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MEMORANDUM

FR: Lori Wallach and Ben Beachy, Global Trade Watch
DT: July 19, 2012
RE: CAFTA Investor-State Ruling: Annex on Minimum Standard of Treatment, Proposed for TPP, Proves Insufficient as Tribunal Ignores Customary International Law Standard, Applies MST Definition from Past NAFTA Award to Rule against Guatemala

The June 29, 2012 investor-state ruling[1] on the merits in the Central America Free Trade Agreement (CAFTA) *Railroad Development Corporation (RDC) v. Republic of Guatemala* case confirmed that an Annex initially included in CAFTA and now proposed for the Trans-Pacific Partnership (TPP) is insufficient to foreclose tribunals from generating expansive interpretations of the Minimum Standard of Treatment (MST) language used in FTA investment chapters and proposed for TPP.

The tribunal explicitly rejected arguments raised by Guatemala, the United States, El Salvador and Honduras that under Customary International Law (CIL), the tribunal must base its MST analysis on actual state practice. Instead, the tribunal relied on a definition issued by a tribunal in the North American Free Trade Agreement (NAFTA) *Waste Management II* award to find against Guatemala. The $11.3 million judgment[2] in favor of RDC also ordered compound interest to be paid *dating back to the government action RDC challenged*.[3] Thus, Guatemala must pay at least $2 million in interest in addition to the over $11 million penalty.[4] Guatemala was also ordered to pay nearly $200,000 for RDC's tribunal fees from the jurisdictional phase, in addition to its own tribunal fees.[5]

The Office of the U.S. Trade Representative (USTR) has long claimed that the MST language in past U.S. Free Trade Agreements (FTA), now proposed for the TPP, does not expose countries to Investor-State Dispute Resolution (ISDR) liability except in instances of denials of justice as that term has long been understood under customary international law (CIL). That is to say denial of due process in administrative or court proceedings, or denial of police protection. To bolster this argument, USTR notes an Annex included in U.S. FTAs since CAFTA – now proposed for inclusion in TPP.[6] It contains circular language describing the MST standard as rooted in CIL understandings of the relevant terms. USTR argues that this annex remedied the problem of runaway ISDR tribunals generating fanciful notions of investor expectations and imagining new MST obligations for governments. On this basis, USTR argues that there is no need for further definition or limitation of the MST standard, nor exceptions to FTA investment chapter obligations.

The RDC ruling shows that in fact the current MST language and Annex do not effectively address concerns that ISDR tribunals can create expansive interpretations of governments' obligations under the MST standard. In recent years, investor-state tribunals have constructed wide interpretations of MST and the related Fair and Equitable Treatment (FET) standard to hold governments liable for an array of actions that meet the CIL standard of denial of justice. Tribunals have generated theories of investor expectations that have led to awards being issued simply because governments have altered policies of general application in response to changing circumstances, such as financial crises, or in response to public demands.[7]

BACKGROUND: The dispute between RDC and the Guatemalan government arose over RDC's operation of Guatemala's railway system. In 1997, nine years before CAFTA went into effect, RDC won a concession and concluded several key contracts with the governmental railway agency to operate the country's newly-privatized rails for 50 years.[8] After initially reopening several defunct rail lines, RDC's progress slowed. After a decade, the company had only completed one of the five phases required to restore the rail system. In particular, RDC started, but did not finish, a planned corridor to link Guatemala with Mexico.[9] It seems that RDC's sluggish investment stemmed from sub-par financial performance—in its first eight years, the company was not able to turn a profit on its Guatemala operations, a fact that the tribunal acknowledged.[10]

After months of negotiations with RDC failed to produce results, in August 2006, Guatemala's executive branch declared one of RDC's contracts to be *lesivo*—or injurious to the interests of the State. The concept of *lesivo*, a product of the Spanish legal system, reserves the right for the executive branch to declare that an administrative act, including a government contract, is contrary to the public interest. At least six Latin American countries have included the *lesivo* process in their legal code for decades.[11] Guatemalan law has reserved this right since 1928, long before RDC obtained its concession or signed any contracts with the government.[12] Indeed, Guatemala noted that the *lesivo* procedure has played a key role in the country's own constitutional checks and balances, and was a well-known feature of the country's legal system before RDC chose to sign its railway contracts.[13]

