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# The consent of a state to international investment arbitration: insights on the Venezuelan case

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# **The Consent of a State to International Investment Arbitration: Insights on the Venezuelan Case.**

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## Abstract

The field of international investment law has been increasingly gaining importance in the international sphere, due to the globalization of the economy there has been an increase in the investments made by investors in foreign countries, and, in turn, foreign investors are more concerned with the protection that foreign countries afford to their investments. But not all States have an interest to protect foreign investments, some countries instead of increasing the protections to foreign investments are looking to diminish or limit such protections. The problem is that some of those States have already granted some protections to foreign investors, including their consent to solve investment disputes through international arbitration and these changes in the States policies directly affect the legal framework in which foreign investors decide to make their investment. Therefore, the purpose of this study will be to analyze to what extent a State can unilaterally withdraw its consent to international investment arbitration and the effects of such withdrawal in on going or future disputes, with a specific focus on the BITs concluded by Venezuela and the denunciation of the ICSID Convention<sup>1</sup> by Venezuela. Based on the foregoing, the research question is: When is it considered that a State has given its binding consent to be brought in front of an arbitral panel by a foreign investor?

To answer the question I will use a qualitative research methodology, and I will analyze the denunciation by Venezuela of the ICSID Convention based on texts of the ICSID Convention, BITs concluded by Venezuela and arbitral awards rendered by Arbitral Tribunals in the cases where Venezuela was involved. Academic literature will also be analyzed.

I found that in order to determine whether a State gave its binding consent to international arbitration depends on the specific wording used by such State in the corresponding treaty, contract or domestic law and that no specific formality is required to grant such consent, and, in essence the consent does not bound the States until the foreign investor have equally granted or accepted the consent to submit disputes to international arbitral tribunals, being possible for the State to unilaterally withdraw the consent prior the consent of the foreign investor has been given.

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<sup>1</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ("ICSID Convention").



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## **Acronyms and Abbreviations**

*BIT* – Bilateral Investment Treaty or Agreement on the Promotion and Protection of Investments.

*Constitution* – Constitution of the Bolivarian Republic of Venezuela published in the Official Gazette of the Bolivarian Republic of Venezuela No. 36,860, dated 30 December 1999.

*FTA* – Free Trade Agreement.

*ICSID* – International Centre for Settlement of Investment Disputes.

*ICSID Convention* – Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

*Foreign Investments Law* – Decree No. 1,438 with rank and force of Law for the Foreign Investments published in the Special Official Gazette of the Republic of Venezuela No. 6,152, dated 18 November 2014.

*Investment Law* – Decree No. 356 with rank and force of Law for the Promotion and Protection of Investments published in the Special Official Gazette of the Republic of Venezuela No. 5,390, dated 22 October 1999.

*UNCITRAL* – United Nations Commission on International Trade Law.

*Venezuela* – Bolivarian Republic of Venezuela.



## 1. Introduction

The amount of investor State disputes submitted to international arbitration has been increasing over the years<sup>2</sup>, and the right of the investor to international investment arbitration has become one of the main features of investment protection. However, States are not automatically bound to submit their investor States disputes to arbitration, instead they have to give their consent (De Brabandere, 2004).

As I will explain in this paper, States can give their consent in three different ways, either through a contract entered into with the foreign investor, a provision contained in an international treaty (ie Bilateral Investment Treaty or a Multilateral Treaty), or through national legislation of the State (Schreuer et al., 2008). I will analyze the legal consequences arising out of the abovementioned manners with a special focus on the consent given through an international treaty (e.g. BITs), which is the most common way used by States to grant their consent to international investment arbitration.

New concerns arose in regards with the consent issue after Plurinational State of Bolivia, Republic of Ecuador and Venezuela gave notice of denunciation of the Convention of the Settlement of Investment Disputes between the States and National of Other States<sup>3</sup> to the World Bank (Luque Macías, 2013). In particular, the concerns were focused on the effects that the dispute settlement clauses may have, especially in those Bilateral Investment Treaties (“BITs”) that contained survival clauses and the effects of the consent given by such States prior the denunciation of the ICSID Convention in light of Articles 71 and 72 of the ICSID Convention (Luque Macías, 2013).

In order to answer the central question I will begin by explaining the interpretation that has been given to Article 25 of the ICSID Convention, the different sources of the State consent, (i.e. contracts, international treaties and domestic law) and the formalities required for that consent to be binding for the State, in doing so I will make reference to doctrine and ICSID case law. Also a brief reference to the scope of the consent in counterclaims will be addressed.

The second chapter will focus on the provisions contained in the ICSID Convention in respect with its denunciation, which are Articles 71 and 72 of the ICSID Convention, and the different approaches of the State consent, those are the “Offer and Acceptance Approach”, the “International Obligation Approach” and the “Individual Consent Approach”. As we will see, depending on the approach the State can be bound by its consent in different moments, it could be bound by the mere offer or it could be bound only after the foreign investor accepts the offer.

Finally, I will address the case of Venezuela by performing an analysis of the BITs executed by Venezuela jointly with the provisions of the Law for the Promotion and Protection of Investments and the new law enacted by the Venezuelan Government to determine the position of Venezuela with regard to international investment arbitration, whether the consent to international arbitration was in fact granted by Venezuela and if it has been withdrawn effectively.

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<sup>2</sup> United Nations Conference on Trade and Development, *Recent Trends in ILAs an ISDs* (February 2015) 5.

<sup>3</sup> “ICSID Convention”

## 2. The Consent under International Investment Law

In order to understand when has a State given its consent to be brought in front of an arbitral tribunal there are two fundamental aspects that should be taken into consideration. In this chapter, I will analyze the interpretation of Article 25(1) of the ICSID Convention, followed by the analysis of the manners in which a State can express its consent to arbitration under International Investment Law.

### 2.1. General Aspects of Article 25(1)

Article 25(1) of the ICSID Convention sets the basis for the jurisdiction of the International Centre for Settlement of Investment Disputes (“ICSID”), and states the following:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent no party may withdraw its consent unilaterally.

The Arbitral Tribunal of the *Venoklim Holding B.V. v Bolivarian Republic of Venezuela* established three requirements for determining the jurisdiction of the ICSID, which are *ratione materiae*, *ratione personae*, and *ratione voluntatis*<sup>4</sup>, that is a legal dispute directly arising out of an investment between Contracting States and provided that both parties to the dispute gave their consent in writing. This paper will focus on the *ratione voluntatis* or consent on the side of the Host State.

In fact it is clear that the jurisdiction of the ICSID is based on consent, and such consent is perfected once both parties to the dispute have agreed to resort to international investment arbitration (Schreuer et al., 2008), it is considered as the ‘final irrevocable agreement’ of the parties. This means that the notion of consent in the ICSID Convention ‘encompasses the element of mutuality and reciprocity’ (Alschner et al., 2010).

The analogy that has been accepted by some scholars to determine when does the consent has been perfected is the contract analogy, whereby the Host State makes an offer, which the foreign investor must accept in order for the consent to be deemed perfected (‘perfected consent’) (Garibaldi, 2009). This standpoint has received several critics.

Therefore, it is not clear if only perfected consent would preserve other ‘rights and obligations under the Convention’<sup>5</sup> (including the jurisdiction of the ICSID Centre) or the mere offer of the State to arbitrate binds the State to accept international investment

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<sup>4</sup> *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015) (“Venoklim Case”) para 42.

<sup>5</sup> ICSID Convention, art 72.

arbitration under international investment law in case the investor decides to accept the offer. This latter case is typical of international investment arbitration tout court, which will be analyzed in section 2 below.

