

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON D.C.

IN THE PROCEEDING BETWEEN

**SGS SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE S.A.**

**(Claimant)**

**and**

**THE REPUBLIC OF PARAGUAY**

**(Respondent)**

ICSID Case No. ARB/07/29

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**Decision on Jurisdiction**

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*Members of the Tribunal:*

Dr. Stanimir A. Alexandrov, President

Mr. Donald Francis Donovan

Dr. Pablo García Mexía

*Secretary of the Tribunal:* Dr. Sergio Puig de la Parra

*Representing Claimant:*

Mr. Olivier Merkt & Mr. Nicolas Grégoire  
*SGS Société Générale de Surveillance S.A., Geneva,  
Switzerland*

and

Mr. Paul Friedland & Mr. Damien Nyer  
*White & Case LLP, New York*

*Representing Respondent:*

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

and

Mr. Brian C. Dunning & Ms. Irene R. Dubowy  
*Thompson & Knight LLP, New York*

Date: February 12, 2010

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## **I. PROCEDURAL BACKGROUND**

### **A. Request for Arbitration**

1. On 19 October 2007, the International Centre for Settlement of Investment Disputes (“ICSID”) received a request for arbitration dated 16 October 2007 (the “Request”) from SGS Société Générale de Surveillance S.A. (“SGS” or “Claimant”) against the Republic of Paraguay (“Paraguay” or “Respondent”) (collectively, the “Parties”).
2. The Request was made under the Agreement on the Promotion and Reciprocal Protection of Investments between Switzerland and Paraguay signed 31 January 1992 and entered into force 28 September 1992 (the “BIT” or the “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Convention”).

### **B. Notice of Registration**

3. On 19 November 2007, the Deputy Secretary-General of ICSID sent Claimant and Respondent a Notice of Registration in accordance with Article 36(3) of the ICSID Convention.
4. In issuing the Notice, the Deputy Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

### **C. Appointment of Arbitrators**

5. On 30 January 2008, Claimant requested, in accordance with Rule 2(3) of the Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), that the Arbitral Tribunal be constituted in accordance with the provisions of Article 37(2)(b) of the Convention. This letter was acknowledged by a letter from ICSID to the Parties of the same date. It was accordingly confirmed that: (1) the Tribunal would consist of three arbitrators; (2) one arbitrator would be appointed by each Party and the third, the president of the Tribunal, would be appointed by agreement of the Parties; and (3) the appointments would follow the procedures set out in Rule 3 of the Arbitration Rules.

6. By letter of 31 January 2008, Claimant appointed Mr. Donald Francis Donovan, Esq., a national of the United States of America, as a member of the Tribunal. On 31 March 2008, Respondent appointed Dr. Pablo García Mexía, a national of Spain. No objections were raised to either appointment.
7. On 20 February 2008, the Parties having failed to reach agreement on the appointment of the President of the Tribunal, Claimant requested the appointment of the third, presiding arbitrator by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the Convention and Rule 4(1) of the Arbitration Rules.
8. By letter of 20 May 2008, the Chairman of the ICSID Administrative Council appointed Dr. Stanimir A. Alexandrov, a national of Bulgaria, as the third arbitrator and president of the Tribunal. No objections were raised to this appointment.
9. The Tribunal was officially constituted on 27 May 2008, in accordance with the Convention and ICSID Arbitration Rules. Mr. Gonzalo Flores, Senior Counsel, ICSID, was initially designated to serve as the Secretary of the Tribunal. On 16 April 2009, the Acting Secretary General informed the Tribunal that due to the redistribution of the Centre's workload, Dr. Sergio Puig de la Parra, ICSID, would serve as the new Secretary of the Tribunal.

#### **D. Objections of Respondent to Jurisdiction**

10. On 8 April 2008, Respondent delivered its Memorial with Objections to Jurisdiction to the Centre, an electronic copy of which was transmitted to Claimant on 10 April 2008.
11. Respondent filed a further document on the question of jurisdiction dated 26 June 2008 during the first session of the Tribunal on 30 June 2008 (discussed below).
12. The submissions of 8 April 2008 and 26 June 2008 were confirmed by Respondent to together constitute Respondent's Memorial on Jurisdiction.

#### **E. First Session**

13. The first session of the Tribunal was held on 30 June 2008 at the seat of the Centre in Washington, D.C. At the session the Parties expressed their agreement that the Tribunal

had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules. The Parties also agreed upon a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal

14. At the first session, the Tribunal heard the Parties' proposals for handling the objections to jurisdiction raised in Respondent's Memorial on Jurisdiction. It was agreed that the proceedings on the merits would be suspended as envisaged in Article 41(2) of the ICSID Convention and Arbitration Rule 41(3).
15. The following procedural calendar was agreed for the preliminary phase of the proceedings:
  - Claimant would submit its Counter-Memorial on Jurisdiction by Monday, 22 September 2008; Respondent would submit its Reply on Jurisdiction by Monday, 15 December 2008; and Claimant would submit its Rejoinder on Jurisdiction by Monday, 23 February 2009;
  - a pre-hearing conference would be held on 9 March 2009;
  - a hearing on jurisdiction would then be held at the seat of the Centre in Washington, D.C., from 6 April 2009 through 8 April 2009.
16. By letter of 11 December 2008 Respondent subsequently requested an extension of time to respond to Claimant's Counter-Memorial on Jurisdiction. Claimant consented to this extension of time by a letter dated 15 December 2008. The revised schedule was agreed as follows:
  - Respondent would submit its Reply on Jurisdiction by Monday, 29 December 2008, and Claimant would submit its Rejoinder on Jurisdiction by Monday, 9 March 2009;
  - the hearing on jurisdiction would be held as originally scheduled, from 6 April 2009 through 8 April 2009.
17. By letter of 20 March 2009 Respondent requested the adjournment of the hearing on jurisdiction until May, due to the hearing date's proximity to Holy Week observances. Claimant objected to such a delay by letter of the same date. By letter of 24 March 2009 the

Tribunal advised the Parties that the hearing would take place on the originally scheduled date (6 April), noting that that date had been set with the consent of the Parties at the 30 June 2008 first session and had been re-confirmed by both Parties in their letters of 11 and 15 December 2008.

18. As the Parties had agreed on procedures to be followed for the hearing on jurisdiction in their letters of 20 March 2009, no pre-hearing conference was necessary.

#### **F. Hearing on Respondent's Objections to Jurisdiction**

19. The hearing on Respondent's Objections to Jurisdiction was held in Washington, D.C., on 6 April 2009, the Parties having agreed that the additional reserved dates (7 and 8 April) were not needed.
20. The Parties were represented as follows:

##### Claimant

Mr. Paul Friedland, Mr. Mark Luz, Mr. Rafael E. Llano Oddone & Mr. Damien Nyer, White & Case LLP

Mr. Nicolas Grégoire, SGS

##### Respondent

Dr. José Enrique García Ávalos, Attorney General of the Republic of Paraguay

Mr. Raúl Sapena, Counsel to the Treasury of the Republic of Paraguay

Mr. Jorge Brizuela, Embassy of the Republic of Paraguay in Washington, D.C.

Mr. Pedro Espínola Vargas Peña, Advisor to the Executive Director, the World Bank

Mr. Agustin Saguier Abente, Saguier Abente Law Firm

Mr. Brian C. Dunning & Ms. Irene R. Dubowy, Thompson & Knight LLP

21. Messrs. García and Dunning and Ms. Dubowy addressed the Tribunal on behalf of Respondent. Mr. Friedland addressed the Tribunal on behalf of Claimant. The jurisdictional hearing was audio recorded and a verbatim transcript in English and Spanish was prepared and delivered to the Parties.

### **G. Further Submissions**

22. On 9 June 2009, Respondent wrote to draw the Tribunal's attention to the decision on jurisdiction rendered on 29 May 2009 in the case of *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9.<sup>1</sup> The Tribunal granted both Parties leave to file brief post-hearing submissions limited to the relevance of the *BIVAC* decision to arguments already put forward by the Parties in the present case. Respondent made its filing by letter dated 3 July 2009, with Claimant following suit by letter dated 23 July 2009.
23. The Tribunal has deliberated and considered carefully all of the Parties' written submissions on jurisdiction as well as the oral arguments that were delivered in the course of the jurisdictional hearing. In the following sections, the Tribunal will briefly summarize the factual background, so far as it is necessary to rule on Respondent's preliminary objections (Section II), and address some preliminary considerations relevant to jurisdiction (Section III). It will then turn first to Respondent's objections based on specific jurisdictional limitations of the BIT and the ICSID Convention (Section IV), and next to Respondent's objections that Claimant has not stated proper claims under the Treaty over which we could exercise jurisdiction (Section V). Finally, the Tribunal will address the issue of costs (Section VI) and set forth its decision on jurisdiction (Section VII).

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<sup>1</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 (“*BIVAC v. Paraguay*, Decision on Jurisdiction”).



## II. FACTUAL BACKGROUND

### A. The Contract

24. Based on the submissions of the Parties, the Tribunal understands the events surrounding the dispute to be as follows. Except where characterized as the allegation of one Party or the other, the following facts are understood to be undisputed.
25. Claimant is a Swiss company providing, *inter alia*, certification services based on pre-shipment inspections of goods. The inspections are typically carried out in the country of export, resulting in certifications that are used by governmental authorities of an importing country, *e.g.*, in collecting import duties and taxes.
26. This dispute concerns a contract entered into between SGS and the Ministry of Finance of Paraguay. Under the contract, SGS was to perform pre-shipment inspection and certification services for cargoes destined for Paraguay.
27. The Ministry of Finance of Paraguay was authorized by Presidential Decree No. 12311 of 31 January 1996 (Ex. C-6) to enter into contracts with two companies, SGS and Bureau Veritas International (“BIVAC”), for pre-inspection services. On 6 May 1996, SGS and Paraguay’s Ministry of Finance signed the Contract for Technical Services Involving Pre-Shipment Inspection of Imports (“the Contract”) (Ex. C-4). Services under the Contract were to begin on 15 July 1996, and the Contract had an initial duration of three years.<sup>2</sup> According to the Contract, the purpose of the Contract was the optimization of tax collection volume and the improvement of the mechanisms for controlling compliance with the tax obligations relating to import transactions.<sup>3</sup>
28. SGS established a liaison office in Asunción, as well as two smaller offices in Ciudad del Este and Encarnación, Paraguay, and carried out inspections of goods in the ports of origin.

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<sup>2</sup> Arts. 8.1.1 & 8.2, Contract (Ex. C-4).

<sup>3</sup> “El Ministerio, con el objeto de optimizar el volumen de las recaudaciones impositivas y mejorar los mecanismos para el control del cumplimiento de las obligaciones tributarias referidas a las operaciones de importación, ha decidido establecer un Programa de Inspección de Pre-Embarque... Para la ejecución del Programa de Servicios Técnicos de Inspección a ser prestados en el exterior, se ha decidido contratar a dos empresas especializadas, por su experiencia, idoneidad y alta calificación en la prestación de este tipo de Servicios Técnicos con Gobiernos de otros países, que garanticen el cumplimiento de presente Programa.” Preamble, Contract (Ex. C-4) (emphasis omitted).

According to Claimant, Paraguay's Ministry of Finance paid SGS's invoices for the period between July 1996 and February 1997, but no payment was made for the March 1997 invoice or the invoices that followed thereafter (with the exception of one payment). SGS continued to conduct pre-inspection services, however. Respondent does not dispute that payment was not made on some number of SGS's invoices, although it contests whether all amounts were owed and raises questions as to whether nonpayment was justified or excused.

29. On 24 February 1999, the Ministry of Finance informed SGS of its intent to terminate the Contract pursuant to Article 8.2, which allows either party to choose not to renew the Contract with four months' notice prior to the expiration of the Contract's original term (or any renewal term). Subsequently, on 1 June 1999, representatives of the Ministry of Finance and SGS met. According to SGS, which points to correspondence following the meeting, the Ministry of Finance and SGS mutually agreed to terminate the Contract by 7 June 1999.
30. SGS made repeated requests for payment on the outstanding invoices, which remain unpaid to date. SGS contends that at different points in time, various Paraguayan officials acknowledged Paraguay's obligation to make payment to SGS. Paraguay and its agencies initiated a number of investigations into the validity of the Contract and the services performed under it.

## **B. Relevant Contractual Provisions**

31. According to Article 2.1 of the Contract, SGS was to carry out the physical inspection of goods prior to shipment in their country of origin, and determine whether the goods submitted to inspection corresponded to the importer's declaration. Article 2.2 required SGS to verify the price invoiced by the seller and establish whether it fell within reasonable limits. SGS was then to provide its opinion on the customs value of the imported goods, under Article 2.3. Under Article 2.4, SGS was also to provide a recommendation for the tariff classification of the goods, and under Article 2.6, SGS was to establish the country of origin of the goods. Upon completion of the verification process, based on its findings, SGS was to issue an Inspection Certificate or Discrepancy Report to the General Customs Department of Paraguay under Article 2.8. Under Articles 2.9 and 2.10, SGS agreed to provide Paraguay with training programs for General Customs Department officials, to

provide technical assistance and advice, and to contribute to the implementation of a Data Bank based upon the information contained in the Inspection Certificates.

32. The Contract also provided, under Article 3.4, that SGS would receive at its liaison office in Paraguay, for each commercial transaction, an Inspection Request from the importer and accompanying documentation.
33. In exchange for the performance of SGS's obligations, according to Article 4, Paraguay agreed to pay SGS, in United States Dollars, a fee amounting to 1.3% of the FOB value of the goods shown in the Inspection Certificate or in the Discrepancy Report. A minimum US\$ 280 fee would be applicable where the rate of 1.3% would produce a smaller fee amount.
34. Article 9, concerning dispute resolution (*solución de conflictos*), provided that “[a]ny conflict, controversy or claim deriving from or arising in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay.”<sup>4</sup>
35. Finally, with regard to termination, Article 7.1 provided that either party could terminate the Contract by reason of non-compliance. Article 7.2 allowed the Ministry of Finance to unilaterally terminate the Contract on grounds of opportunity, merit or convenience, caused by or related to the public interest, with 120 days' notice. Article 8.2 provided that the Contract's original three-year term could be renewed unless either party notified the other in writing of its intention not to extend the Contract beyond the originally agreed upon or renewal term, and did so at least four months before the expiration of that term.

### **III. PRELIMINARY CONSIDERATIONS**

36. Before proceeding to consider Respondent's various objections to this Tribunal's jurisdiction to hear Claimant's claims, it will be helpful to address certain general considerations that guide the Tribunal's analysis.

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<sup>4</sup> “Cualquier conflicto, controversia o reclamo que se derive o se produzca en relación al presente Contrato, incumplimiento, resolución o invalidez, deberá ser sometido a los Tribunales de la Ciudad de Asunción según la Ley Paraguaya.” Art. 9.1, Contract (Ex. C-4).

### A. Relevant Texts

37. Claimant's case is premised on alleged acts and omissions by Respondent that, according to Claimant, violate Respondent's obligations under the BIT. Necessarily, therefore, the Tribunal will look first to the text of the BIT itself. Jurisdiction under the BIT is founded on Article 9, which provides, "for purposes of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party," that "[i]f...consultations do not result in a solution within six months from the date of request for settlement, the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event, the investor has the choice between" ICSID and *ad hoc* arbitration under the UNCITRAL rules.
38. Here, Claimant having elected ICSID arbitration under BIT Article 9(2)(a), Article 25 of the ICSID Convention is also applicable to the Tribunal's jurisdictional inquiry. Article 25 provides, in pertinent part:
- (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre....
39. Article 9(6) of the BIT specifies that:
- [t]he arbitral tribunal shall decide on the basis of the present Agreement [*i.e.*, the BIT] and other relevant agreements between the Contracting Parties; of the terms of any particular agreement that may have been concluded with respect to the investment; of the law of the Contracting State party to the dispute, including its rules on the conflict of laws; of such principles and rules of international law as may be applicable.
40. Among the applicable principles and rules of international law will be the Vienna Convention on the Law of Treaties (both Switzerland and Paraguay having ratified the Convention), and in particular the principles of treaty interpretation set forth in Articles 31-33 thereof.

