

**International Centre for Settlement of Investment Disputes**

Washington D.C.

**Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V**

(Claimant)

v.

**The Republic of Paraguay**

(Respondent)

(ICSID Case No. ARB/07/9)

**Further Decision on Objections to Jurisdiction**

**Members of the Tribunal**

Professor Dr. Rolf Knieper, President

L. Yves Fortier QC, Arbitrator

Professor Philippe Sands QC, Arbitrator

**Secretary of the Tribunal**

Mercedes Cordido-Freytes de Kurowski

*Representing the Claimant*

Messrs. Nigel Blackaby and Lluís Paradell  
and Ms. Caroline Richard

Freshfields Bruckhaus Deringer  
and

Messrs. Oscar Mersán and Pablo Lu  
Mersán Abogados  
Asunción, Paraguay

*Representing the Respondent*

Dr. José Enrique García Ávalos  
Procurador General (up to 27 June 2012)

Dr. Pedro Rafael Valente Lara  
Procurador General (from 28 June 2012)

Procuraduría General de la República del Paraguay  
Asunción, Paraguay

and

Mr. Brian C. Dunning,  
Ms. Irene Ribeiro Gee, and Mr. David N. Cinotti  
Venable, LLP  
New York, NY

Date: 9 October 2012

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## **1. The Parties**

1. Bureau Veritas, Inspection, Valuation, Assessment and Control (“BIVAC” or “BIVAC BV” or the “Claimant”), is a company incorporated under the laws of the Kingdom of the Netherlands (“Netherlands”) since 1984. BIVAC BV is an operating company within the Bureau Veritas Group which maintains affiliated companies in more than one country. The headquarters – BIVAC International S.A. – are situated in France.
2. BIVAC is represented by Mr. Nigel Blackaby, Mr. Lluís Paradell and Ms. Caroline Richard of Freshfields Bruckhaus Deringer, 701 Pennsylvania Avenue, Suite 600, Washington D.C., 20004-2692, USA and by Messrs. Oscar Mersán and Pablo Lu of Mersán Abogados, Fulgencio R. Moreno No. 509 ler. Piso, Asunción, Paraguay.
3. The Republic of Paraguay (“Paraguay” or the “Respondent”) is represented by the Procurador General de la República del Paraguay, Dr. José Enrique García Ávalos (up to 27 June 2012), and Dr. Pedro Rafael Valente Lara (from 28 June 2012), assisted by Mr. Brian C. Dunning, Ms. Irene Ribeiro Gee and Mr. David N. Cinotti of Venable LLP, 1270 Avenue of the Americas, 25th Floor, New York, NY 10020, USA .
4. BIVAC and Paraguay are hereafter referred to as the “Parties”.

## **2. The Arbitral Tribunal**

5. The parties were unable to agree on the constitution of the Arbitral Tribunal. Therefore, it was constituted in accordance with Articles 37(2)(b) and 38 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and Articles 2 to 5 of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”). By letter dated 14 June 2007 BIVAC appointed Mr. L. Yves Fortier, C.C., O.Q., Q.C., LL.D, a Canadian national as arbitrator. Mr. Fortier accepted the appointment on 20 June 2007. By letter

dated 9 July 2007 Paraguay appointed Professor Philippe Sands QC, a British and French national. Professor Sands accepted the appointment on 13 July 2007. Following consultations with the parties, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) appointed Professor Dr. Rolf Knieper, a German national, as the presiding arbitrator. Professor Knieper accepted the appointment on 10 March 2008.

6. By letter dated 10 March 2008, ICSID informed the parties that as of that date the Tribunal had been constituted and that the proceedings were deemed to have commenced. During the first session of the Tribunal which was held with the parties on 20 May 2008 in Washington, D.C., 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 April 2006, which are applicable to these proceedings.
7. After Mr. Gonzalo Flores, ICSID, and Mr. Sergio Puig de la Parra, ICSID, Ms. Mercedes Cordido-Freytes de Kurowski was appointed to serve as Secretary of the Tribunal.

### **3. Procedural History and Background**

#### **3.1. The Developments up to the Decision on Objections to Jurisdiction**

8. On 20 February 2007 ICSID received a Request for Arbitration from BIVAC dated 16 February 2007. In its request BIVAC asserted that it had made investments in Paraguay which were protected under the Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investments (“the Treaty” or the “BIT”).<sup>1</sup>
9. In its request and in further submissions BIVAC asserted that Paraguay violated

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<sup>1</sup>Exhibit CE-66, (signed on 29 October 1992; entered into force on 1 August 1994).

various obligations under the Treaty. BIVAC had concluded a contract with the Ministry of Finance of Paraguay on 6 May 1996 for the provision of technical services for pre-shipment inspection of imports into Paraguay (“the Contract”)<sup>2</sup>. The Contract was to run for a term of three years, from 15 July 1996, which term was to be renewed periodically, unless one of the parties gave written notice of its intention not to renew the Contract no less than four months before the expiration of the term (Article 8.2).<sup>3</sup> The Contract was terminated in June 1999 upon mutual agreement of the parties. BIVAC asserts that it carried out some 70,000 inspections over the three year period and that it had issued 35 invoices. It alleges that 19 of the invoices remained unpaid amounting to US\$ 22,016,142 and that the last payment made by the Ministry of Finance was in March 1999.<sup>4</sup> BIVAC estimates that as of 31 August 2011 the total amount due under the outstanding invoices together with accrued interest is US\$ 63,969,775.13.<sup>5</sup>

10. The Centre registered the Request for Arbitration on 11 April 2007 and duly notified the parties thereof after having been provided with explanations from BIVAC as to the qualification of its activities as an investment and to the relationship between the dispute settlement provisions in the Treaty and in the Contract.
  
11. Paraguay has consistently objected to the jurisdiction of the Centre and the Arbitral Tribunal. It has insisted that neither the appointment of an arbitrator nor the agreement to the constitution of the Tribunal were to be interpreted as its consent to jurisdiction. It asserted *inter alia* that Paraguay had not agreed to arbitration before ICSID, that its relationship with BIVAC was based on an administrative contract which is not covered by the Treaty, that BIVAC had not made an investment in the territory of Paraguay and that Article 9.1 of the Contract contains an exclusive dispute settlement mechanism. Article 9.1 states:

“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

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<sup>2</sup> Contract between the Ministry of Finance of the Government of the Republic of Paraguay and Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V., regarding the rendering of Technical Services for the Pre-Shipment Inspection of Imports, (dated 6 May 1996), Exhibit CE-6.A (Contract in English) // CE-6.B (in Spanish).

<sup>3</sup> BIVAC Memorial (dated 27 November 2009), para. 6.

<sup>4</sup> *Ibid.*, para. 56.

<sup>5</sup> BIVAC Post-Hearing Brief (dated 23 September 2011), para 141 and Annex 3.

Law.”

12. During its first session the Tribunal decided that:

“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”.

This was recorded in the Minutes of the session signed by the Secretary and the President on 6 and 7 July 2008.

13. Subsequently, the Tribunal received the Claimant’s Counter-Memorial dated 3 July 2008, the Respondent’s Reply dated 18 August 2008 and the Claimant’s Rejoinder dated 2 October 2008. All were submitted within the time limits prescribed by the Tribunal. A hearing on jurisdiction was held in Washington D.C. on 11 November 2008. In addition both parties submitted post-hearing briefs, the Respondent on 8 December 2008 and the Claimant on 22 December 2008, as agreed by the Tribunal. As set out below, the Decision on Objections to Jurisdiction was rendered by the Tribunal on 29 May 2009.<sup>6</sup>

14. By letter dated 5 December 2008, the Respondent further requested the Tribunal to dismiss the claim on the ground that BIVAC lacked standing. Paraguay asserted that the real party in interest was BIVAC International S.A. (“BIVAC International”) and not BIVAC BV. By letter dated 11 December 2008, BIVAC responded to Paraguay’s letter and requested the Tribunal to reject Paraguay’s new submission as inadmissible on the grounds that it raised new arguments on objections to jurisdiction, contradicting the Tribunal’s decision not to allow any new arguments to be made at the preliminary stage of the proceedings. It also asserted that BIVAC BV, the Dutch company, was the party to the Contract and thus the real party in interest. The Tribunal invited Paraguay to give its views on the issue, which it did by letter dated 19 December 2008. BIVAC

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<sup>6</sup> Decision of the Tribunal on Objections to Jurisdiction (“Decision on Objections to Jurisdiction”), dated 29 May 2009.

reiterated its request that Paraguay's new arguments as to standing should be declared inadmissible by letter dated 22 December 2008.

### **3.2. The Decision on Objections to Jurisdiction**

15. The salient features of the Decision of 29 May 2009 are reproduced here to assist in understanding the procedure leading to this Further Decision and its motivation.

16. The Tribunal ruled on the jurisdictional issues as follows:

“(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.”<sup>7</sup>

#### **3.2.1. Operative Paragraph A**

17. Article 6 of the BIT stipulates that Dutch investments in Paraguay would not be expropriated except if carried out for a public purpose, on a non-discriminatory basis and accompanied by the 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...”<sup>8</sup>

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<sup>7</sup> *Ibid.*, para. 162.

18. The Tribunal held that “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 dispute 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.”<sup>9</sup>

### ***3.2.1. Operative Paragraph B***

19. Article 3(1) of the BIT stipulates that Dutch investment in Paraguay would be granted fair and equitable treatment. The provision reads:

“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.”<sup>10</sup>

20. The Tribunal found that BIVAC had advanced a factual and legal case which, if established, would be capable of giving rise to a violation of Article 3(1) of the BIT. It was satisfied that based on the Claimant’s description of the circumstances of the claim and Respondent’s reaction it could provisionally conclude that Paraguay’s failure to challenge the validity of the Contract, BIVAC’s compliance with its obligations, and the level of indebtedness amounted to an acknowledgement of the debt. Without expressing any view on the question of whether a persistent failure to pay an outstanding debt could in itself ever amount to a violation of the fair and equitable treatment standard, or whether Paraguay had acted not only like an ordinary contracting party but had exercised governmental power (“*puissance publique*”), the Tribunal concluded that these questions were arguable and relevant for the merits and that this finding sufficed at the preliminary stage to establish its jurisdiction.
21. The Tribunal further held that the dispute resolution clause set out in Article 9 of the Contract was no bar to the admissibility of the claim since it was not based on the application and performance of the Contract as such. Rather, it was based on

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<sup>8</sup> Exhibit CE-66.

<sup>9</sup> Decision on Objections to Jurisdiction, para. 117.

<sup>10</sup> *Ibid.*



Paraguay's alleged exercise of sovereign power in a manner that violated the Treaty standard and was no mere breach of contract.<sup>11</sup>

### *3.2.1. Operative Paragraph C*

22. Article 3(4) of the BIT provides that “[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party.”

23. The Tribunal had concluded this claim was 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.”<sup>12</sup>

24. Despite its finding on inadmissibility the Tribunal decided that it was not in a position to dismiss the claim. It decided instead to stay the proceedings on the grounds that it had not been provided with arguments by the parties as to the course to be followed in the event that jurisdiction is upheld under Article 3(4) of the BIT. The Tribunal therefore decided to join the question of an alternative course to the merits in order to give the parties the opportunity to present arguments as to the the appropriate course of action to be followed, and to allow BIVAC the possibility to explain why it had not

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<sup>11</sup> *Ibid.*, paras. 123-127.

<sup>12</sup> *Ibid.*, para. 159.

had recourse to Tribunals of the City of Asunción, the forum agreed in the Contract.<sup>13</sup>

### **3.2.1. Operative Paragraph D**

25. The Respondent's objection to jurisdiction *ratione personae* was first raised in its letter dated 5 December 2008, after the hearing on jurisdiction. The Tribunal decided that this was too late to allow for a substantive debate of these new arguments at the preliminary stage. A decision on this matter would have been inconsistent with basic principles of due process and procedural economy. The Tribunal had therefore decided, in accordance with Article 41(2) of the ICSID Convention, to join this new objection to the merits.
26. The Decision on Jurisdiction of 29 May 2009, has therefore left the Arbitral Tribunal with the following matters to be resolved in the award on the merits:
- whether the Claimant had *ius standi* in the proceedings;
  - whether the Respondent had violated its obligation of fair and equitable treatment in addition to an eventual breach of contract;
  - whether the inadmissible claim for a violation of the umbrella clause should be dismissed or stayed;
  - how costs and expenses should be allocated.

### **3.3. The Developments up to the Further Decision on Objections to Jurisdiction**

27. On 29 May 2009, the Tribunal invited the parties by letter to agree on a timetable for the next phase of the proceedings and inform the Tribunal of such agreement or, failing an agreement, to inform the Tribunal by 12 June 2009 of their respective positions. This date was extended to 26 June 2009, then to 28 July 2009 and then to 10 August 2009, on each occasion at the request of both Parties.
28. As the Parties did not respond to the Tribunal's invitation, it issued Procedural Order

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<sup>13</sup> *Ibid.*, paras. 160-161.

No. 2 dated 12 August 2009, which fixed the timetable for next phase of the proceedings. The Claimant was to submit a Memorial on the merits no later than 13 October 2009, as well as its pleadings with respect to BIVAC's *ius standi* and to the consequences of the inadmissibility of the claim under Article 3(4) of the BIT; the Respondent was to submit a Counter-Memorial on the merits no later than 14 December 2009; the Claimant was to submit a Reply no later than 28 January 2010 and the Respondent was to submit a Rejoinder no later than 15 March 2010.

29. Following a common request from the Parties communicated to the Tribunal on 30 September 2009, by letter dated 7 October 2009, the Tribunal granted an extension of time for the submission of the Parties' written pleadings: the Claimant's Memorial was to be filed on 27 November 2009, the Respondent's Counter-Memorial on 22 January 2010, the Reply on 5 March 2010 and the Rejoinder on 16 April 2010. The Tribunal further indicated that it would be available for hearings during the last week of July 2010.
30. The Claimant duly submitted its Memorial on 27 November 2009. Following a further request from the Respondent for another extension of time on 27 January 2010 to which Claimant had given its conditioned agreement, the Tribunal decided by letter dated 29 January 2010 to further extend the time limits. The Respondent's Counter-Memorial was to be submitted no later than 12 March 2010, the Claimant's Reply by 7 May 2010 and the Respondent's Rejoinder by 25 June 2010. The dates for the hearing were unchanged.
31. The Respondent submitted its Counter-Memorial on 12 March 2010.
32. On 6 May 2010, the Claimant informed the Tribunal that the Parties had agreed to a suspension of the arbitration to allow for settlement negotiations. Following receipt of the Respondent's confirmation of its agreement to suspend, the Tribunal granted a suspension until 4 August 2010. The hearing due to be held in July 2010 was postponed until a later date. The Tribunal acceded to a request made by the Parties on 29 July 2010 for an extension of the suspension until 4 November 2010. By letter dated 29 October 2010, the Claimant informed the Tribunal that no request for a further suspension would be made.

33. The Claimant and the Respondent agreed on a new procedural calendar and communicated the dates by letter dated 18 November 2010 and by e-mail of 19 November 2010, respectively. The timetable was then fixed by the Tribunal's letter dated 20 November 2010 as follows: the Claimant was to submit its Reply on 11 February 2011 and Respondent its Rejoinder on 9 June 2011. Both Parties duly submitted their pleadings within these timelimits.
34. The dates for the hearing on the merits were fixed for 5 to 7 July 2011 by letter of the Tribunal dated 20 November 2010, and confirmed during a telephone conference between the President of the Tribunal, the Parties and the Secretary of the Tribunal on 9 June 2011. During the conference call the date of 15 September 2011 was fixed for post-hearing briefs for both Parties.
35. The delays to these proceedings are considerable as noted by counsel for the Claimant during the hearing in the opening statement that "here we are, four years later, in ICSID".<sup>14</sup> The delays are the result of repeated requests for extensions of time for submissions and for the suspension of the proceedings by the Parties.
36. The hearing was held in Washington D.C. from 5 to 7 July 2011. BIVAC was represented by Mr. Nigel Blackaby, Mr. Lluís Paradell, Ms. Caroline Richard and Mr. Nigel Best from Freshfields Bruckhaus Deringer, Mr. Pablo Lu 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. Raúl Sapena, Lawyer of the Treasury, Mr. Benigno María López, Member of the Directorate of the Central Bank of Paraguay, Mr. Brian C. Dunning and Mr. David N. Cinotti from Venable LLP.
37. During the hearing and in consultation with the Parties, the Tribunal modified its initial timetable for the conduct of the hearing, but both Parties were offered equal time to give an oral presentation of their submissions. The oral arguments made on behalf of BIVAC were presented by Messrs. Blackaby and Paradell, and on behalf of Paraguay

by Messrs. Dunning, Cinotti and Dr. García-Ávalos. Both Parties used slideshows during the hearing which were also submitted to the Tribunal.

38. At the end of the hearing both Parties expressed their satisfaction with the conduct of the hearing and confirmed to have been treated equally and granted full opportunity to present their respective arguments.<sup>15</sup>

39. On 12 September 2011, the Parties asked for an extension of the time limit for the post-hearing briefs until 23 September 2011. This extension was granted by the Tribunal, and both post-hearing briefs were submitted on time. During the hearing the date for cost submissions was fixed for 14 October 2011, which was accepted and respected by both Parties.<sup>16</sup>

40. On 2 December 2011, the Tribunal addressed the following letter to the Parties:

“When the Tribunal prepared internal deliberations and consulted the *Código Civil* which had been introduced into the proceedings for different reasons, the question arose whether BIVAC's contractual claim might be time barred, in accordance with Articles 657 to 668 of the *Código*.

The Tribunal invites both parties to react to the following questions and this until Thursday, December 22, 2011 at 5:00 p.m. (Washington, D.C. time).

1. Is Claimant's contractual claim time barred according to Paraguayan law, and if so, since when?

2. Does the answer to question 1) in any way have any impact upon the question of Paraguay's alleged violation of its treaty obligation to treat BIVAC fairly and equitably, and BIVAC's alleged claim under the BIT?”

41. On 23 December 2011, both the Claimant and Respondent submitted their response to the questions posed by the Tribunal, after their common request for a one day extension of the time limit had been granted by the Tribunal.

42. The Claimant argues that the contractual claim is not time barred. Even if the period of prescription under the Civil Code of either four or two years might have been exceeded, the repeated unequivocal acknowledgment of the debt by the Respondent

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<sup>14</sup> Hearing on the Merits, 5-7 July 2011, transcript, p. 93.

<sup>15</sup> *Ibid.*, p. 605.

<sup>16</sup> *Ibid.*, p. 607.

and then the request of arbitration had interrupted the limitation period until this day. Moreover, the problem of time bar according to Paraguayan law is of no significance since the Claimant pursues a claim under international law for which Paraguayan contract law is not applicable, and not a contractual claim.

43. The Respondent submits that the normal period of limitation is ten years. Like the Claimant it asserts that the period of limitation has been interrupted before it had ended.

#### **4. The Reasons for this Decision**

##### **4.1. The Uncontested and the Controversial Factual Contours of the Dispute**

###### ***4.1.1. The Contract: its Conclusion and Termination***

44. In 1995, upon recommendation of the International Monetary Fund, the Government of President Juan Carlos Wasmosy implemented measures to remedy tax evasion, among which it established a “programme of pre-shipment inspection” aimed at optimizing the rate of collection of import duties and taxes.<sup>17</sup> Following a selection process, the Ministry of Finance selected two bidders, the Bureau Veritas group and Société Générale de Surveillance SA (“SGS”), to render these services.<sup>18</sup>
45. On 31 January 1996, the Government issued Executive Decree No. 12.311 authorizing the Ministry of Finance to enter into these contracts.<sup>19</sup> On 6 May 1996, the Ministry of Finance entered into the Contract with BIVAC for the provision of such technical services for pre-shipment inspection of imports in Paraguay. 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.<sup>20</sup>

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<sup>17</sup> Witness Statement of Mr. Bojanovich, paras. 8-9; Preamble to the Contract, Exhibit CE-6

<sup>18</sup> Report of the General Controller of the Republic to the Ministry of Finance regarding the process for concluding contracts with BIVAC and SGS, dated 22 February 1999, Exhibit CE-71; Report No 1/96 of the Legal Advisor to the Presidency of the Paraguayan Republic to the Secretary General of the President of the Paraguayan Republic, dated 31 January 1996, Exhibit CE-4; Preamble to the Contract, Exhibit CE-6; see also BIVAC Memorial, paras.17-19.

<sup>19</sup> Executive Decree No. 12.311, Exhibit CE-5.

46. The customs inspection and clearance system that BIVAC was to operate and the services it was to provide were regulated by the State, in particular through Resolution No. 1171/96 “which regulates the operational procedure for the pre-shipment inspection of imports”, and its subsequent modifications.<sup>21</sup>
47. 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. BIVAC was allowed 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 set out in the certificates of inspection. 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 to BIVAC’s offshore bank account. The Contract provided that any differences arising with respect to the documentation that accompanied the invoices were to be resolved promptly and the undisputed amount of the invoice paid forthwith.<sup>22</sup>
48. The Contract also provided that Paraguayan law was applicable and that disputes in relation to the Contract with regard to its “non compliance, resolution or invalidity” were to be submitted to the tribunals of the City of Asunción.<sup>23</sup> As set out below, after a dispute had arisen under the Contract the Claimant chose not to bring a claim to the tribunals of the City of Asunción. It has not argued in its Application or in its written pleadings prior to the hearing that these tribunals were not available, or that it was barred from access to the Paraguayan courts to pursue its claim based on a breach of contract.<sup>24</sup> Rather, in response to a question from the Tribunal, it stated that the decision not to go the tribunals of the City of Asunción was a “commercial decision”.<sup>25</sup> Instead, the Claimant decided to pursue its claim through a different channel as the Respondent allegedly not only breached the Contract but also violated

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<sup>20</sup> Contract, Exhibit CE-6, Cover page.

<sup>21</sup> Resolution No. 1171, dated 3 July 1996, Exhibit CE-51; Resolution No. 2037, dated 25 November 1996, Exhibit CE-54; and Resolution No. 1579, dated 10 September 1996, Exhibit CE-53

<sup>22</sup> Contract, Exhibit CE-6; Articles 2-4.

<sup>23</sup> *Ibid.*, Article 9.

<sup>24</sup> Hearing on the Merits, 5-7 July 2011, transcript, pp. 252-253.

<sup>25</sup> *Ibid.*, p. 91.

the fair and equitable treatment standard set out in the Treaty.<sup>26</sup> The Respondent objects to the Claimant's characterization of the Paraguayan judiciary and insists that "Paraguayan courts offer a fair and independent process to enforce BIVAC's rights and remedies",<sup>27</sup> including an equilibrated system of costs and fees.<sup>28</sup>

49. Over the course of these proceedings both Parties have revised their characterization of the Contract. The Claimant initially emphasized the character of the private investment and the Contract as obliging the Parties to pay service fees in exchange of services and also involving rights granted under public law.<sup>29</sup> It later shifted its approach, emphasising that the Contract "was, from its inception, an eminently public law contract".<sup>30</sup> For its part, Paraguay initially insisted on the characterization of the Contract as being administrative in character,<sup>31</sup> but later insisted on the commercial character of the contractual relationship, given that "Sovereigns and their organs contract with private parties routinely in nearly every economic sector".<sup>32</sup> It stresses that in line with modern doctrine, jurisdiction and international conventions the quality of a contract must be determined according to its nature and not its purpose or motive.<sup>33</sup>
50. Initially, the Government of President Wasmosy complied with its obligations to make regular payments upon receipt of BIVAC's invoices. However, the evidence shows that delays in payments began as early as November 1996.<sup>34</sup> By mid-1998, a number of unpaid invoices had begun to accumulate and Mr. Bojanovich of BIVAC wrote to the Minister of Finance to request payment of certain outstanding invoices issued after June 1997.<sup>35</sup> The Respondent's then Minister of Finance, Miguel Angel Maidana Zayas, acknowledged the total sum of the "outstanding debt of the Paraguayan State in

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<sup>26</sup> Hearing on the Merits, 5-7 July 2011, transcript, p. 98 ss.; BIVAC Memorial, paras. 247-251; BIVAC Post-Hearing Brief, paras. [103-114].

<sup>27</sup> BIVAC Post-Hearing Brief, paras. 104-107.

<sup>28</sup> Paraguay Post-Hearing Brief, paras. 121-122; Hearing on the Merits, 5-7 July 2011, transcript, pp. 293-294. This issue is addressed below at paras. 199-201.

<sup>29</sup> Request for Arbitration, (dated 16 February 2007), para. 11.

<sup>30</sup> BIVAC Post-Hearing Brief, para. 18.

<sup>31</sup> Paraguay Note of 8 April 2008.

<sup>32</sup> Paraguay Rejoinder, paras. 57-67; Paraguay Post-Hearing Brief, para. 5.

<sup>33</sup> Paraguay Post-Hearing Brief, para. 98.

<sup>34</sup> Joint letter from BIVAC and SGS to the Ministry of Finance, dated 31 March 1997, Exhibit RE-15; and Paraguay Counter-Memorial, para. 56.

<sup>35</sup> Witness Statement of Mr. Bojanovich, para. 27; BIVAC Memorial, para. 51.



favour of BIVAC”<sup>36</sup> and expressed his desire to comply with the payment provisions in the Contract for the services provided in 1998.<sup>37</sup> With regards to the outstanding debt for 1997, the Minister indicated that his office was examining legal mechanisms to “regulate” such debt to the satisfaction of the Parties’ interests.<sup>38</sup>

51. The new Government of President Raúl Cubas took office in August 1998. Investigations into the manner in which the previous regime had entered into the Contract were instigated.<sup>39</sup> Thereafter, from September 1998 to June 1999, none of the new invoices issued by BIVAC were paid. BIVAC made several requests for payment to President Cubas’ Minister of Finance, Mr. Gerhard Doll, but no payments were forthcoming. In January 1999, BIVAC sent the Minister a formal demand for payment by certified telegram.<sup>40</sup> Minister Doll responded a week later objecting to all documents attached to the invoices submitted by BIVAC (from June to December 1997 and from March 1998 onwards), on the basis of alleged breaches of Clause 5 of the Contract.<sup>41</sup> Minister Doll’s telegram did not specify BIVAC’s alleged breaches of the Contract. Minister Doll referred to Article 4.5 of the Contract<sup>42</sup> and convened BIVAC to a meeting to resolve the Parties’ discrepancies with respect to the documentation that accompanied the invoices. In March 1999, following a meeting between the Parties, a number of invoices dating back to 1997 were paid, amounting to more than \$7 million. This was the last payment received by BIVAC.<sup>43</sup>

52. On 19 February 1999, Presidential Decree No. 2003 was adopted authorizing the Ministry of Finance to communicate to BIVAC (and SGS) the decision of the

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<sup>36</sup> The outstanding debt owed to BIVAC by the Paraguayan State, deducing the amount of the credit notes from the total amount of the invoices from June 1997 to June 1998, amounted to US\$12,519,353.16 for June to December 1997 and US\$6,449,327.55 for March to June 1998, for a total amount of US\$18,968,680.71: see Exhibit CE-68.

<sup>37</sup> Letter No. 665 from the Ministry of Finance to BIVAC BV, dated 31 July 1998, Exhibit CE-68; BIVAC Memorial, para. 53.

<sup>38</sup> Exhibit CE-68 (“con respecto a la deuda acumulada del año 1997 le informamos que este Ministerio se encuentra estudiando y analizando la posibilidad y mecanismos legales que permitan la regulación de esta deuda en una concertación de intereses”) and Paraguay Post-Hearing Brief, para 66.

<sup>39</sup> The “Special Examination on the contractual process of the companies BIVAC and SGS” was instigated through resolutions adopted in August and September 1998. See *Requerimiento* No. 44 by the Public Prosecutor, dated 22 December 2002, setting out the history of the investigations into the Contract, Exhibit CE-108, p. 4; BIVAC Memorial, para. 54.

<sup>40</sup> Certified Telegram from BIVAC BV to the Ministry of Finance, dated 13 January 1999, Exhibit CE-69; Witness Statement of Mr. Bojanovich, para. 28; BIVAC Memorial, para. 55.

<sup>41</sup> Certified Telegram from the Ministry of Finance to BIVAC BV, dated 20 January 1999, Exhibit CE-70; BIVAC Memorial, para. 55. Article 5 of the Contract related to “Responsibilities of BIVAC”; see: Contract, Exhibit CE-6, Article 5.

<sup>42</sup> Article 4.5 of the Contract: “In the case of discrepancies between the Ministry and BIVAC, with respect to the documentation that accompanies the invoice, payment will proceed on the amount that is not contested, the parties having to resolve said discrepancies as soon as possible.”

<sup>43</sup> Witness Statement of Mr. Bojanovich, para. 29 (indicating that “the invoices issued in June, July, September and October of 1997 were paid”); BIVAC Memorial, para. 56; BIVAC Post-Hearing Brief, para. 31.

Government not to renew the Contract beyond its initial term, pursuant to Clause 8 of the Contract.<sup>44</sup> Presidential Decree No. 2003 did not allege any contractual breach either.<sup>45</sup> On 24 February 1999, Minister Doll notified BIVAC of the Government's decision not to renew the Contract.<sup>46</sup>

#### ***4.1.2. The Alleged Acknowledgment and Repudiation of the Debt under the Contract by the Respondent***

53. On 7 June 1999, given the decision not to renew the Contract and “taking into account the accumulation of financial commitments that the Paraguay State will assume on account of the same”, Minister of Finance Federico Zayas, appointed by President Cubas' successor, President Luis Ángel González Macchi, proposed that the termination date of the Contract be brought forward to 9 June 1999 (instead of 15 July 1999 as set forth in the Contract).<sup>47</sup> Minister Zayas indicated that “[a]s of this date the obligations emerging for both parties related to the Contract for the Rendering of Services shall cease, except the rights already acquired”.<sup>48</sup>
54. On 8 June 1999, BIVAC agreed not to accept additional inspection requests from importers as of 9 June 1999. However, BIVAC indicated that it would not discontinue ongoing operations and that it would submit the corresponding invoices to Paraguay. BIVAC reiterated its request for payment of the sums due under the Contract, which it claimed amounted to \$US 21,434,956.97, as of 30 April 1999.<sup>49</sup>
55. On 14 June 1999, in order to negotiate payment, Minister Zayas proposed a 50% discount on the outstanding balance of the debt, indicating that such balance would be set out in due course.<sup>50</sup> In a subsequent meeting between the Parties' representatives, the Minister offered to pay in Government bonds.<sup>51</sup> On 6 August 1999, BIVAC

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<sup>44</sup> Presidential Decree No. 2003, dated 19 February 1999, Exhibit CE-48; BIVAC Memorial, para. 57.

<sup>45</sup> Exhibit CE-48; BIVAC PHB, para. 31.

<sup>46</sup> Letter from the Ministry of Finance to BIVAC BV, dated 24 February 1999, Exhibit CE-18A; BIVAC Memorial, para. 57; Paraguay's Counter-Memorial, para. 58.

<sup>47</sup> Letter from the Ministry of Finance to BIVAC Paraguay SA, dated 7 June 1999, Exhibit CE-19A; BIVAC Memorial, para. 60; BIVAC Post-Hearing Brief, para. 31.

<sup>48</sup> Letter from the Ministry of Finance to BIVAC Paraguay SA, dated 7 June 1999, Exhibit CE-19.

<sup>49</sup> Letter from BIVAC to the Ministry of Finance, dated 8 June 1999, Exhibit CE-72.

<sup>50</sup> Letter No. 1237 from the Ministry of Finance to BIVAC BV, dated 14 June 1999, Exhibit CE-73; BIVAC's Memorial, para 63.

<sup>51</sup> Witness Statement of Mr. Bojanovich, para 42; BIVAC Memorial, para 64.

expressed its willingness to accept payment of the whole or a part of the outstanding debt in Government bonds.<sup>52</sup>

56. Around the same time, the Ministry of Finance issued a list of nineteen “outstanding invoices issued by BIVAC as of June 1999”, calculating the “total debt as of 30 June 1999” amounted to US\$22,016,140.52 (for the years 1997 to 1999). Another list entitled “outstanding debt with BIVAC held at the Paymaster’s Department of the Ministry of Finance” and dated 6 August 1999 reproduces the same total amount, specifying that no credit notes had been issued for this period.<sup>53</sup>
57. In a subsequent letter dated 2 December 1999, Minister Zayas indicated that BIVAC’s request for payment could not be dealt with until the General Comptroller of the Republic completed its “Special Investigation” into the Contract, pursuant to the request formulated by the Office of the Attorney General in a Note dated 14 July 1999, a copy of which was enclosed to the letter.<sup>54</sup> Then, on 13 December 1999, Minister Zayas responded to a further request for payment sent by BIVAC on 7 December 1999. Minister Zayas referred to its previous letter of 2 December 1999 and mentioned that no payment could be done until the National Congress had passed a law authorizing payment.<sup>55</sup> In September 2000, the Minister told the press that the debts owed to BIVAC and SGS had been unlawfully assumed by the Wasmosy Government, since they had not been authorized by a law of Congress, but were rather entered into pursuant to a Decree.<sup>56</sup> Minister Zayas’s tenure ended without payment being effected and the recovery of the debt fell to be pursued with the next Minister of Finance, Mr. Francisco Oviedo Britez.<sup>57</sup>
58. In a letter to BIVAC dated 13 February 2001, Minister Britez noted the State’s

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<sup>52</sup> Letter from BIVAC to the Ministry of Finance, dated 6 August 1999, Exhibit -CE-75.

<sup>53</sup> List of outstanding invoices prepared by the Ministry of Finance, dated 6 August 1999, Exhibit CE-22. The Spanish original reads “Facturas pendientes de pago emitidas por BIVAC B.V. a junio de 1999” and “Deuda pendiente de pago con la BIVAC obrantes en el Departamento de Giraduria del Ministerio de Hacienda”, Exhibit CE-22B.

<sup>54</sup> Letter No. 2702 from the Ministry of Finance to BIVAC BV, dated 2 December 1999, Exhibit CE-24A; BIVAC’s Memorial, paras. 66-67.

<sup>55</sup> Letter No. 2772 from the Ministry of Finance to BIVAC BV, dated 13 December 1999, Exhibit CE-77; BIVAC Memorial, para. 69.

<sup>56</sup> Press Article, “Deuda asumida por Wasmosy con SGS y BIVAC es ilegal”, ABC Color, dated 16 September 2000, Exhibit CE-91; BIVAC Memorial, para 70.

