Umbrella clause in the eye of *Bivac v Paraguay* tribunal

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The proliferation of bilateral investment treaties led to an increasing number of investment disputes. The basis of such disputes, depending on the circumstances, could be treaty or contractual-based. The investment tribunals adopted distinct approaches in dealing with contractual claims pleaded as treaty claims. Several factors play a role in admitting contractual claims including, inter alia, the existence of an umbrella clause in the treaty. However, the existence of such a clause did not lead to the adoption of a unified position by the arbitral tribunals. The absence of a jurisprudence constante led to different outcomes on the jurisdiction over, and admissibility of, the claims. This paper highlights the different interpretative doctrines developed by jurists and tribunals in dealing with the umbrella clause. Further, it sheds light on the tribunals' different positions in the SGS cases as well as the BIVAC v Paraguay dispute.

INTRODUCTION

The significant number of bilateral investment treaties (BITs) resulted in states competitively providing foreign investors with various commitments and guarantees under said treaties to attract them to invest in such states. Such commitments and guarantees are contained in different treaty clauses, key among which is the so-called "umbrella clause" that appears in around 40% of existing BITs in various wordings.[1] States, pursuant to the umbrella clauses, commit themselves to observe specific undertakings for the benefit of foreign investors.

In reliance upon the umbrella clause, foreign investors argue that contractual claims are convertible to treaty claims and, therefore, are subject to *ratione materiae* jurisdiction of investment tribunals. Nevertheless, the investment tribunals did not blindly follow this argument, and have rather developed and adopted various approaches in dealing with contractual claims presented as treaty claims. In this research, I will shed light on the notion of the umbrella clause, highlighting the conflicting approaches developed by the investment tribunals and analyzing the tribunal's rationale in the BIVAC v Paraguay, while comparing the same with the notable precedents that addressed umbrella clauses, with a focus on two main issues, these being jurisdiction and admissibility.

I. INVESTMENT TREATIES AND CONTRACT CLAIMS

2.1. UMBRELLA CLAUSE

The meaning and rationale of the "umbrella clause" remained uncertain for a period of time. The notion of such a clause is that contracting states shall adopt a reciprocal treatment towards each other to observe obligations typically arising from contractual arrangements entered between the state and the foreign investor.[2] The clause may appear in different wordings, "*observe any obligation it may have entered into*,"

[1] Yannaca-Small, K. (2006), "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment, 2006/03, OECD Publishing. http://dx.doi.org/10.1787/415453814578.

[2] Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, Arbitration International, Volume 20, Issue 4, 1 December 2004, p. 411, https://doi.org/10.1093/arbitration/20.4.411.

"*observe any obligation…*" and "*constantly guarantee the observance of the commitments..*".[3] The origin of this clause may be traced back to late 1953 and early 1954 in settlement of the dispute between the Anglo-Iranian Oil Company and the State of Iran due to the nationalization of the Iranian oil dispute. Subsequently, various initiatives took place to introduce the "umbrella clause." More importantly, the first BIT wherein the "umbrella clause" appeared was the treaty between the Federal Republic of Germany and Pakistan regarding the Promotion and Protection of Investment on 25 November 1959.[4] However, the first investment dispute that specifically addressed such a clause was the SGS v Pakistan ICSID arbitration in 2003. Subsequently, the floodgates opened, and the ICSID jurisprudence was enriched with several contradictory arbitral awards dealing with the umbrella clause.[5]

2.2. THEORIES OF INTERPRETATION

By examining the various investment awards, one could categorize the tribunals' approaches toward the umbrella clause into four schools of legal thought. The first school of thought adopts a rather narrow interpretation of the umbrella clause. The mutual intent of the contracted state and investor must be indicative of their agreement that contractual violations would give rise to a treaty violation under the umbrella clause.[6] This argument has, however, been validly criticized for emptying the clause of its content contrary to the drafters' intention.

The second school of legal thought provides that a breach of contract would amount to a treaty breach only when the host state's breach was committed by exercising its sovereign authority, known as the "sovereignty school."[7] This school creates a level of characterization without any textual support and may lead to conflicting outcomes. Also, by adopting this approach, it would be prudent to determine jurisdiction without examining the dispute's merits.

