



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London**  
**International Arbitration Case Law**

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**Award Name and Date:** Pac Rim Cayman LLC v. The Republic of El Salvador (ICSID Case No. ARB/09/12) Award - 14 October 2016

**Case Report by:** Author, Marina Kofman\*\* and Editor, Gary Shaw\*\*\*

**Summary:** Claimant advanced claims on its own behalf and on behalf of its Salvadoran subsidiaries for damages, interest and costs related to Respondent's refusal to grant Claimant certain mining exploitation concessions. Claimant alleged that Respondent induced it to invest millions of dollars in its mining industry, leading Claimant to reasonably believe that it would be granted the concessions. Claimant argued that Respondent's "*de facto* ban" on mineral mining, announced by President Saca in March 2008, illegitimately swept aside the legal and regulatory regime upon which Claimant had relied, and eviscerated Claimant's rights under the Investment Law of El Salvador, The Constitution and general principles of international law.

Respondent argued that Claimant never made an admissible application for a mining exploitation concession under the Mining Law, and was therefore not legally entitled to any mining exploitation.

The Tribunal concluded that Claimant's application for an exploitation concession did not comply with the Mining Law. The Tribunal also held that Respondent could not be stopped from denying Claimant's application because Claimant failed to show an unequivocal act upon which Claimant relied. Therefore, because Claimant held no legal entitlement to Respondent's exploitation concession, its claims were dismissed.

**Main Issues:** *res judicata* – timing of objections under ICSID Arbitration Rule 41(1) - estoppel – statutory interpretation.

**Tribunal:** V.V. Veeder Esq (President), Professor Brigitte Stern (Arbitrator) and Professor Dr. Guido Santiago Tawil (Arbitrator)

**Claimant's Counsel:** Mr R. Timothy McCrum, Mr Ian Laird, Mr George Ruttinger, Ms Ashley Riveira, (Crowell & Moring LLP, Washington, D.C.)

**Respondent's Counsel:** Mr Douglas Meléndez, Attorney General of the Republic of El Salvador and Mr Luis Parada and Mr Derek Smith (Foley Hoag LLP, Washington D.C.)

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## **Digest:**

### ***1. Relevant Facts***

Claimant is Pac Rim LLC, a legal person organised under the laws of the United States. Claimant owns a number of enterprises that are legal persons organised under the laws of Respondent, namely Pacific Rim El Salvador (PRES) and Dorado Exploraciones, Sociedad Anónima de Capital Variable (DOREX).

Claimant acquired PRES in April 2002, along with PRES' existing exploration licenses for the El Dorado area of El Salvador. These licenses were set to expire on 1 January 2005 unless converted into an exploitation concession under Respondent's Mining Law. (¶ 6.7.)

On 22 December 2004, PRES applied to the Ministry of Economy ("Ministry") to convert its two exploration licenses for El Dorado into an exploitation concession. (¶ 6.13.) The concession covered a total area of 12.5 sq. km. (¶ 6.15.) The concession application included authorization documents covering an area significantly smaller than the total area of the requested concession. According to PRES', these documents related only to that part of the surface area to be directly impacted by the requested concession. (¶¶ 6.17-6.18.)

By email dated 18 March 2005, the Ministry informed PRES (and Claimant) that PRES would need to submit authorization documents for the entire area of the concession—not just the area to be directly impacted. (¶ 6.25.) PRES disagreed with the Ministry and in May 2005, submitted a lengthy memorandum to the Ministry clarifying PRES' interpretation of the application requirements under the Mining Law. (¶ 6.30.) Thereafter, the Ministry and the Presidential Secretariat drafted their own internal memoranda explaining their disagreement with PRES and outlining their interpretations of the Mining Law. (¶ 6.36.)

Later that year, the parties began to discuss a proposal to amend the Mining Law to assist PRES acquire the concession. (¶¶ 6.61-6.62.) The parties continued to work together over the next year. In November 2007, draft amendments to the Mining Law were presented to the Legislative Assembly, (¶ 6.118), but the legislative proposals were never enacted. (¶ 6.122.) In March 2008, the President of El Salvador publically announced that the reforms would not move forward until further studies were done, thus ending all efforts to amend the Mining Law. (¶ 6.125.) PRES was not granted the concession. (¶ 6.127.)

