Consent to Arbitration through Legislation

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I. Introduction

Arbitration, by definition, is always based on an agreement between the disputing parties. In investment arbitration, the agreement is frequently not contained in a direct contract between the disputing parties but results from a general offer by the host State that may be taken up by an eligible investor. In practice, the most frequently used method to give consent to arbitration is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering arbitration to the nationals of one State party to the treaty against the other State party to the treaty. The same method is employed by a number of regional multilateral treaties such as the NAFTA and the Energy Charter Treaty. These offers of consent contained in treaties must be perfected by an acceptance on the part of the investor. Another technique to give consent to arbitration is through a 'general terms' provision in the national legislation of the host State offering arbitration to foreign investors. Many capital-importing countries have adopted such provisions. The investor may accept the offer in writing at any time while the legislation is in effect. Unless otherwise provided in the legislation, the acceptance may be made simply by instituting proceedings.[1] The possibility that a host State may express its consent to arbitration under the ICSID Convention through a provision in its national legislation or through some other form of unilateral declaration was discussed during the Convention's preparation. It was uncontested that a unilateral acceptance by Contracting States of ICSID's jurisdiction constituted an offer that could be accepted by a for-

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1 For earlier studies see M. Potestà, The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws, 27 Arbitration International (2011), 149; C. Schreuer, Investment Arbitration based on National Legislation, in G. Hafner et al. (eds.), Völkerrecht und die Dynamik der Menschenrechte, Liber Amicorum Wolfram Karl (2012), 527.

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eign investor and so become binding on both parties.[2] The Report of the Executive Directors to the Convention confirms that a State may offer consent to ICSID jurisdiction by way of legislation:

> 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]

Tribunals have confirmed the principle that consent to ICSID's jurisdiction may be given by way of an offer contained in the host State's legislation which is subsequently accepted by the investor.[4] Not every reference to arbitration in domestic legislation amounts to a binding offer of consent. Such a reference may hold out the possibility of future consent by the host State or may refer to consent given in another instrument. In a number of cases tribunals have held that legislative provisions that contained references to investment arbitration did not amount to an offer of consent by the host State.[5] Whether consent does, in fact, exist must be established on a case by case basis. The starting point for this inquiry is an interpreta-

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2 International Centre for Settlement of Investment Disputes [ICSID], History of the ICSID Convention Vol. II (1968), pp. 274, 275.

3 International Bank for Reconstruction and Development, 'Report of the executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States' (1965), available at http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partB.htm (last visited 10 September 2018), para. 24.

4 SPP v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction I of 27 November 1985, paras. 51, 52, 70-73; SPP v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction II of 14 April 1988, paras. 53, 73-118; Tradex v. Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, 5 ICSID Reports 47, 54, 63; Zhinvali v. Georgia, ICSID Case No. ARB/00/1, Award of 24 January 2003, 10 ICSID Reports 3, paras. 328-339; Inceysa v. El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 331-332; Rumeli v. Kazakhstan, ICSID Case No. ARB/05/16, Award of 29 July 2008, paras. 332-336; Pac Rim Cayman v. El Salvador, ICSID Case No. ARB/09/12, Decision on Preliminary Objections of 2 August 2010, paras. 242, 253.

5 Amco v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, paras. 21-22; Inceysa v. El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 309-330; Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 329; Mobil v. Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, paras. 71-141; Cemex v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction of 30 December 2010, paras. 63-139; Brandes v. Venezuela, ICSID Case No. ARB/08/3, Award of 2

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tion of the piece of legislation in question. This process involves questions of applicable law, notably whether the legislative provision in question is to be interpreted in accordance with domestic or international law. In addition, the interpretation of the purported consent clause may be subject to particular rules of interpretation.

II. Jurisdiction and Applicable Law

Questions relating to the jurisdiction of international tribunals are governed by rules that differ from the rules on applicable law concerning the merits of a case. ICSID tribunals have confirmed in numerous cases that the law governing jurisdiction differs from the law applicable to the merits in accordance with Article 42(1) of the ICSID Convention.[6] Where

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August 2011, paras. 32-118; Tidewater v. Venezuela, ICSID Case No ARB/10/5, Decision on Jurisdiction of 8 February 2013, paras. 75-141; OPIC Karimun v. Venezuela, ICSID Case No. ARB/10/14, Award of 28 May 2013, paras. 165-179; ConocoPhillips v. Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, paras. 225-263; Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, paras. 381-388; PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, ICSID Case No. ARB/13/33, Award of 5 May 2015, paras. 245-361; Içkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award of 8 March 2016, paras. 395-399; MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award of 4 May 2016, paras. 166-173.

6 CMS v. Argentina, ICSID Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003, paras. 42, 88; CMS v. Argentina, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, para. 68; Azurix v. Argentina, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paras. 48-50; Enron v. Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, para. 38; Siemens v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, paras. 29-31; Camuzzi v. Argentina, ICSID Case No. ARB/03/2, Decision on Jurisdiction of 11 May 2005, paras. 15-17, 57; Sempra v. Argentina, ICSID Case No. ARB/02/16, Decision on Jurisdiction of 11 May 2005, paras. 25-27; AES Corp. v. Argentina, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, paras. 34-39; Jan de Nul N.V., Dredging Intl. N.V. v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, paras. 65-68, para. 82; Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, paras.68, 78, 82; Noble Energy & Machalapower v. Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction of 5 March 2008, paras. 56-57; Alpha v. Ukraine, ICSID Case No. ARB/07/16, Award of 8 November 2010, paras. 225-227; Duke Energy v. Peru, ICSID Case No. ARB/03/28, Decision on Annulment of 1 March 2011, paras. 131-146; AFT v. Slovakia, Award of 5 March

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claimants have sought to base consent on the national legislation of the respondent States, tribunals have applied principles of statutory interpretation as well as rules of international law relating to unilateral acts.[7] The emphasis on either domestic law or international law varies from case to case.

In *SPP v. Egypt*, jurisdiction was based on a provision of Egyptian law.[8] Egypt contended that the jurisdictional issues were governed by Egyptian law by virtue of Article 42(1) of the ICSID Convention. The Tribunal rejected Egypt's argument. It held that any offer of consent to jurisdiction under the ICSID Convention by way of national legislation involved more than interpretation of municipal legislation. The question was whether the legislation created an international obligation under a multilateral treaty. This involved both statutory and treaty interpretation.[9] The Tribunal pointed out that the statutory provision, which SPP claimed to be a unilateral acceptance of the Centre's jurisdiction, 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

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2011, paras. 193-199; Meerapfel v. Central African Republic, ICSID Case No. ARB/07/10, Award of 12 May 2011, paras. 139-147; Abaclat et al. v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, para. 430; Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012, paras. 47-52; Electrabel v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 4.17; Teinver v. Argentina, ICSID Case No. ARB/09/1, Decision on Jurisdiction of 21 December 2012, paras. 227-228; Ambiente Ufficio et al. v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013, paras. 134, 153, 233-246, 257, 514-515; Burimi SRL and Eagle Games SH.A, ICSID Case No. ARB/11/18, Award of 29 May 2013, paras. 92 et seq.; Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013, para. 30; KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Award of 17 October 2013, para. 85; Churchill Mining v. Indonesia, Planet Mining v. Indonesia, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction of 24 February 2014, para. 86; Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award of 29 January 2016, paras. 163-196; CEAC Holdings Ltd. v. Montenegro, ICSID Case No. ARB/14/8, Award, 26 July 2016, paras. 145, 147, 154.

