National Legislation and Unilateral Acts

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CHAPTER SIX

NATIONAL LEGISLATION AND UNILATERAL ACTS OF STATES

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Introduction

The present contribution deals with the issue of national investment legislation as a potential source of international investment law. To a certain extent, municipal investment laws function as unilateral acts of states under international law. Despite this important characteristic, investment legal scholarship has barely concentrated on the contours and elements that allow the depiction of municipal investment laws as unilateral acts of states under international law. Arbitral practice in the field of investment disputes has been restricting the qualification of national investment legislation as unilateral acts of states under international law (I), while general international law itself has set up "hurdles"[1] that prevent municipal investment laws from being considered *prima facie* as *legal acts* within the international legal order (II), and, thus, even less as unilateral acts of states under international law.

[1] L. Boisson de Chazournes, "Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law", in *Arbitration Advocacy in Changing Times*, ed. A. J. van den Berg, ICCA Congress Series No. 15 (Alphen aan de Rijn: Wolters Kluwer, Alphen aan den Rijn, 2011), p. 310–314.

I. *In Search of Lost Time…*[2]

Investors have "basic expectations",[3] not to mention legitimate expectations.[4] These expectations are "not based on an individual negotiation between [an investor] and [a] State".[5] Rather, "they represent the common level of legal comfort which any protected foreign investor [may] expect".[6] And it is essentially because of those investors' expectations that governments – especially from the developing world – commit themselves *unilaterally* in order to "persuade them to invest in their state".[7]

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[2] M. Proust, *In Search of Lost Time*, translated by C.K. Scott Moncrieff, Terence Kilmartin and Andreas Mayor, revised by D. J. Enright (New York: The Modern Library, 1992). The structure of the present contribution is based on some of the main volumes composing Marcel Proust's classic masterpiece *In Search of lost Time*.

[3] As stated by the Tribunal in the *Tecmed* case, "in light of the good faith principle established by international law, [the FET (fair and equitable treatment)] requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment" (*Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154) (italics added). All the arbitral awards (except as otherwise indicated) mentioned in the present case can be found on the following website: http://italaw.com/.

[4] See, *e.g.*, *Perenco Ecuador LTD. V. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador* (*PETROECUADOR*), Decision on Jurisdiction, ICSID Case No. ARB/08/6, 30 June 2011, para. 15. The relevant paragraph of the award shows that legitimate expectations of investors are often at the heart of an investment dispute: "This dispute arises out of Ecuador's enactment of legislative measures which increased its participation under the Participation Contracts on "extraordinary revenues" earned under the Contracts. Briefly summarized, it is Perenco's contention that it has certain enforceable contractual rights as a party to the Participation Contracts, and that *in reliance on those rights* it invested large sums in the exploration and extraction of oil in Ecuador" (italics added). For an explicit reference to "legitimate expectations of investors", see *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 117. See also *SOABI* v. *Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, para. 4.10: "In other words, the interpretation must take into account the consequences which the parties must reasonably and *legitimately* be considered to have envisaged as flowing from *their undertakings*" (italics added).

[5] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 70.

[6] *Ibid.*

[7] W. M. Reisman and M. H. Arsanjani, "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes", in *Völkerrecht Als Wertordnung – Common Values in International Law. Essays in Honour of Christian Tomuschat*, ed. P.-M. Dupuy et al. (Kehl/Strasbourg: N.P. Engel Verlag, 2006), p. 409. The authors explain that "[g]overnments in developing countries which seek to encourage foreign direct investment must reach an undifferentiated global community of potential investors … Because many such governments are seeking to attract a common but finite pool of available foreign capital, the competition for it may become intense. Competitors may somewhat enhance their own national infrastructures but the natural features of a country are essentially fixed, so the competition often turns on relative terms of investment. One of those terms is the normative environment …" (p. 409–410).

That states commit themselves through bilateral or multilateral investment treaties or through contracts with foreign investors is now part of the legal *déjà vu,* to say the least. That states may commit themselves *via* unilateral *binding* statements or declarations is today a fact of international life,[8] since it is broadly accepted that unilateral declarations of states may create rights and obligations under international law,[9] although this category of sources is not expressly mentioned in the inescapable article 38 of the Statute of the International Court of Justice (ICJ).[10]

What is rather challenging for the theory of sources of international investment law is the practice of states making unilateral undertakings[11] within the frame of *national investment legislation*. National investment legislation embodies, *inter alia,*[12] substantive standards of investment treatment (fair and equitable treatment, national and most-favoured-nation treatment, protection from arbitrary and discriminatory measures, protection from nationalization and expropriation, and the right to free transfer of capital),[13] provisions defining the notions of an investment and

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[8] *Ibid.*, p. 410.

[9] See *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472 para. 46: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations." In this respect, see also the position of the International Law Commission (ILC) in its 1997 report: "In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States", (*Official Records of the General Assembly*, *Fifty-second Session*, *Supplement N° 10* (A/52/10), para. 196).

[10] See P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 *Recueil des cours* (1949-I), p. 191. See also, G. Abi-Saab, "Les sources du droit international: essai de déconstruction", in *International Law in an Evolving World: Liber Amicorum in tribute to professor Eduardo Jiménez de Aréchaga*, ed. M. Rama-Montaldo (Montevideo: FCU, 1994).

[11] In the context of the present contribution, those unilateral undertakings will be indifferently referred to as 'investment national legislation', 'national foreign-investment statutes', 'investment promotion legislation', 'national foreign-investment law', 'domestic investment laws', 'municipal investment laws' or 'unilateral investment law undertakings'.

[12] For a detailed analysis of the content of national foreign-investment statutes see M. Potestà, "The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws", 27 *Arbitration International* 2 (2011), p. 150. National foreign-investment statutes can consist of "legislation specifically addressing investments by foreign investors" or of "general legal framework consisting of tax laws, labour laws, environmental laws, corporate laws, competition laws, and intellectual property laws": see A. Joubin-Bret, "Admission and Establishment in the Context of Investment Protection", in *Standards of Investment Protection*, ed. A. Reinisch (Oxford: Oxford University Press 2008), p. 18–19.

[13] See, *e.g.*, Article 8 of the Mongolian Foreign Investment Law, which provides as follows: "1. Foreign investment within the territory of Mongolia shall enjoy the legal protection guaranteed by the Constitution, this law and other legislation, consistent with those

of an investor,[14] as well as rules dealing with the settlement of disputes between the host state and the foreign investor (domestic courts and/or investor–state arbitration).[15] Whatever their variable normative content,[16] domestic investment laws have as a common denominator their role as matrices of legal commitments in favour of foreign investors and/or investments.

These self-imposed legal commitments assumed by states lay investment promotion legislation within the realms of the international legal order. Indeed, such investment promotion legislation formulates

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laws and international treaties to which Mongolia is a party … 3. Investments of foreign investors may be expropriated only for public purposes or interests and only in accordance with due process of law on a non-discriminatory basis and on payment of full compensation …" See also, Article 9 of the Mongolian Foreign Investment Law, which reads as follows: "Mongolia shall accord to foreign investors favorable conditions not less than those accorded to Mongolian investors, in respect of the possession, use, and disposal of their investments", quoted in *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company LTD. v. The Government of Mongolia and MONATOM Co., LTD.*, Notice of Arbitration, 10 January 2011, paras. 69–70.

[14] See, *e.g.*, Article 2, paragraph 4 of the 2002 South Korean Investment Protection Act, which reads as follows: "The term "foreign investment" shall refer to any of the following; (a) Where a foreigner purchases, under the conditions prescribed by the Presidential Decree, stocks or holdings (hereinafter referred to as "stocks") of a Korean corporation (including a Korean corporation in the process of being established) or a company run by a national of the Republic of Korea, for the purpose of establishing a continuous relationship with and participating in the management of said Korean corporation or company; (b) Where a loan with the maturity of not less than five years is extended to a foreign-capital invested company by its overseas holding company or by a company in a relationship with said holding company of the capital investment prescribed by the Presidential Decree The term "foreign investor" shall refer to a foreigner who is in possession of stocks, under the conditions prescribed by this Act", available at: http://untreaty.un.org/cod/avl/pdf/ls/Shin_RelDocs.pdf.

[15] See, *e.g.*, Article 25 of the Mongolian Foreign Investment Law, which provides that: "Disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties", quoted in *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company LTD. v. The Government of Mongolia and MONATOM Co., LTD.*, Notice of Arbitration, 10 January 2011, para. 67.

