IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE REPUBLIC OF VENEZUELA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED JULY 1, 1996 (THE "TREATY" OR THE "CANADA-VENEZUELA BIT")

- and -

THE UNCITRAL ARBITRATION RULES

- between -

NOVA SCOTIA POWER INCORPORATED (CANADA)

(the "Claimant")

- and -

REPÚBLICA BOLIVARIANA DE VENEZUELA

(the "Respondent," and together with the Claimant, the "Parties")

Award on Jurisdiction

ARBITRAL TRIBUNAL

Prof. Juan Fernández-Armesto (President)
Mr. John Beechey
Prof. Philippe Sands QC

Registry:

Permanent Court of Arbitration
(Martin Doe)

Administrative Assistant:

Deva Villanúa Gómez

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I. The Parties

The Claimant

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The Respondent

República Bolivariana de Venezuela

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II. The Tribunal

Appointed by the Claimant:

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International Chamber of Commerce
International Court of Arbitration
38 Cours Albert 1er
75008 Paris
France

Appointed by the Respondent:

Professor Philippe Sands QC
Matrix Chambers
Griffin Building Gray's Inn, London WC1R 5LN
DX 400 Chancery Lane, London
United Kingdom

Appointed by the appointing authority:

Professor Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas 102
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Appointing Authority (pursuant to designation by the Secretary-General of the Permanent Court of Arbitration):

Mr. Jernej Sekolec
Fuhrmannsgasse 14/18
A-1080 Vienna
Austria

III. Procedural History

1. On October 1, 2008, the Claimant submitted its Notice of Arbitration under the Treaty, calling for "the dispute [to] be resolved under the UNCITRAL Arbitration Rules"[1] in accordance with Article XII(4) of the Treaty.

2. By its Notice of Arbitration the Claimant notified the Respondent of its appointment of Dr. Bernard Hanotiau as first arbitrator in these proceedings. The principal developments thereafter are as follows:

3. On October 21, 2008, the Respondent challenged the appointment of Dr. Hanotiau.

4. By letter dated October 29, 2008, the Respondent notified the Claimant of its appointment of Professor Philippe Sands QC as second arbitrator in these proceedings.

5. By letter dated November 13, 2008, the Claimant challenged the appointment of Professor Sands.

6. On November 24, 2008, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration ("PCA") designate an appointing authority under the UNCITRAL Arbitration Rules to decide on the cross-challenges to the Claimant's and the Respondent's appointed co-arbitrators.

7. On December 3, 2008, the Respondent objected to the PCA Secretary-General's competence to designate an appointing authority and to the jurisdiction of any tribunal constituted pursuant to the UNCITRAL Arbitration Rules. The Respondent argued that an investor can only submit a dispute to arbitration under the UNCITRAL Arbitration Rules if neither ICSID nor the Additional Facility of ICSID are available (Article XII(4) of the Treaty).

8. On December 11, 2008, the Claimant refuted the Respondent's objections. The Claimant argued that "Arbitration under the ICSID Additional Facility is not available" and that "[t]he Secretary-General of ICSID … has not approved the Arbitration Agreement."[2]

9. On the same day, the Respondent replied to the Claimant's letter reiterating the objections raised in its letter of December 3, 2008.

[1] CEX-7, Notice of Arbitration, p. 2.

[2] REX-5, p. 2, Letter from Mr. C. Mark Baker.

10. On December 12, 2008, the PCA designated H.E. Judge Peter Tomka as appointing authority, noting that Article 21(1) of the UNCITRAL Arbitration Rules provides that "[t]he tribunal shall have the power to rule on objections that it has no jurisdiction."

11. On February 17, 2009, H.E. Judge Tomka resigned as appointing authority in this matter. On February 26, 2009, further to a request from the Claimant to appoint a replacement appointing authority, the Secretary-General of the PCA designated Mr. Jernej Sekolec as appointing authority in this matter for all purposes under the UNCITRAL Arbitration Rules.

12. By letter dated March 31, 2009, the PCA informed the Parties of Mr. Sekolec's decisions on the challenges to Dr. Hanotiau and Professor Sands. The challenge to Dr. Hanotiau was upheld. The challenge to Professor Sands was rejected.

13. On April 29, 2009, the Claimant notified the Respondent of its appointment of Mr. John Beechey as first arbitrator to replace Dr. Hanotiau.

14. On June 5, 2009, the Claimant informed Mr. Sekolec that the co-arbitrators had been unable to appoint a Presiding Arbitrator within the time limit provided by Article 7(3) of the UNCITRAL Arbitration Rules and requested that he proceed to appoint the Presiding Arbitrator.

15. Mr. Sekolec conducted a list procedure in accordance with Article 6(3)(a) of the UNCITRAL Arbitration Rules and, upon failure of the list procedure, a supplemental procedure to appoint the Presiding Arbitrator. Upon the failure of the supplemental procedure, Mr. Sekolec proceeded directly to appoint Professor Juan Fernández-Armesto as Presiding Arbitrator.

16. On September 30, 2009, once the Tribunal had been constituted in accordance with the UNCITRAL Arbitration Rules, a first procedural meeting was held between the Parties and the Tribunal at the seat of the PCA in The Hague. At the procedural meeting, following discussions with the Parties, the Tribunal decided that there would be a preliminary procedure concerning the interpretation and application of Article XII(4) of the Treaty and its consequences (the "Preliminary Issue") and agreed with the Parties on a schedule for submissions regarding the Preliminary Issue.

17. Following discussions with the Parties during the procedural hearing, the Tribunal decided on October 8, 2009 to fix The Hague as place of arbitration.[3]

18. After having provided the Parties with an opportunity to present their comments on a previous draft and having considered these comments, the Tribunal issued Procedural Order No. 1 on October 26, 2009, which set forth further procedural rules to govern this arbitration and the schedule for submissions agreed with the Parties to be followed with regard to the Preliminary Issue. In addition, the Tribunal noted that it would reserve February 1, 2010 for a telephone conference with the Parties if either of the Parties so requested no later than January 18, 2010.

19. On October 29, 2009, the Respondent submitted a brief presenting its arguments with respect to the Preliminary Issue ("Respondent's Brief on the Preliminary Issue"), together with its supporting documents and a legal opinion by Prof. Dr. August Reinisch ("Reinisch Legal Opinion").

20. On November 17, 2009, after having provided the Parties with an opportunity to present their comments on a previous draft and having considered these comments, the Tribunal issued Procedural Order No. 2, which set out the rules on confidentiality which shall govern this arbitration.

21. On December 3, 2009, the Claimant submitted a brief presenting its arguments with respect to the Preliminary Issue ("Claimant's Brief on the Preliminary Issue"), together with its supporting documents and a legal opinion by Prof. Dr. Rudolf Dolzer ("Dolzer Legal Opinion").

22. On December 10, 2009, in response to a request by the Respondent, the Tribunal granted the Respondent an extension of five days for the submission of its reply brief on the Preliminary Issue.[4] On December 15, 2009, in response to a request by the Claimant, an equal extension was accorded to the Claimant for the submission of the rejoinder brief on the Preliminary Issue.[5]

23. On December 22, 2009, the Respondent submitted a reply brief on the Preliminary Issue ("Respondent's Reply Brief on the Preliminary Issue"), responding to the arguments raised in the Claimant's Brief on the Preliminary Issue, and submitting a second legal opinion by Prof. Dr. August Reinisch ("Reinisch Second Legal

[3] A-1, Letter from the PCA on behalf of the Tribunal to the Parties.

[4] A-10, Letter from the PCA on behalf of the Tribunal to the Parties.

[5] A-10 and A-11, Letters from the PCA on behalf of the Tribunal to the Parties.

Opinion"), as well as an additional legal opinion by Mr. Barton Legum ("Legum Legal Opinion") and supporting exhibits.

24. On January 18, 2010, the Claimant submitted a rejoinder brief on the Preliminary Issue ("Claimant's Rejoinder Brief on the Preliminary Issue"), responding to the arguments raised in the Respondent's Reply Brief on the Preliminary Issue and submitting a second legal opinion by Prof. Dr. Rudolf Dolzer ("Dolzer Second Legal Opinion"), as well as an additional legal opinion by Ms. Ana Palacio ("Palacio Legal Opinion") and supporting exhibits.

25. On January 18, 2010, the Claimant informed the Tribunal that it "considers that the parties' extensive written submissions, and accompanying evidence, already provide all the elements needed for a ruling on the Preliminary Issue, without the need to hold a hearing by telephone or in person."[6]

26. On January 19, 2010, the Respondent communicated to the Tribunal that "given the strictly legal nature of the Preliminary Issue and the submissions of the parties […] Venezuela does not believe it necessary that a hearing be held. […However,] Venezuela believes that a telephone conference could be quite useful."[7]

27. On February 15, 2010, the Tribunal informed the Parties that, "[a]fter having reviewed the Parties' submissions addressing the Preliminary Issue, and bearing in mind the Parties' comments … the Tribunal finds no need to hold a telephone conference or hearing with the Parties on the Preliminary Issue."

28. Accordingly, the Tribunal proceeded to decide the Preliminary Issue upon the basis of the written submissions filed by the Parties.

[6] C-10, Letter from the Claimant to the Tribunal.

[7] R-13, Letter from the Respondent to the Tribunal.

IV. Introduction to the dispute

29. The Claimant brings a claim under the Treaty and describes its claim as follows:

> The dispute is in connection with certain measures by Venezuela (including its integral parts, instrumentalities, agencies, and continent subdivisions) ("Venezuela's Measures") which are in breach of the Treaty and comprise, but are not limited to, the following:
>
> (i) Venezuela's decision to unilaterally and unlawfully suspend and/or cancel, as of December 27, 2007, coal supplies owed to Nova Scotia Power under a Coal Supply Agreement of October 18th, 2005 (along with confirmation letters, transactions, and related documents, the "CSA"), entered into by Nova Scotia Power and Guasare Coal International N.V. ("Guasare"), an enterprise controlled by Venezuela […]; and
>
> (ii) Venezuela's unlawful attempts to impose a mandatory renegotiation of the CSA.[8]

30. Pursuant to Procedural Order No. 1, the Tribunal decided that there would be a preliminary procedure concerning the interpretation and application of Article XII(4) of the Treaty and its consequences.

[8] CEX-7, Notice of Arbitration, p. 2.

V. Relevant legal provisions

V.1 The Treaty

31. Article XII(4) of the Treaty provides as follows:

> The dispute may, by the investor concerned, be submitted to arbitration under:
>
> (a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or
>
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is party to the ICSID Convention; or
>
> In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

V.2 The Additional Facility Rules

32. Articles 2 and 4 of the Additional Facility Rules provide as follows:

> **Article 2**
> **Additional Facility Rules**
>
> The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:
>
> (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
>
> (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
>
> (c) fact-finding proceedings.
>
> The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility.

[…]

Article 4
Access to the Additional Facility
in Respect of Conciliation and Arbitration Proceedings
Subject to Secretary-General's Approval

(1) Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.

(2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.

(3) In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying transaction has features which distinguish it from an ordinary commercial transaction.

(4) If in the case of an application based on Article 2(b) the jurisdictional requirements *ratione personae* of Article 25 of the Convention shall have been met and the Secretary-General is of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment, he may make his approval of the application conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the Centre.

(5) The Secretary-General shall as soon as possible notify the parties whether he approves or disapproves the agreement of the parties. He may hold discussions with the parties or invite the parties to a meeting with the officials of the Secretariat either at the parties' request or at his own initiative. The Secretary-General shall, upon the request of the parties or any of them, keep confidential any or all information furnished to him by such parties or party in connection with the provisions of this Article.

