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

PAC RIM CAYMAN LLC, Claimant, v. REPUBLIC OF EL SALVADOR, Respondent	ICSID Case No. ARB/09/12

Opinion of Professor Don Wallace, Jr.

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I. INTRODUCTION

1. Counsel to Claimant has requested my expert opinion regarding the meaning of the *Dominican Republic-Central America-United States Free Trade Agreement* ("CAFTA"), Article 10.18.2(b), which requires a claimant submitting a claim to arbitration under Section B of Chapter 10 of CAFTA to waive its right to initiate or continue certain types of proceedings. Counsel also has asked me to respond to statements made by Professor W. Michael Reisman on behalf of Respondent concerning the interpretation of Article 10.18.2(b).

2. I am a graduate of Yale College 1953 and Harvard Law School 1957; I have been a professor of law at Georgetown University Law Center since 1966 and am chairman of the International Law Institute and of counsel to Morgan, Lewis & Bockius (although I am giving this opinion in my individual capacity); I have been chairman of the International Law Section of the American Bar Association; I have served as an arbitrator in a number of cases, including *Biloune v. Ghana*[1] and *Wena Hotels v. Egypt*;[2] as counsel in a number of cases, including *Loewen v. United States*,[3] as well as cases in my capacity as of counsel to several law firms; and I am a co-author of *Investor-State Arbitration* (Oxford University Press, 2008), and

[1] *See Biloune & Marine Drive Complex Ltd. v. Ghana Invs. Ctr.*, Award on Jurisdiction and Liability, Ad Hoc – UNCITRAL Arbitration Rules, 27 Oct. 1989, 95 ILR 183 (1993).

[2] *See Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, IIC 273 (2000), 41 ILM 896 (2002), 6 ICSID Rep. 89 (2004).

[3] *See Loewen Group, Inc. v. United States*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, IIC 254 (2003), 42 ILM 811 (2003), 7 ICSID Rep. 442 (2005).

International Business and Economics Law and Policy (LexisNexis, 3rd ed., 2004). My *curriculum vitae* is attached.

II. STATEMENT OF KEY CONCLUSIONS

3. I have reached the following conclusions based on my review of CAFTA Article 10.18.2(b) along with the arguments made by Respondent and Professor Reisman as to the interpretation of this provision:

- By its terms, Article 10.18.2(b) bars a claimant from initiating or continuing certain kinds of proceedings. It does not constrain the submission of claims within the context of the very same proceeding initiated by the filing of a notice of arbitration under Article 10.16.
- A "claim" is not a "proceeding." A single proceeding may involve multiple claims. And claims may arise under different legal instruments – statutes, codes or treaties.
- The scope of Article 10.18.2(b) covers the initiation or continuation of proceedings before "other dispute settlement procedures," as opposed to the same dispute settlement procedure to which the CAFTA claims have been submitted, the objective being to ensure that a state-respondent party is not subject to multiple proceedings in multiple fora.
- Finally, CAFTA's object and purpose do not support the conclusion that Article 10.18.2(b) mandates the broad claim preclusion Respondent advocates. As relevant here, that object and purpose are to avoid double recovery and inconsistent decisions, neither of which is realistically possible when claims are joined in a single proceeding before the same forum.

III. RULES OF TREATY INTERPRETATION

4. Professor Reisman and I generally agree as to the applicable rules of treaty interpretation, in particular as those rules are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT").[4] VCLT Article 31(1) requires interpreting a treaty in good faith[5] according to the ordinary meaning of the terms, in their context, and in light of the treaty's object and purpose. The context in which particular treaty terms are to be understood includes, among other things, other substantive text, the treaty's preamble, and any annexes.[6] Additionally, implicit in VCLT Article 31(1) is the principle of effectiveness in treaty interpretation (*effet utile*), which requires that every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile).*[7] These fundamental rules guide my interpretation of CAFTA Article 10.18.2(b) in this Opinion.

5. According to these rules of interpretation, the text of the treaty is paramount, because it is the most reliable manifestation of the Parties' mutual intentions.[8] In this respect I recall the statement of the tribunal in *Amco v. Indonesia* that "a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way

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[4] *See* Vienna Convention on the Law of Treaties art. 31-32, May 23, 1969, 1155 U.N.T.S. 331 ("VCLT").

