

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**OPIC KARIMUN CORPORATION**

Claimant

and

**BOLIVARIAN REPUBLIC OF VENEZUELA**

Respondent

**ICSID Case No. ARB/10/14**

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**AWARD**

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*Members of the Tribunal*

Professor Doug Jones AO, President

Professor Dr. Guido Santiago Tawil

Professor Philippe Sands QC

*Secretary of the Tribunal:*

Ms. Alicia Martín Blanco

*Date of dispatch to the Parties: 28 May 2013*

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## **I. PROCEDURE**

1. On May 28, 2010, OPIC Karimun Corporation (“OPIC” or “Claimant”), a company incorporated pursuant to the laws of the Republic of Panama, filed with the International Centre for Settlement of Investment Disputes (“ICSID” or “Centre”) a Request for Arbitration (“Request”) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) against the Bolivarian Republic of Venezuela (“Respondent” or “Venezuela”). On 16 June, 2010, the Secretary General of the Centre registered the Request.
2. The Claimant is represented in this proceeding by the law firms of McDermott Will & Emery LLP and K&L Gates LLP. The Respondent is represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP.
3. No agreement having been reached between the Parties on the method of constituting the Tribunal, and more than 60 days having elapsed since the registration of the Request, by letter of 17 August, 2010, the Claimant invoked Article 37(2)(b) of the ICSID Convention.
4. By the same letter, the Claimant appointed Professor Dr. Guido Santiago Tawil, a national of Argentina, as arbitrator.
5. By letter of 14 September, 2010, the Respondent appointed Professor Philippe Sands QC, a national of the United Kingdom and France, as arbitrator.
6. In the absence of an agreement between the Parties about the President of the Tribunal, on November 30, 2010, the Secretary-General of ICSID informed the Parties that she intended to propose to the Chairman that he appoint Professor Doug Jones, a national of Australia and a member of the ICSID Panel of Arbitrators designated by Australia, as the President of the Tribunal, in accordance with Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”). Neither party having indicated that it had a compelling objection to the appointment of Professor Jones, on December 29, 2010, the Secretary-General confirmed that the Chairman would proceed with his appointment.
7. All of the arbitrators having accepted their appointment, the Tribunal was constituted on 5 January, 2011. Ms. Janet Whittaker, Legal Counsel, ICSID, was appointed as Secretary of the Tribunal. On 21 November, 2012, Ms. Alicia Martín Blanco, Legal Counsel, ICSID, replaced Ms. Janet Whittaker as Secretary of the Tribunal, following Ms. Whittaker’s leaving the ICSID Secretariat.
8. On 17 January, 2011, the Claimant proposed the disqualification of Professor Philippe Sands. On 4 February, 2011, the Respondent filed observations on the Claimant’s proposal for

disqualification. On 17 February, 2011, Professor Sands filed observations on the Claimant's proposal for disqualification.

9. On 5 May 2011, Professor Jones and Professor Tawil, acting under Article 58 of the ICSID Convention, dismissed the proposal for the disqualification of Professor Sands made by the Claimant.
10. The first session of the Tribunal was held with the agreement of the parties on 12 July, 2011, at the World Bank's Paris Conference Center. Present at the session were:

Members of the Tribunal

Professor Doug Jones, *President*  
Professor Dr. Guido Santiago Tawil, *Arbitrator*  
Professor Philippe Sands, *Arbitrator*

ICSID Secretariat

Ms. Janet Whittaker, *Secretary of the Tribunal*

Attending on behalf of the Claimant

Dr. Sabine Konrad, McDermott Will & Emery Rechtsanwälte Steuerberater LLP  
(previously of K&L Gates LLP)  
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Attending on behalf of the Respondent

Mr. George Kahale III, *Curtis, Mallet-Prevost, Colt & Mosle LLP*  
Mr. Bernard Preziosi, *Curtis, Mallet-Prevost, Colt & Mosle LLP*  
Dra. Gabriela Álvarez Ávila, *Curtis, Mallet-Prevost, Colt & Mosle SC*  
Dr. Eloy Barbará de Parres, *Curtis, Mallet-Prevost, Colt & Mosle SC*  
Dra. Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*  
Dr. Armando Giraud, *Bolivarian Republic of Venezuela*  
Dr. Álvaro Ledo, *Bolivarian Republic of Venezuela*  
Ms. Beatrice Sansó de Ramirez, *Bolivarian Republic of Venezuela*

11. Various aspects of procedure were determined at the session, including a schedule for the submission of written pleadings and a schedule for document production with respect to the Respondent's jurisdictional objections.
12. In accordance with the schedule fixed during the First Session, the Respondent filed its Memorial on Objections to Jurisdiction on 1 August, 2011. The Claimant filed its Counter-Memorial on Jurisdiction on 1 November 2011. The Respondent filed its Reply Memorial on Jurisdiction on 31 January 2012. The Claimant filed its Rejoinder Memorial on Jurisdiction on 30 April 2012.

13. On 19 September, 2011, the Tribunal issued Procedural Order No. 1 - Decision on Claimant's Request for Document Production ("PO 1"). On 27 September, and 6 October 2011, the Respondent and the Claimant respectively, filed their responses to the Tribunal's directions in PO 1.
14. An oral Hearing on Jurisdiction was held at the seat of the Centre in Washington D.C., on 18-20 June 2012. Present at the hearing were:

Members of the Tribunal

Professor Doug Jones, *President*  
Professor Dr. Guido Santiago Tawil, *Arbitrator*  
Professor Philippe Sands, *Arbitrator*

ICSID Secretariat

Ms. Janet Whittaker, *Secretary of the Tribunal*

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Mr. Abner H. H. Lee, *CPC Corporation/OPIC Karimun Corporation*  
Ms. Chaoming Kuo, *CPC Corporation/OPIC Karimun Corporation*  
Mr. Werner Corrales-Léal, *witness*  
Professor Allan Brewer-Carías, *Expert*  
Judge Stephen Schwebel, *Expert*

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Dr. Bernard Mommer, *Bolivarian Republic of Venezuela*  
Dr. Joaquín Parra, *Bolivarian Republic of Venezuela*  
Mrs. Irama Mommer, *Bolivarian Republic of Venezuela*  
Dra. Natalia Linares, *Bolivarian Republic of Venezuela*  
Dr. Enrique Urdaneta, *Expert*

15. The Parties agreed to dispense with post-Hearing memorials during the Hearing on Jurisdiction.<sup>1</sup>
16. The Tribunal deliberated in London on 18 September, 2012, and again on 19 December, 2012.
17. The Tribunal has taken into account all of the pleadings, documents and testimony submitted in this case.
18. The issuance of this Award constitutes the closure of this proceeding pursuant to Rule 38(a) of the Arbitration Rules.

## II. PARTIES' SUBMISSIONS

### A. THE RESPONDENT'S MEMORIAL ON OBJECTIONS TO JURISDICTION

#### 1. Background

19. On 1 August, 2011, the Respondent submitted a Memorial containing its objections to jurisdiction.
20. The Respondent first outlines the background to the dispute. It explains that the dispute relates to two petroleum projects in Venezuela, commenced in 1996 and structured as "associations" between a subsidiary of *Petróleos de Venezuela S.A.* (the Venezuelan State-owned oil company) and certain foreign oil companies with which the Claimant subsequently partnered. The projects were amongst several affected by the nationalisation of the Venezuelan oil industry in 2007, following which the State took control of the projects. The Parties were unable to reach agreement as to the amount of any compensation payable by Venezuela for the loss of the Claimant's interest in the Projects and this issue forms the basis of the dispute in this proceeding.<sup>2</sup>
21. The Respondent then notes that the only alleged basis of jurisdiction of ICSID advanced by the Claimant is Article 22 of the Venezuelan Law on the Promotion and Protection of Investments (the "Investment Law").<sup>3</sup>

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<sup>1</sup> Hearing on Jurisdiction Transcript Day 2, 524:20-526:3. Following the Hearing, but prior to Tribunal closing the proceedings, the Respondent requested permission, by letter dated 8 February 2013, to include the decision of *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction (8 February 2013) ("*Tidewater*"), in the record of this case. The tribunal in *Tidewater* found that Article 22 does not operate so as to give the consent in writing of Venezuela to submit all investment disputes with nationals of other ICSID contracting states to the jurisdiction of the Centre. The Claimant (by letter dated 14 February 2013) and the Respondent (by letter dated 15 February 2013) each made brief written submissions in respect of *Tidewater*. The Tribunal has taken these submissions into consideration.

<sup>2</sup> Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction ("**Respondent's Memorial**") [2]-[5].

<sup>3</sup> Respondent's Memorial [6].



## 2. Objections to Jurisdiction

22. The Respondent contends that Article 22 of the Investment Law does not provide consent to arbitration of this dispute as required by Article 25 of the ICSID Convention. The Respondent bases this contention on: (a) the text of Article 22 of the Investment Law; (b) Venezuelan legal principles; (c) the historical background of the Investment Law; (d) a comparison of the language of Article 22 of the Investment Law with ICSID model clauses; (e) a comparison of Article 22 of the Investment Law with other national investment laws; (f) a comparison of Article 22 of the Investment Law with the language of consent in Venezuelan bilateral investment treaties; and (g) decisions by other ICSID tribunals on Article 22 of the Investment Law.

### (a) Text of Article 22 of the Investment Law

23. The Respondent places an emphasis on the words “*if it so provides*” in the text of Article 22 and states that this is an express condition on any reference to arbitration by the means set out in Article 22.<sup>4</sup>
24. The Respondent submits:

“[16] According to Article 25(1) of the ICSID Convention, for a dispute to be submitted to ICSID arbitration ... the Parties to the dispute must have committed in writing to resolve the dispute in accordance with the mechanism set forth in the ICSID Convention. This ... requirement may be met through a separate instrument containing a consent to ICSID jurisdiction, but it is not satisfied by a statute that only recognizes international arbitration where the treaty or agreement itself contains an obligatory submission to arbitration. While the ICSID Convention provides a mechanism for international arbitration, it does not itself provide for the arbitration of any dispute without the separate instrument of consent, even in investment disputes where the nationality test is met.

[17] In other words, the plain language of Article 22 of the Investment Law negates any notion of consent in this case. The reference to international arbitration is subject to an express condition - “if it so provides” - and it is indisputable that such condition is not met in this case. [...]”<sup>5</sup> (footnotes omitted)

### (b) Venezuelan legal principles

25. The Respondent submits that it is well settled under Venezuelan law, being consistent with principles of international law, that consent to arbitration must be clear and unequivocal.<sup>6</sup> In

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<sup>4</sup> Respondent’s Memorial [17].

<sup>5</sup> Respondent’s Memorial [16]-[17].

<sup>6</sup> Respondent’s Memorial [18]-[19].

support of its submission, the Respondent cites several judgements of the Supreme Tribunal of Venezuela<sup>7</sup> and the writings of a legal commentator.<sup>8</sup>

26. The Respondent submits that Article 22 of the Investment Law does not come close to constituting *any* kind of consent.<sup>9</sup>
27. The Respondent also relies on a decision of the Supreme Tribunal of Venezuela, which it submits directly addressed the issue of whether Article 22 of the Investment Law constitutes consent to ICSID arbitration. In this case the Supreme Tribunal said:

“[T]he law on the Promotion and Protection of Investments does not contain in itself a general unilateral manifestation of submission to international arbitration governed by 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), but refers instead to their content to determine whether arbitration may be resorted to ... a situation that does not exist in the case of Article 25 of the ICSID Convention ...”<sup>10</sup>

**(c) Historical background of Investment Law**

28. The Respondent refers to a series of decrees and statements made by various political figures, both before and after the enactment of the Investment Law indicating what the Respondent refers to as a “cautious and restrictive attitude” towards international arbitration, particularly with respect to State contracts.<sup>11</sup> The Respondent submits that it is impossible to reconcile such attitudes with the

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<sup>7</sup> Exhibit EU-8, “[I]t is required that there be ‘manifest, express and indisputable’ consent to arbitration”: Tribunal Supremo de Justicia, *Hoteles Doral C.A. v. Corporación L’Hoteles C.A.*, Case No. 2000-0775 (June 20, 2001) at 2 (at 5 in the Spanish Original); Exhibit EU-9, “[A]rbitration ‘requires the compliance and verification of the manifestation of an unequivocal and express will of the Parties involved’”: Tribunal Supremo de Justicia, *Banco Venezolano de Crédito, S.A.C.A. v. Venezolana de Relojería, S.A. (Venrelosa), Henrike Pfeffer C.A., Abraham Ricardo Pfeffer Almeida, Marianela de la Coromoto Nuñez de Pfeffer et al.*, Case No. 2000-1255 (January 29, 2002), at 4 (at 11 in the Spanish original); Exhibit EU-10, “[I]n order to find a valid arbitration agreement, there must exist an unequivocal and express consent”: Tribunal Supremo de Justicia, *Consortio Barr S.A. v. Four Seasons Caracas, C.A.*, Case No. 2003-0044 (March 25, 2003); Exhibit EU-11, “[A]rbitration was not mandatory because there was no ‘manifest and unequivocal’ submission to arbitration”: Tribunal Supremo de Justicia, *Venezolano de Crédito S.A., Banco Universal, formerly known as Banco Venezolano de Crédito, S.A. v. Armando Diaz Egui and Marisela Riera de Diaz*, Case No. 2003-1296 (January 28, 2004), at 5.

<sup>8</sup> Exhibit EU-13, “The arbitration clause must ... [provide] *documentary proof* of the parties’ express and unequivocal consent to submit to arbitration”: Ivor D. Mogollón-Rojas, *Venezuelan Commercial Arbitration (El Arbitraje Comercial Venezolano)* (Vadell Hermanos Editores C.A., Caracas 2004), at 61-62 (emphasis in original).

<sup>9</sup> Respondent’s Memorial [21].

<sup>10</sup> Exhibit EU-29, Tribunal Supremo de Justicia, *Decision on interpretation request filed by Hildegard Rondón de Sansó, Álvaro Silva Calderón, Beatrice Sansó de Ramirez and Others, acting in representation of the Bolivarian Republic of Venezuela, in relation to the last part of Article 258 of the Constitution of the Bolivarian Republic of Venezuela*, Case No. 2008-0763 (October 17, 2008) at 47.

