

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the annulment proceeding between:

SGS SOCIETE GENERALE DE SURVEILLANCE S.A.

and

THE REPUBLIC OF PARAGUAY

ICSID Case No. ARB/07/29

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Mr. Eduardo Zuleta J., Member
Judge Abdulqawi Ahmed Yusuf, Member
Mr. Rodrigo Oreamuno B., President

Secretary of the *ad hoc* Committee
Mrs. Mercedes Cordido-Freytes de Kurowski

May 19, 2014

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GLOSSARY OF ABBREVIATIONS

Agreement or Contract	Agreement entered into between the Government of the Republic of Paraguay and SGS Société Générale de Surveillance S.A. on the Rendering of Technical Services for Import Pre-Shipment Inspection
Application	Annulment Application, dated June 7, 2012.
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award rendered on February 10, 2012 in the arbitration SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29
Background Paper on Annulment	Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012.
BIT	Agreement on the Promotion and Reciprocal Protection of Investments between Switzerland and Paraguay. Signed on January 31, 1992, and entered into force on September 28, 1992.
Counter-Memorial	SGS's Counter-Memorial on Paraguay's Article 52 Application for Annulment, dated March 8, 2013.
Decision on Jurisdiction	Decision on Jurisdiction, dated February 12, 2010.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Memorial in Support of the Republic of Paraguay's Application for Annulment, dated January 4, 2013.
Paraguay	The Republic of Paraguay or the Respondent

Parties	The Republic of Paraguay and SGS Société Générale de Surveillance S.A.
SGS	SGS Société Générale de Surveillance S.A. or the Claimant
Tr	English transcript of the Hearing on Annulment held on November 1, 2013. References to the transcript are made in the following manner: “page number: line number”.
Tribunal	The Arbitral Tribunal that rendered the Award.

I. PROCEDURAL HISTORY

1. On June 7, 2012, ICSID received from Paraguay an Application for annulment of the Award rendered in ICSID Case No. ARB/07/29, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*. The Application also contained a request for the stay of enforcement of the Award, in accordance with Rule 54(1) of the Arbitration Rules. The Application for Annulment was submitted within the time period provided for by Article 52(2) of the ICSID Convention.
2. The Secretary-General of ICSID registered the Application for Annulment on June 8, 2012, in accordance with Rule 50(2) (a) and (b) of the Arbitration Rules, and at the same time notified the Parties of the provisional stay of enforcement of the Award, in accordance with Rule 54(2) of the Arbitration Rules.
3. By letter of June 25, 2012, in accordance with ICSID Arbitration Rule 54(2), SGS requested that the Committee rule, within 30 days of the date of its constitution, on whether the provisional stay of enforcement of the Award should be continued. SGS expressed its opposition to a continued stay of enforcement and requested that Paraguay be ordered to post a bond in the event that the Committee should decide to continue such stay.
4. On July 27, 2012, the Secretary-General, in accordance with Article 52(2) of the Arbitration Rules, informed the Parties that the *ad hoc* Committee (the “Committee”) had been constituted. It was composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President, Mr. Eduardo Zuleta, a national of Colombia, and Mr. Salim Moollan, a national of Mauritius and France. The Parties were also informed that Mrs. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, would be the Secretary of the Committee.
5. By letter of August 8, 2012, the Committee invited the Parties to file written observations on the request for continued stay of enforcement prior to the First Session. Paraguay was invited to file its observations by August 14, 2012 and SGS by August 20, 2012. Both Parties presented their submissions in a timely manner.
6. The first session was held on October 29, 2012 by telephone conference. During the First Session the Parties confirmed that the Committee had been properly constituted, in

accordance with the ICSID Convention and the Arbitration Rules, and that they had no objections to the appointment of any member of the Committee. It was agreed that the proceeding would be conducted in accordance with the ICSID Arbitration Rules in effect from April 10, 2006. The Parties agreed on several other procedural matters, *inter alia*, that the procedural languages would be English and Spanish, and that the place of the proceeding would be the seat of the Centre in Washington D.C. The Parties' joint agreement and the procedural calendar were incorporated in Procedural Order No. 1 dated November 13, 2012, signed by the President and circulated to the Parties.

7. On November 7, 2012, each party filed further observations with regard to SGS' request to terminate the stay of enforcement of the Award.
8. On November 14, 2012, following the resignation of the *ad hoc* Committee member Mr. Salim Moollan, the Secretary-General notified the Parties of the vacancy, and the proceeding was suspended pursuant to ICSID Arbitration Rules 53 and 10(2).
9. On November 26, 2012, after consulting with the Parties, the Chairman of the ICSID Administrative Council appointed Judge Abdulqawi A. Yusuf, a Somali, Djiboutian and Canadian national, to the *ad hoc* Committee to fill the vacancy caused by Mr. Salim Moollan's resignation.
10. Following the appointment of Judge Abdulqawi A. Yusuf, the *ad hoc* Committee was reconstituted and the proceeding was resumed on November 29, 2012, pursuant to ICSID Arbitration Rules 53 and 12.
11. In accordance with the procedural calendar set forth in Procedural Order No. 1, the Republic of Paraguay filed its Memorial on Annulment on January 4, 2013, and SGS filed its Counter-Memorial on March 8, 2013. On March 22, 2013, the Tribunal decided that a second round of pleadings was not needed.
12. On January 17, 2013, SGS filed a request for provisional measures. By a communication dated January 24, 2013, Paraguay strongly opposed the provisional measures requested by SGS and on January 25, 2013, SGS sent a letter to the Committee in which it withdrew its request for provisional relief.

13. On March 22, 2013, the *ad hoc* Committee issued its Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award and SGS' request to terminate it. In it, the Committee decided to reject Paraguay's request, declared that the provisional stay granted by the Secretary-General was terminated as of that date, and that it would rule on the allocation of costs and expenses in its decision on the annulment of the Award.
14. The Hearing on Annulment was scheduled to take place on June 13, 2013. However, it was cancelled because Paraguay failed to pay in time the corresponding fees. It was subsequently rescheduled for November 1, 2013.
15. On August 6, 2013, Counsel for SGS, with the assent of Counsel to Paraguay, informed the Tribunal that the Parties had successfully concluded settlement negotiations and executed a Settlement Agreement dated July 20, 2013. This Agreement required specific actions to be taken by the Parties by December 15, 2013. The Parties agreed that, pending such actions, the annulment proceeding should continue as scheduled and requested the Tribunal to maintain the scheduled date for the Hearing on Annulment.
16. On September 20, 2013, the Tribunal requested the Parties to inform whether the Hearing on Annulment that had been scheduled for November 1, 2013 would go forward. Counsel for Paraguay replied on September 24, 2013, indicating that the specified actions required by the Settlement Agreement had not been undertaken and that it was unlikely that they would before November 1, 2013. The Parties therefore agreed that the Hearing on Annulment should go forward on November 1, 2013, as scheduled.
17. On November 1, 2013, the Hearing on Annulment was held at the seat of the Centre in Washington, D.C. The three members of the *ad hoc* Committee and the Secretary were present during the hearing.
18. During the hearing, SGS was represented by Messrs. Olivier Merkt and Nicolas Grégoire from the Legal Department of SGS Société Générale de Surveillance S.A., and by Messrs. Paul Friedland, Damien Nyer and Daniel Aun from White & Case LLP.
19. The Republic of Paraguay was represented by Dr. Roberto Moreno Rodríguez, *Procurador General de la República*; Dr. Giuseppe Fossati, Legal Counsel from the *Procuraduría*

General de la República; Dr. Benigno López, and by Mr. Brian C. Dunning, Mr. David Cinotti and Ms. Irene Ribeiro Gee from Venable LLP.

20. On March 26, 2014, the proceeding was declared closed in accordance with Rules 53 and 38(1) of the Arbitration Rules.
21. The *ad hoc* Committee conducted its deliberations by various modes of communication among its members and in issuing this Decision has taken into account all written submissions and oral arguments of the Parties.

