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Non-Disputing State Party Participation in Investor-State Arbitration under CAFTA-DR

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This article provides a brief background on the provision allowing for non-disputing State Party participation under Chapter Ten of the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), specifically Article 10.20.2, including the relationship between non-disputing State Party submissions and the transparency provisions of CAFTA-DR as well as the implementation of Article 10.20.2 since CAFTA-DR entered into force.

CAFTA-DR entered into force for the United States, El Salvador, Guatemala, Honduras, and Nicaragua in 2006, for the Dominican Republic in 2007, and for Costa Rica in 2009. Chapter Ten of CAFTA-DR addresses investment and includes provisions for the Parties' obligations with respect to "investors of another Party" and "covered investments" (Section A) as well as investor-State dispute settlement (Section B). The investor-State dispute settlement provisions include Article 10.20.2, which allows non-disputing State Parties to "make oral and written submissions to the tribunal regarding the interpretation of this Agreement." Thus, in an ongoing investor-State arbitration case involving one CAFTA-DR State Party, the other six State Parties may opine on issues of treaty interpretation that arise in the case.

CAFTA-DR Article 10.20.2 works in tandem with Article 10.21 to facilitate non-disputing State Party participation. Article 10.21, entitled "Transparency of Arbitral Proceedings," includes the requirement that the disputing State Party, i.e., the respondent, "shall promptly transmit [certain documents related to the ongoing case] to the non-disputing Parties and make them available to the public." These documents include the notice of intent, the notice of arbitration, pleadings, transcripts of hearings, and orders as well as decisions of the tribunal. *See* CAFTA-DR, art. 10.20.1(a)-(e). The transfer of these documents to the non-disputing State Parties by the respondent State is vital to the participation of non-disputing State Parties as it allows them to review the relevant documents and to become fully apprised of the issues of treaty interpretation that arise in a case. Thus, compliance with Article 10.21 not only ensures that the public is made aware of the case but also that non-disputing Parties are able to exercise their rights pursuant to Article 10.20.2 to make oral and written submissions on questions regarding the interpretation of CAFTA-DR.

In the context of free trade agreements, the provision for participation by a non-disputing State Party in CAFTA-DR Chapter Ten traces back to the North American Free Trade Agreement (NAFTA), which entered into force in 1994. Specifically, NAFTA Article 1128 gives non-disputing State Parties the right to "make submissions to a Tribunal on a question of interpretation of this Agreement" that may arise during NAFTA Chapter Eleven investor-State cases. Similar to

CAFTA-DR Article 10.20.1, NAFTA also provides for the sharing of evidence and written arguments between the disputing State Party and non-disputing State Parties. *See* NAFTA, art. 1129; see also FTC Note of Interpretation of July 31, 2001, available at https://www.state.gov/s/l/c3439.htm. Commentators have deemed NAFTA Article 1128 an "innovative provision" due to its recognition of the systemic interest each State Party has in the interpretation of the treaty. Meg N. Kinnear et al., "Article 1128 – Participation by a Party" in Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Last updated: March 2008 Supplement No. 1 p. 1128-1 (Kluwer Law International 2006) (citation omitted).

In the NAFTA Chapter Eleven context, the Article 1128 right to make submissions on treaty interpretation has been invoked by at least one non-disputing State Party in the majority of NAFTA cases concluded thus far. In the early NAFTA Chapter Eleven cases, the non-disputing State Parties often made several Article 1128 submissions in one case. *See id.* at pp. 1128-2 – 4c (showing that in *Pope & Talbot Inc. v. Canada*, Mexico and the U.S. each made eight Article 1128 submissions, in *Methanex Corp. v. United States*, Canada and Mexico each made three Article 1128 submissions, and in *UPS Inc. v. Canada*, Mexico and the U.S. each made three Article 1128 submissions). NAFTA Article 1128 submissions have focused on a wide variety of treaty interpretation issues, including scope and coverage of the treaty, national treatment, the minimum standard of treatment, performance requirements, and expropriation. On occasion, tribunals have requested input from NAFTA non-disputing State Parties on issues of treaty interpretation. *See, e.g., Mobil v. Canada*, Second U.S. 1128 Submission (Jan. 21, 2011). In addition, non-disputing State Party submissions are often referenced in NAFTA tribunal decisions. *See, e.g., ADF v. United States*, Award at pp. 57-60, 86 (Jan. 9, 2003) (referring to the Article 1128 submissions of Canada and Mexico regarding the minimum standard of treatment); *Bayview Irrigation District et al. v. Mexico*, Award at pp. 16, 24 (June 19, 2007)(noting the United States' Article 1128 submission regarding the scope of protections under Articles 1102 and 1105); *Chemtura Corp. v. Canada*, Award at pp. 13-14, 61 (Aug. 2, 2010)(mentioning the Article 1128 submissions of Mexico and the United States "firmly oppos[ing] the possibility of [using Article 1103 to import] a FET clause from a BIT concluded by Canada").

In the CAFTA-DR Chapter Ten context, at least five cases have been filed thus far, and two have been concluded – one by settlement of the parties; one by decision of the tribunal. An amended notice of arbitration in *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic* was filed in June 2008, and the case was settled in July 2009 following one round of briefing on jurisdiction. No non-disputing State Party submissions pursuant to Article 10.20.2 were filed in the case. *See* Notificaciones related to *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*, available at https://www.seic.gov.do/comercioexterior/Notificaciones/Forms/AllItems.aspx.

Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador was filed in July 2009. El Salvador raised preliminary objections pursuant to the expedited process under Article 10.20.5. After two rounds of briefing and a hearing in November 2010, the Tribunal issued an award on jurisdiction in March 2011 in favor of El Salvador finding that "the dispute is not within its jurisdiction and competence pursuant to CAFTA." Award at p. 46 (Mar. 14, 2011). Two non-disputing State Party submissions pursuant to Article 10.20.2 were made in the case regarding the interpretation of the waiver provision, Article 10.18.2 – one by Costa Rica; one by Nicaragua. *See* Costa Rica 10.20.2 Submission (Nov. 1, 2010); Nicaragua 10.20.2 Submission (Nov. 1, 2010). In its award on jurisdiction, the Tribunal cited relevant portions of each of these non-disputing State Party submissions as additional support for its finding that, contrary to Claimant's argument that a

waiver under Article 10.18.2 need only adhere to written formalities, "a waiver must be more than just words; it must accomplish its intended effect." Award at pp. 27-28 (Mar. 14, 2011); *see* Descarga de Documentos related to *Commerce Group Corp. and San Sebastian Mines, Inc. v. El Salvador*, available at https://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-repblica-de-el-salvador&Itemid=63.

At least three CAFTA-DR Chapter Ten investor-State arbitration cases are still pending as of June 2011. *Railroad Development Corporation v. Guatemala*, filed in June 2007, has proceeded through a two-part jurisdictional phase and is currently in the merits phase with a merits hearing scheduled for December 2011. Following the second hearing in the jurisdictional phase, El Salvador submitted a non-disputing State Party submission pursuant to Article 10.20.2 on the issue of "whether CAFTA Chapter Ten applies to disputes that existed before CAFTA entered into force and remained unresolved after CAFTA entered into force." El Salvador Article 10.20.2 Submission (Mar. 19, 2010). In its subsequent jurisdictional decision, the Tribunal referenced El Salvador's submission; however, it found that "the dispute between the parties concerns a measure dated after the entry into force of the Treaty;" therefore, "the Tribunal does not need to address the arguments in El Salvador's submission in support of Respondent's position in respect of the *ratione temporis* objection." Second Decision on Objections to Jurisdiction at p. 52 (May 18, 2010); *see* Portal Comercio Exterior Guatemala including *Railroad Development Corporation v. Guatemala*, available at https://portaldace.mineco.gob.gt/Casos.

A notice of arbitration was filed in *Teco Guatemala Holdings, LLC v. Guatemala* in October 2010. As of June 2011, this case was still in its initial stages.

Pac Rim Cayman LLC v. El Salvador, filed in April 2009, is currently in the final stages of a two-part jurisdictional phase. El Salvador raised preliminary objections pursuant to the expedited process in Article 10.20.5 of CAFTA-DR, which was followed by two rounds of briefing and a hearing in May 2010. In August 2010, the Tribunal issued its decision declining to grant El Salvador's objections. El Salvador then raised additional preliminary objections, prompting two rounds of briefing, a hearing held in early May 2011, and post-hearing submissions in June 2011. On May 20, 2011, an *amicus curiae* brief was re-filed with the Tribunal, and both Costa Rica and the United States filed non-disputing State Party submissions.

Costa Rica's Article 10.20.2 submission addressed two issues of treaty interpretation, namely Article 10.12.2, the denial of benefits provision, and the definitions of "investor of a Party" and "national." *See* Costa Rica 10.20.2 Submission (May 20, 2011), available at https://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63. With respect to the denial of benefits provision, Costa Rica articulated several points, including:

• "Neither Article 10.12.2 nor Article 18.3, nor any other provision of DR-CAFTA require the State denying benefits to address any communications to the individual concerned." *Id.* at p. 3.

• Exercise of [consultations under Article 20.4] by the State affected, or lack thereof, does not in and of itself affect the denial of benefits made by the denying State." *Id.*

• "[T]he consultation mechanism provided for in Article 20.4 (Consultations) of DR-CAFTA does not constitute a mechanism of diplomatic protection in the sense of Article 25.1 in fine of the

[ICSID Convention], as has been inaccurately been suggested by the Claimant (citation omitted)." *Id.*

• "[D]enial of benefits may occur at any time, regardless of the existence or not of an investment arbitration." *Id.* at p. 4.

• "Failing to allow the invocation of the denial of benefits even when an investment arbitration has already commenced deprives this provision of any effectiveness." *Id.* at p. 6.

The United States' Article 10.20.2 submission addressed two issues related to the denial of benefits provision, specifically:

• "A CAFTA-DR Party is not required to invoke the denial of benefits provision under Article 10.12.2 before arbitration commences."

• "Neither Article 10.12.2 nor Article 18.3 requires notice to claimants."

See U.S. Article 10.20.2 Submission (May 20, 2011), available at https://www.state.gov/s/l/cafta6/c33258.htm.

In conclusion, similar to NAFTA Chapter Eleven, CAFTA-DR Chapter Ten contains a provision allowing for non-disputing State Party participation as well as a provision requiring the respondent State to share documents regarding an ongoing case with the public as well as non-disputing State Parties. Receipt of the relevant documents from the respondent Party is critical to non-disputing State Party participation. With this information in hand, non-disputing State Parties can fully monitor pending cases and can determine whether to invoke the right to opine on issues of treaty interpretation. In the NAFTA context, non-disputing State Party participation has occurred in the majority of cases. Thus far in the CAFTA-DR context, non-disputing State Party participation has occurred in one of the two concluded cases and in two of the three pending cases.

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