela had signed the ICSID Convention but had still not deposited its instrument of ratification. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>

Firstly, the BIT's Contracting Parties' intention, as evidenced by the above wording, was not to provide alternatives in the investor's discretion, but instead, a hierarchy of arbitration forums where one has priority over others.

Secondly, asserting that ICSID Additional Facility or UNCITRAL are available, despite the clear intention of the BIT's Contracting Parties to provide for ICSID arbitration as the *first* forum is not supported by any principle.

The Vienna Convention provides that a treaty must be interpreted in good faith, taking into account the ordinary meaning of the words chosen by the drafters, within the context of the treaty as a whole in light of its object and purpose.<sup>60</sup> Applying these principles to the above example leads to the conclusion that the above BIT provides for a hierarchy as opposed to mere alternatives. This has been recognized by international tribunals.

For instance, in *Nova Scotia v. Venezuela*, the claimant filed its request for arbitration under UNCITRAL *ad hoc* arbitration alleging the unavailability of ICSID Additional Facility given that, under claimant's view, said rules require: (i) cooperation from respondent in filing a joint petition for approval by the ICSID Secretary General and (ii) an agreement between the parties as to the existence of an investment.<sup>61</sup> The Tribunal rejected this view and decided that it lacked jurisdiction:

**“the drafting adopted in the BIT Canada-Venezuela shows that Canada and Venezuela decided to adopt a different approach in this Treaty, in particular, one that establishes a hierarchy of options, depending on each option's availability. ICSID or the Additional Facility are adopted as the main dispute resolution mechanisms, and the Treaty only authorizes access to UNCITRAL if ICSID or the Additional**

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<sup>60</sup> Article 31(1): A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>61</sup> *Nova Scotia Power Incorporated (Canada) v. the Bolivarian Republic of Venezuela*. UNCITRAL. Award on Jurisdiction (published version available only in Spanish), April 22, 2012, pars. 44-50 and 61-75. Available at: <http://www.italaw.com/documents/LaudoNovaScotiaPowerv.Venezuela JURISDICTION.pdf>. This case was based on the BIT between Venezuela and Canada which also provides a hierarchy of options in article XII(4): *first*, ICSID, provided both Contracting States are members of the ICSID Convention, which is not the case for Canada, which has signed but not yet ratified the Convention; *second*, ICSID Additional Facility, if either Contracting State (but not both) is a member of the said Convention, and *third*, UNCITRAL *ad hoc* arbitration, if neither ICSID or the Additional Facility are available.

Facility are not available. **In the BIT Canada-Venezuela, the investor does not have a right to initiate a procedure under UNCITRAL Arbitration Rules if arbitration under ICSID or the Rules of the Additional Facility is available. In such circumstances, the investor must initiate the applicable ICSID procedure.**<sup>62</sup> (Emphasis added).

Moreover, as to the meaning of “*available*”, the claimant argued that it means “present or ready for its immediate use” or “something with a solid perspective of success,” using expert testimony by Professor Rudolph Dolzer, who concluded that the Additional Facility cannot be regarded as available when there is a “reasonable doubt” as to whether the parties will be able to use it.<sup>63</sup>

The Tribunal rejected the claimant’s arguments and clarified that “available” is related to the possibility of exercising a right to initiate arbitration either under ICSID Rules or the Additional Facility Rules:

“(…)the Tribunal proceeds on the ground that for purposes of article XII(4) of the Treaty, arbitration under the Additional Facility shall not be “available” if there is a reasonable perspective that the Secretary General would approve the arbitration agreement and would then register the request for arbitration, and would do it without delay.”<sup>64</sup>

As can be noted, it is incorrect to state that the ICSID Convention’s denunciation makes this forum unavailable and, as such, other alternative forums automatically apply.<sup>65</sup>

