INTERNATIONAL CENTRE
FOR THE SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

IBM World Trade Corporation, Claimant
Vs.
Republic of Ecuador
(ICSID case No. ARB/02/10)

DECISION ON JURISDICTION AND COMPETENCE

1. Members of the Tribunal

Rodrigo Jijón Letort, President
Alejandro Ponce Martínez, Arbitrator
León Roldós Aguilera, Arbitrator

2. Secretary of the Tribunal

Gabriela Álvarez Ávila

Representatives of the Claimant
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Ms.. María del Carmen Arcos
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I. BACKGROUND:

1. On September 6, 2002, the Assistant Secretary General of the International Centre for the Settlement of Investment Disputes (hereinafter referred to as ICSID), registered the request for arbitration filed under the protection of the Convention on the Settlement of Investment Disputes between Governments and Nationals of Other Governments, (hereinafter referred to as "the Convention"), by IBM World Trade Corporation, (hereinafter referred to as "IBM"), a company established under the laws of the State of New York, United States of America, against the Republic of Ecuador.

2. The request for arbitration was filed based on an arbitration clause contained in the Treaty between the Republic of Ecuador and the United States of America on the Promotion and Reciprocal Protection of Investments (hereinafter referred to as BIT), ratified by Ecuador on April 11, 1995 and which entered into force on May 11, 1997.

3. Claimant alleges that the lack of payment of monies payable to IBM del Ecuador C.A. (hereinafter referred to as "IBM Ecuador"), all the shares of which company belong to IBM in virtue of a concession contract entered into with the Republic of Ecuador, constitutes a violation of the BIT by the Ecuadorian Government.

4. Pursuant to article 39 of the Convention, the parties, by common consent, appointed Mr. Alejandro Ponce Martínez and Mr. León Roldós Aguilera as arbitrators of the present cause, and Mr. Rodrigo Jijón Letort as President of the Tribunal.

5. On June 5, 2003, the first session of the Tribunal was held in the city of Quito, Republic of Ecuador, in the auditorium of the Faculty of Jurisprudence of the Pontifical Catholic University of Ecuador, and both parties thereto assisted.

6. In said session, the President declared to the parties that the Tribunal recognized the objection made by the Republic of Ecuador regarding the jurisdiction of the Centre and the competence of the Arbitral Tribunal.

7. Indeed, the Minister of Finance and Economy of the Republic of Ecuador, expressly states in his Official Letter No. 7254 as of December 10, 2002:

> *"There exists no legal nor conventional provision that obliges the Minister of Economy and Finance to submit himself to a procedure other than the one expressly agreed upon by means of contracts between the parties, i.e. the Ministry of Finance and Economy and IBM Ecuador, and that there is no legal support to reason the requested arbitral process, without therefore this communication implying the acknowledgement of the origin of the arbitration and only with the purpose of avoiding that the Ministry of Finance and Economy would be exposed to a defenselessness, with the purpose of complying with the formality set forth in the Regulations for Arbitration for the integration of the Tribunal…"*

8. Pursuant to article 41 of the Convention and regulation 14 of the Regulations of Arbitration of the ICSID, the Tribunal decided to resolve upon the exception of the lack of jurisdiction of the Centre and the competence of the Tribunal, raised by the Ecuadorian Government, as a previous question and set a calendar for the parties to present memorials in order to support their points of view about that exception.

9. On June 7, 2003, The Republic of Ecuador filed its memorial objecting to the jurisdiction of the Centre and to the competence of the Tribunal. The claimant IBM has been served notice of this Memorial and on July 21, 2003, it presented its Memorial containing its legal criterion about the objections to the lack of jurisdiction of the Centre and the competence of the Arbitral Tribunal raised by the Republic of Ecuador.

10. On September 11, 2003, the Arbitral Tribunal met in Quito, and pursuant to article 41 of "the Convention", which empowers it to resolve upon its own competence, it discussed and resolved on the objections raised by the Republic of Ecuador.

II: ANALYSIS OF ECUADOR'S OBJECTIONS:

2.1. First objection to the competence of the Tribunal: lack of jurisdiction of the Centre and of competence of the Tribunal, since the difference arises from a null and void contract.-

11. The Ecuadorian Government alleges that it is not obliged to submit itself to the Jurisdiction of the Centre, since the provisions contained in the BIT, published in the Official Register No. 49 , dated April 22, 1997, are not applicable to the present case.

12. It maintains that, pursuant to the BIT, "Investment" means "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts" and that it comprises, according to the respondent, among other aspects "any right conferred by law or contract, and any licenses and permits pursuant to law;"

13. The Ecuadorian Government furthermore states that, in its opinion, for the purposes of the application of the BIT, the affected party who seeks to submit itself to the arbitral proceedings, "**shall be the holder of a right that arises out of a legitimate and applicable contract"** and that, in this case, the contracts which could bring forth the right, contain defects of absolute nullity. It adds that the contract subscribed with IBM Ecuador on June 20, 1996, never entered into force and shall be considered as not entered into force, since it was never fulfilled the condition set forth in its ninth clause which says if a trust agreement is not executed it is understood that the contract has not been signed. Finally, it declares, that such trust agreement has never been executed.

