

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: FEDAX N.V. V. THE
REPUBLIC OF VENEZUELA*
[March 9, 1998]
+Cite as 37 I.L.M. 1391 (1998)+

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceeding between

FEDAX N.V.
Claimant

and

THE REPUBLIC OF VENEZUELA
Respondent

Case No. ARB/96/3

Award

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
Professor Meir Heth, Arbitrator
Mr. Roberts B. Owen, Arbitrator

Secretary of the Tribunal

Mr. Alejandro A. Escobar

Representing Fedax N. V.

Mr. Alberto Baumeister Toledo
Mr. Jesús Eduardo Cabrera Romero
Mr. Otmaro Silva Lares

Representing the Republic of Venezuela

Mr. Juan Nepomuceno, Garrido Mendoza
Mr. Jorge Szeplaki Otahola

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Date of dispatch to the parties: March 9, 1998.

A. Summary of the Procedure.

1. On June 17, 1996 a request for arbitration was submitted to the International Centre for Settlement of Investment Disputes (ICSID or the Centre) on behalf of Fedax N.V., a company established and domiciled in Curaçao, Netherlands Antilles, against the Republic of Venezuela. The request concerns a dispute arising out of certain debt instruments, referred to below, issued by the Republic of Venezuela and assigned by way of endorsement to the Claimant Fedax N.V. The request invokes the provisions, discussed below, of the October 22, 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the Agreement).
2. On June 18, 1996, the Centre, in accordance with Institution Rule 5, acknowledged receipt of the request. At the same time, the Centre asked the Claimant to indicate the address of the other party to the dispute as required by the Centre's Institution Rules. On that same date, the Claimant informed the Centre of the address of the Venezuelan Minister of Industry and Commerce. On June 19, 1996, the Centre transmitted the request to the Republic of Venezuela in accordance with Institution Rule 5, with a copy to the Embassy of Venezuela in Washington, D.C.
3. On June 26, 1996, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention or the ICSID Convention). On this same date, the Centre's Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
4. On July 2, 1996, Fedax N.V. proposed that the Arbitral Tribunal consist of three arbitrators, one arbitrator appointed by each of the parties, and a third arbitrator, to be the President of the Tribunal, appointed by the President of the Administrative Council of the Centre. Fedax N.V. further proposed that it would appoint an arbitrator from the Panel of Arbitrators maintained by the Centre, but that neither the Republic of Venezuela nor the President of ICSID's Administrative Council were bound to do so.
5. On July 19, 1996, the Centre received a communication from Mr. Freddy Rojas Parra, then Minister of Development of Venezuela, in which he informed the Centre that the Venezuelan Ministry of Industry and Commerce had not yet been established, and that the competent state organs for dealing with the proceeding were therefore the Attorney General's Office (*Procuraduría General de la República*) and the Ministries of Finance and of Foreign Affairs. Through further communications of July 30 and August 1, 1996, Minister Rojas Parra informed the Centre of the addresses and names of the Attorney General of the Republic and of the Ministers of Finance and Foreign Affairs. Copies of the request, of the notice of registration and of correspondence between the Centre and the parties were sent to those addresses under cover of an August 8, 1996 letter from the Centre. Through a letter of August 15, 1996, Mr. Jorge Szeplaki Otahola, Deputy Attorney General for Supreme Court Affairs, informed the Centre that he would be representing the Republic of Venezuela in this proceeding, together with the Attorney General of the Republic, Mr. Jesús Petit Da Costa. In a letter of March 7, 1997, Mr. Szeplaki Otahola informed the Centre that Mr. Juan Nepomuceno Garrido Mendoza was the new Attorney General of the Republic and should be included as its representative.
6. On September 18, 1996, Fedax N.V. informed the Centre that it was choosing the formula of Article 37(2)(b) of the ICSID Convention, and named Professor Meir Heth, a national of Israel, as the arbitrator appointed by the Claimant. On September 20, 1996, the Republic of Venezuela named Mr. Roberts B. Owen, a national of the United States of America, as the arbitrator appointed by it. By means of a further communication of September 24, 1996, the Republic of Venezuela proposed that the third, presiding, arbitrator in the proceeding be appointed by the Chairman of ICSID's Administrative Council. On September 27, 1996, Fedax N.V. accepted this proposal and confirmed its appointment of Professor Meir Heth. On September 30, 1996, the Republic of Venezuela confirmed its appointment of Mr. Roberts B. Owen.
7. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was appointed as President of the Tribunal by the Chairman of ICSID's Administrative Council, acting in accordance with the parties' agreement. On November 27, 1996 ICSID's Secretary-General notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Pursuant to Administrative and Financial Regulation 25, the Centre's Secretary-General appointed as Secretary of the Tribunal Mr. Alejandro A. Escobar, Counsel, ICSID.

