School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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PAC RIM CAYMAN LLP V. THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/12)

DECISION ON THE RESPONDENT'S JURISDICTION OBJECTIONS

Reported by Fabricio Fortese**
Edited by Ignacio Torterola***

An award rendered on June 1, 2012 by an Arbitral Tribunal constituted in accordance with the ICISD Convention and Arbitration Rules and under the Central American-Dominican Republic Free Trade Agreement and the El Salvador Investment Law.

Tribunal:	V.V.Veeder Esq (President), Professor Dr Guido Santiago Tawil and Professor Brigitte Stern.
Claimant's counsel:	Arif H. Ali, Alexandre de Gramont and Theodore Postner, Esqs. of Weil, Gotshal & Manges LLP, and R. Timothy McCrum, Ian A. Laird, Kassi D. Tallent and Ashley R. Riveira of Crowell & Moring LLP.
Defendant's Counsel:	Lic. Romeo Benajmin Barahona, Fiscal General de la Republica de El Salvador, Mesrs Derek C. Smith, Luis Parada, Tomas Solis and Ms Erin Argueta, of Foley Hoag LLP.

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1. Facts of the Case

The Claimant is Pac Rim Cayman LLC, a legal person organised under the laws of Nevada, USA and wholly owned by Pacific Rim Mining Corporation, from Canada. The Claimant started this arbitration against El Salvador, both on its own behalf and on behalf of its Salvadoran subsidiaries, the "Enterprises": (i) Pacific Rim El Salvador ("PRES") and (ii) Dorado Exploraciones ("DOREX").

The "Enterprises" own certain rights in mining areas located in Las Cabañas and San Vicente, in the northern part of El Salvador.

The Claimant advanced several claims against El Salvador's (i) arbitrary and discriminatory conduct, lack of transparency, unfair and inequitable treatment in failing to act upon the Enterprises' application for a mining exploitation concession and environmental permits following the Claimant's discovery of valuable deposits of gold and silver under exploration licenses granted by the Ministry of Economy (MINEC) for the Respondent; (ii) unlawful expropriation of the investments of the Claimant in El Salvador.

In pursuance of these claims, the Claimant alleged that the Respondent breached obligations under CAFTA[1], Salvadoran Investment Law[2] and other legislation[3].

In these proceedings, the Respondent's Objections to the Tribunal's Jurisdiction comprise four independent grounds: Abuse of Process by the Claimant (Issue A); Ratione Temporis (Issue B); the Respondent's Denial of Benefits under CAFTA Article 10.12.2 (Issue C); and the Investment Law (Issue D). In addition, the Tribunal addressed the Parties' respective claims for Legal and Arbitration Costs (Issue E).

The Republic of Costa Rica and the US Department of State, both as Non-Disputing parties, made a submission[4] regarding the denial of benefits under CAFTA Article 10.12.2. Costa Rica also commented on the definition in CAFTA of an "investor" and "national".

Eight member organizations of La Mesa Frente a la Minería Metálica de El Salvador submitted a written submission under cover of a letter from the Centre for International Environmental Law ("CIEL"), and addressed the following matters: (i) the factual background to the dispute raised by the Claimant in this arbitration proceedings, (ii) whether there exists any "legal dispute" under Article 25 of the ICSID Convention or

[1] CAFTA Article 10.3 (National Treatment); Article 10.4 (Most-Favoured National Treatment); Article 10.5 (Minimum Standard of Treatment); Article 10.7 (Expropriation and Compensation) and Article 10.16.1.(b) (Investment Authorizations).
[2] Article 5 (Equal Protection); Article 6 (Non-Discrimination) and Article 8 (Expropriation).
[3] Salvadoran Mining Law (Articles 8, 14, 19 and 23); Salvadoran Constitution (Article 86), Salvadoran Civil Code (Article 1) and Salvadoran Governmental Ethics Law (Article 4(j)).
[4] Pursuant to CAFTA Article 10.20.2

any "measure" under CAFTA Article 10.1; (iii) whether the Claimant's claim amounts to an abuse of process; and (iv) the Respondent's denial of benefits under CAFTA Article 10.12.2.

