Es wäre zu hoffen, dass eine in diesem Sinn durchgeführte neuerliche Reform des Korruptionsstrafrechts, wenn – anders als bei der letzten Reform des Korruptionsstrafrechts – hinreichende Zeit für eine Begutachtung und Berücksichtigung der Stellungnahmen eingeplant wird, eine längere Lebenserwartung haben wird als die wenig geglückten Reformen der Jahre 2008 und 2009!

Nachbemerkung

Im Hinblick auf den aktuellen Gesetzgebungsprozess wurden die vorstehenden Überlegungen im April 2012 auch dem Justizministerium (Herrn Sektionschef *Christian Pilnacek*) übermittelt. Der ursprüngliche Diskussionsentwurf des Justizministeriums wurde danach in überarbeiteter Form im Mai 2012 als Initiativantrag ins Parlament eingebracht und nach weiteren Änderungen durch den Justizausschuss beschlossen (BGBl. I 61/2012; Inkrafttreten am 1.1.2013; dazu 1833 BlgNR, 24. GP). Zusätzlich zu den bereits im Diskussionsentwurf enthaltenen – positiv zu bewertenden – Reformaspekten wurden nunmehr erfreulicherweise die folgenden weiteren Vorschläge aufgegriffen:

- Als „Amtsträger" sind gem. § 74 Abs. 1 Z. 4a lit b StGB nun (wie hinsichtlich des „Beamten" gem. § 74 Abs. 1 Z. 4 StGB) die Organe und Dienstnehmer *aller* „Personen des öffentlichen Rechts" (außer den Kirchen und Religionsgemeinschaften), also insbesondere alle staatlichen Selbstverwaltungskörper, erfasst (oben C.III.). Damit sind nunmehr wohl auch alle Hoheitsakte einbezogen (oben C.II.).
- Ferner wurde die Anregung aufgegriffen, dass „Fordern" von Vorteilen durch Amtsträger in keinem Fall straflos zu lassen (oben C.V.).
- Die Straftatbestände des „Anfütterns" wurden dahin umformuliert, dass es nun nicht mehr auf das „Anbahnen" eines Amtsgeschäfts ankommt und dabei nach pflichtwidrigen und pflichtgemäßen Amtsgeschäften unterschieden wird. Maßgebend ist nach den neuen §§ 306, 307b StGB vielmehr der Vorsatz, dass die Vorteilsannahme oder -zuwendung die „Tätigkeit als Amtsträger beeinflussen" soll (oben C.VI. und E.II.).
- Die Grenzen der Strafbarkeit wurden durch eine nähere Umschreibung der „nicht ungebührlichen" Vorteile (vgl. oben D.) in § 305 Abs 4 StGB sehr sachgerecht weiterentwickelt.

Durch das KorrStrÄG 2012 wurde nunmehr dem GRECO-Evaluierungsbericht Rechnung getragen und ein tragfähiges Korruptionsstrafrecht geschaffen.

Investment Arbitration based on National Legislation

Christoph Schreuer, Vienna

A. *Introduction*

Arbitration, by definition, is based on an agreement between the parties. Therefore, investment arbitration requires an agreement between the host State and the foreign investor. Traditionally consent to investment arbitration is contained in a direct agreement between the parties. Dispute settlement clauses providing for investor-State arbitration are common in contracts between States and foreign investors.

More recently, the most frequently used basis for consent to investment arbitration is a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) and some multilateral treaties contain clauses offering arbitration. Under these clauses a national of one State party to the treaty may institute arbitration against the other State party to the treaty. These treaty clauses providing for arbitration are merely offers of consent that must be perfected by an acceptance on the part of the investor.

Yet another technique to give consent to arbitration with foreign investors is a provision in the host State's national legislation. Unlike offers to arbitrate contained in treaties, provisions on arbitration contained in national legislation are not subject to nationality requirements. Many capital importing countries have adopted such provisions.

The mere existence of such a provision in national legislation will not suffice as a valid basis for the arbitral tribunal's jurisdiction. The legislative provision providing for arbitration is no more than a general offer of consent. An investor may accept the offer in writing at any time while the legislation is in force thus perfecting the arbitration agreement.

The most frequently used framework for the settlement of investment disputes is the ICSID Convention.[1] The ICSID Convention requires "consent in writing" but does not otherwise specify the modalities of consent. But the Report of the Executive Directors to the Convention[2] leaves no doubt that consent by way of national legislation is an option:

1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, in force 14 October 1966, 575 UNTS159; 4 ILM 524 (1965).

