INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ARBITRATION BETWEEN

PAC RIM CAYMAN LLC

(Claimant)

v.

REPUBLIC OF EL SALVADOR

(Respondent)

ICSID CASE NO. ARB/09/12

NON-DISPUTING PARTY SUBMISSION OF THE REPUBLIC OF COSTA RICA

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1. The Republic of Costa Rica makes this submission on the interpretation of certain provisions of the Dominican Republic – Central America – United States Free Trade Agreement (the "Treaty" or "DR-CAFTA"), pursuant to Article 10.20.2 of the Treaty.[1] Costa Rica does not take a position on the facts of the dispute, and no inference should be drawn as to Costa Rica's position with regards to any legal issues that may have arisen between the parties to this dispute and which are not addressed here. In the following paragraphs, Costa Rica makes reference to the following two issues of Treaty interpretation: (a) the denial of benefits clause of Article 10.12 (Denial of Benefits) of the Treaty; and (b) the definition of "investor of a Party" and "national" for purposes of the Treaty in general, and of Chapter Ten – Investment in particular.

[1] Unless expressly indicated otherwise, all Articles referred to in this document are from the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA").

(a) On the denial of benefits clause

2. Under Article 10.12.2 (Denial of Benefits), a Party to the Treaty may deny the benefits of Chapter Ten – Investment of DR-CAFTA to an investor of another Party, under certain circumstances. Article 10.12.2 (Denial of Benefits) reads:

> *Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.*

3. Firstly, the Treaty links this provisions with two others from the same Treaty: the obligation to notify other States Party to the Treaty set forth in Article 18.3 (Notification and Provision of Information)[2] and the possibility that the State affected by the measure may request consultations under Article 20.4 (Consultations).[3] With

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[2] Article18.3 (Notification and Provision of Information) reads as follows:

> *1. To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.*
> *2. On request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure.*
> *3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.*

[3] Article 20.4 (Consultations) provides:

> *1. Any Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.*
> *2. The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the actual or proposed measure or other matter at issue and an indication of the legal basis for the complaint.*
> *3. A Party that considers it has a substantial trade interest in the matter may participate in the consultations on delivery of written notice to the other Parties within seven days of the date of delivery of the request for consultations. The Party shall include in its notice an explanation of its substantial trade interest in the matter.*
> *4. Consultations on matters regarding perishable goods shall commence within 15 days of the date of delivery of the request.*

regard to the first provision, the State denying benefits fulfils the notification requirement by addressing the State Party affected. 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.

4. As to the possibility to request consultations under Article 20.4 (Consultations), this is a faculty of the State Party affected or potentially affected by the measure. Exercise of this faculty by the State affected, or lack thereof, does not in and of itself affect the denial of benefits made by the denying State.

5. In light of the legal interpretation arguments exchanged by the parties in this dispute, it appears necessary to clarify that the 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 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), as has inaccurately been suggested by Claimant (*paras. 345-7, Counter-Memorial*). Diplomatic protection is, as defined by the United Nations International Law Commission, "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".[4] The consultations of Article 20.4 (Consultations), on the contrary, are aimed at elucidating Treaty interpretation and application issues between two States Party to it. Should a

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5. *The Consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:*
   (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation and application of this Agreement; and
   (b) treat any confidential information exchanged in the course of the consultations on the same basis as the Party providing the information.
6. *In consultations under this Article, a consulting Party may request another consulting Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.* [Footnotes omitted.]

[4] Draft articles on Diplomatic Protection, with commentaries, 2006. Text adopted by the International Law Commission at its fifty eighth session, and submitted to the General Assembly as part of the Commission's report (A/61/10), *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

State Party wish to exercise diplomatic protection of one of its nationals, the consultations under Article 20.4 would not be the appropriate mechanism to do so.

6. Article 10.12 (Denial of Benefits) is silent on when may a State invoke this clause. There is no indication, neither express nor implied, in this Article or any other in the Treaty of a temporary limitation for a State to deny benefits to an investor of another Party under this Article. From which follows that denial of benefits may occur at any time, regardless even of the existence or not of an investment arbitration.[5]

7. Even though denial of benefits may be validly invoked at any time, it is necessary to make certain clarifications as to the effects of such denial depending on the moment when such denial is effective. As was asked by the President of the Tribunal during the recent hearing on jurisdiction held in this arbitration (*D2:555:9, English transcript*), ¿what happens if the denial of benefits occurs once an arbitration has concluded and an award has been issued? In that case, it appears evident that there is no possibility to go back on the concluded proceeding: none of the instruments that may govern an investment arbitration under DR-CAFTA (DR-CAFTA itself, the ICSID Convention and Rules, the Rules of the ICSID Additional Facility or the Arbitration Rules of the United Nations Commission on International Trade Law) offer any mechanism to reopen a proceeding or review anew an award for a denial of benefits made in accordance with Article 10.12 of DR-CAFTA.

8. The situation is different when the denial of benefits is being invoked as a preliminary objection to the jurisdiction of an arbitration Tribunal, which has not yet ruled definitively on its own jurisdiction. In that case, the arbitral Tribunal may and should examine whether the State denying benefits has complied with the requirements of Article 10.12 (Denial of Benefits). Should that be the case, the consequence is the Tribunal's lack of jurisdiction to rule on the dispute given that the investor does not enjoy the benefits of the Treaty's investment chapter. [6]

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[5] Under international law, limitations upon the exercise of independence of States must be Express and may not to be presumed. *See*, Permanent Court of International Justice, *Case of the S.S. "Lotus"*, Judgment of 7 September 1927, Series A, No. 10; p. 18.