<sup>57</sup> BIVAC Memorial, paras. 72-73.

momentary inability to make any payment until the conclusion of the ongoing investigation and the completion of account reconciliation. Minister Brites undertook to then proceed to obtain the necessary budgetary amendment from Congress to finance and pay the pending obligations owed by Paraguay for the services rendered by BIVAC.<sup>58</sup>

59. Under President Nicanor Duarte Frutos, who took office in 2003, Vice-Minister of Finance, Miguel Gómez, sent a further letter to BIVAC dated 19 April 2004, in which he noted that Paraguay wished to honor the debts it had with its different creditors, including BIVAC, and that it was working on finding a solution for the claimed amounts. The letter also invited BIVAC's representatives to settlement negotiations.<sup>59</sup> Disputing what is alleged by BIVAC,<sup>60</sup> Paraguay contends that this letter is not an unequivocal promise to pay the debt<sup>61</sup>.
60. On 3 June 2004, the Ministry of Finance adopted Resolution No. 274, by which it established a new Commission to determine whether there was non-compliance with the Contract and whether payment of the pending debts was in order.<sup>62</sup> The Commission concluded that it lacked competence to decide the matter, following which the investigation was reassigned to the National Customs Office, pursuant to Resolution No. 43 adopted by the Ministry of Finance on 3 February 2005.<sup>63</sup> Although the Commission concluded that the Contract had been complied with,<sup>64</sup> no payment was made. On 22 June 2007, the Ministry of Interior issued Decree No. 10485, opening a new investigation into the Contract.<sup>65</sup>
61. BIVAC alleges that within a period of several years successive administrations have vacillated between on the one hand, acknowledging the obligation to pay the debt and on the other, commissioning repetitive and overlapping investigations into the validity and performance of the Contract; that most of these investigations have led to the

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<sup>58</sup> Note from the Ministry of Finance to BIVAC, dated 13 February 2001, Exhibit CE-92.

<sup>59</sup> Letter from the Ministry of Finance to BIVAC, dated 19 April 2004, Exhibit CE-31.

<sup>60</sup> BIVAC Post-Hearing Brief, para. 49.

<sup>61</sup> Paraguay Post-Hearing Brief, para. 70.

<sup>62</sup> Resolution No. 274 of the Ministry of Finance, dated 3 June 2004, Exhibit CE-32.

<sup>63</sup> Resolution No. 43 of the Ministry of Finance, dated 3 February 2005, Exhibit CE-34.

<sup>64</sup> Report No. 377 of the General Customs Office, dated 30 March 2005, Exhibit CE-35.

conclusion that the Contract was valid and that BIVAC had fully complied with its obligations;<sup>66</sup> that successive Governments have failed to abide by their findings and have refused to make any payment; that they have escalated the unpaid debt into a political issue; and that all successive administrations have refused to take responsibility and make payment.<sup>67</sup> According to the Claimant, since both the validity of the Contract and BIVAC's performance under the Contract have been recognized, the consistent non-payment and "Paraguay's conduct constitute[s] an effective political repudiation of the debt".<sup>68</sup>

62. The Respondent objects to BIVAC's assertion that the debt was ever acknowledged, or to its characterization of the existence of the debt as "undisputed". It asserts that the various ministerial letters referred to by the Claimant are largely statements of fact and do not contain any legally binding expression of acknowledgment and that the different reports established by Government agencies are to be qualified as internal documents, advisory technical opinions, *dictamen*, of a non-binding character. The Respondent insists that Paraguay's legal position as to the validity and the quantum of the debt does not equal its repudiation as alleged by Claimant:<sup>69</sup> "Paraguay has never repudiated any of BIVAC's contractual rights".<sup>70</sup>

63. The Respondent also alleges that the Tribunal did not accurately portray Paraguay's position when it held in its Decision on Objections to Jurisdiction 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 amounts owing under the 19 unpaid invoices". In support of this claim it sets forth two arguments. First, the Respondent deems the acceptance or challenge of the alleged debt as a substantive matter, which was to be dealt with at the merits stage of proceedings pursuant to Procedural Order No.1. Second, the Respondent alleges it rebutted the Claimant's argument that the

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<sup>65</sup> Decree No. 10485 from the Ministry of the Interior, dated 22 June 2007, Exhibit CE-136.

<sup>66</sup> BIVAC asserts that such conclusions are reflected in: (i) 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; (ii) formal recognitions of the debt by the Minister of Finance, as declared in February 2001 and in April 2004; and (iii) 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; see Tribunal's Decision on Objections to Jurisdiction, May 29, 2009, para 10.

<sup>67</sup> BIVAC Memorial, paras. 49-144; slides from BIVAC's opening speech during the hearing on the merits, 5 July 2011, Slides 11-49.

<sup>68</sup> BIVAC Post-Hearing Brief, para. 55; BIVAC Memorial, paras. 58-159.

<sup>69</sup> Paraguay Post-Hearing Memorial, paras. 65-77.

Respondent had never challenged the debt. The Respondent insists it devoted no fewer than three full paragraphs in its Post-Hearing Memorial on Jurisdiction to this issue, and alleges the Respondent's challenge was acknowledged by the Tribunal. Further, the Respondent alleges the Tribunal's perception of the Respondent's position in paragraphs 123 and 124 contradicts the Tribunal's own observations in paragraph 111.<sup>71</sup>

64. The Respondent further submits that even if the Minister had admitted the debt, BIVAC's claims are "unliquidated" under Article 439 of the Paraguayan Code of Civil Procedure.<sup>72</sup>
65. BIVAC notes that Paraguay disputed the amount of the debt for the first time in its Counter-Memorial, almost twelve years after the termination of the Contract and more than three years after the arbitration commenced. In its Decision on Jurisdiction the Tribunal noted that "Paraguay's failure to challenge the level of indebtedness may amount to an acknowledgment of such indebtedness."<sup>73</sup> BIVAC further submits that the only document cited by Paraguay to support the argument that it disputed the debt is Minister Doll's telegram of 20 January 1999, and that this document does not specify the documents or debts the Minister objected to, as required under Article 4.5 of the Contract.<sup>74</sup> Moreover, no evidence prior or subsequent to Minister Doll's telegram of 20 January 1999 validates such allegation. With regard to the argument that the claim is "unliquidated" BIVAC submits that this argument does not detract from the Government's acceptance of the principal amounts due: the invoices have a clear face value and the amount of the debt has been certified by the Ministry of Finance.<sup>75</sup>

#### ***4.1.3. The Alleged Breach of the Contract by BIVAC***

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<sup>70</sup> *Ibid.*, para 24

<sup>71</sup> Paraguay Counter-Memorial, paras. 22-26; paras. 67-72.

<sup>72</sup> *Ibid.*, paras. 27-28.

<sup>73</sup> Tribunal Decision on Objections to Jurisdiction, para. 124; BIVAC Reply, para. 26.

<sup>74</sup> Witness Statement of Mr. Bojanovich, para. 29; Certified Telegram from the Minister of Finance to BIVAC BV, dated 20 January 1999, Exhibit CE-70.

<sup>75</sup> List of Outstanding Invoices prepared by the Ministry of Finance, 6 August 1999, Exhibit CE-22; BIVAC Reply, paras. 31-35.

66. The Respondent argues that BIVAC breached material provisions of the Contract.<sup>76</sup> First, the Respondent contends that BIVAC impermissibly inspected Mercosur Goods and charged Paraguay a fee for goods that were exempted from the inspection programme.<sup>77</sup> BIVAC argues that not all goods originating in Mercosur countries were exempt goods and not all goods shipped from a Mercosur country necessarily qualified as originating from Mercosur, as they had to comply with applicable rules of origin. According to BIVAC, such verification as to the “actual origin” of the goods could not be ascertained without the documentation enclosed with the Certificate of Inspection.<sup>78</sup> However, according to the Respondent, only few goods originating in Mercosur countries were subject to import duties in Paraguay and BIVAC had the burden of presenting evidence that the only Mercosur goods that it charged to inspect were those few goods that were subject to duties. Moreover, the Respondent argues that inspection by BIVAC of Mercosur goods was not permitted under the Treaty of Asunción because the responsibility to confirm the origin of such goods fell on the exporting State.<sup>79</sup> Thus, by charging Paraguay to confirm the origin of goods already certified, BIVAC imposed fees for work that had already been done.<sup>80</sup>

67. Second, the Respondent contends that BIVAC impermissibly charged multiple inspection fees for single inspections, by issuing multiple certificates of inspection on a single commercial invoice to create more opportunities to charge the US\$ 280 minimum inspection fee. According to the Respondent, charging to inspect each part of a single shipment violated the applicable regulations, whether or not importers requested such inspections. In the Respondent’s view, a “reasonable” reading of Ministry Resolution 1171<sup>81</sup> suggested two things: first, that partial shipments had to be batched together for custom purposes so that an importer could not evade payment by breaking orders into small, exempt shipments; and second, that although BIVAC

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<sup>76</sup> Paraguay Counter-Memorial, paras. 29-42; Paraguay Rejoinder, paras. 10-23; and Paraguay Post-Hearing Brief, paras. 78-85.

<sup>77</sup> Paraguay Counter-Memorial, para. 41; Paraguay Rejoinder, paras. 10-17; Paraguay Post-Hearing Brief, paras. 83-85.

<sup>78</sup> BIVAC explains that Article 1 of Resolution 1579, dated 10 September 1996, Exhibit CE-53, amended the list of goods exempt from inspection, contained in Article 7 of Resolution No. 1171/96, dated 3 July 1996, Exhibit CE-51, to include “any and all imports free and clear of duties or internal taxes, as described in general or special laws”. However, it did not establish a blanket exemption on all Mercosur-origin goods, some of which continued to bear import duties. See BIVAC Reply, para. 60.

<sup>79</sup> Treaty of Asunción, (RL-32, RL-33, RL-34).

<sup>80</sup> Paraguay Rejoinder, paras. 10-17.

<sup>81</sup> Ministry of Finance Resolution No. 1171, dated 3 July 1996, Exhibit CE-51, Article 7, (providing that shipments with a value of less than US\$3,000 were not subject to inspection) and Article 6 (providing that partial shipments with values of less than US\$ 3,000 FOB that are part of a request or purchase/sale order exceeding US\$3,000 FOB shall be subject to

should get paid if it was required to inspect small shipments, nothing indicated that BIVAC should be paid a minimum fee for “each” such partial shipment, in which case the Parties would have said so clearly.<sup>82</sup>

68. BIVAC has firmly denied all charges that it manipulated the inspection programme and argues that it scrupulously followed Government regulations, as called for in its Coordination Procedure.<sup>83</sup> BIVAC argues that it could not have issued multiple certificates of inspection when this was not called for as each certificate of inspection had to relate to a shipment under a specific request for pre-shipment inspection filed by the trader, and no more than one certificate could be issued per shipment. Thus, each inspection attracted the minimum fee payable under the Contract because the FOB value of each shipment was below the threshold value in the Contract and not because of any form of manipulation by BIVAC.<sup>84</sup>
69. Finally, the Respondent argues that BIVAC failed to provide technical assistance and training to the Paraguayan customs authorities and did not assist Paraguay to create a database that would permit those authorities to eventually become self-sufficient, as required under the Contract and in accordance with the WTO technical assistance standards incorporated into the Contract.<sup>85</sup> The Respondent also alleges that a report from the Comptroller department shows that BIVAC had not held the required training program.<sup>86</sup> Moreover, the “loan” of a personal computer, printer and monitor,<sup>87</sup> together with an invitation to a customs official to visit the Claimant’s offices in Ecuador and a monthly shipment of disks containing extremely limited information did not discharge the Claimant of its technical assistance obligations under the Contract.<sup>88</sup>
70. BIVAC denies any breach of Art. 2.9 and 2.10 of the Contract. It contends that the March 1999 document to which Paraguay refers has been superseded by other more

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inspection).

<sup>82</sup> Paraguay Counter-Memorial, paras. 39-40; Paraguay Rejoinder, paras. 18-23.

<sup>83</sup> Coordination Procedure, GPSI Paraguay, dated 16 October 1996, Exhibit CE-10; and Resolution No. 1171/1996, dated 3 July 1996, Exhibit CE-51, Article 16.

<sup>84</sup> Reply Witness Statement of Mr. Bojanovich, paras. 17-18; and BIVAC Reply, paras. 53-57; Hearing on the Merits, 5-7 July 2011, transcript, pp. 406-408.

<sup>85</sup> Contract, Exhibit CE-6, Articles 2.9 and 2.10; see also Paraguay Counter-Memorial, paras. 32-34.

<sup>86</sup> Report from Victor Jose Safer Presentado, *Contralor General de Aduana*, dated 30 March 1999, Exhibit RE-19.

<sup>87</sup> Letter from BIVAC Paraguay SA to the General Customs Office and receipt, dated 14 November 1996, Exhibit CE-11.



authoritative documents certifying the absence of a breach.<sup>89</sup> Moreover, BIVAC submits that the National Customs Office has certified delivery of the computer and the data, as required under Art. 2.10 of the Contract, and that the General Comptroller of the Republic has investigated this issue and exonerated BIVAC.<sup>90</sup> BIVAC further contends that it complied with all of its obligations under the Contract and that at no point did Paraguay notify it of any breach under the Contract, nor did it take any action for breach of the Contract against BIVAC.<sup>91</sup>

#### ***4.1.4. The Alleged “Political Reasons” Motivating Paraguay’s Conduct***

71. Paraguay contends that the non-payment of BIVAC’s invoices, the investigations into the Contract, the commissions and reports were not politically motivated. Rather, Paraguay argues that non-payment of BIVAC’s invoices was a “fiscal issue” and that the poor health of the Paraguayan economy had to be taken into account.<sup>92</sup>
72. BIVAC does not dispute that the period between 1997 and 2001 was economically difficult for Paraguay, but it argues that in the absence of a defence of necessity under international law, Paraguay is not exempted from its obligation under the Contract to settle the debt.<sup>93</sup>
73. Moreover, BIVAC notes that Paraguay has not explained how the difficult fiscal situation that existed between 1997 and 2001 could excuse the non-payment of the debt after the economy began to recover in 2001.<sup>94</sup>

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<sup>88</sup> Paraguay Counter-Memorial, para. 35-38; Paraguay Post-Hearing Brief, para. 79.

<sup>89</sup> Report No. 4249 of the General Comptroller of the Republic, dated 4 October 2002, Exhibit CE-30; Reply Witness Statement of Mr. Bojanovich, para. 13; BIVAC Reply, paras. 43-47.

<sup>90</sup> Letter from BIVAC Paraguay SA to the General Customs Office and receipt, dated 14 November 1996, Exhibit CE-11; Report No 4249 of the General Comptroller of the Republic, dated 4 October 2002, Exhibit CE-30, p. 6; Reply Witness Statement of Mr. Bojanovich, para. 13; BIVAC Reply, para. 48-51.

<sup>91</sup> BIVAC Memorial, para 30-48; BIVAC Reply, para. 42.

<sup>92</sup> Paraguay Counter-Memorial, para 51-66; Paraguay Post-Hearing Brief, paras. 97-98.

<sup>93</sup> BIVAC Reply, para. 14.

<sup>94</sup> Ibid., para. 15.

#### ***4.1.5. Paraguay's Alleged Dissatisfaction with the Contract***

74. The Respondent argues that the Contract failed to bring a tangible economic benefit to Paraguay, noting that the costs Paraguay incurred as a result of the Programme exceeded the benefits it received in increased tax revenue.<sup>95</sup>
75. The Claimant submits that Paraguay's dissatisfaction with the Contract is no defence to Paraguay's conduct and that no provision of the Contract provides that Paraguay could withhold payment on that basis. Moreover, the Claimant argues that this submission lacks merit as the Tribunal had already found this argument to be unpersuasive at the jurisdictional stage.<sup>96</sup>

## **4.2. The Claimant's Ius Standi**

### ***4.2.1. The Respondent's Position***

76. The Respondent argues that the Tribunal should dismiss BIVAC's claim for lack of standing.<sup>97</sup>
77. The Respondent submits that Claimant has not met its burden of proof to establish its standing to bring a claim under the Netherlands-Paraguay BIT. Specifically, it argues that the Claimant has failed to establish that the contracting party is BIVAC BV, the Dutch company, rather than BIVAC International, incorporated in France.<sup>98</sup>
78. To support its argument that BIVAC International – and not BIVAC BV – is the party in interest Paraguay asserts that (i) BIVAC International signed the Contract with the Ministry of Finance;<sup>99</sup> (ii) the Ministry invited BIVAC International to submit its

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<sup>95</sup> Paraguay Counter-Memorial, para. 43-50.

<sup>96</sup> BIVAC Reply, para. 19, referring to the Tribunal's Decision on Objections to Jurisdiction of May 29, 2009, paras. 95-96.

<sup>97</sup> Paraguay Counter-Memorial, paras. 141-148; Paraguay Rejoinder, paras. 205-206.

<sup>98</sup> The Respondent refers to Article 24(1) of the UNCITRAL Rules and Art. 2(c) of ICSID Institution Rules to support its view that "[i]t is upon Claimant to establish that Paraguay 'consented' to submit this dispute to ICSID, which it must do through Paraguay's consent in the BIT" (Paraguay Counter-Memorial, para. 148.)

<sup>99</sup> Paraguay Counter-Memorial, para. 148; Paraguay Rejoinder, para. 205.

qualifications;<sup>100</sup> (iii) BIVAC International responded to the Ministry's qualification registration;<sup>101</sup> (iv) the Ministry's working group recommended BIVAC International and SGS to the Minister of Finance;<sup>102</sup> (v) the Ministry recommended the retention of BIVAC International to the President;<sup>103</sup> (vi) the President passed the Decree authorizing the hiring of BIVAC International;<sup>104</sup> (vii) BIVAC International appears on the signature page of the Contract;<sup>105</sup> (viii) the Contract preamble makes reference to BIVAC International and SGS;<sup>106</sup> (ix) subsequent regulation continued to show BIVAC International as the contracting party;<sup>107</sup> (x) the Post-Termination Report prepared by the *Contraloría* invoked the lack of clarity with respect to the proper contracting party;<sup>108</sup> (xi) French diplomats and French President Jacques Chirac himself were involved and acted on behalf of BIVAC International, while no record exists of any involvement on the part of the Dutch government or its diplomats;<sup>109</sup> (xii) finally, a French Ministerial Memorandum described BIVAC International as the contractual party.<sup>110</sup>

79. According to the Respondent, the fact that BIVAC BV might have been the entity through which BIVAC International intended to perform its obligations does not mean that Paraguay granted BIVAC BV the right to perform inspection work under the Contract. Those rights, which the Tribunal has held constituted an investment in its Decision on Objections to Jurisdiction,<sup>111</sup> were granted by Paraguay to BIVAC International, not BIVAC BV, as evidenced by the Decree authorizing the Contract to be concluded.<sup>112</sup>

80. The Respondent notes that although BIVAC BV might not have been incorporated

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<sup>100</sup> Letter of the Ministry of Finance No. 775, dated 6 December 1995, Exhibit RE-7.

<sup>101</sup> Letter of BIVAC International, dated 20 December 1995, Exhibit RE-8.

<sup>102</sup> Letter of the Ministry of Finance, dated 15 January 1996, Exhibit RE-9.

<sup>103</sup> Letter of the Ministry of Finance No. 104, dated 19 January 1995, Exhibit RE-43.

<sup>104</sup> Execution Order No. 12311, dated 31 January 1996, Exhibit CE-5.

<sup>105</sup> Contract, Exhibit CE-6.

<sup>106</sup> *Ibid.*

<sup>107</sup> Resolution No. 1171, 3 July 1996, which regulates the operational procedure for the pre-shipment inspection of imports, Exhibit CE-51.

<sup>108</sup> *Contraloría's* Post-Termination Report, Exhibit RE-23, p. 9.

<sup>109</sup> Letter No. 1062 from the French Ambassador in Paraguay, dated 28 September 2006, Exhibit RE-35; Letter No. 376/AL from the French Ambassador in Paraguay, dated 16 December 1999, Exhibit RE-22.

<sup>110</sup> Letter No. 1062 from the French Ambassador in Paraguay, dated 28 September 2006, Exhibit RE-35.

<sup>111</sup> Paraguay continues to disagree with the Tribunal's ruling that rights under public law granted under the Contract were an investment under the BIT. See Paraguay Rejoinder, para. 206 and footnote 282.

<sup>112</sup> Paraguay Rejoinder, para. 206; Decree No 12311, dated 31 January 1996, Exhibit CE-5.

solely to take advantage of the Netherlands-Paraguay BIT, the fact that the France-Paraguay BIT did not contain an umbrella clause “could very well explain why Claimant decided to file the arbitration demand in the name of BIVAC.”<sup>113</sup>

81. Finally, the Respondent questions Mr. Bojanovich’s explanation that BIVAC, not BIVAC International, is the affiliate in charge of government services. According to the Respondent, it is clear from the BIVAC Group’s 2008 Annual Report<sup>114</sup> that “the parent company of both BIVAC International and BIVAC is Bureau Veritas Registre International de Classification de Navires et d’Aéronefs (‘Registre’), not BIVAC S.A.” and that “BIVAC International is the headquarters of the ‘GSIT business’, which stands for ‘Government Services and International Trade Business’”.<sup>115</sup> Moreover, the Respondent notes that “BIVAC does not appear as one of Registre’s principal subsidiaries”,<sup>116</sup> nor does it appear in the comprehensive list of consolidated subsidiaries.<sup>117</sup>

#### ***4.2.2. The Claimant’s Position***

82. The Claimant argues that BIVAC BV was party to the Contract,<sup>118</sup> as evidenced by: (i) the cover page and the first provision of the Contract which both refer to the Contract as “between the Ministry of Finance of the Government of the Republic of Paraguay and Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV”;<sup>119</sup> (ii) the first provision of the Contract which also specifies that “Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V” is “a company constituted under the laws of the Netherlands” and is referred to throughout the Contract as “BIVAC”;<sup>120</sup> (iii) the fact that “BIVAC” was represented for the purposes of the Contract by Mr. Gilles Minard and Mr. Henri Pla,<sup>121</sup> respectively the President

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<sup>113</sup> Paraguay Counter-Memorial, para. 143.

<sup>114</sup> Registre’s 2008 Annual Report (excerpts), Exhibit RE-36, pp. 243, 245.

<sup>115</sup> Paraguay’s Counter-Memorial, para 145.

<sup>116</sup> Paraguay’s Counter-Memorial, para. 146; Registre’s 2008 Annual Report (excerpts), Exhibit RE-36, p. 244.

<sup>117</sup> Paraguay Counter-Memorial, para. 146; Registre’s 2008 Annual Report (excerpts), Exhibit RE-36, p. 209.

<sup>118</sup> BIVAC Memorial, para. 281(a); BIVAC Reply, para. 157; BIVAC Post-Hearing Brief, para. 17.

<sup>119</sup> Contract, Exhibit CE-6, Cover Page and Preamble, pp. 1-2.

<sup>120</sup> *Ibid.*, Preamble, p. 2.

<sup>121</sup> *Ibid.*

and Vice-President of BIVAC BV.<sup>122</sup> According to the Claimant, the reference to “BIVAC International” above the signatures of Messrs Minard and Pla<sup>123</sup> is a “clerical error” and the only other reference to “BIVAC International” in the Contract is the address where notifications under the Contract should be sent<sup>124</sup> and this does not make “BIVAC International” a party to the Contract. Moreover, the Claimant notes that only BIVAC BV could conceivably be the party referred to in the Contract as Bureau Veritas Group party to the Contract, “since it was created by to act as the company of the Group that would execute, perform and manage all pre-shipment inspection contracts signed with States”.<sup>125</sup>

83. The Claimant further argues that Paraguay’s commercial relationship was with BIVAC BV<sup>126</sup> and submits the following as evidence to this effect: (i) invoices for the services provided to the Ministry of Finance under the Contract were issued by BIVAC BV;<sup>127</sup> (ii) letters from BIVAC to the Ministry of Finance stated that payments under the Contract were to be made to a bank account held by “Bureau Veritas BIVAC BV”<sup>128</sup>; (iii) a security bond issued by Banco Sudameris Paraguay to the Ministry of Finance “on behalf of the company BUREAU VERITAS, INSPECTION, VALUATION, ASSESSMENT AND CONTROL, BIVAC B.V.” pursuant to Clause 5.4 of the Contract;<sup>129</sup> (iv) the Decree which authorized the Ministry of Finance to communicate to “BIVAC BV” the intention of the Government not to extend the Contract beyond its initial term pursuant to Clause 8.2 of the Contract;<sup>130</sup> (v) the letter from the Ministry of Finance addressed to “BIVAC BV” notifying the termination of the Contract;<sup>131</sup> and (vi) the letter from the Ministry of Finance addressed to “BIVAC Paraguay S.A.” which refers both to “the debt of the Ministry of Finance with the company BIVAC BV” and to conversations held with “Mr Henri Pla, director of BIVAC BV”.<sup>132</sup>

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<sup>122</sup> Witness Statement of Mr. Federico Bojanovich, para. 18.

<sup>123</sup> Contract, Exhibit CE-6, Signatures, p. 14.

<sup>124</sup> *Ibid.* Signatures, Article. 10.1, p. 13.

<sup>125</sup> BIVAC Memorial, para. 281(a)(v). The Claimant refers to “BIVAC BV’s Articles of Association” (statutenwijziging) registered at the Dutch Royal Notarial Regulatory Body, 17 June 1999 (with English translation), (“Each managing director is authorized to represent the company.”) Article 10(2), Exhibit CE-49.

<sup>126</sup> BIVAC Memorial, para. 281(b).

<sup>127</sup> Copies of invoices issued by BIVAC, Exhibit CE-47.

<sup>128</sup> Letter from BIVAC to the Ministry of Finance, dated 29 July 1996, Exhibit CE-46.

<sup>129</sup> Security Bond issued by Banco Sudameris Paraguay to the Ministry of Finance of Paraguay, dated 4 June 1996, Exhibit CE-8.

<sup>130</sup> Decree No 2003, dated 19 February 1999, Exhibit CE-48.

84. The Claimant argues that it is irrelevant that the initial Decree authorizing the Ministry of Finance to contract pre-shipment inspection services refers to “BIVAC International (Bureau Veritas Group) of France”,<sup>133</sup> as it was only a “logical starting point for contacts” to refer to the more visible BIVAC parent company and to the Bureau Veritas Group as a whole. It is also irrelevant, according to the Claimant, that the “Coordination Procedure” of BIVAC Paraguay was issued by BIVAC International, as this document was prepared for “Bureau Veritas internal use” and “could not have any effect vis-à-vis the Government let alone alter in any way the fact that the Government’s contractual relationship was with BIVAC BV.”<sup>134</sup>
85. Moreover, the Claimant maintains that it is wrong to say that the Certificates of Inspection were provided by “BIVAC International” and it explains the different steps through which inspections were carried out.<sup>135</sup> First, importers would lodge a “Request for Pre-Shipment Inspection” form with one of BIVAC’s liaison offices in Paraguay.<sup>136</sup> These documents were then dispatched by BIVAC’s central liaison office in Asunción to the appropriate BIVAC Centre of Relation with Exporters (CRE) in the country of export and to BIVAC’s central office in Rotterdam. The CRE in the country of export would appoint an inspector who would carry out the physical inspection and submit his conclusions to the CRE.<sup>137</sup> The CRE would then provide the exporter with a draft Certificate of Inspection (carrying the letterhead “BIVAC International”), which would be sent internally to BIVAC Paraguay. BIVAC Paraguay would then verify the information contained therein and provide a final Certificate of Inspection to the importers and the Paraguayan authorities.<sup>138</sup> Thus, the Claimant contends that the company responsible for the Certificate of Inspection was BIVAC Paraguay, BIVAC BV’s liaison office in Paraguay.
86. Finally, the Claimant notes that Dutch investors’ rights to arbitrate disputes under the Treaty are not conditioned upon their government assisting in the resolution of the

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<sup>131</sup> Letter from the Ministry of Finance to BIVAC B.V., dated 24 February 1999, Exhibit CE-18.

<sup>132</sup> Letter from the Ministry of Finance to BIVAC Paraguay, dated 19 April 2004, Exhibit CE-31.

<sup>133</sup> Decree No. 12311, dated 31 January 1996, Exhibit CE-5, Article 1.

<sup>134</sup> For both of these points cf. BIVAC Memorial, para. 282.

<sup>135</sup> BIVAC Memorial, paras. 37-42 and 283; and Resolution No. 1171 (which regulates the operational procedure for the pre-shipment inspection of imports), dated 3 July 1996, Exhibit CE-51, Article 12, (“physical inspection”).

<sup>136</sup> Samples of Requests for Inspection, Exhibit CE-59 (in Spanish).

<sup>137</sup> Resolution No. 1171, dated 3 July 1996, Exhibit CE-51, Article 12.

dispute. Thus, the fact that “there is no record of any involvement on the part of the Dutch Government or its diplomats”, as alleged by Respondent, is irrelevant.<sup>139</sup>

87. The Claimant also notes that despite the Tribunal’s invitation in its Decision on Objections to Jurisdiction that Paraguay provide additional evidence to establish that BIVAC lacks standing, Paraguay has provided no such additional evidence in its Counter-Memorial.<sup>140</sup>

88. For all these reasons, the Claimant contends that Paraguay’s *ius standi* argument should be dismissed.

#### ***4.2.3. The Tribunal’s Reasoning and Decision***

89. In its Decision on Objections to Jurisdiction, the Tribunal decided to join to the merits the issue of BIVAC’s standing to bring the claim in order to allow both Parties the opportunity to present their arguments because it was raised at a late stage by the Respondent, some three weeks after the hearing on jurisdiction.<sup>141</sup>

90. In order to facilitate and orient the Parties’ arguments, the Tribunal had already set out its perception of the facts and law based on the evidence available to it before the Decision was rendered. The relevant passage is set out for convenience:<sup>142</sup>

“(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

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<sup>138</sup> Samples of copies of the Certificates of Inspection, Exhibit CE-62 (in Spanish).

<sup>139</sup> Paraguay’s Memorial on the Merits, para. 148.

<sup>140</sup> BIVAC Reply, para. 155; BIVAC Post-Hearing Brief, para. 17.

<sup>141</sup> Tribunal’s Decision on Objections to Jurisdiction, paras. 50-53 and 162(d).

<sup>142</sup> *Ibid.*, para. 53.

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*), 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 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.”

91. The evidence that has been presented to the Tribunal since it rendered its Decision on Objections to Jurisdiction has not clarified the picture any further.
  
92. It is still uncontested that the BIVAC Group operates (and has established companies in) several countries, including France and the Netherlands, and that the French S.A. is the headquarters and the parent company. The fact that the French President has intervened in favour of the group does not imply that the Claimant is French, nor does the non-intervention by Dutch political authorities imply that it is not Dutch. The intervention or non-intervention indicates a difference in the political culture of different countries but does not determine the legal reality of different members within a group of companies.
  
93. The Dutch BIVAC was founded in 1984 as a BV and it fulfils the requirements of being a juridical person having the nationality of the Netherlands, as set out in Article 25(2)(b) of the ICSID Convention. The fact it was constituted in 1984 clearly demonstrates that it was not established with the aim to profit from the favourable Dutch-Paraguayan BIT only after the dispute had arisen. At the time of the conclusion of the Contract, Mr. Gilles Minard was the executive director of BIVAC BV (a post which he held whilst simultaneously acting as President of BIVAC International). In that context the Tribunal notes the view advanced by one commentator :

“A putative investor can structure its investment through a company having the nationality of a state which has an investment treaty with the host state of the planned investment. This is an example of an investment treaty performing its stated purpose; *viz.* to attract foreign capital: There cannot, however, be a restructuring of the investment in order to resort to the dispute resolution provisions of an investment treaty once a dispute has arisen. Treaty shopping is acceptable, forum shopping is not.”<sup>143</sup>

94. The fact that international groups of companies put in place different strategies and

legal structures cannot of itself be considered to be inappropriate or even illegitimate, and cannot as such justify any suspicions of a hidden agenda as to a future litigation strategy, as alleged by Respondent<sup>144</sup>

95. The evidence establishes that the Paraguayan Presidential Decree No. 12311 dated 31 January 1996 authorized the Ministry of Finance to enter into contracts with SGS and with BIVAC and specified BIVAC International (Group Bureau Veritas) of France. It is undisputed that the Contract mentions on its cover page BIVAC BV and states in its first Article that the Contract is concluded between the Minister of Finance and BIVAC BV “a company constituted under the laws of the Netherlands” and determines that this company is “hereinafter called ‘BIVAC’”, only to refer in the same Article to the Presidential Decree and “BIVAC International (Bureau Veritas Group) of France”. What is disputed is whether the Contract was signed on behalf of BIVAC International or on behalf of BIVAC BV. The relevant documents are not dispositive. The signatures to the Contract appear under “BIVAC International” and the postal address referred to is that of BIVAC International in France. On the other hand, the Rotterdam commercial register identifies one of the signatories, Mr. Gilles Minard, as executive director of BIVAC BV 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 BV. Neither the existence nor the legality of these documents are denied.
96. As it has been presented by the Parties, the documentation does not allow for the Tribunal to determine with any degree of certitude which of the two legal entities is to be identified as the contracting party. The Tribunal is required to go further to determine the identity of the party in interest. The Tribunal must look to the circumstances and effective conduct of both parties during the performance of the Contract. Such conduct is reflected *inter alia* in the following facts: the initial security bond was issued on behalf of BIVAC BV; BIVAC BV rendered the pre-shipment inspection technical services and invoiced the Ministry of Finance which in turn made payments to a Bank account held by BIVAC BV; the termination of the Contract was notified to BIVAC BV; in the course of the arbitral proceedings Respondent has not evoked the lack of standing in a substantiated way until after the hearing on

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<sup>143</sup> Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, para. 542.

jurisdiction although it was aware of the economic links between BIVAC International and BIVAC BV: in its letter dated 4 December 2007 with regard to the constitution of the Arbitral Tribunal, Paraguay had rejected a French national as President of the Tribunal because “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).<sup>145</sup>

97. The facts lead the Tribunal to conclude without any difficulty that from the conclusion of the Contract until the Respondent’s letter dated 5 December 2008 challenging the Claimant’s standing for the first time, both parties had acted in full knowledge of the fact that two legal entities existed.<sup>146</sup> On the Respondent’s side, this knowledge was common and not reserved to one Ministry. In view of this knowledge and the parties’ conduct throughout the contractual relation, as evidenced by the documentation, the Tribunal is confident to state that both BIVAC and Paraguay have – at least implicitly – considered BIVAC BV to be the contracting party.
98. These facts and arguments remove the ambiguity which emerge from the Contractual documents to such a degree as to allow the Tribunal to rule that the Claimant is the correct party in interest. Accordingly, the Tribunal concludes that the Claimant has standing to bring the claim, and there is no other bar to its doing so.

### **4.3. The Alleged Violation of the Clause on Fair and Equitable Treatment and its Consequences**

99. Article 3(1) of the BIT reads:

“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.”

100. In its Decision on Objections to Jurisdiction, the Tribunal concluded that it had jurisdiction in relation to the claim made under Article 3(1) of the BIT and that the

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<sup>144</sup> Supra, para. 77.

<sup>145</sup> Letter of Paraguay’s Procuraduría General, dated 4 December 2007, ICSID, File of Request and Registration.

claim was admissible. The Tribunal made a number of observations, and these are here set out for convenience:

“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* (...) 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.’

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’*.

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 dispute under the Contract.”<sup>147</sup>

#### ***4.3.1. The Claimant's Position***

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<sup>146</sup> Paraguay letter to the Tribunal, dated 5 December 2008.

<sup>147</sup> Tribunal's Decision on Objections to Jurisdiction, paras. 125 and 127.

