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Dr. Ignacio Torterola
GST LLP
View profile

Quinn Smith
GST LLP
View profile

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CAFTA-DR: The Experience under Chapter 10
by K. Sauma

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CAFTA-DR: The Experience under Chapter 10

Karima Sauma[1]

I. Introduction

The Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA-DR") was signed in 2004 and was ratified by each member State on varying years. The last country to ratify it was Costa Rica, where the Treaty entered into force since 2009. This Agreement signified a turning point for the region, which was following the North American Free Trade Agreement's footsteps.

Not unlike the situation prevailing today, at the time of CAFTA-DR's finalization and ratification, there was considerable controversy surrounding the Investment Chapter (Chapter 10), specifically the investor-State dispute settlement ("ISDS") system. As of today, only ten cases have been filed invoking the provisions contained therein.

In light of the current debate surrounding ISDS, this article will look into the cases filed under CAFTA-DR's Chapter 10 in order to understand the region's experience under the Treaty. To this end, the article examines the background of the claims asserted in each case, includes a brief summary of the Tribunals' decisions for the cases where an Award has been rendered, and outlines the general characteristics of the cases.

II. Corona Materials, LLC v. Dominican Republic (ICSID Case No. ARB(AF)/14/3)

On June 10, 2014, the International Centre for Settlement of Investment Disputes ("ICSID") received a Request for Arbitration from Corona Materials, LLC ("Corona Materials" or "Corona"), a company incorporated under the laws of the United States, against the Dominican Republic. On July 30, 2014, the Secretary-General registered the Request under the ICSID Additional Facility Rules.

The Claimant submitted that the Dominican Republic had discriminated against Corona Materials as a foreign investor, and deprived it of the value of its mining project. Corona Materials further asserted that the measures taken by the Dominican Republic breached CAFTA-DR Articles 10.3 (National Treatment), 10.5 (Minimum Standard of Treatment), and 10.7.1 (Expropriation and Compensation),[2] and requested damages of approximately $100 million plus interest.

The Tribunal constituted to hear the case was composed of Fernando Mantilla-Serrano, J. Christopher Thomas, QC, and Professor Pierre-Marie Dupuy.[3]

The case concerned a project to build and operate a mine in the Dominican Republic from which Corona Materials would export construction aggregate materials to Florida and elsewhere.[4]

In May 2007, Corona, through its 99% owned Dominican subsidiary, Walvis Investments, S.A., submitted an application to the Dominican Mining Office to operate the Joama Exploitation

[1] Executive Director, International Arbitration and Mediation Center - AmCham Costa Rica. The views expressed in this paper are those of the author.
[2] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, paras. 5 and 7.
[3] *Id.*, paras. 12-16.
[4] *Id.*, para. 38.

Concession.[5] Then, in September 2007, the Claimant submitted an application for an environmental license to operate the aggregates mine.[6]

The Claimant asserted that the Joama Exploitation Concession was granted in 2009 for a period of 75 years, and that the only remaining approval needed to make full use of it was to obtain the Environmental License, for which an Environmental Impact Assessment was required.[7] On August 18, 2010, the Environmental Ministry informed Corona that the Joama Project was not environmentally viable.[8] According to the Claimant, the Resolution containing the negative environmental decision did not provide explanations, nor indicate any procedure by which the decision could be appealed or submitted for reconsideration. The Respondent disagreed.[9] The subsequent facts were extensively debated by the Parties.[10]

On December 3, 2015, the Respondent filed Expedited Preliminary Objections in accordance with CAFTA-DR Article 10.20.5.[11] The Respondent claimed that the Tribunal lacked jurisdiction because the alleged acts and omissions on which the Claimant's claims were based took place outside the three-year period prescribed under CAFTA-DR Article 10.18.1.[12]

The Respondent submitted that in accordance with CAFTA-DR Article 10.18.1, a tribunal would lack jurisdiction *ratione temporis* if the claim brought under CAFTA-DR Article 10.16 is not submitted to arbitration within three years following the date on which the claimant (a) acquired, or should have acquired, knowledge of the alleged breach; and (b) acquired, or should have acquired, knowledge of the loss or damage incurred.[13]

The Respondent then analyzed the Claimant's claims for alleged breaches of Articles 10.3, 10.5, and 10.7 under the perspective of its objection under Article 10.18.1, and concluded that they were all submitted outside the three-year time limit.[14]

In addition to the Parties' subsequent exchange of pleadings, the United States filed a written submission as a Non-Disputing Party pursuant to CAFTA-DR Article 10.20.2.

In the Award, the Tribunal analyzed the limitations on consent introduced in CAFTA-DR's Article 10.18, and indicated that this provision sets a time limit for the submission of claims to arbitration, which starts to run on the day that the Claimant acquires or should have acquired knowledge of the alleged breach of the Treaty and of the incurred loss or damage. [15]

The Tribunal concluded that a number of elements, and in particular a letter dated February 23, 2011, constituted clear evidence of the fact that, on that date at the latest, the rejection of the application for an environmental license and the failure to address the Motion for Reconsideration were considered by the Claimant to amount to a violation of several provisions of CAFTA-DR.[16] Therefore, the

[5] *Id.*, para. 39.
[6] *Id.*, para. 40.
[7] *Id.*, para. 41.
[8] *Id.*, para. 43.
[9] *Id.*, para. 43.
[10] *Id.*, paras. 43-49.
[11] *Id.*, para. 17.
[12] *Id.*, para. 54.
[13] *Id.*, para. 55.
[14] *Id.*, paras. 65-93.
[15] *Id.*, paras. 189-197.
[16] *Id.*, para. 236.

