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The Standard of Interpretation Applicable to Consent and its Revocation in Investment Arbitration

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THE STANDARD OF INTERPRETATION APPLICABLE TO CONSENT AND ITS REVOCATION IN INVESTMENT ARBITRATION

Andrés A. Mezgravis

Summary

Abstract

Neither scholars nor the ICSID tribunals have been uniform regarding the standard of interpretation applicable to consent in investment arbitration. The different types of manifestation of State consent have caused a certain degree of confusion regarding the applicable standards of interpretation. Some ICSID tribunals have determined the rules of interpretation based on the nature of the public or private instruments containing them (i.e. a treaty, a domestic law, arbitration clause). This article is a modest attempt to question the cutting apart of the arbitration agreement by applying different sets of rules of interpretation for each one of those consents, as if they were not a part of the same context. Instead, this article focuses on the fact that, just like in commercial arbitrations, in investment arbitrations, the arbitration agreement also constitutes a "contract" which is autonomous and independent from the instrument containing it. When the dispute is already registered before ICSID, it can be assumed that the investor has accepted the offer to arbitrate and, at least prima facie, one is dealing no longer

with a unilateral offer, but an arbitration agreement containing both consents. The application of the international rules or principles of interpretation of contracts as a standard of interpretation applicable to consent in investment arbitrations has paramount consequences. Applying the contra proferentem principle to ambiguous State manifestations could result in very different conclusions than if the principles of interpretation of laws, treaties or the rules of interpretation applicable on unilateral acts were applied. Also, it seems incorrect to assert generally that an offer to arbitrate is only irrevocable when accepted. It also seems incorrect to generally assert that an offer to arbitrate made by the State is always an irrevocable international obligation regardless of whether it has been accepted by the investor. Just as in contract law, what makes the unilateral consent of the State to ICSID arbitration revocable or irrevocable is the legitimate expectations created in the investors by the terms of the offer itself.

1. INTRODUCTION

It is well known, and clearly established in the Preamble of the ICSID Convention,[1] that mere ratification, acceptance or approval of the Convention does not constitute an obligation for the Contracting States to submit a particular dispute to conciliation or arbitration. The Contracting State's consent to ICSID arbitration is not automatic, but rather it is dependent upon a subsequent written expression of consent or will.[2]

The Executive Directors' Report on the ICSID Convention states that the written consent of the parties does not need to be expressed in a single

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[1] Also known as the "Washington Convention". It entered in force on October 14, 1966 with the ratification of 20 States. By January 7, 2010, 144 States have ratified the Convention.

[2] Although the 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 ICSID Convention, Article 25. See also MEZGRAVIS, Andrés, "*Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI*", Academia de Ciencias Políticas y Sociales, Serie Eventos 18, Caracas, 2005, pp. 374- 396.

instrument.[3] Furthermore, the Report also makes clear that a host State may offer its consent to submit investment-related disputes to the jurisdiction of the Centre in its investment promotion legislation, and the investor may give his consent by accepting the offer to arbitrate.[4]

From the 1990's onwards and with the proliferation of more than 2,600 Bilateral Investment Treaties ("BITs"),[5] the *standing offer to arbitrate* contained in these treaties has become the most common way for States to express their consent to investment arbitration.[6]

Until a few years ago, the nature and scope of a State's *unilateral* consent and its eventual revocation seemed to be confined to academic discussions. However, on May 2007, Bolivia became the first State in the history of the ICSID Convention to denounce the Convention,[7] followed by Ecuador two years later.[8]

Following Bolivia's denunciation, several scholarly articles were published regarding the interpretation of Article 72 of the Convention, which governs the effect of the "consent" to ICSID jurisdiction that has been given before the

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[3] Available at http://www.worldbank.org/icsid/basicdoc-spa/partB-section05.htm#02 (para. 24).
[4] *Idem.*
[5] In this respect, see http://www.investmenttreatynews.org/.
[6] PAULSSON, Jan. *"Arbitration without Privity."* ICSID Review, Vol. 10, Number 2, Fall 1995.
[7] During the same period of time, the Presidents of Venezuela and Nicaragua, as members of the ALBA (Bolivarian Alternative of the Americas), following Bolivia's President call, also threatened to withdraw from ICSID. Nonetheless, Venezuela only opted to notify on April 30, 2008 the termination of its BIT with the Kingdom of the Netherlands, which became effective on November 1, 2008. Pursuant to Article 14 (3) of this BIT, its duration was extended for 15 years for investments made before the date of termination. It should also be noted that Venezuela has ratified more than 20 BITs that provide for ICSID arbitration as a dispute settlement mechanism; some of them were ratified by President Chávez himself. In the recent BIT with Russia, the selected arbitration rules were either UNCITRAL rules or the Institute of Arbitration of the Stockholm Chamber of Commerce rules. See Official Gazette N° 39.191 of June 2, 2009. Likewise, see MEZGRAVIS, Andrés. "*Expropiaciones, Nacionalizaciones y el Derecho Internacional."* In Ámbito Jurídico, July 2009, p. 12.
[8] Ecuador notified its denunciation on July 6, 2009, which, pursuant to Article 71 of the Convention, became effective six months after its receipt, i.e., on January 7, 2010. It should be noted that by December 4, 2007, Ecuador, pursuant to Article 25 (4) of the Convention, had withdrawn its consent to submit to ICSID jurisdiction disputes arising out of the exploitation of natural resources, such as oil, gas, minerals and others.

Convention's denunciation becomes effective.[9] It seems that Article 72 is the tip of the iceberg. In some of these scholarly articles, significant discrepancies may be noted regarding the nature, scope and effects of the State's unilateral consent. The decisions of ICSID Tribunals have not been uniform regarding the standard of interpretation applicable to consent. Some tribunals have combined *treaty principles of interpretation* with principles of interpretation applicable to *domestic laws*.

Such a mixed methodology of interpretation seems to disregard something that we consider of foremost importance. Just like in commercial arbitrations, in investment arbitrations the arbitration agreement also constitutes a *contract* which is autonomous and independent from the instrument containing it. For this reason, the arbitration agreement, given its very own nature, does not change because it refers to investment arbitration. Therefore, it should be interpreted according to international principles of contract interpretation.

2. PRACTICAL IMPLICATIONS

The importance of examining the nature and scope of the host State's unilateral consent to investment arbitration, alongside its eventual revocation or withdrawal, has been gradually gaining more relevance. States like Jamaica, Egypt, Tunisia and Kazakhstan have modified or revoked their offers to arbitrate contained in their domestic laws. Bolivia and Ecuador have not only denounced the ICSID Convention, but have also threatened to denounce or modify the BITs to which they are party.[10] Consequently, questions arise regarding access to ICSID

[9] Pursuant to 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****". (Emphasis added).* In addition, Article 72 states: *"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).*

[10] In fact, on May 8, 2007, the Bolivian Ambassador for Commercial and Integration Affairs announced that the next step would be to revise and renegotiate every single one of the 24 BITs ratified by Bolivia. Available at http://www.rebelion.org/noticias/2007/5/50729.pdf. Apparently, 19 out

jurisdiction in cases where investors had not yet accepted the offer to arbitrate by the date of the legal reform or by the date of the notification of the ICSID Convention's denunciation, but had, in fact, executed their investments prior to those events.[11]

Additionally, although Venezuela has not yet denounced the ICSID Convention, on October 17, 2008, the Constitutional Chamber of the country's Supreme Tribunal of Justice ruled, in a highly controversial decision (N° 1541),[12] that Article 22 of the 1999 Venezuelan Law on the Promotion and Protection of Investments ("Investments Law")[13] does not contain a standing offer to arbitrate, because it was not clear and unequivocal.[14] Most scholars, however, support the view that article 22 does constitute by itself a standing offer to arbitrate.[15] Several

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of the 24 BITs recognize ICSID as the competent authority to adjudicate disputes between Bolivia and the investors. On the same line, President Correa from Ecuador publicly expressed his country's intention to denounce all of Ecuador's BITs, but later submitted a request to the National Assembly President in which he urged the denunciation of the BITs with Germany, France, Finland, Sweden, Canada, China, England and Ireland, Holland, Argentina, Chile, Venezuela, Switzerland and The United States. Available at at http://www.kaosenlared.net/noticia/nuevo-acto-soberania-ecuador-denuncia-ciadi. Also see CORONEL, César. *"The Future on International Arbitration in Ecuador: the Boomerang Effect".* At: Arbitration News, IBA, Vol. 15, N° 1, March 2010, pp. 171 - 172.

