

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

**CEMEX CARACAS INVESTMENTS B.V. AND
CEMEX CARACAS II INVESTMENTS B.V.**
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE No. ARB/08/15)

DECISION ON JURISDICTION

Members of the Tribunal

Judge Gilbert Guillaume, *President*
Professor Georges Abi-Saab, *Arbitrator*
Mr. Robert B. von Mehren, *Arbitrator*

Secretary of the Tribunal

Ms. Janet Whittaker

Representing the Claimants

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Mr. Marco E. Schnabl,
Mr. Timothy G. Nelson and
Ms. Julie Bédard
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Representing the Respondent

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Mr. Mark H. O'Donoghue,
Mr. Hermann Ferré,
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and
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Date of Decision: December 30, 2010

I. PROCEDURE

1. On 16 October, 2008, Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V., companies incorporated in the Netherlands, filed with the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) a Request for Arbitration against the Bolivarian Republic of Venezuela. On 30 October, 2008, the Centre registered the Request.

2. The Claimants are represented in this proceeding by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP in New York City. Since 29 January, 2009, the Respondent has been represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York City and Mexico City.

3. No agreement having been reached between the parties on the method of constituting the Tribunal, and more than sixty days having elapsed since the registration of the Request for Arbitration, by letter of 31 December, 2008, the Claimants invoked Article 37(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).

4. By the same letter the Claimants reiterated their appointment, as arbitrator, of Mr. Robert B. von Mehren, a U.S. national, whose appointment had initially been included in the Request for Arbitration.

5. By letter of 20 February, 2009, the Respondent appointed Professor Georges Abi-Saab, a national of Egypt as arbitrator.

6. The Tribunal not having been constituted within 90 days of the registration of the Request for Arbitration, by letter of 21 May, 2009, the Claimants 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 19 June, 2009, the Chairman of the ICSID Administrative Council appointed Judge Gilbert Guillaume, a national of France, as the President of the Tribunal.

7. All of the arbitrators having accepted their appointments, the Tribunal was constituted on 6 July, 2009. Ms. Katia Yannaca-Small, Senior Counsel, ICSID, was appointed as Secretary of the Tribunal.

8. On 20 July, 2009, having consulted with the parties and the Centre, the Tribunal fixed the first session to be held on 16 November, 2009, at the World Bank's Paris Conference Center. On the same day, the parties were invited to confer and to advise the Tribunal, by no later than 16 October, 2009, of any points on the session's 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.

9. On 1 September, 2009, the Claimants filed a request for provisional measures. After an exchange of communications between the parties, the Tribunal, by letter of 30 September, 2009, from the Centre, informed the parties that their respective positions on the request for provisional measures would be heard during the first session. On 26 October, 2009, the Respondent filed a reply to the Claimants' request for provisional measures.

10. On 26 October, 2009, the Respondent proposed the disqualification of Mr. von Mehren. On 2 November, 2009, the Claimants filed observations on the Respondent's proposal for disqualification.

11. On 6 November, 2009, President Guillaume and Professor Abi-Saab, acting under Article 58 of the ICSID Convention, dismissed the proposal for the disqualification of Mr. von Mehren made by the Respondent.

The first session of the Tribunal and the hearing on provisional measures was held on 16 November, 2009 at the World Bank's Paris Conference Center. Present at the session were:

Members of the Tribunal

Judge Gilbert Guillaume, *President*
Mr. Robert B. von Mehren, *Arbitrator*
Professor Georges Abi-Saab, *Arbitrator*

ICSID Secretariat

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

Representing the Claimants

Mr. Barry H. Garfinkel, *Skadden, Arps, Slate, Meagher & Flom LLP*
Mr. Marco E. Schnabl, *Skadden, Arps, Slate, Meagher & Flom LLP*
Mr. Timothy G. Nelson, *Skadden, Arps, Slate, Meagher & Flom LLP*
Ms. Julie Bédard, *Skadden, Arps, Slate, Meagher & Flom LLP*

Representing the Respondent

Mr. Mark H. O'Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms. Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr. Hermann Ferré, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr. Tulio Cusman, *Goñi & Co. Abogados*
Dra. Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
Dr. Armando Giraud, *Bolivarian Republic of Venezuela*
Dra. Mariel Perez, *Bolivarian Republic of Venezuela*
Dra. Beatrice Sansó de Ramirez, *Bolivarian Republic of Venezuela*

12. On 22 December, 2009, the Claimants sent to the Tribunal a communication in relation to their request for provisional measures. On 5 January, 2010, the Respondent filed observations on that letter. On 15 January, 2010, the Claimants sent another letter to the Tribunal.

13. On 3 March, 2010, the Tribunal issued a decision on provisional measures, rejecting the Claimants' request for provisional measures and reserving the decision on the costs of the procedure relating to the request for provisional measures to a later stage of the arbitration.

14. The Respondent's Memorial on Objections to Jurisdiction was filed on 15 January, 2010, followed by the Claimants' Counter-Memorial on Jurisdiction on 15 March, 2010, the Respondent's Reply on Jurisdiction on 17 May, 2010 and the Claimants' Rejoinder on Jurisdiction on 25 June, 2010.

An oral hearing on jurisdiction was held at the offices of the World Bank's Paris Conference Center on 27 July, 2010. Present at the hearing were:

Members of the Tribunal

Judge Gilbert Guillaume, *President*
Mr. Robert B. von Mehren, *Arbitrator*
Professor Georges Abi-Saab, *Arbitrator*

ICSID Secretariat

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

Representing the Claimants

Mr. Barry H. Garfinkel, Skadden, Arps, Slate, Meagher & Flom LLP
Mr. Marco E. Schnabl, Skadden, Arps, Slate, Meagher & Flom LLP
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Representing the Respondent

Mr. Mark H. O'Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Ms. Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr. Hermann Ferré, *Curtis Mallet-Prevost, Colt & Mosle LLP*
Mr. Kabir Duggal, *Curtis, Mallet-Prevost, Colt & Mosle LLP*

Dra. Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
Dr. Gustavo Álvarez, *Bolivarian Republic of Venezuela*
Dr. Armando Giraud, *Bolivarian Republic of Venezuela*

15. Following the hearing, the Tribunal deliberated in Paris on 28 July, 2010. The Tribunal has taken into account all of the pleadings, documents and testimony submitted in this case.

16. 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.

II. SUMMARY OF THE PARTIES' SUBMISSIONS

A. The Respondent's Memorial on Jurisdiction

17. On 15 January, 2010, the Bolivarian Republic of Venezuela (the "Respondent" or "Venezuela") submitted a Memorial containing its objections to jurisdiction (the "Memorial").

18. The Memorial first explains that the Request for Arbitration was presented by two companies, Cemex Caracas and Cemex Caracas II, which complain of the nationalization of a Venezuelan company, Cemex Venezuela ("CemVen") in which they held an indirect ownership interest.

19. Venezuela proceeds to provide the Tribunal with some information on the structure of the companies involved in the case. It submits that a Mexican company, Cemex, S.A.B. de C.V. ("Cemex") owns 100% of Cemex España S.A., which owns 100% of one of the Claimants, a Dutch company called Cemex Caracas. In turn, Cemex Caracas owns 100% of the other Claimant, another Dutch Company called Cemex Caracas II. Cemex Caracas II owns 100% of Vencement Investments ("Vencement") a company incorporated in the Cayman Islands. Finally, as of 2002, Vencement owns 75.7% of Cemex Venezuela (CemVen), the cement company that was operating in the territory of the Respondent.

20. The Respondent then notes that the Claimants invoke the jurisdiction of the Tribunal under the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela concluded on 22 October, 1991 (the "BIT", the "Dutch Treaty" or the "Treaty"). In addition, Claimant Cemex Caracas has "reserved its right" to rely on Venezuela's Law on the Promotion and Protection of Investments (the "Investment Law") as an additional basis for jurisdiction.¹ The Respondent contests those two alleged bases of jurisdiction.

1. Jurisdiction Under the Dutch Treaty

21. The Respondent recalls that Articles 9(1) and 9(4) of the BIT cover "disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of

¹ Memorial ¶ 3.

the former under this Agreement in relation to an investment of the latter.” It adds that “while Article 1(a) of the Dutch Treaty defines ‘investments’ to include ‘every kind of asset,’ it then goes on to enumerate five categories of assets within its scope, and makes no reference whatsoever to the subject of ownership or control, whether ‘direct or indirect,’ or to the location of the investments or the manner in which investments may be made.”² According to the Respondent, the omission of this additional language from the definition of investment is significant, when comparing the text of the Dutch Treaty with other BITs concluded by Venezuela or the Netherlands or with multilateral treaties for the protection of investments. Accordingly, the Dutch Treaty does not cover indirect investors.

22. According to the Respondent, this interpretation is reinforced by the facts that the BIT uses a broad definition of “national” (or “investor”) and that it only concerns investments located in the territory of the Contracting Parties. Moreover, such an interpretation has been found in a comparable case in an arbitral award rendered under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce in *Berschader and Bershader v. Russian Federation*, Case No. 080/2004, and is compatible with ICSID case law.

23. In the present case, the Claimants qualify as Dutch Nationals under the BIT because of their incorporation in the Netherlands. However, they do not themselves have investments in the territory of Venezuela. Their indirect investments through Vencement do not entitle them to assert claims for alleged violation of the BIT. They are not the “proper parties to this proceeding.”³

2. Jurisdiction Under the Investment Law

24. The Respondent then submits that under ICSID case law, the consent to ICSID jurisdiction required by Article 25 of the ICSID Convention can be contained in a contract or in a document, such as a request for arbitration, accepting an offer previously made. In all cases, however, consent must exist. In the present case, neither the Claimants nor Venezuela have given such consent.