<sup>11</sup> Respondent’s Memorial [25]-[32].

notion that Article 22 of the Investment Law was intended to constitute a standing and general consent on the part of Venezuela to arbitrate all investment disputes before ICSID.<sup>12</sup>

**(d) Comparison of the language of Article 22 of the Investment Law with ICSID model clauses**

29. The Respondent contrasts the wording of the 1968 and 1993 ICSID Model Clauses with that of Article 22 of the Investment Law. It submits that, unlike Article 22, the model clauses are straightforward, do not contain the expression “if it so provides”, and leave no room for debate as to whether consent to ICSID arbitration has been granted.<sup>13</sup>

**(e) Comparison of Article 22 of the Investment Law with other national investment laws**

30. The Respondent contrasts Article 22 of the Investment Law with the investment laws of other states including Albania, the Central African Republic and Côte d’Ivoire, which it submits contain clear and unequivocal consent to ICSID arbitration, unlike Article 22.<sup>14</sup>

**(f) Comparison of Article 22 of the Investment Law with the language of consent in Venezuelan bilateral investment treaties**

31. The Respondent submits that the text of Venezuela’s bilateral investment treaties in effect at the time of the Investment Law, which differ from that of Article 22 of the Investment Law, show that in 1999 the Respondent knew how to draft an obligatory consent to international arbitration when it was its intention to do so.<sup>15</sup>

**(g) Decisions by ICSID tribunals on Article 22 of the Investment Law**

32. The Respondent relies on two recent decisions of ICSID tribunals,<sup>16</sup> both relating to the nationalization of the Claimant’s interests in oil ventures in Venezuela, which have found that Article 22 does not provide a basis for ICSID jurisdiction.
33. The first is *Mobil*. In its Decision on Jurisdiction, the tribunal interpreted Article 22 of the Investment Law in accordance with rules of international law. In considering the text of Article 22

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<sup>12</sup> Respondent’s Memorial [32].

<sup>13</sup> Respondent’s Memorial [33]-[37].

<sup>14</sup> Respondent’s Memorial [38]-[42].

<sup>15</sup> Respondent’s Memorial [43].

<sup>16</sup> A third ICSID award, *Brandes*, was rendered following the Respondent’s filing of its Memorial and is referred to below at [51].

and the intention of Venezuela in enacting Article 22, it arrived at the conclusion that Venezuela did not, by Article 22, consent in advance to ICSID arbitration for all disputes covered by the ICSID Convention and that jurisdiction was not established on that basis in the circumstances of the case.<sup>17</sup>

34. The second is *Cemex*. In its Decision on Jurisdiction, the tribunal similarly found that “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”.<sup>18</sup>

#### **B. CLAIMANT’S COUNTER-MEMORIAL ON JURISDICTION**

35. On 1 November, 2011, the Claimant submitted a Counter-Memorial in response to Venezuela’s objections to jurisdiction.

##### **1. Background**

36. The Claimant first states that its claims relate to “Venezuela’s unilateral decision to expropriate OPIC’s [Gulf of Paria West] and [Gulf of Paria East] investments without compensation in 2007”, as a result of the enactment of a “Migration Law” that is itself “in violation of the Venezuelan Constitution, Venezuela’s Investment Law ... and other Venezuelan Laws”.<sup>19</sup>

##### **2. Basis for Jurisdiction of the Tribunal**

37. The Claimant then submits that Article 22 of the Investment Law contains in and of itself the written expression of consent by Venezuela to submit any dispute with an international investor to the jurisdiction of ICSID. The Claimant bases its submission on: (a) the requirements of Article 25 of the ICSID Convention; (b) the purpose of the Investment Law; (c) the language of the Investment Law; (d) an objective and good faith interpretation of Article 22; and (e) the absence of any binding authority.

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<sup>17</sup> *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Decision on Jurisdiction (10 June 2010) (“*Mobil*”) [139]-[140].

<sup>18</sup> *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15) Decision on Jurisdiction (30 December 2010) (“*Cemex*”) [138].

<sup>19</sup> Counter-Memorial in response to the Bolivarian Republic of Venezuela’s Objections to Jurisdiction (“*Claimant’s Counter-Memorial*”) [4]-[5].

**(a) Requirements of Article 25 of the ICSID Convention**

38. The Claimant submits that Article 25 of the ICSID Convention merely requires that consent to arbitration be in writing. It does not require that such consent be “clear”, “express” or “unequivocal”. The Claimant submits that Article 22 of the Investment Law provides that requisite written consent.<sup>20</sup>

**(b) Purpose of the Investment Law**

39. The Claimant notes that the purpose of the Investment Law is to promote and protect foreign investments and argues that this purpose must inform the interpretation of Article 22. It submits that the Investment Law sought to broaden the scope of protection for foreign investors<sup>21</sup>. In particular it was aimed at attracting and retaining investments from United States companies following the breakdown of bilateral investment treaty negotiations with the United States.<sup>22</sup> The Claimant states that “[t]he ambiguous way the law is crafted gives an appearance of unilateral consent on which foreign investors relied ... Good faith therefore should prevent Venezuela from using any ambiguity - which resulted from its own confusing drafting of the Law - against foreign investors”.<sup>23</sup>
40. In support of its contention, the Claimant refers to the decision of the tribunal in *SPP*, in which it held that ambiguous offers in a State’s investment law must be interpreted neither restrictively nor expansively, but rather objectively and in good faith.<sup>24</sup> The Claimant argues that this case is of particular relevance given the similarity in wording and structure between the Egyptian law and the Venezuelan law at issue.<sup>25</sup>
41. The Claimant also refers the Tribunal to the court file of the Supreme Tribunal of Venezuela in the case of *Fermin Toro Jiménez*, Expediente 00-1438 (“*Fermin Toro*”), which it says was not considered in full by previous ICSID tribunals and reveals that the Attorney General’s Office argued that the Investment Law provides consent to arbitration.<sup>26</sup>

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<sup>20</sup> Claimant’s Counter-Memorial [36]-[38].

<sup>21</sup> Claimant’s Counter-Memorial [40].

<sup>22</sup> Claimant’s Counter-Memorial [44].

<sup>23</sup> Claimant’s Counter-Memorial [27].

<sup>24</sup> *Southern Pacific Properties Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Decision on Jurisdiction (14 April 1988) (“*SPP*”).

<sup>25</sup> Claimant’s Counter-Memorial [76].

<sup>26</sup> Claimant’s Counter-Memorial [70] and [71.2].

**(c) Language of the Investment Law**

42. The Claimant refers to the mandatory language used in the Investment Law: “disputes... *shall* be submitted to international arbitration” (emphasis added). It submits that such language constitutes consent to arbitration.<sup>27</sup> The Claimant relies on *SPP*, in which it says the Tribunal, “in the face of strikingly similar language to that at issue here,” found that there was consent to ICSID arbitration and that provisions such as the Egyptian investment law must be interpreted in good faith.<sup>28</sup>
43. The Claimant further submits that a comparison of the Investment Law against model clauses and other investment laws is irrelevant to the question in issue because there is no specific formula that must be used to provide for a standing consent to arbitration. It notes that the lack of uniformity among national legislations concerning the acceptance of ICSID jurisdiction is well documented.<sup>29</sup>

**(d) Objective and good faith interpretation of Article 22**

44. The Claimant submits that, while the Tribunal ought to consider Venezuelan legal principles, it must ultimately apply an “objective and good faith interpretation” to Article 22 of the Investment Law. The Claimant relies on the Opinion of Judge Stephen M. Schwebel, dated 24 October, 2011 (“Opinion of Judge Schwebel”), and submits that a good faith interpretation requires the Tribunal to interpret Article 22 in such a way as to not render it “meaningless”.<sup>30</sup>
45. The Claimant submits that to allow the Venezuelan judiciary’s interpretation of Article 22 to inform the Tribunal’s interpretation would be to give the Respondent power to unilaterally decide whether or not it has given its consent to arbitration, which cannot be correct.<sup>31</sup>

**(e) Absence of any binding authority**

46. The Claimant notes that the Tribunal is not bound by the decisions of other ICSID tribunals, nor the Venezuelan Supreme Tribunal, with respect to its interpretation of Article 22 of the Investment Law.<sup>32</sup> It submits that the present case can be distinguished from prior ICSID decisions that

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<sup>27</sup> Claimant’s Counter-Memorial [102]-[105].

<sup>28</sup> Claimant’s Counter-Memorial [88].

<sup>29</sup> Claimant’s Counter-Memorial [111]-[113].

<sup>30</sup> Claimant’s Counter-Memorial [124]-[128].

<sup>31</sup> Claimant’s Counter-Memorial [29].

<sup>32</sup> Claimant’s Counter-Memorial [30].

considered the meaning of Article 22 on several bases, including the introduction of new evidence by the Claimant that was not before the other tribunals.<sup>33</sup>

47. The Claimant relies, particularly, on the evidence of Mr. Corrales, one of two drafters of the Investment Law who has not testified in previous ICSID proceedings with respect to the meaning of Article 22. It submits that the Witness Statement of Mr. Werner Corrales, dated 1 November, 2011 (“First Witness Statement of Mr. Corrales”), “demonstrates conclusively that the government intended to provide consent to ICSID arbitration in Article 22”.<sup>34</sup> The Claimant also relies on the court file of the Supreme Tribunal of Venezuela in the case of *Fermin Toro* (referred to above at paragraph 41).<sup>35</sup>
48. The Claimant submits that the tribunals in prior ICSID decisions on the meaning of Article 22 allowed for the possibility that additional evidence might contradict their conclusions and that the evidence of Mr. Corrales and the Supreme Tribunal court file must be afforded considerable weight and deference. It submits that this is particularly so in the absence of any evidence to the contrary put forward by the Respondent.<sup>36</sup>

#### C. RESPONDENT’S REPLY MEMORIAL ON JURISDICTION

49. On 31 January, 2012, the Respondent submitted a Reply Memorial on objections to jurisdiction.
50. The Respondent submits that this case is essentially no different to the three previous ICSID cases in which tribunals have, when considering whether Article 22 of the Investment Law constitutes a standing general consent to ICSID arbitration, unanimously ruled that it does not. It states that virtually every argument made by the Claimant has been made at length before previous tribunals and has been unsuccessful.<sup>37</sup>
51. The Respondent refers the Tribunal, in addition to *Mobil* and *Cemex*, to *Brandes*. In its Award (rendered following the Respondent’s submission of its Memorial on Objections to Jurisdiction), the tribunal reached a similar conclusion to that of the *Mobil* and *Cemex* tribunals in finding that

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<sup>33</sup> Claimant’s Counter-Memorial [167].

<sup>34</sup> Claimant’s Counter-Memorial [169]-[170].

<sup>35</sup> Claimant’s Counter-Memorial [171].

<sup>36</sup> Claimant’s Counter-Memorial [174]-[176].

<sup>37</sup> Reply Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction (“**Respondent’s Reply Memorial**”) [2]-[3].

“it is obvious that Article 22 of the Law on Promotion and Protection of investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction”.<sup>38</sup>

52. The Respondent further submits that the comparisons drawn by the Claimant between the present case and the tribunal’s decision in *SPP* are inapposite. It states: “[i]t makes no sense to argue that the decision of a divided tribunal involving the interpretation of an Egyptian law, written in Arabic and with a completely different formulation, is more relevant to this case than the three unanimous decisions relating to Article 22 of the Investment Law”.<sup>39</sup>
53. The Respondent addresses the First Witness Statement of Mr. Corrales and submits that it provides no additional information to the paper co-authored by Mr. Corrales in 1999.<sup>40</sup> The Respondent further submits that, in any event, as a matter of Venezuelan law, the intention of the legislature must be derived from the text of the law itself and not from an individual’s opinion.<sup>41</sup>
54. The Respondent goes on to reaffirm the arguments put forward in its Memorial on Objections to Jurisdiction.

**D. CLAIMANT’S REJOINDER ON RESPONDENT’S OBJECTIONS TO JURISDICTION**

55. On 30 April, 2012, the Claimant submitted a Rejoinder on the Respondent’s objections to jurisdiction.
56. The Claimant maintains that the present case differs from previous decisions of ICSID tribunals on the meaning of Article 22 of the Investment Law. It states that the principle difference is that “the tribunals in those cases found significant that Mr. Corrales was not offered to testify, despite the fact that his role in drafting the Investment Law and his knowledge concerning the intent and purpose of the government were subjects of great debate in those proceedings”.<sup>42</sup>
57. The Claimant reiterates its submission that the Respondent has, by Article 22 of the Investment Law, consented to international arbitration and that this is demonstrated by the purpose of the Investment Law, the plain language of Article 22, interpretation of Article 22 in accordance with principles of international law and Venezuelan law, the absence of any requirement for “clear and

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<sup>38</sup> Respondent’s Reply Memorial [17]. *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) Award (2 August 2011) (“*Brandes*”) [118].

<sup>39</sup> Respondent’s Reply Memorial [216].

<sup>40</sup> Respondent’s Reply Memorial [43]-[45].

<sup>41</sup> Respondent’s Reply Memorial [57].

<sup>42</sup> Claimant’s Rejoinder on Respondent’s Objections to Jurisdiction (“*Claimant’s Rejoinder*”) [6].



unequivocal” consent, the historical background of the Investment Law and the opinions of commentators on the Investment Law.

58. The Claimant further submits that the Respondent’s interpretation of Article 22 is inconsistent with the principle of *effet utile*. The Claimant says that:

““if it so provides” would amount to an impossible condition if it was construed to mean “if it [the ICSID Convention] provides consent”, because the ICSID Convention itself provides that consent must be set forth in a separate document. Thus the condition that the ICSID Convention provides consent could never be met.”<sup>43</sup>

59. The Claimant submits that, similarly, the phrase “without prejudice” is ineffective in Article 22 if consent needs to be given separately in the case of the ICSID Convention because, if there were no possibility for an investor to resort to international arbitration, there would be no need for the disclaimer.<sup>44</sup>
60. The Claimant also emphasises the importance of Mr. Corrales’ evidence, being a primary source of testimony on the legislative background to the Investment Law, and draws the Tribunal’s attention to the absence of witness testimony of a similar nature put forward by the Respondent.<sup>45</sup> It submits that the only relevant evidence of the legislative history of the Investment Law is that which has been produced by the Claimant.<sup>46</sup>

#### **E. HEARING ON JURISDICTION**

61. During the hearing held on 18, 19 and 20 June, 2012, the Parties developed their respective arguments as set out in their written submissions. The Respondent maintained that this case was no different to the three previous ICSID decisions that considered Article 22 - *Mobil*, *Cemex* and *Brandes* - and each found it incapable of establishing the consent of the Venezuela to ICSID arbitration. The Claimant placed significant emphasis on what it claimed was “new” evidence before this Tribunal. In particular, considerable emphasis was placed on the testimony of Mr. Corrales, who had not appeared in any previous ICSID hearing concerning Article 22 of the Investment Law.