2 The Report of the World Bank's Executive Directors to the ICSID Convention was adopted together with the Convention's text on 18 March 1965.

> "24. [...] Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing."[3]

B. *Offer and Acceptance*

A provision on arbitration in the host State's legislation can amount to no more than an offer that may be accepted by the investor. The investor may accept the host State's offer simply by submitting a request for arbitration. In *Tradex v. Albania* the investor had relied on the Albanian Law on Foreign Investment of 1993 containing an offer of consent by the host State. The Tribunal said:

> "[...] it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws, the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law."[4]

It may be wise for the investor not to rely on the host State's offer contained in its legislation without accepting it at an early stage. The host State may repeal or amend its legislation at any time thereby withdrawing or restricting access to international arbitration. Once the investor has accepted consent based on legislation, the agreement on consent will stay in effect even if the legislation is repealed.

The investor may express its acceptance of the offer of consent to arbitration in a variety of ways. One of these is the institution of proceedings. Other ways to accept the offer would be a simple written communication to the host State to the effect that consent to ICSID's jurisdiction in accordance with the legislation is accepted or a statement to this effect contained in an application for an investment licence.

In SPP v. *Egypt* the Claimants had sent a letter to Egypt's Minister of Tourism about one year before the institution of arbitration. In this letter they accepted the offer of consent to arbitration contained in the investment law. Before the Tribunal, the Claimants contended successfully that their consent was expressed in the letter and again by the act of filing their request for arbitration.[5]

The host State's legislation containing the offer of consent may prescribe certain conditions, time limits, or formalities for acceptance by the investor.

3 1 ICSID Reports 28.
4 ICSID, *Tradex* v. *Albania*, Decision on Jurisdiction of 24 December 1996, 5 ICSID Reports 63. See also ICSID, *Zhinvali* v. *Georgia*, Award of 24 January 2003, 10 ICSID Reports 6, para. 342.
5 ICSID, *SPP* v. *Egypt*, Decision on Jurisdiction I of 27 November 1985, 3 ICSID Reports 101, paras. 40, 48.

In a number of investment laws, the investor's consent is linked to the process of obtaining an investment authorization.

C. *Legal Nature*

Provisions in in national legislation referring to investment arbitration vary considerably. Some national investment laws unequivocally provide for arbitration. But not all references to arbitration amount to binding offers.

Provisions that state that the investor "may submit" a dispute to arbitration constitute binding offers. For instance, article 8(2) of the Albanian Law on Foreign Investment of 1993 states in part:

> "[...] the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes [...]"[6]

Similarly, Article 15 of the El Salvador Investment Law provides in relevant part:

> "In the case of controversies arising between foreign investors and the State regarding their investment in El Salvador, the investors may submit the controversy to:
> a) [...] ICSID [...]
> b) [...] the Additional Facility of ICSID; in those cases in which the foreign investor involved in the controversy is a national of a State that is not a contracting party to the ICSID Convention."

In *Inceysa v. El Salvador* the Tribunal concluded that this provision constituted a unilateral offer of consent to submit to the jurisdiction of the Centre to hear disputes regarding investments arising between El Salvador and an investor.[7]

Other references in national legislation to investment arbitration do not constitute binding undertakings. This is the case where further action by the host State is required to establish consent. For instance, some laws provide that the parties "may agree" to settle investment disputes through arbitration. Section 23.2 of the Tanzanian Investment Act of 1997 provides in relevant part:

> "A dispute between a foreign investor and the [Tanzania Investment] Centre or the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, [...]"

The Tribunal in *Biwater Gauff* v. *Tanzania* found that this provision required a subsequent agreement between the parties, as a prerequisite for jurisdiction.[8]

6 See ICSID, *Tradex* v. *Albania* (Fn. 4) 5 ICSID Reports 47, 54.
7 ICSID, *Inceysa* v. *El Salvador*, Award of 2 August 2006, para. 331.
8 ICSID, *Biwater Gauff* v. *Tanzania*, Award of 24 July 2008, paras. 326–337.

Some legislative provisions only refer to investment arbitration in general terms without dealing with consent. It is clear that provisions of this nature cannot form the basis of an agreement to arbitrate.[9]

D. Applicable Law

In some cases the meaning of legislative provisions referring to investment arbitration may be unclear. Therefore, whether consent does, in fact, exist must be established on a case by case basis. The starting point for this inquiry is an interpretation of the piece of legislation in question. But statutory interpretation is not the end of the matter. The offer, in order to become effective, must be accepted by the investor. Once perfected, the arbitration agreement forms the basis for the jurisdiction of an international tribunal.

