

**International Centre for Settlement of Investment  
Disputes**

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**AUTOPISTA CONCESIONADA DE VENEZUELA, C.A. (“Aucoven”)**

CLAIMANT

**v.**

**BOLIVARIAN REPUBLIC OF VENEZUELA (“Venezuela”)**

RESPONDENT

**ICSID Case No. ARB/00/5**

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**AWARD**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Karl-Heinz Böckstiegel, Arbitrator

Dr. Bernardo Cremades, Arbitrator

**Date of Dispatch to the parties: *September 23, 2003***

## TABLE OF CONTENTS

List of abbreviations.....	6
I. FACTS.....	9
A. The parties .....	9
1. The Claimant.....	9
2. The Respondent .....	9
B. The Caracas-La Guaira Highway System.....	9
C. The legislative scheme.....	10
1. The Concession Law (Decree Law Nr. 138).....	10
2. The Executive Decree Nr. 502.....	10
D. The award of the concession and the incorporation of Aucoven .....	11
E. The Concession Agreement.....	12
F. Public protest and Venezuela’s refusal to increase the tolls .....	14
G. The impossibility to finance the bridge through tolls .....	15
H. Venezuela’s new government and Aucoven’s termination of the Concession Agreement.....	15
I. The 2002 protest.....	16
II. PROCEDURAL HISTORY .....	16
A. The institution of the proceedings .....	16
B. The arbitral proceedings .....	17
1. The proceedings on jurisdiction .....	17
2. The proceedings on the merits .....	18
2.1 The pre-hearing written phase.....	19
2.2 The hearing on the merits.....	20
2.3 The post-hearing written phase .....	22
III. POSITIONS OF THE PARTIES AND RELIEF SOUGHT.....	23
A. Aucoven .....	23
1. Position .....	23
2. Relief sought.....	25

B.	Venezuela .....	26
1.	Position .....	26
2.	Relief sought.....	27
IV.	DISCUSSION .....	28
A.	Procedural aspects .....	28
B.	Applicable law .....	29
1.	Choice of law .....	29
2.	Applicable law failing a choice of law agreement.....	31
C.	Venezuela’s failure to raise the tolls and <i>force majeure</i> .....	32
1.	The legal ingredients of <i>force majeure</i> and the burden of proof .....	33
2.	Was the 1997 unrest foreseeable? .....	34
3.	Did the 1997 unrest meet the requirement of impossibility? .....	36
4.	Was the 1997 civil unrest attributable to Venezuela? .....	37
5.	Conclusion .....	38
D.	The failure to issue the guarantee and the risk of illegality .....	38
1.	The knowledge of the risk of illegality of the guarantee .....	40
2.	The legal consequences of Aucoven’s knowledge of the risk.....	40
2.1	The significance of the risk of illegality under Venezuelan law .....	41
2.2	The role of Venezuela’s representation about the legality of the guarantee .....	41
3.	Conclusion .....	42
E.	Other breaches of the Concession Agreement .....	42
1.	Obligation to maintain the Economic-Financial Equilibrium .....	42
2.	Obligation to compensate Aucoven for additional and excess works .....	47
3.	Obligation to exempt Aucoven from taxes .....	48
4.	Obligation to pay the Minimum Guaranteed Income.....	51
5.	Obligation to approve the trust agreement.....	54
6.	Obligation to resort exclusively to arbitration .....	56
7.	Obligation to act in good faith .....	58
8.	Conclusion .....	59
F.	Did Aucoven validly terminate the Agreement? .....	60
1.	Was Aucoven entitled to terminate the Agreement unilaterally? .....	60
1.1	The parties’ positions.....	60
1.2	The contractual framework .....	60

1.3	The impact of Venezuelan law .....	61
2.	Were the conditions for unilateral termination met?.....	63
3.	Was the termination a legal fiction?.....	64
4.	Conclusion .....	64
G.	Out-of-pocket expenses .....	65
1.	The legal basis of the claim and the scope of the out-of-pocket expenses to which Aucoven is entitled .....	65
2.	The accounting basis of Aucoven's out-of-pocket costs .....	67
3.	The amounts which Aucoven is entitled to recover as out-of-pocket expenses .....	68
3.1	Out-of-pocket expenses not based on Aucoven's financial statements .....	69
3.2	Error rectifications.....	70
3.3	Bidding and negotiation costs.....	71
3.4	The Seconsa loan.....	72
3.5	Legal fees in actions not related to this arbitration .....	74
3.6	Studies and additional works .....	76
3.7	Interest costs .....	77
3.8	Administrative costs.....	80
4.	Conclusion .....	81
H.	Lost profits.....	82
1.	Introductory comments .....	82
2.	Is Aucoven barred from claiming lost profits?.....	83
2.1	The relevant provisions of Venezuelan law and of the Concession Agreement .....	83
2.2	The necessity of a termination by Venezuela .....	84
2.3	Must the alleged breaches be material?.....	85
2.4	Did Aucoven breach the Agreement?.....	85
2.5	Conclusion .....	89
3.	The standards of recovery of lost profits.....	89
3.1	The positions of the parties .....	89
3.2	Lost profits under the Concession Agreement.....	90
3.3	Lost profits under Venezuelan law .....	91
4.	Does Aucoven's claim for lost profits meet the relevant standards? .....	93
I.	Interest .....	98
1.	The relevant dates .....	99
1.1	Dies a quo .....	99

1.2	The dies ad quem .....	100
2.	The applicable interest rate.....	102
3.	Compound interest.....	104
3.1	Does Venezuelan law allow for compound interest?.....	104
3.2	Does international law require an award of compound interest?.....	105
4.	Method of interest computation.....	106
5.	Conclusion: Interest amounts due .....	107
5.1	Pre-termination losses .....	107
5.2	Post-termination losses .....	107
5.3	Pre-termination assets contributed .....	108
5.4	Post-termination assets contributed .....	108
J.	Currency and Payment of the Award .....	109
K.	Costs .....	110
V.	RELIEF .....	112

## List of abbreviations

### A

Agreement Concession Agreement Nr. MTC – COP – 001 – 95 dated December 23, 1996

### B

Badell Op. Expert Opinion of Rafael Badell Madrid on Venezuelan law dated May 31, 2002

Badell Supp. Supplemental Expert Opinion of Rafael Badell Madrid on Venezuelan Law dated September 27, 2002

Bridge Viaduct to be built over the Tacagua Gorge

Bs. Venezuelan bolivar currency

### C

CAF Corporación Andina de Fomento

Cl. Ex Claimant's exhibits

Cl. Memorial Memorial filed by Aucoven dated December 21, 2001

Cl. PHB / Cl. PHM Claimant's Post-Hearing Brief dated February 7, 2003

Cl. PHR Claimant's Post-Hearing Reply dated March 21, 2003

Cl. Reply Reply filed by Aucoven dated August 5, 2002

Concession The 30-year concession for the Caracas-La Guaira Highway project awarded to the ICA-Baninsa consortium in December 1995

Concession Agreement Concession Agreement Nr. MTC – COP – 001 – 95 dated December 23, 1996

Concessionaire Aucoven

CPI Venezuelan Consumer Price Index

**E**

EFE Economic – Financial Equilibrium

EFP Economic – Financial Plan

**H**

Highway Improvement Agreement Agreement of March 5, 1995 between Aucoven and Venezuela in connection with certain improvement works of Highway System

**I**

IDB Inter – American Development Bank

**L**

Lakshmanan I Claimant's expert report on damages by Mr. Suryanarayan Lakshmanan dated December 21, 2001

Lakshmanan II or Supp. Claimant's supplemental expert report on damages by Mr. Lakshmanan dated August 5, 2002

**M**

Minimum Guaranteed Income Minimum level of the toll collections

Ministry Ministry of Infrastructure, former Ministry of Transportation and Communication

**S**

Stulz / Simmons I Respondent's expert report on damages by Prof. René Stulz and Dr. Laura Simmons dated May 31, 2002

Stulz / Simmons II Respondent's supplemental expert report on damages by Prof. Stulz and Dr. Simmons

**T**

TIPS US Treasury Inflation-Protected Securities

## **V**

Ven. Counter – Memorial	Respondent’s Counter – Memorial dated May 31, 2002
Ven. Ex.	Respondent’s exhibits
Ven. PHB / Ven. PHM	Venezuela’s Post-Hearing Brief dated February 7, 2003
Ven. PHR	Venezuela’s Post-Hearing Reply dated March 21, 2003
Ven. Rejoinder	Rejoinder filed by Venezuela dated September 30, 2002
VIAL III program	Standing loan facility granted to Venezuela by the Inter–American Development Bank

## **I. FACTS**

1. This Chapter summarizes the factual background of this arbitration. More detailed facts will be referred to in the Chapter entitled “Discussion” as and when appropriate.

### **A. THE PARTIES**

#### **1. The Claimant**

2. The Claimant, Autopista Concesionada de Venezuela, C.A. (“Aucoven”) is a company incorporated under the laws of Venezuela, which has its registered office at La Florida Avenida Las Acacias Nr. 39 Sector Av. Libertador y Andrés Bello, Caracas, Venezuela.
3. The Claimant is represented in this arbitration by David W. Rivkin, Donald Francis Donovan, Steven S. Michaels and Dietmar Prager, of Debevoise & Plimpton, New York.

#### **2. The Respondent**

4. The Respondent is the República Bolivariana de Venezuela (“Venezuela”). It is represented by the Government of Venezuela, Ministry of Infrastructure (as successor to the Ministry of Transportation and Communication), Avenida Lecuna, Parque Central Torre Oeste, Piso 51, Caracas, Venezuela and the Attorney General of Venezuela, Avenida Lazo Martí, Edificio Procuraduría General de la República, Piso 8, Santa Mónica, Caracas, Venezuela.
5. The Respondent is represented in this arbitration by Alexander E. Bennett, Susan G. Lee, Angie Armer-Rios and Mara V.J. Senn, of Arnold & Porter, Washington, D.C.

### **B. THE CARACAS-LA GUAIRA HIGHWAY SYSTEM**

6. Caracas, Venezuela’s capital city, is located on a plateau in the mountains, approximately 17 km from the central litoral region of Venezuela on the northern coast of the country, where the Simón Bolívar International Airport, the seaport of La Guaira, and several recreational facilities are located.

7. Caracas and the central litoral region are currently joined by the Caracas-La Guaira Highway System. The Caracas-La Guaira Highway System is the main artery connecting the capital of Venezuela to the seacoast, the ports and the main international airport.
8. The Highway System consists of the Highway and the Old Road:
  - The Highway comprises three viaducts, two tunnels and a toll station. The Highway is a toll road.
  - The Old Road is another, longer, road connecting Caracas to La Guaira. The use of the Old Road is free.
9. One of the viaducts of the Highway, Viaduct Nr. 1 over the Tacagua Gorge, was built on a fault line and was subject to earth movements and soil erosion. As a consequence, concerns were raised as to the safety of the Viaduct Nr. 1.

## **C. THE LEGISLATIVE SCHEME**

### **1. The Concession Law (Decree Law Nr. 138)**

10. In April 1994, Venezuela enacted Decree Law Nr. 138 concerning “Concessions for National Public Works and Public Services” (Cl. Ex. 1). The Decree Law Nr. 138 set the framework for granting concessions of public works and services to private companies. The purpose of this legislation was essentially to allow Venezuela to obtain works and services without the need for government funding by seeking to make public concessions attractive to private bidders and financial lenders.
11. Due to the condition of the Highway, and especially of Viaduct Nr. 1, Venezuela decided to put to bid the improvement and maintenance of the Highway System as the first concession project to be granted under the regime of Decree Law Nr. 138.

### **2. The Executive Decree Nr. 502**

12. On December 28, 1994, President Caldera issued Executive Decree Nr. 502 (Cl. Ex. 2), putting the Highway System up for bid.
13. The main purpose of the concession was the construction of an alternate viaduct on the Highway. The project also included the operation and maintenance of the Highway System, as well as other construction works. The duration of the concession was thirty years.

14. Under the concession model, the main source of revenues for the Concessionaire would come from the collection of tolls on the Highway during the 30-year term of the concession. It was understood that the tolls would need to be increased in order to finance the project and compensate the Concessionaire.
15. The Ministry of Transportation and Communication, which subsequently became the Ministry of Infrastructure (the "Ministry"), was to be responsible for the "process and supervision of the concession" (Article 12).

#### **D. THE AWARD OF THE CONCESSION AND THE INCORPORATION OF AUCOVEN**

16. Venezuela received several bids and, in December 1995, awarded the project to the ICA-Baninsa consortium (the "Concession"). The criteria reviewed for the award of the Concession included, amongst other, the base toll rate and the internal rate of return.
17. Parliamentary opposition and a losing bidder, the Dayco consortium, challenged the award of the Concession to the ICA-Baninsa consortium. On September 6, 1996, the General Comptroller issued an opinion on the challenge by the opposition pursuant to which there were no grounds for nullifying the award (Cl. Ex. 11). On August 22, 1996, the Minister rejected the application by the losing bidder, holding that the Concession had been awarded in compliance with all legal requirements (Cl. Ex. 10 and 12).
18. In addition, a Deputy in the Congress initiated an administrative review proceeding challenging the concession agreement (see below). On August 3, 1997, the Attorney General issued a ruling, holding that the application lacked merit (Cl. Ex. 33).
19. On January 24, 1996, ICA and Baninsa incorporated Autopista Concesionada de Venezuela, Acoven C.A., a Venezuelan corporation, to serve as Concessionaire (Cl. Ex. 8). The latter's name was subsequently changed to Autopista Concesionada de Venezuela, C.A. (Aucoven) (Cl. Ex. 29).
20. Aucoven and Venezuela – acting through the Ministry– negotiated over almost one year the terms of an agreement that would govern the Concession. On December 23, 1996, the parties entered into Concession Agreement Nr. MTC-COP-001-95 (the "Concession Agreement" or the "Agreement"; Cl. Ex. 3).

## **E. THE CONCESSION AGREEMENT**

21. According to the Concession Agreement, Aucoven was to design, construct, operate, exploit, conserve, and maintain the Highway System.
22. Aucoven's main obligation under the Concession Agreement was the construction of the new viaduct over the Tacagua Gorge (the "Bridge"). The construction works were to be completed over a period of thirteen years. The total investment costs for the Bridge alone were approximately US\$ 215 million.
23. In addition to the Bridge, Aucoven was under the obligation to build other works related to the Highway System, i.e., (i) two new braking ramps on the Highway; (ii) two new trailer yards with weighing and profile monitoring stations; and (iii) a modernized and updated set of toll booths.
24. Aucoven was further obligated to operate and maintain the Highway System for a period of 30 years. The maintenance work included an overhaul of the Highway and of the Old Road during the first two years of the Concession.
25. Venezuela's obligations under the Concession Agreement were mainly related to the financing of the investments required under the Concession Agreement. These investments were to be financed as follows: (1) mainly by loans from private banks and multilateral lending institutions, (2) by capital provided by Aucoven, and (3) by the revenues from the collection of tolls.
26. Pursuant to Clause 22 of the Agreement, Venezuela was under an obligation to grant one or more guarantees to any potential lender to facilitate the obtention of the loans by Aucoven upon favorable terms and conditions to every extent possible. The guarantees to private banks were to be issued within 20 business days from Aucoven's request; those to multilateral lending institutions within two months from Aucoven's request.
27. The Concession Agreement granted Aucoven the exclusive right to collect tolls from Highway users (Clause 31). The toll income would repay Aucoven's investment, the return on that investment and finance the operation and maintenance of the Highway System. To accomplish these goals, Venezuela agreed to increase the Highway tolls according to the following scheme:

- for the first two years of the Concession, a progressive increase in tolls in six month increments according to a table set forth in Clause 31;<sup>1</sup>
  - for the entire duration of the Concession, an adjustment of the tolls according to the Venezuelan Consumer Price Index (“CPI”) on a periodical base set forth in Clause 31 and 32.
28. Moreover, Venezuela was to compensate Aucoven in the event that the toll collections would not attain a minimum level (the “Minimum Guaranteed Income” provided in Clause 23).
29. The Concession Agreement provided that the Concession would at all times be maintained in financial equilibrium, referred to as economic-financial equilibrium (the “Economic-Financial Equilibrium” or “EFE”). The EFE implied that Aucoven was able to cover its costs and obtain fair and equitable remuneration by collecting the tolls (Clause 44). Fair and equitable remuneration referred to an internal rate return of 15.21% on Aucoven’s investment.
30. To maintain the EFE, the parties established a mathematical model, the so-called economic-financial plan (the “Economic-Financial Plan” or “EFP”), which provided a basis for interrelating all the relevant economic and financial variables, in particular investment expenses and income (Annex A to the Concession Agreement). The EFP included detailed projections of such variables for the lifetime of the Concession, including an expected investment by Aucoven set at Bs. 8.032 billion (US\$ 47 million) (Annex A1 to the Concession Agreement).
31. By their very nature, the economic and financial data which were part of the EFP were likely to change over time. In the event of change, Aucoven was to update the EFP and, on such basis, Venezuela was to restore the Economic-Financial Equilibrium of the Concession (Clauses 44, 46, and 47).

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<sup>1</sup> The initial increase in toll rates, updated by the CPI, was to be implemented twenty business days after the signature of the Agreement, namely January 22, 1997. At least forty business days before April 1, 1997, Aucoven was required to submit an updated Economic-Financial Plan. Within the five following business days, Venezuela was obligated to pass a resolution updating the contractually agreed toll rates, which were fixed at a constant value as of September 30, 1995, on the basis of the Economic-Financial Plan, thereby establishing the “initial rates” to be applied by Aucoven on the starting date of April 1, 1997 (Clause 31). The resolution, which covered the period of the next eighteen months, was to allow Aucoven to adjust the toll rates to reflect changes in the CPI (i) every six months, and (ii) on such additional dates on which the CPI had changed 5% or more from the last adjustment (Clause 32). The Ministry was also obligated to publish every eighteen months a new resolution setting the maximum toll rates in accordance with the Concession Agreement (Clause 31).

## **F. PUBLIC PROTEST AND VENEZUELA'S REFUSAL TO INCREASE THE TOLLS**

32. According to the schedule set out in Clause 31 of the Concession Agreement, the first increase of tolls was due on January 22, 1997. However, invoking public resistance to the proposed toll increase, the Ministry decided not to increase the tolls.
33. On February 13, 1997, Aucoven proposed a series of works which it believed would contribute to persuade the Venezuelan public of the tangible benefits of the Concession (Cl. Ex. 14). On March 5, 1997, Venezuela approved Aucoven's proposal (the "Highway Improvement Agreement") (Cl. Ex. 17). According to the Highway Improvement Agreement, Aucoven would make certain improvements to the Highway System provided in the Concession Agreement on an accelerated basis , and perform preparatory studies that would enable Aucoven to stay close to the initial schedule for works on the Highway System (Cl. Ex. 14).
34. On March 24, 1997, based on an updated Economic-Financial Plan (Cl. Ex. 15), the parties agreed on a new schedule of toll increases shifting the burden from private cars and public transport vehicles (i.e., taxis, minibuses and buses) to heavy transportation vehicles (Cl. Ex. 19). This shift was meant to avoid protest by the low-income commuters.
35. The implementation of this new toll schedule, which took effect on March 25, 1997 (Cl. Ex. 20, Resolution Nr. 039), raised the toll rate for cars and taxis from Bs. 10 to Bs. 200.<sup>2</sup> The rate for heavy commercial cargos was increased from Bs. 1,800 to an amount between Bs. 7,400 and Bs. 18,300, depending on the size of the truck.
36. The announcement of the planned toll increases resulted in major protests from trucking companies and officials of the State of Vargas, where much of the commercial traffic using the Highway System originates.
37. As a consequence, on March 31, 1997, the Ministry requested that Aucoven refrain from collecting any tolls until further notice. On April 1, 1997, Aucoven began operating the Highway System, without collecting tolls.
38. On April 29, 1997, the Ministry issued Resolution Nr. 057 (Cl. Ex. 23), which annulled the previous one (Resolution Nr. 039) and set different rates, i.e., Bs. 100

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<sup>2</sup> The toll rate for vans was increased to Bs. 300, and the toll rates for buses to Bs. 500.

for private cars and taxis, Bs. 150 for minibuses, Bs. 250 for buses, and Bs. 3,700 to 9,150 for heavy commercial cargos depending on the size of the truck. Resolution Nr. 057 exempted certain police, military and fire department vehicles from the tolls. On May 2, 1997, Aucoven began collecting the tolls pursuant to Resolution Nr. 057 (Cl. Ex. 25).

39. Despite numerous requests by Aucoven between May 14, 1997 and February 14, 2000 (Cl. Ex. 25, 42, 44, 46, 47, 52, 55, 60, 62, 71, 76, 83, 93, 94, 95, 100, 103), Venezuela refused to adjust the tolls in accordance with Clauses 31 and 32 of the Concession Agreement. As a result, the toll rates stayed at the level of April 30, 1997.

## **G. THE IMPOSSIBILITY TO FINANCE THE BRIDGE THROUGH TOLLS**

40. As a consequence of the failure in raising the tolls, the funding of the construction cost through tolls was no longer possible.
41. The parties attempted to restructure the contract in order to find an alternative mechanism to finance the construction. Specifically, it appeared that Venezuela could compensate the lack of toll revenues by a direct investment that would decrease the amount of investment.
42. In June 1997, the parties started negotiations with the Inter-American Development Bank ("IDB"). Venezuela had a standing loan facility at the IDB, under the so-called "VIAL III program", the purpose of which was to improve Venezuela's road infrastructure system. IDB proposed a refinancing package, which conditioned the disbursement of the loan upon an increase in the Highway tolls.
43. Following opposition by the Governor-elect of the State of Vargas, Mr. Alfredo Laya, Venezuela decided not to sign the financing package. The negotiations ended unsuccessfully at the end of 1998 and no alternative financing plan was proposed, neither by Aucoven, nor by Venezuela.

## **H. VENEZUELA'S NEW GOVERNMENT AND AUCOVEN'S TERMINATION OF THE CONCESSION AGREEMENT**

44. In the elections held in November and December 1998, Mr. Hugo Chávez was elected President of Venezuela and formed a new government, which took office in February 1999.

45. On October 25, 1999, the newly established Ministry of Infrastructure opened administrative proceedings to review the award of the Concession and the Concession Agreement (Cl. Ex. 102). On July 31, 2000, the Minister of Infrastructure found that there were “defects of nullity” both in the resolution awarding the Concession and in the Concession Agreement (Cl. Ex. 105). Accordingly, the Ministry requested the Attorney General and the Solicitor General to take the necessary steps before the Venezuelan Supreme Court to have the award of the Concession and the Concession Agreement declared null and void.
46. On June 1, 2000, after Aucoven’s requests to settle the dispute by conciliation pursuant to Clause 62 of the Concession Agreement had remained unanswered, Aucoven filed its Request for Arbitration under Clause 64 of the Agreement.
47. By letter dated June 13, 2000, Aucoven terminated the Concession Agreement in reliance upon Clause 60 of the Concession Agreement (Cl. Ex. 104). In the same letter, Aucoven informed the Ministry that it was “willing to continue performing in good faith the routine maintenance and toll collection activities described in the Concession Agreement”. Aucoven did so “with the understanding that the execution of such activities in good faith must not in any way affect the termination of the aforementioned Concession Agreement”.

## **I. THE 2002 PROTEST**

48. In August 2002, truck drivers staged renewed protests, which soon turned violent. The truck drivers refused to pay the toll determined in April 1997.
49. Despite the continuous presence of the National Guard, the protestors prevented Aucoven from collecting tolls.
50. On September 6, 2002, Aucoven ceased the performance of routine maintenance and abandoned the Highway.

## **II. PROCEDURAL HISTORY**

### **A. THE INSTITUTION OF THE PROCEEDINGS**

51. On June 1, 2000, Aucoven filed its Request for Arbitration.

52. On June 23, 2000, the Secretary General of ICSID registered the Request for Arbitration and notified the parties of the registration.
53. In Clause 64 of the Concession Agreement, the parties had agreed that the Tribunal was to be composed of three members from the Panel of Arbitrators of the Centre, one appointed by each party and the presiding arbitrator appointed by the two party-appointed arbitrators.
54. On August 2, 2000, Aucoven appointed Prof. Karl-Heinz Böckstiegel as arbitrator.
55. On September 14, 2000, Venezuela sent a letter to the Secretary-General of ICSID informing the latter that the parties had agreed to a 90-day extension for Venezuela to name an arbitrator. On November 17, 2000, counsel for Aucoven informed the Secretary General of ICSID that Aucoven had terminated the extension for Venezuela to appoint an arbitrator. On December 7, 2000, Venezuela appointed Dr. Bernardo Cremades as arbitrator.
56. On January 8, 2001, Prof. Böckstiegel and Dr. Cremades designated Prof. Gabrielle Kaufmann-Kohler as President of the Tribunal.
57. On January 16, 2001, the Acting Secretary-General of ICSID notified the parties that all the arbitrators had accepted their appointment and therefore the Tribunal was deemed to be constituted on that date. The Acting Secretary-General designated Ms. Gabriela Alvarez-Avila, Counsel, ICSID, to act as Secretary of the Tribunal in this case.

## **B. THE ARBITRAL PROCEEDINGS**

### **1. The proceedings on jurisdiction**

58. By letter dated February 14, 2001, Venezuela objected to the Tribunal's jurisdiction. On February 15, 2001, Aucoven filed Preliminary Observations further to Venezuela's letter dated February 14, 2001.
59. The Arbitral Tribunal held its first session on February 19, 2001 in Paris. On this occasion, the Tribunal and the parties adopted procedural rules and agreed on a timetable for the arbitration proceedings. The Tribunal noted the Respondent's objections to the Tribunal's jurisdiction in the following terms:

*Having considered the views of the parties and the relevant rules, the Tribunal decided to suspend the proceedings on the merits pursuant to*

*Rule 41(3) of the Arbitration Rules. It was agreed that each party shall submit its observations on objections to jurisdiction and that the Tribunal will then decide by June 13, 2001 whether it will deal with these objections as a preliminary question or join them to the merits of the dispute. If these objections are joined to the merits, a telephone conference will be arranged to discuss the following steps in the proceeding. (Minutes of the First Session of the Tribunal)*

60. The following procedural steps have been followed in respect of the objections to the Tribunal's jurisdiction:

- On April 5, 2001, Venezuela filed its Observations on jurisdiction.
- On May 7, 2001, Aucoven filed its Counter-Memorial in support of jurisdiction.
- On May 22, 2001, Venezuela filed Further Observations on jurisdiction.
- On June 6, 2001, Aucoven filed its Rejoinder in support of jurisdiction.
- On June 14, 2001, the Tribunal rendered its Procedural Order Nr. 1 regarding the organisation of the hearing on jurisdiction.
- On June 28, 2001, the Tribunal held a hearing in Washington, D.C., on the objections to jurisdiction. During such hearing each party presented oral arguments and the Arbitral Tribunal asked questions from counsel. *Verbatim* transcript was taken.
- Thereafter, the Arbitral Tribunal proceeded to deliberate.

61. On September 27, 2001, the Arbitral Tribunal rendered its Decision on Jurisdiction. It ruled as follows:

- a) *The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.*
- b) *The arbitration costs, legal fees and other expenses in connection with the issue of jurisdiction shall be addressed in the Final Award.*

A copy of the decision is attached as Annex 1.

## **2. The proceedings on the merits**

62. On October 26, 2001, the Arbitral Tribunal issued Procedural Order Nr. 2 giving directions for the proceedings on the merits.