[16] For instance, some national foreign-investment laws do not contain any rules on dispute settlement. This is the case of the Syrian Investment Law (1991), the South Korean Foreign Investment Protection Act (2002), the Foreign Investment Law of Myanmar (1988), the Mexican Foreign Investment Law (2001), the Honduran Decree N° 80–92 of June 1992 on investments. On the content of the aforementioned national investment legislations see V. J. Tejera Pérez, "Do Municipal Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study", in *Investment Treaty Arbitration and International Law*, ed. I. A. Laird, T. J. Weiler (Huntington: JurisNet, 2008), p. 85.

rights[17] and obligations in relation to foreign investment that can benefit fully from the "protection of international law".[18] The nexus between national foreign-investment statutes and international law stems from the fact that those domestic laws confer and attribute "rights and other advantageous legal situations (faculties, legal powers and expectations)"[19] to foreign investors; as a result, "the very existence of the international obligation[s] [towards foreign investors and/or investments] depends on a *state of affairs created in municipal law*" (italics added).[20] That 'state of affairs' itself derives from a "certain freely adopted attitude on the part of the legal order of [a] State".[21] Moreover, it is precisely because of this 'freely adopted attitude' that a state can decide to commit itself *unilaterally* with respect to foreign investment protection and promotion. Once it does so within the framework of national legislation, the instrument at stake acquires *prima facie* the legal nature of an autonomous unilateral act under international law,[22] i.e. a *legal act* "made in the exercise of a state's

[17] Foreign investment laws not only embody 'obligations' for states but also 'rights' for foreign investors. See, *e.g.*, *Rumeli Telekom A.S. and Telsim Mobil Telemoki* "it is also well established in international law that a State may not take away *accrued rights* of a foreign investor by domestic legislation abrogating *the law granting these rights*" (ICSID Case No. ARB/05/16, Award, 29 July 2008).

[18] On this expression see G. A. Alvarez and S. Montt, "Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State: Toward a Jurisprudence of "Modesty" in Investment Treaty Arbitration", in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, ed. M. H. Arsanjani et al. (Leiden/Boston: Martinus Nijhoff Publishers, 2011), p. 582.

[19] Separate opinion of Judge Morelli, *Barcelona Traction, Light & Power Co. Limited* (*Belgium v. Spain*), *Judgment, I.C.J. Reports 1970*, p. 233, para. 3.

[20] *Ibid.*, p. 234, para. 4.

[21] *Ibid.*, p. 234, para. 3.

[22] See, *e.g.*, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. and The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, where the arbitral tribunal acknowledged that consent to investment arbitration may derive from "two separate arbitral consents … one arising under CAFTA and the other under the *Foreign Investment Law of El Salvador*" (para. 118). Furthermore, the arbitral tribunal also considered that claims under a BIT or a multilateral investment agreement have to be raised separately from claims under a national foreign-investment law. According to the tribunal, "The Tribunal is not satisfied that Claimants have in fact raised any claims – i.e., causes of action – under the Foreign Investment Law … Further, Claimants' "confirmation" that they have submitted a claim for breach of the Foreign Investment Law is unsupported by their submissions. Claimants have not articulated any claims; rather, as the following review of the submissions demonstrates, they have provided a perfunctory recital of the articles of the Foreign Investment Law, at most … Indeed, in the Request, Claimants state that the Request was filed pursuant to the ICSID Convention, CAFTA and the Foreign Investment Law. Claimants make no other reference to the Foreign Investment Law in this document, not even in paragraph 31 where they set forth their request for relief (referring only to "El Salvador's violation of its obligations under CAFTA-DR with respect to treatment of foreign investors")" (*ibid.*, paras. 124–125).

freedom to act on the international plane".[23] The very *raison d'être* of such a legal transmutation is that international law deduces and "imposes certain obligations on [a] State"[24] whose municipal legal order has *unilaterally* conferred rights on foreign investors/investments.[25] From this *modus operandi*, national foreign-investment laws are then eligible to penetrate the world of unilateral acts of states.

A. *The 'Captive'[26]: Stereotyping Investment National Legislation As Unilateral 'Declarations' of States*

Unilateral acts of states are generally perceived as unilateral governmental "declarations"[27] or "statements"[28] if not understood as "oral declarations of diplomats, some of which reduced to notes, rather than formal acts".[29] However, the recourse to national investment laws has provoked a sort of semantic maelström in the constellation of unilateral acts of states. Indeed, instances of confusion between national investment laws – when these laws are considered unilateral *acts* of a state – and unilateral *declarations* of states occur in practice.[30] Yet, not every unilateral declaration of

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[23] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 81. See also *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85.

[24] Separate opinion of Judge Morelli, *Barcelona Traction, Light & Power Co. Limited* (*Belgium v. Spain*), *Judgment*, *I.C.J. Reports 1970*, p. 235, para. 4.

[25] See *Biwater Gauff* (*Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 566: "The question is not what the investor would prefer to have happened, or even what the investor subjectively expected to happen, but what the investor was objectively entitled to expect. All relevant circumstances, *including the governing municipal law*, should be considered in determining what was objectively reasonable" (italics added).

[26] Proust, see above, note 2, *The Captive & The Fugitive* (*In Search of Lost Time: Volume VI*).

[27] See *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472, para. 46.

[28] Reisman and M. H. Arsanjani, see above note 7.

[29] D. Caron, "The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law", in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, ed. M. H. Arsanjani et al., see above note 18, p. 649.

[30] See, *e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 282, where the document qualifies Article 15 of the Salvadoran Investment Law as a "unilateral declaration at issue is not unclear". See also *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 81, in which the arbitral tribunal qualifies expressly a provision (article 22) of the Venezuelan Law on the Promotion and Protection of Investments as "a unilateral declaration by Venezuela." See also *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 61: "In deciding whether in the circumstances of the present case Law N°. 43 constitutes

a state constitutes a unilateral act of that state,[31] and not every unilateral act of that state is crafted as a declaration.

A unilateral investment-related declaration may have a declaratory effect without producing any formal legal effect under international law.[32] It may be a "trial balloon"[33] or may reflect simple experimental political statements of states "in order to evaluate the reactions to [those] statements for purposes of then taking a particular position or making commitments".[34] It may also function as some preambular parts of certain treaties[35] by simply setting out political and – albeit more rarely, legal – aspirations. The 1988 Foreign Investment Law of Myanmar offers a good illustration of the 'semi-preambular function' that unilateral *statements* of states might perform.[36]

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consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to *unilateral declarations*" (italics added).

[31] For an example of a declaration that is not a unilateral act of a state see the reference to the declaration of the President of El Salvador against mining in the *Pac Rim Cayman LLC v. Republic of El Salvador* case, Notice of arbitration, 30 April 2009, paras. 107–108: "In March 2008, after several months of discussion with MARN officials over the reasons why the Enterprises' application for environmental permits remained unresolved, *President Saca made a public declaration against mining. The declaration represented a radical change in the Government's position with respect to mining and was a radical departure from controlling Salvadoran law*" (italics added).

[32] See J. W. Garner, "The International Binding Force of Unilateral Oral Declarations", 27 *American Journal of International Law* (1933), p. 493–497. See also V. D. Degan, "Acte et norme en droit international public", 227 *Recueil des cours* (1991-II), p. 357–418. See also the position of the Special Rapporteur, Mr. Victor Rodriguez-Cedeno, in his first report on unilateral acts of states where he admits a distinction between 'political unilateral acts' and 'legal unilateral acts' (International Law Commission, UN Doc. A/CN.4/486, 5 March 1998, para. 44): "The intention of the State which formulates or issues a declaration is what really must determine its legal or political character; in other words, whether that State intends to enter into a legal engagement or a political engagement. State practice appears to indicate that in their international relations States formulate purely political unilateral or bilateral declarations without any intention of entering into legal engagements."

[33] Reisman and Arsanjani, see note 7, p. 422.

[34] *Ibid.*

[35] On the value of preambles in general international law see M. M. Mbengue, "The Notion of a Preamble", *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012).

[36] Indeed, the Foreign Investment Law of Myanmar shows that national investment legislation can contain both elements of a unilateral statement without any kind of legally generative force and elements of a unilateral legal act of a state under international law. That Foreign Investment Law clearly distinguishes between the "Statement on Foreign Investment Law on Myanmar" and the "Union of Myanmar Foreign Investment Law" *per se*. The relevant parts of the Statement read as follows: "… Foreign investors who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against

By contrast,[37] a unilateral act of a state should be qualified as such under international law only if it induces a legally generative force[38] or when it "has the force of [an] international commitment".[39] Hence, it is suggested (or preferable) to use expressions such as "autonomous unilateral legal acts"[40] or "unilateral legal acts"[41] or even "unilateral

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nationalization of their business in operation. All these rights and privileges would be granted in the interest of the Union of Myanmar and its people … At present, enquiries are being made by foreign companies and persons wishing to make investments in the State in a reasonable manner … *As it is necessary to make legal provisions for the above-mentioned matter, the State Law and Order Restoration Council has enacted the Foreign Investment Law*" (italics added). More specifically, the last sentence demonstrates that the "Statement on Foreign Investment Law on Myanmar" does not purport to create international obligations (like a unilateral *act* of a state aims at) but only at declaring political (and to a certain extent, legal) aspirations in relation to foreign investment protection and promotion.