2. Legal issues discussed in the decision

2.1. Issue A - Abuse of Process

a. General

The Respondent's position was summarised at the outset of its Post-Hearing Submissions:

"*Pacific Rim Mining Corp., a Canadian corporation, through its wholly-owned shell subsidiary, Pac Rim Cayman, has abused the international arbitration process by changing Pac Rim Cayman's nationality from the Cayman Islands to the United States, and then using this nationality to initiate ICSID arbitration proceedings for a pre-existing dispute and assert claims under CAFTA and the Investment Law of El Salvador as a national of the United States. The consequence of this abuse can only be the dismissal of this entire arbitration.*"[5]

The Tribunal first established its general approach to the question of proof for the purpose of this issue. In this sense, two distinct factors were relevant: (i) the burden of proof and (ii) the standard of proof required to discharge that burden.

Standard of Proof

Having received the Tribunal a substantial mass of evidential materials directed at factual issues, the Tribunal thought it inappropriate to apply to those issues a lesser standard of proof in favour of the Claimant, when the Tribunal could arrive fairly at its decision on a sufficient evidential record to which both Parties have had a full opportunity to contribute and, moreover, have also substantially contributed.

The application of that "prima facie" or other like standard is limited to testing the merits of a Claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case.

The Tribunal therefore decided, in regard to all disputed facts relevant to the jurisdictional issues under CAFTA, not to apply the lesser "prima facie" standard in favour of the Claimant; but, instead, the higher standard of proof applicable to both Parties' cases, whether it be described as the preponderance of the evidence or a standard based on a balance of probabilities. In arriving at this decision, the Tribunal noted that the Respondent's jurisdictional objection based on Abuse of Process by the Claimant did not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming

[5] ¶ 2.20

jurisdiction to exist. For present purposes, the Tribunal considered this to be a distinction without a difference.

Burden of Proof

As far as the burden of proof is concerned, in the Tribunal's view, it cannot be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, the Claimant had to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.

For the purpose of its Decision, the Tribunal adopted a general approach to the Parties' disputed factual allegations whereby all the elements of proof adduced by the Parties are considered by the Tribunal for the purpose of assessing whether the Claimant and the Respondent had discharged their respective burdens to prove their respective cases.

b. The Tribunal's Analysis

The Tribunal found as a relevant fact, that one of the principal purposes of the change in the Claimant's nationality was the access thereby gained to the protection of investment rights under CAFTA and its procedure for international arbitration available against the Respondent. Although the Tribunal accepted that another purpose was to save unnecessary expenses for the Pacific Rim group of companies, the Tribunal found, as a fact, based on the Claimant's own evidential materials, that such a purpose was not the dominant, still less the only, motive for the change. As rightly emphasized by the Respondent, "… Claimant presents no evidence that the costs of maintaining a limited liability company in Nevada are significantly cheaper than being incorporated in the Cayman Islands."[6]

It was not contested between the Parties that the circumstances of this case were decisive as to the time when the relevant measure(s) occurred and the Parties' dispute arose, whether before or after the change in the Claimant's nationality on 13 December 2007.

In order to determine whether the Claimant's change of nationality was or was not an abuse of process, the Tribunal must first ascertain whether the relevant measure(s) or practice took place by El Salvador before or after the change in nationality on 13 December 2007. This approach in turn required the Tribunal to ascertain the legal nature of the relevant measure(s).[7] In order to identify these measures or practice, the Tribunal must necessarily analyse the Claimant's own pleadings. In doing so, the Tribunal considered that the Claimant's case was most clearly pleaded and explained during the Hearing, where it was stated that:

[6] ¶ 2.41
[7] ¶ 2.52

"The measure at issue (…)that is, the measure that is the basis for Claimant's articulation of breaches by Respondent of obligations on the international law plane is the practice of withholding mining-related permits. It is that measure that forms the basis of our claims …"

Accordingly, the Tribunal treated the Claimant's pleaded case as alleging a practice by the Respondent which came to the Claimant's knowledge only with President Saca's reported speech in March 2008 (which announced that he opposed granting any new mining permits). Such practice was alleged to consist of either a continuing or composite act in breach of CAFTA and for which the Claimant claims damages only from March 2008 onwards.

