Date of dispatch to the parties:
January 13, 1997

ICSID Case No. ARB/95/2

IN THE INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
BETWEEN
Cable Television of Nevis Ltd. and Cable Television of
Nevis Holdings, Ltd.,
(Claimants)
AND
The Federation of St. Christopher (St. Kitts) and Nevis
(Respondent)
AWARD
OF
December 16th, 1996

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"holding company" means Cable Television of Nevis Holdings, Ltd.

"ICSID" means the International Centre for Settlement of Investment Disputes.

"NIA" means the Nevis Island Administration.

"operating company" means Cable Television of Nevis Limited.

"the Request" means the Request by the Claimants in writing dated October 23, 1995, to ICSID requesting arbitration.

"Respondent" means the Federation, the other party to the dispute as alleged by the Requesting Parties.

"Rules" or "Institution Rules" means the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) of ICSID.

ABBREVIATIONS

"the Agreement" means the Investment Agreement dated September 18, 1986, between the Government of Nevis and Cable.

"Cable" or "claimants" or "the Requesting Parties" means Cable Television of Nevis Limited and Cable Television of Nevis Holdings, Ltd.

"the Constitution" means the Constitution of Saint Christopher and Nevis.

"the Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, referred to in Clause 16 of the Agreement.

"Federation" means the Federation of St. Christopher (St. Kitts) and Nevis.

CHAPTER 1

Request for Arbitration, Composition of Tribunal, Representation, Hearings and Issues.

1.01 The Arbitral Tribunal begins by recalling that Cable Television of Nevis Limited and Cable Television of Nevis Holdings, Ltd., (hereinafter sometimes called "Cable" or "the claimants") by Lee A. Bertman, President, addressed a request in writing dated October 23, 1995 to the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter called "ICSID") requesting arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called "the Convention").

1.02 The Request states that: (1) both corporations were formed under the Companies Act of the Federation of St. Christopher (St. Kitts) and Nevis (hereinafter called "the Federation"), (2) the two corporations are 99.9% owned (and therefore controlled) by nationals of the United States of America, a Contracting State, and (3) this control, combined with the Agreement described in paragraph 1.03 below (hereinafter called "the Agreement"), constitute the agreement of the parties to treat Cable as a "National of another Contracting State" under Article 25 (2) (b) of the Convention.

1.03 The Request further states that the other party to the arbitration is the Federation of St. Christopher and Nevis (hereinafter called "the Federation"), a Contracting State and that both the United States of America and the Federation are signatories of the Convention. In addition, the Agreement between the parties dated September 18, 1986 provides, in Clause 16, that "any disputes relating to this agreement, its performance or nonperformance shall be referred to arbitration under the rules of procedure for arbitration proceedings (hereinafter the "Rules") in effect as of February 1, 1981 adopted

under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States."

1.04 Cable claims it has invested over one million U.S. Dollars in the construction of a cable television system on the island of Nevis pursuant to the Agreement. In addition, recent hurricane damage to Cable's system on Nevis approximates U.S.$50,000.00. Cable provides basic tier, and premium CATV services on the island of Nevis under the Agreement. Clause 7 of the Agreement permits Cable to increase both its basic and premium charges. Premium charges are not controlled after the first year. Cable believes that tier services (a group of additional channels in addition to the basic services channels) should be treated as premium services for this purpose. As increases in basic charges may only be proportionate to increases in Cable's "cost of goods and services," Cable has repeatedly submitted to the Federation, according to the Request, information and studies based upon that information which justify increases in basic charges.

1.05 Despite the language of the Agreement, according to the Request, (1) the Federation has consistently refused to permit Cable to increase either its basic or premium charges, (2) the Federation, through its Attorney-General, obtained from the High Court of Justice, Federation of St. Christopher and Nevis, Nevis Circuit, an exparte order restraining and enjoining Cable from raising rates prior to completion of the arbitration requested above, and (3) as a result of the actions of the Federation, Cable is unable to recoup its investment and continues in a substantial (in excess of U.S.$700,000) cumulative loss position. Cable seeks the relief in the award of the arbitrators.

1.06 ICSID transmitted a copy of the Request to the Federation under cover of a letter dated November 13, 1995, pursuant to Rule 5 (2) of the Institution Rules of ICSID (hereinafter called "the Rules"). The Request was registered and the parties were notified pursuant to Article 36 (3) of the Convention.

1.07 On November 30, 1995, the Nevis Island Administration (hereinafter called "NIA") through its Legal Department advised ICSID that the dispute between the parties had been overtaken on October 17, 1995 by the Public Utilities Commission Ordinance.

1.08 On December 19, 1995, Cable noted that the Federation, under Chapter II, Article 25, of the Convention, having consented to ICSID arbitration contractually and confirmed that consent before

the Federation's High Court of Justice in August of 1995, could not withdraw its consent unilaterally.

1.09 In accordance with Article 37 of the Convention, G. Arthur A. Maynard of Barbados and Rex Mckay, S.C. of Guyana were appointed Arbitrators by the claimants and respondent, respectively, and Woodbine A. Davis, Q.C. of Barbados, was appointed President of the Tribunal, with the agreement of both parties. Ms. Margrete Stevens, Counsel of ICSID, performed the duties of Secretary of the Tribunal.

1.10 The Claimants were represented by A. Bruce Bowden, Counsel, of Pittsburgh, Pennsylvania, U.S.A. and the Respondent, appearing through NIA, was represented by Terrence V. Byron, Barrister-at-Law and Solicitor, and Mark A.G. Brantley, Attorney-at law, both of Nevis.

1.11 The Tribunal held 2 sessions both in Barbados, the first on March 12, 1996, at which the Respondent produced written documentation containing several objections to ICSID jurisdiction in the matter, and the other on July 1 and 2, 1996, at which lengthy oral submissions were addressed to the Tribunal by counsel on both sides on the documentation furnished to the Tribunal by both parties up to and including July 1, 1996, including further objections by the Respondent to ICSID jurisdiction.

1.12 Basically the Respondent has submitted that, notwithstanding the Agreement and the High Court proceedings, ICSID is without the jurisdiction in the dispute on the following grounds:

(a) the alleged dispute is not within the competence of the Arbitral Tribunal;

(b) the Arbitral Tribunal is not competent to countenance the substitution of a Contracting State, namely, the Federation, in lieu of NIA, as a party to these proceedings;

(c) the institution of the High Court Proceedings for an Injunction does not amount to consent to ground jurisdiction for the purposes of the Convention;

(d) the Request for Arbitration does not comply with the requirements of the Institution Rules in several material particulars, and the said noncompliance is fatal in that it cannot be overcome;

(e) Cable Television of Nevis Limited was not in existence at the time it purported to enter into the Agreement on which it relies for its Request for Arbitration and, consequently, the

Agreement is irrelevant in so far as that Company is concerned; and

(f) Cable Television of Nevis Holding Ltd. is an Offshore Company and, as such, is prohibited from carrying on business within Nevis and any dispute that arises as a result cannot be described as a legal dispute for the purposes of the Convention;

1.13 No oral evidence was taken and all members of the Tribunal, the Secretary, Counsel for the Claimants and both Counsel for the Respondent attended throughout the sessions. The issues outlined in paragraph 1.12 above are discussed in Chapters 2 to 7 and the decisions reached are summarised in Chapter 8.

CHAPTER 2

First Issue: The Alleged Dispute is not Within the Competence of the Arbitral Tribunal.

2.01 This submission by the respondent is based on the contention that NIA (not the Federation) is the Contracting Party in the Agreement, is a constituent subdivision or agency of a Contracting State; i.e., the Federation, and has not been designated as such to ICSID by the Federation. Hence, the Arbitral Tribunal has no jurisdiction to hear the matter.

2.02 The Federation is established by Section 1 of Chapter 1 of the Constitution of Saint Christopher and Nevis (hereinafter called "the Constitution") which sets out as follows:

(1) "The island of Saint Christopher (which is otherwise known as Saint Kitts) and the island of Nevis shall be a sovereign democratic Federal State which may be styled Saint Christopher and Nevis or Saint Kitts and Nevis or the Federation of Saint Christopher and Nevis or the Federation of Saint Kitts and Nevis."

(2) "The territory of Saint Christopher and Nevis shall comprise all areas that were comprised in the associated state of Saint Christopher and Nevis immediately before September 19, 1983, together with such other areas as may be declared by Parliament to form part of the territory of Saint Christopher and Nevis."

2.03 The Constitution further stipulates at Section 2 of Chapter 1 that "this Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void."

2.04 The Constitution makes specific reference to the Island of Nevis, as distinct from the Federation, in many areas, namely, sections 8 (8), 9 (2) (c), 19 (4), (6) (b), (7), (8) and (10) and (20) of Chapter II, section 23 (2) and (6) (b) of Chapter III, sections 28 (3) and (5) (a), 29 (3), 37 (2) to (7) inclusive, 38 (4) (c) and (5) and (49) (1) of Chapter IV, sections 51 (4), 553 (4) (d) and 56 (1) (I) and of Chapter V, section 77 (1) and (2) of Chapter VII, section 98 (c) of Chapter IX, the whole of Chapter X, i.e., sections 100 to 114, sections 115, 118 (2), 119 in part, and 120 of Chapter X, and Schedules 3, 5 and 6. Some of these provisions have been referred to by the Requesting Parties' counsel in his Response of Requesting Parties to Objections to Jurisdiction.

2.05 Perhaps the more relevant provisions of the Constitution for the purpose of this exercise are set out in Section 37 (2) to (7) of Chapter IV and the whole of Chapter X, in particular sections 100, 102, 103, 105, 106 and 108. These sections establish a separate legislature for Nevis, the Nevis Island Legislature, which consists of Her Majesty and an assembly styled the Nevis Island Assembly (Section 100), and has exclusive power to make laws, styled Ordinances, for the peace, order and good Government of the Island of Nevis with regard to the specified matters (Sections 103 and 119 (1) and Schedule 5). Any such Ordinance may contain incidental and supplementary provisions that relate to a matter other than a specified matter provided there is no inconsistency between such provisions and those of any law enacted by Parliament, in which case the latter provisions would prevail (Section 103 (2) and Part 2 of Schedule 5). Section 37 expressly restricts Parliament, which is established for the Federation (Section 25) to make laws for the peace, order and good Government of the Federation (Section 37 (1)), from making laws having effect in Nevis in respect of any of the specified matters without the request and/or consent of NIA,

except for provisions in the interests of external affairs and defence as specified in a proclamation by the Governor-General (Section 17 (2) and (4)). Section 102 establishes NIA, stipulates how it is constituted and sets out its functions. Section 106 provides NIA with exclusive responsibility for administration within the Island of Nevis, in accordance with relevant laws, of airports and seaports, education, extraction and processing of minerals, fisheries, health and welfare, labour, crown lands and buildings appropriated to the use of the Federation, and licensing of imports into and exports out of the State. Section 106 (4) provides that "nothing in subsection (1) shall be construed as precluding the legislature from conferring other responsibilities on the Administration." In other words the Nevis Island Legislature may on its own expand the list of responsibilities of NIA. A list of the specified matters for which the Nevis Island Legislature has exclusive power to make laws under the Constitution is set out in Schedule 5. Section 108 establishes the Nevis Island Consolidated Fund as distinct from the Consolidated Fund of the Federation.

2.06 Counsel for the Requesting Parties in his Response of Requesting Parties to Objections to Jurisdiction refers to the powers and duties of the Governor-General of the Federation including the power to make rules limiting NIA's liability to service its public debt and providing for consultation between the Federation and the Administration concerning any proposal for borrowing and the obtaining of grants (Section 111). The Response also refers to the power of the Governor-General to appoint all members of NIA including the Premier, which power in respect of the latter is exercised in his own deliberate judgment and in respect of the other members of NIA in accordance with the advice of the Premier (Section 102). Counsel also refers to Section 116 under which the performance of any function by the Governor-General in his own deliberate judgment or in accordance with the advice or recommendation of, or after consultation with, any person or authority shall not be enquired into in any court of law.

2.07 As empowered by the Constitution, NIA may contract (Section 28 (6) as modified by Section 104 (1) and reflected at Section 28 (6) of Schedule (6), borrow (section III (1) (b) and (c) and paragraph (5) of Part I of Schedule (5) if the Nevis Island Legislature passes an Ordinance to this effect, hold land and buildings other than Crown property (Section 8 (8), paragraph (15) of Part 1 and paragraph 1 (c) of Part 2 of Schedule 5) with the authorisation of the Nevis Island Legislature, sue and be sued in the Courts of Law in the State (Section 112 and paragraphs 1 (b) and (by implication) (d) to (k) inclusive, and 3 of Part 2 of Schedule 5), and charge rates and taxes on buildings and fees, charges and other taxes, if so authorised by the Nevis Island Legislature (Part 2 of Schedule 5). As already indicated in paragraph 2.06 above, the Governor-General may make rules limiting NIA's existing or contingent liability for servicing its public debt, but the power of the Governor-General in this respect is exercisable on the advise of the Prime Minister which advice shall not be given without the concurrence of the Premier.

2.08 Having regard to the foregoing, it would appear that NIA possesses juridical personality and it is evident that the Constitution recognises Nevis in two ways: one, as an integral in-separate part of the Federation (Chapter I, Section 1) with both St. Kitts and Nevis being unified as one sovereign democratic federal state, and two, as a separate, distinct and somewhat autonomous entity within the Federation (Chapter X enhanced by Section 37). There are several instances within the Constitution whereby NIA or Nevis or the Nevis Island Legislature is treated as distinct from the Federation but what greater evidence of this separate identity for NIA within the Constitution is there than in Section 112 which provides that "[t]he High Court shall, to the exclusion of any other Court of Law, have original jurisdiction in any dispute between [NIA] and the Government [the Federation] if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends." Another example recognising the creation by the Constitution of a separate personality for NIA is in Section III which call for consultation between the Federation and NIA concerning any proposal by NIA to obtain grants or loans of money. As put by Claimants' Counsel in the Response of Requesting Parties to Objections to Jurisdiction, "the island of Nevis, and the NIA are in fact part of the Federation of St. Kitts and Nevis and... the NIA, the Premier, and the Nevis Island Legislature and Assembly are creatures of the Federation Constitution, having been created by that Constitution" (page 3, last paragraph of the Response). Section 102 (5) clearly sets out that "[t]he functions of [NIA] shall be to advise the Governor-General in the government of the Island of Nevis and [NIA] shall be collectively

responsible to the [Nevis Island] Assembly for any advice given to the Governor-General by or under the general authority of [NIA] and for all things done by or under the authority of any member of [NIA] in the execution of his office." It would therefore appear that NIA, as a juridical body, has the power to enter into the Agreement on its own and independently of the Federation. The Agreement was signed by the then Premier of Nevis who is, under the Constitution, a member of NIA ex officio.