7 See Potestà, supra note 1, 160 et seq.

8 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction II of 14 April 1988, 3 ICSID Reports 131, paras. 55-61.

9 Ibid., para 61.

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Tribunal concluded that it would apply general principles of statutory interpretation as well as relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations.[10]

In *Zhinvali v. Georgia*, consent to arbitration was based on a reference to ICSID arbitration in the host State's Investment Law.[11] The Tribunal found that its interpretation of this alleged consent was primarily governed by the law of Georgia subject to the control of international law.[12]

A series of cases have turned on the interpretation of Article 22 of Venezuela's Investment Law and on the question whether Venezuela had offered consent through that piece of legislation. In these cases, the parties differed as to the emphasis the Tribunal should put on domestic law and on international law in interpreting this provision. The Tribunals, though with certain variations in emphasis, found that both the host State's law and international law had to be taken into account.[13]

In *Tidewater v. Venezuela*,[14] the Tribunal went into some detail in determining the relative weight to be given to domestic law and international law. It said:

> It is the Tribunal's view that the Investment Law being a municipal legal instrument susceptible to having effects on the international plane, both national rules of interpretation and international rules of interpretation have their role to play.[15] […] The Tribunal does not consider that national law has to be completely disregarded, but considers that logic implies that an act, which is both rooted in the national legal order and extends its effects in the international legal order, has to be interpreted by reference to both legal orders. Thus, an ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according primarily to national law, but rather has to take

10 Ibid.

11 Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Award of 24 January 2003, para. 229.

12 Ibid., paras. 339, 340.

13 See also Mobil v. Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, para. 85; Cemex v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction of 30 December 2010, para. 79; Brandes v. Venezuela, ICSID Case No ARB/08/3, Award of 2 August 2011, paras. 36, 81; ConocoPhillips v. Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, para. 255.

14 Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction of 8 February 2013.

15 Ibid., para. 81.

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> into account the principles of international law.[16] […] domestic law has a role to play first in order to ascertain the existence and validity of the national law, but also in order to help understanding the intention of the state in adopting such law.[17]

Pac Rim Cayman v. El Salvador raised the question whether Article 15 of the Investment Law of El Salvador contained an offer of consent to arbitration addressed to foreign investors. For purposes of its interpretation, the Tribunal put a strong emphasis on international law and said:

> As established by the International Court of Justice when interpreting optional declarations of compulsory jurisdiction made by States under Article 36(2) of the ICJ Statute[18] and as adopted recently by other ICSID tribunals,[19] legislation and unilateral acts by which a State consents to ICSID jurisdiction are to be considered as standing offers to foreign investors under the ICSID Convention and interpreted according to the ICSID Convention and under the rules of international law governing unilateral declarations of States.[20]

In *PNG Sustainable Development Program v. Papua New Guinea*, the Tribunal found that statutory provisions referring to ICSID arbitration were of a hybrid nature and were governed by both national and international law:

> The Tribunal is of the view that, where national investment legislation is claimed to contain a standing offer to arbitrate under an international instrument, such as the ICSID Convention, that provision constitutes a unilateral declaration made by a State that is rooted in the national legal order of that State, but that also (assertedly) produces effects under international law. […]
> In this regard, the Tribunal concludes that such legislative provisions are of a "hybrid" nature. As a consequence, interpretation of those provisions must also be approached from a hybrid perspective, taking into

16 Ibid., para. 86.
17 Ibid., para. 103.
18 Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, ICJ Reports 1998, 291, para. 25; Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, 453, para. 46. [footnote in original].
19 Mobil v. Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, para. 85; Cemex v. Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction of 30 December 2010, para. 79 [footnote in original].
20 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdiction of 1 June 2012, para. 5.33.

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> account both that State's domestic law on statutory construction and international law. Where the principles of interpretation under the State's domestic law conflict with international law principles, international law principles will ordinarily prevail, although this is an issue that must be resolved on a case-by-case basis, in light of the nature of the conflict. In general, the relevant rules of international law would be character of unilateral acts, but the Vienna Convention's provisions will often be applicable by analogy.[21]

It follows from these cases that a decision whether a State has validly consented to arbitration by way of national legislation is to be made both as a matter of statutory interpretation as well as on the basis of international law. From the perspective of international law the statutory provision is to be regarded as a unilateral act and has to be interpreted as such.[22]

III. The Methodology for the Interpretation of Unilateral Acts

In 2006 the International Law Commission (ILC) of the United Nations adopted Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[23] The ILC recognized that unilateral declarations of States may have the effect of creating legal obligations. Guiding Principle 1 reads as follows:

> 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.

The ILC's Guiding Principles apply not only among States. The ILC pointed out that unilateral declarations may have legal effect beyond purely in-

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21 PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, ICSID Case No. ARB/13/33, Award of 5 May 2015, paras. 264-265.

22 See D. Caron, The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law, in M. H. Arsanjani et al. (eds.), Looking to the Future, Essays on International Law in Honor of W. Michael Reisman (2011), 649, 653.

23 International Law Commission, Unilateral Acts of States – Report of the Working Group, UN Doc A/CN.4/L. 703, 20 July 2006. See also Potestà, supra note 1, 162 et seq.; Caron, supra note 22, 659 et seq.

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ter-State relationships. They may be validly addressed to the international community, to one or several States as well as to "other entities".[24] The ILC adopted the following formula for the interpretation of 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.

Therefore, according to the ILC, the following principles are to be applied in the interpretation of a State's unilateral declarations:

- An obligation exists only if it is stated in clear and specific terms;
- In case of doubt, obligations must be interpreted restrictively;
- An interpretation is to be based first and foremost on the declaration's text together with the context and the circumstances of its formulation.[25]

A. *Restrictive Interpretation of Unilateral Acts?*

The requirement of a restrictive interpretation has given rise to lively discussions. There is a general debate on whether offers of consent to investment arbitration should be read extensively or restrictively. In cases involving references to arbitration in contracts or in treaties, tribunals have typically endorsed neither an extensive nor a restrictive interpretation but what they perceived to be a balanced approach.[26] In cases involving national leg-

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24 UN Doc A/CN.4/L. 703, supra note 23, p. 4, para. 6. See also W.M. Reisman and M.H. Arsanjani, The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes, 19 ICSID Review – FILJ (2004), 328 et seq.

