INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

MOBIL CORPORATION, VENEZUELA HOLDINGS, B.V.,
MOBIL CERRO NEGRO HOLDING, LTD.,
MOBIL VENEZOLANA DE PETRÓLEOS HOLDINGS, INC.,
MOBIL CERRO NEGRO, LTD., AND
MOBIL VENEZOLANA DE PETRÓLEOS, INC.
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/07/27)

DECISION ON JURISDICTION

Members of the Tribunal:

H.E. Judge Gilbert Guillaume, *President*
Professor Gabrielle Kaufmann-Kohler, *Arbitrator*
Dr. Ahmed Sadek El-Kosheri, *Arbitrator*

Secretary of the Tribunal:

Ms. Katia Yannaca-Small

Representing the Claimants:

Mr. Oscar M. Garibaldi,
Mr. Eugene Gulland,
Mr. Miguel Lopez Forastier
Covington & Burling LLP
and
Ms. Toni D. Hennike
Exxon Mobil Corporation

Representing the Respondent:

Mr. George Kahale, III,
Mr. Mark H. O'Donoghue,
Ms. Miriam K. Harwood,
Ms. Gabriela Álvarez-Avila
Curtis, Mallet-Prevost, Colt & Mosle LLP

Date: June 10, 2010

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I. PROCEDURE

1. On 6 September 2007, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received from (i) three U.S. (Delaware) companies, **Mobil Corporation** ("Mobil"), **Mobil Cerro Negro Holding, Ltd**. ("Mobil CN Holding"), and **Mobil Venezolana de Petróleos Holdings, Inc.** ("Mobil Venezolana Holdings"); (ii) two Bahamian companies, namely **Mobil Cerro Negro, Ltd.** ("Mobil CN"), and, **Mobil Venezolana de Petróleos, Inc.** ("Mobil Venezolana"); and (iii) one Dutch company, **Venezuela Holdings, B.V.** ("Venezuela Holdings"), a request for arbitration, dated 6 September 2007, against the Bolivarian Republic of Venezuela ("Venezuela" or the "Respondent").

2. On the same day, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("the Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to Venezuela and to its Embassy in Washington, D.C.

3. The Request for Arbitration, as supplemented by the Claimants' letters of 28 September 2007, was registered by the Centre on 10 October 2007, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. By letter of 7 January 2008, the Claimants confirmed the parties' agreement on the number and method for the constitution of the Arbitral Tribunal, according to which the Tribunal shall be composed of three arbitrators, one appointed by each party and the third one, who shall serve as the President of the Tribunal, to be appointed by agreement of the parties with the assistance of the first two appointed arbitrators.

5. On 7 January 2008, the Claimants appointed Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, as arbitrator. On 31 January 2008, the Respondent appointed Dr. Ahmed S. El-Kosheri, a national of Egypt, as arbitrator.

6. The parties having failed to appoint a presiding arbitrator, and more than 90 days having elapsed since the registration of the request for arbitration, the Claimants, by letter of 16 May 2008, requested the Chairman of the ICSID Administrative Council to appoint the presiding arbitrator, pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4. On 25 July 2008, the Chairman of the ICSID Administrative Council, in consultation with the Parties, appointed H.E. Judge Gilbert Guillaume, a national of France, as the presiding arbitrator.

7. All three arbitrators having accepted their appointments, the Acting Secretary-General of ICSID, by letter of 8 August 2008, informed the Parties of the constitution of the Tribunal, consisting of H.E. Judge Gilbert Guillaume, Professor Gabrielle Kaufmann-Kohler and Dr. Ahmed S. El-Kosheri, and that the proceeding was deemed to have begun on that day, pursuant to Rule 6(1) of the ICSID Arbitration Rules.

8. The first session of the Tribunal was, with the agreement of the parties, held on 7 November 2008, at the World Bank's Paris Conference Center. Present at the session were:

Members of the Tribunal:

1. H. E. Judge Gilbert Guillaume, *President of the Tribunal*
2. Professor Gabrielle Kaufmann-Kohler, *Arbitrator*
3. Dr. Ahmed S. El-Kosheri, *Arbitrator*

ICSID Secretariat:

4. Ms. Katia Yannaca-Small, *Secretary of the Tribunal*

For the Claimants:

5. Mr. Oscar M. Garibaldi, *Covington & Burling LLP*
6. Mr. Eugene D. Gulland, *Covington & Burling LLP*
7. Mr. Toni D. Hennike, *Law Department, Exxon Mobil Corporation*
8. Mr. Charles A. Beach, *Law Department, Exxon Mobil Corporation*
9. Mr. Luis Marulanda del Valle, *Law Department, Exxon Mobil Corporation*

For the Respondent:

10. Mr. George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*
11. Ms. Gabriela Álvarez Avila, *Curtis, Mallet-Prevost, Colt & Mosle, S.C*
12. Ms. Miriam K. Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*
13. Mr. Peter M. Wolrich, *Curtis Mallet-Prevost, Colt & Mosle LLP*
14. Dr. Bernard Mommer, *Bolivarian Republic of Venezuela*
15. Ms. Hildegard Rondón de Sansó, *Bolivarian Republic of Venezuela*
16. Dra. Beatrice Sansó de Ramirez, *Bolivarian Republic of Venezuela*
17. Ms. Mariel Pérez, *Bolivarian Republic of Venezuela*
18. Ms. Irama Mommer, *Bolivarian Republic of Venezuela*

9. Various aspects of procedure were determined at the session, including a schedule for the submission of written pleadings.

10. The Respondent's Memorial on Jurisdiction was filed on 15 January 2009, followed by the Claimants' Counter-Memorial on Jurisdiction on 16 April 2009, the Respondent's Reply on Jurisdiction on 15 June 2009 and the Claimants' Rejoinder on Jurisdiction on 17 August 2009.

11. On 9 September 2009, the Tribunal held a procedural conference with the parties by telephone.

12. An oral Hearing on Jurisdiction was held at the offices of the World Bank's Paris Conference Center, on 23–24 September 2009. Present at the hearing were:

Members of the Tribunal:

1. H.E. Judge Gilbert Guillaume, *President of the Tribunal*
2. Professor Gabrielle Kaufmann-Kohler, *Arbitrator*
3. Dr. Ahmed S. El-Kosheri, *Arbitrator*

ICSID Secretariat:

4. Ms. Katia Yannaca-Small, *Secretary of the Tribunal*

Attending on behalf of the Claimants:

5. Mr. Oscar Garibaldi, *Covington & Burling LLP*
6. Mr. Eugene Gulland, *Covington & Burling LLP*
7. Mr. Thomas Cubbage, *Covington & Burling LLP*
8. Mr. Miguel López Forastier, *Covington & Burling LLP*
9. Mr. David Shuford, *Covington & Burling LLP*
10. Ms. Luisa Torres, *Covington & Burling LLP*

11. Ms. Mary Hernandez, *Covington & Burling LLP*
12. Mr. Andres Barrera, *Covington & Burling LLP*
13. Mr. Andrés A. Mezgravis, *Travieso Evans Arria Rengel & Paz*
14. Mr. Theodore Frois, *Exxon Mobil Corporation*
15. Ms. Toni D. Hennike, *Exxon Mobil Corporation*
16. Mr. Charles A. Beach, *Exxon Mobil Corporation*
17. Mr. Eugene Silva, *Exxon Mobil Corporation*
18. Mr. Alberto Ravell, *Exxon Mobil Corporation*
19. Mrs. Anna Knull, *Exxon Mobil Corporation*
20. Mr. James R. Massey, *witness*
21. Professor Alan Brewer-Carias, *expert*
22. Professor Christoph Schreuer, *expert*

Attending on behalf of the Respondent:

19. Mr. George Kahale III, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
20. Mr. Mark O'Donoghue, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
21. Mr. Miriam Harwood, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
22. Mr. Peter Wolrich, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
23. Ms. Gloria Díaz, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
24. Mr. Christopher Grech, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
25. Mr. Joaquín Parra, *Bolivarian Republic of Venezuela*
26. Dr. Bernard Mommer, *Bolivarian Republic of Venezuela*
27. Mr. Armando Giraud, *Bolivarian Republic of Venezuela*
28. Ms. Moreeliec Peña, *Bolivarian Republic of Venezuela*

13. Following the hearing, Members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Paris on 2 December 2009.

14. The Tribunal has taken into account all the pleadings, documents and testimonies that were submitted in this case.

II. SUMMARY OF THE PARTIES' SUBMISSIONS

A – THE RESPONDENT'S MEMORIAL ON JURISDICTION

15. On 15 January 2009, the Bolivarian Republic of Venezuela submitted a Memorial containing its Objections to Jurisdiction (the "Memorial").

1- Background of the case

16. Such Memorial first reviews the background of the case. In this respect it stresses the strategic nature of the oil industry in Venezuela under article 302 of the Constitution. It recalls that in 1975, the oil industry was nationalized through the Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons (the "1975 Nationalization Law"). In fact, the Law "permitted only two means of private participation in the oil industry: (i) operating agreements, which were to be simple service contracts; and (ii) association agreements, which were permitted only in "special cases". "The latter were valid only if a State company had a participation that guarantied control by the State and only if the agreement was approved by Congress"[1.] In this context, a State-owned petroleum company, Petróleos de Venezuela (PDVSA) was then created.

17. The 1990's marked a change of policy known as Apertura Petrolera. Foreign investors returned to the Venezuelan oil industry through "progressively more strained interpretations of the 1975 Nationalization Law"[2]. In this framework, an agreement was entered into on 28 October 1997 by Lagoven Cerro Negro S.A. (now PDVSA Cerro Negro S.A., hereinafter referred to as Lagoven or "PDVSA CN", a subsidiary of PDVSA with Veba Oel Venezuela Orinoco GmBH (Veba), a German corporation, and Mobil Producción e Industrialización de Venezuela, Inc. (MPIV), a Delaware corporation, for the production and upgrading of extra-heavy crude oil in the Orinoco Oil Belt. The agreement (the "Cerro Negro Agreement") did not create any "contractual relationship with the Republic and imposed no restriction on the right of the Government to exercise its authority over the petroleum industry"[3]. It only provided for compensation of the contracting private parties by Lagoven in the event that certain governmental actions defined in the contract as "Discriminatory

[1] Memorial § 12.
[2] Memorial § 14.
[3] Memorial § 23.

Measures" would result in a "Material Adverse Impact", subject to a ceiling on compensation. Disputes between the Parties related to the Cerro Negro Project would be governed by Venezuelan law and submitted to arbitration within the International Chamber of Commerce (ICC).

18. Moreover Profit Sharing Agreements were authorized by the Congress of Venezuela in 1995 to permit private investors "to explore for oil with no participation by a State owned entity"[4]. In this framework, the La Ceiba Agreement was concluded on 10 July 1996. As of June 2007, Mobil Venezolana (Bahamas) was one of the parties to that Agreement. Here again, the contract "imposed no limitations whatsoever on the sovereign rights" of Venezuela[5].

19. A new Hydrocarbon Law was adopted in 2001[6] and from October 2004, a number of measures were taken by the Government of Venezuela to regulate the petroleum industry. The royalty rates were increased in October 2004. Then "the Minister of Energy and Mines issued an Instruction on April 12, 2005, declaring that the operating service agreements were illegal and setting in motion an orderly process of "migration" of those agreements to the new form of mixed companies required under the 2001 Hydrocarbons Law"[7]. In May 2006, an extraction tax of 33 1/3 % was enacted. In August 2006, the income tax rate was increased to 50 % and "term sheets were prepared for all companies involved in the associations, outlining the proposed conditions for conversion into mixed companies consistent with the 2001 Hydrocarbons Law. Discussions regarding migration failed to reach fruition, and on 8 January, 2007, the President of the Republic announced that all the projects that had been operating outside the framework of the 2001 Hydrocarbons Law, including the Cerro Negro and La Ceiba Projects would be nationalized"[8]. A decree of 26 February

[4] Memorial § 34.
[5] Memorial § 36.
[6] Memorial - Footnote 52.
[7] Memorial § 39.
[8] Memorial § 45.

