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July 11, 2008

VIA ELECTRONIC MAIL AND FEDEX

Ms. Natalí Sequeira
ICSID - The World Bank
MSN US-301
Dulles Commerce Center, Bldg. 100
23760 Pebble Run Drive
Sterling, VA 20166

Re: *Railroad Development Corporation v. Republic of Guatemala (ICSID) Case No. ARB/07/23*

Dear Ms. Sequeira:

Please find attached the Counter-Memorial including exhibits in the above referenced matter. An original of all documents, three (3) hard copies and five (5) CD-Rom disks which will contain these documents electronically have been sent out today to your attention via FedEx.

If you have any questions, please feel free to contact me, Ruth Espey-Romero or Kevin Stern.

Very truly yours,

C. Allen Foster

cc: Ruth Espey-Romero
Juan Pablo Carrasco de Groote
Kevin Stern
Regina Vargo
Minister of the Economy of Guatemala

Enclosures

INTERNATIONAL CENTRE FOR SETTLEMENT

OF INVESTMENT DISPUTES

RAILROAD DEVELOPMENT CORPORATION

Claimant

V.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB 07/23

COUNTER-MEMORIAL ON JURISDICTION

SUBMITTED BY

RAILROAD DEVELOPMENT CORPORATION

Claimant

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I. BACKGROUND

1. In 1997-1999, Railroad Development Corporation ("RDC") on its own behalf and on behalf of its investment enterprise, Compañía Desarrolladora Ferroviaria, Sociedad Anónima ("FVG") entered into a series of agreements which granted to FVG a 50 year usufruct of the right-of-way, track and rolling stock of the defunct national railway in order that RDC and FVG could resuscitate it and operate it, together with associated real estate activities, for the benefit of the people of Guatemala and at a reasonable profit to FVG. From 1997 until 2006, RDC and FVG executed a business plan which reasonably projected profits of $65 million over the life of the usufruct.

2. The Dominican Republic-United States-Central America Free Trade Agreement ("CAFTA-DR" or simply "CAFTA") entered into force between the United States and the Republic of Guatemala ("Republic" or "Respondent") on July 1, 2006. On August 11, 2006, the President of the Republic of Guatemala, in joint counsel with certain cabinet ministers, signed Government Resolution 433-2006, which declared the usufruct of the rolling stock of the railroad to be "INJURIOUS to the interests of the State" (the "Lesivo Resolution").[1] The Lesivo Resolution was published in the *Diario de Centro América* on August 25, 2006, and, thereby became effective on that date (Exhibit C-1). The Lesivo Resolution destroyed FVG's business and, as a result, rendered RDC's investment worthless and caused it to lose its reasonably anticipated profits.

3. On March 13, 2007, RDC (also referred to as "Claimant"), on its own behalf and on behalf of its investment enterprise, FVG, delivered to the Respondent a written notice of its intent to submit a claim to arbitration under the Investor-State dispute settlement provisions in Chapter 10 of the CAFTA. On June 14, 2007, having waited the required minimum 90 days since providing its notice and six months since the event, the Claimant made a formal request to the International Centre for the Settlement of Investment Disputes ("ICSID") for the institution of arbitration proceedings against the Republic for breaches of the substantive obligations of the CAFTA that arose from the Lesivo Resolution. The request for arbitration was accompanied by the waivers required by CAFTA Article 10.18.2(b), the validity of which is the subject of this jurisdictional objection by the Respondent.

4. On August 20, 2007, ICSID notified the parties that it had registered RDC's claim as ICSID Case No. ARB/07/23. The Tribunal was deemed to have been constituted and the proceeding begun on April 14, 2008.

5. In a letter dated May 29, 2008, the Respondent raised an objection to the Tribunal's jurisdiction based on the alleged failure of the Claimant to comply with the requirements of CAFTA Article 10.18.2(b) and requested that the Tribunal consider its objection under the expedited procedure provided for in CAFTA Article 10.20.5. By letter of June 5, 2008, the

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[1] The Lesivo Resolution nullifying the usufruct of the rolling stock was promulgated on the last day allowable under relevant Guatemalan law. Because the usufructs pertaining to the track and right-of-way predated the usufruct of the rolling stock, the time had passed for the Republic to declare those usufructs *lesivo*. As a practical matter, however, the termination of the usufruct of the rolling stock destroyed both FVG's ability to operate a railroad and any chance of securing investors for development of railroad property in the face of Respondent's declared retaking of the railroad.

Tribunal granted Respondent's request for CAFTA's expedited procedure, thereby suspending the proceedings on the merits, and granted the Claimant until July 11, 2008, to submit its response to the objection raised. This response constitutes the Claimant's written Counter-Memorial.

