Annex A

Teco Guatemala Holdings LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Non-disputing Party Submission of El Salvador, Oct. 5, 2012

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

(ICSID)

IN THE ARBITRATION BETWEEN

TECO GUATEMALA HOLDINGS, LLC

Claimant

and

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/10/23

==========

NON-DISPUTING PARTY SUBMISSION OF THE REPUBLIC OF EL SALVADOR

==========

October 5th, 2012

Introduction

1. The Republic of El Salvador ("El Salvador"), exercising its right under Article 10.20.2 of the Free Trade Agreement between the Dominican Republic, Central America, and the United States of America (the "Treaty" or "DR-CAFTA"), makes this submission regarding the interpretation of a provision of the Treaty that has arisen in the arbitration between TECO Guatemala Holdings, LLC and the Republic of Guatemala. Specifically, El Salvador presents its position on the interpretation of Article 10.5 of the Treaty, with regard to the obligation of a State Party to afford a Minimum Standard of Treatment to investments covered by the Treaty.

2. El Salvador does not express any opinion about how the comments in this submission apply to the facts of the case, a matter on which El Salvador does not take a position. On the other hand, the absence of comments in this submission about any other questions of Treaty interpretation does not give rise to any inferences regarding El Salvador's interpretation of any provisions of the Treaty not specifically addressed in this submission.

Observations regarding the text of DR-CAFTA Article 10.5

3. Article 10.5 is titled "Minimum Standard of Treatment" and provides in its first paragraph that each State 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 in Article 10.5 provides that "fair and equitable treatment" is a "concept" included in the Minimum Standard of Treatment, and that this 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. The second paragraph of Article 10.5 also mentions that the obligation to provide "fair and equitable treatment" referred to in the first paragraph "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."

6. Finally, Annex 10-B of the Treaty makes it clear that for the reference to customary international law in Article 10.5, the State Parties understand that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation."

7. In sum, the text of the Treaty makes it clear, first, that the concept of "fair and equitable treatment" used in Article 10.5 is part of the Minimum Standard of Treatment under customary international law, but that it does not require treatment beyond the Minimum Standard of Treatment. Second, the text of the Treaty makes it clear that the concept of "fair and equitable treatment" referred to in Article 10.5 of the Treaty includes the obligation to not deny justice. Finally, the text of the Treaty makes it clear that in order to determine if a norm is part of customary international law, two requirements must be met: 1) determine the general and consistent State practice, and 2) determine that such practice is followed by the States from a sense of legal obligation (*opinio juris sive necessitatis*, "*opinio juris*"). Therefore, customary international law must be established through State practice, not through decisions of arbitral tribunals. Decisions of arbitral tribunals that discuss State practice might be relevant as *evidence* of State practice, but they can never be a substitute for State practice as the *source* of customary international law.

The concept of "fair and equitable treatment" used in DR-CAFTA is different from the autonomous concept used in other treaties

8. In international investment arbitration, the term "fair and equitable treatment" refers to two concepts. The first concept of "fair and equitable treatment", for example the one included in Article 10.5 of DR-CAFTA, is used with reference to the Minimum Standard of Treatment under customary international law. The second concept of "fair and equitable treatment" has been included in many investment protection treaties in an autonomous manner, without reference to the Minimum Standard of Treatment under customary international law, and is therefore different from the first.

9. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, treaties must be interpreted in good faith, in accordance with the ordinary meaning of their terms. The terms of Article 10.5 of the Treaty clearly reflect the State Parties' intention to adopt the most limited concept possible of "fair and equitable treatment" as part of the Minimum Standard of Treatment under customary international law, not as an autonomous concept.

10. The party that alleges the existence of a norm of customary international law 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.[1] 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.[2]

11. Given the text of Article 10.5 and the inapplicability of arbitral decisions, El Salvador rejects any argument that the concept of "fair and equitable treatment" included in DR-CAFTA as

---

[1] *See, for example, Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 I.C.J. 176, 200 (August 27) (Judgment) (citing *Asylum Case (Colombia v. Peru)*), 1950 I.C.J 266, 276 (November 20) (Judgment) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

[2] *See, for example*, the fourth non-disputing Party submission presented by the Government of the United States of America in the *Pope & Talbot v. Canada* arbitration, November 1, 2000, para. 8 (stating that the Minimum Standard of Treatment "incorporat[es] a set of rules that have crystallized over the centuries into customary international law in specific contexts.").

part of the Minimum Standard of Treatment, is equivalent to or has converged with the autonomous standard of "fair and equitable treatment," as the Claimant argues in this arbitration.[3]

The concept of "fair and equitable treatment" used in DR-CAFTA is limited to the context of denial of justice, unless a party proves otherwise

12. As mentioned above, 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. Beyond the obligation to not deny justice, a party alleging the existence of a norm of customary international law has the burden to prove the existence of the norm it alleges, based on general and consistent State practice and *opinio juris*. In the absence of arguments based on general and consistent State practice and *opinio juris*, as required by DR-CAFTA, 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.

The Minimum Standard of Treatment does not include protection of investors' legitimate expectations or protection against merely arbitrary measures

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.

14. Because the focus must be on the conduct of the State, it is incorrect to make reference to the legitimate expectations of the investor to decide if the State has complied with the Minimum Standard of Treatment. State conduct is the only relevant factor for this purpose, because the Minimum Standard of Treatment must be an objective concept that evaluates the treatment a State accords to an investor, and not a concept that can vary depending on the investor's subjective

[3] Claimant's Memorial, para. 244; Reply, para. 231.

understanding about the treatment it expects to receive based on what has been offered. Considering the investor's legitimate expectations would have the effect of eliminating States' regulatory capacity. That is why no evidence has been presented about the existence of a general and consistent State practice, followed out of a sense of legal obligation, of protecting the legitimate expectations of investors. On the contrary, the evidence indicates that even the State of nationality of the Claimant, the United States of America, does not recognize the existence of the alleged obligation in its internal law or as an international obligation.[4]

15. Likewise, the argument that conduct that is merely arbitrary constitutes a breach of the Minimum Standard of Treatment is not supported by evidence based on the general and consistent State practice followed out of a sense of legal obligation, as required by DR-CAFTA Article 10.5.[5]

16. Therefore, the concept of "fair and equitable treatment" used in DR-CAFTA is limited to the context of denial of justice (unless a party proves otherwise) and does not include the protection of an investor's legitimate expectations or the protection against measures that are merely arbitrary, two ideas that have not been established as norms of customary international law.

Conclusion

17. As discussed in this submission, El Salvador interprets that: 1) the concept of "fair and equitable treatment" in Article 10.5 of DR-CAFTA is used and must be understood with reference to the Minimum Standard of Treatment in accordance with customary international law; 2) customary international law can only be established based on State practice followed out of a sense of legal obligation (*opinio juris*); 3) the burden of proof to establish the existence of a norm in customary international law falls on the party that alleges its existence, and must be proven based

[4] *See, e.g.*, Counter-Memorial of the United States of America in the *Glamis Gold* arbitration, September 19, 2006, at 233-234.
[5] *See, e.g.*, Counter-Memorial of the United States of America in the *Glamis Gold* arbitration, September 19, 2006, at 227-230.

on State practice and *opinio juris*, not based on decisions of arbitral tribunals; 4) the text of Article 10.5 only includes the applicability of the concept of "fair and equitable treatment" to the context of denial of justice, unless a party proves otherwise based on general and consistent State practice and *opinio juris*; 5) the concept of "fair and equitable treatment" included in the Minimum Standard of Treatment in Article 10.5 of the Treaty is very different from the autonomous concept by the same name; and 6) the concept of "fair and equitable treatment" in Article 10.5 of the Treaty does not include the protection of an investor's legitimate expectations and does not include protection against merely arbitrary measures.