41. Both Parties have also drawn the Tribunal's attention to the decisions of other investment treaty tribunals, where helpful to their arguments, to contend that this Tribunal should or should not come to similar conclusions on similar questions. It is of course clear that there is no rule of *stare decisis* in investment treaty arbitration, that each Tribunal has its own mandate and competence, and that the decisions of prior tribunals in other cases are not binding on us in any respect. However, we find it appropriate to consider the reasoning of and conclusions reached by such tribunals, and to assess their persuasive force in the particular circumstances presented in this case before us.
42. For the sake of the coherent and reasoned development of investment law, it is likewise appropriate in many cases to articulate where and why we do or do not follow the approaches of other tribunals, particularly on issues where prior tribunals' approaches have diverged. Such discussions are all the more likely in this case, where the Parties have made heavy reference to two prior investment treaty cases involving SGS contracts for pre-shipment inspection services—*SGS v. Pakistan*<sup>5</sup> and *SGS v. Philippines*<sup>6</sup>—and where there has now emerged a decision on jurisdiction in another investment treaty case—*BIVAC v. Paraguay*—involving Paraguay's contract for such services on terms claimed to be “substantially similar, if not identical”<sup>7</sup> to the Contract between SGS and Paraguay in this case.

## **B. Standards at the Jurisdictional Stage**

43. At this stage of the proceedings, the Tribunal has before it only the Parties' arguments on jurisdiction and a limited evidentiary record, reflecting the extent to which the Parties have seen fit to address factual matters at this time. Accordingly, lacking a full presentation of the Parties' claims, defenses, and evidence at this preliminary, jurisdictional stage, the Tribunal must take care to give the proper treatment to the Parties' factual allegations and legal arguments.

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<sup>5</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 (“*SGS v. Pakistan*, Decision on Jurisdiction”).

<sup>6</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (“*SGS v. Philippines*, Decision on Jurisdiction”).

<sup>7</sup> Respondent's Letter to the Tribunal, 9 June 2009 (regarding *BIVAC v. Paraguay* Decision on Jurisdiction).

44. The Parties both invoked the now-familiar notion that, for purposes of determining whether Claimant has stated a BIT claim over which the Tribunal has jurisdiction, the Tribunal should consider whether the facts alleged by Claimant, if proven, could give rise to a violation of the Treaty. For example, referring to certain claims of SGS, Respondent argued in its Reply that this Tribunal “need not take this claim at face value. Rather, it should consider if the facts asserted by SGS are capable of being regarded as breach of the B.I.T.”<sup>8</sup> Respondent contended that Claimant has failed to allege facts that would amount to a breach of the BIT, as required to pass jurisdictional muster on such a *prima facie* standard. In turn, Claimant, quoting the opinion of its legal expert, argued that:

[a]t the jurisdictional threshold, the [C]laimant need only establish that, *assuming* the truth of the facts alleged, those facts *could* violate the provisions of the treaty at issue. Conversely, the Claimant need *not*, for jurisdictional purposes, prove the fact[s] alleged. Nor need the [C]laimant establish that were it ultimately to prove those facts, they necessarily *would* violate the relevant treaty. It suffices for jurisdiction if the facts, the truth of which must be presupposed, *could* violate the treaty.<sup>9</sup>

45. At the hearing on jurisdiction, Claimant confirmed its position that the Tribunal should take as true *all* facts asserted by Claimant: not only those facts that go to the sufficiency of the claims as stated, but also those facts that may be necessary for the determination of the Tribunal’s jurisdiction under the BIT and the ICSID Convention.<sup>10</sup>

46. In the Tribunal’s view, however, it is necessary to distinguish the two inquiries. The question of what standard the Tribunal should apply at the jurisdictional stage in addressing facts relevant to whether a claimant has adequately stated its claims and can proceed to the merits is different from the question of the standard for findings of fact necessary to establish jurisdiction.

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<sup>8</sup> Respondent’s Reply to Claimant’s Counter-Memorial on Jurisdiction, 29 December 2008 (“Respondent’s Reply”), at para. 105.

<sup>9</sup> Claimant’s Rejoinder on Jurisdiction, 9 March 2009 (“Claimant’s Rejoinder”), at para. 87 (quoting Reisman Opinion at para. 7) (emphasis in original).

<sup>10</sup> Transcript, Hearing on Jurisdiction, 6 April 2009 at 65:10 to 67:9; *see also* Reisman Opinion at para. 34.

47. It is well accepted that, at the jurisdictional stage, Claimant need not prove the facts that it alleges in order to state a claim over which this Tribunal has jurisdiction. All Claimant needs to do is to allege facts that, if proven at the merits stage, could constitute a violation of Treaty protections. That is, absent exceptional circumstances,<sup>11</sup> the Tribunal will evaluate whether the acts and omissions of Respondent, taken as they are alleged by Claimant, are capable of making out a Treaty violation—leaving it to the merits stage for Claimant to prove those allegations.
48. This is the oft-quoted approach of Judge Higgins’ separate opinion in the ICJ’s *Oil Platforms* case: a tribunal should “accept *pro tem* the facts as alleged by [the claimant] to be true and in that light to interpret [the treaty] for jurisdictional purposes – that is to say, to see if on the basis of [the claimant’s] claims of fact there could occur a violation of one or more of [the treaty provisions].”<sup>12</sup>
49. Many investment treaty tribunals have echoed this approach.<sup>13</sup> As the tribunal observed in *SGS v. Pakistan*, “we consider that if the facts asserted by Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits.”<sup>14</sup> This approach was succinctly expressed by the tribunals in *Impregilo v. Pakistan*, which considered “whether the facts as alleged by Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked,”<sup>15</sup> and *Bayindir v. Pakistan*, which asked whether the facts alleged “fall within those provisions [invoked] or are capable, if proved, of constituting breaches of the obligations they refer to.”<sup>16</sup>

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<sup>11</sup> For example, the tribunal in *Amco* left room to depart from this approach in the event of “manifest or obvious misdescription or error in the characterization of the dispute by the Claimants.” *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, at para. 38.

<sup>12</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 I.C.J. 803 (“*Oil Platforms*”), Separate Opinion of Judge Rosalyn Higgins at para. 32.

<sup>13</sup> See, e.g., *Methanex v. United States*, UNCITRAL (NAFTA), Partial Award, 7 August 2002, at para. 112; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, at para. 132.

<sup>14</sup> *SGS v. Pakistan*, Decision on Jurisdiction at para. 145 (citation omitted).

<sup>15</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/03, Decision on Jurisdiction, 22 April 2005, at para. 254 (“*Impregilo v. Pakistan*, Decision on Jurisdiction”) (emphasis in original).

<sup>16</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, at para. 197 (“*Bayindir v. Pakistan*, Decision on Jurisdiction”).

50. We note that this standard is different from a “*prima facie*” standard—a term that is frequently invoked, but that has the potential needlessly to confuse the issue. A *prima facie* standard would apply at the merits stage to the evidence that is put forward by a claimant (or by a respondent, in the case, for example, of an affirmative defense). Black’s Law Dictionary explains that *prima facie* evidence is, *inter alia*, “[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence” and that a *prima facie* case is one, *inter alia*, in which “not only...plaintiff’s evidence would reasonably allow [the] conclusion plaintiff seeks, but also that plaintiff’s evidence compels such a conclusion if the defendant produces no evidence to rebut it.”<sup>17</sup> Once a claimant has offered evidence that makes a *prima facie* showing, respondent must then produce evidence to rebut the claimant’s factual assertions. But this is a matter for the merits phase, during which the tribunal weighs the sufficiency of the Parties’ evidence. At the jurisdictional phase, the claimant is not asked to make a *prima facie* showing of its case on the merits; it is not required to produce evidence to support its allegations about the respondent’s purported default. As discussed above, all a claimant needs to do is show that the facts that it has alleged (though not yet proven) could violate the treaty in question.<sup>18</sup>
51. It is equally well accepted that, for jurisdictional purposes, it is sufficient that the facts as asserted by Claimant, if proven, *could* (not would) violate the provisions of the BIT. In other words, at the jurisdictional stage, the Tribunal need not decide whether, assuming the factual allegations were proven, the claim would prevail as a matter of law. Judge Higgins drew this distinction, too, in her separate opinion:

It is interesting to note that in the *Mavrommatis* case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims “would” involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may “could” be converted to “would”. The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.<sup>19</sup>

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<sup>17</sup> BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990) at 1189-90.

<sup>18</sup> One might say that a claimant must allege a *prima facie* case at the jurisdictional stage, but it need not make that case until the merits stage.

<sup>19</sup> *Oil Platforms*, Separate Opinion of Judge Rosalyn Higgins at para. 33.



52. If the rule were otherwise, the inquiry could not properly be considered jurisdictional. A determination that a given set of alleged facts, even if proven, would not constitute a violation of a legal right is, in effect, a holding on the merits. That would be the consequence, for example, if a tribunal were to uphold an objection that a claim is “manifestly without legal merit” under ICSID Arbitration Rule 41(5). Thus, so long as the objection goes only to the authority of the Tribunal to hear claims for the breach of the legal right identified by the Claimant, the Tribunal’s review of the sufficiency of the legal allegations, like its review of the factual allegations, is limited.
53. A fundamentally different approach is required, however, for issues that are directly determinative of the Tribunal’s jurisdiction—such as, for example, issues of consent, nationality, covered investment, territoriality, or the temporal scope of treaty protection. If the Tribunal is to make jurisdictional determinations on such issues in a threshold jurisdictional stage (rather than joining them to the merits), the Tribunal must reach definitive findings of fact and conclusions of law. Without such determinations, the Tribunal cannot satisfy itself that it has jurisdiction to hear the merits of the dispute.
54. This is because the investment treaty context brings with it specific, threshold jurisdictional requirements that are articulated in the relevant investment treaty, and (in some cases such as this one) in the ICSID Convention. For example, the Switzerland-Paraguay Treaty may be invoked only by an investor of a Contracting Party, as defined in Article 1(1) of the Treaty. Likewise, under Article 25 of the ICSID Convention, an ICSID tribunal may hear only a legal dispute between a Contracting State and a national of another Contracting State. It is not sufficient merely to allege the nationality of the investor in order to determine that the Tribunal has jurisdiction *rationae personae*; nationality must be established conclusively at the jurisdictional stage.
55. Where the Tribunal’s jurisdiction with respect to threshold requirements of the Treaty or ICSID Convention turns on the existence (or absence) of certain disputed facts, the Tribunal cannot merely take Claimant’s factual allegations as true, and wait until the merits stage to ascertain whether those facts are established. Such disputed facts must be proven at the jurisdictional stage, so that the Tribunal can make a definitive determination of its own jurisdiction. If the evidence is insufficient to ascertain the facts, the Tribunal can choose to

join the jurisdictional determination to the merits stage for further development of the evidence—but it cannot determine that it has jurisdiction on a *pro tempore* basis, without assuring itself that the necessary facts are proven.

56. As stated by the Tribunal in *Inceysa v. El Salvador*, “because the ICSID Convention obligates the Arbitral Tribunal to decide its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfill this obligation.”<sup>20</sup> With respect to facts that go to the issue of *jurisdiction*, this Tribunal agrees with the *Inceysa* tribunal’s conclusion that it is “obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal’s competence.”<sup>21</sup>
57. The Tribunal’s approach here is also consistent in this particular respect with that in *Phoenix Action v. Czech Republic*, where the tribunal concurred with the respondent that in addition to *alleging* sufficient facts to support one or more claims on the merits, “the claimant must *prove* the facts necessary for the establishment of jurisdiction.”<sup>22</sup> The *Phoenix* tribunal went on to endorse this “double approach” to facts relevant to the merits and facts relevant to jurisdiction.<sup>23</sup> As to the former, the tribunal stated that “they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level.”<sup>24</sup> However, as to the latter, a different approach is required: “On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”<sup>25</sup>

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<sup>20</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, at para. 149 (“*Inceysa v. El Salvador*, Award”) (referring to Article 41 of the ICSID Convention, which states “The Tribunal shall be the judge of its own competence”).

<sup>21</sup> *Inceysa v. El Salvador*, Award at para. 155; *see also Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, at para. 66 (“[A] tribunal need not go beyond determining whether the facts alleged by a claimant, if established, are capable of constituting violations of the provisions that are invoked. However, when a jurisdictional issue hinges on a factual determination that may also relate to the merits of the claims, the Tribunal must proceed to a determination of the facts that are presented to it to the extent necessary for jurisdictional purposes. Therefore, a tribunal can make definitive factual findings at the jurisdictional stage too. For example, a tribunal must determine the nationality of a claimant in order to establish its jurisdiction *ratione personae* in a definitive manner.”).

<sup>22</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 59 (emphasis added) (“*Phoenix Action*, Award”).

<sup>23</sup> *Phoenix Action*, Award at para. 62.

<sup>24</sup> *Phoenix Action*, Award at para. 61.

<sup>25</sup> *Phoenix Action*, Award at para. 61; *see also id.* at paras. 63-64.

58. Claimant suggested at the hearing that the Tribunal should accept as true *all* factual assertions of the Claimant, both those that go to threshold questions of jurisdiction and those needed to make out its claims on the merits. But that cannot be the case, because it would require the Tribunal to forgo the very inquiry it is required to undertake, *i.e.*, determining whether or not the Tribunal has jurisdiction.<sup>26</sup> As the *Pan American v. Argentina* tribunal noted in another jurisdictional context, “if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.”<sup>27</sup> Either at a preliminary jurisdictional stage, or before proceeding to the merits if the tribunal has joined jurisdiction to the merits, an ICSID tribunal must conclusively determine all issues that are necessary to establish its jurisdiction, including by making all necessary factual findings.

#### IV. JURISDICTIONAL LIMITS OF THE BIT AND THE ICSID CONVENTION

59. Respondent advanced multiple objections to this Tribunal’s jurisdiction, several of which crystallized between its Memorial submissions and its Reply. In light of the different standards to be applied (as just discussed in Section III.B above), the Tribunal will separate the objections into those that rest on specific jurisdictional limitations imposed by the terms of the Treaty or the ICSID Convention, addressed in this Section IV, and those that challenge the adequacy, for purposes of jurisdiction, of the claims stated, to be addressed in Section V below.

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<sup>26</sup> See, e.g., Dissenting Opinion of Sir Franklin Berman, *Industria Nacional de Alimentos, S.A. and Indalsa Perú S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, at para. 17 (“[I]f particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?”).

<sup>27</sup> *Pan American Energy LLC and BP Argentina Exploration Co. v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP America Production Co. et al. v. The Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, at para. 50. The *Pan American* tribunal was considering the parties’ conflicting positions on the proper characterization of various issues as either “jurisdictional” or “merits” issues.