101. The Claimant submits that Paraguay has breached Article 3(1) of the Treaty. It alleges that the applicable fair and equitable treatment standard is high (4.3.1.1) and that Paraguay has failed to ensure fair and equitable treatment of BIVAC's investment through arbitrariness, lack of transparency and due process, negligence and inconsistency, bad faith, repudiation of the debt and breach of legitimate expectations (4.3.1.2). It insists that Paraguay's conduct was unfair and inequitable because it was an abuse of governmental power, or '*puissance publique*' (4.3.1.3). It also asserts that Paraguay has impaired BIVAC's investment with unreasonable measures (4.3.1.4). Moreover, the Claimant disputes Paraguay's submission that BIVAC is compelled to go before Paraguayan courts (4.3.1.5). Finally, the Claimant submits that Paraguay's breach of Article 3(1) caused BIVAC's losses (4.3.1.6) and that Paraguay thus owes BIVAC full compensation (4.3.1.7).<sup>148</sup>

#### 4.3.1.1. The Treaty Standard of Fair and Equitable Treatment

102. The Claimant contends that the fair and equitable treatment ("FET") standard is a high and flexible standard which offers crucial protection for investors in a variety of situations in which State conduct may be regarded as unfair or inequitable in the context of investment relations.<sup>149</sup> It notes that the "fundamental importance" of the FET standard is directly recognized in the Netherland-Paraguay BIT as it is even referred to in the preamble, which reads:

"[...] 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 [...]"<sup>150</sup>

103. According to the Claimant, the Treaty has thus established "an independent, self-contained treaty standard"<sup>151</sup> which gives latitude to arbitral tribunals to assess the fairness or unfairness of State conduct in a particular case in light of all the circumstances.

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<sup>148</sup> BIVAC Memorial, paras. 160-257; BIVAC Reply, paras. 61-153; and BIVAC Post-Hearing Brief, paras. 18-138.

<sup>149</sup> BIVAC Memorial, paras. 162-178; BIVAC Reply, paras. 79-86; on the issue of flexibility, the Claimant refers to the following authorities: P. Muchlinski, *Multinational Enterprises and the Law*, 1999, (CL-108), p. 625; R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties* (2005) *The International Lawyer* 87, (CL-113), p. 90; C.H. Brower, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, (2001) 40 *Columbia Journal of Transnational Law* 43, (CL-110), p. 54; S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, (1999) 70 *British Year Book of International Law* 99, (CL-109), p. 163.

<sup>150</sup> Treaty, Exhibit CE-66, Preamble [emphasis added by the Claimant].

<sup>151</sup> BIVAC Reply, para. 83.

104. The Claimant alleges that the terms “fair” and “equitable” must be given their plain meaning<sup>152</sup> and that they should be ascertained using ordinary standards and not by any specific threshold.<sup>153</sup> Accordingly, the Claimant argues that the fair and equitable treatment standard imposes a standard of conduct on the host State “beyond that of the international minimum standard”,<sup>154</sup> without requiring that the conduct to constitute “outrageous” or “egregious”<sup>155</sup> or that the State has acted in bad faith or with malicious intent.<sup>156</sup> In the Claimant’s view, the fair and equitable treatment standard must be interpreted in connection with the purpose of relevant BIT and requires host States to be proactive in the protection of investments and not to act improperly or discredibly in ways that provide disincentives to foreign investors.<sup>157</sup> The fair and equitable treatment standard “allows for justice to be done in the absence of the more traditional breaches of international law standards”.<sup>158</sup>
105. The Claimant argues that fair and equitable treatment under Article 3(1) of the Treaty does not incorporate only the international “minimum standard of treatment” under customary international law, as Paraguay argues. Not only does Article 3(1) not make any reference to customary international law or to the international minimum standard of treatment, but Paraguay has not cited a single award to support its interpretation.<sup>159</sup> Contrary to Paraguay’s contentions, the statement of interpretation of the NAFTA Free

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<sup>152</sup> Vienna Convention on the Law of Treaties, Article 31, (Legal Authority CL 72); BIVAC Memorial, para. 167; BIVAC Reply, para. 80.

<sup>153</sup> BIVAC Memorial, para. 168.

<sup>154</sup> F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, (1981) 52 *British Year Book of International Law* 241, (Legal Authority CL-104), p. 244; BIVAC Memorial, para. 169.

<sup>155</sup> *Pope & Talbot Inc v. Government of Canada* (UNCITRAL), Award on the Merits, Phase 2, 10 April 2001, paras. 111 and 118 [hereinafter, *Pope & Talbot v. Canada*]; and *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Final Award, 11 October 2002, paras. 116 and 127 [hereinafter, *Mondev v. USA*]; BIVAC Memorial, paras. 170-172.

<sup>156</sup> *Azurix Corp v. Argentine Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006, para. 372 [hereinafter, *Azurix v. Argentina*]. See also, e.g., *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Award, 12 May 2005, para. 280 [hereinafter, *CMS v. Argentina*]; *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA), Final Award, 1 July 2004, paras. 183 and 186 [hereinafter, *Occidental v. Ecuador*]; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007, para. 301 [hereinafter, *BG Group v. Argentina*]. According to the Claimant, although bad faith is not required for the finding of a breach of fair and equitable treatment, good faith is one of the obligations of the State under the fair and equitable treatment standard: BIVAC Memorial, paras. 173-174.

<sup>157</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, para. 113 [hereinafter, *MTD v. Chile*]; *Saluka Investments BV v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 309 [hereinafter, *Saluka v. Czech Republic*]; *Técnicas Medioambientales TECMED S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, paras. 155 and 156 [hereinafter, *TECMED v. Mexico*]; BIVAC Memorial, paras. 174-177.

<sup>158</sup> *PSEG Global Inc., The North American Coal Corp., and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007, para. 239 [hereinafter, *PSEG v. Turkey*]; see also *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 2007, para. 300 [hereinafter, *Sempra v. Argentina*]; BIVAC Memorial, paras. 177-178.

Trade Commission (FTC),<sup>160</sup> which expressly ties the “fair and equitable treatment” standard to customary international law, does not apply to the interpretation of other BITs.<sup>161</sup> The distinction in language between the FTC Statement and the text of Article 3(1) of the Netherlands-Paraguay BIT “underlines the election made by the Netherlands and Paraguay to establish the fair and equitable treatment standard as an independent, self-contained treaty standard, not reducible to the minimum standard of treatment in customary international law.”<sup>162</sup>

106. Finally, the Claimant notes that Paraguay appears to base its submissions on the *Neer* case,<sup>163</sup> even though “*Neer* is today almost universally rejected as a correct statement of the current international minimum standard of treatment of foreign investors.”<sup>164</sup>

#### 4.3.1.2. The Breach of the Fair and Equitable Treatment Standard

107. The Claimant asserts that Paraguay’s conduct, seen as a whole and not limited to the non-payment of the debt, constitutes unfair and inequitable treatment. It summarizes the facts and lists a raft of governmental actions that it asserts illustrate what it describes as a “rocambolesque story of contradiction, arbitrary behaviour and total absence of transparency”.<sup>165</sup> The actions relied upon by the Claimant are here set out:

- “By mid-1997 and in conjunction with the mounting criticism of the Government and an acrimonious election campaign against President Wasmosy, the Government’s priorities shifted and payments under the Contract started to fall into arrears;
- Without any communication to BIVAC, the new Government of President Raul Cubas that

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<sup>159</sup> BIVAC Reply, paras. 80-81.

<sup>160</sup> NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, Exhibit RL-26.

<sup>161</sup> The Claimant submits that this is widely accepted: see e.g. *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Liability, 30 July 2010, paras. 184-186 [hereinafter, *Suez v. Argentina I*], where the Tribunal, in comparing the BIT “fair and equitable treatment” clause with the NAFTA minimum standard of treatment clause, held that it was “of course bound by the specific language of each of the applicable BITs” and that where those BITs do not refer to the minimum standard, the Tribunal must “reject the argument that the fair and equitable treatment standard as embodied in the [...] BIT is implicitly limited by the minimum international standard.” See also *AWG Group v. The Argentine Republic* (UNCITRAL), Decision on Liability, 30 July 2010, paras. 184-186 [hereinafter, *AWG v. Argentina*]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (No. ARB/03/17), Decision on Liability, 30 July 2010, paras. 176-179 [hereinafter, *Suez v. Argentina II*]; and *Saluka v. Czech Republic*, para. 294; BIVAC Reply, paras. 82-85.

<sup>162</sup> BIVAC Reply, para. 83. See also United Nations, Fair and Equitable Treatment, UNCTAD Issues in International Investment Agreements (1999) (Legal Authority CL-123), p. 40; *PSEG v. Turkey*, para. 239.

<sup>163</sup> *USA (LF Neer) v. United Mexican States*, (1926) RIAA 4, (Legal Authority RL-27) [hereinafter, *Neer v. Mexico*].

<sup>164</sup> BIVAC Reply, para. 86; See also J Paulsson and G Petrochilos, *Neer-ly Mised?*, (2007) ICSID Review: Foreign Investment Law Journal 242-257, (Legal Authority CL-125); *Mondev v. USA*; *Azurix v. Argentina*; *MTD v. Chile*; *Saluka v. Czech Republic*; *Tecmed v. Mexico*.

<sup>165</sup> BIVAC Memorial, para 188.

- took office in August 1998 and Minister of Finance Gerhard Doll instigated a number of investigations into the manner in which the previous regime had entered into the Contract;
- Payments for services under the Contract from that moment on were completely withheld;
  - In response to requests for payment by BIVAC, on 21 January 1999 Minister Doll objected to all of the invoices on the basis of unspecified breaches of the Contract;
  - In the meetings that followed, the Minister of Finance did not explain how or when BIVAC had failed to observe its obligations under the Contract;
  - In complete contradiction, in early March 1999, a number of invoices dating back to 1997 were paid. This was the last payment that BIVAC received;
  - On 19 February 1999 Presidential Decree No. 2003 was passed authorising the Ministry of Finance to discontinue the Contract upon termination of its initial term;
  - In June 1999, the new Minister of Finance Federico Zayas acknowledged the State's obligation to pay the debt to BIVAC;
  - On 6 August 1999, the Ministry of Finance compiled the list of the nineteen outstanding invoices owed to BIVAC;
  - Immediately after the termination of the Contract, on 14 June 1999 Minister Zayas responded to BIVAC's request for payment by proposing a discount of 50% of the pending debt;
  - Following meetings in July 1999 Minister Zayas put forward a different proposal: paying BIVAC's debt in Government bonds;
  - Despite all this, on 2 December 1999 Minister Zayas indicated that the debt could not be paid until the Contraloría completed its 'Special Investigation', which had started a year before and of which BIVAC had never been informed;
  - On 13 December 1999, Minister Zayas wrote to BIVAC raising a different ground for non-payment: that the debt could not be paid until the National Congress passed a law authorizing payment;
  - The contents of the correspondence exchanged between BIVAC and the Ministry were subsequently leaked to the press;
  - In June 2000, the Legal Department of the Ministry of Finance concluded a review and found that there had been no proved irregularities in the Certificates of Pre-Shipments Inspection issued by BIVAC;
  - The Ministry of Finance nonetheless recommended that the General Customs Office conduct an audit of BIVAC's compliance with the Contract;
  - In September 2000, Minister Zayas stated in the press that the debt with BIVAC and SGS had been invalidly assumed by the Wasmosy Government;
  - On 12 February 2001, the legal department of the Ministry of Finance prepared an internal opinion for the new Minister Oviedo Brítez noting that the debt was legitimate and should be paid after the Contraloría's investigation;
  - The following day, new Minister Oviedo Brítez wrote to BIVAC noting that the debt was



payable and the investigation would be accelerated;

- Following meetings with BIVAC's representatives, Minister Oviedo Brítez agreed to make a partial payment during the 2001 fiscal year of approximately US\$5.4 million, and to pay the remainder of the debt in 2002;
- Shortly thereafter, the Ministry prepared to include the amount of the debt in the State budget;
- In complete contradiction on 31 July 2001 Minister Oviedo Brítez announced to the press that he would not pay given that the legality of the Contract had been put in doubt by a report of the Contraloría, and added to his objection that the issue 'related to a contract that was entered into by former governments';
- The Contraloría report had been issued on 25 July 2001, but had not been communicated to BIVAC. The report concluded that BIVAC had failed to comply with several provisions of the Contract;
- Only upon request by BIVAC, the Ministry sent the 'final' report of the Contraloría dated July 2001, together with two other reports of which BIVAC had no knowledge: a 'final' report dated February 1999, followed by another report in 2000;
- All three reports concluded for different, contradictory and extremely formalistic reasons that the Contract was somehow invalid or that BIVAC had not complied with its terms;
- On 17 August 2001, the legal department of the Ministry of Finance reported to the Minister of Finance noting the contradictions between the Contraloría's reports and the upholding the validity of the Contract;
- In spite of the response to the reports provided by BIVAC, and the legal department's opinion, shortly afterwards BIVAC became aware that, far from being brought to a close, the investigations into the validity and performance of the Contract were being escalated to the criminal courts;
- In May 2002, newly appointed Minister Spalding decided to reopen the investigations of the Contraloría;
- While the Contraloría's investigations were starting afresh, BIVAC became aware that parallel investigations were being carried out by the General Customs Office, which were commenced four years earlier;
- In June 2002, the General Customs Office issued a certificate confirming that it had received no complaints regarding the performance of the Contract;
- In July 2002, the General Customs Office issued Resolution 113 definitively ending its investigations;
- On 4 October 2002, the Contraloría issued its 'final' report (third final report, considering the previous two final reports of February 1999 and July 2001), fully vindicating BIVAC's position. In spite of this no payment occurred ;
- On 27 November 2002, the Minister wrote to BIVAC confirming that a working group would soon be formed with the Ministry of Finance 'to jointly study the best course of

action to be followed in order to respond to your company's claim';

- In December 2002, the Public Prosecutor concluded that the criminal complaint that was pending against BIVAC's representatives was baseless;
- On 30 December 2002, a Criminal Court Judge endorsed the findings of the Public Prosecutor and rejected the complaint against BIVAC's representatives;
- In plain contradiction with all this, in January 2003 the newly appointed Minister Alcides Jiménez opened yet another new investigation into the Contract;
- On 28 January 2003 a two page report of the Ministry concluded that the contracts had 'notoriously prejudiced the State' and that the auditors had come to a 'negative opinion as to the implementation of the [inspection] system'. Minister Alcides Jiménez did nothing else during his tenure;
- In August 2003, the newly elected President Duarte Frutos appointed a new Minister of Finance, Dionisio Borda. Two months later, on 1 October 2003, BIVAC discovered that Minister Borda was questioning in the press the legitimacy of the debt to BIVAC;
- In plain contradiction, when BIVAC's representatives met with the Vice-Minister of Finance Miguel Gómez on 8 October 2003, they were reassured that the new administration would honour the Paraguayan State's pending obligations to BIVAC;
- In subsequent meetings with BIVAC's representatives in November 2003, the Vice-Minister confirmed that the Ministry was considering the modalities for the payment of the debt;
- Following some meetings in March 2004, on 19 April 2004 the Vice-Minister of Finance wrote to BIVAC that the Ministry wished to 'honour debts owed by the Paraguayan State to its various creditors, which include [BIVAC]' and that a study was being finalised in order to establish a schedule of payments;
- In direct contradiction the Ministry of Finance issued Resolution No. 274 in June 2004, opening yet a new investigation into the Contract noting that the Ministry had 'not yet determined whether BIVAC and SGS had complied with the contract', and establishing a 'Commission for the Review and Negotiation of the Debt with the Companies BIVAC and SGS';
- No report was issued by the Commission by the deadline of 3 September 2004;
- On 25 February 2005, the Commission that had been created by Resolution No. 274 concluded that it had no competence to decide on the matter;
- On 3 February 2005, the Ministry of Finance issued Resolution No. 43, cancelling Resolution No. 274 and designating the National Customs Office as the body in charge of establishing 'whether or not the payment of the debt for the contracted inspection services with the companies BIVAC and SGS is in order';
- The National Customs Office rendered its conclusions on 30 March 2005, stating that BIVAC's performance of the Contract had been investigated several times and concluded that BIVAC had fully complied with the Contract, and that there was therefore nothing

else to investigate, saying emphatically that ‘what we are attempting to investigate is a matter that has already been decided’;

- However, the Minister of Finance did not inform BIVAC that the investigation had been concluded, nor did it provide BIVAC with a copy of the conclusions of the National Customs Office, despite its request following reports of the conclusions in the press. Paraguay persisted in its failure to pay;
- In May 2005, incredibly Minister Borda issued a press release stating that it had launched a new investigation into the pending debt with BIVAC. Minister Bergen replaced Borda at the end of that month;
- Between August and November of 2005 officials within the Ministry of Finance explained on various occasions, including to the press, that the new team within the Ministry of Finance had only recently been formed and that it would need to understand and analyse the complex issue of the payment of the debt to BIVAC;
- Press reports announced that the funds necessary to pay the debt to BIVAC had been provided for in the State budget and some meetings to discuss the payment of the debt took place in April 2006;
- However, in his trip to France in May 2006 President Duarte declared to the press that the Government would not ‘pay any debt which [was] not clear’, and that BIVAC’s case would be submitted to yet further review by the Contraloría and the Paraguayan Congress;
- By Decree 10485 of 22 June 2007, and as if nothing had happened in over eight years, President Duarte Frutos ordered yet another review of the Contract and the pending debt.”<sup>166</sup>

108. The Claimant argues that Paraguay does not deny these actions and has not submitted a single document in support of its conduct. According to the Claimant, “[n]othing in the evidence justifies the government’s non-payment for a decade, much less non-payment accompanied by the egregious conduct Paraguayan officials visited upon BIVAC. Rather, the documents prove the unfair and inequitable conduct” of Paraguay:<sup>167</sup>

- Paraguay refers to ‘*the first internal studies and reports commissioned to evaluate the situation of the unpaid invoices date back from early 1997, not 1998*’ – but cites to the report of the Director General of the National Customs Office,<sup>168</sup> which states that the Contract was ‘*absolutely valid*’ and that the reason for non-payment was that the Ministry of Finance did not provide for the Contract in the budget as it should have.

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<sup>166</sup> BIVAC Memorial, para 187; see also BIVAC Post-Hearing Brief, paras. 29-55; Slides from BIVAC’s Opening Speech during the hearing on the merits, 5 July 2011, Slides 11-49.

<sup>167</sup> BIVAC Reply, paras. 98-100 [citations are from the original document but are renumbered for purpose of this Decision].

<sup>168</sup> Aduanas Report Concerning Contracts with SGS and Bureau Veritas, undated, Exhibit RE-16, page 4, section 5 *in fine*.

- Paraguay refers to ‘*payments under the Contract started to be withheld as early as 1996*’ – but cites to BIVAC’s letter of March 1997 to Minister Maidana,<sup>169</sup> which records the agreement of Minister Maidana to pay the outstanding invoices for November and December 1996 along with US\$1.8 million (for the invoices for January through June 1997) by 1 July 1997. Minister Maidana, however, did not make the agreed payments.
- Paraguay states that it ‘*reiterated in meetings and in correspondence its concerns about compliance*’ – but cites to the March 2005 Report from the National Customs Office (which, ‘based on the documentation,’ unequivocally states that the Contract was binding and BIVAC’s performance valid) and Minister Doll’s January 1999 telegram (which was more concerned with delay than BIVAC’s performance).<sup>170</sup>
- Paraguay asserts that ‘*Minister Zayas did not acknowledge the debt*’ – but cites to Minister Doll’s January telegram, which cannot speak for Minister Zayas, who took office in March 1999, and who, in June 1999, acknowledged: ‘as of this date, the obligations of both parties arising under the Contract shall cease, except for the rights already acquired.’<sup>171</sup>
- Paraguay states ‘*The June 2000 Report does not clear BIVAC of misconduct*’ – but, having cited the June 2000 report of the Legal Department of the Ministry of Finance,<sup>172</sup> Paraguay in the very next sentence admits that this document is the ‘*decision by Ministerio dismissing claims [...] concerning BIVAC’s certificates.*’ As noted in the bullet point below, the Legal Department exonerated BIVAC of wrongdoing.
- Paraguay contends ‘*12 February 2001 report does not conclude that the debt was payable*’ – but in that report the Legal Department of the Ministry of Finance ‘*emphasized that the Paraguayan State has never denied the validity of the contract, since the contract has been performed by both parties. That is, the contracted services were rendered and the payments were made [...] the validity and existence of the contract is not put in doubt because it has been complied with in a normal manner as it were, by both parties.*’<sup>173</sup>
- Paraguay states ‘*The 13 February 2001 letter by Minister Oviedo Brítez did not acknowledge that the debt was legitimate and payable*’ – but in that letter to BIVAC Minister Brítez undertook to ‘*proceed with utmost haste to obtain the necessary budgetary amendment from Congress to finance and pay the debt owed by the State for the rendered services.*’<sup>174</sup>
- Paraguay states ‘*The 30 March 2005 report [...] does not clear BIVAC of wrongdoing. It merely incorporated other reports [...] which did find BIVAC in material breach of certain*

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<sup>169</sup> Letter from Carlos Salazar and Roberto Markus, 31 March 1997, Exhibit RE-15. According to the Claimant, Paraguay simply confirms the *modus vivendi* established during 1996-1998 on the payment of BIVAC’s invoices: payment was routinely irregular; it was made with the delay of a few months as explained by Claimant during the hearing: transcript of hearing day 1, pages 77/78; witness statement Bojanovich, para 27-29.

<sup>170</sup> Report No. 377 of the National Customs Office, 30 March 2005, Exhibit CE-35; Certified Telegram from the Minister of Finance to BIVAC BV, 20 January 1999, Exhibit CE-70.

<sup>171</sup> Letter from the Ministry of Finance to BIVAC Paraguay S.A., 7 June 1999, Exhibit CE-19.

<sup>172</sup> Report J.I. No. 13/2000 of the legal department of the Ministry of Finance, 29 June 2000, Exhibit CE-88.

<sup>173</sup> Report No. 139 of the Ministry of Finance, 12 February 2001, Exhibit CE-27. Report No. 139 noted that both the formal validity and contractual performance had “never [been] denied.”

*contractual provisions*’ – but cites to the National Customs Office Report already discussed above, which is based on ‘*the documentation to which we have access*’ and accords with the rest of the evidence emanating from Paraguay’s Contraloría, Ministry, and other agencies and high officials – that ‘*all of the contract’s clauses were complied with*.’<sup>175</sup>

109. In light of these facts, the Claimant submits that Paraguay’s conduct amounts to a clear violation of the fair and equitable treatment standard which is made up of the following components: non arbitrariness (4.3.1.2.1); transparency and due process (4.3.1.2.2); diligence and consistency (4.3.1.2.3); and good faith (4.3.1.2.4). The Claimant also argues that the fair and equitable treatment standard prohibits the repudiation of the debt (4.3.1.2.5) and that Paraguay has breached its legitimate expectations (4.3.1.2.6).<sup>176</sup>

#### *4.3.1.2.1. Arbitrariness*

110. The Claimant submits that international tribunals have defined arbitrary conduct as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”<sup>177</sup>; a measure “not founded on reason or fact [...] but on mere fear reflecting national preference”<sup>178</sup>; the lack of explanation of alleged failures to comply with contractual obligations<sup>179</sup>; “[d]ecisions that were taken without objective grounds, in a unilateral or arbitrary manner”<sup>180</sup>; or insufficiencies that would be recognized “by any reasonable and impartial man”.<sup>181</sup>
111. According to the Claimant, Paraguay’s conduct was arbitrary, capricious and unrestrained. The commissioning of endless reports on the same issue and the decision not to pay a recognized debt was “without cause based on law” and was not based on any genuine belief of possible wrongdoing by BIVAC. The Claimant explains:

“This case law all supports BIVAC. Here Paraguay in an impressive succession of contradictory acts and omissions over ten years has failed to

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<sup>174</sup> Note No. 185 from the Ministry of Finance to BIVAC BV, 13 February 2001, Exhibit CE-92.

<sup>175</sup> Report No. 377 of the National Customs Office, 30 March 2005, Exhibit CE-35.

<sup>176</sup> BIVAC Memorial, paras. 179-227; BIVAC Reply, paras. 87-124; BIVAC Post-Hearing Brief, paras. 65-81.

<sup>177</sup> BIVAC Memorial, para. 190; BIVAC Reply, para. 101

<sup>178</sup> BIVAC Memorial, para. 191.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, para. 193.

<sup>181</sup> *Ibid.*, para. 195.

pay to BIVAC for political reasons, linked to the general distrust by Governments and Ministers of the acts of their predecessors. Paraguay never communicated what it was doing to BIVAC. It never explained the real motivation for the non-payment. This in itself constitutes arbitrary conduct. Further, it is clear that decisions were not taken on objective or reasonable grounds, nor on the basis of a real disagreement with BIVAC over contract performance or the obligation to pay.

[...]

Paraguay's refusal to comply with its obligations towards BIVAC's investment is demonstrably without any objective grounds. After lengthy and repetitive administrative processes, various administrative agencies and organs of the Paraguayan state have all concluded that Paraguay should honour the Contract and pay the debt. But the Executive power has not complied with these decisions. Following the holding in RFCC above, Paraguay has acted unilaterally and arbitrarily and without any justification. [...] Further, there is no contractual disagreement between the parties here, either factual or legal; nor is there a normal contractual dispute between BIVAC and Paraguay. What there is here is a completely unjustified and willful disregard by Paraguay of its obligations after engaging in an attempt to escape its obligations by setting in motion its own administrative structure."<sup>182</sup>

112. The Claimant further refutes the reasons put forward by Paraguay to justify its conduct.<sup>183</sup> First, the Claimant argues that Paraguay is wrong in saying that the “commissions and reports were only internal reports that did not impair BIVAC’s rights in any way”. According to the Claimant, “the spurious commissions and reports are part of the arbitrary conduct because they caused deliberate delay and their repetition and reiteration betray a lack of due process and lack of regard for juridical propriety.” Second, Paraguay’s assertion that “BIVAC ignores the economic reality of the Contract, which cost Paraguay more than it was able to recover in taxes” is also wrong because “the assertion that a contracting party may ignore its contractual obligations because it later considers them a bad bargain is contrary to the most elemental principles of law and justice” and “is per se arbitrary.” Third, contrary to Paraguay’s view that “BIVAC ignores the undisputed evidence that BIVAC did not comply with its contractual obligations”, the Claimant contends that “there is no evidence that BIVAC fell short of its contractual obligations” and that “[i]n fact, the evidence demonstrates the opposite”. Finally, the Claimant argues that it is wrong to allege that “BIVAC’s arbitrariness claim is immaterial insofar as no one ever stopped BIVAC from pursuing its rights before the courts of Asunción”. According to the

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<sup>182</sup> BIVAC Memorial, paras. 196-197.

<sup>183</sup> Paraguay’s Memorial on the Merits, para. 126; and BIVAC Reply, paras. 102-106.

Claimant, “any role for the courts of Asunción is immaterial to BIVAC’s claim.”<sup>184</sup>

#### 4.3.1.2.2. *Lack of Transparency and Due Process*

113. The Claimant submits that lack of transparency occurs when “arguments [are] made to justify delay in paying compensation without basis in the Contract or Decree”<sup>185</sup>, or when the Government fails “to allow [the claimant] to understand exactly what the Government’s preconditions for an acceptable solution were,” or when it “fail[s] to respond in any constructive way” and generally acts inconsistently “instead of engaging in meaningful negotiations.”<sup>186</sup>

114. The Claimant submits that the conduct of the Paraguayan Government with regards to the BIVAC debt is a model of lack of transparency and due process:

“While several Ministers of Finance assured BIVAC time and again that the debt would be paid, thus acknowledging the obligation to pay and the legitimacy of the debt, behind the scenes reports, reviews, investigations, enquiries, and the like were being commissioned to do exactly the opposite. BIVAC was never informed of the commencement of these processes, let alone their evolution and outcomes. Most of the time BIVAC learned about them through the press. BIVAC was never requested to participate.

Similar to the Saluka case, Paraguay did not allow BIVAC to understand the Government’s position and the allegations and suspicions leveled at the Contract and the debt. Following Tecmed, Paraguay’s lack of transparency suggests that the real discreditable reason for the Government’s conduct was not to take responsibility for the debt and the self-interested political reasons of each Minister and Government. These are clear deficiencies that conflict with what a reasonable and unbiased observer would consider fair and equitable.”<sup>187</sup>

115. The Claimant further notes that Paraguay has not provided any official reason for its default on the debt except for the arguments provided for the first time in its Counter-Memorial.<sup>188</sup>

#### 4.3.1.2.3. *Negligence and Inconsistency*

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<sup>184</sup> BIVAC Reply, paras. 104-106, 36-60 and 129-138.

<sup>185</sup> *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, para. 308 [hereinafter, *Siemens v. Argentina*]; BIVAC Memorial, para. 204; BIVAC Reply, para. 110.

<sup>186</sup> *Saluka v. The Czech Republic*, paras. 420, 423 and 430; BIVAC Memorial, para. 206; BIVAC Reply, para. 110.

<sup>187</sup> BIVAC Memorial, paras. 208-209; BIVAC Reply, para. 110.

<sup>188</sup> BIVAC Reply, para. 110.

116. The Claimant submits that the facts in the present case are very similar to those in *Kardassopoulos*,<sup>189</sup> where the Tribunal found that the State had breached the fair and equitable treatment standard through its repeated inconsistencies in the manner it had addressed the investor’s claim for payment. The Claimant explains:

“Those inconsistencies were manifest in the following facts: the ‘circular response’ to the investor and its claim; the changing government attitudes towards resolving the issue; the ‘lengthy delays, refusals by various government officials to address the matter’; the ‘internal disputes over who carried responsibility for the matter’; ‘responsibility for [the investor’s] claim was shuffled from one government ministry to another, without any progress’; that when ‘a new government was elected [...] yet another State commission established to consider the matter of [the investor’s] claims’; all the while ‘the evidence discloses that senior members of the Georgian Government believed that [...] compensation was owed to [the investor].’”<sup>190</sup>

On the basis of other arbitral awards,<sup>191</sup> the Claimant further submits that there has been “evident negligence on the part of the administration in the handling” of the debt issue; a “roller coaster” of unimagined proportions;<sup>192</sup> that the varying, sometimes “even contradictory positions” by the government “made it difficult or even impossible for [the Claimant] to accommodate their proposals to the Government’s position”;<sup>193</sup> that there was a “lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly”;<sup>194</sup> and that the Government’s actions were incoherent and lacked forthrightness.<sup>195</sup>

#### 4.3.1.2.4. *Bad Faith*

117. The The Claimant argues that in addition to the Respondent’s arbitrariness, lack of transparency, negligence, inconsistency and repudiation of the debt, “Paraguay’s use of its governmental machinery to orchestrate repeated and baseless investigations into the Contract and the debt”<sup>196</sup> amounts to bad faith and thus to a breach of the fair and

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<sup>189</sup> *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010 [hereinafter *Kardassopoulos and Fuchs v. Georgia*].

<sup>190</sup> BIVAC Reply, para. 112.

<sup>191</sup> See BIVAC Memorial, paras. 210-218; BIVAC Reply, para. 113.

<sup>192</sup> *PSEG Global v. Turkey*, paras. 246 and 250.

<sup>193</sup> *Saluka v. Czech Republic*, paras. 417 and 248.

<sup>194</sup> *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, para. 99 [hereinafter, *Metalclad v. Mexico*].

<sup>195</sup> *MTD v. Chile*, paras. 163-165 and 172-181; *Pope & Talbot v. Canada*, paras. 172-181.

<sup>196</sup> BIVAC Post-Hearing Brief, para. 78.



equitable treatment standard.<sup>197</sup> According to the Claimant, tribunals have recognized that bad faith is a sufficient – but not a necessary – requirement for a breach of the fair and equitable standard.<sup>198</sup> The Claimant recognizes that the legal threshold for proving bad faith under international law may be high, but in the Claimant’s view, there is no doubt that Paraguay’s conduct crossed that bar.

118. The Claimant describes the facts evidencing bad faith and abuse of authority as follows:

“Absent any basis to deny payment (in spite of numerous attempts to do so), Paraguay’s attempt to create difficulties for paying the debt, by using its administrative agencies and review powers smacks of bad faith. None of the instances of investigations into the Contract and the debt, all of which were favourable to BIVAC, led to the logical result: payment. Hence those review exercises were not carried out in good faith, to ascertain whether payment was due. Had there been good faith, there would not have been necessary to repeat the reviews continuously – one would have been sufficient. Once again those reviews had other more obscure and discreditable motivations, based on real or perceived political necessity. Thus Paraguay acted in bad faith and in abuse of its sovereign authority in ordering various governmental authorities *ad nauseam*, when the State had already concluded that the debt was due.”<sup>199</sup>

119. The Claimant further contends that Paraguay’s defense that it has not acted in bad faith because it “has disputed the debt” is unsupported by the evidence, which clearly shows that Paraguay has never disputed the debt.<sup>200</sup>

#### 4.3.1.2.5. *The Alleged Repudiation of the Debt*

120. The Claimant contends that Paraguay’s arbitrary and inconsistent conduct can only be interpreted as a repudiation of the debt by Paraguay.<sup>201</sup> Following the tribunal’s language in *Eureko*,<sup>202</sup> the Respondent argues that there was a “clear decision” by

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<sup>197</sup> BIVAC Memorial, paras. 219-227; BIVAC Reply, paras. 114-116.

<sup>198</sup> The Claimant refers to *TECMED v. Mexico*, paras. 153-154; *Mondev v. USA*; *Waguilh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, para. 450 [hereinafter, *Siag v. Egypt*]; *Waste Management, Inc v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, para. 138 [hereinafter, *Waste Management v. Mexico*]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, para. 374 [hereinafter *Bayindir v. Pakistan*]; *Siemens Argentina*, para. 308; *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para. 107 [hereinafter, *Phoenix v. Czech Republic*].

<sup>199</sup> BIVAC Memorial, para. 227.

<sup>200</sup> BIVAC Reply, para. 115.

<sup>201</sup> *Ibid.*, paras. 117-121.

<sup>202</sup> *Eureko BV v. Republic of Poland (ad hoc)*, Partial Award, 19 August 2005, para. 226 [hereinafter, *Eureko v. Poland*]; BIVAC Reply, para. 117.

Paraguay “to refuse to abide by and respect its legal obligations” under the Contract, thus “frustrat[ing] the investment” for which Paraguay is responsible under the Treaty. According to the Claimant, Paraguay chose to avoid responsibility for the debt due to “self-interested political motivations of each successive Minister and government”.<sup>203</sup>

121. BIVAC refutes Paraguay’s arguments that the Claimant cannot maintain its complaint because “political continuity cannot be dealt with in a vacuum” and that “BIVAC was well aware of the political volatility in Paraguay at the time of the Contract”.<sup>204</sup> The Claimant adds:

“The assertion that BIVAC should have ‘known better’ in contracting with Paraguay cynically seeks to allocate to investors the risk that successive governments in Paraguay would repudiate their predecessor’s lawfully contracted pecuniary obligations. There is no such ‘political volatility’ exception to international obligations.

