English Translation of Award Rendered in Spanish

International Centre for Settlement of Investment Disputes
Washington, D.C.

AWARD

In the proceedings between

Inceysa Vallisoletana, S.L.
(Claimant)

v.

Republic of El Salvador
(Respondent)

ICSID Case No. ARB/03/26

Members of the Tribunal:
Rodrigo Oreamuno Blanco, President
Burton A. Landy, Arbitrator
Claus von Wobeser, Arbitrator

Secretary of the Tribunal
Claudia Frutos-Peterson

Representing the Claimant

Alfonso López-Ibor Aliño,
Juan Concheiro Linares and
Mónica Baselga Loring
Law Firm
Ventura Garcés & López-Ibor
Madrid, Spain

Representing the Respondent

Whitney Debevoise, David Orta, Jean Kalicki and Eduardo Guzmán
Law Firm of Arnold & Porter,
Washington, D.C.,
Belisario Artiga Artiga, Attorney General of the Republic of El Salvador

Date: August 2, 2006

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The Tribunal, with the composition indicated above, after considering the written and oral submissions of the parties and deliberating, decides:

I. PROCEDURE

1. On July 21, 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received from Inceysa Vallisoletana, S.L. ("**Inceysa**" or the "**Claimant**"), a company incorporated under the laws of the Kingdom of Spain, a request for arbitration against the Republic of El Salvador ("**El Salvador**" or the "**Respondent**").

2. On the same date, the Centre acknowledged receipt of the request and transmitted a copy thereof to the Republic of El Salvador and to the Embassy of El Salvador in Washington, D.C., pursuant to Rule 5 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings of ICSID ("Institution Rules").

3. The dispute refers to a service contract for installation, management and operation of mechanical inspection stations for vehicles and emission control of contaminating gases, particles and noise, executed under the national and international public bid 05/2000 organized by the Ministry of the Environment and Natural Resources (hereinafter MARN) of the Republic of El Salvador. The **Claimant** alleges contractual breach and expropriation on the part of **El Salvador**. The **Respondent** alleges that **Inceysa** acted fraudulently and therefore it cannot claim the protection of the Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of El Salvador and the Kingdom of Spain (hereinafter, without distinction, the **Agreement**, the **Treaty** or **BIT**).

4. According to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

("ICSID Convention"), on October 10, 2003, and pursuant to Rule 7 of the Institution Rules, the Interim Secretary-General of the Centre registered the request and, on the same date, notified the parties of the registration and invited them to proceed to constitute the Arbitral Tribunal.

5. The parties did not reach an agreement concerning the method for the appointment of the Arbitral Tribunal, so that, on December 10, 2003, the **Claimant** requested the constitution of the Tribunal pursuant to Article 37(2)(b) of the ICSID Convention. On December 12, 2003, the Centre indicated that the Arbitral Tribunal would be constituted according to the Article cited, i.e., by three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

6. On December 27, 2003, the **Claimant** appointed as arbitrator Mr. Burton A. Landy, a U.S. national; on January 5, 2004, the **Respondent** appointed as arbitrator Mr. Claus von Wobeser, a Mexican national. The parties did not reach an agreement concerning the nomination of the third arbitrator. On January 15, 2005, the **Claimant** requested that the third arbitrator be designated by the Chairman of the Administrative Council of ICSID, pursuant to Article 38 of the ICSID Convention and Rule 4 of the Rules of Procedure for Arbitration Proceedings of the Centre ("Arbitration Rules").

7. After consulting the parties, on March 23, 2004, the Centre appointed Mr. Rodrigo Oreamuno Blanco, a Costa Rican national, as third arbitrator and President of the Tribunal. Pursuant to Rule 6(1) of the Arbitration Rules, on the same day, the Interim Secretary-General notified the parties that the three arbitrators had accepted their appointments and that the Tribunal was, therefore, deemed to have been constituted, and the proceedings to have been initiated on that date. Under Rule 25 of the ICSID Administrative and Financial Regulations, the parties were informed that Mrs. Claudia Frutos-Peterson, a legal advisor of ICSID, would serve as Secretary of the Tribunal.

8. The Tribunal held its first session in Washington, D.C., on May 21, 2004. Messrs. David Mülchi Paníco and Alessandro Liotta, from the law firm of David Mülchi & Asociados, from Madrid, Spain, represented the **Claimant**. Messrs. Whitney Debevoise, David Orta, Luis Parada and Eduardo Guzmán, from the law firm of Arnold & Porter, from Washington, D.C., as well as Messrs. Belisario Artiga Artiga, Attorney General of the Republic of El Salvador, and Walter Jokisch, Minister of the Environment and Natural Resources of said Republic, represented the **Respondent**.

9. During the first session, the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the ICSID Convention and the Arbitration Rules and indicated that they had no objection to the members of the Tribunal. Furthermore, it was agreed that the proceeding would be conducted according to the Arbitration Rules in force since January 1, 2003.

10. In the first session, the parties also agreed on various procedural matters reflected in the written minutes signed by the President and Secretary of the Tribunal. Concerning the schedule of written submissions, the Tribunal, after consulting the parties, decided that the **Claimant** would file its memorial on the merits within 90 days from the date of the first session and that the **Respondent** also would file its counter-memorial on the merits within 90 days from receipt of **Claimant**'s memorial. Afterwards, both the **Claimant** and the **Respondent** would have a period of 45 days in which to file their respective reply and rejoinder.

11. On June 8, 2004, the **Claimant** submitted a document and requested that it, along with its Request for Arbitration, be considered as a Memorial on the Merits.

12. On September 15, 2004, the **Respondent** submitted a Memorial on Objections to the Jurisdiction of the Centre and the Competence of the Tribunal and, on the same

date, it submitted another memorial asking the Tribunal to issue an order pursuant to Rule 28(1) of the Arbitration Rules and requesting provisional measures in connection with the fees and expenses of the proceeding.

13. Given the objections to jurisdiction submitted by the **Respondent**, on September 21, 2004, the Tribunal, in accordance with Rule 41(3) of the Arbitration Rules, declared the proceeding on the merits suspended. It also invited the **Claimant** to submit its observations on the request for provisional measures made by the **Respondent** concerning the fees and expenses of the proceeding, according to Rule 39(4) of the Arbitration Rules. Subsequently, the Tribunal invited the parties to exchange a second round of observations; they did so on the dates indicated by the Tribunal.

14. On September 23, 2004, the Tribunal issued Procedural Order number 1, and fixed the schedule for written submissions of the parties on the subject of jurisdiction. According to the schedule, on November 4, 2004, the **Claimant** submitted its Counter-Memorial on Jurisdiction; on November 29, 2004, the **Respondent** submitted its Reply on Jurisdiction and, on December 22, 2004, the **Claimant** submitted its Rejoinder on Jurisdiction.

15. On December 9, 2004, the Tribunal scheduled a date for a hearing, in which the parties would be heard with respect to the request of the **Respondent** concerning provisional measures and the objections to jurisdiction. Afterwards, the parties exchanged several communications on various matters related to arrangements for the hearing. Consequently, the Tribunal issued Procedural Order number 2, dated January 19, 2005, resolving that the hearing would be held from February 1 to 4, 2005, in Washington, D.C.

16. On January 27, 2005, counsel for the **Claimant** informed the Tribunal that, given certain circumstances that had arisen, they were compelled to resign their representation. Consequently, the Tribunal declared the hearing suspended. On

January 28, 2005, the **Respondent** asked the Tribunal, among other things, to schedule a new date for the hearing as soon as possible and, in any case, at the latest within the next 60 days, and to order the **Claimant** to pay the expenses incurred by the **Respondent** as a consequence of the cancellation of the hearing.

17. On February 17, 2005, the **Claimant** appointed Messrs. Alfonso López-Ibor Aliño and Juan Concheiro Linares from the law firm of Ventura Garcés & López-Ibor Abogados, from Madrid, Spain, as its legal counsel.

18. On March 1, 2005, the Tribunal notified the parties of Procedural Order number 3 concerning procedural arrangements for the hearing.

19. The Tribunal, after consulting the parties, decided to schedule the hearing on jurisdiction and provisional measures concerning the fees and expenses of the proceedings from April 25 to 28, 2005; subsequently, with the consent of the parties, the hearing was postponed to May 2 to 5, 2005, due to the lack of space availability in the facilities of the headquarters of the Centre of the World Bank in Washington, D.C., on the dates initially indicated.

20. On March 9, 2005, the Tribunal resolved other procedural issues raised by the parties in connection with the organization of the hearing. Furthermore, the Tribunal decided that the request of the **Respondent** to order the **Claimant** to pay the expenses of the **Respondent**, as a consequence of the cancellation of the hearing in February 2005, would be decided by the Tribunal subsequently.

21. The hearing was held on the date and at the place indicated above. The **Claimant** was represented by Messrs. Alfonso López-Ibor Aliño and Juan Concheiro Linares and by Mrs. Mónica Baselga Loring from the law firm of Ventura Garcés & López-Ibor Abogados, from Madrid, Spain. The **Respondent** was represented, among others, by Messrs.

Whitney Debevoise, David Orta and Eduardo Guzmán, and by Mrs. Jean Kalicki, from the law firm of Arnold & Porter, from Washington, D.C., as well as by Mr. Belisario Artiga Artiga, Attorney General of the Republic of El Salvador, and by Mrs. Michelle Gallardo de Gutiérrez, Vice Minister of Environment and Natural Resources of said Republic. During the hearing, the parties examined several factual and expert witnesses, whose statements and opinions had been enclosed by the parties in their written submissions. Pursuant to Rules 32(3) and 35(1) of the Arbitration Rules of the Centre, the Tribunal formulated questions to the parties and to the factual and expert witnesses presented by them.

II. MAIN FACTS

22. In 1999, MARN organized a public bid for contracting mechanical inspection services for vehicles in El Salvador. The participants were: Ingeniería, Construcción y Arquitectura del Sur S.A. (ICASUR), Supervisión y Control S.A., Capitales Murillos S.A. de C.V. and Sertracen y Servipinturas S.A. de C.V. On April 5, 2000, MARN declared the bid cancelled (Memorial on Objections to Jurisdiction, page 8). In this bid, ICASUR was represented by Mr. Joaquín Alviz.

23. In June 2000, MARN once again organized a bidding process denominated "NATIONAL AND INTERNATIONAL PUBLIC BID FOR CONTRACTING SERVICES FOR THE INSTALLATION, MANAGEMENT AND OPERATION OF MECHANICAL INSPECTION PLANTS FOR VEHICLES, INCLUDING EMISSION CONTROL OF CONTAMINATING GASES, PARTICLES AND NOISE (MARN BID No. 05/2000)," hereinafter the **bid.**

24. The participants in the **bid** were: Supervisión y Control S.A., Inceysa Vallisoletana S.L., Ingeniería, Construcción y Arquitectura del Sur (ICASUR), Mustang de El Salvador S.A. de C.V, Talsud S.A. and Servicios de Tránsito Centroamericanos S.A. de C.V. (Request for Arbitration, pages 4 and 5, paragraphs 7 and 9).

25. The evaluation committee evaluated the offers and qualified the participants with the following score: ICASUR: 86.8, Supervisión y Control: 78.3 and **Inceysa**: 85.5 (Memorial on Objections to Jurisdiction, page 15).

26. The factors evaluated were the following: a. financial position; b. financial capacity; c. experience in managing vehicle inspection stations; d. experience with machinery and construction of vehicle inspection stations; e. experience of the personnel; f. legal documentation; g. work plan, methodology and performance of the services; h. equipment and infrastructure, main machinery; i. additional equipment and work plan; j. customer service plans (Memorial on Objections to Jurisdiction, page 15).

27. On October 24, 2000, the Ministry of Environment and Natural Resources awarded first place in the **bid** to Inceysa Vallisoletana S.L. and second place to Ingeniería, Construcción y Arquitectura del Sur, S.A. (ICASUR) (Request for Arbitration, page 7, paragraph 11).

28. One of the participants was excluded from the **bid** without having its tender opened, Mustang del Salvador S.A., which later challenged two MARN resolutions; the first referred to the return of the file of the company and the second to the **bid** award (Request for Arbitration, page 8, paragraph 12). On May 28, 2002, the Administrative Litigation Chamber of the Supreme Court of Justice of El Salvador decided these claims and declared both resolutions valid (page 9, paragraph 14).

29. Subsequently, participant Supervisión y Control S.A. challenged the MARN resolution that awarded the **bid**, and the aforementioned Administrative Litigation Chamber decided that said resolution was valid (Request for Arbitration, pages 10 and 11, paragraphs 16 and 17).

30. The negotiations prior to the execution of the contract between the two winning bidders and MARN took place during the month of November 2000, and, then, MARN signed an independent contract with each of them.

31. The contract between **Inceysa** and MARN (hereinafter the **Contract**) was signed on November 17, 2000. On November 27 of the same year, **Inceysa** submitted the performance guarantee provided for in the **Contract** (Request for Arbitration, pages 12 and 13, paragraphs 18 and 20).

32. On December 27, 2000, **Inceysa** acquired land at San Julian Hacienda San Jorge, Municipality of Acajutla, Jurisdiction of Sonsonate; on February 7, 2001, it bought another property in the Jurisdiction of San Juan Opico; on February 14, 2001, it acquired land in the Cutumay Camones Canton, Jurisdiction and Department of Santa Ana and another in the Jurisdiction of Tonacatepeque, Department of San Salvador (Request for Arbitration, page 17, paragraphs 27, 28 and 29).

33. After several problems arose between the parties, on November 5, 2001, **Inceysa** sent a letter to the Minister of MARN, in which it referred to the Agreement for the Reciprocal Promotion and Protection of Investments signed between the Kingdom of Spain and El Salvador. On the 22nd of that month, **Inceysa** and ICASUR jointly filed a complaint before MARN in order to ascertain whether or not the project was going to continue (Request for Arbitration, page 43, paragraph 91). On this same day, **Inceysa** sent a letter to the President of the Republic of El Salvador requesting his intervention for the continuation of the project, and otherwise requesting compensation for both companies under the **BIT** (page 44, paragraph 92).

34. In July and August 2002, **Inceysa** complained to MARN about the violation of the **Contract** caused by the fact that MARN hired other companies to provide the services Inceysa had been hired to provide, thus denying the exclusivity given to it under the **Contract** (Request for Arbitration, page 39, paragraph 85).

35. On July 29, 2002, MARN responded telling **Inceysa** that it would wait for the decision of the Administrative Litigation Chamber in the case filed by Supervisión y Control S.A. before deciding Inceysa's claim (Request for Arbitration, page 51, paragraph 98).

36. On October 29, 2002, **Inceysa** sent a letter to the President of the Republic, in which it argued noncompliance with the **Contract** and violation of the **BIT** on the part of the Government and requested compensation of US $50,845,251.34 (Request for Arbitration, page 49, paragraph 96).

III. POSITIONS OF THE PARTIES

A. Position of Inceysa

i. Noncompliance of El Salvador and Expropriation

37. In its Request for Arbitration, **Inceysa** argues that the noncompliance of **El Salvador** is equivalent to an unjustified unilateral termination of the **Contract** and an indirect expropriation of the rights granted to it under the contract (Request for Arbitration, page 78, paragraph 168).

38. The **Claimant** indicates that it has the right to claim damages derived from the unjustified unilateral termination of the **Contract**, and bases its claim on the Investment Law (Request for Arbitration, page 83, paragraph 180).

39. **Inceysa** alleges the following noncompliance on the part of **El Salvador** in relation to the **Contract**:

a. Failure to send the initiation order.
b. Failure to provide access to a database belonging to the **Respondent**.
c. **El Salvador's** failure to issue the decrees and legal instruments necessary to make the collection and payment system effective.
d. Failure to issue and prepare the legal instruments necessary to establish the compulsory and exclusive nature of the service (Request for Arbitration, page 85, paragraph 186).

40. The **Claimant** affirms that the **Respondent** awarded the services established in the **Contract** to companies that had been excluded from the bidding process and had not complied with legal procedures to prove their competence, and alleges therefore "discriminatory, unjust and (sic) biased treatment that constitutes a clear violation of national and international law and (sic) noncompliance with (sic) the BIT itself."[1]

41. **Inceysa** indicates that the intervention of the National Assembly of El Salvador by means of an investigation of the bidding process is a "manifest violation of separation of powers [...] with the sole purpose of damaging the investment of Claimant and represents a serious breach of international law and a serious violation of the BIT."[2]

42. **Inceysa** also maintains that the contractual noncompliance of **El Salvador** deprives **Inceysa's** rights under the **Contract** of all economic content, giving rise to expropriation as described in the **BIT** (Request for Arbitration, page 91, paragraph 196).

ii. Termination of the contract

43. In its second document submitted on June 8, 2004, **Inceysa** declares that, after it filed its Request for Arbitration, **El Salvador** filed an ordinary civil lawsuit before the fourth Civil Court of the City of San Salvador, asking for a declaration of termination of the **Contract**, and it contends that this lawsuit is "a persecution strategy that continues to exist and that has been the only reason of this dispute" (paragraph 12).

iii. Request

44. **Inceysa** requests in its petition that **El Salvador** be ordered to pay:

[1] Request for Arbitration, page 89, paragraph 193.

[2] Request for Arbitration, page 89, paragraph 194.

"C.II.1 An indemnity for damages, as agreed by the parties in the amount of US$107,532,329, corresponding to 940,907,878.75 colones, plus annual interest at the rate of 8.7% from November 10, 2002;
C.II.2 An indemnity for damages for the expropriation of the assets covered by the investment in the amount of US$15,000,000, corresponding to (sic), plus interest of 131,250,000 colones, plus interest at the rate of 8.7% from April 29, 2003;
C.II.3 The amount corresponding to the costs of arbitration including counsel fees."[3]

B. Position of El Salvador

i. Protection of investments under BIT

45. **El Salvador**, in its Memorial on Objections to Jurisdiction submitted on September 15, declared the following:

> "[...] the Investment Treaty by its terms and intent extends protection only to investments made in El Salvador in accordance with its laws. El Salvador never consented to treaty protection of investments, such as those based on contracts to provide services for the State, that were procured by fraud, forgery and corruption" (page 2).
>
> ([...] según la intención y las disposiciones del Tratado de Inversión, este protege únicamente las inversiones hechas en El Salvador de acuerdo con sus leyes. El Salvador nunca consintió a que el tratado protegiera inversiones tales como las basadas en contratos para proveer servicios al Estado, que hubieran sido obtenidas mediante fraude, falsificación y corrupción). (Free Translation by the Tribunal).

46. The **Respondent** affirms that the **BIT** protects only legitimate investments (Memorial on Objections to Jurisdiction, page 2).

47. **El Salvador** indicates that in the *travaux preparatoires* of the Treaty signed between Spain and El Salvador, the former has maintained that the necessary condition for an investment to benefit from the Treaty is to be made in accordance with the domestic legislation of each of the Contracting Parties (Memorial on Objections to Jurisdiction, page 68).

[3] Request for Arbitration, page 98.

48. It concludes that: "The Investment Treaty was meant to protect only investments made in accordance with the host State's laws, and the parties consented to ICSID jurisdiction only over disputes arising from such legal investments."[4] (El Tratado de Inversión tiene el propósito de proteger únicamente las inversiones hechas de acuerdo con las leyes del Estado anfitrión y las partes consintieron en la jurisdicción del CIADI solo en relación con las diferencias originadas en esas inversiones que se hubieren hecho legalmente). (Free Translation by the Tribunal).

ii. Consent to resort to ICSID

49. **El Salvador** affirms that it never consented to extend the jurisdiction of ICSID to purely contractual claims and that in the **Contract** it was agreed that the disputes arising between the parties would be resolved by arbitration in El Salvador. Further on, it claims the principle of *pacta sunt servanda* to affirm that if the parties agreed on a different forum, ICSID tribunals must honor said agreement (Memorial on Objections to Jurisdiction, pages 3 and 81).

50. In addition, the **Respondent** affirms that in the negotiations prior to the execution of the **Contract**, the parties did not discuss international arbitration before ICSID, the Investment Law or the Mediation, Conciliation and Arbitration Law (Memorial on Objections to Jurisdiction, page 21).