II. THE PARTIES' POSITIONS

A. PARAGUAY'S POSITION

22. In its Application, Paraguay requested the *ad hoc* Committee to annul the Award in its entirety on the basis of two grounds contained in Article 52 of the ICSID Convention: (i) that the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); and (ii) that the award failed to state the reasons on which it is based (Article 52(1)(e) of the ICSID Convention).
23. Paraguay argued these two grounds for annulment in its Memorial. However, at the hearing, Paraguay said that the main question that it would address was whether or not the Tribunal manifestly exceeded its powers¹. Paraguay would therefore not refer to the parts of its brief related to sovereign acts and the failure to state reasons, but it would rest on its Memorials about these two matters.²

Manifest Excess of Powers

24. According to Paraguay the Tribunal manifestly exceeded its powers in two ways. First, the Tribunal manifestly exceeded its powers in deciding the merits of a dispute over which it lacked jurisdiction, because of an exclusive forum selection clause in the contract in favour of the exclusive jurisdiction of Paraguayan courts. Second, the Tribunal also manifestly

¹ Tr., 8:18-20

² Tr., 9:4-9

exceeded its powers by deciding SGS's claims on the merits, because a pure breach of contract by a State without the exercise of sovereign powers cannot violate the BIT.³

25. In its Memorial on Annulment Paraguay stated:

“The Tribunal manifestly exceeded its powers by refusing to give effect to this forum-selection clause and instead deciding that Paraguay violated the BIT because it breached the payment obligations in the Contract.”⁴

26. Paraguay added:

“The Tribunal also manifestly exceeded its jurisdiction in deciding the merits of SGS's claims because a failure to pay under a contract, without any use or abuse of sovereign authority, cannot amount to a treaty breach, as many ICSID tribunals have held. Because the alleged breach of contract could not violate the BIT, the claim was manifestly outside the Tribunal's jurisdiction.”⁵

27. Paraguay divided its argument on manifest excess of power in two parts:

“First, the Tribunal manifestly exceeded its powers when it considered and decided SGS's claim that Paraguay breached the Contract by failing to pay SGS's invoices. This contract claim was within the exclusive jurisdiction of the Paraguayan courts pursuant to the clear and unambiguous terms of the parties' Contract. No other ICSID tribunal has held that an Umbrella Clause in a BIT renders within its jurisdiction and admissible a breach of contract, without more, that is undisputedly subject to an exclusive contractual forum-selection clause.”⁶

“The Tribunal manifestly exceeded its powers in this case by deciding a claim that was outside its jurisdiction under the BIT and that was inadmissible because it was within the exclusive jurisdiction of the Paraguayan courts. Because the Tribunal lacked authority to decide the merits of the case, it manifestly exceeded its powers.”⁷

“Second, the Tribunal manifestly exceeded its powers by deciding SGS's claim on the merits because a pure breach of contract, without any sovereign act, cannot violate the Umbrella Clause in the BIT. SGS's claim based solely on failure to pay under the Contract was manifestly outside the Tribunal's power to decide.”⁸

28. Paraguay also affirmed:

³ Memorial on Annulment, ¶ 36-37

⁴ Id., ¶ 2

⁵ Id., ¶ 3

⁶ Id., ¶ 36

⁷ Id., ¶ 38

⁸ Id., ¶ 37

“Although the *ad hoc* Committee is not a court of appeal, the Tribunal’s decision to consider SGS’s claim on the merits goes far beyond mere error of law or treaty misinterpretation” “...the Award should be annulled because the Tribunal had no authority to consider the merits of SGS’s claims in the first place. Indeed, in rejecting BIVAC’s claims, the *BIVAC* tribunal held that “[f]or 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.”⁹

29. With respect to the forum-selection clause, Paraguay asserted:

“It was a manifest excess of powers to refuse to enforce the forum-selection clause and instead decide the merits of SGS’s contract claim pursuant to the Umbrella Clause in the BIT. This excess of power is ‘obvious from a simple reading of the reasons of the Tribunal’. The Tribunal’s exercise of jurisdiction violated fundamental principles of party autonomy or *pacta sunt servanda*, and is inconsistent with the rule that specific agreements control over general agreements on the same issue.”¹⁰

30. Paraguay concluded its argumentation about the forum-selection clause stating:

“For these reasons, the Tribunal manifestly exceeded its powers by refusing to abide by the clear language in the Contract and instead deciding the merits of SGS’s Umbrella Clause claim, a claim fundamentally based on a contract rather than any independent treaty standard.”¹¹

31. Paraguay argued that the Tribunal manifestly exceeded its powers in a second way, by deciding the merits of a contractual dispute, outside the scope of the Umbrella Clause¹².

32. In Paraguay’s view, a breach of contract by a State, without the exercise of sovereign powers, cannot violate the Umbrella Clause in the BIT¹³. Paraguay referred to the decisions in *Pan American Energy LLC v Argentine Republic*, *Impregilo S.p.A v Islamic Republic of Pakistan* and *Joy Mining Machinery Ltd v. Arab Republic of Egypt*, to state that Umbrella Clauses and BIT standards are not breached by a commercial conduct like the failure to pay under a contract. On the contrary, “only governmental or sovereign conduct can breach a BIT standard”¹⁴.

⁹ Id., ¶ 44 (footnote omitted)

¹⁰ Id., ¶ 47 (footnote omitted)

¹¹ Id., ¶ 93

¹² Id., ¶ 94

¹³ Id., ¶¶ 35-37

¹⁴ Id., ¶ 94

33. Moreover, the Umbrella Clause in the BIT does not transform a mere contract breach into a treaty breach and is not sufficiently specific to override this rule¹⁵. Further, the Umbrella clause is not a substantive standard of protection¹⁶ and does not automatically convert contract claims into treaty claims. Paraguay cites, the decisions in *Bayindir v. Pakistan* and *Impregilo v. Pakistan* which confirm the basic principle that a State does not violate international law by simply breaching a contract¹⁷.

34. With respect to the umbrella clause, Paraguay concluded:

“Accordingly, the Tribunal manifestly exceeded its powers by exercising jurisdiction over a pure breach of contract on the theory that the Umbrella Clause elevates a breach of contract to a breach of treaty. Paraguay’s alleged failure to pay invoice, the sole basis of the Award here, involves no sovereign act or abuse of sovereign authority, and therefore cannot amount to breach of the BIT.”¹⁸

35. According to Paraguay:

“... if the commitments protected by the Umbrella Clause included contractual commitments, the Tribunal was required to examine the Contract as a whole, not merely parts of it... The Tribunal’s basis for rejecting this argument is far from clear and was based on reasoning that contradicted its explanation for exercising jurisdiction over SGS’s Umbrella Clause claim.”¹⁹

36. Paraguay asserted that:

“In its Decision on Jurisdiction, the Tribunal repeatedly relied on a distinction between treaty and contract claims ... the Tribunal performed no separate treaty analysis or different inquiry; instead, the tribunal entirely focused on whether Paraguay breached the Contract, not whether it breached an independent treaty standard.”²⁰

37. At the hearing on annulment held in Washington D.C. on November 1, 2013, Paraguay summarized the arguments on which it based its request for the annulment of the Award.