II. SUMMARY OF RESPONDENT'S OBJECTION

6. CAFTA Article 10.18 provides for conditions and limitations on the consent of each party to arbitration of claims arising under Article 10.16. Specifically with respect to the Respondent's jurisdictional objection, CAFTA Article 10.18 states in relevant part:

> *"2. No claim may be submitted to arbitration under this Section unless:*
>
> *(b) the notice of arbitration is accompanied,*
>
> *(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and*
>
> *(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers*
>
> *of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."*

7. In its letter of May 29, 2008, which constitutes the Respondent's written Memorial, the Republic raises four separate issues that it contends invalidate the required waivers and leaves the Tribunal without jurisdiction to adjudicate RDC's claims. The Respondent cites NAFTA jurisprudence in *Waste Management I* and *II*[2] as confirmation of the Respondent's challenge.

8. In its Memorial, the Respondent contends that RDC has not satisfied the waiver requirements of CAFTA Article 10.18.2(b) for the following four reasons:

1) The Claimant's purported waiver on behalf of FVG is ineffective or invalid on its face;

2) The Claimant explicitly and unequivocally repudiates its purported waiver in the same document;

3) Assuming *arguendo* that the Claimant's waiver is valid, by filing two arbitrations in Guatemala that involve the same issues and same measures as the instant

[2] *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/98/2) (Award of June 2, 2000) ("*Waste Management I*"). *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3) (Jurisdictional Decision of the Tribunal of June 26, 2002) ("*Waste Management II*")

arbitration, the Claimant has not taken the necessary actions to give effect to its waiver; and

4) CAFTA Article 10.18.2 required the Claimant definitively to dismiss FVG's pending arbitrations in Guatemala against Ferrocarriles de Guatemala ("FEGUA") before submitting its claims to ICSID pursuant to Article 10.16.

None of the Respondent's arguments constitute a valid basis for dismissal of RDC's claim. Each will be addressed in turn.

III. LEGAL SUBMISSIONS

ISSUE 1: RDC'S WAIVER ON BEHALF OF FVG COMPLIED WITH CAFTA

9. Respondent contends that "Claimant's purported 'waiver' is ineffective on its face." In particular, Respondent argues that "Claimant purports to submit this waiver on its behalf and on behalf of its 'investment enterprise', Compañia Desarrolladora Ferroviaria, S.A. ("FVG"). Claimant RDC, however, is not party to the arbitral proceedings initiated in Guatemala by FVG against the Republic, and Claimant fails to provide any documentation to substantiate that it has the requisite corporate authority to effectuate a waiver of local proceedings on behalf of FVG. Claimant's purported waiver on behalf of FVG is thus invalid."[3]

10. Contrary to Respondent's assertion, RDC and its investment enterprise FVG submitted their waivers precisely as required by CAFTA. As noted in the text of CAFTA Article 10.18.2(b) set forth above (¶ 6), the type of waivers required depends upon the type of claim that has been submitted to arbitration under CAFTA Article 10.16 which differentiates claims, first, according to the type of claimant and, then, by the type of obligation that has been breached by the respondent. Specifically, CAFTA Article 10.16.1(a) refers to claims submitted to arbitration by "the claimant, on its own behalf," while CAFTA Article 10.16.1(b) refers to claims submitted to arbitration by "the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly."

11. Here, Claimant RDC submitted its claim to arbitration "... on its own behalf and on behalf of its Investment Enterprise, Compañia Desarrolladora Ferroviaria, S.A., which does business as Ferrovias Guatemala ("FVG" or the "Investment Enterprise"), a Guatemalan company that it owns and controls ...."[4] As such, it represents a claim under both CAFTA Article 10.16.1(a) and CAFTA Article 10.16.1(b), and thereby requires the written waivers specified in both CAFTA Article 10.18.2(b)(i) and (ii). Stated more directly, RDC was required to provide a written waiver on its own behalf (CAFTA Article 10.18.2(b)(i)) and on behalf of its enterprise, FVG (CAFTA Article 10.18.2(b)(ii)), while the enterprise FVG must also provide a written waiver on its own behalf (CAFTA Article 10.18.2 (b)(ii)). Both the waiver by RDC on its own behalf and on behalf of FVG and the waiver by FVG on its own behalf were part of the

[3] Memorial from Attorney General, Republic of Guatemala, to Natalí Sequeira, International Centre for Settlement of Investment Disputes ("ICSID") (May 29, 2008) ("Memorial").

[4] Request for Institution of Arbitration Proceedings submitted by RDC to ICSID on June 14, 2007 (Section I(B)(2)(5)).

Claimant's request for arbitration and appear in that document as Exhibit 8. Both waivers are reproduced here as Exhibit C-2.