51. In connection with the Investment Law, the **Respondent** affirms that:

> "El Salvador simply never consented in the Investment Law to ICSID jurisdiction over claims seeking to enforce rights of status obtained by fraud upon the State." [...] because El Salvador never intended fraudulent investments to enjoy the benefits of the Investment Law, it cannot be interpreted as having consented to ICSID jurisdiction over claims alleging breach of the Investment Law with respect to such fraudulent investments."[5]

[4] Memorial on Objections to Jurisdiction, pages 69 and 70.

[5] Memorial on Objections to Jurisdiction, pages 75 and 78.

(El Salvador simplemente nunca consintió en la Ley de Inversiones a que el CIADI tuviera jurisdicción para conocer de reclamos para exigir derechos de status obtenidos por fraude cometido contra El Estado. "[...] Porque El Salvador nunca tuvo la intención de que las inversiones fraudulentas disfrutaran de los beneficios de la Ley de Inversiones, no puede interpretarse que haya consentido a que el CIADI tuviera jurisdicción para conocer de reclamos que aleguen incumplimientos de la Ley de Inversiones con respecto a esas inversiones fraudulentas). (Free Translation by the Tribunal).

52. **El Salvador** alleges that the Public Contracting and Acquisitions Law (LACAP) does not mention ICSID at all or any arbitration institution in particular (Memorial on Objections to Jurisdiction, page 95), and that the Mediation, Conciliation and Arbitration Law did not exist at the time the contract was executed (page 96). In addition, concerning this law it states that:

"It certainly does not retroactively impose international arbitration for disputes under contracts, like this one, for which the parties originally and expressly negotiated local arbitration."[6]

([...] Ella ciertamente no impone en forma retroactiva el arbitraje internacional a las disputas originadas en contratos, como esta, para la cual las partes, originalmente y en forma expresa, negociaron un arbitraje local). (Free Translation by the Tribunal).

iii. Fraud

53. **El Salvador** alleges in its Memorial on Objections to Jurisdiction that it has undeniable clear evidence on frauds committed by **Inceysa** in five areas:

"(1) the submission of false financial statements; (2) the submission of forged documents to misrepresent the experience of Mr. Antonio Felipe Martínez Lavado, Inceysa's sole administrator at the time; (3) the misrepresentations and deceit surrounding the evidence submitted of Inceysa's experience in the field of vehicle inspections and its relationship with its supposed strategic partner; (4) the submission of forged documents to support the existence of multi-million dollar contracts in the Philippines and in Panama; and (5) the obfuscation of the true association between Inceysa and ICASUR."[7]

[6] Idem, page 97.

[7] Idem, pages 27 and 28.

((1)La presentación de estados financieros falsos; (2) la presentación de documentos falsos para demostrar indebidamente la experiencia del señor Antonio Martínez Lavado, el administrador único de Inceysa en ese tiempo; (3) las representaciones falsas y el engaño que rodean la prueba presentada por Inceysa para demostrar su experiencia en el campo de la inspección de vehículos y su relación con su supuesto socio estratégico; (4) la presentación de documentos falsos para respaldar la existencia de contratos multimillonarios en las Filipinas y en Panamá; y (5) el ocultamiento de la verdadera asociación existente entre Inceysa e ICASUR). (Free Translation by the Tribunal).

54. In connection with the first issue, El Salvador argues that **Inceysa** altered its financial statements for the fiscal years 1997, 1998 and 1999; that the financial statements submitted with **Inceysa's** tender are not those found in the Commercial Registry in Spain and that they are not audited or certified by a public accountant, as the person who certified them is not registered as an authorized auditor in Spain (Memorial on Objections to Jurisdiction, pages 28 and 29).

55. Regarding the alleged experience of Mr. Martínez, **El Salvador** affirms that the letter referring to his membership in the Official Association of Industrial Engineers of Western Andalucía is false (Memorial on Objections to Jurisdiction, page 31).

56. Concerning the alleged relationship between **Inceysa** and its strategic partner, the **Respondent** affirms that the Estación ITV de Alcantarilla [Alcantarilla Inspection Station] has never been a strategic partner of **Inceysa** in the RTV project in El Salvador (Memorial on Objections to Jurisdiction, page 33). Further on, it states that "[...] Mr. Martínez Lavado sent a letter on 9 January 2001 claiming that its partner (Inceysa's) had always been a company called "ITV Alcantarilla, S.L."[8] ([...] el 9 de enero del 2001 el señor Martínez Lavado envió una carta en la que manifestó que el socio de Inceysa siempre ha sido una compañía denominada "ITV Alcantarilla S.L."). (Free Translation by the Tribunal). However, said company was incorporated in December 2000, four months after **Inceysa** had submitted its tender.

57. In connection with the contracts allegedly signed by **Inceysa** with the Municipality of Silay in the Philippines and with the Municipality of Coclé (AMUCO) in Panama, the

[8] Idem, page 36.

Respondent affirms that, according to the affidavit of a representative of the former municipality, it did not enter into a contract with **Inceysa** (Memorial on Objections to Jurisdiction, page 46). The representative of Coclé declared that he doubted the authenticity of the signature on the contract and that, in addition, the existing contract was concluded with ICASUR (page 47). **El Salvador** also alleges that on June 18, 2002, the Supreme Court of Panama declared that on March 21, 2000, the resolution that had approved the incorporation of AMUCO was declared null because it was illegal. As we state below, this issue is irrelevant because **Inceysa** admitted afterwards that it had never signed said contract.

58. Concerning the relationship between **Inceysa** and ICASUR, **El Salvador** affirms that the bidding rules provided that the participation of entities or persons related or associated to each other was prohibited because **El Salvador** was trying to avoid the formation of a monopoly (Memorial on Objections to Jurisdiction, page 38). In the 1999 bid, ICASUR affirms that Mr. Martínez is one of its employees and that he has been its head of projects since 1995. In the 2000 bid, Mr. Martínez appears as the administrator of **Inceysa** and his relationship with ICASUR is not mentioned (page 39). When MARN, through the Evaluation Committee, asked him about this matter, Mr. Martínez affirmed that he had worked for ICASUR, but that in 2000 he no longer had any relationship with the company. **El Salvador** sustains that there was a continuous association between ICASUR and **Inceysa** when these companies submitted separate tenders in the second bid for mechanical inspection for vehicles and that Mr. Alviz essentially controlled the operations of both companies (page 40).

59. Concerning the relationship between ICASUR and **Inceysa**, **El Salvador** affirms that there is evidence that a company controlled by Joaquín Alviz, named Orioles Construction Corporation S.A. (ORIOLES), transferred $227,894.23 to **Inceysa** and that in the accounting documents of that company it is indicated that **Inceysa** is part of "Grupo ICASUR." In other documents of an Argentinean bank, Mr. Alviz is identified as representative of ORIOLES and that company is identified as a subsidiary of ICASUR. For **El Salvador**, it is clear that Mr. Alviz used ORIOLES to hide his contribution of funds

to **Inceysa**, a company which he undoubtedly controlled (Memorial on Objections to Jurisdiction, page 42).

60. In connection with the same issue of the link between ICASUR and **Inceysa, El Salvador** argues that the declaration of Mr. José Mario Orellana Andrade, who was General Manager of ANDA (an entity that renders water and sewer services in El Salvador) is clear. In another public tender organized by ANDA, Mr. Alviz offered Mr. Orellana money for ICASUR to win the bid and in May 2002 Mr. Martínez wrote Mr. Orellana a check as payment of the agreement reached by them. Mr. Orellana also affirms that during that negotiation in June 1999, he met Mr. Martínez as an employee of Mr. Alviz. **El Salvador** concludes that ICASUR and Inceysa were companies controlled by Mr. Alviz and that there was an association between them (Memorial on Objections to Jurisdiction, pages 43 to 45).

61. **El Salvador** explains that two companies that also participated in the bid filed separately two complaints before the courts against the award to **Inceysa** and, in summary, they argued that it did not have the financial capacity, that it submitted false documents in the bid and that it had violated the bidding rules, because it was linked to ICASUR. Even though the decisions rendered in both cases dismissed the charges, the court clarified that it did not rule on the alleged falsity of the documents submitted by **Inceysa** in the bid (Memorial on Objections to Jurisdiction, page 24).

iv. Conclusion

62. **El Salvador** concludes its memorial by saying:

> "El Salvador respectfully objects to the jurisdiction of this Tribunal over all categories of Inceysa's claims, and requests that the Tribunal find that the dispute is not within the jurisdiction of ICSID nor within its own competence and render an award to that effect pursuant to Rule 41 (5)."[9]

[9] Memorial on Objections to Jurisdiction, page 99.

(El Salvador respetuosamente objeta la jurisdicción de este Tribunal para conocer de los reclamos de Inceysa de toda clase y solicita que el Tribunal declare que la disputa [no] está sometida a la jurisdicción del CIADI ni a su competencia y que emita un laudo en ese sentido, según la Regla 41(5)). (Free Translation by the Tribunal).

C. Position of Inceysa on the objections to jurisdiction

63. In its Counter-Memorial on Objections to Jurisdiction, **Inceysa** affirmed that **El Salvador** did not present *"rationae materiae"* and *"rationae personae"* objections, and affirmed that there are two decisions of the Supreme Court of El Salvador which sustained the legality of the bidding and adjudication process. In addition, it affirmed that "[...] the allegations of the **Respondent** in the present stage of the proceedings are irrelevant and do not take into account the (sic) **principle of isolation or autonomy of the arbitration clause**." (Emphasis in original) (Counter-Memorial on Objections, page 3, paragraph 11).

64. **Inceysa** also affirms that the allegations made by the **Respondent** in the first chapter of its memorial on jurisdiction must not be taken into consideration by the Tribunal in this procedural stage, because they concern alleged defects of the legal transaction or of the underlying investment (Counter-Memorial on Objections, page 6, paragraph 12).

i. About the fraud alleged by El Salvador

65. In connection with ITV Alcantarilla S.L., INCEYSA affirms that the sole owner of that company has a contractual relation with the former [Inceysa] (Counter-Memorial on Objections, page 13, paragraph 33).

66. **Inceysa** also sustains that the statements of Messrs. Calderón and Pineda (MARN officials involved with the commission that evaluated the tenders submitted in the **bid** and the negotiations prior to the conclusion of the **Contract**) indicate the explicit recognition of the will of the parties to submit to arbitration proceedings and not to

the jurisdiction of the courts (Counter-Memorial on Objections, page 17, paragraph 45).

67. According to **Inceysa**, the decisions of the Supreme Court rendered in connection with the bid award have the status of "*res judicata,*" including for the Arbitral Tribunal (Counter-Memorial on Objections, page 21, paragraph 54).

68. **Inceysa** denies that it "fabricated" its financial statements in the tender submitted by it in the **bid** and affirms that "[t]he annual accounts filed by Inceysa Vallisoletana S.L. with the commercial registry differ from the accounts presented in the bid due to the mere fact that the latter (sic) were prepared based upon the consolidation of the Group formed by Inceysa Vallisoletana S.L. with the company Kira S.A. of the Dominican Republic."[10]

69. Further on, it maintains that "[...] it was not obligated to consolidate and (sic) consequences to file the consolidated accounts before the commercial registry [...] the **Claimant** had to submit in the bidding its consolidated accounts to demonstrate its real financial condition in the framework of the MARN 05/2000 bid tender. The financial statements submitted by the **Claimant** in the bidding are completely truthful."[11]

70. In connection with its strategic partner, **Inceysa** affirms that it "[...] was not and is not a Public Law entity, but a private Spanish commercial company, both initially in its incorporation and presently as an incorporated company, supported by the professional experience of its members."[12]

71. **Inceysa** denies the existence of a connection between it and ICASUR and that they belong to the same group of companies (Counter-Memorial on Objections, page 32, paragraph 98).

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[10] Counter-Memorial on Objections, page 28, paragraph 77.

[11] Idem, pages 28 and 29, paragraphs 78 and 79.

[12] Idem, page 31, paragraph 92.

72. **Inceysa** also denies having received $227,894.23 from ORIOLES, and affirms:

> "The Claimant does not deny that it received the amount of USD 227,894.23 in its account with Banco Salvadoreño from Orioles Construction S.A. (Orioles) [...] These funds were not, as the Respondent alleges without grounds, from Mr. Alviz or from Orioles."[13]

73. In connection with that said by Mr. Orellana on the handling of checks between **Inceysa** and ICASUR, the **Claimant** calls that declaration into doubt because it was made by a person who is facing criminal prosecution and who made such declaration with a promise of leniency (Counter-Memorial on Objections, page 35, paragraphs 104 and 105).

74. **Inceysa** also denies having signed the contracts with the Municipality of Silay and with AMUCO and denies having presented these contracts with its tender (Counter-Memorial on Objections, page 12, paragraph 29). Concerning the contract with the Municipality of Silay, **Inceysa** affirms that it never signed it and that it did not have a copy of it because it was not a party to this contract (Counter-Memorial on Objections, page 35, paragraph 106). In connection with the contract with AMUCO, **Inceysa** says that it was signed by another company owned by Mr. Martínez, not by itself (page 36, paragraph 110).

ii. Consent of El Salvador

75. Concerning the consent of **El Salvador** and the **BIT**, **Inceysa** states:

> "If it were sufficient to allege that an investment protected by a BIT has not been made in accordance with the law of the country receiving the investment in order to deny the manifestation of consent necessary to support the Jurisdiction of ICSID, so the Tribunal in order to decide on its own competence either would have (sic) to enter into the merits (sic) of the matter in which it has no competence or it would have to deny its competence based on a question (sic) of merits (sic) in which it has not entered because it is not competent. In both cases, the situation reached would be not only paradoxical but also illegal."[14]

76. In addition, **Inceysa** declares:

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[13] Idem, page 33, paragraph 102.

[14] Idem, page 38, paragraph 120.

> "The consent of El Salvador manifested in the BIT cannot (sic) be limited. In fact, a limitation would be nothing but a unilateral withdrawal of the consent, contrary to the express language of Art. 25 (1) (sic) Agreement."[15]

77. According to **Inceysa**, the consent of **El Salvador** was expressed in Clause Twenty-One of the **Contract**, when it refers to Salvadoran legislation. It also considers that, because this was a contract for economic development, no other conclusion could have been reached, but that, when signing the arbitration clause, the investor understood that it referred to international arbitration (Counter-Memorial on Objections, pages 42 and 43, paragraphs 134 and 135).

iii. Protection of investments under the BIT and the contractual clause

78. According to **Inceysa**, the correct interpretation of the expression "in accordance with law" is "[...] that if there is a limitation based on the text "in accordance with law" it has to refer to the approval of the investment (freedom to admit or not admit a certain investment, procedure to be followed for approval)."[16]

79. According to **Inceysa**, Clause Twenty-One of the **Contract**, when referring to "Salvadoran legislation," cannot limit itself exclusively to the legislation in force at the time of the execution of the **Contract**; in this respect, it adds:

> "Indeed, not only the contractual clause that makes explicit reference (sic) to "Salvadoran legislation" cannot in good faith be limited exclusively to the Salvadoran legislation in force at the time of the execution of the contract and to the prejudice of the foreign investor, but it is recognized that the manifestation of consent referred to in article (sic) 25 of the Convention must exist at the time of the request for arbitration before ICSID, and not at the time when the investment subject of the dispute started or was made."[17]

D. Reply of El Salvador:

i. Protection of investments under the BIT and the contractual clause

[15] Idem, page 38, paragraph 121.

[16] Idem, page 39, paragraph 122.

[17] Idem, page 44, paragraph 137.

80. In its Reply, **El Salvador** affirms that:

> "[...] the independence of the arbitration clause never has been interpreted to obviate an inquiry into jurisdictional questions, or to mean *ipso facto* that a Tribunal has jurisdiction over any or all claims that might be brought before it."[18]
>
> ([...] La independencia de la cláusula arbitral nunca ha sido interpretada en el sentido de que evita el cuestionamiento de asuntos jurisdiccionales o de que significa *ipso facto* que un tribunal tiene jurisdicción sobre uno o todos los reclamos que se presenten a su consideración). (Free Translation by the Tribunal).

81. In connection with the expression "in accordance with its law," **El Salvador** adds:

> "[...] if a State has the power under a treaty not to "admit" investments that are in violation of its laws, surely the intent and implication is that such non-admitted investments would not qualify for protection under that treaty. That a particular investment may have been initially "admitted" as a result solely of the investor's fraud on the State -- without fraud, the investment never would have been admitted -- should not entitle that investment to protection under the treaty once the fraud has been exposed."[19]
>
> ([...] Si un Estado tiene la facultad, según un tratado, de no "admitir" inversiones que se hubieren hecho en violación de sus leyes, ciertamente la intención y la implicación de esa facultad es la de que las inversiones no admitidas no calificarían para la protección según ese tratado. El hecho de que una inversión particular haya sido inicialmente "admitida", únicamente como resultado del fraude hecho por el inversionista al Estado -- sin fraude, la inversión nunca hubiera sido permitida -- no le concedería a esa inversión la protección del tratado, una vez que el fraude haya sido expuesto). (Free Translation by the Tribunal).

82. In connection with the arbitration clause and the choice of forum, **El Salvador** considers that even in State contracts this clause is freely chosen by the parties and the forum can be national or international (Reply, page 9).

ii. Consent of El Salvador

83. **El Salvador** categorically affirms that it is not trying to withdraw the consent it granted, but that it is affirming that this case is included in the limitations to consent that have always existed in the Treaty (Reply, page 6).

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[18] Reply, page 2.

[19] Idem, page 4.

iii. Fraud

84. Concerning the discussion of possible fraud, **El Salvador** affirms:

> "Inceysa's fraud is relevant at this stage of the proceedings, because El Salvador never consented to ICSID jurisdiction for claims about investments procured by fraud, forgery, and corruption. If the Tribunal finds, as a matter of fact, that Inceysa indeed committed fraud, Inceysa's investment in El Salvador would fall outside the scope of El Salvador's consent to ICSID jurisdiction, and this case should end."[20]
>
> (El fraude de Inceysa es relevante en esta etapa del procedimiento porque El Salvador nunca consintió a la jurisdicción del CIADI para reclamos sobre inversiones hechas por medio de fraude, falsificación y corrupción. Si el Tribunal concluye, como una cuestión de hecho, que Inceysa ciertamente cometió fraude, la inversión de Inceysa en El Salvador quedaría fuera del consentimiento otorgado por El Salvador a la jurisdicción del CIADI y este caso debería darse por terminado). (Free Translation by the Tribunal).

85. Concerning the financial information submitted by **Inceysa** in the **bid**, **El Salvador** affirms that **Inceysa** misled MARN by not mentioning the existence of the alleged "Grupo Inceysa" or Kira in its tender (Reply, page 18). It adds that the evidence received and the declarations of **Inceysa** indicate that "Grupo Inceysa" did not exist from 1997 to 1999 (page 13). According to **El Salvador**, the deliberate concealment by **Inceysa** of the fact that the financial statements presented by it with its tender were based on the assets of Kira constitutes by itself fraud and makes its investment in El Salvador illegal (pages 13 and 19).

86. According to **El Salvador**, **Inceysa's** admission that Mr. Angulo López, who signed the financial statements presented with its tender to MARN, was not an authorized auditor represents an admission that it violated the rules of the **bid** (Reply, page 20).

87. In connection with **Inceysa's** strategic partner, **El Salvador** affirms that **Inceysa** did not have such a partner when it submitted its tender to MARN, and that it used the name "Estación ITV de Alcantarilla" to create the false impression that its partner was the public station of ITV in Alcantarilla, Murcia. The private strategic partner was not incorporated until December 27, 2000,

[20] Idem, page 12.

and it certainly did not have 16 years of experience in the area of vehicle inspection (Reply, pages 23 and 24).

88. Concerning the contract allegedly signed with AMUCO, **El Salvador** indicates that **Inceysa** admitted that it had never signed it, and adds that it has a copy of the contract signed by Joaquín Alviz. In addition, **Inceysa** now argues that it never included that contract or the contract signed with Silay in its tender, and that they were fabricated by **El Salvador** (Reply, page 27).

89. **El Salvador** affirms that the letters from the Official Association of Industrial Engineers of Andalucía and the Official Association of Technical Engineers of Badajoz, which referred to Mr. Martínez, are false (Reply, pages 28 to 30).

