



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

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**BUREAU VERITAS, INSPECTION, VALUATION, ASSESSMENT AND CONTROL,  
BIVAC B.V.  
AND  
THE REPUBLIC OF PARAGUAY  
ICSID CASE NO. ARB/07/9  
FURTHER DECISION ON OBJECTIONS TO JURISDICTION**

Case Report by Nenad Nevajda\*\*  
Edited by Mona Davies\*\*\*

In a decision rendered on 9 October 2012, 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 stayed proceedings related to Article 3(1) and Article 3(4) claims until after the Claimant sought recourse for a contractual dispute through domestic courts.

**Tribunal:** Dr. Rolf Knieper (President), Mr. L. Yves Fortier, CC, QC,  
Prof. Philippe Sands QC

**Claimant's Counsel:** Messrs. Nigel Blackaby and Lluís Paradell, and Ms. Caroline Richard,  
Freshfields Bruckhaus Deringer; and Messrs. Oscar Mersán and Pablo Lu  
Mersán Abogados Asunción, Paraguay

**Respondent's Counsel:** Dr. José Enrique García Ávalos, Dr. Pedro Rafael Valente Lara, Procurador  
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## 1. PROCEDURAL HISTORY

On 20 February 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration (the “Request”) dated 16 February 2007 from Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. (“BIVAC” or “Claimant”) against the Republic of Paraguay (“Paraguay” or “Respondent”) (collectively, the “Parties”). In its request, BIVAC asserted that it made investments that were protected under the Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investments (“the Treaty” or the “BIT”). Claimant is a Netherlands company.<sup>1</sup>

Paraguay has consistently objected to the jurisdiction of the Centre and Arbitral Tribunal. Paraguay noted that it had not agreed to arbitration before ICSID, the relationship with BIVAC was based solely on an administrative contract, which was not covered by the Treaty, that BIVAC had not made an investment in the territory of Paraguay and finally that Article 9(1) of the contract contained an exclusive dispute settlement mechanism.<sup>2</sup>

The Tribunal, in light of Paraguay’s claims regarding jurisdiction, accepted submissions from the Parties outlining their claims. Paraguay made a further request following the submissions to dismiss BIVAC’s claim on the ground that BIVAC lacked standing, noting that the real party at interest was BIVAC International S.A. (“BIVAC International”), a French national.<sup>3</sup> Following a hearing and submissions of post-hearing briefs, the Tribunal rendered a Decision on Jurisdiction on 29 May 2009.<sup>4</sup> On 12 August 2009, through Procedural Order No. 2, and having turned down Paraguay’s objections to jurisdiction,<sup>5</sup> the Tribunal provided a timetable for submissions on merits as well as with respect to BIVAC’s *ius standi*.<sup>6</sup>

## 2. FACTS OF THE CASE

### a. The Contract

BIVAC had concluded a contract with the Ministry of Finance on 6 May 1996 to supply technical services for pre-shipment inspection of imports into Paraguay (“the Contract”). The Contract was set to run for three years from 15 July 1996, which could be renewed, unless one of the parties gave written notice of its intention not to renew the Contract no less than four months before the expiration of the term.<sup>7</sup> A similar contract was signed with another company - Société Générale de Surveillance SA (“SGS”).<sup>8</sup>

Under the terms of the Contract, BIVAC was required to provide six services: (1) physically identify goods prior to shipment; (2) appraise the reasonableness of the price charged by the seller; (3) estimate customs value; (4) issue certificates of inspection; (5) train Paraguayan personnel; and (6) assist in establishing a database.<sup>9</sup>

The Ministry of Finance was obligated to pay fees for the technical services, which were calculated as a percentage of the FOB value of the goods set out in the certificates of inspection. Such fees were to be paid

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<sup>1</sup> *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. The Republic of Paraguay*, Further Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/9, 9 October 2012, ¶8.

<sup>2</sup> *Id.*, ¶11.

<sup>3</sup> *Id.*, ¶14.

<sup>4</sup> *Id.*, ¶13.

<sup>5</sup> See *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. The Republic of Paraguay*, Decision on Objections Jurisdiction, ICSID Case No. ARB/07/9, 29 May 2009.

<sup>6</sup> *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. The Republic of Paraguay*, Further Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/9, 9 October 2012, ¶28.