2007 called for the transformation (called "migración") of the oil associations (including both Projects) into mixed companies approved by the National Assembly (the "Nationalization Decree"). Amicable settlements were arrived at in most cases. However for the Cerro Negro and La Ceiba Projects, "Exxon Mobil has insisted on demands for grossly exaggerated compensation that made settlement with it impossible"[9].

20. In the midst of the changes in the Venezuelan petroleum industry thus described, the Claimants in October 2005 created a new entity under the laws of the Netherlands, Venezuela Holdings, and inserted it into the corporate chains for the Cerro Negro and La Ceiba Projects in February 2006 and November 2006 respectively.

21. As a result of this restructuring, Mobil (Delaware) owns 100% of Venezuela Holdings (Netherlands), which owns 100% of Mobil CN Holding (Delaware), which owns 100 % of Mobil CN (Bahamas), which finally owns a 41 2/3 % interest in the Cerro Negro Association.

22. Venezuela Holdings (Netherlands) also owns 100 % of Mobil Venezolana Holdings (Delaware), which owns 100 % of Mobil Venezolana (Bahamas), which finally owns a 50 % interest in the La Ceiba Association.

23. As a consequence, according to Venezuela, the claims addressed to the Tribunal fall into three general categories:

> "(a) claims deriving from Mobil CN's interest in the Cerro Negro Project;
> (b) claims deriving from Mobil Venezolana's interest in the La Ceiba Project;
> (c) claims deriving from Mobil's investment in the capital of the two operators, OCN and Agencia Operadora La Ceiba"[10].

24. The jurisdictional grounds alleged for the first two categories are:

[9] Memorial § 52.
[10] Memorial § 73.

a. The 1999 Venezuelan Law on the promotion and protection of investments (the "Investment Law");
b. The 1993 bilateral investment treaty between the Netherlands and Venezuela (the "BIT" or the "Treaty").

25. The sole alleged basis for jurisdiction over the last of Mobil's claims is the "Investment Law".

2- <u>Objections to Jurisdiction</u>

26. Venezuela first contends that Article 22 of the Investment Law does not provide the requisite clear and unambiguous consent to arbitration of this dispute. In this respect, it refers to the text itself of the law, to Venezuelan legal principles and to a decision rendered on 17 October 2008 by the Venezuelan Supreme Court. It moreover stresses that a comparison of Article 22 with other national investment laws leads to the same conclusion. It adds that a comparison with the language of consent in ICSID's model clauses also makes clear that consent to ICSID jurisdiction does not exist in the present case. Finally it submits that in any case, Claimants Venezuela Holding, Mobil CN Holding and Mobil Venezolana Holdings are not "the owners" of the direct investments in Venezuela or "the one who actually controlled" them[11]. Therefore they do not qualify as "international investors" under the Investment Law.

27. Venezuela contends that the BIT does not provide a basis for ICSID jurisdiction over the dispute. It submits that Venezuela Holdings is a "corporation of convenience" created in anticipation of litigation against the Republic of Venezuela for the sole purpose of gaining access to ICSID jurisdiction. It concludes that "this abuse of the corporate form and blatant treaty-shopping should not be condoned"[12]. In support of this argument, it invokes ICSID case law in *Autopista v. Venezuela*, *Tokios Tokeles v.*

[11] Memorial § 120.
[12] Memorial § 127.

Ukraine and *Aguas del Tunari v. Bolivia*. It moreover submits that Claimants Mobil CN, Mobil CN Holding, Mobil Venezolana and Mobil Venezolana Holdings cannot obtain jurisdiction under the Dutch treaty, because of their nationality. It finally contends that indirect investments, as those cited by the Claimants, do not qualify for protection under that treaty.

28. Venezuela concludes that "for the reasons set forth above, the claims set forth in the Request should be dismissed in their entirety"[13].

B – THE CLAIMANT'S COUNTER MEMORIAL ON JURISDICTION

29. On 16 April 2009, the Claimants submitted a Counter-Memorial on Jurisdiction (the "Counter-memorial").

1- Statement of facts

30. The Claimants first state that "there is no genuine dispute about the main events giving rise to this arbitration"[14]. They stress in particular that Venezuela "has admitted that it 'nationalized' the Cerro Negro and La Ceiba Projects in 2007"[15].

31. The Claimants however submit that "the Respondent's chronology of relevant events is misleading"[16]. They contend that the Venezuelan Government gave repeated assurances after 2001 that it would honor contracts signed during the oil opening. In particular, the Government entered on 16 January 2002 into a Royalty Procedures Agreement accepting that the royalty rate for the Cerro Negro Project would remain at the reduced rate of 1% and would not for the life of the Cerro Negro Project exceed 16 2/3 % (instead of the 30 % provided for in the 2001 Law)[17]. Moreover, the Claimants submit that, contrary to the allegations of the Government of Venezuela, the

[13] Memorial § 179.
[14] Counter Memorial § 1.
[15] Counter Memorial § 18.
[16] Counter Memorial p.12.
[17] Counter Memorial § 25.

Government was not willing in 2006 to negotiate the terms of a "migración" of the Project to a mixed enterprise. Then, as a follow up to a speech by President Chávez of 8 January 2007, the National Assembly enacted on 1st February 2007 an Enabling Law under which a Nationalization Decree was taken on 26 February 2007. As ordered by that decree and under threat of military force, Operadora La Ceiba's and Operadora Cerro Negro's assets and operation were transferred to PDVSA in April 2007 "with full reservation of rights". In June 2007, Venezuela fully and finally expropriated the entire investments.

32. The Claimants then explain how their investments were restructured in 2004-2006 through a holding company in the Netherlands. This process "began in late 2004, immediately after the Respondent increased the royalty rate for Orinoco Oil Belt projects from 1 % to 16 2/3 %"[18.] [It] "was completed in 2006, well before the Republic of Venezuela made announcements that it intended to nationalize the Orinoco Oil Belt and profit-sharing projects"[19]. During that period, new and important investments were projected and made. The restructuring "was not intended, nor could it have been intended to 'position' the Claimants for disputes that 'had arisen,' as alleged by the Respondent"[20].

33. The Claimants add that the Cerro Negro Association Agreement does not curtail their rights to prosecute this case. On the contrary, it requires Mobil Cerro Negro to commence and pursue legal claims against Venezuela parallel to the proceedings in the ICC case against PDVSA and PDVSA-CN. Moreover, the agreement "does not limit the recovery to which the Claimants are entitled in this arbitration"[21]. They do not contest the right of Venezuela to expropriate their investments as long as the Respondent complies with the requirements under the Treaty, general international law

[18] Counter Memorial § 42.
[19] *Ibidem.*
[20] Counter Memorial § 46.
[21] Counter Memorial § 56.

and Venezuela's own law, "including the payment of full compensation"[22]. They assert that this obligation is referred to in the Offering Memorandum and the Common Security Agreement entered for the financing of the Cerro Negro Project, also mentioned by the Respondent.

34. The Claimants further submit that they engaged in good faith negotiations with the Government of Venezuela. The negotiation on the terms of the "migración" open before the nationalization was completed, failed "over non-economic terms imposed by the Government, including 'elimination of arbitration'"[23]. The negotiation failed because Venezuela was not prepared to pay compensation based on fair market value, as legally required.

35. The Claimants then contend that PDVSA purchased bonds related to the Cerro Negro Project to avoid a default resulting from the Respondent's expropriation.

36. They finally contend that Mobil Cerro Negro has not engaged in any campaign of harassment against PDVSA or PDVSA-CN, as the Respondent alleged. It only sought conservatory measures in various jurisdictions to ensure that the award to be rendered in the ICC arbitration would not become illusory.

2- <u>Legal basis for jurisdiction</u>

37. Turning to jurisdiction, the Claimants contend that the requirements for ICSID jurisdiction are met *ratione materiae*, *ratione personae*, and *ratione voluntatis*.

38. They first submit that Venezuela consented to that jurisdiction through Article 22 of the Investment Law. This text must be interpreted objectively and in good faith under the ICSID Convention and the relevant principles of international law, as recognized by ICSID case law. It must, in particular, take into account the principle of *effet utile.*

[22] Counter Memorial § 58.
[23] Counter Memorial § 64.

The Claimants add that their interpretation is confirmed by the context and purpose of the Investment Law, as well as the legislative intent. Moreover, "the Respondent's strained comparisons of Article 22 of the Investment Law with consent formulations in other domestic investment statutes and the ICSID Model Clauses are irrelevant"[24]. They submit that the decision rendered in 2008 by the Supreme Court of Venezuela is "not binding on this Tribunal" and "is not entitled to authority of any kind"[25]. They contend that "there is no basis under the Investment Law for the proposition that the concepts of "international investment" and "international investor" presuppose direct ownership or direct control over the investment"[26]. They add that in any case Venezolana Holdings, Mobil Cerro Negro Holding and Mobil Venezolana Holdings are international investors under the Investment Law.

39. The Claimants then state that Venezuela consented to ICSID jurisdiction under Article 9 of the BIT.

40. In this respect they first state that Venezuela Holding is not a "corporation of convenience "created" for the sole purpose of gaining access to ICSID jurisdiction"[27]. According to the Claimants, the objection raised on that basis by Venezuela fails both on factual and legal grounds. There is no legal basis for imposing nationality requirements extraneous to the Treaty or for disregarding the nationality of those holdings. There is no more legal basis for piercing Venezuela Holding's corporate veil.

41. The Claimants further submit that not only Venezuela Holdings, but also Mobil Cerro Negro, Mobil Cerro Negro Holding, Mobil Venezolana and Mobil Venezolana Holdings are nationals of the Netherlands protected by the Treaty. Finally they contend that the Treaty protects indirect investments. On all those points, they invoke ICSID case law.

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[24] Counter Memorial § 158.
[25] Counter Memorial § 161.
[26] Counter Memorial § 186.
[27] Counter Memorial § 187.

42. In the light of those arguments, the Claimants "request the following relief in the form of an Award on Jurisdiction:

i. A declaration that the dispute is within the jurisdiction of ICSID and the competence of this Tribunal;

ii. An order dismissing all of the Respondent's objections to the jurisdiction of ICSID and the competence of the Tribunal;

iii. An order that the Respondent pay all costs of the proceedings on jurisdiction, including the Tribunal's fees and expenses and the costs of the Claimants' legal representation, subject to interest; and

iv. Such other relief as might be right and proper"[28].

C – THE RESPONDENT'S REPLY ON JURISDICTION

43. On 15 June 2009, Venezuela submitted its Reply on Jurisdiction (the "Reply").

44. It first states that the Claimants' version of the facts omits a few important points. It stresses in particular that Mobil CN "received a very robust return"[29] from its investments and that, contrary to the Claimants' evaluation, the true value of the interest at issue in this case is substantially less than US$ 1 billion[30]. It adds that the measures complained of by the Claimants were taken in the legitimate exercise of Venezuela's sovereign rights and were reasonable and non discriminatory.