Contrary to the above two schools, the third school of thought adopts a rather liberal approach by the elevation theory, meaning that umbrella clauses elevate the contractual breaches to international ones.[8] The final school adopts distinctive reasoning known as "enforcement theory," the premise of which is that contract claims remain contractual and governed by contract law. The umbrella clause serves as an additional ground to ensure its enforceability without introducing changes to its character.[9]

Having discussed the different interpretations of umbrella clauses, I will analyze below the tribunal's reasoning in BIVAC's case dealing with two main issues; jurisdiction and admissibility, while simultaneously conducting a comparison with the notable investment dispute precedents known as the "SGS cases."

II. *BIVAC V PARAGUAY*: JURISDICTIONAL OR ADMISSIBILITY IMPEDIMENT?

In 1996, Bureau Veritas, Inspection, Valuation, Assessment and Control ("BIVAC"), a Dutch company, concluded a contract with the Ministry of Finance of Paraguay to execute the program of "pre-shipment inspection" of the

[3] *Ibid.*, p. 412.
[4] *Ibid.*, p. 433.
[5] Raúl Pereira de Souza Fleury, Umbrella clauses: a trend towards its elimination, Arbitration International, Volume 31, Issue 4, 1 December 2015, Pages 680, https://doi.org/10.1093/arbint/aiv062.
[6] James Crawford, Treaty and Contract in Investment Arbitration, Arbitration International, Volume 24, Issue 3, 1 September 2008, p. 367, https://doi.org/10.1093/arbitration/24.3.351.
[7] *Ibid.,* p. 368.
[8] *Ibid.*
[9] James (n. 6), p. 370.
[10] 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).

imported goods to Paraguay ("Contract").[10] In consideration of the services provided by BIVAC, the Paraguayan Ministry of Finance was supposed to pay BIVAC fees based on a percentage of the "FOB" value of the goods.[11] Further, the Contract provided that disputes arising from the implementation, termination, or invalidity thereof shall be resolved according to the Paraguayan Laws and the jurisdiction of "the tribunals of the city of Asuncion."[12]

BIVAC performed its services as described under the Contract; however, the Paraguayan government failed to meet its obligations and paid only 16 out of the 35 invoices issued by BIVAC. Paraguay's indebtedness, as such, reached the amount of $US36.1 million by January 2007.[13] The unpaid 19 invoices went through different levels of scrutiny by the government, which ultimately confirmed the validity of the Contract and accuracy of the invoices. Having said this, the invoices remained unpaid.[14]

BIVAC, in October 2006, made the President of Paraguay aware of the existence of a dispute under the BIT between the Netherlands and Paraguay and requested the initiation of settlement negotiations within three months period.[15] Yet, Paraguay ignored such an invitation. BIVAC, therefore, filed its request for arbitration on 16 February 2007 and requested the constitution of the arbitral tribunal.

BIVAC argued that the Contract qualifies as a protected investment under Article (1)(a) of the BIT being "an "*asset*" a "*title to money*" and "*title to performance having an economic value*"[16] BIVAC requested the tribunal to declare, *inter alia*, that *"(iii) Paraguay has breached Article 3(4) of the Treaty by failing to observe obligations it has entered into with regard to BIVAC's investment"*.[17] In this vein, Article (3)(4) of the BIT represents an umbrella clause, and its language provides that: *"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of the other Contracting Party."*

The above-noted language is one among other patterns of treaty provisions classified as umbrella clauses. As explained above, there is no *jurisprudence constante* in answering the question of whether such clauses may be relied upon by the investor to bring a treaty claim based on a contract.[18] From this stand, I will provide below a comparative analysis of the BIVAC tribunal's findings on the two main issues: jurisdiction and admissibility embedding the law applicable to the claims, compared with the investment tribunals' findings in similar disputes, being SGS cases.