<sup>7</sup> *Id.*, ¶9.

<sup>8</sup> *Id.*, ¶44.

<sup>9</sup> *Id.* ¶47.

on a monthly basis by the Ministry of Finance in U.S. dollars and paid within 20 days of receipts into BIVAC's offshore bank account.<sup>10</sup>

The terms of the contract also set out that Paraguayan law was applicable and that disputes in relation to the Contract regarding its “non compliance, resolution or invalidity” were to be submitted to the tribunals of the City of Asunción.<sup>11</sup> BIVAC did not argue before the Tribunal that it did not have access to Paraguayan courts to pursue its claim, but rather claimed that the decision to pursue a BIT claim was a “commercial decision,” as well noting that Paraguay not only breached the contract but also the fair and equitable treatment standard of the Treaty.<sup>12</sup>

### **b. Unpaid Invoices**

Delays in payments began as early as November 1996 and by mid-1998 a number of unpaid invoices had begun to accumulate. During 1998-1999, BIVAC sent letters to the Ministry of Finance requesting payment for services, by March 1999, \$US7,000,000 in outstanding payments was paid out. This would be the last payment BIVAC received.<sup>13</sup>

Prior to this last payment, on 24 February 1999, the Government of Paraguay informed BIVAC that it would not be seeking an extension of the contract. On 8 June 1999, BIVAC agreed to not accept additional inspection requests, but would not discontinue ongoing operations. BIVAC also notified the Ministry of Finance that as of 30 April 1999, \$US 21,434,956.97 was still owing.<sup>14</sup> The Ministry did not dispute this sum, but rather tried to negotiate a discount of 50% on the outstanding balance.<sup>15</sup> During the same period, the Ministry of Finance calculated the total outstanding debt to be \$US 22,016,140.52.<sup>16</sup>

From the end of 1999 through to 2007 there was more back and forth between subsequent Paraguayan governments and BIVAC.<sup>17</sup> Ultimately, the Contract was never paid, despite the fact, as BIVAC alleges, the Paraguayan government conducted several investigations and concluded that the Contract was valid, BIVAC carried out all of its obligations, and the value of the unpaid debt was undisputed.<sup>18</sup> In response, Paraguay argues that the debt was never acknowledged.<sup>19</sup>

## **3. LEGAL ISSUES DISCUSSED**

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

On 29 May 2009, the Tribunal, in its Decision on Objections to Jurisdiction, determined that certain claims by BIVAC were admissible, and at the same time also decided that it would join to the merits the issue of BIVAC's standing to bring a claim.<sup>20</sup>

Following submissions made by the Parties, the Tribunal determined that no new information that would clarify the issue was submitted.<sup>21</sup> In turn, the Tribunal made the decision that BIVAC did have standing to bring a claim.<sup>22</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶48.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, ¶51.

<sup>14</sup> *Id.*, ¶¶52, 54.

<sup>15</sup> *Id.*, ¶55.

<sup>16</sup> *Id.*, ¶56.

<sup>17</sup> *Id.*, ¶¶57-60.

<sup>18</sup> *Id.*, ¶61.

<sup>19</sup> *Id.*, ¶62.

<sup>20</sup> *Id.*, ¶89.

<sup>21</sup> *Id.*, ¶91.

According to the Tribunal, the Parties agreed that the BIVAC Group operated in several countries; including France and the Netherlands and that the French S.A. is the headquarters and the parent company.<sup>23</sup> To counter the Respondent's arguments, the Tribunal determined that intervention on behalf of the French president in favour of the Group in this dispute does not imply that the Claimant is French, nor does the fact that the Dutch government did not intervene at all indicate that the Claimant is not Dutch. The Tribunal determined that intervention or non-intervention was simply a difference in political cultures between the two countries.<sup>24</sup>

The Tribunal further clarified that the Dutch BIVAC was founded in 1984 and, as a B.V. satisfied the requirements of being a juridical person under Article 25(2)(b) of the *ICSID Convention*. The incorporation date also confirmed that the Dutch BIVAC was not specifically created to take advantage of the Paraguay-Netherlands BIT.<sup>25</sup> The Tribunal elaborated that the fact that international companies establish different structures and legal strategies cannot be considered illegal or inappropriate and quotes one commentator who argues: "Treaty shopping is acceptable, forum shopping is not."<sup>26</sup>