2.09 Turning to the Agreement, the parties, as named therein and conceded by Cable in paragraph 2 of the Request, are the Government of Nevis (therein called the Government) of one part and Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings Ltd., (therein and herein together called Cable) of the other part. By clauses 1 and 2 of the Agreement, the Government of Nevis granted to Cable the right and permission to perform the functions of a cable television company on the Island of Nevis including certain exclusive rights, privileges and franchises in relation to a CATV system on Nevis and to provide video and entertainment services by cable or fiber and the right to receive, retransmit and redistribute over the cable television system all audio and video programming receivable on Nevis. The Requesting Parties (herein also called Cable) have consistently claimed that the Agreement was entered into by the Government of Nevis as representing the Federation, in other words that the Federation should take the place of the Government of Nevis as a party to the Agreement. It seems however that, on the face of it, the Agreement recognises the Government and the Federation separately, since both appear at separate places in the Agreement. Paragraph H of Clause 2 is obviously a case in which the Government of Nevis is intended as the body granting the right since that paragraph expressly uses the words "Government of Nevis," as well as Clause 1 having regard to the definition of the parties in the Agreement.

2.10 Could these concessions have been granted by the Federation? This is really a moot point for we are here concerned not with who can do what but who contracted with whom and in what capacity. The Nevis Island Legislature has exclusive power to make laws, styled Ordinances, for the peace, order and good Government of Nevis with respect to the specified matters. Further, by Section 106 of the Constitution, NIA has exclusive responsibility for the administration within the Island of Nevis of certain specified areas. The basic

tier of programming and premium service referred to in paragraphs b and c of Clause 7 of the Agreement appears to be educational and informative and Cable's letters of September 8, 1992 and February 14, 1994 to the Premier of Nevis do mention "the use of the Nevis Cable Television system for educational uses..." These therefore seem to be matters which appear to fall exclusively within NIA's domain.

2.11 Cable in its Response to Objections to Jurisdiction states that "the Island of Nevis does not have any power to levy its own taxes except in expressly listed cases, which do not include taxes or charges upon income of public utilities in general or CATV service in particular (Schedule 5, Part 2; page 94)." In this regard, while not addressing the matter of public utilities as this is not an issue before the Tribunal, it should be pointed out that Clauses 3 and 4 of the Agreement recognise the inability of NIA to collect certain revenue from a CATV operation in Nevis, and, in so doing, creates a distinction between the Federation and NIA. In Clause 3, "the parties [to the Agreement] recognise that the Government of St. Kitts-Nevis (hereinafter, Federation) currently imposes a levy of Three Dollars ($3.00) EC per month per cable television company subscriber." Furthermore, in Clause 4, "recognising that an active CATV System creates additional revenues for the Government [NIA] and in order to stimulate rapid development and encourage financial growth, Government [NIA] and Cable shall with thirty (30) days of the date of execution hereof [date of Agreement September 18, 1986] obtain from the Governments [sic] of St. Kitts and Nevis (Federation) an appropriate ruling under which Cable shall receive a one hundred percent (100%) tax holiday on corporate income tax and the repatriation thereof for a ten year term." NIA and Cable seem to have recognised prior to the signing of the Agreement the points now being made by Cable's counsel on this score and addressed them in the Agreement.

2.12 It would seem that one of the points raised by Cable in its Response to Objections to Jurisdiction (see the third paragraph on Page 3 of such Response) is that the granting of exclusive responsibility to NIA and the Nevis Island Legislature over specific areas does not necessarily mean that the Federation is totally impotent with regard to such matters or that it has irrevocably abdicated responsibility for such matters, especially bearing in mind section 106 (2) of the Constitution, which reserves the exercise of any

power vested by law in the Governor-General or a Minister and does not empower NIA to take any action inconsistent with the general policy of the Federation as signified by the Prime Minister. In other words, the exclusive responsibility to NIA and the Nevis Island Legislature could be interpreted as being exclusive as regards any other institution or person in the island of Nevis but does not affect any inherent power in the Federation as regards such matters. In the second complete paragraph of Cable's Response to Objections to Jurisdiction, the statement is made that the list set out in Schedule 5 to the Constitution does not include "reference to either public utilities or cable television service." In the next paragraph, mention is made of NIA's "exclusive responsibility for the administration within the island of Nevis of several listed matters none of which relate to public utilities or cable television service." Are they now saying that the Government of Nevis could not enter the Agreement in the first place or, if it did, it could only be on behalf of the Federation? Is the execution of the Agreement by Nevis ultra vires? It should be noted that the Constitution makes no reference at all to public utilities or cable television services, i.e., in respect of the Federation or Nevis. Does the absence of such provision mean that the Federation cannot provide for public utilities or cable television in the island of St. Kitts? Surely, cable television service falls within the parameters of "peace, order and good government of the island of Nevis" for the matters listed in Part 1 of Schedule 5 to the Constitution and the incidental and supplementary matters set out in Part 2 of the said Schedule, note being taken that the lists are not all embracing, and that, by section 106 (4) of the Constitution, the Nevis Island Legislature can confer on NIA responsibilities additional to those already listed in paragraph 5 above.

2.13 Two other points are of some significance. One is that at paragraphs (8) and (16) of Part 1 of Schedule 5 to the Constitution, matters which the Nevis Island Legislature has exclusive powers to make laws (ordinances) in respect of Nevis include (a) conservation and supply of water, and (b) manufacture and supply of electricity. It is not uncommon that, in some countries, including Caribbean countries, the fixing of rates for one or both of these and other public utilities is determined by public utilities tribunals established by the laws of the respective countries, and it should be noted that the Nevis Island Legislature has included both of these utilities within the Public Utilities Commission Ordinance of

Nevis. The other point is that the Public Utilities Commission Ordinance includes within the definition of public utility "the distribution of television programmes by coaxial or fiber optic cable directly or indirectly to or for the public." It is evident that the Nevis authorities consider themselves to have the power constitutionally to deal with public utilities and the provision of cable television services for Nevis and it is not for this Tribunal to enquire into whether they are right or wrong. It would seem that any dispute on this score, being a dispute as to the extent of the powers of the Nevis authorities within the Constitution, must be between the Federation and NIA for hearing by the High Court in accordance with Section 112 of the Constitution, if the parties are unable to settle their differences, the same High Court, albeit sitting in the Nevis Circuit and not in the St. Kitts Circuit, the seat of the Federation, which ruled that the fiat of the Attorney-General of the Federation was not necessary to enable NIA to commence or defend litiguous matters.

2.14 Of special note is the fact that the words "peace, order and good government" also appear in the Constitution in respect of laws by Parliament in relation to the Federation. In other words, these words, which appear in the constitutions of other nations, do give Parliament and the Nevis Island Legislature respectively far reaching powers within which to make laws and ordinances, provided they fall within the parameters prescribed by the Constitution. The argument in this regard by Cable in its response to Objections to Jurisdiction would therefore seem to fail when attention is paid to Section 37 (2) of the Constitution which expressly restricts Parliament from making laws having effect in Nevis which extend to any of the specified matters, and above all, to the fact that nothing has been brought to the attention of the Tribunal to establish that an agreement by NIA, on behalf of Nevis independent of the Federation, for the creation of a CATV in the Island of Nevis, exclusively for that island, is in conflict with any law passed by Parliament or is inconsistent with the general policy of the Federation or is in direct contravention of the exercise of any power vested by law in the Governor-General or a Minister. It would therefore, accordingly, appear that these concessions could be granted by NIA and that the Federation had no standing in the matter.

2.15 In the Agreement, the words "the Government" meaning the Government of Nevis appear twenty four times and a further seven

times in the addendum thereto by telex. Both the Agreement and telex were signed by Mr. S. Daniel, then Premier of Nevis who signed as such on behalf of the Government of Nevis. It states at paragraph f. of Clause 2 that the Government will endeavour to ensure that the local currency is convertible to U.S. funds. Paragraph b. of clause 4 talks of Non-Nevisian employees of Cable; Clause 5 talks of Cable exerting its best efforts to hire and train citizens of Nevis and that the company (it doesn't say which one) will employ Nevisians only, if qualified persons are available, otherwise it will hire foreign nationals; in Clause 6, the Government agrees to make available necessary work permits for foreign nationals required by Cable, business licences, building permits and construction permits, and to grant customs duty exemption with respect to material and equipment imported by Cable in connection with the CATV system and modified concessions to importation of household and personal effects of Cable non-Nevisian staff, Clause 13 makes provision in the event of nationalisation of Cable by Nevis [sic], and Clause 14 stipulates that, in the event that Nevis [sic] shall become an independent nation, the Agreement shall continue in full force and effect. The last mentioned provision obviously relates to a situation over which the Federation has no control, having regard to section 113 of the Constitution.

2.16 In contrast to the foregoing, the Federation, as distinct from the Government of Nevis, is specifically referred to only three times in the Agreement, (1) — at Clause 3 — the parties, i.e., the Government of Nevis and Cable, recognise that the Government of St. Kitts-Nevis (hereinafter, Federation) currently imposes a levy of Three Dollars ($3.00) EC per month per cable television company subscriber; (2) — at Clause 4 — "Government and Cable shall within thirty (30) days of the date of execution hereof obtain from the Governments (sic) of St. Kitts and Nevis (Federation) an appropriate ruling under which Cable shall receive a one hundred percent (100%) tax holiday"; and (3) — at paragraph d. of Clause 6 — "If currency exchange rates, other than the free market are established by the Government or the Federation, Cable may, at Cable's option, use the best official exchange rate available."

2.17 It is manifestly evident from all the circumstances that Cable intended at all times to deal only with the Government of Nevis. This is supported by the telex of September 11, 1986 from the Washington based lawyers direct to the then Premier of Nevis to

further clarify the Agreement between the Government of Nevis [sic] and Cable, and to be treated as an addendum to the Agreement. Further reinforcement for this is evidenced by the events taking place since the Agreement was signed. Cable has at all times been in contact with NIA and no correspondence has surfaced to indicate that it at any time had any discussion with the Federation. Even if it can be held that several of the undertakings by the Government under the Agreement could not be performed directly by the Government, due note being taken that this was never proposed or argued by either party, this does not mean that automatically the Federation should be substituted for the Government as the party to the Agreement or that the Government of Nevis is a party to the Agreement purely as agent of the Federation. The only explanation in such case is that the Nevis Government's undertaking(s) to perform tasks outside its direct control can only amount to best efforts promise(s), a not unusual occurrence in agreements. It is therefore inconceivable that, at this stage, the Federation should be substituted for the Government of Nevis as the party contracting on the ground that, when the Agreement was entered into, the Government of Nevis signed on behalf of the Federation and not on its own behalf.

2.18 One cannot overlook the fact that Clause 16 of the Agreement, which is the only foundation for the institution of these Arbitral Proceedings, does not appear to have been given due consideration by the parties at the time the Agreement was negotiated and signed. During the hearing by the Tribunal, it was observed that the agreement in draft had been prepared by or on behalf of Cable and introduced by Cable to the Nevis authorities, due note being taken that had anything to do with it at the time of its preparation, negotiation and execution. Clause 16, to put it mildly, was an anachronism since it had no legal effect at the time of the Agreement, as conceded by Cable's counsel at the preliminary meeting, and appeared to be rescued only on September 3, 1995 the date when the Federation acceded to the Convention establishing ICSID. It is noted that there have been other ICSID cases in which relevant states became members of ICSID after the related investment agreements containing ICSID arbitration clauses had been signed, so the present case is not an isolated case in which the host state joins ICSID after the date of the investment agreement. One other such case is the Holiday Inns case in which the Base Agree-

ment was signed on December 5, 1966, whereas Morocco became a member of ICSID on June 10, 1967 and Switzerland, the nationality of the foreign investors, on June 14, 1968.

2.19 The procedure for commencing ICSID Arbitral Proceedings is laid down in the Convention and Rules and Regulations made thereunder. Article 25 (1), Chapter II of the Convention, provides that 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." The Contracting State for the purpose of these proceedings must therefore be the Federation, since the dispute is in respect of an agreement which is being performed within that State and the investors are claiming to be American citizens, i.e. nationals of another state, to wit, U.S.A., another Contracting State. The issue of the nationality of the other parties to the dispute is being dealt with later in this decision.

2.20 Cable attempted to introduce increased rates in the island of Nevis to take effect from September 1, 1995 and NIA through the Attorney-General of Saint Christopher/Nevis, as the applicant, moved the High Court of Justice, Federation of Saint Christopher and Nevis, Nevis Circuit, during Court Vacation, to obtain an exparte injunction against Cable. The exparte hearing took place on August 31, 1995, the day before the increased rates were to take effect, and the learned trial judge "ORDERED and DIRECTED that the Respondents [Cable] by their servants or agents or officers or otherwise be restrained and an injunction is hereby granted restraining them from acting in breach of contract entered into between the Government of Nevis and the Respondents dated September 18, 1986 AND in particular from raising the rates charged for the provision of cable services prior to the resolution of issues in dispute between the parties by arbitration as provided for by the aforementioned contract." The Court Order was served later the same day on Cable. Other documentation submitted to the Tribunal included an application by Cable to the same High Court with the same parties and same suit for an Order that the Injunction granted herein and dated August 31, 1995, be vacated and/or discharged. An affidavit by Mr. Lee Bertman, president of Cable, was filed in support. The application and affidavit were both dated and

filed December 1, 1995 with date for hearing set for December 4, 1995. It appears from the Observations Refuting Requesting Party's Responses to Objections to Jurisdiction that the documents were merely filed in the Court Registry and were not served on NIA. In these circumstances, the application was never heard. However, during October 25, 1996, members of the Tribunal received further documentation from the Respondent and the Claimants through ICSID indicating that steps are in train to have the injunction lifted, and on November 1, 1996 received from ICSID by fax a copy of the Court Order entered October 25, 1996, ordering that the injunction dated August 31, 1995, be vacated and/or discharged.