(6) The Secretary-General shall record his approval of an agreement pursuant to this Article together with the names and addresses of the parties in a register to be maintained at the Secretariat for that purpose.

V.3 The Arbitration (Additional Facility) Rules

33. The relevant provisions of Schedule C to Additional Facility Rules (the "Arbitration (Additional Facility) Rules") are as follows:

Article 2
The Request

(1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.

(2) The request may be made jointly by the parties to the dispute.

Article 3
Contents of the Request

(1) The request shall:

(a) designate precisely each party to the dispute and state the address of each;

(b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration;

(c) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility;

(d) contain information concerning the issues in dispute and an indication of the amount involved, if any; and

(e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

(2) The request may in addition set forth any provisions agreed by the parties regarding the number of arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

(3) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulation of the Centre.

Article 4
Registration of the Request

As soon as the Secretary-General shall have satisfied himself that the request conforms in form and substance to the provisions of Article 3 of these Rules, he shall register the request in the Arbitration (Additional Facility) Register and on the same day dispatch to the parties a notice of registration. He shall also transmit a copy of the request and of the accompanying documentation (if any) to the other party to the dispute.

VI. Summary of the Parties' Positions

34. The Preliminary Issue has been extensively pleaded by the Parties. The Respondent submitted a Brief on the Preliminary Issue, dated October 29, 2009, to which the Claimant responded with its Brief on the Preliminary Issue, dated December 3, 2009. The Respondent submitted a Reply Brief on the Preliminary Issue, dated December 22, 2009, to which the Claimant responded with a Rejoinder Brief on the Preliminary Issue dated January 18, 2010. Attached to these written pleadings were a significant number of exhibits, including a number of experts' reports in the form of legal opinions and statements. What follows is a summary of the positions of the Parties, without prejudice to the Parties' full arguments as submitted in their written pleadings, including supporting documents and experts' reports, that the Tribunal has taken into consideration in making its determinations.

VI.1 Interpretation of Article XII(4) of the Treaty and the meaning of "available"

A. The Respondent

35. The Respondent argues that in accordance with the plain language of the Treaty, an investor may submit a dispute to an arbitration under the UNCITRAL Arbitration Rules only if arbitration under ICSID or the Additional Facility is not "available." The Respondent invokes the Reinisch Legal Opinion[9] to the effect that the interpretation of the Treaty is governed by the Vienna Convention on the Law of Treaties (the "Vienna Convention"), in particular its Article 31(1). The Respondent submits that supplementary means of interpretation are available under Article 32 of the Vienna Convention only if the ordinary meaning is ambiguous.

36. The Respondent submits that "[t]here can be no other conclusion from reading Article XII(4) of the Treaty, but that its natural and ordinary meaning establishes a hierarchy for submission of disputes – first to ICSID, if the stated conditions in subparagraph (a) are met, then to the Additional Facility if the conditions in subparagraph (b) are met. Only then – 'in case neither' of those two procedures are 'available,' can the investor seek arbitration under the UNCITRAL Rules."[10] The Respondent asserts that the ordinary meaning of the Spanish and French versions of the Treaty confirm the English language version and its interpretation.[11]

[9] Reinisch Legal Opinion, ¶2.

[10] R-5, Respondent's Brief on the Preliminary Issue, ¶14.

[11] R-5, Respondent's Brief on the Preliminary Issue, ¶15; R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶17-18

37. The Respondent further asserts that arbitration clauses in other bilateral investment treaties ("BITs") adopted by Canada and Venezuela support the Respondent's argument that the Treaty provides for a hierarchical scheme of arbitral *fora*. The majority of the Respondent's current BITs establish that arbitration under the UNCITRAL Arbitration Rules is available only if neither ICSID nor the Additional Facility are available, whereas only four BITs (two of them not yet in force) allow an investor to choose international arbitral *fora* without any hierarchy.[12]

38. The great majority of the BITs signed by Canada give the investor the option to choose to submit the dispute to any one of ICSID, the ICSID Additional Facility, or to *ad hoc* arbitration under the UNCITRAL Arbitration Rules.[13] The fact that such an arrangement was not included in the Treaty "demonstrates that Venezuela and Canada specifically negotiated a clause adopting Venezuela's typical formulation as opposed to Canada's."[14]

39. The Respondent further submits that the Claimant has conceded that a good faith reading of Article XII(4) of the Treaty requires an investor to submit in the first instance to arbitration under the Additional Facility.[15] The Respondent considers that the Claimant relies on "inventive definitions of 'available' and novel explanations of the workings of the Additional Facility" to argue that the Additional Facility was not "available."[16]

40. The Respondent asserts that the Claimant's definition of "available" in Article XII(4) (i.e., "ready for immediate use" and "has a solid prospect of success") is narrow and without foundation. The Respondent maintains that the ordinary meaning of "available" is "accessible," "obtainable," "attainable," "procurable," "capable of producing the desired result" or "within one's reach." The Respondent invokes the Reinisch Legal Opinion and the definition found in the Shorter Oxford Dictionary,[17] noting that the dictionary definitions quoted by the Claimant support the Respondent's approach.[18] The Respondent argues that the Claimant's reliance on a definition of "available" as "present or ready for immediate use" is

[12] REX-11, Venezuelan Bilateral Investment Treaties Chart

[13] R-5, Respondent's Brief on the Preliminary Issue, ¶¶24-25 and footnote 33.

[14] R-5, Respondent's Brief on the Preliminary Issue, ¶26.

[15] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶9-10.

[16] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶10.

[17] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶11; REX-9, *Shorter Oxford English Dictionary*, 5th ed.

[18] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶12.

inappropriate because, as explained by the dictionary itself, the idea that "available" means "ready for immediate use" refers to resources, not dispute resolution mechanisms.[19]

41. The Respondent further asserts that accepting the Claimant's definition of "available" would produce an absurd result. If Claimant's view that the Additional Facility is not "ready for immediate use" because certain procedural steps need to be taken were accepted, then no arbitral forum would be available, because parties must always undertake some procedural steps in order to initiate proceedings.[20] The Respondent states that none of the treaties relied on by the Claimant defines or explains the term "available" and that they come from different contexts.[21] The Respondent argues that the Claimant distorts a passage on local remedies in Mr. Paulsson's treatise on denial of justice regarding whether dispute resolution mechanisms should be considered available when they are unlikely to succeed.[22] According to the Respondent, this treatise actually supports the idea that investors should make reasonable attempts before concluding that local remedies are unavailable.[23]

42. The Respondent notes that the Claimant argues, in the context of the availability of ICSID, that it is "unavailable," because the *ratione personae* requirements of Article 25(1) of the ICSID Convention are not met. According to the Respondent, the Claimant "neglects to mention, however, that these *ratione personae* requirements are the same requirements expressly referred to in Article XII(4) of the Treaty to determine the 'availability' of both ICSID and the Additional Facility."[24] Therefore, the same meaning should be given to "available" in the context of the Additional Facility.

43. Finally, the Respondent rejects the Claimant's argument that the object and purpose of the Treaty requires a default interpretation of Article XII(4) in favour of an investor. In this regard the Respondent invokes the Reinisch Legal Opinion.[25]

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[19] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶13-14.

[20] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶15.

[21] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶20-27, 30-31.

[22] CEXL-12, Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) at 130.

[23] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶28.

[24] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶32 (emphasis in original).

[25] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶87-93; Reinisch Second Legal Opinion, ¶¶48, 59-65.

B. The Claimant

44. The Claimant argues that Article XII(4) of the Treaty contains the Respondent's firm offer to resolve Treaty-related disputes under the UNCITRAL Arbitration Rules, provided that ICSID and the Additional Facility are unavailable.

45. According to the Claimant, the Treaty does not require that the Claimant make the Additional Facility available, nor do the Additional Facility Rules contemplate the possibility that the Claimant make the Additional Facility available without the active cooperation of the Respondent, which has not happened.[26] The Claimant asserts that the Respondent did not officially reply to the Notice of Dispute,[27] which raised the possibility of taking the case to the Additional Facility or to arbitration under the UNCITRAL Arbitration Rules.[28]

46. The Claimant asserts that the Respondent's lack of cooperation was not due to a lack of awareness or understanding of the Treaty as (1) the Respondent has already participated in other cases before the Additional Facility under the Treaty; (2) the Respondent, as a member of ICSID, has drafted and enacted the Additional Facility Rules; and (3) the Respondent was one of the authors, together with Canada, of the dispute resolution mechanisms foreseen in the Treaty.[29]

47. The Claimant highlights the fact that the language used in Article XII(4) of the Treaty is "may" – thus optional – whereas in other treaties the word used is "shall"[30] – hence mandatory.[31] The Claimant also contends that these differences demonstrate that no "typical formulation" exists within the Respondent's treaties. The Claimant asserts that "[t]he Contracting Parties to the Canada-Venezuela BIT clearly appreciated the distinction between mandatory and permissive language."[32]

48. Regarding the meaning of "available" in Article XII(4), the Claimant submits that Canada and Venezuela unconditionally consented to have Treaty-related disputes submitted to arbitration. As for the forum, the Claimant asserts that an investor is

[26] C-7, Claimant's Brief on the Preliminary Issue, ¶7.

[27] CEX-6, Claimant's Notice of Dispute.

[28] C-7, Claimant's Brief on the Preliminary Issue, ¶7.

[29] C-7, Claimant's Brief on the Preliminary Issue, ¶8.

[30] CEXL-17, Treaty between the Federal Republic of Germany and the Republic of Venezuela for the Promotion and Reciprocal Protection of Investments; CEXL-18, Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Republic of Paraguay and the Government of the Republic of Venezuela.

[31] C-7, Claimant's Brief on the Preliminary Issue, ¶¶59-60.

[32] C-7, Claimant's Brief on the Preliminary Issue, ¶¶61-62.

entitled to commence proceedings under the UNCITRAL Arbitration Rules if ICSID and the Additional Facility are not available. As the Treaty does not define "available," the interpretation is to follow the approach set out in the Vienna Convention.[33] The Claimant relies on an opinion by Professor Rudolf Dolzer that argues that the ordinary meaning is the dominant criterion and should be applied in preference to any other criteria.[34] The Claimant disputes the assertion that the Vienna Convention requires reference to other treaty language as a relevant means of interpretation.[35]

49. According to the Claimant, the ordinary meaning of "available" is that something is "present or ready for immediate use"[36] or "something that is likely to succeed."[37] The Claimant refers to several treaties that allegedly use "available" in that sense — e.g., "reasonable efforts to exhaust available remedies to enforce the award"[38]— and refers to commentators who argue that "when the term is used in this context, dispute resolution mechanisms that are unlikely to succeed must be considered unavailable."[39] The Claimant also relies on the Dolzer Legal Opinion which finds that a dispute resolution mechanism such as arbitration in the Additional Facility cannot be considered to be "available" when there is a "reasonable doubt" as to whether the parties would be allowed to use it.[40]

50. The Claimant concludes that, in accordance with the ordinary meaning of the term "available," ICSID and the Additional Facility can only be considered to be "available" when they are "immediately ready for use" and when there is a "reasonable prospect that access to them will be granted."[41] The Claimant asserts that the other criteria set out in Article 31(1) of the Vienna Convention, i.e., the object and purpose of the Treaty and good faith, support a broad interpretation of the Treaty terms and a preference for greater investor protection. Accordingly, any

[33] C-7, Claimant's Brief on the Preliminary Issue, ¶16.