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<sup>62</sup> Id. at par. 95. Free translation from the original in Spanish which reads: “(…) **la redacción adoptada en el TBI Canadá-Venezuela muestra que Canadá y Venezuela decidieron adoptar un enfoque diferente en el caso de este Tratado, en concreto, uno que establece una jerarquía de opciones, dependiendo de cuál está disponible.** CIADI o el Reglamento del Mecanismo Complementario son adoptadas como los principales mecanismos de resolución de controversias, y el Tratado sólo autoriza el acceso a CNUDMI si CIADI o el Reglamento del Mecanismo Complementario no están disponibles. **En el TBI Canadá-Venezuela, el inversor no tiene derecho a iniciar un procedimiento bajo el Reglamento de Arbitraje CNUDMI si el arbitraje bajo CIADI o el Reglamento del Mecanismo Complementario está disponible. En tales circunstancias, el inversor debe iniciar el procedimiento CIADI aplicable.**

<sup>63</sup> Id. at par. 48-49.

<sup>64</sup> Id. at par. 102. Free translation from original in Spanish which reads: “...el Tribunal procede sobre la base de que para el propósito del artículo XII(4) del Tratado, el arbitraje bajo el Reglamento del Mecanismo Complementario no estará “disponible” si no hay una perspectiva razonable de que la Secretaría General aprobaría el acuerdo de arbitraje y luego registraría la solicitud de arbitraje, y lo haría sin demora” .

<sup>65</sup> See, among others, article 7.2 of the BIT between Venezuela and Sweden providing *for ad hoc* UNCITRAL arbitration only if ICSID arbitration (*first venue*) is not “available for any reason.”

Of course, the wording of the relevant BIT would need to be closely examined in order to assess the Contracting Parties' intention.

For instance, the Venezuela-Costa Rica BIT provides as dispute resolution forums either domestic courts or international arbitration in the investor's discretion. If the investor chooses international arbitration, article 11.2 reads:

“2. If the dispute cannot be settled within six months...the investor may submit the dispute to the competent courts of the Contracting Party,···[ ] or an arbitration proceeding in accordance with the following provisions:

a. International Centre for Settlement of Investment Disputes (ICSID)...[ ];

b. ***in the event that a Contracting Party ceases to be an ICSID Contracting State***, the dispute shall be resolved pursuant to the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding by the ICSID Secretariat;

c. an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), ***if both parties cease to be ICSID Contracting Parties***. (Emphasis added).

It is self-evident that the Contracting Parties' intention in this BIT was also to provide a hierarchy of options should the investor choose international arbitration:

(i) *first*, ICSID when both Costa Rica and Venezuela become a party to the ICSID Convention;

(ii) *second*, ICSID Additional Facility, if either Costa Rica or Venezuela ceases to be an ICSID Contracting State;<sup>66</sup> and

(iii) *third*, UNCITRAL *ad hoc* arbitration, if both Costa Rica and Venezuela cease to be ICSID Contracting States, which is not the case for Costa Rica.

In light of the above, an investor who brings his claim under a different arbitration forum runs the risk of having the arbitral tribunal rule lack of jurisdiction in the context of BITs providing for a hierarchy of forums.

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<sup>66</sup> Pursuant to article 71 of the ICSID Convention, Venezuela ceased to be a party to the ICSID Convention on July 25, 2012.

### 3.2 OTHER PRACTICAL IMPLICATIONS

The State-State obligations arising out of consent to ICSID jurisdiction providing for ICSID arbitration and contained in BITs ratified by Bolivia, Ecuador and Venezuela with other States, and even with each other, are still enforceable by investors despite these countries' denunciations of the ICSID Convention.<sup>67</sup>

It is worth mentioning that the BITs entered into by Chile with Bolivia, Ecuador and Venezuela,<sup>68</sup> respectively, all provide as dispute resolution forums either domestic courts of the host State or ICSID arbitration at the investor's discretion. If the above interpretation does not prevail, then Chilean investors would be prevented from bringing their claims under arbitration and forced to submit their claims to Bolivian, Ecuadorian or Venezuelan courts, respectively.