90. In connection with the argument of res judicata, **El Salvador** states:

> "When the "Sala de lo Contencioso Administrativo" rules that an administrative act is lawful based on the evidence (or lack of evidence) presented, it does not mean that the administrative act is conclusively and absolutely valid or legal [...] In the *Supervisión y Control* case, the "Sala de lo Contencioso Administrativo" ruled that the evidence presented was insufficient to prove that MARN had violated the "bases de licitación" [...] the court did not make a finding as to the alleged falsity of the documents submitted by Inceysa [...]."[21]
>
> (Cuando la Sala de lo Contencioso Administrativo resuelve que un acto administrativo es legal, basada en la prueba (o en la falta de esta) presentada, eso no significa que el acto administrativo sea concluyente y absolutamente válido o legal" [...] "En el caso de *Supervisión y Control*, la Sala de lo Contencioso Administrativo resolvió que la prueba presentada era insuficiente para demostrar que el MARN había violado las "bases de licitación"[...] pero el Tribunal no se pronunció sobre la alegada falsedad de los documentos presentados por Inceysa [...]). (Free Translation by the Tribunal).

E. Rejoinder of Inceysa

i. Expropriation

[21] Reply, pages 34 and 35.

91. **Inceysa** affirmed in its Rejoinder that **El Salvador** did not comply with its obligations and that it did a "true expropriation" (page 2, paragraph 4).

ii. Competence of the Tribunal

92. According to **Inceysa**, the legal argument of **El Salvador** concerning the jurisdiction of the Centre is based on the premise that the consent of the Republic of El Salvador, expressed in the **BIT** and its Investment Law, does not include the cases in which the investment is illegal or was made fraudulently. In the opinion of **Inceysa**, these merits questions cannot be resolved in this procedural stage (Rejoinder, page 4, paragraph 10).

93. **Inceysa** argues that the jurisdictional issue "does not consist, as the Respondent wants to allege, of whether or not there is a "fraudulent investment" that would limit the manifestation of consent of the Republic (sic) of El Salvador for the submission of the dispute to ICSID, but it must be limited to the validity of article 11 of BIT as an arbitration clause autonomous and independent from the investments that are the subject of the controversy."[22]

94. According to **Inceysa**, article I of the **BIT** contains objective elements to define the concept of "investment" and, consequently, that definition must not be based "[...] on judgments, which may be subjective, such as compliance of the investments with the national law of the contracting parties."[23]

95. By the nature of the **Contract** (economic and transnational development), it was impossible for **Inceysa** [not] to have "[...] the possibility of accepting the offer of consent so many times presented by the Republic (sic) of El Salvador concerning the jurisdiction of ICSID. Likewise, the Republic (sic) of El Salvador could not

[22] Rejoinder, page 5, paragraph 14.

[23] Idem, page 8, paragraph 22.

in good faith ignore the existence of these offers of consent in its legal system and in special rules [...]."[24]

iii. Investment protection under the BIT

96. **Inceysa** affirms that the expression "'in accordance with law' refers to the reservation by the Host State of the investment of its sovereignty in the framework regulation of the conditions for admission of an investment originating from another contracting State, as well as the regulation of its protection. Thus, a State may limit at its discretion the type of investment admissible through its internal rules [...] without having to violate the BIT [...]."[25]

97. In the opinion of **Inceysa**, the allegations presented by **El Salvador** concern merits questions and it has not alleged any relevant fact in connection with the objection to jurisdiction (Rejoinder, page 10, paragraph 26).

iv. Fraud

98. **Inceysa** insists that the accounts presented with its tender are "[...] authentic (sic) and in conformance with the requisites of the bidding rules." According to it, the bidding rules did not require itemizing the accounts or listing the participants or related companies, so that the accusations of **El Salvador** regarding the lack of express mention of Kira in the tender "[...] do not have any grounds and do not deserve consideration."[26]

99. In connection with its financial capacity, **Inceysa** affirms that the evidence of its capacity is the implementation of the project, the investments made and the bank references and guarantees presented by it. (Rejoinder, page 21, paragraphs 54 and 55).

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[24] Idem, page 13, paragraph 33.

[25] Idem, page 10, paragraph 25.

[26] Idem, page 17, paragraphs 42 and 44.

100. About the contract with AMUCO, **Inceysa** states that "[...] it did not submit the contract signed by "Ingeniería and project of Residuos Hospitalarios S.A."; concerning the contract with Silay, it affirms that "[...] it never signed that contract and never had it (sic) in its possession. Only the Respondent could have materially falsified the document."[27]

IV. CONSIDERATIONS OF THE ARBITRAL TRIBUNAL IN CONNECTION WITH THE POSITIONS OF THE PARTIES

101. In chapter VI of this award, the Tribunal will analyze thoroughly the legal issues presented by the parties and will reach the corresponding conclusions. However, preliminarily, the Tribunal finds it indispensable to refer to the issue of the alleged fraud committed by **Inceysa** to obtain the award of public bid number 05/2000 conducted by MARN, in order to contract mechanical inspection services for vehicles. The Tribunal believes that the analysis of **Inceysa's** allegedly fraudulent actions is indispensable because **El Salvador** bases a good part of its questioning of the Centre's jurisdiction on this allegedly fraudulent conduct.

102. The arguments of **El Salvador** on the alleged fraud committed by **Inceysa** were explained in the previous paragraphs. The following paragraphs will express the conclusions of the Tribunal on each of these arguments.

A. Financial Statements submitted by Inceysa with its tender in the Bidding

103. The analysis of the arguments and evidence presented by the parties, in their written and oral submissions, allows this Tribunal to decide that the financial statements submitted by **Inceysa** with its tender in the **Bid** did not reflect the real financial condition of the Claimant, as the information contained in them is not correct.

104. For this Tribunal, it is clear that, in its tender in the **Bid**, **Inceysa** did not present its real financial condition and that during the **Bidding** process it made false statements

[27] Idem, pages 23 and 24, paragraphs 64 and 66.

concerning its true financial condition, which is one of the fundamental elements taken into account to adjudicate any type of bid.

105. During the proceedings, both in the written and oral submissions, it was proven that the financial statements for fiscal years 1997 to 1999 presented by **Inceysa** with its tender in the **Bid** considerably differ from the financial statements filed by it with the Commercial Registry in Spain, pursuant to Spanish legislation on the matter. The differences between the two sets of financial statements are notable because the statements for the fiscal years 1997 to 1999 filed with the Spanish Commercial Registry show losses for the Claimant, while the financial statements for the same fiscal years enclosed with **Inceysa's** tender in the **Bid** show earnings.

106. To justify the foregoing, **Inceysa** indicated that the differences between the two sets of financial statements are due to the fact that in the **Bid** it presented financial statements consolidated with those of the company Kira, S.A., incorporated in the Dominican Republic, and supposedly owned by **Inceysa**, while to the Commercial Registry in Spain it did not present consolidated financial statements simply because it was not obligated to do so under applicable legislation.

107. It is relevant to mention that **Inceysa** was unable to demonstrate that the financial statements of the fiscal years 1997-1999 submitted by it in the **Bid** were correctly consolidated with the statements of Kira, S.A., as it never proved to this Tribunal that Kira was a company related to **Inceysa** during those periods.

108. In addition, even supposing that the financial statements presented by **Inceysa** in the **bid** had been correctly consolidated with the financial statements of Kira, S.A., it was fully demonstrated before this Tribunal that in the **bid**, **Inceysa** did not mention at all the supposed consolidation of these financial

statements or the existence of Kira, S.A. It is difficult to understand how, in its tender, **Inceysa** did not mention the existence of Kira, S.A. It is equally incomprehensible that the financial statements presented in the **Bid**, supposedly consolidated with those of Kira, S.A., do not mention this company and that they were also not mentioned in the "Audit Report of Annual Accounts" prepared by Mr. José Angulo López, who was the alleged auditor of **Inceysa's** financial statements, and presented by Inceysa in the **bid**. The above omissions are clear and were duly proven in the case.

109. Along with the above, the financial statements presented by **Inceysa** in the **Bid** were audited by Mr. José Angulo López, who, in his supposed capacity as "Authorized Auditor" of the "Instituto de Contabilidad and Auditoría de Cuentas," certified that the financial statements correctly reflected **Inceysa's** financial condition. However, in the proceeding, it was fully proven that Mr. José Angulo López was never registered as an "Authorized Auditor" of the "Instituto de Contabilidad and Auditoría de Cuentas" of Spain. In other words, it was proven that the credentials of the person who audited the financial statements presented by **Inceysa** in the **Bid** were false. In this sense, it is relevant to transcribe the relevant part of the letter signed by Mr. Pedro María Martín, Secretary General of the Instituto de Contabilidad and Auditoría de Cuentas of Spain:

> "According to the documents in possession of this *Instituto de Contabilidad and Auditoría de Cuentas*, Mr. JOSÉ ANGULO LÓPEZ has not been registered at any time with the Official Register of Auditors, so that, pursuant to article 6 of Law 19/1988 of July 12, of Auditoría de Cuentas, he is not authorized to audit accounts."[28]

110. The matters expressed in the previous paragraphs allow this Tribunal to conclude that **Inceysa** submitted false and incorrect financial information during the **Bidding** process. This behavior is extremely serious because financial condition is one of the main elements taken into account to adjudicate a bid and

[28] Exhibit number 6 to the Witness Statement of Javier Villasante, submitted with the Memorial on Objections to Jurisdiction.

particularly the one that gave rise to this arbitration. Consequently, the falsities and imprecisions of the information submitted by **Inceysa** are a clear violation of one of the pillars of the **Bid** itself.

B. Existence of the supposed "strategic partner" of Inceysa

111. In order to demonstrate that it had the necessary experience and relations to properly achieve the purposes of the **bid**, **Inceysa** mentioned that its "strategic partner" was "Estación ITV de Alcantarilla," and indicated that this strategic partner was one of the most experienced entities in matters of vehicle inspection in Spain, with more than 16 years of experience. It added that its strategic partner had carried out vehicle inspections on more than 500 thousand vehicles per year in that country.

112. During the proceedings, it was fully proven that **Inceysa** deliberately made MARN believe that its strategic partner was the public entity named "Estación ITV de Alcantarilla." However, further on, when questioned about the true identity of its strategic partner, **Inceysa** corrected its version and indicated that its strategic partner was the company named "ITV Alcantarilla S.L."

113. The affirmation of **Inceysa** that its strategic partner was the company named "ITV Alcantarilla S.L." demonstrates the falsity it engaged in during the **bid**, as in this proceeding it was demonstrated that that company was incorporated on December 27, 2000, four months after **Inceysa** had submitted its tender in the **bid**. Consequently, it is obvious that **Inceysa** failed to tell the truth concerning the identity of its strategic partner during the bidding process and also lied about the experience of its strategic partner, as it is not at all possible for a company that did not exist (since it had not been incorporated) to have 16 years of experience in vehicle inspections.

114. The lack of experience of **Inceysa's** strategic partner was admitted by the witness presented by the **Claimant**, Mr. García Soler, who, as owner of ITV Alcantarilla S.L., testified during his examination by the counsel for **El**

Salvador, during the hearing of May 4, 2005, the statements transcribed below:

> Question from **El Salvador:** "But you would have to accept that your company in August 2000 by itself did not have 16 years of experience."
> Mr. García's answer: "My company obviously not."
> Question from **El Salvador:** "And you would also have to accept that in August 2000 your company was not one of the companies with the best capacity and prestige in Spain"?
> Mr. García's answer: "My company was not at all."[29]
> Question from **El Salvador:** "The last topic about which I want to ask you is about your company ITV Alcantarilla. Is it correct that that company so far has never managed an RTV project?"
> Mr. García's answer: "Manage means operate, yes?"
> Question from **El Salvador:** "Yes."
> Mr. García's answer: "No, because the project we had was this one."
> Question from **El Salvador:** "Would it be correct to say that the only project the company has had in connection with RTV is the project in El Salvador?"
> Mr. García's answer: "Yes".
> Question from **El Salvador:** "You have never had another?"
> Mr. García's answer: "No, in addition it was incorporated only for this."
> Question from **El Salvador:** "And is it correct to say that this company of yours does not have any employees?"
> Mr. García's answer: "Yes, quite correct."
> Question from **El Salvador** "And it has never had any earnings?"
> Mr. García's answer: "Indeed. It did not get to operate."[30]

115. The evidence and arguments presented by the parties in this proceeding, including the very testimony of the owner of ITV Alcantarilla S.L., allows this Tribunal to consider it demonstrated that **Inceysa** submitted false information concerning **(i)** the identity of its strategic partner; and **(ii)** the capacity and experience of that alleged partner.

116. As explained earlier (paragraph 26), the capacity and experience of **Inceysa's** strategic partner was one of the main aspects **El Salvador** took into account to award the **bid** to **Inceysa**, and therefore the false statements of the **Claimant** on this subject constitute another serious violation of the fundamental pillars of the **Bid**.

[29] Page 463 of the Transcript of the hearing, page 463.

[30] Pages 470 and 471 of the Transcript of the hearing, pages 470 and 471.

117. It is also noteworthy that the falsity concerning the experience and capacity in vehicle inspection was not limited to the strategic partner of the **Claimant**, but it extended to the capacity and experience of **Inceysa** itself. Indeed, during the **Bid** it affirmed that it had carried out various RTV projects, but during the proceedings it was proven that the **Claimant** had never carried out a vehicle inspection project as up until a few months before **Inceysa** participated in the **Bid** its main activity was selling women's underwear and shoes.

118. In addition to the above, during the two years prior to the **Bid**, **Inceysa** did not have operations or employees. In the proceedings, it was fully proven that the **Claimant** was not only not dedicated to operating vehicle inspection stations, but it also did not have any operations or employees. Consequently, it is obvious that **Inceysa** also presented false information concerning its own experience and capacity, thus violating, once again, one of the essential pillars that led **El Salvador** to award the **bid** to it.

C. Career and experience of Mr. Antonio Felipe Martínez Lavado

119. It was also clearly proven in the record that Mr. Antonio Felipe Martínez Lavado, on whose experience **Inceysa** based much of its alleged suitability to render vehicle inspection services, did not have the professional degree or experience attributed to him by **Inceysa**, and it was demonstrated beyond reasonable doubt that the letter referring to his membership in the Official Association of Industrial Engineers of Western Andalucía is false.

120. To prove Mr. Martinez's professional capacity and experience, **Inceysa** included in its tender in the **Bid** two letters by which it sought to accredit these facts. The first piece of correspondence indicates the alleged membership of Mr. Martínez with the Official Association of Industrial Engineers of Western Andalucía. During the proceedings, both in the written and oral submissions, it was duly proven

that both the content and the signature of this letter are false, since its alleged signatory, Mr. José Manuel Pérez López, Secretary of said Association, declared in the certification dated September 2, 2004, the following:

> "Mr. A. Felipe Martínez Lavado has never appeared as a member either in the database of this Delegation or in the database of the center of the Association with any member number.
> We never issue certificates that are not on the original letterhead of the Association [...]"
> [....] The signature on the document is not mine."[31]

121. The second letter by which **Inceysa** tried to demonstrate the capacity and experience of Mr. Martínez is the certification of the Official Association of Technical Engineers of Badajoz, according to which he had participated in various vehicle inspection projects. By written and oral submissions introduced during the proceedings, **El Salvador** demonstrated that the second piece of correspondence is also false. In fact, the certification from the Secretary of the Official Association of Industrial Technical Experts and Engineers of Badajoz, presented by **El Salvador** in the proceedings, indicates that: (i) the letter presented by **Inceysa** in the **Bid** was not signed by an official of said Association, as its signatory, Mr. Pérez Maldonado, had never been Secretary of said association; and (ii) said association does not have any record of projects in which Mr. Martínez would have participated.

122. Consequently, this Tribunal considers it demonstrated that **Inceysa** presented false information on one of the crucial points of the **Bid** concerning the experience and capacity of its sole Administrator, Mr. Martínez.

D. Connection between Inceysa and ICASUR

123. In the record, it was demonstrated that in the 1999 bid, Mr. Martínez appeared as an important official of ICASUR and that in the 2000 bid he appeared as

[31] Exhibit 22 to the Memorial on Objections to Jurisdiction.

the general manager of **Inceysa,** without any mention at all of his prior connection with ICASUR. The financial relationship, direct or through other corporations, between **Inceysa** and ICASUR, amply proven in the record, leaves no doubt that, before tenders were submitted in the public bid 05/2000, and afterwards, there was a clear connection between **Inceysa** and ICASUR, and that the existence of this connection was not disclosed to MARN. This constitutes a deceit on one of the central aspects of the **bid.**

124. Many pieces of evidence were submitted by **El Salvador** to prove the connection of **Inceysa** with ICASUR, in clear violation of one of the most important provisions that governed the **bid.**

125. Thus, it was fully proven that in the 1999 bid Mr. Martínez appeared as an important ICASUR official and that in the 2000 bid he appeared as the general manager of **Inceysa**, without indicating his connection with ICASUR in the 2000 bid. During the 1999 bid, ICASUR presented as part of its tender the *curriculum vitae* of Mr. Martínez, which indicates that he worked as Project Manager of ICASUR since 1995. On the other hand, in the 2000 **bid**, **Inceysa** presented another *curriculum vitae* of Mr. Martínez, not mentioning his work as Project Manager of ICASUR, work performed by him since 1995 according to the *curriculum vitae* presented in 1999.

126. Additionally, the financial relationship, direct or through other corporations, that existed between **Inceysa** and ICASUR was proven in this proceedings. Thus, various financial records demonstrate that **Inceysa** used funds originating from the Panamanian company named Orioles Construction Corporation S.A. to record USD$ 141,574.00 as foreign investment in the Republic of El Salvador.[32] The foregoing is relevant because during the proceeding, **El Salvador**

[32] *See* Exhibit "Q" to the document titled "Evidence in support of the Republic of El Salvador's request for an order pursuant to Arbitration Rule 28(1) and for recommendation of security for costs as a provisional measure," dated September 15, 2004. *See also* pages 634 and 635 of the stenographic version of the hearing of May 5, 2005.

presented evidence that confirms that ORIOLES is a corporation controlled by Mr. Joaquín Alviz, who also controls ICASUR. In addition, various bank documents presented in the record indicate Mr. Alviz as President, Founder and Manager of ORIOLES and the latter as a subsidiary of ICASUR.[33]

127. The statement of **Inceysa's** witness, Mr. García Soler, owner of ITV Alcantarilla S.L., supposed strategic partner of **Inceysa**, demonstrated that, before the tenders were presented in the **bid**, there was a clear connection between **Inceysa** and ICASUR. It is relevant to transcribe the following from this testimony:

> Question from **El Salvador:** "I believe you did not understand the question. Did you attend at any time a meeting on the RTV project on behalf of Icasur? I am not saying that you were there on behalf of Inceysa, it was there also or the representatives of ICASUR were there."
> Mr. García's answer: "I don't remember in particular. That Icasur would have referred to me? I don't believe so.
> Another thing is that, at best, when organizing publicity, logically there was a common interest that we would take the same path. But the meeting was not organized by ICASUR or Inceysa, but a company of your country that said: I am going to present a project which logically will be done jointly – because it is always necessary to look at the economic part, more interesting than if we did it each on our own behalf."
> Question from **El Salvador:** "In any event, what you are saying is that you attended meetings or perhaps there was somebody from ICASUR, this happened during the time Inceysa was already involved as a company in the RTV project. Is that right?
> Mr. García's answer: "Obviously, I was always working for Inceysa. If it was not involved, I could not be involved."

[33] *See* exhibits 81, 19 and 9 of the "Core Bundle" presented by the Republic of El Salvador during the hearing of May 2 to 5, 2005. S*ee also* page 635 of the stenographic version of the hearing of May 5, 2005.

Question from **El Salvador:** Is it not true that you attended a meeting in March 2000, when we were still in the first bid and Inceysa was not involved, on behalf of Icasur?"

Mr. García's answer: "It seems extremely strange, unless it was Inceysa because I always went for Inceysa."

Question from **El Salvador:** "I am going to refer to exhibit 21 of the file. We have here two black folders and exhibit number 21."

Mr. García's answer: "In this first folder?"

[…] Question from **El Salvador:** "Now you have it. This is a document that refers to the national and international public bid number 0399, which is the first bid for Mechanical Inspections of Vehicles in El Salvador, and which, as can be seen, concern a meeting that was held on March 22, 2000. Do you see it? [...]".

