

INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

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WASHINGTON, D.C.

CASE No. ARB/98/5

MR. EUDORO ARMANDO OLGUÍN  
(Claimant)

v.

REPUBLIC OF PARAGUAY  
(Respondent)

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## AWARD

Members of the Tribunal:

Mr. Rodrigo Oreamuno, President  
Mr. Francisco Rezek, Arbitrator  
Mr. Eduardo Mayora Alvarado, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

*Date of dispatch to parties: July 26, 2001*

## THE TRIBUNAL

Constituted as specified above,

Having completed its deliberations,

Hereby renders the following Award:

### I. Introduction

1. The Claimant, Eudoro Armando Olguín, has dual Peruvian and United States citizenship and has his residence in Miami, Florida, United States of America. He is represented in these proceedings by:

Dr. Gonzalo García-Calderón Moreyra,  
Estudio García-Calderón, Ghersi & Asociados  
with registered office for purposes of this case at:  
Libertadores 350  
San Isidro  
Lima 27, Peru

2. The Respondent is the Republic of Paraguay (Paraguay), represented in these proceedings by:

Dr. Juan Carlos Barreiro Perrotta,  
Attorney General, Republic of Paraguay,  
with registered office for purposes of this case at:  
Embassy of Paraguay in Washington, D.C.  
2400 Massachusetts Avenue, N.W.  
Washington, D.C., 20008

3. This award contains the declaration of closure of the proceedings made by the Tribunal under Rule 38 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), as well as the award on the merits of the dispute, pursuant to Rule 47 of the Arbitration Rules. The Tribunal has considered all the arguments, documents, and testimony in the case that were deemed relevant.

## II. Summary of Proceedings

### A. *Proceedings leading to the decision on jurisdiction*

4. On October 27, 1997, the International Centre for the Settlement of Investment Disputes (ICSID or the Centre) received a request for arbitration from Eudoro Armando Olguín against the Republic of Paraguay. The request involved a dispute that arose from the treatment Mr. Olguín allegedly received from the Paraguayan authorities, in relation to his investment in a company for the manufacture and distribution of food products in Paraguay. In his request, the Claimant invoked the provisions of the Treaty between the Republic of Peru and the Republic of Paraguay regarding the Promotion and the Reciprocal Protection of Investments (BIT).<sup>1</sup>

5. On receiving the request for arbitration, the Centre, invoking Rules 5(1)(a) and 5(1)(b) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the request and informed the petitioner that no action of any kind could be taken until such time as the fee for lodging requests was paid as stipulated in Rule 16 of the ICSID Administrative and Financial Regulations. The Centre additionally requested from Mr. Olguín: (i) supplementary information on the parties to the dispute; (ii) more detailed information about Paraguay's consent to submit the dispute subject of the request to arbitration, pursuant to the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), including information on the date of his request to settle the dispute with Paraguay; and (iii) specific information on the issues subject to dispute. The Claimant answered these questions in a letter dated December 15, 1997.

6. After the Claimant had paid the fee for lodging requests referred to above, the Centre, in accordance with the provisions of Institution Rule 5(2), on January 5, 1998, sent a copy of the request for arbitration and the supplementary documentation provided by the Claimant, along with the existing correspondence to date, to the Republic of Paraguay and to the Embassy of Paraguay in Washington, D.C.

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<sup>1</sup> Treaty between Paraguay and Peru dated January 31, 1994, hereinafter referred to as the BIT, which took effect on December 18, 1994.

7. On February 11, 1998, the Centre requested additional information from Mr. Olgúin regarding the alleged existence of legal proceedings in Paraguay, or in any other country, relating to the dispute subject of his request for arbitration. It also asked him for more information on the origin of the Republic of Paraguay's alleged obligation to guarantee certain investment instruments owned by the Claimant, as well as on the exact terms of said obligation. The Claimant answered ICSID's request on April 17, 1998.

8. In a letter dated May 21, 1998, the Republic of Paraguay notified the Centre of its rejection of Mr. Olgúin's request for arbitration, and: (i) denied that the transactions effected by the Claimant were investments; (ii) stated that it was unaware of the existence of the guarantees the Claimant attributes to Paraguay; (iii) acknowledged existence of a payment made to Mr. Olgúin by the Central Bank of Paraguay as a result of the facts in dispute; (iv) mentioned the Claimant's written waiver of his right to institute any further action against the Paraguayan authorities in relation to these facts; (v) mentioned the inadmissibility of the dispute resolution mechanisms provided for in the Peru-Paraguay BIT, since Mr. Olgúin opted to pursue judicial proceedings, thereby ruling out the possibility of international arbitration; (vi) denied the existence of a dispute between the Republic of Paraguay and Mr. Olgúin; and (vii) mentioned the absence of prior consent by the parties to submit the dispute to arbitration before ICSID. This letter was answered in detail by the Claimant in a letter dated June 17, 1998.

9. On August 26, 1998, the Centre's Acting Secretary-General registered the request pursuant to Article 36(3) of the ICSID Convention, and notified the parties, pursuant to Institution Rule 7, that the request had been registered, inviting them to constitute an Arbitral Tribunal as soon as possible.

10. On October 29, 1998, after more than 60 days had elapsed from the date the request was registered, the Claimant informed the Centre's Secretary-General that it was opting to constitute the Tribunal in the manner provided for in Article 37(2)(b) of the ICSID Convention. Accordingly, the Tribunal will be constituted by three arbitrators, one appointed by Mr. Olgúin, another by the Republic of Paraguay and the third, who shall be President of the Tribunal, appointed by agreement of the parties. In the same letter, the Claimant appointed Professor Dale Beck Furnish, a national of the United States of America, as arbitrator for this case.