At the end of the Hearing, the Tribunal requested both the Claimant and the Respondent to comment on whether and (if so) when the alleged practice constituted a continuing act or a composite act, as those two terms are used in Articles 14 and 15, respectively, of the ILC Articles on State Responsibility of States and in particular whether the Claimant's pleaded claims were based on alleged conduct by the Respondent that pre-dated the Claimant's change of nationality on 13 December 2007.

The question of identifying precisely when an internationally wrongful act takes place has important consequences on the law of international responsibility; and, as far as it concerns investment arbitration under a treaty, it can directly affect (as here) the exercise of jurisdiction by a tribunal.

In any particular case, three different situations can arise: (i) a measure is a "onetime act", that is an act completed at a precise moment; or (ii) it is a "continuous" act, which is the same act that continues as long as it is in violation of rules in force; or, (iii) it is a "composite" act, that is an act composed of other acts from which it is legally different. These important and well-established distinctions under customary international law are considered in the Commentaries of the ILC Articles on State Responsibility.[8]

Was the relevant measure in the present case a continuous act or a composite act? This is important, if the continuous or composite act extends over a critical date, here the Claimant's change of nationality on 13 December 2007.

As regards a composite act, the ILC Commentaries state: "*In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.*

Paragraph 1 of article 15 defines the time at which a composite act occurs as the time at which the last action or omission occurs …"[9]

The Claimant pleaded that the alleged unlawful practice by the Respondent is a negative practice not to grant any mining application. Also, although there were deadlines fixed

[8] ¶¶ 2.67 – 2.70

[9] ILC Commentaries, pp 63-64

under Salvadoran law for the granting of the permits and the concession, the Claimant understood that the Salvadoran authorities themselves did not treat these deadlines as definitive deadlines after which permits or concessions could no longer be granted to the Claimant at all.

In the Tribunal's view, on the particular facts of this case as pleaded by the Claimant, an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law. The legal nature of the omission did not change over time: the permits and the concession remained non-granted. The controversy began with a problem over the non-granting of the permits and concession; and it remained a controversy over a practice of not granting the mining permits and concession.

Accordingly, the Tribunal determined that the alleged de facto ban should be considered as a continuing act under international law, which: (i) started at a certain moment of time after the Claimant's request for environmental permits and an exploitation concession but before the Claimant's change of nationality in December 2007 and (ii) continued after December 2007, being publicly acknowledged by President's Saca speech in March 2008; or, in other words, that the alleged practice continued after the Claimant's change of nationality on 13 December 2007.

Legal Consequences: What are the legal consequences of the existence of an alleged continuous act overlapping the Claimant's change of nationality? This question touches not only upon the Abuse of Process issue, but also the Ratione Temporis issue.

(i) Abuse of Process

The Tribunal first considered the point in time when a change of nationality can become an abuse of process. In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.

To this extent, the Tribunal accepted that: "... it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration." In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute.

"... the investor has substantial control over the stages of the development of the dispute (…). Because it is the investor who must express disagreement with a government action or omission and the investor who must formulate legal claims, the investor may delay the development of the dispute into these later stages until it has completed the manipulative change of nationality."[10]

[10] ¶ 2.100

(ii) Ratione Temporis

The Tribunal decided that for jurisdiction to exist under CAFTA in the present case ratione temporis, there must be a dispute between the Parties after the application of CAFTA to the Claimant consequent upon its change of nationality on 13 December 2007, based on a continuous act or measure that existed after such date.

The relevant date for deciding upon the Abuse of Process issue must necessarily be earlier in time than the date for deciding the Ratione Temporis issue. Should the alleged practice was a continuous act (as concluded by the Tribunal), this means that the practice had started before the Claimant's change of nationality and continued after such change.

The Claimant's alleged measure (the de facto ban pleaded for its CAFTA claims), was understood by the Tribunal as a continuous act relevant for the Claimant's claims for compensation from March 2008 onwards (not before); As such, the measure became known to the Claimant only from the public report of President Saca's speech on 11 March 2008; and that, also as such, it was not known to or foreseen by the Claimant before 13 December 2007 as an actual or specific future dispute with the Respondent under CAFTA.

