

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

**BRANDES INVESTMENT PARTNERS, LP
(CLAIMANT)**

v.

**THE BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)**

(ICSID CASE No. ARB/08/3)

AWARD

Members of the Tribunal

Mr. Rodrigo Oreamuno, *President*
Prof. Dr. Karl-Heinz, Böckstiegel, *Arbitrator*
Prof. Brigitte Stern, *Arbitrator*

Secretary of the Tribunal

Ms. Janet M. Whittaker

Representing the Claimant

Mr. Michael D. Nolan
Mr. Edward G. Baldwin
Ms. Elitza Popova-Talty
Mr. Frédéric G. Sourgens
Milbank, Tweed, Hadley & McCloy LLP
International Square Building
1850 K Street, N.W., Suite 1100
Washington, DC 20006
United States of America

Representing the Respondent

Mr. George Kahale, III
Mr. Mark H. O'Donoghue
Ms. Miriam K. Harwood
Mr. Hermann Ferré
Ms. Claudia Frutos-Peterson
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
United States of America
and
Ms. Gabriela Álvarez-Ávila
Curtis, Mallet-Prevost, Colt & Mosle, S.C.
Torre Chapultepec
Ruben Darío 281, Piso 9
Col. Bosque de Chapultepec
11580 México, D.F., México

Date of Dispatch: 2 August, 2011

TABLE OF CONTENTS

I.	GLOSSARY	3
II.	PROCEDURAL HISTORY.....	4
III.	BACKGROUND	8
IV.	THE PARTIES' SUBMISSIONS ON THE INTERPRETATION OF ARTICLE 22 OF THE LPPI	10
V.	THE TRIBUNAL'S POSITION.....	24
VI.	COSTS	33
VII.	DECISION.....	34

I. GLOSSARY

- (a) Brandes: Brandes Investment Partners, LP or the Claimant.
- (b) ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
- (c) LPPI: Decree No. 356 with rank and force of Law on the Promotion and Protection of Investments, published on 22 October, 1999 in the Official Gazette of the Bolivarian Republic of Venezuela, No. 5,390.
- (d) Memorial on Objections: Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 15 April, 2009.
- (e) Counter-Memorial: Counter-Memorial of Brandes Relating to Respondent's Jurisdictional Objection dated 30 June, 2009.
- (f) Rejoinder: Rejoinder of Brandes Relating to Respondent's Jurisdictional Objections dated 15 October, 2009.
- (g) Reply: Reply Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 1 September, 2009.
- (h) Claimant's Post-Hearing Memorial: Claimant's Post-Hearing Brief Regarding Respondent's Jurisdictional Objections dated 15 December, 2010.
- (i) Respondent's Post-Hearing Memorial: Post-Hearing Brief on Objections to Jurisdiction of the Bolivarian Republic of Venezuela dated 15 December, 2010.
- (j) Venezuela: The Bolivarian Republic of Venezuela or the Respondent.

II. PROCEDURAL HISTORY

1. On 14 February, 2008, Brandes Investment Partners, LP, a United States registered investment adviser, filed with the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) a Request for Arbitration (the “Request”) against the Bolivarian Republic of Venezuela. On 24 March, 2008, the Centre registered the Request.
2. The Claimant is represented in this proceeding by the law firm of Milbank, Tweed, Hadley & McCloy LLP in Washington, DC. Since 22 February, 2008, the Respondent has been represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York and SC in Mexico City.
3. By letter of 28 March, 2008, the Claimant appointed Professor Dr. Karl-Heinz Böckstiegel, a German national, as arbitrator.
4. By letter of 14 May, 2008, the Respondent appointed Professor Brigitte Stern, a French national, as arbitrator.
5. As the Tribunal was not constituted within 90 days of registration of the Request, by letter of 12 September, 2008, the Claimant requested the appointment of the third presiding arbitrator by the Chairman of the ICSID Administrative Council, as provided for under Article 38 of the ICSID Convention and Rule 4 of the Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”). On 5 December, 2008, the Chairman of the ICSID Administrative Council appointed Dr. Robert Briner, a national of Switzerland, as President of the Tribunal.
6. All of the arbitrators having accepted their appointments, the Tribunal was constituted on 8 December, 2008. Ms. Katia Yannaca-Small, Senior Counsel at ICSID, was appointed as Secretary of the Tribunal.
7. On 15 December, 2008, having consulted with the Parties and the Centre, the Tribunal scheduled the first session of the Tribunal to take place on 29 January, 2009, at the World Bank’s Paris Conference Center. On the same date, the Secretary of the Tribunal circulated a provisional agenda to the Parties, who were invited to confer and to advise the Tribunal, by no later than 16 January, 2009, of any points on the provisional agenda about which they were able

to reach agreement. The Parties were also invited to notify the Tribunal of any other items that they wished to see included in the agenda. By joint submission of 16 January, 2009b the Parties communicated to the Tribunal their positions and views on the items of the provisional agenda.

8. On 19 December, 2008, the Respondent filed its Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules.

9. On 12 January, 2009, the Claimant submitted its Response to Respondent's Preliminary Objections of 19 December, 2008.

10. The first session of the Tribunal and the hearing on the Respondent's Preliminary Objections were held on 29 January, 2009, at the World Bank's Paris Conference Center. Present at the session were:

Members of the Tribunal

Dr. Robert Briner, *President*

Prof. Dr. Karl-Heinz Böckstiegel, *Arbitrator*

Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Mrs. Katia Yannaca-Small, *Secretary of the Tribunal*

Representing the Claimant

Mr. Michael D. Nolan, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Frédéric Sourgens, *Milbank, Tweed, Hadley, & McCloy LLP*

Representing the Respondent

Mr. George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Mr. Mark H. O'Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle SC*

Mr. Carlos Arvelaiz, General Counsel of the Ministry of Telecommunications and Information Technology, *Bolivarian Republic of Venezuela*

Ms. Alejandra Hidalgo, Ministry of Telecommunications and Information Technology, *Bolivarian Republic of Venezuela*

11. Paragraph 14 of the Minutes of the First Session reads as follows:

“Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20 (1) (c) and 31)

Respondent objects to the Tribunal’s jurisdiction. Claimant submits that the Tribunal has jurisdiction to address the merits of this proceeding. In accordance with Arbitration Rule 41, and as agreed during the session, Respondent’s jurisdictional objection, limited to the interpretation of Article 22 of the Venezuelan Foreign Investment Law as a basis for jurisdiction in this case, shall be addressed by the Tribunal prior to consideration of the merits of the claim asserted in the Request for Arbitration.

At the session, the Parties have agreed to and the Tribunal confirmed the following schedule for briefing on Respondent’s jurisdictional objections ...”

12. At the first session of the Tribunal, counsel for both Parties orally presented their positions regarding the Respondent’s preliminary objections under Rule 41(5) and answered questions posed by the Members of the Tribunal.

13. The Tribunal’s Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules dated 2 February, 2009 was notified to the Parties on 4 February, 2009. A reasoned decision was provided to the Parties on 3 April, 2009.

