

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

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**RAILROAD DEVELOPMENT CORPORATION  
CLAIMANT**

v.

**THE REPUBLIC OF GUATEMALA  
RESPONDENT**

**ICSID Case No. ARB 07/23**

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**RESPONDENT'S REPLY ON JURISDICTION  
REGARDING  
CLAIMANT'S FAILURE TO COMPLY  
WITH CAFTA ARTICLE 10.18**

11 AUGUST 2008

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## I. INTRODUCTION

1. In its Counter-Memorial of 11 July 2008, Claimant argues that it has complied with its obligations under CAFTA-DR Article 10.18. As the Republic will demonstrate in the present submission, however, Claimant has *failed* to comply with these obligations, because Claimant's ongoing arbitrations in Guatemala involve measures also alleged in the claims before this Tribunal. Accordingly, unless Claimant abandons the local arbitrations, *i.e.* dismisses those proceedings with prejudice, per the requirements set forth in Article 10.18, this Tribunal lacks jurisdiction over the claims before it.<sup>1</sup>

2. In Section II.B below the Republic explains that Article 10.18 of CAFTA-DR ("CAFTA" or "the Treaty") represents an express limitation on the consent to arbitrate given by the State parties to the Treaty, whereby the parties consent to arbitrate exclusively those investment disputes not already being adjudicated in other fora. This is a common restriction among investment protection treaties, and the reasons for its incorporation include preventing a State from being held liable multiple times for the same acts and, similarly, preventing a claimant from seeking relief or collecting reparations more than once for the same state acts.

3. In Sections II.C and II.D below the Republic discusses how the State parties to CAFTA effected this ***limitation on consent*** through the Article 10.18 requirement that claimants choose between adjudicating a dispute either before local tribunals or before international tribunals, but not before both simultaneously, in order to, *inter alia*, avoid a situation where a claimant would be permitted to obtain relief under multiple proceedings for the same measures. Per Article 10.18, claimants must thus waive their right to initiate or continue proceedings concerning State acts for which claimants also seek relief in the Treaty claims and must take actions consistent with that waiver by dismissing with prejudice the local proceedings.<sup>2</sup> If such proceedings are not abandoned, the State's consent to arbitrate under the Treaty does not exist, and the tribunal lacks jurisdiction over the claims before it.

4. Section III demonstrates that Claimant impermissibly seeks relief for the same measures through both its local claims and its Treaty claims. This overlap triggers the

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<sup>1</sup> In light of Claimant's explanations provided in § III.1 of its Counter-Memorial, the Republic is sufficiently satisfied that Claimant has presented a waiver on behalf of FVG and that the issue of its authority to present a waiver on behalf of FVG is rendered moot given FVG's signed waiver. This, of course, is without prejudice to the arguments made by the Republic that the waivers presented by RDC and FVG are defective and insufficient.

<sup>2</sup> The text of Article 10.18 (2) requires that the dismissal of the local arbitrations be a dismissal ***with prejudice***, meaning that Claimant is barred from later re-initiating any claim that involves the same measures at issue in this ICSID proceeding. As argued *infra*, Claimant must take action to effectuate the waiver required by Article 10.18(2). The text of that article requires Claimant to waive its right to "***initiate or continue***" before any local court or tribunal any claim that involves the same measures at issue in the CAFTA proceeding. CAFTA Art. 10.18 (2) (emphasis added). By requiring claimants to waive their right to "initiate or continue" local claims, CAFTA is thereby requiring that any pending claims that involve the same measures be dismissed with prejudice. If the requirement were otherwise, claimants could dismiss a local claim and later reinitiate that same claim. Such a result would render the waiver requirement meaningless.

Article 10.18 requirement that the local proceedings be abandoned **before** the Tribunal can exercise jurisdiction over Claimant's Treaty claims.

5. Claimant attempts to persuade the Tribunal that the measure – or measures – (Claimant alleges both) at issue in the Treaty claims is/are not the same as those measures at issue in the local arbitrations. Claimant's argument is factually and legally incorrect, hinges on an incorrect and overly narrow interpretation of the word "measure" as utilized in Article 10.18, and appears to be founded on two contradictory propositions:

6. First, Claimant argues that ***the only*** measure at issue in the Treaty claim is the Acuerdo Gubernativo No. 4333-2006 (in Claimant's terms, the "Lesivo Resolution").<sup>3</sup> Claimant argues that the Treaty claim thus cannot concern any measure at issue in the local arbitrations.

7. Second, Claimant argues that ***the various*** measures at issue in the Treaty claims were all related to alleged breaches of the Treaty and are thus necessarily not the same measures at issue in the local arbitrations, which concern alleged breaches of contract.

8. Both of these propositions are flawed.

9. As the Republic will demonstrate in Section III.A below, the first proposition is false. "Measure", as utilized in Article 10.18, means the state acts upon which the Claimant's Treaty and local claims are predicated. Claimant's own submissions make clear that Claimant's Treaty claims involve a multiplicity of state acts or measures with respect to which Claimant seeks redress, some of which are directly at issue in the local arbitrations.

10. As the Republic will demonstrate in Section III.B below, the second proposition is predicated on a misunderstanding of Article 10.18. Article 10.18 requires that if there is any overlap in the measures for which Claimant seeks relief in its Treaty claims and its local claims, Claimant must abandon the local claims before the Tribunal can exercise jurisdiction over the Treaty claims. The fact that the local claims and the Treaty claims are based on the alleged breach of different legal obligations is of no significance.

11. In Section IV below the Republic summarizes its conclusions. Because Claimant's local arbitrations concern measures also alleged in Claimant's Treaty claims, Claimant has failed to fulfill the requirements of Article 10.18, and the Republic's consent to arbitrate these disputes is thus lacking unless the local arbitrations are dismissed with prejudice. Accordingly, the Republic respectfully requests that this Tribunal order Claimant to abandon its local arbitrations by dismissing them with prejudice within forty-five days from the date of the Tribunal's ruling. Should Claimant fail to comply with this order, the Republic respectfully requests that the Tribunal dismiss the claims before it for lack of jurisdiction based on the absence of consent on the part of the Republic to adjudicate these disputes.

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<sup>3</sup> See Claimant's Exhibit C-1, Acuerdo Gubernativo No. 4333-2006 of 11 August 2006.

**II. THE REPUBLIC CONSENTED ONLY TO ARBITRATE DISPUTES NOT ALREADY ADJUDICATED IN OTHER FORA**

**A. This Tribunal's jurisdiction derives from the consent of the Republic**

12. It is uncontroversial that an arbitral tribunal's jurisdiction derives from the consent of the parties to the arbitration.<sup>4</sup> It is equally settled that this jurisdiction is bound by the precise scope of consent of the parties.<sup>5</sup>

13. Indeed, the ICSID Convention itself makes clear that for an ICSID tribunal to exercise jurisdiction over a dispute – before even considering the jurisdictional requirements present in the substantive treaty or agreement at issue – the tribunal must be satisfied that the parties have consented to such an arbitration.<sup>6</sup>

14. This threshold consent is provided in CAFTA Article 10.17, where the Republic and the other State parties to the Treaty provided their consent to arbitrate before ICSID disputes concerning the provisions of CAFTA's Chapter 10.

