

PRELIMINARY OBJECTIONS UNDER CAFTA ARTICLES 10.20.4 AND 10.20.5. SPECIAL EMPHASIS ON THE PAC RIM CAYMAN V. EL SALVADOR CASE (ICSID CASE NO. ARB/09/12). “IS EFFICIENCY ATTAINED?”¹

EXCEÇÕES PRELIMINARES COM BASE NOS ARTIGOS 10.20.4 E 10.20.5 DO ACORDO DE LIVRE COMÉRCIO ENTRE ESTADOS UNIDOS, REPÚBLICA DOMINICANA E AMÉRICA CENTRAL (CAFTA), COM ÊNFASE NO CASO PAC RIM CAYMAN X EL SALVADOR (ICSID N° ARB/09/12). A EFICIÊNCIA É ATINGIDA?

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ABSTRACT

The ICSID dispute settlement mechanism provides for three opportunities to evaluate the center’s jurisdiction: 1) At the registration stage pursuant to Article 36 of the ICSID Convention; 2) As preliminary objections on an expedite procedure pursuant to Article 41(5) of the ICSID Arbitration Rules; and 3) As preliminary objections pursuant to Article 41(1) of the ICSID Arbitration Rules. This article will analyze only the application of the expedite procedure to entertain preliminary objections specifically, the special procedure provided by CAFTA. As a result of the application of the expedite procedure pursuant to CAFTA - as analyzed in the Commerce Group v El Salvador and Pac Rim v El Salvador cases - one can conclude that Article 41(5) of the ICSID Arbitration Rules applies for every case in which a party raises such objections in so far as to the modifications agreed to by the parties in any Investment Treaty. In any case, the expedite procedure’s efficiency goal – as per the author’s judgment – has been attained in practice, and is therefore fulfilling its intention of getting rid of, on an expedite basis, of frivolous claims or claims without legal merits.

KEYWORDS. Arbitration. Preliminary objections. CAFTA. Expedite Procedure. ICSID.

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RESUMO

O mecanismo de solução de controvérsias previstos no ICSID prevê a possibilidade de avaliação da competência do centro em três distintas oportunidades: 1) Na fase de registro nos termos do artigo 36 do Convênio do ICSID; 2) Como exceções preliminares em procedimento expedito nos termos do artigo 41 (5) do Regulamento de Arbitragem do ICSID e 3) Como exceções preliminares, nos termos do artigo 41 (1) do Regulamento de Arbitragem do ICSID. Este artigo analisará a capacidade de um procedimento expedito de introduzir exceções preliminares, especialmente no procedimento previsto pelo CAFTA. Como resultado desta aplicação – tal como julgado nos casos Group Commerce versus El Salvador e Pac Rim versus El Salvador - pode-se concluir que o artigo 41 (5) do Regulamento de Arbitragem do ICSID se aplicou para cada caso em que uma das partes levantou tal preliminar, na medida das alterações acordadas nos Tratados de Investimento. De qualquer forma, objetivo de agilidade do procedimento expedito – de acordo com o julgamento do autor - foi atingido na prática, e é, portanto, cumprida esta intenção de agilidade por meio da eliminação de ações infundadas ou reclamações sem fundamento legal.

PALAVRAS-CHAVES. Arbitragem. Exceções preliminares. CAFTA. Procedimento expedito. ICSID.

I. INTRODUCTION

This paper is made in an attempt to portray the applicability of CAFTA³'s expedite procedure in contrast with that provided for by ICSID⁴ through its Arbitration Rules. In that regard, the author will initially proceed to state the applicable procedure pursuant to CAFTA Articles 10.20.4 and 10.20.5, to then proceed to analyze two cases in which such procedure has been used. The application of ICSID expedite procedure in two cases - pursuant to Article 41(5) of the Rules - is also included as to reference the effect that such procedure has had in current practice. Finally, a contrast among both procedures will be made in order to prove the similarities among them and that the object and purpose of both procedures remains the same: to seek efficiency in the management of arbitration proceedings.