Tribunal decided that the Claimant failed to submit its claims to arbitration within the time limit set out in CAFTA-DR Article 10.18.1.[17]

Lastly, the Tribunal also rejected the Claimant's allegations of denial of justice[18] and reiterated that since the request for arbitration was time-barred, it did not have jurisdiction over its claims.

III. TCW Group, Inc and Dominican Energy Holdings, L.P. v. Dominican Republic

TCW Group, Inc ("TCW"), a company incorporated in Nevada, United States, filed a Notice of Arbitration and Statement of Claim dated December 21, 2007, against the Dominican Republic, pursuant to CAFTA-DR's Chapter 10 and the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). On June 17, 2008, the Claimant filed an Amended Notice of Arbitration and Statement of Claim, which was submitted on behalf of Dominican Energy Holdings, L.P. ("DEH"), a limited partnership established under the laws of Delaware, United States, as well.

The Tribunal was composed of Professor Juan Fernández Armesto, Professor Thomas Wälde and Professor Karl-Heiz Böckstiegel. Professor Thomas Wälde was later replaced by Professor Mark Kantor.

As submitted by the Claimants, TCW and DEH were indirect owners of Empresa Distribuidora de Electricidad del Este, S.A. ("EDE Este"), a joint venture created in 1999 between the Dominican Republic and a foreign investor, AES Distribución Dominicana Ltd. ("AES Distribución") to serve as one of the three electricity distribution companies in the Dominican Republic. In 1999 and thereafter, AES Distribución allegedly invested in EDE Este and in return became a 50% owner of EDE Este.[19]

In November 2004, AES Corporation, the parent of AES Distribución, sold 100% of the shares of AES Distribución to DEH, a limited partnership that TCW indirectly owns and controls. TCW then renamed AES Distribución, DR Energy Holdings Ltd. ("DREH").[20]

The Claimants alleged that the Respondent had engaged in a willful pattern of announcing and reaffirming reform in the electricity sector, only to back-pedal later.[21]

The Claimants' claims included supposed violations of CAFTA-DR Articles 10.7 (Expropriation and Compensation), 10.4 (Most-Favored Nation Treatment), 10.3 (National Treatment), and 10.5 (Minimum Standard of Treatment).[22] Additionally, the Claimants requested approximately $600 million plus interest as compensation.[23]

On July 14, 2008, the Respondent filed a short Reply to the Amended Notice of Arbitration and Statement of Claim. In it, it stated that the Claimants' Amended Notice of Arbitration contained numerous jurisdictional defects. Subsequently, on November 21, 2008, the Respondent filed its Memorial on Jurisdiction, and the Claimants filed their Counter-Memorial on Jurisdiction on February 13, 2009.

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[17] *Id.*, para. 237.
[18] *Id.*, paras. 239-270.
[19] *TCW Group, Inc and Dominican Energy Holdings, L.P. v. the Dominican Republic*, Amended Notice of Arbitration and Statement of Claim, June 17, 2008, para. 3.
[20] *Id*.
[21] *Id.*, para. 7. Paragraph 9 included a list of the Respondent's alleged wrongful acts.
[22] *Id.*, para. 10.
[23] *Id.*, para. 152.

On July 16, 2009, after reviewing a Settlement Agreement between the Claimants and the Respondent, the Tribunal issued a Consent Award in which it recorded the statements made by the Parties, which confirmed that:

1. The arbitral proceedings over which the Tribunal possessed jurisdiction had been settled.
2. The Claimants and the Respondent submitted themselves to the jurisdiction of the Tribunal for the purposes of making the Consent Award.
3. The Parties agreed that no Party admitted any liability by entering into the Agreement.

IV. Michael and Lisa Ballantine v. Dominican Republic

On June 12, 2014, United States citizens Michael Ballantine, Lisa Ballantine, and Rachel Ballantine filed a Notice of Intent against the Dominican Republic. They claimed that the Dominican Republic had acted inconsistently with its obligations under CAFTA-DR Chapter 10, particularly with respect to the following provisions: Article 10.3 (National Treatment), Article 10.4 (Most-Favored Nation), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation and Compensation).[24] They professed to have invested their efforts and money into developing the *Jamaca de Dios*, a gated community in the Dominican Republic, and warned that they intended to request damages of approximately $20,000,000 as compensation for losses caused by the Respondent's measures in breach of CAFTA-DR.

On September 11, 2014, Michael Ballantine and Lisa Ballantine filed the Notice of Arbitration and Statement of Claim, pursuant to the UNCITRAL Arbitration Rules.[25] They argued that the *Jamaca de Dios* development was highly successful for the first several years. However, in September 2011, the Ministry of Environment rejected their request to expand the project on the grounds that the expansion would violate regulations governing the maximum slope of land for development.[26]

The Ballantines asserted that the actions of the Ministry and other Government entities greatly diminished the value of their investment, and therefore breached the obligations contained in CAFTA-DR's aforementioned provisions.[27] Consequently, they reiterated their request of approximately $20,000,000 in damages.[28]

On October 13, 2014, the Dominican Republic filed its *Respuesta a la Notificación de Arbitraje*. On October 21, 2016, a Tribunal composed of Ricardo Ramírez, Marney Cheek and Raúl Emilio Vinuesa issued the first procedural order.

V. TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23)

On January 13, 2009, the Claimant, TECO Guatemala Holdings, LLC ("TECO"), a company established under the laws of Delaware, United States, submitted its letter of intent to Guatemala, in accordance with CAFTA-DR Article 10.16.2.[29] Subsequently, on October 20, 2010, the Claimant submitted its Request for Arbitration in accordance with the ICSID Convention.