## **2.1 The pre-hearing written phase**

63. On December 21, 2001, Aucoven filed a Memorial (Cl. Memorial) and accompanying submissions, including an expert report on damages by Mr. Suryanarayan Lakshmanan (Lakshmanan I).
64. On May 31, 2002, Venezuela filed a Counter-Memorial (Ven. Counter-Memorial) and accompanying submissions, including an expert report on damages by Prof. René Stulz and Dr. Laura Simmons (Stulz/Simmons I).
65. On August 5, 2002, Aucoven filed a Reply (Cl. Reply) and accompanying submissions, including a supplemental expert report on damages by Mr. Lakshmanan (Lakshmanan II).
66. On September 30, 2002, Venezuela filed a Rejoinder (Ven. Rejoinder) and accompanying submissions, including a supplemental expert report on damages by Prof. Stulz and Dr. Simmons (Stulz/Simmons II).
67. On October 4, 2002, the President of the Tribunal held a pre-hearing telephone conference with the parties' counsel. During this telephone conference, Aucoven announced that it intended to apply to submit new evidence on issues contained in Venezuela's Rejoinder which it allegedly had no opportunity to address earlier.
68. On October 9, 2001, the Tribunal rendered its Procedural Order Nr. 3 regarding the organization of the hearing on the merits and granted the Claimant the opportunity to file an application for supplemental direct examination of witnesses that already submitted a statement.
69. On October 16, 2002, the Claimant submitted the three following applications:
  - Application to submit supplemental direct testimony re: accounting and cost of capital issues;
  - Application to submit supplemental direct testimony of Ricardo Martinez Celis and exhibits re: events since August 2, 2002 (including a supplemental witness statement of Ricardo Martinez Celis and exhibits);
  - Application to submit supplemental direct testimony of Ricardo Martinez Celis and exhibits re: photographic evidence of Aucoven's performance (including a supplemental witness statement of Ricardo Martinez Celis and exhibits).

70. On October 21, 2002, the Respondent submitted an "Opposition to Claimant's three separate applications to submit new evidence".

71. On October 24, 2002, the Tribunal rendered its Procedural Order Nr. 4 ruling on these issues. After having carefully reviewed the parties' arguments and analyzed their respective positions, the Tribunal decided as follows:

*3.1 On Aucoven's application for supplemental evidence on economic issues:*

- *The Arbitral Tribunal authorizes the parties to proceed to direct examinations of the damage experts limited to (1) the alleged errors in Aucoven's financial statements, and (2) the proper measure of the cost of capital.*
- *Beyond this authorization, the application is dismissed.*

*3.2 On Aucoven's application for supplemental direct testimony of Mr. Martinez and exhibits on events since August, 2002:*

*The application is granted, subject to the qualifications set forth in paragraph 35 above with respect to the exhibits to Mr. Martinez's supplemental statement:*

*3.3 On Aucoven's application for supplemental direct testimony of Mr. Martinez and exhibits in connection with photographic evidence of Aucoven's performance:*

*The application is dismissed.*

*3.4 On the structure of the examination of the damage experts:*

- *The damage experts will not be examined by topic;*
- *They will be heard in the order set forth in Paragraph 53 above.<sup>3</sup>*

## **2.2 The hearing on the merits**

72. In accordance with the Tribunal's directions, each party filed with the Tribunal written witness statements prior to the commencement of the oral hearing.

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<sup>3</sup> According to Paragraph 53 of Procedural Order Nr 4, "the Tribunal will hear:

- the expert for the Claimant (Mr. Lakshmanan) : in direct examination limited to the issues of (i) the errors in Aucoven's financial statements and (ii) the "effective cost of capital" (see # 20 above); and, thereafter, in cross and redirect examination on all issues.
- the experts for the Respondent (Dr. Simmons and Prof. Stulz) : in direct examination limited to the issues referred to above; and, thereafter, in cross and redirect examination on all issues.
- if the Claimant deems it necessary, the expert for the Claimant (Mr. Lakshmanan) : in direct examination in *rebuttal* to issues arising out of the examination of the Respondent's expert.
- the experts for the Respondent (Dr. Simmons and Prof. Stulz) : in direct examination in *surrebuttal* to any issues arising out of the rebuttal testimony of the Claimant's expert, if any."

73. The following five witnesses gave evidence on behalf of Aucoven during the oral hearing:
- *Ricardo Martinez Celis*, Technical Manager of Aucoven and member of its Board of Directors.
  - *Francisco Salas Roche*, in charge of the office of The Commissioner for Concessions at the Ministry for Transport and Communications.
  - *Eduardo Perez Alfonzo*, President of Aucoven.
  - *Suryanarayan Lakshmanan*, expert witness on damages.
  - *Luis A. Ortiz-Alvarez*, expert witness on Venezuelan law.
74. On behalf of Venezuela, the following seven witnesses appeared and gave evidence during the oral hearing:
- *Colonel Jaime Jose Escalante Hernández*, former head of the National Guard unit in charge of the La Guaira-Caracas Highway.
  - *General Moisés Antonio Orozco Graterol*, former Minister of Transportation and Communications of Venezuela.
  - *Heidi Gonzalez*, former Director of Venezuela's Finance Ministry Office of Multilateral Financing.
  - *Prof. Gerardo Fernandez Lopez*, former Vice Minister of Services in Venezuela's Ministry of Infrastructure and currently advisor to the Ministry on matters related to this case.
  - *René M. Stulz*, expert witness on damages.
  - *Laura E. Simmons*, expert witness on damages.
  - *Rafael Badell Madrid*, expert witness on Venezuelan law.
75. As scheduled, the hearing commenced on October 28, 2002 in Washington, D.C. As mentioned above, twelve witnesses were heard and counsel for the parties presented oral arguments. The hearing ended on November 1, 2002.
76. On October 31, 2002, Aucoven objected that it had been denied an opportunity to respond to an affirmative defense related to mitigation of damages raised by Venezuela. The Tribunal heard argument from both counsel and ruled that the mitigation issue may be pertinent, and that the parties should have the opportunity of putting forward the relevant evidence on this issue. Therefore, the Tribunal

determined that after the hearing the parties would have the possibility of presenting applications for production of further evidence relating to damages.

### **2.3 The post-hearing written phase**

77. On November 11, 2002, the Tribunal issued Procedural Order Nr. 5, in which it confirmed and supplemented the ruling made during the hearing. Specifically, it granted both parties a time-limit until November 15, 2002 to apply for an authorization to produce limited additional evidence, whether documentary or testimonial, on damages. The time-limit for replies was set on November 22, 2002.

78. On November 15, 2002, Aucoven filed an Application to submit supplemental evidence on cost-of-capital issues. On November 22, 2002, Venezuela filed an Opposition to such application.

79. On December 9, 2002, the Tribunal issued Procedural Order Nr. 6. It dismissed Aucoven's application to submit supplemental evidence on cost-of-capital issues of November 15, 2002. The Tribunal considered that, at that stage of the proceedings, it could not evaluate the relevance of the cost-of-capital issue. Noting that the ICSID Arbitration Rules empower the Tribunal to call for further evidence "if it deems it necessary at any stage of the proceeding" (Rule 34(2)(a); see also Art. 43(a) ICSID Convention) and emphasizing its general duty to manage the arbitration in an efficient manner, including a cost-efficient manner, the Tribunal held that the relevance of the cost-of-capital issue would have to be decided after the Post-Hearing Briefs and a deliberation on the merits of the case:

*If the evidence which Aucoven seeks to produce turns out to be pertinent and necessary in whole or in part, the Arbitral Tribunal may then make use of its prerogative under Rule 34 (2) (a), order production, and give Venezuela an opportunity to respond. If it is not pertinent, no issue of procedural rights arises, and the chosen course will save time and costs.*

80. As ordered by the Tribunal, each party filed a Post-Hearing Brief on February 7, 2003 (Cl. PHB; Ven. PHB).

81. On March 21, 2003, each party filed a Post-Hearing Reply (Cl. PHR; Ven. PHR).

82. On August 1, 2003, the Tribunal declared the proceedings closed pursuant to Rule 38(1) of the ICSID Arbitration Rules.

### III. POSITIONS OF THE PARTIES AND RELIEF SOUGHT

#### A. AUCOVEN

##### 1. Position

83. Aucoven's position is summarized in this Section. It will be further referred to in the Section entitled "Discussion" as and when a specific issue is reviewed. In its written and oral submissions, Aucoven has advanced the following main contentions:

- a. Venezuela performed none of its obligations under the Concession Agreement. It did not raise the tolls (Clauses 31-33), issue the guarantee (Clause 22), pay the Minimum Guaranteed Income (Clause 23), pay Aucoven for additional and excess works (Clauses 25 and 46), exempt Aucoven from taxes (Clauses 27-28), maintain the Economic-Financial Equilibrium (Clauses 44-46 and Annex A), timely approve the trust agreement (Clauses 6 and 40). Further, it failed to refrain from initiating proceedings in Venezuela in order to annul or terminate the Concession Agreement (Cl. PHR, ¶ 2).
- b. Venezuela's non-performance cannot be excused:
  - i. Venezuela's failure to raise the tolls according to Clauses 31-33 of the Concession Agreement cannot be excused by *force majeure*, an excuse that Venezuela has concocted *ex post facto* for the sole purpose of this arbitration (Cl. PHR, ¶ 24).
  - ii. Venezuela's failure to issue the guarantee within twenty business days of Aucoven's request, as required by Clause 22 of the Concession Agreement, cannot be excused by the fact that Aucoven would have assumed the risk of illegality of such guarantee (Cl. PHR, ¶ 49).
  - iii. Nor can any of Venezuela's other contractual breaches be excused:
    - Its failure to pay the Minimum Guaranteed Income on the basis that it did not receive an updated Economic-Financial Plan (Cl. PHR, ¶ 50);
    - Its failure to compensate Aucoven for additional and excess works on the basis that it did not receive an updated Economic-Financial Plan (Cl. PHR, ¶ 53);

- Its failure to exempt Aucoven from taxes on the basis that it did not receive an updated Economic-Financial Plan;
  - Its failure to maintain the Economic-Financial Equilibrium on the basis that it did not receive an updated Economic-Financial Plan;
  - As well as all its other failures, namely the failure to respond to Aucoven's request for approval of the trust agreement for over eight months, the failure to comply with Clause 64 of the Concession Agreement by initiating proceedings in the Venezuelan Supreme Court, and more generally its failure to act in good faith.
- c. Accordingly, under Clause 60(2) of the Concession Agreement, Aucoven was entitled to unilaterally terminate the Concession Agreement.
- d. Clause 60(2) of the Agreement explicitly entitles Aucoven to recover its lost profits in the event of a valid termination by Aucoven. According to a basic principle, common to both Venezuelan and international law, the damaged party must be put in the position in which it would be had the contract been performed according to its terms.
- e. Clause 60(2) of the Agreement also explicitly entitles Aucoven to recover all its out-of-pocket expenses (loss incurred and assets contributed).
- f. Aucoven is entitled to interest sufficient to make it whole for its loss. Accordingly, the following principles must be applied in computing interest:
- i. Interest should be granted as of the date on which Aucoven suffered the damage. Specifically for lost profits, the relevant date is the date of the alleged breach.
  - ii. Consistent with the possibility of choice provided in the Concession Agreement, Aucoven chose the "Bank Rate Method".
  - iii. The Concession Agreement, Venezuelan law, and international law all require the award of compound interest.
  - iv. Interest shall run until the date of effective payment.

- g. Because Venezuela persistently violated its obligations under the Concession Agreement, an award of costs and fees, including attorneys' fees, would be particularly appropriate.

## 2. Relief sought

84. Based upon all of the above submissions, Aucoven requests the Tribunal to make the following decisions (Cl. PHR, ¶ 379):

- (1) *declare that*
  - (a) *Venezuela breached Clauses 19, 22, 23, 27, 28, 31, 32, 33, 40, 44, 45, 46, and Annex A of the Concession Agreement;*
  - (b) *Venezuela breached the agreement to arbitrate set forth in Clause 64 of the Concession Agreement; and*
  - (c) *Venezuela breached its obligation to perform the Concession Agreement in good faith; and*
- (2) *declare that*
  - (a) *Aucoven was entitled to terminate the Concession Agreement pursuant to Clause 60(2) and principles of international law on grounds of Venezuela's breaches; and*
  - (b) *Aucoven was entitled to terminate the Concession Agreement under Clause 60(2) and principles of international law on grounds of Venezuela's failure to perform conditions precedent; and*
- (3) *award Aucoven damages in the amounts of*
  - (a) *Between Bs. 22,178,316,000 (constant as of September 30, 1995) and Bs. 24,212,779,000 (constant as of September 30, 1995) for the present value of Aucoven's lost profits for the term of the Concession through December 31, 2026, plus interest at the rate prescribed in the Concession Agreement;*
  - (b) *Bs. 118,722,000 (constant as of September 30, 1995) as out-of-pocket losses for Operating Years through March 31, 2000, plus interest at the rate prescribed in the Concession Agreement;*
  - (c) *Bs. 2,398,561,000 (constant as of September 30, 1995) as the fair value of Aucoven's assets contributed to the Concession, as of May 31, 2000, plus interest at the rate prescribed in the Concession Agreement;*
  - (d) *Bs. 394,848,000 (constant as of September 30, 1995) as out-of-pocket losses for the Operating Year ended on March 31, 2001, through August 31, 2002, plus interest at the rate prescribed in the Concession Agreement;*
  - (e) *Bs. 341,417,000 (constant as of September 30, 1995) as the net increase in the fair value of the assets contributed by Aucoven to the Concession for the period June 1, 2000*

*through October August 31, 2002, plus interest at the rate prescribed in the Concession Agreement;*

- (f) *Post-award interest, at the rate prescribed in the Concession Agreement, or, in the alternative, at the highest rate allowed by applicable law;*
  - (g) *Aucoven's costs and expenses, including legal fees, incurred in connection with this arbitration, plus interest at the rate prescribed in the Concession Agreement; and*
- (4) *order that*
- (a) *all amounts awarded Aucoven in constant bolivars be updated as of the date of payment in accord with the change in the Venezuelan Consumer Price Index (CPI) since September 30, 1995; and*
  - (b) *all amounts awarded Aucoven be converted into U.S. dollars at the most favorable available exchange rate and be paid to a U.S. bank account designated by Aucoven; or, in the alternative,*
  - (c) *notwithstanding any Venezuelan law or regulation to the contrary, Aucoven be permitted to repatriate freely and without encumbrance or delay all amounts awarded and convert them into U.S. dollars at the most favorable available exchange rate; and*
- (5) *award Aucoven such other and further relief as the Tribunal deems just and proper.*

## **B. VENEZUELA**

### **1. Position**

85. Venezuela's position is summarized in this Section. It will be further referred to in the Section entitled "Discussion" as and when a specific issue is reviewed. In its written and oral submissions, Venezuela has advanced the following main contentions:

- a. Aucoven's purported unilateral termination as of June 13, 2000, was not valid or effective under the Concession Agreement and Venezuelan law.
- b. Aucoven's lost profits claim fails because of four independent legal obstacles excluding Venezuela's liability (Ven. PHR, p. 12), namely:
  - i. The civil unrest directed at the planned future toll increases made it impossible for Venezuela to raise the tolls to the levels originally contemplated by the Concession Agreement. "This circumstance constituted a classic *force majeure* event and excused the Republic's contractual undertaking to increase the tolls to such levels" (Ven. PHR,

p. 97 referring to Resp. Mem. at 18-24, 32-36; Rejoinder p. 15-38; Ven. PHB, p. 15-38).

- ii. Aucoven's breaches of its own obligations under both the Concession Agreement and the Highway Improvement Agreement constitute an independent bar to Aucoven's lost profits claim (Ven. PHR, p. 128).
  - iii. Since Aucoven did not build any works nor make any investment in the project, Aucoven is not entitled under the Economic-Financial Equilibrium to pursue a claim for alleged "lost profits" based on mere projected cash flows as set forth in the initial Economic-Financial Plan (Ven. PHR, p. 141).
  - iv. Since the projected cash flows under the initial EFP and the other assumptions underlying Aucoven's claim for lost profits are uncertain and indeed speculative, such claim cannot be granted under Venezuelan law, which provides that any claim for damages based on an administrative contract be supported by non-speculative and definite proof of actual loss (Ven. PHR, pp. 144-145).
- c. Aucoven's lost profits claim fails because, as a matter of economics, Aucoven did not suffer any loss of future profits.
  - d. Aucoven is only due out-of-pocket costs that are permissible under the Concession Agreement (Ven. PHR, p. 69 referring to Ven. Mem. at 84-89; Rejoinder at 90-92; Ven PHB, at 102-104).
  - e. The Tribunal should not grant compound nor post-award interest.

## **2. Relief sought**

86. Venezuela requests the Tribunal to make the following decisions (Ven. PHR, p. 157):

*[...] Aucoven's claims for lost profits and pre-award interests should be denied in their entirety. Aucoven's award for out-of-pocket expenditures should be limited at most to Bs. 1,181,504,930 (constant September 1995). The Republic should be given the option to pay this amount in updated bolivars or the dollar equivalent thereof converted at the rate of Bs. 170 constant 1995 bolivars per U.S. dollar (for a total of US\$ 7.0 million) (Ven. PHR, p. 157).*

87. Further on interest and costs, Venezuela requested the Tribunal to rule as follows:

*The award in this case should not include any element for pre-award interest (Ven. PHR, p. 86).*

*The Tribunal should not grant post-award interest (Ven. PHR, p. 149).*

*Interest should not be compounded in this case (Ven. PHR, p. 94).*

*Aucoven is not entitled to an award of legal fees and costs related to the arbitration (Ven. PHR, p. 150).*

*[If] the Tribunal chooses to consider the shifting of legal costs from one party to another — contrary to the usual ICSID practice — it is Aucoven that should be ordered to reimburse the Republic for its legal costs and other expense of the arbitration (Ven. PHR, p. 152).*

## **IV. DISCUSSION**

### **A. PROCEDURAL ASPECTS**

88. On September 27, 2001, the Arbitral Tribunal rendered its Decision on Jurisdiction in respect of Article 25 of the ICSID Convention holding that it “has jurisdiction over the dispute submitted to it in this arbitration”.
89. In its submissions on the merits, Venezuela has posited that Venezuelan law reserves to the Venezuelan courts any issues related to the termination of the Concession Agreement. Specifically, Venezuela points out that “Article 10 of Decree Law Nr. 138 allows a Concession Agreement to submit to arbitration matters relating to “interpretation or performance” of a concession contract, but not termination of such a contract (Ven. PHR, p. 126, Fn 119).
90. If and to the extent that this contention must be understood as an objection to the jurisdiction of this Tribunal, it cannot be taken into consideration. Indeed, it is belated, because it was submitted well after the Decision on Jurisdiction.
91. Moreover, if the Tribunal were to consider it, which it does not, it would in any event find it ill-founded. The Tribunal notes that Venezuela’s own legal expert at the hearing recognized that “the arbitral tribunal would be the competent jurisdictional entity” for issues of termination in accordance with Clause 64 of the Agreement (Tr. 729:7-19, spelling corrected). Such expert agreed with the statement that “there is no reason why this tribunal could not enforce Clause 60 by declaring the contract terminated as of June 13, 2000, if, in fact, it finds that Venezuela did indeed breach as Aucoven alleges” (Tr. 730:8-19). Moreover, a jurisdictional challenge based on an alleged exclusive jurisdiction of a Venezuelan authority would also violate the

well-established principle of international law pursuant to which a state cannot rely on its domestic legislation to renege on a contractual obligation to resort to arbitration (Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge 2001, Nr. 95 ad Article 42; Stephen Schwebel, *International Arbitration: Three Salient Problems*, pp. 68 ff. and ref.).

## **B. APPLICABLE LAW**

92. The law to be applied by the Tribunal to the substance of the dispute is laid down in Article 42(1) of the ICSID Convention as follows:

*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

93. The parties disagree on (1) whether they entered into a choice of law agreement within the meaning of the first sentence of Article 42(1) of the ICSID Convention, and (2) which law should govern the dispute failing such an agreement.

### **1. Choice of law**

94. Pursuant to its Preamble, the Concession Agreement “shall be governed by [...] [Decree] Law Nr. 138 [...] Executive Decree Nr. 502 [...] and the provisions of any other laws, regulations, or other documents as may be applicable”. Clause 5 of the Concession Agreement provides that the latter “shall be governed by [Decree Law 138]; [Executive Decree Nr. 502]; by the Clauses and Annexes [of the Concession Agreement]; by the terms set forth in the Bid submitted by [Aucoven]; and by the conditions set forth in the Bid Documents.”

95. The parties disagree on the meaning of these provisions:

- Venezuela submits that, by agreeing to these provisions, “the parties reflected their agreement that Venezuelan law should be applied to any dispute concerning interpretation or application of the terms of the Concession Contract” (Ven. PHB, p. 13).
- Aucoven argues that “the parties did not agree on Venezuelan law as the only applicable law, as contemplated by the first sentence of Article 42(1) of the Washington Convention” (Cl. PHB, ¶ 171, p. 37). Since “[t]he parties’ reference to particular Venezuelan laws cannot, in any event, be construed as

an indication that they intended Venezuelan law to govern the Concession Agreement exclusively” (Cl. PHB, ¶ 172, p. 37), and since the Contract Preamble contemplates that some other law might be applicable (Cl. PHB, ¶ 170, p. 37), Aucoven submits that the Concession Agreement “does not provide for the exclusive application of Venezuelan law” (Cl. PHB, ¶ 169, p. 36).

96. The Tribunal observes that the first sentence of Article 42(1) refers to “rules of law” rather than to systems of law. It is generally accepted that this wording allows the parties to agree on a partial choice of law, and in particular to select specific rules from a system of law. Accordingly, the Tribunal finds that Clause 5 of the Agreement represent a valid choice of law agreement providing for the application of Decree Law 138 and Executive Decree Nr. 502.
97. The Tribunal further notes that the reference to specific texts of Venezuelan law, i.e., Decree Law 138 and Executive Decree Nr. 502, does not necessarily amount to a general choice of Venezuelan law. As pointed out by both parties, such an “extension” of the choice of law was accepted in *LETCO v. Liberia*, where the Tribunal considered that an agreement to apply “the General Business Law, Title 15 of the Liberian Code of Laws of 1956” was a general choice of Liberian Law.<sup>4</sup> The parties disagree on the relevance of *LETCO v. Liberia* for the present case. Venezuela insists on the fact that the “specific choice of local law was made based on contract provisions and other circumstances less compelling than those in the present case” (Ven. Rejoinder, p. 10), while Aucoven emphasizes that “[u]nlike the Concession Agreement, the contract [in *LETCO v. Liberia*] did not refer to “any other laws, regulations, or other documents that may be applicable” (Cl. PHB, ¶ 170, p. 37 Fn. 1).
98. In the Tribunal’s view, the answer hinges upon the interpretation of the terms “... and the provisions of any other laws, regulations, or other documents as may be applicable”, which follow the choice of the two Venezuelan decrees in the Concession Agreement’s Preamble. Does this language constitute an implied choice of any other *Venezuelan* laws or regulations, with the result that the Preamble embodies a general choice of Venezuelan law, as Venezuela submits? Or should

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<sup>4</sup> *Liberian Eastern Timber Corporation (LETCO) v. Liberia*, ICSID Case No.ARB/83/2, Award, March 31, 1986, 2 ICSID Reports 343, Ven. Auth. 4, at 358.

the relevant passage be viewed as an implied reference to international law, as Aucoven argues? Or should such language be understood as it reads, i.e., without a specification in favor of Venezuelan law, with the result that the Preamble contains a partial choice of Venezuelan law and, beyond that, leaves the determination of the governing law to the ICSID Convention?

99. In support of the first assumption, Venezuela submits that such an interpretation is “consistent with the general rule in Venezuela that Venezuelan administrative contracts, like the [Concession Agreement], are governed by Venezuelan law” (Ven. PHB, p. 13). The Tribunal believes, however, that this consideration is not sufficient to establish the parties’ mutual intent to submit their contract to Venezuelan law exclusively.
100. The parties could easily have adopted language showing their common intent to apply exclusively Venezuelan law, i.e., they could easily have expressed their agreement on a general choice of Venezuelan law in the Concession Agreement. Had they meant to provide for international law, they could also have expressed it. But they did not. Failing any indication on record demonstrating that, when agreeing on the Preamble’s wording the parties impliedly meant to provide for a general choice of Venezuelan law or for international law, the Tribunal comes to the conclusion that, except for the matters covered by Venezuelan Decree Law Nr. 138 and Executive Decree Nr. 502, it must look to the second sentence of Article 42(1).

## **2. Applicable law failing a choice of law agreement**

101. In the absence of an agreement of the parties, the second sentence of Article 42(1) of the ICSID Convention provides that “the Tribunal shall apply the law of the Contracting State party to the dispute [...] and such rules of international law as may be applicable.”
102. The role of international law in ICSID practice is not entirely clear. It is certainly well settled that international law may fill lacunae when national law lacks rules on certain issues (so called complementary function). It is also established that it may correct the result of the application of national law when the latter violates international law (corrective function) (Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge 2001, Nr. 131 ad Art. 42, p. 623 with ref.). Does the role of international law extend beyond these functions? The recent decision of the ICSID Ad hoc Committee in *Wena Hotels Ltd. V. Arab Republic of Egypt* accepts the possibility of a broad approach to the role of international law, and that the arbitral

tribunal has “a certain margin and power of interpretation” (ICSID Case Nr. ARB/98/4, 41 I.L.M. 933 (2002), Nr. 39 p. 941).<sup>5</sup> Whatever the extent of the role that international law plays under Article 42(1) (second sentence), this Tribunal believes that there is no reason in this case, considering especially that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law.

103. The parties accept that international law would prevail over Venezuelan law if the latter were in conflict with the former (Cl. PHB, ¶ 174, p. 38; Ven PHB, p. 13). As a general proposition, they further agree that Venezuelan law is not inconsistent with international law. In fact, Aucoven states that “the basic and fundamental legal principles on which this case must be decided are common to both systems” (Cl. PHB, ¶ 168, p. 36), while Venezuela asserts that “the application of Venezuelan legal principles in this instance [would not] in any way violate international law” (Ven PHB, p. 14).
104. Despite these statements, the parties raise certain inconsistencies between Venezuelan and international law, so for instance with respect to the standard of impossibility of *force majeure*. The Arbitral Tribunal will review these alleged inconsistencies as and when they arise in the course of the discussion and decide whether they amount to violations of international law, with the result that the latter would then prevail over Venezuelan law.
105. In conclusion, the Arbitral Tribunal holds that this dispute must be resolved by application of the Decree Law 138 and Executive Decree Nr. 502 (pursuant to the first sentence of Article 42(1)) and, for matters not covered by such decrees, by any other pertinent rule of Venezuelan law (pursuant to the second sentence of Article 42(1)). Moreover, it holds that international law prevails over conflicting national rules.

### **C. VENEZUELA’S FAILURE TO RAISE THE TOLLS AND *FORCE MAJEURE***

106. Venezuela concedes that it was unable to increase the toll rates as provided by Clause 31 of the Concession Agreement. It submits, however, that Aucoven has

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<sup>5</sup> For a commentary of the Wena decision, see Emmanuel Gaillard, *Chronique des sentences arbitrales CIRDI*, Journal du droit international 2003, pp. 191 *et seq.*, in particular 193-194.

failed “to demonstrate that the Republic’s inability to increase toll rates was not excused by *force majeure* events” (Ven. PHR, p. 12).

## 1. The legal ingredients of *force majeure* and the burden of proof

107. The Tribunal cannot follow Aucoven’s argument that the Agreement provides for full compensation even in case of *force majeure* occurred. In particular, the Tribunal notes that the contractual *force majeure* defined in Clause 41(2) expressly refers to circumstances that impede the Concessionaire to perform. The Agreement thus addresses the situation in which Aucoven is prevented from performing due to a *force majeure* event that affects itself. It does not deal with a situation where Venezulea’s performance becomes impossible as a result of *force majeure*. Hence, the consequences of *force majeure* are not governed by contract, but must be assessed according to the applicable law.
108. It is common ground between the parties that *force majeure* is a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law. It is further common ground that the following conditions must be fulfilled for a *force majeure* excuse:
- *Impossibility* (Cl. PHR, ¶ 26), i.e., the *force majeure* event made performance impossible to achieve (Ven. PHR, p. 98).
  - *Unforeseeability* (Cl. PHR, ¶ 30), i.e., the *force majeure* event was not foreseeable (Ven. PHR, p. 105).
  - *Non-attributability* (Cl. PHR, ¶ 32), i.e., the *force majeure* event was not attributable to the defeating party (Ven. PHB, p. 27).
109. It is, however, disputed between the parties whether the record establishes that there was *force majeure* (Cl. PHR, ¶ 25; Ven. PHR, p. 97) and, specifically, whether the 1997 events meet the *force majeure* conditions.
110. Before turning to each single condition, it is necessary to clarify the burden of proof, since the parties appear to express divergent views in this respect (Ven. PHR, pp. 12-13; Cl. PHR, ¶ 31). As a matter of principle, each party has the burden of proving the facts upon which it relies. This is a well-established principle of both Venezuelan and international law. Accordingly, it is up to Venezuela, which relies upon the *force majeure* excuse, to prove that the conditions of *force majeure* are met.

