

Interpretation – Article 25(1) of the ICSID Convention – Characterization of a legal dispute – Conflict of rights vs. conflict of interests – Question of legal rights and obligations in connection with investment – Characterization of “investment” – Loans and promissory notes as investment – Purchase and assignment of promissory notes foreseen

Treaties – Bilateral investment treaty – Investment broadly defined under treaty – Standard approach of bilateral and multilateral investment treaties – Practice of State Party consistent in relation to its other bilateral and multilateral investment treaties – State Party has not exercised right under Article 25(1) of the ICSID Convention to exclude any class of investment

Municipal law – Promissory notes issued in compliance with Commercial Code and Law on Public Credit – Payments authorized at highest level of government – Budgetary appropriation by Congress to finance payments

Jurisdiction – ICSID jurisdiction specifically provided for in bilateral investment treaty – Sources of applicable law including internal law, the Investment Agreement, general principles of international law

FEDAX NV v. REPUBLIC OF VENEZUELA

*Decision on Objections to Jurisdiction.* 11 July 1997

*Award.* 9 March 1998

(*Arbitration Tribunal:* Prof. Francisco Orrego Vicuña, *President*; Prof. Meir Heth and Mr Roberts B. Owen, *Members*)

SUMMARY: *The facts:* — Fedax NV (“Fedax”), a company established and domiciled in Curaçao, Netherlands Antilles, sought ICSID arbitration against the Republic of Venezuela. The request concerned a dispute arising out of certain debt instruments issued by Venezuela in connection with a contract made with a Venezuelan corporation, Industrias Metalúrgicas Van Dam, CA, and assigned by way of endorsement to the Claimant. Fedax relied on the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela of 22 October 1991.

Venezuela objected to the jurisdiction of the Tribunal on the ground that Fedax could not be considered to have made an “investment” as defined by the Convention because it acquired the promissory notes by way of subsequent endorsement.

*Decision on Objections to Jurisdiction:* 11 July 1997

*Held:* — The dispute was within the jurisdiction of the Tribunal.

(1) For the purposes of Article 25(1) of the Convention, a dispute under the Convention must concern a conflict of rights and not a mere conflict of interests between the parties. In the present case, there was a dispute of a legal nature as it concerned the different views of the parties on questions of legal rights and obligations in connection with an investment, in particular the issue of an obligation to honour six promissory notes issued by Venezuela (p. 189).

(2) The term "investment" has been broadly understood in ICSID practice and decisions, as well as scholarly writings. Loans qualify as an investment within ICSID jurisdiction. Promissory notes are evidence of a loan and a common financial and credit instrument. Their purchase therefore qualified as an investment in the circumstances of the case (pp. 190–4).

(3) The 1991 Agreement was the specific bilateral investment treaty governing the consent to arbitration by the parties. Under Article 9(1) of the Agreement, disputes between a Contracting Party and a national of the other concerning an investment were to be submitted to ICSID for arbitration or conciliation. Article 1(a) of the Agreement evidenced that the parties intended a very broad meaning for the term "investment", comprising "every kind of asset" including "rights derived from shares, bonds, and other kinds of interests in companies and joint ventures" and "titles to money, to other assets or to any performance having economic value". Other articles of the Agreement supported the conclusion that the term includes loans and related credit transactions. This broad approach was standard in other bilateral and multilateral investment instruments. Venezuela had not exercised its right under Article 25(4) of the ICSID Convention to exclude any class of investment. Venezuela's practice with regard to other bilateral investment treaties supported this same conclusion (pp. 194–7).

(4) With regard to the six promissory notes, the question was whether the subsequent endorsement of the notes to foreign holders took the matter outside the concept of foreign investment. Venezuela foresaw the possibility that the promissory notes would be transferred and endorsed to foreign holders since the notes explicitly allowed for such a possibility. The fact that these notes were denominated in US dollars was further evidence that their international circulation was contemplated. Venezuela itself expressed the view that the notes were "eminently negotiable instruments in the secondary market, with national and foreign financial institutions" (p. 197).

(5) The promissory notes were issued by Venezuela in compliance with the terms of the Law on Public Credit, enacted to provide for the orderly development of public financial arrangements. It was apparent that the transactions involved in this case were not ordinary commercial transactions and indeed involved a fundamental public interest. This was further evidence that the transactions in this case met the basic features of an investment (pp. 197–9).

*Award on the Merits: 9 March 1998*

*Held:* — (1) The facts alleged by Fedax had not been contested by Venezuela, which had agreed to the payment of the capital and interest on the promissory notes. It had been further agreed between the Parties that the payments would be made

in US dollars and that Venezuela would pay its part in the expenses of the arbitral proceeding. It had also been agreed that accrued interest would be paid until the payment of the principal (pp. 204–5).

(2) As the parties were not in agreement on all the elements relating to the dispute, the parties had not filed with the Secretary-General the full and signed text of their settlement nor requested the Tribunal to embody such settlement in the award, as provided under Rule 43(2) of the ICSID Arbitration Rules. However, given the significance of the settlement reached by the parties on the merits, the Tribunal declared it would render its award on that basis (p. 205).

(3) The Tribunal was satisfied that the purchase by Fedax of the promissory notes met the requirement of an investment under both the Convention and the Agreement. It followed that Venezuela was under the obligation to honour the terms and conditions governing such an investment, as well as to honour specific payments established in the promissory notes in accordance with Article 3 and Article 9(3) of the Agreement, respectively. The Tribunal found that the promissory notes were governed by the provisions of the Venezuelan Commercial Code and the Law on Public Credit. The various sources of applicable law referred to in Article 9(5) of the Agreement, including the laws of the Contracting Party, the Agreement itself, other special agreements connected with the investment and the general principles of international law, provided the basis for the decision on jurisdiction and the award on the merits. This broad framework of the applicable law further confirmed the trends discernible in ICSID practice and decisions (pp. 205–7).

(4) Venezuela was ordered to pay to Fedax the amount of US \$598,950 representing the principal of the promissory notes. Venezuela was also ordered to pay the amount of US \$161,245.14 representing the regular and penal interest due on the promissory notes. Venezuela was ordered to pay Fedax the amount of US \$50,150 representing one half of the charges and costs of the proceeding for which advance payment was made by the Claimant. Each of the parties was ordered to bear the entirety of its own expenses and legal fees (pp. 206–7).

**The texts of the decisions are set out as follows:**

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## OBJECTIONS TO JURISDICTION, 11 JULY 1997

## A. Facts and Procedure

1. On June 17, 1996 a request for arbitration was submitted to the International Centre for Settlement of Investment Disputes (ICSID or the Centre) on behalf of Fedax NV, a company established and domiciled in Curaçao, Netherlands Antilles, against the Republic of Venezuela. The request concerns a dispute arising out of certain debt instruments, referred to below, issued by the Republic of Venezuela and assigned by way of endorsement to the Claimant Fedax NV. The request invokes the provisions, discussed below, of an October 22, 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the Agreement).

2. On June 18, 1996, the Centre, in accordance with Institution Rule 5, acknowledged receipt of the request. At the same time, the Centre asked the Claimant to indicate the address of the other party to the dispute as required by the Centre's Institution Rules. On that same date, the Claimant informed the Centre of the address of the Venezuelan Minister of Industry and Commerce. On June 19, 1996, the Centre transmitted the request to the Republic of Venezuela in accordance with Institution Rule 5, with a copy to the Embassy of Venezuela in Washington, DC.

3. On June 26, 1996, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention or the ICSID Convention). On this same date, the Centre's Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. On July 2, 1996, Fedax NV proposed that the Arbitral Tribunal consist of three arbitrators, one arbitrator appointed by each of the parties, and a third arbitrator, to be the President of the Tribunal, appointed by the President of the Administrative Council of the Centre. Fedax NV further proposed that it would appoint an arbitrator from the Panel of Arbitrators maintained by the Centre, but that neither the Republic of Venezuela nor the President of ICSID's Administrative Council were bound to do so.