[24] *Michael Ballantine, Lisa Ballantine, and Rachel Ballantine v. the Dominican Republic*, Notice of Intent to Submit a Claim to Arbitration, June 12, 2014, para. 5.
[25] *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, Notice of Arbitration and Statement of Claim, September 11, 2014, para. 1.
[26] *Id.*, paras. 3-5.
[27] *Id.*, paras. 7-8.
[28] *Id.*, para. 94.
[29] *TECO Guatemala Holdings LLC v. the Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, para. 18.

The Tribunal was composed of Professor William W. Park, Professor Rodrigo Oreamuno and Mr. Alexis Mourre. Professor Oreamuno was later replaced by Dr. Claus von Wobeser.

The dispute arose from the alleged violation by the *Comisión Nacional de Energía Eléctrica* ("CNEE") for setting tariffs for the distribution of energy by *Empresa Eléctrica de Guatemala S.A.* ("EEGSA"), the electricity company in which the Claimant had an indirect share.[30] According to the Claimant, Guatemala breached Article 10.5 of the Treaty by failing to give fair and equitable treatment to TECO's investment with the aim of imposing an unreasonably low Value Added for Distribution on EEGSA. [31] Consequently, the Claimant requested compensation in the amount of $237.1 million plus interest.

Essentially, the dispute rested on an allegation of abuse of power by the regulator and a supposed disregard of the regulatory framework in the context of an administrative tariff review process.[32]

The Respondent objected to the Tribunal's jurisdiction by contending that: 1) the case was nothing more than a regulatory disagreement on the interpretation of Guatemalan domestic law, the interpretation of which is not a matter for an Arbitral Tribunal but for the Guatemalan courts, which have already decided the issue; 2) the Claimant cannot use an international mechanism to file an appeal against the decisions of the Supreme Court of Guatemala and could only have challenged those decisions under international law by presenting a denial of justice claim; and 3) due consideration must be given to the decision of the Tribunal in the *Iberdrola Energía S.A.* against Guatemala case (which had identical facts to this case and had already been decided in favor of Guatemala).[33] However, the Tribunal found that it had jurisdiction to decide the dispute.[34]

When looking into the merits of the case, the Tribunal first addressed the Parties' disagreement as to the regulatory framework.[35] It then analyzed the alleged representations of the Respondent vis-à-vis Claimant's legitimate expectations at the time of the investment,[36] but indicated that a willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations.[37]

As to the claim of a breach of the obligation to grant fair and equitable treatment, the Tribunal concluded that

> "[…] the regulator has repudiated the two fundamental principles upon which the regulatory framework bases the tariff review process: first that, save in the limited cases provided in Article 98 RLGE, the tariff would be based on the VAD study prepared by the distributor's consultant; and, second, that any disagreement between the regulator and the distributor regarding such VAD study would be resolved by having regard to the pronouncements of a neutral Expert Commission."[38]

Consequently, the Tribunal found that such repudiation of the two fundamental regulatory principles applying to the tariff review process was arbitrary and breached elementary standards of due process in administrative matters[39] and constituted a breach of CAFTA-DR Article 10.5. It ordered Guatemala

[30] *Id.*, para. 79.
[31] *Id.*, para. 264.
[32] *Id.*, para. 489.
[33] *Id.*, para. 238.
[34] *Id.*, para. 488.
[35] *Id.*, paras. 497-610.
[36] *Id.*, paras. 611-622.
[37] *Id.*, para. 621.
[38] *Id.*, para. 710.
[39] *Id.*, para. 711.

to pay $21,100,552 in damages plus compounded interest. Additionally, it ordered Guatemala to pay the entirety of its costs and expenses and reimburse TECO 75% of its legal costs and expenses.[40]

On April 22, 2014, ICSID registered an Application by Guatemala for the annulment of the Award rendered on December 19, 2013. On the same day, ICSID also registered an Application by TECO for the partial annulment of the Award.[41] The *ad hoc* Committee was constituted by Professor Bernard Hanotiau, Ms. Tinuade Oyekunle, and Professor Klaus M. Sachs.

In Guatemala's Application, Guatemala sought annulment of the Award by claiming that: 1) The Tribunal manifestly exceeded its powers; 2) The Award failed to state the reasons on which it was based; and 3) The Tribunal seriously departed from a fundamental rule of procedure.[42] Guatemala's Application also contained a request for a stay of enforcement of the Award until Guatemala's Application for Annulment was decided.[43] Guatemala also filed a Request for the Continuation of the Stay of Enforcement of the Award, requesting that the *ad hoc* Committee continue the stay of enforcement of the Award without Respondent having to provide security for the eventual payment of the Award.[44]

TECO requested that the *ad hoc* Committee either deny Guatemala's request for a continuation of the stay of enforcement of the Award, or condition such a stay on Guatemala posting a bond in the full amount of the Award.[45]

The *ad hoc* Committee decided that the stay of enforcement of the Award would continue until the issuance of a decision on the Parties' respective applications for annulment, without Guatemala being required to post a bond.[46]

TECO's application for the partial annulment of the Award requested that the Committee: 1) Partially annul the damages section of the Award insofar as it did not award TECO any compensation for losses arising from the sale of EEGSA; 2) Partially annul the damages section of the Award insofar as it did not award TECO any interest accruing in the period from August 1,2009 until October 21, 2010; 3) Partially annul the damages section of the Award with respect to the interest rate applicable to pre-award interest; and 4) Order Guatemala to pay TECO's legal fees and costs incurred in the proceedings.[47]

It its Decision on Annulment, the Committee first analyzed TECO's application. On the claim concerning failure to state the reasons, the Committee concluded that there was no genuine contradiction within the Tribunal's analysis of the loss of value claim. The Committee therefore found that annulment for that reason was not warranted.[48]

