

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

WASHINGTON, D.C.

In the annulment proceeding between

SGS SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE S.A.

AND

THE REPUBLIC OF PARAGUAY

ICSID Case No. ARB/07/29

**DECISION ON PARAGUAY'S REQUEST FOR THE
CONTINUED STAY OF ENFORCEMENT OF THE AWARD**

Members of the Committee

Mr. Rodrigo Oreamuno B., President

Mr. Eduardo Zuleta J., Member of the Committee

Mr. Abdulqawi Ahmed Yusuf, Member of the Committee

Secretary of the Committee

Ms. Mercedes Cordido- Freytes de Kurowski

Date: **March 22, 2013**

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GLOSSARY

Award: Award rendered by the Arbitral Tribunal on February 10, 2012.

BIT: Agreement between the Republic of Paraguay and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, entered into on January 31, 1992 and in force and effect since September 28, 1992.

ICSID Arbitration Rules: Rules of Procedure for Arbitration Proceedings.

ICSID or Centre: International Centre for Settlement of Investment Disputes.

ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

ICSID Financial Regulations: ICSID Administrative and Financial Regulations.

SGS: SGS Société Générale de Surveillance S.A.

I. PROCEDURAL HISTORY

1. On February 10, 2012, the Tribunal in the original arbitration proceeding presided by Dr. Stanimir A. Alexandrov (Bulgarian), appointed by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes, and also comprising Mr. Donald Francis Donovan (U.S.A.), appointed by SGS, and Dr. Pablo García Mexía (Spanish), appointed by the Republic of Paraguay, rendered an Award partially upholding SGS's claims and awarding it US\$39,025,950.86, plus simple interest as compensation. The Tribunal concluded that Paraguay had breached its obligation, under Article 11 of the 1992 Agreement on the Promotion and Reciprocal Protection of Investments between Switzerland and Paraguay, to guarantee the observance of the commitments it had entered into with respect to SGS's investment.
2. The Tribunal also found that it did not need to resolve SGS's claims that (i) Paraguay's failure to fulfill its alleged extra-contractual promises of payment constituted an additional breach of Article 11 of the BIT; and that (ii) Paraguay had breached Articles 4(1) and 4(2) of the BIT, by taking undue and discriminatory measures and by denying fair and equitable treatment. According to the Tribunal, such claims ultimately derived from the same set of facts and contractual commitments that gave rise to the Tribunal's conclusion that Respondent had breached Article 11 of the BIT, and because in any event a further finding in favor of SGS would not affect the quantum of damages.
3. On June 7, 2012, ICSID received from the Republic of Paraguay an application for annulment and a request for stay of the enforcement of the Award.
4. On June 8, 2012, pursuant to Rule 50(2) (a) and (b) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Application and notified the Parties of

the provisional stay of enforcement of the Award, pursuant to ICSID Arbitration Rule 54(2).

5. By letter of June 25, 2012, in accordance with ICSID Arbitration Rule 54(2), SGS requested that the Committee rule, within 30 days of the date of its constitution, on whether the provisional stay of enforcement of the Award should be continued. SGS expressed its opposition to a continued stay of enforcement and requested that Paraguay be ordered to post a bond in the event that the Committee should decide to continue such stay.
6. On July 27, 2012, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that the three members of the *ad hoc* Committee had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. The *ad hoc* Committee was composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President of the Committee; Dr. Eduardo Zuleta, a national of Colombia; and Mr. Salim Moollan, a national of Mauritius and France. Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.
7. On July 30, 2012, pursuant to Regulation 14(3) (e) of the ICSID Administrative and Financial Regulations, the Centre requested that the Republic of Paraguay make a first advance payment of US\$200,000 (two hundred thousand United States dollars) within thirty (30) days to cover the initial costs of the annulment proceedings, including the First Session of the Committee.
8. By letter of August 8, 2012, the Committee invited the Parties to file written observations on the request for continued stay of enforcement prior to the First Session. The Republic of Paraguay was invited to file its observations by August 14, 2012 and SGS by August 20, 2012.

9. On the same date and pursuant to ICSID Arbitration Rule 54(2), the Committee extended the provisional stay of the enforcement of Award until it had heard the Parties and reached a final determination on the continuation of the stay.
10. On August 14, 2012, the Committee confirmed that, as agreed by the Parties, the First Session would be held on August 31, 2012, at the seat of the Centre in Washington, D.C.
11. As scheduled, on August 14, 2012, the Republic of Paraguay filed its “Observations in Support of its Request for a Continued Stay of the Award”.
12. On August 20, 2012, the Republic of Paraguay informed that it would not be able to make the requested advance payment in time for the First Session, acknowledging that in such circumstances it might no longer be possible to hold the First Session on August 31, 2012. As a result, the Republic of Paraguay waived the requirement of ICSID Arbitration Rule 13(1) that the Committee hold its First Session within 60 days after its constitution.
13. As scheduled, on August 20, 2012, SGS filed its response to the Observations by the Republic of Paraguay in Support of its Request for a Continued Stay of the Award.
14. On August 21, 2012, the Committee informed the Parties that in view of Paraguay’s message of August 20, 2012, the First Session was canceled. SGS was invited to agree to the Committee holding the First Session after the 60-day period prescribed in ICSID Arbitration Rules 13(1) and 53.
15. On August 21, 2012, SGS gave its consent to the Committee holding its First Session after the 60-day period prescribed in the ICSID Arbitration Rules. SGS also requested that, if payment had not been received by August 26, 2012, the Committee confirm in writing that the provisional stay of the Award should be lifted.

