

CASES

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5)

Introductory Note

On June 1, 2000, Autopista Concesionada de Venezuela, C.A. (AUCOVEN), a company incorporated under the laws of Venezuela, and owned by ICATECH Corporation (ICATECH), a United States company, submitted a request for institution of an arbitration proceeding against the Bolivarian Republic of Venezuela. AUCOVEN invoked the ICSID arbitration clause contained in the 1996 Concession Agreement that it concluded with Venezuela, through Venezuela's Ministry of Infrastructure, for the construction and maintenance of two major highways, linking Caracas to La Guaira. On June 23, 2000, the Secretary-General of ICSID registered the request and invited the parties to constitute the Tribunal.

Under the arbitration clause, the parties 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. AUCOVEN appointed Professor Dr. Karl-Heinz Böckstiegel, Professor of International Business Law at the University of Cologne. Venezuela appointed Dr. Bernardo M. Cremades, President of the Spanish Court of Arbitration. Professor Böckstiegel and Dr. Cremades then appointed Professor

Gabrielle Kaufmann-Kohler, Professor of Private International Law at the University of Geneva, as a presiding arbitrator. On January 16, 2001, the Centre notified the parties that all the arbitrators had accepted their appointments and the Tribunal was therefore deemed to be constituted on that date.

Following the constitution of the Tribunal, Venezuela raised some objections to the Tribunal's jurisdiction and during the first session of the Tribunal in Paris on February 19, 2001, those objections were addressed by the Tribunal. The Tribunal decided to suspend the proceeding pursuant to Arbitration Rule 41(3), pending a determination on the issue of jurisdiction. A schedule for submission of pleadings on jurisdiction was then established.

The dispute that forms the basis of the request for arbitration concerns a Concession Agreement concluded, on December 23, 1996, between AUCOVEN and the Ministry of Infrastructure of Venezuela. At the time of the Agreement, AUCOVEN was controlled by ICA, a Mexican subsidiary of ICA Holding. On June 30, 1998, following a request by AUCOVEN, the Ministry authorized the transfer of 75% of AUCOVEN's shares to ICATECH. The Ministry granted this authorization after ICA Holding accepted to financially guarantee the fulfillment of the Concession Agreement.

Venezuela's objections to jurisdiction mainly focused on two provisions of the ICSID Convention: Article 25(2)(b) and Article 27.

Article 25(2)(b) deals with the nationality requirements of juridical persons wishing to initiate arbitration proceedings under the Convention. As a general rule, any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the critical date (date of consent to arbitration) can be a party in an ICSID arbitration. Article 25(2)(b) further provides, as an exception, that a juridical person which has the nationality of the State party to the dispute, can be a party to an ICSID arbitration, if because of foreign control the parties have agreed to consider the juridical person as a national of another Contracting State.

Article 27 precludes a Contracting State from providing diplomatic protection (not including informal diplomatic exchanges) or bringing an international claim, in connection with a dispute before the Centre involving one of its nationals and another Contracting State, unless the State party to the dispute does not comply with the award rendered in the dispute.

In its submission on jurisdiction, Venezuela argued that the conditions set forth in Article 25(2)(b) of the ICSID Convention were not fulfilled and therefore that the Tribunal lacked jurisdiction. In this respect, Venezuela put forward two main arguments. First, Venezuela pointed out that AUCOVEN was in fact controlled by ICA Holding, a company incorporated under the laws of Mexico, and therefore AUCOVEN could not initiate an ICSID arbitration proceeding, since Mexico was not a Contracting State of the ICSID Convention. Venezuela further argued that, since Mexican officials had sent written communications and held meetings with Venezuelan officials, this amounted to Mexico's diplomatic intervention which confirmed ICA Holding's direct interest in AUCOVEN and which would have a bearing on the Tribunal's jurisdiction. Second, Venezuela asserted that it had not consented to treat AUCOVEN as a national of the United States, indicating that Venezuela's consent to ICSID jurisdiction, set forth in the arbitration clause, was subject to a transfer of actual control to a national of another Contracting State.

In its submission, AUCOVEN contended that the Respondent consented to ICSID arbitration, if AUCOVEN's majority shareholder "came to be a national of a Contracting State." Regarding Mexico's intervention, it argued that Mexico did not file a formal protest with Venezuela.

The Tribunal in its decision on jurisdiction of September 27, 2001 upheld jurisdiction mainly on the basis that the criteria chosen by the parties to define foreign control were reasonable. In reaching this conclusion, the Tribunal first analyzed the terms of the arbitration clause (paras. 83 to 93) and found that the clause was fully applicable. The Tribunal then addressed the requirements set forth in Article 25 of the ICSID Convention (paras. 94 to 132), and in particular whether the parties agreed to treat AUCOVEN as a national of another Contracting State (paras. 105 to 109), the concept of "foreign control" (paras. 110 to 116) and whether the concept of foreign control agreed to by parties was within the limits of the ICSID Convention (paras. 117 to 132).

In this respect, the Tribunal noted that the "Convention does not require any specific form for the agreement" set forth in the Article 25(2)(b) *in fine* and that the parties should have the autonomy to agree on an acceptable criterion regarding the meaning of nationality and foreign control. In particular, the Tribunal found that "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." In analyzing Venezuela's argument

regarding the economic criteria to define the concept of foreign control, the Tribunal pointed out that these criteria “often better reflect the reality” than other legal relevant criteria. It further found that in the present case, that criteria were “irrelevant” and that the parties had agreed on the “majority shareholding as the criterion to be applied.” As mentioned above, the Tribunal found that the criterion chosen by the parties was “reasonable” and that there was no merit to Venezuela’s argument that “ICATECH would be a corporation of convenience” or that “AUCOVEN’s conduct in the context of the share transfer would have been misleading.” Finally, the Tribunal found that Mexico not being a Contracting State, Article 27 of the ICSID Convention was not applicable in this case and that “a denial of jurisdiction is not a remedy available in the context of Article 27.”

The September 27, 2001 decision was issued in English and Spanish. The text of the decision is reproduced below in both languages with the parties’ consent and is posted in PDF format on ICSID’s website at www.worldbank.org/icsid.

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