[5] *See Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 Sept. 1983, at para. 14, 23 I.L.M. 351, 359 (1984) ("conventions to arbitrate[] should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged").

[6] VCLT art. 31(2).

[7] *See, e.g.*, Oppenheim's International Law 1280-81 (R. Jennings & A. Watts eds., 9th ed. 1996) (stating that "an interpretation is inadmissible which would make a treaty provision meaningless, or ineffective").

[8] Richard Gardiner, Treaty Interpretation 144 (2008).

which leads [the tribunal] to find out and to respect the common will of the parties."[9] I agree with that statement, and in examining CAFTA Article 10.18.2(b) I will endeavor "to find out and to respect the common will of the parties."

6. While Professor Reisman and I agree on the rules that apply to treaty interpretation, we nevertheless disagree as to the application of those rules to the circumstances of this case. In particular, I disagree with the following aspects of Professor Reisman's opinion:

- Notwithstanding Professor Reisman's acknowledgement of the central importance of the text of the treaty to be interpreted, his opinion overlooks certain key terms in CAFTA Article 10.18.2(b) or paraphrases text using other terms, which results in giving the text a different meaning. Most notably, his opinion conflates the word "proceeding," a term used in the waiver provision, with "claim," a term not used in the waiver provision. Just as seriously, it glosses over the term "other" in the phrase "other dispute settlement procedures;" and
- Professor Reisman's opinion fails to consider how CAFTA's object and purpose as they relate to dispute resolution—providing "effective procedures" for dispute resolution—affect the proposed interpretation of the text at issue.

IV. THE APPLICABLE TREATIES: ICSID CONVENTION AND CAFTA

7. This arbitration involves two treaties. The first is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("the ICSID Convention"). The second is CAFTA. I will start by examining the relevant provisions of the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings ("the Arbitration

[9] *Amco* para. 14, 23 I.L.M. at 359.

Rules"). I will then briefly set out the bases for the Claimant's claims under the Investment Law of El Salvador, and then turn to the interpretation of CAFTA Article 10.18.2(b), bearing in mind the objectives of CAFTA as set forth in Article 1.2.1,[10] which pursuant to Article 1.2.2 must inform the interpretation of the treaty.[11]

8. Claimant and Respondent both have consented to the jurisdiction of ICSID,[12] as required by Article 25(1) of the ICSID Convention.[13] Indeed, both parties have consented twice to the choice of this ICSID tribunal as the forum to resolve this dispute: The Claimant has done so by invoking CAFTA Article 10.16.3,[14] with its reference to the ICSID Convention and the Arbitration Rules, and by invoking Article 15 of the Investment Law of El Salvador,[15] with its

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[10] Among the objectives identified in Article 1.2.1 is the objective to "create effective procedures . . . for the resolution of disputes." CAFTA art. 1.2.1(f).

[11] CAFTA Article 1.2.2 states, "The Parties shall interpret and apply the provisions of this Agreement in light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

[12] Claimant selected Dr. Guido Santiago Tawil; Respondent selected Prof. Brigitte Stern; the Parties agreed to the proposal by the ICSID Secretary-General that Mr. V.V. Veeder serve as President.

[13] Article 25(1) of the ICSID Convention provides that: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which *the parties to the dispute consent in writing to submit to the Centre*. When the parties have given their consent, no party may withdraw its consent unilaterally." (Emphasis added).

[14] Claimant in this arbitration has submitted claims under CAFTA Articles 10.16.1(a) and 10.16.1(b) on its own behalf and on behalf of two subsidiaries, Pacific Rim El Salvador, Sociedad Anonima de Capital Variable ("PRES"), and Dorado Exploraciones, Sociedad Anonima de Capital Variable ("DOREX") (collectively, "the Enterprises"), for violation of CAFTA Chapter 10 Section A protections, as well as for breaching "investment authorizations." Further, as noted, it has submitted claims for violation of the El Salvador Investment Law.