11. On November 23, 1998, Paraguay, in a letter signed by the Director of Legal Affairs for the Republic's Ministry of Foreign Affairs, José A. Fernández, informed the Centre that it had decided to propose Walter Villalba Zaldívar, a national of Paraguay, for appointment as arbitrator in this case.

12. The Centre immediately informed the Republic of Paraguay that, pursuant to Article 39 of the ICSID Convention and Rule 1(3) of the Arbitration Rules, in cases where the Arbitral Tribunal would be made up of three arbitrators, a party's appointment of an arbitrator who was a national of the State that was party to the dispute or of the State whose national was a party to the dispute, required the other party's consent. As the Claimant had not given his consent, Paraguay was prevented from appointing Mr. Villalba Zaldívar as arbitrator. Consequently, on November 25, 1998, the Republic of Paraguay appointed Judge Francisco Rezek, a national of Brazil, as arbitrator for this case.

13. The parties did not come to an agreement regarding the appointment of the third arbitrator who would serve as President of the Tribunal. Under these circumstances, after more than ninety days had elapsed from the date the parties were notified that the request for arbitration had been registered, the Claimant, in a letter dated January 12, 1999, requested that the third arbitrator for the proceedings and the President of the Tribunal be appointed by the Chairman of the Centre's Administrative Council, pursuant to Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules.<sup>2</sup>

14. After consulting with the parties, the Chairman of ICSID's Administrative Council appointed Rodrigo Oreamuno Blanco, a national of Costa Rica, as President of the Arbitral Tribunal. On February 12, 1999, ICSID's Senior Counsel, on behalf of the Centre's Secretary-General, and pursuant to Rule 6(1) of the Arbitration Rules, notified the parties that all the arbitrators had accepted their appointments and that the Tribunal was deemed to be constituted as of that date. On that same date, pursuant to Rule 25 of ICSID's Administrative and Financial Regulations, the parties were informed that Gonzalo Flores, ICSID Counsel, would serve as Secretary of the Arbitral Tribunal.

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<sup>2</sup> Under Article 38 of the ICSID Convention and under Arbitration Rule 4, if the Tribunal is not constituted within 90 days of the dispatch of the notice of registration, the Chairman of ICSID's Administrative Council, at the request of either party, and after consulting both parties as far as possible, shall appoint the arbitrator or arbitrators not yet appointed and shall designate an arbitrator to serve as President of the Tribunal.

15. On March 16, 1999, the Centre received a letter from the Republic of Paraguay's Ministry of Foreign Affairs, addressed to the Secretary-General of ICSID, in which Paraguay disqualified Professor Dale Beck Furnish under Article 57 of the ICSID Convention. The disqualification was based on the fact that, since the Claimant held United States nationality in addition to his Peruvian nationality, under the aforementioned Article 39 of the ICSID Convention and Arbitration Rule 1(3), he was prevented from appointing a national of the United States of America as an arbitrator in this case, without the Respondent party's consent. Up to that date, the Claimant's dual nationality had been unknown to the Tribunal and to ICSID.

16. Pursuant to the provisions of Arbitration Rule 9, the Secretary of the Tribunal immediately sent the proposal for disqualification to the other members of the Tribunal and to the Claimant. On March 17, 1999, Professor Furnish submitted his resignation as arbitrator in this case. Under the provisions of Rule 8 of the Arbitration Rules, on March 19, 1999, the Tribunal accepted the resignation submitted by Professor Furnish and notified the parties thereof. Consequently, the proceedings were suspended until the Claimant could appoint a new arbitrator. On March 22, 1999, the Claimant appointed Dr. Eduardo Mayora Alvarado, a national of Guatemala, to replace Professor Furnish as arbitrator, and this appointment was accepted according to the provisions of Rule 5 of the Arbitration Rules. The proceedings were resumed on March 29, 1999.

17. The first session of the Tribunal with the parties was held, after consultation with them, on April 16, 1999, at ICSID headquarters, in Washington, D.C. At this session, the parties expressed their agreement that the Tribunal had been properly constituted, pursuant to the relevant provisions of the ICSID Convention and the Arbitration Rules, indicating that they had no objection of any kind in this regard. The Tribunal accordingly declared that it was constituted in accordance with the provisions of said Convention.

18. In the course of the first session, the parties indicated their agreement on various aspects of the proceedings, each of which was duly set down in the respective minutes of proceedings, signed by the President and the Secretary of the Tribunal. The parties elected Spanish as the language for the proceedings, and Washington, D.C., the Centre's seat, was selected as the official venue. The Republic of Paraguay, through its Attorney General, Dr. Juan Carlos Barreiro Perrotta, announced that it had objections to the Centre's jurisdiction, and it asked to have these objections resolved as a preliminary question

prior to the hearing on the merits of the dispute. The Claimant, through Dr. Gonzalo García-Calderón Moreyra, asked the Tribunal to consider the objections to the Centre's jurisdiction put forward by the Republic of Paraguay jointly with the merits of the matter in dispute.

19. After hearing both parties, the Arbitral Tribunal set the following schedule: the Claimant was to submit his memorial within sixty days following the date of the first session; within the sixty days following receipt of this memorial, the Republic of Paraguay would submit its counter-memorial with its statements of fact and of law on the matter of jurisdiction, on the merits of the dispute or both.

20. It was further agreed that, upon the close of the first phase of written proceedings, the Tribunal would determine the steps it would take, leaving open the possibility of allowing or requiring the parties to submit additional briefs. It also left open the possibility of holding a hearing on the matter of jurisdiction.

