

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

Washington D.C.

Case No. ARB/07/9

**BUREAU VERITAS, INSPECTION, VALUATION, ASSESSMENT AND  
CONTROL, BIVAC B.V.**

**(Claimant)**

**v.**

**THE REPUBLIC OF PARAGUAY**

**(Respondent)**

**Decision of the Tribunal on Objections to Jurisdiction**

**Members of the Tribunal**

Professor Rolf Knieper, President

L. Yves Fortier, QC, Arbitrator

Professor Philippe Sands QC, Arbitrator

**Secretary of the Tribunal**

Gonzalo Flores

*Representing the Claimant*

Messrs. Nigel Blackaby and Lluís Paradell  
and Mrs. Patricia García

Freshfields Bruckhaus Deringer  
and

Messrs. Oscar Mersán and Diego Zavala

Mersán Abogados  
Asunción, Paraguay

*Representing the Respondent*

Dr. José Enrique García Ávalos  
Procurador General de la República  
del Paraguay

Procuraduría General de la República  
del Paraguay

Asunción, Paraguay

and

Mr. Brian C. Dunning and

Mrs. Irene Dubowy

Thompson & Knight LLP

New York, NY

Date: May 29, 2009

## (I) Introductory and Background Matters

### 1.1 The Parties and Procedural History

1. BIVAC is Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. (“BIVAC” or the “Claimant”), a company incorporated under the laws of the Kingdom of the Netherlands (Netherlands) since 1984. Its registered office is at Vissersdijk 223-241 301 1 GW Rotterdam, The Netherlands. BIVAC is an operating company within the Bureau Veritas Group, which also maintains affiliated companies in more than one country, the headquarters being situated in France.
2. BIVAC is represented in this arbitration by Mr. Nigel Blackaby, Mr. Lluís Paradell and Mrs. Patricia García of Freshfields Bruckhaus Deringer, 2-4 rue Paul Cézanne, 75375 Paris Cédex 08, France and by Messrs. Oscar Mersán and Diego Zavala of Mersán Abogados, Fulgencio R. Moreno No. 509 ler. Piso, Asunción, Paraguay.
3. The Respondent is the Republic of Paraguay (“Paraguay” or the “Respondent”).
4. Paraguay is represented by the Procurador General de la República del Paraguay, Dr. José Enrique García-Ávalos. Paraguay was originally also represented in this arbitration by Messrs. David Lindsey and Ignacio Suárez-Anzorena of Clifford Chance US LLP, as indicated in Paraguay’s letter of 17 December 2007 to ICSID. By letter of 29 April 2008, Paraguay’s then Procurador General informed ICSID that he no longer had the power to represent Paraguay in this arbitration. During the first session of the Tribunal with the parties Paraguay was represented by Ambassador Luis Enrique Chase Plate, Advisor to the Ministry of Foreign Affairs of Paraguay, Dr. Osvaldo Caballero Bejarano, *Procurador General Adjunto* of Paraguay, Ms. Claudia Medina, Procuradoría General de la República del Paraguay, Dr. Jorge Brizuela, Embassy of Paraguay in Washington D.C. and Ing. Gustavo Ruiz Díaz, Representative of Paraguay before the International Bank for Reconstruction and Development (IBRD). During the session the representatives of Paraguay stated that they would shortly communicate to ICSID and the Tribunal the names of the persons that would represent Paraguay during the future conduct of the proceedings. By letter dated 11 November 2008, Dr. García-Ávalos, the newly appointed *Procurador General*, informed the Tribunal that Paraguay had mandated Mr. Brian C. Dunning and Mrs. Irene Dubowy, of Thompson and Knight LLP, to assist him during the hearing on 11 November 2008. By letter dated 6 December 2008 this mandate was extended to cover the full period of the proceedings during the preliminary objections phase.

## 1.2 Procedural History and Background

5. On 20 February 2007 the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received from BIVAC a Request for Arbitration dated 16 February 2007.

6. In its request BIVAC asserted that it had made investments in Paraguay which were protected by the “Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on encouragement and reciprocal protection of investments”, signed on 29 October 1992, which entered into force on 1 August 1994 (“The Treaty”, or “the BIT”). BIVAC further asserted that Paraguay had violated various obligations under the Treaty.

7. BIVAC’s Request for Arbitration asserts that the Ministry of Finance of Paraguay and BIVAC entered into a contract for the provision of technical services for pre-shipment inspection of imports into Paraguay, on 6 May 1996 (“the Contract”). An identical contract was apparently concluded between the Ministry of Finance and SGS Société Général de Surveillance S.A., a Swiss company, at around the same time. The two contracts were intended to execute a “programme of pre-shipment inspection” of goods to be imported into Paraguay, as established by the Ministry of Finance (Preamble to the Contract). The objective of this programme was to optimise the rate of collection of import duties and taxes. The Paraguayan Government had authorised the Ministry of Finance to enter into these contracts by Executive Decree No. 12.311, dated 31 January 1996 (“The Decree” *Claimant’s Exhibit*, CE-5). The Decree refers to “BIVAC INTERNATIONAL (BUREAU VERITAS GROUP)” of France, rather than BIVAC B.V., and the Contract identifies “Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.” as the contracting partner (*Claimant’s Exhibit*, CE-6). By the terms of the Contract BIVAC was *inter alia* required to:

- (i) physically identify the goods prior to shipment,
- (ii) appraise the reasonableness of the price charged by the seller,
- (iii) estimate the customs value,
- (iv) issue certificates of inspection,
- (v) train Paraguayan personnel, and
- (vi) assist in the establishment of a database (Contract, Article 2).

Articles 3.4 and 3.5 of the Contract allowed BIVAC to open and maintain a liaison office in Paraguay, which was constituted as “BIVAC Paraguay S.A.” The Ministry of Finance was obliged to pay fees for the technical services, which were to be calculated as a percentage of the “FOB” value of the goods. Such fees were to be invoiced on a monthly basis to the Ministry of Finance in U.S. dollars and paid within 20 days of receipt of each invoice (Contract, Article 4).

8. Article 9 of the Contract provided that disputes in relation to the Contract with regard to its implementation, termination or invalidity were to be submitted to the Tribunals of the City of Asunción, with Paraguayan law being applicable.

9. The Contract was to run for a term of three years, and could be extended periodically (Article 8.2). The term of the Contract was due to expire in June 1999. BIVAC asserts that it carried out some 70,000 inspections over the three year period of the Contract, and that it had issued 35 invoices. It alleged that 19 of the invoices remained unpaid, amounting to a total amount of some US\$ 22 million. The last payment made by the Ministry of Finance was in February 1999. BIVAC estimates that as at 31 January 2007, the total amount due under the outstanding invoices, together with accrued interest, is approximately US\$ 36.1 million.

10. BIVAC submits that in August 1999 the Ministry of Finance had established the list of the 19 outstanding invoices and, despite this recognition of Paraguay's indebtedness to BIVAC, a series of internal reviews, audits and controls of BIVAC's services were initiated by different government departments or bodies. BIVAC asserts that these reviews and audits led to the conclusion that the Contract was valid and that BIVAC had fully complied with it. It asserts that such conclusions are reflected in:

- the audit by the *Contraloría General de la República* conducted from October 2000 to October 2002, which concluded that the Contract was valid and that the assertions of breach were unfounded;
- formal recognitions of the debt by the Minister of Finance, as declared in February 2001 and in April 2004;
- the investigation initiated by the *Dirección Nacional de Aduanas* in February 2005, which led to the conclusion that BIVAC had fully complied with the Contract.

11. BIVAC asserts that notwithstanding the positive results of these various inquiries, and despite repeated requests for payment, no payments were made. Instead, BIVAC asserts that between 2001 and 2006 contradictory declarations were made by senior government officials, including the President of Paraguay and the Minister of Finance. These sometimes recognised the validity of the Contract and the outstanding debt, and sometimes announced further inquiries.

12. By letter dated 3 October 2006, BIVAC notified the President of Paraguay, H.E. Dr. Nicanor

Duarte Frutos, on 13 October 2006 of the existence of an investment dispute under the Treaty. BIVAC invited Paraguay to enter into negotiations to reach an amicable settlement of the dispute within a period of three months. The three-month period for negotiations expired on 13 January 2007, apparently without any negotiations having taken place.

13. In its Request for Arbitration dated 16 February 2007, BIVAC sought the establishment of an Arbitral Tribunal and requested the following relief:

“On the basis of the foregoing, without limitation and reserving BIVAC’s right to supplement this request for relief in the light of further action which may be taken by Paraguay, BIVAC respectfully requests that the Tribunal:

(a) DECLARE that:

(i) Paraguay has breached Article 6 of the Treaty by taking measures the effect of which is to deprive BIVAC of its investment without payment of just compensation;

(ii) Paraguay has breached Article 3(1) of the Treaty by failing to accord BIVAC’s investment in Paraguay fair and equitable treatment and impairing it by unreasonable measures;

(iii) Paraguay has breached Article 3(4) of the Treaty by failing to observe obligations it has entered into with regard to BIVAC’s investment; and

(b) ORDER Paraguay to compensate BIVAC for its breaches of the Treaty in an amount of at least US\$36,121,052.35 (as of 31 January 2007), plus interest until date of payment;

(c) AWARD such other relief as the Tribunal considers appropriate, and

(d) ORDER Paraguay to pay all of the costs and expenses of this arbitration.”

14. BIVAC maintains that the dispute is covered by the Treaty, that Paraguay has breached several of its Treaty obligations, and that the jurisdictional requirements of the ICSID Convention are met.

15. In its Request for Arbitration BIVAC contends that the dispute is between Paraguay, a party to

the Treaty, and BIVAC, a legal person constituted under the law in force in the Netherlands and with its legal domicile in the Netherlands. BIVAC asserts that it is a Dutch “national”, within the meaning of Article 1(b) of the Treaty, which includes:

“ii. legal persons constituted under the law of that Contracting Party”.

BIVAC further contends that it has made an investment that is protected under Article 1(a) of the Treaty, which defines “investments” as follows:

“the term ‘investments’ shall comprise every kind of asset and more particularly, though not exclusively:

- i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
- ii. rights derived from shares, bonds and other kinds of interests in companies and joint-ventures;
- iii. title to money, to other assets or to any performance having an economic value;
- iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
- v. rights granted under public law, including rights to prospect, explore, extract and win natural resources.”

BIVAC considers that the Contract constitutes a protected investment within the meaning of the Treaty, specifically that it is an “asset”, a “title to money” and “title to performance having an economic value”, since it provides for the payment of a service fee by the Ministry of Finance to BIVAC in exchange for BIVAC’s services. BIVAC asserts that the rights under the Contract also involve “rights granted under public law”, as the Contract confers functions to it that are ordinarily carried out by the custom services of the State.

16. BIVAC asserts that the non-payment of the amounts claimed in 19 invoices by the Ministry of Finance is attributable to Paraguay, giving rise to its State responsibility under international law and the Treaty. It asserts that Paraguay has violated three distinct obligations under the Treaty.

17. It first asserts that Paraguay is responsible for the violation of Article 6 of the Treaty, which states that Dutch investments in Paraguay would not be expropriated or subjected to measures equivalent to expropriation, except for a public purpose, on a non-discriminatory basis, and against payment of just compensation. The provision reads:

“Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
- (c) the measures are taken against just compensation. . .”

According to BIVAC, the Ministry of Finance’s continuing failure to pay amounts due to BIVAC under the Contract and pursuant to the Executive Decree No. 12.311, has substantially deprived BIVAC of the expected economic benefit of its investment. Since no corresponding prompt, adequate and effective compensation has been paid, BIVAC asserts that Paraguay’s conduct constitutes indirect expropriation, within the meaning of Article 6 of the Treaty.

18. Article 3(1) of the Treaty provides:

“Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.”

According to BIVAC, Paraguay’s failure to pay the amounts due to it under the Contract and pursuant to the Decree are acts made in bad faith, in breach of the Contract and contrary to the investment-backed legitimate expectations and acquired rights of BIVAC. BIVAC considers that Paraguay’s conduct amounts to unfair and inequitable treatment of BIVAC’s investment in Paraguay, being objectively unreasonable, in the sense that it is without any justifiable basis, and that it impairs the investment by unreasonable and discriminatory measures, which also ignore BIVAC’s rights.

19. Article 3(4) of the Treaty reads:

“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.”

BIVAC contends that Paraguay entered into obligations with regard to BIVAC’s investment pursuant to the Decree and the subsequent Contract, that these obligations have not been observed as a result of the failure to pay the amounts due, and that consequently Paraguay is in breach of its obligations under Article 3(4) of the Treaty.

20. BIVAC submits that the jurisdictional requirements as set out in Article 25 have been met. Article 25 reads, in relevant part:

“(1) The jurisdiction of the Centre, shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) ‘National of another Contracting State’ means: [...] (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.”

21. BIVAC asserts that Article 25 imposes four requirements and that all have been satisfied:

- there is a legal dispute arising from the alleged violation by Paraguay of BIVAC’s legal rights under the Treaty and international law;
- the dispute arises directly out of BIVAC’s investment in Paraguay which, as described above, is a protected investment under the Treaty and the ICSID Convention;
- the dispute is between Paraguay, an ICSID Contracting State, and BIVAC, a company incorporated in the Netherlands, another ICSID Contracting State; and

- BIVAC and Paraguay have consented to submit the dispute to ICSID arbitration in writing, the consent being perfected by Paraguay's offer to submit an investment dispute under the Treaty to ICSID arbitration and by BIVAC's acceptance of the offer as expressed in the Request for Arbitration.

Article 9(2) of the Treaty reads in its relevant part as follows:

“Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes...”

22. On 2 March 2007, the Centre asked BIVAC to elaborate on the manner in which it considered the Contract to qualify as an investment under Article 25 of the ICSID Convention. The Centre also asked BIVAC to clarify the interplay between Article 9.1 of the Contract, which contains the contractual dispute settlement clause, and the dispute settlement provisions contained in Article 9 of the BIT.

23. By letter dated 15 March 2007 BIVAC replied to the first question by explaining that the ICSID Convention did not define the term “investment” in Article 25, leaving it to other legal instruments (such as the Treaty) to address the matter. According to BIVAC, the Treaty defines “investment” in a broad sense, comprising “every kind of asset”, including “title to money” (Art. 1(a)(iii)) and “rights granted under public law” (Art. 1(a)(v)) as detailed in paragraph 15 above. BIVAC reiterated that the Contract qualifies as an investment in the sense of the Treaty since it establishes a claim to the payment for services by the Ministry of Finance to BIVAC, which is a title to money, and since it conferred functions upon BIVAC which were normally carried out by the custom services, thereby creating rights under public law.

24. As to the interplay between the dispute settlement provisions in the Contract and the Treaty, BIVAC contended that a contractual arbitration clause does not preclude Treaty jurisdiction over claims for breach of the Treaty, regardless of whether the claim may at the same time raise issues of interpretation or application of the underlying Contract.

25. On the basis of these explanations, and without prejudice to issues of jurisdiction or the merits, the Centre registered the Request for Arbitration on 11 April 2007, and duly notified the parties.

### **1.3 The constitution of the Arbitral Tribunal**

26. By letter dated 12 June 2007, BIVAC informed the Centre that the parties had not come to an agreement as to the constitution of the Arbitral Tribunal and requested the Centre to proceed in accordance with Article 37(2)(b) of the ICSID Convention. By letter dated 13 June 2007, the Centre informed the parties that more than 60 days had elapsed since the registration and that in accordance with ICSID Arbitration Rule 2(3) the Tribunal would be constituted as fixed in Article 37(2)(b) of the Convention.

27. By letter dated 14 June 2007, BIVAC appointed Mr. L. Yves Fortier, C.C., O.Q., Q.C., LL.D, a Canadian national, as an arbitrator in this case. Mr. Fortier accepted his appointment on 20 June 2007. By letter dated 9 July 2007, Paraguay appointed Professor Philippe Sands, QC, a British and French national, as an arbitrator. Professor Sands accepted his appointment on 13 July 2007.

28. By letter dated 18 October 2007, following more than 90 days after the registration of the Request for Arbitration, BIVAC informed the Centre that the parties had been unable to reach an agreement on the appointment of the President of the Tribunal and requested, in accordance with Article 38 of the ICSID Convention and ICSID Arbitration Rule 4(1) and (2), ICSID to proceed with the appointment. Following consultations with the parties, the Centre appointed Professor Dr. Rolf Knieper, a German national, as the presiding arbitrator. Professor Knieper accepted the appointment on 10 March 2008.