12. As will be argued below with respect to the third issue, the Claimant disputes the Respondent's contention that the waivers are applicable to the ongoing arbitration cases brought by FVG against FEGUA. However, even if one were to assume *arguendo* that they were, RDC's waiver explicitly applies to any rights that it has with respect to FVG. Moreover, FVG has provided a separate waiver of its own rights and, thus, is not solely reliant on RDC's waiver of its rights with respect to FVG. Simply put, there is no "hole" in this interlocking system of waivers whereby either RDC or FVG have retained any rights in connection with CAFTA Article 10.18.2 (b).

13. We find it disingenuous for the Respondent to question whether RDC has the "requisite corporate authority" over FVG. Exhibit 7 of the Claimant's request for arbitration evidences RDC's direct ownership and control of FVG. In further response to a request by an official of the Ministry of Economy of Guatemala on April 30, 2007, RDC provided the Ministry with copies of the articles of incorporation of RDC and copies of the certificates for RDC's common and preferred shares in FVG. This exchange of letters between the Ministry and counsel for RDC are reproduced here as Exhibit C-3.

14. Accordingly, there is no basis for the Respondent to contend that RDC's waiver is ineffective on its face on the grounds that RDC is not a party to local proceedings and has not documented its corporate authority over FVG.

ISSUE 2: THE CLAIMANT HAS NOT REPUDIATED ITS WAIVER

15. RDC's waiver includes the following language: "RDC, on its own behalf and on behalf of FVG, reserves the right to pursue any and all local remedies *which the ICSID arbitration panel requires* in order for RDC to avoid any contention by the Government of Guatemala that RDC has failed to exhaust local remedies. . ." (emphasis added).

16. Respondent contends that this reservation language "explicitly and unequivocally repudiates this purported waiver. . ."[5] The Respondent's Memorial does not elaborate on this contention in any way. Later in the Memorial, however, reference is made to NAFTA jurisprudence in *Waste Management I* and *II* so, presumably, the Respondent views the additional language contained in RDC's waiver as analogous to the waiver provided in *Waste Management I,* which the Tribunal in that case found to be deficient.[6]

17. At the outset, we note that the language in the waiver provisions in CAFTA Article 10.18.2 (b) and NAFTA Article 1121 (relied on in *Waste Management I)* differ in some potentially important respects. For example, NAFTA Article 1121 uses the terms "conditions

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[5] Memorial. Note: this identical reservation appears in the waivers of both RDC and FVG but, because the Respondent only raised a concern with respect to RDC's waiver, the discussion is limited to RDC's waiver. However, the same reasoning would be equally applicable to FVG's reservation.

[6] Respondent's reference to *Waste Management II* in support of its contentions is puzzling. With the exception of the discussion noted in ¶ 22 below, that decision does not substantively address any of the issues raised by Respondent here.

precedent" to submission of a claim and "only if", while the words "precedent" and "only if" do not appear in the waiver provision of CAFTA or in the current version of the U.S. "Model" Bilateral Investment Treaty (BIT), completed in November 2004. For present purposes, however, it is not necessary to explore these differences because the meaning and implication of RDC's "reservation" and Waste Management's "understanding" in *Waste Management I* are entirely different.

18. In *Waste Management I,* there were a variety of conditions, limitations, reservations or understandings attached to the waiver offered by the claimant, Waste Management. A majority of the Tribunal there found "that the Claimant [Waste Management] did not limit itself to a full transcription of the content of this Article [NAFTA Article 1121], which in itself is sufficiently complete and clearly reflects the scope of the waiver, but instead additionally introduced a series of statements that reflected *its own understanding* of the waiver submitted ... The fact is the Claimant did not have the intention of presenting the waiver within the terms prescribed by NAFTA Article 1121, rather, it had the intention to present it in accordance *with its own interests*. . ."[7] (emphases added.) Specifically, a majority of the Tribunal found that Waste Management intended its waiver to apply exclusively to proceedings that expressly invoked failure to comply with obligations of international law set forth in Chapter XI of NAFTA, while pursuing remedies under Mexican law in domestic proceedings that involved essentially the same facts and measures. A majority of the Tribunal saw these parallel, and substantively congruent, proceedings as contrary to the purpose of NAFTA Article 1121, and denied jurisdiction.[8]

19. The reasoning in the *Waste Management I* award is not applicable to the reservation in the waiver that accompanied RDC's claim, for several reasons.