21. At the close of the first session, at the request of the Republic of Paraguay, the Tribunal confirmed that submission of a memorial containing arguments solely on the matter of jurisdiction would not preclude the right of the Respondent to subsequently argue on the merits of the dispute.

22. Pursuant to the deadlines set by the Tribunal, on May 27, 1999, the Claimant submitted his memorial to the Centre.

23. On August 2, 1999, the Republic of Paraguay submitted its memorial formally setting forth its objections to ICSID jurisdiction, stating the arguments on which it based those objections, and attaching documents supporting its arguments, thereby suspending the proceedings on the merits of the dispute, pursuant to Article 41(2) of the ICSID Convention and Rule 41 of the Arbitration Rules.

24. In a submission dated August 31, 1999, the Claimant answered the objections to the Centre's jurisdiction put forward by the Republic of Paraguay, stating the reasons why he felt that these objections should be denied and submitting documents to support his position.

25. In a memorial dated December 18, 1999, received by ICSID on December 21, the Republic of Paraguay submitted its reply to the answer

given by Mr. Olguín. On February 2, 2000, the Claimant submitted its rejoinder to ICSID on the matter of jurisdiction.

26. This first phase of the proceedings was subject to various delays caused by the Republic of Paraguay's failure to meet its obligation to make the payments set forth in Rule 14 of the ICSID Administrative and Financial Regulations, which the Secretary of the Tribunal had duly requested from the parties.

27. On August 8, 2000, after having deliberated by phone and in writing, the Tribunal rendered a unanimous decision on the objections to jurisdiction made by the Republic of Paraguay. In its decision, the Tribunal rejected the objections to jurisdiction made by the Respondent, maintaining: (a) that the Republic of Paraguay's conclusion of the Peru–Paraguay BIT constituted the written consent required by Article 25, subparagraph 1 of the ICSID Convention; (b) that the investments made by the Claimant in the Republic of Paraguay were included in the listing appearing in Article 1 of the Peru–Paraguay BIT, and that said Treaty contained no rules that would require the investments made by a national of one of the Contracting States to be previously allowed or acknowledged by the State in whose territory they were being made; (c) that no pronouncement could be made in this first phase on the possible defects of Mr. Olguín's investments alleged by the Republic of Paraguay, since that was clearly a subject relating to the merits of the dispute; (d) that, for the same reason, no pronouncement could be made in this phase of the arbitration on the Republic of Paraguay's allegation that, should it be at all liable, such liability would be subsidiary, and not direct; and lastly, (e) that there was no evidence in the case file to the effect that Mr. Olguín had filed a claim in court against the Republic of Paraguay to collect on the liabilities he is seeking to recover through these arbitration proceedings.

28. On these grounds, the Tribunal decided, unanimously, to reject the objections to the Centre's jurisdiction put forward by the Republic of Paraguay and to declare that the Centre had jurisdiction, and that the Tribunal was competent to resolve the dispute between the parties pursuant to the provisions of the Peru–Paraguay BIT and the ICSID Convention.

29. The Secretary of the Tribunal sent certified copies of the Tribunal's decision to the parties. Attached hereto, as an integral part of this award, is a copy of the decision on jurisdiction handed down by the Tribunal.

*B. Proceedings leading to the award on the merits of the dispute*

30. On August 8, 2000, the Tribunal issued Procedural Order No. 1, pursuant to Rules 19 and 41(4) of the Centre's Arbitration Rules, to resume the proceedings on the merits of the dispute. In said Procedural Order, the Tribunal set the following schedule for the further proceedings:

Having the Claimant submitted, as agreed in the first session held April 16, 1999, his memorial with his statements of fact and of law on the merits of the dispute, the Respondent was to submit its counter-memorial, with its statements of fact and of law on the merits of the dispute, within sixty days of the date of receipt of the Tribunal's decision on the matter of jurisdiction. After that, the Claimant would submit his reply regarding the merits of the dispute within thirty days of the date of receipt of the counter-memorial, and lastly, the Respondent would submit its rejoinder on the merits of the dispute, not later than thirty days following receipt of the Claimant's reply. Once the exchange of submissions was complete, the Tribunal would set a date for the hearing.

31. Following this schedule, on October 5, 2000, the Republic of Paraguay submitted its counter-memorial to the Centre on the merits of the dispute. On November 9, 2000, the Claimant submitted his reply on the merits. Finally, on December 18, 2000, the Respondent submitted its rejoinder on the merits of the dispute.

32. In a letter dated February 12, 2001, the Tribunal, after consulting with the representatives of both parties, called a hearing on the merits of the dispute, to be held from March 11 to 14, 2001, inclusive, at the Centre's headquarters, in Washington, D.C. In the same letter, the Tribunal requested, pursuant to Rules 33 and 34 of the ICSID Arbitration Rules, precise information from each party regarding the evidence which it intended to produce and which it intended to request the Tribunal to call for, together with an indication of the points to which such evidence would be directed.

33. In a letter dated February 20, 2001, the Republic of Paraguay transmitted the information requested by the Tribunal to the Centre and requested that Mr. Eudoro Armando Olguín be present at the hearing for questioning. The Claimant, in turn, in a letter of the same date, requested that Mr. Angel Canziani be present for questioning.

34. In a letter dated February 21, 2001, the Arbitral Tribunal asked the parties to indicate the specific points to which the statements of Mr. Olguín and Mr. Canziani would be directed. The parties produced the requested information by the deadlines set by the Tribunal.

