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Costa Rica

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Costa Rica introduced alternative dispute resolution (ADR) mechanisms in the nineties through its judiciary, which recognised the need to offer more effective means of resolving disputes. Since then, arbitration has become an oft-used mechanism for dealing with commercial disputes. However, the potential of arbitration as an alternative to the traditional proceedings before local courts has not been completely realised. This is due in part to the fact that practitioners still instinctively utilise procedural litigation mechanisms instead of taking full advantage of the flexibility and efficiency that arbitration offers. That, however, is expected to change. The modern legal framework for international arbitration recently adopted by the Costa Rican Congress, which is virtually identical to the UNCITRAL Model Law (as amended in 2006) (the Model Law), provides an opportunity to introduce current arbitration practices to the local culture. Given that and other propitious conditions described in this article, Costa Rica is well placed to become a regional centre for international commercial cases.

After a sensible institutional reform in 1996, Costa Rica pursued a policy of treaty making in the area of international trade and international investment protections. It negotiated and ratified dozens of bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters (collectively, international investment agreements or IIAs), thus cementing the country's commitment to free trade and protection of foreign investment. In the nearly 20 years since then, Costa Rica has built a solid track record of compliance and observance of its obligations under those IIAs. In fact, Costa Rica has not been found to violate its obligations to accord fair and equitable treatment, full protection and security, most-favoured nation and national treatment. It has been ordered to pay compensation for expropriation only in two cases, both of which stemmed from measures that pursued environmental protection objectives.¹

Section II below will provide a description of the legal framework and the relevant judicial decisions, as well as other aspects of international commercial arbitration in Costa Rica, such as logistics, services, and institutions. Section III will discuss the IIAs in force for Costa Rica and will review the country's track record as a respondent in investor-State dispute settlement proceedings. Both sections show that Costa Rica is an arbitration-friendly country.

The international commercial arbitration regime in Costa Rica

Costa Rica keeps a 'dualistic' legal regime: it has a law that governs domestic arbitration, the Law on Alternative Dispute Resolution and Promotion of Social Peace of 4 December 1997 (ADR Law, or Law 7727), and a law that governs international arbitration, Law on International Commercial Arbitration of 25 May 2011 (International Arbitration Law or Law 8937). Between the time when the former came into force and when the latter became effective, the restrictions on language of the arbitration proceedings and the nationality of arbitrators found in the ADR

Law were interpreted to apply to international cases.² Though this only affected a few cases, it hurt Costa Rica's reputation.

The International Arbitration Law eliminates these restrictions and includes no reference to the local Code of Civil Procedures, so this obstacle has been removed. The new framework provides a fertile ground in which to grow a modern arbitration practice in Costa Rica.

Legal framework and jurisprudence

Court decisions have been on balance positive for the development of arbitration.³ The First Chamber of the Supreme Court⁴ (the First Chamber) is the court in charge of matters regarding international commercial arbitration under Law 8937. Since it is the same as the court that has rendered decisions under Law 7727, it is expected that the pro-arbitration judicial policy will continue.

As a civil law country, the Costa Rican legal framework follows a hierarchy that gives weight to rules depending on the legal instrument where they are found. Thus, constitutional norms are the highest ranked, followed by international treaties and domestic legislation, in that order. Decrees and regulations implement laws, but this chapter does not deal with them.

Constitutional right to arbitration in Costa Rica

It is a constitutional right enshrined in article 43 of the Constitution of Costa Rica that all persons have the right to solve their economic disputes through arbitration. Law 7727 provides that 'public persons', including the state, may submit their disputes to arbitration.⁵ The First Chamber has confirmed this numerous times. The capacity of the state and its entities to consent to arbitration therefore cannot be questioned, at least as a matter of principle.

Unlike in jurisdictions where the issue is debated,⁶ the Costa Rican Supreme Court has held consistently that the constitutional remedy of *amparo* is not the appropriate means of dealing with alleged violations of due process in arbitral proceedings.⁷

Relevant international legal instruments in force in Costa Rica

Costa Rica is a party to the United Nations Convention on the Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).⁸

Costa Rica is also a party to the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention).⁹ Almost identical to the New York Convention, the Panama Convention also provides that arbitrators may be of any nationality,¹⁰ and that when parties of countries that are party to the treaty have agreed to arbitration but not provided the means, the applicable default rules are those of the Inter-American Commission on Commercial Arbitration.¹¹ There are no reported cases where the Panama Convention has been applied in Costa Rica.

Costa Rica is a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention or Hague Convention).¹² The implementation of this Convention is the responsibility of the Ministry of Foreign Relations.¹³

Law 8937 on international commercial arbitration

Law 8937 entered into force on 25 May 2011. As indicated above, that law is inspired by the UNCITRAL Model Law but departs from the Model Law in some notable ways. The next four subsections below will describe some of the key differences between Law 8937 and the Model Law.

Scope of application

Law 8937 includes a provision devoted to the scope of the subject matter of arbitration agreements. Article 37, which does not exist in the Model Law, provides that ‘disputes regarding matters of free disposition and transaction, in conformity with the applicable civil and commercial provisions, can be submitted to arbitration.’¹⁴ Both Costa Rican doctrine and courts take a broad approach in terms of matters that can be resolved by arbitration and exclude only non-commercial matters, such as labour, criminal and family litigation, as well as bankruptcy and inheritance disputes.¹⁵

Another deviation from the Model Law in Law 8937 regarding its scope of application is that article 1 of the Law provides that it shall not apply to investor-state disputes regulated in international agreements.¹⁶ Although at first sight it may seem to be a limitation when interpreted in the context of the law, it should not constitute a hindrance.¹⁷

The International Arbitration Law designates the First Chamber as the only court that may intervene in international arbitration proceedings, albeit in limited situations, such as enforcement of the arbitration agreement, constitution of the arbitral tribunal, and recognition of the award.¹⁸ The novelty of Law 8937 as compared to the Model Law is that it adds that the First Chamber may delegate on lower judicial authorities matters regarding specific procedures.¹⁹

The arbitration agreement

The Fourth (Constitutional) Chamber of the Supreme Court has characterised arbitral agreements as ‘contractual with procedural effects’²⁰ and has enforced valid arbitration agreements.