14. The Respondent filed its Memorial on Objections to Jurisdiction on 15 April, 2009. On 30 June, 2009, the Claimant filed its Counter-Memorial on Jurisdiction. The Respondent filed its Reply on Jurisdiction on 1 September, 2009, and the Claimant filed its Rejoinder on Jurisdiction on 15 October, 2009.

15. By letter of 28 July, 2009, Dr. Briner submitted his resignation to his co-arbitrators and the Secretary General of ICSID due to ill health. In accordance with ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy created by Dr. Briner’s resignation could be filled.

16. The Parties were unable to agree on a candidate for president of the Tribunal to replace Dr. Briner. Accordingly, by letter of 20 November, 2009, the Claimant requested that ICSID proceed with the appointment of the new President pursuant to ICSID Arbitration Rule 11 (1). After due consultation with the Parties, on 22 December, 2009, the Chairman of the ICSID Administrative Council appointed Mr. Rodrigo Oreamuno, a national of Costa Rica, as the third and presiding arbitrator in this case. On 23 December, 2009, upon Mr. Oreamuno’s acceptance of his appointment, the ICSID Secretary-General confirmed that the proceeding had resumed.

17. On 9 September, 2010, Ms. Janet Whittaker was appointed as Secretary of the Tribunal, following the conclusion of Ms. Katia Yannaca-Small's secondment to ICSID from the Organisation for Economic Co-Operation and Development.

18. An oral hearing on jurisdiction was held at the offices of the World Bank in Washington, DC on 15 and 16 November, 2010. Present at the hearing were:

Members of the Tribunal

Mr. Rodrigo Oreámuno, *President*

Prof. Dr. Karl-Heinz Böckstiegel, *Arbitrator*

Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Ms. Janet M. Whittaker, *Secretary of the Tribunal*

Representing the Claimant

Mr. Michael D. Nolan, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Edward G. Baldwin, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Frédéric Sourgens, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Andrés Mezgravis, *Mezgravis y Asociados*

Mr. Ian Rose, *Brandes Investment Partners, LP*

Ms. Roberta Loubier, *Brandes Investment Partners LP*

Representing the Respondent

Ms. Miriam K. Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Mr. Mark H. O'Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Claudia Frutos-Peterson, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Katiria Calderón, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Elisa Botero, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Dr. Jesús Centeno, *Bolivarian Republic of Venezuela*

19. Following the hearing, the Parties submitted Post-Hearing Memorials on 15 December, 2010.

20. The Tribunal deliberated in New York City on 14 January, 2011.

21. The Tribunal has taken into account all of the pleadings, documents and testimony submitted in this case.

22. The issuance of this Award constitutes the closure of this proceeding.

III. BACKGROUND

23. On 2 February, 1999, Mr. Hugo Chávez Frías took office as the President of the “Republic of Venezuela”, as it was then named. Soon after he took office, a Constituent Assembly was appointed to draft a new Political Constitution to replace the 1961 Constitution. The new Constitution was adopted on 20 December, 1999.

24. As a result of a sharp decline in the price of oil during 1998, when President Chávez took office in February, 1999, the economy of his country was in a difficult situation. However, by the end of 1998, oil prices had started to increase and, by the end of 1999, oil prices were almost treble those in 1998.¹

25. As part of its efforts to reactivate the economy, the Government of Venezuela promulgated the Law on the Promotion and Protection of Investments (LPPI). It was enacted as an “executive decree with the rank and force of Law” by President Chávez, exercising the powers vested in him by the new Political Constitution, on 3 October, 1999, and published in the Official Gazette on 22 October, 1999.

26. As indicated in paragraphs 11 and 14 of the Award, the Respondent objected to the jurisdiction of ICSID over, and the competence of the Tribunal to resolve, the dispute between the Parties; the Claimant opposed Venezuela’s objections and asserted that this Tribunal does have competence to resolve the existing dispute between the Parties.

27. The Request for Arbitration filed by Brandes is essentially based on the contention that Article 22 of the LPPI contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction. The Respondent asserts that this statement is not correct. In essence, this is the only issue that is before the Tribunal at this stage of the proceeding.

¹ Reply, ¶ 13.

28. The Tribunal has considered carefully the extensive arguments on factual and legal issues presented by the Parties in their written and oral presentations, as well as the experts' opinions and other documentation provided for the record. All of these documents have been extremely useful to the Tribunal. In this Award, the Tribunal analyzes the Parties' arguments that it considers to be most relevant to its decision about the Respondent's jurisdictional objection referenced at paragraph 27 above. The reasoning of the Tribunal, even when it does not refer expressly to all of the arguments made by the Parties, is based on all of their arguments with respect to the factors considered by the Tribunal to be determinative in deciding this question.

29. The Parties based the arguments contained in their written and oral presentations on numerous decisions of other arbitral tribunals and courts. For this reason, the Tribunal considers it to be convenient to set forth some preliminary observations of a general nature on this subject.

30. First, the Tribunal considers it to be useful to establish from the outset that it considers that its task at this stage of this proceeding is, specifically, to analyze the scope of Article 22 of the LPPI and other provisions of Venezuelan law, in order to resolve the dispute that has arisen between the Parties about this issue. For this purpose, it shall consider the relationship between Article 22 and other relevant legal norms of the Bolivarian Republic of Venezuela, and Article 25 of the ICSID Convention. When interpreting the latter text, the Tribunal shall take into account the provisions of Article 31 of the Vienna Convention on the Law of Treaties, which provides in particular that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning given to the terms of the treaty, in their context and in light of its object and purpose.

31. The Tribunal does not consider that the decisions of other arbitral tribunals are decisive in resolving this matter. Furthermore, it is evident that those decisions are not binding on this Tribunal. However, this does not preclude this Tribunal from considering the substance of decisions rendered by other arbitral tribunals, and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided at this stage of the proceeding.

IV. THE PARTIES' SUBMISSIONS ON THE INTERPRETATION OF ARTICLE 22 OF THE LPPI

32. The Tribunal analyzes below the methodologies proposed by each of the Parties for interpreting Article 22 of the LPPI correctly. The article provides as follows:

“Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (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 using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable.”²

33. Opinions have been expressed by the Parties during this proceeding to the effect that the content of Article 22 of the LPPI is clear. The Bolivarian Republic of Venezuela considers this to be the case, stating that this article does not provide the consent of that State to ICSID jurisdiction. The Claimant maintains that there is no doubt that the article does provide such consent.

34. Doctrine and jurisprudence addressing the issue of the consent to arbitration have noted that such consent may be given by different means, and have recognized the possibility that it may be expressed not only through national legislation, but also through treaties on the protection of investments:

“Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings.”³

² See Ex. R-15.

³ See Ex. Pellet-18, Christoph Schreuer, *International Centre for Settlement of Investment Disputes, Dispute Settlement, 2.3. Consent to Arbitration*. United Nations Conference on Trade and Development (2003) at p. 6.