[11]See MEZGRAVIS, Andrés. "*Expropiaciones, Nacionalizaciones y el Derecho Internacional."* In Ámbito Jurídico, July 2009, p.12.

[12]This decision had the dissenting vote of one of the justices. Favorable comments about the contributions of this decision to commercial arbitration can be found in ANZOLA, Eloy, "Luces desde Venezuela: la administración de justicia no es monopolio exclusivo del Estado". In Revista Española de Arbitraje, 2009.

[13]Law on the Promotion and Protection of Investments in Venezuela. Published in Official Gazette N° 5.390 Ext. on October 3, 1999.

[14]A similar case occurred with the Kyrgyz Republic when *Petrobart* initiated arbitration proceedings under UNCITRAL arbitration rules against the said government and the latter, three months later, enacted a "Law of Interpretation on Foreign Investments" and requested the courts to rule that *Petrobart* had not made an investment in the country. For a brief on this case see RIPINSKY, Sergey and WILLIAMS, Kevin, at: http://www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf

[15] In favor Werner L. CORRALES, Marta RIVERA, *Algunas Ideas Sobre El Nuevo Régimen de Promoción y Protección de Inversiones en Venezuela*, in La OMC Como Espacio Normativo, Un Reto para Venezuela, 2000. It is important to note that CORRALES was one of the drafters of the Venezuelan Investment Law. In addition, ÁLVAREZ ÁVILA, Gabriela; Las características del arbitraje CIADI. Anuario Mexicano de Derecho Internacional, Volumen 2, Universidad Nacional Autónoma de México, 2002, p. 212. Nota 23. MEZGRAVIS, Andrés, *Las Inversiones Petroleras en Venezuela y el Arbitraje ante el CIADI,* in Arbitraje Comercial Interno e Internacional – Reflexiones Teóricas y Experiencias Prácticas, 2005 . LEMENEZ, Guillaume, *State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law,* TMD, June 2007. Vol 4, Issue 3; M.D NOLAN and F.G SOURGENS, *the Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, TDM, September 2007, p. 49.

cases currently pending against Venezuela have still to rule on this issue. The Arbitral Tribunals in *Mobil Corporation v. Venezuela* and *CEMEX v. Venezuela* have recently concluded that article 22 does not constitute a standing offer to arbitrate. However, both Tribunals recognized the immense struggle that ICSID Tribunals have had in determining with precision the standard of interpretation applicable to a State's consent contained in a domestic legislation or in any other unilateral act of the State.[16]

The determination of the appropriate applicable standard of interpretation to State consent is of the utmost importance given the divergent results that different standards would produce. For instance, applying the rules of contractual interpretation to ICSID jurisdiction arbitration agreements would lead to different results than applying principles concerning the interpretation of laws or treaties or even the rules of interpretation applicable to unilateral acts. For instance, the application alone of the principle *contra proferentem*, universally accepted in the field of contract law, under which the interpretation of an ambiguous term is construed against the party who has drafted the clause or statement, would definitely lead to a very different result than if the rules of interpretation of treaties, laws or unilateral acts of States were applied to the same ambiguous or obscure statement of the State.

HERNÁNDEZ-BRETÓN, Eugenio, Protección de Inversiones en Venezuela, DeCITA, 2005, pp. 283-84; BREWER-CARÍAS, Allan, *Algunos Comentarios a la Ley de Promoción y Protección de Inversiones: Contratos Públicos y Jurisdicción.* In: Arbitraje Comercial Interno e Internacional – Reflexiones Teóricas y Experiencias Prácticas p. 279, 2005; MUCI, José Antonio, El Derecho Administrativo Global y los Tratados Bilaterales de Inversión, 2007, pp. 213-215; TORREALBA, J. G., La Promoción y Protección de las Inversiones Extranjeras, 2008, p.127. TEJERA, V. "Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate?. The Venezuelan Investment Law: A Case Study, 2009, p. 101. Against this position, aside from the highly controversial ruling of the Constitutional Chamber of the Supreme Tribunal of Justice of October 17, 2008 (Decision N° 1541), GARCÍA BOLÍVAR, Omar, in OGEMID; ANZOLA, Eloy, "Luces desde Venezuela: la administración de justicia no es monopolio exclusivo del Estado", In Revista Española de Arbitraje, 2009. Likewise, WEININGER, Bernardo, at a conference in the Conciliation and Arbitration Business Centre (CEDCA in Spanish), Caracas, 2009 available at http://www.cierc.org/CIERC.

[16] *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction (June 10, 2010), para. 76-77 and 84. *CEMEX Caracas Investments B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15). Decision on Jurisdiction (December 30, 2010) para. 71-72 and 78. Both cases had the same arbitrator as President of the Tribunal.

3. DIFFERENT APPROACHES

The vast majority of the decisions of ICSID Tribunals have distinguished between the applicable law to the merits of the dispute and the applicable law to the arbitration agreement when determining the jurisdiction of the Centre. ICSID Tribunals have recognized in numerous awards that matters related to their jurisdiction are not governed by article 42 of the ICSID Convention, which provides for the applicable law (that of the State party to the dispute) to the merits of the dispute, but instead, are regulated by international law (article 25 of the ICSID Convention).[17]

There is also consensus with regard to the fact that ICSID Tribunals, pursuant to article 41 (1) of the Convention, "judge their own competence". Thus, any sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is neither binding on the tribunal nor determinative of jurisdictional issues.[18]

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[17] See SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR, ICSID Convention: A commentary. Second Edition. Cambridge University Press, 2009 at para. 578, pp. 248- 249. As for awards see *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 330, para. 35; *CMS* v. *Argentina*, Decision on Jurisdiction, 17 July 2003, paras. 42, 88; *CMS* v. *Argentina,* Decision on Annulment, 25 September 2007, para. 68; *Azurix* v. *Argentina*, Decision on Jurisdiction, 8 December 2003, paras. 48-50; *Enron* v. *Argentina*, Decision on Jurisdiction, 14 January 2004, para. 38; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, paras. 29-31; *Camuzzi* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 15-17, 57; *Sempra* v. *Argentina*, Decision on Jurisdiction, 11 May 2005, paras. 25-27; *AES Corp*. v. *Argentina*, Decision on Jurisdiction, 26 April 2005, paras. 34-39; *Jan de Nul N.V., Dredging Intl. N.V.* v. *Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 65-68, para. 82; *Saipem* v. *Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 68, 78, 82; *Noble Energy & Machalapower* v. *Ecuador*, Decision on Jurisdiction, 5 March 2008, paras. 56-57.

[18] Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction (14 April 1988), 3 ICSID Reports 131 (1995), at § 60 (SPP v. Egypt), Inceysa Vallisoletana, S.L. v. El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006), § 212- 22. *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction (June 10, 2010), para. 75, stating that "the same solution has been retained by the Permanent Court of International Justice and the International Court of Justice" citing the following cases: *Electricity Cy of Sofia and Bulgaria* (Preliminary objections), PCIJ. Series A/B N°77 (1989); Aegean Sea Continental Shelf (Greece v. Turkey) – 19 December 1978 – ICJ Reports 1978 p.3; Fisheries Jurisdiction (Spain v. Canada) - 4 December 1998 – ICJ Report 1988 p. 432.

In spite of what has been mentioned, different theories have emerged with respect to the nature, meaning and scope of State consent to ICSID arbitration. Following is a summary of such theories.

3.1 Revocable offer

Professor Schreuer, under a clearly contractual viewpoint (*offer-acceptance*) does not confer much legal effect to the "offer" that has not been accepted. In particular, when referring to the interpretation of article 72 of the ICSID Convention which provides for the continuing effect of consent given before the Convention's denunciation, 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 been perfected.[19] In other words, according to this view, the offer to arbitrate could be revoked at any point in time before its acceptance and, therefore, it is strongly advised that investors accept the offer as soon as possible, even before the dispute arises.[20]

Against Schreuer's thesis, it has been said that the use of *contractual analogy* leads to the mistaken conclusion of identifying the term "consent" with the concept of common consent or consent by both parties to the dispute or "arbitration agreement". According to Garibaldi, this is a "false analogy", because the word "consent" is used in the ICSID Convention to refer to "individual consent" as much as it is used to refer to "common consent," and, in his view, it is advisable to distinguish between "offer" and "acceptance", on the one hand, and "contract" on

[19] See 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.
[20] *Idem* at p. 1281.

the other hand, because the former two are distinct unilateral acts leading to the formation of the latter. [21]

As will be explained later in further detail, as far as we are concerned, State consent can constitute in the context where expressed an "irrevocable offer."