### A. Was There a Valid Expression of Consent?

60. The first of Respondent's jurisdictional objections to which we turn is its contention that the Republic of Paraguay has not consented to the arbitration of this dispute under ICSID's auspices.
61. In both of its Memorial submissions, Respondent argued that, although Paraguay is a party to the ICSID Convention, it has not expressed its consent to ICSID jurisdiction with respect to this dispute, as required under the Convention. Respondent pointed to the Preamble of the ICSID Convention, which declares that "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."<sup>28</sup>
62. Respondent contended that, according to Paraguayan law, Paraguay's consent to arbitration must be exercised by a representative of the State with full powers, *i.e.*, one constitutionally authorized to bind Paraguay. Respondent maintained that the sole authority capable of giving Paraguay's consent to ICSID jurisdiction over this dispute is the President of Paraguay, and that he has not given such consent.
63. Respondent further contended that domestic law prohibits the international arbitration of Claimant's claims, as the Paraguayan Constitution mandates judicial sovereignty in matters of public law. Respondent argued that Paraguay's Constitution bars the arbitration of claims such as this, which affect Government patrimony.
64. Respondent did not reiterate this objection to the Tribunal's jurisdiction in its Reply or at the hearing. However, the Reply was characterized as being "in further support" of Respondent's objections to jurisdiction, and "in addition to the bases set forth in the Republic of Paraguay's previous submissions."<sup>29</sup> Accordingly, the Tribunal understands that Paraguay maintains the objection, and that the Tribunal is required to rule upon it.

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<sup>28</sup> Preamble, ICSID Convention.

<sup>29</sup> Respondent's Reply, Introduction.

65. Claimant pointed to Article 9 of the BIT as evidence of Paraguay's express written consent to ICSID jurisdiction for the resolution of this dispute, which in turn meets the written consent requirement of Article 25(1) of the ICSID Convention. Claimant maintained that no further action by Paraguay was required to perfect or confirm its consent to ICSID arbitration of this dispute.
66. Claimant argued that, pursuant to Article 27 of the Vienna Convention, Respondent cannot invoke its domestic law to excuse or ignore its international obligations. The arbitrability of the dispute under Paraguayan law therefore cannot and does not affect the Tribunal's jurisdiction. Claimant also maintained that the dispute *is* arbitrable under Paraguayan law, because under Paraguay's Constitution the BIT is incorporated into Paraguayan law.
67. In the Tribunal's analysis, it is a straightforward matter to conclude that Respondent has consented to ICSID arbitration of this Treaty dispute.
68. Respondent is, of course, correct that Paraguay's ratification of the ICSID Convention did not, standing alone, constitute consent by Paraguay to ICSID arbitration of this particular dispute. The Preamble and Article 25(1) of the ICSID Convention are both clear that the Contracting State in question must "consent in writing" to submit a given dispute to the Centre for arbitration; the ICSID Convention is not itself an instrument of consent.
69. Respondent errs, however, in its claim that no such express written consent has been given by Paraguay. Paraguay explicitly consented to ICSID jurisdiction of this and any other "disputes with respect to investments between a Contracting Party [to the BIT] and an investor of the other Contracting Party [to the BIT]" in Article 9 of the Switzerland-Paraguay Treaty. BIT Article 9(4) provides that "[e]ach Contracting Party hereby consents to the submission of an investment dispute to international arbitration." Article 9(2) provides that if "consultations do not result in a solution within six months," "the investor may submit the dispute . . . to international arbitration," and gives the investor a choice between (a) ICSID arbitration, and (b) *ad hoc* arbitration under the UNCITRAL arbitration rules.
70. Although it was the subject of some discussion in the early years of investment treaty arbitration, it is now uniformly accepted that the ratification of a bilateral investment treaty

containing such provisions constitutes a State's written consent to arbitration of covered disputes.<sup>30</sup> The State's consent in a BIT is often described as an "open invitation" or a "standing offer" to covered investors to submit such disputes to international arbitration, which the investor "accepts" by giving its own written consent to resort to such arbitration (whether prior to or in its Request for Arbitration).<sup>31</sup>

71. Paraguay concluded and ratified the Switzerland-Paraguay BIT. Paraguay has not argued that the BIT was not properly ratified, or that it never entered into force. The BIT—and Article 9's unequivocal "consent[] to the submission of an investment dispute to international arbitration"—therefore constitutes a binding international obligation of the Republic of Paraguay. This is not an "indirect means" of finding that Paraguay has consented to ICSID arbitration of this dispute, as Paraguay has claimed.<sup>32</sup> Article 9 of the BIT represents a direct and express consent by Paraguay to arbitration of the dispute under ICSID's auspices (provided, of course, that the other jurisdictional requirements of the BIT and the ICSID Convention are satisfied).
72. Paraguay nevertheless maintained that some additional act or statement by the Head of State is required under Paraguayan law to bestow the State's consent to arbitration. However, no such limitation or conditionality is anywhere to be found in Article 9 of the BIT; Paraguay did not qualify Article 9(4), for example, in any way. Thus Paraguay's international obligation to submit to ICSID arbitration if the investor so chooses is not limited by any such domestic law requirement. And Claimant is correct that Respondent cannot invoke its domestic law to avoid its obligations under international law. Article 27 of the Vienna

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<sup>30</sup> See *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal, 8 December 1998, at paras. 43-44 ("*Lanco v. Argentina*, Decision on Jurisdiction"); see also, e.g., *Impregilo v. Pakistan*, Decision on Jurisdiction at para. 108; *SGS v. Philippines*, Decision on Jurisdiction at para. 31; Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* at pp. 190-91, 205-06 (2<sup>nd</sup> ed. 2009) ("Schreuer, COMMENTARY").

<sup>31</sup> See, e.g., *Lanco v. Argentina*, Decision on Jurisdiction, at paras. 31-33; Georges Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 104 (1984) ("Consent may also result from the investor's acceptance of a unilateral offer from the Contracting State involved, when that State has already consented to ICSID arbitration in relevant provisions of its investment legislation or of a bilateral treaty with the Contracting State of which the investor is a national."); Schreuer, COMMENTARY at p. 9 ("Alternatively, consent may be contained in a standing offer by the host State which may be accepted by the investor in appropriate form.... A standing offer may also be contained in a treaty to which the host State and the investor's State of nationality are parties." (citations omitted)); see generally Antonio Parra, *ICSID and New Trends in International Dispute Settlement*, 10/1 NEWS FROM ICSID 7, 8 (1993) (discussing emergence of "general 'offers'" in bilateral investment treaties to submit disputes to ICSID arbitration).

<sup>32</sup> Respondent's Memorial on Jurisdiction (26 June 2008 Submission) at p. 4.

Convention provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . . .” Accordingly, Paraguay’s claims that domestic Paraguayan law imposes certain procedural or substantive limitations on its consent cannot change or derogate from the unequivocal consent given—and binding on Paraguay as a matter of international law—in the BIT.

73. The Tribunal concludes that Paraguay has given the requisite consent in Article 9 of the BIT to international arbitration of this dispute under ICSID’s auspices, and that that provision likewise constitutes Paraguay’s written consent under Article 25 of the ICSID Convention.

**B. Is There a Covered Investment?**

74. Article 2(1) of the BIT provides, in pertinent part, that the BIT “shall apply to investments in the territory of one Contracting Party, made in accordance with its legislation, including possible admission procedures, prior or after the entry into force of the [BIT] by investors of the other Contracting Party.” All of Claimant’s claims are stated as claims for breach of the BIT, which will be applicable in the first instance only if these Article 2(1) conditions are met.
75. Paraguay has not disputed that SGS is a qualified investor of Switzerland for purposes of the nationality requirements of the BIT (and the ICSID Convention). It is undisputed that SGS is a company constituted under Swiss law, with its seat and real economic activities in Geneva, Switzerland. As such, the Tribunal concludes that SGS meets the definition of an “investor” under Article 1(1)(ii)(b) of the BIT, which refers to “legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under Swiss law and have their seat, together with real economic activities, in the territory of the Swiss Confederation.” Likewise, it is undisputed that SGS had the nationality of Switzerland, an ICSID Contracting State, at the time it filed its Request for Arbitration, thus meeting the nationality requirement of Article 25(2) of the ICSID Convention.
76. Respondent does, however, object that Claimant has not made a covered investment within the meaning of the BIT and the ICSID Convention. Absent a proper “investment,” there can be no “dispute[] with respect to [an] investment” (BIT Article 9(1)) nor a “legal dispute

arising out of an investment” (ICSID Convention Article 25(1)) over which this Tribunal could exercise jurisdiction. Respondent’s objection is multifaceted and intertwined, but it can be separated for analytical purposes into three questions, each of which will be addressed in turn:

- (1) Are Claimant’s alleged investments of the type that is covered by the protections of the BIT, and by the ICSID Convention (to the extent they may differ)?
- (2) Does Claimant have an investment or investments “in the territory of” Paraguay, as required in order to obtain the BIT’s protections?
- (3) Was the investment “made in accordance with [Paraguay’s] legislation,” as also required to be covered under the BIT?

### **1. Nature of the Investment**

77. Respondent contends that Claimant’s claimed investments do not meet the “investment” requirements of the BIT, or, in the alternative, the requirements of Article 25(1) of the ICSID Convention. If the claimed investments are not investments within the meaning of the Treaty, that would foreclose the Tribunal’s jurisdiction entirely. Accordingly, we turn first to the question of whether Claimant has made an investment within the meaning of Article 1(2) of the BIT.

#### **a. The Switzerland-Paraguay BIT**

78. Article 1(2) of the BIT defines “investment” to include “every kind of assets and particularly”, *inter alia*, (c) “claims to money or to any performance having an economic value,” and (e) “concessions under public law, including . . . rights given by law, by contract or by decision of the authority in accordance with the law.”

79. Claimant in its Request stated that it had made an investment “on the basis of” the Contract that qualified as an investment under the BIT.<sup>33</sup> In its Counter-Memorial, Claimant identified “the Contract and [its] performance” or “the Contract in itself and SGS’s rights

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<sup>33</sup> Claimant’s Request for Arbitration, 16 October 2007, at para. 18.



thereunder” as its investments,<sup>34</sup> a phrasing echoed in the Rejoinder’s references to “the Contract and associated rights.”<sup>35</sup> Claimant also pointed out that pursuant to the Contract it had established liaison offices in Asunción, Ciudad del Este, and Encarnación, which Claimant alleged cost approximately US\$ 2.225 million per year to maintain and were staffed by approximately 70 local and foreign personnel.

80. Claimant contended that the Contract and associated rights, as well as the liaison office, are assets of value, meeting the foundational “every kind of assets” requirement of Article 1(2). Furthermore, Claimant maintained that they also fall within several of the “particular” examples of such assets listed in Article 1(2), in that the Contract gives SGS claims to money and claims to performance having an economic value (Article 1(2)(c)) and it also encompasses rights given “by decision of the authority” involving the provision of public services, making it, in Claimant’s view, “akin to” a “concession under public law” (Article 1(2)(e)).
81. Respondent objected that Paraguay has not made a protected investment under the BIT. Respondent contended that the Contract is not an asset and suggests that SGS may not have in fact treated the Contract as an asset for accounting purposes. Respondent further contended that the Contract is not a right to a claim to money because it is not a document evidencing a liquidated debt, such as a promissory note or a judgment. Respondent argued that the Contract is not a concession under Paraguayan law, as it was purely a right to receive payment for services performed abroad, not a right granted under public law. And with respect to the liaison office, Respondent argued that the establishment of such an office was not required under the Contract, and that it was incidental to the performance of the Contract.
82. It is not disputed that a contract was entered into by SGS and the Ministry of Finance of Paraguay, that in the exercise of that contract SGS performed pre-shipment inspections and certifications of imports to Paraguay, and that the contract provided that Paraguay would pay SGS for such services. Furthermore, Respondent did not dispute that SGS established

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<sup>34</sup> See, e.g., Claimant’s Counter-Memorial on Jurisdiction, 22 September 2008, at paras. 67, 74 (“Claimant’s Counter-Memorial”).

<sup>35</sup> See, e.g., Claimant’s Rejoinder at paras. 49-64.

an office of considerable size in Paraguay that was responsible for handling certain aspects of SGS's inspection and certification services, at some meaningful expense to SGS.

83. The Tribunal is satisfied that the Contract itself, and certainly in conjunction with the services performed under it and the offices in Paraguay, constitutes a covered investment under Article 1(2) of the BIT. They qualify under the general BIT definition, as “assets.” While the Contract and SGS's rights thereunder may be intangible, they are proprietary to SGS and they have economic value that accrues to SGS. Likewise, the liaison office is a tangible manifestation of SGS's activities under the Contract. The Tribunal is not persuaded, as Paraguay argued, that the characterization of something as an “asset” for purposes of the BIT's “investment” definition should turn on the Claimant's accounting treatment of the claimed investment—*i.e.*, whether the Contract is recorded on SGS's books as an asset.<sup>36</sup> Rather, the question of what constitutes an asset (whether tangible or intangible) must be viewed more broadly, in terms of the item's economic value, rather than limited to the potentially artificial confines of accounting treatment.
84. The Tribunal is also persuaded that the Contract and associated rights are encompassed within the “particular” examples cited by Claimant in Article 1(2). The Contract and the Parties' performance of it give rise to “claims to money or to any performance having an economic value” (Article 1(2)(c)). Claimant will of course have to prove its particular claims to be meritorious in the next phase of the arbitration, but for the purpose of defining an “investment,” the Tribunal's determination that, on its face, the Contract contemplates payment in exchange for services rendered that may give rise to such claims is sufficient. The Tribunal is not persuaded by Respondent's contention that assets in the form of “claims to money” under Article 1(2)(c) are limited to promissory notes or judgments or other documents evidencing liquidated debts.<sup>37</sup> The ordinary meaning of the BIT text itself signals no such limits, and the textual pairing of “claims to money” with the undoubtedly broad “claims...to performance having economic value” together in Article 1(2)(c) suggests that a similar degree of breadth and flexibility should apply to both. In the Tribunal's opinion,

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<sup>36</sup> See Respondent's Reply at para. 47.

<sup>37</sup> According to Black's Law Dictionary, “[a] debt is liquidated when it is certain what is due and how much is due” whether by agreement of the parties or by operation of law. BLACK'S LAW DICTIONARY (6<sup>th</sup> ed. 1990) at 930.

Article 1(2)(c) can properly encompass assets in the form of unliquidated just as well as liquidated claims to money.

85. We note that the tribunal in *SGS v. Pakistan* did not hesitate to classify a SGS pre-shipment inspection services contract and SGS's rights thereunder as investments within the Switzerland-Pakistan treaty's "claims to money" provision, which is identical to the Switzerland-Paraguay BIT provision at issue here.<sup>38</sup> The *SGS v. Philippines* tribunal did not consider the question directly, as the Philippines apparently had not objected to jurisdiction on that basis. But it applied a definition of "investment" substantially identical to Article 1(2) of the Switzerland-Paraguay BIT—including an entirely identical "claims to money" provision—to conclude that "SGS made an investment...under the CISS Agreement, considered as a whole."<sup>39</sup> The *BIVAC* tribunal did not reach the question, having determined that BIVAC's pre-shipment inspection services contract gave it "rights granted under public law," one of the examples of "investment" within the definition of the Netherlands-Paraguay BIT at issue in that case.<sup>40</sup>
86. The Tribunal is also persuaded that the Contract and SGS's rights thereunder fall within the example of covered assets stated in BIT Article 1(2)(e): "concessions under public law . . . as well as other rights given by law, by contract or by decision of the authority in accordance with the law."
87. We need not, for this purpose, conclude that the Contract is a concession as that term is specifically defined in Paraguayan law. Paraguay has argued that the Contract is an administrative contract, which it maintains is distinct from a concession under Paraguayan law. The BIT, however, describes a broader category of assets, in that it includes not only "concessions,"<sup>41</sup> but also "other rights given by law, by contract or by decision of the authority in accordance with the law." Thus, Claimant argues only that the Contract was

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<sup>38</sup> See *SGS v. Pakistan*, Decision on Jurisdiction at para. 135.