“As indicated by the Report of the Executive Directors ... the drafters of the Convention, which entered into force eight years prior to the enactment of Article 8, anticipated that a State might unilaterally give advance “consent in writing” to the Centre's jurisdiction through investment legislation.”⁴

35. As the Parties to this proceeding have agreed,⁵ the interpretation of a legal provision and, specifically, in this case, Article 22 of the LPPI, should begin with a **purely grammatical analysis**; if this initial analysis fails to define clearly the meaning of the provision, it then becomes necessary to examine the **context** in which it was enacted, including a review of other provisions of Venezuelan law relating to the same subject and, in particular, having regard to the hierarchy of norms of the Venezuelan legal system as set forth in the Political Constitution of that State. Other elements that must be used to interpret with clarity the content of Article 22 are the **circumstances** in which it was enacted and the **goals** that it was intended to achieve. The Tribunal shall follow those guidelines in the following analysis.

36. Given that Article 22, insofar as it is relevant to this arbitration, is a unilateral declaration by Venezuela, it is obvious that the initial process of interpretation should be conducted according to the parameters set by the Republic's legal system, starting with the Political Constitution, which is the supreme norm of the State. However, because in the context of this proceeding the outcome of that interpretation has direct effects on the operation of Article 25 of the ICSID Convention, the conclusions resulting from that initial analysis must be read in accordance with the principles of international law⁶.

37. Article 22 refers to the following disputes:

- a. Those 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;

⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case ARB/84/3), Decision on Preliminary Objections on Jurisdiction dated 14 April, 1988 (“SPP”), ¶ 98.

⁵ Counter-Memorial, ¶ 42; Reply, ¶ 42.

⁶ *See also Cemex Caracas Investment B.V., Cemex Caracas II Investment B.V. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/08/15), Decision on Jurisdiction dated 30 December, 2010, ¶ 79 (“Cemex”) (“Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States”).

- b. Those to which the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) apply;
- c. The disputes to which the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) apply.

The article provides that such disputes "... shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides"

38. As concerns the first two types of disputes, the Parties agree on the interpretation of the article. They do not agree with respect to the last type. This difference in interpretation is the basis for the dispute being resolved in the Award.

39. The Parties performed their own **grammatical analysis** of Article 22 which led them to opposite conclusions.

40. The Respondent concludes that:

"As explained in more detail below, Article 22 of the Investment Law does not constitute consent by the Republic to arbitrate the investment dispute alleged by Claimant ...

By its terms, Article 22 only provides for submission to arbitration 'according to the terms of the respective treaty or agreement, if it so provides'. It does not itself constitute a standing, general consent to ICSID jurisdiction of any investment dispute with an investor from a country that is a signatory to the ICSID Convention"⁷

41. The Claimant interprets it in a different manner:

"A grammatical construction of Article 22 therefore comes to the result that Article 22 is a standing consent to international arbitration with regard to disputes that may fall within the purview of the ICSID Convention. The verb tenses used in Article 22 make clear that the dispute does not already need to be subject to ICSID arbitration for (sic) obligation to submit it to international arbitration to apply. Rather, the dispute must only be one amenable to ICSID arbitration pursuant to the Convention – or one to which the ICSID Convention 'may be applicable'. The combination of the subjunctive mood with regard to the applicability of the ICSID Convention to the dispute and the imperative mood with

⁷ Memorial on Objections, ¶ 5.

regard to the submission of the dispute to arbitration unequivocally constitutes a standing ICSID consent by Respondent by the terms to Article 22.”⁸

42. The Claimant insists that, not only does a grammatical interpretation lead inexorably to the conclusion that Article 22 of the LPPI contains the consent of Venezuela to ICSID jurisdiction, but also that this position is strengthened by an analysis of the **context** of that article. In this process, it starts by commenting on the provisions of Article 258 of the **Political Constitution** of that country, the terms of which provide that:⁹

“The Law shall organize the justice of peace in the communities. Peace Justices shall be elected by universal, direct and secret vote pursuant to law.

The Law shall promote arbitration, conciliation, mediation and any other alternative means for the settlement of disputes.”

43. The Respondent disagrees with Brandes’ position and asserts that the relevant constitutional provision cannot be used as a basis upon which to claim a unilateral submission by the Bolivarian Republic of Venezuela to ICSID, purportedly provided for by Article 22:

“... Investment Law reflects a consistent policy of expanding domestic, rather than international, arbitral remedies, except in the context of bilateral or multilateral investment treaties granting reciprocal benefits to Venezuelan investors. This preference for Venezuelan arbitration is entirely consistent with both Article 258 of the Constitution, which refers to promotion of multiple forms of alternative dispute resolution within the Venezuelan legal system, and Article 5 of the Investment Law, which requires that Venezuelan investors be given the same treatment as international investors.”¹⁰

44. In Brandes’ view, other provisions of the LPPI support its assertion that Article 22 provides Venezuela’s consent to ICSID jurisdiction.¹¹ Venezuela does not share that opinion. In order to bolster their respective points of view, the Parties also analyze **other articles of the LPPI**.

⁸ Counter-Memorial, ¶ 53.

⁹ *Id.*, ¶ 67.

¹⁰ Reply, ¶ 85.

¹¹ Rejoinder, ¶¶ 62-63.

45. According to Venezuela:

“Even as so limited, the portion of Article 22’s text referring to disputes governed by the ICSID Convention did not define the scope of the dispute to be submitted to arbitration. By contrast, Article 21 referred to disputes ‘concerning the interpretation and application of the provisions of this Decree-Law,’ while Article 23 covered ‘any dispute arising in connection with the application of this Decree-Law.’ Similar language appeared in each of the BITs executed by Venezuela as of October 1999, usually defining the scope of the dispute to be arbitrated in terms of a violation of the terms of the BIT.”¹²

“By giving investors the right to select Venezuelan arbitral tribunals in Article 23, the Republic effectively gave its standing, unilateral consent to national arbitration of disputes arising under the Investment Law. This consent, which was given to both national and foreign investors, represented a significant expansion of rights for investors to the extent that they were offered a forum in which arbitrators of more specialized expertise would consider their claims.”¹³

46. Brandes contends the opposite and states that:

“Provisions of the Investment Law other than Article 22 speak of commercial arbitration in terms of ‘may submit’ and as such are phrased in terms that are less mandatory than the provision in Article 22. Brandes’ argument in its Counter-Memorial and in Professor Caron’s expert opinion was *e contrario*: if the legislator would have wished to use optional submission language it could have done so. Thus, Article 18 clearly requires an additional written consent for commercial arbitration to be applicable. Similarly, the reference in Article 23 operates as a “may” submit to arbitration.”¹⁴

“There are also significant questions as to how, structurally, Article 23 would operate as an independent arbitration consent. Thus, one might argue, similar arbitration provisions both require a special juridical stability agreement set out in Article 18 of the Investment Law and are couched in optional terms in Article 23. One therefore could reasonably ask why there would be specific requirements for obtaining a similar commercial arbitration clause as part of an investment agreement that was already applicable as a matter of law? Respondent nevertheless has conceded Article 23 is a standing consent to arbitration. A fortiori, Article 22 also must be considered as consent, given its own mandatory terms.”¹⁵

¹² Reply, ¶ 30.

¹³ *Id.*, ¶ 32 (emphasis supplied by the Respondent).

¹⁴ Rejoinder, ¶ 62.

¹⁵ *Id.*, ¶ 63.

47. In addition to analyzing the context of Article 22 of the LPPI, the Parties refer to the **circumstances** relating to the enactment of that article. They express their positions as set forth in the paragraphs that follow.

