

## 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,



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Héctor Miguel Antonio Dada Hirezi  
Ministro de Economía de El Salvador