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1                               P R O C E E D I N G S

2                               PRESIDENT RIGO: We will start the day.

3                               Good morning, Mr. MacSwain. I don't  
4 know--how do you pronounce your name? MacSwain. So,  
5 I said it right.

6                               So, you have the Declaration as expert, and  
7 if you kindly read it to us.

8                               Press--excuse me, sir. Press the button.

9                               MR. DEBEVOISE: Mr. President, before we  
10 begin, we were sent two so-called "demonstrative  
11 exhibits" last night by the counsel for the Claimant.  
12 I think the intention was to use them in today's  
13 testimony. One of them, I think, relates to  
14 Mr. MacSwain. The other one I'm not quite sure which  
15 once is going to use it. I just wanted to say that  
16 with respect to one of the exhibits, which is called  
17 the MacSwain rebuttal, I guess we were able to check  
18 the data points, and they seem to be okay. They seem  
19 to be using data points that are in the record  
20 already.

21                               But with respect to another one, with respect  
22 to Iowa Inter-state Railway EBITDA, I think we have

09:01:14 1 some very strong objections to its use. We have no  
2 way of verifying this chart. You'll recall that the  
3 financials we received for RDC were almost completely  
4 blacked out, and we think that this one should not be  
5 used because the date is not in the record, and we  
6 don't know how we can possibly check this, so I wanted  
7 to raise that before we begin the testimony today.

8 PRESIDENT RIGO: Mr. Foster.

9 MR. FOSTER: I won't use the one they've  
10 objected to without first allowing them to present  
11 their objection and the panel ruling on it.

12 PRESIDENT RIGO: Thank you, Mr. Foster.

13 Then, Mr. MacSwain, we will proceed with your  
14 Declaration as an expert. MacSwain.

15 ROBERT MacSWAIN, CLAIMANT'S WITNESS, CALLED

16 THE WITNESS: I solemnly declare upon my  
17 honor and conscience that my statement will be in  
18 accordance with my sincere belief.

19 PRESIDENT RIGO: Thank you, sir.

20 Mr. Stern.

21 MR. STERN: Thank you, Mr. President.

22 DIRECT EXAMINATION

09:02:32 1 BY MR. STERN:

2 Q. Good morning, Mr. MacSwain.

3 A. Good morning.

4 Q. Do you have in front of you copies of the two  
5 Expert Reports you have submitted in this arbitration,  
6 dated May 18, 2009, and March 15, 2011?

7 A. I do.

8 Q. Okay. And do you ratify each of these  
9 reports and affirm their truthfulness before the  
10 Tribunal?

11 A. I do.

12 Q. Mr. MacSwain, what Expert analysis were you  
13 asked to perform in this case?

14 A. I was asked to opine and assess the revenue  
15 that could be generated on the railways' rights-of-way  
16 and commercial yards and leases with regard to real  
17 estate.

18 Q. And are you referring to the revenues that  
19 would have been generated by Ferrovías?

20 A. Yes.

21 Q. Could you please describe to the Tribunal  
22 some of your background and experience in valuing and

09:03:21 1 leasing railroad real estate.

2 A. Certainly.

3 I have been in real estate since 1967, but  
4 for the last 25 years I basically have been involved  
5 with railroad real estate. I was former Senior Vice  
6 President of Guildford Transportation, who owned three  
7 railroads, the Delaware and Hudson, the Boston and  
8 Maine, and the Maine Central Railroad. I was in  
9 charge of their real estate operations.

10 I then formed my own company as a consultant  
11 for railroads and railroad real estate, and some of my  
12 clients were CSX, Union Pacific, Illinois Central,  
13 Florida East Coast Railway, New York Transit  
14 Authority, and others.

15 And then in my remainder of my career I spent  
16 seven to eight areas as Vice Chairman of Florida East  
17 Coast Industries who owned Florida East Coast Railway,  
18 and I was also President of a company called Flagler  
19 Development Company, which was owned by Florida East  
20 Coast Industries and the railway. And as President,  
21 we developed approximately six and a half million  
22 square feet of office, showroom, and industrial real

09:04:48 1 estate in the State of Florida, and the great bulk of  
2 that was actually developed on railway-owned real  
3 estate.

4 Q. Thank you.

5 Now, to help illustrate your testimony  
6 analysis, I will put up on the screen the  
7 demonstrative exhibit.

8 Can you explain what this chart shows.

9 A. Yes, sir.

10 There are three components to it. One  
11 component is the existing agreements that the railway,  
12 the railroad had, and also the COBIGUA lease and some  
13 short-term rentals; that is in the, I think--I'm  
14 partially color blind, but I think it's in the green.  
15 Then the red is the right-of-way leases that existed  
16 and then was projected as for the remaining 42 years  
17 remaining on the Agreement.

18 And the other was the yards and railroad real  
19 estate that was not necessarily right-of-way and also  
20 projected over the remaining 42 years of the Agreement  
21 with regard to revenue.

22 Q. And the projections that are shown here on

09:06:28 1 this chart here, do these come from--which Report does  
2 that come from in your submissions?

3 A. This comes from the second rebuttal, Second  
4 Report.

5 Q. Now, regarding the first component of your  
6 analysis and projection, the revenues FVG would have  
7 earned from its pre-existing right-of-way and property  
8 leases and short-term rentals, does the Respondent  
9 damages Expert Dr. Spiller adopt your projections?

10 A. He does. I think we are in agreement with  
11 regard to this one.

12 Q. Okay. Now, regarding the second line, the  
13 red line on the demonstrative, the revenues you  
14 project FVG would have earned from additional  
15 right-of-way leases, is it your opinion that your  
16 projections are reasonably certain?

17 A. Yes, sir.

18 Q. Okay. Please explain to the Tribunal the  
19 basis for your opinion.

20 A. Well, there's probably four components to  
21 that. One would be 25 years or so of executing these  
22 kind of agreements with the railroad and railroads,

09:07:33 1 whether they be transmission, fiber-optic, gas lines,  
2 et cetera. I have done dozens of these during my  
3 career.

4           Secondly, there was existing agreements that  
5 had been in place with the Ferrovias, the railway, and  
6 they had been negotiated by the railroad.

7           Thirdly, there was a contract that was about  
8 to be executed with Gesur, and that was about to be  
9 done at \$3,200 a mile and--I think 32 kilometers, I'm  
10 sorry. And that agreement was about to be done, but  
11 there was a lesivo Decree that caused the transaction  
12 not to be completed.

13           And then I think the most accurate of all is  
14 the--looking at the right-of-way, that we have  
15 industrial squatters on the right-of-way that have  
16 virtually filled the right-of-way, and I think that I  
17 asked Mr. Senn to, after the completion of my Report,  
18 to virtually look at the entire right-of-way, both  
19 Main Line and spur lines, to see if there were any  
20 squatters on it that was longitudinally, which would  
21 be for the most part in this instance electrical  
22 easements.

09:09:19 1 Q. Okay. Let's go to Annex one of your Rebuttal  
2 Report. Can you describe what this map illustrates.

3 A. Yes. Those are the Main Line and the spur  
4 lines through the entire railway rights-of-way, and it  
5 shows that virtually--virtually the entire  
6 rights-of-way are now presently occupied by industrial  
7 squatters and power lines.

8 Q. Now, does Respondent's Expert Dr. Spiller  
9 disagree with your projections of the additional  
10 easements that Ferrovías would have obtained in the  
11 absence of a Lesivo Resolution?

12 A. Yes, he does.

13 Q. What is your understanding of Dr. Spiller's  
14 Opinion in that regard?

15 A. Well, it's difficult to understand as you  
16 look at these--at this map and the illustration.  
17 They're all over the right-of-way, virtually the  
18 entire right-of-way; and, therefore, it would be hard  
19 to believe that those would not have been legalized  
20 and then monetized by the railway if the Decree had  
21 not occurred.

22 Q. Okay. Now, let's talk briefly about your

09:10:41 1 projections of the revenues from the additional  
2 station and station yard leases Ferrovias would have  
3 obtained in the absence of a Lesivo Resolution.

4           Is it your opinion that your projections are  
5 reasonably certain?

6       A.    Yes, sir.

7       Q.    And can you please explain the basis for your  
8 opinion.

9       A.    Well, I think there's three components to  
10 that question. One would be the location of these  
11 properties. As you look at the map, you will notice  
12 that the rights-of-way run right through the central  
13 areas of the communities of Guatemala, and this is  
14 where people live and work, and you would be  
15 hard-pressed to find more centralized locations than  
16 those that this railway went through.

17           Two, we had some action, I guess, with some  
18 companies with regard to certain locations, and one  
19 would be Gerona. Gerona was an area that we could  
20 have probably immediately started to develop a parking  
21 lot. That did not occur because of the lesivo Act.

22           We had activity with UniSuper, I think it's

09:12:24 1 called, which is a supermarket chain that was  
2 interested in doing a development, a venture  
3 development with the railway and Zacapa and, I think,  
4 three or four other locations.

5           And when you look at the analysis that I did,  
6 I believe they were highly conservative. I used  
7 delayed start dates, high vacancy rates, virtually no  
8 inflationary movement in most of the properties, no  
9 increase in rents, excuse me; a 10 percent return on  
10 real estate, which is a very normal return for any  
11 land lease investment.

12           So, I feel pretty comfortable that--I don't  
13 understand how Dr. Spiller can, in fact, say that for  
14 the next 42 years that there would be no value to the  
15 real estate that is so centrally located in these  
16 communities.

17           Q. Thank you, Mr. MacSwain. I have no further  
18 questions.

19           PRESIDENT RIGO: Mr. Debevoise.

20                           CROSS-EXAMINATION

21           BY MR. DEBEVOISE:

22           Q. Good morning, Mr. MacSwain.

09:14:04 1 A. Good morning, sir.

2 Q. My name is Whitney Debevoise, and I represent  
3 Guatemala in this proceeding, and I will be asking you  
4 some questions about your reports.

5 A. Okay.

6 Q. You talked a little bit about your  
7 background. I guess you spent nearly 20 years or half  
8 of your employed career with the Hartford Insurance  
9 Group doing domestic U.S. real estate development on  
10 large downtown office buildings, golf resorts,  
11 suburban office parks, and planned communities; is  
12 that right?

13 A. That is correct, sir.

14 Q. That doesn't sound very much like Guatemala,  
15 does it?

16 A. Well, I think if I could answer, I think real  
17 estate development is real estate development.

18 Q. Okay. And for five or six years you were  
19 with Guildford Transportation Industries which runs  
20 railroads in New England in the United States;  
21 correct?

22 A. Yes, sir.

09:14:51 1 Q. And while you were there you negotiated  
2 several fiber-optic right-of-law leasing transactions  
3 with big companies like AT&T, Sprint, and MCI; is that  
4 right?

5 A. Yes, sir.

6 Q. Okay. Have you seen any reference in the  
7 record in this case to big telecommunication companies  
8 like AT&T in Guatemala?

9 A. No, I have not, but I have seen electrical  
10 transmissions, which is the same basic thing. It's a  
11 longitudinal transaction on a right-of-way.

12 Q. Yeah, but we're talking about  
13 telecommunications there, was my question.

14 A. Okay.

15 Q. Then you founded a consulting company where  
16 you spent a decade, and you worked for clients in the  
17 railroad and telecommunications industries, this time  
18 with some clients in the Chicago area and Canada and  
19 Florida; is that right?

20 A. That is correct, sir.

21 Q. Oh, and again I see you were involved with  
22 AT&T and NYMEX, the big Bell companies--

09:15:39 1 A. That is correct, sir.

2 SECRETARY SEQUEIRA: Mr. Debevoise, for  
3 purposes of the interpretation, can you slow down just  
4 a little bit.

5 MR. DEBEVOISE: Okay.

6 BY MR. DEBEVOISE:

7 Q. Then, in 1999, about the time that the  
8 Guatemalan railroad was restarting service, you served  
9 as Vice Chairman of Florida East Coast Industries, the  
10 holding company for the Florida East Coast railroad;  
11 right?