48. The Respondent refers to several **decisions of the Venezuelan Supreme Tribunal of Justice**, and in particular to a decision issued in respect of a Request for Interpretation filed by Hildegard Rondón de Sansó, Álvaro Silva Calderón, Beatrice Sansó de Ramírez *et al*, acting on behalf of the Bolivarian Republic of Venezuela, relating to Article 258 of the Political Constitution, (case number 2008-0763), in which the Court examined the text of Article 22 and concluded that:

“From this it follows then, that the Law on the Promotion and Protection of Investments does not contain in itself a general unilateral statement of submission to the 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***, which in the case of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA), is confirmed since its content is express in this respect – *Viz.* Articles 57 and 58 of this Convention and 1, 2 and 4 of Annex II; a situation that does not exist in the case of Article 25 of the ICSID Convention mentioned above (and as it has been unanimously sustained in the international arena, as discussed *supra*, where it has been pointed out that the mere signing of the Convention does not constitute alleged purported unilateral offer).”¹⁶

49. Contrary to Venezuela, Brandes questions the objectivity of the decisions of the Supreme Tribunal of Justice upon which the State places so much emphasis and states that:

“The decision of the constitutional chamber was subject to a dissent. The dissent noted that the ***constitutional*** chamber had not addressed a constitutional question, at all. It concluded that the interpretation of Article 22 had been reached *ultra vires*.”¹⁷

¹⁶ See Ex. RL-18 (English translation provided by the Respondent), Supreme Tribunal of Justice of Venezuela, Case No. 2008-0763, 17 October, 2008 at p. 48 (emphasis in the original).

¹⁷ Counter-Memorial, ¶ 28 (emphasis supplied by the Tribunal).

“On June 16, 2009, the constitutional chamber of the supreme court issued what it styled a ‘Nota de Prensa’, or press release, purporting to summarize prior rulings on sovereign immunity. In its press release, the constitutional chamber stated that it deemed Respondent immune from enforcement of ICSID awards rendered against Respondent pursuant to Article 22 of the Investment Law. Also by press release, the constitutional chamber purports to *arrogate* to Respondent the right to ‘denounce or modify the agreement signed before 1999 with other countries in which resolution of disputes was submitted to international bodies’.”¹⁸

50. Other elements that the Claimant relies upon to support its position that Article 22 contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction are the **websites** of the embassies of that country in Korea, Switzerland and the United States, and of its consulate in Barcelona:

“All of these promotional efforts establish *first* that Respondent very much wanted the Investment Law read; *second* that it knew of and advertised the importance of international arbitration as a dispute resolution mechanism and *third* that its statements were express that the Investment Law included an international arbitration mechanism.

As Respondent explains, such promotional efforts have been recognized as significant in prior ICSID decisions”¹⁹

“Venezuela advertised internationally that the Investment Law opened the possibility to resort to international arbitration. For example, the website of the Respondent’s Foreign Ministry for its Embassy in Korea”²⁰

“... Respondent’s assertions in the Reply are contradicted by its own advertisements to foreign investors. For example, contrary to statements in the Reply, Respondent advertised on the websites of its Embassy in Switzerland and its Consulate in Barcelona, as well as in communications to foreign investors, that ‘the policy of promoting investment is a reflection of the constitutional design with regard to economics. The Constitution of 1999 foresaw ... a preference for mechanisms of alternative dispute resolution, like arbitration, conciliation and mediation’ In the United States, Respondent’s embassy posted similar news reports, stating, for example, ‘The Venezuelan Commercial Arbitration Law offers great advantages to our country as a neutral zone for various countries’”²¹

¹⁸ *Id.*, ¶ 29 (emphasis supplied by the Tribunal).

¹⁹ Rejoinder, ¶ 82 (emphasis supplied by the Claimant).

²⁰ Counter-Memorial, ¶ 84.

²¹ Rejoinder, ¶ 5.

51. Venezuela minimizes the relevance of what is expressed in those websites and states that none of them announces its alleged submission to ICSID jurisdiction:

“Claimant's Statement of Facts cites no contemporaneous speeches, publications or communications by any governmental officials or agencies indicating that Article 22 of the Investment Law was intended to grant the Republic's unilateral offer of consent to submit all investment disputes to international arbitration before ICSID. Nor does it cite any news articles or commentaries on the Investment Law immediately after its enactment.”²²

52. In paragraph 39 of its Rejoinder, Brandes notes that a semi-governmental entity called **CONAPRI** announced the enactment of the LPPI in September 1999. It also stated that the “policy of promotion of investments’ favoring arbitration was advertised as reflected in the Investment Law which provides for international arbitration against the state as a means of investor-state dispute resolution.” The same reference is made by Brandes at paragraph 79 of the Rejoinder, where it states that the CONAPRI publication was addressed to foreign investors and referred specifically to dispute resolution mechanisms.

53. The Respondent disagrees with the statements made by Brandes and maintains that the documents, which Brandes uses to show the existence of a purported announcement that Venezuela consented to ICSID jurisdiction, do not support that assertion. Specifically, it alleges that the CONAPRI bulletin referred to above, which was issued before the enactment of the LPPI, supports the Respondent’s position that Article 22 recognized the obligations undertaken under the existing treaties but did not create a new obligation and, therefore, does not constitute an open consent to ICSID arbitration.²³

54. Venezuela also added that:

“There is no evidence that investors or their Venezuelan legal advisors regarded Article 22 as consent to ICSID arbitration or to be of special significance for foreign investors. There was no mention of this possibility, for example, in the March 2000 study titled ‘Legal Regime for Foreign Investment in Venezuela,’ which was published by the National Council for the Promotion of Investments (CONAPRI), a public-private entity established to promote investments in Venezuela.”²⁴

²² Reply, ¶ 33.

²³ Respondent’s Post-Hearing Memorial, ¶ 36(iv).

²⁴ Reply, ¶ 34.

55. In several of its presentations, Brandes referred to certain materials that it referred to as “contemporaneous documentary evidence.”²⁵ It asserts that the note published on 30 April, 1999, by the Central Office of the Presidency for Coordination and Planning (“**CORDIPLAN**”), was “... the equivalent of legislative history given that Article 22 was an executive decree for which CORDIPLAN had responsibility.”²⁶

56. The Respondent disagrees completely with this position and says, in brief, the following:

“The statements attributed to then President-elect Chavez at the January 8, 1999 meeting (Ex. C-10) and the commentary in the CORDIPLAN Economic Transition Plan (Ex. C-30) are general in nature and make no mention of Article 22.”²⁷

57. The Parties have discussed extensively the relevance of Mr. **Werner Corrales’ positions** to the interpretation of Article 22 of the LPPI. As part of its explanation of the circumstances in which the law was enacted, the Claimant contends that, in his publication entitled “Some Ideas Concerning the Design of a Legal Regime of Promotion and Protection of Investments in Venezuela”,²⁸ Mr. Corrales, who was a government official involved in the drafting of the LPPI, affirms that the law contains the consent of Venezuela to ICSID arbitration.²⁹ Elsewhere in its Counter-Memorial, Brandes emphasizes the important role played by Mr. Corrales and by his publication, as support for its assertion that the LPPI contains the unilateral consent of Venezuela to ICSID arbitration.³⁰

58. Likewise, in several parts of its Rejoinder, in particular, at paragraph 21, Brandes notes that Mr. Corrales, like other officials of the Government of Venezuela, confirmed that Article 22 of the LPPI was drafted to provide for Venezuela’s consent to ICSID jurisdiction. At footnote

²⁵ See Letter from Brandes to the Tribunal dated 10 January, 2011 with respect to the Decision on Jurisdiction in *Cemex* at p. 2.

