

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 REJOINDER ON THE MERITS

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Summary of Argument	1
II. Guatemala Did Not Expropriate Claimant's Investment	8
A. Claimant Misconstrues The Character Of The Measure At Issue In This Case.....	11
B. Guatemala Has Not Interfered With Claimant's Investment, Its Property Rights, Or Any Reasonable Investment-Backed Expectations	17
C. Any Interference With Claimant's Investment, Property, Or Reasonable Investment-Backed Expectations Was Not Substantial And Permanent And Therefore Does Not Rise To The Level Of Indirect Expropriation	27
D. Even If The Tribunal Determines That An Indirect Expropriation Has Taken Place, The Elements Of An "Unlawful" Expropriation Do Not Exist In This Case	40
E. The <i>Shufeldt</i> Case Is Inapposite To This Case	55
III. Guatemala Afforded Claimant's Investment Fair And Equitable Treatment In Accordance With Article 10.5 Of CAFTA.....	59
A. Standard Of Fair And Equitable Treatment Under CAFTA And Customary International Law	60
B. Claimant Has Failed To Meet Its Burden Of Establishing That Guatemala's Conduct Falls Short Of The Minimum Standard Of Treatment Required By Customary International Law	67
IV. Guatemala Accorded Claimant's Investment Full Protection And Security, In Accordance With Article 10.5 Of CAFTA.....	112
A. The Full Protection And Security Standard Under CAFTA And Customary International Law Is Simply "Reasonable Efforts," Not "Strict Liability"	113
B. Claimant Mischaracterizes The Full Protection And Security Standard	116
C. Claimant Still Fails To Demonstrate That Guatemala Acted Without Due Diligence Or That It Did Not Make Reasonable Efforts To Protect Claimant's Investment	119
V. Guatemala Fulfilled Its National Treatment Obligation In Accordance With Article 10.3 Of CAFTA.....	131
A. Claimant And Mr. Ramón Campollo Were Not In Like Circumstances.....	131

B.	Claimant Has Failed To Prove That It Has Received Less Favorable Treatment As Compared To Mr. Ramón Campollo	139
VI.	Damages And Costs	142
A.	Claimant Misstates And Misapplies The Relevant Legal Standards In Hopes Of Obtaining a Windfall At Guatemala’s Expense In The Form Of Double Compensation.....	142
B.	Even If Claimant Had Correctly Applied The Legal Standard And Had Not Engaged In Double-Counting, It Has Failed To Prove That It In Fact Suffered Any Damages.....	148
C.	A Correct, Realistic, And Substantiated Analysis Of FVG’s Circumstances And Outlook Immediately Prior To The <i>Lesivo</i> Declaration Demonstrates That FVG Was Worthless At That Time; Thus, Claimant Is Entitled To Zero Damages.....	170
D.	Even If The Tribunal Determines That Claimant Or FVG Has Suffered Objectively-Quantifiable Damages, Claimant Has Failed To Prove A Causal Connection Between Those Damages And The <i>Lesivo</i> Declaration	171
E.	If The Tribunal Awards Any Damages, It Should Condition Guatemala’s Payment Obligation Upon Claimant Renouncing And Forfeiting Whatever Rights It Has Under The Usufruct Contracts (402, 143/158/41 and 820) And Returning All Lands And Equipment Covered By Those Contracts To Guatemala.....	176
F.	Claimant Is Not Entitled To Receive Compound Pre-Award Interest.....	177
G.	Claimant Is Not Entitled To An Award Of Costs And Attorney’s Fees; Instead, Claimant Should Be Made To Pay For Guatemala’s Costs And Attorney’s Fees	179
VII.	Conclusion And Relief Requested.....	181

I. Introduction and Summary of Argument

1. Despite criticizing an approach to arbitration that purports to “raise every objection; deny everything; obfuscate or contort the facts; ignore or miscite the law [and] secure experts who will advance any proposition, however unfounded,”¹ in its 24 March 2011 Reply to Respondent’s Counter-Memorial on the Merits (“Reply”) Claimant Railroad Development Corporation (“Claimant” or “RDC”) employs each of these tactics. Guatemala, on the other hand, did no such thing in its Counter-Memorial on the Merits. Rather, it put before the Tribunal the proper factual context and legal arguments that demonstrate that it has not violated any of its undertakings to Claimant under CAFTA.

2. However, Claimant’s Reply — in essence, an attack on anything the Respondent Republic of Guatemala does or says as *per se* incorrect and unreasonable — also goes further. It disputes the applicability of standards and arguments quoted directly from its own Memorial on the Merits;² advances arguments that might be appropriate before a Guatemalan court or a contract tribunal but that are unsuited for the investment treaty forum;³ improperly seeks to shift the burden of proof to Guatemala on its claims;⁴ uses exaggerated rhetoric that is unsubstantiated;⁵ attempts to downplay

¹ Claimant’s Reply to Respondent’s Counter-Memorial on the Merits (24 March 2011) (“Reply on the Merits”), ¶ 431.

² See, e.g., Reply on the Merits, ¶ 264 (disputing what it claims to be Guatemala’s argument that “to prove indirect expropriation, Claimant must demonstrate that Respondent’s interference caused ‘complete destruction’ or virtual annihilation’ of its investment”). As Guatemala stated in its Counter-Memorial, this argument came directly from Claimant’s Memorial on the Merits. See Respondent’s Counter-Memorial on the Merits (5 October 2010), ¶ 311 and n. 803 (“Counter-Memorial on the Merits”) (citing Claimant’s Memorial on the Merits (26 June 2009), ¶ 112 (“Memorial on the Merits”)(conceding that tribunals have found “that an indirect expropriation occurs where the value of the business has been ‘virtually annihilated by the State’s actions or the actions have a ‘substantial’ impact on the investment”). See also Reply on the Merits, ¶ 361 (“Respondent knows full well that the question is not whether the *lesividad* process is constitutional under Guatemalan law — a matter outside the purview of this Tribunal — but, rather, whether the *lesividad* process accords with the due process requirements of *international law*”). As Guatemala pointed out in its Counter-Memorial, Claimant’s Memorial highlighted the fact that “[i]t is for these many reasons that Professor Mayora is of the opinion that the *lesivo* procedure should be declared unconstitutional under Guatemalan law.” Memorial on the Merits, ¶ 146.

³ See, e.g., Reply on the Merits, ¶¶ 284–87 (arguing that issuance of the *Lesivo* Declaration was *incorrect*: “A declaration of *lesividad* is not an appropriate remedy or vehicle for resolving any of these defects or problems”).

⁴ See, e.g., Reply on the Merits, ¶¶ 403–04.

⁵ See, e.g., Reply on the Merits, ¶ 398 (“On the face of it, the *Lesivo* Resolution was unreasonable because its clear intent was not to resolve any alleged legal defects in Contracts 143/158, but to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the

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INTRODUCTION

arguments from Guatemala's Counter-Memorial even when it ultimately agrees with those arguments;⁶ cites its international law expert on issues reserved for arguments from counsel,⁷ recommendations from Guatemalan law experts,⁸ and ultimate decisions by the Tribunal;⁹ proclaims that Guatemala failed to rebut arguments that Claimant had never previously asserted;¹⁰ and endeavors to prove its legal claims by cross-referencing to issues that were not fully-developed in its fact section, by citing documents that do not support its points in the apparent hope that the Tribunal will not carefully scrutinize the documents and simply accept Claimant's statements at face value, or by making bald accusations without providing any citation or support whatsoever.¹¹ In short, Claimant's arguments in its Reply prove to be entirely meritless.

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Government and the mutual economic interests of Ramón Campollo and President Berger's family." (emphasis added); see also *id.*, ¶ 293 (claiming that the *Lesivo* Declaration "laid bare the corruption and cronyism of Guatemala's political and business elites"), ¶ 294 (alleging that the *Lesivo* Declaration was used "solely as a 'threat instrument' against Claimant in order to further Respondent's (and Respondent's favored national investor's) commercial, economic and political interest at Claimant's expense").

⁶ See, e.g., Reply on the Merits, ¶¶ 264–67 (arguing first that the threshold level of interference is not as high as Guatemala argued it was, but then conceding the very argument that Guatemala made (which, at any rate, was based on Claimant's argument in its Memorial)), ¶¶ 244, 265–66 (first disputing Guatemala's argument that interference with an investment must be permanent to constitute expropriation, but then conceding that the interference must be "lasting," and quoting passages of cases stating that the interference must in fact be permanent).

⁷ See, e.g., Reply on the Merits, ¶ 366 (responding to Guatemala's argument that the *Lesivo* Declaration had no immediate effect upon Claimant's investment by citing Professor Reisman's statement and claiming that "Professor Reisman accurately summarizes the situation Claimant experienced").

⁸ See, e.g., Reply on the Merits, ¶ 308 ("[A]s Professor Reisman emphasizes, Guatemalan law does not provide any legal standards for the *Contencioso Administrativo* court to assess the merits or lawfulness of the Government's *lesivo* declaration").

⁹ See, e.g., Reply on the Merits, ¶ 309 (citing Professor Reisman's assertion that, "[f]or CAFTA purposes, it is the declaration of *lesividad*, not the subsequent *Contencioso Administrativo* proceeding, which is substantively decisive, because a *lesividad* declaration has immediate and profound negative consequences on the foreign investment").

¹⁰ See, e.g., Reply on the Merits, ¶ 403 (claiming that none of the evidence Guatemala cited in its Counter-Memorial "demonstrates that Respondent undertook the reasonable, *active* measures to *prevent* harm to Claimant's investment that it was required to take under customary international law"). Claimant's argument would not only reverse the burden of proof, but would also require that Guatemala respond to an argument that Claimant had never previously raised (its discussion in its Memorial of the full protection and security standard being limited to the following single sentence: "Full protection and security 'requires each Party to provide the level of police protection required under customary international law'").

¹¹ Examples of this type of behavior are discussed throughout this Rejoinder.

3. While the parties continue to disagree on many factual and legal issues, the Tribunal, in discharging its Article 48(3) obligation to “deal with every question submitted,”¹² need only decide fundamental issues — *i.e.*, the essential claims and defenses that could affect the outcome of the case.¹³ Accordingly, though Guatemala disagrees with many of Claimant’s assertions — and emphasizes that the absence of an express rebuttal in this Reply should not be construed as a concession of any of Claimant’s arguments — it attempts to limit its responses this Rejoinder to the essential claims and defenses that the Tribunal must decide.

4. With respect to expropriation, the Tribunal must determine ***whether Claimant has satisfied its burden of demonstrating that the preliminary determination by the Executive branch that Claimant’s equipment contract (“Contract 143/158”) was lesivo interfered with all of its contracts, to the extent that Claimant’s entire investment was “worthless.”***¹⁴ As discussed in **Section II**, Claimant’s arguments do not hold up.

5. Perhaps most importantly on the expropriation claim, Claimant has failed to demonstrate a factual and legal link between the declaration of *lesividad* of Contract 143/158 and the “most significant and potentially profitable aspect of the Usufruct — its real estate rights”¹⁵ under Contract 402. Pursuant to Contract 402, Claimant had two potential sources of income: railroad operations (accounting for 8% of potential income by Claimant’s estimation) and real estate leases (accounting for 92% by Claimant’s estimation).¹⁶ Though the railroad equipment covered by Contract 143/158 was arguably necessary for a small portion of Claimant’s railroad operation (e.g., Phase I of the rehabilitation of the railroad) — one of the issues the parties still dispute — Claimant has failed to demonstrate that the equipment was necessary for its *real estate* operation. Quite to the contrary, Claimant states that it was not required to

¹² ICSID Convention Art. 48(3).

¹³ See, e.g., **RL-188**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Decision on Second Annulment, 17 December 1992) (Sucharitkul, Fatouros, Schindler), ¶ 35; **RL-189**, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4 (Decision on Annulment, 14 December 1989) (Sucharitkul, Broches, Mbaye), ¶¶ 5.13, 6.50, 6.84, 6.91; **RL-190**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Decision on Annulment, 19 October 2009) (Hascher, Danelius, Tomka), ¶ 67.

¹⁴ See Reply on the Merits, ¶ 263.

¹⁵ Reply on the Merits, ¶¶ 11, 414.

¹⁶ Reply on the Merits, ¶ 540.

INTRODUCTION

“complete restoration of the specified phases and render cargo transportation services”¹⁷ in order to maintain its real estate benefits under Contract 402. While this issue also is disputed as a matter of legal interpretation under Contract 402, without linking the *lesividad* of Contract 143/158 to the most substantial portion of its investment, Claimant cannot prove its assertion that “the practical effect of the Resolution was to cause the *financial and commercial decimation of Claimant’s investment*.”¹⁸ Rather than prove that the *Lesivo* Declaration has caused the financial and commercial decimation of Claimant’s real estate operations, the evidence actually demonstrates that Claimant’s income under the real estate contracts it had before the *Lesivo* Declaration has increased since the issuance and publication of that Declaration.

6. Nor can Claimant prove that Guatemala used the *lesividad* process “to force Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and ‘other investors’ interested in the railway such as Ramón Campollo.”¹⁹ Apart from the fact that there is no evidence that Ramón Campollo wanted to assume the rights and obligations under the Usufruct — Mr. Campollo himself rejects the point and Claimant’s assertion is based upon only circumstantial and rather weak evidence relating to Héctor Pinto — this argument fails as a matter of logic. If Guatemala’s intention really was to take away Claimant’s rights under Contract 402, why would it use an option that did not target Contract 402 specifically? Or one — which Claimant characterizes as a “legal black hole”²⁰ — that had no immediate effect, could be overturned by the *Contencioso Administrativo* Court, and would leave the property in Claimant’s possession pending the *Contencioso Administrativo* Court decision? More to the point, perhaps the best evidence that Guatemala never intended to take away Claimant’s investment in order to give it to Mr. Campollo is the lack of any evidence after the *Lesivo* Declaration showing that Guatemala tried to give Claimant’s Usufruct rights to Mr. Campollo. Claimant has retained possession of both the right-of-way and the railway equipment both legally and factually,²¹

¹⁷ Reply on the Merits, ¶ 23.

¹⁸ Reply on the Merits, ¶ 231 (emphasis added).

¹⁹ Reply on the Merits, ¶ 288.

²⁰ Reply on the Merits, ¶ 230.

²¹ See Memorial on the Merits, ¶¶ 126, 130; see also Reply on the Merits, ¶ 229.

and has continued to collect revenues from its right-of-way usufruct, including by collecting rent from tenants and easement holders.²²

7. In terms of fair and equitable treatment, as discussed in **Section III**, the Tribunal must decide ***whether, in light of the facts, information, and resources that Guatemala had at the time, the initiation of the lesividad process falls below the minimum standard of treatment under customary international law.*** The task is not, as Claimant suggests, to determine whether Contract 143/158 *should* have been declared *lesivo*. Nor is the task to determine whether Guatemala’s decision to proceed with the *Lesivo* Declaration was “discretionary,”²³ or whether Guatemala should have taken what Claimant refers to as “less draconian options”²⁴ like outright “termination” or “annulment” of the usufruct equipment contract.²⁵ It also is not to evaluate whether Guatemala’s actions would have withstood scrutiny under inapplicable standards, such as ICSID Article 52’s standard for determining whether there has been a “serious departure from a fundamental rule of procedure.”²⁶

8. Instead, the Tribunal must determine whether Claimant has satisfied its burden of proving that Guatemala failed to meet particular components of the standard of treatment *as required by CAFTA*. Section III demonstrates that Claimant articulates the incorrect legal standard under CAFTA and that it has failed to prove that Guatemala’s conduct fell below the correct standard of treatment — the minimum standard of treatment under customary international law — as well as the heightened and inapplicable standard on which Claimant relied.

9. In **Section IV**, we establish that Claimant has carried its burden on the full protection and security claim. There, the question is not whether Guatemala’s efforts with respect to interference would have been sufficient to satisfy its contractual obligations to clear the right-of-way of squatters. Instead, ***based on Guatemala’s resources, its legal framework, and the facts that were known at the time, the question is whether the measures that Guatemala took to protect Claimant’s investment***

²² See **Ex. R-329**, Parties’ Stipulation Regarding Respondent’s Document Request Nos. 38, 40, 42, 44, and 46 (February 2011) (“Parties’ Stipulation”).

²³ See Reply on the Merits, ¶ 376 (“Discretionary decisions such as these are manifestly arbitrary and result in a violation of the fair and equitable treatment standard”).

²⁴ Reply on the Merits, ¶ 348.

²⁵ Reply on the Merits, ¶ 348.

²⁶ See Reply on the Merits, ¶ 358 (quoting ICSID Convention Art. 52(1)(d)).

INTRODUCTION

were reasonable. Despite alleging that the *Lesivo* Declaration caused a “dramatic increase in public interference, theft and vandalism within the right-of-way,”²⁷ that Guatemala “*actively encouraged*”²⁸ harm to Claimant’s investment, and that “the only thing that Respondent was ‘diligent and proactive’ about after the *Lesivo* Resolution was in manufacturing a post-litigation evidentiary record in an attempt to bolster its full protection and security credentials,”²⁹ Claimant has failed to demonstrate that Guatemala’s actions fell short of its commitments under CAFTA. The facts show that Guatemala has at all relevant times taken reasonable steps to protect Claimant’s investment, both before and since the *Lesivo* Declaration. There simply has been no violation of Guatemala’s obligation to provide full protection and security under CAFTA.

10. Regarding Claimant’s national treatment claim, the relevant question for the Tribunal is ***whether Claimant satisfied its burden of proving that: (1) Claimant and Ramón Campollo were “in like circumstances;” and (2) Claimant actually received less favorable treatment as compared to Ramón Campollo.*** If the Tribunal finds that Claimant has met its burden with respect to both of these points, it must also consider whether there were any reasons that could justify any proven disparate treatment. As discussed in **Section V**, Claimant has failed to meet its burden on all of these elements.

11. As a threshold matter, Claimant has failed to prove that RDC, a commercial railroad operator in Guatemala, and Ramón Campollo, who is primarily in the business of sugar production, whose sugar operation in the Dominican Republic contained a non-commercial, very small rail system for internal company use only,³⁰ were competitors in the railroad business in Guatemala, and therefore “in like circumstances.” Claimant cannot make such showing. It similarly has failed to prove that Mr. Campollo was RDC’s competitor for use of the real estate rights arising from the right-of-way usufruct.

12. Even if Claimant could overcome this barrier, its national treatment claim would still fail due the absence of any proof that Claimant received less favorable treatment as compared to Mr. Campollo in either of these sectors. It simply is not true and has not been proven that the *Lesivo* Declaration was “beyond a doubt . . . issued in substantial part to facilitate Ramón Campollo’s takeover of FVG’s

²⁷ Reply on the Merits, ¶ 402.

²⁸ Reply on the Merits, ¶ 407.

²⁹ Reply on the Merits, ¶ 406.

³⁰ See Reply on the Merits, ¶ 413.

Usufruct rights and assets.”³¹ As demonstrated in Section V, there is no meaningful evidence of either a discriminatory intent or effect in relation to the *Lesivo* Declaration.

13. Finally, **Section VI** refutes Claimant’s damages arguments. Claimant resorts to obfuscation of the applicable legal standard to justify what is in essence a bold attempt to be placed not in the same position it would have been had the *Lesivo* Declaration never been issued, but in the position it would have been if it had not invested its money in FVG and instead had done so in a prosperous and profitable enterprise that generated a whopping 12.9% annual return on equity. FVG’s actual return on equity from inception until immediately prior to the *Lesivo* Declaration was minus twenty-six percent (-26%). Ultimately, the question for the Tribunal to decide is ***whether Claimant proved that: (1) it suffered quantifiable, compensable damages; and (2) whatever damages it suffered were proximately caused by the Lesivo Declaration.*** As is clear from the arguments in Section VI, *infra*, and from Dr. Spiller’s two Expert Reports, not only did Claimant not fulfill its burden of proof, but all evidence points clearly to the conclusion that its investment in FVG was worthless long before the *Lesivo* Declaration was issued and that the Declaration had no legal or practical effect on Claimant’s investment.

14. For the reasons set forth herein and in Guatemala’s Counter-Memorial, the claims against Guatemala are entirely without merit and should be dismissed.

³¹ Reply on the Merits, ¶ 420.

EXPROPRIATION

II. Guatemala Did Not Expropriate Claimant's Investment

15. Although Claimant now acknowledges that the *Lesivo* Declaration “in of [sic] itself, did not amount to a *de jure* nullification of Claimant’s investment under Guatemalan law,”³² it nevertheless insists that Guatemala indirectly expropriated its investment because the “*de facto* effect of the President’s declaration of *lesividad* against FVG was to make that company too risky to do business with on a going forward basis, thereby destroying the value of Claimant’s investment.”³³ Claimant has proven neither this allegation nor that Guatemala has breached the expropriation standard set forth in CAFTA.

16. Pursuant to Article 10.7.1 of CAFTA, Parties must not “expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization”³⁴ As Annex 10–C clarifies, “Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”³⁵

17. Though two types of expropriation claims are possible under Article 10.7.1 — direct and indirect — Claimant has invoked only the latter in this case. The parties agree that, as Annex 10–C of CAFTA provides, 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.”³⁶ Annex 10–C describes the fact-intensive indirect expropriation analysis that the Tribunal must undertake:

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:

³² Reply on the Merits, ¶ 229.

³³ Reply on the Merits, ¶ 229 (emphasis added); *see id.*, ¶ 231 (claiming that “regardless of whatever technical legal effect the *Lesivo* Resolution had or didn’t have on Claimant’s investment under Guatemalan law, the practical effect of the Resolution was to cause the financial and commercial decimation of Claimant’s investment.” (emphasis added)).

³⁴ **RL-61**, DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT Art. 10.7.1, 1 July 2006, IC–MT 012 (“CAFTA”) (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]”).

³⁵ **RL-61**, CAFTA Annex 10–C, ¶ 1.

³⁶ **RL-61**, CAFTA Annex 10–C, ¶ 4; *see* Reply on the Merits, ¶ 229, 236–37.

(i) the *economic impact* of the government action, although 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;

(ii) the *extent* to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the *character of the government action*.³⁷

18. As Guatemala explained in its Counter-Memorial, tribunals have considered a number of sub-issues that further inform their analysis of the three factors codified in Annex 10–C. As a threshold matter, and as Annex 10–C provides, a claimant must possess rights under domestic law; “[a]n action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.”³⁸ Next, a tribunal must evaluate the effect of the allegedly-expropriatory measure, considering whether (1) the measure interfered with the claimant’s rights; (2) this interference was so substantial that it could be considered equivalent in effect to a direct expropriation; and (3) such substantial interference is permanent, irrevocable, or irreversible. Finally, should a tribunal find that an indirect expropriation has taken place, pursuant to Article 10.7, it must consider whether such expropriation was lawful (including whether compensation is already due but has not yet been paid). Throughout this analysis, a tribunal must also consider “the character” of the allegedly-expropriatory measure (for instance, as it may relate to the extent of the alleged interference, or to the lawfulness of the expropriation).

19. Although at first glance Claimant appears to reject Guatemala’s articulation of the test for indirect expropriation — even claiming that “Respondent’s five-point ‘effects test’ for indirect expropriation finds no support in CAFTA or customary international law”³⁹ — a closer look reveals Claimant’s criticism to be a complaint regarding terminology. Whether any tribunal has actually used the terms “five point test” or “effects test” is a matter of sophistry rather than substance. What is important for the present case is first, that customary international law reflects a reliance on the five elements articulated by Guatemala as the essential aspects of an indirect expropriation, and, more

³⁷ **RL-61**, CAFTA Annex 10–C, ¶ 4(a) (emphasis added).

³⁸ **RL-61**, CAFTA Annex 10–C, ¶ 2.

³⁹ Reply on the Merits, ¶ 240.

EXPROPRIATION

importantly, that Claimant ultimately concedes that each of the elements described above is needed to demonstrate indirect expropriation.⁴⁰

20. Thus, in order for Claimant to successfully prove its indirect expropriation claim, the parties agree that ***Claimant must demonstrate, among other things, that issuance of (and the circumstances surrounding) the Lesivo Declaration caused a substantial, non-temporary interference with Claimant's property rights and "distinct, reasonable investment-backed expectations."***⁴¹ As demonstrated throughout this section, Claimant has failed to satisfy this burden.

21. With respect to the character of the measure here at issue, Claimant has mischaracterized the nature of the *lesividad* process, both in general and as it was applied to Contract 143/158. Because Claimant alleges that the issuance of the *Lesivo* Declaration was a conspiracy designed to take away Claimant's entire investment in order to give it to Mr. Ramón Campollo,⁴² Guatemala will address this allegation first, in Section II.A. As demonstrated therein, Claimant has utterly failed to prove this allegation.

22. Sections II.B and II.C address the heart of the Tribunal's expropriation inquiry, namely whether Claimant has satisfied its burden of demonstrating that the preliminary determination by the Executive branch that a single component of Claimant's investment — the equipment contract — was *lesivo* interfered with Claimant's entire investment (Section II.B), to the extent that the totality of the investment was left "worthless"⁴³ (Section II.C). Claimant has failed to show that the *Lesivo* Declaration had any legal⁴⁴ or practical effect upon the equipment contract; much less the substantial effect upon its entire investment required to sustain an expropriation claim under CAFTA. Should the Tribunal

⁴⁰ See, e.g., Reply on the Merits, ¶ 241 ("With respect to the first element of Respondent's alleged 'effects test' — the investor must demonstrate that it possesses rights in the investment under domestic law — *EnCana Corporation v. Republic of Ecuador* merely states that, for there to be an expropriation of an investment, 'the rights affected must exist under the law which creates them.' . . . [T]he meaning of the *EnCana* tribunal's dictum is akin to CAFTA's requirement that, for there to be an expropriation, there must be a property right or property interest with which the government's actions interfere").

⁴¹ **RL-61**, CAFTA Annex 10–C, ¶ 4(a).

⁴² See, e.g., Reply on the Merits, ¶ 318 (asserting that Guatemala intended "to bludgeon Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and 'other investors' interested in the railway such as Ramón Campollo").

⁴³ See Reply on the Merits, ¶¶ 263, 270, 396, 428, 529, 555, 571.

⁴⁴ In fact, Claimant concedes that the *Lesivo* Declaration had no legal effect whatsoever upon *any* of the contracts which comprise the Usufruct. See Reply on the Merits, ¶ 229.

nevertheless find that Guatemala indirectly expropriated Claimant's investment, Section II.D explains that the elements of an "unlawful" expropriation do not exist in this case.

23. Finally, Section II.E responds briefly to Claimant's contention that the *Shufeldt Claim* "is on all fours with the present case,"⁴⁵ demonstrating that it is inapposite to the Tribunal's determination.

A. Claimant Misconstrues The Character Of The Measure At Issue In This Case

24. Pursuant to Annex 10–C of CAFTA, tribunals evaluating indirect expropriation claims are instructed to consider the "character of government action."⁴⁶ Here the parties have sharp differences.

25. Claimant takes many liberties in describing the nature of the *lesividad* process, both in general and as it was applied in this case. Though high on rhetoric, Claimant's Reply offers little actual proof of the character of Guatemala's actions.

26. Claimant contends that the *Lesivo* Declaration was "an exercise of governmental fiat, conducted in secret and directed by the top echelon of the Government of Guatemala, targeted to repudiate a foreign investment . . . and used to coerce Claimant into either substantially giving up its property rights or forcing it to abandon its investment without any compensation,"⁴⁷ that this "was the explicit agenda,"⁴⁸ and that "the record documents it fully,"⁴⁹ yet the record proves no such thing. Claimant continues this cavalier approach throughout its Reply, claiming that "Respondent's witnesses in this case freely admit the Government's bad faith motivation behind the *Lesivo* Resolution,"⁵⁰ that "all of the credible evidence presented shows that the Government issued the *Lesivo* Resolution with a discriminatory intent and for a discriminatory purpose,"⁵¹ and that Guatemala "actively encouraged" harm to Claimant's investment "with its numerous public statements in the wake of the *Lesivo*

⁴⁵ See Reply on the Merits, § III.B.8.

⁴⁶ **RL-61**, CAFTA Annex 10–C, ¶ 4(a)(iii).

⁴⁷ Reply on the Merits, ¶ 290.

⁴⁸ Reply on the Merits, ¶ 290 (emphasis added).

⁴⁹ Reply on the Merits, ¶ 290.

⁵⁰ Reply on the Merits, ¶ 2 (emphasis added).

⁵¹ Reply on the Merits, ¶ 319 (emphasis added).

EXPROPRIATION

Resolution, which informed the citizenry of Guatemala in no uncertain terms . . . that the Government was going to take the railroad away from FVG and award it to someone else.”⁵²

27. The facts do not support Claimant’s exaggerated rhetoric.

1. Claimant Has Failed To Prove Its Allegation Of Expropriatory Intent

28. Despite the many pages sacrificed to its conspiracy theory, Claimant has failed to provide any objective proof that the Government intended to transfer Claimant’s investment to Mr. Ramón Campollo by using the *lesividad* process for Contract 143/158. Claimant’s description of events is restricted to hearsay, mischaracterizations of its own documents, and the subjective impressions of interested witnesses (who are not, at any rate, Government officials whose impressions might have been relevant for evaluating Guatemala’s intent).

29. First, the evidence does not support Claimant’s allegation that the Government used the *lesividad* process “to force Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and ‘other investors’ interested in the railway such as Ramón Campollo.”⁵³ Despite repeatedly ascribing statements to Mr. Pinto threatening “that the government would most likely kick [FVG] out should there be no agreement with [Mr. Campollo’s group],”⁵⁴ that “it was not going to be too long . . . before the Government would ‘take the railway from Ferrovías [FVG]”⁵⁵ and that “the rules would change by the end of the month,”⁵⁶ Claimant has failed to tie this unreliable hearsay to any Government intent or action. Claimant has also failed to show that Mr. Pinto was in fact authorized to act on Mr. Campollo’s behalf when making these or any other statements on which Claimant relies (an assertion which Mr. Campollo himself rejects)⁵⁷ or that there was any collusion between Mr. Campollo and the Government intended to transfer Claimant’s Usufruct rights to Mr.

⁵² Reply on the Merits, ¶ 407.

⁵³ Reply on the Merits, ¶ 288.

⁵⁴ Memorial on the Merits, ¶ 53.

⁵⁵ Memorial on the Merits, ¶ 63.

⁵⁶ Memorial on the Merits, ¶ 65.

⁵⁷ Witness Statement of R. Campollo, ¶¶ 24–25; see Second Witness Statement of R. Campollo, ¶ 20.

Campollo (a claim which Mr. Campollo and Mr. J.E. Berger both reject).⁵⁸ Claimant's reliance on the "Desarrollos G proposal" for this point is also misplaced; although a company named Desarrollos G was in fact incorporated to "carry out railway activities" and exercise real estate rights,⁵⁹ Claimant has not proven that Mr. Campollo ever had an interest — or even a share — in such company.⁶⁰ Thus, the best that can be said about this evidence is that it relates to a company that had some relation with Mr. Pinto — not with Mr. Campollo or with the Government — that never carried out any railway activities or ever was anything other than the vehicle for conceptual and very preliminary ideas by Mr. Pinto that never got past the most initial planning stages.

30. Moreover, Claimant has been unable to overcome the substantial documentary evidence which explicitly states the Government's interest was in continuing its relationship with FVG and having a functioning railroad.⁶¹ Nor does Claimant's concocted story make any sense. If the Government's goal was to have an operational nationwide railroad, why would it attempt to achieve this goal by breaking its own laws to transfer the railway rights to a man who had no experience whatsoever operating a railroad as a public service and no interest whatsoever in taking on this business?⁶² And why would it negotiate with Claimant for years to try and fix the problems with the railway enterprise in Guatemala, including in the months just before and after the *Lesivo* Declaration was issued? Wouldn't a government that was interested in taking away these usufruct rights to give them to a third party just find a way to do so without undertaking all of these negotiations?

31. Second, there are other important reasons why there is no logic to support Claimant's story. Claimant has been unable to explain, for example, why the Government would attempt to "to force Claimant into surrendering its substantive rights under Contracts 402 and 820"⁶³ by initiating *lesividad*

⁵⁸ First Witness Statement of R. Campollo, ¶¶ 32–34; see Second Witness Statement of R. Campollo, ¶¶ 24–26; First Witness Statement of J.E. Berger, ¶¶ 13, 18, 19, 21; Second Witness Statement of J.E. Berger, ¶¶ 7–9.

⁵⁹ See Reply on the Merits, ¶ 415 (citing **Ex. C-98**, 2005-03-03, Corporate Registration of Desarrollos G).

⁶⁰ **Ex. R-332**, Mercantile Registry File re: Desarrollos G.

⁶¹ See **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex No. 7; see also **Ex. R-23**, 4-3-2006, Minutes from the High Level Commission Meetings; First Witness Statement of R. Campollo, ¶¶ 32–34; see Second Witness Statement of R. Campollo, ¶¶ 15, 24–26; Second Witness Statement of M. Marroquín, ¶ 9.

⁶² Second Witness Statement of R. Campollo, ¶ 9.

⁶³ Reply on the Merits, ¶ 288.

EXPROPRIATION

proceedings for *Contract 143/158*. Nor has it been able to explain how the Government could use the *Lesivo* Declaration as a “threat instrument” to secure these goals while simultaneously keeping the process “secret,” such that Claimant cannot recall “a single document prior to the *Lesivo* Resolution where it informed Claimant that it viewed Contracts 143/158 as . . . *lesivo*.”⁶⁴ It would stand to reason that if Guatemala were using a declaration of *lesividad* as an instrument of pressure to negotiate a better deal for itself, it would wield that *lesivo* sword in front of Claimant often, would it not? But the evidence is all to the contrary. Claimant also cannot explain why Guatemala would attempt to force Claimant into surrendering its rights by choosing the *lesividad* process, which requires oversight and approval from the judiciary, why it would choose a process that permits Claimant to retain all of its rights under Contract 143/158 until such judicial approval is granted, or why it would use this process when it would have no effect whatsoever upon Claimant’s rights under its other contracts relating to the railway business. Wouldn’t the Government have chosen a different, more effective and efficient mechanism to usurp Claimant’s Usufruct rights if this were really its intention?

32. Third, Claimant has been unable to prove its allegation that Guatemala’s expropriatory intent is demonstrated by “numerous newspaper, television and radio reports issued in Guatemala concerning the *Lesivo* Resolution in the days and weeks after it issued.”⁶⁵ These statements — which, as Claimant itself notes,⁶⁶ were made *after* the *Lesivo* Declaration was issued — in no way demonstrate the Government’s intent in issuing the *Lesivo* Declaration. As proven methodically in the Counter-Memorial, the *lesividad* process moved logically and reasonably from discovery of a problem to a chosen solution, and from the lowest-level officials up to the President. It was a procedure that ran its normal course and which was not influenced in the least by any of the sinister conspiracy theories advanced by Claimant.

33. Here is what the facts show. The illegalities in Contract 143/158 were discovered by Dr. Gramajo, FEGUA’s Overseer, shortly after he assumed that role.⁶⁷ Upon receiving a request for equipment from FVG General Manager Jorge Senn, Dr. Gramajo forwarded that request to FEGUA’s

⁶⁴ Reply on the Merits, ¶ 281.

⁶⁵ Reply on the Merits, ¶ 218; see below, ¶¶ 92–97 for a more-detailed discussion of the newspaper and television reports cited by Claimant.

⁶⁶ Reply on the Merits, ¶ 218.

⁶⁷ First Witness Statement of A. Gramajo, ¶¶ 10–11; Second Witness Statement of A. Gramajo, ¶ 3.

Legal Department, along with his own request for advice on how to respond.⁶⁸ After reviewing Contract 143/158, FEGUA's Legal Department notified Dr. Gramajo that the contract suffered from illegalities.⁶⁹ Dr. Gramajo informed FVG, and the parties attempted to negotiate resolution of the defects for about a year.⁷⁰ Claimant itself wrote to the Ministry of Communications in November 2004 to apprise it of these negotiations and the reason the negotiations were necessary.⁷¹

34. In parallel and when it was clear that the negotiations with FVG were not advancing, Dr. Gramajo sought advice from the legal departments of other Government entities, from outside counsel and from the Attorney General of Guatemala as to whether Contract 143/158 was illegal and, if so, on how to proceed.⁷² Each response confirmed that Contract 143/158 was illegal and *lesivo* to the interests of Guatemala and that it could not continue without remedying the illegalities, including through the issuance of a *lesivo* declaration. Hoping to find a solution, but planning in case a solution was not achievable, the Government continued negotiating with Claimant to solve the problems that Contract 143/158 presented while still maintaining the relationship with FVG, and evaluating internally its legal options should a solution not be reached.⁷³ When negotiations failed, the Government utilized a remedy rooted in its laws that pre-dated Claimant's investment in Guatemala, and which had been recommended by the legal departments in multiple independent agencies, including the Attorney General of the country.

35. There is no evidence whatsoever of a concerted strategy designed to deprive Claimant of its rights under the usufruct contracts, or to transfer those rights to Mr. Campollo. The fact that, when (1) after the *Lesivo* Declaration was issued, and (2) in response to questions from reporters about Guatemala's relationship with FVG — and not specifically about the motivation behind issuing the *Lesivo*

⁶⁸ First Witness Statement of A. Gramajo, ¶ 11; Third Witness Statement of A. Gramajo, ¶ 4.

⁶⁹ **Ex. R-8**, 2004-04-14, FEGUA Opinion 47-2004; see First Witness Statement of A. Gramajo, ¶ 11.

⁷⁰ See Second Witness Statement of A. Gramajo, ¶¶ 5-7; Third Witness Statement of A. Gramajo, ¶ 4.

⁷¹ See **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

⁷² 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; First Witness Statement of A. Gramajo, ¶¶ 18-19, 22.

⁷³ See First Witness Statement of A. Gramajo, ¶¶ 19-20.

EXPROPRIATION

Declaration — certain Government officials discussed Claimant’s failure to rehabilitate the railway or comply with other contractual obligations,⁷⁴ is completely insufficient to refute this conclusion.

2. Even Assuming Claimant Could Prove Its Allegation Of Expropriatory Intent, Such Intent Standing Alone Would Be Insufficient To Justify A Finding Of Expropriation

36. Although Claimant’s allegations of conspiracy and corruption are wholly speculative and unproven, even a strong showing of expropriatory intent would be insufficient standing alone to constitute expropriation.⁷⁵ Indeed, as the *Waste Management II* tribunal found, “[i]ndividual statements . . . 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.*”⁷⁶ The tribunal in *Tradex Hellas v. Albania* reached a similar conclusion, declining to characterize a speech by Albania’s President as an expropriation.⁷⁷ Though the speech emphasized the government’s intention to implement certain measures which would have been expropriatory, because no action was in fact taken, the tribunal rejected the claimant’s expropriation claim.⁷⁸ These cases reflect an understanding that the intent behind a particular measure is by no means determinative of its expropriatory nature; as stated above, the determinative factor is the severity of *actual* interference with an investment.

37. As will be thoroughly discussed below in Sections II.B and II.C, the *Lesivo* Declaration had no effect whatsoever upon Claimant’s investment (much less the substantial and lasting effect required to constitute an indirect expropriation).

⁷⁴ See Reply on the Merits, ¶¶ 218–20 (discussing media reports and public stations “concerning the *Lesivo* Resolution in the days and weeks after it issued,” and claiming that they “consistently reported that the President’s decision to declare the usufruct equipment contract *lesivo* had nothing to do with any alleged legal defects in this contract and everything to do with the Government’s desire to extract major concessions from FVG on the terms of the other usufruct contracts”).

⁷⁵ See **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*”).

⁷⁶ **RL-136**, *Waste Management II Award*, ¶ 161.

⁷⁷ **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*”).

⁷⁸ **RL-168**, *Tradex Award*, ¶¶ 156–57.

B. Guatemala Has Not Interfered With Claimant's Investment, Its Property Rights, Or Any Reasonable Investment-Backed Expectations

38. In its Reply, Claimant makes several key concessions which should be fatal to its case. First, it concedes that, as a legal matter, Guatemala has not interfered with any of the contracts which comprise its investment.⁷⁹ Second, and also as a legal matter, Claimant concedes that the *Lesivo* Declaration concerned *only* its rights under Contract 143/158.⁸⁰ Third, as a practical matter, Claimant has conceded that it remains in possession of not only the railroad equipment that was the subject of the *Lesivo* Declaration, but also of all of the property contemplated under Contract 402,⁸¹ its "Master Usufruct Contract."⁸² Fourth, Claimant has conceded that it continues to profit from real estate contracts and leases, and that these profits have *increased* since Guatemala issued the *Lesivo* Declaration.⁸³ These uncontested facts are all that the Tribunal needs to deny Claimant's expropriation claim.

39. Despite these concessions, Claimant insists that the initial declaration of *lesividad* with respect to Contract 143/158 somehow interfered with its *entire* investment — *i.e.*, with the additional railroad projects which Claimant argues it did not need to undertake (and for which, Claimant admits, the railway equipment would not be necessary) and also with the real estate operations which accounted for 92 percent of the investment's income.

40. According to Claimant, the *Lesivo* Declaration effectively destroyed the entirety of its investment because: (1) the Government's intention in issuing the *Lesivo* Declaration was to deprive Claimant of its rights under Contract 402;⁸⁴ (2) Contracts 143/158 and 402 are interrelated to the point where interference with the equipment contract constitutes interference with (or deprivation of) the rights under Contract 402 to operate the railway and to earn real estate income;⁸⁵ and (3) "all involved"

⁷⁹ See Reply on the Merits, ¶ 229.

⁸⁰ Reply on the Merits, ¶ 263 ("[T]he *Lesivo* Resolution on its face only concerns Contracts 143/158").

⁸¹ See Memorial on the Merits, ¶¶ 126, 130; see also Reply on the Merits, ¶¶ 263.

⁸² Reply on the Merits, 268.

⁸³ See **Ex. R-329**, Parties' Stipulation.

⁸⁴ See, e.g., Reply on the Merits, ¶ 288.

⁸⁵ See e.g., Reply on the Merits, ¶¶ 260–63.

EXPROPRIATION

understood that the issuance of the *Lesivo* Declaration was a death sentence for Claimant's entire investment.⁸⁶

41. As demonstrated below, these arguments are factually and legally without merit, and the *Lesivo* Declaration has had no decisive practical effect on Claimant's investment.

1. The *Lesivo* Declaration Did Not Interfere With Claimant's Rights, If Any, Under Contract 143/158

42. Claimant has provided no evidence whatsoever that the *Lesivo* Declaration had an effect upon any rights it may have under Contract 143/158.

43. As Guatemala demonstrated in its Counter-Memorial,⁸⁷ and as Mr. Aguilar states in both of his expert reports,⁸⁸ a *lesivo* declaration is only a preliminary conclusion by the Executive branch that there is enough evidence to instruct the Attorney General to file a complaint before the *Contencioso Administrativo* Court so that the judiciary may determine whether a particular contract is, in fact, *lesivo*.⁸⁹

44. A declaration of *lesividad*, therefore, is only the first formal step of a process that, in this case, is currently taking place in the *Contencioso Administrativo* Court. As the Constitutional Court held in 2008 with respect to Claimant's property, Claimant retains its full rights under Contract 143/158 during the pendency of the *Contencioso Administrativo* proceedings related to that Contract.⁹⁰ The Constitutional Court also acknowledged that Claimant would be afforded a full opportunity to be heard in defense of Contract 143/158 in that proceeding.⁹¹ To provide an analogy, a *lesivo* declaration is akin to a criminal complaint in the common law system. Much as a complaint represents only a preliminary decision that there is sufficient evidence to initiate a criminal prosecution proceeding, a *lesivo* declaration is only a preliminary decision that there is sufficient evidence to initiate a formal proceeding in the *Contencioso*

⁸⁶ See *e.g.*, Reply on the Merits, ¶¶ 268, 271.

⁸⁷ Counter-Memorial on the Merits, ¶¶ 263–67.

⁸⁸ First Expert Report of J.L. Aguilar, ¶¶ 32, 35–36; Second Expert Report of J.L. Aguilar, ¶ 45.

⁸⁹ See **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, *Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010).

⁹⁰ See **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala, File No. 2498-2006, p. 4.

⁹¹ See **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala, File No. 2498-2006, p. 4.

Administrativo Court. Just as an assessment and final determination of formal charges will be completed by a criminal court, an assessment and final determination of the *lesividad* of a particular contract is made by the *Contencioso Administrativo* Court. The private party that is the subject of a *lesivo* declaration is not consulted during the initial investigative phase which precedes the issuance of the declaration, much like a private party that is the subject of a criminal indictment is not normally consulted during the preparation of an indictment (except for purposes of fact-finding).

45. Claimant has not lost any rights it may have, if any, under Contract 143/158 simply because Guatemala initiated *lesividad* proceedings by way of the *Lesivo* Declaration. This is true both as a legal matter (as the Guatemalan Constitutional Court has maintained)⁹² and as a factual matter (as Claimant concedes).⁹³ As agreed by both parties, the *Lesivo* Declaration does not dispossess Claimant of any legal rights it may have under Contract 143/158, if any. Because “Governments do not repudiate obligations merely by contesting their existence,”⁹⁴ and because Claimant has been unable to demonstrate that the *Lesivo* Declaration had any legal effect whatsoever upon Contract 143/158 — the single component that the *Lesivo* Declaration addressed — it has accordingly failed to meet even the threshold criteria for sustaining its expropriation claim.

46. It also is undisputed that Claimant retains possession of the railway equipment and that the *Lesivo* Declaration left its possessory rights in this equipment undisturbed.

2. The *Lesivo* Declaration Did Not Interfere With Claimant’s Rights Under The Most Lucrative Component Of Its Investment: Contract 402

47. Despite conceding that the “*Lesivo* Resolution on its face only concerns Contracts 143/158,”⁹⁵ and even that “Claimant could still exercise its rights under Contract 402 and Contracts 143/158 after

⁹² See **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala, File No. 2498-2006; see also **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, *Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010).

⁹³ See Memorial on the Merits, ¶ 126 (admitting that “FVG still retained nominal control of the rolling stock after the Government declared *lesivo* because, under Guatemalan law, the Government could not legally seize the equipment until it obtained a court order confirming the *Lesivo* Resolution”).

⁹⁴ **RL-98**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481 (Award, 3 February 2006) (Crawford, Grigera Naón, Thomas), ¶ 194 (“*EnCana Award*”).

⁹⁵ Reply on the Merits, ¶ 263.

EXPROPRIATION

the *Lesivo Resolution*,”⁹⁶ Claimant nevertheless contends that the *Lesivo* Declaration interfered with its “*entire Usufruct*.”⁹⁷ Claimant’s contention is incorrect.

48. The main flaw in Claimant’s argument is that Claimant fails to distinguish between the two types of rights that compose Contract 402, railroad operation rights and real estate rights. With respect to its railroad operation rights, because Claimant retains both nominal *and actual* possession of the equipment covered by Contract 143/158, Claimant has failed to demonstrate that the *Lesivo* Declaration caused any interference. Moreover, as Guatemala explained in its Counter-Memorial, any effect upon railroad operations was likely due to the poor quality of Claimant’s railroad operation, or Claimant’s unilateral decision to cease railway operations in 2007. The head of FEGUA’s engineering department — Miguel Angel Samayoa — also confirms the poor quality of Claimant’s rehabilitation and operation efforts as a reason why FVG lost clients.⁹⁸ Claimant’s own investment partner stated that while it had “many times tried to use Ferrovías service [it had] not been able to do it because of the management’s inefficiency in providing solutions to move said cargo.”⁹⁹

49. For his part, Osvaldo Morales, the Executive Director of the Metallurgical Industries Union, explains that the main entities that comprise his union ceased to use the railway “as a method of transport because [FVG] had ceased railway operations in Guatemala in 2007. None of the entities contacted mentioned the declaration of *lesividad* of the railway equipment contract” as the reason why they ceased using FVG’s service.¹⁰⁰ Rather, they stopped using the rail service, because FVG stopped offering it, and they would likely use it again today if it were being offered.¹⁰¹

50. As is discussed in the next section, even if Claimant could demonstrate that the *Lesivo* Declaration interfered with Claimant’s right to continue operating Phase I of the railroad project — which, as Claimant concedes, is the only phase which would have used the rolling stock covered by

⁹⁶ Reply on the Merits, ¶ 263 (emphasis added).

⁹⁷ Reply on the Merits, ¶ 263.

⁹⁸ First Witness Statement of M. Samayoa, ¶ 20 (“Consequently, I understand that Ferrovías began to lose customers because they were not interested in using this means of transportation due to the uncertainty of when their cargo would reach its destination or if it would never arrive as a result of derailments”).

⁹⁹ **Ex. R-327**, 2007-05-02, Letter from Cementos Progreso to RDC.

¹⁰⁰ Witness Statement of O. Morales, ¶ 4.

¹⁰¹ Witness Statement of O. Morales, ¶ 5.

Contract 143/158¹⁰² — such interference is by no means sufficiently substantial to constitute the expropriation of the entire investment that Claimant alleges.

51. With respect to real estate operations, Claimant has not only failed to show that the *Lesivo* Declaration caused any effect, but has in fact conceded that no effect was possible: “[I]t was not necessary for FVG to have an operating railway in order to lease and develop successfully the majority of the railway real estate it had been granted in usufruct.”¹⁰³ Also, as Claimant has stipulated for the record, except for one year, Claimant’s revenues have increased every year since the *Lesivo* Declaration.¹⁰⁴

3. Claimant Has Proven Neither That Its Investment-Backed Expectations Were Reasonable Nor That Guatemala Interfered With Them

52. In its Reply, rather than contest (or even mention) the standard that Guatemala articulated in its Counter-Memorial, Claimant appeared to proceed on the basis that all of its alleged expectations — including one that it would earn “an above average return on its investment”¹⁰⁵ were reasonable. For this reason, Guatemala will briefly re-articulate the applicable standard before demonstrating the reasons why Claimant’s expectations were either unreasonable (and thus not protected by CAFTA) or why Guatemala did not interfere with Claimant’s expectations.

53. As is the case with the other elements of indirect expropriation under CAFTA, an investor’s reasonable expectations must be evaluated in light of the specific facts of the case.¹⁰⁶ Assessing an investor’s expectations requires an objective finding that such expectations are reasonable; an investor’s subjective impressions and unreasonable expectations with respect to its investment are insufficient to bind a State. Thus, factors which might be relevant include laws that exist at the time an investor invests — based on the investor’s duty to investigate and understand the laws of the host State¹⁰⁷ (or to invest at its own risk)¹⁰⁸ — along with an investor’s prior experience within the host State,

¹⁰² See Reply on the Merits, ¶ 261.

¹⁰³ Memorial on the Merits, ¶ 179; see Reply on the Merits, § II.C.

¹⁰⁴ Ex. R-329, Parties’ Stipulation.

¹⁰⁵ Reply on the Merits, ¶ 272.

¹⁰⁶ See RL-61, CAFTA Annex 10–C, ¶ 4.

¹⁰⁷ RL-155, CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.140 (Oxford University Press, 2007) (“CAMPBELL MCLACHLAN ET AL, INTERNATIONAL

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EXPROPRIATION

and the existence (or lack thereof) of specific representations by officials of the host State.¹⁰⁹

Additionally, investors are presumed to implicitly accept the laws of the host State in place at the time of the investment,¹¹⁰ and the investor's expectations are shaped by this acceptance.¹¹¹ Investors may reasonably expect the "consistent application"¹¹² of laws and regulations in the host State, but not the "modification of the laws of the host country."¹¹³

54. As Guatemala explained in detail in the Counter-Memorial, based on the circumstances surrounding Claimant's investment, with respect to Contract 143/158, Claimant could have no legitimate expectation of permanent and irrevocable validity; as with any contract, the permanent validity of Contract 143/158 remained contingent *inter alia* upon meeting the conditions precedent for the contract's validity, its compliance with local laws and bidding requirements, its continued performance, and upon surviving the statutes of limitation for rescission, revocation and, in this case, *lesividad*. In its Reply, Claimant mischaracterizes Guatemala's argument, suggesting Guatemala's

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INVESTMENT ARBITRATION") (discussing **RL-104**, *International Thunderbird Award* and citing as examples **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*"); **RL-108**, *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Award, 13 November 2000) (Orrego Vicuña, Burgenthal, Wolf) (confirmed by the tribunal in *Waste Management II*)).