12 A. Yes, and the holding company for--

13 Q. And when you were Vice Chairman--

14 PRESIDENT RIGO: Excuse me, please wait to  
15 question the Expert that he has finished, and vice  
16 versa, the Expert to reply and the question had been  
17 asked.

18 BY MR. DEBEVOISE:

19 Q. And when you were Vice Chairman,  
20 approximately how many tons of freight a year did  
21 Florida East Coast Railways ship?

22 A. I frankly had nothing to do with the railway

09:16:27 1 operations, so I don't know.

2 Q. But it was probably in the millions; correct?

3 A. I can't answer that. I don't know.

4 Q. Okay. And while you worked in Florida--and I  
5 assume you worked--you lived in Florida while you  
6 worked there; is that right?

7 A. That is correct.

8 Q. Okay. And you served as President of Grand  
9 Central Corporation or is it Grand? I'm not sure.  
10 The Report said Grand?

11 A. Believe it or not, it's without the D.

12 Q. Without the D, okay, thank you.

13 And then you retired and performed consulting  
14 assignments such as the one you're doing for RDC;  
15 right?

16 A. Yes, sir.

17 Q. Okay. Mr. MacSwain, after all this time in  
18 the railroad business, you kind of like railroads,  
19 don't you?

20 A. I like the real estate with railroads.

21 Q. Okay. Would you say, though, you're bit of  
22 an enthusiast about railroads?

09:17:21 1 A. No, I'm an enthusiast about real estate.

2 Q. Okay. And have you ever consulted for RDC  
3 before?

4 A. No, sir.

5 Q. Now, you were asked to assess and opine on  
6 the reasonably expected returns on the exclusive  
7 leasing and development rights for the Ferrovías  
8 right-of-way, station and station yard real estate  
9 assets that were granted to Ferrovías as of the time  
10 immediately prior to the issuance of the Lesivo  
11 Resolution in August 2006; is that correct?

12 A. That is correct.

13 Q. So, your job was to calculate the reasonably  
14 expected revenue stream of real estate business  
15 associated with assets granted in this Usufruct;  
16 correct?

17 A. Correct.

18 Q. That was a grant under Contract 402 as to  
19 which Guatemala has taken no action; correct? That's  
20 not at issue in this case?

21 A. I have no idea what 402 is, so I don't know.

22 Q. I think in your First Report you said that

09:18:23 1 you had reviewed Contract 402?

2 A. Where did I say that?

3 Q. Let me direct you to that.

4 If you look, sir, on Page 2 of your Report in  
5 Paragraph 3.1.

6 A. You are correct. I stand corrected.

7 Q. Okay. Thank you.

8 And you conducted your analysis as of the  
9 time of the Lesivo Declaration in August 2006; is that  
10 right?

11 A. I think that's when I was there, yes.

12 Q. Well, I was asking you about the analysis,  
13 not when you were there.

14 A. Oh.

15 Q. In other words, you were trying to establish  
16 these future flows as of August 2006; right, the time  
17 of the Lesivo Declaration?

18 A. I have to say that I'm not exactly sure about  
19 August 2006.

20 Q. I see. All right.

21 So, another way of putting this is that you  
22 were asked to ascertain what results a potential

09:19:44 1 willing buyer of this real estate Usufruct would have  
2 projected; right? That was basically your task as set  
3 forth in 1.1 of your statement.

4 MR. STERN: Objection. I think that  
5 mischaracterizes his Report.

6 MR. DEBEVOISE: Could the witness please read  
7 1.1 of his First Statement.

8 THE WITNESS: 1.1 says, "My name is Robert F.  
9 MacSwain. I have been asked by Claimant Railroad  
10 Development (RDC) to assess and opine on what were the  
11 reasonably expected returns on the exclusive leasing  
12 and development rights for the right-of-way station  
13 and station yard real estate assets that were granted  
14 to RDC's Investment Enterprise Ferrovías Guatemala  
15 (FVG) by the Government of Guatemala pursuant to a  
16 50-year Onerous Usufruct (the Usufruct) as at the time  
17 immediately prior to the issuance of the Government's  
18 Lesivo Resolution in August 2006."

19 BY MR. DEBEVOISE:

20 Q. Thank you. And a few minutes ago you said  
21 you weren't quite sure of whether you actually did it  
22 as of August 2006; is that right?

09:21:05 1 PRESIDENT RIGO: Before you reply, Professor  
2 Crawford has a question.

3 ARBITRATOR CRAWFORD: It's not a question.  
4 We are dealing with experts now. I don't think we  
5 need the same sort of intervention from counsel as  
6 we've had with fact witnesses. Mr. MacSwain is quite  
7 capable of looking after himself.

8 MR. DEBEVOISE: Thank you, Professor  
9 Crawford.

10 BY MR. DEBEVOISE:

11 Q. Mr. MacSwain, when were you retained in this  
12 matter?

13 A. I--I cannot give you an exact date. I don't  
14 know the answer to that.

15 Q. Can you give me an approximate time when you  
16 were approached and asked to take on this assignment?

17 A. I would say that it had to be sometime in  
18 2006.

19 Q. You have--

20 A. Prior to my visit to Guatemala, so it had to  
21 be in 2006.

22 Q. Okay, thank you.

09:22:06 1                   And after you were retained, in order to  
2       conduct a willing-buyer analysis, you did some  
3       investigations. You described those in Section 3 of  
4       your first report. And I think you state there that  
5       you reviewed the Business Plan that Ferrovías prepared  
6       and submitted in support of its winning bid on the  
7       Usufruct; right?

8           A.     Let me just read it for a second.

9           Yes.

10          Q.     Okay. And the Business Plan was presented in  
11       1997, when Ferrovías made the bid; correct?

12          A.     I don't know the--whether it was 1997 or not.

13          Q.     Okay. Well, did you find the Business Plan  
14       useful on the subject of real estate?

15          A.     Only that it gave them the right to do it.

16          Q.     Did it contain any projections about what  
17       type of income they might receive?

18          A.     Not that I saw.

19          Q.     Okay, thank you.

20                   And as we mentioned a minute ago, you also  
21       reviewed the Usufruct Contract itself, and I'm sure  
22       that when you did, you noticed the provisions in

09:23:26 1 Clause 13--C-22--that break the task of rehabilitating  
2 the railway system into five phases. I think they're  
3 going to put this up for you, sir.

4 MR. DEBEVOISE: This is C-22, for the record.

5 BY MR. DEBEVOISE:

6 Q. And could we have Clause 13, please. And  
7 could we focus, please--yes, all right.

8 And I think when you reviewed this Clause 13,  
9 one of the things you probably noticed was that  
10 there's a rough timetable associated with each one of  
11 the phases for the rehabilitation; is that right? You  
12 see where it links Phase II is supposed to begin three  
13 years after the effectiveness of Deed 402?

14 A. I see what it says.

15 Q. All right. That's what it says; right, okay?

16 A. Seemingly so, yes.

17 Q. Right. And the Agreement became effective on  
18 May 23, 1998, so three years later would have been May  
19 of 2001; right?

20 A. Yes.

21 Q. And the time associated with Phase III is  
22 five years after effectiveness, so that would have

09:25:11 1 been 2003; right?

2 A. It's seeming--it seems what is the math is.

3 Q. Right. And the time for Phase IV is 10 years  
4 after effectiveness of 2008?

5 A. Okay.

6 Q. And the time for Phase V is 15 years after,  
7 so that would have been 2013.

8 A. Okay.

9 Q. Okay. And according to--well, let me take  
10 that back.

11 From the Contract, therefore, it was  
12 clear--well, excuse me. Let's move forward to  
13 Clause 16 of the Contract, 16(2).

14 You see that underlined language in 16(2) in  
15 the bottom half here? Could you just read that  
16 underlined language, please.

17 A. "The Usufruct's (sic) failure to begin  
18 railway restoration and failure to render cargo  
19 transportation services under the terms of Section 2,  
20 3, 4, 5, and 6 of the 13th Clause of this Contract.  
21 In the event that the Usufructary fails to restore the  
22 railway and fails to render cargo transportation"--do

09:26:56 1 I keep going?

2 Q. No, I think you've caught the essence of it.

3 A. What exactly--oh, I'm sorry.

4 Q. Okay, I'm sorry. Excuse me. Could we just  
5 scroll down, please, to Clause 4.

6 I'm sorry, it's Clause 19--

7 (Pause.)

8 Q. Okay. I'm sorry. So, keep going, then,  
9 please.

10 A. Where am I now?

11 Q. Okay. Start there now with, "of the 13th  
12 Clause" where you were, I think.

13 A. Could I make a comment before I read on,  
14 please?

15 Q. Certainly.

16 A. I'm not quite sure exactly what this has to  
17 do with my analysis of real estate. This seems to be  
18 a legal matter that would be handled by the lawyers  
19 and not by a real estate person. I look at--being  
20 asked to value the real estate, and the legal people  
21 have to figure out whether or not the real estate  
22 belongs to them or not. That is not under my

09:28:39 1 assignment to do, and that's why I'm having a problem  
2 doing this.

3 Q. Okay. I appreciate that, Mr. MacSwain, but  
4 the language here says that the real property, where  
5 the railway has yet to be restored, would have to be  
6 returned to Guatemala or to FEGUA.

7 MR. STERN: Objection. Asking for a legal  
8 interpretation and conclusion. As the witness is not  
9 a lawyer, as he's already stated, he's not to testify  
10 on interpretation of legal documents.

11 MR. DEBEVOISE: Right. And I'm not asking  
12 him to interpret it. I'm just asking him what it  
13 says, that the Contract clearly says that under  
14 certain circumstances, the real estate might have to  
15 be returned, and I'm not saying that that condition  
16 exists today. I'm just saying that that's what the  
17 Contract says.

18 MR. STERN: I think the Contract speaks for  
19 itself.

20 MR. DEBEVOISE: Okay. We will admit that.  
21 The Contract speaks for itself.

22 (Tribunal conferring.)

09:29:42 1 BY MR. DEBEVOISE:

2 Q. And you assumed in your analysis that there  
3 would be real estate revenues from all phases of this  
4 Usufruct--right?--all 800 kilometers.

5 PRESIDENT RIGO: Before the Expert replies,  
6 on the objection that had been raised, I think the  
7 Expert is not pronouncing himself on the clause of the  
8 Contract, but should answer assuming that what counsel  
9 is explaining is correct.

10 THE WITNESS: Yes, I will agree. What I was  
11 trying to say, obviously poorly, was that I was going  
12 to analyze all of the real estate, and the legal  
13 people could figure out whether the real estate should  
14 or should not have been analyzed and valued and was  
15 able to be leased. For example, if there is no rail  
16 on a right-of-way at all, and there is no trains  
17 running on a right-of-way, it makes it even easier for  
18 electrical transmission and other people to use that  
19 right-of-way, and I was valuing it as something that  
20 they would use.

21 Q. Thank you. Thank you, Mr. MacSwain.

22 And according to Mr. Thompson's First Report,

09:31:07 1 Ferrovías would only develop the Atlantic corridor.

2 If we look at Paragraph 57 of Mr. Thompson's Report--

3 A. I will, but I did not read Mr. Thompson's  
4 Report.

5 Q. Okay. So, Mr. Thompson said that in his  
6 Report, yet you assumed in doing your work that you  
7 were doing a valuation on the entire Usufruct, so you  
8 were assuming that the full amount would always be  
9 available for 42 years; correct?

10 A. That--that was the basis of my valuation,  
11 yes.

12 Q. Okay. And yet we saw that in the Contract,  
13 if Ferrovías did not build out the system, they might  
14 have to surrender portions, and you said you would  
15 depend on a lawyer to tell you that.

16 A. I repeat that that was a decision that  
17 lawyers would have to handle, but I was going to  
18 value it as if that was an entire right-of-way.