In Guatemala, an executive declaration that a contract is *lesivo* initiates a legal process in which an administrative court weighs the executive branch's claims that a contract contravenes the public interest against the defense presented by the contractor. The contractor has the right to appeal the resulting decision to the Supreme Court.[14] The government of Guatemala has declared contracts with domestic entities to be *lesivo* on 14 occasions.[15] In these cases, the Guatemalan companies had the opportunity, just as RDC did, to challenge the *lesivo* declaration through the country's administrative tribunals and Supreme Court.

RDC'S ISDR CLAIM: While defending itself in Guatemala's *lesivo*-prompted administrative court process, RDC also launched an investor-state attack under CAFTA through the International Centre for the Settlement of Investment Disputes (ICSID). Claiming that the mere declaration of *lesivo* violated its CAFTA investor rights, RDC demanded $64 million in compensation from one of the hemisphere's poorest countries. RDC argued that the *lesivo* declaration itself had gravely tarnished the company's image, causing it to lose business contracts, lines of credit, potential investors, and even police protection.[16] (At the same time, RDC's railway concession remained in effect, as did all of its governmental contracts, allowing the company to continue earning associated income up through the present.[17])

RDC claimed that Guatemala's *lesivo* constituted an indirect expropriation of its investment, violated national treatment, and failed to satisfy the company's CAFTA-guaranteed "minimum standard of treatment." The tribunal found against RDC on the first two claims,[18] but upheld the MST claim. CAFTA includes the standard MST formulation, stipulating that governments must grant foreign investors a "minimum standard of treatment" that is "in accordance with customary international law, including fair and equitable treatment."[19]

THE TRIBUNAL'S ELASTIC INTERPRETATION OF MST EXTENDS BEYOND STATE PRACTICE: Via non-disputing party submissions, the United States, El Salvador, and Honduras joined Guatemala in arguing that the MST obligation to comply with "customary international law" should be interpreted as the law practiced by "states themselves," rather than being based on the pronouncements of other ISDR tribunals.[20] Despite the inclusion of the USTR-vaunted CIL Annex, the tribunal explicitly declined to limit its consideration of "customary international law" to state practice.

Instead, taking the view that MST is an ever-evolving standard, the tribunal borrowed an interpretation from the NAFTA investor-state *Waste Management II* award, which established its own test: "… the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process." The NAFTA award also noted: "In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[21]

While noting that the interpretations in other arbitral rulings are no substitute for the "state practice" that lies at the core of determining the customary international law that defines the minimum standard of protection owed to aliens, the tribunal nonetheless relied on the interpretation of the NAFTA tribunal in the *Waste Management* case to rule against Guatemala.

The tribunal also suggested that the actual state parties to CAFTA misunderstood the pact's MST requirements and also CIL.[22] In dismissing the CAFTA signatory countries' arguments that the MST standard evolves only as does actual state practice, the panel noted that the governments' own citations to NAFTA and CAFTA case law demonstrated that arbitral decisions contribute to the understanding of international investor rights.[23] The tribunal also explained its reliance on past tribunals' rulings in NAFTA ISDR cases by noting that the definition of investors' MST rights are "constantly in a process of development."[24] Proceeding with this elastic interpretation, the tribunal declared that the Guatemalan government's *lesivo* fell into the MST definition of "arbitrary, grossly unfair, [and] unjust" generated by the tribunal in *Waste Management II.*[25]

The tribunal's ability to exercise such discretion is precisely what the U.S. CIL MST annex was ostensibly designed to foreclose. Yet despite inclusion of the annex in CAFTA, by deciding that past tribunal awards are part of CIL, the panel once again imposed an elastic MST standard, created in one panel award written by three attorneys deciding a specific case. Certainly in signing an international agreement that binds countries to meet a legal standard, governments must have greater certainty as to what their commitment comprises. This ruling suggests that, the U.S. annex notwithstanding, the MST standard now being proposed for TPP would remain open to whatever creative legal theories a tribunal may generate, rather than the actual practices of sovereign states.