[37] The position of the International Court of Justice (ICJ) in the *Nuclear Tests* cases should be rethought. The Court declared that "of course, not all unilateral acts imply obligation" (*Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472, para. 47). Such a position brings uncertainty in the theory of sources of international law. If it is recognized that unilateral acts of states are sources of rights and obligations under general international law, legal security and legal predictability require treating all unilateral acts of states as a single category of sources of international law. Creating a differentiation among unilateral acts of states might be confusing for "the creation and performance of legal obligations" or might impend "trust and confidence in international cooperation" (*ibid.*, para. 49). Either an act of a state is a unilateral act of that state or is not. If it is a unilateral act of a state then it has a legally generative force and is binding upon the state under international law. For concerns of legal security in the area of unilateral acts of states: see Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 503, para. 19.

[38] On this point see E. Suy, "Unilateral Acts of States as a Source of International Law: Some New Thoughts and Frustrations", in *Droit du pouvoir. Pouvoir du droit. Mélanges en l'honneur de Jean Salmon* (Bruxelles : Bruylant, 2007), p. 632. The author emphasizes the semantic difficulties attached to the concept of 'unilateral acts of states': "When dealing with unilateral acts of states we are confronted with two major difficulties of a semantic nature. The first problem is one of linguistic and concerns the qualification of a unilateral act for which the English language does not seem to be very helpful. Whereas in French, Spanish, Italian and German, a unilateral act is qualified as an *acte juridique*, *acto juridico*, *negozio giuridico*, *Rechtsgeschäft*, the English rendering is simply *unilateral act*. This expression does not explain the subtleties behind the German words *Rechtsgeschäft* and *Rechtshandlung*, or the difference between the Italian words *atto* and *negocio*."

[39] *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 46.

[40] On this expression see Suy, see above note 38, p. 634. The author stresses, "Unilateral legal acts are declarations of the will emanating from one subject of international law aiming at a legal effect. The characteristics of a unilateral legal act are that it contains the declaration of the will of only one subject of international law, and that this declaration has an effect without the involvement by other subjects of international law. This important characteristic leads to the expression 'autonomous unilateral legal act.'"

[41] On this expression see K. Zemanek, "The Legal Foundations of the International System", 266 *Recueil des cours* (1997), p. 193–194.

engagements"[42] properly to designate the generic category of unilateral acts of states, whether made orally or in writing.[43]

National foreign-investment statutes purport to produce legal effects either *exclusively* at the domestic level[44] (these are national laws "without international connection"[45]) or *concomitantly* at the domestic and international[46] levels; as such they are not *in se* unilateral declarations or statements. When it aims to generate legal force at the international level, a national foreign-investment law must be individualized as "a unilaterally enacted legislation [which] has created an international obligation"[47] or, simply put, as a "*strictly* unilateral act of a state".[48] Therefore, a line should

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[42] On this expression see the introductory note of the Special Rapporteur on the law of treaties, Mr. Brierly ("wholly unilateral engagements, engagements to the creation of which only one international legal person is a party…"), *Yearbook of the International Law Commission*, *1950*, vol. II, p. 225, para. 10.

[43] On the irrelevance of form for unilateral acts of states see: *The Mavrommatis Jerusalem Concessions*, *P.C.I.J.*, Series A, No. 5, p. 37; *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 13; *Legal Status of Eastern Greenland* (P.C.I.J., *Series* A/B, No. 53, p. 71); *Case of the Free Zones of Upper Savoy and the District of Gex* (P.C.I.J., *Series* A/B, No. 46, p. 170–172); *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 473, para. 48).

[44] See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 212–213 and 217, in which the arbitral tribunal analysed the existence of a state of necessity separately under Argentinean domestic law and under customary international law: "*The issue for the Tribunal to establish is whether, under Argentine law, there is any valid excuse for not complying with the terms of the contractual and legal arrangements Argentina had entered into* … The Argentine Government has invoked in the alternative the existence of a state of necessity under international law as an exemption from liability. The state of international law on this question will be examined separately … In light of this discussion, the Tribunal is persuaded that the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights" (italics added).

[45] Expression borrowed from *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, para. 30.

[46] See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 33, in which the arbitral tribunal acknowledged implicitly that international commitments in relation to foreign investment could also derive from national legislation: "The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of *legally binding commitments made to the investor* in treaties, *legislation* or contracts" (italics added).

[47] *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85.

[48] On this expression see Rodriguez-Cedeno, see above note 32, para. 12. For a discussion of the limits that characterize the definition of "strictly unilateral acts" see *infra*, pp. 11–12.

be drawn between unilateral investment-related declarations and investment national legislation.

B. *The 'Fugitive':*[49] *Extracting National Investment Legislations from the Bedrock of Unilateral 'Declarations' of States*

Unilateral declarations or statements in the field of investment promotion and protection consist mainly of "statements made either orally or distributed in writing in either hard copy or on-line, clearly promising certain conditions or treatment for foreign investors"[50] (i.e., "announcements"[51] to attract foreign investors, statements on the "websites of its embassies"[52] and "publications to inform prospective investors"[53] by national entities established to promote investments within the jurisdiction of a state). The broad array of so-called unilateral declarations or statements made by states to provide "assurances about how foreign investment will be treated"[54] do not necessarily pertain to the category of states' unilateral acts capable of being sources of rights and obligations under general international investment law.[55]

In the same vein, unilateral declarations or statements are neither pieces of legislation nor acts of a legislative nature *per se*. Rather than being 'auto-normative' acts (in French, "*actes autonormateurs*"[56]) or 'hetero-normative' acts (in French, "*actes hétéronormateurs*"[57]), investment-related declarations of states are generally more declaratory of

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[49] Proust, see above note 26.

[50] Reisman and Arsanjani, see above note 7, p. 422.

[51] *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 100.

[52] *Ibid.*, para. 100.

[53] *Ibid.*, para. 101.

[54] Caron, see above note 29, p. 649.

[55] Reisman and Arsanjani acknowledge themselves that not all "sorts of unilateral statements or declarations should be deemed binding in international investment law (Reisman and Arsanjani, see above note 7, p. 422) and suggest a peculiar threshold for unilateral governmental statements in relation to foreign investment to be binding or sources of investment law. Indeed, for these two authors, it is only when the statements are "clearly promising certain conditions or treatment for foreign investors and such statements are made public and are made repeatedly and foreign investors relied on them, and governments do not retrieve or qualify those statements of commitment before the conclusion of contracts with foreign investors" that the said statements "bind the State" (*Ibid.*, p. 422).

[56] P. Daillier, M. Forteau and A. Pellet, *Droit international public* (Paris: LGDJ, 2009), p. 400–402.

[57] *Ibid.* pp. 402–403. For a qualification of unilateral acts of states as 'hetero-normative' acts see Rodriguez-Cedeno, see above note 32, para. 25.

"general [investment] policy"[58] than of "pure"[59] investment law.[60] In most cases, they provide 'evidentiary' value on whether or not a given state has *unilaterally* bound itself under international law through a municipal investment law.[61] Thus, referring to national foreign investment laws or to provisions contained therein as being *par définition* mere 'unilateral declarations' may be misleading when it comes to precisely defining the contours of the sources of international investment law.[62]

But then, what prompted the confusion between national foreign-investment laws and unilateral 'declarations' of states in certain arbitral awards? And what explains the quasi-absence of qualification of municipal investment laws as unilateral acts of states *per se* in practice?

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[58] By analogy to what an arbitral tribunal said in relation to "questions of general economic policy". See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 27.

[59] Understood in the Kelsenian sense: see H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1970).

[60] This is not to say that investment-related unilateral declarations or statements are *always* precluded from producing legal effects at the international level and from being regulated by international law. What is being stressed here is that the obligatoriness of investment-related unilateral declarations often depends on the political will of states, while national foreign investment laws—when assimilated to unilateral acts of states under international law—base their obligatoriness in international law.

[61] See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, paras. 301–305. In its rejoinder, the claimant enumerates a number of unilateral declarations that prove that Article 15 of the Investment Law of El Salvador constitutes a unilateral act of El Salvador on the basis of which that state has consented to ICSID arbitration. The claimant made reference to a "slide" in a powerpoint presentation made before the *Asamblea Legislativa* on the country's proposed investment law ("The Power Point presentation made before the *Asamblea Legislativa* when the proposal of the Investment Law was being debated contained a slide on dispute resolution that expressly referred to "international arbitration administered by ICSID" for the case of foreign investment), to the comments by El Salvador's representative before the World Trade Organisation on that law in November 1996 ("when he stated that the new investment law would guarantee foreign investors access to international arbitration"), and an UNCTAD report on the Foreign Investment Law of el Salvador ("The report was prepared on the basis of input provided by the Salvadoran Government, including its investment agency (PROESA), and then subsequently publicly endorsed by the Government at the report's official presentation in April, 2010 … the Report was prepared with official input by PROESA and other Government ministries, and was endorsed by El Salvador's Ambassador to the United Nations and the Director of PROESA, both acting in their official capacity").