<sup>39</sup> *SGS v. Philippines*, Decision on Jurisdiction at para. 112.

<sup>40</sup> See *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 93.

<sup>41</sup> There is a difference in this respect between the English text of the Switzerland-Paraguay BIT and the French and Spanish texts. The latter both refer simply to "concessions," whereas the English text—"concessions under public law"—adds a clause. The BIT provides (in its concluding paragraph) that in the event of a discrepancy among the three texts, the English text shall prevail. In this case, however, the Tribunal does not consider that any point of significance in its analysis turns on the distinction (if any) between a concession and a concession under public law.

“akin to” a concession under public law, and rests also on the fact that the Contract encompasses rights granted “by a decision of the authority in accordance with the law”—namely, granted by the Ministry of Finance in accordance with Presidential Decree No. 12311 of 31 January 1996 (Ex. C-6).

88. In this vein, it seems clear that the services carried out by SGS were services of a public nature, or at the very least were intimately intertwined with the administration of State functions. Absent inspections and certifications by an entity such as SGS, it would be the function of the State to inspect cargoes, identify and value the goods, and collect the requisite customs duties and taxes on the imports. Paraguay delegated certain of these tasks to SGS, according to Decree No. 12311, to “optimiz[e] the tax collections volume in order to obtain the revenue levels” and to “improve the control mechanisms of compliance with tax liabilities.”<sup>42</sup> The services performed by SGS under the Contract were apparently integral to the State’s import operations, including the collection of import duties and taxes: the certifications issued by SGS (or by BIVAC under its corresponding contract) pursuant to inspections were required by law in order to clear a cargo through Paraguayan customs.<sup>43</sup> Whether or not SGS’s certifications were final and binding, in the sense that Paraguay contends that its customs authorities retained the right to re-inspect shipments previously certified by SGS,<sup>44</sup> SGS’s certifications were apparently integral to the Paraguayan authorities’ customs clearance and duty collection procedures.
89. As noted above, the *BIVAC* tribunal concluded that BIVAC’s similar if not identical contract with Paraguay conferred “rights granted under public law” upon BIVAC, per one of the examples of covered assets in the Netherlands-Paraguay BIT’s definition of investment.<sup>45</sup> While the asset example set out in Article 1(2)(e) of the Switzerland-Paraguay BIT is worded differently from the definition contained in the Netherlands-Paraguay BIT, it embraces a

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<sup>42</sup> Presidential Decree No. 12311, 31 January 1996, at Preamble (Ex. C-6) (“Decree No. 12311”); *see also* Preamble, Contract (Ex. C-4). Respondent reiterated this purpose of the Contract in its Memorial on Jurisdiction (8 April 2008 Submission) at p. 4 (Ministry entered into the Contract “with the view of increasing tax revenues and of improving the control mechanisms for the enforcement of the tax obligations relating to the import transactions subject to the Pre-shipment Inspection Services”).

<sup>43</sup> *See* Decree No. 12311, Art. 2 (Ex. C-6); *see also* Resolution No. 1171/96, Art. 4 (Ex. RL-3B).

<sup>44</sup> *See* Respondent’s Reply at paras. 28, 30 (citing Resolution No. 1171/96, Art. 21 (Ex. RL-3B)).

<sup>45</sup> *See BIVAC v. Paraguay*, Decision on Jurisdiction at paras. 84-91.

sufficiently similar concept that we think it worth taking note of the *BIVAC* tribunal's comparable conclusion. Our conclusion is also consistent with that of the *SGS v. Pakistan* tribunal, which characterized an SGS inspection services contract (albeit a contract not before us here) as “conferr[ing] certain powers [on SGS] that ordinarily would have been exercised by the Pakistani Customs service (the identification and valuation of goods for duty purposes).”<sup>46</sup> That tribunal concluded that “Pakistan effectively granted SGS a public law concession,” and that the SGS contract there “amounted to ‘a concession under public laws’ falling well within the [Switzerland-Pakistan] BIT’s definition of investment.”<sup>47</sup>

90. In sum, the Tribunal holds that the Contract, SGS’s associated rights thereunder, and its operations undertaken in conjunction with the Contract constitute an “investment” within the definition of Article 1(2) of the BIT.

**b. Article 25(1) of the ICSID Convention**

91. Having concluded that the BIT’s requirements for a covered “investment” are satisfied and pose no barrier to this Tribunal’s exercise of jurisdiction over Claimant’s BIT claims, the next question confronting the Tribunal is whether anything in the ICSID Convention compels a different result. Claimant elected under Article 9(2) of the BIT to pursue arbitration of those Treaty claims before ICSID. As a result, Claimant must meet not only the jurisdictional requirements of the BIT, but also the jurisdictional requirements of the ICSID Convention. The question here is whether, and if so, how, those requirements differ with respect to the nature of the “investment” out of which Claimant’s claims must arise.
92. Although Article 25(1) of the ICSID Convention extends jurisdiction to legal disputes arising directly out of an investment, it does not define “investment.” The Report of the Executive Directors on the ICSID Convention specifically explains that “[n]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanisms through which the Contracting States can make known, in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the

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<sup>46</sup> *SGS v. Pakistan*, Decision on Jurisdiction at para. 135.

<sup>47</sup> *SGS v. Pakistan*, Decision on Jurisdiction at paras. 135, 140 (emphasis omitted).

Centre . . . .”<sup>48</sup> As the tribunal in *Mihaly v. Sri Lanka* elaborated, “the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.”<sup>49</sup> Thus, the Tribunal agrees with Claimant that “it was understood that the contracting states would determine the scope of protected and excluded investments in their respective instruments of consent,”<sup>50</sup> such as in the bilateral investment treaty at issue here.

93. It would go too far to suggest that *any* definition of investment agreed by states in a BIT (or by a state and an investor in a contract) must constitute an “investment” for purposes of Article 25(1). To cite the classic example, one would not say that a simple contract for the sale of goods, without more, would constitute an investment within the meaning of Article 25(1), even if defined as such in a BIT or in the contract itself. But the fact that one can conceive of such an outlier example does not change the fact that, in most cases—including, in the Tribunal’s view, this one—it will be appropriate to defer to the State parties’ articulation in the instrument of consent (*e.g.* the BIT) of what constitutes an investment. The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means they believe that that activity constitutes an “investment” within the meaning of the ICSID Convention as well. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given the greatest weight.<sup>51</sup> A tribunal would have to have very strong reasons to hold that the mutually agreed definition of investment should be disregarded.
94. The *BIVAC* tribunal approached the question from this direction: “At a formal level, the question may be put as follows: does the definition [of investment] in the BIT exceed what is permissible under the Convention?”<sup>52</sup> For the Netherlands-Paraguay BIT, the *BIVAC*

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<sup>48</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, at para. 27 (“Report of the Executive Directors”).

<sup>49</sup> *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, at para. 33.

<sup>50</sup> Claimant’s Counter-Memorial at para. 37.

<sup>51</sup> *Cf. Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, at paras. 81, 83 (adopting similar approach with respect to criteria of nationality).

<sup>52</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 94.

tribunal concluded that “the answer is self-evidently negative. The definition in the BIT follows the approach adopted in many other BITs concluded around the world. Paraguay would have to argue that its own BIT is inconsistent with the requirements of the ICSID Convention. Sensibly, it has chosen not to go down that path.”<sup>53</sup>

95. We find that approach compelling. The BIT’s offer of ICSID arbitration for investments covered by the Treaty may fairly be taken as an averment by the State that it believes that all such covered investments are “ICSID investments” as well. Thus, if the State were to claim in an arbitration that an investment that satisfies the BIT’s definition is nevertheless not an investment within the ICSID Convention, it would contradict its prior stance to the contrary.<sup>54</sup>
96. We thus come to the same conclusion with respect to the Switzerland-Paraguay BIT as did the *BIVAC* tribunal under the Netherlands-Paraguay BIT. Nothing in the Switzerland-Paraguay BIT’s definition of investment would support characterizing it as an aberration that risks capturing economic activity clearly outside the ICSID Convention’s intended reach with respect to investments. Accordingly, it is reasonable to proceed on the basis that if a claimed investment satisfies the BIT’s definition of investment (as we have held above that it does here), it is also consistent with the ICSID Convention’s understanding of investment.
97. This is a question on which ICSID tribunals have differed. Some tribunals and *ad hoc* committees have proceeded to test claimed investments—investments that may very well satisfy the jurisdictional definitions of investment found in the applicable treaty or contract—against a separate, abstract conception of what an investment pursuant to the ICSID Convention must comprise. This test, however, appears nowhere in the ICSID Convention itself. Its elements, which tribunals have applied as cumulative (*i.e.*, if one feature is missing, a claimed investment will be ruled out of ICSID jurisdiction), are not found in Article 25(1). Rather, the test seeks to create and enforce a universal definition of “investment” for the ICSID Convention<sup>55</sup>—despite the fact that its drafters and signatories

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<sup>53</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 94.

<sup>54</sup> *Cf.* Devashish Krishan, *A Notion of ICSID Investment*, 6:1 TRANSNAT’L DISP. MGMT. (March 2009) at p. 7 & n.22.

<sup>55</sup> *See, e.g., Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, at para. 53; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2,

decided that it should not have one.<sup>56</sup> In our view, however, criteria announced by tribunals do not qualify, narrow, or take precedence over the plain meaning of the BIT's definition of investment. It is not for this Tribunal to impose additional requirements beyond those agreed to by the States in Article 25(1) of the ICSID Convention and in the BIT.

98. Some of the elements discussed in this test might prove to be useful in the event that a tribunal were concerned that a BIT or contract definition of investment was so overreaching that it might have captured a transaction that manifestly was not an investment under any acceptable definition. These elements could be useful in identifying such aberrations. Indeed, of late tribunals and *ad hoc* committees have expressed the view that these elements should be viewed as non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention.<sup>57</sup>
99. In this case, however, the Parties dedicated considerable argument to the question of whether SGS's claimed investment is compatible with the various criteria catalogued in *Salini v. Morocco*.<sup>58</sup> Respondent, taking the position that the criteria are compulsory, argued that

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Award, 8 May 2008, at para. 232; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, at paras. 29, 33.

<sup>56</sup> See Report of the Executive Directors at para. 27 (“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties....”). The *travaux préparatoires* of the ICSID Convention with respect to this question are reviewed in detail in *Malaysian Historical Salvors Sdn. Bhd. v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, at paras. 63-71 (“*MHS v. Malaysia*, Annulment”).

<sup>57</sup> See, e.g., *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at paras. 312-18; *MHS v. Malaysia*, Annulment at paras. 75-79; cf., *MCI Power Group, LC and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, at para. 165; *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, at paras. 236-38. The first tribunals to confront directly an objection that claimant lacked an “investment” under the ICSID Convention did not search for or apply definitions. In *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, the tribunal merely surveyed prior cases involving investments under the Convention before concluding that the promissory notes before it also qualified; in *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, the tribunal resisted respondent’s call to apply a definition, stating that while the “elements of the suggested definition...tend as a rule to be present in most investments, [they] are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.” *Id.* at para. 90. For more on the distinction between identifying and defining investments, see Prof. Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER (2009) (“Gaillard, *Identify or Define?*”).

<sup>58</sup> See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (“*Salini v. Morocco*, Decision on Jurisdiction”), at para. 53. Contrary to some suggestions, the “*Salini* test” elements for an investment—commitment of capital or resources; a certain duration; regularity of profits and returns; an element of risk; and (in some tribunals’ views) contributions to the development of the host state—were not previously identified as *requirements*. Professor Christoph Schreuer in his 2001 first edition of his COMMENTARY ON



SGS's claimed investments fall short and that this Tribunal therefore lacks jurisdiction under the ICSID Convention. Claimant, while maintaining that the *Salini* criteria are typical but not exclusive features of ICSID Convention investments, insisted that all of the criteria are satisfied. The Tribunal is persuaded that Claimant's investment meets the *Salini* criteria, whether or not such criteria are applicable. Given the limited extent to which such criteria might be relevant (if at all), the Tribunal will set out here only briefly the basis for that assessment.

100. The criteria in question include: (i) commitment of resources or assets in the host state; (ii) a certain duration in time; (iii) an element of risk; and (iv) contribution to the economic development of the host state.<sup>59</sup>
101. With respect to the commitment of resources, it appears to be undisputed that Claimant has committed significant monetary and in-kind assets to the operation of liaison offices in Paraguay. Those offices, in turn, apparently played a critical role in the operation of the Paraguayan customs process: inspections performed by SGS abroad led to the issuance of final certifications by those offices in Paraguay, which certifications in turn were required under Paraguayan law in order to clear cargoes through customs in Paraguay. In order to distinguish this activity from the contractually mandated office that the tribunal in *SGS v. Philippines* found to be a sufficient investment in the territory of the Philippines, Respondent has argued that in this case, a liaison office was not required by the Contract. We are not persuaded that this distinction makes a difference; the key is that the offices were established in Paraguay and played an integral part of the performance of SGS's inspection and certification services under the Contract.
102. The Tribunal also takes note of the fact that, in connection with the inspection operations, SGS necessarily committed substantial economic resources at the behest of and for the direct benefit of Paraguay under the Contract. We do not agree with Respondent's contention that the location where those economic resources were deployed necessarily

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the ICSID Convention described them only as typical characteristics of investments: “[t]hese features should not necessarily be understood as jurisdictional requirements....” Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (1<sup>st</sup> ed. 2001) at p.140; *see also id.* (2<sup>nd</sup> ed. 2009) at p. 128.

<sup>59</sup> *See Salini v. Morocco*, Decision on Jurisdiction at para. 52.

disqualifies them for purposes of identifying an “investment.” In this context, at least—a contract entered into directly with the State, whose benefits accrued in the State—the whole of the resources committed to implement the Contract may be taken into consideration. (This issue may be of greater significance with respect to the requirement of an investment “in the territory” of Paraguay, discussed in the next section, although there too we ultimately are not persuaded that Claimant’s activities can be divided and allocated to distinct locations.)

103. Claimant also contended that it contributed time, human, and data resources in training Paraguayan customs officials and assisting Paraguay in modernizing its customs infrastructure. Respondent claimed that the technical assistance required under the Contract was not provided (or at a minimum that Claimant did not prove that it was provided). Because of our findings above, we need not resolve the factual dispute at this time, and we do not rely upon Claimant’s claimed technical assistance to Paraguay to reach our conclusion that SGS committed resources in and for the state of Paraguay.
104. With respect to duration, the Tribunal notes that, quite apart from the fact that the Contract provides for an initial three-year term and for automatic renewals thereof absent notice of termination, it is undisputed that Claimant did in fact provide services under the Contract for an extended period (nearly three years, according to Claimant). Respondent objects that the Contract’s three-year term is, in effect, illusory, because Respondent had the right to terminate the Contract at its convenience (and to refuse to renew it). But in the face of Claimant’s actual activity over an extended period, the duration element is established, without any need to delve into the specific terms of the Contract.
105. With respect to the element of risk, while it is undisputed that under the Contract Claimant received a minimum fee for each inspection performed, that minimum did not make the Contract a risk-free undertaking. Claimant’s total fees payable were dependent upon both the volume and value of the imports into Paraguay, which fees might or might not exceed its costs of providing the services. Claimant also encountered risk as a result of direct competition with BIVAC to perform inspection services for Paraguay-bound cargoes. If importers chose BIVAC inspections over SGS inspections, SGS’s volume of inspections

might not be sufficient to cover SGS's costs.<sup>60</sup> As such, the Tribunal is persuaded Claimant did, contrary to Respondent's contention, bear the risks—profit or loss—of “participation in the outcome of the investment.”<sup>61</sup>

106. Finally, with respect to a contribution to the economic development of the host state (or, alternatively, a contribution to the economy of the host state),<sup>62</sup> the Tribunal sees that element as met by the purpose of the Contract itself, as expressed in its preambular language stating that the Ministry entered into the contract with the objective of optimizing tax collection volume and improving the control mechanisms for compliance with tax liabilities. Both objectives serve the State, not least by contributing to its coffers. The analysis does not depend on an arithmetic balance sheet calculation of whether Paraguay paid out to SGS more or less than it obtained in increased tax revenues, as Respondent suggests. To the extent the question is one of development, Respondent itself characterized the services of SGS and BIVAC as constituting a “transitional measure” to be used until the State reaches the point where “national customs authorities are able to carry out these tasks on their own”<sup>63</sup>—in other words, until the State's capabilities develop sufficiently. It is no great leap to see the “transitional measure” (the Contract) as facilitating and contributing to that development, based not only on technical assistance (the existence and sufficiency of which is a disputed issue between the Parties) but also on the inspection and certification services themselves. To the extent the question is one of contributing to the economy, Claimant's economic activity in and for the benefit of Paraguay is sufficient to establish such a contribution.

