

**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.)	ICSID Case No. ARB/09/12
)	
REPUBLIC OF EL SALVADOR,)	
)	
Respondent)	

WITNESS STATEMENT OF ALFONSO LÓPEZ-IBOR ALIÑO

1. My name is Alfonso López-Ibor Aliño. I am a citizen of the Kingdom of Spain and a member of the Bar of Madrid with registration number 18333. I am a partner at the law firm of Ventura Garcés & López-Ibor Abogados in Madrid. During the first half of 2005, my law firm represented a Spanish company known as Inceysa Vallisoletane, SL, in the international arbitration proceeding of *Inceysa Vallisoletana, SL v. El Salvador*, ICSID Case No. ARB/03/26 (“the *Inceysa* arbitration”). I was personally involved in this representation, and was present at the hearing on jurisdiction held in the case in May 2005.

2. I understand that the Government of El Salvador (“El Salvador”) has made certain assertions in the present arbitration concerning its interpretation of Article 15 of the Investment Law of El Salvador (“Article 15”) in the context of the *Inceysa* arbitration. I submit this Witness

Statement at the request of Pac Rim Cayman's legal counsel, for the purpose of addressing how Article 15 was dealt with in that arbitration.

3. Prior to giving the present statement, I reviewed the procedural record of the *Inceysa* arbitration, including the submissions of the parties. (Copies of these submissions and other case documents are maintained in my law firm's offsite storage facility, pursuant to our document retention policy). That procedural record served as the basis for the recollections that I set forth herein.

4. I have been compensated by Pac Rim Cayman for my time in reviewing the procedural record and in preparing this statement, in the same manner that I would ordinarily be compensated for the rendering of professional services. I have not been promised any additional compensation by Pac Rim Cayman or its counsel. I have no interest, whether monetary or otherwise, in the outcome of this proceeding.

5. In attesting to the treatment and interpretation of Article 15 in the *Inceysa* arbitration, Pac Rim Cayman's counsel has asked me to focus on the following assertions made by El Salvador in the present arbitration: (1) "No previous ICSID tribunal has been called upon to interpret Article 15 of the Investment Law [...] this issue was simply not before the *Inceysa* tribunal and was not even briefed by the parties in that case;"¹ and (2) "the nature of El Salvador's objection in the *Inceysa* arbitration made it unnecessary for El Salvador to argue, and

¹ The Republic of El Salvador's Memorial on Objections to Jurisdiction, dated 15 October 2010, submitted in the case of *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, para. 339.

for the tribunal to decide, that the Investment Law of El Salvador does not constitute consent to ICSID arbitration.”²

6. In the *Inceysa* arbitration, El Salvador’s third objection to jurisdiction focused on whether the tribunal could assert jurisdiction over claims that the Salvadoran Ministry of Environment (MARN) had breached the terms of the Contract for Provision of Services that it had signed with Inceysa.

7. In this context, El Salvador devoted more than two pages of its briefing to the issue of interpretation of Article 15 of the Investment Law, including the scope of the consent to ICSID arbitration contained in that provision. El Salvador’s primary contention with respect to this issue was that claims arising under contract, standing alone, did not fall within the scope of its consent to ICSID arbitration set out in Article 15 of the Investment Law.

8. El Salvador stated its argument on this point as follows:

Admittedly the language of Article 15 of the Investment Law is broad: it refers to ICSID submission of “controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquéllos efectuadas en El Salvador.” But as with the similarly broad language of the treaty in *SGS v. Pakistan* (“disputes with respect to investments”), this cannot be the end of the analysis. Article 15’s broad language is “descriptive of the *factual subject matter* of the disputes,” but not the *legal basis* of the claims, or the *cause of action* asserted in the claims.” Certainly, the provision constitutes consent to ICSID jurisdiction for claims arising under the Investment Law, *i.e.*, allegations that its protections have been violated in respect of a protected investment. But whether it acts as a blanket consent to ICSID jurisdiction over purely contract disputes is a question of intent. Certainly, the text should create no automatic implication that the Article 15 dispute settlement mechanism “would supersede and set at naught all otherwise valid non-ICSID forum selection

² The Republic of El Salvador’s Reply on Objections to Jurisdiction, dated 31 January 2011, submitted in the case of *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, para. 239.

clauses” in prior contractual agreements ... For this reason, to invoke the particular alternate dispute resolution provision set forth in the law – arbitration before ICSID – a foreign investor’s claim must have as its essential cause of action a right or benefit conferred by that Law [internal citations omitted].³

9. Article 15 was also discussed during the hearing held in Washington, D. C. on 3 May 2005, during which Doctor José Roberto Tercero Zamora,⁴ El Salvador’s expert witness on Salvadorean law, was questioned by one of the arbitrators, Mr. Von Wobeser, on statements presented by Doctor Tercero in the *Inceysa* arbitration. Specifically, Mr. Von Wobeser asked:

Entonces a qué tipo de controversias se refiere el artículo 15 de la Ley de Inversiones Extranjeras? O sea, cuando remite en el segundo párrafo a la posibilidad que da al inversionista de elegir – o sea en las dos posibilidades del segundo párrafo, ¿a qué se refiere, a qué tipo de controversia se refiere?

10. In response, Doctor Tercero answered:

Bien. Una de las cosas que, insisto, se reveló en la política de la atracción de inversiones de la Asamblea Legislativa que diseñó esta ley, era darle la certeza de que la inversión en sí no iba a ser perdida o expropiada indebidamente. La intención principal de este artículo, si es que han de derivarse algunas secundarias, es someter a este mecanismo de solución de controversias relativas a la aplicación de la ley; a los beneficios, prerrogativas y derechos conferidos por la ley.

11. Based on the foregoing, I can affirm that the issue of the interpretation of Article 15 of the Investment Law was before the tribunal in the *Inceysa* arbitration; that it was briefed and argued by the parties in that arbitration; and that El Salvador and its expert witness specifically recognized in that context that Article 15 constituted El Salvador’s consent to ICSID

³ The Republic of El Salvador’s Objections to Jurisdiction, dated 15 September 2004, submitted in the case of *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB 03/26.

⁴ A member of the law firm Delgado y Ceballos Abogados, and professor of Constitutional Law and of Administrative Law of the Universidad Centroamericana “José Simeón Cañas.”

jurisdiction for claims arising under the Investment Law, as long as such claims had arisen in respect of investments made in accordance with Salvadorean law.

12. For the record, I have attached to my statement page 93 of El Salvador's Objections to Jurisdiction from the *Inceysa* arbitration, as well as pages 347-348 of the transcript of the 3 May 2005 hearing on jurisdiction (available only in Spanish), which further evidence the declarations set forth herein.

Being in full agreement with the contents of this statement, I hereby sign it in Madrid on the 7th, April 2011.



Alfonso López-Ibor Aliño