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<sup>43</sup> Claimant’s Rejoinder [212].

<sup>44</sup> Claimant’s Rejoinder [227]-[230].

<sup>45</sup> Claimant’s Rejoinder [242]-[247].

<sup>46</sup> Claimant’s Rejoinder [252]-[262].

### III. ANALYSIS OF THE TRIBUNAL

62. Pursuant to Article 25 of the ICSID Convention, the Centre’s jurisdiction extends to “any legal dispute arising out of an investment between a Contracting State ... and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre” (emphasis supplied).
63. The Tribunal notes that under Article 41(1) of the ICSID Convention, it is for the Tribunal, as the judge of its own competence, and not for State authorities or national courts to determine the basis of that competence,<sup>47</sup> whether it be derived from a treaty or a unilateral offer made in legislation and subsequently accepted in writing by the investor.<sup>48</sup>
64. The sole basis upon which the Claimant asserts that this Tribunal has jurisdiction over the dispute between the Parties is Article 22 of the Investment Law, which reads:

“Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente”.

65. The Article is translated by the Claimant as follows:

“Any disputes arising between an international investor whose country of origin has a treaty or agreement for promotion and protection of investments in force with Venezuela, or any disputes to which the provisions of the Articles of Association of the Multilateral Investment Guarantee Agency (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 under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility using the

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<sup>47</sup> *Mobil* [75]; *Cemex* [70]; *Pac Rim Cayman LCC v The Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on the Respondent’s Jurisdictional Objections (1 June 2012) (“*Pac Rim*”) [5.30].

<sup>48</sup> See the Report of the Executive Directors on the Convention at [24]: “Thus, a host State might in its investment promotion legislation offer to submit disputes...to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing”; *Mobil* [74]; *Cemex* [69]; *SPP* [60]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, [212]-[213]; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) [339]; *Pac Rim* [5.30]; amongst many others.

systems of litigation provided for in the Venezuelan laws in force, when applicable.”<sup>49</sup>

66. The Article is translated by the Respondent as follows:

“Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMIGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), 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 appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.”<sup>50</sup>

67. The Tribunal notes that there is no material difference between the two texts. For the purposes of this Award the Tribunal adopts the translation provided by the Respondent.

68. As summarized above, the Parties disagree on the interpretation of Article 22 of the Investment Law. The Respondent argues that Article 22 does not provide consent under Article 25 of the ICSID Convention, whereas the Claimant submits that it does.

69. In order to determine whether Article 22 constitutes the Respondent’s consent to ICSID jurisdiction, the Tribunal will first identify the standard of interpretation that it considers to be applicable, and will then apply that standard to the terms of Article 22.

#### **A. APPROACH TO INTERPRETATION**

##### **1. Determination of the Standard of Interpretation**

70. The first issue that arises is whether Article 22 is to be interpreted according to international law or by reference to Venezuelan principles of interpretation.

71. In its Memorial, the Respondent proceeds to interpret Article 22 by reference to Venezuelan legal principles, which it says requires “clear, express and unequivocal consent to arbitrate”.<sup>51</sup> The Respondent submits that this approach to interpretation is consistent with principles of

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<sup>49</sup> Request for Arbitration [28].

<sup>50</sup> Respondent’s Memorial [14].

<sup>51</sup> Respondent’s Memorial [20].

international law,<sup>52</sup> and relies on the Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros, dated 29 July, 2011, in this respect.

72. The Claimant, in its Counter-Memorial, agrees that the Investment Law should be interpreted under both principles of interpretation of international law as well as those of domestic law, and that those principles are consistent with one another.<sup>53</sup> However, the Claimant disputes the Respondent's interpretation of the relevant principles. The Claimant submits that neither Venezuelan law, nor international principles, require that consent to arbitrate be "clear and unequivocal".<sup>54</sup>
73. ICSID case law on this point is limited. In some ICSID cases, the terms of the national investment legislation has been so clear and unambiguous that the tribunal has found it unnecessary to determine the approach to interpretation to be applied. This was the case, for example, in *Tradex*,<sup>55</sup> where Article 8(2) of the relevant investment law stated that "[t]he Republic of Albania hereby consents to the submission thereof to the ICSID" and the tribunal found this to be an unambiguous consent to ICSID jurisdiction, thereby making further inquiry unwarranted.<sup>56</sup> A similar approach was taken in *Inceysa v. El Salvador*,<sup>57</sup> *Rumeli Telekom v. Kazakhstan*<sup>58</sup> and *Bivater Gauff v. Tanzania*.<sup>59</sup>
74. In three other ICSID cases, tribunals dealt explicitly with the question of the standard of interpretation to be applied to unilateral offers made by States. In *SPP* the tribunal applied "general principles of statutory interpretation" and considered "relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations".<sup>60</sup> In *CSOB* the tribunal found that a question of consent to ICSID jurisdiction "is not to be answered by reference to national law" but "is governed by international law as set out by Article 25(1) of the

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<sup>52</sup> Respondent's Memorial [19].

<sup>53</sup> Claimant's Counter-Memorial [129]-[130].

<sup>54</sup> Claimant's Counter-Memorial [134]-[140].

<sup>55</sup> *Tradex Hellas S.A. (Greece) v Republic of Albania* (ICSID Case No. ARB/94/2) Decision on Jurisdiction (24 December, 1996) ("*Tradex*").

<sup>56</sup> *Tradex* p. 187.

<sup>57</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26 Award (2 August 2006).

<sup>58</sup> *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award (29 July 2008).

<sup>59</sup> *Bivater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award (24 July 2008).

<sup>60</sup> *SPP* [61].

ICSID Convention”.<sup>61</sup> In *Zhinvali v. Georgia* the tribunal considered that, if the national law of the State addresses the question of consent, then “the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law”.<sup>62</sup>

75. Three other ICSID cases - *Mobil*, *Cemex* and *Brandes* – have dealt specifically with the interpretation of Article 22 of the Investment Law, in circumstances that are strikingly similar to the present case. Each of these tribunals found that, while regard may be had State laws when considering the State’s intention in enacting a legislation that contains a unilateral declaration, a unilateral act must be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.<sup>63</sup>
76. The Tribunal agrees with that approach. It concludes that the correct approach to interpretation of Article 22 of the Investment Law is to apply the rules of international law governing the interpretation of treaties and of unilateral acts formulated within the framework and on the basis of a treaty, namely the ICSID Convention, having regard to the ICSID jurisprudence where relevant.<sup>64</sup>

## 2. Content of the Standard of Interpretation

77. Article 25 of the ICSID Convention requires that consent to arbitration be in writing, but gives no further indication as to the form or timing of that written consent, nor any guidance on interpretation.
78. The principles of international law governing the interpretation of unilateral declarations formulated on the basis of a treaty have been articulated by the International Court of Justice. The content of the relevant rules is usefully set out in the *Fisheries Jurisdiction Case*,<sup>65</sup> where the Court found that since statutes are unilaterally drafted instruments, a certain emphasis is properly to be placed on the intention of the depositing state.<sup>66</sup> Thus, the relevant words of a declaration including a reservation contained therein are to be interpreted:

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<sup>61</sup> *Československá Obchodní Banka, A.S. v. The Slovak Republic* (ICSID Case No. ARB/97/4) Decision on Objections to Jurisdiction (24 May 1999) (“CSOB”) [35].

<sup>62</sup> *Zhinvali Development Ltd. v. Republic of Georgia* (ICSID Case No. ARB/00/1) Award (24 January 2003).

<sup>63</sup> *Mobil* [84]-[85] and [96]; *Cemex* [78]-[79] and [89]; *Brandes* [81]-[82].

<sup>64</sup> *Mobil* [86]-[96]; *Cemex* [80]-[89]; *Pac Rim* [5.34]-[5.35], *Brandes* [81]-[82].

<sup>65</sup> *Fisheries Jurisdiction Case (Spain v Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998 (“*Fisheries Jurisdiction Case*”) p 454.

<sup>66</sup> *Fisheries Jurisdiction Case* p 454 at [48].

“[I]n a natural and reasonable way, having due regard to the intention of the State concerned ... [which] may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.”<sup>67</sup>

79. This approach to interpretation is consistent with that taken by the tribunals in *Mobil*<sup>68</sup> and *Cemex*.<sup>69</sup> It was also adopted by the tribunals in *SPP*<sup>70</sup> and *Pac Rim*.<sup>71</sup>
80. The Tribunal will adopt this approach and commence with a consideration of the plain meaning of Article 22.

## **B. INTERPRETATION OF ARTICLE 22**

### **1. Plain Meaning of Article 22**

#### **(a) The Text of Article 22 of the Investment Law**

81. According to Article 22, disputes arising between a foreign investor and Venezuela under a relevant bilateral investment treaty, or to which the MIGA or ICSID Convention are applicable, “shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides”. The Parties agree that this provision creates an obligation to refer certain disputes to international arbitration subject to conditions contained within the relevant treaty or agreement; they disagree, however, on the conditions that come into play.
82. The Respondent claims that, while the ICSID Convention provides a mechanism for international arbitration, it does not itself provide for consent to arbitration by reference to those mechanisms, and that the necessary expression of consent must be found in a separate instrument of consent. In the absence of any such separate instrument providing for consent - which is the situation in the present case, since Article 22 does not as such provide for such consent - the express condition that is set out in Article 22 - “if it so provides” - is not satisfied.<sup>72</sup>
83. The Claimant, on the other hand, interprets the words “if it so provides” in Article 22 to mean “if the ‘applicable’ treaty or agreement ‘provides’ for international arbitration for the settlement of

<sup>67</sup> *Fisheries Jurisdiction Case* p 454 [49].

<sup>68</sup> *Mobil* [86]-[95].

<sup>69</sup> *Cemex* [80]-[88].

<sup>70</sup> *SPP* [61].

<sup>71</sup> *Pac Rim* [5.34]-[5.35].

<sup>72</sup> Respondent’s Memorial [16]-[17].

potential disputes”.<sup>73</sup> The Claimant notes that the ICSID Convention “undoubtedly ‘provides’ for arbitration before ICSID” and submits that “an objective assessment based on the ‘natural and reasonable’ meaning of the terms used by Venezuela in Article 22 of the Investment Law leads to the conclusion that Venezuela has in this Article ‘consent[ed] in writing to submit to the Centre’”.<sup>74</sup>

84. In support of this argument the Claimant relies on the Opinion of Judge Schwebel. In that opinion Judge Schwebel expresses the view that, while the terms of Article 22 are ambiguous, an ordinary and reasonable construction of the terms leads to the conclusion that Article 22 constitutes Venezuela’s consent to ICSID arbitration.<sup>75</sup> He bases this opinion, in part, on the principle of *effet utile*. Judge Schwebel notes that it is well known that consent is an essential element of ICSID jurisdiction. He says, therefore, that to interpret “if it so provides”, as Venezuela does, to mean “if the ICSID Convention itself provides consent to arbitration” is to render Article 22 meaningless because it is not possible to interpret the ICSID Convention as constituting a state’s consent to ICSID arbitration.<sup>76</sup> The Claimant further submits that the disclaimer that Article 22 is “without prejudice to the possibility of using the systems of litigation provided for in the Venezuelan laws in force, where applicable” would also be meaningless if Venezuela’s interpretation is accepted, because the purpose of the disclaimer is to provide an alternative method of dispute resolution to investors.<sup>77</sup>
85. The Respondent asserts that the purpose and effect of Article 22, when construed in accordance with its interpretation of the text, is to do nothing more than confirm Venezuela’s intention to abide by its existing obligations under its bilateral investment treaties, the MIGA Convention and the ICSID Convention. In the view of the Respondent, Article 22 does not create new obligations or add to Venezuela’s existing international obligations as suggested by the Claimant.<sup>78</sup> The Respondent refers the Tribunal to the decision in *Cemex* and the writings of several commentators to support its contention that the principle of *effet utile* “does not provide a license to give effect to any conceivable conception of effectiveness that an interpreter may entertain with regard to the provision under interpretation” but rather excludes “wholly ineffective results”.<sup>79</sup> The Respondent

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<sup>73</sup> Claimant’s Counter-Memorial [103].

<sup>74</sup> Claimant’s Counter-Memorial [104].

<sup>75</sup> Opinion of Judge Stephen M. Schwebel on October 24, 2011 (“**Opinion of Judge Schwebel**”) [22]-[23].

<sup>76</sup> Opinion of Judge Schwebel [26].

<sup>77</sup> Claimant’s Counter-Memorial [182]-[183].

<sup>78</sup> Respondent’s Reply Memorial [146]-[147].

<sup>79</sup> Respondent’s Reply Memorial [155]-[160].

submits that the principle of *effet utile* is therefore not applicable to Article 22 as it already has a recognised purpose.<sup>80</sup> As to the Claimant's submission in relation to the words "without prejudice", the Respondent says that its purpose is "to make clear that where international arbitration is mandated and has actually commenced - whether under bilateral investment treaties, the MIGA Convention or the ICSID Convention - resort to the national courts may still remain as an option for the investor".<sup>81</sup>

**(b) Bilateral Investment Treaties**

86. In its written submissions, the Respondent refers to the 29 bilateral investment treaties that it has entered into, of which 17 had been signed and were in force prior to the enactment of the Investment Law in 1999.<sup>82</sup> The Respondent argues that the text of the bilateral investment treaties in force "shows that in 1999 the Republic knew how to draft an obligatory consent to international arbitration when that was its intention".<sup>83</sup> The Respondent refers the Tribunal to the text of Article 8 of the bilateral investment treaty with Barbados,<sup>84</sup> by way of example, and submits that "[t]he language of consent contained in other Venezuelan bilateral investment treaties also stands in stark contrast to Article 22 of the Investment Law".<sup>85</sup>
87. The Claimant submits that "the structure of the Investment Law is similar to that of the Venezuelan BITs", noting that there is "no requirement that consent to international arbitration always be expressed in the exact same way".<sup>86</sup> The Claimant further argues that the drafting differences between the Investment Law and Venezuela's bilateral investment treaties do not mean that the Investment Law does not provide consent because a bilateral investment treaty and an

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<sup>80</sup> Respondent's Reply Memorial [145]-[161].