## 2.2. Sources of the Consent of the State

The Host State can give its consent to resort to international investment arbitration by means of a direct agreement with the foreign investor, by an international treaty, through domestic legislation (Schreuer et al., 2008) or a unilateral instrument (e.g. a letter to the ICSID Secretariat or the investor) (Alschner et al., 2010). Out of the abovementioned sources, by December 2014 the highest amount of investor-State disputes registered in the ICSID were those whose consent is based on an international treaty (61.8% - BITs and 10.5% - FTAs or Multilateral Treaties); followed by dispute whose consent was given by direct agreements between the State and the foreign investor (18.3%); and, finally, followed by disputes which consent was given through the domestic legislation of the Host State (9.4%) (ICSID, 2015).

Regardless of the source of consent to international investment arbitration, it has been established by ICSID case law that consent must be ‘clear and unambiguous’, which means that it cannot be presumed, and clearly demonstrated (ICSID, 2013).

As we mentioned previously, the consent provided for in a contract or direct agreement is a ‘perfected consent’. However, there is a distinct feature that differentiates the consent given through an international treaty or domestic legislation from the consent given through a contract. The difference lies in the fact that in the former cases the investor is not part of the relationship, as in the case of the international treaty the consent is agreed between the Host State and the Home State, whereas in the case of the domestic legislation the consent is a unilateral offer to arbitrate. This is the feature that has given origin to the so-called ‘arbitration without privity’ (Waibel, 2014).

Under arbitration without privity the consent is not perfected until the foreign investor decides to accept the offer of the Host State to arbitrate, in other words, it is the foreign investor that chooses to submit a certain dispute to international investment arbitration. In general terms, a foreign investor can accept the offer in two different ways: (i) by filing a request to initiate an arbitration procedure with the ICSID; or (ii) by depositing a notice accepting the offer either addressed to the ICSID or the Host State<sup>6</sup>. Once the consent has been perfected by the foreign investor, the State is bound by its offer and has to accept arbitration.

However, the consent of the investor can be perfected in a variety of ways, it can even be expressed in different documents that evidence the willingness of the investor to submit the dispute to international investment arbitration. In this sense, an interesting decision was taken by the arbitral tribunal in the case *ABCI Investments Limited v. Republic of Tunisia*. In the abovementioned case, the arbitral tribunal declared their jurisdiction based on the offer to international investment arbitration made by the Republic of Tunisia. The offer was made in the national investment law of the Republic of Tunisia and was implicitly accepted by the investor in various separate instruments (Pinsolle, 2014).

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<sup>6</sup> ICSID (No. 17).

This decision is important because in their analysis the arbitral tribunal established a difference between the acceptance of an offer contained in a BIT, that has to be accepted in a clear and explicit manner, and the one contained in a domestic law, that could be accepted in general terms being 'sufficient to invoke the benefit of the legislation' (Pinsolle, 2014).

a. A direct agreement between the Host State and the foreign investor.

A direct agreement may take different forms, it could be a contract executed between the State and the foreign investor containing a compromissory clause, or even an investment application approved by the government of the Host State (Schreuer et al., 2008).

In this case, the parties mutually agree to submit a dispute to international investment arbitration with the ICSID, there is a perfected consent. This scenario is the less problematic one because once the consent is perfected the legal consequence set forth in Article 25(1) of the ICSID Convention applies, ie no party can unilaterally withdraw its consent.

Parties can define the scope of the consent, if it includes all or specific disputes, existing or future disputes, and it can be express in the same or separate instruments (Schreuer et al., 2008). In other words, what matters is the exchange of the wills and to what extent the parties are agreeing to submit disputes to international investment law, not specific formalities.

Over the years, arbitral tribunals have made a distinction between contract claims and investment claims. The general rule is that an arbitral tribunal has jurisdiction to hear claims based on the BIT and that domestic courts are competent to hear claims originated from the contract, especially if it was so established in a dispute settlement clause (Schreuer, 2005). However, it should be noted that a forum selection clause agreed by the parties does not precludes ICSID's jurisdiction (Schreuer, 2005).

The scope of the consent contained in a BIT is especially important in disputes that arise out of contracts that contain clauses establishing a domestic forum selection, without making any reference to ICSID jurisdiction. Two aspects come into play in this case: (i) the scope of the consent contained in the BIT; and (ii) the nature of the claim (i.e. whether it is an investment claim or a contractual claim). Both of these aspects will determine the jurisdiction of the arbitral tribunal over the claim.

In this sense, the wording of the consent in the BIT plays an important role. If the clause in the BIT is drafted in such broad terms to include all disputes concerning investment, the jurisdiction of the arbitral tribunal is not restricted only to violations of the BIT, but also includes contract violations related to the investment (Schreuer et al., 2008).

Based on the foregoing, an ICSID arbitral tribunal can have jurisdiction over disputes originated out of the contract executed between the Host State and a foreign investor even if the contract provides for a domestic forum selection. This was the case of *Salini v. Morocco*, where the arbitral tribunal disregarded the fact that the parties agreed to exclusively submit the disputes arising out of the contract to the courts of the Host State, based on the broad wording of the offer of consent contained in the BIT

between Italy and Morocco and declared its jurisdiction to 'hear contract violations that simultaneously amounted to BIT violations as well as pure contract claims not amounting to breach of the BIT' as long as it is an investment contract executed between the foreign investor and the Host State (Schreuer, 2005). Some arbitral tribunals have followed the same line of reasoning (e.g. cases of *LANCO v. Argentina*, *Azurix v. Argentina*, *Compañía de Aguas del Aconquija v. Argentina*).

However, there is no uniformity in ICSID case law in this regard, some arbitral tribunals have considered inappropriate to extent their jurisdiction to contract claims if they do not also constitute a breach of the substantive terms of the corresponding BIT, as was the case in *SGS v. Pakistan* (Gaillard, 2005). The situation is equally complicated when a dispute arises from a contract executed with an investor which BIT provides for an umbrella clause. In the end, it will all depend on the wording of the clause contained in the BIT and the interpretation given by the arbitral tribunal to such wording.

#### b. An International Treaty.

States can offer their consent to international investment arbitration by means of an international treaty, either a Bilateral Investment Treaty ("BIT") or a Multilateral Agreement. BITs are the most common tool for States to express their consent to international investment arbitration and their negotiation and ratification has been increasing over the years<sup>7</sup>. Due to the foregoing, I will mainly focus on the BITs as a means of expressing consent by the Host State.

In a BIT States can either give its consent to resort to international investment arbitration or express their willingness to agree in the future with the foreign investment to submit a dispute to international investment arbitration (Schreuer et al., 2008). This plays an important role because a unilateral offer will remain valid until such treaty is terminated or re-negotiated, and even if the treaty is terminated, the offer contained therein may be valid for a longer time if provided for in a survival clause (Alschner et al., 2010).

Likewise, the scope of the consent is defined by the wording of the clause in the corresponding treaty. In this sense, the consent could include all disputes arising out of the BIT and those arising out of a contract executed with the foreign investor, the so-called umbrella clause. In addition, it could provide for mandatory procedural requirements (eg amicable settlement, exhaustion of domestic remedies or fork-in-the-road provisions) (Schreuer et al., 2008).

#### c. Through National Legislation.

Depending on the wording of the provision contained in domestic law, a reference to international investment arbitration can be considered as an unilateral offer of the Host State or a mere indication that the State can give its consent in the future to settle a dispute by arbitration. The provision should define the scope of the consent and any required procedural requirements (Schreuer et al., 2008).

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<sup>7</sup> United Nations Conference on Trade and Development, *Recent Trends in ILAs and ISDs* (February 2015) 5.

### 2.3. Consent in Counterclaims

As indicated previously, the consent to international investment arbitration can be tailored by the parties depending on their needs, including the jurisdiction of the ICSID Centre to hear counterclaims or additional claims. The possibility to exclude counterclaims from the jurisdiction of the ICSID Centre is provided for in Article 46 of the ICSID Convention, which establishes that:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims *arising directly out of the subject-matter of the dispute* provided that they are *within the scope of the consent* of the parties and are otherwise within the jurisdiction of the Centre.