Paraguay cannot be heard to excuse its repudiatory conduct because it is an unreliable State, incapable of keeping its promises. But by voicing these excuses, Paraguay is unequivocally illustrating that this case is not one of pure contractual breach, but rather primarily concerns politically motivated treatment of BIVAC that is far from fair or equitable.”<sup>205</sup>

#### 4.3.1.2.6. Frustration of Legitimate Expectations

122. According to the Claimant it “had a right under the FET standard and the principle of good faith that its investment would be treated in accordance with its legitimate expectations” and that these expectations have been violated, amounting to a breach of Paraguay’s obligation of fair and equitable treatment under Article 3(1) of the Treaty.”<sup>206</sup> According to the Claimant, Paraguay misstates that BIVAC’s sole legitimate expectation is that of payment. Adopting the approach of the tribunal in *Kardassopoulos*, the Claimant argues that the Treaty protects BIVAC’s expectation of consistent, transparent, reasonable, non-arbitrary and good faith treatment from Paraguay. As stated in *Kardassopoulos*,<sup>207</sup> the FET treatment protection includes:

“[T]he legitimate expectation that [the State] would conduct itself vis-à-vis this investment in a manner that was reasonably justifiable and did not

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<sup>203</sup> BIVAC Reply, para. 118.

<sup>204</sup> BIVAC Reply, para. 119; Paraguay Counter-Memorial, paras. 93-94 and 178.

<sup>205</sup> BIVAC Reply, paras. 120-121.

<sup>206</sup> BIVAC Post-Hearing Brief, para. 79; BIVAC Reply, paras. 122-124.

<sup>207</sup> *Kardassopoulos and Fuchs v. Georgia*, para. 441; the Claimant also relies on *TECMED S.A. v. Mexico* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, para. 154, and *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Award, 8 November 2010, para. 422 [hereinafter *Alpha v. Ukraine*]; BIVAC Reply, para. 123.

manifestly violate basic requirements of consistency, transparency, even-handedness and nondiscrimination. This includes, in the view of the Tribunal, implementing a compensation process [...] that is both procedurally and substantively fair.”

#### 4.3.1.3. The Alleged Governmental (Non-Commercial) Conduct and its Abuse

123. The Claimant argues that its claim is based on Paraguay’s “politically motivated”<sup>208</sup> violation of its obligation to ensure FET treatment by using its “sovereign prerogatives and authority to evade its obligation to pay the debt”.<sup>209</sup> According to the Claimant, its claim is not based on a “simple breach of Contract”,<sup>210</sup> nor on Paraguay’s commercial conduct and not even on “a formal attempt to nullify or set aside a contract debt”,<sup>211</sup> as these “are purely contractual matters” and do not qualify as breaches of the Treaty.<sup>212</sup> The Claimant asks whether “the persistent refusal to pay in good faith, because the tribunal said you have good reasons not to, is that a breach of the treaty? And the answer, of course, is no [...]”:<sup>213</sup>

“The key distinction at the heart of this case lies in determining whether the parties to a State contract are engaged in a genuine difference of opinion in respect of the scope or interpretation of their respective contractual rights. If so, then it is a mere contractual dispute that should be resolved by the contractual dispute resolution mechanism.

[...]

This situation is to be contrasted with the situation where the conduct surrounding the contract breach is politically motivated, i.e., conduct involving the exercise of *‘puissance publique’*, without the existence of any genuine good faith dispute under the underlying contract. Where the State’s breach of contract is the consequence of the political convenience of the government in power then it ceases to be a mere contractual breach and constitutes a parallel breach of the FET standard.”<sup>214</sup>

124. This juxtaposition implies that the “failure to perform a contract may amount to a violation of the FET standard.”<sup>215</sup> A State act can be based in contract, and yet constitute a breach of a BIT if the State has not complied with its obligation to treat the investment fairly and equitably.<sup>216</sup> Thus, breaches of the FET treatment standard can be

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<sup>208</sup> BIVAC Memorial, para. 235.

<sup>209</sup> *Ibid.*, para. 233.

<sup>210</sup> *Ibid.*, para. 235.

<sup>211</sup> *Ibid.*, para. 203.

<sup>212</sup> BIVAC Reply, para. 71.

<sup>213</sup> Hearing on the Merits, 5-7 July 2011, Transcript, p. 208.

<sup>214</sup> BIVAC Post-Hearing Brief, paras. 9-10.

<sup>215</sup> BIVAC Memorial, para. 180.

<sup>216</sup> *Ibid.*, paras. 245-246.

established when the breach of contract is accompanied by the existence of “aggravating factors”, such as government conduct which is “arbitrary, unfair, unjust, lack[s] due process and [does] not respect the investor’s reasonable and legitimate expectations.”<sup>217</sup> The Claimant argues that “no distinction exists in the law of State Responsibility between acts *iure imperii* (or sovereign acts), for which States can in principle be responsible under international law, and acts *iure gestionis* (or commercial acts), for which States cannot be responsible.”<sup>218</sup> A State is responsible for all the acts of its associated bodies, whatever their nature.<sup>219</sup> Even if an underlying relationship is commercial, a government’s act in relation to the investor may still be governmental.<sup>220</sup> Thus, according to the Claimant, the sole issue is “not the character of a State’s acts but whether, considering all of the circumstances of the case, the acts, howsoever characterized, violate that State’s treaty obligations.”<sup>221</sup> Thus “the tribunal needs to examine whether the conduct complained of breaches the FET standard” which is independent from the breach of contract.<sup>222</sup> It expresses its conviction that different “Governments have escalated the unpaid debt into a political issue”<sup>223</sup> and that Paraguay’s conduct largely transcends the limits of a good faith commercial relationship and must be qualified as an abusive exercise of governmental power.

125. The Claimant submits that the

Contract for pre-shipment inspection was, from its inception, an eminently public law contract. BIVAC’s functions directly replaced services typically performed by the Government through its customs authorities. Further, the very conclusion of the Contract responded to a political imperative to increase tax revenues from import operations in order to “*achieve the income levels and to pay expenses provided for in the National General Budget.*”

Paraguay admitted the public administrative law nature of the Contract early in these proceedings and has only recently sought to change its position. It is worth citing what Paraguay said in this respect in its first written submissions on jurisdiction:

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<sup>217</sup> *Ibid.*, paras. 245 and 181-182; the Claimant cites, e.g., the case of *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, para. 615 [hereinafter, *Rumeli v. Kazakhstan*].

<sup>218</sup> BIVAC Reply, paras. 62-66; see also BIVAC Memorial, paras. 237-246. The Claimant relies on the following authorities: J. Crawford, “Treaty and Contract in Investment Arbitration” (2008) TDM, Legal Authority CL-116, p. 6; and *Noble Ventures v. Romania* (ICSID Case No. ARB/01/11), Award, 12 October 2005, para. 82 [hereinafter, *Noble v. Romania*].

<sup>219</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Articles 4-8.

<sup>220</sup> The Claimant refers to the following awards: *Saluka v. Czech Republic*; *Mondev .v USA*; *Waste Management Inc. v Mexico*; *MTD v. Chile*; *Rumeli v. Kazakhstan*; *Sergei Paushok et al v. the Government of Mongolia* (UNCITRAL), Award, 28 April 2011 [hereinafter, *Paushok v. Mongolia*].

<sup>221</sup> BIVAC Reply, para. 64.

<sup>222</sup> Hearing on the Merits, 5-7 July 2011, Transcript, pp. 239 and 518.

<sup>223</sup> BIVAC Memorial, para. 10.

‘At issue in this litigation is a Contract in which one of the parties is the State. It is not a Private Law contract, executed by two private persons. [...] Evidence of this is that the Paraguayan State has rescinded the Contract of Public Law, by means of a unilateral decision, due to the fact that the public interest was at stake, following the principle that Public Contracts may be modified or rescinded by unilateral decision of the State’s Administration.’ (Paraguay’s Objections on Jurisdiction, 8 April 2008, page 19).<sup>224</sup>

126. The Claimant further submits that the dispute was political and stresses that:

“Paraguay’s repudiatory conduct was due solely to political imperatives. It had nothing to do with any genuine discussion of the scope or interpretation of the Contract, or even with any concern regarding BIVAC’s performance or compliance. The reality is that no Government or Minister was ready to take political responsibility for the obligations contracted by a prior administration. The endless successive investigations providing inconsistent responses simply ensured that the payment of the debt would be passed to the next Minister or Government.”<sup>225</sup>

127. The Claimant argues that Paraguay’s conduct is in breach of the FET standard and the obligation not to impair investments by unreasonable measures for a number of reasons, all of which are linked to the treatment surrounding the breach of Contract by the Government of Paraguay, rather than the breach of Contract itself:

“Once again it is not a simple breach of Contract by itself that is complained of by BIVAC; it is the manner in which Paraguay has treated BIVAC in dealing with that issue. Like in *Azurix*, the problem is that the issue was politicized because of popularity concerns of the different Governments, and/or because the Contract had been awarded by a previous Government. That conduct reveals politically motivated governmental arbitrariness, negligence, lack of transparency, inconsistency or bad faith, and is thus in breach of the FET standard. It is ultimately an instance of repudiation, since there cannot be any good faith explanation to Paraguay’s failure to pay. We are here well within the realm of unfair and inequitable treatment [...]”<sup>226</sup>

The Claimant insists that:

“Paraguay’s acts have nothing to do with the acts that an ordinary party could carry out. They are of a fundamentally different nature. In the absence of any argument to refuse payment, an ordinary contracting party would have no right to commission reports and reviews from various state agencies in order to avoid payment.”<sup>227</sup>

128. The Claimant relies on recent awards to support its position. It refers *inter alia* to the award in *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* where the Tribunal held

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<sup>224</sup> BIVAC Post-Hearing Brief, para. 19.

<sup>225</sup> *Ibid.*, para. 22.

<sup>226</sup> BIVAC Memorial, para. 235.

<sup>227</sup> *Ibid.*, para. 238.

that the facts in that case did

“not preclude Mr. Fuchs from holding throughout the term of his investment the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination. [...]

The compensation process appears to have initially begun in the spirit of reaching an amicable settlement consistent with what Mr. Fuchs may reasonably have expected [...]. Lamentably, despite this initial instruction, the spirit of settlement appears to have diminished over time as lengthy delays, refusals by various government officials to address the matter, and internal disputes over who carried responsibility for the matter combined to result in an overall obfuscation of the compensation process and disregard for the duty to provide compensation. [...]

The process which ultimately unfolded following constitution of the compensation commission in 1997 can only be described as non-transparent, arbitrary and unfair. [...] Georgia was, however, obligated to act reasonably, transparently and in a non-arbitrary manner towards the Claimants. The evidence on the record demonstrates that this is not, in fact, what transpired.

There is moreover no defence, on the evidence presented, for the delay with which the process was carried out, even allowing for some delay on the part of the Claimants in submitting documentation of their claims. [...] While the Claimants complied with each request in an effort to settle the matter of their investment amicably, arranging for the preparation of two audit reports by reputable accounting firms, their efforts were consistently met with a circular response in which a resolution of the matter was ordered from the highest level of the Georgian Government only to be avoided or passed off by the individuals tasked with effecting such a resolution.

Over the course of a seven year period following the formal establishment of a compensation process, responsibility for TrameX's claim was shuffled from one government ministry to another, without any progress. [...]

The Tribunal finds inexcusable the categorical denial of any responsibility or obligation towards the Claimants, which came eight years after Georgia initiated the compensation process.”<sup>228</sup>

129. The Claimant submits that the facts and circumstances of *Kardassopoulos* mirror those in the case at hand. It notes that

“[h]ere too there has been a ‘circular response’ to BIVAC and its claim; there have been ‘lengthy delays, refusals by various government officials to address the matter’; the ‘internal disputes over who carried responsibility for the matter combined to result in an overall obfuscation of the compensation process and disregard for the duty to provide compensation’; ‘responsibility for [the investor’s] claim was shuffled from one government ministry to another, without any progress’; when ‘a new government was elected [...] yet another State commission established to consider the matter of [the investor’s] claims’; all while ‘the evidence discloses that senior members of the [...] Government believed that [...] compensation was owed to’ the investor. Paraguay’s conduct exhibits all these deficiencies, which constitute

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<sup>228</sup> *Kardassopoulos and Fuchs v. Georgia*, paras. 441, 443 and 446-449.

unfair and inequitable treatment, just as in Georgia's case."<sup>229</sup>

The Claimant further argues that contrary to Paraguay's view, the awards in *Bayindir*,<sup>230</sup> *RFCC*,<sup>231</sup> *Impregilo*,<sup>232</sup> *Paushok*,<sup>233</sup> *Waste Management*<sup>234</sup> and *Parkerings*<sup>235</sup> lend no support to Paraguay's position. According to the Claimant, those cases must be distinguished from the circumstances of the present case because they all concerned purely contractual disagreements regarding the interpretation of contract terms or "genuine commercial divergence"<sup>236</sup> and there was no arbitrary and unfair conduct or other issues beyond the application of the contract.<sup>237</sup>

#### 4.3.1.4. Unreasonable Measures

130. Under Article 3(1) of the Treaty, Paraguay is also subject to an obligation not to "impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal [of the investments of nationals of other Contracting Party] by those nationals."<sup>238</sup>
131. The Claimant argues that the standard of reasonableness requires "a showing that the State's conduct bears a reasonable relationship to some rational policy."<sup>239</sup> As with the FET standard, the reasonableness standard must be determined in light of all the circumstances of the case, to assess whether the State's conduct was "appropriate behaviour."<sup>240</sup> The Claimant contends that Paraguay's conduct towards BIVAC "was not grounded in rational policy, as it involved reviewing the legitimacy of an acknowledged debt time and again leaving the debt repudiated."<sup>241</sup> According to the

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<sup>229</sup> BIVAC Reply, para. 74 and BIVAC Post-Hearing Brief, paras. 56-64; the Claimant also relies on *Alpha v. Ukraine* and *Paushok v. Mongolia*.

<sup>230</sup> *Bayindir v. Pakistan*.

<sup>231</sup> *RFCC v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Award, 22 December 2003 [hereinafter, *RFCC v. Morocco*].

<sup>232</sup> *Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005 [hereinafter, *Impregilo v. Pakistan*].

<sup>233</sup> *Paushok v. Mongolia*.

<sup>234</sup> *Waste Management v. Mexico*.

<sup>235</sup> *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007 [hereinafter, *Parkerings v. Lithuania*].

<sup>236</sup> BIVAC Post-Hearing Brief, paras. 93-94, 96-97 and 114; also BIVAC Reply, paras 67-71; BIVAC Memorial, paras. 238-239.

<sup>237</sup> BIVAC Post-Hearing Brief, paras. 95 and 110-111.

<sup>238</sup> Treaty, Exhibit CE-66, Article 3(1).

<sup>239</sup> *Saluka v. Czech Republic*, para. 460; BIVAC Memorial, para. 228; BIVAC Reply, para. 128; BIVAC Post Hearing Brief, paras. 82-85.

<sup>240</sup> *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL), Partial Award, 13 September 2001, para. 158 [hereinafter, *CME v. Czech Republic*]; see also *BG Group v. Argentina*, para. 342; BIVAC Memorial, paras. 229-230.

<sup>241</sup> BIVAC Reply, para. 128.

Claimant, there can be nothing reasonable in commissioning “some twelve different reports or reviews on exactly the same, or very similar issues, only to later fail to pay in spite of the findings in those reports.”<sup>242</sup>

132. The Claimant disputes Paraguay’s view that “it was more than reasonable for Paraguay to conduct investigations” because of “the concerns [...] about certain conduct on the part of BIVAC in the implementation of the Programme and the economic crisis in Paraguay.”<sup>243</sup> First, the Claimant argues that there were no such genuine concerns. Second, according to the Claimant an “economic crisis” does not justify “investigations” into “conduct on the part of BIVAC” (or anything specifically to do with the Contract). Rather, those investigations were “political ploys used unreasonably to avoid paying an unpopular debt.”<sup>244</sup>

#### 4.3.1.5. The Issue of Jurisdiction

##### 4.3.1.5.1. *The Alleged Jurisdiction of the Tribunal*

133. The Claimant asserts its claim is based on the Treaty and “cannot be reduced to a contractual controversy to be submitted to Paraguayan courts.”<sup>245</sup> The requirement of submission to Paraguayan courts would introduce a rule on exhaustion of local remedies into the Treaty and would reduce the FET standard to a bare prohibition against a denial of justice.

134. The Claimant relies on the *Vivendi* Annulment Decision:

“In the Committee’s view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court.[...]”

Claimants should not have been deprived of a decision, one way or the other, merely on the strength of the observation that the local courts could conceivably have provided them with a remedy, in whole or in part. Under the BIT they had a choice of remedies.”<sup>246</sup>

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<sup>242</sup> BIVAC Memorial, para. 231.

<sup>243</sup> Respondent Counter-Memorial, para. 139.

<sup>244</sup> BIVAC Reply, para. 127.

<sup>245</sup> BIVAC Post-Hearing Brief, para. 103; BIVAC Reply, paras. 129-138.

<sup>246</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, paras. 102-103 and 114 [hereinafter, *Vivendi II v. Argentina, Decision on Annulment*]; the Claimant also relies on *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Annulment, 14 June 2010, paras. 47-48, 50-54 [hereinafter, *Helnan v. Egypt*];



135. BIVAC further submits that since “a FET claim is a pure Treaty claim which does not fall under the Contract’s dispute resolution clause, and for which this Tribunal is directly competent under the Treaty,”<sup>247</sup> there is no possible competition between local courts and an arbitral tribunal and a claim before a local court could not justify a stay of arbitral proceedings.

136. The Claimant warns that to “hold otherwise would run contrary to the admonishment of the *Vivendi II* tribunal”<sup>248</sup> which held:

“To the extent the Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state’s courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other.

But if this Tribunal were to restrict the claims of unfair and equitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard. Although the standard is commonly understood to include a prohibition on denial of justice, it would be significantly diminished if it were limited to claims of denial of justice.”<sup>249</sup>

137. The Claimant reviews the relevant case law addressing the problem of remedy in local courts, and argues that the dispute at hand is to be distinguished from those cases insofar as the amount of the debt at issue in the present case is not in dispute;<sup>250</sup> that the conduct of the Respondent was not fair and reasonable;<sup>251</sup> and the dispute is not purely contractual in nature.<sup>252</sup>

#### 4.3.1.5.2. *The Alleged Insufficiency of the Paraguayan Court System*

138. At a late stage in the proceedings, the Claimant introduced a further argument, namely

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BIVAC Reply, paras. 131-132; BIVAC Post-Hearing Brief, paras. 105-106.

<sup>247</sup> *Ibid.*, para. 107.

<sup>248</sup> *Ibid.*, para. 104.

<sup>249</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award, 20 August 2007, paras. 7.4.10-7.4.11 [hereinafter, *Vivendi II v. Argentina, Award*].

<sup>250</sup> As was the case in *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Order of the Tribunal on Further Proceedings, 17 December 2007, para. 22 [hereinafter, *SGS v. Philippines*].

<sup>251</sup> As was the case in *Waste Management v. Mexico*, para. 114.

<sup>252</sup> As was the case in *Parkerings v. Lithuania*, paras. 119-193 and 314-317.

that its own serious and legitimate concerns with the Paraguayan court system were one of the reasons why it took the “commercial decision” to bring the present dispute to arbitration.<sup>253</sup> It refers to the lack of independence, corruption, delays in the rendering of judgments, high and irrecoverable costs as well as the non-enforceability of judgments.<sup>254</sup>

139. The Claimant quotes Transparency International’s 2007 and 2008 Global Corruption Reports which highlight the constant political interference in the judiciary in Paraguay and the general lack of trust due to nepotism and corruption.<sup>255</sup> It also cites the United States Agency for International Development which concluded in its 2004 Report that there is a “general consensus” that Paraguay’s court system was corrupt.<sup>256</sup> The Claimant also referred to Human Rights Report for Paraguay for 2011 of the US State Department which found that

“[t]he constitution provides for an independent judiciary; in practice, however, political interference seriously compromised that independence”.<sup>257</sup>

140. The Claimant further asserts that a civil suit before Paraguay’s courts would have cost it more than US\$ 6 million,<sup>258</sup> that it would take a court of first instance between 3 and 15 years to decide the dispute and four further years for the dispute to be resolved on appeal. The Claimant contended that this statement was not contested by the Respondent,<sup>259</sup> and that any potential judgment finding against the State would not be enforceable because in accordance with Articles 530 and 716 of the Paraguayan Civil Procedure Code the judgment can only be communicated to the Ministry of Finance so that payment is foreseen in the annual State budget.<sup>260</sup>

141. The Claimant alleges that there have been clear changes in the Paraguayan court

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<sup>253</sup> Hearing on the Merits, 5-7 July 2011, Transcript, p. 91.

<sup>254</sup> BIVAC Post-Hearing Brief, paras. 115-129; BIVAC Memorial, para. 251; BIVAC Reply, paras. 129 and 138.

<sup>255</sup> Transparency International, Global Corruption Report 2007, “Politics and nepotism plague Paraguay’s courts”, 2007, Exhibits CE-135 and CE-137, pp. 257-258 and Transparency International, Global Corruption Report 2008, “Politics and nepotism plague Paraguay’s courts”, 2008, pp. 174-176. BIVAC Post-Hearing Brief, paras. 120 and 121.

<sup>256</sup> USAID, An Assessment of Corruption in Paraguay, October 2004, Exhibit CE-146, p. 10; BIVAC Post-Hearing Brief, para. 121.

<sup>257</sup> 2010 US State Department Human Rights Report – Paraguay, 8 April 2011, Exhibit CE-160; BIVAC Post Hearing Brief, para. 122.

<sup>258</sup> Table of Costs of Paraguayan Court Proceedings, Exhibit CE-161(Annex 2 to BIVAC Post – Hearing Brief); BIVAC Post-Hearing Brief, para. 123; BIVAC Reply, para. 129.

<sup>259</sup> BIVAC Post-Hearing Brief, para. 124.

<sup>260</sup> *Ibid*, paras. 125-128.

system between 1996, when the Contract was signed, and 2006, when it initiated the arbitration.<sup>261</sup> The following dialogue during the hearing is instructive:

“MR. FORTIER: Okay. Now, you took us through the chronology of the factual matrix which brought about decisions by the claimant, and you reminded us that the contract was signed, in 1996, with the clause 4 and 9.1. You situated us in 2002 when the Comptroller's report was issued, that, in effect, said:

‘Valid contract, BIVAC has performed its obligations under the contract. And any criticism is unfounded,’ I think was the word which you focused on at one point earlier this morning.

This was in 2002. And then between 2002 and the time in 2006 when you elected to file a request for arbitration before ICSID, you reminded us of the crescendo of statements by the new president, who came into office in, I think, in August of 2003.

MR. BLACKABY: Correct.

MR. FORTIER: And you described --with a number of exhibits, you described what you represent demonstrates the lack of impartiality of the judiciary under the reign of President ‘Duarte.’

MR. BLACKABY: President Frutos.

MR. FORTIER: [...] I understood you to say you have to focus on the lack of independence of the judiciary and the corruption prevalent in Paraguay as of the point in time when BIVAC took the decision to exercise its rights under the treaty. Correct?

MR. BLACKABY: Yes, I mean, we are trying to explain the decision.

MR. FORTIER: But it was the snapshot is the situation of the judiciary, its lack of independence, as of the time that you took that decision.

MR. BLACKABY: Correct.

MR. FORTIER: Do we have evidence in the record as to what the situation was when the contract was signed in 1996 as to the independence or lack thereof of the judiciary in Paraguay at that moment in time?

MR. BLACKABY: I think there is nothing specific. I mean, the Transparency International reports don't go back that far, and the elements which we gave to you go back to 2002.

In 1996, I mean, the only thing one can state is that, with regard to what happened with the purge – I think you can call it that – in 2003 by the president of the Supreme Court, inevitably, that was a consequence of a clash between the powers.

But beyond that, with regard to the situation in 1996, you know, the key issue – I guess the more immediate issue for BIVAC was that the very president who had publicly repudiated the debt was the one who had just nominated six out of the nine members of the Supreme Court, and that, therefore, entering into a system which the ultimate destination would be before that court, you know, was not – that was not something that had occurred before 2003.

MR. FORTIER: And that you represented to us drove your – the claimants’ decision to resort to an allegation of treaty breach.

MR. BLACKABY: I think in any event, you know, in terms of the conduct that we saw here, we believe that the treatment which we had received was a breach – was a breach of the treaty under various heads.”<sup>262</sup>

142. The Claimant has submitted further evidence in this regard and cites a Paraguayan newspaper article reporting that in 2003 the newly elected President Duarte threatened

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<sup>261</sup> *Ibid.* para. 115.

<sup>262</sup> Hearing on the Merits, 5-7 July 2011, transcript, pp.538-541.

“to pulverize the judiciary.” The Claimant asserts that according to a report of Transparency International, shortly thereafter 7 of the 9 judges of the Supreme Court were removed from office and replaced by new members who

“were professionals with lower-grade qualifications and experience than those replaced, giving the impression that the president had all along intended to create a more pliable Supreme Court.”<sup>263</sup>

BIVAC concludes that local remedies would thus have been futile considering the serious deficiencies in the Paraguayan court system and the repudiatory attitude of the President in 2006, who at the same time had uncontested power to interfere with judicial proceedings.<sup>264</sup>

#### 4.3.1.6. Losses Caused by Paraguay’s Conduct

143. According to the Claimant, Paraguay’s conduct has prevented the payment of the debt in its entirety for over a decade and is therefore a proximate and direct cause of BIVAC’s full loss.<sup>265</sup> The Claimant notes that under international law the causal link between the conduct and the loss must be “sufficient”,<sup>266</sup> “adequate”,<sup>267</sup> or “proximate”,<sup>268</sup> or the loss must be “attributable to the wrongful act and foreseeable”.<sup>269</sup> The Claimant argues that these requirements are fulfilled in the present case as “the loss sustained by BIVAC was a direct consequence of the failure to act transparently and in good faith in its treatment of the debt, which was not so paid due to Paraguay’s conduct in breach of FET”<sup>270</sup> and because “[t]he government knew their conduct would result in the State capturing the full amount of the debt owed to BIVAC.”<sup>271</sup>

144. The Claimant notes that its loss “is inextricably tied to the conduct of Paraguay over

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<sup>263</sup> Transparency International, Global Corruption Report 2008, Paraguay, 2008, Exhibit CE-137, p. 174; BIVAC Post-Hearing Brief, para. 118.

<sup>264</sup> BIVAC Post-Hearing Brief, para. 129; BIVAC Memorial, para. 251;

<sup>265</sup> BIVAC Reply, para. 139; BIVAC Post-Hearing Brief, para. 132.

<sup>266</sup> *SD Myers v. Canada*, Second Partial Award, 21 October 2002, paras. 140 and 159 [hereinafter, *SD Myers v. Canada*].

<sup>267</sup> *Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, para. 194 [hereinafter, *Feldman v. Mexico*].

<sup>268</sup> *LG&E v. Argentina* (ICSID Case No. ARB/02/1), Award, 25 July 2007, para. 50 [hereinafter, *LG&E v. Argentina*].

<sup>269</sup> *Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Award, 31 May 1990, para. 172 [hereinafter, *Amco v. Indonesia*]; see also Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Articles 31; *SD Myers v. Canada*, para. 317; and *CME v. Czech Republic* para. 585; *Kardassopoulos and Fuchs v. Georgia*, para. 469.

<sup>270</sup> BIVAC Post-Hearing Brief, para. 135-137; the Claimant relies on *Kardassopoulos and Fuchs v. Georgia*, paras. 469, 459, 534; *Rumeli v. Kazakhstan*, paras. 748, 793; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (PCA Case No. 34877), Partial Award on the Merits, 30 March 2010, paras. 375 and 377-378 [hereinafter, *Chevron v. Ecuador*].

<sup>271</sup> BIVAC Reply, para. 140.

the last decade, not only to its failure to pay in 1999 when the Contract was terminated; “[a]rbitral tribunals do not trace losses back to particular acts or omissions, rather, what matters is the injury flowing from “the whole of the conduct.”<sup>272</sup> According to the Claimant, the Tribunal is therefore required “to award to BIVAC the full amount of the debt plus interest” in order to restore it to the position it would have been in had the debt been dealt with fairly and equitably.<sup>273</sup>

#### 4.3.1.7. The Calculation of Damages

145. Claimant asserts that Paraguay owes BIVAC compensation for the principal amounts set out in the unpaid invoices amounting to US\$ 22,016,142. BIVAC notes that Paraguay has not denied the face value of the invoices.<sup>274</sup>

146. According to the Claimant, it is also entitled to a payment of interest in the present case. BIVAC refers to the *Vivendi* case where the tribunal held that the liability to pay interest to an injured claimant, as a form of compensation for the loss of use and disposition of the money due, is now “an accepted legal principle.”<sup>275</sup>

147. The Claimant further argues that interest rate to be applied is that of Dutch commercial transactions because this rate has the closest connection to the present case and to the commercial reality. According to the Claimant, it is far more likely that the sums owed to BIVAC would have been invested in the Netherlands rather than in Paraguay, considering the fact that BIVAC BV is a Dutch corporation that routinely transacts business in the Netherlands and payments under the Contract were made to BIVAC’s Dutch bank account.<sup>276</sup> The Claimant also argues that the Treaty supports this conclusion, since its provision on expropriation refers to interest “at a normal commercial rate,”<sup>277</sup> which is better reflected in the Netherlands’ rate than in

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<sup>272</sup> The Claimant refers to *Eureka v. Poland*, para. 227; *Saluka v. Czech Republic*, para. 497; BIVAC Reply, para. 141.

<sup>273</sup> BIVAC Post-Hearing Brief, para. 138.

<sup>274</sup> BIVAC Reply, para. 144; Paraguay Counter-Memorial, paras. 28 and 170-171.

<sup>275</sup> *Vivendi II v. Argentina*, para. 9.2.3. The Claimant also refers to *Islamic Republic of Iran v. United States of America* (Iran-United States Claim Tribunal Case No. A19), Decision, 30 September 1987 16 Iran-US CTR 285, para. 12 (CL-120) [hereinafter, *Iran v. USA*]; and J Gotanda, “Awarding Interest in International Arbitration,” (1996) 90 AJIL 40, (CL-122), p. 3. See BIVAC Reply, para. 147.

<sup>276</sup> BIVAC Post-Hearing Brief, para. 140; BIVAC Reply, para. 147.

<sup>277</sup> Treaty, Article 6, Exhibit CE-66.

Paraguay's rate, considering the latter's "uneven commercial and macroeconomic conditions." The Claimant adds that this has been the practice of the Iran-US Claims tribunal<sup>278</sup> as well as other ICSID tribunals.<sup>279</sup>

148. Moreover, the Claimant submits that a commercial rate of interest compounded annually should be applied to each of the unpaid invoices from the date they became due until the date of payment.<sup>280</sup> First, according to the Claimant, the award of compound interest is usual practice under international law.<sup>281</sup> Second, the Claimant disputes Paraguay's argument that "the award of compound interest violates Paraguayan law."<sup>282</sup> According to Article 27 of the Vienna Convention on the Law of Treaties, the Claimant submits that Paraguay cannot rely on its domestic laws to avoid its international obligations to pay interest on the sum due.<sup>283</sup>

149. Thus, applying the legal interest rates for Dutch commercial transactions, compounded annually on the principal amounts, the Claimant argues that BIVAC's loss amounted to US\$ 63,969,775.13.<sup>284</sup>

150. With respect to the quantum, the Claimant refutes Paraguay's view that "BIVAC failed to take reasonable steps to reduce the losses it suffered from Paraguay's alleged wrongful actions."<sup>285</sup> According to the Claimant, this argument is unfounded in law and is not supported by the evidence. In the Claimant's view:

"[...] a contracting party such as BIVAC has the legitimate expectation that the other party (here Paraguay) will perform its side of the bargain unless and until it is informed otherwise. At no stage during performance did Paraguay

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<sup>278</sup> The Claimant refers to *Sylvania Technical Systems v. Iran*, Award, (27 June 1985), CL-119, p. 13 [hereinafter, *Sylvania v. Iran*] in which the Tribunal awarded a U.S. company "the average rate of interest on six-month U.S. certificates of deposit".

<sup>279</sup> The Claimant refers to cases under the US/Argentina BIT which "have consistently awarded US claimants the interest rate applicable to either short-term US Treasury Bills or six-month certificates of deposit": *LG&E v. Argentina*, para. 102; *CMS v. Argentina*, para. 471; *Azurix v. Argentina*, para. 440; BIVAC Reply, para. 148.

<sup>280</sup> BIVAC Memorial, para. 256.

<sup>281</sup> BIVAC Post-Hearing Brief, para. 140; BIVAC Reply, para. 151. The Claimant refers e.g. to *Pope & Talbot v. Canada*, Award in respect of damages, 31 May 2002, para. 89 [hereinafter, *Pope & Talbot v. Canada*, Damages]; and cites J Gotanda, "Compound Interest in International Disputes," (2004) Oxford U Comparative L Forum, 1, Part V, (Legal Authority CL-124), p. 19. The Claimant also relies on awards which seem to apply specifically to "expropriation cases": see *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, (ICSID Case No. ARB/99/6), Award, 12 April 2002, paras. 174-175 [hereinafter, *Cement Shipping v. Egypt*], where the Tribunal held that "compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases."

<sup>282</sup> Paraguay Counter-Memorial, para. 172.

<sup>283</sup> BIVAC Reply, para. 150.

<sup>284</sup> BIVAC Post-Hearing Brief, para. 141.

<sup>285</sup> Paraguay Counter-Memorial, paras 175-176; BIVAC Reply, para. 152.

inform BIVAC that it would cease all payments. There is no rule whereby the performing party has to save a defaulting party from the financial consequences of its own unlawful acts. Further, it is not true that BIVAC ‘passively sat back and decided to let the debt mount each month.’ The evidence is uniform: a sustained – and costly – effort by BIVAC to secure payment.”<sup>286</sup>

#### **4.3.2. The Respondent’s Position**

151. The Respondent rejects the Claimant’s allegations and legal arguments and asserts that Paraguay has not breached Article 3(1) of the Treaty. It contends that the applicable FET standard is reflected in customary international law and that Paraguay has not violated this standard (4.3.2.1). Paraguay argues that even if the Tribunal were to accept the Claimant’s interpretation of the standard, Paraguay still cannot be held to have violated it because it has not acted arbitrarily, lacking transparency and due process, negligently and inconsistently, in bad faith, and has neither repudiated the debt nor breached BIVAC’s legitimate expectations (4.3.2.2). The Respondent insists that the relationship between Paraguay and BIVAC was commercial in nature and not obstructed by governmental power (*‘puissance publique’*) (4.3.2.3). It also asserts that Paraguay has not taken “measures” and that what it did was not unreasonable and did not impair BIVAC’s investment (4.3.2.4). Moreover, the Respondent insists that the dispute must be resolved by the sovereign courts of Paraguay as contractually convened (4.3.2.5). Finally, the Respondent submits that Paraguay’s conduct was immaterial to BIVAC’s losses (4.3.1.6) and that BIVAC cannot claim contractual damages for alleged breaches of a treaty provision, let alone compound interest at Dutch rates and that damages were not mitigated by Claimant (4.3.2.7).<sup>287</sup>

##### **4.3.2.1. No violation of the Fair and Equitable Treatment Standard as Defined by Customary International Law**

152. The Respondent alleges that the FET clause in the BIT incorporates the international minimum standard under customary international law. The Respondent contends that Paraguay<sup>288</sup> and the Netherlands<sup>289</sup> each intended the FET standard to

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<sup>286</sup> *Ibid.*, para. 153.