35. Accordingly, in a letter dated February 23, 2001, the Tribunal, in accordance with Rule 34(2)(a) of the Arbitration Rules, called upon the Claimant to produce the following witnesses for questioning during the hearing on the merits of the dispute: Mr. Eudoro Armando Olguín and Mr. Angel Canziani. In the same letter, the Tribunal instructed the parties on the manner in which the hearing would take place.

36. According to the instructions, the hearing on the merits of the dispute would take place as follows:

The hearing on the merits of the dispute would begin on Sunday, [March] 11, 2001, at 10:00 a.m.

First, the Claimant's representative would make an oral presentation lasting 30 minutes, and then the Respondent's representative would make his presentation for another 30 minutes.

After that, each party would have 15 minutes to present, by way of reply and rejoinder, any further comments that they might have.

Then, each of the witnesses would be examined by the representative of the party requesting their presence, followed by the representative of the other party, each party having two hours in which to question each of the witnesses.

The members of the Tribunal would also be able to ask questions of the representatives of the parties and of the witnesses, and request explanations at any time during the hearing. The time used for questions by the Tribunal and for the replies would not count against the time assigned to each of the parties.

Lastly, the members of the Tribunal would meet on March 13, 2001, in private, to deliberate, and if necessary, on the following day.

37. The hearing on the merits of the dispute was held, as scheduled, on [March] 11 to 13, 2001, at the Centre's headquarters, in Washington, D.C. In attendance at the hearing were:

*Members of the Tribunal:*

Mr. Rodrigo Oreamuno, President; Mr. Francisco Rezek, Arbitrator; and Mr. Eduardo Mayora Alvarado, Arbitrator.

*ICSID Secretary:*

Mr. Gonzalo Flores, Secretary of the Tribunal

*Claimant:*

Mr. Eudoro Armando Olguín

*Representing the Claimant:*

Dr. Gonzalo García-Calderón Moreyra

*Representing the Respondent:*

Dr. Juan Carlos Barreiro Perrotta, Attorney General, Republic of Paraguay

*Also in attendance at the hearing representing the Respondent:*

Dr. Benigno López, Central Bank of Paraguay

Dr. Amelio Calonga Arce, Office of the Attorney General, Republic of Paraguay

Mr. José María Ibáñez, Embassy of Paraguay in Washington, D.C.

38. The hearing began, as scheduled, on Sunday, [March] 11, 2001 at 10:00 a.m. After a brief introduction by the President of the Tribunal, Dr. Gonzalo García-Calderón Moreyra, on behalf of the Claimant, made a statement to the Tribunal, referring to the arguments indicated in his briefs. During his presentation, and in accordance with the announcements in his letter of February 20, 2001, the representative for the Claimant, through the Secretary, handed over to the Tribunal and to the Respondent, the evidentiary documents for his pecuniary claims. After that, Dr. Juan Carlos Barreiro Perrotta, Dr. Amelio Calonga Arce, and Dr. Benigno López made a presentation to the Tribunal, on behalf of the Republic of Paraguay.

39. Mr. Canziani and Mr. Olguín, witnesses whose appearance was requested by the Tribunal, attended the hearing on the merits of the dispute and gave their respective statements, in that order, after consulting with the parties. They were both questioned by the party requesting their appearance, cross-examined by the other party, and answered questions posed by the Tribunal. The examination, cross-examination, and questioning by the Tribunal took place in the session held on [March] 11, 2001.

40. The hearing continued on the morning of [March] 12, 2001. During this session, the representatives for both parties made their closing statements and were questioned by the Tribunal, as scheduled. In addition, and pursuant to the Tribunal's request made during the session held on March 11, 2001, both parties submitted their written answers to the specific questions posed by the Tribunal the previous day. Lastly, the representatives submitted minutes of their oral arguments to the Secretary, pursuant to the Tribunal's suggestion made in a letter dated February 23, 2001. The hearing ended with some closing remarks by the President of the Tribunal.

41. On the afternoon of [March] 12, 2001 and on March 13, 2001, the members of the Tribunal met at the Centre's headquarters, in Washington, D.C., to deliberate.

### *C. Declaration of closure of the proceedings*

42. Rule 38(1) of the ICSID Arbitration Rules provides that when the parties have completed their presentations, the proceedings shall be declared closed.

43. Having examined the parties' presentations, the Tribunal concluded that there were no requests from either party, nor any other reason to reopen the proceedings, as permitted by Rule 38(2) of the ICSID Arbitration Rules.

44. Consequently, in a letter dated May 8, 2001, the Tribunal declared the proceedings closed, pursuant to Rule 38(1) of the ICSID Arbitration Rules.

### **III. Summary of Facts**

45. In November 1993, Mr. Juan Luis Oseli Pagliaro held a position in the Central Bank of Paraguay. Mr. Pagliaro sent a letter to Mr. Olguín, on non-letterhead stationery, dated November 3, 1993, informing him "...of the arrangements made with the company 'La Mercantil S.A. de Finanzas' pursuant to the discussions with Oscar and on our behalf."

Basically, the letter described the interest rates that that finance company was willing to grant Mr. Olguín on his deposits in United States dollars and in guaranis, which were 11% and 33% per annum, respectively.

46. Mr. Olselli also stated in the letter that he was sending the Central Bank of Paraguay's Official Report on La Mercantil and the ranking it held among finance companies in Paraguay. The letter ended with the following paragraph:

“The friend I mentioned to you is Mr. Tomás Rovira, general manager of the finance company, who can be contacted at the phone number that appears on his card.”