16. On August 23, 2012, the Committee, referring to the Parties' recent submissions on the stay of enforcement, indicated that it would like to hear the Parties' oral presentations on this matter before reaching a decision.
17. By letters of August 23 and 24, 2012, the Parties expressed their positions on whether or not the stay of enforcement should expire on August 26, 2012.
18. On August 24, 2012, the Committee informed the Parties about its decision to continue the stay of enforcement until September 17, 2012, when it would automatically be terminated should the Centre not have received Paraguay's payment.
19. On August 30, 2012, the Committee confirmed that, as agreed by the Parties, the First Session would be held on October 29, 2012, provided that Paraguay pay the first advance by September 17, 2012.
20. On September 14, 2012, the Centre acknowledged receipt of Paraguay's payment and the Committee confirmed that the First Session and hearing on the stay of enforcement would be held on October 29, 2012, at the seat of the Centre in Washington, D.C.
21. On October 27, 2012, the Committee informed the Parties that in view of the fact that a hurricane was expected to affect the Washington D.C. area and cause major disruptions in the East Coast of the United States, the First Session would be held on October 29, 2012 by telephone conference and not in person. The hearing about the stay of enforcement was therefore canceled and the Parties were directed to make their presentations in writing by November 2, 2012.
22. The Committee held its First Session with the Parties on October 29, 2012 by telephone conference. The Parties confirmed that the Members of the Committee had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be

English and Spanish and that the place of the proceeding would be Washington D.C. In the absence of an agreement between the Parties, the Committee fixed a schedule for the submissions of pleadings on the application for annulment. The agreements of the Parties and the schedule for the submissions were embodied in Procedural Order No. 1, dated November 13, 2012, signed by the President and circulated to the Parties.

23. On November 7, 2012, each Party filed further presentations about SGS's request to terminate the stay of enforcement of the Award. The original deadline had to be postponed, as agreed by the Parties, because of the serious disruptions that hurricane Sandy caused in New York, which affected the ability of Paraguay's counsel to respond.
24. On November 14, 2012, following the resignation of the *ad hoc* Committee member Salim Moollan, the Secretary-General notified the Parties of the vacancy on the *ad hoc* Committee and the proceeding was suspended pursuant to ICSID Arbitration Rules 53 and 10(2).
25. On November 26, 2012, after consulting with the Parties, the Chairman of the ICSID Administrative Council appointed Judge Abdulqawi A. Yusuf, a national of Somalia, to the *ad hoc* Committee to fill the vacancy caused by Mr. Salim Moollan's resignation.
26. On November 29, 2012, following Judge Yusuf's acceptance of his appointment, the *ad hoc* Committee was reconstituted and the proceeding was resumed pursuant to ICSID Arbitration Rules 53 and 12.
27. The Members of the Committee have deliberated by various means of communication and have taken into consideration the Parties' entire submissions on the matter.

II. THE PARTIES' POSITIONS CONCERNING THE STAY OF ENFORCEMENT OF THE AWARD

A. PARAGUAY'S POSITION

28. By means of a written submission filed on June 7, 2012, pursuant to Article 52(5) of the ICSID Convention and Rule 54 of ICSID Arbitration Rules, the Republic of Paraguay requested that the enforcement of the Award issued on February 10, 2012 be stayed until the Committee renders a decision on the application for annulment thereof.
29. Paraguay stated that strong grounds for the annulment of the Award existed and that it did not request such annulment and the stay of enforcement of the award simply to delay payment.¹
30. In support of its request for a continued stay of enforcement of the Award, Paraguay stated that:
 - (a) Its application for annulment of the award is substantial.
 - (b) It is not a dilatory tactic.
 - (c) The continued stay of enforcement of the award does not prejudice SGS.
 - (d) No bond or guarantee is necessary as mounting interest on the award and Paraguay's obligations under the ICSID Convention suffice to protect SGS's right to payment if the annulment were denied.²

¹ Paraguay's Application for Annulment, June 7, 2012, ¶ 70.

² Paraguay's Written Submission of August 14, 2012, ¶ 3.

31. Furthermore, Paraguay maintained that annulment committees have routinely and consistently stayed awards pending a decision on annulment, provided that they are satisfied that the annulment petition is not merely dilatory. Quoting *Azurix v. Argentina*, Paraguay highlighted that a stay should be granted absent exceptional circumstances.³
32. According to Paraguay, “[a] stay pending a decision on annulment makes eminent practical sense: if the stay is lifted, Paraguay will face the prospect of having to pay the Award before a decision on annulment is rendered, and then seek to recover the money if the Award is annulled. It is far more efficient to await a final determination of the Parties’ obligations”.⁴
33. In addition, Paraguay pointed out that the delay that SGS may encounter in recovering on the Award “... is incidental to the Convention system of annulment, which permits stays of enforcement pending annulment proceedings”.⁵ It went on to cite *Enron v. Argentina* as follows: “... the postponement of the right to payment of the award caused by a stay cannot, by definition, *per se* constitute prejudice”⁶. It added that SGS is not a struggling enterprise that needs to recover on the Award as soon as possible but a multinational company with more than 70,000 employees that recorded US\$4.93 billion in revenue for 2011.⁷
34. In its written submission of November 7, 2012, Paraguay requested once again that the stay of enforcement of the Award be continued, without conditions.⁸ It highlighted that, according to the “Background Paper on Annulment for the Administrative Council of ICSID” of August 2012, *ad hoc* committees have never

³ Id., ¶ 9.

⁴ Id., ¶ 10.

⁵ Id., ¶¶ 14 and 15.

⁶ Id.

⁷ Id.