[15] Investment Law of El Salvador, art. 15, Legislative Decree No. 732 (Oct. 14, 1999).

reference to ICSID. Respondent has consented twice as well, by consenting to jurisdiction both in Article 10.17 of CAFTA and in Article 15 of the Investment Law of El Salvador.[16]

9. The ICSID Convention, together with the Arbitration Rules, provides the procedures applicable to this arbitration pursuant to Claimant's exercise of its option to institute ICSID arbitration under CAFTA Article 10.16.3, as well as Claimant's invocation of its right to institute ICSID arbitration under Article 15 of the Investment Law of El Salvador.

10. The substantive law governing this arbitration, pursuant to ICSID Convention Article 42(1) and CAFTA Article 10.22, consists of the CAFTA itself and other applicable rules of international law (with respect to the claims of breach of obligations under Section A of Chapter 10 of CAFTA), and the law of El Salvador and applicable rules of international law (with respect to the claims of breach of investment authorizations and breach of obligations under the Investment Law).[17]

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[16] Such multiple consents are not uncommon in international litigation and arbitration. For example, the Permanent Court of International Justice, in the *Electricity Company of Sofia Case*, held in this respect that "the multiplicity of agreements concluded accepting the compulsory jurisdiction [of the PCIJ] is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain." *See Elec. Co. of Sofia and Bulg.*, (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 79, at 76 (Apr. 4). The tribunals in *Duke v. Ecuador* and *Rumeli Telekom v. Kazakhstan* likewise both accepted their jurisdictions under two instruments. *See Duke Energy Electroquil v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, paras. 156-62 (Aug. 18, 2008); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, paras. 331-36 (July 29, 2008).

[17] Claimant's Notice of Arbitration ("NOA"), para. 82. Footnote 7 to CAFTA Article 10.22 further clarifies that "[t]he 'law of the respondent' means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case."

V. THE BASES FOR THE CLAIMANT'S INVESTMENT LAW CLAIMS

11. Respondent argues that, pursuant to CAFTA Article 10.18.2(b), Claimant has waived the right to submit to this Tribunal its claims arising under the Investment Law of El Salvador. Notably, that argument addresses only one of the two bases on which Claimant has asked the Tribunal to examine its Investment Law claims. Claimant has alleged that by failing to afford its investments the protections provided by the Investment Law, Respondent has breached its obligations under investment authorizations provided to those investments, as well as obligations under the Investment Law itself.[18] Respondent does not contest that under CAFTA Article 10.16.1, the Tribunal has jurisdiction to consider claims of breach of an investment authorization. Nor does Respondent contest that under CAFTA Article 10.22, the substantive law applicable to a claim of breach of an investment authorization is the law specified in the investment authorization itself or, absent such specification, the law of the respondent, together with applicable rules of international law. Respondent does contest that it has granted investment authorizations to Claimant or Claimant's investments. However, it makes no argument as to the scope of admissible claims if the Tribunal finds such investment authorizations to exist.

12. Instead of challenging this first, investment authorization basis for Claimant's submission of claims under the Investment Law of El Salvador, Respondent challenges the second basis, which is Article 15 of the Investment Law – the provision whereby El Salvador consents to ICSID jurisdiction over "disputes arising among foreign investors and the State, regarding their

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[18] *See, e.g.*, NOA para. 89. In this regard, Professor Reisman is incorrect when he states that "claims of violations of investment authorizations" do not "appear[] to obtain in the instant case." Reisman Op., para. 3.

investments in El Salvador." It is that basis for submitting Investment Law claims that Respondent contends is precluded by the waiver provided under CAFTA Article 10.18.2(b). As I will demonstrate, Respondent's contention is incorrect. But it is worth highlighting that even if the Tribunal were to disagree, Claimant's first basis for submitting its Investment Law claims would still stand.

VI. CAFTA ARTICLE 10.18.2 AND CLAIMANT'S CORRESPONDING WAIVER

13. At issue is whether conditions applicable to Respondent's consent under CAFTA Article 10.18.2 somehow negate or limit its consent under the Investment Law. In my view, they do not, as I explain below.