II. CONTENTS

a. PROCEDURE UNDER CAFTA ARTICLE 10.20.4

In the relevant part, CAFTA Article 10.20.4 provides for the Conduct of Arbitration as follows:

³ The Dominican Republic - Central American – United States Free Trade Agreement

⁴ International Center for Settlement of Investment Disputes

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“ 4. 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. [...]

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits [...].

(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 amendments thereof) [...] The tribunal may also consider any relevant facts not in dispute.”(Emphasis added)

b. PROCEDURE UNDER CAFTA ARTICLE 10.20.5

CAFTA Article 10.20.5 provides for jurisdictional objections by stating that:

“5. 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) [...].”

c. APPLICATION OF CAFTA ARTICLES 10.20.4 AND 10.20.5 IN PAC RIM CAYMAN VS. EL SALVADOR (ICSID CASE NO. ARB/09/12)

i. THE FACTS

On 30 April 2009, PACIFIC RIM CAYMANN LLC hereinafter referred to as “PRC” initiated arbitration proceedings – on its own behalf and on behalf of its subsidiary companies⁵- against EL SALVADOR hereinafter referred to as “SAL” under “ICSID” pursuant to “CAFTA”, the INVESTMENT LAW OF EL SALVADOR, and other national laws of EL SALVADOR alleging that SAL had breached its obligations

⁵ PRC has 2 subsidiaries organized under the laws of El Salvador: 1) PACIFIC RIM EL SALVADOR, SOCIEDAD ANONIMA DE CAPITAL VARIABLE – hereinafter referred to as “PRES” – and; 2) DORADO EXPLORACIONES, SOCIEDAD ANONIMA DE CAPITAL VARIABLE – hereinafter referred to as “DOREX”, altogether the “ENTERPRISES”.

pursuant to the aforementioned regulations by depriving PRC of their right to a mining exploitation concession.

CLAIMANT alleged that SAL's actions and omissions constitute a breach of:

- 1) CAFTA: a) National Treatment; b) Most Favored Nation Treatment; c) Minimum Standard of Treatment; d) Expropriation and Compensation; and e) investment authorizations⁶;
- 2) EL SALVADOR'S INVESTMENT LAW: a) Equal Protection; b) Non Discrimination; and c) Expropriation;⁷ and
- 3) OTHER SALVADOREAN NATIONAL LAWS: a) Salvadorean Mining Law; b) Salvadorean Constitution; c) Salvadorean Civil Code; and d) Salvadorean Governmental Ethics Law.

PRC therefore requests damages measured in hundreds of millions of US dollars including investment expenses in excess of \$77,000,000. On the other hand, SAL denies all claims and sustains that they are inadmissible under CAFTA Articles 10.20.4 and 10.20.5.

ii. EL SALVADOR'S PRELIMINARY OBJECTIONS PURSUANT TO CAFTA ARTICLES 10.20.4 AND 10.20.5

On 4 January 2010, SAL submitted its Preliminary Objections under the expedite procedure provided for in CAFTA Articles 10.20.4 and 10.20.5 requesting the dismissal of all claims sought by PRC. In that regard, SAL sustains that such procedure was intended to dispose of frivolous claims in an expedite way, and is thus entitled to make use of the special procedure to get the dismissal of PRC claims.

iii. STANDARD OF REVIEW OF CAFTA'S EXPEDITED PROCEDURE AS ALLEGED BY EL SALVADOR

Regarding the applicability of CAFTA's expedited procedure, SAL construes its position alleging that:

⁶ CAFTA Articles 10.3, 10.4, 10.5, 10.7, and 10.16 respectively.

⁷ EL SALVADOR'S INVESTMENT LAW Articles 5,6 and 8 respectively.

