INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

OPIC Karimun Corporation v. Bolivarian Republic of Venezuela
(ICSID Case No. ARB/10/14)

Dissenting Opinion of
Professor Dr. Guido Santiago Tawil

1. I concur with my distinguished colleagues in several issues discussed in the Award. I join the majority on the general approach adopted on the applicable law and the standard of interpretation. Unfortunately, I am unable to join their conclusions on the interpretation of the evidence produced in this case regarding Venezuela's consent to ICSID arbitration under Article 22 of the Investment Law.

2. I agree with my fellow arbitrators that the text of Article 22 allows more than one interpretation and that, by itself, it is insufficient to determine whether the Respondent provided its consent to ICSID arbitration with the Claimant.

3. I do not share the finding of other tribunals that "consent should be expressed in a manner that leaves no doubt".[1] Such a requirement would in practical terms limit evidence of consent exclusively to the wording of the text and appears in principle inconsistent with the views of many other tribunals, including those acting in *Mobil* and *Cemex* and related to the interpretation of the very same Article 22 of the Investment Law.[2]

4. I am of the view that an offer of consent as the one provided in Article 22 of the Investment Law must be interpreted neither restrictively nor expansively, but rather objectively and in good faith, as stated by the tribunal in *SPP*.[3] Where the words of the text may be ambiguous in order to determine the intention of the depositing State, the Tribunal may look beyond into the context and the circumstances in which they were formulated.

5. ICSID practice shows that tribunals very rarely limit themselves to only analyze the wording of the provision by means of which the State has provided its consent, even if it raised no doubts. Although wording will ordinarily be the primary source of

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[1] *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) Award (2 August 2011), [113].

[2] *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15) Decision on Jurisdiction (30 December 2010), ("*Cemex*") [87]; *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Decision on Jurisdiction (10 June 2010), ("*Mobil*") [94].

[3] *Southern Pacific Properties Ltd. v. Arab Republic of Egypt* (ICSID Case No, ARB/84/3) (14 April 1988) [63]. This approach has been also followed by other ICSID tribunals, such as the one acting in *Amco* v. *Indonesia*. In that case, the tribunal stated: "In the first place, like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover—and this is again a general principle of law—any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged". *Amco Asia et al.* v. *Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 September 1983) (1984) 23 ILM 351, [24].

interpretation in order to determine whether the consent to arbitrate is present or not, tribunals have consistently analyzed the wording of the text together with the State's intention and purposes and all the circumstances surrounding it.[4] This has been the approach adopted by both tribunals in *Mobil*[5] and *Cemex*[6], among many others.

6. If such exercise is regularly performed even when the intention is clear[7], much more necessary it appears when the wording of the clause is not enough to determine by itself the intent, as happens in the present case. Therefore, I agree with my distinguished colleagues that, in order to decide whether Article 22 of the Investment Law constitutes consent to arbitrate, it is necessary to look beyond the wording of the provision in order to determine Venezuela's intention when enacting the Investment Law.[8]

7. I concur with my fellow arbitrators that Mr. Corrales –who did not provide testimony before the *Mobil*, *Cemex, Brandes* and *Tidewater*[9] tribunals– was a credible and reliable witness.[10] While the Respondent had questioned the absence of Mr. Corrales' testimony to support the claim for jurisdiction in *Conoco* and *Mobil*[11], it did not submit any rebuttal evidence in the present case.

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[4] In the words of the International Court of Justice in the Fisheries Jurisdiction Case (Spain v Canada - ICJ Reports 1998, p. 454), a certain emphasis must be placed on the intention of the depositing State. Thus, the relevant words of a declaration are to be interpreted: "in a natural and reasonable way, having due regard to the intention of the State concerned... [which] may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served". In line with this reasoning, the Pac Rim Tribunal explained that: "...declarations must be interpreted as they stand, having regard to the words actually used and taking into consideration the intention of the government at the time it made the declaration. Such intention can be inferred from the text, but also from the context, the circumstances of its preparation and the purposes intended to be served by the declaration. In doing so, the relevant words should be interpreted in a natural and reasonable way". See: *Pac Rim Cayman LCC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Jurisdiction (1 June 2012), ("*Pac Rim*") para. 5.35.

[5] *Mobil* [94]: "...Intention can be deduced from the text, but also from the context, the circumstances of its preparation and the purposes intended to be served".

[6] *Cemex*.[87]: "The intention of the declaring State must prevail".

[7] *Pac Rim* [5.37] – [5.39].

[8] Award [107].

[9] *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction (8 February 2013) [16]. In the Arbitral Tribunal own words: "...Concurrently with the filing of their Counter-Memorial on Jurisdiction, on 29 July 2011, the Claimants made a Request that the Tribunal invite two individuals alleged to have been involved with the drafting of the Investment Law, Ambassador Werner Corrales Leal and Mr Gonzalo Capriles, to appear and testify at the oral phase of the proceedings. Following an exchange of submissions, on 22 September 2011, the Tribunal issued Procedural Order No. 3. It declined the Claimants' request on the ground that, within the framework of the ICSID Convention, the preparation and presentation of evidence is the responsibility of the parties and not that of the Tribunal".

[10] Award,[112].

