



# International Arbitration Case Law

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## **BUREAU VERITAS, INSPECTION, VALUATION, ASSESSMENT AND CONTROL, BIVAC B.V. v. THE REPUBLIC OF PARAGUAY**

Case Report by Christina L. Beharry\*\*  
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In a decision on jurisdictional objections rendered on May 29, 2009, under the Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on the encouragement and reciprocal protection of investments (1994), an ICSID tribunal adopted a liberal reading of the umbrella clause in the Treaty.

### **Members of the ICSID Tribunal:**

Rolf Knieper (President), Yves Fortier, Philippe Sands

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## *Digest*

### **1. Introduction**

- 1.1 The *BIVAC v. Paraguay* decision contributes to the growing number of cases on the controversial issues of umbrella clauses, the meaning of an investment, and the territorial nexus between a foreign investor and the host State.
- 1.2 The question of whether a breach of a contractual obligation may be elevated to an investment treaty violation has resulted in widely divergent views. The *BIVAC v. Paraguay* decision favours the more generous interpretation of umbrella clauses adopted in *SGS v. Philippines* and the recent *SGS v. Paraguay* award but departs from the narrow reading taken in *SGS v. Pakistan*.
- 1.3 The tribunal's award on the merits is currently pending.

### **2. Facts of the Case**

- 2.1 BIVAC is a Dutch-incorporated company headquartered in France. The dispute arose from a contract entered into between the parties for the provision of technical services for pre-shipment inspection of imports into Paraguay. These services included the physical identification of goods before shipment, appraising the reasonableness of prices charged by sellers, estimating custom values, issuing certificates of inspection, training Paraguayan personnel and assisting in the establishment of a database. The Ministry of Finance was obliged to pay fees for technical services which were calculated as a percentage of the Free on Board value of the goods that were to be paid on a monthly basis. The contract was to run for a term of three years that could be extended periodically.
- 2.2 BIVAC brought the arbitration claiming that of the 35 invoices issued over the three-year period, 19 of those invoices amounting to US\$22 million remained unpaid. BIVAC alleged that the various government bodies confirmed the validity of the contract and BIVAC's compliance with its obligations. Notwithstanding these affirmations, BIVAC claimed that no payments were made. BIVAC filed a Request for Arbitration on 16 February 2007 under the *Paraguay-Netherlands BIT* (the "Treaty") seeking US\$36 million plus interest for a violation of the BIT's protection against deprivation of investment,<sup>1</sup> unfair and inequitable treatment and

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<sup>1</sup> Art. 6, Netherlands-Paraguay BIT.

unreasonable measures,<sup>2</sup> and failing to observe obligations entered into with respect to the investment.<sup>3</sup>

2.3 On March 2, 2007, the ICSID Secretariat asked BIVAC to clarify two issues: (1) how the contract qualified as an investment under Article 25 of the ICSID Convention and (2) what was the interplay between the dispute settlement clause in the contract and the dispute settlement provisions in the BIT. BIVAC responded on March 15<sup>th</sup> stating the BIT contained the relevant definition of “investment” and its claim to money for the services constituted a title to money and a right granted under public law. Second, BIVAC contended that the contractual arbitration clause did not preclude jurisdiction under the Treaty regardless of whether the claim raised issues of interpretation and application under the contract. The Centre subsequently registered the Request for Arbitration on April 11, 2007.

2.4 Paraguay raised six objections to the tribunal’s jurisdiction:

- (i) Paraguay never explicitly consented to arbitration before ICSID and the mere fact of ratification did not constitute such agreement.
- (ii) The arrangement between BIVAC and Paraguay was in the nature of an administrative contract and was not covered by the BIT. Given the purely contractual relationship and the absence of a capital contribution, it did not qualify as an investment in common language or under Paraguayan law.
- (iii) The contract contained an exclusive dispute settlement mechanism establishing the jurisdiction of courts in Asunción and making Paraguayan law applicable.
- (iv) BIVAC did not make an investment in the territory of Paraguay as required by the BIT.
- (v) The Paraguayan Constitution and laws providing for public order prohibit the State from derogating national jurisdiction in favour of international arbitration where issues relating to State property arise.

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<sup>2</sup> *Id.*, Art. 3(1).

<sup>3</sup> *Id.*, Art. 3(4).

- (vi) The dispute is not of a legal nature as required by Article 25(1) of the ICSID Convention because the contract is of a public, administrative nature and is governed by *ius cogens* law and considerations of public policy.

2.5 The tribunal decided to treat Paraguay's jurisdictional objections as a preliminary matter under Article 41(2) of the ICSID Convention and suspended the proceedings on the merits.<sup>4</sup>

### **3. Legal Issues Discussed**

3.1 The tribunal first considered Paraguay's assertion that it had not consented to ICSID jurisdiction since neither the President nor a representative with full powers had committed the State. BIVAC argued that the State had consented to arbitrate disputes through the BIT. The tribunal agreed with BIVAC's argument holding that Paraguay's consent contained in Article 9(2) of the BIT was unqualified with respect to compliance with constitutional or domestic legal requirements.<sup>5</sup>

3.2 Paraguay's second objection that the contract was not an investment because it was purely a right to receive payment for services performed abroad and it was not a concession or rights granted under public law, similarly failed to persuade the tribunal. The tribunal evaluated the services provided by BIVAC (e.g. issuing certificates of inspection) and concluded that they performed functions "commonly reserved to the public authority of the State" and "contributed to the raising of public revenues through import duties."<sup>6</sup> Therefore it concluded that BIVAC's rights were "granted under public law" within the meaning of the BIT.

