

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Legacy Vulcan, LLC

v.

United Mexican States

(ICSID Case No. ARB/19/1)

DISSENTING OPINION TO PROCEDURAL ORDER NO. 7

Prof. Sergio Puig, Arbitrator

11 July 2022

1. I dissent from decision (b) in Procedural Order (“PO”) No. 7 because Claimant’s new claim: (I) is not within the scope of the consent of the Respondent under the NAFTA; and (II) does not arise directly out of the subject-matter of the dispute under the ICSID Convention.

- I. The Scope of Consent under the NAFTA

- a) *General Aspects*

2. The State Parties to the NAFTA (the “Parties”) agreed that compliance with certain procedural steps is necessary for a tribunal to have jurisdiction over “a claim for loss or damage by reason of, or arising out of, [a] breach”.¹ A tribunal has no authority to consider a claim over which it lacks jurisdiction, whether for failure to meet procedural prerequisites or otherwise, nor to consider an amended claim that brings into consideration matters outside its jurisdiction.²
3. Under the NAFTA, an agreement to arbitrate is formed by the consent given by each State Party “to submission of a claim to arbitration in accordance with the procedures set out in this Agreement” and the investor’s corresponding consent to arbitrate in accordance with those procedures.³ The exchange of consents contemplated by Chapter 11 constitutes agreement to arbitrate under the ICSID (and other) Convention(s).⁴
4. NAFTA Article 1122(1) also makes clear that the *content* of such agreement under Chapter 11 includes the procedural prerequisites for submitting a claim to arbitration.⁵ The Parties have also agreed, and tribunals have concurred, that no Chapter 11 claim may be submitted unless the prerequisites for submitting a claim to arbitration specified in the NAFTA have been satisfied.⁶

¹ NAFTA arts. 1116 & 1117(1).

² NAFTA arts. 1120(1). *See*, ICSID Convention art. 46 and ICSID Arbitration Rule 40(1) (allowing for incidental or additional “*provided that they are within the scope of the consent of the parties*” (emphasis added)).

³ NAFTA arts. 1122(1), 1121(1)(a), & 1121(2)(a).

⁴ NAFTA art.1122(2).

⁵ *See*, NAFTA art. 1122(1) (providing that consent is “in accordance with the procedures set out in this Agreement”).

⁶ *See*, Waste Management, Inc. v. United Mexican States, ARB(AF)/98/2 ¶¶ 16-17 (June 2, 2000) (Award) (CL-0007-ENG) (concluding that NAFTA tribunals must ensure the fulfillment of the prerequisites of Chapter 11).

5. In my view, the Parties did not consent, through the NAFTA, to the automatic supplementation of the scope of arbitration unless the procedural prerequisites of Chapter 11 are satisfied for any incidental or additional claim.

b) The Parties' Intention

6. PO No. 7 disregards the highly institutionalized system of arbitration under the NAFTA and, with that, the fundamental conditions for Respondent's consent to arbitrate a claim. The majority makes a far-reaching inference from the Parties not "explicitly" excluding Art. 46 of the ICSID Convention and ICSID Arbitration Rule 40 in the NAFTA.⁷ Under the majority's reading of the treaty, the Parties *intended* to allow incidental or additional claims by investors without first satisfying the procedural steps contemplated in the NAFTA.
7. NAFTA Art. 1120(2) is a gap-filling provision that gives prevalence to the rules of procedure in the treaty *vis-à-vis* the applicable arbitration rules. If the treaty is silent on a particular issue, it does not follow that a tribunal can leave without effect that the Parties conditioned their consent for any "claim for loss or damage by reason of, or arising out of, [a] breach" to the application of rules and procedures to adjudicate investment disputes, including Arts. 1118 to 1121.⁸ Rather, the Parties excluded incidental or additional claims by establishing mandatory steps for submitting *any* claim asserted by a claimant at any point, as argued by the Respondent.⁹
8. If the majority was interested in what the Parties intended, it could have used the means at the Tribunal's disposal under the treaty (*e.g.*, Art. 1128 submissions on a question of interpretation) or under the VCLT (*e.g.*, Art. 31(3)).¹⁰ Instead, reading the provisions of the

⁷ PO No. 7 ¶ 116.