20. First, RDC is offering no alternative understanding that would circumscribe what is required by the waiver provision in CAFTA. In "reserv[ing] the right to pursue any and all local remedies which the ICSID arbitration panel requires," RDC is merely preserving the necessity to pursue local remedies in the highly unlikely event *that the Tribunal requires RDC* to exhaust those local remedies. Article 26 of the ICSID Convention states that "a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" and ICSID's website indicates that, on January 16, 2003, the Republic of Guatemala notified the Centre that "[t]he Republic of Guatemala will require the exhaustion of local administrative remedies as a condition of its consent to arbitration under the Convention." While the Claimant is of the firm conviction that the Republic waived its rights to an exhaustion requirement when it gave its consent to arbitration under CAFTA Article 10.17, the Claimant did not want to find itself in a "Catch-22" situation whereby the Tribunal might deny access to ICSID arbitration until the Claimant had exhausted local remedies and the Republic might deny access to local proceedings based on the waiver that accompanied the Claimant's arbitration request.

21. While such a scenario may seem far-fetched at first, the fact is that the Respondent pursued a very similar line of argumentation in Respondent's letter sent to ICSID on July 5, 2007

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[7] *Waste Management I,* at §31.
[8] *Id.*, at §27(b).

("Letter") (Exhibit C-4). The Letter contends that RDC is forever barred from ICSID arbitration based on CAFTA because it has pursued a local remedy; and, at the same time, contends that RDC cannot bring a CAFTA-based arbitration at ICSID until it has exhausted local remedies. The logical inconsistency between the Respondent's two positions is immediately apparent and, if accepted, would prevent any investor from pursuing a CAFTA claim against the Respondent.[9]

22. Further, the Tribunal in *Waste Management II* foresaw the possibility of a Catch-22 situation and decried it. Noting that the parties had agreed that the waiver contemplated by NAFTA Article 1121 (1) (b) is definitive in its effect whatever the outcome of the arbitration, the Tribunal cautioned, "An investor in the position of the Claimant [Waste Management], who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. *Such a situation should be avoided if possible*" [10] (emphasis added).

23. Second, the Tribunal in *Waste Management I* did not say that the written waiver required by NAFTA had to be in any particular form or language, but that it had to be "clear, explicit and categorical".[11] The Claimant's waiver meets this test. There is nothing ambiguous about RDC's waiver. It contains no expressions the meaning of which need to be deduced.

24. Third, as noted by Arbitrator Keith Highet in his dissenting opinion in *Waste Management I*, "[k]eeping in mind 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,' it stands to reason that a reservation or condition in the written waiver that does not have a negative effect on its substance would be of no moment, but one that does have a negative or diluting effect on its substance would invalidate it."[12] RDC's reservation here has no negative effect on the substance of its waiver. Indeed, it has no meaning at all unless and until it is triggered by the Tribunal, at which time it represents the considered judgment of the Tribunal. As it happens, the Respondent did not choose to include its exhaustion reservation among its objections to the Tribunal's jurisdiction under CAFTA's expedited procedure, so the Tribunal has no need as yet to opine on this point and the reservation is not operative.

25. To summarize, the fact that the Claimant has waived any right to initiate or continue any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16 should not constitute an impediment to the future pursuit of local remedies in the event that ICSID should require local exhaustion first. That is the sole meaning of the Claimant's

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[9] The Respondent's argumentation in the cited Letter relates to CAFTA's Annex 10-E which permanently bars an ICSID claim under certain circumstances. While this is a different provision of CAFTA, it sets up the type of "Catch-22" situation that the Claimant seeks to avoid under CAFTA Article 10.18.2(b) in the present case. Fortunately, neither contention in the Letter is valid. First, RDC has pursued no local remedy which implicates its CAFTA rights and, second, the Respondent has not reserved *in CAFTA* any requirement that local remedies be exhausted.

[10] *Waste Management II*, at §35.

[11] *Waste Management I*, at §18.

[12] *Waste Management I*, Dissenting Opinion by Keith Highet at §5.

reservation, and there is no meaning that would permit an interpretation that the reservation forms a valid basis for dismissal of RDC's claim.

ISSUE 3: FVG'S ARBITRATIONS IN GUATEMALA DO NOT INVOLVE THE SAME MEASURES OR ISSUES AS RDC'S ICSID CLAIM

26. Respondent notes that Claimant has filed, through its investment enterprise, FVG, two arbitrations in Guatemala against FEGUA before the Conciliation and Arbitration Centre of the Guatemalan Chamber of Commerce. Respondent contends that Claimant has not taken sufficient steps to effectuate FVG's waiver because "[b]oth of these arbitrations involve the same issues raised in the instant arbitration, and both challenge the same measures that are the subject of the Claimant's claims under Article 10.16."[13]

27. The waiver required under CAFTA Article 10.18.2(b) is "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to *any measure alleged to constitute a breach referred to in Article 10.16*" (emphasis added). CAFTA defines a "measure" in Chapter 2 to include "any law, regulation, procedure, requirement, or practice."