2.1. JURISDICTION

SGS v Pakistan is the first case wherein an investment dispute arose based on a contract breach relying on the umbrella clause in the BIT between Switzerland and Pakistan.[19] In 1994, the government of Pakistan concluded a contract with SGS regarding "pre-shipment inspection services".[20] The subject agreement stipulated that dispute shall be resolved through arbitration in Islamabad, Pakistan under the Pakistani

[11] *Ibid.*, para. 7
[12] *Ibid.*, para. 8.
[13] BIVAC (n. 9), para. 9.
[14] *Ibid.*, para. 10.
[15] *Ibid.*, para. 12.
[16] *Ibid.*, para. 15.
[17] *Ibid.*, para. 13.
[18] Please see the outcome of SGS v Pakistan, SGS v the Philippines and SGS v Paraguay.
[19] 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).
[20] *Ibid.*, para. 7:11.

arbitration act.[21] SGS, to preserve its rights after the termination of the contract by Pakistan in 1997, initiated proceedings before Swiss Courts which declined its jurisdiction honoring the parties arbitration agreement.[22] Pakistan, thereafter, initiated local arbitration for SGS's breach of contract. SGS, also, advanced an investment claim before ICSID, relying on Article.9 of the relevant BIT.

Pakistan challenged the tribunal's jurisdiction and pleaded that the basis of SGS's claim is the subject contract that provides for arbitration as an exclusive forum. In rebutting this argument, SGS argued that the tribunal has jurisdiction *ratione materiae* based on the following arguments: i) umbrella clause under Art. 9 of the BIT converts the contract claims into treaty claims, and ii) the language of Art. 9 is general enough to include contractual claims.[23]

The tribunal, in declining jurisdiction, adopted a narrow interpretation of the umbrella clause and held that it does not qualify as a valid basis to bring a treaty claim.[24] The tribunal interpreted the commitment of observances as being limited to "*constantly guarantee*" and does not entitle the investor to file a claim for the failure to observe a contractual commitment.[25] According to the tribunal, such commitments are limited to cases that involve administrative or unilateral measures adopted by the government and not contractual breaches. Regarding the applicable law, the tribunal decided that the contract law was applicable to the contractual obligations.[26]

The tribunal's rationale suggests that to cover contractual breaches; there should be an express reference in the text of the treaty; otherwise, the tribunal's default position will be excluding the said obligation. This, in our view, runs contrary to the construction of Art. 9, which does not carve out contractual claims; in fact, the Article's wording is sufficiently broad so as to extend to such claims as well. Further, and contrary to the tribunal's view, the prevalent treaty practice is to explicitly carve out claims desired not to be substantially covered under the treaty.[27] Thus, should two states intend to exclude the *ratione materiae* of international tribunals, the treaty should expressly reflect the same.[28] In the same vein, BITs usually distinguish between treaty and contractual claims under the definition of "investment."[29] Further, if the investor refrained from bringing a claim under the dispute resolution clause referred to in the disputed contract and preferred to bring the whole aspects of the dispute, whether a treaty or contractual, before the designated treaty tribunal, it is justifiable for the investor to raise all those claims, which supposedly interlinked, before a single tribunal to avoid conflicting judgment. I will deal with this issue later while addressing contractual claims' admissibility.[30]

A similar dispute arose from a contract between SGS and the Philippines.[31] The tribunal deviated from the position established in the Pakistan precedent by confirming that it has *ratione materiae* jurisdiction over the dispute.

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[21] *Ibid.*, para. 15.
[22] *Ibid.*, para. 9:16.
[23] SGS v Pakistan (n.19), paras .43:44, 100.
[24] *Ibid.*, para. 163:174.
[25] *Ibid.*, para. 166.
[26] *Ibid.*, para. 96.
[27] Douglas Z, "Jurisdiction Ratione Materiae," The International Law of Investment Claims (Cambridge University Press 2009), p. 238.
[28] *Ibid.*
[29] *Ibid.*, p. 239.
[30] *Ibid.*
[31] 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).