There are two important aspects that can be taken from this Article: (i) the fact that the counterclaim should arise ‘directly out of the subject-matter of the dispute’; and (ii) the dispute must be within the ‘scope of the consent’<sup>8</sup>.

As explained by Steingruber, the first requirement implies that the counterclaim or additional claim must be related with the investment, the rationale behind this is that the jurisdiction of the Arbitral Tribunal over counterclaims is a derivative competence originated from the jurisdiction of the Arbitral Tribunal to hear investment claims (Steingruber et al., 2013).

In turn, the scope of the consent is related with the wording that the parties used to express their consent, and two points of view have been exposed by scholars. One where the scope of the consent is determined by the foreign investor when it accepts the offer of the Host State, and as a result such acceptance concludes the contract between both parties; and the other where the scope of consent is established by the Host State, being impossible for the foreign investor to amend the limits of the consent, in other words, the foreign investor cannot make a counteroffer (Steingruber et al., 2013).

Further considerations may be made in regards with the scope of the consent in counterclaims, but it is not within the purpose of this paper. However, once again the “Offer and acceptance approach”, which we will explain in the next chapter, also finds support in case there is a counterclaim or an additional claim filed by the Host State.

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<sup>8</sup> ICSID Convention art 46.



### 3. Denunciation of the ICSID Convention and the Consent of the State

In addition to Article 25 of the ICSID Convention, there are two additional Articles that come into play when analyzing the rights and obligations arising out of consent, these are Articles 71 and 72 of the ICSID Convention, which prescribe the effects of the denunciation of the ICSID Convention. In this chapter I will analyze the interpretation that has been given to the abovementioned Articles and, based on such interpretation, the nature of the State's consent, this is to what extent is the State compromising itself to accept international investment arbitration once it has expressed its consent according to the prescribed manners indicated in chapter I above.

#### 3.1. General Aspects of Articles 71 and 72

Article 71<sup>9</sup> sets forth the right of the parties to the ICSID Convention to denounce the treaty, and establishes that such denunciation will take effect in a period of six (6) months counted as of the date on which the depositary received the notice of denunciation. As per Article 73 of the ICSID Convention, the depositary is the World Bank. It follows that after such term have elapsed the denouncing State ceases to be a party of the ICSID Convention.

On the other side, Article 72 of the ICSID Convention establishes the following:

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.

Two main ideas can be extracted from the abovementioned Articles: (i) during the six (6) months period the denouncing State is still party to the ICSID Convention; and (ii) the notice of denunciation does not affect rights and obligations arisen out of the consent to the jurisdiction of the ICSID.

However, there has been some debate over the status of the denouncing State during such six (6) months period, as there are certain scholars that consider that the denouncing State is not a party to the ICSID Convention but can still enjoy certain rights and obligations.

Depending on the approach used to interpret Articles 71 and 72, scholars have identified three scenarios to understand the legal effects of the denunciation of the ICSID Convention, which will be discussed in the next section.

#### 3.2. Approaches to Consent under International Investment Law

As indicated above, there are three approaches to understand when does a State is bound by its consent to be brought in front of an arbitral panel by a foreign investor:

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<sup>9</sup> 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.

(i) “Offer and Acceptance Approach”:

This approach takes into account the general principles of contract law and adapts them to international investment law. Therefore, under this viewpoint, the consent contained in a treaty or a domestic law is considered as a mere offer that must be accepted by the investor in order for the Host State to be bound by it. In other words, the offer itself does not create any liability for the Host State, being necessary an explicit acceptance by the foreign investor for the consent to be perfected. Afterwards, the Host State or offeror is bound by its offer and cannot revoke it unilaterally (Nolan and Sourgens, 2007).

The foregoing means that a declaration such as the one indicated in the first paragraph does not comply with the requirement of Article 25(1) (ie the State has not given its written consent), and it is deemed only an offer to consent to international investment arbitration in the future, which can be unilaterally revoke at any time by the Host State, as long as the foreign investor has not accepted the offer. The offer can be withdrawn by amending the domestic law or by terminating the international treaty (Nolan and Sourgens, 2007).

In practical terms this means that only perfected consent that has been given before the notice of denunciation has been filed will preserve the rights and obligation arising out of consent to the jurisdiction of the ICSID, despite the fact that the Host State gave notice of denunciation of the ICSID Convention (Alschner et *al.*, 2010). As soon as the Host State files the notice of denunciation, any foreign investor that has not accepted the offer loses their right to submit a dispute with the ICSID (Nolan and Sourgens, 2007).

There is another variant of this approach supported by Emmanuel Gaillard which focuses on the specific wording of each BIT, and differentiates between an ‘unqualified consent’ (ie prior consent to submit disputes to the ICSID) and an ‘agreement to consent’. Article 72 of the ICSID Convention will only be applicable if the State gave its unqualified consent (Gaillard, 2007).

In the analysis of Emmanuel Gaillard’s approach made by Michael D. Nolan and others, they explain that, following the contract analogy, the unqualified consent of the State can be seen as a firm offer that cannot be revoked once it has been made. Two consequences can be drawn from this approach: (i) extension of the liability of the offeror for any action inconsistent with the firm offer (even if the offer has not been revoked); and (ii) the State is bound by its offer even after the denunciation of the ICSID Convention has taken effect (Nolan and Sourgens, 2007).

(ii) “International Obligation Approach”:

This approach relies on the fact that a State is a sovereign entity and, as a consequence, any declaration expressed by a State cannot be deemed a mere “offer”, but it is considered as a unilateral declaration. Unilateral declarations are binding for the States because they may give origin to international obligations, and under international public law the State has a duty of good faith, which, in turn, finds its basis in the need for legal stability under international law. Any revocation of the consent cannot violate the obligation of good faith of the State (Nolan and Sourgens, 2007).

In fact, as cited by Nolan and others, the International Court of Justice has declared that ‘sovereigns are bound by their declarations due to their fundamental obligations of substantive good faith’ and, therefore, the principle of good faith imposes fundamental obligations to the States (Nolan and Sourgens, 2007).

The expectations that led the investors to make an investment in the corresponding State are also important under this view. The issue is that the declaration of a State contained in a treaty or in a domestic law becomes part of the legal framework in which the investor will manage their investment, and, therefore, a declaration indicating the possibility to access to a neutral and international dispute settlement mechanism might be crucial for the investor to decide whether to invest in a State. Understanding the consent as an “offer” will not grant enough protection to the investor, because it can be easily changed or eliminated, and doing so might be considered as a violation to the duty of good faith, because it was a pre-condition for the investment to be made (Nolan and Sourgens, 2007).

The foregoing means that the consent to arbitrate does not need to be accepted by the foreign investor to be valid and binding for the Host State, and that regardless of an acceptance being made by the investor, investors will continue to be protected by ICSID jurisdiction for an unlimited period of time even if the Host State denounce the ICSID Convention (Nolan and Sourgens, 2007).

(iii) “Individual Consent Approach”:

This third approach was developed by Oscar Garibaldi as a critic to the abovementioned “Offer and Acceptance Approach”, stating that the contract analogy might be helpful to understand how the consent under the ICSID Convention works, but in practice such approach cannot be used because it leads to a solution that contradicts the spirit and purpose of the ICSID Convention. The author finds the support of this approach in the interpretation of the ICSID Convention based on the rules set forth in the Vienna Convention on the Law of Treaties.

This approach states that in general terms the consent required under Article 25 of the ICSID Convention is an individual consent, when the ICSID Convention refers to a perfected consent it does so expressly as with the case of Article 25(1) of the ICSID Convention (ie ‘when *the parties* have given their consent...’) (Garibaldi, 2009).