² Memorial ¶ 27.

³ Memorial ¶ 43.

25. First of all, neither the letter of the Claimants of 9 April, 2008, “accepting the Republic’s offer of consent to ICSID arbitration contained in Article 9(1) of the Dutch Treaty,”⁴ nor the Request for Arbitration “made any reference to, or purported to accept, any consent of the Republic for ICSID arbitration supposedly contained in Article 22 of the Investment Law.”⁵ It is only in a footnote in the request for provisional measures that one of the Claimants, Cemex Caracas, reserved its rights to rely on that law. It did so after having initiated the arbitration without invoking expressly the Investment Law. This cannot be considered as a written consent given in due time.

26. Venezuela then contends that Article 22 of the Investment Law does not provide the requisite express and unequivocal consent to ICSID arbitration required by Article 25 of the ICSID Convention. In this respect, it refers to the text of Article 22 itself and compares it to the provisions of ICSID’s model clauses and with those of bilateral investment treaties concluded by Venezuela. It also refers to publications and commentaries on the Investment Law made before 2005, to Venezuelan legal principles and to a decision rendered on 17 October, 2008 by the Supreme Court of Venezuela. It adds that a comparison of Article 22 with other national investment laws and ICSID case law leads to the same conclusion.

27. Finally, on an alternative basis, the Respondent submits that “[n]either Claimant was the ‘owner’ of CemVen, which is alleged to constitute the ‘investment’ in this case.”⁶ The Claimants were not directly controlling the investment made in CemVen by Vencement. As a consequence, according to Venezuela, they do not qualify as “international investors” under the Investment Law and its applicable regulation.

28. Venezuela, therefore, concludes that “the claims set forth in the Request should be dismissed in their entirety inasmuch as: (i) the indirect investments of Claimants in any event do not qualify for protection under the Dutch Treaty; (ii) Claimants have not consented to ICSID arbitration under the Investment Law; (iii) Article 22 of the Investment Law does not provide a basis for finding ‘consent’ on the part of the Republic to arbitration of this dispute; and (iv)

⁴ Memorial ¶ 46.

⁵ Memorial ¶ 47.

⁶ Memorial ¶ 103.

Claimants do not qualify as ‘international investors’ as defined in the Investment Law and the Investment Law Regulation.”⁷

B. The Claimants’ Counter-Memorial on Jurisdiction

29. The Claimants first submit that their claim arises out of Respondent’s seizure of Cemex Venezuela carried out by decrees of 27 May, 2008, 15 August, 2008 and 19 August, 2008 and by the occupation of Cemex plants by Venezuelan armed forces at the same time. They add that “*no compensation whatsoever has been paid for this forcible taking.*”⁸ They reassert the claims set forth in their Request for Arbitration for purposes of remedying Venezuela’s violation of its obligations.

1. Jurisdiction Under the BIT

30. The Claimants then contend that the Centre possesses jurisdiction to hear each of the claims under the Netherlands-Venezuela BIT.⁹

31. They stress in this respect that the Respondent has given its clear and unambiguous consent to ICSID jurisdiction in Article 9 of the BIT. They submit that the definition of “investment” in Article 1(a) of that treaty is broad and non-exhaustive and extends to indirect investments. They add that “Respondent’s Narrow Interpretation of ‘Investment’ Finds No Support in Either the Vienna Convention or the ICSID Convention.”¹⁰ They contend that “Past Arbitral Decisions Confirm that Claimants have an ‘Investment’ As defined Under the BIT.”¹¹ They add that Cemex Venezuela is an investment “‘In the Territory’ of Venezuela.”¹² They submit that “Other Provisions of the Netherlands-Venezuela BIT, Including the Definition of ‘Investor’ Reinforce the Conclusion that the Netherlands-Venezuela BIT Covers Indirect

⁷ Memorial ¶ 110.

⁸ Counter-Memorial ¶ 21 (emphasis in the original).

⁹ Counter-Memorial at p. 12.

¹⁰ Counter-Memorial at p. 16.

¹¹ Counter-Memorial at p. 21.

¹² Counter-Memorial at p. 38.

Investments.”¹³ They add that “Respondent’s Concerns About ‘Layering’ of Claims Are Not Well Founded.”¹⁴

32. Passing to supplementary means of interpretation, the Claimants stress that “Respondent’s Adoption of the Netherlands Model BIT Indicates an Intention to Follow the Pro-Investment Policies Expressed Therein.”¹⁵ Moreover, “Venezuela’s Treaty Practice Has Consistently Favored a Broad Interpretation of ‘Investment’.”¹⁶

2. Jurisdiction under Article 22 of the Investment Law

33. According to the Claimants, “Separately and Independently From the BIT, Article 22 of Venezuela’s Investment Law Confers Jurisdiction On the Centre.”¹⁷

34. In this respect, they first submit that “the Question of Whether Article 22 of the Investment Law is a ‘Consent’ is a Question of International Law.”¹⁸ Then they contend that the investment made by the Claimants in Cemex Venezuela is an “international investment” and that the Claimants are “international investors” for purposes of the Investment Law. They add that Respondent’s narrow interpretation of ownership or effective control is not well founded.

35. They further submit that Article 22 of the Investment Law expresses Respondent’s consent to the Centre’s jurisdiction for purposes of the ICSID Convention. In this respect they refer to the terms of Article 22, as well as the intention of its drafters. They add that the principle of good faith requires that that article be construed as a binding offer. They contend that Respondent’s comparisons with other investment laws are unavailing and they invoke ICSID case law in support of their position. They stress that the consent to arbitration in Article 22 is not inconsistent with Venezuelan Law and that the weight of scholarship confirms their interpretation. Finally, they submit that the Respondent’s reliance on the Venezuelan Supreme Court decision is unavailing.

¹³ Counter-Memorial at p. 39.

¹⁴ Counter-Memorial at p. 46.

¹⁵ Counter-Memorial at p. 47.

¹⁶ Counter-Memorial at p. 50.

¹⁷ Counter-Memorial at p. 56.

¹⁸ Counter-Memorial at p. 57.

36. Moreover, according to the Claimants, they have consented to arbitrate for purposes of Article 22.

37. They finally submit that “Even if Jurisdiction Under Article 22 Is Lacking, Respondent’s Various Breaches of the Investment Law Are Also Violations of the BIT.”¹⁹

38. Accordingly, they request “that the Tribunal render a decision on jurisdiction:

- (a) dismissing the Respondent’s objections to jurisdiction in their entirety;
- (b) finding that the Tribunal has jurisdiction over all of the claims presented in the Claimants’ Request for Arbitration;
- (c) ordering the continuation of this proceeding pursuant to Arbitration Rule 41(4); and
- (d) awarding the Claimants their legal fees and costs incurred in connection with opposing the Respondent’s jurisdictional objections, including legal fees, experts’ fees and the Claimant’s share of the fees and expenses of the Tribunal and the Centre.”²⁰

C. The Reply Memorial of the Respondent on Objections to Jurisdiction

39. The Respondent first stresses that “Claimants fail to explain the absence of Vencement as a party to this proceeding.”²¹

40. It submits that Claimants “Lack Standing to Assert Claims Under the Dutch Treaty in Relation to the CemVen shares.”²² It stresses that the text of the Dutch treaty does not support Claimants’ interpretation. The reasoning of other arbitral decisions does not warrant a departure from that text. Venezuela concluded that “Claimants are unable to demonstrate that

¹⁹ Counter-Memorial at p. 101.

²⁰ Counter-Memorial ¶ 190.

²¹ Reply ¶ 3.

²² Reply at p. 6.

Vencement's shareholding in CemVen is their own investment and that they have *ius standi* to assert claims under the Dutch Treaty."²³

41. Venezuela further submits that its Investment Law provides no basis for ICSID jurisdiction over this dispute. According to Venezuela, "Article 22 of the Investment Law Does Not Constitute Consent by the Republic to ICSID Arbitration."²⁴ In this respect it refers to the terms of that article, as well as its history, its purpose, the commentaries on that text and Venezuelan legal principles.

42. The Respondent also contends that the Claimants have not given their consent to jurisdiction under the Investment Law. "The form of Claimants' consent in their April 9, 2008 letters, as well as the Request for Arbitration itself, demonstrate that these references fall far short of constituting a written 'instrument of consent,' as contemplated by the Centre's Rules and Article 25 of the Convention."²⁵

43. It finally submits that "[j]urisdiction is also lacking under the Investment Law because Claimants do not qualify as 'international investors' under the statute and therefore are not within the scope of Article 22."²⁶

44. On those bases, Venezuela concludes that "the claims brought by Claimants should be dismissed in their entirety for lack of jurisdiction inasmuch as: (i) Claimants lack standing under the Dutch Treaty to assert claims for alleged violations of its provisions in relation to the shares of CemVen; (ii) Article 22 of the Investment Law does not provide a basis for finding 'consent' on the part of the Republic to arbitration of this dispute; (iii) Claimants have not consented to ICSID arbitration under the Investment Law; and (iv) Claimants do not qualify as 'international investors' as defined in the Investment Law and the Investment Law Regulation."²⁷

²³ Reply ¶ 49.

²⁴ Reply at p. 26.

²⁵ Reply ¶ 88.

²⁶ Reply ¶ 89.

²⁷ Reply ¶ 100.

