ICSID Secretariat File No. UNCT/13/2

UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF CHAPTER 10 OF THE DOMINICAN REPUBLIC - CENTRAL AMERICA - UNITED STATES FREE TRADE AGREEMENT

BETWEEN:

SPENCE INTERNATIONAL INVESTMENTS, LLC, BOB F. SPENCE, JOSEPH M. HOLSTEN, BRENDA K. COPHER, RONALD E. COPHER, BRETT E. BERKOWITZ, TREVOR B. BERKOWITZ, AARON C. BERKOWITZ AND GLEN GREMILLION

INVESTORS / CLAIMANTS

AND

THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA

PARTY / RESPONDENT

CLAIMANTS' POST-HEARING BRIEF

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26 May 2015

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I. INTRODUCTION

1. At the conclusion of the evidentiary hearing, the Tribunal requested post-hearing submissions amounting to observations on the issues of law and interpretation that were addressed in the submissions of the non-disputing parties, the United States of America ("U.S.") and the Republic of El Salvador ("El Salvador"). The Tribunal further instructed that the parties were not to address issues of fact related to these proceedings. Accordingly, the Claimants' post-hearing brief will address only the issues of law and interpretation related to certain CAFTA provisions.

2. The Claimants will address the following articles of the CAFTA: Article 10.1, Article 10.2, Article 10.11, Annex 10-C, Article 10.5, Article 10.7 and Article 10.18. The Claimants will also address the additional submission, made orally by counsel for El Salvador, concerning Chapter 17 of the CAFTA, which was briefly addressed by the Respondent in closing argument.

Article 10.1 - Scope and Coverage

3. Article 10.1 of the CAFTA provides, in relevant part:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
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> (a) investors of another Party;
>
> (b) covered investments; and
>
> (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.
>
> …
>
> 3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

4. The Claimants agree that the CAFTA does not apply retroactively,[1] and that a host State's conduct prior to the entry into force of an obligation may be relevant in determining whether a State subsequently breached that obligation.[2] The Claimants also agree that satisfying the rule against retroactivity requires State conduct to have occurred after the date of entry into force of a treaty.[3] The Claimants submit that, pursuant to the

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[1] See Submissions of the United States of America ("US Submission") at ¶¶ 1-2 and Non-Disputing Party Submission of the Republic of El Salvador ("El Salvador Submission") at ¶¶ 32-33.

[2] See US Submission at ¶ 3. The Respondent also agrees with this position, see Hearing Transcript (Day 5) at 1213:13-21.

[3] See US Submission at ¶ 3. The Claimants note that El Salvador's statement, "that a dispute that existed before CAFTA-DR came into force, and that remains unresolved after CAFTA-DR entered into force, cannot give rise to a claim" appears overly-broad, and not in strict accord with the findings of the Tribunal in *Railroad Development Corporation* v. *Republic of Guatemala*, which it mentions in footnote 18, but only to refer to its Article 10.20 submission in that case.

language of Article 10.1.3, such conduct includes: a measure adopted after the entry into force of a treaty, or a measure adopted before entry into force of the treaty, which was maintained thereafter, such as delay.

5. As noted above, Article 10.1.1 provides: "This Chapter applies to measures **adopted** or **maintained** by a Party" [**emphasis added**]. Any interpretation of Article 10.1.3 that would prevent a host State from being held responsible for conduct that commenced before the treaty came into force, but that continued thereafter, would render the term "maintained" superfluous. Such a result would violate the principle of effectiveness in treaty interpretation.[4] In other words, Article 10.1.3 cannot logically be construed so as to negate the possibility of responsibility attaching to measures *maintained* by a Party, as of the moment the CAFTA came into force.[5]

6. The Claimants' submissions concerning the interpretation of Article 10.1 can be found at paragraphs 191 and 244 of the Memorial on the Merits; paragraphs 283-285 and 320-323 of the Reply on the Merits and Counter-Memorial on Jurisdiction; and paragraphs 62-64, 74-78 and 98-99 of the Rejoinder on Jurisdiction.

Article 10.2 – Relation to Other Chapters; Article 10.11 – Investment and Environment; Chapter 17 - The Environment; and Annex 10-C - Expropriation

7. In its oral submissions, El Salvador submitted that this was "the first CAFTA arbitration that reaches the merits that deals with environmental protection," suggesting that the Tribunal "may want to" refer to CAFTA Chapter 17, which concerns environmental protection, because "Chapter 10 cannot be read in isolation from the rest of the Treaty."[6] The U.S. did not address Articles 10.2, 10.11 or Chapter 17 in its submission. Nor did any of the Respondent's extensive written submissions contain a similar argument. The Claimants submit that none of these provisions are relevant to this dispute.