It is generally accepted that questions of jurisdiction of an international tribunal are determined by international law. In the case of ICSID arbitration the relevant provision would be Article 25 of the ICSID Convention. Therefore, even though national legislation may be a decisive element of the process leading to the consent agreement between the host State and the investor, the tribunal's jurisdiction remains a matter of international law.

This principle was expressed succinctly by the Tribunal in *CSOB* v. *Slovakia* in the following terms:

> "35. 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 in Article 25(1) of the ICSID Convention."[10]

Tribunals have rejected purely national methods of statutory interpretation in cases where the host State's consent was expressed through legislation.

In *SPP* v. *Egypt*, jurisdiction was based on a provision of Egyptian law.[11] Egypt contended that the jurisdictional issues were governed by Egyptian law by virtue of Article 42(1) of the ICSID Convention.[12] The Tribunal rejected Egypt's argument. It held that the offer of consent to jurisdiction under the ICSID Convention by way of national legislation involved elements of international law. It said:

9 ICSID, *Amco* v. *Indonesia*, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389, paras. 5, 17, 21–22.

10 ICSID, *CSOB* v. *Slovakia*, Decision on Jurisdiction of 24 May 1999, 5 ICSID Reports 330, para. 35.

11 ICSID, *SPP* v. *Egypt*, Decision on Jurisdiction II of 14 April 1988, 3 ICSID Reports 131, paras. 55–61.

12 Article 42(1) of the ICSID Convention provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

> "[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."13

The Tribunal pointed out that the relevant statutory provision would have to be considered in light of the international law governing unilateral juridical acts. After referring to decisions of the Permanent Court of International Justice and of the International Court of Justice on unilateral consent to jurisdiction, the Tribunal concluded:

> "[...] in deciding whether in the circumstances of the present case Law No. 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."[14]

In *Zhinvali* v. *Georgia*, consent was based on an offer of ICSID arbitration in the host State's Investment Law.[15] The Tribunal found that its interpretation of consent was primarily governed by the law of Georgia subject to the control of international law. The Tribunal quoted *CSOB* and *SPP*. It said:

> "[...] we are dealing with an internal statute rather than a bilateral agreement and hence the Tribunal believes 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. [...] the 1996 Georgia Investment Law, the Tribunal believes, is completely in keeping with any international law principles that may be applicable. Thus, we have reached our conclusion on the basis of our reading of Georgia's own law, which, in this case, we see no reason to view as in any way divergent from international law."[16]

In *Mobil* v. *Venezuela*, the claimants sought to base consent on Venezuela's Investment Law. The parties differed as to the emphasis the Tribunal should put on domestic law and on international law in interpreting this provision. In its Decision on Jurisdiction[17] the Tribunal stressed the significance of international law. It said:

> "Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States."[18]

13 ICSID, *SPP* v. *Egypt* (Fn. 11) para. 61.

14 *Ibid.*, para. 61.

15 ICSID, *Zhinvali* v. *Georgia* (Fn. 4) para. 229.

16 *Ibid.*, paras. 339, 340.

17 ICSID, *Mobil* v. *Venezuela*, Decision on Jurisdiction of 10 June 2010.

18 *Ibid.*,para. 85.

In *Cemex* v. *Venezuela*, the situation was very similar. Again the parties disagreed on the respective weight to be given to domestic legal principles and to international law in interpreting Venezuela's Investment Law. The Tribunal reached a result on this issue very similar to the one in *Mobil*:

> "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."[19]

In *Brandes* v. *Venezuela* the claimant relied on the same provision in Venezuela's Investment Law. The Tribunal stated that the process of interpretation should be guided by the host State's law in accordance with international law:

> "It is clear to the Tribunal that, in view of the fact that Article 22 of the LPPI is a unilateral declaration of the Venezuelan State, it is necessary that the initial process of interpretation be conducted within the parameters set by the Republic's legal system, based on its Political Constitution, which is the supreme norm of that country. However, because any conclusions that may be reached in the process of interpretation of that article must be applied to determine whether Venezuela granted its consent to ICSID jurisdiction under Article 25 of the ICSID Convention, it is necessary to take account of the principles of International Law to reach a definitive conclusion."[20]

It is evident from these cases that the emphasis given by tribunals to international law and to domestic principles of statutory interpretation varies. But it is clear that the determination of whether a State has validly consented to ICSID's jurisdiction by way of national legislation is not to be made just as a matter of statutory interpretation. This determination must be made also in the light of international law.