45. Venezuela then contends that the language of Article 22 does not support Claimants' position on jurisdiction. It submits that Venezuelan law is necessarily part of the analysis of that article. Under the law of Venezuela, as well as under international law, consent to arbitrate must be clear and unequivocal. Article 22 does not contain such

[28] Counter Memorial § 272.
[29] Reply § 5.
[30] Reply § 15.

consent. "The provision constitutes recognition and confirmation by the State that arbitration is a legitimate means of settling investment disputes with the State if and when the State has consented to arbitration under a specific treaty or agreement"[31]. That interpretation corresponds to the text, is compatible with the principle of *effet utile* and is supported by ICSID case law, as well as the long standing Venezuelan hostility towards arbitration. A comparison of Article 22 with other examples of true consent further undermines Claimants' position in this case. Finally, "there is no legislative history militating against the plain language of the statute"[32].

46. Venezuela adds that, in any case, jurisdiction does not exist under the Investment Law and its implementing regulations for indirect investments, such as those of Venezuela Holdings, Mobil CN Holdings and Mobil Venezolana Holdings.

47. The Respondent then reaffirms that the Treaty does not establish a basis for jurisdiction in the present case. It stresses that ICSID case law provides "a clear set of factors to be taken into account in determining whether there has been an abuse through a 'corporation of convenience' for purposes of obtaining ICSID jurisdiction"[33]. Those conditions are not met here. The restructuring occurred long after the investment. It was took effect only in order to gain access to ICSID. The disputes were not only foreseeable, but they had actually been identified and notified to Respondent before the Dutch company was even created. The restructuring did not create a protected investment under the good faith standards articulated in the *Phoenix v. Czech Republic* case. There was an abuse of rights.

48. Venezuela further recalls that Mobil CN and Mobil Venezolana are companies organized under the laws of the Bahamas and that Mobil CN Holding and Mobil Venezolana Holdings are companies organized under the laws of the State of Delaware (USA). It submits that in any event those companies cannot bring claims as "Dutch

[31] Reply § 62.
[32] Reply p. 48.
[33] Reply §117.

nationals" in their own right. It contends in particular that this is incompatible with Article 25 of the ICSID Convention.

49. The Respondent finally submits that the investments of Venezuela Holdings, Mobil Cerro Negro Holding and Mobil Venezolana Holdings consist of equity interests in their immediate subsidiaries organized under the laws of the USA and the Bahamas. As such they are not "investments in the territory" of Venezuela. Those companies thus lack standing to assert jurisdiction under the BIT.

50. Venezuela finally maintains that the claims should be rejected for lack of jurisdiction.

D – THE CLAIMANT'S REJOINDER ON JURISDICTION

51. On 17 August 2009, the Claimants submitted their Rejoinder on Jurisdiction (the "Rejoinder").

52. They first reaffirm that the Respondent consented to ICSID jurisdiction in the Investment Law. According to the Claimants, Venezuela has retreated from its earlier position that its law controls this question, but it continues to distort the international standard of interpretation of consent instruments. They reaffirm that the Respondent's construction of the words "if it so establishes" in Article 22 is untenable. They stress that other parts of that article and the intent of the drafters confirm the result of the Claimants' textual analysis. They contest the Respondent's theory on the purpose of Article 22, as a matter of law and fact.

53. The Claimants further submit that "nothing in the text of the Investment Law or the Regulation excludes protection of investors that control investments through ownership of shares in holding companies"[34]. As a consequence, Venezuela Holdings, Mobil Cerro Negro Holding and Mobil Venezolana Holdings are protected by the Investment Law.

[34] Rejoinder § 55.

54. The Claimants then recall that Venezuela Holdings is a company incorporated in the Netherlands. It is thus a "national" of the Netherlands as required by the BIT. Its subsidiaries are genuinely and legally controlled by Venezuela Holdings. They are also covered by the BIT. Moreover, the Respondent's allegations of "treaty abuse" have no legal or factual ground, being observed that the Claimants "are not seeking the protection of the Treaty in respect of acts performed before"[35] it became applicable to them.

55. The Claimants further contend that the BIT does not limit the definition of investment to direct investment. It does not require that the claim be related to an investment "in the territory" of Venezuela. The objections raised by the Respondent on those grounds are without basis.

56. The Claimants finally maintain their submission as stated in their Counter Memorial.

E – THE HEARING ON JURISDICTION

57. At the hearing held on 23 and 24 September 2009, Venezuela maintained and developed its objections to the Tribunal's jurisdiction. It contends that it always had a "reluctant attitude toward arbitration"[36], as shown by its Constitution, its 1998 Commercial Arbitration Law and the jurisprudence of its Supreme Court. It submits that under international law and Article 25 of the ICSID Convention, consent to arbitration must be clearly and unequivocally expressed. It adds that this is also the case under Venezuelan law, which "is of some relevance in this case, even if not dispositive"[37]. It recalls that, under Article 22 of the Venezuelan Investment Law, "Venezuela shall submit to arbitration in accordance with treaties, if they so provide"[38]. It concludes that "if the

[35] Rejoinder § 79.
[36] Hearing, 24 December 2009, transcript, p.9.
[37] *Ibidem* p.53.
[38] *Ibidem* p.55.

treaties do not require the submission of a particular dispute to international arbitration, the provision is obviously inoperable"[39]. This is the situation in the present case.

58. Venezuela further contends that the BIT does not provide a basis for ICSID jurisdiction. It recalls that the Claimants had already notified investment disputes in February, May and June 2005 before the Dutch company was inserted into the corporate chain of ownership. Thus the Tribunal has no jurisdiction over the specific disputes that existed at that time. It has no more jurisdiction over the expropriation dispute which arose in 2007 because this dispute was already anticipated in 2005 and the Dutch company never made any bona fide investment in Venezuela. Thus, as in the *Phoenix* case, the creation of the Dutch company was not nationality planning, but abuse of right.

59. In answer to a question put by members of the Tribunal with respect to the arbitration pending in the International Chamber of Commerce between the Claimants and PDVSA Cerro Negro, the Claimants and the Respondent agreed that there was no risk of double recovery.

60. At the hearing, the Claimants reaffirmed that the Tribunal has jurisdiction under Article 22 of the Venezuelan Law. They stress that Article 22 must be interpreted according to the ICSID Convention and to general international law in good faith without bias for or against jurisdiction. They analyse that text in its context, taking account of its object and purpose and conclude that it expresses the consent of Venezuela to arbitration of controversies to which the ICSID Convention may be applicable. They add that Article 3 §4 of the Investment Law covers Venezuela Holdings, Mobil Cerro Negro Holding and Mobil Venezolana Holdings.

61. The Claimants further submit that, in the present case, the Tribunal has jurisdiction under the BIT both *ratione personae* and *ratione materiae*. They analyse the Phoenix award mentioned by Venezuela and stress that, the present situation is completely different, in particular with respect to anticipations and investments.

[39] *Ibidem* p.58.

III. DECISION OF THE TRIBUNAL

62. Article 25 §1 of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre".

63. According to Article 25, consent by both parties to a dispute is thus an indispensable condition for jurisdiction. The fact that the host State and the investor's State of nationality are parties to the Convention does not suffice.

64. Consent can be given through direct agreement between the host State and the investor. Under ICSID case law, consent may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty, which is subsequently accepted by the investor.

65. In the present case, the Claimants submit that Venezuela consented to the jurisdiction of the Centre through :

a. Article 22 of the Venezuelan Decree with rank and force of law N°356 on the promotion and protection of investments of 3 October 1999 (the "Investment Law").

b. The Agreement on Encouragement and Reciprocal Protection of Investment between the Kingdom of the Netherlands and the Republic of Venezuela signed at Caracas on 22 October 1991 (the "BIT" or the "Treaty").

66. The Respondent objects to both of these alleged bases for jurisdiction.

A – ARTICLE 22 OF THE INVESTMENT LAW

67. Article 22 of the Investment Law reads as follows:

> "Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente".

68. Translated to English, Article 22 could read 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"[40].

69. The Parties disagree on the interpretation to be given to Article 22. The Claimants submit that Venezuela consented to ICSID jurisdiction under that article. Venezuela contends that that text does not provide such consent.

70. In order to clarify the meaning of Article 22, the Tribunal will first determine the standard of interpretation to be used and then apply that standard to Article 22.

[40] This translation has been proposed by Venezuela (Memorial on objections to jurisdiction §78). The Claimants have provided another translation in which the word « si así éste lo establece » have been translated, not as « if it so provides », but as « if it so establishes ». However the Claimants have stated that that difference of translation is immaterial (Counter-Memorial – footnote 205; Rejoinder – footnote 43). At the hearing, Venezuela declared that « The proper translation of « si así éste lo establece » is « if it so provides ». One can also translate it as "if it so establishes", use the word « establishes" as synonym with « provides … » (24 September 2009 p.46). The Parties seem in agreement on the immateriality of the difference between "provided" and "established", although they diverge on the meaning to be given to both words (see also the Reply Memorial of Venezuela – footnote 76).

1- Standard of Interpretation

(a) Determination of the standard

71. In its Memorial, Venezuela submits that "under Venezuelan Law, Article 22 does not provide the requisite clear and unambiguous consent to arbitration of this dispute[41]. In that perspective, it refers to the applicable "Venezuelan legal principles" and to a judgment issued by the Constitutional Division of the Venezuela Supreme Court of Justice of 17 October 2008 interpreting Article 22.

72. In the Reply, Venezuela adds that it "did not say that the issue of consent in this proceeding is governed exclusively by Venezuelan law and did not say that the recent Venezuela Supreme Court decision alone requires dismissal of this case". It only said that "Venezuelan Law principles are highly relevant and must be taken into account in deciding whether a Venezuelan statute constitutes consent to arbitrate..."[42]

73. The Claimants for their part submit that "the meaning and effects of article 22 must be determined, first and foremost, under the ICSID Convention and the principles of international law"[43]. They add that an ICSID Tribunal is judge of its own competence and that as a consequence the decision of the Venezuelan Supreme Court is not binding on the Tribunal.

74. The Tribunal first notes that under Article 41 § 1 of the ICSID Convention, it is "judge of its own competence". It is so whatever the basis of that competence, including a unilateral offer made in the Host State's legislation and subsequently accepted by the investor. This has been recognized by ICSID tribunals in a number of cases[44].

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[41] Memorial p.45.
[42] Reply § 22.
[43] Counter-Memorial § 98.
[44] See for example *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Second Decision on Jurisdiction (14 April 1988), 3 ICSID Reports 131 (1995), at § 60 (SPP v. Egypt), *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), § 212-

75. The Tribunal adds that the same solution has been retained by the Permanent Court of International Justice and the International Court of Justice which made clear that a sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues[45]. Thus, the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal's decision on its competence.

76. Another issue is whether Article 22 must be interpreted according Venezuelan rules of interpretation or according to international law rules of interpretation. ICSID case Law on that question is rare and lacks coherence.

77. In a number of cases, ICSID tribunals had to apply national legislations which were so clear that neither the parties, nor the tribunal felt necessary to expressly take a position on the rules of interpretation to be applied.

(i) In *Tradex v. Albania* [46], the Tribunal noted that the Albanian investment law stated unambiguously that "[t]he Republic of Albania hereby consents to the submission thereof to the ICSID"[47] and Albania only challenged the jurisdiction of the tribunal *ratione temporis.* In its decision, it rejected that objection through an analysis of the applicable text, without referring to any general principle of interpretation.

(ii) In *Inceysa v. El Salvador*, four Salvadorian laws were invoked by the Claimant. In three cases, the Tribunal, observed that it was "obvious" that those laws did not confer jurisdiction to ICSID [48]. It specified twice that the laws invoked did not meet the requirements of Article 25 of the ICSID Convention. By contrast, it said in five lines that the fourth text "clearly indicates that the Salvadorian State… made to the foreign investors a unilateral offer", which however did not cover the investment in question[49].

213; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003), 3 § 339.

[45] Electricity Cy of Sofia and Bulgaria (Preliminary objections), PCIJ. Series A/B N°77 (1989); Aegean Sea Continental Shelf (Greece v. Turkey) – 19 December 1978 – ICJ Reports 1978 p.3; Fisheries Jurisdiction (Spain v. Canada) - 4 December 1998 – ICJ Report 1988 p. 432.

[46] *Tradex Hellas S.A.v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996), 14 *ICSID Rev.—FILJ* 161 (1999); 5 *ICSID Rep.* 47 (2002);

[47] *Ibidem* §79.

[48] *Inceysa v. El Salvador*, Award, § 310, 316 and 327.

[49] *Ibidem*, §332.

(iii) In *Rumeli Telekom v. Kazakhstan*, the Tribunal decided that it had jurisdiction on the basis of the BIT between Turkey and Kazakhstan. It added in two lines that it also had jurisdiction under the foreign investment law of Kazakhstan[50]. However, as that law had been repealed, there was a discussion on the jurisdiction *ratione temporis* of the Tribunal. In that respect, the Tribunal rejected the objection of the Respondent, basing itself both on the transitional provisions of the Kazakh law and on the fact that it is "well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights"[51].

(iv) In *Biwater Gauff v. Tanzania*, the Tribunal, after having quoted the relevant provisions of the Tanzanian investment law observed that, in view of those provisions, its jurisdiction was facing an "immediate" and "insurmountable difficulty"[52].

78. In three cases, however, ICSID Tribunals dealt explicitly with the question of the rules of interpretation to be applied.

79. In *SPP v. Egypt*, the Tribunal noted that, "[t]he jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty interpretation". "Thus in deciding whether in the circumstances of the present case, law N° 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations"[53]. However, one must note that in the rest of the award, the part to be played by those different norms of interpretation is not easy to identify.

80. In *CSOB v. Slovak Republic*, the ICSID Tribunal had to decide whether it had jurisdiction both under a BIT and under a notice published by the Ministry of Foreign Affairs of the Slovak Republic. It stated on both grounds that "the question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be

[50] *Rumeli Telekom AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), §334.
[51] *Ibidem*, §333 and 335.
[52] *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award (18 July 2008), §329.
[53] *SPP v. Egypt*, Decision on Objections to Jurisdiction, (14 April 1988), §61.

answered by reference to national law; it is governed by international law as set out in article 25(1) of the ICSID Convention"[54].

81. Finally, in *Zhinvali v. Georgia,* the Tribunal took a third approach. Considering the Georgian investment law, it said that it was "dealing with an internal statute rather than a bilateral agreement". It observed that "if the national law of Georgia addresses this question of consent which the Tribunal find that it does then the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law"[55]. It added that Georgian law was in "keeping with any international law principles that may be applicable"[56] and on the basis of the law thus interpreted, it concluded that the Claimant and the Respondent did consent to submit the dispute to the jurisdiction of ICSID.

82. From this review of ICSID case law, it results that:

(i) In at least four cases, the question was not clearly dealt with.

(ii) 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".

(iii) In *CSOB v. Slovak Republic,* the Tribunal opted for international law without any reservation.

(iv) In *Zhinvali v. Georgia*, it opted for domestic law "subject to ultimate governance by international law".

83. The hesitations of ICSID Tribunals on that question result from the fact that, in those ICSID cases, the State's consent to arbitration was not contained in a treaty to be interpreted according to the Vienna Convention on the Law of Treaties of 23 May 1969, but in a unilateral act of a sovereign state, generally in the form of a national legislation.

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[54] *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case ARB/97/4, Decision on Objections to Jurisdiction,, (24 May 1999), § 35, 36 and 46.
[55] *Zhinvali v. Georgia,* Award, (24 January 2003), §339.
[56] *Ibidem*, §340.

84. Determining the applicable standard of interpretation is particularly difficult when the offer is contained in domestic legislation or other unilateral acts of the State, where there is no overarching convention regarding interpretation. The International Court of Justice had to face that very problem when interpreting optional declarations of compulsory jurisdiction made by States under Article 36 §2 of its Statute. It observed that:

> "A declaration of acceptance of the compulsory jurisdiction of the Court whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to article 36 §2 of the Statute and "makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance"[57].
>
> Accordingly, such "international instrument must be interpreted by reference to international law"[58].

85. The Tribunal shares that analysis, which is in line with the decision taken in *CSOB v. Slovak Republic* and ultimately also in *Zhinvali v. Georgia*. Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.

(b) Content of the standard

86. The ICSID Convention requires in Article 25 that parties to the dispute "consent in writing" to submit such dispute to the Centre. Under Article 25, consent in writing is thus indispensable, but the text does not give any further indication on the manner or timing of such written consent or on the way in which it must be interpreted.

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[57] Land and Maritime Boundary between Cameroon and Nigeria, Preliminary objections – ICJ Reports 1998 p. 291 §25 ; Fisheries jurisdiction (Spain v. Canada) – ICJ Reports 1998 p. 453 §46.

[58] Fisheries Jurisdiction (Spain v. Canada) – ICJ Reports 1998 § 43, 64 and 68.

87. Rules governing States' unilateral acts in international law have never been codified and remain controversial on a certain number of points. Moreover, as recognized by the International Law Commission in its report of 2006 to the General Assembly of the United Nations, "the concept of unilateral act is not uniform"[59]. According to the Commission a basic distinction must be drawn in that field between:

(i) acts formulated in the framework and on the basis of a treaty,
(ii) and other acts formulated by States in the exercise of their freedom to act on the international plane.

88. Both acts may have the effect of creating legal obligations. However when considering acts not formulated in the framework and on the basis of a treaty, it is often difficult to determine whether those acts imply such obligations. Facing situations of that kind in the Preah Vihear case in 1961 and in the Nuclear Tests cases in 1974, the International Court of Justice decided that "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for"[60].

89. Similarly, the International Law Commission adopted in 2006 Guiding Principles covering this type of declaration under which "a unilateral declaration entails obligation 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 shall be interpreted in a restrictive manner"[61].

90. Rules of interpretation are however somewhat different when, as in the present case, unilateral acts are formulated in the framework and on the basis of a treaty, such as the ICSID Convention.

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[59] Document A/CN.4/L.703 dated 20 July 2006 §3.

[60] Nuclear Tests- New Zealand v. France- Judgment of 20 December 1974, ICJ Reports 1974 p. 472- 473 § 47; Armed activities on the territory of the Congo (New application, 2002), (Democratic Republic of the Congo v. Rwanda), ICJ Reports, 2006, p.28, §49 and 50)

[61] Document A/CN.4/L-703 dated 20 July 2006 – Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations - § 7.

91. Those rules have been fixed by the International Court of Justice in a long series of cases, when interpreting unilateral declarations of compulsory jurisdiction made under Article 36 § 2 of its Statute. The Court recalled that such a declaration is a unilateral act of State sovereignty and that at, the same time, it establishes or could establish a jurisdictional link with other States (see § 84 above).

92. Accordingly, the Court first stated that "T[t]he regime relating to the interpretation" of such declarations "is not identical with that established for the interpretation of treaties by the Vienna Convention on the law of treaties"[62]. It then stressed that every declaration "must be interpreted as it stands, having regard to the words actually used"[63].

93. At the same time, since declarations are unilaterally drafted instruments, "the Court has not hesitated to place a certain emphasis on the intention of the depositing State"[64]. "In interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it was made"[65].

94. The Court thus interprets "the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned"[66]. That intention can be deduced from the text, but also from the context, the circumstances of its preparation and the purposes intended to be served.

95. It is on the basis of those rules of international law governing the interpretation of unilateral acts formulated within the framework and on the basis of a treaty that this Tribunal will now proceed to the interpretation of Article 22 of the Investment Law.

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62 Fisheries Jurisdiction (Spain v. Canada) – ICJ Reports 1998 p.453 §46.
63 Anglo-Iranian Oil Co. – Preliminary objection – Judgment – ICJ Reports 1952 p. 105.
64 Fisheries Jurisdiction (Spain v. Canada) – ICJ Reports 1998 p. 454 § 48.
65 *SPP v. Egypt*, Decision on Jurisdiction, 14 April 1988, § 107.
66 Fisheries Jurisdiction (Spain v. Canada) – ICJ Reports 1998 p.454 § 49.

96. The Tribunal must add that the fact that domestic law and the international law of treaties are not controlling or dispositive does not mean that they should be completely ignored:

(i) As stated in the preceding paragraphs, when tribunals interpret unilateral acts, they must have due regard to the intention of the State having formulated such acts. In this respect domestic law may play a useful role.

(ii) Although the law of treaties as codified in the Vienna Convention is not relevant in the interpretation of unilateral acts, the provisions of that Convention may "apply analogously to the extent compatible with the *sui generis* character" of unilateral acts[67].

2- <u>Interpretation of Article 22</u>

(a) The text of Article 22

97. According to Article 22, disputes arising under Venezuela's BITs or to which the MIGA or ICSID Convention is applicable, "shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides".

98. The Parties agree that this provision creates an obligation to go to arbitration subject to certain conditions and in particular subject to the last condition thus incorporated in Article 22. But they disagree on the interpretation to be given to that condition.

99. For the Claimants, the terms "if it so provides" means "if the respective treaty or agreement establishes (or provides for) international arbitration as a mean of dispute resolution"[68]. The Claimants then note that the ICSID Convention establishes such a system of dispute resolution. They conclude that, in the case of ICSID, the condition expressed in Article 22 is fulfilled and that Venezuela has thus consented to arbitration

[67] *Ibidem* – ICJ Reports 1998 p. 453 § 46.
[68] Rejoinder § 18.

of ICSID disputes through that article. The Arbitral Tribunal has jurisdiction in the present case.

100. By contrast, Venezuela interprets the word "if it so provides" as if "the relevant treaty or agreement requires submission of the particular dispute to international arbitration"[69]. It notes that there is no such obligation in the ICSID Convention. Thus the condition is not fulfilled in the case of ICSID and the Arbitral Tribunal has no jurisdiction in the present case.

101. The Tribunal observes that Article 22 consists of one single long sentence of some complexity. As stated by Professor Christoph H. Schreuer in his Commentary to the ICSID Convention, this Article "is drafted in ambiguous terms and is likely to give rise to difficulties of interpretation, notably as to whether it contains an expression of Venezuela's consent to ICSID arbitration or not"[70].

102. In this respect, the Tribunal notes that the disputes which Article 22 mentions "shall be submitted to international arbitration" subject to certain conditions. Article 22 thus creates a conditional obligation relating to the settlement of those disputes. Disputes covered by the text are:

(i) disputes arising between an international investor whose country of origin has a BIT in effect with Venezuela;
(ii) disputes to which the provisions of the MIGA Convention are applicable;
(iii) disputes to which the ICSID Convention is applicable.

103. In this compound text, one observes that there is no mention of the Parties to the disputes in question. With respect to BITs, Article 22 refers to disputes arising "between" an international investor. One would have expected that, after the word "between", mention would have made not of one of the Parties, but of the two Parties to

[69] Hearing – 24 September 2009, transcript, p. 45.
[70] C. Schreuer et al, "The ICSID Convention: A Commentary"– Second Edition, Cambridge University Press, 2009, p. 363.

the dispute. This is not the case and the text must be completed in the light of BITs. A priori it could be construed as covering disputes between an international investor and Venezuela to which BITs are applicable.