3.2 Firm offer

Professor Gaillard, without directly rejecting Schreuer's contractual approach, warns about the particular meaning that should be given to the word "consent" contained in article 72 of the Convention. He contends that, regardless of the denunciation of the ICSID Convention, the possibility of ICSID arbitration will depend on the terminology used in "the arbitration clause" contained in the applicable BIT.[22]

Mantilla-Serrano, following Gaillard's path, argues that article 72 of the ICSID Convention does not refer to "common consent". On the contrary, it refers to unilateral or individual consent. He points out that the contractual notions of offer and acceptance and article 25 of the Convention should not come into play since the binding force of the Convention, after its denunciation, is entirely provided for by article 72.[23]

3.3 International obligation derived from a unilateral act of the State

Following Professor Gaillard's article, Nolan and Sourgens have contended that the State consent expressed in a BIT or in a State's municipal law should not

[21] GARIBALDI, Oscar; *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, TDM, March 2009, Vol 6, # 01.
[22] GAILLARD, Emmanuel, *The Denunciation of the ICSID Convention,* N.Y.L.J., 26 June 2007, Volume 237-N° 122.
[23] MANTILLA SERRANO, Fernando; La denuncia de la Convención de Washington, ¿Impide el recurso al CIADI? Revista Peruana de Arbitraje N° 6, 2008, p. 214

be considered as a mere offer to arbitrate, not even as a firm offer, but as an "independent international obligation".[24]

Professor Hirsch, who had taken a similar view in the past, has held that according to Public International Law, which applies to domestic legislations of the States, the unilateral State consent to ICSID arbitration may be equivalent to an *irrevocable unilateral act* pursuant to International Law and the doctrine of *estoppel*.[25] This theory is inspired on the general principle recognized by the International Law Commission which says that a unilateral declaration intended to produce legal effects to the State making the declaration, cannot be revoked arbitrarily. [26]

The references made in *SPP v. Egypt*,[27] *Amco v. Indonesia*,[28] and the dissenting vote in *Siag & Vecchi v. Egypt*,[29] along with the International Court of Justice's decision in *Nuclear Test* support this thesis.[30]

More recently, some authors have also supported this thesis,[31] whereas others have criticized it.[32]

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[24] 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.

[25] HIRSCH, Moshe. *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*. Martinus Nijhoff Plublishers, Dordrecht/Boston/London, 1993, pp. 53 - 54.

[26] Working Group Report of the International Law Commission, 58th Session (1 May to 9 June and 3 July to 11 August of 2006) held in Geneva, para. 4.

[27] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3).*

[28] *Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1).*

[29] *Waguih Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt (ICSID Case No. ARB/05/15).*

[30] *Case Concerning Nuclear Test. Australia v. France, Judgment of December 20, 1974, ICJ, Rep.1974.*

[31] 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.

[32] SUAREZ 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

In the recent decisions on jurisdiction in the *Mobil v. Venezuela* and *CEMEX v Venezuela* cases, both tribunals leaned towards the thesis of the "unilateral acts of the State", when the purported consent is contained in a domestic legislation.[33]

From our perspective, the unilateral act thesis requires some additional commentaries since in the international law arena, as it may be observed, the concept or definition of a unilateral act has several meanings. Only a broad understanding of unilateral acts would also embrace acts from the State linked to a conventional or customary prescription, as would be the case with the ratification of a treaty or the acceptance of the optional clause for compulsory jurisdiction of the International Court of Justice.[34] However, these cases which appear to be very similar to the offer to arbitrate are in fact quite different. In fact, when it comes to ratifying a treaty or even accepting the optional clause to compulsory ICJ jurisdiction, it is the State itself, in the exercise of its sovereign power, the only one that determines the point in time in which its status as a party to a treaty is perfected and, likewise, the time, term and conditions of submission to compulsory ICJ jurisdiction. By contrast, in the offer to arbitrate scenario, the perfection or formation of the arbitration agreement is conditioned upon a subsequent and additional act lying entirely at the discretion of the investor and not of the State, because it is the investor who ultimately decides whether to accept or not the offer to arbitrate made by the State either on a BIT or a domestic legislation.

In other words, the arbitration agreement in investment arbitrations is generally formed in two steps which are not contemporaneous in time. The first step would be the offer to arbitrate made by the State which, as explained before,

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accordance with the framework under 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. Also see "*Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate?* Id at p. 125.

[33] *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction (June 10, 2010), paras. 83-85. *CEMEX Caracas Investments B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15). Decision on Jurisdiction (December 30, 2010) paras. 77-79.

[34] See Article 36 of the ICJ Statute at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

can be contained either on a BIT or a domestic legislation. The second step which occurs later in time is constituted by the investor's acceptance of such offer and takes place, in most cases, by filing the request for arbitration before ICSID. The exception to this two-step formation rule would be investments contracts which are directly entered into by the investors with the State, because both wills (offer and acceptance to arbitrate) are expressed at the same time.

As tempting as the thesis of unilateral acts might be, it should not be overlooked that, *strictu sensu,* the State's unilateral offer to arbitrate is part of a bilateral or multilateral negotiation process between States. As the primary goal of that offer is to create an act that is not *unilateral* in nature, it should be considered to be definitely closer to being an act of *conventional* nature. This is so because the fundamental purpose of that act transcends the unilateral framework in which it is created. In other words, such State acts go beyond their simple unilateral character into a conventional one.[35] For this reason, the Working Group of the International Law Commission, in charge of codifying the meaning and scope of unilateral acts of States in International Law chose to exclude such type of acts from their study.[36]

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[35] 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 an estoppel in a trial. (Emphasis added). United Nations A/CN/4/486, p.18 para. 96. Available online 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, para. 96. Available online at 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.

[36] This was decided at the 56th Session of the ILC. Available online at http://untreaty.un.org/ilc/summaries/9_9.htm. See also the Official Records of the 60th session of the General Assembly, supplement N° 10 (A/60/10), para. 293 available online at http://www.un.org/law/cod/sixth/60/docs.htm. See likewise, the 58th session (1 May-9 June and 3 July-11 August 2006) Report of the ILC to the 61st session of the General Assembly supplement 61st session Supplement No. 10 (A/61/10), para. 4. Available at http://www.un.org/law/cod/sixth/61/docs.htm

4. NATURE, MEANING AND SCOPE OF STATE CONSENT

4.1 Autonomy and independence of the arbitration agreement

Just like in commercial arbitration, an arbitration agreement may exist or be celebrated between the parties without the existence of a previous contractual relationship between them.[37] But, with the exception of arbitrations imposed by law and mandatory for the parties on specific subject matters, every arbitration (whether commercial or investment) presupposes an arbitration agreement. This has been recognized in a recent decision by the United States Court of Appeals for the Second Circuit in *Republic of Ecuador v. Chevron* where the court stated that:

> *"... the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty. In the end, however, this proves to be a distinction without difference, since Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate... All that is necessary to form an agreement to arbitrate is for one party to be a BIT signatory and the other to consent to arbitration of an investment dispute in accordance with the Treaty's terms. In effect, Ecuador's accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the "agreement in writing" to submit the dispute to arbitration".*[38]

Investment arbitration has, until now, given little attention to the principle of autonomy and independence of the arbitration agreement, universally admitted in commercial arbitrations.[39] In spite of the existing differences between commercial arbitration and investment arbitration, both types of arbitration have the same

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[37] Such is the case of 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 and tortuous liability of a State.

[38] See *Republic of Ecuador v. Chevron* (2d Cir. March 17, 2011) at pp. 12-13.