E. Unilateral Acts

From the perspective of international law a statutory provision containing an offer of consent to arbitration to foreign investors is a unilateral act and has to be interpreted as such.

Unilateral acts of States have been the object of study by the International Law Commission (ILC) of the United Nations. In 2006 the ILC adopted Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[21] The ILC recognized that unilateral declarations of States may have the effect of creating legal obligations. It said:

19 ICSID, *Cemex* v. *Venezuela*, Decision on Jurisdiction of 30 December 2010, para. 79.
20 ICSID, *Brandes* v. *Venezuela*, Award of 2 August 2011, para. 81. See also para. 36.
21 *ILC*, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Report of its 58th session 1 May – 9 June and 3 July – 11 August 2006, A/61/10 A/CN.4/L. 703, 20 July 2006.

> "1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; interested States may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected."[22]

The ILC's Guiding Principles recognize that unilateral declarations have legal effect not only among States. They may be validly addressed to the international community, to one or several States as well as to "other entities".[23]

In case of doubt the ILC favours a restrictive interpretation in interpreting unilateral declarations:

> "7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."[24]

F. Restrictive or Extensive Interpretation

The idea that in case of doubt obligations resulting from a unilateral declaration have to be interpreted restrictively is not borne out in the arbitral practice relating to the jurisdiction of international tribunals. On the contrary, in *Tradex* v. *Albania*, the Tribunal appears to have leaned towards a doctrine of effective interpretation. After finding that the Albanian Investment Law was an expression of Albania's commitment to the full protection of foreign investment, the Tribunal said:

> "It would, therefore, seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the 1993 Law should rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular."[25]

In *SPP* v. *Egypt*, the Tribunal found that there was no presumption either way and that jurisdiction only existed insofar as consent thereto had been given by the parties and if the arguments in favour of consent were preponderant. The Tribunal said:

> "[…] there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction

22 *Ibid.*, para. 1.
23 *Ibid.*, para. 6.
24 *Ibid.*, para. 7.
25 ICSID, *Tradex* v. *Albania* (Fn. 4) 5 ICSID Reports 68. In the end the Tribunal found that it did not have jurisdiction.

> with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively. [...] Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant."[26]

G. *Some Difficult Cases*

In a number of cases tribunals had to interpret domestic statutes that referred to investment arbitration but left doubts as to whether they contained binding offers of consent. In *SPP* v. *Egypt*[27] the Request for Arbitration was based on Art. 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone. This law provided in relevant part:

> "Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies."[28]

Egypt denied that this amounted to consent to arbitration. The Tribunal undertook a detailed grammatical analysis of the relevant text, including the Arabic original. This led it to conclude that the Arabic text mandated the submission of disputes to the various methods prescribed therein to the extent that such methods were applicable.[29] The Tribunal rejected the idea that this provision had the consequence of only informing potential investors of Egypt's willingness, in principle, to negotiate a consent agreement. There was nothing in the legislation requiring a further *ad hoc* manifestation of consent to the Centre's jurisdiction.[30]

In a series of more recent cases tribunals had to interpret Article 22 of the Venezuelan Investment Law. This piece of legislation (translated into English) provides as follows:

> "Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using,

26 ICSID, *SPP* v. *Egypt* (Fn. 11) para. 63. The Tribunal relied on a number of international decisions by the ICJ, the PCIJ and an arbitral tribunal.
27 ICSID, *SPP* v. *Egypt* (Fn. 5).
28 *Ibid.*, para. 70. See also 16 ILM 1476, 1479. This provision has since been repealed.
29 *Ibid.*, paras. 74–82.
30 *Ibid.*, paras. 89–101.

> if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable."