25 See also Y. Andreeva, Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions, 27 Arbitration International (2011), 129, 146, 147.

26 Amco v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, paras. 12-16, 18, 29; SOABI v. Senegal, ICSID Case No. ARB/82/1, Award of 25 February 1988, para. 4.08-4.10; Tradex v. Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, 5 ICSID Reports, 68; Cable TV v. St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award of 13

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islation, tribunals have also generally favoured a balanced approach although there are certain variations in emphasis.

In SPP v. Egypt, the Tribunal interpreting a legislative provision that referred to ICSID arbitration found that there was no presumption of jurisdiction, particularly where a sovereign State was involved. Jurisdictional instruments were to be interpreted neither restrictively nor expansively, but rather objectively and in good faith. Jurisdiction existed only insofar as consent thereto had been given by the parties and if the arguments in favour of consent were preponderant.[27] The Tribunals, interpreting Article 22 of the Venezuelan Investment Law, discussed the ILC's Guiding Principles but adopted a differentiated attitude towards the maxim of restrictive interpretation of unilateral acts. In *Mobil v. Venezuela* the Tribunal, after citing that maxim, came to the conclusion that it did not apply to unilateral acts formulated in the framework and on the basis of a treaty such as the ICSID Convention. It found support for this conclusion in the practice of the International Court of Justice (ICJ) when interpreting unilateral declarations of compulsory jurisdiction under Article 36(2) of its Statute.[28]

January 1997, para. 6.27; CSOB v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999, para. 34; Mondev v. United States (AF), ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 42; Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005, para. 91; Duke Energy v. Peru, ICSID Case No. ARB/03/28, Decision on Jurisdiction of 1 February 2006, paras. 76-78; Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006, para. 64; Inceysa v. El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 177; Noble Energy v. Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction of 5 March 2008, paras. 195-197; Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, Award of 18 August 2008, paras. 129, 130; Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction of 19 June 2009, para. 37; Austrian Airlines v. Slovak Republic, Final Award of 9 October 2009, paras. 119-121; Duke Energy v. Ecuador, Decision on Annulment of 1 March 2011, para. 140; Libananco v. Turkey, ICSID Case No. ARB/06/8, Award of 2 September 2011, para. 540; Iberdrola v. Guatemala, ICSID Case No. ARB/09/5, Award of 17 August 2012, para. 303; Daimler v. Argentina, ICSID Case No. ARB/05/1, Award of 22 August 2012, paras. 174-178; Garanti Koza v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on Jurisdiction of 3 July 2013, para. 22; National Gas v. Egypt, ICSID Case No. ARB/11/7, Award of 3 April 2014, para. 119.

27 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, supra note 8, para. 63. The Tribunal relied on a number of international decisions by the ICJ, the PCIJ and an arbitral tribunal.

28 Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mo-

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The Tribunal in *Cemex v. Venezuela* reached the same conclusion[29] but adopted an equally distanced attitude towards an effective interpretation. It examined the practice of the International Court of Justice and found that the principle of *effet utile* or effectiveness,[30] which plays a role in treaty interpretation, was not to be applied when it comes to unilateral declarations.[31]

In *Tidewater v. Venezuela*,[32] the respondent again argued that the Tribunal, in interpreting Article 22 of the Venezuela Investment Law, should adopt the restrictive approach reflected in Principle 7 of the ILC's Guiding Principles.[33] The Tribunal distinguished between unilateral acts adopted in the framework of a treaty and other unilateral acts. The Tribunal found that the restrictive approach may well apply to the latter category but would not apply in the case of the former category.[34] The reference to ICSID in the Investment Law had to be interpreted in analogy to a unilateral declaration of a State accepting the compulsory jurisdiction of the ICJ in the framework of Article 36(2) of its Statute.[35]

The Tribunal in *Pac Rim Cayman v. El Salvador* adopted the same methodology when interpreting Article 15 of the El Salvador Investment Law, stating:

> As explained by the *Mobil* and *Cemex* tribunals, whilst the ICJ has decided that a restrictive interpretation should apply when construing acts formulated by States in the exercise of their freedom to act on the international plane, rules of interpretation differ when unilateral acts are formulated in the framework and on the basis of a treaty such as, in the present case, the multilateral ICSID Convention.[36]

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bil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, paras. 87-92.

29 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 of 30 December 2010, paras. 81-85.

30 Ibid., para. 114, the Tribunal explains that this principle does not require that maximum effect be given to a text. It only excludes interpretations that would render the text meaningless, when a meaningful interpretation is possible.

31 Ibid., paras. 107-111.

32 Tidewater et al. v. The Bolivarian Republic of Venezuela, supra note 14.

33 Ibid., para. 87.

34 Ibid., paras. 89-92, 99.

35 Ibid., paras. 93-95.

36 Pac Rim Cayman LLC v. Republic of El Salvador, supra note 20, para. 5.34 [Footnote omitted].

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In *PNG Sustainable Development Program v. Papua New Guinea*, the Tribunal had to apply provisions of the Papua New Guinea Investment Promotion Act and the Papua New Guinea Investment Disputes Convention Act. In the process of interpreting these statutory provisions, the Tribunal rejected any presumption in favour of or against jurisdiction:

> In the Tribunal's view, it is well-settled, for good reason, that there is no presumption against the finding of jurisdiction under the ICSID Convention, and no heightened requirement of proof of an agreement to arbitrate. Jurisdictional instruments, whether investment contracts, treaties or legislation, must be interpreted objectively and neutrally, and not either expansively or restrictively.
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> [...]
>
> There is no reason, or justification, to adopt presumptions against (or in favor of) a State's submission to ICSID jurisdiction: the issue is rather to be approached objectively and neutrally, aiming to ascertain the true intentions of the relevant party (or parties) in a particular instrument. Where relevant, the standard of proof is generally held to be a preponderance of the evidence or a balance of probabilities.[37]

It follows from these authorities that tribunals have rejected any presumption in favour of or against jurisdiction based on consent expressed in national legislation. Provisions of this kind are to be interpreted neither extensively nor restrictively. In particular, tribunals found that the statement contained in the ILC's Guiding Principles concerning unilateral declarations to the effect that in case of doubt obligations must be interpreted restrictively did not apply to unilateral offers of consent relating to the ICSID Convention.