8. El Salvador referred specifically to Article 17.1 noting that the CAFTA Parties have memorialized the right to establish their own levels of environmental protection, as well as to Article 17.2, which constitutes a commitment by the CAFTA Parties to not subordinate environmental protection when adopting measures designed to encourage investment. El Salvador argued: "this priority that CAFTA gives to the environment also applies to Chapter 10, the investment chapter" referring to Article 10.11 and noting "that Chapter 10 does not in any way prevent a CAFTA Party from adopting, maintaining, or enforcing measures related to the protection of the environment."[7] El Salvador also noted: "Article 10.2 specifically says that in the event of an inconsistency between any

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4 Oliver Dörr, "General Rule of Interpretation," in: Oliver Dörr & Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (New York: Springer, 2012), 509 at 539-540.

5 Also see, Mendelson Expert Report, ¶ 57.

6 Hearing Transcript (Day 2) at 232-234.

7 Hearing Transcript (Day 2) at 233:4-9. The Claimants note that counsel for El Salvador referred to "a Letter of Understanding between the United States and Costa Rica in relation to the specific protection and preeminence of the environment on issues of regulation regarding to zoning and land use" (Hearing Transcript (Day 2) at 233:10-15). This document does not form part of the record. The Claimants reserve the right to object to its introduction into the record should the Respondent attempt to introduce it at this late stage.

provision of Chapter 10 with any other provision in another chapter of CAFTA, the provision in the other chapter prevails to the extent of the inconsistency."[8]

9. El Salvador's argument appears to be that the Tribunal may rely on the language of Article 10.2.1 to excuse host State conduct – otherwise inconsistent with an obligation found in Chapter 10 – if such conduct was not inconsistent with an obligation found in Chapter 17. This approach is incompatible with the interpretative principle of systemic complementarity, by which the substantive provisions contained within different parts of a multilateral economic treaty are construed cumulatively, rather than in opposition to each other.[9]

10. The Parties in early NAFTA cases made similar arguments, without success.[10] The language of the provision at issue in those cases, NAFTA Article 1112(1), is identical to the language of Article 10.2.1 of the CAFTA.

11. For example, in *SD Myers Inc.* v. *Canada*, the respondent and non-disputing Parties argued that an investment enterprise was engaged in the provision of a cross border service, making it subject to measures governed by obligations found in NAFTA Chapter 12. Based upon NAFTA Article 1112(1), the Parties argued that – to the extent that the activities of an investment enterprise were subject to measures covered by Chapter 12 – the provisions of Chapter 11 could not also be applied. In rejecting this approach, the Tribunal observed:

> In its First Partial Award, the Tribunal adopted the application of the *cumulative principle* to this case. That principle holds that in a given situation, a government or private entity might have different rights under different trade provisions that generally complement, rather than diminish, each other.
>
> **…** The grant of a right generally does not take away other rights unless they are mutually exclusive, or the grant is stated expressly to abrogate another right.

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8 Hearing Transcript (Day 2) at 233:16-22.

9 See, e.g.: Appellate Body Report, E*uropean Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC–Bananas*), WT/DS27/AB/R, adopted 25 September 1997, at ¶ 220; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* (*Canada–Periodicals*), WT/DS31/AB/R, adopted 30 July 1997, at 18-22; and Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R & WT/DS64/R, adopted 23 July 1998, at ¶¶ 14.47-14.55. See, also the related principle of effectiveness in treaty interpretation and the principle that treaties are to be interpreted as a whole. J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: OUP, 2012) § 3.24. Also of note is that the Appellate Body confirmed, in *EC–Bananas*, that the GATS applies to measures that were adopted before, but continued to exist after, its entry into force.

10 *Ethyl Corporation* v *Canada*, NAFTA/UNCITRAL Arbitration, Decision on Jurisdiction, (1998) 7 ICSID Rep 12, (1999) 38 ILM 708, IIC 95 (1998), 24 June 1998 at ¶ 63; *Pope & Talbot Inc*. v *Canada*, NAFTA/UNCITRAL Arbitration, Decision on Preliminary Motion to Dismiss, 26 January 2000, at ¶ 26; *SD Myers Inc*. v *Canada*, NAFTA/UNCITRAL Arbitration, Partial Award, 13 November 2000, (2001) 40 ILM 1408, (2003), 15(1) World Trade & Arb Mat 184, IIC 249 (2000) at ¶¶ 289-300; and *SD Myers Inc*. v *Canada*, NAFTA/UNCITRAL Arbitration, Second Partial Award, IIC 250 (2002), 21 October 2002 at ¶¶ 131-138. See, also: *Canfor Corporation* v *United States*, NAFTA/UNCITRAL Arbitration, Decision on Preliminary Question, IIC 42 (2006), 6 June 2006, at ¶¶ 225-228; and *Cargill, Inc.* v *Mexico*, Award, ICSID Case No ARB(AF)/05/2, IIC 479 (2009), 13th August 2009, 18 September 2009, at ¶¶ 147-153.