- 1) CAFTA constitutes an agreement between the parties⁸ to use the expedite procedure provided for in Articles 10.20.4 and 10.20.5 for making preliminary objection considering that those provisions constitute an agreement to use “another expedited procedure for making preliminary objections” as provided for in ICSID Arbitration Rule 41(5)⁹ and thus modifying the general procedure provided for in ICSID Arbitration Rule 41(5) in favor of the CAFTA procedure.
- 2) CAFTA Article 10.20.5 “allows a respondent to make preliminary objections with regard to competence to be decided on an expedited basis”.¹⁰
- 3) Pursuant to CAFTA Article 10.16.5 ICSID procedure provided for in its Arbitration Rules “shall govern the arbitration except to the extent modified by CAFTA”, and therefore CAFTA’s expedite procedure for preliminary objections shall prevail over ICSID Arbitration Rules, specifically Article 41(5).
- 4) CAFTA’s expedite procedure should efficiently be applied to all claims¹¹ submitted by PRC, including Non - CAFTA claims brought by PRC pursuant to the Investment Law of El Salvador as well as other domestic laws¹².

iv. EL SALVADOR’S PRELIMINARY OBJECTIONS: THE SUBSTANCE

⁸ **SAL** sustains that **PRC’s** consent to the expedited procedure was manifested in its Notice of Arbitration by stating that it “consents to arbitration in accordance with the procedures set out in CAFTA.” PRC’s Notice of Arbitration.

⁹ ICSID Arbitration Rule 41(5) on preliminary objections literally states “**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**. [...]” (emphasis added)

¹⁰ In that sense, **SAL** alleges that **CAFTA** Article 10.20.5 should be “used in conjunction with **CAFTA** Article 10.20.4 [thus allowing] respondent to bring preliminary objection on the merits of the dispute and having the preliminary objections decided on an expedited basis PAC RIM CAYMAN LLC V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/12): 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) Para. 13

¹¹ **SAL** contests the AT jurisdiction to entertain Non – CAFTA claims by alleging that CAFTA’s exclusivity, precludes Claimants to “bring separate claims based on the same measure” alleged constitutes a breach of CAFTA and the Investment Law or other domestic law of El Salvador. Idem Para. 17 and 18

¹² Idem Para. 17 and 18

Having stated the applicability of the expedite procedure contained in CAFTA to the case in question, SAL sustains that it has the right to raise preliminary objections requesting the Arbitral Tribunal, hereinafter referred to as “AT” to “dismiss any claim without an articulated factual basis.”¹³ SAL bases its argument pursuant to CAFTA Article 10.16.2 (c) which in the relevant part states that the Notice of Arbitration shall specify “the legal and factual basis for each claim”. In that regard, SAL sustains that CAFTA “imposes a greater requirement to include factual bases for the legal claims in the Notice of Arbitration”¹⁴ when compared to those required by the ICSID convention and its applicable Arbitration Rules. Moreover, SAL sustains that the obligation for PRC of providing factual basis for its claims also applies to “demonstrating causation and damages” based on CAFTA Article 10.16.1(a)(ii) requirement of showing that a claimant “has incurred loss or damages” arising out of the alleged breach.

In addition, SAL considers that any claim that is not in compliance with the factual basis requirement pursuant to CAFTA Article 16.2(c) is not a claim in which an award in favor of the claimant may be made under CAFTA Article 10.26, and thus enables the applicability of the expedite procedure contained in CAFTA Article 10.20.4. In that regard, and considering SAL’s interpretation of the requirements for submitting a claim under CAFTA’s applicable procedure, it sustains that, in view of PRC refusal to provide for the factual bases of its claims, the AT should proceed to dismiss any claim without an articulated factual basis. This is so, pursuant to SAL’s interpretation of a “more thorough analysis of the facts and the law by the Tribunal to assure the viability of claims”¹⁵ under CAFTA.¹⁶

SAL contests the AT jurisdiction over non – CAFTA claims pursuant to CAFTA Article 10.18 which in its relevant part states that “No claim may be submitted to arbitration [...] unless the notice of arbitration is accompanied [...] by the claimant’s written waiver [...] of any right to initiate [...] any proceedings with respect to any measure alleged to constitute a breach [...]”. According to SAL’s interpretation of Article 10.18, “CAFTA requires exclusivity of the CAFTA dispute settlement provision with respect to any claims related to the same measures alleged to constitute violations of CAFTA”¹⁷ and therefore may not be entitled to bring disputes arising out of the

¹³ Idem Para 28.

