BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pac Rim Cayman LLC,
Claimant.
v.
Republic of El Salvador,
Respondent.

ICSID Case No. ARB/09/12

Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10

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I. INTRODUCTION

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty-one books in my field, six of which focus specifically on international arbitration and adjudication; a seventh, which I edited, focuses on jurisdiction in international law. I have also published a number of articles on ICSID arbitration. In addition to my teaching and scholarship, I have served as Editor in Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International*. I serve as President of the Arbitral Tribunal of the Bank for International Settlements, have served as an arbitrator in numerous international commercial and public arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. With particular reference to investment law, I have served as arbitrator in two NAFTA arbitrations and have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration. A *curriculum vitae* setting forth a complete list of my activities and publications is appended to this opinion.

2. I have been asked by the Government of El Salvador (hereafter "El Salvador") to review the waiver provision in the Dominican Republic-Central America-United States Free Trade Agreement (hereafter "CAFTA"), in the context of a case brought by Pac Rim Cayman LLC (hereafter "PRC") and to express an opinion on an action by PRC which presents a question of first impression. While I will examine the relevant facts later in this opinion, some anticipation of them is necessary in order to understand the issue I have been asked to address.

3. In the case under review here, PRC complains of a particular set of measures of El Salvador, which allegedly violate obligations under CAFTA and the Salvadoran Investment Law. Both CAFTA and the Salvadoran Investment Law arguably permit a claimant (assuming that jurisdiction could be established under either in the facts of this case) to bring its dispute to an ICSID tribunal; however, a CAFTA ICSID tribunal cannot entertain claims arising under the Salvadoran Investment Law because CAFTA jurisdiction *ratione materiae,* under Article 10.16(1)(a)(i), is limited; in addition to violations of CAFTA obligations, a CAFTA tribunal may only entertain claims of violations of investment authorizations (una autorización de inversion) or investment agreements (un acuerdo de inversión) – neither of which appears to obtain in the instant case.

4. In theory, a claimant in PRC's situation might try to invoke another ICSID tribunal that would not operate under CAFTA but only under the Salvadoran Investment Law. PRC could then bring to the non-CAFTA tribunal those of its claims, albeit for the same measures, which it contends had violated the Salvadoran Investment Law. But this theoretical possibility is precluded by CAFTA, for its jurisdiction is, as it were, "monogamous," in that it bars a party which is making a claim for alleged violation of CAFTA obligations (i.e., Section A, investment authorizations or investment agreements) from bringing a claim based on the same measures to another "dispute settlement procedure"; a party seeking CAFTA jurisdiction is required to waive those other claims, for express textual as well as compelling policy reasons which I will explore below. So, faced with what may be described as CAFTA's rule of exclusivity, PRC is required to waive its claims, with respect to the same measures, allegedly arising under the Salvadoran Investment law. PRC has issued the required waiver, but, Article 10.18.2 notwithstanding, it argues that it may still bring its non-CAFTA claims to this CAFTA Tribunal.

5. Now it is clear that for PRC to bring a separate action with respect to the same measures before an "other dispute settlement procedure" would be a violation of its obligations under CAFTA. The question which PRC's

action poses is whether PRC can circumvent the legal consequences of CAFTA's explicit waiver requirement by asserting that the **same** ICSID tribunal can hear both CAFTA and non-CAFTA claims, i.e., that if the "other dispute settlement procedure," which is precluded by CAFTA's waiver requirement, is imported into the same ICSID tribunal, which would ordinarily lack jurisdiction *ratione materiae* over non-CAFTA claims, then CAFTA's waiver requirement, its language notwithstanding, no longer applies. In my opinion, this cannot be done. Consent is the core of jurisdiction in international arbitration; each of the States-parties to CAFTA consented to arbitral jurisdiction with respect to CAFTA obligations subject to a putative claimant's compliance with the waiver requirement. Permitting the circumvention of that waiver requirement, as PRC is trying to do, would fail to honor the limitations of the carefully drafted consent of all the States-parties to CAFTA.

6. A tribunal's jurisdiction for claims arising under CAFTA for alleged governmental measures requires that a putative claimant waive possible claims based on the same measures under non-CAFTA legal instruments. If the waiver requirement set forth in Article 10.18.2 of CAFTA is given its proper effect, the Tribunal must limit its competence exclusively to claims arising from the Treaty itself, the claims presented by PRC allegedly arising

from Salvadoran Investment law having been waived. In the rest of this opinion, I will explain why international law compels this conclusion.

II. SUMMARY OF CONCLUSIONS

7. For the reasons set out in detail below, it is my opinion that:

a. CAFTA, as a treaty, is to be interpreted according to the international canons of interpretation set out in the Vienna Convention on the Law of Treaties[1] (hereafter "VCLT").

b. The VCLT requires that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its [that is, the treaty's] object and purpose."

c. CAFTA Article 10.18.2(b) states, in relevant part and in peremptory terms, that "[n]o claim may be submitted to arbitration under [Article 10.16.1(a)] unless . . . the notice of arbitration is accompanied . . . by the claimant's written waiver … of any right to initiate . . . **before any . . . other dispute settlement procedures**, any proceeding with respect to any

[1] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 International Legal Materials 679 [hereafter VCLT].

measure alleged to constitute a breach referred to in Article 10.16." (Emphasis added)

d. Pursuant to CAFTA Article 10.18.2(b)(ii), PRC's letter of June 4, 2009 has waived its right to initiate **any** proceeding with respect to **any** measure alleged to constitute a breach referred to in Article 10.16. By operation of that waiver, PRC has waived such claims as it may have had arising under the Salvadoran Investment Law.

e. The ordinary meaning of Article 10.18.2(b) in its context and in the light of its object and purpose is clear. PRC's waiver as required by that provision precludes it from bringing the non-CAFTA claims for the same measures, regardless of whether those claims are heard concurrently before the same tribunal.

f. PRC insists on its right to bring, for the same alleged measures, a CAFTA claim and a claim for another dispute settlement procedure before this Tribunal, thus violating the terms of its own purported waiver.

g. By a proper application of the waiver and as necessitated by CAFTA Article 10.18.2, this Tribunal should, therefore, dismiss, with prejudice, all of PRC's claims arising from the Salvadoran

Investment Law which are based on the same measures as its CAFTA claims.

