

ICSID CASE NO. ARB/00/5

AUTOPISTA CONCESIONADA DE VENEZUELA, C.A.  
Claimant

v.

BOLIVARIAN REPUBLIC OF VENEZUELA  
Respondent

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DECISION ON JURISDICTION

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## I. THE PARTIES

### A. The Claimant

1. 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 No. 39 Sector Av. Libertador y Andrés Bello, Caracas, Venezuela.

2. The Claimant is represented in this arbitration by David W. Rivkin, Donald Francis Donovan, and Alexander A. Yanos, of Debevoise & Plimpton, New York.

### B. The Respondent

3. 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.

4. The Respondent is represented in this arbitration by Alexander E. Bennett, Susan G. Lee and Angie Armer-Rios, of Arnold & Porter, Washington, D.C.

## II. THE RELEVANT FACTS REGARDING THE ISSUE OF JURISDICTION

### A. The Caracas–La Guaira Highway System

5. On April 20, 1994, the President of Venezuela issued Decree no. 138 regarding Concessions for National Public Works and Services (Cl. Ex.1).

6. The design, construction, operation, preservation, and maintenance of the Caracas–La Guaira Highway System (the “Project”) was put

to bid under this decree (Ven. Ex. 2). The project also included the construction of an alternative viaduct over the Tacagua Gorge.

7. 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” (Ven. Ex. 2, art. 12).

8. On December 28, 1995, the Ministry awarded the bid to a consortium consisting of ICA, a Mexican engineering and construction firm, and Baninsa, a Venezuelan investment bank.

### **B. The Formation of Aucoven**

9. Aucoven was incorporated on January 24, 1996 to serve as the concessionaire for the project. Aucoven is domiciled and registered in Caracas, Venezuela. Upon Aucoven’s incorporation, ICA held 99% of Aucoven’s shares and Baninsa 1%.

10. ICA is a subsidiary of Empresas ICA Sociedad Controladora, S.A. de C.V. (“ICA Holding” or “EMICA”), the parent company of a Mexican conglomerate of over 140 corporations, which provides a wide range of engineering, construction and construction-related services (Cl. Ex. 7).

11. The majority of ICA Holding’s shares are traded on the Bolsa Mexicana de Valores and on the New York Stock Exchange (Cl. Ex. 8).

### **C. The Highway Concession**

12. Shortly after its incorporation, Aucoven began to negotiate with the Ministry a contract providing for the terms and conditions of the highway concession. On December 23, 1996 (Cl. Ex. A), Aucoven and the Ministry entered into the Concession Agreement (the “Agreement”), under which Aucoven has initiated these proceedings. Pursuant to the Agreement, Aucoven was granted the exclusive right to design, construct, operate, exploit, conserve, and maintain the Caracas–La Guaira Highway and the Caracas–La Guaira old road (this included the construction of the alternative viaduct, substantial improvements to the

Caracas–La Guaira Highway, as well as improvements to the Caracas–La Guaira old road) (Clause 2, Ven. Ex. 1).

13. Under the Agreement, Aucoven was permitted to collect tolls generated by the Highway over a 30-year period (Clause 31, Ven. Ex. 1). In addition, the Ministry guaranteed Aucoven 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. The “Economic–Financial Equilibrium” (i.e. the ability for Aucoven to cover its costs and obtain a fair and equitable remuneration) was to be maintained at all times, to ensure the continuity of the service to be rendered by Aucoven and the performance of the corresponding services and work (Clause 44, Cl. Ex. 3).

14. The Ministry was also to compensate Aucoven through direct payments and/or rate increases for any event not attributable to Aucoven that would affect the Economic–Financial Equilibrium (Clause 45, Cl. Ex. 3).

#### **D. The United States Corporation Icatech**

15. Icatech was incorporated on November 2, 1989, in the State of Florida, United States of America. The first corporate name of the company was ICA Investment Corporation. It was changed to Icatech Corporation on June 15, 1990 (Cl. Ex. 6). Icatech has its principal place of business in Miami, Dade County (Cl. Ex. 5).

16. As a company organised under the laws of Florida, Icatech is subject to Florida and United States laws and regulations. Particularly, it was required to file its Articles of Incorporation with the Florida Secretary of State and to designate and continuously maintain a registered office in Florida with a registered agent. It was also required to pay mandated fees and must submit its annual report to the Secretary of the State.

17. Like ICA, Icatech is a wholly-owned subsidiary of the Mexican company ICA Holding. Shortly after its incorporation, Icatech acquired different companies active in the construction industry. As a consequence of the peso crisis in 1995–1996, during which Mexico’s currency was repeatedly devalued, ICA Holding undertook to internationalise its oper-

ations. It was, however, difficult for a Mexican company to finance projects under the then prevailing economic conditions and a connection to the United States enhanced the ability to obtain financing, a fact which Aucoven asserted at the Hearing of June 28, 2001, without being contradicted and which the Tribunal finds plausible. As a result, ICA Holding decided that its U.S. subsidiary Icatech would establish or acquire several international project companies including Aucoven (namely Empresas y Guatemala, Empresas y Chile, Empresas y Peru, IcaDom in the Dominican Republic, subsidiaries in Malaysia and Puerto Rico, IcaPanama, Cl. Ex. 10; Ven. Ex. 4, p. 6–7. Ven. Ex. 14, 6 (see next paragraph)).

#### E. The Transfer of Aucoven's Shares to Icatech

18. The Agreement between Aucoven and Venezuela became effective on April 1, 1997. On April 7, 1997, at the start of Aucoven's operation of the Highway system, Aucoven requested, in accordance with Clause 7 of the Agreement (see par 92 below), the authorisation from the Ministry to transfer 75% of Aucoven's shares to Icatech (Cl. Ex. 11):

*“[...] so that (i) Ingenieros Civiles Asociados, Sociedad Anonima de Capital Variable, a commercial company duly organized and existing under the laws of the United Mexican States, may transfer to ICATECH CORPORATION (formerly known as ICA INVESTMENT CORPORATION), a commercial company duly organized and existing under the laws of the state of Florida, United States of America, domiciled at 2655 Lejeune Road, Suite 1000, Coral Gables, Florida 33134 and registered with the Department of State of Dade County on October 30, 1989, under NO L27636, two million, four hundred eighty-four thousand, seven hundred twenty (2,484,720) Class “A” Shares with a par value of one thousand bolivars (Bs.1.000.00) each, and four hundred thirty-three thousand, eight hundred forty (433,840) Class “B” Shares with a par value of one thousand bolivars (Bs. 1,000.00) each, which make up the capital stock of Autopista Concesionada de Venezuela, Acoven [sic], C.A.; and so that (ii) Baninsa Finanzas y Valores, V.A. a commercial company duly organized and existing under the laws of Venezuela, may transfer to ICATECH CORPORATION, identified above, thirty-nine thousand, four*



*hundred forty (39,440) Class “D” Shares, with a par value of one thousand bolivars (Bs. 1,000.00) each, which make up the capital stock of Autopista Concesionada de Venezuela, Aucoven [sic], C.A. [...]*”(Cl. Ex. 11)

19. Its request remaining unanswered, Aucoven renewed it on July 11, 1997 (Ven. Ex. 25). In response, the Ministry asked for additional financial information regarding Icatech, which was provided on July 18 and August 13, 1997 (Cl. Ex. 12, 13).

20. On August 7, 1997, the Special Commission of the Minister for Concessions submitted the request filed by Aucoven to Dr Carmen Carrillo, of the Legal Department of the Ministry:

*“I would like to submit for your study and consideration, the requests presented by the concessionaire Autopista Concesionada de Venezuela, C.A., submitted to this Office by means of Remittal Sheet NO, 02350, received on July 14, 1997, whereby the aforementioned concessionaire company requests authorization to transfer shares representing its equity capital, in accordance with the conditions specified in the same request.*

*In this regard, I would like to inform you that in the opinion of this Office, the aforementioned share transfers are appropriate in accordance with that stipulated in Article 33 of Decree Law No. 138 regarding Concessions of Public Works and National Public Services.[...]”* (Ven. Ex. 26)

21. On April 6, 1998, after further requests by Aucoven, the Ministry asked Aucoven to provide a guarantee from Icatech’s parent company:

*“[...] In response and after having reviewed and studied the documents submitted with your request, this office has made the following observations:*

*1. ICATECH CORPORATION AND SUBSIDIARIES:*

*From the evaluation conducted for this company, we have noted from the negative financial results of its operations that there are*

*ongoing financial problems, which are covered by the parent company; accordingly, it is necessary to request a guarantee from its sole shareholder to financially guarantee the fulfillment of the contract to be executed.*

[...]” (Ven. Ex. 27)

22. ICA Holding submitted the requested guarantee on April 22, 1998. It accepted to be jointly responsible for share contributions that Icatech was to make to Aucoven and to assume each and every obligations of Icatech, in its capacity as shareholder of Aucoven. Attached to the same letter, ICA Holding also submitted its financial statements, in order to facilitate a better understanding and evaluation of its technical and financial capacity (Ven. Ex. 29).