Although article 37 of Law 7727 recognises that the arbitrators determine their own competence,²¹ in practice when a lawsuit is brought before a lower court first and subsequently the defendant moves to refer the case to arbitration, the lower court refers the validity of arbitration clause to the Supreme Court’s First Chamber rather than to the arbitral tribunal.²² The situation is different when the dispute is brought first to arbitration and then a party contests the arbitration agreement. In those cases, the First Chamber reviews arbitral awards regarding jurisdiction only after the arbitral tribunal has rendered its decision.²³

Another feature of Law 8937 is that it opted for the requirement that the arbitration agreement be in writing. The First Chamber has held that the arbitration agreement must be expressly stated, rather than being tacit or implicit.

The First Chamber has held as well that the arbitration agreement or arbitral clause ‘cannot encompass third parties by virtue of the principle of relativity of contracts’.²⁴ Nevertheless, non-signatories have been deemed to have consented to arbitration in cases of assignment,²⁵ group of ‘economic interest’,²⁶ and umbrella agreements, as regards related companies that enter

into the contractual relationship subsequently.²⁷ On the other hand, the First Chamber has found that a clause is not enforceable to non-signatories in case of a bank trustee that was not part to the agreement that contained the arbitration clause.²⁸

Finally, it is important to mention the judiciary’s stance regarding multi-tiered clauses. The First Chamber has not enforced the first ‘tier’ of this type of clauses, which provide for means of dispute resolution as a condition precedent for arbitration, because they are by nature not compulsory. In essence, the First Chamber deems that ADR mechanisms that do not result in binding decisions should be kept voluntary.²⁹ Whether dispute adjudication boards will be considered to fit into the voluntary category remains to be seen.

The arbitral tribunal

The provisions of the International Arbitration Law devoted to the constitution of the arbitral tribunal follow the same spirit of the Model Law, which is respect for party autonomy (including the nationality of the arbitrators), the possibility of delegating the parties’ will to an institution or a third party, and the requirement that the arbitrators be independent from the parties.

There is one deviation from the Model Law, which is that the default number of arbitrators under Law 8937 is one arbitrator whereas under the Model Law it is three. In addition, while parties are free to determine the number of arbitrators, Law 8937 requires an odd number, something that is not required expressly in the Model Law.³⁰

Provisional measures

By virtue of article 9 of Law 8937, parties who have entered into an arbitration agreement are free to seek provisional measures from competent state courts without that constituting an implicit waiver of the arbitral jurisdiction.

As regards the powers of the arbitral tribunal to order provisional measures, Law 8937 includes the sections of the Model Law introduced in 2006, including the power to issue preliminary orders. Unlike the Model Law, Law 8937 does not refer to the form that the provisional measure must take but it does require that it be reasoned.³¹ There are no reported cases on enforcement of provisional measures ordered by arbitral tribunals under the International Arbitration Law.

The proceedings

The provisions of Law 8937 that require party equality³² and the freedom to agree on the procedure by which the arbitration shall be conducted³³ are relatively straightforward and are part and parcel of the international standard in international arbitration. Nevertheless, they may prove to be the most challenging aspect for practitioners in Costa Rica, given that they provide no specific rules or instructions, nor do they refer to national procedural norms.

In contrast, in domestic arbitration practitioners have become used to applying the Code of Civil Procedures for matters such as terms and deadlines, notifications, swearing in of the witnesses, and hearing experts.³⁴ Although article 39 of domestic arbitration Law 7727 provides for flexibility in the proceedings as well, that provision includes a reference to local procedural rules³⁵ in case of lacunae.³⁶ In practice, arbitrators interpret the concept of ‘local procedural rules’ to mean Code of Civil Procedures, and practitioners are used to following certain aspects of that code.

Another modification included in Law 8937 is article 38, which establishes that proceedings are confidential; this does not

exist in the Model Law. That same provision further states that the award shall be public, save agreement by the parties to the contrary.³⁷

The arbitral award

As mentioned, the award shall be public. The names of the arbitrators and counsel shall appear in the award, although the parties' names must be replaced with their initials. In practice, other than cases of setting aside or enforcement, awards are kept private, as there is no institution dedicated to publishing awards. In any case, parties are free to agree in the arbitration clause or any time during the proceedings that the award will be kept private.

Provisions regarding the form of the award, applicable law and the setting aside and enforcement of the award are identical to the Model Law. As compared to domestic arbitration Law 7727, the main difference is that the ground for setting aside the award if it is rendered beyond the time limit is not included in Law 8937. An argument can be made, nonetheless, that such a ground still exists under article 34(2)(iv), according to which an award may be set aside if the proceedings were not carried out in accordance with the parties' agreement. Thus, on such an important aspect, practitioners can expect that the First Chamber's track record will remain along the same lines that it has traced for domestic cases. In general, they have coincided with what is considered standard in international arbitration.³⁸

On this same subject, there is a provision of the Model Law that is replicated in the International Arbitration Law and that will surely call the attention of parties in Costa Rica. Article 34(4) establishes that the First Chamber:

(...) may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.'

Although it is arguable that Law 7727 authorises it to do so, the First Chamber has ordered arbitrators in several domestic cases to correct awards under the existing renvoi of Code of Civil Procedures, so it is likely that Costa Rican parties will seek to invoke this provision when facing challenges to awards favourable to their interests.