¹⁵ Id., ¶ 97

¹⁶ Id., ¶ 98

¹⁷ Id., ¶¶ 102-104

¹⁸ Id., ¶ 105

¹⁹ Id., ¶ 108 (internal quotation and footnote omitted)

²⁰ Id., ¶¶ 109 and 110 (internal quotations and footnotes omitted)

38. Paraguay stated: "...the main question to be addressed today is whether or not the Tribunal manifestly exceeded its powers."²¹
39. Paraguay added that it would point out "...the standard under which this Committee should review our challenges to the award"²², and said that its argument about the standard for the review rests on three main propositions.
40. According to Paraguay, those three propositions are the following:
- a) "...a tribunal exceeds its powers when it decides an issue that the parties committed to the exclusive jurisdiction of a different tribunal or forum."
 - b) "...that power, not jurisdiction or admissibility, is the key issue under Article 52(1)b."
 - c) "...whether the term "manifest" requires obvious excess, series (sic) excess, or simply an excess of jurisdiction..."²³
41. When explaining its first proposition, Paraguay stated:
- "This application is not about perceived errors on the merits of a Tribunal's Award, but the illegitimacy of the Tribunal's rendering an award on the merits at all."²⁴
42. Paraguay also argued as follows: "... what could go more to the heart of the legitimacy of the decision-making process than an argument that the Tribunal lacked any power to render a decision at all on the merits. A tribunal's power is necessarily tied to the consent of the parties."²⁵
43. In its PowerPoint presentation Paraguay cited the Decision on Annulment issued in *CDC Group PLC v. Republic of the Seychelles*, in which it was affirmed that a "Tribunal's **legitimate exercise of power** is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent..."²⁶

²¹ Tr., 8:18-20

²² Tr., 9:16-18

²³ Tr., 9:21-22 to 10:1-7

²⁴ Tr., 10:15-18

²⁵ Tr., 11:4-8

²⁶ Paraguay's Presentation, November 1, 2013, p. 4

44. It also referred to *Helnan v. Egypt (Decision on Annulment)*, saying that “[t]he concept of the powers of a tribunal **goes further than its jurisdiction...**”²⁷
45. Paraguay then explained its second proposition, saying that:
- “The second proposition is that the issue before this committee is whether the Tribunal manifestly exceeded its powers. The committee need not decide whether the challenges here pertain to jurisdiction or admissibility.”
- “Article 52(1)b speaks of exceeding powers, not jurisdiction.”²⁸
46. Paraguay also quoted Professor Vaughan Lowe saying that “the tribunal of general jurisdiction must decline to accept the case, because the parties are legally bound to refer the case to another tribunal.”²⁹
47. With respect to the standard of the term “manifest”, Paraguay referred to the ICSID Background Paper on Annulment saying that “*ad hoc* committees have interpreted ‘manifest’ to mean ‘obvious, clear or self-evident, and which is discernible without the need for an elaborate analysis of the award’.”³⁰
48. According to Paraguay, in this case, “[t]he Tribunal’s excess of power was obvious, clear, self-evident, and requires no elaborate analysis to understand.”³¹
49. Paraguay also stated that “...a tribunal that exceeds the boundaries of the parties’ consent to arbitrate has necessarily committed a manifest excess of power.”³²
50. Paraguay then affirmed that “...the Tribunal manifestly exceeded its powers when it decided SGS’s umbrella clause claim.”³³
51. During the hearing, Paraguay referred expressly to the forum-selection clause of the agreement:

²⁷ Id.

²⁸ Tr., 12:6-10 to 12-13

²⁹ Paraguay’s Presentation, November 1, 2013, p. 5

³⁰ Id., p. 7

³¹ Tr., 16:11-14

³² Tr., 16:19-21

³³ Tr., 17:7-9

“Any conflict, controversy or claim deriving from or in connection with the Contract, its breach, termination or invalidity shall be submitted to the Courts of the City of Asunción.”³⁴

52. Paraguay added that “[t]he Tribunal should, therefore, have acknowledged and enforced the forum-selection clause in the contract and declined to hear SGS's claim for nonpayment.”³⁵

53. Paraguay further explained that “...at least the following aspects of the Tribunal's decision are evidence of manifest excess of the Tribunal's powers”:

- a) “...the Tribunal ignored party autonomy by refusing to enforce the forum-selection clause”;
- b) “The Tribunal's disregard of the forum-selection clause is completely inconsistent... with the internationally-accepted legal doctrine of *pacta sunt servanda*...”;
- c) “...the Tribunal also disregarded the universally-accepted rules of legal interpretation, *generalia specialibus non derogant* and *lex specialis generalibus derogant*”;
- d) “...other ICSID Tribunals have dismissed umbrella clause claims based on breach of contract when contract disputes are subject to the exclusive jurisdiction of another formula.”³⁶

54. During the hearing, Paraguay referred specifically to the decision on annulment issued in the Vivendi I case and quoted the following from that decision:

“Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law.”³⁷

55. Paraguay also quoted paragraph 98 of the Vivendi I decision on annulment:

“In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”³⁸

56. Paraguay argued that: “...the umbrella clause and the commitments here do not arise from an independent treaty standard. The basis of the claim is the breach of a contractual

³⁴ Tr., 17:14-17

³⁵ Tr., 17:20-22

³⁶ Tr., 18:6-7, 19:18-21, 21:6-9 and 22:3-6

³⁷ Tr., 23:13-17

³⁸ Paraguay's Presentation, November 1, 2013, p. 16

commitment; a contract that contained the provision that expressly withdrew consent to arbitrate contractual claims.”³⁹

57. Paraguay concluded that:

“The Tribunal's failure to give effect to the parties' bargain in the form of a forum-selection clause constituted a manifest excess of power.”⁴⁰

58. In its rebuttal in the Hearing Paraguay stated:

“...Paraguay is not asking this Committee to substitute its judgment for that of the Tribunal, or to decide the merits of the case de novo.”⁴¹ It is asking the Committee “...to recognize that the Tribunal never had the power to hear this claim in the first place.”⁴²

59. It added that:

“...Paraguay believes that the basic principle in issue in this case is consent of the parties”; and argued that: “... Paraguay never consented to arbitrate these contract claims before an arbitration Tribunal of any kind.”⁴³

60. Paraguay also affirmed that on the question of specific versus general, “SGS has turned the concept on its head a bit in arguing that the treaty is the specific and the forum-selection clause is the general and would argue that the treaty is clearly the more general as it mentions no specific party except for Paraguay, no specific contract or specific aspect of the contract.”⁴⁴

“The Tribunal simply repeatedly talked about what it took to breach the contract rather than what it took to breach the commitment clause in the treaty. That is, it engaged in no separate treaty inquiry.”⁴⁵

61. Paraguay further argued that:

“... the Tribunal refused to deal with the central issue as to what constituted the separate legal inquiry, the separate legal inquiry that the Vivendi annulment committee set forth as

³⁹ Tr., 26:5-10

⁴⁰ Tr., 27: 2-4

⁴¹ Tr., 47: 12-14

⁴² Tr., 47: 17-19

⁴³ Tr., 48: 3-7

⁴⁴ Tr., 48: 16-22

⁴⁵ Tr., 51:11-15

the distinction between treaty and contract that the Tribunal said in its decision of jurisdiction applied.”⁴⁶

62. Paraguay summarized its position as follows:

“...what we are asking is that the committee put everything in context and try to reconcile this big tension between international law and domestic law...”⁴⁷

“... and in that context of the mandate of the BIT, ... try to make sense of all this, respecting the principle that the parties made an agreement to dispute contractual claims somewhere else.”⁴⁸

63. Finally, Paraguay stated the following:

“... the other point ... is about what SGS coined as non-textual limitations of the umbrella clause, like we’re trying to create textual limitations to the meaning of the umbrella clause.”⁴⁹

Failure to State Reasons

64. In its Memorial, Paraguay stated that the Award should be annulled on the additional ground that it failed to state reasons⁵⁰.

65. Paraguay argued that the failure to state reasons not only exists when the Tribunal gives no reasons at all but also “... applies when the tribunal’s reasons ‘are so inadequate that the coherence of the reasoning is seriously affected’ or when the reasons are not ‘adequate and sufficient reasonably to bring about the result reached by the Tribunal’.”⁵¹

66. Paraguay contended that the Tribunal did not conduct independent treaty analysis on the contract commitment to provide access to local courts as encompassed by the Umbrella Clause; and instead, it merely acted as a commercial tribunal deciding a contract case⁵².