23. On May 7, 1998, Aucoven renewed its request for the transfer of the shares.

24. On June 6, 1998, the Ministry asked the Attorney General whether the transfer of shares requested by Aucoven required the approval of the President in Cabinet. The Attorney General answered on June 29, 1998 that the transfer of shares did not require the Cabinet’s approval and was within the powers of the Ministry. The Attorney General also stated:

*“[...] Finally, it would be important to point out that the official letter in question clearly shows that the Minister of Transportation and Communication is aware, that he is responsible for authorizing or not authorizing the Concessionaire Company’s transfer of shares, and that he is in favor thereof, having given much consideration to the request from the economic-financial and legal point of view. Therefore, he does not require the opinion of the Federal Attorney General as to the substance of the matter. [...]”* (Cl. Ex. 16)

25. On June 30, 1998, 15 months after Aucoven’s first request, the Ministry authorized the transfer of 75% of Aucoven’s shares to Icatech (Ven. Ex. 30).

26. On August 28, 1998 Icatech acquired from ICA all of the registered class A shares in Aucoven and a majority of the registered class B shares (Ven. Ex. 24). At the same time, it purchased Aucoven's registered class D shares from Santiago de León Valores, C.A. (Ven. Ex. 42). As a result of these transactions, Icatech became Aucoven's majority shareholder with 75% of its shares.

27. On August 31, 1998, Aucoven provided the Ministry with a copy of these share purchase agreements (Cl.Ex.17). The remaining 25% of Aucoven's shares stayed in ICA's hands. On July 14, 1999, Aucoven requested that the Ministry authorise the transfer of these remaining shares to Icatech as well. Such authorisation was never granted.

28. On August 31, 1998, Aucoven's shareholders adopted a resolution stating that Aucoven was subject to foreign control by Icatech, for all purposes of the Washington Convention and that Aucoven was subject to the arbitration provisions of Clause 64 of the Agreement (see chapter B.1, below). This resolution was forwarded to the Ministry on September 1, 1998 (Ven. Ex. 43).

29. In an administrative decision dated September 15, 1998, the Ministry stated *inter alia* the following:

*"[...] It should nevertheless be pointed out that this Ministry entered into the Concession Contract with a Venezuelan company domiciled in Venezuela pursuant to the Decree with rank and force of Organic Law No. 138, contractually electing special domicile in the city of Caracas. Accordingly, any act claiming to change the domicile or nationality thereof cannot be approved by this Office unless previously approved by the Congress of the Republic; in like manner, we wish to remind you that the Concession Contract is an administrative contract and as such, is of public interest pursuant to Article 127 of the Constitution and the clause shall be incorporated according to which "doubts and disputes which may arise regarding such contracts and which are not amicably settled by the contracting parties will be decided by the competent courts of the Republic, in accordance with its laws, and they may not for any reason or cause give rise to foreign claims." (Ven. Ex. 44)*

30. The reasons that motivated this decision remain unclear. However, when Aucoven filed an Appeal for Review from the above administrative decision, the Ministry confirmed on January 13, 1999 that Clauses 63 and 64 of the Agreement were legal and valid and in full effect between the parties:

*“[...] That clauses 63 and 64 of the Concession Contract No, MTC-COP-001-95, referring to arbitration, will be in full effect between the contracting parties, and are considered legal and valid. [...]”* (Ven. Ex. 45)

31. During October and November 1998, the parties discussed amendments to several provisions of the Agreement. As a result, eleven clauses of the latter and of its Annex A were clarified or modified (Cl. Ex. 20). Clauses 63 and 64 remained untouched.

#### **F. The Outset of the Dispute**

32. The performance of the Agreement gave rise to disagreements between the parties, particularly regarding the implementation of the toll increases as provided by Clauses 31 to 34 of the Agreement.

33. On March 8, 2000 Aucoven sent a letter to the Ministry to initiate conciliation proceedings pursuant to Clause 62 of the Concession Agreement (Cl. Ex. 22, 23, 24). The conciliation proceedings having failed (Cl. Ex. 23, 24), on June 1, 2000, Aucoven filed a Request for Arbitration pursuant to Clause 64 of the Agreement.

34. On June 13, 2000, Aucoven gave Venezuela notice of the termination of the Agreement:

*“1. We inform the Ministry of Aucoven’s decision to terminate the Concession Agreement, under the rights granted to the parties in Clause 60 of the aforementioned Agreement. Notwithstanding the foregoing and expressly subject to all the rights of the company I represent arising from the Concession Agreement, we would 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.*

*2. We respectfully ask that this Ministry proceed to terminate the administrative proceeding instituted by means of Resolution No. 068 of October 25, 1999, thereby resolving that the matter involved in this proceeding is reserved for the competent Arbitration Panel, since clearly, pursuant to Clause 64 of the Concession Agreement, Aucoven and the Ministry agreed to submit to the Center for arbitration any dispute or difference related to the Concession Agreement, and hence the aforementioned administrative proceeding cannot have any effect on Aucoven's rights under the Concession Agreement.” (Cl. Ex. 25)*

#### G. Mexico's Diplomatic Interventions

35. On several occasions, before and after the transfer of 75% of Aucoven's shares to Icatech, Mexican officials attempted to facilitate meetings with the Venezuelan Government, in order to find an amicable solution to the parties' disagreements. The letter sent by the Ambassador of Mexico to the Venezuelan Ministry of Foreign Affairs on November 25, 1999 is an example of such attempts:

*“[...] Under such circumstances, I respectfully request the intervention and valuable actions of Your Excellency before His Excellency the President of the Republic, Hugo Chávez Frias for the search for a solution—both viable and mutually acceptable—to the outstanding matters discussed in relation to the Concession Contract, in order that the important project of the Caracas–La Guaira Highway make progress and be completed in the full environment of traditional understanding and the ever more important relations between Mexico and Venezuela.” (Ven. Ex. 36; see also Ven. Ex. 37, 38).*

36. The Mexican Government continued to try to facilitate settlement discussions (Ven. Ex. 39) after the filing of Aucoven's Request for Arbitration. These interventions proved unsuccessful.

### III. THE CHRONOLOGY OF THE PROCEEDINGS

37. This paragraph sets forth the sequence of these arbitration proceedings leading to this decision on jurisdiction:

- On June 1, 2000, Aucoven filed its Request for arbitration.
- On June 23, 2000, the Secretary-General of ICSID registered the request for arbitration and notified the parties of the registration.
- By clause 64 of the 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 third, presiding, arbitrator appointed by the two party-appointed arbitrators.
- On August 1, 2000, Aucoven appointed Professor Karl-Heinz Böckstiegel as arbitrator.
- 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 6, 2000, Venezuela appointed Professor Bernardo Cremades as arbitrator.
- On January 8, 2001, Professor Böckstiegel and Professor Cremades designated Professor Gabrielle Kaufmann-Kohler as President of the Tribunal.
- 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.
- By letter dated February 14, 2001, Venezuela objected to the Tribunal's jurisdiction.
- On February 15, Aucoven submitted to the Arbitral Tribunal Preliminary Observations further to Venezuela's letter dated February 14, 2001.
- The Arbitral Tribunal held its first session in Paris on February 19, 2001. 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 jurisdiction in the following terms:

*“Having considered the views of the parties and the relevant rules, the Tribunal decided to suspend the proceeding 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 (see below para.17) 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)

- On April 5, 2001, Venezuela submitted its Observations on jurisdiction.
- On May 7, 2001, Aucoven submitted its Counter-Memorial in support of jurisdiction.
- On May 22, 2001, Venezuela submitted Further Observations on jurisdiction.
- On June 6, 2001, Aucoven submitted its Rejoinder in support of jurisdiction.
- On June 13, 2001, the President of the Arbitral Tribunal and the counsel for Aucoven and Venezuela held a pre-hearing telephone conference for the purpose of organising the hearing on jurisdiction to be held on June 28, 2001.
- On June 14, 2001, the Tribunal rendered its Procedural Order no 1 regarding the organisation of the hearing on jurisdiction.
- On June 28, 2001, the Tribunal held a hearing in Washington, D.C. on the objection to jurisdiction. During such hearing each party presented oral arguments and the Arbitral Tribunal asked questions from counsel. An immediate, *verbatim* transcript was made.
- Thereafter, the Arbitral Tribunal proceeded to deliberate and issue this decision.