14. In its reply Memorial, the claimant maintains that the Republic of Ecuador's allegation is inadmissible, since the Ecuadorian Government itself has admitted the validity of the concession contract. It quotes in its favor some decisions of the Ecuadorian State Attorney, contained in the Official Letters 15558 dated December 14, 2000 and No. 16103 dated January 31, 2001, in which said official, judicial representative and defender of the Ecuadorian Government would have acknowledged the validity of the contract.

15. IBM additionally alleges that the Government has never claimed the declaration of nullity of the contract and that no judge has declared such nullity, the contract therefore being, under Ecuadorian law, law to the parties.

16. The Tribunal considers that it cannot declare the nullity of the contract "prima facie". The declaration of nullity of a contract usually should be carried out by a judge. The argument brought forth by the Republic of Ecuador, that the contract is null and void and therefore shall be considered as not entered into, cannot be considered at this procedural stage when solely and exclusively the competence itself of the Tribunal is being resolved upon. Likewise, the Tribunal cannot accept, at this procedural stage, the Ecuadorian Government's allegation that the contract has not been entered into because no trust has been executed.

17. Taking into account what has previously been stated, at this procedural stage, the Tribunal has to admit "prima facie" the existence of the concession contract, and therefore the existence of the investment claimed by IBM, without meaning by this that the Tribunal can not reach a different conclusion, when analyzing the background of the controversy and the evidence presented by the parties.

18. In addition, it shall be taken into account that IBM's claim is also sustained in the right to collect money, capital and interests coming forth from the Certificate of Final Delivery-Receipt of the Contract, entered into on November 11, 1999, which also constitutes an investment that is protected by the BIT.

2.2. Second objection: Lack of consent of the Ecuadorian Government to ICSID jurisdiction.-

19. The Ecuadorian government alleges that there is no document which demonstrates the acceptance of the Ecuadorian government to submit the controversy, the subject matter of this arbitration, to the ICSID proceedings.

20. It argues that number 2 of article 36 of the Convention, Regulation 2, number 1 letter c) and number 3, of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter referred to as "Institution Rules") determine that the obligation to submit oneself to arbitration is conditioned to the express acceptance of each of the parties. The present case does not fulfill that condition, since the Republic of Ecuador has not given its consent for the present difference to be resolved through the arbitral proceedings of the ICSID and on the contrary, in its Official letter SJM-2002-6410 dated October 29, 2002, Ecuador objects to the jurisdiction of the Centre and the competence of the Tribunal.

21. The claimant, in turn, rejects the Ecuadorian Government's reasoning and maintains that what the BIT establishes is the obligation of the Parties, one of which is the Ecuadorian government, to submit themselves to the arbitral proceedings enumerated in Art. VI of the Treaty and that such submission to the arbitral proceedings does not set forth any other requirement than the signature of the BIT and its being into force. This way, the claimant adds that no other consent in addition to the one uttered through the BIT signature is required to initiate the arbitral proceedings. IBM alleges that the parties, i.e. Sovereign States, by signing the BIT have resolved that the arbitration is the norm to solve conflicts without the possibility for one of these States to veto or retract from submitting itself to such proceedings, if such proceeding is requested by a national or company of the other State.

22. The Claimant concludes that the "submission" to the arbitral proceedings, which the BIT refers to, is the unilateral proceeding of the party that files its claim and chooses the arbitral system under which it wants to carry out the process. Thus,

the State remain bound to the ICSID provisions or to the Arbitration Regulations of the UNCITRAL (United Nations Commission on International Trade Law) or to any other arbitral institution which is selected according to the BIT. On the assumption that the States have submitted themselves already to arbitral systems, through the signature of the BIT, the party that initiates the proceeding has the right to choose the Tribunal or Arbitral System.

23. The Tribunal considers that unlike the state jurisdiction, which the State imposed upon those submitted to its sovereignty, arbitral jurisdiction presupposes the acceptance of the parties to have their disputes resolved by a Tribunal, composed of people who are not part of the jurisdictional organ of any State and who therefore do not have the power nor the judicial authority to impose their decisions to third parties.

24. In the case of the ICSID, the parties may express their consent for arbitration in several ways: a) By means of a concrete agreement of the parties to submit their specific differences to the arbitration of an Arbitral Tribunal of the ICSID. That agreement may be conventionally instrumented in an investment contract, an investment guarantee contract or any other contract, or subsequently, through an arbitral commitment reached by the parties once the difference arose; b) By means of the unilateral commitment of the Government receiving the investment, set forth in its legislation, for example, about the promotion of investments in which it proposes to submit the differences, arisen from any investment or any kind of investment, to the ICSID jurisdiction; and c) Through the reciprocal commitment of the Governments, contained in Treaties or Agreements of Investment Promotion and Guarantee, to submit to the ICSID jurisdiction the differences coming forth in matters of investments, between any of the contracting Governments and the nationals of the other Government.

25. IBM has filed its claim based on the BIT in force between the Republic of Ecuador and the United States of America. Article VI of the BIT establishes among the alternatives to solve investment disputes, to recourse to judicial or administrative tribunals of any of the Contracting Governments, or to recourse to

compulsory arbitration, among other possible of been elected, over the one administered by the ICSID (article VI, numbers 2, 3 and 4).

