INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**DANIEL W. KAPPES**
**AND**
**KAPPES, CASSIDAY & ASSOCIATES**
*Claimants*

**v.**

**THE REPUBLIC OF GUATEMALA**
*Respondent*

ICSID Case No. ARB/18/43

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# CLAIMANTS' SUBMISSION ON COSTS OF PRELIMINARY OBJECTIONS PHASE

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14 February 2020

## I. CLAIMANTS SHOULD BE AWARDED COSTS

1. In accordance with the Treaty and international arbitral practice, Claimants should be awarded their costs. DR-CAFTA Article 10.20.6 provides as follows:

> When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, *award to the prevailing disputing party reasonable costs and attorney's fees* incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider *whether either the claimant's claim or the respondent's objection was frivolous*, and shall provide the disputing parties a reasonable opportunity to comment.[1]

2. The predominant and increasing trend in investment arbitrations is to award all or a substantial portion of costs and fees to the prevailing party.[2] Indeed, while the Treaty Parties granted the respondent the absolute right to compel preliminary treatment of certain objections, they balanced that right with the expectation that the claimant would be awarded costs when the invocation of that right was unwarranted due to the frivolous nature of the objections. Awarding Claimants their costs and fees is thus appropriate in this case, where Respondent's objections are without merit and have caused Claimants to incur significant costs.

3. Respondent, for instance, has failed to explain how its interpretation of Article 10.16.1 of the Treaty should prevail, when it would accord less protection to DR-CAFTA investors than that provided by any other investment treaty,[3] and where dozens of arbitral tribunals have rejected its

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[1] DR-CAFTA, Art. 10.20.6 (CL-0001-ENG/SPA) (emphasis added).

[2] *See, e.g., Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 Oct. 2012 ¶¶ 588, 590; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ¶¶ 618-631; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008 ¶ 304; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 402; *PSEG Global Inc. & Konya Ilgin Elektrik Üretim ve Ticaret Ltd. Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 Jan. 2007 ¶¶ 352-353; *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 533; *SAUR Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Award dated 22 May 2014 ¶¶ 405-408, 410-415; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 860; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 ¶¶ 776-777; *Joseph Charles Lemire & Others v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 380; *Ioannis Kardassopoulos & Others v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 Mar. 2010 ¶¶ 689-692; *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Award dated 17 Dec. 2003 ¶ 63; Matthew Hodgson and Alastair Campbell, *Damages and costs in investment treaty arbitration revisited*, GLOBAL ARBITRATION REVIEW (2017) (accessible at: https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited) ("[T]he trend towards some adjustment of costs – whether through application of the 'costs follow the event' or 'relative success' approaches – seems to have gathered pace over the last few years.").

[3] Claimants' PO Counter-Mem. ¶ 37; Claimants' PO Rejoinder ¶¶ 3, 36; Transcript of the Hearing on Preliminary Objections held on 16 Dec. 2019 ("PO Hrg. Tr.") at 89:6-90:4; *id.* at 93:19-95:1; *id.* at 96:8-16; *id.* at 97:9-19; *id.* at 114:17-115:4; *id.* at 193:16-21; *id.* at 194:8-17; *id.* at 211:6-14; *id.* at 214:7-11.

interpretation and no other arbitral tribunal has dismissed a claim on that ground.[4] Indeed, Respondent has failed to offer any response in either its written submissions or at the Hearing to the fact that the only tribunal that has partially accepted its interpretation – which decision was brought to the Tribunal's attention by Claimants – nevertheless found that the claim, akin to the one brought by Claimants here, was properly submitted by the claimants on their own behalf.[5]

4. The frivolous nature of Respondent's preliminary objections is further underscored by its objection to Claimants' MFN claim, on the ground that the court case evidencing the discriminatory treatment vis-à-vis a third-party national was rendered after Claimants filed their Notice of Intent. As explained, the discriminatory treatment by the courts and the MEM vis-à-vis similarly situated investors and investments *was* set forth in that Notice, and the MFN claim was identified in Claimants' Notice of Arbitration.[6] Respondent had *seven months* between the Notice of Arbitration and the constitution of the Tribunal to attempt to negotiate the settlement of the dispute, and will have nearly *two years* from the Notice of Arbitration to respond to Claimants' MFN claim in its Counter-Memorial on the Merits. Respondent thus was unable at the Hearing or otherwise to demonstrate any prejudice or to reconcile its objection with the DR-CAFTA and ICSID provisions expressly permitting amendments and ancillary claims, respectively.[7]