19 Q. Okay. And did you take any look at the  
20 Financial Statements for Ferrovías to see whether they  
21 had any leasing income during the time that they were  
22 operating in Guatemala?

09:32:39 1 A. Yes.

2 Q. All right. And could we please put up  
3 C-27(H), FVG's Annual Report for 2005, specifically  
4 Note 19 to the Financial Statements, which is on  
5 Page 18 of the English version.

6 A. Page...

7 Q. Page 18, please.

8 There's English and Spanish in there, but if  
9 you get back to the very back, you will find the  
10 financials and the notes to the financials. Note 19.

11 A. Page 18, Note 19.

12 Q. Right. And--

13 A. I think I'm on the wrong one here.

14 Q. Okay. There we go.

15 Did you find the right one? It's Exhibit  
16 Number C-27(h).

17 (Pause.)

18 Q. Have you located it, sir?

19 A. No, but I'm going to look on the sheet here.  
20 Exactly which portion are you--

21 Q. Okay. Do you see there about a third of the  
22 way down where it says, "The sanctions for the

09:34:22 1 Usufructuary specified in the Contract are the  
2 following"?

3 A. Yes.

4 Q. Okay. And could you read item A under that  
5 entry.

6 A. "For not rehabilitating the railway line and  
7 not offering the provision of service for the  
8 transportation of cargo must return to FEGUA the  
9 properties which is located that line that was not  
10 rehabilitated."

11 Q. Okay. And could you read Item C, please.

12 A. "For noncompliance with the technical and  
13 economic proposal, the Contract will be terminated,  
14 indemnity paid for to the State for lack of railway  
15 service."

16 And again I repeat, this was not my  
17 assignment. My assignment was to value the real  
18 estate.

19 Q. Right. But you did say you looked at the  
20 financials, and notwithstanding this warning in the  
21 financials, you didn't consult anyone to get any view  
22 on whether this was a reasonable probability or not,

09:35:16 1 did you?

2 A. I was asked to value the real estate, sir.

3 Q. Okay, sir.

4 A. I valued the real estate.

5 Q. Okay. So, let's talk a little bit about what  
6 you did do.

7 You stated in your First Report that from  
8 August 12 to August 19 you personally went to  
9 Guatemala as part of your diligence; right?

10 A. That is correct.

11 Q. Okay. And do you recall how far in advance  
12 of that trip you were retained for this assignment?

13 A. I don't recall exactly how far in advance I  
14 was.

15 Q. Did you do some work on the assignment before  
16 you went to Guatemala?

17 A. Oh, I looked at some stuff that had  
18 some--certainly had many phone conversations.

19 Q. I see. But you based a large part of your  
20 Report on that trip that you made in August of 2007;  
21 is that right?

22 A. That is correct.

09:36:13 1 Q. Okay. Was this the first time you ever went  
2 to Guatemala?

3 A. Yes.

4 Q. Have you been back since?

5 A. No.

6 Q. Okay. You said that while you were there,  
7 you personally toured and inspected the entire FVG  
8 right-of-way in Guatemala; correct?

9 A. Yes.

10 Q. So, you covered 800 kilometers in one week?

11 A. Actually, that is a misstatement on my part.  
12 I did not get over to the Mexico side.

13 Q. What do you mean by "the Mexico side"? You  
14 didn't look at the southern line at all?

15 A. I looked at part of the southern line, but I  
16 did not look--went all the way over to--I can't even  
17 remember what the connection is in Mexico.

18 Q. I see, okay. So, you didn't look at the  
19 Tecún Umán station?

20 A. That's the one.

21 Q. The Tecún Umán station?

22 A. That is correct.

09:37:02 1 Q. And while on the tour you said that you had  
2 discussions with various local developers, potential  
3 Ferrovías investors, and customers from 2006, as well  
4 as local financial institutions and real estate  
5 professionals; right?

6 A. That's correct.

7 Q. Okay. In total, about how many people did  
8 you speak to?

9 A. I couldn't tell you in total at all, but  
10 there certainly was telephone conversations with  
11 bankers, and I think those are listed on my annex to  
12 my Report, and also conversations I had with others,  
13 which is also listed in my Expert Report.

14 Q. I see. So, the people you spoke with are  
15 listed in your Report?

16 A. The people that I spoke with are listed in  
17 the annex of my Report, I think.

18 Q. Yes, okay. I think that's Number 2 to your  
19 Report; correct?

20 A. Yes.

21 Q. Okay. Exhibit 2. All right.

22 Are you familiar with the community of real

09:38:01 1 estate professionals in Guatemala?

2 A. No.

3 Q. And the people you spoke to, were they people  
4 that Ferrovías suggested you talk to?

5 A. They would be the only source, other than I  
6 did--the answer to that would yes.

7 Q. Okay. Thank you.

8 A. They were the people that Ferrovías had dealt  
9 with.

10 Q. Um-hmm, okay. In Exhibit 2 to your First  
11 Report, you referred to conversations with  
12 Mr. Alejandro Arriola, Juan Antonio Azurdia, Drego  
13 Castillo, and Gustavo Arriola, and Juan Pablo  
14 Olyslager.

15 A. Conversation, yes.

16 Q. Do you remember the names of any other people  
17 with whom you met while in Guatemala, other than  
18 Ferrovías personnel?

19 A. No, I was pretty busy while I was running  
20 around, so I don't remember the names, no.

21 Q. Okay. But they weren't important enough to  
22 put in your Report?

09:39:08 1 A. I don't understand what that question means.

2 What do you mean?

3 Q. The names of the other people, the sources  
4 that you spoke to were not considered important enough  
5 by you to list them in the Report. You could have put  
6 an annex in and said I spoke to X, Y, Z, et cetera,  
7 but you listed five people.

8 A. I listed five people who are developers, and  
9 one of them was a real estate broker and represented  
10 Korean investors, bankers.

11 What I don't understand where you're going, I  
12 talked to people who were in the business.

13 Q. Okay. And who was Gustavo Arriola?

14 A. Let me find it.

15 He was a person that was interested in the  
16 Genora station parking lot.

17 Q. Okay. And, Mr. MacSwain, you expressed some  
18 opinions about a long list of properties, 20 some-odd  
19 properties. Did you meet anyone who had specific  
20 knowledge about the real estate market in Chiquimula?

21 A. I think that Mr. Azurdia did.

22 Q. I see. What about Impala?

09:40:32 1 A. I can't remember whether he did or he didn't.

2 Q. Um-hmm. What about Amatitlan?

3 A. You mean all the properties that I gave very

4 low value to? Is that what you're referencing?

5 Because they're not prominent locations?

6 I don't understand where you're going, so I'm

7 more than happy to answer your question.

8 Q. I asked you a simple question, and I'm trying

9 to find out how you learned about these different

10 properties that you listed and valued.

11 A. Because you would talk to people like

12 Mr. Azurdia and actually talk to other real estate

13 people that I have mentioned in here.

14 Q. Um-hmm, okay. If we look at your First

15 Statement, and we looked, for example, at item E on

16 Page 12 of your First Statement, you're talking about

17 Zacapa?

18 A. Yes.

19 Q. Okay. And at the end of the third sentence,

20 you said that this would be perfect for intermodal

21 traffic.

22 A. Yes.

09:41:46 1 Q. Okay. Would your opinion about that change  
2 if I told you that in the course of these proceedings,  
3 we had a witness who moved containers for Ferrovías  
4 from a point right next to their station in Guatemala  
5 City, and he said that the volume of containers he was  
6 handling was maybe 60 or 80 containers a week?

7 A. Would my opinion change? No.

8 Q. Would your opinion about the value of this  
9 real estate change?

10 A. I have no idea who the person was. I  
11 can't--I never heard what he had to say, and you're  
12 now telling me what he had to say. I would look at a  
13 place that as far as I was concerned was midway  
14 between the port and Guatemala City, and it seemed to  
15 me--and a new highway was actually being constructed,  
16 and it seemed to me that it made perfect sense for an  
17 intermodal facility.

18 Q. Okay. And if I told you that that same  
19 person testified in this proceeding that he was  
20 handling 80 percent of all of Ferrovías's container  
21 traffic arriving in Guatemala City, would your opinion  
22 about the possibilities in Zacapa change?

09:42:59 1 A. Probably not.

2 Q. Do you know whether the highway was, in fact,  
3 constructed?

4 A. I know that I was in a traffic nightmare  
5 getting back and fourth there in the middle of the  
6 evening trying to get back, and it was under  
7 construction at the time. Whether or not it is  
8 finished, I don't know.

9 Q. Okay. You said you had subsequent  
10 conversations with Mr. Azurdia. Who introduced you to  
11 him?

12 A. Let me think for a second.

13 I think he was known by Jorge Senn, but the  
14 person who introduced me would be Pablo Alonzo because  
15 at the time I think Jorge was in some kind of Court  
16 case, and I therefore met him with Pablo.

17 Q. That's the same Mr. Alonzo seated at counsel  
18 table over to your left?

19 A. That is he.

20 Q. Okay. Now, you said in Exhibit 2 to your  
21 First Report that Mr. Azurdia was very knowledgeable  
22 about properties such as Gerona, Escuintla, and Zona

09:44:23 1 12, and El Rancho; is that correct?

2 A. Yes, we spoke in detail about those.

3 Q. Okay. And you contrast that, however, with  
4 his knowledge of other properties which you described  
5 in Exhibit 2 as, "reasonably knowledgeable." That  
6 doesn't sound very convincing, Mr. MacSwain, does it?

7 A. That I used the word "reasonably"?

8 Q. Well, that you made a contrast between  
9 Mr. Azurdia--Mr. Azurdia is your source here; right?

10 A. He's one of them.

11 Q. Okay.

12 A. If I may answer, I know something about real  
13 estate, I guess, and I know a lot about Boston real  
14 estate, where I was born and raised, but I might not  
15 know much about Chicago real estate as I do Boston,  
16 but that doesn't mean I don't know Chicago real  
17 estate.

18 Q. Okay. Now, Mr. Azurdia talked to you about  
19 the properties about which he was very knowledgeable,  
20 the four properties that were being considered as  
21 investment properties, but what did you quote him as  
22 saying about them in Exhibit 2 of your Report? Can we

09:45:35 1 take a quick look at that.

2           Do you see, sir, in the middle of the third  
3 paragraph where he says, "It would not be worth the  
4 time and money to perform the significant due  
5 diligence that would be required"?

6           A.    I see that.

7           Q.    Okay.  So, he's talking to you about these  
8 properties.  He hasn't done the significant due  
9 diligence on these properties.  What significant due  
10 diligence did you do on these properties?

11          A.    I don't think he's saying that at all.  If  
12 you look and say whether or not the Korean investors  
13 would put money into these properties, they would  
14 probably be calling for a lot of due diligence as to  
15 people to put money into property.  That could not  
16 necessarily mean that you don't know the value of the  
17 property.

18          Q.    Okay.  And in fact, if we read this  
19 carefully, what he's really saying is that because of  
20 the lesivo, it's not worth putting the time and effort  
21 in, isn't he?

22          A.    That is correct.

09:46:46 1 Q. Right, okay. And your task was to determine  
2 the value of these properties absent the lesivo;  
3 correct?

4 A. Correct.

5 Q. Okay. So--

6 A. I'm not following. I'm sorry.

7 Q. I think the Tribunal can understand.

8 A. Well, I think I should also, in order to  
9 answer the question.

10 Q. I didn't ask you the question about that. I  
11 just made an observation about it.

12 A. Go ahead.

13 Q. All right. You discussed infrastructure  
14 development and/or construction financing with  
15 Mr. Azurdia, according to Exhibit 2; correct?

16 A. Correct.

17 Q. And he said that the Lesivo Declaration,  
18 "virtually negated," any possibility to obtain  
19 financing; right?

20 A. Correct.

21 Q. But did you discuss with him whether and on  
22 what terms financing would have been available absent

09:47:45 1 the Lesivo Declaration?