## ***2. Procedural History***

On 30 April 2009, Claimant submitted a Notice of Arbitration. On 4 January 2010 Claimant filed Preliminary Objections and the Tribunal issued its Decision on Respondent's Preliminary Objections on 2 August 2010. On 3 August 2010, Respondent submitted new objections to jurisdiction. On 1 June 2012 the Tribunal issued its Decision on Jurisdiction.

Claimant submitted its Memorial on the Merits and Quantum on 29 March 2013. On 10 January 2014, Respondent submitted its Counter-Memorial. Claimant submitted its reply on 12 April 2014 and on 11 June 2014 Respondent filed its Rejoinder. The hearing on the merits was held in Washington D.C. from 15 to 20 September 2014. On 21 November 2014 the Parties filed their post-hearing briefs and submissions on costs and on 5 December 2014 each Party filed observations on the other's submission on costs (¶¶ 1.12 – 1.54). The Tribunal issued its award on 14 October 2016.

## ***3. Additional jurisdictional objections***

The Tribunal dismissed Respondent's jurisdictional objections on 1 June 2012. In Respondent's Counter-Memorial on the Merits, it raised several additional objections to jurisdiction, which the Tribunal addressed in the Award.

### ***3.1 The res judicata effect of the decision on jurisdiction***

Claimant argued that the Decision on Jurisdiction was res judicata, barring further objections to jurisdiction. (¶ 5.23.) Respondent argued that res judicata did not apply because Respondent never requested an amendment to the previous Decision on Jurisdiction, but rather a new decision based on new submissions. (¶ 5.21.) Respondent further submitted res judicata did not apply because decisions on jurisdiction are not final until incorporated into an award. (¶ 5.22.)

The Tribunal affirmed that jurisdictional decisions are not final under the ICSID Convention until they are incorporated into an award. (¶ 5.36.) The Tribunal refrained from invoking the principle of res judicata however, resolving the dispute by direct reference to other provisions of the ICSID Convention and the ICSID Arbitration Rules. (¶ 5.39.)

### ***3.2 The admissibility of the additional objections under the ICSID Arbitration Rules***

Respondent submitted that its additional objections were timely raised as they were filed before the deadline for Respondent's counter-memorial in accordance with ICSID Arbitration Rule 41(1). (¶ 5.25.) Claimant argued in response that the additional objections were not filed "as early as possible" as required by the same rule. (¶ 5.29.)

The Tribunal found that Rule 41(1) requires jurisdictional objections to be made as early as possible and no later than the deadline for the counter-memorial. (¶ 5.42.) It concluded that Respondent failed to file its additional objections as early as possible, (¶ 5.49), except for the additional objection based on abuse of process. (¶ 5.51.) The Tribunal nevertheless addressed Respondent's untimely additional objections on its own motion under the power in Rule 41(2). (¶ 5.50.)

### ***3.3 The request for reconsideration of the Tribunal's decision on the abuse of process objection***

Respondent maintained that Claimant had made a material misrepresentation at the jurisdiction hearing when Claimant stated that until March 2008—when President Saca announced a moratorium on further mining activities—Claimant was unaware that a dispute with Respondent existed. Claimant in fact admitted to being aware of the moratorium in May 2007. Respondent argued this new admission required the Tribunal to reconsider Respondent's abuse of process objection. (¶ 5.18.)

The Tribunal declined to reconsider its earlier decision on the abuse of process objection. The Tribunal found that Respondent's objection related only to claims pled by Claimant under CAFTA. (¶ 5.55.) Because the Tribunal had already denied jurisdiction over the CAFTA claims, it concluded that the abuse of process objection was of no consequence to the remaining claims. (¶ 5.57.)

### ***3.4 The admissible scope of claims in light of the applicable law(s)***

Respondent submitted that exclusively Salvadoran law applied to the arbitration and, therefore, any claims based on general principles of international law must be rejected. Respondent further contended that the Tribunal lacked jurisdiction to decide whether Respondent breached its own constitution. (¶¶ 5.2-5.5.)

Claimant argued that the Parties had not agreed to an applicable law and that Article 15 of the Investment law does not contain a provision on applicable law. Absent an agreement, Claimant contended, the Tribunal should proceed under Article 41(2) of the ICSID Convention by applying the law of the Contracting State party to the dispute “and such rules of international law as may be applicable.” (¶ 5.8.)