[62] See, *e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 286. In its rejoinder, the claimant uses at least four different concepts to refer to the same unilateral act (Article 15 of the Investment Law of El Salvador): "Respondent argues that Article 15 of the Investment Law should be interpreted restrictively because it is not an *instrument of consent* but a *unilateral declaration of the State* having no bearing on arbitral jurisdiction. However, several ICSID tribunals have confirmed that *unilateral jurisdictional*

Besides the "lack of a theory of international unilateral acts of states",[63] it is noteworthy that foreign investment laws are primarily not seen as the raw material upon which unilateral acts of states are built in the field of investment protection and promotion.[64] Nevertheless, it is not such a perception of the intrinsic and extrinsic relationship between unilateral acts of states and national investment statutes that has propelled the so-called semantic maelström. Confusion is rather a consequence of a spiral of preconceived ideas. Two layers of the spiral deserve particular attention.

The first layer is grounded on the preconceived idea according to which "the most common formal unilateral act of a State is a declaration"[65] and that "it is difficult in practice to find substantive unilateral acts that are not expressed or embodied in a declaration".[66] The International Law Commission (ILC), for instance, when dealing with its aborted project on 'Unilateral Acts of States' did not mention at all national foreign-investment statutes as examples of unilateral acts.[67] Yet, the Special Rapporteur on the topic of 'Unilateral Acts of States' contemplated

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instruments should not be interpreted restrictively. And at least three tribunals have confirmed that Article 15 of the Investment Law is an *instrument of consent*" (italics added).

63 Rodriguez-Cedeno, see above note 32, para. 13.

64 In general, this is true for much areas of international law concerned with unilateral acts of states. As explained by the Special Rapporteur in his first report, "in the law of unilateral acts, the unilateral declaration is probably the means or procedure by which a State most often performs unilateral acts and assumes strictly unilateral obligations" (*ibid.*, para. 19). More specifically, this is also accurate when it comes to investment protection and promotion. As explained by Reisman and Arsanjani, "… the governments of some States face a particularly hard "sell" when their predecessor governments had not kept commitments. As a result, their national image has acquired a deserved (and legally eufunctional) notoriety. To reach this part of the global market, other techniques must be found. Governments facing this quandary frequently resort to active promotional campaigns in order to assure prospective investors that, among other things, a new government will not succumb to the practices of its predecessors. The campaigns are conducted either at the national level or abroad through diplomatic and consular channels, or through agencies and lobbyists and even through promotions via Internet" (Reisman and Arsanjani, see above note 7, p. 409–410).

65 *Ibid.*, para. 73. See also K. Skubiszewski, "Unilateral Acts of States", in *International Law: Achievements and Prospects*, ed. M. Bedjaoui (Dordrecht/Paris: Nijhoff/UNESCO, 1991), p. 233.

66 Rodriguez-Cedeno, see above note 32, para. 13.

67 See *Eighth Report on unilateral acts of States*, by Victor Rodriguez-Cedeno, Special Rapporteur, 26 May 2005, UN Doc. A/CN.4/557. For a similar point of view see Caron, see above note 29, p. 669: "… in addressing unilateral acts – both oral and written – neither the Special Rapporteur nor tbe ILC appeared to contemplate foreign investment laws as an example of unilateral acts. Domestic statutes are only sporadically mentioned in the reports, and they never concern foreign investment. In his overall work on the topic, the Special Rapporteur, and subsequently the ILC, remained primarily concerned with diplomatic acts performed by states in the areas of recognition of states, maritime and terrestrial boundaries, and other questions concerning sovereignty."

the fact that some "*acts of domestic scope* which do not have effects at the international level"[68] may reflect "substantive unilateral legal acts of States which fall within the treaty sphere".[69] Nevertheless, the Special Rapporteur totally omitted domestic acts that may have effects at the international level, or what he called "formal unilateral legal acts of internal origin which may produce effects at the international level"[70] (like national investment laws), and, accordingly, ignored the rightful placement of those acts within the category of unilateral acts of states. Such a pattern of thought has led some arbitral investment tribunals to "lose sight of the fact that a legislative act of a state, like all other acts of a state, can have meaning within several legal systems simultaneously"[71] and should be qualified *uti singuli* as an *autonomous unilateral legal act* of a state under international law,[72] rather than a mere unilateral declaration.

The second layer of the spiral of preconceived ideas rests on the assumption that unilateral acts that are envisaged under international law pertain to a so-called category of "*strictly* unilateral acts".[73] National statutes in general and municipal investment laws in particular are not commonly perceived as being "strictly unilateral acts". While their very nature is to be adopted at the internal level of each state, they are not in essence considered *strictly* unilateral. They are emanations of the sovereignty of each state to exercise regulatory powers within its jurisdiction. From there, national laws receive in principle their specific legal qualification from the 'pyramid of internal norms' (i.e., the domestic legal order) and not by virtue of international law. Within that 'pyramid', the concept of unilateral acts of states is rather non-existent, not to mention unconventional. Thus, by formulating the high threshold of the 'strictly unilateral act', the ILC – at least unconsciously – excluded *de facto* national investment legislation from the scope of study of unilateral acts of states.

Furthermore, even when looking at the criteria that the ILC highlighted in order to determine whether a given act of a state constitutes a *strictly* unilateral act under international law, it is difficult to see how national

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68 Rodriguez-Cedeno, see above note 32, para. 96.

69 *Ibid.*

70 *Ibid.*, para. 105.

71 Caron, see above note 29, p. 649.

72 For a similar view see Zemanek, see above note 41, p. 193–194: "Autonomous unilateral legal acts are communications under, not about, rules of the existing legal order and intend to confirm or to change the legal position of the author state in application of the respective rule of international law." See also Potestà, see above note 12, p. 161.

73 Rodriguez-Cedeno, see above note 32, p. 12.

investment legislation would qualify as 'strictly unilateral acts' through which a states assumes "*strictly* unilateral (legal) obligations".[74]

The first criterion that was suggested by the ILC is based on 'the single expression of will'. Defining this criterion, the ILC stated that "a unilateral act should be understood as an act which is attributable to one or more States and which creates a new legal relationship with a third State which did not participate in its elaboration".[75] The second criterion that was stressed by the ILC dealt with the 'autonomy of the act and of the obligation'. Here, among the several explanatory points raised by the ILC, one is noteworthy. The ILC emphasized that "although it is rare for a State to commit itself and to assume obligations without any quid pro quo, this is possible under international law, in accordance with the generally accepted principle that a State may, in the exercise of its free will and of the power of auto-limitation conferred on it by international law, contract unilateral obligations".[76]

It is striking that the two criteria identified by the ILC to define *strictly* unilateral acts of states do not properly match the configuration of municipal investment laws. Firstly, the latter are not addressed to third states and do not intend to "create a new legal relationship with a third State". The addressees of investment national legislation are those legal and natural persons who form part of the "foreign investment community"[77], as well as the state that is itself the 'author' of the investment legislation.[78] Secondly, the ILC's interpretation of the autonomy of a unilateral act does not correspond to the rationale that governs national foreign-investment statutes. Indeed, it is not international law *per se* and *exclusively* that founds the power of a state to formulate unilateral commitments *vis-à-vis* foreign investments and investors; municipal investment laws are, first and foremost, rooted in the domestic legal order of the state. Many of such

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[74] *Ibid.*, para. 19.

[75] *Ibid.*, para. 133.

[76] *Ibid.*, para. 141.

[77] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 283.

[78] See, *e.g.*, the Foreign Investment Law of Myanmar (see above note 16): "*Foreign investors* who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against nationalization of their business in operation. *All these rights and privileges would be granted in the interest of the Union of Myanmar and its people*" (italics added).

investment national laws do not even refer to international law.[79] To consider that strictly unilateral acts solely derive from the exercise by a state of its "free will and power of auto-limitation *conferred on it by international law*" leads to a subversive result: excluding municipal investment laws from the realms of (strictly) unilateral acts under international law. It is not surprising therefore that arbitral practice has been characterized by irresolution in approaching national foreign-investment laws as autonomous unilateral legal acts of states under international law, or by confusion in systematically qualifying municipal investment laws as mere unilateral declarations of states.

