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**INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES**

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**RAILROAD DEVELOPMENT CORPORATION**

**Claimant,**

**v.**

**THE REPUBLIC OF GUATEMALA**

**Respondent**

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

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**SECOND OPINION OF W. MICHAEL REISMAN  
ON LEGAL ISSUES RAISED IN THE  
RESPONDENT'S COUNTER-MEMORIAL**

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**MARCH 11, 2011**

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## I. INTRODUCTION

1. I prepared an opinion in the above referenced case, dated June 11, 2009. In that opinion, I indicated my qualifications and attached a complete CV. I incorporate that information by reference and will not repeat it here other than to mention, in the attached footnote, publications that have appeared since 2009.<sup>1</sup>

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<sup>1</sup> L'École de New Haven de Droit International (A. Pedone), 2010.

"McDougal, Myres Smith," in The Biographical Dictionary of American Law, (Roger K. Newman, ed.), page 371 (2009).

"Eclipse of Expropriation?," (with Rocío Digón) in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008, (Arthur W. Rovine (ed.)), page 27 (2009).

"Sanctions and International Law," in Vol. 4 of Intercultural Human Rights Law Review, page 9 (2009).

"International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan," in Vol. 85 of International Law Studies: The War in Afghanistan: A Legal Analysis, page 59 (Michael N. Schmitt, ed.) (2009).

"Inversión Extranjera, Desarrollo Económico y Arbitraje Internacional," in Diálogos Sobre la Justicia Internacional, page 26 (Bernardo Sepúlveda, Coordinator) (2009).

"Combating Piracy in East Africa," 35 Yale Journal of International Law Online 14 (2009), <http://www.yjil.org/> (with Bradley T. Tennis).

"Overview," in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009, (Arthur W. Rovine (ed.)), page 291 (2010).

"Reflections on the Control Mechanism of the ICSID System," in THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 6, page 197 (E. Gaillard (ed.)), (2010).

Foreword (with Lea Brilmayer) in "A Principled Approach to State Failure: International Community Actions in Emergency Situations," by Chiara Giorgetti (2010).

"International Investment Arbitration and ADR: Married but Best Living Apart," in Vol. 24, No. 1, Spring 2009 ICSID Review, p. 185 (2010); and reprinted in UNCTAD Investor-State Disputes: Prevention and Alternatives to Arbitration II, United Nations Publication (2010) (forthcoming).

Foreword in "Yearbook on International Investment Law & Policy 2009-2010", Karl P. Sauvant (ed.), page

2. Greenberg Traurig, LLP, counsel for Railroad Development Corporation (“Claimant” or “RDC”), has asked that I study the Respondent’s Counter-Memorial, dated October 5, 2010, and indicate any disagreements or other observations which I might have with respect to the Respondent’s comments on my opinion. As I am not a witness of fact, I have again assumed the truth of the factual allegations in the Claimant’s Request for Arbitration (“Request”) “insofar as they are not incredible, frivolous or vexatious;”<sup>2</sup> I have also reviewed the Claimant’s additional statement of facts, dealing with issues in contention between the parties. None of the Claimant’s factual allegations can, in my judgment, plausibly be so characterized as incredible, frivolous or vexatious.

3. In my first opinion, I concluded that the Government of Guatemala violated the rights of RDC and FVG to which they are entitled under Chapter Ten of the DR-CAFTA and customary international law. Specifically, I concluded that Guatemala has:

(1) effected an indirect expropriation of FVG in violation of CAFTA Article 10.7 and customary international law;

(2) subjected FVG to unfair and inequitable treatment and denied it due process

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xix, (2010).

“Interpreting Treaties for the Benefit of Third Parties: The “*Salvors’* Doctrine” and the Use of Legislative History in Investment Treaties,” with Mahnoush H. Arsanjani, 104:4 American Journal of International Law, page 597 (2010).

“East African Piracy and the Defense of World Public Order,” with Mahnoush H. Arsanjani, in Law of the Sea in Dialogue, Holger Hestermeyer/Nele Matz-Lück/Anja Seibert-Fohr/Silja Vöneky (eds.), page 137 (2010).

“Soft Law and Law Jobs,” 2:1 Journal of International Dispute Settlement 25 (2011).

<sup>2</sup> *United Parcel Serv. of Am., Inc. v. Canada*, Award on Jurisdiction, Nov. 22, 2002 (UNCITRAL), ¶ 112.

in violation of CAFTA Article 10.5 and customary international law;

(3) denied FVG the full protection and security owed under customary international law and CAFTA Article 10.5; and

(4) treated RDC discriminatorily in violation of the national treatment of CAFTA Article 10.3.

4. The Respondent's Counter-Memorial sets out, helter-skelter, a large number of (not always consistent) arguments. I have not tried to treat every one of them but have focused on what seem to me to be the main issues in the case. Nothing in the Respondent's Counter-Memorial leads me to change the conclusions which I had reached in my first opinion. The reasons for this are set out below by reference to the major legal issues in the instant case and the Respondent's arguments.

## **II. EXPROPRIATION AND THE SPECIAL PROBLEM OF GUATEMALA'S LESIVO**

5. It is uncontested, at this stage, that the protections of Chapter Ten of CAFTA apply, since RDC has effected an "investment," within the meaning of Article 10.28 CAFTA, in the Republic of Guatemala, (i) due to its controlling shares in a Guatemalan company, *Ferrovías de Guatemala* (FVG), (ii) which was created to reconstruct and develop the railroad system in Guatemala, and (iii) in relation to which, it held rights under usufructs and associated loans and management efforts.

6. In my earlier opinion, I concluded that the Respondent, the Republic of Guatemala, has expropriated the Claimant's investment in violation of Article 10.7

CAFTA. According to Article 10.7, an expropriation is only lawful if it fulfills a public purpose, occurs in a nondiscriminatory manner, is accompanied by prompt, adequate and effective compensation, and affords the target of the measure due process of law. These are cumulative requirements, such that the failure to fulfill any one of them will render the expropriation unlawful. In the present case, all of these requirements have been violated.

7. The Respondent makes much of the missing Presidential signature. I will comment on it below but would note now that it was only raised long after Contracts No. 143 and 158, which were supposed to create a right of usufruct to the railroad rolling stock and equipment, had been put into effect by the parties. Beyond the purely formal reason of a missing Presidential signature, no substantive harm to the state of Guatemala was identified or even referred to in the *Lesivo* Declaration that declared the contracts in question harmful to the interests of the State. The absence of a clear public purpose for the measure is disturbing and reinforces the suspicion that the measure was essentially private, as it appears, as alleged by the Claimant, to have been passed solely to safeguard the interests of a local sugar oligarch, Mr. Ramón Campollo.

8. The Declaration was also inherently discriminatory, as it was passed to deny an American investor the fruits of its investment.

