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").

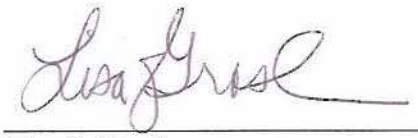
[3] *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20) (internal quotation marks omitted).

[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