⁴⁶ Tr., 52:10-15

⁴⁷ Tr., 53:18-21

⁴⁸ Tr., 54:1-5

⁴⁹ Tr., 54:7-11

⁵⁰ Memorial on Annulment, ¶ 106

⁵¹ Id., ¶ 106 (footnotes omitted)

⁵² Id., ¶ 119

67. According to Paraguay the Tribunal’s analysis did not respond to the arguments on independent treaty analysis, which required the Tribunal to examine contractual commitments as a whole and whether or not Paraguay could have violated the contract without blocking access to domestic courts⁵³. In this connection, Paraguay referred to the decisions in *BIVAC v. Paraguay* and *SGS v. Philippines*, where the Tribunals considered that the treaty standard had to incorporate the whole Contract and not ignore the forum-selection clause⁵⁴. Despite the incorporation of the BIT into the contract, the Tribunal’s analysis does not explain why it considered one commitment and not the other⁵⁵.
68. Referring to the Tribunal’s alleged failure to state reasons, Paraguay argued that:
- “... if the umbrella clause elevated the contract to a commitment protected by the treaty ... then the treaty inquiry ... required the Tribunal to consider the entire contract.”⁵⁶
69. For the reasons stated in its Memorial and at the hearing, Paraguay asked the Committee to “... annul the Award in its entirety.”⁵⁷

B. SGS’ POSITION

70. SGS affirms that Paraguay’s Annulment Application rests on a disagreement about the Tribunal’s interpretation of the BIT and that it raises before the Committee the same arguments that it presented before to the Tribunal⁵⁸.
71. On its March, 8 2013 Counter-Memorial SGS referred to Paraguay’s claims about the forum-selection clause stating:
- “The Tribunal here found that the contractual forum selection clause did not deprive the investor of its right under the BIT to seek international arbitration to resolve its treaty claim. To find otherwise would depart from the plain and ordinary meaning of the BIT, which makes a contractual breach a treaty breach and which provides for international

⁵³ Id., ¶ 114

⁵⁴ Id., ¶ 115

⁵⁵ Id., ¶¶ 116-118

⁵⁶ Tr., 50: 17-22

⁵⁷ Memorial on Annulment, ¶ 121

⁵⁸ Counter-Memorial on Annulment, ¶¶ 1-2

arbitration for any treaty claim. Even if, contrary to fact, the Tribunal’s reasoning had been inconsistent with the language of the BIT, that would not matter for the purposes of Article 52. It does not matter under Article 52 whether the Tribunal was right or wrong in its interpretation of the Treaty. It does not matter under Article 52 whether other ICSID tribunals have taken a different view, or the same view, of the issue presented. And it does not matter under Article 52 whether some or all of the members of this Committee, had they been asked to decide the merits of the dispute, might have come to a different or the same conclusion as to how to harmonize the tension between the provisions of the BIT and the contractual forum selection clause.”⁵⁹

72. SGS added:

“Paraguay likewise argues that, on both jurisdictional and admissibility grounds, the Tribunal should have disregarded the clear and explicit dispute resolution provisions of the BIT in favour of the forum selection clause of the Contract because of the maxims of *pacta sunt servanda* and *lex specialis generalibus derogat*. Whatever their merits (and this Committee need not endorse or reject them), Paraguay’s arguments fall far short of establishing that the Tribunal’s conclusions had no basis in the BIT and were, therefore, *untenable* and constituting a *manifest* excess of powers.”⁶⁰

73. SGS also affirmed the following:

“Commentators have similarly rejected Paraguay’s interpretation of the ICSID Convention as requiring a different standard for jurisdictional determinations. The main drafter of the ICSID Convention, Aron Broches, explained:

‘Art. 41 of the Convention declares that the Tribunal is the judge of its competence. An *ad hoc* Committee constituted to rule on a request for annulment may not substitute its view for that of the Tribunal as if it were an appellate and hierarchically superior body, which it is not. It may annul the award only if the Tribunal’s decision on competence was *manifestly* wrong’.”⁶¹

74. With respect to Paraguay’s assertion that the Tribunal did not reason the Award properly, SGS affirmed that the Tribunal expressed its reasons amply in paragraphs 101 to 109 of the Award and in paragraphs 173-185 of the Decision on Jurisdiction⁶².

75. SGS also affirmed:

⁵⁹ Id., ¶ 3

⁶⁰ Id., ¶ 48 (footnote omitted)

⁶¹ Id., ¶ 43 (footnote omitted)

⁶² Id., ¶¶70 and ¶75

“Paraguay is wrong. The Tribunal, while observing that Paraguay’s argument ‘taken on its face, lack[ed] logical coherence’ because it could not be correct that ‘Paraguay had the option of *either* paying its invoices *or* submitting the dispute to the local courts’, nonetheless offered a detailed rebuttal of the argument and conducted an analysis under the BIT.”

“The Tribunal’s premise was its earlier conclusion in the Decision on Jurisdiction and the Award that an umbrella clause elevates contractual commitments into treaty obligations”.⁶³

“Paraguay appears to fault the Tribunal for not having articulated further why, if the effect of Article 11 of the BIT was to elevate Paraguay’s contractual obligation to pay its invoices into a treaty obligation, the parties’ obligation under the Contract to litigate their disputes in the Paraguayan courts was not likewise elevated.”⁶⁴

Manifest Excess of Powers

76. At the hearing, SGS referred to the Article 52 standard and to the *CDC* case, which in its view is about legitimacy of the process. It stated that “Article 52 was included in the Convention primarily to assure the legitimacy of the process, not to assure a correct result...”⁶⁵

77. For SGS, “Legitimacy ha[d] two notions. One concerns jurisdiction, and the other concerns the process.”⁶⁶

78. SGS quoted from the Decision of the *AES v. Hungary* Committee the following:

“*Ad hoc* committees must avoid ‘an approach which would result in the qualification of a tribunal’s reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal.”⁶⁷

79. SGS then referred to the functions of annulment committees stating:

“Where there’s disagreement among ICSID Tribunals about an issue of treaty interpretation, it’s not the task of an *ad hoc* committee to pick one side or the other or to try to harmonize ICSID jurisprudence.”⁶⁸

⁶³ Id., ¶¶ 70-71 (footnotes omitted)

⁶⁴ Id., ¶ 73 (footnote omitted)

⁶⁵ Tr., 28:14-16

⁶⁶ Tr., 28: 20-21

⁶⁷ SGS’ Presentation, November 1, 2013, page 4

⁶⁸ Tr., 30:6-10

80. With respect to the forum-selection clause, SGS also stated that it was not asking the Committee: “

“... to characterize Paraguay’s arguments about the forum-selection clause debate as admissibility rather than jurisdiction.”⁶⁹

“You can characterize them as both ways, ... and we will respond to both. And we will treat them independently, addressing... the jurisdictional aspect of the forum-selection clause argument first.”⁷⁰

81. With respect to what it called Paraguay’s jurisdictional argument, SGS cited paragraphs 141-142 of the Decision on Jurisdiction, that quoted *Vivendi I v. Argentina* and read as follows:

“Where ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. We note that in our view, this rule applies with equal force in the context of an umbrella clause.”⁷¹

82. Commenting on ICSID’s jurisprudence about the jurisdictional matter, SGS affirmed:

“...the tribunal’s jurisdictional ruling relied on the plain language of the BIT which provides for ICSID arbitration under all treaty claims...”⁷²

“... ICSID jurisprudence is so well-established on this jurisdictional point that Dolzer and Schreuer call it a consistent practice, that the treaty-based jurisdiction of international arbitral Tribunals to decide on violations of these treaties is not affected by domestic forum-selection clauses in contracts.”⁷³

83. SGS further argued that:

“...Paraguay just asks to take a different view than the overwhelming weight of ICSID authority and commentary. Well, even if you had a different view, it’s not a basis for an Article 52 claim. In fact, it wouldn’t be a basis for an Article 52 claim even if the

⁶⁹Tr., 31: 9-11

⁷⁰ Tr., 31:13-17

⁷¹ Tr., 32: 3-11, quoting from Decision on Jurisdiction, ¶¶141-142

⁷² Tr., 33: 4-6

⁷³ Tr., 33: 11-16

overwhelming weight of jurisdiction and commentary were contrary to fact on Paraguay's side."⁷⁴

"The Tribunal here based its jurisdictional ruling on the plain language of the BIT; and it can't be and wasn't an excess of power, let alone a manifest excess of power."⁷⁵

84. SGS then referred to the forum-selection clause, which, in its view, is about:

"... the issue of how to resolve the tension when a BIT provides for ICSID arbitration over all claims arising under the treaty, including an umbrella clause. And then an umbrella clause claim is based on a contract that contains a local court submission. This is a much-debated, very interesting issue in international investment law. And it's an interesting and much-debated issue because there's no easy answer."⁷⁶

