

**In the arbitration under the UNCITRAL Arbitration Rules
and the Dominican Republic-Central America-United States Free Trade Agreement**

between

SPENCE INTERNATIONAL INVESTMENTS, et al

Claimants,

and

THE REPUBLIC OF COSTA RICA

Respondent.

ICSID Secretariat File No. UNCT/13/2

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**NON-DISPUTING PARTY SUBMISSION
OF THE REPUBLIC OF EL SALVADOR**

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April 17, 2015

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1. The Republic of El Salvador ("El Salvador") makes this submission pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (the "Treaty" or "CAFTA-DR"), regarding the interpretation of Articles 10.5 (Minimum Standard of Treatment), 10.7 (Expropriation and Compensation), 10.18 (Conditions and Limitations on Consent of Each Party), and 10.1 (Scope and Coverage).

2. El Salvador does not express a position regarding how the interpretations included in this submission apply to the facts of this case. In addition, no inference should be made from the absence of comments regarding any question not specifically addressed in this submission.

I. ARTICLE 10.5 (MINIMUM STANDARD OF TREATMENT)

A. The source of customary international law is State practice

3. CAFTA-DR Article 10.5 is titled "minimum standard of treatment." The first paragraph of Article 10.5 provides that each CAFTA-DR Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

4. The second paragraph explains that the concept of "fair and equitable treatment" does not require treatment beyond the minimum standard of treatment to aliens in accordance to customary international law.

5. Finally, Article 10.5 must be interpreted in accordance with Annex 10-B, which explains the CAFTA-DR Parties' understanding that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation."

6. The CAFTA-DR Parties thus made it clear that customary international law must be proven through evidence of (1) general and consistent practice of States (2) that they follow from

a sense of legal obligation.¹ Therefore, while decisions of arbitral tribunals that discuss State practice might be useful as evidence of the State practice they discuss, arbitral decisions can never substitute for State practice as the *source* of customary international law.

B. The burden to prove the existence of a norm of customary international law resides with the party alleging its existence, normally the claimant

7. The general and consistent practice of States crystallizes as a norm in customary international law through the passage of time until it can be recognized as such. The party that alleges the existence of a norm of customary international law (normally the claimant) has the burden to prove the existence of State practice followed from a sense of legal obligation that has given rise to the alleged norm.²

C. The minimum standard of treatment does not include the protection of investors' expectations, legitimate or otherwise

8. Because the focus of an inquiry regarding the minimum standard of treatment must be the conduct of the State, it is incorrect to make reference to the expectations of an investor to decide if the State has complied with the minimum standard of treatment. The minimum standard of treatment must be an objective concept to evaluate the treatment a State accords to an investor, not a concept that can vary depending on the investor's subjective understanding about the treatment it expects to receive. This is so even when those expectations might be based on what has been offered to the investor. Considering the investor's legitimate expectations would have the effect of eliminating States' regulatory capacity, something the States Parties never agreed to

¹ The second requirement is also known by the Latin phrase "*opinio juris*" (*opinio juris sive necessitates*).

² *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, Dec. 14, 2012, paras. 352, 354, available at <http://www.state.gov/documents/organization/203097.pdf>.

do in the Treaty. Therefore, State conduct is the only relevant factor in any inquiry regarding the minimum standard of treatment.

9. El Salvador is not alone in this interpretation. In fact, the majority of CAFTA-DR Parties have previously declared that the minimum standard of treatment does not include the protection of investors' expectations. In a previous CAFTA-DR arbitration between Teco Holdings and the Republic of Guatemala, four CAFTA-DR non-disputing Parties (El Salvador, the Dominican Republic, Honduras, and the United States of America) filed written submissions interpreting that the minimum standard of treatment under customary international law, as referred to in CAFTA-DR Article 10.5, does not include the protection of investors' expectations, legitimate or otherwise.³