29. By letter dated 10 March 2008 the Centre informed the parties that the Tribunal had been constituted on that date and that the proceedings were deemed to have begun on the same day. The parties were further informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Tribunal.

### **1.4 Paraguay's Response**

30. Paraguay has consistently and from its first correspondence objected to the jurisdiction of the Centre and the Arbitral Tribunal and has not submitted any arguments as to the merits of the dispute. Paraguay has insisted that neither the appointment of an arbitrator nor the agreement to the constitution of the Tribunal were to be interpreted as consent to jurisdiction.

31. In its first written submission on 8 April 2008, Paraguay put forward the following arguments:

(a) Paraguay has never explicitly agreed to arbitration before ICSID, which it claimed

was necessary since the mere fact of ratifying the ICSID Convention did not constitute such agreement. Paraguay referred to the Preamble, which provides:

“that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration”.

(b) Paraguay asserted that the relationship with BIVAC was based on the Contract, which is to be characterized as an administrative contract and thereby not covered by the Treaty. In its view, a purely contractual relationship without any contribution of capital by the contracting parties does not qualify as an investment as it is understood in common language as well as in Paraguayan law. According to Paraguay, therefore, the Treaty does not apply to the dispute.

(c) Paraguay asserts that Article 9.1 of the Contract contains an exclusive dispute settlement mechanism, establishing jurisdiction of the courts of the city of Asunción, with Paraguayan law being applicable.

(d) Paraguay asserts that BIVAC has not made any investment in the territory of Paraguay, as required by the Treaty. It refers to the Preamble of the Treaty which reads:

“The Government of the Kingdom of the Netherlands and the Government of the Republic of Paraguay...Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect of investments by the nationals of the Contracting Party in the territory of the other Contracting Party...”

(e) According to Paraguay, the Constitution of Paraguay and laws providing for public order prohibit the State from derogating from the national jurisdiction in favour of international arbitration where issues relating to State property arise.

(f) Paraguay asserts that the dispute is not of a legal nature in the sense of Article 25(1) of the ICSID Convention, and that since the Contract is of a public, administrative nature, it is governed by cogent law (*ius cogens*) and considerations of public policy and not by party autonomy; moreover, given that the State has

unilaterally rescinded the Contract for reasons of public policy, the character of the dispute is of a purely administrative nature and not of a legal nature in the sense of the ICSID Convention.

32. For these reasons Paraguay requests: “To admit this party to the proceeding in accordance with the enclosed exhibits. To admit this written pleading which asserts that Paraguay has not consented to ICSID arbitration and that the Tribunal lacks jurisdiction to decide on the request for arbitration filed by BIVAC BV.”<sup>1</sup>

33. In a second, undated brief which was distributed to the Tribunal and BIVAC during the first session on 20 May 2008, Paraguay reiterated its position:

- that no competent State organ of Paraguay had consented to submit the dispute with BIVAC B.V. to an ICSID Arbitral Tribunal;
- that therefore the Tribunal has no jurisdiction;
- that any decision of the Tribunal assuming jurisdiction would be manifestly in excess of its powers and void *ex tunc*; and
- that this problem should be solved before any further action.

34. Paraguay partly reiterated its initial request:<sup>2</sup> “That the Tribunal declare its lack of jurisdiction to decide this dispute as a preliminary matter, not jointly with the merits, as if not, Paraguay would be forced to incur large expenditures from the public treasury to cover its defence costs.”

### **1.5 The Tribunal’s first session**

35. The first session of the Tribunal was held with the parties on 20 May 2008, at the seat of the Centre in Washington, D.C. At that session BIVAC was represented by Mr. Nigel Blackaby and Ms. Patricia García from Freshfields Bruckhaus Deringer, Mr. Andrew Hibbert from BIVAC B.V. and

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<sup>1</sup> “Tener por presentado al recurrente en el carácter invocado en las instrumentales que se acompañan. Tenga por presentado este escrito que denuncia la falta de consentimiento del Estado paraguayo a someterse al CIADI y su clara y contundente Incompetencia de Jurisdicción para conocer en la solicitud de Arbitraje solicitado por BIVAC BV.”

<sup>2</sup> “Que el Tribunal Arbitral del Centro declare la falta de competencia para entender y decidir en esta disputa, como una cuestión previa, no conjuntamente con el fondo de la cuestión, que obligará al Estado paraguayo a una gran erogación de su Tesoro Publico, para hacer frente a los gastos que demande su defensa.

Mr. Oscar Mersán from Mersán Abogados. Paraguay was represented by Ambassador Luis Enrique Chase Plate, Advisor to the Ministry of Foreign Affairs of Paraguay, Dr. Osvaldo Caballero Bejarano, *Procurador General Adjunto*, Ms. Claudia Medina, *Procuraduría General de la República del Paraguay*, Dr. Jorge Brizuela, Embassy of Paraguay in Washington D.C. and Ing. Gustavo Ruiz Díaz, Representative of Paraguay before the IBRD.

36. During the session, the parties agreed that the Tribunal had been properly constituted in accordance with the provisions of the ICSID Convention and the Arbitration Rules in force since 10 April 2006, which are applicable to the proceedings. They also agreed on a series of procedural matters pursuant to the ICSID Convention and the Arbitration Rules. These addressed the apportionment of costs and advance payments to the Centre, fees and expenses of Tribunal members, the place of proceedings in Washington D.C., the records of the hearings, the means of communication to be channelled through the Secretariat, presence, quorum and decisions of the Tribunal as well as delegation of power to fix time limits, written and oral procedures, the examination of witnesses and experts and the publication of the award. These decisions were noted in Minutes signed by the President and the Secretary of the Tribunal and circulated by the latter to the parties.

37. As to the procedural languages, the Minutes state:

“In accordance with ICSID Arbitration Rule 22, BIVAC selected English and the Respondent selected Spanish as the procedural language.

On the issue of translations, after listening to both parties, the Tribunal decided as follows:

- a. All memorials and accompanying witness statements and expert reports will be translated by the submitting party into the other party's selected language;
- b. The translations will be filed simultaneously with the main briefs;
- c. The parties do not need to file translations of other accompanying documentation, but may do so if they wish to.

The accompanying documentation (with the exceptions indicated above), provided that it is in one of the procedural languages, will be filed in its original language. The

Tribunal may require translations from the parties whenever it deems them necessary. The Tribunal will render its decisions in both languages. The communications from the Secretariat to the parties will be made in either language. The Secretariat will arrange simultaneous interpretation services from and into English and Spanish for future hearings.”

38. As to the pleadings, preliminary objections to the jurisdiction of the Tribunal and suspension of the proceedings on the merits, the Minutes record that:

“Paraguay submitted a Memorial with Preliminary Objections to the Jurisdiction of the Centre on April 8, 2008 (a copy of which was transmitted to the Tribunal on April 9, 2008). Paraguay filed a further document on the question of jurisdiction during the first session. Paraguay confirmed that its submissions of April 8 and May 20, 2008 constitute its memorial in chief on the question of jurisdiction.

In view of Paraguay’ objections, after hearing from both parties, the Tribunal decided as follows (as reflected in the Tribunal’s Procedural Order No 1 of June 12, 2008, amended by letter of the Secretary to the parties of June 25, 2008 (attached to these Minutes as Annexes 2 and 3, respectively)):

- The Respondent’s Preliminary Objections, as set out in the documents dated April 9, 2008 and May 20, 2008, shall be treated as a preliminary question;
- The proceedings on the merits are suspended until such time as the Tribunal has adopted a decision on the Preliminary Objections raised by the Respondent, as provided by Article 41, paragraph 2 of the Convention;
- The Respondent’s documents dated April 9, 2008 and May 20, 2008 shall be treated as a written pleading (Memorial), setting out in full the Respondent’s Preliminary Objections within the meaning of Article 41, paragraph 2 of the Convention;
- The time limits for the submission of further pleadings in this phase of the proceedings are as follows:
  - The Claimant shall submit a Counter-Memorial, in English and in Spanish, no later than Thursday July 3, 2008;

- The Respondent shall submit a Reply, in Spanish and in English, no later than Monday August 18, 2008;
- The Claimant shall submit a Rejoinder, in English and in Spanish, no later than Thursday October 2, 2008;
- A hearing on the Respondent’s Preliminary Objections shall be held at the seat of the Centre in Washington D.C., on Tuesday November 11, 2008, to commence at 9:30 a.m.

The conduct and timetable for the hearing, and all other matters, is reserved for further decision.”

39. BIVAC’s Counter-Memorial, Paraguay’s Reply and BIVAC’s Rejoinder were each submitted on time. By letter dated 4 September 2008 the Tribunal invited the parties to agree to an agenda for the hearing on Paraguay’s preliminary objections, to be held at the seat of the Centre in Washington D.C. on 11 November 2008. This was accepted by both parties: BIVAC proposed an agenda by letter dated 1 October 2008, which was orally confirmed during a telephone conversation on 3 October 2008 between Dr. Osvaldo Caballero Bejarano, at that time *Procurador General Adjunto* of the Republic of Paraguay, and Mr. Gonzalo Flores, Secretary of the Tribunal.

### **1.6 The Hearing on Jurisdiction and Post Hearing Briefs**

40. The hearing on jurisdiction was held, as scheduled, on 11 November 2008 at the seat of the Centre in Washington, D.C. At that hearing BIVAC was represented by Mr. Nigel Blackaby, Mr. Lluís Paradell and Ms. Patricia García from Freshfields Bruckhaus Deringer, Mr. Diego Zavala from Mersán Abogados and Mr. Andrew Hibbert from BIVAC BV. Paraguay was represented by Dr. José Enrique García-Ávalos, *Procurador General de la República*, Mr. Luis Emilio Camacho, Chief Legal Advisor of the President, Mr. Raúl Sapena, Lawyer of the Treasury, Dr. Jorge Brizuela, Embassy of Paraguay in Washington D.C., Ing. Gustavo Ruiz Díaz, Representative of Paraguay before the IBRD, Mr. Brian C. Dunning and Ms. Irene Dubowy from Thompson & Knight LLP.

41. Paraguay requested that the hearing be adjourned to a later date. The request was based on the fact that Paraguay had only recently (in August 2008), experienced a significant change of political direction and government, after more than 60 years of government by one political party; that counsel had been retained only days before the hearing; and that more time was needed to master the complex issues arising in the dispute. At the same time Paraguay took care to “recognize that there is

continuity in statehood in Paraguay.”<sup>3</sup>

42. Paraguay also confirmed that it did not call into question the validity of previous acts of government officials. It acknowledged that it had been fully involved in the process including the fixing and evolution of the agenda of the hearing. BIVAC objected to the request for postponement. It insisted that Paraguay had had all the opportunities necessary to present its case, to hear and to be heard, that the request was little more than a further effort to delay the resolution of the dispute. According to BIVAC, it would be unreasonable to frustrate the efforts and expenses that had been deployed to organize the hearing.

43. The Tribunal considered the arguments and decided that it would be appropriate to proceed with the hearing. The request for a postponement was rejected. The Tribunal explained that the decision was motivated by the need to strike a balance between the constraints of the parties and the obligation to conduct the proceedings in reasonable speed and bring them to an end within an expedient and efficient period of time. The Tribunal reiterated that the requirements of due process had been complied with, that both parties had been fully involved in the process, including in the setting of the timetable and agenda for the hearing on jurisdiction. The Tribunal expressed its understanding as to the challenges facing the new government, but nevertheless considered that the interests of the sound administration of justice would justify a continuation of the hearing.

44. The Tribunal further decided, in order to accommodate the interests of both parties and their counsel, and with the agreement of both parties, to grant both parties the opportunity to submit post-hearing memoranda of not more than 40 pages in length, with deadlines for Paraguay of 8 December 2008 and for BIVAC of 22 December 2008. The Tribunal ordered that the submissions elaborate on arguments already presented in written pleadings albeit in a too succinct form but that the parties refrain from introducing new arguments or new approaches at this stage of the proceedings.

45. Both parties accepted the Tribunal’s decision.

46. Due to the length of debate leading to these procedural decisions, the initial timetable for the conduct of the hearing could not be adhered to. With their agreement, both parties were offered equal time to give an oral presentation of their submissions on the issues of jurisdiction. This was done on behalf of Paraguay by Mr. Dunning and Dr. García-Ávalos, and on behalf of BIVAC by Messrs. Blackaby, Paradell and Zavala. After having fully presented their arguments and having answered the Tribunal’s questions, the parties agreed to adjourn the hearing an hour ahead of schedule.

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<sup>3</sup> Statement of Mr. Dunning, Hearing on Jurisdiction, 11 November 2008, transcript, p. 36.

47. In the course of the hearing, Paraguay reiterated that BIVAC had not made an investment in the territory of Paraguay and that therefore the Treaty was inapplicable, and that in any event Paraguay had not breached any of the Treaty obligations. It further asserted that “there were some diplomatic negotiations between the French Republic and the Republic of Paraguay” and that the question had come up “whether the Government of the Netherlands ought to have participated or perhaps ought to participate going forward in diplomatic negotiations to try to resolve the dispute.”<sup>4</sup>

48. BIVAC refuted the argumentation. It reiterated that Paraguay had consented to ICSID jurisdiction, that BIVAC had made a substantive investment in the territory of Paraguay, that it had complied with all its obligations, and that Paraguay had breached its obligations under the Treaty causing damage to BIVAC. It insisted that the claim was arbitrable under Paraguayan law and that the dispute mechanism clause in the Contract did not prevent BIVAC from bringing claims under the Treaty.

49. The parties filed their post-hearing memoranda in accordance with the agreed timetable.

50. In the meantime, Paraguay sent a letter to the Tribunal dated 5 December 2008, inviting the Tribunal to dismiss the entire claim on the ground that BIVAC lacked standing. Paraguay asserted that the real party in interest was BIVAC International S.A., a French company, and not BIVAC BV, a Dutch company. By letter dated 11 December 2008 BIVAC responded to Paraguay’s claim, and requested the Tribunal to reject Paraguay’s new submission as inadmissible on the grounds that it raised new arguments on objections to jurisdiction, thereby contradicting the Tribunal’s decision not to allow any new arguments to be made at this preliminary stage of the proceedings.

51. The Tribunal invited Paraguay to give its views on the issue of admissibility as raised by BIVAC, which it did by letter dated 19 December 2008. By letter dated 22 December 2008 BIVAC reiterated its request that Paraguay’s new arguments as to standing should be declared inadmissible.

52. The Tribunal noted that that the issue of standing only arose for the first time in these proceedings as a result of Paraguay’s letter of 5 December 2008, some three weeks after the hearing on jurisdiction. During that hearing Paraguay submitted that diplomatic negotiations had taken place between France and Paraguay and that the Netherlands should have been associated to them, but it did not raise any issue as to standing. In a letter to the parties dated 24 December 2008 the Tribunal communicated its views as follows:

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<sup>4</sup> Statement of Mr. Dunning, Hearing on Jurisdiction, 11 November 2008, transcript, p. 44.

“The Tribunal notes that Article 41(2) of the ICSID Convention provides:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

It is clear from this provision that the Tribunal may decide to deal with any issue of jurisdiction or admissibility as “a preliminary question” or by joinder to the merits of the dispute. In its Procedural Order No. 1 (12 June 2008) the Tribunal decided as follows: The Respondent’s Preliminary Objections, as set out in the documents dated April 9, 2008 and May 20, 2008, shall be treated as a preliminary question; it is clear from this Order that the decision to treat certain Preliminary Objections of Paraguay by way of preliminary question was limited to the arguments raised by Paraguay in these two documents, and not to any other arguments. The Tribunal recalls that the suspension of proceedings on the merits was made at the request of Paraguay. The Tribunal further recalls that, with the consent of BIVAC, it granted Paraguay a limited further opportunity to elaborate on arguments previously made, whilst also allowing BIVAC a limited right of reply. Further, the Tribunal made clear to the parties during the hearing on 11 November, 2008 that it would not be consistent with principles of due process and procedural economy to introduce new arguments into the preliminary phase when both parties had already agreed to an orderly procedural schedule, and where the parties had had ample opportunities to present their arguments. The Tribunal made clear its direction to the parties that they should not raise any new arguments in the post-hearing memoranda. There were no objections to that direction. The Tribunal notes that Paraguay’s letters of 5 December, 2008, and 19 December, 2008 raise an apparently new argument that was not addressed in Paraguay’s documents dated April 9, 2008 and May 20, 2008. In the circumstances, the Tribunal will limit its decision during this preliminary phase to the objections raised by Paraguay in its documents dated April 9, 2008 and May 20, 2008, and as those arguments (and not any others) are elaborated in the post-hearing memorial dated 8 December, 2008. To the extent that other arguments raised in the documents dated December 5, 2008 and December 19, 2008 remain to be addressed, and without prejudice to any decision the Tribunal may take on the matters raised during this preliminary objections or the need for any further phase, these arguments will be

joined to the merits of the dispute, in accordance with Article 41(2) of the ICSID Convention.”