28. The central question then is whether the measure that is the subject of FVG's two pending arbitrations in Guatemala is the same measure on which RDC is basing its legal claim at ICSID. If not, then the Claimant's waiver is not compromised. Indeed, in the arbitral award in *Waste Management I*, the Tribunal clearly stated that "... it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA. . . in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA."[14] As discussed below, such is precisely the case here with RDC's claim.

29. On June 26, 2005, after extensive efforts to convince the Republic to meet its contractual obligations, FVG initiated two arbitration cases against FEGUA based on breach of contract. The first was for FEGUA's failure to remove squatters from the railroad right of way pursuant to its obligations under Deed 402[15]. The other was for FEGUA's failure to pay monies owed to the Trust Fund for track repair and maintenance pursuant to FEGUA's obligations under Deed 820[16]. Thus, the measures in these arbitrations involve FEGUA's non-compliance with specific contractual obligations owed to FVG under those two Deeds.

30. In contrast, with respect to RDC's ICSID claim, the measure that is alleged to constitute a breach referred to in Article 10.16 is not FEGUA's breaches of contract but the *Lesivo*

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[13] Memorial.

[14] *Waste Management I*, at §27(b).

[15] Usufruct Contract of Right of Way documented by Deed Number 402 dated November 25, 1997 ("Deed 402").

[16] Trust Fund for the Rehabilitation and Modernization of the Railroad System in Guatemala documented by Deed Number 820 dated December 30, 1999 ("Deed 820").

Resolution promulgated by former President Berger which related to the entirely different Deeds 143/158.[17]

31. It is important to note that while NAFTA does not provide for a private right of action for breaches of contract under its Investment Chapter, CAFTA does. As explained in the "Summary of the Agreement" transmitted to the U.S. Congress with the implementing legislation for CAFTA, the section on "Investor-State Disputes" reads: "Chapter Ten provides a mechanism for an investor of a party to submit to binding international arbitration a claim for damages against another Party. The investor may assert that the Party has breached a substantive obligation under the Chapter or that the Party has breached an investment agreement with, or an investor authorization granted to, the investor. 'Investment agreements' and 'investment authorizations' are particular types of agreements between an investor and a host government based on contracts and authorizations respectively."[18] Unfortunately, FEGUA's breaches of contract that are the subject of FVG's pending arbitrations in Guatemala are not actionable under CAFTA because the agreement between FEGUA and RDC predates CAFTA's entry into force(and, thus, by definition, the agreement does not qualify as an "investment agreement".)[19] For this reason, the Claimant has chosen to continue to pursue its claims for FEGUA's breach of its contractual obligations specified in Deeds 402 and 820 in domestic arbitration proceedings as specified in those underlying contracts, and has not made any claim at ICSID for breach of contract under any Deed.[20]

32. In contrast, RDC's claim at ICSID alleges breaches of the substantive obligations of CAFTA as provided for in Article 10.16.1(a)(i)(A) (a claim by an investor on its own behalf that the respondent has breached an obligation under Section A) and 10.16.1(b)(i)(A) (a claim, on behalf of an enterprise that the investor controls, that the respondent has breached an obligation under Section A). A cursory look at RDC's CAFTA claim makes it plainly evident that the only measure alleged to constitute a breach referred to in Article 10.16 is the Lesivo Resolution, which occurred after CAFTA's entry into force, and that the breaches of Article 10.16 are breaches of the substantive obligations under Section A, not breaches of contract and specifically, not breach of a contract related to or arising from Deeds 402 and 820. Section III of the Table of Contents lists the "Legal Claims Under CAFTA Section A of Chapter 10" in their entirety as:

A. The Lesivo Resolution Constitutes an Expropriation under CAFTA Article 10.7.15

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[17] Usufruct Contract of Rail Equipment, Property of FEGUA in Favor of FVG documented by Deed Number 41, dated March 23, 1999, as replaced by Deed Number 143 dated August 28, 2003 ("Deed 143"), and amended by Deed Number 158 dated October 7, 2003 ("Deed 158").

[18] *See CAFTA Summary of the Agreement, Investor-State Disputes* p. 13 (Exhibit C-5).

[19] As a general rule, Chapter 10 (Investment) " … 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." (CAFTA Article 10.1.3) While the Republic's non-compliance with Deeds 402 and 820 continued to exist after CAFTA's entry into force, breach of an "investment agreement" is further constrained by the definition in CAFTA Article 10.28 which specifies, *inter alia*, that an investment agreement must be "a written agreement (FN 12) that takes effect on or after the date of entry into force of this Agreement…." As noted in ¶1, Deeds 402 and 820 were executed between 1997-1999, before CAFTA's entry into force between the Republic of Guatemala and the United States.

[20] It is so obvious that it should require no discussion that the local arbitrations at issue involve breaches of contract under two Deeds, 402 and 820, and the CAFTA claim being arbitrated here arises from the Lesivo Resolution directed at nullifying two different Deeds, 143 and 158. Thus, the proceedings cannot possibly be the same measure.