2.21 Cable had, however, by letter dated October 23, 1995, made request to ICSID for the institution of arbitration proceedings and named the parties to the arbitration as being "Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd., both corporations formed under The Companies Act of the Federation of St. Christopher (St. Kitts) and Nevis, and their shareholders (including the undersigned) referred to below as "Cable." The two corporations are 99.9% owned (and therefore controlled) by nationals of the United States of America, a Contracting State..... The other party to the arbitration is the Federation of St. Christopher and Nevis (the "Federation") a Contracting State. Communications to the Federation may be addressed to The Honorable Vance Amory, Premier, Nevis Island Administration, Administration Building, Charlestown, Nevis, West Indies." It is, at this stage, for the first time that the Federation is being named as a party to the Agreement.

2.22 The consent to ICSID arbitration contained in Clause 16 of the Agreement can only take effect in the present case on the matter of jurisdiction of ICSID if the Contracting State, i.e., the Federation, is a party to the dispute, or, if it is not a party and the relevant party to the dispute is a constituent subdivision or agency of the Contracting State, then that relevant party must have been designated as such to ICSID by the Federation. In addition, the consent by a constituent subdivision or agency of a contracting state requires the approval of that state unless that state notifies ICSID that no such approval is required. No documentation has been furnished to the Tribunal evidencing that NIA or the Government of Nevis has been so designated to ICSID by the Federation, and, in the circumstances, the request by Cable for arbitration in accor-

dance with Clause 16 of the Agreement can only pass this stage under Article 25(1) of the Convention if the Contracting State, i.e., the Federation, can by interpretation or otherwise be substituted in the Agreement in place of the Government of Nevis as the contracting party with Cable, or by some other means qualify as a party to the ICSID arbitration.

2.23 On reviewing Cable's Response to Objections to Jurisdiction on this point, it would appear that Cable is, or was at one time, under the impression, inter alia, that the Respondent's objections to jurisdiction are based in part on the assumption that Nevis Government is a state separate from the Federation. Respondent's objections do not so state, and it is noteworthy that Cable's counsel at the hearing agreed that the word "state" has different meanings to different people. On the international scene, a state is an international legal person i.e. an independent government, which has total control over its affairs both at the national and international levels including its foreign affairs and national security. Such a state can join international organisations like the United Nations or the World Bank or ICSID as, to our knowledge, the Federation has done in each of these three institutions. In other parlance, the word "state" has been attributed to one of states of the United States of America, e.g. Pennsylvania or Iowa or whatever, or of Australia, e.g. the State of New South Wales, which is not an international body capable of sitting in international organisations alongside independent nations of the world, but, nevertheless, each an integral part along with other states of similar status of the United States of America and Australia respectively, which themselves are international legal persons. This appellation also applied to several countries of the English speaking Eastern Caribbean Countries, including St. Kitts and Nevis (formerly St. Kitts, Nevis and Anguilla) prior to their achieving independence from the United Kingdom.

2.24 However, Cable, in the first sentence on page 4 of their Response to Objections to Jurisdiction, mentions that the "Federation has argued that, because the High Court sitting in Nevis has found that the NIA can sue and be sued even when the Attorney-General of the Federation refuses to give his fiat, this establishes that Nevis is an entity separate from the Federation....." In the penultimate sentence of that paragraph, Cable states that this decision is certainly not authority for the proposition "that Nevis is a state separate from the Federation....." The Respondent never sought to establish that Nevis is a state. In fact at point (88) of the Respondent's Submissions in its Objections to Jurisdiction, the Respondent sets out that the "Federation is a federal sovereign democratic State, whereas the NIA is a semi-autonomous Department within that State," and, later in the said Objections, submits that the relationship between NIA and the Federation is analogous to the relationship between the Government of Northern Ireland and the United Kingdom, with one not per se an agent of the other. Cable's counsel, however, by letter dated April 30, 1996, sets out the following:

> "Respondent argues that ICSID lacks jurisdiction not because the Nevis Island Administration ("NIA") is a separate sovereign party but rather because NIA is a subdivision or agency of the Federation of St. Kitts and Nevis (the "Federation") which has not been designated to ICSID by the Federation. Cable went to some trouble to review and analyse in their Response the Federation Constitution because that document makes it clear that NIA and the Federation are one and the same, both being creatures of that Constitution. Nowhere in that document are the words "subdivision" or "agency" or any equivalent expression used to describe NIA. This is one of a number of assertions by the Respondent in its "Observations" for which no legal authority, either in the Federation Constitution or elsewhere, is cited."

2.25 Respondent objected, and quite rightly so, to the issue of this letter, as such issue is in contravention of the procedures agreed to at the first hearing. However, in order to give both parties the fullest hearing, the Tribunal has included this letter in its deliberations. In so doing, the conclusion already reached in paragraph 2.08 above that the Constitution treats Nevis in two ways, (1) as integral and in separate part of the Federation and, (2) as a separate and distinct entity within the state, remains unchanged. In other words, the position posited by Cable that the Constitution makes it clear that NIA and the Federation are one and the same is not accepted.

2.26 The Constitution does not have to set out the words that Nevis is a constituent subdivision or agency of the Federation in order for it to be designated or deemed as such. This is a matter to be determined by the Tribunal having regard to all the documentation

available to it, and, indeed, such designation is a matter for the Federation in matters under the ICSID Convention. Furthermore, whether or not the Attorney-General's fiat is necessary for commencement of legal proceedings by NIA does not appear to be a deciding factor in determining that the Government of Nevis through NIA has a separate legal personality. This legal personality has already been addressed above.

2.27 Additionally, on this issue, having regard to the other provisions in the Constitution applicable to the island of Nevis, the Nevis Island Legislature and NIA, one cannot overlook the fact that the Government of Nevis by way of the Nevis Island Legislature has the power enshrined in the Constitution to secede from the Federation, without consulting the Federation, by following the procedure laid down in Section 113 of the Constitution, thereby becoming, if it so wishes, another independent nation with the inherent eligibility to join international organisations and sit and vote alongside other independent countries, including St. Kitts (the sovereign democratic state after the secession of Nevis (Section I of Schedule 3 to the Constitution) and the superpowers. Upon so doing, Cable should be able to invoke Clause 14 of the Agreement, whereby the Agreement with its exclusive licence to Cable continues in force, notwithstanding the secession. Bearing all the foregoing in mind, it seems clear that the Government of Nevis, as stated in the Agreement, is the proper party to the Agreement and, in the absence of any assignment, that the Federation has no locus standi or privity of contract with Cable and should not be substituted therefor as claimed by Cable.

2.28 The last point to be considered on this issue is the meaning of the words "(or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)" as appears in Article 25 (1) of the Convention. It is evident from Article 25 (1) that ICSID has no jurisdiction in matters brought by or against an entity other than a contracting state unless the entity has been designated to ICSID by the contracting state as a constituent subdivision or agency of the contracting state. Furthermore, it would appear that the provision applies to an entity over which the contracting state has some measure of control, including but not limited to a colony or partially autonomous government forming part of or belonging to the state, a government statutory corporation or

a company incorporated under national/local legislation in which the Government has some interest or shareholding, the apparent intention being that overseas investors dealing with governments and/ or Government owned or controlled enterprises have available to them independent arbitrators and rules to settle any disputes under their investment agreements rather than have to "resort to litigation in the courts of the host state, a forum where national bias and the political pressures which attend foreign investment may result in favouritism towards the sovereign" (John T. Schmidt Arbitration under the Auspices of ICSID: Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica). In other words, a body corporate established in the Contracting State wholly or substantially owned by private citizens would not appear to qualify for designation.

2.29 A review of the list of Designations by Contracting States Regarding Constituent Subdivisions or Agencies ICSID/8C (copies of which were delivered by ICSID to the parties and the Tribunal), reveals that, for instance, Australia has designated the State of New South Wales and four other states in addition to the Northern Territory and the Australian Capital Territory. At the time of the constitution of the Commonwealth of Australia, six states joined to form that Commonwealth, but, unlike in the case of St. Kitts and Nevis, their names for obvious reasons do not form part of the name of that independent country and four of these have been designated by Australia to ICSID as constituent subdivisions/agencies of Australia. It is also noted that Ecuador, Guinea, Madagascar, Nigeria, Portugal, and the Sudan have respectively designated what appears to be corporations, but there is no indication as to the degree of Government control therein, if any. The United Kingdom, with which we are more familiar, has designated as many as 16 of its colonies and dependencies, all of which to our knowledge are Government run. It is likely that these were designated in order to instill investor confidence in these Governments who, in any case, could not join ICSID having regard to their constitutional status. Of some interest is the inclusion among these designations of Anguilla which at one time was a part of the three islands grouping of St. Kitts-Nevis Anguilla, then an associated state with the United Kingdom. Note is taken that the list is not complete and that ad hoc designations and notifications can and have been made

to ICSID by contracting states pursuant to Articles 25 (1) and 25 (3) of the Convention.

2.30 In reviewing the list of ICSID cases up to July 1995, it would appear that there is only one reported case, at least up to 1986, involving the issue of ICSID's jurisdiction over a state agency, i.e., Klöckner Industrie-Anlagen GmbH, Klöckner Belge S.A. and Klöckner Handelmaatschappij B.V. v. United Republic of Cameroon and Societe Camerounaise des Engrais (SOCAME). SOCAME, a state controlled company incorporated in Cameroon pursuant to the parties' joint venture agreement, was named as a respondent even though Cameroon had not designated SOCAME as a constituent subdivision or agency. The issue was resolved without the need of a tribunal decision when Cameroon decided to designate SOCAME as a constituent subdivision within the meaning of Article 25 (1) of the Convention.

2.31 In order to better understand the meaning and significance of the words "constituent subdivision or agency" appearing in Article 25 (1) of the Convention, opportunity was taken to examine the ICSID published Documents Concerning the Origin and the Formulation of the Convention. The words used in the first draft for consideration by the Legal Committee were "political subdivision or agency" in Article 26, later changed to 25. Subsequently, there was a draft submitted by several countries represented on the Working Committee which omitted reference to any subdivision of agency, the intention being that the host state must in all cases be a party to the dispute. Subsequent proposals included the following: "(or a constituent subdivision, such as a State, Republic or Province, of a Contracting State, or any agency of a Contracting State that had been designated to the Center by that Contracting State)" and "(or any body or bodies designated in that behalf by that Contracting State)." A later draft of Article 26 (1) contained the words in parenthesis which were finally adopted in Article 25 (1). However, prior to agreement on the final text, during the deliberations of the Legal Committee, mention was made in referring to the kinds of bodies that should be covered by the Convention, of the "terminological difficulties in how to describe uniformly what were referred to as constituent subdivisions, territorial subdivisions, political subdivisions and agencies." It is of interest to mention that, according to an unapproved record of the Meeting of the

Committee of the Whole, February 23, 1965, the then Chairman of the Legal Committee meetings on the draft convention, in answer to a query as to whether an investor in a federal State could bring a claim against the federal government or the government of a constituent state or both, replied that, "under Article 25 of the Convention, dealing with the jurisdiction of the Centre, a constituent subdivision of a federal state, for instance, a state of the United States, could enter into an Arbitral agreement with a foreign investor with the approval of the federal government. If it did so and lost the case the award could be enforced in any country, including the federal State, as if it were the decision of a court in that State."

2.32 NIA is not as in the case of SOCAME a state controlled company nor is it a government statutory corporation, i.e., a corporation specially created by legislation as a government agency. The Constitution seems to be rather unique in that it creates two constituent bodies, namely Nevis on the one hand and, on the other, the independent Federal State of St. Kitts and Nevis. Attempts by counsel on both sides to find a comparable constitution have been without success. It is our view that NIA or the Government of Nevis, howsoever named, is a creature of the Constitution and is a separate juridical body, clothed with several powers and functions, over and above powers and functions normally vested in a corporation or a company. It has exclusive responsibility for the administration within the island of Nevis of certain matters. The Federation has a final say in matters other than the specified matters, especially in foreign affairs and national security, i.e., defence. The Constitution recognises the coming together of the two islands, i.e., St. Kitts by itself and Nevis by itself, to make a single sovereign democratic federal state and, almost throughout the Constitution, there is reference to Saint Christopher and Nevis, with provision for a Parliament, Governor-General, Attorney-General and Consolidated Fund, inter alia, for Saint Christopher and Nevis. The special treatment for Nevis in the Constitution as already dealt with in the foregoing paragraphs establishes it as constituent part, i.e., a constituent subdivision, of the Federation.

2.33 Jurisdiction in respect of such a constituent subdivision can only be available from ICSID if Nevis was designated as such by the Federation. Furthermore, consent by NIA to ICSID jurisdiction requires

the approval of the Federation under Article 25(3) of the Convention unless the Federation notifies ICSID that no such approval is necessary. None of these has been done and, in the circumstances, the Arbitral Tribunal has no jurisdiction to hear this matter. Clause 16 of the Agreement has not yet in fact been activated.

CHAPTER 3

Second Issue: The Arbitral Tribunal is not competent to countenance the substitution of a Contracting State, namely, the Federation of St. Kitts and Nevis, in lieu of the NIA as a party to these proceedings.

3.01 This has also been addressed and dealt with in Chapter 2 above, in particular at paragraphs 2.15 to 2.17 inclusive, 2.22, 2.25 and 2.27.

3.02 For the reasons advanced therein, the Tribunal does not consider substitution of the Federation for the Government of Nevis as a party to the proceedings as appropriate and finds it unacceptable. It therefore must follow that the Federation is **NOT** eligible to be named as a party to the proceedings, notwithstanding Cable naming it as such in its Request for Arbitration.

CHAPTER 4

Third Issue: The Institution of the High Court Proceedings for an Injunction does not amount to consent to ground Jurisdiction for the purposes of the Convention.

4.01 The relevant provisions of the ICSID Convention relating to consent are set out in Articles 25, 26 and 36 as follows:

Article 25: Jurisdiction of the Centre

"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."

Article 25 (3):

"Consent by a constituent subdivision or agency of a contracting state shall require the approval of that State unless that State notifies the Centre that no such approval is required."

Article 26:

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

Article 36 (2):

"The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of arbitration proceedings."

4.02 Cable, in the Request, on the issue of Consent states at paragraph 2 that "[b]oth the United States of America and the Federation are signatories of the Convention. In addition, the Agreement between the parties dated September 18, 1986 (copy attached at Tab 1) provides, in section 16, that "Any disputes relating to this agreement, its performance or nonperformance shall be referred to arbitration under the rules of procedure for arbitration proceedings (hereinaf-

ter the "Rules") in effect as of February 1, 1981 adopted under the ...Convention...." (The named party in the Agreement is the "Government of Nevis" [now called Nevis Island Administration], which was created by the 1983 Federation Constitution). This Agreement and the Court Order described in section 4 below constitute the consent of the parties described in Article 25(1) of the Convention. "The Centre therefore has jurisdiction over the dispute of which Cable seeks arbitration." Paragraph 2.20 sets out the Court Order in greater detail.