[39] YOUSSEF, Karim. *Consent in Context: Fulfilling the Promise of International Arbitration (Multiparty, Multi-Contract, and Non-Contract Arbitration)*, 2009 ed. 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.

starting point: the existence of an arbitration agreement. Therefore, we cannot find any reason to exclude from investment arbitration the principle of autonomy and independence of the arbitration agreement. On the contrary, we consider that the principle of autonomy and independence must be applied not only when there is an existing investment contract containing an arbitral clause, but also in cases where the State consent is contained in a treaty or domestic legislation.

Certainly, the ICSID Convention uses the term consent interchangeably to refer both to unilateral consent and to "consent by both parties." This is no novelty since it is well known that at the time of the drafting of the Convention (1965), the UNCITRAL Model Law on International Commercial Arbitration responsible for coining the expression "arbitration agreement" had still not been drafted. Since the ICSID Convention's entry into force (1966), there has been much progress to overcome the difficulties that were generated back in those days by the definitions of "*arbitration clause"* and formalization of the *"commitment to arbitrate"*. Wisely, the ICSID Convention departed from the use of these terms and decided to use the term "consent" to refer to both individual consent and consent by both parties.

However, the fact that there are provisions on the ICSID Convention that do refer to individual consent does not alter, in any way, the contractual nature of the arbitration agreement. As pointed out by Professor Schreuer: *"Like any form of arbitration, investment arbitration is always based on an agreement"* [40] *" A legislative provision containing consent to the arbitration is merely an offer by the State to investors. In order to perfect an arbitration agreement that offer must be accepted by the investor".* [41]

The majority of authors and some judicial decisions that have studied the juridical nature of *arbitration*, even those leaning towards a jurisdictional thesis,

[40] See SCHREUER, Christoph H. "Consent to arbitration". In: TDM Volume 2, issue #05 - November 2005, updated on February, 2007, p. 1.
[41] *Idem* at p. 5.

admit that the arbitration agreement has a contractual nature.[42] In fact, the contractual nature of the *arbitral clause* has never been a controversial issue.[43] What has for decades been the subject of greater discussion, without reaching consensus so far, is the issue related to the nature of the arbitral proceedings.[44]

It should be added that the principle of *autonomy* and *independence* of the arbitration agreement has been universally recognized by all modern domestic legislations inspired by the UNCITRAL Model Law on International Commercial Arbitration.[45] It is submitted that, as in the case of the arbitration agreement, which is independent from the terms of the contract containing it, a State offer to arbitrate contained in a treaty or a domestic law should also be considered to be autonomous from the document (*i.e.* treaty or domestic legislation) containing such offer made by the State. Therefore, if we apply the principle of autonomy, the annulment of a domestic law or a BIT by domestic courts on the grounds of their

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[42] *" Under federal law, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"* (internal quotation marks omitted). *Republic of Ecuador v. Chevron* (2d Cir. March 17, 2011) citing *AT&T Techs., Inc. V. Commc'ns Workers of Am.,* 475 U.S. 643, 648 (1986).

[43] See SILVA ROMERO, Eduardo. *"Introducción. El arbitraje analizado a la luz del derecho de las obligaciones"*. In: El Contrato de Arbitraje. Legis. Colombia, 2005 pp. xvi-xviii.

[44] There are still the very same three theories discussed in the past: the *contractual* theory, the *jurisdictional* theory and, lastly, the *eclectic* or *autonomous* theory*,* We have held that whatever the theory embraced (contractual or jurisdictional) with respect to the old discussion regarding the nature of arbitration, it will be closely determined by one's view on whether *coercion* is or is not an essential element of the concept of *jurisdiction*. See MEZGRAVIS, Andrés, *El amparo constitucional y el arbitraje*. In: Revista de Derecho Administrativo N° 6, Edit. Sherwood, Caracas, 1999, p. 259. For an analysis on the different theories and their authors see ROCA MARTÍNEZ, José María: *Arbitraje e Instituciones Arbitrales*. Editor, S.A. J.M. Bosch. Barcelona, 1992, pp. 37- 40. Likewise, OPPETIT, Bruno. *Teoría del arbitraje,* translation from Italian to Spanish by SILVA ROMERO. Legis. Colombia 2006, p. 162.

[45] Art. 16 of the UNCITRAL Model Law on International Commercial Arbitration and Article 23 numeral 1 of the Arbitration Rules (as revised in 2010). Consequently, such principle is contained, among others, in the legislations of Switzerland, Germany, Italy, the Netherlands, Spain, Brazil, Colombia, Costa Rica, Mexico, Peru, Venezuela.The principle of autonomy and independence is the result of both a Restament and case law development which states that in the same instrument can perfectly coexist two contracts: the principal contract and the arbitration contract. This principle has been recognized and reiterated by American and French case law. CÁRDENAS MEJÍA, Juan Pablo. *"Autonomía del Contrato de Arbitraje"* In: El Contrato de Arbitraje, Eduardo Silva Romero, Academic Director and Fabricio Mantilla Espinosa, Coordinador Académico. Legis. Colombia, 2005, pp. 81 - 82*,* who recognizes that autonomy, is an international commercial law principle. For a detail analysis on the autonomy of the arbitration agreement in relation to a domestic law, see LARROUMET, Christian. *"A propósito de la naturaleza contractual del acuerdo de arbitraje en materia internacional y de su autonomía"*. *Id*. at pp. 13 - 19.

unconstitutionality should not affect, in essence, the offer to arbitrate contained in such instruments. It is important to remember, as we have said before, that the formation of the arbitration agreement is constituted by the offer of the State and the acceptance by the investor and that both wills are not expressed contemporaneously but in a successive manner. For this reason, the offer made by the State either in a BIT or in domestic legislation cannot be altered by the decisions of domestic courts. As correctly pointed out by Silva Romero: *"If the arbitration agreement were not autonomous, the independent study of an arbitration contract would not have, in the legal field, any sense whatsoever."* [46]

4.2 The instrument employed to record consent does not change the contractual nature of consent

Nowadays, the vast majority of investment arbitrations are based not on an ordinary arbitral clause contained in an investment contract, directly entered into between the State and the investor, but on the indirectly expressed consent, very often given without the direct contact of the parties before the beginning of arbitral proceedings. But still in these cases, the final result is also an arbitration agreement.[47]

The instrument containing the consent, though important to determine the real *intention* of the parties, does not change the contractual nature or the independence of the consent, and therefore, it should also not modify the applicable rules of contractual interpretation. As a result, the instrument (*i.e.* the writing containing the State's consent) cannot be deemed to be more important than the declaration of will precisely under interpretation. Therefore, it is mistaken to support the application of treaty interpretation principles when State consent is contained in a treaty.

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[46] SILVA ROMERO, Eduardo. *"La Formación del Contrato de Arbitraje" Id*. at p. 77. (translation from Spanish).
[47] See SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR, p. 191, para. 378.

It is interesting to note that when scholars refer to State consent expressed in a BIT, they characterize it as "*unilateral*" consent, contained in a "*treaty"* and therefore they categorically assert that the application of treaty interpretation principles seems self evident.[48] Nonetheless, this characterization should be closely examined in order to avoid confusion.

By definition, a BIT is a "Bilateral Treaty," in other words; it is the result of the consent of two States. Each one of these States offers the nationals from the other State its consent to international arbitration. Hence, when consent is qualified as *unilateral* or *individual* it is not because the treaty only contains the consent of just one State since it is more than obvious that such bilateral treaty contains the consent of both States. Therefore, consent is characterized as "unilateral" not because the consent from the other State party is still pending, but because the consent from the beneficiary of the offer, that is to say, the acceptance of the national investor from the other State party to the treaty is pending and lies entirely at the discretion of the investor who ultimate decides whether an arbitration agreement will or will not be formed.

Consequently, while such acceptance by the investor is pending, it is appropriate and accurate to refer to "unilateral consent of the State". But when the dispute is already registered by ICSID, it is correct to assume that the investor, by initiating arbitral proceedings has presumably accepted the offer to arbitrate and, at least *prima facie*, we can no longer refer to a unilateral offer, but to an arbitration agreement containing the State's offer to arbitrate and the acceptance by the investor.[49] In other words, if the dispute has been registered and submitted to an

[48] *Id*. at p. 249, para. 579. Also see *Fedax v. Venezuela.* Decision on Jurisdiction July 11, 1997 para. 20. Likewise, *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction (June 10, 2010), para. 83.