107. This analysis illustrates the need for special caution before resorting to this criterion, in particular. Should a tribunal find it necessary to check for an aberrational transaction falling outside any reasonable understanding of investment, the first three criteria of resources, duration, and risk would seem fully to serve that objective. The contribution-to-

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<sup>60</sup> See Claimant's Rejoinder at paras. 30-31.

<sup>61</sup> Respondent's Reply at para. 18. The Tribunal therefore need not reach the question whether, as argued by Claimant, the US\$ 250,000 performance bond that it provided to the Ministry also reflected the kind of risk on SGS's part that should be taken into account for purposes of the *Salini* “risk” element.

<sup>62</sup> See *Phoenix Action*, Award at para. 85 (arguing that a contribution to host state “development” is impossible to ascertain and that a contribution to the “economy” of the host state is a more appropriate requirement).

<sup>63</sup> Respondent's Reply at para. 39.

development criterion, on the other hand, would appear instead to reflect the consequences of the first three criteria, bringing little independent content to the inquiry.<sup>64</sup> At the same time, it invites a tribunal to engage in *post hoc* evaluation of the business, economic, financial and/or policy assessments that prompted the claimant’s activities—a form of second-guessing that would not appropriately drive a tribunal’s jurisdictional analysis.

108. In sum, while the Tribunal does not see the features of investments identified in *Salini* as a definitional test, nor does it believe that it is necessary to even look for those elements here absent any suggestion that the BIT’s definition of investment is improperly overreaching, it has nevertheless considered the *Salini* elements in light of the Parties’ extensive briefing of the issue. The Tribunal finds all of those elements to be present in Claimant’s claimed investments.

## 2. In the Territory

109. As noted above, Article 2(1) of the BIT specifies that the Treaty applies only to “investments in the territory” of the host state (here, Paraguay).<sup>65</sup> Respondent objects that the Contract was principally performed by SGS outside the territory of Paraguay, and that SGS’s claims relate to (non)payment for those services rendered abroad, not to any injury to SGS’s assets in Paraguay. Accordingly, Respondent contends that this Tribunal lacks jurisdiction over Claimant’s claims as they do not pertain to an investment in the territory of Paraguay.
110. This issue is potentially intertwined with the question (above) of whether the nature of the investment is such that it is protected under the BIT and subject to dispute resolution under the ICSID Convention. If a tribunal finds occasion to inquire into the *Salini* elements, the first of those is typically articulated in terms of a contribution of resources *in the host state*.<sup>66</sup> Analytically, however, the question is more properly addressed separately—an approach reinforced here by the fact that the BIT itself imposes a territorial requirement in addition to (not as part of) the “investment” requirement.

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<sup>64</sup> Apparently this fourth criterion (contribution to the host state’s economic development) was, in fact, originally proposed as a more flexible alternative to the first three criteria. However, the *Salini* tribunal and those following it have added it as a fourth required element in the definitional test. See Gaillard, *Identify or Define?* at pp. 405-06.

<sup>65</sup> Treaty, Art. 2(1).

<sup>66</sup> The *Salini* decision itself referred only to “contributions.” *Salini v. Morocco*, Decision on Jurisdiction at paras. 52-53.

111. Respondent principally objects that the preponderance of Claimant's performance under the Contract took place outside the territory of Paraguay, in connection with Claimant's inspection activities abroad. Respondent notes that the Contract specifically provides that it was for the performance of "services to be rendered abroad."<sup>67</sup> While acknowledging the existence of SGS's liaison offices in Paraguay, Respondent contends that the Contract did not require the use of offices within the territory of Paraguay and that the activities of those offices were incidental or ancillary to SGS's principal activity of inspection activities in other countries. Moreover, Respondent contends that Claimant's claims turn on alleged nonpayment for the services performed abroad and not on acts and omissions affecting SGS's in-country activities (as would be the case, for example, if SGS were complaining of an expropriation of the liaison office in Asunción). Thus, in Respondent's view, Claimant's claims do not arise out of investments made in the territory of Paraguay.
112. Claimant contends that it performed services and incurred expenditures in Paraguay in accordance with the Contract, including in connection with the liaison office in Asunción and the employees who worked there, as well as the training of Paraguayan officials and the development of a customs database. Furthermore, the purpose of those services was aimed at increasing Paraguay's customs revenues, and the effect of those services was felt in Paraguay alone. In Claimant's view, these activities in the territory of Paraguay, particularly when coupled with the fact that the benefits of its activities outside Paraguay were experienced in Paraguay, are sufficient to constitute investment "in the territory" of Paraguay that is covered by the Treaty and its protections.
113. In the Tribunal's view, Respondent's approach rests on a parsing of SGS's investments and its activities under the Contract that is not sustainable. Like the tribunal in *SGS v. Philippines*,<sup>68</sup> this Tribunal does not consider it consistent with the facts presented to subdivide Claimant's activities into services provided abroad and services provided in Paraguay, and to then attribute Claimant's claims solely to the former category. SGS's inspections abroad were not carried out for separate purposes, but rather in order to enable it to provide, in Paraguay, a final Inspection Certificate on which the Paraguayan authorities

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<sup>67</sup> See, e.g., Preamble, Provision Concerning the "Nature and Subject-Matter of the Agreement," Contract (Ex. C-4).

<sup>68</sup> See *SGS v. Philippines*, Decision on Jurisdiction at paras. 100-101.

relied to enter goods into the customs territory of Paraguay and to assess and collect the resulting customs revenue. These inspections, and the resulting information that was conveyed to the liaison offices in Paraguay, were indispensable operations for the issuance of the final certifications in Paraguay.<sup>69</sup> Thus they were also indispensable to the benefits of the Contract that were received by the Paraguayan state.

114. It is undisputed that as part of these intertwined operations under the Contract, SGS maintained several offices in Paraguay, including in particular a sizeable office in Asunción that employed a significant number of people. Whether or not the Contract required or merely contemplated the operation of such offices in Paraguay,<sup>70</sup> it is the case that Claimant did in fact operate them in Paraguay in connection with the Contract, and injected funds and resources into the territory of Paraguay for the sake of those operations. There is no suggestion in the BIT that an investment in the territory of the State is limited to only those investments that a State *requires* to be made in its territory; it covers any qualifying investments that merely *are* in the territory.
115. And because the Claimant's investment is not divisible in the way Paraguay contends, the suggestion also fails that this dispute does not arise directly out of an investment in the territory of Paraguay. The services provided by SGS in Paraguay were not severable or ancillary; they were part and parcel of the services for which SGS expected to be paid under the Contract. Even if it were possible to segregate the services in the manner Respondent suggests, on the facts presented, it is not plausible to maintain that Paraguay's alleged non-payment relates solely to SGS's services abroad. SGS claims that its invoices for the periods after June 1996 (with only one exception) went unpaid in their entirety. There has been no suggestion by Paraguay that it paid some portions of those invoices that were attributable to

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<sup>69</sup> Respondent sought to rely on the distinction suggested in *SGS v. Philippines*, in which the tribunal indicated that the result might have been different if the certificates were issued abroad rather than in the putative host state. *See SGS v. Philippines*, Decision on Jurisdiction at para. 102. Respondent contended that in this case, SGS prepared its certificates outside Paraguay. Claimant responded with evidence showing that, while certificates were prepared provisionally in other jurisdictions, such drafts were reviewed in Paraguay and the final certificates were issued in Spanish in Paraguay at the liaison offices. Having reviewed this evidence, the Tribunal is persuaded that the final certificates were issued in Paraguay, although it notes that a contrary conclusion would not have compelled it to conclude that SGS lacked an investment in Paraguay.

<sup>70</sup> The Tribunal notes that the Contract clearly anticipates that SGS would establish a liaison office: Art. 3.4 specifies that SGS shall receive at its liaison office various inspection-related documents for each shipment, and Art. 3.5 provides that the Ministry will assist SGS to arrange, *e.g.*, work permits as required for the liaison office. *See* Arts. 3.4 & 3.5, Contract (Ex. C-4).

in-country services while leaving unpaid only those portions attributable to services rendered outside Paraguay. Thus, for purposes of ICSID Convention Article 25(1)'s jurisdictional requirement, the Tribunal holds that Claimant's claims give rise to the requisite "legal dispute arising directly out of an investment".

116. Furthermore, the Tribunal is of the view that the Contract's designation of SGS's services as being performed abroad does not change the analysis. Claimant made a reasonable case that that language of the Contract reflected the parties' agreement that SGS would not be taxed in Paraguay. Clearly, the domestic tax treatment of SGS's investment is not determinative of the territorial situs of the investment for purposes of the BIT. The two issues arise under distinct legal orders. The *SGS v. Philippines* tribunal succinctly explained that "[t]he tax treatment of investments is a matter for local law with its own regime of rules as to where income is considered to have been earned, a regime distinct from that of the BIT."<sup>71</sup>
117. We note that our conclusion is consistent with that of all three tribunals to have examined similar contractual arrangements in disputes brought under investment treaties. In *SGS v. Pakistan*, the tribunal held that an investment resting on comparable pre-inspection services was "in the territory of the host State" because there had been an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement."<sup>72</sup> As noted, the *SGS v. Philippines* tribunal likewise insisted that SGS's activities were to be considered as an integrated undertaking, a sufficient portion of which took place in the host state.<sup>73</sup> And in *BIVAC v. Paraguay*, the tribunal likewise had "little difficulty" in concluding, with respect to a contract virtually identical to the one before the Tribunal here, that BIVAC had made an investment in the territory of Paraguay for purposes of the Netherlands-Paraguay BIT's comparable "in the territory" requirement.<sup>74</sup>

### 3. Made in Accordance with Law

118. Article 2(1) of the BIT further limits the scope of the Treaty's application to investments "made in accordance with [here, Paraguay's] legislation, including possible admission

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<sup>71</sup> *SGS v. Philippines*, Decision on Jurisdiction at para. 107.

<sup>72</sup> See *SGS v. Pakistan*, Decision on Jurisdiction at para. 136.

<sup>73</sup> *SGS v. Philippines*, Decision on Jurisdiction at para. 101.

<sup>74</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 104.

procedures...”<sup>75</sup> Although the framing of its argument evolved over the course of its pleadings, Respondent in its Reply argued directly that Claimant’s investment was not made in accordance with Paraguayan legislation.

119. Respondent grounded this objection on the contention that, because it is a contract for services, the Contract could not be registered as an investment under Paraguay’s Law No. 60/90, a law providing certain incentives for the investment of capital (including foreign capital), and therefore, according to Respondent, it cannot be an investment under Paraguayan law. Claimant insisted that even if the Contract might not fall within the scope of investments eligible for registration and benefits under Law No. 60/90, the BIT requirement that an investment be “made in accordance with [the Contracting Party’s] legislation” concerns the legality of the investment, not the definition of the investment. Respondent, however, maintains that it is not seeking to rely on this domestic law to “define” investment, which it accepts is to be defined instead by reference to the BIT, but rather it insists that the law sets the limits of which investments (among those that might be identified as such under the BIT) can be deemed to be “in accordance with” Paraguayan law.
120. The Tribunal is not persuaded by Respondent’s proffered distinction. Respondent does conflate the *definition* of an investment with the *legality* of an investment. Respondent contends that because the SGS investments cannot be registered under Law No. 60/90, they are not “in accordance” with Paraguayan law. But that contention necessarily rests on a definition: Respondent reasons that the SGS Contract cannot be so registered because it does not meet the domestic law’s definition of an investment subject to registration (which is claimed to exclude services contracts). Thus Respondent is, in effect, seeking to substitute Law No. 60/90’s definition of investment for the definition found in the BIT—an approach that we cannot deem compatible with our obligation to interpret and apply the Treaty itself.
121. Our purpose is not to determine whether or not Claimant’s investment can be registered and receive incentives under Law No. 60/90; we must determine whether the investment is “made in accordance” with Paraguay’s laws, as required by the Treaty. Respondent does not contend that the Contract was invalid, or in any way illegal or improper, under Paraguayan

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<sup>75</sup> Treaty, Art. 2(1).



- law. Indeed, such a suggestion would be surprising given that the Contract was entered into *pursuant* to Paraguayan law, namely Decree No. 12311. Nor does Respondent contend that SGS's activities under the Contract (such as the customs inspections, or the operation of the liaison offices in Paraguay) were illegal under Paraguayan law. Thus, the assets that this Tribunal has identified as "investments" of SGS within the meaning of the BIT are not alleged to have violated Paraguayan law. Moreover, Respondent does not contend that Law No. 60/90 constitutes a mandatory or exclusive procedure for the admission of foreign investments into Paraguay; there is no suggestion that investments made outside its parameters are not permitted in Paraguay.
122. Nor is our analysis affected by Respondent's argument pointing to the fact that the Switzerland-Paraguay BIT contains this "in accordance with [the host state's] legislation" requirement, whereas other BITs signed by Paraguay (such as with France, Germany, and the Netherlands) do not.<sup>76</sup> Respondent contends that this difference reinforces the need to give effect to Article 2(1) here. Quite apart from any claimed distinctions among Paraguay's treaties, however, the fact is that this Tribunal's reading *does* give effect to Article 2(1), as we must, by requiring that an investment is not illegal or invalid at the time it is made. The Tribunal's reading does not give Article 2(1) the more broadly sweeping effect that Respondent would have liked us to attribute to it, but that does not mean the provision is deprived of *effet utile*.
123. In the Tribunal's view, the object of Article 2(1)'s "in accordance with [the host state's] legislation" provision is to deny the Treaty's benefits to investments that transgress the host state's laws at the time the investment was made—a situation not alleged to exist here.<sup>77</sup> Accordingly, Respondent's objection to jurisdiction on this ground is rejected.

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<sup>76</sup> See Respondent's Reply at para. 69.

<sup>77</sup> This situation thus differs from, for example, that faced by the *SGS v. Pakistan* tribunal. There, Pakistan indicated that there were questions about the lawfulness of SGS's actions in entering into the inspection services contract which were the subject of proceedings in Switzerland and Pakistan, and which, if borne out, could be the basis for objections to the tribunal's jurisdiction on the grounds that SGS had not invested "in accordance with the laws and regulations" of Pakistan, as required under the Switzerland-Pakistan BIT. (The tribunal deferred consideration of the issue because there were, at that point, only *potential* allegations of illegality.) See *SGS v. Pakistan*, Decision on Jurisdiction at paras. 141-43.