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

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

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

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

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

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

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

15. After considering the basic facts of the dispute, the ICSID Convention and the 1991 Agreement, as well as the written and oral arguments of the parties' representatives, the Tribunal, in its Decision dated July 11, 1997, overruled the

objections to jurisdiction raised by the Republic of Venezuela. Certified copies of the Decision were on that same date distributed to the parties. The Tribunal found, in its Decision, that the dispute was within the jurisdiction of the Centre and within the competence of the Tribunal, and that, accordingly, the proceeding on the merits was resumed. To this end, the Tribunal issued its Procedural Order No. 3, in which it reiterated the time periods for the written pleadings of the parties.

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

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

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

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

20. By a letter of October 17, 1997, addressed to it from the Secretariat, the Republic of Venezuela was informed that it had a period of thirty days to respond to Fedax N.V.'s reply. Copies of such response from the Republic of Venezuela, dated November 6, 1997, were distributed to the members of the Tribunal and to Fedax N.V. under cover of the Secretariat's letter of November 13, 1997.

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

22. On December 12, 1997, the Secretariat distributed to the members of the Tribunal and to the Republic of Venezuela copies of a December 10, 1997 communication from Fedax N.V. containing a statement of the costs it had incurred. This

communication also stated that, under principles of Venezuelan law, "treaties which have become laws of the Republic are applicable in preference to ordinary laws," and that for this reason the law approving the ICSID Convention must apply regarding the issue of costs.

23. On December 20, 1997 the Secretariat distributed to the members of the Tribunal and to the Republic of Venezuela copies of a communication received from Fedax N.V. confirming the LIBOR interest rates appearing in the documentation accompanying Fedax N.V.'s reply dated October 7, 1997. Also on December 20, 1997, the Secretariat informed the parties that it had, at the request of the Tribunal, obtained from the "Bloomberg" data base the LIBOR interest rate for Wednesday, November 5, 1997, such rate being 5,84375%. In accordance with the promissory notes, this figure should be the basis for the calculation of interest for the six-month period beginning on November 7, 1997.¹

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

B. Considerations.

25. In examining the merits of the dispute subject matter of this proceeding, the Tribunal notes that the facts alleged in the request for arbitration (which has also served as Fedax N.V.'s memorial on the merits) have not been contested by the Republic of Venezuela, and, furthermore, that the basic issues involved have been partially settled by the parties.

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

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

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

29. As decided in respect of jurisdiction on July 11, 1997, the Tribunal is fully satisfied that the purchase by Fedax N.V. of the promissory notes subject matter of the request for arbitration meets the requirement of an investment both under the Convention and the Agreement. It follows that the Republic of Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds in the terms of Article 9 (3) of the Agreement. The payments due shall be established further below.

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

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

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

33. Concerning the date of payment, the Tribunal considers that the appropriate date is May 7, 1998. This date, as noted above, is when the current six-month period of interest will be completed. Moreover, such date should provide ample time for the Republic of Venezuela to finalize its budgetary arrangements for the payment of the amounts involved. Should the Republic of Venezuela pay before that date it may of course adjust the amount of interest to the number of days lapsed, a figure which can be established without difficulty in the terms of the promissory notes.

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

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

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

C. Decisions.

For the reasons stated above the Tribunal unanimously decides that:

- (1) The Republic of Venezuela shall pay Fedax N.V. the amount of U.S. \$598,950 representing the principal of the promissory notes due.
- (2) The Republic of Venezuela shall pay Fedax N.V. the amount of U.S. \$161,245.14 for the regular and penal interest due on the promissory notes.
- (3) The Republic of Venezuela shall pay Fedax N.V. the amount of U.S. \$50,150 representing one half of the charges and costs of the proceeding for which advance payment was made by the Applicant.
- (4) Each of the parties shall bear the entirety of its own expenses and legal fees for its own counsel.
- (5) The payments referred to above shall be made at the latest on May 7, 1998. Should payments be made by the Republic of Venezuela before this date, she may adjust the calculation of interest according to the number of days lapsed.

So Decided.

Roberts B. Owen

Francisco Orrego Vicuña

Meir Heth

Arbitrator

President

Arbitrator

Date: February 26, 1998

Date: 12 February, 1998

Date: February 22, 1998

Place: Washington, D.C.

Place: Santiago de Chile.

Place: Jerusalem.

ENDNOTES

1. Tribunal's translation of promissory notes as they relate to interest:

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

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

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

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

2. Republica de Venezuela: Ley Orgánica de Crédito Público, 12 August 1983, Gaceta Oficial de la República de Venezuela, 14 de Septiembre de 1983, as amended, Gaceta Legal, No. 594, 30 de Septiembre de 1983.
3. Ibrahim F. I. Shihata and Antonio R. Parra: "Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention", ICSID Review — Foreign Investment Law Journal, Vol. 9 No. 2 (Fall 1994), 183-213, at 212.