[49] Generally, the investor manifests his acceptance through a trigger letter which is sent to the government in question before filing the request for arbitration. However, it is well settled that the investor's manifestation of consent or acceptance to the offer to arbitrate can be made in the very own request for arbitration. In this regard, see *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2), ICSID Review-Foreign Investment Law Journal, p. 187. Likewise, see ESCOBAR, Alejandro A. *"Los sistemas de arbitraje del CIADI"*. In: La solución de Controversias en el Hemisferio, Cámara de Comercio de Bogotá, Santa Fe de Bogotá, 1997, p. 291. A. R. PARRA,

ICSID Tribunal is because it has been *prima facie* accepted that there is not only one consent (that from the State), but that there are two existing consents: the State's consent and the investor's consent. Even though the offer and acceptance are contained on separate instruments and the consent is successively formed, ICSID Tribunals can only interpret States' unilateral offers when the existence of the arbitration agreement has been alleged.

Therefore, it does not seem right to assert that the investor-State arbitration agreement derived from a BIT has to be interpreted pursuant to the principles of treaty interpretation. We do not believe that the arbitration agreement has an international treaty nature, because the State does not enter into an arbitration agreement with another State but with the investor from the other State party to the treaty. Even in the case of arbitration agreements between States to submit disputes derived from the interpretation or application of treaties, to which both States are Contracting States, it would be questionable not to distinguish the independence, autonomy and contractual nature of such an agreement from the treaty which contains it.

Little attention has been given to the fundamental difference between the consensual autonomy within the framework of an investor-State arbitration contract, on the one hand, and the collective autonomy (State-State) expressed in treaties either entered into or adhered in a later stage by States, on the other. The arbitration agreement, as any other contract, gives rise to obligations susceptible to the application of general contractual principles,[50] whereas treaties create

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"*Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment".* ICSID Review – Foreign Investment Law Journal, 12 (1997) p. 287. SCHREUER, *Id* at pp. 206 - 263. REED, Lucy, PAULSSON, Jan and BLACKABY, Nigel. *Guide to ICSID Arbitration*, p. 38 and MEZGRAVIS. *"Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI"*. *Id*. at pp. 395 - 396.

[50] Among others, we emphasize two, a "duty to act": submitting the dispute to arbitration, and a "duty to refrain from acting": non submission of the dispute to domestic courts.

international obligations susceptible to the application of both codified international law and customary international law principles.[51]

In other words, the arbitration agreement creates obligations between the signing parties, that is between the State, on the one hand, and the investor, on the other. Whereas the provision that contains an offer to international arbitration made by a State to the investors of another State creates the same international legal obligations between the States party to the treaty in question. As it may be observed, there are two distinct sources of obligations: those arising out of the treaties which create State-to-State obligations, and those stemming from the arbitration agreement which create investor-State obligations.[52]

The same could be said about the offer to arbitrate contained in a domestic legislation. The investor's will does not intervene in the formation of the legislative act containing the State's offer to arbitrate. Of course, the issue becomes even more complex when it is the State itself who contends that the ambiguous or contradictory manifestation contained in a domestic law cannot constitute a valid consent to arbitration and, therefore, cannot be interpreted as if an arbitration contract had been perfected. However, if the dispute has already been registered by ICSID it can be assumed, at least *prima facie,* that we are in the presence of no longer an ambiguous unilateral declaration but a potential arbitration agreement which contains both the State's and the investor's consents. For this reason, just like it happens with the coming into existence of any given international contract,

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[51] BETTI, Emilio. *Interpretación de la Ley y de los Actos Jurídicos.* Translation into Spanish by Prof. José Luis De Los Mozos. Editorial Revista de Derecho Privado. Editorial Revista de Derecho Financiero, p. 391.

[52] The Investor-State obligations and the State-State obligations are so different from each other that most BITs contain a dispute resolution clause between the States themselves. In contrast to an arbitration agreement which, as we have said, has a contractual nature, a treaty has a hybrid structure (conventional stage and a normative stage). For this reason, with respect to a treaty, there is a need for a double interpretative treatment, in response to the very genesis of the treaty both as a *consensual* act (State-Investor) and as a *juridical norm* regulatory of international obligations (State-State). *"Under the genesis of the treaty as a consensual act or process, the analogical direction to the principles governing the interpretation of contracts seems justified."* (Translated from the Spanish version). BETTI, *id*. at pp. 391-392.

the coming into existence of the arbitration contract should be determined pursuant to the international principles of contractual interpretation.

In the case of both BITs and domestic legislation, the "meeting of the minds" can only be perfected through the investor's acceptance of the offer to arbitrate made by the State. Such agreement, despite of having international effects, cannot be characterized as either a treaty or a domestic law, because it is an act essentially conventional, autonomous and independent from the instruments containing it. Therefore, the focus should be placed on the consents and not the instruments which contain them.

It is important to note that in such cases the *treaty* or the *domestic law* are nothing more than mere documents partially recording the arbitration agreement, because they only reflect the will of one of the parties (the State's) to the arbitration agreement whose formation will ultimately depend upon the investor's acceptance. Documenting may be defined as the act or process of setting down or placing for preservation in a writing, magnetic tape, etc., the declarations of will that constitute the very essence of the agreement.[53] Pursuant to article 25 of the ICSID Convention, the only requirement is that the "meeting of the minds" be recorded in writing either in a single document or several of them. In no way does article 25 requires consent to be recorded in a treaty or domestic law. Consequently, the arbitration agreement is just as autonomous and independent from the rest of the clauses which form the main contract as it is from the treaty and domestic law which may partially contain it.

In addition, the fact that one of the consents is ambiguous and the other is manifestly clear does not in any manner alter the contractual nature of the arbitration contract.[54] Both consents (State and investor) must be interpreted under

[53] See DIEZ-PICAZO, Luis. *Fundamentos del Derecho Patrimonial I. Introducción Teoría del Contrato*. Editorial Civitas, Quinta Edic. Madrid, 1996, pp. 254 - 265.
[54] It follows that it would be absurd to interpret an ambiguous clause from the rest of the contract clauses in an isolated manner.

the one and same context: the arbitration agreement. The consent to arbitrate made by the State in a *treaty* or in a *domestic legislation* should not be interpreted according to the nature of the instrument which contains it.

In fact, it seems somewhat anarchical to determine the rules of interpretation of each one of these acts separately based on the nature of the public or private instruments containing them (*i.e.* a treaty, a domestic law, letter of acceptance, commencement of the arbitration proceedings as a tacit manifestation of acceptance, revocation, etc.). Doing so would mean cutting apart the arbitration agreement and applying different sets of rules of interpretation for each consent, as if they were not a part of the same context. Thus, for example, if a BIT contains the "unilateral" consent of the State we should, therefore, apply treaty principles of interpretation found, fundamentally, on the Vienna Convention on the Law of Treaties. But those same principles would not be applicable to tacit manifestations of acceptance of the offer by the investor who commences arbitration.[55]

In short, we consider that both consents (of the State and the investor) are part of the same agreement regardless of the point in time in which both consents are expressed (*i.e* successive manner) and regardless of the instrument in which such consents are expressed. Therefore, they should be interpreted as a whole and not as separate individual acts, since what is radically important here is not the nature of the instrument or document containing the offer or the acceptance. Rather, what is central, as in any given contract, are the terms and conditions of each of those manifestations of will.

4.3 False contractual analogy?

It is true that the arbitration agreement (bilateral consent) that has been formed by the "meeting of the minds" cannot be confused with the State's unilateral

[55] For a distinction between principles of interpretation of treaties and laws, see BETTI, Emilio *id*. at p. 389. Also see SUAREZ ANZORENA, *id*. at pp.73-74.

or individual consent which still awaits the investor's acceptance. Nevertheless, such distinction does not, in any way, impede the possibility of interpreting the State's consent according to international contractual principles in the case of investment arbitration.