47. On March 16, 1994, Mr. Olselli sent a note to Mr. Olguín, to which he attached a newsletter “...for purposes of keeping you informed about La Mercantil and its movement on the market.”

48. Starting in December 1993, the Claimant began transferring capital, in dollars, to the Republic of Paraguay. These transfers, which came to a total amount of U.S.\$1,254,500.00, were converted to Guaranis (Gs) and deposited in a finance company by the name of “La Mercantil S.A. de Finanzas” (La Mercantil).

49. In exchange for the deposit of these sums, Mr. Olguín received investment instruments (*Títulos de Inversión*, TDIs) which were successively renewed.

The following TDIs existed as of July 1995:

- i. No. 06361 with a value of Gs 570,000,000, dated August 2, 1994,
- ii. No. 2225 with a value of Gs 481,250,000, dated June 23, 1995,
- iii. No. 2226 with a value of Gs 481,250,000, dated June 23, 1995,
- iv. No. 2227 with a value of Gs 508,200,000, dated June 23, 1995,
- v. No. 2231 with a value of Gs 231,000,000, dated July 4, 1995,
- vi. No. 2232 with a value of Gs 67,375,000, dated July 4, 1995,
- vii. No. 2253 with a value of Gs 67,982,500, dated July 6, 1995.

The first of these securities was issued to Mr. Angel Canziani Zuccarelli and the remainder were made out to Mr. Eudoro Olguín. The latter securities bore the signature of an officer at the Central Bank of Paraguay. The seven securities came to a total of Gs 2,407,057,500.00.

50. On August 26, 1996, a payment of Gs 48,006,750 was made on each of these securities, with the exception of the one issued to Mr. Canziani. Although the parties differ in regard to the legal consequences of that signature, it was clear to the Tribunal that no payment had been made on the security issued to Mr. Canziani because it did not bear the signature of an officer of the Bank Examiner, which was present on Mr. Olguín's securities.

51. The aforementioned funds were slated to finance the installation of a corn products plant in Paraguay whose owner would be the company known as "Super Snacks del Paraguay S.A." (Super Snacks).

52. On May 25, 1994, Juan Luis Oseli Pagliaro and Tomás Gumercindo Rovira Barchello, accompanied by Mr. Olguín and other persons, appeared before the Public Notary and Recording Officer Blanca Cilda Núñez Noguera, to execute the articles of incorporation for Super Snacks del Paraguay S.A., appointing them, respectively, as the company's Vice Chairman and Director, and at that moment, they subscribed for 12 shares of Gs 1,000,000 each. The corporate by-laws and legal status of the company were approved on July 26, 1994, by arrangement of Mr. Oseli. Super Snacks was officially entered in the Commercial Registry of the Republic of Paraguay on August 22, 1994.

53. In June 1994, the firm "Análisis & Propuestas Consultores" presented Mr. Olguín with a "Technical, Economic, and Financial Feasibility Study" in reference to the corn products plant. According to this study, the project would require an investment of Gs 1,425,500,000, with 36.9% of the financing coming from the company's own funds, and 63.1% from bank resources.

54. On September 22, 1994, Resolution 415 of Paraguay's Ministry of Industry and Commerce granted Super Snacks the tax incentives provided for in Statute No. 60/90.

55. In the midst of the economic crisis the financial system was undergoing in the Republic of Paraguay, on July 14, 1995, La Mercantil suspended its operations and ceased honoring payment of the TDIs.

56. On December 18, 1994, the Bilateral Investment Treaty between the Republic of Peru and the Republic of Paraguay regarding the Promotion and Reciprocal Protection on Investments entered into force, and whose stated purpose was "...to create and maintain conditions favorable to investments of

nationals of one Contracting Party in the territory of the other Contracting Party.”

57. In July 1995, Statute No. 417/73, which regulated Banks and other financial institutions, was in force in Paraguay, and Article 66 of this law provided:

“Once a dissolution decision in the cases provided under this law has been made, the Central Bank of Paraguay shall administer the assets and liabilities of the entity for the sole purpose of its liquidation and shall lend financial support aimed at the payment of holders of savings accounts, with deduction of the legal reserves corresponding to the savings accounts...”

58. On December 4, 1995, the Legislature of Paraguay approved Statute No. 797 on Financial Stabilization and Recovery, which amended the above-mentioned Article 66 to read as follows:

“Once a decision has been made to withdraw a financial institution’s license to operate, the Central Bank of Paraguay shall guarantee payment of the deposits consisting of monetary deposits duly recorded in the entity’s liabilities, in whatever form, in domestic or foreign currency, made by individuals or legal entities, in the banks, finance companies and other credit houses, up to the equivalent of the monthly minimum wage times one hundred per account.”

59. After La Mercantil suspended its operations, Mr. Olgúin, personally and on behalf of Super Snacks, made numerous efforts to try to recover the funds deposited with that financial institution.

#### **IV. Considerations**

60. Paraguay insists that the Tribunal examine the matter of Mr. Olgúin’s nationality, a subject that naturally is preliminary to the examination of the merits. The Respondent’s thinking is that, since Mr. Olgúin is a Peruvian national, and at the same time, a national of the United States of America, and since the Peruvian legal system supposedly establishes that in cases of dual nationality, the person’s registered address will determine the exercise of specific rights by that person, Mr. Olgúin, who resides in the United States, may not claim the protection under the BIT.