[34] CEXL-3, Dolzer Legal Opinion, ¶20.

[35] C-7, Claimant's Brief on the Preliminary Issue, ¶19.

[36] C-7, Claimant's Brief on the Preliminary Issue, ¶21; CEX-8, *Merriam-Webster's Collegiate Dictionary*, 11th ed.

[37] C-7, Claimant's Brief on the Preliminary Issue, ¶¶22-25.

[38] CEXL-11, Multilateral Investment Guarantee Agency, Model Contract of Guarantee for Equity Investments.

[39] C-7, Claimant's Brief on the Preliminary Issue, ¶24.

[40] C-7, Claimant's Brief on the Preliminary Issue, ¶24; CEXL-3, Dolzer Legal Opinion, ¶32.

[41] C-7, Claimant's Brief on the Preliminary Issue, ¶26.

uncertainties in the interpretation of the Treaty should be resolved in favour of the investor.[42]

VI.2 Availability of the Additional Facility

A. The Respondent

51. The Respondent argues that, unlike ICSID, the Additional Facility is available and, consequently, the Claimant is bound to submit the dispute to arbitration under those Rules. The Respondent is a party to ICSID and the *ratione personae* requirements are met. Accordingly, the Additional Facility is "available" within the meaning of Article XII(4)(b).

52. The Respondent accepts that access to the Additional Facility is subject to approval by the Secretary-General as required by Article 4 of the Additional Facility Rules. Although approval is not automatic, the Respondent argues that it may be obtained with ease, subject only to the Claimant actually requesting approval and the fulfilment of the conditions set forth in Articles 2 and 4 of the Additional Facility Rules.[43] In support of this view, the Respondent invokes the Legum Legal Opinion.[44]

53. Contrary to the Claimant's position, the Respondent states that approval of an application to access the Additional Facility may be requested prior to, or together with, the Request for Arbitration, and that in practice the request for approval is almost always submitted with the Request for Arbitration.[45] The Respondent asserts that the Additional Facility Rules do not require that parties request approval jointly. This point reflected in a letter from the current ICSID Secretary-General, which refers to the possibility of only one party requesting approval.[46] The Respondent further refers to Articles 2(1) and 2(2) of the Arbitration (Additional Facility) Rules which indicate that the request may be made by "any State or national" and that the request "may be made jointly by the parties to the dispute." The Legum Legal Opinion states that "[i]n none of the cases under the ICSID Additional Facility in which I acted as counsel has a joint application been made."[47]

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[42] C-7, Claimant's Brief on the Preliminary Issue, ¶¶89-95.

[43] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶33-38.

[44] Legum Legal Opinion, ¶¶26-29.

[45] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶39-41; Legum Legal Opinion, ¶¶20-22.

[46] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶42-43; REX-19, Letter from Secretary-General Meg Kinnear.

[47] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶44-46; Legum Legal Opinion, ¶¶24-25.

54. The Respondent rejects the Claimant's argument that there are two types of applications for approval. According to the Respondent, Article 2 of the Additional Facility Rules provides two categories of proceedings. However, nowhere in the Additional Facility Rules or on the ICSID website does there appear a reference to the existence of two types of applications, nor does a requirement exist that a respondent agree with how a claimant characterizes its application. The Respondent states that the only necessary agreement is an agreement to arbitrate under the ICSID Additional Facility Rules, which exists in this case as the Claimant accepted the Respondent's offer under the Treaty.[48]

55. The Respondent asserts that the mere requirement to seek the Secretary-General's approval does not render the Additional Facility unavailable. Any other interpretation would render the provision of Article XII(4)(b) of the Treaty irrelevant. On the Claimant's argument, "the Additional Facility would never be available."[49]

56. Moreover, disputes under the Treaty have already been submitted and approved for arbitration under the Additional Facility by the Secretary-General, including one on October 28, 2004. Thus, "the fact that the same provision of this very same Treaty has already been approved in another dispute between a Canadian investor and Venezuela is strong support for the likely availability of the Additional Facility for this dispute."[50] Consequently, not having prior approval from the Secretary-General does not indicate that the Additional Facility was not available, as no request for approval was ever made by the Claimant. The Additional Facility Rules and the ICSID website provide detailed instructions on how to seek the Secretary-General's approval, as well as the specific criteria to be considered. The Claimant's assertion that the Additional Facility is the "black hole of ICSID, which is not described to the Investor in publicly available documents,"[51] is wrong. The Respondent notes that "the Secretary-General has approved the 26 requests for access to the Additional Facility it has received since the forum's inception."[52]

57. The Respondent asserts that the Additional Facility was "ready for immediate use." According to the Respondent, an application for approval did not require the Respondent's collaboration, and it was for the Claimant to request approval from

[48] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶47-52.

[49] R-5, Respondent's Brief on the Preliminary Issue, ¶31.

[50] R-5, Respondent's Brief on the Preliminary Issue, ¶32.

[51] R-5, Respondent's Brief on the Preliminary Issue, ¶35.

[52] R-5, Respondent's Brief on the Preliminary Issue, ¶40.

ICSID's Secretary-General. The Respondent asserts that it had no obligation to reply to the Claimant's Notice of Dispute and that the Claimant could have sought approval without the Respondent's support.[53] The Respondent concludes that the Additional Facility was immediately available; the Claimant merely needed to submit with its Request for Arbitration a copy of the Treaty and a request for access to the Additional Facility.[54] An application for use of the Additional Facility had an "extremely high prospect of success" as, on the date the Claimant filed its Request for UNCITRAL arbitration, the Additional Facility was available *ratione personae*.[55]

58. The Parties did not have to file a joint application or agree under which category of disputes described in Article 2 of the Additional Facility Rules the proceedings would fall. The Respondent refers to the *Vannessa Ventures* case,[56] arising out of the same Treaty, which was submitted to the Additional Facility, and where the Respondent challenged the assertion made by Vannessa Ventures Ltd. that its dispute arose out of an investment.[57]

59. According to the Respondent, in the *Vannessa Ventures* case, the claimant requested the approval to access arbitration against Venezuela under the Additional Facility as provided for in the Treaty, together with its Request for Arbitration. After a request from the Secretary-General to Vannessa Ventures Ltd. to provide further information, and a letter from the Attorney-General of Venezuela contending that the claimant had not complied with the requirements (which was replied to and countered by Vannessa Ventures Ltd.), ICSID's Secretary-General approved the request by Vannessa Ventures Ltd. to access the Additional Facility.[58] The Respondent also mentions a second case under the Treaty which has obtained approval to access the Additional Facility.[59]

[53] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶53-58.

[54] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶60-65.

[55] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶67.

[56] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6 ("*Vannessa Ventures*").

[57] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶68-71.

[58] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶72-77.

[59] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶78; REX-25, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1.

60. Finally, amendment of Article 4(6) of the Additional Facility Rules does not cast any uncertainty over the possibility of success of a request by the Claimant to access the Additional Facility.[60]

B. The Claimant

61. The Claimant notes that it is undisputed that ICSID is not available to resolve this dispute.[61] The Claimant agrees that the Additional Facility Rules set out the requirements to guide a determination as to when the Additional Facility is available.[62] The Claimant contests the view that the instructions on the ICSID website have any relevance to this determination.[63]

62. The Claimant asserts that the Respondent acknowledges that any agreement to use the Additional Facility requires the approval of ICSID's Secretary-General and that the Secretary-General of ICSID has never approved an agreement to use the Additional Facility in relation to this dispute.[64] The Claimant challenges the view that availability of the Additional Facility depends solely on ICSID membership.[65]

63. The Claimant criticizes the Respondent for having only addressed how the Secretary-General grants approval in practice, refraining from analyzing the substance of the relevant Articles of the Additional Facility Rules. The Claimant notes that the Treaty and the Additional Facility Rules must be interpreted as written and that alleged practices invoked by the Respondent cannot constitute a subsequent agreement or practice in relation to the Treaty and the Additional Facility Rules in the sense of Article 31(3) of the Vienna Convention. They are not relevant to the interpretation of these texts and must be disregarded.[66]

64. The Claimant argues that the purported ICSID practices should be disregarded, because (1) administrative practices are irrelevant and the Tribunal must stay true to the text of the Treaty and Additional Facility Rules as written;[67] (2) the Respondent

[60] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶¶79-84.

[61] C-7, Claimant's Brief on the Preliminary Issue, ¶28

[62] C-7, Claimant's Brief on the Preliminary Issue, ¶6.

[63] C-7, Claimant's Brief on the Preliminary Issue, ¶33.

[64] C-7, Claimant's Brief on the Preliminary Issue, ¶6.

[65] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶56-64.

[66] C-7, Claimant's Brief on the Preliminary Issue, ¶32; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶36-50.

[67] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶101-104.

has failed to prove the practices it relies on;[68] (3) even if relevant and proven, evidence of these purported practices was not publicly available at the time the Claimant initiated the proceedings;[69] and (4) the alleged practices could have changed without notice. The Claimant asserts that the statement by the current ICSID Secretary-General, Ms. Meg Kinnear,[70] does not support the Respondent's position as it does not even refer to the process of approval for the use of the Additional Facility, but rather to the process to register an arbitration request which, under the Additional Facility Rules and the Arbitration (Additional Facility) Rules, respectively, are subject to different requirements.[71] The Claimant also refutes the Respondent's argument based on the fact that a dispute arising out of the same Treaty (i.e., the *Vannessa Ventures* case) has been approved by the Secretary-General. The Claimant notes that the Secretary-General's approval is granted on a case-by-case basis and only when the requirements of the Additional Facility Rules are met. Furthermore, approval in a previous case under the same treaty is not binding.[72]

65. The Claimant contends that, according to Articles 2 and 4 of the Additional Facility Rules, which determine which cases can access the Additional Facility, the Additional Facility was not available for the present dispute. The Claimant invokes the Dolzer Legal Opinion in support of this view.[73] The Claimant notes that under Article 4(1) of the Additional Facility Rules, any agreement to arbitrate in the Additional Facility requires the approval of the ICSID Secretary-General. Contrary to the Respondent's view, the Claimant argues that the granting of such approval is not automatic or a matter of apparent ease. According to the Additional Facility Rules, approval is only granted if the Secretary-General is satisfied that the requirements have been met.[74] Moreover, the Additional Facility Rules only contemplate requests for approval filed prior to the commencement of proceedings; it is not possible to submit an application together with the notice of arbitration.[75]

[68] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶105-108.

[69] C-7, Claimant's Brief on the Preliminary Issue, ¶34; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶109.

[70] REX-19, Letter from Secretary-General Meg Kinnear.

[71] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶116-120.

[72] C-7, Claimant's Brief on the Preliminary Issue, ¶¶34, 79-82.

[73] C-7, Claimant's Brief on the Preliminary Issue, ¶9; CEXL-3, Dolzer Legal Opinion.

[74] C-7, Claimant's Brief on the Preliminary Issue, ¶31.

[75] C-7, Claimant's Brief on the Preliminary Issue, ¶35.

66. The Claimant argues that, in accordance with Article 4(1) of the Additional Facility Rules, the approval must be sought by "the parties," and that a unilateral application is not permissible. Rather, both parties are required to apply for the approval of the agreement. The Respondent must therefore be one of the applicants.[76] The Claimant argues that in order to obtain approval of the agreement under the Additional Facility, parties can file one of two types of applications, one based on Article 2(a), or another one based on Article 2(b) of the Additional Facility Rules.