⁸ Paraguay's Written Submission of November 7, 2012, ¶ 2.

declined to continue the stay of enforcement of an award and that there is no reason for this case to be the first exception.⁹

35. Paraguay insisted that there are several reasons why the Committee should continue the stay of enforcement of the Award:

- (a) SGS will be sufficiently compensated for any delay in the enforcement of the Award by the continued accrual of interest. In Paraguay's opinion, even if it were not to prevail, SGS would be in the same economic position as it is in now.
- (b) Paraguay has no history of non-compliance with international awards and has paid the amount determined by the Tribunal in the only award issued against it.
- (c) No exceptional circumstances exist that would require Paraguay to provide security in order to continue the stay of enforcement of the award.
- (d) Paraguay's application for annulment is not dilatory.¹⁰

36. Paraguay cited *MTD v. Chile*, *Vivendi v. Argentina* and *Libananco v. Turkey* in support of its position whereby SGS may not use this annulment proceeding to improve the interest awarded thereto. It reiterated that the simple interest awarded is sufficient to compensate SGS for the delay in the event that Paraguay's application for annulment of the Award was denied.¹¹

37. Paraguay denied having a history of non-compliance with international obligations and non-payment of awards. It explained that it had recently been involved in two international arbitrations and that in the proceeding instituted by Grupanor Cercampo

⁹ Id., ¶ 4.

¹⁰ Id., ¶ 5.

¹¹ Id., ¶¶ 7-10.

S.A. Paraguay paid the award, whereas in the *BIVAC* case, the Tribunal concluded that Paraguay had not breached the relevant treaty.¹²

38. Paraguay claimed that:

“[t]here is no indication, past or present, that Paraguay will not enforce the Award should its annulment request fail. Paraguay is in full compliance with Article 69 of the ICSID Convention. It has passed Law No. 944/1982, which incorporated the ICSID Convention into Paraguayan law. Moreover, Article 536 of the Paraguayan Code of Civil Procedure establishes that international arbitral awards shall have full force and effect in accordance with the terms of the treaties under which they are rendered”.¹³

39. Paraguay insisted that its application for annulment is not dilatory. It also pointed out that in *SGS v. Philippines* and *SGS v. Pakistan*, both based on the umbrella clause, the Tribunal declared that it lacked jurisdiction (*SGS v. Pakistan*) or that the claim was inadmissible (*SGS v. Philippines*). According to Paraguay the Award represents a grave abuse of power and an intrusion in the realm of negotiated contracts.¹⁴

40. Paraguay summarized its viewpoint in the following manner:

“As the *ad hoc* committee in *Mitchell v. Congo* explained, ‘in a different field but with the same ‘raison d’être’, stay of

¹² Id., ¶¶ 11 and 12.

¹³ Id., ¶ 14.

¹⁴ Id., ¶¶ 15-19.

enforcement pending an appeal from a judicial decision is, according to several national laws, almost automatic”¹⁵.

B. SGS’S POSITION

41. SGS disagrees with Paraguay as far as the continued stay of enforcement of the award is concerned. It contests Paraguay’s suggestions that “... a stay of enforcement is almost automatic and should be granted absent ‘very exceptional circumstances’” and that, in the present case, there are “no exceptional circumstances [that] warrant denying a stay”. According to SGS, Paraguay misstates the applicable standard. Under the plain language of the ICSID Convention, awards are immediately binding and a stay of enforcement is the exception”¹⁶.
42. By citing, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, and *Kardassopoulos and Fuchs v. Georgia*, among others, SGS argued that “[c]onsistent with the plain meaning of the ICSID Convention, *ad hoc* committees have recognized that there is no automatic right to a stay and that a stay is a remedy of an ‘exceptional nature’”¹⁷.
43. SGS also contested Paraguay’s allegation that the stay of enforcement of the Award would not prejudice SGS, and asserted that:

“[s]imple interest at LIBOR + 1% (as was awarded by the Tribunal) does not constitute adequate compensation for the time value of money. The unchallenged evidence, at the hearing below, by SGS’s Vice President, Finance and Administration (Governments and Institutions Services

¹⁵ Paraguay’s Written Submission of August 14, 2012, ¶10.

¹⁶ SGS’s Written Submission of August 20, 2012, ¶¶ 11 and 12.

¹⁷ *Id.*, ¶ 14.

Division), Michael Lironi, was that interest even at LIBOR + 2% was below SGS's 'actual cost of borrowing'. SGS would suffer a further prejudice if Paraguay – as it has done with respect to the 2005 judgment of the Swiss Federal Tribunal – were to reorganize or conceal its foreign assets so as to make itself judgment proof".¹⁸

44. In response to Paraguay's second argument that its application is not dilatory SGS contended that "[e]ven if one accepts that Paraguay is exercising in good faith its right to seek annulment, that cannot justify a stay of enforcement ... An applicant cannot be entitled to receive the benefit of a stay of enforcement merely because it acted as it was expected to".¹⁹
45. SGS stated that it had doubts as to Paraguay's intent to comply with the Award and whether or not the application for annulment is a dilatory tactic.²⁰
46. SGS cited Professor Schreuer, asserting that "[a]nnulment is only concerned with the legitimacy of the process of decision [in the arbitration]: it is not concerned with its substantive correctness", and that the application for annulment should allege "... defects that go far beyond 'mere errors of fact or law' and, if proved, would indeed justify annulment".²¹ SGS added that "... Paraguay alleges no procedural vice or impropriety. Instead, the essence of Paraguay's Annulment Application is a disagreement with the Tribunal's interpretation of the umbrella clause of the BIT and its application of the dispute resolution provision of the BIT".²² SGS concluded that: "Paraguay's Annulment Application therefore facially has no basis under the ICSID Convention".²³

¹⁸ Id., ¶ 18.

¹⁹ Id., ¶ 21.

²⁰ Id., ¶ 22.

²¹ Id., ¶ 27.

²² Id., ¶ 28.

²³ Id., ¶ 30.