MARIO ROGER HERNANDEZ

VICEMINISTER OF ECONOMY

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS

RELATIVAS A INVERSIONES (CIADI)

EN EL ARBITRAJE ENTRE

TECO GUATEMALA HOLDINGS, LLC

Demandante

y

LA REPUBLICA DE GUATEMALA

Demandado

Caso CIADI NO. ARB/10/23

ESCRITO DE PARTE NO CONTENDIENTE DE LA REPUBLICA DE EL SALVADOR

---

5 de octubre de 2012

Introducción

1. La República de El Salvador ("El Salvador"), haciendo uso del derecho que le confiere el Artículo 10.20.2 del Tratado de Libre Comercio entre la República Dominicana, Centroamérica y los Estados Unidos de América (el "Tratado" o "DR-CAFTA"), presenta este escrito sobre la interpretación de una disposición del Tratado que ha surgido en el arbitraje entre TECO Guatemala Holdings, LLC y la República de Guatemala. Específicamente, El Salvador presenta su posición sobre la interpretación del Artículo 10.5 del Tratado, en lo concerniente a la obligación de un Estado Parte de proporcionar un Nivel Mínimo de Trato a las inversiones cubiertas por el Tratado.

2. El Salvador no expresa ninguna opinión sobre la forma en que los comentarios expresados en este escrito se aplican a los hechos en este arbitraje, algo sobre lo cual El Salvador no toma posición. Por otra parte, la ausencia de comentarios sobre cualquier otro asunto de interpretación del Tratado en este escrito, no deberá dar lugar a ninguna inferencia sobre la interpretación que El Salvador pudiese tener sobre cualesquiera disposiciones del Tratado que no sean específicamente abordadas en este escrito.

Observaciones sobre el texto del Artículo 10.5 del DR-CAFTA

3. El Artículo 10.5 tiene el título de "Nivel Mínimo de Trato," y establece en su primer párrafo que cada Estado Parte "otorgará a las inversiones cubiertas un trato acorde con el derecho internacional consuetudinario, incluido el trato justo y equitativo, así como protección y seguridad plenas."

4. El segundo párrafo del Artículo 10.5 establece que el "trato justo y equitativo" es un "concepto" incluido en el Nivel Mínimo de Trato, y que este concepto de "trato justo y equitativo"

no requiere un trato que vaya más allá del Nivel Mínimo de Trato a los extranjeros según el derecho internacional consuetudinario.

5. El segundo párrafo del Artículo 10.5 también menciona que la obligación de otorgar un "trato justo y equitativo" incluida en el primer párrafo, "incluye la obligación de no denegar justicia en procedimientos criminales, civiles, o contencioso administrativos, de acuerdo con el principio del debido proceso incorporado en los principales sistemas legales del mundo."

6. Finalmente, el Anexo 10-B del Tratado deja claro que al referirse al derecho internacional consuetudinario en el Artículo 10.5, los Estados Parte entienden que el derecho internacional consuetudinario es el que "resulta de una práctica general y consistente de los Estados, seguida por ellos en el sentido de una obligación legal."

7. En resumen, el texto del Tratado deja claro, primero, que el concepto de "trato justo y equitativo" utilizado en el Artículo 10.5 es parte del Nivel Mínimo de Trato según el derecho internacional consuetudinario, pero que no requiere un trato que vaya más allá del Nivel Mínimo de Trato. Segundo, el texto del Tratado deja claro que el concepto de "trato justo y equitativo" mencionado en el Art. 10.5 del Tratado incluye la obligación de no denegar justicia. Finalmente, el texto del Tratado deja claro que para determinar si una norma es parte del derecho internacional consuetudinario es necesario la presencia de dos requisitos: 1) determinar la práctica general y consistente de los Estados y 2) determinar que dicha práctica sea seguida por los Estados en el sentido de que existe una obligación legal de hacerlo (*opinio juris sive necessitatis*, "*opinio juris*"). Por lo tanto, el derecho internacional consuetudinario debe establecerse a través de la práctica de los Estados, no a través de decisiones de tribunales arbitrales. Decisiones de tribunales arbitrales que discuten la práctica de los Estados pueden ser relevantes como *evidencia* de la práctica de los

Estados, pero nunca pueden llegar a sustituir a la práctica de los Estados como la *fuente* del derecho internacional consuetudinario.

El concepto de "trato justo y equitativo" utilizado en el DR-CAFTA difiere del concepto autónomo utilizado en otros tratados

8. En el arbitraje internacional de inversiones se mencionan dos conceptos bajo el nombre de "trato justo y equitativo." El primer concepto de "trato justo y equitativo," como por ejemplo el incluido en el Artículo 10.5 del DR-CAFTA, se hace con referencia al Nivel Mínimo de Trato bajo el derecho internacional consuetudinario. El segundo concepto de "trato justo y equitativo" ha sido incluido en muchos tratados de protección de inversiones de manera autónoma, sin relacionarlo al Nivel Mínimo de Trato bajo el derecho internacional consuetudinario, y por lo tanto es diferente del primero.

9. De conformidad con el Artículo 31(1) de la Convención de Viena sobre el Derecho de los Tratados, los tratados deben interpretarse de buena fe, de conformidad con el significado corriente de sus términos. Los términos del Artículo 10.5 del Tratado reflejan claramente la intención de los Estados Parte de adoptar el concepto más restrictivo posible de "trato justo y equitativo" como parte del Nivel Mínimo de Trato conforme al derecho internacional consuetudinario, no como un concepto autónomo.

10. La parte que alega la existencia de una norma de derecho internacional consuetudinario corre con la carga de la prueba para demostrar que existe una práctica general y consistente de los Estados seguida por un sentido de obligación legal, que ha generado la norma alegada.[1] La

[1] *Ver, por ejemplo*, el *Caso Relativo a los Derechos de los Nacionales de los Estados Unidos de América en Marruecos (Francia c. Estados Unidos)*, 1952 C.I.J. 176, 200 (Fallo del 27 de agosto) (citando al *Caso del Derecho de Asilo (Colombia c. Perú)*, 1950 C.I.J. 266, 276 (Fallo del 20 de noviembre) ("La Parte que invoca una costumbre de esta naturaleza debe probar que esta costumbre ha sido establecida de tal manera que ha llegado a ser obligatoria para la otra Parte.").

práctica general y consistente de los Estados se cristaliza como una norma de derecho internacional consuetudinario a través del paso del tiempo hasta que puede reconocerse como una tal.[2]

11. Teniendo en cuenta el texto del Artículo 10.5 y la inaplicabilidad de las decisiones arbitrales, El Salvador rechaza cualquier argumento en el sentido de que el concepto de "trato justo y equitativo" que se incluye en el DR-CAFTA como parte del Nivel Mínimo de Trato, es equivalente o ha convergido con el concepto autónomo de "trato justo y equitativo," como lo argumenta el Demandante en este arbitraje.[3]

El concepto de "trato justo y equitativo" utilizado en el DR-CAFTA está limitado al contexto de denegación de justicia, a menos que una parte demuestre lo contrario

12. Como se ha mencionado anteriormente, el Artículo 10.5, segundo párrafo, hace referencia específica a que el concepto de "trato justo y equitativo" como parte del Nivel Mínimo de Trato, incluye la obligación de no denegar justicia. Más allá de esta obligación de no denegar justicia, corresponde a la parte que alega la existencia de una norma de derecho internacional consuetudinario correr con la carga de la prueba para establecer la existencia de la norma alegada, en base a la práctica general y consistente de los Estados y *opinio juris*. En la ausencia de argumentos basados en la práctica general y consistente de los Estados y *opinio juris*, como lo requiere el DR-CAFTA, no puede establecerse la existencia de obligaciones adicionales como parte del concepto de "trato justo y equitativo" incluido en el Nivel Mínimo de Trato.

---

[2] *Ver, por ejemplo*, el cuarto escrito de Parte no contendiente presentado por el Gobierno de los Estados Unidos en el arbitraje *Pope & Talbot c. Canadá*, 1 de noviembre de 2000, párrafo 8 (el Nivel Mínimo de Trato "incorpora un conjunto de reglas que han cristalizado a través de siglos en derecho internacional consuetudinario en contextos específicos.").

[3] Memorial del Demandante, párrafo 244; Réplica, párrafo 231.