B. The Intention of the State Adopting the Legislation

A number of tribunals have emphasized the relevance of the intention of the State adopting the legislation. In *Mobil v. Venezuela*, the Tribunal found that the decisive element for the interpretation of Article 22 of the

37 PNG Sustainable Development Program Ltd. v. Papua New Guinea, supra note 21, paras. 253, 255.

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Venezuelan Investment Law was the intention of Venezuela when adopting it.[38]

Cemex v. Venezuela, also involved Article 22 of the Venezuelan Investment Law. Again, the Tribunal, sitting under the same president (Guillaume), put a strong emphasis on the intention of the State making the declaration.[39] 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."[40] In addition, the Tribunal declared 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."[41]

In *OPIC Karimun v. Venezuela*, the Tribunal, again interpreting Article 22 of the Venezuelan Investment Law also stressed the intention of the State adopting the legislation.[42] It said:

> The principles of international law governing the interpretation of unilateral declarations formulated on the basis of a treaty have been articulated by the International Court of Justice. The content of the relevant rules is usefully set out in the *Fisheries Jurisdiction Case*, where the Court found that since statutes are unilaterally drafted instruments, a certain emphasis is properly to be placed on the intention of the depositing state.[43]

In *Pac Rim Cayman v. El Salvador*, too, the Tribunal put a strong emphasis on the intention of the State concerned:

> […] 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

38 Mobil Corporation, Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, supra note 28, para. 119.
39 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, supra note 29, para. 87.
40 Ibid., para. 90.
41 Ibid., para. 112.
42 OPIC Karimun Corporation v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, Award of 28 May 2013, paras. 77-80.
43 Ibid., para. 78.

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> the declaration. In doing so, the relevant words should be interpreted in a natural and reasonable way.[44]

C. Criteria for the Interpretation of Unilateral Acts

Several tribunals have gone beyond references to broad principles like restrictive interpretation or intention of the State adopting the legislation and have sought to develop more specific criteria for the interpretation of unilateral acts embodied in the legislation of States.

In *Brandes v. Venezuela*, the Tribunal noted the parties' agreement on the method to be applied in the interpretation of Article 22 of Venezuela's Investment Law:

> 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.[45]

Additionally, the *Brandes* Tribunal found it "self-evident that such consent should be expressed in a manner that leaves no doubts."[46]

In *Tidewater v. Venezuela*,[47] the Tribunal followed the lead of the ICJ and adopted the criteria for the interpretation of unilateral declarations of States accepting the compulsory jurisdiction of the ICJ in the framework of Article 36(2) of its Statute:

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44 Pac Rim Cayman LLC v. Republic of El Salvador, supra note 20, para 5.34 [Footnotes omitted].

45 Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, Award of 2 August 2011, para. 35 [Emphasis in original; Footnote omitted].

46 Ibid., para. 113.

47 Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela, supra note 14.

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> [t]hese unilateral acts are neither to be interpreted according to the rules of the VCLT, nor according to the rules stated in the ILC Unilateral Declaration Principles; they have their own rules of interpretation.[48]

The *Tidewater* Tribunal found that these *sui generis* rules applicable to unilateral offers of jurisdiction were encapsulated in a passage from the ICJ's *Fisheries Jurisdiction case*.[49] The ICJ had found that these rules would require that the interpretation be performed:

> [...] in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a […] State 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.[50]

The *Tidewater* Tribunal concluded that:

> [...] it will proceed to find that it has jurisdiction if, but only if, the existence of the consent in writing of both parties to its jurisdiction is clear.[51]

In *ConocoPhillips v. Venezuela*, the Tribunal addressed a difference between the parties about the question whether Venezuela's consent had to be stated in terms that were "clear and unequivocal" or "objective and in good faith". The Tribunal opted for what it called a cautious approach and said:

> Given that States are subject to binding third party dispute settlement procedures only if they so consent and, given the weight of authority referred to earlier, particularly as found in decisions of the International Court of Justice and in the particular ICSID context, the Tribunal considers that its approach should be cautious. In the words of the International Court of Justice in considering the very first challenge made to its jurisdiction, the consent must be "voluntary and indisputable", and in the words of both ICSID tribunals "clear and unam-

48 Ibid., para. 96.
49 Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, para. 432.
50 Ibid., para. 49.
51 Ibid., para. 101.

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> biguous". The necessary consent is not to be presumed. It must be clearly demonstrated.[52]

In *PNG Sustainable Development Program v. Papua New Guinea*, the Tribunal summarized its methodological approach in the following terms:

> In fulfilling its interpretive mandate, the Tribunal analyzes the relevant statutory provisions in light of the ordinary meaning of their language, objectively construed, as well as their purpose and relevant context. The Tribunal also considers the legislative history of these provisions and the investment promotion materials as part of the relevant context in which the legislation was adopted and understood.[53]

The methodology of tribunals in dealing with purported expressions of consent to arbitration expressed in national legislation may be summarized as follows:

- Any expression of consent made by way of legislation would have to be made "in clear and specific terms" (ILC, Guiding Principles, para. 7; *ConocoPhillips*) and "in a manner that leaves no doubts" (*Brandes*).
- The restrictive interpretation, suggested by the ILC, has been mostly rejected for acts adopted in the framework and on the basis of a treaty (*Mobil*, *Cemex*, *Tidewater*, *Pac Rim Cayman*, *PNG*).
- Some tribunals have given paramount importance to the intention of the State adopting the legislation (*Mobil*, *Cemex*, *Pac Rim Cayman*, *OPIC Karimun*).
- Most tribunals seemed agreed that they had to focus on the declaration's text, its context and on the circumstances of its adoption (*Mobil*, *Cemex*, *Pac Rim Cayman*, *Brandes*, *Tidewater*, *PNG*).

IV. Tribunal Practice on the Interpretation of National Legislation

In a number of cases tribunals have reached decisions on whether reference to international arbitration in national investment legislation of host States constituted a valid offer of consent to arbitration. In some of these

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52 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, para. 254.

53 PNG Sustainable Development Program Ltd. v. Papua New Guinea, supra note 21, para. 274.

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cases tribunals found that the relevant piece of legislation contained a binding offer of consent. In other instances, they found that the provision in question fell short of a unilateral commitment to arbitrate with foreign investors. It is difficult to draw general conclusions from the interpretation of differently worded legislative texts. However, these cases give an impression of the precision and specificity required of unilateral offers to arbitrate in general and of consent to ICSID arbitration in particular. The following two sections first look at cases in which tribunals accepted the existence of a binding offer to arbitrate on the basis of the host State's national legislation, followed by a series of cases in which tribunals denied the existence of a commitment of this kind.

A. *Existence of a Valid Offer to Arbitrate in National Legislation*

In a number of cases tribunals found that the legislation in question contained a binding offer of ICSID arbitration to foreign investors.[54] In *SPP v. Egypt*,[55] the claimant relied on Article 8 of Egypt's Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone. The relevant part of this Law states:

> 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.[56]

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54 See also Rumeli v. Kazakhstan, ICSID Case No. ARB/05/16, Award of 29 July 2008, paras. 333, 334, 336. In this case the Tribunal found it unnecessary to rely on the domestic statute in view of the existence of jurisdiction under a BIT.