Nonetheless, the Committee considered that the Tribunal's decision on the loss of value claim did not meet the standards set out in Article 52(1)(e) of the ICSID Convention and therefore needed to be annulled on this ground.[49] The Committee indicated that the Tribunal's reasoning on the loss of value

[40] *Id.*, para. 780.
[41] *TECO Guatemala Holdings LLC v. the Republic of Guatemala*, ICSID Case No. ARB/10/23 (Annulment proceedings), Decision on Guatemala's Request for a Continuation of the Stay of Enforcement of the Award, February 10, 2015, para. 1.
[42] *Id.*, para. 2.
[43] *Id.*, para. 3.
[44] *Id.*, paras. 8, 13.
[45] *Id.*, para. 20.
[46] *Id.*, para. 29.
[47] *TECO Guatemala Holdings LLC v. the Republic of Guatemala*, ICSID Case No. ARB/10/23 (Annulment proceedings), Decision on Annulment, April 5, 2016, para. 29.
[48] *Id.*, para. 103.
[49] *Id.*, para. 127.

claim was not clear at all.[50] It added that the Tribunal failed to address the Parties' expert reports on the loss of value claim despite the Parties' strong emphasis on expert evidence, and ignored the existence of evidence that at least appeared to be relevant to its analysis.[51]

The Committee then analyzed TECO's claim that the Tribunal departed from fundamental rules of procedure. However, since it had determined that the Tribunal's decision on the loss of value claim did not meet the requirements of Article 52(1)(e) of the ICSID Convention and had accordingly annulled it, it determined no need to decide whether that decision evidenced the presence of another defect warranting annulment.[52]

The Committee went on to address TECO's claims of manifest excess of powers and serious departure from a fundamental rule of procedure in relation to the Tribunal's decision on interest, and concluded that the Tribunal did not manifestly exceed its powers when it proceeded to decide the issue of pre-Award interest rate.[53] However, it did hold that the Tribunal seriously departed from a fundamental rule of procedure when it denied TECO's claim for interest on historical damages for the period before EEGSA's sale on account of "unjust enrichment".[54]

The Committee subsequently analyzed Guatemala's Application. It began by addressing the claim of manifest excess of powers, in which Guatemala claimed that the Tribunal asserted jurisdiction over a mere regulatory dispute under local law. On this point, the Committee found that the Tribunal correctly identified the applicable law and endeavored to apply it to the facts in dispute. Therefore, it concluded that the Tribunal's *prima facie* analysis was tenable and evidenced no manifest excess of powers.[55]

As to the claim that the Tribunal failed to state reasons for the decision on jurisdiction, the Committee indicated that from a "simple reading of the Award" it was "obvious" that the Tribunal provided reasons for its decision on jurisdiction.[56]

As part of the claim of manifest excess of powers and failure to state the reasons, Guatemala claimed that the Tribunal reviewed and *de facto* reversed a Constitutional Court decision. The Committee also rejected this claim.[57] Additionally, Guatemala argued that the Tribunal failed to apply international law and equated a breach of domestic law with a breach of the CAFTA-DR, in addition to failing to indicate the test of applicable international law. The Committee also found that annulment of the Award on these grounds was not warranted.[58]

Guatemala also considered that the Award should be annulled for failure to state the reasons in light of the contradiction which existed between the Tribunal's decision on liability and its decision on historical damages.[59] It also argued that the Tribunal ignored evidence submitted by Guatemala on historical losses.[60] The Committee also concluded that annulment of the Award on these grounds was not warranted.[61]

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[50] *Id.*, para. 128.
[51] *Id.*, para. 138.
[52] *Id.*, paras. 140-167.
[53] *Id.*, para. 176.
[54] *Id.*, para. 183.
[55] *Id.*, para. 231.
[56] *Id.*, para. 253.
[57] *Id.*, para. 274.
[58] *Id.*, paras. 308, 327.
[59] *Id.*, para. 332.
[60] *Id.*, para. 344.
[61] *Id.*, paras. 337, 348.

Finally, Guatemala contended that the Tribunal's decision on costs should be annulled for failure to state the reasons.[62] The Committee found that, while the Tribunal did explain its decision on the issue of costs, it was based on Guatemala having been partially successful on quantum. Following the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA, the basis for the Tribunal's finding that Guatemala was partially successful on quantum also disappeared.[63] The Committee therefore found that the decision on costs had to be annulled.

It is worth noting that when allocating costs, the Committee considered that the errors which led to the partial annulment of the Award were made by the Tribunal. Therefore, it indicated that since both Parties had participated equally in the appointment of the Tribunal, "the burden of the Tribunal having committed annullable errors should be borne by the Parties equally."[64] It then issued a new decision on costs.[65]

VI. Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23)

On June 14, 2007, Railroad Development Corporation ("RDC") filed, pursuant to the ICSID Convention, a Request for Arbitration against the Republic of Guatemala on its own behalf and on behalf of Compañía Desarrolladora Ferroviaria, S.A., a Guatemalan company which does business as Ferrovías Guatemala ("FVG") and is majority-owned and controlled by RDC.[66]

ICSID registered the Request for Arbitration on August 20, 2007. The Tribunal consisted of the Honorable Stuart E. Eizenstat, Professor James Crawford, and Dr. Andrés Rigo Sureda.[67]