53. Against this background, we will not deal with the merits of this new argument, raised at a late stage by Paraguay. With a view to assisting the parties as they go forward, however, we think it may be useful to share our perception of the facts as they emerge from the evidence that is currently before us.

(1) It has not been contested that the BIVAC Group operates in several countries, where it has established companies, including France and the Netherlands, and that the French company (BIVAC S.A.) is the headquarters and parent company. The Dutch affiliate of BIVAC was founded in 1984, as a B.V. On the basis of the information on the record, it fulfils the requirements of being a juridical person having the nationality of the Netherlands, within the meaning of Article 25(2)(b) of the ICSID Convention. No evidence has been put before us to indicate that the Dutch entity was created to take advantage of a favourable Netherlands-Paraguay BIT, although this point was alluded to in the Respondent’s letter of 5 December 2008. The evidence before us indicates when the Contract was concluded, Mr. Gilles Minard was the Executive Director of BIVAC B.V. (a post which apparently shared with his position as President of BIVAC International/France). It has not been contested that the Paraguayan Presidential Decree No. 12.311, which authorized the Ministry of Finance to enter into contracts with SGS and with BIVAC, refers to BIVAC International (Group Bureau Veritas) of France. It has also not been contested that the cover page of the Contract refers to BIVAC BV, that the Contract states in the opening that the Contract is concluded between the Minister of Finance and BIVAC B.V. (“a company constituted under the laws of the Netherlands”), and that the Contract determines that this company is “hereinafter called “BIVAC”” (although it also refers in the same Article to the Presidential Decree and to “BIVAC International (Bureau Veritas Group) of France”).

(2) The parties apparently disagree on whether the Contract was signed on behalf of BIVAC International S.A. (France) or BIVAC B.V. (Netherlands). The documents are far from clear. The signatures are placed under the words “BIVAC International” and the postal address refers to BIVAC International, in France. On the other hand, the commercial register of Rotterdam in The Netherlands identifies one of the signatories, Mr. Gilles Minard, as executive director of BIVAC B.V. (Netherlands) and the notarial deed of 29 April 1996, established in Asunción and attached to the Contract, certifies a power of attorney for Mr. Henri Pla to act and sign on behalf of

BIVAC B.V. (Netherlands). The authenticity of these documents has not been challenged.

(3) The documentation is – to say the least - far from being entirely consistent. The documents presently before us do not allow us to determine exactly which of the two legal entities is to be identified as the party to the Contract with the Ministry of Finance. This may serve to distinguish the present situation with that which pertained in ICSID Case No. ARB/03/08 (*L.E.S.I. v Algeria*)<sup>5</sup>, on which Paraguay relies, where the identities of the signatories to the contract differed from that of the Claimant.

(4) It follows that evidence beyond the documents is needed to determine with greater certainty the party in interest. This evidence appears to be available in the related circumstances concerning the parties in relation to and under the Contract. The evidence put before us shows that: (a) the initial security bond was issued on behalf of BIVAC B.V.; (b) BIVAC B.V. rendered the pre-shipment inspection technical services and invoiced the Ministry of Finance, which then made payments to a Bank account in the name of BIVAC B.V.; (c) the termination of the Contract was notified to BIVAC B.V.; and (d) in the course of these proceedings Paraguay did not invoke this standing issue until after the hearing on jurisdiction, even though it was previously aware of the economic links between BIVAC S.A. and BIVAC B.V. (in a letter dated 4 December 2007, for example, Paraguay rejected ICSID’s proposal that a French national be President of the Tribunal because the “Claimant is an entity established under the laws of the Netherlands but with very close ties to France by the fact that it is completely owned by the Bureau Veritas Group whose centre is in Paris” (Tribunal’s translation). These factors are evidenced by the documents before us. Both parties have acted under the Contract in a manner that demonstrates (implicitly at least) that they considered BIVAC B.V. to be the contracting party.

(5) There appears to be no dispute between the parties that, unless otherwise agreed, the nationality of a legal entity is not determined by who controls it, but by its place of incorporation. Article 25(2)(b) ICSID Convention defines “national of another Contracting State” to mean any juridical person which has the nationality of a Contracting State other than the State party to the dispute. Case law and commentary are clear in their support for the proposition that States have a broad discretion to

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<sup>5</sup> *Consortium Groupement L.E.S.I. - DIPENTA v People’s Democratic Republic of Algeria* (ICSID Case No. ARB/03/8).

define corporate nationality, for instance for the purposes of a BIT. The BIT in this case does so by specifying in its Article 1(b)(ii) that “nationals” of either Contracting Party comprise “legal persons constituted under the law of that Contracting Party”, which indicates that no test of corporate control is required.

On the basis of the limited evidence that has been put before us so far, it appears that Paraguay’s argument may prove to be difficult to sustain. The documentary material appears to show quite clearly that both parties acted on the basis that the Claimant was the contracting partner, even if two entities (the Claimant and BIVAC S.A. (France)) may have been involved in aspects of the Contract. If Paraguay decides to maintain this argument it will have to provide additional evidence to establish that BIVAC lacks standing to bring these proceedings.

## **(II) The Preliminary Objections on Jurisdiction and Admissibility**

### **2.1 Introductory matters**

54. Paraguay has objected to the Tribunal’s exercise of jurisdiction in its four written pleadings and during the oral arguments. Whilst the various arguments raised by Paraguay might not easily be characterised as constant over the course of the proceedings so far, it has consistently and forcefully objected to the Tribunal’s potential exercise of jurisdiction. Its final written pleading is a Post-Hearing Brief filed on 10 December 2008, which indicates in the introduction (p. 1) that the arguments set forth in that pleading are “In addition to the bases set forth in the Republic of Paraguay’s previous memorials”. BIVAC includes a similar rider in its Post-Hearing Memorial of 22 December 2008, which notes that “while seeking to clarify previous submissions, this brief is in addition to and does not substitute BIVAC’s previous written and oral pleadings”.<sup>6</sup> The Tribunal understands from this that it was the intention of the parties to make their various claims in a cumulative fashion, and that a failure to address any particular issue in the post-hearing briefs should not be taken to indicate any intention to abandon any earlier argument.

55. Having regard to the written and oral pleadings of both parties, the arguments of the parties, and the differences between them, coalesce around five issues. The characterisation of these arguments has not always been as clear as it might have been, and for this reason the Tribunal deems it useful to summarise them as follows:

(1) Has Paraguay consented in writing to ICSID jurisdiction?

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<sup>6</sup> BIVAC Post-Hearing Memorial of 22 December 2008, para. 1 (hereinafter BIVAC Post-Hearing Memorial).

- (2) Has BIVAC made an “investment” within the meaning of the ICSID Convention and the BIT, and if so is it “in the territory of Paraguay”?
- (3) Does the Tribunal have jurisdiction over the claim relating to expropriation (Article 6), and is the claim admissible?
- (4) Does the Tribunal have jurisdiction over the claim relating to fair and equitable treatment (Article 3(1)), and is the claim admissible?
- (5) Does the Tribunal have jurisdiction over the claim relating to the umbrella clause (Article 3(4)), and is the claim admissible?

We deal with each issue in turn. Before doing so, it is useful to address a number of preliminary matters.

56. It is appropriate to recall that at this stage of the proceedings we are to be guided by Article 41 of the ICSID Convention, which states:

“(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

57. No issue has arisen between the parties as to the meaning and effect of Article 41. It is binding and applicable, and both parties accept that it is for the Tribunal to determine whether it has competence over some or all of the claims raised by BIVAC. The parties also recognise that the Tribunal is free to decide any preliminary objection at this stage of the proceedings, as a preliminary question, or join it to the merits.

58. The issues that have been presented to us are not novel. They have been raised in other ICSID or similar proceedings, and both parties have referred to other awards and decisions— or those parts of other awards and decisions that they deem helpful – in support of their arguments. For understandable reasons, two cases have attracted particular attention in the course of the pleadings: the decisions in *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* and in *SGS Société Générale de Surveillance S.A. v Philippines*.<sup>7</sup> In accordance with Article 53(1) of the ICSID

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<sup>7</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (hereinafter *SGS v Pakistan*); *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) (hereinafter *SGS v Philippines*).

Convention, these decisions are binding only on the parties, so we are not bound by them (or any other ICSID award) as precedent. Nevertheless, these and other decisions and awards merit careful consideration. Having regard to the sound administration of justice, and the need to ensure the coherence and well-being of the system of justice established by the drafters of the ICSID Convention, we proceed on the basis that it is appropriate for us to explain why we have or have not followed the approach adopted by other tribunals.<sup>8</sup> This becomes all the more important where, as in the cases here referred to, the decisions appear to have certain contradictory elements.

59. In exercising our powers under the ICSID Convention, we are bound to interpret the provisions of that Convention and the Netherlands-Paraguay BIT. In carrying out that task we will, in accordance with established practice, be guided by the principles of interpretation that are set forth in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties. These provisions are now broadly recognised to reflect general international law.<sup>9</sup> The principles set forth by these provisions point to a balanced approach to interpretation, one that, in the case of investment treaties governed by a BIT such as the Netherlands-Paraguay BIT, recognises the equally legitimate interests of the State and of

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<sup>8</sup> See also *AES Corporation v. Argentine Republic*, (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, (Dupuy (P), Böckstiegel, Bello Janeiro), at paras. 30-33:

“30. An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.

31. One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.

32. The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant.

33. From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or jurisprudence constante, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.”

<sup>9</sup> See *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.174, para 94; case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p.48, para 83; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p.501, para 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 645, para. 37, and the other cases referred to in those decisions.

the investor. As one tribunal put it, a balanced interpretation takes into account:

“both the State’s sovereignty and its responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.”<sup>10</sup>

The same approach is reflected in the Report of the Executive Directors on the Convention<sup>11</sup> and in the Netherlands-Paraguay BIT, the preamble to which provides:

“Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investment by the nationals of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable [...]

## **2.2 Has Paraguay consented in writing to ICSID jurisdiction?**

60. Chapter II of the ICSID Convention is concerned with jurisdiction, and its Article 25 provides that

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

61. Paraguay raises a number of arguments – over the course of the pleadings taken as a whole – that go to the question of whether the requirements of Article 25 have been satisfied. It has raised issues

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<sup>10</sup> See *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, (ICSID Case No. ARB/03/13), Decision on Preliminary Objections, 27 July 2006, (Caflisch (P), Stern, van den Berg) at para. 99.

<sup>11</sup> *International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, (1965), 1 ICSID Reports 25, at paras. 9-12 and 13 (“While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States”).

that relate to the compatibility of the treaty obligations reflected in the BIT and in the ICSID Convention with its Constitution and domestic laws, as well as the argument that the essential basis of BIVAC's claims raise under the internal law of Paraguay. To cut through the thicket of claims, Paraguay's arguments essentially go to two issues: (1) whether it has given its "consent in writing" to submit to the jurisdiction of the Centre, and (2) whether the dispute arises "directly out of an investment". It is convenient to deal with the first issue in this section, and to return to the second issue when we consider the issue of whether BIVAC made an "investment".

62. In its initial written pleadings Paraguay argued that it had not consented to ICSID jurisdiction since neither its President (which was said to be the only office that could represent the State under the Constitution of Paraguay), nor any other representative with "full powers" to commit the State at the international level, had expressed consent on the part of Paraguay to ICSID jurisdiction in these proceedings.<sup>12</sup> This argument was not explicitly raised again in later written pleadings, or in the oral arguments (although in its Counter-Memorial Paraguay stated that it "totally ratifies and reaffirms (*in totum*) the Objections on Jurisdiction of April 9 and May 20, 2008", to the effect that "Paraguay has not consented to ICSID Jurisdiction".<sup>13</sup> We therefore proceed on the basis that the argument has been maintained and requires a response from the Tribunal.

63. BIVAC responded to this argument in Section II of its Counter-Memorial, arguing that:

"The Treaty clearly and unequivocally contains Paraguay's consent and it is universally established that consent to ICSID arbitration is validly formulated in BITs. The Treaty is binding on Paraguay as a matter of international law and, although irrelevant to establish consent under the ICSID Convention, Paraguayan law."<sup>14</sup>

64. In support of that argument, BIVAC invokes Article 9 of the BIT and relies on academic authority and "unanimous" case law accepting the proposition that for the purposes of Article 25 of the ICSID Convention "the respondent State's consent to ICSID jurisdiction is contained in the BIT invoked" and that the "subsequent consent of a claimant may be manifested through the filing of a request for arbitration".<sup>15</sup> BIVAC's written consent has been offered in the Request for Arbitration.

65. Beyond formally maintaining its argument, Paraguay has provided no response to these

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<sup>12</sup> Respondent Note of 8 April 2008, p. 3; and Note of 20 May 2008, p. 3.

<sup>13</sup> Paraguay's Reply to BIVAC's Counter-Memorial, 18 August 2008, p. 2 ("Paraguay Reply").

<sup>14</sup> BIVAC Counter-Memorial on Jurisdiction, para. 4 ("BIVAC Counter-Memorial").

<sup>15</sup> *Ibid.*, para. 11.

arguments, a point recognised by BIVAC.<sup>16</sup> It is difficult to see on what basis it could do so. The general propositions for which BIVAC argues are by now so well established in practise and case-law that they are “no longer controversial”.<sup>17</sup> They are unanswerable. In the present case, Paraguay’s written consent has been expressed in Article 9(2) of the BIT, which states in relevant part:

“Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes...”

66. There is nothing in the language of Article 9(2) that could be read to indicate any qualification as to Paraguay’s expression of consent. Paraguay has not argued that the BIT is not legally binding, or that it was not validly entered into.

67. Instead, Paraguay argues that under its domestic law there is a requirement for an additional specific expression of consent by its President or a person with full powers under international law, and that this has not been given.<sup>18</sup>

68. BIVAC has responded to this argument in Section II(B) of its Counter-Memorial. It refers to ICSID case-law and academic authority in support of the proposition that once a State has given its written consent in the BIT it “may not withdraw its consent unilaterally”.<sup>19</sup> Paraguay has not responded to this argument. Again, we do not easily see on what basis it could effectively do so. There is nothing in the text of Article 9 of the BIT that could be interpreted to make Paraguay’s expression of consent conditional or dependent upon some further and more specific expression of consent by the President, or some other person with full powers under international law. Accordingly, there is no support for Paraguay’s argument to that effect.

69. Paraguay adds another argument. It claims that the ICSID procedure is “effectively against the Constitutional and legal order of the Republic of Paraguay”. In support of that proposition it invokes, amongst other texts, Article 49 of the Judicial Organisation Code (Paraguayan Law No. 879/81) which, it is said, proclaims that “controversies related to the properties of the state and municipalities

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<sup>16</sup> BIVAC Rejoinder on Jurisdiction, 22 September 2008, para. 29 (“BIVAC Rejoinder”)

<sup>17</sup> C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration* (2007), para. 3.27, p. 54.

<sup>18</sup> Respondent’s Note of 8 April 2008, p. 3; and Note of 20 May 2008, p 2.

<sup>19</sup> BIVAC Counter-Memorial, para. 17.

cannot be submitted to arbitral procedures”.<sup>20</sup>

70. In response, BIVAC argues that there can be no question that a dispute concerning the Contract is arbitrable under Paraguayan law. Specifically, BIVAC argues that the BIT is binding on Paraguay as a matter of international law; Paraguay is not entitled to invoke its domestic law as an excuse not to abide by its Treaty obligations; the BIT is part of Paraguayan law which thereby provides for the arbitrability of this dispute; and that Paraguay’s Investment Law allows arbitration of contracts between the State and investors that disputes arising out of those contracts be submitted to arbitration; and arbitration is expressly admitted in administrative contracts.<sup>21</sup>

71. Once again, Paraguay has chosen not to respond to these arguments by BIVAC, at the oral hearing or in its Post-Hearing Memorial. It is noteworthy, in this regard, that another ICSID Tribunal in a case involving Paraguay has already ruled that consent expressed in a BIT is sufficient to found the jurisdiction of an ICSID Tribunal.<sup>22</sup> That decision contradicts Paraguay’s argument in this case. That decision in favour of ICSID jurisdiction was handed down in 2000, some nine years ago. We have been provided with no evidence to indicate that Paraguay objected to the decision or that it took any steps to change its domestic laws, or amend any of its BITs, in response to the decision.