61. What is important in this case in order to determine whether the Claimant has access to the arbitral jurisdiction based on the BIT, is only whether he has Peruvian nationality and if that nationality is effective. There is no doubt on this point. There was no dispute regarding the fact that Mr. Olguín has dual nationality, and that both are effective. What one, or the other, or even both of his mother countries understand regarding, for example, the person's exercise of political rights, civil rights, the responsibility for his diplomatic protection and the importance of his registered address for determining any such rights has no bearing on the legitimate legal fact that Mr. Olguín effectively has dual nationality. To this Tribunal, the effectiveness of his Peruvian nationality is enough to determine that he cannot be excluded from the provisions for protection under the BIT.

62. In the case of a dual national's diplomatic protection, either of his mother countries has the capacity to act on his behalf against a third country, and the third country would have no way of invoking rules, on an international scale, that would serve, in the protecting nation's internal laws, to transfer the responsibility for such protection—which is, in any case, not obligatory—to the co-mother country, on account of the person's registered address or other similar factor. The third nation, the hypothetical author of the unlawful act that caused damage to the foreign individual, would only be authorized, under international law, in this precise field, to deny the legitimacy of such diplomatic protection in the absence of a tie of effective nationality between the individual and the protecting nation; it could never do this based on rules of internal law, which in either of the two co-mother countries, serve to regulate the exercise of given rights, and which furthermore, might prove to be in conflict with each other.

But even if this were not the case, internal rules of this nature, pertaining to the grant of diplomatic protection to individuals, and therefore, to something that under international law is a prerogative of the mother country, could not, by analogy, be applied to the case of access to the ICSID forum, one of whose most important and unique objectives is to effectively give the individual the right of action, excluding the mother country's endorsement of his claim or any other initiatives from the mother country, the only requirement being that it be a party to the 1965 Convention and the relevant BIT.

63. The Claimant is seeking to have the Republic of Paraguay refund him the unpaid portion of his investment, which as of June 30, 1995, came to Gs 2,407,057,500.00, along with the applicable adjustment for the devaluation of

the guarani, from June 1995 to the effective payment date, the interest on that amount, over the same period, at the interest rate agreed in the TDIs, the damages incurred due to the failed payments of principal, and the costs of the arbitration proceedings.

64. Mr. Olguín states that Paraguay's liability emerges from four distinct causes:

(a) The TDIs were endorsed by the Bank Examiner of the Republic of Paraguay, a Paraguayan State agency.

(b) The Republic of Paraguay and its agencies were negligent in supervising the activities of La Mercantil, and this negligence led to the suspension of operations of that financial institution.

(c) The Republic of Paraguay and its agencies engaged in discriminatory conduct, in violation of the provisions of the BIT, particularly the provisions of Article 4, subparagraph 2 of the treaty.<sup>3</sup>

(d) The actions of the Republic of Paraguay in respect to Mr. Olguín's investment were the equivalent of expropriation.

65. The Arbitral Tribunal then analyzed each of these arguments:

a) This Tribunal does not share the Claimant's contention that the signatures appearing on the six TDIs issued in Mr. Olguín's name constitute an endorsement or other similar legal act, capable of obligating the Republic of Paraguay to pay that security. Setting aside the subject of whether the Bank Examiner has the legal authority to obligate the Republic of Paraguay by extending a guaranty of this kind, it appears evident that the effect of that signature is meant solely to register the TDIs.

Legal scholars have discussed at length the possibility of creating securities that are distinct from those expressly set forth in a given legal system. The

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<sup>3</sup> "ARTICLE IV: Protection-Treatment and Economic Integration Zone

(2) TREATMENT: Each Contracting Party shall guarantee fair and equitable treatment in its territory to investments of investors of the other Contracting Party. This treatment shall be no less favorable than the granted by each Contracting Party to investments of its own nationals made in its territory or than that accorded by each Contracting Party to investments of nationals of a most favored nation in its territory, if the latter treatment is more favorable."

Claimant has repeatedly stated that the TDIs were documents distinct from certificates of deposit. To conclude that any signature placed on one of these TDIs constituted an endorsement or similar guaranty would require the existence of an explicit rule in Paraguayan law that so provided. The existence of such a rule has not been demonstrated in the case file.

b) As explained further on in this Award, the Tribunal feels that Paraguay's general conduct in relation to the operations of La Mercantil was not overly sound. Nonetheless, it seems excessive to attribute to this careless conduct the effect of making the Republic of Paraguay liable for the payment of the TDIs.

It seems obvious to this Tribunal that there are serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies. This Tribunal is not seeking to determine whether this situation is more severe in Paraguay than in other nations. What is evident is that Mr. Olgúin, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay. He had his reasons (which this Tribunal makes no attempt to judge) for investing in that country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment.

c) The Claimant's statement that the Republic of Paraguay fully paid for the investment by the Hamilton Bank of the United States of America was not borne out in the file, nor did the party show any other case in which favorable treatment was shown, in a manner that was discriminatory against Mr. Olgúin, to another Paraguayan, or foreign creditor. Statute No. 797/95 on Financial Stabilization and Recovery sought to compensate, in part, the losses suffered by a large number of investors, for purposes of helping to mitigate the severe economic crisis the country of Paraguay was undergoing. However, to a small extent, Mr. Olgúin benefited (along with many other people) from the enactment of that law, which, on amending Article 66 of Statute No. 417/73, extended the coverage of the protection that under the previous law was limited to those with savings accounts, which earned meager amounts of interest.

d) The Tribunal, despite numerous efforts, was unable to understand the Claimant's reasoning on attempting to equate the loss of money Mr. Olgúin suffered to an expropriation. In the latter, a person is deprived of property through an action to take ownership of that property by the State, which log-

ically, contracts an obligation to pay its price. In this case, it cannot be said that the Paraguayan State had appropriated the investment made by Mr. Olguín, which was lost due to the crisis suffered by La Mercantil and by the Paraguayan financial system in general.

