INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

RAILROAD DEVELOPMENT CORPORATION,

CLAIMANT

V.

THE REPUBLIC OF GUATEMALA,

RESPONDENT

ICSID Case No. ARB 07/23

CLAIMANT'S REJOINDER ON JURISDICTION REGARDING RESPONDENT'S EXPEDITED OBJECTION UNDER CAFTA ARTICLE 10.20.5

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I. INTRODUCTION

1. In its Memorial of May 29, 2008, the Republic of Guatemala ("Republic" or "Respondent") contended that Railroad Development Corporation ("RDC" or "Claimant") has not satisfied the waiver requirements of CAFTA Article 10.18.2(b) for four asserted reasons.[1]

2. In its Counter-Memorial of July 11, 2008, Claimant responded to each of Respondent's arguments and demonstrated that none constituted a valid basis for dismissal of RDC's claims. Further, Claimant made the case that even if, *arguendo*, the Tribunal were to find its waiver deficient, the object and purpose of CAFTA would permit the deficiency to be remedied with the subsequent submission of effective waivers.

3. On August 11, 2008, Respondent submitted its Reply on Jurisdiction, which narrows the scope of the issues that need to be addressed in this Rejoinder and decided by the Tribunal. Specifically:

1) With respect to the first issue, Respondent has acknowledged that "the Republic is sufficiently satisfied that Claimant has presented a waiver on behalf of FVG and that the issue of its authority to present a waiver on behalf of FVG is rendered moot given FVG's signed waiver."[2] Since Respondent has now conceded this issue, there is no further need to address it.

2) With respect to the second issue, Respondent has chosen in its Reply not to pursue its argument that Claimant and FVG repudiated their purported waivers by taking a reservation. This argument is only asserted in Respondent's Memorial by reference to the language in the waiver itself.[3] Accordingly, Claimant reiterates its view that the reservation, taken in the

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[1] In particular, Respondent has argued:

1) Claimant's waiver on behalf of FVG was ineffective or invalid on its face.
2) Claimant explicitly and unequivocally repudiated its waiver in the same document.
3) Assuming, *arguendo*, that Claimant's waiver was valid, by filing two arbitrations in Guatemala that involve the same issue and same measures as the instant arbitration, Claimant has not taken the necessary actions to give effect to its waiver.
4) CAFTA Article 10.18.2 required Claimant to dismiss FVG's pending arbitrations in Guatemala against Ferrocarriles de Guatemala ("FEGUA") before submitting its claims to ICSID pursuant to Article 10.16.

See Memorial at 1-3.

[2] Reply, n.1.

[3] Respondent's entire argument is contained in a single sentence, "[f]urther, not only is the purported waiver invalid on its face, but Claimant explicitly and unequivocally repudiates this purported waiver in the same document by stating that '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.'" (Memorial at 3).

> text of the waivers -- "provided, however, that RDC and FVG reserve the right to pursue any and all local remedies which the ICSID arbitration panel requires.… " -- is fully consistent with the waiver requirements of CAFTA Article 10.18.2(b). Respondent has failed to present any contrary case with respect to its second argument. Indeed, the repeated insistence of Respondent throughout its Reply that "[t]he text of Article 10.18.(2) requires that the dismissal of the local arbitration be a dismissal ***with prejudice***, meaning that Claimant is barred from later re-initiating any claim that involves the same measures at issue in this ICSID proceeding"[4] only underscores the foresight of Claimant in attempting to prevent a situation from arising in which Claimant might be without any forum to hear its grievances.

4. With respect to the third issue, in Section III.B of its Reply, Respondent, for the first time, develops the argument (which was only asserted, but neither amplified nor supported, in its Memorial) that Claimant "seeks relief for the same measures through both its local claims and its Treaty claims."[5] That argument is manifestly incorrect but, because this is the crux of the matter in contention[6], Claimant's Rejoinder will focus on this issue.

5. With respect to the fourth issue, in Section II.B of its Reply, Respondent misrepresents Claimant's contention in its Counter-Memorial that a deficient waiver is capable of being remedied and suggests that Claimant is somehow contending that CAFTA Article 10.18 permits the Tribunal to assert jurisdiction in the absence of a valid waiver. Respondent then proceeds to attack a flawed argument of its own making.[7] Nowhere in its Reply, however, does Respondent address Claimant's rebuttal to the position taken by Respondent in its Memorial (without elaboration) that "[CAFTA] Article 10.18(2)(b) obligates Claimant to definitively dismiss these [the local] arbitrations before submitting its claims to ICSID pursuant to Article 10.16."[8] Instead, Respondent merely reasserts in its Reply that, if the Tribunal finds Claimant has failed "to comply with the requirements of Article 10.18, the Tribunal must *dismiss the claims before it*

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[4] Reply, n.2 (emphasis in original). *See also* Reply, ¶¶ 1, 3, 11, 27, 31, 73.

[5] Reply, ¶ 4.

[6] The first half of Respondent's Reply contends that (a) the Republic's consent to ICSID arbitration as expressed in CAFTA Article 10.17 is bound by the precise scope of the waiver required in CAFTA Article 10.18.2(b) and that (b) compliance with this Article requires Claimant to act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16. While the Reply repeatedly suggests that Claimant disagrees with these two points, this is not true -- it obviously was not Claimant's responsibility to develop these arguments on Respondent's behalf, or to reply to arguments which previously had not been made. Without agreeing with every statement in the first 16 pages of Respondent's Reply, Claimant accepts the two points noted above as established jurisprudence. Nor will Claimant waste time presenting formalistic arguments about whether it has or has not given effect to its waiver. If the Tribunal finds (as it should) that the measures in the local arbitrations are not the same measures alleged in this proceeding to constitute a breach referred to in Article 10.16, then, the issue of whether the waivers have been given effect is moot.