67. Under Article 2(a) of the Additional Facility Rules, the Claimant notes that the application must fulfill three requirements: (1) it must involve "legal disputes arising directly out of an investment"; (2) the dispute cannot be "within the jurisdiction of ICSID"; and (3) both parties must "give their consent to the jurisdiction of the Centre (in lieu of the Additional Facility) under Article 25 of the Convention in the event that the jurisdictional requirements *ratione personae* of that Article are met at the time when proceedings are instituted." The Claimant concludes, invoking the Dolzer Legal Opinion, that "if the respondent State takes the position that the dispute does not arise out of an investment because the claimant does not own any investment, then access to the Additional Facility cannot be granted under Article 2(a) of the Additional Facility Rules as written."[77]

68. Under Article 2(b) of the Additional Facility Rules, the Claimant observes that an application must involve "legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment."[78] The Claimant thus concludes that the Additional Facility Rules require that the Parties agree on whether there is an investment and on whether the dispute arises out of it, and that this agreement must be reached before obtaining approval from the Secretary-General of ICSID.[79]

69. The Claimant contends that the Additional Facility was not available because the Secretary-General had not approved their agreement.[80] This view is confirmed by the fact that the Respondent did not reply to the Notice of Dispute,[81] even after a

[76] C-7, Claimant's Brief on the Preliminary Issue, ¶¶39-41.

[77] C-7, Claimant's Brief on the Preliminary Issue, ¶¶43-44.

[78] C-7, Claimant's Brief on the Preliminary Issue, ¶45.

[79] C-7, Claimant's Brief on the Preliminary Issue, ¶¶46-47.

[80] C-7, Claimant's Brief on the Preliminary Issue, ¶¶50-51; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶53-54.

[81] CEX-6, Notice of Dispute.

follow-up letter was sent.[82] According to the Claimant, the Respondent's failure to cooperate in obtaining approval to use the Additional Facility has made the Additional Facility unavailable.[83]

70. The Claimant asserts that it could not attempt to commence arbitration proceedings before the Additional Facility alone, as the language of the Additional Facility Rules requires that both Parties file the application. The Claimant further alleges that not only could it not apply for approval unilaterally, but it was also not obliged to bear the burden of obtaining such approval since the Treaty foresees a fall-back option which is to start proceedings under the UNCITRAL Arbitration Rules.[84]

71. According to the Claimant, in the *Vannessa Ventures* case the Respondent has defended "almost exactly the same position"[85] that the Claimant takes in this case. The Claimant understands that in *Vannessa Ventures*, the Respondent argued that

> (a) The Additional Facility is not available if the Secretary-General has not approved its use before the commencement of the arbitration;
>
> (b) Any application for use of the Additional Facility must be filed by "the parties" (plural);
>
> (c) The Additional Facility Rules cannot be used if the respondent objects to the existence of the investment asserted by the claimant.[86]

As noted above, the Claimant asserts that the Respondent adopted the Claimant's current position in the *Vannessa Ventures* case.[87] Moreover, the Claimant notes that the Respondent stated in a letter sent in relation to those proceedings that this approval should be "requested by the parties."[88] The Claimant therefore argues that, under applicable international collateral estoppel theories, the Respondent should be held to the position it took in *Vannessa Ventures*.[89]

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[82] CEX-15, Letter from the Claimant to the Respondent, dated March 25, 2008.

[83] C-7, Claimant's Brief on the Preliminary Issue, ¶¶52-55.

[84] C-7, Claimant's Brief on the Preliminary Issue, ¶¶56-58; CEXL-3, Dolzer Legal Opinion, ¶¶31, 52, 59, and 61.

[85] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶16.

[86] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶16.

[87] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶65-71.

[88] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶70; REX-23, Letter from Procuradoría General de la República to ICSID Secretary-General in *Vannessa Ventures*.

[89] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶72.

72. The Claimant further contends that an application for use of the Additional Facility had a poor prospect of success and that the Additional Facility was therefore not available. According to the Claimant, any unilateral application for approval was unlikely to succeed because (1) the Rules do not contemplate that an approval can be issued when only one party requests it,[90] as the Respondent correctly conceded in the *Vannessa Ventures* case;[91] (2) it was unclear whether the nationality requirement would be met, given that the Respondent had been threatening to withdraw from ICSID, and Canada was at the same time taking significant steps towards entering ICSID;[92] (3) any application for approval would significantly prejudice either the Claimant's or the Respondent's legal position in the dispute;[93] and (4) the uncertainty arising out of the amendment to Article 4(6) of the Additional Facility Rules in 2003 opened the door to a review of the Secretary-General's determination.[94]

73. The Claimant notes that the Respondent and its experts have argued that the agreement concerning the existence of a dispute arising out of an investment is already embodied in the consent to arbitration contained in the Treaty and thus consent does not need to be given again. The Claimant rejects this argument as the consent to arbitration in the Treaty does not meet the specific language requirements requested by Article 4(2) of the Additional Facility Rules. Furthermore, the Claimant notes that, in the *Vannessa Ventures* case, the Respondent itself confirmed that the Treaty's consent to arbitrate is different from the additional agreement required by the Additional Facility Rules. As stated in the Legal Opinion of Ms. Ana Palacio, the former ICSID Secretary-General, "[t]he mere existence of a BIT consent to arbitration is not enough to make the Additional Facility available. To this effect, further action from the parties and the Secretary-General is needed."[95]

74. The Claimant contends that, when it had to decide where to initiate arbitration proceedings, all the above-mentioned uncertainties existed. Theoretically it thus had the option either to attempt unilaterally to apply for approval to use the Additional Facility or immediately to resort to arbitration under the UNCITRAL Arbitration

[90] C-7, Claimant's Brief on the Preliminary Issue, ¶66.

[91] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶87-88.

[92] C-7, Claimant's Brief on the Preliminary Issue, ¶¶68-74.

[93] C-7, Claimant's Brief on the Preliminary Issue, ¶¶75-82; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶89-94.

[94] C-7, Claimant's Brief on the Preliminary Issue, ¶¶83-86; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶78-84.

[95] CEXL-29, Palacio Legal Opinion, ¶16.

Rules.[96] However, the first option was not feasible for various of the above-mentioned reasons. Moreover, the Claimant's duties towards its shareholders required it to take steps to preserve and exercise its rights, while at the same time refraining from initiating procedures that had a low prospect of success.[97]

75. Finally, the Claimant notes that the Respondent has avoided taking a concrete position in this arbitration regarding when it considers the Additional Facility to be available and has also avoided agreeing to the use of the Additional Facility, if it were found that this dispute could not be resolved by this Tribunal.[98] The Claimant thus contends that the Respondent's goal must be to "have justice denied to" the Claimant and to "delay as much as possible the resolution of this dispute."[99] The Claimant invites the Tribunal not to acquiesce to the Respondent's efforts to delay and eventually deny justice to the Claimant, and instead confirm the valid institution of this UNCITRAL arbitration.[100]

[96] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶78-86.

[97] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶95-99.

[98] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶18-20.

[99] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶23-30.

[100] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶31-33.

VII. The relief sought by the Parties

VII.1 The Respondent

76. The Respondent requests that the Tribunal render an award as follows:

(a) In favour of the Respondent and against the Claimant, dismissing the Claimant's claims before it in their entirety and with prejudice in the sense of the "previous paragraph" [see paragraph 77 below]; and

(b) Pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that the Claimant bear the costs of this arbitration, including the Respondent's costs for legal representation and assistance, including that of the Respondent's experts.[101]

77. The "previous paragraph" which qualifies the Respondent's request for dismissal "with prejudice" of the Claimant's case, reads as follows:

> The Respondent's request for dismissal with prejudice is not intended to preclude a review of Claimant's case on jurisdiction and, if necessary, on its merits before an ICSID Additional Facility tribunal. It is likewise not intended to preclude Claimant from reinstituting this arbitration under UNCITRAL rules in the highly unlikely event, for example, that the ICSID Secretary-General decides not to approve the arbitration agreement under the Additional Facility Rules. It would only bar Claimant from reappearing before this specific Tribunal which Venezuela maintains was improperly constituted. The Tribunal's proper dismissal of Claimant's case would render it *functus officio*.[102]

VII.2 The Claimant

78. The Claimant requests that the Tribunal render an award as follows:

(a) Confirm[ing] that the present arbitration proceedings have been validly instituted pursuant to the UNCITRAL Arbitration Rules and Article XII(4);

(b) Dismiss[ing] all relief sought by the Respondent in connection with the Preliminary Issue; and

(c) Order[ing] the Respondent to pay all fees and costs related to the Preliminary Issue.[103]

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[101] R-5, Respondent's Brief on the Preliminary Issue, ¶101.

[102] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶100.

[103] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶122.

VIII. Considerations of the Tribunal

79. The Preliminary Issue for the Tribunal to decide is discrete and specific: whether on the date on which the Claimant initiated these arbitration proceedings an alternative procedure was "available" under the ICSID Additional Facility, within the meaning of Article XII(4) of the Treaty. If the Tribunal finds that such option was available to the Claimant then the Tribunal would not be entitled to exercise jurisdiction and the Claimant would have to be redirected to the proper forum. If, however, the Tribunal was to conclude that no alternative procedure was available under the ICSID Additional Facility, then this Tribunal could exercise jurisdiction under Article XII(4), subject to any other jurisdictional objections that might arise.

80. The Respondent has objected to the jurisdiction of the Tribunal on the grounds that the Additional Facility was available to the Claimant on October 1, 2008, since all the jurisdictional requirements of the Additional Facility Rules were met. The Respondent further contends that, even under the meaning of "available" that is adopted by the Claimant, the Additional Facility was available on the date these proceedings were initiated, since the consistent practice of the ICSID Secretary-General demonstrates that the Additional Facility can be accessed with ease, as it has been in at least two other cases under the Canada-Venezuela BIT.

81. The Claimant disagrees and contends that neither ICSID nor the Additional Facility were "available" within the meaning of Article XII(4) of the Treaty because they were not "ready for immediate use" or they did not have "a reasonable prospect of success." The Claimant argues that access to the Additional Facility depends, *inter alia*, upon a joint application by the Parties and an agreement between the Parties on the existence of an investment, neither of which was present at the time of initiation of these proceedings, due to the Respondent's alleged failure to cooperate.

82. In order to decide this issue, the Tribunal will begin by interpreting Article XII(4) of the Treaty [VIII.1]. The Tribunal will then address whether the ICSID Additional Facility was "available," it being common ground between the Parties that arbitration under ICSID proper was not available, since Canada is not a party to the Washington Convention [VIII.2]; address the issue of estoppel arising in this case [VIII.3]; and then indicate its decision [VIII.4].

VIII.1 Interpretation of Article XII(4) of the Treaty

83. As noted above, Article XII(4) of the Treaty provides as follows:

> The dispute may, by the investor concerned, be submitted to arbitration under:

> (a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or
>
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or
>
> In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

84. There is no dispute between the Parties that the interpretation of this provision is subject to the rules set forth in the Vienna Convention and, in particular, to Articles 31 to 33 thereof concerning treaty interpretation. Article 31(1) provides the starting point:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

85. There is no dispute that the basic approach to the interpretation of a treaty is to have regard to the ordinary meaning of the words chosen by its drafters, aided by a systematic analysis of the entire agreement and teleological considerations about its intended aim, all under an overarching principle of good faith. The Tribunal will therefore consider the ordinary meaning of Article XII(4), in the context of the Treaty as a whole and having regard to the Treaty's object and purpose.