104. With respect to the MIGA Convention, the Tribunal notes that the only disputes to which Venezuela could be a Party under that Convention are not disputes with investors, but disputes with the Agency itself[71].

105. Finally, Article 22 covers disputes in which the ICSID Convention applies subject to two conditions.

106. First, the text specifies that the dispute shall be submitted to arbitration "according to the terms of the respective treaty or agreement". On that point, the Tribunal notes that, at the outset, Article 22 mentions "treaty or agreement" on the promotion and protection of investments and then the MIGA and ICSID Conventions. One could have expected that at the end of the article the text would have referred to the "respective treaty, agreement or convention". It does not do so. In spite of this awkward drafting, the Tribunal considers that the words "treaty and agreement" also cover the two Conventions.

107. One then reaches the second condition resulting from the words "si así éste lo establece", "if it so provides" or "establishes", on which the Parties disagree.

108. Grammatically, it is undisputed that the word "it" refers to the preceding words "treaty or agreement", which as stated above include the ICSID Convention.

109. The difficulty is with the word "lo" ("so"). This word certainly refers to the preceding words "shall be submitted to international arbitration". However it could be interpreted in two ways. It could mean:

(i) If the treaty, agreement or convention provides for international arbitration or

[71] Convention establishing the Multilateral Investment Guarantee Agency (MIGA) of 11 October 1985 – Article 57 and Annex II.

(ii) If the treaty, agreement or convention provides for mandatory submission of disputes to international arbitration.

110. Both interpretations are grammatically possible. In the first one, the word "lo" (so) refers to international arbitration. In the second one, it refers to the obligation to submit disputes to international arbitration.

111. In a number of cases concerning unilateral declarations, the International Court of Justice decided that it "cannot base itself on a purely grammatical interpretation of the text"[72]. Facing an ambiguous and obscure text, the Tribunal is in the same situation in the present case and has to look further.

(b) The principle of *effet utile*

112. In this regard, the Claimants invoke the principle of *effet utile* (*ut res magis valeat quam pereat*).

113. They contend that construing "if it so establishes" as "if the ICSID Convention provides consent to arbitration (or requires arbitration)" "would subject the mandate of the ICSID portion of Article 22 to a condition that could never be met"[73]. Moreover, the final clause of Article 22 referring to the possibility of litigation in Venezuelan courts would in such a case be useless. This would be "in flagrant violation of the principle of *effet utile*"[74].

114. The Respondent opposes this view. It submits that Article 22 does not contain a general consent to arbitration of international investment disputes. It only constitutes recognition and confirmation by the State that arbitration is a legitimate means of settling investment disputes with investors, if and when the State has consented to

[72] Anglo-Iranian Oil Co. – Preliminary objection – Judgment – ICJ Report 1952 p. 104 ; Fisheries Jurisdiction (Spain v. Canada) – ICJ Report 1998 § 47 p. 454.
[73] Counter Memorial § 113.
[74] Counter-Memorial § 115.

arbitration under a specific treaty. In such an interpretation, the clause reserving the competence of Venezuelan courts would still be useful.

115. In the Rejoinder, the Claimants recognize that it would not "be absurd" for a statute "to recognize and confirm the legitimacy of arbitration as a means of dispute settlement"[75]. But they submit that such an interpretation cannot be given to Article 22.

116. The Tribunal recalls that, as recognized by the International Court of Justice, "the principle of effectiveness has an important role in the law of treaties"[76]. As stated by the Tribunal in the *Eureko v. Poland* case "[i]t is a cardinal rule of the interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless"[77]. The International Court of Justice[78] and ICSID Tribunals[79] applied that principle in number of treaty cases.

117. It remains to be seen whether it is also applicable in the interpretation of State unilateral declarations, such as the legislation invoked in the present case.

118. In its 1988 decision, the *SPP v. Egypt* Tribunal did resort to the principle of *effet utile* [80]. However, later, the International Court of Justice decided that the principle of *effet utile* must not be taken into account in the interpretation of States unilateral declarations[81]. For such declaration "what is referred to in the first place… is that it should be interpreted in a manner compatible with the effect sought" by the State making it[82].

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[75] Rejoinder § 42.

[76] Fisheries Jurisdiction (Spain v. Canada). ICJ Report 1998 p. 455 § 52.

[77] *Eureko BV v. Poland*, Partial Award and Dissenting Opinion, (19 August 2005), § 248.

[78] Advisory opinion of 21 June 1971 on the legal consequences for States of the continued presence of South Africa in Namibia – ICJ Reports 1971 p.35 § 66 ; Border and transborder armed actions (Nicaragua v. Honduras) – Judgment of 20 December 1988 – ICJ Reports 1998 p. 89 § 46.

[79] *Pan American Energy LLC and BP Argentina Exploration Co v. Argentine Republic* – ICSID Case No. ARB/03/13, Decision on Preliminary Objections, (27 July 2006), §132 and *PB America Production Co. and others v. Argentine Republic* – ICSID Case No. ARB/04/8 § 110; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, -Decision on Jurisdiction, (9 November 2004), § 95.

[80] *SPP v. Egypt*,– Decision on Objections to Jurisdiction, (4 April 1988), § 95-96.

[81] Fisheries jurisdiction (Spain v. Canada) – ICJ Reports 1998 p. 455 § 52.

[82] *Ibidem.*

119. This Tribunal agrees with this ruling. Thus in order to interpret Article 22, it will now consider its context, the circumstances of its preparation and its purpose in order to try to determine what was the intention of Venezuela when adopting Article 22..

(c) The intention of Venezuela

120. In this regard, Claimants contend first that the provisions of the Investment Law "are in many respects typical of investment treaties"[83] which usually includes arbitration clauses. Article 22 must be viewed in that context.

121. The Tribunal notes that, according to its Article 1, the Investment Law was "intended to provide investments and investors, both domestic and foreign with a stable and predictable legal framework in which the former and the latter may operate in a secure environment, through the regulation of actions by the State, towards these investments and investors, in order to achieve the increase, diversification and harmonious integration of investments to advance the objectives of national development".

122. Such aims are in general terms comparable to those of the treaties on promotion and reciprocal protection of investments and are reflected in the text of the law itself. Thus, the law contains provisions relating to fair and equitable treatment (Article 7 § 1), non-discrimination (article 8), confiscations and expropriations (Article 11) which are comparable to those incorporated in BITs. However, the rights thus recognized to international investors are often qualified in order not to affect the application of Venezuelan law[84] or the rights of Venezuelan investors[85]. Moreover Article 24 of the law specifies that its provisions do not prevent the adoption by Venezuela of a number of measures it enumerates, inter alia for national security, the conservation of natural resources and the integrity and stability of the Venezuelan financial system.

[83] Counter Memorial § 119.
[84] Article 7; Article 7 § 1; Article 7 § 2; Article 11; Article 12; Article 12 § 2, Article 14
[85] Article 7 § 1; Article 10; Article 15 § 2.

123. The law is thus in some respect different from BITs. Moreover, BITs do not always contain compulsory arbitration clauses. Therefore one cannot draw from the law as a whole the conclusion that Article 22 must be interpreted as establishing consent by Venezuela to submit ICSID disputes to arbitration.

124. The Parties further seek to interpret the Investment Law in the context of Venezuela's attitude *vis-à-vis* arbitration. The Respondent stresses that that attitude has always been and remains cautious and restrictive. By contrast, the Claimants contend that a pro-arbitration environment was prevailing in 1999. For each of the Parties, Article 22 must be interpreted in the light of the attitude thus put forward.

125. The Tribunal first observes that Venezuela had some experience of arbitration at the end of the 19th and the beginning of 20th century which generated hostility in the country towards this form of settlement of disputes. Its boundaries with Colombia[86] and the now Republic of Guyana [87] were fixed at that time by two arbitral awards favourable to its neighbours, the validity of which was contested. Moreover in 1902, Venezuela had to face a military intervention by Germany, Italy and the United-Kingdom seeking to collect unpaid debts and had to accept the establishment of Mixed Commissions in charge of fixing the indemnities to be paid to its foreign creditors. Those events led to the formulation of the Drago doctrine and the Drago-Porter Convention of 1907 prohibiting the use of force for the recovery of contractual debts. It also favoured the insertion in concession contracts of the Calvo clause under which the investor commits itself not to ask for diplomatic protection by its State of origin.

126. The Constitution of Venezuela of 1999 describes in its Articles 253 to 261 “the judicial power and the system of justice” of Venezuela. Article 253 recognizes that “the alternative means of justice” are part of that system and Article 258, after having

[86] Sentence arbitrale de la Reine régente d’Espagne du 16 mars 1891; sentence arbitrale du conseil fédéral suisse du 14 mars 1922 – Reports of International Arbitral Awards of the United Nations – Volume I p. 225.
[87] Sentence du 2 février 1897 – H. La Fontaine – Pasicrisie internationale – 1794-1900, p. 554.

mentioned "justice of peace", provides that "the law shall promote arbitration, conciliation, mediation and other alternative means of dispute settlement".

127. However, Article 151 of the 1999 Constitution (which reproduces Article 127 of the 1966 Constitution) provides that:

> "In public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included, even if not expressed, whereby any doubts and controversies which may arise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws, and shall not on any grounds or for any reason give rise to foreign claims".

128. Moreover, Article 4 of the Law on Commercial Arbitration of 7 April 1998 provides that:

> "When one party to the arbitration agreement is a company where the Republic, States, Municipalities or Independent Institutions have a capital share of at least fifty per cent (50 %) or a company in which the above mentioned parties have a capital share of at least fifty per cent (50%), such agreement shall require for its validity the approval of the competent statutory body and the written authorization of the Ministry of Legal Protection. The agreement shall specify the type of arbitration and the number of arbitrators, which shall in no event be less than three (3)".

129. This reluctant attitude explains that, during the preparation of the ICSID Convention, Latin-American countries, including Venezuela, expressed reservations on the proposed text which, they said, contravened their constitutional principles[88]. It also explains why Venezuela signed the Convention only in 1993, almost thirty years after its adoption.

130. At that time, the environment in Venezuela had become more favourable to international arbitration. In 1993 and 1994, the Respondent ratified both the ICSID Convention and the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958, as well as the Convention establishing the Multilateral Investment Guarantee Agency of 1985. From 1991 to 2001, it concluded

[88] History of ICSID Convention – Volume II – 1 § 39.

25 BITs; 19 of them had entered into force in 2004. Finally it adopted the Investment Law of 1999.

131. It thus appears that the traditional hostility of Venezuela towards international arbitration had receded in the 1990s in favour of a more positive attitude. However, Venezuela remained reluctant *vis-à-vis* contractual arbitration in the public sphere, as testified by the 1998 Arbitration Law and Article 151 of the 1999 Constitution. Moreover, the Tribunal cannot draw from this general evolution in favour of BITs the conclusion that Venezuela, in adopting Article 22, intended to give in advance its consent to ICSID arbitration in the absence of such BITs.

132. The legislative history of Article 22 could in this respect provide more useful information on the intention of the drafters of the Investment Law[89.] However, the Investment Law of 1999 was a decree-law and as such was not discussed in Parliament. Moreover it contains no "exposición de motivos". Thus we have no direct information on its preparation.

133. The Claimants submit that the Investment Law was drafted in 1999 "under the direction of Ambassador Werner Corrales", who in "a contemporaneous publication, acknowledged that it was the intent of the drafters of the Investment Law to provide for consent to ICSID arbitration"[90]. Respondent doubts that the Investment Law had been drafted under Mr. Corrales' direction. It adds that even so, "Mr. Corrales' writings are of no help in the interpreting Article 22"[91].