5. On July 19, 1996, the Centre received a communication from Mr Freddy Rojas Parra, Minister of Development of Venezuela, in which he informed the Centre that the Venezuelan Ministry of Industry and Commerce had not yet been established, and that the competent state organs for dealing with the proceeding were therefore the Attorney General's Office (*Procuraduría General de la República*) and the Ministries of Finance and of Foreign Affairs. Through further communications of July 30 and August 1, 1996, Minister Rojas Parra informed the Centre of the addresses and names of the Attorney General of the Republic and of the Ministers of Finance and Foreign Affairs. Copies of the request, of the notice of registration and of correspondence between the Centre and the parties were sent to those addresses under cover of an August 8, 1996 letter from the Centre. Through a letter of August 15, 1996, Mr Jorge Szeplaki Otahola, Deputy Attorney General for Supreme Court Affairs, informed the Centre that his office and the office of the Attorney General would be representing the Republic of Venezuela in this proceeding.



6. On September 18, 1996, Fedax NV informed the Centre that it was choosing the formula of Article 37(2)(b) of the ICSID Convention, and named Professor Meir Heth, a national of Israel, as the arbitrator appointed by the Claimant. On September 20, 1996, the Republic of Venezuela named Mr Roberts B. Owen, a national of the United States of America, as the arbitrator appointed by it. By means of a further communication of September 24, 1996, the Republic of Venezuela proposed that the third, presiding, arbitrator in the proceeding be appointed by the Chairman of ICSID's Administrative Council. On September 27, 1996, Fedax NV accepted this proposal and confirmed its appointment of Professor Meir Heth. On September 30, 1996, the Republic of Venezuela confirmed its appointment of Mr Roberts B. Owen.

7. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was appointed as President of the Tribunal by the Chairman of ICSID's Administrative Council, acting in accordance with the parties' agreement. On November 27, 1996, ICSID's Secretary-General notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Pursuant to Administrative and Financial Regulation 25, the Centre's Secretary-General appointed as Secretary of the Tribunal Mr Alejandro A. Escobar, Counsel, ICSID.

8. The first session of the Tribunal was held with the parties at the seat of the Centre in Washington, DC on January 17 and 18, 1997. At the session the parties expressed their satisfaction that the Tribunal had been constituted in conformity with the provisions of the Convention and the Arbitration Rules and that they did not have any objections in this respect.

9. As had been announced in a letter of December 5, 1996, the Republic of Venezuela, represented at the first session by Mr Jorge Szeplaki Otahola, raised at that session objections to the jurisdiction of the Centre and to the competence of the Tribunal, both orally and in a written submission, copies of which were distributed at the session to the members of the Tribunal and to the representative of Fedax NV.

10. After hearing the views of the parties at the first session, the Tribunal issued Procedural Order No. 1, of January 18, 1997, in which it determined that the language of the proceeding shall be Spanish, except that the orders, decisions and Award of the Tribunal shall be made in English, with a translation into Spanish. Procedural Order No. 1 also set forth the generally applicable time limits for the written pleadings of the parties. On the same date the Tribunal also issued Procedural Order No. 2, which reads as follows:

1. In view of the fact that the Republic of Venezuela has raised objections pursuant to Article 41(2) of the ICSID Convention, the proceeding on the merits of the dispute is hereby suspended pursuant to Rule 41(3) of the Arbitration Rules of the Centre.

2. In view of the fact that the above-mentioned objections by the Republic of Venezuela were raised by means of a written submission delivered at the first session of the Tribunal, the Republic of Venezuela shall, within seven (7) days, confirm in writing that said written submission is deemed to be its memorial on its objections. The Republic of Venezuela shall, within forty (40) days, submit a translation of its above-mentioned written submission. The Claimant shall, within the same period of forty (40) days, submit its counter-memorial on the objections raised by the Republic of Venezuela. The Tribunal may require the submission of a reply and a rejoinder on the objections, the reply to be submitted within fifteen (15) days from the time the

Tribunal so requests and the rejoinder to be submitted within fifteen (15) days from the date of transmission by the Centre of the reply. The Tribunal may require the reply and the rejoinder to be submitted simultaneously within fifteen (15) days from the time the Tribunal so requests.

11. On January 23, 1997, the Republic of Venezuela confirmed that its written submission of January 17, 1997 was deemed to be its memorial on its objections to jurisdiction. On February 14, 1997 the Centre received from the Republic of Venezuela a translation into English of its January 17, 1997 submission. On February 26, 1997 the Centre received the original and a written translation of Fedax NV's counter-memorial on the objections to jurisdiction. All of these instruments were promptly distributed by the Centre to the members of the Tribunal and to the other party. On March 4, 1997, the parties were invited to submit further written observations on the memorial and counter-memorials on jurisdiction. On March 12, 1997, Fedax NV informed the Centre that it had nothing further to add to its counter-memorial on jurisdiction.

12. In an April 2, 1997 letter to the parties, the Centre confirmed the scheduling of a session of the Tribunal with the parties for May 16 and 17, 1997. The Centre informed the parties that at this session the Tribunal would receive oral presentations from them on the issues of jurisdiction raised by the Republic of Venezuela. The parties were also informed that the Tribunal foresaw putting questions to them and asking them for explanations, as provided in Rule 32(3) of the Centre's Arbitration Rules.

13. In reply to the Centre's April 2, 1997 letter, Fedax NV submitted, on April 30, 1997, written observations concerning information on the issue by the Republic of Venezuela of the promissory notes subject of the dispute. Copies of these written observations were promptly distributed to the members of the Tribunal and to the Republic of Venezuela. At the session of the Tribunal with the parties on May 16, 1997, the Republic of Venezuela, represented by Mr Szeplaki Otahola, submitted copies of a contract between the Republic of Venezuela and the Venezuelan corporation Industrias Metalúrgicas Van Dam CA, pursuant to which the debt instruments subject of the dispute had been issued. The corporation later endorsed those debt instruments to the claimant Fedax NV. Copies of the contract were distributed at the session to the members of the Tribunal and to the representative of Fedax NV.

14. The Tribunal heard no oral arguments by the parties on the merits of the dispute. As mentioned above, the consideration of the merits was postponed until the issue of the Centre's jurisdiction is decided by the Tribunal. After considering the basic facts of the dispute, the ICSID Convention and the 1991 Agreement, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the issue of jurisdiction.

#### B. Considerations

15. In deciding on the question of jurisdiction of the Centre and its own competence in this case, the Tribunal must first consider whether there is a legal dispute

between the parties as required by Article 25(1) of the Convention. Although the term "legal dispute" is not defined in the Convention, its drafting history makes abundantly clear that such term refers to conflicts of rights as opposed to mere conflicts of interests: "[t]he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."<sup>1</sup> The discussions held on the drafts leading to this provision also evidence that legal disputes were meant to exclude moral, political, economic or purely commercial claims.<sup>2</sup>

16. In the light of this background and of the evidence of the record, the Tribunal is satisfied that a dispute of a legal nature is involved in this case as it concerns the different views of the parties on questions of legal rights and obligations in connection with the existence of an investment, and the effects this may have on the issue of an obligation to honor certain debt instruments consisting of six promissory notes accompanying the request for arbitration (the promissory notes), which were issued by the Republic of Venezuela.

17. The Tribunal also notes that jurisdiction *ratione personae* has not been a matter of contention between the parties, nor has an objection to jurisdiction on this ground been raised. It has been properly established that the Republic of Venezuela is a Contracting State under the Convention, and that Fedax NV is a company established under the laws of Curaçao, Netherlands Antilles, thus having the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to arbitration, as well as on the date on which the request was registered by the Secretary-General of the Centre.

18. The main jurisdictional question raised in this case concerns whether the dispute involves an "investment" within the meaning of Article 25(1) of the Convention. In fact, the Republic of Venezuela has objected to the jurisdiction of the Centre in the matter of its dispute with Fedax NV, on the ground that the latter company cannot be considered to have made an investment for the purposes of the Convention, because it acquired by way of endorsement the promissory notes issued by the Republic of Venezuela in connection with the contract made with the Venezuelan corporation Industrias Metalúrgicas Van Dam CA. The interpretation of the term "investment" is therefore crucial in determining the scope of the Centre's jurisdiction under the Convention.

19. The Republic of Venezuela has argued in this respect that Fedax NV's holding of the above-mentioned promissory notes does not qualify as an "investment" because this transaction does not amount to a direct foreign investment involving "a long term transfer of financial resources—capital flow—from one country to another (the recipient of the investment) in order to acquire interests in a corporation, a transaction which normally entails certain risks to the potential investor."<sup>3</sup> Neither would this transaction qualify, in Venezuela's view, as a portfolio investment to acquire titles to money since in that country this occurs "when the investor acquires shares of a corporation through the Stock Exchange—Caracas or

<sup>1</sup> "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States." Doc. ICSID/2, 1 *ICSID Reports*, 1993, 23, para. 26.