85. SGS further stated "One or the other has to take primacy, either the ICSID consent in the BIT that is perfected when the investor files its claims for ICSID arbitration or the local court submission in the contract."⁷⁷

86. SGS quoted paragraph 171 of the Decision on Jurisdiction, which reads as follows:

"Thus the Tribunal finds that it has jurisdiction over Claimant's claims under Article 11 that Paraguay failed to observe commitments it allegedly made to SGS, both under the Contract and under its alleged subsequent oral and written promises to make good on the claimed debt to SGS. And having found jurisdiction, we are of course mindful of the Vivendi I 'annulment committee's admonition that a '[t]ribunal, faced with such a claim and having validly held that it had jurisdiction, [is] obliged to consider and to decide it'."⁷⁸

87. According to SGS, this meant that:

"... the Tribunal recognized that the two instruments in question, the BIT and the contract, gave the investor a choice. And by ruling this way it's our submission (sic) the Tribunal resolved the tension as best as the tension can be resolved. But it doesn't matter whether we're wrong. And it doesn't matter whether you disagree with the way the Tribunal resolved this tension. This is indisputably a subject matter about which reasonable minds can differ."⁷⁹

⁷⁴ Tr., 33: 21-22 and 34:1-6

⁷⁵ Tr., 34:7-10

⁷⁶ Tr., 35:15-22

⁷⁷ Tr., 36:2-7

⁷⁸ Decision on Jurisdiction, ¶ 171 and SGS' Presentation, November 1, 2013, page 12

⁷⁹ Tr., 36:19-22 and 37:1-6

88. SGS then quoted the decision rendered in the *Azurix Corp. v. Argentina* Annulment Proceeding (ICSID Case No. ARB/01/12, ¶ 68), that concluded:

“If (...) reasonable minds might differ as to whether or not the Tribunal has jurisdiction, that issue falls to be resolved definitively by the Tribunal.”⁸⁰

89. SGS further stated:

“... another way to characterize this interesting tension in international investment law is that its resolution is debatable. And as you see on page 14 (of SGS’s presentation), where the matter is debatable, Article 52 does not apply.”⁸¹

“As the *CDC* committee said, any excess apparent in a Tribunal’s conduct if susceptible of argument one way or the other is not manifest.”⁸²

90. SGS then quoted the *Duke Energy International Peru Investments No.1 Limited v. Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee (March 1, 2011), at ¶ 99 that stated:

“A debatable solution is not amenable to annulment [under Article 52], since the excess of powers would not then be ‘manifest’.”⁸³

91. SGS further stated that:

“Paraguay has argued that the ‘where reasonable minds differ’ standard doesn’t apply to jurisdiction or admissibility issues; but that reads manifest out of Article 52. And *ad hoc* committees have rejected just that argument.”⁸⁴

92. With respect to this issue, which was referred specifically in the *Soufraki* and *Lucchetti* cases, SGS affirmed that they basically agree in that “the requirement that an excess of power must be ‘manifest’ applies equally if the question is one of jurisdiction.”⁸⁵

“The Committee [*Lucchetti v Peru* Committee] considers that the word ‘manifest’ should be given considerable weight also when matters of jurisdiction are concerned.”⁸⁶

⁸⁰ SGS’ Presentation, November 1, 2013, page 13

⁸¹ Tr., 37:19-22 and 38:1

⁸² Tr., 38:2-4

⁸³ Tr., 38:9-12

⁸⁴ Tr., 38:13-17

⁸⁵ SGS’ Presentation, November 1, 2013, page 15

⁸⁶ Id.

93. SGS further contended that:

“The extreme complexity of the jurisdictional requirements under the convention makes it necessary to limit the permissible reassessment of the Tribunal’s competence by an ad hoc committee.”⁸⁷

94. Quoting from the *M.C.I Power* Decision, SGS argued that:

“...As the *M.C.I. Power v. Ecuador* Committee said ‘the annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law.’”⁸⁸

95. SGS then referred to another argument raised by Paraguay:

“Paraguay’s contention ..., not raised this morning but raised in its brief, is that the Tribunal manifestly exceeded its power by allowing the umbrella clause claim to proceed, absent evidence of sovereign action.”⁸⁹

96. SGS expressed the view that:

“... the key point here is that nothing in the text of the BIT’s umbrella clause says or suggests that sovereign action is required. And given that our Tribunal applied and followed the plain text of the BIT, I don’t see how it could have been a manifest excess of power.”⁹⁰

97. SGS then quoted paragraph 168 of the Decision on Jurisdiction which reads as follows:

“Given the unqualified text of Article 11 of the Treaty, and its ordinary meaning, we see no basis to import into Article 11 the non-textual limitations that Respondent proposed in its Reply. Article 11 does not exclude commercial contracts of the State from its scope. Likewise, Article 11 does not state that its constant guarantee of observance of such commitments may be breached only through actions that a commercial counterparty cannot take, through abuses of state power, or through exertions of undue government influence.”⁹¹

Failure to State Reasons

⁸⁷ Tr., 39:6-9

⁸⁸ SGS’ Presentation, November 1, 2013, page 17 (footnote omitted)

⁸⁹ Tr., 40:13-17

⁹⁰ Tr., 41:10-15

⁹¹ SGS’ Presentation, November 1, 2013, page 19 (footnote omitted)

98. SGS then referred to Paraguay's contention that the Tribunal failed to state the reasons on which it based the Award. SGS summarized Paraguay's position about this issue asserting that the "...Tribunal stated that contract claims are distinct from treaty claims but then treated the treaty claim as indistinguishable from the contract claim. And that's a failure to state reasons."⁹²

99. SGS answered Paraguay's assertion arguing that "...the point that our Tribunal was making was that the BIT and contract provide independent bases for a claim. Our Tribunal also held that the same act can breach both the treaty and the contract and that the umbrella clause equated a breach of contract with the treaty breach"⁹³ and quoted the last sentence of paragraph 105 of the Award where it is stated that:

"The two obligations are discrete, separate commitments as between the parties, assuming the contrary would, in effect, imply that one can only breach a contract when it breaches, not one, but more than one of its clauses."⁹⁴

100. SGS concluded this part of its presentation by stating that:

" [A]s the Vivendi I committee stated on the Article 52 standard with respect to reasons, it is well accepted, both in the cases and the literature, that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons."⁹⁵

"It bears reiterating that an *ad hoc* Committee is not a court of appeal. Provided that the reasons given by a Tribunal can be followed and relate to issues that were before the Tribunal, their correctness is beside the point in terms of Article 52(1)(e)."⁹⁶

101. SGS requested the Committee to:

⁹² Tr., 43:3-6

⁹³ Tr., 43:7-12

⁹⁴ Tr., 43: 18-22

⁹⁵ Tr., 44: 4-9

⁹⁶ Tr., 44:10-15

- a. Reject Paraguay's Annulment Application in its entirety;
- b. Order Paraguay immediately to comply with the Award; and
- c. Order Paraguay to bear all costs incurred by SGS in connection with this annulment proceeding, including its legal fees and expenses, as well as the fees and expenses of ICSID's Secretariat and the members of the Committee⁹⁷.

III. ANALYSIS OF THE *AD HOC* COMMITTEE

102. In order to arrive to the conclusions contained in this Decision the Committee reviewed and considered all the arguments of the Parties and the documents submitted by them in this proceeding. The fact that the Committee does not specifically mention a given argument or reasoning does not mean that it has not considered it. In their submissions the Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to this Decision on Annulment. The Committee has also considered these documents carefully and may have taken into account the reasoning and findings of the Committees referred to during the proceeding as well as other committees on annulment. However, in coming to a decision on the matter of annulment raised by **Paraguay**, the Committee must perform, and in fact has performed, an independent analysis of the **ICSID Convention**, the **Arbitration Rules**, and the particular facts of this case.
103. The mission of *ad hoc* Annulment Committees has been defined clearly by many jurists that have dealt with this matter, by ICSID's jurisprudence and by ICSID itself, in the Background Paper on Annulment.
104. In the said Background Paper on Annulment, the ICSID Secretariat concluded that the drafting history of the Convention demonstrated that annulment of ICSID awards was designed as a limited remedy to safeguard against procedural errors in the decisional

⁹⁷ Counter-Memorial on Annulment, ¶ 81

process⁹⁸ and that it did not “(...) provide a mechanism to appeal alleged misapplication of the law or mistakes in fact”⁹⁹.