2.2. Issue B – Ratione Temporis

a. General

This Ratione Temporis issue was not decisive of the Tribunal's jurisdiction in regard to the Claimant's CAFTA claims. In these circumstances, the Tribunal addressed this issue shortly, as a matter of courtesy to the Parties.

b. The Tribunal's Analysis

The relevant questions to be addressed under this issue were: (i) whether, in order to be an investor making an investment under CAFTA Article 10.28, an enterprise had already to be a national or an enterprise of a Party or if such nationality could be acquired after the investment has been made; (ii) what is the relevant measure and which date should be considered as the date of the measure for the purpose of this issue; and (iii) the relevance to be given by the Tribunal, if any, to the award in the *Commerce Group* arbitration.[11]

(i) The First Question[12]*:* In the Tribunal´s opinion, for the purpose of this Ratione Temporis issue, what CAFTA requires[13] is not that the investor should bear the nationality of one of the Parties before its investment was made, but that such

[11] ICSID Case No. ARB/09/17, Award, 14 March 2011 https://sites.google.com/a/internationalarbitrationcaselaw.com/www/new-cases/commercevelsalvadordecisiononjurisdictionbyfabriciofortese

[12] ¶¶ 3.32 – 3.34

[13] Article 10.28

nationality should exist prior to the alleged breach of CAFTA by the other Party. Therefore, as regards this issue in the present case, the Tribunal was required to determine when the Parties' dispute arose in order to establish if the Claimant's required nationality under CAFTA nationality was present at the relevant time.

(ii) The Second Question[14]*:* The Tribunal determined that the relevant dispute as regards the Claimant's claims (the de facto mining ban resulting from a practice of withholding mining-related permits and concessions) arose on 13 March 2008, at the earliest.

The Tribunal's determination has several consequences for the Ratione Temporis issue. First, as a matter of chronology, at the time the dispute arose in March 2008, the Claimant was a national of the USA, a CAFTA Party (since 13 December 2007). Second, the relevant measure alleged by the Claimant will necessarily focus on unlawful acts or omissions under CAFTA that allegedly took place not earlier than March 2008.

(iii) The Third Question[15]*:* In the Tribunal's opinion, the present case differs from the *Commerce Group* arbitration. The relevant measure here, as opposed to the one in that proceedings, is not a specific and identifiable governmental measure that effectively terminated the investor´s rights at a particular moment in time (i.e. the termination of a permit or license, denial of an application, etc.), but, rather the alleged continuing practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments. Moreover, no legal action against the Respondent had been filed before the local Salvadoran courts by the Claimant. Whilst it will remain for the Claimant to prove its claims at the merits stage of these proceedings, the way the case has been pleaded and clarified by the Claimant before this Tribunal indicates that the distinction made in the *Commerce Group* award was inapplicable to this Ratione Temporis issue.

2.3. Issue C – Denial of Benefits

a. General

This third issue arose under CAFTA Article 10.12.2, which permits (but does not require) a CAFTA Party to: "*... deny the benefits of [Chapter 10 of CAFTA] to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party and persons of a non-Party, or of the denying Party, own or control the enterprise*". (*"*Enterprise" is a broadly defined term under CAFTA Articles 10.28 and 2.1)

As expressly worded in CAFTA, it is significant that the "benefits" denied under CAFTA Article 10.12.2 include all the benefits conferred upon the investor under Chapter 10 of CAFTA, including both Section A on "Investment" and Section B on "Investor-State Dispute Settlement." Section B specifically includes CAFTA Article 10.16(3)(a) providing for ICSID arbitration, as invoked by the Claimant to establish the

[14] ¶¶ 3.35 – 3.38
[15] ¶¶ 3.39 – 3.43

Tribunal's jurisdiction. Therefore, the Tribunal determined that it must interpret the relevant text of CAFTA by itself, in accordance with the relevant principles for treaty interpretation under international law as codified in the Vienna Convention on the Law of Treaties.