10. Three non-disputing Parties in the *Teco v. Guatemala* arbitration also made oral submissions. During its oral submission, the United States incorporated by reference its interpretation regarding investors' expectations expressed in a NAFTA proceeding also interpreting the content of the minimum standard of treatment under customary international law.⁴ In that NAFTA arbitration, *Grand River v. United States*, the United States clearly stated that "States are not obligated to protect a foreign investor's expectations—legitimate or otherwise—under the minimum standard of treatment."⁵

³ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submissions of El Salvador, Oct. 5, 2012, paras. 13-14 (attached to this Submission as **Annex A**); the Dominican Republic, Oct. 5, 2012, para. 10 (**Annex B**); Honduras, Nov. 15, 2012, paras. 9-10 (**Annex C**); and the United States of America, Nov. 23, 2012, para. 6 (**Annex D**). The non-disputing Party submissions are also available at <http://portaldace.mineco.gob.gt/casos-guatemala>.

⁴ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Oral Submission of the United States of America, Hearing Transcript, Vol. 5, Mar. 4, 2013, at 822-824 (**Annex E**).

⁵ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, Dec. 22, 2008, at 96-100, available at <http://www.state.gov/documents/organization/114065.pdf>. See also, *Glamis Gold, Ltd. v. United States of America*, Counter-Memorial of Respondent

11. In addition to the four non-disputing Parties, Guatemala declared in its written submissions in *Teco v. Guatemala* the same interpretation that "the doctrine of legitimate expectations does not apply in the context of the international minimum standard."⁶ Therefore, at least five of the seven CAFTA-DR Parties have declared in the previous CAFTA-DR arbitrations that there is no role for investors' expectations in an analysis of whether a State has complied with its international obligations under CAFTA-DR Article 10.5.

12. Finally, El Salvador would like to clarify an apparent misunderstanding regarding what the tribunal in the *TECO v. Guatemala* arbitration decided regarding this issue. The Claimants in the present arbitration seem to indicate that the tribunal in *TECO v. Guatemala* rejected Guatemala's interpretation that there is no role for investors' expectations in an analysis regarding compliance with the minimum standard of treatment.⁷ El Salvador notes that the passage of the award quoted by the Claimants in this arbitration does not correspond to the tribunal's analysis; it is a summary of the claimant's arguments in that case.⁸ In reality, the tribunal in the *TECO v. Guatemala* arbitration agreed with Guatemala that there is no role for legitimate expectations in an analysis under the minimum standard of treatment, and cited the non-disputing Party

United States of America, Sept. 19, 2006, at 233-234, available at <http://www.state.gov/documents/organization/73686.pdf>.

⁶ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Rejoinder of the Republic of Guatemala, Sept. 24, 2012, paras. 172, 182, available at <http://portaldace.mineco.gob.gt/sites/default/files/unidades/DefensaComercial/Casos/Controversias/Inversionista%20-%20Estado/Arbitraje%2010-23%20%28Teco%29/Memorial%20de%20D%C3%BAplica/Memorial%20de%20D%C3%BAplica/Ingles/Rejoinder%20ENG.pdf>.

⁷ *Spence International Investments, LLC, et al. v. Costa Rica*, Claimants' Rejoinder on Jurisdiction, Feb. 4, 2015, para. 117 and n.85, available at <http://www.comex.go.cr/tratados/vigentes/cafta/Casos/150204%20Claimants%20Rejoinder%20on%20Jurisdiction.pdf>.

⁸ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, Dec. 19, 2013, para. 267, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4012_En&caseId=C1280.

submissions of El Salvador, the Dominican Republic, and Honduras to support this determination.⁹

D. Only extreme levels of State conduct fall below the minimum standard of treatment

13. Due to the origin of the minimum standard of treatment in customary international law as an absolute floor to the treatment States may provide, only State actions of an extreme nature can violate the minimum standard of treatment. Like other CAFTA-DR Parties, El Salvador understands that the conduct of a State must rise to the level of manifest arbitrariness, utter lack of due process, blatant unfairness, evident discrimination, or egregious denial of justice, to become a breach of CAFTA-DR Article 10.5.¹⁰