> The cumulative principle does not apply where there is actual conflict between different provisions. Canada does not contend that there is any conflict between the provisions of Chapters 11 and 12 as they apply to the facts of this case. No conflict exists to limit the application of the cumulative principle…
>
> SDMI has acquired no extra rights in this case because of the existence of Chapter 12, but neither has it lost any. The Chapter 11 rights of SDMI are no stronger or weaker merely because there is another section of the NAFTA that provides some additional constraints on the way a state treats nationals of another NAFTA state.[11]

12. El Salvador's position appears to be that Article 17.1, which recognizes "the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities," can somehow be used to justify breaches of Articles 10.5 and 10.7. Neither El Salvador nor Costa Rica even attempted to establish, however, why the Tribunal should construe Article 10.5 or 10.7 as leading to "any inconsistency between [Chapter 10] and another [CAFTA] Chapter".

13. "Inconsistency" is established when, in order to comply with a Chapter 10 provision, a CAFTA Party must act in a manner inconsistent with a Chapter 17 provision. This is the test for inconsistency in treaty interpretation.[12] Article 17.1 is a permissive provision, which echoes Article 2 of the *WTO Agreement on Sanitary and Phytosanitary Measures*, to which the CAFTA Parties had previously adhered as WTO Members. It is unclear how this permissive provision could result in an inconsistency with Chapter 10.[13]

14. Article 10.2.1 of the CAFTA provides: "[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." There has been no allegation or suggestion that there is any inconsistency between Chapters 10 and 17 of the CAFTA, much less any argument submitted as to the extent of any such inconsistency. Chapter 10 is an independent Chapter of the treaty. In interpreting Chapter 10, recourse to other Chapters is unnecessary unless the State party to the dispute alleges that, on the facts of the case, an inconsistency exists as between the two.[14] In short, there is no reason whatsoever for the Tribunal to review and interpret Chapter 17 in resolving this dispute.

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[11] *Myers*, Second Partial Award, at ¶¶ 131-133 & 135. The *Myers* Tribunal used the shorthand "cumulative principle" to refer to the interpretative principle of complementarity, which requires a cumulative approach to obligations contained within different portions of the same treaty text. See note 9, above.

[12] *Myers*, First Partial Award, at ¶¶ 291-298.

[13] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in *World Trade Organization, the Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 20 (1994), reprinted in 33 ILM 1154 (1994).

[14] For the avoidance of doubt, the Claimants agree that the applicable rules of customary international law on treaty interpretation, as codified in Article 31(3) of the *Vienna Convention on the Law of Treaties* would justify regarding the provisions of Chapter 17 as part of the overall context of the treaty for purposes of construing the proper meaning of particular provisions of or language found in Chapter 10. However, the Claimants do not understand this to be the basis upon which El Salvador has suggested that the Tribunal review Chapter 17, nor has it provided any analysis in this regard.

15. Nevertheless, the Respondent introduced a new alternative argument based on the language of Chapter 17 in the course of its closing submissions in this case in response to the Claimants' claims that Costa Rica has acted arbitrarily and that it has delayed the expropriations because of lack of funds.[15] The Respondent argued that "Article 17.2 allows Costa Rica a measure of discretion in implementing environmental laws, including a measure of discretion in terms of how to carry out the expropriation, taking into account allocation of resources."[16] Costa Rica also argued that, to the extent that its conduct in expropriating the Claimants' investments was arbitrary, Article 17.2 affords it some kind of 'margin of appreciation' to act in such a manner (i.e. to excuse it for behaviour that would otherwise have been inconsistent with fairness and due process norms applicable under customary international law and the Agreement).[17]

16. The Claimants have not challenged Costa Rica's ability to establish its own levels of environmental protection and, thus, Article 17.1 is irrelevant. Nor has there been any allegation that Costa Rica has either waived or derogated from its environmental laws in order to favour investment, which means that Article 17.2.2 is also irrelevant.

17. Article 17.2 provides, in relevant part:

> Article 17.2: Enforcement of Environmental Laws
>
> 1. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
>
> (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.
>
> 2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement … for the establishment, acquisition, expansion, or retention of an investment in its territory

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[15] Hearing Transcript (Day 5) at 1236:18 to 1239:8, Respondent's Closing Presentation, slide 25.

[16] Hearing Transcript (Day 5) at 1237:17-21. The Respondent maintains its position that any delays in the expropriation process were not related to lack of funds (Hearing Transcript (Day 5) at 1238:7-11).

[17] Although the Respondent used the phrase "measure of discretion", this argument is redolent of "margin of appreciation" arguments raised by States in human rights cases where international norms are evolving. These arguments have no place in the interpretation of provisions of investment treaties that protect an investor's fundamental and established rights against expropriation that is contrary to customary international law.

18. The illogic of the Respondent's submission that Article 17.2.1(b) affords it a measure of discretion in how it adopts or maintains expropriatory measures, which are subject to a law of general application, is manifest on the face of its text. Moreover, the Respondent provided no evidence or argument demonstrating how Article 17.2.1(b) actually applies to how any expropriation has been conducted in this case.