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<sup>67</sup> See article 9(3) of the BIT between Ecuador and Venezuela, which provides for ICSID arbitration as the *first* venue. Therefore, the obligation arising out of consent to ICSID jurisdiction between Ecuador and Venezuela to provide for ICSID arbitration to their respective nationals was perfected between the said States when the BIT entered into force (February 1, 1995), that is to say, before Ecuador's and Venezuela's denunciation of the ICSID Convention. Therefore, it is covered by article 72 of the ICSID Convention. It is important to note that in 2009 the Ecuadorian President requested the National Assembly the denunciation of 13 BITs entered into by Ecuador with Germany, United Kingdom and Northern Ireland, Finland, China, Switzerland, Chile, Venezuela, Sweden, USA, Canada, the Netherlands, Argentina and France under the argument that the ICSID arbitration clauses were incompatible with the recently approved Constitution. Such request was later returned since it required the previous and binding ruling of the Constitutional Court which later ruled the unconstitutionality of the BITs with Germany, UK and Northern Ireland, and later China, Finland, Switzerland, Chile, France, Canada, Sweden, the Netherlands, USA and Venezuela. They were later returned to the National Assembly which we understand approved the termination of the BITs with Germany, UK and Northern Ireland, China, Finland and Switzerland. In this regard, see [http://www.aebe.com.ec/data/files/noticias/Noticias2010/Denuncias\\_Tratados\\_Protecci%C3%B3n\\_Inversiones.pdf](http://www.aebe.com.ec/data/files/noticias/Noticias2010/Denuncias_Tratados_Protecci%C3%B3n_Inversiones.pdf). To the best of our knowledge, the BIT between Ecuador and Venezuela has not yet been terminated by Ecuador. See <http://www.burodeanalisys.com/2011/06/06/denuncia-de-tratados-bilaterales-tambien-preocupa-a-la-ue/>. In any event, it is important to notice that the majority of all of these BITs, including the BIT between Ecuador and Venezuela, contain a survival clause of 10 years for investments made before termination.

<sup>68</sup> See article X.2.a and b of the BIT between Bolivia and Chile; article X.2 and 3 of the BIT between Ecuador and Chile, and article 8.2 of the BIT between Venezuela and Chile. We understand the BIT between Ecuador and Chile has not yet been terminated by Ecuador's National Assembly. In any event, article XI (2) of this BIT contains a 10-year survival clause protecting Chilean investments made before termination.

Such a result would not only be absurd but would also violate the legitimate expectations of Chilean investors who invested in these countries with the firm belief that future disputes would be submitted to a neutral forum such as international arbitration.<sup>69</sup>

The same thing can be said with respect to French and Peruvian investors. The Venezuela-France and Ecuador-Peru BITs also provide for ICSID arbitration or domestic courts as the only valid forums for resolving disputes.<sup>70</sup>

An even more absurd result would be produced in BITs providing for ICSID arbitration as the “only” valid forum for resolving investment disputes. This appears to be the case with the Venezuela-Germany BIT.<sup>71</sup> An alternative interpretation proposes the use of the Most Favored Nation Clause (MFN) present in other BITs as a mean to avoid such an unjust result.<sup>72</sup> However, the procedural use of MFN clauses is still a highly debatable issue among tribunals.<sup>73</sup>

It is also worth adding that the vast majority of BITs contain survival clauses of 10 to 15 years in benefit of the investments made before their termination or denunciation. Such an extension in their validity also includes ICSID arbitration.<sup>74</sup>

Consequently, any revocation of an offer to arbitrate which already created legitimate expectations in foreign investors must be considered arbitrary and invalid.<sup>75</sup> This

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<sup>69</sup> In this regard, see SORNARAJAH, M. *The International Law on Foreign Investment*. Cambridge University Press. Third Edition, p. 250 who states: “Arbitration, in a neutral State before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice to him [foreign investor]. Where an international treaty backs him up by creating an obligation on the host state to submit to any arbitral proceedings brought against it by the foreign investor, a major step could be said to have been taken towards investment protection.”