"[…] Below where it says "List of participants," there is a line that says: "ICASUR." True? And the first name that appears is Joaquín Alviz Victorio."

Mr. García's answer: "Yes."

Question from **El Salvador:** "And afterwards, there is your name, Francisco Javier García Soler. That is your signature, right?"

Mr. García's answer: "Apparently, yes."

Question from **El Salvador:** "If you could read the document, is it not true that in this document where it refers to a meeting in March 2000, here the name **Inceysa** does not appear?"

Mr. García's answer: "Yes."

Question from **El Salvador:** "This meeting was attended only by participants from ICASUR, of the Vice Ministry of Transportation and the Ministry of the Environment and Natural Resources. True?"

Mr. García's answer: "That's right."

Question from **El Salvador:** "Consequently, you did attend the meeting for ICASUR in the first RTV, true?"

Mr. García's answer: "Man, the only thing I can say is that in the beginning, when I got interested in the project, I had a lot of meetings. Here indeed appears the name Joaquín Alviz; I don't know if it was the first or second time that I saw it. What is clear is that I liked the embryo of the project, and before formalizing it, I started to get interested in it. In fact, the exact point where really -- because this is a topic that is not my field because I dealt with the technical and logistic part, but I do not participate in the bureaucratic part. This apparently is so, will be so, and I do not have the slightest doubt about it.

Just like this meeting, there may have been another twenty, in which we were at Ministry level and not at ICASUR level. I really understand that it had to be a meeting with the Ministry or because I was interested in the project. You have to realize one thing: not only am I defending Inceysa, even though the project was not formalized, I am also defending my interest and I had to know whether or not I was interested in continuing with the project."[34]

E. Falsity of the contracts supposedly signed by Inceysa with the Municipality of Silay, in the Philippines, and with the Municipality of Coclé (Amuco), in Panama

128. Even though it was also a much questioned matter, the Arbitral Tribunal finds it unnecessary to analyze in detail the matter of the contracts allegedly signed by **Inceysa** with the Municipality of Silay, in the Philippines, and with the Municipality of Coclé (Amuco), in Panama, because in the end, as indicated in paragraph 101 above, **Inceysa** affirmed that it never signed the first and that it did not present the second in the **bid**.

V. PROVISIONAL MEASURES

129. Even though the issue of the provisional measures requested by **El Salvador** was the subject of a heated discussion between the parties that took the attention of the Tribunal for a long time, given the manner in which this matter will be resolved, the Tribunal considers it

[34] Transcript of the hearing of May 4, 2005, pages 415 to 417.

unnecessary to refer to the various actions taken by the parties and their grounds.

VI. JURISDICTION OF ICSID AND COMPETENCE OF THE ARBITRAL TRIBUNAL

130. The controversy on the competence of this Arbitral Tribunal and the jurisdiction of the Centre has been raised by the parties based on different bodies of laws.

131. In this sense, basically jurisdiction has been alleged based on two types of laws, some international and some of an internal nature. Consequently, the analysis to be made by the Arbitral Tribunal on its own competence will be divided according to these two legal systems. In this context, this Tribunal will first analyze the issue of its own competence according to the ICSID Convention and the Agreement on the Reciprocal Promotion and Protection of Investments signed between the Kingdom of Spain and the Republic of El Salvador. Once this debate is resolved, it will analyze the issue of its competence in light of the provisions of the internal legislation of **El Salvador** (which includes the Public Contracting and Acquisitions Law, the Investment Law and the Mediation, Conciliation and Arbitration Law, as well as the **Contract** executed between **El Salvador** and **Inceysa**).

A. Analysis of the Jurisdiction of the Centre under the ICSID Convention, the BIT and the Investment Law of El Salvador

132. In order to address specifically the issues debated about the competence of this Tribunal, and without prejudice to a detailed analysis further on, it is necessary first to present in a synthetic manner the positions of the parties concerning the competence of the Arbitral Tribunal under the ICSID Convention and the **Agreement**.

i. Positions of the Parties

a) Position of Inceysa

133. The **Claimant** indicated in its Request for Arbitration that this Arbitral Tribunal is competent to hear the dispute presented since the **Agreement** applies because "[...] the **Claimant** is an *"investor"* and because it made in the *"territory"* of the Respondent an *"investment"* according to the definitions contained in Article I of the Agreement."[35]

134. **Inceysa** argues in favor of the jurisdiction of the Centre based as a function of the parties to the proceedings *(ratione personae),* indicating that it is an *investor* under Article I, paragraph 1 b) of the **Agreement,** which reads as follows:

> "[...1. Investors shall mean:... b) legal entities, including companies, associations of companies, commercial companies; branches and other organizations incorporated or, in any case, duly organized under the law of such Contracting Party and that make investments in the territory of the other Contracting Party."[36]

135. In connection with jurisdiction related to the subject matter of the dispute *(rationae materiae)*, **Inceysa** indicated that this dispute is clearly a legal dispute which arises directly from an investment made by it in the territory of **El Salvador**.

136. Additionally, the **Claimant** maintains in its Memorial that **El Salvador** consented to the jurisdiction of the Centre in Article XI of the **Agreement,** which indicates that:

> "1. Any dispute concerning investments arising between one of the Contracting Parties and an investor of the other Contracting Party related to matters regulated by this Agreement will be notified in writing, including

[35] Request for Arbitration, page 57, paragraph 115 (emphasis in original).

[36] Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and El Salvador, Article I.

detailed information by the investor to the Contracting Party receiving the investment.
To the extent possible, the disputing parties will try to settle these differences by amicable agreement.
2. If the dispute cannot be resolved in this manner within six months from the date of the written notice mentioned in paragraph 1, it will be submitted at the choice of the investor:
[...] to the International Centre for Settlement of Investment Disputes (ICSID) created by the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States," open for signature in Washington on March 18, 1965, when each State party to this Agreement adhered to it."[37]

137. In connection with the above, **Inceysa** declared that:

> "ICSID arbitral jurisprudence affirms that the signature of an International Agreement, such as the BIT, which contains an arbitration clause that expressly refers to the ICSID Convention for disputes that may arise, constitutes written consent by the State [...]."[38]

138. Moreover, **Inceysa** affirmed that the **Respondent** expressed its consent to the Jurisdiction of the Centre by a written communication signed by the Ministry of Foreign Relations addressed to the Technical Secretary of the Presidency, in which it affirmed:

> "[...] I have to inform you that there is a Bilateral Agreement for the Promotion and Protection of Investments in force in Spain, and that according to its framework, Spain has the right to request the formation of an Arbitral Tribunal to resolve this situation, which could have been avoided."[39]

139. Finally, the **Claimant** indicated in its Request for Arbitration that it exhausted all available means to find an amicable solution to the dispute, and because it could not find a solution, it decided to submit the dispute to the Jurisdiction of the Centre.

b) Position of El Salvador

[37] Idem, Article XI.

[38] Request for Arbitration, page 58, paragraph 117.

[39] Idem, page 59, paragraph 118.

140. **El Salvador** did not make any objection in connection with the nationality of the **Claimant** or the legal nature of the dispute that originated this proceeding. In other words, it did not make an objection *rationae personae* or *rationae materiae.*

141. The arguments of the **Respondent** focus on expressing that its consent to the Jurisdiction of the Centre is limited to the differences arising from investments actually protected by the **Agreement**. According to **El Salvador**, the consent of the parties to the Jurisdiction of the Centre, expressed in the **Agreement**, was given only for differences related to the investments made **in accordance with the laws** of **El Salvador**. On this particular issue, it indicated the following:

> "Here, El Salvador's consent to ICSID jurisdiction in its Investment Treaty with Spain was limited to disputes involving investments otherwise entitled to protection under the Treaty, i.e., investments made in accordance with Salvadoran law."[40]
>
> (Aquí el consentimiento de El Salvador a la jurisdicción del CIADI otorgado en el Tratado de Inversión con España estaba limitado a las disputas que involucraran inversiones que de todas maneras tendrían derecho a la protección del Tratado, es decir, las inversiones hechas de acuerdo con la legislación salvadoreña). (Free Translation by the Tribunal).

ii. Identification of the Contested Issue

142. Analysis of the arguments raised by the parties in connection with the competence of this Tribunal based on the ICSID Convention and the **Agreement** indicates that the parties did not raise as grounds of the dispute: (i) the nationality of the Claimant; (ii) the fact that **El Salvador** or Spain are not parties to the ICSID Convention; (iii) the legal nature of the difference; or (iv) the nature of the investment made.

143. Consequently, the parties recognized the so-called jurisdiction *rationae materiae* and *rationae personae.*

[40] Memorial on Objections to Jurisdiction, page 57.

144. However, the competence of this Arbitral Tribunal was questioned on the grounds of the existence of the consent of **El Salvador** for this dispute to be submitted to the jurisdiction of the Centre. In other words, the dispute between the parties concerns the so-called jurisdiction *rationae voluntatis.*

145. Indeed, the dispute on the competence of this Tribunal, based on the alleged violations of the **Agreement**, has been focused on determining whether or not the investment made by the **Claimant** in the territory of the **Respondent** is protected by the **Agreement**, i.e., determining whether the consent given by **El Salvador** includes the investment made by the **Respondent**, or, on the contrary, leaves it outside its scope and therefore excludes it from the scope of application of the **Agreement** and, consequently, from the jurisdiction of the Centre.

iii. Power of the Arbitral Tribunal to rule on its own Competence

146. Given that the competence of this Arbitral Tribunal has been questioned based on the scope of the consent given by **El Salvador**, **Inceysa** argued that the objection involves the resolution of substantive issues on the merits of the matter, for which the Arbitral Tribunal could not rule when deciding on its own competence. In this sense, **Inceysa** sustains that:

> "If it were sufficient to allege that an investment protected by a BIT has not been made in accordance with the law of the country receiving the investment in order to deny the manifestation of consent necessary to support the Jurisdiction of ICSID, so the Tribunal in order to decide on its own competence either would have (sic) to enter into the merits (sic) of the matter in which it has no competence or it would have to deny its competence based on a question (sic) of merits (sic) in which it has not entered because it is not competent. In both cases, the situation reached would be not only paradoxical but also illegal."[41]

[41] Counter-Memorial on Objections, page 38, paragraph 120.

147. In light of the arguments raised by the parties, before analyzing whether the consent given by **El Salvador** may support the competence of this Tribunal according to the ICSID Convention and the **Agreement**, it is necessary to examine the power of the Tribunal to decide on its own competence.

148. Article 41 of the ICSID Convention is clear when it indicates that "*The Tribunal shall be the judge of its own competence.*" Consequently, the ICSID Convention recognizes the "Kompetenz-Kompetenz" principle and imperatively obligates the Arbitral Tribunal to decide the issues formulated on this subject.

149. It is obvious that because the ICSID Convention obligates the Arbitral Tribunal to decide on its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation.

150. In this context, it must be noted that, in general terms, competence means the power or capacity of a Tribunal to hear and decide on a certain matter. In the case at hand, the first issue on which this Arbitral Tribunal must pronounce itself is its own competence; afterwards, it may decide the issues raised by **Inceysa** based on the **Agreement**. In this vein, it is possible to affirm that the Arbitral Tribunal has an original and unquestionable competence, which arises from its own constitution and the ICSID Convention, and whose only object is to determine its competence to decide the substantive dispute presented by the parties. Only after the Arbitral Tribunal determines its own competence can it hear and decide the merits of the matter presented.

151. As an obvious consequence of the above, there are cases in which an Arbitral Tribunal decides that it lacks competence to decide the merits of the matter brought before it, without such decision implying that the Arbitral Tribunal exceeded its bounds or acted illegally.

152. Such being the case, there is no paradox when an Arbitral Tribunal rules on its own competence, as asserted by **Inceysa**, because the power to decide this issue stems directly from the command of Article 41 of the ICSID Convention.

153. In light of the above, it is not true that if this Tribunal decides whether **Inceysa's** investment was made in accordance with the law of **El Salvador** or not it would be deciding "merits issues," as explained below.

154. First, the reference to "merits issues" is imprecise. In the present case, and depending on the subject matter of the competence, we can identify two distinct types of competences of the Arbitral Tribunal: the competence to decide on the power of the Arbitral Tribunal to decide on the litigious questions raised before it and the competence to resolve on the merits of the requests and defenses raised by the parties.

155. When deciding on its own competence, the Arbitral Tribunal has the power to analyze all of those issues that may have legal relevance to define it, regardless of whether these are issues that may be qualified as substantive or of "merits" or procedural issues. If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence, then it has no alternative, but to deal with them, under penalty of infringing its obligation under Article 41 of the ICSID Convention.

156. In the case before the Arbitral Tribunal, the controversy concerning the competence of the Tribunal focuses on determining whether the consent given by **El Salvador** to submit to the jurisdiction of ICSID includes the investments not made in accordance with its law. Consequently, to decide on its own competence, this Tribunal is obligated to analyze, first, whether said

argument is admissible and, second, whether it is founded based on the facts of the case brought before it.

157. Thus, even though it might be considered that the analysis the Arbitral Tribunal is obligated to make involves the determination of issues of a substantive nature, such as the conformity of **Inceysa's** investment with the laws of **El Salvador**, it is obvious that these issues constitute a premise that must necessarily be examined in order to decide the issue of the competence of the Arbitral Tribunal.

158. Precisely because of the foregoing, and out of respect for the right of defense of both parties, the Tribunal gave them ample opportunity to make allegations and prove what they wished concerning the matter of competence raised, including by holding a hearing for the sole purpose of discussing this subject.

159. Finally, it must be noted that the claims and defenses raised by the parties (other than the issue of competence stated) neither invade nor coincide with the dispute on competence. **Inceysa's** claim is intended to obtain the protection of the **Agreement** and the indemnity to which it believes it is entitled. In turn, the defense of **El Salvador** refers to the absence of **Inceysa's** right to bring such a claim.

160. Although the argument that **Inceysa's** investment is not protected by the **Agreement** because it is an investment that was not made in accordance with the laws of **El Salvador** can be identified as a substantive defense related to the merits of the matter, this presumption is incorrect. Indeed, if it is determined that the investment is not protected by the **Agreement**, it would imply recognizing that the necessary premise for the Arbitral Tribunal to validly assume jurisdiction was not met. Consequently, in the end, the Arbitral Tribunal would be deciding on its own competence and not on the **Claimant's** indemnity claims.

161. In synthesis, and as a conclusion of the above, this Arbitral Tribunal concludes that its power to decide on its own competence authorizes it to rule validly on the objection to jurisdiction *rationae voluntatis* raised by **El Salvador**, without implying a resolution on the merits of the matter.

iv. General Considerations of the Arbitral Tribunal about consent

162. According to the peculiarities of the case brought before this Tribunal, the point in controversy in connection with competence refers to jurisdiction *rationae voluntatis.*

163. Given the arguments of the parties, it is necessary first to examine the argument raised by **Inceysa**, which maintains that the determination of the scope of consent given by **El Salvador** cannot be considered a jurisdictional matter, because such determination is a substantive question, which falls within the scope of the competence of the Arbitral Tribunal, according to article XI of the **Agreement** and according to the principle of autonomy of the Arbitration Clause. Specifically, the **Claimant** affirms that:

> "Any element incorporated in the Convention or in the national Law may, at some point, be the subject of controversy and the Contracting Parties, in the case of the Convention, as well as the legislator in the case of the National Law, have expressed their will concerning the method to follow to resolve such disputes: the arbitral proceeding and especially before the ICSID Centre and before a Tribunal constituted according to its Regulation. Indeed, the arbitration clause of the BIT (Article 11) expressly refers to *"any dispute* related to investments *arising between one of the Contracting Parties and an investor of the other Contracting Party* ***concerning matters regulated by this Agreement*** *..."* It is obvious that a restrictive interpretation of the manifestation of consent to ICSID jurisdiction expressed in the BIT, as well as issues such as the very definition of *"investment"* (article 1), especially the reference to its qualification by the Respondent as "fraudulent investment," or for *"protection"* (article 3) in its special reference to the "investments made according to its legislation," can only be considered as issues regulated by the same agreement. In the event of dispute, as *in*

casu, such issues have the consequence, by application of Article 11 of the BIT, that they are subject to the jurisdiction chosen by the investor, in our case, ICSID."[42]

"The "jurisdictional issue" does not consist, as alleged by the Respondent, of whether or not there is a "fraudulent investment" that would limit the manifestation of the consent of the Republic (sic) of El Salvador to submit the dispute to ICSID, but must be limited to the validity of Article 11 of the BIT as an arbitration clause autonomous and independent from the investments concerned by the dispute."[43]

164. The argument raised by **Inceysa** is incorrect because Article XI of the **Agreement**, considered as an autonomous arbitration clause, cannot be interpreted as a manifestation of unrestricted consent by **El Salvador** to submit to arbitration any type of dispute claimed to be based on the **Agreement**.

165. In order to support the foregoing, this Tribunal deems it relevant to analyze the principles that regulate consent to the jurisdiction of the Centre.

166. In this regard, extreme relevance is given to the principle established in the first paragraph of Article 25 of the ICSID Convention, which establishes that the submission of the parties to the jurisdiction of the Centre must consist of a written consent which cannot be unilaterally withdrawn by either one of the parties that granted it. The relevant part of this article provides as follows:

> **"Article 25** (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."** (Emphasis added).

[42] Rejoinder to the objections to jurisdiction, page 5, paragraph 13.

[43] Idem, page 5, paragraph 14.

167. Confirming the above, which is a fundamental principle to determine the competence of the Arbitral Tribunal, paragraph 23 of the Report of the Executive Directors provides as follows:

> "Consent of the parties is the cornerstone of the jurisdiction of the Centre. **Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally** (Article 25 (1))."[44] (Emphasis added)

168. In accordance with the precept transcribed above, the following affirmation made by the tribunal in the award that resolved the *Tokio Tokelés v. Ukraine* case is highly illustrative.

> "The jurisdiction of the Centre depends first and foremost on the consent of the Contracting Parties, who enjoy broad discretion to choose the disputes that they will submit to ICSID. Tribunals shall exercise jurisdiction over all disputes that fall within the scope of the Contracting Parties' consent as long as the dispute satisfies the objective requirements set forth in Article 25 of the Convention."[45]
>
> (La jurisdicción del Centro depende primero y de manera primordial del consentimiento de las Partes Contratantes, quienes tienen amplia discreción para escoger las disputas que someterán al CIADI. Los tribunales ejercerán su jurisdicción sobre todas las disputas que queden comprendidas dentro del consentimiento de las Partes, siempre que la disputa satisfaga los requisitos objetivos señalados por el Artículo 25 del Convenio). (Free Translation by the Tribunal).

169. Therefore, it is not enough that **El Salvador** signed and ratified the **Agreement** for the Arbitral Tribunal to be able, *per se*, to recognize its competence. The verification by an ICSID Tribunal of the signature and ratification of an agreement for reciprocal protection of investments is not sufficient for this Tribunal to declare its competence automatically. It is necessary for the

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[44] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States of March 18, 1965, paragraph 23.

[45] *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18. Decision on Jurisdiction of April 29, 2004, paragraph 19.

Tribunal first to analyze whether the dispute submitted to its competence is included within the consent given by the signatory States and, consequently, subject to the jurisdiction of the Centre.

170. In light of the above, a fundamental task of the Arbitral Tribunal to define its jurisdiction is to determine which disputes are included within the consent granted by the parties, considering primarily the **Agreement** itself.

171. In this vein, the Arbitral Tribunal does not agree with the argument raised by the **Claimant**, namely: (i) the consent of **El Salvador** to the jurisdiction of the Centre was given by that country when signing and ratifying the Agreement, without possibility to subject said consent to limitations, and (ii) any limitation claimed to be imposed on the consent granted constitutes a unilateral withdrawal of the consent, which violates Article 25(1) of the Convention. Specifically, **Inceysa** argued that:

> "[t]he consent necessary to support the jurisdiction of the centre (sic) in this concrete case and, pursuant to article (sic) 25 of the Convention, was given by the Republic (sic) of El Salvador when signing and ratifying the BIT with the Kingdom of Spain [...] The consent of El Salvador manifested in the BIT cannot (sic) be limited. A limitation would be in fact nothing but a unilateral withdrawal of the consent, contrary to the express provision of Art. 25(1) of the Convention."[46]

172. The foregoing statement is incorrect because analysis of the content and scope of the consent of the parties who sign an agreement for the reciprocal protection of investments cannot be considered as an imposition of limitations on such consent. On the contrary, it is a mandatory exercise that must be undertaken by any Arbitral Tribunal in order to decide whether or not the dispute brought before it is subject to its competence, according to the real content of the consent manifested by the parties.