B. The Lesivo Resolution Violates Guatemala's Minimum Standard of Treatment Obligations Under CAFTA Article 10.5

C. The Lesivo Resolution Violates Guatemala's National Treatment Obligation's Under CAFTA Article 10.3

33. Thus, the measure that is the subject of the waiver required under CAFTA Article 10.18.2(b) is the Lesivo Resolution. The definition of "measure" is reinforced in the body of the claim, which states: ..."Under CAFTA Article 2.1, the definition of the term 'measure' includes 'any law, regulation, procedure, requirement, or practice.' *The Lesivo Resolution and other actions of the Government of Guatemala in connection with such resolution constitute 'measures'* adopted or maintained by Guatemala. The Lesivo Resolution has substantially and permanently impaired the ability of FVG to continue its operations in Guatemala, has destroyed FVG's business and prospects and has critically compromised the eight-year investment by RDC in the rehabilitation and operation of the Guatemalan railway system. The breaches of CAFTA Articles 10.3, 10.5, and 10.7 have given rise to continuing losses and damage to RDC and FVG. The Lesivo Resolution was the last, direct act and the immediate cause which had a direct effect on RDC's covered investments and there is no contributing, intervening or superseding cause. Such damages are the foreseeable, direct and proximate result of the breaches of CAFTA by the Government of Guatemala" (emphasis added).[21]

34. It is clear from the above that the obligations now sought to be enforced in the Claimant's CAFTA claim are distinct from those in the Guatemalan arbitration proceedings.[22] This situation is in stark contrast to *Waste Management I* where the Waste Management claimant, in its written presentation dated November 9, 1999 concerning the question of jurisdiction, stated the following: "Claimant's allegations against Mexico in this NAFTA arbitration are based on five separate 'measures' constituting violations of NAFTA, *only one of which relates to non-payment under contract*"[23] (emphasis added). On this basis, the Tribunal found: "The fact, *expressly admitted by the Claimant*, that the object of the proceedings initiated against BANOBRAS and ACAPULCO referred to one of the measures allegedly breaching NAFTA provisions is sufficient proof, in the spirit of Article 1121, to include it within the framework of conduct that the waiver should cover . . ."[24] (emphasis added).

35. While Waste Management self-confessed to the overlap of measures in their domestic and NAFTA proceedings, no such overlap exists in the present case. Moreover, the Tribunal in *Waste Management I* makes it clear that the burden of proof is on the Respondent: "For the purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, *but*

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[21] Request for Institution of Arbitration Proceedings submitted by RDC to ICSID on June 14, 2007 (Section I(B)(2)(5)).

[22] This is further reinforced by the observation of Mr. Highet in his Dissenting Opinion in *Waste Management I* that "It is true that Article 1121 does not contemplate concurrent proceedings before national courts and a NAFTA Tribunal concerning the very same issue, but '[s]uch a risk is not raised ...by collateral domestic proceedings that only relate to a portion of the factual background underlying or supporting the NAFTA claim"(¶ 14).

[23] *Waste Management I*, at §27(b).

[24] *Id.*

to have proof that the actions brought before domestic courts or tribunals *directly affect* the arbitration in that their object consists of measures also alleged in the present arbitral proceeding to be breaches of NAFTA. The term "alleged" ("presuntamente" in the Spanish version) appearing in Article 1121 is clearly indicative of the framework within which we have to operate at this very early stage of the arbitration proceedings, which means that *the elements of comparison to be used at the time of verifying compliance with the waiver are the presumed or supposed violations of NAFTA invoked by the Claimant and the actions effectively in process before other courts or tribunals at that time.* All of this without prejudice to the possibility, following an examination of the merits, of the Arbitral Tribunal verifying compliance or non-compliance as asserted by the Claimant"[25] (emphasis added). The Republic has presented no such proof here. Indeed, its Memorial does not even identify what are the "measures" at issue, in either the domestic arbitrations or the CAFTA claim, and merely asserts in conclusory fashion that they are the "same."

36. In summarizing the views of the first Tribunal in *Waste Management I*, the Tribunal in *Waste Management II* said, "The test [of whether the waiver should apply] was whether the measures complained of in the national proceedings were "measures" that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions".[26] RDC's CAFTA claim more than adequately passes this test. RDC's legal claims under CAFTA do not contend that the failure of FEGUA to remove squatters from the railroad right of way pursuant to its obligations under Deed 402 and the failure of FEGUA to pay monies owed to the Trust Fund pursuant to its obligations under Deed 820 -- the subject of its arbitral proceedings in Guatemala -- constitute an expropriation under CAFTA Article 10.7.15, violate the Minimum Standard of Treatment obligations under CAFTA Article 10.5, or violate the National Treatment obligations under CAFTA Article 10.3.