4.03 It seems from the above-mentioned paragraph 2 of the Request that Cable is seeking to use Clause 16 of the Agreement which, they admit, as being between the Government of Nevis and Cable to ground the consent and approach to Arbitration and to drag the Federation into the dispute as the Contracting State via the appearance of the Attorney-General as the party instituting the proceedings resulting in the Court injunction, on the basis that such appearance amounts to a consent by the Federation to the institution of ICSID Arbitral proceedings.

4.04 The summons instituting the injunction proceedings was taken out by Mark Anderson of the Legal Department, Charlestown, Nevis, Solicitor for the Applicant, and the summons, except for the Attorney-General of St. Christopher/Nevis being the applicant, deals throughout with matters confined to the Agreement, the parties thereof and the issues in dispute all related to NIA, Nevis and Cable. There is no reference to the Federation. The matter is filed in the Nevis Circuit (Civil), an arrangement within a judicial system which services the states and territories within the Organisation of Eastern Caribbean States. The affidavit in support of the summons was sworn to by Pearlievan Wilkin of Nevis, then Permanent Secretary in the Ministry of Communications, Works, Public Utilities and Posts in the Nevis administration. Both the summons and the affidavit in support refer inter alia to the provision in the Agreement for settlement of any dispute thereunder under the ICSID Convention and Rules.

4.05 The relevant Court documents also reveal that, by letter dated August 15, 1995, the then acting Premier of Nevis advised Cable that NIA was committed to having the issue of a rate increase submitted to arbitration under Clause 16 of the agreement. That letter ended with the exhortation to "Take note that the proposed rate increase should not be effected until a decision has been rendered

by the arbitration panel." "Cable promptly replied, by letter dated August 17, 1995, to the said acting Premier. In that letter, Cable told NIA, inter alia, that it has instructed its lawyer to proceed with the registration of Cable's request for such action and that, in the interim, the Government of Nevis may not interfere with the rate increase. IT IS THE SOLE RIGHT AND RESPONSIBILITY OF THE ARBITRATION PANEL TO RULE AS TO WHETHER CABLE TV WAS JUSTIFIED IN TAKING THE INCREASE. NIA, in the circumstances, had no alternative but to go to the High Court with the hope of obtaining an injunction and all the Court Order states is that you can not have the rate increase until you have exhausted whatever remedies are available to the parties under the Agreement for the settlement of disputes. The Court Order is NOT a consent Order but is made independently by her Ladyship Justice Velma L. Hylton Q.C., notwithstanding that it was an exparte hearing and Cable was not heard on the matter.

4.06 It is therefore difficult to comprehend that the institution of the High Court proceedings which were forced on NIA, having regard to Cable's letter of August 17, 1995, can amount to a consent by the Federation to ICSID proceedings. It does not put the Agreement in any better or worse light and the appearance of the Attorney-General, only as a figurehead, as the applicant cannot by itself be an act sufficient to cloak the Federation with responsibility for the obligations of NIA under the Agreement or to enable the Agreement to fall within the strict eligibility requirements of ICSID on matters related to ICSID jurisdiction.

4.07 The Constitution establishes the office of Attorney-General, who is the principal legal adviser to the Federation and may be either a public officer or a Minister of the Federation. Unlike in the cases of the Governor-General, Prime Minister, Premier of Nevis, Director of Public Prosecutions, Secretary to the Cabinet, Director of Audit and others, there are no specific duties set out in the Constitution for the Attorney-General other than under (1) Section 36 which enables the Attorney-General to apply to the High Court, or intervene in High Court proceedings, in connection with the determination of any question whether any person has been validly elected to the National Assembly, or appointed as a Senator, or elected as Speaker or whether any such person has validly vacated his seat or office, and (2) Section 67 where he is an ex-officio member of the Advisory Committee on the Prerogative of Mercy.

4.08 It was argued on behalf of the Respondent that the Attorney-General's appearance in NIA's application for the High Court injunction is based on a practice over the years and has its origin in the Crown Proceedings legislation of the U.K from which the Federation gained its independence in 1983. Reference was made to the Rules of the West Indies Associated States Supreme Court (Revision) 1970 regarding proceedings by and against the Crown. Prior to the High Court injunction, the Public Service Commission of St. Christopher and Nevis, in respect of a Nevis related matter, decided to go to the High Court on an **exparte** application for an order for judicial review of a decision of the Public Service Board of Appeal. The High Court, on November 1994, granted leave for the applicant to apply for judicial review and, on November 15, 1994, a Notice of Motion in this connection was filed. An adjournment was granted to enable NIA legal counsel to seek and obtain the Attorney-General's fiat. This fiat was refused and, for the first time, application was made to the High Court for a determination as whether the Attorney-General's fiat was necessary for NIA or the Public Service Commission, Nevis Chapter, to maintain a suit in the High Court. On November 22, 1995, the learned Judge ruled that NIA and/or Public Service Commission can sue and be sued without obtaining the Fiat of the Attorney-General.

4.09 Even if the Attorney-General's fiat was necessary, does this empower him by being named as the applicant in a High Court matter to bind the Federation in a matter in which the Federation has not been involved? As pointed out in the judgment in respect of the Attorney-General's Fiat, the Attorney-General is a creature of the Constitution and as such can properly exercise only those functions imparted thereunder or under any Act of Parliament. In the First "World Bank" Arbitration — (Holiday Inns v. Morocco) — Some legal Problems — by Pierre Lalive, Decision No. 20, with which this Tribunal concurs, "[T]he Tribunal [was] of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as he adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of Consent by that Party." Although this decision concerned the foreign investor

under Article 25 (2) (b) of the Convention rather than the host state, it establishes the principle that the critical date for determining the status of a contracting state is the date of submission of the dispute to ICSID, rather the date of the agreement containing the ICSID Arbitral Clause. If, as Cable claims, the High Court order for the injunction or the documents filed in the High Court, Nevis Circuit, could by any stretch of the imagination amount to a consent by the Federation to the arbitration, Clause 16 of the Agreement and such documentation could together fall within the requirements of the Convention. However, we cannot take the view that the High Court documentation can be interpreted in this manner.

4.10 In fact the Attorney-General does not appear to have done anything at all, other than issue his Fiat. His office was only used to initiate the proceedings and all the documentation and argument was prepared and placed before the Court in Nevis by NIA officials. Furthermore, throughout the documentation submitted in this Arbitration and the appearances before the Tribunal, there has been a most pregnant silence on the Federation's involvement in the Cable TV operation in Nevis, the negotiations and discussions between Cable and NIA and, above all, in this Arbitration, except for both Counsel for NIA placing on record that they are representing the Respondent, i.e., the Federation. Nowhere is there any indication that Cable or NIA has had discussion with the Federation authorities and, except for the Federation being named by Cable as the other party to the Arbitration, the only references to the Federation are at the three places in the Agreement mentioned in paragraph 2.16 above. Added to this is the fact that NIA's contention that litiguous matters involving the Federation are brought in the seat of the Federation, to wit in St. Kitts, has not been contradicted.

4.11 First of all, as indicated earlier, the Attorney-General has not consented to ICSID jurisdiction. The only consent apparently given by the Attorney-General is his Fiat dated August 25, 1995, a copy of which is set out at paragraph (95) of the Respondent's Observations Refuting Requesting Parties' Responses to Objections to Jurisdiction. The Fiat reads as follows:

> "This is to certify that the Attorney-General gives his consent for the institution of legal proceedings by the Nevis

> Island Administration for an Injunction to restrain Cable Television of Nevis Limited from increasing the rate charged for Cable service without first going to Arbitration."

The salient points in the Fiat are (1) the legal proceedings are to be instituted by NIA, not the Federation, and (2) Cable is to be restrained from increasing the rate prior to going to arbitration, which, when read with the High Court summons and other documents filed in the proceedings, means arbitration under Clause 16 of the Agreement.

4.12 It does not even appear that the Attorney-General was present when the application for an injunction was heard, and, again as indicated above, the learned trial judge made the order. She could have thrown out, dismissed or adjourned the application, and it is worthy of note that the Court makes no pronouncement on the effectiveness or otherwise of Clause 16. As a matter of fact it seems that NIA and Cable were assuming at that time that Clause 16 was effective in August 1995. Secondly, if the Attorney-General had given consent on behalf of the Federation, he would have had to be cloaked with the authority to do so. Such authority would have had to come from probably the Cabinet or the Prime-Minister or the Minister of Finance of the Federation because of the far- reaching implications for liability of the Federation and the Consolidated Fund, if a decision of the Tribunal went against the Federation. Furthermore, if it is being that the State is, as alleged by Cable, a party to the arbitration, the consent must be in writing, a requirement of Article 25 (1) of the Convention, and this forms the cornerstone of the jurisdiction of ICSID.

4.13 It is difficult to understand Cable's argument in this regard. Cable seems to be urging that the Agreement is between the Federation and Cable and, if this is so, why is the alleged consent of the Attorney-General via his appearance as applicant in the High Court proceeding so important. One would have thought that Clause 16 of the Agreement would have sufficed, its effectiveness being crystallised when the Federation acceded to the Convention, assuming that the Federation was a party to the Agreement, on September 3, 1995, the date the Convention entered into force in respect of the Federation. Article 25 (3) does not merit consideration in this Section, since Cable has never recognised NIA as being a constituent subdivision or agency of the Federation. As already indicated in

paragraph 2 above, Cable, in its Request for Arbitration, stated quite clearly that Clause 16 of the Agreement and the Court Order constitute the consent of the parties described in Article 25 (1) of the Convention.

4.14 On the issue of consent, there are three grounds on which Cable based its submission. The first is Clause 16 of the Agreement which sets out the intention of the parties to invoke ICSID jurisdiction. This Agreement is on the face of it between the Government of Nevis and Cable.

4.15 The next ground is the institution of proceedings in the High Court, Nevis Circuit, against Cable by the Attorney-General. In support of this ground, Cable is relying on the reference in the summons to the provision in the Agreement for Arbitration, i.e., Clause 16, and the urgency for the issue of the injunction to restrain Cable from raising the rates prior to the resolution of the dispute by arbitration as provided for in the Agreement. The Response does not refer to the inclusion in the summons that the Attorney-General's application was "one of urgency due to the immediate concern of the Nevis Island Administration that the Respondents in breach of contract have decided to raise the rates charged for the provision of Cable services in Nevis." Note the reference to NIA and not the Federation. The next paragraph of the summons refers to the Agreement of September 1986 between the Government of Nevis and the Respondent. Throughout the rest of the summons the references are to NIA and Nevis, nothing about the Federation. Cable in the Response next turns to the Affidavit of Pearlievan Wilkin and again refers to the Agreement and Clause 16. Cable, in its comments on the Affidavit, went on to refer to the already mentioned letter of August 15, 1995 from the then Acting Premier of Nevis to the President of Cable informing Cable that NIA was committed to having the dispute submitted to Arbitration in accordance with Clause 16 of the Agreement. This aspect of the submission then refers to the Court Order of August 31, 1995, and that, on the basis of the High Court documentation, "the Attorney-General of the Federation and one of its Ministers clearly consented to the jurisdiction of ICSID in these proceedings in the Summer of 1995."

4.16 The final ground is based on the letter dated March 18, 1996 from the Honourable Vance Amory, Premier of Nevis, to ICSID on NIA letterhead. The letter deals mainly with the coming into effect of the Public Utilities Commission Ordinance which was passed by

the Nevis Island Assembly and, on December 13, 1995 assented to by the Deputy Governor-General. The Tribunal, on March 12, 1996 — its first session, had requested information about the Ordinance and this letter was issued in response thereto. The letter gave details as to the date when certain matters required under the Ordinance were dealt with and continued as follows:

> ..... "However, the [NIA] having regard to all the circumstances, thought it only prudent to proceed with the utmost circumspection.
>
> Section 11 of the Ordinance, requires each public utility to file tariffs showing all rates within sixty days of the coming into operation of the Ordinance. Having the greatest deference and respect to the Arbitration Tribunal, the Administration did not wish to give even the appearance that it was exercising parallel jurisdiction over the matter before the Tribunal, or even worse, that it was proceeding in a high handed manner or preempting the Tribunal. Therefore our exercise of restraint.
>
> We are pleased to welcome the request of the Tribunal and wish you to note for record purposes that the Commission will be functional by the 30th April, 1996."

Cable is basing its third ground on the above reference by the Premier to parallel jurisdiction as an acknowledgment that ICSID has jurisdiction over the matter. Firstly, this is a statement by Nevis and not the Federation, so the Federation cannot be bound by it, whatever weight it may carry, and, secondly, the words "parallel jurisdiction" are capable of several interpretations and do not necessarily constitute an acknowledgment of ICSID jurisdiction especially in the light of the fact that the letter was issued at the request of the Tribunal which had already had its first session on March 12, 1996 at which NIA or the Federation, call it what you will, had lodged objections to ICSID jurisdiction. One interpretation, and this is probably the correct one, is the NIA did not wish to give even the appearance of dealing with Cable under the Public Utilities Commission Ordinance until the ICSID Arbitral proceedings were completed.

4.17 It is the view of the Tribunal that the references in the High Court documentation to Clause 16 of the Agreement, both in the summons and the affidavit, are merely statements of fact and do not amount to consent by any person or persons to ICSID jurisdiction. In other words, Clause 16 of the Agreement has not been strengthened in favour of Cable, and the consent of the Federation to Arbitration as a party or to enable NIA to do so on its own behalf has not been established by the documentation in the High Court case.

CHAPTER 5

Fourth Issue: The Request for Arbitration does not comply with the requirements of the Institution Rules in several material particulars, and the said noncompliance is fatal in that it cannot be overcome.

5.01 The Respondent, in support at paragraph (115) of Objections to Jurisdiction, suggests that, "in order to invoke the authority of the Arbitral Tribunal to consider the merits of an investment dispute, there must be, in the first place, a request for arbitration meeting the following requirements:

(a) the request must contain information concerning the issues in dispute;
(b) the request must contain information concerning the identity of the parties to the dispute; and
(c) the request must contain information concerning the parties' consent to arbitration in accordance with the rules of procedure for the institution of arbitration proceedings."