26. Pursuant to the BIT, the Republic of Ecuador irrevocably commits itself to the ICSID jurisdiction for the solution of disputes arising from the BIT and as long as the requirements imposed by it and by the Convention are met.

27. It also establishes beyond any doubt that the investor is the one to select the different ways of solving controversies provided for in Article VI of the BIT, at the moment he files his claim. Therefore, in the present case, such selection has been executed by IBM, by filing its claim before the ICSID, thereby expressly manifesting its decision to have the dispute resolved by an ICSID Arbitral Tribunal.

28. The Ecuadorian Government therefore cannot unilaterally withdraw itself from the duties it acquired in a sovereign manner when it freely negotiated the BIT with the United States of America, and in which it committed itself among other ways to solve the investment controversies, to the ICSID arbitral jurisdiction.

29. Precisely an Agreement like the BIT is meant to ensure that the Contracting States fulfill the obligations that come forth from the investments made by foreigners on their territories. Wit these the intention is to agree upon mechanisms to solve controversies, which are to be compulsorily imposed towards the future, whichever may be the national or investor of another State who considers himself, real or presumably, affected by acts or facts that, in his opinion, affect the rights over his investments.

30. That means that, once Ecuador expressed its will to solve in that manner any controversies that may arise in the future, no new agreement is necessary for such submission to arbitration, as the Republic of Ecuador alleges at this point.

<u>2.3. Third objection: Lack of consent of the Ecuadorian Government to have IBM del Ecuador S.A. considered as an investor of the United States of America.</u>

31. The Respondent Government maintains that there does not exist any arbitral link between the Ecuadorian Government and IBM, since the juridical relationship was established between the Ministry of Finances and Public Credit -currently the Ministry of Finances and Economy- and the company IBM del Ecuador C.A. constituted under the protection of the Company Law of Ecuador.

32. In the opinion of the Ecuadorian Government, that lack of contractual link causes the ICSID arbitration not to "operate", since the claimant has not been able to fulfill the condition imposed in number (iii) of Regulation 2 of the Institution Rules.

33. The Ecuadorian Government refers to number (iii) of letter (d) of paragraph (1) of Regulation 2 of the Institution Rules, which states:

> "*(iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;*"

34. The Ecuadorian Government alleges that the agreement, required in the quoted regulation does not exist, in order for IBM Ecuador to be treated as a national of the United States of America and that, therefore, the arbitration is not appropriate.

35. As to that objection, the Tribunal considers that the claimant or plaintiff in this arbitral process is IBM World Trade Corporation, a company created and existing under the laws of the State of New York, i.e. a national company of the United States of America.

36. The claim was not filed by IBM Ecuador C.A., a company constituted in the Republic of Ecuador, and therefore, to the opinion of this Tribunal, the requirement invoked on behalf of the respondent party, i.e. the consent for the respondent to be treated as a national of the United States, is unfounded.

37. One thing this Tribunal does have to analyze, is whether the difference invoked by the claimant, IBM World Trade Corporation, i.e. the lack of payment by the Ecuadorian Government refers to an investment protected by the BIT, which causes the discrepancies arising from this investment to be compulsorily submitted to an ICSID Tribunal.

38. Article 25 of the ICSID Convention grants jurisdiction to the Centre to know about the differences of juridical nature that arise directly from an investment of a Contracting State (…) and the national of another Contracting State (…).

39. Considering the fact that the Convention does not define what exactly is to be understood by "investment", but that the ICSID[1] jurisprudence has considered objective criteria for the concept of investment, said concept shall be analyzed both in light of the ICSID jurisprudence as from the BIT perspective. The BIT states in its article 1:

> *"For the purposes of this Treaty:*
>
> *a) "Investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
>
> *i) Tangible and intangible property, including rights, such as mortgages, liens and pledges;*

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[1] See Salini Costruttori SpA and Italstrade SpA vs..Kingdom of Morocco, Decision on competence as of July 16, 2003, paragraphs 43 and following, Journal du droit international, 129, Année 2002, January-February-March, No. 1, p.196 to 206. and Fedax N.V. vs. Republic of Venezuela, Decision on competence as of July 11, 1997, paragraphs 21 and following, ICSID Reports, vol. 5, 2002.

ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

iii) a claim to money or a claim to performance having economic value, and associated with an investment;

iv) intellectual property which includes, inter alia, rights relating to:

literary and artistic works, including sound recordings;

Inventions in all fields of human endeavor;

Industrial designs;

semiconductors mask works;

trade secrets, know-how, and confidential business information; and

trademarks, service marks and trade names; and

v) Any right conferred by law or by contract, and any licenses and permits pursuant to Law."

40. As shown in the claim, the claimant maintains that the "difference in matter of investment" is formed by the breach of the Republic of Ecuador of its obligation to pay to IBM Ecuador for the contract and other additional contracts, being IBM Ecuador fully owned by IBM.