2 A. No, and if you look at the Rebuttal Report,  
3 all of the financing that would have been necessary  
4 for land improvements had been removed and, therefore,  
5 there was not a cause for the need for financing. It  
6 was a straight due leasing proposition.

7 Q. I see. And so none of these properties would  
8 have required any kind of development, any kind of  
9 investment by the person who was going to rent the  
10 property?

11 A. That had nothing to do with the financing by  
12 the railway.

13 Q. Well, I don't think we're talking about  
14 financing for the railway. We're talking about  
15 financing for properties.

16 A. Well, what we were talking about is FVG's  
17 ability to obtain financing for infrastructure  
18 development and/or construction. It has nothing to do  
19 with the people who were going to lease it.

20 Q. All right. Well, why don't we put up  
21 C-27(d), the Annual Report of Ferrovias 2001. If we  
22 could go to RDC001046.

09:49:13 1           Okay. And could we please take a look  
2 at--sorry, here.

3           The second paragraph in the left column.

4           A. I see it.

5           Q. Could you read that, please. What does that  
6 paragraph say?

7           A. "These include a lack of available financing  
8 in the region for our capital programs and working  
9 capital needs and a similar lack of available  
10 financing for potential users--

11           (Lost interpretation.)

12           A. "These include a lack of available financing  
13 in the region for our capital programs and working  
14 capital needs and a similar lack of available  
15 financing for potential users of our right-of-way for  
16 projects such as fiber optics."

17           Q. Thank you. You also mention in Exhibit 2  
18 your efforts to speak to bankers about possible  
19 financing, but reported that they said that a  
20 face-to-face meeting would serve no purpose; is that  
21 correct? Back in Exhibit 2.

22           A. Correct.

09:50:54 1 Q. Okay. But what does your Report do to  
2 address the pre-lesivo environment?

3 A. What does my Report--

4 Q. Yes. The availability of financing in the  
5 pre-lesivo environment.

6 A. Well, it seems to me it was an after-the-fact  
7 matter that when I was there lesivo had occurred, and  
8 therefore all of my valuations were based upon the  
9 inability to obtain financing and pure leasing, and  
10 that's why the Rebuttal Report is issued in the way it  
11 was.

12 Q. All right. But basically when it comes right  
13 down to it, we don't have any real hard evidence. We  
14 don't have any affidavits from any people. I don't  
15 know if you made some notes on your trip, but we don't  
16 have those. All we have are your two reports and not  
17 any real documentation about any real possibilities.

18 A. You have--you have my two reports, and I have  
19 your two reports which says that there is no value  
20 whatsoever in the land in Guatemala.

21 Q. All right. I think, sir, that our Report  
22 says there is no evidence of the value, and it's

09:52:14 1 your--it's the Claimants who have the burden of proof  
2 on this issue.

3 A. No, I don't think that's accurate. I think  
4 that the Report says that, for example, there would be  
5 no additional longitudinal transactions done on the  
6 right-of-way, and it's now filled with them.

7 Q. Why don't we talk a little bit about this,  
8 about your projections for the right-of-way income.

9 As of 2006, just prior to the lesivo,  
10 Ferrovías had signed contracts for a total of 72.8  
11 kilometers of right-of-way easements with industrial  
12 customers; is that correct?

13 A. I believe that's correct.

14 Q. I think that's in Paragraph 5 of your Second  
15 Report.

16 A. Okay.

17 Q. Now, in your First Report, you assumed that  
18 in the year immediately after the lesivo--that would  
19 be 2007--Ferrovías would have been able to fully cover  
20 the length of its network; is that correct, sir?

21 A. Which--are we in the rebuttal?

22 Q. No, in your First Report, sir.

09:53:21 1 A. And page?

2 Q. Well, I think we look at Section 7 of your  
3 Report, which begins on Page 7, and then if we look at  
4 Page 9, you've got a little chart under 7.1.5.

5 And there you're assuming, if we look at the  
6 top of the chart, 495 kilometers of main lines and  
7 185.4 kilometers of rural spurs.

8 A. Correct.

9 Q. All right. And that leasing starts in 2007,  
10 according to the projections that you made?

11 A. Correct.

12 Q. Okay. And back in 7.1.4, on the previous  
13 page, Page 8, you said in the middle of the paragraph,  
14 7.1.4 that without excluding any of the other possible  
15 longitudinal uses listed above, it is reasonable to  
16 assume that the two main rights-of-way which stretch  
17 from Puerto Barrios to Tecún Umán, a total of  
18 approximately 495 kilometers, would have had at least  
19 one electric transmission and one telecommunication  
20 main transmission line on each side of the  
21 right-of-way; is that correct?

22 A. That's what it says, sir.

09:54:58 1 Q. Okay. So, you were assuming or you were  
2 projecting--excuse me--that in 2006, when there were  
3 78 kilometers--excuse me, 72.8 kilometers--that the  
4 very next year the entire system would be leased?

5 A. That is basically correct.

6 Q. Okay. So, in other words, you were assuming  
7 an increase--an additional 1,360 kilometers because  
8 you had two lines on every kilometer; is that right?

9 A. Yes.

10 Q. Okay. So, from one year to the next there  
11 would be a 1,870 percent increase in the amount of  
12 leases.

13 A. And I think that that has been altered, has  
14 it not, sir, in my Rebuttal Report?

15 Q. I'm not asking you about that yet. We will  
16 get to that, but this is your First Report.

17 A. Okay.

18 Q. So, that's what you assumed and then--or what  
19 you projected.

20 And then, I believe that the income, which  
21 was projected to be generated by this huge increase in  
22 kilometers being leased, was \$3,168,000.

09:56:31 1 Do you see that? Just from the main lines.

2 Page 9.

3 A. I'm getting there.

4 Yes, I see that.

5 Q. Okay. And you forecast a further 444,960  
6 from rural spurs; right?

7 A. Yes.

8 Q. Okay. So, if we add those two amounts  
9 together, you're saying that in 2007 Ferrovias would  
10 have obtained more than three and a half million from  
11 new contracts?

12 A. Yes.

13 Q. Okay. That's a 3,800 percent increase in one  
14 year. Are you aware of that?

15 A. Not until you'd told me.

16 Q. Okay. Do you think that's reasonable?

17 A. That's why I adjusted my next Report.

18 Q. Okay. So, let's talk about your second  
19 report.

20 A. Okay.

21 Q. This time you corrected yourself, and you  
22 introduced a ramp-up period; isn't that so?

09:57:44 1 A. Second Report is what page, sir?

2 Q. If we look at Page 5 of your Second Report--

3 A. Yep.

4 Q. --now you're forecasting \$412,186 of revenues  
5 from easements in 2007.

6 A. Yes.

7 Q. Okay. And that, itself, is a 336 percent  
8 increase compared to the prior year, isn't it?

9 A. The prior year being 2006, obviously?

10 Q. Yes, sir.

11 A. And that's 10 percent occupancy.

12 Q. That's what you assumed?

13 A. Okay.

14 Q. But the total revenues from leasing the prior  
15 year were 94,401.

16 A. That is correct, and I was valuing a  
17 10 percent occupancy on those people who were already  
18 there and to legitimize their use of the right-of-way.

19 Q. Right. And then if we look down at the next  
20 line for 2008, the number doubles. Now it's 824,000,  
21 so that's a 100 percent increase in the next year.

22 A. At 20 percent occupancy?

09:59:09 1 Q. Yes, sir.

2 A. That is how the math works, yes, sir.

3 Q. Right. And then it doubles again the next  
4 year; right?

5 A. Yes, it does.

6 Q. Okay. And for 2009, revenues of 1,648,000.

7 A. Yes, sir.

8 Q. Okay. Now, what evidence do you have that  
9 such a series of increases would have been feasible?

10 A. What evidence do I have?

11 Q. Yes, sir.

12 A. Multitudes of pictures that show they're all  
13 over the right-of-way.

14 Q. And you're assuming that every single line  
15 that you took a picture of or that someone took a  
16 picture of for you would be converted into a paying  
17 lease.

18 A. Why wouldn't it be?

19 Q. From one minute to the next.

20 A. Why wouldn't it be? If you're on property  
21 that I have and you aren't paying, I think that's a  
22 pretty easy negotiation.

10:00:01 1 Q. All right. And did you consider the fact,  
2 Mr. MacSwain, that there was the so-called Gesur  
3 Preliminary Agreement that you talked about; you know,  
4 even if we were to assume that that was valid evidence  
5 of the potential, that was 32 kilometers, wasn't it?

6 A. Yes, it was.

7 Q. It wasn't the entire system, was it?

8 A. No, it wasn't, but I think it says right up  
9 here about occupancy, not entire systems, during the  
10 ramp-up.

11 And I'm going to venture a guess, but I think  
12 I'm going to be correct, that my 2011 number is  
13 probably low based upon the occupancy that is there  
14 now for people who are illegally using the property in  
15 use.

16 Q. Okay. Why don't we put up that map that you  
17 were shown on your direct examination. Did you  
18 prepare this map, sir?

19 A. I did not.

20 Q. Okay. And who did?

21 A. I expect it was via information from Jorge  
22 Senn, and I don't know whether the law firm prepared

10:01:22 1 the map or not, but I did not prepare the map.

2 Q. I see. And do you see any kind of a scale on  
3 this map?

4 A. No.

5 Q. Okay. So, we don't really know how many  
6 kilometers belong to which company or what the--

7 A. What does that have--I don't understand that  
8 question. If they are on the right-of-way, whether  
9 they're Gesur or others, they're on the right-of-way.

10 Q. But you're saying that you know they're on  
11 the right-of-way just because of those pictures.  
12 They're all going to convert.

13 A. No, they're not going to convert. They're  
14 there, and if they're there and you have the use of  
15 the right-of-way, normal real estate action to that  
16 would be to get off the right-of-way or pay me.

17 Q. Okay. And Ferrovías had been there for eight  
18 years, and they didn't succeed in leasing those  
19 properties, did they?

20 A. No, they did not. I would expect that they  
21 were pretty interested in getting the railway up and  
22 running, rather interested in real estate at the time.

10:02:54 1 Q. And do you have any evidence that these  
2 squatters would have stayed if they had to pay \$3,200  
3 a kilometer?

4 A. Do I have evidence? Is that your question?  
5 I'm sorry, I missed the question.

6 Q. That's right. Do you have any proof that  
7 they would have done that? You're just assuming that  
8 they would have.

9 A. It's common logic that if they're going to  
10 spend hundreds of thousands or maybe millions of  
11 dollars to put something up on your right-of-way,  
12 they're not going to take it down.

13 Q. And some of them had a free good for at least  
14 eight years, maybe more; right?

15 MR. STERN: Objection. Assumes facts not in  
16 evidence.

17 MR. DEBEVOISE: He's describing them as  
18 squatters.

19 MR. STERN: I'm objecting to the eight years  
20 characterization.

21 PRESIDENT RIGO: Objection sustained.

22 BY MR. DEBEVOISE:

10:03:47 1 Q. Do you know where these pictures were taken,  
2 or when?

3 A. Yes, I think I do.

4 I don't have my stuff in front of me.

5 I think they were taken after my March  
6 Rebuttal Report was submitted and soon thereafter.

7 Q. We looked earlier at 7.1.4 of your First  
8 Report where you assumed a new telecom contract for  
9 each right-of-way, but Ferrovías's experience was to  
10 the contrary, wasn't it? It had secured no telecom  
11 contracts?

12 A. That is correct.

13 Q. And, in fact, as far back as 2002, Ferrovías  
14 had basically recognized that none were coming. Did  
15 you know that?

16 A. No, I didn't.

17 Q. Could we look at Annual Report from 2002,  
18 C-27(e), Page 1079.

19 A. Okay. I'm there, but go ahead.

20 Q. Okay. You see a section which begins called  
21 "right-of-way revenue"?

22 A. Yes.

10:05:37 1 Q. Okay. Could you read there what it says,  
2 "While we had originally."