## V. JURISDICTION OVER CLAIMANT'S CLAIMS AS STATED

124. We turn now from some of the specific jurisdictional limits imposed by the BIT and the ICSID Convention to Respondent's broader jurisdictional objections that Claimant has not stated claims under the Treaty over which this Tribunal has jurisdiction, or which are admissible.

### A. Contract Claims and the Impact of the Contract's Forum Selection Clause

125. Before turning to the particular substantive Treaty provisions under which Claimant has articulated its claims, however, it is appropriate first to address an issue that potentially affects all of the claims: whether our jurisdiction is precluded by the claims' contractual roots and, as a consequence, by the Contract's forum selection clause.

126. Respondent has objected, in many variations and forms, to this Tribunal's exercise of jurisdiction over this dispute because Article 9 of the Contract states that "[a]ny conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay." In Respondent's view, Claimant's claims are, at their core, claims for breach of the Contract, over which Article 9 of the Contract vests exclusive jurisdiction in the domestic courts of Paraguay.

127. Claimant argues that the Contract's forum selection clause cannot divest the Tribunal of jurisdiction because Claimant has advanced no claims under the Contract. Claimant maintains that it has asserted claims only for breach of the BIT. Claimant acknowledges that, as a factual matter, the acts and omissions that found its BIT claims may also constitute breaches of the Contract by Paraguay, but Claimant points to the distinction between contract and treaty claims enumerated by previous tribunals, and argues that treaty and contract claims can co-exist and be subject to separate dispute resolution procedures.

128. In the Tribunal's view, the distinction between treaty and contract claims is well established, and it disposes of Respondent's core objection here. Claimant has advanced claims for breach of the Switzerland-Paraguay BIT: it claims that SGS suffered unfair and inequitable treatment in violation of Article 4(2) of the BIT; that its use and enjoyment of its investment

was impaired by undue and discriminatory measures of the authorities of Paraguay in violation of Article 4(1) of the BIT; and that the Republic of Paraguay failed to constantly guarantee the observance of commitments it had entered into with respect to the investments of SGS, in violation of Article 11 of the BIT.

129. Claimant has not asked this Tribunal to decide claims by SGS under the Contract for breach of that Contract. We note in passing that the Treaty's dispute resolution provisions are arguably broad enough that Claimant would have been entitled to do so: Article 9 provides for the resolution of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party," and, as discussed in Section IV.A above, Article 9(2) contains Paraguay's consent to international arbitration of such a dispute. There is no qualification or limitation in this language on the types of "disputes with respect to investments" that a Swiss investor may bring against the Republic of Paraguay. The ordinary meaning of Article 9 would appear to give this Tribunal jurisdiction to hear claims for violation of Claimant's rights under the Contract—surely a dispute "with respect to" Claimant's investment—should Claimant have chosen to bring them before us. But Claimant has not done so.
130. Of course, it is apparent that several of Claimant's claims under the Treaty will stem from Respondent's alleged failure to pay for SGS's services under the Contract. That is an action that may (or may not) also constitute a contractual breach, but we are not called upon to decide that question as such. We are called upon to decide whether Respondent's actions, such as its alleged non-payment, breach the aforementioned Articles of the Treaty. In doing so, we are in concert with the well-established jurisprudence regarding the distinction between contract claims and treaty claims.
131. The *ad hoc* committee in *Vivendi I* aptly described this distinction:

[W]hether 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 – in the case of the BIT, by international law; in the

case of the Concession Contract, by the proper law of the contract . . . .<sup>78</sup>

The committee rightly noted that “[a] state may breach a treaty without breaching a contract, and *vice versa*.”<sup>79</sup> It is also possible that the same act of the State will breach both the treaty and a contract, but in this case we are asked to consider only the former question.

132. Other investment treaty arbitration decisions are in accord. The tribunal in *SGS v. Pakistan* averred that “[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.”<sup>80</sup> Likewise, the tribunal in *Impregilo v. Pakistan* held that “contrary to Pakistan’s approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”<sup>81</sup> And the *Azurix* tribunal was clear that claims that are rooted in contractual performance are not thereby excluded from the treaty sphere: “Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute.”<sup>82</sup>
133. Respondent has insisted that to adopt and apply this distinction between treaty claims and contract claims here is to improperly defer to Claimant’s mere “labeling” of its claims. According to Respondent, the Tribunal “need not accept uncritically SGS’s characterization of its claim as a treaty violation.”<sup>83</sup> Respondent would have us examine Claimant’s claims and conclude that they are in fact contract claims that have merely been dressed as BIT claims.

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<sup>78</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, at para. 96 (“*Vivendi I*, Annulment”).

<sup>79</sup> *Vivendi I*, Annulment at para. 95.

<sup>80</sup> *SGS v. Pakistan*, Decision on Jurisdiction at para. 147.

<sup>81</sup> *Impregilo v. Pakistan*, Decision on Jurisdiction at para. 258.

<sup>82</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, at para. 76 (“*Azurix v. Argentina*, Decision on Jurisdiction”).

<sup>83</sup> Respondent’s Reply at para. 79.

134. In Respondent's view, the reason the claims are properly characterized as strictly contractual is because Claimant has alleged no more than non-performance of contractual obligations (principally, the obligation to make payment). Respondent maintains that a State's non-performance of a contract cannot, without more, give rise to a breach of a BIT; Claimant must show (and in Respondent's view it has not shown) more: sovereign interference, *jure imperii*, acts beyond the ordinary conduct of a commercial counterparty.
135. The Tribunal notes here the challenge of drawing a line between an ordinary commercial breach of contract and acts of sovereign interference or *jure imperii*, particularly in the context of a contract entered into directly with a State organ (here, the Ministry of Finance). Logically, one can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party. It is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible.
136. In any event the Tribunal need not, and cannot, at this stage decide whether Claimant has made a showing of Treaty breach. As we explained in Section III.B above, the threshold at the jurisdictional stage is whether the facts alleged by Claimant could, if proven, make out a claim under the Treaty. Claimant maintains it has alleged sufficiently "sovereign" acts in connection with contractual non-performance; Respondent maintains it has not. Resolution of that dispute is properly reserved to such time as both Parties have fully presented their evidence and arguments.
137. Returning to the question whether Claimant has adequately articulated claims under the Treaty (rather than the Contract), this Tribunal, like the tribunal in *SGS v. Pakistan*, is generally of the view that "at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit."<sup>84</sup> As the *Vivendi I ad hoc* committee observed, "[i]t was open to Claimants to claim, and they did claim, that these acts [in breach of administrative law or the contract] taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of

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<sup>84</sup> *SGS v. Pakistan*, Decision on Jurisdiction at para. 145.

the [France-Argentina] BIT.’<sup>85</sup> Likewise, here, it is open to Claimant to contend that acts or omissions of the Paraguayan authorities—acts or omissions that may (or may not) have breached the Contract—also breached the provisions of the Switzerland-Paraguay BIT. Whether Claimant has managed to state claims under those Articles that are legally and factually adequate for jurisdictional purposes is a question we will address claim-by-claim in Section V.B below.

138. Given that the Tribunal does not adopt Respondent’s characterization of Claimant’s claims as contractual rather than treaty claims, the Contract’s forum selection clause is readily disposed of. That is, if Claimant had not advanced claims for breach of the Treaty and had brought forward only claims for breach of the Contract, we would be faced with different questions, including the relationship between Article 9 of the Contract (providing for dispute resolution of contract claims in the courts of the City of Asunción) and Article 9 of the BIT (providing for resolution of “disputes with respect to investments”). Here, however, we accept that Claimant has stated claims under the Treaty, and so the question before us is simply whether a contractual forum selection clause can divest this Tribunal of its jurisdiction to hear claims for breach of the Treaty. The answer to that question is undoubtedly negative.
139. On this point, both the *Vivendi I* tribunal and the *Vivendi I* annulment committee were in agreement. According to the tribunal, a forum selection clause of a contract “does not divest this Tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by [claimant] of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic.”<sup>86</sup> The forum-selection clause “of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.”<sup>87</sup>

140. And according to the *ad hoc* committee:

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<sup>85</sup> *Vivendi I*, Annulment at para. 112.

<sup>86</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, at para. 53 (“*Vivendi I*, Award”).

<sup>87</sup> *Vivendi I*, Award at para. 54.

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. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.

Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.<sup>88</sup>

141. It further explained:

[W]here “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.<sup>89</sup>

142. In anticipation of the analysis of Claimant's claims under Article 11 of the Treaty in Section V.B.3 below, we note that in our view, this rule applies with equal force in the context of an umbrella clause. It has been argued that, if the umbrella clause violation is premised on a failure to observe a *contractual* commitment, one cannot say (in the *Vivendi I* annulment committee's words) that 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”—because, for that type of umbrella clause claim, the treaty applies no legal standard that is independent of

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<sup>88</sup> *Vivendi I*, Annulment at paras. 102-03.

<sup>89</sup> *Vivendi I*, Annulment at para. 101. Conversely, according to the *Vivendi I ad hoc* committee, “[i]n 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.” *Vivendi I*, Annulment at para. 98. The committee made that statement in reliance on the *Woodruff* case, in which jurisdiction was declined based upon a contractual waiver of international rights to claim against the state. See *Vivendi I*, Annulment at paras. 97-99 (citing *Woodruff* Case, IX Rep. of Int'l Arb. Awards 213 (1903) (Venezuela Mixed Claims Commission) (“*Woodruff* Case”). As we have noted, because Claimant here presses claims under only the Treaty, we have no occasion to address this aspect of the *Vivendi I* committee's analysis.

the contract. But that argument ignores the source in the treaty of the State's claimed obligation to abide by its commitments, contractual or otherwise. Even 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 claimant, and hence the source of the claim, remains the treaty itself.<sup>90</sup>

## **B. Has Claimant Stated Claims over Which the Tribunal Has Jurisdiction?**

143. We turn now to the question whether Claimant has adequately set forth claims for violation of Articles 4(2), 4(1), and 11 of the Treaty.

### **1. Fair and Equitable Treatment**

144. Article 4(2) of the Treaty provides that “[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other contracting Party.” Claimant maintains that Respondent has breached this Treaty obligation.

145. Respondent objected to the Tribunal's jurisdiction over this claim because, according to Respondent, even if proven on the merits, Claimant's allegations would fail to establish any breach of the fair and equitable treatment standard. At the core of Respondent's objection is the premise that, to support a claim for Treaty breach, Claimant must allege acts or omissions beyond those that an ordinary counterparty to a contract may take. Respondent argued that Claimant's claim rests on allegations of non-payment under the Contract, and that no breach of the fair and equitable treatment standard can be shown based on simple non-payment.

146. The Tribunal considers that the facts alleged by Claimant, if proven, are capable of coming within the purview of the fair and equitable treatment provision of the BIT. First, a State's non-payment under a contract is, in the view of the Tribunal, capable of giving rise to a breach of a fair and equitable treatment requirement, such as, perhaps, where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value. Whether anything more than a wrongful refusal to pay,

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<sup>90</sup> See also discussion at Section V.B.3 below.



and, if so, what more, is required to prevail on a claim of breach of a fair and equitable treatment standard are questions for the merits.

147. Second, whether or not one were to accept Respondent's premise that a State's non-payment under a contract, alone, cannot give rise to a Treaty breach, it is the case that, here, Claimant alleges more than mere non-payment. It is true that, fundamentally, Claimant contends that Respondent arbitrarily and unjustly refused to compensate SGS for services rendered, and unjustly enriched the State by enjoying the benefits of SGS's services for nearly four years without paying for them. Claimant claims that Respondent thereby breached the Treaty by frustrating SGS's legitimate expectations.
148. But while Claimant contends that SGS was entitled to expect that Paraguay would abide by the Contract and Paraguayan law, and that it would be compensated for services rendered to the State under the Contract, Claimant's Article 4(2) claim does not rest on that alone. In addition to this baseline expectation of contractual compliance, Claimant contends that it had also specific legitimate expectations based on multiple written and oral representations allegedly made by representatives of Paraguay to SGS, in which, according to Claimant, the State acknowledged the debt owed and promised that it would honor the Contract and make payment. Those expectations, according to Claimant, were frustrated when Paraguay failed to live up to any of its alleged undertakings.
149. Claimant also contends generally that Respondent acted in bad faith, capriciously, arbitrarily and in a non-transparent manner towards SGS. In particular, Claimant alleges that Respondent subjected SGS to spurious administrative investigations that, according to Claimant, were not required by law or fact but instead were conducted with the purpose of thwarting or delaying payments due to SGS. According to Claimant, these internal administrative investigations lacked transparency, were untimely and unnecessary and again contradicted various Paraguayan officials' alleged acknowledgments of the debt owed to SGS at the time the investigations were conducted.
150. Of course, our recitation of these allegations does not reflect any views on the Tribunal's part about their veracity or about whether Claimant will be able to prove them at the merits stage. The point is simply that Claimant's allegations with respect to unfair or inequitable

treatment by Paraguay extend beyond mere non-payment in breach of the Contract. Thus the necessary premise of Respondent's objection—that Claimant is alleging only non-payment—fails, and its objection to jurisdiction on that ground must be rejected.

151. For both of the foregoing reasons, the Tribunal is content that Claimant has met—at this stage—the requirements for a claim for breach of Article 4(2) of the BIT, and Claimant's fair and equitable treatment claim should be taken up on the merits.

## **2. Undue and Discriminatory Measures**

152. Article 4(1) of the Treaty provides that “[e]ach Contracting Party...shall not impair, through undue or discriminatory measures, the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.” Claimant contends that Respondent impaired SGS's use and enjoyment of its investments through undue and discriminatory measures in violation of this Treaty protection.

153. Claimant's claims under Article 4(1) rest on many of the same factual allegations discussed under Article 4(2) above. Claimant focuses, however, on what it sees as the allegedly unjustified nature of Respondent's acts and omissions—that is, the “undue” prong of the quoted provision of Article 4(1).<sup>91</sup>

154. Claimant thus argues that the alleged decision of Paraguay not to abide by the Contract was unjustified and unreasonable, and was taken for political purposes and in bad faith. Claimant contends that Respondent's continued refusal to pay SGS's debt was likewise unreasonable in view of the alleged repeated acknowledgements by Paraguayan officials regarding the existence and amount of the outstanding debt, and in light of the alleged results of Paraguay's own internal investigations concerning the Contract. In this vein, Claimant alleges, for example, that the Ministry of Finance willfully refused to disburse amounts allocated in the national budget for payments to SGS, and that this action

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<sup>91</sup> Both Claimant and Respondent are apparently content to equate the adjectives “undue and discriminatory” in Article 4(1) with “arbitrary.” Indeed, Claimant's Rejoinder even uses the heading “Undue and Arbitrary Measures” for its discussion of its Article 4(1) claim. The Tribunal does not take issue with this approach, but merely takes note that Claimant has not advanced arguments that Respondent's actions were discriminatory in the sense of singling out SGS as a Swiss investor (or otherwise).

demonstrates that the Government's failure to make payment to SGS was based on political reasons.