41. In its letter dated August 14, 2002, the claimant adds that the lack of fulfillment of the obligation to pay money, listed as liquidated in the certificate of final delivery-receipt of the concession contract and which remains unpaid in spite of having required the payment to the Ecuadorian Government, creates the legal obligation to pay interests. It states, moreover, that such difference arises from an investment of IBM since: (i) it realized a direct investment of 100% of the capital of IBM del Ecuador C.A.; (ii) the contracts of IBM del Ecuador C.A. constitute an investment to IBM, since they indirectly belong to it; and (iii) the right to collect money, capital and interests is a legal and contractual right derived from the contracts and the certificate of final delivery-receipt, IBM being the indirect holder of this right.

42. There is no doubt that the concession contract was executed by IBM Ecuador, as it was that company the one which execute the final liquidation certificate. It is true that IBM Ecuador is an Ecuadorian company and that its legal personality cannot, in any way, be mistaken with that of IBM.

43. The existence of the contract as a source of obligations generates a link by virtue of which IBM Ecuador can request from the Republic of Ecuador, represented by its government and the pertinent authorities, the compliance of obligations arising from the contract,. Moreover, by the BIT definition, contracts do also constitute or represent investments. In that context, a contract is not only regarded as a source of obligations, but also as a mechanism through which a capital flows from one country towards another one. If the BIT conceives the contract as in investment, it is necessary to analyze and discover why the high contracting parties, the Republic of Ecuador and the United States of America, deemed that contracts had to be considered as investments.

44. The interpretation of international treaties does not only submit itself to principles such as the parties' intention, literality according to the natural and ordinary meaning, good faith, interpretation according to the context, practical application by the parties or by the international organizations, interpretation based on the preparatory works, restrictive and effective interpretations (in accordance with the nature of the matters the treaty deals with), but it shall also take into account the specific purposes of the treaty (teleological interpretation).[2] Hence, in the case sub judice, it is necessary to look for the purpose pursued by an investment treaty, when it enumerates the contracts as one of the ways in which an investment can take form and, therefore, to the opinion of this Tribunal, only for the purposes of such concept (the contract as an investment) one can argue that the investor is the only shareholder of IBM Ecuador, since it was the company that, possibly authorized or attracted by the legal or economical conditions the Ecuadorian State offered, decided to establish a company in Ecuador with the purpose of carrying out the activities set forth in

[2] Cfr. Brownlie, Ian "Principles of Public International Law", Oxford Country Press, London, 1966, p. 503 to 507.

its corporate purpose. Hence, the one who effectuated the investment and who, therefore, could eventually be affected by a possible breach of the rules that guarantees such investment, would be IBM.

45. For those reasons, rather than for the ones expounded by the claiming party, this Tribunal rejects the objection of the Ecuadorian Government based on the certain fact that IBM Ecuador was the company that entered into the contract.

46. The Tribunal furthermore emphasizes that, in the ICSID arbitration initiated by Salini Costruttori SpA and Italstrade SpA against the Kingdom of Morocco, based on an investment agreement between Morocco and Italy, the competence of the Arbitral Tribunal (composed by Robert Briner as President and Bernardo Cremades and Ibrahim Fadlallah as arbitrators) was based on the fact that contracts are a source of investment.[3] Regarding such decision, the editor of the mentioned Journal makes the following observation:

> *« La décision par laquelle le tribunal arbitral constitué dans l'affaire Salini Costruttori SpA et Italstrade SpA c/ Royaume du Maroc retient sa compétence pour connaître des demandes formées par les deux sociétés italiennes adjudicataires du marché de la construction d'une autoroute au Maroc est importante a un double titre. La premier (sic) tient au fait qu'elle admet pour la première fois dans la jurisprudence due Centre qu'un contrat de construction puisse être qualifié d'investissement au sens de l'article 25 de la Convention de Washington ; le second au fait qu'elle illustre la situation relativement fréquente dans laquelle la compétence du Centre pour connaître des litiges opposant l'investisseur à l'Etat sur le fondement d'un traité vient en concours avec celle des juridictions ou des tribunaux arbitraux désignés par les parties à l'opération pour connaître des différends de nature contractuelle susceptibles d'en découler (II). »*

[3] See Salini Costruttori SpA and Italstrade SpA vs..Kingdom of Morocco, Decision on competence dated July 16, 2003, Journal du droit international, 129, Year: 2002, January-February-March, No. 1, pages 196 to 206.

47. In like manner, in the case filed by SGS Société Générale de Surveillance S.A against the Islamic Republic of Pakistan, the respondent objected to the arbitral jurisdiction of the ICSID on the base of the contract entered into between the parties, in which they submitted themselves to arbitration under the Arbitration Law of Pakistan.; the Tribunal, with Judge Florentino P. Feliciano as President and further integrated by André Faurès and Christopher Thomas, decided that it was competent, since the allegation of the claimant company was that Pakistan had breached the Investment Treaty between the Swiss Confederation and Pakistan.[4]

48. This way, with the quoted cases as precedents, the present Tribunal considers that, since IBM had acquired shares in one Ecuadorian company - IBM Ecuador- the former has made investments in the Ecuadorian Government. On this matter, the Tribunal wants to emphasize that the IBM investment constitutes IBM Ecuador, a company which carries out a series of activities and businesses on Ecuadorian territory; and, therefore, in an indirect manner, the breach of Ecuador of its payment obligation, which is part of the commercial activity of IBM Ecuador, affects its investor, IBM. Therefore, IBM has the right to request this arbitration.