<sup>2</sup> ICSID: *Documents Concerning the Origin and the Formulation of the Convention*, 1968, Vol. II, at 54, 203. Hereinafter cited as *Convention History*.

<sup>3</sup> Brief by the Republic of Venezuela on objections to jurisdiction, 17 January 1997, at 8.

Maracaibo—basically those known as ‘Global Depository Receipts’ represented by GDS and ADR,” a type of investment which is “only considered direct when the acquisition of the title is done in a primary way.”<sup>4</sup> Venezuela has further argued that in the light of the rule of interpretation laid down in Article 31.1 of the 1969 Vienna Convention on the Law of Treaties, the term “investment” should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>5</sup> Under such an interpretation, in Venezuela’s view, investment in an economic context means “the laying out of money or property in business ventures, so that it may produce a revenue or income.”<sup>6</sup> Venezuela contends that this particular interpretation is necessary to accommodate the definition of investments as comprising “every kind of asset” as that phrase appears in Article 1(a) of the 1991 Agreement.

20. The Tribunal has examined with great attention the arguments put forward by the Republic of Venezuela since they express a legitimate concern about the interpretation of the Convention and the Agreement. The Tribunal has also carefully considered the jurisdictional arguments of the claimant contesting the views set out by the Republic of Venezuela. The Tribunal does of course concur with the Republic of Venezuela about the need to apply the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. In order to satisfy these requirements the Tribunal shall examine the question in the light of Article 25(1) of the Convention, Article 1(a) and related provisions of the Agreement and other relevant considerations discussed below.

21. The Tribunal shall first examine the meaning of the term “investment” under Article 25(1) of the Convention. It is well established that numerous attempts to define investments were made during the negotiations of the Convention,<sup>7</sup> but none were generally acceptable.<sup>8</sup> Because of this difficulty, it was finally decided to leave any definition of the “investment” to the consent of the parties.<sup>9</sup> As explained by the Report of the Executive Directors:

No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).<sup>10</sup>

An account on these negotiations given by Mr A. Broches is also most pertinent:

During the negotiations several definitions of “investment” were considered and rejected. It was felt in the end that a definition could be dispensed with “given the

<sup>4</sup> Ibid., at 8–9.

<sup>5</sup> Convention on the Law of Treaties, 1969, Article 31.1, *International Legal Materials*, Vol. 8, 1969, 679.

<sup>6</sup> Brief cit., supra note 3, at 5, with reference to Andrés S. Suarez et al., *Diccionario Económico de la Empresa*, 1977, at 212.

<sup>7</sup> Christoph Schreuer: “Commentary on the ICSID Convention,” *ICSID Review—Foreign Investment Law Journal*, Vol. 11, 1996, 316, at 355–8.

<sup>8</sup> *Convention History*, Vol. II. at 835–7.

<sup>9</sup> Ibid., at 1078; Carolyn B. Lamm and Abby Cohen Smutny: “The Implementation of ICSID Arbitration Agreements,” *ICSID Review—Foreign Investment Law Journal*, Vol. 11, 1996, 64, at 80.

<sup>10</sup> Report cit., supra note 1, para. 27.

essential requirement of consent by the parties." This indicates that the requirement that the dispute must have arisen out of an "investment" may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an "investment dispute" will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.<sup>11</sup>

22. In light of the above, distinguished commentators of the Convention have concluded that "a broad approach to the interpretation of this term in Article 25 is warranted,"<sup>12</sup> that it "is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID,"<sup>13</sup> or that the parties "thus have a large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention."<sup>14</sup> Within this broad framework for the definition of investment under the ICSID Convention, the Tribunal also notes that a number of transactions have been identified as qualifying as investments in given circumstances. It has also been noted by commentators of the Convention, and during the history of its negotiation, that jurisdiction over loans,<sup>15</sup> suppliers' credits,<sup>16</sup> outstanding payments,<sup>17</sup> ownership of shares<sup>18</sup> and construction contracts,<sup>19</sup> among other aspects, was left to the discretion of the parties.<sup>20</sup>

23. It is also most relevant to note the conclusions of a distinguished author in this respect:

These new types of investment, and especially those relating to the supply of services, are sometimes on the borderline between investment proper and commercial transactions, which would fall outside the scope of ICSID.

However, the characterization of transnational loans as "investments" has not raised difficulty. The reason is twofold. First, it has been assumed from the origin of the Convention that loans, or more precisely those of a certain duration as opposed to rapidly concluded commercial financial facilities, were included in the concept of "investment." This is evidenced by the first Draft of the Convention according to which:

For the purpose of this Chapter

(i) "investment" means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years.

Although attempts at defining the notion of investment were given up by the authors of the Convention and this provision disappeared, there is no reason to doubt that

<sup>11</sup> A. Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction," *Columbia Journal of Transnational Law*, Vol. 5, 1966, 261-80, at 268, footnote omitted.

<sup>12</sup> C. F. Amerasinghe: "The Jurisdiction of the International Centre for the Settlement of Investment Disputes," *Indian Journal of International Law*, Vol. 19, 1979, 166-227, at 181.

<sup>13</sup> Georges R. Delaume: "ICSID and the Transnational Financial Community," *ICSID Review—Foreign Investment Law Journal*, Vol. 1, 1986, 237-56, at 239-40; Ibrahim F. I. Shihata: "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA," *ICSID Review—Foreign Investment Law Journal*, Vol. 1, 1986, 1, at 4.

<sup>14</sup> Lamm and Smutny, loc. cit., supra note 9, at 80.

<sup>15</sup> *Convention History*, Vol. II, at 261, 474.

<sup>16</sup> *Ibid.*, at 451.

<sup>17</sup> *Ibid.*, at 542.

<sup>18</sup> *Ibid.*, at 661.

<sup>19</sup> *Ibid.*, at 500.

<sup>20</sup> Schreuer, loc. cit., supra note 7, at 357; Amerasinghe, loc. cit., supra note 12, at 181.



loans can be considered as investments for the purposes of the Convention. Another reason why the issue of definition is not a serious one is that, in the case of loan contracts involving foreign public borrowers referring to ICSID as a means of settling loan disputes, the parties take the precaution of stipulating expressly that the loan is an investment for the purposes of the Convention.<sup>21</sup>

This matter will be discussed below in connection with the promissory notes as a form of loan or credit.

24. In addition to the background of Article 25(1) of the Convention, there is also a problem of textual interpretation that the Tribunal must consider. The Republic of Venezuela has made the argument that the disputed transaction is not a "direct foreign investment" and therefore could not qualify as an investment under the Convention. However, the text of Article 25(1) establishes that the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment." It is apparent that the term "directly" relates in this Article to the "dispute" and not to the "investment." It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term "investment" must be given in light of the negotiating history of the Convention.

25. Precisely because the term "investment" has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings, it has never before been a major source of contention before ICSID Tribunals.<sup>22</sup> This is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention. On prior occasions ICSID Tribunals have examined on their own initiative the question whether an investment was involved,<sup>23</sup> and in each such case have reached the conclusion that the "investment" requirement of the Convention has been met. In *Kaiser Bauxite v. Jamaica*,<sup>24</sup> as in *Alcoa Minerals of Jamaica Inc. v. Jamaica*,<sup>25</sup> the Tribunal established the Centre's jurisdiction both on the consent given by the parties and on the fact that the case "in which a mining company has invested substantial amounts in a foreign State in reliance upon an agreement with that State, is among those contemplated by the Convention." Amounts paid out to develop a concession and other undertakings based on a concession agreement, were also considered to qualify as an investment under the Convention in *LETCO v. Liberia*.<sup>26</sup> Also in *SOABI v. Senegal* the Tribunal considered the issue of jurisdiction in respect of an operation encompassing separate agreements, but this dealt only indirectly with the existence of an investment.<sup>27</sup>

26. The issue of whether a given dispute arises directly out of an investment has been also raised in a number of cases, although such cases have not considered

<sup>21</sup> Delaume, loc. cit., supra note 13, at 242, footnote omitted.

<sup>22</sup> Lamm and Smutny, loc. cit., supra note 9, at 80; Schreuer, loc. cit., supra note 7, at 360.

<sup>23</sup> Schreuer, loc. cit., supra note 7, at 360; Lamm and Smutny, loc. cit., supra note 9, at 80.