134. The Tribunal notes that in 1999 Mr. Corrales was Representative of Venezuela to the World Trade Organisation. He recognizes himself that he is "not an attorney", or an "expert in international law" or "investment arbitration". In a communication at a conference on investment arbitration in comparative law organized in April 2009 by the

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89 See for instance International Court of Justice - Aegean Sea Continental Shelf case (Greece v. Turkey) Judgment of 17 December 1978 - ICJ Reports p. 26 to 43.

90 Counter Memorial § 122.

91 Reply § 85.

Caracas Centro Empresarial de Conciliación y Arbitraje (Caracas Business Centre of Conciliation and Arbitration), he stated that he advised in 1999 that the President of Venezuela should prepare a law "that would serve as the compulsory framework for all international treaties and negotiations on investments". He said that he was then entrusted with preparing reference terms to write the draft law and direct its preparation. He adds that the "legal drafting" was assigned to a legal consultant of the Institute of Foreign Trade, Mr. Gonzalo Capriles[92].

135. Soon after the publication of the Investment Law, Mr. Corrales in two articles gave "algunas ideas" (some ideas) on the legal regime of promotion and protection of investments in Venezuela. In those articles, he stated that in his "opinion, a regime applicable to foreign investments must leave open the possibility to resort to international arbitration [unilaterally], which today is accepted almost everywhere in the world, whether through the mechanism provided by the ICSID Convention or through the submission of the dispute to an international arbitrator or to an ad hoc arbitral tribunal as the one proposed by UNCITRAL. In any case, it must be clearly established that there may not be a simultaneous resorting to national courts and to the arbitration mechanism or to any other type of procedure of settlement of disputes. In our case, this subject is dealt with in Chapter IV (article 21-23)" of the Investment Law, "where a great part of the principles commented is accepted[93].

136. The Tribunal observes that, in those articles, Mr. Corrales expressed his opinion on the provisions which, according to his judgement, must be incorporated in any regime of international arbitration. He adds that a "great part" of those principles "is accepted in articles 21 to 23 of the Investment Law"[94]. He did not say that the drafters of Article 22 intended to provide for consent to ICSID arbitration in the absence of any BIT.

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[92] Speech by Ing. Werner Corrales at CEDCA's event – Investment arbitration in Comparative Law – 28 April 2009 – Business – June 2009 p. 78 to 80.

[93] La OMC como espacio normativo – p. 185/186. The word "unilaterally" did not appear in the first article of 30 April 1999. It was added in the second article in 2000.

[94] *Ibidem.*

137. Ten years later, at the conference already mentioned organized by the Caracas Centro Empresarial de Conciliación y Arbitraje, Mr. Corrales was invited by the organisers of the conference to inform the audience of the "drafter's intention" for the law[95.] He then stated that, as far as he was concerned as co-drafter of the law, such intention was to offer "the possibility of open unilateral arbitration"[96.]

138. This last statement was made at a time the present proceedings were already engaged. It is not supported by contemporaneous written documents and the Claimants themselves did not ask Mr. Corrales to appear in the proceedings as a witness. They stated at the hearing that they do not rely on Mr. Corrales' statement "as legislative intent", but only as "confirmation" of their analysis[97]. Accordingly, the Tribunal concludes that the legislative history of Article 22 does not establish that, in adopting the Investment Law, Venezuela intended to consent in general and in advance to ICSID arbitration.

139. The Tribunal further observes that, at the time of the adoption of the Investment Law, Venezuela had already signed more than 15 BITs stating either that it gave "its unconditional consent to the submission of disputes" to ICSID arbitration or that its disputes with foreign investors "shall at the request of the nationals concerned be submitted to ICSID", or using both phrases. Comparable words were used in some national laws and in the ICSID model clauses. 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.

140. 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,

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95 Speech by Mr. Corrales - 29 April 2009 - Business - June 2009 p. 78 (Exh. C-187).

96 *Ibidem* p.80. ("In my scope of competence at least, I can state the intention of offering the possibility of open unilateral arbitration… [M]y purpose as co-drafter was to offer in the broadest and most transparent manner the possibility of the investors resorting to international arbitration as a unilateral offer made by the Venezuelan state.")

97 Hearing 24 September 2009, transcript, p. 19.

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.

141. Finally, the Tribunal notes that, according to the Respondent, Venezuela Holdings, Mobil C.N. Holding and Mobil Venezolana Holdings do not qualify as "international investors" under the Investment Law. The Respondent adds that, even if Article 22 were to be construed as consent to jurisdiction, that article would not provide a basis for such jurisdiction with respect to the claims submitted by those entities. The Claimants conclude the contrary. As the Tribunal has arrived to the conclusion that Article 22 does not constitute consent to jurisdiction with respect to any of the Claimants, it does not have to take a decision on those alternative submissions.

B – ARTICLE 9 OF THE BIT BETWEEN THE NETHERLANDS AND VENEZUELA

142. On 22 October 1991, the Kingdom of the Netherlands and the Republic of Venezuela concluded an Agreement on encouragement and reciprocal protection of investments, which entered into force on 1st November 1993, after ratification by both Parties. That Agreement was "done in the Spanish, Netherlands and English languages, the three texts being equally authentic". However, under paragraph 3 of a Protocol signed on the same day, "[i]n case of difference of interpretation between the three equally authentic texts of the present Agreement reference shall be made to the English text".

143. Article 9 of the BIT provides in its paragraph 1 that "[d]isputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for the settlement of Investment Disputes for settlement by arbitration or conciliation under" the ICSID Convention. Article 9 adds in its paragraph 4 that "[e]ach Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in

paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article".

144. The Claimants contend that the Tribunal has jurisdiction under the BIT to consider the case. The Respondent denies it. It describes the complex corporate form used by Mobil for its investment and submits that :

(i) Some of the Claimants are not Dutch nationals and that the Dutch Claimant, Venezuela Holdings, has only made indirect investments in Venezuela. Thus, according to the Respondent, the BIT does not cover the present claims.
(ii) Moreover, the Dutch entity is a "corporation of convenience" inserted into the corporate chain solely for the purpose of securing access to ICSID arbitration. Such an "abuse" of right should not be permitted[98].

145. The Tribunal first recalls that the present dispute finds its origin in investments made by Mobil in Venezuela for the exploration of oil in la Ceiba from 1996 and for the production and upgrading of extra-heavy crude oil in Cerro Negro from 1997.

146. Some difficulties arose with respect to those projects from October 2004 to August 2006, when Venezuela increased royalty rates and income taxes and created a new extraction tax. Then, in February 2007, a decree called for the transformation of the existing Oil Associations (including Cerro Negro and La Ceiba) into mixed companies. No agreement for such transformation was arrived at between Venezuela and the Claimants. Later in 2007, Cerro Negro's and La Ceiba's assets and operations were transferred to PDVSA and a decree of expropriation was issued.

147. In the meantime, the Exxon Mobil investments in Venezuela had been restructured through a holding company incorporated in The Netherlands. As a result of this restructuring, Mobil (Delaware) owns 100 % of Venezuela Holdings (Netherlands)

[98] Reply, para147.

which owns 100 % of Mobil CN Holding (Delaware) which owns 100 % of Mobil CN (Bahamas) which finally owns 41,66 % in the Cerro Negro project.

148. Venezuela Holdings (Netherlands) also owns 100 % of Mobil Venezolana Holding (Delaware) which owns 100 % of Mobil Venezolana (Bahamas) which finally owns 50 % interest in the La Ceiba Association.

149. In the light of those facts, the Tribunal will determine:

a. whether the BIT provides a jurisdictional basis in the present case
b. and, if so, whether the Claimants have engaged in treaty abuse, which would exclude such jurisdiction.

1- Jurisdiction under the BIT

(a) Nationality of the Claimants

150. It is undisputed that Venezuela Holdings (Netherlands) is an entity incorporated in the Netherlands and as such, a Dutch national entitled to avail itself of the BIT. But Venezuela submits that its subsidiaries, Mobil CN Holding (Delaware), Mobil Venezolana Holding (Delaware), Mobil CN (Bahamas) and Mobil Venezolana (Bahamas) have been incorporated either in the United States of America or in the Bahamas and are not Dutch nationals. According to the Respondent, they cannot avail themselves of the Dutch - Venezuela BIT.

151. Claimants contend that subsidiaries of Venezuela Holdings (Netherlands) are controlled by this Dutch Holding and must therefore be deemed to be Dutch entities under the BIT.

152. Article 1 of the BIT provides that:

"For the purpose of this Agreement

[...]

"(b) The term "nationals" shall comprise with regard to either Contracting Party:

(i) national persons having the nationality of that Contracting Party;

(ii) legal persons constituted under the law of that Contracting Party;

(iii) legal persons not constituted under the law of that Contracting Party, but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above".

153. The Tribunal observes that Venezuela Holdings (Netherlands) owns 100 % of its US and Bahamian subsidiaries. Those subsidiaries are thus controlled directly or indirectly by a "legal person constituted under the law" of the Netherlands. Accordingly they must be deemed to be Dutch nationals under article 1 (b) (iii) of the BIT.

154. The Respondent submits however, that this article is incompatible with Article 25 (2) (b) of the ICSID Convention which, according to Venezuela, excludes the use of the control test for the determination of a corporation's nationality.

155. Article 25 (2) (b) of the ICSID Convention provides the following definition of the term "national of another Contracting State":

> "(i) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration, and,
> (ii) any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention".

156. The Tribunal observes that Article 25 fixes the "outer limits" of ICSID jurisdiction and that parties can consent to that jurisdiction only within those limits.

157. However Article 25 (b) (i) does not impose any particular criteria of nationality (whether place of incorporation, *siège social* or control) in the case of juridical persons not having the nationality of the Host State. Thus the parties to the Dutch-Venezuela BIT were free to consider as nationals both the legal persons constituted under the law

of one of the Parties and those constituted under another law, but controlled by such legal persons. The BIT is thus compatible with Article 25 of the ICSID Convention.

158. The Respondent further contends that in fact Venezuela Holdings (Netherlands) did not exercise any control on its subsidiaries. In the absence of genuine control, the BIT would not be applicable.

159. The Tribunal recalls that a Protocol to the BIT was concluded on the same day by the Netherlands and Venezuela. This Protocol, which is an "integral part" of the BIT, provides in its paragraph 1 ad Article 1 (b) (iii) :

> "A Contracting Party may require legal persons referred to in Article 1 Paragraph (b) (iii) to submit proof of such control in order to obtain the benefit provided for in the provisions of the Agreement. For example, the following may be considered acceptable proof:
>
> a. that the legal person is an affiliate of a legal person constituted in the territory of the other Contracting Party;
> b. that the legal person is economically subordinated to a legal person constituted on the territory of the other Contracting Party
> c. that the percentage of its capital owned by national or legal persons of the other Contracting Party makes it possible for them to exercise control".

160. In the present case, Venezuela Holdings (Netherlands) owns 100 % of the share capital of its two American subsidiaries, which in turn own 100 % of the share capital of the two Bahamas subsidiaries. Thus the share capital of Venezuela Holdings (Netherlands) in those subsidiaries makes it possible for it to exercise control on them. The Tribunal does not have to consider whether or not such control was exercised in fact. In any case, under paragraph 1 (c) of the Protocol, those subsidiaries must be considered as nationals of the Netherlands benefiting of the provisions of the BIT.