49. Considering al the foregoing, there is no ground for the objection of the Ecuadorian Government.

2.4. Fourth Objection: Lack of jurisdiction and competence of the Arbitral Tribunal, since in the concession contract, the parties agreed upon the jurisdiction of the ordinary judges of the city of Quito.-

50. The Ecuadorian State alleges that even if it is accepted that the concession contract entered into between the Ministry of Finances and Public Credit on June

[4] Société Générale de Surveillance S.A. vs. Islamic Republic of Pakistan, Decision on competence dated August 6, 2003, Mealey's International Arbitration Report, Vol. 18, No. 9, September 2003, pages 3 to 66.

20, 1996, is a valid contract, its twenty-third clause provides that any controversy arising in relation with the interpretation, application, execution or cause of breach of the contract, the parties bound themselves to submit the controversy solely to the jurisdiction of the competent judges or tribunals of the city of Quito, thereby expressly renouncing any other jurisdiction.

51. It also alleges on its favor the provision of Art. VIII of the BIT, which states that the BIT shall not discredit “a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;”.

52. The claimant objects to this exception, stating that the Constitution of the Republic of Ecuador acknowledges the arbitration as alternative means for the solution of controversies, that the BIT, a juridical regulation of higher hierarchy, establishes the unilateral right of a company or national of one Party to seek arbitration against the Government hosting the investment and that, therefore, those are valid rights and cannot be annulled by a contract entered into before the establishment of alternative procedural rights. It furthermore alleges that, pursuant to the provisions of the Civil Code of Ecuador about conflict of laws in time, the proceedings set forth in the subsequent law prevail over the ones provided in the previous law, the more when the new proceedings come forth from a law of higher hierarchical value, as is the case of international treaties.

53. The claimant maintains that IBM Ecuador could have sought ordinary justice in Ecuador, had it been advisable, while IBM has the right to submit itself to the ICSID arbitral jurisdiction, since it has never before initiated any claim process in the Republic of Ecuador.

54. In short, what the Tribunal has to decide with regard to this objection is whether the fact that IBM Ecuador and the Ministry of Finances and Public Credit (currently Ministry of Economy and Finances) voluntarily agreed in the contract for providing Information Technology Services, under the concession system, signed June 20, 1996, to submit the differences arising from that contract to the ordinary justice of the city Quito, cause this Tribunal not to have competence to rule on the existing dispute.

55. The Tribunal considers that the arguments set forth in the foregoing paragraph 2.3 are sufficient to ensure its own competence; nevertheless, it considers appropriate to add other arguments about this point.

56. The arbitral system finds its origin and support in the will of the parties to resolve their conflicts by means of this alternative. Such will of the parties may be expressed in contracts or in international treaties.

57. In the contract entered into by and between IBM Ecuador and the Ministry of Finances and Public Credit of the Republic of Ecuador, the parties voluntarily submitted their differences to the ordinary justice of Ecuador, for which the conflicts arising from that contract should be resolved by the judges selected by them, (should such clause be applicable, pursuant to the existing regulations in Ecuador on public contracting) an aspect about which this Tribunal does not or cannot issue any opinion.

58. The Convention and the BIT require, in order for a party to have the possibility to seek ICSID arbitration, that the party commencing the arbitral proceedings had not sought justice before the judges of the country where the investment has taken place. That means that, pursuant to the Convention and the BIT, there is the alternative to call upon the aforementioned judges or to appeal to this international arbitration, as happens with the International Court of Justice.[5] The Parties may grant arbitral jurisdiction by virtue of an arbitration clause contained in a bilateral or multilateral treaty. The Convention is a multilateral treaty; while the BIT is a bilateral agreement. Had IBM sought ordinary justice in Ecuador, such fact would have impeded IBM to call upon this arbitral jurisdiction.

59. By ratifying the BIT, the Republic of Ecuador consented that the differences in matter of investment under the protection of the BIT could be resolved by means of arbitral proceedings by the ICSID. Therefore, the fact that in a contract

[5] Cfr. Roséenme Shabtai, The law and practice of the International Court, 1920-1996, volume II, "Jurisdiction", Martines Nijhoff publishers, The Hague, 1997, p. 665-668.

(which is a form of investment) the contracting parties have submitted themselves to the jurisdiction of the Ecuadorian State does not impede the investor to have recourse to the BIT and to seek arbitration from the ICSID, in order to appeal against the alleged violation of his rights over the investment, provided that he has not previously initiated any proceeding before the Ecuadorian judges.

60. Moreover, whatever is not resolved by the arbitral jurisdiction, in the finding on the merits that this Tribunal may reach because it is not a matter of an investment, the Ecuadorian jurisdiction will subsist.

61. From another point of view, the claimant IBM has additionally alleged in its claim that the lack of payment of the values that were allegedly payable to IBM Ecuador constitutes a breach of the investment regulations.

62. This Tribunal therefore considers that the IBM claim is based on an alleged violation of the BIT and not on an alleged violation of the contract, and that therefore the proceeding provided for by the BIT, in accordance with the provisions of the Convention, grants jurisdiction and competence to this Arbitral Tribunal to know and resolve upon the claim filed by IBM against the Republic of Ecuador.