III. THE PARTIES' POSITIONS CONCERNING THE PROSPECTIVE REQUIREMENT THAT A BOND BE POSTED FOR THE CONTINUED STAY OF ENFORCEMENT OF THE AWARD

A. PARAGUAY'S POSITION

47. According to Paraguay, the stay of enforcement of the Award should be continued without the requirement of a bond. There is no requirement in the ICSID Convention or the Arbitration Rules whereby a party must provide security in order to continue a stay.²⁴
48. Paraguay pointed out that many committees have held that no bond should be required unless there is evidence that the State would not comply with its obligations if annulment were to be denied.²⁵
49. Paraguay highlighted that SGS has been unable to establish circumstances creating doubt that Paraguay would comply with the Award should the annulment application be denied. It also insisted that Paraguay has no history of non-payment under the ICSID Convention.²⁶
50. Furthermore, Paraguay asserted that requiring security would put SGS in a better position, would penalize Paraguay for exercising its rights under the ICSID Convention, and would create a disincentive for developing countries to submit applications for annulment.²⁷
51. By citing *CMS v. Argentina*, Paraguay concluded that several *ad hoc* committees have adopted the interpretation that a bank guarantee represents a windfall for the respondent in an annulment proceeding.²⁸

²⁴ Paraguay's Written Submission of August 14, 2012, ¶ 16.

²⁵ *Id.*, ¶ 17.

²⁶ *Id.*, ¶ 19.

²⁷ Paraguay's Written Submission of November 7, 2012, ¶ 5.

²⁸ *Id.*, ¶ 22.

B. SGS'S POSITION

52. SGS stated that if the Committee were to accept Paraguay's request for a continued stay of enforcement of the Award, it should require that Paraguay post security for the full amount of the Award, plus interest.
53. SGS pointed out that Paraguay owes over US\$39 million that it promised to pay on several occasions but failed to do so.²⁹ Moreover, it stated that "Paraguay repeatedly failed to pay its share of the advances on costs requested by ICSID, with the result that SGS was forced to bear the entire costs of the arbitration proceedings".³⁰ SGS asserted that, in addition to the amount owed to SGS, Paraguay also owes BIVAC, (SGS's competitor), approximately US\$36.1 million.³¹ SGS added that there is another case against Paraguay before the Swiss Federal Tribunal and that Paraguay has openly declared that it will not honor such debt.³²
54. After citing the *Libananco* and *Kardassopoulos* cases, SGS asserted that "... many committees have ordered the provision of security as the necessary and natural *quid pro quo* for a continuation of a stay of enforcement and have not required any further showing of special circumstances. Even if this Committee were minded to require a positive showing by SGS (which it does not need to) ... there are circumstances that justify the provision of security in the present case".³³
55. SGS pointed out that Paraguay "... nowhere suggests that it is unable to pay the Award in full immediately or would suffer economic hardship if required to do so. Paraguay merely contends that it would be 'far more efficient' for it to pay the Award only after the Committee renders its decision ..."³⁴

²⁹ SGS's Written Submission of August 20, 2012, ¶ 5.

³⁰ *Id.*, ¶ 7.

³¹ *Id.*, ¶ 8.

³² *Id.*, ¶ 9.

³³ *Id.*, ¶ 34.

³⁴ *Id.*, ¶ 35.

56. SGS stated that, in ICSID cases, the parties have the joint obligation to make an advance payment to cover the costs of the proceedings. It also added that “Paraguay violated that obligation, in a sustained fashion over the three years that the case below was pending, until Paraguay cynically paid its share of the costs on the day it filed this annulment proceeding”.³⁵
57. Moreover, SGS asserted that “Paraguay has not designated any court or other authority, in accordance with Article 54(2), for the recognition and enforcement of ICSID arbitral awards. Nor has Paraguay identified to ICSID any legislative or other measures taken, pursuant to Article 69 of the Convention, to make the Convention effective in its territory”.³⁶
58. Based on *Repsol* and the statements made by Professor Schreuer, SGS asserted that “[t]he requirement of security serves as an important deterrent against ‘automatic’ annulment applications”.³⁷
59. After pointing out that it had been trying to cause Paraguay to pay the amounts owed thereto for over 15 years, SGS stated that such sole reason would suffice for the Committee to order Paraguay to post a bond or other security as a condition precedent to continuing the stay of enforcement of the Award.³⁸
60. SGS requested that the provisional stay of enforcement of the Award be lifted, and, in the alternative, that is to say, in the event that the Committee decided to continue such stay, the Committee order that, within the term of thirty days as from the date of issuance of the decision, Paraguay “... post security in the form of an unconditional and irrevocable bank guarantee or standby letter of credit with a reputable

³⁵ Id., ¶ 38.

³⁶ Id., ¶ 39.

³⁷ Id. ¶¶ 42 and 43.

³⁸ Id., ¶ 45.

international bank headquartered in Western Europe or North America for the full amount of the Award (including interest to the date of the Committee’s order, plus 30 days) or in such other form and amount as may be determined by the Committee”. In addition, it requested that the Committee order “... that the security so provided be collectible by SGS in full and on first demand if Paraguay’s Annulment Application is rejected, or in the event of partial annulment, partially collectible by SGS in the remaining amount of the Award rendered in its favor”.³⁹ Lastly, it concluded that “... if Paraguay fails to provide the security so ordered within 30 days or defaults in paying any other amount required by ICSID to be paid in the course of Paraguay’s Annulment Application (including the costs of ICSID and/or the costs of the Committee), the stay of enforcement of the Award shall be terminated ...”.⁴⁰

61. In its written submission of November 7, 2012, SGS stated that there are three circumstances that warrant the prospective requirement to provide security in the case at issue here:

- (a) Posting a bond would not prejudice Paraguay. In such regard, it asserted that “Paraguay does not and cannot say that it would suffer economic hardship if required to post a bond. Nor would Paraguay suffer any harm if the Award were annulled. In such circumstance, the bond would simply be rescinded, thereby fully addressing Paraguay’s stated concern about efficiency”.⁴¹
- (b) The Committee would safeguard the integrity of the ICSID system and ensure that Paraguay honor its obligations under the ICSID Convention. In connection therewith, SGS stated that “[t]he Committee will have noted that Paraguay nowhere undertakes to comply with the Award should the Committee reject its application for annulment. (In any event, assurances

³⁹ Id., ¶ 49.