5. Finally, Respondent's time-bar argument is fact-intensive and, therefore, not amenable to disposition in this expedited, preliminary phase. In any event, Respondent's objection misleadingly hinges on the word "continuous" in Claimants' Notices, and intentionally ignores that the blockades were not "continuous" in the manner on which its objection depends. Indeed, the Notices expressly indicate that the initial blockade ended, and that Exmingua thereby was able to commence operations and that it *did* in fact operate for nearly two years, before the new

[4] Claimants' PO Counter-Mem. ¶¶ 38-42; Claimants' PO Rejoinder § II.B.1; PO Hrg. Tr., *id.*, at 83:14-86:9; *id.*, at 210:6-211:14; *id.*, at 214:16-22; *id.*, at 215:15-216:1.

[5] *See Clayton v. Canada*, Award on Damages dated 10 Jan. 2019 (CL-0070-ENG) ¶ 396; PO Hrg. Tr. at 207:22-210:5; *see also id.* at 115:5-116:17; *id.* at 202:2-207:21; Claimants' PO Counter-Mem. ¶¶ 58-59; Respondent's PO Reply ¶ 79; Claimants' PO Rejoinder ¶¶ 32-33.

[6] Notice of Intent, at 3; Notice of Arbitration ¶¶ 61-68; PO Hrg. Tr. at 144:1-18; *id.* at 223:8-225:2; *see also id.* at 138:3-143:13; Claimants' PO Counter-Mem. ¶¶ 83-84; Claimants' PO Rejoinder ¶¶ 93-95.

[7] DR-CAFTA Art. 10.20.4(a), (c); ICSID Arbitration Rule 40; PO Hrg. Tr. at 144:19-151:20; *id.* at 225:3-229:11; Claimants' PO Rejoinder ¶¶ 128-133.

blockades disrupted Exmingua's continued operations and ability to complete its social studies for the Santa Margarita EIA.[8]

## II. CLAIMANTS' COSTS ARE REASONABLE

6. Claimants' legal fees and costs incurred during the preliminary objections phase are reasonable in light of the circumstances and, thus, should be awarded in full. In particular, Respondent raised three preliminary objections, each of which required lengthy arguments in two rounds of submissions on the law and, in the case of its time-bar objection, on issues of fact. Claimants also participated on a pre-hearing call, and an in-person hearing, which required members of Claimants' legal team to travel from London and Mexico City to Washington, D.C.

7. In defending against Respondent's preliminary objections, Claimants incurred a total of US$ 1,537,827.95 in fees and costs, as categorized in Schedule 1 below. These costs are reasonable in light of the aforementioned circumstances, as further confirmed by a comparison to costs incurred by other parties for similar stages of an arbitration.[9]

8. For the foregoing reasons, Claimants respectfully request that the Tribunal award Claimants the entirety of their legal costs and fees for the preliminary objections phase, and that it do so in a costs award that is immediately enforceable.

Respectfully submitted,

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14 February 2020

[8] Notice of Intent, at 2-3; Notice of Arbitration ¶¶ 41-43, 45; PO Hrg. Tr. at 126:21-127:14; *id*. at 130:2-15; *id*. at 216:14-217:14; Claimants' PO Counter-Mem. ¶¶ 117-123; Claimants' PO Rejoinder ¶¶ 136-140.

[9] *See, e.g., Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Claimant's Petition for Costs dated 6 June 2011 ¶ 34 (indicating that the claimant's legal fees and expenses in relation to the DR-CAFTA Article 10.20.5 application totaled US$ 1,899,488); *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award dated 31 May 2016 ¶ 274 (indicating that the claimant's legal fees and expenses in relation to the DR-CAFTA Article 10.20.5 application totaled US$ 1,121,972.79).

**Schedule 1**

| **Claimants' Costs And Fees For The Preliminary Objections Phase** | |
|---|---|
| White & Case legal fees | US$ 1,500,172.00 |
| White & Case costs (including translations and travel costs for the hearing) | US$ 34,759.36 |
| Claimants' costs (for travel to and accommodation during the hearing) | US$ 2,896.59 |
| **Claimants' total fees and costs** | **US$ 1,537,827.95** |