105. In essence, there is a unanimous agreement that annulment is distinct from appeal¹⁰⁰. The *ad hoc* committees are not courts of appeal and their task is not to harmonize ICSID’s jurisprudence,¹⁰¹ or as the *M.C.I. Power v. Ecuador* annulment committee stated: “[t]he annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law.”¹⁰²
106. For these reasons, the Committee will not elaborate further on these matters, and will directly address the questions submitted to it, pursuant to Article 52 of the ICISD Convention, i.e.: (i) whether the Tribunal manifestly exceeded its powers and (ii) if the Award failed to state the reasons on which it is based.

Manifest Excess of Powers

107. According to Paraguay’s submissions, the first manner in which the Tribunal manifestly exceeded its powers consisted in deciding the merits of a dispute over which it lacked jurisdiction, in light of the existence of an exclusive forum selection clause in the contract that favours the exclusive jurisdiction of Paraguayan courts.

⁹⁸ Background Paper on Annulment, p.29, ¶72

⁹⁹ Background Paper on Annulment, p.29, ¶73

¹⁰⁰ Schreuer, Christoph, et al, *The ICSID Convention, A Commentary*, Second Edition, Cambridge, 2011, pg. 901, ¶¶8-11; ICSID Background Paper on Annulment, pgs. 33-37; Schreuer, Christoph, “From ICSID Annulment to Appeal Half Way Down the Slippery Slope”, *The Law and Practice of International Courts and Tribunals*, vol. 10, 2011, pgs. 211-215, pg. 212; Broches, Aron, “Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application”; Van den Berg, Albert Jan, *Yearbook of Commercial Arbitration*, vol. XVIII, 1993, 626-716,pg. 687, ¶170; See for example, the decisions of the following Committees: *Maritime International Nominees Establishment v. The Republic of Guinea*, (ICSID Case No. ARB/84/4), Decision on Annulment, January 6, 1988, ¶4.04; *Wena Hotels Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Decision (Annulment Proceeding), February 5, 2002, ¶18 (“Wena”)

¹⁰¹ *Hussein Nuaman Soufraki v. United Arab Emirates*, (ICSID Case ARB/02/7), Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, ¶20 (“*Soufraki*”); *CDC Group plc v Republic of Seychelles*, (ICSID Case ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, ¶34 (“*CDC*”); Schreuer, Christoph, et al, *The ICSID Convention, A Commentary*, Second Edition, Cambridge, 2011, pg. 902, ¶13; Van Houte, Hans, “Article 52 of the Washington Convention- A Brief Introduction”, in Gaillard, Emmanuel, Banifatemi, Yas, (eds), *Annulment of ICSID Awards*, IAI Series in International Arbitration No. 1, Huntington, New York, 2004, 11-16, pg. 12

¹⁰² *M.C.I. Power Group, L.C. and New Turbine Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, October 19, 2009, ¶ 24

108. Paraguay contended that under Article 52(1)(b) a Tribunal exceeds its power when it decides a dispute that the Parties have submitted to the jurisdiction of a different court or Tribunal¹⁰³. Power is the question under Article 52(1)(b),¹⁰⁴ and the Tribunal lacks power to reach a decision on a matter that was reserved to a different court¹⁰⁵. This excess of power by the Tribunal was obvious and clear, and requires no further analysis¹⁰⁶.
109. Furthermore, Paraguay expressed the view that, unlike a decision on the merits of a claim, a decision by a Tribunal to exercise jurisdiction that it lacks must be subject to annulment, even if the tribunal indicated an arguable basis to reach the merits¹⁰⁷. Paraguay invoked support for the application of this standard on the *Vivendi I* Decision on Annulment and on Philippe Pinsolle’s paper “Manifest Excess of Powers and Jurisdictional Review of ICSID Awards”¹⁰⁸.
110. For SGS, on the other hand, the Tribunal’s decision was based on the plain language of the BIT and cannot be considered a manifest excess of powers¹⁰⁹. Annulment is only available in exceptional and highly limited circumstances and it is not the task of an *ad hoc* Committee to decide an issue on which there is disagreement between ICSID Tribunals or to harmonize ICSID jurisprudence¹¹⁰. Based on analysis by Commentators and on decisions of prior *ad hoc* Committees, SGS rejected Paraguay’s argument that a different standard for manifest excess of powers applies to a Tribunal’s decision on jurisdiction, because it does away with the *kompetenz-kompetenz* power of the Tribunal and deletes the qualifier “manifest” from Article 52(1)(b) of the ICSID Convention¹¹¹.
111. Pursuant to Article 52(1)(b) of the ICSID Convention, an award can be annulled whenever the Tribunal has manifestly exceeded its powers. Other Committees have understood

¹⁰³ Tr., 9: 20- 10:2

¹⁰⁴ Tr., 15:16

¹⁰⁵ Tr., 12:7-11

¹⁰⁶ Tr., 16:10-14

¹⁰⁷ Memorial on Annulment, ¶ 43

¹⁰⁸ Id., ¶ 43, footnote 36

¹⁰⁹ Tr., 34:7-10

¹¹⁰ Tr., 30:6-10 and 30:21-31:1

¹¹¹ Counter-Memorial on Annulment, ¶¶ 40-44

annulment as limited in scope¹¹². The excess of powers must be manifest, and thus must be easily perceived, self-evident and not result from extensive interpretation¹¹³.

112. Moreover, prior Committees have agreed that a tenable standard of review shall be followed; that is, in the face of different opinions on the questions submitted to a Tribunal, an Annulment Committee must evaluate whether the answers given by the Tribunal seem tenable and are not arbitrary¹¹⁴. In other words, an Annulment Committee will not assess the correctness of the Tribunal's decision, even if it considers that it is incorrect¹¹⁵.

113. The limited scope of Article 52(1)(b) was emphasized in the following passage from the annulment committee's decision in *CDC v Seychelles*¹¹⁶:

“As interpreted by various *ad hoc* Committees, the term ‘manifest’ means clear or “self-evident”. Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument ‘one way or the other’, is not manifest. As one commentator has put it, ‘If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive’”.

114. This Annulment Committee considers that there is no difference in the standard of review applicable to a claim of manifest excess of powers on the basis of jurisdiction or on the merits. Under Article 41 of the ICSID Convention, the Tribunal shall be the judge of its own competence, and thus its decision on the scope of its jurisdiction cannot be reviewed *de novo* by an Annulment Committee¹¹⁷. This Committee agrees with others that have

¹¹² *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3), Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, ¶237; *Wena*, ¶18

¹¹³ *Soufraki*, ¶ 39; *AES Summit Generation Limited and AES-Tisza Erömi KFT v. Hungary*, (ICSID Case No. ARB/07/22), Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, ¶31

¹¹⁴ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, (ICSID Case No. ARB/98/2), Decision on Annulment, December 18, 2012, ¶70 (Quoting the decision of the Annulment Committee in *Klöckner II*)

¹¹⁵ *Helnan International Hotel A/S v. Republic of Egypt*, (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee, June 14 2010, ¶55 (“*Helnan*”)

¹¹⁶ *CDC*, referring to *Wena*, ¶ 25, and M.B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitration Awards*, 2 ICSID Rev. 85 (1987), p. 101

¹¹⁷ Broches, Aron, “Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application”; Van den Berg, Albert Jan, *Yearbook of Commercial Arbitration*, vol. XVIII, 1993, 626-716, pg.689, ¶180

stated that nothing in the ICSID Convention indicates that a different standard shall be applied to issues of jurisdiction, and therefore an award can only be annulled if the lack or excess of jurisdiction was manifest¹¹⁸.