<sup>24</sup> *Kaiser Bauxite Company v. Government of Jamaica*, 1975, 1 ICSID Reports, 1993, 296.

<sup>25</sup> *Alcoa Minerals of Jamaica Inc. v. Government of Jamaica*, 1975, Yearbook Commercial Arbitration, Vol. IV, 1979, 206.

<sup>26</sup> *Liberian Eastern Timber Corporation v. Government of the Republic of Liberia*, 1984, 2 ICSID Reports, 1994, 346.

<sup>27</sup> *Société Ouest Africaine des Bétons Industriels v. State of Senegal*, 1988, 2 ICSID Reports 1994, 165.

whether an investment was made in the first place. In *Holiday Inns v. Morocco*, for example, the Tribunal found that the Centre had jurisdiction over loan contracts that had their origin in agreements separate from the investment; although the respondent argued that these constituted different transactions, the Tribunal emphasized "the general unity of an investment operation."<sup>28</sup> In *Amco Asia et al. v. Indonesia* an *ad hoc* Committee also affirmed the Centre's jurisdiction in respect of an international tort arising from lack of protection to the claimant by the Indonesian Army and Police; the Tribunal stated that it "does not think of 'international tort' and 'investment dispute' as comprising mutually exclusive categories," and that "[t]he jurisdiction of the Tribunal is not successfully avoided by applying a different formal characterization to the operative facts of the dispute."<sup>29</sup> In this same case an important distinction was made at a later stage in the following terms:

... the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host State. Legal disputes relating to the latter will fall under Article 25(1) of the Convention.<sup>30</sup>

27. The Tribunal must also note that while some parallel exists between the ICSID Convention and the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA),<sup>31</sup> in as much as investments insured under the latter would qualify as investments under Article 25(1) of the former, the two systems ought not to be considered identical. Among other differences, it is conceivable that an investment under ICSID terms will not qualify for insurance under MIGA if it does not meet the stricter definitions of the MIGA Convention. MIGA is essentially concerned with direct foreign investment,<sup>32</sup> while, as discussed above, ICSID may cover investments which may not be direct if the circumstances so warrant. Even so, MIGA's coverage may eventually extend to "any other medium or long-term form of investment," including loans relating to investments,<sup>33</sup> an alternative which also broadens the scope of the MIGA Convention, and to this extent narrows the differences with the ICSID Convention.

28. Another aspect which the Tribunal has not overlooked is the relationship between the ICSID Convention and the Rules Governing the Additional Facility,<sup>34</sup>

<sup>28</sup> *Holiday Inns SA, Occidental Petroleum Corporation et al. v. Government of Morocco*, Case No. ARB/72/1; Schreuer, loc. cit., supra note 7, at 350-1, with reference to P. Lalive: "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems, *British Year Book of International Law*, Vol. 51, 1980, 123.

<sup>29</sup> *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia*, 1986, 1 *ICSID Reports*, 1993, 509, at 527.

<sup>30</sup> *Ibid.*, Resubmission, 1988, 1 *ICSID Reports*, 1993, 543, at 565.

<sup>31</sup> Convention Establishing the Multilateral Investment Guarantee Agency, 1985, *International Legal Materials*, Vol. 24, 1985, 1605.

<sup>32</sup> Operational Regulations of the Multilateral Investment Guarantee Agency, 1988, as amended, *ICSID Review—Foreign Investment Law Journal*, Vol. 3, 1988, 360; Lamm and Smutny, loc. cit., supra note 9, at 80.

<sup>33</sup> Operational Regulations cit., supra note 32, 370; Lamm and Smutny, loc. cit., supra note 9, at 82.

<sup>34</sup> ICSID Additional Facility, Document ICSID/11, 1979.

since the latter may apply, among other situations, in cases where ICSID jurisdiction is not available because the dispute does not arise directly out of an investment.<sup>35</sup> Here again the term "directly" relates to the evolution of the dispute and not to the investment. In this respect it would appear that, as in the case of ICSID, the Additional Facility Rules might cover types of investment that were not direct if the circumstances so warranted. On this point, the Tribunal must also note that the comment accompanying Article 4, Paragraph (4), of the Additional Facility Rules is somewhat restrictive, because it relates only to a situation in which a Tribunal might declare itself incompetent on the ground that it considered the underlying transaction not to be an "investment;"<sup>36</sup> in fact, a Tribunal might be satisfied that there is an investment, but decline jurisdiction because the dispute does not arise directly from it, and this situation could also be brought to settlement under the Additional Facility Rules. However, under both ICSID and the Additional Facility Rules the investment in question, even if indirect, should be distinguishable from an ordinary commercial transaction.<sup>37</sup> The Tribunal shall consider the question of distinguishing between an investment and an ordinary commercial transaction in this case further below.

29. The Tribunal considers that the broad scope of Article 25(1) of the Convention and the ensuing ICSID practice and decisions are sufficient, without more, to require a finding that the Centre's jurisdiction and its own competence are well-founded. In addition, as explained above, loans qualify as an investment within ICSID's jurisdiction,<sup>38</sup> as does, in given circumstances, the purchase of bonds.<sup>39</sup> Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. This conclusion, however, has to be examined next in the context of the specific consent of the parties and other provisions which are controlling in the matter.

30. The Tribunal turns now to a consideration of the relevant terms and provisions of the Agreement between the Kingdom of the Netherlands and the Republic of Venezuela, which is the specific bilateral investment treaty governing the consent to arbitration by the latter Contracting Party. Under Article 9(1) of this Agreement, disputes 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 be submitted to ICSID for settlement by arbitration or conciliation. In Article 9(4) each Party "gives its unconditional consent" to such submission of disputes.

31. It follows that, as contemplated by the Convention, the definition of "investment" is controlled by consent of the Contracting Parties, and the particular definition set forth in Article 1(a) of the Agreement is the one that governs the jurisdiction of ICSID:

<sup>35</sup> Rules Governing the Additional Facility, Article 2(b).

<sup>36</sup> *Ibid.*, Article 4(4), *Comment* (iv).

<sup>37</sup> Schreuer, *loc. cit.*, *supra* note 7, at 368.

<sup>38</sup> Aron Broches: "Choice-of-law Provisions in Contracts with Governments," in *Ibid.*: *Selected Essays*, 523-32, at 529; Delaume, *loc. cit.*, *supra* note 13, 241-2.

<sup>39</sup> Schreuer, *loc. cit.*, *supra* note 7, at 372.

[T]he term "Investments" shall comprise every kind of asset and more particularly though not exclusively:

...

(ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures;

(iii) titles to money, to other assets or to any performance having an economic value . . .

32. This definition evidences that the Contracting Parties to the Agreement intended a very broad meaning for the term "investment." The Tribunal notes in particular that titles to money in this definition are not in any way restricted to forms of direct foreign investment or portfolio investment, as argued by the Republic of Venezuela. Some such restrictions may perhaps apply to other types of investment listed in such definition, such as rights derived from shares or other similar types of investment, but they do not apply to the credit transactions of different categories that are embodied in the meaning of "titles to money" as referred to in subparagraph (iii) of the definition set out above. It should be noted, moreover, that titles to money are not necessarily excluded from the concept of direct foreign investment.

33. The Tribunal has also undertaken a close examination of other provisions of the Agreement which are related to the definition of an investment, including Article 5 of the Agreement, under which the Contracting Parties guarantee the transfer of payments related to an investment, including the transfer of interests (Article 5(a)) and funds for the reimbursement of loans (Article 5(d)). The conclusion that the definition of "investment" and the meaning of "titles to money" under the Agreement include loans and related credit transactions is thus reinforced. It must also be noted that the Republic of Venezuela has not exercised its right under Article 25(4) of the ICSID Convention to notify the Centre of any class or classes of disputes it would or would not consider submitting to the jurisdiction of the Centre. This provision allows Contracting States to put investors on notice as to what class of disputes they would or would not consider consenting to within the broad meaning of investment under the Convention.