III. RELEVANT FACTS

8. On April 30, 2009, PRC filed a Notice of Arbitration with ICSID under the following heading:

> IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, THE CENTRAL AMERICA – UNITED STATES – DOMINICAN REPUBLIC FREE TRADE AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR

9. PRC alleges conduct of El Salvador's "failing to act upon the [PRC's] Enterprises' application for a mining exploitation concession and for various environmental permits following PRC's discovery of valuable deposits of gold and silver under exploration licenses granted by MINEC, as well as El Salvador's failure to protect Claimant's investments in accordance with the provisions of its own law, and its expropriation of Claimant's and the Enterprises' investments."[2]

10. PRC bases its claims on the provisions of both CAFTA and the Investment Law of El Salvador, alleging that, through the above measures,

[2] NOA. paras. 26 and 91.

"El Salvador has breached its obligations under Section A of Chapter 10 of CAFTA, including the following provisions:" National Treatment, Most-Favored-Nation Treatment, Minimum Standard of Treatment, and Expropriation and Compensation.[3] Pursuant to CAFTA Article 10.16.1(b)(i)(B), PRC also claims, "El Salvador has breached the express and implied terms of the Enterprises' investment authorizations, including, without limitation, all resolutions issued by MINEC in relation to the investments in El Salvador."[4]

11. Regarding the alleged breaches of the Investment Law, PRC asserts that, in addition to the alleged CAFTA violations, "[T]he Government's conduct violates Articles 5 (equal protection), 6 (non-discrimination), and 8 (compensation for expropriation) of the investment law."[5] PRC also alleges further breaches of other various laws of El Salvador.[6] It will be noted that PRC's claims under both procedures are based upon the same alleged measures of El Salvador.

12. PRC's initial waiver, as required by CAFTA Article 10.18(2)(b)(ii), was dated April 23, 2009 and attached to its Notice of Arbitration as "Exhibit 1." It stated, in pertinent part:

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[3] NOA. para. 88.
[4] *Id.* para. 89.
[5] *Id.* at para. 90.
[6] *Id.*

> Pursuant to Articles 10.18(b)(i) and 10.18(b)(ii) of CAFTA, the Investor waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of the Republic of El Salvador ("El Salvador") that are alleged, in the Investor's Notice of Arbitration and served contemporaneously on El Salvador, to be a breach referred to in Article 10.16 of CAFTA, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages (except, to the extent applicable, of the costs of such proceedings), before any administrative tribunal under the laws of El Salvador.

13. On May 27, 2009, the ICSID Secretariat wrote to PRC, requesting, in relevant part:

> 4. Pursuant to CAFTA Article 10.18.4, confirmation that the PRC, PRES and DOREX have not previously submitted the same alleged breach to: i) an administrative tribunal of El Salvador; ii) a court of El Salvador; or iii) to any other binding dispute settlement procedure, for adjudication or resolution.
>
> 5. Pursuant to Annex 10-E (1) and (2) of CAFTA, confirmation that PRC, PRES and DOREX have not initiated a proceeding before a court or administrative tribunal of a Central American Party or the Dominican Republic regarding the breaches of an obligation of Section A of Chapter 10 of CAFTA, included in the Request for Arbitration.
>
> ...
>
> We would appreciate receiving:
>
> a) A copy of PRES and DOREX' written waivers, as provided for by CAFTA Article 10.18.2(b)(ii).
>
> b) Clarification of the impact, if any, of the variation in the language of CAFTA Article 10.18.3 as contained in the [waiver letter dated April 23].

14. On June 4, 2009, PRC submitted another letter, stating, in relevant part:

> In response to your communication of May 27, 2009 requesting information in regard to Pac Rim Cayman LLC's ("PRC" or "Claimant") Notice of Arbitration dated April 30, 2009 ("Notice of Arbitration"), we respectfully submit the following:
>
> ...
>
> 4. Pursuant to CAFTA Article 10.18.4 and further to Paragraph 23 of PRC's Notice of Arbitration, PRC, through the undersigned counsel, hereby confirms that neither PRC, PRES, nor DOREX has previously submitted the same alleged breach to: (i) an administrative tribunal of El Salvador; (ii) a court of El Salvador, or (iii) to any other binding dispute settlement procedure, for adjudication or resolution.
>
> 5. Pursuant to Annex 10-E (1) and (2) of CAFTA, PRC, through the undersigned counsel, hereby confirms that neither PRC, PRES nor DOREX has initiated a proceeding before a court or administrative tribunal of a Central American Party or the Dominican Republic regarding the breaches of an obligation under Section A of Chapter 10 of CAFTA, included in the Notice of Arbitration.

15. In that letter PRC also requested that its April 23, 2009 waiver regarding CAFTA Article 10.18.2(b)(ii) be superseded by an amended letter which contained roughly the same language.