²⁶ *Id.*, at pp. 3-4.

²⁷ See Letter from the Bolivarian Republic of Venezuela to the Tribunal dated 10 January, 2011 with respect to the Decision on Jurisdiction in *Cemex* at p. 2.

²⁸ See Ex. C-32,

²⁹ Counter-Memorial, ¶ 3, fn. 6.

³⁰ *Id.*, ¶ 83, fn. 230.

number 64 to that paragraph, Brandes refers not only to the publication entitled “Some Ideas Concerning the Design of a Legal Regime of Promotion and Protection of Investments in Venezuela”, but also to another publication made by Mr. Corrales, together with Mrs. Marta Rivera, entitled “Some Ideas on the New Regime of Promotion and Protection of Investments in Venezuela”,³¹ and to a lecture by Mr. Corrales at CEDCA.³²

59. At paragraph 99 of its Reply, Venezuela minimizes the authority of Mr. Corrales and refers to him as “an economist described by Claimant as a ‘drafter of the Investment Law’”; in the paragraphs that follow, Venezuela expresses its opinion about him. In paragraph 101, it adds that in the decade following the enactment of the LPPI, “... Mr. Corrales played no discernable role in promoting or commenting upon the Investment Law” and minimizes his involvement in the drafting of this law and his ability to comment on it objectively.

60. In its Post-Hearing Memorial, the Respondent insists on questioning Mr. Corrales’ ability to interpret Article 22 and points out that he did not make a declaration as a witness in *Mobil v. Venezuela* or in any other case.³³

61. In their efforts to interpret the true meaning of Article 22 of the LPPI, the Parties also analyze the **historical circumstances** in which that law was enacted. In its Counter-Memorial,³⁴ Brandes describes the circumstances prevailing in Venezuela in 1999. In particular, it refers to the following facts:

- a. There was a capital flight, which was accelerated as a result of the election of President Hugo Chávez.³⁵
- b. The negotiations to conclude a BIT between Venezuela and the United States of America (at that time Venezuela’s most important commercial partner) had ceased.³⁶

³¹ See Ex. C-6.

³² See Ex. C-11.

³³ Respondent’s Post-Hearing Memorial, ¶ 34, fn. 71.

³⁴ Counter-Memorial, ¶¶ 8-13.

³⁵ *Id.*, ¶ 3.

- c. When President Chávez took office “... Venezuelan heavy crude continued to trade below US\$10-a-barrel, a level that provided comparatively little commercial incentive to U.S. investors to shoulder significant Venezuelan political risk.”³⁷

62. In Brandes’ view, these circumstances and the pressing need to attract foreign investment to its territory led the Respondent to make the concession to submit to ICSID arbitration that is contained in Article 22:

“The law was prepared while BIT negotiations with the United States, Venezuela’s largest trading partner, were stalling. Its stated purpose was to attract foreign investment and provide a stable investment environment – a purpose turned urgent by the capital flight from Venezuela exacerbated by the election of Hugo Chávez to the presidency. The context confirms that Article 22 was meant as a consent to arbitrate investment disputes arising under the law with foreign, and particularly US investors in a neutral forum such as ICSID while such foreign investors were not yet protected by bilateral investment treaties.”³⁸

63. Brandes concludes that, if the LPPI is analyzed in light of the historical circumstances in which it was enacted, its objective to attract foreign investors becomes evident. Brandes asserts that, for this reason, it was structured in a manner similar to bilateral investment treaties (providing for the definition of an international investment, fair and equal treatment, no discrimination between international and national investors, most favored nation treatment, etc.). It concludes that, for this reason, there is no doubt that Article 22 provides Venezuela’s consent to ICSID arbitration, which is characteristic of bilateral investment treaties.

³⁶ *Id.*, ¶ 9.

³⁷ Counter-Memorial, ¶ 10.

³⁸ *Id.*, ¶ 37.

64. The Respondent disagrees with this statement and asserts that, although the LPPI had the clear purpose of attracting investors, the economic situation of the country at that time was not as serious as that described by the Claimant.³⁹ It adds that the prices of oil – a product that is essential to the Venezuelan economy – had increased strongly in the months during which the LPPI was discussed.⁴⁰

65. At paragraphs 12 to 15 of its Reply, the Bolivarian Republic of Venezuela categorically opposes the analysis made by Brandes and states that it ignores the fact that the price of oil almost trebled during the period between December 1998 and December 1999, thereby completely changing that country's economy (it asserts that the price was US\$8.85 per barrel in December 1998, increasing to US\$25 at the end of 1999).

66. Venezuela concludes at paragraph 15 that, although the purpose of the LPPI was to encourage foreign investment, the economic circumstances of the country were not so bad as to make a unilateral consent to ICSID arbitration necessary to achieve that purpose.

67. In their Post-Hearing Memorials, both Parties reiterate their respective points of view. Brandes notes at paragraph 23 that in August 1999, CORDIPLAN issued a publication stating that the recession suffered by the country was “the worst in forty years” and, concluded that a massive foreign investment was required to combat this recession. Venezuela, in paragraph 24 of its Post-Hearing Memorial, reaches the opposite conclusion: “... Claimant has failed to prove that the economic situation prevailing in Venezuela in 1999, occasioned by a collapse in oil prices, was so calamitous that the Government had no choice but to give an unprecedented unilateral consent to ICSID arbitration of all investment disputes in order to attract foreign investment.”

68. The issue of what **goals** the Law on the Promotion and Protection of Investments was intended to achieve is closely related to the historical circumstances in which the law was enacted. The Parties agree that the general purpose of the law was to attract foreign investment to Venezuela. However, aside from this initial agreement, they disagree entirely as to the key

³⁹ Reply, ¶ 15.

⁴⁰ *Id.*, ¶ 13.

issue under discussion: namely, whether Article 22 of the LPPI provides for the unilateral consent of Venezuela to ICSID arbitration.

69. Brandes maintains in its Counter-Memorial that “... viewed in its context, it is apparent that Article 22 was meant to function as an ICSID consent. Article 22 is part of a decree which is structured like, and provides similar protections than a bilateral investment treaty does, and therefore would reasonably be expected to provide comparable dispute resolution provisions.”⁴¹

70. Venezuela agrees with Brandes that the purpose of the LPPI was to attract foreign investment, but does not accept that Article 22 of that law constitutes a unilateral submission on its part to ICSID jurisdiction.