[7] Reply, ¶¶ 19-26.

[8] *See* Memorial, page 2, third paragraph (emphasis in original).

outright for lack of jurisdiction."[9] Because Respondent has not addressed Claimant's clear demonstration that CAFTA permits a deficient waiver to be remedied, Claimant will not argue this point further in this Rejoinder. We note, however, that Respondent itself appears to be of two minds on this issue. Indeed, in its Reply, Respondent also acknowledges that the Tribunal has the discretion "to permit Claimant an additional opportunity to comply with its Article 10.18 obligations"[10] and, in fact, *explicitly requests* the Tribunal to use its discretion to grant this opportunity: "…the Republic's consent to arbitrate these disputes is thus lacking unless the local arbitrations are dismissed with prejudice. Accordingly, the Republic respectfully *requests* that this Tribunal order Claimant to abandon its local arbitrations by dismissing them with prejudice within forty-five days from the date of the Tribunal's ruling."[11] Thus, there does not appear to be any disagreement between the parties that, if the Tribunal were to find deficient waivers in this proceeding, the deficient waivers can be remedied without imposing "the burden on the Claimant to re-file its claim."[12] Thus, as to Respondent's fourth argument, it appears to concede that, even if the Tribunal were to find Claimant's waiver to be defective (which it is not), it can be remedied.

6. Finally, Respondent's Reply misconstrues CAFTA Article 10.17 in such a way that it would permit the Republic to require the exhaustion of local remedies in CAFTA. In paragraph 16 of Respondent's Reply, the imperative "*shall* satisfy' the requirements of Chapter II of the ICSID Convention (which constitutes the parties written consent to ICSID arbitration) is conveniently ignored. Obviously, an exhaustion requirement is precisely what CAFTA's Investment Chapter intended to avoid, and it is important for the Tribunal to address this point so that, in the future, time will not be wasted on such an "ambush."

II. THE MEASURES IN THE LOCAL PROCEEDINGS ARE NOT THE SAME MEASURES THAT ARE ALLEGED TO CONSTITUTE A BREACH OF ARTICLE 10.16 IN THIS ICSID PROCEEDING

A. The Parties Agree on the "Measures" at Issue in the Local Proceedings

7. In Chapter 2 (General Definitions), CAFTA states "**measure** includes any law, regulation, procedure, requirement, or practice."

8. In its Memorial, Respondent did not identify the measures at issue in either the local arbitrations or this ICSID proceeding. This deficiency is corrected in the

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[9] Reply, ¶ 72 (emphasis added).
[10] Reply, ¶ 73.
[11] Reply, ¶ 11 (emphasis added).
[12] Counter-Memorial, ¶50. Claimant notes that tribunals interpreting the requirements of NAFTA's waiver Article 1121 have not required the explicit dismissal of local proceedings "*with prejudice,*" presumably failing to see a need to elaborate on "the ordinary meaning to be given to the terms" in the waiver article. (A treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.).

Respondent's Reply. Claimant concurs with the measures identified by Respondent that are at issue in the local arbitrations. However, Claimant does not agree that the measures alleged to constitute a breach referred to in Article 10.16 that are in dispute in this ICSID proceeding include the same measures as those involved in the local arbitrations.

9. First, we will identify the "measures" which are at issue in the local arbitrations. In that regard, Respondent notes the first of the Claimant's local arbitrations, *Compañia Desarrolladora Ferroviaria S.A. c. Ferrocarriles de Guatemala*, Centro de Arbitraje de la Cámara de Comercio de Guatemala ('CENAC"), Case No. 02-2005, filed on 17 June 2005 ("Trust Fund Claim"), and states, "[t]his claim concerns contractual obligations on the part of the Republic, and the relevant *measures* (*sic*) in this claim concern the alleged failure by the Republic to pay into the trust fund."[13] Claimant notes that the contractual obligation at issue in this local arbitration resides in "Deed 820" and agrees with Respondent that the failure by the Republic to pay monies owed into the trust fund is the measure at issue in this local proceeding.

10. Respondent then notes the second of Claimant's local arbitrations, CENAC Case No. 03-2005, filed on 26 July 2005 ("Squatter's Claim"), and states, "This claim, as the one before it, concerns contractual obligations on the part of the Republic, and the relevant *measures* (*sic*) in this claim concern the alleged failure by the Republic to undertake the judicial processes necessary to remove the squatters."[14] Claimant notes that the contractual obligation at issue in this local arbitration resides in "Deed 402" and agrees with Respondent that the failure by the Republic to undertake the judicial processes necessary to remove the squatters is the measure at issue in this local proceeding.

11. Second, we will identify the "measures" which are involved in this ICSID arbitration. There should be no dispute that the "measure" involved in this arbitration is the Respondent's Declaration of Lesivo as to Deeds 143/158, which the Claimant contends destroyed its business, thereby making its investment worthless and depriving it of reasonably anticipated profits. *See* Request for Arbitration ¶¶ 56-59; *see also id.*, ¶ 70 (Relief and Remedy Sought). In addition, in paragraph 51 of the Request for Arbitration, Claimant notes that Respondent's actions have deprived it of any semblance of justice in the local arbitrations, thereby violating CAFTA Article 10.5 and that, the Tribunal should award Claimant the damages it would have recovered in the local arbitrations but for such violation of Article 10.5.