72. Having expressed its written consent in Article 9 of the BIT without any condition concerning compliance with other Paraguayan constitutional or domestic legal requirements, and having taken no other actions that it relies upon to deny consent, we find it difficult to see on what basis Paraguay can sustain the various claims it has made in the early stages of these proceedings.

73. For these reasons, we reject Paraguay’s arguments and conclude it has expressed its written consent to jurisdiction in Article 9 of the BIT, and that it has not imposed in that provision or elsewhere other explicit conditions that are to be satisfied to perfect that expression of consent, or taken any other actions to support an argument to the effect that written consent under Article 9 is not effective. In these circumstances it follows that Article 9 constitutes the expression of written consent required by Article 25 of the ICSID Convention.

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<sup>20</sup> Paraguay Reply, p.11.

<sup>21</sup> BIVAC Rejoinder, para. 29.

<sup>22</sup> Eudoro A. *Olguín v. Republic of Paraguay*, (ICSID Case No. ARB/98/5), Decision on Jurisdiction, 8 August 2000, paras. 26-27 (Spanish original),-English translation available in 154 *ICSID Reports* 6 at 162.

### 2.3 Has BIVAC made an “investment” within the meaning of the ICSID Convention and the BIT, and if so is it “in the territory of Paraguay”?

74. Paraguay objects to the jurisdiction of the Tribunal on the grounds that BIVAC has not made an “investment” within the meaning of the ICSID Convention or the BIT; that accordingly the dispute does not “arise out an investment”; and that even if an “investment” was made it was not made “in the territory of Paraguay” as required by Article 9(2) of the BIT.<sup>23</sup>

75. BIVAC has responded to these arguments by invoking the decisions in the two *SGS* cases. It argues that:

“The Contract is a protected investment under the express terms of the Treaty and also under the ICSID Convention. Further, Paraguayan law is irrelevant as regards the question of the definition of protected investment under the Treaty. In any case, the Contract would qualify as an investment under the Investment Law and as an asset protected under Paraguayan law.”<sup>24</sup>

76. The parties agree that the ICSID Convention does not define the term “investment”. This is left to the BIT, as described below. The BIT also provides in Article 9(2) that access to dispute settlement under the ICSID Convention is limited to circumstances in which three conditions are met: first, there must be an “investment”; second, it must have been made by a “national”, in this case, of the Netherlands; and third, it must have been made, in this case, “in the territory” of Paraguay. Subject to the point that Paraguay raised at a late stage in the proceedings concerning BIVAC’s standing to bring these claims under the BIT, which will not be decided as a preliminary question (see above at para. 53), we address the first and third issues.

#### “Investment”

77. Paraguay argues that BIVAC has not made a protected “investment” under the ICSID Convention or under the BIT.

78. As regards the ICSID Convention, it is by now well established that in the absence of any attempt to define the term “investment” in the Convention, the parties to that instrument are left with a margin of discretion in defining the term. The Tribunal in *SGS v Pakistan* noted that:

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<sup>23</sup> Paraguay Post-Hearing Memorial on Jurisdiction, 8 December 2008, paras.1-48 (hereinafter Paraguay Post-Hearing Memorial).

<sup>24</sup> BIVAC Counter-Memorial, para. 31 and Section III generally.

“The ICSID Convention does not delimit the term “investment,” leaving to the Contracting Parties a large measure of freedom to define that term as their specific objectives and circumstances may lead them to do so.”<sup>25</sup>

Such freedom as may exist is not unlimited. As the Tribunal recognised in *Joy Mining v Egypt*:

“The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.”<sup>26</sup>

The parties cannot adopt a definition of “investment” that relates to activities that manifestly fall outside the scope of what the drafters of the ICSID Convention intended. The meaning of “investment” is subject to objective appreciation, having regard to the objectives of the ICSID Convention, which seeks to promote international cooperation for economic development and the role of private international investment (see the preamble to the ICSID Convention).

79. Against this background, we will first address the question of whether BIVAC has made an “investment” within the meaning of Article 9(2) of the BIT, and then return to definitional issues under the Convention.

80. Article 1 of the BIT defines investment as follows:

“(a) the term “investments” shall comprise every kind of asset and more particularly, though not exclusively:

- i. movable and immovable property as well as any other rights in rem in respect of every kind of asset ;
- ii. rights derived from shares, bonds and other kinds of interests in companies and joint-ventures;
- iii. title to money, to other assets or to any performance having an economic value;

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<sup>25</sup> *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, (Feliciano (P), Faurès, Thomas), para 133.

<sup>26</sup> *Joy Mining Machinery Limited v Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, (Orrego Vicuña (P), Craig, Weeramantry), para 49.

- iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
- v. rights granted under public law, including rights to prospect, explore, extract and win natural resources.”

81. BIVAC asserts that it has, under the Contract, rights to fees arising from the performance of the Contract which gives it “title to money, to other assets or to any performance having economic value”, within the meaning of Article 1(a)(iii) of the BIT, as well as “rights granted under public law”, within the meaning of Article 1(a)(v) of the BIT.<sup>27</sup> BIVAC has refined its arguments in the course of the pleadings, clarifying that “the rights arising under, and from the operation of, the Contract rather than the Contract itself are assets”.<sup>28</sup> According to BIVAC, it is necessary to consider its operations as a whole within which the Contract right at issue arises. It concludes that:

“The investment is BIVAC’s right under the Contract to payment by the Ministry of the fee contractually agreed in return for BIVAC’s services”.<sup>29</sup>

In support of its arguments, BIVAC makes particular reference to the earlier ICSID decisions in *SGS v Pakistan* and *SGS v Philippines*, both of which are said to support its conclusions. As to the question of assets, BIVAC refers to the non-exhaustive identification of assets referred to in Article 1(a) of the BIT.

82. In response, Paraguay develops its argument that the requirements of the BIT have not been met. In its Post-Hearing Memorial it argues that the Contract is not an investment within the meaning of the BIT, because it is not a concession, its rights under the Contract are purely rights to receive payment for services performed abroad, and not rights granted under public law, and the Contract is not a title to money because it is not a document evidencing a liquidated debt such as a promissory note or a judgment.”<sup>30</sup>

83. By way of preface, we note that practise under the ICSID Convention, including in the relevant case law, recognises that a wide range of “assets” may be characterised as an “investment”, and that they are not limited to equity holdings. In *Fedax v Venezuela*, for example, the tribunal qualified the claimant’s holding of promissory notes as an “investment” because they represented the counterpart of a credit;<sup>31</sup> in *Salini v Morocco* the tribunal ruled that the claimant had made an investment because

<sup>27</sup> Request for Arbitration, para. 11.

<sup>28</sup> BIVAC Post-Hearing Memorial of 22 December 2008, para 5 (hereinafter BIVAC Post-Hearing Memorial).

<sup>29</sup> *Ibid*, para 2(b).

<sup>30</sup> Paraguay Post-Hearing Memorial, paras. 30-31.

<sup>31</sup> *Fedax N.V. v Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction, 11

it had made “contributions in money, in kind, and in industry;”<sup>32</sup> in *Bayindir v Pakistan* the tribunal noted that the claimant had trained engineers, provided equipment and know-how and incurred extensive bank commission charges and thus had “made a significant contribution, both in terms of knowhow, equipment and personnel and in financial terms”;<sup>33</sup> in *SGS v Philippines* the tribunal found an “investment” where the claimant’s activities were not limited to the provision of inspection services and that it had established a “substantial office, employing a significant number of people” with a monthly payroll ranging between US\$ 100,000 and US\$ 200,000.<sup>34</sup>

84. Against this background, which indicates that a broad range of assets have been treated as investments, we first address the question of whether BIVAC has rights granted under public law. BIVAC argues - and Paraguay does not disagree – that the Contract has the character of an administrative contract, rather than a pure commercial contract. The parties disagree, however, as to whether the rights that are conferred by the Contract upon BIVAC are of a kind that might normally be reserved to a public authority.

85. We note that in many respects a public (or administrative) contract may not be structurally different from a contract under civil law. This is recognised by Paraguayan law, which provides in Article 8 of Law No. 2.051 on Public Contracts that the Civil Code will be applicable if no special rules govern. However, a distinguishing feature of a public contract is that the State may unilaterally terminate the contract if the public interest requires.

86. Did the Contract confer rights to BIVAC under public law? Articles 1 and 2 of the Contract required BIVAC to render technical services of inspection of merchandise, to verify the prices invoiced by the importer, to give an opinion with respect to tariff classification, and if appropriate to issue a “Certificate of Inspection”. These acts allowed the national Custom Office to fix the level of import duties. Although the Customs Office was not bound by law to follow the Certificate of Inspection issued by BIVAC, it appears that in practice it invariably did so. Without such a Certificate, importers would be faced with considerable difficulties if they wished to import goods into Paraguay. In its Post-Hearing Memorial BIVAC summarised the process as follows:

“33. The Contract was part and parcel of Paraguay’s tax policy by ensuring through

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July 1997, (Orrego Vicuña (P), Heth, Owen), para. 40.

<sup>32</sup> *Salini Construttori S.p.A. and Italstrade S.p.A. v Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, (Briner (P), Cremades, Fadlallah), para 53.

<sup>33</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, (Kaufmann-Kohler (P), Berman, Böckstiegel), para 131.

<sup>34</sup> *SGS v Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, (El-Koshi (P), Crawford, Crivellaro), paras 101 and 105.

pre-shipment inspections that imports complied with customs duty and tax obligations, thereby raising the financial revenue of the State. BIVAC's services thus pertained to the sphere of internal affairs of the Paraguayan State and its policies. In particular, the services related to the regulation of conduct and consequences of events within the territory of Paraguay such as imports into the territory of Paraguay, tax payments to the Paraguayan government and control of fraud at the level of local customs officials in Paraguay. They concerned the extent to which, and the manner in which, imports could be made and taxes paid in Paraguay according to the law and policies prescribed by the Government.”

87. It appears from this summary and from the Claimant's submissions, which have not been challenged by Paraguay, that BIVAC was entrusted with functions that are commonly reserved to the public authority of the State acting through its customs authorities, so as to establish the conditions in which the State is then in a position to levy customs duties. This is clear from Resolution No 1.171, 3 July 1996, which “regulates the operational procedure for the pre-shipment inspection of imports”. Chapter IV of the Resolution establishes the “procedure” for inspections and the “obligations of the inspection company”. Article 11 describes pre-shipment inspections, as “includ[ing] the exact description of the products, their condition (new or used), quantity, quality and/or origin and the price of the products for a correct tariff classification [...]”. BIVAC's functions are set out in Articles 12 to 20 of the Resolution, in relation to physical inspections, product description, price verification, issuance of reports of inspection, content of the certificates of inspection, responsibility, and technical cooperation with customs. It appears that these regulated functions carried out by BIVAC were the same as those which had previously been “carried out exclusively by the customs authority”, to quote from Articles 65 to 69 of the *Código de Aduanas* (Customs Code), through a procedure known as “aforo”.<sup>35</sup>

88. These were the functions for which BIVAC's services were contracted. In this way, BIVAC was directly substituted for the previous role of the Paraguayan customs authorities in inspecting imported goods. At paragraph 10 of its Post-Hearing Memorial, Paraguay in effect confirms that these were functions of a public character, when it states that:

“Pre-shipment inspection programs are a transitional measure to be used only until host states' national customs authorities are able to carry out these tasks on their

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<sup>35</sup> Article 65 of the Customs Code, in force at the time, provided: “The aforo of the goods will be carried out exclusively by the customs authority. This operation consists of examining the goods, verifying their nature, establishing their weight, quality, quantity or measurement, classifying them according to the customs tariff, establishing their price and determining the applicable customs duties.” (informal translation)

own.”

In our view this indicates that BIVAC’s rights were “granted under public law”, within the meaning of Article 1(a)(v) of the BIT.

89. Relatedly, any Certificate of Inspection issued by BIVAC for Paraguay had legal consequences in that State, as it established a legal basis for authorising imports. Article 2 of Decree 12.311/96 provides that [t]he Certificate [...] shall be a necessary requisite for processing the customs clearance of all imported merchandise, without exception”. Article 4 of Resolution No 1.171/96 reiterates the significance of the Certificate, stating that:

“In order to clear the merchandise from customs duties, the importer shall submit to the Paraguayan Customs the Certificate of Inspection issued by the Inspection Companies, together with the other import documents required by the General Customs”.

Resolution No 100 of 30 August 1996 provided for penalties to be applied in the event that imported goods arrived in the territory of Paraguay without a Certificate of Inspection. It makes clear that without a Certificate provided by BIVAC, in accordance with the terms of the Contract, no import could take place. This Resolution also makes clear that in some circumstances BIVAC could be required to carry out inspections in the territory of Paraguay.

90. Paraguay has not sought to challenge these factual assertions, although it seeks to draw different inferences from them. It asserts that BIVAC’s rights under the Contract are purely rights to receive payment for services performed abroad, and not rights granted under public law.<sup>36</sup>

91. On the basis of the materials set out above, and in the absence of grounds to substantiate the points made by Paraguay, we disagree with its argument. The better view is plainly that the Contract bestowed upon BIVAC “rights granted under public law”, as provided by Article 1(a)(v) of the BIT. The production of Certificates of Inspection and BIVAC’s related activities may have been described in the Contract as “technical services” rendered by a private enterprise, but the factual and legal reality is that they were deeply interwoven with the functioning of the State in its public capacity, including by contributing to the raising of public revenues through import duties. The Contract was backed by legislation and executive acts.

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<sup>36</sup> Paraguay Post-Hearing Memorial, paras 30 and 55.

92. Our conclusion is consistent with the approach taken by the Tribunal in *SGS v Pakistan*, which found that “SGS was conferred certain powers that ordinarily would have been exercised by the Pakistani Customs service (the identification and valuation of goods for duty purposes)”.<sup>37</sup>

93. In light of this conclusion, there is no need for us to determine whether BIVAC had “title to money” within the meaning of Article 1(a)(iii) of the BIT (we note that there is a difference between the Netherlands-Paraguay BIT, and the BITs that were in issue in the two *SGS* cases: in the present case the BIT refers to “title” to money rather than “claims” to money, as was the case in the *Pakistan* and the *Philippines* cases), or whether it held a “concession”.

94. Having concluded that BIVAC made an “investment” within the meaning of the BIT, the question arises whether a different conclusion arises in relation to the meaning of “investment” in the ICSID Convention. At a formal level, the question may be put as follows: does the definition in the BIT exceed what is permissible under the Convention? Framed in that way the answer is self-evidently negative. The definition in the BIT follows the approach adopted in many other BITs concluded around the world. Paraguay would have to argue that its own BIT is inconsistent with the requirements of the ICSID Convention. Sensibly, it has chosen not to go down that path.

95. What Paraguay does do, however, is argue that the acts undertaken by BIVAC under the Contract do not meet the criteria for the definition of “investment” within the meaning of the Convention. Specifically, Paraguay argues that the criteria that it identifies as pertinent – contribution to economic development, contributions, duration and risk - have not been met.<sup>38</sup> BIVAC responds to each of these points to express its strong disagreement.<sup>39</sup>

96. In our view, Paraguay’s argument is unpersuasive. This issue was addressed in *SGS v Philippines* and *Pakistan*. In both cases the Tribunals had little hesitation in concluding that equivalent contractual arrangements gave rise to an “investment” within the meaning of the BITs that were respectively in issue.<sup>40</sup> We have not been presented with any argument that would allow us to reach a different conclusion in the present case, where the nature of the services to be provided under the contracts and the relevant BIT definitions are broadly the same.

“*In the territory of Paraguay*”

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<sup>37</sup> *SGS v Pakistan*, para. 135.

<sup>38</sup> Paraguay Post-Hearing Memorial, paras. 8-23.

<sup>39</sup> BIVAC Post-Hearing Memorial, paras. 18-28.

<sup>40</sup> *SGS v Pakistan*, para. 136; *SGS v Philippines*, para. 112.

97. We turn next to the question of whether the legal dispute concerns an investment “in the territory of [Paraguay]”, as required by Article 9(2) of the BIT.