9. No compensation was proffered, nor, to my knowledge, has it ever been offered under any settlements in Guatemala following *lesivo* declarations in the past.

10. Due process was clearly violated as no official notice or hearing was afforded the Claimant prior to the issuance of the *Lesivo* Declaration or immediately

thereafter. Effectively, the damage was done the moment the President and all the members of his Cabinet published the *Lesivo* Declaration and made known to the markets, and particularly to FVG customers, suppliers and possible investors and financiers who would have followed the events especially closely, that the Government opposed the railroad activities of RDC to the point of initiating a legal process to invalidate a contract granting the right to use the railroad equipment. The market could not but take notice of the Government's hostility, given that the *Lesivo* Declaration was issued on the purely formal ground of a missing Presidential signature - despite the fact that the overseer of the pertinent governmental agency, FEGUA, had executed the contract, and that it had been performed within Guatemala for a significant time without provoking any objections or other problems.

11. Economically, the harm to the Claimant was done when the Government declared the railroad equipment contract harmful to its interests - without any standards guiding that determination. Although the Attorney General still has to seek the formal enforcement of that declaration in the administrative court, the court proceeding, in which due process rights are formally guaranteed (but apparently rarely followed), is actually irrelevant because the court adjudicating the *Lesivo* Declaration has no standards by which to review the Government's declaration of harmfulness. Moreover, this court's decision can typically take years and typically is never rendered; it has not yet been rendered in the case at bar, more than four years since the case was initiated. In the meanwhile, the economic injury has already been wrought by the *Lesivo* Declaration of the Government, wholly apart from the formal question of whether the

declaration has legally binding effect.

12. The case-by-case, fact-based inquiry, which is required by CAFTA Annex 10 C (4)(a), calls for a substantial deprivation of property rights. Such a deprivation is present here, given the impossibility of developing and running the railroad, the original purpose of the investment. The *Lesivo* Declaration also interferes with the distinct and reasonable expectations RDC had when it entered the market of Guatemala, with a business plan fully known and approved by the Respondent and incorporated into the uncontested Deed No. 402; the usufruct of the railroad right of way which contemplated 50 years of use of the railroad rolling stock; the original approval of contested Deed No. 143; the original governmental efforts at renegotiation, not termination; and, finally, the legal character of the *Lesivo* Declaration as a sovereign act.

13. In the light of these introductory comments, I turn to the major issues raised by the Respondent's Counter-Memorial on the Merits.<sup>3</sup> I will commence with the issues relating to expropriation.

### **1. The Respondent's Measures Interfere with the Claimant's Property Rights**

14. The Respondent's Counter-Memorial roundly denies that the *Lesivo* Declaration or any subsequent measures taken by the Respondent constitutes an expropriation under CAFTA.<sup>4</sup> In particular, it alleges that the Republic of Guatemala has not in any way interfered with the Claimant's investment, as, it contends, it has left

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<sup>3</sup> Respondent's Counter-Memorial on the Merits, 5 October 2010 (hereinafter: CM).

<sup>4</sup> CM, ¶ 222.



legally intact Contract No. 402, the usufruct granting the right of way to the real estate of the tracks and their vicinity. It argues that the *Lesivo* Declaration had no effect, practical or legal, on that property right.<sup>5</sup> The Respondent professes that it still allows the Claimant the use of the railroad track property for purposes other than the one which was centrally intended, viz., the operation of a railroad. So, continues the Respondent, the Claimant can, and still does, subcontract local operators of businesses to sell their goods on or near the railroad tracks, etc.

15. There is more than a small dose of disingenuousness here. As the Respondent well knows, the purpose of Contract No. 402 was not to hawk goods along railroad tracks but to facilitate the ultimate goal of the investment, viz., to operate a railroad and exploit the railroad's assets. The contract was drafted in response to the bidding procedures that the Respondent itself had promulgated. Clause 11 of Contract No. 402 obligated FVG to provide rail service "adequately and consequently, pursuant to its business plan contained in the offer presented to the bidding that originated the present contract, and to conserve all assets and elements subject to the contract." In that business plan, submitted to the Respondent in a sealed bid on May 15, 1997, FVG offered to restore and operate Guatemala's dilapidated railway system, including, in Phase I, the expenditure of \$10 million to rehabilitate the railroad's Atlantic corridor and the rolling stock (*i.e.*, locomotives and freight cars).<sup>6</sup> The Respondent argues that the railroad equipment, according to language in Contract No. 402, was to be subject to

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<sup>5</sup> CM, ¶ 260.

<sup>6</sup> FVG Business Plan at § 6.1.

a separate bidding process and might have gone elsewhere,<sup>7</sup> but that argument omits the obvious point that a railroad cannot run without locomotives and cars, especially the ones fitted for the first project, the narrow-gauge track in the Atlantic Corridor.

16. The argument also omits the fact that the Respondent conducted a separate bidding process for the usufruct of the rolling stock, starting in November 1997. On December 11, 1997, FVG submitted its bid, the only one received, and this usufruct was awarded to it on December 16, 1997. It was formalized in Deed No. 41, dated March 23, 1999, signed by the Judicial Administrator of FEGUA, the governmental agency in charge of railroads, and the representative of FVG. That deed was never formally signed by the President, and was later replaced by Deeds No. 143 and 158 in 2003. Still, the railroad rolling stock was fully used without interruption subsequent to Deed No. 41. The purpose of the original contract, i.e., repairing and operating a railroad, was, however, manifestly thwarted when the usufruct to the railroad equipment was effectively terminated by the *Lesivo* Declaration of Contracts 143 and 158. Without, for the moment, entering into the question of violations of CAFTA, I do not see how one can contest the fact that the Respondent interfered, in an economically significant way, with the purpose and content of Contract No. 402.

17. The Respondent also contends that it did not interfere with Contracts No. 143 and 158, arguing, for one thing, that the Claimant had no usufructuary rights to the rolling stock<sup>8</sup> in the first place. It refers to decisions such as *EnCana v. Ecuador*<sup>9</sup> which

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<sup>7</sup> CM, ¶¶ 253-256.