55 SPP v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction I of 27 November 1985, 3 ICSID Reports 101, SPP v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction II of 14 April 1988. For more detailed discussion of this case, see C. Schreuer et al. The ICSID Convention: A Commentary, 2nd ed. (2009), Article 25, paragraphs. 400-405; Potestà, supra note 1, 159 et seq.; Caron, supra note 22, 651 et seq.

56 Southern Pacific Properties Ltd. v. Egypt, supra note 8, para. 71. This provision has since been repealed.

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Egypt contested the existence of consent to arbitration on that basis. The Tribunal undertook a detailed grammatical analysis of the relevant text. 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.[57] The Tribunal rejected Egypt's suggestion that this provision had the consequence of only informing potential investors of Egypt's willingness, in principle, to negotiate a consent agreement. In the Tribunal's view, there was nothing in the legislation requiring a further *ad hoc* manifestation of consent to the Centre's jurisdiction.[58]

In *Tradex v. Albania*,[59] the Tribunal applied Article 8(2) of the Albanian Law on Foreign Investment of 1993 which stated:

> If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws. In addition, if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, then 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 ("Centre") established by the Convention on the Settlement of Investment Disputes between States and National [sic] of Other States, done at Washington, March 18, 1965 ("ICSID Convention").[60]

The Tribunal found that this offer of ICSID arbitration was clear and unambiguous. It relied on the decision in *SPP v. Egypt* and formed the following view:

> In the present case, the formulation of Article 8 of the Albanian Investment Law of 1993 is surely more clear than the corresponding Article 8 of the Egyptian law mentioned above. Article 8 paragraph 2, of the

57 Ibid., paras. 74-82.

58 Ibid., paras. 89-101. In a subsequent case, Manufacturers Hanover Trust v. Egypt, jurisdiction was also based on Egypt's Law No. 43 of 1974. Although there is no published decision, it is known that the case had progressed beyond a jurisdictional decision before it was settled. It may be concluded that this Tribunal also found that Law No. 43 amounted to Egypt's consent to ICSID's jurisdiction.

59 Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, 5 ICSID Reports 47.

60 Ibid., 54.

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> 1993 Albanian Law states unambiguously that 'The Republic of Albania hereby consents to the submission thereof to the International Center for Settlement of Investment Disputes'.[61]

As it turned out, the limitation of the consent to matters relating to expropriation turned out to be decisive in that case.[62]

In *Zhinvali v. Georgia*,[63] the claimant relied on Article 16(2) of the Georgia Investment Law of 1996, which provided:

> 2. Disputes between a foreign investor and [a] governmental body, if the order of its resolution is not agreed between them, shall be settled at the court of Georgia or at the International Centre for the Resolution [sic] of Investment Disputes. Should [the] dispute not be considered in the International Centre for the Resolution [sic] of Investment Disputes the foreign investor is entitled to refer a dispute to the additional institution of the Centre [Additional Facility] or to any international arbitration established in accordance with regulations provided by the Arbitration and International Agreements of the Commission of the United Nations for International Trade Law – UNCITRAL.[64]

The respondent denied the existence of an expression of consent under this provision and relied on an earlier statute, which refers disputes to domestic courts.[65] The *Zhinvali* Tribunal concluded that the Investment Law, being later in time, took precedence. The reference to ICSID in Article 16(2) of the Investment Law constituted consent in writing by Georgia to the jurisdiction of ICSID.[66] The Tribunal said:

> In sum, the Tribunal holds that the provisions of Article 16(2) of the 1996 Georgia Investment Law, […] constitute a 'consent in writing' by the respondent to the jurisdiction of ICSID, which offer the Claimant later accepted in writing when it filed its Request for Arbitration.[67]

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61 Ibid., 63.
62 Tradex v. Albania, ICSID Case No. ARB/94/2, Award of 29 April 1999, paras. 92, 132, 203-205.
63 Zhinvali Development Ltd. v. Republic of Georgia, supra note 11.
64 Ibid., para. 337.
65 Ibid., para. 329.
66 Ibid., para. 342.
67 Ibid., para. 342.

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A few cases concerned the Investment Law of El Salvador.[68] In *Inceysa v. El Salvador*,[69] the Tribunal examined several pieces of legislation put forward by the claimant.[70] Article 15 of the El Salvador Investment Law provided in relevant part:

> In the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to:
> a) the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID Convention).[71]

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. It stated:

> The foregoing clearly indicates that the Salvadoran State, by Article 15 of the Investment Law, made to the foreign investors a unilateral offer of consent to submit, if the foreign investor so decides, to the jurisdiction of the Centre, to hear all "*disputes referring to investments*" arising between El Salvador and the investor in question.[72]

In *Pac Rim Cayman v. El Salvador*,[73] the claimant also relied on Article 15 of the El Salvador Investment Law to establish jurisdiction.[74] The Tribunal found the language of Article 15 clear and unambiguous.[75] It had no doubt that the Investment Law contained the State's consent to ICSID jurisdiction. The Tribunal said:

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68 In Commerce Group, there was reference to Article 15 of El Salvador's Investment Law but no serious discussion concerning its interpretation. See Commerce Group v. El Salvador, ICSID Case No. ARB/09/17, Award of 14 March 2011, paras. 15, 118-128.

69 Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006.

70 Ibid., paras. 309-330: The Tribunal found that some of these pieces of legislation, while referring to arbitration, did not offer consent. That part of the Award is discussed in the next section.

71 Ibid., para. 331.

72 Ibid., para. 332 [Italics and emphasis in original].

73 Pac Rim Cayman LLC v. Republic of El Salvador, supra note 20.

74 Ibid., paras. 5.1 – 5.26.

75 Ibid., para. 5.37.

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> Accordingly, the Tribunal decides that the wording of Article 15 of the Investment Law contains the Respondent's consent to submit the resolution of disputes with foreign investors to ICSID jurisdiction; that such intention appears unambiguously from the text of Article 15; and that it is confirmed from the context, the circumstances of its preparation and the purposes intended to be served by Article 15, read with Article 25 of the ICSID Convention.[76]

The above cases demonstrate that domestic legislation may contain a binding offer of arbitration. In these cases, the offer was couched in terms of a clear right of the investor to submit a dispute to arbitration. In all the cases in which tribunals assumed jurisdiction under the ICSID Convention there was a specific reference to ICSID arbitration in the respective laws. The offer of consent was in terms that left no doubt. The relevant provisions in domestic legislation provided that:

- disputes "shall be settled" within the framework of ICSID (*SPP*, *Zhinvali*);
- "the investor may submit the controversy to" ICSID (*Tradex*, *Inceysa*, *Pac Rim*);
- "Albania hereby consents to the submission" to ICSID (*Tradex*).

