

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

<u>Pac Rim Cayman LLC</u>)	
)	
Claimant,)	
)	
v.)	ICSID Case No. ARB/09/12
)	
The Republic of El Salvador)	
)	
<u>Respondent.</u>)	

**THE REPUBLIC OF EL SALVADOR'S PRELIMINARY OBJECTIONS
UNDER ARTICLES 10.20.4 AND 10.20.5 OF THE DOMINICAN REPUBLIC –
CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT (CAFTA)**

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Standard of Review.....	3
A.	CAFTA Articles 10.20.4 and 10.20.5 Constitute an Agreement to Another Expedited Procedure for Making Preliminary Objections.....	3
1.	The parties to this dispute have agreed to use the CAFTA expedited procedure for preliminary objections.....	3
2.	The parties' agreement to use CAFTA procedures extends to all claims in this arbitration.....	5
B.	Standard of Review under CAFTA Article 10.20.4 Used in Conjunction with CAFTA Article 10.20.5.....	7
1.	The CAFTA expedited procedure is intended to dispose of frivolous claims.....	8
2.	Claimant's obligation to set forth factual bases for each claim and the Tribunal's power to consider facts not in dispute.....	8
3.	Standard of review and time limits.....	10
C.	Standard of Review under CAFTA Article 10.20.5 Preliminary Objections to Competence.....	11
III.	Preliminary Objection Under CAFTA Articles 10.20.4 and 10.20.5 Regarding All Claims Related to the Application for a Mining Exploitation Concession.....	12
A.	Legal Requirements to Obtain a Mining Exploitation Concession.....	12
B.	Claimant's Legal Conclusions Regarding Pacific Rim El Salvador's Application for the Mining Exploitation Concession.....	13
C.	There is no Automatic Right to a Mining Exploitation Concession.....	15
D.	Relevant Facts Not in Dispute Demonstrate that Pacific Rim El Salvador has Failed to Meet the Legal Requirements to Obtain a Mining Exploitation Concession.....	19
1.	Claimant has not even alleged that Pacific Rim El Salvador owns or is authorized to use the real estate property in the requested concession area.....	20
2.	Pacific Rim El Salvador does not own or have authorization to use the real estate property in the requested concession area.....	21

3.	Claimant has not even alleged that Pacific Rim El Salvador has submitted a completed Feasibility Study	25
4.	Pacific Rim El Salvador has not submitted a completed Feasibility Study	25
IV.	Preliminary Objection Under CAFTA Articles 10.20.4 and 10.20.5 Regarding All Claims Related to the Santa Rita Exploration License	33
V.	Preliminary Objection Under CAFTA Articles 10.20.4 and 10.20 5 Regarding Other CAFTA Claims	34
VI.	Preliminary Objection Under CAFTA Article 10.20.5 Related to the Tribunal's Competence Over All Non-CAFTA Claims	35
A.	CAFTA Exclusivity Requirement.....	35
B.	Claimant Consented to Exclusivity of CAFTA Arbitration and Waived its Right to Initiate any Other Proceeding with Regard to the Same Measures Alleged to Constitute a Violation of CAFTA	39
C.	The Claims under the Domestic Laws of El Salvador are Based on the Exact Same Measures as the Claims under CAFTA	39
D.	The Proper Remedy is to Dismiss All Non-CAFTA Claims	40
VII.	Conclusion	41
VIII.	Costs.....	42
IX.	The Republic's Prayer for Relief	44

TABLE OF AUTHORITIES

Treaties

The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004.....	passim
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Statutes

Investment Law of El Salvador, Legislative Decree No. 732, Oct. 14, 1999.....	34
Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995, <i>amended by</i> Legislative Decree No. 475, July 11, 2001	12, 15, 17, 20
Regulations of the Mining Law of El Salvador and its Amendments, Legislative Decree No. 47, June 20, 2003	17, 22

