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Arbitration under the Venezuelan Foreign Investment Law – The Mobil and Cemex Decisions

Andrew Newcombe (University of Victoria Faculty of Law) · Tuesday, January 18th, 2011

Two ICSID tribunals have now weighed in on the much-debated question of whether Art. 22 of Venezuela's Foreign Investment Law provides Venezuela's consent to ICSID arbitration. In Decisions on Jurisdiction dated June and December 2010, the Mobil and Cemex tribunals (both presided by the former president of the ICJ, Judge Gilbert Guillaume), rejected investors' submissions that Art. 22 can be used to establish ICSID jurisdiction, although both also held they had jurisdiction under the Dutch-Venezuelan BIT. Although the decisions are significant in the context of the wave of other ICSID arbitrations commenced against Venezuela, which also invoke Art. 22 as a basis for jurisdiction, the most lasting contribution of the decisions to international arbitration may well be the tribunals' discussions of the applicable law for interpreting unilateral offers to arbitrate incorporated into national laws, more specifically, foreign investment laws.

Consistent with international arbitration law, the tribunals both confirmed, in the same words, that "the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal's decision on its competence." (Mobil, para. 75; Cemex, para. 70). In reviewing ICSID cases, the tribunals noted that previous tribunals had taken differing approaches to interpreting arbitration clauses in foreign investment legislation (*Mobil*, para. 82; *Cemex*, para. 76):

– In *SPP v. Egypt*, the tribunal decided to apply "general principles of statutory interpretation" taking into account both "relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations."

– In *CSOB v. Slovak Republic*, the tribunal based its decision on international law without any reservation.

– In *Zhinvali v. Georgia*, the tribunal opted for domestic law "subject to ultimate governance by international law".

The *Mobil* and *Cemex* tribunals found that the state consent at issue in Art. 22 is not contained in a treaty to be interpreted in accordance with *the Vienna Convention on the Law of Treaties*, but rather is a unilateral act of a sovereign state—national legislation. The tribunals therefore drew on ICJ jurisprudence interpreting optional declarations of compulsory jurisdiction made by states under Article 36(2) of the ICJ Statute. The tribunals found that standing offers to arbitrate must be "interpreted according to the ICSID Convention itself and to the rules of international law

governing unilateral declarations of States." (*Mobil*, para. 85; *accord Cemex* para. 79).

With respect to unilateral declarations, both tribunals stated that international law distinguishes between: (i) declarations formulated in the framework and on the basis of a treaty; and (ii) other declarations made by states in the exercise of their freedom to act on the international plane (*Mobil*, para. 87; *Cemex*, para. 81). Further, rules of interpretation are different for the two types of declarations. In the case of general declarations, the ICJ held in the *Nuclear Tests Case* that "a restrictive interpretation is called for", but that the rules of interpretation are somewhat different where "unilateral acts are formulated in the framework and on the basis of a treaty, such as the ICSID Convention" (*Mobil*, para. 90; accord *Cemex*, para 83). Both tribunals then applied the rules developed by the ICJ in the context of interpreting unilateral declarations of compulsory ICJ jurisdiction. As stated in *Fisheries Jurisdiction*, the words should be interpreted "in a natural and reasonable way, having due regard to the intention of the State concerned." Both tribunals emphasized the importance of determining the state's intention.

The tribunals then turned to Article 22 of the Foreign Investment Law, which can be translated as follows:

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

The central interpretative issue is whether "*if it so provides*" means that there is consent if the treaty or agreement in question provides for arbitration (the interpretation favoured by the investors) or there is only consent to arbitration if the treaty or agreement provides for mandatory submission of disputes to international arbitration (i.e. there must be express consent to arbitrate under the other treaty or agreement)—the interpretation favoured by Venezuela. After an in-depth review of the background and context, both tribunals found that there was no intention to consent to arbitrate in Article 22. Both tribunals rightly noted that in light of the clear language in other contemporaneous BITs providing advance consent to arbitration, no intention to consent to arbitrate could be derived from the "ambiguous text" of Article 22 (*Mobil*, para. 140; *Cemex*, para. 138).

Although the tribunals found that the unilateral declarations at issue should not be interpreted restrictively because they are "declarations formulated in the framework and on the basis of a treaty" (i.e. the ICSID Convention), I would suggest that the restrictive approach to unilateral declarations from the *Nuclear Tests Case*, should never apply to the interpretation of offers to arbitrate. For example, if a foreign investment law has an arbitration provision that purports to offer to arbitrate investment disputes under the UNCITRAL Arbitration Rules, this "unilateral declaration" would not appear to be one "formulated in the framework and on the basis of a treaty" (unless perhaps the argument is made that the *New York Convention* framework applied). It would seem anomalous for different interpretative principles to apply simply because one foreign investment law refers to a treaty regime (ICSID), while another favours *ad hoc* arbitration.

Rather than distinguishing between different types of unilateral declarations, arbitral tribunals should apply (as did the *Mobil* and *Cemex* tribunals) the standard that the ICJ has developed for optional declarations: the "natural and reasonable" meaning of the terms. This standard would appear to be consistent with the general principle identified in *Amco Asia Corporation v. Indonesia*: "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*." Although a unilateral declaration is not an agreement and a tribunal cannot apply the fundamental principle *pacta sunt servanda*, what is called for is an objective assessment of the unilateral offer to arbitrate based on the "natural and reasonable" meaning of the terms and neither a restrictive nor broad presumption of what the state intended by the terms.

This post is written by Andrew Newcombe on behalf of the ITA Academic Council.

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