<sup>81</sup> Respondent's Reply Memorial [163].

<sup>82</sup> Respondent's Memorial [43]; and Exhibit EU-6, which sets out consents to arbitration in Venezuelan bilateral investment treaties in force as of October 1999. See also Respondent's Reply Memorial [73].

<sup>83</sup> Respondent's Memorial [43].

<sup>84</sup> Exhibit RL-30, Agreement Between the Government of the Republic of Venezuela and the Government of Barbados for the Promotion and Protection of Investments, signed at Bridgetown on July 15, 1994, entered into force on October 31, 1995, 1984 U.N.T.S. 169, Article 8: "Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to the investment of the latter, shall at the request of the national or company concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on March 18 1965." Respondent's Memorial [44].

<sup>85</sup> Respondent's Memorial [44].

<sup>86</sup> Claimant's Counter-Memorial [85].



investment law are two different legal instruments, such that “[w]hat may be said in the former instrument has little bearing on the latter”.<sup>87</sup>

88. The Claimant suggests that Venezuela’s reasons for departing from the structure of consent to arbitration in its bilateral investment treaties in drafting Article 22 of the Investment Law is unclear and is a question best answered by reference to the *travaux préparatoires* or by the drafters. It submits that the language of the bilateral investment treaties was considered but ultimately rejected, and refers the Tribunal to paragraph 31 of the Second Witness Statement of Mr. Werner Corrales, dated 25 April, 2012 (“Second Witness Statement of Mr. Corrales”):

“As Mr. Corrales’ witness statement confirms, the differences in language between Article 22 and Venezuela’s BITs can be explained by the drafter’s effort to simplify and shorten the intricate language of the BIT clauses.”<sup>88</sup>

89. The existence and contextual effect of bilateral investment treaties was addressed at some length in the course of the hearing. During cross-examination, Mr. Corrales re-stated his view “that when considering longer texts that we considered during the preparation of the draft, we made an effort to shorten those texts”.<sup>89</sup> He added: “I remember one of the texts that was perhaps half page long, and that we discussed how to put the ideas in a simple form, in a more simple form”.<sup>90</sup> When asked whether he thought that the bilateral investment treaties “were too complicated”, he responded that: “I couldn’t say that BITs are or were considered at that moment too complicated. What I say is that at a certain moment the draft was too long and we considered that it was necessary to shorten it.”<sup>91</sup> Mr Corrales was then asked if he looked at any bilateral investment treaties when he was preparing the draft. He responded:

“I cannot affirm or deny perfectly that we considered one or two or three or none of the BITs, but let me--this part, from now on, is my opinion that it sounds logic that Gonzalo, being an experienced lawyer, may have consulted BITs. But that is different from having rejected the language of BITs because they were complicated. What I said is we had--not only in Article 22--also in a section which is more dedicated to instruments for policy for industrial development and so on, we found them too complicated--too long, and we wanted to shorten them.”<sup>92</sup>

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<sup>87</sup> Claimant’s Counter-Memorial [95].

<sup>88</sup> Claimant’s Rejoinder [79].

<sup>89</sup> Hearing on Jurisdiction Transcript Day 1, 156:4 -6.

<sup>90</sup> Hearing on Jurisdiction Transcript Day 1, 156:9-11.

<sup>91</sup> Hearing on Jurisdiction Transcript Day 1, 156:14 -17.

<sup>92</sup> Hearing on Jurisdiction Transcript Day 1, 159:18-160-6.

90. The language of Venezuela's bilateral investment treaties was also raised during the cross examination of Judge Schwebel. In response to a question from the Tribunal, Judge Schwebel agreed that based on his general knowledge of BITs, the structure and text of Article 22 did not track the consent provision of any BIT with which he was familiar.<sup>93</sup>

(c) SPP

91. The Claimant places reliance on *SPP* and the similarities that Claimant says can be drawn between the wording and approach of the relevant Egyptian and Venezuelan investment laws.
92. *SPP* concerned the interpretation of the Article 8 of Law No. 43, concerning the Investment of Arab and Foreign Funds and the Free Zones ("Egyptian Investment Law"), to determine whether it provided for Egypt's consent to ICSID arbitration. The Egyptian Investment Law has been translated as follows:

**"Investment disputes in respect of the implementation provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and in the investor's home country, or within the framework of the Convention on the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies"** (emphasis added).

93. Egypt argued that:

"Article 8 of the Egyptian Investment Law contains no language expressly consenting to the jurisdiction of the Centre and that on its face the first paragraph of Article 8 is nothing more than a nonlimitative list of possible methods of dispute settlement which may be negotiated by the investor and the Egyptian Government on a case-by-case basis. Consequently ... a separate *ad hoc* expression of consent is required to establish the jurisdiction of the Centre".<sup>94</sup>

94. Egypt contended that the requirement for a separate *ad hoc* agreement was implicit in the phrases "within the framework of the Convention" and "where [the Convention] applies".<sup>95</sup> It maintained that the "framework" of the ICSID Convention included the requirement of a separate written consent to jurisdiction and that the phrase "where it applies" reserved the conditions of the

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<sup>93</sup> Hearing on Jurisdiction Transcript Day 2, 402:20-403-2.

<sup>94</sup> *SPP* [73].

<sup>95</sup> *SPP* [91].

applicability of the ICSID Convention, including the requirements of a special written agreement to submit to the jurisdiction of ICSID.<sup>96</sup>

95. Against this view, SPP argued that Article 8 established a mandatory, hierarchic sequence of dispute resolution procedures and that if the parties had not agreed a method of dispute resolution, and there was no applicable bilateral investment treaty in force, legal disputes arising directly out of investments were to be settled by the procedures specified in the ICSID Convention if the investor's state was a party to the ICSID Convention.<sup>97</sup>
96. The tribunal in *SPP* identified a number of considerations that made it unable to accept Egypt's argument. Amongst those considerations was the following:

“To interpret the phrases ‘within the framework of the Convention’ and ‘where it applies’ to mean that the Parties to an investment dispute must execute a separate agreement to establish consent to the Centre’s jurisdiction would also destroy the internal logic of Article 8 and render much of that provision superfluous ... No valid method of legal interpretation would warrant the conclusion that the express reference to the Convention in Article 8 is meaningless or pleonastic ...”<sup>98</sup>

97. The Claimant in this case submits that *SPP* is relevant to the present proceedings because the language used in the Egyptian Investment Law is “strikingly similar language to that at issue here”.<sup>99</sup> During cross examination, Judge Schwebel said that he had not seen any consent provision in an investment law that has the compound structure of the Venezuelan Investment Law dealing with bilateral investment treaties, MIGA and ICSID, noting that “I think that’s quite original. But, of course, if you look, for example, at the Egyptian Investment Law, which was in point in the SPP case, there is phraseology which is strikingly similar to Article 22.”<sup>100</sup>
98. The Respondent argues in response that the text of Article 8 of the Egyptian Investment Law “differs markedly from Article 22”.<sup>101</sup> The Respondent says that unlike Article 22 of the Investment Law, Article 8 of the Egyptian Investment Law provided for a hierarchy of remedies

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<sup>96</sup> *Id.*

<sup>97</sup> *SPP* [72].

<sup>98</sup> *SPP* [94].

<sup>99</sup> Claimant’s Counter-Memorial [88].

<sup>100</sup> Hearing on Jurisdiction Transcript Day 2, 403:19-404-5.

<sup>101</sup> Respondent’s Reply Memorial [212].

culminating in ICSID arbitration as the most general and that it was principally on this basis that the tribunal determined Article 8 constituted consent on the part of Egypt to ICSID arbitration.<sup>102</sup>

99. The previous ICSID decisions concerning Article 22 of the Investment Law - *Mobil*, *Cemex* and *Brandes* - all make reference to *SPP*. However, they all did so primarily in the context of determining the standard of interpretation to be applied to Article 22.<sup>103</sup> This Tribunal has not found any indication in the respective decisions and awards to suggest that the *Mobil*, *Cemex* or *Brandes* tribunals considered or made any determination in relation to the similarities and distinctions to be drawn between Article 8 of the Egyptian Investment Law and Article 22 of the Investment Law, nor did they consider the relevant of the findings of the tribunal in *SPP* in so far as it relates to those similarities and differences.

**(d) Tribunal's Conclusion on the Plain Meaning of Article 22**

100. As can readily be observed from the Parties' submissions, the question as to whether Article 22 constitutes consent to ICSID jurisdiction permits different views. The Claimant interprets the words "if it so provides" to mean "if the 'applicable' treaty or agreement 'provides' for international arbitration for the settlement of potential disputes" and notes that the ICSID Convention "undoubtedly 'provides' for arbitration before ICSID".<sup>104</sup> The Respondent, on the other hand, interprets the words "if it so provides" to mean "if the respective treaty or agreement provides, according with its terms, that the dispute shall be submitted to international arbitration, not if the respective treaty or agreement provides facilities for international arbitration of disputes".<sup>105</sup>
101. The words "shall be submitted" are to be contrasted with the potential invocation by "should it so provide" of the requirement for written consent "to arbitrate the dispute" under Article 25(1) of the ICSID Convention, which is additional to mere adoption by a state of the ICSID Convention. Of course the question of whether any such additional written consent is required itself begs the question of whether the words "shall be submitted" can themselves constitute such consent, as the Claimant argues, on the grounds that the proviso is satisfied by the ICSID Convention providing for international arbitration between investors and States.

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<sup>102</sup> Respondent's Reply Memorial [213].

<sup>103</sup> *Brandes* [82]; *Cemex* [73], [86]; *Mobil* [79].

<sup>104</sup> Claimant's Counter-Memorial [103]-[104].

<sup>105</sup> Respondent's Reply Memorial [91] (footnotes omitted).

102. If wording such as that used in bilateral investment treaties for acceptance of ICSID jurisdiction had been adopted, instead of that appearing in Article 22, little difficulty would be presented in determining whether the Investment Law constituted a consent. The adoption of the particular wording of Article 22, as opposed to that used in Venezuela's bilateral investment treaties, a matter that was the subject of Mr. Corrales' evidence and is addressed below, will be relevant to evaluation of the evidence of intention before the Tribunal. However it falls to this Tribunal to express a view on the plain meaning of the provision as it was drafted.
103. That such a means of consent to ICSID jurisdiction by way of an Investment Law is possible is exemplified by the *SPP* decision where the wording of the relevant provision is similar but not identical to that of Article 22. Both Article 8 of the Egyptian Investment Law and Article 22 contain a positive statement: "shall be settled" and "shall be submitted" (respectively). Both contain a similar qualification - namely "where such Convention applies" (in Article 8 of the Egyptian Investment Law) and "to which [is] applicable the provisions of the ... Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)" (in Article 22 of the Venezuelan Investment Law) – although Article 22 also contains additional words in relation to the ICSID Convention ("should it so provide") that are not found in Article 8. Article 22 refers to treaties or agreements for promotion and enforcement investments, MIGA and ICSID, whereas the Egyptian Investment Law only refers to ICSID. There is therefore more potential application of the qualification in Article 22 than in Article 8.
104. Although the decisions in *Mobil*, *Cemex* and *Brandes* did not deal with the argument advanced by the Claimant regarding the applicability of *SPP* to the interpretation of Article 22, when considered together these decisions clearly demonstrate that different approaches may be taken to the question of whether provisions such as Article 22 of the Investment Law and Article 8 of the Egyptian Investment Law, being similar (but not identical) in their structure and content, are capable of providing the consent required by Article 25 of the ICSID Convention.
105. The Tribunal is of the view that the text of Article 22 is ambiguous. As there is more than one possible interpretation of Article 22, the principle of *effet utile* is not of itself capable of altering this conclusion or providing a clearer view one way or the other.
106. The Tribunal notes that its assessment of the plain meaning of Article 22 is in accordance with that of the tribunals in *Mobil*, *Cemex* and *Brandes*, which found the text of Article 22 to be "confusing and imprecise",<sup>106</sup> "ambiguous and obscure",<sup>107</sup> with "no natural meaning".<sup>108</sup>

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<sup>106</sup> *Brandes* [86].

107. The Tribunal concludes that the plain meaning of Article 22 does not point to the conclusion that Venezuela intended to give its consent to arbitrate at ICSID. In order to determine Venezuela's intention in enacting the Investment Law, it is therefore necessary to look beyond the words of Article 22, in order to determine whether, as the Claimant asserts, that provision establishes the intention of Venezuela to provide its consent to ICSID arbitration.

## 2. Venezuela's Intention

108. The Claimant relies on evidence that it has put before the Tribunal relating to Venezuela's intention in enacting the Investment Law. Such evidence can be divided into two categories: (1) evidence that the Claimant submits is materially different to that before the *Mobil*, *Cemex* and *Brandes* tribunals; and (2) evidence that appears, on the face of the *Mobil*, *Cemex* and *Brandes* decisions, to have been considered by the tribunals in those three cases. The Tribunal proceeds on the basis that the decisions of those tribunals - which it notes are unanimous in finding that Article 22 does not provide for jurisdiction - are not binding on this Tribunal. Nevertheless, the Tribunal is of the view that it is important to carefully consider and give due weight to the substance of those decisions. If this Tribunal was to depart from the conclusion that was reached by each of the three earlier tribunals - and done so on each occasion by unanimous decision of the three arbitrators - it would need to distinguish this case, for example by reference to new arguments and evidence that was not available to the other tribunals.<sup>109</sup>

### (a) Category One - New Evidence

#### (i) *The Evidence of Mr. Corrales*

109. In these proceedings Mr. Corrales provided two witness statements and presented himself for evidence to the Tribunal. He was cross-examined by the Respondent and questioned by the Tribunal.