A. The structure of Article XII(4)

86. Like most legal rules, Article XII(4) describes a factual matrix that leads to a particular legal consequence.

87. The factual matrix described by Article XII consists of the existence of an investor who claims protection under the Treaty and who asserts that a dispute has arisen against either Canada or Venezuela on the grounds that the Contracting Party has allegedly adopted a measure which is in breach of the protections granted to the investor by the Treaty.[104] Provided that this factual matrix has arisen, Article XII

[104] See Article XII(1) and (3) of the Treaty.

describes the legal consequence—the investor is granted the right to submit the dispute to arbitration under three alternative scenarios:

- ICSID, provided in this case that both Venezuela and Canada are parties to the 1965 Washington Convention;
- the ICSID Additional Facility Rules, provided that either Venezuela or Canada is party to the Washington Convention; and
- in case neither of these procedures is "available," UNCITRAL arbitration.

88. The purpose of Article XII(4) is to afford an investor who meets the requirements of the Treaty the right to bring international arbitration proceedings to resolve an investment dispute. The Tribunal accepts the Claimant's submission[105] that the proper construction of Article XII(4) must lead to the conclusion that an investor should be able to have a right of access to one of the three prescribed arbitration procedures. A protected investor under the Treaty enjoys a right to file international arbitration proceedings. The question is—which procedure?

89. The ordinary meaning of Article XII(4) does not indicate that the three procedures provided by the Treaty are to be treated as alternatives. Rather, the ordinary meaning of Article XII(4) is to establish a hierarchy of procedures. Article XII(4) defines access to ICSID (either under ordinary Rules or under the Additional Facility) as the primary possibility: depending on whether only one Contracting Party or both have ratified the Washington Convention, the investor is *ipso iure* entitled to submit the dispute to the Centre under one set of rules or under the other.

90. The possibility of filing an UNCITRAL arbitration, however, is subject to an additional requirement: UNCITRAL arbitration is only open to an investor "[i]n case neither of the [other] procedures mentioned … is available." The wording of Article XII(4) admits of no ambiguity or doubt. It indicates that the drafters of the Treaty intended that it be first necessary to consider whether the dispute resolution mechanisms of ICSID or its Additional Facility were available. Only if both were not "available" was an investor entitled to have recourse to UNCITRAL arbitration.

91. This conclusion arises inexorably from the ordinary meaning of Article XII(4), and it is reinforced by the text of other BITs signed by Canada and Venezuela with other States.

[105] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶7.

92. Canada makes use of a different form of dispute settlement clause in its other BITs.[106] For example, a number of Canada's BITs provide as follows:

> The dispute may, at the election of the investor concerned, be submitted to arbitration under:
>
> (a) ICSID, established pursuant to the Convention on the Settlement of Investment Disputes between States and National of other States, opened for signature at Washington 18 March 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the Convention, or
>
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or
>
> (c) an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). [107]

This text makes it clear that when Canada has wanted to make arbitration under ICSID or the Additional Facility Rules or the UNCITRAL Arbitration Rules equally available at the choice of the investor, it has done so explicitly.

93. For its part, Venezuela's BITs also indicate that when that State has wanted to make arbitration under the UNCITRAL Arbitration Rules available as an alternative to ICSID or the Additional Facility Rules without condition, then it has done so. In its BIT with Iran, for example, Venezuela has granted the investor the following alternatives:

> The interested investor could refer the dispute to the competent tribunals of the receiving Contracting Party or to:
>
> (a) an ad hoc arbitral tribunal established under UNCITRAL rules, or
>
> (b) the International Court of Arbitration of the International Chamber of Commerce (ICC), or
>
> (c) the International Centre for Settlement of Investment Disputes, if both parties to the contract are members of the Convention.[108]

[106] R-5, Respondent's Brief on the Preliminary Issue, ¶24.

[107] See Armenia-Canada BIT (Article XIII(4)), Barbados-Canada BIT (Article XIII(4)), Canada-Croatia BIT (Article XII(4)), Canada-Ecuador BIT (Article XIII(4)), Canada-Egypt BIT (Article XIII(4)) Canada-El Salvador BIT (Article XII), Canada-Latvia BIT (Article XIII(4)), Canada-Lebanon BIT (Article XII(4)), Canada-Panama BIT (Article XIII(4)), Canada-Philippines BIT (Article XIII(4)), Canada-Romania BIT (Article XIII(4)), Canada-South Africa BIT (Article XIII(4)), Canada-Thailand BIT (Article XIII(4)), Canada-Trinidad and Tobago BIT (Article XIII(4)), Canada-Ukraine BIT (Article XIII(4)), and Canada-Uruguay BIT (Article XII(4)), available online at: http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (emphasis added).

94. Similarly, the Italy-Venezuela BIT provides:

> In the case of international arbitration, the dispute shall be submitted … to any of the following institutions:
>
> (a) To the International Centre for Settlement of Investment Disputes (ICSID) … when each State party in the present agreement is a party to [the Convention]. When that condition is not fulfilled, each Contracting Party gives its consent for the submission of the controversy to the ICSID Additional Facility.
>
> (b) To an ad hoc arbitral tribunal established … according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[109]

95. These BITs entered into by Canada and Venezuela include language that allows the investor to select the arbitration system it prefers—including arbitration under the UNCITRAL Arbitration Rules, if it so wishes. A simple comparison between the wording used in these BITs and the wording adopted in the Canada-Venezuela BIT shows that Canada and Venezuela decided to adopt a different approach in the case of the latter Treaty, namely one that establishes a hierarchy of choices depending upon what is available. ICSID or the Additional Facility Rules are adopted as the primary dispute resolution mechanism, and the Treaty only authorizes access to UNCITRAL if ICSID or the Additional Facility Rules are not available. In the Canada-Venezuela BIT, the investor has no right to initiate proceedings under the UNCITRAL Arbitration Rules if arbitration under ICSID or the Additional Facility Rules is available. In such circumstances, the investor must initiate whichever ICSID procedure is applicable.

B. The meaning of "available"

96. In the present case, therefore, the crucial issue is whether arbitration under ICSID or the Additional Facility Rules was available as at October 1, 2008. What does "available" mean?

97. The Treaty does not provide any guidance. The Parties have extensively and helpfully addressed this issue, in respect of which their disagreement is acute. The Claimant submits that "available" means "present or ready for immediate use,"[110]

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[108] REX-13, Ley Aprobatoria del Acuerdo sobre la Promoción y Protección Recíproca de Inversiones entre el Gobierno de la República Bolivariana de Venezuela y el Gobierno de la República Islámica de Irán, signed on January 12, 2006, Article 11 (emphasis added).

[109] REX-14, Acuerdo entre el Gobierno de la República Italiana y el Gobierno de la República de Venezuela sobre Promoción y Protección de las Inversiones, signed on June 4, 1990, Article 8(5) (emphasis added).

[110] C-7, Claimant's Brief on the Preliminary Issue, ¶21, relying on the *Merriam-Webster Collegiate Dictionary*, 11th ed.

and with a reasonable prospect of success in the endeavour.[111] The Respondent adopts a definition that indicates that ICSID proper or the ICSID Additional Facility will be "available" if they are capable of being used or accessed,[112] and does not accept that any requirement as to the prospect of success is to be read into the definition.[113]

98. In order to clarify this issue, the Tribunal finds that it is appropriate to consider not only the English language version of the Treaty, but also the Spanish and French texts, since each of these texts is equally authentic. The Spanish version of Article XII(4) closely follows the English text, stating as follows:

> En caso de que ninguno de los procedimientos mencionados anteriormente esté disponible, el inversor podrá someter la disputa [a arbitraje CNUDMI].

99. The French text, however, adopts a slightly different approach:

> Lorsque aucun des recours susmentionnés ne peut être exercé, l'investisseur peut soumettre le différend à [l'arbitrage CNUDCI].

100. Comparing these three texts of Article XII(4), the Tribunal notes that the French text might be considered to be more precise, in the sense that it explicitly identifies three considerations, aspects of which may only be implicitly articulated in the Spanish and English versions:

- availability relates to the "exercise," i.e., the ability to implement or to avail oneself of ("*peut être exercé*") the ICSID or ICSID Additional Facility procedures;

- a relevant qualifying factor is the possibility of the "exercise" of the action ("*peut être exercé*"), not the actual success; and

- that it is the investor who must be unable to "exercise" ICSID arbitration, since it is the investor who, in the absence of access to ICSID, has the option to submit the dispute to UNCITRAL arbitration.

101. The French text suggests that Article XII(4) is properly to be interpreted as indicating that the burden is on the Claimant to establish that, at the time when it filed its Request for Arbitration, no possibility existed for it to exercise a right to

[111] C-7, Claimant's Brief on the Preliminary Issue, ¶26.

[112] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶19, relying on the Reinisch Legal Opinion.

[113] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶26.

bring an arbitration, either under the ICSID Rules proper or under the Additional Facility Rules:

(i) Possibility: Article XII(4) cannot be interpreted as requiring a prospective claimant to bring proceedings under ICSID or the Additional Facility Rules, if the prospects of approval (if necessary) and registration are non-existent or unlikely, or will require an unreasonable effort.

(ii) To exercise: When is an investor able "to exercise" an ICSID arbitration procedure? Access to ICSID arbitration requires, as a preliminary step, that certain administrative hurdles be overcome. In the case of arbitration under ordinary ICSID rules, the request must be drafted and communicated to the Secretary-General of ICSID, who will then decide whether or not to register it.[114] In the case of ICSID Additional Facility Rules, the Secretary-General must decide on whether to give his or her approval to an agreement to arbitrate, and then decide on whether to register the request.[115] Until these requirements have been met, an ICSID or ICSID Additional Facility tribunal cannot be constituted and will have no capacity to decide on possible jurisdictional objections and on the merits of the dispute.

102. In sum, the Tribunal proceeds on the basis that for the purposes of Article XII(4) of the Treaty, arbitration under the Additional Facility Rules will not be "available" if there is no reasonable prospect that the Secretary-General would approve the arbitration agreement and then register a request for arbitration, and would do so in a timely manner.

VIII.2 Availability of the Additional Facility

103. Under the Washington Convention it is clear that the jurisdiction of ICSID is limited to disputes arising directly out of an investment, between a Contracting State and a national of another Contracting State.[116] In 1978, the ICSID Administrative Council decided to authorize the Centre to administer certain proceedings between States and nationals of other States that might otherwise fall outside the scope of the Washington Convention. These procedures, which include arbitrations between

[114] See Article 36(3), Washington Convention.

[115] See Article 4(2), ICSID Additional Facility Rules.

[116] See Article 25(1), Washington Convention.

parties at least one of which is either a Contracting State or a national of a Contracting State, are governed by the Additional Facility Rules (as last amended by the Administrative Council on April 10, 2006). These Rules comprise a number of general principles (the Additional Facility Rules), plus three schedules, of which Schedule C provides specific rules for arbitration proceedings.

A. Facts

104. As a preliminary step, it is necessary to summarize the underlying facts. On February 8, 2008, the Claimant sent a Notice of Dispute to the Respondent, in which the investor "accept[ed] the offer made by [Venezuela] in Treaty Article XII(4) to have the Dispute resolved in an international arbitration (including, as available on the date of submission of the arbitration request, arbitration under [ICSID], [ICSID Additional Facility] and arbitration under the [UNCITRAL Arbitration Rules]."[117] The Claimant sent a follow up letter on March 25, 2008.[118] There is nothing in the record to indicate whether the Respondent replied to these communications, although in the Tribunal's view nothing turns on that. On October 1, 2008 the Claimant sent the Respondent a Notice of Arbitration under UNCITRAL Arbitration Rules, which has given rise to the present procedure.[119] There is nothing in the record to indicate whether the Claimant, before submitting its Notice of Arbitration in these proceedings, approached ICSID to enquire whether the Centre would be prepared to administer the arbitration under the Additional Facility Rules. We assume that if the Claimant had made such an approach, and if such an approach had indicated that arbitration was not "available" pursuant to the Additional Facility Rules, then the Claimant would have so informed the Tribunal.