In fact, the application of contractual principles when interpreting an ICSID arbitration agreement does not imply any confusion of the terms "arbitration agreement", "arbitration offer" and "independent obligation." In the contractual as well as in the arbitral field, those terms are clearly differentiated. A perfected and binding contract (arbitration agreement) cannot be unilaterally revoked. An offer (to arbitrate) not yet accepted is revocable, in principle, at any point in time before its acceptance. But it certainly can constitute for the party making the offer (in this case the State) an irrevocable international obligation. This will depend on the context in which it has been expressed (BITs or laws for the promotion and protection of investments), or on the expectations it has created.[56]

In our opinion, Professor Schreuer does not fall into a "false analogy", as some might argue, because the State's individual consent along with the investor's consent are directed to form an arbitration agreement, that is to say, a real contract. It is, therefore, not an analogical application of the principles governing contractual interpretation under international law, but instead, a straightforward application.[57]

In our opinion, a very different kind of criticism could be made to Professor Schreuer's commentary; but this criticism, far from contradicting the thesis of the application of contractual principles to the interpretation of an ICSID arbitration agreement, actually strengthens it. In fact, under international contractual

[56] NOLAN and SOURGENS, have been the first ones to defend within this context the notion of an independent international obligation, but setting themselves away from the application of contractual principles.

[57] GARIBALDI seems to hold a contrary opinion. See GARIBALDI, Oscar. *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the limits of the Contract analogy*, TDM, March 2009, Vol 6, # 01.

principles, the offer that has not yet been accepted can be *irrevocable* in some cases. The most obvious case is when the offer itself indicates a term for its acceptance, that is to say, when the offer expressly provides for its irrevocability for a certain period of time. A more complex situation, which exceeds the scope of the analysis made by the Professor Schreuer, is represented by the offer in which it is argued or disputed *"whether the beneficiary could have reasonably considered that the offer was irrevocable and has thus acted in reliance of such offer."* [58]

The irrevocability of the offer has been included in the United Nations Convention on Contracts for the International Sale of Goods (CISG) known as the Vienna Convention on international sales,[59] as well as in the Draft European Code of Contract.[60] In addition, both *civil* and *common law legislations* provide for these same principles.[61] We could, therefore, be dealing with general principles under international law in the field of contracts. As pointed out by Youssef: *"In most legal*

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[58] Frankly, the argument relating to whether the investor can accept the offer to arbitrate at any point in time, even before the dispute arises, does not seem to be compelling enough to support the revocability of the offer. See SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR. *Id.* at p.1281, para. 7. Just as it so happens in the commercial field, what makes an offer irrevocable is not the impossibility of its acceptance but rather the legitimate expectations created by the offer. A State could hardly contend that a law for the "promotion" and "protection" of investments containing such offer is not precisely intended to create legitimate expectations in the investors.

[59] "*Article 16: (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*

[60] *Article 17. Irrevocable offer: 1. An offer is irrevocable when the party making it has expressly agreed to keep it open for a certain period of time, or if it can be reasonably categorized as such from the prior course of dealing between the parties, prior negotiations, content of the clauses or custom (Translation into English from the Draft made by Universita de Pavia in 2001).*

[61] Following the same lines are the most acclaimed American writers of treatises on contract law who state that a *"firm offer need only be in a signed writing which by its terms gives assurance that it will be held open. It is then irrevocable during the time stated or if no term is stated for a reasonable time."* See FARNSWORTH, Alan. *The Law of Contracts*. (1999), p. 183. According to M.D NOLAN and F.G SOURGENS, *"The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study",* TDM (September 2007), this treatment is provided for in the United States Uniform Commercial Code. In the same sense and with regard to Spanish Law, see DIEZ-PICAZO. *Id.* at p. 298.
On the other hand, even though Venezuela has not yet ratified the CISG, Article 1.137 of the Civil Code provides for a similar rule: *"if the party making the offer* [the State] *has agreed to keep it open for a certain period of time* [established in the BIT], *or if such obligation* [arbitration] *can be derived from the nature of the business* [neutral forum promoted to attract investments] *the revocation made before the expiry of the term* [provided in the BIT or before the time inherent to the made investment] *shall not be an obstacle to the contract's formation "* [arbitration]. (Parenthesis added).

systems, general principles of contract law are applicable to arbitration agreements in the same way they apply to ordinary contracts".[62] It is important to emphasize that such principles do not fall outside the arbitration field, as some may believe. It is reasonable to assume that the *unilateral offer to arbitrate* contained in a BIT with duration of 10 or 15 years may not be revoked during such time.[63] It would also be reasonable to assume that a State that enacts an investment law to promote and attract investments and, in pursuing that goal, offers international arbitration to foreign investors cannot revoke such an offer to arbitrate after it has in fact attracted the said investments.

Therefore, denying that the unilateral consent of the State constitutes an offer to arbitrate, denying that when the acceptance of the offer takes place an arbitration agreement is formed, or denying that the arbitration agreement is in fact a real contract looks unfounded to us. It also seems unfounded to deny any possibility of revocation of the offer to arbitrate that has not yet been accepted. In this regard, it must be distinguished that it is one thing to determine the international obligations created by the offer to arbitrate between the States party to a treaty containing such offer and quite another to determine the legal effects of its potential revocation. Finally, it is also quite very different to interpret and analyze the real existence or formation of an arbitration agreement when the dispute has already been registered before ICSID.

5. STANDARD OF INTERPRETATION OF CONSENT

Despite of the reiterative and preponderant application of international law to jurisdictional matters, we believe that there is still no consensus with respect to the rules of interpretation applicable to the acts which form consent. Some ICSID

[62] YOUSSEF, Karim. *Id.* at p. 352.
[63] This would only be possible if both States party to the BIT agree to modify the text and, even so, and for the reasons which we shall explain later, we believe such revocation would only be valid for investors who have still not made their investments, because for those who have, pursuant to the legitimate expectations created by such treaty it would be arbitrary in light of international law principles.

Tribunals have not felt the need of expressing their view on the matter and those that have done so, have not reached a clear and uniform solution to this issue.

Generally, it has been admitted that the State expresses its consent to ICSID arbitration in three different ways:

i) With the subscription of an investment contract between a government entity (national administration, state or municipal authorities, centralized or decentralized) and an investor, in which a clause is introduced providing for ICSID arbitration;
ii) Through a bilateral or multilateral treaty regarding the reciprocal promotion and protection of investments in which a standing offer to ICSID arbitration is made and;
iii) ii) Through the standing offer to ICSID arbitration made in a national law, generally of promotion and protection of investment.[64]

The different types of manifestation of State consent have caused confusion regarding the applicable *rules of interpretation.* It seems that ICSID arbitration practice varies its emphasis on international law depending on whether State consent has been expressed in a "treaty "or in a "law" or in an investment "contract".[65] Even where some consensus might seem to exist regarding the standard of interpretation in these three scenarios, it is always within the scope of article 25 and not article 42 of the ICSID Convention. Therefore a mixed methodology of interpretation has resulted given the little attention paid to the fact that these three ways all end up in an arbitration agreement.

[64] A fourth way could be the offer to arbitrate contained on a letter of some governmental agency duly authorized by the State in question (art 25(3)). However, since it is very uncommon to see this type manifestation in practice we have not included it in our classification.
[65] See SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR. *Id.* at pp. 250 – 251, para. 585.

5.1 Mixed rules of interpretation

Scholars and even some awards have pointed out that when consent is based on a BIT, it seems obvious to apply both international law and treaty principles of interpretation.[66] The idea of applying the principles of interpretation of *laws* according to the domestic law applicable to the merits of the controversy has been attractive for some ICSID tribunals when dealing with an investment law whose offer to arbitrate is somewhat ambiguous. [67] This thesis has been supported by some authors.[68] However, it should be noted that such interpretation is only valid if the legislation does not contradict the principles of international law.[69]

In *SPP v. Egypt*, jurisdiction was held based upon Egyptian law. The Tribunal rejected Egypt's argument that the consent should be interpreted according to the principles of *Egyptian laws*, as well as the investor's argument that the arbitration agreement should be interpreted according to treaty principles of interpretation.[70] The Tribunal, instead, concluded in favor of the application of general principles of *statutory* interpretation, but noted that it would take into consideration, when appropriate, the principles of treaty interpretation and the principles of international law applicable to unilateral declarations.[71]

In *Mobil v. Venezuela* and *CEMEX v. Venezuela,* both Tribunals made an accurate summary of the different positions held until now by ICSID Tribunals:

(i) In at least four cases, the issue was not clearly dealt with.