Nevertheless, the responsibility for such a state of facts is not only attributable to arbitral practice. General international law has inherently (and maybe constantly) caught up municipal laws as being mere *facts* and, as a result, has failed in accurately considering that pure *legal acts* under international law could emerge out of the interstices of municipal laws. So is the '*Lost Time*'[80] found (i.e., acknowledging in principle that municipal law can function to a certain extent as unilateral acts of states under international law)? Not yet. It is still necessary to go in search of the '*Act*' (i.e., finding what constitutes and what does not constitute a unilateral *legal act* of a state within a municipal investment law) and of its legal effects as a source of international investment law.

II. *In Search of the Lost Act: Factum Est Servanda?*

"From the standpoint of International law and of the Court which is its organ, *municipal laws are merely facts* which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures."[81] This dictum—which is maybe the ultimate *locus classicus* in international jurisprudence—sums up by itself the perception that general international law induces from municipal laws: these laws are not "determinative of international law."[82] Not surprisingly,

[79] See, *e.g.*, the South Korean Foreign Investment Act: "The purpose of this Act is to promote foreign investment in this nation by providing incentives and inducements with the ultimate view of contributing to the sound development of this nation's economy." Throughout the entire act, no reference at all is made to international law.

[80] By reference to Proust, see above note 12.

[81] *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19 (italics added).

[82] *Pac Rim Cayman LLC v. Republic of El Salvador*, Pac Rim Cayman LLC's Response to Respondent's Preliminary Objections, ICSID Case No. ARB/09/12, 26 February 2010, para. 128.

that approach is sometimes imported into the domain of international investment law.[83] But is it really an "axiom of international law"[84] to consider *all* municipal laws as mere 'facts'?

A. *'In the Shadow of Young Girls in Flowers'*:[85] *Photographing*[86] *National Investment Laws As 'Facts'*

To answer such a query, it is essential to decrypt the meaning of the aforementioned dictum of the Permanent Court of International Justice (PCIJ). The main legal consequence that the PCIJ deduced from that statement was as follows: "[t]he Court is certainly not called upon *to interpret the Polish law as such*, but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[87] It follows that the PCIJ was *in limine litis* dealing with an issue of *applicable law*[88] and not with an issue of *source of international*

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[83] See, *e.g.*, *Ioannis Kardassopoulos* (*Greece*) *v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 146: "In the present case, *Georgian law is relevant as a fact* to determine whether or not Claimant's investment is covered by the terms of the ECT and the BIT. But, what ever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law" (italics added). See also, Arbitration pursuant to the Canada-Ecuador Bilateral Investment Treaty and UNCITRAL Rules (London Court of International Arbitration), *EnCana Corporation v. Republic of Ecuador*, Partial Dissenting Opinion of Dr. Horacio A. Grigera Naon, Award, 3 February 2006, para. 12: "Consequently, the local laws, administrative acts and practices and other conduct attributable to the host State at the moment they had effect of operating the deprivation of property, are *facts* to be freely evaluated by the arbitrators …" (italics added). For a less explicit reference see the *Bernardus Henricus Funnekotter* case, where the arbitral tribunal observed that Zimbabwe domestic law may provide "*useful information* on the situation which prevailed in Zimbabwe from 2002 to 2005" (italics added) (*Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 103). The tribunal added that "in any event, *it is on the basis of the applicable rules of International Law* that, in conformity with Article 9(3) of the BIT, the Tribunal must decide whether or not there was at the time a state of necessity which could have made lawful deprivation of property without compensation. In other words, *ultimately international law, not the domestic law of Zimbabwe*, must determine the effect any state of emergency would have on the dispute before the Tribunal" (*ibid.*, para. 103) (italics added).

[84] *Georges Pinson* (*France*) *v. United Mexican States*, 24 April 1928, *Reports of International Awards*, vol. V, United Nations, p. 393, para. 32.

[85] Proust, see above, note 2, *In the Shadow of Young Girls in Flowers* (*In Search of Lost Time: Volume II*).

[86] Metaphor taken from *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

[87] *Case concerning certain German Interests in Polish Upper Silesia,* Merits, P.C.I.J., *Series* A, No. 7, p. 19.

[88] This appears clearly from a careful reading of the *Brazilian Loans* case (*Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment N° 15,

law or of *source of international obligations*.[89] In other words, the PCIJ did not aim to preclude that national legislation could entail *unilateral* international commitments; the PCIJ only pinpointed that because of their nature as 'facts', "tout tribunal international, de par sa nature, est obligé et autorisé à les [i.e., municipal laws] examiner à la lumière du droit des gens."[90]

Quite the reverse; the PCIJ was diligent in specifying that municipal laws "express the *will*"[91] of states. By expressing its will, a state may choose to commit itself *unilaterally* and, as a result, *all* municipal laws cannot be restrictively profiled *mutatis mutandis* as mere 'facts'. In certain instances, municipal laws should rather be sketched as unilateral acts of states under international law, and in particular, when those *national* unilateral commitments are directed towards an 'extraneous factor' (or an 'international factor') such as the foreign investment community.[92] The judgment of the International Court of Justice (ICJ) in the *Frontier Dispute* (*Burkina Faso/*

1929, P.C.I.J., *Series A N° 20/21*, p. 124): "Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, *is not obliged also to know the municipal law of the various countries*. Alı that can be said in this respect is that *the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied*. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken" (italics added).

[89] In the present contribution, we will not deal with the question whether unilateral acts of states constitute a source of international law or a source of international obligations. We consider that the debate is somewhat futile. International law is based on rights and obligations. Therefore, it is difficult to see how an instrument which is a *source of international obligations* does not qualify as a *source of international law*. For a similar point of view see Suy, see above note 38. For a different view see Rodriguez-Cedeno, see above ntoe 32, 82–83. The Special Rapporteur concludes: "Much of the doctrine concludes that unilateral act of States do not constitute a source of law. That does not mean, however, that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law. Unilateral acts are sources of international obligations. International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they have confined themselves to specifying that such acts are a source of international obligations."

[90] *Georges Pinson* (*France*) *v. United Mexican States*, 24 April 1928, *Reports of International Awards*, vol. V, United Nations, p. 393, para. 32.

[91] *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19.

[92] For a similar point of view see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), p. 95: "*The investment rights* … arise in the context of legal relationships governed by domestic law. Hence, IIAs (international investment agreements) and international law leave questions to be decided, in principle, *by the law of the host state*" (italics added).

Mali) confirms this reading of the dictum of the PCIJ. The ICJ, indeed, acknowledged that a domestic law "may play a role not in itself, but only as one factual element among others, or as evidence".[93] However, the ICJ indirectly recognized that "international law could effect [a] renvoi to … any legal rule *unilaterally established by any State* whatever."[94] Henceforth, national laws are perhaps *more or less* 'facts' when it comes to the law applicable before international courts and tribunals.[95] They may, alternatively, function as unilateral 'legal acts' under international law when they operate as sources of international law or international obligations, i.e. when they purport to "creat[e] and perform…. legal obligations"[96] and manifest at the same time the "will"[97] of a state to commit itself unilaterally in its international relations. One scholar goes in the same direction when affirming that "in international law, national unilateral acts, be they legal or illegal, emanating from national authorities are mere facts. But, some of the unilateral acts can be elements of state practice contributing to the formation of a customary rule of international law or *otherwise affecting the rights and obligations of a State in its international relations. Behind some of the legal acts there is an intention to create legal situations*."[98]

It is difficult to see why a municipal investment law would be tantamount to a mere 'fact' when the domestic law (or at least certain of its provisions) "concerning legal or factual situations, may have the effect of creating legal obligations",[99] and both "when it is the intention of the State [enacting the law] that it should become bound according to its terms"[100] and when "that intention confers on the [law] the character of a legal undertaking, the State [is] thenceforth legally required to follow a course of conduct consistent with the [law]".[101] Denaturing the legal characteristics of some of the provisions contained in national foreign-investment laws as being mere 'facts' under general international law comes close to "legal genetic engineering".[102]

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93 *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

94 *Ibid.*

95 In the field of international investment arbitration, this affirmation can be nuanced. See *infra* p. 15.

96 *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 473, para. 49.

97 *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19.

98 Suy, see above note 38, p. 632–633 (italics added).

99 *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 473, para. 46.

100 *Ibid.*

101 *Ibid.*

102 Expression attributed to Prof. Georges Abi-Saab in his Dissenting opinion, *Abaclat and others v. The Republic of Argentina*, ICSID Case No. ARB/07/5, 28 October 2011, para. 139.

Certainly, "international tribunals are properly reluctant to conclude that national law contradicts international law".[103] Admittedly, "arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest",[104] nor "an open-ended mandate to second-guess government decision-making".[105] Assuredly, "compliance with municipal law and compliance with the provisions of a treaty are different questions".[106] Unquestionably, "international law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law".[107] Supposedly, "international law does not appraise the content of a regulatory programme extant before an investor decides to commit".[108] The list goes on....