34. A broad definition of investment such as that included in the Agreement is not at all an exceptional situation. On the contrary, most contemporary bilateral treaties of this kind refer to "every kind of asset" or to "all assets," including the listing of examples that can qualify for coverage; claims to money and to any performance having a financial value are prominent features of such listings.<sup>40</sup> This broad approach has also become the standard policy of major economic groupings such as the European Communities. In providing for the protection of investments the EC have included "all types of assets, tangible and intangible, that have an economic value, including direct or indirect contributions in cash, kind or services invested or received." Among the transactions listed as investments are "stocks, bonds, debentures, guarantees or other financial instruments of a company, other firm, government or other public authority or an international organization; claims to money, goods, services or other performance having economic value."<sup>41</sup> Since the Kingdom

<sup>40</sup> Antonio R. Parra: "The Scope of New Investment Laws and International Instruments," in Robert Pritchard (ed.): *Economic Development, Foreign Investment and the Law*, 1996, 27-44, at 35-6; "ICSID and Bilateral Investment Treaties," *News from ICSID*, Vol. 2, No. 1, 1985, 12-20, at 19-20.

<sup>41</sup> Council of the European Communities: "Community Position on Investment Protection Principles in the ACP States," ACP-CEE 2172/92, 3 November 1992, at 5.



of the Netherlands is a prominent member of the European Communities, it is hardly surprising that a similar approach has been followed in its bilateral investment treaties.<sup>42</sup> Indeed, only very exceptionally do bilateral investment treaties explicitly relate the definition of the assets or transactions included in this concept to questions such as the existence of a lasting economic relation,<sup>43</sup> or specifically associate titles to money and similar transactions strictly to a concept of investment.<sup>44</sup>

35. A similar trend can be identified in the context of major multilateral instruments. It has been rightly noted that the World Bank Guidelines on the Treatment of Foreign Direct Investment<sup>45</sup> are not at all restricted to "direct" investments.<sup>46</sup> The explanatory Report makes clear that there are no restrictions in this context as to the nature of covered investments and that the Guidelines are applicable to "indirect, as well as to direct, investments and to modern contractual and other forms of investment."<sup>47</sup> The Energy Charter Treaty<sup>48</sup> and Mercosur Protocols<sup>49</sup> have included "every kind of asset," the former listing "claims to money and claims to performance pursuant to certain contracts," and the latter referring to "claims to performance having an economic value."<sup>50</sup> Again only exceptionally has a multilateral treaty strictly related the listing of given assets such as interests to equity investments, or excluded claims to money that arise solely from commercial contracts for the sale of goods or services.<sup>51</sup>

36. The Tribunal has also examined the practice of the Republic of Venezuela as to the various investment treaties it has made with other countries and the definition of investment therein included.<sup>52</sup> While this practice is varied, it is possible to conclude that every time the Republic of Venezuela has wished to exclude investments that are not manifestly direct, it has done so in unequivocal terms. Two examples are the Andean Group Regulation on Foreign Investments as amended,<sup>53</sup> which

<sup>42</sup> See, for example, the Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investments, 29 October 1992, in Alejandro A. Escobar: "Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States," *ICSID Review—Foreign Investment Law Journal*, Vol. 11, 1996, 86–220, at 197.

<sup>43</sup> See, for example, the Agreement concerning the promotion and reciprocal protection of investments between Denmark and Ukraine, 23 October 1992, Article 1, as cited in Parra, loc. cit., supra note 40, at 36.

<sup>44</sup> See for example the Agreement between the United States and Zaire of 3 August 1984, Article 1, in *News from ICSID* cit., supra note 40, at 20.

<sup>45</sup> "World Bank Guidelines on the Treatment of Foreign Direct Investment," 1991, *ICSID Review—Foreign Investment Law Journal*, Vol. 7, 1992, 295.

<sup>46</sup> Parra, loc. cit., supra note 40, at 40.

<sup>47</sup> "Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investments," accompanying the Guidelines cit., supra note 45, para. 13.

<sup>48</sup> Energy Charter Treaty, 17 December 1994, *International Legal Materials*, Vol. 34, 1995, 360, Article 1(6), and comments by Parra, loc. cit., supra note 40, at 40–1.

<sup>49</sup> MERCOSUR: Protocol on the Reciprocal Promotion and Protection of Investments in Mercosur, Colonia, 17 January 1994, Article 1(1); and Protocol for the Promotion and Protection of Investments Made by Countries that do not Belong to Mercosur, Buenos Aires, 5 August 1994, Article 2; and comments by Parra, loc. cit., supra note 40, at 40–1.

<sup>50</sup> Parra, loc. cit., supra note 40, at 41.

<sup>51</sup> North American Free Trade Agreement, 17 December 1992, *International Legal Materials*, Vol. 32, 1993, 289, 605, Article 1139, and comments by Parra, loc. cit., supra note 40, at 42.

<sup>52</sup> For recent Latin American practice and treaties, see Escobar, loc. cit., supra note 42.

<sup>53</sup> "Reglamento del régimen común de tratamiento a los capitales extranjeros y sobre marcas, patentes y regalías, aprobado por las Decisiones Nos. 291 y 292 de la Comisión del Acuerdo de Cartagena," *Gaceta Oficial de la República de Venezuela*, 25 March 1992, Article 2.1.



in essence refers to direct foreign investments, and the 1994 Mexico–Colombia–Venezuela Free Trade Agreement, which excludes money claims arising from commercial contracts for the sale of goods or services and commercial credits.<sup>54</sup> In other instances the language of the Agreement with the Kingdom of the Netherlands has been followed.<sup>55</sup>

37. The Tribunal being satisfied that loans and other credit facilities are within the jurisdiction of the Centre under both the terms of the Convention and the scope of the bilateral Agreement governing consent in this case, it must now examine the specific situation of the six promissory notes issued by the Republic of Venezuela. A promissory note is by definition an instrument of credit, a written recognition that a loan has been made. In this particular case the six promissory notes in question were issued by the Republic of Venezuela in order to acknowledge its debt for the provision of services under a contract signed in 1988 with Industrias Metalúrgicas Van Dam CA; Venezuela had simply received a loan for the amount of the notes for the time period specified therein and with the corresponding obligation to pay interest.

38. The Tribunal notes first that there is nothing in the nature of the foregoing transaction, namely the provision of services in return for promissory notes, that would prevent it from qualifying as an investment under the Convention and the Agreement. Specifically, the Tribunal has raised the question whether if Fedax NV, as a Netherlands company, had been doing business in Venezuela at the time in question and had entered into exactly the same arrangement with the Republic of Venezuela as Industrias Metalúrgicas Van Dam CA did, such transaction would have involved an “investment” or whether, in Venezuela’s view, the transaction would be excluded from that category. The record shows that Venezuela does not contend that such an exclusion would be appropriate. It follows that the issue for decision is focussed not in the nature of the underlying service transaction but in whether the subsequent endorsement of the notes to foreign holders somehow requires the Tribunal to treat the matter as one falling outside the concept of foreign investment.

39. The claimant has rightly argued that promissory notes of this kind have a legal standing of their own, separate and independent from the underlying transaction. It is not disputed in this case that the Government of Venezuela foresaw the possibility that the promissory notes would be transferred and endorsed to subsequent holders, since they explicitly allow for such a possibility. The fact that these notes were denominated in US dollars is further evidence that their eventual international circulation and availability to foreign investors was contemplated from the outset. The record also evidences that in the view of the Republic of Venezuela those promissory notes

... due to their nature, in accordance with the provisions of the Venezuelan Commercial Code and because it is expressly stated in their own text, are eminently negotiable instruments in the secondary market, with national or foreign financial institutions.<sup>56</sup>

<sup>54</sup> 1994 Mexico–Colombia–Venezuela Free Trade Agreement, Article 17-01, as cited in Schreuer, *loc. cit.*, *supra* note 7, at 364.

<sup>55</sup> “Acuerdo entre el Gobierno de la República de Venezuela y el Gobierno de Barbados para la promoción y protección de inversiones,” Article 1(a)(iii), in Escobar, *loc. cit.*, *supra* note 42, at 213.

<sup>56</sup> Brief *cit.*, *supra* note 3, at 6–7.

40. In such a situation, although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due. To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the Agreement. While specific issues relating to the promissory notes and their endorsements might be discussed in connection with the merits of the case, the argument made by the Republic of Venezuela that the notes were not purchased on the Venezuelan stock exchanges does not take them out of the category of foreign investment because these instruments were intended for international circulation. Nor can the Tribunal accept the argument that, unlike the case of an investment, there is no risk involved in this transaction: the very existence of a dispute as to the payment of the principal and interest evidences the risk that the holder of the notes has taken.