12. Thus, the "measures" involved in this ICSID arbitration are entirely different from the measures involved in the local arbitrations.

[13] Reply, ¶ 60.
[14] Reply, ¶ 61.

B. Respondent's Use of the Term "Overlap" Obfuscates What CAFTA Article 10.18.2(b) Requires to Trigger the Dismissal of Local Proceedings

13. 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 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****. (emphasis added.)"*

14. Thus, it should be apparent that the plain language of Article 10.18 requires discontinuation of local proceedings only if the "measures" involved in those local proceedings are the same "measures" which, in an ICSID arbitration, are alleged to constitute a breach referred to in Article 10.16. As is demonstrated above, the measures in the local arbitrations are not the same measures which, in this arbitration, are alleged to constitute a breach referred to in Article 10.16. As a result, that should be the end of the inquiry.

15. Faced with that difficulty, in the "Introduction to its Reply", Respondent posits numerous formulations in an attempt to obfuscate what CAFTA Article 10.18.2(b) actually requires. Respondent variously uses the terms "involve" the same measures,[15] "overlap" in the measures,[16] "concern" the same measure,[17] and "related to" any measure,[18] before ultimately settling on the term "**overlap**" in Section II.D: "**Overlap** in the measures for which Claimant seeks relief in local and CAFTA claims triggers requirement that local claims be abandoned (emphasis added.)"

16. Respondent's Section II.D then expounds, "The test for determining whether local arbitrations relate to measures alleged in the Treaty claims is thus simple: if **overlap**

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[15] Reply, ¶ 9.
[16] Reply, ¶ 10.
[17] Reply, ¶ 11.
[18] Reply, ¶ 31.

exists between those measures, i.e., ***State acts***, for which Claimant seeks relief in its local arbitrations and those State acts for which Claimant seeks relief in its Treaty claims, the proceedings are "related," and the Tribunal thus lacks jurisdiction over the Treaty claims unless the local proceedings are abandoned. The relationship between the legal obligations allegedly breached in the local claims and those allegedly breached in its Treaty claims is of no consequence to this analysis."[19]

17. By this argument, Respondent cleverly manufactures a standard that is nowhere found in CAFTA. The simple fact of the matter is that neither the word "overlap" nor the concept of "overlap" appears anywhere in CAFTA Chapter 10, in *Waste Management I* and *II*, or in any other decision of any other tribunal cited in the Respondent's Reply. Indeed, this new "test of overlap" has been concocted by Respondent to try to get around the very explicit terms of CAFTA, which require a waiver only of "any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."

18. Put another way, the fundamental flaw in Respondent's argument is more than just its attempt to create a new standard that is found nowhere in the Treaty. The substantive error is Respondent's failure to focus on whether the same measure is raised in both proceedings, and, if the measures are the same, whether this same measure also is a "measure alleged to constitute a breach referred to in Article 16.10," as required by Article 10.18.2(b). Indeed, once Respondent's overlap test is posited, virtually all of Respondent's references in Section III argue that the same measures are alleged, without any reference whatsoever to the specific measures that are alleged in Claimant's Request for Arbitration as constituting a breach referred to in Article 10.16.

19. This faulty logic reaches its zenith when Respondent argues "[b]y expressly basing its Treaty claims not only on the Lesivo Resolution, but also on 'other actions by the Government of Guatemala [in connection with the Lesivo Resolution],' 'other government measures which accompanied the lesivo process,' and general 'conduct of the Government of Guatemala,' Claimant is challenging in its ICSID proceeding *all* acts by the Republic which, in Claimant's estimation, have harmed its interests, *including those that are at issue in the local arbitrations*."[20] Again, Respondent misstates Claimant's position and even its words. First, Claimant never makes a "general conduct" charge. The reference to "conduct" in paragraph 66 of the Request for Arbitration is a direct reference to very specific allegations made in the preceding paragraphs 64-65, which are not at all the "measures" at issue in the local arbitrations. Second, Claimant cannot comprehend why Respondent would speculate that the measures that were first invoked in the local arbitrations in June - July 2005 -- namely, (i) the failure of the Republic to pay monies owed into the trust fund and (ii) the failure of the Republic to undertake the judicial processes necessary to remove squatters -- would be considered to be the same measures Claimant is invoking with respect to "other government actions in connection with the Lesivo Resolution" that were promulgated *two years later*. Not only

[19] Reply, ¶ 34 (first emphasis added). *See also* Reply, Section III.B. ("The measures upon which Claimant's Treaty claims and local claims are based **overlap**"); Section III.B.2. ("The measures upon which Claimant's Treaty claims and local claims are based undeniably **overlap**").

[20] Reply, ¶ 53 (second emphasis added).

does one have to reach back over a time chasm, but CAFTA clearly states in Article 10.1.3, "For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place … *before* entry into force of this Agreement [July 1, 2007] (emphasis added)." Both the initiation of these local arbitrations and the circumstances that led to them predate CAFTA's entry into force and, thus, as a matter of logic, could not be "the breach(es) referred to in Article 10.16" in the instant proceeding.

20. For all these reasons, Respondent's "overlap" test must be rejected. As described above, Claimant suggests that only a straightforward parsing of CAFTA Article 10.18.2(b), into a two-part test based on the text's plain and ordinary meaning, is permissible: 1) is any measure in the local proceedings also raised in the Request for Arbitration? If so, 2) is this measure also alleged in the Request for Arbitration to constitute a breach referred to in Article 10.16? If the answer is "no" to either of these questions, as it is in this case, then Respondent's jurisdiction objection must be overruled.