B. Absence of a Valid Offer to Arbitrate in National Legislation

In a number of other cases the claimants relied on provisions in national legislation that contained a reference to investment arbitration, but the tribunals found that these were not sufficiently specific to amount to binding offers of consent.

1. Statutory Provisions without a Reference to ICSID Arbitration

In *Amco v. Indonesia*,[77] the consent to ICSID's jurisdiction was contained in a direct agreement between the parties. Before the Tribunal, the claimant additionally sought to rely on Indonesia's foreign investment legislation as

76 Ibid., para. 5.39.
77 Amco v. Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983.

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containing Indonesia's written consent to ICSID arbitration.[78] Article 23(3) of the 1967 Law Concerning Foreign Capital Investment[79] provided that in case of a nationalization:

> […] if no agreement can be reached between the two parties regarding the amount, type and procedure for payment of compensation, arbitration shall take place which shall be binding on both parties.

The Tribunal noted that this provision merely referred to arbitration in general terms without any mention of ICSID. Moreover, the law had been enacted before the Convention had entered into force for Indonesia. Therefore, there was no commitment under the 1967 Law to submit investment disputes to ICSID arbitration. As the Tribunal made clear:

> No mention is made of the ICSID arbitration in this provision, and indeed could not have been made, since at the time of enactment of that law, the Convention had not entered into force in respect of Indonesia […]: that means necessarily that Article 23 of Law No. 1 of 1967 is not and cannot be a *direct* and *sufficient* commitment to submit investment disputes to ICSID arbitration.[80]

In *Inceysa v. El Salvador*,[81] the claimant relied on several pieces of legislation as a basis for ICSID's jurisdiction. As discussed above, the Tribunal found that El Salvador's Investment Law provided for ICSID's jurisdiction.[82] But it found that two other pieces of El Salvador's legislation, while referring to arbitration, contained no express reference to ICSID and, therefore, did not meet the requirement of consent under Article 25 of the Convention. Article 165 of the Public Contracting and Acquisition Law of El Salvador provided as follows:

> After an attempt at direct settlement without finding a solution to any of the disputes, it is possible to resort to arbitration by equitable arbitrators subject to the applicable provisions of pertinent laws, taking into account the modifications established in this chapter.[83]

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78 Ibid., paras. 5, 17.
79 Law No. 1/1967 Concerning Foreign Capital Investment (State Gazette No.1 of 1967, addendum to State Gazette No. 2818).
80 Ibid., para. 22 [Italics in original].
81 Inceysa Vallisoletana S.L. v. Republic of El Salvador, supra note 69.
82 Ibid., para. 331.
83 Ibid., para. 315.

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The *Inceysa* Tribunal found that this provision did not offer consent to ICSID jurisdiction since it contained no express reference to ICSID:

> A reading of the article quoted above and of Title VIII of that Law concerning "Dispute Resolution," obviously shows that, by the application of these provisions, it is not possible in any way to interpret them as granting jurisdiction to the Centre to hear the contractual disputes arising between El Salvador and Inceysa. Sustaining the contrary has absolutely no grounds because these provisions do not contain any express reference to the Centre, and therefore do not meet the requirement established in Article 25 of the ICSID Convention.[84]
> For the foregoing reasons, this Arbitral Tribunal considers that the Public Contracting and Acquisitions Law does not contain the consent of the Salvadoran State to the jurisdiction of the Centre, because (i) in none of its provisions is there a reference to the Centre […].[85]

Other statutory provisions on which the claimant sought to base the jurisdiction of ICSID in *Inceysa* also did not contain a specific reference to the ICSID Convention.[86] The *Inceysa* Tribunal found that these provisions, too, did not constitute valid offers of ICSID jurisdiction because there was no mention of ICSID.[87] The *Inceysa* Tribunal found that these provisions represented no more than an authorization addressed to the authorities of El Salvador to enter into arbitration agreements:

> It is obvious that the provisions of the law in question are simply an authorization for the various agencies of the Salvadoran State to resolve by arbitration the disputes in which they may be involved.[88]

Metal-Tech v. Uzbekistan[89] concerned Article 10 of the Foreign Investment Law of Uzbekistan which, in relevant part, reads as follows:

> A dispute directly or indirectly related to foreign investments (investment dispute) may be settled by the agreement of the parties through consultations. If the parties are unable to reach a negotiated resolution, the dispute must be settled by a commercial court of the Republic of

84 Ibid., para. 316 [Emphasis in original].
85 Ibid., para. 320.
86 Ibid., para. 321.
87 Ibid., para. 329.
88 Ibid., para. 327; see also para. 328.
89 Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013.

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> Uzbekistan or in arbitration in accordance with the rules and procedures of international treaties (agreements and conventions) on the settlement of investment disputes to which the Republic of Uzbekistan has acceded.
> The parties involved in an investment dispute, by mutual agreement, may determine the body considering said dispute as well as the country in which arbitration proceedings are held under the investment dispute.[90]

The Tribunal rejected the claimant's reliance on this provision as a basis for ICSID jurisdiction. The Tribunal pointed out that Article 10 of the Foreign Investment Law (referred to as the 'Law of Guarantees') does not contain an expression of consent to a specific arbitral mechanism. In particular, there was no offer to submit to ICSID. Moreover, Article 10 required a further agreement of the parties before a dispute could be brought to arbitration.[91] As the Tribunal stated:

> 383. To the Tribunal, Article 10 does not embody Uzbekistan's consent to submit disputes to ICSID arbitration independently of the BIT. Paragraph (1) of Article 10 merely states that a dispute which the Parties are unable to resolve amicably may be resolved by the Economic Court of Uzbekistan or through arbitration. It contains no expression of consent to a particular arbitral mechanism. More specifically, it embodies no offer by the State to submit to dispute settlement in the ICSID framework; ICSID is not even mentioned. The Tribunal notes that statutory provisions more specific than Article 10 – even provisions expressly naming ICSID – have been held not to contain state consent to ICSID arbitration. [Citing *Mobil* and *CEMEX*]
> 384. The second paragraph of Article 10 seems to the Tribunal to make it clear that "mutual agreement" of the Parties is required to determine the arbitral authority to settle a dispute. Thus, an agreement is needed designating an arbitral forum before a dispute can be brought before that forum. In other words, Article 10 does not entitle the investor to commence arbitral proceedings before ICSID, unless the state has consented to ICSID beyond the general mention of arbitration in Article 10(1). As in *Biwater*, the Tribunal considers that the words "on mutual

90 Law of the Republic of Uzbekistan on Guarantees and Measures of Protection of Foreign Investors' Rights, April 30 1998, No. 611-I (Amended in accordance with the Law RUz dtd 12.12.2003 – N 568-II, 16.9.2005 – N ZRU-6 and 31.12.2008 – N ZRU-197), Article 10.