115. This position was recognized by ICSID in the Background Paper on Annulment:

“At the same time, *ad hoc* Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence. This means that the Tribunal has the power to decide whether it has jurisdiction to hear the parties’ dispute based on the parties’ arbitration agreement and the jurisdictional requirements in the ICSID Convention. In light of this principle, the drafting history suggests –and most *ad hoc* Committees have reasoned –that in order to annul an award based on a Tribunal’s determination of the scope of its own jurisdiction, the excess of powers must be ‘manifest’. However, one *ad hoc* Committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case.”¹¹⁹

116. The Tribunal’s Decision on Jurisdiction portrays the different positions that have been advanced on these issues by various tribunals. For example, it quotes the decisions of *SGS v. Pakistan*, *SGS v. Philippines* and *BIVAC v. Paraguay*, on the different approaches to the issue of the umbrella clause¹²⁰.

117. In this case, the Tribunal was faced with the difficult decision concerning the distinction between treaty claims and contract claims, in order to determine if the existence of a forum selection clause in a Contract precluded its jurisdiction¹²¹. It decided that the claims advanced by SGS corresponded to treaty claims and therefore a contractual forum selection clause did not divest the Tribunal of its jurisdiction to hear claims for breach of treaty¹²². Based on this finding, the Tribunal assessed the scope of the BIT’s Umbrella Clause and

¹¹⁸ *Azurix Corp. v The Argentine Republic*, (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, ¶66; *Soufraki*, ¶¶118-119; Broches, Aron, “Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application”; Van den Berg, Albert Jan, *Yearbook of Commercial Arbitration*, vol. XVIII, 1993, 626-716, pg.689, ¶180; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.), v. The Republic of Peru*, (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007, ¶101

¹¹⁹ Background Paper on Annulment, ¶ 89

¹²⁰ Decision on Jurisdiction, ¶¶ 169-171

¹²¹ *Id.*, ¶ 125

¹²² *Id.*, ¶ 138

concluded that this clause established an international obligation for the parties to the BIT to observe contractual obligations with respect to investors¹²³ and that, in consequence, it had jurisdiction over SGS's claims under Article 11 of the BIT¹²⁴.

118. The Tribunal could have decided that, according to the Agreement, it did not have jurisdiction and that the dispute should be resolved by the Asunción Courts; or it could have ruled that pursuant to the BIT, it had jurisdiction and, therefore, should decide the dispute submitted to its consideration. The Tribunal chose the second option.
119. The Members of this Committee may agree or disagree with the choice made by the Tribunal. However, for the purposes of this proceeding that agreement or disagreement does not have much relevance unless it can be shown that the Tribunal has manifestly exceeded its powers.
120. According to Article 41 (1) of the ICSID Convention, the Tribunal had to define if it had or did not have jurisdiction. In doing so, it assessed the different submissions by the Parties and the possible positions it could take. Nothing in the Tribunal's analysis demonstrates that it manifestly exceeded its powers.
121. This Committee's responsibility is not to rule about the correctness of the Award. Its mission is simply to decide if any of the situations described in Article 52 of the ICSID Convention existed in this case.
122. According to SGS the Tribunal's Decision was correct. In Paraguay's opinion, it was not. Regardless of what the correct answer is, it is obvious that by deciding in the manner that it did, the Tribunal did not incur in a "manifest excess of powers". It simply chose one of the alternatives that it had. In this connection, the Committee insists that for an excess of power to be "manifest" it has to be textually obvious and substantively serious.
123. At the hearing Paraguay stated that it would concentrate on the issue of whether the Tribunal manifestly exceeded its powers.

¹²³ Decision on Jurisdiction, ¶ 170

¹²⁴ *Idem*, ¶ 171

124. Paraguay's basic argument in this matter was that the tribunal's powers originate exclusively from the consent of the parties. Based on the decision rendered in *Helnan v. Egypt*, it affirmed that "[t]he concept of the powers of a tribunal goes further than its jurisdiction and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed."¹²⁵
125. The Tribunal had to decide if it had jurisdiction or not. As explained in paragraphs 117 and 118 above, the Tribunal ruled that it did have jurisdiction, pursuant to the BIT. Therefore, in this Committee's judgment, Paraguay's position alleging that the Tribunal manifestly exceeded its powers as described above is incorrect.
126. Paraguay insisted repeatedly on its argument that the Tribunal violated the forum-selection clause of the Contract and thus incurred in a manifest excess of its powers.
127. Paraguay broke down its forum-selection clause argument into the following parts (paragraph 53 above):
- a) "...the Tribunal ignored party autonomy by refusing to enforce the forum-selection clause";
 - b) "The Tribunal's disregard of the forum-selection clause is completely inconsistent... with the internationally-accepted legal doctrine of *pacta sunt servanda*...";
 - c) "...the Tribunal also disregarded the universally-accepted rules of legal interpretation, *generalia specialibus non derogant* and *lex specialis generalibus derogat*".¹²⁶
128. Concerning the forum selection clause, the Tribunal followed the reasoning of the *Vivendi I* Tribunal and Committee and concluded that the forum selection clause did not constitute a waiver to the investor's rights under the treaty and therefore could not prevent the investor from presenting claims under the BIT¹²⁷. The Tribunal added that: "[e]ven if the alleged breach of the treaty obligation depends upon a showing that a contract or other qualifying commitment has been breached, the source of the obligation cited by the

¹²⁵ *Helnan*, ¶ 41

¹²⁶ Tr., 18:6-7, 19:18-21, 21:6-9 and 22:3-6

¹²⁷ Decision on Jurisdiction, ¶ 140

claimant, and hence the source of the claim, remains the treaty itself”¹²⁸. This conclusion was premised on the existence of treaty claims that SGS could assert under the BIT¹²⁹.

129. According to Paraguay, the Tribunal disregarded the principles of “*generalia specialibus non derogant*” and “*lex specialis generalibus derogate*”. The Tribunal was faced with the decision of determining which set of rules (the BIT or the Agreement) was particular to the situation submitted to it and, therefore, applicable. It decided for the BIT. That decision may be considered to be correct or incorrect, but it certainly does not constitute a valid basis to annul the Award.
130. This Committee cannot act as an appeals tribunal and review whether the interpretation of the umbrella clause and the forum-selection clause by the Tribunal were correct. The Committee could only annul the award upon verification of the existence of a manifest excess of powers on the part of the Tribunal, which can be easily perceived and does not require extensive interpretation of the Award to be perceived. This is not the case in the Tribunal’s Award.
131. Paraguay asserted that the Tribunal also manifestly exceeded its powers by deciding SGS’s claims on the merits, because a pure breach of contract by a State does not suffice to breach Umbrella Clauses and other BIT standards. According to Paraguay, only sovereign conduct can breach a BIT standard¹³⁰.
132. SGS contended that the BIT’s Umbrella Clause does not require the exercise of sovereign action and that neither the Tribunal, nor the Committee can read non-textual limitations into the clause¹³¹.
133. The Tribunal addressed this issue in the Decision on Jurisdiction and in the Award. It acknowledged that some arbitral tribunals had deemed an abuse of sovereign powers necessary to breach an umbrella clause¹³², but decided to follow the reasoning of other

¹²⁸ Id., ¶ 142

¹²⁹ Id., ¶ 142

¹³⁰ Memorial on Annulment, ¶ 94

¹³¹ Tr., 41:10-17 and 42:4-8

¹³² For example, *Siemens v. Argentina* and *SGS v. Pakistan*

tribunals, such as *Burlington Resources v. Ecuador* and *Duke Energy v. Ecuador*, and concluded that the Umbrella Clause could apply whether or not the exercise of sovereign powers was involved¹³³.

134. In the Committee's view, Paraguay's submission seeks that this Committee conduct a new analysis on the application of the Umbrella Clause. The scope of the Umbrella Clause is an issue over which there is much debate in international investment law, and the Tribunal decided to opt for one of the possible avenues of interpretation. Again, the Committee is not charged with analysing the correctness of the Tribunal's reasoning, but instead it must evaluate if the position held by the Tribunal exceeded the scope of its adjudicative power.
135. The Committee considers that the Tribunal's interpretation of the Umbrella Clause was exercised within the bounds of its power to determine its jurisdiction and thus did not involve a manifest excess of power.
136. For these reasons, the Committee concludes that the Tribunal did not manifestly exceed its powers and therefore the Award cannot be annulled on this ground.