63. The claimant maintains that his rights as investor have been violated, which arise from the contract dated June 20, 1996 and from its supplements; within the provisions of the BIT we find that a difference in matter of investments refers, among other aspects, to "an alleged breach of any right conferred by this Treaty with respect to an investment." Therefore, if the claimant considers that a breach is committed upon a right granted by the BIT, such allegation is sufficient for this Tribunal to declare itself competent to hear about it, provided that the other conditions imposed by the Convention and the BIT are complied with.

64. In accordance with the foregoing, there are previous pronouncements of other arbitral tribunals, organized under the ICSID, on the same topic.

65. The Tribunal considers it appropriate to quote the process between the Compañía de Aguas del Aconquija S.A. & Vivendi Universal vs. The Republic of Argentina (ICSID case No. ARB/97/3), in which the Republic of Argentina raised the exception of lack of jurisdiction of the Arbitral Tribunal, since a clause of the concession contract entered into by and between the parties established the submission of matters of interpretation or application of the contract to the exclusive jurisdiction of the Tribunals related to administrative litigation of the Tucuman Province.

66. The Arbitral Tribunal considered that the claim was based on the allegation that Argentina had violated its obligations under the BIT and not on a breach of the provisions of the concession contract and consequently it decided that its jurisdiction under the ICSID was not precluded.[6]

67. The aforementioned Tribunal maintained furthermore that the contractual provision which regulated the controversies between the parties did not despoil the Tribunal of jurisdiction to hear the case, since such provision did not constitute and cannot constitute a waiver on behalf of the claimant of his rights under the BIT.[7]

68. In the Vivendi case[8], the Ad Hoc committee, referring to what the Arbitral Tribunal had ruled, emphasized that the violation of the BIT and the violation of a contract are two different matters and that, therefore, each and every of those matters shall be resolved upon with the applicable law, which in the case of the

[6] Compañía de Aguas del Aconquija y Vivendi Universal vs. Republic of Argentina, Award dated November 21, 2000, ICSID Review Foreign Investment Law Journal, Vol. 16, No. 2, 2001, paragraph 50, p. 19.

[7] Compañía de Aguas del Aconquija y Vivendi Universal vs. Republic of Argentina, Award dated November 21, 2000, ICSID Review Foreign Investment Law Journal, Vol. 16, No. 2, 2001, paragraph 53, p. 21.

[8] Compañía de Aguas del Aconquija y Vivendi Universal vs. Republic of Argentina, Decisión on the annulment dated July 3, 2002, 41 ILM 1135, 2002, paragraph 95, p. 1154.

BIT is international Law and in the case of the contract is the law agreed upon by the parties in said instrument.

69. In particular, in the Vivendi case, the Tribunal decided that when the essential base of the claim is a contract, the Tribunal shall apply any jurisdiction that is valid under the contract. Nevertheless, when the fundamental base of the claim is a bilateral investment treaty, the existence of a clause, related to the controversies, included into the contract entered into between the claiming company and the responding State, does not impede the jurisdictional submission to the arbitration provided for in the treaty to operate.

70. IBM's allegation about the application over the time of the procedural laws, by virtue of which the latter are in effect since the moment they entered into force, is not applicable to the case, since there is no contradiction between the two regulations on jurisdiction, the contractual one and the regulation of the International Treaty. The contractual regulation shall be applied to controversies arising from the contract and the regulation of the BIT shall be applied to differences that come forth from violations of the guarantees granted by the BIT.

2.5. Fifth objection: The matter of arbitration is not capable of being settled since there is no constitutional or legal provision that empowers the Ecuadorian Government to engage in the settlement of contracts which are in violation of the Law.

71. By ratifying both the Convention in 1986 and the BIT in 1997, Ecuador acknowledged that none of these two instruments altered its juridical constitutional body of laws. At the moment when a State deposits the ratification documents of international conventions, it solemnly declares that all the requirements for their full effect have been met, and therefore, unless the treaty is denounced, it cannot free itself from the obligations coming forth from it. Hence, it is not admissible for the Ecuadorian State to seeks at this point, seventeen years after depositing the ratification instrument of the Convention and six years after doing the same regarding the BIT, to subtract itself from a jurisdiction that the Ecuadorian State committed itself to accept, in front of the

international community, precisely to promote investments in Ecuador and give them a framework of juridical certainty. To act like in this manner, Ecuador should, through the agency that handles its international relations, to free itself from the Convention or the BIT. While such international treaties are still in force, it is the international obligation of the Ecuadorian State to respect them, under prevention of the international responsibility that carry out their violation. The fact that a State fails to recognize the norms that it voluntarily has accepted in international conventions is a breach of the international juridical order; breach that in the present case is evidenced by affirmation that the matter of the arbitration (violation of the BIT) is not capable of settlement.

