

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

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

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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