RDC, a privately-owned railway investment and management company, won in 1997 a bid for the use of the infrastructure and other rail assets to provide railway services in Guatemala ("the Usufruct"). RDC's bid consisted of a plan to rebuild the rail system, which had been closed for some time, with an investment program of about $10,000,000. RDC included in its bid a rehabilitation plan for the rolling stock that would be required for the operation of the railroad. The Usufruct that was awarded to RDC consisted of a 50-year right to rebuild and operate the Guatemalan rail system and did not include rolling stock.[68]

On November 25, 1997, FVG signed the Usufruct Contract of Right of Way ("Usufruct Contract") with Ferrocarriles de Guatemala ("FEGUA"), a state-owned company responsible for providing certain railway transport services and managing the rail equipment and real estate assets. The Usufruct and the Usufruct Contract were ratified by the Congress of Guatemala in 1998.[69]

The Usufruct covered a 497-mile narrow gauge railroad and included the right to develop alternative uses for the right of way. In return, RDC (through FVG) agreed to make certain payments to FEGUA.[70]

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[62] *Id.*, para. 352.
[63] *Id.*, para. 361.
[64] *Id.*, para. 377.
[65] *Id.*, paras. 363-381.
[66] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, para. 1.
[67] *Id.*, para. 2.
[68] *Id.*, para. 30.
[69] *Id.*, para. 30.
[70] *Id.*, para. 31.

In November 1997, Guatemala invited bids for the use of the FEGUA rail equipment in onerous usufruct. On December 11, 1997, FVG submitted its bid and won the rail usufruct. FEGUA and FVG signed a Usufruct Contract on March 23, 1999. This contract never went into force because it was never given government approval.[71]

Since the contract mentioned above had not entered into force, FVG and FEGUA entered into another contract on August 28, 2003.[72] FVG then restored commercial service between various cities, up until 2005.[73] On June 26, 2005, FVG initiated two domestic arbitration cases against FEGUA for breach of contract. The Claimant alleged that Guatemala, through FEGUA, had failed to remove squatters from the rail right of way and to make agreed payments to the trust fund. The Claimant further alleged that, in anticipation of FVG's filings, FEGUA requested the Attorney General to investigate the circumstances surrounding the award of the Usufruct and to issue an opinion on the validity of the contract of August 28.[74]

Subsequently, the Attorney General recommended that Guatemala declare the contract void "as not in the interest of the country".[75] FEGUA then issued an opinion in agreement with the Attorney General's recommendation.[76] In August 2006, the Government issued a resolution that declared the usufruct of the rolling stock injurious to the interests of the State (the *Lesivo* Resolution).[77]

In the arbitration filed under CAFTA-DR, the Claimant alleged that Guatemala had breached its obligations under the following provisions: Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation and Compensation).

On May 29, 2008, Guatemala filed preliminary objections to the jurisdiction of the Tribunal pursuant to CAFTA-DR Article 10.20.5. However, the Tribunal, in its First Decision on Jurisdiction, decided that the waivers submitted by the Claimant pursuant to CAFTA-DR Article 10.18.2 were valid.[78] The Respondent then filed a request for clarification of the Decision, which was rejected by the Tribunal.[79]

On August 21, 2008, RDC requested an interim measure of protection mandating that the Respondent preserve certain categories of documents while the arbitration proceedings were pending, but the Tribunal denied the Claimant's request.[80]

In its Second Decision on Jurisdiction, the Tribunal rejected Respondent's objections *ratione temporis* and *ratione materiae*, and confirmed that its jurisdiction was limited to the *Lesivo* Resolution and conduct subsequent to this Resolution.[81]

In its Memorial, the Claimant contended that the Respondent indirectly expropriated its investment. Claimant analyzed the *Lesivo* Resolution against the requirements of CAFTA-DR Article 10.7.1 for a

[71] *Id.*, para. 32.
[72] *Id.*, para. 33.
[73] *Id.*, para. 34.
[74] *Id.*, para. 35.
[75] *Id.*
[76] *Id.*, para. 36.
[77] *Id.*, para. 37.
[78] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, November 17, 2008.
[79] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Clarification Request of the Decision on Jurisdiction, January 13, 2009, para. 14.
[80] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures, October 15, 2008.
[81] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010.

lawful expropriation and argued that the Resolution did not meet them.[82] The Claimant also alleged that the Respondent breached the minimum standard of treatment under CAFTA-DR Article 10.5. According to the Claimant, the *Lesivo* procedure lacked foundation under substantive Guatemalan law and afforded no due process to the investor.[83]

Additionally, the Claimants alleged a breach of the Respondent's obligation to provide full protection and security to the investment because supposedly after the *Lesivo* Resolution was issued, the local authorities determined that there was no need to protect an investment declared harmful to the State's interests. Consequently, locals allegedly stole rails, track materials, cross-members of three major bridges and set up living quarters along the tracks and in station yards.[84] The Claimant further alleged a breach of CAFTA-DR Article 10.3 (National Treatment).[85]

As for damages, the Claimant submitted a request for compensation in the amount of $64,000,000.

When analyzing the expropriation claim, the Tribunal emphasized that when dealing with expropriations, a common theme is that an effect of the measures is that the claimant is deprived substantially of the use and benefits of the investment.[86] In this particular case, the Tribunal noted:

> "(a) that more than five years after the publication of the *Lesivo* Declaration, Contract 143/158 and Contract 402 remain in effect; (b) Claimant continues to be in possession of the railway equipment; (c) Claimant continues to receive rents associated with its real estate rights under Contract 402; and (d) such rents amount to 92% of revenues of FVG."[87]

Therefore, the Tribunal concluded that the effect on the Claimant's investment did not rise to the level of an indirect expropriation.