72. International treaties establish norms of conduct between and for the States, the mandatory character of which cannot be avoided, the more since current International Law has the tendency to have its norms to prevail even over the provisions of the Political Constitutions themselves. It appears as such in doctrine and constitutional texts, but also in jurisprudence on human rights and community law. Indeed, Max Sorensen affirms that in the event of “a conflict between international and internal law that arises before the jurisdiction of an international tribunal, the supremacy of the international law is consequently resolved upon. When it arises within the internal law and is not resolved upon in the same way, the position to be adopted is of a violation of the international law and it brings forth the same consequences as any other illegal act. Therefore, in either of the two cases, the primacy of the international law is affirmed”.[9] From different points of view, the Inter-American Court of Human Rights[10] and the Tribunal of Justice for Andean Community of Nations[11]have issued alike pronouncements.

[9] Max Sorensen, Manual on Public International Law. Fondo de Cultura Económica, Mexico, 2000, p. 196.

[10] Cfr. Case “The Last Temptation of Christ”, judgment dated February 3, 2001, Series C No. 73, paragraphs 72 and 87.

[11] Cfr. Action of nonfulfillment against the Republic of Colombia, process No. 03-11-97, judgment dated December 7, 1998.

73. Even from the exclusive point of view of the municipal law of Ecuador, the BIT and The Convention are international treaties validly subscribed by the Republic of Ecuador, and their provision are therefore part of the national juridical body of laws in force, as provided in article 163 of the Political Constitution of said State. Hence, even the internal juridical code of laws of Ecuador acknowledges and authorizes that the juridical differences in matter of investment, in the terms set forth in those two international treaties, be submitted to ICSID arbitration.

2.6. Sixth objection: About the lapsing of the right to complain.-

74. The Ecuadorian Government affirms that the legal action of the claimant is lapsed, according to the Ecuadorian Law and that arbitral proceedings would restore the validity of an expired right.

75. This allegation cannot be considered by the Tribunal at this procedural stage, since it is now ruling on its own competence exclusively, as previous defense. To analyze the affirmation of the Ecuadorian Government, which refers to a question of law, therefore turns out to be unlawful.

76. Therefore, it is worth to remind the parties that the Tribunal has declared itself competent to hear only the possible violations to the BIT, which constitutes international obligations protected under International Law.

2.7. Seventh objection: The exhaustion of the administrative or judicial as remedies as a requisite for arbitration.-

77. The Ecuadorian Government argues in its Memorial, that it conditions its consent to the ICSID arbitration to the existence of a previous and definitive pronouncement by the competent internal judicial organ to resolve the case, pursuant to the Ecuadorian legislation, principally with regards to the nullity of the contract.

78. It bases this exception on the provision of article 26 of the Convention, which states:

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

79. As this Tribunal has already said, at the moment when the Ecuadorian State ratified the BIT, it already gave its consent to submit the disputes in matter of investments between the Ecuadorian Government and a national of the United States of America to the ICSID arbitration; it is therefore not necessary nor appropriate that the Ecuadorian Government gives its consent again to initiate this arbitral proceeding.

80. The provision of article 26 of the Convention authorized the Ecuadorian Government to establish certain conditions for the applicability of an International Treaty; i.e., the Ecuadorian Government should have included, as previous requirement, the condition of exhausting the administrative or judicial channels, at the moment it ratified the BIT. And it has not. On the contrary, the first part of article 26 of the Convention, as well as number 2 of article 11 of the BIT, excluded the possibility to call on the national judges if the ICSID arbitration has been sought first.

81. The Ecuadorian Government not only imposed this condition at the moment it entered into the BIT, but is also, expressly, authorized the national of the other country to choose between initiating the administrative or judicial actions in Ecuador to solve the investment divergence, or to directly seek the ICSID arbitration.

82. Number 2 of article VI of the BIT states indeed:

"In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned

__may choose__ to submit the dispute, __under one of the following alternatives,__ (emphasis added by the Tribunal) for resolution:

a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

c) in accordance with the terms of paragraph 3."

83. The referred 3rd paragraph provides in turn:

"a) __Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b)__ and that six months have elapsed from the data on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration."

84. The wording of article VI of the BIT clearly indicates that the Ecuadorian State did not condition the possibility to seek compulsory arbitration to the exhaustion of the administrative or judicial remedies in the Republic of Ecuador. On the contrary, the BIT establishes that in order to resort to arbitration, the interested company or national shall not have submitted the controversy to the judicial or administrative tribunals of Ecuador.

85. The Tribunal reiterates, once more, that the consent of the Republic Ecuador to submit itself to arbitration was already granted, by means of the ratification of the BIT and that in accordance with the provisions of article 25 of the Convention, when both parties have granted their consent, the latter cannot be revoked unilaterally, nor conditioned it to the exhaustion of administrative or judicial remedies.

III. DECISION:

86. Considering the foregoing background, the Tribunal, rejecting the exception of lack of jurisdiction and competence proposed by the Republic of Ecuador, declares itself competent to hear the breaches of the BIT, filed by the claimant party, in accordance with the provisions of article VI, paragraph 1 section c) of the BIT, the claimant having the procedural burden to proof the violations to said Treaty.

87. Since the respondent's objection to the jurisdiction of the Centre and to the competence of the present Arbitral Tribunal has been resolved upon, in accordance with the Regulation of Arbitration 41 (4) the process shall continue, and as such it is declared.

88. Therefore, pursuant to number 15.3 of the abridged act of the first session of the Tribunal as of June 5, 2003, it is hereby provided that within a term of thirty days counting from the service of the notice of the present decision, the claimant shall issue its Memorial.