16. On January 4, 2010, El Salvador submitted preliminary objections seeking the dismissal of all claims related to the application for a mining exploration concession in the El Dorado project, as well as the dismissal of

other secondary claims under CAFTA, and the dismissal of all non-CAFTA claims. It is solely the last issue on which I have been asked to opine.

17. On February 26, 2010, PRC submitted its response to El Salvador's preliminary objection, addressing in paragraphs 200-216 El Salvador's objections with respect to PRC's failure to comply with CAFTA Article 10.18(2)(b)(ii). I will examine the contentions of each of the parties in their submissions below.

IV. THE PRINCIPLES OF TREATY INTERPRETATION REQUIRED BY INTERNATIONAL LAW

18. Since this is an issue that turns on the interpretation of a treaty (a point on which both parties agree), it will be useful to briefly restate the canons of interpretation in international law. The importance of these rules and their centrality to the stability of the regime of international agreements cannot be overstated, for no matter how much care parties may take in expressing with precision their commitments, the predictability of their commitments depends upon commonly accepted rules of interpretation and, equally important, correct application of those rules by those called upon to construe the commitments in question. Thus, just as treaties facilitate cooperative behavior by stabilizing expectations with respect to reciprocal rights and

duties, the rules of interpretation of treaties are designed to ensure that those stabilized expectations are respected.

19. International law's canons for interpreting international agreements have been codified in the VCLT. Those canons have been held by the International Court of Justice to constitute customary international law,[7] and other international tribunals as well as national courts regularly rely on the Convention to determine traditional rules on the law of treaty interpretation.[8] For all their universal acceptance, the VCLT's interpretation provisions have become something of a *clause de style* in international arbitral awards; they are often briefly referred to or solemnly reproduced verbatim, and then largely ignored. A failure to apply the rules of interpretation perforce distorts the resulting interpretation of the parties' agreement and is a species of the application of the wrong law within the meaning of Article 52 of the ICSID Convention.

20. The VCLT has two major provisions on interpretation and I propose to examine the parts which are relevant to the question at hand. The first, Article 31, bears the title or *chapeau* "General rule of interpretation"; the

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[7] *See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) I.C.J. Rep. 1971, 47, and *GabCikovo-Nagymaros Project (HungarylSlovakia),* Judgment, I. C. J. Reports 1997, p. 7, at 35.

[8] *See, e.g., Opel Austria GmbH v. Council of the European Union*, [1997] E.C.R. II-43, 70, and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993).

second, Article 32, bears the *chapeau* "Supplementary means of interpretation." It is clear from the respective *chapeaux* and the mandatory character of the word "rule" in Article 31, as opposed to the subordinate language of the word "means" in Article 32, that Article 31 is dominant here, while Article 32 is auxiliary or supplemental to Article 31.

21. Even though Article 31 is a long and complex provision, its *chapeau* uses the singular, "rule," rather than the plural, "rules," thereby importing that its contents are both mandatory *and* integrated. The provision provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its [that is, the treaty's] object and purpose."[9] The method here is quite clear and can be summarized in tabular fashion:

> First, a good faith interpretation is to be made of the *ordinary* meaning of the terms of that part of the text in dispute, unless, as the fourth paragraph of Article 31 adds, "it is established" that the parties intended to give a term a "special meaning." Note that the default presumption is "ordinary meaning."
>
> Second, the *universe* of ordinary meanings to which the interpreter is instructed to repair, its "context," is the **text** of the

[9] VCLT, Art. 31(1).

rest of the treaty; other treaties of **all** of the parties to the treaty under construction; and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." Context requires construction of a particular part of a treaty with reference to the rest of that treaty and precludes focusing only on a single word or phrase; that type of refraction would, quite literally, "take it out of context."[10] The point of emphasis is that for the interpreter who is governed by the VCLT, context does not mean what it means to scholars, for whom the term may mean everything and anything they can unearth.

Third, object and purpose are to be used to illuminate the interpretation but it is the object and purpose as expressed **in the treaty** and not the subjectivities of the parties, whatever the

[10] In its Commentary to this provision, the Commission stated: "Once it is established—and on this point the commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned." Yearbook of the International Law Commission (YBILC) 2001, vol. II, p. 220, para. 9. The International Court of Justice confirmed in 1991 in Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." The Court stated as an implied corollary to this rule that "[w]here such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." See ICJ Reports, 1991, p.69

word "subjectivities" may mean when we deal with complex political creations such as states.

22. The VCLT's canon thus emphasizes the text of the instrument as the critical part of the interpretative exercise. The text must be subjected to a rigorous examination in the context of the entire treaty, using the modalities set out in Article 31.

23. In contrast to the mandatory methodology of Article 31, the language of Article 32 is facultative and contingent. It **permits** recourse to "supplementary means of interpretation, including the preparatory work of the treaty," the *travaux préparatoires* "and the circumstances of its conclusion" in order to determine a provision's meaning. But this recourse may be exercised only where the application of Article 31 (i) "leaves the meaning ambiguous or obscure"; or (ii) "leads to a result which is manifestly absurd or unreasonable"; or (iii) "to confirm the meaning resulting from the application of article 31."[11] Note that the recourse to *travaux* under (iii) is for the purpose of confirming the meaning resulting from the application of Article 31; it is not for the purpose of displacing that meaning. Article 32 is, thus, not only supplementary to Article 31, but, in contrast to Article 31, contingent. Decision makers seized with a dispute are first obliged to

[11] VCLT *A*rt. 32.

construe the ordinary meaning of the text in application of Article 31,[12] and are permitted to resort to supplementary means only if one of the contingencies specified in Article 32 is met.