3 A. "While we had originally contemplated a  
4 market for fiber optics as the prime alternative use  
5 of our right-of-way, demand for fiber optics must be  
6 considered paralyzed by the recent problems of  
7 overcapacity and lack of financing at a global level.  
8 Guatemala is undeveloped in this regard, but as a  
9 practical matter, few of the companies active in this  
10 business in recent years are actively looking at the  
11 types of opportunities that we have to offer.  
12 Notwithstanding the above, other types of businesses  
13 are evolving that similarly depend on the use of an  
14 unbroken right-of-way through and between urban  
15 areas."

16 Q. So, there weren't going to be any fiber-optic  
17 contracts?

18 A. No, it looks like it would have otherwise.  
19 Other stuff, though.

20 Q. Okay. In your First Report, you make certain  
21 assumptions about the likely evolution of real estate  
22 revenues that FVG would have been able to obtain from

10:07:02 1 2007 onwards absent the lesivo; and based on your  
2 expertise, you thought the assumptions you made in the  
3 First Report regarding future revenues were  
4 reasonable; right?

5 A. Yes, sir.

6 Q. Okay. But yet you changed those assumptions  
7 significantly in your Second Report, didn't you?

8 A. Obviously, yes.

9 Q. Okay. So, could we put up Figure X from  
10 Dr. Spiller's Second Report, please.

11 This figure was prepared based on the data  
12 you submitted in your First and your Second Reports  
13 related to forecasted right-of-way revenues.

14 Do you see that?

15 A. Yes.

16 Q. The two lines are quite different, aren't  
17 they?

18 A. Yes, they are.

19 Q. So, they both can't be right, can they?

20 A. If they're different, they both can't be  
21 right. One is better than the other.

22 Q. Okay. So, which one reflects your view on

10:08:22 1 the way the revenues would have evolved?

2 A. Obviously the rebuttal.

3 Q. Um-hmm, okay. And could we take a look at

4 the slope of that dotted line. It's pretty steep,

5 isn't it?

6 A. Of course it is. It's because the agreements

7 ran out two years before the end of the Usufruct, and

8 we decided to--and it was over. If you look at the

9 years, it's 2042.

10 Q. No, I'm talking about the slope at the

11 beginning, at 2007, and the little demonstrative

12 exhibit that your counsel showed you this morning

13 didn't include the lines to the left of the dotted

14 lines, did it, which is the past performance of

15 Ferrovías?

16 A. I think I would have to think that one over

17 for a second.

18 Q. Okay.

19 A. Can we look at the exhibit that we showed?

20 Q. We don't have it, and we don't control it, so

21 why don't we just move on to another question?

22 A. Wait a minute. I want to make sure that--I

10:09:43 1 don't have it in front of me.

2 Q. Well, I think mechanically it's difficult at  
3 the moment, so why don't we move on.

4 A. I'm sure, hopefully, my counsel will be able  
5 to show it to me later.

6 Go ahead.

7 Q. You said that the changes you made in the  
8 Second Report were to make it more conservative; is  
9 that correct?

10 A. That is correct.

11 Q. But does that make it right?

12 MR. STERN: I'm going to object to the use of  
13 the term "right" in the context of this testimony.  
14 This is expert opinion testimony.

15 MR. DEBEVOISE: This is expert opinion  
16 testimony that what he did was reasonable, and he has  
17 to give his views as to what is reasonable.

18 BY MR. STERN:

19 Q. That's correct. And it's not whether it's  
20 right.

21 MR. DEBEVOISE: But it doesn't depend on  
22 whether it's conservative or not conservative. It has

10:10:33 1 to be right.

2 MR. STERN: We have a standard would be  
3 reasonably certain, not right.

4 PRESIDENT RIGO: If you could rephrase the  
5 question.

6 MR. DEBEVOISE: All right.

7 BY MR. DEBEVOISE:

8 Q. You now consider your numbers reasonable, now  
9 that you've had another chance?

10 A. I consider my numbers quite reasonable and  
11 conservative.

12 Q. Right. And you changed the number of  
13 kilometers of main lines and spurs between one Report  
14 and the other. On what basis did you make that  
15 change?

16 A. I made it on the basis of I obviously had  
17 picked up the wrong numbers when I was in Guatemala on  
18 my trip and had 495 kilometers, but it has been proven  
19 that it was wrong.

20 Q. And how was it so proven?

21 A. By maps and mileposts.

22 Q. And are any of those in our record?

10:11:24 1       A.    I couldn't tell you what's in your record,  
2    but it certainly is in the records of the railway with  
3    regard to its mileposts.

4       Q.    So, we don't really have any basis for  
5    evaluating either of the sets of numbers, do we?

6       A.    Oh, I think you could probably take a map and  
7    figure out exactly what the mileage is between all of  
8    the rights-of-way.

9       Q.    If the map had a scale on it, we could,  
10   maybe.

11      A.    Well, I think that you can probably get a map  
12   of Guatemala that will have a scale.

13      Q.    We don't have one yet in this record.

14      A.    Well...

15      Q.    You made another change.  You increased  
16   short-term annual rental income from \$25,000 a year  
17   \$125,000 a year.  Why did you do that?

18      A.    Because it's accurate.

19      Q.    And did you have any evidence to support that  
20   change?

21      A.    Yes.  Evidence was supplied by the railway.

22      Q.    I see.

10:12:17 1 A. Yes.

2 Q. You don't want to pinpoint that for us here  
3 today.

4 All right. Let's talk about one other thing.  
5 Going back to the real estate contracts, I believe  
6 that you projected the Net Present Value of total real  
7 estate contracts at the 12.9 percent discount rate  
8 that was provided by Dr. Pratt at \$40,572,153. There  
9 has been some evidence submitted in this case  
10 concerning the Gesur extension. We spoke about that.  
11 There was some evidence about the Zacapa retail and  
12 about the Gerona parking lot in the form of some  
13 letters.

14 Do you have any idea of what percentage of  
15 that \$40 million are represented by those three pieces  
16 of evidence?

17 A. No, but I could calculate it.

18 Q. All right. Well, would you be surprised if I  
19 told you it's 5.77 percent?

20 A. No.

21 Q. Okay. Thank you.

22 Just going back to those photographs about

10:13:37 1 the industrial squatters, how do you know that those  
2 are pictures along the right-of-way? You can't really  
3 tell where the right-of-way is, can you?

4 A. Oh, I think we can, yes.

5 Q. All right.

6 A. Could I see those pictures that you're  
7 referencing?

8 Q. I think--

9 PRESIDENT RIGO: Could you show him the  
10 pictures, please.

11 BY MR. DEBEVOISE:

12 Q. I guess the final question is--sorry.

13 PRESIDENT RIGO: I mean, if you have a  
14 final--

15 MR. DEBEVOISE: I'm not going to ask him any  
16 more. I just wanted to ask him if he has any  
17 information about how long the squatters have been  
18 there on these lines.

19 THE WITNESS: Some before, most after lesivo.

20 But again, I want to get back to the pictures  
21 because you brought the subject up and proving whether  
22 or not these squatters are on the right of way, and I

10:15:05 1 think those pictures will evidence that they are. And  
2 those pictures will also evidence that a significant  
3 amount of the right-of-way is used by those squatters.

4 BY MR. DEBEVOISE:

5 Q. The question is not whether they are there.  
6 It's when they got there, and you don't have any  
7 information about that.

8 A. Oh, wait a minute. They weren't there during  
9 one of my visits, and then during my visit--excuse  
10 me--and they're there now, so we can pretty well  
11 confirm that they have--the great bulk of them have  
12 occurred after 2007.

13 Q. Do we have--you said you had only been to  
14 Guatemala once.

15 A. That's right.

16 Q. Right? And we don't have before and after  
17 pictures.

18 A. I don't think that makes any sense to me,  
19 sir. In other words, they weren't on the right-of-way  
20 when I went from Zacapa down to San Jose, for example,  
21 except the ones that we knew about. The great bulk of  
22 them were on the right-of-way after my visit, which

10:16:16 1 was after the lesivo occurred, so it's obvious that  
2 that's when they went on the right-of-way.

3 Q. In fact, your visit took place after the  
4 lesivo?

5 A. And that's when they--that's when they went  
6 on the right-of-way, when they knew they could get  
7 away with it.

8 Q. And you're talking about utility poles that  
9 just sprung up like mushrooms post-lesivo?

10 A. That's exactly what I'm talking about. If we  
11 show those pictures, maybe they would be. It  
12 happened--the great bulk of it happened post-lesivo.

13 MR. DEBEVOISE: Well, I think I'm finished.

14 PRESIDENT RIGO: I know you are finished, and  
15 you're out of time, and you said it was your last  
16 question, but since the issue of the pictures now has  
17 come up, I think the Tribunal would appreciate seeing  
18 the pictures on our time, if necessary.

19 MR. DEBEVOISE: I'm sure that Mr. Stern will  
20 take care of that in his redirect.

21 PRESIDENT RIGO: Mr. Stern.

22 MR. STERN: Thank you.

10:17:12 1

## REDIRECT EXAMINATION

2 BY MR. STERN:

3 Q. And just to get to your question, your  
4 request, up on--on the screens here, Mr. MacSwain,  
5 which is Annex 3 to the Third Statement of Mr. Senn,  
6 is it your understanding that these were photographs  
7 that were taken by Mr. Senn when he traveled the  
8 right-of-way at your request in the winter and spring  
9 of 2011?

10 A. That is correct, sir.

11 Q. And is it your understanding that these are  
12 photographs of the right-of-way?

13 A. Yes, they are.

14 Q. And is it your understanding that these  
15 photographs show power lines present throughout the  
16 right-of-way, based on what these pictures show?

17 A. Yes, sir.

18 Q. And is it also your understanding--

19 A. I'm sorry--the last picture was a perfect  
20 example of it.

21 Q. Which one are you referring to?

22 A. Next one up. Right there.

10:18:18 1 I mean, you can see the right-of-way, and  
2 that's--and the track. I mean, that is in the  
3 right-of-way. There is no doubt about it.

4 Q. And in other pictures you don't see railway  
5 track, but is it your understanding that there might  
6 be a road or some other clear path, is it your  
7 understanding--

8 A. That is correct.

9 Q. --right-of-way on the unrestored portions of  
10 the railway?

11 A. It's my understanding that many of the rail  
12 track had been taken up, and then--but these utility  
13 poles are on what was the active right-of-way and no  
14 longer being used by rail because the rail's gone.

15 Q. Okay, thank you.

16 Let me just ask a few additional questions.  
17 Mr. Debevoise asked you questions about the short-term  
18 revenue amounts that you revised in your Rebuttal  
19 Report. Do you recall questions about that?

20 A. Yes, sir.

21 Q. Is it your understanding that Dr. Spiller  
22 agrees with the revised valuations that you used in

10:19:21 1 your Rebuttal Report?

2 A. Yes. I think that Dr. Spiller agrees with  
3 the existing agreements and the rental--and the  
4 short-term rentals.

5 Q. And do you recall being asked some questions  
6 about whether telecom or fiber-optic companies were  
7 interested in utilizing the right-of-way?

8 A. Yes, I do recall the question.

9 Q. Let me ask you this: Based on your  
10 experience and expertise, from a valuation, a real  
11 estate valuation perspective, does it make a  
12 difference whether the right-of-way easement user is a  
13 telecom company, a power company, a gas company, or  
14 any other type of utility?

15 A. Not necessarily. It would be--it's pretty  
16 well all the same with regard to the monetary  
17 remuneration.

18 Q. You were asked some questions about the  
19 property use, the real estate station yards and the  
20 station leases that are included in your valuation.  
21 Do you recall questions about that?

22 A. Yes.

10:20:26 1 Q. When you made your trip to Guatemala in  
2 August of 2007, did you visit all of the properties  
3 that you valued in your Report?