¹⁴ Idem Para 26.

¹⁵ Idem Para 32.

¹⁶ When comparing with the analysis sought by ICSID Arbitration Rule 41(5).

¹⁷ Idem Para 99.

Investment Law of El Salvador¹⁸ based on the same measures that are alleged to constitute a breach of CAFTA. SAL sustains that allowing PRC to do so, would grant it the “opportunity to litigate two sets of legal claims with regard to the exact same measures”¹⁹ and therefore requests the dismissal of all Non – CAFTA claims.

v. PRC RESPONSE TO EL SALVADOR’S PRELIMINARY OBJECTIONS PURSUANT TO ARTICLES 10.20.4 AND 10.20.5

PRC alleges that SAL “entirely ignores most of PRC factual allegations”²⁰ and the investment of more than \$77,000,000 in the country based on “repeated statements of support and encouragement from the government” which then ignored PRC applications for the environmental permit and mining concession without any legal basis. PRC sustains that, notwithstanding the fact that they had complied with all Salvadorean regulation²¹, permits were not granted breaching CAFTA, the Investment Law of El Salvador, and other internal regulation, and causing damages to PRC thus entitling to the initiation of the proceedings in question.

vi. STANDARD OF REVIEW OF CAFTA’S EXPEDITED PROCEDURE AS ALLEGED BY PRC

The scope of CAFTA’s mechanism for filing preliminary objections – as alleged by SAL – was not contested by PRC. Nevertheless, PRC sustains that SAL has “confused and conflated the issue of standard of review with that of sufficiency of the pleadings”²² alleging that “they are different time frames within the lifecycle of an investor-state arbitration”²³ which encompasses different implications. PRC asserts that at the stage in which the arbitration process is, its duty is to allege facts, not to introduce

¹⁸ The same reasoning has been used by **SAL** with all other domestic laws of El Salvador.

¹⁹ Idem Para 106.

²⁰ PAC RIM CAYMAN LLC V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/12): Pacific Rim Cayman’s Response to 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) Para 2.

²¹ Moreover, **PRC** alleges that “the [Salvadorean] Government has declared that there is nothing that PRC can do to obtain an exploitation concession”. Idem Para. 9

²² Idem Para 57.

²³ Idem Para 57.

evidence and that the standard of review contained in CAFTA is a matter of law. Therefore, in order to determine the validity of SAL's preliminary objections, PRC allegations must be considered by the AT as true.

PRC also contests SAL's interpretation of CAFTA allegedly requesting a more thorough analysis of the facts and that there is a burden of demonstrating causation and damages, sustaining that no such interpretation is baseless. PRC maintains that the Notice of Arbitration is enough and the only element required by CAFTA at the time being.²⁴ In that regard, PRC requests that CAFTA be interpreted based on its object and purpose -in light of the Vienna Convention on the Law of Treaties – and therefore the AT is to consider PRC allegation to determine if an award may be rendered considering the claims as presented by PRC and that a mere doubt whether its claims be asserted should be enough to dismiss SAL's preliminary objections.

vii. PRC RESPONSE TO THE SUBSTANCE OF EL SALVADOR'S PRELIMINARY OBJECTION

PRC alleges that SAL's preliminary objections are "patently frivolous"²⁵ especially in the contexts in which they are based, considering that it is the respondent that has the burden of proving that as a matter of law the claims at issue are not claims for which an award in favor of the claimant can be made. PRC sustains they duly complied with all the requirements imposed by the legal framework applicable. Moreover, it alleged that SAL bases its preliminary objection on issues of Salvadorian law, and that are not matters to under the scope of preliminary objections since they are questions of fact. Regarding SAL's contention that the AT does not have competence to entertain Non – CAFTA claims, PRC alleges that consent to ICSID was given through both CAFTA and El Salvador's Investment Law and asserts that CAFTA's exclusivity is attaining that no other procedure be started under other dispute settlement mechanism, not to bar claimants from submitting diverse claims to the same proceeding, and maintain that they are "unaware of any prohibition against different legal claims being asserted with respect to the same measures and [that this practice] is common place in investor-state arbitration."²⁶