## 2. Was the 1997 unrest foreseeable?

111. Venezuela argues in substance “that, as of the time that the Contract was signed, the parties could not and did not foresee a protest of such magnitude and threatened violence that it would undermine the entire financing mechanism for the construction project, which both sides acknowledge was the very reason for the Republic to enter into the Concession Contract in the first instance” (Ven PHB, p. 27; Ven PHR, p. 105). It relies specifically upon the declaration of a witness called by Aucoven who testifies that Venezuela “had not anticipated the degree to which drivers of heavy trucks would oppose the toll rate increases” (Ven. PHB, p. 26 referring to Tr. 257:6-13). Venezuela stresses that the relevant element of inquiry is whether the protests that actually took place were foreseeable and not whether the mere “prospect of political opposition” was foreseeable.
112. Aucoven points out that a Venezuelan public official admitted that “there was *always* this concern that there could be a *Caracazo*” (Cl. PHB, ¶ 207, p. 47 referring to Tr. 350:14-15; 352:18-20 (Orozco); see also Cl. PHR, ¶ 30, p. 8) i.e., a social explosion leading to a considerable amount of deaths.<sup>6</sup> If there was “always” a fear of a *Caracazo* redux, so argues Aucoven, “that fear must have existed not only a few days after the signing of the Concession Agreement, but also when the Concession Agreement was negotiated and signed” (Cl. PHR, ¶ 30, p. 8; Cl. PHB, ¶ 124, pp. 206-208; Reply, ¶ 56).
113. On the one hand, the Tribunal finds that General Orozco’s declaration according to which “there was *always* this concern that there could be a *Caracazo*” should be replaced in its context, namely the position of Venezuelan law enforcement official “reviewing the problem, at the time where the popular discontent began...” (Tr. 352:3-4). In the Tribunal’s view, Aucoven puts too much weight on the single word “always” when it contends that “[I]f there was “always” a fear of a *Caracazo* redux, that fear must have existed [...] also when the Concession Agreement was negotiated and signed” (Cl. PHR, ¶ 30, p. 8; Cl. PHB, ¶ 124, pp. 206-208; Reply ¶ 56).

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<sup>6</sup> As explained by General Orozco, the *Caracazo* was a political phenomenon that occurred in 1989 following an increase in the price of gasoline and, consequently, the price of transportation. The snowball-effect in popular discontent necessitated the intervention of the armed forces and ended up with 200 deaths. (Tr 351:7 - 352:17).

114. On the other hand, the impact of the tragic events of the 1989 *Caracazo* cannot be underestimated. The Encyclopedia of Venezuela describes the events of February 1989 as follows (Cl. Ex. 140):

*The people, who became protagonists, began to come down from the hills, their place of residence, toward afternoon to take shopping and business centers by storms, looting these places to seize all types of products [...] Some main streets of the cities were also taken by mobs, which built barricades and burned public transportation buses, private vehicles and tires, clearly protesting against the increase in the transportation service costs. [...] [This] massive popular and fundamentally spontaneous social explosion [first led to] the most serious governmental and political crisis of the democratic era had occurred [...] [and later to] a repressive phase in which the military began to control the situation in the ghettos in whatever way possible, which gave rise to all types of excesses. One week later the official figures exceeded three hundred deaths, and the material losses were incalculable.*

115. Considering the impact of the *Caracazo* on Venezuelan society in general – and on the political system in particular – (see also Tr. 352:15-17 and 350:14-15, where General Orozco states that “certainly this left the Country marked” and that Venezuela still “bears the scars”), one cannot reasonably argue that Venezuelan officials negotiating the Agreement could ignore that the increase in transportation price resulting from the contractual mechanism of toll rate increase could at least potentially lead to violent popular protest similar to the one of 1989. This is also supported by Mr. Salas, appearing on behalf of Aucoven, whose testimony confirmed that the Ministry wanted to avoid protests of the kind of the *Caracazo* (Tr. 255:19; 256:3).
116. The Tribunal finds additional support for this view in Venezuela’s submission that “[s]oon after the parties signed the Contract and before any attempt to implement any toll increases, it became apparent that strong public resistance to toll increases could imperil the Concession’s future” (Ven. Counter-Memorial, p. 18). Venezuela did not establish, or even explain, the reasons why the strong public resistance was apparent shortly after the signature of the Agreement and before any actual attempt to increase the tolls, while it was unforeseeable shortly before during the negotiation of the contract. In these conditions, the Tribunal is not convinced that the possibility of strong popular resistance to toll increase became apparent only after the conclusion of the Concession Agreement.
117. Venezuela finally claims that “[t]he fact is that the parties could not and did not foresee a protest of such magnitude and threatened violence” (Ven. PHR, p. 105 referring to Ven. Counter-Memorial, p. 35; Rejoinder, pp. 27-28; Ven. PHB, pp. 26-

27). Accordingly, Venezuela seems to recognize (or at least not to deny) that some public resistance was foreseeable. What it denies is the foreseeability of the magnitude of such resistance. The Tribunal finds that the evidence before it, and in particular the testimony concerning the impact of the *Caracazo* on Venezuela society, clearly demonstrated that if popular protest could be foreseen, then the possibility of very violent protest could not be ruled out.

118. Given the well known tragic precedent of the *Caracazo* and the similar impact on the population of the contractual toll increase, Venezuela did not convince the Tribunal that the possibility of civil unrest could not be foreseen at the time of the negotiation of the Concession Agreement. In conclusion, the Tribunal finds that the alleged impossibility of raising the toll was not unforeseeable.
119. For lack of unforeseeability, Venezuela's non-performance cannot be excused on the ground of *force majeure*. Hence, whether the conditions of impossibility and attributability are met is not decisive. For the sake of completeness, since the parties have extensively tried these issues, they will nevertheless be addressed.

### 3. Did the 1997 unrest meet the requirement of impossibility?

120. Impossibility in the present context raises three main questions: (1) What is the impossibility standard governing under Venezuelan law? (2) Does international law impose a different standard? (3) Do the facts of this case amount to impossibility under the relevant standard?
121. On the first question just set out, the Tribunal sees no reason to depart from the impossibility standard applicable under Venezuelan administrative law as described by Prof. Badell. Under this standard, it is not necessary that the *force majeure* event be irresistible; it suffices that by all reasonable judgment the event impedes the normal performance of the contract. Prof. Badell's evidence to such effect relies on several authorities on administrative contracts.<sup>7</sup> By contrast, the evidence of

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<sup>7</sup> "In administrative law, it is not necessary that the event alleged as force majeure be insurmountable or irresistible for justifying the non-performance of what was agreed to; it suffices that by all reasonable judgment the event impedes the normal execution of the contract, and therefore it is not necessary that such inability be absolute" (Miguel BERCAITZ, *Teoría General de los Contratos Administrativos*, 1980, Badell Auth. 18, p. 578). It is with respect to this aspect that the *force majeure* exhibits a characteristic that is unique to administrative law, which thus allows it to be differentiated from the notion of *force majeure* in private law. [...] There shall or may be "*force majeure*" when an external and unpredictable event disturbs or changes, in a "definitive" manner, the equilibrium of the contract. "Insurmountable" is replaced by "definitive" (Miguel MARIENHOFF, *Tratado de Derecho Administrativo*, 4<sup>th</sup> Ed. 1983, Badell Auth 24, p. 359).

Aucoven's legal expert pursuant to which an element of "absolute impossibility" is required to assert *force majeure* in administrative contracts is not sufficiently supported.

122. Accordingly, the issue before this Tribunal with respect to impossibility may be summarized as follows: did the civil unrest in 1997 impede the increase of the toll rates by reasonable judgment?

123. On the second question set forth above, the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr. v. The Islamic Republic of Iran*, Award No. 192-285-2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc. v. Ministry of Defense of Iran*, Award No. ITL 24-49-2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc. v. Iran*, Award No. 180-64-1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the Draft Articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.

124. On the third and last question, Venezuela admits that the civil protest was not irresistible in the sense that it could not have been mastered by the use of force. This being so, the question then becomes: by all reasonable judgment how much force can a State be legally required to deploy to perform its contract obligations? The answer to this question implies a delicate assessment that calls in part for political judgment. Considering its determination on unforeseeability, the Arbitral Tribunal will not finally resolve it. Suffices it to state that this Tribunal is rather inclined to find that, in consideration of the events of 1989 and of the risk of repetition, the impossibility requirement appears met.

#### **4. Was the 1997 civil unrest attributable to Venezuela?**

125. Like the answer on impossibility, the determination of attributability is not dispositive of the *force majeure* defense. For the sake of completeness, it is nevertheless briefly discussed.

126. It is a well-settled principle of international law that a State is responsible for the conduct of all public authorities within its territory. That principle is not seriously

disputed by Venezuela. It has recently been restated by an ICSID Ad hoc Committee in *Compañía de Agua del Aconquija S.A. v. Argentine Republic*, as follows:

*Under international law [...] it is well established that actions of a political subdivision of a federal state [...] are attributable to the central government. It is equally clear that the internal constitutional structure of a country cannot alter these obligations.*<sup>8</sup>

127. The fact that “the Venezuelan Constitution ascribes separate legal identity to the federal, state and municipal governments, and that the actions of one may not be attributed to another “ (Ven. PHB, p. 29 referring to Badell Supp. ¶ 35 and Rejoinder 28-29) may be accurate, but is irrelevant for the present purposes.
128. The evidence provided at the hearing by Venezuela’s federal government officials showed that “they worked tirelessly with Aucoven to solve the problems with the Contract and that the Republic was not responsible for the protests” (Ven. PHB, p. 27). In spite of these efforts, the fact remains and was admitted by Venezuela that the protest had the “full support of the local government [...] of the State of Vargas” (Ven. Counter-Memorial, p. 19; see also Ven. PHB, p. 29, where Venezuela emphasizes the role of some local officials to quell the protests, but does not deny the fact that local government supported the protest). To which extent such support was causal for the protests or their seriousness is not readily apparent from the record. In view of the finding on unforeseeability, there is no need for this Tribunal to make a final judgment on this issue here.

## **5. Conclusion**

129. On the basis of the foregoing developments, the Tribunal concludes that Venezuela’s breach of its contractual obligation to raise the tolls is not excused by *force majeure*.

## **D. THE FAILURE TO ISSUE THE GUARANTEE AND THE RISK OF ILLEGALITY**

130. The conclusion just reached with respect to *force majeure* is sufficient in and of itself to declare that Aucoven was entitled to terminate the Concession Agreement and to claim damages as a matter of principle pursuant to Clause 60(2). These matters will be reviewed in Section IV.F to H below. However, since Aucoven expressly requests

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<sup>8</sup> *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), Resp. Auth. 35 ¶ 49 (citations omitted).

the Tribunal to declare that “Venezuela breached Clauses 19, 22, 23, 27, 28, 31, 32, 33, 40, 44, 45, 46, and Annex A of the Concession Agreement”, the Tribunal will look at the other breaches alleged by Aucoven in the next Sections. It will devote more significant developments to the alleged breach of the obligation to issue the guarantee - in Aucoven’s words, the other “most devastating breach” next to the failure to raise the tolls (Cl. PHR, ¶ 5) - and more limited developments to the others.

131. Clause 22 of the Agreement provides the following in respect of payment guarantees:

*In accordance with the provision of Article 46 of Decree Nr. 138 having the scope and force of Organic Law, at the request of THE CONCESSIONAIRE, THE NATIONAL EXECUTIVE shall grant multilateral entities, within two (2) months from THE CONCESSIONAIRE’S request, or other financing entities within twenty (20) business days from said request one or more guarantees to ensure the payment of THE CONCESSIONAIRE’S debts.*

132. When Aucoven negotiated to obtain a loan of US\$ 50 million from ING Bank, the latter (Cl. Ex. 26, Martínez I ¶ 37) required that the loan be secured by a satisfactory governmental guarantee (Cl. Ex. 26; Cl. Ex. 129). On May 28, 1997, Aucoven requested that Venezuela issue a guarantee pursuant to Clause 22 of the Concession Agreement (Cl. Ex. 26). It is undisputed that Venezuela did not issue the guarantee within 20 business days of that request (Ven PHR, p. 112: “the granting of the guarantee was *delayed* when the Minister of Finance - the government official normally responsible for financial undertakings of the Republic - determined that the Organic Law of Public Credit prohibited him from executing any guarantee”).
133. Venezuela argues that the Organic Law of Public Credit prohibited the Minister of Finance to issue the guarantee as required by Clause 22 of the Agreement and that Aucoven knew, prior to signing the Concession Agreement, that there was a conflict of (Venezuelan) laws that might prevent or delay the issuance of guarantee. Relying upon the testimony of its legal expert, Venezuela submits that, under Venezuelan law, “Aucoven’s actual prior knowledge of the conflict and its implications for potential lenders means that Aucoven must bear full responsibility for assuming the risk of the illegality of the guarantee”. (Ven. PHR, p. 113 referring to Badell Supp. ¶ 54; Tr. 746:10; 747:11). Accordingly, Aucoven’s knowledge would bar any claim of breach of contract (Ven. PHR, p. 113).

134. Aucoven responds that Venezuela's failure to issue the guarantee cannot be excused. Clause 22 of the Agreement was not illegal under Venezuelan law. Both the Minister of Infrastructure and the Attorney General of Venezuela recognized that the issuance of the guarantee was legal. Moreover, even assuming that Clause 22 of the Agreement was illegal under Venezuela law, "it is well established that as a matter of international law a State cannot excuse its nonperformance of a contractual provision by relying on an alleged illegality under domestic law" (Cl. PHR, ¶¶ 46-48).

## 1. The knowledge of the risk of illegality of the guarantee

135. It is undisputed that on November 18, 1996, i.e., prior to the execution of the Concession Agreement, Aucoven received a letter from Corporación Andina de Fomento (CAF), alerting it to the existence of conflicting rules and the resulting uncertainty in the following terms:

*[...] due to the uncertainty of a legal nature existing about the Republic's guarantee, it is indispensable to have absolute certainty concerning the validity of such guarantee. In this matter, CAF will only be satisfied by a pronouncement by the Supreme Court of Justice declaring in a clear and unobjectionable way, the prevailing nature of the norm set forth in Decree Law Nr. 138 that pertains to us, over that which is established in the Public Credit Law (Ven. Ex. 15).*

## 2. The legal consequences of Aucoven's knowledge of the risk

136. Venezuela argues that, knowing about the risk of illegality, Aucoven should have required a clarification before concluding the Concession Agreement. Having failed to do so, Aucoven must bear full responsibility for assuming the risk of the illegality of the guarantee and, consequently, Aucoven's claim of breach of contract is barred. Indeed, according to Venezuela's legal expert, Venezuelan law provides for a pre-contractual obligation to negotiate in good faith. Citing domestic case law, Prof. Badell referred to the following rule:

*[W]hen one party to a contract hides from the other party a significant fact that would make the contract invalid, but later raises it after the contract has been signed, such behavior constitutes bad faith which bars the first party from taking advantage of the consequence of the facts kept from the other party's knowledge (Badell Supp., ¶ 60, p. 30).*

137. Aucoven does not challenge Prof. Badell's opinion on this point. Rather, it argues in substance that such knowledge is not a "significant fact" within the meaning of

Venezuelan law, and that, as a matter of international law, Venezuela cannot rely on illegality under domestic law.

## **2.1 *The significance of the risk of illegality under Venezuelan law***

138. Aucoven seeks to downplay the risk of conflicting rules preventing the issuance of guarantees by emphasizing that CAF was not part of the Venezuelan Government and that Clause 22 was legal, so that it cannot have assumed any risk with respect to a non-existing illegality.

139. As a matter of common sense, the fact that Clause 22 turned out to be legal does not necessarily mean that no risk existed.<sup>9</sup> Similarly, the fact that CAF is not a Venezuelan governmental entity is equally irrelevant. CAF is a well-recognized financial institution in Latin America. It expressed a concern, which fell in its field of expertise, that is loans to governmental entities, and related to a country within its traditional geographical scope of activity, that is Venezuela. The risk of illegality was not as insignificant as Aucoven now seeks to demonstrate. In reality, Aucoven was well aware of the significance of the risk. This is clear from its letter of February 19, 1997 advising Venezuela of the legal concerns raised by CAF. In such letter, Aucoven insisted that it was “of the utmost importance” to clarify the legal uncertainties, because the latter “might affect the feasibility of the [Concession Agreement]” and the feasibility of the “entire National Concessions Program” (Resp. Ex. 23 at 1-2).

## **2.2 *The role of Venezuela’s representation about the legality of the guarantee***

140. Whatever the significance of the risk, the Tribunal cannot overlook the wording in the Preamble to the Concession Agreement pursuant to which the parties did “assert and guarantee that their obligations are legal, valid, binding and enforceable” (Cl. PHR, ¶ 46). Such representation obviously also applies to the obligation embodied in Clause 22. It is true that, literally, this representation is stated to be given by both parties. However, it must obviously be read to mean that each party “guaranteed” the legality of its own obligations only.

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<sup>9</sup> From this perspective, Aucoven’s argument that “no Venezuelan authority, including the Venezuelan Supreme Court, has ever opined that the conflict about which the CAF official speculated actually exists, or that it would be resolved by declaring Article 46 of Decree Law No. 138 null and void” is also irrelevant.

141. In the Tribunal's opinion, by giving such representation, Venezuela assumed the risk of illegality of the issuance of any guarantees. The Tribunal cannot see how the risk would then be shifted to Aucoven by the mere fact that the latter was aware of a potential illegality.
142. As a consequence of the determination just reached, there is no need to address Aucoven's main argument that, under international law, a state cannot excuse its non-performance of a contractual obligation by relying on an alleged illegality under the domestic law.

### **3. Conclusion**

143. On the basis of the foregoing developments, the Tribunal concludes that Venezuela breached its obligation to issue the guarantee according to Clause 22 of the Concession Agreement.

## **E. OTHER BREACHES OF THE CONCESSION AGREEMENT**

144. Aucoven claims that Venezuela committed additional breaches of the Concession Agreement, by violating (a) its obligation to maintain the Economic-Financial Equilibrium under Clauses 44-46 and Annex A (below, Section 1), (b) its obligation to compensate for additional and excess works under Clauses 25 and 46(1) (below, Section 2), (c) its obligation to exempt Aucoven from specific taxes under Clauses 27 and 28 of the Agreement (below, Section 3), (d) its obligation to pay the Minimum Guaranteed Income under Clause 23 of the Agreement (below, Section 4), (e) its obligation to approve the trust agreement under Clause 40 of the Agreement (below, Section 5), (f) its obligation to resort exclusively to arbitration under Clause 64 of the Agreement (below, Section 6), and (g) its obligation to act in good faith implied in every contract (below, Section 7). The Arbitral Tribunal will review these alleged breaches in this order.

### **1. Obligation to maintain the Economic-Financial Equilibrium**

145. According to Aucoven, Venezuela breached its obligation to maintain the Economic-Financial Equilibrium or EFE provided in Clauses 44-46 and Annex A of the Concession Agreement "by failing to compensate Aucoven for the shortfall in revenues and additional costs that were not attributable to Aucoven" (CI. PHB, ¶ 250, p. 60). Venezuela had the choice to "compensate Aucoven by raising the Highway tolls or making direct payments to Aucoven", but did neither (CI. PHB, ¶ 253, p.60).

146. Venezuela argues that “Aucoven has never actually established any ‘shortfall’ in revenues as compared to its actual costs”. Moreover, it submits that “Aucoven’s remedy, if it were in fact suffering a revenue shortfall, was to submit an updated EFP”, which it never did (Ven. PHR, p. 120).
147. Aucoven replies that Venezuela never suggested at the time that it could not restore the EFE because Aucoven had not updated the EFP. It also responds that “the Concession Agreement made the updating of the EFP the joint responsibility of both parties” (Cl. PHR, ¶¶ 57-59, pp. 15-16). In addition, Aucoven alleges that it did in fact update the EFP on one occasion in November 1998, within the context of the parties’ negotiations with the Inter-American Development Bank (Cl. PHB, ¶ 257, p. 61).
148. Clause 44 of the Concession Agreement reads as follows:

*THE MINISTRY guarantees THE CONCESSIONAIRE the Economic-Financial Equilibrium of the Concession, according to the Economic-Financial Plan, the updates thereof, and the terms and conditions for the financing negotiated with financial institutions. For the purposes of this Agreement, the Economic-Financial Equilibrium shall be understood to exist when THE CONCESSIONAIRE is able to cover its costs and obtain fair and equitable remuneration by collecting the toll rates.*

*[...]*

*In accordance with the provisions of Article 43 of the Decree having the scope and force of Organic Law Nr. 138, the Economic-Financial Equilibrium of the Concession shall be maintained at all times in order to ensure the continuity of the service to be rendered by THE CONCESSIONAIRE and the performance of the corresponding services and work.*

*THE MINISTRY shall restore the Economic-Financial Equilibrium of the Concession in a timely manner. As long as THE MINISTRY does not restore the Economic-Financial Equilibrium, THE CONCESSIONAIRE shall be prevented from fulfilling its obligations pursuant to this Concession, limiting itself to performing routine maintenance work and/or collecting tolls.*

149. Annex A to the Concession Agreement defines the parameters of the Economic-Financial Equilibrium in the following terms:

*Pursuant to Clause 44, it shall be understood that the Economic-Financial Equilibrium of the Concession exists when THE CONCESSIONAIRE is able to recover, in timely fashion, the capital contributed, the loans received, the interest on those loans, the professional fees, the investments, the actual costs and expenses incurred, the contributions and taxes that are not*

*exempted, the commissions and in general any other costs and expenses that THE CONCESSIONAIRE has incurred [...].*

150. Clause 45 further stipulates as follows:

*[...]*

*THE MINISTRY shall compensate THE CONCESSIONAIRE through the Direct Payment System and/or the Rate Increase System for any event not attributable to THE CONCESSIONAIRE that affects the Economic-Financial Equilibrium [...]*

151. Moreover, according to Clause 46:

*THE MINISTRY shall maintain the Economic-Financial Equilibrium of the Concession using the mathematical model of the Economic-Financial Plan described in Annex A hereto, by means of payments and adjustments made in the manner indicated in this Clause, whenever one of the following events [...] occurs [a list of events follows].*

152. The provisions just referred to establish the following contractual features in respect of the Economic-Financial Equilibrium:

- The Economic-Financial Equilibrium is determined in relation with the Economic-Financial Plan, the updates thereof, and the terms and conditions for the financing negotiated with financial institutions (Clause 44(1));
- The Economic-Financial Equilibrium exists when Aucoven is able to cover its costs and obtain fair and equitable remuneration by collecting the tolls (Clause 44(1));
- The Economic-Financial Equilibrium will be maintained at all times by Venezuela and, when needed, restored in a timely manner (Clause 44(3) and (4)). If the Economic-Financial Equilibrium is not restored, Aucoven is under no duty to perform its obligations, except routine maintenance and toll collection (Clause 44(4));
- If events not attributable to Aucoven affect the Economic-Financial Equilibrium, Venezuela must compensate the Claimant through the "Direct Payments System" or through the "Rate Increase System" (Clause 45). These systems are described in Annex A to the Concession Agreement;
- Venezuela will maintain the Economic-Financial Equilibrium using the mathematical model of the Economic-Financial Plan set forth in Annex A

when certain events occur (Clause 46). In such case, Aucoven must notify Venezuela of the occurrence and submit an updated Economic-Financial Plan (Clause 46, Paragraph 1).

153. In connection with the update of the Economic-Financial Plan, Clause 47 of the Concession Agreement provides an obligation of Aucoven in the following terms:

*THE CONCESSIONAIRE is obligated to update the Economic-Financial Plan whenever any of the following circumstances arises: when a circumstance or Event occurs, described in the preceding Clause, or when for any reason it is impossible to maintain the Economic-Financial Equilibrium as indicated in Clause 44 hereof. THE CONCESSIONAIRE shall submit to THE MINISTRY the updated Economic-Financial Plan, and THE MINISTRY shall reestablish said balance by means of the Rate Increase System and/or Direct Payments.*

154. Accordingly, Aucoven had the obligation to submit an updated Economic-Financial Plan whenever it was impossible to maintain the Economic-Financial Equilibrium "for any reason". This makes good sense, since the Economic-Financial Equilibrium was directly related to the Economic-Financial Plan and was supposed to exist when Aucoven was able to recover, amongst other, the capital contributed and the actual costs and expenses incurred. Yet the related data was necessarily in Aucoven's control.

155. This understanding is confirmed by Annex A to the Concession Agreement, which shows that the initiative for an update must come from Aucoven:

*THE NATIONAL EXECUTIVE, in the name of the REPUBLIC OF VENEZUELA, through THE MINISTRY, shall maintain and be required to maintain the Economic-Financial Equilibrium of the Concession at all times pursuant to Decree having the scope of Organic Law Nr. 138 [...] and pursuant to this Agreement, **by means of updating the Economic-Financial Plan at the request of THE CONCESSIONAIRE [...]**. (Emphasis added).*

156. Aucoven appears to have understood the need to update the Economic-Financial Plan to maintain the Economic-Financial Equilibrium, which is confirmed by evidence given by Mr. Martinez:

*"Q. Do you agree that Clause 44 of the contract sets forth a definition of the economic-financial equilibrium that governs the relationship between Aucoven and the Ministry during the life of this contract?"*

*A. Just one moment, please.*

*(Witness reviews document.)*

*I do understand it this way.*

*Q. And as you mentioned earlier, isn't it true that the economic-financial equilibrium is to be maintained by use of the Economic-Financial Plan and updates thereto?*

*A. That is correct (Tr. 172:6–18).*

157. Clause 46 of the Concession Agreement further shows that it was Aucoven's duty to provide updated EFPs. Venezuela had the obligation to approve the adjusted rates only *after* reception of the updated EFP. Indeed, Clause 46 provides the following:

*Paragraph One: THE CONCESSIONAIRE shall notify THE MINISTRY when one or more Events have occurred and shall submit the updated Economic-Financial Plan." (emphasis added)*

*Paragraph Two: Within fifteen (15 ) business days from each date upon which THE MINISTRY receives from THE CONCESSIONAIRE the updated Economic-Financial Plan forming the basis for applying the Rate Increase System and/or the Direct Payment required to maintain the Economic-Financial Equilibrium of the Concession, THE MINISTRY shall approve the adjusted rates and publish them in the Official Gazette of the Republic of Venezuela and/or deliver the corresponding payment order to THE CONCESSIONAIRE, as applicable.*

158. It is thus the Tribunal's view that Aucoven had the obligation to submit an updated Economic-Financial Plan in order to obtain the restoration of the EFE by Venezuela. Subject to the following paragraph, it is undisputed that Aucoven did not submit such an updated Economic-Financial Plan. It is common ground as well that Venezuela did not ask for it. Whatever the reasons for such silence, it cannot modify Aucoven's obligations.
159. Aucoven alleges that it did in fact update the Economic-Financial Plan "on one occasion in November 1998, within the context of the parties' negotiations with the Inter-American Development Bank, on the basis of the assumptions made by the parties in connection with the possible restructuring of the project by use of the VIAL III program" (see above, Section I.G; Cl. PHB, ¶ 257, p. 61). However, the record shows that this updated EFP was specifically related to the refinancing package that was being negotiated then and never entered into effect. Therefore, it could not serve as a basis for restoration of the EFE.

160. In the absence of an updated Economic-Financial Plan, the Tribunal holds that Venezuela did not breach its obligation to maintain the Economic-Financial Equilibrium by not compensating Aucoven.