Garibaldi goes on to explain the function of Article 72 of the ICSID Convention. Since Article 72 of the ICSID Convention does not indicate otherwise, the consent required for the application of such Article is the individual consent of one of the parties (ie of the denouncing State). It follows that the rights and obligations under the ICSID Convention will not be affected by the individual consent granted by the denouncing State prior the denunciation of the ICSID Convention. The rights and obligations refer to in Article 72 of the ICSID Convention include those in regards with the dispute settlement mechanism and the conduct of proceedings (Garibaldi, 2009).

To explain this point of view the author divides its analysis in two aspects: (a) the effects that the withdrawal of consent has in regards with the rights arising out of the State’s consent; and (b) the effects that such withdrawal has in regards with the obligations arising out of the consent.

It is understood that the rights arising out of the State's consent include:

The State's right to submit the dispute to the Centre, as long as the other party consents, the investor's right to give its own matching consent (as long as the State's consent has not been withdrawn) and the due-process rights guaranteed by the Convention to each party to the dispute (Garibaldi, 2009).

Whereas the obligations that arise out of the State's consent include:

Obligations arising from the pre-notice consent, together with any later consent validly given by the other party to the dispute and from any resulting submission of the dispute to the Centre, as well as the obligation to abide by the other duties imposed on the parties by the Convention, including compliance with the award (Garibaldi, 2009).

In respect with the rights arising out of the State's consent the effects would be as follows:

- a) If both parties gave its individual consent prior the notice of denunciation: It is generally accepted that under this scenario the notice of denunciation does not affect the jurisdiction of the ICSID Centre, and so either party shall accept the submission of a dispute to the Centre by the other party, shall comply with the proceedings and must comply with the corresponding award. No party can withdraw its consent during the notice period.
- b) When only the denouncing State consented jurisdiction of the ICSID: As per Article 25(1) of the ICSID Convention the State may withdraw its consent at any moment as long as the investor has not given its individual consent to ICSID jurisdiction, even during the notice period. However, it must do so in observance of the principle of good faith (Garibaldi, 2009).

The author further considers the scenarios under which the State could validly withdraw its consent, which is, complying with the principle of good faith:

- If the consent was given through a contract, the State cannot validly withdraw its consent because there is a matching consent by the other party to the dispute<sup>10</sup>;
- In case the consent was given by means of a unilateral instrument, the withdrawal would have to comply with the terms provided for in the same instrument (ie an equal instrument issued by the competent authority of the State)<sup>11</sup>.

The withdrawal has to be directly addressed to the foreign investor if the unilateral instrument that expresses the consent was directly addressed to such investor. If the consent was given in a generic note addressed to the ICSID or its depositary, a generic unilateral declaration would comply with

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<sup>10</sup> Ibid 264.

<sup>11</sup> Ibid.

the principle of good faith, in which case even the notice of denunciation could be considered as a withdrawal of the consent<sup>12</sup>.

- If the consent was given in domestic law, the withdrawal would have to comply with both domestic law and international law<sup>13</sup>. In respect with domestic law, the withdrawal of the consent would have to be made in accordance with the manners prescribed by the constitution of such State that is normally by the issuance of another act issued by the legislative power that abrogates or derogates the legislation previously enacted<sup>14</sup>. Notice of denunciation would not be considered as a form to validly withdraw the consent because an act issued by the executive power usually does not have the power to repeal a legislation issued by the legislative power. Close attention must be paid in this respect, because if the constitution of the Host State protects 'vested rights or legitimate expectations of foreign investors' the declaration contained in a domestic law may be considered irrevocable.

As per the viewpoint of international law, any act of domestic law, even if it is legally performed, that contravenes treaties or general international law, such as the principle of good faith, may be null. In this sense, there is the possibility that withdrawal of consent under domestic law does not have any effect under international law.

- When the consent has been given by a treaty, then the consent can only be withdrawn in the manners prescribed for in the treaty or in general international law. The only way in which a State can validly unilaterally withdraw its consent is if such withdrawal is set forth in the treaty, otherwise, the consent is valid until the treaty is terminated. The consent would be valid even during the time provided for in the survival clause, if there is one in the treaty (Garibaldi, 2009).

In respect with the obligations arising out of the State's consent the author argues that as long as the consent has not been effectually withdrawn by the Host State, the investor can give its matching consent at any time because the ICSID Convention does not establish a time frame within which the consent must be given.

Furthermore, since Article 72 of the ICSID Convention qualifies the requirement of Article 25(1) of the ICSID Convention by rendering effective the pre-notice consent even after the denunciation takes effect and the Host State ceases to be a party to the ICSID Convention, the obligation arising out of such consent survives the six (6) month term established in Article 71 of the ICSID Convention (Garibaldi, 2009).

According to the different and possible scenarios the effects of the denunciation in regards with the obligations arising out of the consent would be as follows:

c) If only the national of the denouncing State has given its consent: the situation is similar as the one in which the State is the only one that has given its consent, however, it will not be discussed further because it is not within the scope of this work.

d) When neither the State nor its national have consented to ICSID jurisdiction: Article 72 of the ICSID Convention does not apply and the rights

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<sup>12</sup> Ibid 266.

<sup>13</sup> Ibid 267.

<sup>14</sup> Ibid 268.

and obligations of the parties would have to be determined in regards with other provisions of the ICSID Convention or general international law. However, during the period of time set forth by Article 71 of the ICSID Convention, both the denouncing State and its national continue to be a party to the ICSID Convention and, therefore, can give their consent to submit a dispute to the ICSID Centre. Once both parties have given their consent, the dispute would have to be submitted within the six month period before the ICSID, or otherwise the parties will lose this right. The reason for this conclusion is that the qualification imposed by Article 72 of the ICSID Convention does not apply to the consent expressed after the notice of denunciation takes effect, and the requirement of Article 25(1) of the ICSID Convention (ie that the State or its national be a party to the ICSID Convention) would not be met ((Garibaldi, 2009).

These are the approaches that scholars have analyzed and that were seen as positions that Arbitral Tribunals could reproduced if arbitrators were ever faced with a situation in which the request for arbitration was made during the six (6) months established in Article 72 of the ICSID Convention.

Finally, the Arbitral Tribunal in the case *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*<sup>15</sup> had to analyze whether the request for arbitration submitted by a foreign investor during the six (6) months established in Article 71 of the ICSID Convention was valid and, therefore, whether the Arbitral Tribunal had jurisdiction over the claim.

The request for arbitration under ICSID was submitted by Venoklim Holdings B.V. on 23 July 2012 after Venezuela denounced the ICSID Convention on 24 January 2012. Venezuela contended that the consent expressed by the foreign investors was not valid because Venezuela has already denounced the ICSID Convention, and, for this reason, the Arbitral Tribunal did not had jurisdiction; whereas Venoklim Holdings B.V. stated that Venezuela was still party to the ICSID Convention because the six (6) month term had not elapsed and, consequently, the consent was valid and the Arbitral Tribunal had jurisdiction over the claim.

In this sense, the Arbitral Tribunal proceeded to analyze Articles 71 and 72 of the ICSID Convention jointly with Articles 44 and 43 of the Vienna Convention on the Law of Treaties. The Arbitral Tribunal draw the following conclusions: (i) Article 71 set forth the solutions to the problems that the denunciation may carry in the future and Article 72 establishes that the rights and obligations acquired prior the denunciation must be respected and the non retroactivity of the denunciation; (ii) Article 72 refers to the unilateral offer of consent made by the State, not the perfected consent, understanding that only perfected consent will enjoy the effects of Article 72 is contrary to the principle of legal stability<sup>16</sup>. Also, the Arbitral Tribunal indicated:

Once a State has made a valid offer to international arbitration, one of its main obligations is to comply with the same, even during the period of six

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<sup>15</sup> *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015) (“Venoklim Case”) (n 9).

<sup>16</sup> Ibid para 63-5.

months set forth by the ICSID Convention so that the denunciation becomes effective.<sup>17</sup>

Based on the foregoing, the Arbitral Tribunal declared that by the time the investor filed his request for arbitration, Venezuela was still party to the ICSID Convention and it was obliged to respect its obligation to resort to international arbitration with the ICSID.