El Nivel Mínimo de Trato no incluye protección de las expectativas legítimas del inversionista ni protección contra medidas meramente arbitrarias

13. Debido al origen del Nivel Mínimo de Trato en el derecho internacional consuetudinario, como un piso absoluto del trato que pueden otorgar los Estados, solamente acciones de carácter extremo de parte de un Estado pueden violar el Nivel Mínimo de Trato.

14. Debido a que el enfoque debe ser la conducta del Estado, es incorrecto hacer referencia a las expectativas legítimas del inversionista para decidir si el Estado ha cumplido con el Nivel Mínimo de Trato. La conducta del Estado es el único factor relevante para este fin, puesto que el Nivel Mínimo de Trato debe ser un concepto objetivo que evalúa el trato que un Estado otorga a un inversionista y no un concepto que puede variar en función de la apreciación subjetiva del inversionista sobre el trato que espera recibir en base a lo que le ha sido ofrecido. Considerar las expectativas legítimas del inversionista tendría el efecto de eliminar la capacidad regulatoria de los Estados. Es por eso que no se ha presentado evidencia de que exista una práctica general y consistente de los Estados, seguida por un sentido de obligación legal, de proteger las expectativas legítimas de los inversionistas. Por el contrario, la evidencia demuestra que ni siquiera el Estado del cual el Demandante es nacional, los Estados Unidos de América, reconoce la existencia de esta supuesta obligación en su derecho interno ni tampoco como una obligación de carácter internacional.[4]

15. Igualmente, el argumento de que conducta meramente arbitraria constituye un incumplimiento del Nivel Mínimo de Trato no es apoyado con evidencia basada en la práctica

[4] *Ver, por ejemplo*, el Memorial de Contestación de los Estados Unidos de América en el caso *Glamis Gold*, de fecha 19 de septiembre de 2006, páginas 233-234.

general y consistente de los Estados en el sentido de una obligación legal, como lo requiere el Artículo 10.5 del DR-CAFTA.[5]

16. Por lo tanto, el concepto de "trato justo y equitativo" utilizado en el DR-CAFTA está limitado al contexto de denegación de justicia (a menos que una parte demuestre lo contrario), y no incluye protección de las expectativas legítimas del inversionista ni protección contra medidas meramente arbitrarias, dos ideas que no han sido establecidas como normas de derecho internacional consuetudinario.

Conclusión

17. Como se ha expuesto en este escrito, El Salvador interpreta que: 1) el concepto de "trato justo y equitativo" en el Artículo 10.5 del DR-CAFTA se utiliza y debe entenderse solamente con referencia al Nivel Mínimo de Trato de conformidad con el derecho internacional consuetudinario; 2) el derecho internacional consuetudinario solamente puede establecerse en base a la práctica de los Estados seguida por ellos en el sentido de que existe una obligación legal (*opinio juris*); 3) la carga de la prueba para establecer la existencia de una norma de derecho internacional consuetudinario corresponde a la Parte que aduce su existencia, en base a la práctica de los Estados y *opinio juris*, no en base a decisiones de tribunales arbitrales; 4) el texto del Artículo 10.5 solamente incluye la aplicabilidad del concepto de "trato justo y equitativo" al contexto de denegación de justicia, a menos que una parte demuestre lo contrario en base a la práctica general y consistente de los Estados y *opinio juris*; 5) el concepto de "trato justo y equitativo" que forma parte del Nivel Mínimo de Trato en el Artículo 10.5 del Tratado es muy diferente del concepto autónomo con el mismo nombre; y 6) el concepto de "trato justo y equitativo" en el Artículo 10.5

[5] *Ver, por ejemplo*, el Memorial de Contestación de los Estados Unidos de América en el caso *Glamis Gold*, de fecha 19 de septiembre de 2006, páginas 227-230.

del Tratado no incluye la protección de las expectativas legítimas del inversionista ni tampoco otorga protección contra medidas meramente arbitrarias.

MARIO ROGER HERNANDEZ

VICEMINISTRO DE ECONOMIA

Annex B

Teco Guatemala Holdings LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Non-disputing Party Submission of the Dominican Republic, Oct. 5, 2012

REPÚBLICA DOMINICANA
Ministerio de Industria y Comercio
Administración de Tratados Comerciales
Santo Domingo, Distrito Nacional
"Año del Fortalecimiento del Estado Social y Democrático de Derecho"

Courtesy Translation

International Centre for the Settlement of investment disputes
In the arbitration between

TECO GUATEMALA HOLDINGS, LLC
(Claimant)

and

Republic of Guatemala
(Respondent)

ICSID CASE NO. ARB/10/23

Submission of the Dominican Republic as a Non-Disputing Party

---

1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), the Dominican Republic makes this submission on the matter of the correct interpretation of Article 10.5 of the Treaty, which states the obligation of Party States to provide a Minimum Standard of Treatment to covered investments.

2. The Dominican Republic wants to clarify that this submission is silent on the facts of the dispute, or on the application of the Treaty in interpreting the facts of the case, and the fact that a legal issue arisen during the procedure is not addressed in this submission does not mean or should not be considered to mean that the Dominican Republic agrees or disagrees with the position taken by the contending parties.

3. Article 10.5 of the Treaty establishes that "each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

It then states: "For 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."

The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Consequently, the "fair and equitable treatment" established by the Treaty must be seen as part of the "minimum standard of treatment afforded to aliens under customary international law" and this concept is very different from the "fair and equitable treatment" incorporated as an autonomous standard in many investment protection treaties, and which is not related to the minimum standard of treatment under customary international law. Therefore, the Dominican Republic reiterates that the purpose and object of Article 10.5 of the Treaty is limited to the "Minimum Standard of Treatment" afforded to foreigners under customary international law, and not "fair and equitable" as autonomous concept.

4. Annex 10-B of the Treaty states that "customary international law" referred to in Article 10.5 "results from a general and consistent practice of States that they follow from a sense of a legal obligation".

5. It follows from the above provision, that to determine the current state of customary international law, it is necessary to fulfill two requirements: 1) reference to the general and consistent practice of States and 2) that such practice be followed by them in the sense that there is a legal obligation to do so. The current state of customary international law cannot be established through court decisions.

6. With regard to the minimum standard of treatment granted to foreigners under customary international law, the jurisprudence has established that a violation to the standard consists of:

a. An egregious and shocking denial of justice.
b. A manifest arbitrariness or questionable arbitrariness inconsistent to the legal and administrative policies or procedures so as to constitute a repudiation of the objective and goals of the policy, among others.
c. An utter lack of due process so as to offend judicial propriety.
d. A blatant unfairness.
e. An evident discrimination, or a manifest lack of reasons for a decision.

7. Due to the origin of the minimum standard of treatment in customary international law, as an absolute "floor," only egregious, outrageous and shocking State actions may violate the Minimum Standard of Treatment.

8. In consequence, the Dominican Republic considers that for there to exist a violation to the minimum standard of treatment under customary international law included in Article 10.5 of the Treaty, a measure attributable to the State must be sufficiently egregious so as to fall below the internationally accepted standards. Thus, only manifestly arbitrary behavior, blatant unfairness and very egregious actions may be claimed under DR-CAFTA Article 10.5, and not just simply arbitrariness or mere breach.

9. The Dominican Republic believes that an interpretation consistent with the meaning attributed to the terms of the Treaty, as established by the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties of 1969[1], must be in consonance with the "principle of effectiveness." According to this principle, international treaties must be interpreted so as to ensure the purpose of its provisions.

10. Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include investors' expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has

[1] Article 31 of the Vienna Convention on the Law of Treaties of 1969: "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terns of the treaty in their context and in the light of its object and purpose."

REPÚBLICA DOMINICANA
Ministerio de Industria y Comercio
Administración de Tratados Comerciales
Santo Domingo, Distrito Nacional
"Año del Fortalecimiento del Estado Social y Democrático de Derecho"

complied with the minimum standard of treatment. What is relevant, and the only factor to consider, is the conduct of the State, since the Minimum Standard of Treatment should be an objective concept that evaluates the treatment that a State gives to an investor. Were it a variable concept that takes into account the investor's subjective assessment of the treatment he expects to receive, this would have a detrimental effect on the regulatory capacity of States.