²⁴ In this regard, PRC quotes Professor Schreuer et al in THE ICSID CONVENTION: A COMMENTARY: which states that "[o]n most points a mere assertion in the request will suffice and the information thus given may be developed at a later stage." Idem Para. 105.

²⁵ Idem Para 115.

²⁶ Idem Para 215.

viii. THE TRIBUNAL’S DECISION ON EL SALVADOR’S PRELIMINARY OBJECTIONS

1. APPLICABILITY OF CAFTA’S EXPEDITE PROCEDURE UNDER ARTICLES 10.20.4 AND 10.20.5

The AT accepted SAL’s interpretation regarding the application to ICSID proceedings of CAFTA’S Articles 10.20.4 and 10.20.5 as an expedited procedure, complementing it with the fact the PRC did not dispute such application. On the other hand, it dismissed all the preliminary objections alleged by SAL as will be justified in the following paragraphs. The parties disputed the general approach and standard of review under CAFTA Article 10.20.4 to which the AT decided that CAFTA’s expedite procedure “mandates the tribunal to assume the relevant factual allegations made by the claimant to be ‘true’”²⁷ regarding any claim included in by PRC in the notice of arbitration.

a. THE EXTENT OF THE PRESUMPTION OF TRUTHFULNESS

The AT explains that “it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness”²⁸ and that other allegations made - or that could be made - by claimants through written or oral submissions in order to reply to the respondent’s preliminary objections would not benefit from such presumption. In that regard, it decided that it did not consider that “respondent ha[d] demonstrated that [PRC claims] as a matter of law, [are] not [claims] for which an award in favor of the Claimant may be mad under CAFTA Article 10.26.”²⁹

²⁷ PAC RIM CAYMAN LLC V THE REPUBLIC OF EL SALVADOR:(ICSID CASE NO. ARB/09/12): Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Para 87.

²⁸ PAC RIM CAYMAN LLC V THE REPUBLIC OF EL SALVADOR:(ICSID CASE NO. ARB/09/12): Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Para 90.

²⁹ Idem Para 245.

b. THE TRIBUNAL’S UNDERSTANDING OF THE TERM FACTUAL ALLEGATIONS

Pursuant to CAFTA Article 10.20.4.c, “the tribunal shall assume to be true claimant’s factual allegations” which the AT interprets as excluding all legal allegations, as well as a “mere conclusion unsupported by any relevant factual allegation”.³⁰ The AT also considers that liability issues raises questions of interpretation and application of salvadorean domestic law, which cannot be at the time, decided in favor of SAL.

c. THE TRIBUNAL’S DECISION OVER NON – CAFTA CLAIMS

The AT rejected SAL’s position regarding CAFTA’s exclusivity and therefore sustaining that the AT did not have jurisdiction to review Non-CAFTA claims. The AT considers that the “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”³¹ and that therefore the Respondent cannot face a double jeopardy risk. Moreover, the AT sustained that “it is an undisputed historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent [...] without being thereby deprived of jurisdiction.”³²

d. PRELIMINARY OBJECTION REQUESTED BY EL SALVADOR IN COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC. V EL SALVADOR (ICSID CASE NO. ARB/09/17)

i. THE FACTS

In 2 July 2009, COMMERCE GROUP CORP hereinafter referred to as “CGC” and SAN SEBASTIAN GOLD MINES, INC hereinafter referred to as “SSGM” altogether referred to as “CLAIMANTS”³³ initiated arbitration proceedings against EL SALVADOR hereinafter referred to as “SAL” under ICSID pursuant to CAFTA and the

³⁰ Idem Para. 91

³¹ Idem Para 253.