91 Ibid., paras. 381-388.

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> agreement" preclude relying on the Law of Guarantees as a standing unilateral offer to arbitrate which can be accepted by the investor.
> 386. In conclusion, the Tribunal finds that Uzbekistan has not consented to ICSID jurisdiction through Article 10 of the Law of Guarantees and, therefore, the Tribunal lacks jurisdiction over claims brought on this basis.[92]

In the above cases jurisdiction was denied because the legislative provisions in question did not contain specific references to ICSID arbitration but only referred to arbitration in general terms. The tribunals were of the opinion that unspecified references to international arbitration were insufficient to express an intention to submit to ICSID arbitration.

2. *Statutory Provisions Containing a Reference to ICSID Arbitration*

In other cases, tribunals denied the existence of a binding offer of consent to arbitrate despite the existence of references to ICSID. The ground was that the language of the respective provisions was not couched in clearly mandatory terms.
In *Biwater Gauff v. Tanzania*,[93] Section 23.2 of the Tanzanian Investment Act 1997[94] provided:

> 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, that is to say —
> (a) in accordance with arbitration laws of Tanzania for investors;
> (b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes;
> (c) within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic and the Government of the country where the investor originates.[95]

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92 Ibid., paras. 383, 384, 386.
93 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award of 24 July 2008.
94 Act No. 26, 1997.
95 Ibid., para. 326.

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The Tribunal found that this text did not amount to a binding offer of arbitration since it was conditioned by a further agreement. The Tribunal said:

> […] the options for dispute resolution in Section 23.2(a)–(c) are conditioned by the words "*as may be mutually agreed by the parties*". In the present context, these words are most naturally read as meaning that a dispute may be referred to any one of the three options, but only depending upon the agreement of the parties. In other words, a subsequent agreement between the parties is required — which is very different from a standing unilateral offer which simply requires acceptance by an investor.[96]

In *PNG Sustainable Development Program v. Papua New Guinea*,[97] the claimant sought to rely on a combination of two statutory provisions of Papua New Guinea (PNG) to establish ICSID jurisdiction. Section 39 of the Investment Promotion Act 1992 (IPA) provided:

> *The Investment Disputes Convention Act 1978*, implementing the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, applies, according to its terms, to disputes arising out of foreign investment.[98]

In turn, section 2 of the Investment Disputes Convention Act 1978 (IDCA) provided:

> A dispute shall not be referred to the Centre unless the dispute is fundamental to the investment itself.[99]

The Tribunal found that it was unable to discern in these provisions anything that would qualify as an independent consent to ICSID jurisdiction by the State.[100] It said:

> There is nothing in Section 39's [of the IPA] general reference to the IDCA that can fairly be read to satisfy the specific requirement for written consent to ICSID jurisdiction under Article 25 of the Convention.[101] […] Section 2 [of the IDCA] does not eliminate, and does not

96 Ibid., para. 329 [Italics in original].
97 PNG Sustainable Development Program Ltd. V. Papua New Guinea Supra note 21.
98 No. 8 1992, section 39.
99 1978, c. 346, section 2.
100 Ibid., para. 286.
101 Ibid., para. 287.

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> affirmatively satisfy, the requirement of "consent in writing" under Article 25 of the ICSID Convention. […] Indeed, Section 2 very clearly contemplates that future consent is required for submission to ICSID jurisdiction. Section 2 not only does not provide consent; it makes clear that future consent is required.[102]

In *MNSS v. Montenegro*,[103] Article 30 of the Montenegrin Foreign Investment Law of 2011 provided as follows:

> Any dispute arising from foreign investments shall be resolved before the competent court in Montenegro, unless the investment agreement or the incorporation act stipulates that such disputes shall be resolved in domestic or foreign arbitration in accordance with international conventions.
> Where the Government is a contracting party, the disputes arising from the foreign investments shall, until the signature of the ICSID (International Center [sic] for the Settlement of Investment Disputes) Convention, be subject to domestic or foreign arbitration in accordance with the Additional Facility Rules of the ICSID Convention for countries which are not signatories to the ICSID Convention.
> Where the contracting parties are domestic and foreign legal entities and natural persons, the disputes arising from the foreign investments shall be subject to domestic or foreign arbitration in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Rules.[104]

The Tribunal found that it had no jurisdiction under this provision and that consent to arbitration was subject to a further agreement. The Tribunal said:

> If the second paragraph truly meant that the Government has given its consent without the need to have an arbitration clause in an investment agreement, then the sentence in the first paragraph that starts "unless the investment agreement…" would be unnecessary. If Articles 39/30 had the reach argued by the Claimants, it would also be unnecessary to have a default option or a reference in the first paragraph to

102 Ibid., para. 290.
103 MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award of 4 May 2016.
104 Foreign Investment Law, Official Gazette of Montenegro, no. 18/11, 01 April 2011, Article 30.

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> an investment agreement, since the second and third paragraphs of Articles 39/30 would suffice as an instrument of consent.[105]

In a series of cases tribunals had to interpret Article 22 of the 1999 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, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable.[106]

Successive tribunals have come to the conclusion that this formula did not amount to a binding offer of consent to ICSID jurisdiction. In *Mobil v. Venezuela,*[107] the Tribunal, 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, found that it was unable to conclude from the ambiguous text of the law that Venezuela had consented to ICSID arbitration.[108]

The *Mobil* Tribunal noted, in particular, that Venezuela had signed a number of BITs that contained clear expressions of consent to ICSID arbitration. It drew the following conclusion:

> 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 formulas.[109]

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105 Ibid., para. 171.

106 Decree No. 356 of October 3, 1999, with the status and force of law, on Investment Promotion and Protection, Article 22 (Decreto N° 356 del 3 de octubre de 1999, con rango y fuerza de ley, de Promoción y Protección de Inversiones, Artículo 22).

