

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

RAILROAD DEVELOPMENT CORPORATION
Claimant

and

REPUBLIC OF GUATEMALA
Respondent

ICSID CASE NO. ARB/07/23

**Submission of the Republic of El Salvador
as a Non-Disputing Party under CAFTA Article 10.20.2**

January 2012

Introduction

1. The Republic of El Salvador makes this submission as a non-disputing Party pursuant to Article 10.20.2 of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA"), to address one question of treaty interpretation involved in the current arbitration between Railroad Development Corporation ("RDC") and the Republic of Guatemala. Specifically, this submission addresses the interpretation of the requirement to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment under CAFTA Article 10.5.

2. No inferences should be drawn from this submission regarding how the interpretation of the treaty offered below applies to the facts of this case, a matter on which El Salvador does not take a position. Likewise, the absence of comments regarding any other question of treaty interpretation should not give rise to any inferences regarding El Salvador's interpretation of any provisions of CAFTA that are not specifically addressed below.

Interpretation of Fair and Equitable Treatment

3. The text of CAFTA makes it clear that "Fair and Equitable Treatment" is a "floor" or "bottom" to the acceptable treatment of foreign investments—treatment that does not fall below this minimum standard does not give rise to a treaty violation, even if such treatment may not be considered ideal by a party or tribunal.

- CAFTA Article 10.5, which includes the obligation to afford "fair and equitable treatment," is titled "Minimum Standard of Treatment."
- The first paragraph of Article 10.5 provides that each CAFTA Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . ." The second paragraph of Article 10.5 clarifies that "[f]or greater certainty, paragraph 1

prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."

- Paragraph 2 further clarifies that Fair and Equitable Treatment "do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights."
- Finally, Annex 10-B confirms the CAFTA Parties' understanding that "customary international law", as referenced with regard to Fair and Equitable Treatment, "results from a general and consistent practice of States that they follow from a sense of legal obligation."

4. It follows from the above provisions that the proper interpretation of the requirement to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment under customary international law, as required by CAFTA, can only be derived from the analysis of general and consistent State practice resulting from a sense of legal obligation. International arbitral awards are relevant to the determination of the appropriate interpretation under CAFTA, but only if and to the extent that they actually examine State practice resulting from a sense of legal obligation. Therefore, international arbitral awards that refer to "Fair and Equitable Treatment" as an autonomous standard, as well as investment treaties that use "Fair and Equitable Treatment" without reference to customary international law, are not relevant for purposes of the interpretation of the standard under CAFTA Article 10.5.

5. Although this is the first time an arbitral tribunal is called to interpret the requirement to provide "Fair and Equitable Treatment" under CAFTA, the definition of the minimum standard of treatment under CAFTA is identical or near identical to the definition under NAFTA, as clarified by the NAFTA Free Trade Commission, a fact noted by both

Guatemala and RDC.¹ However, the interpretation of the standard by NAFTA tribunals has not always been clear and uniform.

6. After a careful review and analysis of international law standards and the relevant NAFTA awards and other international arbitral awards discussing the requirement to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment under customary international law, El Salvador considers that, in most respects, the interpretation and reasoning of the arbitral tribunal in the NAFTA arbitration between Glamis Gold and the United States of America correctly reflects the interpretation of the requirement to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment under customary international law, and therefore, under CAFTA Article 10.5. Thus, in El Salvador's view, to violate the minimum standard of treatment under customary international law included in CAFTA Article 10.5, a measure attributable to the State "must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards."²

7. Conversely, El Salvador considers that the requirement to provide "Fair and Equitable Treatment" under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations.³

¹ Guatemala's Counter-Memorial on Merits, Oct. 5, 2010, para. 396; RDC's Reply to Respondent's Counter-Memorial on the Merits, Mar. 24, 2011, para. 327.

² *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, paras. 616, 627 available at http://italaw.com/documents/Glamis_Award_001.pdf.

³ With regard to the conclusion in the *Glamis Gold* Award that the "Fair and Equitable Treatment" obligation could be violated in a particular situation where, beyond a mere breach of contract, the State creates objective expectations in order to induce the investment, and then proceeds to repudiate those expectations (*Glamis Gold* Award, paras. 620-621, 627), El Salvador notes that it is the act or measure of the State, not the investor's expectations, that must be examined to determine whether the measure violates the State's "Fair and Equitable Treatment" obligation (see *Glamis Gold* Award, para. 627, n. 1278). Thus, reference to the investor's legitimate expectations is unnecessary and is not part of the obligation to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment.

8. The above interpretation is consistent with the interpretation that the United States, another CAFTA Party, expressed during the *Glamis Gold* arbitration.⁴

9. In conclusion, El Salvador considers that the customary international law minimum standard of treatment articulated in *Neer v. Mexico* has not changed significantly over time.⁵ El Salvador agrees with the view expressed by the United States in the *Glamis Gold* arbitration that the recognition that customary international law may evolve over time does not require that any particular standard must have evolved within a certain amount of time.⁶

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Héctor Miguel Antonio Dada Hirze".

Héctor Miguel Antonio Dada Hirze
Ministro de Economía de El Salvador



⁴ See, e.g., *Glamis Gold, Ltd. v. United States of America*, Counter-Memorial of Respondent United States of America, Sept. 19, 2006, available at http://www.naftalaw.org/Disputes/USA/Glamis/Glamis-USA-Counter_Memorial.pdf, at 227-230 (there is no general obligation on States to refrain from "arbitrary" conduct); *Glamis Gold, Ltd. v. United States of America*, Rejoinder of Respondent United States of America, Mar. 15, 2007, available at <http://www.naftalaw.org/Disputes/USA/Glamis/Glamis-USA-Rejoinder.pdf>, at 155-163 (transparency is not part of the customary international law minimum standard of treatment) and 178-185 (mere frustration of an investor's legitimate expectations does not violate the customary international law minimum standard of treatment).

⁵ *Glamis Gold* Award, para. 616 ("It . . . appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today. . . . [However] one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such.").

⁶ *Glamis Gold, Ltd. v. United States of America*, Rejoinder of Respondent United States of America, Mar. 15, 2007, at 153, n. 610.