## **2. Obligation to compensate Aucoven for additional and excess works**

161. Aucoven claims that Venezuela breached the Concession Agreement by failing to compensate it for additional and excess works, carried out in accordance with Clauses 25 and 46 of the Concession Agreement.

162. These works are also the subject of a claim for out-of-pocket expenses (Section IV.G.3.6). Venezuela admits this claim, save for an amount equivalent to US\$ 180,000, stating that *"now that the Ministry has received valuations in connection with the arbitration, the Republic considers that reimbursement of the authorized work would be appropriate as part of an award of out-of-pocket expenses"* (Ven. PHB, p. 51).

163. Although it now concedes that most of the amounts claimed are due, Venezuela considers that it did not breach the Concession Agreement for the reason that, in some cases, the work performed was neither contemplated by the Concession Agreement nor authorized by the Ministry, and, in other instances, Aucoven had not provided the Ministry with the appropriate documentation to permit compensation. To the extent Aucoven was not compensated for any authorized additional works through toll revenues, its contractual remedy was to submit a revised EFP, which it did not.

164. The Arbitral Tribunal finds that the Concession Agreement supports Venezuela's position. This arises out of the interplay of the following contract provisions. Clause 25 of the Concession Agreement provides:

*THE MINISTRY shall pay THE CONCESSIONAIRE for the additional costs of greater amount of work by compensating it as described in Number 1, Clause 46 hereof. [..].*

165. Number 1 of Clause 46 then reads as follows:

*THE MINISTRY shall maintain the Economic-Financial Equilibrium of the Concession using the Mathematical Model of the Economic-Financial Plan described in Annex A hereto, by means of payments and adjustments made in the manner indicated in this Clause, whenever one of the following events [..] occurs:*

1. *If there are additional costs due to larger amounts of work, as indicated in Clause 25 hereof, THE MINISTRY shall compensate THE CONCESSIONAIRE by means of Direct Payments for the equivalent of 100% of the additional costs.*<sup>10</sup>

166. Annex A to the Concession Agreement in turn defines "Direct Payments" and demonstrates that the "*Direct Payments*" are a means to maintain the Economic-Financial Equilibrium:

*'Direct Payments' shall mean the compensation mechanism according to which THE MINISTRY shall pay to THE CONCESSIONAIRE, by means of a payment order in domestic currency, the amounts required by THE CONCESSIONAIRE from THE MINISTRY, as part of THE MINISTRY'S obligation to maintain the Economic-Financial Equilibrium [...].*

167. For the reasons set forth in Section 1 above, the Tribunal is of the opinion that maintaining the Economic-Financial Equilibrium required Aucoven to submit a revised Economic-Financial Plan. Since "Direct Payments" in compensation of additional works are one of the means of maintaining the EFE, they must be deemed subject to the same prerequisite.

168. It is undisputed that Aucoven has submitted no revised Economic-Financial Plan taking the additional and excess works into account. As a consequence, Venezuela cannot be regarded as being in breach of the Concession Agreement by not paying the additional and excess works.

### **3. Obligation to exempt Aucoven from taxes**

169. Aucoven claims that Venezuela breached Clause 27 of the Concession Agreement by not taking the appropriate steps to make Aucoven exempt from paying the interest tax and by not arranging for, or making its best efforts to obtain from competent entities, an exemption from the luxury and wholesale tax. Aucoven also contends that Venezuela breached Clause 28 by not exempting from import taxes any equipment which Aucoven or its subcontractors would require to perform the Concession (Cl. PHB, ¶¶ 234-242, pp. 54-57).

170. Venezuela concedes that it did not grant the exemptions, but submits that the Concession Agreement contemplated that the exemptions might not be possible and

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<sup>10</sup> It should be noted that Clause 46 lists a number of events and determines, for each of them, whether compensation shall be made through "*Direct Payments*" or through the "*Rate Increase System*".

provided a contractual alternative for such event. The implementation of the alternative was subject to Aucoven's updating the EFP to account for its increased tax costs, which it did not. Thus, "no breach-of-contract claim can rest solely on the Republic's asserted failure to provide the tax exonerations". According to Venezuela, Aucoven must further show that it "sought to obtain compensation for its additional tax costs through an updated EFP", which "did not occur" (Ven. PHB, p. 52).

171. Clauses 27 and 28 provide as follows:

***Clause 27:*** *Once this Agreement has been executed, THE NATIONAL EXECUTIVE shall take the appropriate steps to comply with the provisions of Article 49 of the Decree having the scope and force of Organic Law No. 138, as well as with the provisions of Article 40 of Executive Decree No. 502, to make THE CONCESSIONAIRE exempt from paying one hundred percent (100%) of income tax and applicable taxes on loan principal interest, as well as those corresponding to debt instruments issued by THE CONCESSIONAIRE.*

*Likewise, in order to encourage the application of lower tolls, THE MINISTRY shall arrange for, and make its best effort to obtain from competent entities, an exemption for THE CONCESSIONAIRE from paying luxury and wholesale taxes and an exemption or waiver for THE CONCESSIONAIRE for municipal taxes. If all or part of the exemptions or waivers described in this Clause are revoked or if they expire before the term of the Concession does, **the Economic-Financial Equilibrium** of the Concession shall be re-established in accordance with the provisions of Clause 46, Number 9 hereof. THE MINISTRY shall take the actions that make it possible to include THE CONCESSIONAIRE and its operations within any existing exemption from luxury and wholesale taxes.*

***Clause 28:*** *During the term of the Concession, imports for necessary machinery, supplies, equipment and replacement parts made by THE CONCESSIONAIRE and by its contractors in accomplishing the purpose of the Concession shall be made exempt from import taxes during the Concession term. [...]. If all or part of the exemptions described herein are revoked or if they expire before the Concession term does, the Economic-Financial Equilibrium of the Concession shall be re-established in accordance with the provisions of Clause 46, Number 9 hereof.*

172. Both of these provisions refer to a situation of expiration or revocation of the exemptions, in which case the Economic-Financial Equilibrium must be reestablished in accordance with the provisions of Clause 46, Nr. 9. Such provision stipulates that, if all or parts of the exemptions or waivers granted in accordance with Clauses 27 or 28 are revoked, the Ministry shall compensate Aucoven by means of the "Rate Increase System".

173. Accordingly, the parties had envisioned that the exemptions may expire before the term of the Concession or may be revoked. They had provided for a specific remedy in such cases, i.e., compensation through the "*Rate Increase System*". They did not provide any rule for the event that an exemption would not be granted at all. The Tribunal considers that, given the similarity of the resulting situation, an analogy can be drawn between this latter event and revocation or expiration. This analogy seems particularly apposite as the remedy is a compensation of Aucoven's additional tax burden, i.e., a remedy which adequately compensates a failure to procure an exemption or a lack of best efforts expended to this end.
174. The consequence of the analogous application of Clauses 27 and 28 for our purposes is twofold: the failure to obtain the exemption or to expend related best efforts cannot be deemed a breach, whereas the failure to provide compensation through the "*Rate Increase System*" may be one.
175. Again, the Tribunal considers that the applicability of the "*Rate Increase System*" required the update of the Economic-Financial Plan. This is in particular supported by Section 2 of Annex A to the Concession Agreement:

*Once what is stated in section 1 of this Annex has been done, the appropriate system of compensation in the Mathematical Model shall be defined, applying to the Mathematical Model the variables corresponding to the toll rate, term and amount of investment, together or separately, in order to determine the applicability of the Rate Increase System or the Direct Payments.*

Section 1 of Annex A, to which the provision just quoted refers, contains the mechanism and guidelines for updating the Economic-Financial Plan.

176. Mr. Martinez, testifying on behalf of Aucoven, confirmed the Tribunal's reading, pursuant to which the implementation of Clause 46, Nr. 9 required an update of the Economic-Financial Plan:

*Q. Isn't it true that one of the events that is specified in Clause 46, which would require Aucoven to submit a new financial plan is found in paragraph nine, which states that if Aucoven does not receive a waiver from taxes, the plan shall be updated so the Ministry may compensate Aucoven?*

*(Witness reviews document.)*

*A. That is true, if the Ministry indicated and said that the intention of compensated reimbursement, but if the Ministry decides it is impossible or it does not want to or cannot increase the rates, it would be difficult to request*

*the state to compensate for a failure if it's not indicated that the intent is to reimburse me for that mechanism.*

*So, if we don't know all of the elements, sometimes it is difficult to request the state to compensate if the future consequences are unknown (Tr. 178: 15; 179:11).*

177. Since it is undisputed that Aucoven did not submit a revised EFP, the Tribunal concludes that Venezuela did not commit a breach of contract by not obtaining the exemption of taxes or by not compensating Aucoven.

#### **4. Obligation to pay the Minimum Guaranteed Income**

178. Aucoven submits that because Venezuela refused to raise the tolls, its income fell below the minimum income guaranteed in Clause 23 of the Concession Agreement. ("Minimum Guaranteed Income"). In such a case, Venezuela had the obligation to make direct payments in the amount of the difference between the actual income and the Minimum Guaranteed Income pursuant to Clause 23. Aucoven stresses that, each operating year, it requested the Ministry to pay this difference, but that the Ministry never responded (Cl. PHB, ¶¶ 220-223, p. 51).

179. Venezuela disputes that it had a contractual obligation to make the direct payments claimed by Aucoven. It submits that the purpose of the Minimum Guaranteed Income was to restore the Economic-Financial Equilibrium and, hence, that it cannot be viewed as an independent financial obligation separate and apart from the Economic-Financial Equilibrium (Ven. PHB, p. 47).

180. In this respect, General Orozco testified as follows:

*A. This letter gives an explanation, but I remember that the minimum income and the tolls should be done according to the economic-financial plan that should have been submitted and updated, and that financial plan that should accompany at all times the rates that should be imposed. There was always recalling of the rate, but it was not raised in the Economic-Financial Plan.*

*Q. So, as a result of that reasoning, you took no steps to pay the minimum guaranteed income?*

*A. No, because if there is no Economic-Financial Plan, that will tell me what were the investments made. What were the investments done at that time. The different economic variables that we should have, I don't say I can pay until I get an invoice (Tr.366:17; 367:11).*

181. Mr. Fernandez Lopez provided testimony of similar input:

*Q. So you didn't pay the minimum guaranteed income because you thought that Aucoven would have to update the Economic-Financial Plan before?*

*A. I think that, in accordance with the contract, Aucoven was in the duty to present the new plan. The new economic and financial plan (Tr. 438:14-19).*

182. In addition, Venezuela contends that, in any event, Aucoven was in no circumstances entitled to payment, as any amounts paid under the Minimum Guaranteed Income provisions would be deposited in the trust account (Ven. PHB, p. 48; Ven. PHR, pp. 118-119). It also alleges that the Minimum Guaranteed Income, which is "a fixed amount to which Aucoven was entitled based on the toll rates contemplated in the *initial* EFP" (Ven. PHR, p. 48), would necessarily have changed in response to changes in actual project costs and expenses as reflected in updates of the EFP. Since Aucoven was "relieved from the responsibility for the costs of a substantial construction project the values in the initial EFP, including the projected toll rates used to calculate the minimum guaranteed income, were no longer applicable" (Ven. PHR, p. 49).

183. Clause 23 of the Concession Agreement reads as follows:

*THE MINISTRY guarantees THE CONCESSIONAIRE that it shall receive as minimum income for tolls during each Year of Operation, an amount at least equal to the Minimum Guaranteed Income. In the event that annual income actually collected by THE CONCESSIONAIRE for tolls, related services and the benefits generated by said income is less than the Minimum Guaranteed Income, THE MINISTRY shall pay THE CONCESSIONAIRE an amount sufficient to cover said updated deficit amount. THE MINISTRY shall issue a document on the day the minutes are drawn up pursuant to Clause 15, letter f) of this document, certifying the updated deficit amount. Said amount shall be paid by THE MINISTRY to THE CONCESSIONAIRE within ten business days of March 31 of each Year of Operation, after which the amount owed shall accrue late interest on loan arrears as specified by Clause 26 of this document.*

*[...]*

*Paragraph Two: The term "Minimum Guaranteed Income" shall mean that income that THE CONCESSIONAIRE shall receive as a minimum in tolls for both directions, equal to the amount resulting from multiplying the volume of base vehicular traffic per category and direction determined by THE MINISTRY for each Year of Operation, as described in Annex A hereto, by the amount of the last rates that were in effect during the Year of Operation in question, in accordance with the provisions hereof, corresponding to each category of vehicle in each direction.*

184. According to this provision, the Minimum Guaranteed Income must be determined on the basis of two criteria:

- The volume of base vehicular traffic per category and direction determined by the Ministry for each year of operation, as described in Annex A;
- The amount of the last rates that were in effect during the year of operation.

185. On this issue, Mr. Martinez testified as follows:

*Q. Mr. Martinez, let us talk about payments under the contract. Do you agree that the Minimum Guaranteed Income essentially is the income obtained by multiplying the toll rate in effect in a particular year by the expected volume of traffic for the operating year?*

*A. That is correct, but I would like to clarify that is the volume of traffic that the Ministry included in the bid in--in the bid papers, that estimate (Tr. 183:7-17).*

186. The determination of these criteria (volume and amount) does not require an updated Economic-Financial Plan and Aucoven is right when it points out that there is nothing in Annex A requiring an update of the EFP before making the payments provided in Clause 23 (Cl. PHB, ¶¶ 224-225, pp. 51-52).

187. According to Annex A to the Concession Agreement, it is only in a specific situation that the Economic-Financial Plan needs to be updated in relation to the Minimum Guaranteed Income:

*To lessen the negative impact of the macroeconomic conditions which necessarily affect the Economic-Financial Equilibrium of the Concession, when [...] the amount collected by THE CONCESSIONAIRE in tolls during a six-months period is less than twenty five percent (25%) of the prorated portion of the Guaranteed Minimum Income for that period of six (6) months, THE CONCESSIONAIRE shall update the Economic-Financial Plan taking into account the new situation and shall submit it to THE MINISTRY for its analysis. Fifteen (15) continuous days after THE CONCESSIONAIRE submits the updated Economic-Financial Plan, there shall be an automatic temporary increase in the effective toll rates [...].*

188. This provision confirms that there is no obligation to update the Economic-Financial Plan in other circumstances in order to trigger Venezuela's obligation to pay the Minimum Guaranteed Income on the basis of Clause 23. Therefore, Venezuela had

a contractual obligation to make these payments, even though Aucoven did not submit a revised Economic-Financial Plan.

189. As a consequence, by refusing to pay Aucoven the Minimum Guaranteed Income, Venezuela breached Clause 23 of the Concession Agreement.
190. Venezuela's additional argument that the amount of the Minimum Guaranteed Income should not have been paid to Aucoven, but instead deposited in the trust account does not modify the Tribunal's conclusion, as it is not disputed that Venezuela did not make any deposit in the trust account corresponding to the Minimum Guaranteed Income either.

## **5. Obligation to approve the trust agreement**

191. Aucoven submits that Venezuela breached Clauses 6 and 40 of the Concession Agreement by failing to approve the trust agreement submitted to the Ministry, as the latter did not provide any substantive comments for almost a year. This breach deprived Aucoven of access to the toll income it earned for the first eighteen months of the Concession. In particular, Aucoven claims that Venezuela did not comply with its obligation to submit written comments within fifteen days from Aucoven's request. After it finally furnished comments, Venezuela failed to expeditiously negotiate the finalization of the trust agreement. Furthermore, since the Ministry failed to respond to Aucoven's repeated requests for approval of the trust agreement, Aucoven argues that it was entitled to construe the draft submitted on March 28, 1997 as having been approved (Cl. PHB, ¶¶ 142, p. 30 and 236-238, p. 56).
192. Venezuela disputes the Claimant's position and submits that it could not approve the trust agreement, because the provisions of the draft provided by Aucoven failed to meet entirely legitimate public interest requirements of Venezuela, including requirements expressly stated in the bidding documents. In addition, Venezuela alleges that the parties discussed the draft submitted by Aucoven during meetings between the Ministry and the Claimant (Ven. PHB, pp. 45-46; Ven PHR, pp. 121-123).
193. Clause 6(1) of the Concession Agreement provides for the parties' obligation to promptly respond to each other:

*It is imperative that the parties respond promptly to requests made of each other in connection with the matters having a direct bearing on the Economic-Financial Equilibrium or the schedule for work to be performed according to Annex C.*

And further:

*Therefore, THE MINISTRY shall respond in writing to requests that THE CONCESSIONAIRE may make within fifteen (15) business days from the date they are submitted. In the event that THE MINISTRY does not respond within the aforementioned time limit, the request shall be construed as having been approved, unless the law expressly requires a prior pronouncement.*

194. Clause 40 of the Concession Agreement, to which Aucoven further refers in support of its claim, governs the creation of the trust account. In its first paragraph, it stipulates that Aucoven must submit a draft trust agreement for Venezuela's approval.
195. It is undisputed that Aucoven submitted a draft trust agreement to Venezuela on March 28, 1997. It is also undisputed that Venezuela did not approve this trust agreement, nor respond in writing to its submission. General Orozco testified that the draft trust agreement was not approved, because its terms were not in conformity with those initially contemplated, in particular because "Aucoven wanted to be the only one to manage the trust fund, [...] whereas the Ministry had the responsibility to control those funds which were public monies [...]" (Tr. 372:14-19). The same witness further stated that the draft agreement was discussed on several occasions during meetings held between Aucoven and the Ministry:

*Q. The trust fund wasn't set up until the following year after you left the administration; correct?*

*A. That's right. It was not set up until after I left my position because it was not set up as it had been initially drafted. So, Aucoven wanted to be the only one to manage the trust fund, and so it was opposed to some of the administrative expenses, whereas the Ministry had the responsibility to control those funds which were public monies which had been collected from the fund (Tr. 372:9-20). [...]*

*And we discussed how that trust fund would allow for participation of the Ministry in order to exercise control. [...] (Tr. 373:2).*

196. A comparison between the bid documents and the draft trust agreement shows that the latter indeed differed in material terms. Specifically, the bidding documents expressly provided that "[t]he trust fund shall be operated jointly in all cases..." (Ven. Ex. 6). Hence, the Tribunal cannot follow Aucoven's contention that Venezuela breached the Concession Agreement by failing to approve a document that did not meet the parameters agreed. It remains to be seen whether Venezuela breached

the Agreement by failing to comment on the draft trust agreement, including by failing to provide a written response within fifteen days.

197. It is established that the parties had almost daily contacts at the time. This is in particular evidenced by the testimony of Mr. Perez Alfonzo, the President of Aucoven:

*Q: And as you testified in your statement, you talked nearly every day with Minister Orozco; isn't that correct?*

*A: Correct.*

*Q: And even though he was the Minister of a ministry with wide-ranging responsibilities and matters under its control, he usually took your calls, didn't he?*

*A: Correct.*

*Q: And if you could not get in touch with him on any given occasion, isn't it true that you could usually talk to his staff who were working on the Concession?*

*A: Correct (Tr. 219:12-220:4).*

198. Under these circumstances, the Tribunal finds it implausible that the parties did not discuss the draft trust agreement and that Venezuela did not raise the deficiencies of the draft. It is true that these were oral contacts only and that Clause 6(1) provides for written responses. However, it is clear from the wording of Clause 6(1) that the requirement for a written response within fifteen days merely serves the purpose of ensuring that responses are effectively given promptly. Since that purpose was indeed met here and since Aucoven could not have ignored the non-conformity of the draft, it would be excessively formalistic to find a breach on the basis of the lack of a writing as a stand-alone requirement. The Tribunal cannot discern a breach in the alleged failure to expeditiously negotiate a final trust agreement either, as it was Aucoven's duty to furnish a version in compliance with the requirements of the bidding documents. It results from the foregoing developments that Aucoven was not entitled to treat the draft trust agreement as approved pursuant to Clause 6(1) *in fine*.

199. Therefore, the Tribunal concludes that Venezuela did not breach Clause 6 and 40 of the Concession Agreement in connection with the trust agreement.

## **6. Obligation to resort exclusively to arbitration**

200. Aucoven submits that Venezuela breached the arbitration agreement embodied in Clause 64 of the Concession Agreement by initiating proceedings seeking a declaration of termination of the Concession Agreement before the Venezuelan

Supreme Court of Justice. According to the Claimant, any dispute on the validity of Aucoven's termination had to be submitted to this Tribunal (Cl. PHB, ¶¶ 258-261; Cl. PHR, ¶ 63, p. 17).

201. Venezuela disputes the Claimant's position and contends that its decision to seek a declaration of termination by the Venezuelan Supreme Court cannot represent a breach of contract, because the law expressly governing the Concession Agreement, Decree Law Nr. 138, reserves any issues related to termination of the Concession Agreement to the Venezuelan courts (Ven. PHR, p. 126; Ven. Rejoinder, pp. 52-53).
202. The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration. This has been affirmed in this Tribunal's Decision on Jurisdiction of September 27, 2001. Neither Clause 64, which refers to “[a]ny dispute, claim, controversy, disagreement and/or difference related to, derived from, or in connection with the Concession or on any manner related to the interpretation, performance, nonfulfillment, termination or resolution of the same”, nor the Tribunal’s Decision on Jurisdiction, which declares that “[t]he Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration” limit this Tribunal’s jurisdiction in any manner. Hence it can only be understood as encompassing issues of termination.
203. According to a general principle of procedure applicable in municipal court proceedings as well as in arbitration, any court or tribunal has *Kompetenz-Kompetenz*, i.e., jurisdiction to decide over its own jurisdiction. Therefore, it is not up to this Tribunal to make a determination about the Venezuelan Supreme Court's alleged jurisdiction over issues of termination of the Concession Agreement.
204. This being so, the arbitration agreement in Clause 64, on which this Tribunal’s jurisdiction is founded, is an exclusive one in the sense that it submits “all” disputes arising out of the Concession Agreement to ICSID arbitration. It even specifies that “[e]ach of the parties waives any present or future rights to initiate or maintain any lawsuit or legal proceeding with respect to any controversy until the latter has been resolved according to the aforementioned arbitration proceeding, and then only in order to enforce the award or decision rendered in said arbitration proceeding”.
205. By entering into such an exclusive arbitration agreement, both parties have accepted to refrain from proceeding before a court which is not the one jointly entrusted with the resolution of the dispute. As long as jurisdiction is challenged and

not decided upon, an argument may be made that a party has a right to proceed elsewhere. However, that argument cannot be maintained after a decision affirming jurisdiction was issued. In the present case, the proceedings before the Supreme Court were initiated after the Decision on Jurisdiction had been rendered.

206. The fact that Article 10 of Decree Law Nr. 138, which governs the Concession Agreement by virtue of the parties' choice of law, appears to reserve matters related to termination to the Venezuelan courts does not modify the position. In his supplemental opinion, Prof. Badell observed that Clause 64 of the Agreement appeared to submit the issue of termination or resolution to ICSID. He then stated that the "enforceability of such a provision is questionable under Venezuelan law" and that he had "not attempted in this respect to provide a definitive answer to this question (Badell Supp. ¶ 76 at 42-43). At the hearing, he then admitted that "the competent jurisdictional entity" to decide termination may be an arbitral tribunal if the parties had consented to arbitration (Tr. 729:11-18).<sup>11</sup>
207. Further, it is a well settled principle of international law that a state cannot rely on a provision of its domestic law to defeat its consent to arbitration (Schreuer, referred to above, Nr 95 ad Article 42 and ref.). It is further a well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement (under the second sentence of the same treaty provision) (Schreuer, referred to above, Nrs. 62-70, ad Article 42 and ref., in particular Nr. 70). As a result, Venezuela's defense based on national law is no bar to Aucoven's claim of a breach of Clause 64.
208. Thus, the Tribunal, emphasizing that it makes no determination over the jurisdiction of the Venezuelan courts, but limits itself to applying the provision of the Concession Agreement, holds that Venezuela breached Clause 64.

## **7. Obligation to act in good faith**

209. Aucoven submits that Venezuela's failure to raise the toll rates, to pay Aucoven the Minimum Guaranteed Income, to promptly issue the guarantee, to compensate

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<sup>11</sup> Prof. Badell accepted this proposition by reference to a quotation of Miguel Marienhoff, Administrative Law, appearing at paragraph 63 of his supplemental report pursuant to which a contractor to an administrative contract must petition the "competent jurisdictional entity" for a declaration of termination.

Aucoven for additional work and excess work, to cooperate in issuing permits, granting tax exemptions, obtaining financing, and establishing the trust fund, and to maintain the Economic-Financial Equilibrium constitute each by itself, and taken as a whole, a breach of Venezuela's obligation to perform the Concession Agreement in good faith. Moreover, the Claimant contends that Venezuela's challenges to the validity of the Concession Agreement further underscore the Respondent's lack of good faith (in particular, CI. PHB, ¶¶ 263-265, p. 62).

210. Venezuela disputes the Claimant's position (in particular, Ven. PHR, pp. 127-128). It stresses that Aucoven has dropped its initial allegations of "gross neglect" and "willfully hostile acts". It further alleges that there is no legal foundation to assert that a breach of contract is "by itself" a breach of good faith and that the legal proceedings brought by the Ministry were proper under Venezuelan law.
211. The Arbitral Tribunal notes that, subject to the claim in connection with the administrative challenges, all the elements cited by Aucoven as evidence of Venezuela's bad faith have been raised as breaches of the Concession Agreement. These elements have been examined above in that latter context. The Arbitral Tribunal has decided for each of these elements whether or not they constituted a breach of contract.
212. The Tribunal notes, moreover, that Aucoven claims reimbursement of expenses generated by the administrative challenges and that, to the extent that Venezuela is responsible for such challenges, it is awarded reimbursement (see Section G.3.5 below).
213. Taking these considerations into account, the Arbitral Tribunal can see no legal foundation to find a breach of good faith. In addition, the witness evidence rendered by both parties shows cooperation and genuine efforts by government officials to resolve the difficulties (see in particular the testimony of Mr. Perez Alfonzo, President of Aucoven, Tr. 219:12-220;16).

## **8. Conclusion**

214. On the basis of the elements developed above, the Tribunal holds that Venezuela has breached the obligations to pay the Minimum Guaranteed Income and to resort exclusively to arbitration under Clause 64.
215. In coming to this conclusion, the Tribunal emphasizes that it ruled on the additional breaches for the reason that Aucoven requested declaratory relief in this respect.

However, Aucoven did not raise separate damage claims based on these breaches. Therefore, having already ruled that Venezuela breached its contractual obligations to raise the tolls and deliver the guarantee, the Tribunal can dispense with determining whether the additional breaches reviewed in this section allowed Aucoven to terminate the Agreement and/or to claim damages.

## **F. DID AUCOVEN VALIDLY TERMINATE THE AGREEMENT?**

216. Aucoven asks the Tribunal to declare that it was entitled to terminate the Concession Agreement pursuant to Clause 60(2) and principles of international law on grounds of (a) Venezuela's breaches and (b) Venezuela's failure to perform conditions precedent.

217. Clause 60(2) provides the following in respect of termination by the Concessionaire:

*Without prejudice to the provisions of this document, in the event of nonfulfillment of any of the obligations undertaken in this Agreement by or through the MINISTRY... the CONCESSIONAIRE may terminate this Agreement without prejudice to exercising any other rights and actions that might correspond to it, in which case the Concession shall be terminated, ....*

### **1. Was Aucoven entitled to terminate the Agreement unilaterally?**

#### **1.1 The parties' positions**

218. Relying upon its legal expert, Aucoven asserts that Clause 60(2) of the Concession Agreement constitutes an "express resolatory clause" that must be upheld under Venezuelan law, including Decree Law Nr. 138.

219. Venezuela objects that Clause 60 does not afford Aucoven the right to exercise a self-proclaimed unilateral termination. Venezuela does not entirely dispute "Aucoven's right under Clause 60 of the Contract to terminate the Contract". Instead, it argues that "Venezuelan law and the Contract itself permit Aucoven to terminate the Contract in appropriate circumstances, but only in accordance with the terms of the Contract and Decree Law No. 138, i.e., by applying to the appropriate tribunal for an order approving such termination at Aucoven's request" (Ven. PHR, p. 139).