¹⁰⁸ As L. Yves Fortier and Stephen L. Drymer have noted, "[w]hen 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*.'" **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 FILJ 293, 327 (2004) ("Fortier and Drymer, *Indirect Expropriation in the Law of International Investment*"); see **RL-104**, *International Thunderbird Gaming Corporation v. Mexico*, Ad hoc — UNCITRAL Arbitration Rules, IIC 136 (Award, 26 January 2006) (van den Berg, Wälde, Portal-Arriosa) ("*International Thunderbird Award*").

¹⁰⁹ **RL-115**, *National Grid, P.L.C. v. Argentine Republic* (Award, 3 November 2008) (Garro, Kessler, Rigo Sureda), ¶ 152 ("*National Grid Award*") (quoting JAN PAULSSON AND ZACHARY DOUGLAS, *INDIRECT EXPROPRIATION IN INVESTMENT TREATY ARBITRATIONS* (2004) ("[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."); **RL-136**, *Waste Management II Award*, ¶ 98; see **RL-155**, CAMPBELL MCLACHLAN ET AL, *INTERNATIONAL INVESTMENT ARBITRATION* ¶ 7.105.

¹¹⁰ **RL-149**, L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment*, p. 327; see **RL-104**, *International Thunderbird Award*.

¹¹¹ **RL-155**, CAMPBELL MCLACHLAN ET AL, *INTERNATIONAL INVESTMENT ARBITRATION* ¶ 7.107 (citing *The Oscar Chinn Case* (1934) PCIJ Rep Series A/B No. 63); see **RL-147**, R. Dolzer, *Indirect Expropriations; New Developments?* (2002) 11 NYU ENVIRONMENTAL LAW JOURNAL 64, 78–79.

¹¹² See **RL-113**, *MTD Award*, ¶ 209.

¹¹³ See **RL-113**, *MTD Award*, ¶ 214.

contention was that Claimant could have no reasonable expectation because Claimant should have known Contract 143/158 was *lesivo*.¹¹⁴ In fact, Guatemala’s argument was that in light of Claimant’s knowledge of and experience with Government contracts in Guatemala, as well as its recognition that Contract 143/158 suffered from legal defects (as evidenced by Claimant engaging in negotiations to cure the defects and writing to the Government to request that that it formally acknowledge that Contract once the negotiations to cure the defects were concluded), Claimant had constructive and actual knowledge that Contract 143/158 suffered from legal deficiencies that made it subject to challenge under applicable Guatemalan law, including the law that permits the Executive to declare *lesivo* a contract that suffers from these legal defects. This is especially the case where Claimant has not cited to any Government undertaking upon which it relied to the effect that the *lesivo* law would not be applied as against its investment. Given these circumstances and given the existence of the *lesivo* law when Claimant won the bids for the usufruct contracts and when it later executed Contract 143/158, it could not have had a legitimate expectation that Contract 143/158 would be exempt from challenge under the *lesivo* law. Any such expectation, if it is deemed to exist, is simply unreasonable.

55. In its Reply, Claimant responds to this argument by claiming to have had a reasonable expectation that Contract 143/158 was valid and enforceable. According to Claimant, this expectation comes from “various” specific representations made by the Government over a number of years and from the performance of the contract.¹¹⁵ Claimant also asserts that the expectation of validity stems from the fact that the Government never brought a civil action to challenge Contract 143/158.¹¹⁶ These arguments are irrelevant and unavailing.

56. First, in light of Claimant’s duty to investigate host State laws, and its prior experience with government contracts in Guatemala, Claimant’s insistence that “the representations and assurances of FEGUA Overseer Sarceño”¹¹⁷ were sufficient to create an investment-backed expectation of permanent validity despite deficiencies is far from reasonable.

¹¹⁴ See, e.g., Reply on the Merits, ¶ 273 (“Respondent argues that Claimant could not have had a reasonable expectation that Contracts 143/158 were not ‘harmful to the interests of the State’”).

¹¹⁵ Reply on the Merits, ¶¶ 273–75.

¹¹⁶ Reply on the Merits, ¶ 280.

¹¹⁷ Reply on the Merits, ¶ 275.

EXPROPRIATION

57. As Guatemala demonstrated in its Counter-Memorial, Claimant was well-aware that Guatemalan law required a public bid for Government contracts. This requirement was not only found in the law that existed at the time Claimant invested,¹¹⁸ and could have been divined as a result of the process Claimant had gone through for each of the Contracts that comprised its Usufruct (other than Contract 143/158). As Claimant acknowledged, a bid was required even when only one company actually submitted a bid proposal.¹¹⁹ Claimant also 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.

58. 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, his Cabinet and his Secretary General via *Acuerdo Gubernativo*. Claimant was specifically informed of this requirement, as it was part of the bidding requirements and procedure followed for both Contracts 402¹²⁰ and 41.¹²¹ Claimant was acutely aware that the lack of Executive approval could lead to the invalidity of a Contract, this being the very reason why Contract 41 never entered into force; a fact that Claimant concedes.¹²² That it entered into Contract 143/158 and, in violation of Guatemalan law, tried to contract away this legal requirement cannot create a legitimate expectation that the absence of this legal requirement would not later be challenged by the Government using a legal remedy that existed when Claimant entered into this Contract.

¹¹⁸ See Expert Report of J.L. Aguilar, ¶¶ 93–99.

¹¹⁹ 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 Witness Statement of H. Posner, ¶ 9); see **Ex. R-183**, Score Sheet of the Bid Selection Committee for Contract 41.

¹²⁰ See **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 3.6.4.

¹²¹ See **Ex. R-2**, 1997-11, Bidding Rules for Contract 41, § 6.4; 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).

¹²² See Memorial on the Merits, n. 35.

59. Second, the fact that the Government never brought a civil action to challenge Contract 143/158 is insufficient to create a reasonable expectation of the permanent and irrevocable validity of that Contract — especially in light of the fact that Guatemala complied with the statute of limitations for initiating *lesividad* proceedings. There is no justification for Claimant’s contention that, when there are multiple remedial options for resolving a problem, failure to use one option could somehow preclude the State from using another. Accepting Claimant’s approach would mean that once the Government decided not to pursue a legal option, then no other options would be available to it. But the Government never made any undertaking to Claimant that it would do this (*i.e.*, forego other legal remedies when it decided not to pursue a particular one), and neither Guatemalan nor international law dictates such a requirement.

60. Third, performance of a contract cannot, as Claimant contends, preclude Guatemala from utilizing pre-existing measures, within their time limits, to remedy legal defects under that contract. A bright-line ruling that a State is precluded from questioning the validity of a contract because it had performed under that contract — which, when taken to the extreme, could prevent even contracts initiated under coercion or through bribery — would severely and improperly restrict State sovereignty. Moreover, in the present case, it would prevent Guatemala from even *asking* the *Contencioso Administrativo* Court to determine the *lesividad* of Contract 143/158, despite that Claimant was aware that both a public bid and Executive approval were required for that Contract, and despite the fact that Claimant appears to suggest it would not have been troubled if the Government had taken measures which would have immediately terminated Contract 143/158.¹²³ It also would be tantamount to telling Claimant that it could benefit from its own misconduct in willfully avoiding legal requirements that it accepted when it made its investment. Claimant cannot reasonably expect that it could enter into a contract that avoids legal requirements that Claimant had previously accepted and that performing under that contract would wipe away these illegalities. That is not a reasonable expectation, nor one that international law would or should countenance.

61. The remainder of Claimant’s argument boils down to an assertion that it “certainly had no expectation or understanding that these alleged defects [in Contract 143/158] rendered these contracts *lesivo*, *i.e.*, harmful to the interests of the State.”¹²⁴ Claimant spills considerable ink on this argument,

¹²³ See Reply on the Merits, ¶ 348.

¹²⁴ Reply on the Merits, ¶ 283.

EXPROPRIATION

claiming that the Executive branch's decision to declare Contracts 143/158 *lesivo* was incorrect, entering into a lengthy explanation as to the reasons why Contract 143/158 did not actually require executive approval¹²⁵ or need a public bid,¹²⁶ or suffer from essential legal defects,¹²⁷ and why "if the President decides to declare a contract *lesivo*, it should *not be* solely because the contract suffers from technical legal defects."¹²⁸ However, Claimant's arguments in this regard completely miss the mark.

62. As stated throughout this Rejoinder, the Tribunal's mandate is not to determine whether Contract 143/158 was in fact *lesivo*, but instead to assess whether Claimant has satisfied its burden of proving an investment treaty breach.¹²⁹ Whether Contract 143/158 was in fact *lesivo* is an issue that is currently being considered by the *Contencioso Administrativo* Court, the proper venue for that decision.

63. It is therefore irrelevant, as Claimant asserts, that Guatemala's argument is "based on legal opinions that have never been confirmed by a court of law."¹³⁰ The very purpose of the *Contencioso Administrativo* Court proceedings is to determine whether or not these opinions are correct. Similarly irrelevant is Claimant's position that "[t]here is no legal authority or precedent under Guatemala [sic] law which supports [the assertion that a contract] which does not comply with the technical legal requirements of the law is, by definition, *lesivo*."¹³¹ This argument, too, is reserved for the *Contencioso Administrativo* Court.

64. The question for this Tribunal is whether the Government acted reasonably — both in reaching its initial conclusion that Contract 143/158 was *lesivo*, and in subsequently issuing the *Lesivo* Declaration. The answer to both questions are a resounding yes. The evidence establishes that a number of separate government officials all carefully studied whether Contract 143/158 was *lesivo*, and they each concluded that it was. Even if these officials in good faith reached an incorrect legal determination about whether this contract was *lesivo* — which Guatemala contends they did not do — that does not constitute an expropriation under CAFTA or a violation of any legitimate expectation

¹²⁵ Reply on the Merits, ¶¶ 276, 280.

¹²⁶ Reply on the Merits, ¶ 277.

¹²⁷ Reply on the Merits, ¶ 278–79.

¹²⁸ Reply on the Merits, ¶ 297.

¹²⁹ See Reply on the Merits, ¶¶ 273–75.

¹³⁰ Reply on the Merits, ¶ 255.

¹³¹ Reply on the Merits, ¶ 284; see Reply on the Merits, ¶¶ 278–29, 287.

Claimant may have. Claimant cannot have a legitimate expectation that the Government would make no mistakes in assessing Claimant's legal rights under the subject contract.

C. Any Interference With Claimant's Investment, Property, Or Reasonable Investment-Backed Expectations Was Not Substantial And Permanent And Therefore Does Not Rise To The Level Of Indirect Expropriation

65. Even if the Tribunal finds that the *Lesivo* Declaration interfered with Claimant's investment, it must nevertheless reject Claimant's indirect expropriation claim for failure to demonstrate the such interference was substantial and permanent. Under CAFTA, the Tribunal must evaluate "the *extent* to which the government action interferes with distinct, reasonable investment-backed expectations."¹³² The tribunal in *Cargill* explained that "[t]here are two prongs to an assessment of the degree of interference with Claimant's investment: the severity of the economic impact and the duration of that impact."¹³³ This subsection considers both prongs and demonstrates that Claimant proves neither.

1. Indirect Expropriation Under CAFTA Requires Substantial Interference

66. As is the case with many of its responses to Guatemala's arguments, Claimant first severely criticizes Guatemala's articulation of the level of interference necessary — which, incidentally, came directly from Claimant's Memorial¹³⁴ — and then proceeds to articulate the same high standard that Guatemala had described.¹³⁵ When applying that standard to the facts, Claimant resorts to hyperbole, exaggerating the practical effect of the *Lesivo* Declaration upon its investment, and claiming twice that the *Lesivo* Declaration rendered its entire investment "*worthless*."¹³⁶ However, in light of Claimant's concessions that real estate operations generate 92% of its revenue earning capacity, that "the potential

¹³² **RL-61**, CAFTA Annex 10–C, ¶ 4(a) (emphasis added).

¹³³ **RL-175**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (Award, 18 September 2009), ¶ 359 ("*Cargill Award*").

¹³⁴ See Reply on the Merits, ¶ 264 (disputing what it claims to be Guatemala's argument that "to prove indirect expropriation, Claimant must demonstrate that Respondent's interference caused 'complete destruction' or virtual annihilation' of its investment"). As Guatemala stated in its Counter-Memorial, this argument came directly from Claimant's Memorial on the Merits. See Counter-Memorial on the Merits, ¶ 311 and n. 803 (citing Memorial on the Merits, ¶ 112 (conceding that tribunals have found "that an indirect expropriation occurs where the value of the business has been 'virtually annihilated by the State's actions or the actions have a 'substantial' impact on the investment"))).

¹³⁵ See Reply on the Merits, ¶¶ 265–67.

¹³⁶ Reply on the Merits, ¶ 263 ("after the *Lesivo* Declaration, those rights became effectively *worthless*"; ¶ 270 ("the *Lesivo* Declaration . . . rendered the critical expected economic benefits of the Usufruct *worthless*"); see *id.*, ¶¶ 396, 428, 529, 555, 571.

EXPROPRIATION

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,”¹³⁷ and that income from real estate operations has actually *increased* since issuance of the *Lesivo* Declaration,¹³⁸ this claim of worthlessness rings hollow.¹³⁹

67. As Claimant itself noted in its Memorial, “[w]ith regard to the Annex 10-C indirect expropriation factors . . . the ‘severity of the economic impact is the *decisive* criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place.’”¹⁴⁰ Both CAFTA and customary international law establish that “the standard for indirect expropriation is whether the State measure resulted in ‘*substantial* deprivation’ or ‘*substantial* impairment’ of the investor’s economic rights or reasonably expected economic benefits from its investment”¹⁴¹

68. Although, in its Reply, Claimant disputes Guatemala’s definition of the term “substantial” — claiming that the bar “is not as high as Respondent seeks to convince the Tribunal”¹⁴² — the definition Guatemala articulated in its Counter-Memorial was in fact a compilation of definitions quoted by Claimant in its Memorial. When updated to include the adjectives Claimant uses to define “substantial” in its Reply, it appears that the parties agree on the proper definition. Substantial interference occurs where the adverse effect of a State measure was of such a magnitude as to: “*annihilate*” the investment,¹⁴³ “*radically deprive*”¹⁴⁴ an investor of the economic use and enjoyment of its investment, “*neutralize*” the “economic value of the use, enjoyment or disposition”¹⁴⁵ of an investor’s property,

¹³⁷ Memorial on the Merits, ¶ 179.

¹³⁸ **Ex. R-329**, Parties’ Stipulation.

¹³⁹ See below, § II.C.2.

¹⁴⁰ Memorial on the Merits, ¶ 112 (quoting **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).

¹⁴¹ Reply on the Merits, ¶ 265.

¹⁴² Reply on the Merits, ¶ 264.

¹⁴³ See **RL-127**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Award, 28 September 2007) (Söderlund, Edward, Jacovides), ¶ 285 (“*Sempra Award*”); see also Memorial on the Merits, ¶ 112.

¹⁴⁴ See **RL-133**, *Técnicas Medioambientales Tecmed SA v. México*, ICSID Case No. ARB(AF)/00/2 (Award, 29 May 2003) (Grigera Naón, Fernández Rozas, Vereas), ¶ 115 (“*Tecmed Award*”); see also Memorial on the Merits, n. 156.

¹⁴⁵ See **RL-133**, *Tecmed Award*, ¶ 116; see also Reply on the Merits, n. 604.

“destroy”¹⁴⁶ the business in question, or render an investment “worthless.”¹⁴⁷ The parties also agree with previous tribunals that the standard is whether the State measure deprived the investor “in whole or significant part of the use or reasonably-to-be-expected economic benefit of its investment,”¹⁴⁸ or of “all or most of the benefits of its investment.”¹⁴⁹ As the *Telenor* tribunal explained, “the investment *must be viewed as a whole* and . . . the test the Tribunal has to apply is whether, *viewed as a whole*, the investment has suffered a substantial erosion of value.”¹⁵⁰

69. Thus, as Guatemala explained in its Counter-Memorial, NAFTA tribunals have declined to find an indirect expropriation where a measure affects only a small part of an investor’s investment, or when, despite State interference, an investment retains its value. In *Chemtura*, for example, the tribunal found that “the sales from lindane products were a relatively small part of the overall sales of Chemtura Canada at all relevant times.”¹⁵¹ It therefore concluded that “the interference of the Respondent with Claimant’s investment cannot be deemed ‘substantial.’”¹⁵² In *Glamis Gold*, the tribunal found that, although the claimant had experienced a loss as a result of the measures in question, no expropriation had occurred because the investment retained positive value.¹⁵³ The same was true in *Bogdanov*, where — applying the Moldova-Russia BIT — the tribunal found that the allegedly-expropriatory measure

¹⁴⁶ **RL-93**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1 (Decision on Responsibility, 15 August 2008) (Lowenfeld, Serrano de la Vega, Greenwood), ¶ 93 (“*Corn Products Decision on Responsibility*”); see Reply on the Merits, ¶ 268.

¹⁴⁷ See Reply on the Merits, ¶¶ 263, 270, 396, 428, 529, 555, 571.

¹⁴⁸ Reply on the Merits, ¶ 267 (quoting **RL-85**, *Azurix Corporation v. The Argentine Republic*, ICSID Case No. ARB/01/12, (Award, 14 July 2006) (Rigo Sureda, Lalonde, Martins), ¶ 316 (“*Azurix Award*”)); see **CL-153**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Award, 29 July 2008) (Boyd, Lalonde, Hanotiau), ¶ 685 (“*Rumeli Telekom Award*”) (quoted by Claimant for this proposition in its Reply on the Merits, ¶ 267); see also **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*”) (quoted by Claimant for this proposition in its Reply on the Merits, ¶ 267).

¹⁴⁹ Memorial on the Merits, n. 156 (quoting **RL-82**, *Archer Daniels Award*, ¶ 240).

¹⁵⁰ **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*”) (emphasis added).

¹⁵¹ **RL-89**, *Chemtura Corporation v. Government of Canada*, UNCITRAL Arbitration Rules (Award, 2 August 2010) (Kaufmann-Kohler, Brower, Crawford), ¶ 263 (“*Chemtura Award*”).

¹⁵² **RL-89**, *Chemtura Award*, ¶ 263; see **RL-115**, *National Grid Award*, ¶ 154 (finding that no indirect expropriation had occurred where “[t]he value of [an] investment was diminished, but not to the extent that it could be considered worthless”).

¹⁵³ See **RL-102**, *Glamis Gold Ltd. v. United States of America*, (Award, 8 June 2009) (Young, Caron, Hubbard), ¶¶ 535–36 (“*Glamis Gold Award*”).

EXPROPRIATION

“corresponds to less than 7% of the normal value of the Privatized Company at the moment of the Privatization Contract, and circa 3% of the total investment carried out by the Local Investment Company.”¹⁵⁴ The tribunal concluded that the interference was “not sufficient to turn the lack of compensation for the Transferred Assets into a measure affecting the totality or a substantial part of the investment,”¹⁵⁵ and therefore that the respondent’s conduct had not violated “the prohibition of indirect expropriation.”¹⁵⁶

2. Claimant Has Failed To Demonstrate That Guatemala Substantially Interfered With Its Investment “In Whole Or Significant Part”

70. In light of the standards discussed above, Claimant has failed to prove its claim that the *Lesivo* Declaration “undermined the fundamental economic underpinnings of the **entire** Usufruct and thereby rendered the critical expected economic benefits of the Usufruct *worthless*.”¹⁵⁷

71. To evaluate this claim in its proper context, it is important to recall a few of Claimant’s key concessions. First, Claimant defines its investment broadly, to encompass all of the usufruct and other agreements entered into between FVG and FEGUA in relation to the railway and right to profit from the right-of-way businesses.¹⁵⁸ In its Reply, Claimant rejects the notion that “the right-of-way usufruct and equipment usufruct were completely separate and independent transactions and contracts that essentially had nothing to do with each other.”¹⁵⁹

72. Second, Claimant concedes that the bulk of its income came from real estate rights granted pursuant to Contract 402.¹⁶⁰ Claimant states that these rights were “the most significant and potentially profitable aspect of the Usufruct.”¹⁶¹ And when Guatemala’s damages expert weighed “the

¹⁵⁴ **RL-87**, *Bogdanov and Others v. Moldova*, Ad Hoc—SCC Arbitration Rules; IIC 33 (Award, 22 September 2005) (Cordero Moss), p. 7 (“*Bogdanov Award*”).

¹⁵⁵ **RL-87**, *Bogdanov Award*, p. 17.

¹⁵⁶ **RL-87**, *Bogdanov Award*, p. 17.

¹⁵⁷ Reply on the Merits, ¶ 270 (bold emphasis added); see *id.*, ¶¶ 263, 396, 428, 529, 555, 571.

¹⁵⁸ See Memorial on the Merits, ¶ 25.

¹⁵⁹ Reply on the Merits, ¶ 27.

¹⁶⁰ Reply on the Merits, ¶ 414.

¹⁶¹ Reply on the Merits, ¶ 414.

computed WACCs for real estate vs. railroad operations on a 50-50 ratio,”¹⁶² Claimant rejected that ratio as “incorrect” and replaced it with a real-estate-to-railroad ratio of 92-8.¹⁶³

73. Third, Claimant concedes 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.”¹⁶⁴ Claimant dismissed Guatemala’s interpretation of Contract 402 — as providing that Claimant’s failure to rehabilitate Phases II through V meant that Guatemala could request that Claimant return the right-of-way property — as “false as both a matter of fact and law.”¹⁶⁵ Claimant argued instead that it was not required to complete the rehabilitation process in order to maintain possession of the right-of-way property.¹⁶⁶

74. Fourth, Claimant concedes not only that its records show no loss in real estate income as a result of the *Lesivo* Declaration, but also that they in fact show an *increase* in income.¹⁶⁷

75. Fifth, Claimant concedes that the equipment covered by Contract 143/158 could be used only within Phase I of the railroad project,¹⁶⁸ which accounted for 318 kilometers out of the 798 kilometer project. Claimant also concedes that it retains possession of this equipment.¹⁶⁹

76. Thus, to the extent that Claimant could demonstrate any interference *at all* with its investment, such interference could not rise to the level necessary to constitute the alleged “financial and commercial decimation of Claimant’s investment.”¹⁷⁰ Claimant has failed to demonstrate that, as it states throughout its Reply, “all involved” understood that the *Lesivo* Declaration had declared FVG “too risky to do business with.” In its Memorial, Claimant provided six letters in support of this point.¹⁷¹ Five

¹⁶² Reply on the Merits, ¶ 436.

¹⁶³ Reply on the Merits, ¶ 436.

¹⁶⁴ Memorial on the Merits, ¶ 179.

¹⁶⁵ Reply on the Merits, ¶ 26.

¹⁶⁶ See Reply on the Merits, § II.C.

¹⁶⁷ Ex. R-329, Parties’ Stipulation.

¹⁶⁸ See Reply on the Merits ¶¶ 261, 569; see also Counter-Memorial on the Merits, ¶¶ 114, 259.

¹⁶⁹ See Memorial on the Merits, ¶ 126; see also Reply on the Merits, ¶ 263.

¹⁷⁰ Reply on the Merits, ¶ 231.

¹⁷¹ See Ex. C-34, 2006-09-13, Letter to FVG from Aimar S.A.; Ex. C-35(a), 2006-08-29, Letter to FVG from MAQCISA; Ex. C-35(b), 2006-09-04, Letter to FVG from ENASA; Ex. C-35(c), 2006-09-07, Letter to FVG

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EXPROPRIATION

of these letters came from suppliers; only one came from a customer. Though Guatemala requested additional documents from Claimant over the course of document production, Claimant's counsel stipulated that, apart from the single document it had presented, it had no further evidence that, as a result of the *Lesivo* Declaration, customers "refused to contract exclusively with FVG or for any term longer than meeting immediate needs."¹⁷² Claimant's counsel also stipulated that its support for the proposition that "local companies refused to enter into or continue agreements, either as suppliers (unless for cash up front) or for future carriage by the railroad" as a result of the *Lesivo* Declaration was limited to two letters.¹⁷³ Similarly, Claimant's counsel stipulated that the evidence it had been able to locate in support of the claim that the *Lesivo* Declaration "also caused FVG's principal suppliers to significantly reduce or withdraw their credit terms and/or services to FVG and prevented FVG from securing new credit lines with either financial institutions in country or new suppliers of essential goods and services" was limited to the five letters in Exhibit C-35.

77. A showing from these limited customers, even assuming that the allegations made in the letters would hold up under cross-examination (which is far from certain), is simply insufficient to establish that the *Lesivo* Declaration had the effect of destroying Claimant's ability to generate revenues under Contract 402. The Tribunal knows this because other of Claimant's customers continued to do business with Claimant, or desired to continue to do so had Claimant not voluntarily ceased its operations in 2007.¹⁷⁴

78. Claimant has demonstrated only a "reduction of the yearly tonnage . . . from 125,466 tons in 2005 to only 92,566 tons in 2006."¹⁷⁵ As Guatemala stated in its Counter-Memorial,¹⁷⁶ even if Claimant could prove that the *Lesivo* Declaration was the cause of this reduction in tonnage — which, as discussed in Section II.C.4, Claimant cannot — the reduction in the admittedly least-important

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from ALTRACSA; **Ex. C-35(d)**, 2006-09-11, Letter to FVG from Banco de la República; **Ex. C-35(e)**, 2006-09-12, Letter to FVG from INDUEX, S.A; **Ex. C-35(f)**, 2006-10-10, Letter to FVG from REINTER.

¹⁷² See **Ex. R-329**, Parties' Stipulation.

¹⁷³ See **Ex. R-329**, Parties' Stipulation.

¹⁷⁴ See, e.g., Witness Statement of O. Morales, ¶¶ 4–5; **Ex. R-327**, 2007-05-02, Letter from Cementos Progreso to RDC; **Ex. R-329**, Parties' Stipulation.

¹⁷⁵ Memorial on the Merits, ¶ 88.

¹⁷⁶ See Counter-Memorial on the Merits, ¶ 325 and n. 855.

component of Claimant's investment is insufficient to demonstrate the substantial deprivation, in whole or significant part, of Claimant's investment.

3. Claimant Has Failed To Demonstrate The Existence Of Any Permanent Or Lasting Effect Upon Its Investment

79. As Guatemala explained in its Counter-Memorial, customary international law requires lasting interference in order to justify a finding of indirect expropriation.¹⁷⁷ As with other aspects of the indirect expropriation inquiry, an evaluation of the permanence of any interference is a case-specific and fact-intensive inquiry.¹⁷⁸

80. Although Claimant argues initially in its Reply that there is "no legal support whatsoever" for Guatemala's proposition that substantial interference must be lasting in order to constitute an indirect expropriation,¹⁷⁹ it proceeds to both quote passages from cases which expressly state that "lasting"¹⁸⁰ or "permanent"¹⁸¹ interference is required and to concede that temporary interference is insufficient for purposes of indirect expropriation. Claimant has failed to demonstrate that, to the extent there was any interference with its investment, such interference was lasting.

81. As Guatemalan law expert Juan Luís Aguilar explains in both of his expert reports, an initial declaration of *lesividad* via *Acuerdo Gubernativo* is devoid of any effect until the *Contencioso*

¹⁷⁷ See, e.g., **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), ¶ 200 ("LG&E Award"); **RL-133**, *Tecmed Award*, ¶ 116; **CL-159**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (Award, 30 July 2010) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 134 ("Suez Award"); **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")).

¹⁷⁸ **RL-61**, CAFTA Annex 10–C, ¶ 4(a); see **RL-85**, *Azurix Award*.

¹⁷⁹ Reply on the Merits, ¶ 243.

¹⁸⁰ See Reply on the Merits, ¶ 266 (conceding that "NAFTA tribunals have held that the deprivation must be both lasting and substantial to constitute an expropriation" (citing **CL-126**, *Pope & Talbot, Inc. v. Canada* (Interim Award, 26 June 2000) (Devaird, Greenberg, Belman))).

¹⁸¹ Reply on the Merits, ¶ 265 (quoting **CL-159**, *Suez Award*, ¶ 134 ("[T]his Tribunal will have to determine whether [the measures] effected a substantial, permanent deprivation of the Claimants' investments or the enjoyment of those investments' economic benefits")).

EXPROPRIATION

Administrativo Court renders its decision on *lesividad* of the administrative act or contract in question.¹⁸² Moreover, should the *Contencioso Administrativo* Court ultimately determine that the act or contract is in fact *lesivo*, an affected party may “go[] before the court of highest rank of Guatemala to review the Decision of the Court of the *Contencioso Administrativo*”¹⁸³

82. In light of the fact that the initial declaration of *lesividad* may be overturned¹⁸⁴ — and especially in light of the fact that, pending the *Contencioso Administrativo* Court’s decision, Claimant retains possession of the railway equipment — Claimant’s argument boils down to a suggestion that the multi-year length of the proceedings is alone sufficient to prove its claim.¹⁸⁵ Yet, CAFTA and the overwhelming weight of the jurisprudence require that the Tribunal undertake a case-specific and fact-based analysis and that permanency of the taking be proven. Where would the line be drawn?

83. In its Reply, Claimant cites the decision in *Middle East Cement*, suggesting that the line could be drawn as early as four months.¹⁸⁶ However, the decisive factor in *Middle East Cement* was not the length of the alleged interference. Instead, it was that relatively little time remained on the life of the license at the time of the Government’s decree,¹⁸⁷ and that both parties agreed that the claimant “was deprived, by the Decree, of rights it had been granted under the License.”¹⁸⁸ That is, unlike in this case, four months was sufficient in the *Middle East Cement* case, because there the license would soon expire such that a four month deprivation of the claimant’s rights under the license constituted a permanent deprivation of its rights in the agreement. If the length of time alone were sufficient to demonstrate “permanent” interference, then one would expect that the tribunal in *Cargill*, which found that the claimant had been “precluded from participating in its HFCS-related activities”¹⁸⁹ for three-to-five years,

¹⁸² See Expert Report of J.L. Aguilar, ¶ 32; Second Expert Report of J.L. Aguilar, ¶¶ 98, 100.

¹⁸³ Expert Report of J.L. Aguilar, ¶ 60; see Second Expert Report of J.L. Aguilar, ¶ 58.

¹⁸⁴ See **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, *Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010).

¹⁸⁵ See Reply on the Merits, ¶ 245.

¹⁸⁶ See Reply on the Merits, ¶¶ 243, 246.

¹⁸⁷ See **RL-175**, *Cargill Award*, ¶ 376 (discussing **RL-109**, *Middle East Cement*, ¶ 107).

¹⁸⁸ **RL-109**, *Middle East Cement Shipping and Handling Co. SA v. Egypt*, ICSID Case No. ARB/99/6 (Award, 12 April 2002) (Böckstiegel, Bernardini, Wallace), ¶ 107 (“*Middle East Cement Award*”). Unlike the parties in *Middle East Cement*, the parties in the present case vigorously dispute whether any deprivation has taken place.

¹⁸⁹ **RL-175**, *Cargill Award*, ¶ 370.

would also have held that the respondent expropriated the claimant's investment.¹⁹⁰ However, the tribunal declined to do so.¹⁹¹

84. Guatemala believes that the Tribunal must consider all of the surrounding circumstances to evaluate whether the *Lesivo* Declaration permanently deprived Claimant of the entirety of its investment. In light of the facts that the *Contencioso Administrativo* Court phase of the *lesividad* process is still on-going, that the *Contencioso Administrativo* Court in fact has the authority to reject an application for *lesividad*, and that Claimant will retain both possession of and the ability to use the equipment for the entire length of the proceedings, no permanent damage has been done to Claimant's rights under Contract 143/158 (let alone to the "wholly unconnected" real estate rights which account for 92% of Claimant's expected return on investment). This is especially true given that Claimant has not established that its railway customers would not resume doing rail transport business with it if the *Contencioso Administrativo* Court rejects the Government's application for *lesividad* of Contract 143/158 and where some of the customers have said they would do business with FVG today if it resumed operations, something which it could do tomorrow if it was willing to do so.¹⁹²

4. Claimant Has Failed To Establish A Causal Link Between The *Lesivo* Declaration And The Alleged Damage To Its Investment

85. As Guatemala explained in its Counter-Memorial, in addition to proving the existence of substantial harm to its investment, Claimant bears the burden of establishing that Guatemala's actions were indeed the cause of such harm. Such obligation flows not only from Claimant's general obligation to prove each element of its claims, but also from CAFTA, which provides, 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."¹⁹³ Claimant has failed to satisfy its burden with respect to causation.

¹⁹⁰ **RL-175**, *Cargill Award*, ¶ 370.

¹⁹¹ See **RL-175**, *Cargill Award*, ¶¶ 370–78.

¹⁹² See Witness Statement of O. Morales, ¶ 5.

¹⁹³ **RL-61**, CAFTA Art. 10.16.1(b) (emphasis added).

EXPROPRIATION

86. As Guatemala explained in its Counter-Memorial and stated above, to the extent Claimant experienced any losses as a result of the *Lesivo* Declaration, such losses were caused either by the poor quality of Claimant's operation or the fact that FVG ceased operations in 2007. In its Reply, Claimant responds to this point by arguing that Guatemala had "not produced any evidence that a single existing or potential customer, lender or supplier of FVG stopped doing, or was not willing to do, business with FVG after the *Lesivo* Resolution because FVG did a poor job operating, maintaining and/or repairing the railway."¹⁹⁴ This response not only incorrectly states the burden of proving causation, but also incorrectly summarizes the evidence Guatemala submitted with its Counter-Memorial.

87. At any rate, Claimant's own stipulations serve as the best evidence for refuting its points.

88. Thus, while Claimant claims that the *Lesivo* Declaration "caused an immediate and dramatic decline in use of the railroad for freight transportation and a critical number of customers to stop using the railway as a means to transport their goods,"¹⁹⁵ it stipulated that, apart from witness statements from Claimant's own executives, its only evidence was a single letter from a single customer.¹⁹⁶

89. Similarly, with respect to Claimant's claim that the *Lesivo* Declaration "caused FVG's principal suppliers to significantly reduce or withdraw their credit terms and/or services to FVG and prevented FVG from securing new credit lines with either financial institutions in [sic] country or new suppliers of essential goods and services,"¹⁹⁷ Claimant could find only six letters to support this point.¹⁹⁸ The same is true for Claimant's complaint that the *Lesivo* Declaration "caused potential customers and tenants to back immediately away from negotiations and discussions with FVG"¹⁹⁹ On this point, Claimant

¹⁹⁴ Reply on the Merits, ¶ 175.

¹⁹⁵ Reply on the Merits, ¶ 268 (emphasis added).

¹⁹⁶ See **Ex. R-335**, 2010-12-21, Admission Chart and Redfern re Claimant's Responses to Guatemala's Document Request, No. 13; see **Ex. C-34**, 2006-09-13, Letter to FVG from Aimar S.A.

¹⁹⁷ See Reply on the Merits, ¶ 268.

¹⁹⁸ See **Ex. C-35(a)**, 2006-08-29, Letter to FVG from MAQCISA; **Ex. C-35(b)**, 2006-09-04, Letter to FVG from ENASA; **Ex. C-35(c)**, 2006-09-07, Letter to FVG from ALTRACSA; **Ex. C-35(d)**, 2006-09-11, Letter to FVG from Banco de la República; **Ex. C-35(e)**, 2006-09-12, Letter to FVG from INDUEX, S.A; **Ex. C-35(f)**, 2006-10-10, Letter to FVG from REINTER. Though Claimant also cites Exhibit C-35(g), that document states only that more information is needed regarding the litigation between FVG and Guatemala before evaluating FVG's credit application. It by no means suggests whether such application would be granted or rejected. Through the course of document production, Claimant stipulated that it did not provide a response to the bank's request.

¹⁹⁹ Reply on the Merits, ¶ 268.

could only muster two documents, and ultimately stipulated that rental income had increased since the *Lesivo* Declaration.²⁰⁰ FEGUA also consistently forwarded rental and leasing requests to FVG.²⁰¹

90. With respect to Claimant's claim that the *Lesivo* Declaration caused FVG to lose "customers and [the] commodity transportation market share it had steadily been reestablishing vis-à-vis the trucking industry, as well as goodwill for its improving safety and delivery performance,"²⁰² for which it cites only the witness statement of RDC executive Henry Posner, Guatemala continues to assert that any loss of customers was caused by Claimant's own inefficiency and its decision to voluntarily cease railway operations. As Claimant's own partner, Cementos Progreso, stated in a letter to Mr. Posner, though it had "many times tried to use Ferrovías service [it had] not been able to do it because of the management's inefficiency in providing solutions to move said cargo."²⁰³

91. As will be discussed in Section IV, Claimant has utterly failed to prove its claim that, as a result of the *Lesivo* Declaration, "[l]ocal courts, police and municipalities consistently relied upon the *Lesivo* Resolution as a basis to trespass on, deny protection to, and allow theft and vandalism of FVG's usufruct properties."²⁰⁴ The facts show that, to the contrary, Guatemalan officials and entities continued to recognize Claimant's rights after the *Lesivo* Declaration and even rejected arguments that the *Lesivo* Declaration could be used as a justification for infringing upon Claimant's rights.²⁰⁵

92. To the extent Claimant's customers believed that FVG was "too risky to do business with" after the *Lesivo* Declaration, it is possible that such belief could have been generated by Claimant itself, as a result of a press release Claimant published in all of the Guatemalan newspapers the first business day after the *Lesivo* Declaration was published. As Guatemala explained in its Counter-Memorial, this press release announced that the *Lesivo* Declaration "has placed additional pressure on FVG by making its

²⁰⁰ See **Ex. R-335**, 2010-12-21, Admission Chart and Redfern re Claimant's Responses to Guatemala's Document Request, No. 14; see also **Ex. R-329**, Parties' Stipulation.

²⁰¹ See e.g., **Ex. R-325**, 2006-09-27, Oficio 329-2006, Letter to Ing. 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).

²⁰² Reply on the Merits, ¶ 268.

²⁰³ **Ex. R-327**, 2007-05-02, Letter from Cementos Progreso to RDC.

²⁰⁴ Reply on the Merits, ¶ 268.

²⁰⁵ See below, § IV.

EXPROPRIATION

customers and suppliers wary of doing business with it.”²⁰⁶ That RDC/FVG was already speaking of effects and customer and supplier reactions that could not have possibly occurred one day after the *Lesivo* Declaration had been issued speaks volumes.

93. As Claimant’s own evidence underscores, this press release is but one example of Claimant’s use of the Guatemalan media to shape the public’s perception of the *Lesivo* Declaration and its effect. Though Claimant contests “that the issuance of the *Lesivo* Resolution was not a newsworthy event in Guatemala and that, but for Claimant’s press release, no one in Guatemala — and especially FVG’s customers, suppliers and lenders — would have been aware of it,”²⁰⁷ Claimant cannot overcome the evidence highlighting RDC’s own actions as the reason why the story was “newsworthy,” including its organized press conferences and press releases to its customers informing them of these events.²⁰⁸

94. Claimant’s exhibit C-132, a compilation of television reports, makes this particularly clear.²⁰⁹ Each of the reports seems to have been initiated at Claimant’s behest — either featuring a press conference hosted by RDC executives and its attorneys, or following FVG attorneys as they filed complaints against Guatemala in domestic or international legal proceedings. In each report, it was Claimant’s representatives who took center stage to discuss the scope and implications of the *Lesivo* Declaration. Claimant’s Guatemalan counsel, Juan Pablo Carrasco, features prominently in each video. However, not once did Mr. Carrasco — or any other FVG or RDC representative — properly describe the scope of the *Lesivo* Declaration (*i.e.*, that it applied only to Contract 143/158), correctly explain the legal implications of the *Lesivo* Declaration (*i.e.*, that it had no immediate effect), or explain that the *Lesivo* Declaration was subject to an ultimate determination by the *Contencioso Administrativo* Court. Instead, Claimant exaggerated the effect of the *Lesivo* Declaration — suggesting to all who would listen that it entailed legally invalidating all of Claimant’s rights in all of the Usufruct contracts— and effectively authored the chronicle of a death foretold.

95. President Berger’s statements, on the other hand, were impromptu responses to questions from reporters asking for his reaction to RDC’s press conferences. Though he mentioned his discontent with

²⁰⁶ **Ex. R-190**, 2006-08-26, Press Release: Guatemalan Government Violates Terms of Railroad Privatization Agreement (emphasis added).

²⁰⁷ Reply on the Merits, ¶ 218.

²⁰⁸ See **Ex. C-132**, 2006-09-06, El Independiente report, third broadcast.

²⁰⁹ See **Ex. C-132**, 2006-09-06, El Independiente report, third broadcast.

Claimant's performance of the railway project, he never once discussed the intention behind issuance of the *Lesivo* Declaration and never linked the *Lesivo* Declaration to Claimant's obvious failure to rehabilitate and operate the entire railway system as required of it by Contract 402. In light of the parties' disparate use of the media — Claimant to exaggerate the nature and effect of the *Lesivo* Declaration and Guatemala only to respond to questions presented as a result of Claimant's media events — Guatemala maintains its position that Claimant itself was the source of any belief that FVG was "too risky to do business with."

96. In its Reply, Claimant improperly summarizes this argument and then concludes that it is a "fanciful theory" and "errant nonsense with absolutely no factual support."²¹⁰ However, Guatemala's argument was not, as Claimant alleges, that "it was not the bullet that killed John, it was the newspaper report on the shooting!"²¹¹ Rather, and in keeping with Claimant's tone, the argument is that it was not Jane's comment about John that ruined John's reputation, but rather the fact that John recorded Jane's comment on video, and broadcast that video on YouTube.

97. As mentioned above, Claimant also has not established that the customers who allegedly are unwilling to do business with it now would not resume doing rail transport business with it if the *Contencioso Administrativo* Court rejects the Government's application for *lesividad* of Contract 143/158. The evidence on that point is that some of Claimant's customers have said they would do business with FVG today if it resumed operations.²¹²

98. Finally, it is not unreasonable to conclude, and is likely a higher probability, that FVG was pleased to seize on the *Lesivo* Declaration as an excuse to close an unprofitable business. As far back as the annual report for 2002, FVG made clear that the fiber optic contracts that it anticipated in its business plan had not materialized (due to no fault of Guatemala), leaving a large hole in its revenues from leasing activity — activity that Claimant says represented 92 percent of the expected benefits from its investment. And as made clear in the Counter-Memorial, the writing was on the wall that Claimant's investment was doomed to fail well before the *Lesivo* Declaration was published, because Claimant itself acknowledged that it needed approximately US\$100 million to restore the railway in the Southern

²¹⁰ Reply on the Merits, ¶ 217.

²¹¹ Reply on the Merits, ¶ 217.

²¹² See Witness Statement of O. Morales, ¶ 5.

EXPROPRIATION

corridor of Guatemala in order to make its venture profitable and that it did not have any viable source of funding to obtain this capital. Without this investment, Claimant was doomed to more years of continuous losses, and needed capital infusions by the shareholders of FVG to keep the company from sinking into bankruptcy.²¹³ If ongoing capital infusions for FVG were needed since profits from the railroad business were non-existent, as they were in fact,²¹⁴ Claimant's economic incentive was to close railway operations as rapidly as possible.²¹⁵

D. Even If The Tribunal Determines That An Indirect Expropriation Has Taken Place, The Elements Of An "Unlawful" Expropriation Do Not Exist In This Case

99. Although for the reasons stated above, Claimant has not satisfied its burden of proving the elements of an indirect expropriation, should the Tribunal nevertheless find that one has occurred, it must still reject Claimant's damages claim related to expropriation. Pursuant to Article 10.7.1 of CAFTA, a Party may not expropriate an investment unless it is: (a) for a public purpose; (b) executed in a non-discriminatory manner; (c) in accordance with due process; and (d) in exchange for "prompt, adequate and effective compensation."²¹⁶ Each of these elements will be addressed in turn below.

1. The *Lesivo* Declaration Was Issued For A Public Purpose

100. In arguing that Guatemala did not use the *lesivo* power for a public purpose, Claimant again argues that Guatemala acted in bad faith, hijacking the *lesividad* process in an attempt "to force Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and 'other investors' interested in the railway such as Ramón Campollo."²¹⁷ However, as Guatemala demonstrates throughout this Rejoinder, Claimant has presented no convincing evidence to supports its conspiracy theory.

101. Though Claimant seems eager to enter into a debate as to whether Contract 143/158 is in fact *lesivo* to the interests of the State, ICSID arbitration is an improper forum for that debate. The proper venue for the debate is the *Contencioso Administrativo* Court. Nevertheless, because Claimant rejected

²¹³ See Counter-Memorial on the Merits, § II.F.

²¹⁴ See Second Witness Statement of M. Marroquín, ¶¶ 4–8.

²¹⁵ See **Ex. C-27(e)**, FVG's 2002 Annual Report.

²¹⁶ **RL-61**, CAFTA, Article 10.7.1(c).

²¹⁷ Reply on the Merits, ¶ 288.

Guatemala’s articulation of the public interest served as overbroad and incorrect,²¹⁸ Guatemala will briefly discuss the public interest served by the *Lesivo* Declaration.

102. As Guatemala explained in its Counter-Memorial, the very purpose of the *lesivo* power is to nullify a Government act which the *Contencioso Administrativo* Court finds to be contrary to the public interest.²¹⁹ The broad public interest served is twofold: first, the government is not bound *ad eternum* to perform contracts which violate pre-existing laws or are later deemed detrimental to public welfare; and second, the process of review provides a level of oversight and prevents the Executive branch from unilaterally terminating administrative acts or contracts.²²⁰ Though the term “harmful to the interests of the State” is undoubtedly broad, this is intentional, as the Executive must remain flexible to respond to issues that threaten the nation. The inherent flexibility of the *lesivo* power does not detract from the fact that, in the present case, Guatemala acted in furtherance of what it reasonably believed to be the public interest.²²¹

103. Regardless of whether the *Contencioso Administrativo* Court ultimately determines that Contract 143/158 was harmful to the interests of the State, the fact remains that Guatemala issued the *Lesivo* Declaration out of a good faith belief that, because Contract 143/158 — a contract dealing with State resources — did not comply with the formalities designed to guarantee the proper administration of Government contracts, it was harmful to the interests of the State. As four independent Government agencies advised,²²² and as Mr. Aguilar confirms, “an administrative contract that suffers from absolute

²¹⁸ See Reply on the Merits, ¶¶ 288, 294.

²¹⁹ First Expert Report of Aguilar, ¶ 35.

²²⁰ See First Expert Report of J.L. Aguilar, ¶¶ 35, 43.

²²¹ See First Witness Statement of A. Gramajo, ¶ 25; see also Second Witness Statement of A. Gramajo, ¶ 35; Third Witness Statement of A. Gramajo, ¶ 43; **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.

²²² **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.

EXPROPRIATION

nullity produces, necessarily, an injury to the interests of the State, as it contravenes the law on matters which concern the public administration, and as a result, the State of Guatemala.”²²³

2. Guatemala Has Not Discriminated Against Claimant

104. According to Claimant, the *Lesivo* Declaration was “clearly enacted in a discriminatory manner” because, “[o]n its face, the Resolution was a sovereign, non-regulatory act by Respondent which only targeted Claimant’s investment.”²²⁴ However, the discrimination inquiry is not based upon the unique effect of the allegedly-expropriatory measure. Instead, the principal element of the inquiry is one of comparison, considering whether the measure affected the complainant differently as compared to similarly-situated persons.²²⁵ Despite Claimant’s confidence that “all of the credible evidence presented shows that the Government issued the *Lesivo* Resolution with a discriminatory intent and for a discriminatory purpose,”²²⁶ as was amply discussed above in Section II.A, and as will be further discussed in Section V in response to Claimant’s national treatment claim, Claimant has failed to prove that the *Lesivo* Declaration had a discriminatory effect or purpose.

3. The *Lesividad* Process Accords Due Process, Both In General And As Applied In This Case

105. As defined by the ADC tribunal, and as the parties in this case agree, “due process” requires “[s]ome basic legal mechanisms such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute. . . . In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.”²²⁷ To constitute an international law violation, however, an investor may not rely solely upon an alleged deficiency at a single stage of the proceedings. As Professor Jan

²²³ Second Expert Report of J.L. Aguilar, ¶ 88 (unofficial translation) (“un contrato administrativo que adolece de nulidad absoluta produce, necesariamente, una lesión a los intereses del Estado, por cuanto que violenta la legalidad en asuntos que atañen a la administración pública y, en consecuencia, al Estado de Guatemala”).

²²⁴ Reply on the Merits, ¶ 319.

²²⁵ See **RL-144**, R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 177 (citing **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”)).

²²⁶ Reply on the Merits, ¶ 319.

²²⁷ **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), ¶ 435 (“*ADC Award*”).

Paulsson has explained, the standard 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.²²⁸

106. To return to the common law criminal complaint analogy, even though, before charges are officially announced, the accused receives neither notice of the possibility of charges nor an opportunity to be heard, a State may nevertheless afford due process by giving the accused both notice and an opportunity to be heard before the entity which ultimately decides the case (a criminal court). Notably, the system is considered to provide due process, even when the charges are ultimately dismissed, for it is due to the very existence of due process that this may occur.

107. Guatemala’s *lesividad* process works in much the same way: although an entity whose contract is the subject of a *lesivo* declaration receives no notice of the Government’s investigation and preparation efforts before an *Acuerdo Gubernativo* is published, once proceedings are initiated before the *Contencioso Administrativo* Court, the entity receives both notice of the claims, and an opportunity to be heard in response.²²⁹ As demonstrated below, Claimant’s argument to the contrary is unavailing.

a. In General, The *Contencioso Administrativo* Phase Accords Due Process

108. In its Reply, Claimant contends that “the legal requirement that a *lesivo* declaration must be confirmed by the *Contencioso Administrativo* court . . . is wholly illusory and meaningless.”²³⁰ According to Claimant, because the *Contencioso Administrativo* phase of a *lesividad* proceeding is nothing more than a “rubber-stamp” of the President’s declaration in the *Acuerdo Gubernativo*, “[u]nder Guatemalan law, the *lesivo* procedure is an expansive and essentially unfettered power that allows the President of the Republic to annul administrative contracts the Government has previously entered into without providing any compensation or legitimate justification or due process to the affected contracting party/investor.”²³¹ This is patently incorrect.

²²⁸ **RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005).

²²⁹ See First Expert Report of J.L. Aguilar, ¶¶ 2 (f,h,j), 32, 35, 54-57; see also below, § III.B.2.

²³⁰ Reply on the Merits, ¶ 309.

²³¹ Reply on the Merits, ¶ 297 (citing First Opinion of M. Reisman ¶¶ 33–39; 94–96; First Opinion of E. Mayora ¶¶ 8.2.1– 8.2.3; 8.3.1–8.3.5).

EXPROPRIATION

109. Rather, as a judicial body sworn to uphold the laws of Guatemala, the *Contencioso Administrativo* Court makes its own determination, based solely upon law, fact, and the parties' arguments.²³² It is by no means required or even presumed "rubber stamp"²³³ the Executive's *acuerdo gubernativo*. In fact, as Mr. Aguilar states in his second report, on 22 September 2010 — *i.e.*, before Claimant presented its Reply — the *Contencioso Administrativo* Court overturned the initial declaration of *lesividad* in Case No. 371–2009.²³⁴ Pursuant to the Constitution of Guatemala, the *Contencioso Administrativo* Court is obligated to evaluate each case (including a *lesividad* claim) 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.²³⁵

Both parties are afforded a full opportunity to present evidence, make written and oral arguments, introduce motions, and examine witnesses.²³⁶ Despite Claimant's assertion to the contrary,²³⁷ pursuant to Article 119 of the Civil and Commercial Procedural Code, a party whose contract is ultimately held by the *Contencioso Administrativo* Court to be *lesivo* may present a counter-claim against the State.²³⁸

110. Though Claimant argues that "Guatemalan law does not define or place any limit on what makes a contract or Government act 'harmful to the interests of the State,'"²³⁹ and that therefore "there does not exist any defined legal criteria or precedent under Guatemalan law that a *Contencioso*

²³² See First Expert Report of J.L. Aguilar, ¶¶ 58–59; see also **RL-70**, Article 203 of the Guatemalan Constitution, 1985.

²³³ See Reply on the Merits, ¶¶ 308, 369, 376.

²³⁴ See Second Expert Report of J.L. Aguilar, ¶ 46 (citing **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, *Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010)).

²³⁵ **RL-70**, Article 203 of the Guatemalan Constitution, 1985.

²³⁶ See First Expert Report of J.L. Aguilar, ¶¶ 51–62; Second Expert Report of J.L. Aguilar, ¶ 54.

²³⁷ See Reply on the Merits, ¶ 306.

