

September 27, 2024

**By Federal Express and E-Mail**

His Excellency President Nayib Armando Bukele Ortez  
**President of the Republic of El Salvador**  
Casa Presidencial  
Alameda Doctor Manuel Enrique Araujo, 5500  
San Salvador, El Salvador  
[nayib@presidencia.gob.sv](mailto:nayib@presidencia.gob.sv)

Licda. Margarita Ortez Quintanar  
Directora de Administración de Tratados Comerciales  
**Dirección de Administración de Tratados Comerciales**  
Ministerio de Economía  
Alameda Juan Pablo II y Calle Guadalupe  
Edificio C1-C2, Plan Maestro Centro de Gobierno  
San Salvador, El Salvador  
[mortez@economia.gob.sv](mailto:mortez@economia.gob.sv)

Licda. Raquel Martínez Martínez  
Directora de Política Comercial  
**Dirección de Política Comercial**  
Ministerio de Economía  
Alameda Juan Pablo II y Calle Guadalupe  
Plan Maestro, Edificio C1 – C2  
San Salvador, El Salvador  
[rmartinez@economia.gob.sv](mailto:rmartinez@economia.gob.sv)

Lic. Rodolfo Antonio Delgado Montes  
Fiscal General de El Salvador  
**Fiscalía General de la República**  
Calle Conchagua. Edif. 2. Urb. Santa Elena  
Antiguo Cuscatlán, El Salvador  
[radelgado@fgr.gob.sv](mailto:radelgado@fgr.gob.sv)

Lic. Héctor Gustavo Villatoro Funes  
Ministro de Justicia y Seguridad  
**Ministerio de Justicia y Seguridad Pública**  
Alameda Juan Pablo II y 17 Av. Norte  
Complejo Plan Maestro Edificios B1, B2, B3  
San Salvador, El Salvador  
[webmaster@seguridad.gob.sv](mailto:webmaster@seguridad.gob.sv)

Ing. Manuel Ernesto Aguilar  
Superintendente  
Lic. Wilfredo Alexander Hernández Álvarez  
Gerente Legal  
**Superintendencia General de Electricidad y Telecomunicaciones (SIGET)**  
Sexta Décima Calle Poniente y 37 Av. Sur #2001, Col. Flor Blanca  
San Salvador, El Salvador  
[maguilar@siget.gob.sv](mailto:maguilar@siget.gob.sv)  
[whernandez@siget.gob.sv](mailto:whernandez@siget.gob.sv)

**Re: Notice of Intent to Submit Claims to International Arbitration Pursuant to Article 10.16 of the CAFTA-DR and Article 3.21 of the CACM Agreement on Investment and Trade in Services**

Dear Sir/Madam:

We have been duly instructed by Fibranet, Sociedad Anónima ("**Fibranet**" or "**Claimant**") and its subsidiary enterprise Cablefrecuencias, Sociedad Anónima de Capital Variable ("**Cablefrecuencias**") (together, the "**Fibranet Group**") in respect of an investment dispute with the Republic of El Salvador ("**El Salvador**") regarding Fibranet's investment in and through Cablefrecuencias in El Salvador's telecommunications sector.

In accordance with Article 10.16 of the Dominican Republic-Central America-United States Free Trade Agreement ("**CAFTA-DR**"), Article 3.21 of the Agreement on Investment and Trade in Services between the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (the "**CACM Treaty**") (together, the "**Instruments**"); Fibranet respectfully submits to El Salvador this written notice of its intention to submit claims to international arbitration.

This notice is delivered pursuant to Annex 10-G of the CAFTA-DR and Annex 3.39(2) of the CACM Treaty.