The Tribunal took note of the fact that the Respondent did not make a lack of standing claim until after the hearing on jurisdiction and also stressed that the Respondent had objected to a French national becoming the President of the Tribunal because, according to the Respondent, the "Claimant is an entity established under the laws of Netherlands but with very close ties to France by the fact that it is completely owned by the Bureau Veritas Group."<sup>27</sup> These findings along with the absence of credible evidence to the otherwise, led the Tribunal to determine that BIVAC was the correct party in the dispute.<sup>28</sup>

#### **b. Violation of Article 3(1) of the BIT: Fair and Equitable Treatment**

In making a determination on whether Paraguay violated Article 3(1) of the BIT, the Tribunal cited *Impregilo SpA v. Pakistan*, establishing that in order for BIVAC to succeed in its claim, it would have to show that "the conduct of Paraguay reflects an act of '*puissance publique*', that is to say "activity beyond that of an ordinary contracting party."<sup>29</sup> The Tribunal further clarified that the Article 3(1) claim deals with the alleged conduct of Paraguay and the interpretation of that Treaty provision. Moreover, an interpretation of Article 3(1) is not for the Courts of the City of Asunción to consider.<sup>30</sup>

In order to determine whether there was a violation of Article 3(1) arising out of conduct beyond that of an ordinary contracting party, the Tribunal emphasized that the facts would need to be closely scrutinized so to establish whether Paraguay's acts were only a "persistent failure to make payment on outstanding debt" or something more.<sup>31</sup> Following a careful analysis of the facts,<sup>32</sup> the Tribunal determined that "at the heart of the dispute, and which has been repeated over time in particular since March 2005, is the refusal on the part of Paraguay to pay an outstanding debt that is owed under the Contract."<sup>33</sup>

##### *i. Characterization of the conduct*

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<sup>22</sup> *Id.*, ¶98.

<sup>23</sup> *Id.*, ¶92.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, ¶93.

<sup>26</sup> *Id.* Quote attributed to Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, ¶542.

<sup>27</sup> *Id.*, ¶96

<sup>28</sup> *Id.*, ¶97-98.

<sup>29</sup> *Id.*, ¶211.

<sup>30</sup> *Id.*, ¶212.

<sup>31</sup> *Id.*, ¶213.

<sup>32</sup> *Id.*, ¶¶214-237.

<sup>33</sup> *Id.*, ¶238.

Following its determination that the non-payment of outstanding debt was the crux of the dispute, the Tribunal stressed that BIVAC did not establish that there were any other acts, except for persistent non-payment, that needed remedy.<sup>34</sup> Likewise, the Tribunal pointed out that Paraguay did not avail itself of the kinds of powers that are available to it that would characterize claims relating to a breach of fair and equitable treatment under international law, such as: legislative or regulatory acts, police intervention, or ignorance of court or tribunal rulings.<sup>35</sup>

These two findings led the Tribunal to conclude that Paraguay's actions were not any different from a contracting party who likewise refused to pay, commissioned reports over and over again, made contrary decisions in different departments and so on. In effect, "attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons."<sup>36</sup> Further, the Tribunal ruled that the passage of time could not transform acts that a private person would do into sovereign acts.<sup>37</sup>

*ii. Contracting party or sovereign acts*

Having unequivocally determined that the only issue in dispute was Paraguay's consistent non-payment of outstanding debts, the Tribunal turned to deciding whether those actions could be characterized as the exercise of a sovereign (*puissance publique*). The Tribunal carefully reviewed the authorities relied upon by the parties to understand the approach of each tribunal in assessing the facts, with a view to understanding whether the decision reached focused on the motive behind the conduct, as the Claimant argues, or on the nature of the conduct, as Paraguay argues, or on a combination of these two elements. It noted that determining whether sovereign acts were committed was specific to the facts of each case, thus it was not entirely appropriate for the Tribunal to substitute facts from authorities relied upon by the Parties.<sup>38</sup>