24. Article 31 imposes on interpreters, as part of the "General Rule," an obligation of good faith. Surely that obligation follows the interpreter into Article 32. The point is of especial relevance with respect to the contingencies for bringing Article 32 into operation. The text which has been interpreted by application of Article 31 must still be ambiguous, obscure or absurd before the interpreter may proceed to Article 32. It would be bad faith to pretend that a text is ambiguous or obscure in order to open the door to *travaux* and then to rummage about for something to support a litigating position, when the application of the canons of Article 31 would produce an unambiguous interpretation, which is neither absurd nor unreasonable.

25. There are good reasons for an emphasis on texts as the proper international legal mode of treaty interpretation. The subjective views of a state are usually imagined and, even then, they are changing. And, *a fortiori* in multilateral treaties, where the quest for the "shared" subjectivities of the

[12] See *Methanex Corp. v. United States*, First Partial Award on Jurisdiction and Admissibility, Aug. 7, 2002 (UNCITRAL), paras. 19-21.

many states involved in any place other than in the text of the agreement is a pursuit of the *ignis fatuus*. It is the *text* which is the expression of the parties' shared subjectivities and it is in the text that the objects and purposes are to be found.

V. INTERPRETATION OF CAFTA ARTICLE 10.18.2

26. In light of the international law canon for treaty interpretation, one must look first to that part of the text of the treaty at issue, in its context, as that term is used in the VCLT, in order to determine its meaning. CAFTA Chapter 10 Section B bears the title "Investor-State Dispute Settlement." Article 10.16.1 of CAFTA stipulates the types of claims that can be brought to arbitration under the dispute settlement provisions of the Treaty. Sections (A), (B) and (C) of Article 10.16(1)(a) and (b) provide that a claimant, on its own behalf or on behalf of an enterprise, may submit to Arbitration under Section B of CAFTA (Investor-State Dispute Settlement), a claim that the respondent has breached an obligation under Section A ("una obligación de conformidad con la Sección A"),[13] an investment authorization ("una autorización de inversión"), or an investment agreement ("un acuerdo de

[13] Section A of CAFTA contains the substantive protections afforded to foreign investors: National Treatment; Most-Favored Nation Treatment; Minimum Standard of Treatment; Treatment in Case of Strife; Expropriation and Compensation; Transfers (the rights thereof); Performance requirements; and Senior Management and Boards of Directors.

inversión"). Therefore, only claims for those specified breaches of CAFTA may be submitted to arbitration.

27. Article 10.18, which is a key part of the "context" within the meaning of VCLT Article 31, bears the title "Conditions and Limitations on Consent of Each Party," thus clearly locating the issues included there, the most extensive of which being waiver, at the very core of the jurisdiction of any tribunal convened under CAFTA. Article 10.18 establishes three "conditions and limitations on consent." All of these conditions are manifestly directed at ensuring fairness for the respondent state by leveling the playing field. Paragraph 1 establishes a three-year statute of limitations for claims; without such a limitation, a respondent state might be presented with a claim long after the evidence necessary for a defense is no longer available. Paragraph 2, to which I will return to examine its text in more detail, requires the would-be claimant not only to consent to arbitration under CAFTA but to waive other actions against the respondent state which are based on the same measures as any of its CAFTA claims; without this provision, a claimant could harass a respondent state by mounting multiple attacks against it. Paragraph 3, which is, in effect, a corollary to paragraph 2, clarifies that the waiver does not apply to exclusively conservatory actions pursued before other instances which may be pursued during the pendency of the

arbitration. Paragraph 4 bars a would-be claimant from pursuing a CAFTA claim for breach of an investment authorization or investment agreement if it has already submitted a claim for the same alleged breach "to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure" ("ante un tribunal administrativo o judicial de la Parte demandada, o a cualquier otro procedimiento de solución de controversias vinculante, para adjudicación o resolución").

28. All of the paragraphs of CAFTA Article 10.18 are conditions and limitations on consent which function, as I noted, as protections for the respondent State. They are important procedural safeguards, because the arbitration system under CAFTA consigns the state to the status of respondent, without any express opportunity for bringing claims against the investor. The State is always, as it were, a "sitting duck," so the fairness of an arbitration system requires that special protections against abuses be made available to it. As such, these protections are illustrative of a more general policy of all law, expressed in maxims such as *ne bis in idem*, *lis alibi pendens*, *abus de droit,* etc. These maxims are applied in both public and private international law, on both the civil and criminal sides, to address both the problem of potentially contradictory judgments – which would be likely to occur if the same dispute were decided by different courts or

tribunals – and to prevent a party from being held liable for the same measures more than once.[14] Equally important, they prevent claimants from exploiting legal process to harass another party by seeking to litigate the same measures or actions through multiple instances.

29. The policies expressed in these various maxims no doubt informed the text of Article 10.18.2, under which, in order to initiate an arbitration under CAFTA, a claimant is required to accompany its notice of arbitration with certain written waivers prescribed in Article 10.18.2. It is for that reason that PRC submitted to the Tribunal a waiver containing the following language:

> Pursuant to Articles 10.18(2)(b)(i) and 10.18(2)(b)(ii) of CAFTA, PRC waives its rights to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceeding with respect to any measure alleged in PRC's Notice of Arbitration . . . to constitute a breach referred to in Article 10.16. of CAFTA.