Quito, December 22, 2003

Rodriguez Jijón Letort
President

Alejandro Ponce Martínez
Arbitrator

INTERNATIONAL CENTRE
FOR THE SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

IBM World Trade Corporation, Claimant
Vs.
Republic of Ecuador
(ICSID case No. ARB/02/10)

DISSENTING VOTE OF Mr. LEON ROLDOS AGUILERA

WHEREAS: Quito, December twenty-second of the year two thousand and three. The claim filed by IBM World Trade Corporation, the performance for the constitution of the Arbitration Tribunal, the express objection by the Republic of Ecuador to the jurisdiction of the Centre and the competence of the Arbitral Tribunal; the memorial of the Republic of Ecuador and the claimant's memorial of constitution, to decide, the following is considered:

1. In Ecuador and the United States of America, the treaty on the promotion and reciprocal protection of investments is in force, which has been published in the Official Register No. 49 dated April 22, 1997, article VI of which sets forth that "… Should the difference in matter of investment not be resolved upon amicably, the interested company or the national shall, in order to resolve it<u>, be able to opt to submit it to one of the following channels for its resolution: a) To the judicial or administrative tribunals of the Party that is party to the difference, or.- b) To any procedure of solution of differences applicable and previously agreed upon, or.-</u> c) In accordance with the provisions in paragraph 3 of this article.- 3.a) Provided that the interested company or the national has not submitted the difference, for its solution, pursuant to the provisions in section a) or in section b) of paragraph 2,…"

2. In the text of the referred public deed of the contract of concession and rendering of services of administration and maintenance of the Information System of the Customs Service and the control and supervision of the automatized proceedings of the DUI Office, entered into in Quito on June 20, 1996, between the Ecuadorian Government, represented by the Ministry of Finances and Public Credit and IBM del Ecuador S.A., the twenty-third clause, under the subtitle “Jurisdiction and applicable Law”, establishes that for any controversy that may arise in relation to the interpretation, application, execution or causes of breach, the parties agree to submit themselves to the jurisdiction of the competent judges or tribunals of the city Quito.

3. The twenty-third clause transcribed above is a valid contractual clause, between the parties, in which one of the parties, IBM del Ecuador S.A., agrees with the Ecuadorian Government, the other contract party, on the terms of jurisdiction and competence, which is coherent with section a) of paragraph 3 and section a) of paragraph 2 of article VI of the abovementioned treaty. What is more, the contracts for the provision of support and service in the protection of automatization of the Customs Service as of September 8, 1983, the amendment dated July 9, 1993 and the amplification dated August 1, 1994, all of which are mentioned in the complaints, have similar clauses on jurisdiction and competence.

4. It is true that the aforementioned Treaty with the United States of America considers the possibility to submit the differences to the convention on the settlement of investment disputes between governments and nationals of other countries, generated in Washington on March 18, 1995, (ICSID convention) section 3a).i), but it is not applicable to the specific case, due to that expounded in the foregoing number 1 (referring to sections 2-a), 2-b) and 3-a) of the treaty between Ecuador and the United States of America.

5. The claimant’s plea about the juridical situation of the investment, differentiating it from the contractual terms; in order to conclude that the commitments to submit themselves to the jurisdiction of Ecuador and the competence of the judges and treaties of Quito are not applicable, pursuant to the clause referred to in the foregoing numbers 2 and 3, arises from the assumption that the continents –the contracts- are not binding of the contents –in this case, what is presented as an

investment of a national of the United States of America in Ecuador-. By accepting this, we could reach the unlawful conclusion that anything could be subscribed, since afterwards, nor its efficiency neither its validity shall be recognized.

6. The claimant's argument that the certificates of understanding and commitment and the certificate of final receipt, between the Corporación Aduanera Ecuatoriana and IBM del Ecuador S.A. generate juridical relations that are different from the contracts that were their antecedents, is unlawful, in first place since they are only the consequence of the instruments subscribed before, secondly because it is not the Ecuadorian Government who subscribes it, but the Ecuadorian Customs Corporation, which does not represent the former.

7. The allegation that letter a) of the second paragraph Art. VI of the treaty is to be understood as conditioning the concept of submission when initiating administrative or judicial actions, is a limitative and unfounded interpretation. The more, the twenty-third clause itself expressly states "…the parties agree to submit themselves to the jurisdiction of Ecuador and the competence of Judges and Tribunals of Quito."

   The words "submit it" of the treaty; and the expression "to submit oneself" of the contractual clause, come from submission, and shall not be understood as conditioned to previous judicial or administrative actions: In the specific case, the submission has taken place by the contractual terms.

   The other aspects of the objections of the Government and the reply memorial of the claimant refer to the questions of law of the juridical and economical controversy of the Republic of Ecuador with IBM del Ecuador S.A., therefore it is not appropriate to decide on those topics and it is only appropriate to resolve upon the jurisdiction and the competence, as previous topic.

Considering the foregoing, we accept the exception of incompetence due to lack of jurisdiction of the ICSID, and therefore, the incompetence of the Tribunal to decide upon the present cause.

León Roldós Aguilera,

Arbitrator