161. This first objection to the tribunal jurisdiction based on the text of the BIT cannot be upheld.

(b) Direct and Indirect Investments

162. Venezuela then submits that Venezuela Holdings (Netherlands), Mobil Cerro Negro Holding and Mobil Venezolana Holding (Delaware) are not entitled to assert claims against Venezuela for their indirect interests in the Venezuelan investment of their Bahamian subsidiaries. In this respect, it submits that "the provisions of the Dutch Treaty establish that the obligations of a Contracting Party run only to nationals of the other Contracting Party with respect to their own investments and only to extent that those investments are located in the territory of the first Contracting Party"[99].

163. The Claimants for their part contend that the BIT does not limit the definition of "investment" to direct investments. Moreover, it "does not require that the claim be related to an investment 'in the territory' of Venezuela"[100]. The Treaty was intended to protect investments in Venezuela held by a Netherlands company through a subsidiary whether such subsidiary is incorporated in the Netherlands or in a third country"[101].

164. The BIT in its Article 1 provides that:

> "For the purpose of this Agreement:
>
> a. the term "investment" shall comprise every kind of asset and more particularly though not exclusively:
>
> (i) movable and immovable property, as well as any other rights *in rem* in respect of every kind of assets;
>
> (ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures;
>
> (iii) title to money, to other assets as to any performance having an economic value;

[99] Reply § 167.
[100] Rejoinder §104.
[101] *Ibidem* § 105.

(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) rights granted under public law, including rights to prospect, explore, extract and win natural resources".

165. The Tribunal notes that there is no explicit reference to direct or indirect investments in the BIT. The definition of investment given in Article 1 is very broad. It includes "every kind of assets" and enumerates specific categories of investments as examples. One of those categories consists of "shares, bonds or other kinds of interests in companies and joint ventures". The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments. Investments as defined in Article 1 could be direct or indirect as recognized in similar cases by ICSID Tribunals[102].

166. The second objection to the Tribunal jurisdiction based on the text of the BIT cannot be upheld.

2- <u>Abuse of right</u>

167. The Respondent then submits that the Exxon Mobil's corporate restructuring through the creation of the Dutch holding in 2005-2006 constituted an abuse of right and that, as a consequence, the Tribunal has no jurisdiction under the BIT. The Claimants contend that this allegation has no legal or factual basis.

[102] *Siemens AG v. The Argentine Republic* – ICSID Case No. ARB/02/8 – Decision on Jurisdiction, (3 August 2004),- §136-137, 12 ICSID Reports 174 (2007) ; *Ioannis Kardassopoulos v. Georgia* – ICSID Case No. ARB/05/18, Decision on Jurisdiction, (6 July 2007), §123-124.

168. The Tribunal will first consider the law applicable to abuse of right before applying it to the present case.

(a) The applicable law

169. The Tribunal first observes that in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to "good faith" ("bonne foi"), "détournement de pouvoir" (misuse of power) or "abus de droit" (abuse of right).

170. The principle of good faith has been recognized by the International Court of Justice as "one of the basic principles governing the creation and performance of legal obligations"[103]. It has been recognized in the law of treaties[104] and has been referred to by a number of courts and tribunals including the Appellate Body of the World Trade Organisation[105] and ICSID tribunals[106].

171. The concept of *détournement de pouvoir* (misuse of power) has also been relied upon in international law, in particular in the law of the sea[107], the law of international organisations[108], and in European Community law[109].

172. The same is true of abuse of right. As Hersch Lauterpacht noted in his book entitled "Development of International Law by the International Court": "There is no right,

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[103] Nuclear Tests – ICJ Report 1974 p. 268 §46 – p.473 § 49; Armed action (Honduras v/Nicaragua – ICJ Report 1988 p. 105 § 94.

[104] Vienna Convention on the Law of Treaties 23 May 1969, Articles 26 and 31 §1.

[105] WTO Appellate Body WT/DS/08/AB/R – 24 February 2000 – US Tax Treatment for foreign sales corporations § 166- WT/DS/184/AB/R 24 July 2001.

[106] *Amco Asia Corporation v. Indonesia*. ICSID Case No. ARB/81/1, Decision on Jurisdiction, (25 September1983); *SPP v. Egypt* ,Decision on Jurisdiction II, (14 April 1988), § 63; *Inceysa v. Salvador*, ICSID Case No. ARB/03/26,(2 August 2006), §230.

[107] United Nations Convention on the Law of the Sea of 10 December 1982, Article 187.

[108] See for instance Administrative Tribunal of the International Labour Organisation – Judgments N°13 of 3 September 1954, N° 1129 of 3 July 1991 and N° 1392 of 1 February 1995.

[109] Article 263 § 2 of the Treaty on European Union as revised in Lisbon. See for instance ECJC – Infried Hochbaum v. Commission – Aff. C 107/90 – Rep. 1992 p. 174 § 14.

however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused"[110].

173. It has thus long been recognized in arbitration that "abuse of authority"[111] or "abuse of administration"[112] could engage State responsibility. The Permanent Court of International Justice referred in two judgments to "abus de droit" in general. In the Upper Silesia case, the Court recognized the right of Germany to dispose of her [its?] property in this district until the actual transfer of sovereignty has been made under the Versailles Treaty. However, it added that "a misuse of this right could endow an act of alienation with the character of a breach of the Treaty"[113].

174. Some years later, in the Free Zones of Upper Savoy and District of Gex case, the Permanent Court recognized to France the right to impose "fiscal taxes within the zones as apart from customs duties at the frontier". However it added that "a reservation must be made as regard the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zone by creating a customs barrier under the guise of a control cordon"[114].

175. More recently, the Appellate Body of the World Trade Organisation stated that "the principle of good faith, at once a general principle of law and general principle of international law, controls the exercise of rights by States. One application of this

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[110] Sir Hersch Lauterpacht – Development of International Law by the International Court – London 1958 p. 164 – See also Oppenheim's International Law – Longman 9th Edition by Jennings and Watts Volume I § 124.

[111] Mixed Claims Commission France-Venezuela – Lalanne and Ledour Case – United Nations Reports of International Awards – Volume X p. 17 and 18, in which the arbitrator sanctionned an « abuse of authority » of the President of the Venezuelan State of Guayana ».

[112] Tacna – Arica Question (Chile v. Peru) - 4th March 1925 – United Nations Reports of International Arbitral awards – Volume II p. 941 and 945. In that case the arbitrator considered whether there had been « abuse of administration » by Chile in the disputed area. It arrives to the conclusion that Chile had used its conscription "laws not so much for obtaining of recruits… but with the result, if not the purpose, of driving young Peruvians from the [disputed] provinces». So far as it has been done, the Arbitrator holds it to be an abuse of Chilean authority ».

[113] Permanent Court of International Justice – Polish Upper Silesia – PCIJ – Report – Serie A – Judgment N°7 p. 30. The term « misuse of right » comes from the English version of the judgment. It corresponds to « abus de droit » and « manquement au principe de bonne foi » in the original French text.

[114] Permanent Court of International Justice - Free Zones of Upper Savoy and District of Gex – 7 June 1932 – Serie A.B N°46.

general principle, widely known as the doctrine of "abus de droit", prohibits the abusing exercise of a State's right"[115]. The European Court of Justice in many cases also referred to such "*abus de droit*"[116].

176. For their part, ICSID tribunals had a number of occasions to consider whether or not the conduct of an investor does constitute "an abuse of the convention purposes"[117], "an abuse of legal personality"[118], an "abuse of corporate form"[119] or an "abuse of the system of international investment protection"[120].

177. Under general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.

178. In *Autopista v. Venezuela*, the investor, a Mexican company, ICA, restructured its investment in a Venezuelan company, Aucoven in transferring 75 % of its shares to a US corporation. It was alleged by Venezuela that this restructuring had been an abuse of the corporate form in order to gain access to ICSID jurisdiction. The Tribunal recalled that the transferee entity had been incorporated eight years before the parties entered into the concession agreement. It noted that the transferee was not just a shell corporation. It added that the Claimant had directly requested and had obtained in due time Venezuela's approval of the transfer of shares. It finally observed that the transfer was justified by the difficulties for Mexican companies to obtain financing for projects

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115 WTO Appellate Body – Decision WT/DS58/AB/R of 12 December 1998 - US Import prohibition of certain shrimps and shrimps products § 158.

116 See Triantafyllou, « L'interdiction des abus de droit en tant que principe général du droit communautaire ». Cahiers de droit européen n° 5.6. 2002 p. 611-663.

117 *Autopista Concesionada de Venezuela. C.A v. Bolivarian Republic of Venezuela*. ICSID Case ARB/00/5. Decision on Jurisdiction, (27 September 2001), 16 ICSID Review - Foreign Investment Law Journal 5 (2001) §. 122.

118 *Tokos Tokelés v. Ukraine* – ICSID Case No. ARB/02/18. Decision on Jurisdiction,(29 April 2009) – 20 ICSID Review - Foreign Investment Law Journal 205 (2005) § 56.

119 *Aguas del Tunari S.A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 October 2005) – 20 ICSID Review – Foreign Investment Law Journal – 450 (2005).

120 *Phoenix Action Ltd v. The Czech Republic,* ICSID case No. ARB/06/5, Award- § 113.

because of the peso crisis. On those bases it considered that the restructuring did not constitute "an abuse of the Convention purposes"[121].

179. In *Tokios Tokelés v. Ukraine*, the Claimant company was organised under Lithuanian law and was owned and controlled at 99 % by Ukrainian nationals. The tribunal noted that this enterprise was formed before the BIT between Ukraine and Lithuania entered into force. It added that there was "no evidence in the record that the Claimant used its formal legal personality for any improper use" such as fraud or malfeasance. It concluded that there had been no abuse of legal personality"[122]. However, the President of the Tribunal dissented in a strongly motivated opinion noting that the investment had been made "in Ukraine by Ukrainian citizens with Ukrainian capital" and as such could not benefit from the protection of the ICSID mechanism[123].

180. In *Aguas del Tunari v. Bolivia*, the Claimant, a Bolivian company, had entered into a water concession contract with the Bolivian authorities. Bechtel, a US corporation, owned 55 % of Aguas del Tunari. Bechtel then joined its water management projects with Edison and its shares in Aguas del Tunari were transferred to a Dutch company. The Tribunal was seized on the basis of the Dutch-Bolivian BIT. Bolivia argued that the Dutch entity was a mere shell created solely for the purpose of gaining access to ICSID and that therefore, the tribunal had no jurisdiction under the BIT.

181. In a divided opinion, the Tribunal held that the Dutch entity was "not simply a corporation shell established to obtain ICSID jurisdiction over the case"[124]. It added that "it is not uncommon in practice and - absent a particular limitation – not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal

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[121] *Autopista Concesionada de Venezuela, CA v. Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, (27 September 2001), § 123-126, 16 ICSID Review Foreign Investment Law Journal 5 (2001).

[122] *Tokios Tokeles v.Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (29 April 2004), § 53 to 56. 20 ICSID Review Foreign Investment Law Journal. 205 (2005).

[123] *Ibidem* – Dissenting Opinion § 23 and 25.

[124] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (21 October 2005), § 321, 20 ICSID Review - Foreign Investment Law Journal – 450 (2005).

environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT"[125]. It concluded that it "did not find a sufficient basis in the present record to support the allegation of abuse of corporate form or fraud"[126].

182. The Tribunal arrived at a different conclusion in *Phoenix v. Czech Republic*. In that case, the Claimant, Phoenix, was controlled by a former Czech national who incorporated Phoenix under Israeli law and caused it to acquire an interest in two Czech companies owned by members of his family. Before the acquisition, the Czech companies had already been involved in lawsuits in the Czech Republic and in disputes with the Czech authorities. Approximately two months after the acquisition, Phoenix notified the Czech Republic of an investment dispute and subsequently commenced ICSID arbitration.