30. In order to understand the implications of PRC's waiver, it is necessary to plumb the meaning of Article 10.18.2 (b). It provides:

> No claim may be submitted to arbitration under [Section B] unless: ... the notice of arbitration is accompanied ... by the

[14] The principle that a party should not be judged more than once for the same claims is expressed in the maxim *ne bis in idem*, or *bis de eadem re non sit actio*. Comparably, *lis alibi pendens* permits a court to refuse to exercise jurisdiction if there is parallel litigation pending in another jurisdiction. *See, e.g.*, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 337 (1953).

> claimant's written waiver ... (i) of any right to initiate or continue before (ii) any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, (iii) any proceeding with respect to (iv) any measure alleged (v) to constitute a breach referred to in Article 10.16. (Numbers added)
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> (Ninguna reclamación podrá someterse a arbitraje conforme a [la Sección B] a menos que: . . . la notificación de arbitraje se acompañe . . . de la renuncia por escrito del demandante a las reclamaciones sometidas a arbitraje . . . de cualquier derecho a iniciar o continuar ante cualquier tribunal judicial o administrativo conforme a la ley de cualquiera de las Partes, u otros procedimientos de solución de controversias, cualquier actuación respecto de cualquier medida que se alegue ha constituido una violación a las que se refiere el Artículo 10.16.)

The language of the provision, in both English and Spanish, is intentionally broad, repeatedly using the adjective "any" or "cualquier." The waiver must relate to "**any** proceeding with respect to **any** measure alleged to constitute a breach referred to in Article 10.16." The waiver must encompass "**any** right to initiate . . . before **any** administrative tribunal or court under the law of **any** Party, or other dispute settlement procedures ...."

31. Note that "procedures" in Paragraph 2 is plural and may be contrasted with paragraph 4, which narrows the reach of the term by requiring that the dispute settlement procedure be "binding" and be "for adjudication or resolution." Paragraph 4 provides, in relevant part,

> No claim may be submitted to arbitration . . . if the claimant . . .has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other *binding* dispute settlement procedure, for adjudication or resolution. (Emphasis supplied)
>
> (Ninguna reclamación podrá someterse a arbitraje . . . si el demandante. . . ha[n] sometido previamente la misma violación que se alega ante un tribunal administrativo o judicial de la Parte demandada, o a cualquier otro procedimiento de solución de controversias vinculante, para adjudicación o resolución.)

Paragraph 2, by contrast, would include not only binding procedures, but also political procedures in which the respondent State might be compelled to participate. Note also that while the phrase "administrative tribunal or court" describes national entities ("under the law of any party"), "other dispute settlement procedures" are not qualified as national; the latter phrase is all encompassing and includes national and international instances.

32. No arcane special meaning is being used by the drafters of CAFTA here; the objects and purposes are apparent. Given the clarity of the language of Article 10.18.2, there is, thus, no warrant for resorting to *travaux*; the ordinary meaning of the text is pellucid. The drafters of CAFTA intended to preclude multiple actions with respect to claims relating to the same measures wherever those claims might be brought. In order to secure this objective, the critical part of the preclusion is not the venue ("any" venue) where the claim based on the same measure is brought but the claim itself.

Hence the repetitive language: to preclude claimants from initiating or continuing *any* proceeding before *any* instance with respect to *any* measure alleged to constitute a breach referred to in Article 10.16.

33. It seems clear to me that this must apply to proceedings brought before the same tribunal. Had the drafters wished to create an exception to the waiver, they would have qualified the breadth of the language used and included restrictive language. Such a reading of the text is ineluctable, given both the way the plain language reads and because the obvious purpose of Article 10.18.2(b) is to prevent the multiplication of proceedings based on the same measures and to avoid the *risks* associated therewith – e.g., double jeopardy, added costs and harassment of respondents, to name just a few.

34. Moreover, the fact that El Salvador's own Investment Law arguably permits dispute resolution through ICSID arbitration can have no bearing on the interpretation of CAFTA Article 10.18.2; what is decisive here is the language of CAFTA itself. While the VCLT admits other instruments prepared by **both** parties to a treaty as probative of their shared intention,[15] an instrument prepared by solely one of them is not.

VI. COGNATE PRACTICE AND JURISPRUDENCE

[15] VCLT Article 31(3)(a).

35. The waiver requirement in CAFTA Article 10.18 has the same object and purpose as does the waiver requirement in NAFTA Article 1121, a conclusion drawn by *Railroad Development Corporation v. Guatemala*, the only decision to date interpreting Article 10.18 of CAFTA. In that case, the tribunal dismissed all claims which had also been brought in parallel, local arbitral proceedings, hearing only those which arose out of measures unique to the CAFTA arbitration. Regarding the waiver requirement, the tribunal stated, "[i]t is evident that CAFTA Article 10.18 and NAFTA Article 1121 have the same general rationale and purpose."[16] Indeed, it is widely understood that "[t]he purpose of the investor's waiver [in Article 1121] is to prevent a multiplicity of actions and duplication of remedies,"[17] as well as forum shopping and double jeopardy.[18]

36. The tribunal in *Waste Management I* also found that the object and purpose of the waiver provision of NAFTA is to avoid such risks. In that case, a U.S. waste disposal company filed claims against Mexico under the ICSID Additional Facility Rules alleging breaches of NAFTA Articles 1105 and 1110. But because the company had violated the terms of its waiver as

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[16] *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Decision on Objections to Jurisdiction CAFTA Article 10.20.5., of November 17, 2008, para. 73 (*RDC*).

[17] Investment Disputes under NAFTA, An Annotated Guide to Chapter 11, Kinnear, Bjorklund, et al. (2006).