71. On the basis of its analysis of several decisions of the Supreme Tribunal of Justice, the Bolivarian Republic of Venezuela, at paragraphs 44 to 49 of its Memorial on Objections, asserts that consent to arbitration must be “**manifest, clear, and unequivocal.**”

72. In support of its contention, Venezuela also quotes the decision on jurisdiction issued on 8 February, 2005 in the case of *Plama Consortium Limited v. the Republic of Bulgaria* (ICSID Case ARB/03/24, ¶ 198), in which the tribunal stated the following:

“It is a well-established principle, both in domestic and international law, that such an agreement (of the parties to submit a matter to arbitration) should be clear and unambiguous.”

73. The Claimant asserts that, as expressed by Dr. Allan Brewer-Carias, in paragraph 43 of his report,⁴² “there is no legal provision in Venezuelan law requiring the consent for arbitration or the arbitration agreement to be clear and unequivocal.”

74. Brandes adds that Article 25 of the ICSID Convention only establishes one requirement for consent: namely, that it be granted in writing. It also states that the Report of the Executive

⁴¹ Counter-Memorial, ¶ 37.

⁴² See Declaration of Allan R. Brewer-Carias, 26 June, 2009.

Directors of the ICSID Convention confirms that there are no additional requirements or standards of “clarity” to express consent.⁴³

75. The Respondent claimed that, throughout its history, Venezuela has shown a certain degree of **hostility toward arbitration**:

“Professor Morles Hernández reviewed the history of arbitration in Venezuela at length. He stated: Venezuela is a country which belongs to a region traditionally viewed as resistant and even hostile towards arbitration, as is the Latin American region. Furthermore, it is the region in the world which has been the slowest to accept this method of dispute resolution.”⁴⁴

76. In this respect, Brandes states that:

“Finally, Respondent argues that the lack of promotional efforts on the part of Respondent either on the Investment Law as a whole or its dispute resolution mechanism means that it did not contain a standing consent to international arbitration. Respondent further alleges that this is consistent with its “traditional hostility” toward international arbitration. Neither statement by Respondent reflects the actual state of the promotional efforts that were ongoing at the time.”⁴⁵

77. The Claimant adds that:

“Respondent’s main contextual argument alleges that Article 22 must be read against a purported hostility to arbitration in Venezuela in 1999. Contrary to Respondent’s submission in the arbitration, ‘hostility’ to arbitration is not relevant to the intent of Article 22.

- Respondent in fact admitted that the subject matter of the Investment Law is arbitrable (Slide 128).
- The same subject matter was subject to international arbitration in BITs (Slide 128).
- Respondent conceded that key oil agreements concluded before 1999 contained ICC arbitration clauses (Slide 128).

⁴³ Counter-Memorial, ¶ 70.

⁴⁴ Reply, ¶ 89.

⁴⁵ Rejoinder, ¶ 78.

- Respondent’s postings on embassy websites flatly contradict this statement, advertising that Venezuela is the best country for international arbitration (Slide 129) ...”⁴⁶

78. The Claimant concludes that:

- “The Investment Law was an emergency measure, and as such not business as usual. A generalized hostility thus is not competent context for a specific emergency measure (Slide 128).
- Professor Brewer Carías further explained that the statements relied on by Respondent were taken out of context and referred to a historical attitude in the past and not contemporaneous sentiments about international arbitration in Venezuela.

Hostility to arbitration therefore is neither established nor is part of the circumstances of preparation of Article 22. This assertion is thus not relevant to an international law interpretation of Article 22.”⁴⁷

V. THE TRIBUNAL’S POSITION

79. As defined by the Parties at the first session of the Tribunal, at this stage of the proceeding, the Tribunal shall limit itself to the analysis of Article 22 of the LPPI. Other issues, even if related to the Tribunal’s jurisdiction were deferred for resolution, together with the substantive issues.⁴⁸ Consequently, the role of the Tribunal at this stage of the proceeding is only to decide whether Article 22 of the Law on the Promotion and Protection of Investments contains the consent of Venezuela to ICSID jurisdiction.

80. The Parties discussed extensively whether the interpretation of Article 22 should be made pursuant to the principles and rules of Venezuelan law or under the principles of international law. Venezuela maintains the first position and Brandes the latter.

81. It is clear to the Tribunal that, in view of the fact that Article 22 of the LPPI is a unilateral declaration of the Venezuelan State, it is necessary that the initial process of interpretation be conducted within the parameters set by the Republic’s legal system, based on its Political

⁴⁶ Claimant’s Post-Hearing Memorial, ¶ 35.

⁴⁷ *Id.*, ¶ 35.

⁴⁸ *See* Letter from the Tribunal to the Parties dated 23 April, 2009.

Constitution, which is the supreme norm of that country. However, because any conclusions that may be reached in the process of interpretation of that article must be applied to determine whether Venezuela granted its consent to ICSID jurisdiction under Article 25 of the ICSID Convention, it is necessary to take account of the principles of International Law to reach a definitive conclusion.

82. This approach has been taken by other arbitral tribunals:

“... the jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty interpretation ... Thus in deciding whether in the circumstances of the present case, Law N° 43 constitutes consent to the Centre’s jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.”⁴⁹

“Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of State’s.”⁵⁰

83. In the course of this proceeding, the Claimant and the Bolivarian Republic of Venezuela, in their written and oral presentations, have made significant efforts to interpret Article 22 from a grammatical perspective. As part of its efforts, Brandes has asserted that this article provides for Venezuela’s consent to ICSID jurisdiction. However, despite its assertion that it is clear, it devotes many pages and much time to reinforce its conclusion that the article contains the Republic’s consent to ICSID arbitration.

84. Venezuela also offers a grammatical interpretation and reaches the opposite conclusion, namely, that the State did not consent to ICSID jurisdiction by means of Article 22 of the LPPI.

⁴⁹ *SPP*, ¶ 61.

⁵⁰ *Mobil Corporation, Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela* (ICSID Case ARB/07/27), Decision on Jurisdiction dated 10 June, 2010, ¶ 85 (“*Mobil*”).

85. In spite of the laborious and thorough efforts of the Parties to scrutinize the meaning of Article 22 through grammatical interpretation, the Tribunal considers it to be unnecessary, for the reasons expressed in the next paragraph, to summarize precisely in the Award what the Claimant and the Respondent stated with respect to their grammatical analyses of that article.

86. The Tribunal has assessed very carefully the written and oral interpretations of the Parties concerning the content of Article 22 of the LPPI and the opinions of their respective experts about this matter. Its conclusion is that the wording of Article 22 of the LPPI is confusing and imprecise, and that it is not possible to affirm, based on a grammatical interpretation, whether or not it contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction.

87. In view of what is stated in the paragraph above, the Tribunal will analyze the **context** of Article 22, the **circumstances** in which the LPPI was enacted and the **goals** that its enactment sought to achieve.

88. To start this process, the Tribunal considers it to be essential to analyze other articles of the LPPI, which constitute the immediate context for Article 22.