21. Claimant readily acknowledges that the measures alleged in its local arbitrations are referenced in its ICSID arbitration claim. However, such mere referencing of historical facts is wholly insufficient to trigger CAFTA's waiver requirement that Claimant must dismiss the local proceedings. Claimant categorically states, as it did in its Counter-Memorial[21], that the failure of the Republic to pay monies owed to the trust fund and the failure of the Republic to undertake the judicial processes necessary to remove squatters -- the "measures" in its arbitral proceedings in Guatemala -- are **not** being alleged to constitute an indirect expropriation under CAFTA Article 10.7.15, to violate the Minimum Standard of Treatment obligations under CAFTA Article 10.5, or to violate the National Treatment obligations under CAFTA Article 10.3, those being the only "breach(es) referred to in Article 10.16" in Claimant's Request for Arbitration.

C. Failure to Perform Contractual Obligations Can be Both a "Measure" and a "Breach Referred to in Article 10.16"

22. In arguing that "Claimant conflates the distinct concepts of 'obligations' and 'measures,'"[22] Respondent appears to be reading its failure to pay monies owned into the trust fund and failure to undertake the judicial procedures necessary to remove the squatters as "measures," as they are in the local arbitrations. Under CAFTA, however, these words **could** also describe the breach(es) referred to in Article 10.16, because the failure of a CAFTA Party to fulfill a contractual obligation can be directly actionable in the ICSID proceeding if the contract is either an investment agreement or investment authorization.[23]

23. Unfortunately, Respondent ignores the straightforward logic of Claimant's Counter-Memorial:

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[21] Counter-Memorial, ¶ 36.
[22] Reply, ¶ 58.
[23] See CAFTA Art. 10.16.1.(a)(i)(B), 10.16.1.(a)(i)(C), 10.16.1.(b)(i)(B) and 10.16.1.(b)(i)(C).

- If Claimant had alleged breaches of contract as its Treaty claims, it obviously would have invoked the same measures that form the basis for its legal claims in the local arbitrations and would have been required to dismiss the local arbitrations. However, the fact that the contracts involved in the local arbitrations (Deeds 820 and 402) predate CAFTA preclude them from meeting CAFTA's definition of an investment agreement[24], and thus, Claimant is unable to file a claim under CAFTA's Article 10.16 for breach of an investment agreement (or, for that matter, breach of an investment authorization).

- To augment this point, since CAFTA Article 10.1.3 precludes any measure which occurred before CAFTA's entry into force from binding any Party to the obligations of Chapter 10, Claimant also cannot allege successfully that the prior failure of the Republic to pay into the trust fund and to undertake the judicial processes necessary to remove the squatters are breaches of the substantive obligations in Section A referred to in Article 10.16.[25] Since the Republic's pre-CAFTA breaches can be neither a breach of an investment agreement/authorization, nor a breach of CAFTA's substantive obligations under Section A, this obviously eliminates the possibility "that both legal actions [the local arbitrations and the Treaty claim at ICSID] have a legal basis derived from the same measures. . . ."[26]

- The critical fact is that Claimant's Request for Arbitration cites three breaches of the substantive obligations of Section A of CAFTA'S Chapter 10: expropriation without compensation (Article 10.7); failure to provide a minimum standard of treatment (Article 10.5); and failure to provide national treatment (Article 10.3). The measure(s) that Claimant alleges to constitute these breaches are the Lesivo Resolution (and other specified measures in connection with the Lesivo Resolution) and the Respondent's denial of due process and effective access to the judicial system, not the measures, *i.e.*, the state acts, that provide the legal basis for FVG's local arbitrations.

24. The inevitable logical conclusion is that only the local arbitrations can redress Claimant's contract grievances. It is for this reason that Claimant decided to continue the local arbitrations after determining that doing so would not compromise the requirements

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[24] In Chapter 10 Section C: Definitions, CAFTA states: "**investment agreement** means a written agreement (n. 12) that *takes effect on or after the date of entry into force of this Agreement* between a national authority (n. 13) of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights:

(a) with respect to natural resources or other assets that the national authority controls; and

(b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself (emphasis added.)"

[25] See CAFTA Art. 10.16.1(a)(i)(A), 10.16.1(b)(i)(A).

[26] Note this is the same wording from *Waste Management I* that Respondent contended the Claimant had omitted because it would *contradict* Claimant's arguments. (Reply, ¶38.) Quite the contrary, the inclusion of the full text only *further validates* Claimant's assertion that the local arbitration and this proceeding do not allege the same measures.

of CAFTA's Article 10.18.2(b). Indeed, to paraphrase Arbitrator Keith Highet in *Waste Management I*, it would be a high price to pay in order to engage in a CAFTA arbitration for a CAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its CAFTA claim -- but which nonetheless could not themselves be CAFTA claims.[27]

D. The Specific Examples Cited by Respondent Are NOT Measures Alleged to Constitute a Breach Referred to in Article 10.16

25. In its Request for Arbitration, under Procedural Requirements, Claimant clearly states that:

> "As required by CAFTA Article 10.1, the breaches of Chapter 10 described below arise from measures adopted or maintained by a Party relating to 'covered investments' made by investors of another Party…*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 investment and there is no contributing, intervening or superseding cause."[28]

The Request subsequently describes with specificity "the breaches referred to in Article 10.16" in the section entitled "Legal Claims Under CAFTA Section A of Chapter 10." This section details the specific "other actions of the Government of Guatemala in connection with the Lesivo Resolution" leaving no uncertainty as to, or reason to speculate on, which "measures [are] alleged to constitute a breach referred to in Article 10.16." The failure of the Republic to pay monies owed to the trust fund and the failure of the Republic to undertake the judicial processes necessary to remove the squatters are nowhere included in the description of such government actions.