19. The Respondent's last minute approach to the alleged applicability of Article 17.2.1(b) to the facts of this case is akin to arguing that – so long as public purpose has been established – the Tribunal can skip any further determination of whether compliance has been achieved with regard to all of the other elements that go into the conduct of a lawful expropriation. Reconfiguring Article 17.2.1(b) for use as a shield against State responsibility arising from the arbitrary adoption or maintenance of expropriatory measures, including the introduction of delay in their administration, would undermine the purpose and meaning of Chapter 10 and the CAFTA itself.

20. Noting how Article 17.2.2 prohibits the Parties from weakening or reducing protections afforded in municipal environmental laws, by waiving or otherwise derogating from such laws for the purposes of promoting foreign investment, the Respondent submitted that "Costa Rica cannot weaken its environmental laws adopted well before Claimants made their investments to encourage them to expand or retain their investments."[18] The apparent implication is that it would have been improper for the Respondent to seek to re-interpret the Park Law through legislative means. Nothing in Article 17.2.2 purports to prohibit a legislature from amending or even revoking "environmental laws" under any circumstances. The paragraph specifically concerns executive actions that "waive or otherwise derogate from" an environmental law, which is obviously not the same thing as a legislature deciding to authoritatively interpret or amend the law itself.

21. Indeed, construing Article 17.2.2 as though it applied to legislative acts, on the basis that the protections afforded in "environmental laws" may never be "weakened or reduced," would be inconsistent with the Article 17.1 right of each Party to "establish its own levels of domestic environmental protection". As such, the interpretation implied in the Respondent's argument is logically unsustainable.

22. Chapter 17 also contains a number of other provisions related to the environment, including the requirement for due process in proceedings for the enforcement of environmental laws.[19] Whereas Article 17.2 only refers to enforcement of environmental laws (along with an admonishment not to reduce enforcement to obtain or sustain foreign investment), Article 17.9.1 refers to all matters related to the Chapter. It provides:

> Article 17.9: Environmental Cooperation
>
> 1. The Parties recognize the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening trade and investment relations.

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[18] Hearing Transcript (Day 5) at 1238:16 to 1239:8.

[19] See Article 17.3.

23. Unlike the Parties' proposed interpretation of Articles 17.1 and 17.2, Article 17.9 is consistent with the relevant language of the CAFTA preamble (*viz.* "[to] ENSURE a predictable commercial framework for business planning and investment"). It signals the Parties' original understanding and intention, that the promotion and protection of investment could be accomplished in a manner consistent with protection of the environment and sustainable development.

24. The Claimants have not challenged Costa Rica's right to protect its natural environment as it sees fit, just as so long as, in so doing, it also honours the obligations it explicitly undertook in CAFTA Chapter 10, to attract and maintain foreign investments, and which it owes under customary international law, in any event.

25. This balance of obligations is memorialized in Article 10.11 of the CAFTA, which states:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure **otherwise consistent with this Chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> [**Emphasis added**]

26. Again, the Claimants have not argued that Costa Rica should be prevented from adopting, maintaining or enforcing any measure, and neither has Costa Rica argued that it would be prevented from so doing in the event that the Tribunal construes Articles 10.5 or 10.7 as the Claimants have submitted. Further, Article 10.11 is specifically limited to measures "otherwise consistent" with the protection of investment, which indicates that the Parties intended that expropriatory measures would be subject to Chapter 10 protection regardless of whether the purpose for which the measures were taken related to the environment.

27. Finally, on issues of the environment as they relate to indirect expropriation,[20] paragraph 4 of Annex 10-C provides, in relevant part:

> 4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> … (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

28. El Salvador and the Respondent have effectively submitted that Annex 10-C protects all environmental regulation from claims of indirect expropriation. However, paragraph 4(b)

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[20] This issue does not arise in respect of direct expropriation, which is addressed separately in paragraph 3 of Annex 10-C: "Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." Direct expropriation triggers the obligations in Article 10.7. Annex 10-C is discussed further in the submissions on Article 10.7, below.

of Annex 10-C explicitly contemplates the existence of a class of cases in which even "regulatory actions by a Party that are designed and applied to protect legitimate welfare obligations" will constitute indirect expropriations. It is submitted that the instant case concerns exactly the sort of "rare circumstances" contemplated in the terms of paragraph 4(b) of Annex 10-C – i.e. in which a Party takes land indirectly without paying for it, over an extended, and in most cases seemingly indefinite, period of time, while recognising its obligation to pay when it eventually perfects the direct taking, which it has confirmed will occur.

Article 10.5 – Minimum Standard of Treatment

29. The non-disputing Parties confirm that Article 10.5 imposes an obligation upon the CAFTA Parties to conduct themselves towards foreign investments in a manner consistent with the minimum standard of treatment, which each also owes to foreign investors as a matter of customary international law.[21]

30. In other words, the Parties have implicitly acknowledged that the purpose of Article 10.5 is to provide CAFTA investors with a direct right to seek compensation for host State conduct that falls below customary international law minimum standards. Absent the inclusion of provisions such as Article 10.5 in the CAFTA, U.S. investors would not possess any direct means by which to vindicate their interests in Costa Rica's compliance with minimum standards of customary international law. CAFTA Article 10.16 thus affords the Claimants an exceptional right to pursue binding international arbitration against Costa Rica, concerning the consistency of its conduct with respect to the norms prescribed in Chapter 10.