#### **1.2 The contractual framework**

220. From a contractual point of view, the question boils down to the following: does the terms "THE CONCESSIONAIRE may terminate this agreement" in Clause 60(2) of the Agreement mean that the Concessionaire may unilaterally terminate the

Agreement without resorting to the tribunal allegedly competent under Venezuelan administrative law?

221. The Tribunal agrees with Venezuela that this is not “stat[ed] in so many words” in Clause 60(2). However, a reasonable interpretation of this wording leads to the conclusion that the Concessionaire can unilaterally terminate the Concession Agreement. This is a classic provision in long term contracts. There is no indication on record that could lead the Tribunal to believe that the parties’ intent in drafting Clause 60 was not to provide for an ordinary resolution clause. Had the parties really intended to subject the termination of the Agreement to a ruling by a judicial body, they would have expressly referred to such requirement in Clause 60(2). Hence, the Tribunal finds that Clause 60(2) entitled Aucoven to terminate the Concession Agreement by a unilateral notice.

### **1.3 The impact of Venezuelan law**

222. In reaching the conclusion that Clause 60 allows the Concessionaire to terminate the Agreement by way of a unilateral notice, the Tribunal emphasizes that it focused on the reasonably determinable intentions of the parties. Accordingly, the Tribunal’s approach departs from Venezuela’s contention that “Clause 60 should be interpreted consistently with the position, which Dr. Badell has repeatedly stated, that unilateral termination is not permitted under Venezuelan administrative law” (Ven PHR, pp. 138-139 referring to Badell Op. ¶¶ 63-69, Badell Supp. ¶ 61-72). This does not mean that it does not consider Venezuelan law. However, it finds that the relevant question is rather whether the contractually agreed right to exercise a self-proclaimed unilateral termination is enforceable under Venezuelan law.
223. Relying on the evidence tendered by its legal expert, Venezuela alleges that “under Venezuelan law termination of an administrative contract at the request of the non-State party requires a formal application to the Supreme Tribunal of Justice of Venezuela, which considers public-interest factors in determining whether, and under what circumstances, an administrative contract may be terminated” (Ven. PHB, p. 63 referring to Badell I, ¶ 68). Venezuela’s argument is founded on the decision of the Venezuelan Supreme Court in the matter of *Acción Comercial*, which, Venezuela argues, “establishes that, unlike commercial contracts, administrative contracts may not be terminated by a private party without judicial involvement” (Ven. PHB, p. 63 referring to CSJ/SPA, 06.14.1983, *Acción Comercial*, S.A., reprinted in Ortiz-Alvarez, Luis and Mascetti, Giovanna,

Jurisprudencia de Contratos Administrativos (1980-1999) [Jurisprudence of Administrative Contracts] (Caracas, 1999), Badell Auth. 32, at 81).

224. Aucoven contends that the Venezuelan Supreme Court's decision in *Acción Comercial* does not so hold, but "simply stat[es] the remedies that are open to a contractor when the *Administration* unilaterally terminates for a cause not attributable to the contractor" (Cl. PHR, ¶ 69). In support of this contention, Aucoven submits the full quotation of the passage of the *Acción Comercial* decision referred to by Venezuela:

*[T]he administrative contract authorizes the contracting Administration to terminate it unilaterally, judging the breach of the private party that signed the contract, who in any event has open the way of the courts to obtain, in a debate before the judge with jurisdiction, the preservation of the economic equation of the contract, if the cause of the termination is not attributable to it. [...]* (Badell, Auth. 32, at 81).

225. As the legal expert of Venezuela himself admitted on cross-examination, the Tribunal finds that *Acción Comercial* does not address the question of unilateral termination by the non-State party. The Tribunal is not convinced by Venezuela's argument as to the non-enforceability of a contractually agreed unilateral termination right by the non-State party.
226. But even if one were to accept that Venezuelan law requires that the termination of an administrative contract by the non-State party be sought before Venezuelan courts, this principle is not absolute. Indeed, the Tribunal notes that Venezuela does not really contest Dr. Ortiz's testimony that unilateral termination by the non-State party is possible, in particular in case of economic strangulation.<sup>12</sup> Since it may suffer some exception, the principle invoked by Venezuela cannot be deemed an absolute one. If economic strangulation may generally represent an exception to the principle, the same must be true for a particular contractual clause providing for unilateral termination for specific important reasons.
227. In conclusion, the Tribunal holds that Clause 60 of the Agreement constitutes a unilateral resolatory clause which is not inconsistent with mandatory provisions of Venezuelan law.

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<sup>12</sup> Ven. PHR, p. 137, in which Venezuela emphasized that economic strangulation "does not exist in this case".

## 2. Were the conditions for unilateral termination met?

228. The next issue is whether the conditions for unilateral termination set forth in Clause 60 of the Agreement were fulfilled. In other words, the issue is whether Aucoven was actually entitled to exercise the termination right provided in Clause 60 of the Agreement. Clause 60 sets forth the following conditions: (a) a breach of an obligation provided in the Agreement by or through the Ministry, (b) a notification of the breach by Aucoven, and (c) the non-rectification of the breach by the Ministry within twenty business days.
229. The Tribunal has already held that Venezuela breached the Concession Agreement by failing to raise the tolls as provided in Clause 31 (Chapter IV.C above). Thus, the first condition referring to a breach is fulfilled. It remains to be seen whether the two other conditions are equally met.
230. In this respect, Aucoven's letter of June 13, 2000 to the Ministry reads as follows:

*.... On various opportunities, Aucoven notified the Ministry about the breach of certain obligations undertaken by the Republic under the Concession Agreement, in order to request voluntary performance of such obligations.*

*Accordingly, on September 18 and 19; and November 24, 1997; February 18, May 18, July 14 and October 8, 1998; January 26 and 28, March 4 and July 13, 1999; and February 14, 2000, Aucoven asked the Ministry in writing to adjust the toll rates for the Caracas-La Guaira Highway, pursuant to the agreement expressly made by the parties in Clauses 31 and 32 of the Concession Agreement. However, the Ministry has still not remedied its breach by appropriately adjusting the aforementioned toll rates.*

*Likewise, on September 19, 1997, September 14, 1998 and September 20, 1999, Aucoven informed the Ministry of the amounts corresponding to the shortfall in the updated Guaranteed Minimum Revenues (along with the applicable late interest), for the Years of Operations ended August 31, 1997 and 1998 and March 31, 1999, which the Republic had the obligation to pay to Aucoven pursuant to Clause 26 of the Concession Agreement. However, the Ministry has not paid Aucoven the aforementioned amounts.*

*Due to all of the foregoing, by means of this letter:*

*1. We inform the Ministry of Aucoven's decision to terminate the Concession Agreement, under the right granted to the parties in Clause 60 [...], we would (also) like to inform you that Aucoven is willing to continue performing in good faith the routine maintenance and toll collection activities described in the Concession Agreement, with the understanding that the execution of such activities in good faith must not in any way affect the termination of the aforementioned Concession Agreement.*

231. Venezuela does not deny that Aucoven's letters asking the Ministry to adjust the toll rates represent notices of breach within the meaning of Clause 60 of the Agreement and that the contractually agreed toll increase was not implemented within twenty business days thereafter. Thus, the Tribunal concludes that, like the first one, the last two conditions for the unilateral termination set forth in Clause 60 of the Agreement were fulfilled. Hence, Aucoven validly terminated the Agreement pursuant to Clause 60.

### **3. Was the termination a legal fiction?**

232. Venezuela's last argument in support of the invalidity of the termination is that "Aucoven's claim that it had already terminated the Contract on June 13, 2000, [...] is a legal fiction intended to improve Aucoven's legal posture for the present proceeding" (Ven. PHB, p. 61). In other words, "the facts of Aucoven's conduct simply do not square with its alleged legal argument" (Ven. PHB, p. 115). It is true that Aucoven's letter purporting to terminate the Contract on June 13, 2000 appears to have been drafted by Aucoven's arbitration counsel (Tr. 204:2-6). It is further correct that little or nothing changed in the relationship between the parties as a consequence of the termination letter. In fact, as conceded by Aucoven's technical manager, Mr. Martínez, Aucoven carried out "the same activity" after June 13, 2000 as it had prior to June 13, 2000 (Tr. 201:11; 202:7).

233. However, these facts do not modify the legal position discussed in the foregoing sections. Aucoven's termination was valid both under the Agreement and under Venezuelan law. The Tribunal is not convinced that the mere fact that the parties continued their relationship after the termination is in and of itself sufficient to invalidate the termination. In reality, it may even speak in favor of Aucoven that it did not cease performing immediately but continued to cooperate, which was certainly also in the best interest of Venezuela. The situation would be different had Venezuela established that the termination was abusive or otherwise contrary to good faith, which it did not.

### **4. Conclusion**

234. On the basis of the foregoing developments, the Tribunal concludes that Aucoven validly terminated the Agreement on June 13, 2000.

235. Aucoven's main submission is that Clause 60(2) of the Agreement explicitly entitles it to recover all its damages in the event of a valid termination by Aucoven (CI. PHR,

¶ 75). In the following sections, the Tribunal will now turn to the issues related to damages, namely (1) Aucoven's claim for out-of-pocket expenses, and (2) Aucoven's claim for lost profits, as well as (3) interest.

## **G. OUT-OF-POCKET EXPENSES**

### **1. The legal basis of the claim and the scope of the out-of-pocket expenses to which Aucoven is entitled**

236. The parties agree that Aucoven is entitled to recover its out-of-pocket expenses in accordance with Clause 60(2) of the Agreement (Cl. PHR, ¶ 269; Ven. PHB, p. 70). They construe this provision differently, however, when it comes to the scope of recoverable expenses.

237. Clause 60(2) provides, that, in the event of a termination by the Concessionaire, "the MINISTRY shall compensate and indemnify the CONCESSIONAIRE, pursuant to the same terms stipulated [...] for early repossession", namely:

- (i) *the fair value of the assets and works [...];*
- (ii) *the amounts corresponding to other assets allocated to the Concession [...];*
- (iii) *the current value of other assets related to the Concession or the fulfillment of this Agreement that are different from the Allocated Assets[...];*
- (iv) *all other updated costs and expenses pursuant to the terms of this Concession[...];*
- (v) *all losses or damages, including lost profits and damnum emergens.*

238. Aucoven alleges that "standing alone, Clause 60(2)(v), which entitles Aucoven to receive 'all losses or damages', provides an ample basis to award all of the out-of-pocket expenses that Aucoven claims" (Cl. PHB, ¶ 461, p. 118). In reliance upon Clause 60(2)(iv) of the Agreement, which entitles the Concessionaire to recover the "costs and expenses *pursuant to the terms* of this Concession including interest and investment expenses", Venezuela objects that Aucoven is entitled only to out-of-pocket costs "incurred *pursuant to the terms* of the Agreement" (Ven. PHR, p. 70, emphasis added in the brief).

239. The Tribunal concurs with Venezuela's view that under Clause 60(2)(iv), Aucoven is entitled only to out-of-pocket costs pursuant to the terms of the Agreement. However, the Tribunal finds that, from a systematic point of view, Clause 60(2)(v) is separate from Clause 60(2)(iv) and provides an independent basis for claims. This is

not an attempt “to obscure the dispositive impact of the requirement [of Clause 60(2)(iv)]” (Ven. PHR, p. 70), but rather a reading giving proper consideration to the dispositive language of Clause 60(2)(v).

240. According to the plain text of Clause 60(2)(v), it is undeniable that out-of-pocket damages are not limited to those incurred pursuant to the Agreement. Venezuela’s contention in this respect reads as follows:

*Although Clause 60(2)(v) reflects the possibility that Aucoven may claim recovery of all “losses or damages, including ...”, Aucoven has cited no authority and has not otherwise offered any legitimate argument how the provision would allow Aucoven to claim damages which are unrelated to the Concession contract [...].(Ven. PHR, p. 70)*

241. In other words, Venezuela seems to accept that Clause 60(2)(v) provides a basis for Aucoven’s out-of-pocket claim, but contends that Clause 60(2)(v) does not refer to expenses unrelated to the Agreement. In the Tribunal’s view, this allegation is difficult to square with the plain wording of Clause 60(2)(v): would the drafters of the Agreement have meant Clause 60(2)(v) to refer only to claims related to the Agreement, they would have expressly provided for such a limitation exactly as they did in Clause 60(2)(iv). Venezuela did not offer any explanation for this difference in wording between the two Sections. The only reasonable interpretation of Clause 60(2) is that under Clause 60(2)(v) the Concessionaire is entitled to recover “all losses or damages” beyond the “costs and expenses pursuant to the terms of [the Agreement]”, to which it is entitled to under Clause 60(2)(iv).

242. The Tribunal notes that Venezuela’s arguments about the scope of allowable out-of-pocket damages are all based on the assumption that only the costs allowed by the relevant administrative contract are recoverable. As a matter of fact, however, the Agreement explicitly provides that “all losses or damages” are recoverable. Venezuela relies on “Dr. Badell testimony that, under Venezuelan law, recoverable costs are limited to those costs allowed by the relevant administrative contract Badell I. ¶ 97” (Ven PHR, p. 70). Such passage merely means that out-of-pocket expenses should be confined to those allowable under the terms of the contract because “in this case, the contract generally defines allowable costs”, without reference to any provision of Venezuelan law (Badell Op. ¶ 96).

243. For all these reasons, the Tribunal concludes that, as a matter of principle, Clause 60(2)(v) provides a sufficient contractual basis for Aucoven to claim out-of-pocket expenses.

244. However this does not mean that Aucoven is entitled to recover all the amounts it claims as out-of-pocket expenses. The next issue to be addressed is whether the different elements of Aucoven's claim for out-of-pocket expenses are actually due. Before turning to the actual amounts, the Tribunal needs to address a more general issue, namely whether the financial statements offered by Aucoven represent a valid basis for the assessment of out-of-pocket disputes.

## **2. The accounting basis of Aucoven's out-of-pocket costs**

245. Aucoven uses its financial statements to calculate the out-of-pocket costs it incurred (Cl. PHR, ¶ 270). Venezuela never disputed that the financial statements as such are an appropriate basis for the calculation of out-of-pocket expenses.

246. However, Venezuela challenges the reliability of Aucoven's financial statements. This issue was debated at the hearing. Insisting on the fact that its financial statements have been audited by Deloitte & Touche and on the opinion of its financial expert (Lakshmanan II ¶¶ 47-51), Aucoven submits that all revenues and costs on the financial statements properly reflect the revenues and costs for its work on the Concession.

247. At the hearing, the Tribunal's attention was drawn to some errors in Aucoven's financial statements. It will take these errors into account when assessing the amount of out-of-pocket expenses to which Aucoven is entitled. However, it considers that such errors do not represent a sufficient reason to entirely discard Aucoven's financial statements as proper evidence.

248. It should be emphasized that Venezuela did not challenge the reliability of Aucoven's financial statement until the filing of its Rejoinder only "four weeks before the start of the hearings" (Cl. PHR, ¶ 463, fn. 25). Irrespective of the timeliness of Venezuela's argument, the Tribunal considers that the financial statements on record should not be disregarded. In fact, the very reason why financial statements are audited is to verify their reliability. Hence, in the Tribunal's view, audited financial statements benefit from a *prima facie* presumption of reliability. In the case at hand, Venezuela's criticism of the reliability of the financial statements does not provide sufficient elements to rebut that presumption. Hence, subject to rectifying the errors mentioned above, the Tribunal will rely on the financial statements on record in order to establish the amount of out-of-pocket costs owing to Aucoven.

**3. The amounts which Aucoven is entitled to recover as out-of-pocket expenses**

249. Aucoven's last claim for out-of-pocket expenses, before interest, totals Bs. 3,253,548,000<sup>13</sup> (Cl. PHR, ¶ 268 and Table 2B; Annex 4 to PHR), reduced from Bs. 3,394,266,000 (Cl. PHB p. 117). In the last claim, the amounts for pre-termination losses and assets are unchanged; the figure for post-termination assets is reduced; and the amount for post-termination losses is increased from Bs. 191,368,000 to Bs. 394,848,000. The increase is primarily due to an additional amount of approximately Bs. 234 million, which is discussed in Subsection 3.1 below and is dismissed. Under these circumstances, the Tribunal considers that Venezuela had a proper opportunity to present its defense with respect to the out-of-pocket expenses as no elements of claims put forward in Aucoven's Post-Hearing Brief are considered. It relies upon the principle that Aucoven is entitled to all of its costs under Clause 60(2)(e) of the Agreement.
250. Venezuela emphasizes the fact that this approach allows for costs regardless of their character or origin and irrespective of specific limitations arising from the terms of the Agreement, the bidding documents and Venezuelan law. If out-of-pocket costs are properly calculated, based on the categories of costs and investment allowed under the Concession Agreement, Aucoven's claim for out-of-pocket costs cannot exceed Bs. 1.3 billion in amount (Ven. Rejoinder, p. 8). In its post-hearing submissions, Venezuela further reduced such amount to Bs. 1,181,504,930<sup>14</sup> at most. In fact, if one subtracts the different amounts contested by Venezuela from the last amount claimed by Aucoven, one reaches an amount of Bs. 806,653,930 in out-of-pocket costs which Venezuela is ready to pay.<sup>15</sup>

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<sup>13</sup> This claim comprises the following main elements: (a) Pre-termination Losses Incurred [through 31.3.2000] for Bs. 118,722,000; (b) Pre-termination Assets Contributed [through 31.5.2000] for Bs. 2,398,561,000; (c) Post-termination Losses Incurred [from 1.4.2000 to 31.8.2002] for Bs. 394,848,000; (d) Post-termination Assets Contributed [from 1.6.2000 to 31.8.2002] for Bs. 341,417,000.

<sup>14</sup> This amount "does not include Aucoven's claim for an additional Bs. 234.1 million" (Ven PHB, p. 105, Fn 80). It is based on Aucoven's final claim figure. This explains the difference with the amount calculated by the Tribunal.

<sup>15</sup> This amount is obtained subtracting from Bs. 3,253,548,000 (Aucoven's last claim), the following amounts: Bs. 384,493,000 [which Venezuela lists as 384,100,000] (alleged errors), Bs. 290,000,000 (contested negotiation costs), Bs. 510,000,000 (contested SECONSA loan), Bs. 235,800,000 (contested legal fees), Bs. 258,841,070 (contested studies), Bs. 150,000,000 (contested administration costs) [as Venezuela did in its calculations leading to its accepted amount], Bs. 234,160,000 [which Venezuela lists as Bs. 234.1 million] (additional costs discussed in Section IV.G.3.1), and Bs. 383,000,000 (interest costs).

251. In this Section, the Tribunal will examine the amounts disputed by Venezuela and will decide for each one whether it is due or not. If it is due, it will be added to the total conceded by Venezuela.

### **3.1 *Out-of-pocket expenses not based on Aucoven's financial statements***

252. Venezuela claims that for some elements of the out-of-pocket expenses claims, Aucoven does not provide any supporting documents, *i.e.*, no financial statements nor any other proof that Aucoven actually incurred these costs. Accordingly, the following amounts should be deducted from the total amount claimed by Aucoven:

- Bs. 197,400,000 in out-of-pocket resulting from a loss update for the operating years through to August 31, 2002; and
- Bs. 36,800,000 [*recte*: Bs. 36,760,000] alleged net assets contributed as of August 31, 2002.

253. As to the first disputed amount, (*i.e.*, Bs. 197,400,000), the Tribunal notes that Appendix 6 to Cl. PHB clearly shows that this amount offsets another category of out-of-pocket damages, namely “post resolution assets contribution” (Appendix 6 to Cl. PHB, note 3). Hence, despite the legitimate concerns of Venezuela as to the lack of supporting information in this respect, the update at hand is not relevant for the determination of the total amount of out-of-pocket.

254. By way of contrast, the “net asset contributed as of August 31, 2002, resulting in an increase of damage of [Bs.] 36,760[,000]” is an actual increase of Aucoven’s out-of-pocket claim (Appendix 6 to Cl. PHB, note 4). As such, it is up to Aucoven to establish the existence and the amount of the increased claim. The Tribunal cannot simply derive the existence of the claim from Appendix 6 to Claimant’s Post-Hearing Brief. Considering that Aucoven did not explain this increase in such brief, the Tribunal concludes that Aucoven did not satisfy the burden of proving the damage it incurred. Hence, Venezuela’s objection to Aucoven’s latest increase of Bs. 36,760,000 in the net assets contributed as of August 31, 2002 is well-founded.

255. Accordingly, Bs. 197,400,000 shall be added to the amount that Venezuela has agreed constitutes legitimate out-of-pocket costs.

### **3.2 Error rectifications**

256. Venezuela also claims that the total amount of the out-of-pocket expenses to which Aucoven is entitled must be reduced to take into account some errors in Aucoven's expert analysis, specifically:

- an error of Bs. 363,374,000 in Aucoven's favor by using a September 2001 CPI index to convert May 2002 figures to 1995 bolivars (Tr. 808:18; 809:11 (Lakshmanan)); and
- a CPI conversion mistake of Bs. 21,119,000 in Aucoven's favor using the average of CPI rates rather than the year-end CPI index (Tr. 1237:17; 1238:21 (Lakshmanan)).

257. Aucoven replies that both errors have been adjusted and are already reflected in Aucoven's last out-of-pocket claim of Bs. 3,253,548,000 resulting from revised Exhibit 3 (Cl. PHB, ¶¶ 463, note 25, ¶¶ 501, note 26; Lakshmanan rev. Ex. 3, notes 1, 3, 4), which was presented at the hearing (Tr. 807:3; 809:11), and which is attached as Appendix 6 to Aucoven's Post-Hearing Brief. This view is confirmed by an analysis of Appendix 6:

- As to the first conversion error, note 4 clearly states that the reported amounts included a correction "for the error of using the September 2001 CPI instead of the May 2002 CPI... [that] resulted in a decrease of damages of 363.374[,000] bolivars".
- With regard to the second conversion error, note 1 states that the reported amount has been calculated "using the Year End CPI Index... [which] decreased the net loss through March 31, 2000 by 9,665[,000] bolivars". Similarly, note 3 indicates that the calculations leading to the reported amount "use[d] the Year End CPI Index, which resulted in a decrease of damage of 11,454[,000] bolivars". This means that Aucoven reduced its out-of-pocket claim by Bs 21,119,000 to take into account the average CPI rates rather than the year-end CPI index.

258. To summarize, Aucoven reduced its out-of-pocket claim by Bs. 384,493,000 (i.e., Bs. 363,374,000 + Bs. 21,119,000), which represents exactly<sup>16</sup> the amount disputed by Venezuela. Hence, the Tribunal will deny Venezuela's request to decrease Aucoven's claim for out-of-pocket costs for errors in inflation-adjustments and, accordingly, add Bs. 384,493,000 to the amount which Venezuela has admitted.

### **3.3 Bidding and negotiation costs**

259. Venezuela further contends that Aucoven's claim for Bs. 290 million (US\$ 1.7 million)<sup>17</sup> for bidding and negotiation costs, should be rejected because this category of costs is not recoverable. In support of this contention, Venezuela argues that "the Contract, the Bidding Documents and Venezuelan law all preclude the recovery of bidding *and* negotiation costs". While Aucoven seems to agree that bidding costs are not recoverable, it maintains that negotiation costs are recoverable.

260. With regard to bidding costs, Aucoven's position is that its out-of-pocket claim does not include bidding costs. However, as Venezuela correctly points out, Aucoven's first statement of its claim for out-of-pocket costs expressly mentioned "bidding costs" as an element of Aucoven's claim for out-of-pocket costs (cf. Lakshmanan Rep. Appendix 7, note 4, Appendix 11 note 3). Aucoven replies that its financial statements do not reflect bidding costs. In its Reply, Aucoven provides a breakdown of its administrative costs, which does not list bidding costs (Cl. Reply, ¶ 204 referring to Cl. Ex. 173). In its Rejoinder, Venezuela recognizes that "there are no line items in Aucoven's administrative costs called bidding costs", but points out that "there are some cost categories, such as "professional fees" and "other" that are so vague that they could include bidding costs". (Ven. Rejoinder, p. 95, referring to Stulz/Simmons II, ¶ 65). At the hearing, Aucoven's financial expert acknowledged that he "was advised that bidding costs would not be - should not be [...] part of the costs" ((Lakshmanan) Tr. 1047:17-18). In its first post-hearing submission, Aucoven further emphasized that at the time of the bid Aucoven had not yet been founded and the bidding costs were actually borne by ICA (Cl. PHB, ¶ 470).

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<sup>16</sup> In its submissions, Venezuela requests a "Bs. 384.1 million decrease in reduction of Aucoven's out-of-pocket claim in Aucoven's claim for out-of-pocket costs" based on a first conversion error approximated at "Bs. 363 million" (Ven. PHB, p. 105).

<sup>17</sup> This figure represents Aucoven's claimed pre-contract costs not associated with the Seconsa loan. In assessing this amount, Venezuela emphasizes that "Aucoven has admitted that it includes negotiation costs without attempting to segregate negotiation costs from other costs that may be included in this category" (Ven. PHB, p. 107, note 86).

261. On the basis of these elements, the Tribunal is not convinced that Aucoven's financial statements, and consequently its claim for out-of-pocket costs, include unrecoverable bidding costs. The Arbitral Tribunal finally notes that in its last submission Venezuela abandoned its contention related to bidding costs and insisted on negotiation costs.
262. As to the negotiation costs, the parties disagree on their recoverability. Venezuela contends that, like bidding costs, negotiation costs are not recoverable pursuant to the Agreement, the Bidding Documents and Venezuelan law (Ven. PHR, p. 75). Aucoven's position is "that negotiating expenses, like any other precontract expenses, are recoverable under Clause 60(2)(i), (iv) and (v) of the Concession Agreement" (Cl. PHR, ¶ 285) and that "Venezuela does not explain on what legal basis negotiation costs should be excluded" (Cl. PHM, ¶ 469).
263. The Tribunal has already found that Clause 60(2)(v), according to which the Concessionaire is entitled to recover "all losses and damages" is a proper basis for Aucoven's claim for out-of-pocket costs (see Section 2 above). It is not seriously disputable that the plain wording of Clause 60(2)(v) allows Aucoven to claim negotiation costs. Moreover, the unchallenged testimony of Dr. Badell mentioned by Venezuela in this respect was limited, insofar as Venezuelan law is concerned, to the recoverability of *bidding* costs (Ven PHR, p. 75). Accordingly, the Tribunal can only conclude that nothing on record establishes that negotiation costs are not recoverable under Venezuelan law when a contract provision clearly allows recovery of "all losses and damages".
264. To summarize, negotiation costs should be included in Aucoven's claim for out-of-pocket costs. Since Aucoven's claim for out-of-pocket costs does not reflect bidding costs, the Tribunal will deny Venezuela's request to decrease Aucoven's claim for out-of-pocket costs by Bs. 290 million. Accordingly, Bs. 290 million shall be added to the amount that Venezuela has admitted as out-of-pocket costs.

### **3.4 The Seconsa loan**

265. Venezuela's further contention as to the amount of out-of-pocket costs relates to Aucoven's claim for Bs. 510 million (US\$ 3.0 million) in alleged "losses" on a US\$ 3.6 million loan Aucoven made to an affiliate, Seconsa. This contention is made notwithstanding Aucoven's admission that it charged absolutely no interest to Seconsa for the time during which Seconsa had full use of the entire US\$ 3.6 million amount.

