NOTICE OF INTENT TO SUBMIT
A CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 10 OF
THE CENTRAL AMERICA - DOMINICAN REPUBLIC - UNITED STATES
FREE TRADE AGREEMENT

RAILROAD DEVELOPMENT CORPORATION

Investor

v.

THE REPUBLIC OF GUATEMALA

Party

Pursuant to Articles 10.16 and 10.17 of the Central America - Dominican Republic - United States Free Trade Agreement ("CAFTA"), the Investor, Railroad Development Corporation ("RDC" or the "Investor"), on its own behalf and on behalf of its investment enterprise, Compañia Desarrolladora Ferroviaria, S.A. ("FVG" or the "Investment Enterprise"), serves this Notice of Intent to Submit a Claim to Arbitration for breach of obligations under CAFTA by the Republic of Guatemala ("Guatemala").

I. NAME AND ADDRESS OF THE INVESTOR AND INVESTMENT ENTERPRISE

Railroad Development Corporation

381 Mansfield Avenue, Suite 500
Pittsburgh, Pennsylvania 15220

Compañia Desarrolladora Ferroviaria, S.A.

24 Avenida 35-91, Zona 12
Guatemala City, Guatemala, C.A.
Incorporated on May 6, 1997 under the laws of Guatemala.

RECIBIDO
Dirección de Administración del
Ministerio de Economía

II. NOTICE FILED WITH:

Ministry of Economy

Ministerio de Economía
República de Guatemala
Dirección de Administración de Comercio Exterior
8a Avenida 10-43, zona 1

Ciudad de Guatemala, Guatemala
Attention: Minister of Economy, Lic. Luis Oscar Estrada Burgos

III. BREACH OF OBLIGATIONS

The Investor, on its own behalf and on behalf of its Investment Enterprise, alleges that the Republic of Guatemala has breached its obligations under Section A of Chapter 10 of CAFTA, under the following provisions:

i) Article 10.3 (National Treatment);
ii) Article 10.5 (Minimum Standard of Treatment); and
iii) Article 10.7 (Expropriation and Compensation).

The applicable provisions of CAFTA are:

Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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Article 10.5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

* * *

Article 10.7: Expropriation and Compensation

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) **in a non-discriminatory manner;**

(c) **on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and**

(d) **in accordance with due process of law and Article 10.5.**

* * *

VI. LEGAL AND FACTUAL BASIS FOR THE CLAIMS ON BEHALF OF THE INVESTOR ITSELF AND ON BEHALF OF ITS INVESTMENT ENTERPRISE

1. RDC is a privately owned railway investment and management company which is incorporated under the laws of Pennsylvania. RDC focuses on emerging corridors in emerging markets, meaning railways plus other businesses, such as ports or fiber optics, electric transmissions, or other uses of railway lines and stations, primarily in developing countries. RDC currently has operations in six (6) countries, including the United States, Argentina, Peru, Guatemala, Malawi and Mozambique.

2. Compañia Desarrolladora Ferroviaria, S.A. ("FVG") is the usufructary company which was formed on May 6, 1997 under the laws of Guatemala by RDC. FVG is eighty-two percent (82%) owned by RDC, the U.S. investor, with the remaining eighteen percent (18%) divided among sixty-five (65) Guatemalan investors.

3. Ferrocarriles de Guatemala ("FEGUA") is a state-owned enterprise of the Republic of Guatemala which was established in 1969 under Decree No. 60-72 of the Congress of the Republic of Guatemala for the management and exploitation of the Railroad System of Guatemala. In accordance with its Organizational Law, from 1969 until 1996, FEGUA was responsible for providing certain rail transport service and managing the rail personal property and real estate that comprised its assets.

4. In March, 1996, due to the extensive physical deterioration of the equipment and premises, insufficient investment in the reconstruction or modernization of the railroad system, operating losses and declining cargo and passenger carriage, Guatemala closed the entire national railway system operated by FEGUA.

5. In 1997 (after a peace treaty brokered by the United Nations ended three decades of civil strife), Guatemala, through an international public bidding process, invited the private sector to help rebuild its railway system, and authorized FEGUA to enter into an agreement with a private operator permitting the use of the infrastructure, real estate and other specified rail assets to provide railway services to the country.

6. The public bidding was initiated on February 17, 1997. Of the two presented bids, RDC submitted the only bid that was considered responsive by the Government. RDC's bid represented a commitment to restore FEGUA to operation in stages, committing to an initial investment program estimated at approximately Ten Million Dollars ($10,000,000.00). On this basis, RDC was awarded a 50-year usufructary right of way to restore and operate the Guatemalan rail system on June 23, 1997 (the "Usufruct"). The Usufruct contract was signed on November 25, 1997, by FEGUA Administrator Andrés Porras in a public ceremony on the rear platform of the Presidential coach "Michatoya" of the railway line. The Usufruct and the Usufruct contract were ratified by the Congress of Guatemala by Decree 27-98, published in the Official Gazette on April 23, 1998. The railroad privatization became effective May 23, 1998.

7. The Usufruct covers a 497-mile (narrow gauge) railroad connecting Guatemala City with Mexico, El Salvador, and ports on both the Atlantic and Pacific coasts. The Usufruct also includes the right to develop alternative uses for the right of way, such as pipelines, electric transmission and fiber optics. In return, RDC agreed to pay FEGUA a five percent (5%) royalty on gross income during the first five (5) years of the Usufruct and a ten percent (10%) royalty for the remainder of the Usufruct, plus an additional one point twenty-five percent (1.25%) for the Usufruct of Rail Equipment, making it a total royalty payment effective to date of eleven point twenty-five percent (11.25%) over the gross income.

8. FEGUA entered into the following agreements with FVG, as the investment enterprise:

- Usufruct Contract of Right of Way documented by Deed Number 402 dated November 25, 1997 ("Deed 402");
- Usufruct Contract of Rail Equipment, Property of FEGUA in Favor of FVG documented by Deed Number 41, dated March 23, 1999. This contract was then replaced by Deed Number 143 dated August 28, 2003 ("Deed 143"). Deed 143 was further amended on October 7, 2003 by Deed Number 158 ("Deed 158"); and
- Trust Fund for the Rehabilitation and Modernization of the Railroad System in Guatemala documented by Deed Number 820 dated December 30, 1999 ("Deed 820"), together with obligations by FEGUA to make annual payments into the Trust Fund.

9. Despite decades of little maintenance, complete loss of traffic, extensive invasion by squatters, and the destruction caused by Hurricane Mitch in late 1998, FVG, through literally heroic efforts, was able to resume commercial service on April 15, 1999 with a short-haul (60 km.) symbolic cement movement from El Chile to Guatemala City.

10. In December, 1999, further commercial service was restored with a 320 km. line from Guatemala City to the Atlantic ports of Puerto Barrios and Puerto Santo Tomas. Since that year up to 2005, FVG had been steadily increasing traffic

tonnage as follows: year 2000 - 57,082 tons; year 2001 - 87,963 tons; year 2002 - 100,391 tons; year 2003 - 118,860 tons; year 2004 - 122,308 tons; and year 2005 - 125,466 tons. FVG has continued this daily railroad service through the present, despite the actions and omissions by the Government described herein.

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

12. On June 26, 2005, after extensive efforts to convince Guatemala to meet its contractual obligations, FVG initiated two arbitration cases against FEGUA based on breach of contract, one for failure to remove squatters from the railroad right of way pursuant to Deeds 143/158 and another for FEGUA's failure to pay monies owed to the Trust Fund pursuant to Deed 820.

13. In anticipation of FVG's filings, on June 22, 2005, FEGUA requested the Attorney General of Guatemala to investigate the circumstances surrounding the award of the Usufruct and to issue an opinion on the validity of Deed 143 (as amended by Deed 158). FVG and RDC believe that the timing of this "request" to the Attorney General was no mere coincidence: a request by the Republic of Guatemala to its Attorney General for such an investigation with no basis carries with it an inherent message of how the Republic of Guatemala expects its Attorney General to respond.

14. On August 1, 2005, the Attorney General declared *lesion*[1] (Opinion No. 205-2005) and recommended that Guatemala declare Deeds 143/158 void as not in the interest of Guatemala. In particular, the opinion by the Attorney General, as translated, states as follows:

> Lesion was caused in this case because there is violation to the rules and procedures that should have been applied in order to execute the agreement in due form and with legal validity. The relevant contract breaks the Government Contracting Law and other laws that govern the process to grant FEGUA's property in usufruct.
>
> There is pecuniary lesion by executing an Onerous Usufruct Contract to grant the State's property in usufruct to be exploited by

[1] Black's Law Dictionary defines the term *lesion* as "injury suffered by one who did not receive the equivalent value of what was bargained for." Under Guatemalan law, the President with joint cabinet (Ministers) can issue a resolution called "Lesividad" which declares an administrative act as contrary to the interests of the state and seeks its annulment.

a private entity, in exchange of one point twenty-five percent (1.25%) of the net carrier billing as a result of rendering transportation services.

There is no basis in fact or law for the Attorney General's opinion.

15. On January 13, 2006, FEGUA issued a legal opinion (Opinion No. 05-2006) in which it agreed with the Attorney General's Opinion regarding *lesion* and further argued that the Usufruct agreements were not awarded as a result of a public bid. The facts surrounding the Usufruct bidding process are contrary to this finding and there is no basis in fact or law to support this finding. FEGUA then requested the President of Guatemala to officially declare *lesion* based on the Attorney General's and FEGUA's legal opinions.

16. RDC and FVG have made consistent efforts to resolve their claims through consultation and negotiation with the Government. After numerous attempts to reach an understanding with FEGUA, RDC and FVG requested a meeting with the President of Guatemala, Mr. Oscar Berger, which occurred on March 7, 2006. RDC made a presentation on the current situation and the importance of the Government's support for and compliance with the Usufruct contracts entered into with FVG. CEO Henry Posner III and William Duggan were among those present on behalf of RDC and FVG. President Berger and FEGUA's director Arturo Gramajo were present at the meeting. President Berger instructed FEGUA's director to dissolve FEGUA and to comply with the Usufruct contracts. Unfortunately, neither instruction was followed. President Berger also instructed that a high level railroad commission be incorporated to work with RDC and FVG on the ways the Government could support FVG railroad operations. While the commission was established and a number of meetings took place, the Government never made a proposal or offered a plan of compliance with the Usufruct contracts. The meetings with the commission were suspended by tbe Government, despite multiple requests by FVG to continue the negotiations. (The commission members included Miguel Fernandez/Presidential Commissioner of Investment; Emmanuel Seidner/Joint Presidential Commissioner of Investment; Mario Marroquín/Joint Commissioner of Government Planning; Gabriela Zachrisson/Legal Advisor of the Ministry of Infrastructure; Susan Pineda and Carmen Úrizar from the Office of the Commissioner of Investment; and Dr. Arturo Gramajo/Director of FEGUA. RDC and FVG members included Jorge Senn/General Manager of FVG; Juan Pablo Carrasco de Groote/Legal Adviser of RDC and FVG; William Duggan/Director of FVG; and a representative of one of the local shareholders of FVG.) It would appear that the Government was not acting in good faith during the negotiations as, without the knowledge of RDC or FVG, President Berger and the Government were planning for and preparing the Lesivo Resolution, as hereinafter defined in Paragraph 17. After the Government issued the Lesivo Resolution, it convened no more commission meetings.

17. As described above, while the negotiations were still in progress, on August 11, 2006, the President, in joint counsel with certain of his cabinet ministers, signed

Government Resolution 433-2006, which declared an essential element of the country's 1998 railroad privatization, the usufruct of the rolling stock, "*lesivo*" or "INJURIOUS to the interests of the State" (the "Lesivo Resolution"). The Lesivo Resolution was published in the Guatemala Official Gazette on August 25, 2006. There was no basis in fact or law for the Lesivo Resolution which was issued after CAFTA went into effect between the United States and Guatemala on July 1, 2006.

18. RDC and FVG believe that the Lesivo Resolution, declaring the lease of the rolling stock void, was intended to further two principal, but highly improper, Government objectives: (1) to force FVG to withdraw from the arbitration processes in which FVG has charged FEGUA with breach of contract; and (2) to make it impossible for FVG to perform under its basic Usufruct (Deed 402) so that the right of way provided as part of the Usufruct could be redistributed to certain Guatemalan private sector companies without compensating FVG for the loss of its contractual rights, monetary investments, and reasonably expected profits during the term of the Usufruct. The Lesivo Resolution constitutes a wrongful indirect expropriation under Section A, Article 10.7, and violates the National Treatment obligations of Section A, Article 10.3 and the minimum standard of treatment obligations of Section A, Article 10.5 of CAFTA.

19. The Lesivo Resolution has placed undue and burdensome financial pressure on FVG by causing FVG's customers and suppliers to be justifiably reticent to continue to do business with a private entity in a legal battle with the Republic of Guatemala. Through its Lesivo Resolution, the Government sends a chilling message to investors, all local suppliers and customers of FVG declaring the existing Usufruct to be against the public interest. It was entirely foreseeable that individual customers and suppliers would not be comfortable challenging their own Government by continuing to support a now-targeted private enterprise. The Lesivo Resolution, by its declaration that the lease of rolling stock is void, has undermined and critically compromised the eight-year investment by RDC and truncated the committed efforts of RDC to rehabilitate the railway system that previously was completely abandoned by Guatemala. Prior to the Lesivo Resolution, based solely on the investment and work of RDC, as the majority investor, and despite the obstacles placed in its way by the Government, forty-five percent (45%) of the railroad was reopened, and under operation for the last six years by FVG.

20. Since the Lesivo Resolution, FVG has also suffered the loss of customers for transport of goods, which is reflected in a decline in use of the railroad for freight transportation. After six (6) years of steady traffic increases, for the first time in FVG's operational history, a significant reduction of the yearly tonnage was experienced from 125,466 tons in year 2005 to only 92,566 tons in 2006. The environment in which FVG must now attempt to market to new customers is one of profound uncertainty. FVG has found local companies reluctant to enter into agreements, either as suppliers (unless for cash up front) or for future carriage by the railroad. FVG has met stiff resistance from customers who now refuse to

contract exclusively with FVG or for any term longer than meeting immediate needs. Many of FVG's hard-won regular customers have been protecting themselves by switching their business to truck transportation providers although it had previously been a preferred transportation mode given its cost, safety and security performance.

21. FVG's principal suppliers have significantly reduced credit terms to FVG and it has no current possibility of securing new credit lines with either financial institutions in country or new suppliers of essential goods and services. The local Guatemalan banks have recently taken actions confirming that they consider FVG an entity not credit worthy, not based on FVG's performance or credit history, but on the likelihood of its demise as a result of the Government's actions.

22. Prior to the Lesivo Resolution, FVG had been engaged in leasing of real estate expressly contemplated and allowed under the Usufruct. Customers with which FVG had been negotiating for real estate leases have now withdrawn from those negotiations, choosing to wait to see <u>when</u> (<u>not whether</u>) FVG will succumb to the pressure of the Government's indirect expropriation and official discriminatory treatment and be forced into bankruptcy or simply to shut down operations.

23. Likewise, new investors previously indicating interest have backed away and it is unlikely that FVG will be able to raise investment from any sources as a result of the Lesivo Resolution.

24. Another result of the Lesivo Resolution is that even common legal issues now result in Guatemalan judges issuing injunctions and other precautionary measures based on an expectation that FVG will declare bankruptcy, be dissolved or face a Government imposed shut down and transfer of its assets to Guatemalan private interests. For example, on September 19, 2006 FVG was sued by a "squatter" claiming to own property on a river bank that falls within the Usufruct right of way. FVG had to dredge close to the river bank to prevent the destruction of an FVG railroad bridge caused by recent flooding. The judge <u>ex parte</u>, issued all existing precautionary measures against FVG without providing so much as an opportunity for FVG to present its case. The ordered measures included, among others, embargoes of FVG bank accounts and placing the FVG manager under a "legal guarantee" known as an order of Arraigo (not allowed to travel outside of Guatemala). These effects of the Lesivo Resolution on the judicial process are in violation of the minimum standard of treatment obligations required under CAFTA Section A, Chapter 10, Article 10.5 which requires "fair and equitable treatment" in accordance with principles of due process, as embodied in the world's basic legal systems. In declaring the lease of the railroad stock null and void and against the public interest, the Government is attempting to do by "decree" what it could not achieve through legitimate judicial proceedings. Furthermore, denying RDC and FVG access to due process equal to international due process standards, in a blatant attempt to support private Guatemalan interests in usurping FVG's right of way through the Lesivo Resolution, is contrary to the spirit and intent of Article 10.3, National Treatment, requiring that Guatemala

afford treatment to international investors equal to that afforded to its national investors.

25. FVG has faced public interference from locals who have vandalized the tracks, stolen railroad materials for personal use and set up living quarters as squatters along the tracks, in some cases in collaboration with local authorities. This activity has substantially increased since the issuance of the Lesivo Resolution based on the public perception that FVG is no longer a viable entity and is unavoidably heading toward bankruptcy or dissolution in a face-off with the Republic of Guatemala. Once the Government had declared itself against FVG, even the basic services of the local police to protect FVG's property all but melted away. The current lack of protection by the Government of Guatemala created an insecure environment in violation of the Government's legal obligations under CAFTA Article 10.5 to provide "full protection and security," including the level of police protection required under customary international law.

26. FVG has also regularly faced private and public sector entities that have used the right of way without FVG permission and compensation. FVG's efforts to secure compensation from these entities have been met with delaying tactics in the easily-manipulated court system and been emboldened by the issuance of the Lesivo Resolution because, as stated above, the public perception is that FVG is no longer a viable entity and is unavoidably heading toward bankruptcy or dissolution in a face-off with the Republic of Guatemala.

27. The Government's consistent moves to block FVG's attempts to use the local court system to enforce its Usufruct rights, constitutes a denial of due process under Chapter 10. The Government has systematically opposed, and has been unwilling to submit itself to, the negotiated arbitration provisions of the Usufruct contracts, which constitute the legal and appropriate mechanism to resolve any contractual disputes. In response to FVG arbitration requests, FEGUA filed on September 27, 2005 with the Guatemalan Arbitration Court a motion to dismiss the case alleging lack of jurisdiction, despite unambiguous contract language to the contrary. On December 8, 2005 the Arbitration Court notified both parties that it did not accept FEGUA's motion for lack of jurisdiction. On January 3, 2006 FEGUA filed an unconstitutionality injunction/motion under article 103 of the Guatemalan Public Agreements Act, which provides for arbitrations in public contracts. To date, no hearing has taken place on the motion to find it unconstitutional for the Government to be contractually subject to arbitration. On January 5, 2006 FEGUA, in clear violation of the Usufruct contracts and the arbitration clause, filed a law suit (outside of the arbitration process) with the First Circuit of the Administrative Court seeking to annul the contracts and arbitration clause. The Administrative Court ruled that the arbitration clause was valid and the arbitration process should continue (the court had initially issued a preventive measure suspending the arbitrations). However, through stalling tactics, the Government has prevented the resolution in support of the arbitration clause from entering into effect. To date, the arbitration processes are still suspended because of these actions on part of the Government.

28. Since the Lesivo Resolution, FVG is understandably faced with mounting worker concerns that their jobs are, at best, in jeopardy and, more likely, soon to terminate. The work force, is now becoming demoralized and distracted as measured by such basic indicators as personal injury rates, a major concern to a company that until recently had operated for 1.5 years with no injuries. Many of FVG's workers are looking for employment elsewhere as they see the inevitable result of this forced indirect expropriation.

29. The effect of the Government's measures and actions undertaken as part of the Lesivo Resolution process has been financially and commercially devastating and has resulted in an indirect expropriation of RDC's investment.

30. RDC has been, and will continue to be, harmed as a result of the actions and omissions by the Government. In addition to expending considerable sums in fighting the Government's baseless interference, FVG has suffered significant revenue losses; incurred considerable legal costs; and lost any opportunity to operate and grow into what was once an extremely promising business with reasonably expected and quantifiable revenues and profits, all of which FVG relied on in committing to make a sizable investment to return the railroad to service for the people of Guatemala.

V. RELIEF SOUGHT AND DAMAGES CLAIMED

The Investor claims damages as follows:

1. Not less than $15,000,000.00 as compensation for its investment to date in FVG, plus the estimated discounted cash flow of its future revenue stream in the amount of fifty million dollars ($50,000,000.00) as stated in the business plan submitted by RDC and recognized by Guatemala as part of the RDC formal bid proposal, which together constitute the losses caused by, or arising out of, Guatemala's Lesivo Resolution of August 11, 2006 and other infringing measures by Guatemala which are inconsistent with its obligations contained within Section A of Chapter 10 of CAFTA;

2. Costs associated with these proceedings, including all professional fees, including attorneys fees and costs and all disbursements;

3. Fees and expenses incurred to oppose the promulgation of the infringing Lesivo Resolution and other infringing measures;

4. Pre-award and post-award interest at a rate to be fixed by the Tribunal;

5. Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and

6. Such further relief as the Tribunal may deem appropriate.

VI. NOTICES

All such notices, requests, consents and other communications shall be personally delivered against a written receipt, delivered by reputable courier (e.g. Federal Express, DHL, UPS), or sent by fax, charges prepaid, at or to the address or fax number of the party set forth below. Any written communication shall be deemed given when actually delivered.

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