[46] Counter-Memorial on Objections to Jurisdiction, page 38, paragraphs 117 and 121.

173. In light of the above, the Arbitral Tribunal affirms that for the formation of the consent referred to in Article 25 of the ICSID Convention, it is not sufficient to prove that the host State of an investment executed an agreement for reciprocal protection of investments. It is also necessary for the disputes in question to be included within the scope of the consent given by the parties who signed the agreement.

v. Guidelines to Determine the Scope of Consent

174. As explained in the previous section, there is no doubt that the parties, by their written consent, are the ones that decide what types of disputes they will submit to arbitration; however, it is the Tribunal to which a dispute is submitted that must determine what is the scope of the consent given by the parties, and therefore which disputes they agreed to submit to the jurisdiction of the Centre.

175. In the aforementioned terms, the work of the Arbitral Tribunal cannot be arbitrary or anarchic. In this regard, arbitral jurisprudence has developed three fundamental principles that must guide its task:

a) Absence of presumptions in favor or against jurisdiction;
b) Identification of the will of the Contracting States; and
c) Interpretation according to the principle of good faith.

a) Absence of presumptions

176. To avoid engaging in a partial or subjective analysis, it has been established that any analysis of jurisdiction must be made with meticulous care, without starting from presumptions in favor or against the jurisdiction of the Centre. Any presumption would corrupt the analysis and would unduly limit or expand the original consent given by the parties. In this regard, the case of *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* established the following:

"Clearly, then, **there is no presumption of jurisdiction** -- particularly where a sovereign State is involved -- and **the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties**. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively. **Judicial and arbitral bodies have repeatedly pronounced in favor of their own competence where the force of the arguments militating in favor of jurisdiction is preponderant**. (E.g., *Temple of Preach Vihear (Preliminary Objections), ICJ Reports 1961, p. 34; Chorzow Factory, PCIJ,* Series A, No. 9, p. 32 (1925); *Affaire des foréts du Rhodope central (preliminary issue),* RIAA, vol. 3, p. 3104 (1931)). Moreover, as the Permanent Court of International Justice observed in the Chorzow Factory case:

The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. (*PCIJ.* Series A. No. 9, p. 32 (1927)).

Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, **but rather objectively and in good faith,** and jurisdiction will be found to exist if -- but only if -- the force of the arguments militating in favor of it is preponderant."[47]

(Claramente, entonces **no hay presunción de jurisdicción** -- particularmente cuando un Estado soberano está involucrado -- y **el Tribunal debe examinar las objeciones de Egipto a la jurisdicción del Centro con cuidado meticuloso, teniendo en mente que la jurisdicción en el presente caso existe únicamente en el tanto que el consentimiento haya sido dado por las partes**. Esto no significa, sin embargo, que haya una presunción contraria al conferimiento de la jurisdicción con respecto a un Estado soberano o que los instrumentos creados para conferir jurisdicción deban ser interpretados restrictivamente. **Los organismos judiciales y arbitrales se han pronunciado repetidamente a favor de su propia competencia cuando la fuerza de los argumentos que militan a favor de la jurisdicción es preponderante**. (*E.g., Temple of Preach Vihear (Objeciones preliminares), ICJ Reports 1961, p. 34; Chorzow Factory, PCIJ,* Serie A, No. 9, p. 32 (1925); *Affaire des foréts du Rhodope central (question préalable), RIAA, vol. 3, p. 3104 (1931)).* Más aun, como la Corte International de Justicia expresó en el caso Chorzow Factory:

El hecho de que puedan ser esgrimidos argumentos de peso para respaldar la posición de que no tiene jurisdicción, no puede, por sí mismo, crear una duda calculada para negar su jurisdicción.

[47] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3. Decision on Jurisdiction of November 27, 1985, paragraph 63.

De esta manera, los instrumentos jurisdiccionales no deben ser interpretados ni restrictiva ni expansivamente sino, **más bien, objetivamente y de buena fe,** de tal forma que se determine que hay jurisdicción únicamente si los argumentos que militan en su favor son preponderantes). (Free Translation by the Tribunal).

b) Identification of the will of the Contracting States

177. Once the presumptions are eliminated, in order to determine the scope and requisites of the consent of the parties, ICSID tribunals must try to specify what was the will of the parties to determine the scope of their consent. Thus, for example, in the case *Amco Asia Corporation et. al v. Indonesia* the Tribunal considered the following:

> "[...] like any other conventions, a convention to arbitrate is not to be construed *restrictively,* nor, as a matter of fact, *broadly* or *liberally.* It is to be construed in a way which leads to find out and to respect the common will of the parties: such method of interpretation is but the application of the fundamental principle *pacta sunt servanda,* a principle common, indeed, to all systems of internal law and to international law. Moreover -- and this is again a general principle of law -- any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."[48]

> ([...] como toda otra convención, una convención para arbitrar no debe ser interpretada restrictivamente ni, tampoco, amplia o liberalmente. Debe ser interpretada de una manera tal que lleve a averiguar y a respetar la voluntad común de las partes: ese método de interpretación consiste en la aplicación del principio fundamental de *pacta sunt servanda*, un principio común, ciertamente, a todos los sistemas de legislaciones internas y a la legislación internacional. Además -- y este es, de nuevo, un principio general de derecho -- toda convención, incluyendo las convenciones para arbitrar, deben ser interpretadas de buena fe esto es, tomando en cuenta las consecuencias de las obligaciones de las partes que puede considerarse razonable y legítimamente, que ellas previeron). (Free Translation by the Tribunal).

178. It is important to note that, to determine the will of the parties, it is possible to follow all of the methods recognized by international practice, with

[48] *Amco Asia Corporation et al. v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, paragraph 14.

particular importance given to the exchanges of notes between Contracting States, as well as the various draft treaties prior to the final one.

c) Principle of Good Faith

179. In addition, the Arbitral Tribunal must consider the principle of "Good Faith" when determining the jurisdiction of the Centre.

180. In the same *Amco* case transcribed above, the need to interpret in good faith the relevant normative provisions in an objective manner is emphasized, in order to define correctly whether or not a certain dispute is submitted to the jurisdiction of the Centre.

181. The principle of good faith in this determination manifests itself in a twofold way: (i) in the good faith with which the Arbitral Tribunal must act when making its jurisdictional analysis and (ii) said analysis must start from the premise that the consent of the parties was manifested in writing and given in good faith and, therefore, at the time they manifested their consent, the parties did so with the sincere intent for it to produce all of its effects under the circumstances agreed upon by them.

182. Having specified the above guidelines, it is necessary to concretely examine the arguments on which **El Salvador** bases its objection, maintaining that disputes arising from an investment made illegally are not subject to the jurisdiction of the Centre because they are not included within the premises for which the consent was given.

183. Such being the case, this Arbitral Tribunal will next analyze whether indeed the consent of the States which signed the **BIT** is limited to disputes arising from investments made according to the law of the host State. It will equally analyze the parameters to be considered by this Tribunal to decide that **Inceysa's** investment was not made in accordance with the law of the host State

and therefore the disputes arising from it are not within the competence of this Arbitral Tribunal; finally, it will analyze whether or not the investment made by **Inceysa** falls within the scope of the consent expressed by the Kingdom of Spain and by **El Salvador** in the **BIT**.

vi. Types of limitations to consent

184. As explained above, the States that sign an agreement for reciprocal protection of investments have broad powers to limit their consent only to the disputes that meet the characteristics indicated by them. Therefore, it is perfectly valid and common for States to exclude from their consent to the jurisdiction of the Centre a certain type of dispute, to impose certain requisites for the investments made in their territory by an investor from the other State to benefit from the protection of the agreement in question and to limit their consent only to those that are within the limits indicated in the agreement.

185. States use multiple mechanisms to limit the scope of application of the agreements for the reciprocal protection of investments signed by them. One of the most commonly used refers to the so-called "accordance with the laws of the host State clause." Various tribunals of the Centre have referred to this limitation. This is the case of the arbitral tribunal in the *Tokios Tokelés v. Ukraine* case, in which it was decided as follows:

> "The requirement in Article 1(1) of the Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs." [49]
>
> (El requisito del Artículo 1(1) del Tratado Bilateral de Inversiones Ucrania-Lituania de que las inversiones se hagan cumpliendo con las leyes y reglamentos del estado anfitrión es un requisito común en los TBIs modernos). (Free Translation by the Tribunal).

[49] *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004, paragraph 84.

186. There are various forms by which States establish the "accordance with the laws of the host State clause." Among the mechanisms used to include this limitation is to add it into the definition of *investment* itself, making it clear that for the purposes of that reciprocal protection agreement only those made in accordance with the laws of the host State will be deemed *investments.*

187. Furthermore, the signatory States may validly exclude from the protection of a **BIT** investments made illegally, precisely in the articles that indicate the scope of protection of the **BIT** in question. In this context, particularly relevant are the indications of the tribunal in the *Salini Costruttori S.P.A. and Italstrade S.P.A v. the Kingdom of Morocco* case in which it was decided that:

> "[...] In envisaging "the categories of invested assets [...] in accordance with the laws and regulations of the said party," the provision in question refers to the legality of the investment and not to its definition. It aims in particular to ensure that the bilateral Agreement does not protect investments which it should not, generally because they are illegal."[50]
>
> ([...] al visualizar "las categorías de bienes invertidos, de acuerdo con las leyes y regulaciones de dicha parte", la norma en cuestión se refiere a la legalidad de la inversión y no a su definición. Apunta, en particular, a asegurar que el Acuerdo Bilateral no proteja inversiones que, en términos generales, no debe proteger, por ser ilegales). (Free Translation by the Tribunal).

188. Consequently, the limitation of consent based on the "accordance with law clause" may be contained not only in the definition of investment, but also in the precepts related to "Protection" or even in the chapter related to "Promotion and Admission."

189. To synthesize the above, it is useful to cite the arguments of the **Respondent**, namely:

[50] *Salini Construttori S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001, paragraph 46.

"First, many investment treaties incorporate limitations into their *definition of investment* [...] Alternatively or in addition, State Parties sometimes incorporate a requirement of compliance with the host State's laws into provisions addressing the *applicability of the treaty* [...] A common variation in applicability provisions of investment treaties is to specify the prerequisite of investment legality for the extension of treaty protections to investments made prior to the date the treaty entered into force [...] Third, State Parties frequently incorporate "in accordance with law" limitations into treaty provisions requiring host States *to admit or accept foreign investments* [...] Finally, State Parties frequently incorporate "accordance with law" requirements in the provision pledging *protection and non-impairment* of qualifying investments, which is usually the first substantive obligation section of the investment treaties."[51]

(En primer lugar, muchos tratados de inversión incorporan limitaciones en su definición de "inversión" [...]. Alternativa o adicionalmente, los Estados Partes algunas veces incorporan, en las disposiciones referentes a la aplicabilidad del tratado, el requisito de que se cumpla con las leyes del estado anfitrión [...]. Una variación común en lo que respecta a las disposiciones de aplicabilidad de los tratados de inversión es la de especificar el prerrequisito de la legalidad de la inversión para que las inversiones hechas antes de la fecha en la que el tratado entró en vigencia gocen de la protección del tratado [...]. En tercer lugar, los Estados Contratantes frecuentemente incorporan la limitación de que las inversiones se hagan conforme a la ley en las normas del tratado que exigen que los estados anfitriones admitan o acepten las inversiones extranjeras [...]. Finalmente, los Estados Contratantes frecuentemente incorporan la exigencia de que las inversiones se hagan conforme con la ley "en las normas que protegen y garantizan la no afectación de inversiones que califiquen como tales la cual es, usualmente, la primera sección de las obligaciones sustantivas de los tratados de inversión). (Free Translation by the Tribunal).

vii. The characteristics and scope of the consent given by Spain and El Salvador in the BIT

190. Having indicated that it is valid and common for States that sign an agreement for reciprocal protection of investments to limit the protection of the agreement to investments made in accordance with the laws of the host State, it is the task of this Arbitral Tribunal to decide whether in the **Agreement** signed between Spain and **El Salvador** these States limited the protection of the **BIT** only

[51] Memorial on Objections to Jurisdiction, pages 59, 60 and 61.

to investments made in accordance with the laws of the host State and, consequently, excluded from that protection those made illegally.

191. As indicated when analyzing the scope of consent, for this purpose it is necessary to apply the principles of good faith, identification of the will of the parties and absence of a presumption in favor or against consent.

192. In the identification of the will of the Contracting States of the **Agreement**, the *travaux preparatoires* shed light on the intent of the Republic of **El Salvador** and the Kingdom of Spain. In this regard, this Tribunal considers relevant the indications contained in the communications exchanged between **El Salvador** and Spain days before the entry into force of the **Agreement**. In one of these communications, **El Salvador** made certain observations to Spain about the draft text of the **Agreement**. We transcribe below from this letter the following:

> "THE MINISTRY OF FOREIGN RELATIONS OF EL SALVADOR sincerely greets the Honorable Embassy of the Kingdom of Spain, in reference to the draft Agreement for the Reciprocal Protection of investments between the Government of Spain and the Government of El Salvador.
>
> THE MINISTRY OF FOREIGN RELATIONS most respectfully brings to the attention of this Honorable Embassy the observations of the Government of El Salvador in connection with said draft, which are listed below:
>
> [...] II.- Add to the end of sub-paragraph 5 on the designation of "investments," in paragraph 2 of Article 1, the following language: "...in accordance with the laws in force in each of the Contracting Parties" [...].[52]

193. The above quote clearly indicates that **El Salvador** had, from the beginning of the negotiations, the intent to limit the protection of the **Agreement** it was about to sign only to investments made in accordance with its laws. Furthermore, it is clear that, by said communication, **El Salvador** tried to include this limitation to its consent in the definition of "*investment.*"

[52] Correspondence of the Ministry of Foreign Relations of El Salvador, dated January 31, 1995, attached as exhibit to the Memorial on Objections to Jurisdiction of El Salvador.

194. Faced with the request of **El Salvador**, Spain informed El Salvador that it was not necessary to include the limitation requested in the definition of "investment," because it was included in the text of the **Agreement**. Consequently, Spain answered the request of the Government of El Salvador indicating the following:

> "Paragraph 2: The purpose of Article 1 is to define the concepts that will appear in the other articles of the Agreement, which will establish the conditions and treatment to be given to Investments.
>
> We consider that the reference to the requirement that Investments must be made according to the internal legislation of each of the Contracting Parties is more closely related to the process of admission of the Investment. Hence, Article II, titled "Promotion and Admission," has a section expressly indicating that each Contracting Party will admit **Investments according to its legal provisions.** Thus, it is **a necessary condition for an investment to benefit.**"[53] (Emphasis added).

195. The above communication indicates, without any doubt, that the will of the parties to the **BIT** was to exclude from the scope of application and protection of the **Agreement** disputes originating from investments which were not made in accordance with the laws of the host State.

196. Additionally, the communication of Spain confirms that, in the case of the **BIT**, the limitation "in accordance with the laws" was not included in the article in which the word "Investment" is defined because, as indicated by the Kingdom of Spain itself, this Article is intended to define concepts that will appear in other provisions of the **BIT**, which, in its words "establish the conditions and treatment to be given to investments."[54] Finally, the possibility of limiting the scope of consent in other provisions of the **Agreement** was reflected in absolute clarity in the final sentence of the communication of the Kingdom of Spain, according to which making

[53] Correspondence of the Embassy of Spain, dated February 2, 1995, in response to the correspondence of the Ministry of Foreign Relations of El Salvador, dated January 31, 1995, attached as exhibit to the Memorial on Objections to Jurisdiction of El Salvador.

[54] Idem.

an investment in accordance with the laws of the host State is a "*necessary condition for an investment to benefit.*"[55]

197. According to the foregoing, the **Claimant** is not right to indicate that in order to determine whether its investment falls within the scope of the **Agreement**, it is necessary to examine only the definition of the term *investment*, contained in Article I(2) of the **Agreement**, where there is no reference to the clause "in accordance with law," and that it is not possible to examine other clauses of the **Agreement** to determine the type of investments protected by it.

198. Indeed, if the Contracting States themselves agree that the limitation "in accordance with laws" could be included (as it actually was) in parts of the **BIT** other than the definition of investment, such as that referring to promotion and admission, it is obvious that the restrictive interpretation sustained by **Inceysa** is incorrect. Consequently, the following argumentation of **Claimant** is contrary to the evident intent of the Contracting Parties:

> "It is evident that the issues related to "Promotion and admission," as well as "Protection" are specific issues regulated within the scope of an agreement with global objectives. The jurisdictional issue cannot be treated through the interpretation of specific and special clauses, but must be examined under the general approach of the scope of application of the Agreement. In reference to "investments" as the subject of the agreement, we must refer to the definition contained in article 1 of the BIT, the only clause suitable to delimit the scope of application of the BIT itself. The definition of "investment" contained in article 1 is open (in the sense that it is not exclusive) and not exclusive of (in the sense that it does not contain a list of the types of investments expressly excluded from the scope of application of the Agreement). In addition, the definition of "investment" itself is focused on the identification of objective "types" of assets and not on judgments that may be subjective, such as compliance with the national law of Contracting Parties of the investments. In summary: whether an "investment" is an investment that falls within the scope of application of the BIT or not, it will be necessary to comply with the definition contained in article 1 and not in other specific clauses of the BIT."[56]

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[55] Idem.

[56] Rejoinder on Objections to Jurisdiction, page 8, paragraph 22.

199. Likewise, there are no grounds for the assertions of **Inceysa** in its Rejoinder, where it indicates:

> "[...] the only logical and legal sense to support the literal and teleological interpretation of the expression *"in accordance with its legislation (legal provisions)"* is to refer to the reservation by the Host State of the investment of its sovereignty, within the scope of the regulation of the conditions for admission of an investment made by the other contracting State, as well as the regulation of its protection. Thus, a State can limit at its discretion the type of investment admissible through its internal laws (for example in the case of investments in sectors subject to State monopoly), without violating the BIT, and establish freely its own internal rules suitable to protect foreign investments (avoiding, for example, extending such protection to investments not admitted). These are measures of an economic nature, rather than clauses limiting the consent of the Host State to the jurisdiction of ICSID."[57]

200. So, after analyzing the intent of Spain and **El Salvador** obvious in the *travaux preparatoires* of the **Agreement**, we must look at its own terms. Thus, consistent with what Spain indicated, the conditions imposed on investments are specifically established in other provisions of the **BIT**, specifically in two different articles that refer to the clause of "in accordance with law."

201. Article III, titled "*Protection*," indicates that "*Each Contracting Party shall protect in its territory the investments* ***made, in accordance with its legislation***...,"[58] by investors from the other Contracting Party, thus excluding from the protection of the **BIT** investments made illegally.

202. On this topic, the **Respondent** is right when it asserts that:

> "As a threshold matter, it seems clear that the placement of limiting language directly in Article III -- "Cada Parte Contratante protegerá en su territorio las inversiones efectuadas, *conforme a su legislación... y no obstaculizará... tales inversiones...*" -- bars any claim for violation of Article III with respect to an

[57] Idem, page 10, paragraph 25.

[58] Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of El Salvador and the Kingdom of Spain, Article III (emphasis added).

investment made in significant contravention of Salvadoran law, such as through gross misrepresentation or fraud in a government tender process. El Salvador's consent to the imposition of Article III obligations -- and hence to ICSID's jurisdiction to hear allegations of Article III violations -- is expressly limited to investments made in accordance with law. Any other reading would render the language "conforme a su legislación" entirely without meaning."[59]

(Como un asunto preliminar, parece claro que el ubicar lenguaje limitante directamente en el Artículo III ("cada parte contratante protegerá en su territorio las inversiones efectuadas conforme a su legislación... y no obstaculizará... tales inversiones...") prohíbe cualquier reclamo de violación del Artículo III con respecto a una inversión hecha en significativa contravención de la ley salvadoreña tales como aquellas efectuadas por medio de claras simulaciones o fraudes en una licitación gubernamental. El consentimiento de El Salvador a la imposición de las obligaciones del Artículo III y, consecuentemente, a la jurisdicción del CIADI para conocer de alegatos de la violación de ese artículo, está expresamente limitado a las inversiones hechas de acuerdo con la ley. Cualquier otra lectura de ese texto dejaría a la expresión "conforme a su legislación" enteramente sin sentido). (Free Translation by the Tribunal).