98. Paraguay asserts that if there was an “investment” it was not made “in the territory of” Paraguay because, in accordance with the provisions of the Contract, its performance was to be made abroad.<sup>41</sup>

99. For its part, BIVAC responds that “viewed as a whole, the operation performed under the Contract has a sufficient connection with the territory of Paraguay for BIVAC’s investment be considered as an investment in Paraguay”.<sup>42</sup> BIVAC invites the Tribunal to take into consideration all the aspects of the operations under the Contract, and in particular: the local presence of BIVAC in Paraguay through its subsidiary BIVAC Paraguay which was specifically set up to act as the liaison office to carry out the operations; the functions of this liaison office in receiving and processing the requests for inspections from importers in Paraguay and in verifying the draft Certificates of Inspection sent by BIVAC’s Centres at the place of export; the provision of Certificates of Inspection by BIVAC in Paraguay to importers and customs authorities in Paraguay; the services relating to know-how transfer (customs’ training, data bank) provided for in the Contract and carried out by BIVAC in Paraguay; the utilization of the services provided by BIVAC by the Paraguayan State; the clear replacement by BIVAC of functions otherwise to be carried out by Paraguay’s customs authorities; the legal effect of BIVAC’s Certificates of Inspections in Paraguay; and the public regulation of the whole operation by Paraguayan legislation.<sup>43</sup>

100. Paraguay has not challenged BIVAC’s assertion that it established a local subsidiary which was staffed by more than 70 employees and maintained three liaison offices in Paraguay, although it asserts that the Contract did not oblige it to take these actions.<sup>44</sup> Paraguay also does not challenge BIVAC’s assertion it invested more than US\$ 6.2 million to establish and to run the subsidiary and that it had posted a US\$ 250,000 security bond to guarantee the fulfilment of its obligations. It submits, however, that these investments were incremental, incidental and that they did not profit Paraguay.<sup>45</sup> Paraguay seeks to refute the claim that an “investment” was made in its territory by referring to the text of the Contract, which refers to the fact that technical services are to be rendered abroad (Contract, Preamble, Articles 1.1, 2.1, 5.7), including Paraguay’s transfer of fees abroad (Article 4.4) and which stipulates that the fees would be free of taxes (Article 4.6), which would not be possible in the case of services rendered nationally.<sup>46</sup> It seeks to distinguish this case from the

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<sup>41</sup> Paraguay Post-Hearing Memorial, paras. 32-43.

<sup>42</sup> BIVAC Post-Hearing Memorial, para. 30.

<sup>43</sup> *Ibid.*, paras. 32-50.

<sup>44</sup> Paraguay Post-Hearing Memorial, para. 41.

<sup>45</sup> *Ibid.*, paras. 17-19.

<sup>46</sup> *Ibid.*, paras. 32-36.

SGS decisions on the grounds that the facts are different: in *SGS v Philippines* the certificates of inspection were established in the Philippines and the establishment of the liaison office was a contractual obligation; in *SGS v Pakistan* the tribunal found that the contract in issue in that case was a concession, which Paraguay argues is not the case here.<sup>47</sup>

101. These arguments are far from persuasive, and Paraguay seems to take refuge in arguments of form rather than substance. The facts appear uncontested: a local company was established in Paraguay, and maintained at a professional level (apparently without criticism); training of local personnel took place in Paraguay; knowledge was transferred in Paraguay; and a local data base was established and equipped in Paraguay. BIVAC was entitled to be remunerated in respect of the costs of these actions, which can hardly be said to be extra-contractual: as Article 2.10 of the Contract put it, “The cost of such participation and cooperation will be assumed by BIVAC within the amount for its fees.” In accordance with the Contract, there appears to be no dispute that BIVAC injected money and industry into the project to render the technical services and in addition to set up a structure in Paraguay and to create local know-how. These acts built capacity in Paraguay.

102. BIVAC has also argued for the contractual similarities between the Contract and the contracts on which *SGS v Philippines* and *SGS v Pakistan* were based, and submits that the cases are not distinguishable. In *SGS v Pakistan* the Tribunal concluded that the contract in question:

“defined the commitments of SGS in such a way as to ensure that SGS, if it was to comply with them, had to make certain expenditures in the territory of Pakistan. While the expenditures may be relatively small (Pakistan’s Reply estimates them as amounting to approximately U.S.\$800,000, while SGS presents the estimate of U.S.\$1.5 million), they involved the injection of funds into the territory of Pakistan for the carrying out of SGS’s engagements under the PSI Agreement.”<sup>48</sup>

The decision in *SGS v Philippines* is even more explicit:

“101 (...)Under the CISS Agreement, SGS was to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines. The focal point of SGS’s services was the provision, in the Philippines, of a reliable inspection certificate (...) on the basis of which import clearance could be expedited and the appropriate duty charged. SGS’s inspections abroad were not carried out for their own sake but in

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<sup>47</sup> *Ibid.*, paras. 40-42.

<sup>48</sup> *SGS v Pakistan*, para. 136.

order to enable it to provide, in the Philippines, an inspection certificate on which BOC could rely to enter goods to the customs territory of the Philippines and to assess and collect the ensuing revenue. (...) Further, those operations were organized through the Manila Liaison Office, which under Article 5 of the CISS Agreement SGS was obliged to “continue and maintain... until the date upon which this Agreement ceases to be effective or its implementation is interrupted or indefinitely suspended.” This was a substantial office, employing a significant number of people. Requisitions for inspections were channelled through the Office which arranged the inspection, received the results, incorporated them in a CRF which it provided both to the importer and the BOC prior to customs clearance and dealt with any resulting queries. In addition, direct periodic reports had to be made to the Government, and from time to time BOC would make specific requests for reports or other services with respect to specific consignments.

102. The position might have been different if SGS had provided the certificates and issued its reports abroad, e.g. to a Philippines trade mission in each country of export. But it did not perform the service in that way, nor did the CISS Agreement envisage that it would do so. A substantial and non-severable aspect of the overall service was provided in the Philippines, and SGS’s entitlement to be paid was contingent on that aspect.

103. These elements taken together are sufficient to qualify the service as one provided in the Philippines. Since it was a cost to SGS to provide it, this is enough to amount to an investment in the Philippines within the meaning of the BIT.

[...]

105. The Liaison Office (which had a number of sub-branches) was funded by subventions from an SGS affiliate in Geneva which employed the staff. According to evidence presented by SGS, its monthly payroll in the Philippines ranged between US\$100,000 and US\$200,000, amounting to something of the order of a quarter of its total expenses. SGS accepted that this was a fraction of the cost of conducting the actual inspections abroad. Under Article 7 of the CISS Agreement, invoices were forwarded to the BOC from Switzerland and were paid by bank transfer to SGS’s Swiss account.

[...]

106. The Tribunal does not consider that these circumstances affect the conclusion that SGS made an investment in the Philippines. A Swiss company within the SGS Group funded the Liaison Office as a part of the provision of an overall service—essentially an informational service—which for the reasons given had its focus in the Philippines. The fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that SGS was paid in Switzerland.”<sup>49</sup>

103. We find the arguments underlying both decisions to be highly persuasive. They concerned broadly similar factual and legal circumstances, with the exception of the explicit obligation to set up liaison offices, which do not arise in the Contract but which is not, in any event, dispositive. Activities cannot be subdivided in a way as to distinguish between claims for non-payment of services abroad and claims for services in Paraguay: in practise the services were treated as inseparable and the overall objective was to increase national State revenue and to transfer knowledge to Paraguay, so that the State could pursue the import duty assessment and certification at the end of the Contract with BIVAC. Activities that were internal and external to the territory of Paraguay formed a whole for which a single *ad valorem* fee was paid.

104. For these reasons we have little difficulty in concluding, in the light of the obligations under the Contract and on the basis of the materials that have been put before us, that BIVAC made an investment “in the territory of” Paraguay within the meaning of Article 9(2) of the BIT.

### *Conclusion*

105. For these reasons the Tribunal concludes that BIVAC made an “investment” within the meaning of the ICSID Convention and the BIT, that it did so “in the territory of Paraguay”, and that the dispute before this tribunal arises out of that “investment”. Having concluded that there was an “investment”, and that it was made in the territory of Paraguay, for the sake of completeness we also conclude that the dispute that has been put before the Tribunal “arises out of” that “investment”. Paraguay has not argued to the contrary. The dispute concerns remuneration for the service that BIVAC provided under the Contract and, in this way, arises directly out of the investment, within the meaning of Article 25(1) of the ICSID Convention. Such conclusion is without prejudice to the merits, or to the issue of jurisdiction and admissibility to which we turn.

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<sup>49</sup> *SGS v Philippines*, paras. 101-106.

**2.4 Does the Tribunal have jurisdiction over the claim relating to expropriation  
(Article 6), and is the claim admissible?**

106. Paraguay asserts that BIVAC has failed to establish a *prima facie* breach of the obligation not to expropriate set forth in Article 6 of the BIT, namely the obligation not to take “any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments”.<sup>50</sup> Specifically, Paraguay claims that the facts alleged by BIVAC are not capable of giving rise to a claim for expropriation, on the basis that “a simple breach of contract at the hands of a government is *not* expropriation”.<sup>51</sup> Paraguay relies in particular on the decision in *SGS v. Philippines*, in support of the proposition that a mere refusal to pay a debt cannot amount to an expropriation where remedies exist in respect of such a refusal, and a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.<sup>52</sup>

107. The parties agree that at this stage of the proceedings what needs to be made out is a *prima facie* breach of the obligation. As BIVAC puts it in its Counter-Memorial:

“The Tribunal must be satisfied *prima facie* that the Claimant’s claims are capable of constituting the alleged breach of the Treaty, i.e. that ‘the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked’.”<sup>53</sup>

BIVAC asserts that the *prima facie* standard is met, and that the present dispute is not about a mere failure to pay. According to BIVAC, it is

“a persistent failure to pay accompanied by other factors: contradictory conduct by the authorities in recognising the debt and the obligation to pay, but using governmental powers to commission endless internal reports and establishing commissions for the review of BIVAC’s compliance with the Contract, all of which were favourable to BIVAC; inexcusable failure to adhere by its own internal reports and thus effectively refusing to pay without any justification; unreasonable and arbitrary behaviour in light of the results of the internal reviews; and thus the absence of a real dispute between the parties on either BIVAC’s performance of the Contract,

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<sup>50</sup> Paraguay Post-Hearing Memorial, paras. 83-91.

<sup>51</sup> *Ibid.*, para. 84.

<sup>52</sup> *Ibid.*, para. 85.

<sup>53</sup> BIVAC Counter-Memorial, para. 120, citing *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005, paras 237 and 254.

the obligation to pay, or the amounts due.”<sup>54</sup>

BIVAC further asserts that the measures taken that it says are attributable to Paraguay constitute an indirect expropriation in the sense that they are “measures ‘taken by a State the effect of which is to deprive the investor of the use and benefit of his investment’ even if title to the investment is unaffected, and that Paraguay has deprived BIVAC “of the value of (even if not formally its title to) its right to payment as of July 1999 when the Contract was terminated”.<sup>55</sup>

108. Issue is joined between the parties on the relevance of the decision in *SGS v Philippines*, which is worth considering in some detail. BIVAC does not in its Post-Hearing Memorial assert that this decision was wrongly decided: rather, it argues that it is distinguishable on the facts.<sup>56</sup>

109. The tribunal in *SGS v Philippines* approached “the question of its jurisdiction on the footing that in the Request for Arbitration, SGS made credible allegations of non-payment of very large sums due under the CISS Agreement and claimed that the Philippines’ failure to pay these was a breach of the BIT, but that the exact amount payable has neither been definitively agreed between the parties nor determined by a competent court or tribunal.” It found as fact that “As presented to the Tribunal by the Claimant, the unresolved issues between the parties concern the determination of the amount still payable.”<sup>57</sup> It then proceeded to consider the implications of that factual determination for the question of jurisdiction over a treaty claimed framed in terms of expropriation. At paragraph 161 of its decision the Tribunal ruled:

“In the Tribunal’s view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.”

110. We have been presented with no arguments asserting that the legal principle applied by the

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<sup>54</sup> BIVAC Post-Hearing Memorial, para. 74.

<sup>55</sup> *Ibid.*, para. 77.

<sup>56</sup> *Ibid.*, para. 75.

<sup>57</sup> *SGS v Philippines*, para. 158.

tribunal was wrong as a matter of law, and there is nothing with which we disagree in respect of the legal principle identified and applied by the tribunal. Where a debt arising under a contract continues to exist, and where the contractually agreed forum for the resolution of disputes relating to that debt remains available, it appears self-evident that a contracting party's rights in relation to that debt cannot be said to have been expropriated, whether directly or indirectly. In the present case there is no allegation that the debt under the contract does not continue to exist, or that the contractual forum provided for by the Contract is not available: BIVAC has freely chosen not to go to the courts of Asunción to recover the sums which it says are due to it under the Contract. Rather, BIVAC seeks to distinguish the approach of the tribunal in *SGS v Philippines* in the following way:

“Here there is not a *mere* refusal to pay a debt; nor an unresolved dispute as to the amounts or the obligation to pay. This is precisely the point. Paraguay has engaged in governmental conduct, reviewing BIVAC's performance and the obligation to pay not once, but at least five times, and concluded each time that BIVAC was in full compliance and thus Paraguay had to pay. Yet Paraguay has not paid. That failure to pay cannot be merely commercial. It is governmental conduct: the failure by the government to abide by its own internal acts. Admittedly, there is no formal decree cancelling the debt, but what is discernable from Paraguay's wrongful omission of payment, in these highly unusual circumstances, is a policy decision by the government to do everything within its power to deny BIVAC's right to payment. That effectively amounts to a repudiation of the debt.”<sup>58</sup>

111. The possible distinction between the two cases is that in *SGS v Philippines* there existed a dispute between the parties as to the outstanding amount of the debt, whereas in the present case BIVAC asserts that there is no such dispute. Paraguay disagrees: “it is not true that the Paraguayan government has confessed this debt. Under Paraguayan law, internal letters or reports do not bind the Paraguayan executive branch and do not render a disputed debt an unliquidated claim. In fact, only a Paraguayan court can make a final determination as to the alleged debt.”<sup>59</sup> Paraguay further asserts that BIVAC's claims under the Contract are unliquidated and therefore not subject to a summary collection proceeding and that BIVAC's invoices have not been authenticated.<sup>60</sup>

112. At this preliminary stage we are not in a position to make definitive findings of fact on the claims adopted by the parties, or express conclusions on the arguments of Paraguayan law that have been made. These would be issues for the merits. Our task is limited to an assessment of whether

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<sup>58</sup> BIVAC Post-Hearing Memorial, para. 75.

<sup>59</sup> Paraguay Post-Hearing Memorial, para. 87.

<sup>60</sup> *Ibid.*

BIVAC has pleaded a factual and legal case which, if established, would be capable of giving rise to a violation of the relevant BIT provision, in this case Article 6. This is sometimes referred to as the *prima facie* standard (see above at paras. 106-107). If the pleaded case is so capable then the Tribunal has jurisdiction and the proceedings move on to the merits; if the pleaded case is not so capable then the Tribunal does not have jurisdiction. This was the approach taken by the tribunal in *United Parcel Service of America, Inc. v. Government of Canada* and, more recently and on the basis of an extensive review of the case law, by the Tribunal in *Salini v Jordan*. It is an approach with which we agree. The *Salini* tribunal noted that the approach:

“reflects the balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.<sup>61</sup>

113. Taking this as the approach to be applied, the issue is whether the acts alleged by BIVAC, if established, are capable of giving rise to a claim of expropriation. The acts alleged by BIVAC concern “governmental conduct” in the form of a failure to abide “by its own internal acts”, namely reviewing BIVAC’s performance on five occasions and concluding on each of those occasions that BIVAC was in full compliance and that Paraguay was legally obliged to pay under the contract. We can quite see how such conduct might be said to be inappropriate or unconscionable, and we consider later whether it may give rise to an arguable claim that there has been a breach of the obligation to act fairly and equitably, but could it ever as such constitute an act of expropriation?

114. We have some difficulty in foreseeing how it could. BIVAC has not shared with the Tribunal its thinking as to why a refusal to pay on five occasions might be expropriatory in character whereas a solitary act of refusal would not be. Whether a contracting party refuses to pay once or five times, the contractual debt continues to exist, and the legal characterization of the obligation to pay cannot be said to have been altered. Nor can it be said that a refusal to pay on five (or even more) occasions can alter BIVAC’s legal rights in the debt that is owed to it. The parties did not address the definition of expropriation in their written pleadings. The issue was raised directly during the oral hearings, when a member of the Tribunal put the following question to BIVAC:

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<sup>61</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, (ICSID Case No. ARB/02/13), Decision on Jurisdiction, 9 November 2004, (Guillaume (P), Cremades, Sinclair), para 151.