<sup>287</sup> Paraguay Counter-Memorial, paras. 22-140 and 154-178; Paraguay Rejoinder, paras. 25-200; and Paraguay Post-Hearing Brief, paras. 7-134.

<sup>288</sup> Paraguay Rejoinder, paras. 79-80. As evidence relating to itself, the Respondent cites Paraguay’s membership in Group 77 and its own interpretation of fair and equitable treatment for the purposes of the present arbitration. See Joint Declaration of

refer to the international minimum standard.<sup>290</sup> In addition to the intention of the Parties themselves, the Respondent argues that States, including NAFTA parties such as United States<sup>291</sup> and Canada, and non NAFTA parties such as Switzerland<sup>292</sup> have generally adopted the customary international law minimum standard of FET in bilateral treaties,<sup>293</sup> even where the treaty itself does not expressly refer to customary international law. Indeed, the NAFTA Free Trade Commission issued an official binding interpretation of the FET standard recognizing that “the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard”.<sup>294</sup> The Respondent submits that this interpretation has been applied in subsequent tribunal awards.<sup>295</sup> The Respondent also notes that tribunals outside NAFTA have found that the fair and equitable treatment standard incorporates the international minimum standard,<sup>296</sup> while groups such as the International Law Association noted that the fair and equitable treatment clause is an example of treaty practice.<sup>297</sup>

153. The Respondent further alleges that customary international law is “applicable in the relations” between Paraguay and the Netherlands, as nothing in the Treaty or in the evidence before the Tribunal demonstrates the existence of a contrary intent.<sup>298</sup> The

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the Seventy-Seven Developing Countries Made at the Conclusion of the U.N. Conference on Trade and Development, (15 June 1964), (RL-44); Stephen Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice”, (1999) Brit. Y.B. Int’l L., pp. 99 and 140 (CL-109); Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States”, (2010) Am. J. Int’l L. 104, at pp. 179 and 217, (RL-45).

<sup>289</sup> Paraguay Rejoinder, para. 81. As evidence relating to the Netherlands, the Respondent cites Netherlands’ membership in the OECD and voting in favour of adopting the Draft Convention on the Protection of Foreign Property, which included an FET clause which the commentary to the Convention defined “the standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law.” OECD Draft Convention on the Protection of Foreign Property, Art. 1, cmt. 4(a), (RL-46).

<sup>290</sup> Vienna Convention on the Law of Treaties, Art. 31(4), (“[a] special meaning shall be given to a treaty term if it is established that the parties so intended”).

<sup>291</sup> 2004 U.S. Model BIT, Article 5 and Annex A, (RL-51). Paraguay Rejoinder para.85.

<sup>292</sup> For Switzerland, see Respondent Rejoinder, paras. 87-88. The Respondent cites Swiss Ministry of Foreign Affairs and Swiss Federal government statements from 1979 to the effect that FET clauses in BITs incorporate customary international law even though its treaties do not explicitly refer to custom or international law in general. 36 *Annuaire Suisse de Droit International* 174, 178, (1980), (RL-52); *Message concernant les accords de promotion et de protection réciproque des investissements avec le Kenya et la Syrie* (16 January) 2008, *Feuille Fédérale Suisse* No. 6, p. 903 and 906, (2008), (RL 53).

<sup>293</sup> Paraguay Rejoinder, paras. 82-83, see footnote 96 to Paraguay Rejoinder para 83 for history, commentary and legal authorities.

<sup>294</sup> Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31 2001, p. 2, (RL-26).

<sup>295</sup> *Pope & Talbot v. Canada*, Damages, para. 51; *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, 22 November 2002, para. 97 [hereinafter, *UPS v. Canada*]; Paraguay’s Counter - Memorial para.78.

<sup>296</sup> *Parkerings v. Lithuania*, para. 315. Paraguay’s Rejoinder para. 89.

<sup>297</sup> Int’l Law Ass’n, Comm. on Formation of Customary (General) Int’l Law, Statement of Principles Applicable to the Formation of General Customary International Law, para. 43, (2000), (RL-50).

<sup>298</sup> The Respondent refers to interpretations of Article 31(3)(c) of the Vienna Convention on the Law of Treaties by various Tribunals: the ICJ, the Iran-U.S. Claims Tribunal, and investor-State Tribunals have interpreted undefined and ambiguous



Respondent disputes Claimant's position that the FET clause requires the Tribunal to apply its own notions of fairness and equity. The Respondent alleges that BIVAC's exclusive reliance on tribunal awards ignores the history of the international minimum standard and the consistent expressions by States, which recognize that the FET standard incorporates the international minimum standard.<sup>299</sup>

154. The Respondent further disagrees with BIVAC's interpretation of the awards in *Pope & Talbot*,<sup>300</sup> *Mondev*,<sup>301</sup> and *Azurix*,<sup>302</sup> as a rejection of the minimum standard. Instead, the Respondent argues that the tribunal in *Pope & Talbot* subsequently confirmed the binding nature of the minimum standard interpretation in the award for damages, and that while the tribunal in *Mondev* observed that the FET standard in NAFTA could not exceed customary international law, and the tribunal in *Azurix* interpreted a violation of the FET standard as "conduct below international standards."<sup>303</sup> In addition, the Respondent disagrees with the Claimant's position that the fair and equitable treatment standard in the BIT can be interpreted through reference to dictionaries, noting that such an approach has been rejected by tribunals because it does not provide a defined legal standard.<sup>304</sup> The Respondent also alleges that the Claimant's approach subverts the purpose of the "Vienna Convention on the Law of Treaties which in reality makes clear that background principles of customary international law supply the definition of treaty terms when that is the intent of the treaty parties."<sup>305</sup> Finally, the Respondent argues that the Claimant's proposed analysis is contrary to the ICSID Convention and transforms a legal term with a defined meaning in customary international law into an implicit consent for arbitrators to decide *ex aequo et bono*, a standard to which no

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treaty terms to incorporate their meaning from customary international law pursuant to Art. 31(3)(c). See: *Oil Platforms (Iran v. U.S.)*, 2003 ICJ Rep. p.161, at p.182 (para. 41). (6 November 2003); *Islamic Republic of Iran v. United States*, Case No. A/18, Iran-U.S. Claims Tribunal, Decision No. DEC-32-A18-FT (6 April 1984), para. 6, (RL-57); *Micula v. Romania*, (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, 24 September 2008, para. 87 [hereinafter, *Micula v. Romania*]; *Saluka v. Czech Republic*, para. 254; and Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law", 1 Yale Hum. Rts & Dev. L.J., (1998), pp. 85, 87, (noting that Art. 31(3)(c) can reconcile customary international law with treaty norms), (RL-58); cf. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, ICJ Rep. 1985, p. 246, at p. 291 (para. 83), (holding that multilateral treaties must be read against the background of customary international law). Paraguay Rejoinder, para. 94.

<sup>299</sup> Paraguay Rejoinder, para. 90.

<sup>300</sup> *Pope & Talbot Inc v. Canada*, Respondent Counter – Memorial, para. 76.

<sup>301</sup> *Mondev v USA*, para. 125. Counter – Memorial, para. 78.

<sup>302</sup> *Azurix v. Argentina*, para. 372; Paraguay Counter – Memorial, para. 79.

<sup>303</sup> Paraguay Counter-Memorial, para. 79.

<sup>304</sup> Paraguay Rejoinder, para. 76; see e.g., *Saluka v. Czech Republic*, para. 297, ("The 'ordinary meaning' of the 'fair and equitable treatment' standard can only be defined by terms of almost equal vagueness."); and *Sue, v. Argentina*, para. 213, ("[A]nalyzing the ordinary meaning of the terms 'fair and equitable treatment' as they are used in the two BITs applicable to the present dispute yields little additional enlightenment.") Paraguay Rejoinder para. 92.

<sup>305</sup> Paraguay Rejoinder, para. 76.

State would agree.<sup>306</sup>

155. According to the Respondent, the content of the minimum standard of treatment under customary international law may differ depending on the context or State conduct in question. However, the burden to prove that a specific rule has been breached rests with the Claimant.<sup>307</sup> Irrespective of the application of context-specific rules or a general standard, BIVAC has not proven that Paraguay breached such standard of FET.<sup>308</sup>

156. According to the Respondent, if a general standard of treatment applies, that standard remains the one expressed in the *Neer* case, which states:

“[T]he treatment of an alien, in order to amount to an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>309</sup>

The Respondent disputes the Claimant’s allegation that *Neer* has been almost universally rejected as a statement of the current international minimum standard of treatment of foreign investors. The Respondent considers that the Claimant’s position relies on evidence from scholars<sup>310</sup> and arbitrators, but it is only States that can create

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<sup>306</sup> Paraguay Counter-Memorial, para. 75; Black’s Law Dictionary, p. 581, (7th ed. 1999), (RL-56); ICSID Convention, Article 42(3). Indeed, the ordinary-meaning approach that BIVAC advocates would conflict with the ICSID Convention, which only permits a decision *ex aequo et bono* if the parties specifically consent.

<sup>307</sup> *Tradex Hellas S.A. v. Republic of Albania*, (ICSID Case No. ARB/94/2), Award, 29 April 1999, para. 74 [hereinafter, *Tradex v. Albania*]; *Glamis Gold v. United States*, para. 601; *ADF Grp., Inc. v. United States*, (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003, para. 185 [hereinafter, *ADF v. USA*]; Paraguay Rejoinder para. 96

<sup>308</sup> Paraguay Rejoinder, paras. 97-101.

<sup>309</sup> *Neer v. Mexico*, paras. 61-62, (RL-27). See also OECD, Fair and Equitable Treatment Standard in International Investment Law, pp. 11-12, Working Papers on Int’l Invest., (2004), (noting the positions of the United States, Mexico, and Canada that the *Neer* standard remains the test but that what violates the test could have evolved since the 1920s), (RL-62). It appears, based on the authorities cited above, that the United States accepts the *Neer* test as a statement of customary international law as to the requirement to provide a minimum level of security and perhaps as to the obligation not to deny justice; *Glamis Gold v. USA*, para. 601 (noting that Mexico and Canada agreed that the *Neer* test represented customary international law, although Mexico also stated that “conduct which may not have violated international law [in] the 1920s may very well be seen to offend internationally accepted principles today”); Counter-Memorial of Canada, *Mobil Invs. Canada Inc. v. Canada*, (ICSID Case No. ARB(AF)/07/4), 1 December 2009, para. 247 and footnote 364 [hereinafter, *Mobile v. Canada*] (stating that “[t]he Glamis Tribunal [which relied on *Neer*] summarized the minimum standard of treatment as it currently exists under customary international law,” but that the standard is not frozen as of the time of the *Neer* award because what may be considered shocking or egregious today might be different from what was shocking or egregious in the 1920s), (RL-63); *Cargill, Inc. v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, para. 272 [hereinafter, *Cargill v. Mexico*], (“In the case of the customary international law standard of ‘fair and equitable treatment,’ the Parties in this case and the other two NAFTA State Parties agree that the customary international law standard is at least that set forth in the 1926 *Neer* arbitration.”); *Vivendi II v. Argentina*, para. 6.6.3; and *Saluka v. Czech Republic*, para. 290. Paraguay Rejoinder, paras. 102 - 103.

<sup>310</sup> J. Paulsson and G. Petrochilos, “*Neer*-ly Mised”, (2007), ICSID Review: Foreign Invest. L.J. p. 242, 243, 246, (CL-125). Paraguay Rejoinder, para. 107.

customary international law by means of State practice and *opinio juris*.<sup>311</sup> Thus, whether or not scholars and arbitrators had the intention to set out a general standard is irrelevant to the question of the existence of such a standard.<sup>312</sup> Additionally, “[a]s a matter of State practice, the United States, Canada, Mexico, Argentina and the Czech Republic have expressly accepted that *Neer* represents contemporary customary international law.”<sup>313</sup> Further, the “ICJ, the Iran-U.S. Claims Tribunal, and investor-State tribunals have interpreted undefined and ambiguous treaty terms to incorporate their meaning from customary international law pursuant to Article 31(3)(c).”<sup>314</sup> The Respondent further disputes the relevance of each award cited by the Claimant, alleging that they make little effort to investigate State practice; that they contain no analysis of official State positions; make no mention of domestic judicial decisions; and that they mostly rely on awards of other arbitral tribunals instead of State practice to construe the FET standard.<sup>315</sup>

157. “The [minimum] standard originated to protect foreigners against local legal systems that did not provide basic justice and equity”<sup>316</sup> and [international intervention] is warranted

“when a sovereign State abuses its governmental authority in such a manner that the international community finds shocking or outrageous. A commercial act, like nonpayment of a debt, will rarely, if ever, meet this threshold.”<sup>317</sup>

158. The Respondent denies that the alleged breach of Contract through failure to pay the debt, coupled with unsatisfactory responses to requests for payment, violates the

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<sup>311</sup> *Military and Paramilitary Activities in and around Nicaragua*, (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Rep. 1986, p. 14, at p. 97 (para. 183) [hereinafter, *Nicaragua v. United States of America*]; *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, ICJ Rep. 1985, p. 13, at p. 29 (para. 27) [hereinafter, *Libyan Arab Jamahiriya v. Malta*]; and *Glamis Gold v. USA*, para. 605 (“Arbitral awards [...] do not constitute State practice and thus cannot create or prove customary international law.”). Paraguay Rejoinder para. 105.

<sup>312</sup> Paraguay Rejoinder, para. 108.

<sup>313</sup> *Ibid.*, para. 103 (footnotes omitted).

<sup>314</sup> Paraguay Rejoinder, para. 94; the Respondent refers to *Oil Platforms (Iran v. U.S.)*, ICJ Rep. 2003, p.161, at p. 182, (para. 41); *Islamic Republic of Iran v. United States*, (Case No. A/18), (Iran-U.S. Claims Tribunal, Decision No. DEC-32-A18-FT), (6 April 1984), at 6, (RL-57); *Micula v. Romania*, , para. 87; *Saluka v. Czech Republic*, para. 254; and Philippe Sands, “Treaty, Custom and the Cross-fertilization of International Law”, (1998), 1 Yale Hum. Rts & Dev. L.J. 85, 87, (noting that Article 31(3)(c) can reconcile customary international law with treaty norms), (RL-58); cf. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, 1984 ICJ Rep.246, 291 (para. 83), (holding that multilateral treaties must be read against the background of customary international law).

<sup>315</sup> Paraguay Rejoinder, paras. 110-123. Legal Authorities for which Respondent disagrees with Claimant’s interpretation: *Mondev v. Canada*, paras. 115-116; *Azurix v. Argentina*, paras. 368, 372; *Siemens v. Argentina*, para. 299; *Merrill & Ring Forestry, L.P. v. Canada*, (UNCITRAL), Award, 31 March 2010, para. 210 [hereinafter, *Merrill v. Canada*]; *German Settlers in Poland*, Advisory Opinion, 1923 PCIJ. (ser. B), No. 6, pp. 6-7; *Aboilard* case, 11 R.I.A.A. pp. 71, 75 (1905); *Brown (U.S.) v. Great Britain*, 6 R.I.A.A. 120, paras. 121-26, (1923); *Lalanne & Ledourc*, 10 R.I.A.A. 17, para 17, (1902).

<sup>316</sup> Paraguay Rejoinder, para. 123.

<sup>317</sup> *Ibid.*, para. 124.

international minimum standard under the Contract:

“Where, as here, a claim is based on a breach of contract and the State does not use its executive, legislative, or judicial power to nullify rights under the contract, it does not engage in the level of conduct that warrants international intervention pursuant to customary international law. The BIT parties surely did not expect to be hailed before an international tribunal on a debt-collection matter for which the investor had, but refused, contractual remedies.”<sup>318</sup>

159. The Respondent also disputes the Claimant’s interpretation of the awards in support of its argument on “aggravating factors” and highlights distinctions with the factual situation with respect to choice of law and choice of forum clauses, admissibility of contractual claims and reasonableness of investor’s expectations.<sup>319</sup>

160. The Respondent further objects to BIVAC’s argument

“that, even if the FET Clause reflects customary international law, it protects against conduct that is ‘arbitrary, inconsistent, negligent, unreasonable, in bad faith, opaque and/or repudiatory.’ It also appears to argue that a breach of its legitimate expectations violates customary international law. If the Tribunal concludes that the FET Clause incorporates the international minimum standard, then it is BIVAC’s burden to prove that these factors are part of that standard. None of the factors that BIVAC puts forth as contained in the FET Clause are part of the international minimum standard.”<sup>320</sup>

States have not accepted the various adjectives that BIVAC proffers as components of the international minimum standard. BIVAC does not claim that they have. Instead, it relies exclusively on decisions of tribunals, which did not themselves discuss State practice.”<sup>321</sup>

161. The Respondent asserts that the allegedly unjustified non-payment of the debt and its conduct in the contractual relations with BIVAC cannot be considered shocking or outrageous and therefore cannot be a breach of its obligation of FET as defined by

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<sup>318</sup> *Ibid.*, para. 128.

<sup>319</sup> Paraguay Counter-Memorial, paras. 117-123. Legal Authorities for which Respondent disagrees with Claimant’s interpretation: *Rumeli v. Kazakhstan*, paras. 615, 617-618; *Nykomb Synergetic Technology AB v. The Republic of Latvia*, SCC Arbitration, Award, 16 December 2003, at p. 34. [hereinafter, *Nykomb v. Latvia*],

<sup>320</sup> Paraguay Rejoinder, para. 137; the Respondent relies on: *Asylum (Colombia v. Peru)*, ICJ. Rep 1950, p. 266, at p. 276 [hereinafter, *Asylum*]. (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); *Rights of Nationals of the United States of America in Morocco (France v. United States)*, ICJ Rep. 1952, p. 176, at p. 200 [hereinafter, *Rights of Nationals*]. (quoting *Asylum*); Brownlie, Ian. *Principles of Public International Law*, Fifth Edition (Clarendon Press, Oxford, 1998), at 11 and supra note 134. (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”), (RL-61); *Tradex v. Albania*, para. 74 (“[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim.”); *Glamis Gold v. USA*, para. 601 (holding that Claimant bears the burden of showing that customary international law has evolved beyond *Neer*).

<sup>321</sup> Paraguay Rejoinder, para.138.

customary international law.<sup>322</sup>

#### 4.3.2.2. No violation of the Fair and Equitable Treatment Standard as Defined by Claimant

162. The Respondent further asserts that even if the Tribunal were to apply standard of FET as defined by BIVAC, it has still not been proven that Paraguay had violated its obligations. The Respondent disputes the facts listed by BIVAC in support of its claim and denies that its conduct amounts to a breach of the fair and equitable treatment under any standard. It presents the facts as follows:<sup>323</sup>

- “Paraguay objected to BIVAC’s invoices even before the Parties terminated the Contract. Two months before the mutual termination of the Contract, the Ministry of Finance formally objected to BIVAC’s invoices from June 1997 to December 1997 and from March 1998 due to BIVAC’s failure to comply with the obligations set forth in Section 5 of the Contract;<sup>324</sup> and payments under the Contract started to be withheld as early as 1996;<sup>325</sup>
- report by the Comptroller General of Aduanas on 30 March 1999 where it is reported that BIVAC had not held the training programs required of it by Article 2.9;<sup>326</sup>
- letter to Minister of Finance, dated 22 June 1999, which makes reference to a series of contractual breaches, including failure to provide technical assistance as required by the Contract, inspection of exempt goods, and irregular issuance of CIs in order to generate higher fees;<sup>327</sup>
- report from the Contraloría, dated 25 July 2001, reporting several instances of non-compliance with the Contract and its regulations, such as: (1) the failure to obtain authorized signatures on some CIs; (2) failure to send some documents electronically as required by Resolution 1171/96; and (3) the failure to create the required database, among other problems;<sup>328</sup>
- report from the Ministerio’s internal auditor dated 28 January 2003, which observes several instances of non-compliance, including that exempt merchandise was being inspected at a cost to the State, and failure to provide technical assistance, among

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<sup>322</sup> Paraguay Rejoinder, paras. 123-125, 128 and 137-138; Paraguay Counter-Memorial, paras. 74-80.

<sup>323</sup> Paraguay Counter-Memorial, para. 124; Paraguay Post-Hearing Brief, para. 79.

<sup>324</sup> Exhibit CE-70.

<sup>325</sup> Exhibit RE-15.

<sup>326</sup> Exhibit RE-19.

<sup>327</sup> Exhibit RE-21; (translation: “There is also evidence of bills of lading for amounts higher than \$21,800 that have two, three or more Certificates of Inspection, which, in many cases, do not reach individually the minimum amount. The inspection companies present their assessment as separate inspections, and in cases of convenience they charge the minimum fee, in open contradiction to what is established in Article No. 6, 4th paragraph, which requires in all cases that the inspection company treat these together, when they refer to a single operation.”)

<sup>328</sup> Exhibit CE-95.

others;<sup>329</sup>

- report from Aduanas Director, Margarita Díaz de Vivar, dated 30 March 2005, reporting that clause 2.9 of the Contract was not complied with. Although BIVAC says this Report cleared BIVAC from any wrongdoing, Ms. Vivar's Report observes that BIVAC did not comply with its technology transfer obligations under the Contract;<sup>330</sup>
- The Respondent further states 'that BIVAC failed to screen the PSI requests it received from importers is not in dispute' [...], 'that BIVAC was responsible for ensuring that exempt goods were not inspected' [...] and that 'Paraguay estimates as much as 50% of the certificates of inspection BIVAC issued were undue because they corresponded to Mercosur goods, a material deviation of the stated goals of the Contract (increased revenue) and PSI regulations.'"<sup>331</sup>

163. The Respondent insists that these communications with the Claimant are evidence of a dispute between the parties arising prior to the commencement of the arbitration and refutes the Claimant's allegation that they "constitute *ex post facto* rationalizations to justify not paying BIVAC".<sup>332</sup> Paraguay asserts that the Claimant misrepresents the facts when alleging that the debt was acknowledged by Paraguay or that there was even an agreement reached on its payment. It argues that the Claimant relies on five documents for its allegation and that these five documents are inconclusive:

"The first document is a letter by Minister Zayas dated July 31, 1998 (almost a year before the Contract was terminated), in which Mr. Zayas merely relays the number of invoices pending payment and expresses the desire to pay a third of them and to dispose of the rest (\$12 million out of \$18 million) through a '*concertación de intereses*,' that is, through mutual concessions."<sup>333</sup>

The second document cited by BIVAC is a letter from Minister Zayas dated June 7, 1999, in which Minister Zayas simply gives notice of termination of the Contract. In that letter he makes clear that the termination would not subvert the legal rights and obligations already incurred by both BIVAC and Paraguay. There is no mention of a specific number purportedly owed, much less an acknowledgment of the debt.<sup>334</sup>

The third document relied upon by BIVAC is nothing more than a chart listing the outstanding invoices issued by BIVAC and SGS. The title of the chart itself leaves no doubt that the document in question is not an acknowledgement or admission of the debt: 'invoices pending payment issued by BIVAC, BV until June 1999.' And although the description of the subtotals for each year uses the word '*total adeudado*,' it is a stretch to say that this document is anything other than what its title says: a list of pending

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<sup>329</sup> Exhibit CE-110; (translation: "Exempt goods: Goods that, for a variety of reasons, are exempt from taxes should not have been inspected since this cost creates a loss to the State, which is contrary to the stated goals of the system.")

<sup>330</sup> Exhibit CE-35.

<sup>331</sup> Paraguay Post-Hearing Brief, paras. 80-81 and 84; Paraguay Rejoinder, paras. 10-17.

<sup>332</sup> Paraguay Post-Hearing Brief, para. 78.

<sup>333</sup> Exhibit CE-68.

<sup>334</sup> Exhibit CE-19.

invoices [...].<sup>335</sup>

The fourth document is a letter written by Minister Oviedo-Brítez to BIVAC dated February 13, 2001, in which Minister Oviedo-Brítez is only responding to BIVAC's request for payment. The Minister merely says that he assumes that the Contract was duly performed and that an investigation is ongoing. He makes no statement that unequivocally states the position of the Ministry or the government that BIVAC is due all that it claims is owed.<sup>336</sup>

70. Finally, BIVAC relies upon a letter dated April 19, 2004, by Minister Miguel Gómez. In that letter Minister Gómez states that he is working on finding a solution for the claimed amounts, including a schedule of payments that is in accordance with the financial possibilities of the Paraguayan State, and then requests a new meeting with BIVAC's representatives in order to negotiate the outstanding invoices. This is not an unequivocal promise to pay the debt, as BIVAC claims. It is a letter setting parameters of a settlement negotiation.<sup>337</sup>

The other letters BIVAC cites are instances where Paraguay attempted to resolve the outstanding invoices amicably, first by offering half of the amounts outstanding and then by offering to pay in government bonds.<sup>338</sup> These statements simply cannot be used by BIVAC as evidence that the debt is undisputed. They are statements in the course of settlement negotiations, and under international law they cannot in good faith be relied upon by BIVAC to show that the amounts are owed."<sup>339</sup>

164. As to the Report by the Comptroller General of 4 October 2002 on which BIVAC relies, the Respondent submits that it is a technical opinion in response to a request by the Minister, a "*Dictamen*" according to Paraguayan administrative law without any legally binding force. It cannot be interpreted as a document acknowledging Paraguay's debt.<sup>340</sup>

165. In light of these facts, the Respondent submits that Paraguay's conduct does not violate the FET standard as defined by BIVAC because it is not arbitrary (4.3.2.2.1); is transparent and in accordance with due process (4.3.2.2.2); is diligent and consistent (4.3.2.2.3); and in good faith (4.3.2.2.4). The Respondent also contends that it did not repudiate the debt (4.3.2.2.5) nor did it breach BIVAC's legitimate expectations (4.3.2.2.6).

#### 4.3.2.2.1. No Arbitrariness

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<sup>335</sup> Exhibit CE-22.

<sup>336</sup> Exhibit CE-92.

<sup>337</sup> Exhibit CE-31.

<sup>338</sup> Exhibits CE-73 and CE-75.

<sup>339</sup> Paraguay Post-Hearing Brief, paras. 66-71

<sup>340</sup> Paraguay Post-Hearing Brief, paras. 72-77; Paraguay Rejoinder, para. 175; Paraguay Counter-Memorial, para. 31.

166. The Respondent rejects that arbitrariness is part of the fair and equitable treatment standard,<sup>341</sup> yet at the same time and without expressing any reservations, it cites the awards in *Parkerings v. Lithuania* and *Pantechniki v. Albania* which have both held that arbitrariness and breach of contract may constitute unfair and inequitable treatment.<sup>342</sup> Be that as it may, the Respondent denies the allegation that its conduct was arbitrary. It reiterates that the commissions and reports were only internal measures that did not impair the Claimant's rights and that its refusal to pay the invoices was valid because BIVAC had not complied with its contractual obligations regarding the creation of a database, the provision of technical assistance, and compliance with the regulatory scheme. The economic reality of the Contract, which cost Paraguay more than it was able to recover in taxes, must equally be taken into consideration.<sup>343</sup>
167. The Respondent relies on the ICJ's decision in *ELSI*,<sup>344</sup> to the effect that its conduct was not arbitrary insofar as the Claimant has never been precluded from pursuing legal remedies before the courts of Asunción, as provided for under the Contract. The Respondent contends that those legal remedies were available to BIVAC at any point since 1997 for the alleged non-payment of the debt and allegedly wrongful commissions and investigations.<sup>345</sup>
168. Furthermore, the Respondent denies that the finding of arbitrariness in *Siemens v. Argentina* applies to the present case.<sup>346</sup> In *Siemens*, Argentina acted so as to frustrate the purpose of the contract and the investor's legitimate expectation by not providing an authorization needed by the investor. Paraguay contends that in the present case it did not change any regulation or requirement to make BIVAC's performance more difficult or impossible.<sup>347</sup>

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<sup>341</sup> Paraguay Rejoinder, para. 137.

<sup>342</sup> *Parkerings v. Lithuania*, para 316; *Pantechniki v. Albania*, (ICSID case ARB/07/21), Award, 30 July 2009, para. 87 [hereinafter, *Pantechniki v. Albania*]; Paraguay Post-Hearing Brief, paras. 16 and 35-36.

<sup>343</sup> Paraguay Counter-Memorial, paras. 125, 126 and 130; Paraguay Rejoinder, para. 150.

<sup>344</sup> *ELSI Elettronica Sicula SpA (ELSI)*, (*United States of America. v. Italy*), ICJ Rep. 1989, p. 15 at paras. 128-130, (RL-17) [hereinafter, *ELSI*].

<sup>345</sup> Paraguay Counter-Memorial, paras. 126-128; Paraguay Rejoinder, paras. 150-151.

<sup>346</sup> *Siemens v. Argentina*, Paraguay Counter-Memorial, para. 129.

<sup>347</sup> *Id.*



169. The Respondent relies on *Pantehniki v. Albania*, in which the tribunal held that:

“It is true that arbitrary decisions may constitute unfair and inequitable treatment and that an ICSID tribunal in a general sense has jurisdiction to deal with the merits of such claims. Yet this proposition is immediately defeated if the particular claim of arbitrariness has been voluntarily submitted to another jurisdiction. It transpires on examination that the alleged arbitrariness is said to arise by reason of Albania’s refusal to compensate. That is precisely the issue which the Claimant (to its current regret) took to the Albanian courts. I could not rule on it without violating my own jurisdictional constraints.”<sup>348</sup>

#### 4.3.2.2.2. *Transparency and Due Process*

170. Paraguay refutes BIVAC’s contention of lack of due process for the the same reasons it rejects arguments with regard to arbitrariness:

“BIVAC had an effective legal remedy for both the non-payment and the allegedly wrongful investigations: a contract suit in court. A judicial proceeding – complete with all of the rights of a litigant to present evidence, subpoena and call witnesses, appeal adverse decisions, and enforce a judgment in its favor – is the epitome of due process.”<sup>349</sup>

171. The Respondent further argues that it did not fail to act in a transparent manner. It describes, as undisputed, that the investigations and reports were not conducted secretly and that the results were all communicated to BIVAC. It objects to the allegation that BIVAC was not invited to offer its view of the facts. Paraguay, referring to *Metalclad v. Mexico*, where the tribunal had suggested that transparency requires the unhindered availability of information on laws and regulations with respect to the investment, asserts that the legal regime in Paraguay was incontestably known by Claimant.<sup>350</sup>

#### 4.3.2.2.3. *No Negligence and No Inconsistency*

172. As with arbitrariness, the Respondent also denies that inconsistency and negligence are factors relevant to the FET standard.<sup>351</sup> This being the case, however, it asserts that

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<sup>348</sup> *Pantehniki v. Albania*, para. 87; Paraguay Post-Hearing Brief, paras. 35-36.

<sup>349</sup> Paraguay Rejoinder, para. 151.

<sup>350</sup> *Metalclad v. Mexico*, para. 76; see Paraguay Rejoinder, paras. 153-154;

<sup>351</sup> Paraguay Rejoinder, paras. 137 and 155.

it did not act negligently nor inconsistently.<sup>352</sup> Unlike the respondents' conduct in disputes cited by Claimant, such as *Kardossopoulos*<sup>353</sup> and *PSEG*,<sup>354</sup> where the tribunals had found inconsistent and negligent conduct for procedural and substantial unfairness during the negotiation processes, Paraguay's alleged errors took place in internal, non-binding investigations with no effect on relations with BIVAC. The process of negotiations was therefore not possibly tainted with inconsistencies or negligence.<sup>355</sup>

#### 4.3.2.2.4. No Bad Faith

173. The Respondent denies it acted in bad faith. It alleges that the standard for proving bad faith under international law requires "clear and convincing evidence" that the State engaged in such conduct.<sup>356</sup> In the present case, the Claimant did not show that Paraguay's conduct meets that standard. Paraguay argues that it had "legitimate concerns" with regard to paying BIVAC and that the Tribunal cannot, as the Claimant contends, "infer" bad faith merely from the withholding of payment. Further, relying on the Tribunal's Decision on Objections to Jurisdiction, the Respondent alleges that any allegations of bad faith surrounding non compliance with its contractual obligations are subject to the exclusive jurisdiction of the Paraguayan courts.<sup>357</sup>

#### 4.3.2.2.5. No Repudiation

174. The Respondent assures "that it has never repudiated any of BIVAC's contractual rights, including the right to payment."<sup>358</sup> Paraguay asserts that the Claimant does not contest that investigation results and reports prepared by Paraguayan officials which confirmed a right to payment. With regard to political speeches and communications including former President Duarte's statement, the Respondent contends that although

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<sup>352</sup> Paraguay Counter-Memorial, paras. 134 and 135; Paraguay Rejoinder, paras. 155-157.

<sup>353</sup> *Kardassopoulos and Fuchs v. Georgia*, para. 441. Paraguay Rejoinder, para. 155.

<sup>354</sup> *PSEG v. Turkey*, paras. 242 and 246-252. Paraguay Counter – Memorial para. 134.

<sup>355</sup> Paraguay Counter-Memorial, paras. 134-135; Paraguay Rejoinder, paras. 155-157.

<sup>356</sup> Paraguay Counter-Memorial, paras. 136-138; Paraguay Rejoinder, paras. 158-161. The Respondent relies on the arbitral awards in *Tacna-Arica Question (Chile v. Peru)*, 2 R.I.A.A. 1925 at paras. 921, 930 [hereinafter, *Tacna-Arica*]; *Siemens v. Argentina*,; and *Bayindir v. Pakistan*, para. 143; the Separate Opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company Limited*, Judgment, ICJ Rep. 1970, p. 3, at p. 159 [hereinafter, *Barcelona Traction*]; the ECHR judgment in *Khodorkovskiy v. Russia*, Application No. 5829/04, 31 May 2011, para. 260, (RL-73) [hereinafter, *Khodorkovskiy v. Russia*].