41. Like a number of other bilateral investment treaties and multilateral arrangements,<sup>57</sup> the Agreement contains several references to investments made "in the territory" of the Contracting Parties.<sup>58</sup> In this context, the Republic of Venezuela has argued that Fedax NV does not qualify as an investor because it has not made any investment "in the territory" of Venezuela. While it is true that in some kinds of investments listed under Article 1(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. The same is true of many important offshore financial operations relating to exports and other kinds of business. And of course, promissory notes are frequently employed in such arrangements. The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs.

42. The nature of the transactions involved in this case, and the fact that they qualify as a foreign investment for the purposes of the Convention and the Agreement, serves to distinguish them from an ordinary commercial transaction. In this connection, however, there is one additional element that the Tribunal has to take into consideration. The promissory notes were issued by the Republic of Venezuela under the terms of the Law on Public Credit (the Law),<sup>59</sup> which specifically governs public credit operations aimed at raising funds and resources "to undertake productive works, attend to the needs of national interest and cover transitory needs of

<sup>57</sup> Parra, *loc. cit.*, supra note 40, at 35, 40.

<sup>58</sup> See, for example, Agreement, Preamble, para. 2, and Articles 2, 4, 7.

<sup>59</sup> Venezuela: *Ley Organica de Crédito Público*, 12 August 1983, *Gaceta Oficial de la República de Venezuela*, 14 de Septiembre de 1983, as amended, *Gaceta Legal*, No. 594, 30 de Septiembre de 1983.

the treasury.”<sup>60</sup> It is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest. The Law specifically mentions medium and long-term bonds and obligations, short-term treasury instruments and operations, short-term credit, obtaining credit with national or foreign financial, commercial and industrial institutions, contracting for works and services, and other types of transactions as well.<sup>61</sup> Promissory notes are also expressly governed by the Law in connection with obtaining domestic or foreign credit and contracts for works and services.<sup>62</sup> Detailed authorizations and procedures are provided for the issuance of these instruments, all of which have been duly observed in respect of the promissory notes involved in this case. This Law was enacted to provide for the orderly development of public financial arrangements and has been appropriately utilized by the Republic of Venezuela in this case, as in other matters.

43. The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter—i.e. “volatile capital.” The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.<sup>63</sup> The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made.<sup>64</sup> The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.

44. Other objections to jurisdiction were originally raised by the Republic of Venezuela, but the record before the Tribunal expressly indicates that these other matters will not be pursued, and hence that there is no need for the Tribunal to consider them further.

### C. Decision

45. For the foregoing reasons the Tribunal unanimously decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

<sup>60</sup> *Ibid.*, Article 3.

<sup>61</sup> *Ibid.*, Article 4.

<sup>62</sup> *Ibid.*, Article 29.

<sup>63</sup> Schreuer, *loc. cit.*, *supra* note 7, at 372.

<sup>64</sup> *Law cit.*, *supra* note 60, Article 4(c).

## AWARD, 9 MARCH 1998

## A. Summary of the Procedure

1. On June 17, 1996 a request for arbitration was submitted to the International Centre for Settlement of Investment Disputes (ICSID or the Centre) on behalf of Fedax NV, a company established and domiciled in Curaçao, Netherlands Antilles, against the Republic of Venezuela. The request concerns a dispute arising out of certain debt instruments, referred to below, issued by the Republic of Venezuela and assigned by way of endorsement to the Claimant Fedax NV. The request invokes the provisions, discussed below, of the October 22, 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the Agreement).

2. On June 18, 1996, the Centre, in accordance with Institution Rule 5, acknowledged receipt of the request. At the same time, the Centre asked the Claimant to indicate the address of the other party to the dispute as required by the Centre's Institution Rules. On that same date, the Claimant informed the Centre of the address of the Venezuelan Minister of Industry and Commerce. On June 19, 1996, the Centre transmitted the request to the Republic of Venezuela in accordance with Institution Rule 5, with a copy to the Embassy of Venezuela in Washington, DC.

3. On June 26, 1996, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention or the ICSID Convention). On this same date, the Centre's Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. On July 2, 1996, Fedax NV proposed that the Arbitral Tribunal consist of three arbitrators, one arbitrator appointed by each of the parties, and a third arbitrator, to be the President of the Tribunal, appointed by the President of the Administrative Council of the Centre. Fedax NV further proposed that it would appoint an arbitrator from the Panel of Arbitrators maintained by the Centre, but that neither the Republic of Venezuela nor the President of ICSID's Administrative Council were bound to do so.

5. On July 19, 1996, the Centre received a communication from Mr Freddy Rojas Parra, then Minister of Development of Venezuela, in which he informed the Centre that the Venezuelan Ministry of Industry and Commerce had not yet been established, and that the competent state organs for dealing with the proceeding were therefore the Attorney General's Office (*Procuraduría General de la República*) and the Ministries of Finance and of Foreign Affairs. Through further communications of July 30 and August 1, 1996, Minister Rojas Parra informed the Centre of the addresses and names of the Attorney General of the Republic and of the Ministers of Finance and Foreign Affairs. Copies of the request, of the notice of registration and of correspondence between the Centre and the parties were sent to those addresses under cover of an August 8, 1996 letter from the Centre. Through a letter of August 15, 1996, Mr Jorge Szeplaki Otahola, Deputy Attorney General for Supreme Court Affairs, informed the Centre that he would be representing the Republic of Venezuela in this proceeding, together with the Attorney General of

the Republic, Mr Jesús Petit Da Costa. In a letter of March 7, 1997, Mr Szeplaki Otahola informed the Centre that Mr Juan Nepomuceno Garrido Mendoza was the new Attorney General of the Republic and should be included as its representative.

6. On September 18, 1996, Fedax NV informed the Centre that it was choosing the formula of Article 37(2)(b) of the ICSID Convention, and named Professor Meir Heth, a national of Israel, as the arbitrator appointed by the Claimant. On September 20, 1996, the Republic of Venezuela named Mr Roberts B. Owen, a national of the United States of America, as the arbitrator appointed by it. By means of a further communication of September 24, 1996, the Republic of Venezuela proposed that the third, presiding, arbitrator in the proceeding be appointed by the Chairman of ICSID's Administrative Council. On September 27, 1996, Fedax NV accepted this proposal and confirmed its appointment of Professor Meir Heth. On September 30, 1996, the Republic of Venezuela confirmed its appointment of Mr Roberts B. Owen.

7. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was appointed as President of the Tribunal by the Chairman of ICSID's Administrative Council, acting in accordance with the parties' agreement. On November 27, 1996 ICSID's Secretary-General notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Pursuant to Administrative and Financial Regulation 25, the Centre's Secretary-General appointed as Secretary of the Tribunal Mr Alejandro A. Escobar, Counsel, ICSID.

8. The first session of the Tribunal was held with the parties at the seat of the Centre in Washington, DC on January 17 and 18, 1997. At the session the parties expressed their satisfaction that the Tribunal had been constituted in conformity with the provisions of the Convention and the Arbitration Rules and that they did not have any objections in this respect. The Tribunal hereby states that it was thus established under the Convention.

9. As had been announced in a letter of December 5, 1996, the Republic of Venezuela, represented at the first session by Mr Jorge Szeplaki Otahola, raised at that session objections to the Tribunal's jurisdiction, both orally and in a written submission, copies of which were distributed at the session to the members of the Tribunal and to the representative of Fedax NV.

10. After hearing the views of the parties at the first session, the Tribunal issued Procedural Order No. 1, of January 18, 1997, in which it determined that the language of the proceeding shall be Spanish, except that the orders, decisions and Award of the Tribunal shall be made in English, with a translation into Spanish. Procedural Order No. 1 also set forth the generally applicable time limits for the written pleadings of the parties. On the same date the Tribunal issued Procedural Order No. 2, suspending the proceeding on the merits pursuant to Rule 41(3) of the Arbitration Rules, and requesting the Republic of Venezuela to confirm, within seven days, that its written submission raising objections to jurisdiction, delivered at the first session of the Tribunal, was deemed to be its memorial on such objections. Procedural Order No. 2 also set forth the time limits for the written pleadings concerning the objections to jurisdiction, providing that the Republic of Venezuela was to submit, within forty days, a translation of its above-mentioned



written submission, that the Claimant was to submit, within the same period of forty days, its counter-memorial on the objections raised by the Republic of Venezuela, and that the Tribunal could require the submission of a reply and a rejoinder on the objections.