26. In attempting to make its point, Respondent contends that "these measures -- the Republic's alleged failure to pay into the trust fund and the Republic's alleged failure to remove 'squatters' from the right of way -- are, per Claimant's own Request for Arbitration, an 'integral part' of Claimant's Treaty claims."[29]

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[27] *See* Arbitrator Highet's Dissenting Opinion in *Waste Management I*, ¶44.
[28] Request for Arbitration, ¶ 18 (emphasis added).
[29] Reply, ¶ 62.

27. This citation is a good example of the inherent problem with Respondent's "overlap" test. The language cited ("an integral part") is not contained in the section of Claimant's Request for Arbitration's devoted to "Legal Claims" but, instead, is found only in the descriptive section, "Factual Background." FVG's consistent objection to the Republic's failure to pay monies owed to the trust fund and the Republic's failure to undertake the judicial processes necessary to remove the squatters, as exemplified in the local arbitrations, are invoked throughout this portion of the Request as evidence of the *motivation* for the Republic to carry out the measures that do form the basis of this proceeding's legal claim, "the Lesivo Resolution and other government actions associated with this resolution." While those breaches of contract by Respondent were costly to Claimant, they did not bring Claimant's operation of the railroad to a halt or destroy its investment; indeed, as specifically alleged in paragraph 42 of Claimant's Request, on the eve of the Lesivo Resolution, Claimant was still poised to achieve its business plan. The failure of Respondent's pre-Lesivo breaches of contract to bring Claimant to its knees is the factual background and was the instigating cause and motivation of the Lesivo Resolution which serves as the basis of Claimant's CAFTA claim. Thus, the "measures" asserted in the local arbitrations are in no way the same as the "measures" asserted in this arbitration as violations of Article 10.16.

28. Similarly, after issuance of the Lesivo Resolution, the Republic crossed the line between a measure defined by its failure to undertake the judicial processes necessary to remove squatters to actively encouraging squatters. Thus, the epidemic of squatters after Lesivo is the *result* of "the Lesivo Resolution" and is one of the "other government actions in connection with the Resolution" (*e.g.*, the Republic's active encouragement of squatters and the failure to provide "full protection and security" as required by CAFTA). In this way, the measures at issue in the local proceedings are an "integral part" of the narrative of RDC's Treaty claim, but they are not themselves "measures alleged to be breaches referred to in Article 10.16" as required by CAFTA Article 10.18.2(b).

29. In paragraph 64 of its Reply, Respondent cites a long list of examples from Claimant's Request for Arbitration that allegedly demonstrate that the failures of performance at issue with the local arbitrations "permeate" Claimant's Treaty claims. But "permeate" -- a variation of Respondent's concocted "overlap" test -- is not the appropriate test for the rigorous requirement contained in CAFTA Article 10.18.2(b).

30. The examples listed by Respondent in paragraph 64 are all factually contextual in nature:

- As described above, the reference to "integral part" in Request for Arbitration paragraph 50 underscores the strong connections between the Republic's failures to perform and the Lesivo Resolution without alleging the failures themselves as part of Claimant's legal claims under Article 10.16. From the outset, Claimant has maintained that "[t]he Lesivo Resolution was intended to further three principal, but highly improper, Republic objectives: (1) to force FVG to withdraw from the arbitration processes in which FVG has charged a government entity, FEGUA, with breach of contract, (2) to appropriate FVG's

rolling stock, making it impossible for FVG to perform under the basic right of way usufruct contract (Deed 402) and thereby to appropriate all of FVG's business, without paying compensation, and (3) to redistribute to certain Guatemalan private sector companies the benefits of the usufructs granted by the Republic to FVG for the term of fifty years, again without compensating FVG."[30]

- The reference in Request paragraph 47 of Claimant's Request for Arbitration that the Republic knew it had failed to comply with its contractual obligations under the Usufruct but, because that failure had been ineffective to get Claimant to abandon its investment, it decided to take the rail stock away falls in the contextual category of "failure of one measure" necessitating "another measure," *i.e.*, the Lesivo Resolution.

- The general reference in Request paragraph 49 that FVG has faced a growing epidemic of private and public sector squatters since the Lesivo Resolution falls in the contextual category of "squatters as a result of Lesivo."

- The reference in Request paragraph 56(d) that the Lesivo Resolution has emboldened commercial squatters falls in the contextual category of "squatters as a result of Lesivo." Clearly, emboldened squatters cannot be a "measure" under CAFTA because they do not represent "any law, regulation, procedure, requirement or practice" of a Party.

- Similarly, the reference in Request paragraph 56(f) that, since the Lesivo Resolution, there have been growing instances in which private and public sector entities have used the right of way without FVG's permission and without paying compensation also falls in the contextual category of "squatters as a result of lesivo." In fact, although the items in paragraphs 56(a) through 56(g) appears in the section entitled "Legal Claims", it is absolutely clear from the lead-in to the paragraph that the list is not being asserted as "measures constituting a breach referred to in Article 10.16" but instead as examples of how the "Lesivo Resolution is, in itself, an indirect expropriation."[31]

- The reference in Request paragraph 33 to Guatemala's and FEGUA's failure to remove squatters from the right of way and failure to pay monies owed to the trust fund pursuant to Deed 402, including the size of the outstanding balance as February 2007, is strictly expositive and falls into the contextual category of "the failure of contractual breaches to bring FVG to its knees" as motivation for Lesivo. This connotation is made quite clear in paragraph 35, which begins "In anticipation of FVG's filings and as a thinly disguised threat . . . ."

