

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

RAILROAD DEVELOPMENT CORPORATION (RDC)
Claimant

and

REPUBLIC OF GUATEMALA
Respondent

ICSID CASE No. ARB/07/23

SECOND DECISION ON OBJECTIONS TO JURISDICTION

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: May 18, 2010

TABLE OF CONTENTS

I.	PROCEDURAL BACKGROUND.....	4
II.	STATEMENT OF FACTS	10
III.	THE OBJECTIONS TO JURISDICTION	14
1.	First objection: The Tribunal lacks jurisdiction because Claimant’s Claims relate to a Dispute and “Acts or Facts” that predate the Treaty’s Entry into Force (Objection <i>Ratione Temporis</i>)	14
A.	<i>RESPONDENT’S POSITION ON THE OBJECTION RATIONE TEMPORIS</i>	14
B.	<i>CLAIMANT’S POSITION ON THE OBJECTION RATIONE TEMPORIS</i>	20
2.	Second Objection: The Tribunal lacks Jurisdiction because the Alleged Investment with respect to the Usufruct Contracts is not a Covered Investment under the Treaty (Objection <i>Ratione Materiae</i>)	29
A.	<i>RESPONDENT’S POSITION ON THE OBJECTION RATIONE MATERIAE</i>	29
B.	<i>CLAIMANT’S POSITION ON THE OBJECTION RATIONE MATERIAE</i>	31
3.	Third Objection: The Tribunal lacks Jurisdiction over Claims related to Squatters and to Payments into the Trust Fund because such Claims are the Subject of Local Proceedings	33
A.	<i>RESPONDENT’S POSITION ON THE THIRD OBJECTION</i>	33
B.	<i>CLAIMANT’S POSITION ON THIRD OBJECTION</i>	34
4.	Relief Requested.....	35
IV.	POST-HEARING SUBMISSIONS	35
1.	The Tribunal’s Questions	35
2.	The Parties’ Replies.....	36
A.	<i>REPLIES TO THE FIRST QUESTION</i>	36
B.	<i>REPLIES TO THE SECOND QUESTION</i>	37
C.	<i>REPLIES TO THE THIRD QUESTION</i>	38
D.	<i>REPLIES TO THE FOURTH QUESTION</i>	39
E.	<i>REPLIES TO THE FIFTH QUESTION</i>	40
V.	THE REPUBLIC OF EL SALVADOR’S SUBMISSION AS A CAFTA NON-DISPUTING PARTY .	41

VI. ANALYSIS OF THE TRIBUNAL.....	42
1. Preliminary Matters.....	42
2. Objection <i>Ratione Temporis</i>	43
3. Objection <i>Ratione Materiae</i>	53
4. Third Objection.....	56
VII. DECISION.....	58

SECOND DECISION ON OBJECTIONS TO JURISDICTION

I. PROCEDURAL BACKGROUND

1. On June 14, 2007, Railroad Development Corporation (“RDC” or “Claimant”) filed before the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) a Request for Arbitration against the Republic of Guatemala (“Respondent”, “Guatemala” or the “Government”) on its own behalf and on behalf of Compañía Desarrolladora Ferroviaria, S.A., a company which does business as Ferrovías Guatemala (“FVG”), a Guatemalan company majority-owned and controlled by RDC. The Request was brought under the Dominican Republic – Central America – United States of America Free Trade Agreement¹ (“CAFTA” or the “Treaty”). ICSID registered the Request for Arbitration on August 20, 2007.

2. The Tribunal, composed of Professor James Crawford, Honorable Stuart E. Eizenstat and Dr. Andrés Rigo Sureda (President) was constituted on April 14, 2008.

3. On May 29, 2008, the Respondent requested that the Tribunal considered on an expedited basis, an objection to the jurisdiction of the Tribunal pursuant to CAFTA Article 10.20.5. As required by Article 10.20.5, the Tribunal suspended the proceedings on the merits. The parties exchanged written submissions and a hearing on jurisdiction was held on October 10, 2010. On November 17, 2008, the Tribunal issued its Decision on Objection to Jurisdiction under CAFTA Article 10.20.5 (“First Decision on Jurisdiction”). In that decision the Tribunal held:

¹ Signed in August 5, 2004. CAFTA entered into force between the United States of America and Guatemala on July 1, 2006.

“(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. [and] (b) [t]hat 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.”

4. On December 12, 2008, the Respondent filed a request for clarification of the First Decision on Jurisdiction. The Claimant filed comments on December 19, 2008. On January 6, 2009, the Tribunal issued Procedural Order No. 2 establishing the procedural calendar on the merits phase of the proceedings and fixing May 24, 2009 as the deadline for the submission of the Memorial on the Merits, and a two-week deadline after the date of submission of the Memorial on the Merits for “Respondent [to] inform the Tribunal and Claimant of any intention to raise preliminary objections.” On January 13, 2009, the Tribunal issued the Decision on Clarification in connection with the First Decision on Jurisdiction.

5. By letter of May 5, 2009 and the Respondent’s letter of May 7, 2009, the parties informed the Tribunal of their agreement to modify the schedule for the submissions of pleadings set forth in Procedural Order No. 2. By letter of May 8, 2009, the Tribunal approved the parties’ proposal. According to the new calendar, the Claimant’s Memorial was to be submitted on June 26, 2008 while the Respondent’s notice of any jurisdictional objections was scheduled for July 25, 2009. Accordingly, Claimant filed its Memorial on the Merits on June 26, 2009.

6. On July 24, 2009, Guatemala filed a notice of intent to raise preliminary objections, as it had reserved the right to do under CAFTA, Article

10.20.4.² Claimant objected on August 4, 2009. A further exchange between the parties on this matter took place by Respondent's letter of August 7 and Claimant's letter of August 14, 2009.

7. On August 24, 2009, the Tribunal issued Procedural Order No. 3 suspending the proceeding on the merits, establishing September 24, 2009 as the deadline for Guatemala to submit its Memorial on Objections to Jurisdiction and granting Claimant 30 days after receipt of Respondent's Memorial to submit its Counter-Memorial on Jurisdiction.

8. On September 24, 2009, Guatemala filed its Memorial on Objections to Jurisdiction ("Respondent's Memorial"); Claimant filed its Counter-Memorial on Jurisdiction ("Claimant's Counter-Memorial") on October 26, 2009.

9. On November 3, 2009, the Tribunal issued Procedural Order No. 4 whereby the Tribunal decided that "given the thoroughness of the memorials filed, the Tribunal does not need to receive further written argument but, before deciding on Respondent's objections, it would assist the Tribunal to hear the parties in oral argument."

10. On November 18, 2009, Claimant proposed a bifurcated hearing whereby the Tribunal would hear first oral argument on whether any of Respondent's jurisdictional objections are "maintainable or proper as a matter of law without any need to resolve any disputed questions of fact", and, only if the Tribunal would determine that one or more of Respondent's objections are properly maintainable as a matter of law, would the Tribunal hold a subsequent evidentiary hearing.

11. On November 24, 2009, Respondent objected to Claimant's proposal, *inter alia*, because "its jurisdictional objections are inextricably intertwined with certain facts and thus the legal issues involved can only be evaluated with reference to those facts."

² CAFTA Article 10.20.4 provides that the "preliminary question" procedure (laid down in Article 10.20.5) is "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question". This led in the present case to two jurisdictional hearings on different points, which is inconvenient, to say the least.

12. On December 1, 2009, the Tribunal issued Procedural Order No. 5 deciding to hold a single three-day hearing on the objections to its jurisdiction.

13. After consulting the parties, the Tribunal decided to hold the hearing from March 1 to March 3, 2010.

14. The hearing on jurisdiction took place at the seat of the Centre in Washington, D.C. Pursuant to CAFTA Article 10.21 the hearing was open to the public. Representatives of the United States of America (the 'United States') and the Republic of El Salvador ('El Salvador') attended the hearing as non-disputing parties. The parties were represented by their respective counsel who made presentations to the Tribunal. Present at the hearing were:

Tribunal

Dr. Andrés Rigo Sureda, President

Prof. James Crawford, SC, Arbitrator

Hon. Stuart E. Eizenstat, Arbitrator

ICSID Secretariat

Ms. Natalí Sequeira

Assistant to Hon. Stuart E. Eizenstat

Mr. Adam M. Smith

Claimant

Mr. C. Allen Foster, *Greenberg Traurig, LLP*

Ms. Ruth Espey-Romero, *Greenberg Traurig, LLP*

Ms. Regina Vargo, *Greenberg Traurig, LLP*

Mr. Kevin Stern, *Greenberg Traurig, LLP*

Mr. Nick Caldwell, *Greenberg Traurig, LLP*
Ms. Ha Jeang (Julie) Lee, *Greenberg Traurig, LLP*
Mr. Adam Wolfe-Bertling, *Greenberg Traurig, LLP*
Mr. Henry Posner III, *RDC*
Mr. Bob Pietrandrea, *RDC*
Ms. Hannah Posner, *RDC*
Mr. Jorge Senn, *RDC*
Mr. William J. Duggan, *RDC*
Mr. Pablo Alonzo, *RDC*

Respondent

Mr. Guillermo Porras Ovalle, *Attorney General of the Republic of Guatemala*
Mr. Estuardo Saúl Oliva Figueroa, *Attorney General's Office*
Mr. Aníbal Samayoa Salazar, *Presidential Delegate*
Mr. Jesús Insúa, *Vice-Minister of Communications, Infrastructure and Housing*
Mr. Joaquín Romeo López Gutiérrez, *Ministry of Economy*
Mr. Mynor Castillo, *Ministry of Economy*
Mr. Francisco Vázquez, *Ministry of Economy*
Ms. Myriam López, *Palacios y Asociados*
Mr. Fernando de la Cerda, *Embassy of Guatemala, Washington, D.C.*
Mr. José Lambour, *Embassy of Guatemala, Washington, D.C.*
Mr. David M. Orta, *Arnold & Porter, LLP*
Mr. Patricio Grané, *Arnold & Porter, LLP*

Mr. Bonard Molina García, *Arnold & Porter, LLP*

Ms. Margarita Sánchez, *Arnold & Porter, LLP*

Ms. Giselle Fuentes, *Arnold & Porter, LLP*

Mr. Andrés Ordóñez, *Arnold & Porter, LLP*

Ms. Paloma Gómez, *Arnold & Porter, LLP*

Mr. Danilo Antezana, *Arnold & Porter, LLP*

Ms. Cynthia Ibáñez, *Arnold & Porter, LLP*

Witnesses for the Respondent

Mr. Arturo Gramajo Mondal, *FEGUA*

Mr. Julio Roberto Berdúo Samayoa, *Lawyer (retained by the Government of Guatemala)*

Mr. Manuel Duarte Barrera, *Legal Adviser to the President of Guatemala*

Ms. Celena Deyanira Ozaeta Méndez, *Consultant to the Government of Guatemala*

Ms. Susan Pineda Mendoza, *Member of the High Level Commission*

Mr. Mario Rodolfo Marroquín Rivera, *Member of the High Level Commission*

Ms. Astrid Zosel Gantenbein, *Legal Adviser to the Government of Guatemala*

Ms. Marithza Ruiz Sánchez de Vielman, *Expert Witness*

Witnesses for the Claimant

Mr. Henry Posner III, *RDC and FVG*

Mr. Jorge Senn, *RDC and FVG*

Mr. Mario Estuardo José Fuentes Sánchez, *Presidential Sub-Commissioner for Mega Projects*

Mr. William J. Duggan, *RDC and FVG*

Mr. Eduardo A. Mayora, *Expert Witness*

15. During the hearing, on March 3, 2010, the representatives of the United States and El Salvador made statements reserving their right to make submissions under CAFTA Article 10.20.2 and requesting the Tribunal to fix a dateline for filing them.

16. On March 5, 2010, the Tribunal sent a communication to all non-disputing parties fixing March 19, 2010 as the time limit to file submissions under CAFTA Article 10.20.2.

17. On March 10, 2010, the Tribunal requested the parties to file post-hearing briefs on specific questions not later than March 31, 2010.

18. On March 18, 2010, the United States informed the Tribunal that it would not be making a non-disputing party submission pursuant to CAFTA Article 10.20.2.