All communications with Claimant in connection with this matter should be addressed to their counsel, Eversheds Sutherland (US) LLP, at the following address:

Meriam Nazih Al-Rashid  
Levon Golendukhin  
Ana Rocio Monzón Woc  
Eversheds Sutherland (US) LLP  
The Grace Building  
1114 Avenue of the Americas, 40<sup>th</sup> Floor  
New York, NY 10036  
USA  
[meriamal-rashid@eversheds-sutherland.com](mailto:meriamal-rashid@eversheds-sutherland.com)  
[levongolendukhin@eversheds-sutherland.com](mailto:levongolendukhin@eversheds-sutherland.com)  
[rociomonzon@eversheds-sutherland.com](mailto:rociomonzon@eversheds-sutherland.com)

**The Claimant and Its Investment**

Fibranet, Sociedad Anónima is a company constituted under the laws of the Republic of Guatemala wholly owned and controlled by Guatemalan citizens. Fibranet's principal place of business is at 6ta Calle 7-35, Zone 9, Guatemala City, Guatemala 01010. Fibranet Group has experience and operations throughout Central America, including in the development of fiberoptic cable networks and wireless telecommunications.

Leveraging its experience in telecommunications, in 2010, Fibranet became an investor in El Salvador's telecommunications sector when it acquired 99.9% ownership of Cablefrecuencias, S.A. de C.V., a company constituted under the laws of the Republic of El Salvador, with registered address at 19 Calle Poniente No. 444, Edificio Schmitdt Sandoval Local 3, Centro de Gobierno, San Salvador, El Salvador. In the years since then, under Fibranet's management and control, Cablefrecuencias has developed its core assets, a series of subscription-based spectrum concessions in the 700 MHz band. To operationalize the spectrum, Fibranet Group imported and deployed broadcasting infrastructure in El Salvador. And as the Salvadoran regulatory framework signaled a forthcoming shift in the use of the Bands for mobile communications, Fibranet Group commenced a project for the development of a high-speed 4G LTE mobile network that could cover virtually all of El Salvador's territory, as the spectrum frequency range Fibranet Group developed is valued globally for its excellent signal range and building penetration, as well as its

interoperability with existing telecommunications infrastructure and could be upgraded to actual 5G NR specifications.

### Relevant Factual Background

On or about December 29, 2007, the Salvadoran telecommunications regulatory agency, Superintendencia General de Electricidad y Telecomunicaciones (“**SIGET**”), registered Cablefrecuencias’ acquisition of, *inter alia*, wireless bands 53 (704-710 MHz), 55 (716-722 MHz), and 59 (740-746 MHz) (the “**Bands**”). Under El Salvador’s Legislative Decree No. 142 of 6 November 1997 (the “**Telecommunications Law**”) in effect at all relevant times, ownership rights for broadcast telecommunications spectrum were titled in the form of one of two types of concessions, “*libre recepción*” (or free-to-air) and “*por suscripción*” (or subscription-based), regulation and renewal of each of which was subject to different provisions of the Telecommunications Law.

When Fibranet acquired near-total ownership of Cablefrecuencias in 2010, Cablefrecuencias owned each of the Bands through a subscription-based concession. In accordance with the Telecommunications Law, these concessions had a nominal 20-year duration, but they were subject to an automatic renewal regime.

Although, the Bands had still been licensed in El Salvador’s National Frequency Allocation Table (the “**CNAF**”) for television signal when Fibranet acquired Cablefrecuencias in 2010, Article 10 of the Telecommunications Law required SIGET to update the CNAF every four years to follow the International Telecommunication Union (“**ITU**”) Radio Regulations (RR), which is an international instrument binding on members of the ITU, including El Salvador. The ITU RR prescribes that the licensing of the Bands be expanded to allow mobile networks as well. As part of its development efforts, Fibranet redoubled its efforts for the development of what would be a high-speed 4G LTE mobile network covering up to 96% of El Salvador’s territory, engaging in strategic partnerships with potential technology suppliers such as German company Ubidyne GmbH (part of the Ericsson group of companies) and Huawei, and developing the telecommunications infrastructure to power such a network.

On or about 5 May 2016, after the Constitutional Chamber of the Supreme Court held the prior renewal regime for free-to-air concessions to be unconstitutional, the Legislative Assembly issued Legislative Decree No. 372 (“**Decree 372**”), which in Article 34 prescribed a new concession renewal mechanism for free-to-air spectrum concessions. Notably, Decree 372 does not refer at any point to subscription-based spectrum concessions. Moreover, SIGET – who drafted and submitted the bill for Decree 372 to the Legislative Assembly – certified to the Legislative Assembly that it did so after having had consultations with “all concessionaires involved”. Tellingly, every single free-to-air spectrum concessionaire was invited to consultations with SIGET, while subscription-based spectrum concessionaires Fibranet and Cablefrecuencias were not.