31. One example, cited by Respondent in paragraph 63 of its Reply, requires a more thorough examination. Claimant's Request for Arbitration includes, under "Legal

[30] Request for Arbitration, ¶ 2.
[31] Request for Arbitration, ¶ 56.

Claims," a discussion of the measures that breach the Minimum Standard of Treatment. Respondent highlights a single sentence in paragraph 65 that states, "Specifically, since the Lesivo Resolution, the Government of Guatemala has failed to remove "squatters" from the right of way and to make the contractually obligated payments to the Trust Fund designated to rehabilitate the right of way granted under the Usufruct." By making reference to only a fragment of paragraph 65, Respondent claims that exactly the same measures in the local arbitration -- the failure to undertake the judicial processes necessary to remove squatters and the failure to pay monies owed into the trust fund -- are alleged to constitute a breach of the minimum standard of treatment obligation (a breach referred to in Article 10.16).

32. However, when this sentence is read in the context of the entire paragraph, an entirely different meaning emerges. It becomes clear that "Specifically," is just a transition to a further elaboration on the Lesivo Resolution and other measures in connection with the Lesivo Resolution that are alleged to constitute breaches of the Minimum Standard of Treatment, and that the upfront mention of the Republic's failures is an introductory "scene-setter," a contextual statement that provides the motivation for the alleged breaches which follow, *not* an allegation that these failures constitute a breach of the Minimum Standard of Treatment *in and of themselves*. The lengthy paragraph reads in its entirety:

> "65. Further, having induced RDC to invest millions of dollars into the country's railway system and having solemnly undertaken obligations to investors under CAFTA, **the Government of Guatemala unilaterally decreed that Deeds 143/151 were being cancelled and the rolling stock taken over by the Government** thereby denying FVG's rights, forcing FVG to operate at a loss and/or lose the right-of-way Usufruct by being unable to conduct railroad operations. Specifically, since the Lesivo Resolution, the Government of Guatemala has failed to remove "squatters" from the right of way and to make the contractually obligated payments to the Trust Fund designated to rehabilitate the right of way granted under the Usufruct. FVG's attempts to enforce its rights was met with implacable resistance by the Government which, instead of affording FVG's rights "full protection and security," made a decision to trample on and significantly compromise the rights previously granted **by arbitrarily issuing the Lesivo Resolution without public purpose and for its own nefarious reasons**. **Following the Lesivo Resolution,** even straightforward legal motions now result in **Guatemalan judges taking the unusual steps of issuing injunctions and other precautionary measures** in expectation that FVG will face a Government imposed shut down and transfer of its assets to selected Guatemalan individuals. FVG's efforts to secure compensation from private and public entities that have usurped the Usufruct right of way without FVG's permission and without paying compensation, as well as, FVG efforts to oppose the Government's *lesivo* action against FVG, has been met with **delaying tactics in the easily-manipulated Guatemalan judicial system**. The increased

> instances of **vandalism and stolen railroad material are being ignored by the police. Instead, the local police themselves have occupied one of FVG's train stations within the right of way, without FVG's authorization or paying compensation to FVG. Such actions on the part of the police, as well as, the total lack of police protection send an unmistakable public message that the law will not be applied to protect FVG's investment**. **These actions created an insecure environment inconsistent with FVG's reasonable expectation and reliance that its investment would be afforded security and protection in accordance with Guatemala's CAFTA obligations. The failure of the Guatemalan court system and of the police protective system to afford any reasonable redress to FVG for the well-documented injuries to its rights is itself a violation of Article 10.5 [minimum standard of treatment] of CAFTA."** (emphasis added)

Thus, when read in its full context, it is clear that the failure of the Republic to undertake the judicial procedures necessary to remove the squatters and the failure of the Republic to pay monies owed into the Trust Fund, while indisputably an integral part of the story of RDC's claim, are not themselves the measures alleged to constitute a breach of Article 10.16.

33. In summary, Respondent has failed to demonstrate that these examples in any way establish that Claimant has "re-presented" the measures in the local arbitrations in its Treaty claims. Indeed, nowhere in its Treaty claims does Claimant allege that these failures and performance by the Republic constitute a breach referred to in Article 10.16.

E. RDC Does Not Seek to "Double-Dip" on Damages

34. Respondent also contends that Claimant is making an "express request to recover in this ICSID proceeding all damages that would have been recovered in the local arbitrations."[32] Respondent is wrong. Its contention purposefully ignores the critical sentence in Claimant's Request for Arbitration that states "As a result of [the Republic's] denial of due process and violation of CAFTA Article 10.5 [Minimum Standard of Treatment], RDC and FVG are entitled to recover in this proceeding those damages which would, except for such violations of CAFTA, be recovered in those [local arbitration] proceedings."[33] In other words, in this arbitration, Claimant is only seeking damages *which it cannot obtain locally* because of Respondent's violations of CAFTA Article 10.5 Minimum Standard of Treatment. Thus, Claimant here is not seeking a "double dip" on damages.

35. To be clear, Claimant has absolutely no confidence or even hope in the ability of the Guatemalan judicial system to render a finding in the local

[32] Reply, ¶ 69.