The Tribunal observed that the Investment Law did not contain a provision that specified the applicable law and that there was no separate agreement between Claimant and Respondent. Therefore, in accordance with the second sentence of Article 42(1) of the ICSID Convention, the Tribunal applied Salvadoran law and such rules of international law as may be applicable. (¶ 5.61.)

The Tribunal further rejected Respondent's contention that application of Salvadoran law precluded claims based on international law. It was well-established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law. (¶ 5.62.) Lastly, the Tribunal held claims invoking the Salvadoran Constitution were permissible because the Constitution is an indispensable part of Salvadoran law as the law applicable to the merits of the dispute. (¶ 5.64.)

### ***3.5 The exclusive jurisdiction of the Salvadoran courts under the Mining Law***

Respondent maintained that its consent to jurisdiction under Article 15 of the Investment Law is limited by Article 7(b), subjecting investments related to exploitation of the subsoil to the Salvadoran Constitution and secondary laws. (¶ 5.11.) Claimant argued that Respondent's consent to arbitrate these disputes under the ICSID Convention amounted to an international obligation which Respondent could not revoke by relying upon its domestic law. (¶ 5.13.)

The Tribunal rejected Respondent's objection for two reasons. First, the Tribunal was not bound by Respondent's interpretation of the Investment Law and refused to apply separate legislative provisions that would override an expression of jurisdictional consent that was valid, clear and unambiguous as a matter of law. Second, Claimant itself would not have standing to commence legal proceedings against Respondent before a Salvadoran court. (¶ 5.69.)

### ***3.6 The applicability of a three-year statute of limitations to the El Dorado claims***

Respondent argued that the claims exceeded the applicable three-year time limit in the Salvadoran Civil Code. (¶¶ 5.14-5.15.) Claimant argued that domestic statutes of limitation do not apply to claims raised before international tribunals. (¶ 5.17.)

The Tribunal dismissed the objection, confirming that international investment tribunals are not necessarily bound to apply domestic statutes of limitation. (¶ 5.72.)

## ***4. Liability for El Dorado***

The principal issue addressed by the Tribunal concerned PRES' application for an exploitation concession in El Dorado. (¶ 7.8.) The parties disagreed over whether PRES complied with all requirements of the Mining Law for purposes of its application. The Article 37(2) of the Mining Law requires any application for an exploitation concession to be submitted along with the following documentation: "(a) Plot plan of the property where the activities will be carried out . . .; [and] (b) The ownership deed of the property or the authorization legally granted by the owner." (¶ 8.6.)

### ***4.1 The Interpretation of Article 37(2)(b) of the Mining Law***

Claimant contended that it submitted authorizations or ownership documentation "for the surface area to be affected or likely to be affected during the period of the requested concession." (¶ 7.12.) Respondent argued that the requirements of Article 37(2)(b) are not limited to surface areas where the applicant's concession is to affect directly; but rather to all service areas to be covered by the requested extension. (¶ 7.20.) The specific interpretative issue was thus whether Article 37(2)'s documentation requirement applied to the *whole* of the surface area on and under which the activities were to be realized, or whether it limited to only that *part* of its surface area affected by the applicant's activities. (¶ 7.11.)

The Tribunal concluded that PRES' application did not comply with the documentation requirement of the Mining Law. (¶ 8.44.) The Tribunal reached its unanimous conclusion based on three factors—acquiescence, deference and teleology. As to acquiescence, the Tribunal found that Claimant accepted Respondent's adverse interpretation of the Mining Law by failing to challenge the interpretation in Salvadoran courts and waiting for the law to be favourably amended. (¶ 8.30.) As to deference, the Tribunal concluded that deference should be given "by an international tribunal to the unanimous interpretation of [Respondent's] own laws given in good faith by the responsible authorities . . . at a time before the emergence of the parties' dispute." Applying this principle, the Tribunal gave deference to Respondent's submitted legal opinions over Claimant's interpretations. (¶ 8.31.)