In addition, the Arbitral Tribunal made a distinction between the registration of the case by the ICSID Secretariat and the date on which the consent was perfected. The Arbitral Tribunal considers that the consent was given on the date on which the last expression of consent was granted (ie with the submission of the request for arbitration). Such date is the one that must be taken into account to determine the effects of the consequences of giving the consent. The submission of the request for arbitration as matching the consent of Venezuela is sufficient for the Arbitral Tribunal to have jurisdiction, regardless the fact that the ICSID Secretariat registered the claim after the six (6) months elapsed<sup>18</sup>.

Although decisions of Arbitral Tribunal are not binding to future cases, it is very usual that Arbitral Tribunals use ICSID case law to decide similar matter, therefore, this decision sheds some lights on the approach that is likely to be taken by other Arbitral Tribunals in the future for similar cases.

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<sup>17</sup> Ibid para 66.

<sup>18</sup> *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 April 2015) (“Venoklim Case”) para 76.

## 4. The Case of the Bolivarian Republic of Venezuela

This chapter will begin with the analysis of the laws and regulations regarding the promotion and protection of foreign investments in Venezuela and the Constitution of Venezuela to determine the position of Venezuela with regard to international investment arbitration jointly with the BITs concluded by Venezuela. Furthermore, the new legislation enacted by the Venezuelan Government in the field of investment law will be equally analyzed. Afterwards, Articles 71 and 72 of the ICSID Convention and ICSID case law will be addressed in order to determine the effects and consequences that the denunciation of the ICSID Convention by Venezuela has on ongoing and future investor-state disputes.

The legal framework of investment law in Venezuela was amended on 18 November 2014. Prior such date, this field was regulated by various laws and regulations, being the main one the Investment Law<sup>19</sup>. After 18 November 2014, all the laws and regulations governing investment law in Venezuela were repealed by the Foreign Investments Law<sup>20</sup>. The Foreign Investments Law is in force since.

The Foreign Investments Law contains several amendments to the old legal framework, however, the most relevant one for my analysis is the elimination of any reference to international investment arbitration. Previously, Article 22 of the Investment Law contained a confusing wording that could have led some investors to believe that such Article contained Venezuela's consent to ICSID jurisdiction. This Article has been analyzed in depth by ICSID's arbitral tribunals. We will discuss the outcome of these in this chapter.

### 4.1. Domestic Laws and Regulations

As indicated previously, Article 22 of the Investment Law contained what some foreign investors argued to be an offer by Venezuela to submit investments disputes under ICSID jurisdiction. The English version of this Article read as follows:

Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when

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<sup>19</sup> Decree No. 356 with rank and force of Law for the Promotion and Protection of Investments published in the Special Official Gazette of the Republic of Venezuela No. 5,390, dated 22 October 1999.

<sup>20</sup> Decree No. 1,438 with rank and force of Law for the Foreign Investments published in the Special Official Gazette of the Republic of Venezuela No. 6,152, dated 18 November 2014 ("Foreign Investments Law").



appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.<sup>21</sup>

Indeed, the wording of this Article cannot be defined as clear or unambiguous, as Arbitral Tribunals have considered that the consent to arbitration must be formulated. Therefore, Arbitral Tribunals have taken the task to provide an interpretation of such Article in order to determine whether it contains an offer by Venezuela to international investment arbitration.

The main issue in regards with the interpretation of Article 22 of the Investment Law was to determine the standard and method of interpretation that should be used. After few considerations, the Arbitral Tribunal in the case *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela* determined that Article 22 of the Investment Law is a unilateral act and that ‘unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention’ and regardless of their form ‘they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States’<sup>22</sup>.

As a unilateral act of Venezuela, the interpretation of Article 22 of the Investment Law must take into consideration the intention or purpose of Venezuela, and the Convention of Vienna on the Law of Treaties could also be helpful in the interpretation of unilateral acts in its aspect *sui generis*<sup>23</sup>.

Thereafter, the abovementioned Article was analyzed in detail<sup>24</sup>, but none of the Arbitral Tribunals were able to draw a clear argument that would undoubtedly lead to the conclusion that Venezuela meant to give its consent to ICSID jurisdiction in such Article. Instead, all the Arbitral Tribunals seem to agree on the fact that Article 22 of the Investment Law ‘makes no provision for international arbitration save to the extent that

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<sup>21</sup> The translation was provided by the Arbitral Tribunal of the *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 December 2010) (“Cemex Case”). The Spanish wording of the Article is the following: “Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de la cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente”.

<sup>22</sup> Cemex Case (n 88) para 79.

<sup>23</sup> Ibid para 89(b).

<sup>24</sup> Arbitral Tribunals analyzed Article 22 of the Investment Law in light of various methods, ie grammatical interpretation, principle of *Effet Utile*, context and purpose, good faith, and the legislative history of arbitration as a dispute settlement mechanism in Venezuela.

the relevant treaty makes such provision'<sup>25</sup> and only contains a ratification of the consent to ICSID jurisdiction given in the treaties whereby such consent was expressed<sup>26</sup>.

Furthermore, the declarations of Mr. Corrales, drafter of Article 22 of the Investment Law, did not provide the Arbitral Tribunal with a 'direct evidence before it that establishes the intention of the legislator (...) to grant consent to ICSID jurisdiction by the terms of Article 22 of the Investment Law'<sup>27</sup>, despite the fact that Mr. Corrales affirmed that such Article was drafted with that intention.

All Arbitral Tribunals in the cases whereby the consent of Venezuela based on Article 22 of the Investment Law was involved, have made a careful analysis of such Article 22, and all of them considered that 'it is not possible to conclude that the words of Article 22 of the Investment Law indicate an intent on the part of Venezuela to give its consent to ICSID arbitration for investment disputes that are governed by the Investment Law. The plain meaning of Article 22 is ambiguous'.<sup>28</sup>

I consider that the analysis made by the Arbitral Tribunals is correct. In my view, an Article containing a wording as confusing as such cannot be understood as an expression of consent by a State. As mentioned earlier, ICSID case law is uniform in this respect, consent to arbitration must be clear and unambiguous, and Article 22 of the Investment Law is not. Perhaps what renders such Article most confusing is the phrase '*if it so provides*'<sup>29</sup>, have not the Article included such a phrase the analysis of the Article could have lead to a different conclusion, but this is not the case.

This was the scenario under the Investment Law but this framework is no longer in force in Venezuela. Currently, the investment field is regulated by the Foreign Investments Law which has introduced new conditions on investments and new obligations for foreign investors, but within the scope of this paper only two important amendments were introduced.

On one side, Article 3 of the Foreign Investments Law declares the provisions of such Decree of public interest<sup>30</sup>, and, on the other side, Article 5 of the Foreign Investments Law sets forth that investments disputes are subject to the jurisdiction of the national courts of Venezuela, to wit:

The foreign investments shall be subject to the jurisdiction of the courts of the Republic, according to the provisions of the Constitution of the Bolivarian Republic of Venezuela and other laws. The Bolivarian Republic of Venezuela may participate and make use of other dispute settlement mechanisms within the frame of the integration of Latin America and the Caribbean.

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<sup>25</sup> *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 February 2013) para 127.

<sup>26</sup> *Ibid.*

<sup>27</sup> *OPIC Karimun Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award (28 May 2013) para 178.

<sup>28</sup> *Ibid* para 165.

<sup>29</sup> In Spanish: 'si así éste lo establece'.

<sup>30</sup> Article 3 of the Foreign Investments Law reads as follows: 'La materia objeto de este Decreto con Rango, Valor y Fuerza de Ley se declara de interés público'.

The legal consequences of these Articles remain to be seen. Firstly, it would have to be studied whether the declaration of public interest of a whole field of law made in a Decree with a lower rank than the Constitution is valid and, secondly, whether such declaration affects the provisions of the BITs. Only one thing is sure, despite the purpose of the Foreign Investments Law<sup>31</sup> these new dispositions contribute to the uncertainty of foreign investors over the regulations that govern their investments.