[33] Request for Arbitration, ¶ 51.

arbitrations that respects due process of law or in any way complies with the minimum standard of treatment. Since Claimant initiated the local arbitrations in June of 2005, the Republic has engaged in continued hostile (and unprecedented) motions and stalling tactics that include, *inter alia*:

- With respect to the Trust Fund arbitration, the Republic has challenged the jurisdiction of the Guatemalan Arbitration Court (CENAC). Despite the fact that the contract has unambiguous language stipulating arbitration at CENAC, the Republic filed a motion to declare article 103 of the Guatemalan Public Agreements Act (which provides for arbitration in public contracts*)* unconstitutional in this particular case, an outrageous claim given that a 2006 amendment to Guatemala's public contracting law expressly clarified the validity of government-private arbitration. Although CENAC overruled this motion, the Republic has appealed to the constitutional court and the process has been stalled since early 2006 awaiting a hearing to discuss the merits of the Republic's appeal.

- In the squatter arbitration, the Republic filed a motion in the Guatemalan Arbitration Court to dismiss this case alleging the same lack of jurisdiction. CENAC has not ruled yet on this motion because the Republic also filed a lawsuit, outside the arbitration process, with the First Circuit of the Administrative Court seeking to annul the Usufruct Contract and arbitration clause. This court, ex parte, issued a suspension order of the CENAC arbitration which is still in effect today. Since the contracts clearly establish that arbitration at CENAC is the means to resolve contract dispute issues, FVG filed a jurisdictional plea with the First Circuit, which ruled in favor of arbitration by CENAC (denying itself jurisdiction!). The Republic appealed and filed an injunction against this ruling. The appeal and injunction have both been denied, but the arbitration remains in limbo since there has been no official notification.

36. The upshot is, more than three years after Claimant initiated the local arbitrations -- and 18 months since it served the Republic with its Notice of Intent to submit its CAFTA claims to arbitration -- the local arbitrators have failed to conduct a single hearing on the merits of Claimant's charges that the Republic failed to perform its contractual obligations under Deeds 820 and 402, or on the Republic's counter charges that the Deeds' arbitration clauses are unconstitutional. With this record in mind, Claimant continues to pursue these local claims not in the hope of securing a monetary award, but rather as a testament to the egregious failure of the Guatemalan judicial system to provide even a modicum of due process.

37. Further, these same stall tactics constitute an important element of the "other government actions in connection with the Lesivo Resolution" alleged to constitute a breach of the minimum standard of treatment. The Republic is betting that if it can string the domestic claims out long enough, RDC will exit

Guatemala in the face of unrelenting government hostility and its claims in the local arbitrations -- which are much more politically visible to the Guatemalan citizenry than this ICSID arbitration -- need never be heard. Thus, the "other government actions in connection to the Lesivo Resolution" encompass the inability of the Republic to provide a local channel for redress of its contract disputes, but it does not extend to the measures that provide the legal basis for those contract disputes.

38. Accordingly, the situation in the Guatemalan courts in this case is in sharp contrast to the situation of the Mexican courts in *Waste Management I*. In that case, the Mexican courts rendered awards efficiently and, while the claimant did not agree with the awards, it continued to participate in challenges at every level of the court system and never disavowed Mexico's courts in its treaty claim.

39. With this as backdrop, it becomes clear why Claimant is not double-dipping in its express request in this ICSID proceeding to recover all damages that would have been recovered in the local arbitration but for such violations of CAFTA's Article 10.5, the Minimum Standard of Treatment. If the Guatemalan courts render an award and this Tribunal does not find the Republic violated the minimum standard of treatment, then the domestic award will stand and that Treaty claim will be moot. On the other hand, if this Tribunal agrees with Claimant that the process for adjudicating Claimant's contract grievances in Guatemala's local courts has totally failed to provide the customary international law minimum standard of treatment of aliens found in "all customary international law principles that protect the economic rights and interests of aliens,"[34] the award would rely on a different "measure" for its legal underpinning but Claimant's claim would be satisfied and the local proceedings would be discontinued (under the "single recovery rule").

40. Looked at from another perspective, in the CAFTA arbitration, Claimant seeks (a) $65 million[35] for the loss of its business due to the Lesivo Resolution which is the "measure" at issue here; and (b) the damages sought in the local arbitrations, for which the "measure" is the alleged denial of access to the judicial system because of the Republic's pervasive frustration of Claimant's attempt to recover with the local arbitrations.[36] Thus, it is clear that the "measures" asserted in this ICSID arbitration are not the same "measures" as those asserted in the local arbitrations and Article 10.18.2(b) simply does not apply.

41. Nor should the Tribunal be concerned that the damages sought in this proceeding for the alleged denial of access to the Guatemalan judicial process are the same damages which are sought (as a result of different measures) in the local arbitrations. First, as Respondent concedes, "measures" are **"**State acts,**"**[37] not damages. CAFTA does not

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[34] CAFTA Annex 10-B (Customary International Law)
[35] Request for Arbitration, ¶ 70(a).
[36] First raised in the Request at ¶ 51.
[37] *See* Reply, ¶ 34.

have any prohibition on parallel or concurrent domestic proceedings that seek the same damages as the CAFTA claim. Second, the Tribunal should note that Claimant's Prayer for Relief (Request ¶ 70) does not specifically request the damage claim discussed in paragraph 51 of the Request because those damages should be awarded in the local arbitrations. However, in the likely event the Republic continues systematically to frustrate the administration of justice in the local arbitrations, the Tribunal can, and should, award these damages pursuant to paragraph 70(f) of Claimant's Request ("such further relief as the Tribunal may deem appropriate.").[38]

F. The Object and Purpose of the Waiver Requirement Is Not Compromised by Permitting the Local Arbitrations to Proceed Concurrent with this ICSID Proceeding

42. Respondent's Reply provides several reasons, culled from NAFTA jurisprudence, in its attempt to explain the limitation on consent articulated in CAFTA Article 10.18.2(b), including "State parties to the Treaty intended to avoid a multiplication of proceedings, conflicting outcomes and legal uncertainty, forum shopping, double jeopardy for the Respondent and double redress for Claimant."[39]

43. Nonetheless, Respondent's Reply fails to establish how any of these outcomes are an imminent -- or even probable -- risk if, in this case, the local arbitrations in Guatemala proceed concurrently with this ICSID Tribunal. As Claimant has made abundantly clear, Claimant's CAFTA claim *does not* allege that the measures in the local arbitrations are measures that constitute an expropriation without compensation; a failure to provide a minimum standard of treatment; or a failure to provide national treatment, the breaches in Claimant's CAFTA claim that are referred to in Article 10.16. Thus, permitting the local arbitrations to proceed simultaneously with this Treaty claim cannot result in a multiplication of proceedings or forum shopping. Further, Claimant here only seeks damages that it cannot obtain in the Guatemalan arbitrations due to a flawed judicial process; as a result, there is no danger of conflicting results, legal uncertainty, or double jeopardy for Respondent nor double redress for Claimant.

44. Most importantly, requiring Claimant to give up its local proceedings would deprive Claimant of the forum that should redress its grievances with respect to the Republic's failure to pay monies owed into the trust fund and the Republic's failure to undertake the judicial procedures necessary to remove squatters. Indeed, if the Guatemalan court system were not being interfered with and manipulated by Respondent,, there would be no need for Claimant to bring this allegation into these proceedings. To require Claimant to withdraw from its local arbitrations under these circumstances would send a chilling message to future foreign investors in Guatemala, reward the Respondent for its delaying

[38] Not as part of ¶ 70(a) for "infringing measures" as Respondent incorrectly suggests.
[39] Reply, ¶18.

tactics and interference in the administration of justice and serve to keep foreign investor claims against hidden from its citizens.

III. CAFTA Does Not Require Exhaustion of Local Remedies

45. In Section II.B of its Reply, Respondent advances the argument that CAFTA Article 10.18 restricts State consent to disputes not already pending in other fora. The first justification cited by Respondent for this position states that "CAFTA Article 10.17 itself contains this restriction on consent, as it provides that the parties have consented to arbitrate only those disputes that satisfy the requirements of Chapter II of the ICSID Convention."[40] It then goes on to note that Chapter II of the ICSID Convention provides, *inter alia*, that "[A] Contracting State may require the **exhaustion of local or judicial remedies as a condition of its consent** to arbitration under this convention."[41]

46. Respondent's contention ignores the fact that, in CAFTA, the Republic consented generally to ICSID jurisdiction for disputes under CAFTA, thereby waiving its earlier reservation concerning local remedies. Indeed, the exact language of CAFTA Article 10.17.2 reads "(2) The consent under paragraph 1 and the submission of a claim to arbitration under this Section *shall satisfy the requirements of:* (a) *Chapter II of the ICSID Convention* (Jurisdiction of the Centre) and the ICSID Additional Facility Rules *for written consent of the parties to the dispute*; ….(emphasis added)" In other words, the consent in CAFTA Article 10.17.1 is deemed to constitute the written consent of the parties to the dispute to binding international arbitration when there is a submission of a claim to ICSID arbitration under Section B of CAFTA Chapter 10, making it clear that the Republic has waived its right in CAFTA to exercise its exhaustion reservation at ICSID.

47. Respondent's erroneous interpretation of the interaction between the ICSID Convention and CAFTA represents a serious threat to the effective use of CAFTA's investor-state dispute resolution. If Respondent's interpretation is permitted to stand, the inescapable conclusion would be that RDC and other foreign investors must exhaust local administrative remedies before they could bring a claim under CAFTA to ICSID, a conclusion that is specifically rejected by the explicit terms of CAFTA. Such a result would fly in the face of the object and purpose of CAFTA, which is to "create effective procedures for the …resolution of disputes"[42] and, under specified conditions, to create a level playing field for foreign investors outside of the local judiciary.

48. Accordingly, in the interests of efficiency, which Respondent, Claimant and ICSID all share, Claimant respectfully requests that the Tribunal opine on this

[40] Reply, ¶16.
[41] Reply, ¶16 (emphasis in original).
[42] Article 1(f) under Objectives.

point in order to avoid a subsequent jurisdictional challenge by Claimant based on flawed interpretation of CAFTA Article 10.17.2(a).

IV. CLAIMANT'S WAIVERS COMPLY WITH THE REQUIREMENTS OF CAFTA ARTICLE 10.18.2(b)

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

50. However, in the event that the Tribunal should find a defect in Claimant's waivers, the parties appear to agree that it can be remedied by the presentation of an effective waiver within a stipulated time frame. Respondent has proposed 45 days, and that is acceptable to Claimant.

51. In conclusion, Claimant considers Respondent's jurisdictional objection to be frivolous. Only one of the four claims which Respondent merely asserted in its Memorial was ever developed in its Reply, and many arguments presented by Claimant were never addressed. The one argument which was developed in the rejoinder relied on an "overlap" test of the Respondent's own making, rather than a clear reading of the requirements of Article 10.18.2(b). Respondent's Reply even set up the "ambush" for the next jurisdictional objection. Accordingly, Claimant respectfully requests that the Tribunal award Claimant its legal fees and costs associated with this phase of the proceeding.

Respectfully submitted,

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