107 Mobil Corporation et al. v. Bolivarian Republic of Venezuela, supra note 28.

108 Ibid., paras. 120-140.

109 Ibid., para. 139.

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The Tribunal's overall conclusion with regard to an intention to submit to ICSID's jurisdiction was as follows:

> The Tribunal thus arrives to the conclusion that such intention is not established. As a consequence, it cannot conclude from the ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented in advance to ICSID arbitration for all disputes covered by the ICSID Convention. That article does not provide a basis for jurisdiction of the Tribunal in the present case.[110]

Cemex v. Venezuela[111] involved the same piece of legislation. Again, the Tribunal noted that Venezuela had signed and ratified a number of BITs containing unequivocal offers of consent to ICSID jurisdiction and that it would have been easy for the drafters of Article 22 to use similar language.[112] The Tribunal's overall conclusion was that:

> […] 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.[113]

Brandes v. Venezuela[114] once again concerned Article 22 of Venezuela's Investment Law. The Tribunal found that the wording of the provision was confusing and imprecise and did not lend itself to a meaningful grammatical interpretation.[115] 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.[116] Similarly, the Tribunal observed that BITs concluded by Venezuela contained clear and precise submissions to ICSID jurisdiction.[117] In addition, the Tribunal found that, considering the political circumstances, it did not find it logical that Venezuela was willing to grant a broad unilateral consent to ICSID jurisdiction without any reciprocity.[118]

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110 Ibid., para. 140.
111 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Venezuela, supra note 29.
112 Ibid., para. 137.
113 Ibid., para. 138.
114 Brandes Investment Partners, LP v. Venezuela, supra note 45.
115 Ibid., para. 86.
116 Ibid., para. 92.
117 Ibid., para. 94.
118 Ibid., para. 105.

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> For the Brandes Tribunal, it was "self-evident that such consent should be expressed in a manner that leaves no doubts."[119]
> 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."[120]

Tidewater v. Venezuela[121] was yet another case in which the claimant sought to base ICSID jurisdiction on Article 22 of Venezuela's Investment Law. The Tribunal examined that Article in the context of other provisions of the Investment Law[122] as well as in its historical context.[123] In the Tribunal's view, the reference to treaties and agreements was a reference to obligations to arbitrate under existing treaties:

> Article 22 is designed to ensure that provision is made for the option of dispute resolution by way of international arbitration in cases in which Venezuela has assumed a treaty obligation under international law so to provide. […] Article 22 makes no provision for international arbitration save to the extent that the relevant treaty makes such provision. In other words, Article 22 refers to and respects the terms of Venezuela's international obligations to submit disputes to international arbitration, but does not do more.[124]

The *Tidewater* Tribunal found that a general offer of consent to nationals of all States Parties to the ICSID Convention would have required clearer words:

> If the Claimants' construction of Article 22 were adopted, it would have the consequence that all investment disputes with Venezuela involving nationals of any of the (currently) 147 states parties to the ICSID Convention would be, without more, subject to the jurisdiction of the Centre. In the Tribunal's view, such a construction would require clearer words in the Investment Law indicating the intention of Venezuela to give such general standing consent.[125]

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119 Ibid., para. 113.
120 Ibid., para. 118.
121 Tidewater Inc. et al. v. Venezuela, supra note 14.
122 Ibid., paras. 108-117.
123 Ibid., paras. 118-124.
124 Ibid., para. 127; also at para. 139.
125 Ibid., para. 137.

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It followed that Article 22 of Venezuela's Investment Law "does not operate so as to give the consent in writing of Venezuela to submit all investment disputes with nationals of other ICSID Contracting States to the jurisdiction of the Centre."[126]

In *ConocoPhillips v. Venezuela*,[127] the Tribunal also had to address the meaning of Article 22 of Venezuela's Investment Law. Again, the claimant contended that Venezuela had given its consent to jurisdiction through that provision. The Tribunal examined the text of Article 22 in some detail and concluded:

> […] the ordinary meaning of the terms of Article 22 leads it strongly to the conclusion that Venezuela has not consented to ICSID jurisdiction by enacting that provision.[128]

In the *ConocoPhillips* Tribunal's view, the function of Article 22 was to authorize the State to enter into arbitration agreements:

> […] a provision such as Article 22 may have some effect by clearing the way for the State to conclude specific types of dispute resolution agreements without internal issues such as *ultra vires* arising and as such it provides a sense of certainty for investors.[129]

OPIC Karimun v. Venezuela,[130] again concerned the interpretation of Article 22 of Venezuela's Investment Law. The Tribunal found the provision ambiguous.[131] Its plain meaning did not point to the conclusion that Venezuela intended to give its consent to ICSID arbitration.[132] The Tribunal diagnosed uncertainty in the drafting which did not disclose a clear intention of the legislature to offer consent through Article 22.[133] Its conclusion was as follows:

> […] the Tribunal is not able to conclude on the evidence that Article 22 of the Investment Law was enacted by Venezuela with the intention of granting consent to ICSID jurisdiction, as required by Article 25 of the ICSID Convention.[134]

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126 Ibid., para. 141.
127 ConocoPhillips Petrozuata B.V. et al. v. Venezuela, supra note 52.
128 Ibid., para. 261.
129 Ibid., para. 259.
130 OPIC Karimun Corporation v. Venezuela, supra note 42.
131 Ibid., para. 105.
132 Ibid., para. 107.
133 Ibid., paras. 165-179.
134 Ibid., para. 179.

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The practice, as summarized above, demonstrates that tribunals have refused to accept the existence of a binding offer of consent to ICSID arbitration in two types of situations. The first type of situation involved general references to international arbitration in national legislation without a specific mention of arbitration under the ICSID Convention (*Amco*, *Inceysa*, *Metal-Tech*). The second type of situation involved pieces of legislation that, despite a reference to the ICSID Convention, did not offer consent under the Convention because they were either not mandatory (*Biwater Gauff*, *PNG*, *MNSS*) or imprecise and ambiguous (*Mobil*, *Cemex*, *Brandes*, *Tidewater*, *ConocoPhillips*, *OPIC Karimun*).

V. Conclusion

A host State may offer consent to arbitration by way of a piece of national legislation. However, not every reference to arbitration in domestic legislation amounts to a binding offer of consent. In deciding whether a State has validly consented to arbitration by way of national legislation a tribunal will use principles of statutory interpretation as well as principles for the interpretation of unilateral acts under international law. The ILC's Guiding Principles applicable to unilateral declarations foresee a restrictive interpretation, in case of doubt. Tribunals have rejected any presumption in favour of or against jurisdiction to provisions in national legislation dealing with arbitration. In particular, tribunals found that the statement concerning restrictive interpretation, contained in the ILC's Guiding Principles, did not apply to unilateral offers of consent relating to the ICSID Convention.

Some tribunals have given paramount importance to the intention of the State adopting the legislation. Most tribunals seemed agreed that they had to focus on the declaration's text, its context and on the circumstances of its adoption. In a number of cases tribunals found that the domestic legislation in question contained a binding offer to arbitrate. In these cases the offer was couched in terms of a clear right of the investor to go to arbitration. In another group of cases, tribunals declined to accept the existence of binding offers of consent to arbitrate. Broad and unspecified references to arbitration in legislation were deemed insufficient to establish ICSID's jurisdiction. Even where domestic legislation mentioned the ICSID Convention, tribunals found that imprecise and ambiguous references to arbitration without clearly mandatory language did not amount to a valid offer of consent to arbitration.

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