11. In conclusion, the Dominican Republic considers that the Parties of the Treaty express their intention to incorporate the minimum standard of treatment granted to foreigners by customary international law as the standard of treatment in Article 10.5 of the Treaty.

With sentiments of consideration and respect,

[Signed]
José del Castillo Saviñón
Minister

JDCS

KN/ag

REPÚBLICA DOMINICANA
Ministerio de Industria y Comercio
Administración de Tratados Comerciales
Santo Domingo, Distrito Nacional
"Año del Fortalecimiento del Estado Social y Democrático de Derecho"

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES EN EL ARBITRAJE ENTRE

TECO GUATEMALA HOLDINGS, LLC
(Demandante)

y

LA REPUBLICA DE GUATEMALA
(Demandado)

Caso CIADI NO. ARB/10/23

ESCRITO DE PARTE NO CONTENDIENTE DE LA REPUBLICA DOMINICANA

---

1. La República Dominicana presenta esta comunicación de conformidad con el Artículo 10.20.2 del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos de América (el "Tratado"), sobre la correcta interpretación del Artículo 10.5 del Tratado, que estipula la obligación de los Estado Parte de proporcionar un Nivel Mínimo de Trato a las inversiones cubiertas.

2. La República Dominicana quiere aclarar que mediante el presente Escrito la misma no se pronuncia sobre los hechos de esta disputa, o sobre la aplicación de la interpetacion del Tratado a los hechos del caso, y el hecho de que una cuestión jurídica que haya surgido durante el procedimiento no sea abordada en esta comunicación, no significa ni debe considerarse que la República Dominicana está de acuerdo o en desacuerdo con la posición adoptada por las Partes Contendientes.

3. El Artículo 10.5 del Tratado establece que "cada Parte otorgará a las inversiones cubiertas un trato acorde con el Derecho Internacional Consuetudinario, incluido el trato justo y equitativo, así como protección y seguridad plenas".

A continuación establece: "Para mayor certeza, el párrafo 1 prescribe que el Nivel Mínimo de Trato otorgado a los extranjeros según el Derecho Internacional Consuetudinario es el Nivel Mínimo de Trato que se le otorgará a las inversiones cubiertas".

Los conceptos de Trato Justo y Equitativo y Protección y Seguridad plenas no requieren un tratamiento adicional o más allá de aquel exigido por ese nivel, y no crea derechos sustantivos adicionales.

La determinación de que se ha violado otra disposición de este Tratado o de otro Acuerdo internacional, no establece que se ha violado este Artículo.

De esto se deriva que el "Trato Justo y Equitativo" establecido en el Tratado tiene que ser visto como parte del "Nivel Mínimo de Trato otorgado a los extranjeros según el Derecho Internacional Consuetudinario", siendo este concepto muy distinto al estándar de "Trato Justo y Equitativo" incorporado de manera autónoma en muchos tratados de protección de inversión, y que no presenta vinculación con el Nivel Mínimo de Trato bajo el Derecho Internacional Consuetudinario. Por lo tanto, la República Dominicana reitera que el propósito y objeto del Artículo 10.5 del Tratado se limita al "Nivel Mínimo de Trato" otorgado a los extranjeros según el Derecho Internacional Consuetudinario, y no el "Trato Justo y Equitativo" como concepto autónomo.

4. En el Anexo 10-B del Tratado se establece que el "Derecho Internacional Consuetudinario" referido en el Artículo 10.5 es el que "resulta de una práctica general y consistente de los Estados, seguida por ellos en el sentido de una obligación legal".

5. De lo anterior se deriva que para determinar el estado actual del Derecho Internacional Consuetudinario es necesario que se cumplan dos requisitos: 1) referirse a la práctica general y consistente de los Estados y 2) que dicha práctica sea seguida por ellos en el sentido de que existe una obligación legal de hacerlo. El estado actual del Derecho Internacional Consuetudinario no puede establecerse a través de decisiones de tribunales.

6. Acerca del Nivel Mínimo de Trato otorgado a los extranjeros según el Derecho Internacional Consuetudinario, la jurisprudencia en la materia ha constatado que una violación al mismo consiste en:

a. Una denegación de justicia grave y grosera.

REPÚBLICA DOMINICANA
Ministerio de Industria y Comercio
Administración de Tratados Comerciales
Santo Domingo, Distrito Nacional
"Año del Fortalecimiento del Estado Social y Democrático de Derecho"

b. Una manifiesta arbitrariedad, o una arbitrariedad inconsistente que sea cuestionada en lo relativo a las políticas judiciales y administrativas, así como los procedimientos, de modo que constituya un rechazo del objetivo y propósito de la política, entre otros.
c. Auser cia del debido proceso que infrinja la rectitud judicial.
d. Una injusticia flagrante.
e. Una discriminación manifiesta, o la ausencia manifiesta de razones para una decisión.

7. Debido al origen del Nivel Mínimo de Trato en el Derecho Internacional Consuetudinario, como un "piso" absoluto, solamente acciones de carácter chocante, excesivo, ultrajante, de parte de un Estado, pueden violar el Nivel Mínimo de Trato.

8. En consecuencia, en opinión de la República Dominicana, para violar el estándar del Nivel Mínimo de Trato bajo el Derecho Internacional Consuetudinario incluido en el Artículo 10.5 del Tratado, una medida atribuible al Estado debe ser lo suficientemente atroz, como para caer por debajo de los estándares aceptados internacionalmente. De esta manera sólo las conductas manifiestamente arbitrarias, de repudio flagrante y conductas muy graves pueden ser reclamadas bajo el amparo del 10.5 del DR-CAFTA, y no solo el simple incumplimiento o la simple arbitrariedad.

9. Consideramos que una interpretación conforme al sentido atribuible a los términos de las normas del Tratado, según establece la regla general de interpretación contenida en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969[1], debe realizarse en concordancia con el llamado "principio de efectividad". De conformidad con este principio, los tratados internacionales deben interpretarse de manera tal que se asegure el efecto de sus disposiciones.

10. Tomando en cuenta que el enfoque debe ser la práctica y conducta del Estado, la República Dominicana señala también que resulta erróneo incluir las expectativas de los inversionistas sobre el trato que espera recibir en base a lo que ha sido ofrecido, para decidir si el Estado ha cumplido con el Nivel Mínimo de Trato. Lo relevante es la conducta del Estado como único factor a considerar, puesto que el Nivel Mínimo de Trato debe ser un concepto objetivo que evalúa el trato que un Estado otorga a un inversionista. De ser un concepto variable en función de la apreciación subjetiva del inversionista sobre el trato que espera recibir, tendría un efecto lesivo en la capacidad regulatoria de los Estados.

---

[1] ***Artículo 31 Convención de Viena sobre el Derecho de los Tratados de 1969:*** "Regla general de interpretación. 1. Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin".

REPÚBLICA DOMINICANA
Ministerio de Industria y Comercio
Administración de Tratados Comerciales
Santo Domingo, Distrito Nacional
"Año del Fortalecimiento del Estado Social y Democrático de Derecho"

10. Tomando en cuenta de que el enfoque debe ser la práctica y conducta del Estado, la República Dominicana señala también que resulta erróneo incluir las expectativas de los inversionistas sobre el trato que espera recibir en base a lo que ha sido ofrecido, para decidir si el Estado ha cumplido con el Nivel Mínimo de Trato. Lo relevante es la conducta del Estado como único factor a considerar, puesto que el Nivel Mínimo de Trato debe ser un concepto objetivo que evalúa el trato que un Estado otorga a un inversionista. De ser un concepto variable en función de la apreciación subjetiva del inversionista sobre el trato que espera recibir, tendría un efecto lesivo en la capacidad regulatoria de los Estados.

11. En conclusión, la República Dominicana considera que las Partes del Tratado expresan que se debe de observar el Nivel Mínimo de Trato requerido por el derecho internacional consuetudinario como el estándar de tratamiento en el Artículo 10.5 del Tratado.