4 A. That I valued, yes, except--is Tecún Umán in  
5 there? It's not in my valuation, is it? No, no.

6 The ones that I saw I valued.

7 Q. Just for the record, I believe there is a  
8 Tecún Umán station in your--

9 A. I don't know.

10 Q. Yes, there is a Tecún Umán valuation.

11 Other than Tecún Umán--

12 A. Other than Tecún Umán, yes, because I did not  
13 get there.

14 MR. STERN: I have no further questions.

15 PRESIDENT RIGO: Thank you, Mr. Stern.

16 QUESTIONS FROM THE TRIBUNAL

17 ARBITRATOR EIZENSTAT: I want to have a clear  
18 understanding of how much of the South Coast line you  
19 traversed.

20 THE WITNESS: I need to see a map, so let me  
21 take a quick look.

22 Are you going to zoom in on--right, right,

10:22:21 1 yeah. Right there, that's it. I don't know how to  
2 pronounce it. Retalhuleu, I don't know how to  
3 pronounce the word, but I didn't get any further than  
4 that. I didn't get over to--heading over to--yeah.

5           ARBITRATOR EIZENSTAT: With respect to  
6 comparing Guatemala and Austin and other places in the  
7 U.S., the valuations that you have given the Tribunal  
8 are there based on your discussions with local real  
9 estate people and also on actual revenues that were  
10 generated or--I want to make sure that we have a clear  
11 understanding that we're dealing with Guatemalan  
12 values and how exactly you arrived at those.

13           THE WITNESS: They're all based upon  
14 conversations with Guatemalan people, you know. The  
15 value of Chiquimula, I would need to talk to somebody  
16 to find out whether or not Chiquimula was worth a  
17 dollar or \$10 a foot.

18           The piece of--the big part of my valuation  
19 was based upon the last Contract that was about to be  
20 executed for easement for Gesur that set the bar, so  
21 to speak, for the valuation, mainly. A lot of people  
22 were able to give you valuations for Guatemala City

10:24:30 1 and Genora, et cetera, et cetera, but as you got into  
2 more rural, you got a conversation that had--and you  
3 could see some of my valuations, sir, are pretty low  
4 in some of those towns. For example, you look at some  
5 of the smaller places and you look at the numbers, and  
6 \$28,000 a year, et cetera, for rent, so those I had to  
7 count on the people that I discussed the valuations  
8 with, but mostly were people who were located and  
9 operated out of Guatemala City, to be factual.

10 ARBITRATOR EIZENSTAT: And the Gesur Contract  
11 or potential contract was never actually effectuated,  
12 that was a key litmus test for you?

13 THE WITNESS: Yes, because we were at the  
14 11th hour to execute a contract that was definitely  
15 what I would say the standard--normally it's the last  
16 deal done sets the standard. This was the last deal  
17 that was almost done because they backed out because  
18 of lesivo.

19 ARBITRATOR EIZENSTAT: And was that value  
20 consistent with what you had heard from other experts?

21 THE WITNESS: It was a value that is ready to  
22 be executed by Gesur and FVG.

10:26:21 1                   ARBITRATOR EIZENSTAT: How much of the Phase  
2 I northern line did you traverse?

3                   THE WITNESS: All the way up to Zacapa. Did  
4 not get to Puerto Barrios.

5                   ARBITRATOR EIZENSTAT: Do you have a greater  
6 degree of confidence in your valuations and estimates  
7 for that line since it was completed and you traversed  
8 it than you do for the South Coast where you traversed  
9 only a portion of it?

10                  THE WITNESS: I would have to answer that in  
11 two parts. One, I have a greater degree of confidence  
12 with regard to the yards and stations valuations, but  
13 with regard to the right-of-way longitudinal  
14 easements, I don't think it would make a difference  
15 between whether it was the north or the southern line.

16                  ARBITRATOR EIZENSTAT: I know you're not a  
17 legal expert, and it's not on that basis that you're  
18 testifying, so let me just give you an assumption, and  
19 that is that the Lesivo Declaration was issued with  
20 respect to a set of contracts that we call 143 and  
21 158, which dealt with the rental of Rolling Stock.  
22 The Contract 402, which I think you've reviewed, is a

10:27:55 1 contract which gives the railroad the opportunity to  
2 develop the right-of-way. Is that your understanding?

3 THE WITNESS: Yes, sir, yes, sir.

4 ARBITRATOR EIZENSTAT: The Lesivo Declaration  
5 was not, I would ask you to assume, issued with  
6 respect to that Contract 402.

7 THE WITNESS: I was of the impression that my  
8 assignment, my client was to value all of our real  
9 estate yards and rights-of-way, is to find out what we  
10 would have generated in income without a Lesivo  
11 Decree.

12 ARBITRATOR EIZENSTAT: Would it affect your  
13 judgment if you understood that the railroad continued  
14 to have rights under 402 to lease property, that that  
15 is to say it was unaffected by the lesivo as a legal  
16 matter?

17 THE WITNESS: I don't think so. I don't  
18 think so, sir.

19 ARBITRATOR EIZENSTAT: And can you explain  
20 why.

21 THE WITNESS: I think that--if I understand  
22 your question properly, I think that the railroad's

10:29:28 1 ability to--I guess if you're asking me if the  
2 railroad lost its ability to lease the property?

3 ARBITRATOR EIZENSTAT: Well, if it still  
4 retained its ability to lease.

5 THE WITNESS: Still retained. To me, that  
6 would be how I did value the property, that it did  
7 retain its ability to lease, and would have it for the  
8 remainder of 42 years, which is how I projected our  
9 numbers.

10 ARBITRATOR EIZENSTAT: And do you know--I  
11 mean, you were using an almost completed Contract, the  
12 Gesur. Do you know from your own time in the country  
13 and from your discussions with experts why it might  
14 have been that the railroad didn't continue to try to  
15 lease property on a right-of-way.

16 THE WITNESS: I don't have the answer to that  
17 other than I think that the real reason--the reason  
18 that I would give is that it seems as though they were  
19 absolutely using up every bit of their energy and  
20 personnel to try to get the railroad to operate.

21 ARBITRATOR EIZENSTAT: Well, I'm talking  
22 about after 2007 when they left to now.

10:30:43 1           THE WITNESS: No, I don't have an answer to  
2 that.

3           ARBITRATOR EIZENSTAT: And you mentioned that  
4 it was not necessary to have an operating railroad to  
5 be able to come to these valuations.

6           THE WITNESS: For the most part, yes. If, in  
7 fact--there are pieces of my analysis that would call  
8 for a railway operation like the intermodal facility  
9 in Zacapa. But for the right-of-way it wouldn't  
10 matter whether--in fact, power companies, as is  
11 evidenced, would prefer you don't have a railway.

12           ARBITRATOR EIZENSTAT: Right. No, I think  
13 there are two there. I understand. There are two  
14 pieces to this for the right-of-way, the least  
15 obstruction, the better for transmission lines and so  
16 forth, and that I understand. But for industrial  
17 squatters, would it not make a difference if they were  
18 close to an operating railroad in order to be able to  
19 ship their product, or--

20           THE WITNESS: If there were--as you read  
21 through the Report, if there are Sections that call  
22 for warehousing, et cetera, the likelihood of an

10:31:52 1 active railway would, in fact, make the property more  
2 valuable, not necessarily that it would have no value  
3 because still as long as there's highway and trucking  
4 ability, you could have warehouses, but for intermodal  
5 purposes, and for Maersk refrigerated storage, it  
6 probably would have more value if it had an operating  
7 railway.

8           ARBITRATOR EIZENSTAT: I know that you  
9 mentioned there were very few industrial squatters  
10 when you came down in 2007, and you testified that  
11 there has been a profusion of those since. From the  
12 pictures that you got from Mr. Senn, your discussions  
13 with Mr. Senn or in other ways, can you give the  
14 Tribunal an idea of what types of industrial squatters  
15 they are. Are these major facilities, minor  
16 facilities, somebody who puts up a little store and  
17 becomes an industrial squatter? When you use that  
18 term, what are we really talking about?

19           THE WITNESS: You and I have the same problem  
20 when I first went down there. Industrial squatters to  
21 me meant basically meant you had buildings that were  
22 put on your right-of-way, et cetera, and there are

10:33:03 1 some instances of that.

2           The people in Guatemala refer to industrial  
3 squatters as, in fact, utility easement squatters.  
4 They're an industry that supplies electricity. They  
5 refer to them. There are instances in some of the  
6 picture you will see where you have buildings and  
7 others that are obviously on the right-of-way.

8           Then you have tons of--let me not use that  
9 phrase--lots of squatters who are, in fact, people  
10 occupying railway buildings that used to be and are  
11 now being used for residences. But industrial  
12 squatters to them, for the most part, means like  
13 Gesur. It was not a squatter, but a utility company.

14           ARBITRATOR EIZENSTAT: So, these aren't--I  
15 mean, I'm just trying to put this in a perspective we  
16 can all understand. These are not what we would call  
17 greenfield developments where somebody since 2007 has  
18 built a new facility or, indeed, are they?

19           THE WITNESS: There are a couple of instances  
20 that that has happened, yes. I think I couple of the  
21 pictures will show--if you could put it back up--that  
22 will give you an instance where that warehouse

10:34:27 1 was--let me see where. Keep going. Go back a few.

2           You will see these--some of those extensions  
3 and buildings are things that were built out since  
4 2007, like that platform that was built out there, but  
5 for the most part, this one has a warehouse right  
6 built on--if we could find it.

7           ARBITRATOR EIZENSTAT: Do we have any idea of  
8 the sort of square footage if you combined all of  
9 these industrial squatters, do you have any idea what  
10 sort of total square footage we're talking about?

11           THE WITNESS: I really don't, but if you  
12 glance at the one near the screen now, you will see  
13 what we're--that building is new. I don't know have.

14           ARBITRATOR EIZENSTAT: We don't know how many  
15 and what their square footage there is?

16           THE WITNESS: No, I don't, sir.

17           ARBITRATOR EIZENSTAT: In your First  
18 Statement on Page 6, 6.0, pre-lesivo industrial  
19 squatters, you mentioned unlike individual squatters  
20 most of whom are impoverished, industrial squatters  
21 are illegal trespassers who could afford to pay rent  
22 but have failed to do so because of FEGUA's inaction.

10:36:11 1 The inaction you're referring to, is that not removing  
2 the squatters?

3 THE WITNESS: Yes, or going to force them to  
4 pay for the use of the property.

5 ARBITRATOR EIZENSTAT: And how do you know  
6 they could afford to pay rent?

7 THE WITNESS: I'm sorry?

8 ARBITRATOR EIZENSTAT: How do you know that  
9 they could indeed afford to pay rent?

10 THE WITNESS: Well, some of these companies  
11 I've listed here are actual electrical companies. I  
12 don't know how to pronounce, but INDE is, the  
13 Municipal, EEGSA, those are all--and DEORSA, are, in  
14 fact, transmission companies. They are companies who  
15 sell electricity, so I would expect they have the  
16 ability to pay rent for the use of property.

17 ARBITRATOR EIZENSTAT: But we don't know what  
18 percentage could pay or what percentages are just  
19 there because it's free, and if rent was going to be  
20 required, might not be able to stay?

21 THE WITNESS: We don't know exactly, but I  
22 think when you look at the list of the ones that are

10:37:16 1 shown on the pictures, those are, in fact, large  
2 electrical transmission companies in Guatemala who  
3 they kind of do their area by zones.

4           ARBITRATOR EIZENSTAT: Okay. Let me just ask  
5 you one last question. If we can go back to what was  
6 described--I think Mr. Debevoise's Figure X, Spiller  
7 2, Figure X. I don't know if that gives you  
8 enough--these were my rough notes. I think it was  
9 described by Mr. Debevoise as Figure 10, the second  
10 Spiller Report. It was that chart, the green...

11           THE WITNESS: Yes, sir.

12           ARBITRATOR EIZENSTAT: I'm sorry, I'm going  
13 to have to look at the--I understand.

14           So, there are two sets of questions--well,  
15 three sets. One is simply that you extended out in  
16 your rebuttal the term of the revenues.