31. Thus Article 10.5 is particularly meaningful because it provides U.S. investors with relief from Costa Rica's non-compliance with customary international law standards, which could otherwise have only been obtained through the intervention of the United States Government, acting *qua* Sovereign, for example through espousal.

32. For instance, in the *Santa Elena* case, State action was required to compel Costa Rica to honour its customary international law obligation to provide prompt, adequate and effective compensation to a U.S. investor in 1995. The investor held property rights in a swath of oceanfront land, which bordered a national park. In 1987, the Government of Costa Rica issued a decree, which had the effect of expanding the park's boundaries to include all of the investor's land. Over the eight-year period that followed, between 1987 and 1995, the U.S. investor continued to hold nominal property rights in the land, but the existence of the decree permanently blighted its development plans. It took a coercive act, on the part of the U.S. Government, to compel Costa Rica to agree to binding arbitration with the investor over the amount of compensation owing for its taking of the investor's property rights in the subject land.[22]

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[21] See US Submission at ¶¶ 11-12 and El Salvador Submission at ¶ 3.

[22] The means by which the United States compelled Costa Rica to honour its customary international law obligations towards the U.S. investor was suspension of the payment of a $175 million loan from the Inter-American Development Bank to Costa Rica, at the behest of the United States. See *Santa Elena* at ¶¶ 22-26.

33. The remainder of both Article 10.20 submissions, on the interpretation of Article 10.5, largely track those already made by the Respondent at paragraphs 196 to 201 of the Memorial on Jurisdiction and Counter-Memorial on the Merits and paragraphs 206 to 213 of the Reply on Jurisdiction and Rejoinder on the Merits. For example, the Parties appear to have adopted similar positions as to how one might go about establishing the existence of a new customary rule of international law, observing the orthodox formula of assembling evidence of *opinio juris* and State practice. They have also admitted that the customary international law minimum standard set out in Article 10.5 includes: the obligation to provide fair and equitable treatment, including the duty not to deny justice in criminal, civil or administrative adjudicative proceedings, and the obligation not to expropriate without compensation.[23]

34. In this case, the Claimants are not seeking to establish any novel provisions of customary international law. Of course, in any event, it should be noted that customary international law is not a static body of law and that it is possible for any tribunal to articulate how a general principle of international law, or a customary international law norm, might be articulated within a given case (even if such articulation could be labelled as "novel" by those who disagree with its potential import). In so doing, contrary to the thrust of the Parties' various submissions, there is support for the proposition that the judgments of international tribunals can be a source of such law.[24] It is submitted that the better view of the minimum standard of treatment at customary international law, as referenced in Article 10.5, is that it "provides for fair and equitable treatment of alien investors within the confines of reasonableness."[25]

35. The Claimants disagree with El Salvador's contention that because the CAFTA "includes *expropriation* in Article 10.7 and deals with *full protection and security* in Article 10.5.2(b),… [that] denial of justice … [is] … the only established area of application recognized in Article 10.5.2(a) for the concept of fair and equitable treatment as part of the minimum standard of treatment."[26] In the first place, El Salvador's conception of "denial of justice" is far too narrow, as it appears to be focused on the performance of a municipal judicial regime, *in toto*, to the exclusion of other applications, for example to administrative decision-making, or to particularized adjudicative decision-making, conducted pursuant to a legislated scheme.

36. El Salvador's position on this issue is also inconsistent with the language of Annex 10-B, which states: "[w]ith regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens." The inclusion of protection for breaches of these provisions of customary international law in Article 10.5 ensures that the obligations of the Parties will evolve as customary international law evolves and not

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23 US Submission at ¶¶ 13-14; El Salvador Submission at ¶¶ 13 and 18.

24 See, for example, Schwebel, Stephen M. "Is *Neer* Far from Fair and Equitable?" 27 (2011) Arbitration International 555, cited in: *Gold Reserve Inc* v *Venezuela*, Award, ICSID Case No ARB(AF)/09/1, IIC 660 (2014), 22 September 2014, at ¶ 567; and Paulsson, Jan and Petrochilos, Georgios, "Neer-Ly Misled" 22 (2007) Foreign Investment Law Review 242.

25 See, for example, *Merrill & Ring* v. *Canada*, Final Award at ¶ 213.

26 El Salvador Submission at ¶ 19.

remain wedded to the specific doctrines or idiosyncratic national conceptions of customary international law.[27]

37. Referring to Article 10.5.3, the US submits that "a violation of Article 10.7 does not *per se* constitute a separate violation of Article 10.5", as a breach of another provision of the treaty does not establish that there has been a breach of the minimum standard of treatment.[28] Nevertheless, given how the Parties have deemed that Article 10.7.1 constitutes an expression of the customary international law prohibition on expropriation without prompt, adequate and effective compensation, a breach of Article 10.7 must, *ipso facto*, also constitute a breach of Article 10.5.