37. In summary, the waiver required by CAFTA does not pertain to FVG's pre-existing and ongoing arbitration disputes in Guatemala because the measure that is alleged to constitute a breach referred to in Article 10.16 in RDC's ICSID claim is not the same measure that is the subject of the domestic proceedings.

ISSUE 4: CLAIMANT IS NOT REQUIRED TO DISCONTINUE PENDING LOCAL PROCEEDINGS WHICH RELATE TO OTHER MEASURES AND ISSUES

38. Citing NAFTA jurisprudence in *Waste Management I and II*, the Respondent contends that "the claimant must take actions necessary to effectuate the waiver under the applicable local rules, such as affirmatively discontinuing *any* pending local proceedings"[27] (emphasis added). This is a gross overstatement because *Waste Management I* circumscribes the relevant conduct to only "parallel" proceedings or "proceedings with respect to the measure … that was alleged to be a breach of the NAFTA"[28] (and, other than summarizing the Tribunal's reasoning in *Waste Management I, Waste Management II* does not substantively address this point.)

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[25] *Id.*
[26] *Waste Management II*, at §12.
[27] Memorial.
[28] *Waste Management I*, at §IV.

39. As indicated above, the Respondent identified no measure in any domestic proceeding in Guatemala that is the same measure that is alleged to constitute a breach of the CAFTA in this proceeding. Thus, the Claimant's conduct in continuing its domestic arbitration proceedings in Guatemala is fully consistent with the waiver that accompanied its CAFTA claim, as required by CAFTA Article 10.18.2(b), precisely because the contractual violations involved therein are entirely different measures and are not invoked in Claimant's CAFTA claim.

40. It is with a sense of irony that the Claimant must respond to this point at all because, as the Respondent knows full well, FEGUA filed for an injunction in Guatemala's Conciliation and Arbitration Centre, claiming that Article 103 of the Public Agreements Act (which allows arbitration in public contracts) is unconstitutional. Numerous other objections and annulment requests of the arbitration clauses have been raised by the Republic in Guatemalan courts. Since the inception of those proceedings in June 2005, the Guatemalan arbitration proceedings have been stymied by the actions of the Republic, despite the fact that the Arbitration Centre is expressly named as the tribunal to settle contract disputes under Deeds 402 and 820.

IV. IMPLICATIONS OF AN INEFFECTIVE WAIVER

41. Even if (and only if) one were to assume *arguendo* that this Tribunal does not deem as valid the waiver tendered by the Claimant, the next logical question for the Tribunal to consider would be the impact of that determination on this proceeding. The applicable NAFTA language is quite different from the CAFTA provision at issue here.

42. In reaching its conclusion that the waiver had to conform to NAFTA Article 1121 at the time it was lodged and *that the Claimant could not remedy the deficiency*, the Tribunal in *Waste Management I* relied on its interpretation of the meaning of NAFTA Article 1121's title,"*Conditions Precedent* to Submission of a Claim to Arbitration" and its text, which states "A disputing investor may submit a claim under Article 1116 *only if*. ..." (emphasis added).

43. Even so, in its consideration of whether a disputing investor may have one but only one attempt at international arbitration under NAFTA's Chapter 11, the Tribunal in *Waste Management II* noted that, "In the *Methanex* case, however, the United States, faced with what it considered to be a non-complying waiver, recognized ...'that if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, *these proceedings would take longer to conclude... Recognizing this, in the interests of efficiency*, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, *the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members* -- on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers' (emphasis added)." [29] Thus, not only did the United States take the view that the language in Article 1121 did not prevent a claimant from resubmitting the case to arbitration with a valid waiver, it made clear a Party could also waive the necessity to constitute a new Tribunal.

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[29] *Waste Management II*, §28

44. As the Tribunal in *Waste Management II* also noted, "...such a view of one NAFTA Party is not opposable to another."[30] However, the only Party in common between NAFTA and CAFTA is the United States, so it is of the utmost importance that the United States did not chose to replicate this NAFTA language in the CAFTA, even in light of the *Waste Management I* jurisdictional award that had recently relied so heavily upon it. As noted in ¶17 above, the terms *"condition precedent"* and *"only if"* do not appear in the CAFTA waiver article at all.

45. Indeed, a review of other BITs and U.S. free trade agreements shows that NAFTA is an anomaly in its use of these restrictive terms. They do not appear in other contemporaneous BITs, such as the U.S.-Argentina BIT signed in November 1991, which does not even include a waiver. And a review of the negotiating history of NAFTA's Chapter 11 shows that the concept of a waiver was first tabled by Canada in June 1992.[31]

46. Rather, the U.S. free trade agreements with Singapore (signed in May 2003), Chile (signed in June 2003), CAFTA (signed in August 2005) and in its 2004 Model BIT released in November 2004 all have identical waiver provisions. In each of these, the article that includes the waiver provision is entitled "Conditions and *Limitations* on Consent of Each Party" (emphasis added). In contrast to a "Condition Precedent," a "Limitation" can be remedied by terminating or abandoning the inconsistent behavior.