Con sentimientos de respeto y consideración,

José del Castillo Saviñón
Ministro

JDCS
KN/ag

Annex C

Teco Guatemala Holdings LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Non-disputing Party Submission of Honduras, Nov. 15, 2012

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

EN EL ARBITRAJE ENTRE

TECO Guatemala Holdings, LLC
Demandante
y
LA REPUBLICA DE GUATEMALA
Demandado

Caso CIADI NO. ARB/10/23

==========

ESCRITO DE PARTE NO-CONTENDIENTE DE LA REPUBLICA DE HONDURAS

==========

1. La República de Honduras presenta esta comunicación de conformidad con el Artículo 10.20.2 del Tratado de Libre Comercio entre la República Dominicana, Centroamérica y los Estados Unidos (el "Tratado"), sobre la interpretación del Artículo 10.5 del Tratado.

2. Honduras no se pronuncia sobre los hechos de está disputa, y el hecho que está es una cuestión jurídica que haya surgido durante el procedimiento no se aborde esta comunicación no deberá considerarse como que Honduras esta de acuerdo o en desacuerdo con la posición adoptadas por las partes contendientes.

3. En el arbitraje internacional de inversiones actual se manejan dos conceptos muy distintos bajo el nombre de "trato justo y equitativo." El primer concepto de "trato justo y equitativo" se hace con referencia al nivel mínimo de trato bajo el derecho internacional

consuetudinario, y es un concepto muy limitado. El segundo concepto de "trato justo y equitativo" ha sido utilizado en muchos tratados de protección de inversiones, pero sin relacionarlo al nivel mínimo de trato bajo el derecho internacional consuetudinario, y por lo tanto es un concepto más amplio que el primero.

4. De conformidad con el Artículo 31.1 de la Convención de Viena sobre el Derecho de los Tratados, los tratados deben interpretarse de buena fe, de conformidad con el significado corriente de sus términos.

5. El Artículo 10.5 establece que cada Estado Parte "otorgará a las inversiones cubiertas un trato acorde con el derecho internacional consuetudinario, incluido el trato justo y equitativo, así como la protección y seguridad plenas." Es importante comenzar con la observación que el título y objeto del Artículo 10.5 es el "Nivel Mínimo de Trato," no el "trato justo y equitativo." El "trato justo y equitativo" solamente se menciona con el rango de un "concepto" que está incluido en el "Nivel Mínimo de Trato." El segundo párrafo del Artículo 10.5 establece claramente que este concepto de "trato justo y equitativo" no puede ir más allá del nivel mínimo de trato a los extranjeros según el derecho internacional consuetudinario.

6. Por lo tanto, los términos del Artículo 10.5 del Tratado reflejan claramente la intención de los Estados Parte de adoptar el concepto más restrictivo posible de "trato justo y equitativo" como parte del nivel mínimo de trato conforme al derecho internacional consuetudinario.

7. El Anexo 10-B del Tratado deja claro que al referirse al derecho internacional consuetudinario en el Artículo 10.5, los Estados Parte entendieron que el derecho internacional consuetudinario es el que "resulta de una práctica general y consistente de los Estados, seguida por ellos en el sentido de una obligación legal."

8. Para determinar cuál es el estado actual del derecho internacional consuetudinario es necesario referirse a la práctica de los Estados, no a decisiones de tribunales arbitrales que no han examinado el nivel mínimo de trato. Desde los tiempos de la Corte Permanente de Justicia ha quedado establecido que la parte que alega la existencia de una norma de derecho internacional consuetudinario corre con la carga de la prueba para demostrar que existe una práctica general y consistente de los Estados seguida por un sentimiento de obligación legal que ha generado la norma alegada.

9. Debido al origen del "Nivel Mínimo de Trato" en el derecho internacional consuetudinario, como un "piso" absoluto que complementa la obligación de los Estados de otorgar a los extranjeros al menos el mismo nivel de trato que los Estados otorgan a sus propios nacionales, solamente acciones de carácter chocante, excesivo, ultrajante, de parte de un Estado, pueden violar el nivel mínimo de trato, incluyendo el trato justo y equitativo como un concepto incluido en el nivel mínimo de trato.

10. La República de Honduras considera válidos los siguientes ejemplos específicos de conducta que puede violar el nivel mínimo de trato: una grave denegación de justicia, una arbitrariedad manifiesta, una injusticia flagrante, una completa falta de debido proceso, una discriminación manifiesta, o la ausencia manifiesta de las razones para una decisión.[1] Sin embargo, debido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel mínimo de trato.

José Adonis Lavaire
Secretario de Estado en los Despachos de
Industria y Comercio

[1] *Glamis Gold, Ltd. c. United States of America*, Laudo del 8 de junio de 2009, párrafos 616, 627, *disponible en* http://italaw.com/documents/Glamis_Award_001.pdf.

Annex D

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

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC,

Claimant/Investor

-and-

THE REPUBLIC OF GUATEMALA,

Respondent/Party.

ICSID Case No. ARB/10/23

SUBMISSION OF THE UNITED STATES OF AMERICA

---

1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), the United States of America makes this submission on a question of interpretation of the Agreement. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

2. CAFTA-DR Article 10.5.1 requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." CAFTA-DR Article 10.5.2 specifies that:

> For 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. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

In CAFTA-DR Annex 10-B, "[t]he Parties confirm[ed] their shared understanding that 'customary international law' generally and as specifically referenced in Article[] 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation."

3. These provisions demonstrate the States Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in

CAFTA-DR Article 10.5. As the United States has noted in previous submissions under the NAFTA, 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.[1]

4. These provisions demonstrate the States Parties' intention that Article 10.5 articulate a standard found in customary international law – *i.e.,* the law that develops from State practice and *opinio juris* – rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.[2] Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 10.5.

5. Nor is the principle of "good faith" a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[3]

6. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector.[4] Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as

---

[1] *See, e.g.,* U.S. Memorial on Jurisdiction and Admissibility, *Methanex v. United States*, NAFTA/UNCITRAL (Nov. 13, 2000), http://www.state.gov/documents/organization/3949.pdf; U.S. Post-Hearing Submission on Article 1105(1) and *Pope & Talbot, ADF Group Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/00/1 (June 27, 2002), http://www.state.gov/documents/organization/12001.pdf; U.S. Counter-Memorial, *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL (Sept. 19, 2006), http://www.state.gov/documents/organization/73686.pdf; U.S. Counter-Memorial, *Grand River Enters. v. United States*, NAFTA/UNCITRAL (Dec. 22, 2008), http://www.state.gov/documents/organization/114065.pdf.

[2] *See, e.g., Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶¶ 607-08 (June 8, 2009) (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom").

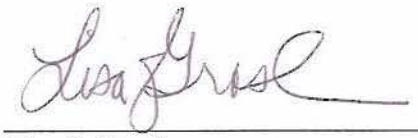
[3] *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20) (internal quotation marks omitted).

[4] *See, e.g., Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) ("Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.").

that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard.[5]

7. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[6] "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[7] Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.[8] Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[9]

Respectfully submitted,



Lisa J. Grosh
Assistant Legal Adviser
Jeremy K. Sharpe
Chief, Investment Arbitration

---

[5] *See, e.g., International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) (citations omitted); *see also* U.S. Counter-Memorial, *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, at 218-262 (Sept. 19, 2006), http://www.state.gov/documents/organization/73686.pdf (discussing the customary international law minimum standard of treatment in the context of regulatory action); U.S. Rejoinder, *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, at 139-243 (Mar. 15, 2007), http://www.state.gov/documents/organization/82700.pdf (same).

[6] *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Judgment of Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation and internal quotation marks omitted).

[7] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also North Sea Continental Shelf (Federal Rep. of Germany v. Netherlands/Denmark)*, 1969 I.C.J. 3, ¶ 74 (Judgment of Feb. 20) ("[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."); CLIVE PARRY ET AL., ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 81-82 (1986) (noting that a customary international legal rule emerges from "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law").