As to the teleological factor, the Tribunal found that Article 37(2)(b)'s wording was unclear; and that what mattered in practice were the potential risks to the surface owners and

occupiers. (¶ 8.32.) In this regard, the Tribunal decided, and the expert evidence concurred, that under Article 37(2)(b), ownership or consent could be legitimately required from those facing potential or actual risks, but not from those facing no risks at all. (¶ 8.39.) Based on this interpretation, the Tribunal concluded PRES never fully complied with the requirements of Article 37(2)(b) because it failed to provide documentation for certain parts of the full surface area that were potentially at risk by the concession. Nor did PRES take steps to identify any areas within the full surface area that might potentially be at risk from underground mining. (¶ 8.43.)

## ***4.2 The argument on estoppel***

Claimant submitted that even if it did not comply with the Mining Law, Respondent was estopped from arguing noncompliance under both international law and the Salvadorian law doctrine of *actos propios*. (¶ 7.2.) Respondent argued that Claimant failed to show that it relied on a clear and unequivocal act by Respondent as required under the doctrine of *actos propios*. (¶ 7.47.)

### ***4.2.1 Claimant's position and factual allegations***

Claimant believed from the outset that it would only need to submit authorization for those areas to be directly affected by the concession (¶ 7.29.) After submitting its application, Respondent informed Claimant that it interpreted the law to require authorizations covering the entire proposed concession area. Nevertheless, the parties worked together to try and resolve the issue. (¶ 7.30.)

Respondent preferred to seek a legislative amendment to the Mining Law. Following communication of the proposed amendment in October 2005, Respondent told Claimant that it was not required to take any further action, and accordingly, Claimant took no further action. (¶ 7.31-7.32.) In June 2006, Respondent publicly proposed a reform to the Mining Law and by 2008, Respondent represented that President Saca's support for the reform had been secured. On 10 March 2008 however, contrary to what had been previously communicated, President Saca announced that the reform would not move forward until further studies were done. As a result, the reform did not proceed. (¶¶ 7.33-7.34.)

Claimant argued that it relied on Respondent's representation that no further action was required. (¶ 7.36.) Claimant also argued that Respondent's conduct amounted to a representation that Article 37(2)(b) did not provide a sufficient basis to deny the concession. (¶¶ 7.37-7.39.) Throughout these conversations, Respondents never expressed any concern over the surface rights issue. According to Claimant, this silence amounted to a clear and unequivocal representation that the Mining Law would not hinder the concession. (¶ 7.40.)

### ***4.2.2 Respondent's position and factual allegations***

Respondent denied any application of international law. (¶ 7.55.) As to Salvadoran law, Respondent argued that the doctrine of *actos propios* requires a clear and unequivocal act that accords with existing law and leaves no doubt as to the actor's intent. According to Respondent, none of its statements could accord with existing law because an officer of the government would have no power to offer something to Claimant that was not allowed by the law (¶ 7.47).

Respondent further argued that Claimant failed to prove such an unequivocal act on the evidence. (¶ 7.48.) To the contrary, there was never any doubt that the mining law required ownership or authorization for the entire surface area of the requested concession. The Ministry of Economy's efforts to accommodate claimant cannot be considered unequivocal acts to be relied on, as they were only intended assist Claimant. (¶ 7.51.)

#### *4.2.3 Tribunal's analysis*

The Tribunal stated that for a representation to be grounds for estoppel, it must be "clear and unambiguous" or "unequivocal." (¶ 8.47). The Tribunal found there was no cogent evidence that the Ministry of Economy ever represented to Claimant that PRES' application for a concession had met or would be treated as having met the requirements of Article 37(2)(b), and in fact the contrary was evident. (¶ 8.49.) Moreover, the Tribunal found Respondent's statement and actions to not be sufficiently clear and unambiguous to support the alleged representation. Whilst it seemed the Mining Law might be amended, the Ministry sought to help and accommodate Claimant as best it could, but there was no representation that if the law was not amended, PRES would be treated as having met already satisfied the requirement. (¶ 8.51.) Claimant's case thus failed on *actos propios* under Salvadoran law and estoppel under international law as a matter of evidence. (¶ 8.52.)

#### **5. Liability – other mining areas**

The Tribunal held that Claimant had not discharged its legal burden of proof for its claims in relation to other mining areas. (¶¶ 9.2-9.25.)

#### **6. Costs**

The Tribunal rejected in full Claimant's claim for legal costs and ordered Claimant to pay Respondent \$US8 million towards its costs. (¶ 11.20.)