

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

IBM World Trade Corporation, Claimant

Vs.

**Republic of Ecuador
(ICSID case No. ARB/02/10)**

DISSENTING VOTE OF Mr. LEON ROLDOS AGUILERA

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

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

2. In the text of the referred public deed of the contract of concession and rendering of services of administration and maintenance of the Information System of the Customs Service and the control and supervision of the automatized proceedings of the DUI Office, entered into in Quito on June 20, 1996, between the Ecuadorian Government, represented by the Ministry of Finances and Public Credit and IBM del Ecuador S.A., the twenty-third clause, under the subtitle “Jurisdiction and applicable Law”, establishes that for any controversy that may arise in relation to the interpretation, application, execution or causes of breach, the parties agree to submit themselves to the jurisdiction of the competent judges or tribunals of the city Quito.
3. The twenty-third clause transcribed above is a valid contractual clause, between the parties, in which one of the parties, IBM del Ecuador S.A., agrees with the Ecuadorian Government, the other contract party, on the terms of jurisdiction and competence, which is coherent with section a) of paragraph 3 and section a) of paragraph 2 of article VI of the abovementioned treaty. What is more, the contracts for the provision of support and service in the protection of automatization of the Customs Service as of September 8, 1983, the amendment dated July 9, 1993 and the amplification dated August 1, 1994, all of which are mentioned in the complaints, have similar clauses on jurisdiction and competence.
4. It is true that the aforementioned Treaty with the United States of America considers the possibility to submit the differences to the convention on the settlement of investment disputes between governments and nationals of other countries, generated in Washington on March 18, 1995, (ICSID convention) section 3a).i), but it is not applicable to the specific case, due to that expounded in the foregoing number 1 (referring to sections 2-a), 2-b) and 3-a) of the treaty between Ecuador and the United States of America.
5. The claimant’s plea about the juridical situation of the investment, differentiating it from the contractual terms; in order to conclude that the commitments to submit themselves to the jurisdiction of Ecuador and the competence of the judges and treaties of Quito are not applicable, pursuant to the clause referred to in the foregoing numbers 2 and 3, arises from the assumption that the contents –the contracts- are not binding of the contents –in this case, what is presented as an

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

6. The claimant's argument that the certificates of understanding and commitment and the certificate of final receipt, between the Corporación Aduanera Ecuatoriana and IBM del Ecuador S.A. generate juridical relations that are different from the contracts that were their antecedents, is unlawful, in first place since they are only the consequence of the instruments subscribed before, secondly because it is not the Ecuadorian Government who subscribes it, but the Ecuadorian Customs Corporation, which does not represent the former.
7. The allegation that letter a) of the second paragraph Art. VI of the treaty is to be understood as conditioning the concept of submission when initiating administrative or judicial actions, is a limitative and unfounded interpretation. The more, the twenty-third clause itself expressly states "...the parties agree to submit themselves to the jurisdiction of Ecuador and the competence of Judges and Tribunals of Quito."

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

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

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

León Roldós Aguilera,
Arbitrator