

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: FEDAX N.V. v.
THE
REPUBLIC OF VENEZUELA
July 11, 1997

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

Decision of the Tribunal on Objections to Jurisdiction

July 11, 1997

Members of the Tribunal
Professor Francisco Orrego Vicuna, President
Professor Meir Heth
Mr. Roberts B. Owen
Secretary of the Tribunal
Mr. Alejandro A. Escobar
Representing Fedax N. V.
Mr. Alberto Baumeister Toledo
Mr. Jesus Eduardo Cabrera Romero
Mr. Otmaro Silva Lares
Representing the Republic of Venezuela
Mr. Juan Nepomuceno Garrido Mendoza
Mr. Jorge Szeplaki Otahola

*1379 A. Facts and Procedure.

1. On June 17, 1996 a request for arbitration was submitted to the International Centre for Settlement of Investment Disputes (ICSID or the Centre) on behalf of Fedax N.V., a company established and domiciled in Curacao, 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 an October 22, 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the Agreement).

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

Centre transmitted the request to the Republic of Venezuela in accordance with Institution Rule 5, with a copy to the Embassy of Venezuela in Washington, 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, 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 (Procuraduria General de la Republica) and the Ministries of Finance and of Foreign Affairs. Through further communications of July 30 and August 1, 1996, Minister Rojas Parra informed the Centre of the addresses and names of the Attorney General of the Republic and of the Ministers of Finance and Foreign Affairs. Copies of the request, of the notice of registration and of correspondence between the Centre and the parties were sent to those addresses under cover of an August 8, 1996 letter from the Centre. Through a letter of August 15, 1996, Mr. Jorge Szeplaki Otahola, Deputy Attorney General for Supreme Court Affairs, informed the Centre that his office and the office of the Attorney General would be representing the Republic of Venezuela in this proceeding.

6. On September 18, 1996, Fedax 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 Vicuna, 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.

*1380 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.

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

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 also issued Procedural Order No. 2, which reads as follows:

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

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

11. On January 23, 1997, the Republic of Venezuela confirmed that its written submission of January 17, 1997 was deemed to be its memorial on its objections to jurisdiction. On February 14, 1997 the Centre received from the Republic of Venezuela a translation into English of its January 17, 1997 submission. On February 26, 1997 the Centre received the original and a written translation of Fedax 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 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 Metalurgicas 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.

*1381 14. The Tribunal heard no oral arguments by the parties on the merits of the dispute. As mentioned above, the consideration of the merits was postponed until the issue of the Centre's jurisdiction is decided by the Tribunal. After considering the basic facts of the dispute, the ICSID Convention and the 1991 Agreement, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the issue of jurisdiction.

B. Considerations.

15. In deciding on the question of jurisdiction of the Centre and its own competence in this case, the Tribunal must first consider whether there is a legal dispute between the parties as required by Article 25 (1) of the Convention. Although the term "legal dispute" is not defined in the Convention, its drafting history makes abundantly clear that such term refers to conflicts of rights as opposed to mere conflicts of interests: "[t]he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation." [FN1] The discussions held on the drafts leading to this provision also evidence that legal disputes were meant to exclude moral, political, economic or purely commercial claims. [FN2]

FN1. "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States," Doc. ICSID/2, 1 ICSID Reports, 1993, 23, para. 26.

FN2. ICSID: Documents Concerning the Origin and the Formulation of the Convention, 1968, Vol. II, at 54, 203. Hereinafter cited as Convention History.

End of FN.