14. CAFTA Article 10.18.2(a) requires the claimant's written consent to submit a claim to arbitration pursuant to Article 10.16. Further, Article 10.18.2(b) requires the claimant to waive its right to initiate or continue all proceedings with respect to the same measure[19] in any other forum:

> 2. No claim may be submitted to arbitration under this Section unless . . .
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of 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 referred to in Article 10.16.[20]

[19] *See* para. 23 *infra* for definition of "measure" under CAFTA.
[20] CAFTA art. 10.18.2.

15. Other CAFTA provisions that provide context for interpreting Article 10.18.2 are Article 10.18.4 and Annex 10-E. Article 10.18.4 precludes a claimant from submitting a claim for breach of an investment authorization or investment agreement

> if the claimant . . . has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.

16. Similarly, Annex 10-E precludes a U.S. investor from submitting

> a claim that a Central American Party or the Dominican Republic has breached an obligation under Section A [of Chapter 10 of CAFTA] . . . if the investor or the enterprise [that the investor owns or controls], respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of a Central American Party or the Dominican Republic.

17. These provisions preclude a claimant from submitting certain claims to arbitration under Section B of Chapter 10 of CAFTA if the claimant previously has submitted the same claim to another form of binding dispute settlement. Claimant in this case has not done that,[21] and, therefore, these provisions do not apply. It is useful to refer to these provisions, however, because they demonstrate by way of contrast how the CAFTA Parties would have drafted the provision at issue – Article 10.18.2 – if they had intended it to preclude the submission of particular claims in the context of a proceeding initiated by a notice of arbitration under Section B of Chapter 10. That they did not follow the model provided by Article 10.18.4 and Annex 10-

[21] On June 4, 2009, Claimant, in correspondence with the ICSID Secretariat, confirmed that "neither PRC, PRES nor DOREX has previously submitted the same alleged breach to: (i) an administrative tribunal of El Salvador; (ii) a court of El Salvador; or (iii) to any other binding dispute settlement procedure, for adjudication or resolution" and further confirmed, pursuant to Annex 10-E of CAFTA, that neither PRC nor its Salvadorian subsidiaries has initiated "a proceeding before a court of administrative tribunal of a Central American Party . . . regarding the breaches of an obligation under Section A of Chapter Ten of CAFTA, included in the Notice of Arbitration."

E demonstrates that the CAFTA Parties did not intend Article 10.18.2 to preclude the submission of particular claims; rather, their focus in that provision was on the initiation or continuation of distinct "proceeding[s]."

18. Claimant, in accordance with CAFTA Article 10.18.2(b), submitted with its Notice of Arbitration the following waiver:

> Pursuant to Articles 10.18[.2](b)(i) and 10.18[.2](b)(ii) of CAFTA, the Investor waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of the Republic of El Salvador ("El Salvador") that are alleged, in the Investor's Notice of Arbitration and served contemporaneously on El Salvador, to be a breach referred to in Article 10.16 of CAFTA . . .[22]

19. The claimant's "waiver," as I will elaborate in the next Section, is an election of forum. It unequivocally affirms that by submitting to an ICSID tribunal a claim that a measure breaches an obligation described in CAFTA Article 10.16, the claimant agrees to submit *all* of its claims with respect to the same measure, whatever the governing law, to the same ICSID tribunal (reserving only the possibility of having recourse to a municipal forum to obtain certain injunctive relief to assist this ICSID tribunal), provided that (as here) the respondent has consented to the submission of such claims to ICSID.[23]

VII. TEXTUAL INTERPRETATION OF CAFTA ARTICLE 10.18.2

20. I would like to focus in more detail on the waiver part of Article 10.18.2, which requires a claimant to submit a written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement

[22] *See* NOA Exh. 1.

[23] *See* CAFTA art. 10.18.3.

procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."[24] I should also note that because the Claimant's waiver, quoted at para. 18 above, repeats this language almost verbatim, my conclusions about the waiver provisions *ipso facto* apply to Claimant's waiver.

21. I have organized my analysis of the text of CAFTA Article 10.18.2(b) into three parts, as follows:

> (a) The words "measure," "claim," and "proceeding."
>
> (b) The phrase "any right to initiate or continue . . . any proceeding with respect to any measure."
>
> (c) The phrase "before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures."