*iii. Assessing conduct*

Following its review of the caselaw, the Tribunal then set out a test in assessing conduct: First, Tribunals should address the nature of the conduct; and second, assuming that the conduct is such to give rise to a breach of the fair and equitable treatment provision, the Tribunal should determine whether the conduct meets the requirement of not being arbitrary, discriminatory or otherwise unfair.<sup>39</sup>

Applying this principle, the Tribunal sought to determine whether Paraguay's non-payment of outstanding debt can by its nature constitute a sovereign act.<sup>40</sup> In its examination, the Tribunal reiterated that the Claimant had not been able to identify a single case where non-payment of a debt could be characterized as a sovereign act. In the case where a breach of contractual obligation led a Tribunal to determine a breach of fair and equitable treatment, it was often accompanied by a direct sovereign act, such as expropriation of investment as noted in *Kardassopolous*.<sup>41</sup>

The Tribunal next looked at the facts of the case and the Contract, concluding that from at least 1999 to 2005, Paraguay failed to pay outstanding debt and nothing more. Even though there was an acknowledgment

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<sup>34</sup> *Id.*, ¶240.

<sup>35</sup> *Id.*, ¶241.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, ¶242.

<sup>38</sup> *Id.*, ¶254.

<sup>39</sup> *Id.*, ¶268.

<sup>40</sup> *Id.*, ¶269.

<sup>41</sup> *Id.*

by the State that debt was owed, this did not transform the nature of the conduct, rather it remained a continuing failure to pay the debt.<sup>42</sup>

*iv. Non-payment of debt cannot be an exercise of sovereign authority*

The Tribunal noted that while the Claimant failed to provide supporting authorities to substantiate its claims, there were authorities that supported the conclusion that mere non-payments of debt could not be construed as sovereign acts.<sup>43</sup>

The Tribunal cited *Waste Management v. Mexico*, specifically ¶115, to argue that a persistent non-payment of debt did not amount to a violation of Article 1105, the fair and equitable treatment provision under the *NAFTA*.<sup>44</sup> The Tribunal also relied on *Parkerings v. Lithuania* to further substantiate that a non-payment of debt did not lead to a breach of fair and equitable treatment.<sup>45</sup> Ultimately, the Tribunal held that non-payment of debt was an act that could be conducted by a private contracting party. Without some kind of accompanying sovereign act, such as the use of police or court powers, actions only available to a State, to repudiate the contract or debt, simple non-payment of debt could not be protected under the Treaty.<sup>46</sup>

The Tribunal did not exclude the possibility that there could be circumstances where a non-payment of debt could lead to a breach of an obligation to provide fair and equitable treatment. In order to make such a claim, the Claimant would have to point to some international law imposing an obligation to comply with a contract. In this case, BIVAC provided no such authority. Even if there were such an authority, BIVAC would still have difficulty in presenting its case due to the contract dispute resolution clause evident in the Contract.<sup>47</sup>

**c. Decision on Violation of Article 3(1) of the BIT.**

In conclusion the Tribunal outlined: (1) The dispute is wholly premised on Paraguay's failure to pay an outstanding debt; (2) Non-payment of debt is conduct that any private party to a contract can engage in; (3) Persistent failure to pay debt does not elevate the conduct to a sovereign act; (4) An unjustified failure to pay debt also does not equate to a sovereign act; (5) The facts of the dispute only show that there has been a breach of contract between a State and a foreign private party; (6) A forum for resolution of contractual disputes has been agreed upon by the parties – the tribunals of the City of Asunción; (7) Ultimately, Paraguay, through its non-payment of debt, had not breached Article 3(1) of the BIT.<sup>48</sup>

*i. Allegations concerning the tribunals of the City of Asunción*

The Tribunal recognized that the BIVAC's allegations of corruption, lack of independence of Paraguayan courts and significant cost-hurdles were not made by BIVAC in the Notice of Arbitration but nevertheless were serious allegations.<sup>49</sup>

The Tribunal therefore stayed the proceedings for a period of 3 months to give BIVAC the opportunity to seek redress in Paraguayan courts. If the Claimant did not seek recourse through the tribunals of Asunción, the Tribunal would render its Award and terminate the proceedings. However, in the event that BIVAC did pursue its claims, it, or the Parties combined, would be required to provide six-month updates to the Tribunal

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<sup>42</sup> *Id.*, ¶270

<sup>43</sup> *Id.*, ¶270-271.