As the concessions for the Bands were coming due for automatic renewal in November 2017, in April 2017, Cablefrecuencias filed the paperwork for anticipated renewal of the concessions. Yet to Cablefrecuencias’ surprise, on 12 June 2017, SIGET sent to Cablefrecuencias, for its three Bands, the same demand it sent to free-to-air spectrum concessionaires, demanding that Cablefrecuencias should file concession renewal forms based on Decree 372 for the renewal of its concessions. This demand was misplaced and impossible for Cablefrecuencias to comply with; nothing in Decree 372 related to renewal of Cablefrecuencias’ subscription-based concessions. While the Constitutional Chamber had struck down the automatic renewal regime for free-to-air concessions, Cablefrecuencias’ *subscription-based* concessions for its Bands still remained subject to the aforementioned automatic renewal regime for subscription-based concessions. Cablefrecuencias amply satisfied all terms for renewal thereunder.

On 30 June 2017, Cablefrecuencias responded to SIGET’s demand, explaining that the renewal process contained in Decree 372 only applied to free-to-air concessions, and not to the subscription-based concessions applicable to the Bands. SIGET did not reply to Cablefrecuencias.

Under the Telecommunications Law's rule on administrative silence (Article 75), SIGET's failure to reply to this communication within 10 days was legally equivalent to assent.

Nevertheless, on 23 August 2018, more than a year after Cablefrecuencias' reply, SIGET issued Resolution No. T-0862-2018 (the "**August 2018 Resolution**"), in which SIGET unlawfully resolved that Art. 34 of Decree 372 was applicable to subscription-based concessions as well; and, for Cablefrecuencias' failure to follow the Decree 372 renewal process for free-to-air concessions, further purported to extinguish the Bands' concessions retroactively as of their automatic renewal date, *i.e.* 29 November 2017.

The position advanced by SIGET in its August 2018 Resolution and its earlier 30 June 2017 communication was wholly inconsistent with the Legislative Assembly's language, intent, and interpretive guidance for Article 34 of Decree 372, as confirmed by, *inter alia*, the express language of Article 34 of Decree 372 and its annotations to the Telecommunications Law as it stood amended and in effect at that time (and to this day), wherein it stated that the Constitutional Chamber's ruling of unconstitutionality related to renewals of free-to-air spectrum concessions. As a regulatory agency, SIGET does not (and did not) have the authority to alter a legal regime for concession renewal established by Legislative Decree in the Telecommunications Law.

### **Fibranet challenged SIGET's August 2018 Resolution before the Administrative Court**

Cablefrecuencias promptly challenged SIGET's August 2018 Resolution for review before SIGET's Board of Directors. When that review was rejected on 29 November 2018, Cablefrecuencias timely filed a legal challenge of the August 2018 Resolution before the Administrative Court.

On 18 July 2023, the Administrative Court rejected Cablefrecuencias' challenge, formalizing into law SIGET's legal position that the renewal process under Decree 372 was applicable to subscription-based spectrum concessions as well (the "**First-Instance Decision**").<sup>1</sup> In so doing, the Administrative Court expressly acknowledged that the Legislative Assembly's Decree 372 only referred to free-to-air spectrum concessions, but it nevertheless undertook a novel "comprehensive" re-interpretation of the Constitutional Chamber's decision from 2015 and the Legislative Assembly's Decree 372 to arrive at its conclusion that, in fact, the Constitutional Chamber and the Legislative Assembly must have intended to cover subscription-based spectrum concessions as well by their respective actions.

Because the First-Instance Decision clearly contravened the relevant legal texts and frameworks and, in effect, retroactively deprived Fibranet and Cablefrecuencias of any means of renewing their concessions for the Bands (as they were legally entitled to do), Cablefrecuencias promptly appealed the First-Instance Decision to the Chamber of Administrative Disputes of the Supreme Court (the "**Administrative Disputes Chamber**"). The Administrative Disputes Chamber is the highest court of administrative appeal in El Salvador. On 7 November 2023, the Administrative Disputes Chamber affirmed the First-Instance Decision.