The Tribunal approached this issue as to denial of benefits on the basis that it is primarily for the Respondent to establish, both as to law and fact, its positive assertion that the Respondent has effectively denied all relevant benefits under CAFTA pursuant to CAFTA Article 10.12.2.

b. The Tribunal's Analysis

The application of CAFTA Article 10.12.2 required the Respondent to establish two conditions: (i) that the Claimant has no substantial business activities in the territory of the USA (beyond mere form) and (ii) either (a) that the Claimant is owned by persons of a non-CAFTA Party (Canada) or (b) that the Claimant is controlled by persons of a non-CAFTA Party (also Canada, or at least persons not of the USA or the Respondent as CAFTA Parties). In addition, the Tribunal considered whether a third condition is required as to the time by which the Respondent should have elected to deny benefits under CAFTA Article 10.12.2 and, if so, whether that deadline was met by the Respondent in the present case.

***(i) Substantial Business Activities*[16]:** the group of companies of which the Claimant forms part has and has had since December 2007 substantial business activities in the USA. However, in the Tribunal's view, this first condition under CAFTA Article 10.12.2 relates not to the collective activities of a group of companies, but to activities attributable to the "enterprise" itself, here the Claimant.

Accordingly, the relevant question was whether the Claimant by itself had substantial activities in the USA from 13 December 2007 onwards. In the Tribunal's view, the evidence adduced in these proceedings showed only that the Claimant was a passive actor both in the USA and the Cayman Islands both before and after December 2007, with no material change consequent upon its change of nationality.

The location (or non-location) of the Claimant's activities remained essentially the same notwithstanding the change in nationality; and such activities were equally insubstantial.

The Claimant's activities, both in the Cayman Islands and the USA, were principally to hold the shares of its subsidiaries in El Salvador. The Claimant's activities as a holding company were not directed at its subsidiaries' business activities in the USA, but in El Salvador, and it "is more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities."

[16] ¶¶ 4.63 – 4.78

(ii) Ownership/Control[17]: The Claimant is wholly owned by its Canadian parent company, Pacific Rim, a person of a non-CAFTA Party. However, a majority of the shareholders in this Canadian company, both natural and legal persons, reside or at least have postal addresses in the USA. According to the Claimant, this factor is said to result in the Claimant being owned, albeit indirectly, by persons of a CAFTA Party (namely the USA).

In the Tribunal's view, the Respondent was correct in applying CAFTA's Annex 2.1 referring for natural persons as USA nationals to the US Immigration and Nationality Act. That statute's requirements for US citizenship or permanent allegiance to the USA cannot be met by adducing mere US postal addresses for shareholders in the Canadian parent company, even assuming them to be natural persons and however convenient or even appropriate for other domestic purposes.

It follows that the Tribunal found as a fact that the Claimant is owned by Pacific Rim Corporation, a legal person of a non-CAFTA Party. In these circumstances, it was not necessary for the Tribunal to decide the alternative part of this second question as to "control" under CAFTA Article 10.12.2.

(iii) Timeliness[18]: There is no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2.

Given that this was the first denial of benefits by any CAFTA Party under CAFTA Article 10.12.2, denying benefits to the Claimant under CAFTA was a decision requiring particular attention by the Respondent, and it was not apparent that the Respondent deliberately sought or indeed gained any advantage over the Claimant by waiting until 1 March 2010 (as regards notification to the USA) or 3 August 2010 (for its invocation of denial of benefits to the Claimant).

Second, this was an arbitration subject to the ICSID Convention and the ICSID Arbitration Rules, as chosen by the Claimant under CAFTA Article 10.16(3)(a). Under ICSID Arbitration Rule 41, any objection by a respondent that the dispute is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the tribunal "shall be made as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial". In the Tribunal's view, the Respondent has respected the time-limit imposed by ICSID Arbitration Rule 41.

Third, the Tribunal accepted the reasoning in Costa Rica's Submission, based on Article 1 of the ILC Draft Articles on Diplomatic Protection (2006). Article 16 of the ILC Draft Articles distinguishes between diplomatic protection and other actions and procedures. The Tribunal also noted a distinction between diplomatic protection under ICSID Article 27(1) and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of a dispute" under ICSID Article 27(2).

[17] ¶¶ 4.79 – 4.82
[18] ¶¶ 4.83 – 4.91

In the Tribunal's view, the two CAFTA procedures envisaged by CAFTA Articles 18.3 and 20.4 fall short of diplomatic protection under international law. Accordingly, the Tribunal rejected the Claimant's submission based on ICSID Article 27(1).