As to the national treatment claim, the Tribunal concluded that the Claimant did not show that the *Lesivo* Resolution was intended to favor local investors. Additionally, the Claimant continued in possession of its investment.[88]

Three Non-Disputing Parties - the United States, El Salvador and Honduras - filed submissions on the minimum standard of treatment of aliens.[89] After analyzing the alleged breach of this standard, the Tribunal concluded that the manner and the grounds on which Respondent applied the *Lesivo* remedy in the circumstances of the case constituted a breach of the minimum standard of treatment. In particular, the Tribunal highlighted that the facts of the case, taken together, demonstrated the "arbitrary, grossly unfair, and unjust nature of *lesivo* in this case", which was also evidence that it was in breach of representations made by Guatemala upon which Claimant reasonably relied.[90]

The Tribunal did not go into the allegations concerning "full protection and security" citing procedural economy, because even if the Claimant were able to establish a breach of this protection, it would be entitled to no greater relief than that which was already warranted by the breach of the minimum standard of treatment.[91]

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[82] Railroad Development Corporation, Award, para. 41.
[83] *Id.*, para. 48.
[84] *Id.*, para. 51.
[85] *Id.*, para. 52.
[86] *Id.*, para. 151.
[87] *Id.*, para. 152.
[88] *Id.*, para. 153.
[89] *Id.*, para. 207.
[90] *Id.*, para 235.
[91] *Id.*, para 238.

The Award ordered Guatemala to pay approximately $11,300,000 plus compound interest. However, the Claimant later asked the Tribunal to rectify and supplement certain damages holdings in the Award. The Tribunal issued a Decision on January 18, 2013, in which it recognized that it had made a mathematical error in its calculation. This rectification meant additional compensation for the Claimant.[92]

VII. Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No. ARB/09/17)

On July 2, 2009, Commerce Group Corp. and San Sebastian Gold Mines, Inc., two corporations organized under the laws of the United States, filed a Notice of Arbitration against El Salvador pursuant to the ICSID Convention, CAFTA-DR Chapter 10 and the Investment Law of El Salvador.[93]

The Claimants began mining precious metals in El Salvador in 1968. Between 1987 and early 2006, Claimants expanded their mining and related activities which were regulated by exploration licenses and environmental permits granted by the Government of El Salvador. However, in September/October 2006, the Government revoked the Claimants' environmental permits and did not renew their exploration licenses.[94] The Claimants asserted that these measures amounted to a violation of the Respondent's obligations under CAFTA-DR, in particular, of Article 10.3 (National Treatment), Article 10.4 (Most Favored Nation Treatment), Article 10.5 (Minimum Standard of Treatment) and Article 10.7 (Expropriation and Compensation). Therefore, the Claimants were seeking compensation in the amount of $100,000,000.[95]

The Tribunal was composed of Professor Albert Jan van den Berg, Dr. Horacio A. Grigera Naón, and Mr. J. Christopher Thomas, QC.

On August 16, 2010, the Respondent filed its Preliminary Objections under the expedited procedure of CAFTA-DR.[96] Costa Rica and Nicaragua filed Non-Disputing Party submissions with their own interpretations of the relevant provisions to the dispute.[97]

The Respondent submitted that the Tribunal did not have jurisdiction to hear this dispute because the Claimants did not comply with the CAFTA-DR Waiver Provision by allowing the existing court proceedings which they had initiated in El Salvador to continue. In the Respondent's view, adherence to the Waiver Provision is a condition precedent to the Respondent's consent to arbitration, and the Claimants' failure to remedy the non-compliance with the Waiver Provision once they were put on notice by the Respondent meant that the Claimants did not preserve their claims in a timely fashion.[98]

In turn, the Claimants submitted that the Waiver provided in the Request served as an abandonment of its legal rights to initiate or continue other proceedings. The Claimants further submitted that CAFTA-DR does not require immediate discontinuance of domestic proceedings, but rather allows the

[92] *Railroad Development Corporation v. the Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation and Rectification of Award, January 18, 2013.
[93] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, para. 15.
[94] *Id.*, para. 9.
[95] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Notice of Arbitration, July 2, 2009, para. 31.
[96] *Id.*, para. 33.
[97] *Id.*, para. 40.
[98] *Id.*, para. 66.

Respondent to use the Claimants' waiver to seek the discontinuance of domestic proceedings if it so desires.[99]

The Tribunal first indicated that CAFTA-DR Article 10.18(2)(b) requires the Claimants to file a formal "written waiver", and then materially ensure that no other legal proceedings are "initiated" or "continued".[100] Costa Rica and Nicaragua agreed with this interpretation.[101] The Tribunal then concluded that even though the Claimants complied with the formal requirement, they failed to discontinue the local proceedings in order to give material effect to their formal waiver.[102] Therefore, the Tribunal determined that the dispute was not within its jurisdiction.

As to the claims arising under the Foreign Investment Law of El Salvador, the Tribunal rejected them, deciding that it was not satisfied that the Claimants had indeed raised any causes of action under the Foreign Investment Law.[103]

On July 11, 2011, the Claimants filed an Application for Annulment based on ICSID Convention Article 52, stating that the Tribunal manifestly exceeded its powers and that the Award failed to state the reasons on which it was based. The *ad hoc* Committee constituted to hear the Application was composed of Professor Michael C. Pryles, Professor Christoph Schreuer, and Professor Emmanuel Gaillard. However, due to financial troubles, the Applicants were not able to secure the funding needed to continue the annulment proceedings. Therefore, the Committee ordered their discontinuance pursuant to Administrative and Financial Regulation 14(3)(d) and (e).[104]