The Tribunal will return to these issues in more detail further on.

66. As stated previously, it has been clearly shown that Mr. Olguín made a substantial investment in Paraguay. Freely, and it would seem, on the advice of various people, among them Mr. Olselli and Mr. Rovira, with whom he established a close relationship, to the point of naming them to the Super Snacks Board of Directors, he decided to convert to guaranis the dollars he had brought from another country (which country being of no importance for purposes of the BIT),<sup>4</sup> and invest them in La Mercantil, which offered to pay him interest at a rate of 33%, which, at the time, seemed extremely attractive.

67. On finalizing the proceedings for the taking of evidence, the Tribunal wished to make certain, by directly consulting the parties in the presence of them both, that its understanding—that of the Tribunal—of the essential part of each of their arguments, both in relation to the facts of the case, and the legal consequences derived therefrom, was substantially correct. This was so confirmed.

68. Two aspects directly related to these arguments call for examination in order to ensure that the grounds for the award are not in any way diminished. They are: (a) the existence or lack of certain omissions in regard to the discharge of the obligations that fall within the scope of Paraguay's accounting bodies, in matters of financial supervision; and (b) the existence of a causal relationship between such omissions—if any—and the obligation to compensate that the Claimant is seeking in his favor.

69. Both parties concur, albeit to differing extents, the Claimant accusing, and the Respondent admitting, that the bankruptcy of La Mercantil, occurring within the broader context of a national financial crisis, was the conse-

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<sup>4</sup> During the hearing on the merits of the dispute, held from March 11 to 13, 2001 at the ICSID headquarters in Washington, D.C., the Republic of Paraguay argued that the funds invested by Mr. Olguín in Paraguay came, physically, from the United States (the Claimant's place of residence), and that therefore, his investment was not protected by the Paraguay-Peru BIT. According to this argument, for an investment to be protected by the Paraguay-Peru BIT, the funds invested must come from the country in which the investor is a national. This requirement is not expressly indicated in the BIT; consequently, the Tribunal rejects that argument.

quence of irregular conduct on the part of its managers, that could have been detected, brought to a halt, and if necessary, sanctioned, thereby fostering confidence in both the integrity of Paraguay's financial system, and investor credits in securities issued by La Mercantil.

70. Without getting into an analysis of third-party opinions, be they media outlets or other entities, on the sociopolitical problems confronting Paraguay, which clearly extend beyond the object of this Award, it is nonetheless possible to gather sufficient evidence to draw the conclusion that there were considerable omissions on the part of Paraguay's public bodies, which had the duty to preserve the integrity of that country's financial system, in regard, not only, but especially, to foreign investment. In other words, in the case before us, the government accounting bodies of Paraguay clearly appear to have been negligent in regard to their duties to monitor, supervise, or control the agents of their country's financial market, during the period of time in which the facts arose that led to this dispute.

71. That being said, it needs to be determined whether, in this case, there existed a suitable causal link that would produce specific legal consequences, such as an obligation, on the part of the State of Paraguay, and a right, on the part of Mr. Olguín, to demand and obtain compensation for the losses he suffered. This question would require the existence of one or more ruling scenarios to which the facts could be subsumed, with the aforementioned legal effects.

72. As a result of a careful analysis of the BIT, this Tribunal concludes that said text does not contain any rules that obligate the State in whose territory an investment is made to guarantee the payment of that investment in the event it were to fail.

73. Had the BIT envisaged as a suitable hypothetical scenario for producing legal consequences like those sought by the Claimant, that the Contracting States might commit gross omissions in regard to their legal and constitutional duties or obligations, thereby causing third parties to suffer losses, then in the light of the facts considered to be shown in this case, this Arbitral Tribunal might well have ruled in favor of the Claimant. The probability—and not the certainty—of such an outcome is due, as stated earlier in this Award, to the fact that the Claimant contributed significantly, within his own individual circle of action, to the occurrence of the facts that he is also censuring. Nonetheless, this hypothesis must be discarded, since there is no rule in the

BIT relating to “gross omissions” that would serve as a basis for the Claimant’s cause of action.

The scope of the Bilateral Investment Treaties was categorically specified in the award issued in the arbitration proceedings between Emilio Agustín Maffezini and the Kingdom of Spain (ICSID Case No. ARB/97/7). That award, rendered by a distinguished Arbitral Tribunal on November 13, 2000, stated, in paragraph 64:

“...the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments.”

74. Although, as explained elsewhere in this ruling, the establishment, in the future, of strict rules that impose economic sanctions on States that fail to closely monitor their financial entities is desirable, the truth is that these rules do not now exist in either Paraguayan law or in the BIT. The Tribunal adds that they do not exist in the majority of the countries in the region either.

75. This Tribunal does not accept Mr. Olguín’s contention that he was induced to make his investment by the bulletins issued by the Central Bank of Paraguay. To the contrary, the Tribunal feels that prudence would have prompted a foreigner arriving in a country that had suffered severe economic problems to be much more conservative in his investments.

76. The statistical bulletins from the Central Bank of Paraguay (BCP) and the Bank Examiner, official in nature, on the situation of various entities that make up Paraguay’s financial system, can be understood to be published to allow various economic agents to make decisions on investments or consumption. It so happens that copies of a few of these bulletins, the content of which produced no objection from the parties, were attached to the record of these proceedings, and they show, for example, that La Mercantil was ranked second among finance companies with the greatest net worth in the country as of September 30, 1993 (the date appears in the tables, although not beneath the bar charts).