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

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

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

19. The Republic of Venezuela has argued in this respect that Fedax N.V.'s holding of the above-mentioned promissory notes does not qualify as an "investment" because this transaction does not amount to a direct foreign investment involving "a long term transfer of financial resources -- capital flow -- from one country to another (the recipient of the investment) in order to acquire interests in a corporation, a transaction which normally entails certain risks to the potential investor." [FN3] Neither would this transaction qualify, in Venezuela's view, as a portfolio investment to acquire titles to money since in that country this occurs "when the investor acquires shares of a corporation through the Stock Exchange -- Caracas or Maracaibo -- basically those known as 'Global Depository Receipts' represented

by GDS and ADR," a type of investment which is "only considered direct when the acquisition of the title is done in a primary way." [FN4] Venezuela has further argued that in the light of the rule of interpretation laid down in Article 31.1 of the 1969 Vienna Convention on the Law of Treaties, the term "investment" should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [FN5] Under such an interpretation, in Venezuela's view, investment in an economic context means "the laying out of money or property in business ventures, so that it may produce a revenue or income." [FN6] Venezuela contends that this particular interpretation is necessary to accommodate the definition of investments as comprising "every kind of asset" as that phrase appears in Article 1 (a) of the 1991 Agreement.

FN3. Brief by the Republic of Venezuela on objections to jurisdiction, 17 January 1997, at 8.

FN4. *Ibid.*, at 8-9.

FN5. Convention on the Law of Treaties, 1969, Article 31.1, *International Legal Materials*, Vol. 8, 1969, 679.

FN6. Brief *cit.*, *supra* note 3, at 5, with reference to Andres S. Suarez et al., *Diccionario Economico de la Empresa*, 1977, at 212.

End of FN.

*1382 20. The Tribunal has examined with great attention the arguments put forward by the Republic of Venezuela since they express a legitimate concern about the interpretation of the Convention and the Agreement. The Tribunal has also carefully considered the jurisdictional arguments of the claimant contesting the views set out by the Republic of Venezuela. The Tribunal does of course concur with the Republic of Venezuela about the need to apply the rules of interpretation laid down in the Vienna Convention on the Law of Treaties. In order to satisfy these requirements the Tribunal shall examine the question in the light of Article 25 (1) of the Convention, Article 1 (a) and related provisions of the Agreement and other relevant considerations discussed below.

21. The Tribunal shall first examine the meaning of the term "investment" under Article 25 (1) of the Convention. It is well established that numerous attempts to define investments were made during the negotiations of the Convention, [FN7] but none were generally acceptable. [FN8] Because of this difficulty, it was finally decided to leave any definition of the "investment" to the consent of the parties. [FN9] As explained by the Report of the Executive Directors:

FN7. Christoph Schreuer: "Commentary on the ICSID Convention," *ICSID Review -- Foreign Investment Law Journal*, Vol. 11, 1996, 316, at 355-358.

FN8. *Convention History*, Vol. II, at 835-837.

FN9. *Ibid.*, at 1078; Carolyn B. Lamm and Abby Cohen Smutny: "The implementation of ICSID Arbitration Agreements," *ICSID Review -- Foreign Investment Law Journal*, Vol. 11, 1996, 64, at 80.

End of FN.

"No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so

desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25 (4))." [FN10]

FN10. Report cit., supra note 1, para. 27.

End of FN.

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

"During the negotiations several definitions of 'investment' were considered and rejected. It was felt in the end that a definition could be dispensed with 'given the essential requirement of consent by the parties.' This indicates that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling." [FN11]

FN11. A. Broches: "The Convention on The Settlement of Investment Disputes: Some Observations on Jurisdiction," *Columbia Journal of Transnational Law*, Vol. 5, 1966, 261-280, at 268, footnote omitted.

End of FN.

22. In light of the above, distinguished commentators of the Convention have concluded that "a broad approach to the interpretation of this term in Article 25 is warranted," [FN12] that it "is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID," [FN13] or that the parties "thus have a large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention." [FN14] Within this broad framework for the definition of investment under the ICSID Convention, the Tribunal also notes that a number of transactions have been identified as qualifying as investments in given circumstances. It has also been noted by commentators of the Convention, and during the history of its negotiation, that jurisdiction over loans, [FN15] suppliers' credits, [FN16] outstanding payments, [FN17] ownership of shares [FN18] and construction contracts, [FN19] among other aspects, was left to the discretion of the parties. [FN20]

FN12. C. F. Amerasinghe: "The Jurisdiction of the International Centre for the Settlement of Investment Disputes," *Indian Journal of International Law*, Vol. 19, 1979, 166-227, at 181.