As regards ICSID Article 25(1), the Tribunal accepted the Respondent's submission to the effect that the Respondent's consent to ICSID Arbitration in CAFTA Article 10.16.3(a) is necessarily qualified from the outset by CAFTA Article 10.12.2. A CAFTA Party's denial of benefits invoked after the commencement of an ICSID arbitration cannot be treated as the unilateral withdrawal of that Party's consent to ICSID arbitration under ICSID Article 25(1).

2.4. Issue D – Investment Law

a. General

The Respondent's independently and alternatively adduced another objection to the effect that the Tribunal lacks jurisdiction under the Investment Law of El Salvador to decide the Claimant's pleaded Non-CAFTA claims.

In the Tribunal's opinion, the Parties' debate under this separate issue could be determined largely as a matter of legal interpretation, where issues as to the standard of proof play no material part. It was, however, ultimately for the Claimant to establish the Tribunal's jurisdiction over its Non-CAFTA claims as a matter of such interpretation.

b. The Tribunal's Analysis

(i) Investment Law[19]

Pursuant to Article 25 of the ICSID Convention, the Centre´s jurisdiction extends to: "any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State which *the parties to the dispute consent in writing* to submit to the Centre" (emphasis supplied).

Article 15 of the Investment Law, provides, in material part: "In the case of disputes arising between foreign investors and the State, regarding their investment in El Salvador, the investors may submit the dispute to: (a) the International Center for Settlement of Investment Disputes (ICSID), in order to settle the dispute (…) in accordance with the Convention on Settlement of Investment Disputes Among States and Nationals of other States (ICSID Convention)".

The Tribunal determined that Article 15 of the Investment Law must be interpreted having regard to the words actually used, interpreted in a natural and reasonable way. In this sense, the Tribunal hold that the wording of Article 15 is clear and unambiguous. It clearly invites foreign investors to decide whether to submit their claims to local courts (Article 15, first paragraph) or to ICSID tribunals (Article 15, second paragraph, (a) and

[19] ¶¶ 5.27 – 5.40

(b)), therefore providing the consent of the Respondent required by Article 25 of the ICSID Convention which the investor can accept.

Nothing in the ICSID Convention establishes the need for specific wording in national legislation or other unilateral acts by which a State consents to ICSID jurisdiction. Consent must be evident and in writing; and, in the Tribunal´s opinion, both requirements were duly met in the present case.

Accordingly, the Tribunal decided that the wording of Article 15 of the Investment Law contains the Respondent's consent to submit the resolution of disputes with foreign investors to ICSID jurisdiction.

(ii) Salvadoran Constitution[20]

With respect to the Salvadoran Constitution[21], the Tribunal did not find it incompatible or inconsistent with the consent provided to ICSID jurisdiction in Article 15 of the Investment Law.

Article 146 of the Salvadoran Constitution allows the Salvadoran State to submit disputes to arbitration or to an international tribunal in treaties or contracts as a qualification to the restrictions made earlier in the Constitution; and it should be read in such context (i.e. what treaties or concession contracts can contain or not).

The Tribunal found no merit in the Respondent's argument that if Article 15 constituted consent, the Claimant's claims were precluded for failing to initiate conciliation before arbitration. The conjunction "and" in Article 15 of the Investment Law can only mean that both dispute settlement mechanisms provided by the ICSID Convention are available to the Claimant. Once consent has been given by the Respondent (as it is in the form of Article 15), it is for the party instituting the proceedings to choose between conciliation and arbitration under the ICSID Convention.

(iii) CAFTA waiver[22]

With regard to the question relating to the CAFTA waiver raised by the Respondent, the Tribunal considered that it fully addressed this same question in its Decision of 2 August 2010[23]; and it here confirmed that answer. In particular, the Tribunal found no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions, here CAFTA and the Investment Law. To the contrary, when consent to the same tribunal´s jurisdiction is contained in two or more instruments, the Respondent's suggestion that different ICSID arbitrations must be commenced under each instrument would render nugatory the natural inclinations of both investors and States for fairness, consistency and procedural efficiency in international arbitration.