Cases

<i>Methanex Corporation v. United States of America</i> , Partial Award, Aug. 7, 2002.....	36
<i>Railroad Development Corporation v. Republic of Guatemala</i> , ICSID Case No ARB/07/23, Decision on Objection to Jurisdiction, Nov. 17, 2008	11, 36
<i>TCW Group, Inc. and Dominican Energy Holdings, L.P. v The Dominican Republic</i> , Respondent's Memorial on Jurisdiction, Nov. 21, 2008	36, 37
<i>TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic</i> , Claimant's Counter-Memorial on Jurisdiction, Feb. 13, 2009.....	37, 38
<i>Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB/07/25, Decision on Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008	9, 14
<i>Waste Management, Inc. v. United Mexican States</i> , Case No. ARB(AF)/98/2, Award, June 2, 2000	36, 40

Other Authorities

Andrea J. Menaker, Benefitting from recent experience: Developments in the United States' most recent investment agreements, 12 U.C. Davis Journal of International Law & Policy 121 (2005)	8
Aurélia Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, 21 ICSID Review: Foreign Investment Law Journal 427 (2006).....	5, 9
Christian Leathley, International Dispute Resolution in Latin America: An Institutional Overview (2007)	42

Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic – Central America – United States Free Trade Agreement, June 23, 2005 8

I. INTRODUCTION

1. The Republic of El Salvador is filing these preliminary objections under the expedited procedures of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA") to request the dismissal of all claims related to the application for a mining exploitation 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.

2. Claimant's principal claims in this arbitration arise from the allegation that the Government of El Salvador has deprived Pacific Rim El Salvador ("PRES") of a "perfected right" to a mining exploitation concession in the El Dorado project. Not only is Claimant's assertion incorrect as a matter of law, but Claimant has failed to provide a factual basis for its claims, as required by CAFTA. Specifically, Claimant has failed to meet its burden with regard to PRES's alleged entitlement to such a concession. First, contrary to Claimant's suggestion, there is no automatic right to a concession under Salvadoran law. Second, instead of asserting the required facts, Claimant merely asserts a legal conclusion that PRES has purportedly "perfected" a legal right to a mining exploitation concession except for the Government's failure to approve an Environmental Impact Study and issue an Environmental Permit. In reality, Claimant fails to set forth facts to show that PRES complied with what Claimant admits are other "plain and explicit" requirements under Salvadoran law which must be satisfied before a company may seek a mining exploitation concession.

3. Claimant's failure to set forth the facts required by CAFTA stems from the fact that PRES has indeed failed to comply with those other requirements, as demonstrated by the undisputed facts set forth in Claimant's own documents. Thus, even if the Government of El Salvador were to approve the Environmental Impact Study and grant the necessary Environmental Permit, the undisputed facts show that PRES would still not have any right to obtain the mining exploitation concession. In short, even assuming as true all of Claimant's

factual allegations regarding the Environmental Permit, the alleged actions or inactions of the Government have caused Claimant no harm. Therefore, all claims related to the El Dorado project are not claims "for which an award in favor of the claimant may be made."¹

4. As for the additional claims related to the exploration licenses granted to the Salvadoran Enterprises Pacific Rim El Salvador and Dorado Exploraciones, the Republic is seeking the dismissal of all claims related to the Santa Rita exploration license. Claimant again has not alleged any factual or legal basis to bring claims related to the Santa Rita exploration license. In any event, Claimant already lost any rights it may have had to renew the Santa Rita exploration license when PRES unilaterally failed to seek the renewal of the exploration license on a timely basis.

5. The Republic is also seeking the dismissal of other secondary CAFTA claims for which Claimant has not provided a factual basis.

6. Finally, the Republic is seeking the dismissal of all non-CAFTA claims in this arbitration. Claimant has violated CAFTA's exclusivity clause and its own express waiver by introducing claims under the Investment Law of El Salvador that are based on the same measures Claimant alleges are breaches of CAFTA.

7. The filing of these preliminary objections, and the limited scope of the objections, does not mean that the Republic of El Salvador accepts the jurisdiction of the Centre or the competence of the Tribunal to decide this dispute. If Claimant chooses to continue with this arbitration beyond these Preliminary Objections, the Republic of El Salvador reserves the right to object to the jurisdiction of the Centre and the competence of the Tribunal regarding any remaining claims, as allowed by CAFTA Article 10.20.4(d) and the ICSID Convention and Arbitration Rules.