#### IV. THE PARTIES' POSITIONS ON JURISDICTION

##### A. Venezuela's Position

38. Venezuela argues that Aucoven's claim should be dismissed on the ground that the Arbitral Tribunal lacks jurisdiction. Aucoven is a

company locally incorporated and Venezuela never agreed to treat it as a national of another Contracting State because of foreign control pursuant to Art. 25(2)(b) of the ICSID Convention. In fact, Aucoven's argument regarding ICSID jurisdiction rests on two fictions: Aucoven is under the foreign control of a US national and Venezuela agreed to ICSID jurisdiction based on such fictional foreign control.

*1. Aucoven's Operations in Venezuela are Controlled by ICA Holding*

39. From the date of its incorporation until today, Aucoven has been a wholly or majority owned subsidiary of ICA Holding, through one or more ICA Holding subsidiaries. The transfer of the shares to Icatech did not change ICA Holding's direct control over, and involvement in, Aucoven's operations and decision-making. ICA Holding is not only the sole shareholder of ICA, Icatech and numerous other subsidiaries, it also exerts direct control over these subsidiaries. Notably, several officers and directors of ICA Holding hold the same positions with many of the subsidiaries, including ICA and Icatech (Ven. Ex. 15, 16). Significantly, the presence of Dr José Luis Guerrero, Executive Vice President of the ICA Group, was required at almost all important meetings with officials of Venezuela regarding Aucoven's operations (Ven. Ex. 14, 16, 17).

40. The transfer of shares to Icatech did not diminish ICA Holding's control over Aucoven's operations in Venezuela. For example, Aucoven's President went on requesting meetings with the Minister of Infrastructure for himself and Dr Guerrero, the Mexican Vice President of Aucoven (Ven. Ex. 20, 21). Mexican nationals with ties to the ICA Group continued to exercise control over decisions related to Aucoven's future in Venezuela (Ven. Ex. 33, 34, 35). At all times relevant to this case, Aucoven's board of directors remained under the majority control of Mexican nationals (Ven. Ex. 37, 38).

41. These elements show that the true control over Aucoven has always been exerted by ICA Holding, notwithstanding the transfer of 75% of Aucoven's shares to Icatech.



*2. ICA Holding's Control over Aucoven was a Condition of the Approval of the Share Transfer*

42. ICA Holding's continued control over Aucoven's operations was a condition of the Venezuelan Ministry's approval of the transfer of shares. Venezuela was advised that because of ICA's ownership of ICA and Icatech, the share transfer would not affect any material aspect of the concession.

43. Given Icatech's perilous financial condition and its dependence on its parent company, the Ministry advised Aucoven that it would not approve the transfer of shares, without a guarantee of Icatech's obligations given by ICA Holding (Ven. Ex. 29). When it finally agreed to the share transfer, the Ministry clearly indicated that its decision was motivated by the fact that Aucoven had complied with the requirements contained in its demand dated April 6, 1998, i.e. that it had provided the required guarantee (Ven. Ex. 30).

*3. The United States has no Significant Interest in this Matter*

44. The United States has no significant national interest in this matter which involves a Venezuelan corporation controlled by Mexican interests, on the one hand, and the Republic of Venezuela, on the other. When the present case was filed and until August 2000, no United States citizen served as an officer or director of Aucoven.

*4. Diplomatic Interventions by the Mexican Government*

45. The control by Mexican nationals is further confirmed by the diplomatic interventions undertaken by the Mexican Government both before and after the transfer of the shares. Mexican actions have included contacts between officials of the Mexican and Venezuelan Governments (Ven. Ex. 31, 32, 33, 34, 35, 36, 37).

46. Mexican diplomatic efforts continued during 1999 and 2000. On August 4, 2000, the Ambassador of Mexico and the Venezuelan Minister of Infrastructure held a meeting, during which the Ambassador pressed for a resolution of the disagreement between Aucoven and Venezuela. The

Minister agreed to open settlement discussions, which resulted in a temporary suspension of the arbitration proceedings in September, 2000.

5. *Venezuela has not Consented to ICSID Jurisdiction in the Circumstances of this Case, i.e. on the Basis of a Fictional Control Relationship*

47. Venezuela never agreed that, by reason of the transfer of shares, Aucoven would be treated as a United States national for purposes of ICSID jurisdiction. Upon receipt of Aucoven's resolution of August 31, 1998, Venezuela promptly rejected Aucoven's position that it was under the control of a United States corporation and that any disputes would be resolved by ICSID arbitration (Ven. Ex. 44).

48. Consent of the parties is the cornerstone of ICSID jurisdiction. Article 25(2)(b) requires a clear expression in writing of the parties' consent to ICSID jurisdiction and of their agreement that a national of the host state may be treated as a national of another contracting state (*Holiday Inns v. Morocco* (Case No. ARB/72/1), in P. Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 1 ICSID Reports 645 (1993), Ven. Auth. 4); *Cable Television of Nevis, Ltd and Cable Television of Nevis Holdings, Ltd, v. Federation of St. Christopher (St Kitts) and Nevis* (Case No. ARB/95/2), Award of December 16, 1996, 13 ICSID Review—FILJ 328 (1998), Ven. Auth.3; *Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon* (Case No. ARB/81/2), Award of October 21, 1983, 2 ICSID Reports 4 (1994), Ven. Auth. 5; *Amco Asia Corporation and Others v. The Republic of Indonesia* (Case No. ARB/81/1), Decision on Jurisdiction of September 25, 1983, 1 ICSID Reports 377 (1993), Ven. Auth. 1; *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia* (Case No. ARB/83/2), Award of March 31, 1986 and Rectification of May 14, 1986, 2 ICSID Reports 343 (1994), Ven. Auth. 6); *Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal*, Decision on Jurisdiction of August 1, 1984, 2 ICSID Reports 165(1994), Ven. Auth. 8).

49. In the present case, when the Agreement was executed, the parties agreed that there would be no ICSID jurisdiction based on the foreign control of Aucoven that then existed, namely control by the ICA Group in Mexico. Hence, there can be no reasonable inference that the

Republic agreed to ICSID jurisdiction, or agreed that Aucoven should be treated as a national of the United States, as long as it would continue to be under the control of the ICA Group. Thus, Venezuela's consent to arbitration in the present circumstances was limited to an arbitration by independent arbitrators in Caracas under Venezuelan law, pursuant to Clause 63 of the Agreement.

50. According to Venezuela, a full reading of Clauses 63 and 64 shows that the parties' consent to ICSID jurisdiction is subject to a transfer of actual control to a national of another Contracting State, as Article 25(2)(b) requires. The transfer of Aucoven's shares among subsidiaries of ICA Holding does not establish consent by Venezuela to ICSID jurisdiction. As a consequence, Clause 64 of the Agreement did not become effective.

*6. The "Foreign Control" Provision of Article 25(2)(b) does not Permit the Exercise of ICSID Jurisdiction in the Circumstances of this Case*

51. The cases decided under Article 25(2)(b) establish that the "foreign control" referred to in the second clause of Article 25(2)(b) means foreign control by nationals of a Contracting State party to the Convention. Moreover, such "foreign control" must meet an objective standard (*Vacuum Salt Products Ltd. v. Government of the Republic of Ghana* (Case No. ARB/92/1) Award of February 16, 1994, 4 ICSID Reports 165(1994), Ven. Auth. 9). As a result, an arbitral tribunal must take into account the true control relationship (*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, S.A.R.L. v. the Democratic Republic of the Congo* (Case No. ARB/98/7), Award Declining Jurisdiction of September 1, 2000, Ven. Auth. 2; *LETCO*, Ven. Auth.6; *SOABI*, Ven. Auth. 8; Christoph Schreuer, *Commentary on the ICSID Convention*, 12 ICSID Review—FILJ 59 (1997) (Second Installment of Commentaries Discussing Article 25), 560, 562–563, Ven. Auth. 11).

52. Therefore, even if the parties had agreed to treat Aucoven as a United States national for jurisdictional purposes, the pervasive control by Mexican nationals over, and involvement in the affairs of, Aucoven should lead the Tribunal to decline jurisdiction.