FN13. Georges R. Delaume: "ICSID and the Transnational Financial Community," *ICSID Review -- Foreign Investment Law Journal*, Vol. 1, 1986, 237-256, at 239- 240; Ibrahim F.I. Shihata: "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA," *ICSID Review -- Foreign Investment Law Journal*, Vol. 1, 1986, 1, at 4.

FN14. Lamm and Smutny, loc. cit., supra note 9, at 80.

FN15. *Convention History*, Vol. II, at 261, 474.

FN16. *Ibid.*, at 451.

FN17. *Ibid.*, at 542.

FN18. *Ibid.*, at 661.

FN19. *Ibid.*, at 500.

FN20. Schreuer, *loc. cit.*, *supra* note 7, at 357; Amerasinghe, *loc. cit.*, *supra* note 12, at 181.

End of FN.

23. It is also most relevant to note the conclusions of a distinguished author in this respect: "These new types of investment, and especially those relating to the supply of services are sometimes on the borderline between investment proper and commercial transactions, which would fall outside the scope of ICSID.

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

For the purpose of this Chapter

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

*1383 "Although attempts at defining the notion of investment were given up by the authors of the Convention and this provision disappeared, there is no reason to doubt that loans can be considered as investments for the purposes of the Convention. Another reason why the issue of definition is not a serious one is that, in the case of loan contracts involving foreign public borrowers referring to ICSID as a means of settling loan disputes, the parties take the precaution of stipulating expressly that the loan is an investment for the purposes of the Convention." [FN21]

FN21. Delaume, *loc. cit.*, *supra* note 13, at 242, footnote omitted.

End of FN.

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

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

25. Precisely because the term "investment" has been broadly understood in the ICSID practice and decisions, as well as in scholarly writings, it has never before been a major source of contention before ICSID Tribunals. [FN22] This is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention. On prior occasions ICSID Tribunals have examined on their own initiative the question whether an investment was involved, [FN23] and in each such case have reached the conclusion that the "investment" requirement of the Convention has been met. In *Kaiser Bauxite v. Jamaica*, [FN24] as in *Alcoa Minerals of Jamaica Inc. v. Jamaica*, [FN25] the Tribunal established the Centre's jurisdiction both on the consent given by the parties and on the fact that the case "in which a

mining company has invested substantial amounts in a foreign State in reliance upon an agreement with that State, is among those contemplated by the Convention." Amounts paid out to develop a concession and other undertakings based on a concession agreement, were also considered to qualify as an investment under the Convention in LETCO v. Liberia. [FN26] Also in SOABI v. Senegal the Tribunal considered the issue of jurisdiction in respect of an operation encompassing separate agreements, but this dealt only indirectly with the existence of an investment. [FN27]

FN22. Lamm and Smutny, loc. cit., supra note 9, at 80; Schreuer, loc. cit., supra note 7, at 360.

FN23. Schreuer, loc. cit., supra note 7, at 360; Lamm and Smutny, loc. cit., supra note 9, at 80.

FN24. Kaiser Bauxite Company v. Government of Jamaica, 1975, 1 ICSID Reports, 1993, 296.

FN25. Alcoa Minerals of Jamaica Inc. v. Government of Jamaica, 1975, Yearbook Commercial Arbitration, Vol. IV, 1979, 206.

FN26. Liberian Eastern Timber Corporation v. Government of the Republic of Liberia, 1984, 2 ICSID Reports, 1994, 346.

FN27. Societe Ouest Africaine des Betons Industriels v. State of Senegal, 1988, 2 ICSID Reports 1994, 165.

End of FN.