BY EXPANDING BEYOND DENIAL OF JUSTICE ANALYSIS, TRIBUNAL DECIDES AGAINST GUATEMALA EVEN AS CLAIMANT IS EXERCISING DOMESTIC DUE PROCESS: In applying the *Waste Management II* standard, the panel's analysis focused both on the particular declaration of *lesivo*, and on the usage of *lesivo* in general. Before proceeding to this analysis, it is important to understand how Guatemala's *lesivo* process operates, as this also underscores the enormous discretion provided to ISDR tribunals under the current rules.
Most importantly, under the *lesivo* process, the company's disputed contract remains intact until 1) Guatemala's administrative court (the *Contencioso Administrativo*) rules on the legitimacy of the *lesivo* declaration, and 2) either the company decides not to appeal that decision or the Guatemalan

Supreme Court rules on an appeal. Indeed, even while litigating its ISDR attack on Guatemala's very initiation of the *lesivo* process, RDC was availing itself of the due process protections provided under that process.[26] Meanwhile, RDC continued to earn revenue under its Guatemalan railway contract for the nearly six years since the *lesivo* declaration.[27] (Under the tribunal's decision, RDC will revoke its contract rights once Guatemala pays the company the awarded amount.)[28]

Thus, while a *lesivo* declaration could certainly be used by a government to make unjustifiable claims, it is extremely worrisome that this tribunal pronounced Guatemala's mere initiation of the *lesivo* process to be a violation of RDC's rights under the MST standard. As is noted by the tribunal in the award, the *lesivo* declaration is not actually a binding decision, but merely the beginning of a legal process. The Guatemalan administrative and court processes – providing a contractor the opportunity to present its case before an administrative court before any action is taken, and then still appeal the resulting decision to the country's Supreme Court – fits squarely into the CIL "denial of justice" standard of requiring due process.

The fact that RDC was taking advantage of these due process rights by "fully participating" in the domestic administrative court process did not deter the tribunal.[29] On this point, the arbitrators opined that investors should be given the right to be heard under ISDR before a government has made a final decision on a matter, or has taken action to alter the contract in question.[30] That the tribunal had the discretion to move this case to the merits phase while domestic procedures were still underway highlights another aspect of current FTA investment chapter rules that requires significant change.

THE TRIBUNAL'S OVERSTEPPING APPLICATION OF ITS BORROWED MST STANDARD: Having decided that the mere initiation of the *lesivo* process could violate its expansive MST interpretation, the tribunal took issue with the government's basis for the *lesivo* declaration. (The government's formal rationale was that a railroad equipment contract with RDC had not passed through the proper legal channels and was thus invalid.[31]) The tribunal then inserted itself unabashedly into the complexities of Guatemala's domestic contract and administrative law. The tribunal contemplated whether a lack of administrative ratification for equipment contracts constitutes sufficient grounds for *lesivo* declarations,[32] and posited theories on the unstated motivations of Guatemala's Attorney General in starting the *lesivo* process.[33] Effectively, rather than reviewing whether RDC was provided with due process, the tribunal took upon itself to rule on the merits of RDC's challenge underway in the domestic *lesivo* review process.

Such an intrusion into domestic process sets a concerning precedent. For instance, U.S. administrative procedures afford companies similar, if not more restricted, rights as those provided to RDC under Guatemala's *lesivo* process. Under the U.S. domestic legal system, a firm has limited, specific bases for challenging agency decisions under the Administrative Procedure Act, which sets the terms for administrative and court proceedings related to U.S. executive branch rulemaking processes. That is to say that a firm can claim that a government agency or official has acted in an arbitrary or capricious manner in *implementing* the statutorily-set procedures for rulemaking that Congress established.[34] And, when a firm shows that the process has been arbitrary or capricious, the U.S. court does not substitute its judgment for the agency's. Rather, it may invalidate a regulation, but it then orders the agency to follow proper process to issue a new regulation. When it comes to U.S. government contracts, there are even higher degrees of judicial deference.[35] However, the message from the RDC ruling is that if a country does not want ISDR tribunals assuming the authority to second-guess such domestic administrative procedures (even if they meet the CIL due process standards), then the country should not sign agreements with investor-state enforcement.