³² Idem.

³³ United States Corporations

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FOREIGN INVESTMENT LAW OF EL SALVADOR alleging that SAL had breached its obligations pursuant to CAFTA.

CLAIMANTS alleged that by failing to permit mining activities in El Salvador, SAL had breached National Treatment, Most Favored Nation Treatment, Minimum Standard of Treatment and Expropriation and Compensation³⁴ obligations contained in CAFTA and requested: 1) Compensation for an amount of \$10,000,000; and 2) The granting of permits that would allow CLAIMANTS to resume their mining activities in El Salvador.

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ARTICLE 10.20.5

SAL filed its preliminary objection pursuant to CAFTA Article 10.20.5 expedited procedure requesting the dismissal of all of CLAIMANTS claims due to the lack of consent. It sustained that pursuant to CAFTA Article 10.18.2 (b) which in its relevant part mandated that:

“no claim may be submitted to arbitration under this Section unless [...] the notice of arbitration is accompanied [by claimant’s] written waivers of any right to initiate or continue before any administrative tribunal or court under the law of the other Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to [in the notice of arbitration].”

In that regard, SAL sustains that CLAIMANTS violated the waiver requirement “by maintaining judicial proceedings before the Supreme Court of El Salvador related to the same measures Claimants allege are breaches of CAFTA”.³⁵ Moreover, after the notice of arbitration was filed by CLAIMANTS, the Supreme Court of El Salvador issued its judgment, proving how CLAIMANTS intended to maintain two “proceedings with respect to the same measures in two fora”³⁶ which equals to an abuse of right. SAL alleges that the violation of the waiver requirement, invalidates the waiver

³⁴ CAFTA Articles 10.3, 10.4, 10.5 and 10.7

³⁵ COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC. V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/17): The Republic of El Salvador’s Preliminary Objection under Article 10.20.5 of the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA) Para 3.

³⁶ Idem Para 50.

presented by CLAIMANTS and thus, no consent could be given by SAL and therefore the AT does not have jurisdiction over the proceedings initiated by CLAIMANTS.

ii. CLAIMANT’S RESPONSE TO EL SALVADOR’S PRELIMINARY OBJECTIONS PURSUANT TO ARTICLE 10.20.5

CLAIMANTS allege that SAL’s preliminary objections are without merit considering three main issues: 1) CLAIMANTS complied with the waiver requirement since they submitted such waivers on 2 July 2009; 2) The “continuance of domestic proceedings”³⁷ after the aforementioned date, does not affect the validity of the waiver; and 3) The waivers are not “defective”³⁸ in any way. In that regard, CLAIMANTS consider that “the fundamental point [of the waiver] is a unilateral and final abandonment, extinguishing and abdication of legal rights”³⁹ and sustains that the fact that they did not take active steps to discontinue such proceedings does not invalidate the waiver.

In addition, CLAIMANTS consider that there never were two concurring proceedings since by the time the ICSID secretariat notified the parties of the constitution of the AT the domestic proceedings had already ended. CLAIMANT maintains a position that they did not take active steps to maintain the domestic proceedings, and that anyways, if the AT considers that the waiver was defective “any alleged defect was remedied by the fact that, as of 19 March 2010, the domestic proceedings had ended.”⁴⁰ In the alternative, and only considering that the AT determines that the waiver requirement under CAFTA was not complied with, CLAIMANTS sustain that consent was also given pursuant to the Investment Law of El Salvador, and therefore, the AT could exercise jurisdiction over the dispute in question.

³⁷ COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC. V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/17): Response to The Republic of El Salvador’s Preliminary Objection under Article 10.20.5 of the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA) Para 15.

³⁸ Idem.

³⁹ Idem Para 17.

⁴⁰ Idem Para 19.

iii. THE TRIBUNAL'S DECISION ON PRELIMINARY OBJECTIONS PURSUANT TO CAFTA ARTICLE 10.20.5

The AT determined that the waiver must comply with both the formal and material element and that a “waiver must be more than just words; it must accomplish its intended effect”⁴¹ which in the case of CAFTA and pursuant to Article 10.18.2 (b) is to waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach”.