203. In synthesis, by interpreting in good faith Article III of the **Agreement**, and by attributing to each of its words the meaning and scope the parties wanted to give them, and according to the will of the contracting States manifested in the *travaux preparatoires*, it is clear that the only correct interpretation of said article must be in the sense that any investment made against the laws of El Salvador is outside the protection of the **Agreement** and, therefore, from the competence of this Arbitral Tribunal.

204. Moreover, and in the same sense, Article II is convincing. According to Article II, the **Agreement**:

"[...] will also apply to investments made before its entry into force by the investors of a Contracting Party **in accordance with the laws** of the other Contracting Party in the territory of the latter [...]"[60] (Emphasis added).

[59] Memorial on Objections to Jurisdiction, page 64.

[60] Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of El Salvador and the Kingdom of Spain, Article II.

205. Reading the article transcribed above, it is evident that the **Agreement** will not apply to investments made in the territory of any of the signatory parties before the enactment of the **BIT**, when they were made illegally. In this vein, and according to an interpretation, as a matter of reason, the **Agreement** will also not apply to investments which, having been made after the execution of the **Agreement**, were not made in accordance with the legislation of El Salvador.

206. The above affirmation is reinforced by a harmonious interpretation of the **Agreement**, as the clause "in accordance with law" appears both in the article on "Protection," and in the article that regulates "Promotion and Admission," indicating that investments that do not comply with the requisite of having been made "in accordance with the laws" of the signatory State will not be admitted (Article II, (1)). This clearly indicates that the **BIT** leaves investments made illegally outside of its scope and benefits.

207. Based on the foregoing arguments, this Arbitral Tribunal considers that the consent granted by Spain and **El Salvador** in the **BIT** is limited to investments made in accordance with the laws of the host State of the investment. Consequently, this Tribunal decides that the disputes that arise from an investment made illegally are outside the consent granted by the parties and, consequently, are not subject to the jurisdiction of the Centre, and that this Tribunal is not competent to resolve them, for failure to meet the requirements of Article 25 of the Convention and those of the **BIT**.

viii. Analysis of Inceysa's investment in light of the scope of the consent given by Spain and El Salvador in the BIT

208. The Tribunal having decided that the consent given by the Kingdom of Spain and the Republic of El Salvador excludes investments not made in accordance with the laws of the host State, it must

determine whether the investment that generated the dispute raised before it was made in accordance with the laws of the host State, i.e. in accordance with the laws of **El Salvador**, and in order to determine thereafter whether this Tribunal is competent or not to hear the dispute submitted to it.

209. Before deciding whether the investment made by **Inceysa** is protected by the **BIT**, considering that it was made in accordance with the laws of **El Salvador**, it is important to repeat that, as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case, i.e. by this Arbitral Tribunal.

210. Consequently, any resolutions or decisions made by the State parties to the **Agreement** concerning the legality or illegality of the investment are not valid or important for the determination of whether they meet the requirements of Article 25 of the Convention and of the BIT, in order to decide whether or not the Arbitral Tribunal is competent to hear the dispute brought before it.

211. Sustaining an opinion different than the one described above would imply giving signatory States of agreements for reciprocal protection of investments that include the "in accordance with law" clause the power to withdraw their consent unilaterally (because they would have the power to determine whether an investment was made in accordance with their legislation), once a dispute arises in connection with an investment.

212. Such being the case, this Tribunal finds unfounded the argument of the **Claimant** to the effect that the determination of the alleged illegal character of **Inceysa's** investment is a matter that has already been resolved to the contrary by the Supreme Court of Justice of **El Salvador** on two occasions, and said decisions constitute *res judicata* and, therefore, prevent this Arbitral Tribunal from ruling in any way.

213. Indeed, what this Arbitral Tribunal must do is to determine the legality of the investment solely and exclusively for the purpose of deciding on its competence. This decision cannot be left up to the Courts of the host State, because this would give the State the possibility to redefine the scope and content of its own consent to the jurisdiction of the Centre unilaterally and at its complete discretion.

214. Moreover, and from the viewpoint of strict procedural theory, this Tribunal does not accept that the determination of the legality of the investment of the **Claimant** has the status of *res judicata*, because it was resolved to the contrary by the Supreme Court of Justice of El Salvador. In fact, as we shall see, in this case, the basic requisites of *res judicata* are not met, namely (i) identity of parties and (ii) identity of claims.

215. It is clear that in the lawsuits invoked by the **Claimant**, the parties were different from those who participate in this arbitration, as they were filed respectively by Mustang, S.A. de C.V. and Supervisión y Control, S.A. against MARN resolution No. 351-2000, which awarded to **Inceysa** and ICASUR the **bid** to operate the inspection stations for vehicles, so that it is evident that there was no identity of claims either.

216. In addition, the issues decided by the Supreme Court of Justice had to do with the legality of certain administrative acts, and the investment in itself was not examined in any manner in those proceedings.

217. The above makes it obvious that in this case the necessary foundations for the application of *res judicata* alleged by **Inceysa** do not exist.

218. Having clarified the foregoing matter, this Tribunal must determine whether or not the investment that is the subject of the dispute was made in accordance with the legislation of the host State, i.e. in accordance with the laws of **El Salvador**. This raises an initial

need for this Tribunal to determine the laws and governing legal principles in **El Salvador** applicable to the investment that gave rise the dispute at hand.

219. The dispute presented arises from alleged violations of the **BIT**. This Agreement constitutes, according to Article 144 of the Political Constitution of **El Salvador**, a law of the Republic, as indicated expressly in its text:

> "**Article 144.-** International treaties concluded by El Salvador with other States or international institutions **are considered laws of the Republic** upon their entry into force, in accordance with the provisions of such treaties and of this Constitution." (Emphasis added).

220. In light of the above, the **BIT**, as valid law in **El Salvador**, is the primary and special legislation this Tribunal must analyze to determine whether **Inceysa's** investment was made in accordance with the legal system of that Nation.

221. This does not necessarily imply that the investment that is the subject of the dispute brought here is protected by the **BIT**, but that, in order to determine whether the investment benefits from that protection, it is necessary to analyze whether it was made in accordance with the requisites imposed in the Agreement. In other words, asserting that the **BIT**, as the valid law of **El Salvador**, applies to **Inceysa's** investment is not the same as asserting that the latter benefits from the protection of the agreement.

222. So, to determine the way to apply the provisions contained in the **BIT** to the present dispute, the Tribunal will analyze paragraph 3 of Article XI, which establishes the following:

> "[...] 3. The arbitration will be based on:
>
> - the provisions of this Agreement and those of other agreements executed between the Contracting Parties;

- generally recognized rules and principles of International Law;

- the national law of the Contracting Parties in whose territory the investment was made, including the rules regarding conflicts of laws [...]"

223. According to the foregoing, by applying the **BIT** as law of El Salvador, this Tribunal is obligated to analyze the provisions of the **Agreement** to decide the issue presented. Evidently, the **Agreement** does not contain substantive rules that permit a determination whether **Inceysa's** investment was made in accordance with the law of **El Salvador**. Consequently, the Tribunal must analyze other legal instruments to decide this issue.

224. The reference made in the **Agreement** to the generally recognized rules and principles of International Law obliges this Tribunal, first of all and before analyzing the legal provisions issued by the internal entities of the government of **El Salvador**, to determine whether, according to said principles and rules, **Inceysa's** investment can be considered legally made.[61]

225. To define the generally recognized principles and rules of International Law to which the **BIT** refers, it is useful to consider the provisions set forth in Article 38 of the Statute of the International Court of Justice, which reads as follows:

"Article 38

1. The Court, whose function **is to decide in accordance with international law** such disputes as are submitted to it, shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) international custom, as evidence of a general practice accepted as law;

[61] 222 *in fine.*

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, **as subsidiary means** for the determination of rules of law. " (Emphasis added).

226. According to the precept transcribed above, the general principles of law are an autonomous or direct source of International Law, along with international conventions and custom.

227. Without attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which, in the opinion of important commentators, are rules of law on which the legal systems of the States are based.

> The international sources of international commercial arbitration law are invariably of public origin. They largely consist of international conventions but also include international custom, general principles of law and judicial decisions, as listed in Article 38 of the Statute of the International Court of Justice.
>
> In international commercial arbitration, however, only general principles of law play an important role. They are frequently applied by arbitrators, particularly, though not exclusively, when dealing with international state contracts."[62]
>
> (Las fuentes internacionales del derecho internacional de arbitraje comercial son invariablemente de origen público. En gran parte consisten en convenciones internacionales, pero también incluyen a la costumbre internacional, los principios generales del derecho y a la jurisprudencia, según se enumera en el Artículo 38 del Estatuto de la Corte Internacional de Justicia.
>
> Sin embargo, en el arbitraje comercial internacional, solamente los principios generales del derecho tienen un papel importante. Son frecuentemente aplicados por los árbitros, particularmente, aunque no exclusivamente, cuando se trata de contratos internacionales públicos). (Free Translation by the Tribunal).

[62] E. Gaillard and J. Savage, Chapter II-Sources of International Commercial Arbitration, Fouchard Gaillard Goldman on International Commercial Arbitration (eds.) (1999), page 93.

228. Another commentator refers to this topic as follows:

> "The general principles of Law are fundamental legal concepts, in other words, their universal validity preserves them over time and space and, therefore, they constitute a formal source as they serve as a basis for the creation of legal norms, either general or individualized. These logical-legal postulates guide the creator of the general rules (legislator or plenipotentiary authorized to conclude an international treaty); the theoretician who speculates on these general norms or on philosophical-legal problems related to them (jurisconsult); the creator of individualized legal norms (judge or official representing the State); and any person who claims to examine the intrinsic validity of a precept in force."
>
> "The general principles of Law play a magnificent complementary mission to the legal system, either national or international." [63]

229. Based on the above, we analyze below **Inceysa's** investment in light of the general principles of law which the Arbitral Tribunal considers to be applicable to the case.

a) Violation of the principle of good faith

230. Good faith is a supreme principle, which governs legal relations in all of their aspects and content. Concerning the scope and content of the principle of good faith, it is necessary to take into account the following comments:

> "The Latin expression bona FIDE is used in the original or translated into various languages, in Spanish "buena fe," to indicate the spirit of loyalty, respect for the law and fidelity, in other words, absence of dissimulation or fraud in relations between two or several parties in a legal act."[64]

231. In the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties. In this regard, Master Díez Picazo noted that:

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[63] Arellano García Carlos. Derecho Internacional Privado, 4th Ed., Editorial Porrúa, Mexico, 1980, page 87.

[64] Diccionario Jurídico Mexicano, Universidad Nacional Autónoma de México, Editorial Porrúa, Mexico, 1991, page 362.

"As we know, good faith is a standard of conduct regulated by the ethical imperatives required under prevailing social conscience."[65]

232. Any legal relation starts from an indispensable basic premise, namely the confidence each party has in the other. If this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time.

233. This implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim *Pacta Sunt Servanda,* unanimously accepted in legal systems.

234. It is clear to this Tribunal that the investment made by **Inceysa** in the territory of **El Salvador**, which gave rise to the present dispute, **was made in violation of the principle of good faith**.

235. During the proceedings conducted before this Tribunal, **Inceysa's** violations of the principle of good faith that must govern legal relations were proven.

236. Among **Inceysa's** violations of the principle of good faith, as demonstrated in chapter IV of this award, the Tribunal emphasizes the following: **(i) Inceysa's** presentation of false financial information as part of the tender made by it to participate in the **bid; (ii)** false representations during the bidding process, in connection with the experience and capacity necessary to

[65] Díez Picazo, Fundamentos del Derecho Civil Patrimonial, Editorial Civitas, Madrid, 5th Ed., page 398.

comply with the terms of the **Contract**, particularly concerning its alleged strategic partner; **(iii)** falsity of the documents by which **Inceysa** sought to prove the professionalism of Mr. Antonio Felipe Martínez Lavado, on whose career in large measure it based its alleged aptness to perform the functions entrusted to it when winning the **bid**; and **(iv)** the fact that it had hidden the existing relationship between **Inceysa** and ICASUR, in clear violation of one of the fundamental pillars of the **bidding** rules.

237. The conduct mentioned above constitutes an obvious violation of the principle of good faith that must prevail in any legal relationship. This Tribunal considers that these transgressions of this principle committed by **Inceysa** represent violations of the fundamental rules of the **bid** that made it possible for Inceysa to make the investment that generated the present dispute. It is clear to this Tribunal that, had it known the aforementioned violations of **Inceysa**, the host State, in this case **El Salvador**, would not have allowed it to make its investment.

238. **El Salvador** gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors. El Salvador did not have any basis to suppose that **Inceysa** would submit false information and would commit fraudulent acts for the purpose of establishing a legal relationship with MARN, which was embodied in the **Contract** that gives rise to this dispute.

239. By falsifying the facts, **Inceysa** violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear **Inceysa's** complaint, since its investment cannot benefit from the protection of the **BIT**, as established by the parties during the negotiations and the execution of the agreement.

b) Violation of the principle *nemo auditur propiam turpitudinem allegans*

240. In addition, this Tribunal decides that the investment made by **Inceysa** violates the principle *Nemo Auditur Propiam Turpitudinem Allegans*, which has been expressed in Spanish as **nadie puede beneficiarse de su propia torpeza o dolo**. In connection with this principle, there are various maxims that clearly apply to the present case:

a) *"Ex dolo malo non oritur actio"* (an action does not arise from fraud).
b) *"Malitiis nos est indulgendum"* (there must be no indulgence for malicious conduct).
c) *"Dolos suus neminem relevat"* (no one is exonerated from his own fraud).
d) *"In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur"* (in general, the rule must be that fraud shall be always punished).
e) *"Unusquique doli sui poenam sufferat"* (each person must bear the penalty for his fraud).
f) *"Nemini dolos suusprodesse debet"* (nobody must profit from his own fraud).

241. All of the legal maxims indicated above are based on justice and have been created on the basis of decisions in concrete cases.

242. Applying the first principle indicated above to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud."

243. In the dispute brought to this Arbitral Tribunal, there are clear facts and reasons that match the aforementioned supposition, since **Inceysa** acted

improperly in order to be awarded the **bid** that made its investment possible and, therefore, it cannot be given the protection granted by the **BIT**. Sustaining the contrary would be to violate the aforementioned general principles of law which, as indicated, are part of Salvadoran law.

244. The clear and obvious evidence of the violations committed by **Inceysa** during the **bidding** process lead this Tribunal to decide that **Inceysa's** investment cannot, under any circumstances, enjoy the protection of the **BIT**. Allowing **Inceysa** to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of the justice that this Tribunal is obligated to render. No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.

c) Violation of international public policy

245. International public policy consists of a series of fundamental principles that constitute the very essence of the State,[66] and its essential function is to preserve the values of the international legal system against actions contrary to it.[67]

246. In line with the foregoing, the inclusion of the clause "in accordance with law" in various **BIT** provisions is a clear manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them.

[66] Monroy Cabra, Marco Gerardo. Tratado de Derecho Internacional Privado. Editorial Temis, Fifth Edition, Colombia, 1999, page 249.

[67] Goldschmidt, Derecho Internacional Privado. Editorial Desalma, Eighth Edition, Buenos Aires, page 163.

247. Therefore, the inclusion of the clause "in accordance with law" in the agreements for reciprocal protection of investments follows international public policies designed to sanction illegal acts and their resulting effects.

248. It is uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country. If this Tribunal declares itself competent to hear the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally.

249. This Tribunal considers that assuming competence to resolve the dispute brought before it would mean recognizing for the investor rights established in the **BIT** for investments made in accordance with the law of host country. It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy.

250. The Tribunal agrees with **El Salvador** and notes that an interpretation of the **Agreement** that would afford protection to investments made fraudulently would have enormous repercussions for those States which signed agreements for reciprocal protection of investments and included the clause "in accordance with law," in order to exclude from the protection of said treaties the investments not made in accordance with the laws and other norms of the State that receives the investment.

251. In this vein, **El Salvador** correctly argued that:

> "The interpretation of the El Salvador-Spain Investment Treaty raises broader public policy issues than just the fate of Inceysa's damages claim. As discussed above, there are countless other investment treaties involving dozens of other countries that contain similar "in accordance with law" clauses. If one Investment

> Treaty is read as protecting fraudulent or illegal investments, the others are open to the same interpretation. But under the general principle of good faith interpretation, treaties should be interpreted where possible to exclude fraud, not encourage it. This is consistent with the public policy maxim *ex dolo malo non oritur actio,* that "no right of action can have its origin in fraud": one obtaining rights by fraud should not be able to further benefit by bringing legal action to enforce those illegally obtained rights.[68]
>
> (La interpretación del Tratado de Inversión El Salvador-España suscita cuestiones más amplias de política pública que el reclamo de daños de Inceysa. Como se discutió anteriormente, hay un sinnúmero de tratados de inversión que comprenden a docenas de otros países los cuales contienen la cláusula "conforme a su legislación". Si se lee un tratado de inversión en el sentido de que protege inversiones fraudulentas e ilegales, los demás estarían sujetos a la misma interpretación. Sin embargo, según el principio general de interpretación de buena fe, los tratados deben ser interpretados, cuando sea posible, en el sentido de excluir y no de promover el fraude. Esto es congruente con la máxima de política pública de *ex dolo malo non oritur actio* de que ningún derecho a accionar puede tener su origen en el fraude: quien obtenga derechos por medio de fraude no puede beneficiarse adicionalmente, recurriendo a acciones legales para exigir los derechos que obtuvo ilegalmente). (Free Translation by the Tribunal).

252. In light of the foregoing, not to exclude **Inceysa**'s investment from the protection of the **BIT** would be a violation of **international public policy**, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that **Inceysa**'s investment is not protected by the **BIT** because it is contrary to international public policy.

d) Violation of the principle that prohibits unlawful enrichment

253. The acts committed by **Inceysa** during the bidding process are in violation of the legal principle that prohibits **unlawful enrichment**.

254. The written legal systems of the nations governed by the Civil Law system recognize that, when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.

[68] Memorial on Objections to Jurisdiction, page 72.

255. Applying the principle discussed above to the case at hand, we note that **Inceysa** resorted to fraud to obtain a benefit that it would not have otherwise obtained. Thus, through actions that violate the legal principles stated above, **Inceysa** tried to enrich itself, signing an administrative contract with MARN, which, without any doubt, would produce considerable profit for it.

256. The clear evidence that proves the violations listed in chapter IV of this award leads this Tribunal to decide that an interpretation that would grant **BIT** protection to **Inceysa**'s illegal investment would favor its unlawful enrichment, which no tribunal constituted according to the Agreement can do.

257. In conclusion, the Tribunal considers that, because **Inceysa**'s investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of **El Salvador** in the **BIT** and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, this Arbitral Tribunal declares itself incompetent to hear the dispute brought before it.

ix. Analysis of Inceysa's investment in light of the Investment Law of El Salvador

258. Starting from the considerations presented in the previous pages, this Tribunal can only hold that **Inceysa**'s investment is also excluded from the unilateral offer to accept the jurisdiction of the **Centre** made by the Salvadoran State in its Investment Law, as it does not meet the requisite of legality necessary to satisfy the premises on which **El Salvador** agreed to submit to the **Centre**.