11. On January 23, 1997, the Republic of Venezuela confirmed that its written submission of January 17, 1997 was deemed to be its memorial on its objections to jurisdiction. On February 14, 1997 the Centre received from the Republic of Venezuela a translation into English of its January 17, 1997 submission. On February 26, 1997 the Centre received the original and a written translation of Fedax NV's counter-memorial on the objections to jurisdiction. All of these instruments were promptly distributed by the Centre to the members of the Tribunal and to the other party. On March 4, 1997, the parties were invited to submit further written observations on the memorial and counter-memorials on jurisdiction. On March 12, 1997, Fedax NV informed the Centre that it had nothing further to add to its counter-memorial on jurisdiction.

12. In an April 2, 1997 letter to the parties, the Centre confirmed the scheduling of a session of the Tribunal with the parties for May 16 and 17, 1997. The Centre informed the parties that at this session the Tribunal would receive oral presentations from them on the issues of jurisdiction raised by the Republic of Venezuela. The parties were also informed that the Tribunal foresaw putting questions to them and asking them for explanations, as provided in Rule 32(3) of the Centre's Arbitration Rules.

13. In reply to the Centre's April 2, 1997 letter, Fedax NV submitted, on April 30, 1997, written observations concerning information on the issue by the Republic of Venezuela of the promissory notes subject of the dispute. Copies of these written observations were promptly distributed to the members of the Tribunal and to the Republic of Venezuela. At the session of the Tribunal with the parties, held on May 16, 1997, the Republic of Venezuela, represented by Mr Szeplaki Otahola, submitted copies of a contract between the Republic of Venezuela and the Venezuelan corporation Industrias Metalúrgicas Van Dam CA, pursuant to which the debt instruments subject of the dispute had been issued. The corporation later endorsed those debt instruments to the claimant Fedax NV. Copies of the contract were distributed at the session to the members of the Tribunal and to the representative of Fedax NV. At its May 16, 1997 session, the Tribunal heard no oral arguments by the parties on the merits of the dispute.

14. The minutes of the Tribunal's meeting of May 16, 1997 were distributed to the parties in draft by the Secretariat on June 24, 1997. Certified copies of the signed minutes were distributed by the Secretariat on July 8, 1997, and their translation into English was distributed on July 30, 1997.

15. After considering the basic facts of the dispute, the ICSID Convention and the 1991 Agreement, as well as the written and oral arguments of the parties' representatives, the Tribunal, in its Decision dated July 11, 1997, overruled the objections to jurisdiction raised by the Republic of Venezuela. Certified copies of the Decision were on that same date distributed to the parties. The Tribunal found, in its Decision, that the dispute was within the jurisdiction of the Centre and within the competence of the Tribunal, and that, accordingly, the proceeding on the merits

was resumed. To this end, the Tribunal issued its Procedural Order No. 3, in which it reiterated the time periods for the written pleadings of the parties.

16. By a communication of January 24, 1997, Fedax NV had confirmed that its request for arbitration constituted its entire claim and that it would therefore be deemed to be its memorial on the merits. The request for arbitration submitted by Fedax NV claims the payment by the Republic of Venezuela of six promissory notes, the originals of which were submitted with the request and which are listed in its text, each for the amount of US \$99,825, plus regular and penal interest as calculated according to the texts of the promissory note. The request for arbitration states that, as of May 7, 1996, the outstanding capital due on the six promissory notes amounted to US \$598,950, and the outstanding interest thereon amounted to US \$80,071.63. It adds in this last respect that the Republic of Venezuela paid regular interest only up to May 7, 1994, with exception of the promissory note having its date of maturity on November 7, 1993, in regard of which regular interest was paid until maturity. The date of maturity of two other such promissory notes was November 7, 1994, and, for the remaining three such notes, May 7, 1995.

17. On September 4, 1997, the Republic of Venezuela submitted its counter-memorial on the merits, which the Secretariat distributed on the same day to the members of the Tribunal and to Fedax NV. The Republic of Venezuela stated in its counter-memorial that the President of the Republic and the Council of Ministers of Venezuela had, on May 28, 1997, authorized the payment of capital and interest on the promissory notes issued on occasion of the contract entered into between the Republic of Venezuela and Industrias Metalúrgicas Van Dam CA, which included the promissory notes subject matter of this proceeding. Venezuela's counter-memorial added that the above-mentioned decision was binding on the organs of the Venezuelan Public Administration. It also stated that the Venezuelan Executive would request the Venezuelan Congress for additional sums in order to meet unforeseen expenses. The counter-memorial concluded by setting forth an offer for settlement, in terms that Fedax NV should, on the above-described basis, request payment of the promissory notes subject matter of this proceeding from the appropriate Venezuelan authorities, and by requesting the Tribunal to put an end to the proceeding as its object was moot.

18. By the Secretariat's letter of September 19, 1997, Fedax NV was requested, on behalf of the Tribunal, to reply to the terms of the Republic of Venezuela's counter-memorial within a period of no more than thirty days. Copies of Fedax NV's reply, dated October 7, 1997, were distributed to the members of the Tribunal and to the Republic of Venezuela under cover of a letter from the Secretariat to the Tribunal of October 17, 1997.

19. In its reply, Fedax NV stated that it wished to clarify that payment by the Republic of Venezuela was to be made in dollars of the United States of America. Fedax NV also requested the Tribunal to decide upon the time of payment of the promissory notes, upon the question of costs, and upon the obligation to pay interest accrued up until the time of payment.

20. By a letter of October 17, 1997, addressed to it from the Secretariat, the Republic of Venezuela was informed that it had a period of thirty days to respond to Fedax NV's reply. Copies of such response from the Republic of Venezuela,

dated November 6, 1997, were distributed to the members of the Tribunal and to Fedax NV under cover of the Secretariat's letter of November 13, 1997.

21. In its response, the Republic of Venezuela acknowledged that payment of the promissory notes would be in dollars of the United States of America, and would include payment of interest accrued up until the date of payment. It also acknowledged that payment by the Republic of Venezuela would include US \$50,000 for its part of the advance payments requested by the Secretariat to cover the expenses of the proceeding. The Republic of Venezuela stated that it could not agree, however, to the payment of Fedax NV's expenses under Venezuelan law. It added that it could not commit to a particular time of payment, as the decision on additional sums was in the hands of the Venezuelan Congress, but that it expected such decision to be taken by the end of 1997.

22. On December 12, 1997, the Secretariat distributed to the members of the Tribunal and to the Republic of Venezuela copies of a December 10, 1997 communication from Fedax NV containing a statement of the costs it had incurred. This communication also stated that, under principles of Venezuelan law, "treaties which have become laws of the Republic are applicable in preference to ordinary laws," and that for this reason the law approving the ICSID Convention must apply regarding the issue of costs.

23. On December 20, 1997 the Secretariat distributed to the members of the Tribunal and to the Republic of Venezuela copies of a communication received from Fedax NV confirming the LIBOR interest rates appearing in the documentation accompanying Fedax NV's reply dated October 7, 1997. Also on December 20, 1997, the Secretariat informed the parties that it had, at the request of the Tribunal, obtained from the "Bloomberg" data base the LIBOR interest rate for Wednesday, November 5, 1997, such rate being 5.84375%. In accordance with the promissory notes, this figure should be the basis for the calculation of interest for the six-month period beginning on November 7, 1997.<sup>1</sup>

24. By a letter from the Secretariat of January 13, 1998, the parties were informed that the Tribunal had on that date closed the proceeding.

## B. Considerations

25. In examining the merits of the dispute subject matter of this proceeding, the Tribunal notes that the facts alleged in the request for arbitration (which has also served as Fedax NV's memorial on the merits) have not been contested by the

<sup>1</sup>*Tribunal's translation of promissory notes as they relate to interest:*

This promissory note shall bear from [date] until it is due an annual interest equal to the London Interbank Offered Rate (LIBOR) for six-month deposits in US dollars, as established further below, adjustable and payable at maturity on 7 May and 7 November of each year, except the last payment of interest which shall be made when this promissory note becomes due . . .

The LIBOR rate shall be that established by the Union Bank of Switzerland, London, England, two working days immediately before the beginning of the corresponding period of interest . . .

Calculation of interest shall be made on the basis of the number of days passed in respect of one year of 365 days . . .

In case the Republic of Venezuela fails to pay this promissory note at maturity, it shall pay penalty interest on the amount of capital at the rate of interest of this note, plus 1% annually, until its total payment.