Regarding the alleged overlapping procedures, the AT considers that taking into account that the date of the request for arbitration is 2 July 2009 and “as of that date, the two complaints filed by Claimants were awaiting judgment by El Salvador’s Court of Administrative Litigation of the Supreme Court of Justice”⁴² which were on exactly the same measure as those pursued in the arbitration proceedings. Consistently, CLAIMANTS had cognizance of the ongoing domestic proceedings and were “under an obligation to discontinue those proceedings in order to give material effect to their formal waiver.”⁴³

Having decided that the waiver requirements were not fulfilled by CLAIMANTS, the AT went on to determine the effect of the non waiver fulfillment with respect to SAL’s consent to ICSID arbitration proceedings. In that regard, the AT decided that “if the waiver is invalid, there is no consent.”⁴⁴ The AT, therefore, determined that if no consent was given, it did not have jurisdiction over the Parties CAFTA dispute.

The AT follows to dismiss all claims brought by CLAIMANTS pursuant to the Salvadorean Investment Law, due to CLAIMANTS lack of identifying particular breaches, and therefore, no claims could be heard. The AT did not enter into analyzing if the waiver would have extinguished CLAIMANTS right to bring up non-CAFTA disputes, but rather focused their reasoning in the fact that there were no real claims pursuant to the Investment Law.

⁴¹ COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC. V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/17): AWARD Para 80.

⁴² Idem. 100

⁴³ Idem Para 102.

⁴⁴ Idem Para 115.

e. PROCEDURE UNDER ICSID ARBITRATION RULES ARTICLE 41 (5)

ICSID framework also provides for an expedite procedure pursuant to which preliminary objections may be raised for a case in which the party considers that the claims brought are “manifestly without legal merit.” Such procedure is contained in ICSID Arbitration Rules Article 41(5) and has successfully been used in two cases. In the first case, GLOBAL TRADING RESOURCE CORP. AND GLOBEZ INTERNATIONAL INC. V. UKRAINE⁴⁵ the AT determined that “the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention”⁴⁶ and therefore “manifestly without legal merit within the meaning of Article 41 (5) of the ICSID Arbitration Rules”⁴⁷ and thus dismiss the claims.

In the second case, RSM PRODUCTION CORPORATON AND OTHERS V. GRENADA⁴⁸, the AT stated that the standards for the successful application of ICSID Arbitration Rule 41(5) is high, and consistently stated that “in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant”⁴⁹. Nevertheless, the AT decided that claimants claims were manifestly without legal merit within the meaning the provision in question, considering that the Claimant’s case was “no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues, dressed up as a Treaty case.”⁵⁰

f. CONTRAST BETWEEN CAFTA ARTICLES 10.20.4 AND 10.20.5 AND ICSID ARBITRATION RULES ARTICLE 41 (5)

The expedited procedure contained in CAFTA and ICSID Arbitration Rules attains to accomplish the same goal: effectiveness and efficiency. Considering that

⁴⁵ ICSID CASE NO. ARB/09/11

⁴⁶ GLOBAL TRADING RESOURCE CORP. AND GLOBEZ INTERNATIONAL INC. V. UKRAINE (ICSID CASE NO. ARB/09/11 : AWARD Para 56.

⁴⁷ Idem Para 58.