In establishing its jurisdiction, the tribunal declined the arguments raised by the Philippines that Article X(2) *"should be interpreted as being limited to obligations under other international law instruments."* The tribunal added that *"Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law. That issue ... is still governed by the investment agreement."*[32] In support of its conclusion, the tribunal concluded that i) the language of the clause is binding on the parties;[33] ii) the BIT aims at protecting the investment and, therefore, should be interpreted as favoring the settlement of uncertainty;[34] and iii) should the states wish to exclude contractual commitments from umbrella clause, they should have done so.[35]

In BIVAC v Paraguay, the tribunal was inspired by the Philippines award and interpreted the language of the umbrella clause in a general manner. In this vein, the language of the subject clause Article 3(4) includes the following wording "any obligation." The tribunal interpreted such a language to encompass contractual obligations and concluded that a narrow interpretation might not be followed to limit the umbrella clause's scope to international and non-contractual obligations.[36] The tribunal further explained that the clause's plain meaning was: "*undoubtedly capable of being read to include a contractual arrangement entered into by BIVAC and the Ministry of Finance of Paraguay, whereby the alleged breaches of the Ministry are attributable to the State.*"

The tribunals validly interpreted the relevant umbrella clauses broadly and did not follow strict interpretation rules, as adopted in SGS v Pakistan. In this vein, I support the argument that should states wish to exclude contractual obligations from the scope of umbrella clauses; the latter should have included a specific and express language limiting its scope or excluding the contractual obligations altogether. In rebutting the tribunal's rationale in Pakistan's case, it explained that the place where the clause in the treaty (i.e., early in the BIT before the obligation on expropriation) gives it *"meaning and practical effect"* to include contractual obligations.[37] This, in our view, does not add a ground to support the tribunal's acceptance of jurisdiction. The location of the clause in the treaty would not have significant importance in deciding whether contractual obligations are covered or not. The interpretation should be guided by the language and terms of the relevant clauses, which are of a general nature and do not include a language limiting its scope.

2.2. ADMISSIBILITY: STAY THE ARBITRATION OR RULING OVER THE MERITS

Having confirmed their *ratione materiae* jurisdiction, the tribunals addressed the second main point; whether the reference to the exclusive jurisdiction of a particular court or tribunal would serve as an admissibility impediment preventing the tribunals from exercising its jurisdiction. The answer differed in the three cases: SGS v Paraguay and Philippines and BIVAC v Paraguay. This section will shed light on the distinct approaches to addressing the admissibility issue while assessing them.

In SGS v Philippines, the agreement includes a dispute resolution clause stipulating that

[32] *Ibid.*, para. 118.
[33] *Ibid.*, para. 115.
[34] Douglas (n. 27), p. 116.
[35] *Ibid.*, p. 118
[36] BIVAC v Paraguay (n. 9), para. 141.
[37] *Ibid.*

contractual claims shall be subject to the jurisdiction of the Courts of Makati or Manilla.[38] In addressing the admissibility of SGS's claim, the tribunal first defined that the dispute relates to the non-payment of SGS's monetary claim.[39] Having concluded that the dispute is subject to exclusive jurisdiction under the subject agreement,[40] the tribunal addressed whether its *ratione materiae* jurisdiction covers contractual claims.[41] In this vein, the tribunal decided to stay its proceedings in favor of the exclusive jurisdiction under the agreement. The tribunal provided various grounds for its reasoning, *inter alia*; i) SGS may not rely on the agreement as the basis of its claim on one hand and decline the exclusive jurisdiction under the agreement on the other hand. In this respect, the tribunal stated that *"SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim."*[42]*;* and ii) the dispute as presented by SGS raises contractual issues that cannot be determined independently under the BIT.[43] The arbitration is prematurely filed as determining the quantum of the claimed amount should be determined first under the agreed contractual mechanism.[44] In respect to the applicable law, the tribunal followed the tribunal in SGS v Pakistan and stated that *"the extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract."*[45]

The tribunal's above approach finds support in jurisprudence. In this vein, scholars developed a theory to deal with this admissibility issue. The tribunals, under this theory, should answer various questions, one leading to the other, before arriving at the final decision.[46] The first question is to determine the source of the claim, whether contractual or treaty-based. If it is contractual, the tribunal should move forward with the second question; whether a *bona fide* or a genuine dispute exists concerning the scope of those contractual rights.[47] The tribunal would *prima facie* examine the dispute's merits to make such a determination. Should the answer to this question be positive, the tribunal should stay the arbitration proceedings in favor of the exclusive jurisdiction in the contract.