110. He was not prepared to give evidence before the *Mobil*, *Cemex* and *Brandes* tribunals for reasons which he explained to the Tribunal.<sup>110</sup>

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<sup>107</sup> *Mobil* [111].

<sup>108</sup> *Cemex* [103].

<sup>109</sup> The Tribunal notes that the new evidence in these proceedings similarly does not appear to have been before the tribunal in *Tidewater* and the relevance of that decision has been considered in this context.

<sup>110</sup> Second Witness Statement of Mr. Corrales [34]; Hearing on Jurisdiction Transcript Day 1, 268:1-3.

111. Thus the evidence of Mr. Corrales to this Tribunal represents additional material to that available to the other three Tribunals. It is appropriate to set out details of Mr. Corrales' evidence before later considering the effect of that evidence.
112. Before doing so, however, the Tribunal wishes to record that Mr. Corrales appeared to be a credible and reliable witness, notwithstanding his involvement in initiatives that are inconsistent with the policies of the present Government of the Respondent.<sup>111</sup> He was subject to extensive skilful cross-examination by counsel for the Respondent. His answers, in the Tribunal's view, were careful and measured, and there was nothing to indicate that he was untruthful in any of the matters he addressed. The issue, as will be addressed below, is not the truthfulness of what he had to say but whether his evidence is such as to establish the intention of Venezuela, in adopting Article 22, to grant its consent to ICSID jurisdiction, or limited to establishing his own belief as to what Article 22 was intended to achieve and did achieve.
113. From 1996 to 2002, Mr. Corrales was Ambassador and Permanent Representative of Venezuela to the United Nations office and the World Trade Organisation in Geneva. Prior to that he held the positions of Minister of Development and President of the Foreign Trade Institute of Venezuela from 1995 to 1996 and Minister of Planning from 1994 to 1995.<sup>112</sup>
114. Within the First Witness Statement of Mr. Corrales, he sets out his involvement in the drafting of the Investment Law as follows:

"II. The Drafting of the Investment Law

6. To understand the origin and purpose of the investment law, I must first explain the opposition that I mounted to certain terms of the proposed bilateral investment treaty between the United States of America and the Republic of Venezuela (the "USA-Venezuela BIT") in 1998.

7. In 1998 the United States and the Republic of Venezuela were very close to finalising a bilateral investment treaty. At that time, I was the Venezuelan permanent representative to the WTO, and as such, I strongly opposed some of the terms that the United States intended to impose on the treaty. In particular, I found unacceptable the United States' demand that the Republic of Venezuela refrain from imposing technology transfer-related performance requirements to investments of American investors. As a specialist in international development, I believed that an obligation of that kind would have severely restricted the Republic of Venezuela's ability to develop policies to encourage the transfer of technology from American investors to Venezuelan companies. My opposition to these terms of the US-Venezuelan BIT was widely covered by the press.

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<sup>111</sup> Hearing on Jurisdiction Transcript Day 1, 268:12- 269:3.

<sup>112</sup> First Witness Statement of Mr. Corrales [1].

8. In December 1998 Hugo Chávez was elected President of Venezuela. In early January 1999, President-elect Chávez invited me to discuss my position on the USA-Venezuela BIT, the progress of which had been disrupted by the controversy that followed to my opposition to that treaty. Dr Jorge Giordani, who later was designated member of his Cabinet, participated in that meeting. President Chávez and Dr Giordani manifested their interest in attracting foreign investment to Venezuela and requested suggestions to overcome the impasse on the negotiations of the USA-Venezuela BIT. All participants in the meeting including President-elect Chávez coincided that any foreign-investment regime, including a bilateral investment treaty, should achieve both goals of contributing to the development of Venezuela and providing effective protection to foreign investors.

9. I advised President-elect Chávez that the best way to proceed was through the enactment of a law that would aim to achieve both goals simultaneously (a fact that was later reflected in which became Article 1 of the Investment Law) and would serve as both the framework for the promotion and protection of foreign investment and a reference for investment treaties to be negotiated.

10. In the first quarter of 1999, Minister Jorge Giordani, who was in charge of the Central Office of Coordination and Planning of the Presidency of the Republic (Oficina Central de Coordinación y Planificación de la Presidencia de la República, also known as CORDIPLAN), asked me to coordinate the preparation of the draft of what later became the Investment Law.

11. I am an expert in international trade, investment and development matters but not a lawyer. For that reason I suggested Minister Giordani to include a legal expert in the drafting team. I recommended Gonzalo Capriles, a specialist in international economic law, who had been the legal counsel of the Foreign Trade Institute (Instituto de Comercio Exterior), the institution in charge of international trade negotiations of Venezuela, over which I had presided as a Minister between 1995 and 1996.

12. In response to Minister Giordani's request, I prepared the Terms of Reference for the work of Mr. Capriles as a consultant, which defined the aims and principles of the draft law. Based on these terms of reference, under my coordination, Mr. Capriles and I prepared the draft of the Investment Law that was presented to President Chávez.

III. The Intent of the drafters of the Investment Law regarding resort to international arbitration

13. In the draft version of the Investment Law that we prepared, Mr. Capriles and I included an option for international investors to resort to international arbitration under three different circumstances. First, international arbitration was to be available where there is an agreement or a treaty between the investor's country of origin and Venezuela. Second, international arbitration also was to be available where the provisions of the Multilateral Investment Guarantee Agency applies. Third, international arbitration was also to be available where the Convention on the Settlement of Investment Disputes between States and Nationals of Other States applies.

14. To my knowledge, the draft investment law was subject to one review by the Economic Cabinet, and the final review by the full Council of Ministers. I participated in the two mentioned meetings in which I made presentations of the



draft Investment Law and responded to questions posed by the Ministers. I particularly remember that in the review by the Economic Cabinet, we discussed the issue of international arbitration, and only one of the persons in the meeting opposed the proposal made by the drafters that the Investment Law should provide foreign investors with a right to pursue international arbitration as a means to resolve disputes with the Republic. The deputy minister of Energy and Mines, Mr. Alvaro Silva-Calderón, opposed that initiative invoking the Calvo doctrine, but the meeting concluded with no objection by the Economic Cabinet to the proposal made by the drafters on the resort to international arbitration.

15. I do not have the required juridical background to legally analyze Article 22 of the Investment Law. But I do know that in preparing the draft of that law, my intent and that of Mr. Capriles was to include in it an open offer to foreign investors to arbitrate disputes with the Republic of Venezuela if they so deemed it convenient, under the circumstances already cited in paragraph 13 above.

16. To the best of my knowledge, the Council of Ministers adopted the version of Article 22 of the Investment Law that had been proposed by the drafters, and that version is included in the text of the Investment Law that was ultimately published in the Gaceta Oficial in October 1999”.

115. In the Second Witness Statement of Mr. Corrales, he says:

“19. Based on my participation in the drafting and discussion of the Investment Law at the time, I confirm that the Investment Law was intended to include consent for international investors to resort to international arbitration even where there is no bilateral investment treaty in place.

20. I also confirm that I understood that I was authorized to include such consent in the Investment Law in order to provide appropriate protection to foreign investors in Venezuela, with the intention to attract them and to maintain them in the country. Moreover, I confirm that both the economic cabinet and the council of ministers agreed with that intention, which was made clear in the presentations I made to the two bodies and their discussions in which I participated.”

116. During the hearing Mr. Corrales was cross-examined by the Respondent and asked questions by the Tribunal.

117. During cross-examination, Mr. Corrales was asked why he selected Mr. Capriles to assist with the drafting of the Investment Law and how they approached the task. Mr Corrales responded that the main reason for selecting Mr. Capriles was that Mr. Corrales had worked with Mr. Capriles at the Instituto de Comercio--Institute for International Trade and in his capacity as Minister of Trade and Minister of Development of Venezuela, and had made the assessment that he was “a very experienced and very knowledgeable person”.<sup>113</sup> With respect to the drafting process, Mr. Corrales stated that Mr. Capriles prepared the first draft, but that “subsequent drafts were always

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<sup>113</sup> Hearing on Jurisdiction Transcript Day 1, 135:17-18.

discussed by the two of us, and when we ended in agreement, and not only regarding Article 22, but any other Article, we considered it is complete”.<sup>114</sup>

118. Mr. Corrales was asked by the Tribunal to describe the difference between the composition of the Economic Cabinet and the Council of Ministers. He explained:

“The members of the Economic Cabinet are the Ministers of areas related to the economy. What was--at the moment one has the name of CORDIPLAN, which was the Ministry for Coordination and Economic Planning; minister for Finance; the Minister of Foreign Affairs attends some meetings when discussions include or issues to be discussed include economic--international and economic relations, the Minister for Oil and Mines or for hydrocarbons; the Minister for Trade and Industry at the moment. Also the Minister of Labor attends when labor issues are discussed. Those are the members of the Economic Cabinet that I remember.

The Council of Ministers is integrated by all Ministers, of the social area, the economic areas, the political--for instance, the Minister of Government or the Minister of Interior or the Minister of Defense. That is the difference, sir.”<sup>115</sup>

119. Mr. Corrales was then questioned by the Tribunal as to the nature and extent of his discussions with members of the Economic Cabinet and the Council of Ministers regarding his view that Article 22 was to be treated as an expression of consent by Venezuela to jurisdiction of ICSID arbitration. He responded:

“I explained, because of the President of the meeting--of the Economic Cabinet, I explained in detail that, based on the provision of the law, international investors were given the right to decide by themselves if they occur or they recurred to international arbitration or national tribunals. I didn't go to details like saying one is ICSID or the other is WTO, et cetera, but it was clear because what I consider politically important was what had been discussed in the Economic Cabinet.

...

Which was access, unilateral access. I mean, the investor had the right to choose between going to international--to international arbitration or making use of national courts.”<sup>116</sup>

“In the discussions in the Economic Cabinet, I explained in more detail because Ministers in the Economic Cabinet are more knowledgeable about these things, and particularly some of them have relations with PdVSA and so on. I went more in detail, and I explained the three cases. In the explanation I made before the Council of Ministers, I didn't go to technical details”.<sup>117</sup>

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<sup>114</sup> Hearing on Jurisdiction Transcript Day 1, 129:19-22.

<sup>115</sup> Hearing on Jurisdiction Transcript Day 1, 220:8 -221:3.

<sup>116</sup> Hearing on Jurisdiction Transcript Day 1, 226:16-227:8.

<sup>117</sup> Hearing on Jurisdiction Transcript Day 1, 228:22-229:7.

“Regarding Article 22, in the Economic Cabinet.

What happened there was that a discussion was opened on the fact that Venezuela was trying to reform the institutions and trying to open its economy and trying to be more attractive to investments, and the general view, I must say, was that international arbitration is a positive step that Venezuela offering international arbitration, et cetera, is a positive step from Venezuela to become a country or an economy which is attractive to foreign investments.”<sup>118</sup>

120. The Tribunal further questioned whether any individual Ministers expressly agreed with Mr. Corrales and confirmed that it was their intention for Article 22 of the Investment Law to contain a unilateral consent to ICSID jurisdiction, to which Mr. Corrales responded:

“Sir, what happened was that at the end, the only person that had raised that position was the Vice Minister of Oil and Hydrocarbons, and the rest participated on the contrary, saying that Venezuela should open--should be open to that.

The arguments that had been used by Vice Minister Silva Calderón that, by the way, had been discussed in the Congress of Venezuela since 1989, I would say they were overruled by the opinion of the rest of the Ministers participating in that meeting, although I said before decisions in the meetings of the Economic Cabinet are not taken by voting. There is a minute that is taken, but there was no objection. At the end, there was no objection after the discussion ended or came to an end.”<sup>119</sup>

121. The Tribunal also explored Mr. Corrales’ understanding of the ICSID Convention. Mr. Corrales stated that it was clear to him that a party to the ICSID Convention does not consent to the jurisdiction of ICSID by virtue only of being a party to that Convention and that something more was required.<sup>120</sup> He believed that Article 22 satisfied the ICSID Convention’s requirements for something more:

“...I have read that several times in Spanish, perhaps I don’t have, perhaps - no. I don’t have the legal expertise, but in plain Spanish, there it is said that if investors are in situation A, B, or C, they can decide by themselves if they come to local tribunals or to international arbitration.”<sup>121</sup>

122. Other subjects addressed during cross-examination and questioning by the Tribunal included: the absence of contemporaneous statements by the Respondent or by Mr. Corrales following the adoption of the Investment Law that supported the view Mr. Corrales now expressed; his silence during the passage of time between the adoption of the Investment Law, his participation at a seminar in April, 2009, and his reasons for providing witness statements in these proceedings; and

<sup>118</sup> Hearing on Jurisdiction Transcript Day 1, 252:4-14.

<sup>119</sup> Hearing on Jurisdiction Transcript Day 1, 252:22 -253:14.

<sup>120</sup> Hearing on Jurisdiction Transcript Day 1, 249:5-13.

<sup>121</sup> Hearing on Jurisdiction Transcript Day 1, 250:4-10.

the inconsistency between the wording of Article 22 and the terms of consent to ICSID jurisdiction contained in bilateral investment treaties between Venezuela and other countries.

123. The Tribunal notes that the Respondent has chosen not to present any evidence to contradict the views expressed by Mr. Corrales regarding his role in the preparation of the Investment Law, including the meetings he attended at the Economic Cabinet and the Council of Ministers, and the Respondent's intentions with respect to Article 22. No evidence has been put before the Tribunal, for example, to suggest the unavailability of Ministers who were present at the meeting of the Economic Cabinet and the Council of Ministers at which the decision of the Government was made regarding the adoption of the Investment Law. Rather, the Respondent argues that the evidence of Mr. Corrales is irrelevant for the purpose of ascertaining whether the Respondent consented to ICSID arbitration, and cites the award in *Brandes* in support of this contention. The Respondent adopted this approach no doubt being aware that the Tribunal may not accept that view, and may look to extrinsic evidence of intention, including by reference to the circumstances of the preparation and enactment of the Law.
124. Some evidence was put before us – in the form of exhibits R-53<sup>122</sup> and R-54<sup>123</sup> - on which Venezuela relied to raise questions about the absence of Mr. Corrales' testimony to support the claims for jurisdiction in the *Conoco* and *Mobil* cases. The Tribunal notes that the absence of testimony by Mr. Corrales (as well as the absence of that of Mr. Capriles) in those cases was criticised by Venezuela; the Tribunal was therefore struck by the failure of the Respondent to provide any rebuttal evidence to the witness statements of Mr. Corrales in this case, and its reliance on the decisions in *Cemex*, *Mobil* and *Brandes*. Further, the Tribunal notes that the Respondent was requested, on several occasions, to produce evidence that might have been in its possession and custody in relation to these matters, but failed to do so.
125. The Tribunal considers that it might be entitled to infer from the absence of such rebuttal evidence tendered by the Respondent that the version of events offered by Mr. Corrales with regard to events at certain meetings of the Economic Cabinet and the Council of Ministers – and the decisions that Mr. Corrales claims were there taken – was not contradicted by witness evidence available to it. However, for the reasons set out below at paragraph 146, the Respondent's failure to provide such evidence, and the inference that might be drawn, is not of itself sufficient to establish an intention on the part of Venezuela of its acceptance of ICSID jurisdiction. Rather, the

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<sup>122</sup> Exhibit R-53B, Transcript of the Hearing on Jurisdiction in *Conoco Philips Company and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) (Case Pending) ("*Conoco*"), Question of Venezuela to Mr. Brewer-Carías, at 2404:20-21.

