Annex E

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration:
Between:

TECO GUATEMALA HOLDINGS, LLC, Claimant, Case No. ARB/10/23
and

THE REPUBLIC OF GUATEMALA, Respondent.

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

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- **MR. JAIME M. CROWE**
- **MR. PETR POLASEK**
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- **MS. NOIANA MARIGO**
- **MR. JEAN PAUL DECHAMPS**
- **MS. LAUREN FRIEDMAN**
- **MS. GISELA PARI**
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- **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 CLODFELTHER**
- **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. LEIDHLIN CONTRERAS**
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#### 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 CATIE**
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P R O C E E D I N G S

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.
And do we have someone from Dominicans?
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?
A couple of minutes.
Okay. So, they're going to be very short. Okay, thank you.
No objection from the Parties?
Okay, thank you.
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 agree 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.
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 CAPTA 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."

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 CAPTA 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 CAPTA 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 República Dominicana.

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 standard 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 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
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| 08:50:19 | The 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 online, 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 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 CNS-4 and dated 23 September 2011, and the second one is CNS-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 doing 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...