Successive tribunals came to the conclusion that this formula did not amount to a binding offer of consent to ICSID jurisdiction. In *Mobil* v. *Venezuela* the Tribunal found that the decisive element for the interpretation of the domestic legal provision was the intention of Venezuela when adopting it.[31] After examining Venezuela's historical attitude towards international arbitration, the circumstances surrounding the investment law's adoption and the existence of BITs providing for ICSID arbitration, the Tribunal concluded that it was unable to conclude from the ambiguous text of the law that Venezuela had consented to ICSID arbitration.[32]

Cemex v. *Venezuela*, involved the same piece of legislation. Again, the Tribunal, put a strong emphasis on the intention of the State making the declaration.[33] In its search for this intention it held that "[t]he 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."[34]

The Tribunal, examining the practice of the International Court of Justice, found that the principle of *effet utile* or effectiveness,[35] which plays a role in treaty interpretation, is not to be applied when it comes to unilateral declarations.[36] This led the Tribunal to declare that "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."[37] The provision's context and purpose did not allow the conclusion that it had to be interpreted as establishing consent to ICSID arbitration.[38] Likewise, the Tribunal was unable to draw a conclusion from the fact that Article 22 was contained in a chapter of the Law entitled "Dispute Resolution".[39]

The Tribunal also noted that Venezuela had signed and ratified a number of BITs containing unequivocal offers of consent to ICSID jurisdiction. Comparable words were used in some national laws and in the ICSID model clauses. This led the Tribunal to conclude that "[i]f 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

31 ICSID, *Mobil* v. *Venezuela* (Fn. 17) para. 119.
32 *Ibid.*, paras. 86–141.
33 ICSID, *Cemex* v. *Venezuela* (Fn. 19) para. 87.
34 *Ibid.*, para. 90.
35 *Ibid.*, at para. 114 the Tribunal explains that this principle does not require that maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.
36 *Ibid.*, paras. 107–111.
37 *Ibid.*, para. 112.
38 *Ibid.*, paras. 116–120.
39 *Ibid.*, paras. 121–122.

clearly by using any of those well-known formulae."[40] The Tribunal's overall conclusion was

> "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."[41]

Brandes v. *Venezuela* once again concerned Article 22 of Venezuela's Investment Law. The Tribunal noted the parties' agreement on the method to be applied when interpreting this provision. This methodology is obviously influenced by Article 31(1) of the Vienna Convention on the Law of Treaties dealing with treaty interpretation. The Tribunal said:

> "As the Parties to this proceeding have agreed the interpretation of a legal provision and, specifically, in this case, Article 22 of the LPPI, should begin with a *purely grammatical analysis;* if this initial analysis fails to define clearly the meaning of the provision, it then becomes necessary to examine the *context* in which it was enacted, including a review of other provisions of Venezuelan law relating to the same subject and, in particular, having regard to the hierarchy of norms of the Venezuelan legal system as set forth in the Political Constitution of that State. Other elements that must be used to interpret with clarity the content of Article 22 are the *circumstances* in which it was enacted and the *goals* that it was intended to achieve."[42]

The Tribunal found that the wording of the provision was confusing and imprecise and did not lend itself to a meaningful grammatical interpretation.[43] As to context, the Tribunal noted that the clarity of most other provisions of the Law contrasted with the confusing and ambiguous wording of Article 22.[44] Similarly, the Tribunals observed that BITs concluded by Venezuela contained clear and precise submissions to ICSID jurisdiction.[45]

The Tribunal also rejected the idea that Venezuela had been willing to grant broad unilateral consent to ICSID jurisdiction in view of its difficulties to conclude a BIT with the United States. Such a broad unilateral concession without reciprocity was implausible.[46] Moreover, for the Tribunal it was "self-evident that such consent should be expressed in a manner that leaves no doubts."[47] It followed that "it is obvious that Article 22 of the Law on Promotion and Protection of Investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction."[48]

40 *Ibid.*, para. 137.
41 *Ibid.*, para. 138.
42 ICSID, *Brandes* v. *Venezuela* (Fn. 20) para. 35. (*Emphases* original). Footnote omitted.
43 *Ibid.*, para. 86.
44 *Ibid.*, para. 92.
45 *Ibid.*, para. 94.
46 *Ibid.*, paras. 104, 105.
47 *Ibid.*, para. 113.
48 *Ibid.*, para. 118.

H. Conclusion

Domestic legislation is one of several ways to establish consent to investment arbitration. A provision in domestic law can only constitute an offer of arbitration that may be accepted by the investor.

Not every reference to arbitration in domestic legislation amounts to a binding offer of consent. Some provisions require an additional consent agreement between the parties.

The determination of whether national legislation referring to arbitration with foreign investors amounts to a binding offer of consent is not just a matter of statutory interpretation. It is informed also by principles of international law governing the construction of unilateral acts.

In a number of cases tribunals had to grapple with ambiguous pieces of legislation referring to investment arbitration.