THE TRIBUNAL'S SWEEPING PRONOUNCEMENT: With implications that extend well beyond Guatemala and the facts of this case, the tribunal then proceeded to pronounce that the very concept of *lesivo* generally clashed with the MST standard, averring that *lesivo* pronouncements in general have abusive tendencies. It concluded that any future usage of the *lesivo*, except in "truly exceptional circumstances such as in cases of corruption," could well violate CAFTA's guaranteed minimum standard of treatment for investors.[36]

This is a very troubling development. First, had the tribunal applied a denial of justice analysis based on practice of states, there would be no basis for such a sweeping declaration given the due process protections of the Guatemalan *lesivo* policy. Second, effectively, the tribunal declared that once a government signs a contract with a foreign investor that can claim MST obligations, the government is largely proscribed from terminating that contract using its non-discriminatory domestic procedures. This does not hold for domestic firms, spotlighting how the current MST standard provides foreign investors with greater rights than domestic firms, investors or contractors.

Moreover, it is quite remarkable that the tribunal considered it within its bounds to broadly pronounce legitimate *lesivo* usage as limited to "truly exceptional" cases. In doing so, three lawyers operating in a tribunal initiated by one private foreign investor deemed it appropriate to unilaterally truncate a public policy employed by a half-dozen sovereign states. Such audacity highlights why the ISDR system faces growing opposition by jurists around the world. Surely governments' use of the *lesivo,* or similar procedures to terminate a contract while providing due process for a contractor, could be legitimate for a wider array of circumstances. What if an oil company operating under a government-granted concession contract spilled tons of crude near the country's coastline through gross negligence in the operation of an offshore oil rig? Would it be permissible for the executive branch to accuse the contract of being "injurious to the interests of the state" and seek to terminate it or change its terms? The tribunal's blithe announcement that *lesivo* may be nearly categorically CAFTA-illegal is yet another example of how the current ISDR system and current investor protection standards unacceptably impinge upon the policy space that governments require to meet their obligations to their citizens.

CONCLUSION: This initial analysis focuses mainly on the controversial MST analysis issued by the tribunal, given that this is the first ISDR tribunal to interpret – and ignore – the MST Annex included in U.S. FTAs since CAFTA and proposed for the TPP. While further analysis of the ruling can reveal additional insights, at its core the ruling demonstrates that past MST language and the MST Annex do not remedy the serious problem of runaway ISDR panels fabricating new obligations for signatory governments that unacceptably limit the policy space required to fulfill their normal functions.

While this memo delves into the weeds of legal interpretation, it is worth noting in conclusion what this ruling means practically. Guatemala still does not have a functioning national railroad. Indeed, after falling into financial troubles, RDC did not progress beyond phase one of its five-phase obligation, even as it continued to earn revenues on its concession. Even so, the government has been slapped with over $13.7 million in damages, compound interest charges and tribunal costs.[37] Meanwhile, Guatemala and any other country subject to the current MST standard and ISDR are on notice that applying non-discriminatory domestic procedures to foreign contractors, even if providing due process, can result in millions of dollars in damages. The tribunal's decision to make good on this threat leaves a chilling effect on governments' efforts to serve their citizens.

ENDNOTES

[1] *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012). (Hereinafter "RDC v. Guatemala".)

[2] See *RDC v. Guatemala*, para. 283. This is an estimated award amount based on current projections. The amount is subject to change, as noted in paragraph 283, depending in part on the date at which Guatemala pays the award.

[3] *RDC v. Guatemala*, para. 283.