[20] ¶¶ 5.41 – 5.44
[21] Article 146 .
[22] ¶ 5.45
[23] ICSID Case No. ARB/09/12, 2 August 2010, ¶¶ 252-253.

(iv) Indivisibility of Arbitration Proceedings[24]

As regards indivisibility, the Tribunal repeated paragraph 253 of its Decision of 2 August 2010:

"In the Tribunal´s view, these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration (…). To decide otherwise would require an interpretation of CAFTA Article 10.18 (2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to a claimant. There is no corresponding unfairness to the Respondent in maintaining these ICSID proceedings as one single arbitration. In particular, the Respondent does not here face any practical risk of double jeopardy. Lastly, it is hardly a legitimate objection to this Tribunal´s competence that it exercises jurisdiction over these Parties based not upon one consent to such jurisdiction from the Respondent but based upon two cumulative consents from the Respondent. It is an indisputable historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent from one disputant party, without being thereby deprived of jurisdiction."

The Tribunal considered that these ICSID arbitration proceedings are indivisible; but it did not consider that the Claimant's claims are indivisible, given the Tribunal's decision to deny any jurisdiction over the Claimant's CAFTA claims. What remained in these proceedings for decision on the merits are the Claimant's non-CAFTA claims and the Tribunal's jurisdiction to decide these claims in this ICSID arbitration cannot be affected by its rejection of the Claimant's CAFTA Claims under this Decision. To this extent, the Tribunal accepted the Claimant's submission that: "… Claimant commenced this proceeding by both invoking CAFTA and the Investment Law, and the Tribunal has already held that this dual invocation of consent did not violate Claimant´s waiver provision. Where the *commencement* of the proceeding did not violate the waiver, it can hardly be imagined that its *continuation* would somehow do so, regardless of which claims go forward and which do not …"200

2.5. Issue E –Legal and Arbitration Costs

a. General

This issue as to costs arose under ICSID Arbitration Rule 28(1) and CAFTA Article 10.20.4 & 10.20.6. It also arises under Paragraph 266(3) of the Tribunal's Decision of 2 August 2010, whereby the Tribunal reserved its powers to order costs under CAFTA Article 10.20.6 until the final stage of these arbitration proceedings.

b. The Tribunal's Analysis[25]

The Tribunal considered that neither the Claimant nor the Respondent can be regarded as having either wholly succeeded or wholly lost their respective cases. Whilst the

[24] ¶¶ 5.46 – 5.47
[25] ¶¶ 6.77 – 6.83

Claimant's CAFTA Claims can no longer proceed in this arbitration as a result of this Decision, the Claimant's Non-CAFTA Claims may proceed to the merits of the Parties' dispute.

In these circumstances, the Tribunal considered that, in the exercise of its discretion under ICSID Arbitration Rule 28(1), the eventual result of these Non-CAFTA Claims on the merits may provide a highly relevant factor to any decision as to the final allocation of legal and arbitration costs between the Parties. As a matter of discretion, the Tribunal declines to make an order at this stage as regards the allocation of any legal or arbitration costs incurred during this second phase of these arbitration proceedings.

3. Decisions of the Tribunal

For the reasons and on the grounds set out above, the Tribunal decided:

(A) As to the Claimant's CAFTA Claims:

(1) to dismiss the Respondent's jurisdictional objections based on the: "Abuse of Process" issue and the "Ratione Temporis" issue;

(2) to accept the Respondent's jurisdictional objections based on the "Denial of Benefits" issue; and

(3) to declare that the International Centre for Settlement of Investment Disputes ("the Centre") and the Tribunal have no jurisdiction or competence to decide such CAFTA Claims pursuant to CAFTA Articles 10.16, 10.17 and ICSID Article 25(1);

(B) As to the Claimant's Claims under the Investment Law, the Tribunal dismissed the Respondent's jurisdictional objections and declared that the Centre and the Tribunal have jurisdiction and competence to decide such Claims pursuant to ICSID Article 25(1);

(C) As to Costs, the Tribunal made no order as to any legal or arbitration costs, whilst specifically reserving in full its jurisdiction and powers as to all orders for costs at the final stage of the arbitration proceedings; and

(D) As to all other matters, the Tribunal retained in full its jurisdiction and powers generally to decide such matters, whether by order, decision or award.