<sup>70</sup> See article 8.2 of the BIT between Venezuela and France, and article 8.2 of the BIT between Ecuador and Peru.

<sup>71</sup> See article 10.2 of the BIT between Venezuela and Germany.

<sup>72</sup> GAILLARD, *The Denunciation of the ICSID Convention...* *op. cit.*, p. 3.

<sup>73</sup> ALSCHNER, Wolfgang; BERDAJS, Ana and LANOVOY, Vladyslav. *Legal basis and effect of denunciation under international investment agreements*. Graduate Institute of International and Development Studies, Geneva, 2010, pp. 38-39 and note 62.

<sup>74</sup> See, for example, article 14.3 of the BIT between Venezuela and Netherlands providing for a survival clause of 15 years in respect of investments made before the date of termination, which in the case of Venezuela occurred on April 30, 2008.

<sup>75</sup> In this regard, see MEZGRAVIS, Andrés. *The Standard of Interpretation Applicable to Consent...* *op. cit.*, pp. 33-35 who states: “For this reason, it is submitted that the purported revocation of the offer to



means that future investors in Bolivia, Ecuador and Venezuela seem to be the ones really affected by the Convention's denunciation since no legitimate expectations have been created in them.

Having said that, only future BITs or FTAs entered into by Bolivia, Ecuador and Venezuela with other States will be affected by the ICSID Convention's denunciation.

#### 4. CONCLUSIONS

1. As a result of the denunciations by Bolivia, Ecuador and Venezuela, several theories with significant discrepancies have emerged regarding the interpretation on the effects of the ICSID Convention's denunciation. They focus mainly on the formation of consent between States and investors (first side of the coin).
2. However, there is another side of the coin which seems to have been *overlooked* so far: *the obligation* which arises out of consent to ICSID jurisdiction when one State undertakes before another State, within a BIT or FTA, to provide ICSID arbitration to the nationals of the latter State.
3. Article 72 of the ICSID Convention not only governs the rights of investors but also the *obligations* for States born under the Convention and prior to its denunciation.
4. Consent to ICSID jurisdiction contained in a BIT or FTA is *first* a State-State bilateral obligation which becomes binding and enforceable once the treaty enters into force, and *then* is an arbitration offer from one State to the nationals of the other State.

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arbitrate contained in article 22 of the Venezuelan Investment Law through the mentioned decision N°1541 of the Supreme Tribunal of Justice [ruling that article 22 does not contain a standing offer to ICSID arbitration] is clearly arbitrary and ineffective for those investors who made their investments in Venezuela before the publication of that decision. For investments made *after* the publication of the decision the matter is more complicated and debatable. There are two important reasons in support of the *ineffectiveness of the revocation* in such scenario: i) article 22 has not been repealed, and ii) the interpretation made by the Venezuelan Supreme Tribunal of Justice is not binding on ICSID Tribunals; in fact, the decision itself recognizes it.”

5. If such State-State bilateral obligations contained in BITs or FTAs were perfected between the States before denunciation of the Convention by one of them, then such *obligations* which arise out of consent to ICSID jurisdiction are covered by article 72.
6. In the context of BITs or FTAs ratified before the Convention's denunciation and providing for ICSID arbitration as the *first* forum, it is mistaken and not supported by any principle of international law to assert the availability of different arbitration forums as a result of the ICSID Convention's denunciation. If a different forum is asserted, the investor runs the risk of having the tribunal rule lack of jurisdiction.
7. Potential denunciation of BITs providing for ICSID arbitration will not prevent the registration before ICSID of requests for arbitrations against Bolivia, Ecuador and Venezuela in the next 10 to 15 years, to say the least, given the existence of survival clauses contained in most of these treaties.
8. Future BITs entered into by Bolivia, Ecuador and Venezuela will be affected by the Convention's denunciation, which also means that future investors in these countries seem to be the ones really affected by it.
9. Far from saying goodbye to ICSID arbitrations through denunciation, it appears that ICSID will be around and is here to stay for quite a while.