(a) The words "measure," "claim," and "proceeding"

22. To begin, it is useful to explain the meaning of the words, "measure," "claim," and "proceeding," and their relation to each other under CAFTA.

23. *Measure*. The word "measure," according to CAFTA Article 2.1, includes: "any law, regulation, procedure, requirement, or practice." The parties do not disagree about the meaning of the word "measure" or the fact that the challenged conduct constitutes a "measure."[25]

24. *Claim*. The definitions article in Chapter 10 of CAFTA (Article 10.28) does not define the word "claim." However, Article 10.16 provides what amounts to an operational definition of "claim." A claim as that term is used in Section B of Chapter 10 has a breach component and a

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[24] CAFTA art. 10.18.2 (emphases added).

[25] *See* Respondent's Preliminary Objections paras. 97-115; Claimant's Response to Respondent's Preliminary Objection paras. 200-16; Respondent's Reply on Preliminary Objections paras. 219-36.

damages component. As to the first, a claim submitted to arbitration must allege a breach of "(A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement."[26] As to the damages component, a claim must allege "that the claimant has incurred loss or damage by reason of, or arising out of, that breach."[27]

25. A single measure may give rise to several claims. A measure may give rise to claims for breach of treaty obligations (*i.e.*, obligations under CAFTA Chapter 10, Section A), as well as to claims for breach of obligations governed by the law of the host state (here, El Salvador) (*i.e.*, obligations set forth in its municipal law and/or investment authorizations or investment agreements governed by its municipal law).

26. *Proceeding*. CAFTA does not define the word "proceeding." A "proceeding," in contrast to a "claim," according to Black's Law Dictionary, refers to "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."[28] In the context of an ICSID arbitration, this would be the progression of an arbitration case. The case in its entirety could be referred to as a "proceeding," or individual phases might be referred to as proceedings (*e.g.*, proceeding on jurisdiction, proceeding on the merits). A proceeding, thus, could and often does involve a number of claims. But, one would not refer to individual claims as proceedings.

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[26] CAFTA art. 10.16.

[27] *Id.*

[28] Black's Law Dictionary 1324 (9th ed. 2009).

27. A closer examination of CAFTA, as well as the ICSID Convention and Arbitration Rules,[29] supports the application of the above-quoted dictionary definitions here. For example, consider how the words "claim" and "proceeding" have been used in ICSID Arbitration Rule 40(2), which provides that "[a]n incidental or additional claim shall be presented not later than in the reply . . . unless the Tribunal . . . authorizes the presentation of the claim at a later stage in the proceeding."[30] Similarly, ICSID Arbitration Rule 41(2) contemplates a tribunal determining whether it has jurisdiction over a particular "claim" "at any stage of the proceeding."

28. In short, a "claim" is not a "proceeding," and the two terms have different legal bases and, therefore, different legal implications for present purposes. They cannot and should not be elided.

(b) The phrase "any right to initiate or continue . . . any proceeding with respect to any measure"

29. The word "any" in CAFTA Article 10.18.2(b) is broad and in this context means "all." A waiver of right according to this provision would, therefore, preclude Claimant from bringing any new proceedings with respect to the measures that have been "alleged to constitute a breach referred to in Article 10.16." Further, it requires abandoning all pending proceedings arising from the same measures. This compels the claimant to pursue all its claims arising from the

[29] ICSID Convention and Arbitration Rules, pursuant to VCLT art. 31(3)(c), are "relevant rules of international law applicable in the relations between the parties." CAFTA Article 10.16 refers arbitration of disputes to ICSID, and this reference makes the ICSID Convention and Arbitration Rules relevant in this context.

[30] Arbitration Rule 40(2).

allegedly unlawful measures in one proceeding and before one forum, in our case this ICSID tribunal.[31]

(c) The phrase "before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures"

30. Let me begin by dividing the fora to which this phrase refers into two categories:

(i) any administrative tribunal or court under the law of any Party;

(ii) other dispute settlement procedures.