*7. Aucoven Cannot Benefit from Both Mexico's Diplomatic Efforts and ICSID Arbitration*

53. Nationals of non-contracting States have no access to ICSID. Indeed, the treaty obligations of a Contracting State were an important part of the balance that the drafters of the Washington Convention sought to achieve. Significantly, when a national of a Contracting State consents to an ICSID proceeding, a suspension of diplomatic protection takes place in accordance with Article 27 of the Convention (Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID Review—FILJ § 175 (1997), Ven. Auth. 11; Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331, 356 (1972–II), Ven. Auth. 12; *Banro*, Ven. Auth. 2).

54. In this case, Mexico has made diplomatic representations to the Republic of Venezuela on behalf of the Claimant, even after the share transfer. In fact, it has espoused and endorsed Aucoven's claim (see Ven. Ex. 36, 37, 38). Mexico is free of any treaty commitments that would prevent it from providing diplomatic protection to Aucoven, even while the latter pursues the present arbitration proceedings.

55. Under these circumstances, to allow Aucoven access to ICSID arbitration in spite of the overwhelming control and domination of it by its Mexican parent company, would be contrary to the text and purpose of the Convention. To do so would be incompatible with ICSID's overall scheme, which seeks to prevent a situation in which an investor benefits from both diplomatic protection and ICSID arbitration at the same time. Neither the ICSID Convention, nor any consent or agreement the Republic has given, allows Aucoven to have it both ways.

56. In conclusion, the parties agreed when entering into the Agreement that the dispute resolution mechanism would be a Venezuelan arbitration. Such arbitration is an appropriate forum to resolve the present dispute. This is fully supported by considerations of expense, burden, convenience of parties and witnesses, and respect for the parties' deliberate choices.

## B. Aucoven's Position

57. Aucoven considers that the conditions of Article 25(2)(b) are fulfilled, the parties having agreed to treat Aucoven as a national of another Contracting State because of foreign control. It argues that, as a consequence, Venezuela's objection to jurisdiction must be dismissed.

### *1. The Parties Executed an ICSID Arbitration Clause that is Effective by its Terms*

58. By Clause 64 of the Agreement, Venezuela consented to ICSID arbitration, if Aucoven's majority shareholder came to be a national of a Contracting State.

59. The ICSID Convention allows the parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as the adhesion of the States concerned to the Convention, or the incorporation of the entity contemplated by the agreement. On this assumption, a party's consent is deemed given on the date on which the conditions are definitely met (*Holiday Inns S.A. v. Morocco*, Ven. Auth. 4).

60. On August 28, 1998, with Venezuela's express authorisation, 75% of Aucoven's shares were sold to Icatech, a corporation organised under the laws of the State of Florida, with its principal place of business in Miami (Cl Ex. 5, 6; Ven. Ex. 24, 42). As a consequence, Venezuela's consent to ICSID jurisdiction became effective on that day and may not be revoked.

### *2. The Definition of Foreign Control Adopted by The Parties in Clause 64 is Reasonable and Must be Enforced*

61. The drafters of Article 25(2)(b) ICSID Convention deliberately left the term "foreign control" undefined in order to afford the parties wide discretion to provide a definition (A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136, *Recueil des Cours* 331, 360 (1972-II), Ven. Auth. 12). In other words, they solved the definitional difficulties by recognising the

autonomy of the parties to agree upon the criteria which would determine foreign control.

62. The parties' freedom to define "foreign control" within the framework of Article 25(2)(b) is confirmed by *Vacuum Salt Ltd v. Ghana* (Ven. Auth. 9) and authoritative commentaries (C.F. Amerasinghe, *Jurisdiction Rationae Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 47 B.Y.I.L. 227, 262 (1974/75), Cl. Auth. 9; C.F. Amerasinghe, Interpretation of Article 25(2)(b) of the ICSID Convention, at 232, Cl. Auth. 8; P.C. Szasz, *A Practical Guide to the Convention on Settlement of Investment Disputes*, 1 Cornell Int'l L. J., I 20 (1968), Cl. Auth. 14).

63. In the present case, Venezuela and Aucoven agreed that Aucoven would be under "foreign control", and Clause 64 would become effective, if a majority of Aucoven's shares were transferred to a national of a Contracting State. The parties thus agreed that, once a majority of Aucoven's shares were owned by a national of a Contracting State, the criterion of "foreign control" would be met. No other test was considered by the parties.

64. The agreement contained in Clause 64 is reasonable: the parties defined control to mean direct control and used the traditional test of share ownership to determine control. Indeed, as the two major cases dealing with layers of foreign control, i.e. *Amco*, (Ven. Auth 1), and *SOABI* (Ven. Auth. 8), made it clear, while there is authority for the proposition that direct control is not the exclusive means of determining control under Article 25(2)(b), direct control is undoubtedly one reasonable method of determining control available to the parties to an ICSID arbitration clause.

65. In light of the parties' agreement on that test of control, there is no reason for the Tribunal to examine different criteria (nationality of the board members, frequency of visits of board members of the direct shareholder, frequency of "monitoring" of Aucoven's activities, financial support etc.), even if such criteria might be relevant in different circumstances.

66. Aucoven nonetheless points out that, since the time that Icatech became Aucoven's majority shareholder, all shareholder resolu-

tions have been passed with the votes of Icatech alone. Similarly, Icatech exercised control by passing the shareholder resolutions pursuant to which Aucoven terminated the Agreement.

*3. Venezuela has not Identified any Circumstances that Warrant Setting Aside the Parties' Agreement*

67. Although Venezuela views Icatech's corporate identity as a mere formality, this formality is the fundamental building block of the global economy. No state, court, or tribunal, has the right to set aside that corporate identity, except where the parties consent to such action or the corporation has engaged in abuse or fraud. No such circumstances are present here.

68. The fact that members of the boards of Aucoven and Icatech are Mexican nationals, as well as the fact that ICA Holding made efforts to settle the present dispute and gave Icatech financial support do not suffice to disregard Icatech's independent corporate identity (Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)*—Some Legal Problems, 1 ICSID Reports 645 (1993), Ven. Auth. 4; *Klöckner*, Cl. Auth. 19).

69. The thicket into which Venezuela would lead the Arbitral Tribunal is precisely what the drafters of the ICSID Convention decided to avoid. Finding the "ultimate", or "effective", or "true" controller would often involve difficult and protracted factual investigations, without any assurance as to the result.

70. In addition, Aucoven has engaged in no abuse. Since its incorporation, Icatech has been an active corporation. It holds directly or indirectly about 20 subsidiaries (Cl. Ex. 10). Icatech acquired its majority shares in Aucoven at a time when it reoriented its activities towards the international market.

71. Aucoven did not defraud the Ministry. The Ministry could not have failed to know that Icatech was a United States national and it had every opportunity to assess the legal consequences of the share transfer. Hence, Venezuela's position according to which Aucoven had an affirmative obligation to advise the Ministry of the legal consequences under Clause 64 of the share transfer has no legal support.

4. *The Efforts of Mexican Officials Towards an Amicable Resolution Cannot Affect Jurisdiction*

72. The bar on diplomatic protection under Article 27(1) is not meant to discourage the amicable resolution of disputes.

73. At no point has Mexico filed a formal protest before the Venezuelan Government. It has not in any other way espoused a claim, and no international dispute has arisen between Mexico and Venezuela. Thus, even if Mexico's activities could affect Aucoven's rights, which they could not, they would not do so in this case.

74. Even if Mexico's actions could be construed as some form of prohibited diplomatic protection, Article 27(1) would not apply here. Indeed, Article 27(1) does not apply to Mexico which is not a Contracting Party. Article 27(1) limits the prohibition of diplomatic protection to disputes in which a national of the State granting the protection is a claimant (Christoph Schreuer, *Commentary on Article 27 of the ICSID Convention*, 12 ICSID Review—FILJ 205 (1997) at 206, § 1, Cl. Auth. 13).

75. While active solicitation of diplomatic protection by the investor might be a violation of Article 26, there is no support, however, for the proposition that an ICSID tribunal may deny jurisdiction on this ground.

5. *Venezuela's Arguments Based on Convenience are Legally Irrelevant*

76. Finally, Venezuela argues that considerations of convenience should influence the interpretation of the dispute settlement provisions of the Agreement. Such arguments are legally irrelevant.