<sup>44</sup> *Id.*, ¶272.

<sup>45</sup> *Id.*, ¶274.

<sup>46</sup> *Id.*, ¶273.

<sup>47</sup> *Id.*, ¶275.

<sup>48</sup> *Id.*, ¶¶277-280.

<sup>49</sup> *Id.*, ¶279.

detailing progress. If during this process, Paraguay or any of its organs failed to address any of the claims brought forth by BIVAC in accordance with the requirements of Article 3(1) of the Treaty, then BIVAC would have the opportunity to bring its claim to the Tribunal.<sup>50</sup>

#### **d. Article 3(4) of the Treaty – the Umbrella Clause**

Article 3(4) of the Treaty stipulates:

“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.”

In the Decision on Objections to Jurisdiction the Tribunal joined the claim made under Article 3(4) to the merits. In that decision, the Tribunal ruled that Article 9(1) of the Contract was a valid exclusive jurisdiction clause for the resolution of any contractual disputes and that Article 3(4) of the Treaty could not override that clause. The Tribunal also noted that barring evidence of exceptional reasons, which might make the contractual forum unavailable, the proper venue to hear contractual disputes were the tribunals of the City of Asunción.<sup>51</sup> Despite the Tribunal’s decision on inadmissibility, it stayed proceedings related to the Article 3(4) claim “on the grounds that it had not been provided with arguments by the parties as to the course to be followed in the event that jurisdiction is upheld under Article 3(4) of the BIT.”<sup>52</sup> The Tribunal then gave leave to the Parties to plead their case with respect to staying the Article 3(4) claim.

The Claimant asserted that the Tribunal had the power to stay proceedings and that it should be given the opportunity to seek recourse through domestic courts under the contractual dispute mechanism.<sup>53</sup> Paraguay on the other hand argued that a stay related to this claim would serve no purpose except to confuse contractual claims with treaty claims.<sup>54</sup>

The Tribunal, taking into account both arguments, favoured staying the proceedings further, as it would be cost-effective and efficient. The Tribunal also noted that in the case BIVAC pursues domestic remedies, but Paraguay disregarded those decisions a claim under the umbrella clause might become admissible.<sup>55</sup>

The Tribunal thus, for the second time, stayed the proceedings related to claims under Article 3(4) of the Treaty.<sup>56</sup>

#### **e. Other Matters**

It was not the intention of Paraguay or the Netherlands to establish a forum for the collection of contractual debts. Throughout the entire dispute at hand, BIVAC always had the option, under Article 9(1) of the Contract, to seek recourse through Paraguayan courts; it did not do so. For the Tribunal to provide relief sought by the Claimant on the grounds that it had waited long enough to be paid would amount to an excess of jurisdiction.<sup>57</sup>

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<sup>50</sup> *Id.*, ¶¶284-285.

<sup>51</sup> *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. The Republic of Paraguay*, Decision on Objections Jurisdiction, ICSID Case No. ARB/07/9, 29 May 2009, ¶159.

<sup>52</sup> *Bureau Veritas, Inspection, Valuation, Assessment, and Control, BIVAC B.V. v. The Republic of Paraguay*, Further Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/9, 9 October 2012, ¶24

<sup>53</sup> *Id.*, ¶288.

<sup>54</sup> *Id.*, ¶289.

<sup>55</sup> *Id.*, ¶290

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, ¶¶291-292.

#### 4. DECISION

The Tribunal determined:

BIVAC has standing to bring a claim under Article 3(1) and Article 3(4) of the Treaty;  
The exercise of jurisdiction in relation to claims made under Article 3(1) and Article 3(4) of the Treaty is stayed;  
The termination is stayed for 3 months, allowing for the Claimant to seek remedy in local courts for breach of contract;  
In the event that such a claim is not brought forward, the Tribunal shall issue its Award and terminate the proceedings;  
If the claim is filed by BIVAC, the proceedings will be stayed further and the Parties will have to report every 6 months on the status of the local proceedings. If the tribunals of the City of Asunción fail to adjudicate, the Claimant will be free to make further application to the Tribunal under the Treaty; and  
All concerns related to costs are reserved for a future determination.<sup>58</sup>

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<sup>58</sup> *Id.*, ¶294.