26. The issue of whether a given dispute arises directly out of an investment has been also raised in a number of cases, although such cases have not considered whether an investment was made in the first place. In *Holiday Inns v. Morocco*, for example, the Tribunal found that the Centre had jurisdiction over loan contracts that had their origin in agreements separate from the investment; although the respondent argued that these constituted different transactions, the Tribunal emphasized "the general unity of an investment operation." [FN28] In *Amco Asia et al. v. Indonesia* an ad hoc Committee also affirmed the Centre's jurisdiction in respect of an international tort arising from lack of protection to the claimant by the Indonesian Army and Police; the Tribunal stated that it "does not think of 'international tort' and 'investment dispute' as comprising mutually exclusive categories," and that "[t]he jurisdiction of the Tribunal is not successfully avoided by applying a different formal characterization to the operative facts of the dispute." [FN29] In this same case an important distinction was made at a later stage in the following terms:

FN28. *Holiday Inns S.A., Occidental Petroleum Corporation et al. v. Government of Morocco*, Case No. ARB / 72 / 1; Schreuer, loc. cit. supra note 7, at 350-351, with reference to P. Lalive: "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) -- Some Legal Problems, *British Year Book of International Law*, Vol. 51, 1980, 123.

FN29. *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia*, 1986, 1 ICSID Reports, 1993, 509, at 527.

End of FN.

"...the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter

of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host State. Legal disputes relating to the latter will fall under Article 25 (1) of the Convention." [FN30]

FN30. *Ibid.*, Resubmission, 1988, 1 ICSID Reports, 1993, 543, at 565.

End of FN.

27. The Tribunal must also note that while some parallel exists between the ICSID Convention and the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), [FN31] in as much as investments insured under the latter would qualify as investments under Article 25 (1) of the former, the two systems ought not to be considered identical. Among other differences, it is conceivable that an investment under ICSID terms will not qualify for insurance under MIGA if it does not meet the stricter definitions of the MIGA Convention. MIGA is essentially concerned with direct foreign *1384 investment, [FN32] while, as discussed above, ICSID may cover investments which may not be direct if the circumstances so warrant. Even so, MIGA's coverage may eventually extend to "any other medium or long-term form of investment," including loans relating to investments, [FN33] an alternative which also broadens the scope of the MIGA Convention, and to this extent narrows the differences with the ICSID Convention.

FN31. Convention Establishing the Multilateral Investment Guarantee Agency, 1985, International Legal Materials, Vol. 24, 1985, 1605.

FN32. Operational Regulations of the Multilateral Investment Guarantee Agency, 1988, as amended, ICSID Review -- Foreign Investment Law Journal, Vol. 3, 1988, 360; Lamm and Smutny, *loc. cit.*, *supra* note 9, at 80.

FN33. Operational Regulations *cit.*, *supra* note 32, 370; Lamm and Smutny, *loc. cit.*, *supra* note 9, at 82.

End of FN.

28. Another aspect which the Tribunal has not overlooked is the relationship between the ICSID Convention and the Rules Governing the Additional Facility, [FN34] since the latter may apply, among other situations, in cases where ICSID jurisdiction is not available because the dispute does not arise directly out of an investment. [FN35] Here again the term "directly" relates to the evolution of the dispute and not to the investment. In this respect it would appear that, as in the case of ICSID, the Additional Facility Rules might cover types of investment that were not direct if the circumstances so warranted. On this point, the Tribunal must also note that the comment accompanying Article 4, Paragraph (4), of the Additional Facility Rules is somewhat restrictive, because it relates only to a situation in which a Tribunal might declare itself incompetent on the ground that it considered the underlying transaction not to be an "investment;" [FN36] in fact, a Tribunal might be satisfied that there is an investment, but decline jurisdiction because the dispute does not arise directly from it, and this situation could also be brought to settlement under the Additional Facility Rules. However, under both ICSID and the Additional Facility Rules the investment in question, even if indirect, should be distinguishable from an ordinary commercial transaction. [FN37] The Tribunal shall consider the question of distinguishing between an investment and an ordinary commercial transaction in this case further below.