## V. THE JURISDICTION OF THIS TRIBUNAL

### A. The Relevant Texts

77. Before entering the discussion on jurisdiction, it may be useful to set out the relevant treaty and contract provisions in full text. These



provisions are Article 25 ICSID Convention and Clauses 63 and 64 of the Agreement.

*1. Article 25 of the ICSID Convention*

*“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

*(2) “National of another Contracting State” means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*

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

*(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.*

*(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification*

*to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).” (emphasis added)*

## *2. Clause 63 of the Agreement*

78. By Clause 63 of the Agreement, the parties agreed to submit their disputes to *ad hoc* arbitration in Caracas pursuant to the Venezuelan Code of Civil Procedure and the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law:

*“In accordance with that expressly provided in article 10 of the Decree with rank and force of Organic Law No.138, which allows the doubts and controversies that may arise regarding the interpretation and/or execution of the Concession, and in view of the necessary financing and foreign investments in order to fulfill the Concession, the parties agree that: Any doubt or controversy that may arise regarding the interpretation and/or execution of the Agreement that cannot be resolved amicably by means of the conciliation procedure established in the previous Clause within a total period of thirty (30) working days from the time of the last notification mentioned in Clause 62 of this document, must be resolved by means of arbitration by law, the procedure of which shall be governed by the provisions of the Civil Procedure Code of Venezuela, provided these provisions are not modified by this document or by the Model Law on International Commercial Arbitration, approved by the United Nations Commission on International Trade Law of June 21, 1985 (UNCITRAL, 1985) (“Model Law”), whose provisions are understood to be contained in this document.*

*The arbitration shall be carried out in Spanish in the city of Caracas, by an Arbitration Tribunal (the “Tribunal”) composed of three (3) independent arbitrators, with the understanding that each of the parties shall name one (1) arbitrator and the third arbitrator, who will be president of the Tribunal, shall be designated by mutual agreement between the two (2) arbitrators designated by the parties. If within twenty (20) working days from the time of receiving a request from the other party, one of the parties does not appoint the arbitrator to which it is enti-*

*tled, or if within the same amount of time, counted from the designation of the arbitrators by the parties, they are not able to come to an agreement on the appointment of the third arbitrator, the same shall be appointed in accordance with the Model Law. The swearing in of the arbitrators, their recusal, the validity of the arbitration clause and the execution of the award or arbitral decision in Venezuela shall be governed by the rules of the Code of Civil Procedures of Venezuela. Each party shall waive any right that either may have at the present time or in the future to initiate or maintain any judgement or legal procedure with regard to any dispute, claim, controversy, disagreement and/or difference related to, derived from, or in connection with this Contract or related in any way to the interpretation, execution, non-fulfillment, termination and/or resolution of the same by any mechanism that is different from that provided in this Clause. The validity and legality of the Concession shall be discussed before the Supreme Court of Justice and shall be excluded from this clause.”*

### *3. Clause 64 of the Agreement*

79. Venezuela being a party to the ICSID Convention, the parties agreed in Clause 64 to ICSID Arbitration instead of *ad hoc* arbitration under Clause 63 if the following requirement was met:

*“Whereas, by virtue of the Act of Approval of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and its ratification, published in the Official Gazette of The Republic of Venezuela No. 35685, of April 3, 1995, which constitutes valid law in Venezuela, The REPUBLIC OF VENEZUELA has seen fit to submit disputes that may arise relating to investors who are nationals of other Contracting States to international settlement methods, the parties agree that if the shareholder or majority shareholder(s) of THE CONCESSIONAIRE come to be (a) national(s) of a country in which the Convention on the Settlement of Investment Disputes between States and Nationals of other states were to be in force, Clause 63 of this document would immediately be substituted by the following text:*

*“Any dispute, claim, controversy, disagreement and/or difference related to, derived from, or in connection with the Concession or related in any way with the interpretation, performance, non-fulfillment, termination, resolution of the same, all of which are recognized by both parties to pertain to investments, which cannot be resolved amicably through the process of conciliation provided for by the previous Clause within a time period of thirty (30) working days from the time of the last notification provided in accordance with the methods established in this Document, must be resolved by the International Centre For Settlement of Investment Disputes (the “Centre”), by means of arbitration, in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “Convention”) and, except as otherwise agreed by the parties, pursuant to the Rules of Arbitration of the Centre that are valid for the date of entry into force of this clause (the “Arbitration Rules”). The arbitration shall be carried out at the Centre by an Arbitration Tribunal (the “Tribunal”) consisting of three (3) arbitrators from the List of Arbitrators of the Centre, with the understanding that each party shall name one (1) arbitrator and the third arbitrator, who will be President of the Tribunal, shall be designated by mutual agreement by the two arbitrators designated by the parties. If, within a period of twenty (20) working days from the time of the designation of the arbitrators by the parties, they have been unable to agree on the designation of the third arbitrator, the latter shall be designated in accordance with the Rules of Arbitration. Each of the parties shall waive any right either may have at the present time or in the future to initiate or maintain any judgement or legal procedure with regard to any dispute, until the same has been determined pursuant to the aforementioned arbitration procedure, and later only to enforce the award or decision rendered by means of said arbitration procedure. Both The Republic of Venezuela, acting by means of THE MINISTRY, and THE CONCESSIONAIRE, agree to attribute to THE CONCESSIONAIRE, a legal person of Venezuela subject to foreign control for the date when this clause enters into force, the character of “National of another Contracting state” for the purpose of applying this Clause and the provisions of the Convention.*

*Regardless that set forth in of Clause 64, if for any reason The Republic of Venezuela and/or the country of citizenship of the*

*majority shareholder or shareholders of THE CONCESSIONAIRE were to revoke the Convention or if in any other way the Convention were to lose validity for these countries before initiating arbitration pursuant to the provisions of Clause 64 or if for any other reason the Convention ceases to have validity in said countries or if it is impossible to carry out the arbitration in accordance with the convention, the Clause 63 of this document shall regain its full effect and validity”.*

## **B. Discussion**

### *1. Introduction*

80. Given Venezuela’s objections to ICSID jurisdiction, the Tribunal will first construe Clause 64 of the Agreement to determine whether it is meant to apply in the event of a transfer of Aucoven’s shares within the ICA group (headings 2 to 4 below).

81. It will then determine whether the conditions of Article 25 of the ICSID Convention are fulfilled (heading 5 below). In particular, it will examine whether the parties’ agreement to treat Aucoven as a national of another Contracting State because of foreign control remains within the scope of the ICSID Convention. In this context, the Tribunal will address the objections raised by Venezuela regarding the alleged abuse of the Convention’s purposes, specifically due to ICA Holding’s continued control over Aucoven notwithstanding the share transfer to Icatech, and Aucoven’s alleged misleading conduct when requesting Venezuela’s approval of the share transfer.

82. Finally, the Tribunal will examine if Mexico’s diplomatic efforts may have an impact on the Tribunal’s jurisdiction.

### *2. Article 64 of the Agreement: the Parties’ Agreement to ICSID Arbitration*

83. Clause 64 of the Agreement provides that the parties agree to submit to ICSID any dispute, claim, controversy, disagreement and/or difference related to, derived from, or in connection with the Concession or related in any way with the interpretation, performance, non-fulfillment, termination, resolution of the same, *if the shareholder or majority shareholder(s) of the Concessionaire, i.e. Aucoven, come to be a national of a country*

*in which the ICSID Convention is in force.* Restating the conditions of Article 25(2)(b), Clause 64 (penultimate paragraph) expressly specifies that, in this event, Aucoven shall be deemed a company under foreign control:

*“Both The Republic of Venezuela, acting by means of the MINISTRY, and THE CONCESSIONAIRE, agree to attribute to THE CONCESSIONAIRE, a legal person of Venezuela subject to foreign control for the date when this clause enters into force, the character of “National of another Contracting state” for the purpose of applying this Clause and the provisions of the Convention.”* (Emphasis added)

84. Again referring to the criterion of majority shareholding, Clause 64, last paragraph, states that, if, for any reason, Venezuela “*and/or the country of citizenship of the majority shareholder or shareholders of THE CONCESSIONAIRE*” (emphasis added) were to revoke the Convention, Clause 63 would regain its full effect and validity.

85. According to Venezuela, Clause 64 does not aim at a transfer of shares within the ICA group. Clause 64 is not meant to apply as long as ICA Holding retains the ultimate and actual control over Aucoven (Venezuela’s Further Observations on jurisdiction dated May 22, 2001, p. 4, transcript of the Hearing of June 28, 2001, p. 25). Hence, Venezuela did not consent to ICSID jurisdiction under the present circumstances.