B. Was the ICSID Additional Facility "available" to the Claimant on October 1, 2008?

105. There is no dispute between the Parties that, on October 1, 2008, Venezuela was a party to the ICSID Convention, but that Canada was not. Accordingly, as already previously noted, the only type of ICSID arbitration which might conceivably have been available to the Claimant would have been ICSID arbitration under the Additional Facility Rules. To determine whether arbitration under the ICSID Additional Facility Rules was "available" on October 1, 2008, it is necessary:

(i) to consider whether the claim is covered by one or both categories of

[117] CEX-6, Notice of Dispute.

[118] CEX-15, Letter from the Claimant to the Respondent, dated March 25, 2008.

[119] CEX-7, Notice of Arbitration.

claims that may be filed under the Additional Facility Rules;

(ii) to identify the requirements that must be met for arbitration under the Additional Facility Rules to be "available";

(iii) to determine the circumstances in which the Centre can deny access to arbitration under the Additional Facility Rules; and

(iv) to apply these considerations to the facts of this case.

(i) Types of applications to access the ICSID Additional Facility

106. Under the Additional Facility Rules, the Centre is authorized to administer proceedings between a State and a national of another State in two categories of circumstances:

1. proceedings for the settlement of legal disputes arising directly out of an investment, which are not within the jurisdiction of the Centre because either the State party to the dispute (in this case, Venezuela) or the State of the investor (in this case, Canada) is not a Contracting State under the Washington Convention (Article 2(a) of the Additional Facility Rules); this category refers to investment disputes arising in connection with alleged violations of BITs; and

2. proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment (provided again that either the State party to the dispute or the State of the counterparty has adopted the Washington Convention) (Article 2(b) of the Additional Facility Rules); this type of dispute includes contractual claims arising from agreements signed between a State (or one of its divisions) and a foreign national.

107. In this case the Claimant alleges that it has a protected investment in Venezuela and that the Respondent has violated certain obligations assumed in the Treaty. The dispute thus constitutes an investment dispute, which, if it is to be submitted to the Additional Facility, can only be presented under Article 2(a) of the Additional Facility Rules. The claim cannot sustain a request for arbitration under Article 2(b) of the Additional Facility Rules because, in the way it has been formulated, it cannot meet the requirements of that article. It is a dispute connected to an investment.

(ii) Requirements for each type of application

108. For a claimant to be able to obtain access to arbitration under Article 2(a) of the Additional Facility Rules, it is necessary that two requirements be met:

(a) the Secretary-General of ICSID must be in a position to give approval under Article 4(2) of the Additional Facility Rules; and

(b) the Secretary-General must then be in a position to register the request for arbitration under Article 4 of the Arbitration (Additional Facility) Rules.

Once these two administrative conditions have been met, the arbitration formally starts with the initiation of the procedure for the designation of the Tribunal.

(a) Approval by the Secretary-General

109. The necessity of approval by the Secretary-General is foreseen by Article 4(1) of the Additional Facility Rules:

> Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General.

110. The requirements for the granting of approval are developed in the second paragraph of Article 4 of the Additional Facility Rules: the Secretary-General can give approval to an application based on Article 2 (a) "only … if [she] is satisfied that the requirements of that provision are fulfilled at the time."[120] Article 2(a) of the Additional Facility Rules sets forth two requirements: first, that the dispute is a legal dispute, and second that it arises directly out of an investment. If these two requirements are met,[121] the Secretary-General has no discretion: under the Additional Facility Rules she "shall" approve the procedure.

111. As regards the timing of the request for approval, Article 4(1) of the Additional Facility Rules is clear: the application may be submitted "in respect of existing or future disputes … at any time prior to the institution of proceedings." The

[120] Article 4(2) further requires that "both parties [must] give their consent to the jurisdiction of the Centre under Article 25 of the [Washington] Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted." This clause of the Additional Facility Rules regulates a situation that has no bearing on this case: the possibility that between authorization and institution of the procedure, the second State, which was not a party to the Washington Convention, becomes a party to this Treaty; in such case the consent requirement of Article 25 of the Convention becomes applicable; since Canada is not a Contracting Party to the Washington Convention, this second requirement is moot.

[121] Moreover, the *ratione personae* requirements which, in this case, are not disputed.

Secretary-General must then take her decision "as soon as possible." (Article 4(5) of the Additional Facility Rules).

112. An issue which has been addressed in some detail by the Parties is whether the application for approval must be made jointly by the Parties, or whether it is sufficient for it to be made by the investor alone, acting unilaterally. The Claimant submits that Article 4(1) requires a joint application by investor and State, and that it cannot therefore bring arbitration proceedings under the Additional Facility Rules without the cooperation of Venezuela which, it claims, has not been forthcoming.[122] The Claimant's argument is based on a rather literal reading of Article 4(1) of the Additional Facility Rules, which states that "the parties may apply for such approval." In the Claimant's opinion, this wording requires that both Parties must jointly apply for approval.

113. The Respondent disagrees with the Claimant's interpretation. It submits that, by signing the Treaty, the Respondent had, well before October 1, 2008, agreed to ICSID Additional Facility arbitration, and that the Request for Arbitration and for approval could be presented by the investor acting on its own.[123]

114. The Respondent has presented extensive evidence to support its assertion that in practice, applications for approval are invariably presented by the investor alone, without participation of a respondent State. This evidence, which has not been contradicted by the Claimant, includes a Legal Opinion signed by Barton Legum, a partner of the law firm Salans LLP, who has acted as counsel in a number of Additional Facility arbitrations. The relevant part of Mr. Legum's statement is more in the nature of a statement of fact tendered by a witness, in the sense that he attests to his own experience. He declares that:

> No additional act by the respondent has been required or even solicited by ICSID before the case was registered by ICSID in any of the cases I have personally handled, including Mobil, Loewen,

[122] C-7, Claimant's Brief on the Preliminary Issue, ¶36; C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶89.

[123] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶42. On December 16, 2009 the Respondent submitted a request to the Secretary-General of ICSID, asking for clarification as to whether "under the Additional Facility Rules … a joint application by the Claimant and the State Respondent [is] necessary in order for ICSID to approve the application." (CEX-30, Letter from the Respondent to the ICSID Secretary-General). The letter, although written by the Respondent, was submitted by the Claimant. The Secretary-General's response was somewhat delphic, because she answered that under Article 2(2) of the Arbitration (Additional Facility) Rules the request for arbitration may be made jointly by the parties (with the implication that it can also be made individually). In fact, the question submitted by the Respondent was different, because it referred to a previous and separate step, the application for approval, and asked whether this application (and not the request for arbitration) could be filed individually by the claimant.

> Mondev and ADF, or in any of the cases against Mexico that I closely followed while at the Department of State.[124]

115. There is further material before the Tribunal that is even more pertinent to the present proceedings, namely information concerning an Additional Facility arbitration between a different Canadian investor and the Respondent that is also based on Article XII(4) of the Canada-Venezuela BIT—namely *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*. That arbitration was initiated on July 8, 2004 under the Additional Facility Rules, by the Canadian company, acting unilaterally. The application sought approval from the Secretary-General of ICSID under Article 4(2) of the Additional Facility Rules.[125] Within four months of the application, and notwithstanding Venezuela's objection,[126] on October 28, 2004 the Secretary-General granted approval and registered the procedure.[127]

116. The arguments before the Tribunal, as supported by the relevant materials, point decisively in one direction, allowing the Tribunal to conclude that it is well established in ICSID practice for the Secretary-General, acting under Articles 4(1) and 4(2) of the Additional Facility Rules, to approve an arbitration agreement upon the application of an investor claimant acting without the support of the respondent State. ICSID practice has consistently construed Article 4(1) of the Additional Facility Rules, which requires that "[t]he parties may apply for [the] approval," in the sense that an application by any one of the parties alone will be sufficient. There is no evidence before the Tribunal to indicate that ICSID has required a request for approval under Articles 4(1) and 4(2) to be made jointly by an investor and a State. The rationale for this appears to be that the entry into force of a BIT containing an express submission to arbitration under the ICSID Additional Facility Rules constitutes an acceptance of the possibility of such arbitration by both parties.

117. There is an additional argument: the above conclusion is consistent with the Arbitration (Additional Facility) Rules, which clearly envisage and allow requests initiating arbitration proceedings under the Additional Facility Rules to be submitted at the instance of the claimant alone.

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[124] Legum Legal Opinion, ¶24.

[125] REX-21, Letter from John Terry, Counsel for Vannessa Ventures Ltd., to ICSID Secretary-General, dated July 8, 2004.

[126] Which is the subject of further analysis, see ¶¶138-146 below.

[127] See REXL-23, Decision on Jurisdiction, dated August 22, 2008.

(b) Registration of the request

118. The second requirement with which an investor must comply, in order to have access to an Additional Facility arbitration, is to submit a written request of arbitration to the Secretariat.[128] The request is in the form of a simple document that identifies the parties, describes the agreement to arbitrate, and provides an indication of the issues in dispute and the financial amount involved.[129] A similar document is also needed at the outset of arbitrations under ordinary ICSID Rules.[130]

119. The Arbitration (Additional Facility) Rules make it clear that under the Additional Facility Rules, requests for the registration of an arbitration may be made individually by an investor, without any need for the participation of the respondent State.[131]

120. Once submitted by the investor claimant, the request must be approved by the Secretary-General if she "ha[s] satisfied [her]self that the request conforms in form and substance" with the requirements set forth in the Additional Facility Rules.[132]

121. In practice, claimants frequently join the application for approval and the request for arbitration into a single document, which is then submitted to ICSID's Secretary-General.[133] That is what happened in the *Vannessa Ventures* case, where the claimant's initial letter dated July 8, 2004 included requests for approval and registration.[134] ICSID approved both applications in a single decision dated October 28, 2004.

122. Once the Secretary-General of ICSID has registered the request, and the final administrative hurdle has been overcome, the arbitration proceedings are formally initiated and the process for the constitution of the Tribunal is triggerred. The arbitration proceedings under the ICSID Additional Facility Rules are set in motion, and the availability of the procedure is finally confirmed.

* * *

[128] Article 2(1), Arbitration (Additional Facility) Rules.

[129] Article 3(1), Arbitration (Additional Facility) Rules.

[130] See Article 36(2), Washington Convention; access to ordinary ICSID arbitration is not subject to authorization from the Secretary-General, but does require registration of the request.

[131] See Article 2(2), Arbitration (Additional Facility) Rules *a contrario sensu*.

[132] Article 4, Arbitration (Additional Facility) Rules.

[133] Legum Legal Opinion, ¶20.

[134] REX-21, Letter from John Terry, Counsel for Vannessa Ventures Ltd., to ICSID Secretary-General, dated July 8, 2004.