38. It is not disputed that the Respondent is bound by customary international law and that customary international law includes the obligation not to expropriate property rights either directly or indirectly, except upon payment of prompt, adequate and effective compensation.[29] Those obligations existed before the CAFTA came into force, as between Costa Rica and the United States. Thus any breaches of those obligations would have become directly actionable for the Claimants, so to speak, as of the date the treaty came into force.

39. The Claimants submit that the Respondent has breached Article 10.5 by expropriating their property rights contrary to customary international law and in accordance with a process that failed to provide them with fair and equitable treatment in the administrative and civil processes within Costa Rica, neither of which conclusions require the Tribunal to establish new norms of customary international law.

40. The Claimants' full submissions concerning the interpretation of Article 10.5 can be found at paragraphs 255 to 298 of the Memorial on the Merits; paragraphs 184 to 198 of the Reply on the Merits and Counter-Memorial on Jurisdiction; and paragraphs 101 to 128 of the Rejoinder on Jurisdiction, as well as at slides 4 to 6 of Claimants' Opening Presentation, and 19 to 21 of Claimants' Opening Presentation on Jurisdiction.[30]

Article 10.7 – Expropriation and Compensation

41. The Claimants' submissions concerning the interpretation of Article 10.7 can be found at paragraphs 198 to 254 of the Memorial on the Merits; paragraphs 162 to 183 of the Reply on the Merits Counter-Memorial on Jurisdiction; and paragraphs 26 to 102 of the Rejoinder on Jurisdiction, as well as at slides 149-150 and 153 of Claimants' Opening Presentation and 5 to 19 of Claimants' Opening Presentation on Jurisdiction.[31]

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[27] In addition, El Salvador's position is also inconsistent with that of the U.S., which states that the minimum standard of treatment referred to in Article 10.5 includes the obligation to provide full protection and security and not to expropriate covered investments except under the conditions specified in Article 10.7. See: US Submission at ¶ 14.

[28] US Submission at ¶ 24.

[29] The customary law obligation also includes the obligation not to expropriate except for a public purpose and in a non-discriminatory manner, which are not at issue in this case.

[30] Also see Hearing Transcript (Day 1) at 86:12 to 88:18 and 207:15-214:2.

[31] Also see Hearing Transcript (Day 1) at 88:19 to 92:4.

42. El Salvador submits that Article 10.7 must be interpreted in accordance with Annex 10-C and that the result of that interpretation is that claimants have "the burden to rebut the strong presumption created in CAFTA-DR that a State's non-discriminatory measures designed to protect the environment do not constitute an indirect expropriation."[32] The U.S. simply notes in this regard that "[u]nder international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory."[33]

43. The Claimants consider the submission of the U.S. to be uncontroversial in this regard. By contrast, El Salvador provides no basis for its novel submission that Annex 10-C establishes any sort of presumption, much less a "strong presumption," regarding the proper construction of Article 10.7 in relation to a given measure.

44. The Claimants accept that they bear the burden of proving that the Respondent has expropriated their property rights in a manner inconsistent with Article 10.7 (as well as Article 10.5, see above). The Claimants submit that, properly interpreted, the language of paragraph 4(b) of Annex 10-C provides a possible defence when a *prima facie* case of uncompensated, indirect expropriation has been established. The burden of sustaining the defence would necessarily lie with the party seeking to establish it. Accordingly the burden falls upon the Respondent.

45. The Respondent has not established that paragraph 4(b) of Annex 10-C applies to the facts of this case. The Respondent did not identify which of its measures were "non-discriminatory regulatory actions" nor did it go on to establish that each of those measures were "designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment".[34] Even if Respondent had established that the measures were non-discriminatory regulatory actions, it did not address the objective of those measures, so as to permit the Tribunal to determine whether the Respondent could even avail itself of this defence.

46. Indeed, as noted above, far from providing support for El Salvador's (or Costa Rica's) position, paragraph 4(b) of Annex 10-C actually does the opposite. It demonstrates the Parties' shared understanding that, notwithstanding the general rule that non-discriminatory regulatory measures are not ordinarily deemed to be expropriatory, there will be times – "rare" though they may be – that those actions can constitute indirect expropriation under Article 10.7. As such, the Tribunal's interpretation of Article 10.7 is unaffected by paragraph 4(b) of Annex 10-C. To determine whether the Claimants have sustained their allegations of indirect expropriation, the Tribunal must undertake the "case-by-case, fact-based inquiry" set out at paragraph 4(a) of Annex 10-C:

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32 El Salvador Submission at ¶¶ 22 to 24.

33 US Submission at ¶ 27.

34 Annex 10-C (4)(b). In fact, the Respondent has admitted that it intends to expropriate all of the Claimants' properties and consolidate them into the Park, but it argues that expropriation has not yet occurred (see Memorial on the Merits at ¶ 111; Reply on the Merits and Counter-Memorial on Jurisdiction at ¶ 124; and Claimants' Closing Presentation, slide 41; Hearing Transcript (Day 5) 1047:12-19).