The above-noted approach is the most practical one to deal with the conflict between two fora; the judicial/arbitral forum chosen by the parties and the investment arbitration provided for in the treaty. On the one hand, it respects the parties' consensus and maintains the rule of *pacta sunt servanda* as the dispute will be adjudicated by the local law chosen by the parties as opposed to the international law applied by investment tribunals. On the other hand, the adjudication before a local tribunal/court will be under the eyes of the investment tribunal to assure that due process is maintained. If such tribunal/court does not follow the international standards, the investment tribunal will step in by allowing the investor to re-adjudicate her dispute before the said tribunal. This approach would safeguard the parties' interests and ensure that the exclusive jurisdiction under the contract would result in denial of justice. This approach

[38] SGS v Philippines (n.30), para. 16,44.
[39] *Ibid.*, para. 137.
[40] *Ibid.*
[41] SGS v Philippines (n.30), para. 135.
[42] SGS v Philippines (n.30), para. 155.
[43] *Ibid.*, para. 156.
[44] *Ibid.*, para. 163.
[45] *Ibid.*, para. 126:127.
[46] Douglas, Zachary. "Admissibility: Contractual Choice of Forum." Chapter. In *The International Law of Investment Claims*, 371. Cambridge: Cambridge University Press, 2009.
[47] *Ibid.*, p. 372.

was followed in the SGS v Philippines case. Yet, the tribunals in BIVAC and SGC v Paraguay followed different approaches.

In SGS and BIVAC v Paraguay cases, the tribunals held that both disputes passed the jurisdiction test while adopting different approaches in dealing with admissibility. In SGS v Paraguay, under the fear of failing to exercise its mandate under both the BIT and ICSID Convention, it exercised both jurisdiction and admissibility.[48] The tribunal added that if it reaches a different conclusion (i.e., the claim is inadmissible), this means that the selected contractual forum would serve as an implied waiver of treaty rights in investment treaties which provides a different dispute resolution mechanism different from ICSID.[49] On the contrary, BIT's very subject and notion of protecting investors' rights by providing an additional level of protection separate from domestic law regimes.[50] The only scenario where the dispute resolution mechanism under the BIT could be waived is when the contract explicitly provides so. If not, the parties' silence may not be implicitly interpreted as a waiver of the same.[51] The tribunal, unlike SGS v Philippines and Pakistan cases, decided that the dispute would be governed by *"the Treaty and the applicable bodies of law specified under it."*[52]

Yet, in BIVAC, the tribunal found the exclusive jurisdiction forum under the Contract an impediment that would prevent it from adjudicating the dispute. However, it did not follow the tribunal's approach in SGS v Philippines case, wherein it stayed the arbitration pending the finalization of the dispute before the forum provided for under the Contract.[53] Instead, after ruling the inadmissibility of the claim and given the absence of arguments by the parties, the tribunal deferred to the merits stage the answer as to whether it should dismiss the claim under Article. 3(4) or stay the proceedings until the circumstance change.[54] In this vein, the tribunal's rationale could be summarized as follows: i) the states concluded the BIT in 1992, and the Contract was executed later in 1996. Thus, should the parties wish to allow the international tribunal exercising its jurisdiction over contractual claims, the Contract should have included a language allowing an umbrella clause to cover contractual claims.[55] As such, all the contractual claims shall be subject to the exclusive jurisdiction of the tribunal of Asuncion; ii) the parties do not enjoy the freedom to pick and choose the types of contractual claims incorporated into the umbrella clause. The tribunal added that *"[t]o allow BIVAC to choose those obligations it wished to incorporate into the BIT and to ignore others would seriously and negatively undermine contractual autonomy."*[56] iii) BIVAC failed to persuade and provide an explanation to allow the tribunal to determine that *"the fundamental basis of the claim"* was the BIT rather than the contract;[57] iv) the dispute would be resolved by the Tribunals of Asuncion applying the national laws of Paraguay (i.e., the tribunal followed the awards in SGS v Philippines and Pakistan and applied the national law).[58] During the merits phase, the tribunal