266. Aucoven's defense is that exchange gains fully offset the Seconsa inflation "losses". This argument lost its credibility when Mr. Lakshmanan admitted on cross-examination that neither the financial statements of Aucoven nor his own workpapers supported the position that an offset occurred and that he himself had never seen any documents supporting such an argument (Tr. 1287:14; 1288:8; 1290:15-1295:17).
267. The issue thus hinges on burden of proof. Relying upon Mr. Lakshmanan's admission at the hearing, Venezuela contends that Aucoven has provided no evidence to support its Seconsa loss claim. By contrast, Aucoven asserts that it has made a *prima facie* case by submitting its financial statements, and that, therefore, the burden of proof shifts to Venezuela, which must rebut the evidence presented by the Claimant or face the prospect of this issue being decided against it (Cl. PHR, ¶ 290 referring to R. von Mehren, *Burden of Proof in International Arbitration*, ICCA Congress Series Nr. 7 (1994), 123, Cl. Auth. 67, at 124, *Asian Agricultural Products Ltd. v. Sri Lanka*, supra, at 272, ¶ 56).
268. The Tribunal finds that Venezuela has cast sufficient doubts to rebut the *prima facie* evidence presented by Aucoven in respect of the losses allegedly incurred in relation with the Seconsa loan. In particular, the following circumstances should be borne in mind:
- First, Aucoven's financial expert admitted that he relied exclusively upon Aucoven's characterization of the transaction without disposing of any underlying materials confirming that position.
  - Second, Aucoven repeatedly changed its version about the real nature of the transaction with Seconsa. The financial statements describe the transaction as a "loan to an affiliate". Mr. Lakshmanan acknowledged that this was an error of labeling and that the transaction was in fact "an advance, or prepaid asset, not a loan". The last characterization as a "security deposit" was contradicted by Aucoven's position at the hearing.
  - Finally, and most importantly, although these inconsistencies were addressed in the report of Venezuela's financial experts (Stulz/Simmons II, p. 40), Aucoven did not cross-examine Dr. Simmons.
269. In conclusion, the Tribunal is not convinced by Aucoven's attempt to establish a loss in connection with the Seconsa transaction. Accordingly, Venezuela's request to

deduct Bs. 510 million from Aucoven's claim for out-of-pocket losses, specifically from the "pre-termination" assets contribution<sup>18</sup> shall be accepted. Hence, no amount will be added on this account to those admitted by Venezuela.

### **3.5 Legal fees in actions not related to this arbitration**

270. It is undisputed that Aucoven was compelled to defend against legal and administrative challenges brought against the award of the Concession and the Concession Agreement. Venezuela contends that the Tribunal should delete Bs. 235.8 million (US\$ 1.4 million), which Aucoven claims in connection with the costs of these legal proceedings.
271. Relying on Dr. Badell's opinion, Venezuela claims that legal costs are not allowable in the absence of an explicit contractual provision (Ven. PHM, p. 111; Badell I, ¶ 98). Stressing that Dr. Badell did not identify any authority to support this allegation, Aucoven submits that there is no such rule under Venezuelan law (CI. PHR, ¶ 300).
272. In the Tribunal's view, Clause 60(2) of the Agreement represents a sufficient contractual provision to allow legal costs. However, as acknowledged by Aucoven itself, to be recoverable, these costs must be "the direct and foreseeable result of Venezuela's failure to perform in good faith the Concession Agreement" (CI. PHB, ¶ 487). Aucoven submits that this is the case "given the Ministry's own role in these challenges". While Aucoven submits that these proceedings were initiated by Venezuelan officials, including the Ministry itself, Venezuela emphasizes that the major legal proceedings in which Aucoven was involved related to challenges brought by competing private bidders, which challenges were eventually denied by the Ministry. As to the inquiry made by members of the Venezuelan National Assembly, Venezuela submits that the Ministry actively defended against the congressional challenge to the Agreement at its own expense.
273. The Tribunal observes that Article 136 of the Constitution of the Bolivarian Republic of Venezuela provides that the legislative power is part of the "national public

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<sup>18</sup> Venezuela seems to assume that the so-called "Seconsa costs" are part of the "pre-termination losses incurred" part of Aucoven's claim (Ven. PHB, p. 119). However, in Aucoven's calculations, "Net Interest and Financing Costs" are part of the "pre-termination assets contributed" part of the claim (See, Revised Exhibit 7 to Lakshmanan II). For that reason, the Tribunal does not need to address the issue whether the "interest" that accrues on operating profits during some periods offsets any "interest" that accrues on operating losses during other periods (Ven. PHB, p. 119). In any event, Venezuela did establish its right to such an offset.

authority” and that the different branches of the authority are bound to cooperate to achieve the goals of the state.<sup>19</sup>

274. As a result, Venezuela is responsible for the conduct of the members of the National Assembly. Its objection against Aucoven’s claim for reimbursement of expenses incurred to resist parliamentary challenge must thus be dismissed.
275. The position is different for legal costs incurred by Aucoven when defending against the challenges brought by private competing bidders cannot be imposed on Venezuela. A legal challenge by unsuccessful competing bidders is a commercial risk that is inherent to the bidding process in a democratic country providing for legal supervision of the adjudication process. Moreover, imposing Aucoven’s costs for the proceedings initiated by competing bidders on Venezuela would be particularly inappropriate since these challenges were denied by the Ministry.
276. The Tribunal notes that Aucoven did not segregate legal fees incurred in connection with challenges brought by competing bidders from those incurred in connection with parliamentary challenge. Nor do the legal bills produced into the record (as Appendix 12 to Mr. Martinez’s Supplemental Declaration) distinguish between these two categories of costs. Taking into account Venezuela’s allegation that “the major legal proceedings in which Aucoven was involved related [not only] to challenges brought by competing bidders, [but also] to an inquiry made by members of the Venezuelan National Assembly” and using its discretion regarding the probative value of evidence provided in ICSID Arbitration Rule 34.1, the Tribunal will assume that half of the legal costs claimed by Aucoven were incurred in connection with challenges brought by competing bidders. These costs being unrecoverable, the Tribunal holds that one half of Bs. 235.8 million (i.e., Bs. 117.9 million) should be deleted from Aucoven’s total out-of-pocket cost claim.
277. Accordingly, Bs. 117.9 million shall be added to the amount that Venezuela has agreed constitutes legitimate out-of-pocket costs.

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<sup>19</sup> “The Public Authority is distributed among the Municipal Authority, the State Authority and the National Authority. The National Public Authority is divided into Legislative, Executive, Judicial, Citizen and Electoral Public branches. Each branch of the Public Authority has its own sources, but the agencies in charge of exercising it shall collaborate with each other to achieve the goals of the State” (Badell Supp. Authorities Nr. 27).

### **3.6 Studies and additional works**

278. Venezuela's next contention as to the amount of out-of-pocket costs concerns Aucoven's claim for Bs. 258,841,070 (US\$ 1.5 million) for soil studies and "additional" works. The costs for additional works, which are described in Appendix B to the Fernandez Declaration, amount to Bs. 30,599,970 (approximately US\$ 180,000). The amount of the costs for studies is Bs. 228,241,100 (US\$ 1.32 million).
279. In connection with soil studies, Venezuela asserts that the Agreement "provides reimbursement only for completed studies" (Ven. Rejoinder, pp. 99, 104). Relying upon Aucoven's admission that no more than 80% of certain soil studies had been completed (Resp. Ex. 102), Venezuela contends that Aucoven is not entitled to any compensation for the costs incurred in preparing the studies.
280. Aucoven replies that it is entitled to be compensated in accordance with Clause 60(2) of the Agreement. Aucoven prepared the studies pursuant to the Concession Agreement and the terms of the Highway Improvement Agreement. The studies were "incomplete" only in the sense that the Ministry refused, with no apparent reason, to approve them (Rejoinder 99; Martínez II, ¶¶ 13-15; Ven. Ex. 102, at 5; Cl. PHM, ¶ 146). Without this failure by Venezuela, Aucoven would have completed the studies and received payment.
281. The Tribunal notes that Venezuela does not challenge that the studies were prepared in accordance with the Agreement. Specifically, Aucoven prepared the design criteria for the Bridge (Cl. Ex. 38, 59, 68), studies on the structural design of the Bridge (Cl. Ex. 75), plans for the Bridge (Cl. Ex. 99), mechanical soil studies (Cl. Ex. 41, 85, 92), studies on the design for the breaking ramps (Cl. Ex. 67) and Environmental Impact Studies (Cl. Ex. 51). Now that the Agreement is terminated, the costs incurred by Aucoven for these studies are losses that Aucoven suffered. Accordingly, Aucoven is entitled to the reimbursement of its costs for soil studies irrespective of the current value that such studies may have for Venezuela.
282. As to the costs for "additional excess works", the parties disagree on whether those works were additional works recoverable under Clauses 25 and 46(1) of the Agreement, as asserted by Aucoven, or whether they were merely "regular works", as asserted by Venezuela.
283. Venezuela argues that they were duplicative of other valuations submitted by Aucoven. Aucoven submitted a claim for "Waste Collection and Disposal" in each of

its monthly valuations for work performed and now claims duplicative payment for “Trash Collection” and “Cleanup of Trash and Weeds Collection,” concerning these same periods.

284. Aucoven replies that Mr. Martinez’s testimony establishes that the works were not duplicative (CI. PHR, ¶ 298 referring to Martinez II, ¶ 39):

*The work in question involved: (i) the collection and transportation of trash throughout the Highway; and (ii) washing canals and islands in the tollbooth zone. None of these works performed by Aucoven were required under the Concession Agreement.*

285. Since Venezuela does not contest that costs for additional works are recoverable, and does not provide evidence to rebut Mr. Martinez’s evidence, the Tribunal holds that Aucoven is entitled to recover the costs it incurred in connection with the disputed additional works.

286. Accordingly, Bs. 258,841,070 which Aucoven claims for soil studies and additional works shall be added to the amount that Venezuela has agreed constitutes legitimate out-of-pocket costs.

### **3.7 Interest costs**

287. Venezuela further contests three items of “interest” expense asserted by Aucoven as part of its claim for out-of-pocket costs for a total of Bs. 383.6 million (US\$ 2.3 million). Specifically, Venezuela opposes the payment of (1) Bs. 17.6 million (US\$ 104,000) in interest incurred for a loan involving an affiliate; (2) Bs. 36.8 million (US\$ 220,000) in “interest” based on an error in inflation calculation; and (3) Bs. 329.2 million (US\$ 1.9 million) in interest incurred for other loans.

288. As to the first item of “interest” expense, the parties seem to agree that it “should not have been included in [the] calculation” (Ven PHR, p. citing Mr. Lakshmanan’s evidence at Lakshmanan Supp., ¶ 61). Aucoven contends that “[a]lthough there was an interest charge recorded on Aucoven’s books because Aucoven was late on a payment to the affiliate, ultimately the affiliate returned the interest charge in a later period” and that, as a result, “there was no effect on Aucoven’s financial position”. (CI. PHR, ¶ 309; CI PHB, ¶ 495). Accordingly, Aucoven specifies that it “is not claiming against Venezuela for this interest” (*ibid.*). However, as correctly pointed out by Venezuela, the corresponding deletion of Bs. 17.6 million from Aucoven’s “investment assets” section of its out-of-pocket claim has been compensated by the

addition of the very same amount in the “pre-termination operating losses” section (Ven PHR, p. 83, note 79 referring to Appendix 6 to Cl. PHB, note 3 and note 4).

289. Since the Bs. 17.6 million (US\$ 104,000) in alleged interest are not due but still included in Aucoven’s calculations, they will be deducted from Aucoven’s claim for out-of-pocket damages. As with the Seconsa loan, this conclusion is also dictated by the contradictions in Aucoven’s position as to the exact nature of the disputed loan. It suffices to mention that the latest report by Aucoven’s financial expert – which is the basis on which Aucoven relies to assert its damage – states: (a) that the transaction was a “loan to an affiliate” (Lakshmanan Supp. ¶ 61); (b) that the cost it recorded had been reversed in a “previous year” (Lakshmanan Supp. ¶ 61); and (c) that the interest expense was offset by a “gain due to inflation” (Lakshmanan Supp. ¶ 61).
290. The second item of “interest” expense disputed by Venezuela refers to an “error” of calculation of the inflation identified by Venezuela, which results in an alleged overcharge of Bs. 36.8 million (US\$ 216,000). The “error” resulted from Mr. Lakshmanan’s use of a yearly Venezuelan CPI instead of the more precise monthly CPI. Relying upon Mr. Lakshmanan’s explanations at the hearing, Aucoven contends that “using this proration was not unreasonable, because any resulting over- or understatement of damages would get washed out by converting the amounts into 1995 bolivars” (Cl. PHB, ¶ 494 referring to Tr. 1239:4; 1242:12 (Lakshmanan)).
291. In the Tribunal’s view, the fact that a calculation is not unreasonable does not mean that it is acceptable. If a more precise calculation is possible, the Tribunal must rely on this more precise calculation. In the present case, Aucoven does not really dispute that the calculation methodology proposed by Venezuela is more precise. Admittedly, Aucoven contends that the difference between the two approaches is eliminated when the amounts are converted into 1995 bolivars. However, the Bs. 36.8 million amount is “already stated in 1995 bolivars and therefore cannot be ‘washed out’ by converting the amounts into 1995 bolivars as Aucoven claimed” (Ven. PHR, p. 84 referring to Stulz/Simmons Supp. ¶ 70). Accordingly, the Tribunal is unable to consider that the difference between the amount calculated according to an annual CPI rate and the one calculated according to the monthly TPI rate is eliminated.

292. Considering that Aucoven does not deny that the difference in the calculation methodology results in a difference of Bs. 36.8 million, the Tribunal finds that this amount must be deducted from Aucoven's out-of-pocket claim.<sup>20</sup> In coming to that conclusion, the Tribunal emphasizes that this is not, as Aucoven seems to suggest, "because in this one instance [the chosen] particular methodology favors Venezuela", but because this methodology more accurately reflects the costs incurred.
293. The third item of "interest" expense contested by Venezuela is related to interest Aucoven incurred on short term loans through September 1998 for an amount of Bs. 329.2 million (US\$ 1.9 million).
294. It is undisputed that Aucoven underwent a serious liquidity crisis that could only be remedied through financing from short term loans. The parties disagree on the reasons that made these loans necessary. While Aucoven contends that the liquidity crisis were the "direct result of Venezuela's failure to comply with its obligations to increase the tolls, to pay the Minimum Guaranteed Income, to issue a guarantee to ING Bank, to promptly establish a trust and to maintain the Economic-Financial Equilibrium" (Cl. PHR, ¶ 307), Venezuela asserts that any shortage of liquidity "was attributable wholly to the actions or inactions of ICA and Aucoven, and not to any actions required to be taken by the Republic under the Contract" (Ven PHR, p. 85). In support of this contention, Venezuela invokes two arguments:
- first, Aucoven failed to provide an adequate trust agreement consistent with the bidding documents (Ven. PHB, pp. 45-46), and
  - second, ICA – Aucoven's main shareholder – failed to infuse Bs. 3.9 billion (US\$ 22.9 million) for shares of Aucoven that it had already "purchased" but not paid for (Ven. PHR, p. 85 referring to Ven. Mem. pp 47 and 78).
295. The Tribunal observes that Aucoven has not disputed the fact that its main shareholder did not pay for the shares it acquired. As a result, it is not established that the need for loans triggering the payment of interest in the amount of the

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<sup>20</sup> Specifically from the "assets contributed". Taking into account the approximate 1/2 ratio between pre-termination "Net Interest and Financing Costs" (Bs. 331 million (i.e., Bs. 660 million, see Lakshmanan I, Exhibit 7 after deduction of Bs. 329 million for unrecoverable short term loans) and post-termination "Net Interest and Financing Costs" (Bs. 188 million, see Lakshmanan I Exhibit 11), the Tribunal finds that Bs. 18.4 million should be deleted from pre-termination assets contributed and Bs. 18.4 from post-termination assets contributed.

interest challenged here was caused by Venezuela's breaches.<sup>21</sup> Hence, this amount should therefore be deducted from Aucoven's claim for out-of-pocket costs, specifically from the "pre-termination" losses.

296. To sum up, all three items of "interest" expense contested by Venezuela totaling Bs. 383.6 million (US\$ 2.3 million) should be deducted from Aucoven's claim for out-of-pocket costs.

### **3.8 Administrative costs**

297. Aucoven claims administrative costs in a total amount of Bs. 1.5 billion (US\$ 8.8 million) (Lakshmanan Supp. Exs. 5, 7, 10, 11).

298. Venezuela objects that these administrative costs are approximately twice as much as they should have been taking the EFP administrative cost projection into account, and at least five times as much as they should have been considering the scaled-back nature of Aucoven's responsibilities (Ven. PHB, p. 114, referring to Ven. Mem. at 98-99).

299. Aucoven does not contest the magnitude of the increase in its administrative costs. It rather contends that it was caused by Venezuela's failure to comply with its obligations under the Concession Agreement. Specifically, Aucoven refers to the following activities undertaken as a result of Venezuela's breaches of the Agreement: "(i) run an administrative gauntlet, and expend substantial resources merely attempting to persuade Venezuela to comply with its contractual obligations; (ii) negotiate with private banks to obtain short-term loans in order to keep the project afloat despite Venezuela's failure to raise the tolls, approve the trust, or pay the Minimum Guaranteed Income; (iii) negotiate with the Inter-American Development Bank; (iv) assist its lawyers in the preparation of submissions in multiple administrative and legal proceedings initiated by Venezuela against Aucoven; and (v) pay the VAT".

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<sup>21</sup> As to the interest on short term loans, Aucoven refers to its Exhibits 106 to 109, which show interest payments much higher than the amounts contested by Venezuela (Bs. 329.2 million). For instance, Claimant's Exhibit 106 shows that, between July 30, 1997 and September 27, 1998, Aucoven paid Bs. 788,108,750 to Banco Provincial as interest on a credit of Bs. 1.950 million (at a rate ranging from 20% to 70 %). The Tribunal notes that the amount of the principal of this (single) loan is lower than the amount which ICA had to infuse for Aucoven's shares, and that the amount of the interest paid on this (single) short term loan is higher than the amount contested by Venezuela.

- 300. Venezuela contends that Aucoven did not “carry its burden of proof on this issue” and concludes that “the Tribunal would be entirely justified in disqualifying this item of costs in its entirety. Short of that, the Tribunal should delete at least 10% (Bs. 150 million (US\$ 882,000)) from Aucoven’s claimed total amount of alleged administrative costs” (Ven PHB, p.114).
- 301. The Tribunal is satisfied that Aucoven incurred additional costs as a result of the contractual breaches by Venezuela referred to above. However, it is true that the increase alleged by Aucoven is very substantial. Moreover, Ex. 5, 7, 10, 11 to Mr. Lakshmanan Supplemental Report do not allow the Tribunal to draw definitive conclusions as to the appropriateness of such amounts.
- 302. Under these conditions, the Tribunal finds that it is appropriate to reduce the total amount claimed by Aucoven. Using its discretion under ICSID Arbitration Rule 34.1, it is satisfied that the 10% reduction proposed by Venezuela as a secondary relief, leads to a fair and adequate compensation.
- 303. In conclusion, the Tribunal holds that Aucoven is entitled to recover Bs. 1.35 billion (1.5 billion – 10%). Hence, Bs. 150,000,000 shall reduce Aucoven’s claim for out-of-pocket costs, specifically the “post-termination” assets contribution.<sup>22</sup>

**4. Conclusion**

- 304. On the basis of the foregoing developments, the Tribunal concludes that Aucoven is entitled to recover the amount of out-of-pocket expenses accepted by Venezuela increased by the amounts challenged by Venezuela but accepted by the Tribunal.
- 305. The out-of-pocket expenses to which Aucoven is entitled may be summarized as follows:

Bs.	Recoverable out-of-pocket costs
806,653,930	Out-of-pocket costs accepted by Venezuela (see <i>supra</i> N° 250)

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<sup>22</sup> See L Exhibit 11 which includes “administrative cost” in the “assets contributed”.

197,400,000	Offset loss update (see <i>supra</i> N° 257)
384,493,000	Alleged errors not established by Venezuela (see <i>supra</i> N° 260)
290,000,000	Recoverable negotiations costs (see <i>supra</i> N° 266)
117,900,000	Recoverable legal costs (see <i>supra</i> N° 279)
258,841,070	Recoverable costs for soil studies and “additional” works (see <i>supra</i> N° 288)
<b>2,055,288,000</b>	<b>Total amount due to Aucoven for out-of-pocket costs</b>

306. With regard to the different elements of Aucoven's claim for out-of-pocket expenses, this total amount is broken down into the following four components:

118,722,000	Pre-termination Losses Incurred [through 31.3.2000]
1,387,061,000	Pre-termination Assets Contributed [through 31.5.2000]
394,848,000	Post-termination Losses Incurred [from 1.4.2000 to 31.8.2002]
154,657,000	Post-termination Assets Contributed [from 1.6.2000 to 31.8.2002]
<b>2,055,288,000</b>	<b>Total</b>

## H. LOST PROFITS

### 1. Introductory comments

307. Citing a significant number of international decisions, Aucoven bases its lost profits analysis on the general principle that the claimant must be made whole, i.e., must be awarded damages such as to place it in the position it would be in had the contract been performed in accordance with its terms (Cl. PHR, ¶ 78).

308. Venezuela does not dispute, the principle of a right to recover lost profits in case of breach. However, it disputes Aucoven's entitlement to lost profits on the following main bases:

- First, Venezuela contends that “Aucoven’s own breaches of the contract constitute an independent bar to Aucoven’s lost profits claim”.
- Second, Venezuela contends that, even if Aucoven could claim lost profits as a matter of law, such claim should nevertheless be dismissed on the basis of the facts of the case, since Aucoven did not establish that it suffered a loss of future profits.

309. In the following Sections, the Arbitral Tribunal will review whether Aucoven is barred from claiming lost profits (Section 2), what the pertinent standards for an award of lost profits are (Section 3), and whether Aucoven has met these standards (Section 4).

## **2. Is Aucoven barred from claiming lost profits?**

### **2.1 The relevant provisions of Venezuelan law and of the Concession Agreement**

310. In substance, Venezuela argues that both under general Venezuelan law (Ven. Rejoinder, p. 52 citing Badell ¶¶ 90-91; Badell Supp. ¶ 74) and “under Article 67 of Decree Law No. 138 and Articles 60(b) and 60(1) of the Contract, Aucoven may not assert a claim for loss of future profits if Aucoven itself breached the Contract” (Ven. PHR, p. 128).

311. Article 67 of Decree Law No. 138 provides the following in respect of “Termination of the Agreement Due to Breach by the Concessionaire”:

*The Concessionaire shall only have the right to be reimbursed for the following expenses:*

1. *Expropriations [...].*
2. *The constructed works, based upon what is actually completed according to the projects and prices approved [...].*
3. *Any other items used to provide [...].*

312. Similarly, Clause 60 of the Agreement provides:

*The Concession shall terminate when... [d]ue to THE CONCESSIONAIRE'S nonfulfillment of a major obligation required to realize the purpose of the Concession” (Clause 60 b.) In this case, “THE MINISTRY shall notify THE CONCESSIONAIRE in writing of the nonfulfillment... and THE CONCESSIONAIRE shall have ninety*

*(90) contiguous days in which to rectify that nonfulfillment. If THE CONCESSIONAIRE is unable to rectify such nonfulfillment for a reason attributable to it, the Concesssion shall be terminated, and the provisions of Chapter I of Title V of the Decree Law No. 138<sup>[23]</sup> shall be observed.”*

313. Aucoven admits that pursuant to Article 67 of Decree Law No. 138 and Articles 60(b) and 60(1) of the Agreement it is not entitled to lost profits if it failed to fulfill a major obligation. However, Aucoven posits that these provisions do not bar its lost profits claim because they exclude compensation for lost profits “only if *Venezuela terminates* the Concession Agreement due to a *material* breach by Aucoven” (Cl. PHR, ¶ 249, emphasis in the original).

## **2.2 The necessity of a termination by Venezuela**

314. Aucoven’s argument relies upon a strict interpretation of the wording of Article 67 of Decree Law No. 138 and Articles 60(b) and 60(1) of the Agreement. Aucoven explicitly raised this argument in its Post-Hearing Reply, so that Venezuela did not respond to it. However, the question was discussed at the hearing following the statement of Aucoven’s legal expert that these provisions do not apply in the present case since the Republic did not make use of the notice provisions to terminate the Agreement (Tr. 778:9-15).

315. According to Venezuela, such a “technical argument” may apply to the specific contractual provisions, but cannot defeat the application of the broader legal principle which the latter express. Relying on Dr. Badell’s testimony, Venezuela argues that, under a general principle of administrative contracts, no claim for lost profits is permissible in the event of breach of contract by a contractor (Ven PHB, p. 54, referring to Badell I ¶¶ 90-91, Badell Supp. ¶ 74 and Tr. 779:11-20).

316. The Tribunal notes that Clauses 60 and 67 of the Concession Agreement do not apply directly in the present case, because it is undisputed that Venezuela did not terminate the Agreement. However, these provisions can be considered as the expression of a wider principle, namely the so-called *exceptio non adimpleti contractus*. At the hearing, Aucoven’s legal expert did not deny the existence and applicability of the *exceptio non adimpleti contractus* as reflected in Article 168 of the

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<sup>23</sup> These provisions (i.e., Articles 61 to 63 of Decree Law No. 138) concern the delivery of the works and facilities necessary to provide the service to the Republic.

Venezuelan Civil Code. Therefore, the Tribunal accepts that Aucoven's own breaches of the Concession Agreement may bar recovery of lost profits.

### **2.3 *Must the alleged breaches be material?***

317. At the hearing, Aucoven's legal expert advanced the argument that Aucoven's alleged breaches could not bar a claim for lost profits since they were immaterial (Tr. 778:16; 779:5). Aucoven did not expand on this argument in its Post-Hearing Brief. In its Post-Hearing Reply, it alleged that "Clause 60(b) of the Concession Agreement allows for termination only in the event of a breach of 'a major obligation required to realize the purpose of the Concession' – in other words, of a material breach." Accordingly, Aucoven writes, "Venezuela's allegations, even if established, would not amount to material breaches of the Concession Agreement" (Cl. PHR, ¶ 251).

318. The Tribunal is aware that Venezuela did not have an opportunity to respond to this last submission by Aucoven. However, the argument was already made at the hearing and Venezuela did address it in its Post-Hearing Brief ("[f]or the first time at the hearing, Dr. Ortiz advanced the argument that Aucoven's breach were immaterial"). Venezuela rejected the argument on the ground that "Aucoven in fact breached all of its obligations under the contract". In doing so, Venezuela can be viewed as implicitly admitting that only material breaches may bar Aucoven's claim for lost profits. Moreover, Venezuela's legal expert did not deny that materiality was a condition to the barring effect of the breaches. In fact, Dr. Badell admitted that he failed to mention the materiality requirement in his opinions and did not examine whether any of Aucoven's alleged breaches were material as a matter of Venezuelan law (Tr. 683:19; 684:18; 688:9-18). Hence, the Tribunal is satisfied that Aucoven's alleged breaches may bar the lost profits claim only if they are material, i.e., if they would have allowed Venezuela to terminate the Concession Agreement.

319. Prior to deciding whether any alleged breaches are material, the Tribunal must obviously first review the existence of any breaches by Aucoven.

### **2.4 *Did Aucoven breach the Agreement?***

320. According to Venezuela, Aucoven breached the Concession Agreement: (1) by failing to perform routine maintenance works on the Highway; (2) by failing to provide routine maintenance on the Old Road; (3) by failing to perform certain of the tasks laid out in the Highway Improvement Agreement; and (4) by walking off the job two years after terminating the Concession Agreement (Ven. PHM, ¶ 54 ff.).

a) *Routine maintenance works on the Highway*

321. Venezuela argues that Aucoven failed to perform routine maintenance works on the Highway in accordance with Clause 15 of the Concession Agreement (Ven. PHB, p. 56-58). The parties disagree on whether this contention is supported by the record as a matter of fact:

- For Venezuela, the evidence demonstrates that Aucoven failed entirely to perform important elements of its routine maintenance obligations established under the Concession Agreement, and that the scope and quantity of work performed by Aucoven for maintenance steadily decreased during the period in which Aucoven operated the Highway. Venezuela's position relies upon the testimony of Mr. Fernandez, who was called by Venezuela (Fernandez Supp. ¶¶ 4-13) to testify on public opinion concerns reported in the press (Ven. PHB pp. 112-117, 120, 122), and on a series of photographs taken on a single day in August 2002 revealing "potholes, broken lighting fixtures, trash piled up on the median strip and along the edge of the Highway and a variety of other conditions that simply would not exist if the Highway had been maintained in the most basic routine fashion" (Ven. PHB p. 57, referring to Fernandez II, ¶ 4 and App. A).
- Aucoven replies that "Venezuela did not submit any contemporaneous evidence showing that Aucoven failed to perform routine maintenance before it terminated the Concession Agreement on June 13, 2000, and it cannot point to any contemporaneous document by which it advised Aucoven of its supposed failures. [...] To the contrary, the valuations submitted as appendices to Mr. Martínez's second statement show that Aucoven did maintain, under the direct supervision of the Ministry's inspector, the Highway as required under the Concession Agreement" (Cl. PHR ¶ 254). As to the photographs submitted by Venezuela, Aucoven considers that "some pictures taken two years after the termination of the Concession Agreement, which show an occasional pothole on the side of the road" are not sufficient evidence (Cl. PHB ¶ 440).