D. The Claimants' Rejoinder on Jurisdiction

45. The Claimants observe that a number of points relating to jurisdiction are uncontested by the Respondent. “[T]he *sole* question facing the Tribunal under the Netherlands BIT is whether Claimants’ indirect equity stake in Cemex Venezuela S.A.C.A. is an ‘investment’ for purposes of Article 1(a). The answer to that question is a resounding ‘yes’.”²⁸ “Furthermore, once jurisdiction is established under the Netherlands BIT, *all* claims in the Request for Arbitration may be heard by this Tribunal, as a violation of investment protections offered by Venezuelan Law also constitutes a BIT violation.”²⁹

46. The Claimants then submit that Respondent’s sole objection to jurisdiction under the BIT is untenable. According to Claimants, Venezuela “Cannot Overcome Decades of Unanimous Case Law.”³⁰ Moreover, they contend that “Respondent’s Attempts to Erect Barriers to Claimants’ Standing Find No Support in the Treaty Text,”³¹ and, in particular, are not supported by Articles 1(a), 1(b) and 9(1). Furthermore, “All the Supplementary Means of Interpretation Demonstrate that Indirect Investments Are Intended to be Covered by the BIT.”³² “Respondent’s Attempt to Impose a Policy-Based Limitation on Indirect Investors’ Standing Is Impermissible and, In Any Event, Unfounded.”³³ The Claimants have made an investment in the “territory” of Venezuela.

47. Claimants further submit that, in the present case, ICSID jurisdiction independently exists under Article 22 of the Investment Law. According to the Claimants, that article constitutes an expression of Venezuela’s consent to ICSID arbitration, whether considering the text itself, the *SPP v. Egypt* case or any supplemental means of interpretation.

²⁸ Rejoinder ¶ 14.

²⁹ Rejoinder ¶ 15.

³⁰ Rejoinder at p. 7.

³¹ Rejoinder at p. 17.

³² Rejoinder at p. 29.

³³ Rejoinder at p. 27.

48. The Claimants then refer to a decision rendered recently in *Mobil Corp. v. Venezuela*.³⁴ They note that the ICSID tribunal in that case “concluded that Article 22 does not constitute Venezuela’s consent to arbitral jurisdiction.”³⁵ They observe that, in that decision, the tribunal distanced itself from the doctrine of *effet utile* on the basis of the judgment rendered by the International Court of Justice (the “ICJ”) in the *Fisheries Jurisdiction* case. However, they stress that under ICJ case law, including that judgment, “critically, the interpretative principle ‘must seek the interpretation which is in harmony with a *natural and reasonable* way of reading the text’.”³⁶ Such a reading should favor the interpretation that gives effect to the mandatory language of Article 22. Moreover, such an interpretation would conform to the legislative history of that article, commentaries made on that text and with Venezuela’s intention discerned from the preamble and the stated purposes and structure of the law.

49. Finally the Claimants reaffirm that they must be considered as “international investors” under the Investment Law. They also reaffirm that they have explicitly consented to ICSID jurisdiction, including under Article 22.

50. They request the Tribunal to render the Decision that they requested previously in their Counter-Memorial.

E. The Hearing on Jurisdiction

51. At the hearing held on 27 July, 2010, Venezuela maintained and developed its objections to the Tribunal’s jurisdiction.

52. It first submits that “the sole issue facing the Tribunal under the Netherlands BIT is whether the Cemex Venezuela S.A.C.A. shares are an investment ... ‘of’ the Claimants for the purposes of Article 9.1 of the treaty as well as Articles 2 through 8 of the treaty.”³⁷ It recognizes that the BIT gives “broad protection to indirect investments,”³⁸ and that “shares held indirectly

³⁴ *Mobil Corp. and Others v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/07/27 (June 10, 2010).

³⁵ Rejoinder ¶ 92.

³⁶ Rejoinder ¶ 96.

³⁷ Transcript of the Hearing of 27 July, 2010 (“Hearing Transcript”) at p. 11.

³⁸ Hearing Transcript at p. 27.

are an investment.”³⁹ However, it stresses that “that does not answer the issue that is before us today which is; who has the right to sue to vindicate the rights with respect to those investments?”⁴⁰ In this regard, Venezuela states that “the ordinary and natural meaning of the possessive, ‘of,’ is once [sic] own.”⁴¹ It adds that this is confirmed by the Spanish version of Articles 2 and 3. Thus only direct investors have *jus standi* under the BIT. This solution is compatible with the decision taken by the ICSID Tribunal in *Mobil v. Venezuela*. In the present case, Vencement, as a direct investor, would have had standing to sue Venezuela. This is not the case for Cemex Caracas and Cemex Caracas II.

53. With respect to Article 22 of the Investment Law, the Respondent refers to the Decision on Jurisdiction rendered in the *Mobil v. Venezuela* case. It adds that Article 22 must be construed in its political and legal context. It contends that, in adopting Article 22, Venezuela “was reaffirming its commitment to existing treaties, which had a meaning, particularly in the political context of 1999, and in addition was offering this option of utilizing domestic remedies when appropriate.”⁴² It finally stresses that “it is important that this issue be addressed”⁴³ by the Tribunal.

54. At the hearing, the Claimants also maintained and developed their previous submissions. They reaffirmed that “the Tribunal could reach a conclusion on the BIT without touching Article 22, and the Claimants would have a complete case to present on the merits.”⁴⁴

55. The Claimants then submit that, to be covered by the BIT, “an investment must belong to a national.” It does not limit the meaning of “National.” It does not limit the meaning of “Investment.”⁴⁵ Indirect investments, as well as direct investments, are investments for the purpose of Article 1(a) of the Treaty, as shown by an unbroken chain of ICSID cases. They explain the reasons for the absence of Vencement from this proceeding and agree with the

³⁹ Hearing Transcript at p. 29.

⁴⁰ Hearing Transcript at pp. 26–27.

⁴¹ Hearing Transcript at p. 18.

⁴² Hearing Transcript at pp. 58–59.

⁴³ Hearing Transcript at p. 61.

⁴⁴ Hearing Transcript at pp. 69–70.

⁴⁵ Hearing Transcript at p. 71.

Respondent that this absence will not raise any procedural problem with respect to access to documents and possible counter-claims.⁴⁶ Moreover, “there is no overlapping claim by Vencement and there is an agreement that there cannot be a double recovery here.”⁴⁷

56. The Claimants finally contend that Article 22 of the Investment Law unambiguously provides for consent to ICSID arbitration. In any event, that article must be interpreted as a unilateral declaration under international law. It must thus be “read in a natural and reasonable way, as it stands, and having regard to the words used, and due regard to the intentions of the State.”⁴⁸ In the light of the law, its historical context and its legislative history, the interpretation given by the Claimants to that text must prevail.

III. DECISION OF THE TRIBUNAL

57. Article 25(1) of the ICSID Convention provides that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly 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.”

58. According to Article 25, consent by both parties to a dispute is thus an indispensable condition for jurisdiction to exist. Such consent can be given through direct agreement between the host State and the investor. Under ICSID case law, it may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted by the investor.

59. In the present case, the Claimants submit that Venezuela consented to the jurisdiction of the Centre through:

- (a) Article 22 of Venezuelan Decree No. 356 on the Promotion and Protection of Investments of 3 October, 1999 (the “Investment Law”); and

⁴⁶ Hearing Transcript at p. 160.

⁴⁷ Hearing Transcript at p. 95.

⁴⁸ Hearing Transcript at pp. 111–12.

- (b) The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela signed at Caracas on 22 October, 1991 (the “BIT”, the “Treaty” or the “Dutch Treaty”).

60. The Respondent objects to both of these alleged bases of jurisdiction.

61. In this respect, the Claimants add that, “Respondent’s Various Breaches of the Investment Law Are Also Violations of the BIT,”⁴⁹ and, in particular, of its Articles 6(b), 3(1) and 3(4). Accordingly they submit that all of their claims “will fall within the consent embodied in Article 9 of the BIT, even if jurisdiction is lacking under Article 22 of the Investment Law.”⁵⁰ The Tribunal could thus “reach a conclusion on the BIT without touching Article 22.”⁵¹ By contrast, the Respondent contends that “it is important for the Republic” and “for the integrity of this process”⁵² that, in any event, both issues be addressed by the Tribunal.

62. The Tribunal observes that it cannot conclude that all of the alleged breaches of the Investment Law would also be violations of the BIT without an in-depth analysis of the Investment Law and the Treaty, which would be inappropriate at the present stage of the proceeding. It thus considers that it is its duty to address both issues.

A. Article 22 of the Investment Law

63. Article 22 of the Investment Law reads as follows:

“Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de la cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje

⁴⁹ Counter-Memorial at p. 101.

⁵⁰ Counter-Memorial ¶ 189.

⁵¹ Hearing Transcript at p. 69.

⁵² Hearing Transcript at p. 61.

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”.

64. Translated into English, Article 22 could read as follows:

“Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.”⁵³

65. The Parties disagree on the interpretation to be given to Article 22. The Claimants submit that Venezuela consented to ICSID jurisdiction under that article. The Respondent contends that the text does not provide such consent.

66. In order to clarify the meaning of Article 22, the Tribunal will first determine the standard of interpretation to be used and will then apply that standard to Article 22.

1. Standard of Interpretation

(a) Determination of the Standard

67. In its Memorial, the Respondent contends that “[a]part from the language of the statute itself, the Investment Law, as part of the law of Venezuela, must be interpreted in the light of Venezuelan legal principles”⁵⁴ and, in particular, of Article 4 of its Civil Code. “While Venezuelan Law may not be dispositive ... it plays an important role in the analysis of that

⁵³ Translation provided by the Tribunal. Other translations have been proposed both by the Claimants (*see, e.g.,* Request for Arbitration ¶ 34; Counter-Memorial ¶ 130; Rejoinder ¶ 74) and by the Respondent (*see, e.g.,* Memorial at p. 9, fn 32 and ¶ 63; Reply ¶ 53). The words “si así lo establece” have been translated as “should it so provides,” “if it so provides” or “if it so establishes”. Those variations seem immaterial to the Parties and to the Tribunal.