⁴⁰ Id.

⁴¹ SGS’s Written Submission of November 7, 2012, page 3.

would have little value given the history of broken promises by Paraguay to pay SGS.) Paraguay's failure even to undertake to comply with the Award comes on top of a record of defiance by Paraguay of its ICSID obligations – Paraguay paid its share of the arbitration costs below only after it decided to commence these annulment proceedings – and evidence of attempts by Paraguay to make itself judgment-proof and frustrate enforcement of a Swiss court judgment rendered in favor of European banks. By ordering a bond, this Committee would prevent this case from becoming another black mark for the ICSID system of a dishonored award”.⁴²

- (c) The nature of the application for annulment submitted by Paraguay warrants a bond or other security. SGS asserts that the Committee should determine whether or not the application for annulment is dilatory. In the words of SGS, “...Paraguay's application is a disagreement about treaty interpretation. Paraguay does not allege procedural vice, due process violation or unfairness. The core issue raised by Paraguay is a disagreement with the Tribunal about the proper interpretation of the dispute resolution clause of the BIT in light of the forum selection clause in the underlying contract”.⁴³

62. SGS added that in *Kardassopoulos v. Georgia* the Committee ordered Georgia to post a bond in circumstances similar to these. According to SGS “... in that case the key consideration was Georgia's protracted history of broken promises to compensate the investor. That history (12 years) was shorter than ours (15 years)”⁴⁴. SGS also cited *Lemire v. Ukraine* where the Committee ordered Ukraine to post security on the basis of Ukraine's poor record of non-compliance with its international obligations.⁴⁵ In

⁴² Id., page 3.

⁴³ Id., page 3.

⁴⁴ Id. pages 3 and 4.

⁴⁵ Id., pages 3 and 4.

contrast, SGS referred to the fact that, in two cases against Chile (*Pey Casado* and *MTD*), the Committees did not order the posting of a bond. This fact “... could point to a spotless record of compliance with its international payment obligations”.⁴⁶ SGS also stated: that the Committee in *Pey Casado* considered “... that Chile’s ‘faithfulness and utmost seriousness’ in complying with its international commitments and duties ‘should itself constitute a sufficient assurance’ of future compliance”.⁴⁷ In *MTD* the Tribunal pointed out that “ ... Chile ‘has always complied with its International payment obligations and with all judgments or awards of international courts and tribunals’”.⁴⁸

63. The Committee will now proceed to analyze the Parties’ written submissions and to adopt a decision on the request submitted by Paraguay. Before doing so, it will, however, examine recent facts that have been brought to its attention in connection with the request for continued stay of enforcement of the Award.

⁴⁶ Id., page 4.

⁴⁷ Id., page 4.

⁴⁸ Id., page 5.

IV. RECENT FACTS

64. On January 15, 2013, SGS sent a letter to the Committee stating that Paraguay had issued a “preliminary offering circular” (the “Offering”) for a bond issuance that it would circulate through investment bankers and international law firms.
65. The Committee examined the Offering carefully and was able to verify that, as SGS stated, Paraguay had actually made reference to the Award holding it liable to pay SGS approximately US\$39 million, plus interest thereon.
66. In its letter of January 15, 2013, SGS added that, on account of the stay of enforcement of the Award, it was disabled from attaching, *even provisionally*, the monies that would flow through the New York banking system in connection with the bond issuance.
67. Moreover, SGS pointed out that, on page 10 of the Offering, Paraguay had made reference to the possibility of SGS, or any other creditor mentioned in the Offering, attaching part of the proceeds of the bond placement.
68. On page 10 of the Offering, Paraguay listed the following outstanding credits:

Creditor	Approx. Amount	Arbitral Tribunal or Court
Nine Banks	US\$85,000,000 plus interest	Swiss Federal Tribunal
SGS	US\$39,000,000 plus interest	ICSID Arbitral Tribunal
BIVAC	US\$36,000,000	ICSID Arbitral Tribunal and Paraguayan Courts.

69. On pages 9 and 10 of its Offering, Paraguay included the two following paragraphs:

“Part of the offering proceeds could be attached by creditors to satisfy outstanding and pending judgments and awards against Paraguay.

Creditors holding outstanding court judgments or arbitral awards present a risk of disruption to the offering. The risk with respect to the offering is that the initial purchasers in the offering could be said to have an obligation to pay money to Paraguay and Paraguay’s judgment creditors may attempt to restrain Paraguay’s interest in any such obligation. Further, Paraguay’s creditors could attempt to attach the proceeds of the offering”.⁴⁹

70. In its letter of January 15 referred to *supra*, SGS requested that this “...Committee lift with immediate effect the provisional stay of enforcement” of the Award. SGS concluded its letter stating that “[t]his may be the last opportunity that SGS will have to force Paraguay to respect its ICSID obligations by attaching monies due to SGS under the ICSID Award”.⁵⁰

71. On the same day, the Committee invited the Republic of Paraguay to address SGS’s request on or prior to January 18, 2013.