²³⁸ First Expert Report of J.L. Aguilar, ¶ 55; Second Expert Report of J.L. Aguilar, ¶ 58.

²³⁹ Reply on the Merits, ¶ 298.

Administrativo Court can use to provide any meaningful judicial review of the Government's *lesivo* determination,"²⁴⁰ Mr. Aguilar explains that Claimant's argument is incorrect as a matter of Guatemalan law:

The Guatemalan courts are fully competent to rule on a case without having precedents or formal sources on which to base their rulings, since, in accordance with the provisions of Article 203 of the Constitution of the Republic of Guatemala, justice shall be dispensed in accordance with the Constitution and the laws of the Republic of Guatemala and it is precisely these bodies of law that regulate the manner in which the courts of justice must proceed . . . In this sense, the standards for applying and interpreting the law are defined in the *Ley del Organismo Judicial*.²⁴¹

111. Finally, two brief comments are in order regarding the chart of "Claims for Administrative *Lesión* Declared by the State of Guatemala,"²⁴² and the conclusions Claimant attempts to extrapolate that demonstrative. First, though Claimant states that, "with the exception of three cases . . . in all of the other known *lesividad* cases either final judgments remain pending . . . or the claim of *lesivo* was settled out of court on terms dictated by the State,"²⁴³ it offers no proof to substantiate this claim. As settlements are private agreements, there is no way of knowing that the settlements referenced in Claimant's chart were indeed "on terms dictated by the State." Moreover, as Claimant itself notes, the majority of the *lesividad* proceedings mentioned in the chart involved disputes between different Government entities.²⁴⁴ By definition, any settlement in those proceedings would have been "on terms dictated by the State."

²⁴⁰ Reply on the Merits, ¶ 298.

²⁴¹ Second Expert Report of J.L. Aguilar, ¶ 81 (unofficial translation) ("Los tribunales guatemaltecos son plenamente competentes para decidir un caso sin tener precedente jurisprudencial o fuente formal sobre el cual fallar, toda vez que, de conformidad con lo que dispone el artículo 203 de la Constitución Política de la República de Guatemala, la justicia se imparte de conformidad con la Constitución y las leyes de la República de Guatemala y es, precisamente en dichos cuerpos legales en donde se regula la manera en que los tribunales de justicia deben proceder . . . En este sentido, el criterio de aplicación e interpretación de la ley se haya definido en la ley del organismo judicial"); see **RL-193**, *Ley de Organismo Judicial*.

²⁴² Reply on the Merits, pp. 153–55.

²⁴³ Reply on the Merits, ¶ 301.

²⁴⁴ See Reply on the Merits, ¶ 307 (discussing "the five *lesivo* actions which have involved Government contracts with private parties (Nos. 123–2004, 350–2006, 361–2006, 97–2004 and 185–2004)").

EXPROPRIATION

112. Second, with respect to Claimant's argument that, where the *lesividad* proceeding involved a private party, "there exists no known record or indication that the affected private companies are still in business in Guatemala,"²⁴⁵ and that "the declaration of *lesividad* was, by itself, the death knell of these companies,"²⁴⁶ Claimant offers no proof other than the statement of its expert, Dr. Mayora.²⁴⁷ For his part, Mr. Aguilar rejects these arguments as being speculative and contrary to law.²⁴⁸ He further emphasizes that "Claimant still enjoys its rights under Contract 143/158 and it is only when the *Contencioso Administrativo* Court rules on the legality of that contract that the *Lesivo* Declaration would have a material or practical effect. Any allegation of the Claimant or its witnesses or experts to the contrary has no basis under Guatemalan law."²⁴⁹

b. In This Case, The *Contencioso Administrativo* Phase Has Accorded Claimant Due Process

113. Claimant contends that FVG "was not allowed an opportunity to contest the Government's charges within a reasonable time after the Government commenced the *Contencioso Administrativo* proceedings"²⁵⁰ because Guatemala's Attorney General filed the action within the deadline (but on the "last possible day"), Claimant waited six months to receive the Government's complaint,²⁵¹ and the Court "has failed to meet any of the mandatory procedural deadlines imposed by Guatemalan law,"²⁵² but these facts do not constitute a denial of due process.

114. Rather, as the *Azinian* tribunal explained, "[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to *undue* delay, or if they administer justice in a

²⁴⁵ Reply on the Merits, ¶ 307.

²⁴⁶ Reply on the Merits, ¶ 307.

²⁴⁷ Though Claimant does not provide a source for its assertion in its Reply, Dr. Mayora makes this point in his third expert report. See Third Expert Report of E. Mayora, ¶ 51.

²⁴⁸ Second Expert Report of J.L. Aguilar, ¶ 100.

²⁴⁹ Second Expert Report of J.L. Aguilar, ¶ 100 (unofficial translation) ("la Demandante aún goza de sus derechos bajo el contrato 143/158 y es sólo hasta que la justicia de lo contencioso administrativo falle sobre la legalidad del referido contrato que la Declaratoria de Lesividad tendría un efecto material o práctico. Cualquier alegación de la Demandante o sus testigos o expertos en contrario no tiene ningún sustento bajo derecho guatemalteco").

²⁵⁰ Reply on the Merits, ¶ 303.

²⁵¹ See Reply on the Merits, ¶ 303.

²⁵² Reply on the Merits, ¶ 304.

seriously inadequate way.”²⁵³ Claimant, who has pointed merely to the length of the *Contencioso Administrativo* Court proceedings, and alleged a “failure to meet deadlines,” has not made out a case for *undue* delay. At any rate, even if Claimant had attempted to make this type of showing, its claim would fail. As the International Court of Justice held in *The Oro Mining and Railway Company Ltd. v. United Mexican States*, a claimant is “entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice [if over a period of nine years] he has not received *any* word or sign that his claim is being dealt with.”²⁵⁴ Claimant has failed to demonstrate either that the proceedings in the present case demonstrate an “undue” delay, or that during the course of the four years that the *Contencioso Administrativo* proceeding has been pending, there has been “no sign” that Claimant’s claim “is being dealt with.”

115. To the contrary, the *lesividad* claim before the *Contencioso Administrativo* Court has been active since its inception on 24 November 2006 (when the Attorney General filed a complaint against FVG).²⁵⁵ Within that complaint, the Attorney General also petitioned the *Contencioso Administrativo* Court for a provisional suspension that would temporarily suspend Contract 143/158.²⁵⁶ Upon receiving the Attorney General’s complaint, the *Contencioso Administrativo* Court petitioned FEGUA for a report on the background and basis for the *Lesivo* Declaration.²⁵⁷ The Court also requested this information from the Secretary General of the President.²⁵⁸ FEGUA and the Secretary General provided their responses on 2 February 2007 and 22 February 2007, respectively.²⁵⁹ The *Contencioso Administrativo* Court admitted

²⁵³ **CL-136**, *Azinian Award*, ¶ 102 (emphasis added).

²⁵⁴ **RL- 176**, *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States*, ICJ Decision No. 55 (18 June 1931) (emphasis added).

²⁵⁵ **Ex. C-11**, 2006-11-14, Attorney General’s claim before the *Contencioso Administrativo* court regarding the *lesividad* of Contracts 143/158; First Expert Report of J.L. Aguilar, ¶¶ 52–53.

²⁵⁶ See First Expert Report of J.L. Aguilar, ¶ 63; see also **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.

²⁵⁷ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo Court* (see entry for 2007-01-22); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo Court* in Case 389–2006.

²⁵⁸ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo Court* (see entry for 2007-02-05); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo Court* in Case 389–2006.

²⁵⁹ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo Court* (see entries for 2007-02-02; 2007-02-22; and 2007-02-22); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo Court* in Case 389–2006.

EXPROPRIATION

the Attorney General's complaint on 23 February 2007, but rejected his request to temporarily suspend Contract 143/158.²⁶⁰ In so doing, the Court cited Article 18 of the *Ley De Lo Contencioso Administrativo*, which recognizes that a party whose contract is the subject of a *lesivo* declaration retains its rights absent a Court order declaring otherwise.²⁶¹ Though the Attorney General requested that the *Contencioso Administrativo* Court reconsider its decision, the Court also rejected this request.²⁶²

116. On 13 April 2007, the Attorney General amended and expanded his original complaint.²⁶³ The Court issued a resolution admitting the amended complaint the next day, on 14 April 2007.²⁶⁴ On 15 May 2007, as Claimant's exhibit demonstrates, the Court notified Claimant of its decisions to admit the Attorney General's original and amended complaints, along with its decision to reject the Attorney General's request to temporarily suspend Contract 143/158.²⁶⁵ FVG filed a brief on "Preliminary Objections of Incompetence and Defects in the Claim" on 21 May 2007.²⁶⁶ Since then, as the "docket" chart below demonstrates, the *Contencioso Administrativo* Court proceeding has been continuously active, with both FVG and Guatemala presenting evidence, motions, and briefs; cross-examining

²⁶⁰ See **RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* court regarding the Attorney General's claim of *lesividad* of Contracts 143/158; First Expert Report of J.L. Aguilar, ¶ 63.

²⁶¹ **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").

²⁶² See **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.

²⁶³ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court (see entry for 2007-04-13); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo* Court in Case 389–2006.

²⁶⁴ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court (see entry for 2007-04-14); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo* Court in Case 389–2006.

²⁶⁵ **Ex. C-160**, 2007-05-15, Notification of Service of Process of Official Complaint ("*Acta de Notificación de la Demanda, Contencioso 389–2006*"); **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court (see entry for 2007-05-15).

²⁶⁶ **Ex. R-276**, 2007-05-21, FVG Brief on Preliminary Objections in the *Contencioso Administrativo* Phase of the *Lesividad* Proceeding re: Contract 143/158; **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court (see entry for 2007-05-21).

witnesses; and making oral arguments before the Court. Most recently, on 3 September 2011, the Attorney General requested final judgment from the Court.²⁶⁷

Figure 1. Documents filed in or emitted by the *Contencioso Administrativo* Court regarding the *Lesividad* of Contract 143/158²⁶⁸

Date	Party submitting	Description of document
2006		
2006-11-24	Attorney General	Petition requesting that the <i>Contencioso Administrativo</i> Court declare Contract 143/158 null and void. Also requests injunctive measures and the provisional suspension of Contract 143/158.
2007		
2007-01-22	<i>Contencioso Administrativo</i> Court	Communication to FEGUA requesting a report and the administrative file on the background and basis of the <i>Lesivo</i> Declaration.
2007-02-02	FEGUA	Written submission providing the <i>Contencioso Administrativo</i> Court with FEGUA's report on the background and basis of the <i>Lesivo</i> Declaration.
2007-02-05	<i>Contencioso Administrativo</i> Court	Communication to the Secretary General of the President requesting the administrative file and a report on the background and basis of the <i>Lesivo</i> Declaration.
2007-02-22	FEGUA	Written submission providing the Court with the administrative file relating to the <i>Lesivo</i> Declaration.
2007-02-22	Secretary General of the President	Written submission providing the Court with the administrative file and a report on the background and basis of the <i>Lesivo</i> Declaration.
2007-02-23	<i>Contencioso Administrativo</i> Court	(RL-73) Order accepting the Attorney General's petition for confirmation of the <i>Lesivo</i> Declaration of Contract 143/158, establishing a deadline for FVG to respond, and denying the Attorney General's request for injunctive measures and provisional suspension of Contract 143/158, deeming them unnecessary.
2007-04-13	Attorney General	Written submission expanding the petition.
2007-04-14	<i>Contencioso Administrativo</i> Court	Order accepting the expansion of the petition.
2007-05-08	Attorney General	Written submission requesting reconsideration of the Court's 2007-02-23 order denying the Attorney General's request for injunctive measures and the provisional suspension of the contract.

²⁶⁷ **Ex. R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court (see entry for 2011-09-03); **Ex. R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo* Court in Case 389–2006.

²⁶⁸ Figure 1 is also reproduced as **Exhibit R-336**, Chart of Documents Filed in or Emitted by the *Contencioso Administrativo* Court. All of the documents listed in the chart may be found in **Exhibit R-331**, Documents Filed in or Emitted by the *Contencioso Administrativo* Court in Case 389–2006.

EXPROPRIATION

2007-05-09	<i>Contencioso Administrativo</i> Court	Order accepting for consideration the reconsideration request made by the Attorney General on 2007-05-08.
2007-05-15	<i>Contencioso Administrativo</i> Court	(C-160) Notification to FVG of orders dated 2007-02-23, 2007-04-14, and 2007-04-26.
2007-05-21	FVG	(R-276) Written submission raising preliminary objections of incompetence and defects in the Attorney General's petition.
2007-05-22	<i>Contencioso Administrativo</i> Court	Order accepting FVG's written submission of 2007-05-21, and granting leave to the other parties to file responses for two days.
2007-05-25	Ministry of Culture and Sports	Written submission presenting the Ministry's response to the Court's 2007-05-22 request.
2007-05-30	FEGUA	Written submission answering the petition.
2007-05-31	<i>Contencioso Administrativo</i> Court	Order accepting the written submission by the Ministry of Culture and Sports.
2007-05-31	<i>Contencioso Administrativo</i> Court	Order declaring the claim answered by FEGUA.
2007-07-23	<i>Contencioso Administrativo</i> Court	Record of Service of orders dated 2007-05-09, 2007-05-10, 2007-05-22, and 2007-05-31 to FVG.
2007-07-25	Attorney General	Written submission responding to FVG's preliminary objections.
2007-07-25	FVG	Written submission responding to the Attorney General's motion for reconsideration of the Court's order denying the provisional suspension of Contract 143/158.
2007-07-26	<i>Contencioso Administrativo</i> Court	Order accepting FVG's submissions on the Attorney General's motion for reconsideration of the Court's order denying the provisional suspension of Contract 143/158.
2007-08-03	FEGUA	Written submission responding to FVG's preliminary objections.
2007-08-06	<i>Contencioso Administrativo</i> Court	Order accepting FEGUA's submissions on FVG's preliminary objections.
2008		
2008-01-31	Attorney General	Written submission requesting the Court to rule on FVG's preliminary objections.
2008-03-10	<i>Contencioso Administrativo</i> Court	Order dismissing the Attorney General's motion for reconsideration requesting provisional suspension of Contract 143/158.
2008-03-12	<i>Contencioso Administrativo</i> Court	Order denying FVG's preliminary objections on incompetence and defects of claim.
2008-05-05	<i>Contencioso Administrativo</i> Court	Record of Service to FVG of the 2007-03-12 order denying its preliminary objections. Notice to FVG also of orders on 2007-07-26, 2007-08-03, 2007-08-06, 2008-03-10, and 2008-03-12.
2008-05-12	FVG	(R-292) Written submission answering the petition. FVG replies to the complaint in negative and does not provide any means of evidence.
2008-05-13	<i>Contencioso Administrativo</i> Court	Order opening the evidentiary phase of the <i>Contencioso Administrativo</i> process for a period of 30 days.
2009		
2009-03-16	Attorney General	Written submission proposing legal and human presumptions as evidence.
2009-03-16	Attorney General	Written submission proposing documents as evidence.

2009-03-17	<i>Contencioso Administrativo</i> Court	Order accepting Attorney General's written submission and evidence presented and granting leave to respond to other parties.
2009-03-19	Attorney General	Written submission requesting the production of documents in possession of FEGUA as evidence.
2009-03-31	Attorney General	Presentation of questions for the deposition of FVG's legal representative.
2009-04-01	<i>Contencioso Administrativo</i> Court	Order establishing 2009-04-29 as the date for the witness deposition of FVG's legal representative.
2009-04-03	FEGUA	Written submission presenting evidence.
2009-04-06		Set of questions to be presented to the legal representative of FVG in his deposition.
2009-04-13	<i>Contencioso Administrativo</i> Court	Order accepting evidence and setting the hearing date for witnesses depositions.
2009-04-22	FVG	Procedural objection (Challenge of Nullity of Process) and request for suspension of Process.
2009-04-22	<i>Contencioso Administrativo</i> Court	Order rescheduling the deposition of FVG's legal representative for 2009-05-05.
2009-04-27	FVG	Written submission requesting the deposition of the Attorney General.
2009-04-27	FVG	Written submission requesting the deposition of FEGUA.
2009-04-28	FVG	Presentation of questions for the witness depositions of America Yolanda González Martínez, Oscar Róchale Cruz Tello, and Francisco Alberto Aldana Marroquin.
2009-04-28	FVG	Presentation of questions for the witness deposition of Oscar Arturo Gramajo Mondal.
2009-04-28	<i>Contencioso Administrativo</i> Court	Minutes of the witness depositions of America Yolanda González Martínez, Oscar Róchale Cruz Tello, Francisco Alberto Aldana Marroquin, Jorge Senn Sagastume, and Oscar Arturo Gramajo Mondal. FVG cross-examined witnesses at this hearing.
2009-04-30	FVG	Procedural objection (Challenge of Nullity) and requesting the suspension of the proceeding.
2009-05-04	FVG	Written submission requesting the deposition of the Attorney General.
2009-05-04	<i>Contencioso Administrativo</i> Court	Order denying FVG's request for the deposition of the Attorney General based on Art. 26 of <i>Contencioso Administrativo</i> Law, which states that the State may only submit written statements.
2009-05-05	<i>Contencioso Administrativo</i> Court	Order accepting FVG's procedural objection for consideration. The Court also suspends the proceeding at FVG's request.
2009-05-05	<i>Contencioso Administrativo</i> Court	Minutes of the party declaration of FVG through its legal representative, Jorge Senn.
2009-05-06	<i>Contencioso Administrativo</i> Court	Record of Service of order issued on 2009-05-05.
2009-05-06	Attorney General	Written submission responding to FVG's procedural objection (Nullity Recourse).
2009-05-07	Minister of Culture and Sports	Written submission responding to FVG's procedural objection. (Nullity Recourse).

EXPROPRIATION

2009-05-08	FEGUA	Written submission responding to FVG's procedural objection. (Nullity Recourse).
2009-05-08	Comptroller's Office	Written submission responding to FVG's procedural objection. (Nullity Recourse).
2009-05-08 2009-05-11 2009-06-16	<i>Contencioso Administrativo</i> Court	Orders accepting all parties' submissions on FVG's procedural objection (Nullity Recourse).
2009-06-12	FEGUA	Written submission requesting the Court's certification of the minutes of the witnesses depositions and party declarations from 2009-04-28 and 2009-05-05.
2009-06-15	FEGUA	Written submission requesting the Court to rule on FVG's procedural objection (Nullity Recourse)
2009-06-15	<i>Contencioso Administrativo</i> Court	Order accepting FEGUA's submission.
2009-06-16	<i>Contencioso Administrativo</i> Court	Order granting the certification of minutes requested by FEGUA.
2009-07-03	<i>Contencioso Administrativo</i> Court	Order denying FVG's procedural objection (Nullity of Process).
2010		
2010-01-11	<i>Contencioso Administrativo</i> Court	Order establishing 2010-01-27 as the date for the party declaration of FVG.
2010-01-21	FVG	Motion to quash the Court's order requiring Jorge Senn to provide a party declaration on behalf of FVG.
2010-01-22	<i>Contencioso Administrativo</i> Court	Order accepting for consideration FVG's motion to quash and suspending the <i>Contencioso Administrativo</i> process.
2010-01-27	FEGUA	Written submission on FVG's motion to quash.
2010-01-28	Attorney General	Written submission on FVG's motion to quash.
2010-01-29	Minister of Culture and Sports	Written submission on FVG's motion to quash.
2010-01-29 2010-02-02	<i>Contencioso Administrativo</i> Court	Orders accepting parties' submissions relating to FVG's motion to quash the Court's order of 2010-01-11.
2010-02-18	<i>Contencioso Administrativo</i> Court	Order granting FVG's motion to quash the Court's order of 2010-01-11 as to the party deposition of FVG and establishing the date of 2010-03-16 for the deposition of FVG.
2010-03-16	FVG	Party declaration of Jorge Senn on behalf of FVG.
2010-04-07	Attorney General	Written submission noting the end of the 30 day period for the presentation of evidence and requesting that the Court accept final written submissions.
2010-04-12	<i>Contencioso Administrativo</i> Court	Order establishing the deadline for the parties' final written submissions in the proceeding before the Court.
2010-05-19	FVG	Final written submission.
2010-05-19	Attorney General	Final written submission.
2010-05-19	FEGUA	Final written submission.
2011		
2011-06-15	Attorney General	Motion requesting final judgment.
2011-09-13	Attorney General	Motion requesting final judgment.

117. Thus, while the *Contencioso Administrativo* Court proceedings may have extended past the deadlines contemplated under Guatemalan law, there is no support for a conclusion that the delay constitutes a failure in due process. As Mr. Aguilar states, “it is important to note that both the State of Guatemala and Ferrovías are part of the same process. . . . Ferrovías has raised numerous motions, requests for annulment, that have delayed and slowed the process.”²⁶⁹ This type of delay — *i.e.*, one attributable to the parties’ joint exercise of their rights to be heard — underscores the existence, rather than the absence, of due process.²⁷⁰

118. Though Claimant contends that “FVG has not had a full and fair opportunity during the *Contencioso Administrativo* proceedings to cross-examine Government witnesses or otherwise to present its case,”²⁷¹ the facts do not support this conclusion. As the “docket” chart above demonstrates, and as Mr. Aguilar has confirmed,²⁷² Claimant has exercised its right to be heard by presenting evidence, making written and oral arguments, and even by cross-examining Government witnesses. Claimant itself admits that “an evidentiary proceeding took place on April 28, 2009,”²⁷³ that witnesses were requested to “confirm the basic facts and allegations underlying the Government legal opinions that served as the basis for the *Lesivo* Resolution,”²⁷⁴ and that “Claimant was allowed to conduct limited cross-examination of the witnesses.”²⁷⁵

119. With respect to Claimant’s assertion that FVG has had “no opportunity . . . to present arguments or evidence to the Administrative Court which challenged the Government’s claim that the alleged legal infirmities in the usufruct equipment contracts were substantively harmful to the interests of the State,”²⁷⁶ Mr. Aguilar emphasizes that this situation was likely one of Claimant’s own doing.²⁷⁷ To this

²⁶⁹ Second Expert Report of J.L. Aguilar, ¶¶ 59–60 (unofficial translation) (“es importante anotar que tanto el Estado de Guatemala como Ferrovías son parte del mismo proceso. . . . Ferrovías ha planteado numerosas acciones, incluyendo nulidades que han dilatado y retardado el proceso”).

²⁷⁰ **RL- 176**, *El Oro Mining*.

²⁷¹ Reply on the Merits, ¶ 305.

²⁷² See Second Expert Report of J.L. Aguilar, § III.B.

²⁷³ Reply on the Merits, ¶ 226.

²⁷⁴ Reply on the Merits, ¶ 226.

²⁷⁵ Reply on the Merits, ¶ 227.

²⁷⁶ Reply on the Merits, ¶ 305.

EXPROPRIATION

end, Mr. Aguilar states that Claimant “has raised the defenses that it believes will serve it”²⁷⁸

Although Claimant could have challenged the *Lesivo* Declaration on substantive grounds, it chose to present only procedural arguments.²⁷⁹ The fact that “the entire focus of the proceedings has been on whether, in connection with the declaration of *lesividad*, the various Government officials complied with the procedural, not substantive, requirements of the law”²⁸⁰ is therefore a failure in Claimant’s defense strategy, rather than a failure in Guatemala’s judicial system.

120. In the past four years, Claimant has also been actively pursuing its rights before the Guatemalan Constitutional Court. On 7 September 2006 — *i.e.*, nearly two months before the Attorney General’s deadline for filing a complaint with the *Contencioso Administrativo* Court had passed — FVG filed an *amparo* claim before the Constitutional Court, claiming to have been the victim of “unrestricted subjection to the law in the exercise of Government power and the autonomy of a decentralized, autonomous entity, as well as [its] right to legal certainty and the principle of due process.”²⁸¹ In January of 2008, the Constitutional Court rejected FVG’s *amparo* challenge as premature, stating that the *Lesivo* Declaration had “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.”²⁸² The Constitutional Court recognized that FVG would have an opportunity to raise its arguments during the *Contencioso Administrativo* Court proceeding²⁸³

121. There have accordingly been ample “signs that Claimant’s claim is being dealt with” and no evidence that there has been a denial of justice to Claimant.

Footnote continued from previous page

²⁷⁷ See Second Expert Report of J.L. Aguilar, ¶ 54.

²⁷⁸ Second Expert Report of J.L. Aguilar, ¶ 54 (unofficial translation) (“ha hecho valer las defensas que estima que le asisten . . .”).

²⁷⁹ See **Ex. R-292**, 2008-05-12, FVG’s Reply Brief in the *Contencioso Administrativo* Phase of the *Lesividad* Proceeding re: Contract 143/158, pp. 2–3 (expressly selecting not to provide any evidence to substantiate its argument before the *Contencioso Administrativo* court that the *Lesivo* Declaration “was issued illegally”).

²⁸⁰ Reply on the Merits, ¶ 305.

²⁸¹ **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 1.

²⁸² **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4.

²⁸³ **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 4.

4. Claimant Will Be Entitled To “Prompt, Adequate, and Effective” Compensation If The *Contencioso Administrativo* Court Upholds The *Lesivo* Declaration

122. Because Claimant retains its rights under Contract 143/158 pending the outcome of the *Contencioso Administrativo* proceedings, and because, irrespective of the outcome of those proceedings, Claimant retains its rights under all of the other contracts which comprise the Usufruct, requiring Guatemala to compensate Claimant for its “loss” prior to that date would make no sense. This is further underscored by the fact that the State bears the burden of proving that an administrative act or contract is in fact *lesivo*, and that the *Contencioso Administrativo* Court has demonstrated, contrary to Claimant’s assertion, that it will reject a *lesividad* petition if the State does not satisfy this burden.²⁸⁴ Compensating Claimant in these circumstances would effectively grant Claimant double-recovery, as it would receive compensation to represent the income it continues to receive from the Usufruct or that which it could be receiving if it did not voluntarily cease all its rail operations.

123. As the *Waste Management II* tribunal explained, expropriation occurs when a repudiated right remains “unredressed by any remedies available to the Claimant.”²⁸⁵ In the present case, not only have Claimant’s rights been unaffected by the *lesividad* process, but, should they eventually be affected *viz* a decision by the *Contencioso Administrativo* Court that Contract 143/158 is in fact *lesivo*, Claimant will be entitled to seek compensation.²⁸⁶

E. The *Shufeldt* Case Is Inapposite To This Case

124. In its Reply, Claimant asserts that “[t]he facts and circumstances of the present case are remarkably similar to another expropriation case that was brought against Guatemala more than 80 years ago, the *Shufeldt Claim*.”²⁸⁷ According to Claimant, “*Shufeldt* holds that the very same measure which Guatemala has taken here against Claimant — the declaration of *lesividad* — constitutes an expropriation, and that the very same arguments Guatemala raises here to defend its expropriatory

²⁸⁴ **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A., Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010), pp. 37–38.

²⁸⁵ **RL-136**, *Waste Management II Award*, ¶¶ 174–75.

²⁸⁶ See First Expert Report of J.L. Aguilar, ¶¶ 55, 59; Second Expert Report of J.L. Aguilar, ¶¶ 61–62.

²⁸⁷ Reply on the Merits, ¶ 310.

EXPROPRIATION

measure do not justify or excuse its conduct.”²⁸⁸ Claimant’s conclusion that the “*Shufeldt Claim* is on all fours with the present case”²⁸⁹ is incorrect.

125. First, *Shufeldt* did not address “the very same measure which Guatemala has taken here against Claimant.”²⁹⁰ As explained throughout this Rejoinder, the *Lesivo* Declaration here at issue is: (1) an initial determination (2) by the Executive branch (3) that there is enough evidence that an administrative act or contract might be harmful to the interests of the State that it must (4) instruct the Attorney General to initiate a proceeding before the *Contencioso Administrativo* Court where (5) that Court will determine whether the act or contract is in fact harmful to the interests of the State, and, if so, (6) what remedy will ensue. The measure at issue in *Shufeldt*, on the other hand, was a legislative decree transmitted to the Executive for execution, which had the immediate effect of “bring[ing] the contract summarily to an end, thus depriving Shufeldt of all his rights under the contract.”²⁹¹ As Claimant notes, the measure at issue in *Shufeldt* — *unlike the one at issue in this proceeding* — was “not subject to review by any [domestic] judicial authority.”²⁹²

126. Second, *Shufeldt* was not an “expropriation case”²⁹³ and could not, therefore, have held that “the very same measure which Guatemala has taken here against Claimant . . . constitutes an expropriation,”²⁹⁴ or that “the very same arguments Guatemala raises here to defend its expropriatory measure do not justify its conduct.”²⁹⁵ Rather, as the parties to the *Shufeldt* case agreed, the two issues in dispute were: (1) whether Mr. Shufeldt “had the right to claim a pecuniary indemnification for damages and injuries which may have been caused to him by the promulgation”²⁹⁶ of the legislative

²⁸⁸ Reply on the Merits, ¶ 316 (emphasis added).

²⁸⁹ Reply on the Merits, § II.B.8.

²⁹⁰ Reply on the Merits, ¶ 316.

²⁹¹ **CL-125**, *Shufeldt*, p. 1095. Indeed as Mr. Aguilar explains, this process was different from the *lesividad* process at issue in this case because in *Shufeldt*, the finding that the contract was harmful to State interests had the immediate effect of depriving Mr. Shufeldt of his rights under that contract. See Second Expert Report of J.L. Aguilar, ¶ 104. Mr. Aguilar also highlights that, in *Shufeldt*, Guatemala’s argument that the contract was not valid was based on laws that were no longer in force. This too is different from the case at hand. See Second Expert Report of J.L. Aguilar, ¶ 106.

²⁹² Reply on the Merits, ¶ 314 (quoting **CL-125**, *Shufeldt*, p. 1098).

²⁹³ Reply on the Merits, ¶ 310.

²⁹⁴ Reply on the Merits, ¶ 316.

²⁹⁵ Reply on the Merits, ¶ 316.

decree which disapproved a contract for the extraction of chicle that he had been assigned; and (2) if so, the amount of the damages owed.²⁹⁷

127. In essence, the first question — the main issue in the case — asked whether Mr. Shufeldt had property rights arising from the contract. Far from evaluating whether the measure at issue had a substantial and lasting effect upon the totality of his rights, as the Tribunal in this case must do, the arbitrator in *Shufeldt* took for granted that the legislative decree invalidated any rights that Mr. Shufeldt may have had. Indeed, the decree at issue in *Shufeldt* supported this conclusion explicitly, as it stated: “The contract in question is disapproved. The Executive should take such measures and emit such dispositions as the case demands, to the effect that the zone of public lands be returned to the power of the State. Passed to the Executive for publication and compliance.”²⁹⁸ As the arbitrator explained, the legislative decree “was approved by the President and published in the *El Guatemalteco* of 7th July 1928. This brought the contract summarily to an end, thus depriving Shufeldt of all his rights under the contract.”²⁹⁹ The facts in *Shufeldt* are therefore starkly different from the case at hand, where Claimant has conceded that the *Lesivo* Declaration has had neither a legal or practical effect upon substantially all of the rights that were the subject of the Declaration,³⁰⁰ and where it has continued to reap the economic benefits of its investment.³⁰¹

128. Third, it is simply untrue that the defense of the measure in *Shufeldt* comprises “the very same arguments Guatemala raises here to defend its expropriatory measure.”³⁰² Because the issue in *Shufeldt* was the threshold validity of the contractual rights he claimed to possess, Guatemala’s main arguments in defense of international liability in that case related to the nullity *ab initio* of the contract due to lack of legislative approval and lack of Governmental authority to enter into a contract which violated its tax laws. In the present case, however, while similar arguments may have been a principal defense invoked at the jurisdictional phase, they have been accorded no such status in terms of Guatemala’s

Footnote continued from previous page

²⁹⁶ CL-125, *Shufeldt*, p. 1083.

²⁹⁷ CL-125, *Shufeldt*, p. 1083.

²⁹⁸ CL-125, *Shufeldt*, p. 1095.

²⁹⁹ CL-125, *Shufeldt*, p. 1095.

³⁰⁰ See Memorial on the Merits, ¶¶ 126, 130; see also Reply on the Merits, ¶ 229.

³⁰¹ Ex. R-329, Parties’ Stipulation.

³⁰² Reply on the Merits, ¶ 316.

EXPROPRIATION

expropriation defense. Guatemala has consistently argued that the lack of *effect* (let alone substantial effect) upon Claimant's investment is the determinative defense to Claimant's expropriation claim.

129. Thus, while the *Shufeldt* decision remains relevant to the Tribunal's damages inquiry, it is inapposite to the Tribunal's determination of the merits.

* * *

130. In light of the reasons set forth both in this section and in Section IV.A. of Guatemala's Counter-Memorial, the Tribunal must reject Claimant's expropriation claim in its entirety.

III. Guatemala Afforded Claimant's Investment Fair And Equitable Treatment In Accordance With Article 10.5 Of CAFTA

131. With respect to fair and equitable treatment, Guatemala's obligation is defined by Article 10.5 of CAFTA. Pursuant to Article 10.5, State Parties are required to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment"³⁰³ As Article 10.5.2 clarifies, the obligation to accord fair and equitable treatment does "not require treatment in addition to or beyond"³⁰⁴ that which is required by the customary international law minimum standard of treatment; nor does this obligation "create additional substantive rights."³⁰⁵ Thus, to decide Claimant's fair and equitable treatment claim, the Tribunal must determine whether Claimant has satisfied its burden of proving that: (1) the customary international law minimum standard of treatment binds Guatemala to accord the types and level of treatment which Claimant invokes; and (2) Guatemala's actions fall short of the obligation it undertook in CAFTA.

132. In its Reply, Claimant invokes five types of treatment as obligations under the customary international law standard that it alleges Guatemala failed to meet. According to Claimant, the customary international law minimum standard of treatment imposes: (a) a duty to refrain from acting in bad faith; (b) an obligation to afford due process; (c) a duty to refrain from engaging in arbitrary or discriminatory conduct; (d) an obligation to refrain from frustrating an investor's legitimate expectations; and (e) a duty to provide transparency and stability to foreign investments.

133. As a threshold matter, as Guatemala explained in its Counter-Memorial, Claimant has failed to demonstrate that each of the five duties it invokes constitutes an element of customary international law, in that it is "a general and consistent practice of States that they follow from a sense of legal obligation."³⁰⁶ And even assuming that, each duty could constitute an element of customary international law, Claimant has failed to substantiate its articulation of each duty. These failures alone should be sufficient cause to reject Claimant's fair and equitable treatment claims.

³⁰³ **RL-61**, CAFTA Art. 10.5.1.

³⁰⁴ **RL-61**, CAFTA Art. 10.5.2.

³⁰⁵ **RL-61**, CAFTA Art. 10.5.2.

³⁰⁶ **RL-61**, CAFTA Annex. 10-B.

FAIR AND EQUITABLE TREATMENT

134. However, there are additional reasons why Claimant's fair and equitable treatment claims must be rejected. First, when applying the correct standard, it is plain that Guatemala did not violate its undertakings with respect to providing fair and equitable treatment to Claimant's investment. Second, even as applied to the legal standards that Claimant asserts, the evidence does not support a conclusion that Guatemala's actions fell below such standards. Thus, after a response to Claimant's arguments regarding the legal standards applicable to its fair and equitable treatment claim (Section III.A), Guatemala will demonstrate (in Section III.B) that its conduct has met or exceeded the level of treatment required, and that Claimant has failed to prove otherwise.

A. Standard Of Fair And Equitable Treatment Under CAFTA And Customary International Law

135. Because Claimant has muddled the arguments that Guatemala set forth in its Counter-Memorial, to the point where Claimant believed them to be "confusing, contradictory and of no assistance in determining the standard of treatment required under the customary international law minimum standard," a few comments are in order regarding the applicable legal standard under CAFTA Article 10.5.

136. First, as Guatemala explained in its Counter-Memorial, the Tribunal should not conflate the customary international law minimum standard of treatment applicable in this case with the autonomous fair and equitable treatment standard that other investment tribunals have been bound to interpret; as the NAFTA tribunal in *Cargill Inc. v. United Mexican States* ("*Cargill*") instructed:

[Though]the requirement to provide "fair and equitable treatment" is included in many bilateral investment treaties . . . some of these clauses involve a reference to customary international law, while others apparently involve autonomous treaty language. It is the Tribunal's view that significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom.³⁰⁷

137. The NAFTA tribunal in *Glamis Gold* also advocated this approach. Specifically, the tribunal rejected the claimant's assertion that BIT jurisprudence on fair and equitable treatment had "'converged with customary international law in this area.'"³⁰⁸ While the tribunal believed it was *possible* for BITs to

³⁰⁷ **RL-175**, *Cargill Award*, ¶ 276 (emphasis added).

³⁰⁸ **RL-102**, *Glamis Gold Award*, ¶ 609.

“converge with the requirements established by customary international law,”³⁰⁹ before relying on a particular BIT, the tribunal found it “necessary to look at the underlying fair and equitable treatment clause of each treaty, and the reviewing tribunal’s analysis of that treaty, to determine whether or not they are drafted with an intent to refer to customary international law.”³¹⁰ The *Glamis Gold* tribunal further stated that it would find no guidance from cases that interpreted an autonomous standard rather than the applicable customary international law standard.³¹¹

138. Non-NAFTA tribunals have also recognized a distinction between the customary international law minimum standard of treatment and the autonomous fair and equitable treatment obligation. In *Saluka v. Czech Republic*, for example, the tribunal not only distinguished between the two standards, but also correctly held that the autonomous obligation is higher than that under customary international law:

[I]t should be kept in mind that the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of ‘fair and equitable treatment’ may in fact provide no more than ‘minimal’ protection. Consequently, in order to violate that [minimum] standard, States’ conduct may have to display a relatively higher degree of inappropriateness.

Bilateral investment treaties, however, are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors’ protection by the ‘fair and equitable treatment’ standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States’ conduct displays a relatively lower degree of inappropriateness.³¹²

139. Second, Claimant cannot accuse Guatemala of contradicting itself by simultaneously discussing autonomous-standard cases and arguing that the Tribunal’s decision could not be based upon such cases.³¹³ In its Counter-Memorial, Guatemala highlighted the autonomous-standard cases to show that

³⁰⁹ **RL-102**, *Glamis Gold Award*, ¶ 609.

³¹⁰ **RL-102**, *Glamis Gold Award*, ¶ 609.

³¹¹ See **RL-102**, *Glamis Gold Award*, ¶¶ 608–10.

³¹² **RL-125**, *Saluka Investments BV v. Czech Republic*, PCA—UNCITRAL Arbitration Rules, IIC 210 (Partial Award, 17 March 2006) (Watts, Fortier, Behrens), ¶¶ 292–93 (“*Saluka Partial Award*”) (emphasis added)

³¹³ See Reply on the Merits, ¶ 329.

FAIR AND EQUITABLE TREATMENT

the autonomous standard imposes a higher obligation upon States than the customary international law standard.³¹⁴ Therefore, if Guatemala demonstrates that its conduct complies with the higher autonomous standard, it will have also proven that its conduct complies with the customary international law standard. Claimant, on the other hand, may not win its case simply by demonstrating that Guatemala's conduct violates the autonomous standard; it must show that Guatemala's conduct violated the standard set forth in CAFTA, which is the customary international law minimum standard of treatment.

140. Third, Claimant bears the burden of establishing that a particular type (and level) of conduct is an element of the minimum standard of treatment under customary international law.³¹⁵ As the *Cargill* tribunal explained, such burden goes beyond arguments based on mere treaty interpretation:

The shift in approach from seeking the meaning of "fair and equitable treatment" as a matter of treaty interpretation to seeking to ascertain the content of custom has fundamental implications for the legal reasoning of a tribunal. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so; namely, the language at issue and the rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only the question of law but involves primarily a question of fact, where custom is found in the practice of States regarded as legally required by them.³¹⁶

141. Thus, as Guatemala explained in its Counter-Memorial, to establish that certain conduct is required by customary international law, Claimant must prove both: "(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*).'"³¹⁷ Though Claimant has attempted to satisfy this

³¹⁴ See **RL-175**, *Cargill Award*, ¶ 285.

³¹⁵ See generally Counter-Memorial on the Merits, § IV.B.1.b; see also **RL-83**, *Asylum Case (Colombia v. Peru)*, International Court of Justice (Judgment, 20 November 1950), p. 14 ("*Asylum Case*"); **RL-102**, *Glamis Gold Award*, ¶ 603; **RL-175**, *Cargill Award*, ¶ 273; **RL-178**, *North Sea Continental Shelf Cases*, ¶ 44.

³¹⁶ **RL-175**, *Cargill Award*, ¶ 271 (emphasis added); see **RL-102**, *Glamis Gold Award*, ¶ 607 ("Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or *opinio juris*").

³¹⁷ **RL-102**, *Glamis Gold Award*, ¶ 602.

burden by citing two types of evidence — previous arbitral awards and the “2000+ bilateral investment treaties that exist today”³¹⁸ — neither type of evidence is sufficient. With respect to arbitral awards, regardless of whether they interpret customary international law or an autonomous standard, as the *Glamis Gold* tribunal stated, “[they] do not constitute state practice and thus cannot create or prove customary international law.”³¹⁹

142. Regarding the “2000+ bilateral investment treaties that exist today,” Claimant argues that these BITs “shape the content” of customary international law,³²⁰ and appears to conclude on that basis that elements that comprise the fair and equitable treatment obligations under those BITs must also necessarily constitute elements of the customary international law minimum standard of treatment. As a threshold matter, it is unclear whether such evidence would in fact demonstrate *opinio juris*:

The evidence of such “concordant practice” undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g. Model BITs), and sometimes pleadings. Although one can readily identify the practice of States, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.³²¹

143. Even if the prevalence of fair and equitable treatment clauses in “the 2000+ bilateral investment treaties that exist today” could demonstrate *opinio juris*, however, it still does not follow that the elements which comprise the “fair and equitable treatment” standard found in those treaties should automatically be considered elements of the customary international law minimum standard of treatment. While the “2000+ bilateral investment treaties that exist today” might demonstrate State agreement to accord an overarching standard of “fair and equitable treatment,” they do not show that State agreement with respect to the individual types of conduct invoked in this case (e.g., transparency, comportment with an investor’s legitimate expectations, arbitrariness). Because it is arbitral awards, rather than investment treaties, which have established that fair and equitable treatment comprises the individual types of conduct Claimant invokes in this case, Claimant’s reference to 2000+ BITs is

³¹⁸ See Reply on the Merits, ¶ 333.

³¹⁹ **RL-102**, *Glamis Gold Award*, ¶ 605.

³²⁰ See Reply on the Merits, ¶ 333.

³²¹ **RL-102**, *Glamis Gold Award*, ¶ 603 (emphasis added).

FAIR AND EQUITABLE TREATMENT

inapposite. As stated above, reference to arbitral decisions is insufficient to prove customary international law.³²²

144. Even if the prevalence of fair and equitable treatment clauses in “the 2000+ bilateral investment treaties that exist today” could demonstrate *opinio juris*, those treaties by and large only refer to “fair and equitable treatment” as the standard; they do not define that standard to include the other standards which Claimant here seeks to invoke. In other words, they do not establish State agreement with respect to the individual types of conduct invoked in this case (*e.g.*, transparency, comportment with an investor’s legitimate expectations, arbitrariness). This is because it is arbitral awards, rather than investment treaties, which contain these interpretations of the fair and equitable treatment standard. But that does not establish a consistent State practice. Thus, Claimant’s reference to 2000+ BITs is inapposite and, as stated above, arbitral decisions are insufficient to prove customary international law.³²³

145. Thus, although “[s]ome reference has been made [to fair and equitable treatment clauses in] the many bilateral treaties for the protection of investments that have been concluded over recent decade as supporting a relevant rule of customary international law,”³²⁴ Claimant “has not attempted to establish that that state practice reflects an understanding of the existence of a generally owed international legal obligation which, moreover, has to relate to the specific”³²⁵ elements it alleges. Accordingly, because it is unaware of any authority that has found, based on a concordant state practice and *opinio juris*, that there is a customary international law obligation to act transparently, to refrain from acting arbitrarily, to refrain from frustrating an investor’s legitimate expectations, and to provide a stable legal and business environment — and because Claimant has failed to prove otherwise — Guatemala continues to dispute the existence of such obligations as part of the undertakings made by Guatemala in Article 10.5 of CAFTA. Should the Tribunal nevertheless find that Claimant has satisfied its burden of proving the existence of these obligations under customary international law, as demonstrated below, Claimant’s claims must be rejected in light of Claimant’s failure to prove that Guatemala in fact violated these standards.

³²² **RL-102**, *Glamis Gold Award*, ¶ 605.

³²³ **RL-102**, *Glamis Gold Award*, ¶ 605.

³²⁴ **RL-171**, *United Parcel Service of America, Inc. v. Canada* (Award, 22 November 2002) (Cass, Fortier, Keith), ¶ 86 (“*UPS Award*”).

³²⁵ **RL-171**, *UPS Award*, ¶ 86.

146. Fourth, apart from arguing that the *Neer* standard may still be applicable in terms of a denial of justice or due process claim³²⁶ — a point which Claimant concedes³²⁷ — Guatemala never argued that the customary international law minimum standard of treatment has remained unchanged since the 1926 *Neer* case.³²⁸ Quoting the NAFTA tribunal in *International Thunderbird*, however, Guatemala noted that “[n]otwithstanding the evolution of customary law since decisions such as the *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*].³²⁹ The tribunal further stated that acts which would violate the customary international law standard would be “those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”³³⁰

147. The *Cargill* tribunal agreed, stating that while the minimum standard of treatment may have evolved in *application* since the *Neer* decision — such that measures which would be an “outrage” in 1926 might no longer deserve such distinction — the severity of the standard has not been lost.³³¹

In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.³³²

³²⁶ See Counter-Memorial on the Merits, ¶ 379.

³²⁷ See Reply on the Merits, ¶ 331.

³²⁸ To the contrary, Guatemala noted that although certain language it quoted 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.” Counter-Memorial on the Merits, ¶ 379.

³²⁹ **RL-104**, *International Thunderbird Award*, ¶ 194 (emphasis added).

³³⁰ **RL-104**, *International Thunderbird Award*, ¶ 194 (emphasis added).

³³¹ See **RL-175**, *Cargill Award*, ¶¶ 284, 286.

³³² **RL-175**, *Cargill Award*, ¶ 296 (emphasis added).

FAIR AND EQUITABLE TREATMENT

Thus, the threshold for demonstrating a fair and equitable treatment violation under CAFTA is substantially higher than the mere “unreasonableness” standard Claimant advocates.³³³

148. Fifth, as Guatemala highlighted in its Counter-Memorial, Claimant may not succeed on its fair and equitable treatment claim by arguing that the issuance of the *Lesivo* Declaration was wrong:

[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 processes³³⁴

149. It is not the mandate of an ICSID tribunal to second-guess, *ex post facto*, the merit of a particular State action; a tribunal may only assess whether — at the time it was taken and with the information the State had at that time — the decision or measure was “so unfair” or “inequitable” that it violated international law.³³⁵ To this end, the *Cargill* tribunal stated:

³³³ See Reply on the Merits, ¶ 329.

³³⁴ **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), ¶ 261 (“*S.D. Myers First Partial Award*”); see **RL-95**, *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004 (Partial Award, 27 March 2007) (Volterra, Karrer, Gaillard), ¶ 272 (“*Eastern Sugar Partial Award*”) (“[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 the guise of a violation of the BIT. This is obviously not what BITs are for”).

³³⁵ See **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*”); **RL-78**, *ADF Group Inc v. United States*, ICSID Case No ARB(AF)/00/1, (Award, 9 January 2003) (Feliciano, de Mestral, Lamm), ¶ 190 (“*ADF Award*”) (stating that the tribunal does not “sit as a court with appellate jurisdiction with respect to U.S. measures” and emphasizing that “even if the U.S. measures were shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1)”; **RL-79**, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22 (Award, 23 September 2010) (von Wobeser, Stern, Rowley), ¶ 9.3.40 (“*AES Award*”) (finding that not every process failing or imperfection will amount to a failure to provide fair and equitable treatment, and that the standard is not one of perfection).

(1) “The failure to fulfill 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 objectives 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.”³³⁶

150. Thus, in terms of the present case, even if the Tribunal believes that Guatemala incorrectly concluded that Contract 143/158 was *lesivo*, this alone is an insufficient reason for holding Guatemala responsible for a violation of its obligation to accord fair and equitable treatment under CAFTA.

B. Claimant Has Failed To Meet Its Burden Of Establishing That Guatemala’s Conduct Falls Short Of The Minimum Standard Of Treatment Required By Customary International Law

151. As is demonstrated throughout this section, Claimant has failed to satisfy its burden of proving that Guatemala’s conduct fell below the customary international law minimum standard of treatment required by CAFTA Article 10.5. Section III.B.1 responds to Claimant’s “bad faith” claim; Section III.B.2 addresses the allegation that Guatemala denied Claimant due process; Section III.B.3 explains why Guatemala’s actions were neither arbitrary nor discriminatory; and Section III.B.4 demonstrates that Guatemala has not frustrated any legitimate expectations, or failed to act transparently or to provide stability to Claimant’s investment.

1. Guatemala Did Not Breach CAFTA Article 10.5 By Acting In Bad Faith, As Claimant Alleges

152. Although the parties agree that a showing of bad faith is not *required* to substantiate a fair and equitable treatment claim,³³⁷ Claimant nevertheless contends that Guatemala violated Article 10.5 of CAFTA by acting in bad faith. According to Claimant, “[t]he record in this case demonstrates beyond peradventure that the *Lesivo Resolution* — i.e., the unlawful measure — was a bad faith exercise and abuse of Guatemala’s sovereign powers.”³³⁸ As demonstrated within this section, Claimant has failed to meet the heavy burden to prove this unfounded allegation.

³³⁶ **RL-175**, *Cargill Award*, ¶ 287 (quoting **RL-100**, *GAMI Award*, ¶ 97).

³³⁷ See Reply on the Merits, ¶ 342.

³³⁸ Reply on the Merits, ¶ 344.

FAIR AND EQUITABLE TREATMENT

153. Pursuant to the “bad faith” standard articulated by the NAFTA tribunal in *Waste Management II*, the “basic obligation of a 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.”³³⁹ As Guatemala explained in its Counter-Memorial, this standard imposes a heavy burden upon Claimant, who must prove that Guatemala (1) acted “improperly” or that its actions were “without justification” under its own laws and (2) that its actions were based on a particular intent — to “deliberately” or “consciously” destroy the relevant investment.³⁴⁰ Substantiating the second element can prove extremely difficult; as the *Chemtura* tribunal recognized, “the standard of proof for allegations of bad faith or disingenuous behavior is a demanding one.”³⁴¹ For its part, the *Waste Management II* tribunal noted that “conspiracy theories, unsupported by solid evidence . . . [are] not enough to cross the Article 1105(1) threshold.”³⁴²

154. The “demanding” nature of the standard of proof for allegations of bad faith is further underscored by the facts in the few cases holding that the respondent State had acted in bad faith. In *Cargill*, for example, the NAFTA tribunal held that respondent Mexico had acted in bad faith because it **admitted** that the measures in question were intended to retaliate against the United States for two breaches of its obligations under NAFTA.³⁴³ Accordingly, the tribunal decided that the import permit requirement at issue in the case “had been instituted to influence the trade policy” of the United States by targeting American suppliers,³⁴⁴ that the measure was in fact “put into effect by Mexico with the express intention of damaging Claimant’s HFCS investment to the greatest extent possible,”³⁴⁵ and,

³³⁹ **RL-136**, *Waste Management II Award*, ¶ 138 (emphasis added).

³⁴⁰ See Counter-Memorial on the Merits, ¶¶ 368–70.

³⁴¹ **RL-89**, *Chemtura Award*, ¶ 137.

³⁴² **RL-136**, *Waste Management II Award*, ¶ 139.

³⁴³ **RL-175**, *Cargill Award*, ¶ 100 (“On 31 December 2001 . . . Mexico’s Chamber of Deputies passed the IEPS Tax, which imposed a 20% tax on soft drinks and other beverages that contained sweeteners other than cane sugar. Also on the same day, Mexico’s executive announced that HFCS imports from the United States would require a permit issued by the secretary of economy. Respondent contends that these measures were taken in response to two breaches by the United States of its obligations under NAFTA: the failure to provide the required market access for sugar, and the failure to cooperate in constituting a Chapter 20 panel”).

³⁴⁴ **RL-175**, *Cargill Award*, ¶ 300.

³⁴⁵ **RL-175**, *Cargill Award*, ¶ 298.

ultimately, that Mexico's actions had "surpassed the standard of gross misconduct and [were] more akin to an action in bad faith."³⁴⁶

155. The high burden of proof was further underscored in *Bayindir*, a case which Claimant invoked in its Reply. In the decision on jurisdiction in that case (which is the decision Claimant invoked), the question for the tribunal was whether "the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT."³⁴⁷ While at the jurisdictional phase, the tribunal concluded that it could "hear Bayindir's claims based on Pakistan's obligation to accord fair and equitable treatment to foreign investment,"³⁴⁸ in the award (which Claimant failed to mention) the tribunal ultimately rejected the claimant's bad faith claim because the claimant failed to meet what the tribunal acknowledged was a "demanding" standard.³⁴⁹ The tribunal had "no hesitation in ruling out a finding of conspiracy," stating that "[s]uch a finding can in no circumstances derive solely from a divergence of views on the interpretation of certain provision of the Contract."³⁵⁰ Thus, while as a jurisdictional matter the *Bayindir* tribunal considered it possible for bad faith to arise due to "termination of an investment for reasons other than the one put forth by the government,"³⁵¹ it declined to find a treaty violation on the merits where the claimant had failed to establish that the termination of its contract was based on the reasons it had alleged.

156. Similarly, in *Vivendi II*, which Claimant heralds as a decision "of particular relevance,"³⁵² the tribunal imposed a high threshold to support a finding of bad faith. In light of the fact that Argentina had used its regulatory powers to force tariff reductions and to impose various fines and charges,³⁵³

³⁴⁶ **RL-175**, *Cargill Award*, ¶ 298.

³⁴⁷ **CL-1**, *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction, 14 November 2005) (Berman, Böckstiegel, Kaufmann-Kohler), ¶ 250 ("*Bayindir Decision on Jurisdiction*").

³⁴⁸ **CL-1**, *Bayindir Decision on Jurisdiction*, ¶ 250.

³⁴⁹ **RL-185**, *Bayindir Insaat Turzim Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29 (Award, 27 August 2009) (Berman, Böckstiegel, Kaufmann-Kohler), ¶ 223 ("*Bayindir Award*").

³⁵⁰ **RL-185**, *Bayindir Award*, ¶ 256.

³⁵¹ Reply on the Merits, ¶ 343 (citing **CL-1**, *Bayindir Decision on Jurisdiction*, ¶ 250).

³⁵² Reply on the Merits, ¶ 343.

³⁵³ See **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), ¶ 7.4.24 ("*Vivendi II Award*").

FAIR AND EQUITABLE TREATMENT

encouraged the claimants' customers not to pay their bills,³⁵⁴ and even enacted measures which prohibited the claimants from seeking relief from non-paying customers,³⁵⁵ the tribunal held that Argentina had mounted a politically-motivated "illegitimate 'campaign' against the concession, the Concession Agreement, and the 'foreign' concessionaire" aimed at forcing a renegotiation of the concession agreement, and that it had therefore violated its fair and equitable treatment obligation.³⁵⁶

157. Claimant has failed to demonstrate that the Government actions in the present case are comparable to the egregious State conduct which prompted a "bad faith" finding in previous cases.

158. In its Reply, Claimant contends that the facts of this case were sufficient to prove "a deliberate conspiracy to defeat the investment."³⁵⁷ According to Claimant:

[The *Lesivo* Declaration] was an exercise of governmental fiat, conducted in secret and directed by the top echelon of the Government of Guatemala, targeted to repudiate a foreign investment which the Government had induced, and used to coerce Claimant into either substantially giving up its property rights or forcing it to abandon its investment without any compensation. That was the explicit agenda, and the record documents it fully.³⁵⁸

159. However, there is absolutely no evidence to support this allegation. First, unlike the respondent in *Cargill* who did not contest the motivation behind its actions, Guatemala has consistently disputed Claimant's characterization of the intention behind the issuance of the *Lesivo* Declaration. The record evidence supports Guatemala's denials rather than Claimant's unsubstantiated conspiracy theories.

160. Second, there is no support for Claimant's allegation that "bad faith *lesivo* strategy was first developed and laid out in the Options Paper prepared by Dr. Gramajo in April 2005."³⁵⁹ This document — which was created to memorialize the various legal opinions, internal meetings conducted by FEGUA, and conversations between Dr. Gramajo and the Ministry³⁶⁰ — outlines two preliminary options for

³⁵⁴ See **RL-135**, *Vivendi II Award*, ¶¶ 7.4.39–7.4.42.

³⁵⁵ **RL-135**, *Vivendi II Award*, ¶¶ 7.4.32–7.4.36.

³⁵⁶ See **RL-135**, *Vivendi II Award*, ¶¶ 7.4.19, 7.4.37.

³⁵⁷ Reply on the Merits, ¶ 343 (citing **RL-136**, *Waste Management II Award*, ¶ 138).

³⁵⁸ Reply on the Merits, ¶ 290 (emphasis added).

³⁵⁹ Reply on the Merits, ¶ 347; **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex No. 7; Third Witness Statement of A. Gramajo, § III.

³⁶⁰ Third Witness Statement of A. Gramajo, ¶ 24.

dealing with the various ongoing problems with the relationship with FVG, which were for internal discussion between FEGUA and the Ministry of Communications legal team.³⁶¹ The first provided for the possible cancellation of the relationship with FVG, which could be done either amicably (by mutual agreement) or non-amicably, but importantly made a distinction as to how such a non-amicable cancellation might operate in relation to the separate usufruct contracts.³⁶² As it relates to the right-of-way Contract 402, it suggested resorting to the “arbitration in equity” process set forth in the agreement. When referring to the possible non-amicable cancellation of Contract 143/158, however, it acknowledged that the contract had never entered into force (and that FVG was using the equipment pursuant to authorizations granted by a former FEGUA Overseer) and listed possible nullification of Contract 143/158 or a possible *lesivo* declaration of that agreement given that the three-year statute of limitations for declaring the agreement *lesivo* had not elapsed.³⁶³ Notably absent from the discussion of a cancellation option is any hint of a strategy to pressure FVG to renegotiate Contracts 402 or 820, or to seek to use a declaration of *lesividad* of Contract 143/158 as an instrument of pressure, as Claimant now alleges.³⁶⁴

161. The second option was to continue to attempt to fix the relationship with FVG. In such event, various issues would need to be discussed between the parties, including the possibility of entering into a new contract for the railway equipment that remedied the legal defects inherent in the agreement and attempting to renegotiate the terms of Contract 820.³⁶⁵ *Again, notably, the document does not reflect using a declaration of lesividad of Contract 143/158 as a pressure mechanism to take away Claimant’s rights under Contracts 402 and 820, or to insist on a renegotiation of those agreements.*³⁶⁶

162. With respect to Claimant’s assertion that this second option showed that Guatemala did not intend to comply with (or wanted to rid itself of) its obligation to remove the squatters along the right-of-way, the text of the document simply does not support that interpretation. To the contrary, the

³⁶¹Third Witness Statement of A. Gramajo, ¶ 24; **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex 7, at RDC005259-62.

³⁶² Third Witness Statement of A. Gramajo, ¶ 25; **Ex. C-104**, Annex 7, RDC005259-60.

³⁶³ See **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex No. 7.

³⁶⁴ Third Witness Statement of A. Gramajo, ¶ 27; **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex 7, at RDC005261-62.

³⁶⁵ Third Witness Statement of A. Gramajo, ¶ 29.

³⁶⁶ Third Witness Statement of A. Gramajo, ¶ 29.

FAIR AND EQUITABLE TREATMENT

document acknowledges that “[u]nder the terms of the Usufruct Contract, . . . FEGUA is bound to request and obtain the orders of eviction, while the Ministry of Communications, Infrastructure and Housing is bound to coordinate the relocation of the squatters.”³⁶⁷ Though the subsection also notes that “we consider that this issue can be subject to negotiation” this language neither says nor implies that FEGUA and the Government sought to evade their squatter-related responsibilities. Rather, it suggests only that the details of how to proceed with evictions and relocations could be discussed between the parties and within the broader framework of the negotiations of the ongoing problems in the relationship with FVG.³⁶⁸

163. Accordingly, this document does not demonstrate the existence of any bad faith strategy by the Government. The options discussed therein were preliminary ideas regarding the issues that would form an internal dialogue between FEGUA and the Ministry of Communications in relation to the various breaches of Contract 402 and Contract 143/158 by FVG.³⁶⁹ It in no way bound FEGUA or the Government to act pursuant to its various options.³⁷⁰ And as the evidence demonstrates, the Government ultimately opted to continue to negotiate with Claimant in good faith leading up to and even after the *Lesivo* Declaration was issued in an effort to remedy the problems in the relationship with FVG and to obtain a functioning railroad.³⁷¹

164. Third, Claimant has utterly failed to prove that the Government’s “explicit” agenda was to “coerce Claimant into either substantially giving up its property rights or forcing it to abandon its investment without any compensation”³⁷² (or to prove its related allegations concerning the Government’s use of “coercion and harassment,”³⁷³ and “use of threats of rescission”³⁷⁴ to force Claimant to renegotiate its rights). As the internal document between FEGUA and the Legal Director of

³⁶⁷ **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex No. 7, at RDC005262.

³⁶⁸ Third Witness Statement of A. Gramajo, ¶ 30.

³⁶⁹ Third Witness Statement of A. Gramajo, ¶ 26.

³⁷⁰ Third Witness Statement of A. Gramajo, ¶ 24.

³⁷¹ Third Witness Statement of A. Gramajo, ¶ 26; Second Witness Statement of M. Marroquín, ¶¶ 9–10.

³⁷² Reply on the Merits, ¶ 290.

³⁷³ Reply on the Merits, ¶ 343 (citing **RL-133**, *Tecmed Award*, ¶ 169; **RL-123**, *Pope & Talbot Inc v. Canada*, Ad hoc—UNCITRAL Arbitration Rules, IIC 192 (Interim Award) 2000 (Dervaird, Greenberg, Belman), ¶¶ 156–81 (“*Pope & Talbot Award*”)).

³⁷⁴ Reply on the Merits, ¶ 343 (citing **RL-135**, *Vivendi II Award*, ¶ 7.4.37).

the Ministry of Communications discussed above demonstrates, this simply was never an option that the Government was considering implementing.

165. To the contrary, the record shows that, beginning in 2004, FEGUA negotiated with FVG in good faith, with the intent to address the illegalities contained in Contract 143/158, and the hope that the parties could simultaneously address issues related to other aspects of the relationship. Although Claimant now contends that the defects in Contract 143/158 “were entirely within the Government’s control to resolve and that they could easily be resolved without any ‘negotiation’ with Claimant,”³⁷⁵ such contention contradicts both Guatemalan law and Claimant’s actions. Pursuant to Guatemalan law, Guatemala could not have solved the problems related to Contract 143/158 by itself. It needed FVG’s — and therefore Claimant’s — cooperation, which it never obtained

166. As Mr. Aguilar and each of the four separate governmental agencies or entities to review Contract 143/157 explained,³⁷⁶ one of that Contract’s deficiencies was that it was not the product of a public bid, as required by Guatemalan law. Though Claimant continues to contend that “Contract 143 was merely the culmination of the same original public bidding process that awarded use of the right-of-way and railway equipment,”³⁷⁷ this contention is supported neither by Guatemalan law nor Claimant’s contemporaneous understanding of the public bid requirement. As Mr. Aguilar explains, a public bid is required for every Government contract relating to State property and a bidding process is effective for one public bidding event; it cannot be used for separate agreements entered into years later.³⁷⁸ Claimant itself acceded to this requirement, submitting a bid for *each* of the contracts which comprise its Usufruct (other than Contract 143/158), regardless of that contract’s relationship to Contract 402. And, while Claimant continues to assert that there was no reason for a new public bid because there “was absolutely no reason to believe that a new public bid for the FEGUA equipment would have

³⁷⁵ Reply on the Merits, ¶ 282.

³⁷⁶ 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; First Expert Report of J.L. Aguilar, ¶¶ 116–17, 131; Second Expert Report of J.L. Aguilar, § II.B; **RL-191**, Guatemalan Government Contract Law Art. 89.

³⁷⁷ Reply on the Merits, ¶ 277.

³⁷⁸ See Second Expert Report of J.L. Aguilar, § II.B and ¶ 110(b) (citing **RL-191**, Guatemalan Government Contract Law Art. 89).

FAIR AND EQUITABLE TREATMENT

resulted in additional bidders,”³⁷⁹ this fact alone is rather irrelevant and cannot override Guatemalan law.

167. As Claimant was well-aware, submitting the only response to a call for proposals is not an automatic guarantee of success,³⁸⁰ and the real point is that Guatemalan law requires a new public bidding process for any new event, which includes entering into a new contract for the railway equipment several years after the original public bidding process was carried out relating to that equipment. It really matters not how many bidders there would have been; the law requires that a public bid be carried out in such circumstances — which were the circumstances that resulted when Claimant and FEGUA desired to enter into a new railway equipment contract — and whatever the possible demand for the railway equipment at that time, Guatemalan the law required that a new public bidding process be carried out.³⁸¹ Claimant does not dispute that the Government followed the same

³⁷⁹ Reply on the Merits, ¶ 49.

³⁸⁰ See **RL-46**, 1992-10-21, Public Contracting Act: Legislative Decree No. 57-92, Art. 31 (“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)).

³⁸¹ See Second Expert Report of J.L. Aguilar, § II.B (citing **RL-191**, Guatemalan Government Contract Law Art. 89).

procedure —requesting bids,³⁸² accepting proposals,³⁸³ meeting to review the proposals,³⁸⁴ and deciding whether to award the contract³⁸⁵ — even when only one company submitted a bid proposal.³⁸⁶

168. It is not true, therefore, that the defects in Contract 143/158 “were entirely within the Government’s control to resolve and that they could easily be resolved without any ‘negotiation’ with Claimant.”³⁸⁷ Nevertheless, the parties’ continued disagreement on this issue cannot, by itself, support a violation of fair and equitable treatment.³⁸⁸ Again, the Government, through the Attorney General’s Office and other agencies, in good faith signaled this as a defect in Contract 143/158 that needed to be remedied and worked to negotiate a resolution with FVG whereby this and other legal defects inherent in that Contract could be remedied.³⁸⁹ While Guatemala contends that the need for a public bid was

³⁸² 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).

³⁸³ **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).

³⁸⁴ **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).

³⁸⁵ 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.

³⁸⁶ 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 Witness Statement of H. Posner, ¶ 9); see also **Ex. R-183**, Score Sheet of the Bid Selection Committee for Contract 41.

³⁸⁷ Reply on the Merits, ¶ 282.

³⁸⁸ See **RL-185**, *Bayindir Award*, ¶ 256.

³⁸⁹ **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; **Ex. C-105**, *Palacios & Asociados*, Analysis of Contract 143 (June 2005).

FAIR AND EQUITABLE TREATMENT

correctly identified as one of the material, legal defects in the railway equipment contract, the Tribunal need not decide whether Guatemala's determination in this respect was correct.³⁹⁰ It need only conclude that Guatemala was acting in good faith when it made this determination. And the evidence shows that it was.³⁹¹

169. Thus, wanting to maintain its relationship with FVG, FEGUA attempted to address the issues with Contract 143/158 through negotiation. Initial negotiations were conducted from mid-2004 through early 2005 with the principal objective of entering into a new equipment contract.³⁹² Taking advantage of the fact that all concerned parties were in the same room, the parties also addressed other topics relevant to achieving the ongoing objective of a functioning nationwide railway system (including removal of squatters, protection of historical patrimony, and compliance with FVG's undertakings under Contract 402, including its promised but yet undelivered rehabilitation of the railroad).³⁹³ That these topics were being discussed in tandem is only natural and is not proof that FEGUA intended to — or in fact did — negotiate by way of coercion or threats.³⁹⁴ There is simply no proof to establish that allegation.

170. As Guatemala explained in its Counter-Memorial,³⁹⁵ at the same time the FEGUA-FVG negotiations were taking place, FVG was also engaging in discussions with the Ministry of Communications (where it sought, *inter alia*, the "official and formal" recognition of Contract

³⁹⁰ See **RL-175**, *Cargill Award*, ¶ 287; **RL-100**, *GAMI Award*, ¶¶ 91, 97) **RL-78**, *ADF Award*, ¶ 190.

³⁹¹ We note that FEGUA's internal legal team did not initially spot the lack of a public bid as one of the legal defects with Contract 143/158. Rather, they focused on other legal defects, including the principal defect that the contract was not approved by the President of Guatemala as was required by Guatemalan law and the initial bidding requirements for the equipment contract. As Overseer Gramajo escalated the issue within FEGUA and otherwise within the Government, other agencies and outside counsel became involved and determined that the lack of a public bid was another of the principal defects with Contract 143/158. Once this emerged, the Government consistently maintained that this defect, as well as the others, needed to be remedied, and it worked to try find an amicable solution with FVG, to no avail.

³⁹² First Witness Statement of A. Gramajo, ¶ 13; Second Witness Statement of A. Gramajo, ¶ 6; **Ex. R-80**, 2004-04-03, Correspondence and Draft Contract Re: Modification of Contract 143/158 to Cure Illegality (see e.g., cl. 6 of Draft Contract).

³⁹³ First Witness Statement of A. Gramajo, ¶ 13.

³⁹⁴ First Witness Statement of A. Gramajo, ¶¶ 12–14.

³⁹⁵ See Counter-Memorial on the Merits, ¶ 62.

143/158).³⁹⁶ The discussion between FVG and the Ministry of Communications — memorialized in a letter from Jorge Senn to Vice-Minister Díaz on 17 November 2004 and attached to this Rejoinder as Exhibit R-9 — is important for several reasons. First, it demonstrates that, as of November 2004, Claimant was aware that Contract 143/158 had legal defects.³⁹⁷ Second, it expressly confirms that Claimant was aware that the Government did not recognize the validity of Contract 143/158 due to these illegalities.³⁹⁸ Third, it serves as contemporaneous evidence of Claimant’s awareness that some sort of remedy was in order, and shows that, rather than refuse to negotiate because the defects in Contract 143/158 “were entirely within the Government’s control to resolve and that they could easily be resolved without any ‘negotiation’ with Claimant,”³⁹⁹ FVG chose to negotiate with FEGUA in an attempt to resolve the Contract 143/158 problem by “presenting an amendment to the contract, or a new contract, before the end of the year.”⁴⁰⁰ Fourth, and finally, it offers contemporaneous insight into FVG’s impression of its negotiations with FEGUA. While Claimant’s witnesses now purport to recall that the Government’s “explicit” agenda was to “coerce Claimant into either substantially giving up its property rights or forcing it to abandon its investment without any compensation,”⁴⁰¹ Claimant’s 17 November 2004 letter gave no such indication.⁴⁰² Nor did it discuss a fear that Guatemala would terminate FVG’s rights in order to favor Ramón Campollo.⁴⁰³

171. Although the FEGUA-FVG negotiations were unsuccessful, the Government nevertheless remained willing to attempt reaching a mutual agreement on a oath forward for resolving the multiple issues stemming from its relationship with FVG. It formed a High Level Technical Commission which, from March to August 2006, met with FVG representatives to negotiate a solution.⁴⁰⁴ Like the FEGUA-

³⁹⁶ **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

³⁹⁷ *See Ex. R-9*, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

³⁹⁸ **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

³⁹⁹ Reply on the Merits, ¶ 282.

⁴⁰⁰ **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

⁴⁰¹ Reply on the Merits, ¶ 290.

⁴⁰² *See Ex. R-9*, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

⁴⁰³ *See Ex. R-9*, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

⁴⁰⁴ *See* Counter-Memorial on the Merits, § III.I; First Witness Statement of A. Gramajo, ¶ 35, §VI; Second Witness Statement of A. Gramajo, ¶¶ 27–28, 32, Witness Statement of M. Marroquín, ¶ 7; Witness Statement of S. Pineda, ¶ 10; Witness Statement of J. Berdúo, ¶ 18; Witness Statement of R. Aitkenhead, ¶ 5.

FAIR AND EQUITABLE TREATMENT

FVG negotiations, the goal of the High Level Technical Commission meetings was twofold: first, to understand and resolve the legal issues related to the Usufruct Contracts; and second, to attain an efficient railway system, suitable for the country's needs.⁴⁰⁵ Importantly, the Government explained its desire to achieve these goals *while maintaining its relationship with FVG*. As the Minutes from the 3 April 2006 meeting reflect, Deputy Commissioner Mario Marroquín "stated that the team has been formed for the purpose of seeking a viable solution to the railroad matter so that we will have a speedy and efficient operation at a low cost to users, for which reason both the State and the Usufructuary company have to be benefited."⁴⁰⁶ Throughout the course of these meetings, the parties addressed issues ranging from the trust established by Contract 820, local arbitration proceedings which FVG had initiated against FEGUA, a search for international financing to support FVG's operation, and evicting squatters from Claimant's right-of-way.⁴⁰⁷

172. Despite the Government's high hopes for the High Level Commission, its meetings ceased soon after its fourth session (on 11 May 2006). At that session, FVG announced that it was aware that the Executive branch had been internally pursuing issuance of a *lesivo* declaration, and demanded that continued negotiations be made conditional upon the Government halting the *lesividad* process.⁴⁰⁸ Though the Government initially acceded to FVG's demand, it was forced to resume the *lesividad* process when only two weeks remained before the three-year statute of limitations for issuing a *lesivo* declaration would expire and no progress in the settlement negotiations seemed imminent.⁴⁰⁹ Nevertheless, Government officials began meeting with FVG on a daily basis in the hope of reaching a settlement agreement.⁴¹⁰

⁴⁰⁵ First Witness Statement of A. Gramajo, ¶ 36; see 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).

⁴⁰⁶ Ex. R-23, 4-3-2006, Minutes from the High Level Commission Meetings (emphasis added).

⁴⁰⁷ First Witness Statement of A. Gramajo, ¶ 36.

⁴⁰⁸ See Ex. R-29, 2006-05-11, Minutes from the High Level Commission Meetings, ¶ 4; Witness Statement of M. Marroquín, ¶ 11; Witness Statement of S. Pineda, ¶ 22; Witness Statement of J. Berdúo, ¶ 24.

⁴⁰⁹ 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 20 of the Law of the *Contencioso Administrativo*.

⁴¹⁰ First Witness Statement of A. Gramajo, ¶ 38; Second Witness Statement of A. Gramajo, ¶ 36; Witness Statement of R. Aitkenhead, ¶ 12; Witness Statement of A. Zosel, ¶¶ 19-20; Ex. R-39, 2006-08-23 and

Footnote continued on next page

173. During these meetings, the Government proposed a draft settlement and was prepared to make reciprocal concessions to reach an agreement that would find a path forward to address the problems in Contract 143/158, and thereby avoid the need for the issuance of the *Lesivo* Declaration.⁴¹¹ This would necessarily include a path to conduct a new public bid and to provide that any new railway contract would be approved by the President, as required by Guatemalan law. These were some of the principal defects that had been identified by the Attorney General and other agencies,⁴¹² and necessarily ones that would need to be corrected; the Government acknowledged in the drafts presented to FVG that the legal defects with the railway equipment contract would need to be remedied as part of any negotiated solution.⁴¹³ FVG, however, refused to negotiate, sending to the meeting only Mr. Senn, who indicated that he did not have a power of attorney or authority to reach an agreement on behalf of FVG.⁴¹⁴ The Government therefore published the *Lesivo* Declaration on the last possible day before the statute of limitations would expire.⁴¹⁵

174. While Claimant tries to make hay that the Government waited until the last day to publish the *Lesivo* Declaration, what it fails to realize is that this underscores the Government's good faith in negotiating with Claimant. The Government gave FVG and FEGUA every opportunity to resolve their disputes and only acted on the *Lesivo* Declaration when it absolutely had to. This point is further proven by the Government's decision in April 2006 to suspend issuance of the *Lesivo* Declaration when it had only one signature remaining to finalize the resolution that paved the way for publication and issuance of the *Lesivo* Declaration. Had the Government really been acting in bad faith as Claimant argues, why

Footnote continued from previous page

2006-08-24, E-mails from Palacios & Asociados to A. Zosel (Ministry of Communications) sending draft minutes of transaction agreements.

⁴¹¹ First Witness Statement of A. Gramajo, ¶ 44; Second Witness Statement of A. Gramajo, ¶ 43; Witness Statement of A. Zosel, ¶ 15; Witness Statement of J. Berdúo, ¶ 32.

⁴¹² **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; **Ex. C-105**, Palacios & Asociados, Analysis of Contract 143 (June 2005).

⁴¹³ **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.

⁴¹⁴ Witness Statement of A. Zosel, ¶ 18; Witness Statement of J. Berdúo, ¶ 34.

⁴¹⁵ **Ex. C-1**, 2006-08-25, Official Publication of Government Resolution No. 433-2006 dated Aug. 11, 2006 Declaring *Lesivo* Regarding Public Deed No. 143 Dated Aug. 28, 2003 as Amended by Public Deed No. 158 dated Oct. 7, 2003.

FAIR AND EQUITABLE TREATMENT

would it suspend the issuance of the *Lesivo* Declaration in April 2006 when it was basically ready to be issued? Why would it continue negotiating with Claimant until the last minute in an effort to reach a resolution? The answer to these questions is because the Government was not engaged in any conspiracy to deprive Claimant of its rights in the Usufruct; it was honestly trying to fix the relationship with FVG and Claimant, including the defects in the railway equipment contract. That is precisely why the President ordered FEGUA and other Government officials to continue to meet with FVG to negotiate a deal addressing the issues Contract 143/158 presented (as well as the other disputes with FVG) even after the *Lesivo* Declaration was published.⁴¹⁶ But these efforts also failed when FVG failed to meaningfully engage in good faith negotiations to seek a resolution.⁴¹⁷

175. In its Reply, Claimant continues to suggest that the Government's settlement offer indicates bad faith because it was a "take it or leave it" offer.⁴¹⁸ But it was no such thing. It was part of an ongoing and very lengthy process by the Government to attempt to solve the disputes with FVG, which process started in 2004 and continued in 2006 at the express order of the President of Guatemala. How many investors can say that the President of a country stepped in to try and solve disputes they have in relation to their investments in foreign countries?

176. According to Claimant, the Tribunal "captured Respondent's hypocrisy"⁴¹⁹ in the Second Decision on Jurisdiction, by noting that "'the reasons for declaring the Equipment Usufruct Contracts *lesivo* . . . are substantially the same as those that prevented Contract 41 from becoming effective,'"⁴²⁰ and concluding that "'even if [the defects] had been cured by FVG, [this] would not have satisfied the conditions of the settlement proposed on August 24, 2006.'"⁴²¹ Yet, *there is no proof whatsoever that the Government would have been unwilling to stop the Lesivo Declaration if Claimant had agreed to negotiate a path forward to resolve the legal defects in Contract 143/158 prior to the publication of that*

⁴¹⁶ See generally Counter-Memorial on the Merits, § III.K; **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.

⁴¹⁷ See generally Counter-Memorial on the Merits, § III.K; **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías; First Witness Statement of A. Gramajo, ¶ 48; Second Witness Statement of A. Gramajo, ¶ 46.

⁴¹⁸ See Reply on the Merits, ¶ 353.

⁴¹⁹ Reply on the Merits, ¶ 353.

⁴²⁰ Reply on the Merits, ¶ 353 (quoting Second Decision on Jurisdiction, ¶ 144).

⁴²¹ Reply on the Merits, ¶ 353 (quoting Second Decision on Jurisdiction, ¶ 134).

resolution, even if the parties could not reach agreement on the others issues set forth in the settlement draft. However, there is ample proof that the Government would have been willing to do so, as demonstrated by its willingness in 2004 and 2005 to attempt to negotiate a resolution of these defects as well as by the language included in the draft agreement presented to FVG on 24 August 24 2006 wherein the Government made clear that it wanted FVG to agree to a path that would remedy these defects,⁴²² and by the Government's continued efforts to negotiate a path forward to cure the defects in the equipment contract even after the *Lesivo* Declaration was issued. While such a path would involve a new public bid for this equipment and approval by the President of any new contract, this could be achieved and it is undisputed that FVG and Claimant had the President's attention and his buy-in on finding a solution to their problems. As attested to by several witnesses, the President wanted a solution that would deliver a functioning railroad.⁴²³ Claimant cannot convert a standard bargaining situation into bad faith and a treaty violation. Rather, as noted, these facts simply underscore the Government's good faith in working at all levels to reach an agreement with FVG and Claimant. Even if the Tribunal takes a different view, bad faith it certainly is not.

177. The parties' negotiations must be evaluated in their proper context. Shortly after FEGUA discovered the legal defects in Contract 143/158, the parties initiated discussions aimed at curing them; in fact, as early as March 2004, the parties were already in discussions about possible modifications to Contract 143/158 or negotiation of a new equipment usufruct agreement to formalize the relationship in a way that complied with the strictures of Guatemalan law.⁴²⁴ Even at the earliest stages of negotiations, however, the parties did not discuss solely the legal defects of Contract 143/158, but, as is natural in negotiations between parties that have a number of issues to discuss, they also broached their positions regarding the alleged breaches of their obligations under Contract 402.⁴²⁵ FEGUA, for

⁴²² **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. "Regarding the railroad equipment contract contained in the aforementioned instrument forty-three. The contract must be modified to eliminate the provisions that are detrimental to the State."

⁴²³ Witness Statement of R. Aitkenhead, ¶¶ 4, 6, 8, 12,19; Witness Statement of M. Marroquin, ¶¶ 7, 18; Second Witness Statement of M. Marroquín, ¶¶ 9–10; Witness Statement of S. Pineda, ¶¶ 12, 15, 18; First Witness Statement of A. Gramajo, ¶ 35.

⁴²⁴ First Witness Statement of A. Gramajo, ¶ 20; Second Witness 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).

⁴²⁵ Second Witness Statement of A. Gramajo, ¶¶ 10, 31–32.

FAIR AND EQUITABLE TREATMENT

example, complained about FVG's failure to rehabilitate each of the different phases, while FVG representatives voiced concerns about FEGUA's compliance with the squatter removal provisions of Contract 402 and with its obligation to pay into the Contract 820 trust fund. These mutual discussions of *all* issues that had arisen within the contractual relationship continued at every stage of the negotiations, including during the meetings of the Railway Commission,⁴²⁶ during the meetings of the High-Level Commission appointed by President Berger,⁴²⁷ during the meetings immediately prior to the issuance of the *Lesivo* Declaration,⁴²⁸ and during the settlement discussions post-*Lesivo* Declaration.⁴²⁹ To argue, as Claimant does here, that Guatemala engaging in these negotiations — in which Claimant's and FVG's representatives actively participated and also discussed complaints it had that were unrelated to the legal defects of Contract 143/158 — was a mere pretext designed to coerce Claimant into a different deal than the one it had signed on for strains credulity. Instead, the facts show that Guatemala negotiated in good faith to resolve all issues that were of concern to the parties, among which were the legal defects of Contract 143/158. These defects, however, were not used as a proverbial sword to threaten Claimant and force its hand.

178. Thus, Guatemala's intent was to find a solution to the illegalities of Contract 143/158 while maintaining its relationship with FVG. Such intention by no means constitutes bad faith; rather, it underscores the Government's diligent attempts to remedy an administrative contract which — as both parties understood — did not conform to the applicable laws. Because unilateral amendment to Contract 143/158 was impossible, FEGUA met with FVG in an attempt to negotiate a solution. Though through the course of these negotiations the parties discussed performance issues related to their other

⁴²⁶ 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; Third Witness Statement of A. Gramajo, ¶ 33.

⁴²⁷ Witness Statement of Mario Marroquín, ¶¶ 7–11; Statement of S. Pineda, ¶¶ 12–20, 31; see 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**).

⁴²⁸ See Reply on the Merits, ¶ 346.

⁴²⁹ 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.

contracts, this fact alone cannot demonstrate bad faith — especially in light of the parties’ shared interest in achieving a functioning nation-wide railway system.

179. Claimant also argues that the Government’s negotiations over the illegalities of Contract 143/158 were but a pretext for Guatemala to “get out” of its contractual obligation to remove squatters from the right of way.⁴³⁰ Quite simply, Guatemala never attempted or intended to “get out” of its obligation to deal with the squatter problem; the Government’s good faith efforts to deal with the squatter issue along the right of way are amply supported by the record. As Dr. Gramajo has explained, the Government not only assembled a multi-disciplinary commission tasked with addressing the squatter problem (along with other issues that plagues the relationship with FVG), but also, by February 2005, had developed a detailed plan to remove the squatters from the southern coast portion of the right of way.⁴³¹ The Government was thus not only willing, but able and ready to remove the squatters from the southern coast right of way corresponding to phase 2 of FVG’s rehabilitation plan. However, the Government was reasonably reluctant to implement its plan, which would have come at considerable financial, social and political expense, until Claimant had a viable and concrete plan to rehabilitate the corresponding portion of the railway. Doing so too early risked having to undertake an expensive operation twice because squatters would just return in a short time if there was no working railroad.⁴³² The Government’s apprehension about FVG’s willingness and ability to rehabilitate the southern coast proved prescient, and has been confirmed by Claimant’s position in this arbitration, where it has argued, contrary to the clear text and intent of Contract 402 and the bidding terms, that it had no obligation to develop phases other than the first one.

180. Though FEGUA hoped that the parties would be able to negotiate a solution to the illegalities in Contract 143/158, it also prepared for the possibility that they might not achieve their goal. While Claimant refers to this preparation as further evidence of Guatemala’s bad faith,⁴³³ such preparation demonstrates the due diligence that any contractual partner would undertake to plan for the eventuality that negotiation might not solve the problem. Holding that Guatemala acted in bad faith

⁴³⁰ See Reply on the Merits, ¶ 346.

⁴³¹ See Second Witness Statement of A. Gramajo, § II; Third Witness Statement of A. Gramajo, § IV, ¶¶ 17-21; *see also*, **Ex. R-181**, 2005-02-17, Agenda and Minutes from Railway Commission Meeting.

⁴³² Second Witness Statement of A. Gramajo, ¶¶ 19-21; Third Witness Statement of A. Gramajo, ¶¶ 37-40.

⁴³³ See Reply on the Merits, ¶ 346.

FAIR AND EQUITABLE TREATMENT

simply because it continued preparing the *Lesivo* Declaration would be like condemning a company engaged in negotiations with another party for requesting that its legal department research and prepare potential legal claims at the same time in case the negotiations fail. That is proper, responsible planning, not bad faith.

181. Accordingly, it considered other options for resolving the problem without jeopardizing its relationship with FVG. Though annulment and rescission were theoretical possibilities that had been suggested, but not recommended, by the Attorney General, these options were not the ones recommended to Dr. Gramajo by his internal or external legal advisors.⁴³⁴ In light of the advice he received, Dr. Gramajo understood that he had a duty to request the President to declare the equipment contract *lesivo*.⁴³⁵ The other options, as Mr. Aguilar opines, were not viable options for the Government given the administrative nature of Contract 143/158.⁴³⁶ Moreover, those options were not the options recommended to the President by his internal legal advisors.⁴³⁷ And Claimant's own expert, Dr. Mayora, opines that these options were not available to the Government in January 2006 when Dr. Gramajo had finalized his analysis of the equipment contract and chose to write to President Berger.⁴³⁸ Thus, by 2006, Guatemala's only remaining legal option to take action against the illegal equipment contract was to initiate *lesividad* proceedings, as requested by FEGUA's Overseer, Dr. Gramajo. *Lesividad* also was the *least intrusive* solution to the problem for Claimant, in that requesting a final determination from the *Contencioso Administrativo* Court would fulfill the Government's obligation to seek a remedy for the illegalities of Contract 143/158, and provide adequate safeguard for Claimant's investment, while at the same time permitting Claimant to retain possession of the equipment pending the Court's decision. If the *Contencioso Administrativo* Court decided that Contract 143/158 was not, in fact, *lesivo* to the interests of the State, the contract would be validated despite its illegalities.⁴³⁹

⁴³⁴ Third Witness Statement of A. Gramajo, ¶¶ 42–43.

⁴³⁵ Third Witness Statement of A. Gramajo, ¶ 43.

⁴³⁶ See Second Expert Report of J.L. Aguilar, ¶¶ 63–65.

⁴³⁷ **Ex. R–25**, 2006-04-26, General Secretariat Opinion No. 236–2006 (all discussing the illegalities of Contract 143/158 under Guatemalan law), p. 6; Witness Statement of C. Ozaeta, ¶¶ 15–16; Witness Statement of M. Duarte, ¶ 16.

⁴³⁸ First Opinion of E. Mayora, ¶ 9.6.

⁴³⁹ See First Expert Report of J.L. Aguilar, ¶¶ 59, 63.

182. As noted above, even after publishing the *Lesivo* Declaration, Guatemala worked with Claimant in the hope of reaching a joint solution to the problems posed by Contract 143/158, and to the other issues stemming from Claimant's other Usufruct Contracts.⁴⁴⁰ During the course of these negotiations, Guatemala discussed settlement offers with Claimant which Claimant's own investment partner — Cementos Progreso — later praised in a letter to Claimant. In this letter, Cementos Progreso stated that "the agreement we reached with the Government in November 2006 was a good one, both in giving the business a reasonable chance of achieving an operational turnaround as well as giving all parties a new opportunity to start over."⁴⁴¹ This letter serves to further dispel Claimant's characterization of Guatemala's actions as an exercise in bad faith.

183. The remainder of Claimant's argument boils down to two assertions: first, that the defects which prompted the *Lesivo* Declaration were insufficient to render Contract 143/158 "harmful to the interests of the State,"⁴⁴² and second, that Guatemala should not have initiated *lesividad* proceedings when the deficiencies in Contract 143/158 were within Guatemala's power to correct.⁴⁴³ These assertions are both inapposite.

184. As Guatemala stated above, it is not the mandate of this Tribunal to assess whether Contract 143/158 was in fact *lesivo*; that is the mandate of the *Contencioso Administrativo* Court. In the words of the *ADF* tribunal, an ICSID tribunal does not "sit as a court with appellate jurisdiction with respect to [State] measures."⁴⁴⁴ Whether an international tribunal believes a particular measure to be "correct" or "incorrect" under domestic law is irrelevant.⁴⁴⁵ Thus, even if the Tribunal agreed with Claimant that there "was no requirement [under Guatemalan law] that the contracts had to be approved by Executive Resolution or subject to a new public bidding process"⁴⁴⁶ and that a failure to comply with such

⁴⁴⁰ See generally Counter-Memorial on the Merits, § II.K; see also First Witness Statement of R. Aitkenhead, ¶ 12; First Witness Statement of A. Gramajo, ¶ 48; Second Witness Statement of A. Gramajo, ¶ 46; Second Witness Statement of M. Marroquín.

⁴⁴¹ Ex. R-327, 2007-05-02, Letter from Cementos Progreso to RDC.

⁴⁴² See Reply on the Merits, ¶¶ 345–46, 348.

⁴⁴³ See Reply on the Merits, ¶ 351.

⁴⁴⁴ RL-78, *ADF* Award, ¶ 190.

⁴⁴⁵ See RL-175, *Cargill Award*, ¶ 287; RL-100, *GAMI Award*, ¶ 97; RL-78, *ADF* Award, ¶ 190.

⁴⁴⁶ Reply on the Merits, ¶ 345.

FAIR AND EQUITABLE TREATMENT

requirements would be insufficient grounds for *lesividad*,⁴⁴⁷ the Tribunal has no power to find a breach of the Treaty on such reasoning. As the *S.D. Myers* tribunal explained, though governments “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,”⁴⁴⁸ such circumstances do not create an international law violation. “The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes”⁴⁴⁹

185. In this vein, the Tribunal must also reject Claimant’s claim that *lesividad* was improper because Guatemala caused the deficiencies in Contract 143/158, and because “the party who has caused the lack of validity of a contract . . . may not invoke that lack of validity in its favor in order to seek the termination of the contract.”⁴⁵⁰ Such claim — in essence, another argument that the *Lesivo* Declaration was incorrect — must be reserved for the *Contencioso Administrativo* Court and cannot be decided by the Tribunal. And while, for purposes of jurisdiction the Tribunal held that “principles of fairness should prevent the government from raising violations of its own law as a defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law,”⁴⁵¹ such holding cannot be adopted in the merits context as a finding that initiating the *lesividad* process was “unfair” or “inequitable.” A finding that Guatemala would be precluded by CAFTA to question the validity of a contract within the processes available under domestic law, simply because it had performed under that contract for a period of time, would severely and improperly restrict State sovereignty. Taken to the extreme, a bright-line rule that a State is estopped from exercising pre-existing domestic remedies to question the validity of a contract simply because the State had operated under that contract for a period of time could prevent a State from terminating a contract initiated by bribery or corruption. On the facts of the present case, it would prevent Guatemala from even *asking* the *Contencioso Administrativo* Court to determine the *lesividad* of Contract 143/158,

⁴⁴⁷ See Reply on the Merits, ¶¶ 345–46, 348.

⁴⁴⁸ **RL-126**, *S.D. Myers First Partial Award*, ¶ 261.

⁴⁴⁹ **RL-126**, *S.D. Myers First Partial Award*, ¶ 261.

⁴⁵⁰ Reply on the Merits, ¶ 256.

⁴⁵¹ Second Decision on Jurisdiction, ¶ 146.

despite the fact that Claimant was aware that both a public bid and Executive approval were required for that Contract.⁴⁵²

186. Moreover, the facts do not support the conclusion that FEGUA “knowingly overlooked [the legal defects in Contract 143/158] and [effectively] endorsed an investment which was not in compliance with its law,”⁴⁵³ as the Tribunal preliminarily concluded at the jurisdictional stage. The more developed record on these points now shows quite the contrary. We know that the moment that Dr. Gramajo learned of the legal defects he immediately informed Claimant of those defects in a letter, and refused Claimant’s request to obtain access to FEGUA property pursuant to Contract 143/158 — in part because FEGUA did not recognize that Contract as valid and binding, given its legal infirmities. FEGUA continued to negotiate with FVG until just before and even after the *Lesivo* Declaration was issued in an effort to cure these legal defects, all the while maintaining that the Contract was invalid. We also know that FEGUA continued to allow FVG to use the railway equipment pursuant to the prior letter authorizations issued by the former FEGUA Overseer while it tried to find a solution to the legal infirmities with Contract 143/158, as evidenced by the April 2005 communication from Dr. Gramajo to the Legal Director of the Ministry of Communications.⁴⁵⁴ This proves FEGUA did not accept the payments under Contract 143/158. Moreover, we know that FVG understood that FEGUA did not overlook the legal defects in the contract and that it did not endorse the agreement, as FVG wrote to the Vice Minister of Communications in November 2004 requesting that the Government officially recognize Contract 143/158.⁴⁵⁵ There would be no reason for FVG to have written this letter if FEGUA had overlooked the legal defects in the agreement and knowingly endorsed it. Thus, the facts do not support a finding that FEGUA knowingly overlooked the defects in the equipment contract, or that it knowingly endorsed that agreement.

⁴⁵² See above, § II.B.3.

⁴⁵³ Second Decision on Jurisdiction, ¶ 146.

⁴⁵⁴ **Ex. C-104**, 2004-04-12, Letter from A. Gramajo to G. Zachrisson, Annex No. 7 (in which FEGUA acknowledges that FVG is using the equipment pursuant to prior authorizations issued by a former FEGUA Overseer); Third Witness Statement of A. Gramajo, § III.

⁴⁵⁵ See **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

FAIR AND EQUITABLE TREATMENT

187. Claimant also should not be entitled to rely on this equitable estoppel argument, in light of the accepted international law principle⁴⁵⁶ of *nemo auditur propriam turpitudinem* — that no one can benefit from his own wrong. As previously established, there is no question that FVG — and Claimant — knew what the legal requirements were for the equipment contract and sought to evade them by entering into back-dated lease agreements and later Contract 143/158.

188. As the *Cargill* tribunal stated, “[t]he record as a whole—not isolated events—determines whether there has been a breach of international law.”⁴⁵⁷ In this case, the record as a whole demonstrates that Guatemala satisfied its obligation to treat Claimant in good faith and hence fairly and equitably.

189. Accordingly, Claimant has failed to meet its burden of proving that Guatemala acted in bad faith in violation of CAFTA Article 10.5.

2. Guatemala Did Not Deny Claimant Justice Or Due Process Of Law In Violation Of CAFTA Article 10.5

190. As Guatemala stated in its Counter-Memorial, Claimant faces a heavy burden in establishing that Guatemala violated its obligation to accord due process. Though Claimant first appears to concede this point by recognizing that the *Neer* standard — *i.e.*, that the State action is “manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)”⁴⁵⁸ — still applies in the context of a denial of justice,⁴⁵⁹ it also argues that the converse is true.⁴⁶⁰ Claimant also vacillates between conceding that, as the *Waste Management II* tribunal stated, a due process violation stems

⁴⁵⁶ See **RL-122**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 (Award, 27 August 2008) (Salans, van den Berg, Veeder), ¶¶ 141–46 (accepting as a principle of international law applicable to the dispute the notion that *nemo auditur propriam turpitudinem*, even where the principle was not expressly mentioned in the relevant treaty); see also ICSID Convention Art. 42(1) (providing that, in the absence of an agreement between the parties as to an applicable rule of law, a tribunal “shall decide a dispute in accordance with . . . such rules of international law as may be applicable”).

⁴⁵⁷ **RL-175**, *Cargill Award*, ¶ 287 (quoting **RL-100**, *GAMI Award*, ¶ 97).

⁴⁵⁸ **RL-79**, *AES Award*, ¶ 9.3.40.

⁴⁵⁹ See Reply on the Merits, ¶ 331 (citing **RL-110**, *Merrill & Ring Forestry L.P. v. Canada* (Award, 31 March 2010) (Orrego Vicuña, Dam, Rowley), ¶ 204 (“*Merrill & Ring Award*”)).

⁴⁶⁰ See Reply on the Merits, ¶ 357 (arguing that the “customary international law standard of protection regarding due process . . . is a high one”); see also *id.*, ¶ 360 (claiming that the *Neer* standard “is fundamentally incorrect”).

from a “manifest failure of natural justice in judicial proceedings,”⁴⁶¹ or from a “complete lack of transparency and candour in an administrative process,”⁴⁶² and arguing that Guatemala could violate the standard simply by acting unreasonably.⁴⁶³ Moreover, Claimant continues to improperly challenge the *lesividad* process *per se*, claiming that “the fact that the Constitutional Court of Guatemala has upheld the validity of the *lesivo* process ‘only confirms that no legal succor is to be expected from the highest judicial instance of the country.’”⁴⁶⁴

191. Once again — and despite quoting its international law expert on issues that should be reserved for a Guatemalan law expert⁴⁶⁵ — Claimant has failed to prove either its articulation of the applicable legal standard, or that the facts of the case meet its rhetoric.

192. With respect to the legal standard applicable to a denial of justice claim, there is no support for Claimant’s assertion that “Guatemala should not ‘seriously depart from a fundamental rule of procedure.’”⁴⁶⁶ This standard applies only to ICSID tribunals in the context of annulment proceedings, and there is no reason to import its application into the substantive interpretation of an investment treaty. At any rate, even if the Tribunal could somehow hold Guatemala to the types of procedure held to be “fundamental rules” for purposes of ICSID annulment proceedings, the parties seem to agree upon those fundamental rules: “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.”⁴⁶⁷

193. Claimant has failed to demonstrate that Guatemala failed to provide this type of treatment. First, as discussed in Guatemala’s Counter-Memorial, although Claimant believes that its claim must be addressed only with reference to the facts and circumstances leading up to the *Lesivo* Declaration,

⁴⁶¹ **RL-136**, *Waste Management II Award*, ¶ 98.

⁴⁶² **RL-136**, *Waste Management II Award*, ¶ 98.

⁴⁶³ See Reply on the Merits, ¶ 359.

⁴⁶⁴ Reply on the Merits, ¶ 361 (quoting Second Opinion of M. Reisman, ¶ 33).

⁴⁶⁵ See, e.g., Reply on the Merits, ¶ 369 (quoting Professor Reisman as evidence that the *Contencioso Administrativo* phase of a *lesividad* proceeding is “an empty formalism”).

⁴⁶⁶ Reply on the Merits, ¶ 358.

⁴⁶⁷ See **RL-77**, *ADC Award*, ¶ 435 (cited by Claimant in its Memorial on the Merits, n. 183, and quoted by Respondent in its Counter-Memorial on the Merits, n. 986).

FAIR AND EQUITABLE TREATMENT

“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”⁴⁶⁸ The Tribunal must therefore consider the entire *lesividad* process in order to determine whether the “record presents such a lack of diligence and of intelligent investigation as constitutes an international delinquency”⁴⁶⁹

194. Second, Claimant’s argument that it was denied due process on this point must also fail as a factual matter. Although Claimant asserts that the damage was done the moment the Executive branch issued the *Lesivo* Declaration, and that “[t]he provision for standardless and never-ending judicial review in the *Contencioso Administrativo* Court does not resurrect the denial of due process embodied in a declaration of *lesividad*,”⁴⁷⁰ Claimant has failed to prove either that the *Lesivo* Declaration caused it harm (an issue with which we deal more extensively in the damages section, Section VI), or that the *Contencioso Administrativo* phase is a “judicial charade”⁴⁷¹ or a “legal black hole.”⁴⁷²

195. The Guatemalan judiciary, which includes the *Contencioso Administrativo* Court, is an independent branch of the Government particularly entrusted to overseeing the administration of justice by other branches.⁴⁷³ The judiciary is bound to evaluate each case objectively, regardless of whether one of the parties before it is a Government agency, representative or entity. Though there is no justification for a presumption against the *Contencioso Administrativo* Court — in fact, as Jan Paulsson explains, the presumption on due process favors adequacy of a State’s system⁴⁷⁴ — the Court has amply demonstrated both its independence and its willingness to uphold Claimant’s rights in this very case. Thus, although the Attorney General sought a provisional suspension from the *Contencioso Administrativo* Court which would temporarily suspend Contract 143/158,⁴⁷⁵ the Court rejected the

⁴⁶⁸ **RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005).

⁴⁶⁹ **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*”).

⁴⁷⁰ Reply on the Merits, ¶ 365.

⁴⁷¹ See Reply on the Merits, ¶ 369.

⁴⁷² See Reply on the Merits, ¶ 230.

⁴⁷³ **RL-70**, Article 203 of the Guatemalan Constitution, 1985.

⁴⁷⁴ **RL-158**, JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 87 (2005).

⁴⁷⁵ See First Expert Report of J.L. Aguilar, ¶ 63; see also **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.

Attorney General's request, and rejected his subsequent petition to reconsider the initial rejection.⁴⁷⁶

Similarly, in 2010, the *Contencioso Administrativo* Court overturned an initial declaration of *lesividad*.⁴⁷⁷

196. Moreover, as Mr. Aguilar explains, there are in fact legal criteria that the *Contencioso Administrativo* Court can use to evaluate whether an administrative act or contract is harmful to the interests of the State:

The Guatemalan courts are fully competent to rule on a case without having precedents or formal sources on which to base their rulings, since, in accordance with the provisions of Article 203 of the Constitution of the Republic of Guatemala, justice shall be dispensed in accordance with the Constitution and the laws of the Republic of Guatemala and it is precisely these bodies of law that regulate the manner in which the courts of justice must proceed In this sense, the standards for applying and interpreting the law are defined in the *Ley del Organismo Judicial*.⁴⁷⁸

197. In the course of exercising its opportunity to be heard before the *Contencioso Administrativo* Court, Mr. Aguilar confirms that a private party may present either substantive or procedural defenses to the Attorney General's claims of *lesividad*.⁴⁷⁹ As is the case before an international arbitral tribunal, however, a party is afforded only an *opportunity* to be heard; the *Contencioso Administrativo* Court is not accountable for a party's failure to avail itself of that opportunity.⁴⁸⁰

198. Second, as discussed above in Section II in the context of Claimant's expropriation arguments, Claimant has been and continues to be afforded due process of law. As Article 23 of the *Ley De Lo*

⁴⁷⁶ See **RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* court regarding the Attorney General's claim of *lesividad* of Contracts 143/158; First Expert Report of J.L. Aguilar, ¶ 63.

⁴⁷⁷ Second Expert Report of J.L. Aguilar, ¶ 46 (citing **RL-198**, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, *Contencioso Administrativo* Case No. 371–2009 (Decision of the 5th Chamber, 22 September 2010)).

⁴⁷⁸ Second Expert Report of J.L. Aguilar, ¶ 81 (unofficial translation) ("Los tribunales guatemaltecos son plenamente competentes para decidir un caso sin tener precedente jurisprudencial o fuente formal sobre el cual fallar, toda vez que, de conformidad con lo que dispone el artículo 203 de la Constitución Política de la República de Guatemala, la justicia se imparte de conformidad con la Constitución y las leyes de la República de Guatemala y es, precisamente en dichos cuerpos legales en donde se regula la manera en que los tribunales de justicia deben proceder En este sentido, el criterio de aplicación e interpretación de la ley se haya definido en la ley del organismo judicial"); see **RL-193**, *Ley de Organismo Judicial*.

⁴⁷⁹ Second Expert Report of J.L. Aguilar, ¶ 54, 110(o) and (t).

⁴⁸⁰ See Second Expert Report of J.L. Aguilar, ¶¶ 54, 110(o) and (t).

FAIR AND EQUITABLE TREATMENT

Contencioso Administrativo requires, on 24 November 2006, the Attorney General filed a complaint against FVG within the 90-day time period from the date of publication of the *Acuerdo Gubernativo* in the *Diario Oficial*.⁴⁸¹ FVG was served with the Government's complaint on 15 May 2007 and has participated in the proceeding since its inception, as is demonstrated by the "docket" chart presented above on pages 49 to 52. Claimant has exercised its right to be heard by presenting evidence, examining witnesses, and making written and oral arguments.

199. With respect to Claimant's assertion that FVG has had "no opportunity . . . to present arguments or evidence to the Administrative Court which challenged the Government's claim that the alleged legal infirmities in the usufruct equipment contracts were substantively harmful to the interests of the State,"⁴⁸² Mr. Aguilar emphasizes that this situation was likely one of Claimant's own doing.⁴⁸³ To this end, Mr. Aguilar states that Claimant "has raised the defenses that it believes will serve it . . ."⁴⁸⁴ Although Claimant could have challenged the *Lesivo* Declaration on substantive grounds,⁴⁸⁵ it chose to present only procedural arguments.⁴⁸⁶ The fact that "the entire focus of the proceedings has been on whether, in connection with the declaration of *lesividad*, the various Government officials complied with the procedural, not substantive, requirements of the law"⁴⁸⁷ is therefore a failure in Claimant's defense strategy, rather than a failure in Guatemala's judicial system.

200. Claimant has also been afforded an opportunity to be heard by the Constitutional Court, where it asserted that the *Lesivo* Declaration violated "the principle of unrestricted subjection to the law in the exercise of government power and the autonomy of a decentralized, autonomous entity, as well as the

⁴⁸¹ **Ex. C-11**, 2006-11-14, Attorney General's claim before the *Contencioso Administrativo* court regarding the *lesividad* of Contracts 143/158; First Expert Report of J.L. Aguilar, ¶¶ 52–53.

⁴⁸² Reply on the Merits, ¶ 305.

⁴⁸³ Second Expert Report of J.L. Aguilar, ¶¶ 54–55.

⁴⁸⁴ Second Expert Report of J.L. Aguilar, ¶ 54 (unofficial translation) ("ha hecho valer las defensas que estima que le asisten . . .").

⁴⁸⁵ Second Expert Report of J.L. Aguilar, ¶¶ 54–55.

⁴⁸⁶ See **Ex. R-292**, 2008-05-12, FVG's Reply Brief in the *Contencioso Administrativo* Phase of the *Lesividad* Proceeding re: Contract 143/158, p. 3 (expressly selecting not to provide any evidence to substantiate its argument before the *Contencioso Administrativo* court that the *Lesivo* Declaration "was issued illegally").

⁴⁸⁷ Reply on the Merits, ¶ 305.

right to legal certainty and the principle of due process.”⁴⁸⁸ After giving both parties an opportunity to present their cases, the Constitutional Court dismissed Claimant’s *amparo* action as untimely, stating that Claimant will be afforded an opportunity to be heard on its arguments during the *Contencioso Administrativo* Court proceeding.

201. Third, to the extent that it attempted to articulate a claim based on the length of the *Contencioso Administrativo* phase,⁴⁸⁹ Claimant has failed to prove its case. As the *Cargill* and *GAMI* tribunals have stated, “[a] failure to satisfy requirements of national law does not necessarily violate international law.”⁴⁹⁰ Nor does a mere delay in the administration of a case. To this end, the *Azinian* tribunal explained, “[a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to *undue* delay, or if they administer justice in a seriously inadequate way.”⁴⁹¹ And, as the International Court of Justice held in *The Oro Mining and Railway Company Ltd. v. United Mexican States*, a claimant is “entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice [if over a period of nine years] he has not received *any* word or sign that his claim is being dealt with.”⁴⁹² Claimant has failed to demonstrate either that the proceedings in the present case demonstrate an “undue” delay, or that during the course of the four years that the *Contencioso Administrativo* proceeding has been pending, it “has not received *any* word or sign that [its] claim is being dealt with.”⁴⁹³ As demonstrated by the *Contencioso Administrativo* Court “docket” compiled above, there is ample evidence that this is not the case.⁴⁹⁴

202. Fourth, as discussed in more detail in the next section, there is no support for Claimant’s contention that the *Contencioso Administrativo* phase of a *lesividad* proceeding violates CAFTA’s fair and equitable treatment standard because “there does not exist any defined legal criteria or precedent under Guatemalan law that the *Contencioso Administrativo* Court can use to perform judicial review of

⁴⁸⁸ See **RL-71**, 2008-01-11, Decision of the Constitutional Court of Guatemala File 2498-2006, p. 1.

⁴⁸⁹ See Reply on the Merits, ¶ 364.

⁴⁹⁰ **RL-175**, *Cargill Award*, ¶ 287 (quoting **RL-100**, *GAMI Award*, ¶ 97).

⁴⁹¹ **CL-136**, *Azinian Award*, ¶ 102 (emphasis added).

⁴⁹² **RL-176**, *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States*, ICJ Decision No. 55 (18 June 1931), p. 198 (“*El Oro Mining*”) (emphasis added).

⁴⁹³ **RL-176**, *El Oro Mining*, p. 198 (emphasis added).

⁴⁹⁴ See **Ex. 336**, Documents Filed in or Emitted by the *Contencioso Administrativo* Court Regarding the *Lesividad* of Contract 143/158; see also Second Expert Report of J.L. Aguilar, ¶ 60.

FAIR AND EQUITABLE TREATMENT

the President's *lesivo* determination or reach a conclusion different from that of the President."⁴⁹⁵ Apart from being incorrect as a factual matter,⁴⁹⁶ Claimant's approach would have the perverse effect of finding a treaty violation every time a country's courts issue a decision of first impression.

203. Accordingly, Claimant's due process claim must be rejected.

3. Guatemala's *Lesivo* Declaration And Subsequent Actions Were Not Arbitrary Or Discriminatory

204. In its Reply, despite characterizing Guatemala's argument that "mere arbitrariness does not constitute a breach of the fair and equitable treatment standard of Article 10.5 of CAFTA,"⁴⁹⁷ as "astonishing,"⁴⁹⁸ Claimant nevertheless concedes that "'mere' arbitrariness may not be sufficient"⁴⁹⁹ to constitute a violation of the minimum standard of treatment under customary international law. While Claimant also states that it "has no objection to the standard of 'manifest arbitrariness,'"⁵⁰⁰ such concession seems to be based on an improper understanding of the term "manifest." According to Claimant, the "ordinary meaning of 'manifest' is 'plain,' 'clear,' 'obvious,' 'evident,' *i.e.* easily understood or recognized by the mind."⁵⁰¹ However, much like their argument that States are bound "not to seriously depart from a fundamental rule of procedure," acceptance of this definition would import a definition applicable only in the context of ICSID annulment proceedings into the substantive requirements to which a State must adhere pursuant to customary international law. Moreover, it would import into a State's substantive obligation a *still-debated* definition applicable only in annulment proceedings.⁵⁰² Thus, should the Tribunal accept the parties' contentions that only "manifestly arbitrary" actions constitute a violation of the minimum standard of treatment under customary

⁴⁹⁵ Reply on the Merits, ¶ 363.

⁴⁹⁶ See Second Expert Report of J.L. Aguilar, ¶ 81.

⁴⁹⁷ Counter-Memorial on the Merits, § IV.B.4.a.

⁴⁹⁸ See Reply on the Merits, ¶ 371.

⁴⁹⁹ Reply on the Merits, ¶ 374.

⁵⁰⁰ Reply on the Merits, ¶ 374.

⁵⁰¹ Reply on the Merits, ¶ 374 (quoting **CL-157**, *Sempra Annulment*, ¶ 211).

⁵⁰² See, e.g., **RL-186**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 (Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki) (Feliciano, Nabulsi, Stern), ¶ 40; **RL-177**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25 (Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide) (Tomka, Hascher, McLachlan QC), ¶ 40.

international law, Guatemala encourages the Tribunal to adopt the standard articulated by the NAFTA tribunal in *International Thunderbird* and by the International Court of Justice in *ELSI*, both of which consider the severity of an arbitrary measure. In *International Thunderbird*, the tribunal discussed a breach in terms of “manifest arbitrariness falling below acceptable international standards.”⁵⁰³ In *ELSI*, the ICJ stated 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 [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁵⁰⁴ The NAFTA tribunal in *Cargill* adopted this standard in full.⁵⁰⁵

205. At any rate, Claimant has failed to satisfy its burden of proving that Guatemala’s actions are arbitrary, let alone manifestly so.

206. According to Claimant, the *Lesivo* Declaration was arbitrary for three reasons: First, “because it was not based on any defined legal standards, but on the Executive’s personal whim and discretion; [second, because] it did not serve any legitimate public purpose; and [third, because] it was taken for reasons other than those put forward by the Government.”⁵⁰⁶ None of these reasons finds support in the record.

207. Claimant’s first claim — that the *Lesivo* Declaration was arbitrary “because it was not based on any defined legal standards,”⁵⁰⁷ is unavailing. According to Claimant, the *Lesivo* Declaration was arbitrary simply because it was the result of a discretionary decision.⁵⁰⁸ However, there is no basis for equating the term “discretionary” with the term “arbitrary.” An exercise of discretion must be “founded on prejudice or preference rather than on reason or fact”⁵⁰⁹ before it could be considered arbitrary. As

⁵⁰³ **RL-104**, *International Thunderbird Award*, ¶ 194.

⁵⁰⁴ **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).

⁵⁰⁵ **RL-175**, *Cargill Award*, ¶ 291.

⁵⁰⁶ Reply on the Merits, ¶ 381.

⁵⁰⁷ Reply on the Merits, ¶ 381.

⁵⁰⁸ See Reply on the Merits, ¶ 376. Elsewhere in its Reply, however, Claimant advocates the use of discretion when it would result in a decision in its own favor. See Reply on the Merits, ¶ 297 (arguing that “if the President decides to declare a contract *lesivo*,” it should be “because, in his judgment, the announced interests of the State upon which the contract is based were capricious or because the terms of the contract were not reasonably related to those announced interests”).

⁵⁰⁹ **RL-96**, BLACK’S LAW DICTIONARY (8th ed. 2004).

FAIR AND EQUITABLE TREATMENT

Guatemala demonstrated in its Counter-Memorial, the decision to issue the *Lesivo* Declaration was based on both fact and reason rather than “the Executive’s personal whim,”⁵¹⁰ prejudice or preference.

208. As Guatemala demonstrated in its Counter-Memorial, the *lesividad* process can be traced back to 2004, when Dr. Arturo Gramajo replaced Hugo Sarceño as FEGUA Overseer. Shortly after assuming this role, Dr. Gramajo received a letter from Jorge Senn, FVG’s General Manager, requesting that FEGUA turn over the custody of several warehouses and garages.⁵¹¹ Being new to FEGUA, Dr. Gramajo forwarded the request to FEGUA’s Legal Department for its analysis.⁵¹² The Legal Department responded, in Opinion 47-2004, by indicating that FEGUA was not required to turn over custody of the requested warehouses and garages and that Contract 143/158 was plagued by legal defects that needed to be remedied as soon as possible (including the lack of the required Executive branch approval).⁵¹³ Dr. Gramajo immediately informed FVG of these defects by letter, attaching Opinion 47-2004,⁵¹⁴ and the parties attempted to negotiate resolution of the defects for several months thereafter.⁵¹⁵ When those negotiations failed, Dr. Gramajo and President Berger proceeded to confirm the existence of the defects with four separate governmental agencies or entities,⁵¹⁶ and heeded their advice that *lesividad* was the way to proceed if no resolution could be with FVG reached.

209. Claimant celebrates the fact that “Respondent and its legal expert do not dispute that the concept of *lesividad* found in Article 20 of the *Ley de [sic] Contencioso Administrativo* has no objective legal standards.”⁵¹⁷ However, the absence of a pre-ordained list of circumstances that are harmful to

⁵¹⁰ Reply on the Merits, ¶ 381.

⁵¹¹ **Ex. R-7**, 2004-04-14, Letter from J. Senn (Ferroviás) to A. Gramajo (FEGUA) Requesting Custody of Warehouses.

⁵¹² First Witness Statement of A. Gramajo, ¶ 11.

⁵¹³ **Ex. R-8**, 2004-04-14, FEGUA Opinion 47–2004; see First Witness Statement of A. Gramajo ¶ 11.

⁵¹⁴ First Witness Statement of A. Gramajo, ¶ 12; Second Witness Statement of A. Gramajo ¶ 5; see **Ex. C-53**, 2004-04-21, Letter to J. Senn from A. Gramajo.

⁵¹⁵ See **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz; First Statement of A. Gramajo, ¶ 13; Second Statement of A. Gramajo, ¶ 6.

⁵¹⁶ 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; First Witness Statement of A. Gramajo, ¶ 20; Second Statement of A. Gramajo, ¶¶ 7, 35; Third Statement of A. Gramajo, ¶ 43; Witness Statement of R. Aitkenhead, ¶ 9.

⁵¹⁷ Reply on the Merits, ¶ 375.

the interests of the State does not equate with the absence of *any* legal standards upon which to objectively assess the matter. As Mr. Aguilar explains, there are in fact legal criteria that the *Contencioso Administrativo* Court can use to evaluate whether an administrative act or contract is harmful to the interests of the State:

The Guatemalan courts are fully competent to rule on a case without having precedents or formal sources on which to base their rulings, since, in accordance with the provisions of Article 203 of the Constitution of the Republic of Guatemala, justice shall be dispensed in accordance with the Constitution and the laws of the Republic of Guatemala and it is precisely these bodies of law that regulate the manner in which the courts of justice must proceed⁵¹⁸

210. That a decision may be one of first impression does not signify, as Claimant suggests, that a procedure is inherently arbitrary in violation of the minimum standard of treatment under customary international law. Finally, as Claimant notes, Guatemala is indeed “untroubled”⁵¹⁹ that the Executive branch has the power to initiate *lesividad* proceedings, and that there is no exhaustive list governing the types of actions which may be considered “harmful to the interests of the State.” Limiting the Executive to a pre-determined list of activities that could be considered “harmful to the interests of the State” would unduly restrict State sovereignty and the ability of the Executive to respond quickly when needed; indeed many countries (including the United States) give their Executive this type of broad authority. Many States — including Spain, France, Mexico, Costa Rica, Ecuador, and Argentina — have even granted their Executive this type of power by codifying a *lesividad* process.⁵²⁰

211. Claimant’s second claim — that the *Lesivo* Declaration did not serve any legitimate public purpose — calls for a determination that issuing the Declaration was “correct,” and as such is beyond the jurisdiction of the Tribunal. There is, however, support for the fact that the *lesivo* power serves a legitimate public purpose: to uphold the rule of law, to ensure that the Government is not bound to perform contracts which violate its laws, and to ensure that the Government is not bound *ad eternum* to

⁵¹⁸ Second Expert Report of J.L. Aguilar, ¶ 81 (unofficial translation) (“Los tribunales guatemaltecos son plenamente competentes para decidir un caso sin tener precedente jurisprudencial o fuente formal sobre el cual fallar, toda vez que, de conformidad con lo que dispone el artículo 203 de la Constitución Política de la República de Guatemala, la justicia se imparte de conformidad con la Constitución y las leyes de la República de Guatemala y es, precisamente en dichos cuerpos legales en donde se regula la manera en que los tribunales de justicia deben proceder”); see **RL-193**, *Ley de Organismo Judicial*.

⁵¹⁹ See Reply on the Merits, ¶ 376.

⁵²⁰ See First Expert Report of J.L. Aguilar, ¶ 42.

FAIR AND EQUITABLE TREATMENT

perform a contract which is, or may become, harmful to the public interest. This power is not without limits, however, as it must be exercised within three years after the administrative act or contract enters into force,⁵²¹ and such exercise must be accepted by an independent judicial body — the *Contencioso Administrativo* Court.⁵²²

212. Thus, unlike the respondent in *ADC*, who attempted to prove that its actions satisfied the “public interest” prong of a lawful expropriation defense in part by referring to — but failing to explain — “the strategic interest of the State,”⁵²³ Guatemala has not relied merely upon “vague invocations of the State’s public interest”⁵²⁴ to defend against the arbitrariness claim.

213. As discussed above in response to Claimant’s allegation of bad faith, Claimant’s final claim — that Guatemala acted arbitrarily because the *Lesivo* Declaration “was taken for reasons other than those put forward by the Government”⁵²⁵ — is also without merit. Though Claimant contends that “President Berger and Respondent’s other witnesses have *conceded*” that the motive behind the *Lesivo* Declaration was “to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger’s family,”⁵²⁶ the record does not support this contention.

214. To the contrary, the record amply shows that the actions preceding issuance of the *Lesivo* Declaration — along with any actions taken thereafter — were taken out of a reasonable belief regarding the proper course of action that the Government should follow to remedy the legal defects in Contract 143/158. As previously established, Dr. Gramajo discovered the illegalities in Contract 143/158 as a result of a routine request,⁵²⁷ informed FVG, and the parties attempted to negotiate resolution of the defects for several months thereafter.⁵²⁸ In the meantime, Dr. Gramajo sought confirmation from the legal departments of other Government entities that Contract 143/158 was illegal and, if so, advice

⁵²¹ See Second Expert Report of J.L. Aguilar, ¶¶ 110 (o), 55.

⁵²² See First Expert Report of J.L. Aguilar, ¶¶ 23–24, 35; Second Expert Report of J.L. Aguilar, § III.B.

⁵²³ See **RL-77**, *ADC* Award, ¶ 431.

⁵²⁴ See Reply on the Merits, ¶ 377.

⁵²⁵ Reply on the Merits, ¶ 381.

⁵²⁶ Reply on the Merits, ¶ 378.

⁵²⁷ First Witness Statement of A. Gramajo, ¶ 11.

⁵²⁸ See **Ex. R-9**, 2004-11-15, Letter from J. Senn to Vice Minister Díaz.

on how to proceed.⁵²⁹ Each legal department advised him that Contract 143/158 could not continue without some sort of remedy, and each concluded that *lesividad* was a potential remedy.⁵³⁰ As stated above, the Government negotiated with Claimant in an attempt to remedy the problems with Contract 143/158 while maintaining the relationship, and yet planned in case the negotiations failed. When negotiations failed, the Government utilized a remedy that pre-dated Claimant's investment in Guatemala, and which had been recommended by the legal departments in multiple independent agencies. There is no evidence whatsoever of a concerted strategy designed to deprive Claimant of its rights, or to transfer those rights to Ramón Campollo. In fact, in no legal opinion or the *Lesivo* Declaration does the name Ramón Campollo appear. The contemporaneous witnesses that worked in the different Government agencies on the analyses of Contract 143/158 all agree that their work was independent, was based on their understanding of Guatemalan law as applied to the equipment contract, was free from any pressure or coercion, and had nothing whatsoever to do with any desire to grant the usufruct to any third party, including Mr. Campollo.⁵³¹

215. From its initiation, the *lesividad* process moved logically, deliberately, and carefully from the problem to the solution, rather than as “a strategy and means to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contract to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger's family.”⁵³² The fact that, when (1) after the *Lesivo* Declaration was issued, and (2) in response to questions from reporters about Guatemala's relationship with FVG — and not specifically about the motivation behind issuing the *Lesivo* Declaration — certain Government officials discussed Claimant's failure to rehabilitate the railway or comply with

⁵²⁹ See **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; First Expert Report of J.L. Aguilar, ¶¶ 66-68.

⁵³⁰ 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.

⁵³¹ First Witness Statement of A. Gramajo, ¶¶ 23-49; Witness Statement of I. Ponce, ¶¶ 9-14; Witness Statement of A. González, 17-20; Witness Statement of C. Ozaeta, ¶¶ 15-19.

⁵³² Reply on the Merits, ¶ 378.

FAIR AND EQUITABLE TREATMENT

other contractual obligations,⁵³³ is wholly insufficient to refute this conclusion, especially given the ample evidence of record to support that the Government acted in good faith at all times. In light of Claimant's failure to demonstrate that Guatemala acted arbitrarily — much less manifestly so — the Tribunal must deny its fair and equitable treatment claim.

216. Finally, regarding Claimant's discrimination claim, Guatemala will address these arguments in the context the of national treatment claim.⁵³⁴

4. Guatemala Did Not Breach Its Obligation To Accord Fair And Equitable Treatment Under CAFTA Article 10.5 By Frustrating Claimant's Legitimate Expectations And Failing To Provide Transparency And Stability To Claimant's Investment

217. As stated above, and as Guatemala demonstrated in its Counter-Memorial,⁵³⁵ Claimant has failed to demonstrate that, due to concordant State practice and *opinio juris*, customary international law imposes an obligation either to act transparently or to refrain from frustrating an investor's legitimate expectations.⁵³⁶ Though Claimant alleges that Guatemala "apparently missed the point that the tribunal in *Waste Management II* was putting forward a standard of review for fair and equitable treatment under the customary minimum standard, having first conducted a comprehensive review of other NAFTA cases that had applied this standard,"⁵³⁷ it appears that it is Claimant that has missed

⁵³³ See Reply on the Merits, ¶¶ 218–20 (discussing media reports and public stations "concerning the *Lesivo* Resolution in the days and weeks after it issued," and claiming that they "consistently reported that the President's decision to declare the usufruct equipment contract *lesivo* had nothing to do with any alleged legal defects in this contract and everything to do with the Government's desire to extract major concessions from FVG on the terms of the other usufruct contracts").

⁵³⁴ See below, § V.

⁵³⁵ Counter-Memorial on the Merits, §§ IV.B.5.a, IV.B 6.a.

⁵³⁶ Claimant has also failed to demonstrate the existence under customary international law of an obligation to provide a stable legal and business environment. Its only discussion of this issue is limited to a single paragraph in its Reply, paragraph 391. Because Claimant has failed to: (1) prove the existence of an obligation to provide a stable legal and business environment; (2) explain what such obligation might entail; and (3) clearly articulate the facts which might demonstrate a violation of such obligation, Guatemala will not address the argument in this Rejoinder. It nevertheless reserves the right to seek leave from the Tribunal to respond to such argument should Claimant clarify its position.

⁵³⁷ Reply on the Merits, ¶ 383 (emphasis added).

Guatemala's point: decisions by international tribunals "do not constitute State practice and thus cannot create or prove customary international law."⁵³⁸

218. Thus, while Claimant may disagree with the *Glamis Gold* tribunal,⁵³⁹ and believe it should be able to rely upon cases interpreting an autonomous fair and equitable treatment standard; disagree with Arbitrator Nikken's opinion in the *Suez* case, and believe that legitimate expectations and a stable legal environment should be considered elements of the minimum standard of treatment; and disagree with the *Glamis Gold* and *Cargill* tribunals,⁵⁴⁰ in articulating that transparency is one of the obligations that comprises the minimum standard of treatment, the fact remains that Claimant has failed to make the required showing to demonstrate a concordant State practice and *opinio juris* as to each of these purported standards of treatment.

219. That notwithstanding, even assuming Claimant had been able to demonstrate that Guatemala was bound to act transparently, to refrain from frustrating investor expectations, and to provide a stable legal environment, Claimant has not satisfied its burden of proving that Guatemala failed to meet these standards of treatment.

a. Transparency

220. With respect to transparency, the parties agree that the term 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"⁵⁴¹ Guatemala argued in its Counter-Memorial that "transparency" would not require "that an investor be apprised of every decision made by every government agency,

⁵³⁸ **RL-102**, *Glamis Gold Award*, ¶ 605.

⁵³⁹ See Reply on the Merits, ¶ 383.

⁵⁴⁰ See **RL-175**, *Cargill Award*, ¶ 294 ("The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105's requirement to afford fair and equitable treatment. The principal authority relied on by Claimant — *Tecmed* — involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the "basic expectations" of an investor rather than as an independent duty under customary international law"); see also **Ex. R-102**, *Glamis Gold Award*, ¶ 580 (noting that the Respondent pointed out that all three State parties to NAFTA have agreed that there is no transparency requirement in Art. 1105 and "have expressly rejected the notion that transparency forms part of customary international law").

⁵⁴¹ **RL-160**, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 374 (2005) (quoted by Claimant in its Memorial on the Merits, ¶ 150 and Reply on the Merits, ¶ 387 and quoted by Guatemala in its Counter-Memorial on the Merits, ¶ 414).

FAIR AND EQUITABLE TREATMENT

entity, or representative, before the opportunity for notification foreseen by the applicable laws or regulations,”⁵⁴² and Claimant did not contest this argument in its Reply. Nor did it contest that, pursuant to the autonomous standard articulated by the *Tecmed* tribunal and advocated by Claimant in its Memorial, 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 the goals of the relevant policies and administrative practices or directives”⁵⁴³

221. Nevertheless, Claimant insists that Guatemala breached its duty to act transparently due to:

(i) the lack of any objective standards for a declaration of *lesividad* in Article 20 of the *Ley De Lo Contencioso Administrativo*; (ii) Respondent’s deliberate withholding of its intention to declare Contracts 143/158 *lesivo* until the day before the deadline to publish the declaration; and (iii) Respondent’s deliberate withholding from Claimant of the asserted legal grounds for declaring Contracts 143/158 *lesivo* until months after its action was formally filed in the *Contencioso Administrativo* court

⁵⁴⁴

222. As a threshold matter, Guatemala wishes to note that the allegations underlying Claimant’s transparency claim completely contradict Claimant’s argument that Guatemala used the *lesividad* process as “a ‘threat instrument’ against Claimant in order to further Respondent’s (and Respondent’s favored national investor’s) commercial, economic and political interests at Claimant’s expense.”⁵⁴⁵ How could Guatemala threaten Claimant with the *Lesivo* Declaration while simultaneously keeping the plan to issue such Declaration secret? As noted above, one would think that a government that is using a declaration of *lesividad* as a “threat instrument” would wield that instrument during negotiations with the investor rather than work on it without informing the investor that it was doing so. It is not very effective to have a “threat instrument” as a pressure tool when the party against which one is supposedly using that tool does not even know of its existence.

⁵⁴² Counter-Memorial on the Merits, ¶ 416.

⁵⁴³ **RL-133**, *Tecmed Award*, ¶ 154 (quoted by Claimant in its Memorial on the Merits, ¶ 141).

⁵⁴⁴ Reply on the Merits, ¶ 397. Though Claimant suggests that these circumstances “undermined [its] legitimate expectations,” and because Claimant has failed to demonstrate the existence of the factual predicate necessary to sustain its fair and equitable treatment claim, Guatemala’s response to these circumstances in the context of transparency should be applied also in the context of legitimate expectations.

⁵⁴⁵ Reply on the Merits, ¶ 294.

223. At any rate, merely failing to notify Claimant of its decision to issue the *Lesivo* Declaration or of the grounds for issuing the Declaration until the notification dates designed for that very purpose,⁵⁴⁶ cannot be a failure in transparency — in general, or as that term is applicable under CAFTA. As stated above, Guatemala’s transparency obligation is only to ensure “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”⁵⁴⁷ Neither a time lapse in notification of the reasons justifying the decision to issue the *Lesivo* Declaration nor withholding formal notification of the decision itself until it has been taken violates this standard.

224. Moreover, as discussed above in the context of Claimant’s due process claim, Claimant was given ample notice of both long before the *Contencioso Administrativo* Court would make a decision affecting its rights.⁵⁴⁸

225. Claimant’s remaining complaint is (again) that “the lack of any objective standards for a declaration of *lesividad* in Article 20 of the *Ley De Lo Contencioso Administrativo*”⁵⁴⁹ demonstrate a failure to act transparently. However, Guatemalan Constitutional and statutory law in fact provides standards that guide a determination of whether a particular administrative act or contract is *lesivo* to the interests of the State, and the *Contencioso Administrativo* Court possesses ample authority to determine whether the Executive’s initial declaration of *lesividad* was correct.⁵⁵⁰ Both the extent of the standards and the standards themselves were readily available to Claimant at the time it invested; the law has not changed since that time. To accept Claimant’s position and hold Guatemala accountable for failing to codify the exact — and only — measures which could be deemed “harmful to the interests of the State” is simply not required by CAFTA Article 10.5.

⁵⁴⁶ Second Expert Report of J.L. Aguilar, ¶ 48.

⁵⁴⁷ **RL-160**, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 374 (2005) (quoted by Claimant in its Memorial on the Merits, ¶ 150 and Reply on the Merits, ¶ 387, and quoted by Guatemala in its Counter-Memorial on the Merits, ¶ 414).

⁵⁴⁸ See **Ex. C-11**, 2006-11-14, Attorney General’s claim before the *Contencioso Administrativo* court regarding the *lesividad* of Contracts 143/158, §§ 2–4; see also Reply on the Merits, ¶ 303 (conceding that the Executive branch published the *Lesivo* Declaration within the time limit required by law, and that the Attorney General filed its complaint before the *Contencioso Administrativo* court within the time limit required by law).

⁵⁴⁹ Reply on the Merits, ¶ 397.

⁵⁵⁰ See Second Expert Report of J.L. Aguilar, ¶ 81.

FAIR AND EQUITABLE TREATMENT

226. Even if it were not readily apparent that the illegalities in Contract 143/158 might lead to a declaration of *lesividad*, based on pre-existing laws, the bidding requirements, and Claimant's experience with Contract 402 and the non-entry-into-force of Contract 41, it *was* readily apparent to Claimant at the time it invested that both a public bid and Executive approval were required for administrative contracts.⁵⁵¹ Claimant could expect, based on this knowledge, that there would be *some* repercussion for failing to meet these requirements — and in fact appears willing to have accepted the outright termination or annulment of Contract 143/158 on this basis.⁵⁵²

227. Accordingly, Claimant has not satisfied its burden of proving that Guatemala failed to act transparently.

b. Legitimate Expectations

228. Apart from claiming that “any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy purposes,”⁵⁵³ Claimant does not contest the legitimate expectations standard that Guatemala articulated in its Counter-Memorial (and summarized above with respect to expropriation).

229. Thus, Claimant bears the burden of proving first that, in light of the specific facts of the case, its expectations were “legitimate,” and second, that Guatemala frustrated those expectations. Regarding the question of whether Claimant's expectations are legitimate, the Tribunal should not be guided by Claimant's subjective belief regarding a particular event. Rather, as the AES tribunal stated, even if an investor believes there is a “great probability” that a particular event will or will not occur, “this does not equate to absolute certainty, giving rise to internationally protected legitimate expectations.”⁵⁵⁴ Internationally-protected legitimate expectations — *i.e.*, those that may bind a State — *arise only from*

⁵⁵¹ See above, § II.B.3.

⁵⁵² See Reply on the Merits, ¶ 348 (referring to these options as “less draconian” than the *lesividad* process).

⁵⁵³ Reply on the Merits, ¶ 390 (quoting **RL-110**, *Merrill & Ring Award*, ¶ 110).

⁵⁵⁴ **RL-79**, *AES Award*, ¶ 9.3.21.

*specific government assurances which induce investment or from laws that exist at the time an investor invests.*⁵⁵⁵

230. As Guatemala explained above in response to Claimant's expropriation claim, Claimant has failed to prove either that its expectations were legitimate or that they were frustrated by Guatemala's issuance of the *Lesivo Declaration*.⁵⁵⁶

231. In its Reply, Claimant asserts that "it had every reason to expect that Guatemala would not use the *lesivo* process as a strategy and means to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger's family."⁵⁵⁷ As explained above, there simply is no evidence that Guatemala did this. Claimant's allegation to the contrary is based on little more than repetition of second-hand hearsay⁵⁵⁸ allegedly traced back to Héctor Pinto — who was not a Government official with power to bind the State, who cannot appear in these proceedings, and whom Mr. Campollo expressly disavows authorizing to act on his behalf — and to Desarrollos G, a company which was formed in part to "carry out railway activities,"⁵⁵⁹ but in which Mr. Campollo never possessed any interest nor held any position.⁵⁶⁰ Both of these points are discussed in more detail below, in Section V.

232. According to Claimant, the facts of the present case are analogous to those of the *Vivendi II* case, where the tribunal found that Argentina has mounted "an illegitimate campaign to force [the claimants], on threat of rescission, to renegotiate a lower tariff."⁵⁶¹ However, as stated above, this

⁵⁵⁵ With respect to specific representations, see Reply on the Merits, ¶ 387; see also **RL-155**, CAMPBELL MCLACHLAN ET AL, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.105; **RL-115**, *National Grid*, ¶ 152; **RL-136**, *Waste Management II Award*, ¶ 98. Regarding expectations based on the laws that exist at the time an investor invests, see **RL-113**, *MTD Award*, ¶¶ 178, 209, 214; **RL-106**, *LG&E Award*, ¶ 130; **RL-149**, L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment*, p. 307.

⁵⁵⁶ See above, § II.

⁵⁵⁷ Reply on the Merits, ¶ 394.

⁵⁵⁸ See, e.g., Reply on the Merits, ¶¶ 425–26; Memorial on the Merits, ¶¶ 53, 63, 65.

⁵⁵⁹ See **Ex. C-98**, Corporate Registration of Desarrollos G. However, the company also "managed on-line lottery, including the sale of instant scratch-off lottery tickets, electronic lottery, lotto-type games, games of numbers, symbols, letters, images, and other games governed by the laws of Guatemala, as well as any other activities related thereto" *Id.*

⁵⁶⁰ See **Ex. R-332**, Mercantile Registry File re: Desarrollos G.; see also First Witness Statement of R. Campollo, ¶ 25; Second Witness Statement of R. Campollo, ¶ 14.

⁵⁶¹ **RL-135**, *Vivendi II Award*, n. 355.

FAIR AND EQUITABLE TREATMENT

finding was based on the fact that Argentina had actually taken measures that undercut the investment, such as introducing regulations that forced tariff reductions and imposed various fines and charges as a pressure mechanism designed to renegotiate rates,⁵⁶² told the claimants' customers "in all tones and in all forms" not to pay their bills,⁵⁶³ and even enacted measures which prevented the claimants from seeking relief from non-paying customers.⁵⁶⁴

233. The facts of this case are in no way similar.

234. As Guatemala has consistently explained — both in this Rejoinder and throughout the arbitration — there is simply no evidence that Guatemala used the *lesividad* process as a means to force Claimant to renegotiate and surrender its rights *at all*; much less to Mr. Campollo or the Berger family. Both Mr. Campollo and Mr. Berger disavow ever having any interest — individually or jointly — in assuming any of the usufruct rights conferred upon Claimant.⁵⁶⁵ And, while Claimant originally claimed that Mr. Campollo was "particularly" interested in the South Coast route because it "would be valuable to him for more economical transport of his sugar products from his sugar mill at Santa Lucia,"⁵⁶⁶ after Guatemala contested this point, Claimant amended its argument to state that Mr. Campollo's "primary interest in the South Coast railway was not how it could be used by his sugar mill."⁵⁶⁷

235. The record shows that Guatemala negotiated with Claimant in good faith to remedy the problems with Contract 143/158, and also to address problems relating to other aspects of the Usufruct. Guatemala acted at all times with the intention to maintain its relationship with FVG. Neither logic nor the record supports Claimant's argument to the contrary. Indeed, if Guatemala truly intended to use the *lesividad* process as a threat instrument to take away Claimant's investment to give it to Mr. Campollo, why would it waste time negotiating with FVG? Why would it request legal opinions from no fewer than four independent entities concerning its options? Why would Claimant now complain that

⁵⁶² See **RL-135**, *Vivendi II Award*, ¶ 7.4.24.

⁵⁶³ See **RL-135**, *Vivendi II Award*, ¶¶ 7.4.39–7.4.42.

⁵⁶⁴ **RL-135**, *Vivendi II Award*, ¶¶ 7.4.32–7.4.36.

⁵⁶⁵ First Witness Statement of R. Campollo, ¶¶ 32–34; see Second Witness Statement of R. Campollo, ¶¶ 15, 24–26; see also First Witness Statement of J.E. Berger, ¶¶ 4, 7–9.

⁵⁶⁶ Memorial on the Merits, ¶ 46.

⁵⁶⁷ Reply on the Merits, ¶ 416.

the Government kept the *lesividad* process “secret?”⁵⁶⁸ Why would it go after only the equipment contract, when the equipment was necessary for only a small portion of the railroad project (which was in turn only a small portion of the entire Usufruct)? Why give the project to someone with absolutely no directly applicable railroad experience, when the bidding requirements called for someone with “experience in railroad operation and engineering,”⁵⁶⁹ and when the scorecard used by the bidding committee to compare Claimant’s bid to the one from Agenda 2000 demonstrates that the Agenda 2000 bid was rejected specifically due to its lack of experience?⁵⁷⁰ And, most importantly, why would it choose to execute its plan by initiating a process that would require approval from 15 Ministers, from the President, from his Secretary General, and ultimately from the *Contencioso Administrativo* Court?

236. It also bears mentioning that the principal document that Claimant invokes to suggest that the Government was using the *Lesivo* Declaration as an element of pressure during the negotiations with FVG — minutes of an internal Government meeting that took place on 28 September 2006, just before the last recorded negotiation meeting between the parties following the *Lesivo* Declaration⁵⁷¹ —does not lead to this conclusion when examined carefully and when evaluated in light of the other evidence relating to the negotiations. As the minutes from that meeting indicate, the Attorney General informed the other Government participants that he had held off initiating the *Contencioso Administrativo* Court proceeding regarding the *Lesivo* Declaration to provide FEGUA, the Government, and FVG more time to reach an amicable solution of the pending disputes, but that he was not inclined to wait further as the negotiations were not producing any results, and as time was running for him to initiate the *Contencioso Administrativo* proceeding.⁵⁷² In the context of making that comment, the Attorney General also

⁵⁶⁸ See, e.g., Reply on the Merits, ¶ 281 (“Respondent cannot point to a single document prior to the *Lesivo* Resolution where it informed Claimant that it viewed Contracts 143/158 as invalid, illegal or *lesivo*. To the contrary, during the entire process leading up to the issuance of the *Lesivo* Resolution, Respondent purposefully kept all of the internal and outside legal opinions and analyses it obtained concerning Contracts 143/158 secret from Claimant”).

⁵⁶⁹ Ex. R-1, 1997-02-14, Bidding Rules for Contract 402, § 3.5.4.

⁵⁷⁰ Ex. R-330, Score Sheet of the Bidding Selection Committee for Contract 402; see First Witness Statement of J. Carrillo, ¶ 4.

⁵⁷¹ Ex. R-36, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías

⁵⁷² Ex. R-36, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías

FAIR AND EQUITABLE TREATMENT

mentioned that perhaps the initiation of the *Contencioso Administrativo* proceeding might act as gentle pressure to move along the negotiations between the parties.⁵⁷³

237. It is understandable that the Tribunal in its Second Decision on Objections to Jurisdiction, based on the limited record then before it, may have jumped to the conclusion that Guatemala may have used the *Lesivo* Declaration as a pressure instrument given the comment made by the then-Attorney General in this 28 September meeting,⁵⁷⁴ but the full record simply does not bear out this is what occurred. It is important to note that this was an internal Government meeting that took place at the *end* of the many months of negotiations between the Government and FVG to try and sort out the disputes between them. There was record of only one meeting between parties after this internal meeting, which took place on 4 October 2006, and there is no indication at all that the *Contencioso Administrativo* proceeding was even discussed in that meeting, let alone used as a pressure tool.⁵⁷⁵ Of interest, during that meeting FVG reportedly agreed to make various changes to Contract 402, including modifying the railway rehabilitation plan, but indicated that it was of lesser priority to enter into a new railway equipment contract given that the restoration of the Southern Corridor would require standard gauge rail and hence different railway equipment.⁵⁷⁶

238. But returning to the point at hand, other than the isolated comment by the Attorney General during an internal meeting that took place at the end of the parties' negotiations, there is actually no evidence that the Government ever used the threat of the *Lesivo* Declaration, or of the initiation of the *Contencioso Administrativo* proceeding as an element of pressure during the negotiations with FVG. Instead, as explained above in more detail, the Government engaged in good faith negotiations with FVG and Claimant in an effort to remedy the legal defects in Contract 143/158, as well as the other issues in dispute between them, while separately preparing to issue the *Lesivo* Declaration — as Claimant concedes principally unbeknownst to it — in the event that the negotiations did not bear fruit. And when Claimant raised the issue of the *Lesivo* Declaration during the High-level Commission

⁵⁷³ **Ex. R-36**, (Aug/Sept 2006) Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

⁵⁷⁴ See Second Decision on Jurisdiction, ¶ 134, n.97.

⁵⁷⁵ See **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

⁵⁷⁶ **Ex. R-37**, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

meetings, the Government said it would *stop* the process to allow the parties to continue to negotiate, rather than use the threat of the Declaration as an instrument of pressure.

239. Claimant also asserts that, similar to the facts of *Tecmed*, Guatemala failed to use *lesividad* “in conformity with its normal function.”⁵⁷⁷ In *Tecmed*, the tribunal found a violation of the autonomous fair and equitable treatment standard due to the fact that Mexican authorities had hijacked the permit process, using it to permanently close down the claimant’s landfill operation. The tribunal concluded that Mexico had not used the permit process for its intended purpose — preservation of public health and of the environment — but used it instead to neutralize what had become a political nuisance.⁵⁷⁸

240. On the other hand, in the present case, Guatemala has used the *lesividad* process in accordance with its normal function. While Guatemala believes this to be true from both a substantive and procedural point of view, the question for this Tribunal must be limited to procedure (as Claimant has failed to establish that Guatemala used the *lesividad* process as part of a conspiracy to give Claimant’s investment to Ramón Campollo, and as the question of whether it was *correct* to issue the *Lesivo* Declaration is irrelevant and beyond the Tribunal’s jurisdiction). Pursuant to Article 20 of the *Ley De Lo Contencioso Administrativo*, the *lesividad* process first requires a finding, based on a legal analysis, that there is sufficient reason to believe that a particular administrative act is harmful to the interests of the State.⁵⁷⁹ In the present case, this requirement was satisfied by the multiple legal opinions issued by four separate and independent Government entities, each of which confirmed that Contract 143/158 was *lesivo* to the interests of the State. This finding is then memorialized in an *Acuerdo Gubernativo* — like the *Lesivo* Declaration here — which must be signed by 13 Cabinet Ministers, the President and his Secretary General, and the Vice-President.⁵⁸⁰ To instruct the Attorney General to initiate proceedings before the *Contencioso Administrativo* Court, the *Acuerdo Gubernativo* must be published in the legal section of the *Diario de Centroamérica*, Guatemala’s Official Gazette.⁵⁸¹ Such publication must take place within three years of the administrative act.⁵⁸² Guatemala satisfied this requirement by publishing

⁵⁷⁷ Reply on the Merits, ¶ 395.

⁵⁷⁸ See **RL-133**, *Tecmed Award*, ¶ 164.

⁵⁷⁹ First Expert Report of J.L. Aguilar, ¶ 36.

⁵⁸⁰ First Expert Report of J.L. Aguilar, ¶ 36.

⁵⁸¹ See First Expert Report of J.L. Aguilar, ¶¶ 36(g), 53.

⁵⁸² First Expert Report of J.L. Aguilar, ¶¶ 36(g), 53.

FAIR AND EQUITABLE TREATMENT

the *Lesivo* Declaration on 25 August 2006.⁵⁸³ Publication of an *Acuerdo Gubernativo* triggers a 90-day time limit for the Attorney General to initiate proceedings in the *Contencioso Administrativo* Court to seek nullity of the act in question.⁵⁸⁴ Guatemala complied with this obligation, as well.⁵⁸⁵

241. The *Contencioso Administrativo* Court is then tasked with determining whether the act or agreement in question is in fact *lesivo* and, if so, the remedies that should be imposed.⁵⁸⁶ Although the *Contencioso Administrativo* Court proceedings are currently ongoing, the actions the Court has taken thus far demonstrate that the *lesividad* process has been executed in accordance with its normal function. To this end, the Court requested evidence and affidavits from FEGUA and from the Secretary General of the President relating to the *Lesivo* Declaration before even admitting the Attorney General's complaint, permitted both parties to present written and oral arguments, opened the proceedings to the presentation of evidence, presided over in-Court deposition and examination of witnesses, and has duly recorded, notified, and responded to motions and requests from both parties. As the "docket" chart produced on pages 49 to 52 demonstrates, the process has been used to evaluate the parties' arguments as to whether Contract 143/158 is indeed *lesivo*. In other words, it has been conducted in accordance with its normal function (and therefore also with CAFTA Article 10.5). The *Contencioso Administrativo* Court itself has worked to enforce the normal boundaries of *lesividad*, rejecting two requests from the Attorney General which would have resulted in the temporary suspension of Claimant's rights under Contract 143/158 notwithstanding the absence of a final decision from the Court mandating such result.⁵⁸⁷

242. With respect to Claimant's contention that its legitimate expectations have been frustrated because "by itself, the *Lesivo* Resolution rendered Claimant's possession of such equipment *worthless* because it destroyed FVG's railroad business,"⁵⁸⁸ Guatemala is unsure how such contention could be the basis of a legitimate expectations claim. In any event, as demonstrated throughout this Rejoinder,

⁵⁸³ See First Witness Statement of A. Gramajo, ¶ 47; Witness Statement of A. Zosel ¶ 20; **Ex. C-1**.

⁵⁸⁴ First Expert Report of J.L. Aguilar, ¶¶ 36(g), 38, 53.

⁵⁸⁵ See Reply on the Merits, ¶ 303; see also **Ex. C-11**, 2006-11-14, Attorney General's claim before the *Contencioso Administrativo* court regarding the *lesividad* of Contracts 143/158.

⁵⁸⁶ First Expert Report of J.L. Aguilar, ¶¶ 36(g), 53.

⁵⁸⁷ See **RL-73**, 2007-02-23, Decision of the *Contencioso Administrativo* court regarding the Attorney General's claim of *lesividad* of Contracts 143/158; First Expert Report of J.L. Aguilar, ¶ 63.

⁵⁸⁸ Reply on the Merits, ¶ 396.

Claimant has failed to put forth the factual support necessary to sustain this claim; Claimant has admitted that it retains and enjoys all of the rights conferred under Contracts 143/158, 402 and 820, including its right to the railway equipment,⁵⁸⁹ and has even stipulated that its investment continues to generate revenue to this day.⁵⁹⁰ Moreover, and in light of the evidence indicating Claimant's own hand in "destroying FVG's railroad business" by providing a service that even Claimant's partner recognized was inadequate,⁵⁹¹ and unilaterally abandoning rail service in Guatemala, Claimant should be estopped from succeeding on this claim.

* * *

243. In light of the reasons set forth both in this section and in Section IV.B. of Guatemala's Counter-Memorial, the Tribunal must reject Claimant's fair and equitable treatment claims in their entirety.

⁵⁸⁹ See Memorial on the Merits, ¶ 130 (arguing that "the *Lesivo* Resolution had the effect of depriving RDC of the benefits, use and enjoyment of its investment in the Usufruct even though it still retained nominal ownership of the rights that comprise the investment").

⁵⁹⁰ Ex. R-329, Parties' Stipulation.

⁵⁹¹ Ex. R-327, 2007-05-02, Letter from Cementos Progreso to RDC.

IV. Guatemala Accorded Claimant's Investment Full Protection And Security, In Accordance With Article 10.5 Of CAFTA

244. Pursuant to Article 10.5 of CAFTA, each Party is required to “accord to covered investments treatment in accordance with customary international law, including . . . full protection and security.”

⁵⁹² Though Article 10.5. does not define the term “full protection and security,” Article 10.5.2 clarifies that the full protection and security obligation requires only that the Parties accord investments treatment equivalent to the minimum standard of treatment.⁵⁹³

245. Guatemala examined the full protection and security standard in its Counter-Memorial and explained that the full protection and security obligation requires only reasonable efforts; it does not guarantee the result of those efforts or impose strict liability.⁵⁹⁴ Guatemala further explained that because it is required to comply only with this minimum standard, Claimant's burden of proving a violation is high.⁵⁹⁵

246. Although, in its Reply, Claimant did not attempt to rebut any of the cases — and even partially concedes the standard — that Guatemala set forth in its Counter-Memorial,⁵⁹⁶ Claimant nevertheless insists that Guatemala breached its full protection and security obligation. According to Claimant, “the only thing that Respondent was ‘diligent and proactive’ about after the *Lesivo* Resolution was in manufacturing a post-litigation evidentiary record in an attempt to bolster its full protection and security credentials.”⁵⁹⁷ Once again, Claimant's allegations prove to be short on substance.

247. Because the parties seem to agree (at least in part) on the applicable legal standard, Section IV.A begins by summarizing that standard and the “essential question” that the Tribunal must answer with

⁵⁹² **RL-61**, CAFTA Art. 10.5.1.

⁵⁹³ **RL-61**, CAFTA Art. 10.5.2.

⁵⁹⁴ See Counter-Memorial on the Merits, § IV.C.

⁵⁹⁵ See Counter-Memorial on the Merits, ¶ 474 (citing **RL-97**, *ELSI Award*, ¶¶ 107–08; **RL-117**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award, 12 October 2005) (Böckstiegel, Lever, Dupuy), ¶ 165 (“*Noble Ventures Award*”)).

⁵⁹⁶ See Reply on the Merits, ¶ 400 (conceding that Guatemala's argument that the “customary international law standard for full protection and security requires that a host State exercise ‘due diligence’ in the protection of a foreign investment, which means that a host State must take ‘reasonable measures’ to protect the investment under the given circumstances . . . [is] the correct standard with respect to protection from third parties . . .”).

⁵⁹⁷ Reply on the Merits, ¶ 406.

respect to full protection and security. Section IV.B examines the qualifications that Claimant attempts to add to the “reasonable efforts” test, and demonstrates that they are underdeveloped and, at any rate, unsustainable. Section IV.C examines the facts, and demonstrates that Guatemala took reasonable measures to protect Claimant’s investment, and that Claimant has failed to satisfy its burden of proving otherwise.

A. The Full Protection And Security Standard Under CAFTA And Customary International Law Is Simply “Reasonable Efforts,” Not “Strict Liability”

248. As Guatemala explained in its Counter-Memorial, the obligation of full protection and security under the customary international law minimum standard of treatment requires only reasonable efforts and due diligence, and does not impose strict liability.⁵⁹⁸ There is broad agreement among international tribunals that the obligation does not create strict liability by providing a guarantee against injury.⁵⁹⁹ The obligation is simply one of reasonable efforts, or in the words of one tribunal, “an obligation of vigilance.”⁶⁰⁰

1. The Reasonableness Of A Country’s Efforts Under The Full Protection And Security Standard Depends On What Is Reasonable “Under The Circumstances”

249. As with the other standards of protection under CAFTA, determining what is “reasonable” under the full protection and security standard requires a case-by-case, fact-specific evaluation.⁶⁰¹ For this claim, *the essential questions for the Tribunal are: (1) what type of protection was necessary; and (2)*

⁵⁹⁸ **RL-133**, *Tecmed Award*, ¶ 177 (applying the higher, autonomous standard, the Tribunal still held that the full protection and security obligation “is not absolute and does not impose strict liability upon the State that grants it.” Because the CAFTA standard is a lower, minimum standard, it cannot by any means be understood as one of strict liability.); **RL-76**, *AAPL Award*, ¶ 48, **RL-117**, *Noble Ventures Award*, ¶ 164; **RL-81**, *American Manufacturing & Trading Award*, ¶ 6.05; see **CL-183**, Christoph Schreuer, *Full Protection and Security*, 1 J. OF INT’L DISPUTE SETTLEMENT 353, 354 (2010).

⁵⁹⁹ **CL-183**, Christoph Schreuer, *Full Protection and Security*, 1 J. OF INT’L DISPUTE SETTLEMENT 366, (2010) (“[t]here is broad agreement that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of ‘due diligence’, ie a reasonable degree of vigilance.”); **RL-180**, A. Newcombe and L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES* 308 (2009) (“Tribunals have rejected arguments that full protection and security obligations provide a guarantee against injury or impose strict liability. The obligation with respect to physical protection is one of due diligence – the same standard as that under customary international law.”).

⁶⁰⁰ **RL-81**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1 (Award, 21 February 1997) (Sucharitkul, Golsong, Mbaye), ¶ 6.05 (“*American Manufacturing & Trading Award*”).

⁶⁰¹ See **RL-133**, *Tecmed Award*, ¶ 177 (explaining that the full protection and security obligation does not impose strict liability).

whether Guatemala's actions constituted a reasonable attempt to offer the necessary protection.

With respect to the second question, the Tribunal must determine whether Guatemala's actions were "reasonable under the circumstances."⁶⁰² As the *Pantechniki* tribunal stated, an evaluation of what is "reasonable under the circumstances" must include the host State's level of development and resources.⁶⁰³

Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard—the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as a relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.⁶⁰⁴

250. The Tribunal's evaluation cannot, moreover, be based on hindsight; the Tribunal may not infer a full protection and security violation merely because it believes that Claimant has demonstrated harm to its property. Accepting Claimant's suggestion that Guatemala breached its full protection and security obligation simply because invasions and thefts occurred⁶⁰⁵ would improperly expand the notion of full protection and security beyond the customary international law standard. Accepting this suggestion would impose a requirement that Guatemala guarantee the absence of any and every injury.

251. Similarly, the Tribunal's evaluation may not be based on the hypothetical; the Tribunal may not consider how Claimant's investment might have been protected in a perfect world or in a different

⁶⁰² **RL-105**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL (U.S./Czech Republic BIT) (Award, 3 September 2001) (Cutler, Briner, Klein), ¶ 308 ("*Lauder Award*") ("The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as is reasonable *under the circumstances*." (emphasis added)).

⁶⁰³ **Ex. RL-179**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 (Award, 30 July 2009)(Paulsson), ¶¶ 77–81 ("*Pantechniki Award*").

⁶⁰⁴ **RL-179**, *Pantechniki Award*, ¶ 81 (quoting **RL-180**, A. Newcombe and L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES* 310 (2009)).

⁶⁰⁵ See Reply on the Merits, ¶¶ 402–03 (claiming that "despite this evidence [that "after the *Lesivo* Resolution was published, Claimant experienced a dramatic increase in public interference, theft and vandalism within the right-of-way"] Respondent nevertheless argues that it took reasonable measures to protect FVG's Usufruct rights after the *Lesivo* Resolution.").

country. Rather, the question is, based on the circumstances, including Guatemala's legal framework, its resources, and the facts that were known at the time, whether the measures the Government took to protect the investment demonstrate a "reasonable effort."

252. Finally, although this dispute contains a contract requiring certain undertakings from FEGUA with respect to the removal of squatters, the Tribunal may not find a treaty violation based upon a contractual breach. Though the parties seem to be in agreement on this point — Claimant states that it does not "argue or even suggest that Respondent's breach of its full protection and security obligation should be measured or determined by FEGUA's breach of its contractual duty to protect the right-of-way from squatters"⁶⁰⁶ — in light of the factual assertions underlying Claimant's full protection and security claim,⁶⁰⁷ Guatemala wished to underline the point. While Contract 402 described Guatemala's duty 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,"⁶⁰⁸ Guatemala's full protection and security obligation does not extend this far. Guatemala's manpower and financial resources, and the normal procedures used to deal with trespass and vandalism inform the CAFTA inquiry, rather than the level of protection described in Contract 402. With respect to squatters, therefore, the question for the Tribunal is simply whether Guatemala provided "the level of police protection required under customary international law,"⁶⁰⁹ namely whether Guatemala undertook reasonable efforts to protect Claimant's investment.

253. As arbitral tribunals have confirmed, the customary international law minimum standard sets the bar *quite* high for establishing a violation of the obligation of full protection and security.⁶¹⁰ Because the obligation requires only due diligence, and because a State's actions will be judged in light of the

⁶⁰⁶ Reply on the Merits, n. 956.

⁶⁰⁷ Compare **Ex. C-22**, Contract 402, cl.12(B) and (E) with Reply on the Merits, ¶¶ 404–05 (asserting that Guatemala failed to "prevent" interference from third parties, and that Guatemala's "efforts to evict squatters from the right-of-way and to prosecute rail thefts after the *Lesivo* Resolution were woefully inadequate").

⁶⁰⁸ **Ex. C-22**, Contract 402, cl.12(B) and (E).

⁶⁰⁹ **RL-61**, CAFTA Art. 10.5(2)(b).

⁶¹⁰ **RL-105**, *Lauder Award*, ¶ 308; see also **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); see also **RL-117**, *Noble Ventures*, ¶¶ 164–65 (accepting the *ELSI* standard in the ICSID context).

circumstances that existed at the time, violations of the full protection and security standard are, in the words of the *Noble Ventures* tribunal, “not easily to be established.”⁶¹¹

B. Claimant Mischaracterizes The Full Protection And Security Standard

254. Before proceeding with the discussion of Claimant’s legal arguments, a brief note is in order regarding the cases that Claimant invokes, which interpreted an autonomous standard rather than the customary international law standard applicable under CAFTA. As stated above in the context of Claimant’s fair and equitable treatment claim, because the autonomous standard imposes a higher obligation than the customary international law minimum standard of treatment, if Guatemala demonstrates that it has satisfied the higher, autonomous, obligation, it will have also satisfied the lower standard applicable under CAFTA. On the other hand, Claimant may *not* succeed simply by invoking a decision interpreting the autonomous standard; it bears repeating that the failure to satisfy the autonomous standard does not automatically equate to behavior that falls below the minimum standard of treatment threshold applicable under CAFTA.

1. Claimant’s Additions To The Reasonable Efforts Test Are Neither Substantiated Nor Fully Defined

255. Despite conceding that the customary international law standard for full protection and security “means that a host State must take ‘reasonable measures’ to protect the investment under the given circumstances,”⁶¹² Claimant asserts that this standard must be qualified in two ways: first, it does not apply when it is a State (or entity thereof) that interferes with a foreign investor’s property or assets;⁶¹³ and second, it *requires* that a State take reasonable “active” measures to *prevent* interference from third parties.⁶¹⁴ Claimant fails to articulate what either qualification would entail.

⁶¹¹ **RL-117**, *Noble Ventures*, ¶ 165.

⁶¹² Reply on the Merits, ¶ 400.

⁶¹³ Reply on the Merits, ¶ 400 (citing **RL-143**, *ILC Draft Articles*, Art. 4 Commentary, ¶¶ 6–7). Claimant also asserts for the first time in its Reply that the obligation of full protection and security requires the host State to refrain from encouraging, fostering, or contributing to actions which physically damage or harm a foreign investment. Reply on the Merits, ¶ 407 (citing **RL-133**, *Tecmed Award*, ¶ 176).

⁶¹⁴ See Reply on the Merits, ¶ 401.

256. With respect to the separate standard Claimant argues should apply to “actions of the Respondent,” Claimant fails to explain what this standard might be.⁶¹⁵ Nor does the lone source Claimant cites — Article 4 of the Articles of State Responsibility — offer any further guidance, or even support the existence of a distinction within the full protection and security obligation. Article 4 discusses only attribution, not the content of the standard: “According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State.”⁶¹⁶ That is not in dispute in this case.

257. Claimant’s second addition to the reasonable efforts test states that only certain categories of action represent reasonable efforts. According to Claimant, “the duty of full protection and security **obligates** a host State ‘to take *active* measures . . . to *prevent* actions by third parties which interfere with or damage the foreign investor’s property or assets.”⁶¹⁷ Claimant asserts that “*passive* and *reactive* measures” are insufficient to satisfy the full protection and security obligation.⁶¹⁸ Though Claimant does not define the term “active,” even if it had, there would be no basis for a bright-line obligation that a State pursue “active” measures in order to fulfill its full protection and security obligation. To interpret the obligation in this way would contradict the inherently flexible nature of a test assessing whether action is “reasonable under the circumstances.” As stated above, the Tribunal must evaluate the type of protection that was necessary under the circumstances, and whether, in light of the knowledge and resources it had at the time, the measures that Guatemala took were sufficient.

2. Claimant Also Mischaracterizes The Burden Of Proving The Full Protection And Security Claim

258. In its three-paragraph full protection and security section in the Memorial, Claimant asserted only that Guatemala’s efforts to protect Claimant’s assets were “nonexistent,” that Guatemala failed “to provide any semblance of physical or legal protection to FVG’s Usufruct property rights and assets after the Lesivo Resolution,” and that this utter absence of action constituted a violation of full protection and security.⁶¹⁹ In its Counter-Memorial, Guatemala identified a number of actions it took to protect

⁶¹⁵ See Reply on the Merits, ¶ 400.

⁶¹⁶ **RL-143**, ILC Draft Articles, Art. 4 Commentary, ¶ 6.

⁶¹⁷ Reply on the Merits, ¶ 401 (bold emphasis added).

⁶¹⁸ Reply on the Merits, ¶ 401 (citing **CL-183**, Christoph Schreuer, *Full Protection and Security*, 1 J. OF INT’L DISPUTE SETTLEMENT 353, 357 (2010); **RL-95**, *Eastern Sugar Award*, ¶ 203).

⁶¹⁹ Memorial on the Merits, ¶¶ 155–57.

FULL PROTECTION AND SECURITY

Claimant's investment,⁶²⁰ squarely disproving Claimant's assertion that Guatemala took no action whatsoever.

259. In its Reply, Claimant attempted to rehabilitate its claim by introducing the new argument discussed above — that *preventative* measures are a necessary component of the full protection and security obligation — and then finding Guatemala's actions to be insufficient under this standard. Claimant then maintains that “none of [the evidence Guatemala cited in its Counter-Memorial] demonstrates that Respondent undertook the reasonable, *active* measures to *prevent* harm to Claimant's investment that it was required to take under customary international law.”⁶²¹

260. This proclamation is based on an improper understanding of the burden of proof. Guatemala is not required to prove that its actions were reasonable simply because Claimant invoked CAFTA's full protection and security provision. To the contrary, it is Claimant who bears the burden of establishing an obligation and then demonstrating a violation.⁶²² In other words, Claimant bears the burden of proving its claim that “after the *Lesivo* Resolution was published, Claimant experienced a *dramatic increase* in public interference, theft and vandalism within the right-of-way,”⁶²³ and that this situation constitutes a full protection and security violation because Guatemala acted without due diligence, or failed to make a reasonable effort to protect Claimant's investment. As stated above, merely highlighting interference or injury is insufficient to prove Claimant's claim; the full protection and security provision in Article 10.5 of CAFTA does not operate as an unconditional guarantee to freedom from all types of interference with an investor's property.⁶²⁴ Should the Tribunal find that Guatemala took reasonable efforts to protect Claimant's investment, regardless of the outcome of those efforts, the Tribunal must decide in Guatemala's favor.

⁶²⁰ Counter-Memorial on the Merits, ¶¶ 482–504.

⁶²¹ Reply on the Merits, ¶ 403; *see also id.*, ¶ 404.

⁶²² **RL-142**, Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 306 (1987) (“The party alleging a violation of international law giving rise to international responsibility the burden of proving its assertion”).

⁶²³ Reply on the Merits, ¶ 402 (emphasis added).

⁶²⁴ *See RL-81, American Manufacturing & Trading*, ¶ 6.05; **RL-155**, CAMPBELL MCLACHLAN ET AL, *INTERNATIONAL INVESTMENT ARBITRATION* ¶ 7.190; *see also RL-105, Lauder Award*, ¶ 308; **RL-162**, UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S: TRENDS IN INVESTMENT RULEMAKING* 132 (United Nations, 2007) at note 33; **RL-76, AAPL Award**, ¶ 77.

261. As is explained further in the next section, Claimant has failed to meet its burden.

C. Claimant Still Fails To Demonstrate That Guatemala Acted Without Due Diligence Or That It Did Not Make Reasonable Efforts To Protect Claimant's Investment

262. In its Memorial, Claimant devoted two of the three paragraphs in its full protection and security section to making the case that Guatemala did essentially nothing to protect its investment. Now, in its Reply, Claimant argues that although Guatemala did act, Guatemala did not *adequately* protect its investment and that the actions Guatemala cited in its Counter-Memorial were insufficient. However, Claimant still fails to meet its burden of proving that Guatemala did not act with due diligence with regard to protection of its investment.

1. Interference From Third Parties

263. With respect to third parties, preventing every instance of interference over hundreds of kilometers was simply not feasible. Nor, as stated above, is it required by CAFTA.

264. A bit of context is appropriate to evaluate the reasonableness of Guatemala's actions and the unreasonableness of Claimant's position. In 2006, the entire Guatemalan National Police force consisted of 19,800 police officers; the number in 2007 was 19,748.⁶²⁵ This police force was charged with serving and protecting 12,293,550 citizens in 2006 and 12,728,110 in 2007.⁶²⁶ These figures mean that, in 2006, there was scarcely 1 policeman for every 620 citizens. As is common knowledge, Guatemala unfortunately has chronic problems with violence and crime, issues that fall on the National Civil Police to deal with on a daily basis. Given these circumstances, it is simply unreasonable to expect that the National Civil Police would be acting as RDC's private security force. Neither the usufruct contracts nor international law require this.

265. Pursuant to Contract 402, Claimant possesses the rights to the 800 kilometers of railway, warehouses, stations, administrative buildings, shop buildings, workers homes and executives' homes, water wells, electrical installations, potable water facilities, telephone facilities, access roads, bridges, tunnels, arches, drainage boxes, ditches, terminals and railroad yards, and to the surrounding areas that

⁶²⁵ **Ex. R-337**, 2011-10-19, General Directorate of the National Civil Police, Doc. No. 13244-2001 Responding to FEGUA Request re: Size of Police Force in Guatemala in 2006, 2007, 2008.

⁶²⁶ **Ex. R-338**, Historical Data Graph of Guatemalan Population, 2000-2011.

FULL PROTECTION AND SECURITY

form the right-of-way.⁶²⁷ As Guatemala stated in its Counter-Memorial,⁶²⁸ to prevent trespass onto the property would require an around-the-clock patrol of every kilometer, and resources that Guatemala simply does not have. Moreover, it would require cataloging every one of the thousands of individuals living on Claimant's property, keeping track of which of those individuals was a tenant and which was a squatter, and keeping track of where those individuals moved and when.⁶²⁹ This would not only impose an undue burden on the State, but also put it in a position to overstep its bounds by accidentally removing a tenant and interfering with Claimant's property rights in the process.

266. It is worth noting that the Government *did* try a round-the-clock patrol of one portion of Claimant's property; at the Palín station, when the army was stationed there to respond to complaints from citizens that a combination of squatters, criminals, and gang members made the area unsafe.⁶³⁰ However, as discussed below, rather than applaud the protection of its property, Claimant alleges that Palín is another example of a full protection and security violation.⁶³¹

267. Thus, rather than attempt to protect Claimant's investment from every possible trespass, Guatemala took a different approach (which undoubtedly satisfies its full protection and security obligation). As Guatemala explained in its Counter-Memorial, its approach comprises four types of action: (i) supervising and monitoring the right of way to identify portions which had been invaded by third parties;⁶³² (ii) filing reports regarding the state of the right of way and any discovered interference;⁶³³ (iii) responding to Claimant's requests to dislodge squatters;⁶³⁴ and (iv) initiating more

⁶²⁷ **Ex. R-1**, Bidding Rules for Contract 402, § 4.1.2.

⁶²⁸ See Counter-Memorial on the Merits, ¶ 191.

⁶²⁹ See Counter-Memorial on the Merits, ¶ 483.

⁶³⁰ Counter-Memorial on the Merits, ¶ 190.

⁶³¹ See Reply on the Merits, ¶ 408.

⁶³² 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 J. Palomo; **Ex. R-141**, 2008-01-29, Letter to A. Gramajo from J. Palomo; **Ex. R-142**, 2008-02-04, Oficio No. 041-2008, Letter to J. Senn from E. Martínez; **Ex. R-139**, 2009-12-29, Letter to A. Gramajo from J. Palomo; **Ex. R-150**, 2009-10-02, Study on those Seated Within the FEGUA Right of Way, Volume I; **Ex. R-152**, 2009-11-26, A Decree of Visual Inspection of Mile 27; **Ex. R-241**, 2010-01-15, FEGUA Engineering Department Report Showing Squatter Uprising; **Ex. R-166**, 2010-03-12, Letter to C. Samayoa Flores from A. Posadas; **Ex. R-176**, Letter to R. Velásquez Ruano from C. Samayoa Flores; Second Witness Statement of M. Samayoa, ¶¶ 22–27.

⁶³³ See **Ex. R-188**, 2007-10-01, FEGUA Report Re: Deterioration and Lack of Maintenance of Tracks between Puerto Barrios and Zacapa. These documents represent a continuation of the supervision

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than 100 judicial proceedings relating to the theft of rails and to the removal of squatters.⁶³⁵ Guatemala consistently informed Claimant of these actions, which were taken *both before and after issuance of the Lesivo Declaration* (and therefore disprove Claimant’s allegation that Guatemala engineered some litigation-driven strategy to shore up its defense to Claimant’s full protection and security claim). Though Claimant suggests that the squatter problem could and should have been resolved quickly, as Miguel Ángel Samayoa — the head of FEGUA’s Engineering Department, and the person tasked with supervising the railway — explains in his witness statement, such result simply was not possible. The eviction process in Guatemala involves coordination from multiple Government entities (the courts, the police, the Prosecutor’s Office) who, upon receipt of an official complaint, undertake multiple lengthy steps (including an investigation, requesting an eviction order from a competent court, and actual removal).⁶³⁶

268. Though Claimant claims that FEGUA “admitted that ‘it has not promoted nor requested the eviction of any of the settlement groups that currently occupy the railway right-of-way’ and apparently had no intention of doing so,”⁶³⁷ this claim is based upon a misunderstanding of the full protection and security obligation, and upon an inaccurate representation of the document Claimant quotes. Regarding the former, Claimant seems to suggest that this Tribunal could find a full protection and security violation simply because a single government agency failed to remove squatters. However, the proper question is not whether FEGUA alone afforded Claimant’s investment full protection and security — which it did — but whether Guatemala, as a whole, satisfied its obligation. It is for this reason that Claimant’s mischaracterization of the document comes into play. Thus, while in September 2004,

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efforts undertaken by FEGUA’s Engineering Department before the Lesivo Declaration was published. See **Ex. R-187**, 2004-09-01, FEGUA Report Re: Poor Conditions and Lack of Maintenance at Railroad Mile 195; Second Witness Statement of M. Samayoa, ¶¶ 22-27.

⁶³⁴ See, e.g., **Ex. R-155**, 2010-01-12, Letter to the Municipal Office of the District Attorney 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, Deed of Delivery Upon Eviction of Squatters from Land; **Ex. R-238**, 2008-08-17, Police Reports Regarding Right of Way Property (Post-Lesivo); Second Witness Statement of M. Samayoa, ¶¶ 22–27.

⁶³⁵ See **Ex. R-184**, Chart of Criminal Proceedings Initiated by FEGUA for the Theft and Removal of Rails; **Ex. R-182**, Chart of Criminal Proceedings Initiated by FEGUA for the Removal of Squatters; Second Witness Statement of M. Samayoa, ¶¶ 28-29.

⁶³⁶ Second Declaration of M. Samayoa, ¶ 29.

⁶³⁷ Reply on the Merits, ¶ 75.

FULL PROTECTION AND SECURITY

FEGUA stated that it had not removed squatters from the right of way, it *also* stated that “all issues involving [squatter] settlement groups are being exclusively dealt [with] by the Inter-Institutional Commission of Housing, coordinated by the Vice-Minister of Housing.”⁶³⁸ The actions of this Commission in taking steps to remove squatters from the right-of-way are no doubt relevant in determining whether Guatemala satisfied its full protection and security obligation.

269. As Guatemala stated in its Counter-Memorial, as further proof of the Government’s interest and engagement in the removal of squatters along the right-of-way, it formed a Railway Commission, where it developed a detailed plan to relocate all of the families of squatters along the portion of the right-of-way in the Southern/Pacific (*i.e.*, in Phase II of the rehabilitation project).⁶³⁹ This plan was not pursued only after FVG could not deliver on its rehabilitation plan.⁶⁴⁰

270. Though Guatemala continues to believe that these measures constitute the required “reasonable efforts” to protect Claimant’s investment, a few brief comments are in order regarding Claimant’s discussion of these measures in its Reply. First, rather than introduce evidence to rebut Guatemala’s arguments, Claimant has primarily sought to attack Guatemala’s evidence by claiming new distinctions in an effort to undermine this evidence. For example, Claimant had argued in its Memorial that, “from July 2007 to present,” Guatemala had not commenced a “single . . . arrest or prosecution . . . in response to any of its reports,”⁶⁴¹ suggesting that Guatemala had essentially ignored Claimant’s reports. In its Counter-Memorial, Guatemala confronted Claimant with evidence that Guatemala had in fact commenced legal actions against squatters and rail thieves, citing approximately 50 judicial proceedings that were initiated after the *Lesivo* Declaration that dealt with theft, and approximately 50 that were initiated after the *Lesivo* Declaration that dealt with the removal of squatters.⁶⁴² Rather than

⁶³⁸ **Ex. C-76**, 2004-09-13, *Al Dia*, FEGUA-paid Press Release.

⁶³⁹ See Counter-Memorial on the Merits, ¶¶ 70–76; Second Witness Statement of A. Gramajo, ¶¶ 8–10; see also **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.

⁶⁴⁰ See Counter-Memorial on the Merits, ¶¶ 77–79; Second Gramajo Witness Statement, ¶ 10; Second Samayoa Witness Statement, ¶ 34.

⁶⁴¹ Memorial on the Merits, ¶ 157.

⁶⁴² Counter-Memorial on the Merits, ¶ 485; see **Ex. R-184**, Chart of Criminal Proceedings Initiated by FEGUA for the Theft and Removal of Rails; **Ex. R-182**, Chart of Criminal Proceedings Initiated by FEGUA

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back down from its allegation, Claimant shifted the focus of its argument, complaining that “only five of those actions (of 45, not 50) were commenced from the time Respondent published the *Lesivo* Resolution in late August 2006 until FVG shut down its commercial railway operations in September 2007.”⁶⁴³ Claimant’s complaint, therefore, is that Guatemala responded to the very claim it originally asserted. What’s more, Claimant continues to invoke the “more than one hundred reports FVG submitted to the Government regarding incidents occurring after the *Lesivo* Resolution” without subjecting those reports to the requirement that they take place between August 2006 and September 2007.⁶⁴⁴ In fact, none of the reports was submitted by FVG to FEGUA before September 2007.⁶⁴⁵

271. Despite Claimant’s assertion to the contrary, the record shows that Guatemala took reasonable measures to protect the right-of-way from squatters and vandalism. As Mr. Samayoa explains in his second witness statement, since before the *Lesivo* Declaration, FEGUA has supervised the right-of-way, and taken measures to stop squatters from settling there (or remove squatters who have already settled there).⁶⁴⁶ If, during the course of this routine supervision, or as a result of information provided by third parties, FEGUA became aware of a settlement, it took immediate action to resolve the problem, by entering a complaint with the Public Ministry.⁶⁴⁷ FEGUA has remained active throughout the entirety of these processes, which entails an investigation by the Public Ministry, a request for an eviction order

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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, Request to be Admitted as Querrellante Adhesivo in a Judicial Proceeding for the Removal of Squatters (requesting, on FEGUA’s behalf, that José Enrique Urrutia Ipiña be named Querrellante 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 Formal Complaints (Post-*Lesivo*).

⁶⁴³ Reply on the Merits, ¶ 406.

⁶⁴⁴ See Reply on the Merits, ¶ 402 (citing the same exhibits Claimant characterized in its Memorial as being submitted “from July 2007 to present.” See Memorial on the Merits, ¶ 157 (citing **Ex. C-46**, Compilation of Reports Submitted by FVG to Public Ministry Relating to Theft, Vandalism and Squatter Invasions on Right-of-Way; **Ex. C-47**, 2008-10-16, Letter from FVG to FEGUA Forwarding Copies of FVG Reports Submitted to Public Ministry)).

⁶⁴⁵ **Ex. C-46**, Compilation of Reports Submitted by FVG to Public Ministry Relating to Theft, Vandalism and Squatter Invasions on Right-of-Way; **Ex. C-47**, 2008-10-16, Letter from FVG to FEGUA Forwarding Copies of FVG Reports Submitted to Public Ministry.

⁶⁴⁶ Second Declaration of M. Samayoa, ¶ 23.

⁶⁴⁷ Second Declaration of M. Samayoa, ¶¶ 24, 28-29.

FULL PROTECTION AND SECURITY

from a judge, and actual removal of the squatters in coordination with the police (and sometimes with a human rights prosecutor).⁶⁴⁸

272. Despite FEGUA's efforts, as Mr. Samayoa explains, FVG presented several obstacles to protecting the right-of-way from squatters. For example, FEGUA worked to overcome FVG's lack of effort in dealing with the squatter problem; while FEGUA secured evictions and returned land to FVG, because FVG had abandoned the land, squatter settlements eventually returned.⁶⁴⁹ It was especially difficult to prevent squatter settlements without an operational railroad to serve as an additional deterrent to squatters.⁶⁵⁰

273. Second, Claimant's third-party-interference claim is based on an unsubstantiated allegation that Guatemala encouraged third parties to harm Claimant's investment by making numerous public statements regarding the invalidity of Claimant's Usufruct Contracts, and promising that the Government would take away the railroad to award it to someone else.⁶⁵¹ Claimant has failed to demonstrate any causal link between the alleged influx of squatters and statements made by Guatemalan representatives in the "numerous newspaper, television and radio reports"⁶⁵² issued in Guatemala. Claimant's argument suffers from three critical flaws.

274. The first critical flaw is perhaps caused by Claimant's exaggerated rhetoric. According to Claimant, "after the *Lesivo* Resolution was published, Claimant experienced a dramatic increase in public interference, theft and vandalism in the right-of-way."⁶⁵³ However, Claimant has presented no evidence supporting an increase in interference, much less a "dramatic increase." Though Claimant is quick to point out that 16,000 persons were "occupying portions of the South Coast right-of-way"⁶⁵⁴ in April 2004, it offered no evidence — apart from its own post-July 2007 requests to remove squatters — that could account for the number of squatters that moved onto Claimant's property after the *Lesivo* Declaration.

⁶⁴⁸ Second Declaration of M. Samayoa, ¶ 29.

⁶⁴⁹ See Second Declaration of M. Samayoa, ¶¶ 32–35.

⁶⁵⁰ See Second Declaration of M. Samayoa, ¶¶ 30–34.

⁶⁵¹ Reply on the Merits, ¶ 407.

⁶⁵² See Reply on the Merits, ¶ 218.

⁶⁵³ Reply on the Merits, ¶ 402 (citing Memorial on the Merits, ¶¶ 92, 156).

⁶⁵⁴ Reply on the Merits, ¶ 74.

275. The next critical flaw comprises failures in both substantiation and in logic. With respect to substantiation, despite acknowledging the value of witness testimony from a squatter explaining *why* he or she initially entered onto the property,⁶⁵⁵ Claimant presented no such evidence. Nor has it provided any other evidence supporting its claim that individuals moved onto the right-of-way because of statements the Government made throughout the allegedly “numerous newspaper, television and radio reports.” However, as a matter of logic, there is likely no such credible evidence that Claimant could produce. As Claimant makes clear in its Reply, the “influx of squatters which occurred after the Lesivo Resolution issued in late August 2006 had nothing to do with the station yard tenants from whom FVG had been collecting rent. In contrast to the station yard tenants, these persons were directly occupying and interfering with the right-of-way and the operation of the trains.”⁶⁵⁶ It is extremely unlikely that impoverished individuals in such dire need of a place to live (a) heard any statements from Government officials on the television or radio, and (b) only *then* decided to move into the right-of-way. But, more to the point, Claimant has not proven that this occurred.

276. The final critical flaw stems from a failure to assume responsibility over Claimant’s role in encouraging squatter trespass. As Guatemala demonstrated in its Counter-Memorial, by permitting one-time trespassers to remain on Claimant’s property as tenants, it was in fact Claimant who encouraged the interference it now cites in support of its full protection and security claim. In its Reply, Claimant referred to this argument as a “preposterous theory,” and one that is “illogical on its face.”⁶⁵⁷ However, the argument by no means deserves such distinction.

277. While perhaps no rational person would “be incentivized to trespass and illegally squat on someone else’s property when he knows that the landlord enforces its property rights and collects rent from its tenants,”⁶⁵⁸ *i.e.*, to trespass *and expect to remain* on property without being required to pay, for purposes of Claimant’s full protection and security claim, the question is what might have encouraged the initial trespass. Was it Government statements regarding a process that squatters had likely never heard of, broadcast over a medium to which squatters likely had no access? Or was it the fact that other people had set up residence on the property and the landlord had not only failed to chase those people

⁶⁵⁵ See Reply on the Merits, ¶ 165.

⁶⁵⁶ Reply on the Merits, ¶ 164.

⁶⁵⁷ Reply on the Merits, ¶ 165.

⁶⁵⁸ Reply on the Merits, ¶ 165.

FULL PROTECTION AND SECURITY

away, but permitted them to stay if they paid a nominal fee? Guatemala believes the latter to be the more likely cause of any squatter interference.

278. Thus, in light of Claimant's inability to prove either that Guatemala was the cause of the alleged "dramatic increase"⁶⁵⁹ in third-party interference, or that Guatemala failed to turn the resources and information it had into a reasonable effort to protect Claimant's property, Claimant's full protection and security claim must fail.

2. Interference By Public Officials

279. With respect to protecting Claimant's investment from interference by public officials, it is again worth noting that Guatemala's obligation is not to prevent *every* interference with Claimant's property rights. In terms of the four instances of alleged interference by public officials that Claimant invokes, the question is not simply whether an official interfered with Claimant's investment, but instead whether the Government, as a whole, made reasonable efforts to protect the investment. Because Claimant again sought to discredit Guatemala's evidence rather than introduce any new evidence of its own, Guatemala briefly revisits the four instances of alleged interference below.

280. The first instance of alleged interference that Claimant invokes is the continuing military presence of the Palín station. According to Claimant, this situation is evidence that the government does not respect FVG's property rights.⁶⁶⁰ However, this situation actually reveals the hypocrisy of Claimant's full protection and security claim. As Guatemala explained in its Counter-Memorial, the army was stationed at the Palín station to respond to complaints from citizens that a combination of squatters, criminals, and gang members made the area unsafe.⁶⁶¹ Riots broke out, resulting in fires and the attempted lynching of two gang members.⁶⁶² Had the army failed to respond, rather than complain that the Army had overstayed its mandate, Claimant would likely be arguing that the Government's failure to respond constituted a full protection and security breach.

⁶⁵⁹ Reply on the Merits, ¶ 402.

⁶⁶⁰ Reply on the Merits, ¶ 408 (citing **Ex. C-119**, 2011-01-20, Photographs of Palin Station showing continued occupation of station by Guatemalan Army).

⁶⁶¹ Counter-Memorial on the Merits, ¶ 190.

⁶⁶² **Ex. R-243**, 2006-04-27, PRENSA LIBRE, "Militiarizan Palín."

281. That said, proving that there is military presence at the Palín station is insufficient evidence to support a finding that the Government failed to accord Claimant's investment full protection and security. Local Guatemalan officials have consistently stated that they continue to recognize Claimant's property rights and that the military will vacate the station upon a request from either FEGUA or FVG.⁶⁶³

282. Claimant also adds nothing decisive to its argument concerning the second instance of alleged interference by a public official; namely, the paving over of the right-of-way in Puerto Barrios. Though Claimant emphatically — and bizarrely, in the context of a full protection and security claim — states that “when FVG initially protested these actions to the Mayor of Puerto Barrios, he told FVG in his official capacity that he did not care about the Municipality's lack of authorization — thereby admitting the Municipality's involvement in these expropriatory actions,”⁶⁶⁴ Claimant does not contest that it was notified, long before it filed its Memorial, that both FEGUA and the local courts stepped in, to punish and correct the parties responsible for this measure. FEGUA filed an official complaint in the Regional Division of the Appellate Court of Zacapa against the Mayor of Puerto Barrios,⁶⁶⁵ and FEGUA officials appeared before the court both as witnesses⁶⁶⁶ and as the proper party to assert the claim against the Mayor.⁶⁶⁷ The Regional Division of the Appellate Court of Zacapa dismissed the claim against the Mayor of Puerto Barrios, stating that the Municipality had neither authorized nor apportioned funds for the paving of the right-of-way.⁶⁶⁸ The Court also recognized that when the Municipality was approached with the request to pave these areas, it “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 responsibility and risk.”⁶⁶⁹ As Guatemala explained in its Counter-Memorial,⁶⁷⁰ it had also initiated a

⁶⁶³ **Ex. R-283**, 2010-09-28, Letter to C. Samayoa Flores from J. López (Palín Municipality); Counter-Memorial on the Merits, ¶ 499.

⁶⁶⁴ Reply on the Merits, ¶ 408.

⁶⁶⁵ **Ex. R-205**, 2008-09-11, Official Complaint Against the Mayor of Puerto Barrios.

⁶⁶⁶ See **Ex. R-206**, 2009-01-28, Letter to C. Samayoa Flores from Ing. M. Samayoa Minera; **Ex. R-191**, 2009-03-04, Decision of the Regional Chamber of the Appellate Court of Zacapa on the Official Complaint Against the Mayor of Puerto Barrios..

⁶⁶⁷ See **Ex. R-205**, 2008-09-11, Official Complaint Against the Mayor of Puerto Barrios.

⁶⁶⁸ **Ex. R-191**, 2009-03-04, Decision of the Regional Chamber of the Appellate Court of Zacapa on the Official Complaint Against the Mayor of Puerto Barrios.

⁶⁶⁹ **Ex. R-191**, 2009-03-04, Decision of the Regional Chamber of the Appellate Court of Zacapa on the Official Complaint Against the Mayor of Puerto Barrios, p. 5.

⁶⁷⁰ Counter-Memorial on the Merits, ¶ 503.

FULL PROTECTION AND SECURITY

criminal investigation regarding the private party allegedly responsible for paving over the right-of-way.⁶⁷¹ This, too, took place before Claimant submitted its Memorial on the Merits. An order for the capture of the suspect was issued and, by January 2009, it was pending execution by the Criminal Investigation Department of the *Ministerio Público*.⁶⁷²

283. Apparently ignoring Guatemala's response in its Counter-Memorial, Claimant continues to insist that the third "incident of Government trespass on FVG property which occurred as a result of the *Lesivo* Resolution was when the Municipality of San Antonio La Paz chose to install a water pipeline on the right-of-way without FVG's authorization."⁶⁷³ Guatemala is perplexed by Claimant's apparent attempt to turn the full protection and security obligation into a diminished expropriation obligation. In the full protection and security context, the question for the Tribunal is not whether Guatemala interfered with Claimant's investment, but instead whether Guatemala acted reasonably to protect such investment. Even framed in its proper context, mere trespass is insufficient to support the finding of a violation.⁶⁷⁴

284. In addition, the facts surrounding this incident do not support the conclusion that Guatemala failed to act reasonably to protect Claimant's investment. First, Claimant does not contest that, pursuant to Contract 402, the Municipality had the right to install this type of pipe. Though the existence of this contract right alone is not determinative of the case before an investment treaty tribunal, it is nevertheless relevant to the Tribunal's inquiry that Contract 402 requires FVG to "[p]rovide access to the right of way in the event of public need, including the 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"⁶⁷⁵ Second, although the mayor of San Antonio La Paz sent various letters to FVG requesting permission to install the water pipes along the right-of-way, FVG never responded to these

⁶⁷¹ See **Ex. R-206**, 2009-01-28, Letter to C. Samayoa Flores from Ing. M. Samayoa Minera (discussing the proceeding against the Mayor of Puerto Barrios and a criminal investigation against Mr. Heron Balda, who was accused of committing the acts in question that interfered with the right-of-way).

⁶⁷² See **Ex. R-206**, 2009-01-28, Letter from M. Samayoa Minera to C. Samayoa Flores, p. 4.

⁶⁷³ Reply on the Merits, ¶ 409.

⁶⁷⁴ See **RL-133**, *Tecmed Award*, ¶ 177 (even applying the higher, autonomous standard, the tribunal still held that the full protection and security obligation "is not absolute and does not impose strict liability upon the State that grants it." Because the CAFTA standard is a lower, minimum standard, it cannot by any means be understood as one of strict liability); **RL-76**, *AAPL Award*, ¶ 48, **RL-117**, *Noble Ventures Award*, ¶ 164; **RL-81**, *American Manufacturing & Trading Award*, ¶ 6.05; see also **CL-183**, Christoph Schreuer, *Full Protection and Security*, 1 J. OF INT'L DISPUTE SETTLEMENT 353, 354 (2010).

⁶⁷⁵ **Ex. C-22**, 1997-11-25, Contract 402, cl. Eleventh(I).

requests.⁶⁷⁶ 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 within the time limitations imposed by the grants that had been given to the Municipality for that purpose.⁶⁷⁷

285. Claimant failed to clearly articulate a response to Guatemala's defense of the fourth alleged instance of interference by a public official. According to Claimant, a "District Attorney also told a local criminal court that, because of the *Lesivo* Resolution, FVG no longer had rights under its Usufruct Contracts in a case FVG had brought against the industrial squatter, EEGSA."⁶⁷⁸ As Guatemala discussed in its Counter-Memorial,⁶⁷⁹ Claimant failed to explain all of the facts surrounding its claim, including the fact that the court rejected this argument, and did so specifically because "[t]he *lesividad* under discussion relates to [Contract 143/158], and not to [Contract 402]."⁶⁸⁰

286. In its Reply, Claimant attempts to detract from the court decision by claiming that "the court did not reject the substance of the argument that the *Lesivo* Resolution, by itself, stripped FVG of its legal rights."⁶⁸¹ According to Claimant, the court "merely noted the technical discrepancy that the case before it involved Contract 402, where as the *Lesivo* Resolution was technically directed at Contracts 143/158."⁶⁸² On this basis, Claimant concludes that "there was no defense from the bench of FVG's rights under the *lesivo* process."⁶⁸³

287. Guatemala continues to believe that the facts support the opposite conclusion — namely, that the court did everything it could to protect Claimant's rights. When faced with an argument that the

⁶⁷⁶ See **Ex. R-148**, 2008-11-17, Letter to P. Alonzo (FVG) from the Mayor of San Antonio La Paz; see also **Ex. R-116**, 2007-03-04, Letter to San Antonio La Paz City Council from COCODE.

⁶⁷⁷ **Ex. C-50**, 2009-02-27, Letter from the Mayor of San Antonio de la Paz to FVG.

⁶⁷⁸ Reply on the Merits, ¶ 410.

⁶⁷⁹ Counter-Memorial on the Merits, ¶ 479.

⁶⁸⁰ **Ex. R-200**, 2008-05-13, C-361–2003 Of. 5, Decision from the Criminal Trial Court at Amatitlán, pp. 3, 8.

⁶⁸¹ Reply on the Merits, ¶ 410.

⁶⁸² Reply on the Merits, ¶ 410.

⁶⁸³ Reply on the Merits, ¶ 410.

FULL PROTECTION AND SECURITY

Lesivo Declaration had deprived FVG of its rights pursuant to Contract 402, the court rejected this argument, finding that Contract 402 was unrelated to the *Lesivo* Declaration. Though Claimant's language seems to suggest that the court should have done something *more*, nothing more was either possible or required by customary international law; Guatemala made reasonable efforts to protect what it continued to recognize was Claimant's property. Claimant's use of the word "merely" does nothing to detract from this conclusion.

* * *

288. For all of these reasons, Claimant has failed to submit any evidence in either its Memorial or Reply that meets the high burden required to prove a violation of the full protection and security standard under Article 10.5 of CAFTA. The facts here and in the Counter-Memorial demonstrate that, under the circumstances, Guatemala has acted reasonably and with due diligence, in accordance with the full protection and security standard under Article 10.5 of CAFTA and customary international law.

V. Guatemala Fulfilled Its National Treatment Obligation In Accordance With Article 10.3 Of CAFTA

289. Article 10.3 of CAFTA obligates each Party to accord to foreign investors and their investments “treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁶⁸⁴ As Guatemala explained in its Counter-Memorial, the national treatment inquiry is composed of three elements: (1) the identification of a domestic comparator that is “in like circumstances;” (2) a finding that, as compared to the domestic comparator, the claimant received “less favorable” treatment; and (3) the absence of any justification for the less favorable treatment that the claimant received.⁶⁸⁵ Because Claimant expresses no disagreement with the national treatment standard as explained by Guatemala⁶⁸⁶ — and its discussion of the legal standard is in fact limited to a citation to only two passages from two cases that Guatemala had referred to in its Counter-Memorial — the only disputed issue between the parties is the application of that standard to the facts of this case.

290. “[I]t 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]”⁶⁸⁷ the treatment accorded to the domestic investments. Therefore, Guatemala will address the questions in this order. Thus, with respect to Claimant’s national treatment claim, the Tribunal must determine ***whether Claimant has satisfied its burden of proving that (1) Claimant and Mr. Campollo were direct competitors; and (2) Claimant actually received less favorable treatment as compared to Mr. Campollo.*** As is demonstrated below, Claimant has failed to meet its burden on either issue.

A. Claimant And Mr. Ramón Campollo Were Not In Like Circumstances

291. As stated above, to sustain its national treatment claim, Claimant must first demonstrate that RDC and Mr. Campollo were “in like circumstances.” The parties agree that determining whether a

⁶⁸⁴ **RL-61**, CAFTA Art. 10.3.2.

⁶⁸⁵ Counter-Memorial on the Merits, § IV.D.

⁶⁸⁶ See Reply on the Merits, ¶¶ 413–30 (citing **RL-123**, *Pope & Talbot Award*, ¶ 78 and **RL-100**, *GAMI Award*, ¶ 114).

⁶⁸⁷ **RL-82**, *Archer Daniels Award*, ¶ 196 (emphasis added).

NATIONAL TREATMENT

foreign and domestic investor are “in like circumstances” essentially entails an inquiry as to whether the two are direct competitors.⁶⁸⁸ This approach to “like circumstances” is consistent with the approach taken by NAFTA tribunals. As the *Archer Daniels* tribunal made clear, though “[t]he ordinary meaning of the word ‘circumstances’ under Article 1102 [of NAFTA] requires an examination of the surrounding situation in its entirety”⁶⁸⁹ NAFTA tribunals “*have focused mainly on the competitive relationship between investors in the marketplace.*”⁶⁹⁰ As Claimant itself stated in its Memorial, “[a] domestic entity is considered ‘in like circumstances’ with a foreign investor if the firms operate in the same business or economic sector.”⁶⁹¹

292. According to Claimant, “there is ample evidence that Mr. Campollo was an experienced direct competitor of Claimant in both the railroad and real estate sectors and, therefore, was a domestic investor in ‘like circumstances’ to Claimant at the time the *Lesivo* Resolution [was] issued.”⁶⁹² However, the facts when examined carefully do not support the conclusion that Claimant and Mr. Campollo were direct competitors in either the railroad or real estate industries.

293. With respect to competition in the railroad business, Claimant contends that “Mr. Campollo and Claimant were very much competitors”⁶⁹³ for two reasons: first, because “Mr. Campollo owned and operated a 44 kilometer, narrow gauge railroad in the Dominican Republic which he used to transport sugar cane to his mill located there;”⁶⁹⁴ and, second, because Claimant and Mr. Campollo “have been competing against each other to invest in and operate the Guatemalan railroad Usufruct”⁶⁹⁵ Claimant’s reliance on the former is inapposite; its reliance on the latter is unsubstantiated.

⁶⁸⁸ **RL-82**, *Archer Daniels Award*, ¶ 197; see Memorial on the Merits, ¶¶ 162; see also Reply on the Merits, ¶ 415 (contending that Mr. Campollo is in “direct competition with Claimant in the railroad and real estate sectors”).

⁶⁸⁹ **RL-82**, *Archer Daniels Award*, ¶ 197.

⁶⁹⁰ **RL-82**, *Archer Daniels Award*, ¶ 199 (emphasis added).

⁶⁹¹ Memorial on the Merits, ¶ 161.

⁶⁹² Reply on the Merits, ¶ 418.

⁶⁹³ Reply on the Merits, ¶ 413.

⁶⁹⁴ Reply on the Merits, ¶ 413.

⁶⁹⁵ Memorial on the Merits, ¶ 162.

294. With respect to Claimant’s assertion that Mr. Campollo is the proper domestic comparator because he “owned and operated a 44 kilometer, narrow gauge railroad in the Dominican Republic,”⁶⁹⁶ Claimant misapplies the “like circumstances” test. That test cannot be reduced to asking merely whether both Claimant and Mr. Campollo operated a railroad. As the *Archer Daniels* tribunal explained — on a point that Claimant quoted that tribunal for in its Memorial⁶⁹⁷ — “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 accompanying, conditioning or determining another, or the logical surroundings of another.”⁶⁹⁸ Under Claimant’s interpretation of the “like circumstances” requirement, a commercial farming company with thousands of acres of crops and hundreds of employees could be compared to a single individual who grows tomatoes in his backyard because both are technically “farmers.” Such result would deprive the “like circumstances” requirement of its intended meaning. Accordingly, Claimant and Mr. Campollo cannot be considered to “operate in the same business or economic sector” simply because Claimant is a railroad operator and Mr. Campollo owns a sugar mill in the Dominican Republic that happens to use an internal railroad to transport sugar for a short distance.

295. Moreover, Claimant and Mr. Campollo cannot be considered to be “in like circumstances” because the facts surrounding both parties’ railroad “operations” are extremely different. For example, while Claimant is a “railway investment and management company which focuses on ‘emerging corridors in emerging markets’”⁶⁹⁹ and whose executives have decades of experience operating railroads, Mr. Campollo is not in the business of operating railroads. Rather he is a sugar producer whose operation in the Dominican Republic happens to use a rail system to transport sugar cane from the fields to the mill.⁷⁰⁰ Unlike the members of Claimant’s management team, who have first-hand knowledge and experience *actually operating* multiple railroads,⁷⁰¹ Mr. Campollo and his staff have neither the experience or knowledge necessary to operate a commercial railroad of the magnitude of the

⁶⁹⁶ Reply on the Merits, ¶ 413.

⁶⁹⁷ See Memorial on the Merits, ¶ 160.

⁶⁹⁸ **RL-82**, *Archer Daniels Award*, ¶ 199.

⁶⁹⁹ First Witness Statement of H. Posner, ¶ 2.

⁷⁰⁰ See Second Witness Statement of R. Campollo, ¶ 7.

⁷⁰¹ See **Ex. R-304**, H. Posner’s Curriculum Vitae; **Ex. R-303**, W. Duggan’s Curriculum Vitae.

NATIONAL TREATMENT

Guatemalan railway project.⁷⁰² Unlike Mr. Posner, Mr. Campollo and his staff have no experience supervising and managing main line and terminal freight operations, analyzing intermodal terminal operations, or developing or negotiating pricing and servicing for carload, trainload and intermodal transportation.⁷⁰³ And unlike Mr. Duggan, who “began his railroad career with the Illinois Central Railroad in 1966, working in various engineering positions ranging from Track Supervisor to Engineering Superintendent, with Engineering responsibility for the northern half of the 3,600-mile system,”⁷⁰⁴ Mr. Campollo’s railroad “experience” is limited to an investment in a company (Consortio Azucarero Central (“CAC”)) that operates a sugar mill in the Dominican Republic which, in turn, contains an internal railroad that is approximately 30 kilometers (roughly 18 miles) in length.⁷⁰⁵ In short, Mr. Campollo has never personally supervised or operated a rail system.⁷⁰⁶

296. The railroads themselves are also entirely different. As the *Merrill & Ring* tribunal was persuaded, a foreign investor must be compared to a domestic competitor located within the same geographical area, and subject to the same types of regulation:

Canada has persuasively argued that the Investor must be compared to other log producers subject to Notice 102 and not to producers in other provinces, notably Alberta, or to producers that are operating under the provincial regulations. As some of *the Investor’s operations are located in provincially regulated lands, these ought to be compared with those operations of similarly located log producers*, whether in respect of the surplus test of harvesting and sorting requirements. Some sub-categories of provincially regulated operations, such as producers in remote areas of British Columbia, which is also the case of some of the Investor’s operations, ought to be compared within that sub-category.⁷⁰⁷

As compared to Claimant’s railroad investment in Guatemala, Mr. Campollo’s railway satisfies neither of these tests.

⁷⁰² See Second Witness Statement of R. Campollo, ¶¶ 9–10.

⁷⁰³ Ex. R-304, H. Posner’s Curriculum Vitae.

⁷⁰⁴ Ex. R-303, W. Duggan’s Curriculum Vitae.

⁷⁰⁵ Second Witness Statement of R. Campollo, ¶ 7.

⁷⁰⁶ Second Witness Statement of R. Campollo, ¶ 9.

⁷⁰⁷ RL-110, *Merrill & Ring Award*, ¶ 91 (emphasis added).

297. Unlike Claimant's railroad interests — an 800 kilometer commercial railroad in Guatemala — Mr. Campollo's 30 kilometer railroad is not a commercial operation.⁷⁰⁸ Mr. Campollo's railroad is not even in the same country. It does not offer services to third parties, does not transport persons or commercial cargo, and never has offered services outside of the sugar mill that it serves.⁷⁰⁹ It has never operated as an independent business.⁷¹⁰ It is not subject to the same type of regulations or safety requirements as to which would apply to a commercial railroad would be subject to. Thus, Mr. Campollo's involvement with the railway in his sugar plantation in the Dominican Republic cannot be considered sufficient proof that he is the proper domestic comparator to Claimant.

298. Moreover, Claimant implicitly admits that the relationship between RDC and Mr. Campollo was not one of competition. As Claimant stated in its Reply, "Claimant was well aware of Mr. Campollo's ongoing railroad operations because, at Mr. Campollo's request, Claimant provided Mr. Campollo with assistance and input on how best to improve and upgrade the operational efficiency of his railroad."⁷¹¹ Would a competitor seek advice on how to improve and upgrade the operational efficiency of one of its railroads from its competitor? That defies common sense.

299. Indeed, in 2004, Mr. Campollo sought Claimant's advice regarding the operation of the small railway in the Dominican Republic used by the CAC to transport sugar cane.⁷¹² Mr. Campollo even offered Claimant the opportunity to operate the CAC railway (though this never came to pass, because Claimant recommended that Mr. Campollo hire someone else for the job and because, at any rate, it was subsequently determined that the limited volume of sugar transported along the railway did not justify the cost of hiring an outside operator).⁷¹³

300. In light of these facts, Claimant's contention that Mr. Campollo is the proper domestic comparator because of his company's use of a small railway must also fail as a matter of logic: As noted

⁷⁰⁸ Second Witness Statement of R. Campollo, ¶¶ 7-12; see **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.2.

⁷⁰⁹ Second Witness Statement of R. Campollo, ¶¶ 7, 12.

⁷¹⁰ Second Witness Statement of R. Campollo, ¶¶ 7, 11.

⁷¹¹ Reply on the Merits, ¶ 413.

⁷¹² See *generally* Second Witness Statement of R. Campollo.

⁷¹³ Second Witness Statement of R. Campollo, ¶¶ 10-11.

NATIONAL TREATMENT

above, if Mr. Campollo was truly Claimant's competitor, why would he need Claimant's advice?⁷¹⁴ And, more importantly, why would Claimant give it to him?

301. Apart from the use of the railroad in the Dominican Republic, Claimant invokes only circumstantial, hearsay, and mischaracterized evidence — relating to Claimant's theory that Mr. Campollo colluded with the Government to poach Claimant's investment — in support of its contention that Mr. Campollo directly competed with Claimant within the railroad sector. Although Claimant now concedes that "Mr. Campollo's primary interest in the South Coast railway was "not how it could be used by his sugar mill,"⁷¹⁵ it nevertheless claims that he was interested in "how it could be built — at no cost to him — to develop and serve his planned Ciudad del Sur real estate development project."⁷¹⁶ As discussed below, Claimant's theory stands unsupported by the record.

302. First, Mr. Campollo categorically denies ever having an interest in operating the railroad.⁷¹⁷ The unsupported statements that Claimant ascribes to Héctor Pinto are insufficient to demonstrate Mr. Campollo's interest in the railroad. Even assuming that Mr. Pinto made this statements — which Guatemala continues to doubt — Mr. Campollo denies ever authorizing Mr. Pinto to negotiate with FVG or RDC in his name or representation or in the name of any of his businesses.⁷¹⁸ Likewise, Mr. Campollo never authorized Mr. Pinto to discuss or exchange drafts of agreements or contracts of any kind with FVG.⁷¹⁹

303. Second, though Claimant proclaims that "Mr. Campollo's direct competition with Claimant in the railroad and real estate sectors is further clearly demonstrated by the 'Desarrollos G' proposal his representative and intermediary made to FVG in March 2005,"⁷²⁰ and stresses the fact that "Government records show that Desarrollos G was incorporated [to] 'carry out railway activities'" and

⁷¹⁴ See also Second Witness Statement of R. Campollo, ¶ 12.

⁷¹⁵ Reply on the Merits, ¶ 416.

⁷¹⁶ Reply on the Merits, ¶ 416.

⁷¹⁷ Witness Statement of R. Campollo, ¶ 10, 29–31; see Second Witness Statement of R. Campollo, 22, 25.

⁷¹⁸ Witness Statement of R. Campollo, ¶¶ 24–25; see Second Witness Statement of R. Campollo, ¶ 20.

⁷¹⁹ Witness Statement of R. Campollo, ¶ 25, see Second Witness Statement of R. Campollo, ¶ 21.

⁷²⁰ Reply on the Merits, ¶ 415.

exercise real estate rights,”⁷²¹ the document it cites shows no connection between Desarrollos G and Ramón Campollo. Rather, it demonstrates only the existence of a company named “Desarrollos G,” which, in October 2005, extended its purpose to include not only “railroads” and “real estate,” but also “manag[ing] on-line lottery, including the sale of instant scratch-off lottery tickets, electronic lottery, lotto-type games, games of numbers, symbols, letters, images, and other games governed by the laws of Guatemala, as well as any other activities related thereto”⁷²² There is no evidence whatsoever that this company ever operated a railroad or carried out the new purpose expressed in its incorporation documents. Where are the railroad business plans for this company? Where are its detailed plans on how it intended to operate a railway in Guatemala? Where is the documentation of other railroad projects with which this company is involved? They are all nonexistent, because there is no good proof that this was a company that operated railroads. Because Claimant failed to do so, Guatemala requested the entire file on Desarrollos G from Guatemala’s Public Registry. This file — attached as Exhibit R-332 — fails to mention Ramón Campollo, either as an initial investor or subsequent shareholder, or as a person authorized to act on behalf of the company.⁷²³

304. Third, Mr. Campollo was not, as Claimant states, interested in how the railroad could be “built — at no cost to him — to develop and serve his planned Ciudad del Sur real estate development project.”⁷²⁴ As confirmed by Mr. Campollo, the Ciudad del Sur project — which only reached the conceptual stage — never contemplated purchasing or operating the railroad, or making use of the approximately 100-foot wide right-of-way that surrounded the railroad.⁷²⁵ Moreover, while Claimant cites to the proposal allegedly made by Mr. Pinto on behalf of Desarrollos G as evidence of Mr. Campollo’s alleged plot to take away their usufruct rights for “nothing,” even if it could overcome the hurdle that this document has nothing to do with Mr. Campollo, a plain reading of the document demonstrates that it does not purport to take away Claimant’s rights at all.⁷²⁶ Rather, the document simply purports to grant Desarrollos G certain option rights to invest and hence participate in future,

⁷²¹ See Reply on the Merits, ¶ 415 (citing **Ex. C-98**).

⁷²² **Ex. C-98**, 2005-03-03, Corporate Registration of Desarrollos G.

⁷²³ **Ex. R-332**, Mercantile Registry File re: Desarrollos G.

⁷²⁴ Reply on the Merits, ¶ 416.

⁷²⁵ Second Witness Statement of R. Campollo, ¶ 13; see **Ex. R-1**, 1997-02-14, Bidding Rules for Contract 402, § 4.1.2.

⁷²⁶ See Reply on the Merits, ¶¶ 415-18; **Ex. C-41**, 2005-03-09, Email from mapriso@intelnett.com to J. Senn, et al. with attachment.

NATIONAL TREATMENT

unspecified business ventures related to the usufruct right-of-way, provides that the determination as to profit sharing from any such ventures would be the subject of future negotiations and further provides various rights to Claimant and FVG should Desarrollos G elect not to participate in such ventures, including the right to participate in those ventures itself or to grant or share that right with other third parties.⁷²⁷ This understanding of the document was confirmed by Mr. Juan Esteban Berger, who denies being the author of this document, asserts that he at most very briefly reviewed the document for approximately one minute and noted that Mr. Pinto sought his advice concerning matters related to his discussion with FVG, but which, as per Mr. Berger, were not related to Mr. Campollo.⁷²⁸ Finally, if Mr. Campollo was truly interested in how the railroad could be “built at no cost to him,” there would be no reason to be interested in Claimant’s rights; he simply could have waited until Claimant developed the railroad (which would be “at no cost to him”), and, as a customer, use the railroad “to develop and serve his planned Ciudad del Sur real estate development project.”⁷²⁹

305. Claimant also has not proven that Mr. Campollo was its competitor in the real estate business. Apart from stating that “[a]s an extensive landowner and real estate developer in Guatemala, Mr. Campollo had both the experience and a direct economic interest in obtaining and exploiting the real estate leasing and development rights that had been granted in usufruct to FVG,”⁷³⁰ Claimant offers no evidence to support its claim that “Mr. Campollo and Claimant were also competitors in the most significant and potentially profitable aspect of the Usufruct — its real estate rights.”⁷³¹ Claimant would need to prove that Mr. Campollo was not only in the business of real estate, but in particular in the business of generating revenues from using railway right-of-way real estate. Without being able to prove that Mr. Campollo was interested in the particular real estate that Claimant possessed, a generalized reference to “real estate” is insufficient to demonstrate that Claimant and Mr. Campollo were in fact direct competitors. Again, none of this has been proven.

⁷²⁷ **Ex. C-41**, 2005-03-09, Email from mapriso@intelnett.com to J. Senn, et al. with attachment, cl. 2.

⁷²⁸ Second Witness Statement of J. Berger, ¶¶ 13-15.

⁷²⁹ Second Witness Statement of R. Campollo, ¶¶ 24–26.

⁷³⁰ Reply on the Merits, ¶ 414.

⁷³¹ Reply on the Merits, ¶ 414.

B. Claimant Has Failed To Prove That It Has Received Less Favorable Treatment As Compared To Mr. Ramón Campollo

306. As stated above, Claimant does not contest the legal standard for “less favorable treatment” that Guatemala described in its Counter-Memorial. Nevertheless, it claims to have met this standard because “[t]he events and actions that led up to the publication of the *Lesivo* Resolution on August 25, 2006 demonstrate beyond a doubt that it was issued in substantial part to facilitate Ramón Campollo’s takeover of FVG’s Usufruct and assets,”⁷³² and because the *Lesivo* Declaration “rendered the fundamental expected economic benefits of the Usufruct *worthless*.”⁷³³ Neither of these arguments is supported by the record. And, more importantly, neither, standing alone, is sufficient to demonstrate a violation of the national treatment obligation.

307. With respect to Claimant’s allegations of discriminatory intent, Claimant has failed to prove any discriminatory intent on the part of Guatemala, as was demonstrated above in the context of the expropriation analysis.⁷³⁴ Moreover, even if Claimant had been able to establish an intent to discriminate against it by Guatemala to favor a national investor, mere intent to favor a national over a non-national investor is insufficient to prove a national treatment claim. As the *Archer Daniels* tribunal explained, a State measure must also cause a discriminatory *effect* in order to constitute a national treatment violation:

The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word ‘treatment’ suggests that a practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.⁷³⁵

308. Though Claimant did not dispute that it was required to prove a discriminatory effect — and in fact concedes that “the application of the national treatment standard involves a comparative measure”⁷³⁶ — it nevertheless endeavors to prove its claim simply by asserting that “the *Lesivo* Resolution and actions taken in furtherance of the Resolution substantially deprived it of its expected

⁷³² Reply on the Merits, ¶ 420.

⁷³³ Reply on the Merits, ¶ 428.

⁷³⁴ See above, § II.

⁷³⁵ **RL-126**, *S.D. Myers First Partial Award*, ¶ 254.

⁷³⁶ Memorial on the Merits, ¶ 160 (quoting **RL-82**, *Archer Daniels Award*, ¶ 197).

NATIONAL TREATMENT

economic benefits under the Usufruct and, in particular, under Contract 402, the Master Usufruct Contract.”⁷³⁷ However, it is insufficient merely to allege that a particular measure adversely affected a foreign investment; one must prove that an adverse effect resulted from the alleged discrimination. Yet, as demonstrated in the Counter-Memorial and *infra* in the context of the damages analysis,⁷³⁸ Claimant has not been able to prove that any damages resulted from this alleged discriminatory action.

309. And even if one assumes that Claimant could prove that an adverse effect resulted from the alleged discrimination, that too would not be enough to sustain a national treatment claim. As Claimant itself recognized, the hallmark of a national treatment claim is its *comparison* of treatment; “[n]ationality discrimination is established by showing that a foreign investor unreasonably has been treated less favorably than domestic investors in like circumstances.”⁷³⁹ 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.”⁷⁴⁰ A claimant must therefore demonstrate that it received different treatment than that accorded to its domestic comparator, and that the treatment the claimant received was comparatively less favorable and resulted in an adverse effect on its investment.

310. In the present case, Claimant has failed to make any attempt at comparing the treatment it received as a result of the *Lesivo* Declaration to the treatment that Mr. Campollo received as a result of the same measure. Claimant simply cannot establish that it had been treated less favorably than Mr. Campollo due to the *Lesivo* Declaration; that Mr. Campollo had benefitted from that declaration while Claimant had not.

311. As explained throughout this Reply, even after the issuance of the *Lesivo* Declaration —and despite Claimant’s refusal to continue railroad operations — Guatemala has continuously acknowledged the validity of Claimant’s rights under both Contracts 143/158 (as it is obliged to do under Guatemalan law until the *Contencioso Administrativo* Court upholds the *Lesivo* Declaration issued by the

⁷³⁷ Reply on the Merits, ¶ 428.

⁷³⁸ See below, § VI.

⁷³⁹ Memorial on the Merits, ¶ 161.

⁷⁴⁰ **RL-144**, DOLZER AND SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 178.

Executive⁷⁴¹) and 402. As Claimant stipulated for the record, its income from real estate leases, contracts, and easements continues to this day — and in fact has increased steadily since the *Lesivo* Declaration was issued.⁷⁴² Moreover, Claimant has not proven that Guatemala has granted any rights to Mr. Campollo under any of FVG’s contracts, or even suggested that it would do so. Nor has it ever attempted to cede Claimant’s rights under any of the contracts to Mr. Campollo or to any other Guatemalan entity. Mr. Campollo has never received — and it has never been suggested that he had the right to receive — income under any of the contracts that comprise Claimant’s investment. Thus, there is no basis for Claimant’s assertion that, as a result of the *Lesivo* Declaration, it received less favorable treatment as compared to Ramón Campollo.

312. Thus, as explained above and in Section VI.D of Guatemala’s Counter-Memorial, Claimant has failed to establish that Mr. Campollo was the proper domestic comparator against which to compare the treatment it received from Guatemala. Even if Mr. Campollo could be considered the proper comparator, however, Claimant has failed to demonstrate that the *Lesivo* Declaration had a *comparatively* negative effect — *i.e.*, a discriminatory effect — upon its investment. Accordingly, Claimant’s national treatment claim must be denied.

* * *

313. For the reasons set forth in Sections II through V above, Claimant has to meet its burden of proving that Guatemala’s issuance of the *Lesivo* Declaration or any of its actions in furtherance of the Declaration ran contrary to its obligations under 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; or (D) the national treatment standard under Article 10.7. Guatemala accordingly requests that the Tribunal dismiss Claimant’s CAFTA claims in their entirety.

⁷⁴¹ Second Expert Report of J.L. Aguilar, ¶ 100.

⁷⁴² **Ex. R-329**, Parties’ Stipulation.

DAMAGES

VI. Damages And Costs

314. As explained in the preceding sections, Respondent did not violate any of its obligations under CAFTA by issuing the *Lesivo* Declaration. However, should the Tribunal conclude otherwise, it should rule that the alleged treaty breaches did not cause Claimant or FVG any quantifiable damages and that, as Dr. Pablo Spiller has so clearly demonstrated, Claimant is entitled to **zero** damages.

A. Claimant Misstates And Misapplies The Relevant Legal Standards In Hopes Of Obtaining a Windfall At Guatemala's Expense In The Form Of Double Compensation

1. The Appropriate Standard For Compensation In This Case, Whether Lawful Or Unlawful Is Fair Market Value Immediately Prior To The *Lesivo* Resolution

315. Claimant contends that Dr. Spiller's damages calculations are flawed because they were arrived at by applying the incorrect legal standard. Claimant posits that the correct standard is not the "fair market value" measure found in CAFTA Article 10.7.2,⁷⁴³ but the customary international law measure of "reparation," which they say is incorporated into CAFTA by operation of Annex 10-B.⁷⁴⁴ Claimant argues that the compensation for fair market value measure of damages explicitly prescribed by CAFTA Article 10.7.2 applies only to cases of lawful expropriation.

316. Claimant fails to cite a single authority to support this argument. Indeed, the term "compensation" in the title of Article 10.7 and in the text of Article 10.7.2 is not qualified in any way. Further, the words "lawful" and "unlawful" do not appear in Article 10.7. Had the States-Party to CAFTA intended that the explicit damages measure provided in Article 10.7.2 apply only to a certain type of expropriation, they could and would have so stated.

317. Applying the customary international law standard of "reparation" to expropriations under CAFTA under the reasoning advocated by Claimant would write a distinction between lawful and unlawful expropriation into the Treaty that is nowhere to be found in its text. This, in turn, would ignore the State-Parties' decision to specifically address and prescribe the measure of damages that would apply in all cases of expropriation.

⁷⁴³ In cases of expropriation, CAFTA Article 10.7.2 requires compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place." **RL-61**, CAFTA Art. 10.7.2.

⁷⁴⁴ Reply on the Merits, ¶¶ 442–44.

318. Claimant incorrectly relies on NAFTA awards, including *Metalclad*, to support its construction of Article 10.7.2 limiting its application to cases of lawful expropriation.⁷⁴⁵ The Tribunal's ruling in *Metalclad* in fact contradicts Claimant's position. There, having found that Mexico had expropriated the claimant's investment in breach of NAFTA Article 1110 (thereby making the expropriation "unlawful" under Claimant's conception), it made no distinction between lawful and unlawful for purposes of compensation. What is more, the *Metalclad* Tribunal awarded the claimant damages equivalent to the fair market value of the investment as of the date of the expropriation consistent with NAFTA Article 1110.⁷⁴⁶

319. As Respondent previously explained, international tribunals have defined "fair market value" as:

[T]he 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 arm's 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.⁷⁴⁷

320. As Dr. Spiller has explained, 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.⁷⁴⁸ Thus, the fair market value measure would compensate Claimant for whatever losses it suffered as a consequence of the *Lesivo* Declaration, as it would wipe out the effects of the alleged expropriation by reflecting the price that a willing buyer would have voluntarily agreed to pay Claimant had there not been a *Lesivo* Declaration.

321. Claimant, however, attempts to create a false dichotomy between what it calls the "full reparation" standard and the "fair market value" measure as applied to this case. Claimant argues that the "full reparation" standard it advocates is born out of the Permanent Court of International Justice's

⁷⁴⁵ Reply on the Merits, n. 1035 (citing **RL-126**, *S.D. Myers First Partial Award*, ¶¶ 305-09 and **RL-111**, *Metalclad Award*, ¶¶ 112-22).

⁷⁴⁶ **RL-111**, *Metalclad Award*, ¶¶ 112-22; **RL-133**, *Tecmed Award*, ¶¶ 151, 188-89 (applying the fair market value standard in a case of unlawful expropriation).

⁷⁴⁷ **RL-92**, *CMS Gas v. Argentine Republic*, ICSID Case No. ARB/01/8 (Award, 12 May 2005) (Vicuña, Lalonde, Rezek), ¶ 402 ("*CMS Award*") (citing International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6, 2001, p.4); First Expert Report of P. Spiller, ¶ 19.

⁷⁴⁸ First Expert Report of P. Spiller, ¶¶ 17, 21.

DAMAGES

(“PCIJ”) decision in the *Chorzów Factory* case,⁷⁴⁹ where the Court held that, in order to compensate a party who suffered damages as a result of an international delict, “reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁷⁵⁰ As explained below and as detailed by Dr. Spiller in his Second Report, in this case the distinction drawn by Claimant is one without significance both from the legal and economic perspectives as both get the Tribunal to the same place — *zero damages resulting from the alleged CAFTA breaches*.⁷⁵¹

2. Under The Facts Of This Case, Calculating Damages By Reference To The Fair Market Value Of The Alleged Investment At The Date Of Expropriation Is The Appropriate Measure In Accordance With *Chorzów*

322. Claimant finds “nonsensical” Respondent’s proposition that, in this case, the CAFTA Article 10.7.2 “fair market value” compensation standard for expropriation is also the proper *Chorzów* full reparation standard.⁷⁵² This argument denotes either Claimant’s misunderstanding of the *Chorzów* standard or the argumentative creativity it employs to justify its request for double compensation. *Chorzów* requires only that Claimant be placed in the position it would have been had the *Lesivo* Declaration not been issued; it does not require or justify Claimant’s request for double compensation.

323. At its core, *Chorzów* stands for the proposition that a claimant that has suffered damages as a consequence of an internationally wrongful act must be placed in the same position it would have been had the act not taken place. In this case, as Dr. Spiller explains, awarding an amount equal to the fair market value of FVG prior to the *Lesivo* Declaration accomplishes this goal.⁷⁵³ Thus, under the circumstances of this case, compensation based on the fair market value of Claimant’s rights immediately prior to the *Lesivo* Declaration is consistent with and equal to *Chorzów*’s reparation principle.

⁷⁴⁹ Reply on the Merits, ¶ 445; First Report of S. Pratt, p.12.

⁷⁵⁰ **RL-90**, *Case Concerning the Factory at Chorzów*, Judgment No. 13 (Claim for Indemnity — The Merits) (Germany v. Poland), Permanent Court of International Justice, 13 September 1928 (“*Chorzów*”), p. 40.

⁷⁵¹ See Second Expert Report of P. Spiller, § II.1.

⁷⁵² Reply on the Merits, ¶ 445.

⁷⁵³ Second Expert Report of P. Spiller, ¶ 12.

324. Claimant's misapplication of *Chorzów* hinges on its calculation of FVG's alleged "lost investments," to which it then adds FVG's projected lost profits. This approach compensates Claimant twice for the value of the asset immediately prior to the *Lesivo* Declaration, thus placing Claimant in a much better position than if the *Lesivo* Declaration had never been issued and violating the *Chorzów* compensation standard which Claimant purports to apply.

325. As Dr. Spiller explains, if the fair market value is measured through the discounted cash flows ("DCF") approach (which both Mr. Thompson and Dr. Spiller agree is the proper valuation technique in this case) "then adding the updated value of Claimant's investments (computed by Mr. Thompson through the NCC method), which also attempts to provide an assessment of the same value, implies counting the same concept twice, thus overcompensating Claimant."⁷⁵⁴ This is because the DCF calculation "values the asset lost according to its income-producing capabilities" and thus "fully compensates the claimant by awarding an amount that reflects both the loss incurred and the gain of which the claimant was deprived."⁷⁵⁵

326. Dr. Spiller's example of a bond with a maturity date 5 years from now with a market price today of \$100 illustrates the point well.⁷⁵⁶ As Dr. Spiller explains, the market price of the bond today (\$100) is by definition equal to the net present value of future interest and capital repayments, as no buyer will pay more than this amount. If a buyer made the investment today and it was instantly expropriated, following Mr. Thompson and Mr. Pratt's proposed methodology, damages would be equal to the discounted future cash flows involving interest and capital repayments (\$100) plus the amount invested in the bond (another \$100): *double the value of the expropriated bond*.⁷⁵⁷ As Dr. Spiller concludes, applying Mr. Thompson's and Dr. Pratt's approach would place the purchaser of the bond in a better position than he was in just before the expropriation happened. This is precisely what Claimant seeks

⁷⁵⁴ Second Expert Report of P. Spiller, ¶ 15.

⁷⁵⁵ **Ex. SPV-07**, John Y. Gotanda, *Recovering Lost Profits*, GEORGETOWN J. OF INT'L DISPUTES (Fall 2004), p. 16; see **RL-152**, MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 198–99 (citations omitted) (explaining that "[a]n 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)").

⁷⁵⁶ Second Expert Report of P. Spiller, ¶ 14.

⁷⁵⁷ Second Expert Report of P. Spiller, ¶ 14.

DAMAGES

with its request for damages for lost investment (calculated via NCC) *plus* lost profits (calculated via DCF).

327. Thus, the correct compensation measure that would place the investor in the bond scenario back in the position it was in just prior to the alleged expropriation consists of either the amount invested, or the present value of the cash flows that the investment would have provided in the absence of the expropriation (also equal to \$100 in this example), but not the sum of both. Here, awarding Claimant an amount equivalent to the fair market value of FVG at the time of the *Lesivo* Declaration calculated via DCF would be the correct measure, as it would fully [compensate] the claimant “by awarding an amount that reflects both the loss incurred and the gain of which the claimant was deprived.”⁷⁵⁸ Claimant’s proposed valuation method, on the other hand, would compensate it twice for the value of the same asset/investment, thus placing it in a much better position than it would have been in absent the *Lesivo* Declaration.

328. Claimant seeks support for its position in *Siemens*, a case that simply does not stand for the overly-broad and ultimately incorrect proposition that the reparation standard cited by Claimant always requires the award of *both* lost investments and lost profits added together as separate components and using different valuation methods for each.⁷⁵⁹ Claimant’s reliance on *Siemens* is unavailing for two main reasons.

329. First, as Claimant admits (albeit in a footnote), the *Siemens* tribunal noted that its approach to damages was “admittedly unusual” and applied only because of the “particular circumstances” of *that* case.⁷⁶⁰ In adding the lost investment to the lost profits claims as a damages measure, the tribunal admitted that “normally [they] are regarded as an alternative means of valuing the same object.”⁷⁶¹ Thus, what Claimant cites as the rule is really an exceptional application of a valuation method that was specific to the facts of that case and, thus, not readily applicable to cases with distinguishable facts, such as this one.

⁷⁵⁸ **Ex. SPV-07**, John Y. Gotanda, *Recovering Lost Profits*, GEORGETOWN J. OF INT’L DISPUTES (Fall 2004), p. 16.

⁷⁵⁹ Memorial on the Merits, ¶ 176.

⁷⁶⁰ **RL-80**, *Siemens A.G.v. The Argentine Republic*, ICSID Case No. ARB/02/8 (Award, 6 February 2007) (Sureda, Brower, Janeiro), ¶ 357 (“*Siemens Award*”) (cited by Claimant in its Memorial on the Merits, n. 211).

⁷⁶¹ **RL-80**, *Siemens Award*, ¶ 355.

330. Second, the underlying facts in *Siemens* were markedly different from the facts in this case.⁷⁶² Claimant posits that this case is similar to *Siemens* because it alleges that a substantial portion of its investment was made before any revenue was realized.⁷⁶³ However, in *Siemens* under the contract between the investor and Argentina, *all* of its costs had to be and were incurred before the first *peso* of revenue was realized. Most importantly, in *Siemens* the claimant proposed that compensation be calculated on the book value of the investment and that *lucrum cessans* be arrived at through discounting an estimate of profits calculated as a percentage of the revenues that it would have received if the Project had run its course per the contract.⁷⁶⁴ The Tribunal adopted this valuation measure only because Siemens' enterprise had barely commenced operations under its contract with Argentina before the government's breaches drove them to a halt. In particular, claimant's operations to produce national identity cards as part of the implementation of the contract only ran for around four months while another component of the operations, the implementation of an immigration control system, only ran for one day.⁷⁶⁵ Under those circumstances, application of the DCF methodology would not have been appropriate because the claimant's enterprise lacked a history of operations on which to base cash flow projections.

331. By contrast, in the instant case FVG had a 6-year history of unprofitable operations and the application of DCF would reflect the fair market value of the investment of RDC, including both the amounts invested and the projected cash flows. In this regard, Dr. Spiller explains that:

FVG has a history of poor performance, showing losses for seven consecutive years, between 2000 and 2006. As early as 2002, FVG had

⁷⁶² Claimant also relies on *ADC (RL-77)* to support its flawed approach to damages calculation. Like *Siemens*, however, *ADC* is inapposite as its facts are distinguishable from those before this Tribunal. The *ADC* tribunal's approach to damages calculation hinged on the "almost unique" and "*sui generis*" nature of the facts of that case, which posed the unusual situation of an investment that had risen in value after the alleged expropriatory measure had occurred. **RL-77, ADC Award**, ¶¶ 496–97. The Tribunal tackled this situation by setting the date of valuation as the date of the award and not the date of expropriation. **RL-77, ADC Award**, ¶ 497. Note, however, that the tribunal, applying the *Chorzow* principle, decided that the correct computation methodology was to ascertain the fair market value of the expropriated investment using the DCF valuation method. **RL-77, ADC Award**, ¶¶ 501–504. This, of course, is precisely the valuation method advocated by Respondent in this case and applied by its expert Dr. Spiller in his report. Thus, *ADC*, like *Siemens*, provides Claimant no refuge and in fact supports Guatemala's damages arguments.

⁷⁶³ Reply on the Merits, ¶¶ 458, 462.

⁷⁶⁴ **RL-80, Siemens Award**, ¶ 355.

⁷⁶⁵ **RL-80, Siemens Award**, ¶¶ 81, 84, 89, 91.

DAMAGES

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 as per Guatemalan regulations. For the same reason, FVG's shareholders had to make additional capital contributions in 2004, 2005 and 2006.⁷⁶⁶

Given FVG's history of operations, the correct measure of what a willing buyer would have paid for FVG immediately prior to the *Lesivo* Declaration is its fair market value as determined using the DCF method.⁷⁶⁷

332. In sum, given the particular facts of this case, compensation computed as the fair market value of RDC's investments just prior to the issuance of the *Lesivo* Declaration provides "full reparation" to Claimant consistent with the *Chorzow* standard. By contrast, as detailed by Dr. Spiller and discussed more fully in section VI.B.2.a, *infra*, Claimant's damages calculation methodology results in gross double-counting and significant over-compensation to Claimant.

B. Even If Claimant Had Correctly Applied The Legal Standard And Had Not Engaged In Double-Counting, It Has Failed To Prove That It In Fact Suffered Any Damages

1. Claimant Is Not Entitled to Recover For FVG's Alleged Lost Profits (*Lucrum Cessans*), Because They Are Wholly Speculative

333. Cognizant of the absolute dearth of evidence to support its claim for lost profits, Claimant posits a standard that is nowhere to be found in the relevant jurisprudence or academic literature: that determining the amounts to which it believes it is entitled requires "a *subjective* evaluation of Claimant's actual loss" including its lost profits. As Dr. Pablo Spiller demonstrates beyond peradventure, Claimant's "subjective" standard for assessing damages has no foundation and is not based, as it should be, on demonstrable evidence and sound economic principles. The speculative nature of Claimant's approach is most apparent in its lost profits arguments and calculations.

334. As Respondent explained in its Counter-Memorial on the Merits, it is axiomatic under international law that no compensation for speculative or uncertain damages, including lost profits, can

⁷⁶⁶ First Expert Report of P. Spiller, ¶ 76.

⁷⁶⁷ See Second Expert Report of P. Spiller, § II.3.

be awarded to any party.⁷⁶⁸ This well-settled principle has led the International Law Commission to explain that:

[L]ost 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.⁷⁶⁹

335. An important corollary to this principle is that a claimant cannot 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 Dr. Spiller's words, "in order to be able to project any positive profits, one must either show that the company has had a history of profitability, or present new evidence showing the company would have been able to generate such profits in the future."⁷⁷⁰ Claimant and its experts cannot prove the existence of a history of profitability and have not presented *any reliable evidence* that would even suggest that FVG would have been able to generate any profits (much less the staggering profits Claimant seeks here) in the future.

336. In *PSEG* the tribunal declined to award lost profits calculated on the basis of the investor's own internal "cash flow tables."⁷⁷¹ The tribunal emphasized that those tables were part of the proposals that did not materialize *in finalized commercial terms of the contract*.⁷⁷² 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."⁷⁷³ Similarly, in *Autopista* the tribunal did not accept the cash flow projections contained in the Economic-

⁷⁶⁸ **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*").

⁷⁶⁹ **RL-143**, ILC Draft Articles on State Responsibility, Comment to Art. 36, ¶ 27 (emphasis added).

⁷⁷⁰ Second Expert Report of P. Spiller, ¶ 47.

⁷⁷¹ **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*").

⁷⁷² **RL-124**, *PSEG Award*, ¶ 313.

⁷⁷³ **RL-124**, *PSEG Award*, ¶¶ 312–14.

DAMAGES

Financial Plan of the concession agreement in circumstances where the investment had not yet been completed and the business had not commenced operations.⁷⁷⁴

337. 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; *facts diametrically opposed to the ones in this case*.⁷⁷⁵

338. As Dr. Spiller's First and Second reports make pellucid, Claimant's assessment of its future lost profits is utterly speculative, unsubstantiated and incompatible with its over 6-year history of consistent losses. None of Claimant's or its experts' arguments in the Reply does anything to contradict Dr. Spiller's assessment, which leads to the inescapable conclusion that "Mr. Thompson's projections of the railway business and Mr. MacSwain's projections of the real estate business remain unsubstantiated and extremely speculative. They stand in drastic contrast to FVG's historical performance and its own management's business expectations prior to the *Lesivo* Resolution."⁷⁷⁶

339. While it is interesting that Claimant's calculations of lost profits decreased from US\$36.16 million in its Memorial on the Merits to US\$22.19 million in its Reply (perhaps the best evidence that even Claimant acknowledged the weakness and speculative nature of its lost profits claim), the underlying calculations of Claimant's experts' cash flow forecasts continue to be unsubstantiated and extremely optimistic considering FVG's historical performance and its management's expectations prior to the *Lesivo* Declaration.⁷⁷⁷

⁷⁷⁴ **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), ¶¶ 354–58 ("*Autopista Award*").

⁷⁷⁵ **RL-77**, *ADC Award*, ¶¶ 506–07.

⁷⁷⁶ Second Expert Report of P. Spiller, ¶ 4(b).

⁷⁷⁷ See Second Expert Report of P. Spiller, § III.1.

a. Claimant's forecasts of future cash flows are inconsistent with FVG's historical performance and its management's expectations.

340. Claimant's experts' forecasts about FVG's future cash flows continue to be inconsistent with the company's historical performance and its management's expectations.⁷⁷⁸ As Dr. Spiller explains and illustrates, "FVG recorded negative operating cash flows (measured by its EBITDA) every single year since 2000, and this trend showed no sign of changing."⁷⁷⁹ This consistent record of failure notwithstanding, Claimant's expert Mr. Thompson not only misapplies the basic accounting concept of EBITDA,⁷⁸⁰ but also "assumes in his rebuttal report that, somehow, the company would be able to drastically revert such situation and obtain a positive EBITDA of US\$133,181 by 2007, and subsequent EBITDA growth rates of 288% and 161% in 2008 and 2009, respectively."⁷⁸¹ Mr. Thompson also applies his rosy yet speculative assumptions to his calculations of FVG's forecasted revenue: "after growing between 2003 and 2005 at a compounded annual growth rate (CAGR) of 1.91%, they grow at a CAGR of 28.4% between 2005 and 2007."⁷⁸² Dr. Spiller's Figure IV,⁷⁸³ reprinted below, best illustrates the dramatic and irreconcilable difference between FVG's actual performance over the 6-year period preceding the *Lesivo* Declaration and Mr. Thompson's inexplicably optimistic projections of the company's future.

⁷⁷⁸ See generally Second Expert Report of P. Spiller, § III.1.

⁷⁷⁹ Second Expert Report of P. Spiller, ¶ 40 and Figure III.

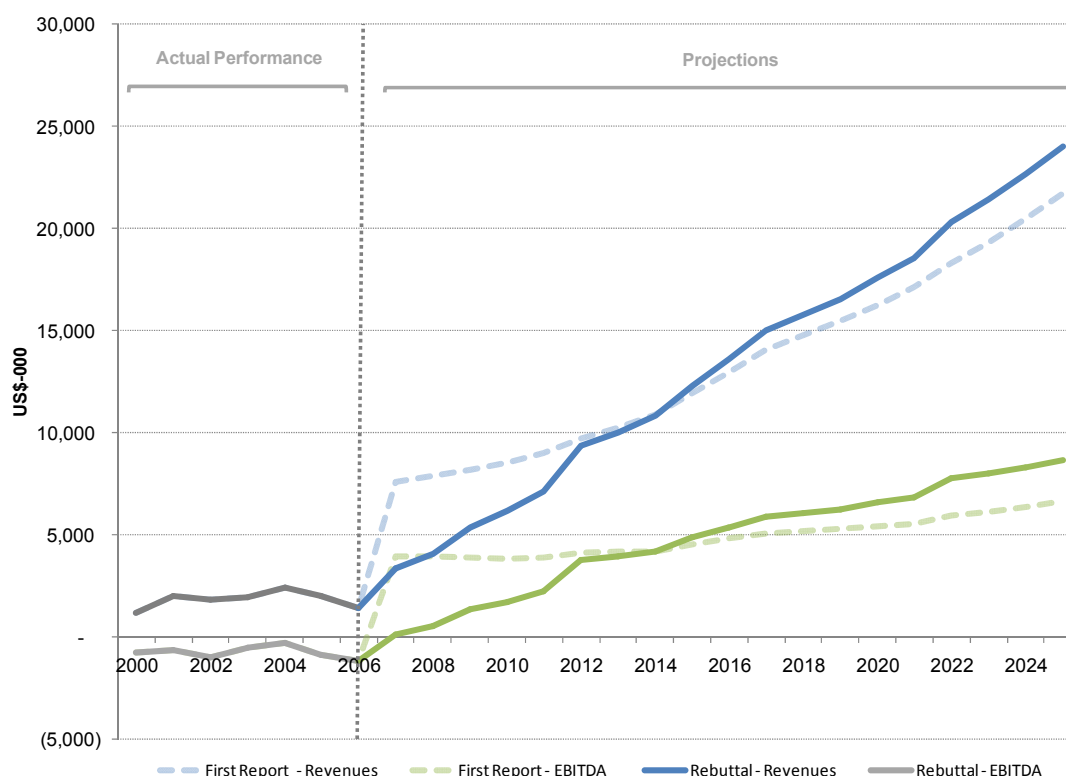
⁷⁸⁰ Second Expert Report of P. Spiller, n. 45.

⁷⁸¹ Second Expert Report of P. Spiller, ¶ 41.

⁷⁸² Second Expert Report of P. Spiller, ¶ 41.

⁷⁸³ Second Expert Report of P. Spiller, Figure IV.

Mr. Thompson's FVG Financial Performance Forecasts



341. As Dr. Spiller correctly underscores, neither of Claimant's experts "have presented any evidence to support such drastic change in performance," leading Dr. Spiller to conclude that their assumptions and conclusions "are extreme and unsubstantiated."⁷⁸⁴

b. FVG's Alleged Lost Profits From Real Estate Leasing And Development Rights Continue To Be Speculative And Unsubstantiated

342. Dr. Spiller explains that Claimant's alleged lost profits from real estate leasing and development rights continue to be unsubstantiated.⁷⁸⁵ Even though Mr. MacSwain made adjustments in his Second Report to his real estate-related revenue forecasts with the purported aim of making his projections "even more conservative"⁷⁸⁶ (even though they in fact are only 5% lower than his original estimates),⁷⁸⁷

⁷⁸⁴ Second Expert Report of P. Spiller, ¶ 41.

⁷⁸⁵ See generally Second Expert Report of P. Spiller, § III.2 and Appendix B.

⁷⁸⁶ Second Expert Report of R. MacSwain, ¶ 14.

⁷⁸⁷ Second Expert Report of P. Spiller, ¶ 46.

Dr. Spiller maintains that his “revised figures, even though resulting in a slightly lower value, are still unsubstantiated” and “continue to suffer from the same fatal flaws as his original estimates.”⁷⁸⁸

343. As Respondent explained in its Counter-Memorial on the Merits and Prof. Spiller explained in his First Report, the most substantial component of Claimant’s *lucrum cessans* claim is revenues derived from FVG’s real estate rights under the usufruct agreements.⁷⁸⁹ Even ignoring for the sake of argument that the *Lesivo* Declaration had no impact, either legal or practical, on FVG’s real estate rights under Contract 420,⁷⁹⁰ Claimant has failed to prove that its projections have any basis whatsoever in fact. As Dr. Spiller demonstrates, “[t]here is simply no evidence that FVG would have been able to increase its revenues derived from the real estate operations as much as Mr. MacSwain forecasts.”⁷⁹¹ Again, one of Dr. Spiller’s graphical illustrations (Figure V--reprinted below) best explains how Mr. MacSwain’s projections of a booming real estate scenario for FVG’s business is completely divorced from the company’s historical performance.

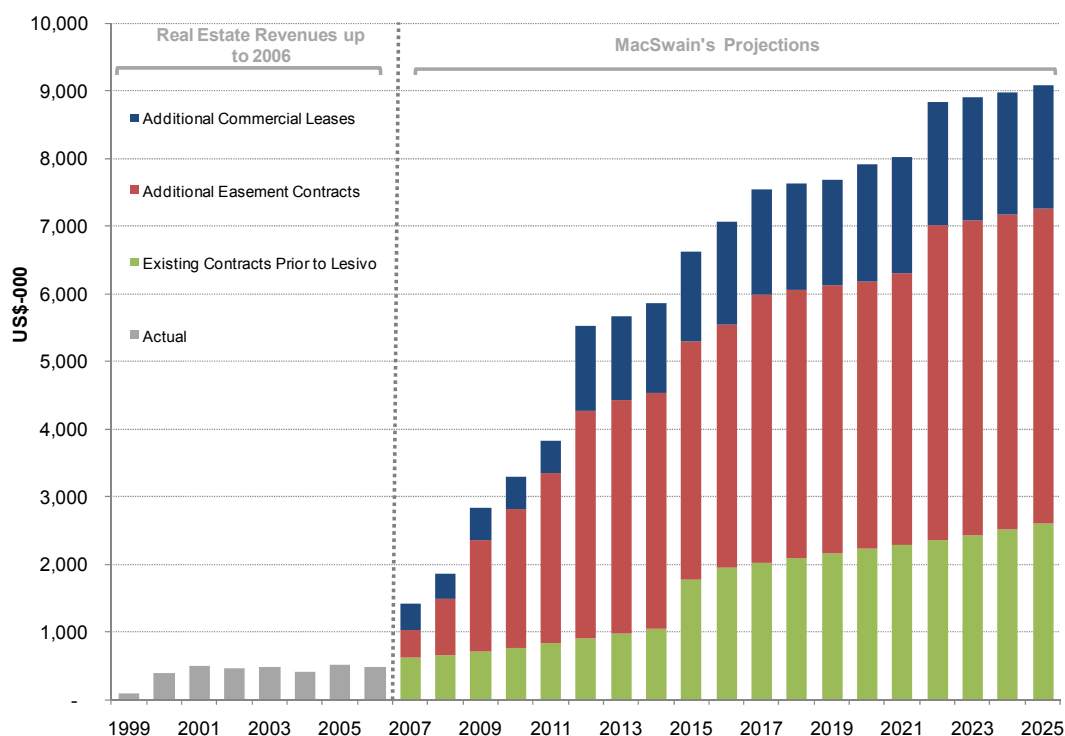
⁷⁸⁸ Second Expert Report of P. Spiller, ¶ 46.

⁷⁸⁹ Counter-Memorial on the Merits, ¶ 590; First Expert Report of P. Spiller, ¶ 42.

⁷⁹⁰ See above, § II; see also **Ex. R-329**, Parties’ Stipulation.

⁷⁹¹ Second Expert Report of P. Spiller, ¶ 48.

FVG's Revenues from Real Estate Business (1999-2025)



344. Mr. MacSwain's corrections in his second report, especially those to his projections regarding potential easements and commercial leases, do not move him away from the conclusion that FVG's performance will be far better than its financial history has demonstrated during its last 8 years of corporate existence. As Dr. Spiller points out, Mr. MacSwain continues to base his projections "on his own opinions, with little or no hard evidence to support them."⁷⁹²

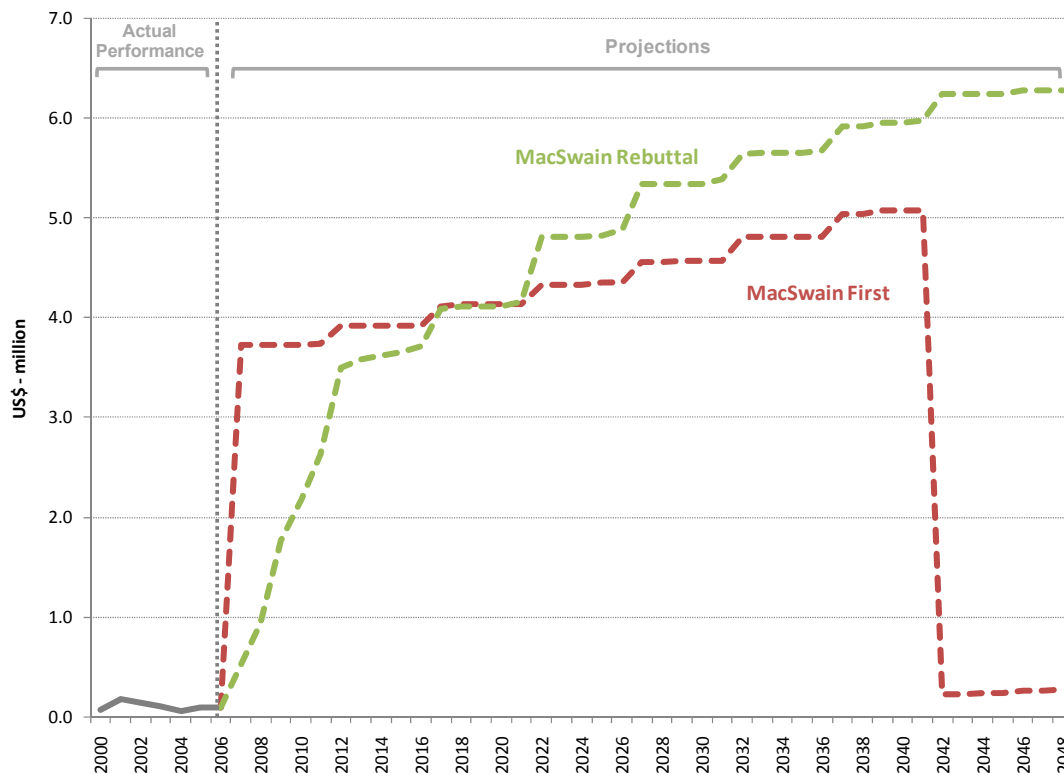
345. With regards to potential easement contracts, Mr. MacSwain changed his analysis in two major ways: (a) by incorporating a ramp-up period during the first five years after the enactment of the *Lesivo* Declaration and (b) by increasing the total length of the main right of way from 495 km to 644.04 km, while decreasing the total distance covered by rural spur lines from 185.4 km to 157.72 km, allegedly based on new information he obtained.⁷⁹³ Both of these changes are equally unsubstantiated and ultimately do not bring reasonability to Mr. MacSwain's projections.

⁷⁹² Second Expert Report of P. Spiller, Appendix B, ¶ 108.

⁷⁹³ Second Expert Report of P. Spiller, Appendix B, ¶¶ 109–10.

346. Mr. MacSwain’s inclusion of a ramp up period “does not correct the flaws of the original projections” as “[g]rowth rates are still extremely high in comparison to FVG’s historical figures, reaching in a very short time span a performance level incomparable to what it had achieved historically.”⁷⁹⁴ In fact, as is illustrated by Prof. Spiller’s Figure X (reprinted below), Mr. MacSwain’s new projections manage to increase projected earnings from additional lease contracts and, contrary to his initial projections, assumes that the imaginary contracts will last until the last year of the concession:

FVG’s Revenues from Easement Contracts



347. Similarly, Mr. MacSwain’s correction to increase the total length of the main right of way (which in turn “increases alleged damages given that the price per kilometer obtained from main lines is almost three times higher than that obtained from rural spurs”)⁷⁹⁵ and his projected price per km for the main line of way easements (US\$3,00) are wholly unsupported by evidence. With respect to the increase in length of the main right of way, Mr. MacSwain provides absolutely no evidence to support

⁷⁹⁴ Second Expert Report of P. Spiller, Appendix B, ¶ 111 and Figure X.

⁷⁹⁵ Second Expert Report of P. Spiller, Appendix B, ¶ 110.

DAMAGES

his modification other than a map showing the main and rural spur lines' paths.⁷⁹⁶ In regards to the price per km, Mr. Spiller notes that Mr. MacSwain's figure was based on the average price of a preliminary agreement between FVG and Gesur for 32 km of easement,⁷⁹⁷ and is almost 140% above the last contract actually signed prior to the *Lesivo* Declaration.⁷⁹⁸

348. As Dr. Spiller concludes

[G]iven Mr. MacSwain's lack of explanation and support for his calculations and FVG's track record of inability to increase its easement contracts, I consider it speculative to assume any additional right-of-way contracts. FVG already had eight years of operational history before the enactment of the *Lesivo* Resolution, and during this period the company was unable to capitalize on any of these opportunities.⁷⁹⁹

349. In the end, FVG's historical record of paltry real estate revenues, along with the acknowledgement by its management's of the disappointing nature of the real estate enterprise⁸⁰⁰ make clear that "the exponential growth that FVG's real estate business would have had in the absence of the *Lesivo* Resolution, according to Mr. MacSwain's revised figures, continues to be unsubstantiated."⁸⁰¹

(i) **FVG's Claimed Lost Profits From Railroad Operations Are Equally Unsubstantiated And Inflated**

350. Dr. Spiller also demonstrates how Claimant's experts' calculations of lost profits from railway operations continue to be inflated.⁸⁰² Aside from one minor correction, Mr. Thompson's revised railway revenues and cost forecasts are the same as in his first report, thus failing to address any of the issues

⁷⁹⁶ Second Expert Report of P. Spiller, Appendix B, ¶ 110.

⁷⁹⁷ See First Expert Report of P. Spiller, ¶ 121.

⁷⁹⁸ See Second Expert Report of P. Spiller, Appendix B, ¶ 113; First Expert Report of P. Spiller, ¶ 125.

⁷⁹⁹ Second Expert Report of P. Spiller, Appendix B, ¶ 114.

⁸⁰⁰ See Second Expert Report of P. Spiller, ¶ 49; Counter Memorial on the Merits, ¶¶ 591–92; **Ex. C-27(c)**, FVG's 2000 Annual Report, at RDC-001011; **Ex. C-27(e)**, FVG's 2002 Annual Report, at RDC-001080. In the company's 2002 Annual Report, for example, FVG management commented: "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 have to offer." See **Ex. C-27(e)**, 2002 FVG Annual Report, p. RDC-001079.

⁸⁰¹ Second Expert Report of P. Spiller, ¶ 51; see also *id.*, Appendix B.

⁸⁰² See generally Second Expert Report of P. Spiller, § III.3.

that Dr. Spiller raised in his First Report. As the Tribunal will recall, Dr. Spiller concluded in his First Report that the figure posited by Claimant as FVG's projected lost profits from its railroad operations is the result of several fundamental errors, including the following:⁸⁰³

- It assumes an abrupt turnaround in railroad operations, with revenue projections that drastically depart from FVG's historical performance;
- It relies on an adapted business plan without any substantiation;
- It provides inadequate substantiation for operational assumptions, and in some cases no substantiation at all; and
- 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.

Dr. Spiller concluded in his First Report that the alleged lost profits from railroad operations were inflated as a result of Mr. Thompson's reliance on adapted business plans with no substantiation, and business projections were inconsistent with FVG's historical performance.⁸⁰⁴

351. Mr. Thompson does, however, refer to two new pieces of evidence in his attempt to support his original assumptions: an exercise to estimate the percentage of FVG traffic in the ports, and two traffic forecasts prepared in 1992 and 1995.⁸⁰⁵ He also claims that his explicit capital expenditures ("CAPEX") forecasts were not explicitly modeled but included as part of the operating expenses. In his First Report, Dr. Spiller pointed out that Mr. Thompson's steel and container traffic estimates were inconsistent with FVG's historical performance and contained unsubstantiated growth estimates. In his second report, Mr. Thompson's container tonnage estimates continue to show exponential, speculative growth.

352. Notwithstanding this "new evidence", Mr. Thompson's analysis and projections remain unsubstantiated. First, he does not provide any supporting documents for the historical figures he used to perform these calculations: "he relied upon yearly data of the total tons at Puerto Barrios and Puerto Santo Tomás between 1996 and 2006, and container tons at Puerto Barrios and Puerto Santo Tomás during that period, without providing any source documents for these figures."⁸⁰⁶ Second, "there is no

⁸⁰³ First Expert Report of P. Spiller, ¶ 59.

⁸⁰⁴ First Expert Report of P. Spiller, ¶¶ 59–64.

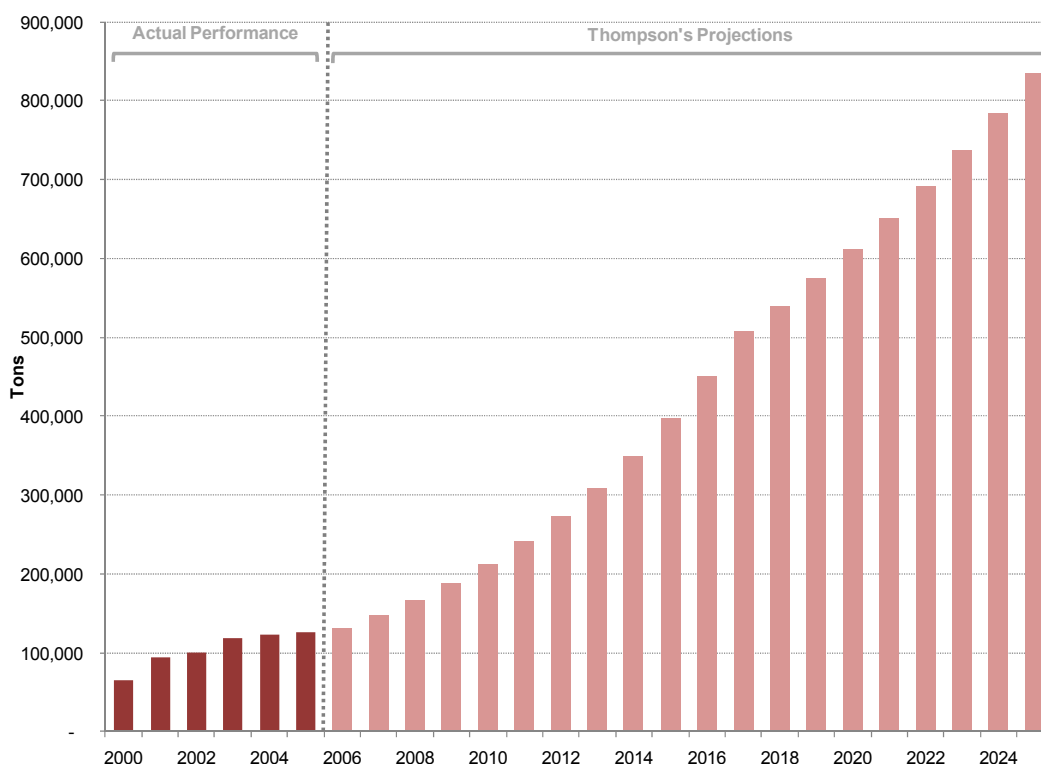
⁸⁰⁵ Second Expert Report of P. Spiller, ¶ 55.