**B. Article 10.18 restricts State consent to disputes not already pending in other fora**

15. The consent expressed in CAFTA Article 10.17 is exclusively limited, however, to *only* those disputes not being already adjudicated in other fora. This limitation on consent is a common feature among investment protection treaties.<sup>7</sup>

16. First, CAFTA Article 10.17 itself contains this restriction on consent, as it provides that the parties have consented to arbitrate only those disputes that satisfy the requirements

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<sup>4</sup> See Respondent's Exhibit R-1, CRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 191-92 (2001).

<sup>5</sup> See id. at 234.

<sup>6</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

<sup>7</sup> See, e.g., North American Free Trade Agreement art. 1121, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; 2004 U.S. Model Bilateral Investment Treaty art. 26 [hereinafter U.S. Model BIT], available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf); Free Trade Agreement Between the United States and Chile, art. 10.17, signed 6 June 2003, entered into force 1 January 2004 [hereinafter U.S.-Chile FTA], available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/asset\\_upload\\_file1\\_4004.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf); Bilateral Investment Treaty Between the United States and Uruguay art. 26, signed 4 November 2005, entered into force Nov. 1, 2006 [hereinafter U.S.-Uruguay BIT].

of Chapter II of the ICSID Convention.<sup>8</sup> Chapter II of the ICSID Convention in turn expressly provides that

*Consent of the parties to arbitration* under this Convention ***shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.*** A Contracting State may require the ***exhaustion of local administrative or judicial remedies as a condition of its consent*** to arbitration under this Convention.<sup>9</sup>

17. Second, this limitation on consent is expressly articulated in the waiver requirement of Article 10.18:

**Article 10.18: Conditions and Limitations on Consent of Each Party**

...

**2. No claim may be submitted** to arbitration under this Section ***unless:***

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) ***the notice of arbitration is accompanied,***

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<sup>8</sup> CAFTA Article 10.17 reads:

Consent of Each Party to Arbitration

(1) Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

(2) The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) ***Chapter II of the ICSID Convention (Jurisdiction of the Centre)*** and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an “agreement in writing;” and

(c) Article I of the Inter-American Convention for an “agreement.”

Dominican Republic-Central America-United States Free Trade Agreement art. 10.17, Aug. 5, 2004 (emphasis added).

<sup>9</sup> ICSID Convention art. 26 (emphasis added).

- (i) for claims submitted to arbitration under Article 10.16.1(a), ***by the claimant's written waiver***, and
  - (ii) for claims submitted to arbitration under Article 10.16.1(b), ***by the claimant's and the enterprise's written waivers***
- of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.***

18. The reason for this requirement is straightforward: State parties to the Treaty intended to avoid a multiplication of proceedings, conflicting outcomes and legal uncertainty, forum shopping, double jeopardy for Respondent and double redress for Claimant.<sup>10</sup> These reasons have been extensively discussed in the context of NAFTA Article 1121, which contains a provision analogous to CAFTA Article 10.18, requiring that a claimant waive any right to initiate or continue any proceeding concerning the measures alleged to constitute a breach of the treaty as a condition precedent to filing its treaty claims. NAFTA Article 1121 states as follows:

**Article 1121: Conditions Precedent to Submission of a Claim to Arbitration**

...

***2. A disputing investor may submit a claim under Article 1117 [or Article 1116] to arbitration only if both the investor and the enterprise:***

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) ***wave their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach*** referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of

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<sup>10</sup> See, e.g., *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Arbitration Rules (Award of 26 January 2006) (van den Berg, Ariosa, Wälde) at ¶ 118; *Waste Management, Inc. v. United Mexican States (Waste Management II)*, ICSID Case No. ARB(AF)/00/3 (Decision of the Tribunal on Mexico's Preliminary Objection Concerning the Previous Proceedings of 26 June 2002) (Crawford, Civiletti, Magallón Gómez) at ¶ 27; *Waste Management I*, Award ¶ 27.

damages, before an administrative tribunal or court under the law of the disputing Party.

19. In its Counter-Memorial Claimant notes that “[t]he applicable NAFTA language is quite different from the CAFTA provision at issue here,”<sup>11</sup> and suggests that these differences imply that the United States intended to *attenuate* in CAFTA the waiver requirement that existed in NAFTA.<sup>12</sup>

20. Claimant is incorrect, and its argument is flawed.

21. Claimant points out that “the terms ‘condition precedent’ and ‘only if’ do not appear in the CAFTA waiver article at all.”<sup>13</sup> This is correct. NAFTA Article 1121, concerning “Conditions Precedent” to the submission of a claim, states that a claim may be submitted “only if” it is accompanied by a valid waiver, and CAFTA Article 10.18, concerning “Conditions and Limitations on Consent,” states that no claim may be submitted “unless” it is accompanied by a valid waiver.

22. Claimant, however, incorrectly infers from these formulations that there is a difference in meaning between “only if” and “unless.” The plain meaning of the text suggests no such difference, and Claimant provides no support whatsoever for this interpretation.

23. Further, Claimant’s argument that the CAFTA waiver requirement is somehow less stringent than the NAFTA waiver requirement defies logic. The only place where the NAFTA Article 1121 and CAFTA Article 10.18 language is indeed “quite different,” as Claimant states, is in the heading of the sections, and this difference demonstrates that the CAFTA waiver requirement is only *more* exacting than its NAFTA counterpart. While NAFTA Article 1121 concerns “Conditions Precedent to Submission of a Claim to Arbitration,”<sup>14</sup> CAFTA Article 10.18 articulates express “**Conditions and Limitations on Consent** of Each Party.”<sup>15</sup> In other words, NAFTA framed the waiver requirement as a “condition precedent,” unbound to any express reservation by the State parties to the scope of their consent and, consequently, it does not provide a direct link to the absence of a tribunal’s jurisdiction over a particular dispute, as is provided in CAFTA Article 10.18. This is indeed “quite different” from the formulation that exists in CAFTA – as well as in Article 26 of the U.S. Model BIT and all its twin clauses, as Claimant itself recognizes<sup>16</sup> – where the State parties to the Treaty chose to leave no room for doubt that they did *not* consent to arbitration, and thus a tribunal would have *no* jurisdiction over a dispute, *unless* the requirements of Article 10.18 were met.

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<sup>11</sup> Counter-Memorial ¶ 41.

<sup>12</sup> Counter-Memorial ¶¶ 44 *et seq.*

<sup>13</sup> Counter-Memorial ¶ 44.