Ultimately, however—regardless of the merits of these "radical or moderate dualist"[109] approaches—nothing precludes an investment arbitral tribunal from qualifying a national foreign-investment law "*as it is*",[110] that is a unilateral act of a state under international law if it operates as such in its machinery, its content and its structure.

It can even be asserted that international investment law, more than any other field of general public international law,[111] requires that qualification. Indeed, international investment law appears as a sort of self-contained system within the sphere of which municipal laws play more of

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[103] In Proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, *GAMI Investments, Inc.* (*Claimant*) *and The Government of the United Mexican States* (*Respondent*), Final Award, 15 November 2004, para. 41.

[104] *Ibid.*, para. 93

[105] In Proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, *S.D. Myers* (*Claimant*) *v. The Government of Canada* (*Respondent*), First Partial Award, 13 November 2000, para. 261.

[106] *Case concerning Elettronica Sicula S.p.A* (*ELSI*), *Judgment, I.C.J. Reports 1989*, p. 51, para. 73. See also, *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), *Judgment, I.C.J. Reports 2004*, p. 65, para. 139.

[107] *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 94.

[108] *GAMI Investments, Inc.* (*Claimant*) *and The Government of the United Mexican States* (*Respondent*), Final Award, 15 November 2004, para. 91.

[109] Expression attributed to Alvarez and Montt: see above note 18, p. 593–594.

[110] *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30 (italics in the original).

[111] See the position of de Beus (J.G. de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico under the Convention of September 8, 1923* (The Hague: Martinus Nijhoff, 1938), p. 140) who implicitly acknowledged that municipal law could benefit from an autonomous legal qualification under international law, without going as far as explicitly admitting that municipal law could constitute a (unilateral) legal act under international law. According to the author: "Experience shows, and this is really understandable, that an act at variance with municipal law is seldom deemed to come up

a normative role than international law[112] and not a 'factual' role. And even if "international law is fully applicable",[113] there are still situations in which the rights of foreign investors can only (or at least, mainly) be measured and determined in light of the *unilateral* commitments of a state, embodied in its national foreign-investment law. The arbitral tribunal in the *EnCana* case has acknowledged this reality by stating, "[u]nlike many

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to international standards … In the great majority of cases conduct towards a foreigner which does not conform with local law, is also at variance with the law of nations … The only value which can under the law of nations be attributed to domestic law *as a standard* is, on the one hand, that if the behavior complained of shows a pronounced departure from that law to the prejudice of a foreigner, there is an international delinquency, and on the other hand, that if the action is in accordance with that law, international commissions will perhaps hesitate to declare that the national law is below international standards of civilization …."

[112] See, *e.g.*, Article 42(1) of the ICSID Convention which reads as follows: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, *the Tribunal shall apply the law of the Contracting State party to the dispute* (including its rules on the conflict of laws) and such rules of international law as may be applicable." The PCIJ also admitted that domestic law can form an integral part of the applicable law before international courts and tribunals when it comes to 'foreign-investment activities'; see *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment N° 15, 1929, P.C.I.J., *Series A N° 20/21*, p. 124. According to the PCIJ: "Once the Court has arrived at the conclusion *that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country*. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force" (italics added).

[113] *Amco Asia Corporation and others v. Republic of Indonesia*, Resubmitted case, ICSID Case No. ARB/81/1, Award, 5 June 1990, para. 40. See also and more specifically, *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85, where the arbitral tribunal emphasized that a unilateral undertaking in a national foreign-investment law should be interpreted in light of principles and rules of international law: "…the jurisdictional issue in this case *involves more than interpretation of municipal legislation*. The issue is *whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty*. Resolution of this issue involves *both statutory interpretation and treaty interpretation* … Thus in deciding whether in the circumstances of the present case, Law N° 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply *general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations*" (italics added). For a similar position see *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 81: "It is clear to the Tribunal that, in view of the fact that Article 22 of the LPPI is a unilateral declaration of the Venezuelan State, *it is necessary that the initial process of interpretation be conducted within the parameters set by the Republic's legal system, based on its Political Constitution, which is the supreme norm of that country*. However, because any conclusions that may be reached in the process of interpretation of that article must be applied to determine whether Venezuela granted its consent to ICSID jurisdiction under Article 25 of the ICSID Convention, *it is necessary to take account of the principles of International Law to reach a definitive conclusion*" (italics added).

BITs there is no express reference to the law of the host State in the [Canada-Ecuador BIT]. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) *the rights affected must exist under the law which creates them, in this case, the law of Ecuador*."[114] Therefore, one should concur with the opinion according to which "where the existence of a right may only be established by reference to domestic law, an examination of the municipal legal system at issue necessarily precedes any investigation into the protection of that right under BITs or general international law'.[115]

For the sole purpose of identifying what constitute unilateral 'legal acts' under international law in the context of a municipal investment law, the "examination of the municipal legislation at issue"[116] should allow moving it away from the 'Shadow of Young Girls in Flowers' (that is, the 'shadow of facts'). From there on, the examination must consist in 'freezing'[117] the *act*(*s*) in national foreign-investment legislation *via* which states enunciate unilateral commitments under international law.

B. *'Time Regained'*:[118] *Freezing Investment National Legislation As 'Unilateral Legal Acts' under International Law*

In principle, for a unilateral act of a state to produce legal effects, "nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required … since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".[119] In this context, through which legal transmutation[120] can a given

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[114] Arbitration pursuant to the Canada-Ecuador Bilateral Investment Treaty and UNCITRAL Rules (London Court of International Arbitration), *EnCana Corporation v. Republic of Ecuador*, Award, 3 February 2006, para. 184. From this statement it seems that it is not only "a failure to comply with the national law to which a treaty refers [that] will have an international legal effect" (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 394). The failure of a state to comply with its own unilateral undertakings under its municipal investment law can also "have an international legal effect" even in the absence of a treaty referring to the said municipal investment law.

[115] Alvarez and Montt, see above note 18, p. 588.

[116] *Ibid.*

[117] Metaphor inspired by *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

[118] Proust, see above, note 2, *Time Regained* (*In Search of Lost Time: Volume VII*).

[119] *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 472, para. 46.

[120] For a similar position see Caron, see above note 29, p. 653: "A legislative act of any state, like all other acts of a state, can have meaning within several legal systems simultaneously."

municipal investment law serve as a basis for unilateral legal acts under international law, i.e. legal enunciations or enactments that *unilaterally* bind a state *vis-à-vis* foreign investors or investments?

At the outset, one would be tempted simply to consider that, if a "foreign investor is entitled to reasonable reliance upon the state's contemporaneous manifestations of its understanding of its laws",[121] nothing precludes *a fortiori* a foreign investor from relying upon the "state's contemporaneous manifestations"[122] of its legal undertakings. And if those legal undertakings are manifested *unilaterally* within the frame of domestic investment laws, they should be opposable to the states concerned under general international law as well as under international investment law, knowing in particular that "it is well established that there are provisions of international agreements that can *only be given meaning by reference to municipal law*".[123]

Therefore, national foreign-investment laws – in reality, only some of their provisions – may be qualified as unilateral (legal) acts of states under international law because of the *offer*(*s*)[124] they contain and the *confidence* that foreign investors place on those offer(s) (not to say the *acceptance*[125] of the offer(s) by foreign investors). This is a sort of 'contractual' approach that indicates that unilateral undertakings made through the prism of municipal investment laws are not only "*acta sunt servanda*" but are also

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[121] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 392.

[122] *Ibid.*

[123] *Ioannis Kardassopoulos* (*Greece*) *v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 145.

[124] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela,* ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 79: "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. Such offers could be incorporated into domestic legislation or not". See also *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 85: "Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as *standing offers* to foreign investors under the ICSID Convention" (italics added).