⁸⁰⁶ Second Expert Report of P. Spiller, ¶ 58.

DAMAGES

relevant point of reference to know whether the 8.7% and 5.6% values he obtains are actually high or low. Mr. Thompson simply says that neither *seems unduly high* but fails to explain what level would be considered high or low and why.”⁸⁰⁷ This conclusion is best illustrated in Figure VIII of Dr. Spiller’s Second Report, reprinted below.

FVG’s Traffic Tonnage (Actual and Projected)



353. In sum, Dr. Spiller concludes that “Mr. Thompson’s new analysis does not provide any additional elements to support his overly optimistic forecasts of railway traffic, especially in light of FVG’s actual traffic data during the period it operated prior to the Lesivo Resolution.”⁸⁰⁸

354. As mentioned above, Mr. Thompson also attempts to justify the alleged conservative nature of his traffic forecasts by comparing them to traffic estimates contained in two railway traffic reports, one prepared in 1992 and the other in 1995.⁸⁰⁹ Mr. Thompson argues that, based on these reports, he could

⁸⁰⁷ Second Expert Report of P. Spiller, ¶ 58.

⁸⁰⁸ Second Expert Report of P. Spiller, ¶ 59.

⁸⁰⁹ Second Expert Report of L. Thompson, ¶ 29.

have assumed that FVG would transport many other commodities besides steel and containers (the only two commodities considered in his projections); and that given that these reports assumed significantly higher traffic volumes than those actually observed, then there was potential for exponential growth in the railway traffic in Guatemala.⁸¹⁰ As Dr. Spiller explains, “[t]he basic flaw in this analysis is to assume that these reports can be used to compute the fair market value of FVG as of December 2006.” The simply cannot, for at least three reasons.

355. First, the reports are “highly unreliable” as valuation and projection tools in light of their age and how far removed they are from the *Lesivo* Resolution (published in 1992 and 1995, more than ten years prior to the *Lesivo* Declaration).⁸¹¹ Second, as Mr. Thompson himself admits, history proved that the reports were *overly optimistic* by 2005, FVG had only achieved around 4% of the total traffic forecasted in this study.⁸¹² Furthermore, as Dr. Spiller points out, these forecasts “assumed that FVG would transport several other commodities besides steel and containers (fuels, wheat, cement, bananas, etc.), which did not happen.”⁸¹³ This, in turn, demonstrates that “the reports were inaccurate and overly optimistic, and cannot be relied upon to forecast FVG’s future performance.”⁸¹⁴ Finally, it is not clear whether the figures reported in these reports are comparable to FVG’s actual traffic figures.⁸¹⁵ As Mr. Thompson explains, these studies cover the full length of railroads, while FVG only operated the Atlantic corridor,⁸¹⁶ and, as it has conceded in this proceeding, apparently did not have plans to further expand or rehabilitate the railroad. Furthermore, it is not clear whether these studies assumed that other operators besides FVG would participate in the railway activity, and whether these estimates include those volumes.⁸¹⁷ These uncertainties further underscore that the reports relied upon by Mr. Thompson to support his unsubstantiated projections do not provide support to any current valuation of

⁸¹⁰ Second Expert Report of L. Thompson, ¶¶ 30–31.

⁸¹¹ Second Expert Report of P. Spiller, ¶ 61.

⁸¹² See Second Expert Report of L. Thompson, ¶ 30; Second Expert Report of P. Spiller, ¶ 62 and Figure IX.

⁸¹³ Second Expert Report of P. Spiller, ¶ 62.

⁸¹⁴ Second Expert Report of P. Spiller, ¶ 62.

⁸¹⁵ Second Expert Report of P. Spiller, ¶ 63.

⁸¹⁶ See Second Expert Report of L. Thompson, ¶ 31.

⁸¹⁷ Second Expert Report of P. Spiller, ¶ 63.

DAMAGES

FVG. In Dr. Spiller's words, "no willing buyer or willing seller would have relied on outdated, and highly inaccurate, reports when assessing FVG's fair market value prior to the Lesivo Resolution."⁸¹⁸

356. Lastly, while Mr. Thompson now admits that he had not explicitly shown how FVG's growing projected tonnage would be accommodated by the capacity of the existing track and rolling stock, and whether he had considered future capacity expansions, he now argues that he intentionally refrained from including explicit investments in capacity in his original DCF analysis supposedly to avoid further complications in his model.⁸¹⁹ According to Mr. Thompson, explicit capital expenditures ("CAPEX") estimates are not necessary as his operating expenses projections for track and rolling stock are escalated faster than other operating expenses in order to generate more funding for capacity expansions.⁸²⁰

357. As Dr. Spiller explains, there are reasons to question Mr. Thompson's assumption. "First, the implicit CAPEX that results from the higher growth rates used for track and rolling stock operating expenses represent on average less than 3% of total annual revenues derived from railroad activities, while there is evidence that capital expenditures as a percentage of revenues can be substantially higher than this."⁸²¹ For example, Dr. Spiller notes that "the Association of American Railroads indicated that between 2000 and 2009, US railroad companies spent on average 17% of their revenues on capital expenditures."⁸²² Another study by George Avery Grimes shows that "[f]rom 1988 to 2002, the industry's [railroad] annual capital expenditures averaged over 16% of revenues,"⁸²³ which Dr. Spiller notes shows the railroad industry's expenditure consistency over the years and highlights the unreasonableness of the CAPEX implicit in Mr. Thompson's projections.⁸²⁴

⁸¹⁸ Second Expert Report of P. Spiller, ¶ 64.

⁸¹⁹ See Second Expert Report of L. Thompson, ¶¶ 36–37.

⁸²⁰ Dr. Spiller explains that rolling stock operating expenses are composed of "rolling stock repairs" and "rolling stock maintenance," while track operating expenses are composed of "track repairs" and "track materials." Mr. Thompson allowed "rolling stock repairs" to grow at 5% per year, and "rolling stock maintenance," "track repairs" and "track materials" to grow at 6% per year, while the remaining operating expenses are escalated using a 2% per year rate. Second Expert Report of P. Spiller, n. 66.

⁸²¹ Second Expert Report of P. Spiller, ¶ 66.

⁸²² Second Expert Report of P. Spiller, ¶ 66.

⁸²³ See **Ex. CLEX-05**, G.A. Grimes, RECOVERING CAPITAL EXPENDITURES: THE RAILROAD PARADOX 38 (2004).

⁸²⁴ Second Expert Report of P. Spiller, ¶¶ 66–67.

358. Additionally, as Dr. Spiller points out:

[A]lthough the US railroad sector is not directly comparable to Guatemala's, this evidence casts doubt on Mr. Thompson's assumption. Mr. Thompson has not demonstrated in any way that the amount of capital expenditures he proposes would be enough to cover the necessary investments. In fact, it would stand to reason that capital expenditures would be higher than the US average in the case of FVG's operations in Guatemala in light of the substantial rehabilitation and construction work that both parties agree would have been required to continue and expand railway operations.⁸²⁵

359. In sum, Claimant's lost profits calculations and claims are based on nothing more than rank speculation and are irreconcilable with FVG's history of consistent losses, failures which were wholly unrelated to, and predated, the *Lesivo* Declaration. This speculative nature alone is *sufficient*, under international law, to deny Claimant the alleged lost profits it seeks. The correctness of this conclusion is buttressed by sound economic analysis and valuation of FVG, which establishes, as Dr. Spiller explains, that it is simply untenable to argue that Claimant's projections of FVG's lost profits for both real estate and railway operations, are a credible and appropriate basis for awarding Claimant or FVG any damages in this case.

2. Claimant Is Not Entitled to An Independent Recovery For Its Alleged Lost Investment In FVG (*Damnum Emergens*)

a. Awarding The Amounts Claimed As *Damnum Emergens* Would Double-Count Damages And Grossly Overcompensate Claimant

360. In its Memorial on the Merits, Claimant sought US\$27.8 million in damages for alleged lost investments plus approximately US\$1.03 million for alleged business termination costs. Claimant now places *many* more of its compensation "eggs" in the lost investment "basket," most likely in light of the inescapably speculative nature of its lost profit claims, by claiming US\$42.9 million and, as discussed below, also increases its claimed business termination costs to US\$1.35 million.⁸²⁶

⁸²⁵ Second Expert Report of P. Spiller, ¶ 67.

⁸²⁶ As Dr. Spiller points out, the substantial increase in Claimant's estimated "lost investment" figures from one memorial to the other (which amounts to a 60% hike), is the result of using a higher WACC (Dr. Pratt's 12.9% instead of an ad-hoc 10% he has used previously) to update the historical figures to 2007, and of including a number of other expenses unrelated to capital contributions allegedly incurred by RDC and supposedly related to FVG. Second Expert Report of P. Spiller, n. 25.

DAMAGES

361. As has been explained above, and as Dr. Spiller clearly concludes, Claimant's insistence on recovering for alleged lost investments and lost profits as separate values added to each other in this case results in double counting and would grossly overcompensates Claimant.⁸²⁷ As Dr. Spiller explains, and as has been developed herein, employing the discounted cash flows ("DCF") method to value Claimant's investment "is sufficient to provide the proper compensation to Claimant when both *damnum emergens* (the 'loss incurred') and *lucrum cessans* (the 'gain of which claimant was deprived') are applicable."⁸²⁸ This, in turn, obviates the need to engage in a separate analysis of alleged lost profits and lost investment, and doing so, as Claimant urges the Tribunal to do, double counts damages. This flaw is compounded by Claimant's experts' use of two separate methodologies (DCF and NCC) to calculate lost profits and lost investment, respectively.

362. Claimant's experts purport to remedy the double-counting identified by Dr. Spiller by amortizing the accumulated value of the lost investment over the remaining 42 years of the usufruct.⁸²⁹ This purported correction, however, "does not eliminate double counting, as the net present value of the amortizations which is deducted from the future cash flows is substantially lower than the amount computed as the 'lost investment.'"⁸³⁰ As, Dr. Spiller explains:

In sum, Mr. Thompson computes a "lost investment" claim figure of US\$ 42.94 million, but then subtracts only US\$ 7.88 million from the "lost profits" claim. There is still a significant portion of the "lost investment" figure, namely US\$ 35.06 million, that is still being claimed twice. Therefore, Mr. Thompson and Dr. Pratt's proposed approach does not eliminate double counting.⁸³¹

363. Dr. Spiller further explains that, in applying the amortization mechanism, Dr. Pratt and Mr. Thompson commit "the fundamental flaw of ignoring the time value of money in projecting the amortization of the lost investments into the future."⁸³² In other words,

⁸²⁷ Second Expert Report of P. Spiller, § II.2.

⁸²⁸ Second Expert Report of P. Spiller, ¶ 29; *see also* Second Expert Report of P. Spiller, § II.3.1.

⁸²⁹ Second Expert Report of L. Thompson, ¶ 15; Expert Report of S. Pratt, ¶ 13.

⁸³⁰ Second Expert Report of P. Spiller, ¶ 18.

⁸³¹ Second Expert Report of P. Spiller, ¶ 20.

⁸³² Second Expert Report of P. Spiller, ¶ 23.

[T]o implement the ‘amortization’ method correctly, the future amortization of the investment must not be in nominal terms, but rather the value of each amortization should be increased by the time value of money so that the net present value of the amortizations spread over time equals the value of the amount invested.⁸³³

364. The appropriate application of the time value of money to Claimant’s experts’ amortization approach would require that each annual amortization quota should be updated (increased) using the appropriate discount rate (*i.e.*, the WACC).⁸³⁴ Calculating the net present value of this stream of cash flows would yield the same initial figure (US\$ 42.94 million) of “lost investment.”⁸³⁵ As a result,

[D]educting this figure from the damage assessment would cancel out the lost investment portion of the analysis, and only the fair market value would be left. Thus, it would be exactly the same, algebraically, to either compute the compensation as the “lost profits” claim alone, or to compute it as the sum of the “lost investment” claim and the “lost profits” claim, net of the amortized “lost investments” when considering the time value of money correctly. In this way, using the amortization mechanism does not “distort the computation”⁸³⁶

365. Claimant’s experts’ calculations of lost investment have an additional, fatal flaw. As Dr. Spiller makes clear, Claimant’s experts’ use of the NCC method to calculate the alleged lost investment is inappropriate given FVG’s history of negative returns and results in significant overcompensation. As Dr. Spiller explains,

the NCC method provides a backward-looking approach, focusing exclusively on the value of the historic contributions made by Claimant from the project’s inception, net of the value of all cash distributions received by the investors, such as dividends or interest payments. These contributions are brought forward to the date of the expropriation at a rate equal to the theoretical return these investments would have had in the absence of the breach. Such approach, however, does not consider whether the performance of the

⁸³³ Second Expert Report of P. Spiller, ¶ 24.

⁸³⁴ Second Expert Report of P. Spiller, ¶ 25.

⁸³⁵ Second Expert Report of P. Spiller, ¶ 25.

⁸³⁶ See Second Expert Report of P. Spiller, ¶ 25.

DAMAGES

company could have actually generated such returns even in the absence of the measures.⁸³⁷

366. In this case, the *Lesivo* Declaration, the Government measure that allegedly damaged Claimant, did not occur immediately after FVG's operations started, but almost eight years later. During the period in which FVG operated the usufruct prior to the *Lesivo* Declaration (between 1999 and August 2006), FVG proved to be unprofitable, presenting large losses (both cash and accounting) in every year between 2000 and 2006.⁸³⁸ As Dr. Spiller explains, "[b]y looking at the capital contributions and awarding a theoretical return equal to FVG's cost of capital, Mr. Thompson is granting a windfall to Claimant, given that those contributions failed to generate the claimed theoretical return, as demonstrated by almost eight years of poor performance prior to the *Lesivo* Resolution."⁸³⁹ In fact, not only did FVG fail to generate the 12.9% theoretical return calculated and applied by Claimant's experts, but, as Dr. Spiller points out, FVG's average historical return on equity (ROE) was -26%.⁸⁴⁰

367. Compensation in this case simply cannot be computed as if Claimant had invested in and possessed an asset whose fair market value could be approximated by the sum of the amounts invested in FVG. As Dr. Spiller explains, "[a] significant portion of the amounts contributed by RDC and other investors to FVG (in the form of equity contributions or loans, were used to cover the operational losses that FVG generated year after year."⁸⁴¹ It is for this reason that Dr. Spiller suggested in his First Report that an alternative historical approach would be to look at the value of FVG's equity as reflected in its books just prior to the *Lesivo* Declaration (US\$4.2 million as of December 2006), as this method would take into account both the capital contributions and the accumulated losses.⁸⁴² However, Dr. Spiller also explained in his First Report that, given FVG's severe financial distress prior to the *Lesivo* Declaration, this figure would result in an overestimation of FVG's fair market value at that time.⁸⁴³

⁸³⁷ See Second Expert Report of P. Spiller, ¶ 30 (emphasis added); see also First Expert Report of P. Spiller, ¶ 74.

⁸³⁸ Second Expert Report of P. Spiller, ¶ 31 and Table I; see Second Witness Statement of M. Marroquín, ¶¶ 4-8.

⁸³⁹ Second Expert Report of P. Spiller, ¶ 31.

⁸⁴⁰ Second Expert Report of P. Spiller, ¶ 32; First Expert Report of P. Spiller, ¶ 78 and Table I.

⁸⁴¹ Second Expert Report of P. Spiller, ¶ 34.

⁸⁴² First Expert Report of P. Spiller, ¶¶ 79-84.

⁸⁴³ First Expert Report of P. Spiller, ¶ 84.

368. Claimant's proposed methodology, on the other hand, fancifully assumes—contrary to all evidence and FVG's record of losses and failure—that Claimant invested in a project that yielded and would have continued to yield a 12.9% annual return on equity. In Dr. Spiller's words, "[g]iven that RDC did make the investment in 1998 and suffered continuous losses between 2000 and 2006, damages based on 'lost investments,' as computed by Mr. Thompson, would greatly over compensate Claimant."⁸⁴⁴

b. RDC's Alleged Business Termination And Wind-Down Costs Should Not Be Considered For Valuation Purposes

369. Claimant's *damnum emergens* calculations also include a claim for alleged business termination and wind-down costs supposedly paid by RDC. Mr. Thompson now estimates these costs at US\$ 1.35 million, up from US\$ 1.03 million estimated in his first report.⁸⁴⁵ The increase responds to Mr. Thompson's consideration of not only the actual contributions made by RDC to FVG, but also RDC's travel expenses and allocated labor costs.⁸⁴⁶

370. In his First Report, Dr. Spiller pointed out that he had not seen evidence to show that the US\$ 1.03 million claimed was actually spent to cover "termination costs," and that the only extraordinary expenses during 2007 that seemed to be related to these costs were severance payments for a total of US\$ 150,000.⁸⁴⁷ Dr. Spiller states that, "[i]n his second report Mr. Thompson again fails to provide any supporting evidence to show that the amount allegedly spent in termination costs is in fact related to expenses caused by the shutdown of FVG's operations."⁸⁴⁸

371. After reviewing the additional evidence provided to Respondent by Claimant during the document production stage of this arbitration, Dr. Spiller found that "out of the US\$ 1.03 million actually contributed by RDC to FVG in 2007, US\$ 710,103 was used to pay for suppliers and operating expenses, US\$ 61,520 was spent in payroll, US\$ 125,162 was paid to FEGUA in canon and trust fund fees, and only US\$ 119,235 was used to pay for severance payments."⁸⁴⁹ Furthermore, Dr. Spiller found no indication

⁸⁴⁴ Second Expert Report of P. Spiller, ¶ 35.

⁸⁴⁵ See First Expert Report of L. Thompson, ¶ 60.

⁸⁴⁶ See Second Expert Report of L. Thompson, ¶ 7.

⁸⁴⁷ See First Expert Report of P. Spiller, n. 86.

⁸⁴⁸ Second Expert Report of P. Spiller, ¶ 69.

⁸⁴⁹ Second Expert Report of P. Spiller, ¶ 70.

DAMAGES

that RDC's travel expenses and salaries allocated to FVG in 2007 were related to the termination of operations.⁸⁵⁰ Thus, Dr. Spiller concludes, as he did in his First Report, "that RDC's investments in FVG during 2007 (US\$ 1.35 million according to Mr. Thompson's second report) should not be considered termination and wind down costs (a possible exception being the US\$ 119,235 spent in severance payments), and thus cannot be added to RDC's claim."⁸⁵¹

372. Claimant's experts' proposed compensation scheme is thus computed as if Claimant actually possessed an asset whose fair market value could be approximated by the sum of the amounts invested in FVG. However, as Dr. Spiller explains, a "significant portion of the amounts contributed by RDC and other investors to FVG (in the form of equity contributions or loans) were used to cover the operational losses that FVG generated year after year."⁸⁵² In fact, "FVG used approximately half of shareholders' contribution up to 2006 for additions to fixed assets. The rest was used to take care of operational losses, and to avoid the automatic dissolution of the company."⁸⁵³

373. In light of the above, it is clear that Mr. Thompson's calculation of "lost investment" is inconsistent with the *Chorzów* principle, as it does not place Claimant in the situation which would, in all probability, have existed if the *Lesivo* Resolution had not been issued. If anything, it seeks to place Claimant not only in the position it would have been in if the investments in FVG had never been made, but in the position Claimant would have been in if, instead of investing in the loss-generating endeavor that FVG turned out to be long before the *Lesivo* Declaration, it had invested in an enterprise that generated a 12.9% annual return on equity. As Dr. Spiller concludes, given that RDC did make the investment in 1998 and FVG suffered continuous losses between 2000 and 2006, damages based on "lost investments" as computed by Mr. Thompson would greatly over compensate Claimant.⁸⁵⁴

⁸⁵⁰ Second Expert Report of P. Spiller, ¶ 70.

⁸⁵¹ Second Expert Report of P. Spiller, ¶ 71.

⁸⁵² Second Expert Report of P. Spiller, ¶ 34.

⁸⁵³ Second Expert Report of P. Spiller, ¶ 34 and Figure II.

⁸⁵⁴ Second Expert Report of P. Spiller, ¶ 35.

c. Claimant Attempts to Have Its Cake And Eat It Too By Claiming For Alleged Lost Investments On Its Own Behalf And On Behalf Of All Other Non-Party Guatemalan Shareholders In FVG

374. Claimant argues that “[u]nder CAFTA [it] can recover both the amount it invested *and* the amount FVG’s minority shareholders invested in FVG.”⁸⁵⁵ Claimant premises this argument on CAFTA Article 10.16(1)(b), which provides, in relevant part, that “the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim”⁸⁵⁶ While Respondent did not identify any decision by a tribunal considering the proper construction of CAFTA Article 10.16, that article is modeled after NAFTA Article 1117, which has been considered and applied on a number of occasions.

375. Notably, neither the text of Article 10.16(1)(b) nor any of the jurisprudence applying its NAFTA cousin, Article 1117, allow for award and payment of damages to one shareholder on behalf of others. This Article, like NAFTA Article 1117, was intended to protect *enterprises* that could be injured “in a manner that does not directly injure the investor/shareholders.”⁸⁵⁷ It was not, however, intended or drafted to allow an investor who claims to have been injured directly (like RDC in this case) to recover damages allegedly suffered by domestic investors in the enterprise who are not claimants in the case and over whom the Tribunal would have no jurisdiction to award damages under the treaty. In fact, Article 10.16(b) says absolutely nothing about a claimant’s ability to recover for alleged losses of domestic investors who are not party to the arbitration; it only speaks of a claimant’s ability to seek compensation for damages suffered by the enterprise it owns or controls. What is more, CAFTA Article 10.26.2(b) and (c) specifically require that any damages awarded under CAFTA Article 10.16(1)(b) be awarded and paid directly to the enterprise, not the individual claimant-investor.⁸⁵⁸

⁸⁵⁵ Reply on the Merits, § IV.E.

⁸⁵⁶ **RL-61**, CAFTA Art. 10.16(1)(b).

⁸⁵⁷ **CL-143**, *GAMI v. Mexico*, Submissions of the United States, 30 June 2003, ¶ 11.

⁸⁵⁸ See, e.g., **RL-187**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Decision on Requests for Correction, Supplementary Decision And Interpretation, 10 July 2008) (Cremades, Rovine, Siqueiros) ¶¶ 20–24 (“*Archer Daniels Decision on Requests for Correction, Supplementary Decision and Interpretation*”); **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), ¶¶ 79–80, 86 (“*Mondev Award*”).

DAMAGES

376. Here, RDC has not argued that it cannot be compensated directly, and in fact has quite vociferously argued that it has been directly injured by Guatemala's actions, thus eliminating the risk that Article 10.16 was designed to guard against. Additionally, Claimant's principal minority shareholder was opposed to this arbitration and clearly has not consented to RDC seeking damages on its behalf or on behalf of FVG.⁸⁵⁹

377. Finally, and quite significantly, Claimant's proposed construction and application of Art. 10.16(b) in this case would work an end run around the jurisdictional limitations of the Treaty, as all other shareholders in FVG are Guatemalan and thus would not have had standing to bring these claims on their own behalf under CAFTA. Under customary international rules of interpretation and Art. 31 of the Vienna Convention on the Law of Treaties ("VCLT"), CAFTA must be interpreted 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. Article 10.16(b) which allows RDC to bring a claim on behalf of a Guatemalan enterprise that it owns and controls, cannot be read out of context by ignoring the definitions of "claimant," "enterprise of a party," and "investor of a party" provided in CAFTA Article 10.28. Under these definitions Cementos Progreso and all other FVG minority shareholders, who are all Guatemalan, do not qualify as a claimant or investor of party. Thus, awarding Claimant damages purportedly suffered by these other investors would impermissibly extend the Treaty's reach and violate the express jurisdictional limitations contained in CAFTA.

378. In light of the foregoing, the Tribunal should seek to compensate only RDC as an investor, and award whatever damages, *if any*, it determines in proportion to RDC's stake in FVG. Taking Claimant's alleged investment figure of US\$42.9 at face value for the sole purpose of computing what percentage of a damages award, if any, that should be granted to it, yields that 75% of it was contributed by RDC, and 25% by others.⁸⁶⁰

⁸⁵⁹ Ex. R-327, 2007-05-02, Letter from Cementos Progreso to RDC.

⁸⁶⁰ This US\$42.9 figure is computed in dollars of Dec 31, 2006, using Pratt's 12.9% WACC.

In Nominal US\$			In US\$ of Dec 31, 2006 (@ Pratt's 12.9% WACC)	
<i>In US\$</i>	<i>Amount</i>	<i>Percentage</i>	<i>Amount</i>	<i>Percentage</i>
(a) Cash Flows Received by FVG from RDC and Others				
RDC	12,800,682	77%	28,201,133	72%
Others	3,916,460	23%	10,719,469	28%
Total	16,717,142	100%	38,920,602	100%
(b) RDC's Additional Expenses Related to FVG				
RDC	2,308,179	100%	4,022,947	100%
Total (a) + (b)				
RDC	15,108,861	79%	32,224,080	75%
Others	3,916,460	21%	10,719,469	25%
TOTAL	19,025,321	100%	42,943,549	100%

Thus, should the Tribunal award any damages corresponding to alleged lost investments, it should award Claimant only 75% of the total loss proven, as opposed to claimed.

379. On the other hand, should the Tribunal conclude that the damages were suffered by FVG, the award should be made in the name of and payable exclusively to the enterprise—FVG—in accordance with CAFTA Article 10.26.2(b) and (c).

3. Claimant's Experts Continue To Underestimate The Discount Rate

380. In his First Report, Dr. Spiller criticized Mr. Thompson's selection of discount rate as inconsistent with standard practice of using the weighted cost of capital ("WACC").⁸⁶¹ Claimant's new economic expert, Dr. Pratt, agrees with Dr. Spiller that the WACC is the appropriate measure of discount rate, and Mr. Thompson adopts Dr. Pratt's proposed WACC. While the discount rates proposed by Claimant's expert and Dr. Spiller are now closer, there is still an important gap of 5.77% between them (Dr. Pratt proposes 12.90% while Dr. Spiller suggests 18.67%).

381. In his Second Report, Dr. Spiller explains why Dr. Pratt's selected input parameters for the WACC calculation, specifically cost of debt, cost of equity, and WACC weights are inappropriate for this case

⁸⁶¹ See First Expert Report of P. Spiller, ¶¶ 85–87.

DAMAGES

and his inputs are more reasonable and appropriate. Thus, based on the reasons developed by Dr. Spiller in his First and Second Reports, the Tribunal should apply a 18.67% discount rate.⁸⁶²

C. A Correct, Realistic, And Substantiated Analysis Of FVG's Circumstances And Outlook Immediately Prior To The *Lesivo* Declaration Demonstrates That FVG Was Worthless At That Time; Thus, Claimant Is Entitled To Zero Damages

382. In order to determine properly the position in which Claimant and FVG would have been had the *Lesivo* Declaration never been issued, Dr. Spiller employed the DCF valuation method instead of Claimant's "DCF plus NCC" approach, which, as has been established, double-counts damages and would grossly overcompensate Claimant. Dr. Spiller's valuation forecasts real estate revenues considering only those contracts in existence prior to the *Lesivo* Declaration, and projects railroad traffic based on historical average growth rates and the expected evolution of Guatemala's GDP.⁸⁶³

383. Given that Mr. MacSwain performed several corrections to his forecasts leading to increased projected revenues from the contracts existing prior to the *Lesivo* Declaration, and that Dr. Spiller accepted them, Dr. Spiller's estimated cash flows are now slightly higher than in his original report.⁸⁶⁴ Dr. Spiller also accepted Mr. Thompson's correction regarding revenues collected after the time of the *Lesivo* Declaration, while modifying the way in which Mr. Thompson introduced these revenues to express the values as of the valuation date.⁸⁶⁵ Finally, Dr. Spiller discounted the corrected forecasted cash flows using the WACC he estimated at 18.67%, in order to obtain the present value of these amounts as of the valuation date.⁸⁶⁶

384. Ultimately, Dr. Spiller concludes that FVG's fair market value as of December 2006 amounts to US\$ -2.7 million. This finding supports Dr. Spiller's original conclusion that no potential buyer would have been willing to pay a positive sum of money for FVG at the time the *Lesivo* Declaration was published. Thus, based on Dr. Spiller's assessment, Claimant's damages from the *Lesivo* Declaration amount to **zero**.

⁸⁶² First Expert Report of P. Spiller, Appendix D; Second Expert Report of P. Spiller, § IV.

⁸⁶³ Second Expert Report of P. Spiller, ¶ 96.

⁸⁶⁴ Second Expert Report of P. Spiller, ¶ 96 and n. 98.

⁸⁶⁵ Second Expert Report of P. Spiller, ¶ 97 and § III.4.1.

⁸⁶⁶ Second Expert Report of P. Spiller, ¶ 98.

D. Even If The Tribunal Determines That Claimant Or FVG Has Suffered Objectively-Quantifiable Damages, Claimant Has Failed To Prove A Causal Connection Between Those Damages And The *Lesivo* Declaration

385. As detailed in Respondent’s Counter-Memorial on the Merits, Claimant bears the burden of proving that the alleged breach of the treaty obligations—here, the *Lesivo* Declaration—was the direct cause of the alleged damages.⁸⁶⁷ Claimant has failed to carry its burden in this case.

386. Claimant has failed to establish that RDC or FVG incurred any monetary, compensable loss as a consequence of the *Lesivo* Declaration; in fact, all evidence points to the undeniable fact that FVG was worthless well before (and for reasons unrelated to) the *Lesivo* Declaration. As Dr. Spiller explains, during the period in which FVG operated the usufruct prior to the *Lesivo* Declaration (between 1999 and August 2006), “it proved to be unprofitable, presenting large losses (both cash and accounting) in every year between 2000 and 2006.”⁸⁶⁸ What is more, nothing in FVG’s history or condition immediately prior to the *Lesivo* Declaration could lead a reasonable observer to conclude that the company’s trend of losses and failure prior to the *Lesivo* Declaration would have reversed following the issuance of the declaration through the end of the usufruct term.⁸⁶⁹ As has already been discussed, Claimant’s experts’ projections to the contrary are nothing more than speculation.⁸⁷⁰

387. As explained in Respondent’s Counter-Memorial on the Merits, this case presents a set of circumstances remarkably similar to those encountered by the tribunal in the *Biwater v. Tanzania* (“*Biwater*”) case. There, the project at issue was a failure for the two years it operated prior to the illegal government action. The facility was in disrepair, and the investor had underestimated the

⁸⁶⁷ See Counter-Memorial on the Merits, § V.C; see also, **RL-168**, *Tradex Award*, ¶ 200; **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 **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.”); **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]”).

⁸⁶⁸ Second Expert Report of P. Spiller, ¶¶ 31–35 and Table I; First Expert Report of P. Spiller, ¶ 76.

⁸⁶⁹ Second Expert Report of P. Spiller, ¶¶ 39–41; First Expert Report of P. Spiller, ¶¶ 49–54.

⁸⁷⁰ Second Expert Report of P. Spiller, §§ II.3 and III.1–3.

DAMAGES

breadth of and expense associated with the work necessary to correct it.⁸⁷¹ Negotiations aimed at re-negotiating the contract between the investor and the state were unsuccessful and the relevant state organ terminated the contract.⁸⁷² 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 contract, occupying claimant's facilities, usurping the company's management control, and deporting its senior managers.

388. The majority of the *Biwater* tribunal (Toby Landau and Bernard Hanotiau) relied on a causation theory to conclude that Tanzania did not owe claimant compensation for the BIT violations.⁸⁷³ It found that "the actual, proximate or direct causes of the loss and damage for which [claimant] now seeks compensation were acts and omissions that had already occurred by [the date of the wrongful government conduct]."⁸⁷⁴ The tribunal also 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.

389. Like the enterprise/investment at issue in *Biwater*, FVG was a resounding failure practically since inception, with the aggravating factor that, while the history of failure in *Biwater* spanned two years, FVG's spanned for more than six. Additionally, like the disrepair in which the *Biwater* facility found itself, FVG had completely neglected and mismanaged the railroad in Guatemala, failing to live up to its promise (and Guatemala's expectation) that it would rehabilitate and operate the entire railway system. Both FVG's consistent failure and its neglect of the railway predate the government action of which Claimant complains here: the *Lesivo* Declaration.

⁸⁷¹ **Ex. RL-86, *Biwater Gauff (Tanzania) Ltd. v. Tanzania***, ICSID Case No. ARB/05/22 (Award, 24 July 2008) (Born, Landau, Hanotiau), ¶ 149 ("*Biwater Gauff Award*").

⁸⁷² **Ex. RL-86, *Biwater Gauff Award***, ¶ 799.

⁸⁷³ The concurring and dissenting arbitrator, Gary Born, also agreed that Tanzania did not owe claimant compensation, but applied a quantum reasoning to reach that result. He found that, although Tanzania's wrongful acts had caused injury to claimant, claimant had failed to "show that there was any monetary value associated with the injury that it suffered." **Ex. RL-86, *Biwater Gauff Award***, Concurring and Dissenting Opinion, ¶ 19. Mr. Born noted that at the time the wrongful conduct occurred, the property had no quantifiable monetary value because claimant was persistently losing money and it would continue to do so. **Ex. RL-86, *Biwater Gauff Award***, Concurring and Dissenting Opinion, ¶ 19. Applying either *Biwater* theory to this case yields the same result: Claimant deserves no compensation.

⁸⁷⁴ **Ex. RL-86, *Biwater Gauff Award***, ¶ 798.

390. Moreover, as established in the Counter-Memorial, the contemporaneous evidence confirms that Claimant did not have, or was not willing to contribute, the needed capital to reverse the course of its failed investment by building a standard gauge railway in the Southern, Pacific corridor of the country.⁸⁷⁵ Having recognized itself that this was what it needed to do to try and salvage its investment, but that it had not been able to do so for reasons not relating to the *Lesivo* Declaration, Claimant's investment was doomed to fail for this reason as well long before the *Lesivo* Declaration was issued.

391. Additionally, Claimant has admitted that, as a legal matter, Guatemala has not interfered with any of the contracts which comprise its investment,⁸⁷⁶ that the *Lesivo* Declaration concerned *only* its rights under Contract 143/158,⁸⁷⁷ that, as a practical matter, it remains in possession of not only the railroad equipment that was the subject of the *Lesivo* Declaration, but also of all of the property contemplated under Contract 402,⁸⁷⁸ its "Master Usufruct Contract,"⁸⁷⁹ that it continues to benefit from real estate contracts and leases, and that these revenues have *increased* since Guatemala issued the *Lesivo* Declaration.⁸⁸⁰

392. With respect to the limited scope of the *Lesivo* Declaration, Claimant has admitted not only that the *Lesivo* Declaration had no legal effect on any contract other than Contract 143/158, but also that Claimant and FVG did not consider Contract 143/158 greatly important (and much less, essential) to its investment.⁸⁸¹ Therefore, Guatemala's *Lesivo* Declaration of Contract 143/158 could not have caused any of the extensive damages alleged by Claimant. Additionally, the *Lesivo* Declaration did not cause Claimant to lose its right to exploit the real estate rights granted to it along the right-of-way under Contract 402. Claimant's rights under Contract 402 were, according to Claimant, "wholly unconnected" to its right to the use the railway equipment under Contract 143/158, but also, from a practical perspective, have remained unperturbed since the *Lesivo* Declaration. As Claimant has admitted, it and FVG have not only remained in full possession and enjoyment of their rights under Contract 402 (and

⁸⁷⁵ See Counter-Memorial on the Merits, ¶¶ 65, 114.

⁸⁷⁶ See Reply on the Merits, ¶ 229.

⁸⁷⁷ Reply on the Merits, ¶ 263 ("[T]he *Lesivo* Resolution on its face only concerns Contracts 143/158").

⁸⁷⁸ See Memorial on the Merits, ¶¶ 126, 130; *see also* Reply on the Merits, ¶¶ 263.

⁸⁷⁹ Reply on the Merits, 268.

⁸⁸⁰ **Ex. R-329**, Parties' Stipulation.

⁸⁸¹ Counter-Memorial on the Merits, ¶¶ 114, 259–61; *see Ex. R-37*, 2006-10-4, Aide-Mémoire for Meetings at Negotiating Table between FEGUA and Ferrovías.

DAMAGES

143/158, for that matter), but they have continued to receive revenue from the contracts that existed pre-*Lesivo* Declaration to this day. In fact, the revenue from the pre-*Lesivo* contracts has increased since the issuance of the *Lesivo* Declaration.⁸⁸²

393. Additionally, despite that FVG was moribund prior to the *Lesivo* Declaration, Claimant has argued to this Tribunal that the *Lesivo* Declaration destroyed its business by, among other ways, causing “potential joint venture partners to back out of projects to rebuild and reopen the South Coast corridor. 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.⁸⁸³ In his first expert report, Prof. Spiller noted 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. None of these “ambitious projects” had been mentioned before, and they all seemed to be based on preliminary talks that FVG was having with third parties.⁸⁸⁴ Thus, the only proof that Claimant has mustered to support its claims is nothing more than speculation.

394. Claimant’s allegations regarding one of the “ambitious projects” that miraculously would have taken FVG off the path of failure and loss that it had been on for the first seven years of operations — Expogranel’s alleged US\$100 million investment—is emblematic of the extremes to which Claimant has gone in its attempt to prove that the *Lesivo* Declaration caused it damages. As Mr. Freddie Pérez —

⁸⁸² See Memorial on the Merits, ¶¶ 126, 130; see also Reply on the Merits, ¶¶ 263; **Ex. R-329**, Parties’ Stipulation. Furthermore, as has been previously discussed, whatever effect the mere publication of the *Lesivo* Declaration might have had on FVG, it is not Respondent’s fault. Claimant’s press release, issued in all major newspapers the business day immediately following the publication of the *Lesivo* Declaration in the little-read Official Gazette, misleadingly informed creditors, investors and customers that the *Lesivo* Declaration had “*placed additional pressure on FVG by making its customers and suppliers wary of doing business with it.*” See **Ex. R-190**, 2006-08-28, Press Release: Guatemalan Government Violates Terms of Railroad Privatization Agreement. In other words, FVG informed its creditors, investors and suppliers what the effects of the *Lesivo* Declaration would be on *them* before those effects could materialize. It is thus unsurprising that Claimant has presented a handful of statements of individuals who echo this message. What is more, as is explained in greater detail at paragraphs 91-95, *supra*, FVG’s “dead man walking” press release was part of a broader strategy to use the Guatemalan media to shape the public’s perception of the *Lesivo* Declaration and its effect, which included a number of press conferences a other orchestrated media interactions during which Claimant misrepresented the legal scope an implications, and exaggerated the effect, of the *Lesivo* Declaration. See **Ex. C-132**, 2006-09-08, *Noticiero Guatevision* report.

⁸⁸³ First Expert Report of P. Spiller, ¶ 52.

⁸⁸⁴ First Expert Report of P. Spiller, ¶ 53.

Expogranel's General Manager at the relevant time — explains, 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, and Expogranel never even considered investing that "astronomical sum."⁸⁸⁵ What is more, Mr. Pérez explains that FVG never presented Expogranel with a business plan that would have allowed Expogranel's constituent sugar mills to even consider the viability or desirability of a joint venture with FVG.⁸⁸⁶ Clearly, local sugar enterprises would have never invested any money — much less US\$100 million — without first studying a detailed business plan for the project and ascertaining its feasibility.⁸⁸⁷

395. Mr. Pérez has made clear 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 ended because the project was not economically feasible.⁸⁸⁸ The unfeasibility of the venture was confirmed early by Roberto Morales' pre-feasibility study, which was commissioned by FVG and concluded that for a number of reasons — including the magnitude of the investment required and the limited volume to be transported by the sugar mills — the rehabilitation of the south corridor simply could not be justified by its potential use by the sugar mills.⁸⁸⁹ The conclusion was echoed later — in 2006 — by a study conducted by financial and management consultants at Mesoamérica.⁸⁹⁰ None of the reasons for the project's unfeasibility and Expogranel's lack of interest in it, however, had anything whatsoever to do with the *Lesivo* Declaration, which was not published until almost two years after the discussions ended without favorable results.

396. Ultimately, as with the enterprise/investment at issue in *Biwater*, Claimant has not proven and cannot prove that the *Lesivo* Declaration was the direct, proximate cause of any damage it suffered.

⁸⁸⁵ Second Witness Statement of F. Pérez, ¶¶ 4–6; First Witness Statement of F. Pérez, ¶ 9; see **Ex. R-122**, 2007-06-14, LOS ANGELES TIMES, *An Uphill Climb*. Claimant's explanations and evidence offered in its Reply about the irregularities in the statement it provided with its Memorial on the Merits are insufficient and suspect. In his second witness statement, Mr. Pérez reiterates that he never appeared before the notary who allegedly legalized the declaration, and that the content of that declaration is inconsistent with reality. Second Witness Statement of F. Pérez, ¶¶ 8–17.

⁸⁸⁶ Second Witness Statement of F. Pérez, ¶¶ 4–6.

⁸⁸⁷ Second Witness Statement of F. Pérez, ¶ 6; First Witness Statement of F. Pérez, ¶¶ 12(a)–(f).

⁸⁸⁸ Second Witness Statement of F. Pérez, ¶ 6; First Witness Statement of F. Pérez, ¶ 9(b).

⁸⁸⁹ First Witness Statement of R. Morales, ¶¶ 4–14; Second Witness Statement of R. Morales, ¶¶ 4–12.

⁸⁹⁰ Second Witness Statement of M. Marroquín, ¶¶ 4–10.

DAMAGES

Contrary to Claimant's allegation that "*lesividad was, by itself, the death knell*" for FVG,⁸⁹¹ it is clear that Claimant's and FVG management's own mismanagement had heralded the company's demise long before the *Lesivo* Declaration had been issued.⁸⁹² Guatemala "cannot be required to compensate Claimant for its own deficient operation of the usufruct prior to the *Lesivo* Resolution."⁸⁹³

E. If The Tribunal Awards Any Damages, It Should Condition Guatemala's Payment Obligation Upon Claimant Renouncing And Forfeiting Whatever Rights It Has Under The Usufruct Contracts (402, 143/158/41 and 820) And Returning All Lands And Equipment Covered By Those Contracts To Guatemala

397. Claimant's damages arguments under all theories of breach are premised on the assumption that it has lost or been deprived of the entire claimed value of their investment in all of the usufruct contracts, not just Contract 143/158. However, Guatemala has proven (and Claimant has admitted) that it continues to enjoy all real estate (and other) rights under Contract 402 (and has continued to receive income from the pre-existing contracts without interruption from the date of the *Lesivo* Declaration to the present), and that it has possession and control of the railway equipment granted to FVG in usufruct under Contract 41 and 143/158.⁸⁹⁴

398. In the case of a damages award in Claimant's favor, allowing Claimant or FVG to remain in possession and control of, and deriving income and other benefits from, the rights granted to it in usufruct under contracts 402, 143/158/41 and 820, would be the most egregious form of double compensation. Thus, if the Tribunal awards any damages to Claimant for Guatemala's alleged breaches of its obligations under CAFTA, it should condition Guatemala's obligation to pay on Claimant's first renouncing and forfeiting all of the rights it has under the usufruct contracts (402, 143/158 and 41), returning all lands and equipment covered by those contracts to Guatemala.⁸⁹⁵

⁸⁹¹ Reply on the Merits, ¶ 307.

⁸⁹² See **Ex. R-327**, 2007-05-02, Letter from Cementos Progreso to RDC (where RDC's local partner in FVG, Cementos Progreso, blames the project's shortcomings not on the *Lesivo* Declaration, but on "management's inability to develop a profitable operation").

⁸⁹³ Second Expert Report of P. Spiller, ¶ 35.

⁸⁹⁴ See Memorial on the Merits, ¶¶ 126, 130; see also Reply on the Merits, ¶ 229; **Ex. R-329**, Parties' Stipulation.

⁸⁹⁵ See **CL-154**, *Compañía del Desarrollo de Santa Elena SA v. Costa Rica*, ICSID Case No. ARB/96/1 (Award, 17 February 2000) (Fortier, Lauterpacht, Weil) ¶ 111(5), (6) (ordering that the amounts granted as damages be deposited with a bank, and ordering the bank only to release those funds to claimant upon confirmation by counsel for both parties that claimant had transferred the property at issue to

Footnote continued on next page

F. Claimant Is Not Entitled To Receive Compound Pre-Award Interest

399. For the reasons detailed above, Respondent not only maintains that it did not breach any of its obligations under CAFTA by issuing the *Lesivo* Declaration, but also that, even if the Tribunal were to find that a breach occurred, Claimant is not entitled to any damages. However, should the Tribunal decide that Claimant has met its burden of proving a breach of Guatemala's undertakings under CAFTA by issuing the *Lesivo* Declaration and that such breach has caused Claimant quantifiable damages, it should not apply to its award the inflated and unsubstantiated pre-award 9.34% compound interest rate that Claimant seeks. Respondent has already explained that there "are few rules within the scope and subject of international law that are better settled than the one that compound interest is not allowable...."⁸⁹⁶ While Claimant has cited to various awards that purportedly applied a compound interest rate, it has failed to demonstrate why the circumstances in this case warrant a compound interest rate. As Prof. Crawford summarized in his Third Report on State Responsibility:

although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed.⁸⁹⁷

As stated, Claimant has failed to show the existence of any "special circumstances" that would justify compounding in this case, or how such compounding is necessary to achieve full reparation under these facts.

Footnote continued from previous page

respondent); *see also*, **RL-77**, *ADC Award*, ¶ 523 (ordering Claimant to transfer the unencumbered ownership in the shares under dispute to Respondent upon payment of the damages under the award); **RL-111**, *Metalclad Award*, ¶ 127 (ordering Claimant's local subsidiary to "relinquish as from [the moment it received payment under the award] all claim, title and interest in the [property subject of the dispute]"; **RL-133**, *Tecmed Award*, ¶ 199 (ordering that "[p]romptly after effective payment to the Claimant of all sums payable to it by the Respondent under this award, the Claimant shall take all the necessary steps to transfer, or caused to be transferred, to the Respondent...the assets [subject of the dispute].")

⁸⁹⁶ **RL-143**, ILC Draft Articles on State Responsibility Comment to Art. 38, ¶ 8 (citations omitted) (quoting *R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran*).

⁸⁹⁷ **RL-196**, Professor James Crawford, *Third Report on State Responsibility*, August 4, 2000 (ILC 2000), ¶ 211.

DAMAGES

400. Claimant's proposed interest rate of 9.34% is also unsupported and inconsistent with international arbitral practice. Claimant cites only to its expert, Mr. Pratt, in support of the 9.34% interest rate it proposes. Mr. Pratt, in turn, justifies the rate by claiming, without any rationale or support, that "the amount of damages found by the Tribunal can be looked at as a 'coerced loan' by RDC to the Republic of Guatemala from the time of the breach until the time of the judgment."⁸⁹⁸ Neither Mr. Pratt nor Claimant explain how or why this "coerced loan" rationale should apply in this case, cite to any authority to support its application, or substantiate if or how it meets the CAFTA "commercially reasonable rate" standard.⁸⁹⁹ The interest rate proposed by Claimant arrived at by applying the "coerced loan" rationale is not only wholly unsupported, but also inconsistent with established practice in international arbitration.

401. Instead of Claimant's suggested rate, Respondent proposes that the Tribunal apply a pre-award interest rate equivalent to the six-month LIBOR +2% to any monetary award in this case. A rate of LIBOR +2% is "a widely recognized conservative measure, which has been adopted in the awards of previous international tribunals."⁹⁰⁰ Unlike Claimant's speculative and unsupported rate based on the "coerced loan" rationale, LIBOR +2% is a "commercially reasonable" rate as required by CAFTA, as it represents the interest rate at which banks lend funds to each other, plus a reasonable margin (2%) to account for the surcharge banks invariably charge to customers.⁹⁰¹ Indeed, Claimant's compounding analysis in its Reply seems to concede that the appropriate analysis to determine the applicable interest rate should not be Mr. Pratt's "coerced loan" rationale, but on a market rationale —like LIBOR +2% —that considers

⁸⁹⁸ Expert Report of S. Pratt, at 15.

⁸⁹⁹ **RL-61**, CAFTA Art. 10.7.3.

⁹⁰⁰ **RL-115**, *National Grid*, ¶ 294; see **RL-194**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Award, 28 March 2011) (Fernández-Armesto, Paulsson, Voss), ¶¶ 351–56 ("*Lemire Award*") (awarding interest at LIBOR plus 2%); **RL-195**, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (Award, 5 September 2008) (Sacerdoti, Veeder, Nader), ¶ 314 (same); **RL-124**, *PSEG Award*, ¶ 348 (same); **RL-127**, *Sempra Award*, ¶ 486 (same); **CL-153**, *Rumeli Award*, ¶ 769 (same).

⁹⁰¹ See, e.g., **RL-194**, *Lemire Award*, ¶¶ 352, 355–56 (holding that LIBOR is a "commercially reasonable rate" and that "2% is a reasonable margin, which reflects the surcharge which an average buyer would have to pay for obtaining financing based on LIBOR."); **RL-115**, *National Grid*, ¶ 294 (applying LIBOR plus 2% noting that the appropriate rate to apply was "an average interest rate which Claimant would have paid to borrow from that date to the present.").

a reasonable re-investment rate, i.e. the interest rate Claimant would have earned if he had invested the awarded value in the market.⁹⁰²

402. For the foregoing reasons, the Tribunal should adopt Respondent's "commercially reasonable rate" of LIBOR +2% and reject Claimant's speculative and unsupported 9.34% rate.

G. Claimant Is Not Entitled To An Award Of Costs And Attorney's Fees; Instead, Claimant Should Be Made To Pay For Guatemala's Costs And Attorney's Fees

403. As is clear from the preceding analysis, FVG was a losing proposition since its inception, generating an abysmal annual return on equity of -26% between 2000 and 2006 and losses in every single one of those years. There can be no doubt that this dismal performance had no relation, causal or otherwise, with the *Lesivo* Declaration of which Claimant complains in this proceeding, as it predates the measure. As Dr. Spiller has explained, there is nothing in FVG's historical performance or its future economic outlook that would even remotely suggest that this trend of failure could be reversed. As far back as 2002, Claimant knew that, through no fault of the Respondent, it could not realize the substantial fiber optics leasing income it had projected when bidding for the usufruct.⁹⁰³ After years of losses and faced with the inevitable failure of FVG, Claimant resorted to this arbitration as an exit strategy, and has sought to obtain from this Tribunal what its business never would have yielded.⁹⁰⁴ Claimant's local partners, Cementos Progreso, underscored how unnecessary, counterproductive and unreasonable Claimant's resort to arbitration was in light of the "good" offer the Government had made in the context of negotiations.⁹⁰⁵

404. Consequently, Guatemala respectfully requests that the Tribunal deny Claimant's request for costs and fees and reiterates its request, pursuant to CAFTA Article 10.26.1 and Article 61(2) of the ICSID

⁹⁰² See Claimant's Reply on the Merits, ¶ 576 (noting that "Claimant could certainly have placed its money in a savings account instead of investing in Guatemala . . .").

⁹⁰³ See **Ex. C-27(e)**, 2002 FVG Annual Report, p. RDC-001079 (Where FVG management notes that "[w]hile 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 have to offer."

⁹⁰⁴ Counter-Memorial on the Merits, ¶¶ 179–216.

⁹⁰⁵ See **Ex. R-327**, 2007-05-02, Letter from Cementos Progreso to RDC.

DAMAGES

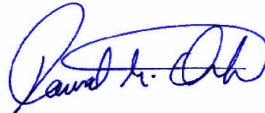
Convention, that the Tribunal award it all costs, legal fees and its share of the administrative expenses it has incurred in connection with its defense against Claimant's allegations during the course of these proceedings, plus commercially reasonable interest on any such award. Claimant's inappropriate use of this international arbitration proceeding as an exit strategy from a failed investment cannot be rewarded with an award of costs and fees; to the contrary, Claimant should pay Guatemala's expenses and counsel fees, plus interest on any such award.

VII. Conclusion And Relief Requested

405. 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 do *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;
- (v) If the tribunal awards any damages to Claimant, that such award and payment thereon be conditioned on Claimant *first* renouncing and forfeiting all rights it has under the usufruct contracts (402, 143/158/41 and 820) and returning all lands and equipment covered by those contracts to Guatemala; and
- (vi) That Claimant must pay Guatemala's costs, legal fees, and share of administrative expenses incurred in these proceedings, plus interest at a commercially-reasonable rate.

Respectfully submitted,



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