Failure to State Reasons

137. Paraguay argued that the Award provides inadequate reasons that seriously affect its coherence, insofar as it did not conduct an independent treaty analysis of the contract as a whole¹³⁴. Its reasoning also contradicts the distinction between treaty and contract claims contained in the Decision on Jurisdiction¹³⁵.
138. SGS submitted that the Tribunal asserted that the BIT and the Contract provided different basis for a claim. According to SGS, all of Paraguay's arguments were addressed by the Tribunal¹³⁶ in a manner that satisfies the standard under Article 52(1)(e), which concerns

¹³³ Award, ¶ 93; Decision on Jurisdiction, ¶¶ 168-169

¹³⁴ Tr., 50:17- 51:3

¹³⁵ Memorial on Annulment, ¶ 114

¹³⁶ Tr., 43:13-17

failure to state reasons with respect to the Award and not failure to state correct or convincing reasons¹³⁷.

139. Article 52(1)(e) enables a Committee to annul an award on the basis that it has failed to state the reasons on which it is based. ICSID's Background Paper on Annulment referred to decisions taken by other *ad hoc* Committees that "... explained that this requirement is intended to ensure that parties can understand the reasoning of the Tribunal, meaning the reader can understand the facts and law applied by the Tribunal in coming to its conclusion. The correctness of the reasoning or whether it is convincing is not relevant."¹³⁸
140. In addition, prior Annulment Committees have recalled that the standard under Article 52(1)(e) is a minimum standard that allows a reasonable reader to understand the award¹³⁹. As stated by the *MTD v. Chile* Annulment Committee: "In the end the question is whether an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them"¹⁴⁰. This ground for annulment only concerns the absence of reasons and not their quality or correctness¹⁴¹.
141. Furthermore, it is not necessary to state reasons for assertions that are in themselves reasons¹⁴².
142. This is the standard of review that this Committee considers applicable. Moreover, in view of the settled doctrine on this issue, the Committee emphasizes that it will not enter into an assessment of the merits of the dispute, either directly or indirectly.
143. In paragraphs 167 to 170 of the Decision on Jurisdiction, the Tribunal explained clearly its interpretation of the Umbrella Clause contained in Article 11 of the BIT with respect to obligations originated in the Agreement and reached the conclusion that it had jurisdiction.

¹³⁷ Tr., 44:4-9

¹³⁸ Background Paper on Annulment, p.29, ¶ 106

¹³⁹ *Wena*, ¶ 79

¹⁴⁰ *MTD Equity Sdn Bhd. v Republic of Chile*, (ICSID Case No. ARB/01/7), Decision on Annulment, March 21, 2007, ¶ 92

¹⁴¹ *Compañía Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, ¶¶ 64-65; *CDC*, ¶¶ 70 and 75

¹⁴² *Soufraki*, ¶ 131

This conclusion was confirmed in paragraphs 72 to 74 of the Award. In paragraphs 173 to 184 of the Decision on Jurisdiction, the Tribunal explained its interpretation of the forum selection clause in the Agreement in relation with the BIT and reached the same conclusion with respect to its jurisdiction; paragraph 75 of the Award confirmed that conclusion. Whether Paraguay or this Committee agrees with the Tribunal's reasoning is irrelevant for the purposes of this proceeding and clearly does not constitute valid grounds for the annulment of the Award.

144. In the Award, the Tribunal stated:

“The Tribunal does not accept Respondent’s argument. The law applicable to Claimant’s claim is the BIT, including Article 11 of the BIT and the investor-state dispute settlement provisions in Article 9 of the BIT. Article 11 requires Respondent to observe its commitments with respect to Swiss investors. The “commitment” at issue in this dispute is the Contract. There is no dispute that the Contract requires payment in accordance with the invoicing procedures set forth therein and that Respondent has not paid the vast majority of the invoices SGS issued. In these circumstances, the Tribunal has no difficulty concluding that Respondent did not fulfill its contractual commitments.”¹⁴³

“Respondent argues that it cannot be found to have failed to observe its contractual commitments unless Claimant proves that Respondent has failed to meet its payment obligations under the Contract *and* frustrated the operation of the forum selection clause.”¹⁴⁴

145. The Tribunal stated that Paraguay has not cited any legal authority to support this position¹⁴⁵. It considered that, contrary to Respondent’s arguments, the obligations in the Contract on payment and to provide access to local courts are not “alternative options but two discrete obligations.”¹⁴⁶ The Tribunal concluded that “[t]his cannot be correct. It cannot be that Paraguay had the option of either paying its invoices or submitting the dispute to local courts.”¹⁴⁷

¹⁴³ Award, ¶ 101

¹⁴⁴ Id., ¶ 102

¹⁴⁵ Id., ¶ 104

¹⁴⁶ Id., ¶ 105

¹⁴⁷ Id., ¶ 106

146. Finally, the Tribunal characterized this argument as an attempt of the Respondent to discuss again arguments on jurisdiction, namely the absence of the Tribunal's jurisdiction on the basis of the existence of a forum selection clause in the Contract¹⁴⁸. The Tribunal rejected this argument¹⁴⁹.
147. The abovementioned sections of the Award show that the Tribunal provided reasons for its conclusions¹⁵⁰. Such reasons can be followed by the reader from the starting point to its conclusion. The Tribunal's analysis departs from a characterization of the type of claim advanced by SGS and concludes that (i) the two obligations under the Contract are discrete and (ii) the insertion of a forum selection clause in the Contract could not negate Respondent's responsibility under the BIT.
148. Consequently, in the Committee's opinion the Award did not fail to express the reasons on which it is based.
149. For the above reasons the Committee will dismiss completely Paraguay's application for the annulment of the Award.

IV. COSTS

150. Pursuant to Article 52(4) of the ICSID Convention, Chapter VI of said Convention (Articles 59 through 61) shall apply *mutatis mutandis* to the proceedings before this Committee.

151. Article 61(2) of the ICSID Convention states:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award. ”

152. The Parties did not agree on a method for apportionment of costs different from that envisaged in Article 61(2) of the ICSID Convention.

¹⁴⁸ Id., ¶ 109

¹⁴⁹ Id., ¶ 109

¹⁵⁰ Id., ¶¶ 101-109

153. Although the Application of the Republic of Paraguay is being rejected in its entirety, the Committee does not consider the Application frivolous. Accordingly, exercising its discretion under Article 61(2) of the ICSID Convention, the Committee shall decide the following:

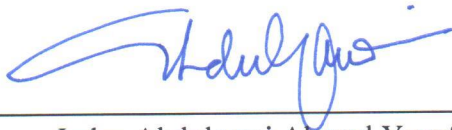
(a) Paraguay shall bear the costs of the proceeding, comprising the fees and expenses of the Committee Members, and the costs of using the ICSID facilities; and

(b) Each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.

V. DECISION

154. For the reasons set forth above, the Committee unanimously decides:

- i. To dismiss in its entirety the Application for Annulment of the Award submitted by the Republic of Paraguay.
- ii. Each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.
- iii. The Republic of Paraguay shall bear the costs of the proceeding, comprising the fees and expenses of the Committee Members, and the costs of using the ICSID facilities.



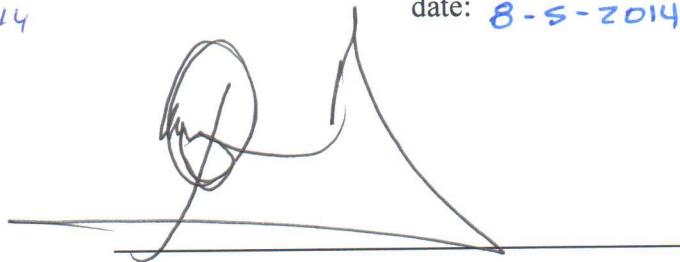
Judge Abdulqawi Ahmed Yusuf
Member of the *ad hoc* Committee

date: 6-5-2014



Mr. Eduardo Zuleta
Member of the *ad hoc* Committee

date: 8-5-2014



Mr. Rodrigo Oreamuno
President of the *ad hoc* Committee

date: May 12, 2014.