⁵⁴ Memorial ¶ 55.

statute.”⁵⁵ It adds that, under Venezuelan law, consent to arbitration must be clear, express and unequivocal. It further refers to a judgment rendered on those bases by the Supreme Court of Venezuela on 17 October, 2008. It submits that “[t]he decision of the Supreme Court is a definitive statement of Venezuelan law at the national level and its reasoning, while not binding on an international tribunal, is entitled to due consideration by this Tribunal.”⁵⁶

68. The Claimants, for their part, submit that “The Question of Whether Article 22 of the Investment Law is a ‘Consent’ is a Question of International Law.”⁵⁷ According to the Claimants, an ICSID Tribunal is the judge of its own competence and the decision of the Venezuelan Supreme Court is not binding on the Tribunal. They further add that the decision in question is unpersuasive.

69. The Tribunal first notes that, under Article 41(1) of the ICSID Convention, it is “judge of its own competence.” This is the case whatever may be the basis of that competence, including a unilateral offer made in the Host State’s legislation and subsequently accepted by the investor, as has been recognized by ICSID Tribunals in a number of cases.⁵⁸

70. The Tribunal adds that the same solution has been adopted by the Permanent Court of International 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.⁵⁹ Thus the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal’s decision on its competence.

⁵⁵ Memorial ¶ 57.

⁵⁶ Memorial ¶ 78.

⁵⁷ Counter-Memorial at p. 57.

⁵⁸ *E.g.*, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988), ¶ 60; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (Award), ICSID Case No. ARB/03/26 (2 Aug. 2006), ¶¶ 212–13; *Zhinvali Development Ltd. v. Republic of Georgia* (Award), ICSID Case No. ARB/00/1 (24 Jan. 2003), ¶ 339.

⁵⁹ *Electricity Company of Sofia and Bulgaria* (Preliminary Objections), PCIJ, Ser. A/B No. 77 (1939); *Aegean Sea Continental Shelf* (Greece v. Turkey) - 19 December, 1978 - ICJ Reports 1978, p. 3; *Fisheries Jurisdiction* (Spain v. Canada) – 4 December 1998 – ICJ Reports 1988, p. 432.

71. Another issue is whether Article 22 must be interpreted according to Venezuelan rules of interpretation or according to international rules of interpretation. ICSID case law on that point is rare and lacks consistency.

72. In a number of cases, ICSID tribunals have had to apply national laws that were so clear that neither the parties nor the tribunal felt it necessary to expressly take a position on the rules of interpretation to be applied. This was the case for the Albanian Investment Law in *Tradex Hellas v. Albania*,⁶⁰ for various Salvadorian Laws in *Inceysa v. El Salvador*,⁶¹ for the Kazakh Foreign Investment Law in *Rumeli Telekom v. Kazakhstan*,⁶² and for the Tanzanian Investment Law in *Biwater Gauff v. Tanzania*.⁶³ However, in three other cases, ICSID tribunals dealt explicitly with the question of the rules of interpretation to be applied to unilateral offers made by Host States.

73. In *SPP v. Egypt*, the tribunal noted that “[t]he 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.”⁶⁴ However, one must note that in the rest of the decision, the part played by those different norms is not easy to identify.⁶⁵

⁶⁰ *Tradex Hellas S.A. v. Republic of Albania* (Decision on Jurisdiction), ICSID Case No. ARB/94/2 (24 Dec. 1996), ¶ 79.

⁶¹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (Award), ICSID Case No. ARB/03/26 (2 Aug. 2006), ¶¶ 212–13, 310, 316, 327 and 332.

⁶² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (Award), ICSID Case No. ARB/05/16 (29 July, 2008), ¶¶ 333–35.

⁶³ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (Award), ICSID Case No. ARB/05/22 (24 July, 2008), ¶ 329.

⁶⁴ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988), ¶ 61.

⁶⁵ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988). Paragraph 74 of the award again refers to the three standards mentioned in paragraph 61. However, paragraph 94 only mentions “general principles of statutory

74. In *CSOB v. Slovak Republic*, the ICSID tribunal had to decide whether it had jurisdiction both under a BIT and under a notice published by the Ministry of Foreign Affairs of the Slovak Republic. It stated on both grounds that “the question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out by Article 25(1) of the ICSID convention.”⁶⁶ Then it observed that “[e]ven if the Notice were to be characterized as a unilateral declaration by the Slovak State, it still needs to be asked whether it was ‘the intention of the State making the declaration that it should become bound according to its terms’ as required by the international law principles applicable to unilateral declarations.”⁶⁷ It answered that question in the negative.

75. Finally, in *Zhinvali v. Georgia*, the tribunal took a third approach. Considering the Georgian Investment Law, it said that it was “dealing with an internal statute rather than a bilateral agreement.” It observed that “if the national law of Georgia addresses this question of consent, which the Tribunal finds that it does, then the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law.” It added that Georgian law was “in keeping with any international law principles that may be applicable” and on the basis of the law thus interpreted, it concluded that the claimant and the respondent did consent to submit the dispute to the jurisdiction of ICSID.⁶⁸

76. From this review of ICSID case law, it results that in four cases, the question was not dealt with. In *SPP v. Egypt*, the tribunal decided to apply “general principles of statutory interpretation,” “taking into consideration relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.” In *CSOB v. Slovak Republic*, the Tribunal took its decision only on the basis of the latter principles. In *Zhinvali v. Georgia*, it opted for domestic law “subject to ultimate governance by international law.”

interpretation” and paragraph 107 only refers to the interpretation to be given to “unilateral declarations” in international law.

⁶⁶ *Československa obchodni banka, a.s. v. Slovak Republic* (Decision on Objections to Jurisdiction), ICSID Case No. ARB/97/4 (24 May, 1999), ¶¶ 35–6 and 46.

⁶⁷ *Ibid.* ¶ 46.

⁶⁸ *Zhinvali Development Ltd. v. Republic of Georgia* (Award), ICSID Case No. ARB/00/1 (24 Jan. 2003), ¶ 339.

77. The hesitations of ICSID tribunals on that question result from the fact that, in those ICSID cases, the State's consent to arbitration was not contained in a treaty to be interpreted according to the Vienna Convention on the Law of Treaties of 23 May, 1969, but in a unilateral offer made by that State in one form or another.

78. The International Court of justice had to face that very problem when interpreting unilateral declarations made by States under Article 36(2) of its Statute. It observed that:

“A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36(2) of the Statute and makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance.”⁶⁹

Accordingly, such an “international instrument must be interpreted by reference to international law.”⁷⁰

79. The Tribunal shares this analysis. 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) Content of the Standard

80. Article 25 of the ICSID Convention requires that the parties to the dispute “consent in writing” to submit that dispute to the Centre. Under Article 25, consent in writing is thus necessary, but the text does not give any further indication about either the manner or timing of such consent or the way in which it must be interpreted.

⁶⁹ *Land and Maritime Boundaries between Cameroon and Nigeria*, Preliminary objections – ICJ Reports 1998 p. 291 ¶ 25; *Fisheries Jurisdiction (Spain v. Canada)* – ICJ Reports 1998, p. 453 ¶ 46.

⁷⁰ *Fisheries Jurisdiction (Spain v. Canada)* – ICJ Reports 1998, ¶¶ 43, 64 and 68.

81. Customary rules governing States' unilateral declarations in international law have never been codified. However, as recognized by the International Law Commission of the United Nations,⁷¹ a basic distinction must be drawn in that field between:

- (a) declarations formulated in the framework and on the basis of a treaty, and
- (b) other declarations made by States in the exercise of their freedom to act on the international plane.

82. Both declarations may have the effect of creating international obligations. However, when considering declarations not made within the framework and on the basis of a treaty, the utmost caution is required when deciding whether or not those declarations create such obligations. The International Court of Justice faced situations of that kind in the *Nuclear Tests* cases in 1974.⁷² In those cases, it decided that “when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.” In 2006, in the *Case Concerning Armed Activities on the Territory of The Congo*, it confirmed that “a statement of this kind can create legal obligations only if it is made in clear and specific terms.”⁷³ The International Law Commission adopted the same position in its Guiding Principles of 2006 Applicable to Unilateral Declarations of States.⁷⁴

83. Rules of interpretation are, however, somewhat different when, as in the present case, unilateral declarations are formulated in the framework of a treaty and on the basis of such a treaty.

84. Those rules have been fixed by the International Court of Justice in a long series of cases, when interpreting unilateral declarations of compulsory jurisdiction made under Article 36(2) of its Statute.

⁷¹ Report to the General Assembly of 2006, Document A/CN.4/L.703 dated 20 July, 2006, “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations,” ¶ 3.

⁷² *Nuclear Tests* – New Zealand v. France – Judgment of 20 December 1974, ICJ Reports 1974, pp. 472–73, ¶ 47.

⁷³ *Armed Activities on the Territory of The Congo* (New Application, 2002) (Democratic Republic of The Congo v. Rwanda), ICJ Reports, 2006, p. 28 ¶¶ 49–50.

⁷⁴ Document A/CN.4/L.703 dated 20 July, 2006, “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations,” ¶ 7.