#### **4.2. Bilateral Investment Treaties**

Venezuela has concluded twenty eight (28) BITs, only one (1) of them is not in force<sup>32</sup>. Additionally, the BIT concluded between Venezuela and the Kingdom of the Netherlands was terminated by Venezuela on 30 April 2008 (Quijada, 2008), but is still in force for another fifteen (15) years due to the survival clause contained therein. All such BITs contain clauses whereby the submission of a dispute between the contracting party and an investor of a contracting party to international investment arbitration is established, out of which twenty four (24) BITs include ICSID jurisdiction as a dispute settlement mechanism available to the foreign investor<sup>33</sup>.

The foregoing means that there are twenty four (24) BITs whereby Venezuela made an offer to foreign investors of the other contracting party to submit investment disputes that may arise out of such BITs to ICSID jurisdiction. As explained in the previous chapters, by including ICSID jurisdiction as a dispute settlement mechanism for foreign investors, Venezuela is bound by the offer contained therein and cannot withdraw such offer unilaterally. Even after the notice of denunciation of the ICSID Convention was filed, Venezuela would have had to re-negotiate or terminate the BITs to avoid the effects of Article 72 of the ICSID Convention during the six (6) months period.

The standard wording of the dispute settlement clause in the BITs concluded by Venezuela reads as follows:

1. Every dispute between an investor of one of the Contracting Parties and the other Contracting Party in respect with the compliance by the latter of this Agreement in regards with an investment of the former, will be solved, if possible, in amicable consultations.
2. If an amicable solution is not reached within the term of six month counted as of the arising of the dispute, the investor may submit it, at his choice, to the competent courts of the Contracting Party in which territory the investment was made or to international arbitration as provided for in this Article. Once the dispute has been submitted to one of these procedures, the choice shall be final.
3. The international arbitration referred to in paragraph (2) above will take place in the International Centre for Settlement of Investment Disputes (ICSID), established by the Washington Convention of March 18, 1965 or, if the case may be, according to the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of such Centre

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<sup>31</sup> Article 1 of the Foreign Investments Law states that the purpose of the Decree is to ‘consolidate a framework that fosters benefits and grants certainty to investments’.

<sup>32</sup> Agreement between the Government of the Republic of Venezuela and the Government of the Federative Republic of Brazil on the Promotion and Protection of Investments (signed 4 July 1995, not in force) (“Venezuela-Brazil BIT”).

<sup>33</sup> See Annex.

(Additional Facility). If for any reason the ICSID or its Additional Facility were not available, the arbitration will take place pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.

4. In any case, the arbitral award will only determine if the Contracting Party has breached any provision of this Agreement and, as a consequence of the foregoing, has caused damaged to the investor. If affirmative, it will only fix the corresponding indemnity.

5. The arbitral awards will be final and mandatory for the parties to the dispute. The Contracting Party shall enforce it pursuant to their legislation.<sup>34</sup>

In general terms, this type of wording was used by Venezuela in ten (10) BITs<sup>35</sup>. There may be certain formalities or other issues that may change between one BIT or another<sup>36</sup>, but the substance in regards with the mechanism available to solve investment disputes is the same. The others BITs contained a wording very similar to the one provided above but with fewer options available for the foreign investor to solve the investment disputes that may arise under the corresponding BIT.

As can be extracted from the abovementioned Article, the dispute settlement clause agreed by Venezuela divides the resolution of disputes in two phases. The first phase starts with an amicable solution between the parties to the dispute, which shall take place in a period of time indicated in each BIT. In the case of Venezuela, the majority of the BITs provide for a term of six (6) months. If after the term provided for in the clause, the parties have not reached an agreement, then the foreign investor is authorized to either submit the dispute to the competent Courts of the Host State or to international arbitration as per the provision of the corresponding BIT.

It is usual in the BITs concluded by Venezuela to establish a fork-in-the-road clauses, because the foreign investor is given the right to choice to submit the dispute to the Courts of the Host Country or to international arbitration, they can choose any of those forum, but once they make their choice, such decision is deemed final and the decision issued by the Court or Arbitral Tribunal will be final and binding for the parties to the dispute.

The highest amount of BITs concluded by Venezuela only provide for three (3) arbitration forum: ICSID, the Additional Facility of ICSID and *ad hoc* arbitration according to UNCITRAL. This is the case of the clause indicated above as an example. It is also very common in the BITs concluded by Venezuela to establish a priority in favor of ICSID as a dispute settlement mechanism. To illustrate this, I refer to the BIT concluded between Venezuela and Paraguay<sup>37</sup> in which it is indicated that investment disputes shall be submitted to ICSID and that 'if for any reason ICSID is not available'<sup>38</sup> the disputes shall be submitted to an *ad hoc* arbitration according to the UNCITRAL rules. In some BITs, is

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<sup>34</sup> Venezuela-Brazil BIT art 8.

<sup>35</sup> BITs concluded with Argentina, Belgium-Luxemburg Economic Union, Brazil, Costa Rica, Ecuador, Italy, Paraguay, Portugal, Spain and Uruguay.

<sup>36</sup> For example, the BITs concluded between Venezuela and the Belgium-Luxemburg Economic Union and Venezuela and Spain require a written notice by the foreign investor of the dispute jointly with a memorandum indicating the details of the same. Other BITs exclude the Additional Facility as a mechanism available in case the contracting parties are not parties to the ICSID Convention yet.

<sup>37</sup> Agreement between the Government of the Republic of Venezuela and the Government of the Republic of Paraguay on the Promotion and Protection of Investments (signed 5 November 1996, entered into force 14 November 1997).

<sup>38</sup> Ibid art 9.

included the Additional Facility of the ICSID as a forum that should be considered before resorting to the *ad hoc* arbitration according to the UNCITRAL rules. Technically, under this wording Venezuela gave its consent to international arbitration under both the ICSID and UNCITRAL, however, it could be argued that UNCITRAL does not have jurisdiction over the claim if ICSID or its Additional Facility (if provided for in the corresponding BIT) is available. This kind of wording is in line with Article 26 of the ICSID Convention, whereby it is established that the consent to ICSID arbitration excludes any other remedy. Notwithstanding the foregoing, this is a jurisdictional issue that should be dealt by the Arbitral Tribunal if it ever faces a case similar to the one mentioned above.

These are the most common arbitration forum established in Venezuelan's BITs, very rarely are the cases in which the foreign investor is provided for other forum for international arbitration<sup>39</sup> or even with the possibility to agree with the other party to the dispute on a different dispute settlement mechanism<sup>40</sup>.

Where the option to resort to international arbitration is established (either by ICSID or any other forum) the consent or the offer of Venezuela is formulated in a very clear and unambiguous wording. Some BITs expressly indicate that Venezuela's 'unconditional consent' is given<sup>41</sup>, others simply indicate that the Contracting Parties give their consent, undertake to submit disputes to international arbitration or leave the choice of the forum to the foreign investor. In short, in most of the BITs the consent to international arbitration by Venezuela is given.

Despite the foregoing, there are some cases in which the consent is not granted or is subject to certain conditions or prior agreement by the parties to the dispute. For example, according to Article 11 of the BIT concluded between Venezuela and Argentina establishes a period of three (3) for the parties to consent to international arbitration either with the ICSID or according to the UNCITRAL rules, if after such period the parties have not reached an agreement, the foreign investor is entitled to submit the dispute before the ICSID. A similar wording is express in the BIT concluded between Venezuela and Russia, such BIT provides for consent to international investment arbitration, but not to ICSID jurisdiction. In this sense, the parties to the dispute have a term of three (3) months to agree to submit the dispute to either *ad hoc* arbitration according to the UNCITRAL rules or to 'The Arbitration Institute of the Stockholm Chamber of Commerce, after which the foreign investor can choose before which venue to submit the dispute'<sup>42</sup>.