<sup>14</sup> NAFTA Art. 1121.

<sup>15</sup> CAFTA Art. 10.18.

<sup>16</sup> Counter-Memorial ¶ 46.

24. These differences notwithstanding, CAFTA's provisions were drafted to generally reflect the standards embodied in NAFTA,<sup>17</sup> and NAFTA jurisprudence and commentary on the substantive aspects of the waiver requirement is thus instructive for our purposes.

25. In *International Thunderbird Gaming Corporation v. Mexico*, for example, the tribunal noted:

In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. *The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.*<sup>18</sup>

26. The United States restated this idea in *Canfor Corp. v. United States of America* by noting that NAFTA Article 1121

*demonstrate[s] the treaty's objective of creating effective dispute resolution procedures and avoiding the inefficacies of duplicative proceedings between the same parties. . . . These provisions evidence the Parties' intent to avoid providing claimants with the ability to submit under Chapter Eleven the same claims that were submitted elsewhere. As the tribunal in Waste Management stated: "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages.* This is precisely what NAFTA Article 1121 seeks to avoid.”<sup>19</sup>

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<sup>17</sup> The summary of CAFTA submitted to Congress notes: “Chapter Ten establishes rules to protect investors from one Party against unfair or discriminatory government actions when they make or attempt to make investments in another Party’s territory. Its provisions reflect traditional standards incorporated in earlier U.S. investment agreements (**including those in the North American Free Trade Agreement** and U.S. bilateral investment treaties) and in customary international law, and contain several innovations that were incorporated in the free trade agreements with Chile and Singapore as well as others.” (emphasis added) Dominican Republic-Central America-United States Free Trade Agreement, Summary of the Agreement, at 12 (emphasis added), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/CAFTA/Transmittal/asset\\_upload\\_file888\\_7818.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/CAFTA/Transmittal/asset_upload_file888_7818.pdf).

<sup>18</sup> *Int'l Thunderbird Gaming Corp.*, Award ¶ 118.

<sup>19</sup> Objection to Jurisdiction of Respondent United States of America at 28–29 (16 October 2003), *Canfor Corp. v. United States of America*, UNCITRAL Arbitration Rules (emphasis added) (footnotes omitted), available at

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**C. Article 10.18 requires that proceedings concerning “any measure alleged” in the CAFTA claims be dismissed**

27. Waiver requirements such as those found in CAFTA Article 10.18 and in NAFTA Article 1121 are *substantive* requirements imposing affirmative obligations on claimants to act in accordance with these requirements.<sup>20</sup> Specifically, to fulfill the requirements of CAFTA Article 10.18, a claimant participating in other simultaneous proceedings concerning “any measure alleged” in its CAFTA claims must dismiss those proceedings with prejudice if it wants to maintain its CAFTA claims.

28. All three State parties to NAFTA share in this understanding as regards NAFTA Article 1121. As the United States noted in its submissions in *Tembec Inc. v. The United States*:

*Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the same measures in another forum.* All three NAFTA Parties have confirmed in submissions to NAFTA tribunals that a claimant’s failure to terminate parallel claims invalidates any purported waiver under Article 1121. The United States has stated its position in this submission and in its Statement of Defense on Jurisdiction in this proceeding. In *Waste Management, Inc. v. United Mexican States*, Canada stated “[i]t follows from a good faith interpretation of this obligation [in Article 1121] that the investor is required to act in conformity with the waiver that it is required to produce. In other words, the waiver must be made effective by the investor.” And Mexico likewise confirmed in that same case that “[t]he claimant’s

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<http://www.state.gov/documents/organization/25567.pdf>. Similarly, in *Waste Management I*, Canada noted that “[Article] 1121 is designed to protect the integrity of a NAFTA State Party’s domestic court system. The State Party must have assurances from the investor that it is committed to a single forum for resolving its claim to monetary damages. This is necessary to avoid forum shopping, procedural harassment and double jeopardy.” See Submission of the Government of Canada ¶ 6 (17 December 1999), *Waste Management I*, available at <http://naftaclaims.com/Disputes/Mexico/Waste/WasteCanada1128Jurisdiction.pdf>; Second Submission of Canada Pursuant to Article 1128, at ¶ 55 (30 April 2001), *Methanex v. United States of America UNCITRAL Arbitration Rules*, available at <http://www.state.gov/documents/organization/3946.pdf>.

<sup>20</sup> *Waste Management I*, Award ¶ 31. See generally Submission of the Government of Canada ¶ 8 (17 December 1999), *Waste Management I*, available at <http://naftaclaims.com/Disputes/Mexico/Waste/WasteCanada1128Jurisdiction.pdf> (“It follows from a good faith interpretation of this obligation that the investor is required to act in conformity with the waiver that it is required to produce. In other words, the waiver must be made effective by the investor.”)

*refusal to provide a clear waiver, and to abide by it, must lead to the conclusion that it has not consented to the resolution of the dispute through arbitration.”<sup>21</sup>*

29. The United States also articulated this understanding in its overview of the United States-Uruguay BIT, which entered into force on 1 November 2006 and whose Article 26 is identical to CAFTA’s Article 10.18:

Article 26 also specifies that no claim may be submitted to arbitration under Section B unless the claimant - or, in the event a claimant makes a claim on behalf of an enterprise that it owns or controls, the enterprise - waives in writing the right to initiate or continue any proceedings relating to the disputed measure in a court or administrative tribunal of either Party or in other dispute-settlement mechanisms. This Article thus generally permits investors to pursue other legal remedies during the three-year limitations period. *After arbitration is initiated under Section B of the Treaty, however, all other legal action must be abandoned* (except for actions for interim injunctive relief that do not involve monetary damages and that are brought for the sole purpose of preserving a claimant’s rights during arbitration).<sup>22</sup>

30. In the present case, Claimant has failed to comply with the requirements set forth in CAFTA Article 10.18, because it has chosen to continue with its local arbitrations notwithstanding that these, as will be discussed below,<sup>23</sup> constitute proceedings that directly involve measures alleged in its CAFTA claims.

#### **D. Overlap in measures for which Claimant seeks relief in local and CAFTA claims triggers requirement that local claims be abandoned**

31. In order to comply with Article 10.18, then, Claimant must dismiss with prejudice any proceedings related to any measure alleged in its Treaty claims.<sup>24</sup> According to

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<sup>21</sup> Objection to Jurisdiction of Respondent United States of America at 36 (4 February 2005), *Tembec Inc. v. United States of America*, UNCITRAL Arbitration Rules (alterations in original) (emphasis added) (footnotes omitted), available at <http://www.state.gov/documents/organization/42165.pdf>.

<sup>22</sup> U.S. State Dep’t, Overview of the U.S.-Uruguay Treaty at 106 (emphasis added), available at <http://tcc.export.gov/static/Uruguay%20BIT%20overview.pdf>.

<sup>23</sup> See Section III, below.

<sup>24</sup> CAFTA Article 2.1 states that the term “measure includes any law, regulation, procedure, requirement, or practice.” This same definition can be found in various investment protection treaties to which the United States is a party. *See, e.g.*, North American Free Trade Agreement art. 201, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289; 2004 U.S. Model Bilateral Investment Treaty art. 1 [hereinafter U.S. Model BIT], available at [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file8](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file8)

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Claimant, however, because its local arbitrations are based on measures concerning breaches of contract while its Treaty claims are based on measure/s surrounding the Lesivo Resolution, the proceedings cannot relate to the same measure/s.<sup>25</sup> Claimant, however, misunderstands the basic distinction between legal obligations and the State acts or measures alleged to breach those obligations.<sup>26</sup>

32. Obligations and measures are distinct. Various legal obligations may be borne from different legal instruments; and certain State acts, *i.e.* measures, may or may not violate those legal obligations. Similarly, a contractual violation is a legal determination ascribed to a State act; it is not a State act in itself. It is State *acts*, and not the labels given them, that constitute measures under CAFTA Article 10.18.<sup>27</sup>

33. For example: a given contractual agreement may prohibit the State act or measure of expropriation without just compensation. A treaty such as CAFTA may contain such a prohibition as well. If a claimant is seeking redress for an alleged expropriatory act by the State, whether the claim is based in the contractual obligation or the treaty obligation, the claimant is seeking redress with respect to the same State act or measure. Similarly, certain State conduct may breach a given contractual obligation, and a treaty, such as CAFTA, may give rise to liability for that same conduct given its prohibition on treatment of foreign investors that is unfair and inequitable. An investor that – based on the same State act – presents a breach of contract claim in a local forum based on the contractual prohibition and, simultaneously, presents a claim of unfair an inequitable treatment before ICSID, has presented different *claims* based on different *legal instruments* in two different fora. The claims, however, are *based on the same measure*.

34. The test for determining whether local arbitrations relate to measures alleged in the Treaty claims is thus simple: if overlap exists between those measures, *i.e.* *State acts*, for which Claimant seeks relief in its local arbitrations and those State acts for which Claimant seeks relief in its Treaty claims, the proceedings are “related,” and the Tribunal thus lacks jurisdiction over the Treaty claims unless the local proceedings are abandoned. The relationship between the legal obligations allegedly breached in the local claims and those allegedly breached in the Treaty claims is of no consequence to this analysis.

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47\_6897.pdf; Free Trade Agreement Between the United States and Chile, art. 2.1, signed 6 June 2003, entered into force 1 January 2004 [hereinafter U.S.-Chile FTA], available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/asset\\_upload\\_file1\\_4004.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf).

<sup>25</sup> Counter-Memorial ¶ 31 & n.20.

<sup>26</sup> See discussion below at section III.

<sup>27</sup> Claimant’s substitution of obligations for measures is further untenable because such an understanding would render Article 10.18 redundant as regards local proceedings: local proceedings would *never* involve violations of the Treaty and would thus *never* involve measures overlapping with those alleged in the Treaty claims. *See Waste Management, Inc. v. United Mexican States (Waste Management I)*, ICSID Case No. ARB(AF)/98/2 (Award of 2 June 2000) (Cremades, Hight, Siqueiros) at ¶ 27.

35. This is a settled position in the jurisprudence.

36. As the *Waste Management I* tribunal stated:

*It is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting “expropriation” under Article 1110 of the NAFTA.<sup>28</sup>*

In ultimately finding impermissible overlap in local and international claims, the tribunal in *Waste Management I* found that the relevant question for finding impermissible overlap between proceedings was whether “actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of NAFTA.”<sup>29</sup>

37. The situation before this Tribunal is remarkably similar. Claimant seeks relief both in its Treaty claims and in its local claims for many of the very same State acts – the Republic’s alleged failure to pay into the trust fund and an alleged failure to remove “squatters.” Claimant’s attempts to present these same acts under different packaging does nothing to cure the impermissible overlap between its local claims and its Treaty claims.

38. In its Counter-Memorial, Claimant cited a fragment of *Waste Management I* in an effort to support its position.<sup>30</sup> When the passage is not taken out of context, however, it contradicts Claimant’s assertions.

In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. *However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for*

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<sup>28</sup> *Waste Management I*, Award ¶ 27(a) (emphasis added).

<sup>29</sup> *Waste Management I*, Award ¶ 27.

<sup>30</sup> Counter-Memorial ¶ 28.

**damages. This is precisely what NAFTA Article 1121 seeks to avoid.**<sup>31</sup>

39. The question before the Tribunal, then, is whether there is any commonality among the State acts that form the legal basis for the local arbitrations and those that form the legal basis for the Treaty claims in order to avoid a situation where Claimant would obtain relief from multiple fora in relation to *the same State acts*. As demonstrated in Section III, *infra*, there is such impermissible commonality here.

#### **E. Failure to comply with the requirement set forth in Article 10.18 constitutes a jurisdictional impediment**

40. As Claimant correctly notes, the wording of Article 10.18 mirrors analogous provisions in other United States investment protection treaties.<sup>32</sup> Indeed, the list of investment protection treaties to which the United States is a party which contain waiver requirements that mirror the language of Article 10.18 is quite expansive – *all* such investment protection treaties that have come into force after the release of the 2004 United States Model BIT contain the language of Article 26 of that Model BIT.<sup>33</sup> The similarities in these provisions are instructive.

41. Article 10.18 of CAFTA, Article 26 of the US Model BIT, and all analogous provisions in the post-2004 related treaties are entitled *Conditions and Limitations on Consent of Each Party*, as Claimant itself notes.<sup>34</sup> Article 10.18 and all its analogs thus *begin*, as discussed above, by making clear that the State parties to the Treaty expressly restrict their consent to arbitrate per the terms of those provisions. Specifically, ***unless Claimant fulfills the***

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<sup>31</sup> *Waste Management I*, Award ¶ 27 (emphasis added). Similarly, the United States stated that the phrase “with respect to” in NAFTA Article 1121 should be construed broadly, to include proceedings with a “legal basis derived from, refer[ring] to, and hav[ing] their origin in” the measure at issue (which, in *Canfor*, was U.S. antidumping and countervailing duty laws). Reply on Jurisdiction of Respondent United States of America at 10–11 (6 August 2004), *Canfor Corp. v. United States of America*, UNCITRAL Arbitration Rules, available at <http://www.state.gov/documents/organization/35199.pdf>.

<sup>32</sup> Counter-Memorial ¶ 46.

<sup>33</sup> U.S. Model BIT art. 26; Bilateral Investment Treaty Between the United States and Uruguay art. 26, signed 4 November 2005, entered into force Nov. 1, 2006; Bilateral Investment Treaty Between the United States and Rwanda art. 26, signed 19 February 2008; U.S.-Chile FTA art. 10.17; Free Trade Agreement Between the United States and Colombia art. 10.18, signed 22 November 2006; Free Trade Agreement Between the United States and Morocco art. 10.17, signed 15 June 2004, entered into force 1 January 2006; Free Trade Agreement Between the United States and Oman art. 10.17, signed 19 January 2006; United States-Panama Trade Promotion Agreement art. 10.18, signed 28 June 2007; United States-Peru Trade Promotion Agreement art. 10.18, signed 12 April 2006; Free Trade Agreement Between the United States and the Republic of Korea art. 11.18, signed 30 June 2007; Free Trade Agreement Between the United States and Singapore art. 15.17, signed 6 May 2003, entered into force 1 January 2004.

<sup>34</sup> Counter-Memorial ¶ 46.

**requirements set forth in Article 10.18, the Republic does not consent to arbitrate under the Treaty, and the Tribunal lacks jurisdiction over the claims before it.<sup>35</sup>**

42. Claimant's failure to comply with the requirements set forth in Article 10.18 thus constitutes a jurisdictional impediment to its claims.<sup>36</sup>

43. This is an issue that has been comprehensively treated in NAFTA jurisprudence addressing NAFTA Article 1121. In *Waste Management I*, the tribunal held that it lacked jurisdiction due to the claimant's failure to comply with the waiver requirements of NAFTA Article 1121.<sup>37</sup> Failure to comply with these requirements was similarly recognized as a "jurisdictional barrier" in *Waste Management II*<sup>38</sup> and in various other cases.<sup>39</sup>

44. The United States itself has adopted this position. In *Tembec Inc.*, the United States clarified in its Respondent's Objection to Jurisdiction that "The NAFTA Parties' consent to Chapter Eleven arbitration is subject to the fulfillment of [Article 1121's waiver] requirement by the claimant. **Without a valid waiver, there is no consent of the parties necessary for**

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<sup>35</sup> See ICSID Convention art. 25.

<sup>36</sup> In its Counter-Memorial Claimant argues that the Republic bears the burden of proof at this jurisdictional stage. Counter-Memorial ¶ 35. This is incorrect. As the tribunal stated in the *Softwood Lumber Consolidated Proceedings*, the burden lies with claimant to establish "that all preconditions and formalities under Articles 1118-1121 are fulfilled." *Canfor Corp. v. United States of America and Forest Products Ltd. v. United States of America (Softwood Lumber Cases)*, UNCITRAL Arbitration Rules (Decision on Preliminary Questions of 6 June 2006) (van den Berg, de Mestral, Robinson), at ¶ 176. The same is true for CAFTA Article 10.18.

<sup>37</sup> *Waste Management I*, Award § IV.

<sup>38</sup> *Waste Management II*, Decision on Preliminary Objection ¶ 27.

<sup>39</sup> See, e.g., *Int'l Thunderbird Gaming Corp.*, Award ¶118; *Pope & Talbot v. Gov't of Canada*, UNCITRAL Arbitration Rules (Award on Harmac Motion of 24 Feb. 2000) (Dervaird, Belman, Greenberg), at ¶ 18; Submission of the Government of Canada ¶ 11 (17 December 1999), *Waste Management I*, available at <http://naftaclaims.com/Disputes/Mexico/Waste/WasteCanada1128Jurisdiction.pdf> ("[If the waiver requirement is not met, a NAFTA Party] cannot be assumed to have consented to the arbitration and the Tribunal lacks jurisdiction to hear the case"); Statement of Defence ¶ 21 (27 November 1997), *Ethyl Corp. v. Gov't of Canada*, UNCITRAL Arbitration Rules, available at <http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpStatementOfDefense.pdf> ("[B]ecause Ethyl failed to comply with Articles 1119 through 1121 [waiver] and 1137 of Chapter 11 of NAFTA, the claim set out in the Statement of Claim is null and void and this Tribunal is utterly without jurisdiction to entertain it.").

It is worth noting that in those cases where NAFTA tribunals have not barred arbitration proceedings due to deficiencies with a claimant's waiver, the only relevant issue concerned the "un-timeliness" of the filing of the waivers and not the insufficiency of these waivers. See *Int'l Thunderbird Gaming Corp.*, Award ¶118; *Ethyl Corp. v. Gov't of Canada*, UNCITRAL Arbitration Rules (Award on Jurisdiction of 24 June 1998) (Böckstiegel, Brower, Lalonde) at ¶¶ 89–91.

*a tribunal to assume jurisdiction over a dispute.*<sup>40</sup> Accordingly, the United States argued, Claimant in that case had “*failed to comply with the waiver requirement in Article 1121 of the NAFTA and its claims must therefore be dismissed for lack of jurisdiction.*”<sup>41</sup>

45. Similarly, because Claimant in this case has failed to comply with the requirements of CAFTA Article 10.18, this Tribunal lacks jurisdiction over the claims before it.

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<sup>40</sup> Objection to Jurisdiction of Respondent United States of America at 35 (4 February 2005), *Tembec Inc. v. United States of America*, UNCITRAL Arbitration Rules (emphasis added) (footnotes omitted), available at <http://www.state.gov/documents/organization/42165.pdf>.

<sup>41</sup> Statement of Defense on Jurisdiction of Respondent United States of America ¶ 10 (15 December 2004), *Tembec Inc. v. United States of America*, UNCITRAL Arbitration Rules (emphasis added), available at <http://www.state.gov/documents/organization/40223.pdf>.

### III. CLAIMANT IMPERMISSIBLY SEEKS RELIEF IN ITS LOCAL CLAIMS AND ITS TREATY CLAIMS FOR THE SAME MEASURES

#### A. Claimant's allegations that its ICSID claims are based "only" on the Lesivo Resolution are incorrect and belied by its own submissions

##### 1. Summary of Claimant's allegations

46. Claimant's contention that it has effectively complied with the requirements of Article 10.18 relies on the proposition that the Treaty claims before this Tribunal do not concern the same measures at issue in Claimant's arbitrations before the *Centro de Arbitraje de la Cámara de Comercio de Guatemala*.<sup>42</sup> Claimant states clearly and categorically in its Counter-Memorial that

[a] cursory look at RDC's CAFTA claim makes it plainly evident that ***the only measure alleged to constitute a breach referred to in Article 10.16 is the Lesivo Resolution.***<sup>43</sup>

47. Claimant reiterates the idea multiple times:

In contrast, with respect to RDC's ICSID claim, ***the measure that is alleged to constitute a breach referred to in Article 10.16 is not FEGUA's breaches of contract but the Lesivo Resolution promulgated by former President Berger which related to the entirely different Deeds 143/158.***<sup>44</sup>

Thus, ***the measure that is the subject of the waiver required under CAFTA Article 10.18.2(b) is the Lesivo Resolution . . .***<sup>45</sup>

In summary, the waiver required by CAFTA does not pertain to FVG's pre-existing and ongoing arbitration

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<sup>42</sup> *Compañía Desarrolladora Ferroviaria S.A. c. Ferrocarriles de Guatemala*, Centro de Arbitraje de la Cámara de Comercio de Guatemala ("CENAC") Case Nos. 02-2005, 03-2005. Note that in its Request for Institution of Arbitration Proceedings, RDC incorrectly identified the local arbitrations as being based on breaches of contract of Deeds 143/158 and 820, Request for Arbitration ¶ 34, while in its Counter-Memorial, it notes that they are based on breaches of contract of Deeds 402 and 820. Counter-Memorial at ¶31 n.20. It would appear that the local arbitrations are based on allegations of breaches of the latter deeds, Deeds 402 and 820.

<sup>43</sup> Counter-Memorial ¶ 32 (emphasis added).

<sup>44</sup> Counter-Memorial ¶ 30 (emphasis added).

<sup>45</sup> Counter-Memorial ¶ 33 (emphasis added).

disputes in Guatemala because *the measure that is alleged to constitute a breach referred to in Article 10.16 in RDC's ICSID claim is not the same measure that is the subject of the domestic proceedings.*<sup>46</sup>

48. Because any overlap in measures alleged in its local arbitrations and those alleged in its Treaty claims would mean that Claimant would be required to abandon its local arbitrations in order for this Tribunal to have jurisdiction over Claimant's Treaty claims, Claimant attempts to argue – albeit unconvincingly – that no such overlap exists because the *only* measure alleged in its Treaty claims is the Lesivo Resolution, and this measure was never alleged in the local arbitrations.

49. This assertion, however, is belied by Claimant's own submissions, which establish that Claimant's Treaty claims concern multiple measures, including those that form the basis of its local arbitrations.

## 2. In fact, Claimant alleges that a variety of “measures” constitute a breach of the Treaty

50. As clearly and categorically as Claimant stated in its Counter-Memorial that the *only* measure alleged to constitute a Treaty violation is the Lesivo Resolution, Claimant stated in its Request for Arbitration that “RDC and its investments have been subject to **measures** imposed by Guatemala in violation of CAFTA Article 10.3.”<sup>47</sup>

51. This allegation is repeated multiple times:

As required by CAFTA Article 10.1, the breaches of Chapter 10 described below arise from **measures** adopted or maintained by a Party relating to “covered investments” made by “investors of another Party.”<sup>48</sup>

The Lesivo Resolution *and other actions* of the Government of Guatemala in connection with such resolution constitute “**measures**” adopted or maintained by Guatemala.<sup>49</sup>

The effect of the Government of Guatemala’s **measures**, actions and omissions as part of the Lesivo Resolution

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<sup>46</sup> Counter-Memorial ¶ 37 (emphasis added).

<sup>47</sup> Compare Counter-Memorial ¶ 32 with Request for Arbitration ¶ 68.

<sup>48</sup> Request for Arbitration ¶ 18 (emphasis added).

<sup>49</sup> *Id.* (emphasis added).

process has been financially and commercially devastating and has resulted in an indirect expropriation of RDC's investment.<sup>50</sup>

...

To the contrary, the Lesivo Resolution ***and other government measures*** which accompanied the lesivo process defeated the legitimate expectations of RDC . . . The Government's ***measures***, therefore, defeat reasonable stability and predictability of the commercial framework for business planning and investment which Guatemala agreed to ensure by signing CAFTA.<sup>51</sup>

52. Ultimately, in its request for relief, Claimant seeks to recover for:

Damages arising from infringing ***measures*** by Guatemala which are inconsistent with its obligations contained within Section A of Chapter 10 of CAFTA . . .<sup>52</sup>

Fees and expenses incurred to oppose the promulgation of the infringing Lesivo Resolution ***and other infringing measures*** . . .<sup>53</sup>

As demonstrated in the next section, these "measures" alleged to breach the Republic's Treaty obligations include precisely those same measures for which Claimant seeks relief in the local arbitrations, *viz.* the Republic's alleged failure to pay into the trust fund and the Republic's alleged failure to remove "squatters."<sup>54</sup> Indeed, Claimant itself recognizes that these local arbitration measures form an "***integral part***" of Claimant's Treaty claim.<sup>55</sup>

53. By expressly basing its Treaty claims not only on the Lesivo Resolution, but also on "other affirmative actions by the Government of Guatemala,"<sup>56</sup> "other government measures which accompanied the lesivo process,"<sup>57</sup> and general "conduct by the Government of Guatemala,"<sup>58</sup> Claimant is challenging in its ICSID proceeding *all* acts by

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<sup>50</sup> Request for Arbitration ¶ 58 (emphasis added).

<sup>51</sup> Request for Arbitration ¶ 64 (emphasis added).

<sup>52</sup> Request for Arbitration ¶ 70(a) (emphasis added).

<sup>53</sup> Request for Arbitration ¶ 70(c) (emphasis added).

<sup>54</sup> See, e.g. Request for Arbitration ¶ 65.

<sup>55</sup> See, Request for Arbitration ¶ 50 (emphasis added).

<sup>56</sup> Request for Arbitration ¶ 50.

<sup>57</sup> Request for Arbitration ¶ 64.

<sup>58</sup> Request for Arbitration ¶ 66.

the Republic which, in Claimant's estimation, have harmed its interests, including those that are at issue in the local arbitrations. Claimant's assertion that it is "plainly evident that the only measure alleged to constitute a breach referred to in Article 10.16 is the Lesivo Resolution"<sup>59</sup> is, therefore, incorrect.

54. Thus, what Claimant attempts to do is to have it both ways: Assert in the context of this jurisdictional proceeding that its claims before this Tribunal only relate to one specific governmental measure – the Lesivo Resolution – while at the same time attempting through legerdemain to ultimately envelop claims with respect to other governmental measures (measures that are brought forth in its Request for Arbitration) within the penumbra of its claims regarding the Lesivo Resolution.

## **B. The measures upon which Claimant's Treaty claims and local claims are based overlap**

### **1. Claimant misunderstands the meaning of "measures"**

55. In its Counter-Memorial Claimant correctly points out that the contractual breaches at issue in the local arbitrations are outside of the jurisdictional scope of this Tribunal.<sup>60</sup> Notwithstanding this admission, Claimant concludes – incorrectly – that the *measures* alleged to constitute a breach of the Treaty do not overlap with the *measures* complained of in the Local Arbitrations.

56. This faulty inference permeates Claimant's argument.

57. Claimant repeats this mistake multiple times. It argues that the Local Arbitrations concern alleged breaches of *obligations* distinct from those *obligations* allegedly breached in the Treaty, and that this fact itself demonstrates that there is no overlap in measures. In essence, Claimant conflates the distinct concepts of "obligations" and "measures."

58. Claimant states, for example, that:

It is clear from the above that *the obligations now sought to be enforced in the Claimant's CAFTA claim are distinct* from those in the Guatemalan arbitration proceedings.<sup>61</sup>

Claimant also provides the following assertion:

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<sup>59</sup> Counter-Memorial ¶ 32.

<sup>60</sup> Counter-Memorial ¶ 31 ("Unfortunately, FEGUA's breaches of contract that are the subject of FVG's pending arbitrations in Guatemala are not actionable under CAFTA because the agreement between FEGUA and RDC predates CAFTA's entry into force (and, thus, by definition, the agreement does not qualify as an "investment agreement").

<sup>61</sup> Counter-Memorial ¶ 34 (emphasis added).

Thus, the Claimant’s conduct in continuing its domestic arbitration proceedings in Guatemala is fully consistent with the waiver that accompanied its CAFTA claim, as required by CAFTA Article 10.18.2(b), precisely because *the contractual violations involved therein are entirely different measures and are not invoked in Claimant’s CAFTA claim.*<sup>62</sup>

59. This illustrates yet again Claimant’s fundamental error in misunderstanding the distinction between obligations and measures. As explained above, the test for “overlap” in proceedings concerns the measures or State acts for which Claimant ultimately seeks relief, and not the source of the legal obligations allegedly violated.

## **2. The measures upon which Claimant’s Treaty claims and local claims are based undeniably overlap**

60. The first of Claimant’s local arbitrations, CENAC Case No. 02-2005, filed on 17 June 2005 (“Trust Fund Claim”), involves alleged breaches of contract 820 and is based on the allegation that the Republic, through Ferrocarriles de Guatemala, “assumed the obligation and commitment to contribute to the trust all income resulting from the use, usufruct, easement, or leasing contracts that are currently in effect and were entered into by said entity and third parties . . . [and] it has utterly breached said obligation.”<sup>63</sup> This claim concerns contractual obligations on the part of the Republic, and the relevant *measures* in this claim concern the alleged failure by the Republic to pay into the trust fund.

61. Similarly, the second local arbitration, CENAC Case No. 03-2005, filed on 26 July 2005 (“Squatter’s Claim”), involves alleged breaches of contract 402 and is based on the allegation that the Republic, through Ferrocarriles de Guatemala, “fail[ed] to comply with its obligation to solve the problem caused by the invasion of some buildings, parts of some properties, and the right of way by third parties, through the establishment, promotion and completion of legal procedures corresponding to the eviction.”<sup>64</sup> This claim, as the one before it, concerns contractual obligations on the part of the Republic, and the relevant *measures* in this claim concern the alleged failure by the Republic to undertake the judicial processes necessary to remove the “squatters.”

62. While Claimant makes assertions to the contrary in its Counter-Memorial,<sup>65</sup> these measures – the Republic’s alleged failure to pay into the trust fund and the Republic’s alleged

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<sup>62</sup> Counter-Memorial ¶ 39 (emphasis added).

<sup>63</sup> See Respondent’s Exhibit R-2, CENAC Case No. 02-2005, Claimant’s Memorial of 3 October 2005 pp 5-6.

<sup>64</sup> See Respondent’s Exhibit R-3, CENAC Case No. 03-2005, Claimant’s Memorial of 27 September 2005 p 2; See Respondent’s Exhibit R-4, CENAC Case No. 03-2005, Claimant’s Request for Arbitration of 25 July 2005 p 2.

<sup>65</sup> See Counter-Memorial ¶¶ 30, 32, 36.

failure to remove “squatters” from the right of way – are, per Claimant’s own Request for Arbitration, an “integral part” of Claimant’s Treaty claims.<sup>66</sup>

63. In the section of the Request for Arbitration concerning the Republic’s alleged breach of CAFTA’s minimum standard of treatment obligations, for example, Claimant states:

Further, having induced RDC to invest millions of dollars into the country’s railway system and having solemnly undertaken obligations to investors under CAFTA, the Government of Guatemala unilaterally decreed that Deeds 143/151 were being cancelled and the rolling stock taken over by the Government thereby denying FVG’s rights, forcing FVG to operate at a loss and/or lose the right-of-way Usufruct by being unable to conduct railroad operations.

*Specifically, since the Lesivo Resolution, the Government of Guatemala has failed to remove “squatters” from the right of way and to make the contractually obligated payments to the Trust Fund designated to rehabilitate the right of way granted under the Usufruct.<sup>67</sup>*

64. These alleged failures, the very measures at issue in the local arbitrations, permeate Claimant’s Treaty claims. In its Request for Arbitration, Claimant states, for example:

Since the Lesivo Resolution, *the Government of Guatemala has made successive specific decisions not to pay into the Trust the funds required by Deed 820, and, through FEGUA, has made successive specific decisions not to remove squatters from the railway right of way, stations and yards. These decisions are an integral part of the Lesivo Resolution and other affirmative actions by the Government of Guatemala to deny RDC and FVG the minimum standards of treatment required by international law and, thereby, to make it impossible for FVG to remain in business and thereby to appropriate FVG’s assets without compensation.<sup>68</sup>*

...

In declaring the lease of the railroad stock null and void and against the public interest, the Government is attempting to expropriate Claimant’s property and investment by “decree” and without compensation. *The Government knew*

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<sup>66</sup> Request for Arbitration ¶ 50

<sup>67</sup> Request for Arbitration ¶ 65 (emphasis added).

<sup>68</sup> Request for Arbitration ¶ 50 (emphasis added).

*perfectly well that it had failed to comply with its [contractual] obligations under the Usufruct and therefore, to avoid the consequences of its illegal actions, decided to take the rail stock away from FVG and then blame FVG for failing to perform under the Usufruct Contracts.<sup>69</sup>*

...  
Additionally, FVG faces an epidemic of private and public sector entities using the right of way without FVG permission and without paying compensation [i.e., “squatters”].<sup>70</sup>

...  
*[T]he Lesivo Resolution has emboldened “commercial squatters” to make blatant use of FVG’s right of way without even considering entering into leases or making rental payments to FVG as legally required;*

...  
Since the Lesivo Resolution, based on the public perception that FVG is no longer a viable entity, *FVG has faced more instances in which private and public sector entities have used the right of way without FVG’s permission and compensation;*

...  
FVG has consistently objected to Guatemala's and FEGUA's failure to comply with their obligations under Deeds 402, 143/158 and 820. *In particular, Guatemala, through its agency, FEGUA, has failed to remove "squatters" from the right of way and to make the contractually obligated payments to the Trust Fund granted under the above mentioned Deed 820 designated to rehabilitate the right of way granted under Deed 402. Through February, 2007, the outstanding balance owed to the Trust Fund by Guatemala exceeds Three Million Dollars (\$3,000,000.00).*

The above allegations establish that same measures at issue in the local arbitrations are squarely at issue in this ICSID proceeding.

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<sup>69</sup> Request for Arbitration ¶ 47 (emphasis added).

<sup>70</sup> Request for Arbitration ¶ 49 (emphasis added).

65. Claimant cannot now escape the fact that the very same measures that form the basis of its local arbitrations are also at issue in this ICSID arbitration. Its own allegations undeniably confirm this point. Claimant's allegations concerning the Republic's alleged failure to pay into the trust fund and failure to remove squatters, whether presented in the local arbitrations or re-presented in the Treaty claims, are allegations based on the same State acts, the same measures.

66. The overlap in measures becomes most apparent when one looks to the overlap in relief sought in each of the arbitrations. Not only is Claimant simultaneously seeking redress for the same measures in the two fora, but *Claimant is seeking in this ICSID arbitration all damages that would have been recoverable in the local arbitration proceedings*.

***RDC and FVG are entitled to recover in this proceeding those damages which would, except for such violations of CAFTA, be recovered in those proceedings.<sup>71</sup>***

67. This effort to double-dip on damages is also evident in the allegations from the local proceedings. In the arbitration related to the Trust Fund Claim, Claimant seeks damages for the Republic's alleged failure to make payments to the trust fund. Claimant requests:

(d) That [the Court] hold that Ferrocarriles de Guatemala had an obligation to pay the total amount of debt mentioned in clause (c) [concerning the amounts allegedly owed to the trust fund] . . . , an obligation that shall be paid in a term not exceeding 30 days. For that purpose, Ferrocarriles de Guatemala must be obligated to deposit in the trust the total income arising from the contracts subject to the trust, which it has received as of January 1, 2000.

(e) That [the Court] hold ***that FEGUA's breach has caused damages and losses to [Claimant]*** the company I represent, thus the court must make a specific statement on that respect.

(f) That the Honorable Court establish the amount of damages and losses mentioned in item "e" above, based on the evidence gathered during this arbitration, as well as the term in which the amount should be paid to the company I represent.<sup>72</sup>

68. Similarly, in the arbitration related to the Removal Claim, Claimant seeks damages for the Republic's alleged failure to remove the "squatters." Claimant requests:

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<sup>71</sup> Request for Arbitration ¶ 51

<sup>72</sup> See Respondent's Exhibit R-2, CENAC Case No. 02-2005, Claimant's Memorial of 3 October 2005 p 20.

(c) That [the Court] hold that Ferrocarriles de Guatemala had an obligation to carry out the implementation of solutions to the problem of invasions by third parties to some properties .

...

(d) That [the Court] hold ***that FEGUA's breach has caused damages and losses to Claimant*** the entity I represent, and the arbitration court should issue a statement in that regard.

(e) That [the Court] hold that the damages and losses referred to in item “e” above should be quantified by experts, based on the evidence obtained within this arbitration process. To this effect, the entity I represent asks the Honorable Court to establish the procedure through which the experts should quantify the damages and losses.<sup>73</sup>

69. In comparison, the Request for Arbitration related to the Treaty claims similarly seeks relief for these very same alleged failures. In addition to Claimant’s express request to recover in this ICSID proceeding all damages that would have been recovered in the local arbitrations, in the prayer for relief Claimant seeks redress for “infringing measures by Guatemala,”<sup>74</sup> where Claimant itself emphasized that the same alleged failures on the part of the Republic to pay into the trust fund and to remove “squatters” constituted an “integral part”,<sup>75</sup> of the “infringing measures.”<sup>76</sup>

70. Claimant’s argument that the measures alleged in the local arbitrations are not alleged in the Treaty claims is, therefore, demonstrably false. Claimant’s own submissions disclose that Claimant impermissibly asks this Tribunal to adjudicate disputes based on measures already being adjudicated in other fora, and Claimant seeks the same damages in both fora, all in violation of the express jurisdictional requirement of CAFTA Article 10.18.

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<sup>73</sup> See Respondent’s Exhibit R-3, CENAC Case No. 03-2005, Claimant’s Memorial of 27 September 2005 p 14; See Respondent’s Exhibit R-4, CENAC Case No. 03-2005, Claimant’s Request for Arbitration of 25 July 2005 p 2.

<sup>74</sup> Request for Arbitration ¶ 70(a).

<sup>75</sup> Request for Arbitration ¶ 50.

<sup>76</sup> Request for Arbitration ¶ 70(a).

#### **IV. CLAIMANT'S WAIVERS ARE DEFECTIVE AND INSUFFICIENT AND THE TRIBUNAL LACKS JURISDICTION TO CONTINUE HEARING THIS CASE**

71. Claimant's Treaty claims and local claims impermissibly overlap with respect to the measures alleged for which Claimant seeks relief. As articulated in Article 10.18 of the Treaty, the Republic did not consent to arbitrate disputes involving such an overlap. Absent this consent, the Tribunal lacks jurisdiction to continue hearing this case.

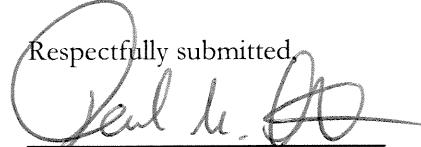
72. The Republic respectfully suggests that in light of Claimant's failure to comply with the requirements of Article 10.18, the Tribunal must dismiss the claims before it outright for lack of jurisdiction.

73. In the interest of efficiency, however, the Republic acknowledges the possibility that the Tribunal may wish to permit Claimant an additional opportunity to comply with its Article 10.18 obligations. In the event that the Tribunal should deem it proper to allow Claimant such an opportunity, the Republic respectfully requests that this Tribunal issue an order continuing the suspension of this matter on the merits for a period of forty-five days to permit Claimant to cure the deficiencies in its waiver by dismissing with prejudice the local arbitrations. In such event, the Republic also requests that the Tribunal order Claimant not to file or reinitiate any proceedings in any other fora that involve any of the measures/state actions that are at issue in this ICSID arbitration.

74. In the event that the Tribunal elects to provide Claimant with additional time to comply with its Article 10.18 obligations, and should Claimant fail to adequately comply with the Article 10.18 requirements within the time permitted by the Tribunal, then the Republic respectfully requests that this Tribunal dismiss this arbitration outright for lack of jurisdiction.

75. Because Claimant has failed to comply with the clear requirements of Article 10.18, and because this failure has resulted in the Republic's needless expenditure of resources to object to this failure--regardless of whether the Tribunal chooses to dismiss the claims before it outright or to grant an additional opportunity for Claimant to cure its failure--the Republic respectfully requests that the Tribunal award the Republic its legal fees and costs associated with this phase of the proceedings.

Respectfully submitted,



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