<sup>123</sup> Exhibit R-54, Transcript of the Hearing on Jurisdiction in *Mobil*, at 197.

Tribunal considers that, in the face of ambiguities in the meaning and effect of Article 22, what is required is direct evidence of intent on the part of Venezuela to consent to ICSID jurisdiction. This has not been made available to the satisfaction of the Tribunal.

(ii) *Exhibits WCL-1 and WCL-3*

126. These exhibits are documents said to have been discovered by Mr. Corrales upon his return to Geneva in late 2011, during the Claimant's preparation for the hearing on jurisdiction, some 12 years after the Investment Law was adopted. These documents were not available as evidence to the other three ICSID tribunals that considered Article 22 of the Investment Law.

127. Exhibit WCL-1<sup>124</sup> is a document setting out the terms of reference prepared by Mr. Corrales for the engagement of a consultant to assist in the preparation of the draft Investment Law. The terms of reference described the functions to be fulfilled by the proposed Law, its general objectives, and its contents. Paragraph 10 is entitled "Content of the Law" and states:

"10. Dispute resolution in the case of foreign investments:

The law should cover aspects relating to the mechanisms for the resolution of disputes that may arise, between the Venezuelan State and the State of which the investor is a national, as well as between the Venezuelan State and the investor. In both cases the Consultant should analyse the options and present the arguments for the advantages and disadvantages of such [options]. In particular, those [options] should be studies which relate to the disputes between States [the different mechanisms set forth for this purpose in the United Nations Charter] and to the disputes between the foreign investor and the Venezuelan State (quite often would be to offer the former the possibility of resorting to the Venezuelan Tribunals or to an international tribunal mechanism, with the understanding that upon opting for one of those procedures the case could no longer be filed under the other procedure, in order to avoid contradictory decisions)".

128. The Tribunal notes that paragraph 10 provides only for "options" to be studied, and makes no direct reference to ICSID.

129. Exhibit WCL-3<sup>125</sup> is a document, dated 30 June, 1999, that contains comments by Mr. Corrales on a draft investment law. These comments criticise "the Draft of a Decree-Law on the Promotion and Protection of Investments". Section 2.4 of the document states:

"2.4 Access to dispute resolution mechanisms

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<sup>124</sup> Exhibit WCL-1, Terms of Reference for the Formulation of the Draft Law on Investments

<sup>125</sup> Exhibit WCL-3, Comments on the Draft of a Decree-Law on the Promotion and Protection of Investments

Article 20 of the Draft contemplates that the State and the investors may refer their disputes in relation to an investment to the Courts of the Republic or to arbitration tribunals constitution in accordance with international treaties.

This wording does not grant any greater safeguards to investors, because it is clear that they will always be able to resort to Venezuelan Courts, to which our State is obviously subject. What could convert this into a “asset” of the Draft would be the submission of the State to the jurisdiction of an international arbitral tribunal. Indeed, it says that “the State and investors may submit a dispute ( ...) to arbitral tribunals ..”, but this would seem to imply that the choice of that jurisdiction is by agreement between the State and the investor, and does not offer the latter the possibility of unilaterally resorting to arbitration as the bilateral treaties for the protection of investments already do.”

130. As with the previous document, this one makes no direct reference to ICSID.
131. The Tribunal considers that these documents alone are insufficient to establish that Venezuela intended the Investment Law to provide consent to ICSID arbitration. Whilst they may not be inconsistent with Mr. Corrales’ own belief that, irrespective of the views of the Government, he intended Article 22 of the Investment Law to contain a unilateral consent to ICSID arbitration, but they fall short of establishing explicit intent on the part of the Venezuela to consent to ICSID jurisdiction.

(iii) *The Fermin Toro Case*

132. The Claimant has also put before the Tribunal new material in the form of Exhibit LAC-16<sup>126</sup>, an English translation of excerpts from the Court file of the constitutional chamber of Venezuela’s Supreme Court of Justice for the *Fermin Toro* case, including written submissions by the Attorney General of Venezuela. As far as the Tribunal is aware, these extracts from the Court file, and the submissions of the Attorney General of the State of Venezuela were not available to the *Mobil*, *Cemex* or *Brandes* tribunals. The Court was asked by petitioners to declare as unconstitutional the Investment Law, and in particular its Article 22, on the basis that it allowed individuals to submit to foreign arbitral organs disputes which were essentially matters of public order. In a submission to the Supreme Court, the Attorney General of Venezuela made the following assertion:

“From the concatenated interpretation of the partially transcribed constitutional articles, it is evident that arbitration is admitted into our national legislation as an alternative means of justice, and by providing for national or international arbitration as a means of resolving disputes arising from the application of treaties of promotion and reciprocal protection of investments or from the Decree Law [the Investment Law], this Decree does not contradict our Constitution, since the aforementioned article supports arbitration as a method of dispute resolution.

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<sup>126</sup> Exhibit LAC-16, Court file of Expediente 00-1348 at p. 193 - 194.

This legislation also does not violate Section 301 of the Constitution, because although Article 22 of the contested decree refers to the admissibility to arbitration of “disputes arising between an international investor”, it subsequently refers all dispute that fall within the provisions of international conventions signed by the Republic, which obviously are part of the existing law in our country, and provide for arbitration for domestic investments abroad, if so provided in the relevant treaties. Furthermore, in the final part of that article the possibility of using contentious routes provided for in current Venezuelan legislation is established”.

133. The Tribunal notes that the submissions of the Respondent’s Attorney General in the *Fermin Toro* case are expressed in terms that broadly repeat the text of Article 22. For this reason, the Tribunal considers that this material leaves open the meaning and effect of Article 22 as regards ICSID, and cannot assist the Claimant in reaching a conclusion that the Respondent considered Article 22 to contain its consent to ICSID arbitration in respect of disputes arising under the Investment Law. Moreover, this was a case in which the petitioners failed for want of standing, and did not result in any finding of the Supreme Court as to what Article 22 did or did not mean. Accordingly, the Tribunal concludes that this material cannot be regarded as being of any material weight or effect as to the intentions of Venezuela with regard to ICSID consent.

(iv) *Recordkeeping Evidence*

134. In the course of these proceedings the Claimant has made specific document requests. In particular, the Claimant requested that the Respondent produce a number of documents, including: the contract between Gonzalo Capriles and the Venezuelan Government concerning his work relating to the Investment Law; correspondence or memoranda between Gonzalo Capriles and the Venezuelan Government concerning the draft Investment Law; files of the Council of Ministers including Cabinet documents; Cabinet meeting minutes and reports to and from the cabinet reflecting discussions of the Investment Law or drafts of the Investment Law in the meetings of the “Economic Cabinet” held in the last week of August 1999; and files of the Council of Ministers relating to similar matters.<sup>127</sup>
135. The Respondent opposed these requests, which became the subject of the Tribunal’s Procedural Order No. 1 dated 19 September 2011. By this Order the Tribunal noted that the Respondent asserted that it did not have the requested documents in its possession custody or control, and directed the Respondent to produce them or provide a statement in writing to confirm that, after a thorough and careful search for the documents, it had ascertained that they were not in its possession, custody or control. The Tribunal also offered the Respondent an opportunity to make submissions on privilege, to the extent necessary. In its response to Procedural Order No. 1, the

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<sup>127</sup> Claimant’s first request for the Respondent to produce documents (22 August 2011).

Respondent advised that, after a thorough and careful search, the documents requested had not been found and that any question of privilege was moot.<sup>128</sup> The Claimant has subsequently asserted that the Respondent's failure to produce the requested documents should lead the Tribunal to draw adverse inferences against the Respondent, in relation to the matters that would be addressed in the requested documents.

136. In May 2012, eight months after the Claimant first filed a request for document production, the Respondent produced Exhibit R-51 and Exhibit R-52. These exhibits contain exchanges of correspondence between Gladys María Gutiérrez Alvarado (the then Attorney General of Venezuela) and Mr. Capriles during August 2009. They also refer to other documents that the Tribunal considers were likely to have been in the Respondent's possession and which were the subject of Procedural Order No. 1, including Mr. Capriles' agreement to provide advice, as well as early drafts of the Investment Law.
137. In the course of the hearing further evidence was provided as to the existence of the requested documents that the Respondent had failed to produce.
138. The Tribunal asked Mr. Corrales whether there was an administrative dossier concerning the Investment Law held by the Venezuelan Government, to which he responded: "I didn't see it, but I know that the practice is that, before final approval, after being considered by the Council of Ministers, even before being considered by the Council of Ministers, but anyway, before it is published in Gaceta Oficial, any decision has to go to the Procuraduría General de la Republica".<sup>129</sup> When asked by the Tribunal whether Mr. Capriles' terms of reference and employment contract were part of an administrative dossier, Mr Corrales said:

"Yes. And there must be a contract, and CORDIPLAN must have--if practices that were in place when I was a Minister of CORDIPLAN continued, and I think it is normal, there must be a contract containing the Terms of Reference, a contract for Gonzalo Capriles in CORDIPLAN, there must be copy of that contract with the Terms of Reference at the Procuraduría General de la Republica. That I am sure."<sup>130</sup>

139. The Tribunal questioned the Claimant's witness, Mr. Brewer-Carías, a professor of administrative law, about the administrative practices of the Venezuelan Government and its use of dossiers. Mr. Brewer-Carías stated:

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<sup>128</sup> Respondent's answer to Procedural Order No. 1 concerning the production of documents (27 September 2011).

<sup>129</sup> Hearing on Jurisdiction Transcript Day 1, 255:19-256:3.

<sup>130</sup> Hearing on Jurisdiction Transcript Day 1, 256:15-22.



“The general principle in Venezuela establishing the administrative procedure law and in the public administration law is providing for a written administrative procedure.

So, the compulsory formation of a file, an expediente is necessary for each sort of cases not only petition from individuals before public administration but also for initiatives of the public officials. So an expediente must be always open, and this is to be kept during the whole procedure up to the end of the procedure; and, in that expediente or file, must be filed all the documents. So, this is the general principle. You have to have everything together in writing and normally numbered. That’s the general principle, as it is in all our Latin American administrative law all over our countries.

Regarding specifically the process of enacting a law to a Decree-Law, as is the case of the Investment Law, in the Cabinet, in the Council of Ministers, the initiative of a proposal is normally given to the Minister of this sector. This is the normal way. So the Minister must prepare a writing document. This writing document with the exposición de motivos, with the motives of the proposal, and the text of the law must be submitted to the President in order to be presented into the consideration of the Council of Ministers or the Economic Cabinet.

So, since the beginning, it is a writing document; and, in this process, that person responsible of the Project must kept all the dossiers, not only the proposal but all the other written elements regarding that law or that decree or regulation. It applies to all these normative procedures, beginning with the law enabling the executive to enact that law.

And this is normally in the hands of the public official responsible of that Minister of the sector in charge of the Project or another public official in charge, and this goes to the Council of Ministers, the whole bunches of paper, and it goes to all the Ministers, so all have those documents. And when the law is approved, it is approved in a document that is written before all of them.”<sup>131</sup>

140. The Tribunal then questioned Mr. Brewer-Carías in relation to the likely whereabouts of the dossier concerning the Investment Law and the employment of Mr. Capriles:

“...you will have two dossiers. Because one is the contracting of a person in order to render a service. The administrative aspect of the Contract will be one dossier. But the content of his work will go to the main dossier of the project of the law.

...

All the draft reports on all the documents, and that in the end, in a case like the--a law approved by the Council of Ministers will remain in the Council of Ministers. The Secretariat of the Council of Ministers is the final point in which, in a case of a law approved by the President in the Council of Ministers the file will be kept.”<sup>132</sup>

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<sup>131</sup> Hearing on Jurisdiction Transcript Day 2, 365:7-367:6.

<sup>132</sup> Hearing on Jurisdiction Transcript Day 2, 367:20-368:12.

141. Mr. Brewer-Carías was asked what occurs if a dossier is lost and needs to be reconstructed:

“It’s possible to reconstruct it because all those documents have an origin, or in the Ministry of CORDIPLAN or in the Procuraduría General de la Republica, in the Attorney General’s Office, or in the Office of the Minister of Governors, and then you can reconstruct because all those documents are all over.

...if the dossier is lost, somebody has to ask, and the Minister and the public official has the authority to obtain all the documents from all over the administration.”<sup>133</sup>

142. The Tribunal went on to question counsel for the Respondent in relation to the Respondent’s efforts to locate documents requested by the Claimant. The Tribunal’s exchange with counsel for the Respondent is as follows:

“ARBITRATOR TAWIL: Mr. Kahale, I would like to take you to your Exhibit R-51.

MR. KAHALE: Yes.

ARBITRATOR TAWIL: It’s the exchanges with Mr. Capriles. The last letter I find from is a letter from Mr. Capriles from September 8, 2009. I don’t know if there’s anything after that.

MR. KAHALE: Not that I’ve seen.

ARBITRATOR TAWIL: Okay. He says at the end, “In any event, pursuant to the provisions established in Article 3 of the Organic Law of the office of the Attorney General, I have ordered a thorough revision of the documents that I keep from those times both in hard copies or electronic, and I will inform you of the results of this revision as soon as possible”.