“if the debt continues to exist, as it does, what is the argument in relation to expropriation? That’s I suppose what I am having a little bit of difficulty about. What has actually been expropriated? Assuming all the facts you have made are established, how do you justify an expropriation claim where your rights under the Contract to be paid continue to exist?”<sup>62</sup>

One Counsel for BIVAC provided the following response:

“In relation to conduct where the net effect, and once you look at the effect otherwise it would seem to us to create a perverse incentive to states to perform in the way that Paraguay has behaved, by simply refusing – wilful refusal to pay, wilful refusal to pay, which is one of the issues that was looked at in the *Encana versus Ecuador* case, this concept of a wilful refusal to pay, meaning that, no, no, sure, you’re not ever going to get your money. That is precisely on that basis that we are bringing our claim obviously under the Umbrella Clause to seek that payment and also damages as a result of the other aspects. [...] To look at the net effect, it’s a measure – the conduct of the State having an effect equivalent to expropriation. If I owed you money 10 years ago and you have not seen a cent until today, is that – through my conduct, does that have an effect equivalent to expropriation? [...] you just engage in an endless spin or everything through the different administrative organs, a wilful refusal to pay. Isn’t the effect of that – of that conduct of the State precisely to have the effect of an expropriation?”<sup>63</sup>

Another counsel for BIVAC followed on: “It begs the question, what’s an expropriation?”<sup>64</sup>

115. BIVAC’s argument is less than compelling, and we were given no more assistance in the Post-Hearing Memorial.<sup>65</sup> The only authority cited in that pleading was - again - the decision of the Tribunal in *Encana v Ecuador*, which itself relies on an earlier award in *Waste Management v United Mexican States* (No. 2). The award in *Encana* does not support BIVAC’s argument, or assist the Tribunal reaching the conclusion that BIVAC’s factual assertions could, if established, give rise to an act of expropriation, either directly or indirectly. We have carefully reviewed the award, which merits reproduction in full:

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<sup>62</sup> Hearing on Jurisdiction, 11 November 2008, Transcript, p. 184-185.

<sup>63</sup> *Ibid.*, pp. 185-6.

<sup>64</sup> *Ibid.*, p. 187.

<sup>65</sup> BIVAC Post-Hearing Memorial, paras. 74-77.

“192. A NAFTA Tribunal in the Waste Management case analysed in some detail the test for expropriation of incorporeal rights by executive action. After referring to earlier decisions and doctrine, the Waste Management tribunal concluded as follows:

“The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation... [T]he normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is practically or legally foreclosed that the breach could amount to an outright denial of the right, and the protection of Article 1110 would be called into play.”

Subsequently it expressed the test for executive expropriation in the following terms:

“an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent, thereby frustrating or negating the enterprise as a whole”.

In other words (and more succinctly) was there a “final refusal to pay (combined with effective obstruction of legal remedies)”?

[...]

But there is nonetheless a difference between a questionable position taken by the executive in relation to a matter governed by the local law and a definitive determination contrary to law. In terms of the BIT the executive is entitled to take a position in relation to claims put forward by individuals, even if that position may turn out to be wrong in law, provided it does so in good faith and stands ready to defend its position before the courts. Like private parties, governments do not repudiate obligations merely by contesting their existence. An executive agency does not expropriate the value represented by a statutory obligation to make a payment or refund by mere refusal to pay, provided at least that (a) the refusal is not merely wilful, (b) the courts are open to the aggrieved private party, (c) the courts’ decisions are not themselves overridden or repudiated by the State.”<sup>66</sup>

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<sup>66</sup> *EnCana Corporation v. Republic of Ecuador*, Award, 3 February 2006 (London Court of international

116. The *Encana* award supports the proposition that a “final refusal to pay (combined with effective obstruction of legal remedies)” could amount to an expropriation. The facts alleged by BIVAC do not meet that standard. Even assuming there to have been “a final refusal” to pay, which Paraguay apparently disputes, BIVAC does not allege any obstruction of the legal remedies provided for by the Contract. The fact that BIVAC has opted not to have recourse to such remedies, or believes them for some unstated reason to be unattractive or ineffective, cannot contribute to a claim of expropriation.

117. Our conclusion may be put simply: in circumstances in which there is no dispute that the alleged contractual debt continues to exist, or that the forum for the resolution of contractual disputes remains fully available, the materials put forward by BIVAC do not raise the possibility of an arguable case of expropriation. To take the standard argued for by the Claimant, the Tribunal is not satisfied *prima facie* that the Claimant’s claims are capable of constituting the alleged breach of the Treaty. We reach this conclusion even assuming that it could be shown that Paraguay acted in exercise of a *puissance publique* (see below at para. 125). It follows that this Tribunal does not have jurisdiction over the claim under Article 6 of the BIT, as presented. In these circumstances, the issue of admissibility does not arise.

**(4) Does the Tribunal have jurisdiction over the claim relating to fair and equitable treatment (Article 3(1)), and is the claim admissible?**

118. Article 3(1) of the BIT obliges each party to “*ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals*”. BIVAC asserts that the Tribunal has jurisdiction in respect of its claims under this provision, whereas Paraguay disagrees. Specifically, Paraguay asserts that BIVAC has not alleged facts that give rise to a *prima facie* claim: “No breach of the [fair and equitable treatment] standard can be found where the only violation alleged is a lack of payment under a municipal contract”<sup>67</sup>

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Arbitration (Crawford (P), Grigera Naon, Thomas). See also *Waste Management, Inc. v. United Mexican States* (Number 2), (ICSID Case No.ARB(AF)/00/3, Award, 30 April 2004, (Crawford (P), Civiletti, Magallón), para 175: “it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to BIVAC, which has the effect of preventing its exercise entirely or to a substantial extent.”

<sup>67</sup> Paraguay Post-Hearing Memorial, paras. 91-97 and 92 and 96.

119. BIVAC's position is that it expected that the Ministry of Finance would respect and abide by the law in fulfilling the Contract and that in failing to "comply with its part of the bargain" the standard of fair and equitable treatment was breached.<sup>68</sup> BIVAC asserts that Paraguay's actions have been arbitrary, wilful and contrary to due process, in a manner that cannot but "shock or at least surprise a sense of juridical propriety"; and that the decision not to pay the debt under the Contract was "not based on reason and judgment, when all the reviews it commissioned pointed in the other direction", giving rise to a breach of the duty not to impair by unreasonable measures BIVAC's investment.<sup>69</sup> BIVAC returns to these themes in its Post-Hearing Memorial, invoking the award in *Eureko v Poland*<sup>70</sup> (in which it asserts that "a breach of fair and equitable treatment in the context of contractual breach was found to have occurred because the Government "consciously and overtly, breached the basic expectations of Eureko that are at the basis of its investment") and claiming that Paraguay has failed to respond all of its arguments, including the claim as to unreasonableness.<sup>71</sup>

120. As with the claim to expropriation, at this preliminary stage we are not in a position to make definitive findings of fact or express conclusions on the arguments of law. Again, our task is limited to an assessment of whether BIVAC has pleaded a factual and legal case which, if established, would be capable of giving rise to a violation of Article 3(1) of the BIT. If the pleaded case is so capable then the Tribunal has jurisdiction and the proceedings move on to the merits.

121. This issue was addressed by the tribunal in *SGS v Philippines*, which ruled that the claimant in that case had stated a claim to unfair and inequitable treatment under the BIT but that the existence of an unresolved dispute as to outstanding amount owing meant that the claim was not yet admissible: the existence of a forum before which the amounts could be established meant that the claim was premature and had to "await the determination of the amount payable in accordance with the contractually-agreed process"<sup>72</sup> The Tribunal said:

"Turning to Article IV (fair and equitable treatment), the position is less clear-cut. Whatever the scope of the Article IV standard may turn out to be—and that is a matter for the merits—an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV. As noted already (see paragraphs 36-41), the Philippines did appear to acknowledge that a large

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<sup>68</sup> BIVAC Counter-Memorial, para. 137.

<sup>69</sup> *Ibid.*, paras.138 and 141.

<sup>70</sup> *Eureko B.V. v. Republic of Poland*, Partial Award and Dissenting Opinion, 19 August 2005, (Fortier (P), Schwebel, Rajska) (hereinafter *Eureko v Poland*).

<sup>71</sup> BIVAC Post-Hearing Memorial, paras. 79 and 81.

<sup>72</sup> *SGS v Philippines*, para. 163.

proportion of the amount claimed was payable. [...] At the level of jurisdiction, a claim has in its view been stated by SGS under both provisions. But, there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the CISS Agreement is inappropriate and premature.”<sup>73</sup>

122. In the *SGS v Philippines* case, at the jurisdictional stage the tribunal identified elements of the underlying contractual claims for which there was no evidence of acknowledgement of indebtedness on the part of the Philippines, as well as outstanding issues relating to the calculation of interest payable under the contract at issue in that case. “On any view”, the tribunal concluded, “a court or Tribunal having jurisdiction to determine obligations under the CISS Agreement will have a substantial task to perform”<sup>74</sup>

123. In the present case, at this jurisdictional stage at least, the evidence before us does not point to any such differences. In its Application, BIVAC described the circumstances in which its claim of approximately US\$22 million arose under 19 unpaid invoices under the Contract, at June 1999. BIVAC then alleged that in August 1999 the Ministry of Finance recognized the debt under the 19 invoices; in February 2001, the Ministry of Finance recognized the Contract and expressed a willingness to pay amounts due, following an audit by the Contraloría General de la República; in October 2002 the Contraloría fully accepted the claim, after a two year audit; in April 2004 the Ministry again acknowledged the debt; in June 2004 it appointed a “Commission for the Review and Negotiation” of the amounts owing, which eventually determined that this was a task not for it but for the Dirección General de Aduanas; and in March 2005 the Dirección concluded that BIVAC had fully complied with the Contract. According to the Request for Arbitration, it appears that at no point did any authority acting on behalf of Paraguay conclude that the Contract had not been complied with or challenge the level of the amounts owing under the 19 unpaid invoices.

124. In its pleadings Paraguay does not challenge any of these alleged facts. It asserts that the Contract did not provide economic or other benefits to Paraguay, for the purpose of challenging its characterisation as an “investment”. At no point, however, does it challenge the amounts alleged to be outstanding, or the validity of the nineteen unpaid invoices, or BIVAC’s assertions that it properly and fully carried out its obligations under the Contract. In these circumstances, and on the basis of the evidence that is before us, we can provisionally conclude that Paraguay’s failure to challenge the level of indebtedness may amount to an acknowledgment of such indebtedness. Nor has Paraguay raised any difficulties concerning the assessment of interest payments, or asserted that the issues that

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<sup>73</sup> *Ibid.*, para. 162.

<sup>74</sup> *Ibid.*, para. 41.

the Courts of the City of Asunción, which is the chosen forum for the resolution of disputes under the Contract, would have “a substantial task to perform”, in the sense adverted to by the tribunal in *SGS v Philippines*.

125. In these circumstances, it appears at this preliminary stage of the proceedings that there is no apparent unresolved dispute as to the amount payable. Accordingly, we conclude that it would not be premature to come to a decision on the merits of the claim under Article 3(1) of the BIT, at least in so far as the claim relates to acts attributable to Paraguay in relation to the failure to make payments owing under the Contract. In reaching this conclusion, we wish to make clear that we express no view whatsoever on the merits of the case. In particular, our finding as to jurisdiction should not be taken to reflect any view, even provisional in nature, as to whether a persistent failure to make payment on an outstanding debt, however unreasonable or unwarranted, could *of itself* ever amount to a violation of the obligation to provide fair and equitable treatment in circumstances in which a contractually agreed remedy remains available. In this regard, we note that in *Impregilo SpA v Pakistan* (a case that did not involve an umbrella clause) the tribunal made the following point in relation to the interplay between treaty claims and contract claims, of considerable pertinence also for the present case:

“In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.”<sup>75</sup>

Applying this standard, in order to succeed in a claim alleging violation of Article 3(1) of the BIT, BIVAC would have to meet a threshold for treaty claims that requires it to establish acts by or attributable to Paraguay that show an act of “*puissance publique*”, that is to say “activity beyond that of an ordinary contracting party”<sup>76</sup>

126. We express no view as to whether it could meet that standard. At this preliminary stage our conclusion is simply that BIVAC’s claim in relation to Article 3(1) of the BIT is arguable. We therefore reject the objection to jurisdiction submitted on this point by Paraguay.

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<sup>75</sup> *Impregilo SpA v Pakistan*, Decision on Jurisdiction, 22 April 2005, at para. 260.

<sup>76</sup> *Ibid.*, para. 266.

127. We see no other bar to the admissibility of the claim. Paraguay has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree. It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues. As the *ad hoc* Committee on annulment put it in the Vivendi case, “whether there has been a breach of the BIT and whether there has been a breach of contract are different questions”<sup>77</sup> The *ad hoc* Committee explained that

“where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.”<sup>78</sup>

The fundamental basis of the claim under Article 3(1) of the BIT, over which this Tribunal has jurisdiction, turns on the interpretation and application of that provision and alleged acts of Paraguay (as “*puissance publique*”), not on the interpretation and application of the Contract as such, although the Contract will necessarily be part of the overall factual and legal matrix. Moreover, the interpretation of Article 3(1) of the BIT is not a matter over which the courts of Asunción would be able to exercise jurisdiction under Article 9 of the Contract. The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum, and there can be no question of an independent or self-standing treaty claim over which we have jurisdiction being inadmissible by reason of the choice of forum for the resolution of a disputes under the Contract. Our conclusion in respect of this aspect of the claim is without prejudice to the issues that arise in relation to the claim under Article 3(4) of the BIT, the so-called “umbrella clause”, to which we now turn.

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<sup>77</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (Fortier (P), Crawford, Fernández-Rozas), para. 96 (hereinafter *Vivendi v Argentina*).

<sup>78</sup> *Ibid.*, para. 101.

**(5) Does the Tribunal have jurisdiction over the claim relating to the umbrella clause (Article 3(4)), and is the claim admissible?**

128. Article 3(4) of the BIT provides that “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.” In its Request for Arbitration, BIVAC summarises its claim under this provision as follows:

“Paraguay entered into obligations with regard to BIVAC’s investment pursuant to the Decree and the subsequent Contract which it has not observed by failing to make the relevant payments to BIVAC. Paraguay is consequently in breach of its obligations under Article 3(4) of the Treaty.”

129. BIVAC treats Article 3(4) as a provision which incorporates the obligations of the Contract into the BIT, so that a violation of the Contract becomes, as such, a violation of this provision of the BIT.<sup>79</sup> BIVAC elaborated on these arguments in its Counter-Memorial, invoking a raft of arbitral awards in support of the proposition that “The case law has consistently upheld that the effect of umbrella clauses is to elevate a breach of contract into a breach of treaty”<sup>80</sup> We return to this case law in due course. BIVAC asserts that by breaching its obligations to pay under the Contract “governed by Paraguayan law, and the obligation under Paraguayan law to observe the Contract, Paraguay has also committed a breach directly cognizable as a Treaty breach pursuant to the umbrella clause”, and that accordingly the Tribunal may exercise jurisdiction over this treaty claim.<sup>81</sup> In making this argument, BIVAC appears to recognize that in determining the claim under Article 3(4) the Tribunal “must take into account the Contract and whether the Ministry breached it, as well as Paraguayan law as applicable to the Contract”<sup>82</sup> In other words, it is not possible to form a view on whether the Treaty obligation have been met without reaching a conclusion as to whether there has been a breach of the Contract. BIVAC further argues that this claim is admissible: it seeks to distinguish the facts from the decision on jurisdiction in *SGS v Philippines*, where the Tribunal found that it had jurisdiction over the claims under the umbrella clause but decided to stay the proceedings on the grounds that this claim and that in relation to the obligation to provide fair and equitable treatment were premature and that “justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable ... in accordance with [the contract]”<sup>83</sup> We return to this point below. BIVAC restates and elaborates upon these arguments in its Rejoinder and in its Post-Hearing Memorial. Perhaps anticipating issues that might arise, it sought

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<sup>79</sup> See also BIVAC Rejoinder, para. 19.

<sup>80</sup> BIVAC Counter-Memorial, para. 143.

<sup>81</sup> *Ibid.*, para. 147.