86. Venezuela’s construction is not in conformity with the clear wording of Clause 64. Furthermore, there is no indication on record showing that, when they entered into the Agreement, the parties intended to subject their consent to ICSID jurisdiction to a condition different from the one they had clearly expressed. The Tribunal has found no element allowing it to find that, by the words the “*majority shareholder(s) of THE CONCESSIONAIRE* », the parties did not mean the person holding the majority shares, but rather the person exercising effective control over Aucoven. In other words, there is no indication on record that the parties intended to exclude share transfers among ICA Holding’s subsidiaries and meant to condition their agreement upon a change of effective or ultimate control over Aucoven.

87. As a result, in the absence of any contrary indication, the Tribunal does not see any reason nor justification for departing from the clear wording of Clause 64, according to which the parties consented to ICSID jurisdiction in the event that Aucoven's majority shareholder(s) came to be a national of another Contracting State.

88. Having established the meaning of Clause 64, the Tribunal must determine whether the parties' consent to ICSID jurisdiction meets the requirements of Article 25 of the ICSID Convention. However, before discussing this matter, the Tribunal will briefly address the issue of conditional consent and of the effectiveness of such consent in the context of Clauses 7 and 64 of the Agreement.

### *3. Clause 64: a Conditional Agreement to ICSID Arbitration*

89. The parties' agreement to ICSID jurisdiction expressed in Clause 64 is subject to the fulfilment of a condition, i.e. the transfer of Aucoven's majority shares to a national of another Contracting State.

90. It is common ground that such a conditional arbitration agreement is valid. Indeed, the ICSID Convention does not forbid the parties to subject the entry into force of their arbitration agreement to the subsequent fulfilment of conditions:

*“The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party. As for the date of consent contemplated by Article 25(2)(b) of the Convention, it will automatically be the date on which the two corresponding consents coincide...”* (Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco)*—Some Legal Problems, 1 ICSID Reports 645 (1993) p. 668, Ven. Auth. 4).

91. In such a case, the parties' consent to ICSID jurisdiction becomes effective once the condition provided in the arbitration agreement is met. Assuming that Clause 64 is a valid agreement to arbitrate, the consent became effective on August 28, 1998, on the date of the share transfer.

#### *4. The Effectiveness of the Parties' Agreement to ICSID Arbitration*

92. Pursuant to Clause 7 of the Agreement, the transfer of Aucoven's shares was subject to Venezuela's approval:

*“THE CONCESSIONAIRE is obligated to maintain, within the term of the Concession, its status as a corporation domiciled in Venezuela and its Venezuelan nationality. It is expressly understood that the shares of THE CONCESSIONAIRE shall remain registered and not convertible to bearer shares and that they may not be sold or encumbered, directly or indirectly, without prior authorization from THE MINISTRY. [...]”.*

93. Thus, the occurrence of the event defined by the parties as the condition for ICSID jurisdiction requires Venezuela's approval. However, once the approval has been given and the transfer of the shares has taken place, Clause 64 becomes immediately effective. There is no need for an additional consent by the parties. In other words, Clause 7 does not constitute an opportunity to reassess the conditions under which the parties consented to ICSID jurisdiction in Clause 64.

#### *5. The Requirements of Article 25 of the ICSID Convention*

##### *5.1 The Parties' Consent: the Cornerstone of the Jurisdiction of the Centre*

94. Article 25(1) of the ICSID Convention requires the Parties' consent to submit a dispute to ICSID Jurisdiction. No proceedings can take place under the Centre's auspices unless the parties to the dispute have given their consent in writing. More specifically, the system of the Convention is premised on two levels of consent. At the first level, one finds the consent expressed by the Contracting States which agreed to be bound by the Convention. At the second level, one finds the consent given by the host State and the investor by means of an agreement to ICSID arbitration (Bernardo M. Cremades, *Arbitration between States and*



*investors: some jurisdiction issues*, in *Business Law International*, May 2001, p.157 (160–162)).

95. According to ICSID Tribunals and the commentaries on the ICSID Convention, great weight must be placed on the fact that the parties consented to ICSID’s jurisdiction, consent often being described as the cornerstone of the jurisdiction of the Centre:

*“The third and in a sense the most important jurisdictional requirement is that of consent, by both parties, to the submission of the dispute to the Centre. In the report of the Executive Directors this requirement is described as “the cornerstone of the jurisdiction of the Centre.” Its paramount importance is underlined by the fact that at least to a certain extent the other two jurisdictional requirements can be conditioned (though not waived) by agreement of the parties that would normally be expressed in the instrument expressing the consent: the characterization of a particular transaction as an “investment,” and the stipulation that a domestic corporation is to be considered as a national of another State because of foreign control.” (P. Szasz, *A Practical Guide to the Convention on Settlement of Investment Disputes*, 1 Cornell Int’l Law Journal (1968), Cl. Auth. 14; see also Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), Ven. Auth. 12).*

96. However essential, consent in and of itself is not sufficient to ensure access to the Centre. Indeed, Article 25 of the ICSID Convention provides for additional objective requirements which must be met in addition to consent. These objective requirements are the following:

- The dispute between the parties must be a “legal dispute”;
- The dispute must arise directly out of an “investment”; and,
- In the event that the investor is a corporation registered under the laws of the host State, the parties must agree to treat the locally incorporated company, because of “foreign control”, as a “national” of another Contracting State for the purposes of the Convention.

97. The Convention does not contain any definition of these objective requirements. The drafters of the Convention deliberately chose not

to define the terms “legal dispute” “investment”, “nationality” and “foreign control”. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention (Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), Ven. Auth. 12; C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 47 *B.Y.I.L.* 227 (1974/75), p. 231–232, Cl. Auth.9); Christoph Schreuer, *Commentary on the ICSID Convention* (1997), p. 82), Ven. Auth. 11).

98. Or in the words of Dr Aron Broches, General Counsel of the World Bank, who chaired the consultative meetings at which the preliminary draft of the Convention of October 15, 1963 was discussed:

*“The World Bank staff in preparing a new draft for the Legal Committee which was to advise the Executive Directors on a final text, drew the conclusion from the Consultative Meetings that attempts at definitions should be abandoned and that instead an attempt should be made, relying on the consensual character of the Convention, to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a “national of another Contracting State.” (Aron Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 136 Recueil des Cours 331 (1972–II), p. 360, Ven. Auth. 12)*

*“In the end, the effort to devise a generally acceptable definition of the term “investment” was given up “given the essential requirement of consent by the Parties”.*

*I believe that this was a wise decision, fully consonant with the consensual nature of the Convention, which leaves a large measure of discretion to the parties. It goes without saying, however—and I have made this remark before in another connection—that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.*

[...]

*It was impossible to reconcile the different points of view, quite apart from the fact that some of the proposals would have unduly limited the Centre's jurisdiction. In the end, a large majority was in favour of dropping the definition but to retain the term "legal dispute."* (Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), p. 362–363, Ven. Auth. 12);

99. As a result, to determine whether these objective requirements are met in a given case, one needs to refer to the parties' own understanding or definition. As long as the criteria chosen by the parties to define these requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties' choice.

#### *5.2 The Objective Requirements Provided by Article 25 of the ICSID Convention*

##### *a) Article 25(1): a Legal Dispute Arising Directly out of an Investment*

100. The conditions of Article 25(1) of the ICSID Convention, which are not disputed by the parties, are clearly met. The dispute between Aucoven and Venezuela is a legal dispute, since it relates to the parties' obligations agreed upon in the Agreement.

101. Moreover, according to the Agreement, Aucoven was to design, construct, operate, exploit, conserve, and maintain the Caracas–La Guaira Highway and the Caracas–La Guaira old road. Pursuant to Clause 64, the parties expressly agreed to consider these works as an investment, which seems reasonable. Indeed, the performance of the Agreement, which implies substantial resources during significant periods of time, clearly qualifies as an investment in the sense of Article 25 of the ICSID Convention.

##### *b) Article 25(2)(b): any Locally Registered Corporation which, Because of Foreign Control, the Parties have Agreed should be Treated as a National of Another Contracting State*

102. Article 25(2)(b) creates an exception to the rule that a national cannot initiate ICSID proceedings against its own State. This exception is justified by the fact that host states may require foreign investors to

operate by way of a locally incorporated company, without intending to prevent such investor from acceding to ICSID arbitration.