85. The Court first stated that “[t]he regime relating to the interpretation” of those declarations “is not identical with that established for the interpretation of treaties by the Vienna Convention on the law of treaties.”⁷⁵ It then stressed that every declaration “must be interpreted as it stands, having regard to the words actually used.”⁷⁶

86. At the same time, since declarations are unilaterally drafted instruments, “the Court has not hesitated to place a certain emphasis on the intention of the depositing State.”⁷⁷ Similarly, in *SPP v. Egypt*, the ICSID tribunal decided that: “[i]n interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it was made.”⁷⁸

87. Accordingly, the International Court of Justice interprets “the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned.”⁷⁹ The Court does so by starting with the text and, if the text is not clear, by giving due consideration to the context and examining the “evidence regarding the circumstances of its preparation and the purposes intended to be served.”⁸⁰ Thus the intention of the declaring State must prevail. It could be “defeated or nullified” only by a defect “so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement.”⁸¹

88. It is on the basis of those rules of international law that the Tribunal will now proceed to interpret Article 22 of the Investment Law.

89. The Tribunal must add that although domestic law and the international law of treaties are not controlling or dispositive, it does not mean that they should be completely ignored:

⁷⁵ *Fisheries Jurisdiction* (Spain v. Canada) – ICJ Reports 1998, p. 453 ¶ 46.

⁷⁶ *Anglo-Iranian Oil Co.* – Preliminary objections – Judgment – ICJ Reports 1952, p. 105.

⁷⁷ *Fisheries Jurisdiction* (Spain v. Canada) – ICJ Reports 1998, p. 454 ¶ 48.

⁷⁸ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr., 1988), ¶ 107.

⁷⁹ *Fisheries Jurisdiction* (Spain v. Canada) – ICJ Reports 1998, p. 454 ¶ 49.

⁸⁰ *Ibid.*

⁸¹ *Temple of Preah Vihear* – ICJ Reports 1961, p. 21.

- (a) As stated in the preceding paragraphs, when tribunals interpret unilateral declarations, they must have due regard to the intention of the State having made the relevant declarations. In this respect, domestic law may play a useful rôle, in particular when consent to jurisdiction has been given through national legislation.
- (b) Although the law of treaties as codified by the Vienna Convention on the Law of Treaties is not relevant in the interpretation of unilateral declarations, the provisions of the Vienna Convention may “apply analogously to the extent compatible with the *sui generis* character” of such declarations.⁸²

2. Interpretation of Article 22

(a) The Text of Article 22

90. The starting point in the interpretation of unilateral declarations (as well as in statutory interpretation or in the interpretation of treaties) is the textual analysis of the document to be construed. Thus the Tribunal will thus first consider the words used in Article 22.

91. According to Article 22, disputes arising under Venezuela’s BITs or to which either the Convention Establishing the Multilateral Investment Guarantee Agency (“MIGA Convention”) or the ICSID Convention is applicable “shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides” (“si así éste lo establece”).

92. The Parties agree that this provision creates an obligation to go to arbitration subject to certain conditions and, in particular, subject to the last condition thus incorporated in Article 22. But they disagree on the interpretation to be given to the words “if it so provides.”

93. For the Claimants, “[t]he reference to ‘it’ is, in this context, incontestably a reference to the ICSID Convention.”⁸³ Thus “Article 22 is a binding direction that the State must submit to

⁸² *Fisheries Jurisdiction* (Spain v. Canada) – ICJ Reports 1998, p. 453 ¶ 46.

⁸³ Counter-Memorial ¶ 130.

international arbitration all controversies to which the ICSID Convention applies.”⁸⁴ Article 22 “expresses an immediate, fully operative consent, conditional only upon the jurisdictional criteria of the ICSID Convention being ‘established,’ as they no doubt are here. Accordingly the Centre has jurisdiction pursuant to Article 22 of the Investment Law.”⁸⁵

94. By contrast, Venezuela contends that “Article 22 does not itself constitute a general consent to ICSID arbitration of all investment-related disputes between the Republic and foreign investors from Contracting States, but instead requires such disputes to be submitted to arbitration according to the terms of the ICSID Convention only ‘if it so provides’ — meaning, *inter alia*, that consent to ICSID arbitration of a particular dispute or class of disputes has been given in writing both by the Republic and the investor.”⁸⁶ In the absence of such written consent, the Centre has no jurisdiction in the present case.

95. The Tribunal observes that Article 22 consists of one single long sentence of some complexity. As stated by Professor Christoph H. Schreuer in his well known commentary on the ICSID Convention, this Article “is drafted in ambiguous terms and is likely to give rise to difficulties of interpretation, notably as to whether it contains an expression of Venezuela’s consent to ICSID arbitration or not.”⁸⁷

96. In this respect, the Tribunal first notes that Article 22 concerns:

- (a) disputes arising between Venezuela and an international investor whose country of origin has a BIT in force with Venezuela;
- (b) disputes to which the provisions of the MIGA Convention are applicable;
- (c) disputes to which the ICSID Convention is applicable.

97. Article 22 covers those disputes subject to two conditions.

⁸⁴ Counter-Memorial ¶ 127.

⁸⁵ Counter-Memorial ¶ 133.

⁸⁶ Memorial ¶ 65.

⁸⁷ C. Schreuer, “The ICSID Convention: A Commentary,” Second Ed., Cambridge University Press, 2009, p. 363.

98. First, the text specifies that the disputes shall be submitted to arbitration “according to the terms of the respective treaty or agreement.” On this point, the Tribunal notes that, at the outset, Article 22 mentions “treaty or agreement” on the promotion and protection of investments, and then, the MIGA and ICSID Conventions. One could have expected that, at the end of the article, the text would similarly have referred to the “respective treaty, agreement or convention.” It does not do so. However the Tribunal observes that the term “treaty” is a comprehensive one and normally includes “conventions.”⁸⁸ It further notes that this is not contested by the Parties. It accordingly considers that, in Article 22 *in fine*, the words “treaty and agreement” also cover the two Conventions.

99. One then reaches the second condition resulting from the words “si así éste lo establece” (if it so provides), on which the Parties disagree.

100. Grammatically, it is undisputed that the word “it” refers to the preceding words “treaty or agreement”, which, as stated above, include the ICSID Convention.

101. The difficulty is with the word “lo” (so). This word certainly refers to the preceding words “shall be submitted to international arbitration.” However, it could be interpreted in two ways. It could mean:

- (a) If the treaty, agreement or convention provides for international arbitration; or
- (b) If the treaty, agreement or convention creates an obligation for the State to submit disputes to international arbitration.

102. Both interpretations are grammatically possible. In the first case, the word “lo” (so) refers to international arbitration. In the second case, it refers to the obligation to submit disputes to international arbitration.

⁸⁸ Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as “an international agreement between two states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” *See also* Jean Salmon, *Dictionnaire de Droit International Public*, p. 1088.

103. In a number of cases concerning unilateral declarations, the International Court of Justice decided that it “cannot base itself on a purely grammatical interpretation of the text.”⁸⁹ Facing an ambiguous and obscure text, which has no natural meaning, the Tribunal is in a similar situation and has to look further.

(b) The Principle of *Effet Utile*

104. In this regard, the Claimants invoke the principle of *effet utile* (*ut res magis valeat quam pereat*).

105. They submit that “[w]hen the Investment Law was enacted in October of 1999, Venezuela was already a party to the ICSID Convention. Therefore, it would serve no purpose to enact a statute providing that disputes ‘shall’ be submitted to ICSID arbitration, unless the intention was for those words to indicate a binding offer of arbitration;”⁹⁰ “under the doctrine of *l’effet utile*, Article 22 should ... be interpreted as Venezuela’s binding consent to ICSID arbitration.”⁹¹

106. The Respondent opposes this view. It contends that “[t]he function of article 22 is not to establish new rights for international investors, but rather to acknowledge and confirm the commitments of the Republic to submit disputes to international arbitration in accordance with its treaty obligations.”⁹² Such acknowledgment and confirmation has an *effet utile*.

107. The Tribunal recalls that, as recognized by the International Court of Justice, “the principle of effectiveness has an important role in the law of treaties.”⁹³ As stated by the tribunal in the *Eureka v. Poland* case, “[i]t is a cardinal rule of interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless.”⁹⁴ The

⁸⁹ *Anglo-Iranian Oil Co* – Preliminary Objections – ICJ Reports 1952, p. 104; *Fisheries Jurisdiction* (Spain v. Canada) – ICJ Reports 1998, p. 454 ¶ 47.

⁹⁰ Counter-Memorial ¶ 143.

⁹¹ Counter-Memorial ¶ 145.

⁹² Reply ¶ 59.

⁹³ *Fisheries Jurisdiction* (Spain v. Canada), ICJ Reports 1998, p. 455 ¶ 52.

⁹⁴ *Eureka B. V. v. Poland*, Partial Award and Dissenting Opinion (19 Aug. 2005) ¶ 248.

International Court of Justice⁹⁵ and ICSID Tribunals⁹⁶ have applied that principle in a number of treaty cases.

108. It remains to be seen whether it is also applicable in the interpretation of States' unilateral declarations, such as offers resulting from legislation of the kind invoked in the present case.

109. As far as the Tribunal knows, this question as such has not been dealt with by ICSID tribunals.⁹⁷

110. By contrast, the International Court of Justice has taken a position on the issue, at least twice, when interpreting the text of declarations of compulsory jurisdiction made under Article 36(2) of its Statute. In 1952, in *Anglo-Iranian Oil Co.*, the Court recognized that the principle of *effet utile* "should in general be applied when interpreting the text of a treaty." But it added that "the text of the Iranian Declaration is not a treaty resulting from negotiations between two or more States. It is the result of unilateral drafting by the government of Iran."⁹⁸ As a consequence, the Court interpreted the declaration on the basis of the intention of Iran and did not adopt the British argument based on the principle of *effet utile*.⁹⁹

111. More recently, in 1988, the Court was required to construe a reservation made by Canada to its jurisdiction in a similar declaration. The Court noted that it "was addressed by both Parties on the principle of *effectiveness*." It stated that: "[c]ertainly, this principle has an important role

⁹⁵ Advisory opinion of 21 June, 1971 on *The legal consequences for States of the continued presence of South Africa in Namibia* – ICJ Reports 1971, p. 35 ¶ 66; *Border and transborder armed actions* (Nicaragua v. Honduras) – Judgment of 20 December 1988, ICJ Reports 1988, p. 89 ¶ 46.