17           THE WITNESS: I did. And the reason I did  
18 that is that I figured that if they're already there,  
19 we're going to run through the 2048.

20           ARBITRATOR EIZENSTAT: Right. It's not just  
21 going to drop off the cliff.

22           THE WITNESS: Correct. Which is what the

10:39:06 1 first one did, it did drop off the cliff.

2 ARBITRATOR EIZENSTAT: Right, I understand.

3 The second issue is, that the curve starting  
4 in around 2020 or so, and your rebuttal goes up quite  
5 considerably faster in terms of revenues than in your  
6 first. Can you explain what assumptions you made that  
7 would have resulted in that.

8 THE WITNESS: I think that I ran out of the  
9 vacancy. I felt comfortable that the vacancy would no  
10 longer be applicable around that period of time and,  
11 therefore, the right-of-way would be basically full,  
12 and, therefore, here, on the first one, I didn't do  
13 that, but when I came to right around 2018, we were  
14 now at a hundred percent occupancy, so to speak, and,  
15 therefore, that causes the spike that continues  
16 between the rebuttal and the first.

17 ARBITRATOR EIZENSTAT: So, in other words,  
18 you're assuming about a hundred percent occupancy in  
19 the rebuttal.

20 THE WITNESS: As we get into a further period  
21 of time--I will show you. Excuse me.

22 Yes, what I did is basically did a ramp-up

10:40:51 1 period where it was only starting in 2007 was at  
2 10 percent, then 20, 30, 40, 50 and 60 percent  
3 throughout 2011 occupancy. Then beginning in 2012, I  
4 had a 20 percent vacancy, and then I shrunk it after  
5 five years to a 15 percent vacancy, and then after  
6 that you are basically full, which is...

7           ARBITRATOR EIZENSTAT: Then the third to last  
8 question I have is to compare those projections with  
9 actual performance, so between 2000 and 2006--this is  
10 pre-lesivo--the actual revenues were fairly modest.  
11 Do you have a sense of why they were?

12           And then the second part of the question is:  
13 What assumptions--I understand technically what  
14 assumptions you made, but why would one assume that  
15 suddenly you would get this big ramp-up after 2006  
16 when they didn't get that from 2000 to 2006?

17           THE WITNESS: I would say the real reason is  
18 that they did not work very hard at accomplishing that  
19 between 2000 and 2006, and they were devoted to and  
20 dedicating their time to operating a railroad, which  
21 was experiencing much more problems, I'm told, than  
22 they ever expected they were going to deal with, and

10:42:41 1 so they used their personnel for railway purposes  
2 only.

3 I do believe that what was needed here was  
4 somebody or some people who were going to dedicate  
5 their time to the real estate development and the  
6 easement development.

7 ARBITRATOR EIZENSTAT: But they had six years  
8 to do it, and they didn't evidently do it.

9 THE WITNESS: I just think that they spent  
10 their time with the railway rather than trying to work  
11 this out.

12 ARBITRATOR EIZENSTAT: Because there has been  
13 other testimony that one of the reasons why RDC wanted  
14 to bid on this Contract to begin with was that they  
15 expected the revenue from leasing of property  
16 easements, et cetera, to far exceed that from the  
17 railway.

18 So, given that, wouldn't one assume  
19 reasonably that you could talk and chew gum at the  
20 same time, particularly when the real value was in  
21 these leases?

22 THE WITNESS: I have to admit that they

10:43:56 1 probably needed to be a heck of a lot more aggressive  
2 than they were in the early stages. I mean, because I  
3 believe as you look at what has occurred with regard  
4 to at least the longitudinal stuff, it's there. They  
5 could have and should have capitalized on it faster,  
6 but I think their timeframe was more dedicated to--and  
7 I'm told that the funds that they were supposed to be  
8 receiving didn't come their way as expected with  
9 regard to--is it FEGUA? Is it FEGUA? They weren't  
10 getting the funds out of FEGUA that they expected to  
11 get to.

12           ARBITRATOR EIZENSTAT: Okay. Then looked at  
13 the other way, however, since 2007, without anybody  
14 being there, you've got this profusion of use of the  
15 right-of-way with transmission lines and so forth; is  
16 that your understanding?

17           THE WITNESS: It is my understanding, sir,  
18 yes.

19           ARBITRATOR EIZENSTAT: And this is typical  
20 from your railway experience of what happens along  
21 railway rights-of-way?

22           THE WITNESS: It's very common in almost

10:45:22 1 all--not common. The great bulk of railway  
2 rights-of-way that they contain transmission lines,  
3 gas lines, telecommunication lines, cell towers,  
4 et cetera.

5 ARBITRATOR EIZENSTAT: And how much different  
6 do you think that might be with a developing country  
7 like Guatemala versus other places?

8 THE WITNESS: Well, I don't think it would be  
9 different with regard to the need and the growth  
10 because of electrical transmission. I do believe that  
11 I probably erred with the telecommunications in the  
12 First Report to why it was removed in the Second  
13 Report, but I believe that when a country has--answer  
14 a different way. In order for a country to develop,  
15 they're going to need electricity and gas, and the  
16 easiest place to do it is on railway rights-of-way.

17 ARBITRATOR EIZENSTAT: And that's because you  
18 don't have to acquire any property, you don't have to  
19 remove anybody--

20 THE WITNESS: You don't have to cut trees,  
21 you don't--the construction is of ease because  
22 normally, you know, you go on either side of the

10:46:35 1 right-of-way from where the train runs, and it's an  
2 ease of construction.

3 ARBITRATOR EIZENSTAT: Thanks.

4 THE WITNESS: You're welcome.

5 PRESIDENT RIGO: Professor Crawford has some  
6 questions.

7 ARBITRATOR CRAWFORD: My colleague, Secretary  
8 Eizenstat, has covered on this third point the main  
9 question I wanted to ask, but I'd like to take it a  
10 bit further.

11 Is it true that the essential reason why the  
12 performance in the non-railway aspects of the  
13 enterprise, essentially the people who are represented  
14 by the low figure are people who are essentially  
15 wanting a free ride? Isn't that right? They're  
16 parking their cars or setting up their enterprises and  
17 not being charged. You're making an assumption that  
18 within a very short period of time--and I'm putting  
19 this as a question--that a very short period of time  
20 you're going to be able to get a hundred percent  
21 recovery from people whose basic existence depends  
22 upon their not paying rent. They're not being

10:47:48 1 licensed, not being part of a rule of law of economy.

2 Is that an unfair remark?

3 THE WITNESS: I think slightly, sir. There's  
4 a brand-new courthouse there. I think the people are  
5 going to go there, and if you could park for free, you  
6 can park for free, but a lot of those cars that are  
7 there are, in fact, attorneys, et cetera, who are  
8 going to the courthouse. And if you had safe, secure  
9 parking and--I know where you're coming at, but I do  
10 believe that they would also pay. If they could get  
11 away for free, they could get away for free, but I  
12 think they could pay.

13 ARBITRATOR CRAWFORD: I want to see your  
14 graphic. If it was realizable in the context of  
15 Guatemala, surely it would be realized by the rights'  
16 holders, whoever the rights' holders are. I mean,  
17 there is a very significant potential there for  
18 income, but it's a pure hypothesis.

19 THE WITNESS: I guess that it has to be  
20 tempered with some--it's a hypothesis that's tempered  
21 with a piece of realism that says, it's loaded with  
22 cars. If you were to fence it off and make them come

10:49:11 1 in to pay, the assumption has to be that there's other  
2 places they could go for free, but it wouldn't be next  
3 to the courthouse.

4 ARBITRATOR CRAWFORD: How long were you in  
5 Guatemala?

6 THE WITNESS: About a week.

7 ARBITRATOR CRAWFORD: I have no further  
8 questions.

9 ARBITRATOR EIZENSTAT: Just to follow up on  
10 Professor Crawford's question, should the Tribunal, in  
11 looking at this issue, distinguish between the  
12 industrial users, the so-called "industrial  
13 squatters," where you do get the question of whether  
14 how many would stay if they actually had to pay? I  
15 mean obviously a couple of those have built major  
16 facilities. They're not going to--but many of them  
17 perhaps are there as the Professor said for a free  
18 ride, and that was implying as well in my question,  
19 that many are there because they don't have to pay.  
20 We don't know how many would stay if they had to pay,  
21 certainly if they had to pay at the rate you're  
22 assuming.

10:50:20 1                   Should we distinguish between that set of  
2 potential revenues and those from transmission lines  
3 where you already have immovable investments, poles,  
4 and so forth. Is one more certain than the other in  
5 terms of revenues?

6                   THE WITNESS: Yes, and the transmission lines  
7 have got significant investment into those poles and  
8 wires now, so one would be much more immovable, one;  
9 and, two, really would have to pay--it would cost them  
10 more to take down the stuff, number one; and, number  
11 two, lose the system while doing it. So, that would  
12 be almost certain by a lot.

13                   Then you have some instances like the  
14 warehouse that you saw. That's pretty certain. There  
15 are others that somebody may just tell you go pound  
16 sand. I don't know what the percentage is, but some  
17 will definitely tell you to do that.

18                   Then you need the following thing to happen,  
19 and that is that, as I understand it--and I'm not the  
20 legal guy--that the Government was supposed to help  
21 remove those people who wouldn't pay or were illegally  
22 there.

10:52:02 1                   ARBITRATOR EIZENSTAT: And again, this is  
2 beyond your mandate to know why the railway isn't  
3 today, December 2011, collecting revenues from the  
4 transmission lines?

5                   THE WITNESS: No. I think that after lesivo,  
6 nobody is going to pay anyway, I don't think. Who are  
7 they going to pay?

8                   ARBITRATOR EIZENSTAT: Thank you.

9                   PRESIDENT RIGO: Thank you, Mr. MacSwain.

10                  THE WITNESS: I appreciate it. Thank you  
11 very much.

12                  PRESIDENT RIGO: Mr. Stern? Thank you.

13                                FURTHER REDIRECT EXAMINATION

14                  BY MR. STERN:

15                  Q. Mr. MacSwain, could you go to the  
16 paragraph--your Second Rebuttal Report, and I want to  
17 focus starting on Paragraph 9. I just want to in  
18 response to some of the questions from Secretary  
19 Eizenstat just to make clear and in showing Figure X  
20 from Dr. Spiller's Second Report, just so they have a  
21 full understanding as to what were the differences  
22 between your original easement valuations versus your

10:53:21 1 second.

2 A. Where were you again?

3 Q. I'm on Paragraph 9 of your rebuttal report.

4 A. Okay. I've got my pages mixed up. What page  
5 is it?

6 Q. Page 4 of your Rebuttal Report, not your  
7 original Report.

8 A. Yeah, I know. I screwed them up.

9 Q. Maybe we can just look on the screen and go  
10 from there.

11 A. Okay.

12 (Witness reviews document.)

13 Q. So, in Paragraph 9 you discuss some  
14 adjustments you made on your easement valuations from  
15 your original Report; right?

16 A. Yes.

17 Q. And one of the adjustments you made was based  
18 upon learning new information or revised information  
19 about the distances of the Main Line and the rural  
20 spurs on the right-of-way?

21 A. That is correct.

22 Q. And did that have the effect of increasing

10:54:32 1 the distances for both segments?

2 A. Oh, yes. Yes.

3 Q. And as a result of that, did that cause--have  
4 an effect of increasing some of your easement  
5 valuations?

6 A. Yes, it does, and it's one of the reasons  
7 that the chapter you saw the climb occurred right from  
8 the very start. We had a--I mean, 495 to 644 is a  
9 pretty significant number.

10 Q. Okay. And then in Paragraph 10 and the chart  
11 that follows on your Rebuttal Report, you discuss some  
12 adjustment you made on the vacancies for the vacancy  
13 rates for the easements?

14 A. Yes. I could see it--there we go.

15 Yes.

16 Q. And those adjustments have the effect of  
17 making your valuations more conservative?

18 A. Oh, without a doubt.

19 I mean, you know, if you take the 1020  
20 through 60 percent of 2011 and then even in 2012,  
21 you're still 20 percent vacant. Of course, it does.