Readiness of institutions, logistics and human resources in Costa Rica for the development of international arbitration cases

According to Law 7727, local arbitration institutions must be authorised by the Ministry of Justice to provide dispute resolution services. In Costa Rica, out of the arbitration centres that are authorised to provide such services, four are capable of managing international cases:

- Costa Rican Chamber of Commerce Centre of Conciliation and Arbitration (CCA);³⁹
- US–Costa Rican Chamber of Commerce International Centre for Conciliation and Arbitration, AmCham (CICA);⁴⁰
- Costa Rican Bar Centre of Arbitration and Mediation (CAM-CR);⁴¹ and
- Centre of Conflict Resolution of the Federated Association of Engineers and Architects (CRC-CFIA).⁴²

Outside of those institutions, parties are free to agree to conduct their international arbitration proceedings in accordance with the

rules of international arbitration centres located outside Costa Rica, as well as ad hoc rules.

In terms of logistics, international hotel chains such as Intercontinental, Marriott and Holiday Inn provide appropriate hearing rooms and accommodations to hold arbitral hearings in San José. In addition, since local centres are prepared to record all hearings per the requirements of Law 7727, sound systems and other technology is available for those purposes. Also, San José has direct flights to and from other capital cities, such as Madrid, Washington DC, Newark, Houston, Dallas, Los Angeles, Lima, and Mexico City.⁴³

In terms of human resources, most attorneys and professionals who are involved in arbitration are fully bilingual. Since several international and regional institutions have offices or seat in Costa Rica, such as the Inter-American Court of Human Rights and the United Nations High Commissioner for Refugees, skilled court reporters and professional interpreters and translators are readily found.

IIAs and Costa Rica's track record in investor-state dispute settlement

Costa Rica has been an active player in the multilateral trading system, particularly after the establishment of the World Trade Organization in 1995. As a small but prosperous country, Costa Rica certainly punches above its weight. Costa Rica is arguably the strongest democracy in Latin America, known in the international community for its political stability, strong institutions, rule of law and respect for international law. In the context of investor-state dispute settlement (ISDS), Costa Rica's conduct is consistent with that reputation. The paragraphs below outline Costa Rica's framework of IIAs and the country's track record as a respondent in ISDS proceedings.

Protection and promotion of foreign investment in Costa Rica through IIAs

Since Costa Rica's establishment of its Ministry of Foreign Trade (COMEX) through congressional Law 7638 of 30 October 1996, the country has pursued a consistent and coherent policy of promoting and protecting international investment and international trade through treaties⁴⁴ and domestic legislation. Costa Rica is a party to 14 BITs that are currently in force, with Argentina (1997), Canada (1998), Chile (1996), Czech Republic (1998), France (1984), Germany (1994), Republic of Korea (2000), the Netherlands (1999), Paraguay (1998), Qatar (2010), Spain (1997), Switzerland (2000), the Republic of China (Taiwan) (1999) and Venezuela (1997). Costa Rica is also a party to nearly a dozen FTAs, several of which contain an investment chapter, including DR-CAFTA (2004), CARICOM (2004), Central America and Mexico (2011), EFTA and Panama (2013), Peru (2011), Singapore (2010) and Chile (1999). In addition, Costa Rica has negotiated and signed nearly a dozen other IIAs that are yet to enter into force, including most recently with the People's Republic of China (BIT, 2007), Colombia (FTA, 2013) and Central America and the EU (FTA, 2012).

Most of the IIAs that are currently in force for Costa Rica provide effective legal protections for foreign investors and their investments, including recourse to ISDS mechanisms in the form of international arbitration.⁴⁵ For example, the IIAs that Costa Rica has in place with states that are important sources of inward foreign investment (including the United States, Canada, Spain, Germany and the Netherlands) provide for rights to compensation for lawful and unlawful expropriation, fair and equitable treatment,

full protection and security, most-favoured nation treatment, national treatment, and free transfers. Some of those IIAs (for example those with Spain, Germany and the Netherlands) also contain an ‘observance of undertaking’ or ‘umbrella clause’.

In the event of an investment dispute with Costa Rica, most of the IIAs in force (including the DR-CAFTA and the BITs with Canada, Spain, and the Netherlands) offer foreign investors with qualifying investments the choice of international arbitration under the ICSID Convention and Arbitration Rules,⁴⁶ the ICSID Additional Facility Rules, and ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).⁴⁷

Costa Rica's track record as a respondent in investor-state dispute settlement proceedings

Costa Rica has been an active and, on the whole, a successful party in ISDS proceedings.⁴⁸ It has been a respondent state in 10⁴⁹ such proceedings, under various investment treaties, including three cases under the Costa Rica-Canada BIT, two cases under the DR-CAFTA, and two cases under the Costa Rica-Germany BIT. Of the 10 cases, five have concluded and five are still pending.⁵⁰

Of the five concluded proceedings, Costa Rica was ordered to pay compensation to the claimant in only two proceedings.⁵¹ One of those proceedings, *Santa Elena*⁵² was initiated with the essential purpose of determining the value of compensation. In the remaining three concluded proceedings, the claims were dismissed on jurisdiction,⁵³ dismissed on the merits⁵⁴ or discontinued.⁵⁵

Six of the ten proceedings against Costa Rica were brought under the ICSID Convention and Arbitration Rules; two under the ICSID Additional Facility Rules and the remaining two (both pending) under the Arbitration Rules of UNCITRAL.

It is noteworthy that half of the registered cases against Costa Rica relate to government measures in connection with environmental protection. The claims made in the *Marion Unglaube*,⁵⁶ *Reinhard Hans Unglaube*,⁵⁷ and *Spence International Investments, LLC, Berkowitz et al v the Republic of Costa Rica* (UNCITRAL Arbitral Tribunal, Case No. UNCT/13/2 (pending)) (*Spence International*) proceedings all relate to government measures to support the establishment of the Las Baulas National Park, an ecological national park hosting leatherback sea turtles on Costa Rica's Pacific coast. Similarly, in *Santa Elena*, the compensation complaint related to Costa Rica's expropriation of land adjacent to the Santa Rosa National Park, in the interests of protecting flora and fauna, including stable environments for puma and jaguars and spawning grounds for sea turtles. The pending *David Aven et al v Republic of Costa Rica* (UNCITRAL Arbitral Tribunal) (*David Aven*) proceeding also concerns government conduct in connection with the protection of wetlands and forests on Costa Rica's Pacific coast.