259. In effect, just as is the case with the BIT, for **Inceysa** to access the jurisdiction of the **Centre**, its investment must meet the premise of legality, as sustained by Mr. José Roberto Tercero Zamora, in his expert opinion:

> "Any consent to arbitration offered unilaterally by El Salvador in the Investment Law would be in any case subject to the legality of the investment."[69]

260. This requirement of legality arises from the Constitution of El Salvador, which, in its Article 96, establishes the following:

> "Foreigners, from the moment they arrive in the territory of the Republic, will be strictly obligated to respect the authorities and obey the laws and will acquire the right to be protected by them" (the emphasis is not in original).[70]

261. To the same effect as the Constitution, the Foreigners Law of the Republic of El Salvador indicates expressly that:

> "Foreigners, from the moment they enter the national territory, are obligated to respect the Constitution, the secondary laws and the authorities of the Republic; acquiring the right to be protected by them" (emphasis added).[71]

262. In accordance with the Constitution and the Foreigners Law, no person who violated systematically the legal principles and foundations that made its investment possible may claim the protection of that law. For a foreigner or foreign company to benefit or be protected by Salvadoran legislation, it must comply with the condition of respecting and obeying the laws whose protection it seeks. The foregoing principle is expressed in the Investment Law itself, which

[69] Expert opinion of Mr. Tercero, para. 34.

[70] Constitution of the Republic of El Salvador, Art. 96.

[71] Foreigners Law, Art. 4

imposes on investors the obligation to comply with the laws of the Salvadoran State, indicating:

> "Every national or foreign investor shall comply with those obligations established in the laws, specially regarding tax, labor, and social security matters." [72]

263. Recognizing that the unilateral offer to accept the jurisdiction of the **Centre** made by **El Salvador** in its Investment Law includes those disputes arising from investments that are openly and clearly contrary to the laws of **El Salvador** would be the same as contradicting the text of the Salvadoran Constitution and of other laws of that country concerning this matter. Likewise, a recognition in this sense would be a violation of public policy, and would violate the principle that establishes that "no person may benefit from his own fraud." Therefore, the systematic interpretation of the Constitution, of the Foreigners Law, of the Investment Law, and of the general principles of law deny **Inceysa** the right to access the jurisdiction of the **Centre**.

264. In light of the foregoing, and considering the violations of Salvadoran law committed by **Inceysa** when making its investment, as described in the previous pages, this Tribunal decides that **Inceysa** cannot benefit from the rights granted by the Investment Law because its "investment" does not meet the condition of legality necessary to fall within the scope and protection of that law. Consequently, this Arbitral Tribunal denies the jurisdiction of the **Centre** and its competence to decide the claim arising from **Inceysa's** investment.

B. Analysis of the competence of the Arbitral Tribunal according to the Service Contract executed between El Salvador and Inceysa

i. Position of the Parties

[72] Investment Law, Art. 14.

265. The discussion concerning the competence of the Arbitral Tribunal based on the **Contract** was raised by **Inceysa** and gave rise to a complex debate that involves not only the **Contract**, but several normative texts of **El Salvador**. Given the amplitude and complexity of the arguments of the parties, this Tribunal finds it pertinent to refer in detail to the position of each of them.

a) Position of Inceysa

266. As indicated in its Request for Arbitration, **Inceysa** argues that the jurisdiction of the Centre to resolve disputes arising from the **Contract** is based on the "renvoi" made by Clause Twenty-one of the **Contract** to Salvadoran legislation, which indicates arbitration as a mechanism for dispute resolution. (Request for Arbitration, pages 61 to 63). Said clause reads as follows:

> **"CLAUSE TWENTY-ONE. ARBITRATION.** In cases of controversies, disputes or differing interpretations of this contract, after exhausting direct negotiations, **both parties agree to submit to an arbitration proceeding in accordance with Salvadoran Law"** (emphasis added).

267. Under this line of reasoning, although it is true that, as admitted by the **Claimant** in its Request for Arbitration, the **Contract** does not grant "expressly direct competence to ICSID or to any other international Arbitration Institution,"[73] in accordance with Salvadoran law to which the **Contract** refers, the Centre has jurisdiction to hear this dispute.

268. To sustain the foregoing, the **Claimant** considers that the following laws of El Salvador apply to this case:

i) Article 25 of the Mediation, Conciliation and Arbitration Law, which establishes the following:

[73] Request for Arbitration, page 61, paragraph 125.

"Disputes in which the State and public law entities are interested parties may be submitted to arbitration, provided they concern disposable rights and arise from a legal relationship involving property rights governed by private law or of a contractual nature.

In disputes arising from contracts the Salvadoran State or public law entities conclude with nationals or foreigners, special laws or international treaties or conventions shall apply and, in their absence, the provisions of this law.

This type of dispute may be resolved by arbitration at the Centers established in this law.

Private law companies with state capital or mixed economy companies may agree freely and without prior authorization that the disputes arising from their contracts with nationals or domiciled foreigners or that refer to their own assets will be submitted to Arbitration."

ii) Article 77 of the same Mediation, Conciliation and Arbitration Law, which provides:

"Disputes arising from contracts concluded by the Salvadoran State and public entities with nationals or non-domiciled foreigners, or arising from a legal relationship involving property rights governed by private law may be submitted to International Arbitration, inside or outside the country, freely and without a requirement of prior authorization, provided they concern disposable rights.

In all of these cases, the arbitration must be conducted by an Arbitration Center with recognized prestige, and the State or its entities may submit to its regulations and rules."

iii) Article 15 of the Investment Law, which provides:

"In case controversies or differences arise between national or foreign investors and the State regarding their investments carried out in El Salvador, the parties may resort to the competent courts of justice in accordance with the legal procedures.

In the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to:

a) the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and

arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention);

b) International Centre for Settlement of Investment Disputes (ICSID) with the purpose of solving the controversy through conciliation and arbitration, in accordance with the procedures of the Additional Facility of ICSID; in those cases in which the foreign investor involved in the controversy is a national of a State that is not a contracting party to the ICSID Convention."

iv) Article 165 of the Public Contracting and Acquisitions Law, which provides as follows:

"After an attempt at direct settlement without finding a solution to any of the disputes, it is possible to resort to arbitration by equitable arbitrators subject to the applicable provisions of the pertinent laws, taking into account the modifications established in this chapter."

269. Finally, in order to justify the jurisdiction of the Centre to hear the disputes arising from the **Contract**, **Inceysa** also affirms that the **BIT** concluded between Spain and **El Salvador** applies to this case, because this international treaty is a substantial part of Salvadoran legislation, as established in Article 144 of the Constitution of **El Salvador**. **Inceysa** does not provide any explanation as to which of the provisions of the treaty justify the competence of this Arbitral Tribunal to hear the disputes arising from the **Contract**.

b) Position of El Salvador

270. In its Memorial on Objections to Jurisdiction, the **Respondent** argues that **El Salvador** never consented to the jurisdiction of the Centre to hear contractual disputes, and that, on the contrary, the mechanism established in the **Contract** to resolve this type of dispute was local arbitration, as provided in the text of the Contract and by the declaration of the negotiators of the Contract on behalf of MARN, Messrs. José Antonio Calderón Martínez and Marcial Antonio Pineda Zamora. (Memorial on Objections to Jurisdiction, page 78).

271. **El Salvador** argues that the intention of the parties when concluding Clause Twenty-one of the **Contract** was to establish as a mechanism for dispute resolution *ad hoc* local arbitration, to be governed by the arbitration rules in force at the time in **El Salvador**, provided in the Code of Civil Procedure, in the Commercial Code and in the Code of Mercantile Procedure, rather than an international arbitration conducted by the Centre. It adds that, even if the Salvadoran legislation to which **Claimant** refers were applicable to the case, due to the alleged "renvoi" made by said Clause Twenty-one of the **Contract**, the fact is that no rule in the legislation of El Salvador authorizes the jurisdiction of the Centre for merely contractual violations, and there is no written consent given by it to the jurisdiction of the Centre for these matters, as required by Article 25 of the ICSID Convention.

272. To support this argument, **El Salvador** contends that the main commentators on international arbitration maintain that, when the parties do not indicate in their arbitration agreements an institution to administer arbitration or a set of arbitration rules, it is considered that they have established *ad hoc* arbitration as the mechanism for dispute resolution. The commentators to which the **Respondent** refers are Gary B. Born and Alan Redfern and Martin Hunter, who express, respectively, the following views:

> "Ad hoc arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration."[74]
>
> (Los arbitrajes *ad hoc* no se conducen bajo los auspicios o la supervisión de una institución arbitral. Las partes simplemente convienen en un arbitraje, sin designar ninguna institución que lo administrará). (Free Translation by the Tribunal).
>
> "An ad hoc arbitration usually takes place when the arbitration clause in the original agreement between the parties provides for arbitration without designating any arbitral institution and without referring to any particular set of institutional rules."[75]

[74] G. BORN. International Commercial Arbitration, 2d ed., 2001, page 12.

[75] A. Redfern & M. Hunter. Law and Practice of International Commercial Arbitration, 3d ed., 1999, page I-82.

> (Un arbitraje *ad hoc* usualmente tiene lugar cuando la cláusula arbitral que aparece en el contrato original celebrado por las partes prevé un arbitraje, sin designar una institución arbitral y sin referirse a un grupo particular de normas institucionales). (Free Translation by the Tribunal).

273. Consistent with the foregoing, and following the expert opinion of Mr. Tercero (Statement of José Roberto Tercero Zamora, September 13, 2004, page 5), El Salvador considers that, pursuant to the second paragraph of Article 1437 of the Salvadoran Civil Code, which governs the **Contract**, its Clause Twenty-one must be interpreted "against" the claim of the **Claimant** and, therefore, it is necessary to consider that it refers to local *ad hoc* arbitration.

274. Indeed, by applying the principles of interpretation of contracts contained in the Civil Code, Mr. Tercero maintains in his expert opinion that the mechanism for dispute resolution indicated in the Contract is local arbitration (Ibid, page 6).

275. To support this assertion, Mr. Tercero starts from the premise that it was at the request of "the lawyers of the Spanish companies that won the bid" that said Clause Twenty-one was included in the **Contract**. He reaches this conclusion starting from (i) the witness statement of Atty. Pineda[76] and (ii) the fact that the rules of the **bid** did not include any reference to arbitration and, therefore, if it was included in the **Contract** it was at the request of **Inceysa**.

276. The second paragraph of Article 1437 of the Civil Code of El Salvador establishes the following:

> "Ambiguous clauses that have been extended or dictated by one of the parties, being either the creditor or the debtor, will be interpreted against them, provided the ambiguity results from the lack of an explanation that should have been given by it."

[76] Witness Statement of Atty. Marcial Antonio Pineda Zamora of August 25, 2004, pages 3 and 4.

277. This being the case, according to **El Salvador** and Mr. Tercero, and in line with the text of the aforementioned article, because the lawyers of the Spanish companies were the ones who "extended" Clause Twenty-one (according to the statement of Atty. Pineda), its alleged ambiguity is directly imputable to **Inceysa**, because if it wanted to submit the disputes arising from the **Contract** to international arbitration under the ICSID rules, **Inceysa** could have proposed clear and precise terms, which would not leave doubt about the intent of the parties. The lack of clarity must, therefore, be interpreted against **Inceysa**, according to the aforementioned article.

278. **El Salvador** argues that the will of the parties when they executed Clause Twenty-one of the **Contract** was to provide for local arbitration governed by the arbitration rules in force in that country at the time of the execution of the **Contract**, i.e., the rules established in the Code of Civil Procedure, in the Commercial Code and in the Code of Mercantile Procedure, but in no way by the legislative provisions on which the **Claimant** seeks to base the jurisdiction of the Centre.

279. Moreover, **El Salvador** argues that, even if the provisions on which **Inceysa** is seeking to base the jurisdiction of the Centre were applicable to the case in question, none of them implies the consent of **El Salvador** to the jurisdiction of the Centre to resolve merely contractual disputes, as explained below.

280. **BIT. El Salvador** contends that the "renvoi" made in Clause Twenty-one of the **Contract** to Salvadoran legislation, including the **BIT**, cannot grant the Centre jurisdiction to hear merely contractual disputes, simply because the **BIT** does not grant this jurisdiction.

281. Indeed, according to **El Salvador**, Clause XI of the **BIT** grants jurisdiction to the Centre to hear "*matters regulated by this Agreement,*" rather than merely contractual matters, as claimed by **Inceysa**.

282. **Investment Law.** In line with its defense, **El Salvador** affirms that the protection granted by the Investment Law is exclusively limited to investments made in accordance with its laws and, therefore, Article 15 of its Investment Law cannot constitute grounds for the jurisdiction of the Centre to hear a dispute related to an investment arising from a contract.

283. In addition, **El Salvador** asserts that **Inceysa** cannot base the jurisdiction of the Centre to hear contractual disputes on Article 15 of the Investment Law because, to do so, its action would have to derive from a right granted by the law itself and not, as in this case, from a right arising from a contract. In this regard, **El Salvador** stated the following:

> "[...] to invoke the particular alternate dispute provision set forth in the law -- arbitration before ICSID -- a foreign investor s claim must have as its essential cause of action a right or benefit conferred by that Law. Nothing in the text or the legislative history of the Investment Law suggests an intent to override parties' private agreements for resolution of contractual disputes. Certainly, nothing suggests that the Investment Law was meant to allow foreign investors who had expressly agreed to local arbitration of contractual disputes to invoke Article 15 to escape that agreement."[77]
>
> ([...] para invocar la particular disposición sobre resolución alternativa de disputas establecida en la ley -arbitraje ante el CIADI- el reclamo de un inversionista extranjero debe tener como su causa de acción esencial un derecho o beneficio conferido por esa Ley. Ninguna norma del texto ni la historia legislativa de la Ley de Inversiones sugieren que exista la intención de dejar sin efecto los acuerdos privados de las partes para la resolución de disputas contractuales. Ciertamente, nada sugiere que la Ley de Inversiones tuviera el propósito de permitir a los inversionistas extranjeros, que hubieran convenido expresamente, en un arbitraje local para resolver sus disputas contractuales, invocar el Artículo 15 para escapar de ese acuerdo). (Free Translation by the Tribunal).

284. **Public Contracting and Acquisitions Law. El Salvador** argues that neither Article 165 of this Law, nor any other can serve as basis for the jurisdiction of the Centre on contractual claims, because this law does not make any reference to international arbitration much less to arbitration administered by the Centre, and therefore the requisite of

[77] Memorial on Objections to Jurisdiction, page 94.

consent required by Article 25 of the ICSID Convention is not fulfilled. In addition, **El Salvador** asserts that this Law establishes its own procedural arbitration rules, so it cannot be considered as referring to international arbitration administered by an institution, such as the Centre, which has its own procedure.

285. **Mediation, Conciliation and Arbitration Law.** **El Salvador** maintains that it was impossible for the parties to have agreed in Clause Twenty-one of the **Contract** to refer to the Salvadoran Law of Mediation, Conciliation and Arbitration because, at the time the **Contract** was executed, such law did not exist yet. In addition, **El Salvador** maintains that the provisions of that law on which **Inceysa** seeks to base the jurisdiction of the Centre (Articles 25 and 77) do not refer whatsoever to international arbitration administered by the Centre and, therefore, do not meet the requisite of *written consent* required by Article 25 of the ICSID Convention.

286. Finally, following Mr. Tercero's opinion, **El Salvador** argues that Article 77 of the Mediation, Conciliation and Arbitration Law, on which **Inceysa** seeks to base the jurisdiction of the Centre, has a permissive nature, rather than a mandatory nature, and therefore it cannot be understood as binding on the parties, nor can it prevail over the arbitration agreements executed previously by them (page 97).

ii) Additional arguments of the Parties concerning the jurisdiction of the Centre

287. After **El Salvador** raised the objection to the jurisdiction of the Centre in the terms described above, **Inceysa**, in order to defend the competence of this Arbitral Tribunal to hear the disputes arising from the **Contract**, presented in its memorial of November 4, 2004, the following considerations.

288. In connection with the witness statements of the negotiators of the **Contract** on behalf of MARN, Mr. Calderón and Atty. Pineda, with which **El Salvador** seeks to prove that the intention of the parties when agreeing on Clause Twenty-one of the Contract was to establish local arbitration as the dispute resolution mechanism, **Inceysa** contested the impartiality of the witnesses in the following terms:

> "And, in conclusion, the claimant alleges that the statements of Messrs. Calderón and Pineda are not admissible because the witnesses do not have the necessary impartiality of the witnesses since they are economically and politically involved in the dispute, and closely related to the respondent and therefore cannot have evidentiary value in favor of those who propose them."[78]

289. **Inceysa** also argues that because of the nature of the **Contract**, as a contract for economic development, the reference in Clause Twenty-one to Salvadoran legislation cannot be understood to refer to the Code of Civil Procedure, or to the Commercial Code or to the Code of Mercantile Procedure because this "goes violently against the very nature of the contract ... and particularly against its transnational transcendence" and, in addition, "because the rules to which the "witnesses" refer do not contain specific clauses related to an arbitration proceeding."[79]

290. The **Claimant** maintains that the nature of the **Contract** requires that the reference to arbitration in its Clause Twenty-one be understood as a reference to international arbitration and argues:

> "In addition, by the very nature of the contract, an economic development contract or "state contract," pursuant to general principles of Law recognized by International Law, such as the Principle of Good Faith or *pacta sunt servanda,* cannot reach any other conclusion, but that the foreign investor, when signing the arbitration clause in Art. 21, had to understand by "arbitration proceeding in accordance with Salvadoran Law" that the parties were referring to <u>international arbitration</u> and particularly within the scope of application of the <u>Salvadoran Law especially targeted at regulating and supporting foreign investments.</u>

[78] Reply on Objections to Jurisdiction, page 18, paragraph 50.

[79] Ibid, page 22, paragraph 59.

> Nothing would have prevented the parties from stipulating an arbitration clause referring to an arbitration proceeding "**in** El Salvador," or even better, excluding expressly international arbitration. It is clear that the parties did not decide this way because (sic) in this case the investor would have never made the investment."[80]

291. In addition, and concerning the Salvadoran legislation in force when the **Contract** was signed, particularly the Mediation, Conciliation and Arbitration Law, the **Claimant** argues that:

> "[...] [it] cannot in good faith be limited exclusively to the Salvadoran legislation in force at the time of execution of the contract and to the prejudice of the foreign investor, but it is recognized that the manifestation of consent referred to in article (sic) 25 of the Agreement must exist at the time of the request for arbitration before ICSID, and not at the time when the investment that is the subject of the dispute started or was made."[81]

292. Finally, the **Claimant** maintains that the special legislation, international conventions and treaties to which the Mediation, Conciliation and Arbitration Law refers are the **BIT** and the Investment Law, which, in its opinion, constitute an express and unequivocal reference to the jurisdiction of the Centre.

293. Starting from the statements made by the **Claimant** in its counter-memorial on objections to the jurisdiction of the Centre, in its Reply, **El Salvador** argued that, although the **Claimant** maintains that, when entering into Clause Twenty-one of the **Contract** it always understood that it referred to international arbitration, the reality is that **Inceysa** did not submit any statement of a witness who negotiated the **Contract** to support the fact, as **El Salvador** did.

294. Concerning the challenge to the reliability as witnesses of Messrs. Calderón and Atty. Pineda raised by **Inceysa**, **El Salvador** maintains that these two persons had direct knowledge of the facts that happened and that their testimony could have benefited either one of the two parties.

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[80] Ibid, page 43, paragraphs 135 and 136 (emphasis in original).

[81] Ibid, page 44, paragraph 137.

295. Concerning **Inceysa's** argument that "Nothing would have prevented the parties from stipulating an arbitration clause referring to an arbitration proceeding "**in** El Salvador"[82] or, even better, excluding expressly international arbitration;" **El Salvador** sustains that, likewise, nothing would have prevented the parties from expressly referring to international arbitration or arbitration administered by the Centre, as it has been done in other contracts (Reply, page 9) and that the absence of specificity of Clause Twenty-one of the **Contract** cannot be interpreted in favor of the jurisdiction of the Centre because, by so doing, the principle that the acceptance of the jurisdiction of the Centre must be express and in writing would be violated.

296. Concerning **Inceysa's** argument that the nature of the **Contract**, as a contract for economic development, requires Clause Twenty-one to be interpreted to refer to international arbitration due to the principle of "national transcendence," **El Salvador** contends that the parties to a contract of this nature are free to agree on any mechanism for dispute resolution and not only an institutional international arbitration and, therefore, the nature of the **Contract** cannot replace in any manner the agreement of the parties.