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
>
> (iii) the character of the government action.

47. The Claimants maintain that it is for the Tribunal to conduct this fact-based inquiry and determine whether an indirect expropriation has taken place and, if so, whether the Respondent has met its obligations under Article 10.7.[35] The Claimants submit that in instances where the measures are intended to be expropriatory in nature and the State has acknowledged that eventually a direct taking will follow, as opposed to non-discriminatory regulations of general application that have an ancillary adverse effect on economic value of the investment, they constitute indirect expropriation. With respect to the timing of a direct expropriation, paragraph 3 of Annex 10-C specifies that the taking occurs "where an investment is nationalized or otherwise directly expropriated through the formal transfer of title." The timing of the expropriations may therefore differ from the date of breach of the CAFTA.

48. Further, and in similar regard, in its submission the U.S. observed:

> If an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. A breach of any such condition requires compensation in accordance with Article 10.7.2. **Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. In contrast, "when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation," a breach of the compensation obligation may occur later, subsequent to the time of the taking.**
>
> [**Emphasis added**][36]

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[35] The Claimants submit that it is also for the Tribunal to determine the timing of an indirect expropriation, as it will depend upon the outcome of the Tribunal's fact-based inquiry.

[36] US Submission at ¶ 26. The footnote found at the end of this paragraph provides:

> See Comments of the United Kingdom on the Draft Articles on State Responsibility at ¶ 59 ("the breach does not arise until local procedures have definitively failed to deliver proper compensation," e.g., "have so failed within the time limits implied by the requirement of promptness") (emphasis added); *OI European Group B.V.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award at ¶¶ 422, 425 (Mar. 10, 2015) ("The Tribunal has already established that the LECUPS is a modern statute, the compliance with which in principle complies with the requirements of Art. 6(c) of the [treaty]. Nevertheless, … the Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing paying [*sic*.] at least the

49. This position supports the Claimants' submission that Articles 10.7.1 and 10.7.2 create separate, complementary obligations to provide adequate compensation without delay.[37] The Claimants' position is also supported by the language of paragraph 1 of Annex 10-C, which provides that only Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation. Article 10.7.1 sets out the general proposition that no State may expropriate either directly or indirectly except for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation and in accordance with due process of law.

Article 10.18 - Conditions and Limitations on Consent of Each Party

50. The Claimants' submissions concerning the interpretation of Article 10.18 can be found at paragraphs 277 to 281 of the Reply on the Merits and Counter-Memorial on Jurisdiction, as well as at slides 1 to 3 of Claimants' Opening Presentation on Jurisdiction.[38]

51. Article 10.18 provides, in relevant part:

> 1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

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fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Art. 6(c) of the [treaty] that compensation be paid "without undue delay.") (translation by counsel) ("El Tribunal ya ha establecido que la LECUPS es una legislación moderna, cuyo cumplimiento en principio cumpliría con los requisitos del Art. 6(c) del APRI. Sin embargo, … el Tribunal concluye que la República Bolivariana no ha ofrecido una explicación plausible que justifique el retraso de más de cuatro años en la fijación y en el pago al menos del justiprecio debido en cumplimiento de la LECUPS, lo que a su vez implica que no pueda considerarse cumplido el requisito del Art. 6(c) del APRI de que la compensación sea satisfecha "sin demora indebida."); *Goldenberg Case* (*Germany v. Romania*), 2 R.I.A.A. 901, 909 (Sept. 27, 1928) ("[T]he requisition carried out by the German military authorities did not *initially* constitute an 'act contrary to the law of nations'. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.") (translation by counsel; emphasis in original) ("[L]a réquisition opérée par l'autorité militaire allemande ne constituait pas *initialement* un 'acte contraire au droit des gens'. Pour qu'il continuait à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinssent une indemnité équitable. Or tel n'a pas été le cas, l'indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.")

[37] For the avoidance of doubt, it is not the Claimants' position that the United States agrees with their submission that Article 10.7(2) constitutes an autonomous provision, which contains obligations owed by the Parties regardless of whether they are also owed as a matter of customary international law. The authorities cited by the US merely demonstrate the correctness of the Claimants' position on the significance of delay in this context, regardless of whether one applies it pursuant to the terms of Article 10.7(1) or 10.7(2).

[38] Also see Hearing Transcript (Day 1) at 191:20 to 192:2.

52. The U.S. submits that knowledge of the alleged breach and loss is first acquired as of a particular date and cannot be acquired at multiple points in time or on a recurring basis.[39] Further, the U.S. says that a continuing course of conduct cannot renew the limitations period under Article 10.18.1, but that a legally distinct injury can give rise to a separate limitations period under Chapter 10 of the CAFTA.[40]

53. As noted above, the CAFTA did not enter into force between the US and Costa Rica until 2009 and it does not apply to acts that took place or situations that ceased to exist before its entry into force. Article 10.18 refers to claims for breach of the treaty. Accordingly, an investor's knowledge of facts constituting a breach could not have occurred before 2009. It would therefore be impossible for Claimants to have had "knowledge of the breach" until 1 January 2009, at the earliest.