5.02 The foregoing are all required under Rule 2 of the Rules, which deals with the Contents of the Request. The Request appears to establish a prima facie for ICSID arbitration in that it contains ***inter alia*** the following as required under the Rules:

(a) the issue in dispute — the failure of NIA to agree to the increased rates and the High Court injunction;

(b) the indentity of the parties — the Requesting Parties on the one side and the Federation on the other, the Requesting Parties having been set out as nationals of U.S.A., a Contracting State, with the Federation at that time being the other Contracting State; and

(c) information concerning the parties' consent to the arbitration — Clause 16 of the Agreement and the High Court documentation, there being no intention by the Requesting Parties to treat NIA as a party and hence no need to deal with the constituent subdivision or agency of a Contracting State aspect.

Accordingly, having regard to the submissions by Counsel on behalf of the Respondent on this issue, the Tribunal is in full agreement with the decision by the ICSID Secretary-General to register the Request on November 14, 1995 pursuant to Article 36 (3) of the Convention, as communicated to the parties by his Notice of Registration dated November 14, 1995.

5.03 The Respondent has not raised as an issue whether there is a 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, one of the essential elements to ground the jurisdiction of ICSID as required in Article 25 of the Convention. Accordingly, it appears to have conceded that there is a legal issue. However, since the matter of ICSID's jurisdiction is called into question, it seems that the Tribunal must consider all the issues affecting jurisdiction.

5.04 In this regard, without prejudice to decisions on other aspects of the Request for Arbitration, Clause 16 of the Agreement between the Government of Nevis and Cable, the base on which the Request for Arbitration has been made, provides explicitly that any disputes relating to the agreement, its performance or nonperformance shall be referred to arbitration under ICSID rules of procedure. Clause 7 d. of the Agreement provides that, after the second year of service, Cable may increase its basic charges proportionate to Cable's increased cost of goods and services, and that, after the first year of service, premium charges will not be controlled. Cable has, time and again commencing in November 1991, endeavoured to obtain a rate increase but NIA has consistently opposed such increase. So you have Cable, on one hand, stating that it is entitled

to a rate increase under Clause 7 of the Agreement and the Government of Nevis, the other party to the Agreement, saying Cable is not so entitled. So, there is obviously a dispute over the operation of Clause 7 of the Agreement, which, in our view and provided all other requirements have been met, could be brought within Article 25 of the Convention.

5.05 Further support for concluding that this is a dispute under the Agreement can be taken from (a) the fifth paragraph of Cable's letter of July 26, 1995 to the Honourable Vance Amory, Premier, Government of Nevis, which states inter alia that "in the event that Government opposes said increase, Cable Television of Nevis will have no alternative but to forthwith offer the matter to International Arbitration as prescribed for in Section 16 of the Franchise Agreement"; (b) the third paragraph of letter dated August 15, 1995 from Mr. Malcolm Guishard, Acting Premier of Nevis which states inter alia "Please be advised that in accordance with item 16 of the agreement and paragraph five of your letter [of July 26, 1995], the Nevis Island Administration is committed to having this matter submitted to arbitration. Take note that the proposed rate increase should not be effected until a decision has been rendered by the arbitration panel"; and (c) paragraph 6 of the **exparte** summons in Suit No 156/95 in the High Court of Justice Federation of Saint Christopher and Nevis, Nevis Circuit, between the Attorney-General of St. Christopher/Nevis and Cable Television of Nevis Limited and Cable Television of Nevis Holdings Limited which alleges that Lee Bertman, President of Cable, is in breach of the Agreement and paragraph 9 of the Affidavit of Pearlievan Wilkin filed in the same suit in which it is stated that the proposed action by the Respondents in the suit will be in breach of Clause 16 of the Agreement.

5.06 The Respondent has posited as one of its objections on this issue is that "in breach of the Institution Rules [Rule 2 (1) (a)], the request does not designate, precisely or at all, each party the dispute, for the reason that [NIA] is a party to the dispute, and is not designated therein, either as "the Government of Nevis" or in any other fashion." The latter section of paragraph 1 of the Request for Arbitration states that "[t]he other party to the arbitration is the Federation of St. Christopher and Nevis (the "Federation"), a Contracting State. Communications to the Federation may be addressed to the Honorable Vance Amory, Premier, Nevis Island

Administration, Administration Building, Charlestown, Nevis, West Indies." The Tribunal has already given thorough consideration to this aspect as reflected at paragraphs 2.15 to 2.18 inclusive, 2.23 and 2.27 and has concluded in the last sentence of paragraph 2.27 and in paragraph 3.02 that the Federation is not a proper party to these proceedings and that, if all the necessary other elements had been met, the proper parties to these proceedings should be Cable and NIA. Accordingly, the Tribunal agrees with this submission by the Respondent.

5.07 In further support of its objections on this issue, the Respondent has stated that "in breach of the Institution Rules [Rule 2 (1) (b)], the request does not state that, [NIA] being a constituent subdivision or agency of a Contracting State, it has been designated to the Centre by that State pursuant to the provisions of the Convention." The Tribunal has also already given a thorough consideration to this aspect in chapter 2 especially at paragraphs 2.15 to 2.17 inclusive, 2.22, 2.27, 2.32 and 2.33. The Tribunal, accordingly, agrees with this submission by the Respondent.

5.08 The Respondent further states that "[i]n breach of the Rules [Rule 2 (1) (c)], the request does not indicate the date of the consent necessary to ground jurisdiction in the Arbitral Tribunal, for the reason that, in claiming that the Agreement and the Court Order constitute the necessary consent, Cable conspicuously avoids referring to any "date" at all." Rule 2 (1) (c) requires that the request for arbitration shall "indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required."

5.09 The Respondent has also submitted that "in breach of the Institution Rules, the instruments in which the consent of the NIA as a party to the dispute is recorded are not indicated, for the reason that the NIA is not a party to the request for arbitration."

5.10 In the Request for Arbitration and in all its submissions, both written and oral, to the Tribunal, Cable has maintained the position that the parties to the Arbitration are Cable on the one hand and the Federation on the other. The Tribunal has already rejected the purported substitution of the Federation as a party to the arbitration proceedings, in lieu of the Government of Nevis. The Tribunal has been informed that the Federation acceded to the Convention on September 3, 1995 and no documentation has been furnished to the Tribunal evidencing the exclusions or designations regarding constituent subdivisions or agencies being made to ICSID by the Federation if it so wished in accordance with the Convention.

5.11 The Tribunal has already addressed the matter of alleged consent by the Federation through the presence of the Attorney-General as a party to the Court proceedings culminating in the Court injunction in Chapter 4. All things being considered, Clause 16 of the Agreement could have been regarded as one ingredient leading to a consent for purposes of ICSID Arbitration. This however had no legal effect at the time the Agreement was signed on September 18, 1986. The Federation's accession to the Convention on September 3, 1995 created a second ingredient leading to a consent for the purposes of ICSID Arbitration. However, these two ingredients do not by themselves satisfy ICSID requirements. No further documentation has been forthcoming to meet the other essential requirements. The further documentation needed in the light of earlier decisions by the Tribunal in this arbitration would seem to be (a) NIA be a party to the Arbitral proceedings in place of the Federation, (b) a formal designation to ICSID by the Federation that NIA is a constituent subdivision or agency of the Federation, and (c) an approval to ICSID duly authorised by the Federation to Arbitral proceedings between Cable and NIA or, in lieu of such approval, notification by the Federation to ICSID that no such approval is necessary.

5.12 In the Holiday Inns case, the tribunal agreed, and this Tribunal concurs, that "the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions." This decision, which has been followed by later ICSID arbitral tribunals, implies that the date of consent required by Rule 2 (1) (c) of the Institution Rules need not be expressly set out in the Request for Arbitration, so long as the date is determinable or indicated from the documentation submitted. Only two ingredients would have been met if NIA was a party to the proceedings, and, if the others had been met, all the conditions for consent would have been deemed met when the last of the conditions had been satisfied. The Tribunal has rejected Cable's naming the Federation party to the proceedings, and, in the circumstances, the Tribunal does not consider that Rule 2(1) (c) has been complied with.

5.13 The Respondent has also submitted that, "in breach of the Institution Rules, the request for arbitration does not indicate the nationality of the party that is a national of a Contracting State on the date of consent." It appears to be a simple thing to refer to paragraph 1 of the Request in which Cable states that the "parties requesting arbitration are Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd., both corporations formed under the Companies Act of the Federation of St. Christopher (St. Kitts) and Nevis and their shareholders (including the undersigned) referred to below as "Cable." The two corporations are 99.9% owned (and therefore controlled) by nationals of the United States of America, a Contracting State. This control, combined with the Agreement described in Section 2 below, constitute the agreement of the parties to treat Cable as a "National of another Contracting State" under Article 25 (2) (b) of the Convention."

5.14 However, the issue is more complicated since Cable has made the Federation the opposing party to the Arbitral proceedings in lieu of NIA. As already decided by the Tribunal, the Federation is not a proper party to these proceedings, was not a party to the Agreement and there is no privity of contract between the Federation and Cable. Accordingly, there is no agreement between the Federation and Cable for Arbitral Proceedings under ICSID rules and, consequentially, no consent by the Federation to the Arbitration proceedings and no date of consent for the purpose of this hearing.

5.15 The statement in paragraph 1 of the Request as to the 99.9% ownership by nationals of the United States of America, a Contracting State, could have been relevant otherwise but the Request would have been deficient by the failure to comply with Rule 2 (2) of the Institution Rules in that the information required by Rule 2 (1) (d) (III) must be supported by documentation. The lack of appropriate documentation at the time of filing of the Request, in our view, was not fatal as such documentation could be provided during the hearings, and an attempt was made to do so by Cable in its Response to Objections to Jurisdiction and in documentation submitted after the hearing on July 1 and 2, 1996.

5.16 The Respondent, in its Observations Refuting Requesting Party's Responses to Objections to Jurisdiction, made an issue as to the proof of foreign nationality of the investors behind the Cable companies, i.e., the holding company and the operating company, based on the documentation submitted by the Requesting Parties in the Response to Objections to Jurisdiction. Among other things,

Respondent does not dispute the fact that the only two directors of the operating company have at all times been nationals of the U.S.A. but disputes their continued existence as directors based on the requirements of the Bylaws of the holding company for the annual rotation of directors. The mere fact that the identity of the initial directors is known at May 6, 1986, the date of incorporation, does not necessarily establish anything in respect of the identity or nationality of the directors beyond May 6, 1987, by which time the initial directorships lapsed. Another contention is that the documentation reveals only one subscriber of shares in the holding company, such subscriber being a national of the Federation. Additionally, the documentation reveals only one shareholder for the operating company, whereas by law at least two shareholders are required. Based on these and other factors, the Respondent states that "[t]he result is that the Requesting Party, since it is a dual party, cannot be said to be under foreign control, since while the Directors of one are nationals of the U.S.A., the single shareholder of that one is a company whose single shareholder is a national of the Federation of St. Kitts and Nevis, and the identity of whose Directors is not known."

5.17 The foregoing reveals flaws in the preparation and filing of documentation required by law in the Federation and in Nevis and are matters which, while of some concern to the Tribunal because of some obvious inconsistencies and their largely unhelpful nature, could be ventilated in another forum. One glaring eyesore in the annual returns documentation related to Cable Television of Nevis Limited, both in the obviously incorrect documentation first submitted having regard to the time of incorporation and the memorandum and articles of association of that company and the later documentation which corresponded with the memorandum and articles of association of the company, is that they all reflected that (1) no shares had been issued notwithstanding that at least one share each had been issued to two separate individuals at the time of the company's registration, (2) there was no change in share ownership, and (3) all the shares were held by one person, the holding company, despite the fact that the law requires at least 2 shareholders. The issues, however, before the Tribunal are whether the Requesting Parties have met the requirements of Article 25 (2)(b) of the Convention as to the nationality of another Contracting State and, if so, whether the parties to the arbitration have agreed that, because of such foreign control, the Requesting Party

should be treated as a national of such Contracting State for the purposes of the Convention.

5.18 First, on the matter of recognition, there are provisions in the Agreement which infer that Cable, though incorporated in the State of St. Christopher and Nevis, is controlled by nationals of another state, e.g., inter alia convertibility of local currency to U.S. funds, the concession to Cable of a 100% ten year tax holiday, subject to renewal, recruitment of foreign nationals to work for Cable, and customs and duty exemption to Cable and expatriate staff. The presence of Clause 16 in the Agreement does give rise to the presumption that the parties thereto were treating Cable as being owned or controlled by nationals of a contracting state of the ICSID Convention outside of the Federation, notwithstanding that, at the date of the Agreement and for several years thereafter, the Federation had not acceded to the Convention. The Agreement was signed by Lee. A. Bertman, as the representative of both companies and the Request is signed by the same Lee. A. Bertman as President of both companies.

5.19 All returns submitted on behalf of the Requesting Parties have been certified by Lee A. Bertman, as director, and Suzanne B. Etzold, as secretary. These two persons are reported as having the nationality of U.S.A., with residences at one time or another in Virginia, U.S.A., the Dominican Republic and Anguilla, and with one being President and the other Vice-President of Cable TV company. Throughout the documentation, there is statement, albeit questionable, that there has been no change of ownership of the shares in the operating company. The memorandum and articles of association of the operating company were signed by the same Lee A. Bertman, President Cable TV company, as taking up one share, and Myrna C. Liburd, Assistant Secretary CSCL, as taking up another share. It is assumed that (1) M.C. Liburd is the national of the Federation referred to by the Respondent as the only shareholder in the holding company, and (2) CSCL is the acronym for Corporate Services Company Limited which is the Registered Agent in Nevis for the holding company. Furthermore, all the correspondence submitted to the Tribunal as from Cable to NIA has emanated from the same Lee A. Bertman, as President of one or both Cable companies with an offshore address, and nothing has surfaced to indicate that the directors have ceased being nationals of the U.S.A.

5.20 In respect of the holding company, it is noted that Myrna C. Liburd is the only person signing as incorporator and subscriber of

one share with a par value of ten US cents in an authorised share capital of five hundred thousand registered shares with such par value, i.e., an authorised share capital of U.S.*$50,000*. However, the Articles of Incorporation of the holding company reveal that five persons have been named as the initial directors, all with addresses in U.S.A. The same Lee A. Bertman heads the list and two of the remaining four are the two Washington based lawyers who were involved in the Agreement. Under the Articles of Incorporation, the Board of Directors or shareholders shall have the authority to adopt, amend or repeal the bylaws of the holding company.