72. Before receiving Paraguay’s response, the Committee received another communication from SGS dated January 17, whereby it stated that, “as a matter of urgency”, it addressed it directly to the Committee. In this second letter, SGS requested the following provisional measures:

“... as a matter of urgency and in accordance with its powers under Article 39(1) of the Rules, the Committee order that Paraguay direct its agents – including Citigroup and its affiliates (as Global Coordinator, Joint Book-Runner,

⁴⁹ Preliminary Offering Circular, Republic of Paraguay, evidence submitted by SGS on January 15, 2013, pages 9 and 10.

⁵⁰ SGS’s Letter of January 15, 2013, pages 1 and 2.

Trustee, Principal Paying Agent, Transfer Agent and Registrar of the Offering), Bank of America Merrill Lynch (as Joint Book-Runner of the Offering) and any other financial institutions involved in the Offering – to place the proceeds of the Offering (up to the amount of the ICSID Award plus interest) in an interest-bearing trust account with Citigroup in New York pending the Committee’s decision on the Parties’ respective requests regarding the stay of enforcement”.⁵¹

73. On January 18, 2013, the Committee received Paraguay’s answer to SGS’ letter. In this reply, Paraguay:

- (a) Stated that, “... although it is true that Paraguay is raising funds on the international debt markets... this fact does nothing to change the debate over continuation of the stay of enforcement of the Award ...”.⁵²
- (b) Stated once again that since no *ad hoc* committee has declined to continue the stay enforcement of an award, such stay should be continued pending the Committee’s final decision in the context of this annulment proceeding.⁵³
- (c) Submitted a copy of the special power granted by the President of the Republic of Paraguay to the Attorney General “... to provide a sworn commitment before the International Centre for Settlement of Investment Disputes (ICSID), in the name and in representation of the Paraguayan State, [in] the litigation Societe Generale de Surveillance S.A. (S.G.S.) against the Republic of Paraguay, No. ARB/07/29 ...”.⁵⁴

74. By means of a further communication dated January 24, 2013, Paraguay strongly opposed the provisional measure requested by SGS and referred to in paragraph 72

⁵¹ SGS’s Letter of January 17, 2013, pages 1 and 2.

⁵² Paraguay’s Letter of January 18, 2013, page 1.

⁵³ *Id.*, page 1.

⁵⁴ Decree No. 9949 of October 24, 2012, submitted by Paraguay on January 18, 2013.

supra, arguing that such measure would negatively affect the actions it is undertaking in order to raise funds in international capital markets.

75. On January 25, 2013, SGS sent a letter to the Committee in which it withdrew the request for provisional relief that it had made in its January 17 letter. It stated that:

- (a) “For the avoidance of doubt, such withdrawal does not entail acceptance by SGS of the arguments raised in Paraguay’s letter of 24 January 2013 ...”⁵⁵
- (b) “... Paraguay had hitherto offered *no* assurances that it intended to comply with the Award should this Committee reject its annulment application”.⁵⁶
- (c) “The decree that authorizes Paraguay to offer assurances was issued on 24 October 2012 ...” but Paraguay preferred to keep it in reserve and it was not until it “... was faced with the prospect of seeing the proceeds of its first sovereign bond offering seized that Paraguay undertook to represent to this Committee that it intended to comply with the Award”.⁵⁷
- (d) “... Paraguay *anticipated future enforcement actions* and specified that “any action taken to enforce ... the SGS Award” would not be regarded as an event of default under the bonds”.⁵⁸
- (e) “SGS maintains its request that the Committee not extend the provisional stay of enforcement or, alternatively, order Paraguay to provide financial security for the full amount of the Award with interest”.⁵⁹

⁵⁵ SGS’s Letter of January 25, 2013, page 1.

⁵⁶ *Id.*, page 2.

⁵⁷ *Id.*, page 2.

⁵⁸ *Id.*, page 2.

⁵⁹ *Id.*, page 3.

76. On January 30, Paraguay sent its reply to SGS's January 25th letter. With respect to Decree 9949, it stated:

“SGS’s unfounded speculation about the timing of the letter cannot detract from the fact that Paraguay has conveyed its assurances that it will pay the Award if it is not annulled. As Paraguay has already pointed out, annulment committees routinely accept such assurances to support extending provisional stays”.⁶⁰

77. In that response Paraguay stated that the Offering “... does not purport to state a government policy that an enforcement action will be required to enforce the Award”.⁶¹ It also reiterated its request that the stay of the Award be extended.

⁶⁰ Paraguay’s Letter of January 30, 2013, page 2.

⁶¹ Id., page 2.

V. ANALYSIS OF THE *AD HOC* COMMITTEE

A. ANNULMENT REGIME UNDER ICSID

78. Before analyzing the arguments of the Parties, the Committee considers it important to refer to Article 52(5) of the ICSID Convention which reads as follows:

“The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request”.

79. Rule 54 of the ICSID Arbitration Rules provides the following:

“Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee

granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification”.

80. The Parties hold different views with regard to the interpretation of the annulment regime under ICSID. Moreover, Paraguay affirmed that it has always complied with its international obligations, especially those arising from ICSID arbitrations. It added that annulment committees have routinely and consistently stayed awards pending a decision on annulment, provided that they are satisfied that the annulment petition is not merely dilatory. Quoting *Azurix v. Argentina*, Paraguay highlighted that a stay should be granted absent exceptional circumstances.⁶² In contrast, SGS alleged that Paraguay has repeatedly failed to comply with its international obligations; there is no automatic right to a stay of enforcement of an award and that a stay is a remedy of an exceptional nature.⁶³

⁶² Paraguay’s Written Submission of August 14, 2012, ¶ 9.

⁶³ SGS’s Written Submission of August 20, 2012, ¶¶ 7, 8, 9, 11 and 12.