103. Article 25(2)(b) (second prong) defines “national of another Contracting State” as any juridical person which had the nationality of the Contracting State party to the dispute, and which because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

104. Hence, locally incorporated companies may agree to ICSID arbitration subject to two requirements:

- The parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and
- The said company is subject to foreign control.

*c) The Agreement to Treat a Juridical Person as a National of Another Contracting State*

105. The Convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state as a national of another Contracting State because of foreign control.

106. Further, Article 25(2)(b) does not define nationality. As reflected in the *Travaux préparatoires*, the drafters intentionally gave up inserting into the ICSID Convention a definition of nationality:

*“The subsequent First Draft is silent on the possible criteria for corporate nationality and merely refers to a possible agreement on nationality between the parties (History, Vol. I, p. 124). Although there was some reference to the fact that the criteria for the nationality of a juridical person remained to be determined (History, Vol. II, pp. 669,671), no serious effort to do so was made. A United States attempt to reintroduce the criterion of a “controlling interest” in the definition of “national of another Contracting State” was defeated by a large majority (at pp. 837, 871). The Revised Draft and the Convention are silent on the method to be employed for the determination of a juridical person’s nationality.”* (Christoph

Schreuer, Commentary on the ICSID Convention, 12 ICSID Review—FILJ 59 (1997) (Second Installment of Commentaries Discussing Article 25), p. 81, Ven. Ex. 11)

107. According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration (Christoph Schreuer, Commentary on ICSID Convention: Article 25, p. 81, Ven. Auth. 11; Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331 (1972–II), p. 360, Ven. Auth. 12).

108. The test of the place of incorporation or of the seat has been largely adopted by ICSID Tribunals, for example in *SOABI*:

*“The Tribunal has observed that the Convention does not define the term “nationality”, thus leaving to each State the power to determine whether or not a company is possessed of its nationality. As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company’s shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances. Thus “a juridical person which had the nationality of the Contracting State, party to the dispute”, the phrase used in Article 25(2)(b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, has its head office or has been incorporated in that State.” (SOABI, p. 181, Ven. Auth.8)*

*“Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. [...]” (Amco, p. 396, Ven. Auth. 1)*

109. However, as stated by Aron Broches, the purpose of Article 25(2)(b) being to indicate “the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre”, the parties should be given “the widest possible latitude” to agree on the meaning of nationality. Any definition of nationality based on a “reasonable criterion” should be accepted (see Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), p. 361, Ven. Auth. 12).

*d) Foreign Control*

110. Like the other objective requirements of Article 25 of the ICSID Convention, foreign control is not defined. Article 25(2)(b) does not specify the nature, direct, indirect, ultimate or effective, of the foreign control.

111. In different decisions on jurisdiction, arbitral tribunals have discussed how far a tribunal should go in searching for foreign control. In *Amco* the tribunal considered that it should go one step behind the nationality of the host State; in *SOABI* the tribunal searched for real control and went one step further to second-tier control, i.e. to the majority shareholders of the company holding the share of the locally incorporated entity.

112. According to Venezuela, foreign control in the meaning of Article 25(2)(b) means effective control. However, this interpretation lacks convincing support. Indeed, the term “effective control” is not found in the ICSID Convention. In addition, there is no indication in the *Travaux préparatoires* and in the commentaries on Article 25(2)(b) that “effective control” should be viewed as a threshold that has to be reached before the parties may agree to treat a local corporation as a foreign national in the meaning of Article 25(2)(b).

113. The review of the *Travaux préparatoires* shows that, given the criticism drawn by attempts to define foreign control, the drafters considered that the enterprise of defining foreign control (like nationality, investment or legal dispute) was impracticable. Moreover, definitions of these terms would be difficult to apply in practice and would often lead to protracted investigation of the ownership of shares, nomi-

nees, trusts, voting arrangements, etc. Hence, the drafters decided to give the parties wide discretion to determine under what circumstances a company could be treated as a national of another Contracting State because of foreign control. The concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights, etc. (see Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 *Recueil des Cours* 331 (1972–II), p. 361, Ven. Auth. 12).

114. Given the autonomy granted to the parties by the ICSID Convention, an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the Convention:

*“The Convention does not specify what constitutes “control” for this purpose (i.e. must there be a majority of foreign shareholders), and thus it would be difficult to challenge later such a stipulation agreed to by the Contracting State concerned, regardless of the objective situation.”* (Paul C. Szasz, *a Practical Guide to the Convention on Settlement of Investment Disputes*, p. 20, Cl. Auth. 14)

115. Some commentators even consider that an Arbitral Tribunal should be less stringent in assessing the level of control and the reasonableness of the criterion or criteria chosen by the parties when there is an express agreement in this respect (Amerasinghe, *Interpretation of Article 25(2)(b) of the ICSID Convention*, in R.B. Lillich, C.N. Brower (eds): *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?*, 223 (1993), p. 242 Cl. Auth. 8).

116. On the basis of the foregoing developments, it is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention, i.e. whether they have defined foreign control on the basis of reasonable criteria. For this purpose, the Tribunal has to review the concrete circumstances of the case without being limited by formalities. However, as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused (for example in cases of fraud or misrepresentation), the Arbitral Tribunal must enforce the parties’ choice.

*5.3 The Parties' Agreement Expressed in Clause 64 Remains within the Limits of the ICSID Convention*

117. As stated above, the parties decided to subject their consent to ICSID jurisdiction to the occurrence of a transfer of the majority of Aucoven's shares to a national of another Contracting State. Thus, Aucoven and Venezuela chose to define the term "foreign control" only by reference to Aucoven's direct shareholding. They did not take into account additional criteria, such as nationality of the directors, effective or ultimate control over Aucoven.

118. According to Venezuela, this definition of foreign control, which is merely based on a formal criterion, i.e. direct shareholding, does not meet the requirements of Article 25(2)(b) ICSID. Indeed, notwithstanding the share transfer, ICA Holding retained the ultimate control over Aucoven: the Executive Vice President of the ICA group, Dr Guerrero, continued to attend meetings with officials of Venezuela, the majority of Aucoven's directors remained Mexican nationals and ICA Holding continued to financially support Aucoven and Icatech.

119. As a general matter, the arbitral Tribunal accepts that economic criteria often better reflect reality than legal ones. However, in the present case, such arguments of an economic nature are irrelevant. Indeed, exercising the discretion granted by the Convention, the parties have specifically identified majority shareholding as the criterion to be applied. They have not chosen to subordinate their consent to ICSID arbitration to other criteria.

120. As a result, the Tribunal must respect the parties' autonomy and may not discard the criterion of direct shareholding, unless it proves unreasonable.

121. Direct shareholding confers voting right, and, therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define "foreign control", direct shareholding is certainly a reasonable test for control.

122. The actual circumstances prevailing in this case confirm this finding. Indeed, the Tribunal has found no indication supporting Venezuela's assertions that Icatech would be a corporation of convenience



exerting a purely fictional control for jurisdiction purposes or that Aucoven's conduct in the context of the share transfer would have been misleading.

*a) Icatech is not a Corporation of Convenience Exerting Merely Fictional Control over Aucoven*

123. Icatech was incorporated in Florida on November 2, 1989, well before the conclusion of the Agreement, the share transfer and the emergence of the present dispute. Icatech, which has about 20 subsidiaries in different countries, is subject to economic, tax and social regulations in the United States, a country which is not considered a tax or regulatory heaven.

124. As stated above (see para. 18), Aucoven requested Venezuela's approval of the share transfer at the very beginning of the project. As Aucoven alleged without being contradicted, it was difficult at that time for a Mexican company to finance projects because of the peso crisis. Since a connection to the United States enhanced the ability to obtain financing, again an assertion which remained unchallenged, ICA Holding decided that Icatech would establish or acquire several international project companies including Aucoven. Such explanation which is being put forward by Aucoven in the context of the present proceedings (Hearing of June 28, 2001, transcript, p.175) is consistent with the one expressed in the request for approval of the share transfer:

*"On the other hand, I must indicate, Honorable Minister, that the purpose of the authorization requested herein is to create a new capital participation structure of the concessionaire company in charge of the project, construction, developement, conservation and maintenance of the Caracas-La Guaira Expressway and Old Caracas-Highway and Related Services"* (Letter from E. Perez Alfonso to Minister M. Orozco Graterol dated July 11, 1997, Ven. Ex. 25)

125. Further, in connection with corporate decision-making, the fact that Icatech exercises its voting rights (at least as far as major issues are concerned) in a way consistent with ICA Holding's strategy shows the group's coherence. It is certainly not sufficient to conclude that Icatech is a corporation of convenience.