31. These are the fora before which a claimant, having submitted a claim to arbitration under Section B of Chapter 10 of CAFTA, may not initiate or continue a proceeding regarding the measure underlying that claim.

32. This Tribunal does not need to determine the universe of fora that fall within these two categories. All it needs to do is to determine whether "other dispute settlement procedures" includes the *same* tribunal constituted pursuant to CAFTA, which is this ICSID tribunal in the present case.[32] If this Tribunal reaches the conclusion that it – that is, the Tribunal – is not an "other dispute settlement procedure" within the meaning of Article 10.18.2(b), which I believe is the correct conclusion, and taking into account that the Claimant's Investment Law claims are not barred in any other way,[33] then the conclusion is foregone: The Claimant may continue

[31] This is subject to the limited exception in Article 10.18.3. *See supra* n.24.

[32] This Tribunal clearly does not fall within category (i), and the disputing parties agree about this. *See* Respondent's Preliminary Objections paras. 97-115; Claimant's Response to Respondent's Preliminary Objections paras. 200-16; Respondent's Reply on Preliminary Objections paras. 219-36.

[33] *See supra* paras. 11-12.

litigating its Investment Law claims along with its CAFTA Chapter 10 Section A claims before this Tribunal.[34]

33. The key in this analysis is to understand what the word "other" in "other dispute settlement procedures" refers to. The word "other" is an adjective in this context and means "being the one or ones distinct from that or those first mentioned or implied."[35]

34. In order to find the point of reference for the word "other" (*i.e.*, the terms that are "first mentioned or implied"), one must examine the entirety of Article 10.18.2:

> No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied by . . . the claimant's written waiver . . . of 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 referred to in Article 10.16.[36]

35. The word "other," when one reads Article 10.18.2 in its entirety, refers to the words "arbitration under this Section" in the *chapeau* as well as "any administrative tribunal or court

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[34] Even if the Tribunal concludes that it – that is, the Tribunal – *is* an "other dispute settlement procedure" within the meaning of Article 10.18.2(b), Claimant would nevertheless not be barred from presenting its Investment Law claims because, as I explained earlier, those claims are not "proceedings." As the submission of those claims is not the initiation or continuation of a proceeding, it is not precluded by the waiver. Moreover, as discussed in Section V, *supra*, an additional basis for Claimant's Investment Law claims is its contention that Respondent has breached investment authorizations. Under those investment authorizations, Respondent committed to afford Claimant the protections set forth in the Investment Law. Claimant alleges that failure to afford those protections constitutes a breach of the investment authorizations. Determining whether there has been a breach of the investment authorizations as thus alleged requires an examination of the protections to which Claimant is entitled under the Investment Law. *See* NOA paras. 87-89.

[35] Merriam-Webster's Online Dictionary, *available at* http://www.merriam-webster.com; *see also* Oxford English Dictionary online, *available at* http://www.oed.com (defining "other" as, *inter alia*, "[s]eparate or distinct from that or those already specified or implied; different; (hence) further, additional").

[36] CAFTA art. 10.18.2 (emphasis added).

under the law of any Party." Put another way, Article 10.18.2 identifies the following fora as candidates for the submission of claims: "arbitration under this Section"; "any administrative tribunal or court under the law of any Party"; and "other dispute settlement procedures." In view of the ordinary meaning of "other," the phrase "other dispute settlement procedures" refers to any forum that is not "arbitration under this Section" or "any administrative tribunal or court under the law of any Party."

36. As a result, Claimant's waiver prevents it from submitting claims with respect to the measures at issue to "any administrative tribunal or court under the law of any Party" and "other dispute settlement procedures," but does not prevent Claimant from submitting those claims to "arbitration under this Section." This interpretation is consistent with the ordinary meaning of Article 10.18.2. Moreover, it is consistent with the principle of *effet utile* in that it gives meaning to all words of the provision, including the word "other."[37]

37. The alternative reading of Article 10.18.2(b) – which Respondent impliedly endorses – treats "other dispute settlement procedures" as any forum that is not an "administrative tribunal or court under the law of any Party." Under that reading, this very Tribunal would be an "other dispute settlement procedure." But that reading is implausible, because it would render Article 10.18.2 a self-negating provision. On the one hand a claimant would be initiating a proceeding with respect to a measure alleged to constitute a breach under Article 10.16 by submitting its claim to "arbitration under this Section"; on the other hand, it would be precluding itself from initiating a proceeding with respect to such measure before "other dispute settlement procedures," which would include "arbitration under this Section." In other words, this

[37] *See supra* n.7.

interpretation would deny Article 10.18.2 "*effet utile*" and, therefore, is impermissible under the ordinary rules of treaty interpretation.