19. On March 19, 2010, El Salvador filed a submission as a non-disputing party under CAFTA Article 10.20.2.

20. On March 23, 2010, the Tribunal invited the views of the parties on the submission of El Salvador.

21. On March 31, 2010, the parties filed their replies to the Tribunal's questions and their observations on El Salvador's submission.

II. STATEMENT OF FACTS

22. Railroad Development Corporation ("RDC") is a privately-owned railway investment and management company incorporated in the United States.

In 1997 it won, through international public bidding, the use of the rail infrastructure to provide railway services in Guatemala (the “Usufruct”). Only two bids were submitted. 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. Only RDC’s bid was considered responsive by Respondent, in spite of the fact that RDC submitted an integrated bid that included the use of the railway equipment.

23. The Usufruct awarded to RDC consisted of a 50-year right to rebuild and operate the Guatemalan rail system by way of a usufruct. On November 25, 1997, FVG signed the Usufruct Contract of Right of Way with Ferrocarriles de Guatemala (“FEGUA”), a state-owned company, established in 1969, responsible for providing railway transport services and managing the railway’s personal property and real estate assets. The Usufruct and the related Railway Usufruct Contract were ratified by the Congress of Guatemala by Decree 27-98, and published in the Official Gazette on April 23, 1998. It is accordingly not in dispute that – whether RDC’s bid conformed to the tender requirements or was a non-conforming bid accepted by Guatemala – the Railway Usufruct Contract was lawfully concluded as a matter of Guatemalan law.

24. 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.

25. The Railway Usufruct Contract was documented by Deed Number 402 (“Contract 402”) and came into force on May 23, 1998. In addition, on December 30, 1999, FVG and FEGUA entered into a Trust Fund Agreement for the Rehabilitation and Modernization of the railroad system (“Contract 820”) providing for certain payments to be made by FEGUA into a trust fund established for this purpose (“Trust Fund”).

26. In November 1997, Guatemala invited bids for the use of FEGUA's rail equipment in onerous usufruct. On December 11, 1997, FVG submitted its bid. FVG was the only bidder and on December 16, 1997 won the rail equipment usufruct. The Tribunal would observe that it is not surprising that FVG was the only bidder. As noted above, its original bid (which resulted in Contract 402) had explicitly envisaged both the right of way and the use of the railway stock and property. Further, the railway being narrow gauge, only the narrow gauge rolling stock retained by FEGUA was of any use.

27. On March 23, 1999, FEGUA and FVG signed Usufruct Contract 41 ("Contract 41"), granting FVG "the use, enjoyment, repair and maintenance of railway equipment owned by FEGUA for the purposes of rendering railway transportation services." This contract never entered into force for lack of approval by an *Acuerdo Gubernativo* ("Executive Resolution"). Such approval was required under Guatemalan administrative law and also by Clause 6.4 of the bidding conditions for Contract No. 41. As reported below (see paragraph 104) and despite a question by the Tribunal, it is uncertain why no *Acuerdo Gubernativo* was issued. Meanwhile, FVG had the use of the railway equipment under short-term arrangements (see below, paragraph 143).

28. In view of the fact that Contract 41 did not enter into force and in order to achieve the same purposes, FVG and FEGUA entered into Contract 143 on August 28, 2003. The circumstances and effect of Contract 143 are a matter of controversy between the parties and the Tribunal simply registers here the fact that FVG and FEGUA signed this contract, and subsequently modified it by Contract 158 ("Equipment Usufruct Contracts")

29. FVG restored 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.

30. On June 13, 2005 and on July 25, 2005, FVG filed domestic arbitration cases against FEGUA for breach of Contract 402 and Contract 820, respectively.

FVG alleged that Guatemala through FEGUA failed to remove squatters from the rail right of way and to make payments to the Trust Fund. FVG 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 the Equipment Usufruct Contracts. The Attorney General issued Opinion No. 205-2005 on August 1, 2005 (the "*Lesividad* Opinion"), and recommended that Guatemala declare the Equipment Usufruct Contracts void as not in the interest of the country.

31. On January 13, 2006, FEGUA issued Opinion 05-2006, arguing, in agreement with the Attorney General's opinion, that the Contracts were not awarded as a result of a public bid.

32. Claimant met the President of the Republic, Mr. Oscar Berger, on March 7, 2006; as a result the President set up a high level commission to work with RDC and FVG, on which FEGUA was represented. This commission met a number of times but the meetings were suspended after the meeting held on May 11, 2006. The importance of this meeting loomed large in the exchanges between the parties. At issue is when Claimant learned about the process of *lesividad*, which Respondent alleges to have been started in late April 2006, and to what extent this process was suspended to allow the negotiations to proceed. For reasons that will become apparent, this is a matter which is not material to the question of the Tribunal's jurisdiction.

33. Contract 143 having been executed on August 26, 2003, the period for the Government to declare it *lesivo* under the Guatemalan statute of limitations (three years from the date of execution of the contract) expired on August 26, 2006. The day before, i.e. August 25, 2006, the resolution declaring the Equipment Usufruct Contracts *lesivos* to the interests of the State was published. It had been signed by the President on August 11, 2006.

34. After the publication of the *Lesivo* Resolution a "*mesa de diálogo*" was established and FEGUA, FVG and the parties continued to negotiate during the period of ninety days within which the Attorney General had to file the

lesividad claim with the Administrative Tribunal. To this date the Administrative Tribunal has not decided on the *lesividad* claim.

* * *

35. The Tribunal will now summarize the three objections to jurisdiction as they were developed in the evidence and in argument, and the parties' replies to the Tribunal's questions addressed in the post-hearing briefs.

III. THE OBJECTIONS TO JURISDICTION

1. FIRST OBJECTION: THE TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT'S CLAIMS RELATE TO A DISPUTE AND "ACTS OR FACTS" THAT PREDATE THE TREATY'S ENTRY INTO FORCE (OBJECTION *RATIONE TEMPORIS*)

A. RESPONDENT'S POSITION ON THE OBJECTION RATIONE TEMPORIS

CAFTA Article 10 provides as follows:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments; and

(c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.

...

3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

36. According to Respondent, all claims of RDC fall outside the temporal scope of the Tribunal's jurisdiction because Claimant's Treaty claim is a continuation of a dispute which arose before the Treaty entered into force and the acts or facts on which RDC relies also happened before such entry. (The CAFTA entered into force between Guatemala and the United States on July 1, 2006.)

37. Respondent's contention is based on CAFTA Article 10.1.3 and Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention") which reflect the customary international law principle of non-retroactive application of treaties. According to Respondent, this general rule applies, as held by the International Court of Justice ("ICJ") in the *Ambatielos* case, unless there is a special clause providing for retroactive application, which is not the case here.³ It is the Respondent's view that the phrase "for greater certainty" at the beginning of CAFTA Article 10.1.3 indicates that an explicit non-retroactivity clause was included to reaffirm the customary international law rule of non-retroactivity. Respondent argues that the non-retroactive nature of the Treaty implies that pre-treaty disputes and acts or facts that pre-date the Treaty are outside its scope.

38. In support of its contention Respondent adduces the work of the International Law Commission ("ILC") and in particular the Third Report of Sir Humphrey Waldock, Special Rapporteur on the Law of Treaties, which was considered at the Sixteenth Session of the ILC.⁴ Respondent points to the statement that, when jurisdictional clauses are attached to substantive clauses to secure their application, the non-retroactivity principle applies to exclude any disputes that arose prior to the treaty's entry into force. Respondent also adduces jurisprudence of the Permanent Court of International Justice ("PCIJ")

³ *Ambatielos Case* (Greece v. United Kingdom), I.C.J. Rep. 1952, p. 28, 45.

⁴ Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission*, 1964, Vol. II, A/CN.4/167 and Add. 1-3.

(*Phosphates in Morocco*⁵) and of investment treaty arbitration tribunals (*Impregilo v. Pakistan*,⁶ *Salini v. Jordan*,⁷ *MCI v. Ecuador*,⁸ *Generation Ukraine v. Ukraine*⁹) in support of its conclusion that, regardless of the wording of the treaty, “investment treaty tribunals have consistently held that unless there is evidence of intent to the contrary, they lack jurisdiction under the treaties over disputes which arose prior to the treaty’s entry into force and over acts or facts that predate the treaty.”¹⁰ Respondent finds that there is no evidence that the parties to the Treaty intended that it would have retroactive effect.

39. Respondent finds further support in the case law of investment treaty arbitration to determine whether the dispute originated before the Treaty. Based on *Lucchetti v. Peru*,¹¹ *Vieira v. Chile*¹² and *MCI v. Ecuador*,¹³ Respondent argues that the key test is whether the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. According to Respondent, when this test is applied to the instant dispute, the dispute is clearly a pre-Treaty dispute because the facts and considerations that gave rise to the decision to declare the Equipment Usufruct Contracts *lesivos* are “the very same facts and considerations that have been in play in the dispute that has existed between the parties since 2004 concerning the legality of the subject contracts.”¹⁴ Respondent points out that FEGUA has questioned the validity of the Equipment Usufruct Contracts since April 2004 when it denied the request made by FVG to hand over certain warehouses and attached the legal opinion of FEGUA’s Legal Department on the illegalities of the Equipment Usufruct

⁵ *Phosphates in Morocco Case*, P.C.I.J., Series A/B, no. 74, 1938, p. 23.

⁶ *Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/11), Decision on Jurisdiction, April 22, 2005, 12 ICSID Rep. 242.

⁷ *Salini Construttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, November 29, 2004, 14 ICSID Rep. 303.

⁸ *M.C.I. Power Group L.C. and New Tribune, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, July 31, 2007.

⁹ *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, September 16, 2003, 10 ICSID Rep. 236.

¹⁰ Respondent’s Memorial, para. 112.

¹¹ *Industria Nacional de Alimentos S.A. and Indalsa Perú (formerly Empresas Lucchetti S.A. and Lucchetti Perú S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Award on Jurisdiction, February 7, 2005, 12 ICSID Rep. 218.

¹² *Sociedad Anónima Eduardo Vieira v. Chile* (ICSID Case No. ARB/04/7), Award, August 21, 2007.

¹³ *M.C.I. v. Ecuador*, see note 8 above.

¹⁴ Respondent’s Memorial, para. 133. Emphasis in the original.

Contracts. The same illegalities were the basis on which the Attorney General's Office, the Cabinet Ministers and the President of Guatemala himself concluded that the Equipment Usufruct Contracts must be declared *lesivos*. Furthermore, alleges Respondent, the subject matter of the dispute is the same that gave rise to the pre-Treaty dispute since it results from Guatemala's position on the invalidity of the Equipment Usufruct Contracts which now Claimant characterizes as a Treaty breach. Respondent explains that the *Lesivo* Resolution was Guatemala's way to deal with this dispute when the parties were unable to reach a settlement to cure the underlying illegalities. According to Respondent, the dispute did not come to an end, or subsequently crystallize in a new dispute. This was attested by Claimant's own conduct in requesting the suspension of the signing of the *Lesivo* Resolution in order to continue the negotiations, an event which occurred two months before the resolution was adopted and before the CAFTA entered into force. It was also attested by the repeated references of Claimant to the "*lesivo* process", which show that Claimant did not understand the *lesividad* declaration to be a single act which occurred after the Treaty entered into force.

40. Respondent describes the steps of the *lesividad* process in the instant case as follows:

- First, on August 1, 2005, the Attorney General's Office issued Opinion 205-2005 recommending that the Usufruct Contracts be declared *lesivos* on account of invalidity.
- Second, on January 13, 2006, FEGUA submitted this opinion to the President's Office with its own recommendation that the Usufruct Contracts be declared *lesivos* on account of nullity. Then the President's Office transferred the recommendation to the Ministry of Finance for analysis.
- Third, on April 6, 2006, in a joint opinion three departments of the Ministry of Finance concurred in the *lesividad* of the Usufruct Contracts on account of their invalidity.

- Fourth, on April 26, 2006, the President decided the issuance of the *lesividad* declaration and began the collection of ministerial signatures.

41. Respondent contests Claimant's affirmation that it knew nothing about the *lesividad* process until the Treaty entered into force. Respondent points out that this matter was public knowledge, it was discussed in the press and, on May 11, 2006, "in the midst of settlement negotiations and before the Treaty entered into force, *Claimant objected to the ongoing lesivo process in light of the settlement negotiations* and required that the *lesivo* process be suspended, the decision of the President put on hold, pending the negotiations."¹⁵ According to Respondent, on that date, the process was put on hold but if negotiations did not succeed the resolution would need to be adopted because the President would incur personal liability if he did not declare the *lesividad* within the three-year statute of limitations period.

42. Respondent alleges that Claimant manipulated the timing of the issuance of the *Lesivo* Resolution. According to Respondent, "Claimant, after purportedly negotiating with Guatemala for months to settle the disputes that gave rise to the *Lesivo* Resolution, and aware that the *Lesivo* Resolution would not be issued until negotiations [failed], kept negotiations going, but then curiously lost all interest in reaching a negotiated resolution to the dispute soon after CAFTA entered into force."¹⁶ On the other hand, Respondent finds proof of its own negotiating good faith in the fact that, as late as September 8, 2006, FEGUA offered to negotiate new contracts with Claimant to replace the Usufruct Contracts.

43. Respondent argues that the *ratione temporis* constraints cannot be circumvented by asserting a Treaty claim since such interpretation would mean that the *ratione temporis* objection could always be defeated by invoking a different cause of action under the Treaty. Respondent finds support for this

¹⁵ *Ibid.*, para. 145. Emphasis in the original.

¹⁶ *Ibid.*, para. 148.

argument in *Lucchetti v. Peru*¹⁷ and *Impregilo v. Pakistan*¹⁸ and affirms that, merely because certain acts took place after the Treaty's entering into force, "such circumstances do not obviate the need for the Tribunal to dig deeper in order to determine whether the dispute at bottom relates to the 'same subject' matter as some earlier, pre-Treaty dispute."¹⁹

44. Respondent argues further that, even if Claimant's assertions are assumed to be true, the evidence shows that the dispute arose before the entry into force of the Treaty. Respondent addresses each of Claimant's assertions. First, Respondent refers to Claimant's assertion that the *lesividad* process was used in an attempt to force FVG to withdraw from the local arbitration processes in which FVG has charged FEGUA with breach of contract. According to Respondent, this assertion would mean that Respondent's maneuver was designed to address the local arbitrations and underlying contractual disputes that arose long before the Treaty's entry into force.

45. Respondent refers to two more assertions of Claimant, that it was the purpose of the *lesividad* process: (a) to appropriate FVG's rolling stock making it impossible for FVG to perform under the basic right-of-way and thus effectively appropriating all of FVG's business without paying compensation, and (b) to redistribute to Guatemalan private sector companies the benefits of the Equipment Usufruct Contracts. Respondent denies the truthfulness of these assertions but, in its opinion, they show that, by Claimant's own admission, the *Lesivo* Resolution arose in the context of a pre-Treaty dispute.

46. Alternatively, Respondent argues that,

"if the Tribunal takes a narrower view of the scope of the *ratione temporis* objection, and focuses on the specific 'acts or facts' alleged by Claimant as part of its Treaty claims, without regards to the existence of the underlying broader dispute to which these acts and facts relate, Claimant's claims are still outside the scope

¹⁷ *Lucchetti v. Peru*, see note 11 above, quoted in Respondent's Memorial.

¹⁸ *Impregilo v. Pakistan*, see note 6 above, quoted in Respondent's Memorial.

¹⁹ Respondent's Memorial, para. 152.

of the treaty because its claim centers on an act or fact that took place before the Treaty's entry into force."²⁰

47. Then Respondent addresses Claimant's argument that, if it were not for the *Lesivo* Resolution, the Treaty would not have been breached and affirms that the *lesividad* process was set in motion and the decision to declare the Equipment Usufruct Contracts *lesivos* taken by the President of Guatemala shortly after April 26, 2006 well before the Treaty entered into force. According to Respondent, the *Lesivo* Resolution was inescapable given the unanimous recommendation of the Guatemalan administration to declare the Equipment Usufruct Contracts *lesivos*, and the fact that the President faced personal liability if the resolution was not issued within the statutory limitation of three years, which expired on August 25, 2006.

B. CLAIMANT'S POSITION ON THE OBJECTION RATIONE TEMPORIS

48. As an initial matter, the Tribunal notes that the Claimant contests facts on which Respondent relies in support of its arguments. According to Claimant: (a) FEGUA did not inform FVG of any legal defects with regard to the Equipment Usufruct Contracts in the April 2004 exchange of correspondence between the General Manager of FVG, Mr. Senn and the Director of FEGUA, Dr. Gramajo; (b) discussions between FEGUA and FVG since late 2004 did not concern the validity of the Equipment Usufruct Contracts or whether they were *lesivos*; (c) FEGUA never conveyed to FVG its concern about the historical and cultural value of the railway equipment assets; (d) during the years 2004-2005, FVG only presented proposals and possible draft contracts at FEGUA's request, not because FVG deemed a new contract necessary; (e) FEGUA never informed FVG that the parties were at an impasse; (f) Respondent never provided or communicated to FVG any of the legal opinions concerning the *lesivo* character

²⁰ *Ibid.* para. 164.

of the Equipment Usufruct Contracts; (g) at the meeting between the Chairman of RDC, Mr. Posner, and President Berger on March 7, 2006 there was no mention that the Equipment Usufruct Contracts were illegal or harmful to the State, the President indicated his desire to see a high-level commission formed to work with RDC and FVG to resolve outstanding contract disputes with FEGUA related to FVG's arbitrations; and (h) no legal or technical defects of the Usufruct Contracts were discussed at the meetings of the High-Level Commission held on April 3, May 5 and May 10, 2006.

49. As to the May 11th meeting of the High-Level Commission, Claimant alleges that Claimant's representatives heard on the way to the meeting that a document to cancel FVG's contract was being circulated for signature among the Ministers. At the meeting the Government's representatives informed the Claimant's representatives that the Government was not willing to withdraw FEGUA's legal actions which sought to annul the arbitration clause in Contracts 402 and 820. When confronted with what the Claimant's representative had heard just before the meeting, the Government's representatives appeared surprised and, after trying unsuccessfully to contact the persons whom they needed to talk to, stated that they would investigate the issue and stop whatever it was and get back to FVG at the next meeting scheduled for later in the month.

50. The meeting scheduled for May 24, 2006 was cancelled by the Government on that same day and no further meetings took place. Through the remainder of May and June 2006 Messrs. Senn and local FVG counsel, Carrasco contacted the High-Level Commission members in an effort to reconvene the meetings. On July 6, 2006, Mr. Carrasco e-mailed the Commission members insisting that negotiations resume. Commission member Ms. Pineda responded only on August 16, 2006 stating that the Government was working on a negotiating proposal. Claimant points out that the President had signed the *Lesivo* Resolution five days earlier.

51. Claimant affirms that only in mid-August did it learn that the *lesivo* rumor heard on May 11, 2006 was true. According to Claimant, on August 11 Mr.

Melville of Cementos Progreso, a minority shareholder of FVG, informed Mr. Posner that at the doing of Mr. Campollo, a local businessman, the Government would declare some aspects of unspecified usufruct contracts of FVG *lesivos*. Mr. Posner instructed Mr. Carrasco to seek the support of the United States Embassy and, to this effect, Mr. Carrasco prepared a fact sheet. Claimant finds support in the fact sheet for its argument that up to then Claimant had no specifics regarding the impending *Lesivo* Resolution and was unaware that it had already been signed.

52. On August 24, 2006, representatives of the Government and FVG met. According to Claimant, at this meeting Respondent presented “a written take-it-or-leave it proposal which principally demanded that FVG renegotiate key terms of Contracts 402 and 820, dismiss its breach of contract arbitrations, and surrender ‘railway sections yet to be restored in which other investors may be interested;”²¹ this proposal also included “a minor reference to modifying the terms”²² of the Equipment Usufruct Contracts. Claimant alleges that Respondent “informed FVG that it intended to issue the *Lesivo* Resolution with regard to the equipment contracts the next day unless FVG agreed to its demands concerning Contracts 402 and 820 and regardless if FVG was willing to agree to the Government’s requested modifications to the equipment contracts.”²³ Claimant refused Respondent’s demands and the *Lesivo* Resolution was issued the next day.

53. Regarding the specific arguments made in this objection, Claimant agrees with Respondent that CAFTA Article 10.1.3 only serves to “reaffirm the standing residual rule of customary international law of non-retroactivity embodied in Article 28 of the VCLT [Vienna Convention on the Law of Treaties]”, but it contests Respondent’s assertion that, due to the Treaty’s non-retroactivity, it must explicitly provide that it applies to disputes that arose prior to the Treaty’s entry into force.

²¹ Claimant’s Counter-Memorial, para. 35.

²² *Ibid.*

²³ *Ibid.*

54. Claimant considers this to be a misstatement of customary international law which, according to Claimant, provides that, “absent expressly stated party intent to the contrary, an investment treaty applies to *any dispute existing* between the parties at the time of the treaty’s entry into force.”²⁴ Claimant finds support in the official Commentary to Article 28(3) of the Vienna Convention which states that when “an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty.”²⁵ Claimant also refers to the Commentary on Article 28(2) which, based on the *Mavrommatis Palestine Concessions*, concludes that if an agreement uses “the word ‘disputes’ without any qualification, the parties are understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement.”²⁶ Claimant contests the meaning attributed by Respondent to the Sixteenth Session Report of the ILC and quotes the following paragraph: “[The] word ‘disputes’ is apt to cover any dispute which exists between the parties after the coming into force of the treaty. *It matters not either that the dispute concerns events which took place prior to that date or that dispute itself arose prior to it*, for the parties have agreed to submit to arbitration or judicial settlement all their existing disputes without qualification.”²⁷

55. Claimant argues that this is how Article 25 of the ICSID Convention has been construed by the doctrine and arbitral tribunals. Claimant points out that the cases of *Lucchetti v. Peru* and *Vieira v. Chile*, relied on by Respondent, concern treaties which specifically provide that they do not apply to disputes prior to their entry into force. Claimant observes that Respondent ignores in its argument that “the obvious reason for the inclusion of specific language barring pre-entry disputes in the Chile BITs at issue in *Lucchetti* and *Vieira* was to bar a

²⁴ *Ibid.* para. 41.

²⁵ *Ibid.* para. 43.

²⁶ *Ibid.* para. 44.

²⁷ Report of the International Law Commission on the Work of its Sixteenth Session, July 11, 1964, Doc. A/CN.4/173, *Yearbook of the ILC*, 1964, Vol. II, p. 178 (emphasis added by Claimant) quoted in para. 47 of the Claimant’s Counter-Memorial.

category of disputes that otherwise would *not* be excluded from the treaties' respective jurisdiction."²⁸

56. Claimant dismisses the relevance of other arbitral case law relied on by Respondent because on closer analysis it does not support Respondent's position. Claimant further refers to the decision of the arbitral tribunal in *Chevron v. Ecuador* where the tribunal rejected Ecuador's *ratione temporis* objection because the treaty's temporal restrictions referred to investments and not disputes.

57. After rebutting Respondent's arguments based on arbitral jurisprudence, Claimant addresses the text of the Treaty itself. Claimant argues that nowhere in CAFTA Article 10.15 (Consultation and Negotiation) and CAFTA Article 10.16 (Submission of a Claim to Arbitration) or elsewhere in Chapter 10 does the Treaty qualify or restrict the types of investment disputes that may be submitted to arbitration. Claimant points out that the term "measure" as used in the Treaty relates to a national or an enterprise of a State party that has made an investment in the territory of another Party in existence as of the date of entry into force of this Agreement, and reasons:

"RDC is the 'investor' in Article 10.1(a), FVG is the 'covered investment' in Article 10.1(b), and the 'measure(s) adopted or maintained by [Respondent]' that form the basis for RDC's 'claim(s)' under Article 10.16 are 'the Lesivo Resolution and...subsequent conduct of the Respondent pursuant to the Lesivo Resolution.' These measures adopted by Respondent 'breached...an obligation under Section A.' The initial breach, the Lesivo Resolution, was officially declared on August 25, 2006 by publication in the Guatemalan Official Gazette; additional breaches arising from Respondent's subsequent conduct pursuant to the Lesivo Resolution by definition occurred after August 25, 2006."²⁹

²⁸ Claimant's Counter-Memorial, para. 55. Emphasis in the original.
²⁹ *Ibid.* para. 76.

58. Claimant concludes that the parties to the Treaty chose not to define the Treaty's *ratione temporis* jurisdiction by reference to the timing of the dispute and instead chose the timing of a "measure", the State act complained of. Claimant sees bad faith on the part of the Respondent when it fails to take this into account in its Memorial and had relied on it in its previous preliminary objection.

59. Claimant offers an alternative argument should the Tribunal find that it has no jurisdiction over disputes that arose prior to the Treaty's entry into force. It is Claimant's contention that there was in fact no dispute between Claimant and Respondent in respect of the *Lesivo* Resolution or any of the alleged legal defects in the Equipment Usufruct Contracts before the Treaty entered into force. As a further alternative argument, Claimant contends that its Treaty claims are based on a *different dispute*,³⁰ one that arose after the Treaty entered into force.

60. As regards the first alternative argument, Claimant points out that most of the events Respondent relies upon were internal to Respondent and FEGUA and cannot have been part of a dispute with FVG. Claimant relies on the six factors which characterize a dispute outlined by the *Vieira* tribunal to show that no dispute existed with Respondent prior to the Treaty entering into force. First, "there was absolutely NO communication between Respondent and Claimant prior to CAFTA's entry into force about the Government's intention to declare these contracts [the Equipment Usufruct Contracts] *lesivo*."³¹ Second, "With minimal exception, the Government went to great lengths NOT to communicate to Claimant either the nature of the contracts' alleged legal defects or the possibility of using *lesivo* to take over RDC's investment prior to August 2006, when the *Lesivo* Resolution issued."³²

61. Claimant points out that, prior to the *Lesivo* Resolution, Respondent never communicated to Claimant any of the legal opinions on the alleged *lesivo*

³⁰ *Ibid.* para. 83. Emphasis added by Claimant.

³¹ *Ibid.* para. 89. Emphasis added by Claimant.

³² *Ibid.* Emphasis added by Claimant.

nature of the Equipment Usufruct Contracts and, as to the illegalities of the Equipment Usufruct Contracts, the only communication identified by Respondent is the letter of April 14, 2004 of Dr. Gramajo to Mr. Senn attaching FEGUA legal opinion 47-2004 which does not mention any of the alleged illegalities. Dr. Gramajo's transmittal letter simply denied Mr. Senn's request.

62. Claimant argues that the "conversations" to which Dr. Gramajo refers can hardly constitute a dispute when the two parties seem to be of one mind to solve the existing problems. Claimant observes that the issues identified were almost entirely within Respondent's control and, while Respondent never offered to solve them, there is no evidence that it ever refused to do so, "thereby potentially creating a dispute."³³

63. Claimant contests Respondent's argument based on FEGUA's purported concern for the condition of the railroad equipment as historical and cultural patrimony of the State. According to Claimant, prior to the *Lesivo* Resolution, Respondent never declared any of FEGUA's railway equipment or rolling stock to be part of its cultural and historic patrimony, and this contention does not appear in the *Lesivo* Resolution itself.

64. Claimant also points out that Dr. Gramajo's concern about cannibalization of equipment is raised now for the first time. According to Claimant, there is nothing in the Equipment Usufruct Contracts or in the predecessor Contract 41 which prohibited FVG from removing parts from unused equipment to be used in working equipment. Claimant also refers to the criminal complaint filed by FEGUA against FVG in order to safeguard railway equipment cited by Dr. Gramajo and observes that it was not legally notified of the suit until after the Treaty entered into force and no ruling has been issued by the court to this date.

65. Claimant argues in great detail how the exchanges that took place at the May 11th meeting of the High Level Commission do not constitute a

³³ *Ibid.* para. 92.

disagreement which implies “a minimum of communication between the parties” as put by the *Vieira* tribunal.

66. Claimant continues with its analysis of the May 11th meeting and of the events that preceded the issuance of the *Lesivo* Resolution to show that the remainder of the requirements for a dispute to exist, as set forth by the *Vieira* tribunal, were lacking before the entry into force of the Treaty. Claimant argues that there was neither a disagreement on a point of law or fact expressed at the May 11th meeting or at any other meeting of the High-Level Commission; at that meeting or afterwards no argument took place which reflected a situation in which the parties had clearly opposing positions in regard to an issue of fact or of law; there is no authentic oral or written registration of a disagreement either in the minutes of the May 11th meeting or thereafter, in fact, according to Claimant, the offer of Commissioner Fernández to suspend any consideration of *lesivo* is the antithesis of registering a disagreement; and there was no concrete claim of Claimant before the Treaty’s entry into force because, in the aftermath of the May 11th meeting, Respondent misled Claimant to believe that any governmental action was in abeyance. Claimant concludes by saying that the May 11th meeting was not the origin or the source of a dispute between the parties regarding the declaration of *lesividad* of the Usufruct Contracts.

67. Claimant argues alternatively that, even assuming that Respondent’s assertions are true, Claimant’s Treaty claims are based on a different dispute than any dispute between the parties that arose prior to the Treaty’s entry into force. According to Claimant, the declaration of *lesividad* is a new and separate dispute from that concerning the validity of the Equipment Usufruct Contracts under Guatemalan law.

68. Claimant finds support for this contention in *Jan de Nul v. Egypt*.³⁴ As in that case, any dispute that allegedly existed between Claimant and Respondent prior to entry into force of the Treaty with regard to the Equipment Usufruct Contracts would have been decided in accordance with Guatemalan law

³⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, June 16, 2006.

and FEGUA never presented its claims against FVG in a domestic court. It also finds support in *Lucchetti v. Peru* since the entry of a new actor can be a decisive factor in determining whether the dispute is a new dispute.³⁵ The new actor in the instant case is the President of Guatemala and the Cabinet Ministers who intervened to issue the *Lesivo* Resolution. Furthermore, according to Claimant, “the separate and distinct nature of the *Lesivo* Resolution from any of the alleged contract disputes between FVG and FEGUA is confirmed by the fact that the *lesivo* claim the Government filed in Administrative Court subsequent to the *Lesivo* Resolution was filed against *both FVG and FEGUA*.”³⁶

69. On the basis of *Mondev v. United States*³⁷ and *Tecmed v. United States*,³⁸ the Claimant contends that it is permissible to refer to the conduct of Respondent prior to the Treaty’s entry into force in order to provide context to the Respondent’s issuance of the *Lesivo* Resolution and subsequent conduct of Respondent.

70. Claimant rebuts Respondent’s argument that the act of declaring the Equipment Usufruct Contracts *lesivos* actually took place when the President decided to take such action in April 2006 following the unanimous opinion of his advisors; and that, barring settlement, the President had no option but to go through with the declaration to avoid potential personal liability. Claimant argues that: (a) there is no evidence of any such decision except hearsay within hearsay; (b) Respondent’s own expert does not attempt to define the legal act of declaring *lesividad* as the moment the President decides in his own head to begin the necessary administrative process to issue such declaration; and (c) Guatemalan administrative law specifically forbids to take as a resolution the opinions given by any legal or technical advisor: “The judgment of the President of the Republic cannot be constitutionally or legally substituted by the judgment

³⁵ *Lucchetti*, see note 11 above, quoted in Claimant’s Counter-Memorial.

³⁶ *Ibid.* para. 141. Emphasis added by Claimant.

³⁷ *Mondev International Ltd v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, October 11, 2002, 6 ICSID Rep.181.

³⁸ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, May 29, 2003.

of his legal advisors or other lower ranking Government officials, no matter how many opinions and recommendations they provide.”³⁹

2. SECOND OBJECTION: THE TRIBUNAL LACKS JURISDICTION BECAUSE THE ALLEGED INVESTMENT WITH RESPECT TO THE USUFRUCT CONTRACTS IS NOT A COVERED INVESTMENT UNDER THE TREATY (OBJECTION *RATIONE MATERIAE*)

A. RESPONDENT’S POSITION ON THE OBJECTION RATIONE MATERIAE

71. Respondent bases this objection on CAFTA Article 10.28(g), which includes in the definition of “investment”, “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law”. Respondent argues that the Equipment Usufruct Contracts are in the nature of “licenses, authorizations, permits and similar rights”. The purpose of Contract 143 was to confer to FVG the use, enjoyment, repair and maintenance of the railroad equipment identified in that contract, for rendering of services in the different branches of the railroad service. Contrary to what is asserted by Claimant, the Usufruct Contracts are not run-of-the-mill concession contracts but “usufruct contracts that involve the inherent governmental function of granting to a private third party the permission and right to use a public good.”⁴⁰

72. Respondent goes on to argue that, according to CAFTA Article 10.28(g), licenses, authorizations permits and similar rights need to be conferred “pursuant to domestic law” if they are to constitute investments; if they do not create rights protected under domestic law, they “do not have the characteristics of an investment.” It is the contention of Respondent that the Equipment Usufruct Contracts suffer from grave legal defects; they were not awarded through a public bidding process and were not approved by an *Acuerdo Gubernativo*. Accordingly they were not conferred pursuant to Guatemalan law. Respondent explains that, although the terms of the Equipment Usufruct Contracts were

³⁹ Claimant’s Counter-Memorial, para. 155.

⁴⁰ Respondent’s Memorial. para. 179.

assumed to have been based on the bidding terms intended for Contract 41, Guatemalan law required a new bidding term for the new contract which was signed four years after the Contract 41 bidding process. The absence of new bidding terms was one of the key grounds of the *Lesivo* Resolution.

73. Respondent affirms that Claimant was well aware of these requirements having participated in the bidding process of other usufruct contracts included the intended Contract 41. Respondent contests the Claimant's allegation that Clause 10 of Contract 402 already conferred rights over the rolling stock. Respondent explains that this clause needs to be read together with the bidding terms of that contract which provide for a subsequent bidding process to acquire the rolling stock that it deems convenient for its activities, and it shows that Claimant was aware of this requirement.

74. Respondent further explains that FEGUA's authority as an autonomous agency is limited to the powers delegated to it by the Guatemalan Congress and the powers of the *Interventor* of FEGUA are in turn limited to those specified in FEGUA's Organic Law, which in either case do not include the authority to grant usufruct rights to private parties of the public railway stock without the President's approval through an *Acuerdo Gubernativo*. Respondent alleges that Claimant was aware of this requirement, having participated in the bidding processes of Contracts 402 and 41; in particular it was well aware that Contract 41 never entered into force for lack of this requirement. Furthermore, Respondent points out that Claimant was sufficiently concerned over the validity of the Equipment Usufruct Contracts to seek their "official recognition".

75. Respondent considers misleading the contention of Claimant that Contract 41 was replaced by Contract 143 at the Government's request. Respondent observes that one year after the execution of Contract 41 and being aware that the *Acuerdo Gubernativo* was not forthcoming, Claimant's General Manager wrote to FEGUA's *Interventor* seeking alternative ways to ensure that they could use the equipment. Respondent also alleges that the Equipment

Usufruct Contracts were prepared by Claimant in an attempt to circumvent a legal precondition for the use of rolling stock.

76. Respondent explains that the approval by the Guatemalan Executive was not a mere formality but a substantive requirement under Guatemalan law; lack of this approval meant that none of these contracts generated usufruct rights. Respondent adds that the “reasons for that approval not having been obtained have no bearing on this dispute, and the tribunal could not make a determination about them because they predate the entering into force of the Treaty.”⁴¹

77. Respondent concludes that the Equipment Usufruct Contracts are not “covered investments” under CAFTA Article 10.28(g) because they were not conferred in accordance with Guatemalan law and, therefore, pursuant to Article 25 of the ICSID Convention and CAFTA Article 10.17, the Tribunal lacks jurisdiction because Guatemala has not consented to submit to arbitration legal disputes that do not arise out of a “covered investment”.

B. CLAIMANT’S POSITION ON THE OBJECTION RATIONE MATERIAE

78. Claimant refers to the broad definition of investment under CAFTA and points out its non-exhaustive character. Claimant argues that its covered investment is not defined or limited to the Equipment Usufruct Contracts, but consists of its controlling interest in and ownership of shares in its investment enterprise FVG: “It is through this investment and ownership stake in FVG that RDC had an ‘expectation of gain’, not only through the profits that FVG was expected to earn through the Usufruct (which could have been paid to RDC in the form of dividends), but also through the expected increased equity value of FVG as the business enterprise operating the Usufruct.”⁴² Furthermore, “even if one were to construe the nature of RDC’s covered investment on the basis of the

⁴¹ *Ibid.* para. 199.

⁴² *Ibid.*, para. 162.

bundle of rights granted to FVG by Guatemala pursuant to *all of the* Usufruct Contracts⁴³, it would still satisfy the Article 10.28 [of the Treaty] definition of ‘investment’ because the Usufruct was an ‘asset’ that RDC indirectly owned that had the ‘expectation of gain or profit.’”⁴⁴

79. Claimant contests the characterization of the Equipment Usufruct Contracts as “concessions over public goods”. Claimant refers to the Guatemalan Civil Code distinction between goods under public domain of “common use” and of “special use”. The latter are those destined for the services of state decentralized entities such as FEGUA. According to Claimant, this mischaracterization implies that the Usufruct Contracts are not “licenses, concessions, authorizations, permits and similar rights” as contended by Respondent.

80. Claimant further argues that the expression “conferred pursuant to domestic law” in CAFTA Article 10.28(g) refers to the validity of the investment and not to its definition. Claimant observes that this expression appears only in Article 10.28(g) and contends that, even assuming *arguendo* that the Equipment Usufruct Contracts fall under Article 10.28(g), this article does not limit the definition of what constitutes an “investment” under this provision but is concerned with the legality of the investment.

81. Claimant rebuts Respondent’s argument that the Equipment Usufruct Contracts were void *ad initio* under Guatemalan law. According to Claimant, the Equipment Usufruct Contracts were “conferred pursuant to domestic law”. Claimant points out that Respondent has not alleged that RDC or FVG committed any acts in violation of Guatemalan law in obtaining or entering into the Equipment Usufruct Contracts but it has argued that they are not “protected investments because a State-owned entity, FEGUA, acted in violation of Guatemalan law by entering into these agreements without initiating a new public bidding process and obtaining Executive approval.”⁴⁵

⁴³ In this context the term “Usufruct Contracts” includes Contract No. 402.

⁴⁴ Claimant’s Counter-Memorial, para. 164. Emphasis added by Claimant.

⁴⁵ *Ibid.* para. 178.

82. Claimant contends that Respondent is estopped from objecting to the Tribunal's jurisdiction *ratione materiae* because FEGUA provided a legal opinion of its legal advisors to RDC and other potential bidders to the effect that the bidding rules complied with Guatemalan law and each of the Equipment Usufruct Contracts set forth the legal capacity of FEGUA's representative to enter into the contract and the legal basis for the contract. Furthermore, Contract 143 states that "[t]his contract shall be in force as of its endorsement, without need of subsequent authorization from any other authority", a statement contrary to later assertions by the Government that Contract 143 is void because it was not awarded pursuant to a separate public bidding process and not authorized or approved by *Acuerdo Gubernativo*.

83. Claimant recalls that during nine years Respondent allowed FVG to perform Contract 402 and the Equipment Usufruct Contracts. RDC further argues that it reasonably relied upon the Government's representations and actions in making its initial and subsequent investments and concludes that the Government's conduct generated in RDC expectations protected by international law and Respondent is estopped from asserting that the Tribunal lacks jurisdiction *ratione materiae*.

3. THIRD OBJECTION: THE TRIBUNAL LACKS JURISDICTION OVER CLAIMS RELATED TO SQUATTERS AND TO PAYMENTS INTO THE TRUST FUND BECAUSE SUCH CLAIMS ARE THE SUBJECT OF LOCAL PROCEEDINGS

A. RESPONDENT'S POSITION ON THE THIRD OBJECTION

84. This objection was the subject of the First Decision on Jurisdiction and the subsequent Decision on Clarification. Respondent includes it in its Memorial on Objections to Jurisdiction because Claimant, in its Memorial on the Merits, "insists on raising claims based on the same measures that are at issue in the local arbitrations, measures that the Tribunal already ruled were excluded

from this arbitration by virtue of Claimant's failure to adequately meet the threshold requirement of Article 10.18.2 of the Treaty."⁴⁶

85. Respondent re-affirms that the Tribunal lacks jurisdiction to hear claims related to the removal of squatters from the right of way of the railroad and related to FEGUA's payments into the Trust Fund because they are the subject of local arbitration proceedings and Claimant has failed to waive its right to continue those proceedings. Respondent supports its contention with arguments which the Tribunal heard in connection with the first round of preliminary objections to its jurisdiction and for which Respondent finds support in the Decisions of the Tribunal. They will not be repeated here.

B. CLAIMANT'S POSITION ON THIRD OBJECTION

86. Claimant explains that its claim of breach of fair and equitable treatment is based upon the *Lesivo* Resolution and not Respondent's failure to remove squatters. According to Claimant, the Memorial on the Merits clearly states that "the Government's action in issuing the *Lesivo* Resolution, in violation of the standard of fair and equitable treatment, served to undermine RDC's *investment-backed expectations*, one of which was RDC's reasonable expectation that the Government would protect the railway against squatters."⁴⁷

87. Claimant further explains in respect of its full protection and security claim that the type of measures at issue in FVG's claim in the local arbitrations are different from the measures on which Claimant relies in this arbitration. In the case of the local arbitration, FVG's claim is against FEGUA, as legal owner of the railway right-of-way, for breaching its contractual obligation to bring legal actions to evict squatters from the right of way. In the case of the Treaty arbitration, Claimant relies "upon the failure of an entirely different organ of the Government of Guatemala – the local police and law enforcement authorities – to provide any

⁴⁶ *Ibid.* para. 224.

⁴⁷ *Ibid.* para. 189. Emphasis added by Claimant.

semblance of physical or legal protection to FVG's property and assets (and, hence, RDC's investment) after the issuance of the *Lesivo* Resolution.”⁴⁸

88. Finally, Claimant disputes that its claims are based upon Respondent's failure to make Trust Fund payments as alleged by Respondent. According to Claimant, references to such failure are in “the context of factual background...and in discussing the reasonable factual assumptions underlying FVG's Business Plan.”⁴⁹

4. RELIEF REQUESTED

89. Respondent has requested that the Tribunal dismiss all claims of Claimant for lack of jurisdiction and order Claimant to pay Respondent's costs, legal fees, and share of administrative expenses incurred in these proceedings.

90. Claimant requests that the Tribunal deny the jurisdictional objections without any further briefing or hearings and award Claimant its reasonable costs and attorney's fees in responding to Respondent's objections.

IV. POST-HEARING SUBMISSIONS

1. THE TRIBUNAL'S QUESTIONS

91. After the hearing the Tribunal requested that the parties answer the following questions:

(a) On the assumption (which is understood is in dispute) that a declaration of lesividad involves a measure of judgment or discretion can it really be said that a contract subsequently declared lesivo is unlawful *ab initio*.

(b) Can a contract be declared lesivo as a result of facts occurring after its conclusion?

⁴⁸ *Ibid.* para. 193.

⁴⁹ *Ibid.* para. 198.

(c) Can the Administrative Tribunal disagree with an executive determination of *lesividad*? Has the Administrative Tribunal ever done so? If so, how can it be said that the executive declaration is decisive for CAFTA purposes?

(d) What are the publication requirements of acts of the administration under Guatemalan law? Can it be said that the declaration of *lesividad* was legally finalized prior to proper notification to the complainant via publication, with a list of reasons for the act?

(e) Why was Contract 41 never approved? Why did each side proceed under Contract 41 (and then Contracts 143 and 158) as though there was a legal contract in place?

2. THE PARTIES' REPLIES

A. REPLIES TO THE FIRST QUESTION

92. Respondent replied that a contract declared *lesivo* by the competent judicial authority is deemed unlawful *ab initio*. According to Respondent, Guatemala cannot unilaterally declare a contract *lesivo* and cease performance. Respondent explains that the governmental agency concerned must continue to operate under the contract until the Administrative Tribunal declares the contract unlawful *ab initio*; if it does so, the Administrative Tribunal orders that the parties restore things to their respective positions before the agreement was entered into, thus avoiding any unjust enrichment due to the partial *de facto* performance of the contract declared *lesivo*.

93. Respondent explains further that a determination of *lesividad* by the Executive is not binding on the Administrative Tribunal, and the State has the burden of proof to establish that the contract concerned is unlawful and prejudicial.

94. Claimant draws a distinction between the concepts of "legality" and "harmfulness to the interests of the State". Claimant explains that the lawfulness

of a contract is a matter of the law of contracts and not *lesividad*. According to Claimant, a contract may comply with Guatemalan law and still be harmful to the interests of one of the parties; the legality of a usufruct contract is regulated by the civil law on contracts while the *lesividad* is a procedure regulated by the *Ley de lo Contencioso Administrativo*. It is the view of Claimant that “The availability to the State of separate and distinct remedies in the civil and administrative courts to declare a contract void *ab initio* or voidable due to various legal defects demonstrates that Guatemalan law draws a clear distinction between the ‘legality’ of a contract and ‘*lesividad*’ of a contract.”⁵⁰

95. Claimant concludes by affirming that the declaration of *lesivo* should not be based on the technical defects of a contract which can be otherwise remedied but because, in the judgment of the President of Guatemala, “the announced interests of the State upon which the contract is based were capricious or because the terms of the contract were not reasonably related to those announced interests.”⁵¹

B. REPLIES TO THE SECOND QUESTION

96. Respondent replied in the negative and explained that “*lesividad* is determined by legal defects and illegalities relating to the contract’s formation and the terms of the contract as such, and not by supervening causes or subsequent conduct by the parties. This helps to explain why a contract declared *lesivo* is deemed unlawful *ab initio*.”⁵²

97. Claimant replied substantially in similar terms. According to Claimant, “the nature of *lesivo* itself and the structure of the procedures concerning the declaration of *lesividad*,...indicate that independent facts occurring subsequent to the formation of the contract cannot be considered as a ground for *lesivo*.”⁵³ Claimant considers that this view is confirmed by the fact that “the statute of limitations on declaring *lesividad* runs three years from the

⁵⁰ Claimant’s Post-Hearing Brief, para. 8. Emphasis in the original.

⁵¹ *Ibid.* para. 11.

⁵² Respondent’s Post-Hearing Brief, para. 12.

⁵³ Claimant’s Post-Hearing Brief, para. 13.

date of the contract, not from some subsequent event”,⁵⁴ and by the fact that none of the declarations of *lesivo* over the last 20 years have relied on independent post-execution facts.⁵⁵

C. REPLIES TO THE THIRD QUESTION

98. Respondent replied that the Administrative Tribunal is an independent branch of government under Guatemalan law and free to disagree with the executive declaration of *lesivo*: “The court’s mandate in those cases is to objectively and independently assess whether the contract in question is *lesivo*, considering the evidence presented both by the Attorney General and the private party to the contract.”⁵⁶ Respondent explained that in the last thirty years only one decision has been rendered based on *lesividad* claims and in that instance the State prevailed. However, Respondent points out that, in the case of the *lesividad claim* concerning Contracts 143 and 158, the Administrative Tribunal has twice decided against requests of the Attorney General for the suspension of those contracts, which shows, according to Respondent, the independence of this adjudicatory body.⁵⁷

99. Respondent considers that the President’s decision of *lesivo* is decisive, “because that act or fact, which serves as the basis for Claimant’s claim, is an act or fact that occurred and was completed *before* the entry into force of CAFTA.”⁵⁸ Respondent reasons that “At that precise moment, the President made an official determination that could not be reversed without incurring in personal liability, unless the parties reached a negotiated solution that would resolve causes giving rise to the *lesividad* of Contracts 143/158.”⁵⁹ However, the President’s declaration is “not necessarily decisive when one considers liability under CAFTA, because that executive declaration of *lesividad*, by itself, has no legal effect other than instructing the Attorney General to initiate

⁵⁴ *Ibid.* para. 14.

⁵⁵ *Ibid.* para. 16.

⁵⁶ Respondent’s Post-Hearing Brief, para. 18.

⁵⁷ *Ibid.* para. 22.

⁵⁸ *Ibid.* para. 23. Emphasis in the original.

⁵⁹ *Ibid.* para. 24.

a claim against Ferrovías in the *Contencioso Administrativo* court.”⁶⁰ In this respect, Respondent recalls that Claimant has had no legal or other impediment to operate in Guatemala while the *lesividad* proceeding is pending.⁶¹

100. Claimant agrees that, as a technical legal matter, the Administrative Tribunal can disagree with the President’s finding of *lesivo* but it points out that “there exists no known case where an Administrative Tribunal has disagreed with or denied a Government *lesivo* claim when such claim was made within the requisite three-year time frame for such claims.”⁶² According to Claimant, “*lesivo* is little more than a thinly guised methodology for State-sponsored extortion” because once a *lesivo* claim is filed the Government may not desist from it and thus settlement may be justified only on terms favorable to the Government.⁶³ Claimant considers that, for CAFTA purposes, “it is the declaration of *lesividad* and not the subsequent Administrative Court proceeding, which is substantively decisive because a *lesividad* declaration has immediate and profound negative consequences on the private contracting party.”⁶⁴

D. REPLIES TO THE FOURTH QUESTION

101. Respondent explains that the purpose of the publication of a *lesivo* declaration is to instruct the Attorney General to present a *lesividad* claim before the courts within three months of its publication and not to notify private parties (in the instant case the Claimant), that the contracts are *lesivo* nor of the reasons for such declaration. Publication of the instruction has no legal effect in itself as regards the private parties’ rights. Respondent explains further that the legal justification for the finding of contracts *lesivo* is formally presented before the Administrative Tribunal. Thereafter private parties are notified and have the opportunity to rebut it, as was the case of Claimant.⁶⁵ According to Respondent,

⁶⁰ *Ibid.* para. 28. Emphasis in the original.

⁶¹ *Ibid.* para. 29.

⁶² Claimant’s Post-Hearing Brief, para. 19.

⁶³ *Ibid.* para. 22.

⁶⁴ *Ibid.* para. 24.

⁶⁵ Respondent’s Post-Hearing Brief, para. 33.

notice to Claimant officially or otherwise does not affect the finality of the President's decision.⁶⁶

102. Claimant replies that, *inter alia*, *Acuerdos Gubernativos* require publication under Guatemalan law which is explained by the fact that the private parties are not party to the proceedings leading to the declaration of *lesividad* and are not given notice otherwise. Furthermore, without publication, the declaration of *lesividad* has no legal effect, “no party other than the President and his Cabinet can take official notice of a declaration’s existence in order to take specific action until after it is published.” Claimant reasons that “if the Government actually believed that publication of the declaration had no legal significance in relation to the three-year statute of limitations, it would not have made sure that publication took place prior to the expiration of the limitations period.”⁶⁷

103. Claimant notes that, contrary to the presupposition underlying the Tribunal's question, the *lesivo* declaration contains no list of reasons and only refers to the report of FEGUA's Overseer and the Solicitor General office's opinion which were not in the public domain or provided to FVG.⁶⁸

E. REPLIES TO THE FIFTH QUESTION

104. According to Respondent, the reasons for the lack of approval of Contract 41 “remain essentially unclear based on the evidence of record.”⁶⁹ However, Respondent notes that Ferrovías never utilized the legal remedies open to it in such circumstance. Respondent emphatically denies that the parties ever considered that Contract 41 entered into force or operated as if it were in force. On the other hand, Contracts 143 and 158 are “technically in force and must be observed by the parties –notwithstanding its [sic] illegalities- at least until

⁶⁶ *Ibid.* para. 37.

⁶⁷ Claimant's Post-Hearing Brief, para. 27 and 28.

⁶⁸ *Ibid.* para. 29.

⁶⁹ Respondent's Post-Hearing Brief, para. 38.

such time as the *Contencioso Administrativo* court decides whether those Contracts are *lesivo* and should be declared null *ab initio*⁷⁰

105. In its reply Claimant first points out that it is not correct to state that Contract 41 was never “approved” by the Government since the Government had approved and published the bidding terms and conditions. At most, according to Claimant, it can be argued that Contract 41 was not ratified by the President. Claimant also observes that,

“Despite the Government’s purported position that such ratification was necessary and essential, it never provided FVG with any reason or explanation as to why it did not or could not obtain ratification...Even to this day, FVG does not know or understand why the Government never obtained Executive ratification of Contracts 41 and 143, and Respondent’s witnesses have certainly not offered any logical or credible explanation for the Government’s failure to do so.”⁷¹

106. As to the second part of the question, Claimant believed that Contract 143 was legal, and “Entirely consistent with the fact that FVG had been using the railroad equipment without objection or protest from the Government for *six years* prior to the execution of Contract 143 on August 28, 2003. Contract 143 specifically provided that no further Executive approval or ratification of the contract was necessary.”⁷²

V. THE REPUBLIC OF EL SALVADOR’S SUBMISSION AS A CAFTA NON-DISPUTING PARTY

107. El Salvador filed comments under Article 10.20.2 on the issue whether CAFTA Chapter Ten applies to disputes that existed before CAFTA entered into force and remain unresolved after CAFTA entered into force.

⁷⁰ *Ibid.* para. 44.

⁷¹ Claimant’s Post-Hearing Brief, para. 35. Emphasis in the original.

⁷² *Ibid.* para. 37.

108. Based on CAFTA Article 10.1.1 and Article 10.1.3, it is El Salvador's opinion that consent to arbitration by CAFTA parties does not include "consent to arbitration with respect to measures adopted or any act or fact that took place or any situation that ceased to exist before the date of entry into force of CAFTA for the consenting Party."⁷³ El Salvador is confirmed in this opinion by CAFTA Article 10.15 which begins with the words "In the event of an investment dispute..." According to El Salvador this phrase when read together with CAFTA Article 10.1.1 and Article 10.1.3 "can only mean an investment dispute based on CAFTA, i.e. an investment dispute that arose after CAFTA entered into force."⁷⁴ El Salvador concludes that Chapter Ten is prospective and "a dispute that existed before CAFTA entered into force that remains unresolved after CAFTA entered into force, cannot give rise to a claim for a violation of the substantive provisions of CAFTA."⁷⁵

109. The Tribunal invited the parties to comment on El Salvador's submission. The parties had addressed the issue of the applicability of CAFTA to continuing disputes in their memorials. Claimant's communication refers to its prior submissions and arguments and considers that El Salvador's submission does not warrant further comments. Respondent supports the views expressed by El Salvador which it considers to be consistent with its position in this proceeding.

VI. ANALYSIS OF THE TRIBUNAL

1. PRELIMINARY MATTERS

110. Before addressing the objections to jurisdiction raised by Respondent, the Tribunal will consider as preliminary matters the law to be applied and its jurisdiction under the ICSID Convention.

111. The law to be applied by the Tribunal at this jurisdictional phase is not a matter in dispute. The jurisdiction of the Tribunal is governed by Chapter

⁷³ El Salvador's Submission, para. 5.

⁷⁴ *Ibid.*, para. 6.

⁷⁵ *Ibid.*, para. 7.

Ten of CAFTA and Article 25 of the ICSID Convention and, to the extent required for their interpretation, the Tribunal will have recourse to customary international law as codified in the Vienna Convention on the Law of the Treaties.

112. Except for the issue of whether an investment which does not conform to the laws of Respondent may qualify as an investment under the ICSID Convention, the jurisdiction of the Tribunal under the ICSID Convention as such has not been a matter of contention between the parties. It is undisputed that Claimant is not a national of Respondent, that the dispute between the parties is a legal dispute and that the dispute arises out of an investment. The Tribunal does not need to dwell on the extensive case law on the characteristics to be met by an investment to be considered such under the ICSID Convention⁷⁶ or on whether such characteristics are in the nature of jurisdictional conditions.⁷⁷ Based on the facts of this case, Claimant's investment was risky, substantial, of long duration, there was an expectation of return and it would assist in the resumption of rail transport in Guatemala, which Respondent judged "*un objetivo de interés económico para las actividades productivas de la nación.*"⁷⁸ The Tribunal will consider the issue of the legality of the investment and its relevance to qualify as such under the ICSID Convention as part of its analysis of the Second Objection to its jurisdiction.

113. The Tribunal will now proceed to analyze each of the objections.

2. OBJECTION RATIONE TEMPORIS

⁷⁶ See e.g. *Salini Costruttori and Italstrade v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction, July 16, 2001. See also *Joy Mining Machinery, Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Decision on Jurisdiction, August 6, 2004, para. 53; *Jan de Nul N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, June 16, 2006, at para. 91; *Helnan International Hotels A/S v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objection to Jurisdiction, October 17, 2006, at para. 77; *L.E.S.I.-DIPENTA v. Republic of Algeria* (ICSID Case No. ARB/03/08), Decision on Jurisdiction, July 12, 2006.

⁷⁷ The Tribunal notes that several recent tribunals have discussed this issue in depth -- see e.g. *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, (ICSID Case No. ARB/05/10), Decision on the Application of Annulment of April 16, 2009 (Award and Dissent); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, (ICSID Case No. ARB/05/22), Award, July 24, 2008, paras. 310, 312-318).

⁷⁸ *Claúsula Primera, Contract 402* ("an objective of economic interest to the productive capacities of the nation").

114. The following issues emerge from the parties' exchanges on the *ratione temporis* objection and are listed in the order they will be addressed by the Tribunal: i) first, the date of the measure subject of the claim; is the critical date the date the *lesivo* process began or the date of publication of the *Lesivo* Resolution?; ii) Second, is there a dispute between the parties and, if the answer is yes, when did the dispute begin?; iii) Third, if it is the Tribunal's conclusion that the dispute began before the date of entry into force of the Treaty, is it the intention of the Treaty to cover disputes which began before such date?

115. Respondent has based its first objection on CAFTA Article 10.1.3 and Article 28 of the Vienna Convention. For ease of reference, it is convenient to reproduce the text of these provisions. CAFTA Article 10.1.3 reads as follows:

“For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”

Article 28 of the Vienna Convention provides:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

116. The consent of Respondent to arbitration is limited to breaches of obligations undertaken by Respondent under the Treaty. Therefore, to paraphrase Article 28 in positive terms, the Tribunal has jurisdiction in respect of any act or fact that took place or any situation that continued to exist after the Treaty entered into force. The Treaty cannot be breached before it entered into force: “An act of a State does not constitute a breach of an international

obligation unless the State is bound by the obligation in question at the time the act occurs.”⁷⁹

117. It will be useful to recall here that in the First Decision on Jurisdiction the Tribunal determined that:

“(b) ... 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.”⁸⁰

118. The *Lesivo* Resolution is an act of the Government under preparation since before the Treaty entered into force. To be issued, the resolution needed approval by *Acuerdo Gubernativo* signed by all Government Ministers and the President, who signed it last on August 11, 2006. Publication of the resolution was two weeks later on August 25, 2006.

119. If the President had not signed the *Acuerdo Gubernativo* and the Resolution had not been published, the measure represented by the *Lesivo* Resolution would not have come into existence as expressly stated in its Article 3: “*El presente Acuerdo Gubernativo empieza a regir al día siguiente de su publicación en el Diario de Centro América*”⁸¹ The Tribunal remains unconvinced, as argued by Respondent, of the inevitability of the *lesivo* process and the lack of discretion of the President to sign or not to sign a *lesivo* resolution once he has been advised that a contract is *lesivo* and has decided to proceed with the declaration of *lesivo* unless there is a settlement.

120. Respondent has alleged that the *lesivo* process started at the latest in April-May 2006 when the President decided to declare the Equipment Usufruct

⁷⁹ Article 13, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Annual Report of the International Law Commission on its Fifty-third Session (April 23- June 1 and July 2- August 10, 2001), A/56/10 ch. IV, endorsed by UNGA res. 56/83, December 12, 2001.

⁸⁰ First Decision on Objections to Jurisdiction, November 17, 2008, para. 76.

⁸¹ “The *Acuerdo Gubernativo begins to take effect* the day after its publication in the *Diario de Centro América*.” Emphasis added by the Tribunal.

Contracts *lesivo* or as early as in August 2005 when the *Lesivo* Opinion was issued. The evidence before the Tribunal does not show the exact date when the President took the decision to declare the Equipment Usufruct Contracts *lesivo* and Respondent has not submitted any document which registers the date of such decision or the decision itself. It seems incongruent with the formal requirements of the Guatemalan legal system that the controlling date of a measure of the Government would be uncertain and unknown to members of the Government or those affected by it, as opposed to the legal certainty of the date of the President's signature and of the publication of the *Lesivo* Resolution. It is undisputed that both these acts occurred after the entry into force of the Treaty as between the parties on July 1, 2006. These considerations are even more applicable to the argument that the Tribunal should consider the *Lesivo* Opinion itself as only the first step in the process.

121. Furthermore, even if the Tribunal were to accept the inevitability of the *lesivo* process after some undefined point in time in April-May 2006, we would be faced with an act or situation which occurred before the Treaty entered into force and continued to occur or exist afterwards. Respondent's own expert, Dra. Vielman, in her oral testimony, testified that *lesivo* is a "comprehensive proceeding". When Dra. Vielman was cross-examined about the steps to reach the *Lesivo* Resolution – in her written expert opinion she had affirmed that there were two steps: the signature of the President and the publication of the resolution in the official gazette – she replied "...it is important to note at this point...that this is a *comprehensive proceeding*. First, you have the President's decision, and then there are some other related acts that lead to a proceeding to declare...that the Contract is null and void." Counsel to Claimant queried whether the expert was saying that there are three steps as opposed to the two steps asserted in her expert statement. Dra. Vielman replied:

"I am not contradicting my own statement. In my statement, we said that there is the step –and I could give you more steps. You have the decision by the President, you have all the decisions that support the discussion by the President, which is the one that

determines the willingness of the State, and then you have the signing of the document – of the resolution and the publication. But once again, I think it is important to state that this is a *comprehensive proceeding*. These are related acts and they are final.”⁸²

122. The idea of process is also reflected in the affirmation of Dra. Vielman in her written statement that a *lesivo* resolution has no legal effect on the “*administrado*”. It is simply a “*supuesto procesal*” (“procedural course”) which permits the Attorney General to seek the annulment of the *lesivo* contract in Administrative Court. During her cross-examination she reiterated this idea: “Whether it [was] published, not published, the Executive Resolution of *lesividad* has no effects whatsoever. What it does is that it instructs the Attorney General to start the *lesividad* proceedings, and these proceedings are the vehicle for annulment to be declared.”⁸³

123. This idea of a comprehensive process brings the Tribunal to consider whether it is faced with a “continuing act.” As pointed out in the ILC Commentary to Article 24 of the Draft Convention on the Law of Treaties submitted to the General Assembly, if

“an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.”⁸⁴

The Commentary then adds: “In other words, the treaty will not apply to acts or facts which are *completed* or to situations which have ceased to exist before the treaty comes into force.”⁸⁵

⁸² Transcript of March 3, 2010, pp. 737-738. Emphasis added by the Tribunal.

⁸³ *Ibid.* p. 741.

⁸⁴ Draft Articles on the Law of Treaties with commentaries, adopted by the ILC at its eighteenth session, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 212, Para. 3 of the commentary to Article 24 which became Article 28 of the Vienna Convention.

⁸⁵ *Ibid.* para. 4. Emphasis in original.

124. There is consistent arbitral case law considering “continuing acts” in breach of a treaty when their occurrence spans a period before and after a treaty enters into force. The *Mondev* tribunal noted that the parties accepted that “in certain circumstances conduct committed prior to the entry into force of a treaty might continue in effect after that date, with the result that the treaty could provide a basis for determining the wrongfulness of the continuing conduct.”⁸⁶ The tribunal in *SGS v. Philippines* considered a continuing breach the persistent failure to pay sums due under a contract.⁸⁷ Similarly, the tribunal in *Tecmed* determined to be a continuing breach acts, omissions or conduct provided “upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement...”⁸⁸

125. The Tribunal concludes that, if the *Lesivo* Resolution is viewed as a measure taken on a specific date, it was taken on the day of publication. Alternatively, if it is considered as part of a process, then it is part of a continuing act which started before the date of the entry into force of the Treaty and continued after such date. On either view, Respondent’s argument fails.

126. The Tribunal will now address the second issue, is there a dispute and, if the answer is in the affirmative, when did it start?

127. Whether there is a dispute and when it started depends on the definition of dispute and the elements which differentiate one dispute from another. The term “dispute” is not defined in CAFTA Article 10.28 (Definitions). The dictionary defines dispute as “a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contradictory claims or allegation on the other.”⁸⁹ Somewhat more broadly the ICJ has defined “dispute” as a “disagreement on a point of law or fact, a conflict of legal views or interests between the parties.”⁹⁰ The ICSID Convention does not define “dispute”. The Report of the Executive Directors on the Convention explains in

⁸⁶ *Mondev v. U.S.A.*, see note 37 above, Award, para. 56.

⁸⁷ *SGS Société Générale de Surveillance SA v. Republic of Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction, January 29, 2004, 8 ICSID Rep. 515, para. 167.

⁸⁸ *Tecmed v. Mexico*, see note 38 above, Award, para. 63.

⁸⁹ *Black’s Law Dictionary* (West Paul, 1968), Revised Fourth Edition, p. 558.

⁹⁰ See e.g. *Case Concerning East Timor* (Portugal v. Australia), I.C.J. Rep 1995, pp. 89 and 99.

the context of delimiting the nature of disputes which may be submitted to the jurisdiction of ICSID under Article 25(1) of the Convention that: “The expression ‘legal dispute’ has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not.”⁹¹

128. Claimant has argued its case on the basis of the *Vieira* tribunal’s definition and has applied each of the requirements listed in that definition to the facts before the Tribunal in order to deny the existence of a dispute before the date of entry into force of the Treaty. In the view of the Tribunal the *Vieira* definition of “dispute” is arguably the strictest definition of such term in international arbitral practice and stricter than the way the term “dispute” has been understood in arbitral practice and under the jurisprudence of the ICJ.⁹²

129. For its part, the Tribunal retains the concept of dispute as a conflict of views on points of law or fact which requires sufficient communication between the parties for each to know the other’s views and oppose them. Furthermore and for purposes of determining the date when a dispute starts, it is necessary to distinguish it from the facts leading to the dispute, which naturally will have occurred earlier. In this respect, the Tribunal finds useful the description of the emergence of a dispute in *Maffezini*:

“It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying acts predate them. It has also rightly commented that the existence of the dispute presupposes a minimum of communication between the parties,

⁹¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), p. 44, para. 26.

⁹² Relevant jurisprudence has preferred not to look at a check-list understanding of “dispute,” but rather to rely on a more commonly-understood notion of what makes for a dispute. See paragraph 127 above and e.g. *AALP v. Sri Lanka*, (ICSID Case No. ARB/87/3), Award of June 27, 1990; *Lucchetti*, see note 11 above, para. 48; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of March 1950, I.C.J. Reports 1950, p. 65 at 74; *South West Africa, Preliminary Objections. Judgment*, I.C.J. Reports 1962, p. 319, at 328.

one party taking the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction."⁹³

130. The next step for the Tribunal is to determine which dispute is before it. The so-called *lesivo* process is different from the disagreements between FVG and FEGUA related to Contract 402 and Contract 820 and the subject of local arbitrations. It is clear from the record that there were also disagreements between FVG and FEGUA related to the Equipment Usufruct Contracts, such as access to a workshop, use of tools, preservation of historic assets and the irregularities pointed out in the opinion attached to the letter of Mr. Gramajo to FVG dated April 14, 2004. The conflict in that regard was sufficiently serious for Claimant to seek the help of the President to solve the issues between FVG and FEGUA.

131. The issue for the Tribunal is whether the instant dispute may be differentiated from the disputes in the local arbitration proceedings. For this purpose, the Tribunal finds guidance in arbitral practice related to *lis pendens*. In *Benvenuti & Bonfant* the tribunal held that "there could only be a case of *lis pendens* where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals."⁹⁴

132. In the instant case, the cause of action is based on the Treaty and not the Equipment Usufruct Contracts. The parties to the dispute are RDC and the Republic of Guatemala and the object of the dispute is the *Lesivo* Resolution itself and the subsequent conduct of Respondent as it relates to the Claimant's investment. For purposes of this proceeding the dispute between RDC and the

⁹³ *Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction, January 25, 2000, 5 ICSID Rep. 387, para. 96.

⁹⁴ *Benvenuti & Bonfant SRL v. the Government of the People's Republic of Congo* (ICSID Case No. ARB/77/2), Award, August 8, 1980, 1 ICSID Rep. 330, p. 340 at para. 1.14.

Republic of Guatemala crystallized when the *Lesivo* Resolution was published after CAFTA entered into force.

133. The *lesivo* process proceeded in parallel to negotiations of FEGUA with FVG regarding issues in dispute in the local proceedings; to the extent that Claimant was aware of such process, which is disputed by Claimant, it was used to negotiate other pending issues. Suffice here to mention that, in the settlement proposal communicated to FVG by FEGUA in the meeting of August 24, 2006, of seven items, only the seventh is related to the Equipment Usufruct Contracts. More importantly, the *Lesivo* Resolution in the “*Exposición de Motivos*” does not list items such as the conservation of the historic and cultural patrimony of railway equipment, nor does it list the other six items part of the settlement proposed by Respondent on August 24, 2006.⁹⁵

134. Expressed differently, the grounds for the *Lesivo* Resolution (“*Exposición de Motivos*”)⁹⁶, even if they had been cured by FVG, would not have satisfied the conditions of the settlement proposed on August 24, 2006. While this confirms, as argued by Claimant, the use of the *lesividad* process as an element of pressure to achieve other results which seem unrelated to the *lesividad* declaration⁹⁷, this does not make the dispute in connection with the

⁹⁵ The *Lesivo* Resolution fails to mention the grounds for *lesividad* which were included in the *Lesivo* Opinion of the Attorney General (Exhibit R-15). For instance, that Opinion found as grounds of *lesividad* certain provisions of Contract 143 (which had been copied from Contract 41 and which the Government had attested to be in accordance with Guatemalan law), namely: (a) the fact that the canon was paid at the end of the year because Government was deprived of the interest which would accrued to the Government if FVG would had to pay the canon in installments; and (b) the fact that a 45 year-term was too long taking into account the life of the equipment. Similarly in his letter, dated January 13, 2006, to the President of Guatemala, Dr. Gramajo lists as irregularities matters which can also be found in Contract 41, for instance, “FEGUA’s obligation to grant any new or used equipment or spare parts in usufruct to the selected entity” (para. 4(a); “The usufructuary is authorized to move the equipment outside the national territory for the term it deems necessary” (para. 4(b)); “the contract provides that the usufructuary may remove component parts of a piece of equipment to use them as replacements in other equipment” (para. 4(f)); the term of the contract (para. 4(g)); the canon of 1.25% of the net freight turnover, “No method was established for calculating the amounts charged for freight services, and FEGUA is not allowed to participate in the prior determination of said freight services.” (para. 4(h)) (Exhibit R-21).

⁹⁶ Exhibit C-10. The translation provided by Claimant does not convey the full meaning of the Spanish original. “*Exposición de Motivos*” has been translated as “Explanatory Statement”. “Motivo” in this context means “ground”. The statement lists the grounds for Respondent’s adopting the *Lesivo* Resolution.

⁹⁷ The element of pressure is registered in the minutes of the meeting held at FEGUA’s request and without representatives of Claimant at the Procuraduría General de la Nación (“PGN”) on September 28, 2006. The Attorney General “*indicó que había dejado pendiente de iniciar dichas acciones [acciones correspondientes en el caso de la Declaración de Lesividad] por la existencia de una mesa de diálogo entre las partes pero que él considera que si no hay avances en dicha mesa no es conveniente esperar más para*

Lesivo Resolution and the subsequent conduct of Respondent an integral part of other disputes which may have existed or may still exist in the local arbitration proceedings. It is understandable that parties in a negotiation bargain on all pending matters but, if a settlement is not reached, the nature of the dispute or disputes returns to whatever it was *ex ante*. The disputes submitted to local arbitration are no more part of the dispute before this Tribunal than the dispute before this tribunal is part of them.

135. The Tribunal is aware, as pointed out by Respondent, that in *Lucchetti*, the tribunal decided that: “The allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT.”⁹⁸ This warning, however, is inapposite in a situation as in the instant case where relevant facts arose or continued, and/or a dispute (on which jurisdiction could be based) emerged after the BIT was in force.

136. The Tribunal concludes that there is a dispute between Claimant and Respondent which began on the date the *Lesivo* Resolution was published in the Official Gazette. Having reached this conclusion, the Tribunal does not need to determine whether a tribunal under CAFTA has jurisdiction over disputes which began before the date the Treaty entered into force and continued after such date. It merely notes that CAFTA is expressed to apply “to measures adopted or maintained by a Party” (Article 10.1.1), and that it was not until the *Lesivo* Resolution was finally published that it could be considered a “measure”.

137. On the basis of the above considerations, the Tribunal rejects the *ratione temporis* objection.

138. In view of the Tribunal’s finding that the dispute between the parties concerns a measure dated after the entry into force of the Treaty, the Tribunal does not need to address the arguments in El Salvador’s submission in support of Respondent’s position in respect of the *ratione temporis* objection.

actuar en este caso. Considera también el Procurador, que al iniciar la PGN los procesos jurídicos haría un poco de presión para que efectivamente se agilicen las negociaciones.” Exhibit R-36.

⁹⁸ *Lucchetti v. Peru*, see note 11 above, Award, para. 59.

3. OBJECTION *RATIONE MATERIAE*

139. Respondent has argued that Claimant's investment is not a "covered investment" under the Treaty or the ICSID Convention because the investment was illegal and did not create rights protected under domestic law. Respondent has based its argument on CAFTA Article 10.28(g) and the fact that the Equipment Usufruct Contracts were not let through public bidding and did not receive Presidential and Congressional approval. Claimant has argued that the Equipment Usufruct Contracts were in the nature of a concession under Article 10.28(e) which does not refer to domestic law.

140. CAFTA Article 10.28(g) is part of a non-exhaustive list of forms of investment and reads as follows: "licenses, authorizations, permits, and other rights conferred pursuant to domestic law." As part of the same list, Article 10.28(e) provides "turnkey, construction, management, production, concession, revenue-sharing and other similar contracts." The Tribunal notes that reference to domestic law is limited to paragraph (e), but it does not consider that it is correct to infer from this fact that rights conferred under other forms of investment may be contrary to Guatemalan law. It is to be expected that investments made in a country will meet the relevant legal requirements. Therefore, it is immaterial whether the Equipment Usufruct Contracts qualify as a form of investment under CAFTA Article 10.28(g) or 10.28(e). The Tribunal agrees with Claimant, supported by a long line of case law, that "conferred pursuant to domestic law" is not a characteristic of the investment to qualify as such but a condition of its validity under domestic law.⁹⁹

141. It is well established before this Tribunal that Contract 41 was legally tendered by the Government and that the only bid was submitted by FVG and accepted by Respondent on December 16, 1997. Contract 41 was signed more than a year later, on March 23, 1999, but never approved by *Acuerdo*

⁹⁹ The *Salini v. Morocco* tribunal held that reference to the law of the host State in the BIT was "to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal." See note 76 above, Decision on Jurisdiction, para. 46.

Gubernativo and Congress, both approvals being conditions for Contract 41 to become effective.

142. Shortly after signature of Contract 41, on April 12, 1999, FEGUA authorized FVG by letter to use the towing and traction equipment at the request of FVG.¹⁰⁰ The authorization was renewed in 2000 at FVG's request. The letter of FVG, dated April 16, 2000, explains that the requested equipment is needed by FVG to fulfill its obligations under Contract 402 pending the approval of Contract 41, and then it states: "The use of the railway equipment we are hereby requesting is subject to the same terms and conditions as apply to the agreement mentioned in item b) above [Contract 41], and will not in any way amend or affect the agreement already mentioned."¹⁰¹

143. Thus notwithstanding that Contract 41 was never approved, FEGUA let FVG operate the equipment to the extent that, shortly after signature of Contract 41 and three days after FEGUA authorized the use of the railway equipment, on April 15, 1999, train service was established between Guatemala City and El Chile. It is worth noting that at that time Contract 402 was not yet effective; it became effective more than a month later on May 23, 1999, which implies that the section Guatemala City-El Chile of the railway was rehabilitated before Contract 402 was effective. In December 1999 train service was extended to Puerto Barrios and Puerto Santo Tomás. FVG used the equipment and paid the corresponding canon under the terms of Contract 41 as if it would have been in effect until signature of Contract 143. Afterwards, the equipment continued to be used and the higher canon provided for in Contract 143 was paid and accepted until after the publication of the *Lesivo* Resolution.

144. The Tribunal concludes that both parties to the Contract – FEGUA and FVG – conducted themselves substantially as if the terms of Contract 41 had been in effect – as they have done since the beginning of their relationship in the case of Contract 402. Contract 143 was entered into four years after Contract 41 when it was evident that Contract 41 would not come into effect. The reasons for

¹⁰⁰ Oficio 076-99 Clasificación GaP referred to in FVG's letter dated April 16, 2000. Exhibit R-41.
¹⁰¹ Exhibit R-41.

declaring the Equipment Usufruct Contracts *lesivo* as stated in the “*Exposición de Motivos*” of the *Lesivo* Resolution are substantially the same as those that prevented Contract 41 becoming effective (lack of approval by *Acuerdo Gubernativo* and by Congress) or relate to the need to follow the procedures for public contracting that, notwithstanding the fact that they had already been followed by FVG and FEGUA in respect of the same equipment in the case of Contract 41, had been to no avail to secure the approvals entirely under the Government’s control.

145. Respondent has argued that FVG was fully aware of the approval conditions of Contract 143 when it entered into it since its objective was the same: the usufruct of the equipment. Respondent has denied that FEGUA and FVG entered into Contract 143 at the Government’s request. Who took the initiative to sign a new contract is irrelevant to the Tribunal’s conclusion. FEGUA and FVG were faced with a *de facto* situation which they tried to reflect in Contract 143, and FEGUA benefited from a 25% increase in the canon stipulated in Contract 41.¹⁰²

146. Even if FEGUA’s actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were *ultra vires* (not “pursuant to domestic law”), “principles of fairness” should prevent the government from raising “violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law.”¹⁰³

147. Based on these considerations the Tribunal finds that Respondent is precluded from raising any objection to the Tribunal’s jurisdiction on the ground that Claimant’s investment is not a covered investment under the Treaty or the ICSID Convention.

¹⁰² The Tribunal notes that prior ICSID tribunals have accorded determinative import to such *de facto* situations. For instance, in *Amco Asia* the Tribunal held that even if the government’s action did not change the legal realities, it did create a *de facto* situation on which the Tribunal based its decision. *Amco Asia Corp., Pan-American Development Ltd and PT Amco Asia Indonesia v. Republic of Indonesia* (Case No. ARB/81/1), Award (Original Arbitration Proceeding), November 20, 1984, para. 257.

¹⁰³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award, August 16, 2007, para. 346.

4. THIRD OBJECTION

148. As already pointed out, in its First Decision on Jurisdiction the Tribunal determined that:

“(b) 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.”

149. When Respondent requested a clarification of the First Decision on Jurisdiction the Tribunal denied the request because it was the Tribunal’s view that:

“the reasoning of the Tribunal leading to its decision clearly excludes claims based on the measures at issue in the local arbitrations under Deed 402 and Deed 820 irrespective of the article of CAFTA under which they would be advanced. On the other hand, Article 10.5 provides for the minimum standard of treatment under customary international law. This is a general and wide ranging standard of treatment that may cover claims based on other measures taken by Respondent beyond those at issue in the local arbitrations. It would be inappropriate for the Tribunal to exclude them *a priori* or to speculate on how Claimant may articulate its claims.”

150. Now Claimant has articulated its claims in its Memorial on the Merits and Respondent has raised the issue of Claimant’s compliance with the First Decision on Jurisdiction of the Tribunal by allegedly pressing claims excluded by the terms of this decision.

151. As clearly stated above, the Tribunal’s jurisdiction is limited to claims arising from the *Lesivo* Resolution and from subsequent conduct of

Respondent pursuant to this Resolution. Therefore, Claimant should strictly circumscribe its claims to the terms of the First Decision on Jurisdiction.

152. As regards payments by FEGUA into the Trust Fund, Respondent lists specific references to Contracts 402 and 820 in the Memorial on the Merits in paragraphs 39, 195 and 222. Claimant explains that:

“The only specific references in Claimant’s Memorial on the Merits regarding Guatemala’s failure to make Trust Fund payments are in the context of factual background (paragraph 39) and in discussing the reasonable factual assumptions underlying FVG’s Business Plan (paragraph 222). Nothing in Claimant’s Memorial even arguably suggests that any of its claims – indirect expropriation, fair and equitable treatment, full protection and security and national treatment – are based upon Guatemala’s failure to make payments into the Trust Fund.”¹⁰⁴

153. The Tribunal observes that paragraph 195(vii) of the Memorial on the Merits, which is not referred to in the Counter-Memorial, reads as follows:

“Despite serious breaches of contract by the Government prior to the Lesivo Resolution, which cannot be allowed to diminish the amount of compensation due RDC, FVG, through its own efforts, was on track to achieve its long-term business plan up to the Lesivo Resolution.”

Both, this paragraph and paragraph 222 are part of the chapter on compensation. While the Tribunal accepts that paragraph 39 is part of the factual context, as argued by Claimant, references in the chapter on compensation show that Claimant continues to press claims related to payments by FEGUA into the Trust Fund, a matter which the Tribunal has determined to be outside its jurisdiction and which should not be further discussed in this arbitration.

¹⁰⁴ Claimant’s Counter-Memorial, para. 198.

154. As to the removal of squatters, Claimant has drawn a distinction between the measures subject of the local arbitration on the failure of FEGUA to remove squatters and the conduct of Respondent subsequent to the *Lesivo* Resolution: “in contrast to FVG’s breach of contract claim in the squatters arbitration, the failure of law enforcement authorities to provide full protection and security to RDC’s investment arose only *after and as result of* the issuance of the *Lesivo* Resolution.”¹⁰⁵ To the extent that such difference may be proven, *prima facie*, the Tribunal would have jurisdiction to consider measures of Respondent related to squatters which are part of “the conduct subsequent to the *Lesivo* Resolution.”

VII. DECISION

155. Having carefully considered the parties’ arguments in their written pleadings and oral submissions, and for the reasons stated above, the Tribunal has decided: (a) to reject Respondent’s objections *ratione temporis* and *ratione materiae* to its jurisdiction; and (b) to confirm that its jurisdiction is limited to the *Lesivo* Resolution and conduct subsequent to this Resolution, which may include acts or omissions of Respondent related to squatters, but only to the extent that these result from the *Lesivo* Resolution.

156. Both parties have requested the award of costs and their respective legal fees and expenses associated with this phase of the proceeding. The Tribunal will consider this matter as part of its final award.

157. The Tribunal will order the continuation of the proceeding on the merits and will establish a calendar for the filing of further pleadings on the merits after consultation with the parties.

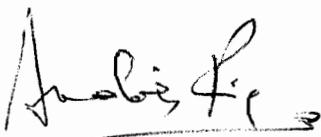
¹⁰⁵ Claimant’s Counter-Memorial, para. 196. Emphasis in the original.

Done in Washington, D.C.

The Tribunal


Hon. Stuart E. Eizenstat
Arbitrator


Professor James Crawford
Arbitrator


Dr. Andrés Rigo Sureda
President of the Tribunal