[18] Canada's NAFTA Article 1128 submission in *Waste Management I . Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2).

required by Article 1121 by initiating proceedings in Mexican national courts for claims arising from the same measures, the Tribunal dismissed the company's case for lack of jurisdiction. In contrast to the dissenting opinion of Mr. Highet, the tribunal found that the waiver in NAFTA Article 1121 applied to both claims against Mexico under Mexican law and claims against Mexico under international law:

> [W]hen both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.[19]

Double indemnity would not have been the only cost, for even if the respondent state had evaded that consequence, it would still have had to bear the considerable costs involved in defending itself twice for the same matter.

37. Because the tribunal in *Waste Management I* did not have any authority over the parallel proceedings which had already been initiated in the Mexican court system, it had no alternative but to dismiss the arbitration altogether due to the claimant's failure to comply with the terms of its waiver. That is not the situation in the present case, where the Tribunal can

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[19] *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Arbitral Award of June 2, 2000 at para. 27. http://www.economia.gob.mx/pics/pages/5500_base/III_Waste_Management_Inc__20080603.pdf.

simply dismiss those claims which are improperly before it, because they have been waived by the claimant in its formal instrument of waiver.

38. In light of the ordinary meaning of the text of Article 10.18.2, coupled with the understanding that the provision is CAFTA's analogue to NAFTA Article 1121, it is clear that the object and purpose of CAFTA's waiver requirement is to avoid the costs and inequities associated with a multiplication of proceedings which derive from the same measures. Whether these costs and inequities may or may not materialize, or whether a tribunal may administer a case so as to reduce those risks, is irrelevant because jurisdiction for non-treaty claims arising from the same measures as those to which the Treaty applies is precluded by the clause's text, object and purpose.

39. Similarly irrelevant is the practice of any BIT which does not contain a waiver requirement similar to that presented in CAFTA Article 10.18.2. In its response to El Salvador's Preliminary Objections, PRC presents what can only be described as a far-fetched argument. It essentially argues that, because two other investor-state arbitrations which were brought under their respective BITs and arising from the same measures, may have been predicated on more than one law, the CAFTA Tribunal in this case should not be bound by Article 10.18 to dismiss PRC's Salvadoran Investment Law

claims as barred by PRC's waiver. Specifically, PRC cites to *Rumeli v. Kazakhstan*[20] and *Duke Energy v. Ecuador*[21] in an effort to demonstrate instances where tribunals have accepted concurrent jurisdiction over BIT claims and local investment law claims arising from the same measures.

40. The specific factual details of *Rumeli* and *Duke Energy* need not be set out for purposes of an analysis of the jurisdictional matters before this Tribunal. Suffice it to say that in *Rumeli,* there was no real controversy over the application of Kazahkstan's national law; the respondent itself wanted its own law to apply by operation of ICSID Article 42(1). Moreover, one must not forget that *Rumeli* was a case arising out of the 1995 Turkey-Kazakhstan BIT and it does not contain a waiver clause such as that in CAFTA. Without such a clause, it is difficult to see the relevance of *Rumeli* to the case under discussion.

41. Nor does the U.S-Ecuador BIT, on which *Duke Energy* was predicated, contain a waiver clause. Unlike the case before us, the claimant in *Duke Energy* would have been permitted to bring separate, parallel proceedings to address both types of its claims – those arising out of the

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[20] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kasakhstan*, ICSID Case No. ARB/05/16, Award dated 21 Jul. 2008.

[21] *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award dated 12 Aug. 2008.

arbitration agreement and those brought under the BIT. Because it was not precluded from bringing parallel claims arising out of the same measures as its BIT claims, it was simply a matter of judicial economy for both sets of claims to be handled in the same arbitration. Indeed, the tribunal noted that the respondent did not "generally oppose the submission of these claims [arising out of the arbitration agreement] to ICSID proceedings under the BIT. It merely objects to their submission in this arbitration."[22] That is not the situation in the instant case, where the claimant is explicitly precluded from bringing non-CAFTA claims arising from the same measures in *any* proceeding, and where a CAFTA tribunal is not competent, *ratione materiae*, to entertain such claims.

42. I should also note that while the arbitration agreement in *Duke Energy* did contain some form of an exclusion clause in its Paragraph 12, which the tribunal examined cursorily,[23] the crux of the tribunal's decision was that it is the content of the parties' consent which determines whether concurrent jurisdiction is or is not permissible. The tribunal's decision, then, turned on its interpretation of Paragraph 12 of the arbitration agreement and whether it contained a specific expression of waiver:

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[22] *Duke Energy* at para. 161.
[23] *See Duke Energy* at para. 158.

> The Tribunal finds that the fact that the parties agreed to submit some of their investment disputes to ICSID arbitration in the Arbitration Agreement, does not in and of itself preclude the Claimants from availing themselves of the Treaty for additional claims outside the scope of the Arbitration Agreement. **It is true that the situation would be different had the Claimants specifically waived their right to invoke the Treaty.** However, such a waiver … would have to be explicit and this is not the case.[24] (Emphasis added)

While the tribunal does not provide enough reasoning for me to comment on its interpretation of Section 12 of the arbitration agreement, I agree with the tribunal's view that whether or not concurrent jurisdiction is permissible depends on the consent of the parties. That is why, as noted above, the waiver provision is lodged in Article 10.18, whose rubric is "Conditions and Limitations on Consent of Each Party"; consent – and its conditions and limitations – is at the very heart of the jurisdiction of every international tribunal. With that standard in mind, can one say that CAFTA Article 10.18.2 is anything less than clear, indeed clear beyond peradventure of doubt?