Was there any follow-up? That was in 2009.

MR. KAHALE: Yes. Not to my knowledge, and there has been no further search or correspondence that I know of with Mr. Capriles since we did this for the Mobil Case. Obviously, we didn’t do that for this case.

ARBITRATOR TAWIL: And what about the calls?

MR. KAHALE: The what?

ARBITRATOR TAWIL: You said that you had phone calls with them.

MR. KAHALE: That was at the time.

ARBITRATOR TAWIL: Oh, for the 2009?

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<sup>133</sup> Hearing on Jurisdiction Transcript Day 2, 368:16-369:8.

MR. KAHALE: Yes. That was at the--actually right at the time of those letters, of course. He was first contacted to get a feeling.

ARBITRATOR TAWIL: And having here Mr. Corrales, Venezuela did not try to approach him again?

MR. KAHALE: Who?

ARBITRATOR TAWIL: Mr. Capriles.

MR. KAHALE: He told us he had a conflict, and Mr. Corrales apparently--

ARBITRATOR TAWIL: But in order to get the documents?

MR. KAHALE: We did that, and he didn't provide the documents.

ARBITRATOR TAWIL: You did that in 2009, not after having Mr.--

MR. KAHALE: Yes, we did not go back to him for this case to ask again for the documents.

ARBITRATOR TAWIL: Thanks.

MR. KAHALE: Yes. And apparently Mr. Corrales did also, and he couldn't even contact him. At least that's what I thought he said or I don't know whether it was Mr. Corrales who said that or Professor Brewer. I forget. Yes?

PRESIDENT JONES: Can I ask whether you can help us with the position regarding the entitlement in Venezuela of a client to access of files kept by a lawyer engaged by that client.

MR. KAHALE: I'm not an expert on that subject, Mr. President, but it's my understanding that we had a right to get those files. We're not pleased with the fact that we got that response, but, you know, what are we going to do? The politics in Venezuela, as you can imagine, are not that easy, and the last thing the Government wants to do is to do anything. You saw what Mr. Corrales's attitude was. The last thing we want to do is do anything which gives the appearance of being heavy-handed in any way.

PRESIDENT JONES: I should share with you my personal experiences of acting for Governments, and they are that governments are quite astute to ensure and insist upon the provision to Governments of files built by those that act for to them, and that to insist upon the provision of documents held by lawyers and consultants employed by Government would not, in my own view, be in any way unusual or heavy-handed.

MR. KAHALE: Yes, I understand that, Mr. President. I think the choice here was to bring the legal proceeding against Mr. Capriles, and I believe that undoubtedly that would have been misunderstood by Exxon, used by Exxon in the case against us, and the decision was made not to pursue legal proceedings, I think, for those reasons.

But I'm not privy to those discussions. This is my speculation; and, you know, it is my understanding that we do, as a former client, have a right to have those documents, and we don't.

ARBITRATOR TAWIL: I'm sorry, I don't understand. Is that your speculation, or is that something that you know, that they were thinking of bringing legal proceedings against Mr. Capriles?

MR. KAHALE: No, I didn't say they were thinking of bringing a legal proceeding. I said I think the choice would have been to bring the legal proceeding.

ARBITRATOR TAWIL: Okay, okay. My apologies.

MR. KAHALE: And obviously that has happened.

PRESIDENT JONES: Can I just say again, from my own experience, that the production by a lawyer of the files held for a client, including particularly a government client, would not normally require the commencement of legal proceedings, but merely a demand?

MR. KAHALE: That demand was made several times, Mr. President.

PRESIDENT JONES: Do we have material establishing that?

MR. KAHALE: It's those formal letters from the Attorney General to Mr. Capriles.

PRESIDENT JONES: I think my colleague has pointed out that there is silence following an undertaking by Mr. Capriles to investigate and look for the documents. There is not a refusal to provide the documents in the material we have before us.

MR. KAHALE: My understanding, Mr. President, is I don't have any response, any further correspondence, and my understanding is we were led to believe that there was no way we were going to get any cooperation from Mr. Capriles, given his firm's conflict. That's all I can tell you".<sup>134</sup>

143. In the course of the hearing, counsel for the Respondent confirmed that no document requests were made by the Claimants in the *Conoco* or *Mobil* cases.<sup>135</sup>

144. The Tribunal has taken note of the fact that the Respondent has not produced contemporaneous documents that were responsive to the requests made by the Claimant. On the basis of the evidence that was put before the Tribunal regarding the process for administrative decision-making in Venezuela, the Tribunal concludes that it would be most surprising if files and documents of the kind requested by the Claimant had not existed at the time of enactment of the Investment Law. In the absence of more detailed explanation than that provided by the Respondent, the Tribunal considers it likely that such files and documents are still in existence today, in a form allowing for

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<sup>134</sup> Hearing on Jurisdiction Transcript Day 3, 561:19-567:4.

<sup>135</sup> Hearing on Jurisdiction Transcript Day 3, 686:18-22.

their discovery and production, or alternatively to be the subject of claims for privilege (which the Tribunal would then have been in a position to address).

145. The Respondent has tendered some correspondence relating to Mr. Capriles' files, but this merely leaves open the question of why these files could not be obtained by the Respondent, or why the material that was likely to have been provided by Mr. Capriles to the Attorney General's office (in the course of the preparation of the Investment Law) was not produced. The Tribunal considers that the explanations offered by counsel for the Respondent as to Venezuela's failure to follow up the production of Mr. Capriles' files are less than fully convincing. In these circumstances, the Tribunal considers that it might draw certain inferences from the failure to produce requested documents (as well as the failure to claim any privilege in respect of these documents), namely that the requested contemporaneous documents that relate to the preparation of the investment law (and likely to be in the possession of the Respondent) do not assist the Respondent in support of its arguments in these proceedings.
146. The Tribunal by majority considers, however, that such inferences fall well short of the direct evidence that would be needed to establish intent in the face of the ambiguities of the Investment Law. The majority of the Tribunal are of the view that inferences alone, absent direct evidence, are not sufficient to establish - that Article 22 reflects an intention on the part of Venezuela to consent to ICSID jurisdiction, as required by Article 25 of the ICSID Convention.

**(b) Category Two - Common Evidence**

*(i) Evidence Relating to the Preparation and Enactment of the Investment Law*

147. Mr Corrales provided evidence as to the process of preparation of the Investment Law. Although his witness testimony was not available to the tribunals in the *Mobil*, *Cemex* or *Brandes* cases, a limited number of contemporaneous documents were available to those tribunals. These documents comprised two articles, one that was prepared during the drafting of the Investment Law, and a second that was prepared a few months after the Investment Law was enacted, expressing Mr Corrales' comments on the principles upon which the Investment Law is based.<sup>136</sup>
148. The *Mobil* and *Cemex* tribunals concluded that these documents do not expressly state that the drafters of Article 22 intended to provide consent to ICSID arbitration in the absence of any bilateral investment treaty.<sup>137</sup> In the *Brandes* case, the tribunal concluded that it was not necessary

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<sup>136</sup> First Witness Statement of Mr. Corrales [18]-[20].

<sup>137</sup> *Mobil* [136] and *Cemex* [132].

to determine the relevance of these publications, because “Mr. Corrales’ opinion cannot provide the basis for finding that Article 22 of the [Investment Law] contains the consent of the Bolivarian Republic of Venezuela to submit to ICSID arbitration”.<sup>138</sup>

149. Nothing in these documents is necessarily inconsistent with an intention of the Respondent to provide for disputes arising between investors and the Respondent under the Investment Law to be the subject of ICSID arbitration. The Tribunal believes that although these documents taken together do not themselves establish that intention, they are consistent with and supportive of the evidence given by Mr. Corrales regarding his explanation to the Economic Cabinet and the Council of Ministers regarding the intention of the drafters of the Investment Law for it to provide an option to investors to have disputes under the Investment Law between the investors and the State be the subject of arbitration.
150. As noted above at paragraph 102, the other contemporaneous documents relevant to the intention of Venezuela at the time of the enactment of the Investment Law were the numerous bilateral investment treaties that had been entered into by Venezuela and other States. Each of these contained an express consent by the Respondent to submit disputes arising under those treaties to ICSID arbitration.<sup>139</sup>
151. The Tribunal notes that the terms of Article 22 of the Investment Law are quite different to those terms by which Venezuela agrees to ICSID arbitration in these bilateral investment treaties. The *Mobil* and *Cemex* tribunals concluded that if Venezuela had intended to provide consent to ICSID arbitration in Article 22, it “would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well-known formulas”.<sup>140</sup> A similar conclusion is implied by the *Brandes* tribunal, which “notes that each of [the] treaties contains a submission to ICSID jurisdiction expressed in a similar manner, and in clear and precise language”.<sup>141</sup>
152. In the course of the hearing Mr. Corrales was asked about Venezuela’s bilateral investment treaties and the laws of other countries that provided for ICSID jurisdiction in clear terms. His evidence does not establish unequivocally that Mr. Capriles had the terms of these bilateral investment treaties available to him (for example, amongst the materials which Mr. Corrales had sight of during his meetings with Mr. Capriles), or that he had examples of the national laws of other states

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<sup>138</sup> *Brandes* [103].

<sup>139</sup> See also [86]-[90] above.

<sup>140</sup> *Mobil* [139]. A similar finding was made in *Cemex* [137].

<sup>141</sup> *Brandes* [94].

that provided for ICSID jurisdiction in clear terms. Mr Corrales' evidence was that initial drafts of Article 22 were too long and needed to be simplified. In his view, Article 22 dealt collectively with international arbitration under bilateral investment treaties, international arbitration under MIGA,<sup>142</sup> and ICSID arbitration. That is the reason why Mr. Corrales says Article 22 was prepared to deal with dispute settlement arising in three distinct circumstances, but did not follow the clear wording in favour of ICSID arbitration as contained in the Respondent's bilateral investment treaties.

153. The Tribunal has noted this explanation, which may well explain why Mr. Corrales was satisfied with the approach taken in Article 22. Notwithstanding this explanation, however, the Tribunal is bound to take into account the existence of these bilateral investment treaties, which were available at the time of the drafting work carried out by Messrs Corrales and Capriles and which provided examples of language that provided consent for ICSID arbitration in clear terms. Mr. Corrales confirmed that Mr. Capriles was an expert in international economic law, including international investment law.<sup>143</sup> As such, the Tribunal considers that he must be assumed to be familiar with the provisions of Venezuela's bilateral investment treaties - and in particular those provisions providing for consent.

154. Mr. Corrales admitted that if he knew then what he knows now, the wording of Article would have been different:

“I think--what I would say, I will repeat is, If I had knew what has happened to my county in the last six to seven years, I would have been clearer, but I was in 1999, sir.”<sup>144</sup>

155. The Tribunal considers that the plain inconsistency between the agreement to ICSID arbitration in Venezuela's existing bilateral investment treaties, on the one hand, and the wording of Article 22, on the other, is significant. Even if the Tribunal accepts the evidence of Mr. Corrales that he intended Article 22 to provide for an express consent to ICSID arbitration for disputes arising under the Investment Law, the majority of the Tribunal recognises that there is a distinction to be drawn between the intention of Mr. Corrales (and possibly Mr. Capriles) and that of Venezuela. The material difference in the wording of Article 22 and of the bilateral investment treaties is a

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<sup>142</sup> The Tribunal notes that Chapter IX Settlement of Disputes (Articles 56-58) of the Convention establishing the MIGA does not provide for arbitration at the instance of an investor (or equivalent private party) against a State. Its inclusion in the Investment Law appears to be based on a misapprehension of a kind that indicates that the drafters of the law may not have been fully familiar with the requirements of the MIGA Convention.

<sup>143</sup> First Witness Statement of Mr. Corrales [11].

<sup>144</sup> Hearing on Jurisdiction Transcript Day 1, 250:20-251:1.

significant factor to be taken into account by the Tribunal in assessing the evidence as to the intention of Venezuela.

156. For its part, the Respondent argues that there has been a “traditional hostility towards arbitration” on the part of Venezuela and its legal community, that this is even more strongly held in relation to disputes involving the State, and that this is irreconcilable with the Claimant’s interpretation of Article 22.<sup>145</sup> The Respondent refers the Tribunal to a number of political statements which, in its view, demonstrate Venezuela’s “cautious and restrictive attitude” towards arbitration.<sup>146</sup> These statements include an official opinion issued by Venezuela’s Attorney General in December 1999, in which the Attorney General concludes that “the inclusion of an express clause by the Venezuelan State waiving the privilege of jurisdictional immunity in contracts of public debt is contrary to the Constitution of the Republic”.<sup>147</sup>
157. The Claimant, on the other hand, argues that there has been a “pro-arbitration trend” in the Venezuelan legal system.<sup>148</sup> It says that Article 258 of the Venezuelan Constitution guarantees arbitration as a fundamental right and imposes a duty upon State organs to promote arbitration as a method of dispute resolution.<sup>149</sup> The Claimant argues that the statements relied upon by the Respondent have been taken out of context and, when taken in their full context, demonstrate an evolution on the part of Venezuela and its law in favour of arbitration.<sup>150</sup>
158. The Tribunal has carefully considered the evidence submitted by each party. It is apparent from this material that Venezuela has displayed reluctance towards international arbitration as a method of dispute resolution in the past. This much is clear from the statement of Prof. Morles, a Venezuelan jurist, at a seminar convened by the Academy of Political and Social Sciences in Caracas in 2005, relied on by both Parties. Prof. Morles’ explains, however, that this attitude has evolved, and that the “hostile culture towards arbitration in general [has] gradually given way to a new situation, internationally favoured by the equal treatment among nations and by the actions of

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<sup>145</sup> Respondent’s Memorial [24]-[25].

<sup>146</sup> Respondent’s Memorial [26].

<sup>147</sup> Exhibit EU-21, Opinion of Jesús Petit Da Costa, Attorney General, to Luis Raúl Matos Azocar, Finance Minister, dated 19 December 1996, p. 11 (English translation).

<sup>148</sup> Claimant’s Counter-Memorial [141]-[154].

<sup>149</sup> Claimant’s Counter-Memorial [142]-[143].