These cases involving environmental protection measures present a mixed picture of success for the claimants. To date, Costa Rica has been ordered to pay a total sum of US\$20,065,900.33 in compensation, comprising approximately 39 per cent of the amount claimed in *Santa Elena*, and possibly an even lower percentage in the *Marion Unglaube* case.⁵⁸

No international tribunal to date has found Costa Rica to breach its obligations to accord fair and equitable treatment, full protection and security, most-favoured nation or national treatment to foreign investors and their investments.

We will now summarise the five concluded cases against Costa Rica, identify the five pending cases and consider Costa Rica's compliance record to date.

Concluded cases

Compañía Del Desarrollo de Santa Elena S.A. v Republic of Costa Rica (Final Award) (ICSID Arbitral Tribunal, Case No ARB/96/01, 17 February 2000)

Claimant: Compañía del Desarrollo de Santa Elena, SA (a Costa Rican corporation with majority shareholders of US nationality)

Date registered: 15 May 1995

Investment agreement: N/A

Arbitration forum: ICSID

Status: Concluded (Final Award ordered Costa Rica to pay compensation to the claimant)

The tribunal observed that ‘this is, at the end of the day, a case of expropriation in which the fundamental issue before the tribunal is the amount of compensation to be paid.’⁵⁹

The investment that was the subject of the dispute was a property known as Santa Elena, located in Costa Rica's northwest Guanacaste Province consisting of over 30 kilometres of Pacific coastlines, numerous rivers, springs, valleys, forests and mountains, and a wide variety of flora and fauna. On 5 May 1978, Costa Rica issued an executive expropriation decree for Santa Elena to expand the adjacent Santa Rosa National Park with the stated objective of environmental conservation. In accordance with an appraisal of Santa Elena, Costa Rica proposed to pay the claimant US\$1.9 million in compensation.

The claimant's request to ICSID, which was preceded by an agreement between the governments of the United States and Costa Rica to submit the case to the ICSID, did not object to the expropriation but complained about the amount of compensation owed to the claimant in connection with the expropriation. The claimant requested an award of US\$41.2 million with interest and other amounts as fair and full compensation for the expropriation.

The tribunal ordered that Costa Rica pay the claimant the sum of US\$16 million, which comprised principal and adjusted compound interest to the date of the award.⁶⁰ The tribunal held that compensation had to be determined according to the applicable principle of ‘full compensation for the fair market value of the property’⁶¹ with the fair market value of Santa Elena to be calculated by reference to its ‘highest and best use’.⁶² The tribunal decided that the relevant date that Santa Elena must be valued was the date of the expropriation decree, as that was the date that Santa Elena lost its practical and economic use.⁶³ The tribunal determined that the sum of US\$4,150,000 constituted a reasonable and fair approximation of the value of Santa Elena at the date of its taking.⁶⁴

In determining Santa Elena's fair market value, the tribunal proceeded by means of approximation based on the appraisals effected by the parties in 1978 and in accordance with several international arbitrations.⁶⁵ The tribunal ordered adjusted compound interest on the basis that although the claimant was able to use and exploit Santa Elena to a limited extent, it was unable to use Santa Elena for its planned tourism development.⁶⁶

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and the ICSID.⁶⁷

Alasdair Ross Anderson et al v Republic of Costa Rica (Award) (ICSID Arbitral Tribunal (Additional Facility), Case No ARB (AF)/07/3, 19 May 2010)

Claimant: 137 individual Canadian nationals⁶⁸

Date registered: 27 March 2007

Investment agreement: Canada – Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID Additional Facility
Status: Concluded (dismissed on jurisdiction)

The investments that were the subject of the dispute were deposits made by the claimants in a fraudulent Ponzi scheme that was operated by two Costa Rican nationals, Luis Enrique Villalobos Camacho and his brother Osvaldo Villalobos Camacho. Osvaldo Villalobos Camacho was convicted for aggravated fraud and illegal financial intermediation and was sentenced to 18 years in prison by the Costa Rican authorities. His brother, Luis Enrique Villalobos, absconded and remains a fugitive.

The claimants complained that Costa Rica, by failing to provide proper vigilance and government regulatory supervision over Costa Rica's financial system, injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation.

The tribunal accepted the first objection to jurisdiction made by Costa Rica and dismissed the case for lack of jurisdiction 'ratione materiae'.⁶⁹ The tribunal found that the claimants did not qualify as investors pursuant to the BIT because they had failed to demonstrate that they owned or controlled an investment in the territory of Costa Rica in accordance with the laws of Costa Rica.⁷⁰ The transaction by which the claimants obtained ownership of their assets did not comply with the relevant law of the Central Bank of Costa Rica.⁷¹

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and the ICSID.⁷²

Marion Unglaube v Republic of Costa Rica (Award)
(ICSID Arbitral Tribunal, Case No ARB/08/1, 16 May 2012); *Reinhard Hans Unglaube v Republic of Costa Rica (Award)* (ICSID Arbitral Tribunal, Case No. ARB/09/20, 16 May 2012)

Claimant: Mrs Marion Unglaube and Mr Reinhard Hans Unglaube (German nationals)

Date registered: 25 January 2008; 11 November 2009 (consolidated)

Investment agreement: Costa Rica – Germany Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Concluded (Final Award partially in favour of claimant)

The investments that were the subject of the proceedings were properties owned by the claimants and acquired for the development of an ecotourism project. The properties were located in the vicinity of Playa Grande, in the Guanacaste Province, Costa Rica. Playa Grande is a picturesque beach on Costa Rica's Pacific coast and an important site on which the endangered leatherback turtles lay their eggs. Costa Rica has undertaken numerous actions to protect the habitat; as early as 1991 it announced its intention to create the Las Baulas National Park and has pursued successive legal, administrative and court-ordered measures in pursuance of that objective.