VII. CONCLUSION

43. As I have already discussed, Article 10.18.2 leaves no doubt that the waiver requirement is intended to preclude a claimant from initiating or

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[24] *Id.* at para. 159.

continuing *any* proceeding before *any* instance with respect to *any* measure alleged to constitute a breach referred to in Article 10.16. If the drafters had wished to confine the waiver's application to parallel or future proceedings, they would have included language to that effect. Instead, the use of the word "any" indicates that the drafters did not intend to create an exception permitting an assortment of claims arising from the same measures before the same tribunal. To assume as much would be a drastic deviation from the plain text of Article 10.18.2.

44. Article 10.18.2 essentially prescribes that a claimant must choose between bringing claims under CAFTA or bringing claims under another legal regime—but it is not allowed two bites at the apple once the claimant has elected to initiate a CAFTA proceeding. In other words, if PRC were to have initiated an arbitration based solely on El Salvador's Investment Law, without raising any CAFTA claims arising from the same measures, there would be no need for this opinion. But, by initiating an investment arbitration under the procedures set forth in CAFTA, PRC is subject to the waiver requirement. If the waiver is merely limited to parallel or future proceedings, claimants will inevitably do what PRC has done; they will bring non-CAFTA claims before the same arbitral tribunal and successfully circumvent the waiver altogether. To incentivize such a policy by allowing

PRC to achieve its objective in the current case would run counter to the text, context, object and purpose of Article 10.18.2.

45. The text of Article 10.18.2 is clear; if a claimant wishes to bring an arbitration against a State party to CAFTA for an alleged violation of any of the Treaty's terms, it must waive its right to initiate any other claim which arises from the same measures – whether such claim is brought before another judicial body simultaneously or in the future, or concurrently before the same tribunal. It may not evade the clear purport of the text by taking the prohibited parallel procedure and bringing it "in house," as it were.

46. PRC agreed in writing, pursuant to Article 10.18.2 of CAFTA, to waive "its rights to initiate or continue before *any* administrative tribunal or court or other dispute settlement procedure… *any* proceeding with respect to *any* measure alleged in PRC's Notice of Arbitration to constitute a breach referred to in Article 10.16. of CAFTA." Legally, that waiver should have terminated whatever claims PRC believed it had under the Salvadoran Investment law. PRC's contention that it is permitted to present claims to this Tribunal which derive from El Salvador's Investment Law, but which are based on the exact same measures as those which give rise to its treaty claims contravenes Article 10.18.2.

47. For the above reasons, it is my opinion that

a. CAFTA, as a treaty, is to be interpreted according to the international canons of interpretation set out in the Vienna Convention on the Law of Treaties.

b. The VCLT requires that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its [that is, the treaty's] object and purpose."

c. CAFTA Article 10.18.2(b) states, in relevant part and in peremptory terms, that "[n]o claim may be submitted to arbitration under [Article 10.16.1(a)] unless . . . the notice of arbitration is accompanied . . . by the claimant's written waiver ... of any right to initiate . . . **before any . . . other dispute settlement procedures**, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16." (Emphasis added)

d. Pursuant to CAFTA Article 10.18.2(b)(ii), PRC's letter of June 4, 2009 has waived its right to initiate **any** proceeding with respect to **any** measure alleged to constitute a breach referred to in Article 10.16. By operation of that waiver, PRC has waived such

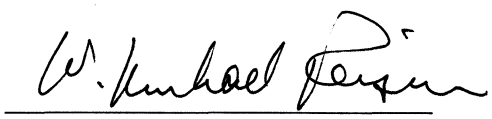
claims as it may have had arising under the Salvadoran Investment Law.

e. The ordinary meaning of Article 10.18.2(b) in its context and in the light of its object and purpose is clear. PRC's waiver as required by that provision precludes it from bringing the non-CAFTA claims for the same measures, regardless of whether those claims are heard concurrently before the same tribunal.

f. PRC insists on its right to bring, for the same alleged measures, a CAFTA claim and a claim for another dispute settlement procedure before this Tribunal, thus violating the terms of its own purported waiver.

g. By a proper application of the waiver and as necessitated by CAFTA Article 10.18.2, this Tribunal should, therefore, dismiss, with prejudice, all of PRC's claims arising from the Salvadoran Investment Law which are based on the same measures as its CAFTA claims.