[8] *Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common laws, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.").

[9] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

Neale H. Bergman
David M. Bigge
John I. Blanck
Alicia L. Cate
Nicole C. Thornton
Attorney-Advisers
Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

November 23, 2012

Annex E

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

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration Between:	
TECO GUATEMALA HOLDINGS, LLC, Claimant,	
and	Case No. ARB/10/23
THE REPUBLIC OF GUATEMALA, Respondent.	
	Volume 5

HEARING ON JURISDICTION AND MERITS

Monday, March 4, 2013

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 8:17 a.m. before:

MR. ALEXIS MOURRE, President of the Tribunal

PROFESSOR WILLIAM W. PARK, Arbitrator

DR. CLAUS von WOBESER, Arbitrator

Also Present:

MS. ANNELIESE FLECKENSTEIN,
Secretary to the Tribunal

MR. BINGEN AMEZAGA,
Assistant to the President of the Tribunal

Court Reporters:

MR. DAVID A. KASDAN, RDR-CRR
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

SR. VIRGILIO DANTE RINALDI, S.H. (via video)
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina
(5411) 4957-0083

Interpreters:

MS. SILVIA COLLA

MR. CHARLES ROBERTS

MR. DANIEL GIGLIO

APPEARANCES:

On behalf of the Claimant:

MS. ANDREA J. MENAKER
MR. JAIME M. CROWE
MR. PETR POLASEK
MS. KRISTEN M. YOUNG
MS. SARA SARGEANTSON
MS. ERIN VACCARO
White & Case, LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807
(202) 626-3617

Representing the Claimant:

MR. CHARLES A. ATTAL, III

MR. JAVIER CUEBAS

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. NIGEL BLACKABY
MR. LLUÍS PARADELL
MS. NOIANA MARIGO
MR. JEAN PAUL DECHAMPS
MS. LAUREN FRIEDMAN
MS. GISELA PARIS
MS. GUADALUPE LOPEZ
MS. KATHERINE IBARRA
MS. ALLISON GILCHRIST
Freshfields Bruckhaus Deringer U.S. LLP
701 Pennsylvania Avenue, N.W.
Suite 600
Washington, DC 20004
(202) 777-4500

On behalf of the Republic of Guatemala:

MR. VLADIMIR OSMAN AGUILAR
MR. SAÚL OLIVA
MR. EVER OBDULIO BARRIENTOS PADILLA

On behalf of Arenales & Skinner-Klée:

MR. ALEJANDRO ARENALES
MR. ALFREDO SKINNER-KLÉE
MR. RODOLFO SALAZAR

APPEARANCES: (Continued)

Non-Disputing Parties' Representatives:

On behalf of the Republic of El Salvador:

MR. LUIS PARADA
MR. MARK CLODFELTER
MR. DEREK SMITH
Foley Hoag, LLP

On behalf of the Dominican Republic:

MS. KATRINA NAUT
Directora General de Comercio Exterior
Administración de Tratados
Comerciales Ministerio de Industria y
Comercio

MR. ARIEL GAUTREAUX
Analista Legal
Ministerio de Industria y Comercio

MS. LEIDLYLIN CONTRERAS
Abogado Ayudante
Consultoría del Poder Ejecutivo

On behalf of the United States of America:

MR. JEREMY K. SHARPE
Chief, Investment Arbitration, Office of
International Claims and Investment Disputes
MR. JOHN DALEY
Deputy Assistant Legal Adviser
MS. ALICIA CATE
Attorney Adviser
United States Department of State

C O N T E N T S

C O N T E N T S (Continued)

P R O C E E D I N G S

PRESIDENT MOURRE: So, good morning, everyone. I apologize this hearing in ICSID case 10/23.

We will start today as agreed with hearing presentations from non-disputing parties. I don't know whether the distinguished representatives of the non-disputing parties are here in the room.

Good morning.

Are you for?

MR. PARADA: El Salvador.

PRESIDENT MOURRE: And do we have someone from Dominicana?

MS. NAUT: Good morning.

PRESIDENT MOURRE: Good morning.

And I think the United States would like to make a very short presentation as well. That's what I heard today. Is anyone in the room from the United States?

MR. SHARPE: Yes.

PRESIDENT MOURRE: Good morning. I understand that your presentation will be very short.

08:28:56 MR. SHARPE: A couple of minutes.

PRESIDENT MOURRE: Okay. So, they're going to be very short. Okay, thank you.

No objection from the Parties?

And after that we will hear from Mr. Giacchino, Mr. Moller, and Mr. Colom. And after that we have the legal experts.

We really need to go through the legal experts today, so I will be grateful if the Parties could arrange--I believe the remaining time allocation is far too long for two days of hearing. It doesn't take into account the fact Mr. Mate was not heard, but I think the goal today is to go through the legal experts, and I would be grateful if the Parties could at some point during the day confer and arrange, agree on their allocation of time so that we would be able to terminate today with the legal experts at a reasonable time, maybe 7:00 p.m., so.

MR. BLACKABY: That will be fine, Mr. President.

Just one brief comment with regard to the non-disputing parties. I mean, it was agreed between

the Parties as we indicated in the letter to the Tribunal that each of us reserved the right to make brief submissions after the non-disputing parties had made their representations.

PRESIDENT MOURRE: Yes, this is noted.

Do we have any further matter before hearing El Salvador?

MS. MENAKER: No, not from Claimant.

MR. BLACKABY: Nor from Respondent.

PRESIDENT MOURRE: Can I then invite the representative for San Salvador to take the floor.

I would be very grateful, sir, if you could really not exceed 15 minutes. We agreed that you would have a maximum of 15 minutes. We have a very tight schedule, as you heard, so we will need to limit your presentations to what was agreed. You have the floor. Thank you very much.

OPENING STATEMENT BY COUNSEL FOR EL SALVADOR

MR. PARADA: Thank you, Mr. President, Members of the Tribunal. Good morning.

The most important decision this Tribunal will make in this proceeding is an interpretation of

Article 10.5 of the Free Trade Agreement between the United States, Dominican Republic, and Central America, known as DR-CAFTA or CAFTA.

Four non-disputing parties of CAFTA have already exercised their right under the Treaty to make written submissions to this Tribunal regarding the interpretation of Article 10.5; and today it is my privilege to address the Tribunal on behalf of the Republic of El Salvador to further explain El Salvador's written submission.

I would like to begin by emphasizing that the CAFTA non-disputing parties do not have an interest in the outcome of a particular case. They're here, though, because they do have a long-term interest in preserving the integrity and viability of the Treaty, and they know and understand that an important part of preserving the integrity of the Treaty involves assisting arbitral tribunals that are called to interpret the provisions of the Treaty that the State Parties to CAFTA negotiated, signed, and ratified.

This is particularly important when a tribunal is called to interpret the provision as

important as the Minimum Standard of Treatment in Article 10.5. And to interpret Article 10.5, El Salvador believes it is important to begin with the text of the article; and, in that regard, I would like to make a few observations regarding the most relevant provisions of this Article.

The first observation is that the title of Article 10.5 is, "Minimum Standard of Treatment." This term, "Minimum Standard of Treatment," is repeated twice in the text of Article 10.5 as an umbrella concept that includes and informs the interpretation of the entire article.

Moving on, Paragraph 1 of Article 10.5 states that each State Party to CAFTA has an obligation to treat covered investments in accordance with customary international law, including Fair and Equitable Treatment and Full Protection and Security. This is the first time that we see the term customary international law, which will be repeated also several times in this Article.

Paragraph 2 brings together these two terms and starts by explaining that when Paragraph 1 is

referring to treatment in accordance with customary international law, it is referring to the Minimum Standard of Treatment under customary international law.

Paragraph 2 also explains that the concept of Fair and Equitable Treatment and the concept of Full Protection and Security, which are the two concepts that are included under the umbrella of the Minimum Standard of Treatment, do not require treatment in addition to or beyond what is required under that standard and do not create additional substantive rights.