89. The Tribunal observes first that, in fact, as pointed out by Brandes, the law has the characteristic structure and contents of many bilateral investment treaties. The following provisions confirm this assertion:

- a. "... international investments shall be entitled to fair and equal treatment, in accordance with international law standards and criteria, and shall not be subject to arbitrary or discriminatory measures ..." (Article 6);
- b. "... international investors ... shall have the same rights and obligations as those to which national investments and investors are entitled in similar circumstances ..." (Article 7);
- c. "There shall be no discrimination in treatment between international investments or investors because of the country of origin of their capital." (Article 8);
- d. "International investments and investors shall be entitled to the most favorable treatment ..." (Article 9); and

- e. “No confiscation shall be ordered or enforced, except in the exceptional cases provided for by the Constitution; and, as concerns the investments of international investors, by international law. Expropriations of investments or measures equivalent to an expropriation may only be made for causes of public or social interest, following the procedure legally established for these purposes, in a non-discriminatory manner and by means of a prompt, fair and adequate compensation.” (Article 11).

90. When reading the transcribed texts, several facts call one’s attention:

- a. The quoted provisions are actually similar to those usually appearing in a bilateral investment treaty;
- b. They are written in a direct language, which is easily understandable by any reader;
- c. If the drafters of those texts were able to express those ideas so clearly, why did they fail to do the same when establishing a fundamental guaranty for an investor such as ICSID arbitration?; and
- d. Articles 18.4 and 21 of the LPPI also refer to several forms of arbitration in a precise and clear manner.

91. Despite the similarities between the content of the LPPI and that of a BIT, the Tribunal does not find in the article that it has analyzed nor in any other article of the LPPI, any provision that would allow it to assert that it provides for Venezuela’s consent to ICSID jurisdiction.

92. The clarity of most provisions of the LPPI contrast with the confusing and ambiguous wording of Article 22. This fact obviously weakens the assertion made by Brandes that Venezuela consented to ICSID jurisdiction by means of Article 22.

93. The Tribunal indicated in the foregoing paragraphs that the content of the LPPI is very similar to that of several bilateral investment treaties. Therefore, it considers it to be appropriate to note for purposes of its analysis of the context of Article 22 that, at the time of the enactment of the LPPI, the Respondent had entered into bilateral investment treaties with the following countries: the Kingdom of the Netherlands, Chile, Argentina, Ecuador, Switzerland, Portugal, Barbados, Denmark, the United Kingdom, Lithuania, The Czech Republic, Spain, Perú,

Germany, Canada, Paraguay and Sweden.⁵¹ It subsequently entered into other similar treaties with The United Mexican States and with The Republic of Colombia.⁵²

94. Obviously, for purposes of the Award, the analysis of each of those bilateral investment treaties is unnecessary. However, the Tribunal notes that each of these treaties contains a submission to ICSID jurisdiction expressed in a similar manner, and in clear and precise language.

95. As part of its analysis of the context of Article 22, which is aimed at establishing its meaning, the Tribunal has studied the Parties' analyses of the provisions of the Political Constitution of the Bolivarian Republic of Venezuela, but could find only one provision that is relevant for the purposes of this proceeding. It is Article 258, which reads as follows in English:

“The Law shall organize the justice of peace in the communities. Peace Justices shall be elected by universal, direct and secret vote pursuant to law.

The Law shall promote arbitration, conciliation, mediation and any other alternative means for the settlement of disputes.”

96. Although the provision quoted above is clear with respect to arbitration, it is evident that the consent of Venezuela to ICSID jurisdiction cannot be inferred from this constitutional language.

97. The analysis of the context of Article 22 could be completed with the examination of other provisions of the Venezuelan legal system which may shed light on this issue. Nevertheless, the Parties did not submit arguments based on those supposed provisions. Accordingly, the Tribunal assumes that there is no other legal text issued by the relevant authorities of the Bolivarian Republic of Venezuela that may help to clarify the issue discussed in the Award.

98. As noted at paragraphs 48 and 49 of the Award, the Respondent attributes great importance to several decisions of the Supreme Tribunal of Justice, which concluded that the

⁵¹ See Ex. RL-5, Table, Consents to Arbitration in Venezuelan Bilateral Investment Treaties in Force as of October 1999. See also Reply ¶ 55, fn. 81.

⁵² *Id.*

LPPI does not contain the Respondent's consent to ICSID arbitration. This Tribunal has examined very thoroughly the content of the decisions of the highest court of Venezuela as cited by the Parties but reaffirms that such decisions are not binding on this Tribunal with respect to their interpretation of Article 22.

99. In addition to what is stated in the paragraph above, the Tribunal considers that the decisions of the Venezuelan authorities are not determinative for the purpose of resolving this dispute. The same conclusion was reached by the tribunal in *Cemex v. Venezuela*, which concluded that:

“The Tribunal adds that the same solution has been retained by the Permanent Court of Justice and the International Court of Justice which have made clear that a sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues. Thus the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal's decision on its competence.”⁵³

100. Brandes maintains that, in its eagerness to attract foreign investors, the Respondent announced and publicized in different ways the enactment of the LPPI, and also underscored that, in several of its announcements, Venezuela emphasized the fact that this law favored arbitration. Among the mechanisms which the Respondent – according to Brandes – used for this purpose, are the websites of its embassies in the United States of America, Korea and Switzerland, as well as that of its consulate in Barcelona. The Tribunal has analyzed those references thoroughly and has failed to find in them any express manifestation by the Respondent of its consent to ICSID jurisdiction.

101. Other instruments used by Venezuela to inform prospective investors about the enactment of the Law on the Promotion and Protection of Investments were the publications of the National Council of Promotion of Investments (CONAPRI), an entity established to promote investments in Venezuela. The Parties also disagree about the scope of those publications, as noted at paragraphs 52, 53, and 54 of the Award. Leaving aside the issue of whether a non-

⁵³ *Cemex*, ¶ 70 (citing *Electricity Company of Sofia and Bulgaria* (Preliminary Objections) (Belgium v. Bulgaria) dated 4 April, 1939, PCIJ Reports, Ser. A/B No. 77 (1989); *Aegean Sea Continental Shelf* (Greece v. Turkey) dated 19 December, 1978, ICJ Reports (1978) at p. 3; *Fisheries Jurisdiction* (Spain v. Canada) dated 4 December, 1998, ICJ Reports (1988) at p. 432). *See also Mobil*, ¶ 75.

governmental entity such as CONAPRI could express the intention of the Venezuelan government, the Tribunal has not found in the CONAPRI publications filed in the record, any assertion that supports the statement that Article 22 provides for Venezuela's consent to ICSID jurisdiction.

102. In the Tribunal's judgment, neither CORDIPLAN's publications nor the relationship of that entity with Mr. Werner Corrales may be used as a basis to support the statement made by Brandes that Article 22 of the LPPI provides for Venezuela's consent to ICSID jurisdiction.

103. As set forth above at paragraphs 57 and 58, Brandes insists on ascribing a dominant role in the drafting of the LPPI to Mr. Werner Corrales. To the contrary, as described at paragraphs 59 and 60 above, Venezuela questions his objectivity and the role that he allegedly played in the drafting of the LPPI. The Tribunal considers it to be unnecessary, for purposes of resolving this dispute, to establish the actual role played by Mr. Corrales in the drafting of the LPPI, his knowledge of the issue under discussion and the relevance of his publications about this issue. What is apparent to the Tribunal is that Mr. Corrales' opinion cannot provide the basis for finding that Article 22 of the LPPI contains the consent of the Bolivarian Republic of Venezuela to submit to ICSID arbitration.