VIII. Pac Rim Cayman LLC. v. Republic of El Salvador (ICSID Case No. ARB/09/12)

The Claimant, Pac Rim Cayman LLC ("PRC"), a United States company, filed its Notice of Arbitration on April 30, 2009, pursuant to the ICSID Convention, CAFTA-DR and the Investment Law of El Salvador. The Claimant alleged that its claims arose out of unlawful and politically motivated measures taken by the Government of President Elias Antonio Saca against the Claimant's investments. Particularly, the Claimant alleged that the Government encouraged it to spend millions of dollars to undertake mineral exploration activities in EI Salvador, but failed to act upon the applications for a mining exploitation concession and for various environmental permits following PRC's alleged discovery of deposits of gold and silver.[105]

According to the Claimant, President Saca abruptly and without justification announced that he opposed granting any new mining permits. The Claimant also alleged that this followed an extended period during which the Government had ceased to communicate with it or to act upon its regulatory filings.[106]

The Claimant therefore submitted that in light of the Government's actions and inactions, El Salvador breached its obligations under the following CAFTA-DR provisions: Article 10.3 (National Treatment), Article 10.4 (Most-Favored Nation Treatment), Article 10.5 (Minimum Standard of

[99] *Id.*, para. 67.
[100] *Id.*, para. 84.
[101] *Id.*, paras. 81-82.
[102] *Id.*, para. 102.
[103] *Commerce Group Corp. and San Sebastian Gold Mines, Inc.*, Award, paras. 121-128.
[104] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (Annulment Proceeding), Order of the Committee Discontinuing the Proceeding and Decision on Costs, August 28, 2013.
[105] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Notice of Arbitration, April 30, 2009.
[106] *Id.*, para. 9.

Treatment), and Article 10.7 (Expropriation and Compensation). As compensation, the Claimant requested $77 million plus interest for out of pocket expenses, as well as the right to complete the exploration and exploitation activities.[107]

The Tribunal was constituted by Professor Guido Santiago Tawil, Professor Brigitte Stern, and V.V. Veeder, Esq.

On January 4, 2010, the Respondent filed its Preliminary Objections under CAFTA-DR Articles 10.20.4 and 10.20.5. Under this expedited procedure, the Respondent requested the dismissal of all claims related to the application of a mining exploitation concession in the El Dorado project, as well as the dismissal of all CAFTA-DR and all non-CAFTA-DR claims. The Respondent submitted that the Claimant's assertions were not only incorrect as a matter of law, but that the Claimant also failed to provide a factual basis for the claims. Specifically, that the Claimant failed to meet its burden regarding the alleged entitlement to the concession in dispute. However, the Tribunal did not accept the Respondent's Preliminary Objections.[108]

On October 15, 2010, the Respondent filed its Memorial on Objections to Jurisdiction, in which it set out four separate jurisdictional objections regarding: 1) the Claimant's abuse of process, 2) CAFTA-DR's denial of benefits provision, 3) the Claimant's non-compliance with CAFTA-DR's jurisdictional requirements, and 4) the lack of jurisdiction under the Investment Law of El Salvador.

In May, 2011, both the United States and Costa Rica filed Non-Disputing Party submissions pursuant to CAFTA-DR Article 10.20.2. Additionally, the Center for International Environmental Law submitted an *amicus curie* brief pursuant to CAFTA-DR Article 10.20.3 on behalf of member organizations of *La Mesa Nacional Frente a la Minería Metálica de El Salvador*.

On June 1, 2012, the Tribunal issued its Decision on the Respondent's Jurisdictional Objections. It rejected the Respondent's case on the abuse of process and *ratione temporis* issues, but decided that the Respondent did establish the denial of benefits claim. However, the Tribunal accepted it had jurisdiction to decide the non-CAFTA-DR claims pleaded by the Claimant in its Notice of Arbitration.

On October 14, 2016, the Tribunal issued an Award dismissing all of the claims under the Investment Law and awarding El Salvador $8 million to cover legal costs and fees.

IX. Spence International Investments et al. v. Republic of Costa Rica (ICSID Case No. UNCT/13/2)

On June 10, 2013, a group of United States nationals[109] filed a Notice of Arbitration against Costa Rica, in accordance with the UNCITRAL Arbitration Rules. The Claimants alleged that they had made significant investments in land located on the Pacific coast of Costa Rica, with the intention of developing luxury beachfront homes for "environmentally conscious clientele". The Claimants claimed that Costa Rica has unlawfully deprived them of the use and enjoyment of their investments and has failed to provide prompt or adequate compensation for the resulting deprivation. Such deprivation, the Claimants allege, has resulted from physical confiscation and/or from rendering their property rights inutile by commencing the expropriation process established under Costa Rican law

[107] *Id.*, para. 128.
[108] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA-DR Articles 10.20.4 and 10.20.5, August 2, 2010.
[109] Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brett E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion.

but failing to proceed with the expeditious and/or fair determination of compensation due for each respective taking.[110]

The expropriations alluded by the Claimants were the result of legislation that established the *Parque Nacional Marino Las Baulas*, a Park created to protect the leatherback sea turtles, which nest in the area and are an endangered species.

The Tribunal constituted to hear the case is composed of Sir Daniel Bethlehem, Mr. Mark Kantor, and Professor Raúl E. Vinuesa.

The Claimants submit that Costa Rica is in breach of the following CAFTA-DR provisions: 1) Article 10.3 (National Treatment), 2) Article 10.4 (Most-Favored-Nation Treatment), 3) Article 10.5 (Minimum Standard of Treatment), and 4) Article 10.7 (Expropriation and Compensation) and are asking for damages of approximately $49 million plus interest.