5.21 Note is also taken of the Auditors' Report and Financial Statements for the Year ended December 31, 1993 of Cable Television of Nevis Limited by a firm of chartered accountants of Anguilla, set out in Tab 4 of the Request for Arbitration. At Note 7 of that Report, there is mention of long term debt of principal and interest due to Lee Bertman, "Director and majority shareholder" and to Philips Credit Corporation (PCC). The PCC loan is dated July 31, 1987 with negotiation taking effect in August 1994. Mr. Bertman is guarantor and at December 31st 1993 amounts owing under the PCC loan stood at U.S.$ 593,033. Additionally at that date the company owed Mr. Bertman U.S.$534,229 making a total exposure of U.S.$1,127,262 by Mr. Bertman. In that Report, it is stated that at that date only 2 ordinary shares of E.C. $20 each were issued and there was a share premium of U.S.$149,985 which was eroded by accumulated loss.

5.22 When all the foregoing is taken into account together with the statement in the Request for Arbitration, signed by the same Lee A. Bertman, as President of both companies as indicated earlier, which statement sets out that "[t]he two corporations are 99.9% owned (and therefore controlled) by nationals of the United States of America, a Contracting State," and the statement made by Counsel for the Claimants at the hearing that the principals are Mr. and Mrs. Bertman, it would not seem unreasonable for the Tribunal to, and it does, conclude that both the holding and operating companies are established respectively under the laws of Nevis and of the Federation and that ownership of these companies by nationals of U.S.A. has been established for the purposes of Article 25 (2)(b) of the Convention.

5.23 The matter of the agreement with the Federation that the Requesting Parties "being juridical persons which [have] the nationality of

the Contracting State party to the dispute, because of foreign control, should be treated as a national of another Contracting State for the purposes of [the] Convention" needs to be studied. Article 25 (2)(b) of the Convention seems to presuppose that the host State must be a party to the dispute. This Tribunal has already ruled that the Federation is not a party to the dispute. The chronological events reflect that in September 1986 NIA entered into the Agreement with at least one Cable company which agreement provided for ICSID arbitration. The Federation became a member of ICSID on September 3, 1995.

5.24 In Decision 20 of the Holiday Inns case, already outlined and commented on at paragraph 4.09, parties may condition the effectiveness of their arbitration clauses on the occurrence of specified events, one of which may be the adherence of relevant states to the Convention. In this case, the Federation's adherence to the Convention on September 3, 1995 represents a fulfilled condition along the way towards effecting ICSID jurisdiction on matters within that state. However, there has been no consent by the Federation to either the institution of these proceedings against it and/or any other party or to the treatment of the Requesting Parties as being under the foreign control of United States nationals for the purposes of Article 25 (2)(b) of the Convention. As put in paragraph 33 of the Holiday Inns decision: "The question arises, however, whether such an agreement must be expressed or whether it may be implied. The solution which such an agreement is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves clearly and explicitly with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here." There has been no expressed or implied agreement or consent in this regard by the Federation, and, in the circumstances, the requirements of Rule 2(d)(iii) of the Institution Rules have not been met. On reflection, the Requesting Parties may have been attempting to do so by alleging the consent of the Federation via the documentation of the High Court case, but, as already indicated in Chapter 4, the Tribunal has rejected this submission.

CHAPTER 6

Fifth Issue: Cable Television of Nevis Limited was not in existence at the time it purported to enter into the Agreement on which it relies for its Request for Arbitration. Consequently, the Agreement is irrelevant insofar as the company is concerned, and no further consideration need be given to any contention on behalf of the company in relation to that Agreement.

6.01 Article 42 (1) of the Convention provides as follows:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

6.02 The Agreement is silent on the matter of applicable law and, in the circumstances, in accordance with Article 42 (1) of the Convention the law of the Federation and applicable international law will apply.

6.03 The Companies Act Cap 335 of the laws of St. Christopher and Nevis is an old Act and, we are told, is based on the U.K Companies Act of 1929. It is trite law in the U.K and, owing to its links with the U.K for many years, in the Federation, in regard to relevant matters falling under the U.K Companies Law prior to and after the 1929 Companies Act that a company cannot enter into agreements before the date of its incorporation, and any such agreement is completely null and void and of no effect is against that company. They may, prima facie, bind only the actual makers of the contract and not the company, and may be completely null and void if the persons purporting to sign on behalf of the company cannot show that they were the real principals.

6.04 In this regard it is noted that, in the preamble to the Agreement dated September 18, 1986, Cable Television of Nevis, Ltd. is described as "formed under The Companies Act (335) of St. Kitts and Nevis" and, in respect of this company, the Agreement is signed "CABLE TELEVISION OF NEVIS, LTD. By Lee A. Bertram."

6.05 In support of this issue, the Respondent has submitted several U.K cases for study, namely, in chronological sequence, Kelner v. Baxter and Others (1866) L.R. 2 C.P. 174, Re Northumberland Avenue Hotel Co. (1886) 33 Ch. D 16, Melhado and Another v The Porto Alegre, New Hamburgh, and Brazilian Railway Company (1874) L.R. 9 C.P. 503, Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co (1902) 1 Ch. 146, Natal Land and Colonization Company, Limited v Pauline Colliery and Development Syndicate, Limited (1904) A.C. 120, and Newborne v Sensolid (Great Britain), Ltd. (1954) 1 Q.B. 45. Cable, to counter these submissions, has submitted Holiday Inns v Morocco, and ICSID's Emerging Jurisprudence, which have both been referred to earlier, and the other ICSID cases referred to in paragraph 4.10 above.

6.06 The U.K cases which appear to have direct relevance seem to be re Northumberland Avenue Hotel Company and Newborne v. Sensolid. The other cases deal with the validity of contracts signed by persons as agents or promoters for companies to be formed at a future date, which is not relevant in the present case, since there is no alleged agency by Cable.

6.07 Stated very briefly, in the Northumberland case, a written agreement was entered into on July 24, 1882 between W of the one part and D as trustee for an intended company to be called the N. Company, of the other part. N Company was incorporated the next day, i.e. July 25, 1882 and did not, after such incorporation, enter into any further agreement in writing with W, but acted upon the agreement of July 24, 1882, took possession in October 1882 of certain lands as intended under the agreement of July 24, 1882 and expended upon it a large sum of money, amounting to about 40,000 pounds sterling. In October 1884, N company passed a resolution for voluntary winding-up and, on December 29, 1884, an order was made for carrying on the winding up under the supervision of the court. W became bankrupt and S, his trustee, inter alias, on the interest of W under the agreement of July 24, 1882, took out a summons asking that they might be admitted as creditors for damages sustained by them in respect of the breach by N company of that agreement on the footing that the agreement was one by which the N company was bound. Mr. Justice Chitty held that, if D contracted for the company, then, as the company was not in existence at the time, the agreement could not be ratified by the company, and that, if he contracted as trustee, then, whatever

claims he might have against the company if they took the benefit of the agreement, there was no contract between the company and W. An appeal followed. Set out below are excerpts from the decisions of the three appeal court judges. While, admittedly, this case is somewhat similar to the other cases which are not considered relevant since they dealt with pre-incorporation contracts entered into by agents or promoters, the rationale of the decisions are pertinent to the present issue:

Cotton, L.J:- (p.20)

> "But it is said that we ought to hold that there was a contract entered between the company and Wallis on the same terms (except so far as they were subsequently modified) as those contained in the contract of July 24, 1882. In my opinion that will not hold. It is very true that there were transactions between Wallis and the company in which the company acted on the terms of that contract entered into with Wallis by the person who said he was trustee for them. But why did the company do so? The company seems to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. Wallis, and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of July 24, was binding on the company..... We are not therefore authorised to infer a contract as it was inferred in those cases where there was no other explanation of the conduct of the parties. In my opinion the decision of Mr. Justice Chitty was right, and the appeal must therefore fail."

Lindley, L. J.:- (p.21)

> "The more closely the facts are looked into the more plain is that everything which the company did, from the taking of possession down to the very last moment, was referable to the agreement of July 24, 1882, which the directors erroneously supposed to be binding on the company. I therefore cannot come to any other conclusion than the conclusion at which Mr. Justice Chitty arrived."

Lopes, L. J. :- (p.21)

> "The question is whether there was a contract between Wallis and the company. There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the company. But at that time the company was not incorporated, and therefore it is perfectly clear that the agreement was inoperative as against the company. It is also equally clear that the company, after it came into existence, could not ratify that contract, because the company was not in existence at the time the contract was made. No doubt the company, after it came into existence, might have entered into a new contract upon the same terms as the agreement of July 24, 1882, and we are asked to infer such a contract from the conduct and transactions of the company after they came into existence. It seems to me impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract because they firmly believed that the contract of the July 24 was in existence, and was a binding, valid contract. Everything that was done by them after their incorporation appears to me to be based upon the assumption that the contract of July 24, 1882, was an existing and binding contract. I think, therefore, that the appeal ought to be dismissed."

6.08 The Newborne v Sensolid (Great Britain) is more direct on the point and is much more recent (C.A. 1953). Briefly stated, a contract, which purported to be entered into for the sale of certain goods by Leopold Newborne (London) Ld., was signed "Leopold Newborne (London) Ld., and underneath was the name Leopold Newborne. On the back of the document were set out the names of Leopold Newborne and M. Newborne as directors of the company. The goods were tendered but the purported buyers refused to take delivery. A writ was issued in the name of Leopold Newborne

(London) Ld against the buyers claiming damages for breach of contract, namely failure to accept the goods. Whilst the case was in progress, it was discovered that, at the time when the contract was signed, the company, Leopold Newborne (London) Ld., was not registered and steps were taken to substitute for the name of the company, as plaintiff, that of Leopold Newborne. It was held, by Mr. Justice Parker, that Leopold Newborne never purported to contract to sell nor sold the goods either as principal or agent. The contract purported to be made by the company, on whose behalf it was signed by a future director, and, inasmuch as the company was nonexistent at the material time, the contract was a nullity. Newborne appealed and, in the decision of the Court of Appeal dismissing the appeal, Lord Goddard, C.J., held as follows: "The company makes the contract. No doubt, the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but to be selling the company's goods. The only person who had any contract here was the company, and Mr. Newborne's signature merely confirmed the company's signature. The document is signed "Yours faithfully, Leopold Newborne (London) Ld.," and then the signature underneath is the signature of the person authorised to sign on behalf of the company. In my opinion, unfortunate though it may be, as the company was not in existence when the contract was signed there never was a contract, and Mr. Newborne cannot come forward and say "Well, it was my contract." The fact is, he made a contract for a company which did not exist. It seems to me, therefore, that the defendants can avail of the defence which they pleaded and the appeal must be dismissed.

6.09 Paragraphs 6.07 and 6.08 above have been inserted in order to set out clearly the U.K, and consequently the Federation, legal position with regard to contracts signed by or on behalf of companies prior to incorporation, a situation which seems to be applicable in this case to Cable Television of Nevis, Ltd., a purported party to the Agreement of September 18, 1986 along with Cable Television of Nevis Holdings, Ltd., on one side, and the Government of Nevis on the other. Paragraph 6.08 shows clearly that, according to the

law of the Federation, such a purported agreement by an unincorporated, later incorporated, company is a nullity in respect of such a company, and paragraph 6.07 indicates that subsequent acts by such a company in the erroneous belief that such agreement is valid does not validate the agreement.

6.10 Cable on the other hand referred to the following ICSID cases: Liberian Eastern Timber Corporation (LETCO) v. the Government of Liberia 26 I.L.M. 647, 651–52 (1987), AMCO Asia Corporation and others v. the Republic of Indonesia 23 I.L.M. 351, 361–62 (1984), Alcoa Minerals of Jamaica v. the Government of Jamaica as discussed in John T. Schmidt, Arbitration under the Auspices of ICSID: Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica Incorporated, Inc. v. Government of Jamaica 17 Harv. Int'l L.J., 90, 102–3 (1976) and the aforementioned Holiday Inns v. Morocco case. Cable had also in paragraph 6 of its counsel's reply dated April 30, 1996, to the Respondent's "Observations Refuting Requesting Party's Responses to Objections to Jurisdiction" set forth the following position:

> "Respondent argues that Requesting Party the Operating Company was incorporated subsequent to the date of the Agreement, and is thus a "non-party" in these proceedings. The Agreement upon which the Request for Arbitration is based is dated September 1986. The Holding Company Requesting Party was incorporated on May 6, 1986 (see Tab 1 to our Response). The Operating Company Requesting Party was incorporated April 2, 1987. Thus, there was a Requesting Party in existence on the date of the Agreement, and the Agreement makes it apparent on its face that the organization of the Operating Company was contemplated by both parties. Cable respectfully submits that it is not unusual to encounter legal requirements of various countries of the world concerning the legal structure under which one must invest in those countries. It is also common for compliance with those requirements to take some time to complete. It is respectfully submitted that the organization of the Operating Company after the Agreement was signed is not legally relevant. While Mr. Byron makes numerous assertions of violations of local law of the Federation, he cites no legal authority for any of these assertions, and, since they are irrel-

evant in any case, Cable requests that the Tribunal disregard these assertions. Since it took the Federation several years to approve and ratify the Convention under which these proceedings are being conducted, and which Convention the Respondent had designated in the Agreement, perhaps Cable can be forgiven this short delay in causing the second of its entities to be organised."

To put the record straight on one point made by Cable's Counsel in this paragraph, the U.K cases referred to in paragraph 5 above were submitted by Mr. Byron through ICSID by letter dated June 24, 1996, for the Tribunal's consideration and formed part of his argument at the hearing on July 1 and 2, 1996.

6.11 Careful attention has been paid to the several ICSID arbitral cases for guidance on this and other issues raised in these Arbitral proceedings. On a comparison of these cases, it would appear that the Holiday Inns case has the most direct relevance to the present case.

6.12 In the LETCO v. Liberia case, on the matter of consent giving rise to establishing of ICSID jurisdiction, LETCO, the claimant relied on an arbitration clause contained in the concession agreement signed by LETCO and Liberia. Liberia never appeared at any of the hearings before the Tribunal and submitted no documentation contesting the issues. The Tribunal found that the content of the relevant article in the concession agreement was clear evidence of the parties' consent in writing to submit to ICSID and required no further discussion. LETCO however wished to add as a joint claimant a subsidiary company of LETCO, namely LETCO Lumber Industry Corporation (LLIC), which was not a party to the concession agreement. The Tribunal decided on this issue that no evidence was submitted which would permit the Tribunal to extend ICSID jurisdiction to LLIC, since it was a separate juridical person from LETCO and had not entered into an ICSID arbitration agreement with Liberia. However this did not exclude LETCO from seeking damages based on its investments in LLIC which were made pursuant to the ends contemplated in the concession agreement. An attempt was also made to join the Liberian Bank for Development and Investment (LBDI) as a party to the proceedings but this was rejected by the Tribunal, as neither LBDI or Liberia had consented to such participation. So there is very little help, if any, from this case on this issue.