FN34. ICSID Additional Facility, Document ICSID/ 11, 1979.

FN35. Rules Governing the Additional Facility, Article 2 (b).

FN36. *Ibid.*, Article 4 (4), Comment (iv).

FN37. Schreuer, *loc. cit.*, *supra* note 7, at 368.

End of FN.

29. The Tribunal considers that the broad scope of Article 25 (1) of the Convention and the ensuing ICSID practice and decisions are sufficient, without more, to require a finding that the Centre's jurisdiction and its own competence are well-founded. In addition, as explained above, loans qualify as an investment within ICSID's jurisdiction, [FN38] as does, in given circumstances, the purchase of bonds. [FN39] Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. This conclusion, however, has to be examined next in the context of the specific consent of the parties and other provisions which are controlling in the matter.

FN38. Aron Broches: "Choice-of-law provisions in contracts with governments," in *Ibid.*: Selected Essays, 523-532, at 529; Delaume, *loc. cit.*, *supra* note 13, 241-242.

FN39. Schreuer, *loc. cit.*, *supra* note 7, at 372.

End of FN.

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

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

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

.....

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

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

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

should be noted, moreover, that titles to money are not necessarily excluded from the concept of direct foreign investment.

*1385 33. The Tribunal has also undertaken a close examination of other provisions of the Agreement which are related to the definition of an investment, including Article 5 of the Agreement, under which the Contracting Parties guarantee the transfer of payments related to an investment, including the transfer of interests (Article 5 (a)) and funds for the reimbursement of loans (Article 5(d)). The conclusion that the definition of "investment" and the meaning of "titles to money" under the Agreement include loans and related credit transactions is thus reinforced. It must also be noted that the Republic of Venezuela has not exercised its right under Article 25 (4) of the ICSID Convention to notify the Centre of any class or classes of disputes it would or would not consider submitting to the jurisdiction of the Centre. This provision allows Contracting States to put investors on notice as to what class of disputes they would or would not consider consenting to within the broad meaning of investment under the Convention.

34. A broad definition of investment such as that included in the Agreement is not at all an exceptional situation. On the contrary, most contemporary bilateral treaties of this kind refer to "every kind of asset" or to "all assets," including the listing of examples that can qualify for coverage; claims to money and to any performance having a financial value are prominent features of such listings. [FN40] This broad approach has also become the standard policy of major economic groupings such as the European Communities. In providing for the protection of investments the EC have included "all types of assets, tangible and intangible, that have an economic value, including direct or indirect contributions in cash, kind or services invested or received." Among the transactions listed as investments are "stocks, bonds, debentures, guarantees or other financial instruments of a company, other firm, government or, other public authority or an international organization; claims to money, goods, services or other performance having economic value." [FN41] Since the Kingdom of the Netherlands is a prominent member of the European Communities, it is hardly surprising that a similar approach has been followed in its bilateral investment treaties. [FN42] Indeed, only very exceptionally do bilateral investment treaties explicitly relate the definition of the assets or transactions included in this concept to questions such as the existence of a lasting economic relation, [FN43] or specifically associate titles to money and similar transactions strictly to a concept of investment. [FN44]

FN40. Antonio R. Parra: "The scope of new investment laws and international instruments," in Robert Pritchard (ed.): *Economic Development, Foreign Investment and the Law*, 1996, 27-44, at 35-36; "ICSID and Bilateral Investment Treaties," *News from ICSID*, Vol. 2, No. 1, 1985, 12-20, at 19-20.

FN41. Council of the European Communities: "Community position on investment protection principles in the ACP States," *ACP-CEE 2172/92*, 3 November 1992, at 5.

FN42. See for example the Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investments, 29 October 1992, in Alejandro A. Escobar: "Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States," *ICSID Review -- Foreign Investment Law Journal*, Vol. 11, 1996, 86-220, at 197.