104. At paragraphs 61 to 67 above, the Tribunal summarizes the positions of the Parties concerning the economic situation in Venezuela in 1999 and the influence that those circumstances may have had on the enactment of the LPPI. The Tribunal has no doubt that, in view of the difficulty of concluding a bilateral investment treaty with the United States of America, Venezuela sought several mechanisms to attract investors and the LPPI was one of those instruments.

105. Although the Tribunal understands Venezuela's eagerness to attract foreign investment to its territory, it does not consider it to be logical to find that Venezuela – which was already having many disagreements with the United States of America – was willing, as Brandes has asserted, to grant a broad unilateral consent to ICSID jurisdiction without any reciprocity. This point of view is especially difficult to accept considering that many of the prospective investors would have been companies of the United States of America.

106. It may be correct to assert, as the Respondent does,⁵⁴ that due to particular historical circumstances the Bolivarian Republic of Venezuela, like some other Latin American countries, traditionally did not favor arbitration. However, this assertion does not necessarily lead to the conclusion reached by Venezuela that, in view of this historical attitude, it is possible to ascertain that Article 22 does not provide the consent of that State to ICSID arbitration. There are other valid arguments to support the contention that Article 22 of the LPPI does not provide for such consent, but such alleged hostility toward arbitration is not one of them.

107. Based on the decisions of its highest court, Venezuela states categorically, in several of its presentations that the consent to arbitration has to be **manifest, clear, and unequivocal**. The Claimant maintains that there is no provision that requires the consent to ICSID jurisdiction to have those characteristics and that Article 25 of the ICSID Convention only requires that consent be expressed in writing. In the following paragraphs, the Tribunal addresses this fundamental difference between the Parties.

108. Article 253 of the Political Constitution provides that:

“The power to administer justice emanates from the citizens and is exercised in the name of the Republic by the authority of the Law.

The bodies comprising the Judicial Power shall deal with the cases and matters within their competence, through the procedures determined by law, and shall execute or enforce their judgments”

109. Accordingly, it is evident that the general rule in Venezuela is that the function of administering justice is entrusted to the State, which performs it through the courts.

110. It is also an unquestionable fact that the basis for arbitration is consent.⁵⁵ There cannot be an arbitration, national or international, *ad hoc* or institutional, before ICSID or any other entity that administers arbitration proceedings, if the parties do not agree to arbitrate.

⁵⁴ Reply, ¶¶ 89-91.

⁵⁵ See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March, 1965, (“Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).”).

111. The statement made in the previous paragraph is definitive. Even in the case of a dispute between private citizens, the rule is that they must settle their disputes in court. The exception is that, only if they agree, they may resolve their dispute through arbitration. If this is true in the ambit of private law, it is even more so when a State is involved, because when a State submits to arbitration proceedings, it is waiving the possibility of resorting to its own courts.

112. As expressed in a well-known award:

“Article 25 of the ICSID Convention is by no means an exception to the law of the land. It is limited to defining the conditions of ICSID jurisdiction, which include the fundamental condition of consent. Without doubt, the consent to an arbitration proceeding constitutes a renunciation or a derogation from the right to have recourse to national courts. Therefore such consent should not be presumed.”⁵⁶

113. Even if there is no requirement that consent to ICSID arbitration should have any characteristic other than to be expressed in writing in accordance with Article 25 of the Convention, it is self-evident that such consent should be expressed in a manner that leaves no doubts.

114. Brandes has argued repeatedly that this Tribunal had information before it (namely, CORDIPLAN’s and CONAPRI’s documents),⁵⁷ that the arbitral tribunals in the *Cemex* and *Mobil* cases did not have. This Tribunal has examined the relevant information thoroughly, as well as Brandes’ arguments in this regard, and has not found anything that may lead it to depart from the conclusions arrived at by those tribunals with respect to the specific matter at issue here.

⁵⁶ *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal* (ICSID Case No. ARB/82/1), Award dated 25 February, 1988, ¶ 4.09.

⁵⁷ See Letter from Brandes to the Tribunal dated 10 January, 2011 at pp. 4-5; Brandes’ presentation at the Hearing on 15-16 November, 2010 at pp. 43 and 124.

115. This Tribunal sees no reason to depart from the conclusions reached by these two tribunals in comparable cases as follows:

“The Tribunal thus arrives to the conclusion that such intention is not established. As a consequence, it cannot conclude from the ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented in advance to ICSID arbitration for all disputes covered by the ICSID Convention. That article does not provide a basis for jurisdiction of the Tribunal in the present case.”⁵⁸

116. Although in connection with the interpretation of the verb “to submit”, contained in Article 22 of the LPPI Brandes referred briefly to the principle of *effet utile*,⁵⁹ the Tribunal considers that its interpretation of Article 22 in the foregoing paragraphs does not contravene that principle in any way.

117. To refute one of Venezuela’s arguments, Brandes refers in its Rejoinder to the notification about the LPPI made by the Respondent to ICSID in 2000,⁶⁰ and to the fact that the enactment of that law was communicated to the World Trade Organization. The Tribunal does not find in those documents any statement by Venezuela to the effect that Article 22 provides for its consent to ICSID jurisdiction.

118. Based on the findings in the paragraphs above, in the Tribunal’s opinion, 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. Therefore, this Tribunal lacks competence to resolve the dispute that has been submitted to it.

VI. COSTS

119. While the Respondent prevails to the effect that this Tribunal finds that it does not have competence in this case, each Party has prevailed in respect of a number of the arguments that it put forward.

⁵⁸ *Mobil*, ¶ 140; *Cemex*, ¶ 138.

⁵⁹ Counter-Memorial, ¶ 62.

⁶⁰ Rejoinder, ¶ 36.

120. Therefore, the Tribunal, in accordance with Art. 61(2) of the ICSID Convention and 47(1)(j) of the ICSID Arbitration Rules, concludes that the Parties shall bear on an equal basis the fees and expenses of the members of this Arbitral Tribunal and the fees and expenses of the International Centre for Settlement of Investment Disputes, and that each party shall bear the fees and expenses incurred by it in relation to this proceeding.

VII. DECISION

121. For the above reasons and pursuant to Articles 41, 48 and 61 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and ICSID Arbitration Rules 41 and 47, the Arbitral Tribunal declares unanimously that:

- a. The objection to the jurisdiction of the International Centre for Settlement of Investment Disputes made by the Bolivarian Republic of Venezuela is admitted.
- b. Accordingly, the International Centre for Settlement of Investment Disputes has no jurisdiction to hear this matter and this Arbitral Tribunal has no competence to decide the merits of the case.
- c. The Parties shall bear on an equal basis the fees and expenses of the members of this Arbitral Tribunal, and of the International Centre for Settlement of Investment Disputes.
- d. Each party shall bear the fees and expenses incurred by it in relation to this proceeding.

Brigitte Stern.

Professor Brigitte Stern
Arbitrator

27 July, 2011

Karl-Heinz Bockstiegel

Professor Dr. Karl-Heinz Bockstiegel
Arbitrator

18 July 2011

Rodrigo Oreamuno Blanco
President of the Tribunal

29 July 2011