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Host State Controls over the Offer to Arbitrate: Waivers Against Parallel Actions in Investor-State Arbitration

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More recent generations of investment treaties tend to include explicit provisions requiring claimants in investor-State arbitrations to submit waivers that – depending on the actual terminology used in these waiver provisions – generally seek to bar them from submitting their claims to other forums, such as through litigation before domestic courts or parallel international proceedings. Waivers were in use as early as 1992 through NAFTA Chapter 11, Article 1121(2)(b), which requires a disputing investor and the investment enterprise in the host State to "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach…except for injunctive, declaratory, or other extraordinary relief not involving payment of damages, before an administrative tribunal or court under the law of the disputing Party."

NAFTA investor-State arbitral jurisprudence affirms the status of these waivers as part of the conditions precedent to submitting a claim to investor-State arbitration. To fulfill the waiver requirement properly, both formal and material aspects of waivers must be met. *Formal requirements* for NAFTA Article 1121 waivers refer to "presentation of the waiver in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration" (*Waste Management Inc. v. Mexico*, Award and dissent, ICSID Case No. ARB(AF)/98/2, 2 June 2000, para. 18), while *material requirements* involve "a declaration of intent by the issuing party, which logically entails certain conduct in line with the statement issued…a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions" (*Waste Management* Award, para. 24). Significantly, NAFTA tribunals have subsequently rejected an excessively strict or technical interpretation of the formal requirement (*Ethyl Corporation v. Canada*, Decision on Jurisdiction, 24 June 1998, paras. 90-91; *Mondev International Limited v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 86; *International Thunderbird Gaming v. Mexico*, Award, UNCITRAL Ad hoc, 26 January 2006, paras. 117-118).

Ideally, waivers against parallel actions operate as a form of host State control to limit the scope of its offer to arbitrate in an investment treaty. By insulating the dispute to the specific claims of the investor-claimant against the host State away from other parallel proceedings or actions, waivers can be seen as a kind of jurisdictional control device where host States can avoid having to defend against a multiplicity of suits arising from substantially similar or identical facts, parties, and/or

causes of action. A claimant-investor that has to submit a waiver in order to properly trigger the investor-State arbitration process under an investment treaty is, in principle, supposed to be deterred from any kind of 'cross-border forum shopping' of the claim that could result in conflicting findings between different courts or tribunals. Most importantly, the consequences of breaching the waiver requirement – which is, often, to void the existence of a valid consent to arbitrate on the part of the host State – should disincentivize the institution of spurious or nuisance proceedings in other jurisdictions, especially when resorted to by claimants merely to gain strategic advantages or negotiating leverage against the host State.

So much of these desired consequences, however, depend on the precise wording of the waiver requirement in the investment treaty, and how arbitral tribunals interpret these provisions in the investment treaty. For the most part, tribunals have been fairly liberal in construing the formal and material aspects of waivers. In *Railroad Development Corporation (RDC) v. Guatemala* (Decision on Jurisdiction, ICSID Case No. ARB/07/23, 17 November 2008), the tribunal interpreted the waiver requirement in Article 10.18 of the 2004 DR-CAFTA to include a pending domestic arbitration in Guatemala over the subject-matter of the same ICSID claim. The *RDC v. Guatemala* tribunal declared that a claim under the waiver requirement in Article 10.18 of the 2004 DR-CAFTA refers to individual claims which relate to a violation of the provisions of the investment treaty. (see *RDC* Award, para. 68). The *RDC v. Guatemala* tribunal thereafter upheld the validity of the submitted waiver and affirmed its jurisdiction. Another ICSID tribunal, interpreting the same Article 10.18 in 2004 DR-CAFTA, applied the waiver requirement to pending administrative tribunal litigations, stressing the material requirement that "a waiver must be more than just words. It must accomplish its intended effect. In the case of CAFTA, this effect is to have claimants relinquish any right to initiate or continue proceedings before an administrative tribunal." (*Commerce Group Corporation and San Sebastian Gold Mines Inc. v. El Salvador*, Award, ICSID Case No. ARB/09/17, 14 March 2011, para. 80.). In another case where a BIT carried the provision that "the dispute shall, *unless otherwise agreed*, be decided…by way of arbitral proceedings", the tribunal in *European American Investment Bank AG v. Slovakia* (Second Award on Jurisdiction, PCA Case No. 2010-17, 4 June 2014, paras. 261-267) found that the parties did not agree to have the dispute decided by local courts but through arbitration, and that the claimant waived its right to arbitrate by persisting with its litigation of judicial proceedings in parallel with the arbitration. In *Vannessa Ventures Ltd. v. Venezuela* (Decision on Jurisdiction, ICSID Case No. ARB(AF)/04/6, 22 August 2008), in applying the BIT provision on waivers, the tribunal was completely deferential to the Venezuelan Supreme Court's determination of whether the claimant had fulfilled the formal and material requirements for a waiver of remedies under Venezuelan law, with the tribunal liberally finding that the claimants had met the waiver requirement as a result of the Venezuelan Supreme Court's definitive ruling that the claimant had waived such remedies under Venezuelan law.