⁹⁶ *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentina* (Decision on Preliminary Objections), ICSID Case No. ARB/03/13, (27 July, 2006) ¶ 132; and *BP America Production Co. and Others v. Argentina*, ICSID Case No. ARB/04/8, ¶ 110; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (Decision on Jurisdiction), ICSID Case No. ARB/02/13 (9 Nov. 2004) ¶ 95.

⁹⁷ In *SPP v. Egypt*, the Tribunal applied the principle of *effet utile* as a general principle of statutory interpretation. See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988), ¶ 94. It does not mention *effet utile* in its interpretation of the text as a unilateral declaration. See, *id.*, ¶ 107.

⁹⁸ *Anglo-Iranian Oil Co.* (United Kingdom v. Iran), ICJ Reports 1952, p. 16.

⁹⁹ Academic comments on that solution are rather rare. However, one may note that in his course in the Hague Academy of International Law in 1965, Professor Berlia, after having analysed the *Anglo-Iranian Oil Co.* judgment, added that: "La logique du raisonnement est d'une force suffisante pour que l'on considère sans imprudence que le régime particulier des actes unilatéraux sur ce point est établi." See also, Study of M. Fartache, *Revue générale de droit international public*, 1952, p. 593.

to play in the law of treaties and the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36(2) of the Statute is that it should be interpreted in a manner compatible with the effect sought by the reserving State.”¹⁰⁰ The Court did not examine any further the arguments of the Parties based on the principle of *effet utile*.

112. The Tribunal agrees with those rulings of the International Court of Justice. Thus in order to interpret Article 22, it will consider its context, its purpose and the circumstances of its preparation in order seek to determine what was the intention of Venezuela when adopting Article 22.

113. However, it will add that, even if the principle of *effet utile* were applicable to unilateral declarations, this would not help in the interpretation of Article 22.

114. In this respect one must recall that this principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible. Thus, in a number of cases, the International Court of Justice, when interpreting agreements or treaties, has given a very limited effect to the text it had to construe. In the *Aegean Sea Continental Shelf* case, the Court decided that the agreed communiqué invoked by Greece did not give jurisdiction to the Court. It added that “it is for the two Governments to consider ... what effect, if any, is to be given to [this text] in their further efforts to arrive to an amicable settlement of the dispute.”¹⁰¹ In three other cases, the Court had to interpret bilateral treaties providing for “firm and enduring peace and sincere friendship” between the Contracting States or using comparable formulae. It construed those provisions as fixing only an “objective in the light of which the other treaty provisions are to be interpreted and applied.”¹⁰²

115. In the present case, one must recall that Article 22 covers three types of treaties.

¹⁰⁰ *Fisheries Jurisdiction* (Spain v. Canada), ICJ Reports 1998, p. 455, ¶ 52.

¹⁰¹ *Aegean Sea Continental Shelf* (Greece v. Turkey), ICJ Reports 1978, p. 44, ¶ 108.

¹⁰² *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 136 ¶ 273; *Oil Platforms* (Islamic Republic of Iran v. United States of America), ICJ Reports 1996 (II), p. 814 ¶ 28; *Case concerning certain questions of mutual assistance in criminal matters*, (Djibouti v. France), Judgment of 4 June 2008, ¶¶ 110–11.

- (a) First it mentions the MIGA Convention which contains a clause providing for compulsory arbitration. The Tribunal observes that the only possible effect of this mention is to recall and confirm the existing obligations of Venezuela in this regard.
- (b) Then it covers disputes between Venezuela and international investors whose country of origin has a BIT in effect with Venezuela. In this respect the Tribunal notes that all BITs concluded by Venezuela before the entry into force of the Investment Law contained a provision for compulsory arbitration. Article 22 recalls and confirms those existing commitments.

This is not denied by the Claimants, but they contend that Article 22 could also have the effect of providing for compulsory arbitration of disputes arising under future Venezuelan BITs, which would not contain a provision to that end. However, such an interpretation implies that Venezuela could in the future prefer consenting to ICSID jurisdiction through Article 22, without any limitation and reciprocity, rather than concluding BITs with appropriate clauses providing for compulsory arbitration. The Tribunal is not convinced that such a possibility is realistic and was contemplated by Venezuela in 1999.

- (c) It thus appears that, for the MIGA Convention and for BITs, the only possible effect of Article 22 is to recall and confirm the existing obligations of Venezuela.
- (d) With respect to disputes to which only the ICSID Convention is applicable, Venezuela submits that has the same effect, whereas the Claimants contend that it imposes new obligations on the Respondent. Under the first interpretation, Article 22 has a limited effect. By contrast, under the second interpretation, it has far reaching consequences. But, even under the first interpretation, it has some effect, as recognized by an

ICSID Tribunal in respect of another domestic law of that type.¹⁰³ It is not meaningless. Accordingly, even if the principle of *effet utile* were applicable to unilateral declarations (which is not the case), it would be of no use to this Tribunal in the choice to be made between those two interpretations.

(c) Context and Purpose

116. With respect to the context, the Parties first diverge on the meaning of Article 1 of the Investment Law. The Claimants submit that the stated object and purpose of the Law as set forth in Article 1 is “to provide investments and investors ... with a stable and foreseeable legal framework’ In furtherance of this goal, the Law contains a comprehensive and far reaching set of investment protections and guarantees typically found in modern BITs ... But these rights potentially depend on the mechanism of Article 22 providing the means by which rights might be vindicated in a neutral forum.”¹⁰⁴ The availability of such a forum is thus a critical means whereby the purpose of the Investment Law is achieved. This is the object of Article 22 as interpreted in the light of Article 1.

117. The Respondent, for its part, contends that the purpose of the Investment Law, as stated in Article 1, was not “economic opening and liberalisation,” but “national development.”¹⁰⁵ It observes that the premise of Claimants’ argument is that “the Investment Law’s purposes cannot be achieved without ICSID Arbitration as a ‘neutral forum’ ... That policy judgment is not reflected in the Law itself.”¹⁰⁶

118. The Tribunal notes that, according to Article 1, the Investment Law was “intended to provide investments and investors, both domestic and foreign, with a stable and predictable legal framework in which the former and the latter may operate in a secure environment, through the regulation of actions by the State, towards these investments and investors, in order to achieve

¹⁰³ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (Award), ICSID Case No. ARB/05/22 (24 July, 2008).

¹⁰⁴ Counter-Memorial ¶ 140.

¹⁰⁵ Hearing Transcript at p. 49.

¹⁰⁶ Reply ¶ 57.

the increase, diversification and harmonious integration of investments to advance the objectives of national development.”

119. Such aims are in general terms comparable to those of treaties on promotion and reciprocal protection of investments and are reflected in the Investment Law itself. Thus, the Investment Law contains provisions relating to fair and equitable treatment (Article 7(1)), non discrimination (Article 8), confiscations and expropriations (Article 11), which are comparable to those incorporated in BITs. However, the rights thereby accorded to international investors are often qualified in order not to affect the application of Venezuelan Law or the rights of Venezuelan investors. Moreover, Article 24 of the Investment Law specifies that its provisions do not prevent the adoption by Venezuela of a number of measures that it enumerates, *inter alia*, for national security, the conservation of natural resources and the integrity and stability of the Venezuelan financial system.

120. The Investment Law is thus in some respect different from BITs. Moreover, BITs do not always contain a compulsory arbitration clause. It is true that a clause of that kind was incorporated in the seventeen BITs concluded before 1999 by Venezuela. But this does not imply that Venezuela was ready to accept such an obligation vis-à-vis States with which it had no BIT. One cannot draw from Article 1 and from the Law as a whole the conclusion that Article 22 must be interpreted as establishing consent by Venezuela to submit to arbitration all potential disputes falling within the ambit of the ICSID Convention.

121. The Parties then discuss the consequences to be drawn from the fact that Article 22 is inserted into Chapter IV of the Law, which is entitled “Dispute Resolution” and contains three Articles, namely, Articles 21 to 23. The Claimants contend that, if Article 22 were only meant as an abstract affirmation of the principles of arbitration, it would not be inserted in that chapter “between two provisions full of operative and mandatory content.”¹⁰⁷ The Respondent arrives at a contrary conclusion: it stresses that, if Venezuela had intended to give unilateral standing consent to ICSID Arbitration in Article 22, it would have retained clearer formulae, like those used in Articles 21 and 23.

¹⁰⁷ Rejoinder ¶ 79.

122. The Tribunal is of the opinion that it can draw no conclusion, one way or another, from the fact that Article 22 is inserted into a chapter relating exclusively to the settlement of disputes. It further notes that Article 21 concerns interstate disputes. Under that Article, those disputes are first to be resolved through diplomatic means. Article 21 adds that, if no agreement is thus reached, Venezuela shall “foster” the submission of the controversy to an arbitration tribunal under conditions to be agreed upon with the other State. Article 23 concerns investors not covered by Article 22. It provides that: “[a]fter the administrative avenues have been exhausted by the investor, any dispute arising in relation with the application of this Decree-Law, may be submitted to the Domestic Courts or to the Venezuelan Arbitration Tribunals, at the investor’s election.” Those Articles thus concerns disputes different from those covered by Article 22. They provide some flexibility for other types of dispute settlement mechanisms. They can be of no help in the interpretation of Article 22.