123. Against this background, the Tribunal finds that the requirements with which a claimant must comply in order to access Additional Facility arbitration consist of an application for authorization addressed to the Secretary-General of the Centre and a request for registration of the dispute. The application for authorization and the request for registration may be joined in a single document, which in the *Vannessa Ventures* case did not exceed two pages in length. No evidence has been put forward by the Claimant in this case to suggest that ICSID admits of any unnecessary delay in dealing with the authorization and registration procedures. In *Vannessa Ventures*, despite the fact that the Respondent presented objections that were supported by detailed argument, the case was registered by the ICSID Secretary-General in less than four months from the date the requests were made.

124. The Tribunal has already found that the Additional Facility is "available" within the meaning of Article XII(4) of the Treaty, as long as there is a reasonable prospect that the Secretary-General would approve the arbitration agreement and then register the request for arbitration, and would do so in a timely manner. What remains to be determined is whether the ICSID Secretariat, in the event that the Claimant had made such an application here, would have decided not to register the case.

(iii) Denial of access to the Additional Facility

125. The members of the Tribunal are conscious that it is not for this Tribunal to determine whether or not the ICSID Secretary-General would register the case under the Additional Facility Rules. That is a matter for the ICSID Secretary-General alone, and the Tribunal wishes to make clear that it does not in any way prejudge her exercise of powers at ICSID. That said, in order for the Tribunal to determine whether arbitration under the Additional Facility Rules is or is not "available" for the purposes of the exercise of its jurisdiction in these proceedings, the Tribunal does need to form a view as to the likelihood that the ICSID Secretary-General would register an application in relation to this Treaty and a request for arbitration proceedings.

126. The Respondent submits that approval by the ICSID Secretary-General and registration of the request is straightforward and easily available to those who apply for it. The Respondent submits that in at least 26 published cases, applications by a claimant under the Additional Facility Rules have been approved and registered.[135] Moreover, the Respondent has adopted as legal submission the views expressed by

[135] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶54.

Mr. Legum in his Legal Opinion, asserting that he is not aware of any case in which ICSID has refused a request for approval concerning an existing dispute on the ground that it did not meet the requirements of Article 2 of the Additional Facility Rules.[136] These two submissions have not been challenged by the Claimant; it has also not disputed that in the *Vannessa Ventures* case under the Canada-Venezuela BIT, approval for arbitration under the Additional Facility Rules was duly granted and the request registered.

127. On the basis of these considerations, the Claimant's prospects of success in invoking arbitration under the Additional Facility Rules may not, on their face, be said to be unlikely. Nevertheless, as both Parties agree, these decisions of the ICSID Secretary-General are not binding precedent; provided that she conforms to the Additional Facility Rules the theoretical possibility exists that the Secretary-General could decide to deviate from the approach taken in previous decisions.[137] On the basis of the facts in this case, therefore, is there any basis for considering that the ICSID Secretary-General might adopt a different approach in this case from that taken in the *Vannessa Ventures* case?

128. The Claimant has not put forward any evidence as to facts, or invoked any legal arguments, that would permit the Tribunal to conclude that there is any real prospect that the Secretary-General of ICSID might adopt a different approach from that taken in *Vannessa Ventures*.

129. Out of an abundance of caution, the Tribunal has nevertheless turned its mind to two possibilities that might, theoretically, be relied upon by the Secretary-General of ICSID to adopt a different approach in this case.

(a) Does the dispute arise directly out of an investment?

130. The first consideration concerns the requirement of Article 2(a) of the Additional Facility Rules that a dispute can only be submitted to the Additional Facility if it arises directly out of an investment. In its Notice of Dispute, the Claimant has asserted that its investments in Venezuela include the following:

> (i) A Coal Supply Agreement of March 18th, 2005, between the Investor and Guasare Coal International N.V. ("Guasare"), an enterprise ultimately controlled by the Government of Venezuela (the "GOVE"), along with confirmation letters, transactions, and related documents (together, the "CSA");

[136] Legum Legal Opinion, ¶30.

[137] See C-7, Claimant's Brief on the Preliminary Issue, ¶34; R-12, Respondent's Reply Brief on the Preliminary Issue, ¶40. See also CEXL-29, Palacio Legal Opinion, ¶17.

> (ii) The capital committed by the Investor, as payments under the CSA, for the development of the Venezuelan economy in general and its mining industry in particular; and
>
> (iii) The Investor's claims to performance under the CSA, as well as its claims to performance of GOVE's various undertakings vis-à-vis the Investor, including the Investor's claims to the delivery of coal extracted from Venezuelan mines and owed by the GOVE to the Investor.[138]

131. In taking any decision to approve the arbitration, the ICSID Secretary-General would have to "give [her] approval only if [she] is satisfied" that the dispute arises directly out of an investment (see Article 4(2) of the Additional Facility Rules). Consequently, if the Secretary-General was not satisfied that the Claimant was the owner of a protected investment located in Venezuela, she would not be able to give her approval.

132. Would there be any basis for the Claimant to expect that the Secretary-General might have rejected in October 2008 a request for approval, on the basis that the dispute did not arise directly out of an investment? The Tribunal sees no reasonable basis for such a view.

133. The Tribunal reaches this conclusion initially on the grounds that the Claimant has not been able to show a single case in which the Secretary-General has refused approval for access to the Additional Facility, for this or any other reason. The absence of any evidence in that direction could indicate that the Secretary-General only rejects a request for approval if she finds that the dispute is manifestly outside the scope of the Additional Facility (applying by analogy the criterion established in Article 36(3) of the Washington Convention for denying registration in ordinary ICSID arbitration), and allows all other cases to be decided by the arbitrators, as a matter of admissibility or jurisdiction.[139] It is difficult to see on what basis it could be said that this dispute is manifestly outside the scope of the Additional Facility such as to lead to the conclusion that a request to register would be rejected.

[138] CEX-6, Notice of Dispute.

[139] An indication in favour of this interpretation can be deduced from an amendment introduced on January 1, 2003 to Article 4(6) of the Arbitration (Additional Facility) Rules. Since then, the approval of the Secretary-General has not been conclusive and can be reviewed by an Arbitral Tribunal. The issue, however, is not entirely clear as the text of Article 4 of the Arbitration (Additional Facility) Rules differs to that of Article 36(3) of the Washington Convention. Based on this difference, former Secretary-General Palacio stated in her legal opinion that the "manifestly" test is only applicable in ordinary ICSID arbitration, but not in the Additional Facility: CEXL-29, Palacio Legal Opinion.

134. There is an additional and more specific factor that leads the Tribunal to the same conclusion. Article 1(f) of the Canada-Venezuela BIT provides a broad definition of "investment":

> (f) "investment" means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter's laws. In particular, though not exclusively, "investment" includes:
>
> (i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;
>
> (ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;
>
> (iii) money, claims to money, and claims to performance under contract having a financial value;
>
> (iv) goodwill;
>
> (v) intellectual property rights;
>
> (vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources;
>
> but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.
>
> Any change in the form of an investment does not affect its character as an investment.

135. This broad definition, which would be taken into account by the ICSID Secretary-General in reaching her decision, reduces or eliminates the prospect that at the initial phase of approval the Secretary-General might deny the Claimant access to arbitration under the Additional Facility Rules.

136. The Claimant acknowledges that it did not approach the ICSID secretariat to ascertain the prospects of success of a request for approval of the arbitration agreement and registration of the request for arbitration under the Additional Facility Rules. If the Claimant had taken that step, and received an indication that the request might in some way not meet the conditions for approval and registration, then the considerations which frame the Tribunal's conclusions may have been different. That is not, however, the situation.

* * *

137. In summary, the Tribunal concludes that on October 1, 2008, the date on which the Claimant initiated these arbitration proceedings under the UNCITRAL Arbitration Rules, arbitration under the ICSID Additional Facility Rules could have been "available" to the Claimant within the meaning of Article XII(4) of the BIT. There was no bar to the Claimant submitting an application for approval to the Secretary-General of ICSID, and there is no basis upon which the Claimant could reasonably conclude that approval and registration would not have been forthcoming in a timely manner.

VIII.3 Estoppel

138. The Claimant has made a further argument that requires the Tribunal's attention.[140] It notes that the Respondent took a position in the *Vannessa Ventures* case that was the opposite of that which it is now putting forward in this arbitration, namely that in an Additional Facility arbitration a request for approval of an arbitration agreement must be presented jointly by both parties, with the consequence that the Additional Facility will not be "available" if the respondent State raises an objection, for example on the grounds that the dispute did not arise out of an "investment." The Claimant submits that "a man shall not be allowed to blow hot and cold,"[141] and that the Tribunal should hold Venezuela to the position it adopted in argument in the *Vannessa Ventures* case.

139. The request for approval and registration in the *Vannessa Ventures* case was submitted to ICSID on July 8, 2004.[142] Upon receipt of the submission, the ICSID Secretary-General gave Venezuela the possibility to submit observations, which Venezuela did by a letter from its Attorney-General, dated August 23, 2004.[143] Venezuela asserted that Vannessa Ventures Ltd. should be denied access to the Additional Facility and its request for arbitration be rejected.[144] The reasons included, *inter alia*, the fact that the BIT had not been approved by the Secretary-General,[145] and that approval had to be requested jointly by both parties.[146]

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[140] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶¶65-72.

[141] C-11, Claimant's Rejoinder Brief on the Preliminary Issue, ¶72.

[142] REX-21, Letter from John Terry, Counsel for Vannessa Ventures Ltd., to ICSID Secretary-General, dated July 8, 2004.

[143] REX-23, Decision on Jurisdiction, dated August 22, 2008.

[144] REX-23, Decision on Jurisdiction, dated August 22, 2008, p. 21.

[145] REX-23, Decision on Jurisdiction, dated August 22, 2008, pp. 8-9.

[146] REX-23, Decision on Jurisdiction, dated August 22, 2008, p. 6: "Dicho Acuerdo [i.e. the BIT], no sólo no ha sido aprobado por la Secretaría General del [CIADI], tal y como lo exige [el artículo 4 (1) of the Additional

140. There is no doubt that the arguments presented in 2004 by Venezuela in that case contradict the position that Venezuela adopts in this arbitration. Is the Respondent estopped from adopting this new position, as the Claimant asserts?

141. The existence of a doctrine of estoppel, or the prohibition of *venire contra factum proprium*, is well established in public international law, even if its existence as a general principle of law or a rule of customary international law remains open to debate.[147] The consensus further covers the origin of the doctrine, which in public international law may be seen as being connected to the principle of good faith.[148] Its applicability has long been recognized in investment arbitration.[149] The precise scope of the doctrine remains subject to considerable debate. Notwithstanding this discussion, there is general agreement that the doctrine can be applied to the behaviour of States in judicial or arbitral proceedings. In these situations, if there is an inconsistency between a State's present claims or allegations and its previous conduct, such divergence violates the principle of good faith, to which all the State's action must submit, and more specifically the prohibition of *venire contra factum proprium*. Consequently, the State should be estopped from adopting this new stance.[150]

142. The Tribunal sees no reason to enter into the details of this debate, however interesting or important it may be. At the heart of the principle of estoppel, even assuming it to be applicable, is the notion that one party is prevented from asserting a new position that contradicts an earlier position on which the other party has relied. As the International Court of Justice has put it, estoppel in international law requires:

Facility Rules], sino que no hay evidencia de que tal aprobación haya sido solicitada por las partes, para cumplir con la exigencia prevista en la norma in comento."

[147] See I. C. MacGibbon, "Estoppel in International Law" (1958) 7 Int'l & Comp. L.Q. 468 at 468 and more recently, T. Cottier and J-P Müller, "Estoppel" in *Max Planck Encyclopedia of Public International Law* (2007), ¶¶9-10, online: Max Planck Institute for Comparative Public Law and International Law <http://www.mpepil.com>.