VIII. ARTICLE 10.18.2(b) IN LIGHT OF CAFTA's OBJECT AND PURPOSE

38. I have concluded so far that the ordinary meaning of CAFTA Article 10.18.2(b), in context, does not bar Claimant from submitting claims to this Tribunal pursuant to the El Salvador Investment Law. As a final point, I shall examine how the object and purpose of CAFTA bear on the interpretation of Article 10.18.2(b).

39. As noted earlier, one of CAFTA's objectives is to "create effective procedures for the implementation and application of this Agreement, for its joint administration, and for the resolution of disputes."[38] CAFTA Article 1.2.2 requires the Parties to interpret and apply CAFTA provisions in the light of these objectives as well as others set out in Article 1.2, and in accordance with the applicable rules of international law. In addition, CAFTA contains a number of safeguards to help ensure efficiency in dispute settlement. These include the waiver provision in Article 10.18.2(b), as well as the consolidation provision in Article 10.25. These provisions generally aim at eliminating risks arising from parallel proceedings,[39] *i.e.*, proceedings before two separate fora, including double recovery and potential inconsistent decisions involving the same underlying measures.

40. Professor Reisman's assertion, thus, that "the critical part of the preclusion [under CAFTA Article 10.18.2] is not the venue ('any' venue) where the claim based on the same

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[38] CAFTA art. 1.2.1(f).

[39] *See generally* Katia Yannaca-Small, *Parallel Proceedings*, *in* Oxford Handbook of International Investment Law 1008 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

measure is brought but the claim itself,"[40] is without support. In fact, the relevant CAFTA object and purpose suggest that it is indeed venue that is the critical part of the preclusion. By channeling all claims with respect to the same underlying measure into a single forum to the extent both disputing parties have consented to that forum, the waiver provision in Article 10.18.2(b) advances CAFTA's objective of "effective procedures . . . for the resolution of disputes."

41. Moreover, the inequities or risks identified by Respondent as results that the waiver provision seeks to avoid, *e.g.*, inconsistent decisions and double recovery, do not materialize if the claims are presented before a single forum, rather than before two separate fora.

IX. CONCLUSION

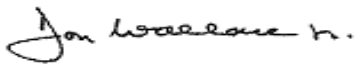
42. To recapitulate the main points in my opinion:

- The applicable rules of treaty interpretation are those of VCLT Article 31, including the effectiveness principle (*effet utile*), and Article 32. Particular attention should be paid to the ordinary meaning of the text, because this is the most reliable expression of the Parties' mutual intent.
- A textual interpretation of CAFTA Article 10.18.2 suggests that:
  - A "claim" is different from a "proceeding."
  - CAFTA Article 10.18.2 is clear and precludes the claimant from starting or continuing proceedings only in other fora. It does not preclude the Claimant here from bringing Investment Law claims before this Tribunal.

[40] Reisman Op. para. 32.

- The object and purpose of CAFTA further confirm that resolving disputes within the same forum, here before this ICSID Tribunal, advances CAFTA's objectives, which require the CAFTA Parties to create efficient procedures for resolution of disputes.
- This Tribunal, thus, should dismiss Respondent's objection to the submission of Claimant's Investment Law claims to this Tribunal.
- Finally, let us assume that the Notice of Arbitration did not invoke El Salvador's consent to ICSID arbitration in Article 15 of the Investment Law. Would that change anything? No. This Tribunal can still hear all claims of breach of obligations under Chapter 10 Section A and all Investment Law claims arising from Claimant's allegation of breach of investment authorizations.

Respectfully submitted,



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