81. Article 52 of the ICSID Convention and Arbitration Rules 52 to 54 lay down the fundamental rules on annulment of awards. The relevant mechanism deriving from the conjunction of such rules is the following:

- (a) Upon registration of an application for the annulment of an award, ICSID authorities appoint an *ad hoc* Committee to decide on such application.
- (b) If the application for annulment contains a request for stay of enforcement of the award, the Secretary-General of ICSID shall order the provisional stay thereof.
- (c) In the event that the Committee considers “that the circumstances so require”, it may order that the stay be continued pending its decision on the application for annulment.
- (d) Unless the Committee decides to continue the stay, it shall automatically be terminated.
- (e) If the Committee grants a stay of enforcement, it may at any time modify or terminate the stay at the request of either party.

82. Based on the plain language of the ICSID Convention and Arbitration Rules on annulment, it is clear to the Committee that a continued stay of enforcement of the award is not, in any event, automatic. Pursuant to article 52(5) of the ICSID Convention, a continued stay is dependent on the specific circumstances of the case. Indeed, to order the continuation of the provisional stay, the Committee must be convinced that within the context of the case at hand such continuation is required.

83. The above conclusion is further reinforced by Article 53 of the Convention, pursuant to which the binding nature of the award is the rule and its annulment the exception:

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent

that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”.

84. The actions taken by the “Contracting Parties”, who created the ICSID system must lead us to the conclusion that the binding nature of the award is the rule, whereas its annulment is the exception. The ICSID system is built on the premise that the awards rendered by ICSID tribunals settle in a definite manner the issues submitted to their consideration, and that only under exceptional and highly limited circumstances may their annulment be declared.
85. The inevitable consequence of the foregoing reasoning is that, despite an application for annulment, awards must be enforced and only in very specific cases where the circumstances so require, may enforcement be stayed by the corresponding committee.
86. Based on the plain language of Rule 54(4) of the ICSID Arbitration Rules, it is also clear to the Committee that the party interested in the continued stay bears the burden of proof to demonstrate the existence of circumstances that warrant said continuation. Indeed, Rule 54(4) provides that “[a] request [for a stay of enforcement] ... shall specify the circumstances that require the stay ...”. In the present case, the burden of establishing circumstances justifying a continued stay clearly falls on Paraguay.
87. The Committee also notes that Article 52(5) of the ICSID Convention provides that the stay shall only be continued if the Committee considers that “the circumstances so **require**”. The Convention does not use other less categorical verbs, such as “recommend”, “deserve”, “justify” or similar words, but resorts to the imperative verb “require”.
88. In sum, to order a continued stay of enforcement of the award, the Committee must be certain that the circumstances of the particular case so require. It is for the interested party to show that such circumstances exist, and thus, the stay of enforcement of the award should be continued.

89. The reasoning set forth above is in conformity with decisions of previous *ad hoc* committees, e. g., the Committee in *Sempra v. Argentina* held that:

“Against that background, the view of the present Committee as to the prerequisites for granting a stay can be summarized as follows. An ICSID award is immediately payable by the award debtor, irrespective of whether annulment is sought or not. A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour of granting a stay of enforcement. This follows, in the Committee’s opinion, from the ordinary meaning to be given to the terms of Article 52(4) of the ICSID Convention, which authorizes the Committee to stay enforcement of the award pending its decision ‘if it considers that the circumstances so require’. Although the ICSID Convention does not give any indication as to what circumstances would warrant a stay, it is nonetheless clear from this language that there must be *some* circumstances present that speak in favour of granting a stay. As a consequence, it cannot be assumed that there should be a presumption in favour of a stay or that the primary burden is placed on the award creditor to show that continuation of the stay should not be granted”.⁶⁴

90. As was highlighted by Paraguay, some *ad hoc* committees have considered that, absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceeding has now become almost automatic.

B. THE CIRCUMSTANCES OF THE PRESENT CASE

91. The Committee gave careful consideration to the rules set forth in the ICSID Convention and Rules of Arbitration with regard to the stay of enforcement of awards and to the Parties’ submissions. As a result, the Committee concluded that Paraguay has failed to discharge its burden of proof. Indeed, Paraguay has not demonstrated

⁶⁴ *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16). Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) of March 5, 2009, ¶ 27.

that there are specific circumstances in the present case that require the stay to be continued.

92. Paraguay has limited its arguments to an attempt to prove that SGS would not be prejudiced by a continued stay and that it would be “far more efficient” to await a final determination of the Parties’ obligations. The Committee agrees with SGS in that Paraguay has “reversed the prejudice issue”. As stated above, under the ICSID Convention, awards are immediately binding and SGS is entitled to the amounts that were awarded by the Tribunal. It was Paraguay’s burden to show that it would be prejudiced if enforcement were allowed and that such prejudice warranted a continued stay of enforcement. However, Paraguay did not even argue that it is unable to immediately pay the Award or that it would suffer economic hardship if required to do so.
93. The Committee must also reject Paraguay’s argument that it would be far more efficient for it to pay only after the Committee denies its annulment request. That Paraguay may have to pay now only to be reimbursed later — if the Award were annulled — is the natural consequence of the enforcement regime created by the ICSID Convention, where a stay is the exception and not the rule. Furthermore, Paraguay has not claimed that it would be unable to recoup any payments made to SGS; it has, on the contrary, acknowledged that SGS is a large and solvent multinational company.
94. Paraguay repeatedly manifested that its annulment application was not presented with a dilatory purpose. In the Committee’s view, the mere fact that the application is not dilatory does not justify a stay of enforcement of the Award. The Committee considers that SGS is correct in stating that Paraguay cannot be entitled to receive the benefit of a stay of enforcement merely because it acted as it was expected to.
95. In addition to the strict legal reasoning and to the analysis of the specific circumstances of the case that may warrant a stay, this Committee must assess, in

order to make a determination on such a delicate matter, the recent history of Paraguay's compliance with its ICSID- related payment obligations.