[148] *Gulf of Maine (Canada v. U.S.)*, [1984] I.C.J Rep. 246 at 305 ("the concepts of acquiescence and estoppel, … both follow from the fundamental principles of good faith and equity.")

[149] *Amco Asia Corp. v. Republic of Indonesia*, Award on Jurisdiction (1983) 23 I.L.M. 351 at 381 ("the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved. In addition, the Tribunal considers that, in particular for the applications in international relations, the whole concept is characterized by the requirement of good faith.").

[150] Judge Alfaro in his separate opinion in *Temple of Preah Vihear* referred to estoppel in international law as an "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible": *Temple of Preah Vihear (Cambodia v. Thailand)*, [1962] I.C.J. Rep. 6 at 39-51 (Separate Opinion of Vice President Alfaro), ¶40.

> a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.[151]

143. In other words, it is not sufficient that one party has engaged in inconsistent conduct. It is also necessary to establish that the counterparty was aware of that conduct, relied on it, and acted on the assumption that the first party would not deviate from that original position.[152] In the present case, the Claimant cannot credibly assert that it relied on the Respondent's legal argument made in another case involving another party, and which was unambiguously rejected by the Secretary-General of ICSID. Moreover, the evidence indicates that, on October 1, 2008, when the Claimant submitted its Notice of Arbitration under the UNCITRAL Arbitration Rules, without any previous approach or consultation with ICSID,[153] it could not have been aware of the detailed arguments presented by Venezuela in the *Vannessa Ventures* case, as the contents of Venezuela's letter of August 23, 2004 were only disclosed to the Claimant when Venezuela filed a copy of the letter in these proceedings.[154] It is therefore difficult to see on what basis the Claimant's decision to start UNCITRAL proceedings in October 2008 might be said to have been influenced by arguments made in another proceeding of which the Claimant had no knowledge.

144. The change of position adopted by Venezuela is consistent with the decision of the ICSID Secretary-General. If Venezuela had maintained its previous argument, it would have done so in the knowledge that it would be bound once again to fail. Were the Tribunal to adopt the position advocated by the Claimant, it would in effect be punishing Venezuela for adopting the reasonable position of taking into account the bases of the decision of the ICSID Secretary-General.

145. In this regard, there is a distinct but related matter that the Tribunal feels bound to address, having regard to the likelihood that the Claimant may decide to make a fresh request for arbitration under the Additional Facility Rules. In the event that such a request is made, it would be unfortunate if the Respondent were to adopt a

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[151] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Judgment on Application to Intervene, [1990] I.C.J. Rep. 92 at 118. Nicaragua sought to estop the other parties to the case from challenging its legal interest in intervening.

[152] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, Decision on Preliminary Objections (2006) ICSID Case No. ARB/03/13, ¶159, adding the requirement that the reliance must be detrimental ("[o]f the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.")

[153] CEX-7, Notice of Arbitration.

[154] REX-23, Decision on Jurisdiction, dated August 22, 2008,.

different position from that which it has advanced in these proceedings as to the propriety of the dispute that is the subject of this case being referred to arbitration under the Additional Facility Rules. This matter arose during the hearing held on September 30, 2009. In response to a question from the Tribunal, the Respondent confirmed without qualification that the proper forum for the resolution of this dispute was by arbitration under the Additional Facility Rules.[155]

146. The Tribunal has taken note of the Respondent's explicit confirmation in this regard. There is no reason to suppose that the Respondent might adopt a different position in any future proceedings under the ICSID Additional Facility Rules, and the Claimant is entitled to expect that a consistent position is maintained by the Respondent in the face of any future proceedings.

VIII.4 Conclusion

147. Under the BIT, the Claimant is entitled to bring arbitration proceedings under Article XII of the BIT in respect of a dispute that meets the requirements of that Treaty. Equally, the Respondent is entitled to expect that the intention of the drafters of the Treaty will be respected with regards to the choice of appropriate forum. The Tribunal concludes that arbitration proceedings under the Additional Facility Rules were, within the meaning of Article XII(4) of the BIT, "available" to the Claimant on October 1, 2008, and that that was and still is the proper forum in which to bring this dispute. For this reason, and on the basis that the preliminary issue is one of jurisdiction rather than admissibility (since it relates to a condition which limits the consent of the Parties to the jurisdiction of the Tribunal),[156] the Tribunal decides that it does not have jurisdiction over the claim brought by the Claimant.

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[155] See Procedural Hearing Transcript, September 30, 2009, pp. 42-44:

> ARBITRATOR SANDS: …Are you saying that when that claim was submitted under this BIT … Venezuela accepted the jurisdiction on the basis of this BIT in relation to that claim in the sense of accepting to have it litigated before Additional Facility Rules?
>
> MR. GOODMAN: That is correct.
>
> ARBITRATOR SANDS: So, to put you on the spot, 64 million-dollar question and you may not want to answer it, if that had happened in this case, what would Venezuela have done?
>
> MR. GOODMAN: I don't think it would have had a choice with respect to it. The Treaty is clear. […]
>
> ARBITRATOR SANDS: So, subject to whatever other jurisdictional objections Venezuela may have, the position is that … [t]hese issues ought not to be being addressed before the PCA. These issues ought to be being addressed before the Additional Facility of ICSID?
>
> MR. GOODMAN: That is correct. Well, not before UNCITRAL Rules. […].

[156] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, [2006] I.C.J. Rep. 5 at 39, ¶88 ("The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (see paragraph 65 above). When that consent is expressed

148. It will be for the Claimant to decide what course it might wish to pursue in the future. It is free to bring arbitration proceedings under the Additional Facility Rules. This Tribunal does not foresee that such a request would face obstacles as to approval or registration, but that is ultimately a matter for another body to decide. The possibility cannot be excluded, of course, that for some unforeseen or unforeseeable reason the Secretary-General of ICSID might not proceed to approve the arbitration agreement and register the request. In such circumstances, Article XII(4) of the Treaty would entitle the Claimant to bring proceedings under the UNCITRAL Arbitration Rules. The Respondent has suggested that in this situation, the Claimant would have to start a new UNCITRAL procedure, and request the designation of a new tribunal, because in Venezuela's opinion there is a defect in the composition of this Tribunal and after this decision it should become *functus officio.*[157]

149. The Tribunal has turned its mind to the consequences of such a situation, however unlikely it may be. It has given careful consideration to the possibility that it might stay a decision on the preliminary issue, having regard to other cases in which an arbitral tribunal has decided to stay (rather than terminate) proceedings. The Tribunal has, in particular, identified a number of precedents suggesting that an international arbitral tribunal may decide to stay a procedure rather than adopt a final and definitive order terminating proceedings in circumstances in which some other competent forum has jurisdiction over some part of a claim.[158] These cases, however, invariably dealt with a different situation to the one that is here faced,

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in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 11-15; *Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, pp. 327-328; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 78-80; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 344-346; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 427-429, paras. 81-83; *Border and Trans-border Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 88-90, paras. 42-48 ; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, paras. 16-19; p. 24, paras. 39-40; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 121-122, paras. 15-19; p. 129, paras. 38-39).")

[157] R-12, Respondent's Reply Brief on the Preliminary Issue, ¶100.

[158] See, e.g., *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3 (2003) 42 I.L.M. 1187 ("*The MOX Plant Case*") at 1199 in *SGS Société Générale de Surveillance v. Republic of the Philippines*, Decision on Objections to Jurisdiction (2004) ICSID Case No. ARB/02/06 ("*SGS Société Générale de Surveillance v. Republic of the Philippines*"); *SPP v. Egypt*, Decision on Jurisdiction I (1985) ICSID Case No.ARB/84/3 ("*SPP v. Egypt*").

namely one of parallel proceedings where two instances have been simultaneously seized (or appear to be about to be seized, as in the *MOX Plant Case*) and an arbitral tribunal is then faced with the question of whether it may – or should – exercise simultaneous jurisdiction pending the outcome of those other proceedings. The Tribunal notes that:

(a) in *SGS v. Philippines*, for example, the arbitral tribunal ruled that it had jurisdiction over a part of the claim, but decided that the claim was inadmissible, because the parties to the dispute had agreed by contract to go to the Philippine courts to resolve aspects of the contractual issues over which the tribunal found it had jurisdiction.[159]

(b) In the *MOX Plant Case* (Ireland v. United Kingdom), an Arbitral Tribunal established under Annex VII of the 1982 UN Convention on the Law of the Sea did not conclude that it had no jurisdiction or that the claim was inadmissible. Rather it concluded that it faced a situation in which there were "substantial doubts" whether the jurisdiction of the Annex VII Tribunal could be "firmly established in respect of all or any of the claims in the dispute" in circumstances where some or all of the claims might fall within the jurisdiction of the European Court of Justice, with the result that Ireland would not, as a matter of European Community law, be able to raise the claims before an UNCLOS Annex VII Arbitral Tribunal. In these particular circumstances, the Annex VII Tribunal suspended the proceedings by reference to "considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States."[160]

(c) In *SPP v. Egypt*, an ICSID tribunal rejected certain jurisdictional objections of the Respondent, but decided to stay the proceedings in respect of other jurisdictional objections until proceedings before the French courts "finally resolved" the question of whether the parties had decided to refer the dispute to the jurisdiction of the International Chamber of Commerce.[161]

150. In each of these three cases, it is important to note that the arbitral tribunal stayed proceedings in circumstances in which it had not decided that it did not have

[159] *SGS Société Générale de Surveillance v. Republic of the Philippines*, ¶169.

[160] *The MOX Plant Case*, ¶¶26-28.

[161] *SPP v. Egypt*, ¶88.

jurisdiction, but was faced with parallel proceedings that might give rise to conflicting decisions. The present case is different: the Tribunal has concluded without ambiguity that it does not have jurisdiction, because arbitration proceedings under the Additional Facility Rules were "available" on October 1, 2008. Having so concluded, it does not appear that there could be a reasonable basis for the Tribunal to stay a decision on jurisdiction in circumstances in which it has decided that it has no jurisdiction. In this way, the distinction between an issue of admissibility and jurisdiction may rightly be seen to be "a matter of considerable concrete importance."[162] The Tribunal has not been able to identify any authority that allows a contrary approach. Accordingly, it has no real option but to proceed to terminate the proceedings, subject to the issue of costs.

151. The Claimant and the Respondent have requested that the Tribunal order the counterparty to pay all fees and costs incurred in these preliminary proceedings. The Tribunal decides that each party shall submit, within one month of the date of this decision, a detailed breakdown as to the costs it has incurred in these proceedings up to and including the date of this decision. The breakdown should not include any further allegations regarding costs, the Tribunal being sufficiently briefed on this issue. Thereafter the Tribunal will adopt a decision on costs.

[162] See Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (Paris: ICC Publishing, 2005) at 601.

IX. Decisions

152. In view of the foregoing reasons, the Tribunal unanimously decides:

1. The Tribunal does not have jurisdiction over the claims submitted to it by the Claimant.

2. Within one month of the date of this decision each Party shall submit a detailed breakdown as to the costs it has incurred in these proceedings up to and including the date of the decision, and thereafter the Tribunal shall make an order for costs.

This Award is rendered in Spanish and English, both versions being equally authentic.

Place of Arbitration: The Hague, The Netherlands

Date of the decision: April 22, 2010

[signed]

Juan Fernández-Armesto
President of the Tribunal

[signed]

John Beechey

[signed]

Philippe Sands QC