[4] The *lesivo* declaration was adopted on August 11, 2006. Under the overoptimistic assumption that the government could repay the entire award amount of approximately $11.3 million by August 11 of this year, Guatemala would owe six years of compound interest. At the decided rate of six-month LIBOR plus two percentage points (2.74%), and assuming annual interest calculation, total interest would thus amount to $1,990,906.

[5] *RDC v. Guatemala*, para. 283.

[6] The relevant Annex is 10-B under CAFTA. Parallel wording has been proposed as Annex12-B in the leaked TPP Investment Chapter text, available at http://tinyurl.com/tppinvestment.

[7] See, for example, *Occidental Exploration and Production Co. v. Ecuador, Tecmed v. Mexico*, and *El Paso v. Argentina*.

[8] *RDC v. Guatemala*, para. 30.

[9] See RDC v. Guatemala, Third Statement of Henry Posner III, para. 4.

[10] See *RDC v. Guatemala*, para. 269.

[11] Other Latin American countries that employ a *lesivo*-initiated administrative process include Mexico, Argentina, Peru, Ecuador, and Costa Rica. For Mexico, see R. Fraga Jimenez, "El Juicio de Lesividad en el Procedimiento Contencioso Administrativo Mexicano," Thesis, Universidad de las Américas Puebla, 2004, section 3.3.2. For Argentina, see José Roberto Dromi, "El Proceso Administrativo en el Derecho Argentino," R.D., U.C.V. Vol. I, 1977, p. 82.. For Peru, see Ramón Huayapa Tapia, "Algunos Temas Puntuales en Relación a la Regulación Normativa del Proceso Contencioso-Administrativo de "Agravio" o de Lesividad en la Ley que Regula el Proceso Contencioso Administrativo del Peru," *Derecho Administrativo: Revista de Doctrina, Jurisprudencia, y Práctica*, July/September 2010, Buenos Aires, p. 4. For Ecuador, see Nelson Fernando López Jácome, "La Interposición del Recurso de Lesividad como Mecanismo de Control de la Legalidad Dentro de la Jurisdicción Contencioso Administrativa," Masters of Law Program, Universidad Andina Simón Bolívar--Ecuador, 2008, p. 41. For Costa Rica, see Amanda Grosser Jiménez and Karen Núñez Víquez, "Modificaciones del Código Procesal Contencioso Administrativo en la Legitimación Activa y la Capacidad Procesal: Análisis Comparativo," Thesis, Universidad de Costa Rica, 2011, p. 123.

[12] The Ley de lo Contencioso-Administrativo was first enacted under Legislative Decree number 1550 in 1928 (see http://200.12.63.122/gt/mostrar_ley.asp?id=7222). In that original version, Article 3 stated: "Podrá también interponerse el recurso de lo contencioso-administrativo por la propia Administración, respecto a las providencias y resoluciones que por acuerdo gubernativo se declaren lesivas para los intereses del Estado, salvo el caso de que hubieren transcurrido cinco años desde la fecha en que se profirió la resolución de que se trata." The Ley de lo Contencioso-Administrativo and its *lesivo* provisions were subsequently revised but maintained under Legislative Decree 1881 and Legislative Decree 119-96. Source: Juan Carlos Estrada Flores, "La Autonomía Municipal y la Lesividad Administrativa," Thesis, Universidad Francisco Marroquin, October 2004.

[13] *RDC v. Guatemala*, para. 61.

[14] *RDC v. Guatemala*, para. 91.

[15] Dirección de Administración de Comercio Exterior, "Report Regarding Contencioso-Administrativo Processes Concerning *Lesivo* Declarations," website of Guatemala's Dirección de Administración de Comercio Exterior , accessed July 11, 2012.

[16] *RDC v. Guatemala*, para. 152.

[17] *RDC v. Guatemala*, para. 152.