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[66] See, supra note 47.
[67] See *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1), paras. 339-340.
[68] SUAREZ ANZORENA holds that the existence of State consent contained in a law must be interpreted according to the principles of interpretation of laws of the State in question and, only after the existence of such consent is determined, can we use other principles such as good faith, estoppel and international rules. *Id.* at p. 79.
[69] See *CSOB* v. *Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 330, para. 35. *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), para. 263.
[70] See *SPP v. Egypt,* Decision on Jurisdiction II, April 14, 1988, para. 55-60.
[71] *Id.* at para. 61.

(ii) In *SPP v. Egypt*, the Tribunal decided to apply "general principles of statutory interpretation" taking into account both "relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations".

(iii) In *CSOB v. Slovak Republic,* the Tribunal opted for international law without reservation.

(iv) In *Zhinvali v. Georgia*, the Tribunal opted for domestic law "subject to ultimate governance by international law".[72]

Moreover, the *Mobil* and *CEMEX* tribunals take the view that when the consent of the State is contained in a national law, then a *unilateral* act is present whose interpretation is governed by international law, but that, in order to interpret the State's intent, domestic laws should also be taken into account. Both tribunals also add that although the law of treaties as codified in the Vienna Convention is not relevant in the interpretation of unilateral acts, the provisions of that Convention may apply analogously to the extent compatible.[73]

This unique methodology leads to the mixture of principles of interpretation of treaties with that of laws and unilateral acts, even though it is also recognized that "*the perfected consent is neither a treaty nor simply a contract under domestic law, but an agreement between the host State and the investor based on international principles" .*[74]

[72] *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27). Decision on Jurisdiction (June 10, 2010), para. 82. *CEMEX Caracas Investments B.V. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15). Decision on Jurisdiction (December 30, 2010) para. 76.
[73] *Id*. at para. 96 and para. 89, respectively.
[74] See SCHREUER. *Id.* at p. 249, para. 579.

5.2 International contractual rules

As it was decided in *Amco v. Indonesia*:

> *" like any other convention, a convention to arbitrate is not to be construed **restrictively**, nor, as a matter of fact, **broadly** or **liberally.** It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle **pacta sunt servanda**, a principle common, indeed, to all systems internal law and to international law. Moreover- and this is again a general principle of law- any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged".*[75]

Several awards have applied principles of contractual interpretation based on good *faith* to investment arbitration agreements.[76] But until now, nothing has been said about the application of the principle ***favor negotti*** (pro arbitration) related to the preservation of the effectiveness and validity of juridical acts, or the principle ***contra proferentem*** of universal acceptance in contract law according to which doubts regarding interpretation shall be resolved against the drafting or declaring party. If the State drafted an ambiguous legal provision which generates doubts in terms of whether or not it contains its consent to investment arbitration, it is clear under these contractual principles that such declaration should be interpreted against the State and in favor of arbitration.[77]

The application of the *contra proferentem* principle could lead to conclusions very different from those that could be reached if the principles of interpretation of

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[75] See *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), para. 14 (original emphasis).

[76] Among others, see *Société Ouest Africaine des Bétons Industriels v. Senegal* (ICSID Case No. ARB/82/1), paras. 4.08 – 4.10. Also see SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR. Id. at pp. 251 - 252, paras. 587-589, particularly note 802.

[77] This principle has been indisputably accepted in commercial arbitration. See AGUILAR, Fernando. *"Los efectos de la cláusula arbitral y su interpretación".* In: El Arbitraje en el Perú y en el mundo. Instituto Peruano de Arbitraje (2008), p. 208. Article 40.3 of the European Contract Draft provides: *"The clauses prepared by one contracting party and that have not been the object of preliminary negotiations shall be interpreted, in case of doubt, against the drafting party".*

laws were applied. Principles of interpretation of laws inquire on the "*individual intention"* of the legislator and not the *"common intention"* of the parties. In the interpretation of laws, aside from the fact of the inapplicability of the *contra proferentem* principle, it is irrelevant how the investors understand the legal provision. Instead, in contract interpretation the conduct observed by the parties is relevant according to the principles of good faith, security and reliance, which include the duty of informing the other party about the essential elements of the declarant's will. Therefore, for example, the conduct of an investor or group of investors who sent to the State a letter of acceptance of the purported offer to arbitrate and the conduct of the State which does not object to such belief should all be considered under contractual rules of interpretation as conducts which reflect upon the parties' intention. In the field of interpretation of laws those conducts are not even considered.

Very different conclusions would be reached if instead of contractual rules, the standard of interpretation applicable to unilateral acts were applied, since the latter are usually interpreted in a restrictive manner in favor of the State making the declaration which contains its commitment.[78]

6. THE IRREVOCABILITY OF THE OFFER TO ARBITRATE AS A RESULT OF THE LEGITIMATE EXPECTATIONS CREATED IN THE INVESTORS

The binding and irrevocable nature of the arbitration agreement submitting to ICSID jurisdiction is the expression of the *pacta sunt servanda* principle.[79] Article

[78] See *Nuclear Tests- New Zealand v France.* Judgment of 20 December 1974, ICJ Reports 1974 pp. 472-473 Section 47; Armed activities on the territory of Congo (New application, 2002). (Democratic Republic of Congo v Rwanda), ICJ Reports, 2006, p.28 Section 49 and 50): Document A/CN/.4/L-703 dated 20 July 2006- Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations- Section 7.

[79] See SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR. *Id*. at pp. 254 – 255, paras. 598-599.

25 of the ICSID Convention expressly provides that *"when the parties have given their consent, no party may withdraw its consent unilaterally."* [80]

In order to determine the revocability or irrevocability of the *unilateral* consent to ICSID arbitration expressed by the State, it is necessary to clarify certain issues related to the offer to arbitrate which cause confusion. As evident as it may seem, it is not the same to interpret the denunciation of the ICSID Convention, a treaty that *per se* does not imply consent to ICSID arbitration,[81] than to interpret the revocation of an offer to arbitrate contained in a BIT or in a domestic law, since the last two do contain the State's consent to arbitration. Likewise, the legitimate expectations created in the context of private negotiations in favor of a particular potential investor are easier to determine and control than the legitimate expectations created in an undetermined number of investors through an offer to arbitrate made in a domestic law to "promote" and allegedly "protect" foreign investments in general. In the public offer case, legitimate expectations might have been created in the investors who in such reliance made their investments. Similarly, one should distinguish and admit the legitimate possibility that a State would have of *withdrawing* its public offer from those beneficiaries that have not made investments in the State in question since it can be assumed that such investors have not placed their trust nor their legitimate expectations according to that offer.[82]

For these reasons, it seems wrong to generalize and assert that an offer to arbitrate only becomes irrevocable once it is accepted. Moreover, it is also

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[80] In *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ICSID Case No. ARB/74/2), Jamaica contended that before the dispute's submission to the Centre, it had already announced, pursuant to Article 25(4) of the Convention, its will to exclude disputes arising out of natural resources. The Tribunal rejected Jamaica's contention because, by the time of such notification, consent to submit to the jurisdiction of the Centre had already been expressed in the investment contract entered into by both parties.

[81] And contains a series of provisions (arts. 70, 71 and 72) which establish certain requisites in order for the denunciation to be valid.

[82] The Vienna Convention makes the distinction between *withdrawal* and *revocation.* Unlike revocation, withdrawal occurs when the offer has not reached its beneficiary, and therefore, has not accomplished any binding force nor has it created a situation of reliance. See DIEZ-PICAZO. *Id.* at pp. 294 - 295.

mistaken to say than an offer to arbitrate made by a State always constitutes an irrevocable international obligation regardless of whether it has been accepted by the investor.

Just as in contract law, what ultimately makes the State's unilateral consent to ICSID arbitration revocable or irrevocable are the terms contained in the offer itself. The offer will be irrevocable if it has created legitimate expectations in the investors who reasonably relied upon it and reasonably considered it to be irrevocable by making their investments. Therefore, a single revocation could be arbitrary and, thus, ineffective to investors who made their investment according to a law of promotion and protection of investments containing such offer and still be valid and effective to *future* investors who, at the time of the revocation, had not made their investments. Moreover, a single revocation might be arbitrary with regard to investments made by a single investor before the offer's revocation and still be valid for future and new investments made by that very same investor.