3.3 With respect to Paraguay's argument that BIVAC did not make an investment within its territory, the tribunal found a sufficient territorial nexus based on BIVAC's local presence, BIVAC's training of Paraguayans and the establishment of a local database in Paraguay.<sup>7</sup> Further, the tribunal considered that the activities performed by BIVAC whether in Paraguay or abroad were inseparable.<sup>8</sup>

3.4 Paraguay also argued that the mere refusal to pay a debt cannot amount to an

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<sup>4</sup> After the hearing on jurisdiction, Paraguay raised objections to BIVAC's standing contending that the real party in interest was a French company. BIVAC objected to the introduction of a new objection but the tribunal decided to join the matter to the merits.

expropriation where remedies exist in respect of the refusal. The tribunal agreed finding that the refusal to pay was not capable of sustaining an expropriation claim because there was no dispute that the contractual debt continued to exist and the forum for the resolution of contractual disputes remained available.<sup>9</sup>

3.5 By contrast, the tribunal refused to express any view as to whether “a persistent failure to make payments on an outstanding debt, no matter how unreasonable or unwarranted, could *of itself* ever amount to a violation of the obligation to provide fair and equitable treatment in circumstances in which a contractually agreed remedy remains available.”<sup>10</sup> The tribunal therefore found that there was an arguable claim relating to fair and equitable treatment. However, to establish a successful claim, BIVAC would have to establish that the acts of Paraguay show an “activity beyond that of an ordinary contracting party.”<sup>11</sup> It further rejected Paraguay’s contention that the local courts should hear this claim. In this respect, the tribunal distinguished between treaty claims and contract claims despite the overlap of the underlying factual issues.

3.6 Finally, Paraguay argued that the dispute settlement procedures in the contract were applicable and that a mere failure to pay under a contract did not convert a domestic dispute into an international claim under the BIT. In considering this argument, the tribunal distinguished between the jurisdiction and admissibility of the Claimant’s contractual claims.

3.7 With respect to the issue of jurisdiction, the tribunal recognized that there was “no *jurisprudence constante* on the effect of umbrella clauses.”<sup>12</sup> The tribunal found that the broadly worded provision in the BIT established an international obligation for the parties to observe contractual obligations with respect to investors.<sup>13</sup> In reaching this conclusion, the tribunal gave weight to the placement of the umbrella clause in the Treaty which was located in the same provision that imposed an obligation to

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<sup>5</sup> *BIVAC v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, May 29, 2009, ¶¶ 72-73.

<sup>6</sup> *Id.*, ¶¶ 87-91.

<sup>7</sup> *Id.*, ¶ 101.

<sup>8</sup> *Id.*, ¶ 103.

<sup>9</sup> *Id.*, ¶ 117.

<sup>10</sup> *Id.*, ¶ 125.

<sup>11</sup> *Id.*, ¶¶ 125-126.

<sup>12</sup> *Id.*, ¶ 141.

<sup>13</sup> *Id.*

provide fair and equitable treatment and before the expropriation clause. The tribunal also considered it significant that Paraguay had not offered an explanation of the purpose and effect of the umbrella clause. It therefore determined that Article 3(4) gave “the tribunal jurisdiction over a claim that arises from or is produced directly in relation to the Contract.”<sup>14</sup> This, the tribunal concluded, meant that Article 3(4) not only imported obligations under the contract into the BIT, but it also imported into the BIT all the obligations owed by Paraguay to BIVAC under the contract (including the forum selection clause).<sup>15</sup>

3.8 As to the admissibility of the claim, the tribunal held that the claims were inadmissible because the contract included an exclusive alternative forum clause.<sup>16</sup> The tribunal was persuaded by the fact that the contract post-dated the BIT and that the language of the forum selection clause was broadly worded.<sup>17</sup> The tribunal also pointed to the need to respect the parties’ autonomy as reflected in the contract.<sup>18</sup> Hence, it found that the proper forum for the resolution of contractual claims raised under Article 3(4) of the BIT were the local Paraguayan courts.

#### 4 *Decision*

4.1 The tribunal declined jurisdiction over the company’s expropriation claim but upheld its jurisdiction with respect to the allegations of unfair and inequitable treatment.

4.2 Although the tribunal found that BIVAC’s claims under the umbrella clause were inadmissible, it reserved for the merits the question whether the consequence of this decision should be that the claim must be dismissed or the exercise of jurisdiction must be stayed.

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<sup>14</sup> *Id.*, ¶ 142.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, ¶ 159. Article 9(1) of the Contract provides: “Any conflict, controversy or claim which arises from or is produced in relation to this Contract, non compliance or invalidity shall be submitted to the Tribunals of the City of Asunción pursuant to Paraguayan law.”

<sup>17</sup> *Id.*, ¶¶ 145-6.

<sup>18</sup> *Id.*, ¶ 148.