322. The Tribunal agrees with Venezuela that the litigious pictures "were not limited to 'an occasional pothole,' but [...] instead show numerous potholes, trash piled up in the median strip and along the Highway, broken lamps" (Ven. PHR, p. 129). However, it is not convinced that this is sufficient evidence to conclude, as Venezuela does, that these "and other problems [...] surely would not exist if routine maintenance were

properly performed” (*loc. cit.*). The Highway is 17 km long and the possibility that some problems exist at a certain time in certain places is not necessarily due to a failure in maintenance. One assumes that a failure in maintenance would rather have led to systemic problems. In that case, one would expect the record to contain evidence of complaints by Venezuela about Aucoven’s failures. As Aucoven emphasizes, Venezuela is unable to point to any document by which it complained about Aucoven’s maintenance work. This circumstance is particularly significant given that Aucoven periodically submitted to Venezuela valuations of its maintenance work (see Cl. Ex. 122).

323. Based upon the foregoing considerations, the Tribunal finds that Venezuela did not establish that Aucoven breached its obligation to perform routine maintenance works on the Highway,<sup>24</sup> nor did it demonstrate that such breach, if any, would have been material.

*b) Routine maintenance on the Old Road*

324. It is undisputed that Clause 15 of the Agreement required Aucoven to perform routine maintenance on the Old Road. It is equally undisputed that Aucoven never undertook any maintenance work on the Old Road.

325. According to Aucoven, despite the text of Clause 15, “the parties agreed from the start that Aucoven’s routine maintenance obligations pursuant to Clause 15 did not include the Old Road” (Cl. PHB, ¶ 443). Because of the very bad conditions of the Old Road, the Ministry agreed that until the initial improvement work was completed on the Old Road any routine maintenance work on the Old Road would be useless and impossible – and the few resources available because of Venezuela’s breach were better spent on the Highway (Cl. PHR, ¶ 258).

326. Venezuela’s insistence on the testimony of Aucoven’s own witnesses that “the plain language of the contract requires Aucoven to maintain the Old Highway” (Ven PHB, p. 58 referring to Mr. Martínez testimony, Martínez II ¶ 9) and that “the Contract had never been amended” (Ven PHR, p. 131 referring to Mr Salas’s oral testimony; Tr. 265:4-6) does not contradict Aucoven’s position. Indeed, parties may agree not to

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<sup>24</sup> Having reached this conclusion on a factual basis by evaluating the evidence on record, the Tribunal does not need to address Aucoven’s legal argument that “Aucoven was no longer obliged under Clause 15 of the Concession Agreement to perform any routine maintenance after it had terminated the Concession Agreement, and it therefore could not have breached that obligation” (Cl. PHR, ¶255).

perform part of a contract without formally amending it, in particular when this non-performance is meant to be temporary.

327. In the Tribunal's view, the fact that Venezuela cannot point to any document in which it required Aucoven to perform its maintenance obligation on the Old Road convincingly shows the parties' mutual recognition that this obligation had become moot.

*c) The tasks laid out in the Highway Improvement Agreement*

328. The dispute here deals with Aucoven's obligation to retile and improve the ventilation in Boquéron Tunnel Nr. 1.

329. Aucoven does not dispute that it did not perform this obligation as set forth in the Highway Improvement Agreement, but it claims that, upon the Ministry's request, the parties agreed on 28 April 1997 that the works in Boquerón Tunnel Nr. 1 would be limited to renewing the asphaltic pavement and to making horizontal demarcations, which Venezuela acknowledges Aucoven performed.

330. As Venezuela accurately stresses, Aucoven's witness, Mr. Salas, acknowledged that the Ministry never agreed to excuse Aucoven's performance but merely to postpone it (Ven PHR, p. 135). This being so, nothing in the record shows that Venezuela decided to put an end to the mutually agreed postponement. In these circumstances, the Tribunal finds that Aucoven's obligation was suspended and, thus, Aucoven was not in breach of the Highway Improvement Agreement.

*d) Cessation of the activities in 2002*

331. Since Aucoven was entitled to terminate the Concession Agreement in June 2000, Venezuela cannot rely on Aucoven's cessation of activities in 2002 to bar Aucoven's claim for lost profits raised on the ground of termination. This does not necessarily mean, as Aucoven's writes, that Aucoven was not bound by any obligation and was thus not in a position to commit any breach anymore (Cl. PHB, ¶ 453). It rather means that any possible breach would not arise from the same legal relationship as the claim for lost profits. Accordingly, the cessation of activities in 2002 cannot bar Aucoven from claiming lost profits under the Concession Agreement.

## **2.5 Conclusion**

332. On the basis of the foregoing developments, the Tribunal concludes that Aucoven did not breach the Concession Agreement in a manner that may bar a claim for lost profits.

## **3. The standards of recovery of lost profits**

### **3.1 The positions of the parties**

#### *a) Aucoven's position*

333. Aucoven submits that the Concession Agreement explicitly entitles it to recover its lost profits in the event of a valid termination. Specifically, it refers to Clause 60(2), which provides that Venezuela shall compensate Aucoven for "*all losses or damages, including lost profits and damnum emergens*".

334. According to Aucoven, the purpose of a compensation for lost profits "*is to make the claimant whole by putting the claimant in the position it would have been in if the respondent had not breached the contract, but instead performed it as agreed*" (Cl. PHR, ¶ 78). This is a principle which is common to both Venezuelan law and international law.

335. With respect to the assessment of the lost profits, Aucoven's position may be summarized as follows;

- The date as of which the value of the Concession Agreement should be determined is the day immediately preceding the breach of the Concession Agreement. In the present case, the relevant date is 1997.
- The value of the Concession Agreement is determined by discounting the project's cash flows to their present value in 1997.
- The shareholder flow line in the EFP indicates the parties' joint projections of Aucoven's net cash flows for each semester of the thirty-year Concession period and thus reflects the bottom-line profit Aucoven stood to realize in any given semester. It represents the 15.21% real annual return Aucoven would earn over the thirty-year Concession period on its projected investment. Since it reflects the obligations under the Concession Agreement, it mirrors the parties' estimate as to the cash flows due Aucoven if the Concession Agreement had been performed as stipulated. Under the EFP, the total value

of the shareholder flows over the life of the Concession was Bs. 53,817,233,000.

- The expected rate of return available in capital markets on alternative investments of equivalent risk provides the appropriate discount rate. According to Aucoven, such discount rate corresponds to the US Treasury Inflation-Protected Securities (TIPS).
- There should be no further reduction or mitigation of damages.

*b) Venezuela's position*

336. Venezuela contends that Aucoven's claim is inconsistent with both the Concession Agreement and Venezuelan law and should be dismissed. Moreover, Venezuela submits that international law would not lead to a different result.

337. First, Venezuela submits that the Concession Agreement provides for a "fair and equitable remuneration", which corresponds to the 15.21% internal rate of return based on Aucoven's investments in the project. Aucoven would receive cash flows that constituted a 15.21% return on its investment, rather than an immutable series of cash flows stated in absolute amounts. The shareholder flows contained in the initial EFP were a projection that needed to be amended to maintain a 15.21% rate of return based on the amounts actually invested. Since Aucoven did not make any of the investment in works contemplated in the Concession Agreement, Aucoven has no right to pursue a claim for lost profits based on the amounts stated on the shareholder flow line.

338. Second, Venezuela contends that Aucoven's claim does not meet the requirements of definiteness and proportionality imposed by Venezuelan law and constitutes an improper windfall to Aucoven.

339. Finally, Venezuela argues that, as a matter of economics, Aucoven did not suffer any loss of future profits. Indeed, Venezuela alleges that any future cash flows, when discounted with the proper discount rate – including sovereign risk and project risk – lead to a net present value of zero.

**3.2 *Lost profits under the Concession Agreement***

340. Aucoven's claim for lost profits is based on the relevant provisions of the Concession Agreement and on the requirements set by Venezuelan law. The parties

do not contend that Venezuelan law is incompatible with international law as to the scope of recoverable lost profits. Hence, the Tribunal will address the issues presented by application of the contractual and national law provisions. It will merely refer to international practice as a matter of additional guidance.

341. Clause 60(2) of the Concession Agreement provides as follows:

*Without prejudice to the provisions of this document, in the event of nonfulfillment of any of the obligations undertaken in this Agreement by or through THE MINISTRY, [...] THE CONCESSIONAIRE may terminate this Agreement [...] and THE MINISTRY must compensate and indemnify THE CONCESSIONAIRE pursuant to the terms stipulated in this Second paragraph for the case of early repossession [including "all losses or damages, including lost profits and damnum emergens"].*

342. The Concession Agreement does not define the scope and measure of "lost profits". Failing a specific contract rule, the Tribunal will turn to the standards of recovery set by the applicable law.

### **3.3 Lost profits under Venezuelan law**

343. According to Aucoven, lost profits under Venezuelan law cover the compensation required to "make the claimant whole", by putting it in the position it would have been in if the Respondent had not breached the contract, but instead performed it as agreed (Cl. PHR, ¶¶ 78-79).

344. Venezuela applies the same standard, although expressed with different words. Indeed, according to its legal expert, the purpose of an award of lost profits is to compensate the creditor for damages suffered, not to impoverish nor enrich it. (Badell Supp. ¶ 83).

345. In a decision relied upon by the Claimant, the Venezuelan Supreme Court defined lost profits as follows:

*[L]ost profits is the utility or revenue of which the injured party has been deprived as a result of the violation, delay or breach by the other party. It consists of the non-increase in the creditor's patrimonium as a result of the deprivation of the increase that would normally have taken place in his patrimonium if the breach had not taken place. (Cl. PHR, ¶ 89).*

(Diques y Astilleros Nacionales (DIANCA), excerpted in L. Ortiz-Alvarez & G. Mascetti, *Jurisprudencia de Contratos Administrativos 1980-1999* (1999), Ortiz Auth. 106, p. 596 (translation by Aucoven)).

346. The Tribunal agrees that the scope and purpose of lost profits compensation under Venezuelan law is to indemnify the claimant for all, but not more than, the damage actually suffered. For the sake of completeness, the Tribunal adds that this solution is consistent with the practice of international tribunals. It suffices to refer to the consistent jurisprudence of ICSID Tribunals<sup>25</sup> and of the Iran-US Claims Tribunal.<sup>26</sup>
347. To be granted compensation for lost profits so defined, a claimant must prove the amount of its loss. Only these proven amounts will be awarded.
348. In this respect, Venezuela contends that lost profits may not be awarded under Venezuelan administrative law if they are remote, uncertain or speculative (Ven. PHR, p. 144). Aucoven concurs in substance with Venezuela's position, as it submits that lost profits may be awarded as long as they are not too remote, uncertain or speculative (Cl. PHB, ¶ 282). It adds that under Venezuelan law lost profits require only a reasonable showing of lost opportunity to make such profits (Cl. PHB, ¶ 281).
349. The Venezuelan Supreme Court has specified the standards of proof in the following terms:

*It is necessary for the claimant to provide the necessary evidence, not necessarily demonstrative, but evidence not based on speculation, or on the mere possibility of making a profit. If it is not possible to present credible evidence, at least the claimant must provide evidence that allows the establishment of indicia that allow the presumption that effectively [the claimant] had the opportunity to make a profit and could not [do so] as a result of the breach of the other party.*

(Diques y Astilleros Nacionales (DIANCA), excerpted in L. Ortiz-Alvarez & G. Mascetti, *Jurisprudencia de Contratos Administrativos 1980-1999* (1999), Ortiz Auth. 106, p. 596 (translation by Aucoven))

350. The necessity to prove the amount of the profits lost is confirmed by scholarly commentary:

*It is necessary to adopt a restrictive criteria for the determination of lost profits, since the profits that have been lost must be real, proven*

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<sup>25</sup> See D. Friedland & E. Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, in *ICSID Review*, 1991, p. 400, 403.

<sup>26</sup> See A. Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, *ICSID Review*, 1990, p. 256, 289. *Amco Asia Corporation v. The Republic of Indonesia*, in *International Arbitration Report*, Vol. 5, 11/90, p. D-43, nr. 178.

*with a basis of objective information, and it is not enough to assume possible results but that lack certainty, coming from speculations or hypothetical suppositions, doubtful or contingent.*

*(R. Escobar-Gil, Responsabilidad Contractual de la Administración Pública, Bogotá 1989, p. 187)*

351. Again, the Tribunal notes that the requirement of Venezuelan law pursuant to which lost profits must be established with sufficient certainty and cannot be awarded on the basis of speculative assessments is consistent with the practice of international tribunals. Decisions issued by ICSID tribunals<sup>27</sup> and by the Iran-US Claims Tribunal<sup>28</sup> have often dismissed claims for lost profits in cases of breach of contract on the ground that they were speculative and that the claimant had not proven with a sufficient degree of certainty that the project would have resulted in a profit.
352. The Tribunal will now turn to reviewing whether Aucoven has established the existence and amount of the lost profits for which it seeks compensation with a sufficient degree of certainty.

#### **4. Does Aucoven's claim for lost profits meet the relevant standards?**

353. After an extensive review of the detailed economic and financial evidence on record and of the parties' discussion of such evidence, the Arbitral Tribunal is disinclined to award lost profits in the circumstances of this case. It reaches the conclusion that Aucoven has not made a showing of future lost profits with a sufficient degree of certainty under the relevant standards set forth above.
354. It is not disputed that lost profits, if awarded, should be computed on the basis of the expected cash flows under the Concession Agreement. There is no common ground, however, on the determination of such expected cash flows:
- According to Aucoven, the expected cash flows are to be determined using the shareholder flow line appearing in the Economic-Financial Plan of the Concession Agreement. The shareholder cash flow line represents the 15.21% real annual return which Aucoven would have earned on its *projected*

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<sup>27</sup> See *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Aug. 30, 2000; *Asian Agricultural Products v. Sri Lanka*, Award of June 27, 1990, in 4 ICSID Reports, p. 245, 292-293; *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB 793/1, ¶ 7.14.

<sup>28</sup> G. H. Aldrich, *The Jurisprudence of the Iran-United States Tribunal*, Clarendon Press, Oxford 1996, p. 294. See in particular *Levitt v. Islamic Republic of Iran*, 14 Iran-US C.T.R. 191, 209; *Dadras International v. Islamic Republic of Iran*, Award No. 567-213/215-3 (Nov. 7, 1995), in G. Aldrich, *op. cit.*, p. 296.

investment over the thirty-year Concession period (Cl. PHR, ¶ 130, emphasis added).

- By contrast, Venezuela asserts that the agreed “fair and equitable remuneration” is a 15.21% internal rate of return which must be “based on Aucoven’s *actual* investment in the project” (Ven. PHR, p. 141, emphasis added).

355. Aucoven further contends that, being a reflection of the obligations under the Concession Agreement, the original EFP “reflects the parties’ agreement on a detailed forecast of future cash flows” (Cl. PHM, ¶ 291). Accordingly, it “is the best evidence conceivable of the cash flows that Aucoven could reasonably have expected to receive” (Cl. PHM, ¶ 291). Venezuela, on its part, alleges that the figures on the shareholder flow line of the initial EFP would have changed over the period of the Concession and are thus unreliable (Ven. PHB p. 173).

356. The Tribunal accepts that the Concession Agreement represents the cash flows which the parties anticipated for the event that no change occurred over the 30-year Concession period. However, the Concession Agreement itself required updates of the EFP if an event listed in Clause 46 occurred. Such updates were intended to restore the EFE, but not to guarantee projected amounts of shareholder flows.<sup>29</sup>

357. One further factor weights heavily in the Tribunal’s; assessment of lost profits. The main purpose of the Agreement was the construction of the Bridge. The expected cash flows were agreed as part of a broader agreement, pursuant to which Aucoven was to build the Bridge and would, in return, receive a “fair and equitable remuneration”. As a matter of contractual interpretation, one cannot rely exclusively on the figures set forth in the original EFP without taking into account that the Bridge was never built. Otherwise, Aucoven would obtain the same compensation that it would have received had it built the Bridge and, for that purpose, invested the amounts forecast. The Tribunal is of the opinion that such result cannot be deemed to correspond to the intent of the parties.

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<sup>29</sup> Contrary to Aucoven’s argument, Prof. Stulz has not accepted the shareholder flows of the EFP. He has used them as a working assumption, as his analysis in any event showed a loss (Stulz/Simmons II, ¶ 93). He also testified that “very different profits” could be produced under the 15% return rate if the EFP was amended (Tr. 1342:18-1343:5).

358. For these reasons, the Tribunal is not convinced that the figures set forth in the original EFP represent a sufficient basis to assess Aucoven's lost profits in a non-speculative way as required by Venezuelan law. For the same reasons, the Tribunal does not share Aucoven's view that the "circumstances fundamentally distinguish this case from any other case relied upon by Venezuela", in which the (ICSID) "tribunals were unable to make a reasonable forecast of future revenue" (Cl. PHB, ¶ 292).
359. In support of its contention that lost profits should not be awarded where they are not justified by economic evidence, Venezuela relies, *inter alia*,<sup>30</sup> upon the following ICSID precedents:
- *S.P.P. (Middle East) Limited, Southern Pacific Properties, Ltd. V. the Arab Republic of Egypt*, ICC Arbitration No. YD/AS No. 3493, Award (Mar. 11, 1983), 22 I.L.M. 752 (1983), Resp. Auth. 21. In this decision, the Tribunal denied lost profits on the grounds that "the great majority of the work [on the project] [...] is still to be done," and that the calculation offered by plaintiffs "produces a disparity between the amount of the investment made by the Claimants and its supposed value at the material date" (*Id.* at 782-83, ¶ 65).
  - *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990, 4 ICSID Rep. 245, Resp. Auth. 17. The Tribunal found there, in connection with a newly formed company, which had no record of profits and was undercapitalized, that neither the "goodwill" of the company nor its "'future profitability' [...] could be reasonably established with a sufficient degree of certainty" (*Id.* at 292-93).
  - *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 16 ICSID Rev. - FILJ 168, Cl. Auth. 5, at 197-199 ¶¶ 119-122. In this matter, the Tribunal denied a lost profits claim noting that "where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value" (*Id.* ¶ 120).

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<sup>30</sup> See in addition especially *Benvenuti & Bonfant v. Congo*, Resp. Auth. 6 (concluding that no lost profits may be awarded for a beginning enterprise). See also *AGIP Spa v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award of Nov. 30, 1979, 1 ICSID Rep. 306, 326-27, Resp. Auth. 13; and *Société Ouest-Africaine des Bétons Industriels (SOABI) v. Republic of Senegal*, ICSID Case No. ARB/82/1, Award of Feb. 25, 1988, 2 ICSID Rep. 190, at ¶¶ 7.01-7.19, Cl. Auth. 8.

- *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), Resp. Auth. 23, at 64-70 ¶¶ 118-130. In this decision, the Tribunal dismissed the claim for future lost profits for the reason that an award made on such ground would be speculative and in large disparity compared to the actual investment (*Id.* at 66-67 ¶¶ 123-124).

360. These decisions show that ICSID tribunals are reluctant to award lost profits for a beginning industry and unperformed work. This reluctance of ICSID tribunals is confirmed by the practice of the Iran-U.S. Claims Tribunal.<sup>31</sup>
361. It bears emphasizing that the cases cited by Aucoven to support the proposition that “where future cash flows could be reasonably determined, tribunals have awarded lost profits even if the project had been only in its initial stage”<sup>32</sup> deal with fact situations in which a substantial part of the project had been realized. Specifically, the claimant in *Karaha Bodas* had invested US\$ 93 million by the time the breach occurred<sup>33</sup> and the claimant in *Delagoa Bay* had already completed 82 kilometers out of a total of a 90 kilometer railway project.<sup>34</sup>
362. In the present case, the fact remains that Aucoven had no record of profits and that it never made the investments in the project nor built the Bridge required by the Concession Agreement. In these circumstances, the Tribunal considers that Aucoven’s claim for future profits does not rest on sufficiently certain economic projections and thus appears speculative. Hence, it does not meet the standards for an award of lost profits under Venezuelan law, nor would it meet these standards under international law, if the latter were applicable.
363. As an additional reason, the Tribunal points out that, even if it had reached a different conclusion in the preceding paragraphs, the result would be the same. Indeed, it finds that Aucoven has not established that, once discounted at an appropriate rate and time, the cash flows would have yielded a positive result. With respect to the appropriate time or date of valuation, the Arbitral Tribunal is of the

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<sup>31</sup> See ALDRICH, *op. cit.*, Ven. Auth. 24, p. 294.

<sup>32</sup> Cl. PHB, ¶ 285, referring to *Karaha Bodas v. Perusahaan Pertambangan & Pt. Pln*, Final Award, December 18, 2000, Cl. Auth. 25, at 41, ¶¶ 124-25, and *Delagoa Bay and East African Railway Company* (Great Britain, United States v. Portugal), *Sentence finale*, March 29, 1900, *reprinted in* H. La Fontaine, *Pasicrisie Internationale* (1902), 398, Cl. Auth. 41, at 402-404.

<sup>33</sup> *Karaha Bodas*, referred to above, C. Auth. 25 at 34, ¶ 107.

<sup>34</sup> *Delagoa Bay*, referred to above, at 400, 402.

opinion that the proper date is the date when the damage to Aucoven materialized. It sets this date at the time of termination of the Concession Agreement, not at the date of the breach.<sup>35</sup> Indeed, the breaches committed by Venezuela in and of themselves did not cause the damage. Aucoven was not deprived of the value of the contract at that time. It could then still insist on Venezuela restoring the EFE. In other words, the Concession Agreement contained mechanisms to deal with these situations. It is only when Aucoven terminated the Concession Agreement that the damage and the right to lost profits materialized.<sup>36</sup>

364. With respect to the appropriate discount rate, Aucoven and its expert use a risk-free discount rate, while Venezuela argues that the rate must include a number of risks, including sovereign or country, project and capital risks. On the basis of the expert evidence, the Tribunal finds that the cash flows involved certain risks and therefore a risk-free rate is inappropriate. It first notes that the bidding documents, which are an integral part of the Concession Agreement (Clause 5), expressly provide that the bids were to include country and project risks (Cl. Ex. 3). It further notes that a claim cannot be valued without consideration of its environment, i.e., without consideration of social, economic, political or other factors which may affect it.<sup>37</sup> Under these circumstances, it can be left open whether the rate used by Prof. Stulz was conservative because the risks involved in the project were even higher in reality. The same is true of the extent to which project and capital risks should be taken into consideration. Indeed, whatever the answers, the evidence shows that the project was unlikely to generate profits.<sup>38</sup>
365. In general, the Arbitral Tribunal found the expert evidence put forward by Venezuela, which established that the Concession Agreement would not have generated profits even if performed under its terms, convincing. By contrast, it often remained unpersuaded by the evidence of Aucoven's expert. For all these reasons, it restates that Aucoven has not established a loss of future profits pursuant to the

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<sup>35</sup> The Tribunal appreciates that the date of breach often coincides with the date on which the damage materializes, especially in expropriation cases. The situation is different here, however.

<sup>36</sup> The Tribunal notes that, to perform his discounted cash flow analysis, Mr. Lakshmanan has used this same date (Lakshmanan I, ¶ 24; Tr. 920:15-921:6).

<sup>37</sup> Aucoven's expert, Mr. Lakshmanan, admitted that any debt by a sovereign was affected by sovereign risk (Tr. 969: 10-13). Both experts also testified that sovereign risk is not necessarily linked to the debtor's "propensity to breach", but rests on a variety economic, social, political and other factors, which affect a country or region (Lakshmanan, Tr. 953: 2-11; Stulz/Simmons II, ¶ 11).

<sup>38</sup> In addition, as was already addressed above, Aucoven or its parent did not make the investment required for this project and were thus able to invest the funds into other ventures.

standards governing under Venezuelan law, being specified that the same conclusion would stand had international law been applicable.

## **I. INTEREST**

366. As a result of the findings on lost profits, the present discussion is limited to interest on out-of-pocket expenses. Aucoven claims pre- and post-award interest. Venezuela opposes that Venezuelan law does not allow post-award interest on inflation-adjusted awards. With respect to pre-award interest on out-of-pocket expenses Venezuela puts forward the following arguments (Ven. PHR, p. 86): (a) Aucoven's computation double counts inflation, which is not admissible, (b) interest starts running from the date on which a competent body declares the contract terminated, (c) no interest is due on operating losses because the removal of unrecoverable costs eliminates any such losses, and (d) interest should not be compounded.
367. The Tribunal will review the parties' positions examining the following matters, which need to be addressed to decide the interest claim: (1) the dates which are relevant for the interest computation, (2) the rate, (3) compound interest, and (4) the methodology to compute interest.
368. Clause 60(2) of the Concession Agreement provides that "[i]n the event of delay in the payment of the amounts owed under this Clause, late interest shall be calculated pursuant to the provisions of Clause 26 of this document". In turn, Clause 26 (as amended) provides in pertinent part as follows:

*The amounts that THE MINISTRY must pay to THE CONCESSIONAIRE, unless otherwise stipulated, shall be paid to THE CONCESSIONAIRE within a period not to exceed thirty (30) business days from the date the obligation is due, in which case late interest shall accrue in THE CONCESSIONAIRE'S favor from the end of said period until the date it is effectively paid, which shall in no event exceed two (2) months from the end of the thirty (30) business day period mentioned above. [...]The total amounts that THE MINISTRY owes to THE CONCESSIONAIRE under this Clause must be calculated according to either of the following formulas, at the option of THE CONCESSIONAIRE: (a) The amount owed shall be equal to the sum of the amount owed plus the "Adjustment" according to the definition of said term in Clause 26 of the Concession Agreement, plus interest on unpaid balances, calculated monthly at an annual rate of 10%, or (b) The amount owed shall be equal to the amount owed plus interest on unpaid balances calculated monthly at a rate equal to the average lending rate of the five (5) principal Banks in the country, in accordance with the latest*

*classification issued by the Banco Central de Venezuela. The formulas indicated above include default interest.*

## **1. The relevant dates**

### **1.1 Dies a quo**

369. While Aucoven argues that interest on out-of-pocket expenses “should run from the date when those expenses were incurred” (Cl. PHR, ¶ 321) and interest on out-of-pocket assets contributed should run from the end of the period over which they were contributed (Cl. PHR, ¶ 325),<sup>39</sup> Venezuela argues that interest begins to run on the date of termination of the Agreement (Ven. PHR, pp. 90-93) and that “since Aucoven’s litigation-related ‘termination’ letter had no legal effect, no pre-award interest should be granted [...]”<sup>40</sup> (Ven. PHR, p. 90). Having held that Aucoven’s termination was valid, the Tribunal will focus on Venezuela’s alternative conclusion that “no interest can begin to run on Aucoven’s claims [...] until, at the earliest, the date when a termination of the Contract has taken place” (Ven. PHR, p. 91; emphasis omitted).
370. The Tribunal finds that interest should generally run from the date on which the principal amount to which it applies became due. This approach is consistent with Clause 26 of the Agreement providing that interest starts to run “thirty (30) business days from the due date of the obligation”. It also conforms to Art. 1277 of the Venezuelan Civil Code, pursuant to which interest is due “as of the day of default” (Badell, Auth. 28).
371. Aucoven’s claim for out-of-pocket expenses is based on Clauses 60(2) and 26 (Cl. PHR ¶ 321). Clause 60(2) entitles Aucoven to recover the damages it suffered in the event it validly terminates the Agreement. Consequently, Aucoven’s claim cannot become due before the termination has taken place, i.e., before June 13, 2000. In its calculations, Aucoven “added sixty calendar days, in order to comply with the thirty-one business day requirement of Clause 26 of the Concession Agreement” (Cl.