6.13 The AMCO Asia Corporation (AAC) and others v. the Republic of Indonesia involved three claimant companies, namely (1) AAC, the parent company, (2) P.T. Amco Indonesia (PTA),the subsidiary of AAC and which had applied to carry out a hotel investment in Indonesia and had included in its application a provision for ICSID arbitration which Indonesia accepted when it agreed to the application, and (3) Pan American (PA), to which a portion of the shares held by AAC had been transferred. On the matter of consent to arbitration, Indonesia raised objections to jurisdiction in respect of AAC and PA in that Indonesia had never consented to ICSID's jurisdiction in respect of any dispute between Indonesia and AAC or between Indonesia and PA. A third objection was for the Tribunal to determine whether it had jurisdiction over PTA since Indonesia had not effectively agreed to treat PTA as a national of U.S.A. for purposes of the Convention. The first two objections only are relevant to the issue at hand. In respect of AAC, the Tribunal took the view that the foreign investor was AAC and PTA was merely an instrumentality through which AAC was to realize the investment. The tribunal had already considered that PTA had the benefit of the arbitration clause and asked the question: would it not be fully illogical to grant this protection to the controlled entity, but not to the controlling one. It had by this time looked at the preamble to the Convention and come to the conclusion that "while a consent in writing to ICSID arbitration is indispensable, since it is required by article 25 (1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration for the ICSID tribunal to have jurisdiction over them." The tribunal also referred to Indonesian legislation and literature which, seemingly unlike in the case of the Federation, provided for the protection of investors through international arbitration in the interest of Indonesia. In conclusion on this point, the tribunal held that there was a written consent to the arbitration in the investment agreement between Indonesia and PTA and accordingly the formal requirement of article 25 (1) of the Convention had been fulfilled. The Tribunal further interpreted that written consent as being capable of being invoked by AAC, and therefore it had jurisdiction over AAC. It also held that whether and to what extent AAC took part itself in the building of

the hotel is not relevant. With regard to PA, the tribunal decided that it had jurisdiction over disputes involving PA, having regard to the fact that PA had acquired shares in AAC, and, since the tribunal had decided that it had jurisdiction in relation to AAC, by virtue of the transfer of such shares to PA with the approval of the Government of Indonesia without any exclusion of the right to ICSID arbitration, PA also acquired the right to ICSID arbitration.

6.14 The Alcoa Minerals of Jamaica, Inc. (AMJ) v. Government of Jamaica is another uncontested arbitral matter and the main issue, as regards consent, was whether Jamaica, after entering an agreement with AMJ which included an ICSID arbitration clause could unilaterally withdraw from the agreement. Both Jamaica and USA were already contracting states to the Convention without reservation when the agreement was signed in 1968. In 1974, Jamaica enacted legislation which effected an increase in taxes on mining by the investors, who considered this as a violation of the agreement. In addition, shortly after the legislation, Jamaica informed ICSID that investment disputes "at any time arising" involving natural resources would not be submitted to ICSID arbitration. The tribunal decided on this aspect that these actions by Jamaica could not oust jurisdiction. Having earlier agreed to ICSID arbitration, Jamaica could not unilaterally withdraw its consent and that its directive to ICSID withdrawing disputes of that nature from ICSID arbitration could apply only to future arbitration agreements.

6.15 On this matter of consent, it may be helpful to quote extensively from the Holiday Inns v. Morocco case as discussed by Pierre Lalive (p. 144-145) as follows:

> "A similar insuperable difficulty confronted the second part of the Moroccan objection to jurisdiction raised against Holiday Inns S.A., Switzerland. The Government had signed an agreement which expressly identified one of the parties as the company 'Holiday Inns S. A., Spielhof 3, Glarus Switzerland." Now the same Government was contending that, although it had intended to confer jurisdiction upon ICSID in respect of that company, Holiday Inns, Glarus failed to meet the requirements of Article 25 of the Convention because it was not legally in existence at the date of the Basic

Agreement (and in particular had then "no nationality at all").

The relevant facts have been outlined above and were not in dispute: at the time of signing the contract, the two American partners (H.I. and O.P.C.) had already decided that, in keeping with a frequent business practice, they would perform the Project through two wholly owned subsidiaries to be created for the purpose. The Moroccan Government was fully aware of this fact, as shown in particular by the very designations in the Agreement of the "Parties of the Second Part" and also by the signing, following the Government's request, of a "letter of guarantee" of the same date by the two American mother companies). The Government appears also to have known full well that on the date of signing, the preparations made by the H.I. group in order to create a Swiss subsidiary had not been completed. The Charter and By-Laws of the company were signed a few weeks later, on 30 December 1966, and the formalities came to an end on 1 February 1967 with the formal registration of the new company in the Commercial Register, a registration which, under the Swiss Code of Obligations (Article 643), is necessary to confer legal personality upon a stock corporation.

Several distinct arguments were put forward by the claimants to meet the Moroccan objection. First, under the personal law of the company, which was undoubtedly Swiss law, a stock corporation in a process of constitution is not entirely devoid of existence and the legal acts made on its behalf do have some effects. Secondly, whatever the position may have been in Swiss private law, the Government, when it signed the Basic Agreement with Holiday Inns, Glarus, Switzerland, had thereby recognised its legal personality and existence, in so far as Moroccan law and the international legal order were concerned; the requirements laid down by the Convention were thus fulfilled (independently of the formalities and the type of company or legal person contemplated by Swiss internal law). Thirdly, in any event, it was stressed that the Government had knowingly contracted with a corporation in a process of creation and that it could not in good faith

rely on the absence of Swiss registration on the date of the contract. All the less so since it had no legitimate interest whatever in objecting to a fact (ulterior registration) which had not caused the slightest damage to the Government and had been totally accepted by it. The claimants believed, in other words, that the Government was precluded from raising that objection under the principle of good faith in an international sense.

To sum up, the claimants counter-attacked by emphasizing the "artificial" character of the Moroccan objections, which interpreted the Washington Convention in an extraordinarily formalistic and narrow manner. The Moroccan theory on the date of consent amounted, in their submission, to an exclusion of all expression of intent subject to suspensive conditions and to a requirement that all conditions be met simultaneously at the precise minute when the contract was signed. The Convention (as well as the Basic Agreement) was therefore deprived of a large part of its effectiveness, contrary to the evident intention of its signatories and contrary, in the concrete case, to the recognised intention of the Moroccan State itself to accept the jurisdiction of ICSID for "any dispute" relating to the contract and the "Moroccan Project". Furthermore, the Government's position, however ably presented by its counsel before the Tribunal, happened to be in flat contradiction to its own attitude both at the time of signing the Basic Agreement and afterwards. The Government had started to perform the contract long after the respective dates of registration of Holiday Inns, Glarus, and of the coming into force of the Washington Convention between all the States concerned, and it had at all times (prior to the arbitration proceedings) treated Holiday Inns, Glarus as a Contracting Party.

6.16 The tribunal in the Holiday Inns case formed the opinion, as already mentioned at paragraphs 4.09 and 5.11, that "the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as the adherence of the States concerned to the Convention or the incorporation of the company envisaged by the agreement. On

this assumption, it is the date when the conditions are definitely satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party."

6.17 Having noted that the Government of Morocco did not deny that it entered into the Basic Contract and intended that the Centre should have jurisdiction in respect of "Holiday Inns S. A. and the subsidiary of Occidental Petroleum", that Tribunal stated that "the only reasonable interpretation of the Basic Agreement is to hold that the Parties when signing the Agreement envisaged that all necessary conditions for jurisdiction of the Centre would be fulfilled and their consent at that time would be effective." That Tribunal went on to say that "Morocco became a Contracting State on June 10, 1967 and Switzerland on June 14, 1968, the Company became a juridical person in 1967. Consequently, it is on the last of those dates, i.e., June 14, 1968, that the Parties "have consented to submit the dispute to arbitration" within the meaning of Article 25 (2) (b) of the Convention. From that date neither Party could unilaterally withdraw its consent as provided in Article 25 (1)."

6.18 Turning first to Cable's Counsel's reply of April 30, 1996, copied in paragraph 6.10 above, Cable concedes that only the Holding Company Requesting Party, i.e. Cable Television of Nevis Holdings, Ltd. was in existence at the time the Agreement was signed. The letter goes on to state that "the Agreement makes it apparent on its face that the Organisation of the Operating Company was contemplated by both parties." A perusal of the Agreement could lead one not to agree with this statement. The preamble to the Agreement refers to the Operating Company as "formed under The Companies Act (335) of St. Kitts and Nevis." This would suggest that the company was already incorporated on or before September 18, 1986 the date of the Agreement. Furthermore, the recitals in the Agreement read as follows: "WHEREAS, Government desires to promote the development of cable television service, and, WHEREAS, Cable is a television company." Cable here refers to the Holding and the Operating Companies which seemingly are together called Cable under the Agreement. The Agreement goes on to state that the Government hereby grants to Cable the right and permission etc. The term of the Agreement commenced on the date of its execution i.e. September 18, 1986, (Clause 11) and the Agreement ends at Clause 19 "Effective Date. Acceptance by Cable is contingent upon completion of engineering and strand mapping

of the system, which acceptance must be given within sixty (60) days of the above date. The effective date of this Agreement shall be the date of its execution by all parties." The Agreement is executed by CABLE TELEVISION OF NEVIS, LTD. By Lee A. Bertman. Nowhere in the agreement is there mention or inference of the organization of the Operating Company at a future date being contemplated by the parties to the Agreement and Clause 19 does not appear to help since the contingencies for acceptance by Cable make no reference to the future incorporation of the Operating Company and stipulates quite clearly that the effective date of the Agreement shall be the date of its execution, i.e., signature, by all parties, the effective date being September 18, 1986.

6.19 In comparing the Holiday Inns case with this one, there are at least three common veins, namely, (1) the host state was not a member of ICSID when the project agreement was signed, (2) foreign investors signed to carry out the project, and (3) a purported executing party to the agreement was not in existence at the time of the signing of the agreement.

6.20 Against this, there are several dissimilarities. First and foremost, the applicable municipal law is different. In the present case, as indicated above, the law of the Federation (which is based for the most part on U.K. law) together with applicable international law must be applied. In the Holiday Inns case, there was recourse to Morocco and Swiss law, plus relevant international law. As Cable's Counsel submitted in his letter of June 30, 1996, "it is not unusual to encounter legal requirements of various countries of the world concerning the legal structure under which one must invest in those countries. It is also common for compliance with those requirements to take some time to complete."

6.21 Another apparent dissimilarity is that, in the Holiday Inns Case, the Government of Morocco was fully aware that the American investors would be performing the Project through two wholly owned subsidiaries to be created for the purpose and that at the date of signing the preparations to create a Swiss subsidiary had not been completed. In the present case, NIA was obviously aware that foreign, apparently American, investors were to carry out the Cable TV Project in Nevis. This seems to be the only inference one can draw from the Agreement, since inter alia (1) the Holding Company is an offshore company formed under the Nevis Business Corporation Ordinance of 1984, (2) there is a condition for

convertibility of local funds into U.S. funds, (3) there is provision for tax holiday for Cable, (4) there is exemption from tax on remittances to offshore investors, (5) Non-Nevisian employees of Cable are to be exempt from the 20% tax on earnings, (6) Cable is entitled to the best exchange rate and establish and operate a U.S. currency account, and (definitely not least) there is provision for ICSID Arbitration. Added to these is the appearance of the names of two Washington based lawyers on the cover sheet of the Agreement and the fact that the telex containing last minute modifications to the Agreement issued directly from these two lawyers to the then Premier of Nevis, giving rise to the assumption that these lawyers had a hand in the Agreement.

6.22 NIA however, unlike in the Holiday Inns case, seems, or rather so it seems to be now claiming, to have first become aware that the Operating Company was not in existence at the time of the signing of the Agreement when Cable submitted its documentation in the Response of Requesting Parties to Objections to Jurisdiction, such documentation having included a true copy of the Certificate of Incorporation of the Operating Company. Furthermore, no evidence has been adduced to the Tribunal that NIA was aware that the investors were intending to form an operating company after the Agreement was signed. As a matter of fact, none of the persons who appeared before the Tribunal was involved with the preparation or signing of the Agreement. The Tribunal however cannot overlook the fact, as communicated by counsel for the Respondent during the hearing, that the arrangements with Cable were formalized by an NIA of a different political persuasion. In paragraph (9) of section B. of The Facts, as set out in the Respondent's Objections to Jurisdiction, Respondent states that "Cable dealt with successive political parties in office in [NIA]. The first one headed by the Honourable Simeon Daniel as Premier was the Nevis Reformation Party (NRP). The agreement was signed with the NRP Administration." Respondent further states at paragraph (18) of The Facts that "[a]s a result of local elections in Nevis in mid-1992, the NRP was replaced by the Concerned Citizen's Movement (CCM), headed by the Honourable Vance Amory, as Premier." In other words, NIA, as presently constituted, is comprised of persons of a different political party to the one in 1986 when the Agreement was negotiated and signed.

6.23 Another apparent dissimilarity is the argument raised in the Holiday Inns case that a stock corporation in a process of constitution under Swiss law is not entirely devoid of existence and the legal acts made on its behalf do have some effects. The Tribunal is not familiar with Swiss law and, consequently, is uninfluenced by this indecisive statement, as it cannot confirm its veracity. This legal position, however, is not so under St. Kitts and Nevis law.

6.24 Finally, the State of Morocco was a signatory to the Basic Agreement with (1) Holiday Inns S.A., Glarus, Switzerland, which at that time was only in the process of creation, and (2) a subsidiary of O.P.C. which at the time was clearly not in existence. In the present case, the State, i.e., the Federation, is not a party to the Agreement, notwithstanding Cable's claim otherwise, the party thereof being the Government of Nevis. So the matter of the Federation agreeing and intending, or not denying that it entered into an agreement and intended, that ICSID should have jurisdiction in respect of the Operating or any other company does not arise.

6.25 To turn again to the applicable law which, in the absence of agreement of the parties as to the rules of law to apply to this hearing, is the law of the Federation and such rules of international law as may be applicable, it is desirable that consideration be given to the Convention and the reasons therefor. Quoting from ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction by William Rand, Robert N. Homick and Paul Friedland, "[ICSID]..... was established by..... the Convention..... in 1965 under the auspices of the World Bank in order to provide a forum for the arbitration of investment disputes between governments and foreign investors. ICSID is a unique forum serving a variety of interests. To both foreign investors and host governments, it is a neutral forum, independent of the investors' and host governments' courts, in which investment disputes between the foreign investors and host governments can be resolved. Foreign investors can expect that tribunal awards will be enforced since Article 54 of the Convention establishes that an ICSID award shall be treated by each Contracting State as if it were a final judgment of a court of that state. Host governments are guaranteed that they will not be subjected to international claims or diplomatic intervention by the foreign investor's home country and that the law governing the arbitration will be, in the absence of a different

agreement among the parties, that of the host government. Most significantly, to the benefit of both foreign investors and host governments, ICSID promotes foreign investment by providing a reliable forum for the resolution of investment disputes."

6.26 The Respondent's submission in respect of the nonexistence of the Requesting Operating Company at the date of the signing of the Agreement, i. e., September 18, 1986, appears to be relevant in respect of Article 25 of the Convention for the purpose of establishing that the Requesting Operating Company could not, and did not, consent to ICSID Arbitration, as required under that Article. The Tribunal does not accept submission that "no further consideration need be given to any contention on behalf of this company in relation to that Agreement." All that the tribunal is concerned with at this stage is whether it has jurisdiction in disputes between the operating company and the respondent. The incontrovertible facts are that (1) at the time of the signing of the Agreement, i. e. September 18, 1986, the Requesting Operating Company was nonexistent, (2) that company was incorporated on April 2, 1987, some 6 1/2 months after the Agreement was signed, (3) all the parties had treated the Requesting Operating Company as if it had been in existence from September 18, 1986, and (4) all the work required under the Agreement in respect of the CATV System on Nevis had been carried out by the Requesting Operating Company, if Respondent's submission that the Holding Company cannot carry out such activities in Nevis is correct.

6.27 In the ICSID arbitration matter, AAC v. Indonesia, referred to in paragraph 6.13 above and in the aforementioned ICSID's Emerging Jurisprudence, that tribunal ruled that "under well settled principles of international law an agreement to arbitrate is not to be construed restrictively but rather in a way that leads [the court] to find out and to respect the common will of the parties. According to the Tribunal, the guiding principle of construction is reasonableness, or good faith, as determined by consideration of the consequences the parties may be considered as having reasonably and legitimately envisaged to arise from their commitments." That tribunal's award reaffirms that the reasonable understanding and contemplation of parties to international contracts containing ICSID arbitration clauses will not be frustrated by technical arguments interposed in order to defeat ICSID jurisdiction.

6.28 In the Holiday Inns arbitration, the tribunal, in rejecting Morocco's position, "referred explicitly to three general principles of international commercial law: (1) the general unity of an investment operation; (2) respect for the sovereignty of States, and (3) the primacy, in principle, of international proceedings over purely internal proceedings. Applying the first and dispositive principle, the tribunal reasoned that the agreements underlying a single investment could be categorized as basic contracts that create the parties' obligations and related agreements, contemplated by the initial contracts, concerning the execution of the matters originally agreed upon. The loan contracts fell into the latter category; although separate agreements, they were an integral part of the investment picture. Accordingly, the rights and duties emerging from them could not be ignored when ruling upon disputes regarding the underlying investment agreement."

6.29 The Holiday Inns and AAC cases involved parties that either had not signed the arbitration agreement or were not clearly designated in the relevant arbitration clause. Additionally, the Holiday Inns case also dealt with signatories which were not in existence at the time of signing. The tribunal refused to be swayed by formalistic arguments when it was clear that the parties had, both at the time of signing and thereafter, reasonably contemplated ICSID jurisdiction over all the principal parties to the dispute. This portion of the Holiday Inns jurisdictional ruling is significant as a precedent for the extension of jurisdiction over unnamed parties not signatories to the agreement containing the arbitration clause. Another statement by the tribunal in the Holiday Inns case is worthy of mention. That tribunal took the view that while "an agreement should .....normally be explicit .....an implied agreement would.....be acceptable in the event that the special circumstances would exclude any other interpretation of the intention of the parties. The above quotations are all taken from the above-mentioned ICSID's Emerging Jurisprudence: The Scope of ICSID's Jurisdiction.

6.30 In the present case, it is highly probable that, if the matter was litigated before the local courts, they would be bound to follow the decisions already referred to in paragraphs 6.07 and 6.08 above. However, having regard to the international nature of the Convention and arbitration matters taking place thereunder, there are certain other aspects to be considered.

6.31 No evidence or other information has been brought to indicate what transpired between the overseas investors and NIA prior to and up to the time of the signing of the Agreement in September 1986. There were obviously some sort of negotiations, since it is unlikely that NIA would have accepted a first draft agreement related to the project without question. This is reflected in the fact that there are some marked up delineations creating four changes in the text of the Agreement and the addendum contained in the telex of September 11, 1986, from the Washington based lawyers dealt with these changes. Obviously, the overseas investors intended to execute the project through two locally incorporated companies, one, an off-shore company which will be the holding company, and the other, a subsidiary of the holding company, which will carry out the on-the-ground work in Nevis. NIA was obviously aware of this intention prior to the signing of the Agreement as it is manifest in the Agreement that this is the intention of the overseas investors, otherwise why the naming of two companies as parties to the Agreement representing Cable. NIA obviously agreed to the proposal by Cable to have a holding company and an operating company carry out the project, otherwise NIA would not have signed the Agreement with the two Cable designated companies.

6.32 There is only one Project, i.e., the establishment and commercialism of an island wide Cable TV system for the island of Nevis, with benefits accruing to both NIA and Cable. Based on the understandings reached as reflected in the Agreement, the overseas investors seemingly moved large sums of money held outside to invest in Nevis in the establishment of the project. The parties all along seem to have treated the operating company as having the authority to represent Cable in all matters in Nevis under the Agreement. This is reflected in the correspondence referred to at paragraphs (9) to (31) of The Facts in the Respondent's Objections to Jurisdiction and the copies of correspondence circulated to the Tribunal. Lee A. Bertman, with an American address, signed the Memorandum of Association of the Operating Company, as President, Cable TV Company, at least by March 13, 1987, thereby taking up one share in the company. He had purported to sign the Agreement six and one half months earlier as president of the operating company. One should therefore assume that, at time of signing of the Agreement, he knew or should have been aware, unless he received incorrect advice, that the company had not yet been registered. The annual

returns of the company reveal that the operating company is wholly owned and controlled by the holding company, and that the directors are both of USA nationality. The holding company can therefore direct and dictate to the operating company what it should do, provided it is within the powers and functions set out in the Memorandum and Articles of Association of the company.

6.33 As pointed out at the hearing by Cable's counsel, the Agreement, at clause 18, provides for assignment as follows; "the agreement shall not be assignable in whole or part except with the mutual consent of the parties, provided, however, Cable may assign this Agreement to a subsidiary parent, or related entity." Even if the strictly legal position as it applies to the Federation were followed and a determination was made that the non-existence of the operating company at the time of the signing of the Agreement meant that the operating company was not a party to the Agreement, it seems one may infer an assignment by the holding company to the operating company, which is a subsidiary of the holding company, from the conduct of the parties, bearing in mind the ruling by the tribunal in the Holiday Inns case, already referred to in paragraph 6.28 above, that while an agreement should be normally explicit, an implied agreement would be acceptable in the event the specific circumstances would exclude any other interpretation of the intention of the parties. Furthermore, unlike in the matter of a new contract as might have been required under a strict interpretation according to the law of the Federation, the agreement of NIA to such an assignment is not required.

6.34 In the circumstances, it appears to the Tribunal that, if the other requirements for ICSID arbitration were or are being met, the late registration of the operating company does not operate to bar the operating company from participation in the institution of Arbitral proceedings under the Convention. In this regard, the very flexible interpretation given in the Holiday Inns case, already referred to in paragraphs 6.10 and 6.16 above, in that "the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfillment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the parties involved, which constitutes in the sense of the Convention the date of consent by that Party." In

respect of the operating company, the requirements to be met by the Federation under the Convention have not been satisfied and, in the circumstances, the operating company's consent to the ICSID Arbitral proceedings has not been established.

CHAPTER 7

Sixth Issue: Cable Television of Nevis Holdings Limited is by the terms of its incorporation under the Nevis Business Corporation Ordinance, 1984, an offshore company.

An offshore company is prohibited from carrying on business within Nevis and, accordingly, if an offshore company does so carry on business, any dispute that arises as a result cannot be described as a legal dispute for the purposes of the Convention.

Cable cannot be heard to say that Cable Television of Nevis Holdings Limited is a party to a dispute for the purposes of the Convention.

7.01 The Tribunal rejects this submission. These are overseas investors who have agreed with NIA to carry out the project through the medium of two locally incorporated companies, one, an offshore company, which is the holding company, and the other, the operating company which is a subsidiary of the holding company. The holding company is permitted by the Nevis Business Corporation Ordinance, 1984, inter alia to "invest in stocks or entities of Nevis corporations or be a partner in Nevis partnership or a beneficiary of a Nevis trust or estate" and, for the purpose of this investment has done just that. All the on-the ground operations have been carried out, or so it appears, by the operating company which has been registered under the Companies Act Cap 335 of the Federation. The investors have signed the Agreement as an interested party and, in so doing, have agreed to Clause 16, the Arbitration

Clause. Accordingly, whether or not it is an offshore company is not relevant. The salient points are (1) it has signed the Agreement and has therefore agreed with NIA on the manner in which the Arbitration should be conducted, if there is any dispute arising under the agreement, (2) it is the parent or holding company of the operating company which may be eligible to qualify for the same arrangements for arbitration, (3) the presence of the holding company as an offshore company, albeit incorporated in Nevis, gives rise to the presumption of foreign ownership thereby enabling it to seek to qualify for treatment under Article 25 (2)(b) of the Convention, and (4) above all, it is the money of the overseas investors behind the holding company which is at risk.

7.02 **However, as already indicated in paragraph 6.34 above, since there are other unfulfilled requirements of ICSID essential in order to ground ICSID arbitration in this matter, the Tribunal rules that Cable Television of Nevis Holdings, Ltd. has not yet established consent to the institution of ICSID proceedings.**

CHAPTER 8

Summary of decisions reached and Order

8.01 In summary, the Tribunal concludes in respect of the Respondent's Objections to Jurisdiction as follows:

(1) The Tribunal decides that the proper party to the Agreement is NIA and not the Federation, and that NIA is a constituent subdivision or agency of the Federation which has not been designated as such to ICSID as required by Article 25 (1) of the Convention. Accordingly, the Tribunal has no jurisdiction (paragraphs 2.08, 2.15 to 2.17, 2.25, 2.27, and 2.32 to 2.33);

(2) The Tribunal decides that substitution of the Federation for the Government of Nevis as a party is not appropriate and that the Federation is not eligible to be named as a party to the proceedings (paragraphs 2.17, 2.27 and 3.02);

(3) The Tribunal decides that the references in the High Court documentation to Clause 16 of the Agreement are merely statements of fact and do not amount to consent by any person or persons to ICSID jurisdiction and that the consent of the Federation to arbitration as a party or to enable NIA to do so on its own behalf has not been established by the documentation in the High Court case (paragraph 4.17);

(4) The Tribunal decides in respect of the Rules:
   (a) Rule 2 (1) (a) has not been complied with, since the Federation is incorrectly named as a party to the proceedings (paragraph 5.06);
   (b) Rule 2 (1) (b) has not been complied with, since the correct party should be NIA which is a constituent subdivision or agency of the Federation and has not been designated to ICSID as such by the Federation (paragraph 5.07);
   (c) Rule 2 (1) (c) has not been complied with in that no relevant documentation has been furnished in respect of NIA as a constituent subdivision or agency of the Federation (paragraph 5.12); and
   (d) Rule 2 (1) (d) has not been complied with in its entirety in that, while the Requesting Parties meet the nationality requirements, the agreement of the parties that they should be treated as nationals of another Contracting State has not been established (paragraphs 5.22 and 5.24);

(5) The Tribunal decides that the operating company, Cable Television of Nevis Limited, has not established its consent to ICSID jurisdiction since all the conditions required to ground such jurisdiction have not been met (paragraph 6.34); and

(6) The Tribunal holds that Cable Television of Nevis Holdings Ltd., an offshore Company, could be a proper party to ICSID Arbitral proceedings if the jurisdiction hurdle in relation to such proceedings were overcome (paragraph 7.02).

8.02 The Tribunal therefore, in accordance with Arbitration Rule 41 (5), proposes to render an award that the dispute before the Tribunal is not within the jurisdiction of ICSID and not within the competence of the Tribunal.

8.03 On the matter of costs, several attempts were made by the Requesting Parties over the years to obtain an increase in the rates for Cable TV service in Nevis and, in each case, NIA did not support the proposed increase. Following exchanges between the parties, NIA

sought and obtained exparte a High Court Order dated August 31, 1995, to the effect that Cable could not increase the rates until Cable had exhausted whatever remedies were available to the parties under the Agreement for the settlement of disputes. Cable, by letter dated October 23, 1995, to ICSID, requested ICSID arbitration. In so doing, Cable used the only means available to it, that of naming the Federation as a party to the Agreement and to the proceedings. The Respondent quite rightly raised objections on the matter of jurisdiction and the Tribunal, as reflected in this award, has agreed to some extent with the Respondent's submissions.

8.04 Article 61(2) of the Convention provides that "[i]n the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of [ICSID] shall be paid. Such decision shall form part of the award". ICSID Arbitration Rule 47 (1) (j) requires that the award shall contain "any decision of the Tribunal regarding the cost of the proceeding". The Tribunal notes that, on behalf of each party, it was submitted that the costs of the successful party should be borne by the unsuccessful party. Accordingly, the words "the parties otherwise agree" within the meaning of Article 61 (2) of the Convention are not applicable hereto. The Tribunal decides that each party shall bear the expenses incurred by it in connection with the proceedings and that the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of ICSID shall be paid by them in equal shares. Inasmuch as the parties have advanced to ICSID equal deposits in respect of such fees, expenses and charges adequate to pay them, no monetary award is required.

8.05 With foregoing in mind, and having regard to the complexity and unusual nature of the issues raised, the tribunal considers that each party should bear its own costs.

ORDER

8.06 For the reasons set forth above

THE TRIBUNAL AWARDS AS FOLLOWS:

1. The Request for Arbitration herein registered on November 14, 1995 is dismissed for lack of jurisdiction.

2. Each party shall bear the costs incurred by it in connection with the proceedings.