96. In paragraph 187 of the Decision on Jurisdiction, issued on February 12, 2010 in the arbitration proceeding giving rise to this annulment proceeding, the Tribunal stated that:

“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)”.⁶⁵

97. In paragraph 192 of the Award issued on February 10, 2012, in that same arbitration, the Tribunal pointed out that:

“The Tribunal believes that both sides have presented their positions ably and in good faith, and neither has caused undue delay or expense in the proceeding. However, Respondent has not paid its portion of the costs associated with this proceeding, and has forced Claimant to bear the entire cost itself. The Tribunal finds that Respondent should pay its share, and, therefore, awards to Claimant half of the costs of the arbitration, i.e., the amount of the ICSID costs and fees that Respondent should have advanced. The Tribunal does not believe it is appropriate to make any other award with respect to costs and fees”.⁶⁶

98. In furtherance of the obligation imposed by Rule 13 of the Arbitration Rules, soon after it had been constituted, on July 30, 2012, this Committee requested that Paraguay make an advance payment of US\$200,000 not later than August 29, 2012, so that the Committee would have the necessary funds to cover the expenses of the first session. On August 14, 2012, the Committee decided that the first session was to

⁶⁵ SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, (ICSID Case No. ARB/07/29), Decision on Jurisdiction of February 12, 2010), ¶ 187.

⁶⁶ SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, Award of February 10, 2012 (ICSID Case No. ARB/07/29), ¶ 192.

be held on August 31, 2012, provided that Paraguay made the relevant deposit in a timely fashion. In spite of other actions undertaken by the Committee and by its Secretary, payment was not received in time and the first session had to be cancelled.

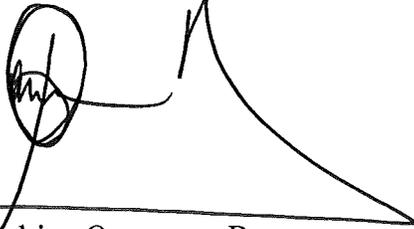
99. In view of the foregoing, the Committee agreed to continue the stay of enforcement of the award until September 17, 2012 and warned Paraguay that if on such date ICSID had not received US\$200,000 deposit it would terminate the stay of enforcement of the Award. Finally, on September 13, 2012 Paraguay made the deposit.
100. Moreover, in the Offering the Republic of Paraguay itself acknowledged the existence of three outstanding obligations, two of them related to ICSID, to pay very considerable amounts, respectively, to nine banks, SGS and BIVAC. It also referred in the Offering to “other creditors of Paraguay” and to the possibility of any of those creditors (the three it identified as well as the others that it mentioned but failed to identify) attaching part of the proceeds of the Offering.
101. The purpose of the special power that the President of the Republic of Paraguay granted to the Attorney General, to which reference is made in paragraph 73 above, was to provide a “sworn commitment”. In this Committee’s opinion, such a commitment is neither provided for under the Rules of ICSID nor does it amount to the posting of security. Besides, it is not categorical enough to evidence Paraguay’s firm undertaking to pay the amounts owed to SGS, in the event that the annulment of the Award were denied.
102. SGS strongly opposed Paraguay's request for the continued stay of enforcement of the Award. It argued that, in any case, such stay could only be continued if Paraguay were ordered to post a bond or security. By virtue of the determination to be made *infra*, an analysis of the bond issue becomes unnecessary.
103. Likewise, in view of the fact that in its letter dated January 25, 2013 SGS withdrew its request for provisional measures, the Committee will not refer to it.

104. The Parties based the arguments advanced in their written submissions on many decisions issued by other courts and arbitral tribunals. Therefore, the Committee deems it necessary to make some general comments in this regard.
105. The Committee considers that the decisions adopted by other arbitral tribunals or *ad hoc* committees are not decisive for the purpose of the settlement of this dispute and are clearly not binding upon this Committee. However, this has not prevented the Committee from taking into consideration the content of the decisions issued by other arbitral tribunals and *ad hoc* committees as well as the arguments raised by the Parties based on such decisions, insofar as they shed light on the matter to be settled in this stage of the proceeding.
106. The Committee deems it necessary to establish that its duty at this stage of the proceeding is solely to decide on the continued stay of enforcement of the Award.
107. The Committee declares that nothing contained herein may or shall be interpreted as a preview of the criteria that will be used in the decision to be issued at the end of this proceeding.
108. The Committee gave careful consideration to the content of the arguments advanced by the Parties in their written submissions, with regard to factual and legal matters, as well as to the documents contributed by them to the file. All these documents have been of utmost importance to the Committee. In this decision, the Committee refers to the arguments raised by the Parties that it deemed most relevant. Even where it fails to make express reference to all the arguments advanced by the Parties, the reasoning of the Committee considered most of them.
109. Based on the conclusions reached in the foregoing paragraphs, the Committee finds that Paraguay's request for a continued stay of enforcement of the Award must be rejected.

VI. DECISION

110. The *Ad hoc* Committee hereby:

- (a) Rejects Paraguay's request for the continued stay of the enforcement of the Award rendered on February 10, 2012 whose annulment was requested by Paraguay;
- (b) Declares that the provisional stay granted by the Secretary-General is terminated as of the date hereof;
- (c) Decides that it will rule on the allocation of costs and expenses in its decision on the annulment of the Award.

A handwritten signature in black ink, consisting of a circular loop followed by a series of vertical and horizontal strokes, ending in a long horizontal line that extends to the right.

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