¹ The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004 ("CAFTA"), Article 10.20.4 (**Respondent's Authority 1**). The President of the United States signed implementing legislation for CAFTA in August 2005 and CAFTA entered into force in El Salvador on March 1, 2006.

II. STANDARD OF REVIEW

A. CAFTA Articles 10.20.4 and 10.20.5 Constitute an Agreement to Another Expedited Procedure for Making Preliminary Objections

1. The parties to this dispute have agreed to use the CAFTA expedited procedure for preliminary objections

8. The first sentence of ICSID Arbitration Rule 41(5) provides:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.²

9. The plain text of the Rule makes it clear that the procedure under ICSID Arbitration Rule 41(5) does not apply if "the parties have agreed to another expedited procedure for making preliminary objections"

10. In this case, the parties have agreed to such another expedited procedure through their consent to arbitration under CAFTA. The relevant provisions of CAFTA for making preliminary objections are Articles 10.20.4 and 10.20.5.³

11. CAFTA Article 10.20.4 provides:

Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

² ICSID Rules of Procedure for Arbitration Proceedings, Article 41(5) (2006) (emphasis added).

³ CAFTA Article 10.20.6, which refers to the power of the tribunal to award costs and attorney's fees, will be discussed in another section of this Request.

- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

12. CAFTA Article 10.20.5 provides:

In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

13. From these provisions it is clear that CAFTA Article 10.20.5 allows a respondent to make preliminary objections with regard to competence to be decided on an expedited basis. CAFTA Article 10.20.5, when used in conjunction with CAFTA Article 10.20.4, also allows a respondent to bring preliminary objections on the merits of the dispute and have the preliminary objections decided on an expedited basis. Therefore, CAFTA Article 10.20.5, alone or in

conjunction with CAFTA Article 10.20.4, constitutes an agreement by the CAFTA Member States to "another expedited procedure for making preliminary objections."⁴

14. Claimant agreed to submit to the CAFTA procedures, including the expedited procedure for making preliminary objections when it submitted its Notice of Arbitration. In its updated Exhibit 1 of its Notice of Arbitration, Claimant affirmed:

Pursuant to Article 10.18(2)(a) of the Central America – United States – Dominican Republic Free Trade Agreement ("CAFTA"), Pac Rim Cayman LLC ("PRC") hereby consents to arbitration in accordance with the procedures set out in CAFTA.⁵

15. In addition, CAFTA Article 10.16.5 makes clear that CAFTA provisions preempt any different provision in the ICSID Arbitration Rules.⁶ Therefore, the parties to this dispute have agreed to use the CAFTA expedited procedure for making preliminary objections, to the exclusion of ICSID Arbitration Rule 41(5).⁷

2. The parties' agreement to use CAFTA procedures extends to all claims in this arbitration

16. During the process of constitution of the Tribunal, Claimant took the position that it is entitled to use two different sets of procedures in the same arbitration, because it is bringing claims under CAFTA and under the Investment Law of El Salvador.

⁴ See Aurélie Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, 21 ICSID Review: Foreign Investment Law Journal 427, 441 (2006) (**Respondent's Authority 2**) (referring to the 2004 U.S. Model BIT, which has procedures for making preliminary objections identical to the CAFTA provisions, as an example of an agreement by the parties to use another procedure for making preliminary objections that would make ICSID Arbitration Rule 41(5) inapplicable).

⁵ See Notice of Arbitration ("NOA"), Updated Exhibit 1 ("Claimant's Consent & Waiver") (**Respondent's Exhibit 1**). The relevant sentence in the original waiver contained in Exhibit 1 submitted with the Notice of Arbitration was substantially the same.

⁶ CAFTA Article 10.16.5 provides that the ICSID Arbitration Rules in effect on the date the claim or claims are submitted to arbitration under Section B of CAFTA Chapter 10 "shall govern the arbitration except to the extent modified by [CAFTA]."

⁷ As previously stated, the Republic does not waive any objections to jurisdiction and competence by raising this preliminary objection and invoking the procedures under CAFTA and making reference to the ICSID Arbitration Rules.