[18] With respect to National Treatment, RDC accused Guatemala of declaring *lesivo* in order to show railway favoritism to one Ramon Campollo, a Guatemalan owner of a sugar business who had expressed interest in investing in the restoration of one of the railway lines (*RDC v. Guatemala*, para. 94). How might the government's opinion of a railroad contract be a gift to a sugar producer? Despite RDC's interesting theory that the government was secretly scheming to annul the contract so as to hand a rail line to Campollo to transport his sugar, the tribunal was "not persuaded" by the allegation of national treatment (*RDC v. Guatemala*, para. 110.) The tribunal noted that a), a sugar businessman and a rail company could not be considered to be in "like circumstances" (a prerequisite of illicit

national treatment), and b) the government had not shown favoritism in any case, since it had made no moves to grant Campollo railway rights in the nearly six years since the *lesivo* declaration (*RDC v. Guatemala*, paras. 153-155).

With respect to Indirect Expropriation, RDC declared that the pronouncement of *lesivo*, by hurting the company's business relationships, amounted to such an expropriation. The government noted that if RDC was so concerned with its reputation, it probably should not have taken out newspaper advertisements immediately following the *lesivo* pronouncement in which the company declared itself to be a "dead man walking" (*RDC v. Guatemala*, para. 60). It seems that RDC's reputational losses were partially self-inflicted. Second, the mere declaration of *lesivo*, which is not a binding decision, did not revoke RDC's right to use the railways. Indeed, the tribunal noted in its rejection of RDC's expropriation claim that the company has continued to lease out railway usage ever since the *lesivo*, an income stream accounting for 92 percent of RDC's Guatemala revenue (*RDC v. Guatemala*, para. 152). While the tribunal ruled in Guatemala's favor on this count, it did not totally close a dangerous line of interpretation in past investor-state tribunals that something less than 100 percent appropriation or destruction of real property can constitute an expropriation. Indeed, the tribunal favorably cited several awards that said that only a "substantial deprivation" had to occur (*RDC v. Guatemala*, para. 151) – a threshold that is lower than that provided for under U.S. law.

[19] *RDC v. Guatemala*, para. 212.

[20] *RDC v. Guatemala*, para. 207. Also see *RDC v. Guatemala*, paras. 208-211.

[21] *RDC v. Guatemala*, para. 219.

[22] *RDC v. Guatemala*, paras. 216-218. The panel also took a rather disparaging view of the oft-cited 1926 *Neer* case (*L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 4 R.I.A.A.) that the United States, El Salvador, and Honduras referenced as establishing the state practice concept in CIL.

[23] *RDC v. Guatemala*, para. 217.

[24] *RDC v. Guatemala*, para. 218.

[25] *RDC v. Guatemala*, para. 235.

[26] See RDC v. Guatemala, Second Expert Report by Juan Luis Aguilar Salguero, paras. 53-60.

[27] See *RDC v. Guatemala*, para. 152.

[28] See *RDC v. Guatemala*, para. 283.

[29] *RDC v. Guatemala*, para. 221.

[30] See *RDC v. Guatemala*, para. 221.

[31] See *RDC v. Guatemala*, para. 235.

[32] See *RDC v. Guatemala*, paras. 228-229.

[33] See *RDC v. Guatemala*, para. 232.

[34] See eg *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). This case remains the current standard of deference to statutorily-set procedures, as employed in numerous recent U.S. Supreme Court cases, including the Court's unanimous decision in *Freeman vs. Quicken Loans*, 132 S. Ct. 2034 (May 24, 2012).

[35] See eg *Coalition for Common Sense in Government Procurement v. U.S.*, 821 F.Supp.2d 275 (D.D.C. 2011), citing U.S. Supreme Court rulings providing a high degree of deference for administrative procurement procedures delegated by Congress, including, for example, *Heckler v. Campbell* (see *Heckler v. Campbell*, 461 U.S. 458, 466, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983).

[36] *RDC v. Guatemala*, para. 233.

[37] This figure includes the projected award amount of $11,306,740.93, the projected compound interest amount of $1,990,906, and the projected full jurisdictional phase costs of $384,854.01 (See *RDC v. Guatemala*, para. 283). While the award amount could diminish somewhat as noted above, the interest amount will likely increase as noted above. In addition, this figure does not take into account the 50% of remaining Tribunal/ICSID fees and expenses that Guatemala will have to cover for the merit phases (see *RDC v. Guatemala*, para. 283).