6.1 Denunciation of the ICSID Convention

As mentioned above,[83] the ICSID Convention does not contain any offer to arbitrate, but its denunciation is expressly provided in the text of the Convention. Thus, the denunciation *per se* cannot be regarded as a revocation of the State's consent to ICSID arbitration. The issues posed by the denunciation that have been the subject matter of debate have all revolved around its effects over BITs and domestic laws containing offers to arbitrate. In this respect, most scholars point out that the ICSID Convention's denunciation, as a legitimate right of a Member State, does not affect the validity or effectiveness of the offers contained in BITs, as these treaties are autonomous and independent and, as such, have their own regulations.[84]

[83] Supra introduction.
[84] In this regard, see GAILLARD, Emmanuel. *The Denunciation of the ICSID Convention,* N.Y.L.J., 26 June 2007, Volume 237-N° 122. NOLAN Michael and SOURGENS F.G., *"The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela*

We believe that the sole purpose of article 72 of the ICSID Convention is to preserve the rights and obligations born under the Convention prior to its denunciation. This principle is also contained in the Vienna Convention on the Law of Treaties which provides that termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[85]

It should be noted that the ICSID Convention *a priori* does not afford investors with any right to ICSID jurisdiction; nor does the State take on any duty to offer international arbitration to investors. It is the Member State by itself who later affords such possibility through the immediate and direct, or progressive and indirect, subscription of the arbitration agreement.[86]

There is the possibility that the "meeting of the minds" between the State and the investor could not be perfected by the effective date of termination of the ICSID Convention, but this does not preclude the validity and effectiveness of the bilateral obligation between the States party to a BIT consisting in the offer of submission to ICSID arbitration by one of those States to the nationals of the other State. This State-to-State obligation that has been perfected prior to the denunciation of the ICSID Convention is covered by article 72 of the Convention.

Case Study". TDM, Provisional Issue, September 2007. ESCOBAR, Alejandro. *"Bolivia Exposes Critical Date Ambiguity"*. Global Arbitration Review, 17, 2007. MANTILLA SERRANO, Fernando. *La denuncia de la Convención de Washington, ¿impide el recurso al CIADI?* Revista Peruana de Arbitraje N° 6, 2008, p. 211. GARIBALDI, Oscar. *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*. TDM, March 2009, Vol 6, # 01. Against: SCHREUER, with MALINTOPPI; REINISCH and SINCLAIR. *Id.* at pp. 1279 – 1282.

[85] Vienna Convention Arts. 70 (1) and 70 (2). It is important to mention that, in theory, the Vienna Convention is inapplicable to the ICSID Convention, because the latter on Article 4 provides that *"the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States"*. The ICSID Convention came into force on 1966 and the Vienna Convention on 1980. It is also important to note that Bolivia, Nicaragua and Venezuela are not parties to this Convention. However, such Convention is generally recognized as a codification of customary international law.

[86] Very different is the situation of Contracting States who take upon international obligations between or among themselves from the very moment of ratification of a treaty, whether bilateral or multilateral.

Therefore, the rights and obligations established in a BIT and taken on by one State in relation to another State and, particularly, the offer to ICSID arbitration to the nationals of the other State cannot be affected, in principle and, unless otherwise agreed, by the denunciation of the ICSID Convention made by one of the States party to the BIT, since the ICSID Convention is a separate and independent treaty from the BIT in question.

6.2 Denunciation of a BIT

A similar outcome would occur when a BIT is denounced, because the vast majority of these treaties establish an extension of their validity for a period of 10 to 15 years in benefit of the investments made before its denunciation. Therefore, future investors would be the real ones affected by the denunciation, since no legitimate expectations have been created in them. However, an eventual reform or revision of a BIT to revoke the offer to arbitrate contained in it, or a declaration of unconstitutionality of the BIT would be governed by the same principles applicable to the arbitrary revocation of an offer to arbitrate made in a domestic law which we shall explain in further detail below.

6.3 Revocation of the offer to arbitrate contained in a domestic law

The offer to arbitrate is irrevocable even when there is no express provision ratifying it or a fixed term for its acceptance when the investor could reasonably think that the offer was firm and has relied upon it in 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."* [87]

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

[87] See PAULSSON, Jan. *"The Power of States to make meaningful promises to foreigners"*. TDM, September 2008, p. 21.

bodies who 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.[88] 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, which provide for the irrevocability of the offer in the aforementioned cases.

In short, the revocation of the State's unilateral consent is arbitrary and, thus ineffective, when that offer created legitimate expectations in the investors when making their investments. 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 in fact made their investments before the revocation of such offer.

For this reason, it is submitted that the purported revocation of the offer to arbitrate contained in article 22 of the Venezuelan Investment Law through the mentioned decision N°1541 of the Supreme Tribunal of Justice is clearly arbitrary and ineffective for those investors who made their investments in Venezuela before the publication of the 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. However, in support of the *effectiveness* of the revocation for new investors stands out the difficulty of demonstrating that they *relied* upon such legislation after the publication in the Official Gazette of that

[88] In this sense, see RONDÓN DE SANSÓ, Hildegard. "*El Principio de Confianza Legítima o Expectativa Plausible en el Derecho Venezolano"*. Editorial Ex Libris. Caracas. 2002. GONZÁLEZ PÉREZ, Jesús. *"El Principio General de la Buena Fe en el Derecho Administrativo"*. 2º Edición. Editorial Civitas. Madrid. 1989. Likewise, GARCÍA LUENGO, Javier. *"El principio de protección de la confianza en el Derecho Administrativo".* Editorial Civitas. Madrid. 2002.

decision[89] and also with the publication of the awards in the *Mobil v. Venezuela* and *CEMEX v Venezuela* cases. It is clear that if future ICSID awards rule in favor of the thesis that article 22 does in fact contain an offer to arbitrate, then the issue is reversed.

7. CONCLUSIONS

1. - Neither scholars nor the ICSID Tribunals have been uniform regarding the standard of interpretation applicable to consent in investment arbitration.

2. - Little attention has been given to the fact that, in investment arbitrations, the arbitration agreement is also a *contract* which is autonomous and independent from the instrument containing it, in whole or in part.

3. - From our perspective, it does not seem correct to assert that when State consent is contained on a treaty *"the application of treaty principles of interpretation is self evident"* and when it is contained in a national law is governed by the rules of interpretation applicable to unilateral acts or the rules of interpretation applicable to laws. In all these cases, we are dealing with an arbitration contract or a potential arbitration contract, independent and autonomous from the instrument containing such consent.

4. - The manifestation or expression of the State's unilateral consent recorded in a treaty, a law or even a private instrument does not change the nature of consent as a legal act which incorporates a manifestation of will intended to form an arbitration agreement. The instrument cannot be confused with the act itself.

5. - When the dispute is already registered before ICSID, it can be assumed that the investor has accepted the offer to arbitrate and, at least *prima facie*, we are dealing no longer with a unilateral offer, but an arbitration agreement containing

[89] Published in Official Gazette N° 39.055. November 10, 2008.

both consents. ICSID Tribunals cannot interpret in an isolated manner the acts or unilateral offers made by States. They can only interpret them when they have already been accepted by the investors.

6. - The application of the international rules or principles of interpretation of contracts as a standard of interpretation applicable to consent in investment arbitrations has paramount consequences. Applying the *contra proferentem* principle to ambiguous State manifestations could result in very different conclusions than if the principles of interpretation of laws, treaties or the rules of interpretation applicable on unilateral acts were applied.

7. - It seems incorrect to assert generally that an offer to arbitrate is only irrevocable when accepted. By the same token, it also seems incorrect to generally assert that an offer to arbitrate made by the State is always an irrevocable international obligation regardless of whether it has been accepted by the investor. Just as in contract law, what makes the unilateral consent of the State to ICSID arbitration revocable or irrevocable is the legitimate expectations created in the investors by the terms of the offer itself. Consequently, a single revocation could be both arbitrary and thus ineffective to those investors who have made their investments according to a domestic law for the promotion and protection of investments containing the offer, and, at the same time, be effective and legitimate for *future* investors who at the time of revocation had not made their investments.

8. - It seems that Bolivia and Ecuador's denunciations of the ICSID Convention as well as the potential revocation of the offer to arbitrate contained in the Venezuelan Investment Law and the potential denunciation of BITs entered into by such States will not prevent the registration of requests for arbitrations against them before ICSID in the next 10 to 15 years, to say the least. In fact, the legitimate expectations created freely by States in the exercise of their sovereign power cannot simply be made void overnight by new economic policies implemented by the government currently in power.