⁸ *See*, Methanex Corporation v. United States of America, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (RL-070) (listing the necessary requirement of consent to arbitration, including the satisfaction of "all pre-conditions and formalities required under Articles 1118-1121" and concluding that when the "requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.")

⁹ Response ¶¶ 82-83.

¹⁰ *See*, USMCA art. 14.D.3 (C-0157-ENG) (providing that "[a] claim asserted by the claimant *for the first time after [the] notice of arbitration is submitted* shall be deemed submitted to arbitration..." and conditioning claimant's submitting any claim to arbitration to the satisfaction with procedural prerequisites (emphasis added)).

NAFTA out of their context, the majority decides to exercise jurisdiction, to allow the Claimant to circumvent important procedural stages and, with that, to deny strategic decisions to the Respondent (such as the appointment of an arbitrator) for the new claim.

c) The Procedural Prerequisites

9. PO No. 7 also asserts that the procedural prerequisites of Chapter 11 are automatically “covered by compliance with those requirements in relation to the original claim”.¹¹ The NAFTA does not give tribunals the power to disregard admissibility or jurisdictional requirements. The majority’s importation of all procedural prerequisites to the new claim does exactly that. Even if the ancillary claim *were* within the scope of the consent of the parties, such automatic coverage does not logically follow from the admission of the application and raises important policy concerns.¹²

II. The Subject-Matter of the Dispute under the ICSID Convention

10. The majority concludes that “it is not feasible to separate the subject-matter” of the claims mainly because “the ancillary claim refers to actions and assessments” of Respondent’s federal environmental authority “relevant to the arguments made” in two (out of three) original claims.¹³ This is a low bar and disregards the fact that the additional claim arises directly out of a different measure adopted by the Respondent years after the measures in the original claims and relates to a different, self-sufficient investment. Moreover, the additional claim is made on a distinct legal and factual basis and has a particularized damages claim by reason of, or arising out of, a new alleged breach.¹⁴

¹¹ PO No. 7 ¶¶ 119 & 149.

¹² *See*, Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, (Aug. 3, 2005), ¶¶ 25-26 (Part II, Ch. F) (RL-020-ENG) (expressing concerns and rejecting to construct a waiver under Chapter 11 to include “future [measures] still to be [adopted].”) *See also*, ICSID Arbitration Rule 41(1) (allowing preliminary objections against ancillary claims for lack of jurisdiction and competence of the tribunal).

¹³ PO No. 7 ¶¶ 137-138.

¹⁴ Response, ¶¶ 89-90 & 92; Rejoinder, ¶¶ 7, 31 73, 74-76.

11. Similarly, other considerations do not justify the majority’s conclusion. In disputes under arbitration systems that contain well-functioning procedures to consolidate common and related claims, a tribunal should be sensitive to questions of fairness in applying Art. 46 of the ICSID Convention and ICSID Arbitration Rule 40.¹⁵ In particular, a tribunal should consider that a party might be denied strategic choices by reopening the proceedings and admitting a new claim bypassing procedural steps. In such a context, like here, “efficiency”, “procedural economy” and limiting the risk of “conflicting decisions” do not outweigh the unfairness towards the Respondent.¹⁶

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12. Accordingly, I *dissent* from the decision to allow Legacy Vulcan to present an ancillary claim concerning Mexico’s alleged wrongful shutdown of Legacy Vulcan’s remaining quarrying operation in Mexico. I *concur* in all other decisions listed in paragraph 160 of PO No. 7.

[Signed]

Prof. Sergio Puig
Member of the Tribunal
Date: 11 July 2022

¹⁵ See, NAFTA art. 1126(2) (requiring consolidation tribunals to consider fairness in deciding applications).

¹⁶ PO No. 7 ¶¶ 138, 146 & 149.