47. Such an interpretation would be consistent with the CAFTA's objectives, one of which is to "(f) create *effective* procedures for the implementation and application of this Agreement, for its joint administration, and for the resolution of disputes;"[32] (emphasis added). As noted by Keith Highet in his Dissenting Opinion in *Waste Management I*, "An elementary application of the *principle of effectiveness* in the interpretation of international undertakings (*ut magis res valeat quam pereat*) therefore makes it *impossible* to hold that a defective waiver *can never* be remedied"[33] (emphasis added).

48. The recent timeframe is replete with examples of the U.S. emphasis (and indeed, the increasing emphasis of the NAFTA partners) on *efficiency* and effectiveness in investor-state disputes. For example, the U.S.-Chile, U.S.- Singapore and CAFTA free trade agreements were the first to include the *expedited* procedure being used in this dispute (for the first time in any of these or subsequent trade agreements) regarding whether the dispute is within the tribunal's competence. This demonstrates the recognition of the Parties to these agreements of their obligation to provide an *effective* avenue for dispute resolution, not a preclusive one.

49. The NAFTA Parties were also making efforts during this timeframe to improve the efficiency of the operation of NAFTA within the parameters of its existing text. In its Joint Statement "Celebrating NAFTA at Ten," the NAFTA Free Trade Commission announced they had agreed upon a statement and a recommended procedure that "will enhance the transparency

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[30] *Id.*

[31] NAFTA Trilateral Negotiating Draft Texts of Chapter 11 found at *www.ustr.gov/Trade Agreements/Regional/NAFTA/Secton_Index.html*

[32] CAFTA Article 1.2 Objectives.

[33] Dissenting Opinion of Keith Highet, *Waste Management I*, §55.

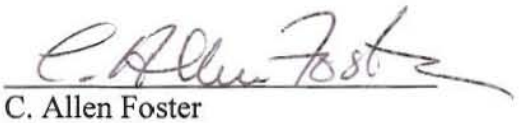
and *efficiency* of the investment chapter's investor-state dispute settlement process"[34] (emphasis added). In its related press release, the Office of the U.S. Trade Representative stated that the enhanced transparency and *efficiency* of these agreed actions were "part of the ongoing commitment to make the NAFTA more responsive to the needs of the public"[35] (emphasis added).

50. For these reasons, the Claimant contends that the reasoning of the Tribunal in *Waste Management I* -- that a waiver found to be deficient under NAFTA Article 1121 cannot be remedied -- simply is not applicable to CAFTA if, *arguendo,* a similarly deficient waiver was found. While it would still be necessary to supply waivers that comply with CAFTA Article 10.18.2(b), there is simply nothing in the 30 pages of CAFTA's Investment Chapter or the Agreement that suggests it is necessary to impose the burden on the Claimant to re-file its claim.

V. CONCLUSION

51. The Respondent has wholly failed to demonstrate that the waivers filed by Claimant do not effectively abdicate Claimant's rights under the waivers required by CAFTA Article 10.18.2(b). The Claimant respectfully requests that the Tribunal hold that the Respondent has failed to carry its burden to prove that the Claimant is prevented from bringing the present proceedings, and proceed to the merits of the case.

Respectfully submitted,



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[34] NAFTA Free Trade Commission Joint Statement (Montreal, October 7, 2003). Note also the explanation in the *2003 Trade Policy Agenda*, Office of the U.S. Trade Representative, pg. 215: "The operation of Chapter 11 and the cases that have been brought under its investor-state dispute settlement procedures have given rise to issues that the NAFTA investment experts group has begun to discuss with a view to ensuring the *effective* and proper implementation of the Chapter" (emphasis added).

[35] USTR Press Release, October 7, 2003

LIST OF EXHIBITS

Exhibit No.	Description of Documents
C-1	The Lesivo Resolution declared on August 11, 2006 and published in the *Diario de Centro América* on August 25, 2006
C-2	RDC and FVG's Consent and Waiver dated June 14, 2007
C-3	Letter from C. Allen Foster dated May 18, 2007, in response to letter from Ministerio de Economía of Guatemala dated April 30, 2007
C-4	Letter from Mario Estuardo Gordillo Galindo dated July 5, 2007, in response to Railroad Development Corporation's June 14, 2007 request for institution of arbitration proceedings under CAFTA and ICSID Convention
C-5	Copy of CAFTA's Summary of the Agreement