<sup>357</sup> Paraguay Rejoinder, paras. 68-72 and 161; and the Tribunal's Decision on Objections to Jurisdiction, para. 146 (holding 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").

these voiced doubts as to the payment obligations, they also insisted that they would only pay a debt that is clear and/or legally valid. Finally, it argues that Paraguay never closed the door to Paraguayan courts and would have respected a ruling establishing an obligation to pay the debt.<sup>359</sup>

175. The Respondent relies in its assessment on *Waste Management*, *EnCana* and *Parkerings* and quotes the tribunals' decisions:

“[t]he Mayor was not purporting to *exercise legislative authority or unilaterally to vary the contract*. He was not *intervening by taking some extra-legal action*[...]. He was saying what ought to be done, in his view, to allay public concerns which did in fact exist at the time. Individual statements of this kind made by local political figures in the heat of public debate may or may not be wise or appropriate, but they are not tantamount to expropriation *unless they are acted on in such a way as to negate the rights concerned without any remedy*. In fact no action was taken of the kind threatened at the time or later. *Even if it had been taken, the Claimant had remedies available to it, under the Concession Agreement and otherwise.*”<sup>360</sup>

and

“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.*”<sup>361</sup>

and

“Under certain limited circumstances, a substantial breach of a contract might constitute a violation of a treaty. [...] In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract.”<sup>362</sup>

176. The Respondent relies on the dicta in these awards to argue that:

“the failure to pay a contractual debt remains a contract claim, not a treaty claim, when the State leaves open a forum to adjudicate and remedy the alleged breach of contract and does not repudiate the contract by, for example, taking legislative or extra-legal action to eliminate contractual rights or remedies.”<sup>363</sup>

#### 4.3.2.2.6. No Violation of Legitimate Expectations

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<sup>358</sup> Paraguay Post-Hearing Brief, para. 24; Paraguay Rejoinder, paras. 187-192.

<sup>359</sup> Paraguay Post-Hearing Brief, paras. 24 and 28-29.

<sup>360</sup> *Waste Management v. Mexico*, para. 161, (emphasis added by the Respondent).

<sup>361</sup> *EnCana Corp. v. Republic of Ecuador*, (LCIA Case No. UN3481), Award, 3 February 2006, para. 194, (emphasis added by the Respondent) [hereinafter, *EnCana v. Ecuador*].

<sup>362</sup> *Parkerings v. Lithuania*, para. 316.

<sup>363</sup> Paraguay Post-Hearing Brief, para. 30.

177. The Respondent argues that legitimate expectations must be assessed as “at the time of the investment”.<sup>364</sup> According to the Respondent, BIVAC’s legitimate expectations at the time of the Contract were “to perform under the Contract, get paid, or, if insufficient payment was forthcoming, to have the option of stopping performance and suing in the courts of Asunción for contractual breach.” The Respondent contends none of these expectations were frustrated and that BIVAC cannot complain that its legitimate expectations did not materialize when it itself refused to bring a claim to the Paraguayan courts.<sup>365</sup> The Respondent adds that “contractual expectations” are distinct from “expectations as understood in international law” and that remedy for frustration of the former is to seek redress before a national Tribunal, rather than bring a claim for breach of FET in international law.<sup>366</sup>
178. The Respondent disagrees with the argument that the expectation of payment of invoices due under the Contract is the type of expectation protected by the FET standard. Relying on *ELSI*<sup>367</sup> and *Waste Management*,<sup>368</sup> the Respondent notes that while a breach of contract may be against a rule of law, but in itself a breach of contract is not against the rule of law, or international law.<sup>369</sup>
179. The Respondent also argues that the Claimant’s view suggests that the Ministry’s failure to pay BIVAC’s invoices can be considered a breach of the FET standard “as a fall-back provision to its umbrella clause claim.” The Respondent alleges that such an interpretation is at odds with Article 31(1) of the Vienna Convention, which requires that terms of a treaty provision be given their ordinary meaning.<sup>370</sup> The Respondent further distinguishes its actions from the case in *Azurix*: “[b]y contrast, here BIVAC and the Ministerio agreed to terminate the Contract and there is no allegation that any branch of the government tortuously interfered with the Contract” or that Paraguay

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<sup>364</sup> Paraguay Rejoinder, para. 165; Paraguay Post-Hearing Brief, para. 19-20; the Respondent relies on *Bayindir v. Pakistan*, paras. 190-191; *Duke Energy v. Ecuador*, para. 340; and *LG&E v. Argentina*, para. 130.

<sup>365</sup> Paraguay Rejoinder, para 165.

<sup>366</sup> Paraguay Rejoinder, para. 166; Paraguay Post-Hearing Brief, para. 19; the Respondent relies on *Parkerings v. Lithuania*, para. 344.

<sup>367</sup> *ELSI*, paras. 128-130, (RL-17).

<sup>368</sup> *Waste Management v. Mexico*, , para. 115.

<sup>369</sup> Paraguay Counter-Memorial, paras. 82-83.

<sup>370</sup> *Ibid.*, para. 88.

“subvert[ed] the contractual or regulatory framework in a way that frustrated BIVAC’s legitimate expectations.”<sup>371</sup>

180. Finally, the Respondent disputes the Claimant’s allegations that Paraguay’s alleged lack of political continuity affected and deprived BIVAC of its reasonable expectations. First, the Respondent alleges that the Claimant has failed to address the issue of causation, *i.e.* “the nexus between the commissions and reports and the impact those had on BIVAC separate from the purported breach of the Contract itself.” Since BIVAC’s alleged losses materialized at the time its invoices became past due, and well before such commissions and reports were ever initiated, the Claimant’s choice to pursue a non-litigious resolution and its consequences are to be attributed to the Claimant alone.<sup>372</sup> Second, the Respondent alleges that the issue of “political continuity” must be dealt with by looking into the circumstances of the individual case. The Respondent suggests that BIVAC was well aware of the political volatility in Paraguay at the time of Contract, just as the the Claimant in *Bayindir* had been aware.<sup>373</sup>

#### 4.3.2.3. The Alleged Commercial (not Governmental) Conduct

181. The Respondent’s argument rejecting BIVAC’s approach to the breach of Treaty claim is based on the Tribunal’s statement in its Decision on Objections to Jurisdiction “that 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>374</sup> The Respondent alleges that the Claimant has failed to satisfy this test, and that its theories on liability and on damages demonstrate that the claims are fundamentally contractual and that Paraguay’s conduct was not sovereign in nature.

182. The Respondent argues that sovereign acts give rise to sovereign liability in a forum

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<sup>371</sup> *Azurix v. Argentina*, paras. 372 and 374-377; Paraguay Counter-Memorial, para. 89.

<sup>372</sup> Paraguay Counter-Memorial, paras. 91 and 92.

<sup>373</sup> *Bayindir v. Pakistan*, , paras. 192-193; Paraguay Counter-Memorial, para. 94. The Respondent cites evidence of the Claimant’s knowledge of the first democratic elections following a long dictatorship, as well as other events suggestive of political volatility.

for sovereigns, while commercial acts give rise to private liability in a private forum. Only a sovereign State's acts can violate the standard of treatment under the BIT and this view is consistent with the Tribunal's holding in its Decision on Objections to Jurisdiction and a wider *jurisprudence constante*.<sup>375</sup> Consequently, the Respondent argues that a commercial act such as failure to pay a debt due under a contract is not, as such, a breach of international law.<sup>376</sup> The Respondent disagrees with the Claimant's arguments that any act of the state, either *iure imperii* or *iure gestionis*, can violate international law. Instead, the Respondent advances its own interpretation of the authorities cited by the Claimant<sup>377</sup> to argue that the rules surrounding state conduct require an analysis of the sovereign or commercial nature of the State's actions. It refers to modern developments of national and international law which distinguish between public and commercial actions of States on the basis of the nature of the contractual relationship and not to its purpose as Claimant asserts.<sup>378</sup> The Respondent submits that there is no evidence in the present case to allow for the conclusion that the parties to the BIT clearly intended for the BIT to apply to commercial acts, and that such an intention would be required under international law in order to derogate from well established principles.

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<sup>374</sup> Tribunal's Decision on Objections to Jurisdiction, para. 125.

<sup>375</sup> Paraguay Rejoinder, paras. 34-37. The Respondent refers to *Gustav FW Hamester GmbH & Co. KG v. Republic of Ghana*, (ICSID Case No. ARB/07/24), Award, 18 June 2010, paras. 328 and 337 [hereinafter, *Gustav v. Ghana*]; *Burlington Res. Inc. v. Republic of Ecuador*, (ICSID Case No. ARB/08/5), Decision on Jurisdiction, 2 June 2010, para. 204 [hereinafter, *Burlington v. Ecuador*]; *Bayindir v. Islamic Pakistan*, para. 180; *Duke Energy v. Ecuador*, paras. 342-345; *Parkerings v. Lithuania*, paras. 316-317; *Siemens v. Argentina*, para. 53; *Azurix v. Argentina*, para. 315; *Noble v. Romania*, para. 53, (CL-48); *Impregilo v. Pakistan*, paras. 259-262; *Joy Mining Mach. Ltd v. Arab Republic of Egypt*, (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, para. 72 [hereinafter, *Joy Mining v. Egypt*]; *Waste Management v. Mexico*, para. 115, (CL-74); *Consortium R.F.C.C. v. Kingdom of Morocco*, paras. 51 and 100, (RL-16).

<sup>376</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001), at 41, (RL-36); Stephen M. Schwebel, "On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law," in *Justice in International Law*, (1994), 425, at p. 431, (RL-37); see Paraguay Rejoinder, para. 38.

<sup>377</sup> James Crawford, "Treaty and Contract in Investment Arbitration", 6 T.D.M. 1, 6, (CL-116). Paraguay Rejoinder para. 35.

<sup>378</sup> Paraguay Post-Hearing Brief, para. 98; Paraguay Rejoinder, paras. 59-60; the Respondent cites the United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 2(2), (not yet in force), ("In determining whether a contract or transaction is a 'commercial transaction' [...] reference should be made primarily to the nature of the contract or transaction"), (RL-40); *Playa Larga v. I Congreso del Partido*, [1983] 1 A.C. 244, 267 (H.L.), (Lord Wilberforce), ("[T]he court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."), (RL-41); *Ibid.* at 278 (Lord Bridge of Harwich), ("[I]f a sovereign state voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character."); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992), (RL-42) [hereinafter, *Weltover Case*]; *Claim Against the Empire of Iran Case*, 45 I.L.R. at 80, ("As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity."), (RL-38); *Collision with Foreign Government-Owned Motor Car (Austria) Case*, 40 I.L.R. 73, 75-76 (1961) (Austrian S. Ct.), (RL-43) [hereinafter, *Collision Case*]

183. Further, the Respondent argues the Tribunal’s interpretation of the BIT must comply with the principle of *in dubio mitius*, as recognized in international law, which provides that “[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.”<sup>379</sup>
184. Furthermore, the Respondent disagrees with the Claimant’s argument that the cases of *Bayindir*, *Impregilo* and *RFCC*, in which it was held that commercial acts do not violate BIT provisions such as the FET clause, can be distinguished from the circumstances in the present case.<sup>380</sup> The Respondent goes on to allege that the Tribunal must apply the rule in *Waste Management* to the effect that “even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105 [of NAFTA (fair and equitable treatment)], provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.”<sup>381</sup>
185. The Respondent also disagrees with with the Claimant’s interpretation of *Noble Ventures* as a basis for the Tribunal to reconsider its Decision on Objections to Jurisdiction. Paraguay asserts that the Claimant’s interpretation confuses the issue of State attribution of an internationally wrongful act with whether that act was internationally wrongful in the first place.<sup>382</sup> Relying on the ILC Articles on State Responsibility,<sup>383</sup> the Respondent alleges that the question here is not whether a commercial act of a State organ is attributable to the State (as it was in *Noble Ventures*), but whether the primary obligations established in the BIT are violated by commercial acts. *Noble Ventures* supports the view that there exist a general rule

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<sup>379</sup> World Trade Organization Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), para. 165, n.154, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) (quoting R. Jennings & A. Watts eds., *Oppenheim’s International Law* 1278 (9th ed. 1992)). Paraguay Rejoinder para. 41.

<sup>380</sup> Paraguay Rejoinder, para. 42.

<sup>381</sup> Paraguay Rejoinder, para. 45, referring to *Waste Management. v. Mexico*, paras. 112 and 115.

<sup>382</sup> *Noble Ventures v. Romania*, at paras. 81-82, (CL-48); BIVAC also relies on the statement in *Noble Ventures* that a distinction between sovereign and commercial acts is difficult to draw. BIVAC Reply, para. 63. However, the German Federal Constitutional Court held in the Claim Against the Empire of Iran case, “[t]he fact that it is difficult to draw the line between sovereign and non-sovereign state activities is no reason for abandoning the distinction. International law knows of other similar difficulties”, 45 I.L.R. 57, (1980), 79-80, (RL-38). Paraguay Rejoinder para. 46.

<sup>383</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, at 31, (RL-36). Paraguay Rejoinder para. 47.

whereby breach of a contract by a State, under normal circumstances, does not give rise to direct responsibility on the part of the State under international law.<sup>384</sup>

186. Finally, the Respondent disagrees with the Claimant's interpretation of *Kardassopolous, Rumeli, PSEG, Alpha* and *Eureka*<sup>385</sup> as providing support for its claim that a commercial act can breach the standards of treatment under a BIT. First, the Respondent claims that in none of these cases are the facts parallel to those in the present case, since they involved the abuse of State sovereign authority; procedurally and substantially unfair administrative negotiations proceedings; the absence of an efficient remedy against governmental decisions whereas according to the Respondent, the present case involves an alleged breach of contract. It concludes that

“[A]ll of the cases on which BIVAC relies are consistent with the principle that a claimant cannot transform a breach of contract into a breach of treaty merely by saying that the breach of contract was unfair, arbitrary, nontransparent, or negligent when the State offers an adequate contract remedy, which it does not frustrate or repudiate. To the extent that any of these cases could be said to involve a breach of contract by the State, the claimants had treaty claims, not contract claims, because the State had not offered or had frustrated a fair legal process to address the alleged breach of contract.”<sup>386</sup>

187. According to the Respondent, given that only sovereign, governmental and public conduct on behalf of the State of Paraguay consisting an abusive interference with the Contract could have given rise to a claim for violation of the FET standard, the Claimant has to prove that such conduct was indeed exercised. The Respondent argues that the Claimant failed to do so since it did not show that Paraguay had used “its police, adjudicatory, or legislative powers to the detriment of the rights of the claimant” which is a requirement for an act to be deemed a sovereign act.<sup>387</sup> It is alleged that in reality “[T]he Ministerio behaved as a normal market player. Its failure to pay sums allegedly due is an act that any private party can commit” and the internal investigations and reports could also “have been undertaken by a corporation to evaluate its post-termination strategies.”<sup>388</sup> BIVAC “attempts to turn an ordinary commercial dispute into a misuse of sovereign power”.<sup>389</sup> According to the

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<sup>384</sup> Paraguay Rejoinder, para. 46.

<sup>385</sup> Paraguay Post-Hearing Brief, paras. 44-63; Paraguay Rejoinder, paras. 49-56.

<sup>386</sup> Paraguay Post-Hearing Brief, para. 63.

<sup>387</sup> Paraguay Post-Hearing Brief, para. 99; Paraguay Rejoinder, para. 57; Paraguay Counter-Memorial, paras. 103-105.

<sup>388</sup> Paraguay Counter-Memorial, para. 104

<sup>389</sup> Paraguay Rejoinder, para. 3.



Respondent, the attempt to characterize the Respondent's actions as governmental also fails because "a private entity certainly can hire a third party to help it collect revenue and prevent fraud; these are not uniquely sovereign goals. A private party can also rely on macroeconomic factors, including an economic downturn, to explain non-payment under a contract".<sup>390</sup> In sum:

"Any private party can refuse to pay under a contract. Commercial disputes routinely involve alleged non-payment under contracts for goods or services. A private party can also make statements purportedly consistent with a desire to pay but still refuse payment. And a private company can conduct internal investigations or audits regarding a contracting partner's performance under a contract to determine whether requested payment is consistent with the parties' contractual obligations."<sup>391</sup>

188. Moreover, the Respondent contends that the Claimant's allegations regarding Paraguay's wrongful refusal to pay and the investigations into BIVAC's claims for payment do not support its arguments because they incorrectly focus on the purported purpose of the alleged acts rather than their nature. According to the Respondent, none of these allegations demonstrates the misuse of governmental authority or the application of '*puissance publique*'. Further, the Respondent alleges that to determine whether an act is commercial or sovereign, the Tribunal can make an analogy with the law of sovereign immunity, whereby an act is commercial if its nature (rather than its purpose) is commercial. Paraguay explains that the purpose for which it entered into the contract and refused payment is not determinative as to the sovereign or private characterization of the acts. Looking at the distinction in nature between a sovereign and a private act, the Respondent submits that in the present dispute the elements of private acts are present, whereas the elements of sovereign acts are absent.<sup>392</sup>

189. Finally, the Respondent submits that internal reports generated to advise the State as to whether payment is due to a contracting party which request it, as well as statements in response to such requests for payment, are not legislative, administrative, or quasi-judicial acts.<sup>393</sup> The Respondent further argues that since Paraguay did not undertake sovereign acts in the present case, such as a legislative decree to cancel the Contract,

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<sup>390</sup> *Ibid.*, para. 58.

<sup>391</sup> *Ibid.*, para. 63.

<sup>392</sup> *Ibid.*, para. 63.

<sup>393</sup> Paraguay Rejoinder, para. 64; The Respondent relies on the ICJ decision in *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, I.C.J. rep 2002, p. 625, at p. 685, (para. 148) [hereinafter, *Sovereignty Over Pulau*].

and since it has never claimed that its non-payment was unchallengeable in Paraguayan courts, there was no sovereign act to abrogate or cancel the contract.<sup>394</sup>

The Respondent maintains that persistent non-payment under a contract constitutes an indisputably commercial act and thus is not proof of sovereign authority sufficient to violate Article 3(1) of the BIT.

#### 4.3.2.4. The Absence of Unreasonable Measures

190. The Respondent alleges that the Claimant has not proven that Paraguay engaged in unreasonable measures because: (i) it has not shown that the Respondent's statements or investigations constitute "measures" as defined under the BIT; (ii) the Respondent's acts were not unreasonable; and (iii) the alleged acts did not impair the Claimant's investment.

191. First, the Respondent alleges that State conduct without legal effect cannot constitute a "measure" under international law. The internal reports on which BIVAC relies were not "measures" because "[t]hey were not binding administrative proceedings and had no legal effect." Rather, they were "meant to advise the Paraguayan government as to whether or not BIVAC was entitled to payment." Further, the Respondent also denies that the alleged statements (the letters or statements made during meetings) constitute "measures".<sup>395</sup>

192. Second, and in the event that the Respondent's conduct is considered as "measures" by the Tribunal, the Respondent argues the measures were reasonable and do not constitute a violation of Article 3(1) of the BIT.<sup>396</sup> According to the Respondent, tribunals have recognized that State acts purportedly contrary to law but that can be corrected through judicial process do not constitute a breach of the general standard of

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<sup>394</sup> Paraguay Rejoinder, para. 65; the Respondent's argument against the existence of a sovereign act in the present case relies on the definition of "sovereign act" set out in *Shufeldt Claim (United States ex rel. P.W. Shufeldt v. Republic of Guatemala)*, see: Schwebel, "On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law," in *Justice in International Law* 425, 432 (1994), (RL 37).

<sup>395</sup> Paraguay Rejoinder, paras. 175-177; the Respondent refers to *Lauder v. Czech Republic*, (UNCITRAL), Award, 3 September 2001, paras. 245, 283-284 [hereinafter, *Lauder v. Czech Republic*.], and WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film & Paper*, 10.122, WT/DS44/R (31 March 1998), where an internal investigation report setting out possible options for the government was not considered a "measure".

<sup>396</sup> Paraguay Rejoinder, paras. 178-186.

treatment.<sup>397</sup> The Respondent disputes the Claimant's view that such a rule imposes a requirement to exhaust local remedies. Instead, the Respondent argues that where the basis of an alleged breach of an investment treaty is a violation of a contract or the disregard of contractual rights, the Claimant's failure to seek an available remedy for such acts in the contractually designated forum renders the alleged breach of international law merely inchoate. According to the Respondent, State practice supports this view.<sup>398</sup> The Respondent also argues that this interpretation is consistent with the annulment committee's decision in *Helnan* and *Vivendi*, where it was acknowledged that in some circumstances the failure to seek remedies in the local courts may be relevant when deciding whether State's conduct has violated a treaty standard.<sup>399</sup>

193. Third, the Respondent contends that the Claimant must prove that the alleged unreasonable measures on which it bases its claim impaired "the operation, management, maintenance, use, enjoyment or disposal" of its investment.<sup>400</sup> According to the Respondent, BIVAC failed to show "clear evidence" that the investigations and statements, rather than non-payment itself, impaired its investment, nor has it identified "specific injury" flowing from these actions, or proven that the statements and investigations were a *conditio sine qua non* of the impairment of its investment, as other tribunals have required.<sup>401</sup> The Respondent submits that neither the investigations nor the various statements prevented the Claimant from bringing forward a contractual claim to secure payment.

#### 4.3.2.5. The issue of jurisdiction

##### 4.3.2.5.1. *The alleged lack of jurisdiction of the Tribunal*

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<sup>397</sup> Paraguay Rejoinder, paras. 179; e.g., *Vivendi v. Argentina*, Annulment, para. 113; *Parkeringset v. Lithuania*, paras. 315-319; and *Waste Management v. Mexico*, paras. 115-116.

<sup>398</sup> Paraguay Rejoinder, paras. 181-183; the Respondent refers to *The Loewen Group, Inc and Raymond L. Loewen c. United States of America*, (ICSID Case No. ARB (AF)/98/3), Award, 26 June 2003, para. 156, [hereinafter, *Loewen v. United States*]; *EnCana v. Ecuador*, para. 194; *Parkerings v. Lithuania*, paras. 315-319; *Waste Management v. Mexico*, paras. 115-116, (CL-74); International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, para. 71, (RL-68); and Geoffrey Marston, ed., "*United Kingdom Materials on International Law*", 69 Brit. Y.B. Int'l L. (1998) at pp. 443 and 558-559, (RL-74).

<sup>399</sup> Paraguay Rejoinder, paras 181-183; the Respondent refers to *Helnan v. Egypt*, para. 14(a); *Vivendi v. Argentina*, Annulment, para. 113.

<sup>400</sup> Paraguay Rejoinder, paras. 187; the Respondent relies on the language of the Netherlands-Paraguay BIT, Article 3(1) (CE-66) and on *AES Summit Generation Ltd v. Republic of Hungary*, (ICSID Case No. ARB/07/22), Award, 23 September 2010, at para. 10.3.3 [hereinafter, *AES v. Hungary*].

<sup>401</sup> Paraguay Rejoinder, paras. 188-192; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (Case ICSID No. ARB/05/22), Award, 24 July de 2008, paras. 696, 699 and 708 [hereinafter *Biwater Gauff v. Tanzania*]; and *Saluka v. Czech Republic*, para. 480.

194. In the Respondent's view, the agreement to bring "any conflict, controversy or claim which arises from or is produced in relation to this Contract, non compliance, resolution or invalidity [...]"<sup>402</sup> before Paraguayan courts, entails two consequences with respect to the present dispute.
195. First, it establishes the exclusive competence of these courts over disputes concerning the Contract, thus barring the Tribunal's jurisdiction. The Respondent alleges that "BIVAC has always had the unimpeded right to resort to the Paraguayan judiciary", even while negotiations and investigations were under way<sup>403</sup> and that this remedy was effective for both the non-payment and the alleged wrongdoing.<sup>404</sup> It insists that BIVAC's assertions are nothing more than an attempt to avoid its obligation to bring a contractual claim in the Paraguayan courts thus circumventing "freely made contractual choices."<sup>405</sup>
196. The Respondent further disagrees with Claimant's assertion that the requirement to bring the dispute before local courts amounts to a local-exhaustion condition. It argues that the question in the present case is not one of denial of justice but of applying the Parties' autonomous agreement in the appropriate forum.<sup>406</sup>
197. On the other hand the forum selection clause has a direct bearing on the ascertainment of Treaty obligations. The Respondent asserts that:
- BIVAC cannot prove that "Paraguay unfairly treated its right to payment because that right must first be established in Paraguay,"<sup>407</sup>
  - it is not possible to establish the repudiation of the debt as long as the investor's rights are protected by an effective remedy to courts,<sup>408</sup>
  - arbitrariness or lack of due process cannot be established as long as effective legal remedies by way of a "suit in court" exist,<sup>409</sup> and

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<sup>402</sup> Article 9.1 of the Contract, (Exhibit CE-6).

<sup>403</sup> Paraguay Counter-Memorial, para. 105; also Paraguay Post-Hearing Brief, paras. 30 and 91-95.

<sup>404</sup> Paraguay Rejoinder, paras. 151 and 163.

<sup>405</sup> Paraguay Post-Hearing Brief, paras. 1, 4 and 30.

<sup>406</sup> Paraguay Rejoinder, para. 136.

<sup>407</sup> Paraguay Post-Hearing Brief, para. 18.

<sup>408</sup> Paraguay Post-Hearing Brief, paras. 26 and 30; Paraguay Rejoinder, paras. 162-164.

<sup>409</sup> Paraguay Rejoinder, paras. 150 and 151.

- no legitimate expectation is frustrated as long as Paraguay does not “block BIVAC's access to court.”<sup>410</sup>

Finally, the Respondent states that at “no time, and in no way, did anyone prevent BIVAC from initiating a collection suit in Asunción.”<sup>411</sup>

198. The Respondent relies on *Parkerings v. Lithuania*, where the Tribunal held:

“Under certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract. [...]

However, if the contracting-party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in position, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred. In other words, as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the “treatment” that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.

In the case at hand, there is no doubt that BP had access to the Lithuanian Courts. [...] The experts confirmed that the Lithuanian Courts are independent and that levels of corruption had declined substantially.

[...] The failure to complain of the violation of the Agreement before the Lithuanian Court leads to two consequences. First, the Claimant failed to show that the Municipality of Vilnius terminated the Agreement wrongfully and therefore breached the Agreement. Second, even supposing that the Agreement has been wrongfully terminated, the Claimant failed to show that the right of BP to complain of the breach of the Agreement has been denied by the Republic of Lithuania and thus that its own investment was actually not accorded, by the Respondent, an equitable and reasonable treatment in such circumstances.”<sup>412</sup>

#### 4.3.2.5.2. *The Alleged Insufficiency of the Paraguayan Court System*

199. The Respondent strongly objects to BIVAC’s argument that Paraguayan courts are so corrupt, sluggish, expensive and inefficient that any resort to them would be futile and

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<sup>410</sup> *Ibid.*, paras. 165-166.

<sup>411</sup> Paraguay Counter-Memorial, para. 3.

<sup>412</sup> *Parkerings v. Lithuania*, paras. 316-319 (footnotes omitted); Paraguay Post-Hearing Brief, paras. 16-17; Paraguay Rejoinder, para. 71. The Respondent equally relies on *Pantechniki v. Albania*, para. 87 (quoted at para. 169 of this Decision).

that it can therefore not be expected to litigate in Paraguay.<sup>413</sup> It does so on two counts.

It firstly argues that

“[T]his argument rings especially hollow given that BIVAC agreed by contract to the jurisdiction of the Paraguayan courts. It cannot negate its contractual obligation by now claiming that the forum to which it agreed was never in a position to grant justice. And it is unlikely that a sophisticated multinational company like BIVAC would have accepted the jurisdiction of a forum that it believed would deny it justice. Indeed, Paraguayan courts have taken the side of foreign investors against the government in recent cases.”<sup>414</sup>

Secondly, it submits that BIVAC changed the argument only during the hearing to accommodate the Tribunal’s question to this effect by suddenly asserting “for the first time that “the Paraguayan courts have deteriorated in the time since it signed the Contract” and “that the forum-selection clause could no longer be respected.”<sup>415</sup>

200. The Respondent invites the Tribunal to reject the Claimant’s submission since allegations as to endemic corruption, inefficiency and incompetence are extremely serious matters and can only be accepted by solid evidence, and that such evidence has not been put before the Tribunal.<sup>416</sup> It alleges that BIVAC has relied on “a handful of unreliable reports” which are devoid of facts and analysis and replete with conclusions about the state of the judiciary based on hearsay and anecdotal evidence, and the authors are not available for cross-examination. It suggests that hearsay has been excluded by international tribunals when not supported by confirmatory evidence.<sup>417</sup>

“It would be unfair for the Tribunal even to consider the reports. This is especially true because on this flimsy evidence BIVAC would have the Tribunal make the very consequential finding that Paraguay – a sovereign party to the ICSID Convention and an emerging democracy – has a judicial system that is so corrupt and incompetent that nobody can rely on it.”<sup>418</sup>

It would have been BIVAC’s duty to present expert testimony on the state of

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<sup>413</sup> Paraguay Rejoinder, paras. 130-136; Paraguay Post-Hearing Brief, paras. 104-122; comments of the Attorney General of Paraguay during the hearing on the Merits, 5-7 July 2011, transcript, pp. 290-296.

<sup>414</sup> Paraguay Rejoinder, para. 130; Paraguay Post-Hearing Brief, para. 104.

<sup>415</sup> Paraguay Post-Hearing Brief, paras. 104 and 106.

<sup>416</sup> Paraguay Post-Hearing Brief, paras. 109-113 and 115; Paraguay Rejoinder, paras. 133-134.

<sup>417</sup> Paraguay Rejoinder, paras. 131-135; Paraguay Post-Hearing Brief, paras. 109-116; the Respondent refers to *EDF (Servs.) Ltd. v. Republic of Romania*, (ICSID Case No. ARB/05/13), Award, 8 October 2009, para. 224 [hereinafter, *EDF v. Romania*] (ruling that a statement by a witness was inadmissible hearsay because it was based, not on his own knowledge, but rather on information purportedly imparted to him by a third-party); *Stag v. Egypt*, para. 347 (declining to admit hearsay evidence when no other evidence is submitted to support statements); *Methanex Corp. v. United States*, (UNCITRAL), Final Award, 3 August 2005, paras. 49 and 56 [hereinafter, *Methanex v. USA*] (refusing to admit “double hearsay” offered by a party); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1984, p. 14, at p. 42, [hereinafter, *Case Concerning Military and Paramilitary Activities*] (rejecting “testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay”).

<sup>418</sup> Paraguay Post-Hearing Brief, para. 114.

Paraguay's legal system, and that it has failed to do so.

201. The Respondent presents the decision of the Appellate Court of Asunción which found in an economically important case that an arbitral award had to be enforced against the State which demonstrates that the Paraguayan courts can fairly and independently enforce the rights of foreign claimants against the government.<sup>419</sup>
202. Finally the Respondent refutes the Claimant's presentation of costs as "absurd" as it includes counsel's fees and other costs which are not part of costs of courts, as it presents the costs as being more than US\$ 6 million which is 30 times higher than the real costs, and it neglects that the State would have to reimburse all costs and fees if BIVAC prevailed.<sup>420</sup>

#### 4.3.2.6. No losses caused by Paraguay's conduct

203. The Respondent alleges that BIVAC has failed to prove its damages, since it has not demonstrated the accuracy of its invoices or that it actually performed all of the inspections for which it seeks payment. The Respondent also recalls that BIVAC is not entitled to damages for inspecting goods originating in Mercosur countries that were not subject to import duties or to recover payment for improperly issued certificates.<sup>421</sup>
204. Moreover, the Respondent relies on a holding in the case concerning the *Factory at Chorzów* which states that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."<sup>422</sup> It asserts that the alleged losses, *i.e.* the unpaid invoices, were caused by the alleged breach of contract and not by the conduct on which Claimant has based its treaty claim: if all the investigations, reports and political declarations were "wiped out", the Claimant

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<sup>419</sup> *Ibid.*, paras. 118-120..

<sup>420</sup> Paraguay Post-Hearing Brief, paras. 121-122; comments of the Attorney General of Paraguay during the hearing on the Merits, 5-7 July 2011, transcript, p. 294.

<sup>421</sup> Paraguay Rejoinder, paras. 194-195.

<sup>422</sup> *Factory at Chorzów (Germany v. Poland)*, PCIJ (ser. A) No. 17, (1928), p. 47, [hereinafter, *Chorzów*] Paraguay Post-Hearing Brief para. 123.

would still be left with unpaid contractual debts. Further, the Claimant cannot prove that losses occurred because it relied on statements made after the termination of the Contract, since they had occurred with its termination and thus could not possibly have been caused by violations of a FET obligation.<sup>423</sup> The Claimant has not shown that the investigations and statements on which it relies for its claim under Article 3(1) of the BIT has caused any harm to BIVAC or resulted in the same damages as the alleged breach of contract.

#### 4.3.2.7. The calculation of damages

205. The Respondent submits that in case the Tribunal awards damages, BIVAC would not be entitled to any interest. It asserts that BIVAC had the responsibility to reduce its losses by pursuing its claim and seeking compensation in a timely fashion. “Instead, BIVAC passively sat back and decided to let the debt mount each month.” BIVAC’s ten year delay before taking legal action against Paraguay caused the interest demand to balloon is unreasonable<sup>424</sup> and in violation of the obligation to mitigate its damages. The Respondent alleges that while the Respondent does not accept the Claimant’s allegations, no reasonable person in BIVAC’s place that believed that successive governments’ tactics were “empty, baseless, dilatory, clearly unfounded, obviously meant to evade responsibility, and based on a familiar and predictable pattern”, (which the Respondent contests), would have waited ten years to file this arbitration or a contract suit in Paraguay.<sup>425</sup> Therefore, the Tribunal should not award interest, which it has the power to do since the award and calculation of interest is not mandatory, but within the Tribunal’s discretion.<sup>426</sup>

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<sup>423</sup> Paraguay Counter-Memorial, paras. 156-161; Paraguay Post-Hearing Brief, paras. 123-126.

<sup>424</sup> Paraguay Counter-Memorial, para. 176; Paraguay Rejoinder, paras. 196-200; Re Paraguay Post-Hearing Brief, paras. 129-130; the Respondent relies on the ILC’s Commentaries on the Articles of State Responsibility (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, at p. 93), (RL-36); the Respondent further refers to municipal courts decisions supporting the principle that unreasonable delay in filing suits reduces or eliminates the prejudgment interest: *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1297-98 (11th Cir. 2002), (RL-76) [hereinafter, *Blasland v. Miami*]; *Godfrey v. Gloucestershire Royal Infirmary NHS Trust*, [2003] EWHC (QB) 549 40 (Eng.), (RL-77) [hereinafter, *Godfrey v. NHS*]; *Gulf S. Mach., Inc. v. Am. Standard, Inc.*, No. Civ. A. 97-0065, 1999 WL 199085, at \*2 (E.D. La. Apr. 8, 1999), (RL-78) [hereinafter, *Gulf v. Am. Standard*]; and *Baker v. Pope*, [1992] 318 A.P.R. 316, at para. 19 (Can. Nfld. Ct. App.), (RL-79) [hereinafter, *Baker .v Pope*].

<sup>425</sup> Paraguay Rejoinder, para. 200.