<sup>82</sup> *Ibid.*, para. 153.

<sup>83</sup> Cited in BIVAC Counter-Memorial, para. 155.

to address the possibility that whatever the finding may be as to jurisdiction in relation to Article 3(4), the claim should also be admissible, on the grounds that if the drafters had intended to exclude treaty jurisdiction under an umbrella clause they could have inserted a clause to that effect in the BIT, as the Netherlands and India did in their BIT<sup>84</sup> Further, BIVAC asserts:

“Had Paraguay or the Netherlands been concerned about the overlap with contract dispute resolutions clauses, and the choice thus being given to an investor to resort to arbitration under the Treaty, they would have not opted for such a wide jurisdiction clause, or could have used one of the limitations for contract claims that exist in BIT practice as described above. The Netherlands, for example, included such limitation in its BITs with India and Oman. In short, any limitations would have been stated expressly.”<sup>85</sup>

In its Post-hearing Memorial BIVAC develops its arguments as to jurisdiction under Article 3(4), and reiterates its reliance on case-law. It also asserts that BIVAC’s claims are fully admissible and that “Paraguay does not seem to challenge this”<sup>86</sup>

130. In response, Paraguay’s argument has evolved over time. In its written submissions of April and May 2008 it argues that the dispute is governed by the Contract and subject to the exclusive jurisdiction clause. In its Reply to BIVAC’s Counter-Memorial, Paraguay invoked Clause 9(1) of the Contract, which provides for the exclusive jurisdiction of the courts of Asunción for the resolution of all disputes under the Contract are to be resolved for the exclusive jurisdiction, and asserts:

“The BIVAC BV claim against the Ministry of Finance of Paraguay for payment on its services provided abroad specified in the Administrative *Contract* is a matter of Administrative Law. In fact, it is a matter of PUBLIC LAW and it would be wrong to settle the issue under the principles and rules of PRIVATE LAW. The dispute is unrelated to the Bilateral Agreement (The Treaty) and it must be decided within the Jurisdiction of Paraguayan Tribunals.”<sup>87</sup>

Paraguay asserts that Article 9(1) of the Contract establishes “an exclusive jurisdiction to resolve controversies”, that the parties to the Contract “excluded the jurisdiction of International Arbitral

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<sup>84</sup> BIVAC Rejoinder, para. 14, referring to Article 4(5) of the Netherlands - India BIT (which is quoted as providing: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party. Provided that dispute resolution under Article 9 of this Agreement shall only be applicable in the absence of a normal, local, judicial remedy being available.”)

<sup>85</sup> *Ibid.*, para. 16.

<sup>86</sup> BIVAC Post-Hearing Memorial, para. 99.

<sup>87</sup> Paraguay Reply, p. 6.

Tribunals”, and that “it was the free will of the parties which have decided to rule their rights under laws within Paraguayan Territory and Paraguayan Tribunals”. In support of that argument Paraguay relied on the Decision on Jurisdiction of the ICSID tribunal in the *Aguas del Tunari v Republic of Bolivia*<sup>88</sup> (we note that the Tribunal in that case ruled that “the Concession does not place all disputes concerning the Concession within the exclusive jurisdiction of Bolivian courts” and that the decision does not indicate whether Aguas del Tunari was asserting jurisdiction on the basis of an “umbrella clause).

131. In its Post Hearing Memorial Paraguay clarifies its position and responds to the various authorities invoked by BIVAC. It asserts that when the parties signed the Contract they “expressly agreed to resolve disputes of this type in the sovereign courts of Paraguay under Paraguayan law. The parties should be held to their agreement, and this case should be dismissed.”<sup>89</sup> It argues that the types of action that the umbrella clause in the BIT is intended to protect investors from “is not of the type which can be undertaken by an ordinary private party, but rather is the type which involves the exercise of a state’s sovereign powers”.<sup>90</sup> It asserts that “because the core claims in question are exclusively related to a domestic commercial contract, the Tribunal should enforce the Contract’s exclusive forum selection clause and dismiss BIVAC’s claims”.<sup>91</sup> It argues that a “mere failure to pay does not convert a domestic dispute into an international one”, and relies on the two *SGS* decisions to support its proposition that “neither of these tribunals interpreted the umbrella clause to elevate a pure breach of a commercial contract into a treaty violation”, and relies in particular on the decision in *SGS v. Pakistan* as authority that “the Tribunal held that it had no jurisdiction to decide *SGS*’s purely contractual claims”.<sup>92</sup>

132. The issues that divide the parties on Article 3(4) of the BIT relate to two issues: the issue of jurisdiction, namely whether the Tribunal has jurisdiction over BIVAC’s claims under Article 3(4); and the issue of admissibility, namely whether in the event that the Tribunal does have jurisdiction, the claim is admissible. It is true that Paraguay has not framed its argument in terms of admissibility, a point that is alluded to by BIVAC.<sup>93</sup> However, the substance of Paraguay’s argument is substantively to that effect: it’s consistent position has been that contract claims are for the courts of Asunción under Article 9 of the Contract, and in its Post-Hearing Memorial it affirms its strong support for the primacy of the exclusive jurisdiction clause, arguing that “if these are really just

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<sup>88</sup> *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent’s Objections to Jurisdiction, 21 October 2005.

<sup>89</sup> Paraguay Post-Hearing Memorial, Introduction, p. 2.

<sup>90</sup> *Ibid.*, para. 61.

<sup>91</sup> *Ibid.*, para. 58.

<sup>92</sup> *Ibid.*, para. 63.

<sup>93</sup> BIVAC Post-Hearing Memorial, para. 99.

contract claims, as we submit, then that clause requires BIVAC to sue in Paraguay”.<sup>94</sup>

133. Against this background, we deal first with the issue of jurisdiction and then the issue of admissibility.

*Article 3(4): Jurisdiction*

134. BIVAC asserts that the Tribunal has jurisdiction under Article 3(4) of the BIT over claims relating to “any conflict, controversy or claim which arises from or is produced in relation to [the] Contract”. BIVAC presents this on the basis that it is making a Treaty claim rather than a contractual claim.<sup>95</sup>

135. In making this argument in its Counter-Memorial, BIVAC relies on *Vivendi I*, to the effect that if the Tribunal has jurisdiction under the umbrella clause to hear the claim then it cannot be dismissed because it could or should have been dealt with by a national court.<sup>96</sup> In its Rejoinder BIVAC argues that Article 3(4) gave the Tribunal jurisdiction as it placed an obligation of respect on the parties for the contractual obligations, which Paraguay had breached.<sup>97</sup>

136. In making its argument, BIVAC provides a summary of the history of the use of umbrella clauses in seeking to show that Article 3(4) could be applied to all types of contracts in respect of any sort of breach by the State as a contracting party, in line with the “object and purpose of the treaty to promote and protect investment”<sup>98</sup> BIVAC has sought to distinguish the conclusion of the Tribunal in *SGS v Pakistan* as “probably linked to the very narrow language used in that treaty.”<sup>99</sup> BIVAC relies heavily on the holding of the *SGS v Philippines* tribunal which, it submitted, “is fully applicable here.”<sup>100</sup>

137. Paraguay has strongly objected to BIVAC’s argument. In its Reply it refers to the exclusionary nature of the jurisdiction given to the Paraguayan courts by the parties to the Contract of their own free will, in Article 9 of the Contract.<sup>101</sup> In its Post-Hearing Memorial, Paraguay refines its argument, submitting that an umbrella clause could not elevate a contractual claim into a treaty violation on the grounds that “a mere failure to pay does not convert a domestic dispute into an

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<sup>94</sup> Paraguay Post-Hearing Memorial, para. 53.

<sup>95</sup> BIVAC Post-Hearing Memorial, para. 64.

<sup>96</sup> BIVAC Counter-Memorial, para. 150.

<sup>97</sup> BIVAC Rejoinder, para 19.

<sup>98</sup> BIVAC Post-Hearing Memorial, paras. 84-93.

<sup>99</sup> *Ibid.*, para 89.

<sup>100</sup> *Ibid.*, para 96.

<sup>101</sup> Paraguay Reply, p.9.

international one.”<sup>102</sup> Paraguay argues that BIVAC is not raising genuine Treaty claims but making a contractual claim:

“Despite BIVAC’s clever framing of its “treaty claims,” BIVAC’s factual allegations are exclusively premised on lack of payment under the Contract.”<sup>103</sup>

Paraguay further contends that neither *SGS v Philippines* nor *SGS v Pakistan* interpreted the umbrella clause in such a way that ultimately gave the Tribunal the basis for jurisdiction.<sup>104</sup>

138. The parties have addressed extensive arguments to the decisions in *SGS v Pakistan* and *SGS v Philippines*, and in particular the question of whether an umbrella clause can establish a tribunal’s jurisdiction in relation to commitments made under a contract. It is appropriate that we address those decisions, which turned on the particular facts – including the relevant contractual and BIT provisions – and arguments advanced in the respective cases. Nevertheless, the two decisions cannot be reconciled, reflecting different approaches to this issue to the effect of an umbrella clause in the framework of a BIT.

139. In *SGS v Pakistan*, the tribunal found that an umbrella clause did not automatically elevate a breach of contract claim to the level of a claim for a breach of international law and it would only be under “exceptional circumstances” that it would provide a basis for accepting jurisdiction over a contract claim.<sup>105</sup> The Tribunal gave four reasons for adopting a restrictive interpretation to the umbrella clause: first, that it was too wide and read like a legal obligation of a general character; second, that general principles of international law generated a presumption against the broad interpretation of the clause; third, because of a concern that such a reading of an umbrella clause would override dispute settlement clauses negotiated in contracts; and fourth, that the umbrella clause would have appeared earlier in the BIT if it were to impose substantive international obligations.

140. In *SGS v Philippines* the tribunal rejected the approach taken in the earlier decision. It ruled that the umbrella clause gave the tribunal jurisdiction on the basis of a broad interpretation of the mandatory language contained in the text of the provision of the BIT that was at issue in that case. On the issue of jurisdiction, the tribunal disagreed with the reasoning of the tribunal in *SGS v Pakistan*, although it’s finding was without prejudice to what it would rule in relation to the admissibility of the claim, a point to which we return below.<sup>106</sup> In support of its conclusion that the

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<sup>102</sup> Paraguay Post-Hearing Memorial, para 63.

<sup>103</sup> *Ibid.*, para. 51

<sup>104</sup> *Ibid.*, para 63.

<sup>105</sup> *SGS v Pakistan*, para 96(b)

<sup>106</sup> *SGS v Philippines*, para 138.

contract claim could be brought within the scope of the umbrella clause, the tribunal advanced the following arguments: first, that the text of the provision was phrased in mandatory language, which imposed obligations on the parties;<sup>107</sup> second, that the overriding purpose of the BIT should be given effect by resolving any uncertainty regarding the scope of the provision in favour of protecting investment;<sup>108</sup> and third, that the parties were free to stipulate a restriction in the BIT to limit the umbrella clause to obligations arising under “other international law instruments” and they had not done so.<sup>109</sup>

141. We have carefully considered the meaning and effect of Article 3(4) of the BIT. We recognise in particular that there is no *jurisprudence constante* on the effect of umbrella clauses, that the subject is one on which legal opinion is divided, that the relationship between commercial and sovereign acts of government is not free from difficulty, and that each particular clause falls to be interpreted and applied according to its precise wording and the context in which it is included in a BIT. We have carefully weighed and debated the competing arguments of the parties, following which the conclusion that has prevailed is that Article 3(4) of the BIT establishes an international obligation for the parties to the BIT to observe contractual obligation with respect to investors. In reaching this conclusion the broadly worded text of Article 3(4) of the BIT has been significant. It provides that Paraguay “shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.” The words “any obligation” are all encompassing. They are not limited to international obligations, or non-contractual obligations, so that they appear without apparent limitation with respect to commitments that impose legal obligations. On a plain meaning they are undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby the alleged breaches of the Ministry are attributable to the State. The umbrella clause also appears early on in the BIT, in the same provision as that imposing an obligation to provide fair and equitable treatment, and it is located before the obligation on expropriation: this might distinguish this BIT from that in issue in *SGS v Pakistan* (even assuming the tribunal’s point on the location within a treaty of any particular text to have force). Moreover, we consider that the umbrella clause has to be interpreted in such a way as to give it some meaning and practical effect: Paraguay has not explained the purpose or effect of the umbrella clause if it was not that for which BIVAC argues.<sup>110</sup>

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<sup>107</sup> *SGS v Philippines*, para. 115.

<sup>108</sup> *SGS v Philippines*, para. 116.

<sup>109</sup> *SGS v Philippines*, para. 118.

<sup>110</sup> BIVAC’s argument based on the text of Article 4(5) of the Netherlands - India BIT – see above at footnote 84 – tends to support our conclusion, but it does not address the situation in the present case where the parties to the Contract have agreed on an exclusive jurisdiction clause. Rather, Article 4(5) of that BIT appears to provide for jurisdiction or admissibility in respect of a claim under that umbrella clause to be dependent on the “absence of a normal, local, judicial remedy being available”.

142. For these reasons, we conclude that Article 3(4) of the BIT does have the effect for which BIVAC argues, namely that it gives the Tribunal jurisdiction over a claim that arises from or is produced directly in relation to the Contract. This is not, however, the end of the matter. Assuming that Article 3(4) does import the obligations under the Contract into the BIT, giving this Tribunal jurisdiction to interpret and apply the Contract as such, then it must have imported into the BIT all of the obligations owed by Paraguay to BIVAC under the Contract. This would include not only the obligation to make payment of invoices in accordance with the requirements of the Contract, but also the obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were available to resolve any “conflict, controversy or claim which arises from or is produced in relation to” the Contract. This raises an issue of admissibility, to which we now turn. The effect of an umbrella clause is one issue; a different issue is whether such a clause may be invoked in circumstances where the parties have clearly agreed on an exclusive jurisdiction for the resolution of contractual disputes that may fall within the terms of the umbrella clause.

*Article 3(4): Admissibility*

143. In the present case the issue of admissibility in relation to the possible exercise of jurisdiction under Article 3(4) of the BIT may be put simply: assuming that Article 3(4) allows the Tribunal to exercise jurisdiction over a contractual dispute – in which the essential cause of action is the Contract - does the existence of Article 9 of the Contract and the agreement of the parties to have recourse to the exclusive jurisdiction of the courts of Asunción act as a bar to the Tribunal’s exercise of jurisdiction under Article 3(4) of the BIT? The answer to that question turns on the meaning and effect of Article 9 of the Contract; the subject matter jurisdiction that the Tribunal might have to exercise under Article 3(4) of the BIT; and the legal principles that govern the relationship between these two provisions in the event of a conflict between them. We deal with each point in turn.

144. Article 9(1) of the Contract provides as follows:

“Any conflict, controversy or claim which arises from or is produced in relation to this Contract, non compliance, resolution or invalidity shall be submitted to the Tribunals of the City of Asunción pursuant to Paraguayan Law.”

145. There appears to be no disagreement between the parties as to the meaning and effect of this provision in relation to a dispute under the Contract, and their mutual desire to respect the autonomy and exercise of will by the parties to the Contract: Article 9(1) is an exclusive jurisdiction clause which post-dated the BIT and has been voluntarily accepted by the parties to the Contract and which

has the effect of precluding any body other than the Tribunals of the City of Asunción from resolving any dispute “which arises from or is produced in relation to” the Contract, which Tribunals are bound to apply the law of Paraguay. On its face, the text is very broad: the words “any conflict, controversy or claim which arises from or is produced in relation to” the Contract are capable of being interpreted to include not only disputes relating directly to alleged breaches of the Contract but also disputes concerning acts that may be connected with the Contract which may give rise to claims under other instruments, including the BIT. The parties did not direct their attentions to this point. Be that as it may, the tribunals of the City of Asunción have not been given competence to interpret and apply the BIT. BIVAC appears to recognise that the effect of this provision is to preclude this Tribunal from exercising jurisdiction over the contractual dispute between the parties, as such. Instead, BIVAC says, acting under Article 3(4) of the BIT the Tribunal would exercise jurisdiction over a distinct and free standing treaty obligation into which the contractual obligations would, in effect, have been incorporated. In exercise of our jurisdiction we would be interpreting and applying the Treaty, not the Contract, BIVAC argues, and it “is not requiring this Tribunal to exercise contractual jurisdiction”.<sup>111</sup>

146. In considering the effect of Article 9 it is appropriate to consider its relationship in time to the BIT. The BIT came first. It was concluded in The Hague on 29 October 1992, and came into effect shortly afterwards, on 1 August 1994. The Contract between BIVAC and the Ministry of Finance was executed on 6 May 1996, that is nearly two years after the BIT came into force. No evidence has been tendered by the parties as to the relevance of the BIT to BIVAC’s decision to enter into the Contract. Paraguay, and its Ministry of Finance, must be taken to have knowledge of the treaties that it has entered into, and it would be surprising if those responsible for advising BIVAC on the legal aspects of the Contract were not aware of the BIT and the protections it provided, including the potential availability of ICSID arbitration for certain treaty disputes. Knowledge of the BIT was not, however, a subject to which arguments or evidence have been addressed by the parties. Nevertheless, the parties agreed to include in the Contract a provision which provides for the exclusive jurisdiction of the Tribunals of the City of Asunción to settle “Any conflict, controversy or claim which arises from or is produced in relation to this Contract, non compliance, resolution or invalidity”. The parties could have included a provision in Article 9(1) to the effect that the obligations it imposed were without prejudice to any rights under the BIT, including the possible exercise of jurisdiction by an ICSID Tribunal to any matters arising under the Contract which could fall to be determined under Article 3(4) of the BIT. The fact that they did not do so is not without relevance: it indicates, at the very least, that the parties to the Contract, including BIVAC, intended the exclusive contractual jurisdiction of the Tribunals of the City of Asunción to be absolute and without exception, and for it

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<sup>111</sup> BIVAC Counter-Memorial, para. 151.

to mean what it says.