14. Conversely, conduct that is merely arbitrary has not been established to constitute a breach of the minimum standard of treatment based on evidence of general and consistent State practice followed from a sense of legal obligation, as required by CAFTA-DR Article 10.5.¹¹

15. In addition, as the United States expressed in its non-disputing Party submission in the *Teco* case, "[d]etermining a breach of the minimum standard of treatment 'must be made in the

⁹ *TECO v. Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, Dec. 19, 2013, para. 621 and n.513 ("It is clear, in the eyes of the Arbitral Tribunal, that any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs. What matters is whether the State's conduct has objectively been arbitrary, not what the investor expected years before the facts.").

¹⁰ See, e.g., *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submissions of the Dominican Republic, Oct. 5, 2012, paras. 6-9 (Annex B); Honduras, Nov. 15, 2012, para. 9 (Annex C); and the United States of America, Nov. 23, 2012, para. 6 (Annex D).

¹¹ See, e.g., *Glamis Gold, Ltd. v. United States of America*, Counter-Memorial of Respondent United States of America, Sept. 19, 2006, at 227-230, available at <http://www.state.gov/documents/organization/73686.pdf>.

light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."¹²

E. A claimant has the burden to prove that the concept of "fair and equitable treatment" may be applied in contexts other than denial of justice

16. Article 10.5, second paragraph, specifically mentions that the concept of "fair and equitable treatment" as part of the minimum standard of treatment "includes the obligation to not deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

17. The United States noted in its non-disputing Party submission in the *TECO v. Guatemala* case that "the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law *in specific contexts*."¹³

18. In *Apotex v. United States of America*, the United States explained that the applicability of the minimum standard of treatment under customary international law has only been established in a few areas. The United States explained in further detail:

Sufficiently broad State practice and *opinio juris* thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for *expropriation*; to provide *full protection and security* (or a minimum level of internal security and law); and to refrain from *denials of justice*. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.¹⁴

¹² *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submission of the United States of America, Nov. 23, 2012, para. 7 (internal citation omitted) (Annex D).

¹³ *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-disputing Party Submission of the United States of America (November 23, 2012), para. 3 (emphasis added) (Annex D).

¹⁴ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, Dec. 14, 2012, para. 353 (emphasis added, internal citations omitted), available at <http://www.state.gov/documents/organization/203097.pdf>.

19. CAFTA-DR includes *expropriation* in Article 10.7 and deals with *full protection and security* in Article 10.5.2(b). This makes *denial of justice* 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.

20. A party alleging the applicability of the minimum standard of treatment beyond the area of denial of justice has the burden to prove the existence of the norm it alleges. As mentioned before, the proof must be based on the general and consistent State practice that States follow from a sense of a legal obligation.

21. In the absence of evidence of general and consistent State practice that they follow from a sense of a legal obligation, as required by CAFTA-DR Article 10.5 and Annex 10-B, it is not possible to establish the existence of additional obligations as part of the concept of "fair and equitable treatment" included in the minimum standard of treatment. Therefore, unless a party (normally the claimant) proves otherwise with evidence of the general and consistent practice of States that they follow from a sense of legal obligation, the concept of "fair and equitable treatment" used in CAFTA-DR as part of the minimum standard of treatment, has only been established as applicable in the area of denial of justice.

II. ARTICLE 10.7 (EXPROPRIATION AND COMPENSATION)

22. Article 10.7.1 protects investments covered by CAFTA-DR from direct and indirect expropriation, except (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2-4 of Article 10.7; and (d) in accordance with due process of law and Article 10.5.

23. The CAFTA-DR Parties made it clear that Article 10.7 must be interpreted in accordance with Annex 10-C. In Annex 10-C, the CAFTA-DR Parties "confirm[ed] their shared

understanding" that, "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

24. Therefore, a claimant would have the burden to rebut the strong presumption created in CAFTA-DR that a State's nondiscriminatory regulatory measures designed to protect the environment do not constitute an indirect expropriation.