<sup>426</sup> Paraguay Rejoinder, para. 197; the Respondent refers to *Isaiah v. Bank Mellat*, Iran-U.S. Claims Tribunal, Case No. 219



206. The Respondent asserts that in case interest is awarded it should be simple interest at a rate based on Paraguayan law, rather than compound interest at a rate based on Dutch law.<sup>427</sup> Contrary to BIVAC's contentions, the Respondent denies that the Netherlands interest rate more closely corresponds to the "normal commercial rate" under Article 6 of the BIT. According to the Respondent, Article 42(1) of the ICSID Convention directs the application of Paraguayan law, which is both the law of the Contract and the law of the State party to arbitration:

"The Dutch rate neither reflects the agreement of the parties, nor is it internationally accepted as the standard interest rate".<sup>428</sup>

The Respondent submits that tribunals have recognized that international law does not require any particular interest rate and that the law of the host State applies to determine the amount of interest due. If at all, the Tribunal should follow the trend of arbitral tribunals and award interest at a maximum rate of LIBOR +2%.<sup>429</sup>

207. As for compound interest, the Respondent submits<sup>430</sup> that this principle violates Paraguayan law which expressly nullifies any clause providing for it,<sup>431</sup> and that it has not been accepted by international tribunals such as *Autopista v. Venezuela*<sup>432</sup> and further does not correspond to international law as is made clear by the International Law Commission's Commentary to the Articles on State Responsibility, which note that

"[t]he general view of courts and tribunals has been against the award of compound interest.

[...]

Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that 'compound interest reasonably incurred by the injured party should be recoverable as an item of damage'. This view has also been supported by arbitral tribunals in some cases. But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation."<sup>433</sup>

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(30 March 1983), (RL-75) [hereinafter, *Isaiah v. Bank Mellat*].

<sup>427</sup> Paraguay Rejoinder, paras. 201-203; Paraguay Post-Hearing Brief, paras. 132-134.

<sup>428</sup> Paraguay Post-Hearing Brief, para. 132.

<sup>429</sup> Paraguay Post-Hearing Brief, para. 134; the Respondent refers to *National Grid v. Republic of Argentina*, (UNCITRAL), Award, 3 November 2008, para. 294 [hereinafter, *National Grid v. Argentina*].

<sup>430</sup> Paraguay Rejoinder, para. 204; Paraguay Post-Hearing Brief, para. 133.

<sup>431</sup> Law No. 2339/2003, (RL-23). Paraguay Post-Hearing Brief, para. 133.

<sup>432</sup> *Autopista Concesionada de Venezuelav. Venezuela*, (ICSID Arb. No. ARB/00/5), Award, 23 September 2003, para. 393 [hereinafter, *Autopista v. Venezuela*].

<sup>433</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with

### 4.3.3. *The Reasoning and Decision of the Tribunal*

208. Having concluded that the Claimant has standing to bring this claim for a violation of the BIT, the Tribunal turns to the central issue in this case, namely the question of whether, by its acts or omissions, Paraguay is liable for a violation of Article 3(1) of the BIT.

209. Article 3(1) 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.”

210. To prove a violation of Article 3(1), the Claimant must establish that the actions of Paraguay are of a nature as to give rise to a violation of the treaty obligation set out in that provision. In its Decision on Jurisdiction, the Tribunal addressed one factor that arises where, as in the present case, the claim under Article 3(1) is closely connected to the contractual relationship between Claimant and Respondent in circumstances in which the Contract provides for the resolution of contractual disputes. Having regard to the arguments and evidence then before it, the Tribunal was alerted to the possibility that the dispute may be centered on a failure to pay an outstanding debt owing under the Contract. With this in mind, the Tribunal emphasized in its Decision on Jurisdiction over the Article 3(1) claim (as formulated by the Claimant) that it expressed no view 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”.<sup>434</sup>

211. The Tribunal noted the Award of the Tribunal in *Impregilo SpA v. Pakistan*, on the interplay between treaty claims and contractual claims. The Tribunal in that case

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Commentaries, 2001 (2008), p. 108-109, (RL-36).

<sup>434</sup> Decision on Objections to Jurisdiction, para 125.

stated:

“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>435</sup>

On the basis of this approach, which the Tribunal considers to be correct and applicable in the present case, in order to succeed in a claim alleging violation of Article 3(1) of the BIT, the Claimant must show that it meets the threshold for treaty claims. It must show, in other words, that the conduct of Paraguay reflects an act of *puissance publique*, that is to say “activity beyond that of an ordinary contracting party.”

212. The fundamental basis of the treaty claim under Article 3(1), over which this Tribunal has jurisdiction, turns on the interpretation and application of that treaty provision and the alleged conduct of Paraguay (as *puissance publique*), and 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 which must be considered). In this regard, the Tribunal notes that the interpretation of Article 3(1) of the BIT is not a matter over which the tribunals of the City of Asunción would be able to exercise jurisdiction under Article 9 of the Contract. The issue of fair and equitable treatment 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 the Tribunal has jurisdiction being inadmissible by reason of the choice of forum for the resolution of a dispute under the Contract.
213. The Tribunal has paid careful attention to the arguments of the Parties, as they have evolved over the proceedings, as well as the evidence on which they rely in support of their respective arguments as to the treaty claim. In order to determine whether or not there has been a violation of Article 3(1) of the Treaty, the Tribunal considers that it must begin by looking at the facts, to establish with precision the conduct of Paraguay

that is said to give rise to the alleged violation of the Treaty. The Tribunal must begin by ascertaining whether the facts establish that the conduct of Paraguay amounts only to “a persistent failure to make payment on an outstanding debt”, or whether it amounts to something more. Having addressed that issue, the Tribunal must then determine whether the facts as properly characterized can give rise to a violation of Article 3(1) of the Treaty. If the facts show that Paraguay’s acts amount only to “a persistent failure to make payment on an outstanding debt”, then the Tribunal must decide whether such facts are capable of giving rise to a violation of Article 3(1) of the Treaty; if the facts show something more, as the Claimant alleges (appearing now to accept that a mere failure to make payment on an outstanding debt would not be sufficient to allow a successful claim under Article 3(1)), then the Tribunal must determine whether those facts give rise to a violation of Article 3(1).

#### 4.3.3.1 The Tribunal’s appraisal of the facts

214. What is the conduct of Paraguay that is complained of? As set out at paragraphs 44 - 52 above, there is no dispute between the Parties that a Contract was entered into, that certain services were performed under the Contract, that a series of invoices were issued, and that by August 1998 at least some of those invoices were paid. Nor is it in dispute that other invoices remain unpaid since that date.
215. The evidence shows that in August 1998 Paraguay’s new Government of President Cubas took office, and that shortly thereafter payments for services under the Contract were suspended. In January 1999 the Minister of Finance instigated investigations into the Contract, on the basis of alleged breaches of the Contract. In February 1999, by Presidential Decree No. 2003, the Ministry of Finance was authorised to discontinue the Contract upon termination of its initial term. There is no dispute as to the legality of the discontinuance under the Contract: it was agreed between the Parties, in accordance with the terms of Article 8 of the Contract, which does not require any reason to be stated or there to be any allegation of a breach of contract. There is no claim by the Claimant that the adoption of Decree No. 2003 was in any way in breach of the Contract, or that it violated the BIT.

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<sup>435</sup> *Impregilo v Pakistan*, para 260.

216. In March 1999, following the adoption of the Decree, a number of invoices dating back to 1997 were paid. As matters stood at the end of March 1999, the situation was that the Contract had been lawfully discontinued, but a significant number of invoices under the Contract remained unpaid by the Government. It is these unpaid invoices - that total nineteen in number - that are at the heart of this claim under the BIT.
217. What happened next? By letter dated 7 June 1999, the new Minister of Finance (Federico Zayas) confirmed the Government's decision to discontinue the Contract. He also noted that the obligations of both parties arising under the Contract for the Rendering of Services shall cease "except the rights already acquired."<sup>436</sup> The Tribunal considers that the letter recognizes that the Claimant's existing rights under the Contract will not be interfered with, in the sense that "rights already acquired" by BIVAC will be honoured. There is no repudiation of any rights under the Contract. Nor, however, does the Tribunal read the letter as amounting to a recognition of the validity of the Claimant's claims to payment under the Contract: it is one thing to recognize the existence of rights under the Contract, but quite another to determine whether such rights include the right to be paid for any particular services and invoices rendered under the Contract.
218. Minister Zayas followed this communication with another letter a week later, dated 14 June 1999. This responded to a letter from the Claimant of 8 June 1999, requesting payment of the debt. In his letter, Minister Zayas suggests that it would be appropriate to set out in due course the balance of the debt, and proposes applying a discount of 50% of the outstanding balance as a basis for negotiation.<sup>437</sup> The Tribunal considers that this letter, like the earlier one, cannot be interpreted as recognizing BIVAC's right to payment under the Contract; the letter merely proposes a lump sum reduction of the claim as eventually ascertained without offering any reason for the proposed way forward (there is no indication, for example, as to whether the proposal is made for reasons of contractual disagreement or budgetary difficulties, or the existence of other reasons).

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<sup>436</sup> Letter No. 1158 from the Ministry of Finance to BIVAC (7 June 1999), Exhibit CE-19.

<sup>437</sup> Letter no. 1237 from the Minister of Finance to BIVAC (14 June 1999), Exhibit CE-73.

219. On 22 June 1999, the Ministry of Finance prepared a Report for Minister Zayas that addressed the circumstances of the existing non-payment of the financial obligations under the Contract. The Report identified a series of alleged contractual breaches by the Claimant, including an alleged failure to provide technical assistance as required by the Contract.<sup>438</sup> This Report by the Ministry's of Finance technical services purported to list a number of incidents arising in relation to the Contract, and asserted that the Claimant had not complied with its contractual obligations. It also raised a concern about possible double billing by the Claimant, apparently for the first time. The Tribunal expresses no view on the merits of the arguments raised by the Ministry's Report. It recognizes, however, that the concerns raised do set out a *prima facie* plausible explanation for non-payment that is founded on a view of the Contract and an assessment of the facts. As such, the preparation of the Report cannot as such be said to amount to an exercise of sovereign authority that interferes with a right under the Treaty: the report is not qualitatively different from any similar internal report that might have been prepared by a private party to a contract that has formed the view – whether justified or not - that there are grounds for non-payment of a debt owing under a contract to which it is a party.
220. On 6 August 1999, the Ministry of Finance prepared a List of Outstanding Invoices.<sup>439</sup> The Claimant asserts that this constitutes a recognition of an outstanding debt. The Respondent disagrees, on the basis that the title of the chart merely refers to invoices for which payment is pending as issued by BIVAC, and does not constitute an admission of a debt. The title indeed leaves no doubt that the document in question is not an acknowledgement or admission of the debt: it is entitled “invoices pending payment issued by BIVAC”. The Tribunal considers that the document is no more than a list of outstanding invoices. It cannot as such amount to a recognition of a debt owing under the Contract, and its preparation cannot be said to constitute an exercise of sovereign authority, whether or not in violation of a Treaty obligation. The document could just as easily have been prepared by any party to a contract.

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<sup>438</sup> Report of the Internal Auditor of the Ministry of Finance to the Minister of Finance (22 June 1999), Exhibit RE-21.

<sup>439</sup> List of outstanding invoices prepared by the Ministry of Finance, Exhibit CE-22.

221. On 2 December 1999 the Ministry of Finance wrote to the Claimant responding to a further request for payment of the outstanding debt.<sup>440</sup> Minister Zayas indicated in the letter that no debt could be paid until the General Comptroller of the Republic had completed a special investigation, in conformity with the request formulated by the Office of the Attorney General in a Note dated 14 July 1999 (a copy of which was attached to the letter). The Tribunal considers that this letter once again relates exclusively to the issue of a payment under the Contract. It does not purport to repudiate any rights under the Contract, and amounts to an action that any non-sovereign contracting party could just as easily follow. There is nothing in the action so initiated that can be said to amount to an exercise of sovereign authority. The Tribunal reaches the same conclusion in relation to the letter sent the following week – on 13 December 1999 – in which Minister Zayas responds to a further request for payment of the debt pending.<sup>441</sup>
222. The following year, in an undated document prepared at some point during 2000, the General Comptroller of the Republic published its first report on alleged irregularities concerning the certificates of inspection issued by the Claimant.<sup>442</sup> The Tribunal expresses no view on the report’s findings, but concludes once again that there is nothing in the report to support the view that the preparation of the report or its contents reflects an exercise of sovereign authority in respect of rights arising under the Contract. The Claimant’s rights under the Contract – in particular the right to be paid and to seek judicial relief before the courts of Asunción if payment is not made – are fully maintained. The preparation of such a report could just as easily have emanated from the bowels of a private contracting party.
223. On 12 February 2001 the Ministry of Finance produced a further report on the matter.<sup>443</sup> The report states that the Ministry recognises the validity and existence of the Contract, but that “the Ministry of Finance cannot effect any payment until the relevant control procedures initiated by the General Comptroller of the Republic are completed.” The report adds that “this does not imply in any way that the State is

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<sup>440</sup> Letter No. 2702 from the Ministry of Finance to BIVAC, Exhibit CE-24.

<sup>441</sup> Letter no. 2772 from the Ministry of Finance to BIVAC, Exhibit CE-77.

<sup>442</sup> First Report of the General Comptroller of the Republic regarding the irregularities in the certificates of inspection issued by BIVAC, Exhibit CE-140.

refusing to honor its obligations with respect to said contract.” The Tribunal reiterates its conclusions as set out above in relation to earlier documents, which apply equally to the Note of 13 February 2001: this indicated the view of the Ministry of Finance that “once the assignment is concluded by the [General Comptroller of the Republic], and the required account reconciliations are completed, we will proceed with utmost haste to obtain the necessary budgetary amendment from Congress to finance and pay the pending obligation owed by the State for the services rendered by your company...”<sup>444</sup> There is no sovereign interference with the Claimant’s rights, including any right to be paid. Throughout this period, the Claimant was free to avail itself of the right of access to the tribunals of the City of Asunción to resolve the dispute under the Contract.

224. On 25 July 2001, the General Comptroller of the Republic produced its Final Report on certificates of inspection issued by the Claimant.<sup>445</sup> The report sought to verify the performance by the Claimant of services under the Contract, to determine “the facts that could be considered irregular with respect to the formal and substantive aspects of pre-shipment inspection certificates.” The Report purported to describe instances of alleged non-compliance with the Contract and its regulations, including (1) the failure to obtain authorized signatures on some Certificates of Inspection; (2) the failure to send some documents electronically as required by Resolution 1171/96; and (3) the failure to create the database required by the Contract. The Tribunal expresses no view on any of the allegations made. The Tribunal notes, however, that once again there is nothing in the report that could be said to amount to an interference with the Claimant’s rights under the Contract, or an exercise of sovereign authority that goes beyond that which an ordinary contracting party could adopt.

225. Over a year later, on 4 October 2002, the General Comptroller of the Republic produced a further Report, concluding that “the hypothetical non-compliance with the contract or economic harm to the patrimony of the Republic of Paraguay resulting

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<sup>443</sup> Report No. 139 of the Ministry of Finance, Exhibit CE-27.

<sup>444</sup> Note No. 185 from the Ministry of Finance to BIVAC (only in Spanish), Exhibit CE-92.

<sup>445</sup> Final Report of the General Comptroller of the Republic regarding certificates of inspection issued by BIVAC and Note CGR 3030, Exhibit CE-95.



from the performance of said contract, is unfounded.”<sup>446</sup> This apparently clear conclusion followed a statement issued by the General Customs Office in June 2002 which certified that “there is no existing complaint regarding non-compliance with the contract against [the Claimant].”<sup>447</sup> The Tribunal notes that the October 2002 report appears to be the first occasion on which a body associated with the Respondent states that the Claimant has complied with its obligations under the Contract (the certification by the General Customs Office appears to do no more than state that no claim of non-compliance had previously been made). In response, in its submissions to the Tribunal the Respondent argues that the further report of the General Comptroller of the Republic is non-binding, and was merely advisory in character and not part of an administrative proceeding initiated under Paraguayan law. Whether or not that is an accurate account of the situation pertaining under the law of Paraguay, the fact is that the report provides considerable support for the Claimant’s claim to be entitled to be paid on the outstanding debt. The Tribunal notes that the Claimant did not avail at this time, as it could have done, of the right of access to the tribunals of the City of Asunción to recover the payment which it claimed to be due under the Contract.

226. Some nine months later, the situation appears to have changed. On 28 June 2003, the Internal Audit of the Ministry of Finance produced Note No. 21. This found that the Claimant had not complied with the Contract, *inter alia* in relation to matters of pre-inspection and technical cooperation.<sup>448</sup> The Tribunal notes that this finding reiterated the previous finding of the Ministry of Finance (of June 1999, see above at para. 219), but contradicted the more recent report of the General Comptroller of the Republic. The Tribunal is thus faced with a situation in which two government departments have reached apparently different conclusions on the same matter. The two positions are indeed contradictory and cannot be reconciled. Yet there is nothing in the June 2003 note that purports to interfere with the Claimant’s rights under the Contract, including the right to have recourse to the contractually agreed forum for the resolution of disputes. The mere fact that a difference of view has arisen within two government departments – not an infrequent occurrence in the life of public authorities --cannot as such amount to an exercise of sovereign authority that goes beyond that which an

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<sup>446</sup> Report No. 4249 of the General Comptroller of the Republic to the Ministry of Finance, Exhibit CE-30.

<sup>447</sup> Opinion No. 0501 of the General Customs Office, Exhibit CE-28.

<sup>448</sup> Note A.I. No. 21 from the Internal Auditor of the Ministry of Finance to the Minister of Finance, Exhibit CE-110.

ordinary contracting party could adopt. The Tribunal is equally aware that an ordinary (non-sovereign) contracting party might equally find itself subject to an internal difference of view as to whether a contractual obligation requires payment of any moneys.

227. On 19 April 2004, the Ministry of Finance wrote to the Claimant once more.<sup>449</sup> The Ministry stated that it was “the desire of the National Authorities to honor the debts that the Paraguayan State has with its different creditors, among which is the company that you represent”, adding that it is “finalizing a study [...] in order to find a solution to the payment of the debt claimed and propose a schedule of payments that is in accordance with the financial possibilities of the Paraguayan State.” The Tribunal notes that the letter is not on its face an acknowledgement of any outstanding debt, in the sense of an agreed amount, or a commitment to pay any outstanding debt. Moreover, there is nothing in the letter that could be said to amount to an interference with the Claimant’s rights under the Contract, or to reflect any exercise of sovereign authority that goes beyond the behaviour of any ordinary party to a contract, or to constitute any inducement for the Claimant to avoid recourse to the tribunals of the City of Asunción, which remained available. The delay is unfortunate, to say the least, and may even be unjustified as a matter of law under the Contract, but the mere fact of delay cannot as such transform conduct under the Contract (including non-performance) into a sovereign act that could give rise to a violation of Article 3(1) of the BIT. Something more is needed, and this conduct, like that which it follows, relates exclusively to the non-payment of a contractual obligation, and not to anything else.

228. Two months later, on 3 June 2004, the Ministry of Finance adopted Resolution No. 274, which determined that the payment of BIVAC’s invoices “are suspended until the veracity of possible irregularities in the companies’ compliance with the contract is established.”<sup>450</sup> The Ministry noted that it had “not yet determined whether there was non-compliance with the contract on the part of [BIVAC]”, and established a Commission to review the matter. The Resolution further stated that “[p]rior to the

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<sup>449</sup> Letter No. 407 from the Ministry of Finance to BIVAC, Exhibit CE-31.

<sup>450</sup> Resolution No. 274 of the Ministry of Finance, Exhibit CE-32.

commencement of negotiations with the representatives of BIVAC [...] the Commission [created herein] shall establish the definitive position of the Ministry of Finance with respect to whether or not the payment of the pending debts to the inspecting companies is in order.” The views of the Tribunal as to this conduct is the same as that pertaining to the earlier conduct.

229. Eight months later, on 3 Feb 2005, by Resolution No. 43 the Ministry of Finance resolved that the investigation as to whether any payment should be made to BIVAC under the Contract would be reassigned to the National Customs Office, a branch of the Ministry of Finance, as the Committee tasked by Resolution 374 had concluded that it lacked competence.<sup>451</sup> The Tribunal notes the further delay, but sees no basis for concluding that the resolution as such interferes with the Claimant’s rights under the Contract, including the right of recourse to the tribunals of the City of Asunción. The decision reflected in the Resolution cannot as such amount to an exercise of sovereign authority that goes beyond the kind of decision that an ordinary contracting party might also take.
230. The following month, on 30 March 2005, the National Customs Office issued Report No. 377. The Report notes that the Claimant has undertaken “scant verification of pre-shipments”, that there has been a “lack of technical cooperation” and a “lack of information for the creation of a databank”, and that “the training mentioned in clause 2.9 was not carried out.” However, it concluded that “all possible claims with respect to the compliance or non-compliance with the contract signed by the Minister of Finance and Bivac Paraguay S.A. have already been reported, debated, refuted and dismissed by either the Public Prosecutor or by the General Comptroller of the Republic.” It further found that the Public Prosecutor and the Comptroller of the Republic had “already conducted investigations into the contract in question, and both institutions concluded that all of its clauses had been complied with.”<sup>452</sup> The Tribunal takes note of this report, which appears to be conclusive in determining that as at March 2005 the debt that the Claimant claimed to be owed under the Contract was recognized by the relevant authorities of Paraguay as being valid. All that remained,

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<sup>451</sup> Resolution No. 43 of the Ministry of Finance, Exhibit CE-34.

<sup>452</sup> Report No. 377 of the General Customs Office, Exhibit CE-35.

thereafter, was for the amounts to be determined and paid.

231. Despite this Report, the outstanding debts under the Contract were not paid. Instead, on 22 June 2007, the Ministry of Interior adopted Decree No. 10485, opening a new investigation, apparently at the instigation of the President of the Republic.<sup>453</sup> Understandably, having regard to the fact that some eight years had now passed since the matter was first raised, the Claimant decided not to proceed with further efforts at negotiation, and decided instead to have recourse to the settlement of the dispute under the law. Rather than have recourse to the tribunals of the City of Asunción, as it was still entitled to do under the Contract, it chose to institute ICSID proceedings under the Treaty.
232. Before summarising the conclusions of the Tribunal as to the facts, it is appropriate briefly to address certain other evidence tendered by the Claimant in support of its contention that the Respondent's conduct constitutes the exercise of sovereign authority such as to be able to violate Article 3(1) of the Treaty.
233. The Claimant invokes a number of letters that it has written and sent to Paraguay over the period of the dispute. For example, on 29 May 2001 it wrote to the Ministry of Finance, summarizing the situation, and asserting that the Ministry of Finance had undertaken to pay US\$ 5,465,778 for invoices from August, November and December 1997 and to that end would apply to Congress to have this amount included in the 2001 budget.<sup>454</sup> A further letter of 6 July 2001 suggests that the Claimant had been shown a budgetary application made to the Congress, to allow payment of US\$ 5.4 million to BIVAC in 2001.<sup>455</sup> On 6 November 2003, the Claimant wrote to the Ministry of Finance referring to a meeting said to have been held on 8 October 2003, claiming that it was agreed that the Ministry of Finance would examine the matter and suggest a mechanism to pay the outstanding debt which would be negotiated between the parties.<sup>456</sup> Additionally, on 23 February 2006 the Claimant wrote once again to the Ministry of Finance, in which it was claimed that the modalities for the payment of the

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<sup>453</sup> Decree No. 10485 from the Ministry of the Interior, Exhibit CE-136.

<sup>454</sup> Letter No. 052/D/L from BIVAC to the Ministry of Finance, Exhibit CE-93.

<sup>455</sup> Letter No. 066/D/L from BIVAC to the Ministry of Finance, Exhibit CE-94.

debt were initiated.<sup>457</sup> The Tribunal notes that these letters were written by the Claimant, summarizing its perspective of the matters that were said to have taken place, including undertakings alleged to have been given. In the absence of any confirmatory evidence indicating the views of the Respondent, the Tribunal cannot rely on such communications as evidence that such undertakings were in fact given. In any event, on its face none of this material could reasonably be said to reflect any sort of repudiation by Paraguay of the Claimant's rights under the Contract. Nor could the undertakings alleged to have been given – assuming them to be established - be said to amount to an exercise of sovereign authority that goes beyond a conduct which an ordinary contracting party could adopt by analogous actions.

234. The Claimant also invokes a number of newspaper articles in support of its claims. For example, it refers to an article in *Última Hora* dated 31 July 2001 (“*No se pagarán deudas a las SGS y la BIVAC*”), that reports that Minister Oviedo announced that he will not pay a single *guaraní* to BIVAC without Congress' authorization, as the debt relates to a contract that was entered into by former governments.<sup>458</sup> It invokes an article dated 7 May 2005 in *ABC Color* (“*Hacienda anuncia investigación de deudas con SGS y BIVAC*”), which asserts that the Minister will launch a new investigation, notwithstanding the recent report by the Customs Office vindicating the Claimant.<sup>459</sup> Another article published by the same newspaper on 18 May 2006 (“*Gobierno solo pagará las deudas legítimas*”, *ABC Color*) includes a quote from President Duarte, during a visit to France, in which it is alleged that he stated that “I do not have anything to do with previous Governments” and that no debt would be paid that was not clear.<sup>460</sup> The following day a further article was published (“*Deuda con los franceses data de la era Wasmosy*”, *ABC Color*), alleging a statement by President Duarte that suggested the obligations had been assumed by a previous Government that may not have accrued them lawfully.<sup>461</sup> Interesting as they may be, the Tribunal is wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced. The Tribunal has no objection to treating such

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<sup>456</sup> Letter No. 046/D/L from BIVAC to the Ministry of Finance, Exhibit CE-114.

<sup>457</sup> Letter No. 003/D/L from BIVAC to the Minister of Finance, Exhibit CE-37.

<sup>458</sup> Exhibit CE-96.

<sup>459</sup> Exhibit CE-122.

<sup>460</sup> Exhibit CE-131.

reports, which are in the public domain, as admissible but of limited, if any, probative weight. That said, even assuming such reports to be fully accurate, they do not, in the view of the Tribunal, constitute a repudiation by Paraguay of the Claimant's rights to relief under the Contract, or an exercise of sovereign authority that can reasonably be said to go beyond behaviour that an ordinary contracting party might adopt if it had decided not to make a payment owing under a contractual obligation.

235. The Tribunal turns then to the assessment of these facts. In its Decision on Jurisdiction, the Tribunal concluded that Article 3(4) of the BIT gave it jurisdiction over a claim that arises from or is produced directly in relation to the Contract, but that this included 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" (Decision on Jurisdiction, para. 142). The Tribunal further concluded that the Claimants' case under Article 3(4) was 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." (Decision on Jurisdiction, Para. 159)

236. Against the background of these findings, it is apparent that the parties to the Contract decided that it would be a matter for the tribunals of the City of Asunción to determine

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<sup>461</sup> Exhibit CE-132.

whether or not Paraguay was in breach of any obligations under the Contract, including the amounts that it might be owing to the Claimant. It is not for this Tribunal to make findings of law as to the interpretation and application of the Contract to the facts. That said, the Tribunal is bound to note that the National Customs Office concluded, in its Report of 30 March 2005, that “all possible claims with respect to the compliance or non-compliance with the contract signed by the Minister of Finance and Bivac Paraguay S.A. have already been reported, debated, refuted and dismissed by either the Public Prosecutor or by the General Comptroller of the Republic”, and that the Public Prosecutor and the Comptroller of the Republic had “concluded that all of [the Contract’s] clauses had been complied with” by the Claimant.<sup>462</sup> On the basis of the record before the Tribunal, it does not see any real possibility of new facts or legal arguments emerging so long into the dispute that could now change this conclusion.

237. On this basis, it appears an inescapable conclusion on the basis of the record of evidence before the Tribunal that Paraguay has an outstanding debt to the Claimant under the Contract, and that it has, since 2005 at least, failed without proper justification to make payment on that debt. Putting it another way, the Tribunal concludes that the evidence demonstrates that the heart of the dispute that is before it concerns “a persistent failure to make payment on an outstanding debt.” Having carefully examined each and every act that is complained of by the Claimant – from Minister Zayas’ letter of 14 June 1999 to Decree No.10485 adopted by the Ministry of the Interior on 22 June 2007 – the Tribunal concludes that each act is essentially about the failure to make the payment that is owed. A generous interpretation of the facts would conclude that before March 2005, each act could be said to concern the issue of assessing whether there was an outstanding debt on which payment was due. After the publication of the Report of March 2005 there was no need for any further assessment, as the validity of the debt had, in effect, been recognized by the relevant Paraguayan authorities, and a payment was recognized as being owed. From March 2005, there has been a straightforward refusal to pay, without any apparent justification.

238. The Tribunal therefore concludes that the conduct that lies at the heart of the dispute, and which has been repeated over time in particular since March 2005, is the refusal

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<sup>462</sup> Report No. 377 of the National Customs Office, Exhibit CE-35.

on the part of Paraguay to pay an outstanding debt that is owed under the Contract.

4.3.3.2 The characterization of the conduct: non-performance of Contract or exercise of sovereign authority

239. The Tribunal turns therefore next to the issue of how to characterize Paraguay's conduct. Is the persistent refusal to pay an outstanding debt under the Contract a sovereign act, as the Claimant argues, or merely an act that an ordinary contracting party could have engaged in, as Paraguay argues?
240. It is important to recognize that beyond the refusal to pay there are no other acts that the Claimant really seeks to remedy. Whilst Paraguay has not paid a contractual debt that it has recognized since March 2005 as being owed, the Claimant has not argued that it has interfered in any other way with the Claimant's rights under the Contract. There is no allegation that Paraguay has, for example, by legislation or other means, sought to take any steps to interfere with other rights under the Contract, or that it has sought to prevent or otherwise limit the Claimant's rights of access to the tribunals of the City of Asunción. There is no claim of the taking of a right under the Contract or of the Contract's unlawful discontinuance. There is no claim of harassment or interference with the Claimant's right to be present in Paraguay, through its representatives, or to carry on such commercial activities as it wishes to engage in. It is impossible to escape the conclusion that this case is, in its totality and however valiantly the Claimant might otherwise seek to characterise it, about the non-payment of an outstanding debt under a Contract.
241. It is also apparent that Paraguay has not availed itself of the kinds of powers that are normally available to a sovereign if it wishes to interfere with the rights of an ordinary party. No legislation or regulatory acts have been adopted, no police powers used, no judgment of any court has been ignored. These are the kinds of powers that frequently characterise claims relating to unfair or inequitable treatment in international investment law. They typically require the exercise of powers that are simply not available to the ordinary contracting party. Yet no such act has been complained of in



the present case. It is therefore not immediately apparent that any of the conduct complained of by the Claimant might not equally have been adopted by a contracting party which was not a sovereign: the initial refusal to pay, the commissioning of one internal report after another, the contradictory decisions of different departments, the involvement of the chief executive, and so on. There is nothing inherent in the fact that such conduct is undertaken by a State in its capacity as a contracting party that might as such endow them with the quality of sovereign acts such as to catalyse responsibility under an international treaty obligation relating to fair and equitable treatment. There has been no reliance by Paraguay on the powers of a public authority that might not – by analogous means – also be available to a private person or corporation. Attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons.

242. It is equally not apparent to the Tribunal that the mere passage of time can have the effect of transforming an act (or acts) that any private person could perform into a sovereign act. The Tribunal does not see how time alone, coupled with the repetition of the conduct, could as such transform the act of a sovereign contracting party into an exercise of sovereign authority. “We will not pay” means “we will not pay”, whether it is said in Year 1 or in Year 8. The fact that eight years may have passed does not as such change the characterisation of the conduct. An act that breaches a contract remains that - and that alone - whether it has been done once in a single year or twenty times over eight years.

243. In this regard, the Tribunal is bound to note the manner in which the case was framed in the original Request for Arbitration submitted to ICSID on 16 February 2007. Part III of the Request is entitled ‘The Facts Relevant to the Dispute’, and it is in three sections. Section B is entitled “Paraguay’s Failure to Pay Amounts Due Under the Contract”, and it runs to eight paragraphs. The only acts alleged to give rise to the violation of the Treaty concern the alleged failure to make payments owing under the Contract. Paragraph 33 of the Request, for example, which addresses violations of the Treaty, states that “The Ministry of Finance’s conduct *in failing to pay amounts due to BIVAC under the Contract* [...] is attributable to Paraguay and engages its state responsibility under international law and the Treaty” (emphasis added). The Tribunal notes that no acts - either in relation to rights under the Contract or the availability of

the contractually agreed forum for the resolution of disputes under the Contract - are complained of in the Request. It is true that the Claimant has reserved to itself, in the paragraph that follows, the right to supplement or amend its claims, and that over the course of the proceedings its case has indeed evolved and changed. This seems to have occurred in order to accommodate the views expressed by the Tribunal in its Decision on Jurisdiction. This is reflected, for example, in the Claimant's Reply on the Merits, where its case has been recast to contradict the claim in the Request, stating that:

“BIVAC is not complaining here of its failure to recover its investment through payment of a contractual debt in January 1999. Rather, it is complaining about its loss of investment through Paraguay's conduct in the following decade – successive governments distancing themselves from an earlier obligation for their own political interests, one after another – resulting in effective repudiation”.<sup>463</sup>

244. The Claimant is of course entitled to seek to recast the facts in another light, and to present them in a different way. The Tribunal is not persuaded, however, that the Claimant got it wrong in its Request for Arbitration, or that the facts are in reality different from the way in which they were originally characterised by the Claimant. As explained in detail in its Decision on Objections to Jurisdiction, the Tribunal holds that these facts cannot sustain a claim for a loss of investment due to Paraguay's conduct, since there was no allegation that the Contract was unlawfully interfered with except in relation to a payment that is said to be due under the Contract. The Contract was lawfully discontinued, and the Claimant's right to have recourse to the contractually agreed forum for the resolution of its claim has not been interfered with, whether by way of exercise of *puissance publique* or otherwise. The facts show that this dispute is indeed about Paraguay's “failing to pay amounts due to BIVAC under the Contract”, as the Claimant put the matter in its Application, no more and no less. The record cannot sustain a claim that the facts concern conduct that gave rise to a loss of investment. The investment came to an end, and it is not in dispute that it did so in accordance with the Contract and therefore lawfully.

245. Accordingly, we now turn to the consequences of our conclusion that this dispute is, at its heart, only about the non-payment of a contractual debt. We are bound to inquire whether the breach of contract is “the result of behaviour going beyond that which an

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<sup>463</sup> BIVAC Reply on the Merits, para. 5.

ordinary contracting party could adopt”, and whether the actions of Paraguay are those not of a mere contracting party but those of a sovereign exercising public powers ‘*puissance publique*’.

246. The Parties are divided on a great number of issues, but they appear to agree that for Paraguay to be liable for a violation of Article 3(1) it must be shown that it acted in a manner that is qualitatively different from an ordinary contracting party. In fact, by its very nature an act that breaches a contract is likely to contradict an initial representation of one of the parties to the contract, and the act may occur for undisclosed reasons or without transparency or pursuant to bad faith of the party in breach. This is the daily lot and misfortune of commercial life, giving rise to a great number of commercial proceedings in law. States are not exempt from this type of conduct. It can be part of the unfair or unreasonable treatment that may be meted out to a private partner in a contractual relationship. Such behaviour under a contract, however, cannot as such give rise to a violation of an obligation established by Treaty governed by international law. All the characterisations that have been invoked to characterize unfair and unreasonable treatment in international law and which the Claimant has argued and which the Respondent denies having occurred – arbitrariness, lack of transparency, negligence, inconsistency, bad faith, the frustration of legitimate expectations, the introduction of unreasonable measures – occur in exercise of sovereign authority over and above acts that constitute mere breach of contract. Something more than mere breach of contract is needed. This might occur, for example, if the State agreed to the jurisdiction of its national courts for the resolution of a contractual dispute and then acted to limit effective access to such courts.

