



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

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**BRANDES INVESTMENT PARTNERS, LP**  
**V.**  
**THE BOLIVARIAN REPUBLIC OF VENEZUELA**  
**(ICSID CASE NO. ARB/08/3)**  
**AWARD**

Case Report by Alfredo De Jesús O.\*\*  
Edited by Diego Gosis \*\*\*

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An Award rendered on August 2, 2011, under the ICSID Convention and Arbitration Rules.

<b>Tribunal:</b>	Mr. Rodrigo Oreamuno (President), Professor Karl-Heinz Böckstiegel, Professor Brigitte Stern.
<b>Claimant's counsel:</b>	Mr. Michael D. Nolan, Edward G. Baldwin, Elitza Popova-Talty, Frédéric G. Sourgens MILBANK, TWEED, HADLEY & McCLOY LLP
<b>Defendant's Counsel:</b>	Mr. George Kahale III, Mark H. O'Donaghue, Miriam K. Harwood, Hermann Ferré, Claudia Frutos-Peterson, Gabriela Alvarez-Avila CURTIS,MALLET-PREVOST, COLT & MOSLE LLP / CURTIS,MALLET-PREVOST, COLT & MOSLE S.C.

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## *Digest*

### **1. Facts of the Case**

In its Request for Arbitration, Brandes Investment Partners, LP (Brandes), a US-registered investment advisor, maintained that prior to the actions challenged in these proceedings it controlled a substantial number of American Depository Receipts and shares of *Compañía Anónima Nacional de Teléfonos de Venezuela* (CANTV) that it acquired for and on behalf of its clients.

Brandes alleged that the Bolivarian Republic of Venezuela (Venezuela) coerced it into accepting a tender offer to purchase all of the ADR and shares of CANTV at a price that was substantially below market value. Even though Brandes accepted Venezuela's tender and received USD225.5 million in exchange for its shares, it claimed that Venezuela's conduct was unlawful and resulted in Brandes' sale of its shares in CANTV to Venezuela at a loss. Brandes alleged that the measures adopted by Venezuela were tantamount to an expropriation by destroying the value of its investment without proper indemnification, and that they also violated Venezuela's obligation not to take arbitrary and discriminatory measures, and to treat Brandes' investment fairly and equitably.

The Request for Arbitration was registered on March 24, 2008, and on December 19, 2008, Venezuela filed Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), arguing (i) that Brandes had agreed to waive and release any claims in connection with the tender, (ii) that Brandes was not an investor within the meaning of the ICSID Convention, as it was only acting as an agent and not as an owner, and (iii) that the omission of essential facts in the Request for Arbitration led to the conclusion that there was neither a jurisdictional nor a substantive basis for the claims. The Preliminary Objections were rejected by a decision of February 2, 2009.

Venezuela filed its Memorial on Objections on Jurisdiction on April 15, 2009. After the exchange of memorials on jurisdiction, an oral hearing was held on November, 2010.

The arbitration was essentially based on the contention that Article 22 of the Venezuelan Investment Law (LPPI) contains a unilateral offer of ICSID jurisdiction. Venezuela asserted that this statement was not correct.<sup>1</sup>

This award deals exclusively with the scope of Article 22 of the LPPI.

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<sup>1</sup> Award, ¶ 27.

2. *Legal Issue Discussed in the Decision (The interpretation of Article 22 of the LPPI)*

Before entering into the analysis of Article 22 of the LPPI, the Tribunal considered it useful to establish from the outset that it would consider the relationship between Article 22, other relevant provisions of Venezuelan law, and Article 25 of the ICSID Convention<sup>2</sup>.

The Tribunal pointed out that while it did not consider that the decisions of other arbitral tribunals were decisive in resolving this matter, in the sense that those decisions were not binding on it, this did not preclude it from considering the substance of the decisions rendered by other tribunals and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided<sup>3</sup>.

Article 22 of the LPPI 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”<sup>4</sup>

In relation with the standard of interpretation, the Tribunal stated that, “in view of the fact that Article 22 of the LPPI is a unilateral declaration of Venezuela, it is necessary that the initial process of interpretation be conducted within the parameters set by Venezuela’s legal system. 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 definite conclusion”<sup>5</sup>.

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<sup>2</sup> Award, ¶ 30.

<sup>3</sup> Award, ¶ 31.

<sup>4</sup> Award, ¶ 32.

<sup>5</sup> Award, ¶ 81.

The Tribunal then turned to analyze the Parties' submissions on the interpretation of Article 22 from a grammatical perspective. It concluded "that the wording of Article 22 of the LPPI is confusing and imprecise, and that it is not possible to affirm, based on a grammatical interpretation, whether or not it contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction"<sup>6</sup>.

After this finding the Tribunal engaged in the analysis of the context of Article 22 and the circumstances in which the LPPI was enacted<sup>7</sup>. It found that "despite the similarities between the content of the LPPI and that of a BIT, the Tribunal did not find in the article that it has analyzed nor in any other article of the LPPI, any provision that would allow it to assert that it provides for Venezuela's consent to jurisdiction"<sup>8</sup>.

It also found (i) that the clarity of most provisions of the LPPI contrast with the confusing and ambiguous wording of Article 22 (a fact that weakens Brandes position)<sup>9</sup>, (ii) that the wording of Article 22 also contrasts with the clear and precise language of the submission to ICSID jurisdiction contained in the BITs entered with other countries<sup>10</sup>, (iii) that it is evident that the consent of Venezuela to ICSID jurisdiction cannot be inferred from Article 258 of the Venezuelan Constitution, which provides that "the law shall promote arbitration..."<sup>11</sup>.

Although not bound by it, the Tribunal also analyzed the decision of the Venezuelan Supreme Court which concluded that Article 22 of the LPPI does not contain a unilateral offer to ICSID jurisdiction.

Also, the Tribunal found no reason to depart from the conclusions of the ICSID arbitration awards in *Mobil v Venezuela* and *Cemex v Venezuela* that established that Article 22 does not contain the consent of Venezuela to ICSID jurisdiction<sup>12</sup>.

In conclusion, in the Tribunal's opinion "it is obvious that Article 22 of the Law on Promotion and Protection of Investments does not contain the consent of the

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<sup>6</sup> Award, ¶ 86.

<sup>7</sup> Award, ¶ 87.

<sup>8</sup> Award, ¶ 91.

<sup>9</sup> Award, ¶ 92.

<sup>10</sup> Award, ¶ 94.

<sup>11</sup> Award, ¶ 96.

<sup>12</sup> Award, ¶ 115.

Boliviarian Republic of Venezuela to ICSID jurisdiction. Therefore, this Tribunal lacks competence to resolve the dispute that has been submitted to it”<sup>13</sup>.

### 3. *Decision*

The Tribunal (i) admitted the Objection to Jurisdiction made by Venezuela, (ii) decided that ICSID has no jurisdiction to hear this matter and the Arbitral Tribunal has no competence to decide the merits of the case, (iii) decided that the Parties shall bear on an equal basis the fees and expenses of the members of the Arbitral Tribunal and the ICSID, and (iv) decided that each party shall bear the fees and expenses incurred by it<sup>14</sup>.

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<sup>13</sup> Award, ¶ 118.

<sup>14</sup> Award, ¶ 121.