123. The Parties further seek to interpret the Investment Law in the wider context of Venezuela’s attitude vis-à-vis arbitration. The Respondent submits that “international arbitration was long disfavored in Venezuela”¹⁰⁸ and recalls the “historical antipathy”¹⁰⁹ of that country to arbitration. The Claimants do not deny this, but stress that a “tectonic shift” in favour of international arbitration took place in the nineties.¹¹⁰

124. The Tribunal first observes that Venezuela had some experience of arbitration at the end of the 19th and the beginning of the 20th century that generated hostility in this country towards this form of settlement of disputes.¹¹¹ This reluctant attitude explains why, during the preparation of the ICSID Convention, Latin-American countries, including Venezuela, expressed reservations regarding the proposed text which, they said, contravened their constitutional

¹⁰⁸ Memorial ¶ 65, fn. 87.

¹⁰⁹ Hearing Transcript at p. 61.

¹¹⁰ Rejoinder ¶¶ 104–05; Hearing Transcript at p. 123. *See also* Counter-Memorial ¶ 157.

¹¹¹ The boundaries of Venezuela with Colombia and the now Republic of Guyana were fixed at that time by two arbitral awards favorable to its neighbors, the validity of which was contested. Moreover, as a consequence of a military intervention by Germany, Italy and the United Kingdom, Venezuela had to accept the establishment of Mixed Commissions in charge of fixing indemnities to be paid to foreign creditors. Those events led to the formulation of the Drago doctrine prohibiting the use of force for the recovery of contractual debts and the Calvo clause under which investors commit themselves not to ask for diplomatic protection by their State of origin.

principles.¹¹² It also explains why Venezuela signed the Convention only in 1993, almost thirty years after its adoption.

125. At that time, the environment in Venezuela had become more favorable to international arbitration. In 1993, the Respondent ratified both the ICSID Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the “New York Convention”), as well as the MIGA Convention. From 1991 to 1999, it signed and ratified seventeen BITs. Finally it adopted the Investment Law of 1999. However, even at that time, Venezuela remained reluctant to engage in contractual arbitration in the public sphere, as shown by the 1998 Law on commercial arbitration and Article 151 of the 1999 Constitution.

126. The Tribunal notes that, during that period, Venezuela signed and ratified a number of treaties relating to international arbitration in the field of investments and, in particular, concluded many BITs. Moreover, since 1999, Venezuela has ratified eight more BITs, thus confirming its will to be bound by such treaties. However, the Tribunal cannot draw from this general evolution the conclusion that Venezuela, when adopting Article 22, intended to give in advance a general consent to ICSID arbitration in the absence of any Treaty. For a State to commit itself through treaties creating reciprocal obligations is one thing; to commit itself unilaterally without counterpart is another.

(d) Legislative History

127. The legislative history of Article 22 could in this respect provide more useful information about the intention of the drafters of the Investment Law.¹¹³ However, the Investment Law of 1999 was a decree-law and, as such, was not discussed in Parliament. Moreover it contains no “*exposición de motivos*.” Thus we have no direct information about its preparation.

128. The Claimants submit that Article 22 was intended by its drafters as a “Binding Offer of ICSID Arbitration.”¹¹⁴ In this respect, they first refer to a public statement made by President

¹¹² History of the ICSID Convention – Volume II(1) ¶ 39.

¹¹³ See, e.g., *Anglo-Iranian Oil Co.* (United Kingdom v. Iran), Judgment of 22 July, 1952 – ICJ Reports 1952, pp. 104–07; *Aegean Sea Continental Shelf* case – Judgment of 17 December, 1978 – ICJ Reports, pp. 26–43.

¹¹⁴ Counter-Memorial at p. 73.

Chavez one day before his election. However in this statement, President Chavez only states that Venezuela needs private international investments and that he had no intention to nationalize anything. Such a general statement is not of great assistance in the interpretation of Article 22.

129. The Claimants then refer to various papers published by M. Werner Corrales Leal, “one of the drafters of the Investment Law.”¹¹⁵ By contrast, the Respondent stresses that Mr. Corrales “was not the legislator”¹¹⁶ and that, in any case, his statements are misconstrued by the Claimants.

130. The Tribunal notes that in 1999, Mr. Corrales was the Representative of Venezuela to the World Trade Organisation. In a communication made at a conference on investment arbitration in comparative law organized in April 2009 by the Caracas Centro Empresarial de Conciliación y Arbitraje (Caracas Business Center of Conciliation and Arbitration), Mr. Corrales stated that he had advised in 1999 that the President of Venezuela should prepare a law “that would serve as the compulsory framework for all international treaties and negotiations on investments.” He said that he was then entrusted with preparing “reference terms to write the draft law and direct the preparation thereof.” He added that the “legal drafting” was assigned to a legal consultant of the Institute of Foreign Trade, Mr. Gonzalo Capriles.¹¹⁷

131. Soon after the publication of the Investment Law, Mr. Corrales in two articles gave “*algunas ideas*” (some ideas) on the legal regime for promotion and protection of investments in Venezuela. In those articles, he stated that in his “opinion, a regime applicable to foreign investments must leave open the possibility to resort to international arbitration [unilaterally], which today is accepted almost everywhere in the world, whether through the mechanism provided for by the ICSID Convention or through the submission of the dispute to an international tribunal or to an ad hoc arbitral tribunal as the one proposed by UNCITRAL. In any case, it must be clearly established that there may not be simultaneous resorting to national courts and to the arbitration mechanism or to any other type of procedure of settlement of

¹¹⁵ Counter-Memorial ¶¶ 135–37.

¹¹⁶ *See* Reply ¶ 72.

¹¹⁷ Speech by Ing. Werner Corrales at CEDCA’s event – Investment Arbitration in Comparative Law – 28 April 2009 – Business – June 2009, pp. 78–80.

disputes. In our case this subject is dealt with in chapter IV (Articles 21–23)” of the Investment Law, “where a great part of the principles commented is accepted.”¹¹⁸

132. The Tribunal observes that, in those articles, Mr. Corrales expressed his opinion on the principles which, according to his judgment, must be incorporated in any international arbitration regime. He added that a “great part” of those principles “is accepted in Articles 21 to 23 of the Investment Law.” He did not say that this was the case for all of the principles that he favored and he did not say that the drafters of Article 22 intended to provide for consent to ICSID arbitration in the absence of any BIT.

133. Moreover, at the same time, Mr. Juan de Jesús Montilla, then Minister of Production and Trade, stated to the contrary that, under the Investment Law, “the solution in the case of controversies or disputes where it is set forth that these shall be resolved in national courts or within a framework of acknowledgment of the commitments that have been undertaken in international agreements.”¹¹⁹

134. Ten years later, at the above-mentioned conference organized by the Caracas Centro Empresarial de Conciliación y Arbitraje, Mr. Corrales was invited by the organisers of the conference to inform the audience of the “drafter’s intention” for the Law. He then stated that his purpose, as “co-drafter” of the Law, “was to offer in the broadest and most transparent manner the possibility of the investors resorting to international arbitration as a unilateral offer made by the Venezuelan State.”

135. This last statement was made at a time that the present proceedings were already pending. It is not supported by contemporaneous written documents and the Claimants did not ask Mr. Corrales to appear in the proceeding as a witness. The Tribunal cannot draw from such a statement the conclusion that in adopting the Investment Law, Venezuela intended to consent in general and in advance to ICSID arbitration.

¹¹⁸ La OMC como espacio normativo, pp. 185–86. The word “unilaterally” did not appear in the first article of 30 April, 1999. It was added to the second article in 2000.

¹¹⁹ Juan de Jesús Montilla, La política de atracción de IED en Venezuela, Finanzas, inversión y crecimiento, Revista Capítulos, n°59, Sistema Económico Latinoamericano y del Caribe (Mayo-Agosto 2000).

136. Both Parties then refer to academic publications relating to the Investment Law. The Tribunal has carefully examined those publications. It observes that all of them were written after 2005, at a time when controversies had already emerged between Venezuela and foreign investors, and also that most of them refer to the proceedings pending either in the Supreme Court of Venezuela or within ICSID. They add nothing to the arguments exchanged by the Parties in the present case.

137. The Tribunal finally notes that, at the time of the adoption of the Investment Law, Venezuela had already signed and ratified seventeen BITs stating either that Venezuela gave “its unconditional consent to the submission of disputes” to ICSID arbitration or that its disputes with foreign investors “shall at the request of the national concerned be submitted to ICSID,” or using both phrases. Comparable words were used in some national laws and in the ICSID model clauses. If it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well known formulae.

138. The Tribunal thus arrives at the conclusion that such an intention has not been established. As a consequence, 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. That article does not provide a basis for jurisdiction of the Tribunal in the present case.

139. Finally the Tribunal observes that, according to the Respondent, the “Claimants Have Not Given Their Consent To Jurisdiction Under the Investment Law”¹²⁰ and that they “Are Not ‘International Investors Under [that] Law.’”¹²¹ It submits that, for those reasons also, the Tribunal has no jurisdiction in the present case. However, as the Tribunal has arrived to the conclusion that Article 22 does not constitute consent to jurisdiction by Venezuela, it does not have to take a decision on those alternative objections to jurisdiction.

¹²⁰ Memorial at p. 25.

¹²¹ Memorial at p. 53.