So the CAFTA Parties went to great lengths to define and limit the concepts included in Article 10.5 under the umbrella of the Minimum Standard of Treatment under customary international law.

And the final observation that I have this morning regarding the text of Article 10.5 is particularly relevant for the task before this Tribunal. Paragraph 2 says that the concept of Fair and Equitable Treatment includes the obligation not to deny justice, and this is one of the most important

observations of Article 10.5 because the only obligation that the text of this Article expressly recognizes as being included in the concept of Fair and Equitable Treatment is the obligation not to deny justice.

Now, this is not to say that the reference to denial of justice is meant to be exhaustive. As the United States of America explained the term "Minimum Standard of Treatment" in Paragraph 3 of its written submission, and I quote, "The Minimum Standard of Treatment is an umbrella concept reflecting a set of rules, a set of rules, that over time has crystallized in customary international law in specific contexts.

So, it would be possible that another rule or obligation in addition to the obligation not to deny justice could also be recognized as included in the Minimum Standard of Treatment under the concept of Fair and Equitable Treatment in Article 10.5. However, the existence of a rule of customary international law cannot be presumed. In a CAFTA arbitration, a claimant that alleges the existence of an obligation under this umbrella of the Minimum

Standard of Treatment has the burden to prove that this alleged obligation exists as an obligation under customary international law.

And how can a claimant establish the existence of a rule or obligation under customary international law? The text of the CAFTA itself provides the answer because CAFTA defines with precision the only source that may be used to prove the existence of a rule of customary international law.

Article 10.5 directs us to Annex 10 B in Footnote 1 that says Article 10.5 shall be interpreted in accordance with Annex 10 B.

And Annex 10 B explains the understanding of the CAFTA Parties that customary international law generally and specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation.

So, it follows that to establish that the concept of Fair and Equitable Treatment in Article 10.5 includes a rule or obligation in addition

to the obligation not to deny justice. A claimant would have to prove that a rule of customary international law exists by proving two things:

One, that there is a general and consistent practice of States;

And, two, that such practice is followed from a sense of legal obligation. In other words, El Salvador understands that, in the absence of evidence based on general and consistent practice of States follows from a sense of legal obligation, the concept of Fair and Equitable Treatment as part of the Minimum Standard of Treatment under customary international law, as it is required in Article 10.5 of CAFTA can only be applied in the context of denial of justice.

This understanding is not just El Salvador's interpretation. This is what the text of the Treaty provides for. Is this a harsh or extreme interpretation? Absolutely not. Article 10.5 was always intended to offer a very limited protection--a floor, if you will--in the acceptable level of treatment to covered investments. This is why it is called "Minimum Standard of Treatment."

But a Claimant that invokes protection under Article 10.5 always has the opportunity to prove the existence of another rule or obligation under customary international law. The only requirement is that that Claimant must prove the existence of such rule with evidence from general and consistent practice of States followed from a sense of legal obligation as it is required in Annex 10 B.

We should also keep in mind that Article 10.5 is not the only protection that CAFTA affords to covered investments. CAFTA includes protections related to national treatment, most favored nation treatment, and expropriation. CAFTA even allows an investor to bring claims to international arbitration for alleged breaches of investment agreements, and investment authorizations; that is, for alleged breaches of contracts with the State. So, Article 10.5 is not the only protection available to a CAFTA investor. However, if an investor chooses to bring a claim for an alleged breach of Article 10.5 in areas other than denial of justice and Full Protection and Security, that Claimant has the burden to prove

the existence of such obligation under customary international law in accordance with Annex 10(b).

In conclusion, El Salvador invites the Tribunal to focus on the text of the Treaty as the Tribunal decides on the correct interpretation of Article 10.5. This provision, which was negotiated, signed, and ratified by all the seven States Parties to CAFTA, all of these States have a long-term interest in preserving the integrity and viability of the Treaty not just for their own benefit, but the benefit of their nationals that invest and other CAFTA Parties.

This concludes El Salvador's oral submissions. Thank you very much.

PRESIDENT MOURRE: Thank you very much.

I propose, if there are comments from the Parties, we will take them after we hear the representative from the Dominican Republic and the United States, if that's okay.

So, thank you very much. This is much appreciated.

Can I now invite the representative from

Republica Dominican.

OPENING STATEMENT BY COUNSEL FOR DOMINICAN REPUBLIC

MS. NAUT: First of all, I would like to say good morning to all of you. And also I would like to say good morning to the distinguished members of the Tribunal: Mr. Alexis Mourre, President; Professor William Park, Arbitrator; Mr. Claus von Wobeser, Arbitrator.

The Dominican Republic, based on the provisions in Article 10.20.2 of the Treaty between the Dominican Republic, Central America, and the United States, would like to state the following in connection with the application of Article 10.5 of the Treaty.

In this sense, the Article establishes that each of the Parties shall grant or afford the covered investments treatment that is in accordance with customary international law, including Fair and Equitable Treatment as well as Full Protection and Security; and it continues to establish that for greater certainty, Paragraph 1 prescribes that the minimum level of treatment that has been granted to

foreigners based on customary international law is the Minimum Standard of Treatment to be afforded to the covered State investments. The concepts of Fair and Equitable Treatment and legal certainty have no need for further understanding more than the level expressed there, and it does not create any substantive right, and the determination that there has been breach of another provision of this Treaty or any other international agreement does not state that there was a breach of this Article.

From this, we can say that Fair and Equitable Treatment established in the Treaty should be understood as part of the Minimum Standard of Treatment that is to be afforded to foreigners based on customary international law. This is quite different from the Fair and Equitable principle that has been independently included in many investment protection agreements and that do not have any connection with the Minimum Standard of Treatment under the customary international law.

Therefore, the Dominican Republic reiterates that the purpose and the objective of Article 10.5 of

the Treaty should limit itself to the minimum level of treatment to be afforded to foreigners based on customary international law rather than Fair and Equitable Treatment as an isolated concept.

As for the minimum level of stand of treatment to be afforded to foreigners based on customary international law, jurisprudence in this subject has also verified that a breach comprises the following elements: Denial, gross and severe denial of justice, arbitrary treatment, are also--are inconsistent--arbitrary treatment that has to do with judicial policies as well as proceedings, and it becomes a denial of the purpose and the policies and absence of due process that has an impact on the administration of justice, also flagrant injustice. And, finally, but not less important, clear discrimination or the absence of justification for a decision.

Based on this, the origin of the Minimum Standard of Treatment under customary international law is an absolute floor, or it is considered by many to include actions that are extreme by a State that

could constitute the elements, the key elements, to breach the minimum standards of treatment.

As a consequence, this is the opinion of the Dominican Republic. To breach the minimum standard of treatment under customary international laws included in Article 10.5 of the DR-CAFTA, a measure to be attributed to the State should be extreme enough to be below the standards that had been internationally accepted.

Therefore, only conducts that are clearly of an arbitrary nature and that are very severe, conduct could be claimed under 10.5 of the DR-CAFTA rather than the mere breach or arbitrary nature.

And taking into account what the focus should be and that the focus should be on the conduct of the State, the Dominican Republic indicates that it is a mistake to include the expectations of the investors vis-à-vis the treatment that they expect to receive based on what they had been offered to decide whether the State has complied with the Minimum Standard of Treatment.

The conduct of the State is the key element

as the only factor to take into account, since the Minimum Standard of Treatment should be an objective concept to assess the conduct and also the treatment afforded by the State in connection with an investment. And this is different from the subjective view of the investor and the expected treatment that this investor expects to receive, and this would have a negative effect on the States.

To conclude, the Dominican Republic considers that the Parties to the Treaty have clearly stated and concretely stated their intention to include the Minimum Standard of Treatment afforded to foreigners under customary international law, and that is the Minimum Standard of Treatment as stated in Article 10.5 of the agreement, and this is the reason why the Dominican Republic is here today, because the Dominican Republic believes that this Tribunal shall implement the right application or the right interpretation of Article 10.5 under CAFTA.

Thank you very much.

PRESIDENT MOURRE: Thank you very much.