247. Bearing these considerations in mind, both Parties have devoted considerable attention to the issue of whether the conduct of Paraguay that is the subject of this dispute is to be characterised as the exercise of sovereign authority (*puissance publique*), and as such the kind of acts that could give rise to Paraguay’s liability for a violation of Article 3(1) of the BIT. It is no surprise that they adopt markedly different approaches and conclusions.

248. The Claimant argues that the acts for which Paraguay is responsible amount to an exercise of sovereign authority. On its approach, the characterization of Paraguay’s conduct is to be addressed principally by reference to the motivation of the acts that are the subject of the dispute. The Claimant argues that “conduct surrounding the contract breach” is to be treated as an exercise of sovereign authority where the conduct “is politically motivated [...] without the existence of any genuine good faith dispute under the underlying contract.” On its approach, where the “State’s breach of contract is the consequence of the political convenience of the government in power then it ceases to be a mere contractual breach and constitutes a parallel breach of the FET standard.”<sup>464</sup> According to the Claimant,

“[t]he key distinction between a mere commercial breach of contract and a breach of FET does not depend on how actions or measures may be labeled. It depends on whether the parties to a State contract are engaged in a genuine difference of opinion in respect of the scope or interpretation of their respective contractual rights or a good-faith exercise (or breach) of such rights. If so, then that is a simple contractual dispute that should be resolved by the contractual dispute resolution mechanism. However, if the state is not engaged in such a good faith discussion and simply asserts political excuses for its failure to comply in an arbitrary manner then the dispute is a ripe FET claim. This distinction is at the essence of what has sometimes been called the exercise (or not) of ‘puissance publique’.”<sup>465</sup>

249. On the Claimant’s assessment of the facts, Paraguay’s act of “non-payment of the debt obeys political reasons and is not based on any good faith contractual or commercial cause”, and is motivated by reasons of “political convenience”, namely the desire not to take responsibility for obligations assumed by a previous government.<sup>466</sup> According to the Claimant, the facts show “that Paraguay did not fail to pay the debt to BIVAC due to the existence of any good faith contractual dispute” and thus finds

“no reasonable foundation in private law rights, and cannot be labelled as commercial. It was motivated by governmental or political reasons which have nothing to do with the Contract itself.”<sup>467</sup>

250. In support of the view that the motive for the conduct is the main factor to be taken into account in assessing whether conduct is to be treated as an exercise of sovereign authority, the Claimant relies principally on five decisions: *Alpha v. Ukraine*; *Kardassopoulos v. Georgia*; *Rumeli v. Kazakhstan*; *PSEG v. Turkey*; and *Eureko v.*

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<sup>464</sup> BIVAC Post Hearing Brief, para. 10.

<sup>465</sup> *Ibid.*, para. 92.

<sup>466</sup> *Ibid.*, para. 11.

<sup>467</sup> *Ibid.*, para. 102.

*Poland*. It invokes other awards, including the decisions in *Bayindir v. Pakistan*; *RFCC v. Morocco*; *Impregilo v. Pakistan*; and *Amto v. Ukraine*.

251. For its part, Paraguay adopts a different approach: it considers that the characterization of conduct as an exercise of sovereign authority turns not on the motivation of the act, but rather on its nature and distinguishing features. Paraguay invokes the decision of the Tribunal in *Bayindir v. Pakistan*, to the effect that the distinction between a treaty breach and a contract violation requires a claimant to “establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power.”<sup>468</sup> For the Respondent, the conduct must be of a nature that is such that a non-sovereign could not engage in it.

252. For Paraguay, motivation is not the pertinent factor. It argues that “the alleged purpose of the contract and purported reasons for failing to pay are irrelevant to whether the acts that form the basis of BIVAC’s claim ... are acts beyond that of an ordinary contracting party.”<sup>469</sup> Rather, it submits that it is the nature of the act that is significant, and in support of that proposition it invokes authorities drawn from the area of sovereign immunity which, it argues, recognise that

“the alleged motive for the act is not dispositive; instead, it is the nature of the act that matters. If the act is of such a nature that it could have been done by a private party, it is not a sovereign act. Thus, whatever the purported reasons for refusing to pay under a contract and failing to comply with purported promises to pay, there has been no sovereign act because any private party could have engaged in the same conduct.”<sup>470</sup>

253. In support of its approach, Paraguay distinguishes the authorities relied upon by the Claimant and invokes a number of other authorities. It argues that all the cases relied upon by the Claimant in support of its view that motive is the defining factor in fact show that “a sovereign act occurs when the State uses its police, adjudicatory, or legislative powers to the detriment of the rights of the claimant”; according to Paraguay, in this case no such act has occurred.<sup>471</sup> Paraguay further argues that the Claimant has not presented evidence to establish that Paraguay’s failure to pay the

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<sup>468</sup> Paraguay Post-Hearing Brief, para. 7, citing *Bayindir v. Pakistan*, para 180.

<sup>469</sup> Paraguay Post-Hearing Brief, para. 98.

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.* para. 99.

contractual debt was politically motivated, and that no witness testified that Paraguay withheld payment out of political considerations and no documents prove that the government was so motivated. BIVAC merely relies on innuendo and supposition.<sup>472</sup>

254. The Tribunal turns now to its own approach. It has paid very close attention to the arguments of the Parties. The characterization of conduct – does it amount to an exercise of sovereign authority or is it of the kind that an ordinary contracting party could engage in? – is necessarily a matter that turns on the facts of each particular case. This is evident from the numerous decisions invoked by both Parties in support of their respective arguments. The Tribunal considers that it is useful to carefully look at those authorities, and it has done so. But it is also conscious that this is a matter that largely turns on the appreciation of facts, and that it is not for the Tribunal to substitute its view of the facts of any of these authorities for those of the respective tribunal reaching the decision, given their proximity to the arguments raised by the parties, and to the evidence in the factual record. In examining these cases, the Tribunal has therefore sought to understand the approach of each tribunal in assessing the facts, with a view to understanding whether the decision reached focused on *the motive behind the conduct*, as the Claimant argues, or on *the nature of the conduct*, as Paraguay argues, or on a combination of these two elements. The Tribunal is bound to note, before embarking on this review, that in no case that was argued before it has an arbitral tribunal ruled that the non-payment of an outstanding contractual debt could – taken alone – be characterized as an exercise of sovereign authority such as to give rise to a violation of an obligation to provide fair and equitable treatment to an investor.

255. *Kardassopolous and Fuchs v. Georgia*<sup>473</sup> In this case, on which the Claimant placed particular reliance, Georgia was found to be in violation of the obligation to provide fair and equitable treatment in circumstances in which it began by expropriating the claimants' investment, and subsequently proceeded to establish a compensation commission to determine the amount of compensation to be paid for that act of expropriation. The tribunal ruled that Georgia had failed to provide procedural and

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<sup>472</sup> *Ibid.*, para. 97.

<sup>473</sup> *Kardassopolous and Fuchs v Georgia*.

substantive due process during the proceedings of the compensation commission, which was a substitute for the dispute settlement process which the claimants argued they were entitled to have access to but which they had not invoked. The Claimant relies on the award to argue that, like the claimants in that case, it had a legitimate expectation that Paraguay would “implement [a] compensation process that was procedurally and substantively fair.”<sup>474</sup>

256. The Tribunal notes that the facts are distinguishable from the present case. The claimants were not parties to a contract, and the tribunal did not invoke the availability of any contractual remedies otherwise available to the entity in which they were investors. At the heart of that case was an act of expropriation, which by its very nature is conduct that only a State can engage in and which is, almost by definition, an example of the exercise of sovereign authority. Moreover, the act of establishing an adjudicatory *ad hoc* body to deliberate on and award compensation for the expropriation is necessarily an act that only a sovereign entity can engage in: the act of expropriation and consequential actions are not the acts of an entity acting as a contracting party.

257. The *Kardassopolous* tribunal devotes twenty-four paragraphs to its assessment of the obligation to provide fair and equitable treatment, and its conclusion that Georgia violated its obligation to provide such treatment.<sup>475</sup> A careful reading of those paragraphs makes clear that the tribunal’s conclusion was based on the tribunal’s finding that, following the act of expropriation, Georgia made “specific assurances of compensation”, which assurances “gave rise to a specific expectation of compensation” against the background of “the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination”.<sup>476</sup> In the end no compensation was forthcoming.

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<sup>474</sup> BIVAC Post Hearing Brief, para. 80 citing *Kardassopolous and Fuchs v Georgia*, para. 441.

<sup>475</sup> *Kardassopolous and Fuchs v Georgia*, paras. 428-452.

<sup>476</sup> *Ibid.*, paras. 439, 441

258. The facts in the present case are plainly distinguishable. In the present case there was no act of expropriation and no assurances were given by Paraguay that were equivalent to those offered by Georgia. The tribunal in *Kardassopolous* does not in terms address the issue of *puissance publique*, and whether its existence (or not) is to be determined by reference to the nature of the conduct or its motivation. However, it is evident from a close reading of the award that it was the nature of Georgia's actions – the acts of expropriation, establishment of a compensation commission and offering of assurances that compensation would be forthcoming – that underpinned the ruling that Georgia had violated the obligation to provide fair and equitable treatment. Having identified the nature of the acts, only then did the tribunal turn to the issue of the arbitrariness of Georgia's conduct. The tribunal did not seek to justify its finding by reference to the motive of the actions.
259. *Rumeli v. Kazakhstan*<sup>477</sup> In the *Rumeli* case the tribunal concluded that there had been a violation of the obligation to provide fair and equitable treatment in circumstances where Kazakhstan terminated an investment contract to which it was a party before its expiration date, without previously suspending the contract as its terms required. According to the tribunal, such conduct amounted to a breach of the obligation to provide fair and equitable treatment (which was incorporated by means of a most-favoured nation clause) because it was “arbitrary, unfair, unjust, lacked in due process and did not respect the investor's reasonable and legitimate expectations.”<sup>478</sup> The arbitral tribunal further ruled that the subsequent process that led to the decision of a working group created to assess the termination of the contract “lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle”, and that “since the Working Group acted as an organ of the State, the violation amounts to a breach of the BIT by the Republic of Kazakhstan.”<sup>479</sup>
260. It cannot be said that this aspect of the award is overly burdened by the weight of its reasoning. The tribunal does not indicate whether it is the nature of the conduct – the termination of the investment contract coupled with the creation and operation of the

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<sup>477</sup> *Rumeli Telekom v. Kazakhstan*.

<sup>478</sup> *Ibid.*, para. 615.

<sup>479</sup> *Ibid.*, para. 618.



working group “as an organ of the State” – or its motivation that caused it to reach the conclusion that it did. The Tribunal does not see, therefore, that either Party in the present case can obtain much assistance from this somewhat *de minimis* award. From the published award, however, it does appear that the Respondent made no arguments as regards *puissance publique* or the characterization of Kazakhstan’s conduct in relation to its contractual obligations. It is also apparent that the claimants had no contract with Kazakhstan, and accordingly the state owed no contractual obligation to the claimants, and no contractually agreed forum was therefore available to the claimants to pursue any claim. The tribunal did not identify or engage with the issues that arise in the present case, which appears also to be distinguishable in the sense that the *Rumeli* case went beyond a mere failure to pay an outstanding debt under a contract in circumstances in which a remedy for violations of the contract remained available.

261. *PSEG v. Turkey*<sup>480</sup> In *PSEG* the tribunal ruled that Turkey had violated its obligations to provide fair and equitable treatment as a result of a series of actions of the State that were serious enough to give rise to liability. The tribunal found that Turkey had demonstrated “evident negligence [...] in the handling of the negotiations with the Claimants”, had engaged in “abuse of authority” in seeking to renegotiate the contract that governed the relations between the parties in a manner that went “far beyond” the purpose of the applicable law and the relevant public body’s “authority”, “ignore[d] rights granted by law as a matter of policy or practice”, ignored a decision of the Turkish Constitutional Court “upholding the rights acquired under a contract”, and engaged in constant changes in legislation that had a “‘roller-coaster’ effect of [...] continuing legislative changes.”<sup>481</sup>
262. It is apparent from the award – which followed a decision on jurisdiction in which the tribunal had already concluded that “[t]he nature of the dispute is [...] not that of a typical contractual dispute”<sup>482</sup> – that the tribunal was addressing conduct that no ordinary contractual party could engage in, and that in any event went far beyond the mere failure to pay an outstanding debt under a contract. The case is therefore plainly

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<sup>480</sup> *PSEG v. Turkey*.

<sup>481</sup> *Ibid.*, paras 246-250.

<sup>482</sup> *PSEG v. Turkey*, Decision on Jurisdiction, para. 173.

distinguishable from the present case, since the conduct of Turkey as a commercial partner, rather than a sovereign regulator, was not the basis of the tribunal's conclusions.

263. *Alpha v. Ukraine*<sup>483</sup> In this case, the arbitral tribunal found that Ukraine had interfered with a contractual relationship between claimant and a third party, in a manner that effectively negated agreements under the contract and directly interfered with the day-to-day management of the company in which the claimant had invested.<sup>484</sup> In circumstances in which the Ukraine was not a party to the contract, the question of whether the State was acting in exercise of sovereign authority or as a contracting party did not arise. For this reason the award is of no relevance to the issue we face.
264. *Eureko v Poland*<sup>485</sup> In the Eureko case the Council of Ministers of Poland adopted a Resolution on 2 April 2002 which prevented Eureko, the claimant in that case, from acquiring from the State Treasury an additional 21% of the shares in the entity in which it had invested, thereby preventing it from acquiring the controlling interest in the newly privatized company (PZU) that it had expected to gain. By a majority, the tribunal interpreted this act, and others that followed as a consequence, as evidence that Poland had “consciously and knowingly, decided to violate the investment of Eureko in PZU by refusing to honour its legal commitments”, and these acts “frustrated the investment of Eureko in PZU” (including Poland’s commitment to allow it to obtain a controlling stake in PZU) and violated its rights as a shareholder.<sup>486</sup>
265. It is evident that the majority in the *Eureko* case founded its decision on the resolution adopted by Poland’s Council of Ministers, which is self evidently a sovereign act going beyond what a party to a contract might engage in. By that resolution Poland’s Council of Ministers “resolved that it was essential for the state Treasury to maintain control over [PZU] and [...] consented to a change in the privatization strategy for [PZU].”<sup>487</sup> The resolution also “obligated the State Treasurer to advise ambassadors of

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<sup>483</sup> *Alpha v. Ukraine*,.

<sup>484</sup> *Ibid.*, para. 422.

<sup>485</sup> *Eureko v Poland*.

<sup>486</sup> *Ibid.*, paras. 201, 219, 224, 226.

<sup>487</sup> *Ibid.*, para. 218.

EU member states of a change in the privatization strategy.”<sup>488</sup> These are self-evidently actions that are not of a nature that can be adopted by an ordinary contracting party. The Tribunal notes that in the present case the conduct that is complained of is qualitatively different.

266. *Other cases* Numerous other cases have also been cited, by one or other Party. In *Bayindir v. Pakistan*, for example, the tribunal found that there was no breach of the obligation to provide fair and equitable treatment, and found *inter alia* that a failure to make payments under the contract at issue in this dispute could be characterized as being based on “a reasonable contractual explanation.”<sup>489</sup> This is a point on which the Claimant relies. The Tribunal notes, however, that there is nothing in the award to indicate that the mere failure to pay an amount owing under a contract could, as such and taken alone, give rise to an obligation to provide fair and equitable treatment. The same point may be made in relation to *RFCC v. Morocco*<sup>490</sup> and *Noble Ventures v. Romania*.<sup>491</sup> Another case referred to is *AMTO v Ukraine*,<sup>492</sup> which was not a dispute between the claimant and the State under the contract, but alleged conduct on the part of the Ukraine that was said to have caused the entity in which the claimant had invested to be unable to recover certain debts. On the basis of the evidence the tribunal rejected the claim, but this Tribunal notes in any event there is nothing in the award to support the proposition that the mere failure of a State that is a party to a contract to pay an outstanding debt on the contract could, of itself, amount to a breach of a treaty obligation to provide fair and equitable treatment.
267. From this review of the case law it is apparent that, in determining whether conduct of a State violates an obligation to provide fair and equitable treatment, arbitral tribunals do not necessarily adopt a uniform or completely consistent approach, and only rarely engage in an explicit consideration of whether the conduct in question constitutes an exercise of sovereign authority. Indeed, that issue inevitably arises only when the State is itself a party to a contract and the relationship between an alleged breach of a contract and/or treaty is in issue, and it is necessary to determine whether the conduct

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<sup>488</sup> *Ibid.*

<sup>489</sup> *Bayindir v. Pakistan*, para. 356.

<sup>490</sup> *RFCC v. Morocco*.

<sup>491</sup> *Noble Ventures v. Romania*.

<sup>492</sup> *Limited Liability Company AMTO v. Ukraine*, (SCC Arbitration No. 080/2005, Award, 26 March 2008 [hereinafter, *AMTO*])

goes beyond that of a contracting party, in the sense identified by the tribunal in the *Impregilo* case.

268. Across the range of cases, it is apparent also that in assessing conduct arbitral tribunals consider both the nature of the act and its motivation. To the extent that any sort of general approach can be discerned, it seems that tribunals adopt a two step process, whether explicitly or implicitly: *first* they address the nature of conduct; *second*, assuming the conduct to be such as to give rise to the possibility of a breach of the obligation to provide fair and equitable treatment, they address whether it meets the requirement not to be arbitrary or discriminatory or otherwise unfair or inequitable. That second element necessarily requires an assessment of motive, but it is plain that the motive that explains particular conduct is treated as being distinct from, and informing of, its nature.
269. In the present case the real issue the Tribunal is faced with is the determination of whether a refusal to pay an outstanding contractual debt can by its nature constitute a sovereign act, in the sense of being conduct that an ordinary contracting party cannot engage in. The Tribunal notes that the Claimant has not been able to identify a single case in which a tribunal has ruled that the non-payment of an outstanding debt by a State (or statal body) could be characterised as an exercise of sovereign authority. This is true too even if the non-payment is said to be persistent and unjustified under the contract. In cases in which a violation of a contractual obligation has formed the basis of a finding that the obligation to provide fair and equitable treatment has been violated, the conduct in relation to the contract has been accompanied by some other act or conduct that the respective tribunal has determined to be an exercise of sovereign authority: the act of expropriation in the *Kardassopolous* case is an example.
270. The Tribunal concludes therefore that it is necessary to look at the nature of the conduct in question. In the present case, the failure to pay the outstanding debt was an act of Paraguay dating back to at least 1999. At that moment, the conduct was the simple failure to pay the debt: to carry out an assessment of whether the debt was due,

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v. *Ukraine*].

and if so to instruct the relevant body to authorize a payment on the amount and then to pay the amount. That conduct continued until 2005, when the debt was acknowledged. Throughout that period, the conduct in question concerned the failure to pay the debt under the contract. Thereafter, the acknowledgment of the debt by the State – or elements of it – cannot transform the nature of the conduct, which remains a continuing failure to pay the debt and no more. If that acknowledgement had been accompanied by other acts of Paraguay that interfered with the Claimant’s ability to recover the debt – for example by an exercise of sovereign authority interfering with the availability of the contractually agreed forum for the resolution of disputes concerning the amount owing under the Contract – the situation may be different. But there were no such acts. The Tribunal notes too that the Claimant has not been able to cite any authority for the proposition that international law imposes any obligation as such on a State to pay moneys owing under a contract.

271. Against the Claimant’s argument, there are other authorities that support the conclusion that the non-payment of a contractual debt cannot as such be characterised as an exercise of sovereign authority such as to give rise to a liability for a failure to meet the obligation to provide fair and equitable treatment.

272. In *Waste Management v. Mexico* the arbitral tribunal in a case under the North American Free Trade Agreement had to decide whether Mexico had violated the claimant’s right to fair and equitable treatment under Article 1105 NAFTA. The tribunal ruled:

“For present purposes it is sufficient to say that even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.”<sup>495</sup>

273. In the Tribunal’s view that conclusion applies equally to the consideration of Article 3(1) of the BIT in the present case. The reason is that such conduct does not go beyond that in which an ordinary contracting party could engage. Such conduct coupled with repudiation of the transaction, or interference with other rights under the transaction, including the right of access to the contractual remedy, would tend to transform the

conduct beyond that which an ordinary contracting party could engage in. No such additional conduct exists in the present case, and it has not been argued – and cannot reasonably be argued - that there has been a repudiation of the Contract.

274. The second pertinent case is *Parkerings v. Lithuania*, where the tribunal was faced with the issue of the relationship between a breach of a contract and the obligation to provide fair and equitable treatment. The tribunal ruled that

“[u]nder certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract.

[...]

However, if the contracting-party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in position, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred. In other words, as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the “treatment” that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.”<sup>494</sup>

275. This Tribunal too does not exclude the possibility that there may be circumstances in which a substantial breach of a contract could, as such, give rise a breach of an obligation to provide fair and equitable treatment. To make such a case a claimant would have to point to a requirement of international law imposing an obligation to comply with a contract and persuade a tribunal that such a requirement was part of the obligation to provide such treatment. The fact that no authority has been brought to the Tribunal’s attention and which identifies an example of such a situation indicates that it will be rare, assuming that it could ever arise. Even if it did arise, the continued unhindered availability of a contractually agreed forum for the resolution of the dispute under the contract would be a significant factor imposing an additional hurdle for a claimant to overcome were it to make such an argument.

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<sup>493</sup> *Waste Management v. Mexico*, para. 115.

<sup>494</sup> *Parkerings v. Lithuania*, para. 316 - 317.

276. Having concluded that this dispute is premised on Paraguay's failure to make a payment of a debt owing under the Contract it entered into with the Claimant, the Tribunal further concludes that Paraguay's failure to pay that outstanding debt, including in particular in the period after March 2005, cannot properly be characterized as an exercise of sovereign authority. It is, in the Tribunal's view, conduct that an ordinary private party to a contract might also engage in. The fact that the failure is persistent cannot change the character of the conduct. Nor can the fact that the failure appears to be wholly unjustified transform the nature of the conduct into the exercise of sovereign authority. Taking the Claimant's case at its highest, the bottom line is that Paraguay has refused to pay sums owing to the Claimant under the Contract. That failure, which turns on the facts established in the record, cannot as a matter of law amount to an exercise of sovereign authority. In the Tribunal's view the facts show "mere breach by a State of a contract with an alien (whose proper law is not international law)" and that accordingly no violation of Article 3(1) of the BIT arises.<sup>495</sup> As the *Impregilo* Tribunal put the point in respect of one aspect of the case before it:

"These are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of "*puissance publique*" by the State."<sup>496</sup>

277. It follows from this that the Respondent's failure to pay its debt may be one of the prerequisites for determining that a State might be liable for a breach of an obligation to provide fair and equitable treatment but that the other essential prerequisite for such violation, i.e. the exercise of sovereign power, has not been satisfied. Putting this conclusion another way, the Tribunal finds that the case is a contractual dispute, no more and no less. A forum for the resolution of contractual disputes has been agreed by the Parties to the Contract. The right to have access to that forum – the tribunals of the City of Asunción - remains fully available, and has not been interfered with by Paraguay in exercise of sovereign authority (or otherwise). There is nothing in the record of evidence to indicate that the Claimant was somehow induced – whether by

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<sup>495</sup> See S. Schwebel, "On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law," in *Justice in International Law*, 425, 431 (1994).

<sup>496</sup> *Impregilo v. Pakistan* para. 268. (see also paragraph 278, where the Tribunal notes that "a Host State acting as a contracting party does not "interfere" with a contract; it "performs" it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority.")

representations or other means made by or on behalf of Paraguay - not to bring proceedings before the tribunals of the City of Asunción. The Claimant has chosen not to avail itself of its rights under the Contract to have access to that forum. When asked during the hearing why it had taken that decision, counsel on its behalf characterised the choice as “a commercial decision.”<sup>497</sup>

278. The Claimant raises arguments concerning the lack of independence and the general inadequacy of the tribunals of the City of Asunción as a forum for the resolution of the contractual dispute. The Tribunal notes that the Request for Arbitration made no such claim when it was submitted in 2007. It was only by the Claimant’s Memorial dated 27 November 2009 and at the hearing that any evidence was tendered in relation to the matter, and that related to allegations of lack of judicial independence long after the dispute had arisen, and many years after the Claimant could have brought its case to the tribunals of the City of Asunción.

279. In addressing this matter, the Tribunal has asked itself whether there are any aspects of Paraguay’s conduct in failing to pay outstanding debts under the Contract that could not be fully remedied in proceedings before the tribunals of the City of Asunción. At this point in time, it sees none. As noted above, in its Request for Arbitration the Claimant itself characterised its claim as being to recover payment of a debt owing under a contract. It did not request this Tribunal to provide any other relief, and it did not assert that Paraguay had otherwise interfered with its contractual rights, for example by interfering with the availability of the contractually agreed forum for disputes relating to the Contract. The Tribunal recognizes, however, that the Claimant’s allegations that “the lack of independence of the Paraguayan courts is notorious”,<sup>498</sup> and that the court system is corrupt, slow and cost-intensive, are serious allegations. A cornerstone for the distinction of the non-payment of a contractual debt as being *either* a breach of contract *or* – in addition – a violation of a treaty obligation is the question of whether the State acted in the exercise of its sovereign power. One of the expressions of such power would be an interference with the functioning of the agreed dispute resolution mechanism before national courts, or the failure to ensure that such courts function in a manner that is independent and effective, and gives

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<sup>497</sup> Transcript of Hearing on the Merits (July 5 -7, 2011), page 91/18



rulings solely on the basis of law. A deviation from generally accepted principles in the functioning of the tribunals of the City of Asunción would be relevant to the assessment of an alleged violation of the fair and equitable treatment standard.

280. On the basis of the foregoing, the Tribunal concludes that, at this point in time, Paraguay has not, by its failure to make payment on the outstanding debt under the Contract, violated Article 3(1) of the BIT. It notes that a lack of effectiveness of the agreed contractual dispute resolution mechanism might give rise to a different conclusion

281. Having so concluded, the Tribunal proceeds to consider the consequences of this Decision.

#### 4.3.3.3 Recourse to the tribunals of the City of Asunción

282. As set out above, it has been a central part of the Tribunal's consideration that the tribunals of the City of Asunción were available to the Claimant from the moment the dispute arose until the date on which the Request for arbitration was filed. As noted at paragraphs 38 to 41 of this Decision, the Tribunal invited the Parties to express views as to whether the Claimant's contractual claims were now time barred according to Paraguayan law. In their responses, both Parties agreed that the tribunals of the City of Asunción continue to be available to the Claimant in respect of its claims under the Contract, on the grounds that any period of limitation that might have been applicable was interrupted before it had ended. It follows from this that, if it wishes to do so, the Claimant can still have recourse to those tribunals to pursue its contractual claim.

283. Until now, the Claimant has apparently not wished to avail itself of its right under the Contract to have recourse to the tribunals of the City of Asunción. It may now wish to do so, and the Tribunal considers it appropriate to have a limited period within which to avail itself of this right.

284. The Tribunal will therefore stay these proceedings for a limited period of three

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<sup>498</sup> BIVAC Memorial, para 153.

months, within which the Claimant may wish to exercise its right to have recourse to the Asunción tribunals. If the Claimant does not avail itself of this possibility, the Tribunal will thereafter render its Award and terminate these proceedings. In the event that the Claimant does avail itself of the possibility, the Tribunal will retain jurisdiction over these proceedings for a reasonable period of time, to allow the tribunals of Asunción to hear the Claimant's claim. The Tribunal considers that it will be appropriate for the Claimant to inform the Tribunal at the latest three months after the date of this Decision whether it has chosen to pursue its claim before the tribunals of the City of Asunción. In the event it does pursue such a claim, the Parties are directed to report to the Tribunal, separately or jointly, on the status of those proceedings at intervals of six months. The first report will be due six months after the date of this Decision.

285. In this regard, the Tribunal is bound to note that on the basis of the arguments presented in these proceedings, the claim for payment under the Contract would appear to be straightforward and should not admit of any undue delay in its adjudication by the tribunals of the City of Asunción. In the event that such a claim is made, the Tribunal expects that Paraguay will not introduce any new factual elements in defending its claim or invoke the statute of limitation which it assures has not lapsed. The Tribunal further expects that Paraguay will not avail itself of any procedures that are aimed at introducing any inappropriate delays or other obstacles to the timely and efficient exercise of jurisdiction by the tribunals of the City of Asunción in dealing fairly with the claims for outstanding payments under the Contract. In the event that Paraguay or any of its organs, including the courts, fail to address any such claim in accordance with the requirements of Article 3(1) of the Treaty, the Claimant will be free to make an application to this Tribunal.
286. The Tribunal would be surprised if the resolution of the outstanding contractual dispute should provide any degree of difficulty before the tribunals of the City of Asunción. The issues of contractual breach have been very fully argued before this Tribunal. As noted above, the Customs Office has concluded, without ambiguity, that the Claimant performed its obligations and that it was, in effect, entitled to be paid what it is owed under the Contract, and both Parties agree that the claim is not time barred

## 5. Article 3(4) of the Treaty

287. In its first Decision on Objections to Jurisdiction, in relation to the claim made under Article 3(4) of the Treaty the Tribunal joined 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 and had invited the Parties to submit its arguments with respect to the consequences of the inadmissibility of the claim.
288. The Claimant asserts that the Tribunal has the power to order a stay of the proceedings and that it would be appropriate to deal with admissibility issues. It argues that since the issue is not absolute and only a temporary obstacle, BIVAC should be granted the opportunity to initiate local proceedings under the contractual dispute settlement mechanism with the Tribunal exercising an ongoing “supervisory function”:
- “[T]here would be little point in dismissing jurisdiction here if, should BIVAC attempt to overcome the admissibility obstacle by resorting to local remedies, it became obvious very quickly that those remedies are blocked, ineffective or futile, or if Paraguay acts unfairly and uncooperatively in those proceedings. That is, the admissibility issue identified by the Tribunal could well fade away fairly quickly. If in the meantime the claim is dismissed as inadmissible, BIVAC would have to restart the process that it commenced almost three years ago.”<sup>499</sup>
289. The Respondent argues that a stay “would serve no real purpose in light of the Tribunal’s prior holding as to that claim’s inadmissibility” and that it would only confuse the specificities of contractual claims and treaty claims. It therefore pleads for the dismissal of this part of the case.<sup>500</sup>
290. The Tribunal considers that a continued stay of the proceedings is the appropriate way forward, being a cost-effective and efficient in the treatment of the issue of admissibility. The Parties agree that the contractual dispute solution mechanism is still available. It is premature to say whether it will be employed by Claimant and– in the

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<sup>499</sup> BIVAC Memorial on the Merits, para 278 citing C. Schreuer, *Consent to arbitration*, in *The Oxford handbook of International Investment Law*, ed. Muchlinski et al., Schreuer (Oxford University Press, 2008) p. 846, Exhibit CL – 115.

<sup>500</sup> Paraguay Memorial on the Merits, para 149.

event that it is – whether it will meet expectations with regard to the sound administration of justice. The Claimant will inform the Tribunal at the latest three months after the date of this Decision whether it has chosen to pursue its claim before the tribunals of the City of Asunción or not. In case it has, and the Paraguayan courts have ascertained Claimant’s claim and the Respondent disregarded the decision, the claim under the umbrella clause might then become admissible, depending on the circumstances. For these reasons and in view of the decision taken in relation to Article 3(1), the Tribunal orders the stay of the proceedings with respect to the claim under Article 3(4) of the BIT.

## **6. Other matters**

291. The Tribunal is conscious that it might be said that it should have proceeded to give the relief sought by the Claimant, on the grounds that the Claimant has waited long enough to be paid on the debt it is owed. That is not a course the Tribunal was entitled to follow. In entering into the Contract, the Claimant agreed by its Article 9(1) that “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.” The decision not to avail itself of rights under Article 9(1) was taken by the Claimant and by it alone, without any inducement, and on its own account for “commercial reasons.” In that respect, such delays as have arisen are therefore the responsibility of the Claimant alone.
292. The function of an arbitral tribunal established under the BIT, like any arbitral tribunal established in relation to ICSID and other investment treaty proceedings, is to apply the law in relation to the matters agreed by the States that adopted the BIT, in this case the Netherlands and Paraguay. It is not the function of arbitrators who are charged with interpreting and applying a treaty to go beyond the limits of what that treaty allows them to do, whether to do justice or for any other reasons. In its Decision on Jurisdiction the Tribunal explained why this BIT did not provide remedies for mere breaches of contractual obligation, in circumstances where the parties to the contract had agreed on a specific forum to resolve contractual disputes. For this Tribunal to exercise jurisdiction in relation to a pure contractual dispute, in the circumstances of this case, would plainly amount to an excess of jurisdiction. The Netherlands and Paraguay did not agree to allow for the establishment of an arbitral tribunal as a forum

for the mere collection of contractual debts except as specified by the BIT. The jurisdiction of this Tribunal is a limited and exceptional jurisdiction, one that is not permitted to stray beyond the matters agreed by the Netherlands and Paraguay.

## **7. Costs**

293. The Tribunal reserves jurisdiction to determine in the Award the costs of the Arbitration and their allocation between the Parties.

## DECISION

294. For these reasons the Tribunal decides that:

- a. BIVAC has standing to bring the claims under Article 3(1) and 3(4) of the BIT;
- b. the exercise of jurisdiction in relation to the claims made under Articles 3(1) and 3(4) of the BIT is stayed;
- c. the termination of these proceedings is stayed for a period of three months from the date of this Decision, within which period the Claimant may wish to file before the tribunals of the City of Asunción a claim for breach of the Contract in order to recover the sums owing to it under the Contract and notify the Tribunal of its course of action, within that period;
- d. in the event that such a claim is not filed, the Tribunal shall render its Award and terminate these proceedings;
- e. in the event that such a claim is filed: (i) these proceedings will be stayed further and the Parties shall be directed to inform the Tribunal, either jointly or separately, every six months, beginning with the date of this Decision, on the status of the proceedings before the tribunals of the City of Asunción; (ii) the Claimant shall be free to make a further application in the event that the tribunals of the City of Asunción fail to proceed to the adjudication of any such a claim in a timely manner and in accordance with the requirements of the Treaty; and
- f. all other questions, including those concerning a potential obligation to pay interest, the costs and expenses of the Tribunal and the costs of the parties are reserved for future determination.



Dr. Rolf Knieper

President

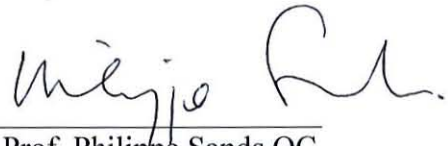
Date: 4 August 2012



Mr. L. Yves Fortier, CC, QC

Arbitrator

Date: 30 July 2012



Prof. Philippe Sands QC

Arbitrator

Date: 23 July 2012