FN43. See, for example, the Agreement concerning the promotion and reciprocal protection of investments between Denmark and Ukraine, 23 October 1992, Article 1, as cited in Parra, loc. cit., supra note 40, at 36.

FN44. See for example the Agreement between the United States and Zaire of 3 August 1984, Article 1, in *News from ICSID* cit., supra note 40, at 20.

End of FN.

35. A similar trend can be identified in the context of major multilateral instruments. It has been rightly noted that the World Bank Guidelines on the Treatment of Foreign Direct Investment [FN45] are not at all restricted to "direct" investments. [FN46] The explanatory Report makes clear that there are no restrictions in this context as to the nature of covered investments and that the Guidelines are applicable to "indirect, as well as to direct, investments and to modern contractual and other forms of investment." [FN47] The Energy Charter Treaty [FN48] and Mercosur Protocols [FN49] have included "every kind of asset," the former listing "claims to money and claims to performance pursuant to certain contracts," and the latter referring to "claims to performance having an economic value." [FN50] Again only exceptionally has a multilateral treaty strictly related the listing of given assets such as interests to equity investments, or excluded claims to money that arise solely from commercial contracts for the sale of goods or services. [FN51]

FN45. "World Bank Guidelines on the Treatment of Foreign Direct Investment," 1991, ICSID Review -- Foreign Investment Law Journal, Vol. 7, 1992, 295.

FN46. Parra, loc. cit., supra note 40, at 40.

FN47. "Report to the Development Committee on the legal framework for the treatment of foreign investments," accompanying the Guidelines cit., supra note 45, para. 13.

FN48. Energy Charter Treaty, 17 December 1994, International Legal Materials, Vol. 34, 1995, 360, Article 1 (6), and comments by Parra, loc. cit., supra note 40, at 40-41.

FN49. MERCOSUR: Protocol on the Reciprocal Promotion and Protection of Investments in Mercosur, Colonia, 17 January 1994, Article 1 (1); and Protocol for the promotion and protection of investments made by countries that do not belong to Mercosur, Buenos Aires, 5 August 1994, Article 2; and comments by Parra, loc. cit., supra note 40, at 40-41.

FN50. Parra, loc. cit., supra note 40, at 41.

FN51. North American Free Trade Agreement, 17 December 1992, International Legal Materials, Vol. 32, 1993, 289, 605, Article 1139, and comments by Parra, loc. cit., supra note 40, at 42.

End of FN.

36. The Tribunal has also examined the practice of the Republic of Venezuela as to the various investment treaties it has made with other countries and the definition of investment therein included. [FN52] While this practice is varied, it is possible to conclude that every time the Republic of Venezuela has wished to exclude investments that are not manifestly direct, it has done so in unequivocal terms. Two examples are the Andean Group Regulation on Foreign Investments as amended, [FN53] which in essence refers to direct foreign investments, and the 1994 Mexico-Colombia-Venezuela Free Trade Agreement, which excludes money claims arising from commercial contracts for the sale of goods or services and commercial credits. [FN54] In other instances the language of the Agreement with the Kingdom of the Netherlands has been followed. [FN55]

FN52. For recent Latin American practice and treaties, see Escobar, loc. cit., supra note 42.

FN53. "Reglamento del regimen comun de tratamiento a los capitales extranjeros y sobre marcas, patentes y regalías, aprobado por las Decisiones Nos. 291 y 292 de la Comision del Acuerdo de Cartagena," Gaceta Oficial de la Republica de Venezuela, 25 March 1992, Article 2.1.

FN54. 1994 Mexico-Colombia-Venezuela Free Trade Agreement, Article 17-01, as cited in Schreuer, loc. cit., supra note 7, at 364.

FN55. "Acuerdo entre el Gobierno de la Republica de Venezuela y el Gobierno de Barbados para la promocion y proteccion de inversiones," Article 1 (a) (iii), in Escobar, loc. cit., supra note 42, at 213.