183. The Tribunal examined successively the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the true nature of the operation. It noted that "all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made". It observed that the initial request "was based on a claim by the two Czech companies, which were supposedly assigned to Phoenix". It added that the timing of the claim showed that "what was really at stake were indeed the pre-investment violations and damages". The "whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction. Moreover, "no activity was either launched or tried after the alleged investment was made". "All the elements analysed lead to the same conclusion of an abuse of right". As a consequence the Tribunal concluded that it lacked jurisdiction on the Claimant's request[127].

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[125] *Ibidem* § 330 (d).
[126] *Ibidem* § 331.
[127] *Phoenix Action Ltd v.The Czech Republic*, ICSID Case No. ARB/06/5, Award, (15 April 2009),- § 136 to 145.

184. Those decisions and awards use different criteria to determine in each case whether or not there has been abuse of right. But in all cases, as stated by Professor Prosper Weil in his dissenting opinion in Tokios Tokelés, the question is to give "effect to the object and purpose of the ICSID Convention" and to preserve "its integrity"[128].

185. In the present case, the Tribunal has to act accordingly and to consider whether or not the restructuring of Mobil's investments in Venezuela in 2005-2006 is to be deemed as an abuse of right and as a consequence whether or not it has jurisdiction under the BIT.

(b) Application of the Law to the Case

186. Initially, Mobil investments in Venezuela were structured as follows:

(i) Mobil (Delaware) owned 100% of Mobil CN Holding (Delaware), which in turn owned 100 % of Mobil CN Holding (Bahamas), which has a 41 2/3 % participation in the Cerro Negro Association.
(ii) Mobil (Delaware) also owned 100 % of Mobil Venezolana Holding (Delaware), which in turn owned 100 % of Mobil Venezolana (Bahamas), which had a 50 % participation in the La Ceiba Association.

187. On 27 October 2005, Claimants created a new entity under the law of the Netherlands, called Venezuela Holdings. On 21 February 2006, this entity acquired all the shares of Mobil CN Holding (Delaware). Then on 23 November 2006, it also acquired all the shares of Mobil Venezolana Holding (Delaware). The Dutch holding company was thus inserted into the corporate chain for the Cerro Negro and La Ceiba projects.

188. Respondent submits that this restructuring occurred long after the investments. It adds that it did not consent to it. It contends that "the disputes were not only foreseeable, but they had actually been identified and notified to Respondent before the Dutch company was even created"[129]. Thus, according to Venezuela, the only purpose of this restructuring was to gain access to ICSID for existing disputes. This was "an abusive manipulation of the system of international protection under the ICSID Convention and

[128] *Tokio Tokeles v. Ukraine* – Dissenting Opinion § 25.
[129] Rejoinder p. 83.

the BITs"[130]. According to Venezuela it is therefore the duty of the Tribunal not to protect such manipulation and to decline its jurisdiction.

189. Claimants contest each of those points. They explain that they were "surprised" by Venezuela's "unilateral imposition of a 16 2/3 % royalty rate in October 2004", which in their opinion was contrary to the existing agreements. They say that Mobil promptly "undertook a review of the extent of the legal protection for its investments in Venezuela". Upon doing so, it concluded in early 2005 that it should restructure its Venezuelan investments through a holding company incorporated in the Netherlands, which had a bilateral investment treaty with Venezuela"[131]. This choice was considered as "logical", taking into account the double taxation agreements concluded by the Netherlands and the activities that Exxon Mobil already had in that country.

190. It thus appears to the Tribunal that the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT.

191. Such restructuring could be "legitimate corporate planning" as contended by the Claimants or an "abuse of right" as submitted by the Respondents. It depends upon the circumstances in which it happened.

192. In this respect, the Tribunal first observes that, contrary to the situation in *Autopista v. Venezuela*, there was no contractual obligation in the present case for Mobil or its subsidiaries to submit the proposed restructuring to the approval of the Venezuelan authorities. Yet, Mobil did not hide this operation. In fact, Mobil Cerro Negro notified the Respondent of Venezuela Holdings' ownership of the Cerro Negro investment on 16 October 2006. On 7 March 2007, Venezuela Holdings also informed Venezuela of the acquisition of the La Ceiba investments. The Respondent did not raise any objection at the time.

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[130] Rejoinder p. 147.
[131] Counter Memorial § 195-197.

193. With respect to the timing of the investments, the Tribunal observes that, as stated by the Respondent, "the main investment at issue is the investment in the Cerro Negro project"[132]. The bulk of this investment, *i.e.* 1,915 billion US dollars, was made from 1999 to 2002. "By 2000, sales from early production of extra-heavy crude oil blended with condensate had commenced. By 2001 the upgrade had been completed and by 2002 the project was already generating more than enough income to cover all its expenses and cash needs"[133].

194. As a consequence from 2002 to 2005, the annual investment was far smaller than before and varied from a minimum of 45 million US dollars in 2003 to a maximum of 175 million US dollars in 2005.

195. In the last period, however, a gas facility modification and new wells (Pad 8) were constructed. The wells were completed in late 2005[134] and the gas facility became operational in December 2006[135]. The investments in 2006 amounted to 89 million US dollars.

196. The Tribunal does not have at its disposal such precise figures in the case of the La Ceiba project. However the Claimants submit that in "December 2005, Mobil Venezolana, along with its partner, Petro-Canada La Ceiba GmbH, commited itself to invest roughly US $ 1.3 billion in the La Ceiba project. Mobil re-confirmed its intention to proceed with that investment in January 2007". This is not contested by the Respondent.

197. Moreover, it is not disputed that the Claimants contributed their part to those investments.

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[132] Reply § 119.
[133] *Ibidem.*
[134] Reply § 124.
[135] Rejoinder – footnote 183.

198. It thus appears that in 2005-2006, the two projects had developed normally through the required investments. Therefore the investments made in 2006 in Cerro Negro were far lower than those made each year from 1999 to 2001 (although higher than in 2002 and 2003). As stated by the Respondent, they were financed, as through the funds "generated by the project itself rather than brought into Venezuela from or through the Netherlands"[136]. This was so because the project was already "up and running"[137]. The situation in the present case is thus quite different from the situation which the arbitral tribunal had to consider in the Phoenix case. The limited amount of investment made in particular in 2006 and the fact that it was financed without external funding was in harmony with the project at the time of the restructuring as it then stood. No adverse inference can be drawn from that situation. It should also be added that the Treaty contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement[138].

199. The Tribunal will now turn from the timing of the investment to the timing of the dispute. To that end, it will recall what complaints had already been lodged by the Claimants at the time of the restructuring.

200. In two letters dated 2 February 2005, and 18 May 2005, drafted in comparable terms, the Claimants first complained of the increase from 1 % to 16 2/3 % of the royalties decided by Venezuela both for the Cerro Negro and the La Ceiba projects. They requested the Government to designate representatives to meet with them in order to discuss an amicable settlement. They added that "as you well know, in accordance with Article 22 of the Investment Law, the Bolivarian Republic of Venezuela has consented to submit to arbitration under the ICSID Convention, investment disputes between the Bolivarian Republic of Venezuela and foreign investors". They went on, consenting "to

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[136] Reply § 124.

[137] *Ibidem.*

[138] For comparable cases, see *Olguin v. Paraguay*, ICSID Case No. ARB/98/5, Award, (26 July 2001), IIC 97 (2001) at 13 n 4; *Saipem S.p.a. v. The People Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (21 March 2007), IIC 280 (2007) at 106

ICSID's jurisdiction for arbitration of the investment dispute, and of any further investment dispute with the Bolivarian Republic of Venezuela, so that, should arbitration become necessary, it can be carried out under the ICSID Convention". They finally concluded in requesting "an early meeting to commence consultation" in order "to explore an amicable solution of the matter"[139].

201. Then, on 20 June 2005, Mobil Cerro Negro Holding, Mobil Cerro Negro and Operadora Cerro Negro informed the Venezuelan authorities that the recent ministerial decision to increase the royalties to 30 % "has broadened the investment dispute" previously brought to their attention. They stated that the introduction of a bill that would increase income tax rates from 34 % to 50 % would further broaden that dispute. They contended those decisions were "in breach of the obligations" of Venezuela and requested again consultations "in an effort to reach an amicable resolution of this matter". They recalled Article 22 of the Investment Law and the position they took on this matter in their previous letters. They added that "[o]ut of an abundance of caution, each of the Mobil Parties hereby confirms its consent to ICSID jurisdiction over the broadened dispute described above and any other investment disputes with the Bolivarian Republic of Venezuela existing at the present time or that may arise in the future, including without limitation any dispute arising out of any expropriation or confiscation of all or part of the investment" of the Mobil Parties.

202. It results from those letters that in June 2005 there were already pending disputes between the Parties relating to the increase of royalties and income taxes decided by Venezuela. Claimants had even accepted to submit those disputes to ICSID arbitration under Article 22 of the Venezuelan Investment Law. "Out of an abundance of caution", they had further indicated that on the same basis they were also consenting to arbitration for any future dispute, including future dispute arising from expropriation or confiscation.

[139] Quotations from the letter of 18 May 2005.

203. As recalled above, the restructuring of Mobil's investments through the Dutch entity occurred from October 2005 to November 2006. At that time, there were already pending disputes relating to royalties and income tax. However, nationalisation measures were taken by the Venezuelan authorities only from January 2007 on. Thus, the dispute over such nationalisation measures can only be deemed to have arisen after the measures were taken.

204. As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs [140]. The Claimants seem indeed to be conscious of this, when they state that they "invoke ICSID jurisdiction on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed"[141].

206. The Tribunal thus:

a. has jurisdiction under the ICSID Convention and the BIT with respect to any dispute born after 21 February 2006 for the Cerro Negro project and after 23 November 2006 for the La Ceiba project, and in particular with respect to the pending dispute relating to the nationalisation of the investments;

[140] *Phoenix v. Czech Republic* - § 144.
[141] Reply §4.

b. has no jurisdiction under the ICSID Convention and the BIT with respect to any dispute born before those dates.

207. Finally, the Tribunal notes that Mobil Corporation has only raised claims on the basis of Article 22 of the Investment Law and not on the basis of the BIT. In § 140 above, the Tribunal has concluded that Article 22 of the Investment Law does not provide a basis for jurisdiction in the present case. As a consequence, the Tribunal has no jurisdiction over the claims of Mobil Corporation, which will thus not be a Party to the continuation of these proceedings.

C – COSTS OF THE PROCEEDINGS

208. Lastly, the Tribunal makes no order at this stage regarding the costs of the proceeding and reserves it to a later stage of the arbitration.

IV. DISPOSITIVE PART OF THE DECISION

209. For the foregoing reasons;

The Tribunal unanimously decides:

(a) that it has jurisdiction over the claims presented by Venezuela Holdings (Netherlands), Mobil CN Holding and Mobil Venezolana Holdings (Delaware), Mobil CN and Mobil Venezolana (Bahamas) as far as:

(i) they are based on alleged breaches of the Agreement on encouragement and reciprocal protection of investments concluded on 22 October 1991 between the Kingdom of the Netherlands and the Republic of Venezuela;

(ii) they relate to disputes born after 21 February 2006 for the Cerro Negro Project and after 23 November 2006 for the La Ceiba Project and in particular as far as they relate to the dispute concerning the nationalization measures taken by the Republic of Venezuela;

(b) that it has no jurisdiction under Article 22 of the Venezuelan Decree with rank and force of law No. 356 on the protection and promotion of investments of 3 October 1999;

(c) to make the necessary order for the continuation of the procedure pursuant to Arbitration Rule 41 (4);

(d) to reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination;