

**BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

Railroad Development Corporation,

Claimant,

v.

The Republic of Guatemala,

Respondent.

ICSID Case No. ARB 07/23

RESPONDENT'S COUNTER-MEMORIAL ON MERITS

5 October 2010

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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

1. In its Memorial on the Merits dated 26 June 2009, the Railroad Development Corporation (hereinafter “RDC” or “Claimant”) asserts that the Republic of Guatemala (“Guatemala”) has violated three provisions of the Dominican Republic-Central America-United States Free Trade Agreement (“Treaty” or “CAFTA”): (a) the expropriation provisions in Article 10.7; (b) the minimum standard of treatment provision in Article 10.5, including the obligations to accord fair and equitable treatment and full protection and security; and (c) the national treatment provision in Article 10.3. The facts demonstrate, however, that Guatemala has not violated any of the CAFTA provisions invoked by Claimant. Claimant’s claims, therefore, should be dismissed in their entirety.

2. Claimant builds its case on a story of deceit and corruption that does not withstand the slightest scrutiny. Its principal allegation is that the Government of Guatemala conspired with what it calls a local “sugar oligarch” to take away its usufruct rights. In particular, Claimant alleges that administration of President Oscar Berger declared lesivo its equipment usufruct contract in order to expropriate its railway business and hand it over to a Mr. Ramon Campollo. There is no question that Claimant spins an interesting tale, the problem with its story is that it is pure fiction, based on speculation and irresponsible and defamatory allegations involving Mr. Campollo and the son of President Berger. It also is not based on any hard evidence and simply is *not true*.

3. What does the hard evidence show? It shows that Claimant promised to rehabilitate Guatemala’s entire railway system and deliver a modernized state-of-the-art railway, but did not deliver. It ran its investment through Ferrovías de Guatemala (“FVG”), but had losses every year since its inception. This is because it did not invest the funds necessary to give the railway project a fair opportunity to succeed. It rehabilitated the first phase, and very poorly at that, but this phase could not turn a profit.

4. FVG’s dire financial straits made it realize that the only investment that could be profitable for it would be the rehabilitation and successful operation of the railway in the

Southern Coast, but the problem there was that it could not raise the capital it needed--approximately \$100 million--for that aspect of the restoration project. The project was so costly, because it had to build a standard gauge railway to transport the products and attract the customers that would make that phase of the restoration profitable. Unable to finance the costly investment itself, it first tried to raise the funds through a public offering, but there was meaningful demand for its stock. It then tried to attract potential private local investors, but that effort also failed.

5. By that time, FVG already was on notice that its equipment usufruct contract had been questioned by the government agency who oversees rail operations in Guatemala (FEGUA), and it was negotiating with that agency over the terms of a new equipment contract that would cure the defects in the existing one, as well as over a number of other contractual disputes. The long and short of it is that these negotiations faltered at about the same time that FVG realized that it could not raise the funds to build the railway in the Southern Coast.

6. With its investment in shambles, Claimant commenced a litigation strategy that culminated in this arbitration. Claimant's first step, initiating two local arbitrations against FEGUA—one of which sought to blame the Government for failing to remove squatters from the right of way notwithstanding that FVG had a long-standing practice of charging rent to these very same squatters, thereby perpetuating the problem of which it complained and despite that the Government was cooperating with the eviction of the squatters including designing a detailed plan to evict squatters along the portion of the right of way that encompassed the Southern Coast.

7. Next, Claimant and the Government tried a further round of negotiations in 2006, this time spurred by an outreach Claimant made to President Berger. The Government approached those negotiations in good faith and tried to achieve its goal of obtaining a functioning railway, but Claimant and FVG were not prepared or willing to negotiate in good faith. Why? Well the most likely reason is that they had no real solution to their failed business venture, no way to raise the \$100 million they needed to rehabilitate Phase 2 of the project and make the venture viable. Hence, when asked by Government representatives for concrete answers to the

problem with the project, they had none. Thus, they stalled and when they caught wind from an internal government source that the Government was going to declare their equipment contract *lesivo* to the interests of Guatemala, they initiated their planning for this exit strategy; i.e., this arbitration.

8. They thus prepared their case and as soon as the Government published the *Lesivo* Declaration, declaring *lesivo* their equipment usufruct, they *sprang* into action. In perhaps the clearest sign that its plan was to engage in litigation as its exit strategy for its failed venture, on 28 August 2006, the very *first* business day after the publication of the *Lesivo* Declaration, Claimant and FVG took out a paid advertisement in all of the principal Guatemalan newspapers, the same ones read by the general public, beginning to brand FVG's as a "dead man walking" and manufacturing the very harm they allege in this case.

9. Not content with publicizing the *Lesivo* Declaration and announcing to its own customers that they should be wary of doing business with them, Claimant unilaterally abandoned Guatemala and repudiated its obligations under the usufruct contracts when it very-publicly announced on 6 July 2007 that it was discontinuing rail service as of 1 October 2007 and withdrawing financial support from FVG. This was just yet another effort in its campaign to manufacture a damages case.

10. As is laid out in the following sections, however, Claimant cannot prove that the *Lesivo* Declaration violated any of Guatemala's obligations under CAFTA or that the declaration caused it any harm whatsoever. Any loss of value in Claimant's alleged investment in FVG was the result of Claimant's actions, not of any conduct on the part of Guatemala.

11. Though Claimant would prefer to distract the Tribunal with unsubstantiated conspiracy theories, the facts show that Guatemala had perfectly legitimate reasons for initiating the *lesividad* process, and that this process was *not* the cause of Claimant's alleged damages. The *lesividad* process at issue in this case was initiated after four separate and independent entities had undertaken an objective legal analysis of Contract 143/158. Contrary to Claimant's suggestions, the initiation of this internal, administrative process was not in response to any

pressure from the Guatemalan businessman Ramón Campollo or a concealed attempt to favor some other unspecified national investors at the expense of a foreign investor. Nor was it in retaliation for FVG's local arbitration claims. Rather, the *Lesivo* Declaration was issued in response to the contracts' inherent illegalities and Claimant's unwillingness to correct those illegalities in good faith, through a negotiated settlement.

12. The *lesividad* process in Guatemala is part of the Executive Branch's inherent powers and of the country's constitutional system of checks and balances which pre-dated Claimant's investment. It provides the executive branch with the power to declare an administrative act that is harmful to the public interest *lesivo*, thereby opening the door for that executive branch determination to be tested in the courts. Private parties affected by the declaration may challenge it in the court proceeding and have the opportunity to convince the courts to reject the executive branch's determination and to seek and receive compensation in the event that the court upholds that determination. Until the judiciary makes a determination that a particular contract or action *is* injurious to the interests of the State, the private party retains full rights in the contract notwithstanding the President's *Lesivo* Declaration.

13. The *fact* of the matter, therefore, is that the *Lesivo* Declaration did not cause the harm that Claimant alleges. As a threshold matter, the declaration addressed only Contract 143/158, not Claimant's rights in the railway right of way contract that, by its own admission, represented the *core value* of its investment: Contracts 402. Moreover, as mentioned, to the extent that news of the *Lesivo* Declaration caused Claimant any harm, this was attributable not to the Government's acts, but to Claimant's own unilateral publication of the declaration to its customers and the general public, along with a false statement that the declaration had rendered Claimant's rights null and void. Claimant cannot shift to Guatemala the responsibility for any customer alarm or confusion that Claimant itself fostered.

14. This Counter-Memorial is organized into four remaining sections. First, **Section II** summarizes the procedural history of this case. Second, **Section III** details and corrects the factual record, demonstrating that the story told by Claimant in its Memorial on the Merits is partial, self-serving and highly distorted. **Section IV** addresses Claimant's four specific claims,

namely for (a) alleged expropriation (Section IV.A), (b) alleged violation of fair and equitable treatment (Section IV.B), (c) alleged failure to afford full protection and security (Section IV.C), and (d) alleged failure to afford national treatment:

- **Section IV.A.** demonstrates that Guatemala *did not expropriate* Claimant's investment in violation of Article 10.7 of CAFTA because (a) Claimant did not in fact own all of the usufruct rights that it claims were expropriated; (b) the *Lesivo* Declaration did not interfere with Claimant's property rights that it *did* own, or any reasonable investment-backed expectations; (c) any interference attributable to Guatemala does not meet the requisite level of substantiality to be considered an expropriation, and, at any rate, it is not irreversible or irrevocable; and (d) Guatemala's actions did not violate any of the conditions for lawful expropriation, nor is any compensation due.
- **Section IV.B.** addresses Claimant's broad and sweeping condemnation of the *lesividad* procedure in Guatemala, both *as such* and *as applied* in this case, as an alleged violation of the **fair and equitable treatment** standard. Guatemala demonstrates in this Section that: (a) Claimant's argument that the *lesividad* procedure violates the fair and equitable treatment standard prescribed by Article 10.5 of CAFTA is divorced from the case-specific, fact-based inquiry required by customary international law; (b) Claimant failed to prove that more than half of the standards allegedly violated—good faith, due process, rationality, transparency, and the obligation not to frustrate an investor's legitimate expectations—are elements of the customary international law minimum standard of treatment imposed by Article 10.5 of CAFTA; and (c) even if Claimant had demonstrated that the standards alleged were elements of the minimum standards of treatment, the *lesividad* process met each of those standards both by design and as applied in this particular case.
- **Section IV.C.** demonstrates that Guatemala accorded Claimant's investment **full protection and security**, in accordance with Article 10.5 of CAFTA. Because Claimant failed to discuss or even define the full protection and security obligation under CAFTA, this Section defines that standard and demonstrates that Guatemala

fulfilled its obligation by taking reasonable measures to protect Claimant's investment. Even if the claims asserted by Claimant could constitute a violation of the full protection and security obligation, Guatemala demonstrates that these claims have no basis in fact, and that Guatemala took diligent and reasonable measures to protect Claimant's investment.

- **Section IV.D.** demonstrates that Guatemala fulfilled its **national treatment** obligation in accordance with Article 10.3 of CAFTA because Claimant was afforded "treatment no less favorable"¹ than that accorded to Guatemalan nationals. Apparently, however, Claimant is unsatisfied by the equal treatment accorded by Guatemala and seems to expect treatment that is *more* favorable than that accorded to Guatemalan nationals. As to Claimant's conspiracy theory regarding Mr. Ramón Campollo, the facts shows that Claimant and Mr. Campollo were not "in like circumstances," and that Mr. Campollo did not have anything to do with the *Lesivo* Declaration.

15. Finally, **Section V.** explains why Claimant's request for damages is unsubstantiated and should be rejected. Specifically, Guatemala exposes the flaws in Claimant's request for damages, both because Claimant has failed to demonstrate that Guatemala's actions caused the damages it seeks, and because its demand reflects double-counting and other serious methodological errors.

II. PROCEDURAL SUMMARY

16. On 14 June 2007, Claimant filed a Request for the Institution of Arbitration Proceedings before the International Centre for Settlement of Investment Disputes ("ICSID") against Guatemala under Articles 10.16 and 10.17 of the Treaty on its own behalf and on behalf of Compañía Desarrolladora Ferroviaria, S.A., which does business in Guatemala as Ferrovías de Guatemala ("FVG"), a Guatemalan company majority-owned and controlled by Claimant("the Arbitration Request").

¹ **Ex. RL-61**, DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT Art. 10.3, 1 July 2006, IC-MT 012 ("CAFTA").

17. ICSID registered the Request for Arbitration on 20 August 2007. Claimant appointed the Honorable Stuart E. Eizenstat; Guatemala appointed Professor James Crawford. After the parties failed to agree on the Chairman of the Tribunal, the Acting-Secretary General of ICSID, after consulting the parties, appointed Dr. Andrés Rigo Sureda as Chairman on 8 April 2008. The Tribunal was officially constituted on 14 April 2008, and held its first session in Washington, D.C. on 13 June 2008.

18. On 29 May 2008, Guatemala requested that the Tribunal consider, under Article 10.20.5 of the Treaty and on an expedited basis, an objection to its jurisdiction on grounds of Claimant's failure to comply with the waiver requirements of Article 10.18.2(b). Guatemala also requested that the Tribunal suspend the proceedings as required by CAFTA 10.20.5. The Tribunal suspended the proceedings on the merits while it considered Guatemala's 10.18.2 Objection to Jurisdiction. Claimant submitted a Counter-Memorial on 11 July 2008, Guatemala filed a Reply on 11 August 2008, and Claimant submitted its Rejoinder on 11 September 2008.

19. Relying on Article 10.18.2(b)'s condition precedent requirement that a Claimant waive in writing "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, and proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16", Guatemala argued that Claimant had failed to take the necessary steps under Article 10.18.2(b) to effectuate a waiver of two local arbitrations it had filed in 2005, through its local subsidiary FVG, against FEGUA before the Conciliation and Arbitration Centre of the Guatemalan Chamber of Commerce (collectively "the local arbitrations"). In the local arbitrations, like in the present arbitration, Claimant complained of Guatemala's alleged failure to remove squatters from the right of way pursuant to Contract 402 and of the Government's alleged failure to make payments to the Trust Fund under Contract 820.

20. This Tribunal rendered its Decision on Jurisdiction on 17 November 2008 and issued a Decision on Clarification Request on 13 January 2009, ruling that Claimant had in fact complained of the same measures in this arbitration—i.e., removal of squatters from right of way and payment into Trust Fund—that were the subject of two pending local arbitrations in

Guatemala. The Tribunal thus expressly excluded from this arbitration any claim based on those measures, irrespective of the article of the Treaty under which Claimant would seek to advance such claim.

21. On 26 June 2009, Claimant filed its Memorial on the Merits. On 24 July 2009, after review of the Memorial, Guatemala filed a Notice of Intent to Raise Preliminary Objections. On 4 August 2009, Claimant filed its response to Guatemala's notice of intent, arguing, *inter alia*, that the preliminary objections on jurisdiction signaled within Guatemala's notice of intent were time-barred. On 7 August 2009, Guatemala submitted its reply, and on 14 August 2009 Claimant submitted yet another letter insisting on its objection.

22. On 24 August 2009, the Tribunal issued Procedural Order No. 3 whereby it suspended the proceeding on the merits to hear Guatemala's objections on jurisdiction. Guatemala filed its Memorial on objections to jurisdiction on 24 September 2009 and Claimant submitted its Counter-Memorial on Jurisdiction on 26 October 2009. After receiving the parties' submissions, the Tribunal decided in Procedural Order No. 4 that it did not need to receive further written argument and that it would assist the Tribunal to hear the parties in oral argument regarding the objections raised.

23. The Hearing on Jurisdiction was held in Washington, D.C. from 1–3 March 2010. At its completion, the Tribunal invited the parties to submit by 31 March 2010 simultaneous post-hearing briefs which should exclusively address the questions posed by the Tribunal through the letter from the Secretary of the Tribunal to the parties dated 10 March 2010.

24. On 18 March 2010, the United States informed the Tribunal that it would not be making a non-disputing party submission pursuant to CAFTA Article 10.20.2, however, on March 19, 2010, El Salvador filed a submission as a nondisputing party under CAFTA Article 10.20.2. On 23 March 2010, the Tribunal invited the views of the parties on the submission of El Salvador. On 31 March 2010, the parties filed their replies to the Tribunal's questions and their observations on El Salvador's submission.

25. On May 18, 2010, the Tribunal rendered its Second Decision on Objections to Jurisdiction rejecting Guatemala's objections *ratione temporis* and *ratione materiae* to its jurisdiction and confirming that its jurisdiction is limited to the *Lesivo* Declaration and conduct subsequent to this Resolution, which may include acts or omissions of Guatemala related to squatters, but only to the extent that these result from the *Lesivo* Declaration and do not involve the same measures at issue in the pending local arbitrations.

26. In Procedural Order No. 6, the Tribunal gave Guatemala until October 5, 2010 to file its Counter-Memorial on the Merits.

III. FACTUAL SUMMARY

A. The *Lesividad* Process Under Guatemalan Law

27. Before turning to the relevant facts, it is useful to educate the Tribunal about the *lesividad* process under Guatemalan law. The concept of *lesividad* is found in Article 20 of the *Ley De Lo Contencioso Administrativo*, passed by Decree No. 119–96 of the Congress of the Republic of Guatemala in 1996.² Importantly, this law was in place when Claimant made its bid in 1997 to acquire its railway usufruct rights, and thus Claimant knew or should have known about its existence and possible applicability to the contract rights it was seeking to acquire. Pursuant to this law, the Guatemalan President may declare an administrative act, including an agreement entered into by the State with a private party, *lesivo* (or harmful) to the interests of the State.³

28. The law in reality is designed to protect private parties as it ensures that the Executive cannot unilaterally revoke administrative acts.⁴ Hence, if the Guatemalan Government discovers that there were illegalities concerning the execution of a contract with the State, then it may not simply unilaterally revoke or declare null a private parties' rights under that contract. Instead, the President, with assistance from others within the Executive branch, must

² Expert Report of Lic. Juan Luís Aguilar, 2010-10-01, ¶ 22 (“Expert Report of J.L. Aguilar”).

³ Expert Report of J.L. Aguilar, ¶ 29.

⁴ Expert Report of J.L. Aguilar, ¶ 35.

undertake an internal analysis of the illegalities and must conclude along with his Cabinet Ministers that the administrative act in question is harmful to the interests of Guatemala.⁵ This conclusion must be embodied in an executive resolution (called an *Acuerdo Gubernativo*) signed by the President, his Cabinet Ministers and his Secretary General.⁶ Only then can he sign the *Lesivo* Declaration.⁷ This conclusion is the product of a purely internal deliberation within the Government as to which private parties have no right to participate or be heard.⁸ It is like any other internal deliberative governmental decision that may affect the rights of third parties and to which private parties have no right to participate. This is not a process that is *sui generis* to Guatemala; it is also embodied within the legal systems of such countries as Spain, France, Mexico, Costa Rica, Ecuador and Argentina.⁹

29. For any administrative act to be deemed *lesivo*, there must be sufficient legal grounds showing that the agreement is injurious to the interest of the State.¹⁰ In the case where an administrative act, such as the execution of a public contract, has been deemed to be injurious to the interests of the State, Guatemalan law imposes a duty on the Government to declare that act *lesivo* unless the causes making the act *lesivo* can be remedied.¹¹ Under Guatemalan law, the President faces personal liability for failing to declare an administrative act *lesivo* if the *lesivo* nature of that act has been brought to his attention and the causes making the act *lesivo* cannot be or are not remedied.¹²

30. Once a declaration of *lesividad* has been signed, it must be published in Guatemala's Official Gazette prior to the expiration of the three-year statute of limitations from when the

⁵ Expert Report of J.L. Aguilar, ¶ 36.

⁶ Expert Report of J.L. Aguilar, ¶ 36.

⁷ Expert Report of J.L. Aguilar, ¶¶ 36–37.

⁸ Expert Report of J.L. Aguilar, ¶ 34.

⁹ Expert Report of J.L. Aguilar, ¶ 42.

¹⁰ Expert Report of J.L. Aguilar, ¶ 37.

¹¹ Expert Report of J.L. Aguilar, ¶ 37.

¹² Expert Report of J.L. Aguilar, ¶ 37.

administrative act occurred, here the signing of Usufruct Contract 143/158.¹³ Such resolutions are published in the legal section of the Official Gazette, which is the *Diario de Centroamerica*.¹⁴ That paper, and certainly the legal section thereof, is not popular or widely-read in Guatemala outside of arcane legal circles.¹⁵

31. By declaring an administrative act *lesivo*, the President seeks to have the Attorney General of Guatemala file a case in the *Contencioso Administrativo* Court to, among other things, seek the nullity of agreements that are harmful to the interests of the State.¹⁶ The Attorney General has 90 days from the date of publication of the resolution to file an action in the *Contencioso Administrativo* court to have the court determine whether the act in question is *lesivo* and, if so, the remedies that should be imposed.¹⁷

32. The *Contencioso Administrativo* court hears the parties and finally decides *whether or not* the act or contract is *lesivo*.¹⁸ Any private party whose rights are or may be affected by the declaration of *lesividad* has a right to be noticed and heard in the proceeding before the *Contencioso Administrativo* Court.¹⁹ It is during this proceeding that private parties may express its views and arguments as to the validity or not of the declaration of *lesividad*.²⁰

33. The declaration of *lesividad* alone is devoid of any legal effect until the *Contencioso Administrativo* court renders its decision on the validity, or absence thereof, of the act that was declared *lesivo*.²¹ In other words, in the circumstance where the Government has declared

¹³ Expert Report of J.L. Aguilar, ¶ 38.

¹⁴ Expert Report of J.L. Aguilar, ¶ 39.

¹⁵ Expert Report of J.L. Aguilar, ¶ 39.

¹⁶ Expert Report of J.L. Aguilar, ¶¶ 35-36.

¹⁷ Expert Report of J.L. Aguilar, ¶¶ 36(g), 53.

¹⁸ Expert Report of J.L. Aguilar, ¶ 53.

¹⁹ Expert Report of J.L. Aguilar, ¶ 51.

²⁰ Expert Report of J.L. Aguilar, ¶ 51.

²¹ Expert Report of J.L. Aguilar, ¶ 32; *see also*, **Ex. R-53**, 1996-07-25, Total Unconstitutionality Action in *Poliductos* Case (states that “el citado Acuerdo no es una ley sino una resolución emitida por el Presidente de la República en forma de Acuerdo.”).

lesivo a Government contract, the private party with rights under that contract retains *all* rights thereunder unless and until the Court rules that the agreement is *lesivo* and should be rendered null or otherwise ineffective.²² If the court renders the contract null, the private party has the right to seek compensation so as to have its *status quo* situation restored.²³ The private party also has the right to challenge the decision of the *Contencioso Administrativo* court within the parameters of the Guatemalan legal system.²⁴

B. Claimant Wins An International Public Bid To Rehabilitate And Modernize Guatemala’s Entire Railway System And Later Wins A Separate, Independent Public Bid To Use the Railway Stock

34. In 1997, Guatemala initiated an international bidding process to grant in usufruct State assets held and operated by FEGUA, a decentralized public entity created to manage and operate the railway system in Guatemala, in an effort to refurbish and modernize the country’s rail transport system.²⁵ The bidding process began on 17 February 1997 calling for participants with ample experience in the railway industry to bid on the revitalization project.²⁶ The Usufruct which would become Contract 402 consisted of a 50-year right to rebuild and operate the Guatemalan rail system²⁷ with the objective of providing Guatemala with a functioning railway system.²⁸ Contract 402 covered 800 km of narrow gauge railroad and included the right to develop alternative uses for the right of way, such as pipelines, electric transmission, fiber optics, and commercial and institutional development.²⁹ When it awarded the entire 800 km of the railway right-of-way in usufruct, Guatemala, through FEGUA, sought to have the winning

²² Expert Report of J.L. Aguilar, ¶¶ 40, 63, 129.

²³ Expert Report of J.L. Aguilar, ¶ 55.

²⁴ Expert Report of J.L. Aguilar, ¶ 60.

²⁵ **Ex. C-22**, 1997-11-25, Contract 402, cl. I ; Witness Statement of Andrés Porras, ¶ 7.

²⁶ **Ex. C-3**, Notices of “International Public Bidding Contract of Onerous Usufruct of Railroad Transportation in Guatemala, Government of Guatemala” published in Guatemala newspapers, February 13 and 21, 1997.

²⁷ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 1.1.

²⁸ **Ex. C-22**, 1997-11-25, Contract 402, cl. I.

²⁹ See **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 4.1.2.

bidder rehabilitate and modernize the *entire* railway, not just a fraction of it.³⁰ This can be evidenced by the text of the bidding terms. For instance, in Section 1.1, the bidding terms indicate “The Government of Guatemala is interested in managing to restore railroad transportation in the country . . .”³¹ Similarly, Section 2.4 of the same bidding terms state that the purpose of the contract awarded to the winning bidder was to provide “railroad transportation service in an efficient manner that is competitive with other means of transportation and in keeping with the new trends for the movement of merchandise and persons.”³² This same language would later be incorporated into Contract 402.³³ Also, Section 3.3.3.3. of the bidding terms provided that all offerees should present a business plan that would accomplish the restoration and modernization of the entire railway system within the first twenty-five (25) years of the contract.³⁴ Finally, Section 4.1.16 of the terms make clear that Guatemala sought to have the winning bidder offer freight and passenger transport throughout all sections of the railway given in usufruct.³⁵ According to Mr. Andrés Porras, the Overseer of FEGUA at the time this bidding process was carried out, this objective of having the winning bidder restore and modernize the entire railway system in all of the lands given in usufruct was precisely what Guatemala intended to achieve through this bidding process.³⁶

35. After submitting their bid on 15 May 1997, Claimant, having certified that it submitted a bid in strict conformity with the bidding rules, was chosen as the winning bidder to rebuild the

³⁰ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶¶ 1.1, 2.4, 3.3.3.3; Witness Statement of Andrés Porras, ¶¶ 7, 8.

³¹ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 1.1; Statement of A. Porras, ¶¶ 7, 8.

³² **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 2.4; Statement of A. Porras, ¶ 7.

³³ **Ex. C-22**, 1997-11-25, Contract 402, cl. IV; Statement of A. Porras, ¶ 7.

³⁴ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 3.3.3.3; Statement of A. Porras, ¶ 10.

³⁵ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 4.1.16; Statement of A. Porras, ¶ 7.

³⁶ Statement of A. Porras, ¶ 10.

defunct rail system.³⁷ In so doing, the bidding commission expressly noted that it was awarding the winning bid to FVG in accordance with the bidding rules and requirements.³⁸

36. In its bid, Claimant offered to conduct the rehabilitation of the 800 km railway in the following five phases, which it said would yield Guatemala over Q.1,362,230,000 or USD 225,065,028³⁹ in the first twenty-five (25) years of the contract:

- Phase I would reopen the 320 km Atlantic/North Coast corridor, which would connect the Atlantic port cities of Puerto Barrios/Puerto Santo Tomás with Guatemala City;
- Phase II would involve reopening the 200 km Pacific/South Coast corridor from the Mexican border at Tecúm Umán to Escuintla and Puerto Queztal. This phase was supposed to be rehabilitated by 2002;
- Phase III involved the construction of a branch line to serve Cementos Progreso, a cement manufacturer and minority shareholder in FVG. This phase was due to be initiated in 2003;
- Phase IV would connect the Pacific and Atlanta corridors by restoring the Escuintla-Guatemala City line. This phase was due to be commenced in 2008; and
- Phase V would reopen the connection between El Salvador and Zacapa.⁴⁰

37. After some negotiations, FVG and FEGUA entered into Contract No. 402 (“Contract 402”) with FEGUA granting FVG the right to use all of the railway right-of-way assets (but not the railway equipment or the rolling stock) previously controlled by FEGUA for a fifty-year period with the objective that FVG would restore and modernize railway transportation

³⁷ **Ex. C-15**, Ferrovías Business Plan, Envelope A Technical Offer § 4.2; **Ex. R-54**, 1997-05-14, Acuerdo de Intervención No. 003-97; **Ex. R-59**, 1997-06-04, Acta No. 2 Junta de Licitación; **Ex. R-201**, 1997, 06-13, Acuerdo de Intervención No. 007-97; **Ex. R-202**, 1997-06-20, Letter to A. Porras from Lic. R. Calvo (RDC); **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 3.2.2.

³⁸ **Ex. R-59**, 1997-06-04, Acta No. 2 Junta de Licitación.

³⁹ **Ex. C-15**, Ferrovías Business Plan, Envelope A Technical Offer (converting quetzals (“GTQ”) into American dollars (“USD”) using the 1997 exchange rate).

⁴⁰ 2009-06-26, Claimant’s Memorial on the Merits, ¶ 19; **Ex. C-15**, Ferrovías Business Plan, Envelope A: Technical Offer § 3.0 (Operation Plan).

services in Guatemala.⁴¹ Then Overseer Porras acknowledged that FVG had insisted throughout the negotiations that it had submitted a non-conforming bid in certain respects, including insisting that the railway stock and equipment be part of the right-of-way Usufruct, but he communicated to FVG that this was not possible and that the contract would be awarded pursuant to and strictly complying with the bidding requirements.⁴²

38. The contract outlines the dates of initiation of rehabilitation for each phase of the railway and commencement dates for railway operations.⁴³ Consistent with the bidding requirements, the stated purpose of Contract 402 was to rehabilitate the *entire* railway, not merely a fraction of it.⁴⁴ As noted by Overseer Porras, to protect itself given the large amounts of land being given in usufruct to FVG, FEGUA insisted that FVG would be required to return to FEGUA those lands in which FVG did not restore the railway.⁴⁵ This further underscores that the principal objective for Guatemala was to have a functioning railway in all of the lands given in usufruct to FVG.

39. The railroad stock and equipment were not part of Contract 402.⁴⁶ As noted above, notwithstanding that FVG requested in their bid and during contract negotiations that the railway stock be granted to them under Contract 402, FEGUA did not and could not honor this request.⁴⁷ Rather, under Clause 10 of Contract 402, Claimant was only granted the right “[t]o

⁴¹ **Ex. C-22**, 1997-11-25, Contract 402 for the provision of rail transport. This contract was approved by Congress, according to Decree No. 27-98 of 23 April 1998. See **Ex. R-61**, Oficio No. 648-97, Letter to the President from Lic. Andrés Porras Castillo (stating that Contract 402 needed to be approved by the Executive and then subsequently approved by Congress).

⁴² Statement of A. Porras, ¶ 12; **Ex. R-201**, 1997, 06-13, Acuerdo de Intervención No. 007-97; **Ex. R-202**, 1997-06-20, Letter to A. Porras from Lic. R. Calvo (RDC).

⁴³ **Ex. C-22**, 1997-11-25, Contract 402, cl. 13; Statement of A. Porras, ¶ 18.

⁴⁴ Statement of A. Porras, ¶¶ 17-18.

⁴⁵ **Ex. C-22**, 1997-11-25, Contract 402, cl. 16 which states “In the event that the USUFRUCTARY fails to restore the railway and fails to render cargo transportation services under the terms of sections two, three, four, five, and six of the THIRTEENTH CLAUSE hereof, the Usufructary shall surrender to FEGUA the real property where the railway yet to be restored is located, and any such property shall no longer be subject to this usufruct.” Statement of A. Porras, ¶ 10.

⁴⁶ Statement of A. Porras, ¶¶ 11-16; **Ex. C-22**, 1997-11-25, Contract 402, cl. 10.

⁴⁷ Statement of A. Porras, ¶¶ 11-16.

obtain the rail and non-rail equipment, property of FEGUA, that it deems convenient for its operations, pursuant to the provisions of the basis of the bidding, origin of this contract.”⁴⁸ The bidding rules explain that “[s]uch equipment will be the object of a [separate] bidding process” and the “contracting party will have the **opportunity** to acquire those that it deems convenient for its activities.”⁴⁹ FVG was thus given the option of participating in a separate bid to obtain FEGUA’s equipment in usufruct, or separately acquiring the railway stock it would need to operate the railway elsewhere.⁵⁰ In fact, section 4.1.8 of the Bidding Rules provides the winning bidder with the possibility of incorporating its own railway equipment to operate the railway.⁵¹ Contract 402 similarly recognizes this option.⁵² Importantly, in the Bidding Rules, FEGUA reserved the right to concession the building of a separate railroad to another private company in lands not given in usufruct to FVG, thus demonstrating that Guatemala could have other parties interested in acquiring or using FEGUA’s railway stock.⁵³

40. It also is important to note that Claimant’s duties and obligations under Contract 402 existed whether or not it was able to ultimately acquire FEGUA’s railway stock through the separate public bidding process and usufruct contract and whether or not having acquired the equipment through such a process it later, for whatever reason, lost its rights to utilize that equipment. For example, assuming that FVG had won the tender for right-of-way usufruct but later participated in and lost the separate tender for the railway stock, or did not participate in

⁴⁸ **Ex. C-22**, 1997-11-25, Contract 402, cl. 10 (emphasis added).

⁴⁹ **Ex. R-1**, 1997-11, Bidding Rules for Contract 402, § 4.1.6 (emphasis added).

⁵⁰ Statement of A. Porras, ¶ 11; **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 4.1.6, 4.1.8.

⁵¹ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 4.1.8.

⁵² **Ex. C-22**, 1997-11-25, Contract 402, cl. 5 (II) (The Infrastructure and the premises of the railway network were built under ancient standards, and are currently obsolete and in poor conditions. The USUFRUCTARY is free to choose whether to use those assets or not. The USUFRUCTARY may propose to substitute them by other assets that will result in services and, for such purposes, build or install new railway elements and repair or restore tracks, stations, administrative buildings, workshops, etc., with no need to request the authorization of Ferrocarriles de Guatemala – FEGUA, provided that FEGUA receives previous notice thereof.”); cl. 11 (D) (“The preceding provision does not apply to equipment owned by the Usufructary, including that destined to railway, non-railway, workshop or any other purpose related to the Usufructary commercial operations, which will remain as the Usufructary own upon the expiration of this contract.”).

⁵³ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 4.1.15; Statement of A. Porras, ¶ 11.

that tender, FVG would nonetheless be required to comply with its duties to rehabilitate and operate the railway pursuant to Contract 402.⁵⁴ FVG could have negotiated for the inclusion of a condition precedent in Contract 402 which made its obligations to restore the railway under that contract contingent upon its later acquiring FEGUA's railway stock in usufruct, but it did not do so. Rather, pursuant to Clause 18 of Contract 402, it only reserved the right to terminate Contract 402 if it could establish two conditions: (i) that it failed to acquire FEGUA'S rail equipment; and, (ii) that as a result of not having use of this equipment it could not meet its obligations under Contract 402.⁵⁵ This latter condition presumably would require some showing that it could not acquire rail equipment elsewhere in the world to operate the Guatemalan railway. But, importantly, it retained the obligation to rehabilitate the entire railway under Contract 402 absent a proper exercise of this termination right.⁵⁶ FVG has never invoked Clause 18 to terminate Contract 402.

41. In November 1997, FEGUA issued a separate public request for bidding proposals for the use of FEGUA'S rail equipment.⁵⁷ FVG submitted its bid and won the railway equipment in onerous usufruct on 16 December 1997.⁵⁸ The public bidding documents made clear that the winning bidder must strictly adhere to and could not deviate from the bidding rules in making its offer or executing the resulting usufruct contract.⁵⁹ They further established that the winning bidder could only take possession of the equipment under the resulting usufruct contract when that contract came into effect and that such contract would not come into effect *unless and until* it was approved by the President through an *Acuerdo Gubernativo* and that resolution was published in the Official Gazette (*Diario Oficial*).⁶⁰ RDC and FVG expressly

⁵⁴ **Ex. C-22**, 1997-11-25, Contract 402, cls. 4, 6, 11(a); Statement of A. Porras, ¶ 16.

⁵⁵ **Ex. C-22**, 1997-11-25, Contract 402, cl. 18 (III); Statement of A. Porras, ¶ 16.

⁵⁶ **Ex. C-22**, 1997-11-25, Contract 402, cl. 18 (III); Statement of A. Porras, ¶ 16.

⁵⁷ Statement of A. Porras, ¶ 19.

⁵⁸ **Ex. R-63**, 1997-12-16, Acta No. 21-97, Minutes of Meeting of the Bid Selection Committee: Railway Equipment; see **Ex. R-64**, 1998-01-09, Intervention Agreement No. 001-98.

⁵⁹ **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 3.2.1-3.2.2.

⁶⁰ **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.2, 6.4 and Draft Form Contract attached to the Bidding Rules at Clause 5.

acknowledged these conditions precedent to their being able to take lawful possession of the equipment under the usufruct contract when they submitted their bid for Contract 41.⁶¹ As a result of this bidding process, the parties entered into Usufruct Contract No. 41 (“Contract 41”).⁶² In this contract, FVG agreed to pay a Canon fee to FEGUA in the amount of 1% of the *gross* freight traffic revenue of the railroad, not to exceed GQT 300,000 per year.⁶³

42. Claimant does not dispute that Contract 41 never entered into force and thus did not generate any contractual rights because it was never approved by the President through an *Acuerdo Gubernativo* as required by Guatemalan Administrative Law, Clause 6.4 of the Bidding Rules and Clause 5 of Contract 41.⁶⁴ This executive approval was a key requirement of the Bidding Rules and is a requirement that must be complied with before FEGUA’s Overseer may give the railway equipment in usufruct to a private party.⁶⁵

43. The final usufruct contract between FVG and FEGUA was Trust Fund Contract No. 820 (“Contract 820”). This contract was also awarded to FVG after a separate public bidding process and in accordance with the bidding specifications drawn up by FEGUA. Contract 820 constituted an administration and payment trust fund that required both FVG and FEGUA to

⁶¹ **Ex. C-18**, 1999-11-11, FVG Sealed Bid Proposal for Guatemala’s Rail Equipment Usufruct, cl. 2.5 (“The period of time during which CODEFE claims to use the Rail Equipment is of 50 years, which will start 30 days after the publication in the Diario de Centroamérica, of the Government Resolution approving the Onerous Usufruct Contract of the Rail Equipment property of Ferrocarriles de Guatemala.”)

⁶² **Ex. R-3**, 1999-03-23, Contract 41, cl. 5.

⁶³ **Ex. R-3**, 1999-03-23, Contract 41, cl. 7 (emphasis added); **Ex. C-18**, 1999-11-11, FVG Sealed Bid Proposal for Guatemala’s Rail Equipment Usufruct, cl. 2.3 (“In addition to the amounts mentioned for the reparation of the equipment, we propose to pay an annual commission to FEGUA for the exclusive use of the equipment. This commission shall be 1%(one percent) of the gross traffic freight of the railroad and shall not exceed Q.300,000.00 per calendar year.”).

⁶⁴ **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.4; **Ex. R-3**, 1999-03-23, Contract 41, cl. 5; *see*, Memorial on the Merits, ¶ 25 (iii).

⁶⁵ Expert Report of J.L. Aguilar, ¶¶ 105–106; **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.2, 6.4; **Ex. R-3**, 1999-03-23, Contract 41, cl. 5.; **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice-Minister Diaz.

make certain payments into the fund for use in the administration, rehabilitation and modernization of the railway system.⁶⁶

C. Parties Exchange Letters Granting Temporary, Revocable Authorization To FVG To Use FEGUA'S Railway Equipment

44. Recognizing that Contract 41 had not come into effect and that it therefore had no legal right to use the equipment per that agreement, FVG sought temporary authorization to utilize FEGUA's railway stock via letter request. In the first of such letters, dated 9 April 1999, FVG requested an authorization from FEGUA to use the railway equipment and in so doing acknowledged that Contract 41 had not yet entered into force.⁶⁷ In response, on 12 April 1999, FEGUA granted FVG temporary authority to use the equipment.⁶⁸ In early 2000, as then Overseer Porrás was leaving office, FVG again requested temporary authorization to use the railway equipment.⁶⁹ FEGUA again granted the temporary authorization requested.⁷⁰

45. Similarly, in a letter dated 22 August 2002, FVG sent a letter to FEGUA indicating that it would still be operating under the temporary authorization while the proper approval was obtained with respect to Contract 41.⁷¹ Subsequently, in a letter dated 9 October 2002, FEGUA made clear to FVG that Contract 41 had not yet entered into force and that FVG was operating per the temporary written authorizations granted to it by FEGUA via letters and that FVG should pay the stipulated commission for use of the equipment as set forth in the letters authorizing its use.⁷²

⁶⁶ **Ex. R-40**, 1999-12-30, Contract 820. This Trust was established in the Banco Agrícola Mercantil de Guatemala, SA.

⁶⁷ **Ex. R-196**, 1999-04-09, Oficio No. GG-114-99, Letter to A. Porrás from R. Ravelo.

⁶⁸ **Ex. R-197**, 1999-04-12, Oficio No. 076-99, Letter from A. Castillo to R. Ravelo.

⁶⁹ **Ex. R-41**, 2000-02-16, Oficio No. GG-020-2000, Letter to A. Castillo from R. Ravelo.

⁷⁰ **Ex. R-195**, 2000-02-25, Oficio No. 023-2000, Letter to R. Ravelo from A. Porrás.

⁷¹ **Ex. R-198**, 2002-08-22, Oficio No. 167-2002, Letter to J. Senn from R. Minera.

⁷² **Ex. R-42**, 2002-10-09, Oficio No. 197-2002, Letter to J. Senn from R. Minera.

46. Through these letter authorizations, FEGUA was in no way endorsing or recognizing the validity of Contract 41. Quite to the contrary, as Overseer Porras who was the first to grant such temporary authorization explains, this temporary authorization was a showing of the governments' good faith in allowing FVG to use the railway equipment while it was determined whether the President would approve Contract 41, and it always was made clear to FVG that the authorizations were temporary.⁷³ FVG is the one who suggested that it pay the same amount to FEGUA as was stipulated in Contract 41, but as Overseer Porras confirms FEGUA accepted this proposal as it made logical sense to use the same amount that the parties had already negotiated.⁷⁴ By accepting this proposal from FVG, FEGUA was not in any way recognizing the validity of Contract 41, and, as Overseer Porras confirms, FEGUA's Overseer does not have authority to deviate from the Bidding Rules so as to unilaterally give the equipment in usufruct to FVG.⁷⁵ FVG's seriatim requests for authorization to use the equipment confirms its understanding that it was only receiving temporary authorization from FEGUA to use the equipment, not some kind of validation of its rights under Contract 41.

D. Claimant Enters Into Back-Dated Lease Agreements And Later Subsequent Railway Equipment Usufruct Contracts With Mr. Hugo Sarceño

47. On 13 August 2003, FVG and FEGUA entered into two virtually identical lease agreements (Contracts 03-2003 and 05-2003), in which FEGUA purported to lease its railway stock and equipment to FVG.⁷⁶ These lease contracts have virtually identical clauses with the exception that Contract 05-2003 provides for a slightly higher lease payment to FEGUA.⁷⁷ The very odd thing about these contracts is that they create lease agreements as of 13 August 2003 which purport to *back date the leasing obligations to 30 January 1998* as if the leasing

⁷³ Statement of A. Porras, ¶¶ 21-22.

⁷⁴ Statement of A. Porras, ¶ 22.

⁷⁵ Statement of A. Porras, ¶ 22.

⁷⁶ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

⁷⁷ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

obligations had been in effect five years earlier.⁷⁸ The leases each provided that they would be in effect from 30 January 1998 until 28 August 2003, which happens to be the very same date when Contract 143 is executed between the parties.⁷⁹ The lease agreements make no mention of the letter agreements between FEGUA and FVG providing for temporary authorization of the railway equipment.⁸⁰ Each recognizes that they are being executed to regularize FVG's use of FEGUA's equipment while presidential approval of Contract 41 was being obtained.⁸¹ Each was signed by FEGUA on behalf of then Overseer Hugo Sarceño—the same person who later executed Contract 143—and by Mr. Senn on behalf of FVG.⁸² All were apparently prepared by the same notary.⁸³

48. As noted above, through these lease agreements, FVG yet again recognized that Contract 41 was not operative and had never come into effect. Through these leases, FVG also recognized that it did not believe that the previous letter agreements were in any way a statement by FEGUA that it was recognizing the validity of Contract 41. Had this been the case there would have been no need for FVG and FEGUA to enter into the leases.

49. Finally, these leases also show that FVG paid a mere pittance to FEGUA for the use of the railway stock and that it went several years without making any payments to FEGUA for the equipment. Lease agreement 05-2003, which is the agreement containing the higher lease payments to FEGUA, shows that FVG paid FEGUA USD 1,114.15 in 1999 for use of the

⁷⁸ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

⁷⁹ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05; **Ex. R-5**, 2003-08-28, Contract 143.

⁸⁰ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

⁸¹ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

⁸² **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

⁸³ **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05.

equipment⁸⁴ and that it then made no payments in 2000, 2001, 2002 or the first seven months of 2003 for this equipment. Then, upon or at some point after executing the 05-2003 lease agreement, FVG paid FEGUA the sum of USD 45,447.60 as the remaining lease payment for the use of the equipment from 1998 through 28 August 2003.⁸⁵ So in total for its use of all of FEGUA's rolling stock and equipment from January 1998 through August 28, 2003, FVG paid FEGUA USD 46,561.75, which is an average payment of USD 7,760.17 per year.

50. On 27 August 2003, FVG and FEGUA entered into yet another agreement (145-2003), this one to terminate the lease agreement contained at 05-2003.⁸⁶ Interestingly, this termination agreement, which does not purport to terminate lease agreement 03-2003, provides that the 05-2003 lease agreement would be terminated as of 27 August 2003 and that FVG would, as of that date, return all of the railway equipment to FEGUA.⁸⁷

51. As Lic. Aguilar notes in his expert report, these lease agreements violate Guatemalan law because the FEGUA overseer lacked the legal authority to dispose of FEGUA's assets, which are State property, in favor of third parties.⁸⁸ The contracts are absolutely null, as they contradict Guatemalan laws insofar as it was necessary to submit them to a public bid and to later secure the President's authorization via and Executive Resolution.⁸⁹

52. By the time that these leases were being executed, Mr. Senn of FVG and Mr. Sarceño of FEGUA had already been negotiating for several months a new usufruct contract—what

⁸⁴ The Guatemalan Quetzal to U.S. Dollar Exchange rate for January 1999, the approximate date that the first equipment cannon was paid, was 0.14860 thus yielding a conversion of GTQ 7,500 to USD 1,114.15.

⁸⁵ **Ex. R-66**, 2003-08-13, Lease Agreement for use of Railway Equipment No. 05. Cl. 5. The Guatemalan Quetzal to U.S. Dollar Exchange rate for 13 August 2003, the date of the lease agreement, was 0.130, thus yielding a conversion of GTQ 370,425.11 to USD 45,447.6.

⁸⁶ **Ex. R-67**, 2003-08-27, Termination of Lease Agreement No. 05.

⁸⁷ **Ex. R-67**, 2003-08-27, Termination of Lease Agreement No. 05. It appears that lease agreement 05-2003 was the operative lease agreement given that this is the agreement that the parties terminated, but that is not clear from the documentation.

⁸⁸ Expert Report of J.L. Aguilar, ¶¶ 132-135.

⁸⁹ Expert Report of J.L. Aguilar, ¶¶ 132-135.

ultimately became Contract 143—whose purpose it was to replace Contract 41.⁹⁰ In May 2003, Mr. Sarceño forwarded a draft of the proposed replacement contract to Mr. Mario Saul Cifuentes Hernández, FEGUA’s principal legal counsel at the time, for his review.⁹¹ Mr. Sarceño indicated that he wanted Mr. Cifuentes to give him the results of his analysis informally and as soon as possible.⁹² Mr. Cifuentes then did a thorough examination of the draft contract, the very one that later became Contract No. 143, and prepared an informal note containing his legal conclusions.⁹³ He presented this note to Overseer Sarceño on 14 July 2003.⁹⁴

53. Among the legal recommendations Mr. Cifuentes made to Mr. Sarceño were that Contract 143, to be enforceable: (a) had to be approved by the President via an *Acuerdo Gubernativo*; and (b) had to be executed by the State’s Notary.⁹⁵ These recommendations informed Mr. Sarceño that the draft contract as worded contained various legal defects rendering it unenforceable. Although Mr. Sarceño received a copy of the note containing Mr. Cifuentes’ legal recommendations, he never discussed them or the contract with Mr. Cifuentes again.⁹⁶ Ultimately, Mr. Sarceño disregarded Mr. Cifuentes’ legal advice and entered into Contract 143 with FVG on 28 August 2003 *without* correcting the contract’s legal deficiencies.⁹⁷

54. Both Mr. Sarceño and FVG knew at the time they were executing Contract 143 that this contract violated the requirements of the Bidding Rules of Contract 41 and violated

⁹⁰ Witness Statement of Mario Saúl Cifuentes Hernández, ¶ 9.

⁹¹ Statement of M. Cifuentes, ¶¶ 2, 5, 9.

⁹² Statement of M. Cifuentes, ¶ 11.

⁹³ Statement of M. Cifuentes, ¶ 11.

⁹⁴ Statement of M. Cifuentes, ¶ 11.

⁹⁵ Statement of M. Cifuentes, ¶ 12.

⁹⁶ **Ex. R-5**, 2003-08-28, Contract 143; **Ex. R-6**, 2003-10-07, Contract 158.

⁹⁷ **Ex. R-5**, 2003-08-28, Contract 143; **Ex. R-6**, 2003-10-07, Contract 158; **Ex. R-3**, 1999-03-23, Contract 41, cl. 5.; **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.2, 6.4 and Draft Form Contract attached to the Bidding Rules at Clause 5. **Ex. C-18**, 1999-11-11, FVG Sealed Bid Proposal for Guatemala’s Rail Equipment Usufruct, cl. 2.5 (“The period of time during which CODEFE claims to use the Rail Equipment is of 50 years, which will start 30 days after the publication in the *Diario de Centroamérica*, of the Government Resolution approving the Onerous Usufruct Contract of the Rail Equipment property of Ferrocarriles de Guatemala.”); Statement of M. Cifuentes, ¶¶ 12–14, Expert Report of J.L. Aguilar, ¶ 128.

Guatemalan law. Specifically, both knew that the Bidding Rules, and applicable law, including FEGUA's Organic Law and the Guatemalan Constitution, required that the agreement be first approved by the President and his Cabinet Ministers before it could be enforceable as they were aware of the applicable laws, and specifically incorporated the Bidding Rules from Contract 41 as part of Contract 143.⁹⁸ They also knew or should have known that Guatemala's public contracting law required that a new public bid be conducted given that the prior public bid had taken place in November 1997, six years earlier, and that they were entering into a new and different contract which departed from the Bidding Rules for the prior contract.⁹⁹ Lic. Aguilar confirms this point.¹⁰⁰ Also, as Lic. Aguilar explains, a contract of this magnitude and duration involving the granting of public goods to a private third party constitutes an extraordinary act outside the ken of customary management duties that are within the delegated authority of FEGUA's Overseer.¹⁰¹ Hence, it was contrary to Guatemalan law and an *ultra vires* act for Mr. Sarceño and FVG to try to circumvent the Bidding Rules and Guatemalan law by stating in Contract 143 that it need not be approved by the President to be enforceable.¹⁰²

55. Because FVG was well aware that Contract 143 has been executed in contravention of Guatemalan law and of the Bidding Rules incorporated into it, it knowingly took the risk that this contract would subsequently be declared illegal and would not withstand governmental or judicial scrutiny. And not surprisingly, as discussed in more detail below, once the new Overseer interventor accepts his position at EGUA, a mere four months after the signing of Contract 143, FEGUA informs FVG in writing that Contract 143 suffered from a number of legal defects that needed to be immediately remedied.

⁹⁸ Expert Report of J.L. Aguilar, ¶ 126.

⁹⁹ **Ex. RL-46**, Guatemala's State Hiring Act, Article 17.

¹⁰⁰ Expert Report of J.L. Aguilar, ¶¶ 116–118, 126.

¹⁰¹ Expert Report of J.L. Aguilar, ¶ 91.

¹⁰² Expert Report of J.L. Aguilar, ¶¶ 91, 111–13.

56. There is one more point about Contract 143 that should be discussed before moving on. Claimant incorrectly notes that the cannon fee under Contract 143 “increased to 1.25% of the **gross** traffic revenue, with no annual limitation.”¹⁰³ This is incorrect. The new canon payment to be made by FVG per Contract 143 was “1.25% of the **net** value of the freight billing.”¹⁰⁴ Contract 143 provides that “the term **net** value means the amount billed *excluding* any type of tax or duty that is to be paid by Compañía Desarrolladora Ferroviaria, Sociedad Anónima.”¹⁰⁵ This means that Claimant is simply wrong when it asserts that FEGUA received a benefit in the form of a *higher* cannon fee for the equipment under Contract 143.¹⁰⁶ Claimant ignores that the basis used to calculate the freight under Contract 143 is *lower* than that used to calculate the cannon due to FEGUA under Contract 41.¹⁰⁷ As FEGUA’s Chief Financial Officer explains, this is so because the net freight standard, which is defined to include freight received *minus* applicable taxes, will always be *lower* than the gross freight standard used under Contract 41, which includes the freight charges paid plus the applicable taxes.¹⁰⁸ As he further explains, this means that it is very unlikely that FEGUA would have insisted in this change in cannon fee as it would not have been in its interest to do so.¹⁰⁹

E. Guatemala Discovered the Legal Defects In Contract 143/ 158 That Render It *Lesivo* In Early 2004 And First Tried To Resolve Them with FVG (March 2004- Early 2005)

57. The decision to request a declaration of *lesividad* was prompted in 2004 by **Dr. Arturo Gramajo**, the then “Overseer” of FEGUA, after Mr. Sarceño’s departure.¹¹⁰ Upon assuming his duties and *without* being aware of the *content and details of the* contracts between FEGUA and FVG, Dr. Gramajo requested his staff to provide him with copies of all of the *contracts* between

¹⁰³ Memorial on the Merits, ¶ 28.

¹⁰⁴ Ex. R-5, 2003-08-28, Contract 143, cl. 7 (emphasis added).

¹⁰⁵ Ex. R-5, 2003-08-28, Contract 143, cl. 7.

¹⁰⁶ Memorial on the Merits, ¶¶ 28, 81, 84, 119.

¹⁰⁷ Statement of José Miguel Carrillo Chinchilla, ¶ 18.

¹⁰⁸ Statement of J. Carrillo, ¶ 18.

¹⁰⁹ Statement of J. Carrillo, ¶ 18.

¹¹⁰ First Statement of A. Gramajo, ¶ 8.

FEGUA and third parties to familiarize himself with the contractual relationships to which FEGUA was a party. Dr. Gramajo also asked Carolina de Dubón, the Lead Counsel in FEGUA's legal department, for a legal opinion that analyzed the contents and scope of *all contracts*, including the Contracts 402 and 143/158.¹¹¹

58. Before Dr. Gramajo had an opportunity to delve into the contractual relationship with FVG, FEGUA received a letter from Mr. Jorge Senn, FVG's General Manager, on 14 April 2004, requesting that FEGUA turn over the custody of several warehouses and garages. Given that this request was based on the usufruct contracts between FEGUA and FVG, including the equipment usufruct, Overseer Gramajo forwarded the request to FEGUA's Legal Department for their analysis.¹¹² That same day, 14 April 2004, the Legal Department issued Opinion 47-2004, indicating that FEGUA was not required to turn over custody of these warehouses and garages and, importantly, that Contract 143/158 was plagued by legal defects that needed to be remedied as soon as possible.¹¹³ The legal opinion specifically referenced that the equipment usufruct was entered into without approval of the Executive Branch as required by the Bidding Rules cited therein.¹¹⁴

59. In her analysis, delivered to Dr. Gramajo on 14 April 2004, Ms. Dubón pointed out the following legal defects with Usufruct Contract 143/158: the Contracts (a) provided for unilateral termination, (b) included equipment that should not have been and was not part of the object of the contract, (c) allowed for the equipment to be taken out of the country, (d) provided that the equipment be insured at book value, and (e) omitted the key legal requirement of executive

¹¹¹ First Statement of A. Gramajo, ¶ 10.

¹¹² First Statement of A. Gramajo, ¶ 11; **Ex R-7**, 2004-04-14, Letter from J. Senn (Ferrovías) to A. Gramajo (FEGUA) Requesting Custody of Warehouses.

¹¹³ First Statement of A. Gramajo, ¶ 11; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

¹¹⁴ First Statement of A. Gramajo, ¶ 11; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

approval, among others.¹¹⁵ Ms. Dubón recommended that FEGUA engage FVG in negotiations to cure these defects.¹¹⁶

60. On 21 April 2004, a few days after he received Opinion 47-2004 from FEGUA's Legal Department, Dr. Gramajo sent a letter to Mr. Senn informing him that according to the opinion of FEGUA's legal counsel—which he attached to the letter—it was not possible for him to grant FVG its request of 14 April 2004 to turn over the custody of the warehouses and garages.¹¹⁷ Through this letter and the attached legal opinion, FEGUA formally informed FVG that Usufruct Contract 143/158 contained serious legal defects, which called into question the legal validity of those contracts, and which needed to be remedied as soon as possible.¹¹⁸

61. The parties initiated negotiations in an effort to remedy the defects in Contract 143/158. From mid-2004 through early 2005, the parties held a series of negotiations in which their principal objective was to enter into a *new* equipment usufruct that cured the legal defects contained in Contract 143/158. In fact, as early as March 2004, the parties were already in discussions about possible modifications to Contract 143/158 or negotiaton of a new equipment usufruct to cure the legal defects in Contract 143/158 of which FEGUA complained, including obtaining presidential approval of the same.¹¹⁹ In addition to ensuring that the new contract would secure presidential approval as required by the Bidding Rules and Guatemalan law, other concerns cited by FEGUA included the historical patrimony and its welfare, particularly avoiding the destruction of rail equipment and locomotives of high historical and cultural value.¹²⁰ At the same time, FEGUA complained to FVG about its failure to complete

¹¹⁵ First Statement of A. Gramajo, ¶ 11; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

¹¹⁶ First Statement of A. Gramajo, ¶ 11; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

¹¹⁷ First Statement of A. Gramajo, ¶ 12; see **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo.

¹¹⁸ First Statement of A. Gramajo, ¶ 12; Second Statement of A. Gramajo ¶ 5; see **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo.

¹¹⁹ First Statement of A. Gramajo, ¶ 13; Second Statement of A. Gramajo ¶ 14; **Ex. R-80**, 2004-04-03, Correspondence and Draft Contract Re: Modification of Contract 143/158 to Cure Illegalities (see e.g., cl. 6 of Draft Contract); **Ex. R-80**, 2004-04-03, Correspondence and Draft Agreement Re: Amendment of Contract 143/153 to cure illegalities.

¹²⁰ First Statement of A. Gramajo, ¶ 14.

their obligation to rehabilitate each of the different phases.¹²¹ FVG's failure to complete the different phases of rehabilitation per the terms of Contract 402 also was public knowledge.¹²²

62. While FVG was negotiating with FEGUA to try to resolve disputes relating to the concerns expressed by FEGUA, it *simultaneously* was lobbying the Government, through the Ministry of Communications, to try and resolve these disputes. FVG and RDC met with high-level officials within the Ministry of Communications prior to June 2004 and then again on June 7, August 4 and November 5.¹²³ During these meetings, they sought, among other things, official recognition of Contract 143/158 by the Government, thereby acknowledging expressly that the Government *did not recognize* the validity of this Contract given the irregularities noted in the agreement by FEGUA.¹²⁴

63. On 15 November 2004, FVG, through Mr. Senn, sent a letter to Vice-minister Roberto Diaz requesting yet again an official and formal recognition of Usufruct Contract 143/158:

As was explained in our meeting, the government's failure to acknowledge these contracts ***creates a lack of legal certainty*** for potential investors, ***and this could be interpreted that use of the narrow track equipment owned by FEGUA is at risk***, given that this affects our ability to maintain and improve service on the Atlantic route. Consequently, this situation puts the entire Usufruct Contract at risk, which includes all the projects and operations on the southern coast.

We have started communications with FEGUA's legal department on this matter so as to be able to arrive at a joint proposal that satisfies both the government's concerns through FEGUA and those of our company. If the results of this initiative are successful, together with FEGUA ***we would be presenting an***

¹²¹ Second Statement of A. Gramajo, ¶¶ 10, 31-32; FEGUA began to receive reports that Ferrovías had not been completing its obligations under Contract 402 since as early as 2001. See e.g., Ex. R-87, 2001-02-06, Oficio No. 04-2001, Letter to E. Minera from FEGUA's Legal Dept.

¹²² Second Statement of A. Gramajo, ¶ 33; see e.g., Ex. R-86, 2005-02-13, PRENSA LIBRE, "The Railroad Does Not Run Well"; Ex. R-82, 2004-08-22, SIGLO XXI, "The train that fails to get back on track"; Ex. R-87, 2005-02-13, PRENSA LIBRE, "Slow-Paced Train."

¹²³ Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz.

¹²⁴ Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz.

amendment to the contract, or a new contract, before the end of the year. If not, we will be informing you of this as quickly as possible.¹²⁵

64. The letter indicated that negotiations between FEGUA and FVG had commenced with the goal of remedying some of the concerns expressed by FEGUA and FVG concerning their relationship.¹²⁶ Again, that FVG made this request to the Vice-minister is a clear indication that it was aware that the Government did not recognize the validity of Contract 143/158.

65. In his November 15th letter, Mr. Senn also informs Vice Minister Diaz FVG's plans for expansion of the railway include the installation of *standard gauge* railway for the Southern Coast (which is Part of Phase II of the phased restoration project set forth in Contract 402) and notes that this expansion will depend "strongly" on investment by local companies who would also use that part of the railway to transport their products.¹²⁷ Mr. Senn also sought assistance from the Government with the reallocation of squatters along the rail right-of-way toward the Southern Coast, noting that investors had expressed concerns over this issue.¹²⁸ As discussed in more detail below, the failure of FVG to obtain local or other investors to raise capital for the construction of the *standard gauge* railway for the Southern Coast turns out to be the absolute death knell of their investment.

66. Mr. Senn closes his letter by imploring Vice Minister Diaz to take action to help resolve the various disputes between FVG and FEGUA as outlined in his letter:

Mr. Vice Minister, I trust that you appreciate the fact that ***we have made several attempts to resolve these situations through various meetings held during the first ten months of this government***, starting with the meetings held with Minister Eduardo Castillo and Vice Minister Federico Moreno. Subsequently we met with you and our president, Bill Duggan, on

¹²⁵ Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz.

¹²⁶ First Statement of A. Gramajo, ¶ 15; Witness Statement of Astrid Zosel Gantenbein, ¶ 6; Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz.

¹²⁷ Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz; Second Statement of A. Gramajo, ¶ 24.

¹²⁸ Ex. R-9, 2004-11-15, Letter from J. Senn to Vice-minister Díaz; Second Statement of A. Gramajo, ¶ 13.

June 7, 2004, and later there was a follow-up meeting with you and Bill Duggan on August 4, 2004. The most recent meeting was the meeting between you, Henry Posner III, our CEO, and Bill Duggan, our president, held on November 5, 2004. ***This is in addition to the numerous telephone calls, letters, and meetings that we have had with various government officials during this and previous governments.***¹²⁹

67. Shortly thereafter, Vice-minister Díaz forwarded a copy of Mr. Senn's letter to Dr. Gramajo requesting an opinion from FEGUA regarding the requests made and issues raised in Mr. Senn's letter.¹³⁰ Dr. Gramajo immediately requested an opinion from FEGUA's Legal and Finance Departments regarding their respective views on Mr. Senn's letter.¹³¹

68. After receiving the responses from both departments, on 3 January 2005,¹³² Dr. Gramajo sent a letter to Vice-Minister Díaz informing him that FEGUA and FVG were in fact meeting to try to resolve their various disputes, including the legal defects in Contract 143/158.¹³³ Dr. Gramajo also expressed his concern that FVG was not completing the restoration of the railway operations per Contract 402, including phases II (which included the connection to Southern Coast) and III.¹³⁴

69. Dr. Gramajo attached the legal opinion 204-2004 prepared by FEGUA's Legal Department on 9 December 2004 to the letter he sent to the Vice-Minister.¹³⁵ That opinion indicated that Contract 143/158 was injurious ("*lesivo*") to the interests of the State and that it was necessary for the parties to negotiate a new contract that was not *lesivo*, precisely what

¹²⁹ **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice-minister Díaz.

¹³⁰ First Statement of A. Gramajo, ¶ 14.

¹³¹ First Statement of A. Gramajo, ¶ 14.

¹³² First Statement of A. Gramajo, ¶ 14; **Ex. R-12**, 2005-01-03, Letter to Vice-Minister Díaz from A. Gramajo.

¹³³ First Statement of A. Gramajo, ¶ 14; Statement of A. Zosel, ¶ 6; **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn.

¹³⁴ **Ex. R-12**, 2005-01-03, Letter from A. Gramajo to Vice-Minister Díaz; **Ex. R-13**, 2005-04-15, Letter to Lic. Gabriella Zachrisson from A. Gramajo.

¹³⁵ **Ex. R-11**, 2004-12-09, FEGUA Opinion 204-2004.

FEGUA and FVG had been attempting to do since March 2004.¹³⁶ Dr. Gramajo also forwarded to the Vice-Minister FEGUA's Finance Department's opinion, in which Chief Financial Officer, Mr. Jose Miguel Carrillo, informed Dr. Gramajo that: (i) there were several breaches of the three Usufruct Contracts by FVG; (ii) FVG had not complied with the investment plan that it had provided to FEGUA; (iii) a new contract should be negotiated with FVG in relation to railway equipment (to replace Contracts 41 and 143), and (iv) the new contract must be approved by an *Acuerdo Gubernativo* as was noted in Section 6.4 of the bidding terms of the public bid related to the original equipment usufruct with FVG.¹³⁷

F. Recognizing That The Only Way The Investment Would Be Profitable Would Be To Restore The Pacific/South Corridor, FVG Sought Local Investors And Government Assistance To Restore The Railway In That Phase (January 2005-April 2005)

70. By 2004 and early 2005, FVG's investment had produced yearly losses, never having turned a profit.¹³⁸ The situation was so dire that FVG's shareholders were having to routinely contribute more capital just to keep the company afloat and out of bankruptcy.¹³⁹ With the revenues generated from Phase I of the project being insufficient to keep the company afloat, FVG desparately sought the USD 60–100 million investment it needed to build a **standard guage** track toward the Southern Pacific Coast.¹⁴⁰ It had tried to raise capital via a public stock offering in July 2003, but that effort failed.¹⁴¹ As FVG's finance manager noted, they did not

¹³⁶ First Statement of A. Gramajo, ¶ 14.

¹³⁷ First Statement of A. Gramajo, ¶ 14.

¹³⁸ Expert Report of P. Spiller, ¶ 76; **Ex. R-86**, 2005-02-13, PRENSA LIBRE, "The Railroad does not run well"; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovias bets on the south"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE, "Slow-Paced Train;" **Ex. C-27(g)**, FVG's 2004 Annual report, p. RDC0001248; **Ex. C-27 (h)**, FVG's 2005 Annual Report, p. RDC0001313.

¹³⁹ Expert Report of P. Spiller, ¶ 76; **Ex. C-27(g)**, FVG's 2004 Annual Report, pp RCC001248-1249; **Ex. C-27 (h)**, FVG's 2005 Annual Report, pp. RDC0001313; **Ex. R-86**, 2005-02-13, PRENSA LIBRE, "The Railroad does not run well"; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovias bets on the south"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE "Slow-Paced Train"

¹⁴⁰ **Ex. R-86**, 2005-02-13, PRENSA LIBRE, "The Railroad does not run well"; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovias bets on the south"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE, "Slow-Paced Train"

¹⁴¹ **Ex.R-273**, 2003-07-19, NEGOCIOS NACIONALES, "Ferrovias withdraws from national stock exchange."

have sufficient investors interested in acquiring FVG's stock.¹⁴² With that effort having failed, FVG then focused its efforts on trying to attract interest from the local industries who conducted their operations in the Southern Coast and exported or imported their products through the Pacific port.¹⁴³ But as discussed in more detail below, that effort also failed.

71. While FVG sought local investors to help raise the capital to invest in a rail for the Southern Coast, it also pressed the Government to assist it in removing squatters from the section of the railway. Responding to FVG's request, the Government immediately formed a Railway Commission to address this issue.¹⁴⁴ Members of this commission included representatives from FVG, FEGUA, the Ministry of Communications, the governmental agency for low income housing (UDEVIPO) and certain consultants.¹⁴⁵ In the initial meetings, the commission discussed various disputes between FEGUA and FVG, including FVG's failure to comply with its contractual obligations and FEGUA's failure to make payments in a trust fund, as well as the need for a plan to remove squatters along the Southern corridor.¹⁴⁶ It was decided at a later meeting that all issues in dispute between FVG and FEGUA would be addressed in separate, parallel discussions between the Ministry of Communications, FEGUA,

¹⁴² **Ex.R-273**, 2003-07-19, NEGOCIOS NACIONALES, "*Ferrovías withdraws from national stock exchange.*"

¹⁴³ **Ex. R-81**, 2004-06-28, SIGLO XXI, "*Ferrovías bets on the south*"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE, "*Slow-Paced Train*"

¹⁴⁴ Second Statement of A. Gramajo, ¶¶ 8-9; see, **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting; **Ex. R-178**, 2005-01-20, Agenda and Minutes from Railway Commission Meeting; **Ex.R-179**, 2005-01-27, Agenda and Minutes from Railway Commission Meeting; **Ex. R-180**, 2005-02-03, Agenda and Minutes from Railway Commission Meeting; **Ex.R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meetings.

¹⁴⁵ The members of this railway commission were: Arq. José Luis Gándara (Viceministro de Vivienda), Jorge Senn (General Manager of Ferrovías), Pedro Mendoza Montano (Ferrovías Attorney), Héctor Tórtola (on behalf of Ferrovías), Dr. Arturo Gramajo (Overseer of FEGUA), Astrid Zosel (CIV), Oscar Bautista (Consultant), Carolina de Dubón (FEGUA Attorney), Ricardo Gaubaud (General Coordinador of UDEVIPO), Héctor R. Valenzuela (Consultant CIAAP), Ing. Jan Malamud (on behalf of Ferrovías), Mabel Hernandez G. (FARUSAC), Hector Pinto Marroquín (FERROSUR- Ciudad del Sur), and Diego Sierra (Coordinación Jurídica CIV).

¹⁴⁶ See, **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting; **Ex. R-178**, 2005-01-20, Agenda and Minutes from Railway Commission Meeting; **Ex.R-179**, 2005-01-27, Agenda and Minutes from Railway Commission Meeting; **Ex. R-180**, 2005-02-03, Agenda and Minutes from Railway Commission Meeting; **Ex.R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meetings; Second Witness Statement of A. Gramajo, ¶ 10.

and FVG and that the Commission would focus exclusively on the reallocation of the squatters from the rail portions extending to the Southern Coast.¹⁴⁷

72. Mr. Hector Pinto, a representative of a company that was interested in a project called Ciudad de Sur, also attended a few of the early meetings at the invitation of FVG.¹⁴⁸ Dr. Gramajo understood that Mr. Pinto was involved with the sugar industry and that the Ciudad del Sur project, and that the company that he represented could have an interest in utilizing the railway were it to be developed by FVG.¹⁴⁹ As discussed later, the Ciudad del Sur project never materialized.

73. Mr. Pinto informed the commission that the company he represented as well as the sugar industry were only interested in determining if FVG would provide them with railway service in the south corridor.¹⁵⁰ Mr. Pinto also stated that the equipment that FVG was using to operate the railway was not adequate for the cargo that the sugar industry would need transported, nor any other cargo that would be transported by other industry sectors in the south corridor, such as the grain industry.¹⁵¹

74. During the commission meeting held on 11 January 2005, those in attendance, including representatives of the Department of Housing, Ministry of Communications, UDEVIPO, CIAAP, FVG (through Mr. Senn) and Dr. Gramajo, reached the consensus that the implementation of railway service in the Pacific/South corridor needed to occur as soon as possible and was a top

¹⁴⁷ See **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting; **Ex. R-178**, 2005-01-20, Agenda and Minutes from Railway Commission Meeting; **Ex. R-179**, 2005-01-27, Agenda and Minutes from Railway Commission Meeting; **Ex. R-180**, 2005-02-03, Agenda and Minutes from Railway Commission Meeting; **Ex. R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meetings; Second Witness Statement of A. Gramajo, ¶ 10.

¹⁴⁸ See **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting; **Ex. R-178**, 2005-01-20, Agenda and Minutes from Railway Commission Meeting; **Ex. R-179**, 2005-01-27, Agenda and Minutes from Railway Commission Meeting; **Ex. R-180**, 2005-02-03, Agenda and Minutes from Railway Commission Meeting; **Ex. R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meetings; Second Witness Statement of A. Gramajo, ¶ 11.

¹⁴⁹ Second Statement of A. Gramajo, ¶ 11.

¹⁵⁰ Second Statement of A. Gramajo, ¶ 11.

¹⁵¹ Second Statement of A. Gramajo, ¶ 12.

priority.¹⁵² The participants also agreed that steps needed to be taken to effectuate the evacuation of squatters that were occupying the railway within two months.¹⁵³

75. During this same meeting, Mr. Senn expressed his enthusiasm for the growth of the railroad with the Government's cooperation and the seriousness of the members who comprise the commission.¹⁵⁴ He also confirmed that the railway in the Atlantic (which corresponds to Phase I, from Guatemala City to Puerto Barrios) had never been profitable and that restoration of the of the Pacific/South corridor via **standard gauge** track, which corresponds to Phase II of the development plan in Contract 402, was vital to FVG's viability.¹⁵⁵ Mr. Senn reiterated this point at the commission meeting held on 20 January 2005.¹⁵⁶

76. Led by the Viceminister of Housing, Arq. José Luís Gándara, the commission came up with plans to initiate a census, for which the Ministry of Communication hired Lic. Oscar Bautista.¹⁵⁷ By February 2005, the commission had also come up with a detailed plan to vacate and all of the squatter families that were occupying the right of way along the Pacific/South corridor.¹⁵⁸ This plan was due to be implemented by 21 February 2005 and completed by 1 June 2005.¹⁵⁹

¹⁵² **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting; Second Statement of A. Gramajo, ¶ 13.

¹⁵³ **Ex. R-177**, 2005-01-11, Agendas and Minutes from Railway Commission Meetings; Second Statement of A. Gramajo, ¶ 13.

¹⁵⁴ Second Statement of A. Gramajo, ¶ 14.

¹⁵⁵ Second Statement of A. Gramajo, ¶ 14; see **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovias bets on the south" (indicating that at that point, in the five years that they have been operating in Guatemala, they have never recorded a profit).

¹⁵⁶ Second Statement of A. Gramajo, ¶ 14.

¹⁵⁷ Second Statement of A. Gramajo, ¶ 16.

¹⁵⁸ **Ex. R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meeting; Second Statement of A. Gramajo, ¶ 17.

¹⁵⁹ Second Statement of A. Gramajo, ¶ 18.

77. According to the plan, FVG was supposed to start installing new **standard gauge** rail lines by the end of May 2005.¹⁶⁰ Mr. Senn indicated that FVG had estimated that there were at least 38 miles which had to be rehabilitated and that they could rehabilitate one mile per day, although others on the commission felt this to be an unrealistic goal.¹⁶¹

78. With just one week remaining before the Government would proceed with the evictions of the squatters, the Deputy Minister of Communications received a letter dated April 13, 2005 from Mr. Pinto indicating that negotiations for an agreement between FVG and the company he represented had not prospered and notified that he was withdrawing from the commission.¹⁶² With the withdrawal of one of the potential investors for the project, the Government representatives asked FVG if it would still have the ability to run the project.¹⁶³ It was apparent that FVG did not have the capacity, or possibly the interest, to itself make the necessary investment to implement the project.¹⁶⁴ Mr. Senn confirmed FVG's lack of investment capacity and said that FVG would have to explore international financing options to finance the project, but this never materialized.¹⁶⁵

79. Because FVG was not going to move forward with its efforts to restore the south corridor, there was no longer a need to remove the squatters from the right of way in the south corridor, and the Government's effort to do so came to an end.¹⁶⁶

¹⁶⁰ Second Statement of A. Gramajo, ¶ 18.

¹⁶¹ Second Statement of A. Gramajo, ¶ 18.

¹⁶² **Ex. R-189**, 2005-04-13, Letter to Vice-minister J. Gandara from H. Pinto; Second Statement of A. Gramajo, ¶ 19.

¹⁶³ Second Statement of A. Gramajo, ¶ 19.

¹⁶⁴ Second Statement of A. Gramajo, ¶ 19.

¹⁶⁵ Second Statement of A. Gramajo, ¶ 20.

¹⁶⁶ Second Statement of A. Gramajo, ¶ 20.

G. When It Became Clear That Its Latest Effort To Salvage Its Investment Failed, Claimant Resorted To A Litigation Strategy And Initiated Local Arbitrations Against FEGUA Concerning Contract 402 And Contract 820 (May 2005-July 2005)

80. A little over a month after Mr. Pinto's withdrawal from the commission but while the commission was still celebrating meetings, and presumably recognizing that its latest effort to rescue its investment had failed, FVG initiated its litigation strategy. On 16 May 2005, FVG sent a letter to FEGUA notifying that it would be initiating an arbitration claim in equity against FEGUA for alleged breaches of the usufruct trust.¹⁶⁷ In June and then again later in July 2005, finding itself without any investors to rebuild the Pacific/South corridor and failing to negotiate a resolution to the various legal issues plaguing the contractual relationship between FEGUA and FVG, FVG initiated two local arbitration proceedings against FEGUA for alleged breach of Contract 402 and Contract 820.¹⁶⁸

81. Specifically, FVG filed the first arbitration (CENAC Case No. 02-2005) on 17 June 2005, alleging that Guatemala, through FEGUA, breached its obligation under Contract 820 to "contribute to the trust all income resulting from the use, usufruct, easement, or leasing contracts that are currently in effect and were entered into by said entity and third parties."¹⁶⁹ Ferrovias filed the second arbitration (CENAC Case No. 03-2005) on 26 July 2005, alleging that Guatemala, through FEGUA, failed to comply with its obligation under Usufruct Contract 402 to "solve the problem caused by the invasion of some buildings, parts of some properties, and the right of way by third parties, through the establishment, promotion and completion of legal procedures corresponding to the eviction."¹⁷⁰

¹⁶⁷ Second Statement of A. Gramajo, ¶ 21; **Ex. R-89**, 2005-05-16, Letter from J. Senn to A. Gramajo.

¹⁶⁸ 2009-06-26, Claimant's Memorial on the Merits ¶ 40.

¹⁶⁹ **Ex. R-44**, CENAC Case No. 02-2005, 2005-10-03, Claimant's Memorial at pp. 5-6; See 2009-06-26, Claimant's Memorial on the Merits ¶ 40.

¹⁷⁰ **Ex. R-43**, CENAC Case No. 03-2005, 2005-09-27, Claimant's Memorial p. 2; **Ex. R-45**, 2005-07-25, CENAC Case No. 03-2005, Claimant's Request for Arbitration at 2; See 2009-06-26, Claimant's Memorial on the Merits ¶ 40.

82. It bears noting that this latter arbitration alleging the Government's failure to remove squatters was initiated notwithstanding that the Government has developed and was ready to execute a detailed plan to evict squatters along the portion of Phase II of the railway project that FVG intended to restore, which plan was abandoned only because FVG could not come up with the financing to initiate the restoration project. It also should be noted that the remedy that FVG seeks in that arbitration, including a declaration that FEGUA be ordered to remove all squatters on the lands granted to them in usufruct and to pay damages that it suffered as a result of the failure to evict such squatters, overlaps with the post-*Lesivo* squatter allegations raised in this arbitration.¹⁷¹ As such, all post-*Lesivo* squatter allegations should be outside this Tribunal's jurisdiction in conformity with the Tribunal's prior rulings on this issue.¹⁷²

H. Faced With The Reality That FVG Could Not And Would Not Make The Necessary Investments To Restore Phase II of the Railway Project, And Having Failed To Negotiate A Resolution Of the Legal Defects Within Contract 143/158, FEGUA Initiated The Process To Declare Contract 143/158 *Lesivo*

83. In April 2005, Dr. Gramajo contacted the Legal Coordinator of that Ministry to discuss the defects of Contract 143/158 and the other pending disputes that FEGUA had with FVG.¹⁷³ Following that discussion, Dr. Gramajo sent a letter to the Legal Coordinator of the Ministry of Communications,¹⁷⁴ Ms. Gabriella Zachrisson, on 12 April 2005 explaining the circumstances surrounding the contracts with FVG, the outstanding disputes with FVG, and, in particular, the legal defects of Contract 143/158.¹⁷⁵

84. Representatives from the legal department of the Ministry of Communications and representatives of FEGUA met to analyze the possible *lesivo* nature of Contract 143/158.¹⁷⁶ The

¹⁷¹ **Ex. R-43**, CENAC Case No. 03-2005, 2005-09-27; Claimant's Memorial, pp. 13-14; Memorial on the Merits, ¶¶ 4, 92, 153(v), 156-57.

¹⁷² 2008-11-17, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, ¶ 62; 2009-01-13, Decision on Clarification Request, ¶¶ 12-13; 2010-05-18, Second Decision on Objections to Jurisdiction, ¶ 155.

¹⁷³ First Statement of A. Gramajo, ¶ 10.

¹⁷⁴ First Statement of A. Gramajo, ¶ 10; **Ex. R-13**, 2005-04-12, Letter from A. Gramajo to G. Zachrisson.

¹⁷⁵ First Statement of A. Gramajo, ¶ 10; Statement of A. Zosel, ¶ 8.

¹⁷⁶ First Statement of A. Gramajo, ¶ 17; Statement of A. Zosel, ¶ 8.

representatives of both entities also discussed how other pending disputes between FEGUA and FVG could be resolved.¹⁷⁷ These other disputes included (i) the preservation of the railroad equipment, which included historical and cultural patrimony, and other state goods; (ii) FVG's failure to comply with the Railway Rehabilitation Plan included in its business plan and in Contract 402; and (iii) several issues related Usufruct Contract 820.¹⁷⁸

85. In May 2005, in response to the concerns raised by FEGUA concerning Contract 143/158, the Ministry of Communications hired outside counsel, the law firm of Palacios & Asociados, to review the Contracts and to give an independent legal opinion about the validity of these Contracts.¹⁷⁹ At no point did the Ministry of Communications, or any other Government entity, suggest to the attorneys at Palacios & Asociados that they should reach a predetermined conclusion on their analysis.¹⁸⁰ The opinion given by this firm was independent and based solely on technical and legal standards.¹⁸¹

86. The Palacios and Asociados firm confirmed in June 2005 what counsel at FEGUA had already determined: that Contract 143/158 was not in accordance with Guatemalan law and was *lesivo* to the interests of the State.¹⁸² Their analysis yielded the following key conclusions:

- Contract 143 was not the object of a public bid in derogation of the Government Contracts Law of Guatemala;
- Contract 41 never entered into force because it was not approved by the President of Guatemala, which is an indispensable requirement needed for its validity;
- Contract 143 inappropriately cites as its legal base the public bid that was utilized for Contract 41;

¹⁷⁷ First Statement of A. Gramajo, ¶ 17; Statement of A. Zosel, ¶ 8.

¹⁷⁸ First Statement of A. Gramajo, ¶ 17.

¹⁷⁹ Witness Statement of Julio Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9; First Statement of A. Gramajo, ¶ 18.

¹⁸⁰ Statement of J. Berdúo, ¶¶ 9-11; Statement of A. Zosel, ¶ 9.

¹⁸¹ Statement of J. Berdúo, ¶ 13.

¹⁸² Statement of J. Berdúo, ¶ 10.

- Contract 143 should have been authorized by the President of Guatemala, which did not happen, thereby rendering Contract 143 unenforceable;
- Contract 143 did not fulfill the requirements of the Government Contracts Law, including with respect to the conveyance of state-owned property, and therefore was not enforceable.¹⁸³

87. Their principal conclusions were that: (i) Contract 143/158 was not a valid contract and (ii) Contract 143/158 was *lesivo* to the interests of the Guatemalan state.¹⁸⁴

88. On 22 June 2005, after receiving legal opinion of Palacios & Asociados, and given that FEGUA could not reach an agreement with FVG to correct the legal flaws and other issues affecting the cultural patrimony and other State property, Dr. Gramajo requested the independent legal opinion of the Attorney General's Office (Procuraduría General de la Nación) regarding the legality of Contract 143/158.¹⁸⁵ Contrary to Claimant's allegations, FEGUA did not do this in response to FVG's having filed its local arbitrations against FEGUA, nor was this a part of an ongoing effort to help Mr. Ramón Campollo obtain control of Claimant's usufruct rights, as explained more fully below.¹⁸⁶ Rather, this request was motivated solely by Dr. Gramajo's belief that he was complying with his duties as Overseer of FEGUA, and thus avoiding personal responsibility for failing to do so.¹⁸⁷

89. The Attorney General's Office is an independent institution separate from any other Government entity, including FEGUA.¹⁸⁸ Its role is to serve as general legal advisor and consultant to state organs and entities; the Attorney General is the head of the Office and is the legal representative of the State.¹⁸⁹ A request made by the Government to the Attorney

¹⁸³ Statement of J. Berdúo, ¶ 10.

¹⁸⁴ Statement of J. Berdúo, ¶¶ 8-13.

¹⁸⁵ First Statement of A. Gramajo, ¶ 22; Statement of J. Berdúo, ¶ 14; Statement of A. Zosel, ¶ 9

¹⁸⁶ See Memorial on the Merits, ¶ 55.

¹⁸⁷ First Statement of A. Gramajo, ¶ 22; Statement of J. Berdúo, ¶ 14; Statement of A. Zosel, ¶ 9

¹⁸⁸ Witness Statement of Ivonne Haydee Ponce Peñalongo, ¶ 14.

¹⁸⁹ Statement of I. Ponce, ¶ 7.

General does not carry with it “an inherent message of how the Government expects its Attorney General to respond.”¹⁹⁰

90. In response to Dr. Gramajo’s request, after conducting an independent analysis of the issues, the Attorney General’s Office issued Opinion 205-2005 of 1 August 2005.¹⁹¹ The opinion concluded that there were several legal defects that affected the validity of Contract 143/158 and that this contract should be declared *lesivo* to the interests of the State.¹⁹² In particular, the Attorney General’s Office found that:

- the Overseer exceeded its legal authority and was not competent to execute Contract 143/158, and those contracts needed to be approved by the President via an *Acuerdo Gubernativo*;
- the bidding process for Contract 41 itself produced no effect whatsoever; and
- that Contract 143 could not be based on the bidding process that led to Contract 41 in part because the contracts were four years apart, the same conditions did not exist at the time, and Contract 41 never received the required approval via an *Acuerdo Gubernativo*.¹⁹³

91. The Attorney General’s Office also found that the duration of the contract, of over 45 years, was excessive considering the useful life of the railway equipment.¹⁹⁴ It further found that there existed a risk of partial or total loss to the cultural patrimony of the State given the

¹⁹⁰ See Memorial on the Merits, ¶ 55.

¹⁹¹ Ex R–15, 2005-08-01, Attorney General’s Office Opinion 205-2005.

¹⁹² Ex R–15, 2005-08-01, Attorney General’s Office Opinion 205-2005.

¹⁹³ Ex R–15, 2005-08-01, Attorney General’s Office Opinion 205-2005.

¹⁹⁴ Ex R–15, 2005-08-01, Attorney General’s Office Opinion 205-2005.

evidence on file that FVG had not allowed FEGUA to properly supervise the property and that FVG was not making repairs to the equipment as required by the contract.¹⁹⁵

92. The Attorney General's Office also found that the duration of the contract, of over 45 years, was excessive considering the useful life of the railway equipment.¹⁹⁶ It further found that there existed a risk of partial or total loss to the cultural patrimony of the State given the evidence on file that FVG had not allowed FEGUA to properly supervise the property and that FVG was not making repairs to the equipment as required by the contract.¹⁹⁷

93. Finally, the Attorney General's Office indicated that the payment of 1.25 % of the net freight at year end was unfavorable to the state and represented a loss of income, whereas FVG stood to receive a higher return by reinvesting the income from the freight on a monthly basis.¹⁹⁸ The Attorney General's Office concluded that that the contracts should be found to be void via a declaration of *lesividad* issued through a Presidential *Acuerdo Gubernativo*.¹⁹⁹

94. On 13 January 2006, after studying the opinion of the Attorney General's Office and consulting further with FEGUA's in-house counsel and its outside advisors Palacios & Asociados, Dr. Gramajo sent Oficio 05-2006 to the President, requesting that he declare Contract 143/158

¹⁹⁵ **Ex R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005. Under Guatemalan law, cultural patrimony is protected by the Anthropology and Historical Institute ("IDAEH") and by article 47 of the Law on National Cultural Patrimony.

¹⁹⁶ **Ex R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005.

¹⁹⁷ **Ex R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005. Under Guatemalan law, cultural patrimony is protected by the Anthropology and Historical Institute ("IDAEH") and by article 47 of the Law on National Cultural Patrimony.

¹⁹⁸ **Ex R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005.

¹⁹⁹ **Ex R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005.

lesivo to the interests of the State.²⁰⁰ The request cited and agreed with the Attorney General's Office's opinions, FEGUA's legal analysis, and Palacios & Asociados' conclusions.²⁰¹

I. FVG Seeks Presidential Intervention To Resolve Its Disputes And Find Investors To Finance Its Restoration Project, And The President Forms A High Level Commission To Foster Settlement Negotiations Between FVG and FEGUA To Try And Settle Their Various Disputes, Including The Legal Defects With Contract 143/158 (March 2006-August 2006)

95. Given its inability to reach an agreement with FEGUA and perhaps on notice that the *lesividad* process was under way, FVG by-passed FEGUA and requested a meeting directly with President Berger on 6 March 2006.²⁰² The meeting with President Berger was granted and held the very next day, on 7 March 2006, and attended by Henry Posner III, for RDC, William Duggan, for FVG's, Miguel Fernández, an advisor to the President, Gabriela Zachrisson on behalf of the Communications Ministry, and Dr. Gramajo, for FEGUA.²⁰³ Also attending were Federico Melville and Mario Montano, Directors of Cementos Progreso, the minority shareholder in FVG.²⁰⁴ During the meeting, Mr. Posner made a slide presentation in which he discussed the state of the restoration project, including seeking assistance from the Government on removing squatters and finding investors to help finance the restoration of the rail toward the Pacific Coast.²⁰⁵ The parties also discussed FVG's failure to comply with its contractual obligations.²⁰⁶ The President expressed his interest in having a functioning railroad in Guatemala, and offered to create a High Level Technical Commission consisting of representatives of FVG, FEGUA, Ministry of Communications and other high-level Government officials, to foster a resolution of

²⁰⁰ **Ex R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; Statement of J. Berdúo, ¶ 17; Witness Statement of Richard Aitkenhead, ¶ 9.

²⁰¹ **Ex R-21**, 2006-01-13, Letter from A. Gramajo to President Óscar Berger, requesting that the President declare the Usufruct Contracts "*lesivo*"; First Statement of A. Gramajo, ¶ 24; Statement of R. Aitkenhead, ¶ 9.

²⁰² Memorial on the Merits, ¶ 59.

²⁰³ First Statement of A. Gramajo, ¶ 32.

²⁰⁴ Memorial on the Merits, ¶ 59.

²⁰⁵ **Ex. C-33**; Second Statement of A. Gramajo, ¶ 23.

²⁰⁶ First Statement of A. Gramajo, ¶ 35.

the issues in dispute between the parties and to develop a plan that would lead to the creation of a functioning railroad in Guatemala.²⁰⁷ The President tasked Commissioner Miguel Fernández and Commissioner Richard Aitkenhead with supervising the members and work of the High Level Technical Commission.²⁰⁸

96. Thus, notwithstanding Claimant and FVG’s failure to live up to its end of the bargain, including its failure to restore and modernize the railway consistent with Contract 402 and its business plan, the Government remained willing to find a negotiated solution to the legal differences between the parties with the principal aim of fostering the rehabilitation and operation of the railroad in Guatemala.²⁰⁹

97. Claimant incorrectly alleges that during this meeting with the President, Dr. Gramajo made a presentation to President Berger where he emphasized “the substantial interest of ‘other private section parties’ in the development of the South Coast route and Ciudad del Sur.”²¹⁰ Claimant further incorrectly asserts that “Mr. Melville questioned whether the ‘other private sector parties’ were Ramon Campollo, which Mr. Gramajo confirmed.”²¹¹ Although the Ciudad del Sur project was briefly discussed during this meeting in the context of a discussion of potential local investors, Dr. Gramajo clarifies that he did not raise this issue or make any

²⁰⁷ First Statement of A. Gramajo, ¶ 35; Second Statement of A. Gramajo, ¶ 27; Witness Statement of Mario Rodolfo Marroquín Rivera, ¶ 7; Witness Statement of Susan Pineda Mendoza, ¶ 8. This High Level Commission included Commissioner Miguel Fernández, Commissioner Mario Marroquín Rivera, and Commissioner Emmanuel Seidner on behalf of the Presidential Commission on Competition and Investments; Gabriela Zachrisson, in-house counsel at the Ministry of Communications; Dr. Arturo Gramajo, Overseer of FEGUA; Mr. Jorge Senn and his legal counsel Mr. Juan Pablo Carrasco on behalf of FVG; Mr. Mario Montano from Cementos Progreso; and Susan Pineda Mendoza and Carmen Úrizar from Programa Nacional de Competitividad (“PRONACOM”)—Guatemala’s investment promotion agency. Statement of S. Pineda, ¶ 14.

²⁰⁸ Statement of M. Marroquin, ¶ 6; Statement of S. Pineda, ¶ 7; Statement of R. Aitkenhead, ¶ 4.

²⁰⁹ First Statement of A. Gramajo, ¶ 35; Second Statement of A. Gramajo, ¶ 32; Statement of M. Marroquín, ¶ 7; Statement of S. Pineda, ¶ 10; Statement of J. Berdúo, ¶ 18; Statement of R. Aitkenhead, ¶ 6.

²¹⁰ 2009-06-26, Claimant’s Memorial on the Merits ¶ 60; **Ex. C-57**, 2006-03-13, Notes from Meeting with President Berger.

²¹¹ Second Statement of A. Gramajo, ¶ 23.

statements concerning Mr. Campollo during the meeting.²¹² Rather, it was Mr. Posner who initiated the conversation regarding prospective investors in the project, including mentioning that there had been sporadic local interest from the sugar and power industries but without any formal commitments.²¹³ He further focused his presentation on FVG's need to attract local and/or international investors, such as the World Bank, to continue with its plan to restore the Pacific/South corridor.²¹⁴ It was clear from this presentation that neither Claimant nor FVG had sufficient capital to develop the Pacific/South corridor and this project, which was the principal project that Claimant identified as being necessary to make its investment profitable, and would need to be financed through third-party sources.²¹⁵ This is consistent with their historical actions, such as their prior unsuccessful efforts to convince the sugar, grain and coal industries to invest in this project.²¹⁶ It also is consistent with statements that representatives of FVG made to the Guatemalan press indicating that they needed the financial support of investors in order to develop the Pacific/South Corridor and that Claimant was merely an "operator" rather than an investor.²¹⁷

98. From 3 April 2006 to 11 May 2006, the High Level Commission met on at least four occasions with representatives from Claimant and FVG.²¹⁸ During these meetings, FVG raised issues such as (i) payment to the Trust Fund to improve the infrastructure²¹⁹; and (ii) the alleged failure of the State to remove squatters from the right of way.²²⁰

²¹² Second Statement of A. Gramajo, ¶ 23.

²¹³ **Ex. C-33**, 2006-03-07, FVG PowerPoint Presentation to President Berger; Second Statement of A. Gramajo, ¶ 24.

²¹⁴ **Ex. C-33**; Second Statement of A. Gramajo, ¶ 24.

²¹⁵ Second Statement of A. Gramajo, ¶ 24.

²¹⁶ Statement of F. Perez, ¶ 10; Witness Statement of Roberto Enrique Morales Morales, ¶ 15.

²¹⁷ Second Statement of A. Gramajo, ¶ 24; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovías bets on the south"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE, "Slow-paced train."

²¹⁸ Statement of M. Marroquín, ¶¶ 9-11; Statement of S. Pineda, ¶¶ 13-20; see Minutes from the High Level Commission Meetings: **Ex. R-23** (2006-04-03); **Ex. R-26** (2006-05-05); **Ex. R-28** (2006-05-10); **Ex. R-29** (2006-05-11).

²¹⁹ It is important to note that the argument made by Claimant that the failure to make payments to the Trust Fund somehow affected their investment is simply unsustainable as the amounts needed to

Footnote continued on next page

99. The Government, in turn, sought to find a path that would ensure Claimant and FVG would comply with their obligations to make the necessary investments to rehabilitate the railway.²²¹ It also sought to negotiate a resolution to the ongoing legal disputes with Claimant and FVG, including (i) the legal defects giving rise to Overseer Gramajo's request to the President to declare *lesivo* Contract 143/158; (ii) resolution of the two pending arbitrations filed by FVG against FEGUA and resolution of the action pending before the *Contencioso Administrativo* courts; and (iii) resolution of the damage to the cultural patrimony of the State and the associated legal action filed by the Government to address this issue and seek protection of that patrimony.²²²

100. On 11 May 2006, during the fourth High Level Commission meeting, Mr. Duggan, FVG's President, announced that he was aware of an ongoing process in the Presidential Office that sought to declare the Usufruct Contract 143/158 *lesivo*, and expressed suspicion about the real intention of the state in these negotiations.²²³ Mr. Duggan noted that if the *Lesivo* Declaration continued its course and was issued, Claimant and FVG would *not* continue negotiating with the Government.²²⁴

101. In light of FVG's refusal to negotiate if the *lesividad* process was continuing, and as a gesture of good faith, Commissioner Fernández stated, through Mr. Marroquín and Mrs. Pineda, that he would undertake to do everything possible to suspend the process of *lesividad*,

Footnote continued from previous page
restore the Southern/Pacific corridor approximate USD 100 million and Claimant was operating at net losses every year.

²²⁰ **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's first meeting; Statement of M. Marroquín, ¶ 9; Statement of S. Pineda, ¶ 12.

²²¹ **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's first meeting; **Ex. R-26**, 2006-05-05, Minutes from the High Level Commission's second meeting; **Ex. R-28**, 2006-05-10, Minutes from the High Level Commission's third meeting; Statement of M. Marroquín, ¶ 7; Statement of S. Pineda, ¶ 31.

²²² **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's first meeting; Statement of M. Marroquín, ¶ 9; Statement of S. Pineda, ¶ 12.

²²³ Statement of S. Pineda, ¶ 22; Statement of M. Marroquín, ¶ 11; Statement of J. Berdúo, ¶ 24; **Ex. R-29**, 2006-05-11, Minutes from the High Level Commission's Fourth Meeting.

²²⁴ Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

which was ongoing as noted above and in more detail below, while the parties continued to seek an amicable solution of their ongoing disputes and a path forward to restoration of the railway.²²⁵ FVG's representatives responded that they would not continue negotiations until they received objective confirmation that the *lesividad* process had been suspended.²²⁶ As a sign of good faith, and to allow the parties to return to the negotiating table, the Government ordered the temporary suspension of the process to formalize the President's decision to declare *lesivo* Contract 143/158.²²⁷

J. The President And His Cabinet Worked In Parallel To Declare *Lesivo* Contract 143/158 While Negotiations With FVG Were Ongoing, But The President Waited Until The Final Moment Before Publishing The *Lesivo* Declaration So As To Afford The Parties A Further Opportunity To Resolve Their Differences And Achieve A Functioning Railway

102. As explained above, the decision to request a declaration of *lesividad* was required by law and was based on a conscientious and rigorous analysis by four separate Government agencies over the course of one year—namely (1) FEGUA's Legal Department,²²⁸ (2) the Office of the Attorney General,²²⁹ (3) three separate departments of the Ministry of Finance,²³⁰ and (4) the Technical Board of the General Secretariat of the Presidency.²³¹ Each of these agencies concluded that Contract 143/158 is *lesivo* and their objective legal opinions were conducted independently and did not respond to any pressures or influences whatsoever.²³²

103. In light of these opinions and given that his own legal team concurred in the view that Contract 143/158 was *lesivo* and that he would face personal liability if he did not declare the

²²⁵ Statement of J. Berdúo, ¶ 25; Statement of S. Pineda, ¶ 24; Statement of M. Marroquín, ¶¶ 12-13.

²²⁶ Statement of J. Berdúo, ¶ 25; Statement of S. Pineda, ¶ 24; Statement of M. Marroquín, ¶ 11.

²²⁷ Statement of S. Pineda, ¶ 24; Statement of M. Marroquín, ¶ 13; Statement of R. Aitkenhead, ¶ 9.

²²⁸ Ex. R-20, 2006-01-13, FEGUA General Counsel Opinion 05-2006.

²²⁹ Ex. R-15, 2005-08-01, Attorney General's Office Opinion 205-2005.

²³⁰ Ex. R-24, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance.

²³¹ Ex. R-25, 2006-04-26, General Secretariat Opinion No. 236-2006.

²³² First Statement of A. Gramajo, ¶¶ 23, 49; Statement of Ivonee Haydee Ponce, ¶¶ 9-11, 13; Statement of América González, ¶¶ 17-19; Witness Statement of Celena Ozaeta, ¶¶ 15-19.

contract *lesivo*,²³³ the President decided to declare *lesivo* Contract 143/158 in late April 2006 and instructed his legal team to collect the necessary signatures from his Cabinet Ministers and others for the declaration of *lesividad*.²³⁴ However, as previously explained, once FVG representatives complained that the President was circulating the *Acuerdo Gubernativo* for signature and demanded that the process be stopped in order to continue with the High Level Commission negotiations, the President, as a sign of good faith and in an effort to achieve the Government's principal goal of obtaining a functioning railway, suspended the process to finalize the *Acuerdo Gubernativo* so as to allow for further negotiations with FVG.²³⁵

104. It should be noted that proceeding with the process to declare Contract 143/158 *lesivo* while the High Level Commission negotiations were ongoing was not only not in conflict with the ongoing negotiations, but it was the responsible thing for President Berger's administration to do. Had the Government waited until negotiations with FVG reached impasse to initiate this process, a process which took over four months from the time the request from FEGUA's Overseer reached the President's desk, then the President would *not* have had enough time before the expiration of the statute of limitations to adequately analyze the issue and declare the contract *lesivo*. As previously mentioned, if the parties had been able to negotiate a settlement that cured the causes of *lesividad*, then the President could have reverted his decision.²³⁶

105. Guatemala continued negotiating in good faith until it was no longer possible to postpone the issuance of the *Acuerdo Gubernativo*. With no progress or imminent resolution in the settlement negotiations between the parties, President Berger, acting responsibly, lifted the conditional suspension and finalized the *Lesivo* Declaration on 11 August 2006, allowing just two weeks for the publication of the *Acuerdo Gubernativo* in the Official Gazette before the

²³³ Expert Report of J.L. Aguilar, ¶¶ 2(p), 37, 72.

²³⁴ Witness Statement of Manuel Duarte Barrera, ¶ 17; Statement of C. Ozaeta, ¶ 11; Statement of S. Pineda, ¶ 23; Statement of M. Marroquín, ¶ 12; Statement of R. Aitkenhead, ¶ 9.

²³⁵ Statement of R. Aitkenhead, ¶ 9; Statement of M. Marroquín, ¶ 12; Statement of S. Pineda, ¶ 24; Statement of J. Berdúo, ¶ 24.

²³⁶ Statement of M. Marroquín, ¶ 12; Statement of S. Pineda, ¶ 21; Statement of R. Aitkenhead, ¶ 10.

period of limitations expired.²³⁷ After the *Acuerdo Gubernativo* was finalized but before it was published in the Official Gazette, the Government, demonstrating yet again its good faith, continued negotiations with FVG, hoping to reach settlement that would lead to a functioning railroad before publication was necessary.²³⁸

106. From 21 to 24 of August 2006, as a further sign of the Government's good faith and willingness to reach a settlement of the legal disputes with Claimant, including curing the defects that led the President to declare *lesivo* the equipment usufruct, representatives from the Government of Guatemala and FEGUA began meeting daily with representatives from FVG to continue the settlement negotiations with respect to their pending disputes.²³⁹ These meetings included the participation of Dr. Arturo Gramajo and Lic. Carolina de Dubón, from FEGUA, and Myriam López and Julio Berdúo, from Palacios & Asociados, and on behalf of Ferrovías, Mr. Jorge Senn and Juan Manuel Díaz-Durán, a partner at the law firm Díaz-Durán & Asociados.²⁴⁰

107. During these meetings, the Government proposed a draft settlement and was prepared to make reciprocal concessions to reach an agreement that would remedy the defects in Contract 143/158, and thereby avoid the need for the issuance of the *Lesivo* Declaration.²⁴¹ Contrary to Claimant's characterizations, Guatemala did not demand a bond guaranteeing the rehabilitation of the railway to the South Coast, although doing so would have made imminent sense given Claimant's failure to move forward with this aspect of the restoration and its

²³⁷ **Ex. R-35**, 2006-08-11, *Acuerdo Gubernativo* 433-2006, where Usufruct Contract 143 and Amendment 158 were declared *lesivo*; **Ex. RL-72**, 1996-11-21, Article 19 of the Law of the Contencioso Administrativo.

²³⁸ First Statement of A. Gramajo, ¶ 38; Second Statement of A. Gramajo, ¶ 36; Statement of R. Aitkenhead, ¶ 12; Statement of A. Zosel, ¶¶ 19-20; **Ex. R-39**, 2006-08-23 and 2006-08-24, E-mails from *Palacios & Asociados* to A. Zosel (Ministry of Communications) sending draft minutes of transaction agreements.

²³⁹ First Statement of A. Gramajo, ¶ 42; Second Statement of A. Gramajo, ¶ 36; Statement of R. Aitkenhead, ¶ 11; Statement of A. Zosel, ¶ 11; Statement of J. Berdúo, ¶ 29.

²⁴⁰ First Statement of A. Gramajo, ¶ 41; Second Statement of A. Gramajo, ¶ 36; Witness Statement of A. Zosel, ¶ 11; Statement of J. Berdúo, ¶ 30.

²⁴¹ First Statement of A. Gramajo, ¶ 44; Second Statement of A. Gramajo, ¶ 43; Statement of A. Zosel, ¶ 15; Statement of J. Berdúo, ¶ 32.

acknowledgement that the development of that phase of the railway was critical to its viability as a going concern.²⁴²

108. According to *Claimant*, the Government's settlement offer contained a provision that would require it to "'surrender[] railway sections yet to be restored' (i.e., the South Coast route) 'in which other investors may be interested' (as Mr. Campollo had been pressing for almost two years)."²⁴³ However, as mentioned above, the terms of Contract 402 required that all five phases be commenced per the time limits enumerated in clause 13 of the contract. In the event that the phases were not commenced and restored pursuant to Contract 402 and *Claimant's* business plan, FVG agreed when it signed this agreement in 1997 that it would *forfeit and return to the Government* the lands on which it did not restore the railway.²⁴⁴ As former Overseer Porras explains, FEGUA insisted on this condition as a means to protect the Government given that it was giving over so much land to FVG to restore the railway, and it did not want to allow FVG to retain the rights to the lands if it was not going to follow through with its promise to build and restore the railway on them.²⁴⁵

109. It also is worth looking at this issue in context. One must recall that prior to these negotiations, FVG, in 2005, had insisted on the mobilization of massive efforts on the part of the Government to evict squatters from the Southern/Pacific corridor, only to pull the rug out of from under that project at the last minute given its inability to find financing to move forward with the restoration of that corridor.²⁴⁶ Also, in the preceding months of negotiations, *Claimant* and FVG had failed to produce concrete plans or proposals to the Government negotiators concerning their efforts to raise financing and had in fact been telling the Government that it had no financing to proceed with its restoration plans, except for its

²⁴² First Statement of A. Gramajo, ¶ 44; Second Statement of A. Gramajo, ¶ 36; Statement of A. Zosel, ¶¶ 13–14; Statement of J. Berdúo, ¶ 33.

²⁴³ Memorial on the Merits, ¶ 71.

²⁴⁴ **Ex. C-22**, 1997-11-25, Contract 402, cl. 16; Statement of A. Porras, ¶ 10; Second Statement of A. Gramajo, ¶ 10.

²⁴⁵ Statement of A. Porras, ¶ 10.

²⁴⁶ See above at Section III. F.

fanciful musings about the possibility of obtaining international financing from the World Bank.²⁴⁷ Thus, there is nothing odd about the Government having included a provision in the proposed settlement agreement that simply required FVG to do what it was contractually obligated to do.²⁴⁸ Also, it is important to note that the language included in the draft referred generically to the return of lands given in usufruct and not restored by FVG, and not to the South Corridor in particular or much less to Mr. Campollo or any phantom interest that he purported had in Claimant's usufruct rights. As will be developed below, Claimant's allegations regarding Mr. Campollo are nothing but pure speculation and fantasy, which irresponsibly defame the characters of Mr. Campollo, President Berger, his son and his administration.

110. On 24 August 2006, the last possible day to reach a deal and avoid the publication of the *Acuerdo Gubernativo*, negotiations ended abruptly due to Claimant.²⁴⁹ Based on the discussions and negotiations leading up to that meeting, the Government representatives were under the impression that a final agreement could be reached that day.²⁵⁰ They came prepared to negotiate and brought a draft contract that could serve as the basis to cure the defects that proposed solutions to the various disputes between the parties, including those with respect to Contract 402, the trust fund and the legal defects giving rise to the *Lesivo* Declaration.²⁵¹ The aim on the Government's side was to reach a deal and avoid publication of the *Lesivo* Declaration.²⁵² Mr. Senn arrived at the meeting and indicated that he did not have a power of

²⁴⁷ Statement of S. Pineda, ¶ 15; Statement of R. Aitkenhead, ¶ 11; **Ex. C. 33**, 2006-03-07, FVG PowerPoint Presentation to President Berger.

²⁴⁸ Per the terms of Clause 13 of Contract 402, the second phase was to be commenced in 2001. The fact that 8km had been restored to allow a train from Mexico to make a stop in Guatemala does not imply that the obligations set forth in the contract were met. *See Ex. R-15*.

²⁴⁹ First Statement of A. Gramajo, ¶ 45; Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34.

²⁵⁰ First Statement of A. Gramajo, ¶ 45; Second Statement of A. Gramajo, ¶ 36; Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 32.

²⁵¹ First Statement of A. Gramajo, ¶ 44; Second Statement of A. Gramajo, ¶ 36; Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34; **Ex. R-39**, 2006-08-24/23, E-mails from Palacios & Asociados to A. Zosel (Ministry of Communications) sending draft minutes of Transaction Agreement.

²⁵² First Statement of A. Gramajo, ¶ 43; Second Statement of A. Gramajo, ¶ 36; Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34; Statement of R. Aitkenhead, ¶ 10.

attorney or authority to reach an agreement on behalf of FVG.²⁵³ He requested that the Government not publish the *Lesivo* Declaration until he could secure a power of attorney, and offered to sign a letter of intent stating that FVG would continue to negotiate with the Government.²⁵⁴ The Government, however, as Mr. Senn well knew, could not acquiesce to this proposal based on such a hollow promise, because the following day was the very *last* business day in which the Government could publish the *Lesivo* Declaration.²⁵⁵ The Parties were aware that in the absence of an agreement *that day*, the publication of the *Lesivo* Declaration was inevitable.²⁵⁶ Mr. Senn's proposal was nothing more than a smoke-screen *delay tactic*, perhaps designed to lure the Government into missing the publication deadline, but it did not work.

111. When Mr. Senn realized that the Government would not accept his proposal, he then suggested during the August 24th meeting that the parties continue to negotiate after the publication of the *Acuerdo Gubernativo* declaring Contract 143/158 *lesivo*, with the goal of reaching an agreement before the 90-day time period within which the Attorney General had to initiate the judicial proceeding that would determine the legal validity of the *lesividad*.²⁵⁷ The Government, again demonstrating its good faith in the process and desire to reach a settlement so as to have a functioning railway, agreed to continue negotiations after the publication of the *Acuerdo Gubernativo*. But to protect its ability to challenge the illegal equipment usufruct, the Government published the *Lesivo* Declaration in the Guatemalan Official Gazette on 25 August 2006.²⁵⁸

²⁵³ Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34.

²⁵⁴ Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34.

²⁵⁵ First Statement of A. Gramajo, ¶ 45; Second Statement of A. Gramajo, ¶ 38; Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶ 34; Statement of R. Aitkenhead, ¶ 11

²⁵⁶ First Statement of A. Gramajo, ¶ 44; Statement of A. Zosel, ¶¶ 18-20; Statement of J. Berdúo, ¶¶ 35–36.

²⁵⁷ First Statement of A. Gramajo, ¶ 46; Second Statement of A. Gramajo, ¶ 40 ; Statement of A. Zosel, ¶ 19; Statement of J. Berdúo, ¶¶ 35–36.

²⁵⁸ **Ex. R-47**; First Statement of A. Gramajo, ¶ 47; Second Statement of A. Gramajo, ¶ 43; Statement of A. Zosel, ¶ 20.

K. Even After The Publication Of The *Lesivo* Declaration, The Government Continued Negotiating With FVG To Resolve The Existing Disputes, Enter Into A New Contract That Would Cure The Legal Defects Making Contract 143/158 *Lesivo*, And Thus Avoid Having To Initiate The Action Before The *Contencioso Administrativo* Court

112. As further evidence of the Government's primary interest in obtaining a working railroad in Guatemala and finding a sustainable path forward with FVG, even after the *Lesivo* Declaration was published the President instructed members of his Cabinet to meet with FVG to try to resolve the ongoing disputes.²⁵⁹ The members of these discussion table talks were Mr. Jorge Senn, Dr. Arturo Gramajo, Lic. Gabriella Zachrisson on behalf of the CIV, and Mr. Mario Estuardo Fuentes, as Presidential Commissioner.²⁶⁰

113. In addition to demonstrating the Government's willingness to continue negotiating to try and resolve the defects in Contract 143/158 as well as the other issues in dispute between FEGUA and FVG, the negotiations that occurred after the publication of the *Acuerdo Gubernativo* reveal various key points. First, that these negotiations were taking place completely undermines Claimant's theory that the Government declared Contract 143/158 *lesivo* so as to take away its usufruct rights to benefit a local interest. If that had truly been the Government's intention, then why would the Government continue negotiating with FVG after it finalized the *Lesivo* Declaration? There simply would have been no rational reason for the Government to continue negotiating with FVG after the *Lesivo* Declaration was finalized if that had been its true intention. In fact, if one really thinks about this issue, the Government's behavior prior to the signing of the *Acuerdo Gubernativo* also is inconsistent with Claimant's theory, because there would have been no reason for the Government to temporarily suspend the signing and publication of the *Acuerdo Gubernativo* as it did in May 2006 if the Government

²⁵⁹ Statement of R. Aitkenhead, ¶ 12; First Statement of A. Gramajo, ¶ 48; Second Statement of A. Gramajo, ¶ 46.

²⁶⁰ **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48; Second Statement of A. Gramajo, ¶ 41.

truly had decided to try to expropriate Claimant's usufruct rights to give them to a local interest.

114. Second, as noted, during these meetings FEGUA proposed, *inter alia*, that the parties enter into a new contract to replace Contract 143/158 so as to cure the defects that made the agreement *lesivo*.²⁶¹ FVG's response to this request is very telling and undermines their case. In response to the Government's various requests to negotiate a new equipment usufruct to eliminate the causes of *lesividad*, Mr. Senn responded that doing so was of "secondary priority, in view of the plans to change the railroad system to **wide gauge**."²⁶² That is precisely what Mr. Senn said to the Railroad Commission back in early 2005 when he stated that FVG's rail business had not been profitable and could only be profitable if it built a **standard gauge** railway toward the Southern/Pacific corridor and captured as clients the local industries that operated in the Southern corridor, such as the sugar, grain and coal industries.²⁶³ It reported the same thing to the press.²⁶⁴

115. This admission exposes one of the gaping holes in Claimant's case. It reveals that FVG had very little use for the FEGUA usufruct equipment that was declared *lesivo*. It could only use that equipment for the rail corridor operated in Phase I, which had not been profitable since inception and had only produced yearly losses. That is precisely why the request by the Government in the post-*Lesivo* negotiations received such little attention from Mr. Senn and was relegated to being of "secondary priority." The truth is that equipment FVG would need for Phase II had to operate on **standard gauge** track, which the equipment that it received pursuant to Contract 143)158 could *not* do. That equipment only runs on the *narrow gauge*

²⁶¹ See **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

²⁶² See **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

²⁶³ See above at Section III.F., ¶ 69.

²⁶⁴ **Ex. R-86**, 2005-02-13, PRENSA LIBRE, "The Railroad does not run well"; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovias bets on the south"; **Ex. R-87**, 2005-02-13, PRENSA LIBRE, "Slow-Paced Train"

track. Thus, the equipment that Claimant alleges in this arbitration is so vital to its existence is really *not* at all vital to its existence; it only is useful for the portion of the unprofitable portion of the railway. The equipment FVG *really needs* to make its operations profitable would need to be obtained outside of Guatemala and only if it could somehow obtain the financing to acquire it and build the standard gauge track it needed for the Southern corridor; something which FVG tried and failed to do several times before.²⁶⁵

116. Finally, the memoirs from these meetings help to establish that Claimant *cannot* establish a causal link between its alleged damages and the Government's *Lesivo* Declaration. This will be discussed in more detail in the damages section, but the principal point is that it was Claimant, not the Government, who informed its clients about the *Lesivo* Declaration. It must be recalled that the *lynchpin* to Claimant's damages case lies in its being able to establish that FVG's clients either stopped doing business with FVG or materially changed the terms under which they would do business with FVG *once they found out that the Government had declared lesivo its usufruct equipment contract.*²⁶⁶ But as noted by Lic. Juan Luís Aguilar, the Government's publication of the *Acuerdo Gubernativo* occurs in the "Legal" section of the *Diario Oficial*, which is not a publication that is widely-circulated or read by most Guatemalans.²⁶⁷ The Government publishes the *Acuerdo Gubernativo* in that publication not because it wants to notify the public or Claimant about the *Lesivo* Declaration, but because it is legally required to do so to officially notify the Attorney General to file a legal case before the *Contencioso Administrativo* court concerning the *Lesivo* Declaration.²⁶⁸ Reading the "Legal" section of this arcane governmental publication is most assuredly *not* how FVG's clients heard about the *Lesivo* Declaration. Instead, they heard about this development directly from Claimant.

²⁶⁵ See above at Section III.F., ¶ 69.

²⁶⁶ Claimant's Memorial, ¶¶ 87-90.

²⁶⁷ Export Report of J.L. Aguilar, ¶ 39.

²⁶⁸ Export Report of J.L. Aguilar, ¶ 38.

117. On 28 August 2006, the very *first* business day following the Friday, 25 August publication of the *Acuerdo Gubernativo* in the *Diario Oficial*, Claimant and FVG took out a paid advertisement in all of the principal Guatemalan newspapers, the same ones read by the general public, telling FVG’s clients and the general public that Guatemala had declared *lesivo* FVG’s equipment usufruct rights, what it called an “essential element” of the railroad privatization, and thereby began “*what amounts to an expropriation of our concession.*”²⁶⁹ Claimant posted an English version of this press on its website on 28 August 2006.²⁷⁰ It also later reproduced a Spanish version of the same release in local Guatemalan newspapers.²⁷¹

118. What is perhaps even more curious about this press release is that Claimant and FVG announced to the public and its customers that “[i]n the short term, under the terms of the concession usufruct agreement the Government cannot force the company out of business, but its action *has placed additional pressure on FVG by making its customers and suppliers wary of doing business with it.*”²⁷² In making this statement they began manufacturing the *very harm* they allege in this case by telling their own customers that they would not want to continue doing business with FVG. The release is chalk full of other apocalyptic statements foreshadowing the demise of FVG’s business and painting it in a sure-lose war with the Guatemalan Goliath. Thus, while Claimant alleges before this Tribunal that the *Lesivo* Declaration marked FVG as a “dead man walking,”²⁷³ the truth is that Claimant and FVG began a campaign to mark FVG as a “dead man walking” literally the next business day after the *Lesivo* Declaration was finalized.

²⁶⁹ **Ex. R-190**, 2006-08-26, RDC Press Release “Guatemalan Government Violates Terms of Railroad Privatization Agreement.”; **Ex. R-185**, RDC Webpage News & Press Clips Snapshot.

²⁷⁰ **Ex. R-185**, RDC Webpage News & Press Clips Snapshot.

²⁷¹ **Ex. R-105**, 2006-09-04, “El Gobierno de Guatemala Viola los Términos del Contrato de Privatización Ferroviaria.”

²⁷² **Ex. R-190**, 2006-08-26, RDC Press Release “Guatemalan Government Violates Terms of Railroad Privatization Agreement.” (emphasis added).

²⁷³ Claimant’s Memorial, ¶114.

119. The first post-*Lesivo* settlement meeting occurred on the same date that Claimant and FVG released this press release, and the participants to the meeting recognized that it was “public information that on that same day all the newspapers in the country published FVG’s paid advertisement.”²⁷⁴ The participants communicated to Mr. Senn that it was not appropriate for the company to resort to media outlets to express their opinions on the process while settlement discussions were ongoing and asked FVG to cease communications to the press about the *Lesivo* Declaration.²⁷⁵ FVG and Mr. Senn ignored this request.

120. Two days later, on 30 August 2006, FVG appeared yet again in the press, again telling the world that the *Lesivo* Declaration sent a wrong signal to investors and set a bad precedent for legal certainty in the country.²⁷⁶ On that same day, an internal Government meeting was held to organize for further negotiations with FVG and Mr. Mario Fuentes, the Presidential Commissioner, informed the participants that FVG had scheduled a press conference for the following day and had invited the American Embassy, AMCHAM and other institutions to participate.²⁷⁷

121. Thus, while the Government tried to meet in good faith with FVG in an effort to settle the disputes and avoid the filing of the action in *Contencioso Administrativo* court, FVG was manufacturing its damages case.²⁷⁸ The post-*Lesivo* negotiations ended on 4 October 2006 after FVG communicated its lack of flexibility on certain key issues, including, most notably,

²⁷⁴ **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; Second Statement of A. Gramajo, ¶ 39.

²⁷⁵ **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

²⁷⁶ **Ex. R-104**, 2006-08-30, El Periódico, “Ferrovías de Guatemala se queda sin locomotoras.”

²⁷⁷ **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

²⁷⁸ **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

informing the Government that it was not interested in entering into a new equipment usufruct.²⁷⁹

L. Faced With The Failed Negotiations And The Impending Statute of Limitations, The Attorney General Filed A Complaint Before The *Contencioso Administrativo* Court Seeking A Judicial Order Declaring The Contract *Lesivo*

122. On 24 November 2006, pursuant to Article 23 of the *Ley De Lo Contencioso Administrativo*, the Attorney General filed a complaint against FVG before the *Contencioso Administrativo* Court.²⁸⁰ Through this case the Attorney General seeks to have this court determine whether Contract 143/158 are *lesivo* to the interests of Guatemala.²⁸¹ If it prevails on that argument, it would ask the Court to declare Contract 143/158 null and void.²⁸²

123. FVG was served with the Government's complaint on May 15, 2007, and filed its initial objections to the claim on May 21, 2007.²⁸³ FVG also filed a Reply brief in that proceeding on May 12, 2008.²⁸⁴ As of the date of this Memorial, the *Contencioso Administrativo* court has not yet ruled on the validity of the *Lesivo* Declaration or issued any final relief.

124. As noted by Lic. Juan Luís Aguilar, Claimant, through FVG, has participated in the *Contencioso Administrativo* proceeding, including exercising its due process rights under the Guatemalan Constitution to file objections and make its case concerning the invalidity of the

²⁷⁹ See Ex. R-37, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48; Second Statement of A. Gramajo, ¶ 46.

²⁸⁰ See Ex. C-11, 2006-11-14, Attorney General's claim before the Contencioso Administrativo court regarding the lesividad of Contracts 143/158, bates RDC000179-227; Expert Report of J.L. Aguilar, ¶ 52-53.

²⁸¹ See Ex. C-11, 2006-11-14, Attorney General's claim before the Contencioso Administrativo court regarding the lesividad of Contracts 143/158, bates RDC000179; Expert Report of J.L. Aguilar, ¶ 53, 58-59.

²⁸² See Ex. C-11, 2006-11-14, Attorney General's claim before the Contencioso Administrativo court regarding the lesividad of Contracts 143/158, bates RDC000226; Expert Report of J.L. Aguilar, ¶ 59.

²⁸³ See Ex. R-276, 2007-05-21, FVG Preliminary Objections in the *Contencioso Administrativo* Phase of the *Lesividad* Process; Expert Report of J.L. Aguilar, ¶ 63.

²⁸⁴ See Ex. R-292, 2008-05-12, FVG Reply Brief in the *Contencioso Administrativo* Phase of the *Lesividad* Process; Expert Report of J.L. Aguilar, ¶ 63.

Lesivo Declaration.²⁸⁵ Claimant also filed and had its challenge to the *Lesivo* Declaration heard before the Guatemalan Constitutional Court.²⁸⁶

125. Importantly, Claimant's rights under Contract 143/158 have not been suspended throughout this entire process and are still in force.²⁸⁷ Although the Attorney General sought the suspension of the contract pending resolution of the case,²⁸⁸ the court rejected the Attorney General's petition, thereby affirming that FVG still is in possession of its rights under the contract until the court determines otherwise.²⁸⁹ In so doing, the Court cited Article 18 of the *Ley De Lo Contencioso Administrativo*, which recognizes that a party with rights under a contract with the state that has been declared *lesivo* by the Executive retains such rights absent a court order declaring otherwise.²⁹⁰ The Attorney General submitted its request for reconsideration of the denial of this request, but the court again rejected the petition.²⁹¹ These decisions demonstrate very nicely that FVG, and thus Claimant, is being afforded its due process rights in the proceedings determining the validity of the *Lesivo* Declaration before the Guatemalan courts.

²⁸⁵ Expert Report of J.L. Aguilar, ¶ 63.

²⁸⁶ **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158); Expert Report of J.L. Aguilar, ¶ 74-5.

²⁸⁷ Expert Report of J.L. Aguilar, ¶¶ 40, 63, 129.

²⁸⁸ *See Ex. C-11*, 2006-11-14, Attorney General's claim before the Contencioso Administrativo court regarding the *lesividad* of Contracts 143/158, pp. 69-70 ¶ 14.

²⁸⁹ *See Ex. RL-73*, 2007-02-23, Decision of the *Contencioso Administrativo* court regarding the Attorney General's claim of *lesividad* of Contracts 143/158; Expert Report of J.L. Aguilar, ¶ 63.

²⁹⁰ **Ex. RL-72**, 1996-11-21, Article 18 of the Law of the *Contencioso Administrativo* ("The *contencioso administrativo* process will have a single instance, and its filing will not have the effect of suspending the act or contract in question except in the case of specific exceptional cases in which the tribunal decides otherwise in the same resolution in which it admits the claim, provided the tribunal considers it indispensable and does not cause irreparable harm to the parties") (unofficial translation).

²⁹¹ *See Ex. RL-74*, 2008-03-10, Decision of the Contencioso Administrativo court regarding the Attorney General's resubmitted claim for suspension of Contracts 143/158 within the *Lesividad* claim.

126. If the Court were to declare that the *Lesivo* Declaration was proper, and further determine that Contract 143/158 is null and void, FVG would still have the right to seek compensation for any damages that it can prove it has sustained.²⁹²

127. Finally, it also is important to note that the *Lesivo* Declaration has had no effect on FVG's legal rights under Usufruct Contract 402.²⁹³ To date, FVG retains all of its rights and obligations under that contract as well.²⁹⁴

M. The *Lesivo* Declaration Had Absolutely Nothing To Do With Any Supposed Interest By The Government To Benefit Mr. Ramón Campollo Or Any Other Local Interest

128. In its Memorial on the Merits, Claimant spins a fanciful story of corruption that supposedly motivated the President's decision to publish a declaration of *lesividad* regarding Contract 143/158. Claimant spends a considerable amount of time and ink trying to convince this Tribunal of its conspiracy theories regarding the Government's efforts to benefit Mr. Ramón Campollo at Claimant's expense. For example, Claimant asserts that one of the purposes of the *Lesivo* Declaration was to "cause or facilitate the transfer of FVG's rights and interests under the Usufruct to a domestic competitor, the sugar oligarch Ramón Campollo, after Campollo had been unsuccessful in his private attempts to intimidate FVG into ceding to him all, or substantially all, of its Usufruct rights and interests."²⁹⁵ These claims are completely unfounded and patently false; nothing more than smoke and mirrors.²⁹⁶

129. As has been described in section I.D., above, the process of *lesividad* was initiated not by the President or high-level officials in the Executive Branch, but by FEGUA's Overseer, Dr. Gramajo, who became aware of the legal defects and irregularities in Contract 143/158 when he assumed his post. As the applicable legal process requires, the Attorney General's Office

²⁹² Expert Report of J.L. Aguilar, ¶¶ 55, 59.

²⁹³ Expert Report of J.L. Aguilar, ¶ 121.

²⁹⁴ Expert Report of J.L. Aguilar, ¶ 121; see below at Section III.P.

²⁹⁵ Memorial on the Merits, ¶ 3.

²⁹⁶ See Witness Statement of Juan Esteban Berger, ¶ 15; Statement of R. Aitkenhead, ¶¶ 14-18.

and later a number of government officials within different agencies issued their independent, unbiased, and unpressured opinions on whether the equipment contracts should be declared *lesivo*, and all agreed that they should.²⁹⁷ The officials involved in analyzing the issue of *lesividad* from each of the Government offices that considered it all have stated categorically that their respective opinions were the product of their own independent legal analysis based on the record before them and that they were in no way influenced or pressured by the President or anyone else.²⁹⁸

130. What is more, no one in the Government received any instructions or pressures of any kind from the President or anyone else in or outside of his administration suggesting that FVG's rights under its contracts with FEGUA had to be terminated in order to benefit Mr. Ramón Campollo or any other local or international interest.²⁹⁹ One of the former President's most trusted advisors, Mr. Richard Aitkenhead, makes clear that Mr. Campollo never figured in the President's decision to declare the equipment contracts *lesivo*.³⁰⁰ In fact, as of the filing of this counter-memorial, Mr. Campollo does not own, was not given, and is not remotely interested in any of the usufruct rights or interests that are the subject of this claim, despite that the *Lesivo* Declaration was published in 2006 and that Claimant unilaterally abandoned its investment and duties in September 2007.³⁰¹

131. In its Memorial on the Merits, Claimant alleges that during a meeting held on 23 August 2006 in the Presidential palace, President Berger "cut Mr. Senn short, asking 'whether there had been any joint ventures between FVG and potential investors so far,' and made it clear that

²⁹⁷ Statement of R. Aitkenhead, ¶ 14; Statement of M. Cifuentes, ¶ 14; First Statement of A. Gramajo, ¶ 19; A. González, ¶ 15; Statement of C. Ozaeta, ¶ 15; Statement of I. Ponce, ¶¶ 9-11; Statement of A. Zosel, ¶ 10.

²⁹⁸ Statement of R. Aitkenhead, ¶ 14; First Statement of A. Gramajo, ¶¶ 18-19; A. González, ¶ 19; Statement of C. Ozaeta, ¶ 19; Statement of I. Ponce, ¶ 13; Statement of A. Zosel, ¶ 10.

²⁹⁹ Statement of R. Aitkenhead, ¶ 15; Statement of R. Aitkenhead, ¶ 14; First Statement of A. Gramajo, ¶¶ 18-19; A. González, ¶ 19; Statement of C. Ozaeta, ¶ 19; Statement of I. Ponce, ¶ 13; Statement of A. Zosel, ¶ 10; Second Witness Statement of A. Gramajo, ¶ 34.

³⁰⁰ Statement of R. Aitkenhead, ¶¶ 14-18.

³⁰¹ Witness Statement of Ramón Campollo, ¶ 19

the Government’s primary interest was in a standard gauge railroad track along the South Coast.” Claimant goes on to state that, from those supposed words of the President, “it was clear to Mr. Senn that the ‘potential investors’ President Berger was referring to was Ramón Campollo.”³⁰² Neither Claimant nor its witnesses claim that President Berger ever mentioned Mr. Campollo by name during this meeting. Instead, Claimant bases its arguments on what its own interested party-witness and employee speculated about what the President meant when he referred to potential investors. To suggest that the President’s possible mention of joint venture partners was a reference to some supposed interest in the railway by Mr. Campollo is simply an incorrect and unwarranted inferential leap.³⁰³

132. It was public knowledge that FVG was in need of funds to rehabilitate the railway and that it therefore needed to find potential local or international investors in order to be able to continue with the development and rehabilitation of the railroad in Guatemala and in particular with *its* plan to develop the railway toward the Pacific corridor.³⁰⁴ It even asked for the Government’s help in finding potential investors for this effort.³⁰⁵ During his presentation to President Berger at that very meeting (March 7, 2006), Mr. Posner referred to what he termed the “occasional interest” of the sugar and power sectors in the development of the South Route, although he cautioned that there had been “no commitments” from those industries.³⁰⁶ What is more, on November 15, 2004—almost two years before the meeting in the President’s office where Jorge Senn interpreted his mention of “potential investors” as a clear reference to Ramón Campollo—Mr. Senn himself referred to the need of securing “local investors” in order to make the rehabilitation of the South Route possible.³⁰⁷ Specifically, Mr. Senn communicated to FEGUA that the South Route projects “strongly depend on local investors, who, in turn, will

³⁰² Memorial on the Merits, ¶ 69.

³⁰³ Statement of R. Aitkenhead, ¶ 15.

³⁰⁴ Statement of R. Aitkenhead, ¶ 15.

³⁰⁵ Statement of R. Aitkenhead, ¶ 15.

³⁰⁶ **Ex. C-33**, 2006-03-07, FVG PowerPoint Presentation to President Berger, BATES RDC002364

³⁰⁷ **Ex. R-9**, 2004-11-15, Letter to Vice Minister Díaz from J. Senn, p. 2.

become the users of the railroad service in this area.”³⁰⁸ It is clear then that, far from referring to anyone in particular (much less to Mr. Campollo), the President’s question about “potential investors,” assuming for argument’s sake that the President made this comment, was merely in follow up to an issue that Mr. Posner and FVG representatives had raised during that very meeting and in the past as a precondition to FVG’s viability as a going concern.

133. Mr. Campollo himself flatly denies Claimant’s false claims about his role. While Claimant deceptively presents Mr. Campollo as an all-powerful sugar “oligarch” who had the Government of Guatemala under his control, the truth is that he is an honest businessman who has but a 25% interest in a sugar company that participates in *only 6%* of the sugar market in Guatemala.³⁰⁹ Because it needs a villain for its tale of corruption, discrimination, and expropriation, Claimant concocts a storyline starring Mr. Campollo as a politically connected “lone wolf” insistent on usurping Claimant’s usufruct. It bases this story entirely on hearsay, unwarranted assumptions, alleged recollections of interested party-witnesses, and alleged statements and actions of a deceased man—Mr. Héctor Pinto—who cannot contradict or contextualize Claimant’s allegations.

134. Contrary to Claimant’s assertions and depictions, Mr. Campollo explains that his involvement with Claimant and FVG was minimal and limited to three meetings with Claimant and FVG representatives, all at their request.³¹⁰ The first meeting, which was requested by Mr. Posner, was held in Mr. Campollo’s residence in Guatemala in the year 2000 or 2001, and did not last more than approximately thirty minutes.³¹¹ During that meeting, Mr. Posner spoke about FVG’s plans for the railroad, which supposedly included rehabilitation and operation of the South Route from Guatemala City to Puerto Quetzal.³¹² Mr. Posner did not once detail or

³⁰⁸ Ex. R–9, 2004-11-15, Letter to Vice Minister Díaz from J. Senn, p. 2.

³⁰⁹ Statement of R. Campollo, ¶ 3. Mr. Campollo also categorically denies Claimant’s assertion that he has a “large investment holding in [EEGSA]” (Claimant’s Memorial on the Merits, ¶¶ 42, 96) and states that he does not own and never has owned a single share in EEGSA. Statement of R. Campollo, ¶ 4.

³¹⁰ Statement of R. Campollo, ¶ 7.

³¹¹ Statement of R. Campollo, ¶ 8.

³¹² Statement of R. Campollo, ¶ 8.

even refer to investment figures, financial projections, or any other information that would have shed some light on the plans and prospects of the project he was describing.³¹³ After listening to Mr. Posner, Mr. Campollo explained that, absent receiving detailed information about FVG’s proposed project, “he was not in a position of even beginning to consider whether he would be interested in participating in” the railroad project.³¹⁴ He specifically told Mr. Posner that his level of interest would necessarily depend on how profitable the business would be.³¹⁵ At no time during this first meeting did Mr. Campollo “express an interest, much less an intention, of obtaining control of Ferrovías, its rights, or the railroad.”³¹⁶

135. The next meeting between Mr. Campollo and FVG representatives did not take place until years later when, in December 2004 again at FVG’s request, Mr. Campollo agreed to meet Messrs. Duggan and Senn at Greenberg Traurig’s offices—Mr. Campollo’s lawyers at the time—in Miami (the “Miami meeting”).³¹⁷ Mr. Campollo invited Mr. Juan Esteban Berger to attend the Miami meeting, as he was at the time in discussions with a group of Korean investors who were considering the possibility of investing in Guatemala and in one of Mr. Campollo’s proposed projects, Ciudad del Sur—a mixed development project that was still in the conceptual stage and ultimately never materialized.³¹⁸ Mr. Berger, however, did not attend that meeting or any other as Mr. Campollo’s attorney, representative, or spokesperson, and Mr. Campollo never introduced him as such.³¹⁹ Mr. Berger participated in the Miami meeting in the same capacity as Mr. Campollo: individuals who could have or represented others who could have some use or interest in a functioning railroad along the Pacific Coast of Guatemala depending on the details of the project.³²⁰ His presence at the Miami meeting or at any other

³¹³ Statement of R. Campollo, ¶ 8.

³¹⁴ Statement of R. Campollo, ¶ 9.

³¹⁵ Statement of R. Campollo, ¶ 9.

³¹⁶ Statement of R. Campollo, ¶ 10.

³¹⁷ Statement of R. Campollo, ¶ 11.

³¹⁸ Statement of R. Campollo, ¶¶ 12-13; Statement of J. Berger, ¶ 21.

³¹⁹ Statement of R. Campollo, ¶¶ 13-14; Statement of J. Berger, ¶ 19.

³²⁰ Statement of R. Campollo, ¶ 13; Statement of J. Berger, ¶ 21.

meeting regarding the possible development of the railway toward the Pacific corridor certainly was not part of a plan to create the impression that Mr. Campollo somehow controlled or had influence over the Government of Guatemala through Mr. Berger.³²¹

136. Like the first meeting in Guatemala, the Miami meeting lasted approximately thirty minutes and was devoid of any discussion about financial projections or any details that would have allowed Mr. Campollo to conduct a due diligence of FVG's proposals and to make an informed decision about whether he was interested in participating in any capacity.³²² Messrs. Duggan and Senn did, however, offer Mr. Campollo shares in Ferrovías, explaining that Ferrovías' Guatemalan partner—Cementos Progreso—had no interest in contributing more capital to fund the rehabilitation, development, and operation of the South Route of the railroad.³²³ In response to Messrs. Duggan's and Senn's pitch, Mr. Campollo responded that without detailed information about financial projections, performance, and other information that would allow a through due diligence—information that FVG had not and never provided—he could not even consider investing in FVG or in its railroad project in any capacity.³²⁴ At no point during this meeting did Mr. Campollo show or express any interest in controlling the railroad in Guatemala or any other aspect of Ferrovías' business.³²⁵

137. In fact, Mr. Campollo explains that he was never interested in and would have never insisted on operating the railroad for several reasons. First, Mr. Campollo never has been in the railroad or transportation business, which he understood to require technical and operational knowleged that neither he nor any of his business ventures possess.³²⁶ Second, and most important, using the railroad to transport sugar would not necessarily have been cheaper in

³²¹ Statement of R. Campollo, ¶ 14; Statement of J. Berger, ¶ 19.

³²² Statement of R. Campollo, ¶ 20.

³²³ Statement of R. Campollo, ¶ 21.

³²⁴ Statement of R. Campollo, ¶¶ 20-21.

³²⁵ Statement of R. Campollo, ¶¶ 15-16.

³²⁶ Statement of R. Campollo, ¶ 18.

light of the investment required to make that transport possible.³²⁷ Specifically, Mr. Campollo recalls knowing about a feasibility study commissioned by Ferrovías, which had concluded that using the railroad for sugar transport would not be economically beneficial to Guatemala's sugar mills because the investment required to rehabilitate and condition the railway and railroad equipment to make sugar transport feasible would have been monumental and far outweighed savings to be realized in shipping costs (if any).³²⁸ Additionally, Mr. Campollo explains that, by the time Ferrovías had approached him about their railway project, many of the sugar mills had developed a system of internal roads that allowed the transportation of their product more efficiently, directly, and cheaply, and without the limitations on weight imposed by the Government on public roads.³²⁹ Finally, Mr. Campollo notes that, given that the sugar mill in which he has a 25% share only participates in 6% of the sugar production in Guatemala, it would have been absurd for him to be interested in (much less insist on) controlling the railroad in order to transport sugar from that mill, especially in light of the substantial investment in infrastructure and equipment that would have been required to make that transportation possible.³³⁰

138. Mr. Campollo's recollection was not mistaken, as FVG in fact had commissioned Mr. Roberto Morales in 2003 to conduct a feasibility study of the Pacific/South corridor with particular emphasis on the potential use of the railroad by the sugar industry.³³¹ The study examined the viability of the railway as well as the transport rates that could be offered to the various mills located within the southern corridor.³³² This feasibility study was critical to determine whether it was viable for FVG to offer railway service to the sugar industry and to

³²⁷ Statement of R. Campollo, ¶¶ 15-18.

³²⁸ Statement of R. Campollo, ¶ 17.

³²⁹ Statement of R. Campollo, ¶ 17.

³³⁰ Statement of R. Campollo, ¶ 18.

³³¹ Statement of R. Morales, ¶ 4.

³³² Statement of R. Morales, ¶ 4.

become aware of the various facilities and equipment that would be necessary to transport the product.³³³

139. After studying the available infrastructure, the railway route, and other factors, Mr. Morales concluded that regardless of the efforts expended to connect the sugar mills to the railroad and even taking into account all the sugar produced in Guatemala that requires transportation, the volume of cargo would be too low to justify the investment that would have to be made in order to make viable the railroad transportation of crude sugar in bulk.³³⁴

Specifically, Mr. Morales based his conclusions on the following:

- a. It was necessary to invest in infrastructure (roadways and other access points) to connect the sugar mills to the nearest railway stations, as the sugar mills in Guatemala are spread apart throughout the region and were not adjacent to the railway because the railway was originally developed to support relation the banana and coffee industries.³³⁵
- b. It also would be necessary to invest in infrastructure and equipment that would allow loading and transport of the sugar in its raw, bulk state from the mills to the rail cars, as well as in specialized railcars that could be emptied at the Expogranel warehouses at Puerto Quetzal for eventual shipment to its final destination.³³⁶
- c. The investments above would be in addition to the investments necessary to rehabilitate the railway in the Southern Route, which was at the time completely abandoned.³³⁷
- d. The transport of sugar alone would not justify the substantial investments described above given that sugar is a seasonal product harvested only during the summer (dry) season, which lasts six months.³³⁸

³³³ Statement of R. Morales, ¶ 5.

³³⁴ Statement of R. Morales, ¶ 7.

³³⁵ Statement of R. Morales, ¶¶ 5, 8.

³³⁶ Statement of R. Morales, ¶¶ 8-9.

³³⁷ Statement of R. Morales, ¶ 11.

³³⁸ Statement of R. Morales, ¶ 12.

- e. By the time the study was conducted, the principal sugar mills in Guatemala had developed a more practical, economical, and efficient means—internal private roads not subject to the weight limitations imposed on public road transportation—to transport their product to Puerto Quetzal, a point confirmed by Mr. Campollo.³³⁹ This meant that the mills could carry up to four times more sugar per trip using these roads as opposed to the public roads, and using a route that cut the distance between their facilities and Puerto Quetzal by approximately 30 to 60 kilometers, reducing the distance to nearly a third of the distance traveled using public roads.³⁴⁰ With this alternative, the need for sugar producers to use the railroad to transport sugar was essentially nullified.³⁴¹

140. In light of the factors outlined above, Mr. Morales concluded that the sugar mills most likely would not be interested in investing to enable the transportation of sugar using the railroad, as the savings represented (if any) would not justify the substantial investment that was needed.³⁴² From the point of view of FVG, Mr. Morales concluded and explained to Messrs. Posner and Duggan that, given the substantial investment required to make the railway viable for transporting sugar, the limited volume of sugar produced and shipped annually in Guatemala, and the other transportation alternatives available to the mills, FVG would have to offer freight rates so low that they would not cover the substantial investment that was needed.³⁴³ Therefore, if FVG was interested in operating the railway in the Pacific/South corridor, it could not rely exclusively on the transport of sugar, and would have to seek other sources of freight to make the operation profitable in view of the necessary investment, even assuming that all sugar produced in Guatemala was transported by rail.³⁴⁴

³³⁹ Statement of R. Morales, ¶ 13.

³⁴⁰ Statement of R. Morales, ¶ 13.

³⁴¹ Statement of R. Morales, ¶ 13.

³⁴² Statement of R. Morales, ¶ 14.

³⁴³ Statement of R. Morales, ¶ 14.

³⁴⁴ Statement of R. Morales, ¶ 14.

141. Mr. Morales' conclusions were in line with Mr. Campollo's thoughts about FVG's project, and made clear that it would not have made business sense for someone like Mr. Campollo to be interested in investing, much less controlling and operating, railroad.³⁴⁵

142. Mr. Campollo also categorically states that he was never interested in controlling FVG's usufruct rights or any other aspect of its business. Claimant suggests that Mr. Campollo's alleged interest in the right of way arose from one or more of his investments and projects. Claimant's characterization of those alleged interests and projects, however, is completely misleading. First, Claimant implies that Mr. Campollo was interested in controlling the railway right of way in connection with a supposed natural gas pipeline from Mexico to Guatemala City that Mr. Campollo supposedly wanted to construct on the Ferrovías' right of way. Mr. Campollo explains, however, that he had no interest (economic or otherwise) in the gas pipeline project Claimant refers to, which was being contemplated by a company (GASISTMO) in which a friend of his—Dr. Manuel Ayau—had share participation.³⁴⁶ But Mr. Campollo did not have a single share or any interest in this company or this possible project.³⁴⁷ Mr. Campollo's connection to this project was merely as an advisor to his friend given his experience in the energy sector.³⁴⁸ In any event, in less than a year of pre-feasibility studies, Dr. Ayau discarded the pipeline project as it was discovered that it was not and could not be feasible given that, among other reasons, Mexico is not a natural gas exporter (it in fact is an important natural gas importer).³⁴⁹

143. Similarly, Claimant suggests that Mr. Campollo's alleged interest in controlling the railroad and right of way was related to his project Ciudad del Sur, a mixed development project that in 2004 was in its conceptual phase and would have served as a space where manufacturing, storage, distribution, and other enterprises would have located their operations

³⁴⁵ Statement of R. Morales, ¶ 15; Statement of R. Campollo, ¶¶ 15-18.

³⁴⁶ Statement of R. Campollo, ¶ 5.

³⁴⁷ Statement of R. Campollo, ¶ 5.

³⁴⁸ Statement of R. Campollo, ¶ 6.

³⁴⁹ Statement of R. Campollo, ¶ 6.

with the advantage of being located near Puerto Quetzal and in an important strategic location within Guatemala.³⁵⁰ Mr. Campollo owns the lands where Ciudad del Sur would have been located, and his interest in the project would have been as landlord.³⁵¹ Mr. Campollo explains, however, that while Ciudad del Sur tenants could have conceivably used the railroad, such use depended on the eventual tenants' needs and the rates offered by the railroad operator; the railroad was by no means an indispensable or even necessary component for the development of Ciudad del Sur.³⁵² In any event, the Ciudad del Sur project never went beyond the conceptual stage and was held in abeyance around 2005 due to lack of interest on the part of potential investors who, for one reason or another, did not want to invest in Guatemala.³⁵³

144. Finally, Claimant alleges that Mr. Campollo was interested in controlling the railroad in order to transport sugar from the mill he has an investment in, and in connection with his plan to purchase lands near the Mexico border for sugarcane cultivation. As has been explained and consistent with Mr. Morales's conclusions, it would not have made economic or business sense for Mr. Campollo or any other player in the sugar industry to control or operate the railroad in order to transport sugar, as the investments needed to make railroad transportation of sugar viable would have completely outweighed whatever savings railroad transportation would have represented, if any. In Mr. Campollo's case in particular, it would have made even less sense in light of his relatively minor role in the sugar industry, as he has but a 25% interest in a sugar mill that represents only 6% of the sugar market in Guatemala.³⁵⁴ Moreover, FVG never even presented Mr. Campollo with a concrete plan that he could analyze regarding his company's possible use of the railroad to transport the sugar produced at his factory.³⁵⁵ And concerning the supposed plans to purchase lands near the Mexico border for sugar cultivation, Mr. Campollo makes clear that while he once considered such a purchase, that idea had long since

³⁵⁰ Statement of R. Campollo, ¶ 12.

³⁵¹ Statement of R. Campollo, ¶ 12.

³⁵² Statement of R. Campollo, ¶ 12.

³⁵³ Statement of R. Campollo, ¶¶ 12, 35.

³⁵⁴ Statement of R. Campollo, ¶ 3.

³⁵⁵ Statement of R. Campollo, ¶¶ 20-21.

been rendered futile as other companies purchased the lands and are using them to cultivate other crops.³⁵⁶

145. Stripped of its mischaracterizations and inventions about Mr. Campollo's supposed interest in controlling the railroad and right of way, Claimant is left with little in the way of reasons as to why Mr. Campollo would want to control an operation and rights that he had no use for. Quite simply, Mr. Campollo never communicated an interest or desire to control the railroad and right of way because he never had such an interest.³⁵⁷

146. In making its story, Claimant relies heavily on the alleged words and actions of people it does not present as witnesses, most notably on those of Mr. Héctor Pinto—a former employee of Mr. Ramón Campollo who is deceased and cannot dispute or contextualize Claimant's allegations. Claimant characterizes Mr. Pinto as Mr. Campollo's supposed "front man and go-between,"³⁵⁸ and even as his "dirty jobber."³⁵⁹ Mr. Pinto, however, was none of these things. In fact, Mr. Pinto was an employee whose sole responsibility was dealing with some of Mr. Campollo's real estate holdings, including the then-conceptual Ciudad del Sur, and had absolutely no power or discretion to make decisions, nor did he represent Mr. Campollo or his interests in any way.³⁶⁰ Mr. Campollo has also made clear that when he engages in negotiations or is interested in or approached for a project, he participates directly in discussions and does not use intermediaries, as evidenced by his direct, in-person meetings with FVG representatives on three occasions.³⁶¹ Importantly, at no point during those meetings did Mr. Campollo ever inform Messrs. Posner, Duggan, Senn, or anyone else

³⁵⁶ Statement of R. Campollo, ¶ 19.

³⁵⁷ Statement of R. Campollo, ¶ 18.

³⁵⁸ Memorial on the Merits, ¶ 44; Statement of J. Senn, ¶ 25; Statement of W. Duggan, ¶ 4; Statement of H. Posner, ¶ 27.

³⁵⁹ **Ex. C-45**, 2006-09-05, Email from J. Senn to H. Posner, W. Duggan, and B. Pietrandrea.

³⁶⁰ Statement of R. Campollo, ¶ 23.

³⁶¹ Statement of R. Campollo, ¶ 24.

associated with FVG that Mr. Pinto was authorized to speak for or represent him in any way, because he simply was not.³⁶²

147. Whatever Claimant's allegations about Mr. Pinto, however, Mr. Campollo has categorically stated that he never authorized Mr. Pinto to negotiate with FVG or RDC in his name or representation or in the name of any of his businesses.³⁶³ Likewise, Mr. Campollo never authorized Mr. Pinto to discuss or exchange with FVG drafts of agreements or contracts of any kind.³⁶⁴

148. The documents that Claimant has presented in this case as supposed draft agreements related to the railway exchanged between FVG and Mr. Pinto in early March and April 2005 also are misleading.³⁶⁵ While Claimant describes the draft agreement as a "written 'offer'" from Mr. Campollo,³⁶⁶ the document appears to be, at most, an email from Héctor Pinto attaching his comments to an existing draft of the alleged agreement. We do not know who created the drafts, nor really much else about the documents. Assuming, however, for the sake of argument that the documents provided by Claimant were in fact sent by Mr. Pinto and are what they purport to be—assumptions that unfortunately Mr. Pinto can neither confirm nor deny—it establishes that the supposed draft agreement originated from FVG, and that Mr. Pinto was merely commenting on it.

149. Additionally, and most important, the supposed draft agreements were between FVG and an entity by the name of Desarrollos G.³⁶⁷ Aside from his unequivocal testimony that he not only never authorized Mr. Pinto to negotiate or exchange drafts of any kind with FVG, Mr. Campollo makes clear that he had never seen the alleged drafts presented by Claimant in this

³⁶² Statement of R. Campollo, ¶ 24.

³⁶³ Statement of R. Campollo, ¶¶ 24-25.

³⁶⁴ Statement of R. Campollo, ¶ 25.

³⁶⁵ **Ex. C-41**, 2005-03-09, Email from mapriso@intelnett.com to J. Senn, et al. with attachment; **Ex. C-42**, 2005-04-06, Email from J. Senn to H. Posner, B. Duggan, and B. Pietrandrea with attachment.

³⁶⁶ Memorial on the Merits, ¶ 49.

³⁶⁷ **Ex. C-41**, 2005-03-09, Email from mapriso@intelnett.com to J. Senn, et al. with attachment; **Ex. C-42**, 2005-04-06, Email from J. Senn to H. Posner, B. Duggan, and B. Pietrandrea with attachment.

proceeding until counsel for Guatemala brought them to his attention.³⁶⁸ Mr. Campollo also notes that he does not know, has never heard of, and certainly does not own or have an interest in Desarrollos G, the company that was to be FVG's counterparty in these alleged agreements.³⁶⁹

150. In fact, Mr. Campollo did not find out that Mr. Pinto was supposedly in discussions with FVG until he received a call in mid-april 2005 from Juan Esteban Berger, who informed him that he had heard that FVG representatives had been saying that Mr. Campollo, through Mr. Pinto, had been using Mr. Berger's name to obtain favorable concessions in negotiations with FVG.³⁷⁰ Mr. Berger's call to Mr. Campollo stems from a series of events that culminated in a meeting that took place on 12 April 2005, during which Claimant asserts Mr. Pinto threatened FVG by stating that "Campollo's Group" would somehow convince the Government to "kick [Ferrovías] out should there be no agreement with Mr. Campollo's Group."³⁷¹ Claimant's account of the 12 April 2005 meeting is incorrect and replete misrepresentations.

151. Prior to the 12 April 2005 meeting, Mr. Luis Fuxet had a conversation with Mr. Berger, who expressed his disappointment at hearing from FVG representatives that Mr. Pinto allegedly had been threatening FVG using Mr. Berger's name and implying that he would influence the his father's administration to take away the control of the railroad assets from FVG.³⁷² Mr. Fuxet, at the time, represented Cementos Progreso—RDC's local partner in Ferroviás—and also represented other clients who were in negotiations with clients of Mr. Berger.³⁷³ Whilst meeting with Mr. Fuxet concerning other matters, Mr. Berger told Mr. Fuxet that FVG had called a meeting for 12 April 2005 but noted that he could not attend that meeting.³⁷⁴ Mr.

³⁶⁸ Statement of R. Campollo, ¶ 25.

³⁶⁹ Statement of R. Campollo, ¶ 25.

³⁷⁰ Statement of R. Campollo, ¶ 27.

³⁷¹ Memorial on the Merits, ¶ 53.

³⁷² Witness Statement of Luis Pedro Fuxet Ciani, ¶ 8; Statement of J. Berger, ¶ 15.

³⁷³ Statement of L. Fuxet, ¶¶ 6-7.

³⁷⁴ Statement of L. Fuxet, ¶ 9; Statement of J. Berger, ¶ 15.

Berger nonetheless noted that it was important that it be clarified as soon as possible that Mr. Berger's only interest was to procure a functioning railway and that he had not authorized Mr. Pinto or anyone else for that matter to make statements of the kind that Mr. Pinto was allegedly making.³⁷⁵ Because they were friends and business colleagues, he asked Mr. Fuxet whether he would attend the meeting to make this clarification, noting that he would later follow up and do so personally.³⁷⁶ Mr. Fuxet agreed and attended the 12 April meeting to clarify the situation and assure the participants that, if in fact Mr. Pinto had made statements using his name, he had done so without his knowledge or authorization.³⁷⁷ Contrary to Claimant's allegation,³⁷⁸ Mr. Fuxet was not and never has been an attorney at the firm where Mr. Berger works.³⁷⁹

152. Claimant alleges that Mr. Pinto called the meeting to discuss the "illegalities" of FVG's Usufruct Contracts, under the shadow of Mr. Pinto's threat "that the government would most likely kick [them] out should there be no agreement with [Mr. Campollo's] group." According to Claimant, in response Mr. Duggan said that he understood this to be an obvious threat and demanded to know what it was about the FVG contracts that Mr. Pinto considered illegal.³⁸⁰ Claimant asserts that "Mr. Fuxet responded that 'there was no threat per se,' but that the Minister of Communications had alluded to such situation since FVG had not gotten the railroad up to a standard the Government thought was needed regardless of the terms stated in the Usufruct Contracts."³⁸¹ However, this is completely false.³⁸²

153. At no point did Mr. Fuxet make the statements quoted by Claimant in its Memorial, nor did he talk about having contacts with the Ministry of Communications with respect to this

³⁷⁵ Statement of L. Fuxet, ¶ 9.

³⁷⁶ Statement of L. Fuxet, ¶ 9; Statement of J. Berger, ¶ 15.

³⁷⁷ Statement of L. Fuxet, ¶ 12; Statement of J. Berger, ¶ 15.

³⁷⁸ Memorial on the Merits, ¶ 53.

³⁷⁹ Statement of L. Fuxet, ¶ 7.

³⁸⁰ Memorial on the Merits, ¶ 53.

³⁸¹ Memorial on the Merits, ¶ 53.

³⁸² Statement of L. Fuxet, ¶ 11.

issue.³⁸³ To the contrary, in response to the affirmations made by Claimant and FVG, Mr. Fuxet responded by indicating what he had discussed with Mr. Berger, namely that whatever Mr. Pinto might have said, he did not represent or speak for Mr. Berger or the Government.³⁸⁴ Mr. Fuxet also expressed that Mr. Berger's desire and intention was to promote the successful development of the railway project and nothing more.³⁸⁵ Finally, Mr. Fuxet makes clear that he does not recall Mr. Pinto being at the 12 April meeting and that if he was present he did not say much and certainly did not make any threats of any kind or any statements regarding Mr. Berger.³⁸⁶

154. After this meeting, Mr. Fuxet met with Mr. Berger where he informed Mr. Berger of what had been said at the 12 April 2005 meeting with FVG.³⁸⁷ He told Mr. Berger that it would be a good idea for him to clarify things personally with FVG.³⁸⁸ Mr. Berger said that he would meet with FVG personally to clear up any misunderstandings.³⁸⁹ At a meeting on 15 April 2005, Mr. Berger did just that—he informed the FVG representatives that he had nothing to do with Mr. Pinto's alleged threats and that in no circumstances would he ever attempt to influence his father, President Berger, with regard to the FVG issue, or any other issue.³⁹⁰ As a result, it was Mr. Silva who apologized to Mr. Berger for the misunderstanding.³⁹¹

155. As previously mentioned, Mr. Berger also called Mr. Campollo to inquire about FVG's comments regarding supposed threats by Mr. Pinto.³⁹² Mr. Berger's call surprised Mr. Campollo, as he was not aware of Mr. Pinto's alleged statements, and he had not authorized

³⁸³ Statement of L. Fuxet, ¶ 11.

³⁸⁴ Statement of L. Fuxet, ¶ 12.

³⁸⁵ Statement of L. Fuxet, ¶ 12.

³⁸⁶ Statement of L. Fuxet, ¶ 11.

³⁸⁷ Statement of L. Fuxet, ¶ 13.

³⁸⁸ Statement of L. Fuxet, ¶ 13; Statement of J. Berger, ¶ 15.

³⁸⁹ Statement of J. Berger, ¶ 15.

³⁹⁰ Statement of J. Berger, ¶ 15.

³⁹¹ Statement of J. Berger, ¶ 15.

³⁹² Statement of R. Campollo, ¶ 27.

Mr. Pinto to negotiate with FVG or RDC with respect to the railroad.³⁹³ In any event, so as to avoid any misunderstanding, Mr. Campollo explained to Mr. Berger that, assuming what FVG was alleging had in fact happened—which Mr. Campollo did not know—it was without his knowledge or authorization.³⁹⁴ Mr. Campollo assured Mr. Berger that he would make it clear to FVG that he had no interest in its railway project.³⁹⁵

156. After his conversation with Mr. Berger, Mr. Campollo immediately called Mr. Pinto and asked him whether he had in fact used Mr. Berger’s name to obtain concessions from FVG in the context of negotiations related to the railroad.³⁹⁶ Mr. Pinto responded that he had *not* done so, and that he did not understand why FVG would claim something different.³⁹⁷ So that there would be absolutely no doubt, however, Mr. Campollo drafted a letter that same day (15 April 2005) directed at FVG through its General Manager Jorge Senn, in which he made it clear that he was *not interested* in the railway project that FVG had presented him during their meeting in Miami.³⁹⁸ Once Mr. Campollo finished drafting the letter to Ferrovías, he called Mr. Pinto to his office.³⁹⁹

157. Mr. Campollo directed Mr. Pinto to disassociate himself completely from FVG’s project, and instructed him that under no circumstance was he to talk to or negotiate with FVG in his name or that of any company in which Mr. Campollo had an interest.⁴⁰⁰ Mr. Campollo then signed the letter to FVG in Mr. Pinto’s presence so that there would be no doubt about his desire to sever any ties with FVG, and instructed Mr. Pinto to deliver it personally to FVG that

³⁹³ Statement of R. Campollo, ¶ 27.

³⁹⁴ Statement of R. Campollo, ¶ 28.

³⁹⁵ Statement of R. Campollo, ¶ 28.

³⁹⁶ Statement of R. Campollo, ¶ 28.

³⁹⁷ Statement of R. Campollo, ¶ 28.

³⁹⁸ **Ex. R-174**, 2005-04-15, Letter from R. Campollo to J. Senn; Statement of R. Campollo, ¶ 29.

³⁹⁹ Statement of R. Campollo, ¶ 29.

⁴⁰⁰ Statement of R. Campollo, ¶ 30.

very day, which he did.⁴⁰¹ Writing and sending his 15 April 2005 letter was the last thing Mr. Campollo did in connection with FVG and its supposed railway project on the South Coast.⁴⁰²

158. Three days later, on 18 April 2005, FVG responded to Mr. Campollo's letter with a letter from its General Manager Jorge Senn.⁴⁰³ In that letter, FVG recognized that, even though Mr. Campollo never communicated an intent to invest in their project, they lamented his decision to withdraw but understood his reasons for doing so, and thanked him for his time and efforts.⁴⁰⁴ Interestingly, despite Claimant's allegations that "[s]ometime in late 2004 or early 2005 [it] first began to receive reports that Mr. Campollo was, through President Berger's son, Juan Esteban, enlisting the Government in his efforts to obtain control of the railroad assets",⁴⁰⁵ it makes no mention whatsoever in its 18 April 2005 letter of those alleged plots. If Claimant in fact knew or even believed that Mr. Campollo was crusading to seize Ferrovías' rights and assets, one would think that the tone and content of its 18 April 2005 letter surely would have been different. As Mr. Campollo notes, FVG says nothing in this letter about any supposed threats that Mr. Campollo had made to take over FVG's usufruct rights and only thanks him for his time and laments his withdrawal from the discussions.⁴⁰⁶ In any event, after receiving that letter, Mr. Campollo heard nothing more from FVG or any of its representatives, and had nothing more to do with them, their projects, or the Guatemalan railroad.⁴⁰⁷

159. And nothing more to do with FVG and the railroad meant precisely that. Contrary to Claimant's protestations and inventions to the contrary, Mr. Campollo never spoke to any Guatemalan Government official about the railroad or Ferrovías's rights related to the same.⁴⁰⁸ Mr. Campollo also maintains that he never requested or authorized any of his employees

⁴⁰¹ Statement of R. Campollo, ¶ 30.

⁴⁰² Statement of R. Campollo, ¶ 30.

⁴⁰³ **Ex. R-173**, 2005-04-18, Letter from J. Senn to R. Campollo; Statement of R. Campollo, ¶ 31.

⁴⁰⁴ **Ex. R-173**, 2005-04-18, Letter from J. Senn to R. Campollo; Statement of R. Campollo, ¶ 31.

⁴⁰⁵ Memorial on the Merits, ¶ 48.

⁴⁰⁶ **Ex. R-173**, 2005-04-18, Letter from J. Senn to R. Campollo; Statement of R. Campollo, ¶ 29.

⁴⁰⁷ Statement of R. Campollo, ¶ 31.

⁴⁰⁸ Statement of R. Campollo, ¶ 34.

(including Mr. Pinto) to communicate with any Government official to discuss, and much less to pressure about, the Guatemalan railroad, and does not know that any such communication ever took place.⁴⁰⁹

160. Claimant's reliance on what it characterizes as an email from Mr. Pinto to Mr. Seidner—a highly suspect document—is simply unavailing.⁴¹⁰ First, the document purports to be some form of communication from Héctor Pinto to Emmanuel Seidner, a Government official at the National Competitiveness Office. However, there is no indication that the supposed communication from Pinto was ever sent to or received by Mr. Seidner. The text supposedly sent to Mr. Seidner appears to be pasted onto Jorge Senn's email to Messrs. Posner, Duggan, and Pietrandrea, and does not contain any information about the email account it was sent from, the account it was sent to, the subject of the message, or any other information that is typically found on email messages.⁴¹¹ Moreover, the email that Claimant cites also appears to be a reproach from a person who had been seeking a meeting or a telephone call with Mr. Seidner but was *unsuccessful* in his attempts.⁴¹²

161. Finally, the content of the supposed message from Mr. Pinto casts doubt on the document's veracity. The message mentions Ciudad del Sur as the supposed interested party in reactivating rail service from Puerto Quetzal to Santa Lucías Cotzumalguapa. As confirmed by Mr. Campollo, this project, however, never went beyond the conceptual stage, and by September 2006—the date of the message—it had already been abandoned about a year prior in light of a lack of interest by potential investors.⁴¹³

162. Claimant also bases its false allegations about Mr. Campollo on supposed statements of two top executives from its local partner in FVG, Cementos Progreso. Claimant alleges that

⁴⁰⁹ Statement of R. Campollo, ¶ 25.

⁴¹⁰ Ex. C-45, 2006-09-05, Email from J. Senn to H. Posner, B. Duggan, and B. Pietrandrea.

⁴¹¹ Ex. C-45, 2006-09-05, Email from J. Senn to H. Posner, B. Duggan, and B. Pietrandrea.

⁴¹² Ex. C-45, 2006-09-05, Email from J. Senn to H. Posner, B. Duggan, and B. Pietrandrea.

⁴¹³ Statement of R. Campollo, ¶ 35.

these gentlemen, Frederick Melville and Mario Montano, verbally informed them that the President's decision to declare the equipment contracts *lesivo* was "the doing" of Mr. Campollo "and his group of henchmen."⁴¹⁴ Specifically, Claimant alleges that on 28 July 2006, "Mr. Montano informed Mr. Duggan that 'there was a push on within the Government by Ramon Campollo's group of henchmen' to cancel FVG's Usufruct and award it to Campollo."⁴¹⁵ Moreover, Claimant asserts that on 11 August 2006, "Mr. Posner received a call from Federico Melville of Cementos Progreso, who told him that he had been informed that President Berger was in the process of declaring FVG's concession 'lesivo' or 'injurious to the interests of the State.'"⁴¹⁶ They claim that "Mr. Melville added that this action seemed to be 'the doing of Mr. Campollo,' and a step toward revoking the concession" and added that "FVG's counsel, Juan Pablo Carrasco, had a separate conversation with Mario Montano on the same day which echoed Mr. Melville's report."⁴¹⁷ Curiously, even though Cementos Progreso is RDC's local partner in FVG, Claimant relies on alleged hearsay statements from Messrs. Melville and Montano instead of presenting them as witnesses in this proceeding. Guatemala has a good faith basis to believe that, if called to testify by this Tribunal, Messrs. Mario Montano and Frederick Melville will deny having ever made the statements attributed to them by Claimant's witnesses in this proceeding in the context of the *lesividad* process, and will confirm that Claimant's tale is a complete fabrication. Guatemala also expects that these witnesses will confirm that they did not agree with Claimant's decision to proceed with this arbitration. Guatemala reiterates its request that the Tribunal request Messrs. Melville's and Montano's testimony as it can assist the Tribunal in discerning the truth behind Claimant's allegations.⁴¹⁸

163. Finally, in yet another attempt at depicting Mr. Campollo as a rogue businessman intent on interfering with their business, Claimant has alleged that Mr. Campollo sent an emissary to

⁴¹⁴ Memorial on the Merits, ¶¶ 60, 66-68.

⁴¹⁵ Memorial on the Merits, ¶ 66 citing First Statement of William Duggan, ¶ 21.

⁴¹⁶ Memorial on the Merits, ¶ 67 citing First Statement of Henry Posner, ¶ 41.

⁴¹⁷ Memorial on the Merits, ¶ 67 citing First Statement of Henry Posner, ¶ 41.

⁴¹⁸ 2010-09-21, Letter to Tribunal from D. Orta (requesting testimony from Messrs. Melville and Montano).

talk to Mr. Freddie Pérez of Expogranel in an effort to paralyze a project that Ferrovías and Expogranel were allegedly negotiating on. This is yet another example of the extents to which Claimant has been willing to go in their mission to convince this Tribunal that the Government's actions were motivated by discriminatory and illegal motives. Both Mr. Campollo and Mr. Pérez flatly deny that this conversation ever took place.⁴¹⁹

164. Quite simply, Claimant has concocted a story that it cannot prove because it is a fabrication. The President's decision to declare Contract 143/158 *lesivo* was a considered and carefully deliberated decision that was based on a conscientious analysis by a number of independent Government officials of the legal defects that plagued those contracts, and not a politically motivated, arbitrary measure of a Government determined to benefit a local investor. Claimant's machinations to the contrary are simply unsupported fiction.

N. Claimant Promised Guatemala That It Would Rehabilitate And Operate A National Railway System In Five Phases That Would Yield Substantial Monies To FEGUA, Yet It Dramatically Underdelivered On Its Promises

165. FVG's and Claimant's story in Guatemala is one of lofty promises unkept. When it was vying to obtain the usufruct over FEGUA's 800km right of way, Claimant promised Guatemala that it would rehabilitate, *modernize* and operate a national railway system that would yield substantial revenues for Claimant and FEGUA. What Claimant ultimately delivered, however, was one fifth of a poorly maintained railway that generated but a fraction of the projected revenues. Guatemala *never* received the modernized railway for which it bargained.

1. Claimant Promised Guatemala A Modernized, National Railway System, Yet It Only Poorly Rehabilitated One Of The Five Phases Promised

166. As explained in more detail in Section III.B, above, when Guatemala awarded the *entire* 800km railway right of way in usufruct, it sought to have the winning bidder rehabilitate and modernize the *entire* railway, not just a fraction of it.⁴²⁰ And in its bid, Claimant offered just

⁴¹⁹ Statement of R. Campollo, ¶ 36; Witness Statement of Freddie Pérez Tapia, ¶ 16.

⁴²⁰ Ex. R-1, 1997-02-14, Bidding Rules for Contract 402, ¶¶ 1.1, 2.4, 3.3.3.3; Statement of A. Porras, ¶¶ 7, 8; *see also* above at Section III.B., ¶ 28.

that: to rehabilitate the 800 km railway in five phases. What Claimant delivered, however, was much different and certainly not “heroic” as it asks this Tribunal to believe. Despite the fact that Contract 402 incorporated FVG proposal to rehabilitate and modernize the rail system in five phases and delineates the agreed upon commencement dates for each phase,⁴²¹ Claimant only completed the first phase—and *shoddily* at that—and now argues that it was under no obligation to complete the other four phases.⁴²² This argument is not surprising given Claimant’s complete inability to deliver on what it promised.

167. While Claimant maintains that it invested upwards of USD 15 million in the railway project in Guatemala, its claim chafes against the reality of what FVG actually accomplished. As previously mentioned, Claimant completed only one of the five phases it had proposed for the rehabilitation of the railway. To cover *this* first phase, which was projected to take between six to eight months to complete,⁴²³ Claimant had originally forecast an investment of USD 10 million, which included USD 6 million for the rehabilitation of the railway, USD 2 million for the rehabilitation of the rolling stock, and USD 2 million in closing costs, start-up expenses, and working capital.⁴²⁴ As is explained below, Claimant did precious little in the way of rehabilitation, modernization and maintenance of the railway and equipment—and the little they did, was completed in the cheapest and poorest way possible—casting serious doubt on the investment figures claimed.

168. Even accepting Claimant’s investment figures, however, FVG cannot escape that Mr. Senn, in November 2004, informed FEGUA that, *between 1999 and October 2004* it had invested a total of USD 7,772,420.78 in the supposed rehabilitation of the railway and

⁴²¹ **Ex. C-22**, 1997-11-25, Contract 402, cl. 13; **Ex. R-87**, 2005-02-13, PRENSA LIBRE *Slow-paced train*.

⁴²² **Ex. R-82**, 2004-08-22, SIGLO XXI, *A train that fails to get back on track*; **Ex. R-12**, 2005-01-03, Letter to Vice-Minister Díaz from A. Gramajo (regarding points that CODEFE is requiring of the government); **Ex. R-86**, 2005-02-13, PRENSA LIBRE, *The Railroad does not run well*; **Ex. R-92**, REVISTA D, *Life, Passion, and Death of the Railroad* (discussing the current state of the railroad); **Ex. R-81**, 2004-06-28, SIGLO XXI, *“Ferrovías bets on the South.”*

⁴²³ **Ex. C-15**, 1997-05-15, FVG Sealed Bid Proposal for Usufruct Contract 402, at BATES RDC000412.

⁴²⁴ **Ex. C-15**, 1997-05-15, FVG Sealed Bid Proposal for Usufruct Contract 402, at BATES RDC000424.

equipment.⁴²⁵ Given that Claimant did not rehabilitate or operate any additional phase (beyond Phase I) and made no further substantial investments beyond those made early on to rehabilitate Phase I, it is virtually impossible to fathom that Claimant would invested USD 8 million more between November 2004 and September 2007, the date when FVG unilaterally ceased operations. What is more, when discussing the “heroic” efforts in which it supposedly invested over USD 15 million to rehabilitate the railway, especially in light difficult circumstances like those imposed by the devastation of Hurricane Mitch,⁴²⁶ Claimant failed to mention that at least USD 2,943,07 came directly from the Government of Guatemala, which paid directly for the repairs of the damage caused by the storm.⁴²⁷

169. In fact, it was patently clear from Claimant’s own conduct and use of the right of way that, whatever its investment, it had no intention of living up to its promise and obligation to rehabilitate and operate, much less modernize, a national railway system. One of the clearest example of this was FEGUA’s discovery of a series of electricity transmission poles installed by the company Gesur under a contract with FVG. These poles were installed right in the middle of the railway, making it impossible for a train to pass.⁴²⁸

2. Claimant Promised Guatemala A Safe, Modern, Efficient, And Properly Maintained Railroad Operation, And Delivered A Poorly Rehabilitated And Deficiently Maintained Single Phase

170. Claimant also promised Guatemala that, in its rehabilitation of the railway, it would “offer a safe operation; eliminate the risk of derailments; allow for an operative speed of 40km/hour; and rehabilitate the railway to an adequate condition to manage the estimated traffic.”⁴²⁹ Despite its promises, Claimant’s rehabilitation and maintenance work in the areas

⁴²⁵ Ex. R-9, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn, at p. 2.

⁴²⁶ Merits Memorial, ¶ 32.

⁴²⁷ Statement of J. Carrillo, ¶¶ 26-27; *see also* Ex. R-87, 2005-02-13, PRENSA LIBRE “ Slow-Paced Train” at BATES RDC00015652 (reporting that Claimant completed Phase I after investing USD 10 million of its own money and USD 5 million given by the President Arzú government after Hurricane Mitch in 1998).

⁴²⁸ Statement of M. Samayoa, ¶ 21-22; Statement of J. Carrillo, ¶ 30-31.

⁴²⁹ Ex. C-15, 1997-05-15, FVG Sealed Bid Proposal for Usufruct Contract 402.

outlined in its own proposal within Phase I—the only phase they arguably completed and offered rail service on—were abysmally deficient.

171. Mr. Pedro Barrientos, FVG’S General Railway Supervisor from 1998 until 2001 and the person in charge of supervising the rehabilitation work on Phase I, explains that “FVG did not provide the necessary materials to adequately rehabilitate the railway.”⁴³⁰ Mr. Barrientos’ impression was that FVG either did not want to use or did not have enough money to purchase quality materials for use in the rehabilitation of the Guatemalan railway.⁴³¹ For example, Mr. Barrientos explains that FVG used poor quality sleepers (the wooden planks used to hold the rails together), did not properly level the railway, and hired inexperienced foremen and laborers in its rehabilitation of the north route.⁴³² Mr. Barrientos communicated his concern about the use of poor-quality materials to FVG’S Head Engineer, Mr. Jorge Mario Coronado, who in turn told FVG’S Financial Manager, Mr. Jorge de León.⁴³³ Mr. de León, however, explained that FVG was *only interested in quantity, not quality*.⁴³⁴ With this, Mr. Barrientos understood that FVG was not bothered by the use of poor-quality sleepers and materials for its rehabilitation works.⁴³⁵ In general, Mr. Barrientos describes FVG’S rehabilitation works as “extremely poor, and insufficient to withstand the train traffic in the midterm.”⁴³⁶

172. After leaving his post as Railway Supervisor, FVG immediately hired Mr. Barrientos as the only contractor in charge of hiring and managing the team of laborers that would repair and maintain the railway.⁴³⁷ Mr. Barrientos reports that, like its job in “rehabilitating” the railway, FVG’S maintenance and repair projects were “very deficient and did not seek to correct the problems once and for all, instead opting to repair sections of the railway when there were

⁴³⁰ Witness Statement of Pedro Barrientos, ¶¶ 6–7.

⁴³¹ Statement of P. Barrientos, ¶ 7.

⁴³² Statement of P. Barrientos, ¶¶ 7, 9–10.

⁴³³ Statement of P. Barrientos, ¶ 8.

⁴³⁴ Statement of P. Barrientos, ¶ 8.

⁴³⁵ Statement of P. Barrientos, ¶ 8.

⁴³⁶ Statement of P. Barrientos, ¶ 11.

⁴³⁷ Statement of P. Barrientos, ¶ 13.

derailments.”⁴³⁸ Mr. Barrientos explains that FVG did not undertake any of the basic, necessary maintenance projects and measures required to keep the railway in a good state.⁴³⁹ Specifically, FVG did not have in place the recommended number of laborers per kilometer, did not clear the way of thicket and debris, did not level the railway, did not properly ballast the railway (setting a base of sand and rock on which the rails are placed so as to improve stability and prevent sinking), did not properly even out and re-nail the rails, and did not properly maintain the sewers and drainages so as to prevent water from invading the railway.⁴⁴⁰ Mr. Barrientos recalls a particular instance when he was hired to perform leveling, re-nailing, and change of sleepers on a particular portion of the North Route, only to be recalled by FVG after completing only 5 miles of work because the maintenance would have been too expensive.⁴⁴¹ FVG’S deficient “rehabilitation” and maintenance of the railway, according to Mr. Barrientos, lead to *constant derailments*, which started as early as a year after FVG had begun railroad operations.⁴⁴²

173. Mr. Miguel Angel Smayoa—FEGUA’s Head of Engineering since the year 2000—confirms Mr. Barriento’s description of Claimant’s poor rehabilitation and inexistent mainenance progrmas for the railway. Mr. Samayoa confirms that Claimant’s rehabilitation of the railway was dreadful, and that infrastructure conservation works were *virtually inexistent*.⁴⁴³ As early as 2001, FEGUA had concluded that Claimant had not properly preserved the instalations given to it in usufruct, which were by then in a constant process of deterioration and that Claimant’s rehabilitation of Phase I of the railway project had been deficient.⁴⁴⁴ Mr. Samayoa’s cites numerous examples of how Claimant’s lack of investment, dismal maintenance practices, and

⁴³⁸ Statement of P. Barrientos, ¶ 14.

⁴³⁹ Statement of P. Barrientos, ¶ 16.

⁴⁴⁰ Statement of P. Barrientos, ¶ 15.

⁴⁴¹ Statement of P. Barrientos, ¶ 16.

⁴⁴² Statement of P. Barrientos, ¶ 19.

⁴⁴³ Statement of M. Samayoa, ¶ 7.

⁴⁴⁴ Statement of M. Samayoa, ¶ 7; **Ex. R-203**. 2001-02-06, Oficio No. 004-2001, Letter to E. Minera from FEGUA’s Legal Department.

lack of repairs lead to constant derailments of the train, which reached a level of at least one derailment per trip—a condition that created serious risks for the population, the crew, the equipment, and private property.⁴⁴⁵ FEGUA was able to establish that during September, 2001, FVG experienced 2.52 daily derailments *per crew*, and that by 2006, derailments *had increased by 70%* compared to 2001 figures.⁴⁴⁶ These constant derailments, in turn, resulted in the railroad travelling at ever-decreasing speed, reaching an average speed of 4.12km/hour (2.56 miles per hour) between Guatemala and Jalapa—just over 10% of the average speed promised by Claimant in its Bid Offer.⁴⁴⁷

174. Long before the *Lesivo* Declaration was published, Claimant’s dismal rehabilitation and maintenance of the railway had created chronic operational problems for FVG, which lead to a significant decrease in operations and, thus, to unfulfilled obligations with clients: the poor state of the railway, lack of repairs and maintenance, constant derailments, a train the moved at snail’s pace, and serious delays in the delivery of cargo were problems that resulted not from the *Lesivo* Declaration, but from Claimant’s lack of interest in and commitment to investing at the level it had originally promised Guatemala.

3. Claimant Promised, And Was Contractually And Legally Bound, To Preserve The Railway Equipment Given To It In Usufruct, Yet Completetly Neglected It And Other Railroad Instalations

175. Claimant was equally careless with the railroad equipment, which is part of Guatemala’s cultural patrimony yet was mishandled, destroyed and/or neglected. This neglect flew in the face of Guatemalan laws in place to preserve and protect the country’s cultural patrimony, as well as of FVG’S contractual obligation to preserve the assets given to it in usufruct by FEGUA the laws in place that require their preservation.⁴⁴⁸ An example of FVG’s neglect of the railway

⁴⁴⁵ Statement of M. Samayoa, ¶ 10–17.

⁴⁴⁶ Statement of M. Samayoa, ¶ 13; **Ex. R–22**, 2006-04, Presentation at the Ministry of Communications.

⁴⁴⁷ Statement of M. Samayoa, ¶ 20.

⁴⁴⁸ First Witness Statement of Arturo Gramajo, ¶ 27; *see* **Ex. R–78**, 2003-07-17, Oficio No. 178-2003, Letter to J. Senn from A. Gramajo (indicating that items that are deemed cultural patrimony cannot be sold to third parties); **Ex. C–22**, 1997-11-25, Deed No. 402, Onerous Usufruct Contract of Right of Way, cl. Eleven (C), **Ex. C–24**, 1999-03-23, Deed No. 41, Onerous Usufruct Involving Railway Equipment cl. Ten(B),

Footnote continued on next page

equipment was witnessed in August 2005 by members of the FEGUA team who visited some of the stations under usufruct by FVG and saw box cars whose doors had been welded shut, and the roof and upholstery removed. The FEGUA team noted that some of the box cars that were left in the open had accumulated water inside, thus causing oxidation, and becoming a harbor for insects and an atmospheric pollutant.⁴⁴⁹ Among the box cars witnessed during this visit, there was one registered as a historical asset by the Institute of Anthropology and History (“IDAEH”), that was being destroyed by the elements and water logging.⁴⁵⁰ Likewise, the FEGUA team noticed that some of the stations were *completely abandoned* by FVG. All of these observations were registered in a 19 August 2005 Report to Dr. Gramajo.⁴⁵¹

176. As a result of FVG’s constant supervision and inspection of the right of way, railway equipment and railway stations, it was established that FVG completely disregarded its conservation obligations under the usufruct contracts.⁴⁵² Moreover, FEGUA was also left with no choice but to file a report with Mr. Arturo Paz, Director of Cultural and Natural Assets of the Ministry of Culture and Sports, on 21 October 2005 regarding the precarious state of the railway equipment.⁴⁵³ On 2 December 2005, based on Dr. Gramajo’s report, Mr. Paz filed a formal complaint before the Criminal Section of the Prosecutor’s Office, for a crime against the

Footnote continued from previous page

Ex. C-25, 2003-08-28, Deed No. 143, Onerous Usufruct Contract of Railway Equipment, cl. Ten(B), all binding Claimant to conserve the assets given to it by FEGUA in usufruct.

⁴⁴⁹ **Ex. R-16**, 2005-08-19, FEGUA’s Engineering Department Report.

⁴⁵⁰ **Ex. R-16**, 2005-08-19, FEGUA’s Engineering Department Report.

⁴⁵¹ **Ex. R-16**, 2005-08-19, FEGUA’s Engineering Department Report; see Statement of M. Samayoa, ¶¶ 8, 25, 29.

⁴⁵² See, Statement of M. Samayoa generally.

⁴⁵³ **Ex. R-18**, 2005-10-21, Report by A. Gramajo to Mr. Arturo Paz Director of Cultural and Natural Heritage.

State's cultural assets.⁴⁵⁴ As a result of the complaint, the court ordered a protective measure on national assets that were being damaged by FVG's actions.⁴⁵⁵

177. The precarious state of the assets held by FVG was showcased in a presentation given to the Ministry of Communications on 2 April 2006. The slides showed the inadequate treatment given to the railway equipment by FVG, and the precarious conditions in which high value historical assets were being kept.⁴⁵⁶ Despite the Government's claims against FVG and numerous requests to FVG that they give the equipment the treatment required by law, and leave nonoperational assets in FEGUA's custody, the situation was never remedied by Claimant.⁴⁵⁷

4. Claimant Projected That It Would Pay Guatemala A Substantial Amount Of Money In Canon Payments, Yet Ended Up Paying A Pittance

178. Finally, Claimant's projections in its bids to acquire the railway and equipment usufructs of the canon payments it would pay to FEGUA were a classic "bait and switch." Claimant grossly overpromised and overestimated its projected revenue and resulting payments to FEGUA. As has already been explained, Claimant had offered and eventually agreed to pay FEGUA 10% of its railroad transportation revenues plus 10% of its revenues from non-railroad economic activities under Contract 402 as a canon for the use and enjoyment of the lands and right of way granted it in usufruct. Claimant also initially offered and later agreed to pay FEGUA 1% of its gross railroad revenue, not exceeding GTQ 300,000 per year, for the use of the rolling stock under Contract 41.⁴⁵⁸ In the context of these promises, based on its projected railroad

⁴⁵⁴ **Ex. R-19**, 2005-12-02, Request by A. Gramajo to A. Paz, Director of Cultural and Natural Heritage of the Ministry of Culture and Sports for a Protective Order for Railway Equipment.

⁴⁵⁵ **Ex. R-27**, 2006-05-09, Resolution by the Criminal and Environmental Crimes Lower Court of Zacapa Department.

⁴⁵⁶ **Ex. R-22**, 2006-04, Presentation at the Ministry of Communications.

⁴⁵⁷ **Ex. R-30**, 2006-06-07, Letter to J. Senn from A. Gramajo; **Ex. R-38**, 2007-01-18, Letter to J. Senn from A. Gramajo - Reply on the bell located at Bananera Station.

⁴⁵⁸ While the 1% of gross railroad revenues measure was later changed to 1.25% of net railroad revenues, we discuss the relationship between projections and reality here using the 1% figure, as that is what Claimant proposed in its bid offer.

revenues, Claimant projected that it would pay FEGUA under Contract 402 USD 20,662,586 in the first 25 years of the project, USD 7,158,938 of which it would pay between the years 1998 and 2007.⁴⁵⁹ In addition to these payments under Contract 402, Claimant's projected revenues yielded projected payments to FEGUA under the equipment contracts of approximately USD 1,189,570 within the first 25 years of the 50 year usufruct, of which approximately USD 378,819.77 would have been paid to FEGUA between 1998 and 2007.⁴⁶⁰ As noted by one of the members of the Bidding Commission, these projected payments to FEGUA were an important factor in the decision to award the usufruct contracts to Claimant.⁴⁶¹

179. These projections, however, turned out to be nothing more than fantasy. In sharp contradiction to the lofty promises and projections it made in order to win the public bids for the right of way and equipment contracts, FVG ended up paying to FEGUA USD 896,294 (of the projected USD 7,158,938) between 1998 and 2007 under Contract 402, and USD 100,892 (of the projected USD 378,819.77) for the use of the equipment.⁴⁶² Claimant never paid a single cent to FEGUA of the 10% of non-railway revenues it was obligated to pay and further failed to comply with their obligation to seek prior approval from FEGUA before entering into contracts for non-railway revenues.⁴⁶³ As detailed in the next section, that FVG hid the sources of non-railway revenue is perhaps not surprising given that there were engaging in improper behavior by, among other things, charging squatters rent, thereby *causing and exacerbating* the very problem about which they complained to the Government.

⁴⁵⁹ Statement of J. Carrillo, ¶¶ 4–11.

⁴⁶⁰ Statement of J. Carrillo, ¶¶ 12–22.

⁴⁶¹ Statement of J. Carrillo, ¶¶ 5, 22.

⁴⁶² Statement of J. Carrillo, ¶ 7.

⁴⁶³ Statement of J. Carrillo, ¶ 24.

O. Guatemala, On The Other Hand, Acted Diligently And In Good Faith To Remove Squatters And Address Other Issues, Only To Learn That Claimant Has Been Causing And Exacerbating Those Problems

180. Claimant alleges that as a result of the *Lesivo* Declaration “the basic service of the local police to protect FVG’s property and assets all but melted away” and that FVG faced a “substantial increase in public interference from locals who vandalized the tracks, stole the railroad materials for personal use or financial gain, and set up living quarters as squatters along the tracks, in some cases in collaboration with local authorities.”⁴⁶⁴ Claimant also asserts that squatters were emboldened and enabled by Government officials after the *Lesivo* Declaration.⁴⁶⁵ The only party that has enabled vandals and squatters, however, is Claimant.

181. Conveniently, Claimant neglected to mention in its Memorial that since the inception of its business, it has been *charging rent from the same squatters* it blames Guatemala for not removing. In fact, Claimant had an entire system in place to identify squatters and request rent from them. If the squatter refused to pay, they would be referred to FEGUA and the authorities for removal.⁴⁶⁶ Specifically, Claimant would deliver letters to the squatters on its official letterhead, signed by FVG officials including attorney Pablo Alonso, informing him/her that FVG is the legitimate usufructuary of the land where he/she was located.⁴⁶⁷ The letters informed the squatters who they should contact to arrange for the execution of a lease contract that would provide for the payment of rent.⁴⁶⁸ There were also instances where squatters would seek permission from FVG to establish themselves on a particular tract of land within FVG’S

⁴⁶⁴ Memorial on the Merits, ¶ 92.

⁴⁶⁵ Memorial on the Merits, ¶ 96.

⁴⁶⁶ **Ex. R-172**, 2010-10-27, Open Letter from P. Alonzo Authorizing R. Gutiérrez to Charge and Collect Rent from “Squatters” on Behalf of FVG (informing the public that Mr. Gutierrez works for FVG and has the responsibility of supervising and charging rent in the Atlantic Region); see **Ex. R-117**, 2007-04-09, Open Letter of Authorization from P. Alonzo (FVG) Re: R. Gutiérrez as Bananera Station Manager; see also **Ex. R-210**, 2005-08-23, Letter to A. Gramajo from M. Arreaga; See **Ex. R-207**, 2001-2009, List of Squatters that were Charged Rent by R. Gutiérrez.

⁴⁶⁷ See e.g., **Ex. R-140**, 2007-2008, Letters to Squatters from P. Alonzo (FVG).

⁴⁶⁸ See e.g., **Ex. R-140**, 2007-2008, Letters to Squatters from P. Alonzo (FVG); **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment; See e.g., **Ex. R-118**, 2007-05-15, Contracts between FVG and Squatters; **Ex. R-114**, 2007-02-07, Contracts between FVG and Squatters.

right of way, after which the relationship would be formalized with a lease agreement.⁴⁶⁹ Claimant then collected payment from the squatters and issued them a receipt.⁴⁷⁰ Only in cases where the squatters did not pay their rent, were they reported to FEGUA to seek their removal from the usufruct right of way.⁴⁷¹ Some of these contracts with squatters, many of which were executed *after* the *Lesivo* Declaration, were even signed by FVG'S General Manager and witness in this proceeding, Jorge Senn.⁴⁷² This practice of charging rent from squatters took place before and after the *Lesivo* Declaration,⁴⁷³ and, to the best of Respondent's knowledge, continues today.

182. By turning squatters into tenants, FVG not only legitimized the illegal occupation of their right of way, but also sent a clear message to other individuals that they could similarly invade the lands around the railway so long as they paid rent to FVG. This, combined with the fact that the railroad never passed through the lands surrounding Phases II–V of the project and passed only seldom and irregularly through the lands of Phase I, all but ensured that squatters—FVG's tenants—would continue to populate and remain in FVG's right of way. Only those who did not pay FVG were reported to FEGUA and dealt with according to the law; the rest had no reason to leave so long as their landlord remained content with the money it received from them.

⁴⁶⁹ See *e.g.*, **Ex. R-83**, 2007-01-18, Letter from J. Cesar Díaz G. to FVG and related documents.

⁴⁷⁰ See **Ex. R-223**, Rent Payment Records (Post-*Lesivo*); See *e.g.*, **Ex. R-244**, Sample Receipts: 1998; **Ex. R-245**, Sample Receipts: 1999; **Ex. R-246**, Sample Receipts: 2000; **Ex. R-247**, Sample Receipts: 2001; **Ex. R-248**, Sample Receipts: 2002; **Ex. R-249**, Sample Receipts: 2003; **Ex. R-250**, Sample Receipts: 2004; **Ex. R-251**, Sample Receipts: 2005; **Ex. R-252**, Sample Receipts: 2006; **Ex. R-253**, Sample Receipts: 2007; **Ex. R-254**, Sample Receipts: 2008; **Ex. R-255**, Sample Receipts: 2009. In the interest of procedural economy, the preceding exhibits include a sampling of receipts from each year that Claimant has collected rent from squatters along the right of way (1999 through 2009). The full set of receipts in Guatemala's possession could be provided to the Tribunal upon request.

⁴⁷¹ See *e.g.*, **Ex. R-208**, 2008-07-01, Letter to R. Calderón from P. Alonzo; **Ex. R-222**, Post-*Lesivo* Letters to "Squatters" from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment.

⁴⁷² **Ex. R-234**, Rental Agreements: Notarized Contracts Signed by J. Senn (Post-*Lesivo*).

⁴⁷³ See **Ex. R-224**, Letters/Contracts from FVG Permitting "Squatters" who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*); **Ex. R-233**, Rental Requests (Post-*Lesivo*); **Ex. R-232**, Renter Files (Post-*Lesivo*); **Ex. R-234**, Rental Agreements: Notarized Contracts Signed by J. Senn (Post-*Lesivo*).

183. FVG's practice of charging squatters rent, including after the publication of the *Lesivo* Declaration, should operate to estop Claimant from seeking damages in this case for the supposed exacerbation of squatters following the *Lesivo* Declaration. As discussed more fully in Section IV below, Claimant cannot benefit from conduct that it was itself promoting.

184. The Government, on the other hand, has been diligent and proactive in taking reasonable measures to prevent and respond to reports of squatters and vandalism both before⁴⁷⁴ and after the issuance of the *Lesivo* Declaration.⁴⁷⁵ For instance, in 1999 only, FEGUA legally requested and executed the removal over 500 families from the right of way and

⁴⁷⁴ See e.g., **Ex. R-84**, 2005-01-03, Oficio No. 002-2005, Letter to Mayor Jorge Arturo Reyes Ceballos of Cuyotenango from A. Gramajo (informing mayor of destruction of railway and legal action that FEGUA was taking in response); **Ex. R-85**, 2005-01-04, Oficio No. 007-2005, Letter from A. Gramajo to J. Senn (forwarding report to FVG regarding destruction of the railway); **Ex. R-88**, 2005-04-22, Oficio No. 168-2005, Letter to J. Senn from A. Gramajo (informing Senn of their abandonment of a station and the risk it presents for squatters and theft); **Ex. R-99**, 2006-06-20, Oficio No. 243-2006, Letter to J. Senn from A. Gramajo (asking whether FVG authorized the occupation of third parties along the right of way); **Ex. R-101**, 2006-07-31, Oficio No. 281-2006, Letter to J. Senn from A. Gramajo (informing FVG that after supervising the railway they have identified a squatter and asking that FVG take necessary measures to avoid further invasions); **Ex. R-102**, 2006-07-31, Oficio No. 282-2006, Letter from A. Gramajo to J. Senn (asking whether FVG authorized the placing of fences along the right of way); **Ex. R-108**, 2006-10-23, Oficio No. 365-2006, Letter to J. Senn from A. Gramajo (FEGUA's inspection of Gualan station); **Ex. R-126**, 2007-08-13, Oficio No. 139-2007, Letter to J. Senn from A. Gramajo (informing FVG that FEGUA filed criminal action); **Ex. R-97**, Oficio No. 175-2006, 2006-05-12, Letter from A. Gramajo to J. Senn (informing him of the possible squatter invasions due to Claimant's abandonment of the railway); **Ex. R-209**, 2004-06-25, Oficio No. 237-2004, Letter to J. Senn from A. Gramajo (thanking FVG for the information they provided regarding a criminal action against thieves).

⁴⁷⁵ See e.g., **Ex. R-121**, 2007-06-12, Oficio No. 119-2007, Letter to J. Senn from A. Gramajo (asking whether permission granted for construction); **Ex. R-115**, 2007-02-12, Oficio No. 044-2007, Letter to J. Senn from A. Gramajo (asking whether permission given for construction and what measures will be taken to prevent invasions); **Ex. R-119**, 2007-05-31, Oficio No. 114-2007, Letter to J. Senn from A. Gramajo (informing FVG of theft of rails); **Ex. R-130**, 2007-08-28, Oficio No. 148-2007, Letter from A. Gramajo to J. Senn (informing FVG of findings from supervision of railway); **Ex. R-146**, 2008-08-02, Oficio No. 148-2008, Letter to J. Senn from E. Martínez (informing of criminal proceedings initiated by FEGUA); **Ex. R-158**, 2010-01-14, Oficio No. 013-2010, Letter to Viceminister Jesús Insua from Lic. C. Samayoa (FEGUA removal of squatters and returning land back to FVG); **Ex. R-167**, 2010-04-05, Oficio No. 034-2010, Letter from C. Samayoa to J. Senn (asking whether permission given for formal construction along the railway); **Ex. -157**, 2010-01-13, Eviction Decree of Squatters from Mile 217; **Ex. R-151**, 2009-11-09, Case filed Against Squatters initiated by José Enrique Urrutia Ipiña; **Ex. R-169**, 2010-06-15, Oficio No. 069-2010, Letter to Lic. C. Samayoa from C. de Dubón (informing FEGUA over supervision of mile 217); **Ex. R-144**, 2008-02-20, Oficio No. 063-2008, Letter to J. Senn from E. Martínez (asking if permission was given for persons to build homes in the yard of the Escuintla station); **Ex. R-152**, 2009-11-26, Decree of Visual Inspection of Mile 217; **Ex. R-145**, 2008-07-03, Oficio No. 107-2008, Letter to J. Senn from E. Martínez (expressing concern over increase in the depredation of the railway and squatters).

relocated them.⁴⁷⁶ As discussed previously, between January and May 2005, the Government formed a Railway Commission and developed and was ready to implement a detailed and massive plan to relocate all of the families squatting along the portion of the Southern/Pacific corridor that FVG said it was going to rehabilitate, only to have to abandon that effort after FVG could not deliver on its rehabilitation plan.⁴⁷⁷ In January 2006, FEGUA again requested and executed the removal of over 150 additional squatters from the usufruct right of way.⁴⁷⁸

185. And the Government's actions did not stop with the *Lesivo* Declaration. Since the *Lesivo* Declaration was published, the Government has commenced over 50 legal proceedings in relation to the theft of rails.⁴⁷⁹ The Government has also commenced over 50 legal proceedings seeking the removal of squatters from FVG's right of way.⁴⁸⁰

186. For example, with respect to land located in railway mile 217, FEGUA initiated judicial proceedings against squatters along this portion of the right of way and in fact removed the squatters.⁴⁸¹ The Government then returned the land back over to Claimant on 13 January 2010.⁴⁸² Subsequently, FEGUA's engineering department continued to supervise this area and reached out to Claimant to inform it that although FEGUA has already removed the squatters from this area, that Claimant needed take the necessary action to avoid the further trespassing of squatters along this right of way since there is a threat of another invasion.⁴⁸³ In an attempt to prevent the invasion, FEGUA informed the mayor of Amatitlán of the attempted invasion⁴⁸⁴, and requested that the *police and military* get involved in order to prevent the squatters from

⁴⁷⁶ **Ex. R-65**, 1999-01-23, El Periódico, "Trasladarán a 514 familias que habitan en la vía férrea."

⁴⁷⁷ See above at Section III. F.

⁴⁷⁸ **Ex. R-94**, 2006-01-20, "Expulsan a Invasores."

⁴⁷⁹ **Ex. R-182**, Excel Chart of Criminal Proceedings For the Theft/Rail Removal.

⁴⁸⁰ **Ex. R-84**, Excel Chart of Criminal Proceedings For Removal of Squatters.

⁴⁸¹ **Ex. R-157**, 2010-01-13, Eviction Decree of Squatters from Mile 217; **Ex. R-149**, Oficio No. 001-2009, Letter to J. Senn from C. Samayoa (notifying FVG of date for removal of squatters from mile 217).

⁴⁸² **Ex. R-156**, 2010-01-13, Acta de Entrega de Bien Inmueble Desalojado.

⁴⁸³ **Ex. R-163**, 2010-02-04, Oficio No. 022-2010, Letter to J. Senn from Lic. C. Samayoa.

⁴⁸⁴ **Ex. R-162**, 2010-02-04, Oficio No. 021-2010, Letter to Mayor Mazariegos from Lic. C. Samayoa; see **Ex. R-165**, 2010-02-12, Letter to Lic. C. Samayoa from Mayor Mazariegos.

returning, which they did do.⁴⁸⁵ About a month later, on 12 March 2010, FEGUA was again informed by its technical investigator that there was some construction occurring along mile 217 and they were not aware if this construction was authorized by FVG.⁴⁸⁶ On 5 April 2010, FEGUA wrote a letter to Claimant to determine whether or not it had been authorized this construction because in the event that it hadn't, FEGUA would take the necessary legal action for the removal.⁴⁸⁷ Mr. Senn responded by letter on 7 April 2010 informing FEGUA that they were not responsible for the aforementioned construction and that they had not authorized anyone to do any construction along the right of way.⁴⁸⁸ The letter went on to state that since the *Lesivo* Declaration, that Claimant has not been able to exercise control over the property along the right of way, *an absolutely false claim*, as FVG continues to charge squatters rent, thereby nullifying the Government's efforts to curb the problems.⁴⁸⁹

187. The above is merely an example of the *numerous* times that the Government has stepped in to remove squatters from the right of way and has worked to keep them from re-entering by soliciting help from Claimant as well as law enforcement authorities to prevent the squatters from returning. It is also an example of the attitude that Claimant has adopted with respect to its obligation to take any steps to prevent squatters from entering the right of way, a position that is convenient and necessary for their arguments in this arbitration.

188. Aside from its allegations regarding supposed squatters and vandals, Claimant gives three examples of alleged instances where Government entities have interfered with its right of way as a consequence of the *Lesivo* Declaration. First, Claimant alleges that in response to the *Lesivo* Declaration, the municipality of San Antonio La Paz took unilateral action against FVG's Usufruct property rights in January 2009 by authorizing the Mayor to carry on with the

⁴⁸⁵ **Ex. R-146**, 2010-02-05, Letter to Lic. C. Samayoa from Ing. M. Samayoa Minera.

⁴⁸⁶ **Ex. R-166**, 2010-03-12, Letter from A. Posadas to Lic. C. Samayoa.

⁴⁸⁷ **Ex. R-167**, 2010-04-05, Oficio No. 034-2010, Letter from C. Samayoa to J. Senn.

⁴⁸⁸ **Ex. R-168**, 2010-04-07, Letter from J. Senn to C. Samayoa.

⁴⁸⁹ **Ex. R-168**, 2010-04-07, Letter from J. Senn to C. Samayoa.

installation of a drinking water pipeline alongside the railway without FVG's permission.⁴⁹⁰ However, Claimant has *omitted* several important facts regarding this project. Claimant does not mention, for example, that Contract 402 requires FVG to "[p]rovide access to the right of way in the event of public need, including access to...passage or pipe installation for carrying water or other liquids . . . provided that it is not in detriment to the safety of the right of way"⁴⁹¹ Claimant also chose to leave out that the mayor of San Antonio La Paz sent various letters to FVG requesting permission to install the water pipes along the right of way to which FVG never responded.⁴⁹² The Municipality sent these letters seeking FVG's permission *after* the *Lesivo* Declaration had been published, making it clear that the Municipality understood FVG to be the rightful usufructuary of the right of way under the terms of Contract 402. It was not until FVG failed to respond to the mayor's requests that the city decided to proceed with the project to install the water pipes, as it had an obligation to bring potable water to its residents, and had to do so quickly or risked forfeiting the grants that had been given to the City for that purpose, which had to be used within a certain period of time.

189. In similar, misleading fashion, Claimant alleges that the *Lesivo* Declaration emboldened the Municipality of Puerto Barrios, which decided to pave over the railroad tracks in the town center and permanently converted the right of way into a public street and green spaces.⁴⁹³ Claimant also alleges states that no action has been taken apart from a court decision "to excuse the mayor from responsibility for the Municipalities actions."⁴⁹⁴ Once again, Claimant is far too selective with the facts. Claimant fails to inform this Tribunal, for example, that FEGUA *filed an official complaint* in the Zacapa Court of Appeals against the Mayor of Puerto Barrios, and appeared before the court both as witness⁴⁹⁵ and as the proper party to assert the claim

⁴⁹⁰ Memorial on the Merits, ¶ 95.

⁴⁹¹ **Ex. C-22**, 1997-11-25, Contract 402, clause Eleventh(I).

⁴⁹² See **Ex. R-148**, 2008-11-17, Letter to Pablo Alonzo (FVG General Counsel) from Carlos Humberto Paz Cante (Alcalde Municipal de San Antonio La Paz); see also **Ex. R-116**, 2007-03-04, Letter from COCODE to San Antonio La Paz Municipal Department of Urban and Rural Development

⁴⁹³ Memorial on the Merits, ¶ 94.

⁴⁹⁴ Memorial on the Merits, ¶ 94.

⁴⁹⁵ See **Ex. R-206**, 2009-01-28, Letter from Ing. M. Samayoa Minera to Lic. C. Samayoa Flores.

against the Mayor.⁴⁹⁶ Claimant also omits that three months before Claimant submitted its Memorial on the Merits in this arbitration, the Zacapa Court of Appeals dismissed the claim against the Mayor of Puerto Barrios, finding that he was not responsible for the illicit actions that were being alleged⁴⁹⁷ and that the Municipality neither authorized nor apportioned funds for the paving of the right of way.⁴⁹⁸ In fact, when the Municipality was approached with the request to pave these areas, it denied the request specifically because it would interfere with Claimant's right of way.⁴⁹⁹ Subsequently, FEGUA initiated a criminal investigation regarding the private party allegedly responsible for paving over the right of way.⁵⁰⁰ Therefore, Claimant's allegations with respect to the Mayor and Municipality of Puerto Barrios are misleading attempts to blame the publication of the *Lesivo* Declaration for actions that the Government was not responsible for and has taken action to remedy.

190. Finally, Claimant alleges that in 2007, the Guatemalan army took over the Palin station in Escuitla and proceeded to rename it the "4th Squadron," where it remains today.⁵⁰¹ Again, Claimant asserts that the Army's actions were part of the "increased epidemic of private and public sector entities using and taking over the right of way without FVG permission or paying compensation" that allegedly resulted from the *Lesivo* Declaration.⁵⁰² Claimant's presentation of these facts, however, crosses the line from misleading to *patently false*. Contrary to its assertions that the Army's presence took place in 2007—after the *Lesivo* Declaration—the truth is that it happened *in April 2006*, a full 4 months before the *Lesivo* Declaration was

⁴⁹⁶ See **Ex. R-205**, 2008-09-11, Official Complaint Against the Mayor of Puerto Barrios.

⁴⁹⁷ **Ex. R-191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios.

⁴⁹⁸ **Ex. R-191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios.

⁴⁹⁹ **Ex. R-191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios (emphasis added).

⁵⁰⁰ See **Ex. R-206**, 2009-01-28, Letter from Ing. M. Samayoa Minera to Lic. C. Samayoa Flores (discussing the on-going criminal investigation against Mr. Heron Ralda, who was accused of committing the acts in question that interfered with the right of way).

⁵⁰¹ Memorial on the Merits, ¶ 93.

⁵⁰² Memorial on the Merits, ¶ 93.

published.⁵⁰³ This irrefutable fact not only makes it impossible for the Army's presence to have been caused or even made possible by the *Lesivo* Declaration, but it also places the issue and its surrounding facts *outside the jurisdiction of this Tribunal*, which excluded from this arbitration all matters related to squatters that pre-date the *Lesivo* Declaration. In any event, it bears mentioning that the Army was forced to encamp at the Palín station in response to a request from the citizens of the area who had grown tired of the squatters, criminals, and gang members who had moved into the station because Claimant had left it completely abandoned and unprotected.⁵⁰⁴

191. Short of stationing armed guards at every kilometer of the right of way—which neither the contracts nor CAFTA require—Guatemala acted responsibly to prevent and deal with issues of vandalism and squatters along Claimant's right of way by expending considerable human and economic resources to, among other measures, identify squatters and thieves, establish reasonable security measures, commence legal proceedings against squatters and vandals, execute the removal of squatters, and relocate removed families. Claimant, on the other hand, has stood idly by in the face of invasions and thefts and, instead of dealing with these problems in a responsible and consistent manner, has manipulated them and used them to its economic advantage by collecting rents from squatters, transforming FVG into a real estate company rather than a railroad operator. These actions, along with Claimant's failure to maintain, repair, and operate the railway consistently, caused and exacerbated the *very problems* for which it now seeks to blame Guatemala.

P. Claimant Still Is In Possession Of, Has Continued To Exercise Its Rights Under, And Continues To Perceive Economic Benefits From, The Usufruct Contracts Notwithstanding the *Lesivo* Declaration

192. Claimant remains in possession of the railway equipment and has retained its property rights under Contract 402 even after the issuance of the *Lesivo* Declaration. What is more, Claimant has continued to receive revenue associated with right of way easement contracts,

⁵⁰³ Ex. R-243, 2006-04-27, PRENSA LIBRE, "Militarizan Palín."

⁵⁰⁴ Ex. R-243, 2006-04-27, PRENSA LIBRE, "Militarizan Palín."

long-term leases, and rent payments received from squatters despite the issuance of the *Lesivo* Declaration.

193. In referring to a series of contracts for leases and easements it entered into with several companies, Claimant argues, albeit impliedly, that the *Lesivo* Declaration has somehow affected or interfered with FVG's rights under those contracts.⁵⁰⁵ Again, Claimant misrepresents the facts to this Tribunal. Each of the contracts cited by Claimant (Plano y Puntos/Gesur, Texaco Guatemala, Zeta Gas de Centroamerica, S.A., Genor, and Chiquita/COBIGUA) are *still in effect* and Claimant continues to derive the economic benefits from them despite the *Lesivo* Declaration. In fact, in 2007, after the publication of the *Lesivo* Declaration, Claimant registered the Chiquita/COBIGUA contract—a 33-year lease to COBIGUA of a parcel of land at the Puerto Barrios railroad station starting in 2015—before the Guatemala General Property Registry.⁵⁰⁶ FVG's registration of this contract, of course, demonstrates not only that the contract is in force and enforceable, but that even after the *Lesivo* Declaration FVG understood that it still enjoyed the same rights over its right of way as before *and would do so for years to come*. Similarly, Claimant also continues to collect money under its easement contract with Texaco, which is not set to expire per its own terms until 31 October 2046.⁵⁰⁷ Finally, as explained in the previous section, Claimant also continues to collect rent from squatters that reside on the land granted under Usufruct Contract 402 despite the *Lesivo* Declaration.⁵⁰⁸

194. As Professor Pablo Spiller explains in greater detail in his independent expert damages report, FVG's own financial statements contradict Claimant's allegations in this proceeding and confirm not only that FVG continued to collect revenues from its real estate contracts after the *Lesivo* Declaration, at least through 2008, but that those revenues in fact *increased after the*

⁵⁰⁵ Memorial on the Merits, ¶¶ 200-201.

⁵⁰⁶ **Ex. R-69**, 2000-11-19, Contract No. 120 and Registration (CODEFE and COBIGUA).

⁵⁰⁷ **Ex. C-28(c)**, Texaco Easement Contract No. 16.

⁵⁰⁸ See **Ex. R-70**, 2002-02-26, Letter to R. Gutierrez from Lic. J. de Leon; **Ex. R-71**, 2002-04-03, Receipt from FVG for Rent from Rosa López; **Ex. R-175**, Receipt of Payment 2002—Arrendamiento; **Ex. R-159**, 2010-02-01, Receipt of Payment—Arrendamiento No. 13603.

Lesivo Declaration.⁵⁰⁹ In particular, Prof. Spiller notes that FVG’s real estate revenues were Q.4.8 million (USD 0.63 million) in 2007 and Q.5.3million (USD 0.7 million) in 2008, up from Q.3.7 million (USD 0.49 million) in 2006.⁵¹⁰

195. Additionally—and also since the *Lesivo* Declaration—FEGUA has consistently recognized FVG’s rights to the right of way, sending letters to FVG every time it received a request or inquiry regarding the use of land that is part of Claimant’s rights under Contract 402.⁵¹¹ Importantly, aside from its unsupported allegations in this arbitration, Claimant has never suggested that it is not in control of its rights under the contracts. In fact, in correspondence outside of this proceeding, FVG has consistently maintained that Contract 402 is still in effect.⁵¹²

196. Thus, it is clear that as a factual matter,⁵¹³ Claimant continues to be in complete possession and control of its rights under the Usufruct Contracts and has continued to derive economic benefits from them, benefits that have in fact *increased* since the *Lesivo* Declaration. Claimant’s allegations to the contrary are simply unsupported, litigation-driven falsehoods.

Q. Claimant Has Used The *Lesivo* Declaration As An Exit Strategy From An Investment That Had Failed Long Before

197. Claimant intends to use CAFTA and this arbitration as a golden parachute to salvage an investment that was worthless long before the *Lesivo* Declaration. As Prof. Pablo Spiller explains in his expert report, even in the absence of the publication of the *Lesivo* Declaration,

⁵⁰⁹ Expert Report of P. Spiller, ¶ 40.

⁵¹⁰ Expert Report of P. Spiller, ¶ 40, n. 37.

⁵¹¹ See, e.g., **Ex. R-106**, 2006-09-20, Oficio No. 317-2006, Letter to J. Senn from A. Gramajo; **Ex. R-109**, 2006-11-16, Oficio No. 386-2006, Letter to J. Senn from A. Gramajo; **Ex. R-110**, 2006-11-27, Oficio No. 398-2006, Letter to J. Senn from A. Gramajo; **Ex. R-133**, 2007-09-05, Oficio No. 153-2007, Letter to J. Senn from A. Gramajo.

⁵¹² See, e.g., **Ex. R-131**, 2007-08-29, Oficio No. GG-14-07, Letter to A. Gramajo from J. Senn (requesting FEGUA’s intervention with respect to criminal acts committed in the Station at Mazatenango, in accordance with the terms of Contract 402); **Ex. R-147**, 2008-09-16, Letter to J. Senn from E. Martínez (despite arguing that Guatemala had “indirectly expropriated” Claimant’s investment, Mr. Senn still recognized that Contract 402 was in force); **Ex. R-235**, Letters in Which FVG Exercises its Rights Under Contract 402.

⁵¹³ As will be discussed in Section IV (Legal Arguments), Claimant, as a matter of Guatemalan law, also still retains all legal rights in Contracts 402 and 143/158.

FVG's fair market value would have been *negative*.⁵¹⁴ In other words, at the point in time just prior to the *Lesivo* Declaration, even in the absence of the *Lesivo* Declaration no reasonable buyer would have been willing to pay any positive sum of monies for FVG.⁵¹⁵

198. Prof. Spiller's assessment of FVG's negative market value prior to the *Lesivo* Declaration is consistent with FVG's own management statements prior to the publication of the *Lesivo* Declaration, with the auditors' warnings stated annually in FVG's Annual Reports, and with the evidence of FVG's past performance.⁵¹⁶ For example, in the seven years that the railroad had been operating under Claimant's control, it never made a profit⁵¹⁷ and recorded losses every year.⁵¹⁸ FVG was supported by large cash infusions from RDC (and, apparently other shareholders) over the eight years of operations, but these infusions only kept FVG afloat, and just barely, it never turned a profit. The company's auditors clearly had serious doubts about Claimant's investment in Guatemala as a going concern. For example, RDC's audited financial statements for the year ended on 31 December 2005 stated that:

At December 31, 2005 and 2004, the Company had accumulated losses of Q69,879,382 y Q60,100,738, which represent 66% and 64% of paid in capital at those dates, respectively.⁵¹⁹

199. The magnitude of FVG's accumulated losses caused the auditors to warn FVG that under the Code of Commerce of the Republic of Guatemala, the loss of more than 60% of paid-in capital *is cause for the dissolution* of a company. question the company's ability to continue as a

⁵¹⁴ Expert Report of P. Spiller, ¶¶ 10, et seq.

⁵¹⁵ Expert Report of P. Spiller, ¶¶ 10, et seq.

⁵¹⁶ Expert Report of P. Spiller, ¶¶ 10, et seq.

⁵¹⁷ Statement of S. Pineda, ¶ 15; Statement of M. Marroquín, ¶ 9; **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's First Meeting; Expert Report of P. Spiller, ¶ 76.

⁵¹⁸ Expert Report of P. Spiller, ¶ 76.

⁵¹⁹ **Ex. C-27(h)**, FVG's 2005 Annual Report, BATES RDC001332. These accumulated losses kept growing and, by the end of 2007, represented 99% of FVG's paid-in capital.

going concern.⁵²⁰ These overwhelming accumulated losses, of course, had nothing to do with the *Lesivo* Declaration, which was published 8 months later.

200. The concern about FVG's value was shared by its management. At the end of the 2005 Annual Letter to Shareholders, Mr. Posner stated:

I'm often asked why we continue to support a venture with so many problems, and I'll give you both the short and the long answer.... The longer answer is, We are supporting a business *whose ultimate value we do not yet know.*⁵²¹

201. Furthermore, an examination of FVG's finances reveals that:

a. It *registered negative net cash flows from operations in every year of its operations.* This meant that FVG's shareholders had to continuously contribute capital to cover the operating losses. That is, FVG was consistently destroying the value of its shareholders' equity over the eight years of the investment.⁵²²

b. By end-2005, FVG had received about USD 14 million in equity contributions (of which Claimant had provided 82 percent). These equity contributions had to cover a substantial portion of the USD 9.2 million in losses accumulated by then, which meant that FVG only invested USD 7.6 million in fixed assets throughout its existence.⁵²³

c. At end-2005, the company's accumulated losses had contributed to reducing FVG's net book value to USD 4.2 million.⁵²⁴

d. FVG was able to pay only about USD 30,000 in dividends during its entire existence.⁵²⁵

202. As will be explained in more detail in the Damages section of this Counter-Memorial, FVG's management reported systematic difficulties in expanding its real estate business since

⁵²⁰ **Ex. C-27(h)**, FVG's 2005 Annual Report, BATES RDC001332.

⁵²¹ **Ex. C-27(h)**, FVG's 2005 Annual Report, BATES RDC-001277 (emphasis added).

⁵²² Expert Report of P. Spiller, ¶ 76 (emphasis added).

⁵²³ Expert Report of P. Spiller, ¶ 80.

⁵²⁴ Expert Report of P. Spiller, ¶ 82.

⁵²⁵ Expert Report of P. Spiller, n. 90.

the beginning of operations and up to prior to the issuance of the *Lesivo* Declaration.⁵²⁶ This is in addition to the fact that its railway operations were never profitable.⁵²⁷

203. Notwithstanding FVG's agonizing financial situation prior to the *Lesivo* Declaration, Claimant alleges in this proceeding that the *Lesivo* Declaration destroyed its business by, among other unsupported ways, causing "potential joint venture partners to back out of projects to rebuild and reopen the South Coast corridor because, as one of the potential partners put it, the 'disagreement between the Government of Guatemala and your organization is an obvious impediment to the Project on a going forward basis which will, in our view, obstruct your ability to attract investors.'"⁵²⁸ Interestingly, however, these "potential joint ventures" that Claimant paints as presenting virtual certain business opportunities for FVG are nowhere to be found in FVG's financial statements and annual reports from prior to the *Lesivo* Declaration. Prof. Spiller notes that it was only *after* the publication of the *Lesivo* Declaration, that for the *first time* in the company's history, FVG's management mentioned "ambitious projects" that supposedly did not take place as a result of the *Lesivo* Declaration.⁵²⁹ None of these "ambitious projects", however, had been mentioned before, and they all seemed to be based on preliminary talks that FVG was having with third parties.⁵³⁰ Prof. Spiller describes why all of Claimant's supposed "joint ventures" and "ambitious projects" are completely speculative.

204. One of Claimant's alleged "ambitious projects" bears mentioning, however. Claimant has filed what purports to be a sworn witness statement presumably signed before a Notary Public in Guatemala by Mr. Freddie Perez, former General Manager of Expogranel. Mr. Perez, however, ***categorically denies*** having ever signed the declaration submitted by Claimant, or having ever appeared before Notary Guillermo Felipe Uturriaga Reyes on 19 May 2009.⁵³¹

⁵²⁶ Expert Report of P. Spiller, ¶ 45.

⁵²⁷ Expert Report of P. Spiller, ¶ 65.

⁵²⁸ Memorial on the Merits, ¶ 95.

⁵²⁹ Expert Report of P. Spiller, ¶ 52.

⁵³⁰ Expert Report of P. Spiller, ¶ 53.

⁵³¹ Statement of F. Pérez, ¶ 6.

Interestingly, the address at which Mr. Perez supposedly appeared to offer and sign his declaration—which he adamantly denies ever doing—corresponds with the address of Claimant’s attorneys in this arbitration, Díaz-Duran & Asociados Central Law.⁵³² *The Tribunal should respond swiftly and clearly to Claimant’s unethical attempt to defraud it and this proceeding by submitting falsified evidence.*

205. Even ignoring Claimant’s attempted fraud upon the Tribunal, Mr. Perez explains that the content of his *falsified* declaration is inconsistent with the truth. Specifically, Mr. Perez explains that while Expogranel participated in preliminary discussions with FVG regarding the rehabilitation of the railroad’s south corridor to Puerto Quetzal, there was never a potential USD 100 million joint venture in the works between Expogranel and FVG.⁵³³ Mr. Perez explains that during his discussions as Expogranel General Manager with FVG, Expogranel never even considered investing what he calls the “astronomical sum” of USD 100 million as Claimant alleges.⁵³⁴

206. What is more, Mr. Perez clarifies that long before 2006, probably on or about the end of 2004 or beginning of 2005, discussions between Expogranel and FVG about the rehabilitation of the south corridor had concluded because the project was not economically feasible.⁵³⁵ The unfeasibility was confirmed by at least one pre-feasibility study commissioned by FVG, which concluded precisely that for a number of reasons—among them the magnitude of the investment required and the limited volume to be transported by the sugar mills—the rehabilitation of the south corridor simply was not practicable.⁵³⁶ None of the reasons for the project’s unfeasibility, however, had anything whatsoever to do with the Government of Guatemala or with a *Lesivo* Declaration that was not published until almost two years after.⁵³⁷

⁵³² Statement of F. Pérez, ¶ 7.

⁵³³ Statement of F. Pérez, ¶ 9.

⁵³⁴ Statement of F. Pérez, ¶ 9(a).

⁵³⁵ Statement of F. Pérez, ¶ 9(b).

⁵³⁶ Statement of F. Pérez, ¶ 12.

⁵³⁷ Statement of F. Pérez, ¶¶ 9(b), 20.

207. Nor did Expogranel's decision not to participate in FVG's project have anything to do with Mr. Ramón Campollo. Claimant has presented a 6 April 2005 email from Jorge Senn to Messrs. Posner, Duggan, and Pietrandrea in which Mr. Senn states that Mr. Campollo "sent someone last Friday to talk to Freddie Pérez of Expogranel", and that person delivered the message that Mr. Perez should "hold the project until [they] finished discussing some illegalities."⁵³⁸ Mr. Senn goes on to state in his email that he "felt Freddie a little concerned about the issue but [he] finally agreed to keep moving forward with our project, FVG - Expogranel, while handling carefully the relation with Ramon [Campollo]."⁵³⁹ Mr. Perez, however, categorically states that everything stated in Mr. Senn's email with respect to Mr. Perez is *absolutely false*.⁵⁴⁰ Mr. Perez makes clear that no one associated to Mr. Campollo or any of his companies ever contacted him to say that Expogranel should suspend a project until illegalities were discussed.⁵⁴¹ Mr. Perez never told Mr. Senn anything different.⁵⁴² What is more, Mr. Perez did not and would not have told Mr. Senn anything relating to the supposed south corridor project around the time of Mr. Senn's email, as Expogranel had already decided that it was not feasible.⁵⁴³

208. In view of this, in late 2004 or early 2005, Expogranel communicated to FVG that it was not interested in the project to rehabilitate the railway.⁵⁴⁴ This communication of Expogranel's decision not to participate in the project, of course, predates and has no relationship with the *Lesivo* Declaration, which was published on 25 August 2006.⁵⁴⁵

209. Interestingly, despite Expogranel's clearly communicated lack of interest in FVG's project, Messrs. Senn and Duggan called Mr. Pérez years later in 2006, after issuance of the

⁵³⁸ Ex. C-42, 2005-04-06, Email to H. Posner from J. Senn.

⁵³⁹ Ex. C-42, 2005-04-06, Email to H. Posner from J. Senn.

⁵⁴⁰ Statement of F. Pérez, ¶ 15.

⁵⁴¹ Statement of F. Pérez, ¶ 16.

⁵⁴² Statement of F. Pérez, ¶ 16.

⁵⁴³ Statement of F. Pérez, ¶ 16.

⁵⁴⁴ Statement of F. Pérez, ¶ 13.

⁵⁴⁵ Statement of F. Pérez, ¶ 9(b).

Lesivo Declaration, to ask again whether Expogranel was interested in participating in the same defunct project, to which Mr. Perez responded just as it had years before.⁵⁴⁶ This seemingly innocuous call, of course, was one of the steps Claimant took manufacturing the evidence for the arbitration it would soon file against Guatemala. Following that call in which Mr. Perez reiterated that Expogranel was not interested in FVG’s project, Mr. Senn asked Mr. Perez to sign the letter dated 19 September 2006, which Claimant has submitted as exhibit C-37(b).⁵⁴⁷ Mr. Perez agreed to sign this letter *as a favor* to Mr. Senn, who he considered a good friend and who told Mr. Perez that he was about to lose his job and the letter could help him keep it.⁵⁴⁸ To the best of Mr. Perez’s recollection, Mr. Senn even provided him with the text of the letter he had to sign.⁵⁴⁹

210. Independent of the 19 September letter, the fact remains that Expogranel was never interested in FVG’s rehabilitation project—which Mr. Perez describes as stillborn—and certainly never told FVG that it would invest USD 100 million in it.⁵⁵⁰ In fact, when asked by the L.A. Times in 2007 about his thoughts on Claimant’s arbitration and its accomplishments in Guatemala, Mr. Pérez indicated that the “Americans were naïve, arrogant and never presented a workable business plan. And they are taking advantage of CAFTA in order to get a large payment in their favor. I think what they wanted was an outlet.”⁵⁵¹ Mr. Perez’s words could not have been more accurate and prescient.

211. As has been described in more detail in Section III.F, above, and in this section, FVG’s dire financial straits made it realize that the only investment that could be profitable for it would be the rehabilitation and successful operation of the railway in the Southern Coast. Unable to finance the costly investment itself and in light of its failed attempt to sell stock in the

⁵⁴⁶ Statement of F. Pérez, ¶ 9(b).

⁵⁴⁷ **Ex. C-37(b)**, 2006-09-19, Letter from Expogranel; Statement of F. Pérez, ¶ 18.

⁵⁴⁸ Statement of F. Pérez, ¶ 18.

⁵⁴⁹ Statement of F. Pérez, ¶ 18.

⁵⁵⁰ Statement of F. Pérez, ¶ 19.

⁵⁵¹ Statement of F. Pérez, ¶ 8; **Ex. R-122**, 2007-06-14, LOS ANGELES TIMES, “An Uphill Climb.”

market⁵⁵², FVG focused its efforts on attracting potential private local investors in an attempt to resuscitate the ailing corporation. As described, however, these efforts also failed, as neither Mr. Campollo nor Expogranel (or any of the other industries consulted for that matter) was interested in going into the railroad business with FVG.

212. With its investment collapsing before its eyes, Claimant commenced a litigation strategy that culminated in this arbitration and was designed to recoup and achieve a massive windfall from RDC's alleged investments in Guatemala at the expense of the Government. Claimant's first step, initiating two local arbitrations against FEGUA—one of which sought the removal of squatters from the right of way—came despite the Government's efforts to remove the squatters, Claimant's practice of charging them rents thus perpetuating the problem, and the development by the Government of a detailed plan to evict squatters along the portion of the right of way that encompassed Phase II of the railway project.

213. Next, Claimant filed the instant international arbitration arguing that the *Lesivo* Declaration had destroyed its investment in FVG. This step came immediately after FVG strung the Government along a series of negotiations in which the Government participated seriously and in good faith to seek a compromise solution to the impasse between FEGUA and FVG.⁵⁵³ Having left the Government no option in light of FVG's intransigence and bad faith at the negotiating table, the *Lesivo* Declaration was published on 25 August 2006.

214. In a clear sign that its plan was always to engage in litigation with the Government and that it was setting all its proverbial ducks in a row for that purpose, on 28 August 2006, the very *first* business day after the publication of the *Lesivo* Declaration, Claimant and FVG took out a paid advertisement in all of the principal Guatemalan newspapers, the same ones read by the

⁵⁵² **Ex. R-273**, NEGOCIOS NACIONALES, "Ferrovías withdraws from national stock exchange."

⁵⁵³ See above at Section III.J.

general public, beginning to brand FVG's as a "dead man walking" and manufacturing the very harm they allege in this case.⁵⁵⁴

215. Not content with publicizing the *Lesivo* Declaration and announcing to its own customers that they should be weary of business with them, Claimant unilaterally and voluntarily abandoned Guatemala and anticipatorily repudiated its obligations under the usufruct contracts when RDC very publicly announced on 6 July 2007 that they were discontinuing rail service as of 1 October 2007 and withdrawing financial support from FVG. Like with their 28 August 2006 press release, Claimant made sure that this news was widely publicized and disseminated.⁵⁵⁵ Claimant even posted an advisory on its webpage informing the public that it had ceased operations due to this arbitral proceeding.⁵⁵⁶ This was just yet another effort in their campaign to manufacture a damages case.

216. As is laid out in the following sections, however, Claimant has not proven (because it simply cannot) that the *Lesivo* Declaration and the way in which the Government issued it violated any of Guatemala's obligations under CAFTA or that the declaration caused it any harm whatsoever. Any loss of value in Claimant's alleged investment in FVG was the result of Claimant's and its project's failings, not of any conduct on the part of Guatemala contrary to its treaty obligations.

IV. LEGAL ARGUMENTS

217. According to Claimant, "[t]he Government of Guatemala's action in issuing the *Lesivo* Resolution and actions taken in furtherance of said Resolution constitute clear violations of the

⁵⁵⁴ See above at Section III. K, ¶ 111.

⁵⁵⁵ Memorial on the Merits, ¶ 35; **Ex. R-123**, 2007-07-12, MIAMI HERALD, "Rail Investor Calls it Quits in Guatemala"; **Ex. C-39**, 2007-07-06, Letter to Customers, Employees and Friends of FVG Guatemala from H. Posner; **Ex. R-204**, 2007-10, RAILWAY GAZETTE INTERNATIONAL, "The Lights Go Out"; **Ex. R-120**, 2007-06-11, EL PERIODICO, "FVG Will Suspend Its Operations on October 1"; see **Ex. R-128**, 2007-11-19, Oficio No. 192-2007, Letter to J. Senn from A. Gramajo (requesting verification that FVG has discontinued railway operations in light of the fact that Contract 402 was still in force); **Ex. R-137**, 2007-12-10, Oficio No. 205-2007, Letter to J. Senn from A. Gramajo (reiterating request to verify that FVG has discontinued railway operations).

⁵⁵⁶ **Ex. R-186**, RDC Webpage Snapshot of Service Update.

foreign investment protection provisions of [CAFTA].”⁵⁵⁷ Since the *lesividad* process is still pending in Guatemala, Claimant’s argument is essentially that the *mere initiation* of the process interfered with Claimant’s rights under CAFTA, to such a degree that Claimant is owed damages of more than USD 64 million. According to Claimant, what matters is not the ultimate *outcome* of the still-pending process, but simply that the process itself *exists* and allegedly affected its investment. Claimant’s position is that “the *lesivo* procedure should be declared unconstitutional under Guatemalan law.”⁵⁵⁸ In support of its damages claim, Claimant argues that the mere initiation of the *lesividad* process in this case—which could still be rejected by the local *Contencioso Administrativo* court—violates CAFTA’s: (A) expropriation standard under Article 10.7; (B) fair and equitable treatment standard under Article 10.5; (C) requirement of full protection and security, also under Article 10.5; and (D) national treatment standard under Article 10.7.

218. Claimant’s argument ignores both law and fact in three major ways. First, Claimant mischaracterizes the effect of the *Lesivo* Declaration and purports to argue that its investment has been nullified under Guatemalan law as a result of this Declaration. This is not the case. The President’s initiation of the *lesividad* process by way of the *Lesivo* Declaration does not, in and of itself, amount to a *de jure* nullification of the investment under Guatemalan law.⁵⁵⁹ Nor does it have the practical *effect* of nullifying Claimant’s investment under Guatemalan law.⁵⁶⁰ The *Lesivo* Declaration did not, as Claimant argues, “financially and commercially destroy FVG’s business and RDC’s investment in the Usufruct”⁵⁶¹ in violation of CAFTA. Instead, the

⁵⁵⁷ Memorial on the Merits, ¶ 5.

⁵⁵⁸ Memorial on the Merits, ¶ 146; *see also* Expert Report of E. Mayora, ¶ 9.8 (“[O]n careful examination [the *lesividad* process] should be declared unconstitutional”); Expert Report of W. M. Reisman, ¶ 46 (“In any event, there appear to be serious questions about the essential lawfulness of the Guatemalan version of *lesión* as it is practiced within that country, whether with respect to aliens such as the foreign investor in the instant case or with respect to Guatemalan nationals.” (emphasis added)); *but see* Ex. RL-172, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

⁵⁵⁹ *See* Expert Report of J. Aguilar, ¶¶ 2(h), 32, 33.

⁵⁶⁰ *See* Expert Report of J. Aguilar, ¶¶ 2(h), 32, 33, 40; *see also* above at Sections III.P., Q. (discussing how Claimant is still profiting from the Usufruct).

⁵⁶¹ Memorial on the Merits, ¶ 4.

President's declaration simply set into motion the *as-yet unfinished* process by which the validity of an admittedly small *portion* of Claimant's investment—Contract 143/158—would be determined.⁵⁶² As discussed more fully in the "Damages" section of this Counter-Memorial, any side-effects of the initiation of the *lesividad* process, in terms of the perception by third parties that Contract 143/158 one day might be invalidated by the conclusion of this process, were attributable to Claimant's own premature and erroneous publication of a false statement that Contract 143/158 already had been canceled and its campaign to paint FVG as a "dead man walking."⁵⁶³ These and other actions taken by Claimant severed the chain of causation such that, even if the Tribunal were to find that Guatemala violated the provisions of CAFTA—a finding that as we explain is not justified by the evidence—Claimant cannot prove that any "measure" attributable to Guatemala resulted in any of its alleged damages.

219. Second, the mere declaration of *lesividad* (and the subsequent actions taken in furtherance thereof)⁵⁶⁴ did not violate the substantive provisions of CAFTA. The remainder of Section IV is devoted to an in-depth examination of these provisions and demonstrates that the State action alleged does not constitute a violation of any of the protections afforded by CAFTA. **Section IV.A** examines the standard of **expropriation** under CAFTA and customary international

⁵⁶² It is important here to note that Guatemala uses the definitions of "Usufruct" and "investment" provided by Claimant. Claimant uses the terms "Usufruct" and "investment" broadly and interchangeably, to encompass all of the agreements entered into between FVG and FEGUA. See Memorial on the Merits, ¶ 25 (defining Claimant's investment as: "Onerous Usufruct Contract of Right of Way, documented by Deed Number 402 dated November 25, 1997 . . . Deed 402 came into force on May 23, 1998 and has a term of fifty (50) years; Trust Fund for the Rehabilitation and Modernization of the Railroad System in Guatemala, documented by Deed Number 820 dated December 30, 1999, with a term of twenty-five (25) years expiring on December 31, 2025; and Onerous Usufruct Contract Involving Railway Equipment, documented by Deed Number 41, dated March 23, 1999, granting FVG the 'use, enjoyment, repair and maintenance of railway equipment' owned by FEGUA for the purposes of rendering railway transportation services. Because Deed 41 was never formally approved by Government Resolution, this contract was replaced, at the Government's request, by Deed Number 143 on August 28, 2002. Deed 143 was further amended on October 7, 2003 by Deed Number 158. Deed 143 has a term of 44 years, 8 months, and 25 days, to May 22, 2048, the termination date of the original 50-year Usufruct").

⁵⁶³ See below at ¶¶ 262–67; see also Memorial on the Merits, ¶ 114; **Ex. R–190**, 2006-08-28, RDC Press Release: "Guatemalan Government Violates Terms of Railroad Privatization Agreement."

⁵⁶⁴ See Memorial on the Merits, ¶¶ 3, 87, 144, 158 (stating repeatedly that the State action complained of is the declaration of *lesividad* by the President, and the subsequent measures taken in furtherance of the Declaration).

law, and demonstrates that the *Lesivo* Declaration did not interfere with Claimant’s rights to such an extent that it could be deemed “expropriation” under this standard. **Section IV.B** discusses the **fair and equitable treatment** standard outlined in Article 10.5 of CAFTA, and demonstrates that Guatemala afforded Claimant’s investment fair and equitable treatment in accordance with that standard. Section IV.B also explains that Claimant has failed to discharge its burden with respect to proving that transparency, a duty to refrain arbitrary action, and compliance with an investor’s legitimate expectations are elements of the minimum standard of treatment under customary international law. **Section IV.C** describes the standard of **full protection and security** under CAFTA and concludes that Guatemala accorded Claimant the treatment required to satisfy that standard. **Section IV.D** examines the **national treatment** standard, and demonstrates that Guatemala accorded Claimant the requisite “treatment no less favorable”⁵⁶⁵ than that accorded to Guatemalan nationals.

220. The third and final reason Claimant’s position is unsustainable is that the *Lesivo* Declaration did not cause the damage alleged; namely, the financial and commercial decimation of the investment. Although this issue will also be examined more fully in Section **VError! Reference source not found.**, on damages, the lack of causation will be discussed as relevant within this Section IV to demonstrate that no CAFTA violation has taken place.⁵⁶⁶

221. Given that the *Lesivo* Declaration did not legally or effectively nullify Claimant’s investment, violate any of the standards discussed in Sections IV.A through IV.D, or cause the damage alleged by Claimant, Section IV.E concludes that Guatemala did not violate any of its obligations under CAFTA.

⁵⁶⁵ **Ex. RL–61**, CAFTA Art. 10.3.

⁵⁶⁶ Article 10.16.1 recognizes causation as a necessary element for a claim under CAFTA. See **Ex. RL–61**, CAFTA Art. 10.16.1(b) (providing, in relevant part, that a “claimant, on behalf of an enterprise of the respondent that is a juridical person that claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the respondent has breached [an obligation] *and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.*” (emphasis added)). Applying an identical provision in NAFTA, the tribunal in *Merrill & Ring Forestry L.P. v. Canada* explained that no treaty violation may be found where no harm exists. **Ex. RL–110**, *Merrill & Ring Forestry L.P. v. Canada* (Award) 31 March 2010 (Orrego Vicuña, Dam, Rowley), ¶ 245 (“*Merrill & Ring Award*”) (“[I]n the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the *primary obligation is quite clearly inseparable from the existence of damage.*” (emphasis added)).

A. Guatemala Did Not Expropriate Claimant's Investment

222. While CAFTA protects covered investments against both direct and indirect expropriation,⁵⁶⁷ Claimant has only argued that the *Lesivo* Declaration and subsequent measures constitute an *indirect* expropriation.⁵⁶⁸ But a proper review of the factors enumerated in Annex 10–C of CAFTA and of customary international law demonstrate that neither the *Lesivo* Declaration nor the subsequent measures taken in accordance therewith constitute an indirect expropriation.

223. **Part 1** of this Section introduces the elements of indirect expropriation under CAFTA and customary international law; namely, that Claimant must demonstrate: (1) that it possesses rights under domestic law, which (2) due to Guatemala's interference, have been "taken" by Guatemala; (3) that this taking deprived Claimant of substantially all of the value of its investment; (4) that this alleged taking is irrevocable or irreversible; and finally that (5) the alleged expropriation was unlawful and/or compensation is already due but has not yet been paid, *i.e.*, that the matter is ripe for international arbitral consideration. **Parts 2 through 6** demonstrate that Claimant has not met its burden with respect to any of these elements. Specifically, **Part 2** explains that Claimant does not in fact own the particular Usufruct rights that it claims were expropriated; **Part 3** explains that the *Lesivo* Declaration has not interfered with Claimant's investment, property rights, or any reasonable investment-backed expectations; **Parts 4 and 5**, respectively, argue that even if tribunal finds that Guatemala *has* interfered with Claimant's investment, such interference does meet the requisite level of substantiality to be considered an expropriation, and, at any rate, the interference is not irreversible or irrevocable; and **Part 6** demonstrates that Claimant has not met its burden of proving either an *unlawful* expropriation or that payment of compensation is already due but has not been paid, as necessary for its claim to be ripe for international arbitral review.

⁵⁶⁷ See **Ex. RL–61**, CAFTA Art. 10.7.1.

⁵⁶⁸ Memorial on the Merits, ¶ 136 ("In sum, based upon both the factors set forth in CAFTA Annex 10–C as well as customary international law . . . the actions of the Government of Guatemala here constitute an obvious indirect expropriation").

Accordingly, **Part 7** concludes that the *Lesivo* Declaration does not constitute an indirect expropriation of Claimant's rights.

1. Standard Of Expropriation Under CAFTA And Customary International Law

224. Pursuant to Article 10.7.1 of CAFTA, Parties have the obligation not to “expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (‘expropriation’), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation;
and

(d) in accordance with due process of law [and the customary international law minimum standard of treatment].”⁵⁶⁹

225. Although CAFTA does not establish a unique standard of “expropriation,” it provides that the obligation not to expropriate—except in accordance with the requirements outlined in Article 10.7.1—is intended to reflect “customary international law concerning the obligation of States with respect to expropriation.”⁵⁷⁰

226. Annex 10–C expresses the Parties’ shared understanding of the notion of *indirect* expropriation—the kind alleged by Claimant in this case. Pursuant to that understanding, an action or series of actions by a Party is considered an indirect expropriation when it has “an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”⁵⁷¹

Annex 10–C describes the indirect expropriation analysis as follows:

⁵⁶⁹ **Ex. RL–61**, CAFTA Art. 10.7.1; 10.5.

⁵⁷⁰ **Ex. RL–61**, CAFTA Annex 10–C, ¶ 1. The Parties’ shared understanding is that “customary international law,” generally and in this specific context, results from “a general and consistent practice of States that they follow from a sense of legal obligation.” **Ex. RL–61**, CAFTA Annex 10–B.

⁵⁷¹ **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4.

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a *case-by-case, fact-based inquiry* that considers, among other factors: (i) the *economic impact* of the government action . . . (2) the *extent* to which the government action *interferes* with distinct, reasonable investment-backed expectations; and (iii) the *character of the government action*.⁵⁷²

227. Customary international law reflects a reliance on an “effects test,” which—often combining factors similar to the “economic impact” and “interference” prongs of CAFTA’s indirect expropriation inquiry—is based on the actual effect of the government action upon an investor’s rights.⁵⁷³ Under this effects test, the State action must have substantially or radically affected the claimant’s investment,⁵⁷⁴ to the point where the investment has been “*virtually annihilated*”⁵⁷⁵ or completely “*destroyed*.” The mere threat, or even intent, of expropriation does not constitute expropriation.⁵⁷⁶ As the international tribunal in *National Grid, P.L.C. v. Argentine Republic* (“*National Grid*”) explained, “[t]he terms used in [cases that employ the

⁵⁷² **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4(a) (emphasis added).

⁵⁷³ See, e.g., **Ex. RL–115**, *National Grid, P.L.C. v. Argentine Republic*, (Award) 3 November 2008 (Garro, Kessler, Rigo Sureda), ¶ 149 (“*National Grid Award*”) (discussing the use of the “effects test” in *CME Czech Republic B.V. v. Czech Republic*; *Lauder v. Czech Republic*; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*; *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica* and *Técnicas Medioambientales Tecmed S.A. v. Mexico*); see also **Ex. RL–134**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award) 13 September 2006 (Goode, Allard, Marriott), ¶¶ 64–67 (“*Telenor Award*”).

⁵⁷⁴ See **Ex. RL–115**, *National Grid Award*, ¶ 149 (citing **Ex. RL–133**, *Técnicas Medioambientales Tecmed SA v. México*, ARB(AF)/00/2 (Award) 29 May 2003 (Grigera Naón, Fernández Rozas, Vereza), ¶ 115 (“*Tecmed Award*”).

⁵⁷⁵ Memorial on the Merits, ¶ 112 (quoting **Ex. RL–127**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Award) 28 September 2007 (Söderlund, Edward, Jacovides), ¶ 285 (“*Sempra Award*”)) (emphasis added).

⁵⁷⁶ See **Ex. RL–136**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Award) 30 April 2004 (Crawford, Civiletti, Magallón Gómez), ¶ 161 (“*Waste Management II Award*”) (“Individual statements of this kind made by local political figures in the heat of public debate may or may not be wise or appropriate, *but they are not tantamount to expropriation unless they are acted on in such a way as to negate the rights concerned without any remedy. In fact no action was taken of the kind threatened at the time or later. Even if it had been taken, the Claimant had remedies available to it, under the Concession Agreement and otherwise.*” (emphasis added)); see also **Ex. RL–168**, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2 (Award) 29 April 1999 (Böckstiegel, Fielding, Giardina), ¶¶ 156–57 (“*Tradex Award*”) (declining to characterize a speech by Albania’s President as an expropriation, as the speech—while emphasizing the government’s intention to implement certain subsequent legislative or executive acts—did not itself do so).

effects test] convey the effect that the measures concerned must have: neutralization, radical deprivation, irretrievable loss, [or an] inability to use, enjoy or dispose of the property.”⁵⁷⁷ Also relevant in the effects test is whether the impact of the government measure is “irreversible and permanent”;⁵⁷⁸ expropriation does not take place where an effect is “merely ephemeral.”⁵⁷⁹

228. Inherent in the effects test, therefore, —are three requirements. *First*, the claimant must demonstrate that it had that particular right in the first place under domestic law.⁵⁸⁰ As the tribunal in *EnCana Corporation v. Republic of Ecuador* (“*EnCana*”) explained, “for there to have been an expropriation of an investment or return . . . the *rights affected must exist under the law which creates them . . .*”⁵⁸¹ *Second*, a claimant must demonstrate that action which is attributable to the government has *interfered* with this recognized right.⁵⁸² And *third*, the degree of interference with that right must lead to its destruction.

229. But even if an investor is able to demonstrate these three requirements, for the matter to be considered an international delict, both Article 10.7 of CAFTA and customary international

⁵⁷⁷ **Ex. RL–115**, *National Grid Award*, ¶ 149.

⁵⁷⁸ **Ex. RL–133**, *Tecmed Award*, ¶ 116.

⁵⁷⁹ **Ex. RL–148**, CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS, BORZU SABAH, INVESTOR-STATE ARBITRATION 468 (Oxford University Press, 2008) (“DUGAN ET AL, INVESTOR-STATE ARBITRATION”) (citing *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Gov’t of the Islamic Rep. of Iran, Civil Aviation Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank of Iran & Holland*, Case No. 7, 6 IRAN-U.S. CL. TRIB. REP. 219 (Award) 22 June 1984) (“The investor must also show that the deprivation is not merely ephemeral”); *see also* **Ex. RL–133**, *Tecmed Award*, ¶ 115 (requiring that the claimant be “radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto —such as the income or benefits related to the [investment . . .]—had ceased to exist”); **Ex. RL–106**, *LG&E Energy Corp and Others v. Argentina*, ICSID Case No ARB 02/1 (Decision on Liability) 3 October 2006 (de Maekelt, Rezek, van den Berg) (“*LG&E Award*”).

⁵⁸⁰ *See, e.g.*, **Ex. RL–104**, *International Thunderbird Gaming Corporation v. Mexico*, Ad hoc—UNCITRAL Arbitration Rules, IIC 136 (Award) 26 January 2006 (Van den Berg, Wäide, Portal-Ariosa), ¶ 208 (“*International Thunderbird Award*”) (“[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited”).

⁵⁸¹ **Ex. RL–98**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No UN3481 (Award) 3 February 2006 (Crawford, Grigera Naón, Thomas), ¶ 184 (“*EnCana Award*”) (emphasis added).

⁵⁸² **Ex. RL–61**, CAFTA Annex 10–C, ¶ 3.

law still require that the matter be *ripe* for international review. In practical terms, this means that the claimant must demonstrate that it is owed compensation, and that this compensation has not yet been paid.⁵⁸³ For this element of the expropriation inquiry, tribunals have asked whether the claimant’s right to payment has been the victim of a “final refusal to pay.”⁵⁸⁴ As the *EnCana* tribunal explained, a government does not violate the expropriation standard simply by contesting its obligation to pay:

Like private parties, governments do not repudiate obligations merely by contesting their existence. An executive agency *does not expropriate* the value represented by a statutory obligation to make a payment or refund *by mere refusal to pay*, provided at least that (a) the refusal is not merely wilful, (b) the courts are open to the aggrieved private party, (c) the courts’ decisions are not themselves overridden or repudiated by the State.⁵⁸⁵

230. Accordingly, before finding that an expropriation has taken place, tribunals inquire as to whether the claimant has requested, and been refused, compensation. The mere fact that a government has not yet paid an investor, by itself, does not support a finding of expropriation.

231. Thus, to prove that there has been an indirect expropriation of its investment based on the elements of CAFTA and standards of customary international law, Claimant is charged with demonstrating *five* points. *First*, it must demonstrate that it possesses rights in the investment under domestic law. *Second*, Claimant must show that Guatemala’s action—which, according to the Memorial on the Merits, was the *Lesivo* Declaration and subsequent measures taken in furtherance thereof—have interfered with the rights outlined by Claimant under the first element. *Third*, Claimant must prove that Guatemala’s interference with its rights meet the high degree of interference required to constitute an expropriation. *Fourth*, Claimant must prove that the interference is irreversible or irrevocable. *Fifth*, and finally, Claimant must prove that the matter is ripe. In other words, it must demonstrate that compensation is due, that it

⁵⁸³ See Ex. RL–61, CAFTA Art. 10.7.1–4.

⁵⁸⁴ Ex. RL–98, *EnCana Award*, ¶ 193 (quoting Ex. RL–136, *Waste Management II Award*, ¶¶ 174–75)).

⁵⁸⁵ Ex. RL–98, *EnCana Award*, ¶ 194.

has been requested, and that this request has been denied. As with all of the factors in the indirect expropriation inquiry, Claimant may not plead that an expropriation has taken place by use of generalizations; rather, CAFTA mandates that “[t]he determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a *case-by-case, fact-based inquiry*.”⁵⁸⁶

232. As is discussed in **Parts 2 through 6** below, Claimant has singularly failed to make any of the required showings

2. Claimant Cannot Claim Expropriation Of Usufruct Rights That It Does Not Own

233. As stated above, one of the elements that a claimant must successfully demonstrate in order to prevail on an expropriation claim is that, within the meaning of the host State’s law, it owned the rights that were allegedly expropriated by the respondent State.⁵⁸⁷ If “the right contended for is not recognized and protected in either host State law or international law, the failure to protect it cannot by definition constitute a breach of the standard.”⁵⁸⁸ In the present case, this means that Claimant is required to prove that it possessed rights in the “Usufruct,”⁵⁸⁹ within the meaning of Guatemalan law, in order to prevail on its expropriation claim. But it cannot do so.

⁵⁸⁶ **Ex. RL-61**, CAFTA Annex 10-C ¶ 4 (emphasis added).

⁵⁸⁷ **Ex. RL-155**, CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.180 (Oxford University Press, 2007) (“CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION”) (“The starting point is always that a foreign investor enters a host State voluntarily and must take its law as he finds it . . . [I]t is for the host State’s own law to define the basis for the investor’s establishment, and the nature of any property rights which he may acquire”).

⁵⁸⁸ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.135; *see also Ex. RL-125, Saluka Investments BV v. Czech Republic*, PCA—UNCITRAL Arbitration Rules, IIC 210 (Partial Award) 17 March 2006 (Watts, Fortier, Behrens) (“*Saluka Partial Award*”); **Ex. RL-78**, *ADF Group Inc v. United States*, ICSID Case No ARB(AF)/00/1; (Award) 9 January 2003 (Feliciano, de Mestral, Lamm); **Ex. RL-146**, Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) (“[O]nce it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of expropriation”).

⁵⁸⁹ As stated above, Guatemala defines the terms “investment” and “Usufruct” as Claimant does; namely, to include the “three agreements entered into by and between FEGUA and FVG” Memorial on the Merits, ¶ 25.

234. With respect to Contract 143/158, Claimant’s expropriation claim is unsustainable, as this contract is not valid, never came into force and therefore affords Claimant no protection under Guatemalan law.⁵⁹⁰ Guatemala could not expropriate alleged rights that Claimant never had.⁵⁹¹

235. With respect to Contract 402,⁵⁹² Claimant’s claim is likewise unsustainable because it does not have rights under that contract to compensation for hypothetical profits for its commercialization of lands it received in usufruct for phases of the railway rehabilitation project that it never completed. The terms of that contract dictate that Claimant must return to FEGUA all usufruct rights for those lands received in usufruct and upon which it has *not* completed its rehabilitation and railroad operation obligations.⁵⁹³ Because Claimant voluntarily abandoned all of its operations in September 2007, it cannot claim to have the commercialization rights to the lands it did not restore as it is obligated by the contract to restore those lands to FEGUA and thus does not possess such rights under Contract 402.

236. The notion that expropriation requires the right allegedly affected by a State’s actions to be a vested property right under domestic law was adopted by the tribunals in *EnCana, Generation Ukraine, Inc. v. Ukraine* (“*Generation Ukraine*”),⁵⁹⁴ and the NAFTA case *International Thunderbird Gaming Corporation v. Mexico* (“*Thunderbird*”).⁵⁹⁵ The *EnCana* tribunal explained: “[F]or there to have been an expropriation of an investment or return . . .

⁵⁹⁰ Expert Report of J.L. Aguilar, § V.

⁵⁹¹ Moreover, even if one were to assume that Claimant had rights pursuant to Contract 143/158, as will be discussed in detail below in Section IV.A.3.b, the *Lesivo* Declaration does nothing to eliminate those rights; it merely opens the door for the Attorney General to bring an action in the *Contencioso Administrativo* Court to have that court determine whether FVG has, and if so, whether it should retain any rights under that usufruct.

⁵⁹² As will be discussed in detail below at Section IV.A.3.a, Claimant’s expropriation claim is likewise unsustainable, because Claimant to this day possess the rights it bargained for under Contract 402.

⁵⁹³ See **Ex. C–22**, 1997-11-25, Contract 402; Statement of A. Porras, ¶ 10; see also below at ¶ 237.

⁵⁹⁴ **Ex. RL–7**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Award) 15 September 2003 (Paulsson, Salpius, Voss) (“*Generation Ukraine Award*”).

⁵⁹⁵ **Ex. RL–104**, *International Thunderbird Award*.

the rights affected must exist under the law which creates them . . .”⁵⁹⁶ The *EnCana* tribunal also held that requirement of domestic validity of an investment existed even though the definition of “investment” in the relevant BIT did not contain “an express reference to the law of the host State.”⁵⁹⁷

237. The *Generation Ukraine* tribunal treated the existence of property rights, vested under Ukrainian law, as a threshold question in its merits analysis.⁵⁹⁸ Similar to the *EnCana* tribunal, the *Generation Ukraine* tribunal stated that “there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights . . .”⁵⁹⁹ The *Thunderbird* tribunal, for its part, explained that “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”⁶⁰⁰

238. The holdings of the *EnCana*, *Thunderbird*, and *Generation Ukraine* tribunals also find support in a line of cases that have held that legality under domestic law is a component of BIT protection regardless of whether the requirement that an investment be made “in accordance with host State law” is stated explicitly. In *Plama Consortium Limited v. Bulgaria (“Plama”)*,⁶⁰¹ for example, the tribunal stated that the legality of an investment under domestic law is an implicit prerequisite of the substantive obligations of an international treaty:

Unlike a number of Bilateral Investment Treaties, the ECT [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. *This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law . . . The Arbitral Tribunal concludes that the*

⁵⁹⁶ Ex. RL-98, *EnCana Award*, ¶ 184 (emphasis added).

⁵⁹⁷ Ex. RL-98, *EnCana Award*, ¶ 184.

⁵⁹⁸ Ex. RL-7, *Generation Ukraine Award*, ¶¶ 8.8; 18.1–18.85.

⁵⁹⁹ Ex. RL-7, *Generation Ukraine Award*, ¶ 8.8.

⁶⁰⁰ Ex. RL-104, *International Thunderbird Award*, ¶ 208.

⁶⁰¹ Ex. RL-122, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Award) 27 August 2008 (Salans, Van den Berg, Veeder) (“*Plama Award*”).

*substantive protections of the ECT cannot apply to investments that are made contrary to law.*⁶⁰²

239. The *Plama* tribunal's reasoning was adopted in the recent *Phoenix Action, Ltd. v. The Czech Republic* case.⁶⁰³ As commentator and arbitrator Campbell McLachlan has explained, "it is for the host State's own law to define the basis for the investor's establishment, and the nature of any property rights which he may acquire."⁶⁰⁴ Furthermore, "[i]t is for the host State to decide for itself the legal framework which it will apply to foreign investments upon its territory"⁶⁰⁵

240. These cases and commentary show that the validity of an investment under domestic law is *an implicit element of substantive BIT protection*, generally, and of expropriation, specifically. The requirement that an investment be made in conformity with local laws "refers to the validity of the investment and not to its definition . . . [I]t seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."⁶⁰⁶

241. Concerning this important issue of the validity of the investment under local law, this Tribunal explained in its Second Decision on Objections to Jurisdiction that "*[i]t is to be expected that investments made in a country will meet the relevant legal requirements . . . [I]t is immaterial whether the Equipment Usufruct Contracts qualify as a form of investment under CAFTA Article 10.28(g) or 10.28(e).*"⁶⁰⁷ Moreover, the Tribunal explained, the term "'conferred pursuant to domestic law' is not a characteristic of the investment to qualify as such but a

⁶⁰² **Ex. RL-122**, *Plama Award*, ¶¶ 138–39 (emphasis added).

⁶⁰³ See **Ex. RL-121**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5 (Award) 15 April 2009 (Stern, Bucher, Fernández-Armesto), ¶ 101.

⁶⁰⁴ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.180.

⁶⁰⁵ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105.

⁶⁰⁶ **Ex. RL-20**, *Salini Costruttori S.p.A and Italstrade S.p.A. v. Kingdom of Morocco*, 42 ILM 609 (Decision on Jurisdiction) 23 July 2001 (Briner, Cremades, Fadlallah), ¶ 46.

⁶⁰⁷ Second Decision on Objections to Jurisdiction, ¶ 140 (emphasis added).

condition of its validity under domestic law.”⁶⁰⁸ Thus, regardless of how Claimant’s investment is defined, in order to receive protection against expropriation (and the other substantive provisions of CAFTA),⁶⁰⁹ it must have met any relevant legal requirements under Guatemalan law. Because Contract 143/158 is not a valid investment under Guatemalan law, Claimant cannot claim expropriation of these rights.

242. As explained by the five separate and independent legal opinions issued by different agencies over the course of more than a year, and by outside legal counsel, and by Guatemalan law expert Lic. Juan Luís Aguilar, Contract 143/158 did not comply with Guatemalan law.⁶¹⁰ Among the defects of Contract 143/158 were defects in the Contract’s formation; namely: (1) the fact that Contract 143 was not, as required by Guatemalan law, a product of a public bid;⁶¹¹ and (2) the fact that Contract 143/158 was never signed and approved by the President and his Cabinet via *Acuerdo Gubernativo*, as required by Guatemalan law.⁶¹² Both a public bid and presidential approval are necessary—indeed, fundamental—elements of a valid public contract under Guatemalan law;⁶¹³ because Contract 143/158 failed to meet these requirements,

⁶⁰⁸ Second Decision on Objections to Jurisdiction, ¶ 140 (emphasis added).

⁶⁰⁹ See **Ex. RL-122**, *Plama Award*, ¶¶ 138–39.

⁶¹⁰ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05–2006; **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205–2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181–2006–AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236–2006; Statement of J. Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9; First Statement of A. Gramajo, ¶ 18; Expert Report of J. L. Aguilar, ¶¶ 78–131, 128.

⁶¹¹ See **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205–2005 (explaining that the bidding process for Contract 41 produced no valid contract, and that Contract 143 could not be based upon the bidding process which led to Contract 41 in part because the contracts were four years apart, the same conditions did not exist at the time, and because Contract 41 never received the require approval via *Acuerdo Gubernativo*); see also **Ex. RL-49**, 1996-11-21, *Ley De Lo Contencioso Administrativo* Art. 20.

⁶¹² See Expert Report of J.L. Aguilar, ¶ 126; Statement of M. Cifuentes, ¶ 12; **Ex. R-10**, 2004-11-24, FEGUA Finance Department Opinion 123–2004. This requirement was made clear to Claimant on several occasions, and was incorporated into the bidding rules for each of the contracts entered into by Claimant and FEGUA. See **Ex. R-2**, 1997-11-02, Bidding Rules for Contract 41, § 6.4; **Ex. R-1**, 1997-11, Bidding Rules for Contract 402, § 3.6.4; see also **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting “official and formal acknowledgment” of Contract 143/158).

⁶¹³ See Expert Report of J.L. Aguilar, ¶¶ 98, 101; see also Statement of J. Berdúo, ¶ 10 (discussing the defects of Contract 143/158 under the Government Contract Law).

Claimant *never acquired the rights* to use the railway equipment contemplated therein.⁶¹⁴ Accordingly, because Claimant has failed to demonstrate that its purported rights under Contract 143/158 “exist[ed] under the law which create[d] them,”⁶¹⁵ it cannot claim the right to compensation for the *Lesivo* Declaration’s alleged effect upon those rights.

243. As a corollary to the principle—explained by the *EnCana* tribunal—that an investor’s alleged rights must “exist under the law which creates them,”⁶¹⁶ to determine the scope of an investor’s rights under a particular contract, tribunals must also examine the terms of that contract. A claimant may not succeed on an expropriation claim for rights that were not granted pursuant to the relevant contract. Although this point will be discussed more in-depth in Section V, in the context of damages, it is relevant here to note that by the terms bargained for by Claimant, Contract 402 states:

In the event that [Claimant] fails to rehabilitate the railway and does not offer cargo transport service . . . within the determined terms, it shall surrender to FEGUA the real estate where the railway that had not been rehabilitated is located; *moreover, said assets shall stop being subject matter of this usufruct.*⁶¹⁷

244. Because Claimant fulfilled its obligation to rehabilitate and operate the railroad only with respect to “Phase I,”⁶¹⁸ and has since unilaterally abandoned its rights and responsibilities under that Contract, its rights under Contract 402 can extend *only* to the property contemplated in Phase I.

⁶¹⁴ Expert Report of J.L. Aguilar, § VI.

⁶¹⁵ **Ex. RL-98**, *EnCana Award*, ¶ 184.

⁶¹⁶ **Ex. RL-98**, *EnCana Award*, ¶ 184.

⁶¹⁷ **Ex. C-22**, 1997-11-25, Contract 402 (emphasis added).

⁶¹⁸ See Memorial on the Merits, ¶¶ 31–33 (limiting the discussion of “FVG’s Successful Rehabilitation of Railway” to Phase I); ¶¶ 47, 214 (stating that FVG “only committed to completing Phase I, *i.e.*, reopening the Atlantic/North Coast corridor”); see also, Claimant’s Memorial, ¶¶ 4, 33, indicating that it abandoned the railway project in September 2007; **Ex. R-128**, 2007-11-19, Oficio No. 192–2006, Letter to J. Senn from A. Gramajo; **Ex. R-161**, Oficio No. GG–24–07, Letter to A. Gramajo from J. Senn.

3. Guatemala Has Not Interfered With Claimant's Investment Or Other Property Rights Or Any Reasonable Investment-Backed Expectations

245. The parties agree that indirect expropriation under CAFTA requires interference by Guatemala with Claimant's investment, property rights, or its reasonable investment-backed expectations.⁶¹⁹ This section demonstrates that Guatemala did not expropriate Claimant's investment because it *did not interfere* with Claimant's rights *at all*. **Part A** explains that Guatemala has not taken any measure that interfered with Claimant's rights under Usufruct Contract 402, which was not even the object of the *Lesivo* Declaration; **Part B** demonstrates that the *Lesivo* Declaration, the State action for which Claimant alleges Guatemala is liable, has not interfered with Claimant's alleged rights under Usufruct Contract 143/158, or its reasonable investment-based expectations; and **Part C** examines Claimant's argument against the *lesividad* process *per se*, demonstrating that the acceptance of this argument would cause an impermissible limitation upon Guatemala's legitimate exercise of its regulatory powers.

a. Guatemala Has Not Taken Any Measure That Interfered With Claimant's Rights Under Contract 402

246. Claimant explains in its Memorial on the Merits that the most lucrative and important part of its investment was the right-of-way transferred by Usufruct Contract 402.⁶²⁰ The *Lesivo* Declaration had no effect whatsoever upon Claimant's rights under Contract 402.

247. Through the award of Contract 402, Claimant was permitted to focus not only on the development and operation of railways but also on "other complementary businesses, such as ports, fiber optics, electric and petroleum transmissions, and commercial and institutional developments of other uses of railway lines, stations and yards"⁶²¹ In addition to acknowledging that Contract 402 is the most lucrative component of Claimant's investment, Claimant stated that its profit from the right-of-way is independent from its investment in the rehabilitation of the railroad:

⁶¹⁹ Memorial on the Merits, ¶¶ 112–21.

⁶²⁰ See Memorial on the Merits, ¶¶ 179–81.

⁶²¹ First Statement of H. Posner, ¶ 2.

[A]s RDC's damages experts Robert MacSwain and Louis Thompson have opined in their accompanying reports, *RDC's investment in the rehabilitation of the railroad was wholly unconnected to the profits FVG would have earned over the life of the Usufruct from its program to lease the right of way and adjacent real estate parcels for non-railway purposes.* In other words, because the potential demand for leasing the properties and easement contracts along the right of way is not dependent on whether the railroad would have been in operation, *it was not necessary for FVG to have an operating railway in order to lease and develop successfully the vast majority of the railway real estate that had been granted in usufruct.*

248. To stress this point, Claimant explains that, apart from the right of way, the Usufruct was of little or no value to Claimant: "RDC's investment in the rehabilitation of the railroad was almost exclusively a benefit to Guatemala, not to RDC."⁶²² In fact, Claimant states, relying on Mr. Thompson's analysis, that "the Usufruct would have been more profitable if FVG only leased the right of way and adjoining real estate parcels without having to rehabilitate and operate the railway."⁶²³ Furthermore, Claimant explains, "FVG's Business Plan was explicitly based upon its ability to make substantial profits from real estate leasing and demonstrated that the operation of the railroad, by itself, could not justify the investment . . . absent [this] expected income, there would be no investment."⁶²⁴

249. Claimant's argument that the *Lesivo* Declaration and subsequent acts interfered with Contract 402 is, in the true sense of the word, incredible. It is an undisputed fact that the *Lesivo* Declaration applied exclusively to Contract 143/158, for the use of railway equipment.⁶²⁵

⁶²² Memorial on the Merits, ¶ 180, *see also* Claimant's Counter-Memorial on Jurisdiction, 2009-10-26, ¶ 164 (explaining that defining Claimant's investment solely by reference to Contract 143/158 "ignores the fact that the Usufruct was comprised of not only the Railway Equipment Usufruct Contracts, but also, much more importantly, Contract 402 . . . It was through the exclusive railway operation and real estate rights granted to FVG under Contract 402 that *all* of the expected profits from RDC's investment in FVG were expected to be generated." (emphasis added)).

⁶²³ Memorial on the Merits, ¶ 179 (citing Expert Report of R. MacSwain, ¶ 4.2(a); Expert Report of L. Thompson, ¶¶ 50–57).

⁶²⁴ Memorial on the Merits, ¶ 181.

⁶²⁵ *See Ex. R–35*, 2006-08-11, *Acuerdo Gubernativo* No. 433–2006 Where Usufruct Contract 143 and Amendment No. 158 Were Declared *Lesivos*; *see also* Memorial on the Merits, ¶¶ 3, 42–99 (explaining

Footnote continued on next page

Claimant's rights in Contract 402 have never been questioned by the Government;⁶²⁶ as Claimant has agreed,⁶²⁷ Contract 402 is still in effect, and Claimant continues to earn income based on its rights as Usufructuary. Guatemalan law expert Lic. Juan Lu s Aguilar also agrees that the *Lesivo* Declaration had no effect at all on FVG's rights under Contract 402.⁶²⁸

250. Claimant's argument that "the *Lesivo* Resolution and Guatemala's subsequent conduct pursuant to the *Lesivo* Resolution destroyed RDC's investment and FVG's business by . . . destroying its business prospects and reasonably expected economic benefits flowing from the Usufruct,"⁶²⁹ is untenable, both in theory and in practice. As Claimant explained, "RDC's investment in the rehabilitation of the railroad was *wholly unconnected* to the profits FVG would have earned over the life of the Usufruct from its program to lease the right of way and adjacent real estate parcels for non-railway purposes."⁶³⁰ Furthermore, Claimant itself stated that absent the expected income from real estate leasing along the easement granted in Contract 402, "there would be no investment."⁶³¹ Therefore, *by Claimant's own admission*, the *Lesivo* Declaration—which applied exclusively to Contract 143/158 and was concerned solely with the rehabilitation aspect of Claimant's investment—could have no effect upon Claimant's main source of income, its "business prospects" for the right of way under Contract 402.

Footnote continued from previous page

that the *Lesivo* Declaration "deemed an essential element of the Usufruct granted to FVG, the Usufruct Contract of Rail Equipment [No. 143, as modified by No. 153], 'INJURIOUS to the interests of the State . . .'"

⁶²⁶ See, e.g., **Ex. R-200**, 2008-05-13, MP 361-2003, Decision from the Criminal Trial Court at Amatitl n, pp. 3, 8 (explaining that the *Lesivo* Declaration applied only to Contract 143/158, and not at all to Contract 402); **Ex. R-283**, 2010-09-28, Letter to C. Samayoa Flores from J. L pez, Pal n Municipality (recognizing that FVG possesses rights in Contract 402 by stating that the military dispatched for security measures will leave whenever requested to do so by FEGUA or FVG).

⁶²⁷ See **Ex. R-131**, 2007-08-29, Oficio No. GG-14-07, Letter to A. Gramajo from J. Senn (explicitly recognizing (in response to **Ex. R-130**, 2007-08-28, Oficio No. 148-2007, Letter to J. Senn from A. Gramajo) that Contract 402 is still in effect).

⁶²⁸ Expert Report of J.L. Aguilar, ¶ 121.

⁶²⁹ Memorial on the Merits, ¶ 99.

⁶³⁰ Memorial on the Merits, ¶ 179 (citing Expert Report of R. MacSwain, ¶ 4.2(a); Expert Report of L. Thompson, ¶¶ 56-57) (emphasis added).

⁶³¹ Memorial on the Merits, ¶ 181.

251. In addition, despite Claimant’s statement that “as a result of the Lesivo Resolution, FVG came to be viewed by all those concerned as a ‘dead man walking,’ an entity that, almost overnight became too risky to do business with,”⁶³² Claimant continues to generate revenues from its rights under Contract 402, and as noted by Dr. Pablo Spiller, Claimant is generating more revenues from leasing now than it was before the declaration.⁶³³ Even after the *Lesivo* Declaration, Claimant has continued to receive revenue associated with easement contracts, long-term leases, and rent from squatters.⁶³⁴ Among the sources of continuing revenue are a 33-year contract with Cobigua to lease a parcel of land and the Puerto Barrios railroad station that was registered in 2007⁶³⁵ an easement contract between FVG and Texaco which is not due to expire until 31 October 2046,⁶³⁶ and rent from alleged “squatters” who reside on the land granted to Claimant under Contract 402.⁶³⁷ Indeed, since the *Lesivo* Declaration, Claimant has made an organized and concerted effort to collect rent from the “squatters” within the right of way: Claimant has encouraged them to sign rental agreements with FVG,⁶³⁸ threatened eviction for non-payment,⁶³⁹ permitted “squatters” that were illegally camped within the right of way to remain upon payment,⁶⁴⁰ responded to rental requests by entering into notarized

⁶³² Memorial on the Merits, ¶ 114. To the extent (if at all) Claimant was considered a “dead man walking,” as discussed above in Section III.K. and below at Section IV.A.3b(ii), this was a direct result of Claimant’s own actions.

⁶³³ Expert Report of P. Spiller, ¶ 40.

⁶³⁴ See above at Section III.O.

⁶³⁵ See **Ex. R-69**, 2000-11-19, Contract No. 120 Between FVG and COBIGUA.

⁶³⁶ See **Ex. C-28(c)** Texaco Easement Contract No. 16.

⁶³⁷ See **Ex. R-70**, 2002-02-26, Letter to R. Gutiérrez (FVG Bananera Station) from J. De Leon (FVG) Instructing and Authorizing R. Gutiérrez to Charge Rent to Squatters; **Ex. R-71**, 2002-04-03, Receipt No. 000942, Sample Receipt of Rent Paid by Squatters to FVG (Rosa López); **Ex. R-175**, 2002, Receipt from FVG to Rosa López for Rent for the Months of January and February 2002; **Ex. R-208**, 2008-07-01, Letter to R. Calderón from P. Alonzo (threatening to dislodge one of the renters due to his failure to pay); **Ex. R-159**, 2010-02-01, Receipt of Payment—Arrendamiento No. 0013603.

⁶³⁸ See **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment.

⁶³⁹ See **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment.

⁶⁴⁰ See **Ex. R-224**, Letters/Contracts from FVG Permitting “Squatters” who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*).

contracts that were signed by FVG's General Manager, Mr. Jorge Senn,⁶⁴¹ and, ultimately, collected payment.⁶⁴²

252. Additionally—and also since the *Lesivo* Declaration—Claimant has been apprised of requests to rent or otherwise use the right of way,⁶⁴³ and has acknowledged that Contract 402 is still in effect.⁶⁴⁴ For example, in a letter to the Mayor of Gualán dated 24 June 2008—nearly two years after the *Lesivo* Declaration was published—Mr. Senn stated that FVG was still the “sole and legitimate USUFRUCTARY of . . . the entire right of way [adjacent to the railway] in accordance with the Onerous Usufruct Contract of Right of Way [402]. (unofficial translation)”⁶⁴⁵ Thus, as Claimant admits, “it was not necessary for FVG to have an operating railway in order to lease and develop successfully the vast majority of the railway real estate that had been granted in usufruct.”⁶⁴⁶

253. Contract 402 is simply *not* dependent upon the existence of Contract 143/158; that is apparent from the plain language of those instruments and their incorporated documents. In its “Bid to Obtain the Concession to Operate Ferrocarriles de Guatemala,” Claimant suggested including “the exclusive use of all railways, right [*sic*] of way, yards, locomotives, freight cars,

⁶⁴¹ See **Ex. R-233**, Rental Requests (Post-*Lesivo*); **Ex. R-232**, Renter Files (Post-*Lesivo*); **Ex. R-234**, Rental Agreements: Contracts Signed by J. Senn and Notarized by J. Carrasco (Post-*Lesivo*).

⁶⁴² See **Ex. R-223**, Rent Payment Records (Post-*Lesivo*); **Ex. R-244**, Sample Receipts: 1998; **Ex. R-245**, Sample Receipts: 1999; **Ex. R-246**, Sample Receipts: 2000; **Ex. R-247**, Sample Receipts: 2001; **Ex. R-248**, Sample Receipts: 2002; **Ex. R-249**, Sample Receipts: 2003; **Ex. R-250**, Sample Receipts: 2004; **Ex. R-251**, Sample Receipts: 2005; **Ex. R-252**, Sample Receipts: 2006; **Ex. R-253**, Sample Receipts: 2007; **Ex. R-254**, Sample Receipts: 2008; **Ex. R-255**, Sample Receipts: 2009.

⁶⁴³ See, e.g., **Ex. R-106**, 2006-09-20, Oficio No. 317-2006, Letter to J. Senn from A. Gramajo; **Ex. R-109**, 2006-11-16, Oficio No. 386-2006, Letter to J. Senn from A. Gramajo; **Ex. R-110**, 2006-11-27, Oficio No. 398-2006, Letter to J. Senn from A. Gramajo; **Ex. R-133**, 2007-09-05, Oficio No. 153-2007, Letter to J. Senn from A. Gramajo.

⁶⁴⁴ See, e.g., **Ex. R-131**, 2007-08-29, Oficio No. GG-14-07, Letter to A. Gramajo from J. Senn (requesting FEGUA's intervention with respect to criminal acts committed in the Station at Mazatenango, in accordance with the terms of Contract 402); **Ex. R-147**, 2008-09-16, Letter to J. Senn from E. Martínez (despite arguing that Guatemala had “indirectly expropriated” Claimant's investment, Mr. Senn still recognized that Contract 402 was in force); **Ex. R-235**, Letters in Which FVG Exercises its Rights Under Contract 402 (Post-*Lesivo*).

⁶⁴⁵ See **Ex. R-235**, Letters in Which FVG Exercises its Rights Under Contract 402 (Post-*Lesivo*), p. 2.

⁶⁴⁶ Memorial on the Merits, ¶ 179 (citing Expert Report of R. MacSwain, ¶ 4.2(a); Expert Report of L. Thompson, ¶¶ 56-57).

stations, maintenance premises, equipment and real property” within the definition of assets to be obtained under the original concession.⁶⁴⁷ This suggestion, which conflicted with the bidding rules for the original concession,⁶⁴⁸ was not adopted into Contract 402. Pursuant to the bidding rules, the eventual concessionaire would **not** be “entitled” to the railway equipment belonging to FEGUA, but instead would receive only an *opportunity* to bid for the equipment:

The offerors will be able to inspect the rolling stock and other equipment owned by Ferrocarriles de Guatemala. *Such equipment will be the object of a bidding process* in due course after the awarding of the Onerous Usufruct Contract, and *the contracting party will have the opportunity* to acquire those that it deems convenient for its activities.⁶⁴⁹

254. Moreover, the Guatemalan Government reserved the right to “build and operate another rail line or give a concession to another private company to construct a new rail line,”⁶⁵⁰ and, conceivably, the equipment could have gone to furnish this separate railroad.⁶⁵¹ The chosen concessionaire, therefore, would *not* be automatically entitled to the exclusive use of FEGUA’s railway equipment. To ensure that the railway would nevertheless be operational, the bidding rules for Contract 402 provided that “[t]he bidders [could] include equipment owned by them . . . for their commercial operations under the Onerous Usufruct.”⁶⁵²

255. Contract 402 expresses a preference for the Government’s bidding rules over Claimant’s bid. Pursuant to Clause 10 of Contract 402, Claimant had the right “[t]o obtain the rail and non-rail equipment, property of FEGUA, that it deems convenient for its operations, *pursuant to the provisions of the basis of the bidding*, origin of this contract.”⁶⁵³ As stated above, the bidding rules limit this right to the *opportunity* to participate in the public bidding process for railway

⁶⁴⁷ **Ex. C-15**, 1997-05-15, FVG Sealed Bid Proposal for Usufruct, § 6.1.

⁶⁴⁸ *See Ex. R-1*, 1997-02-14, Bidding Rules for Contract 402, § 4.1.6, 4.1.15.

⁶⁴⁹ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.6.

⁶⁵⁰ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.15.

⁶⁵¹ Statement of A. Porras, ¶ 11.

⁶⁵² **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.8 (emphasis added).

⁶⁵³ **Ex. C-22**, 1997-11-25, Contract 402 Cl. 10 (emphasis added).

equipment that was in FEGUA's possession.⁶⁵⁴ Moreover, while FVG's bid was incorporated as part of Contract 402, Clause 15 of the contract makes clear that in case of conflict between FVG's bid and the Contract provisions, the *contractual provisions control*.⁶⁵⁵ Finally, FVG accepted its usufruct rights in conformity with the "terms of the present contract."⁶⁵⁶ Thus there can be no doubt that FEGUA did not accept the non-conforming aspects of Claimant's bid that contradict the terms of Contract 402, as Claimant attempts to sustain.

256. Moreover, as Claimant was well-aware, the opportunity to participate in a public bid is not a guarantee of success.⁶⁵⁷ This is especially so when, in the bidding rules for Contract 402, the Guatemalan Government reserved the right to "build and operate another rail line or give a concession to another private company to construct a new rail line,"⁶⁵⁸ and, conceivably, the equipment could have gone to furnish this separate railroad. Thus aware of the possibility that the railway equipment belonging to the State might not be awarded to it, if Claimant believed that such equipment was essential to the operation of Contract 402, it had an extra incentive to ensure that—by its terms—Contract 402 provided that FVG's obligations under that agreement were conditioned upon receipt of the equipment. But that is not what FVG bargained for or what it received. While in Contract 41, Claimant bargained for, and expressly conditioned, its obligations upon the continued existence of Contract 402,⁶⁵⁹ *the reverse is not true*; the terms of Contract 402 do not condition its application upon receipt of the railway equipment.

⁶⁵⁴ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.6.

⁶⁵⁵ **Ex. C-22**, 1997-11-25, Contract 402 Cl. 15.

⁶⁵⁶ **Ex. C-22**, 1997-11-25, Contract 402 Cl. 3.

⁶⁵⁷ See **Ex. RL-46**, 1992-10-21, Public Contracting Act: Legislative Decree No. 57-92 Art. 31 (explaining that even if Claimant were the sole bidder for the equipment contract, it would not be guaranteed to win the public bid: "If only one bidder concurs to a convened public bidding, it *may* be awarded to the bidder, *provided that the Bidding Board deems that the offer satisfies the requirements set out in the bidding terms and that the proposal is convenient for the interests of the State. Otherwise, the Board may abstain from making a decision to award.*" (emphasis added)).

⁶⁵⁸ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.15.

⁶⁵⁹ See **Ex. R-3**, 1999-03-23, Contract 41 Cl. 15 ("THE USUFRUCTARY shall not be liable in case of early termination of the term provided for in the contract for onerous usufruct of assets owned by Ferrocarriles de Guatemala for the purposes of rendering railroad transportation services, as evidence in

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257. Instead of placing expressly this condition precedent upon its obligations under Contract 402, so that those obligations would not arise or would terminate automatically if Claimant did not succeed in obtaining the railway equipment belonging to FEGUA, the parties agreed only to the creation of an *option* to terminate:

In the event that COMPAÑIA DESARROLLADORA FERROVIARIA, SOCIEDAD ANONIMA is unable to exercise the conferred rights it is entitled to with regards to the railway equipment according to the contract and bidding terms referred to in the second clause of this contract, or notwithstanding, having exercised them, *it is not able to acquire the railway equipment in accordance with what is established in the tenth clause* of this contract and as a consequence it is not able to comply with the purposes of this contract, for reasons not attributable to it, then it may terminate this contract without any responsibility on its part.⁶⁶⁰

258. Thus, FVG only bargained for the right to terminate Contract 402 if it could not acquire FEGUA's railway equipment pursuant to a separate bidding process, but if and only if, it could also make a showing that "as a consequence it is not able to comply with the purposes of [Contract 402]." This presumably would require proof not just that it was not able to acquire FEGUA's equipment, but that "as a consequence" it could not perform its obligations under Contract 402, which in turn would require a showing that it could not acquire the equipment to operate the railway elsewhere. Notwithstanding Claimant's allegations in this case to the contrary, FVG has certainly never made such a showing.⁶⁶¹ In any event, even if one assumes that FVG could make both showings, that would simply give rise to its right to terminate Contract 402 pursuant to Clause 18 of Contract 402, a right which it is undisputed FVG never exercised.

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notorial deed number four hundred and two (402) . . . and THE USUFRUCTARY's only obligation shall be to return the assets as provided for herein").

⁶⁶⁰ **Ex. C-22**, 1997-11-25, Contract 402 Cl. 18 (emphasis added).

⁶⁶¹ As Dr. Spiller notes in his Expert Report, there are a number of countries outside of Guatemala where FVG (or Claimant) could acquire the narrow gauge equipment it needs to operate Phase I of the railway, and FVG has never made a showing that it could not acquire the equipment from these places. See Expert Report of P. Spiller, note 7.

259. That the possession of the particular railway equipment belonging to FEGUA was not an “essential element”⁶⁶² of Contract 402, and the *Lesivo* Declaration therefore had no effect upon this original concession, is apparent for at least three reasons. *First*, In light of the facts known to Claimant at the time it entered into Contract 402, and the fact that Claimant conditioned its contractual obligations under Contract 41 upon the continuing existence of Contract 402 but did not place the reverse condition upon its obligations under Contract 402, it is apparent that Claimant did not intend to condition the application of Contract 402 upon receipt of FEGUA’s railway equipment. Or even if that was its intention, it never secured the right to do so. *Second*, under the plain terms of Contract 402, Claimant was given only the option of terminating Contract 402 if it did not receive the specific equipment and made the further showing that this caused it to be unable to meet its responsibilities under Contract 402; because Claimant has not exercised this option to terminate Contract 402, it remains in full force and effect. *Third*, and perhaps most significantly, as established above in Section III.K., FVG had very little use for the FEGUA usufruct equipment that was declared *lesivo*. It could only use that equipment for the rail corridor operated in Phase I, which only produced yearly losses. The equipment FVG would need for Phase II had to operate on **standard gauge** track, which the equipment that it received pursuant to Contract 143/158 could not do. Thus, contrary to Claimant’s allegations, FEGUA’s equipment is not at all vital to FVG’s existence.

260. Accordingly, because the receipt of FEGUA’s railway equipment was not a required part of Contract 402 and in fact was not of any significance to its planned, future restoration plans, Claimant’s argument that it could no longer operate under Contract 402 if it lost the right to use FEGUA’s equipment is fallacious. The *Lesivo* Declaration had no practical or legal effect whatsoever upon that contract.

⁶⁶² Memorial on the Merits, ¶ 3.

261. The *Lesivo* Declaration also did not interfere with Claimant’s rights under Contract 402; it neither expressly deprived “the investor of the use and benefit of its investment,”⁶⁶³ nor did it have this effect upon Contract 402. As explained above, Claimant could—and did—continue to exercise its rights and reap economic benefits under Contract 402, the contract Claimant expressly admits is the most important and lucrative component of its investment.⁶⁶⁴ Thus, even if Claimant could demonstrate that the *Lesivo* Declaration was somehow improper or unexpected, there could be no claim that it expropriated Claimant’s broader investment rights, which in their most substantial part (Contract 402) had nothing to do with the particular contract at issue in the *Lesivo* Declaration (Contract 143/158).

b. The Lesivo Declaration Has Not Interfered With Claimant’s Alleged Rights Under Usufruct Contract 143/158 Or Any Reasonable Investment-Backed Expectations

262. According to Claimant’s Memorial on the Merits, “the issuance of the *Lesivo* Resolution had an immediate, devastating impact on FVG’s ability to reasonably operate the Usufruct in a profitable manner . . . [In addition,] the *Lesivo* Resolution interfered with RDC’s distinct, reasonable investment-backed expectations.”⁶⁶⁵ Despite this assertion, the evidence demonstrates that there has been no interference with Claimant’s alleged rights for three reasons: (1) the mere initiation of the *lesividad* process does not equate to the nullification of Contract 143/158, either legally or effectively; (2) to the extent that there has been any adverse effects on Claimant’s investment following the *Lesivo* Declaration, those were the direct result of Claimant’s own actions, not those of Guatemala; and (3) the expectations which were allegedly interfered with by Guatemala were not objectively reasonable.

⁶⁶³ Ex. RL–109, *Middle East Cement Shipping and Handling Co. SA v. Egypt*, ICSID Case No ARB/99/6 (Award) 2002 (Böckstiegel, Bernardini, Wallace), ¶ 161 (“*Middle East Cement Award*”) (cited by Claimant in ¶ 127 of its Memorial on the Merits).

⁶⁶⁴ The fact that the *Lesivo* Declaration and subsequent acts of the Government of Guatemala did not interfere with Claimant’s right to reap economic benefits from its investment, is a separate issue from FVG’s fair market value at the time of the alleged expropriatory measure, which, as Dr. Spiller explains in his Expert Report, was *negative*. This is because FVG’s present value of the cash outflows was greater than the present value of the cash inflows. See Section V.G below; Expert Report of P. Spiller, ¶ 104.

⁶⁶⁵ Memorial on the Merits, ¶¶ 113–15.

(i) The Mere Initiation Of The *Lesividad* Process Does Not Interfere With Claimant's Rights

263. Claimant's argument—that the *Lesivo* Declaration, in and of itself, nullified Contract 143/158—is unsustainable. The *Lesivo* Declaration is merely the first step in a pending process by which an independent organ of the Guatemalan Government—the courts—ultimately will determine the validity of the contract. Until that determination is made, Contract 143/158 indisputably remains in effect. Until that determination is made, FVG (and thus Claimant) retains all rights it may have under Contract 143/158.⁶⁶⁶ The mere initiation of the *lesividad* process thus has not interfered with Contract 143/158, either in law or in effect.⁶⁶⁷

264. Specifically, Lic. Aguilar explains that “the administrative process for the issuance of the Acuerdo that declares the *lesividad* of the act or resolution . . . does not have any binding effects on the administered, as [the declaration of *lesividad*] does not have executive or privative effects on the rights of the administered since the *lesivo* declaration must be validated by the courts”⁶⁶⁸ The sole purpose of the *Lesivo* Declaration is to instruct the Attorney General to commence proceedings before the *Contencioso Administrativo* court.⁶⁶⁹ Moreover, Lic. Aguilar explains that the *lesividad* process is “a legal burden that the law imposes on the Public Administration in order to allow it to initiate the *Contencioso-Administrativo* process and, in that way, challenge its own administrative acts that damage the State's interests.”⁶⁷⁰ By law, and as specifically held by the Constitutional Court with respect to this case,⁶⁷¹ Claimant

⁶⁶⁶ Expert Report of J.L. Aguilar, ¶¶ 2(q), 40, 129. .

⁶⁶⁷ Expert Report of J.L. Aguilar, ¶¶ 2(q), 40, 129.

⁶⁶⁸ See Expert Report of J.L. Aguilar, ¶ 32(b) (unofficial translation).

⁶⁶⁹ See Expert Report of J.L. Aguilar, ¶¶ 35, 36.

⁶⁷⁰ Expert Report of J.L. Aguilar, ¶ 35 (unofficial translation) (emphasis in original).

⁶⁷¹ **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158 (“[T]his court determines that the [*Acuerdo Gubernativo* declaring Contract 143/158 *lesivo*] has not extinguished the process established in Article 19 of the *Ley De Lo Contencioso Administrativo*, by means of which a potential decision about the legality or illegality of that contract would be obtained. On occasion of such *Contencioso Administrativo* process, Claimant will be able to present before the corresponding judicial body its arguments and legal grounds on which it purports to justify the present claim. *The mere declaration of lesividad denounced as challenged act, by itself, cannot cause the supposed offences, as it*

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remains in full possession of its rights pending the decision of the *Contencioso Administrativo* court regarding Contract 143/158's validity.⁶⁷²

265. One need go no further than the decisions of the *Contencioso Administrativo* courts to find the best evidence of this point. Pending the ultimate decision regarding *lesividad*, the *Contencioso Administrativo* courts upheld Claimant's rights under Contract 143/159 on two separate occasions and specifically rejected a request for their injunctive and provisional suspension.⁶⁷³ The *Contencioso Administrativo* court remains free to find that Contract 143/158 was not, in fact, *lesivo*, and to leave this contract permanently in force.⁶⁷⁴

266. Nor has the *Lesivo* Declaration had the *practical effect* of nullifying Claimant's investment. Both of the parties to this case have acted consistently with the decisions of the administrative courts, and continue to act in accordance with Contract 143/158 until the *Contencioso Administrativo* court determines otherwise.⁶⁷⁵ Claimant remains in possession of the railway equipment contemplated under Contract 143/158.⁶⁷⁶ In September of 2007, for example, a year after the *Lesivo* Declaration was published, FEGUA Overseer Arturo Gramajo sent a letter to FVG General Manager Jorge Senn notifying Mr. Senn that FEGUA had filed a

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corresponds to the court of the Contencioso Administrativo to resolve on the matter." (emphasis added; unofficial translation)).

⁶⁷² To this end, it is relevant that the Attorney General was required to file a petition for the injunctive suspension of Contract 143/158 before the *Contencioso Administrativo* court; there is no automatic suspension of rights due to the publication of a *lesivo* declaration. The Attorney General's petition in any event was denied. See **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Claim of *Lesividad* of Contract 143/158 (denying the Attorney General's request, and leaving Claimant's rights under Contract 143/158 intact).

⁶⁷³ See **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

⁶⁷⁴ See Expert Report of J.L. Aguilar, ¶¶ 58-59 ("*El tribunal de lo Contencioso-Administrativo debe dictar sentencia, la que examinará la totalidad de la juridicidad del acto o resolución cuestionada, pudiéndola revocar, confirmar, o modificar.*")

⁶⁷⁵ Expert Report of J.L. Aguilar, ¶¶ 2(q), 40, 129.

⁶⁷⁶ Second Statement of A. Gramajo, ¶¶ 51-52; **Ex. R-296**, 2007-07-17, SIGLO XXI, *Government Analyzes Concession of New Train System*.

report regarding the state of a particular locomotive. In that letter, Dr. Gramajo recognized that the locomotive was part of the still-in-effect Contract 143/158.⁶⁷⁷ In response, and on behalf of Claimant, Mr. Senn agreed, stating:

I remind you that as is indicated in the Onerous Usufruct Contract for Railway Equipment that you mention in said letter, in its TENTH clause, allows my represented to use the railway equipment as usufructuary, besides there not existing any possibility that the IDAEH interfere with my represented's possession of locomotive 204 and other equipment that is being exhibited by FEGUA.⁶⁷⁸

267. This exchange of letters is merely one of a series that recognizes that, well after the *Lesivo* Declaration, Claimant maintained all of its rights pursuant to Contract 143/158.⁶⁷⁹

(ii) The Adverse Effects Alleged By Claimant Were A Direct Result Of Claimant's Own Actions

268. To the extent that there have been any adverse effects upon Claimant's investment in Contract 143 following the *Lesivo* Declaration, those were the direct result of Claimant's own actions, not those of Guatemala. First, and as explained above in Section III.Q., Claimant on its own initiative publicized its mischaracterization of the *Lesivo* Declaration, telling its own investors essentially that it was a "dead man walking," an entity that, almost overnight, became too risky to do business with."⁶⁸⁰ Guatemala, on the other hand, did not actively publicize the *Lesivo* Declaration,⁶⁸¹ and certainly did not characterize Claimant as a risky business partner.

⁶⁷⁷ **Ex. R-132**, 2007-09-04, Oficio No. 150-2007, Letter to J. Senn from A. Gramajo.

⁶⁷⁸ **Ex. R-134**, 2007-09-06, Oficio No. GG-17-02, Letter to A. Gramajo from J. Senn (unofficial translation) ("Le recuerdo que tal como indica el Contrato de Usufructo Oneroso de Equipo Ferroviario a que usted hace mención en dicho oficio, en su cláusula DÉCIMA permite a mi representada utilizar el equipo ferroviario en su calidad de usufructuaria, además de no existir posibilidad de que el IDAEH perturbe en la posesión de mi representada sobre la locomotora 204 y demás equipo que se encuentra en exhibición por parte de FEGUA").

⁶⁷⁹ See, e.g., Second Statement of A. Gramajo, ¶¶ 51-52.

⁶⁸⁰ Memorial on the Merits, ¶ 114.

⁶⁸¹ See Expert Report of J.L. Aguilar, ¶ 39 ("The obligated publication of the *Lesivo* Resolution is done in a specialized communication medium, the *Diario de Centroamérica*, and in particular in its 'Legal' section, which by its technical-legal nature, does not have the interest and dissemination effects among the

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Unlike Claimant, it did not hold press conferences or take out pre-prepared press releases in all of the popular Guatemalan newspapers. Second, despite Guatemala's continued efforts to negotiate with Claimant in order to achieve a successful railway operation, and the fact that the Government was legally obligated to proceed with the *Lesivo* Declaration if a settlement agreement was not reached, Claimant refused to negotiate in good faith.

269. As explained throughout this Counter-Memorial, upon discovering the legal defects of Contract 143/158,⁶⁸² and as required by law, Government officials met with Claimant on a number of occasions in an attempt to reach an agreement to remedy the illegalities of that contract before the three-year prescription period for declaring *lesividad* expired.⁶⁸³ The Government approached these meetings in good faith, concerned first and foremost with the successful rehabilitation and operation of the railroad.⁶⁸⁴ This is precisely why, as the record amply demonstrates, the Government attempted to find a negotiated solution with FVG of the problems plaguing the railway project at every juncture, starting in March 2004 when FEGUA first discovered the illegal usufruct equipment contracts through the first couple of months after the *Lesivo* Declaration was published.⁶⁸⁵

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general public that other communications mediums and dailies have") (unofficial translation) ("La publicación obligada del Acuerdo de Lesividad se realiza en un medio de comunicación 'especializado,' el Diario de Centroamérica, y en particular en la sección 'Legal' de este medio, que por su carácter técnico jurídico, no tiene los efectos de interés y difusión, en el público, que tienen los otros medios y diarios de comunicación social").

⁶⁸² See First Statement of A. Gramajo, ¶ 10 (discussing Dr. Gramajo's request, upon assuming his duties as Overseer of FEGUA, that the legal department furnish him with an opinion that analyzed the contents and scope of all contracts, including the Usufruct Contracts).

⁶⁸³ See above at Section III.I (discussing the meetings of the High Level Technical Commission); Statement of M. Marroquín, ¶¶ 9–11; Statement of S. Pineda, ¶¶ 13–20; **Ex. R–23**, 2006-04-03, Minutes from the High Level Commission Meetings; **Ex. R–26**, 2006-05-05; **Ex. R–28**, 2006-05-10; **Ex. R–29**, 2006-05-11.

⁶⁸⁴ See Statement of R. Aitkenhead, ¶ 6; Statement of M. Marroquín, ¶ 7.

⁶⁸⁵ See Statement of R. Aitkenhead, ¶¶ 5-6; Statement of M. Marroquín, ¶ 7; See above at Sections III.E., I., J., K.; See **Ex. R–100**, 2006-07-26, E-mail to R. Aitkenhead *et al* from M. Marroquín (discussing a proposal to be presented to FVG); see also **Ex. R–103**, 2006-08-04, E-mail to G. Zachrisson *et al* from S. Pineda (attaching the proposal, and stating that they had received from Gabriela Zachrisson the points that FEGUA would negotiate at the next meeting with FVG, and that FEGUA agreed to do whatever was in the best interests of the State).

270. On 24 August 2006, FEGUA presented FVG with a proposal designed to cure the defects of Contract 143/158.⁶⁸⁶ Although Claimant has referred to this offer as a bad-faith, “take it or leave it” offer,⁶⁸⁷ because it required that FVG “surrender railway sections yet to be restored,”⁶⁸⁸ this condition required nothing more than Claimant’s bargained-for obligations under Contract 402.⁶⁸⁹ In relevant part, Contract 402 provides:

*In the event that the USUFRUCTARY fails to restore the railway and fails to render cargo transportation services under the terms of sections two, three, four, five, and six of the THIRTEENTH CLAUSE hereof, the Usufructary shall surrender to FEGUA the real property where the railway yet to be restored is located, and any such property shall no longer be subject to this usufruct.*⁶⁹⁰

271. Moreover, while the Government attempted to negotiate in good faith, and even suspended conditionally the *Lesivo* Declaration,⁶⁹¹ Claimant made only minimal concessions, failed to provide information regarding a concrete plan for complying with its plan for restoration, and in the end even refused to negotiate a new agreement that would cure the causes of *lesividad*, thereby rendering further negotiations futile.⁶⁹²

272. In addition to bearing responsibility for squandering its opportunity to forestall the *lesividad* process by constructive negotiations, Claimant is also responsible for unilaterally publishing statements that prejudged the result of the independent judicial review of Contract 143/158 before it even began, and thereby for discouraging its own investors from maintaining

⁶⁸⁶ See Statement of A. Zosel, ¶ 18; Statement of J. Berdúo, ¶¶ 32, 34; see also Memorial on the Merits, ¶ 71.

⁶⁸⁷ Memorial on the Merits, ¶ 73.

⁶⁸⁸ Memorial on the Merits, ¶ 71.

⁶⁸⁹ Statement of A. Porras, ¶ 10; Second Statement of A. Gramajo, ¶¶ 30-31.

⁶⁹⁰ **Ex. C-22**, 1997-11-25, Contract 402 Cl. 16 (III) (emphasis added).

⁶⁹¹ Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

⁶⁹² See **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48; Statement of R. Aitkenhead, ¶ 11.

their contracts.⁶⁹³ Many of Claimant’s suppliers attributed their decision not to continue doing business with FVG to these statements in the media.⁶⁹⁴ By contrast, representatives of Guatemala, who remained interested in negotiating a settlement plan to facilitate the rehabilitation and operation of the railroad, agreed not to generate more hype from the media,⁶⁹⁵ and did not publish similar false statements disparaging the continuing viability of FVG.

273. Thus, to the extent Claimant suffered any damages or lost business as a result of the *Lesivo* Declaration, it was as a result of its own misguided public relations strategy, and without any encouragement or help from Guatemala. In essence, Claimant created a self-fulfilling prophecy by repeatedly informing the country and its investors that it was a ““dead man walking,”” and risky business partner.⁶⁹⁶

(iii) Claimant’s Alleged Expectations Were Unreasonable

274. A claimant’s potential recovery under CAFTA for its investment-backed expectations is limited to those expectations that can be considered objectively “reasonable.”⁶⁹⁷ In this case, Claimant may not recover based on the *Lesivo* Declaration’s alleged interference with the investment, because Claimant’s alleged expectations with respect to Contract 143/158 were not reasonable. This section first discusses the meaning of “reasonable” expectations under CAFTA and customary international law, and then proceeds to explain that, in light of the domestic law applicable to Claimant’s investment, and the absence of any specific representations made by Guatemala to the contrary, Claimant’s alleged expectations with respect to Contract 143/158 were unreasonable. This section also demonstrates that, as the

⁶⁹³ See above Section III.K.

⁶⁹⁴ See, e.g., **Ex. C-34**, 2006-9-13, Letter to FVG from Aimar, S.A.; **Ex. C-35(a)**, 2006-8-29, Letter to FVG from MAQCISA; **Ex. C-35(b)**, 2006-9-4, Letter to FVG from ENASA; **Ex. C-35(c)**, 2006-9-7, Letter to FVG from ALTRACSA; **Ex. C-35(d)**, 2006-9-11, Letter to FVG from Banco de la República; **Ex. C-35(e)**, 2006-9-12, Letter to FVG from INDUEX, S.A.; **Ex. C-35(f)**, 2006-10-10, Letter to FVG from REINTER.

⁶⁹⁵ **Ex. R-36**, 2006-09-08, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

⁶⁹⁶ Memorial on the Merits, ¶ 114.

⁶⁹⁷ See **Ex. RL-61**, CAFTA Annex 10-C, ¶ 4.

Lesivo Declaration is merely the initiation of a judicial proceeding based on laws that were in place before Claimant made its investment, it did not interfere with Claimant’s only possible “reasonable investment-backed expectation;”⁶⁹⁸ namely, that Guatemala would consistently and faithfully apply its laws.

275. The requirement in Annex 10–C of CAFTA that expectations be “reasonable”, is an accepted standard under customary international law.⁶⁹⁹ For example, the *National Grid*, tribunal stated: “[T]he prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertakings or representations by the host State upon which the investor has reasonably relied.”⁷⁰⁰ The tribunal in *Parkerings-Compagniet A.S. v. Lithuania* (“*Parkerings*”)⁷⁰¹ agreed, explaining that it is not *any* subjective expectation that is entitled to protection, but rather only those that are *legitimate* and reasonable:

In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its *legitimate* expectations provided it exercised due diligence and that its *legitimate expectations were reasonable* in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.⁷⁰²

⁶⁹⁸ **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4.

⁶⁹⁹ See, e.g., **Ex. RL–111**, *Metalclad Corp v. Mexico*, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1 (Award) 30 August 2000 (Lauterpacht, Civiletti, Siqueiros), ¶ 103 (“*Metalclad Award*”) (“Expropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or *reasonably-to-be-expected* economical benefit of property even if not necessarily to the obvious benefit of the host State.” (emphasis added)).

⁷⁰⁰ **Ex. RL–115**, *National Grid Award*, ¶ 152 (quoting JAN PAULSSON AND ZACHARY DOUGLAS, *INDIRECT EXPROPRIATION IN INVESTMENT TREATY ARBITRATIONS* (2004)).

⁷⁰¹ **Ex. RL–120**, *Parkerings-Compagniet A.S. v. Lithuania*, ICSID Case No. ARB/05/8 (Award on Jurisdiction and Merits) 14 August 2007 (Lévy, Lew, Lalonde) (“*Parkerings Award*”).

⁷⁰² **Ex. RL–120**, *Parkerings Award*, ¶ 333 (emphasis added).

276. Similar to the other elements of indirect expropriation under CAFTA, an investor's reasonable expectations must be considered in light of the specific facts of the case.⁷⁰³ In determining whether a particular expectation is "reasonable," tribunals consider an investor's duty to investigate into the laws of the host State, its prior experience within the host State, and the existence (or lack of existence) of specific representations by officials of the host State. Based on the facts that were known or which should have been known to Claimant at the time of its investment, none of its claimed expectations in this case regarding Contract 143/158 were objectively reasonable.

277. First, an investor is required to "take responsibility for meeting in full the requirements of local law; ignorance of the law being no defence."⁷⁰⁴ In many cases, including those in which the claimant failed to investigate host State law, arbitral tribunals have declined to find a breach of the expropriation standard if the claimant somehow contributed to its own losses.⁷⁰⁵ Explaining the balance in favor of respondent States in cases involving an investor's legitimate expectations, L. Yves Fortier and Stephen L. Drymer stated: "When it comes to understanding precisely when and how State conduct that interferes with an investment will be found to comprise an expropriation, the foreign investor would be wise to heed the credo: '*caveat investor.*'"⁷⁰⁶

⁷⁰³ See **Ex. RL-61**, CAFTA Annex 10-C, ¶ 4.

⁷⁰⁴ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.140 (discussing **Ex. RL-104**, *International Thunderbird Award*).

⁷⁰⁵ See **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.140 (citing as examples **Ex. RL-113**, *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No ARB/01/7 (Award) 2004 (Rigo Sureda, Lalonde, Oreamuno Blanco) ("*MTD Award*"); **Ex. RL-108**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No ARB/97/7, IIC 86 (Award) 2000 (confirmed by the tribunal in *Waste Management II*); **Ex. RL-104**, *International Thunderbird Award*).

⁷⁰⁶ **Ex. RL-149**, L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REVIEW IFLJ 293, 327 (2004) ("Fortier and Drymer, *Indirect Expropriation in the Law of International Investment*"); see also **Ex. RL-104**, *International Thunderbird Award*.

278. One of the reasons for this warning is that by choosing to invest in a particular host State, the investor has implicitly accepted the laws of that State. The investor's expectations are shaped by this acceptance:

[T]he investor must take the conditions of the host State as he finds them. *He cannot make a subsequent complaint if his investment fails merely because of laws, policies or practices which were in place at the time of investment, and which were, or ought to have been, well known to him before making the investment.*⁷⁰⁷

279. The investor may only reasonably expect the "consistent application"⁷⁰⁸ of the host State's laws and regulations; "an investor does not have the right to a modification of the laws of the host country."⁷⁰⁹ Moreover, as the tribunal in *LG&E Energy Corporation and Others v. Argentina (LG&E)* explained, "the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns."⁷¹⁰ Investment treaty arbitration, and "[i]nvestment protection [are] not an insurance policy and international tribunals have often reminded investors that they bear the normal risks associated with conducting a business."⁷¹¹

280. In addition to examining the host State law implicitly or explicitly accepted by an investor, tribunals determining an investor's reasonable expectations have also considered whether the respondent State made any specific representations.⁷¹² For example, the *National*

⁷⁰⁷ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.107 (citing *The Oscar Chinn Case* (1934) PCIJ Rep Series A/B No. 63)("[I]n considering the legitimate expectations of investors, tribunals are able to focus on the legal situation of the host country, reconciling the proposition that *States have the right to set their 'own rules of property which the foreigner accepts when investing'* and 'the notion that expectations deserve more protection as they are increasingly backed by an investment.'" (emphasis added)); see also **Ex. RL-147**, R. Dolzer, *Indirect Expropriations: New Developments?* (2002) 11 NYU ENVIRONMENTAL LAW JOURNAL 64, 78-79.

⁷⁰⁸ See **Ex. RL-113**, *MTD Award*, ¶ 209.

⁷⁰⁹ See **Ex. RL-113**, *MTD Award*, ¶ 214.

⁷¹⁰ **Ex. RL-106**, *LG&E Award*, ¶ 130.

⁷¹¹ **Ex. RL-113**, *MTD Award*, ¶ 178; see also **Ex. RL-149**, Fortier and Drymer, *Indirect Expropriation in the Law of International Investment*, p. 307.

⁷¹² See **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105.

Grid tribunal explained that “the prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertakings or representations by the host State upon which the investor has reasonably relied.”⁷¹³ Similarly, the *Waste Management II* tribunal stated that “[i]n applying [the expropriation] standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”⁷¹⁴

281. Thus, a tribunal may accord weight to an investor’s expectations when they are reasonable in light of domestic law, or based upon specific representations made to the investor by representatives of the Government. Applying these factors does not, however, advance Claimant’s position in this case. Considering Claimant’s duty to investigate Guatemalan law when making its investment, its prior experience with public concessions in Guatemala, and the lack of any contrary representations about Guatemalan law by representatives of Guatemala, Claimant’s expectations regarding Contract 143/158 were simply unreasonable. Specifically, Claimant both knew and should have known that its purported expectation that Contract 143/158 had been “approved in accordance with Guatemalan law,” when it was not the product of a public bid⁷¹⁵ and was never signed and approved by the President and his Cabinet,⁷¹⁶ was unreasonable. Additionally, based on Guatemalan law,

⁷¹³ **Ex. RL–115**, *National Grid Award*, ¶ 152 (quoting Jan Paulsson and Zachary Douglas, *INDIRECT EXPROPRIATION IN INVESTMENT TREATY ARBITRATIONS* (2004)).

⁷¹⁴ **Ex. RL–136**, *Waste Management II Award*, ¶ 98.

⁷¹⁵ See **Ex. R–15**, 2005-08-01, Attorney General’s Office Opinion 205–2005 (explaining that the bidding process for Contract 41 produced no valid contract, and that Contract 143 could not be based upon the bidding process which led to Contract 41 in part because the contracts were four years apart and the same conditions did not exist at the time, and also because Contract 41 itself never received the required approval via *Acuerdo Gubernativo*); see also Expert Report of J.L. Aguilar, ¶¶ 110–28 (affirming, upon an independent review of the law and facts of this case, that Contract 143/158 was not a valid contract because it was not produced as a result of a public bid, and was not approved via *Acuerdo Gubernativo*).

⁷¹⁶ See Expert Report of J.L. Aguilar, ¶¶ 97, 126, 128; Statement of M. Cifuentes, ¶ 12; **Ex. R–10**, 2004-11-24, FEGUA Finance Department Opinion 123–2004. This requirement was made clear to Claimant on several occasions, and was incorporated into the bidding rules for each of the contracts entered into by Claimant and FEGUA. See **Ex. R–2**, 1997-11, Bidding Rules for Contract 41, § 6.4; **Ex. R–1**, 1997-02-14, Bidding Rules for Contract 402, § 3.6.4; see also **Ex. R–9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting from the Ministry of Communications the “official and formal acknowledgment” of Contract 143/158).

Claimant's experience, and Guatemala's representations, Claimant could have no reasonable expectation that its investment would not be subject to the supervening control of the Executive through the *lesividad* process.

282. As was made clear to Claimant during the bidding process for Contracts 402 and 41, the existence of a public bid is an *essential element* of Guatemalan Government contracts.⁷¹⁷ For each of these contracts, Guatemala undertook the same process: Guatemala issued a request for a public bid,⁷¹⁸ accepted proposals,⁷¹⁹ met to consider the proposals,⁷²⁰ and awarded the contract.⁷²¹ As Claimant acknowledged, this procedure was followed even when only one company submitted a bid proposal.⁷²² Claimant's contention—that “the integrated structure of the Usufruct Contracts makes *ridiculous* the contention that another round of public

⁷¹⁷ See Expert Report of J.L. Aguilar, ¶¶ 93–99. .

⁷¹⁸ See **Ex. C–3**, 1997-02-13 and 1997-02-21 Notices of “International Public Bidding Contract of Onerous Usufruct of Railroad Transportation in Guatemala;” **Ex. C–17**, 1997-11, Guatemala's Separate Public Bid Request for Guatemala's Rail Equipment Usufruct (Contract 41); see also Memorial on the Merits, ¶¶ 17, 23 (discussing the public bidding process for Contracts 402 and 41).

⁷¹⁹ **Ex. R–55**, 1997-05-15, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R–58**, 1997-06-04, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R–62**, 1997-12-11, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41); **Ex. R–63**, 1997-12-16, Minutes de la Reunión de la Junta de Licitación: Equipo Ferroviario; see also **Ex. C–15**, FVG Business Plan, Envelope A: Technical Offer (Contract 402); **Ex. C–17**, FVG's Offer for Contract 41.

⁷²⁰ **Ex. R–55**, 1997-05-15, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R–58**, 1997-06-04, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R–62**, 1997-12-11, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41); **Ex. R–63**, 1997-12-16, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41).

⁷²¹ See **Ex. R–57**, 1997-06-05, Oficio No. 001–97, Letter to Mr. Cabrera (Agenda 2000) from the Bid Selection Committee; **Ex. R–56**, 1997-06-05, Oficio No. 002–97, Letter to R. Calvo (FVG) from the Bid Selection Committee; **Ex. C–19**, 1997-12-16, Guatemala's Award of Rail Equipment Usufruct to FVG.

⁷²² Memorial on the Merits, ¶ 23 (“Per the terms of the Government's request for proposal [*sic*], FVG submitted its bid proposal [for what would become Contract 41] on December 11, 1997. *There were no other bids submitted.*” (emphasis added)). Additionally, although two bids were submitted in response to the request for proposals for the right-of-way usufruct (Contract 402), Claimant's bid was the only proposal considered to be “responsive.” Memorial on the Merits, ¶ 22 (citing First Statement of H. Posner, ¶ 9); see also **Ex. R–183**, Score Sheet of the Bid Selection Committee for Contract 41.

bidding”⁷²³ was necessary—is simply unsustainable; Claimant knew of and acquiesced to the public bid requirement in attempting to execute Contract 41, even though, by its supposed understanding, the railway equipment contemplated therein was “an essential component of the public bid on the right of way usufruct.”⁷²⁴ Indeed, Claimant has participated in a public bid for *each* of the contracts it entered into with Guatemala, regardless of its relationship to Contract 402. Accordingly, after having complied with the bidding requirement for each of the contracts it entered into with Guatemala, regardless of whether the subject matter was interrelated or whether it submitted the only bid, Claimant could not have “reasonably expected” that no similar public bid was required for Contract 143/158.

283. In addition to having both actual and constructive knowledge of the requirement under Guatemalan law of a public bid, Claimant was aware of the requirement that each contract be approved by the President and his Cabinet via *Acuerdo Gubernativo*. Claimant was specifically informed of this requirement, as it was part of the procedure followed for both Contracts 402⁷²⁵ and 41.⁷²⁶

284. Claimant has argued that “for *nine years* prior to the Lesivo Resolution, from 1997 until 2006, Guatemala consistently represented to RDC that the Usufruct award and Usufruct Contracts—including deed 143—were perfectly legal and proper”⁷²⁷ and that “there was never any serious question as to their legitimacy under Guatemalan law.”⁷²⁸ But this is patently untrue. The assertion is especially meritless in light of Claimant’s agreement that Contract 41 “was never formally approved by Government Resolution,”⁷²⁹ and needed to be replaced.

⁷²³ Memorial on the Merits, ¶ 108 (emphasis added).

⁷²⁴ Memorial on the Merits, ¶ 80.

⁷²⁵ See **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 3.6.4.

⁷²⁶ See **Ex. R-2**, Bidding Rules for Contract 41, November 1997; see also **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting that the Ministry of Communications officially approve Contract 143/158).

⁷²⁷ Memorial on the Merits, ¶ 116 (emphasis in original).

⁷²⁸ Memorial on the Merits, ¶ 116.

⁷²⁹ Memorial on the Merits, ¶ 25.

285. In a series of letters exchanged by the parties between 1999 and 2002,⁷³⁰ and in two rental agreements for the use of railway equipment signed in 2003,⁷³¹ Claimant recognized expressly that Contract 41 had *not* entered into force due to its lack of proper approval. And it did so in the rental agreements that were executed a mere *two weeks* before Contract 143/158 was executed. In one such letter, Mr. Renato Fernández requested that the temporary authorization to use railway equipment, that had been granted on 12 April 1999, remain in force, and stated explicitly that the “reason why [FVG was] requesting this authorization [was because Contract 41 was] still pending approval under the respective Executive Resolution.”⁷³² The other letters and contracts, which similarly acknowledge that the temporary agreements were necessary because Contract 41 had not been approved via *Acuerdo Gubernativo*, demonstrate that the parties did *not* treat Contract 41 as if it had entered into force. In fact, the opposite is true; these letters and agreements granted temporary permission for the use of the railway equipment expressly because Contract 41 itself had no legal effect.⁷³³

286. By March of 2004, only seven months after Contract 143 was signed⁷³⁴ (and only five months after Contract 158, which modified Contract 143, was signed),⁷³⁵ Claimant, through FVG, was already exchanging draft agreements with FEGUA to modify the illegal Contract

⁷³⁰ See **Ex. R-41**, 2000-02-16, Oficio No. GG-020-2000, Letter to A. Castillo from R. Ravelo; **Ex. R-197**, 1999-04-12, Oficio No. 076-99, Letter to R. Ravelo from A. Castillo; **Ex. R-196**, 1999-04-09, Oficio No. GG-114-99, Letter to A. Porras from R. Ravelo; **Ex. R-195**, Oficio No. 023-2000, Letter to R. Ravelo from A. Porras; **Ex. R-198**, 2002-08-22, Oficio No. 167-2002, Letter to J. Senn from R. Minera; **Ex. R-42**, 2002-10-09, Oficio No. 197-2002, Letter to J. Senn from R. Minera; see *also* Second Statement of A. Gramajo, ¶¶ 4-5.

⁷³¹ See **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement No. 5, Lease Agreement Between FEGUA and FVG for the Use of Railway Equipment.

⁷³² **Ex. R-41**, 2000-02-16, Oficio No. GG-020-2000, Letter to A. Castillo from R. Ravelo.

⁷³³ See **Ex. R-199**, 2003-08-13, Lease Agreement for Use of Railway Equipment No. 03; **Ex. R-66**, 2003-08-13, Lease Agreement No. 5, Lease Agreement Between FEGUA and FVG for the Use of Railway Equipment; see *also* Second Statement of A. Gramajo, ¶ 4.

⁷³⁴ **Ex. R-5**, 2003-08-28, Contract 143.

⁷³⁵ **Ex. R-6**, 2003-10-07, Contract 158.

143/158.⁷³⁶ In April of 2004, just one month later, in his first interaction with FVG as the newly-appointed Overseer of FEGUA, Dr. Gramajo expressly notified Claimant of some of Contract 143/158's legal defects via a legal opinion that noted that they had to be remedied.⁷³⁷

287. Hence, rather than endorse a contract which was plagued with illegalities, Guatemala explained that Contract 143/158 suffered from fatal insufficiencies. From this point on, Guatemala consistently represented its intention to cure the defects of Contract 143/158, or, if this proved to be impossible, to proceed with the *lesividad* process before the expiration of the three-year prescription period.⁷³⁸

288. Claimant not only was notified of Contract 143/158's legal defects,⁷³⁹ but also agreed that they existed, and negotiated with Guatemala to cure them. In November of 2004, for example, FVG's General Manager, Mr. Jorge Senn, sent a letter to the Vice-Minister of Communications requesting the "official and formal acknowledgment" of Contract 143/158.⁷⁴⁰ In addition, from March of 2004 to the first several months in 2005, Claimant negotiated with FEGUA to cure the illegalities in Contract 143.⁷⁴¹ Based on Guatemala's clear statements about the illegalities of the contract, and Claimant's own contemporaneous response to those statements, it is apparent that Claimant could have no reasonable expectation that Contract 143 to the contrary was "perfectly legal and proper."⁷⁴²

⁷³⁶ See above Section III.E.; First Statement of A. Gramajo, ¶ 20; Second Statement of A. Gramajo ¶ 35; **Ex. R-80**, 2004-04-03, Correspondence and Draft Contract Re: Modification of Contract 143/158 to Cure Illegalities (see e.g., cl. 6 of Draft Contract); **Ex. R-80**, 2004-04-03, Correspondence and Draft Agreement Re: Amendment of Contract 143/158 to Cure Illegalities.

⁷³⁷ See First Statement of A. Gramajo, ¶ 11 (discussing the letter to J. Senn, dated 21 April 2004, which included the legal department's opinion regarding Contract 143/158's defects, and notified Claimant of these illegalities); see also **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

⁷³⁸ See above at Section III.I. **Error! Reference source not found.** (describing the High Commission meetings and the temporary suspension of the *Lesivo* Declaration).

⁷³⁹ See **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo, attaching FEGUA Opinion 47-2004.

⁷⁴⁰ **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn.

⁷⁴¹ See above Section III.E.

⁷⁴² Memorial on the Merits, ¶ 116.

289. Even if Guatemala had *not* so clearly notified Claimant that Contract 143/158 was defective and that Guatemala was contemplating initiating *lesividad* proceedings, the *Lesivo* Declaration still would not have interfered with Claimant’s reasonable expectations. As stated above, an investor may only reasonably expect the “consistent application”⁷⁴³ of the host State’s laws and regulations; it may not complain, therefore, if the host State acts in accordance with a pre-existing law.⁷⁴⁴ That is especially the case where, as here, Claimant, as a condition to participating in the public bids that resulted in the Usufruct Contracts, agreed that it was “subject to the laws of the Republic of Guatemala”⁷⁴⁵ including necessarily the *lesividad* law. By issuing the *Lesivo* Declaration within the three-year prescription period required under Article 20 of the *Ley De Lo Contencioso Administrativo*, Guatemala faithfully applied the law. Claimant’s reliance on *ADC Affiliate Ltd. v. Hungary* (“ADC”)⁷⁴⁶ to suggest the contrary is misplaced. Claimant seemingly invokes *ADC* in support of an argument that Claimant reasonably relied on the legality of Contract 143/158 and that Guatemala was somehow time-barred from contesting this legality.⁷⁴⁷

290. Claimant neglects to mention that: (1) the language it cites did not come from an interpretation of reasonable expectations, or even of expropriation or fair and equitable treatment claims;⁷⁴⁸ and (2) in reaching its decision that Hungary was time-barred from asserting a defense of invalidity of the lease based on formation defects, the *ADC* tribunal based its decision upon the fact that the validity argument had not been made within the

⁷⁴³ See **Ex. RL-113**, *MTD Award*, ¶ 209.

⁷⁴⁴ See **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105.

⁷⁴⁵ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 3.1.4; **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 3.1.4.

⁷⁴⁶ **Ex. RL-77**, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award) 2 October 2006 (Brower, Van den Berg, Kaplan) (“*ADC Award*”).

⁷⁴⁷ Memorial on the Merits, ¶ 117.

⁷⁴⁸ See **Ex. RL-77**, *ADC Award*, ¶¶ 446–75 (discussing the validity of the lease agreement in a section titled “Miscellaneous Points Raised by the Respondent.” This section was distinct from the tribunal’s discussion of expropriation, and the one paragraph in which the tribunal considered the other claims of treaty violations and concluded they had all been breached).

country's generally-applicable statute of limitations period.⁷⁴⁹ The very paragraph of the *ADC* award cited by Claimant in the present case for the proposition that Guatemala should be time-barred from contesting the validity of Contract 143/158 explains that the reason for imposing a time-bar on the *ADC* respondent's validity argument was that Hungary failed to comply with its own regulations and assert this claim within the five-year statute of limitations period.⁷⁵⁰ In the present case, however, Guatemala has faithfully executed its duties in accordance with Article 20, and raised the issue of invalidity of Contract 143/158 within the applicable three-year statute of limitations period; the claim that Guatemala interfered with Claimant's legitimate expectations is meritless.

291. In accordance with CAFTA and customary international law, Claimant *was* entitled to expect the "consistent application"⁷⁵¹ of Guatemala's laws and regulations. As demonstrated throughout this Counter-Memorial, the *Lesivo* Declaration and subsequent actions taken pursuant thereto were dutifully executed in good faith and in accordance with Guatemalan law. Furthermore, the *Lesivo* Declaration was executed for the ultimate "public purpose;" namely, to uphold Guatemalan rule of law.⁷⁵² By its nature, the *lesividad* process acts in the public interest, seeking to determine whether a particular contract is "injurious to the State."⁷⁵³

292. Guatemala used the *lesividad* power in conformity with its normal function.⁷⁵⁴ After discovering Contract 143/158's legal defects upon a routine review,⁷⁵⁵ Guatemala notified FVG

⁷⁴⁹ **Ex. RL-77**, *ADC Award*, ¶ 456.

⁷⁵⁰ **Ex. RL-77**, *ADC Award*.

⁷⁵¹ *See Ex. RL-113*, *MTD Award*, ¶ 209.

⁷⁵² *See Ex. R-20*, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006 (all discussing the illegalities of Contract 143/158 under Guatemalan law).

⁷⁵³ **Ex. R-35**, 2006-08-11, *Acuerdo Gubernativo* No. 433-2006 Where Usufruct Contract 143 and Amendment No. 158 Were Declared *Lesivo*.

⁷⁵⁴ **Ex. RL-133**, *Tecmed Award*, ¶ 173.

of these defects⁷⁵⁶ and began a process by which four independent agencies or entities ultimately confirmed the necessity of initiating *lesividad* procedures by way of the Declaration.⁷⁵⁷ Even in this initial stage of the *lesividad* process, Guatemala acted in accordance with due process of law, affording Claimant both notice and an opportunity to be heard. Representatives of Guatemala met with Claimant on numerous occasions, attempting to reach an agreement to remedy the illegalities of the contract before the three-year prescription period had passed.⁷⁵⁸ In addition, Guatemala conditionally suspended the declaration of *lesividad* both in response to Claimant's expressed refusal to negotiate while the *lesividad* process was pending,⁷⁵⁹ and as a gesture demonstrating Guatemala's intention to negotiate a solution to Contract 143/158's defects.⁷⁶⁰

293. Based on the foregoing, it is evident that the *Lesivo* Declaration did not interfere with the alleged—or any other—legitimate expectations that Claimant had in Contract 143/158.

Footnote continued from previous page

⁷⁵⁵ See First Statement of A. Gramajo, ¶ 10 (discussing Dr. Gramajo's request, upon assuming his duties as Overseer of FEGUA, that the legal department furnish him with an opinion that analyzed the contents and scope of all contracts, including the Usufruct Contracts).

⁷⁵⁶ First Statement of A. Gramajo, ¶ 12; see also **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo, attaching FEGUA Opinion 47-2004.

⁷⁵⁷ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006.

⁷⁵⁸ See above at Section III.I. (discussing the meetings of the High Level Technical Commission); Witness Statement of M. Marroquín, ¶¶ 9-11; Witness Statement of S. Pineda, ¶¶ 13-20; Minutes from the High Level Commission Meetings: 3 April 2006 (**Ex. R-23**); 5 May 2006 (**Ex. R-26**); 10 May 2006 (**Ex. R-28**); 11 May 2006 (**Ex. R-29**).

⁷⁵⁹ Witness Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

⁷⁶⁰ Witness Statement of M. Marroquín, ¶ 12; Statement of S. Pineda, ¶ 24; Statement of J. Berdúo, ¶ 24.

c. *Acceptance Of Claimant’s Argument That The Process Of Lesividad Is Per Se An Interference With Its Rights Would Limit Guatemala’s Legitimate Exercise Of Its Regulatory Powers*

294. Claimant not only argues that the process of *lesividad* as applied is expropriatory, it also goes as far as arguing that the process itself, i.e., as a whole, is *per se* an interference with its rights. But to go this far would impermissibly limit Guatemala’s legitimate exercise of its powers as a sovereign State. The power to declare an act or contract *lesivo* is a traditional exercise of State prerogative that reinforces the public interest. Claimant’s request, in essence, is that this Tribunal declare fundamentally illegitimate a procedure designed to allow Guatemala to seek administrative judicial review of its own actions and enable it to desist from actions found by the *Contencioso Administrativo* courts to be detrimental to the public. Claimant asks that Guatemala retain the power to act, but not the ability to retreat from its prior actions, regardless of the applicable circumstances. Acceptance of Claimant’s argument would not only limit Guatemala’s *legitimate exercise* of its regulatory powers, but also upset the country’s longstanding system of checks and balances and contravene the rule of law.

295. Professor Reisman, one of Claimant’s experts, says that there are “serious questions about the essential lawfulness of the Guatemalan version of *lesión* as it is practiced within that country, whether with respect to aliens such as the foreign investor in the instant case *or with respect to Guatemalan nationals*.”⁷⁶¹ Professor Reisman’s criticisms appear to go well beyond the scope of CAFTA or the protection of foreign investors more broadly. But Professor Reisman does not explain how he arrived at his conclusions regarding the lawfulness of the *lesividad* process under Guatemalan law, as it is applied to foreign investors and nationals. He does admit, however, that he is “not an expert on Guatemalan law,” and that his conclusions are based on “[t]he Guatemalan practice of *lesión*, as it ha[d] been described to [him].”⁷⁶² It appears that whoever described the practice of *lesión* to Professor Reisman omitted the important fact that the Constitutional Court of Guatemala—the highest authority in the land on

⁷⁶¹ Expert Report of W. M. Reisman, ¶¶ 37, 46.

⁷⁶² See Expert Report of W.M. Reisman, ¶¶ 37, 42, 46.

issues of constitutionality under the Guatemalan legal system—examined the lawfulness and constitutionality of the *lesividad* process in Guatemala—years before Contract 143/158 was declared *lesivo*—and held that the process was lawful and constitutional.⁷⁶³ This decision from the Constitutional Court is discussed in more detail both in the expert report of Lic. Juan Luís Aguilar,⁷⁶⁴ and below in Section IV.B.3.

296. Dr. Mayora, Claimant’s other expert, also questions the lawfulness and constitutionality of the *lesividad* process, but, like Professor Reisman, fails to mention the Constitutional Court’s decision. Dr. Mayora is less coy about his desire to fundamentally rewrite Guatemalan law; he admits that he “do[es] not maintain here that the power is unconstitutional, but that on careful examination it *should be* declared unconstitutional.”⁷⁶⁵ Taking a cue from Dr. Mayora, who found it “unnecessary” to examine the *application* of the *lesividad* procedure to Claimant and its investment,⁷⁶⁶ Claimant attacks the procedure as a whole, arguing that “the *lesivo* procedure in Guatemala is a procedure that, in both form and practice, is utterly lacking in due process.”⁷⁶⁷

297. Even setting aside that Claimant’s argument ignores the “case-by-case, fact-based” analysis required for CAFTA’s expropriation inquiry,⁷⁶⁸ Claimant’s challenge of the *lesividad* process *as such* cannot be accepted, because it contradicts the deference to a State’s use of its “police powers” under customary international law. Claimant’s argument is an attack upon Guatemala’s ability as a sovereign to legitimately exercise its regulatory powers. To accept Claimant’s argument would preclude Guatemala from enforcing its own law, from ever again initiating the *lesividad* process to determine the legality of public contracts with either foreigners or nationals, and from effectively exercising its police powers in favor of the public

⁷⁶³ **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

⁷⁶⁴ See Expert Report of J.L. Aguilar, ¶ 47.

⁷⁶⁵ Expert Report of E. Mayora, ¶ 9.8 (italic emphasis added; underlining in original).

⁷⁶⁶ See Expert Report of E. Mayora, ¶ 9.2.

⁷⁶⁷ Memorial on the Merits, ¶ 111.

⁷⁶⁸ See **Ex. RL-61**, CAFTA Annex 10-C, ¶ 4.

interest.⁷⁶⁹ As explained below, this assault on Guatemala’s basic right to implement a *lesividad* process is serious overreaching, running counter to the considerable deference accorded to States’ use of police powers under customary international law, since the *lesividad* process comes within the definition of a legitimately-exercised police power. Acceptance of Claimant’s argument, which attacks the *lesividad* process as such rather than simply as applied, would effectively prevent Guatemala from exercising this legitimate power.

298. Annex 10–C of CAFTA codifies the extensive deference customary international law accords to a State’s exercise of its police powers.⁷⁷⁰ Annex 10–C states: “Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, *do not constitute indirect expropriations.*”⁷⁷¹ This provision accepts the customary international law standard expressed in a number of cases that “State measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation.”⁷⁷²

299. The tribunal in *Técnicas Medioambientales Tecmed S.A. v. Mexico* (“*Tecmed*”) stated: “[t]he principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.”⁷⁷³ The police power, which is “[t]he inherent and plenary power of a sovereign to make all laws necessary and

⁷⁶⁹ Claimant argues that Guatemala should not be permitted to initiate the *lesividad* process, either against aliens or nationals. See Expert Report of W. M. Reisman, ¶ 46.

⁷⁷⁰ See **Ex. RL–126**, *S.D. Myers Inc. v. Canada*, Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (First Partial Award and Separate Opinion) 13 November 2000 (Schwartz, Chiasson, Hunter), ¶ 263 (“*S.D. Myers First Partial Award*”) (discussing the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”).

⁷⁷¹ **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4(b) (emphasis added).

⁷⁷² **Ex. RL–140**, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (7th ed., 2008); see also **Ex. RL–89**, *Chemtura Corporation v. Government of Canada*, UNCITRAL Arbitration Rules (Award) 2 August 2010 (Kaufmann-Kohler, Brower, Crawford), ¶¶ 266–67 (“*Chemtura Award*”).

⁷⁷³ **Ex. RL–133**, *Tecmed Award*, ¶ 119.

proper to preserve the public security, order, health, morality, and justice,”⁷⁷⁴ is “a *fundamental power essential to government*, and [] cannot be surrendered by the legislature or irrevocably transferred away from government.”⁷⁷⁵

300. Claimant argues that the process as a whole interferes with property rights, and must accordingly be considered expropriatory *per se*. To accept this contention would be to deny Guatemala “fundamental power[s] essential to [its] government;” namely the power to determine whether a particular course of action is detrimental to the State, and, if so, the power to withdraw from that course of action.⁷⁷⁶ Claimant does not argue that the *lesividad* process constitutes an expropriation *as applied*, but instead argues that the process as a whole interferes with property rights, and must accordingly be considered expropriatory *per se*. This argument has footing neither in CAFTA nor in customary international law. To borrow a line from NAFTA’s fair and equitable treatment jurisprudence:

International law does not appraise the content of a regulatory programme extant before an investor decides to commit. The inquiry is whether the State abided by or implemented that programme. It is in this sense that a government’s failure to implement or abide by its own law in a manner adversely

⁷⁷⁴ **Ex. RL-26**, BLACK’S LAW DICTIONARY (8th ed. 2004).

⁷⁷⁵ **Ex. RL-26**, BLACK’S LAW DICTIONARY (8th ed. 2004); *see also Ex. RL-120, Parkerings Award*, ¶ 332 (“It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion”).

⁷⁷⁶ As Lic. Aguilar explains in his expert report, the *lesividad* process is not exclusive to the Guatemala legal system; it also exists in Spain and other jurisdictions like France, Mexico, Costa Rica, Ecuador, and Argentina. The case of Spain that Dr. Mayora cites in his first report, far from evidencing deficiencies in the Guatemalan legal system as it relates to *lesividad*, underscores its strength. While in Spain the public administration can declare the nullity of its own acts, in Guatemala, as recognized by its Constitutional Court, the Administration cannot do the same. The power to declare the nullity of administrative acts exclusively falls on the courts of justice, which, after affording the required notice and opportunity to be heard, examine the legality of the *lesivo* declaration. That is the reason why in Spain, the administration offers an opportunity to be heard before the declaration of *lesividad* is issued by the Executive, while it does not happen in Guatemala as the *lesivo* declaration is an internal government matter that does not affect the contractual rights of the private party, who is accorded due process and an opportunity to challenge the administration’s determination before the courts. Expert Report of J.L. Aguilar, ¶¶ 42, 48.

affecting a foreign investor may but will not necessarily lead to a violation⁷⁷⁷

301. Although the inquiry here *cannot* appropriately appraise the content of *lesividad* as a process,⁷⁷⁸ *lesividad* is, nevertheless, a reasonable process, by which Guatemala’s contractual partner—whether Guatemalan or foreign—is afforded due process and an opportunity to contest the initial *lesivo* declaration before the country’s *Contencioso Administrativo* courts, as well as an opportunity to appeal an unfavorable decision to the Supreme Court of Guatemala, and pursue an *amparo* proceeding before the Constitutional Court.⁷⁷⁹ The *lesividad* procedure under Guatemalan law is a normal exercise of State sovereignty practiced by countries worldwide.⁷⁸⁰ Like its counterparts in Spain, France,⁷⁸⁰ Mexico, Costa Rica, Ecuador, and Argentina, Guatemala’s *lesividad* procedure is a mechanism by which the Government can ensure that its contracts are validly formed, and in the continuing interest of the State.⁷⁸¹ As explained above, both CAFTA and customary international law afford States considerable deference to act “in the public interest.”⁷⁸² *Lesividad* proceedings permit Guatemala to refrain from taking action that is contrary, or “injurious,” to public interest.

302. Guatemalan law imposes personal responsibility on the President if he has knowledge of a contract’s defects, and fails to initiate *lesividad* proceedings by way of an *Acuerdo Gubernativo* issued within three years of the effective date of the contract.⁷⁸³ The President may initiate *lesividad* proceedings only upon sufficient legal grounds which demonstrate that

⁷⁷⁷ **Ex. RL-100**, *GAMI Investments, Inc v. Mexico*, Ad hoc—UNCITRAL Arbitration Rules; IIC 109 (Final Award) 15 November 2004 (Paulsson, Reisman, Lacarte Muró), ¶ 91 (“*GAMI Award*”).

⁷⁷⁸ **Ex. RL-100**, *GAMI Award*, ¶ 91.

⁷⁷⁹ See Expert Report of J.L. Aguilar, ¶¶ 55–61; **Ex. RL-45**, Constitution of the Republic of Guatemala, Article 221; **Ex. RL-173**, Decree Number 1-86, Law Governing Constitutional Protection Claims, Articles 1-10(h), 116.

⁷⁸⁰ See Expert Report of J.L. Aguilar, ¶¶ 42–48 (discussing the power to declare an act or contract *lesivo* as a traditional State prerogative).

⁷⁸¹ Expert Report of J.L. Aguilar, ¶¶ 42, 48.

⁷⁸² See above at notes 770–77 and accompanying text.

⁷⁸³ See Expert Report of J.L. Aguilar, ¶¶ 37, 72; see also **Ex. RL-45**, Constitution of the Republic of Guatemala, Articles 153-154; **Ex. RL-50**, Executive Decree No. 114-97, Executive Branch Law, Article 16.

the contract in question is harmful or injurious to the interests of Guatemala.⁷⁸⁴ Article 20 of the *Ley De Lo Contencioso Administrativo* provides that only acts or resolutions that have become final can be the object of an action before the *Contencioso Administrativo* court.⁷⁸⁵ Thus, should the parties in the present case have reached an agreement to cure Contract 143/158's illegalities within the prescription period, the *Lesivo* Declaration would not have become final and could have been vacated.

303. If the parties fail to reach an agreement within the three-year statute of limitations, and once a declaration of *lesividad* has been signed by the President and Ministers, it is published in Guatemala's Official Gazette, serving as notice that the Executive, through the Attorney General, will request the *Contencioso Administrativo* court to determine officially whether the contract is *lesivo*.⁷⁸⁶ The declaration of *lesividad*, on its own, is devoid of any legal effect; only the eventual decision of the *Contencioso Administrativo* court determines whether the contract must be nullified due to illegalities, formation defects, or because it is injurious to the interests of Guatemala.⁷⁸⁷ Throughout the *Contencioso Administrativo* proceedings, both parties are given an opportunity to be heard.⁷⁸⁸ Similar to other administrative proceedings conducted worldwide in which a State is a party, the *Contencioso Administrativo* court does not, as Claimant mistakenly argues, simply stamp its seal of approval upon the Government's case as

⁷⁸⁴ Expert Report of J.L. Aguilar, ¶¶ 36–37.

⁷⁸⁵ See **Ex. RL-49**, Contentious Administrative Law, Executive Decree 119-96, Article 20; Expert Report of J.L. Aguilar, ¶ 28.

⁷⁸⁶ Expert Report of J.L. Aguilar, ¶¶ 36(g), 38–39.

⁷⁸⁷ Expert Report of J.L. Aguilar, ¶¶ 2(h), 32, 129. See **Ex. RL-49**, 1996-11-21, Articles 19 and 20 of the *Ley De Lo Contencioso Administrativo*, and **Ex. RL-70**, Article 221 of the Guatemalan Constitution, 1985; see also **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4, concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158 (“*The mere declaration of lesividad denounced as challenged act, by itself, cannot cause the supposed offences, as it corresponds to the court of the Contencioso Administrativo to resolve on the matter.*” (emphasis added; unofficial translation)); **Ex. RL-172**, Decision of the Constitutional Court of Guatemala File 6108-2004 (“*The lesivo declaration does not carry immediate material effects that can prejudice the rights of the individuals involved and only seeks, through a proceeding followed with all the legal formalities, the legality of the acts and contracts declared lesivo*”) (emphasis added) (unofficial translation).

⁷⁸⁸ Expert Report of J.L. Aguilar, ¶¶ 51, 55.

part of “a thinly guised [*sic*] methodology for state-sponsored extortion.”⁷⁸⁹ Rather, as a governmental body sworn to uphold the laws of Guatemala,⁷⁹⁰ upon considering the arguments of both parties, the *Contencioso Administrativo* court issues its determination regarding *lesividad* based solely on law and fact.⁷⁹¹

304. As Lic. Aguilar explains, Claimant has the right and ability to appear and present its evidence and arguments before that Court, as well as the right to present submit counter-claims for an allegedly improper issuance of a *lesivo* declaration. Additionally, Claimant also has the right to appeal the decision of the *Contencioso Administrativo* court. In the present case, the Constitutional Court has specifically informed Claimant that it may present an *amparo* claim before that court, but that it must wait until a decision regarding the *lesividad* of Contract 143/158 is reached: “[T]his court appreciates that the [*Acuerdo Gubernativo* declaring Contract 143/158 *lesivo*] has not extinguished the process established in Article 19 of the *Ley De Lo Contencioso Administrativo*, by means of which a potential decision about the legality or illegality of that contract would be obtained. On occasion of such *Contencioso Administrativo* process, Claimant will be able to present before the corresponding judicial body its arguments and legal grounds on which it purports to justify the present claim. *The mere declaration of*

⁷⁸⁹ Memorial on the Merits, note 178; *see also* Memorial on the Merits, ¶ 55 (claiming that Dr. Gramajo’s request that the Attorney General’s office issue a legal opinion regarding Contract 143/158, as “an inherent message of how the Government expects its Attorney General to respond,” was part of a conspiracy by all branches of the Guatemalan government to destroy Claimant’s investment).

⁷⁹⁰ *See RL-70*, Article 203 of the Guatemalan Constitution, 1985 (describing the *Contencioso Administrativo* court’s constitutionally-mandated obligation to adjudicate the executive determination of the executive determination of *lesividad* in an independent and objective manner: “Justice is administered in accordance with the Constitution and the laws of the Republic. . . . Magistrates and judges are independent in the exercise of their functions, and are only subject to the Constitution of the Republic and the laws. Those who attack the independence of the Judiciary, in addition to being imposed the corresponding criminal sanctions, will be proscribed to exercise any public office. . . . No other authority [than the Judiciary] may intervene in the administration of justice”).

⁷⁹¹ Expert Report of J.L. Aguilar, ¶ 58–59.

*lesividad denounced as challenged act, by itself, cannot cause the supposed offences, as it corresponds to the court of the Contencioso Administrativo to resolve on the matter.”*⁷⁹²

305. To find that the mere initiation of the *lesividad* process constitutes an indirect expropriation would prevent Guatemala from exercising this non-discriminatory procedure in order to act in defense of the public interest. Furthermore, to declare the *Lesivo* Declaration inherently “expropriatory” before the *Contencioso Administrativo* courts have even completed their review would effectively prevent Guatemala from fulfilling the basic requirement of “due process,” which, as stated above, requires not that each individual step of a process itself afford “due process,” but instead, that the process as a whole afford an opportunity for any mistakes to be corrected.⁷⁹³

306. Moreover, Claimant’s contention that the *lesividad* process *per se* constitutes an indirect expropriation also contradicts the generally accepted principle that “interference by the State” is not synonymous with “expropriation.” As the tribunal in *Saluka Investments B.V. v. Czech Republic*⁷⁹⁴ explained, “the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts *general regulations* that are ‘commonly accepted as within the police power of States’ forms part of customary international law today. There is ample case law in support of this proposition.”⁷⁹⁵

307. Among the “ample case law in support of this proposition” are the decisions in *Methanex Corporation v. United States* (“*Methanex*”) and *LG&E*. Describing a permissible

⁷⁹² **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158) (emphasis added; unofficial translation).

⁷⁹³ **Ex. RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005) (emphasis added).

⁷⁹⁴ **Ex. RL-125**, *Saluka Partial Award*.

⁷⁹⁵ **Ex. RL-125**, *Saluka Partial Award*, ¶ 262 (citing **Ex. RL-112**, *Methanex Corporation v. United States*, Ad hoc—UNCITRAL Arbitration Rules (Final Award on Jurisdiction and Merits) 3 August 2005 (Rowley, Reisman, Veeder) (“*Methanex Final Award*”)); see also **Ex. RL-149**, Fortier and Drymer, *Indirect Expropriation in the Law of International Investment*, p. 298 (“In international law, a long line of authorities has established that States are not liable to pay compensation when, in the normal exercise of their police powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare”).

exercise of a State’s police power as “a non-discriminatory regulation for a public purpose,”⁷⁹⁶ the *Methanex* tribunal explained that this type of measure does not constitute expropriation:

[A]s a matter of general international law, *a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable* unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁷⁹⁷

308. For its part, the *LG&E* tribunal explained that “the State has the right to adopt measures having a social or general welfare purpose. *In such a case, the measure must be accepted without any imposition of liability . . .*”⁷⁹⁸

309. Thus, to overcome the presumption in favor of deference to the State’s exercise of its police power, a claimant must demonstrate that: (1) *as applied specifically against a particular investor*; (2) the measure was discriminatory; (3) was not for a public purpose, and (4) the investor was not afforded due process. As explained above in the context of Claimant’s legitimate expectations, Claimant has failed to demonstrate any of these elements.⁷⁹⁹

4. Even Assuming That The *Lesivo* Declaration And Subsequent Acts Interfered With Claimant’s Investment, Such Interference Was Not Substantial And Therefore Did Not Constitute Indirect Expropriation

310. Even if the Tribunal determines that the *Lesivo* Declaration interfered with Claimant’s investment, Claimant has failed to demonstrate the substantial deprivation of value required for a finding of “expropriation” under CAFTA and international law. As stated above, State interference is not in and of itself synonymous with “indirect expropriation,” either under

⁷⁹⁶ Ex. RL–112, *Methanex Final Award*, §4(3), ¶ 7.

⁷⁹⁷ Ex. RL–112, *Methanex Final Award*, §4(3), ¶ 7.

⁷⁹⁸ Ex. RL–106, *LG&E Award*, ¶ 195.

⁷⁹⁹ See above at ¶¶ 283–86.

CAFTA or customary international law.⁸⁰⁰ This notion was expressly adopted by the CAFTA Parties in Annex 10–C, which states that “*the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.*”⁸⁰¹ To hold that an indirect expropriation has taken place, CAFTA requires that a tribunal consider the “*extent to which the government action*” interferes with the claimant’s investment.⁸⁰²

311. International jurisprudence establishes a high threshold of State interference; the claimant must demonstrate that the interference amounts to the investment’s complete *destruction, or virtual annihilation.*⁸⁰³ As recognized by Claimant in its Memorial on the Merits, “*the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or measure tantamount to expropriation has taken place.*”⁸⁰⁴ To this end, the *Archer Daniels* tribunal, cited by Claimant in support of its expropriation claim, stated that “[a]n expropriation occurs if the interference is substantial and *deprives the investor of all or most of the benefits of the investment.*”⁸⁰⁵

312. The requirement of complete or substantial deprivation of value has been adopted and explained by a number of international tribunals. In *Waste Management II*, for instance, the tribunal explained that “[i]t is not the function of Article 1110 [of NAFTA] to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or *sterilising* of the enterprise.”⁸⁰⁶ Similarly, in *Sempra Energy International v. Argentine*

⁸⁰⁰ See **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4.

⁸⁰¹ **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4; see also **Ex. RL–136**, *Waste Management II Award*, ¶ 159 (“[T]he loss of benefits or expectations is *not a sufficient criterion* for an expropriation, even if it is a necessary one.” (emphasis added)).

⁸⁰² **Ex. RL–61**, CAFTA Annex 10–C, ¶ 4.

⁸⁰³ **Ex. RL–127**, *Sempra Award*, ¶ 285 (quoted by Claimant in ¶ 112 of its Memorial on the Merits); see also **Ex. RL–115**, *National Grid Award*, ¶ 149.

⁸⁰⁴ **Ex. RL–82**, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4 (Award) 21 November 2007 (Cremades, Rovine, Siqueiros), ¶ 240 (“*Archer Daniels Award*”) (emphasis added) (quoted by Claimant in ¶ 112 of its Memorial on the Merits).

⁸⁰⁵ **Ex. RL–82**, *Archer Daniels Award*, ¶ 240 (emphasis added).

⁸⁰⁶ **Ex. RL–136**, *Waste Management II Award*, ¶ 160 (emphasis added).

Republic (“*Sempra*”),⁸⁰⁷ the tribunal explained that “indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been *virtually annihilated*.”⁸⁰⁸ As another international tribunal explained, the purportedly violative State action must “affect[] the totality or a substantial part of the investment.”⁸⁰⁹ As succinctly explained by the *Vivendi II* tribunal, recalling well-established precedent:

[Where] there have been measures equivalent to expropriation . . . it is necessary to consider whether the challenged measures have or will (i) *radically deprive* Claimants of the economic use and enjoyment of its investment—*Tecmed*, (ii) *effectively neutralise* the benefit of Claimants’ property—*CME*, (iii) **deprive** the owner of the benefit and economic use of its contractual rights—*Santa Elena*; (iv) render Claimants’ property rights useless—*Starrett Housing*, or have a similar dispossession effect.⁸¹⁰

313. Many tribunals also explain that “mere restrictions” do not satisfy the requisite threshold to establish an indirect expropriation.⁸¹¹ On this point, the *Generation Ukraine* tribunal stated:

The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed

⁸⁰⁷ **Ex. RL-127**, *Sempra Award*.

⁸⁰⁸ **Ex. RL-127**, *Sempra Award*, ¶ 285.

⁸⁰⁹ **Ex. RL-87**, *Bogdanov and Others v. Moldova*, Ad Hoc—SCC Arbitration Rules; IIC 33 (Award) 22 September 2005 (Cordero Moss) (holding that a measure which affected 7 percent of the investment did not constitute an indirect expropriation); *see also* **Ex. RL-134**, *Telenor Award*, ¶¶ 64–67 (discussing generally the substantial level of interference required and stating “that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is *whether, viewed as a whole, the investment has suffered a substantial erosion of value*.” (emphasis added)).

⁸¹⁰ **Ex. RL-135**, *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Award) 20 August 2007 (Kaufmann-Kohler, Bernal Vereza, Rowley), ¶ 7.5.24 (“*Vivendi II Award*”) (emphasis added).

⁸¹¹ **Ex. RL-102**, *Glamis Gold Ltd. v. United States of America*, (Award) 8 June 2009 (Young, Caron, Hubbard), ¶ 356 (*Glamis Gold Award*) (“Mere restrictions on the property rights do not constitute takings”).

investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune.⁸¹²

314. Similarly, the *National Grid* tribunal found that no expropriation had taken place where “[t]he value of [an] investment was diminished, but not to the extent that it could be considered *worthless*.”⁸¹³

315. The tribunal in the recently-decided NAFTA case *Glamis Gold v. United States* (“*Glamis Gold*”) stated that “the foundational threshold inquiry [is] whether the property or property right was in fact taken.”⁸¹⁴ The test for this inquiry, explained the *Glamis Gold* tribunal, is whether the challenged measures “substantially impaired the investor’s economic rights, *i.e.* ownership, use or management of the business, *by rendering them useless*.”⁸¹⁵ Despite the adverse effect that the government measures in question had upon the investment in *Glamis Gold*, the tribunal ultimately held that there was no expropriation because the claimant’s investment still retained some value.⁸¹⁶

316. A similar line of reasoning was adopted by the tribunals in *Corn Products International, Inc. v. United Mexican States* (“*Corn Products*”) and *Chemtura Corporation v. Government of Canada* (“*Chemtura*”). In *Corn Products*, the tribunal explained that “[g]overnment measures which have a detrimental effect on an investor’s markets, even if they are discriminatory . . . are not expropriatory unless they have the effect of destroying the business in question.”⁸¹⁷ The *Chemtura* tribunal, for its part, declined to find that an indirect expropriation had taken place when the State measure in question affected only a small part of the overall investment; based on the evidence, the tribunal found that “the sales from lindane products were a relatively

⁸¹² Ex. RL-7, *Generation Ukraine Award*, ¶ 20.30.

⁸¹³ Ex. RL-115, *National Grid Award*, ¶ 154 (emphasis added).

⁸¹⁴ Ex. RL-102, *Glamis Gold Award*, ¶ 356.

⁸¹⁵ Ex. RL-102, *Glamis Gold Award*, ¶ 357 (emphasis added).

⁸¹⁶ Ex. RL-102, *Glamis Gold Award*, ¶¶ 535–36.

⁸¹⁷ Ex. RL-99, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1 (NAFTA) (Decision on Responsibility) 15 August 2008 (Lowenfeld, Serrano de la Vega, Greenwood), ¶ 93 (“*Corn Products Decision on Responsibility*”) (emphasis added).

small part of the overall sales of Chemtura Canada at all relevant times”⁸¹⁸ and concluded that under those circumstances, “the interference of the Respondent with Claimant’s investment cannot be deemed ‘substantial.’”⁸¹⁹

317. Thus, under CAFTA and international law, Claimant is required to demonstrate more than the mere fact that the *Lesivo* Declaration and subsequent measures taken pursuant thereto purportedly had an adverse effect upon its investment. Claimant must demonstrate that the adverse effect was of such a magnitude as to “annihilate” the investment,⁸²⁰ “radically deprive”⁸²¹ Claimant of the economic use and enjoyment of its investment, “neutralize”⁸²² the benefits, economic value of the use, enjoyment or disposition of the investor’s property, render Claimant’s property rights “useless”⁸²³ due to a “substantially complete deprivation”⁸²⁴ of the economic use and enjoyment of rights to the property, or “destroy”⁸²⁵ the business in question. In the present case, Claimant has not shown—and cannot show—that there was such an extreme effect on its investment—if there was any effect at all.

318. Additionally, CAFTA requires that Claimant submit *concrete evidence* of “the economic impact of the government action.”⁸²⁶ In light of the CAFTA Parties’ expressed understanding that “the determination of whether an action or series of actions constitutes an indirect

⁸¹⁸ Ex. RL–89, *Chemtura Award*, ¶ 263.

⁸¹⁹ Ex. RL–89, *Chemtura Award*, ¶ 263.

⁸²⁰ See Ex. RL–127, *Sempra Award*, ¶ 285.

⁸²¹ See Ex. RL–133, *Tecmed Award*.

⁸²² See Ex. RL–133, *Tecmed Award*, ¶ 116.

⁸²³ See Ex. RL–131, *Starrett Housing Corp., Starrett Systems, Inc., Starrett Housing Int’l, Inc. v. Gov’t of the Islamic Rep. of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, Case No. 24, 4 IRAN-U.S. CL. TRIB. REP. 122 (Interlocutory Award No. ITL–32–24–1, 19 December 1983).

⁸²⁴ Ex. RL–93, *Corn Products Decision on Responsibility*, ¶ 91.

⁸²⁵ Ex. RL–93, *Corn Products Decision on Responsibility*, ¶ 93.

⁸²⁶ Ex. RL–61, CAFTA Annex 10–C, ¶ 4(a).

expropriation [] requires a case-by-case, *fact-based* inquiry;”⁸²⁷ mere assertions regarding the *Lesivo* Declaration’s economic impact are insufficient.

319. As stated above in Section IV.A.3.a, Claimant has acknowledged that the most important—and lucrative—component of its investment is the right-of-way granted pursuant to Contract 402—which was not the object of the *Lesivo* Declaration.⁸²⁸ In its Memorial on the Merits, Claimant explained that the Usufruct was of little or no value to Claimant apart from the right-of-way; as its railroad operation failed to make a profit in its seven years of operation,⁸²⁹ Claimant acknowledged that its only expected source of income was from Contract 402:

RDC’s investment in the rehabilitation of the railroad was almost exclusively a benefit to Guatemala, not to RDC . . . FVG’s Business Plan was explicitly based upon its ability to make substantial profits from real estate leasing and demonstrated that the operation of the railroad, by itself, could not justify the investment . . . absent [this] expected income, there would be no investment.⁸³⁰

320. Claimant also explained that “RDC’s investment in the rehabilitation of the railroad was *wholly unconnected* to the profits FVG would have earned over the life of the Usufruct from its program to lease the right of way and adjacent real estate parcels for non-railway purposes.”⁸³¹ Because the *Lesivo* Declaration has not deprived Claimant of its rights under Contract 402, the most lucrative component of Claimant’s investment, and because the *Lesivo* Declaration applied exclusively to an aspect of the investment which was “wholly unconnected” to Claimant’s acknowledged “bread-winning” Contract, the claim of substantial interference is unsustainable.

⁸²⁷ **Ex. RL-61**, CAFTA Annex 10-C, ¶ 4 (emphasis added).

⁸²⁸ See above at Section IV.A.3.a; see also Memorial on the Merits, ¶¶ 179–81.

⁸²⁹ See Statement of S. Pineda, ¶ 15; Statement of M. Marroquín, ¶ 9; **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission’s First Meeting; see also Expert Report of P. Spiller, ¶ 52.

⁸³⁰ Memorial on the Merits, ¶¶ 180–81.

⁸³¹ Memorial on the Merits, ¶ 179 (citing Expert Report of R. MacSwain, ¶ 4.2(a); Expert Report of L. Thompson, ¶¶ 50–57) (emphasis added).

321. As outlined above, the terms used in indirect expropriation cases “convey the effect that the measures concerned must have: neutralization, radical deprivation, irretrievable loss, [or an] inability to use, enjoy or dispose of the property.”⁸³² Without affecting the only part of the investment that Claimant itself considers to be of any importance,⁸³³ the *Lesivo* Declaration could not and did not “annihilate” or “destroy” Claimant’s investment. In light of the persuasive analytical approach of the *Glamis Gold* and *Corn Products* tribunals discussed above, and because Claimant has actually earned *higher*⁸³⁴ revenues from its leasing program for the right-of-way parcels adjacent to the railway under Contract 402,⁸³⁵ the Tribunal should find that no expropriation has taken place on the grounds that the business obviously has not been “destroyed.”⁸³⁶

322. Although it makes several allegations in support of its claim that the “issuance of the *Lesivo* Resolution had an immediate, devastating impact on FVG’s ability to reasonably operate the Usufruct in a profitable manner,”⁸³⁷ each of the “facts” alleged either (1) did not take place, or (2) did not have such a severe impact upon the economic value of Claimant’s investment as to constitute indirect expropriation.⁸³⁸ It bears noting that as Claimant states in its Memorial on the Merits, it views its “investment as encompassing all of the contracts—Nos. 402, 41, 143/158 and 820—signed by FVG and FEGUA.”⁸³⁹ Pursuant to this comprehensive definition of

⁸³² **Ex. RL-115**, *National Grid Award*, ¶ 149.

⁸³³ Memorial on the Merits, ¶ 180.

⁸³⁴ Expert Report of P. Spiller, ¶ 40, n. 37.

⁸³⁵ *See, e.g.*, **Ex. R-69**, 2000-11-19, Contract No. 120 Between FVG and COBIGUA; **Ex. C-28(c)**, Texaco Easement Contract No. 16; **Ex. R-70**, 2002-02-26, Letter to R. Gutiérrez (FVG Bananera Station) from J. De Leon (FVG) Instructing and Authorizing R. Gutiérrez to Charge Rent to Squatters; **Ex. R-71**, 2002-04-03, Receipt No. 000942, Sample Receipt of Rent Paid by Squatters to FVG (Rosa López); **Ex. R-175**, Receipt from FVG to Rosa López for Rent for the Months of January and February 2002; **Ex. R-159**, 2010-02-01, Receipt of Payment—Arrendamiento No. 0013603; **Ex. R-253**, Sample Receipts: 2007; **Ex. R-254**, Sample Receipts: 2008; **Ex. R-255**, Sample Receipts: 2009.

⁸³⁶ **Ex. RL-93**, *Corn Products Decision on Responsibility*, ¶ 93; **Ex. RL-102**, *Glamis Gold Award*, ¶¶ 535–36.

⁸³⁷ Memorial on the Merits, ¶ 113.

⁸³⁸ *See above* at Section III.Q.

⁸³⁹ *See* Memorial on the Merits, ¶ 25.

Claimant's investment, an alleged effect that relates to only a *small portion* of this investment—Contract 143/158—is unlikely to constitute the “substantial” interference required for a violation of the expropriation standard. According to Claimant, the *Lesivo* Declaration had five damaging effects. First, it caused reduction of the railroad's yearly tonnage, from 125,466 tons in 2005 to 92,566 tons in 2006.⁸⁴⁰ In addition, Claimant alleged the following effects:

It caused a critical number of FVG's railway customers to refuse to continue to do business with FVG; [i]t caused FVG's principal suppliers of goods, services, and short-term financing to significantly reduce or eliminate their credit terms and/or services to FVG; [p]otential new customers, lenders, investors and joint venture partners immediately backed away from negotiations and discussions with FVG after having previously expressed interest in doing business with FVG; and [l]ocal courts, police and municipalities consistently relied upon the *Lesivo* Resolution as a basis to deny protection to, issue rulings against and allow theft of and vandalism against FVG's Usufruct property.⁸⁴¹

323. These allegations are either false, or do not rise to the requisite level of substantiality to be considered an expropriation. *First*, as explained in-depth in Section IV.A.3.b, above, the *Lesivo* Declaration did not itself cause any of “FVG's railway customers to refuse to continue to do business with FVG”⁸⁴² or result in “[p]otential new customers . . . back[ing] away from negotiations and discussions with FVG.”⁸⁴³ To the extent that any railway customers *did* refuse to continue to do business with Claimant, this was attributable to Claimant's press campaign and efforts to paint itself as a “dead man walking.”⁸⁴⁴ An additional reason for the post-*Lesivo* losses in railway customers is the fact that in 2007, Claimant unilaterally ceased railway

⁸⁴⁰ Memorial on the Merits, ¶ 88.

⁸⁴¹ Memorial on the Merits, ¶ 113.

⁸⁴² Memorial on the Merits, ¶ 113.

⁸⁴³ Memorial on the Merits, ¶ 113.

⁸⁴⁴ See above at Sections III.K and IV.A.3.b(ii); see also **Ex. R-190**, 2006-08-28, Press Release: “Guatemalan Government Violates Terms of Railroad Privatization Agreement;” Memorial on the Merits, ¶ 114.

operations.⁸⁴⁵ For example, when surveyed by Mr. Oswaldo Morales, the executive director of the metal industry trade association, some of the main metal companies in Guatemala confirmed that in the past they had used the railroad to transport their products and that they stopped using the railroad only because FVG stopped providing the service in 2007.⁸⁴⁶ None of the companies even mentioned the *Lesivo* Declaration.⁸⁴⁷ In fact, all of the companies confirmed that they would use the railroad to transport their products if FVG again offered the service; irrespective of the existence of the *Lesivo* Declaration.⁸⁴⁸

324. Moreover, Claimant's reference to a loss in "potential new customers" does not satisfy its burden of showing—as CAFTA requires—that there was an actual economic impact,⁸⁴⁹ especially when some of these alleged "potential new customers," such as Expogranel, were in fact not customers at all and are just a fabrication created by Claimant as part of its litigation exit strategy.⁸⁵⁰

325. *Second*, since the *Lesivo* Declaration, representatives of all agencies and branches of the Government of Guatemala have acted consistently with the understanding that Contract 143/158 is still in effect. In 2007 and 2008, for example, the *Contencioso Administrativo* courts declined to grant a request for the injunctive suspension of Contract 143/158, thereby recognizing that FVG retained its rights under that agreement.⁸⁵¹ Local police and

⁸⁴⁵ **Ex. R-123**, 2007-07-12, THE MIAMI HERALD, "Rail Investor Calls it Quits in Guatemala"; **Ex. C-39**, 2007-06-06, Letter from Posner to Customers, Employees and Friends of Ferrovías Guatemala; **Ex. R-204**, 2007-10, RAILWAY GAZETTE INTERNATIONAL, "The lights go out"; **Ex. R-120**, 2007-11-06, EL PERIODICO, *Ferrovías will suspend its operations on October 1*.

⁸⁴⁶ Witness Statement of Oswaldo R. Morales, 2010-09-30, ¶ 4 ("Statement of O. Morales").

⁸⁴⁷ Witness Statement of O. Morales, ¶ 4.

⁸⁴⁸ Witness Statement of O. Morales, ¶ 5.

⁸⁴⁹ See **Ex. RL-61**, CAFTA Annex 10-C, ¶ 4(a)(i) (explaining that one of the elements a claimant must demonstrate to satisfy the burden of proving its expropriation claim is "the economic impact of the government action").

⁸⁵⁰ See above at Section III.Q.

⁸⁵¹ See **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

municipalities have likewise continued to uphold the validity of Contract 143/158 (and 402), and have continued to evict squatters from the land.⁸⁵² Third, even if Claimant’s allegations about the loss of railway customers were true, this still would not rise to the level of harm necessary to constitute an indirect expropriation. This is true both generally—in terms of the alleged interference with Contract 143/158, which Claimant in any event described as being “of secondary priority”⁸⁵³ and an essentially worthless⁸⁵⁴ part of its overall investment—and specifically, as is the case with the reduction in railway tonnage from 125,466 tons to a still considerable 92,566 tons.⁸⁵⁵

326. Because Claimant has failed to satisfy its burden of proving that there has been a complete annihilation or even a substantial deprivation of the value of its investment, the *Lesivo* Declaration does not, and cannot, constitute an indirect expropriation of that investment.

5. Whatever Interference Claimant Suffered With Its Investment Is Not Irreversible Or Irrevocable And Therefore Does Not Constitute Indirect Expropriation

327. Claimant bears the burden of demonstrating not only that the *Lesivo* Declaration substantially interfered with its investment—which it has not proven—but also that this substantial interference is not temporary *but rather permanent*. Claimant cannot meet this burden either, as the *Lesivo* Declaration is merely the initiation of a process by which the

⁸⁵² See above at Section III.P.; **Ex. R-115**, 2007-02-12, Oficio No. 044-2007, Letter to J. Senn from A. Gramajo; **Ex. R-119**, 2007-05-31, Oficio No. 114-2007, Letter to J. Senn from A. Gramajo; **Ex. R-121**, 2007-06-12, Oficio No. 119-2007, Letter to J. Senn from A. Gramajo; **Ex. R-146**, Oficio No. 148-2008, 2008-09-02, Letter to J. Senn from Elder Roberto Martinez (Interventor de FEGUA); **Ex. R-151**, 2009-09-11, Case filed Against Squatters initiated by José Enrique Urrutia Ipiña; **Ex. R-158**, 2010-01-14, Letter to Vice-Minister J. Insua from C. Samayoa Flores; **Ex. R-167**, 2010-04-05, Oficio No. 013-2007, Letter to J. Senn from Lic. C. Samayoa; **Ex. R-157**, 2010-01-13, Eviction Decree of Squatter from Mile 217; **Ex. R-169**, 2010-06-15, Oficio No. 069-2010, Letter to C. Samayoa Flores from C. de Dubón; **Ex. R-144**, 2008-02-20, Oficio No. 063-2008, Letter to J. Senn from E. Martinez.

⁸⁵³ See **Ex. R-37**, **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

⁸⁵⁴ See Memorial on the Merits, ¶ 181.

⁸⁵⁵ Memorial on the Merits, ¶ 88. This reduction amounts to only a 27 percent drop in Claimant’s (admittedly) least-important investment. See Memorial on the Merits, ¶¶ 179-81.

Contencioso Administrativo court of Guatemala ultimately will determine the continuing validity of Contract 143/158. The initial declaration of *lesividad* is neither irreversible nor irrevocable.⁸⁵⁶

328. Several tribunals have declined to find an expropriation had taken place where the adverse effects of a challenged government action were not permanent.⁸⁵⁷ The *Tecmed* tribunal, for example, explained that “it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are *irreversible and permanent* and neutralize or destroy the economic value of the use, enjoyment, or disposition of the assets or rights.”⁸⁵⁸ To determine whether the measures are “irreversible and permanent,” the tribunal in *Azurix Corporation v. The Argentine Republic* (“*Azurix*”)⁸⁵⁹ explained that “[t]here is no specific time set under international law for measures constituting creeping expropriation to produce [an expropriatory] effect. *It will depend on the specific circumstances of the case.*”⁸⁶⁰

329. The specific circumstances of the present case demonstrate that any interference the *Lesivo* Declaration is alleged to have caused with Claimant’s investment is not permanent, irreversible, or irrevocable, because the Declaration itself has not been confirmed by the *Contencioso Administrativo* court, and Contract 143/158 remains in full force and effect until such time as that may (or may not) occur. As stated throughout this Counter-Memorial, a declaration of *lesividad*, on its own, is devoid of any legal effect; only the *Contencioso*

⁸⁵⁶ See Expert Report of J.L. Aguilar, ¶ 32; see also **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (stating that Claimant has an opportunity to be heard before the Constitutional Court if the final decision of the *Contencioso Administrativo* is to confirm the *lesividad* of Contract 143/158).

⁸⁵⁷ See, e.g., **Ex. RL-106**, *LG&E Award*, ¶ 200.

⁸⁵⁸ **Ex. RL-133**, *Tecmed Award*, ¶ 116 (emphasis added).

⁸⁵⁹ **Ex. RL-85**, *Azurix Corporation v. The Argentine Republic*, ICSID Case No. ARB/01/12, (Award) 14 July 2006 (Rigo Sureda, Lalonde, Martins) (“*Azurix Award*”).

⁸⁶⁰ **Ex. RL-85**, *Azurix Award*, ¶ 313.

Administrativo court has the power to declare Contract 143/158 null and void for *lesividad*.⁸⁶¹

The very purpose of the *Contencioso Administrativo* phase is to determine whether a declaration of *lesividad* must be reversed; the *Contencioso Administrativo* court is free to confirm Claimant's rights by determining that Contract 143/158 is not *lesivo* to the interests of Guatemala.⁸⁶²

330. Also relevant here is the fact that, while the administrative phase of the *lesividad* process is pending, Claimant retains full ownership and possession of the rights granted pursuant to each of the Usufruct Contracts.⁸⁶³ As explained above, the *Contencioso Administrativo* courts upheld Claimant's rights under Contract 143/159 on two separate occasions and rejected a request for their injunctive and provisional suspension.⁸⁶⁴ Both of the parties to this case have heeded the decisions of the administrative courts, and continue to act in accordance with Contract 143/158. Claimant remains in possession of the railway equipment contemplated under Contract 143/158.⁸⁶⁵

331. Accordingly, because Claimant retains possession, ownership, and control of its rights pursuant to all of the Usufruct Contracts, and because the *Lesivo* Declaration represents only the initiation of a process by which the validity of a portion of Claimant's investment is to be ascertained, Claimant has demonstrated neither the "irreversible" nor "permanent" destruction of its investment⁸⁶⁶ in violation of Article 10.7 of CAFTA.

⁸⁶¹ See Expert Report of J.L. Aguilar, ¶ 32; see also *id.*, ¶ 48 (distinguishing the *lesividad* process in Guatemala from the *lesividad* process in Spain, in which the Executive is free to declare its own acts null and void, without transferring the case to an independent branch of the government).

⁸⁶² See Expert Report of J.L. Aguilar, ¶¶ 58–59.

⁸⁶³ See Expert Report of J.L. Aguilar, ¶¶ 32(b), 35; see also **Ex. R–296**, 2007-7-17, SIGLO XXI, *Government Analyzes Concession of New Train System*.

⁸⁶⁴ See **Ex. RL–73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Claim of *Lesividad* of Contract 143/158; **Ex. RL–74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

⁸⁶⁵ Second Statement of A. Gramajo, ¶¶ 51-52; **Ex. R–296**, 2007-07-17, Siglo XXI, *Government Analyzes Concession of New Train System*.

⁸⁶⁶ **Ex. RL–133**, *Tecmed Award*, ¶ 116 (emphasis added).

6. Claimant In Any Event Has Not Demonstrated the Elements of An “Unlawful” Expropriation, Nor That Its Claim for Compensation Is Ripe

332. Claimant’s expropriation claim fails at the threshold, because it has not demonstrated that an expropriation even took place. But it should also be noted that Claimant in any event has not proven any of the elements required to classify even a purported expropriation as *unlawful*, or to prove that compensation is already due and owing for either a lawful or an unlawful taking. Article 10.7 of CAFTA does not forbid all expropriations; it simply imposes an obligation upon the CAFTA Parties not to expropriate an investment except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) in accordance with due process, and (d) in exchange for “prompt, adequate and effective compensation.”⁸⁶⁷ Assuming that the *Lesivo* Declaration constitutes an indirect expropriation—which it does not—such expropriation has not been proven to be. The next paragraphs discuss each of the requirements for lawful expropriations.

333. *First*, the *Lesivo* Declaration was issued for a “public purpose.” As explained above, both CAFTA and customary international law accord States a large amount of deference to act “in the public interest.”⁸⁶⁸ The *Lesivo* Declaration was both “designed and applied to protect legitimate public welfare objectives.”⁸⁶⁹ By design, the *lesividad* process protects public welfare objectives; similar to Spain, France, Mexico, Argentina, and other countries, Guatemala’s version is a mechanism by which the Government can ensure that its contracts are validly formed, and in the continuing interest of the State.⁸⁷⁰ The very purpose of the *lesividad* process is to ensure the public interest and rule of law is safeguarded. *Lesividad* proceedings permit

⁸⁶⁷ **Ex. RL-61**, CAFTA Art. 10.7.1; 10.5.

⁸⁶⁸ See above at notes 770–72 and accompanying text; see also **Ex. RL-61**, CAFTA Annex 10–C, ¶ 4(b) (“Except in *rare* circumstances, nondiscriminatory regulatory actions taken by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” (emphasis added)); **Ex. RL-163**, UNCTAD, TAKING OF PROPERTY 13 (United Nations, 2000) (citing the European Court of Human Rights in *James v. United Kingdom* (1986), p. 123)(“Usually, a host country’s determination of what is in its public interest is accepted”).

⁸⁶⁹ **Ex. RL-61**, CAFTA Annex 10–C, ¶ 4(b).

⁸⁷⁰ Expert Report of J.L. Aguilar, ¶¶ 6–21, 35.

Guatemala to refrain from taking action that is contrary, or “injurious,” to public interest and prevent the State from unilaterally revoking its administrative acts, including its contracts with private parties.⁸⁷¹

334. Contrary to Mr. Mayora’s and Claimant’s contentions, the Constitutional Court of Guatemala *has*, in fact, validated and upheld the constitutionality of the *lesividad* process.⁸⁷² As Lic. Aguilar explains, the *lesividad* process does not violate due process, as the individual is afforded a full and fair opportunity to be heard, has the ability to assert defenses before the *Contencioso Administrativo* Court, can raise counterclaims against the government within the judicial proceeding, and can appeal the Court’s decision if unsatisfied with it.⁸⁷³

335. In the present case, the *lesividad* process was pursued with the sole objective of protecting the public interest. As explained throughout this Counter-Memorial, due to the illegalities of Contract 143/158, four independent agencies or entities issued legal opinions calling for the initiation of *lesividad* procedures by way of the Declaration.⁸⁷⁴ As a response to these legal opinions, and pursuant to his obligation to “ensure that the law is enforced,”⁸⁷⁵ the President signed and published the *Lesivo* Declaration in the Official Gazette so that the judiciary—and independent organ of the State—could determine whether Contract 143/158 was, in fact, “injurious to the State.”⁸⁷⁶ In his independent legal analysis, Guatemalan legal

⁸⁷¹ Expert Report of J.L. Aguilar, ¶¶ 6–21, 35; *see also* **Ex. R–20**, 2006-01-13, FEGUA General Counsel Opinion 05–2006; **Ex. R–15**, 2005-08-01, Attorney General’s Office Opinion 205–2005; **Ex. R–24**, 2006-04-03, Joint Opinion 181–2006–AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R–25**, 2006-04-26, General Secretariat Opinion No. 236–2006 (all discussing the illegalities of Contract 143/158 under Guatemalan law).

⁸⁷² Expert Report of J.L. Aguilar, ¶¶ 47–48.

⁸⁷³ Expert Report of J.L. Aguilar, ¶¶ 51, 55, 58–62.

⁸⁷⁴ *See* **Ex. R–20**, 2006-01-13, FEGUA General Counsel Opinion 05–2006; **Ex. R–15**, 2005-08-01, Attorney General’s Office Opinion 205–2005; **Ex. R–24**, 2006-04-03, Joint Opinion 181–2006–AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R–25**, 2006-04-26, General Secretariat Opinion No. 236–2006.

⁸⁷⁵ **Ex. RL–45**, CONSTITUTION OF THE REPUBLIC OF GUATEMALA ART. 183 (1985).

⁸⁷⁶ **Ex. RL–35**, 2006-11-11, *Acuerdo Gubernativo* No. 433–2006.

expert, Lic. Juan Luís Aguilar analyzed Contract 143/158 and confirmed, based on his expert opinion, that this contract met the criteria to be considered *lesivo* under Guatemalan law.⁸⁷⁷ In addition, Lic. Aguilar explained that the particular process of *lesividad* followed by the administration of President Berger was conducted in accordance with local law.⁸⁷⁸ Thus, Guatemala acted in the public interest both in the design and implementation of the *lesividad* procedure and the Declaration issued in this case.

336. Second, the *Lesivo* Declaration was neither discriminatory on its face nor in its effect. The existence of a discriminatory measure or action requires a fact-based inquiry and a comparison of the complainant to a similarly-situated person or persons.⁸⁷⁹ Claimant received the same treatment that is afforded to any other person or entity whose alleged interests have been the subject of an *Acuerdo Gubernativo*. Furthermore, there was no discriminatory intent or effect; the President declared Contract 143/158 *lesivo* after being notified that several independent agencies within his administration, including this legal team and the Attorney General of the Nation, all agreed that contract's deficiencies caused it to be *lesivo* to the interests of Guatemala.⁸⁸⁰ In so doing, he upheld the Constitution and laws of Guatemala,⁸⁸¹ and avoided facing civil and criminal liability for failure to initiate the *lesividad* process.⁸⁸²

337. Guatemala acted in accordance with its own laws and procedures, and not with the intent to discriminate. As is discussed in-depth in Sections III.M, IV.B.4.c and IV.D of this

⁸⁷⁷ See Expert Report of J.L. Aguilar, ¶¶ 78–131.

⁸⁷⁸ See Expert Report of J.L. Aguilar, ¶¶ 65–77.

⁸⁷⁹ See **Ex. RL–144**, R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 177 (citing **Ex. RL–99**, *Marvin Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, (Award) 16 December 2002 (Kerameus, Covarrubias Bravo, Gantz) ¶ 171 (“*Feldman Award*”) (“The basis of comparison is a crucial question in applying provisions dealing with non-discrimination”)).

⁸⁸⁰ See **Ex. R–20**, 2006-01-13, FEGUA General Counsel Opinion 05–2006; **Ex. R–15**, 2005-08-01, Attorney General’s Office Opinion 205–2005; **Ex. R–24**, 2006-04-03, Joint Opinion 181–2006–AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R–25**, 2006-04-26, General Secretariat Opinion No. 236–2006.

⁸⁸¹ **Ex. RL–45**, CONSTITUTION OF THE REPUBLIC OF GUATEMALA ART. 183 (1985).

⁸⁸² See Expert Report of J.L. Aguilar, ¶¶ 2(p), 37, 72.

Counter-Memorial, and in the witness statement submitted by Mr. Ramón Campollo,⁸⁸³ Claimant’s allegation that Guatemala issued the *Lesivo* Declaration in order to transfer Claimant’s rights to Mr. Campollo is nothing more than an unsubstantiated—and defamatory⁸⁸⁴—conspiracy theory.

338. Third, even during the initial stage of the *lesividad* process, Guatemala acted in accordance with due process of law, affording Claimant both notice and an opportunity to be heard. Representatives of Guatemala met with Claimant on numerous occasions, attempting, as required by Guatemalan law, to reach an agreement to remedy the illegalities of the contract before the three-year prescription period had passed.⁸⁸⁵ Guatemala negotiated in good faith, even conditionally suspended the declaration of *lesividad* in response to Claimant’s expressed refusal to negotiate while the *lesividad* process was pending.⁸⁸⁶ In any event, as Guatemalan law expert, Lic. Juan Luis Aguilar explained, the *lesividad* process is a purely internal one within the Government that does not have legal or practical implications for the individual; the purpose of which is to launch the *Contencioso Administrativo* process, where the affected party has the right to be heard by the competent court.⁸⁸⁷

339. Fourth, and finally, because Claimant’s alleged right to compensation is not yet ripe, because the *Contencioso Administrativo* court has not yet decided the matter and thus Contract 143/158 remains valid and in full force, Guatemala has not violated any duty to pay “prompt, adequate and effective compensation.”⁸⁸⁸ As explained above in Section IV.A.1, a State’s action is considered to be expropriation in violation of international law only when certain conditions are met, including the condition that a claimant be immediately owed compensation which it

⁸⁸³ See Statement of R. Campollo.

⁸⁸⁴ Statement of R. Campollo, ¶ 32.

⁸⁸⁵ See above at Section III.I. (discussing the meetings of the High Level Technical Commission); Statement of M. Marroquín, ¶¶ 9–11; Statement of S. Pineda, ¶¶ 13–20; Minutes from the High Level Commission Meetings: 3 April 2006 (Ex. R–23); 5 May 2006 (Ex. R–26); 10 May 2006 (Ex. R–28); 11 May 2006 (Ex. R–29).

⁸⁸⁶ Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

⁸⁸⁷ See Expert Report of J.L. Aguilar, ¶¶ 2 (f, h, j), 32, 35; see also below at Section IV.B.3.

⁸⁸⁸ Ex. RL–61, CAFTA Art. 10.7.1.

has requested, but which has not yet been paid.⁸⁸⁹ In essence, this requirement is a requirement that the matter be ripe for international arbitral review. As the tribunal in *Waste Management, Inc. v. United Mexican State* (“*Waste Management II*”) explained, an executive expropriation is “an effective repudiation of the right, *unredressed by any remedies available to the Claimant*, which has the effect of preventing its exercise entirely or to a substantial extent, thereby frustrating or negating the enterprise as a whole.”⁸⁹⁰

340. Thus, the supposedly aggrieved investor must take some step to redress its rights before simply abandoning all hope in favor of international arbitration. As the *Generation Ukraine* tribunal explained, if the allegedly expropriatory action is effectuated by a government official or agency whose actions are still subject to further review, the investor is not free to bypass that available review by claiming before an international tribunal that there had been an uncompensated expropriation. Instead, the investor must seek redress through the channels available under local law. This does not mean that there is a requirement to exhaust local remedies, as that notion is commonly understood. Instead, it means that an international delict can come only from a final decision affecting the investor’s rights:

[A]n international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.⁸⁹¹

⁸⁸⁹ See above at ¶¶ 221–25 (introducing the elements required to demonstrate an expropriation has taken place).

⁸⁹⁰ **Ex. RL–136**, *Waste Management II Award*, ¶¶ 174–75.

⁸⁹¹ **Ex. RL–7**, *Generation Ukraine Award*, ¶ 20.30 (emphasis added). This passage is in line with the concept of mitigation of damages accepted under customary international law. **Ex. RL–155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 9.110 (“A respondent State will not be liable to pay damages in respect of losses which could have been mitigated by actions of the claimant.”); **Ex. RL–109**, *Middle East Cement Award*, ¶ 167 (“[A] duty to mitigate loss is one of the general principles of law which are part of international law”).

341. In this case, in which the *lesividad* process has not yet been completed, and Claimant has not even submitted a counterclaim for compensation or indemnification to the *Contencioso Administrativo* courts—as permitted under Guatemalan law—and there has been no final decision affecting Claimant’s rights.⁸⁹²

7. Conclusion

342. As demonstrated in Parts 2 through 6 of this Section, Claimant has failed to demonstrate any of the elements of an indirect expropriation pursuant to CAFTA and customary international law. Specifically, Claimant has **not** proven:

- That it owns, in accordance with Guatemalan law, all of the rights for which it claims expropriation;
- That the *Lesivo* Declaration and subsequent actions taken in furtherance thereof interfered with its investment;
- That, assuming that there was interference attributable to Guatemala, such interference caused harm that was so substantial, permanent and irrevocable that it meets the required test for expropriation; or
- That any of the conditions of Article 10.7 of CAFTA are met, namely that the purported expropriation was unlawful and/or that compensation is already due but has not been paid, making the matter ripe for international arbitral consideration.

343. Accordingly, there can be no finding that by virtue of the *Lesivo* Declaration, Guatemala violated its obligations under Article 10.7 of CAFTA.

B. Guatemala Afforded Claimant’s Investment Fair And Equitable Treatment In Accordance With Article 10.5 Of CAFTA

344. In addition to arguing that the *Lesivo* Declaration constitutes an indirect expropriation of its rights under CAFTA, Claimant argues that the *lesividad* procedure constitutes a violation of “Guatemala’s obligation under CAFTA to provide fair and equitable treatment in accordance with customary international law.”⁸⁹³ As is demonstrated throughout this section, this is not the case. **Part 1** discusses the key elements of the fair and equitable treatment standard under

⁸⁹² Expert Report of J.L. Aguilar, ¶ 55, 58–59.

⁸⁹³ Memorial on the Merits, ¶ 149.

both CAFTA and customary international law, which Claimant bears the burden of proving were violated in this case. Parts 2 through 6 apply these standards to the facts. Specifically, **Part 2** addresses the duty to act in “good faith,” and explains that at all times, Guatemala acted in accordance with that standard; **Part 3** demonstrates that Guatemala did not deny Claimant justice or due process of law; **Part 4** discusses the definitions of “arbitrary or discriminatory” measures, and shows that the State action in question did not violate either standard; **Part 5** explains that even if “transparency” is an element of fair and equitable treatment for purposes of the “minimum standard” relevant under CAFTA—which Claimant has not demonstrated—Guatemala has acted transparently; and **Part 6** addresses Claimant’s failure to prove that “legitimate expectations” is a recognized element of the customary international law minimum standard of treatment, and explains that because Claimant’s expectations in this case were not legitimate, their frustration in any event could not have led to a violation of Guatemala’s obligation to accord fair and equitable treatment. **Part 7** explains that Claimant’s argument against the *lesividad* process *per se* is unsustainable. **Part 8** examines the particular factual assertions Claimant offers as evidence that Guatemala breached the fair and equitable treatment standard, and demonstrates in each case either that the assertion is untrue, or that it does not amount to a violation of the fair and equitable treatment obligation under CAFTA. Accordingly, **Part 9** concludes that Guatemala has not breached its obligation under Article 10.5 of CAFTA to accord fair and equitable treatment to Claimant.

1. Standard Of Fair And Equitable Treatment Under CAFTA And Customary International Law

345. Claimant has failed to meet its burden with respect to each of the violations of CAFTA’s fair and equitable treatment standard that it has alleged.

346. As explained below, Article 10.5 of CAFTA limits the Parties’ fair and equitable treatment obligation to the minimum standard of treatment under customary international law. A claimant alleging a violation of the minimum standard of treatment under customary law bears two burdens: first, as examined in this section, it must prove as a matter of law that the particular standard of treatment is within the scope of the minimum standard of treatment

under customary international law; second, as examined below in **Parts 2 through 8**, it must prove as a matter of fact that the respondent State violated that particular standard of treatment.

347. As is explained in **Subsection a**, below, Article 10.5 of CAFTA limits the obligation to accord fair and equitable treatment to the minimum standard of treatment under customary international law. **Subsection b** explains that Claimant bears the burden of proving that the particular legal standard allegedly at issue on the facts does indeed fall within the scope of this minimum standard of treatment. In this case, Claimant invokes a number of legal standards (*e.g.*, arbitrariness, lack of transparency, and disappointment of legitimate expectations) without even *attempting* to demonstrate that they fall within the scope of the required minimum standard of treatment prescribed by Article 10.5 of CAFTA. Guatemala is not responsible for alleged violations of these standards, which exceed—and thus are not encompassed within—the scope of CAFTA’s fair and equitable treatment obligation.

Subsection c discusses the legal standards which, by contrast, *have* been found to be elements of the minimum standard of treatment under customary international law. The remainder of Section IV.B is devoted to explaining that, regardless of whether Claimant demonstrated that each particular legal standard is an element of the minimum standard of treatment under customary international law, Guatemala fulfilled the obligations of that standard.

a. The Obligation To Accord Fair And Equitable Treatment Requires Only The Minimum Standard Of Treatment Under Customary International Law

348. Article 10.5 of CAFTA provides that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment”⁸⁹⁴ Article 10.5.2 clarifies that the obligation to accord fair and equitable treatment does “not require treatment in addition to or beyond”⁸⁹⁵ that which is required by

⁸⁹⁴ Ex. RL-61, CAFTA Art. 10.5.

⁸⁹⁵ Ex. RL-61, CAFTA Art. 10.5.2.

the customary international law minimum standard of treatment; nor does this obligation “create additional substantive rights.”⁸⁹⁶ In relevant part, Article 10.5.2. unequivocally states:

For greater certainty, paragraph 1 prescribes the *customary international law minimum standard of treatment* of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” *do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*⁸⁹⁷

349. This section examines the elements or standards of conduct that have been recognized to comprise the minimum standard of treatment under customary international law. After explaining the burden that this implies for Claimant,⁸⁹⁸ Guatemala discusses generally each of those elements. As is mentioned within this section, and discussed in-depth in Sections I.A.1.a(i)393, IV.B.5 and IV.B.6, Claimant has failed to demonstrate that three of the duties it alleges—to refrain from acting arbitrarily, to act transparently and to act in accordance with an investor’s legitimate expectations—are recognized elements of the minimum standard of treatment required under customary international law.

350. Leading experts Rudolf Dolzer and Margrete Stevens explain that “[s]ome debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept.”⁸⁹⁹ Some treaties define the scope of the fair and equitable treatment standard by reference to specific components like the duty to provide due process,⁹⁰⁰ while others define the standard according to “general principles of international

⁸⁹⁶ **Ex. RL-61**, CAFTA Art. 10.5.2.

⁸⁹⁷ **Ex. RL-61**, CAFTA Art. 10.5.2 (emphasis added).

⁸⁹⁸ See **RL-83**, *Asylum Case (Colombia v. Peru)*, International Court of Justice (Judgment) 20 November 1950, p. 14 (“*Asylum Case*”) (explaining that “[t]he Party which relies on a custom of this kind[,] must prove that this custom is established in such a manner that it has become binding on the other Party”).

⁸⁹⁹ **RL-145**, RUDOLF DOLZER AND MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 59 (Kluwer Law International, 1995).

⁹⁰⁰ See, e.g., **Ex. RL-151**, AGREEMENT BETWEEN THE REPUBLIC OF LEBANON AND REPUBLIC OF HUNGARY FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS, 22 June 2001 BITREAT HULB (Westlaw 2008)

Footnote continued on next page

law.”⁹⁰¹ Still others refer to the minimum standard of treatment under “customary international law.”⁹⁰²

351. But the CAFTA Parties left no room for debate. They defined the contours of the fair and equitable treatment standard in Article 10.5 in clear and unequivocal terms, based on the definition of “fair and equitable treatment” espoused by the NAFTA Free Trade Commission in its 2001 *Notes of Interpretation of Certain Chapter 11 Provisions* (“FTC Interpretation”) and the 2004 US Model BIT.⁹⁰³ Article 10.5 of CAFTA provides that the obligation to accord fair and equitable treatment “prescribes the *customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.*”⁹⁰⁴ As stated above, Article 10.5 “do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights.”⁹⁰⁵ By defining their obligation in terms of “customary international law,” as opposed to any of the other sources of international law under Article 38 of the Statute of the International Court of Justice, the CAFTA Parties clearly intended to limit the scope of the fair and equitable treatment obligation to precisely that: the minimum standard of treatment under customary international law.

Footnote continued from previous page

(linking “the obligation to grant fair and equitable treatment [to] the duty to abstain from impairing the investment through unreasonable or discriminatory measures.” **Ex. RL-162**, UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S: TRENDS IN INVESTMENT RULEMAKING 30 (United Nations, 2007)).

⁹⁰¹ See, e.g., **Ex. RL-150**, ACCORD ENTRE LA GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE LA RÉPUBLIQUE ARGENTINE SUR L’ENCOURAGEMENT ET LA PROTECTION RÉCIPROQUES DES INVESTISSEMENTS, 3 July 1991, IC-BT 226; Spain-Mexico BIT at issue in *Tecmed* (ACUERDO PARA LA PROMOCIÓN Y PROTECCIÓN RECÍPROCA DE INVERSIONES ENTRE EL REINO DE ESPAÑA Y LOS ESTADOS UNIDOS MEXICANOS, 1996).

⁹⁰² See, e.g., **Ex. RL-157**, NORTH AMERICAN FREE TRADE AGREEMENT ART. 1105, 1 January 1994, 32 I.L.M. 605 (1993) (“NAFTA”).

⁹⁰³ Compare **Ex. RL-170**, NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (31 July 2001) with **Ex. RL-61**, CAFTA Art. 10.5. To make it abundantly clear that “fair and equitable treatment” under CAFTA equates only to the minimum standard of treatment under customary international law, the CAFTA Parties expanded upon the language of the FTC Interpretation, explaining that Article 10.5 of CAFTA “do[es] not create additional substantive rights.” See **Ex. RL-61**, CAFTA Art. 10.5.

⁹⁰⁴ **Ex. RL-61**, CAFTA Art. 10.5.2 (emphasis added).

⁹⁰⁵ **Ex. RL-61**, CAFTA Art. 10.5.2.

b. *Claimant Bears The Burden Of Demonstrating That The Standards Of Conduct It Invokes As Part Of Its Fair And Equitable Treatment Claim Are Indeed Part Of The Minimum Standard Of Treatment Under Customary International Law*

352. Annex 10–B of CAFTA provides that “‘customary international law’ generally and as specifically referenced in Article 10.5, 10.6, and Annex 10–C results from a general and consistent practice of States that they follow from a sense of legal obligation.”⁹⁰⁶ This definition reflects the accepted understanding that “customary international law” contains two elements. As the *Glamis Gold* tribunal recently explained, “establishment of a rule of customary international law requires: (1) ‘a concordant practice of a number of States acquiesced in by others,’ and (2) ‘a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).”⁹⁰⁷

353. In the *Asylum Case*, the International Court of Justice explained that a claimant bears the burden of demonstrating that these requirements have been met, as “[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”⁹⁰⁸ Similarly, the *Glamis Gold* tribunal stated that “it is necessarily Claimant’s place to establish a change in custom.”⁹⁰⁹ Importantly, a claimant seeking to demonstrate that a particular practice comes within the definition of “customary international law”⁹¹⁰ may not rely on the definition of “fair and equitable treatment” provided by international tribunals that were not similarly bound by the minimum standard of treatment

⁹⁰⁶ Ex. RL–61, CAFTA Annex 10–B.

⁹⁰⁷ Ex. RL–102, *Glamis Gold Award*, ¶ 602 (quoting the respondent’s pleadings); see also Ex. RL–171, *United Parcel Service of America, Inc. v. Canada* (Award) 22 November 2002 (Cass, Fortier, Keith), ¶ 84 (“*UPS Award*”); Ex. RL–83, *Asylum Case*, pp. 14–15.

⁹⁰⁸ Ex. RL–83, *Asylum Case*, p. 14.

⁹⁰⁹ Ex. RL–102, *Glamis Gold Award*, ¶ 603; see also Ex. RL–83, *Asylum Case*, p. 14.

⁹¹⁰ It is beyond dispute that claimants bear the burden of proof with respect to the matters that they allege. See, e.g., Ex. RL–129, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 (Award) 7 July 2004 (Fortier, Schwebel, El Kholy), ¶ 58 (“In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts”); see also Ex. RL–153, Meg N. Kinnear, *Treaties as Agreements to Arbitrate: International Law as the Governing Law*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, ICCA Congress Series, 2006 Montreal Volume 13 (Albert Jan van den Berg (ed), 2007) 401–433, 425.

of customary international law. In the words of the *Glamis Gold* tribunal, “[a]rbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law.”⁹¹¹

354. Thus, Claimant bears a heavy burden in demonstrating that particular standards of treatment are elements of customary international law. But as is further discussed in Sections I.A.1.a(i)393, IV.B.5 and IV.B.6, below, Claimant has *failed* to demonstrate that three of the alleged standards of treatment—non-arbitrariness, transparency and adherence to an investor’s legitimate expectations—are elements of the minimum standard of treatment. Liability cannot be predicated upon a supposed violation of these (alleged) rules unless Claimant demonstrates to the satisfaction of the Tribunal that they: (1) meet the required degree of State acceptance; and (2) are understood by States to be required or compelled by international law.

355. In order to meet its burden, Claimant may not rely upon treaties that prescribe or jurisprudence that interprets anything other than the “customary international law” minimum standard of treatment. Article 38 of the Statute of the International Court of Justice distinguishes “customary international law” from both “general principles of international law” and international conventions.⁹¹² To define CAFTA’s standard of fair and equitable treatment in terms of “principles of international law” or by simple reference to judicial decisions—sources of international law under Article 38 of the Statute of the International Court of Justice that are distinct from “customary international law”⁹¹³—would run afoul of the principle of “effective interpretation” (*ut res magis valeat quam pereat*).⁹¹⁴ This principle finds expression in the rule

⁹¹¹ **Ex. RL–102**, *Glamis Gold Award*, ¶ 605 (emphasis added).

⁹¹² See **Ex. RL–161**, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE Art. 38(1)(a)–(c), 33 U.N.T.S.993 (citing “international custom,” “general principles of law,” and “international conventions” as three separate sources of law).

⁹¹³ See **Ex. RL–161**, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE Art. 38.

⁹¹⁴ **Ex. RL–102**, *Glamis Gold Award*, ¶ 602 (specifically attacking the claimant’s reliance on *Tecmed* in explaining that reference to BITs, and their corresponding interpretation in the jurisprudence, “will not be of assistance if they include different protections than those provided for in customary international law”).

of interpretation of customary international law codified in Article 31 of the Vienna Convention on the Law of Treaties.

356. Article 31 requires that a treaty “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁹¹⁵ Accordingly, the terms of Article 10.5 and Annex 10–B of CAFTA must be given full effect, and must not be interpreted in a manner that renders them superfluous:

Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. *This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an “effet utile.”*⁹¹⁶

357. As explained in Sections I.A.1.a(i)393, IV.B.5 and IV.B.6, Claimant has failed to demonstrate either of the elements of customary international law discussed above. With respect to its assertions that arbitrariness, non-transparency, and the frustration of legitimate expectations are elements of the minimum standard of treatment under customary international law, Claimant has proven neither that these “rules” meet the required degree of

⁹¹⁵ **Ex. RL–41**, VIENNA CONVENTION ON THE LAW OF TREATIES ART. 31.1, *entered into force* 27 January 1980, 1155 U.N.T.S. 331.

⁹¹⁶ **Ex. RL–138**, *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14 (Award) 8 December 2008 (Nariman, Bernárdez, Bernardini), ¶ 165; *see also Ex. RL–94*, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4 (Decision of the Tribunal on Objections to Jurisdiction) 24 May 1999 (Buerghenthal, Bernardini, Bucher), ¶ 39 (stating that a BIT provision “must be deemed to have some meaning as required under the principle of effectiveness (*effet utile*)”); **Ex. RL–169**, *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7 (Award) 21 August 2007 (von Wobeser, Czar de Zalduendo, Reisman), ¶ 240 (“En base el principio de efecto útil (*effet utile*), toda disposición contenida en un tratado debe interpretarse en un sentido que le permita producir todos sus efectos, bajo el entendido de que su introducción en el texto tuvo una razón de ser específica.”); **Ex. RL–167**, WTO Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, *adopted* 20 May 1996, DSR 1996:I, 3, p. 23 (“[o]ne of the corollaries of the ‘general rule of interpretation’ in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” (citing *Corfu Channel Case* (1949) I.C.J. Reports, p.24; *Territorial Dispute Case* (Libyan Arab Jamahiriya v. Chad) (1994) I.C.J. Reports, p. 23; 1966 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II at 219; Vol. 1 OPPENHEIM’S INTERNATIONAL LAW 1280–81 (9th ed., Jennings and Watts eds., 1992) P. Dallier and A. Pellet, DROIT INTERNATIONAL PUBLIC ¶ 17.2 (5è ed., 1994)).

State acceptance nor that they are understood by States to be required or compelled by international law. In addition, and as further explored in Sections I.A.1.a(i)393, IV.B.5 and IV.B.6, Claimant’s reliance on case law generally,⁹¹⁷ and *Tecmed* and *Metalclad* specifically, does not discharge its burden.⁹¹⁸

358. But even assuming *arguendo* that Claimant succeeded—which it did not—in demonstrating that the three alleged standards of treatment were required under the international minimum standard of treatment, Claimant still has failed to demonstrate that Guatemala’s conduct breached those standards. Customary international law places a heavy burden upon the claimant to demonstrate that the respondent State has violated an applicable standard of conduct.

359. Tribunals determining whether a particular action violates the fair and equitable treatment standard, even in cases where treaties did *not* require the standard to be bounded by the minimum standard of treatment under customary international law, have accorded a large amount of deference to respondent States. This deference is due in part to the fact that the investor consents to a host State’s legal system by choosing to invest in that State, and due additionally to tribunals’ respect for States’ sovereignty. As the tribunal in *Eastern Sugar B.V. v. The Czech Republic* (“*Eastern Sugar*”) explained, BITs are not designed to turn any misstep on the part of the host State into an international delict:

[A] BIT may . . . not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under

⁹¹⁷ See Ex. RL–102, *Glamis Gold Award*, ¶ 605.

⁹¹⁸ See below at ¶¶ 404–05 (discussing Claimant’s misplaced reliance upon these cases in the context of its “transparency claim”); ¶¶ 418–21 (explaining why Claimant’s reliance upon these cases for its “legitimate expectations” claim is inappropriate).

the guise of a violation of the BIT. This is obviously not what BITs are for.⁹¹⁹

360. As is the case with expropriation, the claimant may not demonstrate a violation of fair and equitable treatment simply by showing that the State action affected its investment in some way.⁹²⁰ Rather, the claimant must demonstrate an impermissible interference with Claimant's rights, in violation of one of the standards of conduct recognized by customary international law.

c. The Fair And Equitable Treatment Standard Under The Customary International Law Minimum Standard Of Treatment As Recognized By Other International Tribunals

361. The evolving standard of conduct⁹²¹ under the minimum standard of treatment in customary international law has been recognized by international tribunals to be breached if the host State: *fails to act in "good faith"*;⁹²² engages in conduct that "involves a *lack of due process* leading to an outcome *that offends judicial propriety*";⁹²³ or is "*manifestly arbitrary*" or

⁹¹⁹ **Ex. RL-95**, *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004 (Partial Award) 27 March 2007 (Volterra, Karrer, Gaillard), ¶ 272 (with partial dissenting opinion by R. Volterra) ("*Eastern Sugar Partial Award*"); see also **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 261 ("[Tribunals do] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes . . .").

⁹²⁰ See, e.g., **Ex. RL-120**, *Parkerings Award*, ¶ 332 ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion."); **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.99 (discussing the due process standard: This standard relates to "the character of the decision-making process: Was the administrative decision reached through a fair process? Or did the host State use its administrative powers for improper purposes or inconsistently?").

⁹²¹ **Ex. RL-104**, *International Thunderbird Award*, ¶ 194 ("[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.").

⁹²² **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 134.

⁹²³ **Ex. RL-136**, *Waste Management II Award*, ¶ 98.

“discriminatory.”⁹²⁴ As the basis for rejecting the claimant’s fair and equitable treatment claim in *Waste Management II*, the tribunal stated:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁹²⁵

362. This finding by the tribunal in *Waste Management II*, which was relied upon by Claimant in support of its fair and equitable treatment claim,⁹²⁶ reflects the heavy burden imposed in order to demonstrate a violation of fair and equitable treatment under the customary international law minimum standard of treatment. Citing *Waste Management II* and other cases, the *Thunderbird* tribunal explicitly recognized this high threshold:

Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment *still remains high*, as illustrated by recent international jurisprudence [e.g., *Genin*, *Waste Management II*].

For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to *a gross denial of justice or manifest arbitrariness* falling below acceptable international standards.⁹²⁷

⁹²⁴ See, e.g., **Ex. RL–102**, *Glamis Gold Award*, ¶ 24; **Ex. RL–104**, *International Thunderbird Award*, ¶ 194; **Ex. RL–136**, *Waste Management II Award*, ¶ 98; **Ex. RL–133**, *Tecmed Award*, ¶ 141.

⁹²⁵ See **Ex. RL–136**, *Waste Management II Award*, ¶ 98 (emphasis added) (quoted by Claimant in ¶ 140 of its Memorial on the Merits).

⁹²⁶ Memorial on the Merits, ¶ 140.

⁹²⁷ **Ex. RL–104**, *International Thunderbird Award*, ¶ 194 (emphasis added).

363. The *GAMI* tribunal, for its part, explained that the above-cited pronouncement from *Waste Management II* has four implications—each of which reflect the high threshold of the customary international law minimum standard of treatment and the heavy burden it imposes on investors to show a breach of such standard:

(1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objective of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole—not isolated events—determines whether there has been a breach of international law.⁹²⁸

364. Finally, in *Alex Genin, Eastern Credit Limited, Inc., and A.S. Baltoil v. The Republic of Estonia* (“*Genin*”),⁹²⁹ the tribunal explained that acts that violate the customary international standard of fair and equitable treatment are those “showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”⁹³⁰

365. Claimant has completely failed to demonstrate that the conduct of Guatemala in this case fell short of the minimum standard of treatment required by customary international law, as that standard was described by the international tribunals in *Waste Management II*, *GAMI*, *Genin*, and others. In accordance with Article 10.5 of CAFTA, and the customary international law minimum standard of treatment examined above, Claimant was required to demonstrate that (1) it suffered harm;⁹³¹ (2) that this harm was caused by action attributable to

⁹²⁸ **Ex. RL-100**, *GAMI Award*, ¶ 97. The decisions of other investor-State tribunals further demonstrate that the “threshold” for establishing a breach of the fair and equitable treatment standard is “a high one.” See, e.g., **Ex. RL-86**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award) 24 July 2008 (Born, Landau, Hanotiau), ¶ 597 (“*Biwater Gauff Award*”).

⁹²⁹ **Ex. RL-101**, *Alex Genin, Eastern Credit Limited, Inc., and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (Award) 25 June 2001 (Fortier, Heth, Van den Berg) (“*Genin Award*”).

⁹³⁰ **Ex. RL-101**, *Genin Award*, ¶ 367.

⁹³¹ **Ex. RL-136**, *Waste Management II Award*, ¶ 98. Similar to that of expropriation, the fair and equitable treatment analysis incorporates an element of causation. Indeed, in *Merrill & Ring*, the tribunal dismissed the claimant’s fair and equitable treatment claim under NAFTA because the claimant

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Guatemala;⁹³² and (3) that, in light of the relevant facts of this case,⁹³³ the relevant State action meets the high threshold required to violate the notion of fair and equitable treatment accepted as part of the minimum standard of treatment under customary international law.

366. In any event, Claimant has not demonstrated that either the *Lesivo* Declaration, or any of the subsequent actions alleged, violated the purported customary international law standards, much less the recognized customary international law standards of bad faith, denial of justice in accordance with the principle of due process of law,⁹³⁴ or actions that were discriminatory, grossly unfair, unjust or idiosyncratic.

2. Guatemala Did Not Act In Bad Faith, As Claimant Alleges

367. Claimant's accusation that Guatemala acted in bad faith in violation of CAFTA's fair and equitable treatment standard⁹³⁵ is unfounded. In fact, the opposite of what Claimant alleges is true: Guatemala has acted in good faith *at all times* vis-à-vis Claimant and its investment, in accordance with its obligations under CAFTA and international law.

368. Interpreting the fair and equitable treatment obligation in Article 1105 of NAFTA, the *Waste Management II* tribunal found that the duty to act in good faith is one of the obligations that comprise the minimum standard of treatment under customary international law:

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failed to demonstrate any damage. *See Ex. RL-110, Merrill & Ring Award*, ¶ 266 ("Even if the scenario most favorable to the Investor were to be adopted, and breach of the Article 1105(1) obligation assumed, damages have not been proven to the satisfaction of the Tribunal. In these circumstances, the Tribunal both dismisses the Investor's claim for damages and concludes that Canada has not been shown to have breached Article 1105(1) since one and the other are inextricably related and, as previously noted, an international wrongful act will only be committed in international investment law if there is an act in breach of an international legal obligation, attributable to the Respondent that also results in damages").

⁹³² *Ex. RL-136, Waste Management II Award*, ¶ 98.

⁹³³ *See Ex. RL-16, Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/00/2 (NAFTA) (Award) 11 October 2002 (Stephen, Crawford, Schwebel), ¶ 118 ("*Mondev Award*") ("A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case").

⁹³⁴ *See Ex. RL-61*, CAFTA Art. 10.5.2(a).

⁹³⁵ Memorial on the Merits, ¶ 149.

The Tribunal has no doubt that a *deliberate conspiracy*—that is to say, a *conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement*—would constitute a breach of Article 1105(1) [of NAFTA]. A basic obligation of the State under Article 1105(1) is to act in good faith and form, and *not deliberately to set out to destroy or frustrate the investment* by improper means.⁹³⁶

369. The good faith standard, as explained by the *Waste Management II* tribunal and argued by Claimant,⁹³⁷ has two elements. The *first*, which considers whether a host State acted “improperly,” or “without justification,” is a requirement that the State act rationally, in accordance with its own laws. In the words of the *Tecmed* tribunal, the proper inquiry is whether the State “use[d] the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments.”⁹³⁸ Citing *GAMI*, Campbell McLachlan discussed a similar standard: “[A] good faith effort on the part of the State agencies to fulfill the requirements of host State law will be a powerful indication that the [fair and equitable treatment] standard has been met.”⁹³⁹

370. The *second* element of the good faith standard is one of intent; a claimant must prove that the respondent State acted “deliberately” or “consciously” in order to destroy the relevant investment. To prove that Guatemala acted in bad faith, Claimant’s burden is considerably heavy. As the *Chemtura* tribunal recognized, “the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one.”⁹⁴⁰ Despite the gravity of Claimant’s accusation that Guatemala did not act in good faith by allegedly implementing a measure “with

⁹³⁶ Ex. RL–136, *Waste Management II Award*, ¶ 138 (emphasis added).

⁹³⁷ See Memorial on the Merits, ¶ 149.

⁹³⁸ Ex. RL–133 *Tecmed Award*, ¶ 154 (quoted by Claimant in ¶ 141 of its Memorial on the Merits).

⁹³⁹ Ex. RL–155, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.129 (emphasis added); see also Ex. RL–100, *GAMI Award*.

⁹⁴⁰ Ex. RL–89, *Chemtura Award*, ¶ 137 (citing *Bayindir Insaat Turzım Ticaret VE Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Award) 27 August 2009 (Kaufmann-Kohler, Böckstiegel, Polasek), ¶ 143)); see also Ex. RL–136, *Waste Management II Award*, ¶ 139 (explaining that “conspiracy theories, unsupported by solid evidence . . . [were] not enough to cross the Article 1105(1) threshold”).

intent to discriminate and knowledge of the unlawfulness of such implementation,”⁹⁴¹ Claimant fails to substantiate its claim with any shred of objective, verifiable evidence. Instead, Claimant weaves a conspiracy theory, at the center of which is Guatemalan businessman Ramón Campollo, but this story fails to withstand scrutiny.⁹⁴² But as the NAFTA tribunal in the *Waste Management II* case noted, “conspiracy theories, unsupported by solid evidence . . . [are] not enough to cross the Article 1105(1) [fair and equitable treatment] threshold.”⁹⁴³

371. The solid evidence in this case tells a different story regarding Guatemala’s intent. In declaring Contract 143/158 *lesivo*, Guatemala has acted rationally, in accordance with its own laws, and without malicious or improper intent. As repeated throughout this Counter-Memorial, Guatemala applied the *lesividad* procedure consistently with the letter and spirit of its laws, acting in good faith. At no point in time did the Government act with “intent to discriminate and knowledge of the unlawfulness” of its conduct.⁹⁴⁴ In fact, there was no unlawfulness, much less a known unlawfulness; Guatemala sought, and ensured, the faithful and good faith application of its extant laws concerning *lesividad*.

372. As discussed in detail in Sections III.E, H, I and J, upon assuming the role of Overseer of FEGUA, and after requesting from the legal department an analysis of all of the agreements that governed the relationship between FEGUA and FVG, Dr. Gramajo learned from his legal department that Contract 143/158 contained legal defects that needed to be remedied.⁹⁴⁵ He immediately informed FVG of this, and the parties initially attempted to negotiate a resolution of these defects for several months. When those negotiations failed, Dr. Gramajo proceeded to

⁹⁴¹ Memorial on the Merits, ¶ 149.

⁹⁴² Mr. Campollo has submitted a witness statement in this arbitration that flatly contradicts Claimant’s suppositions. See *generally* Statement of R. Campollo; above at Section III.M.

⁹⁴³ **Ex. RL-136**, *Waste Management II Award*, ¶ 139.

⁹⁴⁴ Memorial on the Merits, ¶ 149.

⁹⁴⁵ First Statement of A. Gramajo, ¶ 11; **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004.

confirm the existence of the defects with four separate governmental agencies or entities,⁹⁴⁶ and heeded their advice as to how to proceed.

373. Once the illegalities of Contract 143/158 were raised, each of the Government's agents acted pursuant to Guatemalan law and all concluded that the contract must be declared *lesivo*; and that is what the President did. The *Acuerdo Gubernativo* which instructed the Attorney General to initiate proceedings before the *Contencioso Administrativo* court was signed by all of the required Ministers and the President, and was published in the Official Gazette within the three-year statute of limitations period.⁹⁴⁷ The Attorney General filed the case within the 90-day period required under Article 23 of the *Ley De Lo Contencioso Administrativo*.⁹⁴⁸ The *Contencioso Administrativo* courts have also acted consistently with their mandate, offering Claimant an opportunity to be heard, and even rejected the provisional measures requested by the Attorney General to suspend the validity of Contract 143/158 pending the final decision regarding its *lesividad*.⁹⁴⁹

374. Guatemala's sole intent and motivation was to apply its laws, and obtain a functioning railroad system.⁹⁵⁰ Rather than turn the railroad over to Ramón Campollo upon publishing the *Lesivo* Declaration, as Claimant's conspiracy theory suggests, Guatemala continued to meet with Claimant after the *Lesivo* Declaration was published, to negotiate a contract that would

⁹⁴⁶ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006.

⁹⁴⁷ See **Ex. R-35**, 2006-08-11, *Acuerdo Gubernativo* No. 433-2006 Where Usufruct Contract 143 and Amendment No. 158 Were Declared *Lesivo*; see also **Ex. RL-49**, 1996-11-21, *Ley De Lo Contencioso Administrativo* Art. 20.

⁹⁴⁸ Expert Report of J.L. Aguilar, ¶ 36(g), 53; **Ex. RL-49**, Contentious Administrative Law, Art. 23.

⁹⁴⁹ See **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General's Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

⁹⁵⁰ See Statement of R. Aitkenhead, ¶ 10..

enable the railroad to operate.⁹⁵¹ Negotiations ended when FVG stated that it had no interest in entering into new equipment contracts.⁹⁵² Despite Guatemala's efforts to negotiate, Claimant ceased railway operations in 2007,⁹⁵³ and left Guatemala without an operational railroad.

375. Because Guatemala has consistently and diligently applied its own law, without improper intent, Claimant has failed to meet the demanding standard required to demonstrate that Guatemala has acted in bad faith in violation of CAFTA.

3. Guatemala Did Not Deny Claimant Justice Or Due Process Of Law

376. Claimant has also failed to substantiate its claim that Guatemala breached its obligation to accord fair and equitable treatment by denying Claimant justice or due process of law.

377. According to Claimant, "Guatemalan law affords no due process to the investor/contracting party against whom a *lesivo* resolution is directed."⁹⁵⁴ In support of this argument, Claimant states that the *lesividad* process "does not require or allow the investor an opportunity to contest or respond to the Government's allegations of *lesion* [*sic*] prior to the issuance of the resolution."⁹⁵⁵ Therefore, Claimant argues, "both in form and as used by Guatemala in this case against FVG and RDC, [the *lesividad* procedure] 'involves a lack of due process'"⁹⁵⁶ In other words, Claimant challenges the *lesividad* process both as such (as

⁹⁵¹ See **Ex. R-36**, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

⁹⁵² See **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

⁹⁵³ **Ex. R-123**, 2007-07-12, THE MIAMI HERALD, "Rail Investor Calls it Quits in Guatemala"; **Ex. C-39**, 2007-06-06, Letter from Posner to Customers, Employees and Friends of Ferrovías Guatemala; **Ex. R-204**, 2007-10, RAILWAY GAZETTE INTERNATIONAL, "The lights go out"; **Ex. R-120**, 2007-11-06, EL PERIODICO, *Ferrovías will suspend its operations on October 1*.

⁹⁵⁴ Memorial on the Merits, ¶ 146.

⁹⁵⁵ Memorial on the Merits, ¶¶ 146; 149 (claiming that the *Lesivo* Declaration and subsequent actions taken in furtherance thereof constitute a violation of the fair and equitable treatment standard by "[f]ailing to provide FVG with any due process to challenge or contest the Lesivo Resolution before an independent and neutral decision maker prior to or even shortly after its issuance . . .").

⁹⁵⁶ Memorial on the Merits, ¶ 149 (quoting **Ex. RL-136**, *Waste Management II Award*, ¶¶ 98-99).

designed and existing in the abstract), as well as in the manner in which it was applied in this particular case. Each of these arguments will be addressed in turn.

a. As Designed, The Lesividad Procedure Accords Due Process

378. Claimant may not prevail on its fair and equitable treatment claim by arguing broadly and sweepingly—as it has—that “the *lesivo* procedure under Guatemalan law is a broad and essentially unfettered power that lacks any foundation under substantive Guatemalan law.”⁹⁵⁷ In *Mondev International Ltd. v. United States of America* (“*Mondev*”), the tribunal explained that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”⁹⁵⁸ Moreover, the *Mondev* tribunal explained, the duty of States under international law is “to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected”⁹⁵⁹ Claimant must therefore demonstrate that, when viewed in its entirety, the *lesividad* process that it challenges offends due process rights. As Jan Paulsson, a leading arbitrator and practitioner, has explained, this is no simple feat:

It is not easy for a complainant to overcome the presumption of adequacy and thus to establish international responsibility for denial of procedural justice. The fact that the international tribunal seized of the matter may believe it would have applied national law differently—‘mere error’—is in and of itself of no moment.⁹⁶⁰

⁹⁵⁷ Memorial on the Merits, ¶ 145. Although this section is confined only to a rebuttal of Claimant’s argument that the *lesividad* process, as such, violates due process, Section IV.B.7 below addresses Claimant’s allegation that, on its face, the *lesividad* process violates the fair and equitable treatment standard because it was “arbitrary, grossly unfair, unjust or idiosyncratic . . . [and] discriminatory” Memorial on the Merits, ¶ 149.

⁹⁵⁸ See Ex. RL–16, *Mondev Award*, ¶ 116.

⁹⁵⁹ Ex. RL–158, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005) (emphasis added); see also Ex. RL–89, *Chemtura Award*, ¶ 145 (“In assessing whether the alleged procedural deficiencies attributable to the Respondent involved a breach of Article 1105 of NAFTA, the Tribunal should not limit its inquiry to a specific portion of such arrangements. It must appraise any [purported] procedural deficiency in the light of the mechanisms provided by the Respondent itself to manage such potential occurrences”).

⁹⁶⁰ Ex. RL–158, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 87 (2005) (emphasis added); see also Ex. RL–140, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39 (7th ed., 2008); see also Ex. RL–158,

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379. Claimant bears a heavy burden in demonstrating that Guatemala denied justice or failed to accord due process. As the tribunal in *L.F.H. Neer and Pauline Neer v. United Mexican States* (“*Neer*”) explained, “there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such a lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.”⁹⁶¹ Although this language from *Neer* no longer applies to most standards of treatment that are within the scope of the minimum standard of treatment under customary international law, the *Merrill & Ring* tribunal recently held that the *Neer* standard still applies to denial of justice and due process.⁹⁶²

380. Even if Claimant could point to a procedural failing—which it cannot—this would not lead automatically to the conclusion that there has been a violation of due process. As the tribunal in *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary* (“*AES*”) recently agreed: “[I]t is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection.”⁹⁶³ Instead, the procedure applied to a foreign investment must amount to “an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁹⁶⁴ A claimant must demonstrate that, “on the facts and in the context before the

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Jan Paulsson, *Denial of Justice in International Law* 7 (2005) (“international law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a *system of justice which ensures that unfairness to foreigners either does not happen, or is corrected . . .*” (emphasis added)). To find that Claimant was afforded no due process based merely upon the initiation of the *lesividad* procedure via *Acuerdo Gubernativo* would effectively estop Guatemala from continuing to the administrative phase, in which Claimant is afforded even more procedural rights, and through which any alleged unfairness may be corrected. See Expert Report of J.L. Aguilar, ¶¶ 34, 73.

⁹⁶¹ Ex. RL–116, *F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, (1926) 4 R.I.A.A. 60, Mexico-U.S. General Claims Commission, ¶ 3 (“*Neer Decision*”).

⁹⁶² Ex. RL–110, *Merrill & Ring Award*, ¶ 204.

⁹⁶³ Ex. RL–79, *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22 (Award) 23 September 2010 (von Wobeser, Stern, Rowley), ¶ 9.3.40. (“*AES Award*”).

⁹⁶⁴ Ex. RL–116, *Neer Decision*, ¶ 4.

adjudicator, [the State action was] manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety).”⁹⁶⁵

381. By design, the *lesividad* process affords due process to the private party and ensures that the Executive follows a process of submitting its determinations to the courts in order to revoke its administrative acts that it believes are injurious to the public good, rather than simply allowing the Government to unilaterally revoke those acts.⁹⁶⁶ This process is not “manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety).”⁹⁶⁷ The practice of *lesividad* in Guatemala is not, as Dr. Mayora asserts, “[in]consistent with . . . the constitutional principles of legality, the rule of law, and the due process of law”⁹⁶⁸ Instead, the *lesividad* process is both fair and reasonable, and affords private parties not only an opportunity to be heard, but an opportunity to overturn the initial declaration of *lesividad*, recourse for declarations that were improperly issued, and, if a contract *is* declared null and void after the administrative phase, the ability to file an indemnity claim for work that had previously been completed.⁹⁶⁹

382. Moreover, Dr. Mayora’s assertion that “the Constitutional Court has not yet been asked to rule on the unconstitutionality of the legal provisions that grant the power to make a declaration of *lesividad* . . . but that on careful examination [this power] *should* be declared unconstitutional” contradicts the decision of the Constitutional Court holding that the *lesividad*

⁹⁶⁵ **Ex. RL-79, AES Award**, ¶ 9.3.40. Although Claimant has not directly alleged a violation of due process due to procedural delay, it is relevant here to note that even if it had alleged such a claim, the claim would fail. See **Ex. RL-89, Chemtura Award**, ¶ 215 (“In assessing whether the time used by the PMRA to register Gaucho CS FL was excessive and discriminatory to a point that it entailed a breach of Article 1105, the Tribunal must take into account the obvious fact that the operation of complex administrations is not always optimal in practice and that the mere existence of delays is not sufficient for a breach of the international minimum standard of treatment.” (emphasis added)).

⁹⁶⁶ See Expert Report of J.L. Aguilar, ¶¶ 47–48.

⁹⁶⁷ **Ex. RL-79, AES Award**, ¶ 9.3.40.

⁹⁶⁸ Expert Report of E. Mayora, ¶ 9.2.

⁹⁶⁹ See Expert Statement of J.L. Aguilar.

process is both *lawful and constitutional*.⁹⁷⁰ This decision was issued on 15 July 2004; that is, two years before the publication of the *Lesivo* Declaration here at issue, and nearly five years before Dr. Mayora drafted his expert report in support of Claimant’s allegations.

383. As Lic. Juan Luís Aguilar explains, a private party need not receive an opportunity to be heard in the first stage because (1) that initial stage is an internal process and it is reasonable that the government make an initial decision without consulting the private party; (2) the declaration does not have any immediate practical or legal effects on the individual or its rights; and (3) the private party receives the right to be heard in the second stage.⁹⁷¹ The case of Spain, which Mr. Mayora cites as an example of a jurisdiction that does afford individuals some participation at the executive, internal level is inapposite because, as Lic. Aguilar explains, the Spanish system does *not* afford a subsequent opportunity to question the executive’s internal decision before a court.⁹⁷² Thus, as Lic. Aguilar makes clear, the Guatemalan version of *lesividad* affords *more* protections to the rights of individuals affected by a *lesivo* declaration, as it grants them an opportunity to question that determination before a neutral, impartial court independent of the Executive branch that declared the *lesividad*.⁹⁷³

384. Rejecting the very same argument regarding the unconstitutionality of the *lesividad* process that Claimant presses here, the Constitutional Court of Guatemala made clear, in a ruling issued two years prior to the initiation of the *lesividad* procedure regarding FVG’s usufruct equipment contracts, that the *lesividad* process does not violate due process or any other constitutional right, as it affords the affected party “an effective opportunity to be heard and raise defenses before the competent court, which will examine . . . affording due process,

⁹⁷⁰ See **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

⁹⁷¹ Expert Report of J.L. Aguilar, ¶¶ 2(f, g, h, j), 32, 35, 41, 51, 62.

⁹⁷² Expert Report of J.L. Aguilar, ¶ 48.

⁹⁷³ Expert Report of J.L. Aguilar, ¶ 48.

the what the State has requested as well as the arguments and defenses of the affected party.⁹⁷⁴

b. The Lesividad Procedure Accorded Due Process, As Applied To Claimant

385. To determine whether a particular procedure affords due process as applied, tribunals have consistently followed three rules. First, regardless of a tribunal’s opinion regarding a State’s actions, it is not the function of international tribunals to second-guess the merits of those actions. In determining whether a government action amounts to an international delict, the *Neer* tribunal explained that an international tribunal is not authorized to carry out a *de novo* review of the matter before local courts or authorities:

It is not for an international tribunal such as this Commission to decide whether another course of procedure taken by the local authorities . . . might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in ***an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action***, or (2) that Mexican law rendered it impossible for them properly to fulfil their task.⁹⁷⁵

386. Second, to determine whether the application of a particular process constitutes a violation of due process, tribunals have held that no violation occurs where the State faithfully applies a pre-existing law that is fair on its face. As Campbell McLachlan has explained, an “investor must take the conditions of the host State as he finds them. He cannot make a subsequent complaint if his investment fails merely because of laws, policies or practices which were in place at the time of investment, and which were, or ought to have been, well known to

⁹⁷⁴ Expert Report of J.L. Aguilar, ¶ 47(b); **Ex. RL-172**, Decision of the Constitutional Court of Guatemala File 6108-2004.

⁹⁷⁵ **Ex. RL-116**, *Neer Decision*. As noted above, the *Merrill & Ring* tribunal recently held that the *Neer* standard still applies to denial of justice and due process, even though. See **Ex. RL-110**, *Merrill & Ring Award*, ¶ 204.

him before making the investment.”⁹⁷⁶ Similarly, in *GAMI Investments, Inc. v. Mexico* (“GAMI”), the tribunal explained that the faithful application of a pre-existing law does not violate the minimum standard of treatment under customary international law.⁹⁷⁷ The GAMI tribunal also stated that customary international law does not impose strict liability upon departures from pre-existing laws:

International law does not appraise the content of a regulatory programme extant before an investor decides to commit. The inquiry is whether the State abided by or implemented that programme. It is in this sense that a government’s failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105.⁹⁷⁸

387. Third, tribunals have explained that initial decisions that have the potential to be overturned upon further review do not generally violate the fair and equitable treatment standard under customary international law. As the *Mondev* tribunal explained, “[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. *If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.*”⁹⁷⁹ Similarly, in *EnCana*, the tribunal explained that the investor was not permitted to claim before an international tribunal—as Claimant has here⁹⁸⁰—that the Government measure was “unconstitutional” before the tribunal without having first contesting its constitutionality domestically:

388. The Claimant adduced some evidence that the Interpretative Law is unconstitutional, but *no steps have been taken to contest its constitutionality in the manner provided for under*

⁹⁷⁶ Ex. RL–155, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.107.

⁹⁷⁷ Ex. RL–100, *GAMI Award*, ¶ 91.

⁹⁷⁸ Ex. RL–100, *GAMI Award*, ¶ 91 (emphasis added).

⁹⁷⁹ See Ex. RL–16, *Mondev Award*, ¶ 126.

⁹⁸⁰ Memorial on the Merits, ¶ 146; see also Expert Report of E. Mayora, ¶ 9.8; Expert Report of W. M. Reisman, ¶¶37, 46.

the Political Constitution of Ecuador, and at least it must be presumed to be constitutional. It has been treated as valid and applied by at least one Ecuadorian court. From the Tribunal’s perspective, unless and until action is successfully taken to annul the Interpretative Law on constitutional grounds . . . that Law must be taken to define the extent to which oil companies are entitled to VAT refunds in respect of the acquisition of goods and services.⁹⁸¹

389. In this case, Claimant’s claim that the *lesividad* procedure does not accord due process is contrary to each of these three rules followed by international tribunals. *First*, Claimant is asking this Tribunal to second-guess the decisions of the Constitutional Court of Guatemala that has found the *lesividad* process to be lawful under Guatemalan law, both as such and as applied in this case.⁹⁸² *Second*, Claimant is asking this Tribunal to find a violation of due process where all that Guatemala did was faithfully apply the pre-existing laws that establish and regulate the *lesividad* process; a process that is fair on its face. *Third*, Claimant is asking this Tribunal to condemn the *lesividad* process for not according due process rights to Claimant when that process has not even run its full course, as the *Contencioso Administrativo* court has not even been given an opportunity to issue a decision on the merits.

390. In his expert report in support of Claimant’s Memorial on the Merits, Dr. Mayora did not discuss *at all* the application of the *lesividad* procedure to Claimant. According to Dr. Mayora, this step was unnecessary because, in his opinion (which contradicts the decision of Guatemala’s highest judicial authority on matters of constitutionality of Government acts), the *lesividad* process is unconstitutional:

Since it is my conclusion that there are insurmountable obstacles at a general or systematic level, that prevent the power to issue a declaration of *lesividad* from being made consistent with and subject to the constitutional principles of legality, the rule of law, and the due process of law, *it is unnecessary to look into this—or*

⁹⁸¹ **Ex. RL-98**, *EnCana Award*, ¶¶ 186–87.

⁹⁸² **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158); Expert Report of J.L. Aguilar, ¶ 74-5; **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

*any particular case—in order to determine whether the Administration has acted in accordance with the Constitution.*⁹⁸³

391. In addition to the Judgment of the 2004 Constitutional Court of Guatemala upholding the lawfulness and constitutionality of the *lesividad* process,⁹⁸⁴ that same Court in 2008 rejected a request for constitutional protection (“amparo”) from FVG seeking to declare unconstitutional the *Lesivo* Resolution at issue in this case, and ruled that the *lesividad* process as applied in FVG’s case did not violate its due process rights as it had the opportunity to be heard and present its defenses before the *Contencioso Administrativo* Court. Dr. Mayora does not mention this ruling. In light of the decision of the Constitutional Court in July of 2004 confirming the lawfulness and constitutionality of the *lesividad* process and the international jurisprudence discussed above, it becomes *necessary* “to look into this . . . case in order to determine whether the Administration has acted in accordance with the Constitution.”⁹⁸⁵

392. As applied to the facts, the evidence demonstrates that Claimant was afforded both notice and an opportunity to be heard,⁹⁸⁶ and that, in the present case, Guatemala faithfully executed its *lesividad* procedure in accordance with the laws and process explained above in Section IV.B.3.a. In addition, and as explained above, the only State action for which Claimant has alleged a violation of CAFTA—the *Lesivo* Declaration—constitutes merely the initiation of the process by which the *Contencioso Administrativo* court determines whether Contract 143/158 is valid. This on-going process affords private parties an opportunity to be heard, an opportunity to overturn the initial declaration of *lesividad*, and opportunities to obtain recourse for improperly issued declarations and indemnity in case the contract is declared null and

⁹⁸³ Expert Report of E. Mayora, ¶ 9.2 (emphasis added).

⁹⁸⁴ **Ex. RL-172**, Decision of the Constitutional Court of Guatemala File 6108-2004.

⁹⁸⁵ Expert Report of E. Mayora, ¶ 9.2.

⁹⁸⁶ See Memorial on the Merits, note 183 (citing **Ex. RL-77**, *ADC Award*, ¶435 (“Some basic legal mechanisms, such as reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such [a] legal procedure meaningful”).

void.⁹⁸⁷ Accordingly, Guatemala did not violate the standard of due process required by international law and did not deny Claimant justice.

393. As has been previously explained and Lic. Aguilar confirms, Guatemala has been completely transparent and has strictly observed the established procedure to declare FVG's equipment usufruct contracts *lesivo*.⁹⁸⁸ Specifically, the process started upon request by FEGUA's overseer, followed by legal opinions from all concerned Ministries and FEGUA, as well as the President's Secretary General, and culminated with the decision by the President to declare the equipment contracts *lesivo*. Although not required to do so by law, the Government even informed Claimant of the process and halted it in order to accommodate negotiations in the hopes of reaching a compromise. Since a negotiated solution was impossible, the *Lesivo* Resolution was published in accordance with the law within the established time period to do so. Following publication, the Attorney General filed its complaint before the *Contencioso Administrativo* Court, where the process remains pending. Thus, Guatemala applied its *lesivo* process to FVG's equipment usufruct contracts as is required by law and just as it would and does with respect to any other person or entity. Claimant does not and cannot claim otherwise.

4. Guatemala's *Lesivo* Declaration And Subsequent Actions Were Not Arbitrary Or Discriminatory

394. Claimant has neither demonstrated that the minimum standard of treatment under customary international law imposes an obligation to refrain from taking "arbitrary" action, nor—to the extent that such an obligation exists—that Guatemala has treated Claimant or its investment in an arbitrary manner.

395. This section first analyzes Claimant's allegation that Guatemala acted "arbitrarily" in issuing the *Lesivo* Declaration. As an initial matter, while Claimant alleges generally that Guatemala acted "arbitrarily" in violation of CAFTA's fair and equitable treatment

⁹⁸⁷ See generally Expert Report of J.L. Aguilar.

⁹⁸⁸ See, Expert Report of J.L. Aguilar, ¶¶ 2(n), 63, 75, 77.

standard,⁹⁸⁹—which includes neither a definition of the term nor an application to the facts of the case—it simply *fails to meet its burden* to demonstrate that the obligation to refrain from acting arbitrarily is an element of the minimum standard of treatment under customary international law.⁹⁹⁰ But even if it *were* part of the minimum standard, the evidence demonstrates that the *Lesivo* Declaration was *not* an “arbitrary” measure.

396. This section also examines Claimant’s allegation that Guatemala acted “discriminatorily,” in violation of Article 10.5 of CAFTA. The evidence demonstrates that the *Lesivo* Declaration was not a discriminatory measure.

a. Mere Arbitrariness Does Not Constitute A Breach Of The Fair And Equitable Treatment Standard Of Article 10.5 Of CAFTA

397. Mere allegations of “arbitrariness” does not violate the minimum standard of treatment under *customary* international law. Rather, as multiple tribunals have found, including the tribunal in *International Thunderbird*, only *manifestly* arbitrary State action has the potential to violate the fair and equitable treatment standard.⁹⁹¹ Similarly, as the *Sempra* tribunal explained, “a finding of arbitrariness requires that some *important measure of impropriety be manifest*.”⁹⁹² This standard requires Claimant to prove not only that Guatemala’s actions were “arbitrary,” but that they were “manifestly” so, “falling below international standards.”⁹⁹³ In *Elettronica Sicula S.p.A. (ELSI) v. Italy*, the International Court of Justice held that arbitrariness under customary international law “is not so much something opposed to a rule of law, as something opposed to *the* rule of law . . . It is a *wilful disregard of due process of law*, an act which *shocks*, or at least surprises, a sense of *juridical propriety*.”⁹⁹⁴ The *Saluka* tribunal, which

⁹⁸⁹ See Memorial on the Merits, ¶¶ 149, 154.

⁹⁹⁰ Ex. RL–83, *Asylum Case*, p. 14 (citing Ex. RL–161, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE ART. 38(1)).

⁹⁹¹ See Ex. RL–104, *International Thunderbird Award*, ¶ 194; see also Ex. RL–127, *Sempra Award*, ¶ 318.

⁹⁹² Ex. RL–127, *Sempra Award*, ¶ 318 (emphasis added).

⁹⁹³ Ex. RL–104, *International Thunderbird Award*, ¶ 194.

⁹⁹⁴ Ex. RL–97, *Elettronica Sicula S.p.A. (ELSI) v. Italy (United States of America v. Italy)*, International Court of Justice (Judgment) 20 July 1989, ¶ 128 (“*ELSI Award*”) (emphasis added).

tyed the definition of arbitrariness under customary international law to the notion of “unreasonableness,” imposed a similarly high standard, explaining that the standard is violated only when there is *no* reasonable relationship whatsoever to a rational policy.⁹⁹⁵ The United States, another CAFTA Party, has endorsed this understanding of the degree of arbitrariness necessary under customary international law. Explaining its understanding of the definition of “fair and equitable treatment” under NAFTA⁹⁹⁶—which is nearly identical to the definition of that standard under CAFTA—the United States government in the recent *Glamis Gold* case argued that the claimant had failed to demonstrate that customary international law places a general obligation upon States to refrain from acting arbitrarily: No Chapter 11 tribunal has found that decision-making that appears “arbitrary” to some parties is sufficient to constitute an Article 1105 violation. Instead these tribunals have consistently accorded a high level of deference must be accorded to administrative decision-making. By reference to customary international law, therefore, Article 10.5 of CAFTA only imposes an obligation upon Parties to refrain from manifestly arbitrary action.

b. The Lesivo Declaration Was Not Arbitrary By Any Objective Standard

398. Even if the Tribunal finds that Claimant has satisfied its burden to establish a change in custom,⁹⁹⁷ and assuming *arguendo* that even a small degree of arbitrary State action can violate the minimum standard of treatment under customary international law, Claimant’s argument in this case still falls short, as it fails to demonstrate that the *Lesivo* Declaration was an arbitrary measure by any objective standard.

399. *Black’s Law Dictionary* defines the term “arbitrary” as “depending on individual discretion; (. . .) founded on prejudice or preference rather than on reason or fact .”⁹⁹⁸

⁹⁹⁵ See Ex. RL–125, *Saluka Partial Award*, ¶ 460 (discussing the definition of “unreasonable measures”).

⁹⁹⁶ See Ex. RL–157, NAFTA Art. 1105; Ex. RL–170, NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (31 July 2001).

⁹⁹⁷ Ex. RL–102, *Glamis Gold Award*, ¶ 603; see also Ex. RL–83, *Asylum Case*, p. 14.

⁹⁹⁸ Ex. RL–97, BLACK’S LAW DICTIONARY (8th ed. 2004).

Tribunals have considered a State’s actions to be simply arbitrary—as opposed to manifestly arbitrary, as discussed above—where the State acted on the basis of “prejudice or preference rather than reason or fact,”⁹⁹⁹ or acted unreasonably or capriciously.¹⁰⁰⁰

400. As explained above, Guatemala’s *lesividad* process is a reasonable and rational “check” on State action through which the Government ensures that its own actions and contracts comply with Guatemalan law.¹⁰⁰¹ It also is designed to protect private parties that contract with the Government, because it prevents the Executive branch from unilaterally nullifying public contracts and other administrative acts.¹⁰⁰² Guatemala acted both reasonably and responsibly in applying this procedure to Claimant’s investment.¹⁰⁰³ Despite Claimant’s conclusory statements to the contrary, Guatemala has not acted arbitrarily; rather, Guatemala has at all times acted in good faith, taken reasonable measures to undertake the *lesividad* procedure in conformity with its usual function, and implemented actions consistent with rational government policies.¹⁰⁰⁴ Moreover, as the very purpose of the *lesividad* process is to uphold the rule of law,¹⁰⁰⁵ and to protect Guatemala from actions that violate its own laws, it is evident that the legitimate initiation of this process does not violate the “arbitrariness” standard.

401.

⁹⁹⁹ **Ex. RL–105**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL (U.S./Czech Republic BIT) (Award) 3 September 2001 (Cutler, Briner, Klein), ¶ 221 (“*Lauder Award*”).

¹⁰⁰⁰ See, e.g., **Ex. RL–97**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8 (Award) 12 May 2005 (Orrego Vicuña, Lalonde, Rezek) (“*CMS Gas Award*”); **Ex. RL–115**, *National Grid Award*, ¶ 197. Tying the requirement to one of “reasonableness,” both of these cases discussed the “arbitrariness” standard in relation to an express BIT provision requiring the State parties to refrain from “arbitrary” behavior.

¹⁰⁰¹ See above at Section IV.B.3; see also Expert Report of J.L. Aguilar, ¶¶ 2(c, d, i), 35, 41.

¹⁰⁰² See Expert Report of J.L. Aguilar, ¶¶ 47–48.

¹⁰⁰³ See Expert Report of J.L. Aguilar.

¹⁰⁰⁴ See above at Section IV.B.2

¹⁰⁰⁵ See Expert Report of J.L. Aguilar, ¶¶ 2(c, d), 35, 41.

402. Guatemala used the *lesividad* process in this case in conformity with its normal function.¹⁰⁰⁶ After discovering Contract 143/158’s legal defects upon a routine review,¹⁰⁰⁷ Guatemala notified FVG of these defects¹⁰⁰⁸ and began a process by which four independent agencies or entities (plus outside counsel)¹⁰⁰⁹ ultimately confirmed the necessity of initiating *lesividad* procedures by way of the Declaration.¹⁰¹⁰ Even in this initial stage of the *lesividad* process, Guatemala acted in accordance with due process of law, affording Claimant both notice and an opportunity to be heard.¹⁰¹¹ Representatives of Guatemala met with Claimant on numerous occasions, attempting to reach an agreement to remedy the illegalities of the contract before the three-year prescription period had passed.¹⁰¹² Additionally, Guatemala conditionally suspended the declaration of *lesividad* both in response to Claimant’s expressed refusal to continue negotiating while the *lesividad* process was pending,¹⁰¹³ and as a gesture demonstrating Guatemala’s intention to negotiate a solution to Contract 143/158’s defects.¹⁰¹⁴

¹⁰⁰⁶ **Ex. RL-133**, *Tecmed Award*, ¶ 173.

¹⁰⁰⁷ See First Statement of A. Gramajo, ¶ 10 (discussing Dr. Gramajo’s request, upon assuming his duties as Overseer of FEGUA, that the legal department furnish him with an opinion that analyzed the contents and scope of all contracts, including the Usufruct Contracts).

¹⁰⁰⁸ First Statement of A. Gramajo, ¶ 12; see also **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo, attaching FEGUA Opinion 47-2004.

¹⁰⁰⁹ See Statement of J. Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9.

¹⁰¹⁰ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006.

¹⁰¹¹ See **Ex. RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005) (“international law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a *system of justice which ensures that unfairness to foreigners either does not happen, or is corrected . . .*” (emphasis added)).

¹⁰¹² See above at Section III.I., J., K. (discussing the meetings of the High Level Technical Commission); Witness Statement of M. Marroquín, ¶¶ 9-11; Witness Statement of S. Pineda, ¶¶ 13-20; Minutes from the High Level Commission Meetings: 3 April 2006 (**Ex. R-23**); 5 May 2006 (**Ex. R-26**); 10 May 2006 (**Ex. R-28**); 11 May 2006 (**Ex. R-29**).

¹⁰¹³ Witness Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

¹⁰¹⁴ Witness Statement of M. Marroquín, ¶ 12; Statement of S. Pineda, ¶ 24; Statement of J. Berdúo, ¶ 24.

403. In light of the five legal opinions from independent agencies and outside counsel, each of which concluded that Contract 143/158 must be declared *lesivo*,¹⁰¹⁵ In view of Claimant's indifference toward negotiation, and the pending statute of limitations deadline, the President's decision to declare Contract 143/158 *lesivo* was not only reasonable, but required.¹⁰¹⁶ Under these circumstances, Guatemalan law affords the President no discretion; he must initiate the *lesividad* process via *Acuerdo Gubernativo*. As Lic. Aguilar explains, in light of the foundation and support for the *lesividad* of Contract 143/158 as determined by the legal opinions he received, the President was under an obligation to declare that contracts *lesivo* and would have been subject to personal liability.¹⁰¹⁷

404. Moreover, when considering that: (1) the only effect of the *Lesivo* Declaration was that it would prompt Guatemala's Attorney General to initiate the proceedings by which another independent agency of the Government would review the case;¹⁰¹⁸ (2) the President—or any other Government official—is civilly liable for improper declarations of *lesividad*¹⁰¹⁹ and (3) the Constitutional Court had upheld the constitutionality of the *lesividad* process two years earlier,¹⁰²⁰ it is apparent that the President did not act unreasonably, or with “prejudice or preference rather than on reason or fact.”¹⁰²¹

¹⁰¹⁵ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006; Statement of J. Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9, First Statement of A. Gramajo, ¶ 18.

¹⁰¹⁶ Expert Report of J.L. Aguilar, ¶ 72.

¹⁰¹⁷ Expert Report of J.L. Aguilar, ¶ 72.

¹⁰¹⁸ Expert Report of J.L. Aguilar, ¶¶ 2 (f,g,h), 32, 35.

¹⁰¹⁹ Expert Report of J.L. Aguilar, ¶ 72.

¹⁰²⁰ **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

¹⁰²¹ **Ex. RL-97**, BLACK'S LAW DICTIONARY (8th ed. 2004).

c. *Guatemala Has Not Discriminated Against Claimant Or Its Investment*

405. The concept of discrimination, for its part “has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.”¹⁰²² The existence of a discriminatory measure or action requires a fact-based inquiry and a comparison of the complainant to a similarly-situated person or persons.¹⁰²³ Despite the bare allegation that “the *lesivo* procedure in Guatemala . . . is demonstrably . . . discriminatory,” Claimant does not explain *how* the *lesividad* process, as such, is discriminatory. Nor did Claimant provide the Tribunal with a proper basis of comparison, describe a distinction between itself and domestic investors, and demonstrate that the State action was unreasonable.¹⁰²⁴

406. As is explained in Section IV.D, in response to Claimant’s “national treatment” claim under Article 10.3 of CAFTA, Claimant has failed to demonstrate that the *Lesivo* Declaration was discriminatory *as applied*. Contrary to the position taken by Claimant, the *Lesivo* Declaration did not have a “discriminatory purpose and intent.”¹⁰²⁵ The purpose of the *Lesivo* Declaration was not, as Claimant alleges, to “directly or indirectly take away RDC’s Usufruct investment and award it, either directly or indirectly, to a favored domestic investor in like circumstances, Ramon [*sic*] Campollo.”¹⁰²⁶ Rather, upon notice of the illegalities of Contract 143/158, and having been unable to negotiate a new contract with FVG to cure these illegalities, the purpose of the *Lesivo* Declaration was to initiate the process by which the *Contencioso Administrativo* court would determine whether Contract 143/158 was in fact *lesivo* to the interests of Guatemala.

¹⁰²² **Ex. RL–99**, *Feldman Award*, ¶ 170.

¹⁰²³ **Ex. RL–144**, DOLZER AND SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, p. 177 (citing **Ex. RL–99**, *Feldman Award*, ¶ 171 (“The basis of comparison is a crucial question in applying provisions dealing with non-discrimination”)).

¹⁰²⁴ The lack of discriminatory treatment will be discussed in-depth in Section IV.D, below (National Treatment).

¹⁰²⁵ Memorial on the Merits, ¶ 164.

¹⁰²⁶ Memorial on the Merits, ¶ 164.

407. Importantly, the *Lesivo* Declaration, which is the sole State action upon which Claimant purports to base its claims, has not had a discriminatory *effect*. The decision of whether to declare Contract 143/158 rests ultimately with an independent judicial court; if the *Contencioso Administrativo* court finds that Contract 143/158 is, in fact, injurious to the public interest, only then will Claimant’s investment be declared null and void.¹⁰²⁷ Even if Contract 143/158 is declared null and void, as the Guatemalan judiciary has previously recognized with respect to Claimant’s investment, this decision will have no effect upon Claimant’s investment under Contract 402.¹⁰²⁸ The *Lesivo* Declaration has had no legal or practical effect upon Claimant’s rights: Claimant retains full possession and control of all of its rights under the contracts entered into with Guatemala.¹⁰²⁹

408. Thus, to the extent that CAFTA imposes an obligation not to act arbitrarily or discriminatorily, Guatemala has met this obligation.

5. Guatemala Has Acted In A Transparent Manner

409. Concerning its allegations regarding transparency, Claimant has not satisfied its burden to demonstrate either that this standard falls within the minimum standard of treatment applicable under Article 10.5 of CAFTA imposes an obligation upon States to act transparently, or, assuming that it does, that Guatemala has failed to act transparently.

a. Claimant Has Not Demonstrated That The Obligation To Act Transparently Is An Element Of The Customary International Law Minimum Standard Of Treatment

410. In its Memorial on the Merits, Claimant argued that “[j]ust like Mexico in *Metalclad*, Guatemala here failed to ensure a transparent and predictable framework for FVG’s business . . .

¹⁰²⁷ Expert Report of J.L. Aguilar, ¶¶ 58–59.

¹⁰²⁸ **Ex. R–200**, 2008-05-13, MP 361–2003, Decision from the Criminal Trial Court at Amatitlán, pp. 3, 8 (explaining that the *Lesivo* Declaration applied only to Contract 143/158 and had no effect upon Claimant’s investment in Contract 402).

¹⁰²⁹ See above at Section IV.A.3.

..¹⁰³⁰ This failure to act transparently, Claimant argues, violated the obligation to accord Claimant’s investment fair and equitable treatment under Article 10.5 of CAFTA.¹⁰³¹ Relying as it does solely on the decisions in *Metalclad*¹⁰³² and *Tecmed*,¹⁰³³ Claimant’s argument demonstrates neither that transparency is a “relatively uniform and consistent state practice”¹⁰³⁴ nor that States act transparently as a matter of *opinio juris*, “out of a belief that [this] is compelled”¹⁰³⁵ by international law. Taking into consideration that, as Claimant itself recognizes, “[t]he Supreme Court of British Columbia subsequently set aside the award in *Metalclad* on grounds that the tribunal had improperly based it on transparency,”¹⁰³⁶ Claimant’s authorities on transparency boil down to a single standing decision, *Tecmed*. Yet Claimant’s citation to *Tecmed* fails to establish that transparency is a required element of the minimum standard of treatment under customary international law.

411. Claimant’s reliance on the *Tecmed* decision is misplaced. As the *Glamis Gold* tribunal explained, the *Tecmed* award cannot be cited for support when attempting to add to the definition of fair and equitable treatment under customary international law:

The various BITs cited by Claimant may or may not illuminate customary international law; they will prove helpful to this Tribunal’s analysis when they seek to provide the same base floor of conduct as the minimum standard of treatment under customary international law; but *they will not be of assistance if*

¹⁰³⁰ Memorial on the Merits, ¶ 153.

¹⁰³¹ See Memorial on the Merits, ¶¶ 150–54.

¹⁰³² Memorial on the Merits, ¶¶ 151–53.

¹⁰³³ Memorial on the Merits, ¶150.

¹⁰³⁴ See **Ex. RL–102**, *Glamis Gold Award*, ¶ 602; see also **Ex. RL–171**, *UPS Award*, ¶ 84.

¹⁰³⁵ See **Ex. RL–102**, *Glamis Gold Award*, ¶ 602 (quoting the respondent’s pleadings); see also **Ex. RL–171**, *UPS Award*, ¶ 84.

¹⁰³⁶ Memorial on the Merits, note 182 (citing *United Mexican States v. Metalclad Corp.*, (Judgment), Supreme Court of British Columbia) 2 May 2001, 5 ICSID REPORTS ¶¶ 70–76. The Supreme Court of British Columbia explained that, in applying NAFTA’s fair and equitable treatment provision, the tribunal “misstated the applicable law to include transparency obligations and then made its decision on the basis of the concept of transparency,” and held that the decision must be overturned. *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, (Judgment) 2 May 2001, 5 ICSID REPORTS ¶ 70).

*they include different protections than those provided for in customary international law . . . Looking, for instance, to Claimant’s reliance on Tecmed v. Mexico for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico, defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance.*¹⁰³⁷

412. The standard that the tribunal in *Tecmed* was applying was indeed an autonomous standard of fair and equitable treatment, and *not* the standard under customary international law. The applicable treaty in *Tecmed* provided: “Each Contracting Party shall guarantee fair and equitable treatment in its territory pursuant to international law for investments made by investors from another Contracting Party”¹⁰³⁸ As has been explained, the standard applicable in this case is “the customary international law minimum standard of treatment . . . [Fair and equitable treatment] do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights.”¹⁰³⁹

413. Therefore, as was the case in *Glamis Gold*, the reliance by Claimant on the *Tecmed* award for its argument regarding fair and equitable treatment—and specifically for whether transparency is an element of that standard—will *not* be of assistance to this Tribunal, for it includes different protections than those provided for in customary international law.

414. Recent international tribunals that have applied the same standard as the one under Article 10.5 of CAFTA have observed that the requirement for transparency in governmental conduct is not at present part of the customary law standard, even if by some views it is

¹⁰³⁷ **Ex. RL-102**, *Glamis Gold Award*, ¶¶ 608–10 (emphasis added); see also **Ex. RL-88**, *Champion Trading Company and Ameritrade International, Inc. v. Egypt*, ICSID Case No. ARB/02/9 (27 October 2006) (Briner, Fortier, Aynès), ¶¶ 157–64 (“*Champion Trading Award*”) (discussing the *Tecmed* award as an example of international law, distinct from “customary international law.” In *Champion Trading*, the claimant had withdrawn its claim that the failure to act transparently constituted a violation of the applicable customary international law standard. Only after stating expressly that the tribunal would not discuss the customary international law standard did it discuss *Tecmed*).

¹⁰³⁸ **Ex. RL-133**, *Tecmed Award*, ¶ 64.

¹⁰³⁹ **Ex. RL-61**, CAFTA Art. 10.5.2 (emphasis added).

approaching that stage.¹⁰⁴⁰ The *Champion Trading* tribunal also recognized a distinction between the requirement of transparency and the customary international law minimum standard of treatment; although the claimants in *Champion Trading* completely “withdrew their claim based on the alleged violation of the fair and equitable treatment” obligation under customary international law, that tribunal still considered the claimants’ lack of transparency claim.¹⁰⁴¹ The *Champion Trading* tribunal interpreted the transparency claim under international law, rather than *customary* international law.

b. Guatemala Acted In A Transparent Manner In The Instant Case

415. Even if this Tribunal were to disagree with the tribunal in *Merrill & Ring* and hold that transparency is, at present, part of the customary law standard of the minimum standard of treatment (including fair and equitable treatment), Claimant has not met its burden of demonstrating a violation of Article 10.5 of CAFTA in this case.

416. Professor Schreuer explained that the transparency inquiry is concerned with a country’s overall legal framework, and the country’s adherence to that framework:

Transparency means that the legal *framework* for the investor’s operations is readily apparent and that any decision affecting the investor *can be traced to that legal framework* . . . The investor’s legitimate expectations will be based upon this clearly perceptible legal framework and on any undertakings and representations made explicitly or implicitly by the host State.¹⁰⁴²

417. Thus, the transparency analysis concerns the availability of access to existing laws and regulations. The term “transparency” requires only that the investor have an opportunity to “know beforehand any and all rules and regulations that will govern its investment, as well as

¹⁰⁴⁰ See **Ex. RL-110, Ex. RL-110**, *Merrill & Ring Award*, ¶ 231 (citing and upholding judicial review of the *Metalclad* award by the Supreme Court of British Columbia, which held that transparency was not a proven element of the fair and equitable treatment standard under customary international law).

¹⁰⁴¹ **Ex. RL-88**, See *Champion Trading Award*, ¶¶ 157–64.

¹⁰⁴² **Ex. RL-160**, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 374 (2005) (emphasis added) (quoted by Claimant in ¶ 150 of its Memorial on the Merits).

the goals of the relevant policies and administrative practices or directives”¹⁰⁴³ Because an investor accepts a host State’s law, as it exists at the time of the investments,¹⁰⁴⁴ by investing within that host State, a tribunal determining whether the State has acted transparently should consider both whether the applicable rules and regulations were available to the investor, and whether the investor took measures to discover those rules and regulations. In other words, the proper test contemplates both whether the investor knew and whether it *could or should have known* of the laws and procedures underlying the particular State action. As the *GAMI* tribunal explained, a violation of the fair and equitable treatment standard exists only where the respondent State failed to abide by the laws and procedures that the investor accepted when investing:

International law does not appraise the content of a regulatory programme extant before an investor decides to commit. The inquiry is whether the State abided by or implemented that programme. *It is in this sense that a government’s failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105.*¹⁰⁴⁵

418. Indeed, Claimant’s own legal authorities require only that the legal “framework,” or the *system* of laws, rules and regulations, be transparent. “Transparency” does not require that an investor be apprised of *every* decision made by *every* government agency, entity, or representative, before the opportunity for notification foreseen by the applicable laws or regulations.

419. In the present case, the facts show that Guatemala was at all times transparent in its dealings with Claimant and at all times acted in good faith to dutifully execute its laws. The *lesividad* process—a traditional exercise of Guatemala’s sovereign powers—has pre-dated Claimant’s investment, and was “capable of being readily known”¹⁰⁴⁶ to Claimant. Moreover,

¹⁰⁴³ **Ex. RL–133**, *Tecmed Award*, ¶ 154 (quoted by Claimant in ¶ 141 of its Memorial on the Merits).

¹⁰⁴⁴ **Ex. RL–155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.180.

¹⁰⁴⁵ **Ex. RL–100**, *GAMI Award*, ¶ 91 (emphasis added).

¹⁰⁴⁶ **Ex. RL–111**, *Metalclad Award*, ¶ 76.

Claimant agreed as a condition to participating in the public bidding processes for Contracts 402 and 41, that it was “subject to the laws of the Republic of Guatemala,”¹⁰⁴⁷ thus incurring the obligation to review and understand those laws.

420. Furthermore, in applying the *lesividad* process to Contract 143/158—which neither Claimant nor its experts endeavored to do¹⁰⁴⁸—it is apparent that Guatemala acted transparently. Claimant was aware of each aspect of the *lesividad* process. First, as explained throughout this Counter-Memorial, Claimant was aware of the illegalities in Contract 143/158, and participated in negotiations with Guatemalan officials to cure these deficiencies.¹⁰⁴⁹ Second, Claimant was aware that Guatemala was considering initiating the *lesividad* process.¹⁰⁵⁰ As counsel for Claimant stipulated for the record at the Hearing on Jurisdiction, there was a document regarding the *lesividad* of Claimant’s concession contracts that was being circulated among Government Ministers for signature in May 2006.¹⁰⁵¹ Claimant’s witness Mr. Mario Fuentes, who was appointed as a mediator to resolve any differences that might exist between FVG and FEGUA,¹⁰⁵² explained at the hearing that he communicated this information, in his official capacity, to Claimant in March of 2006.¹⁰⁵³

421. Mr. Fuentes’ statement at the hearing is consistent with the testimony given by Susan Pineda and Mario Marroquín—representatives of Guatemalan agencies on the High Level

¹⁰⁴⁷ **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, ¶ 3.1.4; **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 3.1.4.

¹⁰⁴⁸ See Expert Report of E. Mayora, ¶ 9.2 (declining to examine the application of the *lesividad* process to Claimant based upon the mistaken understanding that there had been no decision regarding the constitutionality of the *lesividad* process under Guatemalan law); but see **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

¹⁰⁴⁹ See above at Sections III.D., E.

¹⁰⁵⁰ See Memorial on the Merits, ¶¶ 69–69; see also **Ex. R-14**, 2005-06-28, Declarations by A. Gramajo in “el Periódico.”

¹⁰⁵¹ See Hearing Transcript (English), 2010-03-03, pp. 667:17-668:18 (Mr. Foster, Mr. Orta).

¹⁰⁵² See Hearing Transcript (English), 2010-03-03, p. 649:16–20 (Mr. Foster, Mr. Fuentes).

¹⁰⁵³ See Hearing Transcript (English), 2010-03-03, pp. 665:16-666:3 (Mr. Fuentes) (“Q. Did you also tell Mr. Senn that, according to your reliable source or reputable source, the Government was pulling together the signatures of the Ministers on a document that would extinguish or terminate these Contracts; correct? A. Yes. . . .”).

Commission—which explains that Claimant approached the negotiations with the understanding that Contract 143/158 might be declared *lesivo*, and even asked for the temporary suspension of the *lesividad* proceedings while negotiations were pending.¹⁰⁵⁴ As a gesture of good faith, this request was granted.¹⁰⁵⁵

422. Claimant has also been given notice and has been afforded a full opportunity to be heard in its own defense in further proceedings before the *Contencioso Administrativo* court.¹⁰⁵⁶ True to Guatemalan law, the *Contencioso Administrativo* courts have reinforced the principle that a *lesivo* declaration itself has no effect upon the validity of a contract. On two separate occasions, the *Contencioso Administrativo* courts declined to temporarily suspend Contract 143/158 while the final decision regarding the validity of that contract was pending.¹⁰⁵⁷ What is more, Guatemalan courts have ruled that the *Lesivo* Declaration had no effect upon Claimant’s investment or rights under Contract 402,¹⁰⁵⁸ and police and other authorities continue to recognize the validity of Claimant’s entire investment.

423. In light of these factors, the only conclusion one can reasonably draw is that Guatemala has acted transparently at all times in its interactions with Claimant.

¹⁰⁵⁴ See Statement of S. Pineda, ¶ 24; Statement of M. Marroquín, ¶¶ 12–13.

¹⁰⁵⁵ Statement of R. Aitkenhead, ¶ 10; Statement of M. Marroquín, ¶ 12; Statement of S. Pineda, ¶ 24; Statement of J. Berdúo, ¶ 24.

¹⁰⁵⁶ See above at Sections III.A and IV.B.3; see also **Ex. RL–73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Claim of *Lesividad* of Contract 143/158; **Ex. RL–74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim; Expert Report of J.L. Aguilar, ¶¶ 62-63, 74-75.

¹⁰⁵⁷ **Ex. RL–73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Claim of *Lesividad* of Contract 143/158; **Ex. RL–74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

¹⁰⁵⁸ See **Ex. R–200**, 2008-05-13, MP 361–2003, Decision from the Criminal Trial Court at Amatitlán, pp. 3, 8.

6. Claimant’s Expectations Were Not Legitimate; Their Frustration Could Not Have Led To A Violation Of Guatemala’s Obligation To Accord Fair And Equitable Treatment Under Customary International Law

a. Fair And Equitable Treatment Under Customary International Law Does Not Include An Obligation To Satisfy Or Not Frustrate Claimant’s Expectations

424. Claimant has failed to demonstrate both that “legitimate expectations” are an element of the minimum standard of treatment under customary international law, and that, even if compliance with legitimate expectations were such an element, Guatemala has frustrated those expectations. As explained above in Section IV.B.1.b, Claimant bears the burden of demonstrating that a particular standard of action is part of the “minimum standard of treatment” required under customary international law.¹⁰⁵⁹ Despite Claimant’s reliance upon *Sempra*, *Tecmed*, and *Waste Management II* for the proposition that legitimate expectations are an element of fair and equitable treatment,¹⁰⁶⁰ none of these cases address the more narrow contours of the minimum standard of treatment under customary international law, to determine if that minimum standard itself requires that a State act according to an investor’s legitimate expectations.¹⁰⁶¹

425. In a separate opinion to the recent decision in *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. The Argentine Republic (“Suez”)*,¹⁰⁶² arbitrator Pedro Nikken made this exact point. Mr. Nikken noted that customary

¹⁰⁵⁹ See above at Section IV.B.1.b; **Ex. RL–61**, CAFTA Art. 10.5.1.

¹⁰⁶⁰ See Memorial on the Merits, ¶¶ 140–42.

¹⁰⁶¹ *Waste Management II*, for its part, states only that “[i]n applying [the fair and equitable treatment] standard, it is *relevant* that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.” Memorial on the Merits, ¶ 140 (citing **Ex. RL–136**, *Waste Management II Award*, ¶¶ 98–99). *Tecmed*, as stated above, does not apply the minimum standard of treatment under customary international law, and cannot be relied upon by Claimant to expand its definition. See **Ex. RL–102**, *Glamis Gold Award*, ¶¶ 608–10.

¹⁰⁶² **Ex. RL–132**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (Separate Opinion of Arbitrator Pedro Nikken) 30 July 2010 (“*Suez Separate Opinion*”).

international law does not include an obligation to abide by an investor’s legitimate expectations:

The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms “fair and equitable.” [. . .] *[N]o other State has made any statement to the effect of giving fair and equitable treatment a meaning different from the international minimum standard (let alone linking it to the “legitimate expectations” of investors and the stability of the legal environment for investment).*¹⁰⁶³

426. Mr. Nikken explained further that an investor’s “legitimate expectations” are an improper source for determining a State’s treaty obligations:

[T]he standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments. Indeed, more attention has been paid to what the claimants have considered the scope of their rights than what the Parties defined as the extent of their obligations.¹⁰⁶⁴

427. To this end, the annulment committee considering the case of *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile* (“*MTD*”) warned tribunals that basing a decision upon an investor’s expectations rather than express treaty obligations may result in an annulable error:

The obligations of the host State towards [sic] foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under

¹⁰⁶³ **Ex. RL-132**, *Suez Separate Opinion*, ¶¶ 3–7 (emphasis added).

¹⁰⁶⁴ **Ex. RL-132**, *Suez Separate Opinion*, ¶¶ 20, 27 (“The expectations of investors are not the appropriate instrument for measuring whether a government acted correctly or not according to the canons of a well-organized state. I think it is out of all proportion to interpret the fact that States committed to fair and equitable treatment to mean that they were going to compel their governments to submit to such a test”).

the BIT might well exceed its powers, and if the difference were material might do so manifestly¹⁰⁶⁵

428. Similarly, in *Glamis Gold*, a case in which the applicable standard of fair and equitable treatment was tied to the customary international law minimum standard of treatment—as is also the case here—the tribunal accorded no weight to the claimant’s argument regarding legitimate expectations, finding that the standard enunciated in *Tecmed* was inapplicable under a customary international law analysis. The *Glamis Gold* tribunal concluded that “merely not living up to expectations *cannot be sufficient to find a breach of Article 1105* [the fair and equitable treatment provision] *of the NAFTA.*”¹⁰⁶⁶

429. But even if Claimant had met its burden of demonstrating that compliance with an investor’s legitimate expectations *is* an element of the minimum standard of treatment under customary international law—Claimant’s argument still fails, because it has not shown that Guatemala violated that standard by frustrating the Claimant’s legitimate expectations. As explained above in the context of expropriation, an “investor will have a right of protection of its *legitimate* expectations provided it exercised due diligence and that its *legitimate expectations were reasonable in light of the circumstances.*”¹⁰⁶⁷

430. In determining whether a set of expectations is “legitimate,” or “reasonable,” tribunals consider an investor’s duty to investigate into the laws of the host State, its prior experience within the host State, or specific representations made by officials of the host State. Tribunals have consistently declined to impose liability upon respondent States where the investor failed to “take responsibility for meeting in full the requirements of local law”¹⁰⁶⁸ Ignorance of

¹⁰⁶⁵ **Ex. RL–114**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 (Decision on Annulment) 21 March 2007 (Guillaume, Crawford, Ordoñez Noriega), ¶¶ 67–69 (emphasis added).

¹⁰⁶⁶ **Ex. RL–102**, *Glamis Gold Award*, ¶¶ 608–10; 620.

¹⁰⁶⁷ **Ex. RL–120**, *Parkerings Award*, ¶ 333 (emphasis added); *see also* **Ex. RL–89**, *Chemtura Award*, ¶ 178 (declining to accord weight to the claimant’s “disingenuous” expectations).

¹⁰⁶⁸ *See* **Ex. RL–155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.140 (discussing **Ex. RL–104**, *International Thunderbird Award*); *see also* **Ex. RL–113**, *MTD Award*, ¶ 167 (“This conclusion of the Tribunal does not mean that Chile is responsible for the consequences of unwise business

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the law is no defense.¹⁰⁶⁹ In the absence of specific representations to the contrary,¹⁰⁷⁰ an investor is entitled to expect nothing more than the consistent, faithful application of the laws that exist at the time it makes its investment.¹⁰⁷¹

431. Furthermore, tribunals and commentators alike have explained that, to the extent “reasonable expectations” are relevant, they are not intended to indemnify an investor for its own failings, whether this is a failure to investigate host State law or a failure to anticipate business risk.¹⁰⁷² To this end, the *MTD* tribunal stated: “BITs are not an insurance against business risk and the Tribunal considers that Claimants should bear the consequences of their own actions as experienced businessmen.”¹⁰⁷³

432. Accordingly, Claimant must demonstrate first that its expectations were legitimate, and, second, that Guatemala has frustrated these expectations. As is explained in Part b, below, Claimant has failed to prove for each of the alleged legitimate expectations that (a) its expectation was legitimate, and (b) its expectation was frustrated by the *Lesivo* Declaration.

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decisions or for the lack of diligence of the investor. Its responsibility is limited to the consequences of its own actions to the extent they breached the obligation to treat the Claimants fairly and equitably”).

¹⁰⁶⁹ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.140 (discussing **Ex. RL-104**, *International Thunderbird Award*); Expert Report of J.L. Aguilar, ¶ 45.

¹⁰⁷⁰ See **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.111 (Oxford University Press, 2007) (citing **Ex. RL-104**, *International Thunderbird Award* (“[T]he absence of specific representations is a material factor in leading to a finding that the standard has not been breached”).

¹⁰⁷¹ See **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.107; 8.105 (citing *The Oscar Chinn Case* (1934) PCIJ Rep Series A/B No. 63); see also **Ex. RL-147**, R. Dolzer, *Indirect Expropriations: New Developments?* (2002) 11 NYU ENVIRONMENTAL LAW JOURNAL 64, 78-79; **Ex. RL-113**, *MTD Award*, ¶ 209.

¹⁰⁷² **Ex. RL-106**, *LG&E Award*, ¶ 130 (the investor’s fair expectations cannot fail to consider parameters such as business risk or industry’s regular patterns).

¹⁰⁷³ **Ex. RL-113**, *MTD Award*, ¶ 178; see also **Ex. RL-149**, Fortier and Drymer, *Indirect Expropriation in the Law of International Investment*, p. 307.

b. Guatemala Did Not Frustrate Claimant's Legitimate Expectations; Any Expectations That Contract 143/158 Would Not Be Subject To Guatemala's Government Procurement Laws Were Not Reasonable

433. Claimant alleges that Guatemala frustrated its legitimate expectations in violation of Article 10.5 of CAFTA. However, Claimant has failed to demonstrate that (a) its alleged expectations were legitimate, and (b) that they were frustrated by the *Lesivo* Declaration.

434. Claimant bases four of its allegedly legitimate expectations on the rights and obligations set forth in Contract 143/158. Specifically, these expectations, according to Claimant, were:

- i. RDC's expectation that FVG would have the exclusive right to use the rolling stock during the entire 50-year term of the Usufruct;
- ii. RDC's expectation and understanding that Deed 143 was awarded, executed and approved in accordance with Guatemalan law;
- iii. RDC's expectation and understanding that the economic terms of Deeds 143/158 were acceptable to the Government; [and]
- iv. RDC's expectation and understanding that Deeds 143/158 adequately protected the Government's purported "historical and cultural patrimony" interests in the rolling stock¹⁰⁷⁴

435. However, these expectations about Contract 143/158 were not reasonable, for the same reason that in the expropriation context, Claimant's understanding that Contract 143/158 was "approved in accordance with Guatemalan law" was unreasonable: that Contract was not the product of a public bid,¹⁰⁷⁵ and was never approved by the President or his Cabinet.¹⁰⁷⁶

¹⁰⁷⁴ Memorial on the Merits, ¶ 153.

¹⁰⁷⁵ See **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005 (explaining that the bidding process for Contract 41 produced no valid contract, and that Contract 143 could not be based upon the bidding process which led to Contract 41 in part because the contracts were four years apart, the same conditions did not exist at the time, and because Contract 41 never received the require approval via *Acuerdo Gubernativo*).

Because Contract 143/158 did not comply with the formation requirements of which Claimant was well-aware—having previously been awarded two contracts as a result of a public bid, and having admitted that Contract 41 never entered into force because it never received the requisite approval—Claimant could not have generated any legitimate expectations based on the terms of Contract 143/158. Hence, these expectations are unreasonable.

436. Moreover, in light of the law existing at the time Claimant invested in Guatemala, its prior experience with Government contract procedure, and the specific representations made by Guatemalan representatives, none of these expectations are legitimate. In fact, the only reasonable conclusion based on Guatemalan law, Claimant’s experience, and Guatemala’s representations, was that Contract 143/158 was plagued with formation defects, and that its terms were unacceptable. And Claimant well knew this, as its actions, in exchanging draft agreements and negotiating with the Government to enter into a new usufruct equipment contract, demonstrate Claimant’s understanding that Contract 143/158 was tenuous on legal grounds. Upon being notified of the deficiencies of Contract 143/158 as early as April of 2004,¹⁰⁷⁷ Claimant accepted that Contract 143/158 was defective,¹⁰⁷⁸ began negotiations with FEGUA in an attempt to cure its problems,¹⁰⁷⁹ and requested that the Government “officially and formally acknowledge”¹⁰⁸⁰ Contract 143/158. After notifying Claimant in April of 2004 that

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¹⁰⁷⁶ See Statement of M. Cifuentes, ¶ 12; **Ex. R-10**, 2004-11-24, FEGUA Finance Department Opinion 123-2004. This requirement was made clear to Claimant on several occasions, and was incorporated into the bidding rules for each of the contracts entered into by Claimant and FEGUA. See **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.4; **Ex. R-1**, 1997-02-04, Bidding Rules for Contract 402, § 3.6.4; see also **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting from the Ministry of Communications the “official and formal acknowledgment” of Contract 143/158).

¹⁰⁷⁷ See First Statement of A. Gramajo, ¶ 12; see also **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo (attaching **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004, which discussed the illegalities of Contract 143/158).

¹⁰⁷⁸ See, e.g., **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting that Contract 143/158 be “officially” approved).

¹⁰⁷⁹ See First Statement of A. Gramajo, ¶ 20.

¹⁰⁸⁰ **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting that Contract 143/158 be “officially” approved).

Contract 143/158 contained illegalities, Guatemala has consistently represented that the Contract was defective and could not stand absent modification to correct the legal defects.¹⁰⁸¹

437. Furthermore, and also based on the law existing at the time Claimant invested in Guatemala, its prior experience with government concessions, and the specific representations made by State officials, Claimant could not reasonably expect that Guatemala would not enforce its laws (including through the *Lesivo* Declaration). Claimant's investment in Guatemala in 1997 was thus subject to the *lesividad* process, and international tribunals have consistently imposed constructive knowledge upon investors of the domestic laws that pre-date an investment.¹⁰⁸² As one noted commentator explained, "in the absence of some specific representation to the contrary, the investor is bound by host State law at the date of the investment, and cannot bring a complaint of unfair treatment for a subsequent faithful application of it."¹⁰⁸³ Claimant here cannot rely upon any specific representations of government officials to substantiate its claim that it "legitimately" expected that the *lesividad* process would not be initiated in response to the illegalities of Contract 143/158. To the contrary, Guatemala consistently explained to Claimant—based on the conclusions in five separate and independent legal opinions¹⁰⁸⁴—that it would have no choice but to initiate *lesividad* proceedings via *Acuerdo Gubernativo*, if no settlement agreement was reached to cure the defects of Contract 143/158. Claimant was aware that Guatemala intended to initiate *lesividad* proceedings if a settlement was not reached, and even requested that Guatemala suspend the declaration of *lesividad* while negotiations were pending.¹⁰⁸⁵

¹⁰⁸¹ See First Statement of A. Gramajo, ¶¶ 12-13, 37-40; Second Statement of A. Gramajo, ¶¶ 6-7.

¹⁰⁸² See, e.g., **Ex. RL-113**, *MTD Award*, ¶ 209.

¹⁰⁸³ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105.

¹⁰⁸⁴ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General's Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006; Statement of J. Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9; First Statement of A. Gramajo, ¶ 18.

¹⁰⁸⁵ Statement of R. Aitkenhead, ¶ 10; Witness Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

438. As one noted commentator explained, “in the absence of some specific representation to the contrary, the investor is bound by host State law at the date of the investment, and cannot bring a complaint of unfair treatment for a subsequent faithful application of it.”¹⁰⁸⁶ Claimant here cannot rely upon any specific representations of Government officials to substantiate its claim that it “legitimately” expected that the *lesividad* process would not be initiated in response to the illegalities of Contract 143/158. To the contrary, Guatemala consistently explained to Claimant—based on the conclusions in five separate and independent legal opinions¹⁰⁸⁷—that it would have no choice but to initiate *lesividad* proceedings via *Acuerdo Gubernativo*, if no settlement agreement was reached to cure the defects of Contract 143/158. Claimant was aware that Guatemala intended to initiate *lesividad* proceedings if a settlement was not reached, and even requested that Guatemala suspend the declaration of *lesividad* while negotiations were pending.¹⁰⁸⁸

439. In light of these objective facts, Claimant’s understanding, and the specific representations of the Government, Claimant may not reasonably allege that its stated expectations were legitimate.

440. Even assuming, *arguendo*, that Claimant’s expectations regarding Contract 143/158 are reasonable, the *Lesivo* Declaration did not frustrate these expectations. Claimant remains in full possession of the railway equipment governed by Contract 143/158, and, per the instructions of the *Contencioso Administrativo* courts, Guatemala continues to act as if Contract 143/158 is in full effect.

441. Claimant has also alleged that Guatemala frustrated the expectation “that the Government would, pursuant to its obligation under Deed 402, not ‘hinder the rail and non-rail

¹⁰⁸⁶ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105.

¹⁰⁸⁷ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006; Statement of J. Berdúo, ¶ 8; Statement of A. Zosel, ¶ 9; First Statement of A. Gramajo, ¶ 18.

¹⁰⁸⁸ Witness Statement of S. Pineda, ¶ 22; Statement of J. Berdúo, ¶ 24.

activities of [FVG],’ and ‘protect[] the exercise of [FVG’s] rights against third parties that may intend to have or want to exercise a right on the real estate granted as onerous usufruct”¹⁰⁸⁹ Guatemala has in fact acted in a manner that respects this expectation, both before and after the *Lesivo* Declaration was published.¹⁰⁹⁰ Since the *Lesivo* Declaration, and based mostly upon information received as a result of FEGUA’s surveillance of the right of way property,¹⁰⁹¹ Guatemala has initiated more than 50 legal proceedings relating to the theft of rails¹⁰⁹² and more than 50 legal proceedings to dislodge squatters and trespassers along the right of way granted under Contract 402.¹⁰⁹³

442. Likewise, Guatemala did not frustrate Claimant’s expectation “that any disputes between it or FVG and the Government would be addressed and resolved through negotiation or binding arbitration rather than unilateral Government action.”¹⁰⁹⁴ As Claimant itself has agreed, the parties attempted to negotiate a settlement regarding the illegalities of Contract

¹⁰⁸⁹ Memorial on the Merits, ¶ 153.

¹⁰⁹⁰ **Ex. R–115**, 2007-02-12, Oficio No. 044–2007, Letter to J. Senn from A. Gramajo; **Ex. R–119**, 2007-05-31, Oficio No. 114–2007, Letter to J. Senn from A. Gramajo; **Ex. R–121**, 2007-06-12, Letter to J. Senn from A. Gramajo; **Ex. R–146**, Oficio No. 148-2008, 2008-09-02, Letter to J. Senn from Elder Roberto Martinez (Interventor de FEGUA); **Ex. R–151**, 2009-09-11, Case filed Against Squatters initiated by José Enrique Urrutia Ipiña; **Ex. R–158**, 2010-01-14, Letter to Viceminister Jesús Insua from Lic. C. Samayoa; **Ex. R–167**, 2010-04-05, Letter to J. Senn from Lic. C. Samayoa; **Ex. R–157**, 2010-01-13, Eviction Decree of Squatter from Mile 217; **Ex. R–179**, 2010-06-15, Oficio No. 069-2010, Letter to C. Samayoa from C. de Dubón; **Ex. R–144**, 2008-02-20, Oficio No. 063-2008, Letter to J. Senn from E. Martinez.

¹⁰⁹¹ See, e.g., **Ex. R–124**, 2007-07-10, Oficio No. 128-2007, Letter to A. Gramajo from J. De Leon; **Ex. R–138**, 2007-12-14, Oficio No. 206-2007, Letter to J. Senn from A. Gramajo; **Ex. R–143**, 2008-01-19, Letter to A. Gramajo from Jorge A. Palomo (Tecnico Inspector en Seguridad); **Ex. R–141**, 2008-01-29, Letter to A. Gramajo from Jorge A. Palomo (Tecnico Inspector en Seguridad); **Ex. R–142**, Oficio No. 041-2008, 2008-02-04, Letter to J. Senn from Elder Roberto Martínez; **Ex. R–139**, Letter to A. Gramajo from J. Palomo (Tecnico Inspector en Seguridad); **Ex. R–166**, 2010-03-12, Letter to C. Samayoa Flores from A. Veliz Posadas; **Ex. R–176**, Oficio No. 011-2010, Letter to Lic. R. Velázquez Ruano (Ministro de Gobernación) from Lic. C. Samayoa.

¹⁰⁹² See **Ex. R–182**, Excel Chart of Criminal Proceedings Initiated by FEGUA for the Theft and Removal of Rails.

¹⁰⁹³ See **Ex. R–184**, Excel Chart of Criminal Proceedings Initiated by FEGUA for the Removal of Squatters.

¹⁰⁹⁴ Memorial on the Merits, ¶ 153.

143/158 on numerous occasions. The parties continued to negotiate even after the *Lesivo* Declaration had been published.¹⁰⁹⁵

443. Importantly, the inclusion of an arbitral dispute clause in the contracts between Claimant and the Government cannot generate a legitimate expectation that Guatemala would not enforce its laws and utilize the *lesividad* process when faced with illegalities of the type surrounding the execution of Contract 143/158. Stated differently, Claimant could not reasonably expect that the existence of an arbitration clause in its contracts with the Government would preclude Guatemala from upholding its law and resorting to the *lesividad* process. This is especially so given that, as Lic. Juan Luís Aguilar notes, Guatemalan law requires the Government to declare an administrative act *lesivo* before it can submit the same to the *Contencioso Administrativo* courts for its determination on the legality of that act.¹⁰⁹⁶ That is the procedure called for under Guatemalan law, and thus the procedure FEGUA and the Government were required to follow.

444. Finally, Guatemala did not violate Claimant's expectation that "Guatemala would not take any precipitous or arbitrary actions against it that would serve to harm RDC's investment or FVG's business."¹⁰⁹⁷ This contention, which was addressed more specifically in Section I.A.1.a(i)393 above, has no merit. Guatemala has acted consistently and rationally to dutifully apply its own laws, and in order to protect the interests of the State. There has been no precipitous or arbitrary action on the part of Guatemala, either against Claimant or its investment.

445. Thus, Claimant has failed to demonstrate that Guatemala frustrated its legitimate expectations, in violation of Article 10.5 of CAFTA.

¹⁰⁹⁵ See First Statement of A. Gramajo, ¶ 48; see also **Ex. R-36**, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

¹⁰⁹⁶ Expert Report of J.L. Aguilar, ¶ 42.

¹⁰⁹⁷ Memorial on the Merits, ¶ 153.

7. Claimant Argues That The Process Of *Lesividad* As Such Is Contrary To The Minimum Standard Of Treatment Under Customary International Law

446. Similar to its argument that the process of *lesividad* is *per se* expropriatory in violation of CAFTA, Claimant argues that the process—that is, not only its application—is *per se* a violation of the minimum standard of treatment under customary international law: “[W]hen applied against a foreign investor, the *lesivo procedure* in Guatemala clearly does not conform with Guatemala’s obligation under CAFTA to provide fair and equitable treatment in accordance with customary international law.”¹⁰⁹⁸ Claimant’s expert, Dr. Mayora, made a similar point, finding it “unnecessary” to examine the application of the *lesividad* process to Claimant because he mistakenly believed that the process as a whole was unconstitutional.¹⁰⁹⁹ Although this argument was examined in-depth in Section IV.B.3.a, above, we have addressed succinctly below Claimant’s argument that the *lesividad* process, “in form,”¹¹⁰⁰ violates CAFTA’s fair and equitable treatment standard because it is “demonstrably ‘arbitrary, grossly unfair, unjust or idiosyncratic [and] discriminatory’”¹¹⁰¹

447. Acceptance of this argument would contravene two established international law principles. First, accepting this argument would undermine the requirement that “fair and equitable treatment” be determined by a case-specific, fact-based inquiry. As the *Mondev* tribunal explained, “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”¹¹⁰² Second, as discussed in Section IV.A.3.c, above, and as the *Parkerings* tribunal explained, to hold that a long-standing, legitimate exercise of Guatemala’s police power violates the fair and equitable treatment standard would itself violate notions of comity and sovereignty:

¹⁰⁹⁸ Memorial on the Merits, ¶ 149 (emphasis added).

¹⁰⁹⁹ *Compare* Expert Report of E. Mayora, ¶ 9.2 with **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights (“Amparo”), Exp. 6108-2004.

¹¹⁰⁰ Memorial on the Merits, ¶ 149.

¹¹⁰¹ Memorial on the Merits, ¶ 149.

¹¹⁰² See **Ex. RL-16**, *Mondev Award*, ¶ 116.

*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion . . . What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.*¹¹⁰³

448. While the case before the *Parkerings* tribunal dealt specifically with deference to a State's inherent power to legislate, other tribunals have reached similar outcomes with respect to a State's regulatory,¹¹⁰⁴ administrative,¹¹⁰⁵ and judicial¹¹⁰⁶ functions.

449. As demonstrated throughout this section, the *lesión* power in Guatemala is not an inherently unfair, unreasonable or inequitable exercise of State power. Instead, it is a judicially-recognized constitutional and reasonable measure designed to uphold the rule of law,¹¹⁰⁷ and to protect the public interest. As designed, the *lesividad* process violates none of the standards alleged by Claimant.

450. As explained in-depth in Section I.A.1.a(i)393 above, the *lesividad* process in Guatemala is not arbitrary. Customary international law imposes a heavy burden upon investors claiming that a particular State action was "arbitrary," defining a violation as a measure or act which "is

¹¹⁰³ **Ex. RL-120**, *Parkerings Award*, ¶ 332 (emphasis added).

¹¹⁰⁴ See **Ex. RL-136**, *Waste Management II Award*, ¶ 94 (quoting **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 263) (In *S.D. Myers*, "[t]he tribunal consider[ed] that a breach of [NAFTA] Article 1105 occurs 'only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.'" (emphasis added)).

¹¹⁰⁵ See **Ex. RL-133**, *Tecmed Award*, ¶ 119 ("The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable").

¹¹⁰⁶ **Ex. RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 100 (2005) (citing **Ex. RL-107**, *Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award) 26 June 2003 (Mason, Mikva, Mustill) ("States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct." (emphasis added)).

¹¹⁰⁷ See **Ex. RL-172**, Constitutional Court Decision, Claim for the Protection of Constitutional Rights ("Amparo"), Exp. 6108-2004; see Expert Report of J.L. Aguilar, ¶¶ 2(c, d), 6-21, 35, 129 (discussing the manner in which the *lesividad* process acts as a safeguard for the principle of legality).

a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”¹¹⁰⁸ The *lesividad* procedure does not meet this standard.¹¹⁰⁹

451. Closely related to the argument put forth in Section IV.B.3.a regarding due process, the *lesividad* process is neither “grossly unfair” nor unjust. The inquiry as to whether a procedure is “unfair” must take into account the procedure as a whole, as well as the potential for remedy. As the *Mondev* tribunal stated, the duty of States under international law is “to create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected”¹¹¹⁰ The *lesividad* process is this type of procedure; it affords the affected parties an opportunity to be heard in their own defense, and multiple opportunities to correct any potential mistakes, including: an opportunity to overturn the initial declaration of *lesividad*, recourse for declarations that were improperly issued, and, if a contract is declared null and void after the administrative phase, the ability to file an indemnity claim for work that had previously been completed.¹¹¹¹

452. As to Claimant’s allegation that the *lesividad* procedure violates Article 10.5 of CAFTA because it is “idiosyncratic,” this is neither true nor probative of a violation of the fair and equitable treatment standard under customary international law. Under the ordinary meaning of the word, which denotes peculiarity, a State’s conduct can be deemed idiosyncratic and not unjust or unfair. There is no penalty under international law for having national laws or procedures that are unusual or particular to a State’s national circumstances, so long those laws are publicly available for review by would-be investors, as they were in this case.¹¹¹² In any

¹¹⁰⁸ Ex. RL–97, *ELSI Award*, ¶ 128.

¹¹⁰⁹ Expert Report of J.L. Aguilar, ¶¶ 2(c, d), 47-48, 51, 55, 58–59.

¹¹¹⁰ Ex. RL–158, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005) (emphasis added); see also Ex. RL–89, *Chemtura Award*, ¶ 145 (“In assessing whether the alleged procedural deficiencies attributable to the Respondent involved a breach of Article 1105 of NAFTA, the Tribunal should not limit its inquiry to a specific portion of such arrangements. It must appraise any [purported] procedural deficiency in the light of the mechanisms provided by the Respondent itself to manage such potential occurrences.” (emphasis added)).

¹¹¹¹ Expert Report of J.L. Aguilar, ¶¶ 2(c, d), 51, 55, 58–62.

¹¹¹² Expert Report of J.L. Aguilar, ¶¶ 44–46.

event, the *lesividad* process is not “peculiar” or “idiosyncratic;” many other countries have similar mechanisms for controlling the legality of State acts and safeguarding the public interest.¹¹¹³

453. Finally, as discussed both above in Section IV.A.6 and below in Section IV.D, the *lesividad* procedure is not discriminatory on its face; apart from distinguishing between acts or contracts which are injurious to the interests of the State and those that are not, the process makes no other distinction or classification, let alone an unreasonable one.

8. Claimant’s Factual Allegations Are Either False Or Do Not Constitute A Breach Of The Fair And Equitable Treatment Standard

454. In addition to failing to invoke the correct legal standards and citing precedent that is inapposite to the present dispute, Claimant also neglected to apply the very standards it invoked to the facts of this case. Claimant simply listed the following six allegations in support of its contention that Guatemala breached the fair and equitable treatment standard:¹¹¹⁴

(1) Basing the Lesivo Resolution on grounds that are directly contrary to the facts and prior actions, representations and agreements of the Government;

(2) Basing the Lesivo Resolution on grounds that were entirely the fault of the Government and easily within the Government’s control to address and correct (if even necessary) through less extreme measures;

(3) Issuing the Lesivo Resolution just prior to the expiration of the three-year limitations period after FVG refused the Government’s demands that it agree, for no consideration (other than the Government abandoning the Lesivo Resolution), to modify the economic terms of the Usufruct Contracts to the Government’s benefit and surrender substantial rights under the Contracts;

¹¹¹³ See Expert Report of J.L. Aguilar, ¶¶ 42–43, 48.

¹¹¹⁴ Memorial on the Merits, ¶ 149.

(4) Declaring Deeds 143/158 detrimental or injurious to the interests of the State when no demonstrable injury to the State existed;

(5) Failing to provide FVG with any due process to challenge or contest the Lesivo Resolution before an independent and neutral decision maker prior to or even shortly after its issuance;

(6) Failing to act in good faith toward RDC and its investment by implementing a measure with intent to discriminate and knowledge of the unlawfulness of such implementation.

455. But these allegations are either false, or, if true, do not constitute violations of CAFTA’s fair and equitable treatment standard. All of these claims have been discussed to some extent in previous sections; nevertheless, Guatemala will address them briefly in the paragraphs that follow.

456. The first allegation—that Guatemala based the *Lesivo* Declaration “on grounds that are directly contrary” to the Government’s representations—is untrue.¹¹¹⁵ As has been extensively discussed by now, including above in Section IV.B.6.b, the *Lesivo* Declaration was based on the illegalities of Contract 143/158, including the fact that it was not a product of a public bid and was not approved via *Acuerdo Gubernativo*, when both were required by law.¹¹¹⁶ Claimant was

¹¹¹⁵ Memorial on the Merits, ¶ 149(i).

¹¹¹⁶ See **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205–2005, p. 2 (explaining that the bidding process for Contract 41 produced no valid contract, and that Contract 143 could not be based upon the bidding process which led to Contract 41 in part because the contracts were four years apart, the same conditions did not exist at the time, and because Contract 41 never received the required approval via *Acuerdo Gubernativo*); see also **Ex. RL-49**, 1996-11-21, *Ley De Lo Contencioso Administrativo* Art. 20. Discussing the requirement of government approval, p. 2; Expert Report of J.L. Aguilar, ¶¶ 2(o, p), 91, 92-97, 101, 126-128; Statement of M. Cifuentes, ¶ 12; **Ex. R-10**, 2004-11-24, FEGUA Finance Department Opinion 123–2004. This requirement was made clear to Claimant on several occasions, and was incorporated into the bidding rules for each of the contracts entered into by Claimant and FEGUA. See **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.4; **Ex. R-1**, 1997-11-02, Bidding Rules for Contract 402, § 3.6.4; see also **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn, p. 2 (requesting “official and formal acknowledgment” of Contract 143/158).

aware that Contract 143/158 suffered from legal defects,¹¹¹⁷ and met with representatives of the Government on numerous occasions to attempt to cure these illegalities.¹¹¹⁸

457. The second allegation, that the *Lesivo* Declaration was predicated upon a situation that was entirely the fault of the Guatemalan Government and that the Government could have taken a “less extreme measure,” is similarly untrue.¹¹¹⁹

458. First, the Government did try to resolve this issue through a less extreme measure when it attempted to negotiate a new contract with FVG that would cure the legal defects, but, as discussed previously, Claimant, through FVG, ultimately refused to enter into a new contract.¹¹²⁰ Even if other lesser restrictive measures did exist—Claimant has not pled any—customary international law does not impose an obligation to choose the less restrictive measure. CAFTA requires only that Guatemala treat foreign investors fairly and equitably, consistent with the minimum standard of treatment under customary international law, which it has demonstrably done in the present case. Moreover, as Lic. Juan Luís Aguilar explains, the *Lesivo* Declaration is precisely the procedure that the President and his Cabinet were compelled to follow under Guatemalan law in view of the illegalities associated with Contract 143/158.¹¹²¹

459. As stated above in Section IV.A.2 and as the Tribunal explained in its Second Decision on Objections to Jurisdiction, “[i]t is to be expected that investments made in a country will meet the relevant legal requirements”¹¹²² This statement echoes the reasoning adopted by many other tribunals, which explain that the investor assumes the duty to ensure its investment is

¹¹¹⁷ See, e.g., **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting “official and formal acknowledgment” of Contract 143/158)

¹¹¹⁸ See First Statement of A. Gramajo, ¶ 48; see also **Ex. R-36**, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

¹¹¹⁹ Memorial on the Merits, ¶ 149(ii).

¹¹²⁰ See above at Sections III.K.; III.L.

¹¹²¹ Expert Report of J.L. Aguilar, § VI..

¹¹²² Second Decision on Objections to Jurisdiction, ¶ 140 (emphasis added).

made pursuant to host State law.¹¹²³ Claimant may not succeed on a claim by summarily dismissing its own obligations to exercise due diligence and to comply with the domestic laws applicable to its investment.¹¹²⁴

460. In addition, arguing that the need to resort to the *lesividad* process was entirely the fault of the Government, Claimant asks this Tribunal to provide it with a pass for violating the very laws that it agreed to follow as a condition of the public bidding process and that governed its investment. This the Tribunal should not do. As explained above in Section IV.A.3.b(iii) regarding Claimant's alleged "reasonable expectations" in the expropriation context, Claimant was made aware that the existence of a public bid, and presidential approval of a contract via *Acuerdo Gubernativo* are essential elements of Guatemalan Government contracts. Claimant's contemporaneous actions demonstrate that it understood these requirements; for both Contracts 402 and 41, Claimant submitted a proposal¹¹²⁵ in response to the Government's solicitation for a public bid,¹¹²⁶ and was subject to the approval of a bid selection committee.¹¹²⁷

¹¹²³ See above at Section IV.A.2.

¹¹²⁴ See **Ex. RL-113**, *MTD Award*, ¶¶ 168–78 (discussing the claimant's lack of diligence).

¹¹²⁵ **Ex. R-55**, 1997-05-15, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402), p. 1; **Ex. R-58**, 1997-06-04, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402), p. 1; **Ex. R-62**, 1997-12-11, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41), p. 1; **Ex. R-63**, 1997-12-16, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41), p. 1; see also **Ex. C-15**, FVG Business Plan, Envelope A: Technical Offer (Contract 402); **Ex. C-17**, FVG's Offer for Contract 41.

¹¹²⁶ See **Ex. C-3**, Notices of "International Public Bidding Contract of Onerous Usufruct of Railroad Transportation in Guatemala, Government of Guatemala" published in Guatemalan newspapers, February 13 and 21, 1997 (Contract 402); **Ex. C-17**, 1997-11, Guatemala's Separate Public Bid Request for Guatemala's Rail Equipment Usufruct (Contract 41); see also Memorial on the Merits, ¶¶ 17, 23 (discussing the public bidding process for Contracts 402 and 41).

¹¹²⁷ **Ex. R-55**, 1997-05-15, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402), p. 1; **Ex. R-58**, 1997-06-04, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402), p.1; **Ex. R-62**, 1997-12-11, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41), p. 1; **Ex. R-63**, 1997-12-16, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41), p. 1; **Ex. R-57**, 1997-06-05, Oficio No. 001–97, Letter to J. Cabrera (Agenda 2000) from the Bid Selection Committee, p. 1; **Ex. R-56**, 1997-06-05, Oficio No. 002–97, Letter to R. Calvo (FVG) from the Bid Selection Committee, p. 1; **Ex. C-19**, 1997-12-16, Guatemala's Award of Rail Equipment Usufruct to FVG.

This was true irrespective of whether Claimant was the only company that submitted a bid.¹¹²⁸

In addition, Claimant was not only specifically informed of the requirement of presidential approval of Government contracts,¹¹²⁹ but also acted upon this information by requesting that Guatemala officially approve Contract 143/158.¹¹³⁰ Claimant's argument that the *Lesivo* Declaration was entirely the fault of the Government is completely inconsistent with Claimant's actions and its obligation to conduct due diligence regarding Guatemalan laws.

461. The third allegation both mischaracterizes the fair and equitable treatment standard and fails to discuss the relevant facts.¹¹³¹ In this allegation, Claimant states that Guatemala violated the fair and equitable treatment standard by issuing the *Lesivo* Declaration within the three-year statute of limitations period.¹¹³² As discussed above in Sections IV.A.3.b(iii), IV.B.2, IV.B.3 and IV.B.6, the faithful and consistent application of a constitutional procedure that predated Claimant's investment does not constitute a violation of the minimum standard of treatment under customary international law.¹¹³³ The contention that Guatemala issued the *Lesivo* Declaration as a retaliatory measure after Claimant refused to "surrender substantial rights under the Contracts" is also untrue. The *Lesivo* Declaration was part of a rationally-chosen course of action to address illegalities in the execution of Contract 143/158 as well as to

¹¹²⁸ Memorial on the Merits, ¶ 23 ("Per the terms of the Government's request for proposal [*sic*], FVG submitted its bid proposal [for what would become Contract 41] on December 11, 1997. *There were no other bids submitted.*" (emphasis added)). Additionally, although two bids were submitted in response to the request for proposals for the right-of-way usufruct (Contract 402), Claimant's bid was the only proposal considered to be "responsive." Memorial on the Merits, ¶ 22 (citing First Statement of H. Posner, ¶ 9); *see also* **Ex. R-183**, Score Sheet of the Bid Selection Committee for Contract 41.

¹¹²⁹ **Ex. R-1**, 1997-11, Bidding Rules for Contract 402, § 3.6.4; **Ex. R-2**, Bidding Rules for Contract 41, November 1997.

¹¹³⁰ **Ex. R-9**, 2004-11-15, Letter to Vice-Minister Díaz from J. Senn (requesting that the Ministry of Communications officially approve Contract 143/158).

¹¹³¹ Memorial on the Merits, ¶ 149(iii).

¹¹³² Memorial on the Merits, ¶ 149.

¹¹³³ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105 ("It is for the host State to decide for itself the legal framework which it will apply to foreign investments upon its territory . . . It carries with it the consequence that, in the absence of some specific representation to the contrary, the investor is bound by host State law at the date of the investment, and cannot bring a complaint of unfair treatment for a subsequent faithful application of it").

further the goal of obtaining an operational railroad, within the confines of Guatemalan law.¹¹³⁴ The *Lesivo* Declaration was published only after negotiation had failed, and when the Government *had* no option but to proceed with publication of the *Lesivo* Declaration.¹¹³⁵ Second, Guatemala did not demand, as Claimant alleges, that FVG “surrender substantial rights under the Contracts.”¹¹³⁶ Rather, Guatemala’s offer only requested that Claimant comply with its pre-existing duty under Contract 402 to return the *lands* which had not been rehabilitated for railway use within the timeframe allotted.¹¹³⁷ Requesting that Claimant act consistently with its contractual obligations simply cannot be equated with demanding the surrender of contract rights.

462. Moreover, considering the five legal opinions from independent agencies and outside counsel concluding that Contract 143/158 was *lesivo* to the interests of the State,¹¹³⁸ Claimant’s indifference toward negotiation, and the pending statute of limitations deadline, the President’s decision to declare Contract 143/158 *lesivo* was not only reasonable, but

¹¹³⁴ See Statement of R. Aitkenhead, ¶ 10; Statement of M. Marroquín, ¶ 7; see also **Ex. R-100**, 2006-07-26, E-mail to R. Aitkenhead *et al* from M. Marroquín (discussing a proposal to be presented to FVG); **Ex. R-103**, 2006-08-04, E-mail to G. Zachrisson *et al* from S. Pineda (attaching the proposal, and stating “recibimos por parte de la Licda. Gabriela Zachrisson los puntos que FEGUA *negociará* con FERROVIAS, los analizamos detenidamente y estamos de acuerdo que FEGUA proceda con lo planteado y sobre todo que se haga lo que más convenga al país.” (emphasis added)).

¹¹³⁵ Expert Report of J.L. Aguilar, ¶¶ 2(p), 37, 72.

¹¹³⁶ Memorial on the Merits, ¶ 149.

¹¹³⁷ Cf. **Ex. R-39**, 2006-08-24/23, E-mails from Palacios & Asociados to A. Zosel (Ministry of Communications) sending draft minutes of Transaction Agreement; **Ex. C-22**, 1997-11-25, Contract 402 (“In the event that [Claimant] fails to restore the railway and fails to render cargo transportation services . . . within the [determined deadlines, it] shall surrender to FEGUA the real estate where the railway that had not been rehabilitated is located; *moreover, said assets shall stop being subject matter of this usufruct.*” (emphasis added)).

¹¹³⁸ See **Ex. R-20**, 2006-01-13, FEGUA General Counsel Opinion 05-2006; **Ex. R-15**, 2005-08-01, Attorney General’s Office Opinion 205-2005; **Ex. R-24**, 2006-04-03, Joint Opinion 181-2006-AJ issued by the Government Procurement Regulations Department, the State Assets Department and the Legal Department of the Ministry of Public Finance; **Ex. R-25**, 2006-04-26, General Secretariat Opinion No. 236-2006.

required.¹¹³⁹ Under these circumstances, the President’s most reasonable and, in reality, his only remaining option was to initiate the *lesividad* process via *Acuerdo Gubernativo*.

463. Claimant’s fourth allegation, which presupposes that Contract 143/158 was not, in fact, injurious to the State, mischaracterizes the effect of the *Lesivo* Declaration.¹¹⁴⁰ As Guatemalan law expert Lic. Juan Luís Aguilar explained, the President and his Cabinet had sufficient grounds to issue the *Lesivo* Declaration.¹¹⁴¹ In any event, the *Lesivo* Declaration is not a final decision that Contract 143/158 was *lesivo*; it merely demonstrates that the President and his Cabinet had enough evidence to submit the question of whether the contract was *lesivo* to the *Contencioso Administrativo* court could make a final determination.¹¹⁴²

464. The remaining two allegations, that Guatemala did not afford Claimant due process, and that Guatemala acted in bad faith or with an intent to discriminate against Claimant, have already been addressed in Sections IV.B.3 and IV.B.2, respectively. Claimant has failed to meet its burden with respect to both of those claims.

465. Accordingly, for the reasons stated above, Claimant has failed to demonstrate that the violations of Article 10.5 of CAFTA that it alleges in its Memorial are based on either law or fact.

9. Conclusion

466. As demonstrated throughout this section, the *lesividad* procedure does not constitute a violation of CAFTA’s fair and equitable treatment standard under Article 10.5, either in form or as used by Guatemala in this case. Claimant has failed to meet its burden on all elements of the standard. As discussed in Parts 393, 5 and 6, Claimant has not met its burden to prove that the duty to refrain from arbitrary action, “transparency,” and an obligation to comply with

¹¹³⁹ Declaration of J.L. Aguilar, ¶¶ 2(p), 37, 72; Statement of R. Aitkenhead, ¶ 10 (confirming that the President was advised that he would incur personal responsibility if he did not declare *lesivo* Contract 144/158).

¹¹⁴⁰ Memorial on the Merits, ¶ 149(iv).

¹¹⁴¹ Expert Report of J.L. Aguilar, ¶¶ 2(p), 68, 72–73.

¹¹⁴² Expert Report of J.L. Aguilar, ¶¶ 2(p), 68, 72–73.

legitimate expectations are elements of the minimum standard of treatment under customary international law. Even assuming, *arguendo*, that Claimant had correctly articulated the standards comprising the fair and equitable treatment standard, the evidence demonstrates that Guatemala has fulfilled all of its obligations, with respect to both these standards and the legal standards that have been found to be elements of the customary international law minimum standard of treatment. Guatemala acted in good faith, accorded due process to Claimant and its investment, and neither denied Claimant justice nor discriminated against it. Accordingly, there has been no violation of the fair and equitable treatment standard enumerated in Article 10.5.

C. Guatemala Accorded Claimant’s Investment Full Protection And Security, In Accordance With Article 10.5 Of CAFTA

467. Claimant devotes a scant three paragraphs of its Memorial on the Merits to argue that Guatemala breached its obligation to provide full protection and security under customary international law in breach of Article 10.5.1. of CAFTA.¹¹⁴³ Apart from stating that “[f]ull protection and security ‘requires each Party to provide the level of police protection required under customary international law,’”¹¹⁴⁴ Claimant neither defines nor applies that standard.

468. **Part 1** of this Section examines the standard of full protection and security set forth by Article 10.5 of CAFTA, which is explicitly defined by reference to the customary international law minimum standard of treatment. **Part 2** demonstrates that, as applied to the facts of this case, Guatemala has met its requirements with respect to each of the violations alleged by Claimant. Accordingly, **Part 3** concludes that the Tribunal must find that Guatemala fulfilled its full protection and security obligation under Article 10.5 of CAFTA.

¹¹⁴³ Memorial on the Merits, ¶¶ 154–57.

¹¹⁴⁴ Memorial on the Merits, ¶ 154 (quoting **Ex. RL–61**, CAFTA Art. 10.5.2(b)).

1. Standard Of Full Protection And Security Under CAFTA And Customary International Law

469. Claimant has *failed* to demonstrate that Guatemala breached the obligation under CAFTA’s full protection and security provision to take reasonable measures to protect its investment. Article 10.5 of CAFTA requires that each Party “accord to covered investments treatment in accordance with customary international law, including . . . *full protection and security*.”¹¹⁴⁵ Article 10.5 does not define “full protection and security,” but requires only that the Parties accord investments treatment equivalent to the customary international law minimum standard of treatment, and clarifies that the obligation to accord full protection and security does “not require treatment in addition to or beyond”¹¹⁴⁶ that which is required by the minimum standard of treatment; nor does it “create additional substantive rights.”¹¹⁴⁷

470. International tribunals have recognized that the obligation to provide full protection and security *does not impose strict liability* on the host State and therefore does not protect foreign investments against every possible loss of value that may occur. Indeed, the *Tecmed* tribunal explained that “the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.”¹¹⁴⁸ The tribunal in *Asian Agricultural Products, Ltd. v. Republic of Sri Lanka* (“*AAPL*”)¹¹⁴⁹ similarly declined to impose a strict liability standard:

The Arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting States with “full protection and security”

¹¹⁴⁵ **Ex. RL-61**, CAFTA Art. 10.5.1.

¹¹⁴⁶ **Ex. RL-61**, CAFTA Art. 10.5.2.

¹¹⁴⁷ **Ex. RL-61**, CAFTA Art. 10.5.2.

¹¹⁴⁸ **Ex. RL-133**, *Tecmed Award*, ¶ 177. Although, as discussed in ¶ 412 above, the *Tecmed* tribunal imposed an autonomous standard rather than the customary international law standard, this standard still offers guidance in this case: Because CAFTA imposes a less restrictive obligation on the Parties than the autonomous standard in *Tecmed*—and even this more stringent standard does not impose strict liability—the CAFTA standard cannot by any means be understood as one of strict liability.

¹¹⁴⁹ **Ex. RL-76**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (Final Award) 27 June 1990 (El-Kosheri, Goldman, Asante) (“*AAPL Award*”).

was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a “strict liability” on behalf of the host State.¹¹⁵⁰

471. In *Noble Ventures*, the tribunal dismissed the claim that Romania had breached the full protection and security provision under the BIT, rejecting the application of strict liability and noting instead that customary international law merely requires the State to exercise “*due diligence*”:

[I]t seems doubtful whether that provision [full protection and security] can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. *The latter is not a strict standard, but one requiring due diligence to be exercised by the State.*¹¹⁵¹

472. It is well-settled under customary international law that the full protection and security standard requires that a host State undertake *reasonable efforts*, but does not guarantee the result of the measures taken by the host State to protect the covered investment.¹¹⁵² As explained by noted commentators, the full protection and security standard “does not operate as an indemnity for any damage caused to the investor’s property within the host State, or create a test of strict liability. Rather, the enquiry is as to whether the State utilized its police powers with due diligence.”¹¹⁵³

473. The obligation to exercise “due diligence” means simply that the host State must take *reasonable measures* to protect an investment:

¹¹⁵⁰ **Ex. RL-76**, *AAPL Award*, ¶ 48.

¹¹⁵¹ **Ex. RL-117**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award) 12 October 2005 (Böckstiegel, Lever, Dupuy), ¶ 164 (“*Noble Ventures Award*”) (citing **Ex. RL-76**, *AAPL Award*) (emphasis added); **Ex. RL-81**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1 (Award) 21 February 1997 (Sucharitkul, Golsong, Mbaye) (“*American Manufacturing & Trading Award*”).

¹¹⁵² See **Ex. RL-81**, *American Manufacturing & Trading*, ¶ 6.05.

¹¹⁵³ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.190.

[Full protection and security] does not impose strict liability on the host country to protect foreign investment, but requires the host country to do so with the level of “diligence” required by customary international law. [It] requires that the host country should exercise *reasonable care* to protect investments against injury by private parties.¹¹⁵⁴

474. For its part, the *AAPL* tribunal explained that “‘due diligence’ is nothing more nor less than the *reasonable measures* of prevention which a well-administered government could be expected to exercise under similar circumstances.”¹¹⁵⁵

475. As with the other standards of protection discussed in this Counter-Memorial, determining what is “reasonable” requires a case-by-case, fact-specific examination.¹¹⁵⁶ To this end, the *Lauder* tribunal explained that the duty to provide full protection and security “does not oblige the Parties to protect foreign investment against *any* possible loss of value.”¹¹⁵⁷ Rather, it “obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.”¹¹⁵⁸ In the words of the tribunal in *American Manufacturing & Trading, Inc. v. Republic of Zaire* (“*American Manufacturing & Trading*”), the duty to accord full protection and security is merely “an obligation of vigilance.”¹¹⁵⁹

476. By permitting a host State to defend against alleged full protection and security violations by demonstrating that its action was “reasonable under the circumstances,”¹¹⁶⁰ international jurisprudence indicates that the bar for establishing a violation of this obligation is

¹¹⁵⁴ **Ex. RL-162**, UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S: TRENDS IN INVESTMENT RULEMAKING* 132 (United Nations, 2007) at note 33 (emphasis added).

¹¹⁵⁵ **Ex. RL-76**, *AAPL Award*, ¶ 77 (emphasis added).

¹¹⁵⁶ See **Ex. RL-133**, *Tecmed Award*, ¶ 177 (explaining that the full protection and security obligation does not impose strict liability).

¹¹⁵⁷ **Ex. RL-105**, *Lauder Award*, ¶ 308.

¹¹⁵⁸ **Ex. RL-105**, *Lauder Award*, ¶ 308; see also **Ex. RL-125**, *Saluka Partial Award*, ¶ 484 (“The standard does not imply strict liability of the host State . . . The host State is, however, obliged to exercise due diligence . . .”).

¹¹⁵⁹ **Ex. RL-81**, *American Manufacturing & Trading*, ¶ 6.05.

¹¹⁶⁰ **Ex. RL-105**, *Lauder Award*, ¶ 308; see also **Ex. RL-125**, *Saluka Partial Award*.

high. This high threshold—accepted by the International Court of Justice in the *ELSI* judgment¹¹⁶¹—has been adopted by ICSID tribunals. The *Noble Ventures* tribunal, for example, rejected the argument that the failure by Romanian officials to take adequate measures to protect the claimant’s investment from protestors and their unlawful acts (*i.e.*, theft, occupation, intimidation, seizure of facilities and assault), despite being informed about these events, was a violation of Romania’s obligation to provide full protection and security.¹¹⁶² Referring to the *ELSI* judgment, the *Noble Ventures* tribunal explained that violations of the full protection and security standard “are not easily to be established.”¹¹⁶³

2. Guatemala Acted With Due Diligence And Took Reasonable Measures To Protect Claimant’s Investment

477. Claimant alleges that Guatemala’s violation of the full protection and security obligation is evident by reference to six factual events or circumstances that took place after the *Lesivo* Declaration. According to Claimant:

1. Police and local authorities felt no need to protect rights that were the subject of a *lesivo* declaration;
2. Law enforcement authorities intervened in proceedings initiated to remove squatters from the right of way in order to argue that the *Lesivo* Declaration meant that Claimant no longer had rights under Contract 402;
3. FVG experienced an increase in public interference, vandalism, and theft within the right of way;

¹¹⁶¹ **Ex. RL-97**, *ELSI Award*, ¶¶ 107–08 (explaining that the obligation to provide “constant protection and security cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed,” even though the occupation which the host State failed to prevent and protect against was unlawful).

¹¹⁶² **Ex. RL-117**, *Noble Ventures Award*, ¶¶ 161; 164.

¹¹⁶³ **Ex. RL-117**, *Noble Ventures Award*, ¶ 165.

4. Guatemalan authorities consistently ignored Claimant's written reports regarding theft, vandalism, and public interference along the right of way;
5. Rails and other track materials were stolen; and
6. Local authorities collaborated with the thieves and vandals that interfered with the right of way.¹¹⁶⁴

478. Claimant's allegation that Guatemala violated its obligation to accord full protection and security under Article 10.5 of CAFTA consists of three main arguments; in essence, Claimant argues that post-*Lesivo* Declaration, Guatemala (a) did not recognize Claimant's rights under Contract 402 (points 1 and 2 above); (b) did not take reasonable measures to protect Claimant's investment (points 3 through 5 above); and (c) even collaborated with the parties responsible for the interference with the right of way (point 6 above).

479. As is discussed below, each of Claimant's allegations: (i) is inaccurate; (ii) is beyond the immediate control of the State and therefore cited by Claimant in a misguided attempt to impose strict liability upon Guatemala; (iii) fails to establish that Guatemala fell short of its obligation to accord due diligence or take reasonable measures of protection; or (iv) is an attempt to turn a purported contractual breach into an automatic treaty violation that is impermissible absent an umbrella clause.

- a. *After The Lesivo Declaration, Guatemala Continued To Recognize Claimant's Rights Under Contract 402*

480. It is not true, as Claimant alleges, that local authorities "determined that there was no need to protect an investment that the Government had declared to be 'harmful to the interests of the State.'"¹¹⁶⁵ It is an undisputed fact that the *Lesivo* Declaration had no legal effect whatsoever upon Claimant's rights in the right of way.¹¹⁶⁶ Furthermore, the *Lesivo*

¹¹⁶⁴ Memorial on the Merits, ¶¶ 156–57.

¹¹⁶⁵ Memorial on the Merits, ¶ 156.

¹¹⁶⁶ See above at Section IV.A.3.a.

Declaration had no *practical* effect upon Claimant’s rights; Guatemalan authorities continue to this day to recognize the validity of Contract 402. In fact, Guatemalan authorities have recognized that the *Lesivo* Declaration itself had no effect upon the validity of even the contract that was the subject of that declaration, Contract 143/158.¹¹⁶⁷

481. The only explanation Claimant gives in support of its proposition that local authorities decided that they no longer needed to protect Claimant’s rights is an allegation that these authorities intervened “in legal actions brought by FVG to enforce and protect its property rights against squatters” and argued that “FVG no longer had any enforceable contract rights and, therefore, no legal standing to bring such actions.”¹¹⁶⁸ Although Claimant asserts that law enforcement authorities intervened in this manner in *actions* (in the plural), it cites only one case in which this occurred, and conveniently left out the important fact that the court—an organ of the Guatemalan State—rejected this argument.¹¹⁶⁹ In rejecting this argument, the court acknowledged that the *Lesivo* Declaration was not at all related to Claimant’s rights under Contract 402:

The *lesividad* under discussion relates to [Contract 143 of August 28, 2003] and its modification contained in [Contract 158 of October 7, 2003], and *not to* [Contract 402 of November 25, 1997 For the reasons already considered . . . the requests are denied¹¹⁷⁰

¹¹⁶⁷ **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim; **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4 (concerning the challenge by FVG of the declaration of *lesividad* of Contracts 143/158 (“*The mere declaration of lesividad denounced as challenged act, by itself, cannot cause the supposed offences, as it corresponds to the court of the Contencioso Administrativo to resolve on the matter.*” (emphasis added; unofficial translation))).

¹¹⁶⁸ Memorial on the Merits, ¶ 156 (citing Memorial on the Merits, ¶ 96, discussing Empresa Electrica case).

¹¹⁶⁹ See **Ex. R-200**, 2008-05-13, MP 361-2003, Decision from the Criminal Trial Court at Amatitlán, p. 8.

¹¹⁷⁰ **Ex. R-200**, 2008-05-13, MP 361-2003, Decision from the Criminal Trial Court at Amatitlán, p. 8 (emphasis added) (unofficial translation) (“[L]a lesividad que se discute es sobre la escritura publica numero ciento cuarenta y tres, de fecha veintiocho de agosto del dos mil tres y su modificación contenida en Escritura Pública numero ciento cincuenta y ocho de fecha siete de octubre del dos mil

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482. As the *EnCana* tribunal explained in the context of expropriation, “[l]ike private parties, governments do not repudiate obligations merely by contesting their existence.”¹¹⁷¹ Furthermore, a government’s actions must be considered in context.¹¹⁷² To hold a government liable for every act or omission (including statements made by officials) regarding a foreign investment (regardless of whether that act or omission has any effect, and even if it does) would impermissibly impose a strict liability standard. That a local District Attorney in Guatemala requested that a local court reconsider its decision in a criminal trespass suit, *especially when that court rejected the motion*—reasoning that the *Lesivo* Declaration applied to Contract 143/158 and had no effect upon Contract 402—¹¹⁷³ does not meet the high threshold required under international law to demonstrate that Guatemala violated its obligation to accord full protection and security.

483. Since Contract 402 entered into force, Guatemala has consistently acknowledged its validity and has represented to third parties that Claimant is the owner of the right of way by denying requests that were contrary to Claimant’s rights.¹¹⁷⁴ In only one example of many, FEGUA denied a request from EEGSA to purchase rails, because they were within the assets granted to FVG.¹¹⁷⁵ As was its customary practice, FEGUA transmitted copies of the request itself and of its denial to Claimant.¹¹⁷⁶ Moreover, Guatemala protected Claimant’s right to profit from the right of way, and consistently forwarded third party requests to FVG, after

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tres, y no particularmente sobre la Escritura pública numero cuatrocientos dos de la fecha veinticinco de noviembre de mil novecientos noventa y siete . . . Por lo ya considerado y se apunto revisada la resolución recurrida se declara sin lugar los Recursos de Reposición . . .”).

¹¹⁷¹ **Ex. RL–98**, *EnCana Award*, ¶ 194.

¹¹⁷² **Ex. RL–105**, *Lauder Award*, ¶ 308; *see also Ex. RL–125*, *Saluka Partial Award*, ¶ 484.

¹¹⁷³ *See Ex. R–200*, 2008-05-13, MP 361–2003, Decision from the Criminal Trial Court at Amatitlán, pp. 3, 8.

¹¹⁷⁴ **Ex. R–283**, 2010-09-28, Letter to C. Samayoa Flores from J. López (recognizing that FVG possesses rights in Contract 402 by stating that the military dispatched for security measures will leave whenever requested to do so by FEGUA or FVG).

¹¹⁷⁵ *See Ex. R–240*, 1999-09-08, Letter to J. Duarte from A. Porras; *see also Ex. R–68*, 1999-09-27, Letter to R. Fernández from A. Porras.

¹¹⁷⁶ **Ex. R–68**, 1999-09-27, Letter to R. Fernández from A. Porras.

acknowledging that Claimant was the only party who had the capacity to grant these requests. This was FEGUA's customary practice both before and after the *Lesivo* Declaration.¹¹⁷⁷

b. Even After The Lesivo Declaration, Local Authorities Took Reasonable Measures To Protect Claimant's Property And Assets

484. As Guatemala has maintained throughout this Counter-Memorial, since the publication of the *Lesivo* Declaration, it has taken reasonable measures to protect Claimant's property and assets. Although Claimant has alleged that since the *Lesivo* Declaration, FVG "faced an overwhelming increase in public interference with the right of way from locals"¹¹⁷⁸ and that Guatemala has failed to respond to the "more than a hundred reports" regarding interference, theft and vandalism, Claimant failed to sustain these allegations or to demonstrate that there has been an increase in interference with the right of way for which Guatemala was responsible, or, in the alternative, that Guatemala failed to take reasonable measures to protect Claimant's investment. It is not true, as Claimant alleges, and is discussed above, that local authorities "determined that there was no need to protect an investment that the Government had declared to be 'harmful to the interests of the State'"¹¹⁷⁹ so that Government efforts to protect Claimant's rights "became practically nonexistent after the *Lesivo* Resolution was issued"¹¹⁸⁰

485. To the contrary, the facts demonstrate that: (1) Guatemalan officials have taken reasonable action, commensurate with domestic laws, to protect Claimant's rights from public interference;¹¹⁸¹ and (2) Claimant has encouraged the situation for which it now attempts to impose liability upon the State, by permitting many of the "squatters" responsible for the

¹¹⁷⁷ See, e.g., **Ex. R-98**, 1999-06-01, Oficio No. 120-99, Letter to R. Fernández from A. Porras; **Ex. R-285**, 2000-08-07; **Ex. R-284**, 2004-03-02, Oficio No. 063-2004, Letter to J. Senn from A. Gramajo; **Ex. R-106**, 2006-09-20, Oficio No. 317-2006, Letter to J. Senn from A. Gramajo; **Ex. R-109**, 2006-11-16, Oficio No. 386-2006, Letter to J. Senn from A. Gramajo; **Ex. R-110**, 2006-11-27, Oficio No. 398-2006, Letter to J. Senn from A. Gramajo; **Ex. R-133**, 2007-09-05, Oficio No. 153-2007, Letter to J. Senn from A. Gramajo.

¹¹⁷⁸ Memorial on the Merits, ¶ 156.

¹¹⁷⁹ Memorial on the Merits, ¶ 156.

¹¹⁸⁰ Memorial on the Merits, ¶ 156.

¹¹⁸¹ See above at Sections III.O. and P.

alleged “public interference” to reside within the right of way in exchange for rent.¹¹⁸²

Claimant’s argument imposes an impermissibly high burden upon Guatemala by requiring that it protect Claimant from squatters who are virtually indistinguishable from the tenants and potential tenants that Guatemala recognizes possess valid contracts with Claimant that were entered into under its rights as Usufructuary under Contract 402.

486. Pursuant to Contract 402, Guatemala had the obligation to defend Claimant’s “rights against any third parties that may intend or be willing to exercise any right on the real property,” to give “prompt reply” to Claimant’s complaints on this matter, and “to solve the squatting issues.”¹¹⁸³ In accordance with its continued recognition of the validity of Contract 402, even after the *Lesivo* Declaration, Guatemala continued to fulfill this contractual obligation to protect Claimant’s property.

487. Although Claimant alleges that Guatemala breached its full protection and security obligation generally because it is not aware of “a single documented arrest or prosecution that has occurred in response to any of its reports”¹¹⁸⁴ regarding squatters, thieves or vandals, this statement evinces either bad faith or a complete lack of due diligence on the part of Claimant. Claimant in fact has received multiple reports from Guatemalan representatives regarding the *more than 50 judicial proceedings* initiated after the *Lesivo* Declaration that deal with theft, and the identical number of proceedings initiated that deal with the removal of squatters.¹¹⁸⁵ In

¹¹⁸² See generally **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment; **Ex. R-224**, Letters/Contracts from FVG Permitting “Squatters” who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*); **Ex. R-233**, Rental Requests (Post-*Lesivo*); **Ex. R-232**, Renter Files (Post-*Lesivo*); **Ex. R-234**, Rental Agreements: Contracts Signed by J. Senn and Notarized by J. Carrasco (Post-*Lesivo*); **Ex. R-223**, Rent Payment Records (Post-*Lesivo*)

¹¹⁸³ **Ex. C-22**, Contract 402, cl. 12 (B) and (E).

¹¹⁸⁴ Memorial on the Merits, ¶ 157.

¹¹⁸⁵ See **Ex. R-182**, Excel Chart of Criminal Proceedings Initiated by FEGUA for the Theft and Removal of Rails; **Ex. R-184**, Excel Chart of Criminal Proceedings Initiated by FEGUA for the Removal of Squatters; **Ex. R-149**, Oficio No. 001-2009, Letter to J. Senn from C. Samayoa Flores; **Ex. R-153**, 2009-12-22, *Solicitud de Admisión como Querellante Adhesivo Provisional* (requesting, on FEGUA’s behalf, that José Enrique Urrutia Ipiña be named *Querellante Adhesivo*, a type of co-petitioner required to assert the claim for the removal of squatters); **Ex. R- 237**, Government Action In Response To FVG’s Complaints (Post-*Lesivo*).

some cases, Claimant has even participated in the process, as was the case in early 2010 when FEGUA evicted squatters from the right of way, and returned that land to Claimant.¹¹⁸⁶ In others, Claimant acknowledged receipt of letters from FEGUA in which FEGUA had discussed an official complaint it had filed against trespassers.¹¹⁸⁷ It is patently untrue, therefore, that Claimant did not receive a “single documented arrest or prosecution”¹¹⁸⁸ regarding its requests, or that Guatemalan officials “ignored” Claimant’s reports.

488. In addition to responding to reports filed by Claimant, Guatemala has acted upon its own initiative to protect the right of way from public interference, vandalism and theft. Guatemala has satisfied its full protection and security obligation to act reasonably by: (i) supervising the right of way to identify portions which had been invaded by third parties;¹¹⁸⁹ (ii) filing reports regarding the state of the right of way and any discovered interference;¹¹⁹⁰ (iii) responding to Claimant’s request to dislodge squatters;¹¹⁹¹ and (iv) initiating judicial

¹¹⁸⁶ See **Ex. R–156**, 2010-01-13, Deed of Delivery Upon Eviction of Squatters from Land; see also **Ex. R–154**, 2010-01-07, Oficio No. 001–2010, Letter to J. Senn from C. Samayoa Flores; **Ex. R–160**, 2010-02-02, Letter to J. Senn from C. Samayoa Flores; **Ex. R–163**, 2010-02-04, Oficio No. 022–2010, Letter to J. Senn from C. Samayoa Flores.

¹¹⁸⁷ See, e.g., **Ex. R–242**, 2008-09-02, Letter to J. Senn from E. Martínez (marked as “received” by FVG).

¹¹⁸⁸ Memorial on the Merits, ¶ 157.

¹¹⁸⁹ See, e.g., **Ex. R–124**, 2007-07-10, Oficio No. 128-2007, Letter to A. Gramajo from J. De Leon; **Ex. R–138**, 2007-12-14, Oficio No. 206-2007, Letter to J. Senn from A. Gramajo; **Ex. R–143**, 2008-01-19, Letter to A. Gramajo from Jorge A. Palomo (Tecnico Inspector en Seguridad); **Ex. R–141**, 2008-01-29, Letter to A. Gramajo from Jorge A. Palomo (Tecnico Inspector en Seguridad); **Ex. R–142**, Oficio No. 041-2008, 2008-02-04, Letter to J. Senn from Elder Roberto Martínez; **Ex. R–139**, Letter to A. Gramajo from Jorge A. Palomo (Tecnico Inspector en Seguridad); **Ex. R–150**, 2009–10–02, Estudio Sobre La Participación de los Asentados Dentro del Derecho de Via Propiedad de FEGUA; **Ex. R–152**, 2009-11-26, Acta de Inspección Ocular Re: Invasores; **Ex. R–241**, 2010-01-15, Letter to C. Samayoa Flores from Ing. M. Samayoa; **Ex. R–166**, 2010-03-12, Letter to C. Samayoa Flores from A. Veliz Posadas; **Ex. R–176**, Oficio No. 011-2010, Letter to Lic. R. Velaquez Ruano (Ministro de Gobernación) from C. Samayoa Flores.

¹¹⁹⁰ See **Ex. R–188**, Post-*Lesivo* Informes del Departamento de Ingeniería de FEGUA. These documents represent a continuation of the supervision efforts undertaken by FEGUA’s Engineering Department before the *Lesivo* Declaration was published. See **Ex. R–187**, Pre-*Lesivo* Informes del Departamento de Ingeniería de FEGUA.

¹¹⁹¹ See, e.g., **Ex. R–155**, 2010-01-12, Letter to the Fiscalía Municipal de Amatitlán from C. Samayoa Flores; **Ex. R–154**, 2010-01-07, Oficio No. 001-2010, Letter to J. Senn from C. Samayoa Flores (notifying FVG that actions to dislodge squatters had been taken in Amatitlán and that FEGUA was taking steps to officially return the land to FVG); **Ex. R–156**, 2010-01-13, Acta de Entrega de Fracción de Bien Inmueble Desalojado; **Ex. R–238**, Police Reports Regarding Right-of-Way Property (Post-*Lesivo*).

proceedings relating to the theft of rails and to the removal of squatters.¹¹⁹² Guatemala kept Claimant apprised of all of these measures and maintained regular conduct with Claimant to ensure that it did not inadvertently initiate removal proceedings against squatters or businesses which had received approval from FVG.¹¹⁹³

489. As explained above in Section IV.B.1, Guatemala’s potential liability under Article 10.5 of CAFTA is to be determined by a review of its *efforts* to protect Claimant’s investment, rather than the result of these efforts; the duty to provide full protection and security “does not oblige the Parties to protect foreign investment against *any* possible loss of value.”¹¹⁹⁴ In other words, the full protection and security obligation would not require, as Claimant seems to argue, that local police officers take summary executive action to remove squatters. Instead, the standard of full protection and security under customary international law requires the CAFTA Parties “to exercise such due diligence in the protection of foreign investment as *reasonable under the circumstances*,”¹¹⁹⁵ and permits local authorities to comply with that obligation by employing

¹¹⁹² See **Ex. R-182**, Excel Chart of Criminal Proceedings initiated by FEGUA for the theft and removal of rails; **Ex. R-184**, Excel Chart of Criminal Proceedings initiated by FEGUA for the removal of squatters.

¹¹⁹³ See e.g., **Ex. R-270**, 2007-08-09, FEGUA Report Re: Deterioration Of The San Fernando Station; **Ex. R-271**, 2007-08-16, FEGUA Report Re: Deterioration Of The Mazatenango Station; **Ex. R-188**, 2007-10-01, FEGUA Report Re: Deterioration And Lack Of Maintenance Of Tracks Between Puerto Barrios And Zacapa; **Ex. R-121**, 2007-06-12, Oficio No. 119-2007, Letter to J. Senn from A. Gramajo (asking whether permission granted for construction); **Ex. R-115**, 2007-02-12, Oficio No. 044-2007, Letter to J. Senn from A. Gramajo (asking whether permission given for construction and what measures will be taken to prevent invasions); **Ex. R-119**, 2007-05-31, Oficio No. 114-2007, Letter to J. Senn from A. Gramajo (informing FVG of theft of rails); **Ex. R-130**, 2007-08-28, Oficio No. 148-2007, Letter from A. Gramajo to J. Senn (informing FVG of findings from supervision of railway); **Ex. R-146**, 2008-09-02, Oficio No. 148-2008, Letter to J. Senn from E. Martinez (informing of criminal proceedings initiated by FEGUA); **Ex. R-158**, 2010-01-14, Oficio No. 013-2010, Letter to Viceminister Jesús Insua from C. Samayoa Flores (FEGUA removal of squatters and returning land back to FVG); **Ex. R-167**, 2010-04-05, Oficio No. 034-2010, Letter from C. Samayoa to J. Senn (asking whether permission given for formal construction along the railway); **Ex. R-157**, 2010-01-13, Eviction Decree of Squatters from Mile 217; **Ex. R-151**, 2009-11-09, Case filed Against Squatters initiated by José Enrique Urrutia Ipiña; **Ex. R-169**, 2010-06-15, Oficio No. 069-2010, Letter to C. Samayoa Flores from C. de Dubón (informing FEGUA over supervision of mile 217); **Ex. R-144**, 2008-02-20, Oficio No. 063-2008, Letter to J. Senn from E. Martinez (asking if permission was given for persons to build homes in the yard of the Escuintla station); **Ex. R-152**, 2009-11-26, Decree of Visual Inspection of Mile 217; **Ex. R-145**, 2008-07-03, Oficio No. 107-2008, Letter to J. Senn from E. Martínez (expressing concern over increase in the depredation of the railway and squatters).

¹¹⁹⁴ **Ex. RL-105**, *Lauder Award*, ¶ 308.

¹¹⁹⁵ **Ex. RL-105**, *Lauder Award*, ¶ 308 (emphasis added).

existing local procedures to achieve this end. Guatemalan officials have initiated and implemented their own procedures in order to address third party interference with Claimant's rights, both on their own initiative, and in response to Claimant's complaints.

490. In addition to arguing generally that Guatemala breached its full protection and security obligation, Claimant also alleges that Guatemala violated its full protection and security obligation under Article 10.5 of CAFTA specifically, because "[s]ince the Lesivo Resolution, at least 65 kilometers of rails and track materials, along with cross-members of three major bridges, have been stolen."¹¹⁹⁶ Claimant's sole documentary evidence of the alleged theft of 65 kilometers of railroad materials is a newspaper article that does not explain *when* the rails and materials were stolen, and therefore does not support the allegation of Claimant's witness—RDC Chairman Mr. Henry Posner—that this occurred entirely after the *Lesivo* Declaration.

491. But even if the allegation were true, Claimant still has not explained how this situation is attributable to a failure of the Guatemalan Government to take reasonable actions to protect Claimant's investment. The absence of such an explanation demonstrates that Claimant is attempting to impose strict liability upon Guatemala. As explained above, this argument has no support in customary international law.¹¹⁹⁷

492. Importantly, one could easily conclude that Claimant, rather than the Government of Guatemala, is responsible for this alleged activity given its very public exit from the country in 2007 and its barrage of media releases and conferences wrongfully telling the world that its usufruct rights had been taken from it. It also bears mentioning that Guatemala has a good faith basis to believe that FVG's General Manager, Mr. Senn, has himself, either personally or for the benefit of FVG, been participating in the selling of the rail and track materials to third parties utilizing third party intermediaries, such as RedEx, S.A., and is working to garner the

¹¹⁹⁶ Memorial on the Merits, ¶ 156 (citing First Statement of H. Posner, ¶ 51; **Ex. C-38**, 2009-03, INTERNATIONAL RAILWAY JOURNAL, "Thieves Strike Guatemala Railways").

¹¹⁹⁷ See above at Section IV.C.1.

proof it needs to concretely establish this point.¹¹⁹⁸ In addition, in response to reports that FVG employees had been impermissibly selling or renting rails, FEGUA consistently reminded FVG that it had no power to do so.¹¹⁹⁹ These facts alone should operate legally to estop Claimant from even raising these claims.

493. As previously explained within this section, the facts show that Guatemala has, in fact, taken reasonable measures to protect the rail and track materials. Representatives of the Government have supervised the land granted to Claimant under Contract 402,¹²⁰⁰ and have initiated legal proceedings to deal with the theft of railway assets.¹²⁰¹ Claimant is aware of these measures, having acknowledged receipt or responded to letters from FEGUA that discussed the steps being taken to address rail theft or similar issues,¹²⁰² which included surveillance of the right of way, communication between Claimant and Guatemalan officials to ensure that the third parties operating within the right of way had Claimant's permission to do so, and the initiation of legal proceedings by means of an official complaint filed at local courts against individuals or entities that were operating without Claimant's permission.¹²⁰³

¹¹⁹⁸ Claimant (through FVG) has documents that will establish this point, which will be requested in discovery. **Ex. R-72**, Request from *Redex Sociedad Anonima*.

¹¹⁹⁹ *See, e.g.*, **Ex. R-74**, 2003-06-05, Oficio No. 118-2003, Letter to R. Girón (FVG) from G. Chávez (FEGUA); **Ex. R-75**, 2003-06-16, Oficio No. 150-2002, Letter to J. Senn from H. Rene Orellana.

¹²⁰⁰ *See, e.g.*, **Ex. R-91**, 2005-07-07, Oficio No. 125-2005, Letter to A. Gramajo from C. de Dubón (discussing a report of rail theft and suggesting that a formal complaint be issued against the parties responsible); **Ex. R-113**, 2007-01-04, Oficio No. 001-2007, Letter to J. Senn from A. Gramajo (attaching FEGUA's engineering reports regarding supervision of the right of way, and the deterioration of assets including the Río Seco and Madre Vieja bridges); **Ex. R-112**, 2007-01-05, Oficio No. 004-2007, Letter to J. Senn from A. Gramajo.

¹²⁰¹ **Ex. R-182**, Excel Chart of Criminal Proceedings Initiated by FEGUA for the Theft and Removal of Rails.

¹²⁰² *See, e.g.*, **Ex. R-107**, 2006-09-27, Oficio No. 330-2006, Letter to J. Senn from A. Gramajo; **Ex. R-113**, 2007-01-04, Oficio No. 001-2007, Letter to J. Senn from A. Gramajo (attaching FEGUA's engineering reports regarding supervision of the right of way, and the deterioration of assets including the Río Seco and Madre Vieja bridges); **Ex. R-112**, 2007-01-05, Oficio No. 004-2007, Letter to J. Senn from A. Gramajo; **Ex. R-125**, 2007-08-08, Oficio No. 138-2007, Letter to J. Senn from A. Gramajo (requesting permission to use rail bikes to supervise the railway in an effort to comply with Contract 402); **Ex. R-127**, 2007-08-17, Oficio No. GG-11-07 (granting FEGUA permission to use certain equipment in its security efforts); **Ex. R-129**, 2007-08-23, Oficio No. 144-2007, Letter to J. Senn from A. Gramajo (requesting permission to use equipment to supervise the railway).

¹²⁰³ *See* above at Section III.O.

494. Because, as noted above, the duty to provide full protection and security does not oblige the Parties to protect foreign investment against *any* loss of value,¹²⁰⁴ but instead requires only that the host State take reasonable measures to fulfill its “obligation of vigilance,”¹²⁰⁵ Guatemala’s diligence in supervising the railroad and its prosecution of vandals satisfy CAFTA’s full protection and security requirement.

495. It is also relevant to note that Claimant seemingly attempts to base its full protection and security claim on the alleged breach of FEGUA’s duties under Contract 402. As stated above, these duties—to defend Claimant’s “rights against any third parties that may intend or be willing to exercise any right on the real property,” to give “prompt reply” to Claimant’s complaints on this matter, and “to solve the squatting issues”¹²⁰⁶—are the examples Claimant cites in support of its claim that Guatemala violated the full protection and security obligation of Article 10.5 of CAFTA. Claimant’s veiled attempt to assert a contractual claim under the guise of a full protection and security claim is meritless; the mere fact that FEGUA had contractual obligations under Contract 402 does not alter the full protection and security analysis, or demonstrate that Guatemala’s actions constitute a violation of the full protection obligation.

496. But even if Claimant could prove—which it cannot—that Guatemala breached its contractual obligations under Contract 402, this alone would not satisfy Claimant’s burden of proof with respect to the full protection and security obligation. As the tribunal in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (“Vivendi II”)* explained, “whether there is a breach of contract or a breach of the Treaty involves two different inquiries.”¹²⁰⁷ A tribunal is permitted to consider “the parties’ behaviour under and in relation to the terms of the contract,” but must nevertheless determine “whether there has been a

¹²⁰⁴ Ex. RL-105, *Lauder Award*, ¶ 308.

¹²⁰⁵ Ex. RL-81, *American Manufacturing & Trading*, ¶ 6.05.

¹²⁰⁶ Ex. C-22, Contract 402, cl. 12 (B) and (E).

¹²⁰⁷ Ex. RL-135, *Vivendi II Award*, ¶ 7.3.10.

breach of a *distinct* standard of international law, as reflected in . . . the BIT.”¹²⁰⁸ The *Waste Management II* tribunal reached a similar conclusion in the context of expropriation, finding that a government’s non-performance of contractual obligations does not always constitute a treaty violation: “the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach.”¹²⁰⁹ As explained, Article 10.3 imposes an obligation of reasonable vigilance which, as demonstrated throughout this section, Guatemala fulfilled.

497. Claimant also attempts to impose an unreasonable standard of care upon Guatemala; Claimant has failed to differentiate between damage allegedly caused by Guatemala’s purported failure to protect its investment and damage caused as a result of Claimant’s own decisions to permit paying “squatters” to remain on the land¹²¹⁰ and to sell rails.

498. Claimant fails to mention that it both expressly and implicitly encouraged so-called “squatters” to “set up living quarters . . . along the tracks and in station yards,”¹²¹¹ by informing right-of-way residents in writing that they must contact FVG to set up rental agreements,¹²¹²

¹²⁰⁸ **Ex. RL-135**, *Vivendi II Award*, ¶ 7.3.10.

¹²⁰⁹ *Waste Management Award*, ¶ 174.

¹²¹⁰ See **Ex. R-172**, 2007-10-29, Letter to Whom it May Concern from P. Alonzo (informing the public that Mr. Gutierrez works for Ferrovías and has the responsibility of supervising and charging rent in the Atlantic Region); **Ex. R-70**, 2002-02-26, Letter to R. Gutiérrez (FVG Bananera Station) from J. De Leon (FVG) Instructing and Authorizing R. Gutiérrez to Charge Rent to Squatters; **Ex. R-71**, 2002-04-03, Receipt No. 000942, Sample Receipt of Rent Paid by Squatters to FVG (Rosa López); **Ex. R-175**, Receipt from FVG to Rosa López for rent for the months of January and February 2002; **Ex. R-159**, 2010-02-01, Receipt of Payment—Arrendamiento No. 0013603; **Ex. R-118** and **Ex. R-114**, Contracts between FVG and Squatters; **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment; **Ex. R-224**, Letters/Contracts from FVG Permitting “Squatters” who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*); **Ex. R-233**, Rental Requests (Post-*Lesivo*); **Ex. R-232**, Renter Files (Post-*Lesivo*); **Ex. R-234**, Rental Agreements: Contracts Signed by J. Senn and Notarized by J. Carrasco (Post-*Lesivo*); **Ex. R-223**, Rent Payment Records (Post-*Lesivo*).

¹²¹¹ Memorial on the Merits, ¶ 156.

¹²¹² See **Ex. R-222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment.

and by permitting “squatters” to remain on the land so long as they paid rent.¹²¹³ Claimant has engaged in this practice for more than a decade—both pre- and post-*Lesivo* Declaration—explicitly using its rights under Contract 402 to send letters to so-called “squatters” demanding rent,¹²¹⁴ signing notarized contracts to turn “squatters” into “tenants,”¹²¹⁵ collecting rent,¹²¹⁶ and maintaining extensive tenant files and payment ledgers.¹²¹⁷ Thus, while Claimant argues that Guatemala has breached its duty to protect its investment against all possible interferences, Claimant omitted informing the Tribunal that Claimant, through its subsidiary FVG, encouraged and profited from the interference. Not surprisingly, Claimant also leaves out the fact that Guatemala took affirmative measures—in a reasonable and diligent manner—in response to the interference.

499. In any event, even under Claimant’s partial and self-serving account of the facts, it is clear that Guatemala has not breached its obligation to accord full protection and security to

¹²¹³ **Ex. R–224**, Letters/Contracts from FVG Permitting “Squatters” who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*); **Ex. R–233**, Rental Requests (Post-*Lesivo*); **Ex. R–232**, Renter Files (Post-*Lesivo*); **Ex. R–234**, Rental Agreements: Contracts Signed by J. Senn and Notarized by J. Carrasco (Post-*Lesivo*); **Ex. R–220**, 2007-04-09, Letter to the District Attorney of Morales, Izabal from J. Senn (authorizing R. Gutiérrez to act on behalf of FVG); **Ex. R–244**, Sample Receipts: 1998; **Ex. R–245**, Sample Receipts: 1999; **Ex. R–246**, Sample Receipts: 2000; **Ex. R–247**, Sample Receipts: 2001; **Ex. R–248**, Sample Receipts: 2002; **Ex. R–249**, Sample Receipts: 2003; **Ex. R–250**, Sample Receipts: 2004; **Ex. R–251**, Sample Receipts: 2005; **Ex. R–252**, Sample Receipts: 2006; **Ex. R–253**, Sample Receipts: 2007; **Ex. R–254**, Sample Receipts: 2008; **Ex. R–255**, Sample Receipts: 2009.

¹²¹⁴ See **Ex. R. 228**, Pre-*Lesivo* Letters To “Squatters” From FVG Requesting Payment In Exchange For Permission To Live Within The Right Of Way; **Ex. R–222**, Post-*Lesivo* Letters to “Squatters” from FVG Encouraging them to Contact FVG to Sign Rental Agreements and Threatening Eviction for Non-Payment; **Ex. R–224**, Letters/Contracts from FVG Permitting “Squatters” who were Illegally on the Land to Remain if they Paid Rent (Post-*Lesivo*).

¹²¹⁵ **Ex. R–227**, Letters Expressly Using FVG Authority Under Contract 402 To Grant Rental Agreements To Purported “Squatters” (Pre-*Lesivo*); **Ex. R–225**, Letters From The *Gerente Administrativo* Of FVG Authorizing Rental Agreements (Pre-*Lesivo*); **Ex. R–230**, FVG Tenant Files (including request for and approval of rental agreements, contract and payment ledgers) (Pre-*Lesivo*); **Ex. R–234**, Rental Agreements: Contracts Signed by J. Senn and Notarized by J. Carrasco (Post-*Lesivo*).

¹²¹⁶ **Ex. R–226**, Letters Authorizing R. Gutiérrez to Collect Rent (Pre-*Lesivo*); **Ex. R–229**, Rent Payment Records (Pre-*Lesivo*); **Ex. R–223**, Rent Payment Records (Post-*Lesivo*); **Ex. R–244**, Sample Receipts: 1998; **Ex. R–245**, Sample Receipts: 1999; **Ex. R–246**, Sample Receipts: 2000; **Ex. R–247**, Sample Receipts: 2001; **Ex. R–248**, Sample Receipts: 2002; **Ex. R–249**, Sample Receipts: 2003; **Ex. R–250**, Sample Receipts: 2004; **Ex. R–251**, Sample Receipts: 2005; **Ex. R–252**, Sample Receipts: 2006; **Ex. R–253**, Sample Receipts: 2007; **Ex. R–254**, Sample Receipts: 2008; **Ex. R–255**, Sample Receipts: 2009.

¹²¹⁷ See **Ex. R–230**, FVG Tenant Files (including request for and approval of rental agreements, contract and payment ledgers) (Pre-*Lesivo*); **Ex. R–232**, Renter Files (Post-*Lesivo*).

Claimant. As previously discussed, the full protection and security obligation is not a rule of strict liability. Guatemala satisfied its obligation under Article 10.3 of CAFTA; Guatemala recognizes Claimant's rights in the right of way and took reasonable measures to protect those rights even against interference which Claimant itself permitted and encouraged.

c. Local Authorities Did Not Collaborate With Locals To Interfere With The Right Of Way, But Rather Took Reasonable Measures To Punish The Parties Responsible For Such Interference

500. Citing as examples the "incidents" at the Palín station in Escuintla and in Puerto Barrios, Claimant argues that "[i]n some instances, these criminal activities were done by, or in collaboration with, the local authorities."¹²¹⁸ Neither of these examples demonstrates Claimant's case. First, the facts surrounding the military intervention at the Palín station—which, importantly, took place *before* the *Lesivo* Declaration was published—do not demonstrate that government authorities collaborated in the criminal activities discussed above in Section IV.A.1.a(i). Rather, the military intervention consisted of soldiers being dispatched, upon public request, to respond to gang violence in areas surrounding the Palín station, and setting up headquarters at the station.¹²¹⁹ Second, both the reports from FEGUA's engineering department and court documents regarding the "incident" in Puerto Barrios demonstrate that Guatemala took reasonable measures to prevent interference with the right of way, and to punish the parties responsible for this interference.

501. According to Claimant, Guatemalan authorities collaborated with interference and theft of railway assets in 2007, when the Guatemalan army took over the Palín station in Escuintla.¹²²⁰ Rather than aid or abet criminals, however, the military intervened to protect

¹²¹⁸ Memorial on the Merits, ¶ 156 (citing Memorial on the Merits, ¶¶ 93–94 (discussing the alleged takeover of the Palín station in Escuintla by the Guatemalan army, and alleging that the Municipality of Puerto Barrios permanently converted a portion of the right of way in a public street)).

¹²¹⁹ See **R-243**, 2006-04-27, PRENSA LIBRE, "*Militarizan Palín*;" see also **Ex. R-283**, 2010-09-28, Letter to C. Samayoa Flores from the Mayor of Palín (recognizing that FVG possesses rights in Contract 402 by stating that the military dispatched for security measures will leave whenever requested to do so by FEGUA or FVG).

¹²²⁰ Memorial on the Merits, ¶ 93.

citizens of Escuintla after riots which included setting fire to four criminal hide-outs and the attempted lynching of two gang members.¹²²¹ Incidentally, as part of its initiative at the Palín station, the military evicted the squatters that were living in or around the station.¹²²² The government continues to recognize Claimant's superior rights in the Palín station, and has explained that it will vacate its temporary security post upon request from either FEGUA or FVG.¹²²³ Although Claimant attempts to characterize it as such, the incident at the Palín station demonstrates neither an arbitrary interference with its rights nor governmental collaboration with criminal activity.

502. It also must be reiterated here that the above incident regarding the Palín station is outside the jurisdiction of this Tribunal given its earlier rulings that only increased squatter activity that was caused by the issuance of the *Lesivo* Declaration was within its competence. Because the military's occupation of the Palín station occurred before and not after the issuance of the *Lesivo* Declaration and for reasons wholly unrelated to this declaration, it cannot be said that this occupation was caused by the issuance of the *Lesivo* Declaration.

503. According to Claimant, "[a]nother egregious incident took place in 2008 when the Municipality of Puerto Barrios paved over the railroad tracks in the town center and permanently converted the right of way into a public street and 'green spaces,' thereby directly expropriating the right of way from FVG."¹²²⁴ Claimant alleges that no action has been taken apart from a court decision "to excuse the Mayor from responsibility for the Municipality's actions."¹²²⁵

504. Claimant's serious allegation that Guatemalan officials participated in criminal activity in Puerto Barrios is *completely unsubstantiated*; both FEGUA and the local courts stepped in to

¹²²¹ See **R-243**, 2006-04-27, PRENSA LIBRE, "*Militarizan Palín.*"

¹²²² See **R-243**, 2006-04-27, PRENSA LIBRE, "*Militarizan Palín.*"

¹²²³ **Ex. R-283**, 2010-09-28, Letter to C. Samayoa Flores from the Mayor of Palín.

¹²²⁴ Memorial on the Merits, ¶ 94.

¹²²⁵ Memorial on the Merits, ¶ 94.

punish and correct the parties responsible for this measure, and Claimant, through FVG, **knew this long before it filed its Memorial**. FEGUA itself filed an official complaint in the Regional Division of the Appellate Court of Zacapa against the Mayor of Puerto Barrios.¹²²⁶ More than 18 months before Claimant submitted its Memorial on the Merits, FEGUA officials appeared before the court both as witnesses¹²²⁷ and as the proper party to assert the claim against the Mayor.¹²²⁸ Three months before Claimant submitted its Memorial on the Merits, the Regional Division of the Appellate Court of Zacapa dismissed the claim against the Mayor of Puerto Barrios, stating that “there were not illegal acts attributable to the aforementioned Mayor.”¹²²⁹ In reaching this decision, the court also noted that the Municipality neither authorized nor apportioned funds for the paving of the right of way.¹²³⁰ In fact, when the Municipality was approached with the request to pave these areas, it denied the request precisely to safeguard Claimant’s rights:

The Urban Commission decided that *it was impossible to offer the requested authorization . . . given the fact that the occupied area belonged to Fegua or Ferrovías*, and thus the Municipal Council on March 17, 2008, in point five of the Minutes of the Ordinary Session number [017-2008] *denied the requested authorization, explaining to the petitioner that if it wished to perform the works without the Municipal permit, it was under their own risk and responsibility*.¹²³¹

¹²²⁶ See **Ex. R–205**, 2008-09-11, Official Complaint Against the Mayor of Puerto Barrios.

¹²²⁷ See **Ex. R–206**, 2009-01-28, Letter from Ing. M. Samayoa to C. Samayoa Flores.

¹²²⁸ See **Ex. R–205**, 2008-09-11, Official Complaint Against the Mayor of Puerto Barrios.

¹²²⁹ **Ex. R–191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios, p. 6 (unofficial translation) (“no se advierte la existencia de hechos ilícitos imputables al alcalde antejuiciado”).

¹²³⁰ **Ex. R–191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios.

¹²³¹ **Ex. R–191**, 2009-03-04, Decision of the Sala Regional Mixta de la Corte de Apelaciones de Zacapa on the Official Complaint Against the Mayor of Puerto Barrios, p. 5 (emphasis added) (unofficial translation) (“La Comisión de Urbanismo dictaminó que *no era posible brindarle la autorización solicitada . . . en virtud que el área ocupada pertenecía a Fegua o Ferrovías*, por lo que el Concejo Municipal en fecha diecisiete de marzo de dos mil ocho en el punto quinto del *Acta de Sección Ordinaria número cero diecisiete guión dos mil ocho negó la autorización solicitada, manifestándole al solicitante que si realizaba dichos trabajos sin el permiso municipal, eran bajo su propia responsabilidad y riesgo*”).

505. Guatemala has also initiated a criminal investigation regarding the private party allegedly responsible for paving over the right of way.¹²³² This, too, took place before Claimant submitted its Memorial on the Merits. In a report dated 28 January 2009, FEGUA engineer Miguel Samayoa informed FEGUA Overseer Carlos Samayoa that an order for the capture of suspect Heron Ralda had already been issued, and was pending execution by the Criminal Investigation Department of the *Ministerio Publico*.¹²³³

506. With respect to the incident in Puerto Barrios, therefore, Guatemala took reasonable steps to protect Claimant's investment; it denied a request that would interfere with the right of way, recognized Claimant's rights in the land (this after the *Lesivo* Declaration), and participated in judicial proceedings against the parties allegedly responsible, irrespective of whether those parties were government officials or private persons.¹²³⁴ Furthermore, because Claimant knew for (at least) several months before submitting the Memorial on the Merits that Guatemalan authorities had not authorized the interference with the right of way, and instead took reasonable measures to protect Claimant's investment, Guatemala can reasonably conclude that Claimant set out to mislead the Tribunal by providing only a partial account of the facts.

3. Conclusion

507. Claimant has failed to satisfy the high burden required to prove that Guatemala violated its full protection and security obligation under Article 10.5 of CAFTA. Despite Claimant's unsubstantiated allegations that Guatemala failed to protect its investment, the facts show that Guatemala has taken reasonable measures to satisfy its "obligation of vigilance,"¹²³⁵ in

¹²³² See **Ex. R-206**, 2009-01-28, Letter from M. Samayoa Minera to C. Samayoa Flores (discussing the proceeding against the Mayor of Puerto Barrios and a criminal investigation against Mr. Heron Ralda, who was accused of committing the acts in question that interfered with the right of way).

¹²³³ **Ex. R-206**, 2009-01-28, Letter from M. Samayoa Minera to C. Samayoa Flores, p. 4.

¹²³⁴ See **Ex. R-206**, 2009-01-28, Letter from M. Samayoa Minera to C. Samayoa Flores (discussing the proceeding against the Mayor of Puerto Barrios and a criminal investigation against Mr. Heron Ralda, who was accused of committing the acts in question that interfered with the right of way).

¹²³⁵ **Ex. RL-81**, *American Manufacturing & Trading*, ¶ 6.05.

accordance with the full protection and security standard under Article 10.5 and customary international law.

D. Guatemala Fulfilled Its National Treatment Obligation In Accordance With Article 10.3 Of CAFTA

508. Claimant’s allegation that Guatemala issued the *Lesivo* Declaration in order to give the railroad concession (and all of its components) to Guatemalan businessman Ramón Campollo, in violation of Article 10.3 of CAFTA, is nothing but an unsubstantiated conspiracy theory; Claimant has failed to demonstrate any of the elements of the national treatment standard set forth in Article 10.3.

509. Article 10.3 of CAFTA obligates each Party to accord to “investors of another Party”¹²³⁶ and to “‘covered investments’ treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”¹²³⁷ Predicated entirely on its conspiracy theory, Claimant’s argument is that the “Government of Guatemala’s declaration of *lesivo* . . . constituted a breach of the national treatment standard under CAFTA,”¹²³⁸ because it was a discriminatory measure taken against Claimant and in favor of Ramón Campollo.¹²³⁹ More specifically, Claimant asserts that the *Lesivo* Declaration had a “discriminatory purpose and intent;” allegedly to “directly or indirectly take away RDC’s Usufruct investment and award it, either directly or indirectly, to a favored domestic investor in like circumstances, Ramon [*sic*] Campollo.”¹²⁴⁰ This argument is purely speculative and has no basis in fact. Guatemala has already addressed and rebutted Claimant’s claim of discrimination in Sections III.M. and IV.B.4.c above, in the context of the fact section

¹²³⁶ Ex. RL-61, CAFTA Art. 10.3.1.

¹²³⁷ Ex. RL-61, CAFTA Art. 10.3.2.

¹²³⁸ Memorial on the Merits, ¶ 158.

¹²³⁹ Memorial on the Merits, ¶ 163.

¹²⁴⁰ Memorial on the Merits, ¶ 164.

and the fair and equitable treatment standard, but will do so again briefly in this section, in the specific context of the national treatment standard set forth in Article 10.3 of CAFTA.

510. The remainder of this section is divided into four parts. **Part 1** discusses the standard of the national treatment obligation under Article 10.3 of CAFTA. **Part 2** demonstrates that Claimant did not meet its burden under that standard, as applied to the facts of this case. **Part 3** explains that Claimant did not receive treatment less favorable than that accorded to any Guatemalan investor. **Part 4** concludes that Guatemala fulfilled its national treatment obligation under CAFTA.

1. Standard Of The National Treatment Obligation Under Article 10.3 Of CAFTA

511. The guiding principle of the national treatment obligation under international law is one of equality. To this end, Professors Dolzer and Schreuer explained that a foreigner's expectations must be constrained to the treatment afforded to its domestic counterparts, since the purpose of a national treatment clause "is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals."¹²⁴¹

512. As recognized by Claimant, the national treatment inquiry is, by nature, a test by comparison.¹²⁴² The NAFTA tribunal in *Archer Daniels Midland Co. v. United Mexican States* ("*Archer Daniels*"), a case cited by Claimant in its Memorial,¹²⁴³ examined the national treatment obligation under Article 1102 of NAFTA, which is identical to the standard in Article 10.3 of CAFTA. That tribunal in that case explained that the national treatment inquiry takes part in three steps: "(i) identify the relevant subjects for comparison; (ii) consider the

¹²⁴¹ **Ex. RL-144**, DOLZER AND SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 178.

¹²⁴² Memorial on the Merits, ¶ 160 ("It is an 'application of the general prohibition of discrimination based on nationality, including both *de jure* and *de facto* discrimination,' *i.e.*, measures that on their face treat entities differently and measures which are neutral on their face, but which result in differential treatment." (quoting **Ex. RL-82**, *Archer Daniels Award*, ¶ 193).

¹²⁴³ Memorial on the Merits, ¶ 160.

treatment each comparator receives; and (iii) consider any factors that may justify any differential treatment.”¹²⁴⁴ Discussing the proper order of examination, that tribunal explained further that “it is necessary to consider the question of ‘like circumstances’ *before* the question of ‘no less favorable treatment’ because if the circumstances are not ‘like,’ no obligation arose for the Respondent State to accord Claimants’ [investment]”¹²⁴⁵ the best treatment accorded to the domestic investments.

513. Claimant has failed to meet its burden with respect to two outcome-determinative elements of the test enunciated by the *Archer Daniels* tribunal. Claimant’s national treatment argument must be dismissed because (1) Claimant and Ramón Campollo were *not* in like circumstances; and (2) Claimant received no treatment less favorable than that afforded to Ramón Campollo—or for that matter any other Guatemalan investor. What Claimant seeks, and what CAFTA does not provide, is treatment *more* favorable than that accorded to a domestic investor.¹²⁴⁶

2. Claimant And Ramón Campollo Were Not In Like Circumstances

514. Claimant has failed to establish the first prong of the national treatment inquiry, which determines whether a claimant and its selected comparator are “in like circumstances.”¹²⁴⁷ Citing *Methanex*, the *Archer Daniels* tribunal explained that:

The ordinary meaning of the word “circumstances” under Article 1102 [of NAFTA] requires an examination of the surrounding situation in its entirety. [Moreover,] all “circumstances” in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator. The dictionary meaning of the word “circumstance” refers to a condition, fact, or event

¹²⁴⁴ **Ex. RL-82**, *Archer Daniels Award*, ¶ 196.

¹²⁴⁵ **Ex. RL-82**, *Archer Daniels Award*, ¶ 196 (emphasis added).

¹²⁴⁶ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.152 (“[T]he requirement of national treatment, found in most modern investment treaties, aims to provide a *level* playing-field for foreign investors. . . .” (emphasis added)); see also **Ex. RL-123**, *Pope & Talbot Inc v. Canada*, Ad hoc—UNCITRAL Arbitration Rules, IIC 192 (Interim Award) 2000 (Dervaird, Greenberg, Belman) (“*Pope & Talbot Award*”).

¹²⁴⁷ **Ex. RL-61**, CAFTA Art. 10.3.1.

accompanying, conditioning or determining another, or the logical surroundings of another.¹²⁴⁸

515. Tribunals have also held, and Claimant agrees, that “a domestic entity is considered ‘in like circumstances’ with a foreign investor if the firms operate in the same business or economic sector.”¹²⁴⁹ As part of this element, the *Archer Daniels* tribunal considered whether the claimants’ selected comparator was a direct competitor.¹²⁵⁰ Discussing the decisions in *Feldman Karpa v. Mexico* (“*Feldman*”) and *Methanex*, the *Archer Daniels* tribunal explained: “Considering the object of Article 1102—to ensure that a national measure does not upset the *competitive relationship* between domestic and foreign investors—other tribunals convened under Chapter Eleven *have focused mainly on the competitive relationship between investors in the marketplace.*”¹²⁵¹ Despite Claimant’s conclusory statement that Ramón Campollo is the proper comparator, the facts demonstrate that he cannot be considered as such under any of the tests submitted by Claimant. In other words, Claimant and Ramón Campollo were *not* “in like circumstances.”¹²⁵²

516. The only similarity between Claimant and Ramón Campollo is that both operated businesses in Guatemala. Apart from this shared characteristic, Claimant and Mr. Campollo did not compete either directly or indirectly, and did not even operate in similar industries. Mr. Campollo’s business interests—a 25 percent stake in a sugar business that represents 6 percent of Guatemala’s sugar industry¹²⁵³—do not compete with those of Claimant, which is a “railway investment and management company which focuses on ‘emerging corridors in emerging markets’”¹²⁵⁴ Nor did Mr. Campollo attempt to enter into a situation in which he and

¹²⁴⁸ **Ex. RL-82**, *Archer Daniels Award*, ¶ 199 (quoted by Claimant in ¶ 160 of its Memorial on the Merits).

¹²⁴⁹ Memorial on the Merits, ¶ 161 (citing **Ex. RL-99**, *Feldman Award*, ¶ 171; **Ex. RL-126**, *S.D. Myers First Partial Award*).

¹²⁵⁰ **Ex. RL-82**, *Archer Daniels Award*, ¶ 199; *see also* Memorial on the Merits, ¶¶ 199–204.

¹²⁵¹ **Ex. RL-82**, *Archer Daniels Award*, ¶ 199; *see also* Memorial on the Merits, ¶ 199.

¹²⁵² **Ex. RL-61**, CAFTA Art. 10.3.1.

¹²⁵³ Witness Statement of R. Campollo, ¶ 3.

¹²⁵⁴ First Statement of H. Posner, ¶ 2.

Claimant would *become* direct competitors; it is uncontested that Mr. Campollo did not participate in the public bidding process for any of the contracts that comprise Claimant's investment.¹²⁵⁵

517. Furthermore, although Claimant approached Mr. Campollo on three separate occasions in an attempt to bring him into the railroad business, Mr. Campollo never accepted this offer,¹²⁵⁶ and communicated the same to Claimant in writing in a letter dated—and marked as received by FVG on—15 April 2005.¹²⁵⁷ Mr. Senn also acknowledged receipt of this letter and, in a letter sent three days later, accepted Mr. Campollo's decision not to enter into business with FVG on behalf of Claimant.¹²⁵⁸ Mr. Campollo categorically denies Claimant's allegation that he participated, or authorized any of his employees to participate, in discussions or negotiations with the Government to undermine Claimant's railroad operation.¹²⁵⁹ Neither Mr. Campollo nor his employees ever made a direct or indirect offer to enter into any business, much less the railroad business, with Claimant.¹²⁶⁰ Contrary to Claimant's assertion that Mr. Campollo was interested in the railroad because it would give him a more economical way to transport his products,¹²⁶¹ Mr. Campollo clarifies that using the railroad would require that the sugar producers invest in special equipment, and would be a more expensive and circuitous means of transportation, when compared with the roads that sugar producers had already built

¹²⁵⁵ See **Ex. R-55**, 1997-05-15, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R-58**, 1997-06-04, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Right of Way (Contract 402); **Ex. R-62**, 1997-12-11, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41); **Ex. R-63**, 1997-12-16, Minutes from the Meeting of the Bid Selection Committee: Usufruct Contract for the Equipment (Contract 41) (explaining in their totality that Claimant and an entity named "Agenda 2000" were the only participants in the bidding process for what would become Contract 402, and that Claimant was the only participant in the bidding process for Contract 41).

¹²⁵⁶ See Witness Statement of R. Campollo, ¶ 7.

¹²⁵⁷ See **Ex. R-173**, 2005-04-15, Letter to J. Senn from R. Campollo.

¹²⁵⁸ **Ex. R-174**, 2005-04-18, Letter to R. Campollo from J. Senn.

¹²⁵⁹ Witness Statement of R. Campollo, ¶¶ 32-37.

¹²⁶⁰ See *generally* Witness Statement of R. Campollo.

¹²⁶¹ Memorial on the Merits, ¶ 46.

in order to transport their product directly to port.¹²⁶² Mr. Roberto Morales and Mr. Freddie Pérez confirm these conclusions in their declarations.¹²⁶³

518. Absent a direct or indirect comparator in Ramón Campollo, or in “the same business or economic sector,”¹²⁶⁴ the only proper comparator for Claimant is a person or entity which has experienced the same “condition, fact, or event”¹²⁶⁵ as Claimant. In the present case, the logical condition, fact, or event upon which to judge Guatemala’s treatment of Claimant is the *lesividad* procedure. Accordingly, the proper comparator for purposes of the national treatment inquiry under Article 10.3 of CAFTA is a Guatemalan entity which has been subject to a *lesivo* declaration. But Claimant has not alleged that Mr. Campollo ever has been subject to a *lesivo* declaration. As is discussed immediately below in Section 3, Claimant has received treatment no less favorable than this comparator.

3. Claimant Did Not Receive Less Favorable Treatment Than Ramón Campollo Or Any Other Domestic Investor

519. The second prong of the test articulated by the tribunal in *Archer Daniels*—the comparison aspect—determines whether the foreign investor has been discriminated against by receiving “less favorable treatment” than the relevant comparator. It is not enough, as Claimant alleges in its conclusion on national treatment, that a government measure be “exclusively directed” toward an investor;¹²⁶⁶ a violation of the national treatment obligation requires that the investor prove the treatment it received was less favorable than that accorded to its domestic counterparts. In this case, the second prong—like the first—is not met; Claimant did not receive less favorable treatment than Mr. Campollo or any other domestic investor.

¹²⁶² Witness Statement of R. Campollo, ¶ 17; *see also* Witness Statement of R. Morales.

¹²⁶³ *See above* Sections III. M and Q; Statement of R. Morales, ¶¶ 5-9; Statement of F. Pérez, ¶ 9.

¹²⁶⁴ Memorial on the Merits, ¶ 161 (citing **Ex. RL-99**, *Feldman Award*, ¶ 171; **Ex. RL-126**, *S.D. Myers First Partial Award*).

¹²⁶⁵ **Ex. RL-82**, *Archer Daniels Award*, ¶ 199 (quoted by Claimant in ¶ 160 of its Memorial on the Merits).

¹²⁶⁶ Memorial on the Merits, ¶ 164.

520. To determine whether a measure accords the foreign investor “less favorable treatment,” international tribunals have explained that the decisive factor is the measure’s *adverse effect* or practical impact on the foreign investor and its investment, and not the intent of the State *behind the measure*. As the tribunal in *SD Myers* explained:

The existence of an intent to favour nationals over non-nationals would *not give rise to a breach of Chapter 1102* of the NAFTA [which is equivalent and nearly identical to the national treatment provision in Article 10.3 of CAFTA] if the measure in question were to produced [sic] no adverse effect on the non-national complainant. The word “treatment” suggests that *practical impact is required to produce a breach of Article 1102*, not merely a motive or intent that is in violation of Chapter 11.¹²⁶⁷

521. The tribunal in *Archer Daniels* (citing the First Partial Award in *SD Myers*), likewise explained that “[i]n establishing whether the Tax affords ‘less favorable treatment’ to the Claimants, previous Tribunals have relied on *the measure’s adverse effects* on the relevant investors and their investments rather than on the intent of the Respondent State.”¹²⁶⁸ The *Siemens* tribunal similarly held that “*intent is not decisive or essential* for a finding of discrimination, and that *the impact of the measure on the investment would be the determining factor* to ascertain whether it had resulted in non-discriminatory treatment.”¹²⁶⁹

522. Thus, even if Claimant had demonstrated that Guatemala intended to discriminate against it and its investment in favor of Mr. Campollo—which Claimant has not—it would still have fallen short of establishing a violation of Guatemala’s national treatment obligation. Claimant had the burden—but failed—to establish that the measure in question (the *Lesivo* Declaration) had the *effect* of treating Claimant and its investment less favorably than Mr. Campollo or another relevant comparator.

¹²⁶⁷ **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 254 (emphasis added).

¹²⁶⁸ **Ex. RL-82**, *Archer Daniels Award*, ¶ 209 (emphasis added).

¹²⁶⁹ **Ex. RL-80**, *Siemens A.G.v. The Argentine Republic*, ICSID Case No. ARB/02/8 (Award) 6 February 2007 (Sureda, Brower, Janeiro), ¶ 321 (“*Siemens Award*”) (emphasis added).

523. But even if the investor succeeds in demonstrating that the measure had an adverse impact on its investment, the inquiry would not end there. The investor would still have to prove that the alleged discrimination was unreasonable. As Claimant recognizes, “[n]ationality discrimination is established by showing that a foreign investor *unreasonably* has been treated less favorably than domestic investors in like circumstances.”¹²⁷⁰ In addressing this “reasonableness” aspect of the standard, tribunals consider the legitimacy of the State action, or “whether the difference [in treatment] has a reasonable nexus to rational government policies”¹²⁷¹ Applying this reasonableness test, the *GAMI* tribunal rejected the claimant’s argument that Mexico’s measures had violated the national treatment provision of NAFTA “mainly because the government demonstrated a legitimate policy reason for the contested measure, which was ‘neither applied in a discriminatory manner nor designed as a disguised barrier to equal opportunity.’”¹²⁷² The *Pope & Talbot*¹²⁷³ and *Archer Daniels*¹²⁷⁴ tribunals also incorporated this “legitimacy” element into their analyses regarding the reasonableness element of the national treatment standard.

524. Claimant in this case has failed to meet its burden of proof in all respects under the second prong of the national treatment test: (i) it failed to prove “discriminatory purpose and intent” on the part of Guatemala, as it set out to do in its Memorial;¹²⁷⁵ (ii) it failed to prove that the measure had an adverse effect or impact such that it caused less favorable treatment; and (iii) it failed to prove, to the extent there was any differentiation, that it was unreasonable.

¹²⁷⁰ **Ex. RL-82**, *Archer Daniels Award*, ¶ 205 (quoted by Claimant in ¶ 161 of its Memorial on the Merits); see also Memorial on the Merits, note 193 (quoting **Ex. RL-99**, *Feldman Award*, ¶ 170 (emphasis added)) (“In the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.” (emphasis in original)).

¹²⁷¹ **Ex. RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.160.

¹²⁷² **Ex. RL-148**, DUGAN ET AL, INVESTOR STATE ARBITRATION 402 (quoting **Ex. RL-100**, *GAMI Award*, ¶ 114 (emphasis added)).

¹²⁷³ **Ex. RL-123**, *Pope & Talbot Award*, ¶ 78 (“Differences in treatment will presumptively violate Article 1102(2), unless they have a *reasonable nexus to rational government policies* that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.” (emphasis added)).

¹²⁷⁴ **Ex. RL-82**, *Archer Daniels Award*, ¶¶ 208–10.

¹²⁷⁵ Memorial on the Merits, ¶ 164.

Although Claimant alleges fabricated “facts” that it claims demonstrate a violation of the national treatment standard, Claimant has in fact offered nothing more than circumstantial evidence and unsubstantiated conspiracy theories on which to hoist its argument that Guatemala based the *Lesivo* Declaration upon a discriminatory intent and had an adverse effect on its investment.

525. In its Memorial on the Merits, Claimant listed as proof of its national treatment claim the following six points, which even if taken to be true, relate only to Claimant’s theory regarding Guatemala’s discriminatory intent:

- In April 2005, Mr. Pinto asserted to FVG that there were alleged “illegalities” in FVG’s Usufruct Contracts and that he would come to FVG’s offices to “let [FVG] know what is the legal point of view of the Ministry [of Communications] regarding our contract,” but that, “if we reach an agreement maybe we could work out together these illegalities”
- In March 2006, FEGUA representatives told President Berger at a meeting with RDC and FVG that Ramón Campollo had substantial interest in developing the South Coast corridor.
- In May 2006, Mr. Pinto told a third party who was bidding on obtaining the railroad’s scrap metal business that it was not going to be too long, probably within the current year, before the Government would “take the railway away from Ferrovias [FVG].”
- On August 23, 2006, President Berger expressed the Government’s interest in opening the South Coast route and questioned FVG regarding whether there had been any joint ventures so far between it and potential investors for development of that route. The “potential investor” had been previously specifically identified as Ramón Campollo. President Berger then told FVG in no uncertain terms that *lesividad* would be declared unless FVG agreed to substantive changes to the Usufruct Contracts.
- The Government then presented FVG with a “take it or leave it” proposal in which FVG would have had to agree to significantly modify the terms of the Usufruct Contracts and release unrestored railway segments (*i.e.*, the South Coast corridor) to “other investors [which] may be interested.” After FVG rejected the Government’s demands, the Lesivo Resolution issued the next day.
- Less than two weeks after the Lesivo Resolution issued, Hector Pinto, on behalf of Mr. Campollo, wrote to a Government official at the Ministry of Competitiveness informing him that railway service between Puerto Quetzal to Ciudad del Sur in Santa Lucia would

be restored shortly for the purposes of transporting sugar from Mr. Campollo's mill to the port.¹²⁷⁶

526. Claimant's version of the facts is based on speculation and hearsay. As Claimant itself recognized, even if true, many of these events—at most—are merely “circumstantial.”¹²⁷⁷

527. First, Claimant's allegations regarding Mr. Campollo's and Mr. Pinto's actions are *completely untrue* and, as Mr. Campollo explains in his witness statement, *false* and *defamatory*.¹²⁷⁸ As Mr. Campollo himself explained, apart from attending three short meetings upon Claimant's request, he never pursued, nor authorized his employees to pursue, a business relationship with Claimant.¹²⁷⁹ Moreover, Mr. Campollo neither has nor had an interest in the railroad business.¹²⁸⁰ Using the railroad to transport sugar not only would cost Mr. Campollo and other sugar producers more money because they would have to invest in special machinery to transfer the raw sugar cane into specially-made railway cars,¹²⁸¹ but also would involve using a longer and more circuitous route than the private roads that sugar producers already had built to transport their product directly to the southern ports.¹²⁸² As Mr. Campollo and Mr. Roberto Morales explained, Claimant is aware that use of the railroad would be a poor investment for sugar producers, as Claimant itself commissioned Mr. Morales' study, upon which many of the sugar producers made the decision not to use the railroad.¹²⁸³

528. Despite Claimant's effort to secure an investment from Mr. Campollo so that it could open the Southern route,¹²⁸⁴ Mr. Campollo never accepted the offer,¹²⁸⁵ and then finally

¹²⁷⁶ Memorial on the Merits, ¶ 163.

¹²⁷⁷ Memorial on the Merits, ¶ 163.

¹²⁷⁸ Witness Statement of R. Campollo, ¶ 37.

¹²⁷⁹ See generally Witness Statement of R. Campollo.

¹²⁸⁰ Witness Statement of R. Campollo, ¶¶ 7, 19.

¹²⁸¹ Witness Statement of R. Morales, ¶¶ 8–10.

¹²⁸² Witness Statement of R. Campollo, ¶ 17; see also Witness Statement of R. Morales, ¶ 13.

¹²⁸³ Witness Statement of R. Campollo, ¶ 17; Witness Statement of R. Morales, ¶ 4.

¹²⁸⁴ Claimant failed to make a profit in its first seven years as concessionaire. **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's First Meeting; **Ex. R-81**, 2004-06-28, SIGLO XXI, *Ferrovías bets on the south* (indicating that at that point, in the five years that they have been operating in Guatemala,

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declined the same in writing, in a letter dated—and marked as received by FVG on—15 April 2005.¹²⁸⁶ Mr. Campollo sent this letter to FVG expressly to clear up any confusion regarding false statements Mr. Pinto reportedly might have made regarding his interest in the railroad project.¹²⁸⁷ Mr. Senn acknowledged receipt of this letter and, replied to Mr. Campollo three days later, accepting on behalf of Claimant Mr. Campollo’s decision not to enter into business with FVG.¹²⁸⁸ Until he submitted his witness statement in support of this Counter-Memorial, drafting his own letter and receiving Mr. Senn’s response was the last connection Mr. Campollo had to either Claimant or its railroad project.¹²⁸⁹

529. Second, Claimant’s depiction of the Government’s interest—supposedly to “replace FVG with Ramón Campollo”—is completely untrue. As discussed above in the context of fair and equitable treatment,¹²⁹⁰ Guatemala’s principal intent and motivation was to apply its laws, and obtain a functioning railroad system.¹²⁹¹ After notifying Claimant of the legal defects of Contract 143/158 as early as 2004,¹²⁹² Guatemala attempted to negotiate with Claimant through 2006 to cure those illegalities and to keep on track its goal of obtaining a functioning railway.¹²⁹³ Guatemala presented a proposal to Claimant in the course of these negotiations,

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they have never recorded a profit); *see also* **Ex. R–9**, 2004-11-15, Letter from J. Senn to Vice-Minister Diaz (stating that FVG’s “projects strongly depend on local investors, who, in turn, will become the users of the railroad service in this area”).

¹²⁸⁵ Witness Statement of R. Campollo, ¶ 7; *see also id.* ¶¶ 8–22.

¹²⁸⁶ *See* **Ex. R–173**, 2005-04-15, Letter to J. Senn from R. Campollo.

¹²⁸⁷ Witness Statement of R. Campollo, ¶¶ 29–30.

¹²⁸⁸ **Ex. R–174**, 2005-04-18, Letter to R. Campollo from J. Senn.

¹²⁸⁹ Witness Statement of R. Campollo, ¶ 31.

¹²⁹⁰ *See* above at Sections IV.B.2 and IV.B.4.c.

¹²⁹¹ *See* Statement of R. Aitkenhead, ¶ 10; Statement of M. Marroquín, ¶ 7.

¹²⁹² *See* First Statement of A. Gramajo, ¶ 12 (discussing the letter to J. Senn, dated 21 April 2004, which included the legal department’s opinion regarding Contract 143/158’s defects, and notified Claimant of these illegalities); *see also* **Ex. C–53**, 2004-04-21, Letter to J. Senn from A. Gramajo, attaching FEGUA Opinion 47–2004; **Ex. R–8**, 2004-04-14, FEGUA Opinion 47–2004.

¹²⁹³ *See* above at Section III.F. (describing the High Commission meetings and the temporary suspension of the *Lesivo* Declaration).

but it was by no means the “take it or leave it” offer that Claimant alleges.¹²⁹⁴ Nor was it designed, as Claimant alleges, “to coerce RDC into surrendering unrestored rail segments in favor of ‘other [interested] investors’ in exchange for the Government abandoning the Lesivo Resolution.”¹²⁹⁵ The condition to which Claimant refers in fact required nothing more than Claimant’s bargained-for obligations under Contract 402 to restore to FEGUA those lands given in usufruct and in which Claimant did not rehabilitate the railway.. In relevant part, Contract 402 provides:

*In the event that the USUFRUCTARY fails to restore the railway and fails to render cargo transportation services under the terms of sections two, three, four, five, and six of the THIRTEENTH CLAUSE hereof, the Usufructary shall surrender to FEGUA the real property where the railway yet to be restored is located, and any such property shall no longer be subject to this usufruct.*¹²⁹⁶

530. Clause 13 of Contract 402, for its part, establishes the time limits for initiating the different phases of railway rehabilitation and transportation.¹²⁹⁷ By the time Claimant received Guatemala’s proposal, the deadlines for Phases II and III had already passed.¹²⁹⁸ It is a mischaracterization of the offer, therefore, to say that Guatemala sought to “coerce” Claimant into surrendering its rights; under the plain terms of the Contract, Claimant had no rights in the real property where it had failed to rehabilitate and restore the railroad.

531. Despite Guatemala’s best efforts, negotiations ended because FVG stated that it had no interest in entering into new equipment contracts.¹²⁹⁹ The President had practically no choice but to follow Guatemalan law and proceed with the *lesividad* process before the expiration of

¹²⁹⁴ Memorial on the Merits, ¶ 163.

¹²⁹⁵ Memorial on the Merits, ¶ 165.

¹²⁹⁶ **Ex. C–22**, 1997-11-25, Contract 402 Cl. 16 (II) (emphasis added).

¹²⁹⁷ **Ex. C–22**, 1997-11-25, Contract 402 Cl. 13.

¹²⁹⁸ *See Ex. C–22*, 1997-11-25, Contract 402 Cl. 13.

¹²⁹⁹ *See Ex. R–37*, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

the three-year prescription period.¹³⁰⁰ Rather than take away Claimant’s rights, or nullify Contract 143/158, the President merely took the steps required of him under Guatemalan law to transfer the case to an independent judicial organ.¹³⁰¹ Despite Guatemala’s efforts to negotiate, Claimant ceased railway operations in 2007,¹³⁰² and left Guatemala without an operational railroad and without remedy.

532. Finally, and as especially relevant to Claimant’s allegation that Mr. Pinto wrote to the Government fewer than two weeks after the *Lesivo* Declaration was published stating that railway service would soon be restored,¹³⁰³ it is important to note that even if all of Claimant’s allegations are taken to be true, Claimant has not demonstrated a discriminatory *effect* upon its investment. To this day, Claimant remains in full possession of its rights under Contracts 402¹³⁰⁴ and 143/158.¹³⁰⁵

533. Moreover, Claimant has prevailed in multiple cases before the Guatemalan courts regarding its continuing rights in Contracts 402 and 143/158 pending the *Contencioso Administrativo* court’s final decision regarding the *lesividad* of Contract 143/158. In 2007 and 2008, for example, the *Contencioso Administrativo* courts rejected the provisional measures requested by the Attorney General to suspend the validity of Contract 143/158 pending the

¹³⁰⁰ Expert Report of J.L. Aguilar, ¶¶ 2(p), 37, 72.

¹³⁰¹ Expert Report of J.L. Aguilar, ¶¶ 2(f, g, h), 32, 35.

¹³⁰² **Ex. R-123**, 2007-07-12, THE MIAMI HERALD, “Rail Investor Calls it Quits in Guatemala”; **Ex. C-39**, 2007-06-06, Letter from Posner to Customers, Employees and Friends of Ferrovías Guatemala; **Ex. R-204**, 2007-10, RAILWAY GAZETTE INTERNATIONAL, “The lights go out”; **Ex. R-120**, 2007-11-06, EL PERIODICO, *Ferrovías will suspend its operations on October 1*.

¹³⁰³ Memorial on the Merits, ¶ 163.

¹³⁰⁴ See above at Section IV.A.3.a.

¹³⁰⁵ **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim; **Ex. RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4; **Ex. R-296**, Siglo XXI, *Government Analyzes Concession of New Train System*; Second Statement of A. Gramajo, ¶¶ 51-52.

final decision regarding its *lesividad*.¹³⁰⁶ There was a similar outcome in the criminal trespass case against EEGSA (which, incidentally, Claimant mistakenly alleges is owned in part by Ramón Campollo);¹³⁰⁷ the local court reinforced Claimant’s rights by rejecting an argument that Claimant no longer had rights under Contract 402 once the *Lesivo* Declaration was issued.¹³⁰⁸

534. Claimant also continues to make money from its rights under Contract 402, including revenue associated with easement contracts and long-term leases, and rent from tenants which are virtually indistinguishable from the “squatters” about whom Claimant complains in its full protection and security claim.¹³⁰⁹ Guatemala has consistently acknowledged the validity of Claimant’s rights in both Contracts 143/158 and 402, including post-*Lesivo* Declaration and after Claimant ceased railway operations in 2007. Rather than cede Claimant’s rights to another party to further its own desires to establish an operational railroad, Guatemala has respected Claimant’s rights and continues to protect Claimant’s right to profit from the right of way by forwarding third party requests to FVG and acknowledging that only Claimant had the legal capacity to grant these requests.¹³¹⁰

535. In the course of the *lesividad* proceedings, Claimant has received treatment no less favorable than that accorded to Guatemalan entities that have been the subject of a *lesivo*

¹³⁰⁶ See **Ex. RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Claim of *Lesividad* of Contract 143/158; **Ex. RL-74**, 2008-03-10, Decision of the *Contencioso Administrativo* Court Regarding the Attorney General’s Resubmitted Claim for Suspension of Contracts 143/158 Within the *Lesividad* Claim.

¹³⁰⁷ See Statement of R. Campollo, ¶ 4, and **Ex. R-194**, 2010-09-22, Certification from *Empresa Electrica de Guatemala* (explaining that Ramón Campollo has no interest in that company); see generally Section IV.D (rebutting Claimant’s allegations of a collaboration between Ramón Campollo and government officials in a conspiracy against FVG).

¹³⁰⁸ **Ex. R-200**, 2008-05-13, MP 361-2003, Decision from the Criminal Trial Court at Amatitlán, p. 8.

¹³⁰⁹ See above at Sections III.P., IV.C; **Ex. R-69**, 2000-11-19, Contract No. 120 Between FVG and COBIGUA; **Ex. C-28(c)** Texaco Easement Contract No. 16.

¹³¹⁰ See, e.g., **Ex. R-98**, 1999-06-01, Oficio No. 120-99, Letter to R. Fernández from A. Porras; **Ex. R-285**, 2000-08-07, Oficio No. 143-2000, Letter to R. Fernández from J. Rivera; **Ex. R-284**, 2004-03-02, Oficio No. 063-2004, Letter to J. Senn from A. Gramajo; **Ex. R-106**, 2006-09-20, Oficio No. 317-2006, Letter to J. Senn from A. Gramajo; **Ex. R-109**, 2006-11-16, Oficio No. 386-2006, Letter to J. Senn from A. Gramajo; **Ex. R-110**, 2006-11-27, Oficio No. 398-2006, Letter to J. Senn from A. Gramajo; **Ex. R-133**, 2007-09-05, Oficio No. 153-2007, Letter to J. Senn from A. Gramajo.

declaration. Guatemala has followed the established procedure in the same way it would have and has followed in any other case of *lesividad*. Claimant does not, because it cannot, allege any different.

536. Finally, Claimant fails to demonstrate that—to the extent that there was any discriminatory effect—such effect was unreasonable. In light of the definition of “reasonableness” enunciated by the *GAMI, Pope & Talbot* and *Archer Daniels* tribunals, as discussed above,¹³¹¹ which considers whether the respondent State had a legitimate policy reason for implementing the contested measure, it is apparent that any differential treatment Claimant experienced was reasonable. As explained above, Guatemala had a legitimate policy goal—abiding by its own laws and enforcing the rule of law—that served as the foundation for its *Lesivo* Declaration. The steps that Guatemala took to reach this goal, which included negotiation with Claimant,¹³¹² and the transfer of the dispute to the *Contencioso Administrativo* courts when Claimant decided it no longer wanted to negotiate and thus left the President with no meaningful option but to issue the *Acuerdo Gubernativo*,¹³¹³ were rationally tied to this legitimate purpose. Accordingly, Claimant failed to prove that Guatemala breached its national treatment obligation under CAFTA.

4. Conclusion

537. Claimant’s national treatment claim must fail on all counts. First, Claimant failed to establish that Ramón Campollo was the proper domestic counterpart against which to compare the treatment it received from Guatemala. Second, Claimant failed to prove that Guatemala issued the *Lesivo* Declaration to further a discriminatory intent or purpose. As demonstrated throughout this Counter-Memorial, Guatemala acted in good faith at all times and pursued its goal of obtaining a rehabilitated and functioning railroad system while at the same time

¹³¹¹ **Ex. RL-100**, *GAMI Award*, ¶ 114; see also **Ex. RL-123**, *Pope & Talbot Award*, ¶ 78; **Ex. RL-82**, *Archer Daniels Award*, ¶¶ 208–10.

¹³¹² See above at Section III.J. (describing the High Commission meetings and the temporary suspension of the *Lesivo* Declaration).

¹³¹³ Expert Witness Statement of J.L. Aguilar, 2(p), 37, 72.

respecting Claimant's rights and endeavoring to enforce and apply its own laws. Third, and most importantly, Claimant failed to prove that the *Lesivo* Declaration had an adverse effect or impact upon its investment. Claimant continues to possess *and exercise* its rights under both Contracts 402 and 143/158. Finally, Claimant failed to prove, to the extent there was any differentiation, that was unreasonable, especially given that the only State action upon which it claims liability is predicated—the *Lesivo* Declaration—serves only to transfer this matter to the *Contencioso Administrativo* court. Accordingly, the Tribunal must find that Guatemala has satisfied CAFTA's national treatment obligation.

E. Conclusion Of Legal Arguments

538. For the reasons set forth in Sections A through D, above, Claimant has failed to prove that the issuance of the *Lesivo* Declaration (or any steps taken in furtherance of that declaration) constitutes a violation of CAFTA's: (A) expropriation standard under Article 10.7, because the *Lesivo* Declaration did not interfere with Claimant's rights to such an extent that it could be deemed "expropriation" under Article 10.7 of CAFTA; (B) fair and equitable treatment standard under Article 10.5; (C) requirement of full protection and security, also under Article 10.5, because Guatemala took reasonable measures to protect Claimant's investment; or (D) the national treatment standard under Article 10.7, because Guatemala accorded Claimant the requisite "treatment no less favorable" than that accorded to Guatemalan nationals. These sections also demonstrate that the *Lesivo Declaration* does not constitute a violation of those CAFTA provisions, either by design or as applied in relation to Claimant's investment.

539. Accordingly, the Tribunal must dismiss Claimant's claims in their entirety.

V. DAMAGES AND COSTS

A. Introduction

540. Claimant alleges that its contractual rights and assets were unlawfully expropriated in violation of CAFTA Article 10.7 and seeks to obtain damages, relying on the standard of compensation reflected in *Siemens A.G. v. Argentine Republic* and *The Factory at Chorzów*, for both its *lost investment* of USD 27,874,732 (including USD 1,033,823 in business termination

costs incurred in 2007)¹³¹⁴ and *lost profits* of USD 36,161,127 as of 2006, consisting of two principal components: (i) profits earned from the leasing and development of the railway real estate granted in Usufruct; and (ii) profits earned from railway operations.¹³¹⁵

541. Claimant, however, is not entitled to the damages it seeks because, as discussed in Section IV of this Memorial, it has failed to demonstrate that Guatemala's actions violate any of the substantive provisions of Chapter 10 of CAFTA. But even assuming, *arguendo*, that the challenged measure amounted to a violation of one of the cited substantive provisions, Claimant, for the reasons discussed below, is *not* entitled to damages for the purported loss of its alleged investment, for its alleged lost profits, or for pre-award compounded interest. If this Tribunal finds, however, that a compensable damage has resulted from Guatemala's measures, and Claimant is entitled to compensation for either loss of investment or lost profits, Claimant is not entitled to the amount it seeks, as that amount is grossly overestimated and would represent a windfall for Claimant at Guatemala's expense. Guatemala's damages expert in this case, Dr. Pablo Spiller, has demonstrated that after employing the correct assumptions, analyzing the actual available evidence, putting aside speculative and unsupported projections, taking into consideration the proper discount rate, and correctly applying the discounted cash flow method to determine FVG's fair market value as of December 2006, that Claimant is entitled to **zero** damages.

B. The Legal Standard for Compensation of Damages Resulting From Expropriation

542. In the *Factory at Chorzow* case, the Permanent Court of International Justice explained the notion of "reparation" under customary international law:

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out the

¹³¹⁴ Memorial on the Merits, ¶ 188.

¹³¹⁵ Memorial on the Merits, ¶ 196.

consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹³¹⁶

543. In order to be entitled to “reparation,” in the form of compensatory damages, Claimant must prove that there was an “illegal act”—in this case, a violation of CAFTA—that such illegal act is attributable to Guatemala, and that this international delict has *caused* Claimant damages.¹³¹⁷ If Claimant fails to meet this burden and demonstrate, to the satisfaction of this Tribunal, that it has suffered damages as a result of Guatemala’s alleged illegal act, then Guatemala could not be found liable under CAFTA and international law. As the tribunal in *Merrill & Ring* explained:

Even if the scenario most favorable to the Investor were to be adopted, and breach of the Article 1105(1) obligation assumed, damages have not been proven to the satisfaction of the Tribunal. In these circumstances, the Tribunal both dismisses the Investor’s claim for damages and concludes that Canada has not been shown to have breached Article 1105(1) since one and the other are inextricably related and, as previously noted, an international wrongful act will only be committed in international investment law if there is an act in breach of an international legal obligation, attributable to the Respondent that also results in damages.¹³¹⁸

544. If this Tribunal finds that Guatemala has breached its obligations under Article 10.7 of CAFTA, it must then ascertain what is the proper valuation methodology and apply it to the facts at hand in order to assess the amount of compensation, if any, that Claimant could be entitled to.

545. With respect to expropriation, Article 10.7 of CAFTA sets forth the standard for reparation. It requires the payment of “compensation” to be equivalent to the “fair market value” of the expropriated investment, immediately before the expropriation (or other violation

¹³¹⁶ **Ex. RL-90**, *The Factory at Chorzow*, Judgment No. 13 (Claim for Indemnity - The Merits), Perm. Ct. Int’l Justice, 13 September 1928, p. 40.

¹³¹⁷ **Ex. RL-110**, *Merrill & Ring Award*, ¶ 266.

¹³¹⁸ **Ex. RL-110**, *Merrill & Ring Award*, ¶ 266.

of CAFTA’s substantive provisions) took place. It provides further that “the valuation criteria [for expropriation] shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.”¹³¹⁹

546. International tribunals have defined “fair market value” as:

the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.¹³²⁰

547. As Dr. Spiller explains, applied to this case, the concept of “fair market value” means the value at which a willing buyer would have voluntarily agreed to pay Claimant, and Claimant would voluntarily have agreed to receive, for the right to use the usufruct just prior to the issuance of the *Lesivo* Declaration.¹³²¹

548. Though Claimant argues that CAFTA only stipulates the damages payable in the case of *lawful* expropriation,¹³²² the term “compensation” in the title of Article 10.7 and 10.7.2 is not qualified by any distinguishing condition that can possibly support the conclusion that the prescribed standard of compensation applies *only* to lawful expropriations, as opposed to both lawful and unlawful expropriations. Therefore, based on the plain meaning of the term “compensation,” coupled with the absence of a distinction between lawful and unlawful expropriations, the treaty-based compensation should be applied to *any* expropriation under CAFTA.¹³²³

¹³¹⁹ **Ex. RL-67**, CAFTA Article 10.7(2).

¹³²⁰ **Ex. RL-92**, *CMS Gas Award*, ¶ 402 citing the International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6, 2001, p.4; Expert Report of P. Spiller, ¶ 19.

¹³²¹ Expert Report of P. Spiller, ¶ 17, 21.

¹³²² Memorial on the Merits ¶ 166.

¹³²³ See **Ex. RL-92**, *CMS Gas Award*, ¶ 409, which states “As was the situation in the *Feldman v. Mexico* case, the Tribunal is faced with a situation where, absent expropriation under Article IV, the Treaty offers no guidance as to the appropriate measure of damages or compensation relation to fair and

Footnote continued on next page

549. Unlike the case for expropriation, CAFTA does not establish a standard of compensation for breaches of *other* obligations under the treaty. In those cases, the principle of reparation under customary international law as described above would apply.¹³²⁴

C. Claimant Has Failed To Establish Any Causation Or Quantifiable Damages And Therefore Should Not Be Entitled To Lost Investment Or Lost Profits

550. Claimant bears the burden of proving that the alleged breach of the treaty obligation was the direct cause of the alleged damages. That is the causation standard required under international law, which Claimant *has failed* to establish in this case.¹³²⁵ Specifically, Claimant has failed to show that it is Guatemala’s alleged violations of CAFTA—the *Lesivo* Declaration—rather than conduct by Claimant itself that caused the damages it allegedly suffered; namely “out-of-pocket costs” and “lost profits.”

551. According to Article 31 of the International Law Commission’s (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*:

1. The responsible State is under an obligation to make full reparation *for the injury caused by the internationally wrongful act*.

Footnote continued from previous page

equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other agreements such as NAFTA.”

¹³²⁴ In fact, it has been established that treaties are not “self-contained regimes” and that the Nations should refer to the “relevant rules of international law applicable in the relations between the parties.” **Ex. RL–155**, Campbell McLachlan Qc, Laurence Shore And Matthew Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION SUBSTANTIVE PRINCIPLES* 15, 1.38 (2007). It was also once stated by Verzijle: “Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.” Georges Pinson (France v. Mexico), 5 UNRIAA 327 (1928). See **Ex. RL–85**, *Azurix Award*, ¶ 422; **Ex. RL–126**, *S.D. Myers First Partial Award*, ¶ 309.

¹³²⁵ **Ex. RL–168**, *Tradex Award*, ¶ 74; **Ex. RL–76**, *AAPL Award*, pp. 603–04; **Ex. RL–142**, Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, pp. 329–31 (1987); **Ex. RL–166**, Marjorie M. Whiteman, *DAMAGES IN INTERNATIONAL LAW*, Vol. II (1937), p. 1010 (“the burden of proving that pecuniary loss has been sustained rests, of course, with the claimant.”).

2. Injury includes any damage, whether material or moral, *caused* by the internationally wrongful act of a State.¹³²⁶

The ILC's commentary to Article 31 explains that:

Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. . . . *The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.*¹³²⁷

552. In *Tradex Hellas v. Albania*, the tribunal found that in the context of its award, the only relevant inquiry was whether expropriation measures taken by the government were the cause of the difficulties that were experienced with respect to a joint venture project.¹³²⁸ The *Tradex* tribunal discussed standards from cases from the International Court of Justice (ICJ) and the Iran-US Claims Tribunal. For instance, the Tribunal pointed out that in the ICJ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* Case, the tribunal held that Claimant must prove “that the ultimate result was the consequence of the acts or omissions” of the state authorities.¹³²⁹ The *Tradex* tribunal also referred to the Iran-US Claims Tribunal's holding in the *Otis* Case, where it was decided that

a multiplicity of factors affected Claimant's enjoyment of its property rights... However, the Tribunal is not convinced that the Claimant has established that the infringement of these rights was caused by conduct attributable to the Government of Iran. The acts of interference determined by the Tribunal as being attributable to Iran are not sufficient in the circumstances of this

¹³²⁶ **Ex. RL-29**, *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, 2001, Art. 31 (emphasis added).

¹³²⁷ **Ex. RL-143**, J. Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES* (2002), pp. 204–05.

¹³²⁸ **Ex. RL-168**, *Tradex Award*, ¶ 200.

¹³²⁹ **Ex. RL-168**, *Tradex Award*, ¶ 200, citing **Ex. RL-97**, *ELSI Award*, § 119 (concluding that it was not possible to say in the case of a claim for expropriation “that the ultimate result was the consequence of the acts or omissions of the [state] authorities” when Claimant was “in so precarious a state that bankruptcy was inevitable”);

Case, either individually or collectively, to warrant a finding that a deprivation or taking of the Claimant's participation in Iran Elevator had occurred.¹³³⁰

553. Taking these standards into account, the Tradex tribunal found that Claimant had not proved that the failure of the joint venture at issue was due to expropriation measures by the State of Albania.¹³³¹ Similarly, in *S.D. Meyers Inc. v. Canada*, the tribunal agreed with the respondent and accepted the following principles as applicable in determining compensation:¹³³²

- the burden is on claimant to prove the quantum of the losses in respect of which it puts forward its claims;
- compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific treaty (NAFTA in that case) provision that has been breached; the economic losses claimed by claimant must be proved to be those that have arisen from a breach of the treaty, and not from other causes;
- damages for breach of any one treaty provision can take into account any damages already awarded under a breach of another NAFTA provision; there must be no "double recovery".

¹³³⁰ **Ex. RL-168**, *Tradex Award*, ¶ 200, citing **Ex. RL-119**, *Otis Elevator Co. v. Islamic Republic of Iran*, Iran-US Claims Tribunal Case No. 284 (Award No. 304-284-2 of 29 Apr. 1987) (Briner, Aldrich, Bahrami-Ahmadi), reprinted in 14 IRAN-US CL. TRIB. REP. 283, 299 (1987) ("*Otis Elevator Award*").

¹³³¹ **Ex. RL-168**, *Tradex Award*, ¶ 200; see **Ex. RL-164**, T.W. Wälde & B. Sabahi, *Compensation, Damages and Valuation in International Investment Law*, TDM, Vol. 4, No. 6 (Nov. 2007), pp. 35–36 (Damage calculation relies on showing "a causal relationship between the unlawful act and the harm done thereby excluding recovery for damages that have not been caused by wrongful acts"); see also **Ex. RL-103**, *Houston Contracting Co. v. National Iranian Oil Company*, Iran-US Claims Tribunal Case No. 163 (Award No. 378-173-3 of 22 July 1988) (Virally, Brower, Ansari), ¶ 467, reprinted in 20 IRAN-US CL. TRIB. REP. 3, 124 (1988) (confirming that the claimant was obliged to take reasonable steps in investing "so as to satisfy the burden of proof to show that the losses suffered by it were incurred as a result of the acts or omissions of Iran and not by [the claimant's] own failure to act."); **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 316 ("the economic loss claimed...must be proved to be those that have arisen from a breach of the [treaty]").

¹³³² **Ex. RL-126**, *S.D. Myers First Partial Award*, ¶ 316.

554. In summary, the tribunal determined that it would assess the compensation payable to the claimant on the basis of the economic harm that the claimant was able to legally establish.¹³³³

555. The *Biwater Gauff v. Tanzania* (“*Biwater*”) case exemplifies how a State may be found to have violated a BIT, and nevertheless not owe claimant any compensation due to the claimant’s failure to prove causation.¹³³⁴ In that case, a foreign company, Biwater Gauff Tanzania (BGT), formed a Tanzanian company, City Water, to conduct water and sewerage services. City Water entered into a lease contract with a State entity, DAWASA, which was responsible for regulating the water and sewerage system. Under the contract, City Water was responsible for running the water and sewerage system for ten years and for billing and collecting tariff payments from customers. The project was a failure during the two years in which it operated. The water system was in disrepair and BGT had underestimated the amplitude of the work necessary to correct it.¹³³⁵ BGT tried to renegotiate the terms of the contract, but negotiations were unsuccessful and DAWASA terminated the contract.¹³³⁶ The claimant alleged that Tanzania expropriated its property and violated its obligation to provide fair and equitable treatment under the applicable BIT by repudiating the lease contract, occupying City Water’s facilities, usurping its management control, and deporting City Water’s senior managers.

556. Relying on the ILC’s Draft Articles on State Responsibility, but applying different reasoning, both the majority of the *Biwater* tribunal (Toby Landau and Bernard Hanotiau) and the concurring and dissenting arbitrator (Gary Born) agreed that Tanzania did not owe BGT compensation for the BIT violations. The majority relied on a causation theory; it found that

¹³³³ **Ex. RL–126**, *S.D. Myers First Partial Award*, ¶ 317.

¹³³⁴ **Ex. RL–86**, *Biwater Gauff Award*, ¶ 798; See **Ex. RL–119**, *Otis Elevator Award*, ¶ 47 (where the tribunal held that a multiplicity of factors affected the claimant’s position, only some of which resulted from conduct attributable to Iran. It found that the “acts of interference determined by the Tribunal as being attributable to Iran are not sufficient in the circumstances of this Case, either individually or collectively, to warrant a finding that a deprivation or taking of the Claimant’s participation in Iran Elevator had occurred.”)

¹³³⁵ **Ex. RL–86**, *Biwater Gauff Award*, ¶ 149.

¹³³⁶ **Ex. RL–86**, *Biwater Gauff Award*, ¶ 799.

“the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005,” the day when Tanzania’s first expropriatory act occurred.¹³³⁷ It found that the fair market value of the investment at the date of the expropriation was zero, as reflected by the fact that no rational buyer would have bought it at that time. It also found that although Tanzania had interfered with and accelerated the contractual termination process, by that stage termination was inevitable.¹³³⁸

557. The concurring and dissenting arbitrator of the tribunal came to the conclusion that BGT was owed no compensation by relying on a quantum, rather than causation, theory. He asserted that although Tanzania’s wrongful acts caused injury to City Water, the claimant had failed to “show that there was any monetary value associated with the injury that it suffered.”¹³³⁹ The arbitrator noted that at the time that Tanzania’s wrongful conduct occurred, the property had no quantifiable monetary value because City Water was persistently losing money under the lease contract and it would continue to do so because DAWASA had exercised its right to refuse to renegotiate the lease contract to enable City Water to become profitable.¹³⁴⁰ Thus, he concluded, whether or not the lease contract was terminated, it did not provide City Water with a positive financial value, so Tanzania had no economic loss to compensate.¹³⁴¹

558. From a damages perspective, the instant case presents a set of facts strikingly similar to those in *Biwater*. Like the claimant in *Biwater*, Claimant here has not shown that it is entitled to compensation for alleged losses, whether one relies on a causation or a quantum theory. The Government action that Claimant bases its claims on is the *Lesivo* Declaration, which was

¹³³⁷ Ex. RL–86, *Biwater Gauff Award*, ¶ 798.

¹³³⁸ Ex. RL–86, *Biwater Gauff Award*, ¶ 799.

¹³³⁹ Ex. RL–86, *Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Concurring and Dissenting Opinion) 18 July 2008 (Born), ¶ 19 (“*Biwater Gauff Concurring and Dissenting Opinion*”).

¹³⁴⁰ Ex. RL–86, *Biwater Gauff Concurring and Dissenting Opinion*, ¶ 22.

¹³⁴¹ Ex. RL–86, *Biwater Gauff Concurring and Dissenting Opinion*, ¶ 31.

published on 25 August 2006.¹³⁴² But as explained above, the *Lesivo* Declaration only dealt with Usufruct Contract 143/158, and did not affect the rights acquired under Usufruct Contract 402, either *de jure* or *de facto*. Claimant itself admits that the subject-matter of Contract 143/158 and Contract 402 were “wholly unconnected.” As Claimant and its damages experts Robert MacSwain and Louis Thompson recognized:

RDC’s investment in the rehabilitation of the railroad was *wholly unconnected* to the profits FVG would have earned over the life of the Usufruct from its program to lease the right of way and adjacent real estate parcels for non-railway purposes. In other words, because the potential demand for leasing the properties and easement contracts along the right of way is not dependent on whether the railroad would have been in operation, it was not necessary for FVG to have an operating railway in order to lease and develop successfully the vast majority of the railway real estate that had been granted in usufruct. Indeed, as Mr. Thompson’s analysis demonstrates, the Usufruct would have been more profitable if FVG only leased the right of way and adjoining real estate parcels without having to rehabilitate and operate the railway.¹³⁴³

559. This shows that Claimant did not consider Usufruct Contract 143/158 of great importance in relation to its investment. It also shows that the railway equipment under Contract 143/158 was not, as Claimant argues, a required component of the investment.¹³⁴⁴ Therefore, Guatemala’s publication of the *Lesivo* Declaration of Contracts 143/158 could not have caused any of the damages alleged by Claimant.

560. Another telling sign that the railway equipment was not important to FVG’s investment can be found in FVG’s reaction to FEGUA’s request that it enter into a new contract to avoid the presentation of the *lesivo* issue to the courts. As previously noted, FVG responded that doing so was of “secondary priority” given that its plans for expansion into the only segment that it believed would make its business profitable required equipment that would run on *wide* gauge

¹³⁴² See Memorial on the Merits, ¶ 180.

¹³⁴³ Memorial on the Merits ¶ 179 (emphasis added).

¹³⁴⁴ Memorial on the Merits, ¶¶ 80, 115.

rail, rather than the FEGUA usufruct equipment. Again, the equipment FVG *really needs* to make its operations profitable is not the equipment that the Government declared *lesivo*.¹³⁴⁵ Thus, the equipment that Claimant alleges in this arbitration is so vital to its existence is *not* so. This provides yet another break in the chain of causation between Claimant's claimed damages and the *Lesivo* Declaration.¹³⁴⁶

561. Additionally, the publication of the *Lesivo* Declaration did not cause Claimant to lose its right to exploit the right of way or operate the railway. As discussed above in Section X, per the terms of Contract 402, Claimant had the opportunity to acquire and use railway equipment that is not owned by FEGUA to meet its obligations under Contract 402.¹³⁴⁷ Therefore, in the event that Claimant was unable to acquire FEGUA's railway equipment through the public bidding process, Claimant would have two choices. It could either continue to operate under Contract 402 using its own railway equipment acquired elsewhere or it could terminate Contract 402 without holding the State responsible provided it could show that the inability to acquire FEGUA's railway equipment rendered it unable to meet its obligations under Contract 402. These were the options that were available to Claimant and these were the rights that it bargained for at the time that it entered into Contract 402 with FEGUA. Claimant cannot therefore argue that if it lost the equipment because of the declaration of *lesividad* with respect to Contract 143/158, then it automatically lost its rights and ability to operate the railway under Contract 402.

562. Absent it properly exercising its option to terminate under Section III of Clause 18 of Contract 402, which it has not done, Claimant continues to have the rights, duties, and obligations that arise from Contract 402 even if the railway equipment contract never existed, is declared null and void by a court order pursuant to the *Contencioso Administrativo* court or otherwise is terminated. Having not exercised its right to terminate Contract 402 pursuant to

¹³⁴⁵ See above at Sections III.F., and III.K.

¹³⁴⁶ See **Ex. R-36**, (Aug/Sept 2006) Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; **Ex. R-37**, 2006-10-4, Aide-mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Statement of A. Gramajo, ¶ 48.

¹³⁴⁷ See *e.g.*, **Ex. C-22**, Contract 402, cl. 5, II, and cl. 11.

section III of Clause 18, Claimant continues to have all rights, duties, and obligations under Contract 402. Therefore, Claimant cannot assert that the publication of the *Lesivo* Declaration has prevented it from operating the railway.

563. There also is no causal nexus between the publication of the *Lesivo* Declaration and any damage or loss suffered by Claimant with respect to its rights to exploit its usufruct of the railway equipment, because Claimant is responsible for its own alleged harm. Throughout the entire time that Claimant was in possession of the railway, it failed to maintain and rehabilitate it properly, which led to constant derailments and accidents.¹³⁴⁸ Moreover, the poor condition of the railway made it impossible for the locomotives to travel at more than 4km per hour (one tenth of the speed the train had to achieve in order to be efficient), leading to missed schedules and delayed cargo, which in turn resulted in lost business.¹³⁴⁹ All of these factors pre-date the publication of the *Lesivo* Declaration.¹³⁵⁰

564. As has been described above, Claimant also encouraged squatters to invade the land along the right of way by charging them rent and allowing them to remain on the land that was supposed to be rehabilitated for railroad use, a situation that, according to Claimant, made rehabilitation, development and operation of the railway more difficult. Even in instances where squatters were reported and legally removed from the right of way through FEGUA's efforts, the squatters would simply return to the right of way due to Claimant's failure to operate the railway and take the necessary precautions to prevent further invasions as explained in Section X.

565. Furthermore, even assuming *arguendo*, that the mere publication of the *Lesivo* Declaration had some form of impact—reputational or otherwise—on FVG, Claimant is to blame for it. Claimant issued a press release in all of the major newspapers and held press

¹³⁴⁸ Second Statement of A. Gramajo, ¶ 50; Statement of M. Samayoa, §§ II and III; Statement of P. Barrientos, § II.

¹³⁴⁹ Second Statement of A. Gramajo, ¶ 50; Statement of M. Samayoa, ¶ 20.

¹³⁵⁰ Second Statement of A. Gramajo, ¶ 50; Statement of M. Samayoa, ¶ 20.

conferences immediately after the publication of the Lesivo Declaration¹³⁵¹ telling its creditors, investors, and customers misleadingly that the government of Guatemala had declared Contract 143/158 *lesivo* without explaining that this declaration has no legal effect, either with respect to Contract 402—because it was not the focus of the declaration—or with respect to Contract 143/158 —because the declaration, as a matter of Guatemalan law, has no legal effect if and until the *Contencioso Administrativo* court finds that the contract is indeed injurious to the interests of the State.¹³⁵² As discussed earlier, this was part of Claimant’s campaign to paint itself as a “dead man walking” so as to manufacture its damages case for this proceeding.¹³⁵³ One need look no further than the text of Claimant’s press release to reach this conclusion: Claimant and FVG announced to the public and its customers that “[i]n the short term, under the terms of the concession usufruct agreement the government cannot force the company out of business, but its actions *has placed additional pressure on FVG by making its customers and suppliers wary of doing business with it.*”¹³⁵⁴ The evidence that Claimant has presented to demonstrate that its suppliers and customers were somehow impacted by the *Lesivo* Declaration all *post-dates* its press release by at least several weeks. Thus, through its press release, Claimant was beginning to manufacture the very damages it now alleges. To the extent any of FVG’s customers or suppliers were warded off, it was due to Claimant’s chilling message and media campaign.¹³⁵⁵

¹³⁵¹ **Ex. R–190**, 2006-08-26, RDC Press Release “Guatemalan Government Violates Terms of Railroad Privatization Agreement.”

¹³⁵² Expert Report of J.L. Aguilar, ¶¶ 2(f, g, h), 32, 35, 129.

¹³⁵³ See above Section III.K.

¹³⁵⁴ **Ex. R–190**, 2006-08-26, RDC Press Release “Guatemalan Government Violates Terms of Railroad Privatization Agreement.”

¹³⁵⁵ **Ex. C–34**, 2006-09-13, Letter to FVG from AIMAR (“through local press and television media we have been alarmed about the declaration made by the Government of Guatemala on the administrative lesion caused by a contract on equipment involving FERROVIAS”); **Ex. C–35(c)**, 2006-09-07, Letter to FVG from ALTRACSA (“given the latest comments and news on the fact that the Government has filed a claim for administrative lesion against your company . . .”); **Ex. C–35(e)**, 2006-09-12, Letter to FVG from INDUEX (“It has come to our knowledge through the media that the Government of the Republic has filed a claim for administrative lesion against Ferrovías de Guatemala.”); **Ex. C–35(g)**, 2007-06-21, Letter to FVG from Banco G&T Continental (“with regard to your Company and due to the news we have been aware of lately . . .”); **Ex. C–36**, 2006-09-29, Letter to FVG from Grupo UniSuper (“*Por medios de*

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566. What is more, as is explained in greater detail in Dr. Spiller’s expert report, there is absolutely no evidence that the publication of the *Lesivo* Declaration had any impact whatsoever on actual business plans or ventures that FVG was undertaking. Guatemala has even demonstrated that one of the alleged ventures that Claimant alleges was frustrated by the *Lesivo* Declaration—the fabled USD 100 million joint venture with Expogranel—in fact never existed, and Claimant’s allegations to the contrary are based on the falsified and false witness statement of Mr. Freddie Perez, who flatly denies ever making or signing the falsified witness statement presented by Claimant here.

567. Finally, the evidence shows that Claimant mismanaged its own business and rendered it completely worthless well before the publication of the *Lesivo* Declaration. FVG admitted that because its railway operations in the Atlantic corridor (which corresponded to Phase I of the five phases that they were obligated to rehabilitate) were not profitable, it needed to develop the railway along the Pacific/South corridor in order to have a hope at profitability.¹³⁵⁶ However, FVG never developed the Pacific/South corridor (or any other phase of their proposed rehabilitation plan) because they did not have the financial wherewithal to get the job done and were unable to muster any interest from local investors to participate in the project.

568. From the perspective of the quantum standard, Claimant has also failed to establish that it has suffered any monetary loss associated with the injury that it alleges to have suffered. Even if this Tribunal were to find that Guatemala’s actions occurred as asserted by Claimant, Mr. Spiller explains that Claimant’s investment had *no value* long before the *Lesivo* Declaration, as it had consistently reported losses and failed to record a profit during the entire time of operation.¹³⁵⁷ There is absolutely no indication that this trend would have been different absent the *Lesivo* Declaration, and Claimant’s experts’ projections to the contrary are

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comunicación, escritos y televisados, nos hemos enterado sobre la declaratoria de lesividad del contrato de equipo que sostienen actualmente con FEGUA . . .”).

¹³⁵⁶ Second Gramajo Statement, ¶ 14; Ex. R-177, 2005-01-11, Railroad Commission Minutes.

¹³⁵⁷ Expert Report of P. Spiller, ¶ 76.

unsubstantiated and wholly speculative.¹³⁵⁸ What is more, given Claimant's record of neglect of the railway and lack of any significant investment in its rehabilitation and in the railroad operations, one can only expect that the losses would have continued to accumulate. Therefore, whether or not the Government had issued the *Lesivo* Declaration, and even assuming, *arguendo*, that doing so caused Claimant some form of reputational harm by discouraging clients from doing business with Claimant, there is absolutely no evidence that there was any monetary value associated with that harm or that Claimant would have been in a better economic position absent the declaration. In fact, all evidence points to the undeniable fact that FVG was worthless long before the *Lesivo* Declaration, and would have continued to be worthless even if the *Lesivo* Declaration had not been published.

D. Claimant Seeks Double-Recovery By Claiming For Both Loss Of Investment And Lost Profits

569. Claimant argues that it is entitled, under customary international law and pursuant to the decision of the PCIJ in the *Chorzów Factory* case and the award of the tribunal in *Siemens*, to compensation for *both* the value of the investment at the date of the expropriation (*damnum emergens*) and lost profits (*lucrum cessans*).¹³⁵⁹ Claimant, however, is not entitled to damages for *either* loss of investment *or* lost profits, and much less for *both*, as this constitutes double-counting.¹³⁶⁰

570. In requesting damages for both lost profits and lost investment and calculating its damages based on the "discounted cash flow" ("DCF") analysis, Claimant has engaged in double-counting and is thus seeking double-recovery.¹³⁶¹ The concept of lost profits is a concept that has led tribunals to incorrectly award double recovery when it is requested

¹³⁵⁸ Expert Report of P. Spiller, ¶ 49.

¹³⁵⁹ Memorial on the Merits, ¶¶ 176-178.

¹³⁶⁰ Expert Report of P. Spiller, ¶ 24-29.

¹³⁶¹ Expert Report of P. Spiller, ¶ 24.

together with *damnum emergens*, and that is exactly what would happen in this case if the Tribunal were to grant Claimant's request.¹³⁶²

571. The Commentaries to the International Law Commission's Articles on State Responsibility note that "[a] particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits."¹³⁶³ As one commentator explained:

In some business valuation disputes, arbitrators have awarded both an amount equal to the invested capital as *damnum emergens* and an amount based on DCF projections as *lucrum cessans*. However, the potential for double recovery of invested capital can arise if recovery of sunk investment costs is combined with a DCF valuation. An Income-Based Approach like a DCF forecast calculates the net present value of *all* cash flows an equity investor will receive, including the component of those cash flows that constitutes a recovery by the investor of invested capital (sunk investment costs) as well as the component that constitutes a return on that equity capital (gross profits to the investor). If the arbitrator awards recovery of the invested capital as *damnum emergens* and also separately awards the net present DCF amount as *lucrum cessans*, the investor's recovery will double count the invested capital.¹³⁶⁴

¹³⁶² **Ex. RL-164**, T.W. Wälde & B. Sabahi, COMPENSATION, DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT LAW, TDM, Vol. 4, No. 6 (Nov. 2007), p. 12 citing J. Gotanda, *Recovering Lost Profits in International Arbitrations*, 30 GEO J. INT'L L. 61 (2004) p. 111 ("tribunals should be mindful that where the claimant seeks both *damnum emergens* and *lucrum cessans*, they need to be careful to avoid double counting to ensure the claimant obtain the benefit for the bargain and no more"); **Ex. RL-165**, L. Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia*, 19(4) ARB. INT'L 471 (2003) pp.472 et seq (criticizing the *KBC v. Indonesia* award for awarding both *damnum emergens* and *lucrum cessans* to claimants); **Ex. RL-143**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 213 (compiled by James Crawford, Cambridge University Press, 2002) commentary on Article 36, p.227; **Ex. RL-154**, Irmgard Marboe, Compensation and Damages in International Law - The Limits of "Fair Market Value", 7(5) J. WORLD INV. & TRADE 723 (2006) p. 747 (finds double recovery in *Letco v. Liberia* as net worth plus future profits were awarded).

¹³⁶³ **Ex. RL-143**, Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) p. 258 (¶ 26).

¹³⁶⁴ **Ex. RL-152**, Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation methods and Expert Evidence, pp. 198-199 (citations omitted).

572. As discussed above, the fair market value of Claimant’s investment is determined by evaluating the value at which a willing buyer would agree to pay Claimant, and what Claimant would agree to receive immediately before the publication of the *Lesivo* Declaration.¹³⁶⁵ Therefore, as Dr. Spiller explains, the fair market value should represent the cash flow-generating capabilities of the assets associated to the usufruct.¹³⁶⁶

573. There are multiple ways to assess the cash flow-generating capabilities of assets—and hence damages.¹³⁶⁷ Claimant has selected two methods: the Discounted Cash Flow (DCF), as a way to assess the cash flow-generating capabilities of the usufruct; and the Net Capital Contribution (NCC), as a way to assess the adjusted value of RDC’s past investment in the usufruct.¹³⁶⁸

574. The DCF is the preferred standard of valuation methods and is widely-used in economic and financial analyses of businesses, including project finance, and is accepted by practitioners and regulators alike.¹³⁶⁹ Claimant, however, does not use the DCF valuation method to measure the *fair market value* of its investment.¹³⁷⁰ Rather, Claimant uses this methodology to assess only the present value of the *lost profits* that could have been generated by that investment, to which, according to Claimant, one should add the adjusted value of the investment itself, measured as the adjusted sum of Claimant’s capital contributions to FVG in the period 1998 to 2007.¹³⁷¹

575. There are multiple flaws in the way Claimant computed the adjusted value of its investment via the NCC approach, and the expected value of the cash flows via the DCF

¹³⁶⁵ Expert Report of P. Spiller, ¶ 21.

¹³⁶⁶ Expert Report of P. Spiller, ¶ 24.

¹³⁶⁷ Expert Report of P. Spiller, ¶ 24.

¹³⁶⁸ Expert Report of P. Spiller, ¶ 24; Expert Report of L. Thompson, ¶ 68. Mr. Thompson provides three alternative methods to compute the value of the investment based on the net capital contribution.

¹³⁶⁹ Expert Report of P. Spiller, ¶ 24.

¹³⁷⁰ Expert Report of P. Spiller, ¶ 25.

¹³⁷¹ Expert Report of L. Thompson, ¶ 8.

method.¹³⁷² In principle, the adjusted value of the investment is intended to reflect the value of the assets as of the date of the alleged expropriation, in the same way that the DCF valuation method measures the value of the same assets as of that same date.¹³⁷³ That means that the adjusted value of the investment via the NCC method—if it in fact reflects the cash flow-generating capabilities of the assets—should provide *the same measure of value* as the DCF method.¹³⁷⁴ Yet in this case, Claimant’s expert, Mr. Thompson, has used both the NCC and DCF methodologies to determine the same thing—FVG’s fair market value.¹³⁷⁵ In other words, as Dr. Spiller concludes, Mr. Thompson double-counts damages.¹³⁷⁶

576. Mr. Thompson estimates damages at USD 64.1 million; that amount comprises USD 36.2 million from alleged lost profits (USD 1.4 million from railway operations, plus USD 34.8 million from real estate operations), plus USD 27.9 million from the adjusted value of Claimant’s alleged investment.¹³⁷⁷ As explained above and in more detail in Dr. Spiller’s expert report, these two figures reflect the *same* concept. If Mr. Thompson’s figures are taken at face value, then the USD 27.9 million that Claimant allegedly invested in the operations is worth USD 36.2 million, as a willing buyer would supposedly be willing to pay more than the adjusted value of the investment (USD 27.9 million according to Mr. Thompson). No buyer, however, would be willing to pay USD 64.1 million for the rights to the usufruct, when it will be able to recover—according to Claimant—only USD 36.2 million going forward.

¹³⁷² Expert Report of P. Spiller, ¶ 26.

¹³⁷³ The NCC computes the capital (net of dividends and other distributions) contributed by claimants to the enterprise assuming that the company generates a return equivalent to its cost of capital. If the company in fact would be generating returns equal to its cost of capital, then the NCC would generate a value very closely related to the value of the equity capital in place as measured by the company’s cash flow generating capability. If, as is the case with FVG, the company generates returns well below its cost of capital, then the NCC would be generating a value well above the cash flow generating capabilities of the company. Expert Report of P. Spiller, ¶ 27.

¹³⁷⁴ Expert Report of P. Spiller, ¶ 26.

¹³⁷⁵ Expert Report of P. Spiller, ¶ 28.

¹³⁷⁶ Expert Report of P. Spiller, ¶ 28.

¹³⁷⁷ Expert Report of L. Thompson, ¶ 56; Expert Report of P. Spiller, ¶ 29.

577. As Dr. Spiller explains, methodologically the Tribunal can and should simply discard the USD 27.9 million assessment.¹³⁷⁸ First, if Claimant is correct as to FVG’s cash flow-generating capabilities, then willing buyers would have been willing to pay more than USD 27.9 million, and hence that amount would under-compensate Claimant.¹³⁷⁹ If, however, Claimant’s experts’ assessment of the cash flow-generating capabilities of the usufruct are overestimated, and the correct assessment is, in fact, substantially lower than the USD 27.9 million adjusted value of the investment, then no willing buyer would have been willing to pay Claimant USD 27.9 million for the rights to the usufruct.¹³⁸⁰

578. It appears that the underlying reasons for Claimant’s adding of both the alleged value of the investment and the alleged cash flow-generating capabilities (lost profits) is Claimant’s flawed interpretation of the *Siemens v. Argentina* case and an article by Professor Irmgard Marboe.¹³⁸¹ Claimant relies on the *Siemens* case for its proposition that *both* loss of investment and lost profits should be awarded in tandem, which is what Siemens argued in that case.¹³⁸² But as Claimant notes in a footnote in its Memorial, the tribunal in that case noted that *Siemen’s* approach was an “admittedly unusual approach” and had merit only because of the “particular circumstances” of *that* case.¹³⁸³ Claimant has not explained what particular circumstances in this case would give merit to its request that the Tribunal deviate from the normal rule and accept Claimant’s request for double compensation. Moreover, even *Siemens* admitted that loss of investment and lost profits are “normally . . . regarded as an alternative means of valuing the same object.”¹³⁸⁴ And Clamaint in this case recognized that it was sensible for Siemens to argue in the alternative, recognizing that normally the two methods are

¹³⁷⁸ Expert Report of P. Spiller, ¶ 32.

¹³⁷⁹ Expert Report of P. Spiller, ¶ 32.

¹³⁸⁰ Expert Report of P. Spiller, ¶ 32.

¹³⁸¹ Memorial on the Merits, ¶¶ 173-182.

¹³⁸² Memorial on the Merits, ¶ 176.

¹³⁸³ **Ex. RL-80, *Siemens Award***, ¶ 357 (cited by Claimant in its Memorial on the Merits, n. 211).

¹³⁸⁴ **Ex. RL-80, *Siemens Award***, ¶ 355.

alternatives, not complements.¹³⁸⁵ Moreover, the tribunal in *Siemens* ultimately rejected the investor’s claim for lost profits because it determined that its claim was too speculative—which is also the case here concerning Claimant’s claim for lost profits as discussed in Section X.¹³⁸⁶

579. Furthermore, the methodology that was used in *Siemens* to determine fair market value was different from the one Claimant argues for in this case.¹³⁸⁷ Moreover, contrary to what Claimant asserts,¹³⁸⁸ it could hardly be argued that the investment in the rehabilitation of the railroad was almost to the exclusive benefit of Guatemala when Claimant in this case did not comply with its obligations under Contracts 402 and 143/158, used cheap and poor-quality materials in its “rehabilitation” of Phase I which led to derailments and accidents, encouraged squatters to inhabit the right of way, and abandoned its obligations to provide a functioning railway to Guatemala.

580. Claimant also argues that since its main source of business is real estate development, while the railroad operations are essentially unprofitable,¹³⁸⁹ it is possible to claim that there is no double-counting because the investments were made in a line of business that is not the one generating the profits.¹³⁹⁰ This, however, cannot be the case. First, an investor cannot claim damages for an alleged projected profit that is not backed by a protected investment.¹³⁹¹

¹³⁸⁵ Memorial on the Merits, n. 208.

¹³⁸⁶ Memorial on the Merits, ¶¶ 176-178.

¹³⁸⁷ In the *Siemens* case, Siemens calculated its claimed loss of profits by applying a notional profit percentage to its projected future net revenues under the Contract, and then discounting those claimed profits to their present value via the DCF method, to which it then has added the book value of its costs actually incurred. **Ex. RL-80**, *Siemens Award*, ¶ 355.

¹³⁸⁸ Memorial on the Merits, ¶ 180.

¹³⁸⁹ Claimant’s experts assess the value of the railroad operations at USD 1.4 million, while they value Claimant’s real estate operations at USD 34.8 million.

¹³⁹⁰ Claimant seems to rely on Mr. MacSwain who stated that the right of way business was independent of whether FVG had an operating railway (see Expert Report of R. MacSwain, ¶ 4.2.a) and on an article by Prof. Marboe, claims that adding the adjusted value of the investment to the future lost profits does not imply double counting. Claimant quotes an article by Professor Marboe, in which he says that “[d]ouble counting does not occur if wasted costs and expenses are not directly related to the expected profits.” See Claimant’s Memorial, ¶ 179.

¹³⁹¹ Expert Report of P. Spiller, ¶ 37.

Second, even if the two lines of business were commercially separate, as argued by Claimant, it is still the case that the value of the usufruct immediately prior to the publication of the *Lesivo* Declaration is given by the expected cash flows associated with the operation of the usufruct (USD 1.4 million in railroad operations and USD 34.8 million in real estate operations, according to Claimant).¹³⁹² Thus, whether the real estate development is commercially linked to the development of the railroad operations has no bearing on how potential damages should be measured;¹³⁹³ damages must be measured based exclusively on the fair market value of the usufruct as of the time of the *Lesivo* Declaration.¹³⁹⁴ That is a *negative* value as Dr. Spiller points out, and thus Claimant is not entitled to *any* damages.

581. In sum, Claimant's request for lost profits *and* loss of investment should be denied, as granting it would overcompensate Claimant by awarding it double damages.

E. Claimant Has Not Proven That It Has Suffered Any Damages

1. Claimant Is Not Entitled To Any Lost Profits

a. Standard For Calculating Lost Profits

582. Where a tribunal has found a treaty violation depriving an investor of the value of that investment, it may choose to determine the fair market value of the lost investment with reference to the discounted future cash flow the investment would have generated but for the wrongful act. This includes, for demonstrably profitable enterprises, an element of future lost profits. However, in order for a claimant to recover damages for lost profits, it must establish, in addition to causation, that the lost profits projected are not unduly speculative. This means, among other things, that the claimed profits must be reasonably consistent with the historical performance and expectations for the investment, or if inconsistent with past performance, that there must be a documented and credible reason for believing that the prospects for the investment would dramatically have improved over past performance, but for the challenged

¹³⁹² Expert Report of P. Spiller, ¶ 38.

¹³⁹³ Expert Report of P. Spiller, ¶ 39.

¹³⁹⁴ Expert Report of P. Spiller, ¶ 39.

government act. Where there is a huge disparity between the amount that was originally invested and the amount that is being claimed in future returns, tribunals are particularly likely to scrutinize the calculations for unsupported optimism or rank speculation.

583. Article 36 (2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides: “The compensation shall cover any financially assessable damages including loss of profits *insofar as it is established*.”¹³⁹⁵ There must be objective proof that damages in *the form* of lost profits not only were reasonably anticipated, but also were probable and not merely possible.¹³⁹⁶ As the International Law Commission points out, lost profits must attain “sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.”¹³⁹⁷ It also emphasizes that:

...lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made.¹³⁹⁸

584. It is the settled rule under customary international law that no compensation for speculative or uncertain damages, including lost profits, can be awarded to any party.¹³⁹⁹ In particular, awards of future lost profits are normally reserved for the compensation of investments that already have been substantially completed, and already have a *proven record*

¹³⁹⁵ **Ex. RL–29**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Art. 36, p. 98 (emphasis added).

¹³⁹⁶ **Ex. RL–128**, *Percy Shufeldt (US) v. Guatemala*, 2 U.N.R.I.A.A. 1081 (1930), p. 1099.

¹³⁹⁷ **Ex. RL–29**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Comment to Art. 36, ¶ 27.

¹³⁹⁸ **Ex. RL–29**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Comment to Art. 36, ¶ 27.

¹³⁹⁹ **Ex. RL–2**, *Amoco International Finance Corporation v. Islamic Republic of Iran*, reprinted in 15 Iran-US. Claims Tribunal Case No. 189 (Partial Award No. 310-56-3) 24 July 1987 (Virally, Brower, Moin), ¶ 238 (stating that “one of the best settled rules of the law on international responsibility of States is that no reparation for speculative and uncertain damage can be awarded.”) (“*Amoco Partial Award*”).

of profits.¹⁴⁰⁰ By contrast, as discussed further below, where a project is in its relative infancy, and the investor either has not yet committed the resources required to complete substantial parts of the investment or in any event there has been no past record of profitable operation, awards of lost profits frequently have been refused as unduly speculative. This is certainly the case for claims related to lost future opportunities.¹⁴⁰¹ In *ADC Affiliate Ltd. v. Hungary*, for example, the tribunal stated:

With respect to Claimants' claim relating to Lost Future Development Opportunities (i.e., the parking garage facility and the additional terminal capacity), the Tribunal is of the view that they cannot be awarded since the Claimants had no firm contractual rights to those possible projects. Moreover, Claimants have been unable to quantify, with any fair degree of precision, the damages that would have resulted from the loss of those alleged opportunities.¹⁴⁰²

585. Tribunals have likewise rejected lost profits for projects which have only just begun, or where there is a significant disparity between the amount invested and the lost profits claimed.¹⁴⁰³ The tribunal in *Autopista* emphasized that awards of lost profits are warranted only when a substantial part of the project already has been realized, and that tribunals are "reluctant to award lost profits for a beginning industry and unperformed work."¹⁴⁰⁴ In that case, the claims of lost profits were rejected, because the work on the investment project had

¹⁴⁰⁰ **Ex. RL-84**, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/05 (Award) 23 September 2003 (Kaufmann-Kohler, Cremades, Böckstiegel), ¶ 361 ("*Autopista Award*").

¹⁴⁰¹ **Ex. RL-84**, *Autopista Award*, ¶ 365.

¹⁴⁰² **Ex. RL-78**, *ADC Affiliate Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16 (Award) 2 October 2006 (Kaplan, van den Berg, Brower), ¶ 515.

¹⁴⁰³ **Ex. RL-84**, *Autopista Award*, ¶ 360; **Ex. RL-137**, *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award) 8 December 2000 (Leigh, Fadlallah, Wallace), ¶ 124 ("*Wena Hotels Award*"); **Ex. RL-130**, *Southern Pacific Properties, Ltd. v. the Arab Republic of Egypt*, ICC Arbitration No. YD/AS No. 3493, Award (Mar. 11, 1983), 22 I.L.M. 752 (1983), Resp. Auth. 21. In this decision, the Tribunal denied lost profits on the grounds that "the great majority of the work [on the project] [...] is still to be done," and that the calculation offered by plaintiffs "produces a disparity between the amount of the investment made by the Claimants and its supposed value at the material date" (*Id.* at 782-83, ¶ 65) ("*SPP Award*").

¹⁴⁰⁴ **Ex. RL-84**, *Autopista Award*, ¶ 360.

not progressed sufficiently far as to render projections of future profits anything other than speculative.¹⁴⁰⁵

586. Tribunals have also taken care not to award lost profits where the amount claimed reflects a significant disparity in relation to the amount invested. In *Tecmed* the tribunal viewed a large difference in the amount invested by the claimant (USD 4 million) and the amount sought (a DCF value of USD 52 million) as an indication that the investor's estimate was "likely to be inconsistent with the legitimate and genuine estimates on return on the claimant's investment."¹⁴⁰⁶ Similarly, in *Wena Hotels* the tribunal pointed to a large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment (approximately USD 8.8 million) as one of the reasons to deny the award of lost profits.¹⁴⁰⁷

587. Nor can Claimant recover lost profits based on its own subjective assessments of a rosy outlook, without adducing *objective evidence* that it was reasonable to expect future profits. In *PSEG* the tribunal declined to award lost profits calculated on the basis of investor's own internal "cash flow tables."¹⁴⁰⁸ The tribunal emphasized that those tables were part of the proposals that did not materialize *in finalized commercial terms of the contract*.¹⁴⁰⁹ The tribunal was also "troubled" that the projections were based on the "minimum return that the equity providers were willing to accept," which represented the "subjective assessment of the investor's own minimum acceptable return on equity, without any objective or market-based assessment of the project and its risks."¹⁴¹⁰ Similarly, in *Autopista* the tribunal did not accept

¹⁴⁰⁵ **Ex. RL-84**, *Autopista Award*, ¶ 362. The tribunal emphasized that with respect to start-up businesses, lost profits were awarded only if the investment projects had been nearly completed or substantial investments had been made: the claimant in *Karaha Bodas* had invested USD 93 million by the time the breach occurred and the claimant in *Delagoa Bay* had completed 82 kilometers out of total of 90 kilometers railway project (*Id.*, ¶ 361).

¹⁴⁰⁶ **Ex. RL-133**, *Tecmed Award*, ¶¶ 186-195.

¹⁴⁰⁷ **Ex. RL-137**, *Wena Hotels Award*, ¶ 124.

¹⁴⁰⁸ **Ex. RL-124**, *PSEG Global Inc. v. Republic of Turkey*, ICSID Case. No. ARB/02/5, (Award) 19 January 2007 (Vicuña, Fortier, Kaufmann-Kohler), ¶ 313 ("*PSEG Award*").

¹⁴⁰⁹ **Ex. RL-124**, *PSEG Award*, ¶ 313.

¹⁴¹⁰ **Ex. RL-124**, *PSEG Award*, ¶¶ 312-14.

the cash flow projections contained in the Economic-Financial Plan of the concession agreement, in circumstances where the investment had not yet been completed and the business had not commenced operations.¹⁴¹¹ By contrast, in *ADC Affiliated Ltd. v. Hungary*, the Tribunal relied on the business plan that was approved by the Government as the basis for the projection of future cash flows, because the claimant already had completed its construction, had begun to operate two terminals in Budapest International Airport in Hungary, and already had a track record of financial success.¹⁴¹²

b. Claimant’s Assessment of Its Future Lost Profits is Completely Speculative and Unsubstantiated

588. In this case, Claimant is requesting compensation for projected future profits that are patently speculative and wholly inconsistent with FVG’s past performance. Claimant seeks a total of USD 36.2 million in purported lost profits,¹⁴¹³ calculated as a combination of an alleged USD 1.4 million for lost profit from railway operations,¹⁴¹⁴ and an alleged USD 34.8 million for lost profit from real estate leasing and development rights. The latter figure is largely composed of additional utility easement contracts for rights of way and additional leasing of large parcels and station yards, which Claimant *projects* it *would have* been able to conclude in the future but for the *Lesivo* Declaration rather than the purported net present value of cash flows derived from FVG leases in existence prior to the *Lesivo* Declaration.¹⁴¹⁵ These figures are completely speculative and unreasonable given the objective evidence before this Tribunal.

589. As a threshold matter, Claimant, whose Guatemalan railway business had nothing but losses each year of its existence, seeks damages at a level that far exceeds its own alleged investment in the Guatemalan railway. By Claimant’s own exaggerated assertions, it invested

¹⁴¹¹ **Ex. RL-84**, *Autopista Award*, ¶¶ 354–58.

¹⁴¹² **Ex. RL-77**, *ADC Award*, ¶¶ 506–07.

¹⁴¹³ Memorial on the Merits, ¶ 235.

¹⁴¹⁴ Memorial on the Merits, ¶ 233.

¹⁴¹⁵ Memorial on the Merits, ¶ 233.

approximately USD 15 million,¹⁴¹⁶ but it seeks to obtain an award of close to USD 65 million.¹⁴¹⁷ For the reasons discussed in *Tecmed*¹⁴¹⁸ and *Wena*,¹⁴¹⁹ noted above, this dramatic disparity is itself cause for heightened scrutiny of Claimant's extraordinary damage claim.

590. Second, Claimant bases its projections about lost profits not on FVG's actual demonstrated performance, but on cash flow projections from its business plan that have no basis in fact.¹⁴²⁰ This situation is analogous to *PSEG*¹⁴²¹ and *Autopista*¹⁴²² where, as discussed above, tribunals rejected similar efforts by investors to profit from their own subjective (and unduly optimistic) predictions. In this case, FVG's actual performance did not even come close to the projections anticipated in its business plan *prior* to the *Lesivo* Declaration,¹⁴²³ so there is no reason to posit that it suddenly would have begun meeting those projections had the Declaration not been issued. Indeed, contrary to what the business plan predicted, Claimant never recorded a profit during the entire time it possessed the usufruct rights conferred by Contracts 143/158 and 402.¹⁴²⁴ Therefore, Claimant's business plan does not provide an objective or reliable basis on which to base projections as to the future performance of Claimant's operations for the purposes of assessing damages.¹⁴²⁵

591. Claimant's damages assessments consistently ignore FVG's historical performance and expectations prior to the publication of the *Lesivo* Declaration. It is axiomatic that claims for lost profits must bear some consistent relationship with the manifested capability of the firm to

¹⁴¹⁶ Memorial on the Merits, ¶ 184.

¹⁴¹⁷ Memorial on the Merits, ¶ 236.

¹⁴¹⁸ **Ex. RL-133**, *Tecmed Award*, ¶¶ 186-95.

¹⁴¹⁹ **Ex. RL-137**, *Wena Hotels Award*, ¶ 124.

¹⁴²⁰ Memorial on the Merits, ¶ 195.

¹⁴²¹ **Ex. RL-124**, *PSEG Award*, ¶¶ 312-314.

¹⁴²² **Ex. RL-84**, *Autopista Award*, ¶¶ 354-58.

¹⁴²³ Expert Report of P. Spiller, ¶ 60, Figure IV.

¹⁴²⁴ Expert Report of P. Spiller, ¶ 60-61.

¹⁴²⁵ Expert Report of P. Spiller, ¶ 63.

generate such cash flows.¹⁴²⁶ Thus, a history of profitability is necessary, as such historical profitability reflects the firm's capacity to generate positive returns in the future.¹⁴²⁷ In this case, there is no historical record of profitability to speak of.¹⁴²⁸ To the contrary, Claimant admits that it has failed to record a profit during the entire time that it has been in possession of the usufruct railway and right of way.¹⁴²⁹

592. In fact, since the beginning of operations, FVG has *not* been able to obtain significant revenues from its real estate operations, which nonetheless now miraculously is supposed to account for more than 96% of its overall lost profits claim (USD 34.8 million out of a total USD 36.2 million).¹⁴³⁰ For instance, in 2004, FVG had a total of four right of way leases, one facility lease, and several other small, short-term rentals.¹⁴³¹ These generated revenues of only USD 411,644 for that year.¹⁴³² In 2005, the year immediately prior to publication of the *Lesivo* Declaration, overall non-railway revenues (which included real estate and other operations) were approximately USD 511,473.¹⁴³³ In 2004, for instance, real estate revenues accounted for 17% of total revenues.¹⁴³⁴ This value increased to 25.3% and 33.8% in 2005 and 2006, respectively, not because leases and easements increased in any significant amount, but because railway revenues decreased during those years.¹⁴³⁵

593. The lack of real estate potential is also evident from FVG's own management reports, long prior to the *Lesivo* Declaration. In fact, FVG's own management reported systematic

¹⁴²⁶ Expert Report of P. Spiller, ¶ 42.

¹⁴²⁷ Expert Report of P. Spiller, ¶ 42.

¹⁴²⁸ Expert Report of P. Spiller, ¶ 44, 76.

¹⁴²⁹ **Ex. R-23**, 2006-04-03, Minutes from the High Level Commission's First Meeting; **Ex. R-81**, 2004-06-28, SIGLO XXI, "Ferrovías Bets on the South" (indicating at that point, in the five years that they had been operating in Guatemala they have never recorded a profit).

¹⁴³⁰ Expert Report of P. Spiller, ¶ 42.

¹⁴³¹ Expert Report of P. Spiller, ¶ 44.

¹⁴³² Expert Report of P. Spiller, ¶ 44.

¹⁴³³ Expert Report of P. Spiller, ¶ 44; **Ex. C-27(h)**, FVG's 2005 Annual Report, at RDC-001311.

¹⁴³⁴ Expert Report of P. Spiller, ¶ 44.

¹⁴³⁵ Expert Report of P. Spiller, ¶ 44.

difficulties in expanding FVG's real estate business from the very beginning of operations. For example, in its 2000 Annual Report, management stated, "[T]he negotiation of an easement for the right of way that will give the necessary revenues to feed the cash flow to the company has yet to be achieved."¹⁴³⁶ In 2002, FVG management stated:

While we had originally contemplated a market for fiber optics as the prime alternative use of our right-of-way, demand for fiber optics must be considered paralyzed by the recent problems of overcapacity and lack of financing at a global level. Guatemala is underdeveloped in this regard, but as a practical matter few of the companies active in this business in recent years are actively looking at the types of opportunities that we offer.¹⁴³⁷

594. Management's caution about obstacles to rapid expansion of real estate operations continued to reflect economic reality for the next several years, including in the years immediately prior to the *Lesivo* Declaration. For example, in their 2005 Annual Report, management reported as follows:

[I]n our efforts, to develop alternative uses for our right of way, various conflicts have emerged with current users who are not only not inclined to pay but see our development as competition. We are not engaged in a number of such conflicts which may well escalate in the coming months; we are prepared for this.¹⁴³⁸

At the end of the 2005 Annual Letter to Shareholders, management stated:

I'm often asked why we continue to support a venture with so many problems, and I'll give you both the short and the long answer. . . . The longer answer is, "we are supporting a business ***whose ultimate value we do not yet know.***"¹⁴³⁹

595. Yet Claimant's damages expert ignores the implications of the historical record, instead forecasting a booming real estate operation for FVG. His forecast for 2007 (his first forecasting

¹⁴³⁶ Ex. C-27(c), FVG's 2000 Annual Report, at RDC-001011.

¹⁴³⁷ Ex. C-27(e), FVG's 2002 Annual Report, at RDC-001079.

¹⁴³⁸ Ex. C-27(h), FVG's 2005 Annual Report, at RDC-001277.

¹⁴³⁹ Ex. C-27(h), FVG's 2005 Annual Report, at RDC-001277 (emphasis added).

year) is more than 11 times FVG’s actual revenues from real estate activities in 2005, the year just prior to the publication of the *Lesivo* Declaration. In order to justify this sudden increase, Claimant assumes for purposes of its calculations that it immediately could have leased most of the subject properties,¹⁴⁴⁰ even though FVG had failed to lease these properties in its eight years of operation.¹⁴⁴¹ Such a massive jump is fundamentally inconsistent with FVG’s historical performance.¹⁴⁴² Figure II in Dr. Spiller’s expert report compares the actual revenues generated by real estate activities for eight years (1998-2006), according to FVG’s annual reports—including revenues from the Puerto Barrios Contract—to the wholly unrealistic projections for 2007 to 2025 that Claimant offers for this case.

596. There is simply no logical basis for maintaining as Claimant does that an enterprise which already had been operating for eight years as of the end of 2006 would suddenly jump, in the very next year, from an average of less than USD 414,677 in yearly real estate revenues to a yearly revenue level of almost USD 6 million.¹⁴⁴³ As Dr. Spiller explains, an almost 12-fold jump in revenues requires either an extraordinary streak of luck (which is too speculative for a Tribunal to accept) or a dramatic new management approach with a proven record of success, neither of which are applicable here.¹⁴⁴⁴ Indeed, as discussed above, Claimant’s own annual reports for 2005, the year prior to the *Lesivo* Declaration, do not suggest any comparable optimism about an imminent jump in real estate revenues, much less an expectation (as Claimant’s expert would posit) that such revenues suddenly would account for 75.2% of FVG’s total revenues by 2007.¹⁴⁴⁵

¹⁴⁴⁰ Expert Report of R. MacSwain Report, ¶ 4.2.b.

¹⁴⁴¹ Expert Report of P. Spiller, ¶ 47.

¹⁴⁴² Expert Report of P. Spiller, ¶ 47.

¹⁴⁴³ Expert Report of P. Spiller, ¶ 48.

¹⁴⁴⁴ Expert Report of P. Spiller, ¶ 48.

¹⁴⁴⁵ Expert Report of P. Spiller, ¶ 49.

597. It was only *after* publication of the *Lesivo* Declaration that, for the first time in the company's history, FVG's management suddenly began to mention "ambitious projects" that supposedly would have borne fruit, but for the *Lesivo* Declaration:

Although income from major real estate contracts has been steady and with a little increase during 2006, since annual increases were agreed on each contract, due to the government declaring the "lesivo" we weren't able to consolidate ***ambitious prospects*** like a parking lot at the Gerona station next to the Public Ministry building, the opening of a chain of commercial developments in all major stations throughout the country altogether with the second largest chain of supermarkets in Guatemala, as well as the set-up of an export cargo terminal in the Zacapa station with the most important shipping line in Guatemala.¹⁴⁴⁶

598. None of these projects had ever been mentioned before, and seem to be based entirely on the fact that FVG was holding preliminary talks with third parties.¹⁴⁴⁷ Indeed, as mentioned, a substantial portion of Claimant's lost profits claim is predicated not on FVG leases in existence prior to the *Lesivo* Declaration, but on the purported prospects for additional utility easement contracts for rights of way and additional leasing of large parcels and station yards.¹⁴⁴⁸

599. Claimant thus asks this Tribunal to accept that it would have succeeded in closing profitable transactions as a result of several alleged "active discussions and negotiations for leases of rail stations, station yards and other land parcels of land controlled by FVG,"¹⁴⁴⁹ even though none of these transactions were yet in existence at the time of the *Lesivo* Declaration and FVG had been unable to consummate any such transactions in the past. There is simply no way to know with any degree of certainty that these negotiations or discussions would have led to future contracts, much less that the projects inevitably would have yielded profits.¹⁴⁵⁰

¹⁴⁴⁶ **Ex. C-27(i)**, FVG's 2006 Annual Report, at RDC-001350 (emphasis added).

¹⁴⁴⁷ Expert Report of P. Spiller, ¶ 53.

¹⁴⁴⁸ Expert Report of P. Spiller, ¶ 56.

¹⁴⁴⁹ Memorial on the Merits, ¶ 207.

¹⁴⁵⁰ Expert Report of P. Spiller, ¶ 55-56.

Claimant does not present any concrete evidence regarding the duration or terms of these supposed future contracts, much less about the cash flow that they would have generated.¹⁴⁵¹ In these circumstances, it would be *completely speculative and unreasonable* to rely on the mere existence of preliminary discussions (if in fact such discussions even occurred), as the basis for projecting a dramatic turnaround in FVG's previously unprofitable real estate operations.¹⁴⁵² For the same reasons, it would be patently unfair to make Guatemala pay for damages based on nothing more than Claimant's wanton speculation.

600. Claimant's damages case for real estate operations is also predicated on the erroneous assumption that but for the *Lesivo* Declaration, it would have had the legal right to profit for decades from land and easement leases along the routes of all five phases of the rail rehabilitation project, even if it never actually restored the railway for most of those routes. This ignores the connection made in Contract 402 between Claimant's obligation to rehabilitate the Guatemalan railway in five phases and its right to exploit the rights-of-way for non-railway economic activities. Specifically, Contract 402 provided that "[i]n the event that [FVG] fails to restore the railway and fails to render cargo transportation services under the terms of [the Contract], [FVG] shall surrender to FEGUA the real property where the railway yet to be restored is located, and any such property shall no longer be subject to this usufruct."¹⁴⁵³ In other words, FVG was under a contractual obligation to either rehabilitate the entire railway according to the provisions of the contract, or surrender the lands corresponding to the non-rehabilitated portions back to FEGUA.

601. Thus, Claimant cannot claim damages for real estate revenues derived from easements over, and leases of, parcels on portions of the railway it did not, could not, or would not rehabilitate. By Claimant's own admission, it had only "completed" one phase and discontinued railway service at the end of September 2007, thereby completely abandoning its

¹⁴⁵¹ Expert Report of P. Spiller, ¶ 55-56.

¹⁴⁵² Expert Report of P. Spiller ¶ 55-56.

¹⁴⁵³ Ex. C-22, 1997-11-25, Contract 402, clause Sixteenth(II) (emphasis added).

obligations under Usufruct Contract 402.¹⁴⁵⁴ This abandonment, along with the failure even to commence Phases II through V, constituted an anticipatory repudiation of Claimant's obligations under Contract 402, which in turn triggered its duty to surrender to FEGUA the lands covered by the undeveloped routes. Thus, its claims for damages arising from lands appurtenant to the portions of the railway it never rehabilitated are not only speculative, but barred by Contract 402.

602. In this sense, the facts are similar to those in *Autopista*,¹⁴⁵⁵ *Wena*¹⁴⁵⁶ and *S.P.P. (Middle East)*,¹⁴⁵⁷ where the project that was the main purpose of the agreement had not been completed by the time the challenged Government action had occurred. Nevertheless, Claimant here attempts to "have its cake and eat it too," denying that it was obligated to proceed with development of the five railway phases if this was not economically feasible,¹⁴⁵⁸ yet at the same time claiming damages for supposed lost income from land and easement rentals in the very sections of the route that it neither developed nor rehabilitated.¹⁴⁵⁹ This result would allow Claimant to effectively benefit from its own repudiation of railway rehabilitation obligations, recover damages for work that it did not complete, and ignore the contractual provision it agreed to.

603. A final but rather important flaw in Claimant's calculations relating to future real estate operations involves the discount rate it applies to those future cash flows, which as discussed below in Section V.E., should be 18.7%, not 10% as suggested by Claimant's expert, Mr. Thompson.¹⁴⁶⁰ By applying an unrealistically low discount rate, Claimant further exaggerates

¹⁴⁵⁴ Memorial on the Merits, ¶ 33.

¹⁴⁵⁵ **Ex. RL-84**, *Autopista Award*, ¶ 362.

¹⁴⁵⁶ **Ex. RL-137**, *Wena Hotels Award*, ¶ 124.

¹⁴⁵⁷ **Ex. RL-130**, *SPP Award*, ¶ 65 (4).

¹⁴⁵⁸ Memorial on the Merits, ¶ 20.

¹⁴⁵⁹ Memorial on the Merits, ¶ 20.

¹⁴⁶⁰ Expert Report of P. Spiller, ¶ 58.

the value of its already unrealistic projections of lost profits from future real estate transactions.¹⁴⁶¹

604. While Claimant's projections and valuations related to real estate rights form the vast majority of its lost profits demand (USD 34.8 million out of a total USD 36.2 million), it is worth mentioning that its projections of lost profits for railway operations are equally flawed. Claimant asserts damages of some USD 1.4 million (USD 1,354,127 to be precise) for alleged lost profit from railway operations.¹⁴⁶² Yet as Dr. Spiller explains, this figure is the result of several fundamental errors, including the following:¹⁴⁶³

- a. It assumes an abrupt turnaround in railroad operations, with revenue projections that drastically depart from FVG's historical performance;
- b. It relies on an adapted business plan without any substantiation,
- c. It provides inadequate substantiation for operational assumptions, and in some cases no substantiation at all;
- d. It discounts future cash flows at a discount rate that is unrealistic and inconsistent with FVG's financial distress and lack of access to financial capital.

605. Thus, although FVG had been in railway operations for eight years prior to the *Lesivo* Declaration, Claimant's forecasts of future returns from railway operations are not based on trends and patterns in FVG's actual performance. Instead, as Mr. Thompson explains, he adapts the model used in FVG's original Business Plan, inserts into the model FVG's results for 2006, and uses the relationships between various type of costs and operating variables to forecast the future performance of the company in the absence of the *Lesivo* Declaration.¹⁴⁶⁴ While he claims that his model estimates railway demand based on FVG's actual experience prior to the *Lesivo* Declaration and on its plans for the Pacific Route operations,¹⁴⁶⁵ the link

¹⁴⁶¹ Expert Report of P. Spiller, ¶ 58.

¹⁴⁶² Memorial on the Merits, ¶ 233.

¹⁴⁶³ Expert Report of P. Spiller, ¶ 59.

¹⁴⁶⁴ Expert Report of L. Thompson, ¶ 50.

¹⁴⁶⁵ Expert Report of L. Thompson, ¶ 51.

between this forecasted demand and FVG's historical performance cannot be divined in the actual data. As can be seen in Figure IV of Dr. Spiller's expert report, not only were *actual* railway revenues substantially lower than what was expected both in the Business Plan and the Share Issue Prospectus, but railroad revenues also failed to show *any consistent upward trend* during the six years prior to the *Lesivo* Declaration.

606. In fact, in 2005 FVG management stated clearly that they were operating a "business whose ultimate value we do not yet know,"¹⁴⁶⁶ and during several meetings held early that year, Mr. Jorge Senn, general manager of FVG, stated that the railway Atlantic operations were not profitable, in particular due to the type of load that they were carrying.¹⁴⁶⁷

607. Mr. Thompson, however, ignores the precarious and unstable performance of FVG prior to the *Lesivo* Declaration, blithely assuming that in the absence of that Declaration, FVG's railroad revenues would have grown at a compound annual growth rate (CAGR) of 14.7% between 2007 and 2013.¹⁴⁶⁸ This projected growth rate is staggering, when compared with the actual results from 2000 through 2006, during which the company's railway revenues remained essentially flat.¹⁴⁶⁹

608. Claimant adopts an equally optimistic scenario for the next several decades. According to Mr. Thompson's projections, revenues from railroad activities would grow steadily at an

¹⁴⁶⁶ See **Ex. C-27(h)**, FVG's 2005 Annual Report, page RDC-001277; Expert Report of P. Spiller, ¶ 59.

¹⁴⁶⁷ See **Ex. R-178**, 2005-01-20, Agenda and Minutes from Railway Commission Meeting: "Even so, it is not profitable for the company given the type of load transported in which over 75% are containers." See **Ex. R-177**, 2005-01-11, Agenda and Minutes from Railway Commission Meeting ("In this opportunity Ing. Jorge Senn clearly said that the railway in the Atlantic line was not profitable, and that most of the load would come in the future from the rehabilitation of the Pacific line, due to the load volume weight they would transport there." (unofficial translation)) Observe, however, that Mr. Thompson disagrees with this. First, he finds that it is not profitable to expand into the Pacific, see Expert Report of L. Thompson's, ¶ 57 "[...]adding the Pacific operations would have been minimal or even slightly negative. At a 10 percent discount rate, FVG's net present value would have actually decreased by US\$640,503. Thus, the ability of FVG to conduct the Pacific operations would have been critically dependent on access to low cost finance because it would have been unreasonable to take on the significant extra risk for no added value to FVG." Second, he finds that the Atlantic operations are minimally profitable. Expert Report of L. Thompson's, ¶ 56.

¹⁴⁶⁸ Expert Report of P. Spiller, ¶ 62.

¹⁴⁶⁹ Expert Report of P. Spiller, ¶ 62.

annual rate of between 14% and 15% until 2017, between 8% and 9% from 2018 to 2027, and between 4% and 6% thereafter, up to 2048.¹⁴⁷⁰ However, as LECG notes, Claimant provides no documentation that would allow one to reconcile this optimistic view of FVG’s railroad business with its demonstrated poor performance not just immediately prior to the *Lesivo* Declaration, but from the very inception of its operations in 1999.¹⁴⁷¹

609. In short, Claimant’s projections of FGV’s lost profits, for both real estate and railway operations, are wholly unrealistic and unsubstantiated.¹⁴⁷² They are simply not a credible basis for awarding damages in this case.

2. Claimant Is Not Entitled To Any Damages for Lost Investment

610. As Dr. Spiller explains, Claimant’s methodology and calculations regarding “lost investment,” using the NCC approach of adjusting historic investment costs, are as flawed as its approach to DCF analysis for lost profits.¹⁴⁷³ Claimant calculated an alleged lost investment of USD 27.8 million using the NCC approach,¹⁴⁷⁴ and added a further USD 1,033,823 in “business termination” costs allegedly incurred in 2007.¹⁴⁷⁵ But these calculations reflect a number of serious errors.

611. First, as previously noted, the NCC approach provides a “backward looking” damages estimate by focusing on the actual contributions made by an investor, plus an expected return, minus the actualized value of all cash distributions received by the investors.¹⁴⁷⁶ These distributions would include dividends, interest payments, etc.¹⁴⁷⁷ This approach, which uses historical investments as part of its valuation, is normally used when an alleged expropriation

¹⁴⁷⁰ Expert Report of P. Spiller, ¶ 63.

¹⁴⁷¹ Expert Report of P. Spiller, ¶ 63.

¹⁴⁷² Expert Report of P. Spiller, ¶ 71.

¹⁴⁷³ Expert Report of P. Spiller, § III.4.

¹⁴⁷⁴ Memorial on the Merits, ¶ 188.

¹⁴⁷⁵ Memorial on the Merits, ¶ 184.

¹⁴⁷⁶ Expert Report of P. Spiller, ¶ 74.

¹⁴⁷⁷ Expert Report of P. Spiller, ¶ 74.

takes place within a period of time that is close to the date on which the original investment was made.¹⁴⁷⁸ In such cases, the alleged expropriation literally prevented the investor from exploiting the possibilities associated with its investment project, and there is no available history on which to base future performance.¹⁴⁷⁹

612. As Dr. Spiller explains, however, this NCC approach is *not* an appropriate method of measuring the fair market value of Claimant's investment in this case.¹⁴⁸⁰ As a threshold matter, the *Lesivo* Declaration was not issued immediately after FVG commenced operations.¹⁴⁸¹ Rather, FVG was constituted in 1998 and operated in Guatemala for eight years before the *Lesivo* Declaration was published.¹⁴⁸² This provides a clear history of performance, albeit a poor performance, which showed that the company recorded losses for seven consecutive years, between 2000 and 2007.¹⁴⁸³ For example, in 2002, FVG had already accumulated losses for 54% of the paid-in capital, and in January 2003, it had to capitalize previous contributions and convert debt into stock to avoid the dissolution of the company per Guatemalan regulations.¹⁴⁸⁴ FVG's shareholders had to make additional capital contributions in 2004, 2005 and 2006 for the same reason.¹⁴⁸⁵ Given this history, it is evident that Claimant's investment was generating *only losses* and was *not* generating profitable returns, long before and completely independent of the *Lesivo* Declaration. Consequently, an NCC approach which measures fair market value simply by imputing a hypothetical return to invested capital, is at odds with the demonstrated facts about FVG's performance. It would drastically over-estimate

¹⁴⁷⁸ Expert Report of P. Spiller, ¶ 75.

¹⁴⁷⁹ Expert Report of P. Spiller, ¶ 75.

¹⁴⁸⁰ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸¹ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸² Expert Report of P. Spiller, ¶ 76.

¹⁴⁸³ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸⁴ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸⁵ Expert Report of P. Spiller, ¶ 76.

the value of FGV's business,¹⁴⁸⁶ and provide Claimant with a windfall that it never would have enjoyed even absent the *Lesivo* Declaration.

613. Thus, as long as NCC is computed using a positive return, it would *unjustifiably overcompensate* Claimant, by implying that Guatemala is responsible for the operational losses incurred by FVG during its seven years of operations prior to publication of the *Lesivo* Declaration.¹⁴⁸⁷ It is important to note that FVG's large operational losses in those years were not the result of large scale investments, which might arguably boost revenues for future years, but rather were the result of FVG's inability to generate sufficient demand for its services, and/or to obtain appropriate financing for more rapid expansion.¹⁴⁸⁸ FVG had to rely on Claimant's infusion of additional capital and debt contributions in order to cover its ongoing operational losses.¹⁴⁸⁹

614. The inherent flaws in Claimant's NCC approach exist regardless of which of Claimant's three alternative interest rates is used to bring forward capital contributions (an expected return of 10% over the investment, a rate based on Guatemala's inflation, or a rate based on the regulatory cost of capital of U.S. railroads). Any of these three interest rates would overestimate FVG's ability to return capital to its shareholders when considering its actual performance.¹⁴⁹⁰

615. As Dr. Spiller explains, a more appropriate method to use in determining the fair market value of lost investment in this case would be to look at the current value of FVG's equity as reflected in its financial books.¹⁴⁹¹ The book value of FVG's equity by the end of 2006 was Q.32.2 million, or USD 4.2 million.¹⁴⁹² This value, which is substantially lower than what

¹⁴⁸⁶ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸⁷ Expert Report of P. Spiller, ¶ 76.

¹⁴⁸⁸ Expert Report of P. Spiller, ¶ 45, 69-71.

¹⁴⁸⁹ Expert Report of P. Spiller, ¶ 83.

¹⁴⁹⁰ Expert Report of P. Spiller, ¶ 77.

¹⁴⁹¹ Expert Report of P. Spiller, ¶ 79.

¹⁴⁹² Expert Report of P. Spiller, ¶ 81-82.

Claimant alleges it invested, is achieved once FVG's equity contributions, allegedly amounting to USD 15.0 million, are reconciled with its total accumulated losses, amounting to USD 10.8 million, per FVG's 2006 Annual Report.¹⁴⁹³ Since the equity contribution amount of USD 15.4 million had to be used to cover the USD 10.8 million in losses, FVG's equity value already was reduced to only USD 4.2 million by the end of 2006.¹⁴⁹⁴

616. FVG's auditors confirmed, on an annual basis, its poor financial situation. The auditors' reports demonstrate that from 2000 onwards, FVG was unable to generate any operating cash flows (as measured by its EBITDA), and depended largely on the additional contributions and debt capitalizations from its shareholders in order to meet its financial obligations.¹⁴⁹⁵ In every Annual Report between 2001 and 2007, FVG's auditors expressed their doubts about the company's viability as a going concern, and indicated that additional capital contributions were required in order to cover FVG's accumulated losses and prevent its dissolution.¹⁴⁹⁶

617. In other words, FVG was in severe financial distress well before the publication of the *Lesivo* Declaration. Although it had a positive net worth according to its books, it had failed to achieve positive operating results for the last six years, and relied on continuous capital injections and swaps of debt into equity to avoid entering into negative equity, and thus being forced into liquidation.¹⁴⁹⁷ Therefore, although FVG remained for the time being a going concern, its viability was a serious open question, as both its auditors and management

¹⁴⁹³ Expert Report of P. Spiller, ¶ 82.

¹⁴⁹⁴ Expert Report of P. Spiller, ¶ 82; See **Ex. C-27**, FVG's Annual reports.

¹⁴⁹⁵ Expert Report of P. Spiller, ¶ 83.

¹⁴⁹⁶ See **Ex. C-27 (d)**, FVG's 2001 Annual Report, p. RDC001072 ("the continuation of its operations as a going concern will depend on the financial support that it receives from its shareholders and the Management's ability to generate profitable businesses in its transportation services."); see also, **Ex. C-27 (j)**, FVG's 2007 Annual Report, n. 17, p. RDC001460 ("As of December 31, 2007 and 2006, the Company has accumulated losses for Q.90,069,226 and Q.82,015,101, which represent 99% and 90% of paid-in capital on those dates, respectively. Under the Code of Commerce of the Republic of Guatemala, the loss of more than 60% of paid-in capital is cause for dissolution of a company [...] Continuing as a going concern also depends on the results of the actions described in note 18 below.")

¹⁴⁹⁷ Expert Report of P. Spiller, ¶ 84.

repeatedly indicated.¹⁴⁹⁸ In such instances, assessing the value of the firm simply by its book value of equity defies any semblance of reality, as no buyer in fact would base the value of the business on the amount of the historical investment, without reference to actual results.¹⁴⁹⁹ Rather, a reasonable buyer would pay either the liquidation value of the firm or the value arising from a discounted cash flow analysis.¹⁵⁰⁰ Consequently, even though FVG had a positive book value of equity as of 2006, this value does not reflect the fair market value of FVG, and cannot be used as a basis for damages calculations.¹⁵⁰¹

618. As to Claimant's alleged "business termination" costs, Claimant merely asserts that "In 2007, RDC invested an additional USD 1,033,823 in FVG, principally to cover termination and wind-down costs for the business...".¹⁵⁰² However, Claimant does not provide any evidence that supports this assertion. There is no documentation of an alleged additional expenditure of approximately USD 1.0 million, nor that these supposed costs were related to any alleged action attributable to the Government.¹⁵⁰³

619. Indeed, the only item mentioned in FVG's audited financial statements for the year-ended December 2007 that would seem to refer to "termination and wind-down costs" is found in "(f) Indemnity of employees." This item indicates that:

During the year 2007, considering the present condition of the business, the decision was taken to dispense with the services of 62 employees, whose payments for indemnity totaled Q1.2 million and which was covered by contributions received from Railroad Development Corporation during the year.¹⁵⁰⁴

¹⁴⁹⁸ Expert Report of P. Spiller, ¶ 84.

¹⁴⁹⁹ Expert Report of P. Spiller, ¶ 84.

¹⁵⁰⁰ Expert Report of P. Spiller, ¶ 84.

¹⁵⁰¹ Expert Report of P. Spiller, ¶ 84.

¹⁵⁰² Memorial on the Merits, ¶ 184.

¹⁵⁰³ Expert Report of P. Spiller, n. 86.

¹⁵⁰⁴ **Ex. C-27(j)**, 2007 FVG Annual Report, p. RDC001430.

620. By the end of 2007, Q1.2 million was equivalent to just over USD 150,000.¹⁵⁰⁵

Therefore, without any additional evidence that FVG spent amounts contributed by Claimant on legitimate “termination and wind-down costs,” it would be reasonable for this Tribunal to eliminate at least USD 850,000 of the total claimed by RDC for alleged “business termination costs.”¹⁵⁰⁶

F. Claimant’s Discount Rate Is Grossly Underestimated

621. In order to estimate the value of FVG at the time of the publication of the *Lesivo* Declaration, Claimant’s expert, Mr. Thompson, applied a discount rate of 10%.¹⁵⁰⁷ This is based upon a statement that 10% is a common standard in valuing long term infrastructure investments, a reference to Mr. MacSwain’s report for the proposition that the same rate is commonly used in the real estate business, and an observation that FVG used the same rate in its underlying bid proposal.¹⁵⁰⁸ However, the first two statements, about infrastructure and real estate investments in general, are completely unsupported by the record; neither Mr. Thompson nor Mr. MacSwain provide any evidence to support their sweeping assertions.¹⁵⁰⁹ As for the third justification, it is axiomatic that a discount rate is not a static concept; it may change depending on the period analyzed.¹⁵¹⁰ There is thus no logical reason to assume that a discount rate projected a decade earlier remains a realistic rate for a damages valuation conducted a decade later.¹⁵¹¹

622. None of Mr. Thompson’s reasons for selecting a 10% discount rate reflect the standard approach for valuation.¹⁵¹² To the contrary, it is widely accepted that discount rates should

¹⁵⁰⁵ Expert Report of P. Spiller, n. 86.

¹⁵⁰⁶ Expert Report of P. Spiller, n. 86.

¹⁵⁰⁷ Expert Report of L. Thompson, ¶ 54.

¹⁵⁰⁸ Expert Report of L. Thompson, ¶ 54.

¹⁵⁰⁹ Expert Report of P. Spiller, ¶ 86.

¹⁵¹⁰ Expert Report of P. Spiller, ¶ 86.

¹⁵¹¹ Expert Report of P. Spiller, ¶ 86.

¹⁵¹² Expert Report of P. Spiller, ¶ 87.

appropriately reflect weighted average cost of capital (“WACC”), which represents a measure of the cost of raising funds from shareholders and lenders in a company operating in the industry at hand.¹⁵¹³ The cost of raising funds from lenders is given by the interest rate at which they are willing to offer loans, called the cost of debt, whereas the cost of raising funds from shareholders is measured by the so-called cost of equity, which represents the expected rate of return (distributed in the form of dividends) on the equity contributions.¹⁵¹⁴ Thus, the WACC estimates the implicit risk existing in future cash flow, considering the rate of return required by each of the two providers of finance, each weighted by the optimal proportion of debt and equity observed in the industry.¹⁵¹⁵ Dr. Spiller has determined that in order to properly discount FVG’s projected cash-flows from 2007 forward, the discount rate applied should be 18.7%.¹⁵¹⁶

G. An Appropriate And Substantiated Analysis Demonstrates That FVG Had A Negative Fair Market Value At The Time Of The Alleged Expropriation, And That Therefore Claimant Suffered Zero Damages

623. In order to properly determine FVG’s fair market value, Guatemala’s expert, Dr. Spiller, employs a DCF analysis, rather than the double-counting “DCF plus NCC” approach followed by Claimant’s expert.¹⁵¹⁷ For the DCF valuation, Mr. Spiller projected FVG’s cash inflows (revenues from railroads and real estate activities) and outflows (trust fund fees, operating expenses, income tax).¹⁵¹⁸ The real estate revenues were forecasted using the contracts that existed prior to publication of the *Lesivo* Declaration, due to the speculative nature of the hypothetical future contracts Claimant optimistically includes in its valuation. Railway traffic was determined by increasing historical figures by a growth rate based on historical averages and

¹⁵¹³ Expert Report of P. Spiller, ¶ 87.

¹⁵¹⁴ Expert Report of P. Spiller, ¶ 87.

¹⁵¹⁵ Expert Report of P. Spiller, ¶ 87.

¹⁵¹⁶ Expert Report of P. Spiller, ¶ 88. This rate is an average of two discount rates, one for each segment. Mr. Spiller assessed the discount rate for real estate operations at 16.93% and that for railroad operations at 20.41%. Both rates are for operations in Guatemala as of 2006. For further explanation please refer to Appendix D of the Expert Report of P. Spiller.

¹⁵¹⁷ Expert Report of P. Spiller, ¶ 89.

¹⁵¹⁸ Expert Report of P. Spiller, ¶ 102.

the expected evolution of Guatemala's GDP. Costs were modeled using Mr. Thompson's assumptions.¹⁵¹⁹ Mr. Thompson assumes that some costs (such as fees, drayage and fuel) are dependent on the level of revenues, while others (such as administration costs) are considered fixed.¹⁵²⁰ These assumptions were not changed.¹⁵²¹

624. Dr. Spiller then discounted the projected flows using the WACC of 18.7% to obtain the present value of each of the items expressed in USD for December 2006.¹⁵²² The fair market value of FVG, as of December 2006, was therefore calculated by subtracting the present value of the cash outflows from the present value of the cash inflows. The result is a *negative* fair market value, namely -USD 3.5 million.¹⁵²³ Based on this assessment, Claimant's damages from the *Lesivo* Declaration amount to **zero**.¹⁵²⁴ In other words, even in the absence of the publication of the *Lesivo* Declaration, no buyer would have been willing to pay anything for FVG as of the date immediately prior to the challenged government action.¹⁵²⁵

H. Claimant Is Not Entitled To Receive Any Pre-Award Interest

625. Claimant is not entitled to compound pre-award interest.¹⁵²⁶ If an expropriation is found to have occurred and the Tribunal determines that Claimant is entitled to damages, CAFTA Article 10.3 provides that:

[I]f the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, *plus interest at a*

¹⁵¹⁹ Expert Report of P. Spiller, ¶ 103.

¹⁵²⁰ Expert Report of P. Spiller, ¶ 103.

¹⁵²¹ Expert Report of P. Spiller, ¶ 103.

¹⁵²² Expert Report of P. Spiller, ¶ 88, 104.

¹⁵²³ Expert Report of P. Spiller, ¶ 104.

¹⁵²⁴ Expert Report of P. Spiller, ¶ 104.

¹⁵²⁵ Expert Report of P. Spiller, ¶ 104.

¹⁵²⁶ Memorial on the Merits, ¶ 246.

*commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.*¹⁵²⁷

626. While it is true that there has been an increased tendency by international tribunals to award compound interest,¹⁵²⁸ it is not a foregone conclusion that investors have an automatic right to it. Rather, Claimant has to meet its burden of proof in demonstrating why, based on the facts of this particular case, it is entitled to compound interest. Claimant, however, has not even attempted to meet that burden or even explain why it should be awarded to compound interest. And meeting that burden would be a tall order for Claimant, considering that leading legal authorities provide that compound interest is generally not allowed under international law.

627. For instance, the commentaries to the ILC's Articles on State Responsibility confirm that compound interest is not appropriate under international law:

The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest . . . In R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran, the tribunal failed to find:

'any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable" ...'

The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

'the arbitral case law in matters involving compensation of one state for another for damages suffered by the nationals of one within the territory of the other . . . is

¹⁵²⁷ **Ex. RL-61**, CAFTA Article 10.3 (emphasis added).

¹⁵²⁸ **Ex. RL-135**, *See Vivendi II Award*, ¶ 9.2.4; **Ex. RL-77**, *ADC Award*, ¶ 522.

unanimous . . . in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.¹⁵²⁹

628. That traditional principle (i.e., that compound interest is not allowed) continues to apply today. Indeed, recent tribunals that have awarded simple instead of compound interest.¹⁵³⁰ Therefore, if this Tribunal issues an award in favor of Claimant, an award of simple interest at a current commercially reasonable rate would be appropriate.

I. Costs

629. Guatemala respectfully requests, pursuant to Article 10.26.1 of CAFTA and Article 61(2) of the ICSID Convention, that it be awarded all costs, legal fees and its share of the administrative expenses it has incurred in connection with its defense against Claimant during the course of these proceedings.

VI. CONCLUSION AND RELIEF REQUESTED

630. For the reasons set forth above, Guatemala respectfully requests that the Tribunal make the following determinations:

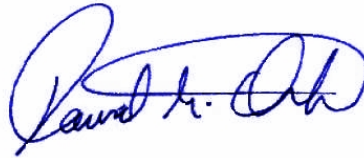
- (i) That the *Lesivo* Declaration and subsequent conduct of Guatemala does *not* constitute an indirect expropriation of Claimant's rights in violation of Article 10.7.1 of CAFTA;
- (ii) That Guatemala did *not* violate the customary international law minimum standard of treatment prescribed by Article 10.5 of CAFTA, including fair and equitable treatment and full protection and security;
- (iii) That Guatemala did *not* violate the national treatment standard under Article 10.3 of CAFTA;
- (iv) That Claimant is *not* entitled to any damages—or to compound pre-award interest at the average rate paid by Guatemala on its private commercial debt; and,

¹⁵²⁹ **Ex. RL–29**, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Comment to Art. 38, ¶ 8 (citations omitted).

¹⁵³⁰ **Ex. RL–118**, *See, e.g. Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN 3467, ¶ 211 (Final Award) 1 July 2004 (Orrego Vicuña, Brower, Sweeney); **Ex. RL–99**, *Feldman Award*, ¶ 205.

- (v) That the Tribunal order Claimant to pay Guatemala's costs, legal fees, and share of administrative expenses incurred in these proceedings.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David M. Orta". The signature is stylized with a large, looping initial "D" and "O".

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