We call on the representative for the United

States of America. Please, you have the floor.

OPENING STATEMENT BY COUNSEL FOR THE UNITED STATES

MR. SHARPE: Thank you, Mr. President, and Members of the Tribunal. I'm Jerry Sharpe, the Chief of Investment Arbitration at the U.S. Department of State.

The United States thanks the Tribunal and the disputing parties for the opportunity to make two brief remarks this morning.

First, we wish to reiterate that the United States takes no position on the merits of this case. In accordance with CAFTA-DR Article 10.20.2, the United States exercises its right as a non-disputing party to make submissions on questions of treaty interpretation, whether or not the investor is a United States investor.

We thus would reject any suggestion that our written submission in this case somehow reflects a failure by the United States to, "protect," a U.S. investor.

Rather, we exercised our right under the Treaty to draw the Tribunal's attention to the Treaty

Parties' shared understanding that the customary international law Minimum Standard of Treatment in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. The burden, we noted, rests with the Claimant to establish the existence and applicability of a relevant obligation.

Second, the disputing parties have discussed the non-disputing parties' views on the question of legitimate expectations. As the United States observed in its written submission, in our view, States may modify or amend their Regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's expectations about the State of Regulation in a particular sector.

Regulatory action violates Fair and Equitable Treatment under the Minimum Standard of Treatment where, for example, it amounts to a denial of justice or manifest arbitrariness falling below international minimum standards. Should it be helpful, a more

complete statement of the United States's views can be found in the U.S. Counter-Memorial in Grand River Enterprises versus the United States, beginning at Page 96, which is available on-line, including on the State Department's Web site.

Thank you very much, Mr. President, Members of the Tribunal.

PRESIDENT MOURRE: Thank you very much.

Do the Parties wish to make any comments on the non-disputing parties' presentations?

Claimant?

MS. MENAKER: Claimant doesn't believe it's necessary and is prepared to just respond in the Post-Hearing Submissions.

PRESIDENT MOURRE: Thank you.

Respondent?

MR. BLACKABY: I think we can also, in the absence of any response from Claimant, I think we can also reserve any observations for the Post-Hearing Brief.

PRESIDENT MOURRE: Very well. Thank you very much.

So, shall we now start hearing Mr. Giacchino?

Is Mr. Giacchino in the room?

MR. BLACKABY: We need a little bit of organization of the witness stand.

PRESIDENT MOURRE: No problem.

LEONARDO GIACCHINO, CLAIMANT'S WITNESS, CALLED

MR. BLACKABY: Just for the record, we are distributing the Core Bundle that was distributed in New York. We appreciate with all the documents in this case and that we have extra copies of the Core Bundle and the bundle which is being distributed for the cross-examination of Mr. Giacchino.

PRESIDENT MOURRE: Good morning, Mr. Giacchino.

THE WITNESS: Good morning.

PRESIDENT MOURRE: You have been called to testify in this arbitration by the Claimant, as you know.

You should have in front of you the text of the Declaration which I would be grateful if you could read for the record.

THE WITNESS: I solemnly declare upon my

honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

PRESIDENT MOURRE: Thank you very much.

Will you testify in Spanish or English?

THE WITNESS: English.

PRESIDENT MOURRE: In English, very well.

We have in front of us two statements that you signed. The first for the record is CWS-4 and dated 23 September 2011, and the second one is CWS-10 and is dated 24 May 2012.

Do you have a copy of those declarations with you?

THE WITNESS: Yes, I do.

PRESIDENT MOURRE: Do you confirm those declarations?

THE WITNESS: Yes.

PRESIDENT MOURRE: Is there any corrections or amendments you would like to make?

THE WITNESS: No.

PRESIDENT MOURRE: Thank you very much.

Ms. Menaker, do you have any question on direct?

MS. MENAKER: Mr. Polasek will be doming the direct.

MR. POLASEK: Good morning, Mr. President and Members of the Tribunal. I'm Petr Polasek, counsel for Claimant, and we just have a few quick questions for Mr. Giacchino.

DIRECT EXAMINATION

BY MR. POLASEK:

Q. Mr. Giacchino, Guatemala asserts in the Rejoinder that the CNEE's technical team involved in EEGSA's 2003 Tariff Review was understaffed and that its ability to analyze information received from EEGSA was limited. How competent did the CNEE's technical team involved in the 2003 review appear to you?

A. The 2003 team that CNEE assembled, it was highly qualified on a technical side. They have the person in charge, Ricardo Bialus from the CNEE, who was very knowledgeable of the network. When we presented the initial results, he surprised us because he knew the location of the feeders, you know, the streets where the lines went through and everything on a great deal of detail. The person seconded him was

Annex F

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Non-disputing Party Submission of El Salvador, Mar. 19, 2010

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

March 19, 2010

1. Pursuant to Article 10.20.2 of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA"), the Republic of El Salvador makes this submission to address a question of treaty interpretation that has arisen in the arbitration initiated by Railroad Development Corporation against the Republic of Guatemala.

2. Specifically, the Republic of El Salvador would like to submit comments regarding the issue of whether CAFTA Chapter Ten applies to disputes that existed before CAFTA entered into force and remain unresolved after CAFTA entered into force.

3. CAFTA Chapter 10 does not include specific provisions regarding pre-existing disputes. However, the Republic of El Salvador considers the provisions of CAFTA Articles 10.1.1, 10.1.3, and 10.15, helpful to determine whether a dispute already in existence before CAFTA entered into force, and that remains unresolved after CAFTA entered into force, can give rise to a claim under CAFTA Chapter Ten.

4. CAFTA Article 10.1 creates an express temporal limitation on all of the provisions on investment in CAFTA Chapter 10, including the provision on dispute resolution. CAFTA Article 10.1.1 establishes that Chapter Ten applies to measures. Measure is a defined term that includes "any law, regulation, procedure, requirement, or practice." (CAFTA Article 2.1.) CAFTA Article 10.1.1 further explains that these "measures" to which Chapter 10 applies are measures "adopted or maintained" by a CAFTA Party. The use of "adopted and maintained" without the defined term "existing" indicates that Chapter 10 applies only to measures adopted or maintained after CAFTA entered into force. Moreover, Article 10.1.1 must be read in light of the temporal limitations set forth in Article 10.1.3.

5. The express statement of non-retroactivity in CAFTA Article 10.1.3 leaves no room for doubt regarding this understanding of Article 10.1.1. Article 10.1.3 states:

> 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.

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 expressly affirms that this principle applies to all of the provisions on investment in CAFTA Chapter Ten, including Section B: Investor-State Dispute Settlement. The consent of CAFTA Parties to arbitration in CAFTA Article 10.17, for example, is thus expressly limited *ratione temporis* by the language of CAFTA Articles 10.1.1 and 10.1.3 and does not include consent to arbitration with respect to measures adopted or any act or fact that took place or any situation that ceased to exist before the date of entry into force of CAFTA for the consenting Party.

6. Finally, CAFTA Article 15, the first article in Chapter Ten's Investor-State Dispute Settlement Section, begins with the following reference: "In the event of an investment dispute . . ." When read in the context of the temporal limitation of CAFTA Article 10.1.1 and 10.1.3, this phrase can only mean an investment dispute based on CAFTA, *i.e.,* an investment dispute that arose after CAFTA entered into force. In other words, an investment dispute as that term is used within CAFTA can only arise once CAFTA is in force.

7. The Republic of El Salvador interprets all these provisions to mean that a dispute that existed before CAFTA entered into force which relates to an "investment" as that term is defined under Article 10.28 of CAFTA, and that remains unresolved after

CAFTA entered into force, cannot give rise to a CAFTA claim. CAFTA is prospective in nature and the Chapter Ten dispute settlement provisions only apply prospectively from the date CAFTA entered into force. Accordingly, a dispute that existed before CAFTA entered into force, and that remains unresolved after CAFTA entered into force, cannot give rise to a claim for a violation of the substantive provisions of CAFTA.

Respectfully submitted,

Héctor Miguel Antonio Dada Hirezi
Ministro de Economía de El Salvador