End of FN.

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

38. The Tribunal notes first that there is nothing in the nature of the foregoing transaction, namely the provision of services in return for promissory notes, that would prevent it from qualifying as an investment under the Convention and the Agreement. Specifically, the Tribunal has raised the question whether if Fedax N.V., as a Netherlands company, had been *1386 doing business in Venezuela at the time in question and had entered into exactly the same arrangement with the Republic of Venezuela as Industrias Metalurgicas Van Dam C.A. did, such transaction would have involved an "investment" or whether, in Venezuela's view, the transaction would be excluded from that category. The record shows that Venezuela does not contend that such an exclusion would be appropriate. It follows that the issue for decision is focussed not in the nature of the underlying service transaction but in whether the subsequent endorsement of the notes to foreign holders somehow requires the Tribunal to treat the matter as one falling outside the concept of foreign investment.

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

"...due to their nature, in accordance with the provisions of the Venezuelan Commercial Code and because it is expressly stated in their own text, are eminently negotiable instruments in the secondary market, with national or foreign financial institutions." [FN56]

FN56. Brief cit., supra note 3, at 6-7.

End of FN.

40. In such a situation, although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the

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

41. Like a number of other bilateral investment treaties and multilateral arrangements, [FN57] the Agreement contains several references to investments made "in the territory" of the Contracting Parties. [FN58] In this context, the Republic of Venezuela has argued that Fedax N.V. does not qualify as an investor because it has not made any investment "in the territory" of Venezuela. While it is true that in some kinds of investments listed under Article 1(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities. The same is true of many important offshore financial operations relating to exports and other kinds of business. And of course, promissory notes are frequently employed in such arrangements. The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs.

FN57. Parra, *loc. cit.*, supra note 40, at 35, 40.

FN58. See, for example, Agreement, Preamble, para. 2, and Articles 2, 4, 7.

End of FN.

42. The nature of the transactions involved in this case, and the fact that they qualify as a foreign investment for the purposes of the Convention and the Agreement, serves to distinguish them from an ordinary commercial transaction. In this connection, however, there is one additional element that the Tribunal has to take into consideration. The promissory notes were issued by the Republic of Venezuela under the terms of the Law on Public Credit (the Law), [FN59] which specifically governs public credit operations aimed at raising funds and resources "to undertake productive works, attend to the needs of national interest and cover transitory needs of the treasury." [FN60] It is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest. The Law specifically mentions medium and long-term bonds and obligations, short-term treasury instruments and operations, short-term credit, obtaining credit with national or foreign financial, commercial and industrial institutions, contracting for works and services, and other types of transactions as well. [FN61] Promissory notes are also expressly governed by the Law in connection with obtaining *1387 domestic or foreign credit and contracts for works and services. [FN62] Detailed authorizations and procedures are provided for the issuance of these instruments, all of which have been duly observed in respect of the promissory notes involved in this case. This Law was enacted to provide for the orderly development of public financial arrangements

and has been appropriately utilized by the Republic of Venezuela in this case, as in other matters.

FN59. Venezuela: Ley Organica de Credito Publico, 12 August 1983, Gaceta Oficial de la Republica de Venezuela, 14 de Septiembre de 1983, as amended, Gaceta Legal, No. 594, 30 de Septiembre de 1983.

FN60. *Ibid.*, Article 3.

FN61. *Ibid.*, Article 4.

FN62. *Ibid.*, Article 29.

End of FN.

43. The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter -- i.e. "volatile capital." The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development. [FN63] The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made. [FN64] The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.

FN63. Schreuer, *loc. cit.*, *supra* note 7, at 372.

FN64. *Law cit.*, *supra* note 60, Article 4(c).

End of FN.

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

C. Decision.

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

Francisco Orrego Vicuna President

Roberts B. Owen Arbitrator

Meir Heth Arbitrator

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