126. On the basis of these facts, the Tribunal finds that Icatech cannot be regarded as a corporation of convenience. Hence, the assertion of ICSID jurisdiction based on the fact that Icatech holds 75% of Aucoven's shares does not constitute an abuse of the Convention purposes.

*b) Aucoven's conduct was not misleading*

127. According to Venezuela, when requesting approval for the share transfer, Aucoven purposefully failed to mention the consequences of such transfer. Following Venezuela's argumentation, Aucoven knew well that Venezuela would not have given its approval pursuant to Clause 7 of the Agreement, had it realized that such approval would entail consent to ICSID jurisdiction. Far from being informed of the jurisdictional consequences of its approval, Venezuela had merely been advised that the transfer from one subsidiary to another would not affect any material aspect of the Concession. ICA Holding accepted to guarantee Icatech's obligations as Aucoven's shareholder, thus confirming its intention to maintain its financial support to Aucoven.

128. On the basis of the foregoing, the Tribunal does not find Aucoven's conduct misleading. Aucoven unequivocally stated that the shares would be transferred to a United States corporation. With its request, Aucoven submitted Icatech's Articles of Incorporation and other documents, such as a good standing certificate and consolidated financial statements (Cl. Ex. 11, 15; Ven. Ex. 25). On this basis, Venezuela was in a position to assess the jurisdictional consequences of the contemplated share transfer.

129. Venezuela approved the share transfer 15 months after Aucoven's first request. During this period of time, Venezuela apparently studied the consequences of the transfer carefully. The record shows that Venezuela's main concern—understandably so—was to ascertain that ICA Holding would continue to grant Aucoven the necessary financial support to perform its obligations and that the new majority shareholder would have the technical expertise to run the project. The memorandum from Mr. F. Salas and the letter from the Attorney General clearly expressed these concerns:

*“By virtue of the foregoing, we can conclude that both Ingenieros Civiles Asociados, S.A. de C.V. and ICATECH Corpora-*

*tion are owned by and indirectly controlled by the Mexican company called ICA Holding by virtue of which the operation whose authorization has been requested initially implies the transfer of shares between associated and related companies that preserve and maintain the construction experience, financial situation, infrastructure and necessary equipment to fulfill the scope of the concession of the Highway System, already accredited.” (Memorandum from F. Salas to C. Carrillo dated August 7, 1997 Ven. Ex. 26)*

*“[...] Finally, it would be important to point out that the official letter in question clearly shows that the Minister of Transportation and Communication is aware, that he is responsible for authorizing or not authorizing the Concessionaire Company’s transfer of shares, and that he is in favor thereof, having given much consideration to the request from the economic-financial and legal point of view. Therefore, he does not require the opinion of the Federal Attorney General as to the substance of the matter. [...]” (Letter from J. N. Garrido Mendoza, Attorney General to Minister M. Orozco Graterol dated June 29, 1998, Cl. Ex. 16)*

130. The review of these documents does not lead to the conclusion that Venezuela was misled as to the jurisdictional implications of the share transfer. They merely demonstrate that Venezuela’s foremost preoccupations regarded the continued viability of the project, more specifically Icatech’s expertise in the construction field and Icatech’s financial situation. The consequences of the transfer on Clause 64 do not appear to have been a concern. Significantly, once it obtained ICA Holding’s guarantee of Icatech’s obligations, Venezuela promptly gave its approval on June 30, 1998, without raising any further points.

131. This understanding of the facts is further confirmed by the parties’ conduct during the following months. Indeed, in October and November 1998, the parties discussed several provisions of the Agreement. As a result, eleven clauses of the latter and its Annex A were clarified or modified (Cl. Ex. 20). Clause 64 remained untouched. Its validity was even specifically confirmed by the Ministry on January 13, 1999 (Minister of Infrastructure J. Martí, Resolution No. 003 dated January 13, 1999, Ven. Ex. 45).

132. On the basis of the above considerations, the Tribunal considers that Aucoven did not mislead Venezuela by omitting to draw its attention to the jurisdictional consequences of the share transfer.

*6. The Parties' Agreement to ICSID Arbitration is Valid and in Full Effect*

133. Pursuant to the above considerations, Clause 64 which makes the parties' consent to ICSID jurisdiction conditional upon the transfer of Aucoven's majority shares to a national of another Contracting State meets the requirements of Article 25 of the ICSID Convention.

134. A majority of Aucoven's shares, i.e. 75%, were transferred to Icatech on August 28, 1998. Pursuant to the criterion of incorporation which is commonly used to determine the nationality of a corporation, Icatech is a national of another Contracting State (the United States) according to Article 25(2)(b) of the ICSID Convention. As a result, Clause 64 became effective on the same day.

*7. The Significance of the Intervention by Mexican Officials*

135. Article 27 prohibits a Contracting State from espousing the claim of one of its nationals in respect of a dispute that one of its nationals and another Contracting State consented to submit to ICSID arbitration.

136. Mexico is not a Contracting State. Therefore, it is not bound by Article 27 of the ICSID Convention. Hence, Venezuela contends that, should the Tribunal accept its jurisdiction, Venezuela would have to face multiple claims. Indeed, no treaty provision would prevent Mexico from interfering in the dispute between Venezuela and Aucoven. According to Venezuela, Mexico has already espoused Aucoven's claim with a view to protecting the financial interests of ICA Holding, which is one of its nationals.

137. The Tribunal Agrees with Venezuela that Mexico's interest in the outcome of this dispute is somewhat disturbing when one considers the purpose of the ICSID Convention. However, it cannot give such interest the weight Venezuela seeks to give it for two reasons.

138. First, Article 27 of the ICSID Convention makes a clear distinction between diplomatic protection and efforts to settle a dispute. The ICSID Convention provides a forum for resolving disputes. However, its purpose is not to commit parties to arbitration, when there is a possibility to reach an amicable solution. Hence, attempts to settle a dispute do not constitute prohibited diplomatic protection in the sense of Article 27.

139. The record shows that the purpose of Mexico's efforts has been to facilitate the settlement of the dispute between Aucoven and Venezuela (see Ven. Ex. 36, 37, 38, 39). There is no indication that Mexico has espoused Aucoven's claim.

140. Second, even if Mexico's interventions were to constitute prohibited diplomatic interventions in the meaning of Article 27 of the ICSID Convention, this would have no bearing on the jurisdiction of this Arbitral Tribunal which is properly created under Article 25(2)(b). Indeed a denial of jurisdiction is not a remedy available in the context of Article 27.

## VI. CONCLUSION

141. The conditions of Article 25 of the ICSID Convention and of Clause 64 of the Agreement are clearly met in the present case. As a result, Clause 63 providing for arbitration in Caracas was substituted by Clause 64. Venezuela's arguments as to the convenience of arbitration proceedings in Caracas are thus inapposite.

142. As a result of the factual and legal considerations set out in this decision, the Tribunal comes to the conclusion that it has jurisdiction over the dispute submitted to it in these proceedings. This conclusion should not be read as a general statement in favour of one definition of foreign control in Article 25(2)(b) rather than another. It does not reflect such a statement or opinion. It applies the provisions pertinent to this dispute, i.e. Clause 64 of the Agreement and Article 25 of the ICSID Convention. In doing so, it enforces the parties' own test of foreign control, which the Tribunal has found to be within the boundaries set by Article 25 of the ICSID Convention.

143. Finally, the Tribunal is aware that the ICSID award in *Banro* (*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, S.A.R.L. v. the Democratic Republic of the Congo* (Case No. ARB/98/7)) reached a different conclusion. However, the circumstances in *Banro* were different too. In *Banro* the transfer of shares was not subject to the approval of the Government and, more importantly, the parties had not contractually defined the test for foreign control. As a result of these differences, the Arbitral Tribunal is of the opinion that an analogy between *Banro* and the present case is inapposite.

144. The Tribunal reserves its decision on costs, legal fees and other expenses for this stage of the arbitration to be dealt with in the final award.

## VII. DECISION ON JURISDICTION

The Arbitral Tribunal hereby makes the following decision:

- 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.

Done on September 27, 2001, the place of Arbitration being Washington, DC, USA.

### THE ARBITRAL TRIBUNAL

Prof. Karl-Heinz Böckstiegel

Prof. Bernardo M. Cremades

Prof. Gabrielle Kaufmann-Kohler