155. Claimant also argues that Respondent's non-payment was a breach of Article 4(1) because, Claimant contends, it occurred in disregard of Paraguayan domestic law and international law. Claimant further alleges that the administrative investigations instigated by Respondent lacked factual or legal justification, and that Respondent's alleged refusals to abide by the results of its own internal reports amounted to a willful disregard of due process of law.
156. Respondent objected that Claimant failed to allege any undue or discriminatory measures that impaired its investment. However, most of Respondent's objections in this instance were based on the facts themselves and not on any claimed insufficiency of Claimant's factual allegations. For example, Respondent claimed that the alleged debt to SGS was not acknowledged, and that the internal reports cited by Claimant are not binding under Paraguayan law. On that basis, Respondent maintained that it was not unreasonable for Respondent to refrain from paying the amounts claimed by SGS. As another example, Respondent alleged that investigations of SGS were justified by the cost of the Contract to Paraguay and by corruption in the pre-shipment inspection industry.
157. Just as Claimant will have a full opportunity to adduce evidence in support of its factual allegations, Respondent will have a full opportunity to rebut those allegations—at the merits stage. Disputes over the facts, however, are not a proper basis for an objection that Claimant has failed to state a sufficient claim under Article 4(1) over which this Tribunal can exercise jurisdiction. Whether Paraguay's investigations were justified or unjustified, for example, is a question for the merits; for purposes of exercising jurisdiction, however, the allegation that they were unjustified—and thus allegedly “undue”—is sufficient to state a proper claim under Article 4(1). To the extent Respondent challenged Claimant's Article 4(1) claims on the facts, Respondent's arguments present no obstacles to this Tribunal's jurisdiction.
158. Even those objections that were articulated in terms of the sufficiency of Claimant's claims (rather than in terms of contesting Claimant's factual allegations) are also tied up in factual and legal contentions that must be resolved on the merits. For example, Respondent

maintains that the debt claimed by SGS is unliquidated, and that Claimant therefore cannot have suffered any impairment because Paraguay has not refused to pay a final judgment against it. In effect, this invites an assessment of whether Paraguay's alleged non-payment is excusable—clearly a question for the merits.

159. Likewise, Respondent's objection that an omission to include the alleged debt in Paraguay's national budget is still nothing more than a failure to pay, and lacks *jure imperii*, does not exclude jurisdiction. As noted above, the Tribunal doubts whether a State's failure to pay under a contract necessarily lacks *jure imperii*, or (stated differently) whether an additional showing of *jure imperii* is required. But even if one were to assume *arguendo* that *jure imperii* was required, the answer to whether it was present here would depend on inquiries, such as an inquiry into the nature of Paraguay's budgeting process, that are beyond the scope of a jurisdictional analysis. It is sufficient at this stage that the alleged budget episodes could (perhaps depending on their details) make out a claim for undue or arbitrary treatment.
160. Respondent also contended that Claimant can assert no due process violations, because SGS has never sought its day in court in Paraguay. Whether or not one could be persuaded that concepts of due process are applicable only to court proceedings, as Respondent claimed,<sup>92</sup> this argument simply rests too much on Claimant's passing use of the term "due process." In essence, Claimant maintains that Respondent's behavior—*i.e.*, non-payment notwithstanding alleged internal government reports that were claimed to be in SGS's favor—was "undue" or arbitrary. Regardless of whether or not that behavior can also be characterized as contrary to due process, the question before the Tribunal is whether it can be characterized as "undue or discriminatory" within the meaning of Article 4(1)—and that is a question to be resolved on the merits. Accordingly, Respondent's argument does not present a basis for declining jurisdiction over this aspect of Claimant's Article 4(1) claim.
161. In sum, we consider that the facts alleged by Claimant, if proven, are capable of coming within the purview of Article 4(1)'s prohibition on impairment of an investment by undue and discriminatory measures. Claimant's undue and discriminatory measures claims will be considered on the merits.

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<sup>92</sup> See Respondent's Reply at para. 111.

### 3. Observance of Commitments

162. Article 11 of the Treaty provides, in its entirety, that “[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.”
163. Claimant contends that Respondent failed to observe the commitments it entered into with respect to Claimant’s investment, in violation of Article 11 of the BIT. Specifically, Claimant argues that Respondent’s failure to pay the amounts due to SGS under the Contract constituted a breach of Respondent’s commitments to Claimant. In addition, Claimant argues that Respondent’s failure to abide by subsequent alleged promises to honor the Contract and to pay such debts also represents a breach of Respondent’s Treaty obligation under Article 11.
164. Respondent objected that Claimant failed to allege a breach of Article 11. Respondent argued that an “umbrella clause” provision in a BIT such as Article 11 cannot “elevate a pure breach of a commercial contract into a treaty violation.”<sup>93</sup> In its Reply, Respondent argued that an umbrella clause is implicated only if the host state abuses its power or exerts undue governmental interference in breaching a contract or any other type of undertaking. In Respondent’s view, any ordinary commercial counterparty could fail to pay under a contract, and Claimant has failed to allege that Paraguay committed any other wrongful action constituting an abuse of governmental power. On that basis, Respondent contended that Claimant did not allege a viable claim under Article 11.
165. Respondent adopted additional arguments in its later submission discussing the *BIVAC v. Paraguay* decision (which was issued after the Parties’ original briefing and the hearing on jurisdiction). While maintaining its argument that the Tribunal lacks jurisdiction over Claimant’s Article 11 claim as stated, Respondent argued, in the alternative, that this Tribunal should follow the *BIVAC* tribunal’s approach and find the Article 11 claim to be inadmissible in light of the Contract’s forum selection clause in favor of the courts of the City of Asunción.

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<sup>93</sup> Respondent’s Reply at para. 88.

166. As a first step in our analysis, we turn back to Claimant’s claims under Article 11. As noted above, Claimant has not asked this Tribunal to adjudicate directly any claims for breach of the Contract as such. Claimant has, however, put before us Treaty claims under Article 11. The predicate for those claims is one or more breaches of the State’s commitments to SGS—some of which commitments are, indeed, to be found in the Contract. But that does not alter the fact that, for purposes of the long-recognized distinction between contract and treaty claims discussed in Section V.A above, we are presented with claims under Article 11 of the Treaty.
167. On this basis, we have little difficulty in finding jurisdiction over Claimant’s claims under Article 11. That article creates an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other Party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc. Not all of Claimant’s Article 11 claims are predicated on breach of the Contract itself: Claimant has also alleged that Paraguayan officials subsequently made various oral and written commitments to respect the Contract and to make payment of amounts owed to SGS, which commitments were allegedly breached. But even as to the Article 11 claims that are predicated directly on Paraguay’s alleged breach of the Contract, we have no hesitation in treating the Contract’s obligations as “commitments” within the meaning of Article 11.
168. 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. Respondent’s appeal to the putative “true meaning”<sup>94</sup> of umbrella clauses cannot take precedence over the plain language of the umbrella clause that is before us. In effect, we see no basis on the face of the clause to believe that it should mean anything other than what it

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<sup>94</sup> Respondent’s Reply at para. 86.

says—that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party’s investors.

169. The Tribunal necessarily acknowledges that in so holding, it is parting ways with the decision in *SGS v. Pakistan*, which addressed an umbrella clause in the Switzerland-Pakistan BIT that is worded identically to Article 11 of the Switzerland-Paraguay BIT.<sup>95</sup> In *SGS v. Pakistan*, concerns that “the scope of [the umbrella clause]...appears susceptible of almost indefinite expansion,” and that the consequences of reading the clause literally to include contractual commitments would be “far-reaching in scope,” led the tribunal to decide that the clause’s ordinary meaning could not be followed unless it saw clear and convincing evidence that the State party signatories intended those consequences.<sup>96</sup> To the contrary, we believe that Article 11’s ordinary meaning must be respected, as required by the Vienna Convention (Article 31(1)). Without revisiting the extensive legal commentaries that have engaged the umbrella clause issue since the *SGS v. Pakistan* decision, we note that it has emerged that at least one State party indeed intended the provision to have its literal reach: the Swiss government is on record objecting to the *SGS v. Pakistan* holding and opining that a violation of such a contractual commitment is covered by the umbrella clause and should be subject to the Treaty’s dispute settlement procedures.<sup>97</sup>
170. In permitting the umbrella clause to encompass host State commitments of all kinds, including contractual commitments, we are in agreement with the tribunals in *SGS v.*

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<sup>95</sup> The *SGS v. Philippines* tribunal suggested that it reached a different result from the *SGS v. Pakistan* tribunal and gave full effect to the umbrella clause based at least in part on differences between the umbrella clause language of the Switzerland-Philippines BIT and the supposedly less direct or less specific language of the umbrella clause in the Switzerland-Pakistan BIT. See *SGS v. Philippines*, Decision on Jurisdiction at para. 119. However, the Swiss government, in a note on its interpretation of the Switzerland-Pakistan BIT that was circulated following the *SGS v. Pakistan* decision, described that same language—identical to the language before this Tribunal—as being directed to “a commitment to a specific investment or a specific investor.” See “Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in Light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. versus Islamic Republic of Pakistan,” Note under Cover of Letter from Swiss Government to ICSID Deputy Secretary-General, 1 October 2003, 19 MEALEY’S INT’L ARB. REP. E-1, E-2 (Feb. 2004) (Ex. CLA-47) (“Swiss Government Note”). Thus the Swiss Government, at least, evidently did not understand such language to be general or non-specific. Inasmuch as we reach the same result on jurisdiction as the *SGS v. Philippines* tribunal, on the basis of the same Treaty language as was before the *SGS v. Pakistan* tribunal, it follows that this Tribunal does not see the language as meaningfully different. That is, we do not consider that the wording of Article 11 of the Treaty is so general or hortatory as to preclude reading it as an obligation of the State to comply with, *inter alia*, its contractual commitments.

<sup>96</sup> *SGS v. Pakistan*, Decision on Jurisdiction at paras. 166-67.

<sup>97</sup> See Swiss Government Note at p. E-2.

*Philippines* and *BIVAC v. Paraguay*, among others.<sup>98</sup> Like the *BIVAC* tribunal, we conclude that the umbrella clause before us “establishes an international obligation for the parties to the BIT to observe contractual obligation[s] with respect to investors” and that this interpretation is necessary to give the umbrella clause purpose and effect.<sup>99</sup>

171. 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.”<sup>100</sup>
172. It is from that standpoint that we must address the latest proposition put to us by Respondent: that this Tribunal should adopt the rest of the *BIVAC* tribunal’s analysis, and find that we will not hear Claimant’s umbrella clause claims arising out of the Contract—claims over which we have jurisdiction—because the parties to the Contract included a forum selection clause directing disputes under it to Paraguayan domestic courts. The *BIVAC* tribunal accepted that the umbrella clause in the Netherlands-Paraguay BIT encompassed obligations under the BIVAC contract into the Treaty, giving the tribunal jurisdiction, but insisted that all of the contract’s obligations—including its forum selection clause—must then be given effect in that treaty setting.<sup>101</sup> On that basis, the *BIVAC* tribunal found the umbrella clause claims to be inadmissible and left open only the question of whether to stay them or dismiss them outright. Given the extensive factual commonalities of the cases confronting both tribunals, including Paraguayan contracts for pre-shipment inspection services that are claimed to be substantially if not entirely identical, we have of course considered carefully the reasoned analysis of that distinguished tribunal.

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<sup>98</sup> See *SGS v. Philippines*, Decision on Jurisdiction at paras. 114-28; *BIVAC v. Paraguay*, Decision on Jurisdiction at paras. 134-42. See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, at paras. 51-62; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, at paras. 317-25; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, at paras. 257-60.

<sup>99</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 141. We reach that conclusion notwithstanding the fact that the language of the umbrella clause before us arguably is not as broad or explicit as the Netherlands-Paraguay BIT considered in *BIVAC*.

<sup>100</sup> *Vivendi I*, Annulment at para. 112.

<sup>101</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction, at paras. 142-58.



In this Tribunal's view, however, a decision to decline to hear SGS's claims under Article 11 on the grounds that they should instead be directed to the courts of Asunción would place the Tribunal at risk of failing to carry out its mandate under the Treaty and the ICSID Convention.

173. First, Claimant's Article 11 claims are not co-extensive with claims under the Contract, and they are not necessarily disposed of by the four corners of the Contract. Claimant has advanced Article 11 claims not only for breach of the Contract's payment obligation but also for breach of alleged subsequent commitments by Paraguay's representatives. Whether or not both might be within the reach of the Contract's broadly worded forum selection clause,<sup>102</sup> the latter cannot be judged under the Contract alone. Whether Paraguayan representatives made the alleged commitments, whether those commitments could be relied upon by SGS, and whether the commitments were breached, must all be decided by this Tribunal with reference to the Treaty and the applicable bodies of law specified under it. Accordingly, it would sweep too broadly to say that all umbrella clause claims—and, in particular, all of the umbrella clause claims before us—can be disposed of on contractual grounds by the contractual forum.
174. Second, even to the extent that certain of the Article 11 claims may be co-extensive with claims under the Contract, the Tribunal is not persuaded that this presents a basis to find them inadmissible. Respondent argued strenuously, in many forms, that the fundamental basis of Claimant's claims—and in particular Claimant's umbrella clause claims—is the Contract and not the Treaty. From that premise, as we noted earlier,<sup>103</sup> one might contend that, at least for the Contract-based claims, the Article 11 breach will not be assessed under an independent, international law standard in the Treaty, but rather under the Contract. But that is an argument for declining *jurisdiction*, not for inadmissibility, and this Tribunal has already rejected that jurisdictional argument.

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<sup>102</sup> “Any conflict, controversy or claim deriving from or in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay.” Art. 9.1, Contract (Ex. C-4).

<sup>103</sup> See discussion at para. 142 above.

175. For the reasons set forth in Section V.A and in the first part of this Section V.B.3, this Tribunal—like the *BIVAC* tribunal—has found that we have jurisdiction over Claimant’s Article 11 claims. And having so found jurisdiction, we do not see a basis for finding such claims inadmissible. To the contrary, having found jurisdiction, we would have to have very strong cause indeed to decline to exercise it.<sup>104</sup>
176. Third, as noted above, one reason to read Article 11 as providing jurisdiction over contractual claims is to give purpose and effect to that provision. The State parties to the BIT intended to provide this Treaty protection in addition to whatever rights the investor could negotiate for itself in a contract or could find under domestic law, and they gave the investor the option to enforce it, including through arbitrations such as this one.<sup>105</sup> It would be incongruous to find jurisdiction on this basis, but then to dismiss the greater part of all Article 11 claims on admissibility grounds—because the effect would be, once again, to divest the provision of its core purpose and effect, to the same extent as if we had denied jurisdiction outright. As Professor Gaillard put it when assessing the approach taken by the tribunal in *SGS v. Philippines* (*i.e.*, accepting jurisdiction but then staying the tribunal’s resolution of the claim):

[T]o the extent this solution recognises, “in principle,” an investor’s right to choose an international arbitral tribunal for the settlement of its investment disputes and, in the same breath, requires that the selected tribunal stay the proceedings on the basis of an exclusive forum selection clause contained in the investment contract, it results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution process of any meaning.<sup>106</sup>

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<sup>104</sup> See *Vivendi I*, Annulment at para. 102 (“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. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.”).

<sup>105</sup> See, e.g., *SGS v. Philippines*, Decision on Jurisdiction, Declaration of Prof. Crivellaro at paras. 3, 5.

<sup>106</sup> Prof. Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—the SGS Cases Considered*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL INVESTMENT TREATIES AND CUSTOMARY INTERNATIONAL LAW* 325, 334 (2005). See also Thomas W. Wälde, *Energy Charter Treaty-based Investment Arbitration*, 5 *J. WORLD INV. & TRADE* 373, 393 (2004) (discussing *SGS v. Philippines* as “impractical,” having “recognize[d] the effect of the ‘umbrella clause’ to bring a contract dispute to the level of international law but reversed this, in effect, by giving full effect to a national court’s jurisdiction clause”).