[6] This interpretation is consistent with the consideration that denial of benefit clauses produce effects into the future. Even as Costa Rica recognizes the informative valued that decisions from other arbitral tribunals on similar provisions in other treaties may have, it is important to remember that awards

9. This is the consequence regardless of whether an investment arbitration has been initiated under Section B of Chapter Ten – Investment or not. Filing a notice of intent and a request of arbitration, as well as registration of such request in cases before ICSID, do not freeze in favour of claimant a determination on whether the International arbitration has been rightfully commenced. On the contrary, the first question an arbitral Tribunal must answer is that of its own jurisdiction to determine whether the arbitration may go forward. The invocation of denial of benefits clause is not extemporaneous even though an arbitration may have already been initiated, when there has not been a final determination on the Tribunal's jurisdiction.

10. This interpretation, supported by the text of the Treaty, is furthermore consistent with a teleological interpretation in accordance with Article 31.1 of the Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention").[7] Where it not so, this provision would be denied effectiveness or "*effet utile*".

11. Indeed, an interpretation in accordance with the ordinary meaning to be given to the provisions of the DR-CAFTA, as set forth by the general rule of interpretation contained in Article 31 of the Vienna Convention, must be made according to the so-called "principle of effectiveness". Under this principle, international treaties are to be interpreted to ensure the effects of their provisions. The International Court of Justice has already recognized that the principle of effectiveness in treaty interpretation has been consistently upheld by international jurisprudence,[8] and has even specifically invoked this principle when interpreting of dispute resolution treaties.[9]

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rendered under other treaties – to which none of the DR-CAFTA Parties is a party – are not binding beyond the context in which they were issued.

[7] *Vienna Convention on the Law of Treaties* of 23 May 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331. Besides being an International treaty, the Vienna Convention is generally regarded to have codified provisions of customary international law on the interpretation of international treaties. See, for example, *Pope and Talbot v. Government of Canada,* Interim Award of 26 June 2000, para. 66, available at http://ita.law.uvic.ca/documents/InterimAward_001.pdf, last visited on 13 May 2011.

[8] *Territorial Dispute (Libyan Arab Jamahiriyu/Chad),* Judgment, I.C.J. Reports 1994, p. 25. See also, *Lighthouse Case (France/Greece), Judgment, 1934, P.C.I.J., Series A/B, No. 62,* p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 35, para. 66; and *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 22, para. 52. In internataional trade law, the principle of effectiveness has been applied repeated times by the Appellate Body of the World Trade Organization, in particular when interpreting provisions from the

12. The object and purpose of DR-CAFTA, and Chapter Ten – Investment in particular, is to recognize to investors of States Party to the Treaty a minimum level of treatment and other guarantees in order to strengthen trade and investment flows in the region, as well as legal certainty (Article 1.2 (Objectives)). Parties to the Treaty undertake this obligation on the basis of reciprocity, under the understanding that its own nationals shall enjoy the same protection in the territory of the other States Party to the Treaty. The denial of benefits clause of Article 10.18 (Denial of Benefits) of DR-CAFTA aims to correct a situation where investors, who may formally be from a Party to the Treaty but are not such in reality, attempt to benefit from the Treaty. In this regard it is a clause that privileges substance over form. It furthermore does not subject the exercise of the faculty to deny benefits to any formal requirements other than that of notification in accordance with Article 18.3 (Notification and Provision of Information). An interpretation of Article 10.18 (Denial of Benefits) that creates formal requirements, including as to the moment of invocation, that are not present in the text of the treaty and that have the effect of denying the provision of any practical applicability goes against the object and purpose of the Treaty.

13. A State Party to DR-CAFTA is not necessarily informed at all times of the share make-up and corporate structure of all investors from other Parties to the Treaty in its territory. What is more likely is that the State only becomes aware of who owns or controls a company at the time when there is a dispute, which escalates into an investment arbitration. Failing to allow the invocation of the denial of benefits clause even when an investment arbitration has already commenced deprives this provision of any effectiveness.

Understanding on rules and procedures governing the settlement of disputes; see, for example, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996) p. 16-17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996) p. 10-11; *Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (adopted 25 February 1997) p. 16; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* WT/DS98/AB/R (circulated 14 December 1999), para. 80 – 82; *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, (circulated 14 December 1999) para. 88; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (adopted 27 October 1999) para. 132-133; and *Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, para. 338.

[9] *Case of the Free Zones of Upper Savoy and the District of Gex*, Order of August 19th, 1929, P.C.I.J. Collection of Judgments, Series A, No. 22, p. 13; and *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950, p. 229.*

(b) On the definition of "investor from a Party" and "national".

14. DR-CAFTA expressly and clearly provides what is to be understood, for the purposes of the Treaty in general and Chapter Ten – Investment in particular, as "investor of a Party" and "national". Indeed, Annex 2.1 (Country-Specific Definitions) to Chapter Two – General Definitions provides:

> *For purposes of this Agreement, unless otherwise specified:*
>
> ***natural person who has the nationality of a Party*** *means:*
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> ...
>
> *(g) with respect to the United States, "national of the United States" as defined in the existing provisions of the* Immigration and Nationality Act

15. Likewise, Article 10.28 (Definitions) provides that:

> *For purposes of this Chapter:*
>
> ...
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> ***investor of a Party*** *means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;*
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> ***national*** *means a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions).*

16. In light of the foregoing, it is unnecessary and even inappropriate, to look to other domestic law instruments of a Party to determine who is to be considered as a national or an investor of a Party, other than those expressly provided for in the Treaty. With respect the United States, the nationality of a natural person is determined in accordance with the *Immigration and Nationality Act*.

Respectfully submitted,

[Original signed]
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