The claimants alleged five separate categories of BIT violations: expropriation without compensation; failure to observe assumed obligations; unfair and inequitable treatment; failure to grant full protection and security; and impairment of the administration, management, use or enjoyment of investments by arbitrary or discriminatory measures.

The tribunal found in the claimants' favour in relation only to the expropriation claim made by Ms Marion Unglaube regarding

a particular parcel of land (the 75-metre strip).⁷³ The tribunal found that Costa Rica, in the process of initiating expropriation of that land, did not make timely arrangements to determine the amount of compensation and make payment thereof to claimant Marion Unglaube.⁷⁴ The tribunal found that the rights of the claimant had been affected in a similar way as in *Santa Elena* and in obiter dicta said that the state responsibility for expropriation included proper drafting of expropriation laws.⁷⁵ Accordingly, the tribunal ordered that Costa Rica pay to claimant Marion Unglaube the sum of US\$3.1 million plus interest to the date of the award for a total amount of US\$4,065,900.33.⁷⁶

The tribunal rejected the claimants' other arguments, including the allegation that Costa Rica failed to provide a stable and predictable legal and business environment and frustrated the investors' legitimate expectations.⁷⁷

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and ICSID.⁷⁸

Quadrant Pacific Growth Fund LP and Canasco Holdings Inc v Republic of Costa Rica (Order of the Tribunal) (ICSID Arbitral Tribunal (Additional Facility), Case No ARB (AF)/08/1, 27 October 2010)

Claimant: Quadrant Pacific Growth Fund LP and Canasco Holdings, Inc (Canadian investors)

Date registered: 21 December 2007

Investment agreement: Canada – Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID Additional Facility

Status: Concluded (discontinuance noted; costs ordered against claimants)

The investments at issue in this case were orange plantations located on the northern border of Costa Rica (the Aprel lands), allegedly owned by the claimants. The claimants complained that Costa Rica had failed to take reasonable steps to address the continuing illegal trespass on the Aprel lands by illegal squatters. The claimants contended that Costa Rica's failure to enforce its law for the protection of private property resulted in damages to the Aprel lands, in violation of the BIT. The claimants pleaded that Costa Rica breached the provisions of the BIT concerning fair and equitable treatment, full protection and security, national treatment, and most-favoured nation treatment.

On the eve of the hearing on the merits and after almost two years of litigation and a staunch legal defence by Costa Rica, the claimants abandoned their claims. In January 2010, the tribunal decided to stay the proceedings pursuant to the ICSID Administrative and Financial Regulations and the ICSID Additional Facility Rules;⁷⁹ the Secretary-General of ICSID subsequently requested that the proceedings be discontinued. The tribunal took note of the discontinuance of proceedings and ordered that the claimants pay the sum of US\$730,000 to Costa Rica in respect of fees and costs.⁸⁰ Although it is not common practice to include an order as to costs in an order providing for discontinuance, the tribunal took the view that the claimants' improper conduct justified such an order.⁸¹

Pending cases

Supervision y Control SA v Republic of Costa Rica
(ICSID Arbitral Tribunal, Case No. ARB/12/4)

Claimant: Supervision y Control SA (Spanish motor vehicle inspection company)

Date registered: 9 February 2012

Investment agreement: Spain – Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Cervin Investissements SA and Rhone Investissements SA v Republic of Costa Rica (ICSID Arbitral Tribunal, Case No. ARB/13/2)

Claimant: Cervin Investissements SA and Rhone Investissements SA (Swiss investors in a Costa Rican gas company)

Date registered: 11 March 2013

Investment agreement: Costa Rica – Switzerland Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Spence International Investments, LLC, Berkowitz et al v the Republic of Costa Rica (UNCITRAL Arbitral Tribunal, Case No. UNCT/13/2)

Claimant: Spence International Investments, LLC, Bob F Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E Copher, Brette E Berkowitz, Trevor B Berkowitz, Aaron C Berkowitz and Glen Gremillion (US investors)

Date registered: 10 June 2013

Investment agreement: Dominican Republic Central America Free Trade Agreement (CAFTA-DR)

Arbitration forum: Ad hoc UNCITRAL arbitration

Status: Pending

David Aven et al v Republic of Costa Rica (UNCITRAL Arbitral Tribunal)

Claimant: Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shiolen, Mr Giacomo Anthony Buscemi, Mr David Alan Janney and Mr Roger Raguso (US investor)

Date registered: 24 January 2014

Investment agreement: Dominican Republic Central America Free Trade Agreement (the CAFTA-DR)

Arbitration forum: Ad hoc UNCITRAL arbitration

Status: Pending

Infinito Gold Ltd v Republic of Costa Rica (ICSID Arbitral Tribunal, Case No. ARB/14/5)

Claimant: Infinito Gold Ltd (Canadian mining company)

Date registered: 4 March 2014

Investment agreement: Canada – Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Costa Rica's compliance record

Consistent with its obligations under international law, including under the ICSID Convention, Costa Rica has complied with the only two awards⁸² that have ordered it to pay compensation to foreign investors,⁸³ both of which concerned uncompensated expropriation. Conversely, the foreign investors that brought unsuccessful claims against Costa Rica and ultimately were ordered by an international tribunal to pay the costs of proceedings to the state have failed to do so.

Notes

- 1 The government of Costa Rica has honoured both awards in full, as will be noted below.
- 2 See Eduardo Silva Romero 'La nouvelle loi costaricienne sur l'arbitrage commercial international du 25 mai 2011,' *Revue de l'Arbitrage* 3 (2011): 843. In response, see Dyalá Jiménez Figueres, 'La nueva ley de Arbitraje Comercial Internacional de Costa Rica: una visión siempre optimista', 13 *Revista El Foro* 13 (2012): 93.
- 3 For a review of the relevant jurisprudence see Alberto Fernández López, *Derecho, Arbitral Jurisprudencial (compendio de jurisprudencia)* (San José, Costa Rica: Litografía e Imprenta LIL, 2012).
- 4 The Supreme Court is divided into four chambers, depending on the subject matter; the First Chamber is in charge of inter alia civil and commercial matters, and the Constitutional (or Fourth) Chamber has the final word on constitutional matters.
- 5 Article 18: 'Arbitration of disputes: (...) All persons of public law, including the State, are free to submit their disputes to arbitration in accordance with the provisions of the present law and Article 27(3) of the Law of Public Administration.' Free translation. See original text: 'ARTÍCULO 18.- Arbitraje de controversias (...) Todo sujeto de derecho público, incluyendo el Estado, podrá someter sus controversias a arbitraje, de conformidad con las reglas de la presente ley y el inciso 3), del artículo 27 de la Ley General de la Administración Pública.'
- 6 Some jurisdictions where this has been an issue are Venezuela, Chile, Colombia and Spain. See Pablo Rey Vallejo, 'El arbitraje y los ordenamientos jurídicos en Latinoamérica', 126 *Vniversitas Bogotá* (Colombia) 126 (2013): 199, pp. 225-228.
- 7 See decision of the Fourth Chamber No. 2009-14331 of 16 September 2009, declaring that the appropriate remedy is the setting aside recourse provided in the ADR Law. See also Decisions No. 2009-16397 of 27 Oct 2009, No. 2008-18395 of 11 Dec 2008 and No. 2004-06144 of 4 Jun 2004.
- 8 Date of signature: 10 June 1958. Entry into force: 24 January 1988.
- 9 Date of signature: 30 January 1975. Entry into force: 16 June 1976.
- 10 Article 2: 'Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.'
- 11 Article 3: 'In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.'
- 12 Date of accession: 6 April 2011. Entry into force: 14 December 2011.
- 13 'República de Costa Rica Ministerio de Relaciones Exteriores'. Available at www.rree.go.cr/index.php?sec=servicios%20al%20publico&cat=servicios%20de%20autenticacion&cont=684, last accessed 23 June 2015.
- 14 Free translation. See original Text: 'Artículo 37.- Materias objeto de arbitraje. Pueden someterse a arbitraje las controversias sobre materias de libre disposición y transacción, conforme a las disposiciones civiles y comerciales aplicables.'
- 15 For more detail, see Marcela Filloy-Zerr, 'National Report for Costa Rica', in *ICCA International Handbook on Commercial Arbitration* (Supplement No 79), eds. Jan Paulsson and Lise Bosman (Kluwer Law International: May 2014), at pp. 14–15.
- 16 Free translation. See original text: '(...) La presente ley no afectará a ninguna otra ley de Costa Rica en virtud de la cual determinadas controversias no sean susceptibles de arbitraje o se puedan someter a arbitraje únicamente de conformidad con disposiciones que no sean las de la presente ley. Tampoco será de aplicación en

- las disputas entre inversionista-Estado reguladas en los acuerdos internacionales.'*
- 17 See Eduardo Silva Romero, note 2. In response see, Dyalá Jiménez Figueres, note 2 above, for an analysis according to which the only plausible interpretation is that the provisions of Law 8937 do not replace provisions that foresee different procedures under IIAs.
- 18 Pursuant to article 6: 'Court or other authority for certain functions of arbitration assistance and supervision. The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by the First Chamber of the Supreme Court of Justice. The First Chamber of the Supreme Court of Justice may designate a relevant judicial authority, in accordance with internal rules of competence, to process matters under articles 11 3) y 4), 13 3), 14, 16 3), procedures related to articles 17, 17A, 17B, 17C, 17D, 17E, 17F, 17G, 17H, 17I, 17J and any other matter that it considers convenient.'
Adapted from the English version of the Model Law.
- 19 Lower courts may be called to intervene when the enforcement of provisional measures and awards requires specific notification or actions that make them more effective when ordered by the local courts. As regards the constitution of the arbitral tribunal, in domestic arbitrations the First Chamber designates arbitration centres for the appointment of arbitrators in cases where parties in ad hoc cases do not designate arbitrators, since the First Chamber does not keep a list of arbitrators.
- 20 See Decision No. 900-F-2004 of 20/Oct/2004.
- 21 This provision goes further than article 16(1) of Law 8937, since it states that arbitral tribunals have 'exclusive jurisdiction' to decide objections regarding its jurisdiction and the arbitration agreement. See original text: *'El tribunal arbitral tendrá competencia exclusiva para decidir sobre las objeciones referentes a su propia competencia y sobre las objeciones respecto de la existencia o validez del acuerdo arbitral.'*
- 22 See Decision No. 98-2010 of 17 Mar 2010 of the Second Civil Court of San José, interpreting provisions from the Code of Civil Procedures, the Organic Law of the Judiciary, and the ADR Law regarding conflicts of jurisdiction. The First Chamber stated in Decision No. 1092-C-S1-2010 of 9 Sept 2010 that lower courts must not decline jurisdiction and refer the parties to arbitration but rather let the matter be determined by the First Chamber. This interpretation is not consonant with obiter dicta in other decisions by the First Chamber and should be modified, by virtue of articles 37 of Law 7727 and 16(3) of Law 8937 and judicial policy.
- 23 Most of the decisions from the First Chamber cited in the present section regarding the validity of arbitral clauses come from appeals against jurisdictional decisions of arbitrators. Article 16(3) of Law 8937 and the Model Law are quite similar.
- 24 See original text: *'Valga una vez más recordar que el efecto negativo de una cláusula arbitral es la renuncia a la jurisdicción común, renuncia que no puede ser simplemente implícita, sino expresa, aunque no sea formal' y (...) el acuerdo arbitral – por su naturaleza convencional – no alcanza a terceros, como corolario del principio de relatividad de los contratos y por la manera estricta con la que debe verse la renuncia a la jurisdicción común.'* (Decision No. 357-03 of 25 June 2003).
- 25 See Decision No. 200-A-06 of 7 Apr 2006. See also, Decision No. 002 of 21 January 2004.
- 26 See Decision No. 1565-A-S1-2010 of 23 December 2010. But see Decision No. 729-C-S1-2008 of 31 Oct 2008, where the arbitrators' decision to include non-signatories that belonged the same economic was revoked by the First Chamber, without much reasoning.
- 27 See Decision 746-C-2007 of 19 Oct 2007. See also Decision No. 703-A-00 of 22 September 2000 and Decision No. 475-0 of 27 June 2001.
- 28 See Decision No. 299-F-S1-2009 of 26 March 2009.
- 29 See for example, decisions No. 784-A-03 of 20 Nov 2003, No. 495-F-S1-2008 of 24 Jun 2008, and No. 798-C-S1-2008 of 4 December 2008. See also, decision 267 of 26 August 2005 of the Second Civil Court of San José, where it was decided that clauses for voluntary negotiation-like ADR mechanisms cannot be enforced lest access to justice under constitutional article 41 is violated.
- 30 Article 10: 'Number of arbitrators
(1) The parties are free to determine the number of arbitrators.
(2) Failing such determination, the number of arbitrators shall be three.' Adapted from the English version of the Model Law.
- 31 Article 17: 'Power of arbitral tribunal to order interim measures
(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
(2) An interim measure is any temporary measure, taken with a reasoned decision, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.'
Adapted from the English version of the Model Law.
- 32 Article 18: 'Equal treatment of parties. The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'
- 33 Article 19: 'Determination of rules of procedure
(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.' Taken from the English version of the Model Law.
- 34 For more detail, see Marcela Filloy-Zerr, note 15 above, at pp. 29–32.
- 35 Procedural rules of Costa Rican law shall complete the arbitral proceedings in matters that are compatible. Free translation. See original text: *'Las normas procesales de la legislación costarricense integrarán, en lo que resulte compatible, el procedimiento arbitral.'*
- 36 Article 42 does make reference of the Code of Civil Procedures, in terms of making it apply to notification and terms when parties or the arbitral tribunal have not ordered something different. See original text: *'En lo relativo a plazos o términos y su cómputo, regirán las normas del Código Procesal Civil, salvo si las partes o el propio tribunal disponen lo contrario.'*
- 37 See article 38: 'Confidentiality. The arbitral proceedings shall be confidential. In the event the file is presented before judicial courts, access to it shall be reserved to parties and their representatives. Unless the parties have expressly agreed to the contrary, the final award shall be public. The names of the arbitrators and counsel shall appear in the award; however, to afford parties protection, they shall be identified solely by their initials.' Free translation. See original text: *'ARTÍCULO 38. Confidencialidad
El procedimiento arbitral será confidencial. Cuando el expediente deba ser conocido ante los tribunales de justicia, se le dará*

- únicamente acceso a las partes y sus representantes. Salvo acuerdo expreso en contrario, el laudo, una vez que se encuentre firme, será público. En él constarán los nombres de los árbitros y de los abogados participantes; sin embargo, por protección de las partes, estas serán identificadas únicamente mediante sus iniciales.* A similar provision exists in the ADR Law (article 60).
- 38 See Dyalá Jiménez Figueres, note 2, p. 93. See also Marcela Filloy-Zerr, note 15.
- 39 'Centro de Conciliación y Arbitraje de la Cámara de Comercio de Costa Rica', available at www.camara-comercio.com/centro.php, last accessed 23 June 2015.
- 40 'Centro Internacional de Conciliación y Arbitraje de la Cámara de Comercio Estados Unidos-Costa Rica, AmCham', available at www.cica.co.cr, last accessed 26 June 2015.
- 41 'Centro de arbitraje y mediación del Colegio de Abogados', available at www.abogados.or.cr/index.php?option=com_content&view=article&id=159:rac&catid=47, last accessed 23 June 2015. CAM-CR is also the seat of the Iber-American Center of Arbitration (the CIAR).
- 42 'Centro Resolución de Conflictos del Colegio Federado de Ingenieros y Arquitectos', available at <http://crc.cfia.or.cr>, last accessed 23 June 2015.
- 43 'Aeropuerto Internacional Juan Santamaría', available at www.fly2sanjose.com, last accessed 23 June 2015.
- 44 All of the BITs and FTAs Costa Rica has signed can be found on the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub website, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/49#iialnnerMenu>, last accessed 18 June 2015.
- 45 The level of protection in Costa Rica's IIAs varies. For example, with respect to full protection and security, Costa Rica's BIT with Chile (1996) only provides a general protection. Moreover, the investment chapter contained in Costa Rica's FTA with EFTA and Panama (2013) does not include provisions for expropriation, fair and equitable treatment, full protection and security or most-favoured nation treatment.
- 46 Costa Rica has been a member state of the International Centre for Settlement of Investment Disputes (ICSID) since 27 May 1993.
- 47 Some of Costa Rica's IIAs do not provide these three options of ISDS arbitration rules. Costa Rica's BIT with Switzerland (2000) does not provide for recourse to the ICSID Additional Facility Rules. Moreover, Costa Rica's BITs with the Republic of Korea (2000), Chile (1996) and France (1984) each only refer to international arbitration through ICSID.
- 48 See Dyalá Jiménez Figueres and Karina Cherro, 'International Arbitration in Costa Rica' (2012) 29(4) *Journal of International Arbitration* 453.
- 49 The parties in *Marion Unglaube v Republic of Costa Rica* (Award) (ICSID Arbitral Tribunal, Case No. ARB/08/1, 16 May 2012) (*Marion Unglaube*) and in *Reinhard Hans Unglaube v Republic of Costa Rica* (Award) (ICSID Arbitral Tribunal, Case No. ARB/09/20, 16 May 2012) (*Reinhard Hans Unglaube*) agreed to consolidate the two cases and to have them heard by the same tribunal.
- 50 Costa Rica has been represented in international investment arbitration proceedings by White & Case, Sidley Austin LLP, Arnold & Porter, Volterra Fietta, Baker Botts and Herbert Smith Freehills. In the interest of full disclosure, the authors note that co-author Patricio Grané Labat has represented or is representing Costa Rica in four of the 10 cases, including three that have concluded and one that is pending.
- 51 *Compañía Del Desarrollo de Santa Elena SA v Republic of Costa Rica* (Final Award) (ICSID Arbitral Tribunal, Case No. ARB/96/01, 17 February 2000) (Santa Elena) and *Marion Unglaube*, note 50.
- 52 *Ibid.*
- 53 *Alasdair Ross Anderson et al v Republic of Costa Rica* (Award) (ICSID Arbitral Tribunal (Additional Facility), Case No. ARB (AF)/07/3, 19 May 2010) ('Alasdair').
- 54 Reinhard Hans Unglaube, note 50.
- 55 *Quadrant Pacific Growth Fund LP and Canasco Holdings Inc v Republic of Costa Rica* (Order of the Tribunal) (ICSID Arbitral Tribunal (Additional Facility), Case No. ARB (AF)/08/1, 27 October 2010) (*Quadrant Pacific*).
- 56 Note 50.
- 57 Note 50.
- 58 In Santa Elena, the claimant sought US\$41,200,000 (later revised down to US\$40,337,750) and was awarded US\$16 million; in *Marion Unglaube* and *Reinhard Unglaube* the claimants sought in excess of US\$8,800,000 and the tribunal awarded Ms Unglaube US\$4,065,900.33 (including interest to the date of the award).
- 59 Note 52, para. 54.
- 60 Note 52, para. 111.
- 61 Note 52, paras. 70 and 73.
- 62 Note 52, para. 70.
- 63 Note 52, para. 81.
- 64 Note 52, para. 95.
- 65 *American International Group, Inc. and American Life Insurance Company v The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran)*, Award No. 93-2-3, 4 Iran-U.S. C.T.R. 96 (19 December 1983); *Phillips Petroleum Company Iran v The Islamic Republic of Iran, The National Iranian Oil Company*, Award No. 425-39-2, 21 Iran-U.S. C.T.R. 79 (29 June 1989).
- 66 Note 52, paras. 105–106.
- 67 Note 52, para. 109.
- 68 The original Request for Arbitration was submitted by alleged investors of other nationalities but the Request for Arbitration that was ultimately registered (several years after it was originally submitted) was submitted only on behalf of Canadian individuals.
- 69 Note 54, para. 65.
- 70 Note 54, para. 59.
- 71 Note 54, para. 57.
- 72 Note 54, para. 66.
- 73 Note 50, para. 332.
- 74 Note 50, para. 209.
- 75 Note 50, para. 221.
- 76 Note 50, para. 332.
- 77 Note 50, paras. 251 – 259.
- 78 Note 50, paras. 251 – 332.
- 79 Note 56, paras. 55 – 56.
- 80 Note 56, para. 73.
- 81 Note 56, para. 67.
- 82 In *Santa Elena*, note 52 above, and *Marion Unglaube*, note 50 above.
- 83 Canadian investors *Quadrant Pacific Growth Fund LP and Canasco Holdings, Inc.*



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DJ Arbitraje

Dyalá Jiménez Figueres set up boutique firm DJ Arbitraje in Santiago, Chile in 2011. DJ Arbitraje is now based in her home country, Costa Rica.

Dyalá has represented clients in ICC arbitrations and in pre-arbitration and litigation disputes. She has worked in cases governed by the ICC Rules of Arbitration and the AAA Commercial Arbitration Rules administered by the ICDR, as well as the ICSID Arbitration Rules. Also, Dyalá has been appointed sole arbitrator and chair of the tribunal in ICC and ad hoc international arbitrations. She has participated in setting-aside proceedings of international awards and rendered legal opinions in arbitral proceedings.

Dyalá is a Costa Rican attorney from the Universidad de Costa Rica and holds a masters in law (LLM) in International Law from Georgetown University Law Center. She lived in Santiago, Chile for almost 10 years, where she taught International Arbitration at the Universidad de Chile and at that university's joint LLM programme with the Heidelberg Institute.

A founding member of the ICC Latin American Arbitration Group, the International Arbitration Institute (IAI), and the Asociación Latinoamericana de Arbitraje, Dyalá is often invited to participate as speaker at international conferences and seminars.



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Patricio Grané Labat is a partner of the law firm Volterra Fietta, the only dedicated public international law firm in the world. He is both civil and common law-trained and is admitted to practise in New York and Washington, DC. He holds a Master's in Law (LLM) in international law from Georgetown University Law Center.

Patricio has extensive experience representing sovereign States and private parties in international dispute resolution proceedings, as well as in non-contentious matters under public international law. He has represented claimant and respondent parties in investment arbitrations, including under the North American Free Trade Agreement (NAFTA), the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), and various bilateral investment treaties. He has acted as counsel in institutional or ad hoc arbitrations under ICSID, UNCITRAL, SCC and ICC rules. Patricio has also represented developed and developing countries in dispute settlement proceedings under the World Trade Organization (WTO) and has argued cases (including as lead counsel) before panels and the Appellate Body. Patricio also advises sovereign states on jurisdictional immunities issues, including in the context of judicial proceedings before European courts, as well as on international humanitarian law, the use of force and state responsibility.

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