177. Fourth, this Tribunal is concerned that to dismiss umbrella clause claims as inadmissible on the ground that a forum selection clause is applicable to the parties' commitments under the Contract will be, in effect, to read an implied waiver of BIT rights into every investment agreement that specifies a dispute resolution mechanism other than ICSID—a result we would not embrace.
178. The *BIVAC* tribunal reasoned that because the claimant's contract post-dated the BIT, it should take precedence: “[t]he parties could have included a provision in [the forum selection clause] to the effect that the obligations it imposed were without prejudice to any rights under the BIT, including the possible exercise of jurisdiction by” a treaty tribunal under the umbrella clause.<sup>107</sup> While the same sequence is in play here—the Switzerland-Paraguay BIT entered into force in 1992, while the Contract was concluded in 1996—we would reverse the presumption. Given the significance of investors' rights under the Treaty, and of the international law “safety net” of protections that they are meant to provide separate from and supplementary to domestic law regimes, they should not lightly be assumed to have been waived. Assuming *arguendo* that the parties to the later-in-time Contract could have expressly excluded the right to resort to arbitration under the extant BIT, at least as to Contract-based claims under Article 11,<sup>108</sup> they did not do so—and we would not take their silence as effecting that same waiver of Treaty rights.
179. In this regard, we agree with the tribunal in *Aguas del Tunari v. Bolivia*, which considered the question of whether and under what circumstances a contractual forum selection clause could be held to work a waiver of the treaty right to invoke ICSID jurisdiction. The *Aguas del Tunari* tribunal drew a distinction between “(1) a separate document [*i.e.* a contract] that waives the right to invoke, or modifies the extent of, ICSID jurisdiction (where the intent of the parties to alter the possibility of ICSID jurisdiction is direct); and, (2) a separate

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<sup>107</sup> *BIVAC v. Paraguay*, Decision on Jurisdiction at para. 146.

<sup>108</sup> There is a serious question whether individuals are capable of waiving rights conferred upon them by a treaty between two States. See *SGS v. Philippines*, Decision on Jurisdiction at para. 154. The tribunals in *Azurix v. Argentina* and *Aguas del Tunari v. Bolivia* both sidestepped a direct ruling on the question, although the tribunal in *Aguas del Tunari* indicated it would have been prepared to give effect to a clear, express waiver of ICSID jurisdiction. See *Azurix v. Argentina*, Decision on Jurisdiction at para. 85; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (“*Aguas del Tunari v. Bolivia*, Decision on Jurisdiction”), at para. 118. This Tribunal is similarly situated to those in *Azurix* and *Aguas del Tunari*: because we would not give effect to an alleged waiver that is merely implied, we need not address the question whether we would have given effect to an express waiver.

document that contains an exclusive forum selection clause designating a forum other than ICSID (where the intent of the parties to alter the possibility of ICSID jurisdiction must be implied).”<sup>109</sup> As to the second circumstance—the one that we also face in the present case—the *Aguas del Tunari* tribunal insisted that the mere designation of a non-ICSID forum in a contract, without an express waiver of ICSID jurisdiction, was insufficient to cause the tribunal to refrain from exercising its jurisdiction under the BIT:

The Tribunal does not find the authority under the ICSID Convention for it to abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists. To the contrary, it is the Tribunal’s view that an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID.<sup>110</sup>

180. We are in accord. In the instant case, there is no showing that the parties to the Contract clearly intended to exclude the jurisdiction of a tribunal formed under the Treaty to review SGS’s Treaty claims. Paraguay, at least, must be deemed to have known the content of its own Treaty at the time its Ministry of Finance entered into the Contract; it either did not try, or did not obtain SGS’s agreement, to clearly waive SGS’s rights to seek separately arbitration of claims under the Treaty (necessarily including claims under Article 11 thereof). At least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims of a tribunal constituted under that Treaty.
181. We are also in accord with Professor Crivellaro in his partial dissent in *SGS v. Philippines*, when he argued that posing the question as whether a BIT dispute settlement clause should

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<sup>109</sup> *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction at para. 115.

<sup>110</sup> *Aguas del Tunari v. Bolivia*, Decision on Jurisdiction at para. 119. The claims in *Aguas del Tunari* did not include any claims under an umbrella clause, but there is nothing in the *Aguas del Tunari* tribunal’s reasoning to suggest that its analysis would apply any differently to an alleged implied waiver of umbrella clause claims. The *Woodruff* case is not contrary to our analysis; the *Woodruff* commission emphasized that its dismissal turned on the claimant’s express, written waiver: “[A]s the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges.” *Woodruff* Case at p. 223.

override a contractual forum selection clause (or *vice versa*, presumably) creates a conflict where there need not be one. As Professor Crivellaro explained, both provisions “survive and coexist”—both remain effective, with the only difference that the contract clause ceases to be an “exclusive” forum from the investor’s perspective.<sup>111</sup> As the *Bayindir v. Pakistan* tribunal expressed it: “[W]hen the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty.”<sup>112</sup> That choice should not be foreclosed.

182. Finally, certain other aspects of the Treaty counsel against letting the Contract’s forum selection clause divest this Tribunal of its obligation to decide the Treaty claims over which it has jurisdiction (including claims under Article 11). Provisions of the Treaty other than Article 11, such as Article 9(1) and 9(6), contemplate that tribunals constituted under it will be deciding contractual matters; they too should not be rendered *inutile* by the dismissal on admissibility grounds of all such claims for breach of contract.
183. As previously noted, the BIT’s dispute resolution provisions (Article 9) are not on their terms limited to claims for breach of the BIT itself. Article 9(1) arguably extends the Treaty dispute settlement process to all manner of “disputes related to investments”—a category broad enough to encompass contract disputes. But deference to a contractual forum selection clause would significantly cut back Article 9’s scope. It will be the rare State contract that has no dispute resolution clause of any kind. And faced with a contract containing such a clause, we would expect that the same reasoning that led the *BIVAC* tribunal to find contract-based umbrella clause claims inadmissible would presumably lead one also to dismiss any contract claims against a State that are advanced directly under an “any dispute”-style dispute resolution provision like Article 9. This approach would effectively negate Article 9’s open-ended language, reducing it to a mechanism solely for resolving claims of Treaty breach. If that were the Treaty parties’ intent, they presumably

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<sup>111</sup> See *SGS v. Philippines*, Decision on Jurisdiction, Declaration of Prof. Crivellaro at para. 4.

<sup>112</sup> *Bayindir v. Pakistan*, Decision on Jurisdiction at para. 167.

could have said so.<sup>113</sup> Their choice of language giving a broader scope to the dispute resolution articles of the BIT should not be so readily disregarded.

184. Article 9(6) of the Treaty also contemplates that tribunals constituted under the Treaty will engage in the resolution of contract claims. That provision states the law to be applied by ICSID or UNCITRAL tribunals adjudicating disputes related to investments under Article 9:

The arbitral tribunal shall decide on the basis of the present Agreement [*i.e.* the BIT] and other relevant agreements between the Contracting Parties; of the terms of any particular agreement that may have been concluded with respect to the investment; of the law of the Contracting State party to the dispute, including its rules on the conflict of laws; of such principles and rules of international law as may be applicable.

The parties to the Switzerland-Paraguay BIT evidently had no qualms about the prospect that disputes under the Treaty would call for the application of “the terms of any particular agreement that may have been concluded with respect to the investment”—such as the Contract at issue here. Yet a decision to exclude as inadmissible all contract-based umbrella clause claims under Article 11 and contract claims that are directly advanced under Article 9 (unless the contract lacks a forum selection clause altogether) eliminates a large swath of claims for which this clause of Article 9(6) is applicable. Given Article 9(6)’s readiness to interpret and apply contracts to disputes, there is little reason to think that the State parties were expecting to see it so underutilized.

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<sup>113</sup> For example, in two treaties signed prior to the Switzerland-Paraguay BIT, Switzerland limited investor-state dispute settlement to claims for breach of obligations under the respective treaty. The Switzerland-Turkey BIT (signed 3 March 1988) provides that, “for purposes of this Article [investor-state dispute settlement], what is meant by dispute relating to an investment is a dispute in which is alleged the non-observance of rights and obligations created or conferred by this Agreement.” Switzerland-Turkey BIT, Art. 8 (“Aux fins du présent article, on entend par différend relatif à un investissement, le différend dans lequel est allégué le non-respect de droits et obligations conférés ou créés par le présent Accord.”) The Switzerland-Ghana BIT (signed 8 October 1991) provides for investor-state dispute settlement for disputes “relating to an undertaking by the [host State] in the present Agreement.” Switzerland-Ghana BIT, Art. 12 (“différends entre une Partie Contractante et un investisseur de l’autre Partie Contractante relatifs à un engagement pris par la première dans le présent Accord et concernant un investissement d’un investisseur de l’autre Partie Contractante sur le territoire de la première”). *See also* Switzerland-Mexico BIT, Schedule II, Art. 2(2) (investor may bring “a claim based on the fact that the other Party has breached an obligation under this Agreement”); Switzerland-Cuba BIT, Art. 10 (investor-state dispute settlement of disputes “relatifs à une obligation qui incombe à cette dernière en vertu du présent Accord”); Switzerland-South Africa BIT, Art. 10 (same). Paraguay likewise has entered into BITs whose investor-state dispute settlement provisions are limited to claims for treaty breach. *See* Paraguay-Venezuela BIT, Art. 9 (investor-state dispute resolution for a “controversia entre un inversor de una Parte Contratante y la otra Parte Contratante respecto del cumplimiento del presente Convenio en relación con una inversión de aquel”), Paraguay-Spain BIT, Art. 11 (investor-state dispute resolution for a “controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversor de la otra Parte contratante respecto a cuestiones reguladas por el presente Acuerdo”).

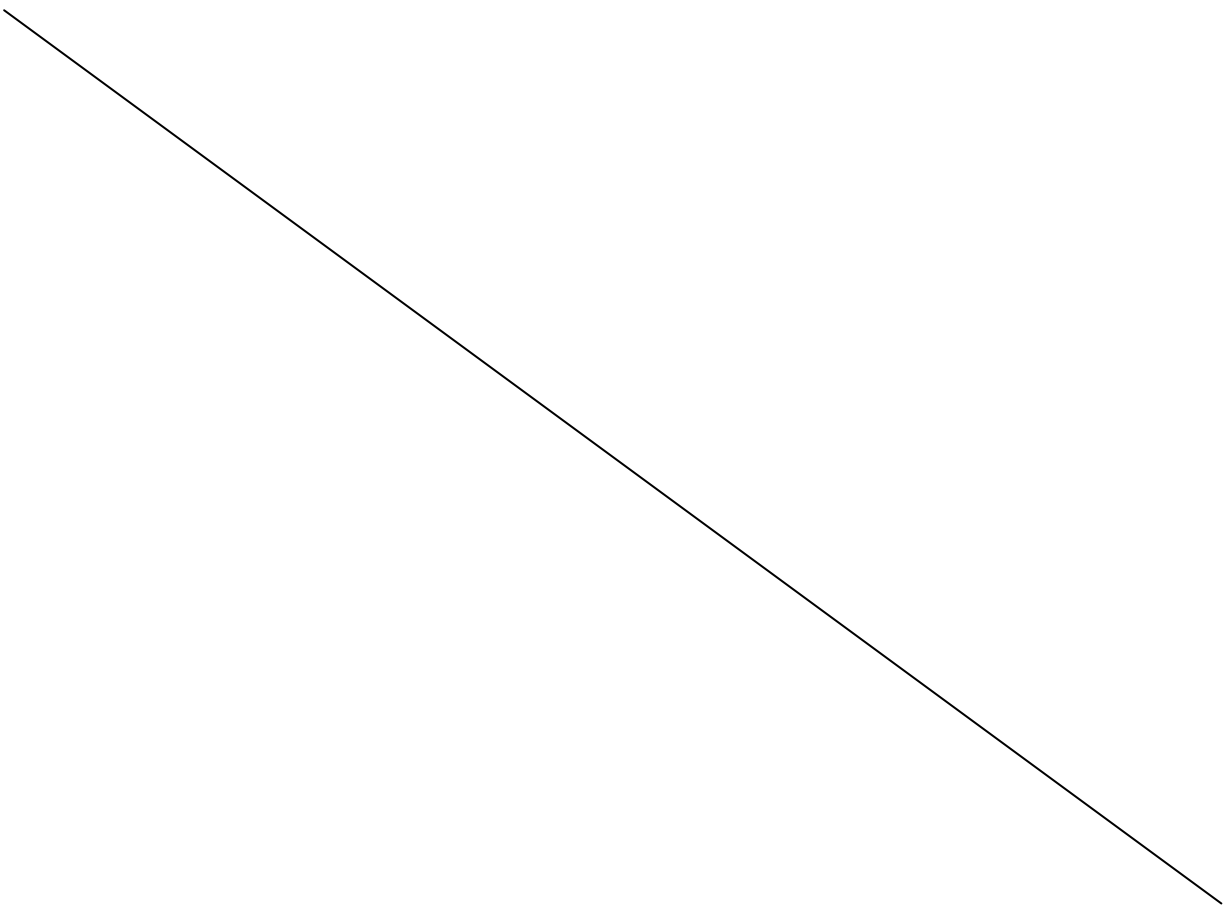
185. For all of the foregoing reasons, the Tribunal concludes not only that it has jurisdiction under Article 11 over Claimant's claims as stated, but also that those claims are admissible. The Tribunal will exercise its jurisdiction over them on the merits.

## **VI. COSTS**

186. Each Party requested that the Tribunal award them costs and fees, including ICSID fees and attorney's fees, in the event that they prevail. The Parties confirmed these requests at the hearing on jurisdiction.

187. The Tribunal takes note that Respondent has not complied with ICSID's 27 April 2009 and 24 August 2009 requests for payment of each Party's share of the advance on costs. Instead, Claimant has paid the entirety of the requested advance on costs (including Respondent's share).

188. However, the Tribunal has decided to reserve its determination on costs until the conclusion of the proceedings, consistent with Article 61 of the ICSID Convention and Rule 28 of the Arbitration Rules.

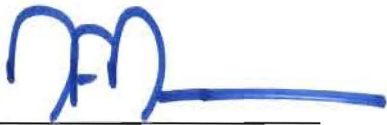


## VII. DECISION

189. For the reasons set out above, the Tribunal decides as follows

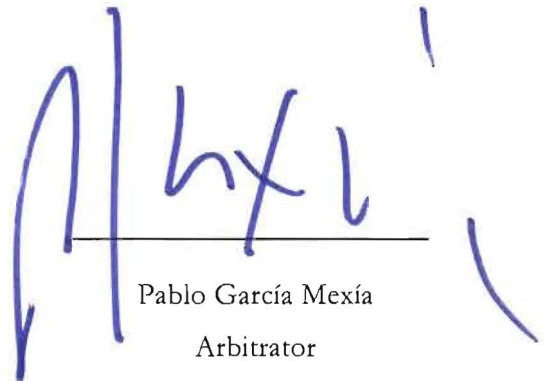
- The Tribunal has jurisdiction to decide Claimant's claims under Articles 4(1), 4(2) and 11 of the Treaty. Respondent's objections to jurisdiction are dismissed.
- The Tribunal's determination on the Parties' costs is reserved until the conclusion of the proceedings.

190. The Parties are instructed to confer and seek to reach agreement on a schedule for the merits proceedings, and to report to the Tribunal thereon within 30 days following the issuance of this Decision.



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Donald Francis Donovan  
Arbitrator



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Pablo García Mexía  
Arbitrator



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Stanimir A. Alexandrov  
President