<sup>8</sup> CM, ¶¶ 233 *et seq.*

require a vested right to be taken for purposes of expropriation. *Thunderbird v. Mexico*, which it also quotes, holds that “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”<sup>10</sup> Contracts No. 143 and 158, the Respondent argues, were “not valid, never came into force, and therefore afford Claimant no protection under Guatemalan law.”<sup>11</sup>

18. This contention runs counter to the fact that Contracts No. 143 and 158 were signed by the representative of Respondent’s agency in charge of Guatemala’s railroads, the Judicial Administrator of FEGUA, in order to remove any ambiguity about the validity of Deed No. 41 that might arise from the absence of the President’s signature. Signed on August 28, 2003, at the Government’s request, it stated: “[I]n spite of having been endorsed by both parties [FEGUA and FVG], and having complete validity, [Deed No. 41] was never in force seeing that it was not approved by the President of the Republic; this was, however, an unnecessary requirement [correction of official translation by reference to the authentic Spanish text: “*no obstante ser un requisito innecesario pues el Interventor de Ferrocarriles de Guatemala tiene las facultades necesarias para la suscripción de ese contrato*”) since the Judicial Administrator of [FEGUA] has the necessary capacities to enter into this contract.”<sup>12</sup> It refers to the prior bidding, which had resulted in the December 16, 1997 award to FVG of a usufruct in the railroad

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<sup>9</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, ¶ 184.

<sup>10</sup> *International Thunderbird Gaming Corporation v. Mexico*, Ad hoc – UNCITRAL Arbitration Rules, IIC 136, Award, 26 January 2006, ¶ 208.

<sup>11</sup> CM, ¶ 234.

<sup>12</sup> Contract No. 143, First Part, No. V.

equipment.<sup>13</sup> Contract No. 143 then states, as recorded, “This contract shall be in force as of its endorsement, without need of subsequent authorization from any other authority.”<sup>14</sup>

19. In terms of international law and, for that matter, of common sense, it is difficult to see why the Claimant should not have relied on this express assurance of immediate validity of the contract by a person in charge of the issue in the Guatemalan governmental structure. This assurance by a competent governmental official in a recorded document would have reasonably assuaged the anxieties of any prudent foreign investor regarding the missing Presidential signature and the need, or lack thereof, of novel bidding processes.

20. In *Metalclad*,<sup>15</sup> assurances of a less competent official sufficed: The U.S. investor there had relied on *federal* officials’ statements that a *municipal* construction permit would not be required; the permit was ultimately denied. The tribunal concluded that “Metalclad was entitled to rely on the representations of federal officials”<sup>16</sup> – even though they had no jurisdiction over this issue. Here, the Judicial Administrator of FEGUA had jurisdiction over the issues, knew of all points of conflict, and consequently legally committed the State to this contract as one of its agents. Article

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<sup>13</sup> *Id.*, Second Part.

<sup>14</sup> *Id.*, Sixth Part.

<sup>15</sup> *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (2001).

<sup>16</sup> *Id.* ¶ 89. See, similarly, Elizabeth Snodgrass, *Protecting Investors’ Legitimate Expectations: Recognizing and Delimiting a General Principle*, 21 ICSID Rev. – FILJ 1 (2006) (“[a] reasonable position might be that ultra vires acts, while they may give rise to legitimate expectations, will do so less readily than would lawful acts”).

4 of the 2001 Articles on State Responsibility, restating customary international law in the field, provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.<sup>17</sup>

21. Oblivious to the inconsistency with its preceding argument, the Respondent is at pains to argue that the Lesivo Declaration itself did not deprive Contracts Nos. 143 and 158 of their legal effect. The Respondent's reasoning here is difficult to follow. Why would these contracts be a nullity, never have entered into force, or have been invalid if the Respondent chose the cumbersome route of the *lesivo* process to nullify them? The Respondent presumably believed that the contracts were indeed valid if it took steps to invalidate a document that must have had some present legal effect.<sup>18</sup>

22. In assessing expropriations, particularly indirect takings, international

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<sup>17</sup> Report of the International Law Commission, Fifty-third Session, General Assembly Official Records, Fifty-Sixth Session, Supplement No. 10, A/56/10, (2001), p. 84. Paragraph (6) of the Commentary to Article 4 provides that:

The reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.

<sup>18</sup> CM, ¶ 262 ("the mere initiation of the *lesividad* process does not equate to the nullification of Contract 143/158, either legally or effectively").

investment arbitral practice does not focus on the issue of the final determination of rights (in indirect takings, such formalities are characteristically absent). Rather, it focuses on the effect the governmental measures have had on the investment. As the tribunal in *Impregilo* stated, “the ‘effect’ of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.”<sup>19</sup> There is ample authority for the proposition that “the intent of the government is less important than the effects of the measures on the owner, and the form and the measures of control or interference is less important than the reality of their impact.”<sup>20</sup> This “effects test,” as the *Archer Daniels Midland* tribunal called it,<sup>21</sup> or the “sole effects doctrine,” as Dolzer prefers,<sup>22</sup> has been characterized as the “dominant conception in international law.”<sup>23</sup>

23. By contrast, the Respondent hews to a formal legalism, arguing that the initiation of the process of *lesividad* itself does not interfere with the Claimant’s rights under those contracts. Those rights, the Respondent argues, could only be abridged with legally binding effect, by a final decision by the Guatemalan court system, starting with the administrative court to which the Attorney General must take the Cabinet’s

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<sup>19</sup> *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 279.

<sup>20</sup> Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA, Award No. 141-7-2 (June 22, 1984), reprinted in 6 IRAN-U.S. CL. TRIB. REP. 219, 226 (1986), with reference to 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1006-20; G.C. Christie, *What Constitutes a Taking under International Law?*, 38 BRIT. Y.B. INT’L L. 307 (1962); and the *Mariposa Development Company Case* decided by the U.S.-Panama General Claims Commission, 6 U.N.R.I.A.A. 390. Cited also, approvingly, in *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, Award, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 77.

<sup>21</sup> *Archer Daniels Midland Co. et al. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 240.

<sup>22</sup> Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 79 (2002).

<sup>23</sup> Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. – FILJ 1, 10 (2005).

*Lesivo* Declaration in order to nullify the contract.<sup>24</sup>

24. The Respondent's domestic law expert testifies that there is no disagreement on the point that the *Lesivo* Declaration itself (whatever its economic consequence) does not have "legally binding" effect in Guatemalan law. He also testifies that that Declaration is the product of a "purely internal deliberation" of the Government in which "private parties have no right to participate or to be heard."<sup>25</sup> By declaring an administrative contract *lesivo*, the President "seeks to have the Attorney General of Guatemala file a case in the *Contencioso Administrativo* Court to ... seek the nullity of agreements ... harmful to the interests of the State."<sup>26</sup>

25. Yet neither the local expert nor the Counter-Memorial define what would constitute sufficient legal grounds to declare a contract *lesivo* or, put differently, what would constitute *insufficient* grounds that might lead the administrative court to disagree with the conclusion of the President and his Cabinet and leave the contract intact. Lacking legal standards to be applied, the role of the court in this constellation is reduced to that of a rubber stamp of the Executive Branch: whatever the Claimant may say in that process cannot upset the standardless decision of the Cabinet. It is, moreover, taken *in camera* and, thus, decides, with ultimate authority, whether or not a contract harms the interest of the State. It is under no legal obligation to indicate how or why.

26. One would have to look far for a legal arrangement that ensures, with

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<sup>24</sup> CM, ¶ 264.

<sup>25</sup> CM, ¶ 28.

<sup>26</sup> CM, ¶ 31.

more efficiency, an arbitrary decision. The rubber stamping function assigned to a court as the apparent legal pre-condition for the *Lesivo* Declaration to become binding is revealed to be an empty formalism. In substance, the essentially unreviewable decision by the Cabinet seals the foreign investor's economic fate: in the absence of clear standards of review, as both the Counter-Memorial and the Respondent's expert acknowledge, the foreign investor has little, if any chance of securing a change of the outcome of the *Lesivo* Declaration in court. In fact, such a change in favor of the investor has never occurred in a Guatemalan court, as will be discussed further below. In that national legal context, it is no surprise, then, that the *Lesivo* Declaration led directly to the demise of the Claimant's investment.

27. The Respondent claims, astonishingly, that the adverse effect of the *Lesivo* Declaration is not the fault of the Government but is the direct consequence of the Claimant's own actions, i.e., RDC's public protest of its treatment in a newspaper advertisement.<sup>27</sup> But the record reveals that the actual sequence of events was quite different. The Government's *Lesivo* Declaration, bearing the signatures of the President and all the members of his Cabinet, was published in the *Diario de CentroAmérica*, a periodical which also serves as the official gazette of the country.<sup>28</sup> This act was widely reported in various newspapers of the country, and even commented on in interviews by President Berger, as documented in the Claimant's Reply on the Facts.<sup>29</sup>

28. The Claimant's allegation is that, in this very public and conclusory

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<sup>27</sup> CM, ¶ 268.

<sup>28</sup> *Id.*

<sup>29</sup> Claimant's Reply on the Facts, ¶¶ 218-220.



fashion and without the opportunity to defend itself, the Government of Guatemala acted in a way that could only injure the Claimant's investment in Guatemala, essentially destroying the goodwill that had been established toward FVG in the country and creating an atmosphere of fear of association with the company that ultimately led to the disappearance of funding sources and the demise of its railway business. The Respondent asks the Tribunal to ignore the *economic* effect of a public governmental condemnation of an investor's contract as being harmful to the State's interest as well as its initiation of a process of legal invalidation of a contract that is the lifeblood of the investment, and instead to blame the victim for the adverse economic consequences because of the public protest of its unfair treatment and declaration of economic consequences by means of an advertisement in a newspaper.

29. The Respondent's contention is not credible. The adverse effect of the *Lesivo* Declaration is attributable to the well-publicized Governmental action, and not to the investor's reaction. The holding of the tribunal in *Santa Elena v. Costa Rica* is particularly relevant to the instant case:

A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.<sup>30</sup>

30. The Respondent also claims that the Claimant's expectations regarding its

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<sup>30</sup> *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 76.

investment were unreasonable, failing the test of CAFTA Annex 10-C 4(a)(ii) of “distinct, reasonable, investment-backed expectations.” But RDC’s business plan had been fully known and had been approved by the pertinent Guatemalan authorities, in particular FEGUA and its overseers. It was included in Deed No. 402, the right of way usufruct, the continuing validity of which the Respondent does not deny. Why these legally sanctioned shared expectations should now have suddenly become unreasonable is difficult to fathom.

31. The Respondent reacts with particular sensitivity to my conclusion that the *lesivo* process *per se*, as constructed and practiced in Guatemala, interferes with the rights of the Claimant. It argues that such a conclusion would “limit Guatemala’s legitimate exercise of its powers as a sovereign State.”<sup>31</sup> My conclusion was not based on a subjective appraisal. CAFTA constitutes the legal standard of this arbitration and, in accordance with it, any exercise of State power is subject to the obligations which the State Parties have undertaken with respect to qualifying foreign investors. This reflects the generally prevalent relationship of dualism between international law and domestic law.<sup>32</sup> As Sir Robert Jennings put it, “the international claim will not be dependent on showing that there was a breach of contract in the sense of the local law (which might simply be untrue), but that the local law is not in accord with the requirements of international law.”<sup>33</sup> In the *Norwegian Shipowners’ Claim* case,<sup>34</sup> the arbitral tribunal held

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<sup>31</sup> CM, ¶ 294.

<sup>32</sup> For a recent nuanced discussion, see SANTIAGO MONTI, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 312-315 (2009).

<sup>33</sup> R.Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT’L L. 156, 168 (1961).

<sup>34</sup> *Norwegian Shipowners’ Claim* (Norway v. U.S.), (122), 1 R.I.A.A. 307, 331 (emphasis added). See also

that it “cannot ignore the municipal law of the Parties, unless that law is contrary to the principle of the equality of the Parties, or to the *principles of justice which are common to all civilized nations.*”

32. *Lesivo* processes are known to other countries, as I explained in my earlier opinion, and as the Counter-Memorial points out. In its reference to the opinion of its Guatemalan law expert, Mr. Aguilar, the Respondent states that a form of *lesivo* is part of the legal systems of Spain, France, Mexico, Costa Rica, Ecuador, and Argentina.<sup>35</sup> This assembly of national practices misses the point. The issue is not a common practice among states but the concordance of *Guatemala’s* internal legal practices with the obligations it has assumed as a party to CAFTA. In any event, besides the occasional reference to a difference in the procedural structuring of the *lesivo* process between Guatemala and Spain,<sup>36</sup> the Respondent does not report the due process guarantees in the *lesivo* proceedings of any of the countries mentioned. The Claimant’s expert, Dr. Mayora, points out, in his explanation of the due process guarantees offered in Spain *before* a final declaration of *lesivo* is issued by the Executive Branch,<sup>37</sup> precisely what is missing in Guatemala. This is not, as Respondent would have it, a “strength,”<sup>38</sup> but a fundamental weakness of the system as practiced in Guatemala.

33. The point of emphasis in this case is that the *lesivo* process, as it has been practiced in Guatemala, violates essential elements of due process, prescribed by

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Hersch Lauterpacht’s separate opinion in *Certain Norwegian Loans* (France v. Norway), 1957 I.C.J. 9, 37.

<sup>35</sup> CM, ¶ 301 n. 781, with reference to Expert Report of J.L. Aguilar, ¶¶ 42, 48.

<sup>36</sup> CM, ¶ 300 n. 776.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

CAFTA Article 10.7(d): the decision to invalidate an investment contract is, in substance, made by the President and the Cabinet in a “purely internal”, Star-Chamber fashion, and the administrative courts which are called on to make the final decision on nullification of the contract are afforded no legal standards by which to assess the lawfulness of the government’s action; the apparent due process guarantees that are supposed to become operative at this juncture, are, thus, illusory and, in practice, prove to be meaningless. The fact that the Constitutional Court of Guatemala has upheld the validity of the *lesivo* process, as stated by the Respondent,<sup>39</sup> only confirms that no legal succor is to be expected from the highest judicial instance of the country. To be effective, due process has to be granted at the place and time where the de facto final substantive decision is made; to decide otherwise would unduly elevate form over substance. In this context, it may not come as a surprise that the first (and to my knowledge) only legislative decree that declared a commercial contract harmful to the national interest that was brought before an *international* arbitrator came from Guatemala. In the *Shufeldt* case of 1930, the arbitrator declared the decree violative of international law.<sup>40</sup>

## **2. The Claimant’s Property Rights in Its Investment Have Been Substantially Interfered With, If Not Extinguished**

34. The Respondent proceeds to claim that there is a need for the interference with the property right to be “substantial” and that the harm to RDC did not meet that

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<sup>39</sup> CM, ¶ 334.

<sup>40</sup> *Shufeldt Claim (U.S. v. Guatemala)*, July 24, 1930, 2 U.N.R.I.A.A. 1079. For a detailed discussion, see my earlier opinion, ¶¶ 75 *et seq.*

threshold.

35. I have no quarrel with the Respondent regarding the need for the interference to be significant. *De minimis non curat praetor*. We differ, however, on the metric for measuring significance. In my prior opinion, I referred to the *Metalclad* case, in which, it will be recalled, the government's interference was required to have the "effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of the property."<sup>41</sup> *CME v. Czech Republic* interprets indirect expropriation as "effectively neutraliz[ing]" the benefit of the property of the foreign owner,<sup>42</sup> while Christoph Schreuer defines it as "substantial loss of control or economic value of the foreign investment."<sup>43</sup> The decision in *Pope & Talbot* speaks of a certain "magnitude and severity,"<sup>44</sup> and *Occidental v. Ecuador* of the need for a "substantial deprivation of property rights."<sup>45</sup>

36. The issue, then, is not the legal standard, which is well established: it is the facts of the case. The factual outcome, as I understand it, is that the *Lesivo* Declaration effectively destroyed the foundation and purpose of RDC's investment, i.e., the creation and operation of a functioning, modern railway system in Guatemala. The

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<sup>41</sup> *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36, 50 (2001) ("[E]xpropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State."); *Archer Daniels, supra* note 21, ¶ 240 ("An [indirect] expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.").

<sup>42</sup> *CME Czech Republic BV v. Czech Republic*, UNCITRAL Arbitral Tribunal, Partial Award, 13 September 2001, reprinted in 14(3) WORLD TRADE AND ARBITRATION MATERIALS 109 (2002), ¶ 604.

<sup>43</sup> Christoph Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties*, 2 TRANSNATIONAL DISPUTE MANAGEMENT, Nov. 2005, ¶ 12.

<sup>44</sup> *Pope & Talbot, Inc. v. Government of Canada*, Interim Award, 26 June 2000, ¶ 96.

<sup>45</sup> *Occidental Exploration and Production Co. v. Ecuador*, LCIA No. UN 3467, Award, 1 July 2004, ¶ 89.

goal of the investment could not be achieved if the investor was denied the right to use the railroad rolling stock and equipment. The *Lesivo* Declaration, thus, would appear to have far exceeded whatever was set as the threshold of substantial interference; it effectively destroyed the Claimant's investment in the railway business in Guatemala.

37. The Respondent who would have the Tribunal focus on the right of way as the "most important and lucrative" part of the Claimant's investment,<sup>46</sup> i.e., the "leasing of the right of way and adjacent real estate parcels for non-railway purposes."<sup>47</sup> But under Contract No. 402, the central part and purpose of the Claimant's investment was to rehabilitate and operate Guatemala's railroad system in response to its Government's international invitation to bid. The stated purpose of the Respondent's February 17, 1997 request for bids was for FEGUA, with the consent of the Government of Guatemala, to grant an "onerous usufruct" for a fixed period of 50 years (with an option to be extended for as long as 5 periods of 10 years each) for the exploitation of the Guatemalan railroad system.<sup>48</sup> In its successful bid dated May 15, 1997, FVG proposed rehabilitating the 800 kilometer railway in five distinct phases, including an initial \$10 million investment for rehabilitation of the Atlantic corridor (Phase I) and the rolling stock (i.e., locomotives and freight cars).<sup>49</sup> This business plan was expressly referred to and included in Contract No. 402.

38. The original intent and purpose of the investment, as understood by both parties, is exactly what the *Lesivo* Declaration thwarted. The *Lesivo* Declaration thus

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<sup>46</sup> CM, ¶ 319.

<sup>47</sup> CM, ¶ 320.

<sup>48</sup> Bidding Rules, § 1.1.

<sup>49</sup> FVG Business Plan, at § 6.1.

rendered the investment, understood as an integrated whole by both parties, no longer viable and constituted effectively an indirect expropriation of the entire investment.

39. The Respondent also argues that the interference did not constitute an indirect expropriation because it was not irreversible or irrevocable. I doubt whether such a requirement of permanency is part and parcel of the customary international law of indirect expropriations.<sup>50</sup> The only reference the Respondent adduces for this proposition is the *Tecmed Case*.<sup>51</sup> In contrast, in *SD Myers v. Canada*, the tribunal stated that “in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.”<sup>52</sup> And in *Wena Hotels v. Egypt*, a temporary deprivation (seizure of a hotel for approximately one year) was found to be sufficient to support an expropriation.<sup>53</sup> Even if there were such a requirement of permanency, it would have been met in this case: the *Lesivo* Declaration caused substantial injury, if it did not completely destroy the Claimant’s investment in the Guatemalan railroad industry.

40. Finally, the Respondent argues that the expropriation was not unlawful

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<sup>50</sup> The rather elaborate article on “Expropriation” in *THE OXFORD HANDBOOK ON INTERNATIONAL INVESTMENT LAW* (2008) (by August Reinisch, at 407 *et seq.*), for example, does not mention it as a separate criterion. The discussion in *CAMPBELL MCLACHLAN QC ET AL., INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES* (2007), at 299-300, essentially refutes it.

<sup>51</sup> CM, ¶ 328, with reference to *Técnicas Medioambientales Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 116.

<sup>52</sup> *SD Myers v. Government of Canada*, UNCITRAL Ad Hoc Arbitration, Partial Award, 13 November 2000, 8 ICSID Rep. 4, 59.

<sup>53</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, 41 ILM 896, 915. Another temporary measure was considered to be expropriatory in *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, referred to by MCLACHLAN, *supra* note 50, at 299.

under CAFTA Article 10.7 because it was performed in the “public interest.”<sup>54</sup> The Respondent does not define that public interest with any specificity and limits itself to the citation of various legal opinions supporting the power of the President to declare the contract *lesivo* and focusing on the absence of a new bidding process. The question of how compliance with these measures, all in the sphere of the Respondent, would have benefitted Guatemala remains unanswered. The Counter-Memorial also fails to address the palpable private interest of Mr. Campollo, a private Guatemalan citizen. According to Claimant’s Reply on the Facts, Mr. Campollo’s interests were to be served primarily. As the Tribunal in *ADC v Hungary* held:

[A] treaty requirement for “*public interest*” requires some genuine interest of the public. If mere reference to “*public interest*” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.<sup>55</sup>

41. The Respondent proceeds to declare that it did not act with discriminatory intent or effect. The Claimant’s representation that the Declaration was made to facilitate the ambitions of Mr. Campollo in the railroad industry is dismissed as “nothing more than an unsubstantiated – and defamatory – conspiracy theory.”<sup>56</sup> I am not a fact witness and can only observe that, from a probative standpoint, the Claimant’s Reply on the Facts adduces an abundance of detail in support of its theory of discrimination in favor of Mr. Campollo.

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<sup>54</sup> CM, ¶ 335.

<sup>55</sup> *ADC v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 432.

<sup>56</sup> CM, ¶ 337.



42. The Respondent claims that it engaged in various negotiations with the Claimant before the *Lesivo* Declaration was issued, and thus complied with the requirement of due process of law.<sup>57</sup> Such fits and starts of attempted renegotiations do not, however, meet the customary international law requirement of notice and opportunity to be heard. And, as expounded upon above, due process, to be meaningful, has to be afforded where the real decision is made, i.e., before the Cabinet took action, and not at the level of the administrative court, in a procedure bereft of standards and with scant prospect of success.

43. The Respondent tries to justify the lack of prompt, adequate and effective compensation with the argument that, formally, the contracts which were declared *lesivo* remain in force.<sup>58</sup> In essence, the Respondent contends, no harm has yet been done. But in the face of the effective termination of the Claimant's investment objectives, such an argument does not withstand scrutiny.

44. Lastly, the Respondent invokes an argument akin to the exhaustion of local remedies. Invoking *Generation Ukraine*,<sup>59</sup> it argues that a final decision must have been rendered in the expropriating state before a claim for compensation on the international level is ripe.<sup>60</sup> Under Article 15 of the 2006 Draft Articles on Diplomatic Protection, which largely codify customary international law and which may be applied, at least by analogy, to this case, local remedies "do not need to be exhausted where: (a) ...[T]he local remedies provide no reasonable possibility of effective redress"

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<sup>57</sup> CM, ¶ 338.

<sup>58</sup> CM, ¶ 339.

<sup>59</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 20.30.

<sup>60</sup> CM, ¶ 340.

or “(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible.”<sup>61</sup> The ILC commentary to this Article refers to the exception in paragraph (a) as the “futility” or “ineffectiveness” exception because of the failures in the administration of justice: “(i) the local remedies are obviously futile; (ii) the local remedies offer no reasonable prospect of success; (iii) the local remedies provide no reasonable possibility of effective redress.”<sup>62</sup>

45. As discussed above, as the “harm to the interests of the State” is an undefined open standard, there is no reasonable possibility of effective redress in Guatemala’s courts. This absence of the prospect of meaningful remedy is further aggravated by what can only be described as a pattern of chronic delay, even lack of resolution, in the cases on *lesivo* declarations in the Respondent’s administrative courts. There has only been one confirmation of a *lesivo* declaration in the administrative court since 1991; the other cases remain pending or have been settled on terms favorable to the Government, without ever resulting in compensation.<sup>63</sup> RDC’s claim for prompt, adequate and effective compensation is thus plainly ripe and should have been met.

46. Contrary to the Respondent’s conclusion,<sup>64</sup> the *Lesivo* Declaration has thus been an unlawful expropriation in violation of CAFTA Article 10.7.

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<sup>61</sup> Draft Articles on Diplomatic Protection, U.N. GAOR, 59<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/59/10, chap. IV (2004), art. 16.

<sup>62</sup> *Id.* ¶ (2), at 77. See also the authorities cited in the commentary on pages 77-80.

<sup>63</sup> Claimant’s Reply on the Facts, ¶ 300.

<sup>64</sup> CM, ¶ 342.

### III. THE MINIMUM STANDARD OF FAIR AND EQUITABLE TREATMENT

47. CAFTA Article 10.5 requires a minimum standard of treatment of aliens' investments in accordance with customary international law. This includes the principles of "fair and equitable treatment" and "full protection and security." In particular, "fair and equitable treatment" includes the obligation "not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."<sup>65</sup> Annex 10-B clarifies that "the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."<sup>66</sup>

48. As my original opinion stated, what violates the standard of fair and equitable treatment under customary international law is conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory ... or involves a lack of due process," a "manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."<sup>67</sup> The expectation is that the State act "consistently," "without arbitrarily revoking any preexisting decisions or permits issued by the State which were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business

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<sup>65</sup> CAFTA, art. 10.5(2)(a).

<sup>66</sup> CAFTA, Annex 10-B.

<sup>67</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 98-99.

activities.”<sup>68</sup> The *Azurix* case clarified that this standard is objective, meaning that there need not be proof of bad faith or malicious intent on the part of the State.<sup>69</sup>

49. In the instant case, the President and his Cabinet have unfettered discretion in determining whether a contract is harmful to the interests of the State. Discretionary decisions such as these are essentially unforeseeable and thus arbitrary, resulting in a violation of the fair and equitable treatment standard. In the context of fair and equitable treatment, it is critical that the Claimant was not provided with notice of any charges regarding the harmfulness of its contract and had no chance to defend itself before the *Lesivo* Declaration was issued. This denies it justice under the rules of the principal legal systems of the world and thus violates the standard of fair and equitable treatment as it is defined in CAFTA Article 10.5(2)(a).

50. The Respondent simply argues that the standards of non-arbitrariness, transparency and adherence to an investor’s legitimate expectations do not reflect customary international law<sup>70</sup> and are thus not binding on this Tribunal. It ignores the case law adduced in my original opinion, instead demanding proof of state practice in this respect. It over-interprets *Glamis Gold*,<sup>71</sup> which includes the cautionary note that arbitral interpretations of fair and equitable treatment under BITs that do not limit themselves to the understanding of this term under customary international law are not reliable guidance as to the content of customary international law, and that an

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<sup>68</sup> Tecmed, *supra* note 51, ¶ 154.

<sup>69</sup> *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372.

<sup>70</sup> CM, ¶ 354.

<sup>71</sup> *Glamis Gold Ltd. v. United States of America*, ICSID NAFTA/UNCITRAL Arbitration, Award, 8 June 2009.

alleged change in custom has to be proven by the Claimant.<sup>72</sup> The Respondent fails to mention the last sentence in the paragraph it cited:

They [arbitral awards] can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.<sup>73</sup>

51. The opinion submitted here reflects arbitral decisions that interpret the standard of fair and equitable treatment in the light of customary international law, i.e., they apply the international minimum standard as it has evolved over time.<sup>74</sup> The *Glamis Gold* tribunal itself recognized the evolutionary nature of this standard, as it, for example, no longer sees it as requiring “bad faith ... to find a violation of the fair and equitable treatment standard.”<sup>75</sup>

52. In any event, tribunals seized by two states with the authority to determine whether one of their specific practices constitutes fair and equitable treatment are engaged, by the joint authorization of the states concerned, in a delegated appraisal of the lawfulness of practice common to each of the states. In any examination of state practice, such arbitral awards, by virtue of their very judgment of lawfulness, are a reliable indicator of relevant state practice.

53. Indeed, the Respondent itself relies on arbitral case law when providing its own, more restrictive understanding of the reach of the fair and equitable treatment

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<sup>72</sup> CM, ¶ 353.

<sup>73</sup> *Glamis Gold*, *supra* note 71, ¶ 605.

<sup>74</sup> Upon detailed analysis, a most recent study finds: “[M]ost arbitral tribunals have lately arrived at the conclusion that the FET standard, whether or not it is “autonomous,” does not go de facto beyond IMS [the International Minimum Standard under customary international law].” MONTI, *supra* note 32, at 309.

<sup>75</sup> *Glamis Gold*, *supra* note 71, ¶ 616.

standard under customary international law. It cites to *Waste Management II*, as referred to in my prior opinion,<sup>76</sup> as well as to *Thunderbird*, which requires “a gross denial of justice or manifest arbitrariness.”<sup>77</sup> (One must note, however, that this latter definition is not on all fours with the textual commitment of CAFTA Article 10.5(2)(a) to “simple,” not “gross” denial of justice concepts under customary international law.)

54. Be that as it may, the burden which the Respondent would impose on the Claimant is not the correct one. Under recognized standards of international law the Claimant need not conduct a vast research of pertinent state practice and *opinio juris* itself, as the Respondent would have it, to confirm the emergence of a new norm of customary international law. Under Article 38(1)(d) of the Statute of the International Court of Justice, it is entitled to rely on the evidence of customary international law norms provided by pertinent decisions of tribunals and the teachings of the most highly qualified publicists.

55. It is unusual, to say the least, to argue that international law allows states to act in an arbitrary fashion. In contrast to the Respondent’s own statement that, for example, the standard of non-arbitrariness does not form part of customary international law, *Glamis Gold* sees a customary international law violation of the fair and equitable treatment standard in conduct that is “manifestly arbitrary” or “discriminatory.”<sup>78</sup> A governmental measure is considered “discriminatory” if its

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<sup>76</sup> CM, ¶ 361.

<sup>77</sup> CM, ¶ 362.

<sup>78</sup> *Glamis Gold*, *supra* note 71, ¶ 616: Sufficiently egregious and shocking conduct of a kind that violates the customary international law standard of fair and equitable treatment include “manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.”

intent or effect is to discriminate against a foreign investor.<sup>79</sup> Jan Paulsson lists as denials of justice “unreasonable delay, politically dictated judgments, ... fundamental breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence.”<sup>80</sup> The fair and equitable treatment standard is of a piece with a dynamic view of the traditional international minimum standard of the treatment of foreigners, as a recent study shows.<sup>81</sup> The study included among these international minimum standards the prohibition of arbitrariness.<sup>82</sup> I remain convinced that the standards of non-arbitrariness and non-discrimination are alive and well in customary international law.

56. The Respondent also argues that the *Lesivo* Declaration itself is not arbitrary or discriminatory. But the lack of standards for determining harm to the interests of the State makes it an inherently arbitrary process. Also, the treatment of RDC, as compared to Mr. Campollo, was discriminatory toward an alien investor. The record, as compiled by the Claimant, contains ample evidence of that adverse differential treatment. I will reference it below in the discussion of the national treatment standard.

57. The Respondent denies that the Government of Guatemala acted in bad faith.<sup>83</sup> Whether or not that is so (and I am of the opinion that it did act in bad faith

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<sup>79</sup> LG&E v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 146.

<sup>80</sup> JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 205-206 (2005). For a most recent overview of customary international law in the field of due process, see ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM 113-123 (2009).

<sup>81</sup> MONTT, *supra* note 32, at 298 *et seq.*

<sup>82</sup> *Id.* at 342 *et seq.*

<sup>83</sup> CM, ¶ 367.

based upon my understanding of the facts), the state of mind or the intent of the Respondent is irrelevant, as stated in my prior opinion; as *Azurix*<sup>84</sup> makes clear, the fair and equitable treatment standard is objective, not subjective.

58. Finally, the Respondent argues that a violation of the fair and equitable treatment standard did not occur because the Claimant's expectations regarding its intended investment were not reasonable or legitimate. The purported reason is that RDC could not reasonably expect that it would not be subject to government procurement laws. While such an argument is generally correct, the converse is equally true: The Government knew of the purpose of the investment and negotiated every detail of the contested contracts through its entity and agent FEGUA, only to impede the project by means of the denial of a final signature by the President of the essential railroad equipment usufruct contract. Under the circumstances of this case, the expectation that the President would sign the contracts in question, if it was even legally necessary, was legitimate.

59. It is thus clear that the Respondent violated the standard of fair and equitable treatment under customary international law as established by CAFTA Article 10.5.

#### **IV. THE MINIMUM STANDARD OF FULL PROTECTION AND SECURITY**

60. CAFTA Article 10.5(2)(b) also mandates that the covered investment is to

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<sup>84</sup> *Azurix v. Argentina*, *supra* note 69.



be given full protection and security, defined as “requir[ing] each Party to provide the level of police protection required under customary international law.”

61. My original opinion referred to the leading case, the *Lena Goldfields* arbitration of 1930, as setting the standard of customary international law in that field. In that case, the USSR denied the foreign company the exploitation of new fields, allowed the theft of gold, offered no police protection, conducted criminal raids, searches and seizures, arrested high-level staff, and terrorized its labor force, resulting in the total paralysis of the company’s business activities.<sup>85</sup>

62. Just as in this case, modern arbitral awards interpret the minimum standard of full protection and security as requiring the State to “protect the investor’s property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence.”<sup>86</sup>

63. *AAPL v. Sri Lanka*<sup>87</sup> involved the destruction of a Hong Kong company’s shrimp farm during a governmental raid on Tamil Tiger rebels. Applying the customary international law standard of full protection and security in concluding that the Respondent had breached the standard by failing to take precautionary measures before it launched the counter-insurgency operation,<sup>88</sup> the tribunal based its use of the

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<sup>85</sup> Schiedsgerichtssache zwischen Lena Goldfields Co. Ltd. Und der Regierung der U.S.S.R., Award, 2 September 1930, available, with English translation, at <http://translex.uni-koeln.de/output.php?docid=261300>. See also Arthur Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31 *et seq.* (1950/51), available at <http://www.trans-lex.org/127500>.

<sup>86</sup> MCLACHLAN, *supra* note 50, at 247.

<sup>87</sup> Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, 4 ICSID Rep. 245.

<sup>88</sup> *Id.* at 284-287.

due diligence standard on a thorough analysis of both jurisprudence and scholarly doctrine.<sup>89</sup>

64. *AMT v. Zaire*<sup>90</sup> involved the looting and destruction of the claimant's property caused by Zairian soldiers during riots in Kinshasa. As Zaire had taken no action at all to protect the claimant's property, the full protection and security standard was found to be violated, in particular, the State's "obligation of vigilance,"<sup>91</sup> irrespective of whether the acts of destruction had been committed by Zairian soldiers or civilians.<sup>92</sup>

65. In *Wena Hotels v. Egypt*,<sup>93</sup> a British company had entered into agreements with an Egyptian state-owned company (EHC) to manage two hotels in Egypt. These hotels were attacked by large crowds, including members of the staff of EHC; the guests were forcibly evicted; and EHC took control of the hotels for almost a year. Egypt was held to be liable for the violation of the full protection and security standard as it was aware of the seizures but did nothing to prevent them, to prevent damage to Wena's investment, to compensate it for its losses, or to sanction EHC.<sup>94</sup>

66. In the case at bar, the facts evidence a pervasive lack of police protection for the Claimants' assets. Looting and vandalizing occurred with impunity, as in the

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<sup>89</sup> *Id.* at 280 (referring, inter alia, to Judge Huber's decision on *British Claims in the Spanish Zone of Morocco*, 2 R.I.A.A. 615, 645, the *Sambiaggio Case*, 10 R.I.A.A. 499, 512 and decisions of the Mexico-U.S. Claims Commission).

<sup>90</sup> *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 5 ICSID Rep. 11.

<sup>91</sup> *Id.* at 29.

<sup>92</sup> *Id.* at 30-31.

<sup>93</sup> *Wena Hotels v. Egypt*, *supra* note 53.

<sup>94</sup> *Id.* at 920.

*Lena Goldfields* case, in *Wena Hotels*, and in *AMT v. Zaire*. Squatters were allowed to occupy and destroy the railroad tracks and related equipment. Here, too, impunity reigned; the lack of police protection and prosecution of offenders only increased after the issuance of the *Lesivo* Declaration.

67. The Respondent argues that the Government acted with due diligence and took reasonable measures to protect the Claimant's investment. Also, it stated that the local authorities did not collaborate with local citizens to interfere with the Claimant's right of way; instead, they took reasonable measures to protect the Claimant's property and assets. Claimant itself entered into business dealings with the squatters, thus making money and needing no police protection. The Claimant's Reply on the Facts, however, avers that the contractual arrangements referred to by the Respondent were made not with squatters, but with families living near railroad stations or station yards, often former FEGUA employees, or individuals who had concessions near the railroad tracks.<sup>95</sup>

68. Even though the facts may show a recent increase in police protection and prosecutions, possibly in reaction to the commencement of this arbitration, the Claimant contends that an inordinate amount of daily transgressions upon the Claimant's property continues, with resulting significant damage; police protection and prosecution of offenders are, according to the facts as submitted by the Claimant, sorely lacking.<sup>96</sup> Thus the customary international law minimum standard of full protection

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<sup>95</sup> Claimant's Reply on the Facts, ¶¶ 162-164.

<sup>96</sup> Claimant's Memorial on the Merits ¶¶ 92-96; Claimant's Reply on the Facts ¶¶ 166-173.

and security has been violated as well.

## V. THE NATIONAL TREATMENT STANDARD

69. Under CAFTA Article 10.3, foreign investors are to be treated the same as a State Party's own investors. As I stated in my original opinion, the 2007 decision of the NAFTA tribunal in *Archer Daniels Midland v. Mexico* clarifies that this clause prohibits discrimination based on nationality, *de jure* and *de facto*.<sup>97</sup> The tribunal in *Pope & Talbot v. Canada* stated that

Differences in treatment will presumptively violate Article 1102(2) [national treatment standard], unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.<sup>98</sup>

70. The tribunal in *Feldman v. Mexico*<sup>99</sup> applied the same test, and found a violation of the national treatment standard even in a case where there was only one local investor in the same industry, since the record demonstrated preferences accorded to the local investor which were not given the foreign investor.<sup>100</sup>

71. The facts, as related by the Claimant, establish that the Respondent favored its own national and potential investor, Mr. Ramón Campollo, over the Claimant, a U.S. corporation. Mr. Campollo, at the time of the issuance of the *Lesivo*

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<sup>97</sup> *Archer Daniels Midland Co. v. Mexico*, *supra* note 21, ¶ 193.

<sup>98</sup> *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL Ad Hoc Arbitration, Award on the Merits of Phase 2, 10 April 2001, ¶ 78.

<sup>99</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

<sup>100</sup> *Id.* ¶ 187.

Declaration, considered taking over the railroad, especially in the Southern Corridor of Guatemala.

72. The Respondent argues that the Claimant and Mr. Campollo were “not in like circumstances” as they operated in different businesses – the sugar and the railroad industries.<sup>101</sup> It also maintains that the Claimant did not actually receive less favorable treatment than Mr. Campollo. The Claimant, in its Reply on the Facts, paints a starkly different picture. The sugar oligarch did more than contemplate entering the railroad industry; he entered into serious negotiations with RDC and developed pertinent plans of his own, creating a situation of competition in the railroad industry that puts him into “like circumstances” with the Claimant. The Claimant also details intimate relationships between the President’s family and the family of the sugar oligarch, particularly during the time period at issue in this arbitration.<sup>102</sup> I thus maintain my position that, based on these facts, a violation of the national treatment standard has been manifest.

## VI. CONCLUSION

73. For the above reasons, I confirm that it is my opinion that Guatemala has

- (1) effected an indirect expropriation of FVG in violation of CAFTA Article 10.7 and customary international law;
- (2) subjected FVG to unfair and inequitable treatment and denied it due process in violation of CAFTA Article 10.5 and customary international law;

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<sup>101</sup> CM, ¶ 516.

<sup>102</sup> Claimant’s Reply on the Facts, ¶¶ 86, 88, 110-113.

(3) denied FVG the full protection and security owed under customary international law and CAFTA Article 10.5; and

(4) treated RDC discriminatorily in violation of the national treatment standard of CAFTA Article 10.3.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. Michael Reisman". The signature is fluid and cursive, with a large initial "W" and a long, sweeping tail.

W. Michael Reisman