Respectfully submitted,



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Summary Resume

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Born April 23, 1939, Philadelphia, PA; educated, Philadelphia public schools; Central High School, 1956; B.A. Johns Hopkins University, 1960; LL.B. summa cum laude, Faculty of Law, Hebrew University, Jerusalem, Israel, 1963; Diplôme en Droit Comparé (Premier Cycle), Faculté Internationale pour l'enseignement de droit comparé (Strasbourg), 1963; LL.M. Yale Law School, 1964; Admitted, Connecticut Bar, 1964; J.S.D. Yale Law School, 1965; Research Associate, Yale Law School, 1965; Fulbright Scholar, The Hague, The Netherlands, 1966-67; Associate Professor, Yale Law School, 1969; Professor, Yale Law School, 1972-82; Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School, 1982-98; Myres S. McDougal Professor of International Law, 1998-; Board of Editors, American Journal of International Law, 1971-1983; Board of Editors, American Journal of Comparative Law, 1971-1977; Vice-President, American Society of International Law, 1984-86; Honorary Vice-President, American Society of International Law, 1996; Board of Editors, Journal of Conflict Resolution, 1972-1987; Board of Editors, Policy Sciences, 1984-88; Board of Review and Development, American Society of International Law (ASIL), 1972-1975; Executive Council, ASIL, 1972-1974, 1983-1984, 1996-; Committee for Student and Professional Development, ASIL, 1971-1974; Panel of Humanitarian Law, ASIL, 1971-1974; Advisory Board, Aviation Consumer Action Project, 1971-1974; Member, Consortium for Inter-University World Order Studies, Fund for Peace, 1970-1975; Board of Directors, Policy Sciences, Inc., 1979-; Board of Directors, U.S. Committee for Somali Refugee Relief, 1980-86; Advisory Board, Urban Morgan Institute for Human Rights, 1984-; Council on Foreign Relations, 1975-; International Law Association, 1975-; Executive Committee, American Branch, International Law Association, 1981-1995; Fellow, World Academy of Art and Science, 1981-; Executive Council, World Academy of Art and Science, 1983-93; Advisory Committee on International Law, U.S. Department of State 1987-; Fellow, Institute for Advanced Studies, Berlin, 1990; Member, Inter-American Commission of Human Rights, Organization of American States, 1990-95; Second Vice-President, Inter-American Commission on Human Rights, Organization of American States, 1992-93; First Vice-President, Inter-American Commission on Human Rights, Organization of American States 1993-94; President, Inter-American Commission on Human Rights, Organization of American States 1994-95; Honorary Vice-President, American Society of International Law, 1997; Member of the Board, Foreign Policy Association, 1997- ; member of the Institute of World Business Law of the International Chamber of Commerce, 1998-2001; *associé* of the *Institut de Droit International*, 1999; Academic Advisory Board for Transnational Books; Chairman, International Advisory Panel, National University of Singapore, 2002; member of panel of overseas referees of *Singapore Academy of Law Journal*, 2002-; member of the Advisory Board of *Journal of International Criminal Justice*, 2002-; member, International Bar Association Task Force on Legal Responses to International Terrorism, 2002-2004; Editor-in-Chief, American Journal of International Law, 1998-2003; member of the Advisory Board of *African Human Rights Law Journal*, 2003-; Board of Editors, Encyclopedia of Public International Law (Heidelberg), 2003-; member of the Panel of International Consultants for the Gujarat National University, Ahmedabad, Gujarat State, India, 2004-2006; member of the Editorial Board of *Indian Journal of International Law*, 2004-; member of the European Society of International Law, 2004-; Honorary Editor, *American Journal of International Law*, 2004-;

member of the Advisory Editorial Board of the *University of Botswana Law Journal*, 2004-; member of the Editorial Board of the *Stockholm International Arbitration Review*, 2005-; member of the ASIL Advisory Committee for ICJ Nominations and Other International Appointments, 2005-; ICSID Arbitrators List (for Colombia) for the period effective February 15, 2006-2012; member of the Advisory Board of the Columbia Program on International Investment, 2006-; member of the International Editorial Board of the *Cambridge Review of International Affairs*, 2006-; Honorary Professor, Gujarat National Law University, 2007-; member of the International Advisory Board of the School of Law of City University of Hong Kong, 2007-; member, World Bank Administrative Tribunal Nominating Committee, 2007-2008; Honorary Professor in City University of Hong Kong, May 1, 2008 to April 30, 2011; member of the Advisory Board of the Latin American Society of International Law (LASIL), 2007-; member of the Advisory Board of *Journal of International Dispute Settlement*, 2009-; member of the Advisory Board of *Yearbook on International Investment Law and Policy*, 2009-; Member of The American Law Institute, 2009-.

Prizes and Awards: Gherini Prize, Yale Law School, 1964; International Organization Prize (Ginn Foundation), 1965; Fulbright Scholar, 1966-1967; O'Connell Chairholder, University of Florida, Law Center, Spring, 1980; World Academy of Art and Science, Harold Dwight Lasswell Award for Communication in a Divided World, April, 1981; Certificate of Merit, American Society of International Law, 1994; Order of Bahrain, First Class, 2001; Manley O. Hudson Medal, American Society of International Law, 2004; Human Rights Award, International Human Rights Law Review, St. Thomas University School of Law, 2008.

Endowed Lectureships

Myres S. McDougal Distinguished Lecture in International Law and Policy, University of Denver, 1982.

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Dunbar Lecture, University of Mississippi, College of Law, 1988.

Brainerd Currie Lecture, Duke University, School of Law, 1989.

Freiwillige Akademische Gesellschaft Lecture, University of Basel, 1991.

Sloan Lecture, Pace University Law School, 1992.

Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, 1995.

Hague Academy of International Law, 1996.

Lauterpacht Lecture, Cambridge University, 1996.

Eberhardt Deutsch Lecture, Tulane University, 1997.

Order of the Coif Lecture, 1999.

Hugo L. Black Lecture, University of Alabama School of Law, Spring 2001.

The Johnson Lecture, Vanderbilt Law School, January 2002.

Adda B. Bozeman Lecture, Sarah Lawrence College, April 2002.

The Manley O. Hudson Lecture, American Society of International Law, April 2004.

The Klatsky Lecture in Human Rights, Case Western Reserve University School of Law, January 2008.

The Goff Arbitration Lecture, Freshfields Bruckhaus Deringer/City University of Hong Kong, Hong Kong, December 2008.

Human Rights Missions

1. Member, Independent Counsel on International Human Rights, Peshawar, Pakistan, 1987.

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5. On-site visit to Haiti, Inter-American Commission on Human Rights, 1990, 1994.

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