On the other hand, the BIT concluded between Venezuela and the Belgium – Luxembourg Economic Union set forth that 'each Contracting Party shall grant their irrevocable consent in advance so that it [the investment dispute] be submitted to such arbitration'<sup>43</sup>. In fact, under this scenario, either Contracting Party has given their consent to any arbitration forum, but instead they undertake to give such consent prior the dispute be submitted to any arbitration forum.

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<sup>39</sup> Other forum established are the Chamber of Commerce of Paris, in the BIT concluded with Iran and The Arbitration Institute of the Stockholm Chamber of Commerce, in the BIT concluded with Russia.

<sup>40</sup> This possibility is set forth in the BITs concluded with Argentina, Belarus, Cuba, Uruguay and Vietnam.

<sup>41</sup> See BITs concluded with Barbados, Canada, The Netherlands and Sweden.

<sup>42</sup> Article 9(3) of the BIT concluded between Venezuela and Russia provides the following: 'The dispute may be submitted at the choice of the investor to consideration of one of the three procedures referred to in paragraph 2 of this Article, if both parties to the dispute do not reach mutual consent in respect with the procedure to settle the dispute during a period of three months, initiated as of the date of the receipt of the written request made by any of the parties to the dispute about its resolution.'

<sup>43</sup> Article 9 of the BIT concluded between Venezuela and the Belgium – Luxembourg Economic Union.

Another example is seen on the BIT concluded between Germany and Venezuela, whereby in fact the Contracting Parties consent to submit the investment disputes to international arbitration. Under this treaty, ICSID is established as sole arbitration forum but it is available only if the parties do not agree on a different international arbitration procedure<sup>44</sup>.

In the BIT concluded between Italy and Venezuela the availability of international investment arbitration is subject to the condition that the Courts of the Host Country do not issue a decision on the matter in a period of eighteen (18) months<sup>45</sup>.

As indicated previously, providing for more than one international arbitration forum is very common in the BITs concluded by Venezuela. Usually the most common venues are ICSID and UNCITRAL, but some BITs also provide for other *ad hoc* arbitration procedures. After the denunciation of Venezuela of the ICSID Convention became effective, that is, once the six (6) month period established by Article 72 of the ICSID Convention elapsed, ICSID jurisdiction is no longer available because Venezuela is no longer party to the ICSID Convention, even in the BITs that still provide for this venue<sup>46</sup>.

Withdrawal of ICSID jurisdiction certainly reduces the protection afforded to foreign investors. However, it does not necessarily pose a real problem to all foreign investors, because there are other dispute settlement mechanisms available for investors in most of the BITs. This is true for the majority of the BITs concluded by Venezuela, but there are other BITs that provide for fewer options for the foreign investor, even some BITs provide for ICSID as the sole international arbitration forum for the resolution of investment disputes. Foreign investors covered by these BITs, could indeed face some difficulties to solve their disputes with Venezuela.

In this sense, the BITs concluded by Venezuela with France and Chile both provide for a very similar dispute settlement clause. Under such BITs, the parties to the dispute shall try to settle said dispute amicably and, provided that no agreement is reached, the foreign investor may choose to submit the dispute to the national courts of the Host State or to international arbitration. The BITs only provide for one international arbitration forum: ICSID. Since Venezuela is no longer party to the ICSID Convention, this arbitration forum is not available to nationals of the Contracting Parties. The logic result is that the foreign investors can only submit their disputes to national courts of the Host State.

On the other side, the BIT concluded between Venezuela and the Kingdom of the Netherlands is now only left with the Additional Facility of the ICSID as dispute settlement mechanism. Of course that pursuant to Article 5 of the Foreign Investments Law, nationals of the Kingdom of the Netherlands can also resort to Venezuela's national courts even if it is not provided for in the treaty, but the problem is the reliance that foreign investors may have on such courts to solve their investment disputes.

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<sup>44</sup> Article 10(2) of the BIT concluded between Venezuela and Germany provides the following: 'If a dispute cannot be solved within a term of six months, counted as of the date in which one of the parties to the dispute has notice it, will be submitted, at the request of the national or corporation, to an arbitral procedure. As long as the parties to the dispute do not reach a different agreement, the dispute will be submitted to an arbitral procedure according to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965.' (emphasis added)

<sup>45</sup> Art 8.

<sup>46</sup> Pursuant to Article 25 of the ICSID Convention both Contracting Parties must be parties to the ICSID Convention for the ICSID to have jurisdiction over the investment dispute.

In a country like Venezuela where it is evident that the judicial branch is not independent from the executive branch, being only able to submit investment disputes to Venezuela's national courts is a problem for foreign investors. Especially now that Venezuela has increasingly reduced the protections afforded to foreign investors, first by denouncing the ICSID Convention and, second, by enacting a new law whereby international investment law principles such as fair and equitable treatment, most favorable treatment and no discrimination were eliminated.

Consequently foreign investors may be reluctant to submit investment disputes with Venezuela's national courts, and though the majority of foreign investors still have other dispute settlement mechanisms, nationals of Chile and France have no choice but Venezuela's national courts. Depending on each BIT and the wording of the Most Favorable Treatment clause provided therein, foreign investors from Chile or France could analyze the possibility of benefitting of such principle, however, the extension of the Most Favorable Treatment to dispute settlement mechanisms has been highly contested and ICSID case law is not uniform in this respect (Schreuer, 2008). Otherwise, foreign investors would have to wait for a renegotiation of the corresponding BIT.

## 5. Conclusions

Regardless of the instrument used by the Host State to express its consent to international investment law it is crucial for determining whether the consent was given to analyze the wording used by the parties in the corresponding clause or by the State in its domestic law. There is no specific formula to determine the proper way to interpret the dispute settlement clause or article in domestic law, at the end, it will depend on the considerations made by the Arbitral Tribunal. However, although there has been some contention, the vast majority of ICISD case law has acknowledged that the expression of consent by a State should be interpreted by international law principles, disregarding the principles of domestic law.

Whether the State is bound by such consent and, consequently, can at any moment unilaterally withdraw such consent depends on the approach that one may consider appropriate. For many years scholars debated over which was the approach that would be used by the Arbitral Tribunal. Finally, the Arbitral Tribunal of the *Venoklim Holding B.V. v Bolivarian Republic of Venezuela* was faced with the task of determining their jurisdiction based on a request for arbitration made by the claimant during the six (6) month period provided for in Article 72 of the ICSID Convention. The Arbitral Tribunal assumed the individual consent approach, because it declared that the unilateral offer of consent given by the State was sufficient for purposes of Article 72 of the ICSID Convention. However, the Arbitral Tribunal differs from that approach in the fact that the unilateral offer of consent has to remain valid during the six (6), otherwise it would be contrary to the principle of legal stability.

It is not possible to say what other Arbitral Tribunals will decide if they are confronted with a similar case in the future, but I think that it is very likely that they will assume the same approach as the one assumed in *Venoklim Holding B.V. v Bolivarian Republic of Venezuela* because this criterion is better fitted to the general principles of international law. Therefore, I consider that it is safe to say that prior the notice of denunciation is made a State is not bound by the unilateral offer of consent unless such offer was accepted by the foreign investors, being able to withdraw such offer at any moment. Once the State has given notice of denunciation of the ICSID Convention, the State has the duty to comply with its offer and it is bound by it in case a foreign investor wishes to accept it during the six (6) months term.

If Venezuela wanted to avoid submitting disputes to ICSID arbitration it would have had to withdraw the all offers made prior filing the notice of denunciation. As we explained it earlier, the withdrawal of a unilateral offer should be made in accordance with the law, therefore, it should be made by abrogating the domestic law that contains the offer or renegotiating or filing notice of termination of the BITs containing the offer. Consent given in a contract bounds the State as of the execution of such contract because the exchange of wills was made in a single act at the same time, so the State cannot unilaterally withdraw such consent. In order for the withdrawal to be valid, both parties would have to agree to withdraw the consent.