147. As set out above, Article 3(4) of the BIT is broadly worded and has the effect of importing the obligations under the Contract into the BIT. Such obligations include the contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, comprising amongst other obligations the obligation to make payment of invoices in accordance with the requirements of the Contract, and the implicit obligation to ensure that the tribunals of the City of Asunción were available to resolve any “conflict, controversy or claim which arises from or is produced in relation to” the Contract. On such a reading, and assuming that BIVAC’s approach to these issues is correct, if Paraguay had taken steps to prevent the Tribunals of the City of Asunción from exercising jurisdiction over a dispute in relation to the Contract, then BIVAC would be entitled to challenge such an act under Article 3(4).

148. The broader point, however, having regard to the fundamental principle that the autonomy and will of the parties is to be respected, is that the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an “umbrella clause” provision such as Article 3(4) and to ignore others. The obligation that Paraguay entered into with BIVAC was to pay its invoices in a timely way and if it failed to do so to allow any contractual dispute to go to the Tribunals of the City of Asunción. To allow BIVAC to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy. If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so.<sup>112</sup> BIVAC has not identified any reasons at all.

149. Instead, it seeks to address this issue by arguing, in effect, that if this Tribunal were to exercise jurisdiction under Article 3(4) in the way that it wished then it would only be interpreting and applying the Treaty not the Contract. This strikes us as being entirely artificial. There is no free-standing international treaty obligation, under the BIT or anywhere else, which would allow this Tribunal to determine whether the acts of Paraguay gave rise to a violation of Article 3(4) of the BIT.

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<sup>112</sup> See in this sense the recent Concurring Opinion of Professor Abi Saab in *TSA Spectrum de Argentina S.A. v Argentine Republic* (ICSID Case No. ARB/05/5), 19 December 2008, at para. 5:

“Thus, where what is contended in the treaty claim is mainly that the contract has been violated and that this violation constitutes in turn and by another name (figuring in the treaty) a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim. To use the terminology of *Vivendi II*, “where ‘the fundamental basis of the claim’” is the contract, however, many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract.”

The reality is that the Tribunal would have to interpret and apply the Contract, to determine whether Paraguay was or was not in breach of its obligations thereunder to make certain payments on the nineteen invoices. If the Tribunal was to find that there was a breach of the Contract, on BIVAC's argument it would have to find also a breach of the BIT. But if the Tribunal were to find no breach of the Contract, there would be no breach of the BIT. Everything turns on the meaning and effect of the Contract. BIVAC has provided no explanation as to where in the BIT, or anywhere else in the rules of international law, the Tribunal might find the "independent standard" that might allow it to determine whether or not Article 3(4) has been breached. The *ad hoc* Committee in *Vivendi* adverted to these considerations in invoking the decision in the *Woodruff* case, to conclude that

"where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard".<sup>113</sup>

In the present case, in relation to Article 3(4) we do not see how it could be concluded that "the fundamental basis of the claim" was the BIT rather than the Contract. Any other approach strikes us as being so artificial as to be unreasonable.

150. We are not the first tribunal to face this issue. Both parties have invoked a number of arbitral decisions and awards in favour of the positions for which they argue. Although we are not bound by these earlier decisions and awards, it is both useful and appropriate to have regard to them to explain our approach. It is clear that with the passage of time the issues have crystallised as there has been greater time for reflection. We recognise that tribunals which first had to deal with these issues were often doing so without the benefit of commentary and reaction, on the basis of the facts of their particular cases and the arguments that were presented by the parties. We express our appreciation for the efforts made by the arbitrators in these early cases, which have facilitated our task.

151. Two of the earliest decisions which are pertinent to these issues were handed down the two SGS tribunals, where the facts were somewhat similar to those before us. In *SGS v Pakistan* the tribunal did not address the admissibility of a claim under an umbrella clause in the face of an exclusive jurisdiction clause for the resolution of contractual disputes by reference to arbitration under the law of Pakistan, having concluded that the tribunal did not have jurisdiction to resolve contractual disputes under the umbrella clause of the BIT (we note that in that case the BIT entered

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<sup>113</sup> *Supra.*, note 77.

into force *after* the relevant contract was adopted).<sup>114</sup> That tribunal also concluded that the umbrella clause in the BIT that they were required to interpret did not transform purely contractual claims into BIT claims.<sup>115</sup>

152. The issue of admissibility was addressed by the tribunal in *SGS v Philippines*, in a manner which we have found helpful and with which we largely, but not completely, agree. There too the tribunal was faced with a claim that an umbrella clause allowed it to exercise jurisdiction over claims arising directly under a contract. On the basis of the language of the umbrella clause in the Switzerland/Philippines BIT the Tribunal concluded that “in principle (and apart from the exclusive jurisdiction clause in the [underlying contract] it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII(2) of the BIT”.<sup>116</sup> The tribunal then turned to the impact of that contract’s exclusive jurisdiction clause, which provided that “All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila” (a formulation which appears on its face to be narrower in scope and effect than Article 9(1) of the Contract at issue in the present case). By a majority, the tribunal proceeded to hold that Article VIII(2) of the BIT was not intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims were concerned, and that the balance of opinion in the jurisprudence supported the conclusion that such a clause affected the Tribunal’s jurisdiction or the admissibility of the claim.<sup>117</sup> In summary, the tribunal ruled that it

“cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims. As the *ad hoc* Committee said in the *Vivendi* case:

‘where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.’”<sup>118</sup>

153. Invoking the distinction between jurisdiction and admissibility, the Tribunal concluded that as a matter of admissibility a party should not be allowed “to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum”, unless there were good

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<sup>114</sup> *SGS v Pakistan*, paras. 156-162.

<sup>115</sup> *Ibid.*, paras. 163-174.

<sup>116</sup> *SGS v Philippines*, para. 135.

<sup>117</sup> *Ibid.*, paras. 140 and 150.

<sup>118</sup> *Ibid.*, para. 153.

reasons, such as *force majeure*, which prevented a claimant from complying with the contract.<sup>119</sup> Up to this point we fully share the approach adopted by the tribunal in *SGS v Philippines*.

154. Having concluded that the tribunal should not exercise its jurisdiction over a contractual claim when the parties had agreed on an exclusive alternative forum, we would have expected the tribunal to dismiss the claim. Indeed, it concluded that “[n]ormally a claim which is within jurisdiction but inadmissible (e.g., on grounds of failure to exhaust local remedies) will be dismissed, although this will usually be without prejudice to the right of the claimant to start new proceedings if the obstacle to admissibility has been removed (e.g., through exhaustion of local remedies).”<sup>120</sup> The tribunal did not, however, dismiss the claim. Instead, it decided to stay the proceedings “pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with [the contract]”.<sup>121</sup> The tribunal’s true rationale for that decision is not entirely clear from the text. It refers somewhat cryptically to “substantial efforts” on the part of the claimant to settle the claim through negotiations and the existence of “the factual predicate of a determination” by the Philippine court of the total amount owed by the respondent, circumstances which led it to conclude that the fixing of the amount payable under the contract - whether by definitive agreement between the parties or by proceedings before the courts of the Philippines – “should not require the bringing of a new ICSID claim by SGS”.<sup>122</sup> The logic of this approach is not immediately apparent to us: if the parties to the contract have agreed on an exclusive jurisdiction to resolve a dispute under the contract, whether it relates to the amount that is to be paid or the justifications raised by one party for non payment, then it is exclusively for that forum to resolve all aspects of the dispute under the exclusive jurisdiction clause. If any agreement between the parties on the amounts outstanding under the contract does not resolve the contractual dispute, then exclusive jurisdiction continues to vest in the agreed forum and the ICSID tribunal is barred from exercising jurisdiction. Whatever facts may have pertained in the case of *SGS v Philippines*, or whatever other considerations may have given rise to the Tribunal’s decision to stay the proceedings rather than dismiss the claim, it is not immediately apparent to us the nature or extent of argument that was addressed to this point by the parties, or what truly motivated the decision.

155. Against this background BIVAC has referred to a large number of decisions and awards in support of its argument that the tribunal has jurisdiction under the umbrella clause and there is no bar

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<sup>119</sup> *Ibid.*, para. 154. We would add that another exceptional circumstance which might justify a claimant having resort to an umbrella clause (assuming it to provide jurisdiction) to litigate a dispute under a contract which would otherwise go to the forum selected by the exclusive jurisdiction clause, would be if the state party had taken steps to prevent recourse to the agreed forum. That has not happened in the present case: BIVAC has not alleged any impossibility of recourse to the tribunals of the City of Asunción to resolve the outstanding contractual dispute.

<sup>120</sup> *Ibid.*, para. 171.

<sup>121</sup> *Ibid.*, para. 175.

<sup>122</sup> *Ibid.*, paras. 173-4.

to the admissibility of the claim. In its Post-Hearing Memorial it focused on three cases in its treatment of jurisdiction,<sup>123</sup> as well as the decision in *SGS v Philippines* in its arguments on admissibility. We consider the three cases on jurisdiction for the purposes of completeness.

156. The first award referred to is *Eureko v Poland*, where the tribunal rejected Poland's argument on the inadmissibility of a claim under the umbrella clause in circumstances in which there was an exclusive jurisdiction clause for contractual disputes: since the Claimant "advances claims for breach of Treaty ... every one of those claims must be heard and judged by this Tribunal".<sup>124</sup> As to the violations of the contract at issue in that case, the tribunal concluded that Poland's actions and inactions that were in breach of its obligations under the BIT - those held to be unfair and inequitable and expropriatory in effect - were also in breach of the umbrella clause and the underlying contractual obligations. The award provided no assessment or analysis of the contractual provisions that were in issue in that case, so that it appears that its conclusions are to be understood against the background of the particular facts that were there in issue.

157. The second award invoked by BIVAC is *Noble Ventures v Romania*.<sup>125</sup> Although that award dealt with the meaning and effect of an umbrella clause, there is no indication that the underlying contract included an exclusive jurisdiction clause or that there was any argument as to admissibility. Accordingly that award can provide no assistance to BIVAC on this issue.

158. The third case invoked by BIVAC is *Siemens v Argentina*. In its decision on jurisdiction the tribunal did not address the issue of admissibility with regards to the umbrella clause. In a single line it ruled that "The dispute as formulated by the Claimant is a dispute under the Treaty", and on that basis found that it had jurisdiction.<sup>126</sup> At the merits phase the tribunal found that the Claimant was not a party to the contract, and accordingly rejected the claim as regards breach of the contract.<sup>127</sup> The decision therefore provides no support for BIVAC's position as to admissibility.

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<sup>123</sup> BIVAC Post-Hearing Memorial, paras. 91-93.

<sup>124</sup> *Eureko v Poland*, Partial Award and Dissenting Opinion, at para. 113. The tribunal indicated that it had reviewed and considered the other cases cited by the Respondent in support of its jurisdictional objection, but that these decisions did not lead the Tribunal to any other conclusion: *ibid.*, at note 7.

<sup>125</sup> *Noble Ventures, Inc. v Romania*, (ICSID Case No. ARB/01/11), Award, 12 October 2005, (Böckstiegel (P), Lever, Dupuy).

<sup>126</sup> *Siemens AG v Argentine Republic*, (ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, (Rigo Sureda (P), Brower, Bello Janeiro), para. 180.

<sup>127</sup> *Siemens AG v. Argentine Republic*, Award, 6 February 2007, (Rigo Sureda (P), Brower, Bello Janeiro), paras. 204-206.

*Conclusions on admissibility of the Article 3(4) claim*

159. For the reasons set out above, assuming that Article 3(4) of the BIT provides a basis for the exercise of jurisdiction by the tribunal over claims relating to the Contract, we conclude that the claim in relation to Article 3(4) is inadmissible, because:

- (1) In Article 9(1) of the Contract the parties agreed to a legally binding exclusive jurisdiction clause which provided for the resolution of “any conflict, controversy or claim which arises from or is produced in relation to [the] Contract” only by the Tribunals of the City of Asunción;
- (2) Article 3(4) of the BIT does not override the exclusive jurisdiction clause of Article 9(1) of the Contract;
- (3) “the fundamental basis of the claim” presented by BIVAC in respect of Article 3(4) of the BIT concerns a “conflict, controversy or claim” arising from or produced in relation to the Contract;
- (4) having regard to the need to respect the autonomy of the parties, BIVAC cannot rely on the Contract as the basis of a claim under Article 3(4) of the BIT when the Contract itself refers that claim exclusively to another forum, in the absence of exceptional reasons which might make the contractual forum unavailable;
- (5) the proper forum for the resolution of the contractual claim that has been raised under Article 3(4) of the BIT is the Tribunals of the City of Asunción, applying the law of Paraguay.

160. Having concluded that the claim under the umbrella clause is inadmissible, the normal course would be to dismiss the claim. As noted above, however, the Tribunal in *SGS v Philippines* the tribunal did not follow this course, and chose instead to stay the proceedings. We were not presented with arguments by the parties as to what course we should follow in the event that we upheld jurisdiction under Article 3(4) of the BIT but decided that the claim was inadmissible. We note that no proceedings have been initiated by BIVAC before the tribunals of the City of Asunción, despite the passage of many years and, perhaps surprisingly if the evidence before us is to be believed, in the face of Paraguay’s persistent and unexplained failure to comply with its contractual obligation to pay. We note also that BIVAC has not sought to explain why it has not had recourse to the forum agreed by the Contract for the resolution of disputes, and that it has not put any evidence before the Tribunal

to suggest that justice would not be done before the tribunals of the City of Asunción.

161. In such circumstances it might be concluded that a stay of these proceedings in relation to the claim under Article 3(4) of the BIT would be unwarranted, and the proper course would be to dismiss the claim. Against that, we have heard no argument from the Respondent seeking to dissuade us from adopting the approach taken by the Tribunal in *SGS v Philippines*, which decided to stay proceedings. In the absence of argument by either party, and having found that the claim under Article 3(4) is inadmissible, we consider that the most prudent approach is to join to the merits the limited issue of whether the Tribunal should *either* dismiss the claim under Article 3(4) of the BIT *or* stay the exercise of jurisdiction indefinitely or for some other period of time or until some other circumstances pertain.

## DECISION

162. For these reasons the Tribunal decides that:

- (a) it has no jurisdiction in relation to the claim made under Article 6 of the BIT;
- (b) it has jurisdiction in relation to the claim made under Article 3(1) of the BIT, and that claim is admissible;
- (c) it has jurisdiction in relation to the claim made under Article 3(4) of the BIT but that the claim is inadmissible, and it joins to the merits the issue of whether the consequence of the decision on inadmissibility is that the claim should be dismissed or the exercise of jurisdiction stayed;
- (d) the claim raised by Paraguay in its letter of 5 December 2008 as to the standing of BIVAC to bring the claims is joined to the merits; and
- (e) all other questions, including those concerning the costs and expenses of the Tribunal and the costs of the parties determination are reserved for future determination.

[signed]

Professor Rolf Knieper

President

[signed]

Professor Philippe Sands, QC  
Arbitrator

[signed]

Mr. L. Yves Fortier, QC  
Arbitrator