[48] SGS Société Générale de Surveillance S.A. v The Republic of Paraguay, ICSID ARB/07/29, Decision of the Tribunal on Objections to Jurisdiction (12 February 2010), para. 34; BIVAC v Paraguay (n.9), para. 142.

[49] *Ibid.*, para. 177.

[50] *Ibid.*, para. 178.

[51] Yannaca-Small, K. "BIVAC BV v Paraguay Versus SGS v Paraguay: The Umbrella Clause Still in Search of One Identity." *ICSID review* 28, no. 2 (2013): 311.

[52] SGS v Paraguay (n.48), para. 173.

[53] BIVAC v Paraguay (n. 9), para. 159.

[54] *Ibid.*, para. 161.

[55] *Ibid.*, para. 145-6.

[56] *Ibid.*, para. 148-9.

[57] *Ibid.*, para. 149.

[58] *Ibid.*, para. 159.

stayed the proceedings initially for three months to allow BIVAC to bring its claim before the Asuncion Courts.[59] The tribunal stated that it would exercise its jurisdiction and hold the claim admissible if the Paraguayan Courts ruled in favor of BIVAC and Paraguay refrained from executing the judgment. Further, the tribunal allowed the parties to submit their reports to the tribunals within six months intervals period.[60]

BIVAC and SGS v Paraguay tribunals concluded that the umbrella clause gives them jurisdiction over contractual disputes. Nevertheless, they adopted two distinct approaches while dealing with admissibility. The tribunal in BIVAC respected parties' autonomy in the dispute settlement and honored the principle of freedom to contract. While the BIVAC's award may appear as opening the door for states (who are usually respondents) to argue the non-admissibility of contractual claims brought under the umbrella clause, the tribunal, by adopting a continuous supervisory function, leaves a room for the tribunal to exercise its jurisdiction depending on the outcome of local remedies as well as the state behavior. On the other side, the SGS tribunal gave weight to the international system of treaty protection and accepted both jurisdiction and admissibility.[61] This decision was motivated by the tribunal's fear of failing to exercise its envisaged mandate under the BIT should it decline jurisdiction.[62] The tribunal explained that if it followed the BIVAC tribunal's rationale on admissibility, it would mean that the dispute resolution clause in the investment contract providing a different forum (i.e., other than ICSID) would serve as an implied waiver of treaty rights.[63] Further, the investment treaties aim to provide an additional international forum to the investor different and independent from the domestic forum. The exclusion of the international forum (ICSID or otherwise) should be achieved through explicit language in a later contract.[64]

CONCLUSION

In summary, it is apparent that no unified position or a *jurisprudence constante* does exist in dealing with the effect of the umbrella clause and whether contractual claims be elevated in the treaty. The tribunal in SGS v Pakistan adopted, among other reasons, a narrow interpretation of the relevant clause and declined its jurisdiction. The tribunals in SGS v Philippines, SGS v Paraguay, and BIVAC v Paraguay avoided the critics addressed to the Pakistan tribunal and exercised *ratione materiae* jurisdiction over the contractual disputes. However, the three tribunals' positions on admissibility differed. The most practical approach that preserves the interest of foreign investors is for the tribunal to adopt an ongoing supervisory rule by staying the arbitration proceedings pending the finalization of the proceedings before the exclusive contractual forum. Such an approach would ensure that investors' interest is not jeopardized and denied justice.

[59] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012), Para. 290.

[60] *Ibid.*, para. 284.

[61] Yannaca (n.51), p. 312.

[62] SGS v Paraguay (n.48), para. 172.

[63] SGS v Paraguay (n.48), para. 177.

[64] *Ibid.*, para. 178.