In contrast, however, the recent 15 July 2016 Partial Award on Jurisdiction in *Renco Group v. Peru*, an UNCITRAL arbitration initiated under Chapter 10 of the US-Peru Trade Promotion Agreement, presents interesting nuances to the satisfaction of the formal and material requirements for waivers against parallel actions, and the legal consequences from defective waivers. Notably, the waiver provision in the treaty subject of this case (e.g. "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16") is similar to NAFTA Article 1121 as well as Article 10.18 of the 2004 DR-CAFTA. Peru raised its waiver objection four years after Renco filed its Notice of Arbitration. (*Renco* Partial Award, para. 123). Renco had revised the original waiver it submitted in the Notice

of Arbitration. The waiver accompanying its Amended Notice of Arbitration stated that "To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits." (*Renco* Partial Award, para. 58). Renco had argued that this waiver would not violate the formal or material requirements for a valid waiver, because if the tribunal were to dismiss all claims on jurisdictional or admissibility grounds, "there would be no risk of concurrent proceedings, double recovery, or inconsistent findings of fact or law." (*Renco* Partial Award, para. 86.), an argument that the tribunal rejected, declaring that the "burden and risk of a multiplicity of proceedings arises whether or not the proceedings are commenced in parallel or sequentially. The fact that one set of proceedings terminates, and another set then commences, may be just as prejudicial to the respondent State as two sets of proceedings running in parallel." (*Renco* Partial Award, para. 87). The tribunal thus declared that Renco failed to satisfy the formal requirements of the waiver because its reservation of rights in the Amended Notice of Arbitration was not permitted under the express terms of the treaty, its object and purpose, as well as the structure of the other provisions in the treaty that prohibits claimants from doing a "U-turn" (e.g. subsequently initiating domestic proceedings if a claim is dismissed on grounds of jurisdiction, admissibility, or on the merits).

The *Renco* tribunal was split on the consequences of the defective waiver, with the majority of the tribunal finding that the *formal* defects of the waiver prevented any arbitration agreement from coming into existence, since "the submission of a formally compliant waiver (and the material obligation to abstain from initiating or continuing proceedings in a domestic court) is a precondition to the State's 'consent' to arbitrate and to the Tribunal's jurisdiction….Renco cannot unilaterally cure its defective waiver by withdrawing the reservation of rights.") (*Renco* Partial Award, paras. 138, 142, and 160). Thus, quite unlike the trend of NAFTA jurisprudence – which rejects excessive severity in exacting technical compliance with the formal requirements of waivers against parallel actions and often allows parties to cure formally defective waivers – the Renco majority instead construed the failure to meet the formal requirements of waivers against parallel actions as a substantive jurisdictional matter. If the claimant did not submit a valid waiver, there can be no valid acceptance of the host State's offer to arbitrate, which would completely deprive the tribunal of any jurisdictional competence to resolve the claim.

Renco stands as a significant departure from the previous liberal approach to formally defective waivers in investor-State arbitration jurisprudence, and one that subscribes to a markedly stronger vision of the host State's continuing control over its offer to arbitrate in investment treaties through conditions precedent such as waivers of parallel actions. It should be of considerable interest for States to examine the effectiveness of waiver provisions in their investment treaties, given the differing liberal and strict approaches to waivers against parallel actions. To date, waivers have proliferated in various United States, Canadian, and Mexican bilateral or regional investment treaties, such as those in Article 26(2) of the 2005 US-Uruguay BIT; Chapter 10, Article 10.18 of the 2004 Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA 2004); Article 26 of the Canada-Jordan BIT, Article 12(4) of the 2007 Mexico-India BIT and Article 13(6) of the 2006 Mexico-Trinidad and Tobago BIT, as well as in the templates used for the new regional investment treaties of the Association of Southeast Asian Nations (ASEAN), such as in Article 14(6)(b)(ii) of the 2010 ASEAN-China Investment Agreement and Article 20(8)(b)(iii) of the 2014 ASEAN-India Investment Agreement.

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