### **Legal Basis for International Arbitration Claims**

#### **1. El Salvador Expropriated Claimant's Investment.**

The significance and effect of the First-Instance Decision in July 2023, and the Administrative Disputes Chamber's affirmation thereof in November 2023, is that Fibranet has been deprived of its investment in the subscription-based Bands concessions, notwithstanding Cablefrecuencias' unqualified right to their automatic renewal. These judicial takings were in violation of Salvadoran law, including being inconsistent with the very same legislative acts they purported to be applying.

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<sup>1</sup> A different, earlier decision from Administrative Court dated December 10, 2021, had been served on Cablefrecuencias in January 2022. However, no loss flows from that decision as it was promptly reversed by the Supreme Court's Administrative Disputes Chamber on 28 April 2022.

The Salvadoran judiciary thereby effected an expropriation in violation of Fibranet's and Cablefrecuencias' rights under Article 10.7 of CAFTA-DR and Article 3.11 of the CACM Treaty.

2. El Salvador Failed to Accord Claimant and its Investment Full Protection and Security.

By failing to adhere to the established statutory legal framework for Fibranet's investment in subscription-based concessions for the Bands, and by retroactively cancelling the automatic renewal of Fibranet's concessions in the Bands six years prior on erroneous legal grounds, El Salvador breached its obligations under the Full Protection and Security clauses in Article 10.5.1 of CAFTA-DR and Article 3.03 of the CACM Treaty.

3. El Salvador Failed to Accord Claimant and its Investment Fair and Equitable Treatment.

Finally, because the First-Instance Decision was so patently erroneous as to directly contravene the existing Salvadoran legal framework for subscription-based spectrum concessions and to misapply the express text and guidance in the Legislative Assembly's Decrees, and because Fibranet's resort to the highest court of administrative appeal failed to correct these errors, El Salvador's Judiciary enacted a denial of justice and breached the Fair and Equitable Treatment clauses in Article 10.5.1 of CAFTA-DR and Article 3.03 of the CACM Treaty.

**Relief Sought and Approximate Damages Suffered**

El Salvador's measures have destroyed the full value of Claimant's investment in El Salvador. Without prejudice to its rights to amend, supplement or restate the relief to be requested in the arbitration, if Fibranet Group is unable to resolve this dispute with the government of El Salvador within ninety (90) days of delivery of this Notice of Intent, Claimant (individually and/or on behalf of Cablefrecuencias) will submit this dispute to international arbitration under the ICSID Convention and the ICSID Rules of Procedures for Arbitration pursuant to Article 10.16.3 of CAFTA-DR and Article 3.22 of the CACM Treaty. Claimant will seek compensation for the losses and other injuries suffered as a result of El Salvador's unlawful measures. Claimant is entitled to compensation for the full value of that investment, in an amount to be fully quantified in arbitration. At this time, Claimant anticipates that the amount of such compensation will be at least \$130 million US dollars in compensatory damages, plus appropriate interest and legal fees.

**Invitation to Consultations and Negotiations for Resolution of Claims**

Fibranet Group delivers this Notice of Intent to safeguard and preserve its rights under the Instruments. However, notwithstanding the fact that Fibranet Group's attempts at discussions to date with Salvadoran authorities have not yielded a resolution to this dispute, Fibranet Group remains fully committed to reaching an amicable resolution of this dispute. Fibranet Group respectfully invites El Salvador to use the 90-day waiting period for the commencement of international arbitration triggered under the Instruments by this Notice of Intent to engage in good-faith consultations and negotiations with Fibranet Group in the spirit of Article 10.15 of the CAFTA-DR and Article 3.20 of the CACM Treaty.

Sincerely,



**Meriam Nazih Al-Rashid**

*Partner*

*Global Co-Chair of International Arbitration*

*Co-Head of Latin America Arbitration Practice Group*

EVERSHEDS SUTHERLAND LLP (US)