297. In the same vein, **El Salvador** argues that **Inceysa** never identified on which Salvadoran law it wants to base the jurisdiction of the Centre to resolve contractual claims, and adds that **Inceysa** does not refute its arguments concerning each of the laws on which it wants to base this jurisdiction, but limits itself to "rehashing these arguments" and simply asserting that the reference to the jurisdiction of the Centre in the Investment Law and in the **BIT** is sufficient for this Arbitral Tribunal to be entitled to hear the claims arising from the **Contract**.

298. Moreover, in its Rejoinder, **Inceysa** insists on challenging the witnesses presented by **El Salvador** in the following terms:

[82] Ibid, page 43, paragraph 136 (emphasis in original).

"Concerning clause 21 of the contract, the Respondent blames the Claimant for not having submitted witnesses to support its interpretation of the arbitration clause and defends the reliability of the witnesses brought by it. In this regard, it should be noted that the only "witnesses" available to clarify the intent or will not explicitly manifested in writing in the arbitration clause are the very parties to this proceeding. Indeed, the witnesses mentioned by the Respondent have acted on behalf and representation of the Salvadoran executive and can only "testify" about their representation [...] A witness statement of the parties and/or their representatives in this regard cannot reasonably have better evidentiary value [...]."[83]

299. Likewise, in order to sustain the jurisdiction of the Centre to resolve the claims arising from the **Contract**, **Inceysa** repeats that Clause Twenty-one refers to an offer of consent to accept the jurisdiction of the Centre made by **El Salvador** through its legislation. Supporting this argument, **Inceysa** insists that:

"By the nature of the contract and its object (contract for economic development), its transnational character, the existence of specific norms (sic) and special norms in the Salvadoran legal system, such as the BIT and the Investment Law, which expressly contain offers of consent to the jurisdiction of ICSID, the foreign investor, *in casu,* the **Claimant** could not in good faith, at the time of manifesting its will concerning the arbitration clause contained in the contract, not count on the possibility of accepting the offer of consent offered so many times by the Republic of El Salvador. Likewise, the Republic of El Salvador in good faith could not ignore the existence of these offers of consent in its legal system and in special norms, whose main object are the investments concerned in the contract it was going to sign."[84]

300. Finally, concerning its arguments to support the jurisdiction of the Centre, the **Claimant** complains to this Arbitral Tribunal about what it considers to be bad faith, inconsistent procedural conduct consisting of the fact that **El Salvador**, in spite of arguing in this arbitration proceedings that Clause Twenty-one of the **Contract** refers to local arbitration, requested an ordinary civil court of its country to rule against objections of arbitration and lis pendens raised

[83] Rejoinder, page 13, paragraph 33.

[84] Idem.

by **Inceysa**. That court agreed with this thesis and ruled in favor of ordinary [local court] jurisdiction. According to the **Claimant**, this fact demonstrates the seriousness of the consequences that would be created by accepting the objection to the jurisdiction of ICSID, because it would leave it in a state of complete defenselessness.

301. Having presented the arguments of the parties about the jurisdiction of the Centre, the Arbitral Tribunal will now express its views about the admissibility of the objection to jurisdiction raised by **El Salvador**.

iii) Considerations of the Arbitral Tribunal about the jurisdiction of the Centre

302. Considering the arguments and proof presented by the parties in this proceedings, the Arbitral Tribunal considers that the crucial point to determine whether or not the Centre has jurisdiction to resolve disputes arising from the **Contract** consists of determining whether said **Contract**, or the Salvadoran law to which it refers, contains an arbitration agreement that meets the requisites established by the ICSID Convention, i.e., an arbitration agreement which refers to the jurisdiction of the Centre expressly and in writing.

303. To address the foregoing, it is necessary to analyze first the several clauses of the **Contract** that establish a forum selection for resolving differences arising from it, in order to determine whether they contain an arbitration agreement that meets the requisites mentioned in the previous paragraph.

a) Interpretation of the contract

304. A review of the **Contract** leads this Tribunal to conclude that it contains three clauses that refer to mechanisms for the resolution of contractual disputes. The first of them is Clause Thirteen, which provides as follows:

> "**DISPUTES.** The Ministry will decide in writing the petitions of the contractor on technical and legal matters of the contract; if the contractor disagrees with the decision, the matter must be submitted to arbitration before starting any legal action."

305. A mere reading of this Clause Thirteen clearly shows that it does not meet the requisites established in Article 25 of the ICSID Convention. Indeed, this clause does not contain any express reference to the jurisdiction of the Centre, and therefore, it is illogical to try to base on it the competence of this Arbitral Tribunal to hear the disputes arising from the **Contract**.

306. As stated by the **Respondent** (Memorial on Objections to Jurisdiction, page 84), when an arbitration clause does not refer to an arbitration institution or to a set of rules under which the arbitration proceeding must take place, it must be understood that the agreement was for an arbitration *ad hoc,* which completely excludes the jurisdiction of the Centre.

307. The other clause that refers to a mechanism for dispute resolution arising from the **Contract**, is Seventeen, which provides as follows:

> "**JURISDICTION.** For the legal purposes of this contract, the parties expressly constitute as special domicile this city, submitting to Salvadoran law and to the jurisdiction of the Courts of the City of San Salvador."

308. Regardless of the interpretation that might be given to the apparent contradiction that may exist between clauses Thirteen and Seventeen, the fact is that it is not possible in any way to base on them the jurisdiction of the Centre to hear disputes arising from the **Contract**. On the contrary, the reference to the jurisdiction of the Courts of the City of San Salvador, *"for the legal purposes of this contract,"* made in Clause Seventeen, is clear.

309. Finally, we find in the Contract Clause Twenty-one, by which the **Claimant**, based on the express reference it makes to Salvadoran law, is trying to justify the jurisdiction of the Centre. This Clause reads as follows:

> "**ARBITRATION.** In the event of controversies, disputes or differing interpretations of this contract, after exhausting direct negotiation, **both parties agree to submit to an arbitration proceeding in accordance with Salvadoran Law**." (Emphasis added).

310. It is obvious that it is not possible to extract from the language of this clause an arbitration agreement that confers jurisdiction on the Centre. Consequently, it is necessary to analyze the Salvadoran legislation to which the clause in question allegedly refers.

311. As appears from the arguments of the parties presented in the previous pages, **El Salvador** considers that the legislation to which this Clause Twenty-one refers is the Commercial Code, the Law of Mercantile Procedure and the Code of Civil Procedure; **Inceysa**, on the contrary, is of the opinion that the legislation to which this provision refers is the Public Contracting and Acquisitions Law, the Mediation, Conciliation and Arbitration Law, the Investment Law and the **BIT** executed between **El Salvador** and Spain.

312. The Tribunal finds it unnecessary, for the purpose of deciding on the jurisdiction of the Centre, to study which is the legislation referred to in Clause Twenty-one of the **Contract** and, consequently, ascertain what was the intent of the parties when establishing the arbitration agreement in reference. Consequently, this Arbitral Tribunal will limit itself to analyzing each of the laws on which **Inceysa** seeks to base the jurisdiction of the Centre to determine whether it is possible to base on any of them the competence of this Arbitral Tribunal to hear this dispute.

313. To analyze this topic, the Tribunal finds it appropriate to make a clear distinction between the Salvadoran laws that do not contain an express written reference to the Centre and those that do.

314. In the first group, we find the Public Contracting and Acquisitions Law and the Mediation, Conciliation and Arbitration Law. For this purpose, the Tribunal will analyze below whether the application of these laws can grant jurisdiction to the Centre.

b) Public Contracting and Acquisitions Law

315. The provision on which **Inceysa** seeks to base the jurisdiction of the Centre is Article 165 of the Public Contracting and Acquisitions Law, which reads as follows:

> "After an attempt at direct settlement without finding a solution to any of the disputes, it is possible to resort to arbitration by equitable arbitrators subject to the applicable provisions of pertinent laws, taking into account the modifications established in this chapter."

316. A reading of the article quoted above and of Title VIII of that Law concerning "Dispute Resolution," obviously shows that, by the application of these provisions, it is not possible in any way to interpret them as granting jurisdiction to the Centre to hear the contractual disputes arising between **El Salvador** and **Inceysa**. Sustaining the contrary has absolutely no grounds because these provisions do not contain any express reference to the Centre, and therefore do not meet the requirement established in Article 25 of the ICSID Convention.

317. Moreover, the arbitration referred to in Article 165 of the Public Contracting and Acquisitions Law is a process of "arbitration by equitable arbitrators," which, on the date of execution of the **Contract**, was governed by the Code of Civil Procedure that established a local arbitration process.

318. Finally, the "modifications established in this chapter," to which the last part of the quoted article refers, are those contained in articles 166 to 169 of that law, which, as sustained by Mr. Tercero, "[...] also establish certain rules and procedures to be followed in arbitration proceedings, including those related to the designation of the arbitrators, presentation of claims and compensation of arbitrators."[85]

319. From the perspective of this Arbitral Tribunal, the existence of these rules makes it clear that the Public Contracting and Acquisitions Law does not refer to the jurisdiction of the Centre and that it is not plausible for a law that contains specific procedural rules for arbitration to, at the same time, refer to institutional arbitration.

320. For the foregoing reasons, this Arbitral Tribunal considers that the Public Contracting and Acquisitions Law does not contain the consent of the Salvadoran State to the jurisdiction of the Centre, because (i) in none of its provisions is there a reference to the Centre, and (ii) its rules refer to local arbitration which would take place according to Salvadoran law in force at the time of contracting. In light of the above, this Arbitral Tribunal is not competent to hear, based on the Public Contracting and Acquisitions Law, the differences arising from the **Contract**.

c) Mediation, Conciliation and Arbitration Law

321. Other **Salvadoran** statutory provisions on which the **Claimant** seeks to base the jurisdiction of the Centre are Articles 25 and 77 of the Mediation, Conciliation and Arbitration Law, which provide the following, respectively:

> "Article 25. Disputes in which the State and public law entities are interested parties **may** be submitted to arbitration, provided they concern disposable rights and arise from a legal relationship involving property rights governed by private law or of a contractual nature.
>
> In disputes arising from contracts the Salvadoran State or public law entities conclude with nationals or foreigners, special laws or international treaties or conventions shall apply and, in their absence, the provisions of this law.
>
> This type of dispute may be resolved by arbitration at the Centers established in this law.

[85] Witness Statement of José Roberto Tercero Zamora of September 13, 2004, page 9.

> Private law companies with state capital or mixed economy companies may agree freely and without prior authorization that the disputes arising from their contracts with nationals or domiciled foreigners or that refer to their own assets will be submitted to Arbitration."
>
> Article 77. "Disputes arising from contracts concluded by the Salvadoran State and public entities with nationals or non-domiciled foreigners, or arising from a legal relationship involving property rights governed by private law **may** be submitted to International Arbitration, inside or outside the country, freely and without a requirement of prior authorization, provided they concern disposable rights.
>
> In all of these cases, the arbitration must be conducted by an **Arbitration Center with recognized prestige**, and the State or its entities may submit to its regulations and rules." (Emphasis added).

322. Again, in spite of the fact that the articles quoted above refer to international arbitration, their analysis clearly indicates that they do not mention expressly the jurisdiction of the Centre and, therefore, do not meet the requisites of Article 25 of the ICSID Convention, in order to attribute competence to this Arbitral Tribunal.

323. The reference made in the second paragraph of Article 77 to an *"Arbitration Center with recognized prestige,"* is insufficient to grant jurisdiction to the Centre because there is no discussion that, in addition to the International Centre for Settlement of Investment Disputes, there are in the world other "Arbitration Centers of recognized prestige" that could hear the disputes arising from the **Contract** executed between **El Salvador** and **Inceysa**.

324. Moreover, the Mediation, Conciliation and Arbitration Law of **El Salvador** was not in force at the time of execution of the **Contract** and, therefore, the parties could not have agreed in Clause Twenty-one on the application of a Law that they did not know and which did not exist yet. The **Contract** was executed on November 17, 2000, and the Mediation, Conciliation and Arbitration Law was published in the Official Gazzete of El Salvador on August 21, 2002.

325. In spite of the above, as already mentioned, the **Claimant** argues the following:

> "[...] The Respondent cannot argue in good faith that the Mediation, Conciliation and Arbitration Law was published after the signing of the contract. Indeed, not only can the contractual clause that makes explicit reference (sic) to "Salvadoran law" not in good faith be limited exclusively to the Salvadoran law in force at the time of execution of the contract and to the prejudice of the foreign investor, but it is recognized that the manifestation of consent referred to in article (sic) 25 of the Agreement must exist at the time of the request for arbitration before ICSID, and not at the time when the investment object of the dispute started or was made."[86]

326. This Arbitral Tribunal agrees with the **Claimant** that the consent to the jurisdiction of the Centre must exist before submitting the request for arbitration to ICSID. However, the **Claimant** forgets that the will of **El Salvador** had already been manifested in Clause Twenty-one of the **Contract** and that its intent could not have referred to the Mediation, Conciliation and Arbitration Law, which was not in force yet.

327. It would not be possible, based on the foregoing, to allege that, under the provisions of this Law, **El Salvador** made an unilateral offer to accept the jurisdiction of the Centre, which **Inceysa** accepted in writing and that, consequently, the dispute resolution mechanism established in Clause Twenty-one was repealed by this "new pact." It is obvious that the provisions of the law in question are simply an authorization for the various agencies of the Salvadoran State to resolve by arbitration the disputes in which they may be involved.

328. Even if it were accepted that the Mediation, Conciliation and Arbitration Law applies in this case, this Arbitral Tribunal considers that the provisions of that law are

[86] Counter-Memorial on Objections to Jurisdiction, page 43, paragraph 137.

simply permissive and not mandatory. In fact, an analysis of the language of Articles 25 and 77 of the law shows that they do not suggest a unilateral offer, but simply an authorization to the public agencies of the Salvadoran State to agree on arbitration clauses in which they indicate that they submit to arbitration their controversies with private parties, provided they concern disposable rights. Consequently, since the parties did not execute any arbitration clause or *compromis* giving express jurisdiction to the Centre, this Arbitral Tribunal must deny its competence to hear the claims arising from the **Contract**.

329. Under the same line of reasoning, and even if Articles 25 and 77 of the Mediation, Conciliation and Arbitration Law implied a mandatory duty of the State agencies and, therefore, a right of the private parties to submit their disputes to arbitration, in none of the provisions indicated is there a reference to the Centre and, therefore, the requirement established in Article 25(1) of the ICSID Convention is not met.

330. In light of the foregoing, the Arbitral Tribunal considers that in this case it is not possible to infer its competence from Articles 25 and 77 of the Mediation, Conciliation and Arbitration Law of El Salvador, or from any other article of that Law, because (i) there is no article in that Law that meets the requirements established in Article 25 of the ICSID Convention to confer jurisdiction on the Centre, (ii) said Law did not exist at the time of execution of the **Contract** and, therefore, the parties could not have consented to its content, and (iii) said provisions represent only an authorization to enter into an arbitration clause or *compromis*, and not an agreement to submit to the jurisdiction of the Centre.

331. Having decided the foregoing, the Tribunal will next analyze whether, based on the legal texts in which there is an express reference to the jurisdiction of the Centre, it is competent to hear the disputes arising from the **Contract** executed between **El Salvador** and **Inceysa**.

d) Investment Law

The **Claimant** seeks to base the jurisdiction of the Centre to hear the contractual claims on Article 15 of the Investment Law, which reads as follows:

"In case controversies or differences arise between national or foreign investors and the State regarding their investments carried out in El Salvador, the parties may resort to the competent courts of justice in accordance with the legal procedures.

In the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to:

a) the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention);

b) International Centre for Settlement of Investment Disputes (ICSID) with the purpose of solving the controversy through conciliation and arbitration, in accordance with the procedures of the Additional Facility of ICSID; in those cases in which the foreign investor involved in the controversy is a national of a State that is not a contracting party to the ICSID Convention."

332. The foregoing clearly indicates that the Salvadoran State, by Article 15 of the Investment Law, made to the foreign investors a unilateral offer of consent to submit, if the foreign investor so decides, to the jurisdiction of the Centre, to hear all "*disputes referring to investments*" arising between **El Salvador** and the investor in question. However, in the case at hand, as indicated in the previous paragraphs, **Inceysa** cannot enjoy the rights granted by said Investment Law because its "investment" does not meet the condition of legality

necessary to fall within the scope and protection of that law. Consequently, this Arbitral Tribunal cannot do anything other than deny the jurisdiction of the Centre and its competence to resolve the claims arising from the Contract.

333. Furthermore, this Arbitral Tribunal also agrees with the argument of **El Salvador** to the effect that, in order to invoke the arbitration jurisdiction provided in the Investment Law, there must be a claim with substantive grounds in said law, a situation which does not exist in the case at hand. Indeed, **Inceysa** cannot claim the jurisdiction of the Centre to hear the disputes arising from the **Contract** based on a legislative provision that grants jurisdiction to the Centre only to hear disputes arising from the application of the Law that excludes purely contractual disputes.

334. Based on the foregoing, this Arbitral Tribunal denies its competence to hear the contractual disputes of the parties, based on Article 15 of the Investment Law, which grants jurisdiction to the Centre only to hear disputes arising from the application of the Law.

e) The BIT

335. Finally, the Claimant seeks to base on the **BIT** itself the jurisdiction of the Centre to hear its contractual disputes with **El Salvador**. However, as indicated above, **Inceysa** cannot benefit from the rights granted in the **BIT**, including access to the jurisdiction of the Centre, because its investment does not meet the conditions of legality necessary to be included within the scope of that investment protection.

336. Such being the case, for the reasons presented, the jurisdiction of the Centre to hear the disputes arising from the **Contract** or any other dispute, of any origin, cannot be recognized by this Arbitral Tribunal because **Inceysa's** investment does not fall within the scope of the **BIT**.

337. In summary, this Arbitral Tribunal concludes that in the present case the Centre does not have jurisdiction to hear the dispute brought before it, arising from the **Contract** executed between **El Salvador** and **Inceysa**, and the Arbitral Tribunal does not have competence to resolve these disputes.

VI. COSTS

338. In this award, the Arbitral Tribunal has carefully analyzed the incorrect manner in which the **Claimant** acted in connection with Public Bid number 05/2000, for Contracting for Services for the Installation, Management and Operation of Mechanical Inspection Plants for Vehicles, which is the source of the disputes it wanted to resolve in this arbitration proceedings. By such undue conduct, it obtained the award of the bid, which obviously would not have happened if MARN of **El Salvador** had known the reality of the facts. Knowing that it had behaved improperly in the bidding process, it initiated this arbitration, in which, again, it hid facts of enormous importance for the resolution of this matter. It was necessary for its counterpart to make a great and costly effort to prove **Inceysa's** incorrect acts. Therefore, this Tribunal considers that it must bear all of the fees and expenses of the arbitrators and the administrative fees for the use of the Centre. In spite of the foregoing, the Tribunal considers that the circumstances surrounding the negotiation that gave rise to this dispute, and another undertaken by ANDA at the same time; the naïve handling of bid number 05/2000 by MARN officials and, in general, the way in which they and other public officials of El Salvador reacted to the actions of **Inceysa**, mean that the conduct of El Salvador cannot be considered beyond reproach. For this reason, the **Respondent**, like **Inceysa,** must pay the fees of the counsel contracted by each of them to advise them.

VII. DECISION

339. For the reasons presented and pursuant to Rules 41(5) and 47(1)(j) of the Arbitration Rules and Article 61(2) of the Convention, the Arbitral Tribunal unanimously decides:

1. To accept the objection to the jurisdiction of the International Centre for Settlement of Investment Disputes raised by the Republic of El Salvador.

2. Consequently, declare that the **Centre** does not have jurisdiction to hear this matter and that this Arbitral Tribunal is not competent to resolve it;

3. Because it is unnecessary, it declines to rule on the Provisional Measures requested by the Republic of El Salvador;

4. To impose on Inceysa Vallisoletana S.L. the payment of the entire fees and expenses of the members of this Arbitral Tribunal and of the adminsitrative fees for the use of the **Centre**. Each party must pay the fees of the counsel who advised it.

5. The petitions of the parties that are not expressly granted shall be considered denied.

signed
Burton A. Landy
Arbitrator
Date: *July 10, 2006*

signed
Claus von Wobeser
Arbitrator
Date: *July 13, 2006*

signed
Rodrigo Oreamuno Blanco
President
Date: *July 25, 2006*