[125] See, *e.g.*, *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 258: "The Tribunal can only hold that Inceysa's investment is also excluded from *the unilateral offer to accept* the jurisdiction of the Centre made by the Salvadoran State in its Investment Law" (italics added). See also *Report to the Executive Directors*, accompanying the ICSID Convention, which emphasizes that "a host State might in its investment promotion legislation *offer* to submit disputes … to the jurisdiction of the Centre, and the investor might give its consent by *accepting the offer* in writing (*ICSID Documents concerning the Origin and the Formulation of the Convention*, Vol. II, p. 1069) (italics added).

reflective of *pacta sunt servanda*.[126] This line of thought is akin to the analysis by the ICJ in the *Nuclear Tests* cases. Indeed, the Court held, "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[127] So as to confirm the so-called 'contractual' approach to the binding character of unilateral acts of states under international law, the Court stressed the importance of "trust and confidence".[128] Transposing the rationale of the Court in the field of unilateral undertakings enacted in municipal investment laws, it is then possible to conclude that national investment legislation can be 'frozen' as unilateral acts of states under international law as long as "interested investors may take cognizance of unilateral [offers made in national investment legislations] and place confidence in them", and "are entitled to require that the obligation thus created be respected".[129]

Despite the relevance of this approach, in practice, it might prove difficult clearly to delineate the provisions in municipal investment laws that constitute unilateral (legal) acts of a state under international law. This is the case with provisions dealing more specifically with the issue of consent to ICSID arbitration contained in domestic investment laws. A state

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126 On this point see C. Goodman, "*Acta Sunt Servanda?* A Regime for Regulating the Unilateral Acts of States at International Law", 25 *Australian Yearbook of International Law* (2006), p. 67: "The term *pactum* could quite easily be extended to cover both conventional and unilateral acts without suffering any substantial change in its criteria. Second, and in the alternative, it has been suggested that a new term such as *promissio est servanda*, reflective of their autonomous nature, could be coined to apply the principle *pacta sunt servanda* to unilateral acts." See also Rodriguez-Cedeno, see above note 32, para. 156: "Recognition of the principle of respect for promises, known as *pacta sunt servanda* in the law of treaties, is also applicable in the case of unilateral acts, although some authors, who place such acts in the context of the law of international agreements, consider that that fundamental norm would also apply to unilateral acts."

127 *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 473, para. 49.

128 *Ibid.*

129 By analogy to what the Court said in the *Nuclear Tests* cases, id. For a similar position see also Rodriguez-Cedeno, see above note 32, para. 162: "Necessary confidence in the relationships and expectations which are created by a State which formulates a declaration and assumes an engagement also found or justify the binding nature of that declaration. The binding nature of the unilateral obligation contracted through a declaration, based on the above-mentioned rules, allows the addressee State(s) to require its performance by the author State. The third State has placed its trust in the conduct or in the declaration constituting the unilateral act and in the author of that act not attempting to go back on its word. A more specific formulation of the general rule of good faith *contra factum proprium non concedit venire* should therefore determine the opposability of the unilateral act vis-à-vis its author."

can decide "by means of a unilateral commitment … set forth in its legislation, for example, about the promotion of investments"[130] to "*propose* … to submit the differences, arisen from any investment or any kind of investment, to the ICSID jurisdiction".[131] Does such a 'proposal' or 'offer' amount in every case to a *binding unilateral commitment under international law*?[132] From the perspective of investment arbitral tribunals, this is not always so. As a general rule, it is within the *compétence de la compétence* of investment arbitral tribunals and not up to the state concerned to decide whether a given provision of a municipal investment law reflects a "unilateral offer made in the Host State's legislation".[133]

In order to determine whether a binding unilateral commitment does exist, primacy should be given to the *ordinary meaning of the terms* of the provision at stake in domestic investment law.[134] Yet, interpreting whether unilateral consent to ICSID arbitration could be induced from a 'Notice' of the Ministry of Foreign Affairs of the Slovak Republic announcing the

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[130] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 24.

[131] *Ibid.* See also *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 45: "Many investment laws of developing countries provide for the State's acceptance of ICSID jurisdiction (or for alternative dispute resolution methods) for disputes with the investor arising out of a particular investment. Under some laws the offer is deemed to be accepted as soon as the foreign investor files an investment application pursuant to such a law, regardless of whether the application includes a reference to the arbitration provision contained in the law".

[132] See Caron, see above note 29, p. 655. The author explains that "even though a national foreign-investment law has a legal meaning given to it by the specific national legal system, the question whether that statute as a unilateral act under international law contains, for example, a consent to ICSID arbitration, is a question to be determined in accordance with international law".

[133] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 69. See also *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 60; *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 212–213; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 Jan. 2003, para. 339.

[134] By analogy to what the ICJ said about the interpretation of unilateral declarations recognizing the compulsory jurisdiction of the Court under article 36 (2) of the Statute of the ICJ. See, *e.g.*, *Anglo-Iranian Oil Co*., Preliminary objections, Judgment, *I.C.J. Reports 1952*, p. 105, where the Court stated that a declaration under article 36 (2) "must be interpreted as it stands, having regard to the words actually used". More specifically in the field of investment arbitration: see *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 90: "The starting point in the interpretation of unilateral declarations (as well as in statutory interpretation or in the interpretation of treaties) is the textual analysis of the document to be construed".

entry into force of the 1992 Treaty on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of the Czech Republic, an arbitral tribunal—quoting the judgment in the *Nuclear Tests* cases—estimated that "even if the Notice were to be characterized as a unilateral declaration by the Slovak State, it still needs to be asked whether it was '*the intention* of the State making the declaration that it should become bound according to its terms', as required by the international law principles applicable to unilateral declarations".[135] Arguably, the intention of the state is perhaps the criterion that best fits unilateral declarations of states. Nonetheless, this criterion should not prevail for *all* kind of unilateral acts of states, and in particular investment "domestic legislative acts"[136] that contain binding unilateral offers (commitments) in favour of foreign investors.[137]

In some instances, indeed, national foreign-investment legislation has been considered as containing such binding unilateral offers under international law when it "*clearly* contain[ed] a *standing* offer by the state to submit disputes to the ICSID",[138] regardless of the intention of the state. The arbitral tribunal in *Tradex Hellas v. Albania*, for example, after having recognized that "it can now be considered as established and not requiring further reasoning that [consent to ICSID jurisdiction] can also be effected unilaterally by a Contracting State in its national laws the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law",[139] concluded

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[135] *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 46.

[136] *Ibid.*, para. 44.

[137] In this sense, the statement according to which "[i]n interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it was made" should be nuanced and not understood as giving prevalence to the criterion of intention: *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 107.

[138] Potestà, see above note 12, p. 156. The author stresses that "this is the case when the piece of legislation uses formulations such as 'the host state hereby consents' or 'the consent of the host state is constituted by this article'." As an illustration, he gives a list of provisions contained in African national foreign-investment laws, such as Article 5 of Togo's Investment Code (Law No. 89–22 of 31 October 1989), Article 21 of Mali's Law No. 91–048/AN-RM of 26 February 1991 Bearing on Investment Law, Article 24 of Law No. 95–620 of 3 August 1995 on the Investment Code of the Republic of Côte d'Ivoire, and Article 38 of the *Code des Investissements* of the Democratic Republic of Congo (Law No. 004/2004 of 21 February 2002) (*ibid.*, footnote 29).

[139] *Tradex Hellas S.A.* (*Greece*) *v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, *ICSID Review – Foreign Investment Law Journal*, p. 187.

that Article 8, paragraph 2, of the 1993 Albanian Law on Foreign Investment was "unambiguous"[140] in constituting a binding unilateral offer under international law. In other instances, *a contrario*, some municipal investment laws do not clearly embody a binding unilateral offer to submit investment disputes to ICSID arbitration as demonstrated in the *Biwater Gauff v. Tanzania* case, where the arbitral tribunal found that the language of section 23 of the 1997 Tanzanian Investment Act did not "suggest a *standing unilateral offer*"[141] by the Republic of Tanzania.

The above-mentioned case law demonstrates that the identification of binding unilateral commitments within the frame of national foreign-investment legislation follows to a certain extent the basic methodology of treaty interpretation by giving prevalence to the *ordinary meaning of the terms* (what is strictly said in the unilateral offer), in their *context* (domestic investment laws as instruments of protection and promotion of foreign investment) and in light of their *object and purpose* (i.e., to provide legal assurances and safeguards to foreign investors).

The criterion of the intention of the state should formally (i.e., as separate or decisive criterion) come into play only when difficulties arise in identifying the existence of a unilateral legal act under international law,[142] that is when municipal investment laws are purely ambiguous or when they do not embody an explicit statement of consent by the state. Even in the latter situation, a unilateral binding offer under international law can be detected when the "offer to submit disputes to ICSID may nonetheless result *from phrases which are worded so as* to grant investors an unrestricted and unequivocal right to submit a dispute to ICSID".[143] This is the case with Article 15 of the Salvadorian Investment Law, which reads as follows in its relevant part: "[i]n the case of controversies arising

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[140] *Ibid.*

[141] *Biwater Gauff* (*Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 329 (italics added). According to the arbitral tribunal, "the options for dispute resolution in Section 23.2 (a)-(c) are conditioned by the words '*as may be mutually agreed by the parties*'." In the present context, these words are most naturally read as meaning that a dispute may be referred to any one of the three options, but only depending upon the agreement of the parties. In other words, a subsequent agreement between the parties is required, *which is very different from a standing unilateral offer which simply requires acceptance by an investor*" (italics added).

