

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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In the Matter of the Arbitration between

**RAILROAD DEVELOPMENT CORPORATION**  
Claimant

and

**REPUBLIC OF GUATEMALA**  
Respondent

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

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**DECISION ON OBJECTION TO JURISDICTION**  
**CAFTA ARTICLE 10.20.5**  
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**MEMBERS OF THE TRIBUNAL**

Dr. Andrés Rigo Sureda, President  
Honorable Stuart E. Eizenstat, Arbitrator  
Professor James Crawford, Arbitrator

**SECRETARY OF THE TRIBUNAL**

Natalí Sequeira

**DATE:** November 17, 2008

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## Decision on Objection to Jurisdiction

### Under CAFTA Article 10.20.5<sup>1</sup>

#### I. PROCEDURAL BACKGROUND

1. On June 14, 2007, the Railroad Development Corporation ('RDC' or 'Claimant') filed with the International Centre for Settlement of Investment Disputes ('ICSID') a Request for the Institution of Arbitration Proceedings against the Republic of Guatemala ('Respondent', 'Guatemala' or 'the Republic') under Articles 10.16 and 10.17 of the Dominican Republic – Central America – United States of America Free Trade Agreement ('CAFTA')<sup>2</sup> on its own behalf and on behalf of its Compañía Desarrolladora Ferroviaria, S.A., which does business as Ferrovías Guatemala ('FVG'), a Guatemalan company majority-owned and controlled by RDC (the 'Arbitration Request'). RDC owns eighty two per cent (82%) of the shares of FVG and eighteen percent (18%) is divided among sixty-five Guatemalan investors.
2. ICSID registered the Arbitration Request on August 20, 2007. The Claimant appointed the Honorable Stuart E. Eizenstat and the Respondent Professor James Crawford. The parties failed to agree on the Chairman of the Arbitral Tribunal. The Acting Secretary-General of ICSID, after consulting with the parties, appointed Dr. Andrés Rigo Sureda on April 8, 2008. Thus the Tribunal was constituted on April 14, 2008.
3. On May 29, 2008, the Respondent requested that the Tribunal consider, under Article 10.20.5 and on an expedited basis, an objection to the jurisdiction of the Tribunal based on the Claimant's failure to comply with the requirements of Article 10.28.2(b) ('Objection to Jurisdiction'), and suspend the proceedings, as required by Article 10.20.5. The Respondent

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<sup>1</sup> References to articles are references to CAFTA articles unless otherwise stated.

<sup>2</sup> CAFTA became effective between the Republic of Guatemala and the United States of America on July 1, 2006.

also requested the suspension of the first meeting of the Tribunal scheduled to take place on June 13, 2008.

4. The Tribunal suspended the proceeding on the merits as required by Article 10.20.5 but maintained the scheduled first session. During that meeting the parties agreed to a timetable for submission of a Counter-Memorial, a Reply and a Rejoinder in respect of the Objection to Jurisdiction.
5. The Claimant filed its Counter-Memorial on Jurisdiction ('Counter-Memorial') on July 11, 2008. The Respondent filed its Reply on August 11, 2008 ('Reply') and the Claimant filed its Rejoinder on September 11, 2008 ('Rejoinder'). All three memorials were filed within the deadlines agreed at the first session.

## **II. THE ARBITRATION REQUEST**

6. RDC is a privately-owned railway investment and management company which in 1997 won, through international public bidding, the use of the infrastructure and other rail assets to provide railway services in Guatemala (the 'Usufruct'). Only two bids were submitted and RDC's bid was the only one considered responsive by the Respondent. RDC's bid consisted of a staged plan to rebuild the rail system, which had been closed since March 1996, with an investment program of about ten million U.S. dollars. The Usufruct awarded RDC consisted of a 50-year usufruct right to rebuild and operate the Guatemalan rail system. On November 25, 1997, FVG signed the Usufruct Contract of Right of Way (the 'Usufruct Contract') with Ferrocarriles de Guatemala ('FEGUA'), a state-owned company established in 1969 and responsible for providing certain railway transport services and managing the rail personal property and real estate assets. The Usufruct and the Usufruct Contract were ratified by the Congress of Guatemala by Decree 27-98, published in the Official Gazette on April 23, 1998.

7. The Usufruct covers a 497-mile (narrow gauge) railroad and includes the right to develop alternative uses for the right of way, such as pipelines, electric transmission, fiber optics and commercial and institutional development. In return for the right-of-way Usufruct, RDC (through FVG) agreed to make certain payments to FEGUA.
8. The Usufruct Contract was documented by Deed Number 402 ('Deed 402') and came into force on May 23, 1998. In addition, the Usufruct consisted of: (a) a Usufruct Contract of Rail Equipment, Property of FEGUA and documented by Deed Number 41, dated March 23, 1999, and subsequently replaced by Deed 143, dated August 28, 2003 ('Deed 143'), and further amended by Deed 158, dated October 7, 2003 ('Deed 158'); and (b) a Trust Fund Agreement for the Rehabilitation and Modernization of the railroad system documented by Deed 820, dated December 30, 1999 ('Deed 820'). (The Usufruct Contract, Deed 143, Deed 158 and Deed 820 are collectively referred to as the 'Usufruct Contracts'.)
9. FVG resumed commercial service between El Chile and Guatemala City on April 15, 1999. In December 1999, commercial service was restored between Guatemala City and the Atlantic ports of Puerto Barrios and Puerto Santo Tomás. Tonnage traffic gradually increased until 2005 but declined in 2006.
10. On June 26, 2005, FVG initiated two domestic arbitration cases against FEGUA for breach of contract. The Claimant alleged that Guatemala through FEGUA failed to remove squatters from the rail right of way and to make payments to the Trust Fund. The Claimant further alleged that, in anticipation of FVG's filings, FEGUA requested the Attorney General to investigate the circumstances surrounding the award of the Usufruct and to issue an opinion on the validity of Deed 143 and Deed 158. The Attorney General issued Opinion No. 205-2005 on August 1, 2005 (the 'Lesivo Opinion'), and recommended that Guatemala declare Deeds

143/158 void as not in the interest of the country. As translated by the Claimant, the Lesivo Opinion stated:

'Lesion was caused in this case because there is a violation to the rules and procedures that should have been applied in order to execute the agreement in due form and with legal validity. The relevant contract breaks the Government Contracting Law and other laws that govern the process to grant FEGUA's property in usufruct.

There is pecuniary lesion by executing an Onerous Usufruct Contract to grant the State's property in usufruct to be exploited by a private entity, in exchange of one point twenty-five percent (1.25%) of the gross income as a result of rendering transportation services.'<sup>3</sup>

11. The Claimant affirms that there is no basis in fact or law for this opinion. On January 13, 2006, FEGUA issued Opinion 05-2006 in agreement with the Attorney General's opinion, arguing that the Usufruct Contracts were not awarded as a result of a public bid.
12. According to the Claimant, the Claimant and FVG made numerous attempts to reach an understanding with FEGUA and met with the President of the Republic, Mr. Oscar Berger, on March 7, 2006. According to the Claimant, the President instructed that FEGUA be dissolved and a high level commission be established to work with RDC and FVG on governmental support of FGV railroad operations and to address issues of public, private and commercial squatters, vandalism and theft which plagued the operations. This commission was established and a number of meetings took place, but after about three months the meetings were suspended. It is the contention of the Claimant that, in parallel, the Government was preparing a resolution to declare the usufruct of the rolling stock injurious to the interests of the State. Such a resolution (the

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<sup>3</sup> Arbitration Request, para. 36.

'Lesivo Resolution') was adopted by the Government on August 11, 2006 and published on August 25, 2006.

13. It is the Claimant's case that the Lesivo Resolution had the following objectives: to force FVG to withdraw from the arbitration processes in which FVG has charged FEGUA with breach of contract, to appropriate FVG's rolling stock without payment of compensation, and to redistribute to Guatemalan private sector companies the benefits of the Usufruct.
14. On November 14, 2006, the Government of Guatemala filed a claim against FVG in the *Sala Primera de lo Contencioso* (the Guatemalan Administrative Court) seeking the court's confirmation of the Lesivo Resolution, an order seizing the rolling stock, and an order denying the FVG general manager the right to travel outside the country. The claim was served on FVG on May 15, 2007. FVG filed its initial objections on May 21, 2007. Consistent with CAFTA Article 10.18.3, FVG intends to defend this action to preserve its contractual rights under Deed 143/158 while this arbitration is pending and does not seek monetary compensation.
15. The Claimant affirms that the Lesivo Resolution had a devastating impact on its investment. According to the Claimant, since the Lesivo Resolution was issued, the Republic has made successive decisions not to pay into the Trust Fund and not to remove the squatters from the railway right of way. According to the Claimant, these decisions are bound up with the Lesivo Resolution. Furthermore, the Claimant alleges that the Lesivo Resolution was an 'all clear signal to poorer Guatemalan citizens to seize land and personal property from FVG with impunity as the Government would not provide protection.'<sup>4</sup>
16. The Claimant alleges that the Respondent has blocked FVG's attempts to use the courts to enforce its Usufruct rights through the following actions:

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<sup>4</sup> Arbitration Request, para. 48.

- On September 27, 2005, FEGUA filed with the Guatemalan Court of Arbitration a motion to dismiss the case alleging lack of jurisdiction. On December 8, 2005, the Arbitration Court denied FEGUA's motion.
- On January 3, 2006, FEGUA filed a motion to declare Article 103 of the Public Agreement Act unconstitutional because it provides for arbitration in public contracts. So far no hearing has been held on this motion.
- On January 5, 2006, FEGUA filed a lawsuit with the First Circuit of the Administrative Court seeking to annul the Usufruct Contracts and the arbitration clause. The Administrative Court has ruled that the arbitration clause is valid and that the arbitration should continue. According to the Claimant, the Respondent has engaged in delaying tactics that have prevented the judicial order in support of the arbitration clause from entering into effect.

17. In the present proceedings, RDC seeks the following relief:
  - (a) Damages arising from measures of Guatemala inconsistent with its obligations under Chapter 10 of CAFTA, including losses involving RDC's common and preferred shares in FVG, un-repaid advances by RDC to FGV, allocated or to-be-allocated overhead of RDC, the reasonably expected income stream from its investment over the life of the fifty (50) year Usufruct and the risk-adjusted cost of capital applicable to that investment, totaling no less than US \$65,000,000.
  - (b) Costs of these proceedings.
  - (c) Fees and expenses incurred to oppose the promulgation of the Lesivo Resolution and other measures infringing Chapter 10 of CAFTA.
  - (d) Pre-award and post-award interest at a rate to be fixed by the Tribunal.
  - (e) Compensation equal to any tax consequences of the award.

(f) Such further relief as the Tribunal may deem appropriate.

### **III. THE OBJECTION TO JURISDICTION**

18. In its challenge to the jurisdiction of this Tribunal, Guatemala argues that the waiver submitted by the Claimant under Article 10.18.2(b) is insufficient because:

(a) The Claimant purports to submit a waiver on its own behalf and on behalf of FVG; but the Claimant is not a party in the arbitration proceedings of FVG against Guatemala and it has not shown that it has the authority to waive the rights of FVG to pursue the local arbitration. Therefore, the waiver is invalid.

(b) The Claimant explicitly repudiates the waiver when it reserves its own right and the right of FVG to pursue local remedies required by the Tribunal in order for RDC to avoid the contention by Guatemala that RDC has failed to exhaust local remedies.

(c) The Claimant has not taken the necessary action to give effect to the waiver. The Claimant, through FVG, has initiated and maintained two arbitrations in Guatemala against FEGUA. Both of them involve the same issues raised in this arbitral proceeding and challenge the same measures that are the subject of the Claimant's claim under Article 10.16. These arbitrations are pending and the Claimant has not filed any request to desist or dismiss those proceedings.

19. The Respondent argues that Article 10.18.2 is modeled after Article 1121 of NAFTA and that for a claimant to waive effectively its claims it is not enough for the claimant to simply state in writing that it is waiving its claims before the arbitral tribunal; it must actually act in accordance with that waiver.

20. The Respondent reserves ‘its right to present any other jurisdictional objections, if necessary, at a subsequent point in the proceedings.’<sup>5</sup>

#### **IV. THE COUNTER-MEMORIAL**

21. The Claimant recalls that, under Article 10.18.2(b), Claimant is required to provide a waiver on its own behalf and on behalf of FVG and, in turn, FVG is required to provide a waiver on its own behalf; it confirms the validity of both waivers submitted with the Arbitration Request. In its words, ‘there is no “hole” in this interlocking system of waivers whereby either RDC or FVG have retained any rights in connection with CAFTA Article 10.18.2(b).’<sup>6</sup> As to the Claimant’s authority to waive the rights of FVG questioned by the Respondent, the Claimant refers to Exhibit 7 of the Arbitration Request which evidences RDC’s direct ownership and control of FVG.

22. The Claimant disputes that the language of the waiver contradicts its purpose by reserving the right to pursue local remedies that might be required by the ICSID panel. The Claimant points out that Article 10.18.2(b) of CAFTA and Article 1121 of NAFTA differ in ‘some potentially important respects.’<sup>7</sup> Article 1121 of NAFTA uses the terms ‘conditions precedent’ to submission of a claim, and uses the phrase ‘only if’. None of these terms appears in the CAFTA waiver provision. Furthermore, the reasoning of the NAFTA Tribunal in *Waste Management I*<sup>8</sup> is not applicable to the reservation in RDC’s waiver. The Claimant justifies the reservation included in the waiver on the Respondent’s notification made to ICSID requiring exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the ICSID Convention. While the Claimant considers that Guatemala waived such right to require exhaustion of local remedies when it consented to arbitration under

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<sup>5</sup> Arbitration Request, p. 3.

<sup>6</sup> Counter-Memorial, para. 12.

<sup>7</sup> *Ibid.*, para. 17.

<sup>8</sup> *Waste Management, Inc. v. United Mexican States*, Award of June 2, 2000, 5 ICSID Reports 443.

CAFTA Article 10.17, the Claimant explains that it does not wish to find itself in a situation ‘whereby the Tribunal might deny access to ICSID arbitration until the Claimant had exhausted local remedies and the Republic might deny access to local proceedings based on the waiver that accompanied the Claimant’s arbitration request.’<sup>9</sup> In this respect, the Claimant refers to the Respondent’s letter to the Secretary-General of ICSID of July 5, 2007 where such argument is developed, and notes that the Respondent has not pursued it in the Objection to Jurisdiction. The Claimant also points out that, in *Waste Management II*, the tribunal showed awareness of such situation and cautioned:

‘An investor in the position of the Claimant [Waste Management], who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. *Such a situation should be avoided if possible.*’<sup>10</sup>

23. The Claimant further refers to *Waste Management I* and the fact that the tribunal in that case did not require that the waiver had to be in any particular form or language but be ‘clear, explicit and categorical.’<sup>11</sup> According to the Claimant, there is nothing ambiguous in its waiver and RDC’s reservation has no negative effect on the substance of its waiver. The Claimant further submits that such reservation has no meaning unless it is triggered by the Tribunal.

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<sup>9</sup> Counter-Memorial, para. 20.

<sup>10</sup> *Waste Management, Inc. v. United Mexican States (No. 2)*, Decision on Mexico’s Preliminary Objection, 26 June 2002, 6 ICSID Reports 538, 558 (para. 35), quoted in the Arbitration Request, para. 22 (emphasis added by the Claimant).

<sup>11</sup> *Waste Management, Inc. v. United Mexican States*, Award of June 2, 2000, 5 ICSID Reports 443, 454 (para. 18).

24. The Claimant then addresses the issue of whether the measures involved in the domestic arbitrations are the same as those involved in this arbitration. The Claimant explains that the measures at issue in the domestic arbitrations are actually contract breaches under Deed 402 and Deed 820. On the other hand, the measure at issue in this proceeding is the Lesivo Resolution. The Claimant further observes that CAFTA permits claims based on breaches of investment agreements but the contracts at issue in the domestic arbitrations do not qualify as investment agreements under CAFTA because they predate CAFTA's entry into force between the U.S. and Guatemala. The Claimant notes that this is the reason why no claim for breach of contract has been filed in this arbitration and it has continued to pursue the local arbitrations.
25. According to the Claimant, the Lesivo Resolution is a measure within the meaning attributed to this term in CAFTA Article 2.1, and there is no overlap between this measure and the actions of the Government under consideration in the domestic arbitrations. Therefore, the Claimant does not need to take action to effectuate the waiver under the applicable local rules. Furthermore, it is the Claimant's contention that the burden of proof on the validity of the waiver falls on the Respondent and no proof has been presented by the Respondent. In fact, the Respondent has not identified the measures at issue; it has simply asserted that they are the same.
26. The Claimant adds that, even if the Tribunal would accept the Respondent's position, the next logical question for the Tribunal would be the impact of such determination on this proceeding. The Claimant argues that the terms used in NAFTA and CAFTA are different. The tribunal in *Waste Management I* reached its decision that the claimant could not remedy the waiver on the basis of its interpretation of the condition in Article 1121: 'A disputing investor may submit a claim under Article 1116 only if...' The Claimant points out that in *Methanex*, the U.S. allowed the waiver to be corrected in the interest of efficiency, and requested the

tribunal to issue an order that the arbitration would be deemed to have commenced on submission of the effective waivers.<sup>12</sup>

27. The Claimant observes that the wording of NAFTA has not been reproduced in CAFTA, in any of the more recent FTAs concluded by the U.S. or in the 2004 U.S. Model BIT. The term used in CAFTA is not 'Conditions Precedent' but 'Conditions and Limitations.' According to the Claimant the difference is that a 'limitation' can be remedied by terminating or abandoning the inconsistent behavior. The Claimant considers that its interpretation is consistent with the U.S. emphasis on effectiveness and efficiency in investor-State arbitration.

## **V. THE REPLY**

28. In the Reply, the Respondent argues that, under Article 10.17 of CAFTA and Article 26 of the ICSID Convention, it consented only to arbitrate disputes not already adjudicated in other fora. Article 10.18 is clear in expressing the requirement that the request to initiate arbitration proceedings must be accompanied by waivers of 'any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.' It is obvious to the Respondent that the reason for this requirement is 'to avoid a multiplication of proceedings, conflicting outcomes and legal uncertainty, forum shopping, double jeopardy for the Respondent and double redress for the Claimant.'<sup>13</sup>
29. The Respondent rebuts the inferences drawn by the Claimant from the differences in the language used in Article 1121 of NAFTA and 10.18 of CAFTA. The Respondent finds that the plain meaning of the text of both articles does not provide support for the conclusion reached by the Claimant. According to the Respondent, CAFTA Article 10.18 is directly

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<sup>12</sup> *Methanex Corporation v. United States of America, First Partial Award*, (2002) 7 ICSID Reports 208, 257-258 (para. 93).

<sup>13</sup> Reply, para. 18.

linked to jurisdiction, in a way which NAFTA is not, by framing the waiver as part of the 'Conditions and Limitations on Consent of each Party.' It is evident that 'the States party 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.'<sup>14</sup>

30. It is the Respondent's contention that the measures under the local arbitration and this proceeding overlap because the State acts for which the Claimant seeks relief under the local arbitrations and the State acts concerning this arbitration are related even if the claims pursued are different. The Respondent finds support for its position in *Waste Management I* where the tribunal stated that that 'the same measure may give rise to different types of claims in different courts or tribunals'<sup>15</sup>, and '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.'

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31. The Respondent disputes the Claimant's argument that its allegations are based only on the Lesivo Resolution. According to the Respondent, the Claimant alleges that a variety of measures constitute a breach of the Treaty. In this respect, the Respondent points out references in the Request to the 'Lesivo Resolution and other actions', 'the Lesivo Resolution and other Government measures which accompanied the lesivo process', 'The Government's measures, therefore defeat reasonable stability and predictability', 'Damages arising from infringing measures', and 'Fees and expenses incurred to oppose the promulgation of the infringing Lesivo Resolution and other infringing measures.' The

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<sup>14</sup> Ibid., para. 23.

<sup>15</sup> Ibid., para. 36, citing 5 ICSID Reports 443. 458 (para. 27)..

<sup>16</sup> Reply, para. 38 (emphasis added by the Respondent), citing 5 ICSID Reports 443. 459 (para. 27).

Respondent further points out that the Claimant itself recognizes that the measures at issue in the local arbitrations form an 'integral part' of the Claimant's Treaty claim.<sup>17</sup>

32. The Respondent contends that the Claimant misunderstands the meaning of 'measures' and conflates it with the term 'obligations' when it argues that the alleged breaches of obligations in the domestic arbitrations are distinct from the obligations allegedly breached in the Treaty and infers from this that the measures do not overlap. As examples, the Respondent refers to paragraphs 67 and 68 of the Arbitration Request where it is in substance stated that, since the Lesivo Resolution, the Respondent has failed to remove squatters from the right of way and to make the contractually obligatory payments to the Trust Fund, and that these decisions not to pay into the Trust and not to remove squatters are an integral part of the Lesivo Resolution. The Respondent finds particularly significant that the Claimant seeks to recover in this proceeding 'those damages which would, except for such violations of CAFTA, be recovered in those proceedings.'<sup>18</sup> The Respondent refers to the heads of damages in the local arbitrations and finds that the damages sought under the Treaty are claimed on account of the same failures.
33. The Respondent concludes the Reply by acknowledging that, in the interest of efficiency, the Tribunal may wish to permit the Claimant an opportunity to comply with its Article 10.18 obligations. If that would be the case, the Respondent requests the Tribunal to issue an order continuing the suspension on the merits for a forty-five day period to dismiss with prejudice the local arbitrations and to order 'Claimant not to file or reinitiate any proceedings in any other fora that involve the measures/state actions that are at issue in this ICSID arbitration.'<sup>19</sup> Should the Claimant fail to

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<sup>17</sup> Reply, paras. 51-52.

<sup>18</sup> Ibid., para. 66 quoting para. 51 of the Arbitration Request.

<sup>19</sup> Ibid., para 73.

comply, then the Tribunal should dismiss this arbitration for lack of jurisdiction.

34. The Respondent requests that the Tribunal award to it the legal fees and costs associated with this phase of the proceedings.

## **VI. THE REJOINDER**

35. The Claimant notes that the Reply narrows the scope of issues to be decided by the Tribunal by not insisting on the Claimant's lack of authority to waive the rights of FVG to pursue the local arbitration, and then proceeds to distinguish which issues are before the local arbitrations from those in this proceeding. According to the Claimant, the issues before the local arbitrations are (i) the failure by the Republic to pay moneys owed into the Trust Fund pursuant to Deed 820, and (ii) the failure to undertake the judicial processes necessary to remove the squatters pursuant to Deed 402. On the other hand, what is at issue in this arbitration is (i) the Declaration of Lesivo as to Deeds 143/158, and (ii) the Respondent's actions which have deprived it of any semblance of justice in the local arbitrations.<sup>20</sup>

36. The Claimant then questions the concept of 'overlap' developed by the Respondent in the Reply. The Claimant points out that the test of overlap is nowhere to be found in CAFTA or the jurisprudence of NAFTA, and contends that the Respondent fails 'to focus on whether the same measure is raised in the same proceedings, and, if the measures are the same, whether this same measure also is "a measure alleged to constitute a breach referred to in Article 16.10", as required by Article 10.18.2(b).' <sup>21</sup>

37. The Claimant points out that the Lesivo Resolution and the measures associated with it cannot be the same measures for the simple reason that CAFTA entered into force between the U.S. and Guatemala only on July 1, 2007 and the local arbitrations were initiated in 2005. Because they

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<sup>20</sup> Rejoinder, para. 11 referring to para. 51 of the Request.

<sup>21</sup> Ibid., para. 18.

predate July 1, 2006, the contracts documented in Deeds 820 and 402 cannot be ‘investment agreements’ under CAFTA. Article 10.1.3 precludes any measure that occurred before that date from binding any Party to the obligations of Chapter 10. The measures that the Claimant alleges to be breaches of Articles 10.7, 10.5 and 10.3 are the Lesivo Resolution and other measures in connection with it, and ‘the Respondent’s denial of due process and effective access to the judicial system.’<sup>22</sup>

38. As to the examples cited by the Respondent, the Claimant argues that they are part of the factual background; they are factually contextual and not part of its legal claims under Section A of Chapter 10. The Claimant also rebuts the assertion of the Respondent that it seeks to ‘double-dip’ on damages. The Claimant explains that it is only seeking damages which it cannot obtain locally because of Respondent’s violations of Article 10.5 on the minimum standard of treatment. After describing the difficulties that the Claimant has encountered in the pursuit of the local arbitrations and pointing out that after more than three years since the local arbitrations were initiated no hearing had been conducted by the arbitrators, the Claimant contends that it ‘continues to pursue these local claims not in the hope of securing a monetary award, but rather as a testament to the egregious failure of the Guatemalan judicial system to provide even a modicum of due process.’<sup>23</sup> This failure is part of ‘the other government actions in connection with the Lesivo Resolution.
39. The Claimant argues further that the object and purpose of the waiver is not compromised by permitting the local arbitration to proceed concurrently with this proceeding. The Claimant explains that it is not alleging in the local arbitrations that there had been an expropriation without compensation or a failure to provide a minimum standard of treatment or a failure to provide national treatment. Therefore, continuation of the local arbitrations cannot result in a multiplication of

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<sup>22</sup> Ibid., para. 23, third bullet.

<sup>23</sup> Ibid., para. 36.

proceedings or forum shopping. Similarly, there is no danger of conflicting results, legal uncertainty, or double jeopardy for the Respondent nor double redress for the Claimant.

40. Then the Claimant turns to its concern that the Republic may raise an objection to the Tribunal's jurisdiction for failure to exhaust local remedies. The Claimant notes that there is no requirement to exhaust local remedies under CAFTA and refers to the observation made in the Reply in reference to Chapter II of the ICSID Convention: '[A] Contracting State may require the exhaustion of local or judicial remedies as a condition of its consent to arbitration under this Convention.' The Claimant argues that this statement ignores the fact that Guatemala consented generally to ICSID jurisdiction for disputes under CAFTA and waived its earlier notification to ICSID concerning local remedies. In the interest of efficiency the Claimant requests that the Tribunal opine on this matter to avoid a subsequent jurisdictional challenge.

41. The Claimant concludes by requesting the Tribunal to dismiss the Respondent's objection to jurisdiction. However, if the Tribunal would decide that the waivers are defective, Claimant finds acceptable a forty-five day period to correct them.

## **VII. THE TRIBUNAL'S VIEWS**

42. Before addressing the contentions of the parties in respect to the Objection to Jurisdiction, the Tribunal notes that the Respondent no longer contests the validity of the waiver submitted on behalf of FVG.

### **A. EXPRESS RESERVATION IN THE WAIVERS**

43. The Tribunal will deal first with the exhaustion of local remedies reservation in the waivers of the Claimant and FVG. The reservation in the Claimant's waiver reads in relevant part as follows: 'provided, however, that RDC, on its own behalf and on behalf of FVG, reserves the right to pursue any and all local remedies which the ICSID arbitration panel requires in order for RDC to avoid any contention by the Government of

Guatemala that RDC has failed to exhaust local remedies...'<sup>24</sup> FVG makes a similar reservation in its waiver. As explained by the Claimant, this reservation is related to the notification, dated January 13, 2003, submitted by the Republic of Guatemala to ICSID<sup>25</sup> and to the letter of July 5, 2007 referred to above where the Respondent has advanced such argument in respect of its consent to ICSID arbitration under CAFTA. The Claimant has noted that no such argument is made in the Objection to Jurisdiction although it felt obliged to comment on some statements made by the Respondent in the Reply. The Claimant has requested the Tribunal to opine on this matter to avoid a future objection to jurisdiction on this account.

44. The Tribunal notes first that no objection to jurisdiction for lack of consent based on the non-exhaustion of local remedies has been submitted by the Respondent. The Tribunal further notes that the Respondent had the opportunity to pursue such a basic objection for lack of consent, as initially argued in its letter, but has chosen not to do so. Admittedly, by filing an objection to jurisdiction under the expedited procedure, the Respondent is not foregoing its right under CAFTA to submit other objections in the future as permitted under Article 10.20.4, and the Respondent has expressly reserved its right in this respect. However, it notes that the use of the expedited procedure as just an additional jurisdictional layer would hardly fit with the stated objective of CAFTA to create effective procedures for the resolution of disputes.<sup>26</sup>
45. As to the content of the reservation included in the Claimant's and FVG's waivers, the Respondent has argued that they constitute by themselves a repudiation of the waivers. The Tribunal disagrees. The Tribunal has no authority under CAFTA or the ICSID Convention to order the Claimant to

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<sup>24</sup> Exhibit 8 to the Arbitration Request.

<sup>25</sup> Notification made pursuant to Article 25(4) of the ICSID Convention. Document ICSID/8 'List of Contracting States and Measures taken by them for the purpose of the ICSID Convention' available at [www.icsid.worldbank.org](http://www.icsid.worldbank.org).

<sup>26</sup> Article 1.2. Objectives.

pursue domestic proceedings in order to satisfy consent requirements of the Respondent in this arbitration. In these circumstances, the express reservation in the waivers is without any possible object and it does not deprive the Tribunal of jurisdiction.

**B. ADEQUACY OF THE WAIVERS**

46. The Tribunal turns to the issue of the adequacy of the waivers. In the first part of the waivers it is stated:

‘In connection with its claims against the Government of Guatemala submitted to arbitration under CAFTA Article 10.16.1(a) and 10.16.1(b) on behalf of itself and its investment enterprise *Compañía Desarrolladora Ferroviaria, S. A.* (‘FVG’), respectively, RDC hereby waives any right to initiate or continue before any administrative tribunal or court under the law of any party to CAFTA, or other dispute settlement procedures, any proceeding (‘local remedies’) with respect to any measure alleged to constitute a breach referred to in CAFTA Article 10.16.’

47. The Respondent has pointed out that the waivers have not been implemented since FVG continued to pursue claims related to Deeds 402 and 820 in two arbitrations in Guatemala that overlap with claims pursued in this arbitration. The Respondent has argued that CAFTA requires desisting from local proceedings with prejudice; it is not sufficient simply to sign the waiver, it has to be effectuated. Since the waiver is defective, the Respondent contends that Claimant has not met the consent conditions of Article 10.18. The Claimant argues that, on the contrary, there is no such overlap and that the measures at issue in this arbitration are distinct from those under consideration in the local arbitrations. First, Deeds 402 and 820 precede CAFTA and hence they are not investment agreements under the CAFTA definition of such instruments. Second, the measures associated with the Lesivo Resolution related to the increase in squatters and payments to the Trust Fund stem from the Lesivo Resolution itself. Third, FVG seeks only performance and not compensation under the local

arbitrations. Fourth, it is unlikely that FVG would succeed in its claims in the local arbitrations because of the obstruction of the Republic.

48. The key questions for the Tribunal are whether the measures before the domestic arbitrations are the same measures which are 'alleged to constitute a breach referred to in Article 10.16', and, if so, what is the effect on the validity of the waiver and the jurisdiction of the Tribunal.

49. It will be useful for reference purposes to reproduce here the text of paragraph 2 of Article 10.18 on 'Conditions and Limitations on Consent of Each Party':

'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,

(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.'

50. There is no dispute between the parties that 'other dispute settlement procedures' includes arbitration. There is no dispute that Deeds 402 and 820 do not qualify as investment agreements under CAFTA because they predate CAFTA. There is no dispute that the Lesivo Resolution is not a measure under consideration in the local arbitrations. What is disputed is whether the measures related to the Lesivo Resolution and which concern

Dead 402 and Deed 820 are the same, in whole or in part, as those before the local arbitrations.

51. In the Arbitration Request, the introductory paragraph of Chapter III setting forth 'Legal Claims under CAFTA Section A of Chapter 10' refers to 'The Lesivo Resolution and the actions of Guatemala under provisions of Section A of Chapter 10 of CAFTA: Expropriation and Compensation (Article 10.7), Minimum Standard of Treatment (Article 10.5), and National Treatment (Article 10.3).'<sup>27</sup> Then each claim is developed under separate headings which refer exclusively to the Lesivo Resolution. However, in the text there are generic references to 'measures' in connection with the Lesivo Resolution: 'the Government of Guatemala's measures, actions and omissions as part of the Lesivo Resolution process'<sup>28</sup>, and 'the Lesivo Resolution and other government measures which accompanied the *lesivo* process defeated the legitimate expectations of RDC...':<sup>29</sup> These references are ambiguous and a possible source of misunderstanding about the measures of which the Claimant is complaining.
52. The ambiguity is dispelled when the Claimant, after referring to the cancelled Deeds 143/151 states: 'Specifically, since the Lesivo Resolution, the Government of Guatemala has failed to remove "squatters" from the right of way and to make the contractually obligated payments to the Trust Fund designated to rehabilitate the right of way granted under the Usufruct.'<sup>30</sup> This statement is part of the legal claim that the Lesivo Resolution violates the minimum standard of treatment obligations of the Respondent under Article 10.5. Therefore, it is difficult to accept the Claimant's argument that references to removal of squatters and failure of payments to the Trust Fund are only references to facts to provide context to the Lesivo Resolution. While it may be correct, as also argued by the Claimant, that the specific words 'integral part' pointed out

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<sup>27</sup> Para. 51.

<sup>28</sup> Para. 58.

<sup>29</sup> Ibid., para. 64.

<sup>30</sup> Ibid., para. 65.

in the Respondent's argument are not found in the section of the Arbitration Request devoted to 'Legal Claims' but in the background description in Chapter II,<sup>31</sup> the passage cited makes clear that the failure to remove squatters and to make payments into the trust fund are complained of. by the Claimant in the present CAFTA arbitration.

53. The Tribunal will now address the remaining arguments advanced by the Claimant to differentiate the claims under consideration under this arbitration from those under consideration in the local arbitrations. The argument that the Claimant is only seeking performance under the local arbitrations is immaterial for purposes of Article 10.18. The waivers under Article 18.10.2 are not restricted to damages claims. They should also cover claims seeking performance. A reading of Article 10.18.3 confirms this understanding. This paragraph excepts from the waivers actions seeking interim injunctive relief which do not involve the payment of monetary damages and brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration. This exception would have been unnecessary if Article 10.18.2 waivers were limited to damage claims. There is no question that the actions before the local arbitrations do not seek 'interim injunctive relief.' Nor can there be any distinction for this purpose between a claim for damages and one for a debt.
54. As to the argument that it is unlikely that the Claimant would receive any payment for damages under the domestic arbitrations, this is not the issue under Article 10.18. It is the fact that two domestic arbitration proceedings exist and overlap with this arbitration as determined by the Tribunal that

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<sup>31</sup> 'Since the Lesivo Resolution, the Government of Guatemala has made successive specific decisions not to pay into the Trust the funds required by Decree 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.' Arbitration Request, para. 50. Emphasis added.

- triggers the defect in the waiver. Whether an overlapping claim before a domestic court or domestic arbitral tribunal would be successful is an entirely different matter.
55. The Claimant has also argued that the language used in CAFTA Article 10.18 in respect of waivers is less restrictive than NAFTA Article 1121 because the words ‘Conditions precedent’ are not found in the title of CAFTA Article 10.18 and the words ‘only if’ are also missing. The Claimant compares the terms of the two articles in particular ‘Condition Precedent’ to ‘Limitation’ used in the title of CAFTA Article 10.18, and draws the conclusion that a ‘Limitation’ can be remedied by terminating or abandoning the inconsistent behavior.
56. The Tribunal is not convinced that the dissimilarities noted by the Claimant between the texts of these two articles justify the inferences drawn by the Claimant. The title of Article 10.18 (‘Conditions and Limitations on Consent of Each Party’), when read with the ensuing text and in particular the first sentence of paragraph 2 (‘No claim may be submitted to arbitration under this Section *unless*<sup>32</sup>...’) leads the Tribunal to the conclusion that these differences in drafting are immaterial. ‘Only if’ and ‘unless’ have the same meaning and, whether the term ‘precedent’ is used or not, the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected.
57. The Claimant relies on the difference in the language between the two articles to support the argument that, should the Tribunal find a waiver defective, it may be cured without the need for the Claimant to re-file the claim. Before addressing this issue, the Tribunal will turn to the question of whether the Respondent has accepted that the Claimant might remedy its waiver.
58. In the Reply, the Respondent acknowledged, in the interest of efficiency,

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<sup>32</sup> Emphasis added by the Tribunal.

'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...'<sup>33</sup>

59. The Claimant concluded the Rejoinder by stating that 'in the event that the Tribunal should find a defect in Claimant's waivers, the parties appear to agree that it can be remedied by the presentation of an effective waiver within a stipulated time frame. Respondent has proposed 45 days, and that is acceptable to the Claimant.'<sup>34</sup> The Claimant repeated this understanding of the Respondent's position in its Request for Interim Measures.

60. However, in its Response to the Claimant's Request for Interim Measures, the Respondent considered that the Claimant has mischaracterized the Respondent's position on the opportunity to cure the defective waiver. According to the Respondent:

'It is not the case that the Republic would have no objection to the Tribunal permitting the Claimant an opportunity to cure its defective waiver pursuant to CAFTA Article 10.18; instead, the Republic confirmed that it seeks dismissal for lack of jurisdiction but acknowledged that the Tribunal might, for efficiency purposes, seek to grant the Claimant an opportunity to cure its defective waiver. Should the Tribunal choose to proceed with that option, the Republic has not waived any objections it might present to such a decision and at the appropriate time.'<sup>35</sup>

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<sup>33</sup> Reply, para, 73.

<sup>34</sup> Ibid., para. 50.

<sup>35</sup> Respondent's Response to Claimant's Request for Interim Measure of Protection Regarding Preservation of Evidence, para. 7.

61. The Tribunal considers that the Claimant's understanding of the Respondent's position is a fair reading of the Respondent's statement in its Reply. In fact, the Respondent even requested the Tribunal to issue an order to permit the Claimant to remedy the defective waiver. But it is also clear from subsequent submissions, confirmed during the hearing, that the Respondent retracted this concession and there is no basis on which the Tribunal could hold that it was precluded from doing so. This being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in *Methanex*.<sup>36</sup>
62. The Tribunal has previously concluded that measures concerning squatters and payments to the Trust Fund alleged to be related to the Lesivo Resolution are measures at issue in the local arbitrations under Deed 402 and Deed 820. The question for the Tribunal is whether, because of this overlap, the entire waiver is defective and affects the whole proceeding before this Tribunal or whether the waiver is only partially defective in respect of those claims maintained in contradiction to the waiver requirements of Article 10.18. To answer this question, the Tribunal turns first to the meaning of the term 'claim' in Article 10.18.
63. Counsel for the Respondent argued, based on *Waste Management I*, that, for a claim to be defective, the overlap of some measures is enough. In effect, this reads the word "claim" in CAFTA Article 10.18(2) as referring to the whole arbitration proceeding commenced by the request for arbitration

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<sup>36</sup> In *International Thunderbird Gaming Corporation v. United Mexican States*, Award of January 26, 2006, paras. 114-118, the tribunal held that unambiguous waivers submitted with the Particularised Statement of Claim were sufficient for the purposes of NAFTA Art. 1120(1)(b); the failure to file these with the Notice of Arbitration was a merely formal defect. In the present case, by contrast, the Claimant has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure.

rather than as applying severally to each distinct claim initiated by the request for arbitration.<sup>37</sup>

64. In response to a question from the Tribunal, counsel for the Respondent accepted that the same phrase “no claim” in Article 10.18(1) applied distributively with respect to different claims that were alleged in the Notice of Arbitration. Such claims might arise at different times and the three-year time limit in Article 10.18(1) would have to be applied separately to each distinct claim. But counsel argued that the function of Article 10.18(1) was different than Article 10.18(2); the use of the same term “no claim” in both should not lead to an identical interpretation. In short, the Respondent submitted, “failure to submit the requisite waiver means that ... *there is no jurisdiction over the entire action, not just over the particular claim or one of the claims.*”<sup>38</sup>
65. The parties have exchanged post-hearing communications on this issue.<sup>39</sup> For the Claimant, Article 18.10.1 contemplates multiple ‘claims’ and ‘it would be incomprehensible that a claimant who had such multiple claims would be subject to a limitations bar on all of its claims just because one of them was older than three years.’ A tribunal faced with that situation would consider each claim separately and accept or reject each on the basis of the time limitation bar. The same reasoning should be applied to the waiver requirement.
66. The Claimant finds support for this interpretation in Article 10.16(1) and (2). According to the Claimant, the drafters of Article 10.16(2) ‘clearly considered that **a claim** submitted to arbitration may contain **multiple claims** and further, that the inference to be drawn is that each such **claim** can be considered separately as a “claim” subject to the provisions of Article 10.18(2). The requirement that each claim be pled, and supported, with specificity would be meaningless if the signatories had not also

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<sup>37</sup> Transcript, pp. 48-50.

<sup>38</sup> *Ibid.*, pp. 163-164. Emphasis added by the Tribunal.

<sup>39</sup> Letter of the Claimant of October 17, 2008 and letter from the Respondent of October 22, 2008.

contemplated that each claim be considered separately from the others, both on the merits and as to jurisdiction.’<sup>40</sup> As to Article 10.16(1), ‘a claim under this section refers to each specific breach that is alleged and contemplates that each will be considered separately for all purposes.’

67. The Respondent argues that, as is the case in NAFTA, the term ‘claim’ in Chapter 10 is ‘interchangeably used to refer to the **whole action** that is presented by a claimant for consideration by a tribunal in a given arbitration (‘whole claim’), or to each **individual claim** that forms part of the action (‘individual claim’).’<sup>41</sup> The Respondent recalls that, as discussed in the Reply, ‘**No claim** may be submitted to arbitration...unless...’ in Article 10.18.2 of CAFTA has the same meaning as in ‘A disputing investor may submit a **claim**...to arbitration only if...’<sup>42</sup> of NAFTA Article 1121. Given that ‘claim’ has the same meaning in both articles, reasons the Respondent, it is instructive that in the relevant NAFTA jurisprudence this term is understood to mean the whole claim and that NAFTA tribunals in *Waste Management I*, *Waste Management II* and *Thunderbird* have an ‘unequivocal understanding’ that the term ‘claim’ refers to the whole claim and have concluded that an invalid waiver affects the claimant’s ability to proceed with the entire arbitration.

68. The Respondent has further argued that:

‘the ordinary meaning of the text in Article 10.18.2 demonstrates that the term “claim” in that Article refers to the whole claim, and the term “claims” refers to individual claims: “No **claim** may be submitted to arbitration...unless...the notice of arbitration is accompanied, for **claims** submitted...by the claimant’s written waiver.” In other words, the claimant is barred from proceeding with the **whole** of its claim if that claimant fails to present valid waivers for any of its **individual** claims. This understanding is logical in light of the construction of this provision which

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<sup>40</sup> Emphasis in the original.

<sup>41</sup> Letter dated October 22, 2008, p. 1. Emphasis in the original.

<sup>42</sup> Emphasis added by the Respondent.

contemplates the existence of various individual “claims”, each one of which requires a valid waiver, presented with and in the context of the whole “claim”, which is what would be barred from proceeding if the waiver requirements are not met.<sup>43</sup>

The Respondent concludes by reiterating its request that the Tribunal dismiss the whole claim of the Claimant.

69. Grammatically, the phrase ‘No claim’ at the beginning of paragraphs 1, 2 and 4 of Article 10.18 could mean ‘any claim’, ‘a claim’, ‘each claim’ or ‘all claims’ and not necessarily the ‘whole claim’ to use the Respondent’s terminology. But the term ‘claim’ is used consistently to refer to a specific cause of action throughout Article 10.18. It is not necessary to have recourse to any theory of “dual meaning” to make sense of Article 10.18. Article 10.18(1) time bars claims older than three years from the date on which the claimant first acquired, or should have first acquired knowledge of the alleged breach. Evidently here, as the Respondent accepts, the word ‘claim’ must mean each individual claim submitted to arbitration. This being the case, it would be odd that the same word in the same grammatical construction would mean something different when used subsequently in other paragraphs of the same article.
70. This understanding of the Tribunal is confirmed by the wording in Article 10.18(4). This paragraph excludes claims for certain breaches if such claims have been previously submitted to the administrative tribunals or courts of the respondent:

‘No claim may be submitted to arbitration:

(a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(b) for breach of an investment agreement under Article 10.16.1(a)(i)(C), or Article 10.16.1(b)(i)(C),

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<sup>43</sup> Ibid., pp.3-4. Emphasis in the original.

if the claimant...or the claimant or the enterprise...has previously submitted the same alleged breach to an administrative tribunal or court of the respondent...'

71. In the view of the Tribunal these are 'individual' claims related to a specific breach of an investment authorization or of an investment agreement. This understanding is confirmed by reading Article 10.18(4) with Article 10.16(2)(b) and Article 10.16(2)(c) which require that the notice of intention specify:

'(b) for *each claim*, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for *each claim*...'<sup>44</sup>

72. In the Tribunal's view, the phrase 'No claim' in Article 10.18(2) has the same meaning as it does in Article 10.18(1): it refers to a specific claim made against a State under Chapter 10. This interpretation respects the rationale and purpose of the waiver to which the Respondent has often alluded to in support of its arguments. It would not give rise to conflicting outcomes nor to double redress for the same conduct or measure.<sup>45</sup> It is also more in consonance with the objective of CAFTA to introduce effective procedures of dispute settlement. The effect of the interpretation proposed by the Respondent would be the dismissal of the entire proceeding, but it would not prevent the Claimant from initiating a new ICSID arbitration by submitting a request for arbitration with a waiver modified accordingly, a rather ineffective and procedurally inefficient result.

73. The Respondent has drawn the attention of the Tribunal to Article 1121 of NAFTA and the related NAFTA jurisprudence. It is evident that CAFTA Article 10.18 and NAFTA Article 1121 have the same general rationale

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<sup>44</sup> Emphasis added by the Tribunal.

<sup>45</sup> *Thunderbird*, para. 118.

and purpose. While the Respondent has argued that the dual use of the term 'claim' is also a feature of NAFTA, the Tribunal observes that in NAFTA Article 1121 'claim' is used consistently in the singular. This difference between the two articles may lead to different interpretations – but the Tribunal's function is confined to CAFTA Chapter 10, and it is not necessary to express any view as to the application of Article 1121(1)(b) of NAFTA to the current facts.

74. The other NAFTA cases adduced by the Respondent do not address the issue discussed here. The validity of waivers submitted after the notice of arbitration was at issue in *Thunderbird*. The tribunal in that case decided that it did 'not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA.' The issue in respect of NAFTA Article 1121 before the tribunal in *Waste Management II* was whether a claim could be re-submitted to a new arbitral tribunal with a new valid waiver after having been rejected in a previous arbitral proceeding because of the invalidity of the waiver. Mexico filed a preliminary objection to jurisdiction arguing that a claim could only be submitted once. The tribunal dismissed the objection. Therefore, the only relevant precedent is *Waste Management I* and, as explained above, the differences between NAFTA Article 1121 and CAFTA Article 10.18 in respect of the use of the term 'claim' may, in the view of the Tribunal, reasonably justify a different interpretation under CAFTA.
75. The Tribunal concludes that the word 'claim' in Article 10.18 means the specific claim and not the whole arbitration in which that claim is maintained. Therefore, the waivers submitted by the Claimant are valid in respect of claims arising out of the Lesivo Resolution and the subsequent conduct of the Respondent pursuant to that resolution.

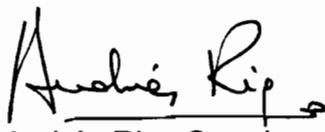
## **VIII. DECISION**

76. Having carefully considered the parties' arguments in their written pleadings and oral submissions, and for the reasons stated above, the Tribunal decides:
- (a) That the reservation included in the waivers submitted by the Claimant pursuant to Article 10.18.2 is of no consequence for purposes of their validity.
  - (b) That the waivers submitted by the Claimant pursuant to Article 10.18.2 are valid in respect of the claim arising from the Lesivo Resolution and from subsequent conduct of the Respondent pursuant to the Lesivo Resolution and, therefore, fulfill the Respondent's consent to arbitration conditions under Article 10.18 in respect of that claim.
77. The Claimant has requested the award of the costs of this phase of the proceeding. The Respondent has requested the award of such costs and its own legal fees and expenses associated with this phase of the proceeding. The Tribunal will consider this matter as part of the merits.
78. The Tribunal will order the continuation of the proceeding on the merits and will establish a calendar for the filing of pleadings on the merits after consultation with the parties.

Done in Washington, D.C.

  
Hon. Stuart E. Eizenstat  
Arbitrator

  
Professor James Crawford  
Arbitrator

  
Dr. Andrés Rigo Sureda  
President of the Tribunal