[11] Exhibit R-53, Transcript of the Hearing on Jurisdiction in *Conoco Philips Company and Others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) (Case Pending) ("*Conoco*") and Exhibit R-54, Transcript of the Hearing on Jurisdiction in *Mobil*.

8. Further, the Claimant filed documentary evidence with regards to the context surrounding the Investment Law (Exhibits WCL-2, WCL-3 and AB-64), which is consistent with the testimony provided by Mr. Corrales regarding the intention to provide consent to arbitration through Article 22 of the Investment Law. Exhibits WCL-2[12] and WCL-3[13] appeared months before the enactment of the Investment Law and Exhibit AB-64[14] was published immediately after such enactment took place and many years before any dispute on the matter arose, which evidences "the context and purpose" of Article 22. On the contrary, Venezuela failed to submit any contemporary documentary or witness evidence to the contrary, even when requested to do so.

9. The Tribunal has explained in paragraphs 109-124 of the Award the relevance of Mr. Corrales testimony and how the Respondent decided not to present evidence contradicting such testimony regarding its intention with respect to Article 22. It has also explained in paragraphs 134-145 of the Award how, differing from *Conoco* or *Mobil*, specific document requests were made by Claimant in this case[15], how the Tribunal directed Respondent to produce those documents in its possession, custody or control,[16] that although such documents must have existed they were not produced and how the Tribunal considered itself entitled to infer that contemporaneous documents of the Respondents relating to the preparation of the Investment Law would not assist the Respondent to support its contention in this matter.

10. Notwithstanding so, my fellow arbitrators have concluded that, absent direct evidence of Respondent's intention to consent to ICSID jurisdiction, such negative inference is not

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[12] Exhibit WCL-2, *Algunas ideas relativas a un nuevo régimen legal de promoción y protección de Inversiones en Venezuela*, Geneva, 8 May 1999, section 4.6. at page 11.

[13] Exhibit WCL-3 *Comments on the Draft of a Decree-Law on the Promotion and Protection of Investments (Comentarios a un proyecto de Decreto-Ley sobre promoción y protección de inversiones)*, Caracas, 30 June 1999, section 2.4. at page 10.

[14] Exhibit AB-64, *Algunas ideas sobre el nuevo régimen de promoción y protección de inversiones en Venezuela*, in "La OMC como espacio normativo. Un reto para Venezuela", Asociación Venezolana de Derecho y Economía, Caracas, 2000, pages 185-186.

[15] *See* Claimant's First Request for the Respondent to Produce Documents dated 22 August 2011 (in particular, Requests No. 7, 8, 9 and 10) and Claimant's Response to Respondent's Reply to Claimant Request for Document Production dated 5 September 2011.

[16] Procedural Order No. 1 – Decision on Claimant's Request for Document Production dated 19 September 2011.

enough to determine on its own that Article 22 was intended by Venezuela to be the consent to jurisdiction required by Article 25 of the ICSID Convention.[17]

11. I am unable to agree with such conclusion. The record evidences that while the Claimant has made substantial efforts to prove that Article 22 of the Investment Law provides consent to arbitrate, the Respondent provided no assistance in determining the purpose and intention of such provision, notwithstanding its duty to "cooperate with the Tribunal in the production of the evidence" under Rule 34(3) of the Arbitration Rules.

12. Absent in the case of the Investment Law (enacted by Presidential decree)[18] a formal Congressional debate[19], "direct evidence" of the intention of the legislator would have normally appeared in the form of documents existing in the official administrative files, the minutes of the Economic Cabinet or the minutes of the Council of Ministers. Such evidence could have only been produced by Respondent, who did not disclose them, notwithstanding the multiple requests made to this respect.[20]

13. Having the Tribunal come to the conclusion that Messrs. Corrales and Capriles contributed to the drafting of the Investment Law, and that their intention was that Article 22 of the Investment Law would constitute consent of Venezuela to ICSID jurisdiction in respect of disputes brought by investors against the Respondent under the Investment Law –which is consistent with the documentary evidence available in the record–, denial of jurisdiction for lack of consent based in the absence of "direct evidence" that could only take the form of documents in possession, custody or control of the Respondent, duly requested and not produced, appears in my view as a threshold too high for the Claimant to comply with and with which I am, respectfully, unable to agree.

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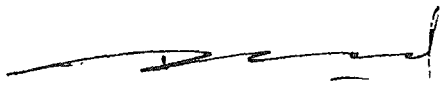
[17] Award, paras. 125 and 146.

[18] Exhibit LA C-21, Publication of Decree-Law No. 356 of 3 October 1999 on Protection and Promotion of Investments in ICSID's Investment Laws of the World (March 2000) ICSID's Investment Laws of the World (March 2000).; Exhibit EU-1, Decree with Rank and Force of Law on the Promotion and Protection of Investments, Decree No. 356, published in the Official Gazette No. 5.390 (Extraordinary), on October 22, 1999.

[19] *See*, Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros dated 29 July 2011, para. 3. *See*, also, Respondent's letter dated 14 October 2011.

[20] *See*, Claimant's First Request, *supra note* 15.



Professor Dr. Guido Santiago Tawil
Arbitrator
Date: 16 May 2013