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<sup>39</sup> It also writes that “[i]nterest should run from the several dates on which the relevant obligations became due”. (Cl. PHB, ¶ 515). See also Cl. PHR, ¶ 313, where Aucoven invokes “the well established principle under international law that interest runs from the date on which the damage occurred, because it is from that date that the compensation is due”, referring to *Southern Pacific Properties (Middle East) Ltd. (SPP) v. Arab Republic of Egypt*, ICSID Case Nr. ARB/84/3 (1992), Award, May 20, 1992, 3 ICSID Rep. 189 (1992), Cl. Auth. 31, at 240, ¶¶ 234, 235).

<sup>40</sup> Venezuela’s argument is technically limited to interest on invested assets.

PHR, ¶ 320). Accordingly, the Tribunal concludes that interest runs from August 1, 2000 on “pre-termination” out-of-pocket expenses.

372. With regard to *pre-termination out-of-pocket “losses”*, Aucoven’s interest “was calculated as of October 31 of the years 1997 and 1998, May 31 of the years 1999, 2000” (Cl. PHR, ¶ 324 referring to Appendices 5 and 6). In accordance with the considerations set forth above, the Tribunal will correct such interest computation to start on August 1, 2000.

373. With regard to *pre-termination asset contributions*, Aucoven’s calculations comply with the Tribunal’s approach. Indeed, “Aucoven assumes that the assets that had been contributed over the period ending on May 31, 2000, were all contributed on that date. In order to comply with the thirty-one business day requirement of Clause 26 of the Concession Agreement, Aucoven has added an additional sixty calendar days, so that interest on the assets contributed starts to run from *August 1, 2000*” (Cl. PHR, ¶ 325, italics added).

374. With regard to *post-termination out-of-pocket expenses*, the Tribunal finds that Aucoven’s assumption that “interest[...] should run from the date when those expenses were incurred” (Cl PHR, ¶ 321) is applicable. Noting that Venezuela does not contest this approach, the Tribunal will uphold the computation method calculation proposed by Aucoven:

- interest on *post-termination out-of-pocket “losses”* shall be “calculated as of May 31 of the years 2001 and 2002 and as of October 31, 2002”;
- interest on *post-termination out-of-pocket “assets contributed”* shall be calculated as of November 1, 2002, sixty calendar days after August 31, 2002 (Cl. PHR, ¶ 326 referring to Appendix 4).

375. As a final matter in this context, the Tribunal must address Venezuela’s request for a post award “grace period [...] during which no interest would run” (Ven. PHB 125). Having awarded pre-award interest and taken into consideration the contractually agreed grace period of 60 calendar days, the Tribunal disallows Venezuela’s request.

## **1.2 The dies ad quem**

376. Aucoven claims post-award interest “until the date of the effective payment of the award by Venezuela” (Cl. PHR, ¶ 350). In support of its position, it relies on the

“fundamental point that the parties explicitly agreed in the Concession Agreement that the interest rates of Clause 26 run ‘until the date [the damages are] effectively paid” (Cl. PHR, ¶ 352). More generally, Aucoven argues that “the principle that full compensation must include interest applies fully to the period between the award and payment” (Cl. PHB, ¶ 524) and refers to the following ICSID precedent (Cl. PHR, ¶ 349):

*As to the dies ad quem, ... [t]he prevailing jurisprudence in international arbitrations is to the effect that interest runs until the date of effective payment, and this conclusion is supported by doctrinal opinion.*

*(Southern Pacific Properties (Middle East) Ltd. (SPP) v. Arab Republic of Egypt, ICSID Case Nr. ARB/84/3 (1992), Award, May 20, 1992, 3 ICSID Rep. 189 (1992), Cl. Auth. 31, at 244, ¶ 235).*

377. To oppose Aucoven’s claim, Venezuela relies upon the testimony of its legal expert, who declared that “post-award interest is not allowed under Venezuelan law when the claimant seeks an inflation-adjusted award (Ven. PHR, p. 149 referring to Badell Supp. ¶ 95). Aucoven objects that Professor Badell’s position is unsubstantiated (Cl. PHB, ¶ 525) since he “does not, nor could he, cite one single provision of Venezuelan law, precedent or authority in support of his proposition”. (Cl. PHR, ¶ 351, fn 33). However, at the hearing, Aucoven’s own legal expert was unable to contradict that position when prompted to address this issue (Tr. 802:6-8: “Quite honestly, this is a subject area I know nothing about, and I would rather not proffer an opinion”).
378. In the absence of any opinion by Aucoven’s legal expert, the Tribunal may be inclined to rely on the opinion of Prof. Badell and accept that post-award interest is not allowed under Venezuelan law when the claimant seeks an inflation-adjusted award. However, for the reasons explained below, the Tribunal considers that Aucoven does not seek an inflation-adjusted award.
379. The parties’ positions diverge on whether Aucoven is seeking “an inflation-adjusted award”. Venezuela’s legal expert considers that it does, “because Aucoven has requested that the award be stated in 1995 bolivars and then either adjusted for inflation or converted into dollars” (Badell Supp. ¶ 95). Aucoven replies that it “does not ask that the award be indexed for inflation. It merely asks that, in accordance with Clause 26 of the Concession Agreement, the nominal ‘bank rate’ of interest be applied to the principal amount awarded in constant bolivars” (Cl. PHR, ¶ 351).

380. In the Tribunal’s understanding, an “inflation-adjusted award” barring the award of *post-award interest* can only be an award indexed for inflation *as to the post-award time*. Indeed, post-award interest is intended to compensate the additional loss incurred from the date of the award to the date of final payment. It bears no relation to the manner in which the Tribunal assesses the damage at the time of the award. From a logical point of view, the fact that the award will take into account the inflation up to the date of the award is irrelevant for the possibility of awarding post-award interest under Venezuelan law.
381. Having concluded that in the present case post-award interest is not precluded under Venezuelan law, the Tribunal does not need to review whether Venezuelan law should be disregarded on this point on the ground put forward by Aucoven that “international law provides that interest runs until the date of effective payment” (Cl. PHR, ¶ 349 referring to *Southern Pacific Properties (Middle East) Ltd. (SPP) v. Arab Republic of Egypt*, ICSID Case Nr. ARB/84/3 (1992), Award, May 20, 1992, 3 ICSID Rep. 189 (1992), Cl. Auth. 31, at 244, ¶ 235).

## 2. The applicable interest rate

382. The parties disagree on the applicable interest rate. Aucoven relies on Clause 26 of the Concession Agreement, which allows it to choose between two alternative methods, the so-called “bank rate” method and the so-called “10 percent flat rate”<sup>41</sup> Aucoven has chosen the bank rate method (Cl. PHB, ¶¶ 504-507), under which “interest is calculated monthly at a rate equal to the average lending rate of the five (5) principal Banks in the country, in accordance with the latest classification issued by the Banco Central de Venezuela” (Clause 26 of the Concession Agreement, as amended). Venezuela contends that the Tribunal should limit post-award interest to 3% per annum, which “is the maximum rate allowable in any circumstances under the Venezuelan Civil Code, even when the claimant, like Aucoven in this case, seeks an inflation-adjusted award” (Ven. PHR, p. 150). In support of its position, Venezuela relies on the opinion of its legal expert, who testified that “[only] ‘legal interest’ would be charged, which is three percent per year, as stated in the Article 1746 of the Civil Code”. Aucoven does not really dispute this, even if it emphasizes that Dr. Badell does not substantiate his opinion (Cl. PHB, ¶ 525).

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<sup>41</sup> Under the ‘10 percent flat rate’, “[t]he amount owed shall be equal to the sum of the amount owed plus the ‘Adjustment’ according to the definition of said term in Clause 26 of the Concession Agreement, plus interest on unpaid balances, calculated monthly at an annual rate of 10%”.

383. In the Tribunal's view, the Agreement contains a clear-cut contractual rule to determine the interest rate. If Venezuela wishes this rate to be disregarded, it must establish that Venezuelan law prohibits the contractual rate. Dr. Badell's statement that "[only] 'legal interest' would be charged" under Venezuelan law seems to imply that the "legal interest" set in Article 1746 is mandatory (i.e., that it applies irrespective of any contractually agreed interest rate). This does not correspond to the wording of Article 1746 of the Venezuelan Civil Code. According to the translation provided by Dr. Badell, this provision reads as follows (Authorities to Badell Supp., at 28):

*Article 1.746.- Interest is legal or contractual.*

*Legal interest is three percent per annum.*

*Contractual interest has no limits other than those designed by special Law; unless, if not limited by Law, it exceeds by one half the interest proven to be current interest at the time of the contracting, in which case it shall be reduced by the Judge to said current interest, if so requested by the debtor.*

*The contractual interest must be proven in writing when witness testimony is not admissible as proof of the principal obligation. [...]*

384. The plain text of this provision clearly shows that the "legal interest" of three percent is not a mandatory rate. The only limits imposed by Venezuelan law are those set in the third sentence of Article 1746. Venezuela invokes no limitation by virtue of "special Law", nor does it request a reduction of the rate on the ground that the contractual interest exceeds by one half the current interest at the time of contract conclusion.

385. Venezuela's further argument, according to which "[i]f the Tribunal departs from Venezuelan law in this area, and instead relies on the recent ICSID decisions, a reasonable post-award rate of interest to apply to the constant 1995-bolivar award would be 6% per annum and not higher in any circumstances than 9% per annum" is irrelevant, since the Tribunal does not depart from Venezuelan law as to the applicable interest rate.

386. Finally, it should be recalled that "there is no rule of international law that would fix the rate of interest or proscribe the limitations imposed by [domestic] law" (*Southern Pacific Properties (Middle East) Ltd. (SPP) v. Arab Republic of Egypt*, ICSID Case Nr. ARB/84/3 (1992), Award, May 20, 1992, 3 ICSID Rep. 189 (1992), Cl. Auth. 31, at 240, ¶ 222). Accordingly, the Tribunal's exclusive reliance on Venezuelan law is justified.

387. On the basis of the foregoing developments, the Tribunal concludes that the applicable interest rate is the rate calculated under the so-called “bank rate” method that Aucoven chose according to Clause 26. Under such provision, this rate applies to pre- and post-award interest equally.

### **3. Compound interest**

388. The parties disagree on whether the Tribunal should award compound interest. Aucoven argues that “[t]he Concession Agreement, Venezuelan law, and international law all require the award of compound interest in this case” (CI. PHR, ¶ 331). Venezuela opposes Aucoven’s claim for compound interest, because it is not founded under Venezuelan law and international law, and because it leads to a fully unreasonable result.<sup>42</sup> Since Aucoven argues that, even if Venezuelan law prohibited compound interest (or in the absence of an express provision in the Concession Agreement), international law mandating compound interest would prevail over conflicting domestic law in accordance with Article 42(1) of the ICSID Convention. The Tribunal will review the claim for compound interest, first, under Venezuelan law and contractual terms and then under international law.

#### **3.1 Does Venezuelan law allow for compound interest?**

389. Relying upon the opinion of its legal expert Dr. Badell, Venezuela asserts that compound interest cannot be granted under Venezuelan law, unless compounding is “expressly” agreed by the parties. Aucoven states that the parties did so agree in Clause 26 of the Agreement (“Under [this provision], interest is ‘calculated monthly’ on ‘unpaid balances’. Hence, if interest charges are not paid as they accrue, those charges become part of the ‘unpaid balance’ for the following month”; CI. PHR ¶ 332).

390. At the hearing, Aucoven’s legal expert was unable to confirm this contention (Tr. 800:19; 801:5). In reply to the question whether Clause 26 “reflected an intent to capitalize”, Dr. Ortiz’s testimony was that he did not “want to say yes or no”. Even if Dr. Badell’s expert testimony that “the contract does not refer to capitalizing interest

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<sup>42</sup> From a systematic point of view, Venezuela’s contention refers solely to “pre-award” interest. However, its argumentation on compound interest is more general and the Tribunal understands it so apply also to post-award interest (Venezuela does not raise the argument in connection with post-award interest, since it claims that post-award interest is precluded by law). This is at least implicitly recognized by Aucoven (see for instance CI. PHR, ¶ 33, note 29), where Aucoven refers to Venezuela’s argument in general terms without distinguishing between pre- and post-award interest.

on a monthly basis” (Tr. 803:3-7 (Badell) and Badell Supp. ¶ 94) stands unrebutted (Ven. PHB, p. 123), this is a matter of contract interpretation to which the Tribunal must proceed in order to decide whether the language of Clause 26 reflects an intent to apply compound interest.

391. Proceeding to interpret the Agreement, the Tribunal first observes that the words “compound interest” or “compounding” do not appear in Clause 26 (Ven. PHB, p. 123). Admittedly, the lack of such words does not necessarily rule out an intent to apply compound interest (Cl. PHR, ¶ 335). However, the Tribunal does not discern such an intent in the wording of Clause 26. In reality, Venezuela’s argument that “[t]he parties merely agreed that interest would be ‘calculated’ *monthly* based on the changing *annual* interest rates of Venezuela’s five lending banks, as reported by the Central Bank of Venezuela”, is in line with the language of Clause 26. In coming to that conclusion, the Tribunal bears in mind that compound interest may have a very significant economic impact, especially when high interest rates are applicable. Therefore, in the Tribunal’s view, an agreement on compound interest must be sufficiently clear and cannot be too easily implied. In the present case, the Tribunal is unable to infer from Clause 26 of the Agreement that the parties ever reached a clear agreement to apply compound interest.
392. Hence, Venezuelan law combined with the Agreement does not allow an award of compound interest in the present case.

### **3.2 Does international law require an award of compound interest?**

393. Aucoven submits that even in the absence of an express provision in the Concession Agreement or even if Venezuelan law prohibited compound interest, international law would require an award of compound interest (Cl. PHR, ¶ 338). This submission is based on a recent ICSID award in which the tribunal awarded compound interest notwithstanding Egyptian law to the contrary (*Wena Hotels Ltd. v. Egypt, ICSID Case Nr. ARB/98/4*, Award, December 8, 2000, 41 I.L.M. 896, Ven. Auth. 23, ¶¶ 128-129). Venezuela opposes the claims for compound interest, and in particular points out that international jurisprudence has often refrained from awarding compound interest when this appeared unreasonable under the circumstances.
394. *Wena* upon which Aucoven relies was an expropriation case. In the other ICSID precedent on which Aucoven bases its claim for compound interest (*Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica ICSID Case Nr. ARB/96/1* (2000),

reprinted in 4 ICSID Rev. – FILJ 170, Cl. Auth. 2, extensively cited in Cl. PHR, ¶ 340), the tribunal expressly drew a distinction between expropriation cases and cases “of simple breach of contract”. It stated that “there is a tendency in international jurisprudence to award only simple interest [...] in relation to cases of [...] simple breach of contract” and found it necessary to emphasize that it was not dealing with a case of contract breach but with an expropriation case.

395. These two ICSID precedents are sufficient in and of themselves to demonstrate that there is no well established principle of international law requiring the award of compound interest in the present case.<sup>43</sup> The other cases cited by the parties confirm this conclusion.

396. Aucoven’s submission that international law requires an award of compound interest must thus be rejected.<sup>44</sup> Having concluded that the applicable Venezuelan law combined with the pertinent contract provision does not allow compound interest and that international law does not require it, the Tribunal can dispense with making a determination on whether the specific circumstances of the case prevent an award of compound interest in the present arbitration.

397. In conclusion, the Tribunal will not award compound interest.

#### **4. Method of interest computation**

398. The parties further disagree on the methodology for the computation of the interest. Aucoven puts forward a calculation (i.e., revised Ex. 9 to Lakshmanan Supp.), to which Venezuela objects that it involves double counting of inflation (Appendix C to Ven. PHB, Ex. 6).

399. Aucoven replies that no double counting occurred since it computed interest as follows: “[It] first converted amounts stated in 1995 bolivars to nominal bolivars as of the due date. Nominal interest has then been applied for the period from the date sixty days past the due date to January 1, 2003. For consistency, the resulting nominal amount is then restated, or “deflated,” to 1995 bolivars” (Cl. PHR, ¶ 330).

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<sup>43</sup> See also O. SANDROCK, *Compound Interest in International Arbitration*, in: *Etudes de procédure et d’arbitrage en l’honneur de J.-F. Poudret*, Lausanne, 1999, p. 537; J. ORTSCHIEDT, *La réparation du dommage dans l’arbitrage commercial international*, Paris, 2001, n° 597 p. 275; N. AFFOLDER, *Awarding Compound Interest in International Arbitration*, *The American Review of International Arbitration* 2001, pp. 68-69.

<sup>44</sup> For the sake of clarity, the Tribunal emphasizes that international law does not prohibit compound interest (see for instance AFFOLDER, *cit.*, p. 69 and the cited authorities).

400. However, as Venezuela correctly points out, Aucoven's financial expert agreed that the contractual 5-bank interest rate chosen by Aucoven is a nominal rate, which includes both a "real" interest component and a CPI component (Tr. 1198:8-19; 1201:15-1203:2; on cross-examination, Mr. Lakshmanan testified that in his opinion the 5-bank rate "already include the inflation, so there is no need for further adjustment for inflation in that rate" (Tr. 1210:2-8)).

401. Accordingly, the Tribunal holds that, for the sake of interest calculation, the amounts awarded in 1995 bolivars should be converted into nominal bolivars as of the due date. The 5-bank rate of interest should then be applied for the period from the date on which interest is due to the date of payment.

## **5. Conclusion: Interest amounts due**

402. In this Section, the Tribunal applies the foregoing considerations to each item of claim awarded to Aucoven.

### **5.1 Pre-termination losses**

403. Interest on pre-termination losses (i.e., losses incurred during the operating years through March 31, 2000) starts to run on August 1, 2000.

404. Aucoven claims Bs. 118,722,000 for pre-termination losses (Cl. PHB, ¶ 458). The Tribunal did not reduce this part of Aucoven's out-of-pocket claim.

405. Accordingly, Aucoven is entitled to simple interest at the rate prescribed in the Concession Agreement on **Bs. 118,722,000 as of August 1, 2000** until effective payment.

### **5.2 Post-termination losses**

406. Interest on post-termination losses (i.e., losses incurred during the operating years ending on March 31, 2001, and on August 31, 2002) starts to run on May 31, 2001 and 2002 and on October 31, 2002 on the amounts specified below.

407. Aucoven claims Bs. 394,848,000 for post-termination losses (Cl. PHR, ¶ 268). The Tribunal did not reduce this part of Aucoven's out-of-pocket claim. The total post-termination loss of Bs. 394,848,000 derives from the addition of a net profit of Bs. 31,479,000 during the spending period from April 1, 2000 to March 31, 2001, a net loss of Bs. 121,169,000 during the spending periods from April 1, 2001 to March 31,

2002 (Lakshmanan II, Revised Ex. 10), and a net loss of Bs. 242,200,000 during the spending periods from April 1, to August 31, 2002 (App. 6 to Cl. PHB).

408. Accordingly, Aucoven is entitled to simple interest at the rate prescribed in the Concession Agreement **on Bs. 31,479,000 as of May 31, 2001, on Bs. 121,169,000 as of May 31, 2002, and on Bs. 242,200,000 as of October 31, 2002, all until effective payment.**

### **5.3 *Pre-termination assets contributed***

409. As previously noted, interest on pre-termination assets contributed (i.e., assets contributed during the operating years through March 31, 2000) starts to run on August 1, 2000.

410. Aucoven claims Bs. 2,398,561,000 for pre-termination assets contributed (i.e., for “assets contributed to the Concession as of May 31, 2000”). The Tribunal considered that Bs. 510,000,000 for non recoverable costs in connection with the “Seconsa loan”, Bs. 117,900,000 for non recoverable legal fees, and Bs. 383,600,000 for non recoverable interest on short terms loans should be deducted from Aucoven’s out-of-pocket claim for pre-termination assets contributed. Hence, Aucoven’s out-of-pocket claim regarding “pre-termination assets contributed” on which interest accrues amounts to Bs. 1,387,061,000.

411. Accordingly, Aucoven is entitled to simple interest at the rate prescribed in the Concession Agreement **on Bs. 1,387,061,000 as of August 1, 2000, until effective payment.**

### **5.4 *Post-termination assets contributed***

412. As previously noted, interest on post-termination assets contributed (i.e., assets contributed for the period June 1, 2000 through August 31, 2002) starts to run on November 1, 2002.

413. Aucoven claims Bs. 341,417,000 for post-termination assets contributed. The Tribunal considered that Bs. 36,760,000 for non established net assets contributed and Bs. 150,000,000 for non recoverable administrative costs should be deducted. Hence, Aucoven’s out-of-pocket claim regarding “post-termination assets contributed” on which interest accrues amounts to Bs. 154,657,000.

414. Accordingly, Aucoven is entitled to simple interest at the rate prescribed in the Concession Agreement on **Bs. 154,657,000 as to November 1, 2002, until effective payment.**

## **J. CURRENCY AND PAYMENT OF THE AWARD**

415. In its pre-hearing submissions, Aucoven had sought an award stated in “B[olivars]s (constant as of September 30, 1995) (that is augmented by an amount sufficient to make the sum equal as of the date of payment to the stated amount on September 30, 1995) or converted to US dollars at the rate of Bs 170/US\$ 1” (see Cl. Memorial ¶ 193; Cl. Reply, ¶ 221). Similarly, at the hearing, Aucoven submitted that “[a]ny award here should be rendered either in dollars or constant bolivars that can be immediately converted and in accord with the contract immediately expatriated at full value” (Tr. 92:16-19).

416. Venezuela did not challenge the position pursuant to which a payment option existed. It mentioned in its Rejoinder (p. 121, fn. 109) that Aucoven conceded that the option be exercised by the Respondent and restated that it had the option in its opening statement at the hearing (Tr. 99:1-5).

417. For the first time in its post-hearing submissions (Cl. PHB, ¶ 537; Cl. PHR, ¶ 377), Aucoven requested the Tribunal to issue an award in dollars or a ruling on repatriation and conversion at the most favorable rate in the following terms:

*all amounts awarded Aucoven be converted into U.S. dollars at the most favorable available exchange rate and be paid to a U.S. bank account designated by Aucoven; or, in the alternative,*

*notwithstanding any Venezuelan law or regulation to the contrary, Aucoven be permitted to repatriate freely and without encumbrance or delay all amounts awarded and convert them into U.S. dollars at the most favorable available exchange rate.*

418. Emphasizing that Aucoven “abandons its prior position and advances [...] entirely new propositions” “for the first time in its Post-Hearing Memorial”, Venezuela considers that “there is no basis for such extraordinary action, particularly since such action was not even suggested until after the hearing closed” (Ven. PHR, pp. 152, 153, and 155).

419. Aucoven advanced its new position in its first post-hearing submission (Cl. PHB, ¶ 535). It did not expand on its reasons before the Post-Hearing Reply. Hence, Venezuela had an opportunity to respond to the request as such, which it actually

did, but not to comment on the different arguments which Aucoven put forward in its second post-hearing submission. Neither did Venezuela have the opportunity to tender legal or financial expert evidence nor to present oral argument on the issues raised by Aucoven's request.

420. Aucoven's new submission did not only deprive Venezuela of the right to properly try these issues. It is also contrary to Procedural Order N° 2, which required that the parties "set out all facts and legal arguments on which they intend to rely" in the first round of written submissions and that the second round be "limited to replies".
421. For all these reasons, the Tribunal holds that Aucoven should not be allowed to depart from its pre-hearing position, pursuant to which the amounts awarded in 1995 bolivars shall be "augmented by an amount sufficient to make the sum equal as of the date of payment to the stated amount on September 30, 1995, or converted in US dollars at the rate of Bs 170/US\$1" (See Cl. Reply ¶ 221). Hence, the Tribunal does not need to discuss Venezuela's argumentation in response.
422. As a result, the Arbitral Tribunal will order payment of the amounts awarded in accordance with the terms of Aucoven's request for relief as it stood at the time of the hearing, being specified that such request can only be understood as giving the award debtor the choice between the two possibilities of paying out on the award.

## **K. COSTS**

423. Aucoven argues that Venezuela should pay Aucoven's costs and expenses, including legal fees, incurred in connection with this arbitration (Cl. PHR, ¶ 368), while Venezuela submits that each party should bear its own arbitration costs and fees or, should the Tribunal shift legal costs from one party to another, Aucoven should then be ordered to reimburse the Republic for its legal costs and other expenses of the arbitration (Ven. PHR, p. 152).
424. The parties concur that the Tribunal has discretion in matters of costs under Article 61(2) of the ICSID Convention. The Tribunal agrees with Aucoven that in exercising its discretion the Tribunal should give effect to Clause 60(2) of the Concession Agreement, which reflects a principle common to both Venezuelan and international law, namely, that a party injured by a breach must be fully compensated for its losses and damages, which include arbitration costs (Cl. PHR, ¶ 364). On the other hand, the Tribunal also agrees with Venezuela that the "loser pays" principle is not

absolute, in particular when the claimant succeeds only partially (Ven. PHR, pp. 150-151).

425. Considering all circumstances of this case, including in particular that Venezuela breached the Concession Agreement; that it unsuccessfully challenged jurisdiction; that Aucoven's claim for lost profits, which was by far the largest one which required the most efforts in terms of evidence and briefing, was not granted; that Aucoven changed its economic analysis of lost profits at a late stage of the proceedings; the Arbitral Tribunal deems it fair and reasonable that the cost burden be shared equally between the parties each bearing its own legal expenses and 50 % of the arbitration costs.

## **V. RELIEF**

For the foregoing reasons, the Tribunal renders the following award:

- 1. Venezuela has breached Clauses 22, 23, 31, 32 and 64 of the Concession Agreement;**
- 2. Aucoven was entitled to terminate the Concession Agreement pursuant to Clause 60(2) on the ground of Venezuela's breaches;**
- 3. Venezuela shall pay to Aucoven the sum of Bs. 118,722,000 (constant as of September 30, 1995) as compensation for out-of-pocket losses for operating years through March 31, 2000, plus interest as of August 1, 2000 until effective payment;**
- 4. Venezuela shall pay to Aucoven the sum of Bs. 1,387,061,000 (constant as of September 30, 1995) as compensation for assets contributed to the Concession, as of May 31, 2000, plus interest as of August 1, 2000 until effective payment.**
- 5. Venezuela shall pay to Aucoven the sum of Bs. 31,479,000 (constant as of September 30, 1995) as compensation for out-of-pocket losses for the operating year ended on March 31, 2001, plus interest as of May 31, 2001 until effective payment.**
- 6. Venezuela shall pay to Aucoven the sum of Bs. 121,169,000 (constant as of September 30, 1995) as compensation for out-of-pocket losses for the operating year ended on March 31, 2002, plus interest as of May 31, 2002 until effective payment.**
- 7. Venezuela shall pay to Aucoven the sum of Bs. 242,200,000 (constant as of September 30, 1995) as compensation for out-of-pocket losses for the operating year ended on March 31, 2002, plus interest as of October 31, 2002 until effective payment.**
- 8. Venezuela shall pay to Aucoven the sum of Bs. 154,657,000 (constant as of September 30, 1995) as compensation for the net increase in the fair value of the assets contributed to the Concession for operating year ended on August 31, 2002, plus interest as of November 1, 2002 until effective payment.**
- 9. The awarded amounts shall be augmented by an amount sufficient to make the sum equal as of the date of payment to the stated amount on September 30, 1995, or converted in US dollars at the rate of Bs. 170/US\$1.**
- 10. The applicable interest rate is equal to the average lending rate of the five (5) principal Banks in the country, in accordance with the latest classification issued by the Banco Central de Venezuela. Interest shall not be compounded.**

**11. Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne by the parties in equal shares.**

**12. All other claims or requests are dismissed.**

Place of arbitration: Washington, D.C.

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Karl-Heinz Böckstiegel

Date:

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Bernardo Cremades

Date:

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Gabrielle Kaufmann-Kohler

Date: