

PCA Case No. 2016-17

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,
SIGNED ON AUGUST 5, 2004 (the “DR-CAFTA”)**

- and -

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)
(the “UNCITRAL Rules”)**

- between -

MICHAEL BALLANTINE AND LISA BALLANTINE

(the “Claimants”)

- and -

THE DOMINICAN REPUBLIC

(the “Respondent”, and together with the Claimants, the “Parties”)

PARTIAL DISSENT BY PROF. VINUESA ON COSTS

Tribunal:

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Ms. Marney L. Cheek
Prof. Raúl Emilio Vinuesa

Secretary to the Tribunal:

Mr. Julian Bordaçahar

Registry:

Permanent Court of Arbitration

3 September, 2019

PARTIAL DISSENT AS TO THE ALLOCATION OF COSTS

1. While fully agreeing with the decision on the Tribunal's lack of jurisdiction in this matter, I regret being unable to share the grounds justifying the majority's decision on the allocation of the costs of the proceedings before the PCA, and of the Tribunal's fees and expenses, for the following reasons.
2. The applicable law for determining who should bear the legal costs and fees is set forth in DR-CAFTA as well as in the applicable arbitration rules, *i.e.* the UNCITRAL Rules.
3. Under these provisions established by different instruments, the Tribunal must, given that there is no order of priority between them, interpret and apply these provisions privileging their compatibility.
4. The guiding criterion, both in DR-CAFTA¹ and in the UNCITRAL Rules,² is related to the principle of "the unsuccessful party pays". The applicable law grants the Tribunal broad discretionary power to adjust the application of this principle by considering the particular circumstances of the case to reach a reasonable result. Therefore, this broad discretionary power is not absolute, but rather it must be exercised pursuant to the parameters established under the applicable law.
5. After stating that the tribunal may, if warranted, grant the unsuccessful party court costs and fees, DR-CAFTA Article 10.20.6 goes on to say the tribunal should likewise consider whether the Claimant's claim is frivolous in nature. If the tribunal finds the claim is not frivolous, it should then assess the circumstances of the case in order to adopt a reasonable criterion as regards the apportioning of the costs. DR-CAFTA Article 10.20.6 does not exclude the tribunal's power to justify the reasonability of its decision based on the particular circumstances of the case, under Article 42 of the UNCITRAL Rules.
6. Under applicable law it is not possible to confuse the frivolity assessment of a "claim" with the necessary consideration of the particular circumstances of each case to arrive at a reasonable result. The threshold for determining the frivolity of a claim is high and such a determination under no circumstances presupposes in itself setting aside the guiding principle for cost allocation

¹ DR-CAFTA, Article 10.20.6 ("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.")

² UNCITRAL Rules, Article 42(1) ("The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case").

(i.e. “the unsuccessful party pays”). Pursuant to applicable law, the “unsuccessful party pays” principle is the starting point and likewise an essential circumstance the Tribunal is required to keep in mind when deciding on the reasonability of the result in apportioning costs.

7. Thus, the Tribunal’s determination as to the frivolity or not of a claim is a determination which is prior to and independent of the consideration of the particular circumstances of the case in establishing a reasonable result.
8. For this reason, therefore, I do not agree with the conclusion of the majority of the Tribunal, which, having considered the facts of the dispute and allegations does not find elements to deem the claim “frivolous”.³ Firstly, pursuant to the text and context of the applicable regulations, the frivolity of a claim does not depend on “the facts or arguments put forward by the parties”, but simply on the content and scope of the claim. Secondly, the cases cited in this same paragraph by the majority that reached the decision on costs (the *Commerce Group*⁴ and *Corona Materials*⁵ cases), are insufficient, under the law the Tribunal is required to apply in this case (i.e. DR-CAFTA and UNCITRAL Rules) to justify their aforementioned conclusion. Thirdly, once a tribunal has decided that a claim is not frivolous, only then must it proceed to determine the apportioning of the costs bearing in mind the guiding criterion that “the unsuccessful party pays” and any other particular circumstances of the case, to reach a reasonable result.
9. The tribunal in the *Commerce Group* case held, without providing any grounds, that the power granted to the Tribunal under Article 10.20.6 of DR-CAFTA is limited to the determination of costs, considering only whether the claims filed by the claimants or the preliminary objection submitted by the respondent were “frivolous”.⁶
10. Likewise, the tribunal in *Corona Materials* held that the tribunal’s discretion in allocating costs and fees is subject only to a single test – that of “frivolity”.⁷

³ Award, ¶ 632.

⁴ *Commerce Group Corp. and San Sebastian Gold Mines, Inv. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011.

⁵ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 de mayo de 2016.

⁶ *Commerce Group*, ¶ 137 (“The Tribunal has found entirely in favor of Respondent. However, to conclude from Respondent’s victory that Claimant’s claims were “frivolous” would be to go too far. Indeed, the Tribunal has been presented with no indication that Claimants were not serious about the claims they asserted in these proceedings”).

⁷ *Corona Materials*, ¶ 277 (“Looking at DR-CAFTA Article 10.20.6, the immediate test for the Arbitral Tribunal is to determine whether the claim was ‘frivolous’. The Arbitral Tribunal finds that the facts surrounding the dispute and the allegations made demonstrate that the Claimant – even if it was wrong in the construction and application of the DR-CAFTA to said facts – had a bona fide claim and did not act with such wanton disregard of the facts and the law as to permit this tribunal to consider that its claim was ‘frivolous’.”).

11. Therefore, citing the *Commerce Group* and *Corona Materials* cases as valid precedents to justify the decision of the majority on costs is inappropriate. The tribunals that heard those cases were not bound, as is this Tribunal, to apply the UNCITRAL Arbitration Rules.
12. Although ICSID Rules, like UNCITRAL Rules, grant tribunals a broad margin of discretion in deciding on cost allocation between the parties,⁸ the substantive difference lies in that the UNCITRAL Rules applicable to this case expressly states the criterion (“the unsuccessful party pays”) from which other particular circumstances of the case should be considered to reach a reasonable result on cost allocation.
13. Moreover, the above-mentioned cases cited by the majority as grounds for their decision on costs contradict the arguments made by other DR-CAFTA precedents, likewise cited by the majority: this is the case of the *Railroad Development Corporation v. Republic of Guatemala; Pac Rim Cayman LLC. v. Republic of El Salvador*; and *David R. Aven et al v. Republic of Costa Rica* precedents.⁹
14. In this context, the tribunal in *Railroad*¹⁰ does not take the “frivolity” of the unsuccessful party’s allegations as a basis when deciding that the costs involved in the proceedings relating to the jurisdictional stage should be paid for by the respondent who was, ultimately, the unsuccessful party in that stage. Instead, in the allocation of procedural costs related to the merits, the tribunal decided that such costs should be apportioned equally between the respondent and the claimant.¹¹ The tribunal clearly distinguishes the provisions it must apply when allocating the costs and expenses of the proceedings, acknowledging that the ICSID Rules do not impose any condition or requirement to decide on this matter. The tribunal likewise applied Article 10.20.6 of DR-CAFTA on the understanding that it had full discretion to decide on the costs and other tribunal’s

⁸ ICSID Arbitration Rule 28.

⁹ Award ¶ 624.

¹⁰ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012.

¹¹ *Railroad*, ¶ 282 (“Each party has pleaded that it be awarded counsel fees and expenses as well as the administrative expenses of ICSID and the fees and expenses of the Tribunal. CAFTA Article 10.26.1 permits the award of costs and attorney’s fees in accordance with that section and the applicable arbitration rules. The ICSID Arbitration Rules only require that the award contain “any decision of the Tribunal regarding the cost of the proceeding” (Rule 47). On the basis of the discretion bestowed on the Tribunal by CAFTA and the applicable arbitration rules, the Tribunal determines that they shall be responsible for their own counsel fees and expenses. As to administrative expenses of ICSID and the fees and expenses of the Tribunal, the Tribunal distinguishes between the jurisdictional phases and the merits phase of the proceedings. Given that Respondent’s objections to jurisdiction were twice rejected in an unusually protracted process, Respondent shall be responsible for the administrative expenses of ICSID and fees and expenses of the Tribunal related to the two jurisdictional phases. Each party shall be responsible for 50% of the administrative expenses of ICSID and 50% of the fees and expenses of the Tribunal related to the merits phase.”).

expenses.¹² However, the tribunal, though not required to apply the UNCITRAL Rules, decided the allocation of the costs related to the jurisdictional stage by relying on the “the unsuccessful party pays” principle.

15. Therefore, the award given in *Railroad* does not help to provide support to justify the majority of the Tribunal’s decision on costs.
16. In *Pac Rim*,¹³ the tribunal confirms, with some tempering, the principle that states that the unsuccessful party shall pay. This precedent, therefore, likewise fails to support the decision of the majority of the Tribunal on costs. The tribunal held that it had jurisdiction, dismissing the respondent’s additional objections and dismissing on the merits all the damages and interest claims submitted by the claimant during the third stage of the arbitration. The tribunal orders the claimant to pay USD 8 million for the respondent’s fees, while the costs of the procedure were to be apportioned equally between the parties.¹⁴
17. To arrive at this conclusion, the tribunal held it had broad discretion to allocate costs under Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the ICSID Arbitration Rules. Thus, the tribunal considered that the following factors were relevant when exercising its discretion:¹⁵

[t]he Tribunal has decided that the Respondent is to be considered the prevailing party in the merits phase of this arbitration. Second, [...] **the Tribunal decided in its Decisión on Jurisdiction that neither Party could be considered as having prevailed overall.** Third, [...] whilst the Claimant’s case prevailed over the Respondent’s case under the Tribunal’s Decision on Preliminary Objections, it was perhaps, as the Duke of Wellington might have put it (as he did of the Battle of Waterloo), a “near-run thing” with consequences for this third phase on the merits. Lastly, the Claimant’s case prevailed over the Respondent’s case on the latter’s Additional Jurisdictional Objections”.¹⁶ (Emphasis my own)

18. It is evident from analyzing the *Pac Rim* case that the tribunal did not diverge from the general principle of “the unsuccessful party pays”¹⁷ but rather adapted its application to the favorable or adverse result of each party in each stage of the process. Therefore, and independently of the fact

¹² *Railroad*, ¶ 283 (“XII. Decision: [...] 5. That the Respondent shall be responsible for the administrative expenses of ICSID and fees and expenses of the Tribunal related to the two jurisdictional phases [...] 6. That each party shall be responsible for 50% of the remainder of administrative expenses of ICSID and of the fees and expenses of the Tribunal. 7. That each party shall be responsible for its own counsel fees and expenses.”).

¹³ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016.

¹⁴ *Pac Rim*, ¶ 12.1.

¹⁵ *Pac Rim*, ¶ 11.17.

¹⁶ *Pac Rim*, ¶ 11.17.

¹⁷ The tribunal dismissed the claimant’s head of claim for legal costs against the respondent and ordered the claimant to pay the respondent a proportion of its legal costs for a sum of USD 8 million (*Pac Rim*, ¶ 11.18). As regards the tribunal’s arbitration costs, the tribunal decided to dismiss each party’s heads of claim in connection with the arbitration costs *inter se* and ordered that each party should pay its respective proportion of the arbitration costs (*Pac Rim*, ¶ 11.19).

that the tribunal was not bound by the UNCITRAL Rules, this precedent also does not help to support the decision of the majority on costs.

19. In the *David Aven*¹⁸ case, the tribunal held that Article 10.26.1 of DR-CAFTA provides that a tribunal may also allocate costs and attorney fees under this Section and the applicable arbitration rules. By considering that the applicable rules were precisely the UNCITRAL Rules, the tribunal pointed out that their Article 42 defines the standards for allocating costs based on the principle that arbitration costs should be paid by the unsuccessful party. This same standard authorizes the tribunal to apportion the costs between the parties, if it decides that the apportionment is reasonable taking into account the circumstances of the case.¹⁹
20. This way, the tribunal in *David Aven* does not even consider the option of restricting its discretion to merely assessing the eventual “frivolity” of the unsuccessful party when deciding on the allocation of costs and fees.²⁰
21. The tribunal understood that it had the obligation to assess the circumstances of the case and the reasonability of costs (UNCITRAL Rules Article 42(1)) to conclude that,

[i]n this case, the Claimants are unsuccessful regarding the merits, **but the Respondent is unsuccessful on the Counterclaim so the Tribunal shall take into account such “circumstances of the case” in order to decide on the apportionment of costs.**²¹
(Emphasis is my own)

22. The tribunal in *David Aven* correctly interprets and applies DR-CAFTA and the UNCITRAL Rules when stating that the tribunal should consider as “circumstances of the case” – who was unsuccessful and who was successful at each stage of the proceedings – for the purpose of exercising its discretion in the apportioning of costs, pursuant to applicable law.
23. In short, the tribunal in *David Aven* did not even consider the potential or apparent “frivolity” of the claimant’s claim or of the respondent’s objections when deciding on the allocation of costs and fees. Although the tribunal decided that it did have jurisdiction, and thus the claimant is the prevailing party in that stage, the fact that on the merits the tribunal dismissed the claimant’s

¹⁸ *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, September 18, 2018.

¹⁹ *David R. Aven*, ¶ 752.

²⁰ *David R. Aven*, ¶ 756 (“[t]he principle “loser pays” may be inferred from the rule of customary international law requiring “full compensation” [...]. [T]he winning party suffered damages when having to finance its defense that proved to be useless and unnecessary and that would have been avoided if the defeated party had recognized the prevailing rights of the other to avoid litigation.”), s. XIV (“(1) The Tribunal has jurisdiction over certain Claimants’ claims, as identified, and over Respondent’s counterclaim; (2) Denies Claimants’ claims under Article 10.5 DR-CAFTA and Annex 10-B; (3) Denies Claimants’ claims under Article 10.7 DR-CAFTA and Annex 10-C; (4) Denies Respondent’s counterclaim under Article 10 DR-CAFTA; (5) Orders Claimants to pay Respondent USD 1,090,905.10 for Respondent’s portion of the advances paid by Respondent to ICSID on account of arbitrators’ fees and expenses, ICSID administrative expenses, as well as direct expenses of the arbitration”).

²¹ *David R. Aven*, ¶ 760.

heads of claim and the respondent's counterclaims, it eventually ordered that all the costs of the proceedings (*i.e.* arbitrator fees and expenses involved in the proceedings before ICSID) be paid for by the claimant, in other words, the unsuccessful party on the merits.

24. The *David Aven* precedent is also not helpful to support the decision taken by the majority of this Tribunal on costs and fees.
25. Accordingly, based on everything stated so far, I disagree with the majority's holding that, in all the precedents cited, the tribunals took into account the circumstances of the case instead of directly applying the "costs follow the events" principle.²² A simple analysis of the cases previously cited, including the case in which the tribunal applied DR-CAFTA and the UNCITRAL Rules, confirms the opposite.
26. Unlike what the majority holds,²³ and as has already been set forth previously, I consider that "the frivolity of the claim" must be determined pursuant to its content and scope. Once it has been defined that the claim is not frivolous, the particular circumstances of each case should be taken into account to give support to a reasonable result in the allocation of costs.
27. Among the particular circumstances of this case, the majority deciding on costs cannot ignore, for the purpose of allocating such costs, that the Respondent was successful and the Claimants were unsuccessful, and therefore the Tribunal was unable to hear the merits of the claims. The very precedents cited by the majority that decided the issue of costs show that, even in some of those cases in which the UNCITRAL Rules were not a part of the applicable law, the characterization of successful party and unsuccessful party was considered as one of the particular circumstances and the starting point to keep in mind for the purpose of reaching a reasonable result in the allocation of costs.
28. Regarding the scope which the majority assigns to the nature of the objection on the dominant and effective nationality of the Claimants as though this were a relevant circumstance to bear in mind, I consider that, while this objection sets forth a novel issue, it in no way warrants considering this case as a complex one to justify the existence of a special circumstance that would merit setting aside the application of the guiding principle on costs allocation.²⁴ Unlike what the majority deciding on costs held,²⁵ I consider that the power to interpret the applicable

²² Award, ¶ 624 *in fine*.

²³ Award, ¶ 362.

²⁴ Although in the context of this particular case at issue, the tribunal in *David Aven* held that "[t]he Tribunal thinks that the issues that were submitted to its judgment, although showing some technical complexity, by themselves are not especially complex from a legal point of view. The complexity of this case arises rather from the actions and omissions of the parties than from the litigated issues." (*David R. Aven*, ¶ 762).

²⁵ Award, ¶ 629.

rules is not an exceptional role justifying the existence of a special circumstance. Rather, this power is part of the basic primary role any tribunal is required to assume when reaching a decision consistent with the law.

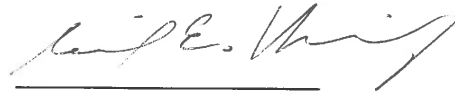
29. Furthermore, within the particular circumstances of this case, one cannot overlook the effects of the Claimants' opposition to the request for bifurcation made by the Respondent. This opposition led to a majority decision by the Tribunal on bifurcation which demanded considerable time and effort and greater costs to the Parties throughout the procedure. These greater costs turned out to be unnecessary and fruitless since the Tribunal eventually reached a majority decision on its lack of jurisdiction.
30. Moreover, I consider that when the majority deciding on costs holds that "*the Claimants brought a credible case*,"²⁶ a value judgement is being made on the merits that exceeds the scope of the majority's decision as to the Tribunal's lack of jurisdiction.
31. In the present case, the lack of jurisdiction makes no pre-judgement as to the merits of the issues brought, therefore, the Tribunal cannot and should not give an opinion on the merits. In this sense, the Tribunal, having decided by majority that it has no jurisdiction, is not empowered to give an opinion as to the consequences that the majority deciding on costs attempts to attribute to the allegations by the Claimants on the merits, by describing them as consisting of a "credible case". In this context, it is certainly understandable that the Tribunal should have an opinion to be able to determine whether the claim is frivolous or not. But that opinion must inexorably be based on the content and scope of the Claimants "claim" in the context of the jurisdictional stage, and not, as held by the majority, on "the facts and allegations of the Parties"²⁷ as developed throughout the proceedings. In this award, the analysis of the majority decision on jurisdiction make no reference to the developments on the merits for the simple reason that such proceedings could not be taken into account as grounds for a decision on jurisdiction.
32. Likewise, I consider that not only the Claimants, but also the Respondent, acted in good faith and submitted their arguments on jurisdiction adequately and acted professionally during the proceedings. Therefore, it is my understanding that it is not possible to consider the behavior of one of the Parties as a special circumstance to benefit that Party as regards the other, which, as the successful Party, also displayed the same behavior.
33. Finally, the majority that decided on costs failed to verify the reasonability of the result caused by its decision. It does not even base its reasoning on the cases it cites to provide a counterfactual test comparing the logical consequences of a possible decision in favor of the Claimants on

²⁶ Award, ¶ 633.

²⁷ Award, ¶ 632.

jurisdiction and in favor of the Respondent on substance, with the decision on jurisdiction in favor of the Respondent adopted by the majority.

34. To conclude, a submission based on a claim that can be defined as “not frivolous” may, to my understanding, empower the Tribunal to mitigate the rigorosity of the guiding principle it is required to apply (“the unsuccessful party pays”), but not to ignore it, and much less to dismiss it. In this context, taking into account the behavior of the Parties and their legal counsel during the process, I consider that each of the Parties should bear their own costs and fees. Since, in accordance with the particular circumstances of the case, the Claimants have been unsuccessful in all of their jurisdictional claims, there has been no especial legal complexity involved in the issues submitted, and in view of the costs incurred as a consequence of the Claimants’ opposition to the request for bifurcation made by the Respondent, it is reasonable to decide that the expenses of the PCA and arbitrator fees and expenses should be borne entirely by the unsuccessful Party, *i.e.* the Claimants.
35. For all the reasons set forth above, and agreeing that each Party should bear its own costs and legal fees incurred throughout the proceedings, I dissent with the majority that decided on costs, with regards to their decision to allocate the costs of the PCA proceedings and the Tribunal’s fees and expenses equally among the Parties. I therefore consider that PCA’s costs, including the Tribunal’s fees and expenses, should be borne entirely by the Claimants after due consideration of the particular circumstances of the case that justify the reasonability of the abovementioned apportionment.

A handwritten signature in cursive script, appearing to read "Raúl E. Vinuesa", written in black ink. The signature is positioned above a horizontal line.

Prof. Raúl Emilio Vinuesa
Co-arbitrator