54. It is agreed that expropriation, in and of itself, does not constitute a breach of the CAFTA. Parties are entitled to expropriate property for a public purpose upon payment of prompt, adequate and effective compensation. Legal expropriation results in the investor receiving fair market value for the investment without delay. It is inherent in the nature of any expropriation process that it will take some time. The occurrence of the expropriation in and of itself will rarely amount to a breach of the CAFTA. Only expropriations adopted or maintained in a manner inconsistent with customary international law or the provisions of Article 10.5 or 10.7 would constitute a breach of the CAFTA in this case.

55. The Claimants allege that Costa Rica's failure to provide prompt and adequate compensation for indirect expropriation was a continuing, wrongful act that began before the entry into force of the treaty and continued thereafter. On 1 January 2009, that alleged wrongful act became a potential breach of the treaty, which did "not arise until local procedures had definitively failed to deliver proper compensation," either in terms of value or in that they "have so failed within the time limits implied by the requirement of promptness."[41] With respect to a potential breach based on the inadequacy of compensation, no final judgments determining fair market value were issued before June 2010, which marked the beginning of the three-year period before the Claimants provided notice of their respective claims to arbitration.[42] Concerning Costa Rica's failure to provide prompt compensation, the pertinent question is: how much time must pass before a reasonable investor would have been expected to bring a delay claim? Put another way how much delay must have accumulated before the Claimants can or should be said to have had knowledge of the breach? The Claimants' position is that they did not know and should not have known of breach, on the grounds of delay, until after June 2010. For the avoidance of doubt, the Claimants also say that there were new, additional measures relating to delay that were unknown to the Claimants until the proceedings commenced and therefore well within the limitation period.

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39 US Submission at ¶¶ 4-5. El Salvador Submission at ¶¶ 25-28 also addresses Article 10.18.1. The El Salvador submission is unobjectionable on this point, as they do not address the date of acquisition of knowledge of breach and accordingly will not be addressed further by the Claimants.

40 US Submission at ¶ 5.

41 See note 36, above.

42 See Claimants' Appendix 2.

56. Ultimately it should not matter whether one regards the "compensation obligation" as being an integral element of the act of expropriation under customary international law that can later trigger a breach, **or** if one regards the obligation to pay compensation "without delay" under 10.7(2)(a) to be additive to the customary obligation (as evidenced by the fact that paragraph 1 of Annex 10-C only provides that Article 10.7.1 should be considered as representing the applicable customary international law standard). Under either scenario, the Article 10.18 time limitation would be satisfied – because in both scenarios the lack of timely payment constitutes an on-going breach of the underlying obligation.

57. Delay cases are difficult because they essentially require tribunals to determine the point(s) at which an investor should have known that it was time to give up on the municipal process and pursue a costly international arbitration instead. Delay cases are different from cases in which a measure has merely been maintained, such as in the *Clayton* case.[43] Although both types of case involve an ongoing harm, such that the breach could plausibly be construed as ongoing, in cases like *Clayton* the investor knows, or ought to know, about the breach on the first day it commenced. In cases of delay, one day is never going to be considered sufficient to constitute a breach. The difficulty lies in determining a suitable period of time by which point the average investor would assume a breach of either a positive promptness obligation or a prohibition on delay had occurred.[44]

58. It is submitted that, in making this determination, tribunals should recall the CAFTA's preambular exhortation to "ENSURE a predictable commercial framework for business planning and investment," as well as the Article 1.2 objective of establishing "effective procedures for the implementation and application of this Agreement… and for the resolution of disputes."

Conclusion

59. The language of Article 10.1 of the CAFTA supports the Claimants' position that they have brought claims related to breaches of the Agreement that occurred or were maintained after its entry into force. The provisions of Chapter 17 of the CAFTA are irrelevant to this dispute. The facts on the record support the finding that the Respondent breached Articles 10.5 and 10.7 of the CAFTA by indirectly and directly expropriating property rights. The Claimants brought their claims within three years of when they knew (or should have known) of the breaches, as required by Article 10.18. Any interpretation of the CAFTA or international law that would deprive the Claimants of their rights under the CAFTA would undermine the fundamental purpose of the treaty itself and allow the Respondent to avoid liability for violating one of the most basic and fundamental international economic rights - the right not to have property expropriated without the payment of prompt, adequate and effective compensation.

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[43] *Clayton et al v. Canada*, NAFTA/UNCITRAL Tribunal, Award on Jurisdiction and Liability, PCA Case No. 2009-04.

[44] For the avoidance of doubt, the Claimants are not abandoning any of their other claims that are based upon conduct that manifestly falls within the limitation period established under Article 10.18.1 (such as 2010's "new delay measures" (which were not revealed to the Claimants until 2013) or the arbitrary administration of the Respondent's municipal expropriation regime).

Respectfully submitted,

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