[142] Thus, the author of the present contribution therefore disagrees with the arbitral tribunal in *CEMEX* when it concluded that: "the intention of the declaring State must prevail" (*CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 87).

[143] Potestà, see above note 12, p. 157.

between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to: a) the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States".[144] From an ordinary reading of the terms, the arbitral tribunal in *Inceysa Vallisoletana v. El Salvador* concluded that "by"[145] Article 15 of the Investment Law, the Salvadoran state "made to the foreign investors a unilateral offer of consent to submit, if the foreign investors so decides, to the jurisdiction of the Centre".[146] If the existence of binding unilateral offers can more easily be deduced from provisions like Article 15 of the Salvadorian Investment Law, such is not the case for provisions of domestic investment laws that are characterized by "unclear and imprecise formulations".[147] It is in the context of these unclear and imprecise formulations that the delineation of unilateral binding offers within municipal investment laws must accordingly take into account the intention of the state.

In recent arbitral practice, much controversy has arisen in relation to obscure consent to arbitration-related provisions of municipal investment laws. The most prominent example is Article 22 of the 1999 Venezuelan Decree-Law No. 356 for the Promotion and Protection of Investments. Article 22 provides as follows: "[d]isputes 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

144 *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 268.

145 *Ibid.*, para. 332.

146 *Ibid.*

147 Potestà, see above note 12, p. 157. See also Tejera Pérez, see above note 16, p. 89. This author explains that "there are cases where the specific language of investment laws is not so clear. That may happen, for example, because the particular provision dealing with arbitration contains disclaimers or qualifications such as '*if applicable*' or '*where applicable*' that make it difficult for the reader to interpret the actual meaning of the provision."

appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect".[148]

Some scholars firmly believe that "although with an awkward wording, Article 22 of the Venezuelan Investment Law contains in itself an offer of ICSID arbitration from the Bolivarian Republic of Venezuela to settle disputes with all foreign investors".[149] However, the arbitral tribunal in the *CEMEX v. Venezuela* case reached a total different conclusion,[150] finding that "if it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly"[151] and "that such an intention hav[ing] not been established … it cannot conclude from the obscure and ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented unilaterally to ICSID arbitration for all disputes covered by the ICSID Convention in a general manner".[152] It is neither within the scope of the present contribution to discuss whether the arbitral tribunal was correct in the result achieved[153] nor in its ambition to

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[148] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 64.

[149] Tejera Pérez, see above note 16, p. 101.

[150] The arbitral tribunals in *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010 and in *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, reached the same conclusion with approximately similar reasoning.

[151] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para.. 137.

[152] *Ibid.*, para. 138.

[153] For critical point of views see Tejera Pérez, see above note 16, p. 107. The author considers: "[c]oncluding that Article 22 of the Venezuelan Investment Law is not an offer to ICSID arbitration … would leave Article 22 with no object and purpose … Thus, one could ask: if Article 22 does not contain an offer of ICSID arbitration, what is the purpose of such provision? Just informing the community that Venezuela is an ICSID Convention signatory? In our opinion, that cannot be a correct and good faith interpretation …." See also Potestà, see above note 12, p. 166: "the two … ICSID tribunals drew a complete analogy with the regime applicable to the interpretation of declarations made under Article 36(2) of the ICJ Statute. It could, however, be questioned whether an indiscriminate analogy between an ICJ optional clause declaration and a foreign investment law (and the consequent emphasis placed on the search for the state's 'intention' behind the declaration) might always lead to fully satisfactory results. It might be a very hard task to ascertain what the real intent behind a piece of legislation is, especially if (as was the case with Venezuela) there are no travaux préparatoires or other official reports which could shed light on the drafters' intention. In such a case, it might be questioned whether greater emphasis should be placed on this subjective element or rather on the 'context' in which the dispute settlement provision was inserted, that is, a law enacted with the specific aim of attracting foreign capital into the host state."

discuss whether a so-called principle of 'restrictive interpretation' should govern the interpretation of unilateral acts of states in case of doubt regarding their terms.[154]

To conclude, it is nonetheless important to stress that conferring primacy on the criterion of intention in the identification of the potential unilateral legal acts that could derive from municipal investment laws is somewhat contestable. The 'freezing' of unilateral legal acts of states in the field of international investment law requires a more sustained and sustainable treatment of obscure provisions contained in domestic investment legislation. That approach should consist in a "weighing and balancing process"[155] of three criteria: the *ordinary meaning of the words*, the *intention of the state* and the *legitimate expectations of investors*. It is not appropriate when it comes to national foreign-investment laws to consider that a "State which formulates the [unilateral act] is bound to fulfill the obligation which it assumes, *not because of the potential juridical interest of the addressee* but because of the intention of the State making the [unilateral act]".[156] The 'potential juridical interest of the addressee' (i.e. the juridical interest of the foreign investment community) is essential in the crafting and formulation of municipal investment laws. These laws are "not similar to a diplomat's off-the-cuff apparent promise or a

[154] See, ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006, Principle 7: "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. *In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner*. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated" (italics added), available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. For a critical analysis of the so-called principle of restrictive interpretation suggested by the ILC see Caron, see above note 29, p. 671: "In light of this history, and the goals of the ILC Guiding Principles, it appears that, in applying these Guiding Principles to a unilateral act such as a national foreign investment law, a tribunal should take into account that such legislation was not the evident focus of the ILC. Such a unilateral act is not an unscripted statement by a diplomat, nor does it limit sovereign rights and powers with respect to such subjects as territorial boundaries or military practices. Its analysis therefore seems not to require a restrictive interpretation. Therefore, although the ILC Guiding Principles with respect to unilateral acts remain a helpful guide in their analogy to Article 31(1) of the Vienna Convention and their focus on the factual circumstances in which they were made, and of the reactions to which they gave rise, I do not view the adoption by the Guiding Principles of a restrictive interpretation in case of doubt to be as readily applicable."

[155] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the WTO Appellate Body, 12 March 2001, WT/DS135/AB/R, para. 172.

[156] Rodriguez-Cedeno, see above note 32, para. 160 (italics added).

leader's political statement".[157] Rather, they are the roots of "an indispensable basic premise"[158] of any legal relation, "namely the confidence each party has in the other".[159] Moreover, "if this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time".[160]

When a state makes unilateral offers in its foreign investment law, good faith must be the guiding principle with respect to the determination of the binding nature of such offers under international law, regardless of the 'obscurity' or 'ambiguity' of the offers.[161] One of the legal translations of good faith in international investment law is 'protection of the integrity of the legitimate expectations of foreign investors'.[162] A state cannot reasonably hide behind the curtain of legal obscurity to exclude unilateral offers that the foreign investors perceived in good faith as constituting binding unilateral acts (commitments) under international law.[163] As rightly pointed out by the arbitral tribunal in the *Tecmed* case, "the foreign investor expects the host state to act in a consistent manner, *free from ambiguity and totally transparently in its relations with the foreign investor*, so that it may know beforehand *any and all rules and regulations* that will govern its investments as well as the *goals* of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[164] Thus, ambiguity in the formulation

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[157] Caron, see above note 29, p. 674.

[158] *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 232.

[159] *Ibid.*

[160] *Ibid.*

[161] See *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 115: "…the safeguarding of good faith is one of the fundamental principles of international law and investment law, which has a complementary function allowing for lacunae in the applicable laws to be covered and for obscurities of the law to be clarified."

[162] By analogy to the principle of "respect for the integrity of the law of the host state" referred to in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 402.

[163] See, *e.g.*, *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures, Ltd. and Bridas Corporation v. Government of Turkmenistan, Concern Balkannebitgazsenagat and State Concern Turkmenneft*, ICC Arbitration Case No. 9058/FMS/KGA, First Partial Award, 25 June 1999, p. 19: "The legitimate expectation of a party can translate into intention. That is, the legitimacy of the expectation reflects the intention of the representor for the representee to have an expectation. The expectation reflects the intention of the representee."

[164] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154.

of unilateral commitments within the frame of municipal investment laws should not profit the state.[165] Only then will 'Time' be regained, once unilateral offers in national foreign investment laws are approached as "unilateral assumption[s] of an obligation under international law".[166]

[165] See *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Separate Opinion of Thomas Wälde, Award, paras. 47 and 71: "The implications of the obligation to be clear and avoid ambiguity is that the government agency has to bear the risk of its own ambiguity. This allocation of the risk of ambiguity requires that the investor did and could reasonably have confidence in the assurance, not as an ultra-perfect lawyer equipped with a hindsight vision facility, but as a reasonable businessman in the position of the investor would do in the particular circumstances … the principle of good-faith which emphasises transparency, clarity and discourages the abuse of intentional ambiguity to allow a government to first make the recipient and investor believe one message and then turn around and claim it really had sent the opposite message."

[166] Caron, see above note 29, p. 673.