Costa Rica filed its Counter-Memorial on the Merits together with the following jurisdictional objections: 1) the Tribunal lacks jurisdiction because the Claimants knew about the measures they now challenge more than three years before they submitted their Notice of Arbitration, and 2) the Tribunal lacks jurisdiction because the Claimants' claims are based on alleged breaches that took place before CAFTA-DR entered into force.

Both the United States and El Salvador filed Non-Disputing Party submissions. Following the hearing held in April, 2015, the Tribunal asked the Parties to file post-hearing briefs referring only to the Non-Disputing Parties' submissions.

On October 25, 2016, the Tribunal issued an Interim Award in which it upheld Costa Rica's jurisdictional objections in relation to eighteen of the twenty-six properties at issue in the case. However, the Tribunal has left open the door for further pleadings in relation to the remaining eight properties.

X. David R. Aven et al. v. Republic of Costa Rica (ICSID Case No. UNCT/15/3)

On January 24, 2014, a group of nationals from the United States[111] filed a Notice of Arbitration against the Government of Costa Rica in accordance with the UNCITRAL Arbitration Rules. The claim concerned the Claimants' intent to develop a residential and commercial project known as the Las Olas Project, in Esterillos Oeste, also on Costa Rica's Pacific coast. The Project never materialized because of apparent environmental harm.

After the developers began works on the Project site, several neighbors filed complaints against them alleging that they drained and filled wetlands in the Project area and illegally cleared a forest. After a series of investigations, the Government filed criminal proceedings against one of the Claimants, David Aven, and one of his employees, for environmental damage. As a result, the Claimants had to suspend works on the Project site while the situation regarding the environmental damage was resolved. Mr. Aven proceeded to flee Costa Rica, so the criminal proceedings against him are still pending.

[110] *Spence International Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Notice of Arbitration and Statement of Claim, June 10, 2013, paras. 8-10.
[111] David Richard Aven, Samuel D. Aven, Carolyn Jean Park, Eric Allan Park, Jeffrey Scott Shioleno, Giacomo Buscemi (who is no longer a Claimant), David Alan Janney and Roger Raguso.

The Claimants submit that the actions taken by the Costa Rican Government constitute a violation of the following CAFTA-DR provisions: 1) Article 10.5 (Minimum Standard of Treatment), and 2) Article 10.7 (Expropriation and Compensation). The Claimants are seeking $103,500,000 in compensation, $5,000,000 in moral damages, plus interest.[112]

Costa Rica filed its jurisdictional objections together with its Counter-Memorial on the Merits. Its objections are mainly two: 1) Mr. Aven is a dual national of Italy and the United States and has held effective and dominant Italian citizenship throughout the period relevant to the Claims, and 2) the Claimants deliberately violated imperative norms of Costa Rican environmental protection, thereby invalidating the legality of their purported investment. Thus, Claimants' misconduct bars them from claiming under the Treaty.[113]

The Tribunal constituted to hear the case is composed of Eduardo Siqueiros, C. Mark Baker, and Professor Pedro Nikken. The Parties are currently in the process of exchanging written submissions.

XI. Guatemalan, Costa Rican and Dominican Victims of the Stanford Ponzi Scheme v. the United States of America

On December 29, 2012, several victims of the so-called "Stanford Ponzi Scheme" filed Notices of Intent against the United States.[114] The Claimants alleged that the United States failed to provide basic levels of protection and legal security in the Houston-based Stanford Financial group of companies, which led them to lose their investments as the victims of a massive Ponzi scheme. The Claimants submitted that United States regulators chose to "do nothing" after identifying the fraudulent nature of the enterprise.[115]

The Claimants alleged violations of the following CAFTA-DR provisions: 1) Article 10.3 (National Treatment), 2) Article 10.4 (Most-Favored-Nation Treatment), and 3) Article 10.5 (Minimum Standard of Treatment). They were asking for damages of approximately $2,264,369 plus interest. However, there are no further documents in the public domain related to the case.

XII. Observations

From the ten cases outlined above, three have been filed against the Dominican Republic, two against Guatemala, two against El Salvador, two against Costa Rica and one against the United States. To this day, Honduras and Nicaragua have not been Respondents in cases initiated under CAFTA-DR's Chapter 10.

Evidently, investors from the United States have turned to the dispute settlement provisions in CAFTA-DR's Chapter 10 more often than investors from other member States. However, these cases do not represent the avalanche of claims that some expected would happen once CAFTA-DR entered into force.

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[112] *David R. Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Claimants' Memorial, November 27, 2015. Claimants also alleged violations of CAFTA-DR Articles 10.3 and 10.4 in their Notice of Arbitration; however, no declaration was sought from the Tribunal regarding these two provisions in Claimants' Memorial.

[113] *David R. Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Counter-Memorial, April 8, 2016.

[114] In addition to the Notice of Intent filed by nationals of Costa Rica, Guatemala and the Dominican Republic pursuant to CAFTA-DR Article 10, nationals from Chile, Uruguay and Peru filed notices pursuant to other applicable treaties with the United States.

[115] *Guatemalan, Costa Rican and Dominican Victims of the Stanford Ponzi Scheme v. the United States of America*, Notice of Intent, December 29, 2012.

Until now, the cases under Chapter 10 have involved investments in the following sectors: mining, energy, tourism and residential developments, railway concessions, and finance. However, mining activities and tourism and residential developments in particular have been at the center of Chapter 10 cases repeatedly. Additionally, these tend to involve environmental issues and/or measures aimed at protecting the environment.

It is worth noting that a few of these cases were settled or discontinued, while others are still ongoing. Therefore, not many final awards have been rendered in cases initiated under Chapter 10. This means that the region's experience under this Chapter is still in its early stages, and thus will be influenced by the outcome of the pending cases.