77. That situation contrasts with Angel Canziani’s and the Claimant’s own statements and with numerous statements by the representative and other attorneys for the Paraguayan State during the evidentiary hearings, from which it was inferred that La Mercantil—among other entities—issued investment

instruments that, while they should have been reflected in the issuer's account liabilities, were circulated as off-the-book securities ("títulos negros") as they were referred to by the attorneys for the Respondent. In this regard, the report of "the Government Auditors from the Central Bank of Paraguay in La Mercantil S.A. de Finanzas," dated October 20, 1995, a copy of which can be found in the files, indicates the following:

"We noted that the volume of the entity's deposits as of April 28, 1995 came to a total of G. 20.225 billion, and remained relatively stable through May 30 of that year. However, after May 31, there were substantial increases in deposits, in amounts not recorded in the company's normal course of business, a situation that was at odds with the official explanatory statements established. It should be noted that this discrepancy was due to an attempt to legalize parallel deposit transactions, by making improper use of the deposit instruments authorized by the Central Bank of Paraguay. This caused a surge in the level of deposits from G. 20.225 billion to G. 98.259 billion..."

78. This means that, on the date of that report, La Mercantil had issued and placed in circulation securities in an amount that was approximately five times what showed in its books or account ledgers. The report goes on to state the following:

"...By means of preferred loans granted to individuals related (with either employment or business ties) and entities related (Dimex S.A., Financiera Corpus SA., Publicity S.A., Laprofarm, Arami S.A., Super Snacks, Distrimport, among others) to La Mercantil S.A. de Finanzas, funds collected by the company were diverted, in violation of the legal principles of Art. 35 f) of Act 417/73 on Banking and Other Financial Entities..."

79. The inclusion of "Super Snacks" stands out among the legal entities related to La Mercantil. However, in the context of these issues, it is more important to analyze these facts and circumstances as they relate to the existence of omissions on the part of the competent Paraguayan authorities, as will be done further on.

80. Further related to the auditors' findings are two facts that were acknowledged by both parties. One, that an officer of the Central Bank of Paraguay (BCP), Mr. Juan Luis Oseli Pagliaro, furnished the Claimant with a written recommendation (letter dated November 3, 1993, referred to earlier) for carrying out financial undertakings with La Mercantil; the other, that the latter's general manager, Mr. Tomás Rovira, and Mr. Oseli, agreed to form the Board of Directors of "Super Snacks," apparently without any consequences in terms of oversight actions by the Bank Examiner.

81. Perhaps it would be overly zealous to attempt to demand that the Paraguayan financial control bodies be obligated to detect and prevent hidden or "shadow" relationships of public officers (in the case of Oseli) or private ones (in the case of Rovira), that place them in a clear situation of legally culpable conflict of interest, as indicated by the auditors of La Mercantil. Nonetheless, as stated earlier, both officers went to the extreme of appearing before a public notary to incorporate, together with Mr. Olguín, "Super Snacks Paraguay Sociedad Anónima."

82. The file makes no mention of how long Mr. Oseli retained his position as an officer of the BCP, which could be of significance when considering the overall impact of the fact, significant in itself, that it was Mr. Oseli who submitted the "presentation" to the Ministry of the Interior that led the President of the Republic to issue Decree 4,861 (a copy of which is included in the case file), approving the corporate by-laws of Super Snacks and recognizing its legal status.

83. As indicated in the preceding paragraph, the Tribunal wished to ensure that it understood clearly the party's positions, and in this sense, it noted that the Claimant's legal argument is based, among other things, on the existence of an expropriation, within the context and under the terms of Article 6 of the BIT. Said expropriation, states the Claimant, would be indirect in nature, made up of omissions such as the ones the Arbitral Tribunal refers to above, by way of example, and without limitation. To give the legal institution of expropriation the scope that the Claimant attempts to give it would imply, on the part of the Arbitral Tribunal, a departure from the general principles of law and the rules of substantive law that define and regulate expropriation.

84. For an expropriation to occur, there must be actions that can be considered reasonably appropriate for producing the effect of depriving the affected party of the property it owns, in such a way that whoever performs those

actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property. Expropriation therefore requires a teleologically driven action for it to occur; omissions, however egregious they may be, are not sufficient for it to take place.

### Costs

85. Although this Tribunal is rejecting all of Mr. Olguín's claims, it does not feel that it is fair to make him pay the costs for these proceedings. In the first place, the Respondent's questioning of this Tribunal's jurisdiction was flatly rejected, on the grounds expressed earlier.

In the second place, as already stated various times in this Award, while the oversight exercised by the Paraguayan State through its bodies did not rise to a level of negligence that created liability to pay the losses suffered by the Claimant, it is also true that it cannot be considered to have been exemplary. Moreover, the conduct of the Republic of Paraguay needlessly prolonged these proceedings by repeatedly failing to meet the deadlines set by the Tribunal, in particular, the obligations imposed by the ICSID Administrative and Financial Regulations. For the above reasons, this Tribunal feels that it is fair that the parties each contribute part of the expenses arising from these proceedings, dividing the procedural costs in equal shares, and each assuming the costs for their legal representation.

### V. Decision

For the above reasons, the Tribunal unanimously resolves:

1. All contentions made by the Claimant Eudoro Armando Olguín are hereby denied.
2. Each party shall pay one half of the fees for these proceedings and the entire cost of their representation.

RODRIGO OREAMUNO  
*President of the Tribunal*

FRANCISCO REZEK  
*Arbitrator*

EDUARDO MAYORA ALVARADO  
*Arbitrator*