III. ARTICLE 10.18 (CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY)

25. Article 10.18.1 provides that "no claim may be submitted to arbitration . . . if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of a breach under CAFTA-DR Article 10.16.1 . . . and knowledge that the claimant . . . has incurred loss or damage."

26. CAFTA-DR does not require the investor to act immediately. Article 10.15 encourages the parties to a dispute to "seek to resolve [it] through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation." In addition, Article 10.16.3 mandates a minimum period of six months between the date of the events giving rise to a claim and the date when an investor may submit the claim to arbitration.¹⁵

27. According to Article 10.18.1, a claim becomes time-barred three years from the date when the claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of loss or damage as a result of that breach. This three-year time limit includes the time that the parties to the dispute may be engaged in direct consultation or negotiation, as well as in conciliation or mediation procedures.

¹⁵ This is the minimum waiting time, provided that the claimant has also filed the required Notice of Intent within those six months and at least 90 days earlier, in accordance with CAFTA-DR Article 10.16.2.

28. This leaves a window of 2½ years (after the mandatory minimum of six months counted from the events that give rise to the claim) for an investor to initiate arbitration under CAFTA-DR Article 10.16.

A. Knowledge of the existence of a measure alleged to breach CAFTA-DR and resulting harm is sufficient to trigger the three-year statute of limitations

29. Article 10.18.1 refers to knowledge of a "breach alleged under [CAFTA] Article 10.16.1" and knowledge of resulting harm as the triggering event for the three-year statute of limitations to begin to run. However, it is not necessary for the investor to know that there has been a breach of a certain provision of CAFTA-DR Section A, of an investment authorization, or of an investment agreement, in the legal sense. It is sufficient if the investor is aware, or should be aware, of the existence of a measure that harms it and that is later alleged to constitute the breach under CAFTA-DR Article 10.16.1.

B. It is not necessary to know the exact amount of loss or damage, only that loss or damage has been suffered as a result of the measure

30. While knowledge of loss or damage is required, it is not necessary to have knowledge of the precise amount of the loss or damage.¹⁶ The only requirement in Article 10.18.1 is knowledge that there has been some loss or damage as a result of the offending measure.

¹⁶ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, para. 77 ("A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time."), available at <http://www.state.gov/documents/organization/69499.pdf>.

C. It is irrelevant whether an alleged breach is characterized as an act having a continuing character

31. Because the requirement refers to "the date on which the claimant first acquired, or should have first acquired, knowledge of a breach", it is irrelevant whether the measure is characterized as an act having a continuing character. El Salvador agrees with the United States' submission regarding the same language in NAFTA:

An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.¹⁷

IV. ARTICLE 10.1 (SCOPE AND COVERAGE)

32. CAFTA-DR Article 10.1.3 provides that:

For greater certainty, this Chapter [Ten] 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.

33. This clause tracks the language of the non-retroactivity principle as stated in Article 28 of the Vienna Convention on the Law of Treaties and affirms that this principle applies to all of the provisions on investment in CAFTA-DR Chapter Ten, including Section B: Investor-State Dispute Settlement. The consent of CAFTA-DR Parties to arbitration in Article 10.17 is thus limited *ratione temporis* by the language of Article 10.1.3. Each Party's consent does not extend to arbitration with respect to measures adopted or any act or fact that took place before CAFTA-DR entered into force for that Party.

¹⁷ *Merrill & Ring Forestry, L.P. v. Canada*, UNCITRAL, Submission of the United States of America, July 14, 2008, para. 5 (emphasis in original), available at <http://www.state.gov/documents/organization/128851.pdf>.

34. El Salvador thus interprets that a dispute that existed before CAFTA-DR entered into force, and that remains unresolved after CAFTA-DR entered into force, cannot give rise to a claim for a breach of the substantive provisions of CAFTA-DR.¹⁸


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¹⁸ See *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Non-disputing Party Submission of El Salvador, Mar. 19, 2010 (**Annex F**).