B. Article 9 of the BIT between the Netherlands and Venezuela

140. On 22 October, 1991, the Kingdom of the Netherlands and the Republic of Venezuela signed an Agreement on Encouragement and Reciprocal Protection of Investments, which entered into force on 1st November 1993, after ratification by both Parties. That agreement was “done in the Spanish, Netherlands and English languages, the three of them being equally authentic.” However, under paragraph 3 of a Protocol signed on the same day, “[i]n case of difference of interpretation between the three equally authentic texts of the present Agreement, reference shall be made to the English text.”

141. Paragraph 1 of Article 9 of the BIT provides that “[d]isputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for the Settlement of Investment Disputes for settlement by arbitration or conciliation under” the ICSID Convention. Article 9 adds that “[e]ach Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.”

142. The Claimants contend that the Tribunal has jurisdiction under the BIT to consider the case. The Respondent denies this. It recalls that “[t]he claims made by the Claimants arise from the Republic’s nationalization of their indirect subsidiary, Cemex Venezuela, S.A.C.A. (“CemVen”) in connection with the 2008 restructuring of major cement producing companies in Venezuela.” It describes the complex corporate form used for this investment and submits that “the Claimants, as indirect investors in CemVen, did not have any investment in the territory of Venezuela which gave rise to the treaty obligations allegedly breached by the Republic.”¹²²

143. The first Claimant, Cemex Caracas (sometimes referred to as Cemex Caracas I) was incorporated in 1999 as a Dutch *Besloten Vennootschap*. It is a wholly-owned subsidiary of Cemex España S.A., which, in turn, is an indirect subsidiary of Cemex S.A.B. de C.V., a Mexican company with worldwide operations.

¹²² Memorial ¶ 4.

144. The second Claimant, Cemex Caracas II, was also incorporated in the Netherlands in 2001 as a Dutch *Besloten Vennootschap*. It is a wholly-owned subsidiary of Cemex Caracas. Cemex Caracas II is the owner of 100% of a Cayman Islands company, called Vencement Investments (Vencement), which in turn owns 75.7% of Cemex Venezuela (CemVen).

145. The Respondent observes that Article 1(b)(iii) of the BIT “defines a ‘national’ to encompass entities owned or controlled by citizens or companies organized under the laws of The Netherlands or Venezuela,”¹²³ and notes that this is an expansive definition. It adds that Article 1(a) also gives a broad definition to the term “investment” which includes “every kind of asset.” Accordingly it recognizes that the Claimants, as well as Vencement, must be deemed to be Dutch nationals under the BIT.¹²⁴ It also recognizes that the shares owned by Vencement in CemVen are an investment within the meaning of the Treaty.

146. It stresses however that the BIT “makes no reference whatsoever to the subject of ownership or control, whether ‘direct or indirect,’ or to the location of the investments or the manner in which investments may be made.”¹²⁵ Thus the treaty “does not grant standing to nationals of a Contracting Party who do not themselves have investments in the territory of the other Contracting Party. Those nationals indirectly receive the benefits of the treaty because their controlled entities are entitled to assert claims for alleged violations of the obligations of the Contracting Party in which they have investments. Accordingly, Claimants are not proper parties to this proceeding.”¹²⁶

147. Venezuela, in other terms, submits that the BIT covers investments in the territory of one contracting Party of nationals “of” the other Contracting Party. In the present case, the shares of CemVen are an “investment of Vencement [which] has *jus standi* and the right to sue.”¹²⁷ They are not directly owned by the Claimants and cannot be considered as an investment “of” the

¹²³ Memorial ¶ 31.

¹²⁴ See Memorial ¶ 26.

¹²⁵ Memorial ¶ 27.

¹²⁶ Memorial ¶ 43 (emphasis in the original).

¹²⁷ Hearing Transcript at p. 39.

Claimants under the BIT. As indirect investors, the Claimants have no “*ius standi* to assert claims under the Dutch Treaty.”¹²⁸

148. The Claimants, for their part, recall that the definition of investment in the BIT is broad and non exhaustive. They submit that “the treaty text, its context, the *travaux préparatoires* and *all* arbitral jurisprudence unanimously support the conclusion that the BIT covers indirect investments.”¹²⁹ Thus the Tribunal has jurisdiction over the claim under the Treaty.

149. The Tribunal observes that a number of ICSID decisions and awards have considered the question of “indirect investments.” In most cases, the question was raised by the respondent State when a local company was owned or controlled by a Claimant through another company. Two questions then may arise. First, the tribunal may have to decide whether the Claimant has *jus standi*. Second it may have to decide whether and to what extent the Claimant may claim compensation for damages suffered by the local company. At the present stage, this Tribunal is only faced with the first issue.

150. The BIT defines investments in Article 1(a). This text provides that:

“For the purpose of this Agreement:

- a. the term “investment” shall comprise every kind of assets and more particularly though not exclusively:
 - (i) movable and immovable property, as well as any other rights *in rem* in respect to every kind of assets;
 - (ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures;
 - (iii) titles to money, to other assets as well as to any performance having an economic value;

¹²⁸ Reply ¶ 49.

¹²⁹ Rejoinder ¶ 5.

(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) rights granted under public law, including rights to prospect, explore, extract and win natural resources.”

151. The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT, and in particular in Article 1(a). It also notes that the definition of investment given in that article is very broad. It includes “every kind of assets” and enumerates specific categories of investments as examples. One of those categories consists of “shares, bonds or other kind of interests in companies and joint ventures.”

152. In a comparable case, *Siemens v. Argentina*, the ICSID Tribunal observed that “there is no explicit reference to direct or indirect investment as such in the [German/Argentine BIT]. The definition of ‘investment’ is very broad. An investment is any kind of asset considered to be under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words ‘not exclusively’ before listing the categories of ‘particularly’ included investments. One of the categories consists of ‘shares, rights of participation in companies and other type of participation in companies’. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.”¹³⁰

153. The same solution was adopted on the same ground by several ICSID tribunals. This was the case in *Ioannis Kardassopoulos v. Georgia*,¹³¹ which interpreted the BIT between Greece and Georgia. This was also the case in *Tza Yap Shum v. Peru*, which interpreted the BIT between

¹³⁰ *Siemens A.G. v. Argentina* (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 Aug. 2004), ¶ 137.

¹³¹ *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), ICSID Case No. ARB/05/18 (6 July, 2007), ¶¶ 123–24.

Peru and China.¹³² This was finally the case in *Mobil v. Venezuela*, interpreting the BIT between the Netherlands and Venezuela.¹³³

154. The Respondent submits that this jurisprudence is not so well established. In support of this contention, it references the award rendered on 21 April, 2006 in *Berschader v. Russian Federation*.¹³⁴ However in that award, the Tribunal, faced with a text comparable to Article 1(a) stated that “the wording of the Treaty does not exclude and therefore leaves open the possibility that an investment made indirectly by the investor in the territory of the other Contracting Party is encompassed by the terms of Article 2.1.”¹³⁵ Thereafter, the Tribunal construed a specific provision of the Treaty concerning the nationality of the intermediary and concluded that the provision prohibited indirect investments through companies incorporated in the investors’ home State (a question which is not relevant to the present case).

155. The Respondent further submits that, even if a BIT covers indirect investments, this does not give *jus standi* to indirect investors. It stresses that this solution is even more justified when, as in the present case, the BIT uses broad definitions of “nationals” and “investments,” and thus allows direct investors easily to initiate arbitral proceedings.

156. The Tribunal considers that, as acknowledged by the Respondent, investments as defined in Article 1 of the BIT could be direct or indirect. By definition, an indirect investment is an investment made by an indirect investor. As the BIT covers indirect investments, it necessarily entitles indirect investors to assert claims for alleged violations of the Treaty concerning the investments that they indirectly own.

157. The Tribunal further notes that, when the BIT mentions investments “of” nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. But this does not imply that they must be “directly” owned by those

¹³² *Tza Yap Shun v. Republic of Peru* (Decision on Jurisdiction), ICSID Case No. ARB/07/6 (19 June, 2009), ¶¶ 106–11 (where the Tribunal based its decision on the text of Article 1 of the BIT, the intention of the Parties to promote and protect investments and the absence of an express limitation in the Treaty).

¹³³ *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/07/27 (10 June, 2010), ¶¶ 162–66.

¹³⁴ *Berschader v. Russian Federation* (Stockholm Chamber of Commerce, Case No. 080/2004).

¹³⁵ *Id.*, ¶137.

nationals. Similarly, when the BIT mentions investments made “in” the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be “directly” made in such territory.

158. Thus, as recognized by several arbitral tribunals in comparable cases, the Claimants have *jus standi* in the present case. The Respondent’s objection to the Tribunal jurisdiction under the BIT cannot be upheld.

C. Costs of the Proceedings

159. Lastly, the Tribunal makes no order at this stage regarding the costs of the proceeding and reserves this question to a later stage of the arbitration.

IV. DECISION ON JURISDICTION

160. For the foregoing reasons, the Tribunal unanimously decides:

- a. That it has jurisdiction over the claims presented by Cemex Caracas and Cemex Caracas II as far as they are based on alleged breaches of the Agreement on Encouragement and Reciprocal Protection of Investments concluded on 22 October, 1991 between the Kingdom of the Netherlands and the Republic of Venezuela;
- b. That it has no jurisdiction under Article 22 of Venezuelan Decree No. 356 on the Promotion and Protection of Investments of 3 October, 1999;
- c. To make the necessary order for the continuation of the procedure pursuant to Arbitration Rule 41(4); and
- d. To reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination.

[signed]
Judge Gilbert Guillaume
President of the Tribunal

[signed]
Professor Georges Abi-Saab
Arbitrator

[signed]
Mr. Robert B. von Mehren
Arbitrator