Republic of Venezuela, and, furthermore, that the basic issues involved have been partially settled by the parties.

26. The Tribunal will first set forth the following statement of the facts of the dispute as it finds them. As mentioned above at paragraph 16, Fedax NV alleges that the Republic of Venezuela has not paid the principal of each of the six promissory notes subject matter of its claim, regular interest from May 7, 1994 on five of such promissory notes, and penal interest from the dates of maturity on all six such promissory notes. This statement has not been contested by the Republic of Venezuela. Both in the course of the proceeding on jurisdiction and at page 2 of its counter-memorial, the Republic of Venezuela has indeed confirmed that her authorities had suspended all payments on these and other promissory notes issued on occasion of the contract entered into between the Republic of Venezuela and Industrias Metalúrgicas Van Dam CA. The Republic of Venezuela, as noted below, has furthermore stated in its counter-memorial that her authorities have authorized the payment of capital and interest on the above-mentioned promissory notes, including "the promissory notes subject to this arbitration procedure" (page 5 of the English text of the counter-memorial). In view of the above, the Tribunal finds the facts of the dispute to be those described at paragraph 16 of this award.

27. The Tribunal will now examine the issues raised by the dispute and partially agreed upon by the parties. First and foremost, the Republic of Venezuela has agreed to the payment of the capital and interest of the promissory notes that were the object of the request for arbitration by Fedax NV. As stated in the offer for settlement of September 4, 1997, the Republic of Venezuela has authorized such payments by means of a decision adopted at the highest level of Government, including the President of the Republic and the Council of Ministers. Instructions for the implementation of this decision have also been issued within the Venezuelan administration and the appropriate steps for budgetary appropriations have been undertaken before the Congress of Venezuela. Second, as a result of further clarifications, it has been agreed that the payments shall be made in dollars of the United States of America, just as it is indicated in the text of the promissory notes, and that Venezuela shall pay its part in the expenses of this proceeding. Third, it has been also agreed that accrued interest will be paid until the date of payment of the principal.

28. Although the elements set out above are the core issues of the dispute, the parties have not specifically agreed to a few other items. These are the date of payment and the question of payment of expenses and legal costs of Fedax NV. Because the agreement does not include all the elements relating to the dispute, the parties have not filed with the Secretary-General the full and signed text of their settlement nor requested the Tribunal to embody such settlement in the award, as provided under Rule 43(2) of the ICSID Arbitration Rules. In fact, while the Republic of Venezuela requested the discontinuance of the proceeding, Fedax NV on its part requested the Tribunal to embody the settlement reached in its award, but both parties did not jointly agree to one and the same option. None of these questions detract from the significance of the settlement reached on the merits, this being the basis on which the Tribunal shall render its award.

29. As decided in respect of jurisdiction on July 11, 1997, the Tribunal is fully satisfied that the purchase by Fedax NV of the promissory notes subject matter of the request for arbitration meets the requirement of an investment both under



the Convention and the Agreement. It follows that the Republic of Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds in the terms of Article 9(3) of the Agreement. The payments due shall be established further below.

30. Besides the provisions of the Convention and the Agreement, the Tribunal finds that Venezuelan law is also relevant as the applicable law in this case. In fact, the promissory notes subject matter of the dispute are in turn governed by the provisions of the Venezuelan Commercial Code and more specifically by those of the Law on Public Credit,<sup>2</sup> having been issued under the terms of the latter. Both parties have pointed in their pleadings to relevant aspects of the Venezuelan legislation and the Tribunal has examined these provisions with particular attention. It is of interest to note in this respect that the various sources of the applicable law referred to in Article 9(5) of the Agreement, including the laws of the Contracting Party, the Agreement, other special agreements connected with the investment and the general principles of international law, have all had an important and supplementary role in the considerations of this case as well as in providing the basis for the decision on jurisdiction and the award on the merits. This broad framework of the applicable law further confirms the trends discernible in the ICSID practice and decisions.<sup>3</sup>

31. The first item that the Tribunal must establish is the amount of the principal of the promissory notes. The parties have not disputed the figure since it is specifically recorded in each promissory note, and the Republic of Venezuela has agreed to its payment under the terms of the partial settlement referred to above. Such principal is established in the amount of US \$598,950.

32. The Tribunal turns now to the question of accrued interest. In this respect the Tribunal is satisfied that the figures submitted by Fedax NV and supplemented by the Tribunal's own finding as explained above, correspond exactly to the calculation of interest established in the promissory notes. The current six-month period of interest began on November 7, 1997, and is due at the latest on May 7, 1998. The amount of regular interest overdue is US \$22,148.50. Penal interest as provided also in the promissory notes amounts to US \$139,096.64, including the current period. Total interest is therefore in the amount of US \$161,245.14. The total amount of principal and interest is US \$760,195.14. These figures have not been objected to by the Republic of Venezuela and payment of interest has also been agreed in the partial settlement reached by the parties. It has been further agreed that both principal and interest shall be paid in dollars of the United States of America.

33. Concerning the date of payment, the Tribunal considers that the appropriate date is May 7, 1998. This date as noted above, is when the current six-month period of interest will be completed. Moreover, such date should provide ample time for

<sup>2</sup> Republica de Venezuela: *Ley Orgánica de Crédito Público*, 12 August 1983, *Gaceta Oficial de la República de Venezuela*, 14 de Septiembre de 1983, as amended, *Gaceta Legal*, No. 594, 30 de Septiembre de 1983.

<sup>3</sup> Ibrahim F. I. Shihata and Antonio R. Parra: "Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention", *ICSID Review—Foreign Investment Law Journal*, Vol. 9 No. 2 (Fall 1994), 183–213, at 212.



the Republic of Venezuela to finalize its budgetary arrangements for the payment of the amounts involved. Should the Republic of Venezuela pay before that date it may of course adjust the amount of interest to the number of days lapsed, a figure which can be established without difficulty in the terms of the promissory notes.

34. In respect of the expenses incurred in the present proceeding, including the charges for the use of the facilities of the Centre and the fees and expenses of the Tribunal, it is the decision of the Tribunal that each of the parties shall bear an equal share of such institutional expenses. Accordingly, the Republic of Venezuela shall reimburse Fedax NV the amount of US \$50,150 representing one half of the charges and of the costs of the proceeding for which advance payments have been made by Fedax NV. The Tribunal must also record that the Republic of Venezuela has agreed to the payment of its share in such expenses in the terms of the partial settlement referred to above.

35. The Applicant has also requested that the Republic of Venezuela pay the expenses and legal costs of counsel for Fedax NV, an aspect which has not been agreed to by the Republic. Arguments based on Venezuelan domestic law and the Convention have been put forth by the parties in support of their respective positions. Taking into consideration these arguments and the professionalism of counsel for the parties which is commended in the following paragraph, the Tribunal decides that each party shall bear the entirety of its own expenses and legal fees for its own counsel.

36. In reaching its award, the Tribunal must note with satisfaction that this is the first case decided under the Convention in which the Contracting Party, namely the Republic of Venezuela, is a prominent member of the Latin American region, a fact which in itself illustrates well the evolution that the legal treatment of foreign investments has had in this region as elsewhere in the world. Moreover, the settlement which the Republic of Venezuela has made possible is fully consistent with its good standing in the international financial community and honors a long tradition of observance of international agreements. The Tribunal also notes with appreciation that counsel for both parties have been prominent Venezuelan lawyers, who have performed their duties with outstanding professionalism and have at all times fully cooperated with the task of the Tribunal, an attitude for which they must be commended.

### C. Decisions

For the reasons stated above the Tribunal unanimously decides that:

- (1) The Republic of Venezuela shall pay Fedax NV the amount of US \$598,950 representing the principal of the promissory notes due.
- (2) The Republic of Venezuela shall pay Fedax NV the amount of US \$161,245.14 for the regular and penal interest due on the promissory notes.
- (3) The Republic of Venezuela shall pay Fedax NV the amount of US \$50,150 representing one half of the charges and costs of the proceeding for which advance payment was made by the Applicant.

- (4) Each of the parties shall bear the entirety of its own expenses and legal fees for its own counsel.
  - (5) The payments referred to above shall be made at the latest on May 7, 1998. Should payments be made by the Republic of Venezuela before this date, she may adjust the calculation of interest according to the number of days lapsed.
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