<sup>150</sup> Claimant’s Counter-Memorial [145]-[149].



international organizations such as UNCITRAL”.<sup>151</sup> The Tribunal does not consider that the Respondent’s arguments with respect to the Attorney General’s comments can be dispositive in relation to Venezuela’s attitude to international arbitration and the implications of that attitude for the interpretation of Article 22. The Tribunal notes too that the *Mobil* and *Cemex* tribunals considered that traditional hostility towards arbitration had receded in Venezuela during the 1990s, in favour of a more positive attitude. Those tribunals did find, however, that they could not draw from this general evolution a conclusion that Venezuela had intended by the terms of Article 22 to consent to ICSID arbitration, in the absence of a bilateral investment treaty.<sup>152</sup>

159. The Tribunal concludes that the evidence submitted by the Parties in relation to this evidence cannot be dispositive either way. The evidence does not point to a conclusion that President Chávez and the Council of Ministers would not have accepted Mr. Corrales’ advice that the Investment Law should include a general and unilateral consent to ICSID arbitration. Equally, however, it does not assist the Claimant in establishing that Venezuela had an intention to consent to ICSID arbitration.

(ii) *Evidence following the Enactment of the Investment Law*

160. This material falls into 2 categories. The first is material emanating from the Respondent, and the second comprises speeches and addresses given by Mr. Corrales and others many years after the enactment of the Investment Law.

161. So far as the first category is concerned, material emanating from the Government of Venezuela, the relevance of this material is to establish *ex post facto* whether it is likely that the Respondent did intend by Article 22 to consent to ICSID jurisdiction. This material consists of what the Claimant alleges to be “promotional material”<sup>153</sup> issued by Venezuela around the time the Investment Law was enacted, including:

- a newsletter issued by the National Council of Promotion of Investments, which noted that the Investment Law provides for “resort to international arbitration “without Venezuela having to waive its sovereignty””,<sup>154</sup>

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<sup>151</sup> Exhibit EU-19, Alfredo Morles Hernández, *Presentation*, in *Internal and International Commercial Arbitration: Theoretical Reflections and Practical Experiences* (I. de Valera ed., Academia de Ciencias Políticas y Sociales 2005), p 12 (English translation).

<sup>152</sup> *Mobil* [131] and *Cemex* [126].

<sup>153</sup> Claimant’s Counter-Memorial [63].

<sup>154</sup> Exhibit C-18, “Investment Promotion Law Approved by Cabinet”, in CONARPI, *Invest Venezuela TIPS* No. 12 (20 September 1999) p 2.

- a statement by Cordiplan's General Director, Fernando Hernández, international arbitration is maintained in the Investment Law as an option for foreign investors;<sup>155</sup>
- publication of the Investment Law in the 2000 edition of Investment Laws of the World;<sup>156</sup> and
- a press release issued by the Venezuela's Embassy in the United States in 2001 titled "Venezuela Best Country for International Arbitration".<sup>157</sup>

162. The Tribunal does not consider this level of "promotion" of the Investment Law to be significant, and notes that nothing in this material refers expressly to Venezuela's consent to ICSID arbitration. This is consistent with the finding of the tribunal in *Brandes*.<sup>158</sup> The Tribunal is unable to conclude from the material submitted by the Claimant that Venezuela was publicising the Investment Law and seeking to attract foreign investors on the basis that the Law contained a general consent to ICSID arbitration.

163. The Tribunal agrees with the Respondent's submissions to the effect that the absence of significant promotion by the Government of Venezuela of the Investment Law indicates that no great weight was put by the Government on the provisions of Article 22. The failure of such promotional material to publicize any general grant of consent to ICSID jurisdiction does not assist the Claimant's argument that there was an intention to consent to such ICSID jurisdiction.

164. As concerns the second category of material - subsequent speeches and statements by Mr. Corrales - the Tribunal believes that, given its view of Mr. Corrales' evidence referred to at paragraph 112 above and its acceptance of that evidence, the relevance of what was said at seminars ten years after the event is marginal. Material in relation to Mr. Corrales' silence prior to the speeches he gave and the context of his speeches, were presented by the Respondent to challenge Mr. Corrales' credibility. The Tribunal considers that whilst the passage of time may not have that effect, the fact that his views were only expressed long after the Investment law had been adopted, and only in the context of litigation, would tend to diminish its weight. While the *Mobil* and *Cemex* tribunals considered that this evidence was not supported by contemporaneous written documents, they also found it relevant that the Claimants in each case did not ask Mr. Corrales to appear as a

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<sup>155</sup> Claimant's Counter-Memorial [66].

<sup>156</sup> Exhibit LAC-21, Publication of Decree-Law No. 356 of 3 October 1999 on Protection and Promotion of Investments in ICSID's Investment Laws of the World (March 2000) ICSID's Investment Laws of the World (March 2000).

<sup>157</sup> Claimant's Counter-Memorial [67].

<sup>158</sup> *Brandes* [100].

witness.<sup>159</sup> This is a significant point of difference in the present case, although the Tribunal notes that there is not a great deal of substantive difference between the statements Mr. Corrales made at the seminar – which were before earlier tribunals – and those he has now expressed in these proceedings. The fact that his evidence has been tested is of course significant, but cannot be dispositive in circumstances in which the Tribunal has drawn a distinction between Mr Corrales’ intention and that of Venezuela.

### C. THE TRIBUNAL’S CONCLUSIONS

165. In paragraph 107 above, the Tribunal has concluded that it is not possible to conclude that the words of Article 22 of the Investment Law indicate an intent on the part of Venezuela to give its consent to ICSID arbitration for investment disputes that are governed by the Investment Law. The plain meaning of Article 22 is ambiguous. In view of this finding, the Tribunal has had regard to the evidence presented by the Parties in order to determine whether or not that evidence establishes, with sufficient clarity, that Venezuela intended to consent to ICSID arbitration when it enacted Article 22.
166. The Tribunal is satisfied on the evidence before it that Messrs Corrales and Capriles contributed to the preparation of the Investment Law. It is also satisfied that Article 22, as it appears in the Investment Law, appeared in the draft which they prepared and presented for consideration to the Economic Cabinet and the Council of Ministers of the State of Venezuela. On the evidence provided to the Tribunal, it concludes that the intention of Mr. Corrales was that Article 22 of the Investment Law should constitute a consent by the State of Venezuela to ICSID jurisdiction in respect of disputes brought by investors against Venezuela and which are subject to the Investment Law.
167. These conclusions are not, however, the end of the matter. There are two further key matters to be considered. The first is whether the relevant intention of the legislator has been established as a matter of fact and, if so, the second is whether that intention may be said to express consent on the part of Venezuela to ICSID arbitration in respect of disputes arising under the Investment Law.
168. In the Tribunal’s view, a key element in the inquiry as to the intention of Venezuela in enacting Article 22 of the Investment Law, so far as consent to ICSID jurisdiction is concerned, is the intention of the legislator. For the purposes of determining consent, the Tribunal regards evidence of the intention of the Council of Ministers and of the Economic Cabinet as relevant to the

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<sup>159</sup> *Mobil* [137]-[138] and *Cemex* [131]-[135].

intention of Venezuela.<sup>160</sup> The intention of the drafters of the Investment Law, and in particular Article 22, is relevant in so far as they made known to the Economic Cabinet and the Council of Ministers the effect which they intended that Article 22 would have, namely to constitute the consent to ICSID jurisdiction required by Article 25 of the ICSID Convention.

169. Critical to the Tribunal's determination of whether such an intention was conveyed to and agreed upon by the Economic Cabinet and the Council of Ministers is the evidence of what occurred at the meetings of both bodies at which the Investment Law was considered and approved. As set out above, the Tribunal accepts the evidence of Mr. Corrales. The issue with which the Tribunal has had to grapple is whether that evidence satisfactorily establishes that the intention of Mr. Corrales (and also Mr. Capriles) for Article 22 to constitute a consent to ICSID jurisdiction was conveyed to the Economic Cabinet and the Council of Ministers, that it was accepted by these bodies, and then acted upon.
170. The Tribunal by majority does not consider that the direct evidence before it establishes with sufficient certainty that the intention of Messrs Corrales and Capriles for Article 22 to be a specific consent to ICSID jurisdiction under Article 25 of the ICSID Convention was conveyed to, and then accepted and acted upon, by either the Economic Cabinet or the Council of Ministers.
171. In the view of the majority of the Tribunal, given the uncertainty of the drafting adopted in Article 22 which discloses no plain meaning, and its clear difference from the consent to jurisdiction contained in the bilateral investment treaties already then entered into by Venezuela, the evidence must show that Article 22 reflected an intention on the part of the Economic Cabinet and the Council of Ministers to effect consent to ICSID jurisdiction.
172. The evidence before the Tribunal in relation to this critical question is addressed in the following paragraphs.
173. In paragraph 14 of the Witness Statement of Mr. Corrales he says:

"I particularly remember that in the review by the Economic Cabinet, we discussed the issue of international arbitration, and only one of the persons in the meeting opposed the proposal made by the drafters that the investment law should provide foreign investors with the right to pursue international arbitration as a means to resolve disputes with the Republic".<sup>161</sup>

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<sup>160</sup> The Tribunal notes that the Respondent submits that the legislator was President Chávez (Hearing on Jurisdiction Transcript Day 3, 556:18-20), but accepts the submission of the Claimant that President Chávez acted through the Council of Ministers (Hearing on Jurisdiction Transcript Day 3, 596:5-20).

<sup>161</sup> Set out at [114] above.

174. This falls short of evidence that Article 22 was intended itself to be the consent to jurisdiction required by Article 25 of the ICSID Convention. It is merely a general reference to international arbitration.

175. In paragraph 20 of the Second Witness Statement of Mr. Corrales, he says:

“I also confirm that I understood that I was authorised to include such consent in the investment law in order to provide appropriate protection to foreign investors in Venezuela, with the intention to attract them and to maintain them in the country. Moreover, I confirm that both the Economic Cabinet and the Council of Ministers agreed with that intention which was made clear in the presentations I made to the two bodies and their discussion in which I participated”.<sup>162</sup>

176. Again, this evidence falls short of establishing that the Economic Cabinet and the Council of Ministers was told that Article 22 of the Investment Law was intended to be the consent required by Article 25 of ICSID Convention.

177. The Tribunal has also carefully considered Mr. Corrales’ oral testimony, in particular his answers to questions from the Tribunal about meetings he had with the Economic Cabinet and the Council of Ministers.<sup>163</sup> Mr Corrales’ evidence was that there was no mention of ICSID arbitration at the meeting of the Economic Cabinet or at the meeting of the Council of Ministers. Mr. Corrales’ evidence in response to further questions from the Tribunal, does not establish that any intention on the part of Mr. Corrales (or Mr Capriles) to the effect that Article 22 of the Investment Law established the consent required by Article 25 of the ICSID Convention, was conveyed to the meeting of the Economic Cabinet or the Council of Ministers.<sup>164</sup> Nor does the evidence of Mr. Corrales indicate that a provision with the intended effect of establishing consent to ICSID jurisdiction (the importance of which Mr. Corrales was aware) was agreed to by those who were present at either meeting.

178. The Tribunal considers by a majority that there is no direct evidence before it that establishes the intention of the legislator (in this instance, the Economic Cabinet and the Council of Ministers chaired by the President of Venezuela) to grant consent to ICSID jurisdiction by the terms of Article 22 of the Investment Law. In this regard, inferences that the Tribunal might be able to draw from the lack of evidence put forward by Venezuela, and the failure of Venezuela to produce documents requested by the Claimant, cannot be sufficient to establish the requisite intention. Other evidence referred to in this decision (including the oral testimony of Mr. Corrales,

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<sup>162</sup> Set out at [115] above.

<sup>163</sup> Hearing on Jurisdiction Transcript Day 1, 207:17- 208:10, ,258:10-11 .

<sup>164</sup> Hearing on Jurisdiction Transcript Day 1,181:13-182:1.

documents prepared by Mr. Corrales at the time of the preparation and enactment of the Investment Law (including Exhibits WCL-1 and WCL-3) and the Attorney General's submissions in *Fermin Toro*), though not inconsistent with an intention of the Respondent to provide consent to ICSID jurisdiction, is nevertheless also incapable of establishing that intention.

179. Accordingly, the Tribunal is not able to conclude on the evidence that Article 22 of the Investment Law was enacted by Venezuela with the intention of granting consent to ICSID jurisdiction, as required by Article 25 of the ICSID Convention. It follows that the Claimant is not able to establish that the Respondent has given its consent to ICSID arbitration in respect of its claims in the present case.

#### IV. COSTS

180. Each party seeks an order for costs in its favour.<sup>165</sup> The Tribunal does not, however, consider it is appropriate or necessary to make any order for costs that would require one party to make payment to the other. The Claimant advanced well-presented and reasonable arguments which were not ventilated in the previous three ICSID cases that considered Article 22 of the Investment Law. Further, the Claimant provided evidence not available to the tribunals in these previous ICSID cases. In these circumstances the Tribunal concludes that each party shall bear its own costs, and that the costs payable to ICSID shall be borne in equal shares by the Parties.

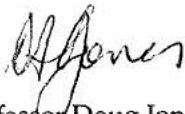
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<sup>165</sup> Request for Arbitration [92]; Respondent's Memorial [51]; Claimant's Counter-Memorial [205]; Claimant's Rejoinder [297]; Respondent's Reply Memorial [225]-[226].

## V. DECISION

181. For the foregoing reasons, the Tribunal decides that:

- (a) The International Centre for Settlement of Investment Disputes has no jurisdiction under Article 22 of the Venezuelan Decree with rank and force of law No. 356 on the Protection and Promotion of Investments of 3 October 1999 to hear this matter and this Tribunal has no competence to decide the merits of the case.
- (b) The Parties shall bear on an equal basis the fees and expenses of the members of this Tribunal and or the International Centre for Settlement of Investment Disputes.
- (c) Each party shall bear the fees and expenses incurred by it in relation to this proceeding.



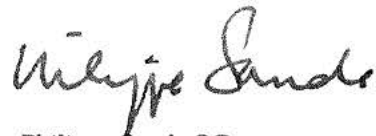
Professor Doug Jones AO  
President

22 May 2013



Professor Dr. Guido Santiago Tawil  
Arbitrator  
(Signed subject to the attached Dissenting  
Opinion)

16 May 2013



Professor Philippe Sands QC  
Arbitrator

10 May 2013