Foreign investors could file a request for arbitration with the ICSID based on the international obligation approach, but I considered it a very risky option because it is highly possible that the Arbitral Tribunal disregard the claim based on lack of jurisdiction given the fact that Venezuela is not longer a party to the ICSID Convention.

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## Annex

### *BITs concluded by Venezuela*

Counterparty	International Arbitration	Other ADR	Domestic Jurisdiction	Survival Clause	Other Comments
<b>Argentina (Article 11)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- The parties <i>may agree</i> to submit the dispute to ICSID or UNCITRAL. If after three (3) months no agreement is reached, the parties shall submit it to ICSID (or its Additional Facility).</li> <li>- The arbitral awards are final and mandatory.</li> <li>- Diplomatic channels will not be used unless the award is not complied with.</li> <li>- The investor and the Contracting Party may agree to submit their disputes to any other dispute settlement mechanism.</li> </ul>
<b>Barbados (Article 8)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	No	No	10 years	<ul style="list-style-type: none"> <li>- Disputes shall “at the request of the national concerned” be submitted to ICSID (or its Additional Facility). If these are not available, the dispute shall be submitted to UNCITRAL.</li> <li>- The parties “give its unconditional consent” to international arbitration.</li> </ul>
<b>Belarus (Article 8)</b>	UNCITRAL or any other arbitration <i>ad hoc</i> previously agreed.	Amicably, diplomatic channels.	Yes	10 years	<ul style="list-style-type: none"> <li>- If no agreement is reached in regards with international arbitration, the dispute must be solved by diplomatic means.</li> <li>- Even after the disputes have been submitted to Court, the parties may agree to submit it to international arbitration.</li> <li>- The parties give its consent to international arbitration.</li> <li>- The award will be final and binding for the parties.</li> </ul>
<b>Belgium – Luxembourg Economic</b>	ICSID or UNCITRAL.	Negotiation or conciliation.	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- Each Contracting Party <i>shall grant</i> its <i>irrevocable consent</i> in advance so that the dispute may be submitted to international arbitration.</li> </ul>

<b>Union (Article 9)</b>					<ul style="list-style-type: none"> <li>- Only if ICSID is not possible, the investor can resort to UNCITRAL arbitration.</li> <li>- The award will be final and binding for the parties.</li> </ul>
<b>Brasil (Article 8)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- UNCITRAL can only be requested if ICSID is not available.</li> <li>- The award will be final and binding for the parties.</li> </ul>
<b>Canada (Article XII)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	No	15 years	<ul style="list-style-type: none"> <li>- The investor has to waive his right to initiate or continue any other procedure in regards with the dispute.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The parties “give its unconditional consent” to international arbitration.</li> <li>- The award is final and binding.</li> </ul>
<b>Chile (Article 8)</b>	ICSID	Amicably	Yes	15 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- The parties agree to submit disputes to international arbitration.</li> <li>- Diplomatic channels will not be used unless the award is not complied with.</li> </ul>
<b>Costa Rica (Article 11)</b>	ICSID, Additional Facility of the ICSID or UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- It is provided for that in case any of the parties is no longer a party to the ICSID Convention, the dispute will be solved by the ‘additional facility for the administration of procedures of Conciliation, Arbitration and Evidence of Facts’ of the ICSID Secretary.</li> <li>- Fork-in-the-road provision.</li> <li>- The award is final and binding.</li> <li>- Diplomatic channels will not be used unless the award is not complied with.</li> </ul>
<b>Cuba (Article 9)</b>	UNCITRAL	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- The parties give its consent to international arbitration.</li> <li>- The award is final and binding.</li> <li>- The foreign investor and the Contracting Party can agree on a different dispute settlement mechanism.</li> </ul>
<b>Denmark (Article 9)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL	Negotiations	No	10 years	<ul style="list-style-type: none"> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Ecuador (Article 9)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- As long as the Contracting Parties are not parties to the ICSID Convention, the Additional Facility will be available.</li> </ul>



					<ul style="list-style-type: none"> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>France (Article 8)</b>	ICSID	Amicably	Yes	15 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- The award is final and binding.</li> </ul>
<b>Germany (Article 10)</b>	ICSID	Amicably	No	15 years	<ul style="list-style-type: none"> <li>- If the parties do not reach a different agreement, the investor has the right to submit the dispute to ICSID.</li> <li>- The award is final and binding.</li> </ul>
<b>Iran (Article 11)</b>	ICSID, UNCITRAL, Chamber of Commerce of Paris,	Negotiations	Yes	10 years	<ul style="list-style-type: none"> <li>- ICSID is only available if both Contracting Parties are party to the ICSID Convention.</li> <li>- The other Contracting Party shall comply with the award.</li> </ul>
<b>Italy (Article 8)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	5 years	<ul style="list-style-type: none"> <li>- The investor can submit the dispute to international arbitration if the Court has not issued a decision on the matter after eighteen (18) months have elapsed.</li> <li>- The Contracting Parties expressly give their advance consent to arbitration.</li> <li>- “As long as such condition” (ie party to the ICSID Convention) is not complied with, disputes can be submitted to the Additional Facility.</li> <li>- The award is final and binding.</li> </ul>
<b>Lithuania (Article 7)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	No	15 years	<ul style="list-style-type: none"> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Netherlands (Article 9)</b>	ICSID and Additional Facility of the ICSID.	No	No	15 years	<ul style="list-style-type: none"> <li>- The parties “give its unconditional consent” to ICSID jurisdiction.</li> <li>- As long as Venezuela has not become a party to the ICSID Convention disputes shall be submitted to the Additional Facility.</li> </ul>
<b>Paraguay (Article 9)</b>	ICSID and UNCITRAL	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Peru (Article 10)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	15 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Portugal (Article VIII)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	5 years	<ul style="list-style-type: none"> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Czech Republic (Article 8)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Negotiations	No	10 years	<ul style="list-style-type: none"> <li>- The parties can agree on a different procedure prior submitting the dispute to ICSID.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> </ul>

<b>Russia (Article 9)</b>	UNCITRAL and The Arbitration Institute of the Stockholm Chamber of Commerce.	Negotiations	Yes	10 years	<ul style="list-style-type: none"> <li>- The award is final and binding.</li> <li>- The investors may choose the dispute settlement mechanism if after a term of three (3) months the parties have not reached an agreement.</li> <li>- The award is final and binding.</li> </ul>
<b>Spain (Article XI)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Additional facility: if the parties did not execute the ICSID Convention.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Sweden (Article 7)</b>	ICSID and UNCITRAL.	No	No	15 years	<ul style="list-style-type: none"> <li>- The parties “give its unconditional consent” to international arbitration.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>Switzerland (Article 9)</b>	ICSID and UNCITRAL.	Amicably	No	10 years	<ul style="list-style-type: none"> <li>- Each Contracting Party “undertakes to submit any investment disputes to international arbitration”.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- The award is final and binding.</li> </ul>
<b>United Kingdom (Article 8)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	No	15 years	
<b>Uruguay (Article 9)</b>	ICSID, Additional Facility of the ICSID and UNCITRAL.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Fork-in-the-road provision.</li> <li>- UNCITRAL is only possible if ICSID is not available.</li> <li>- Express consent to international arbitration is granted therein.</li> <li>- The award is final and binding.</li> <li>- The parties can agree on a different dispute settlement procedure.</li> </ul>
<b>Vietnam (Article 8)</b>	UNCITRAL or any other <i>ad hoc</i> arbitration previously accepted.	Amicably	Yes	10 years	<ul style="list-style-type: none"> <li>- Express consent to international arbitration is granted therein.</li> <li>- Fork-in-the-road provision.</li> <li>- The award is final and binding.</li> </ul>