⁴⁸ ICSID CASE NO. ARB/10/6

⁴⁹ RSM PRODUCTION CORPORATION AND OTHERS V. GRENADA (ICSID CASE NO. ARB/10/6): AWARD, Para 6.1.3

⁵⁰ Idem Para 7.3.7

ICSID Arbitration Rules expressly give the parties autonomy to modify the expedite procedure contained therein, CAFTA follows to make adjustments to that procedure. For example, CAFTA Article 10.20.4 provides for a mandatory suspension of proceedings on the merits once the objections have been raised while ICSID Article 41(1) give discretion to the AT.⁵¹ CAFTA Article 10.20.5 establishes that an application of the preliminary objections should be made within 45 days from the constitution of the tribunal while ICSID provides for 30 days.⁵² CAFTA seems to grant a more expedite procedure granting the AT a time limit in order for a decision on preliminary objections to be made⁵³, while ICSID⁵⁴ again gives discretion to the AT. Although both frameworks have its variations, both provisions reserve the right for the respondent to make further objection later in the course of the proceedings, including jurisdictional objections.

III. CONCLUSION

Efficiency is the goal of expedite procedures enabling the parties to a dispute to raise preliminary measures that would attain to get rid of frivolous, fruitless claims in an attempt to reduce the costs of proceedings. Is there such thing as a preliminary analysis of a case? In *PRC V SAL*⁵⁵, one can notice the extensiveness in which the parties to the dispute pleaded their case. In many ways, SAL's allegations were more of the substance of the case, than what the AT determined was the scope of preliminary objections pursuant to CAFTA, thus having been dismissed entirely. Was SAL's use of CAFTA expedited procedure in order to raise provisional measures efficient? Even though all the preliminary objections raised by SAL were dismissed, perhaps, as the AT mentions - after recognizing that it was the first application made under CAFTA expedite procedure - "there was something to be learnt for all involved, and what might seemed

⁵¹ According to Catherine Rogers, the discretion was given "In recognition of the fact that the objection could itself relate to aspects of the case on the merits." Rogers, Catherine A and Alford, Roger P. "The Future of Investment Arbitration"(2009)Page 82.

⁵² ICSID Arbitration Rule 41(5) provides for an application to be made within 30 days of the constitution of the tribunal or by the first session of the tribunal, if earlier.

⁵³ CAFTA Article 10.20.5 specifies the timing provided to render a decision on preliminary objections to 150 days which could be extended for a maximum period of 60 days.

⁵⁴ ICSID Arbitration Rule 41(5) establishes that the Tribunal "shall, at its first session or promptly thereafter, notify the parties of its decision on the objection."

⁵⁵ *Pac Rim Cayman V. The Republic of El Salvador*

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inappropriate after that lesson would not have seemed so beforehand, at the time when it mattered.”⁵⁶

In *Commerce Group Corp. v SAL*⁵⁷, all claimants’ claims were dismissed pursuant to CAFTA’s expedite procedure for alleging jurisdictional objections in accordance to Article 10.20.5 after the AT determined SAL’s consent was not given if the waiver requirement was not adequately met thus ending what could have been an endless litigation promptly, thus proving the expedite procedure efficient. ICSID’s expedite procedure pursuant to Article 41(5) of its Arbitration Rules was used in both *Globez V. Ukraine*⁵⁸ and in *RMS V. Grenada*⁵⁹ dismissing claims that were manifestly without legal merit and avoiding further proceedings, thus proving the expedite procedure efficient. The efficiency desired by the introduction of expedite procedures nevertheless constitutes a dilatory tactic when giving two shots on jurisdictional objections when enabling the raising of jurisdictional objections both as a preliminary objection and then again as a regular objection. This theory is to be tested by El Salvador in the PAC RIM case as they have proceeded to file a memorial on jurisdictional pursuant to ICSID Arbitration Rules Article 41(1) after the award on preliminary objections was rendered. Considering that the AT has already rendered a decision dismissing SAL’s objection on jurisdiction, would this new jurisdictional objection constitute a second bite at the cherry? If so, would the intended efficiency of the expedite procedure for filing preliminary objection be attained?

⁵⁶ PAC RIM CAYMAN LLC V THE REPUBLIC OF EL SALVADOR (ICSID CASE NO. ARB/09/12): Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 Para 263

⁵⁷ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v The Republic of El Salvador*

⁵⁸ *Global Trading Resource Corp. and Globez International Inc V. Ukraine*

⁵⁹ *RMS Production Corporation and others V. Grenada*

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