22 Q. And just so the record is clear, in the

10:55:49 1 Year 2007, you were assuming that only 10 percent of  
2 the entire Main Line would have been--would have  
3 right-of-way easements?

4 A. That is a correct statement.

5 Q. And then you do a ramp-up from that point  
6 forward, 20, 40, 50, 60 percent of the next four  
7 years?

8 A. That is correct, and it's why I made the  
9 statement that, you know, the possibility exists. I  
10 know--don't laugh at me, but the possibility exists  
11 that my number might be low because of the squatters  
12 that are on there now, if they were monetized.

13 Q. Okay. Now, I just want to also get clear as  
14 to the components of your valuation since there were  
15 questions asked about, you know, whether the station  
16 yard leases versus the easements and which are more  
17 important in effect.

18 MR. STERN: Could you go to his demonstrative  
19 exhibit.

20 BY MR. STERN:

21 Q. As the demonstrative exhibit shows, could you  
22 describe, you know, versus the additional station yard

10:57:06 1 leases and the right-of-way easements, how did they  
2 account like in terms of the valuations that you did?

3 A. Oh, you can see that the right-of-way  
4 leases--

5 Q. Speak closer to the microphone.

6 A. The right-of-way--

7 Bad back.

8 The right-of-way leases are a significant  
9 part of the valuation without any question of a doubt,  
10 and the pre-existing, especially the COBIGUA which has  
11 paid a spike on the pre-existing, and then all the  
12 other real estate really generated basically if you  
13 look at the Report closely probably five or six  
14 properties has caused the valuation.

15 Q. And on the right-of-way leases, is the  
16 ramp-up period that you did, is it based upon the  
17 information that you had been provided or were  
18 provided by Mr. Senn when he traveled the  
19 right-of-way?

20 A. Actually, no. Actually, no. We took  
21 the--made the analysis, was filed, and then Mr. Senn  
22 went on the right-of-way, and that's why I keep saying

10:58:24 1 I might have been too conservative as far as the  
2 right-of-way is concerned because if you're able to  
3 legalize and monetize what presently exists, my  
4 numbers in 2012--'11 are probably low, if you were  
5 able to do that.

6 Q. Okay. Now, I just to want get one more thing  
7 clear on the record on the question of industrial  
8 squatters. If you could go back to the map.

9 Now, the term "industrial squatters" as used  
10 in this map and I think also in your reports as well,  
11 are you referring to warehouse facilities or  
12 properties, or buildings, or are you referring to  
13 power lines?

14 A. Power lines.

15 Q. So, in the context of discussing how you  
16 would have monetized the industrial squatters in your  
17 analysis, are you referring to the right-of-way  
18 easements?

19 A. Yes. Absolutely, entirely the right-of-way  
20 easements.

21 Q. And is it your understanding that this map  
22 only--the purpose of this map is to show the depiction

10:59:51 1 of power lines as industrial squatters?

2 A. Yes.

3 MR. STERN: Okay. I have nothing further.

4 PRESIDENT RIGO: Mr. Debevoise, on the  
5 Tribunal questions.

6 RE-CROSS-EXAMINATION

7 BY MR. DEBEVOISE:

8 Q. Mr. MacSwain, you just told the Tribunal that  
9 after lesivo nobody is going to pay anyway; right?

10 A. Well, they don't have to.

11 Q. Right. But Ferrovías has continued to  
12 collect rents from entities that occupied the  
13 right-of-way, prior to the lesivo?

14 A. Correct.

15 Q. And they continued to collect those rents, so  
16 why are they continuing to pay?

17 A. I think they're afraid that any cancellation  
18 of the Agreement, as I understand it, Gesur, for  
19 example, is continuing to pay. I can't give you their  
20 rationale of why they are, but they are. But there  
21 are lots that aren't.

22 Q. And I think you indicated in your Report in

11:01:01 1 Paragraph 5, this being your Second Report--no, excuse  
2 me--yes, your Second Report, that it's quite  
3 reasonable to assume that, had the lesivo not  
4 occurred, Ferrovías would have taken steps to either  
5 legalize the industrial squatters by entering into  
6 long-term easement agreements with them, or Ferrovías  
7 would have had them evicted, or other utilities would  
8 have taken their place. But once again, that has not  
9 happened, has it?

10 A. Obviously not, no.

11 Q. Okay. And some of the squatters have been  
12 there since 1994, even before Ferrovías came?

13 A. Yes.

14 Q. Okay. And they have not been evicted?

15 A. Don't you need Government help to evict? I  
16 don't know how that works, but I could understand that  
17 if you--in order to evict, I assume you need the  
18 police or Government to do it, and that didn't seem to  
19 be forthcoming.

20 Q. Right. Did it occur to you that any of the  
21 companies might be owned by the Government?

22 A. No, didn't occur to me at all.

11:02:23 1 Q. Did it occur to you--

2 A. Does that have anything to do with not  
3 paying?

4 Q. Did it occur to you that some of the  
5 companies might not be licensed to engage in the  
6 distribution business and might be unwilling to come  
7 forward in a formal way?

8 A. No, that didn't occur to me at all. I assume  
9 that if that's the case, then it seems that the  
10 Government isn't doing their job properly.

11 Q. Well, that wasn't your issue. You were  
12 trying to value.

13 A. No.

14 Q. Now, you had a question about from Secretary  
15 Eizenstat about the increase after 2020. Were you  
16 aware that the COBIGUA lease has a term on it?

17 A. Yes.

18 Q. And what did you assume about that lease?

19 A. That lease in 2015 increases to a 4 percent  
20 of the revenue.

21 Q. Right.

22 A. Yeah.

11:03:26 1 Q. And it ends in 2015.

2 A. Not the way that I read it.

3 Q. Well...

4 A. Where does it say that it terminates in 2015?

5 It increases to 4 percent of the revenue in 2015, as I

6 read it.

7 Q. I believe that it increases before 2015 and

8 it terminates in 2015.

9 A. I did not read it that way. I would have to  
10 see that to understand that.

11 Q. Okay.

12 A. And I do believe--is it 2014 that it  
13 increases rather than 2015?

14 Q. More importantly because I'm not allowed to  
15 have a lot of time for these questions, were you aware  
16 that that lease is with FEGUA, not with Ferrovías?

17 A. Well, I assume that it was transferable from  
18 Ferrovías to FEGUA--

19 Q. So, you assumed that. You assumed that  
20 Ferrovías would take it over?

21 A. They gave it to it, didn't it? Why would  
22 COBIGUA be paying FVG?

11:04:24 1 Q. The question might be whether it's in the  
2 concession or not.

3 A. Well, that's a legal matter, but they had  
4 been paying FVG, and in 2014 or '15 they're going to  
5 pay them a very considerable amount of money, and I  
6 didn't see there was any termination.

7 Q. Okay. One final thing. There was a lot of  
8 talk about the Gesur Contract, and I believe you and  
9 Dr. Spiller had a little discussion about the Gesur  
10 Contract; right?

11 A. I've never talked to Dr. Spiller in my life.

12 Q. I mean, I meant in your reports, back and  
13 forth about the subject.

14 A. Oh, okay.

15 Q. And I believe that he used a figure of \$3,200  
16 per kilometer as the price for the Preliminary  
17 Agreement between Ferrovías and Gesur for that  
18 32-kilometer extension; correct?

19 A. Yes.

20 Q. And you said something about you never saw  
21 anything less than \$5,000 per mile; right?

22 A. That was in the United States, correct.

11:05:33 1 Q. Right.

2 A. But I said this deal set the bar for our  
3 railway dealing with electrical transmission.

4 Q. Right. But one mile is approximately 1.61  
5 kilometers; right? So, 5,000 U.S. dollars per mile is  
6 3100.7 dollars per kilometer; right?

7 A. I think that they were paying--I'm have the  
8 opinion they were paying \$3,200.

9 Q. Per kilometer?

10 A. But my calculations are based upon 644  
11 kilometers at \$3,200 per kilometer.

12 Q. Right. And in the U.S. it's the same; right?

13 A. It had nothing to do with the U.S.

14 Q. I think the point has been made. The  
15 Tribunal can read the back and forth between the two  
16 of you.

17 A. Okay.

18 MR. DEBEVOISE: Thank you very much.

19 PRESIDENT RIGO: Thank you. There are no  
20 further questions. Thank you so much.

21 THE WITNESS: Thank you. I appreciate it.

22 PRESIDENT RIGO: You can leave.

11:07:03 1 (Witness steps down.)

2 MR. FOSTER: I was just going to say that  
3 because of Dr. Pratt's health, he's in a wheelchair,  
4 and it takes some time to move him around and get him  
5 here. If we could have our break now, and we will  
6 begin the work of getting Dr. Pratt here.

7 PRESIDENT RIGO: It is time for a break no  
8 matter what, but I appreciate that.

9 Before we break, you have asked us what does  
10 the Tribunal need because we had met with various  
11 people from both teams in terms of what the Tribunal  
12 requirements are for after the hearing in terms of  
13 documentation, and I have consulted with my  
14 colleagues, and we would appreciate receiving one USB  
15 key with all the documentation of the case with a  
16 chronological index with hyperlink to the  
17 documentation. That's one item.

18 The second item is we would like to have a  
19 hard copy Joint Bundle but only of the documents that  
20 have been used in the hearing and also with a  
21 chronological index in hard copy of those documents  
22 and organized chronologically, and that we would

11:08:53 1 appreciate to receive in A5, even if it's small size  
2 and small print.

3           So, those are the two things we would like to  
4 have.

5           I know I mentioned to the staff we had met  
6 before that probably we wouldn't require the A5, it  
7 was my original request, but I have to come back on  
8 what I said on this after consulting with my  
9 colleagues.

10           MR. FOSTER: Could I ask one question?

11           PRESIDENT RIGO: Mr. Orta raised his hand  
12 first, so Mr. Orta.

13           MR. ORTA: I beat you to the punch, Allen,  
14 but thank you, Mr. Chairman.

15           Just a quick question on the last request  
16 which was, as I understood it, a compilation of only  
17 those documents that have been used in the hearing in  
18 A5 format. Do we have any liberty to include in a  
19 very limited way additional documents that we think  
20 are important for the Tribunal's consideration? Why  
21 do I ask that? Because, for example, there are a  
22 number of, I think, key witnesses that the Respondent

11:09:57 1 put forward on the issue of the Lesivo Declaration  
2 that the other side chose not to cross-examine; and,  
3 as a result, during the hearing there has not been  
4 references to the documents associated with those  
5 witnesses, but they are witnesses that we believe are  
6 quite important for the Tribunal to have at the ready  
7 when they are easing the case.

8           So, the question is, are we at liberty to  
9 include some of those additional documents in the A5  
10 Bundle?

11           PRESIDENT RIGO: The answer--let me--you  
12 might correct me, of course, but I don't know what  
13 your question is.

14           MR. FOSTER: My question was a little bit  
15 more general, but covers the same issue that Mr. Orta  
16 has. My question was, I am assuming that "used at the  
17 hearing" means documents that are attached to Witness  
18 Statements as well as documents that are physically  
19 exhibited or discussed at the hearing. And that  
20 would, of course, take care of David's situation as  
21 well.

22           MR. ORTA: Actually my--

11:11:10 1            ARBITRATOR EIZENSTAT: Not fully, not fully  
2 because you're talking about Witness Statements for  
3 witnesses we haven't seen, but you want us to review  
4 their statements and so--

5            MR. ORTA: That's correct.

6            ARBITRATOR EIZENSTAT: That certainly should  
7 be part of it. I mean, you would be selective as to  
8 what you wanted.

9            MR. ORTA: Yes, sir.

10           MR. FOSTER: I have no problem with that at  
11 all. I considered that all Witness Statements,  
12 whether they were physically--whether they were  
13 cross-examined or not would be part of the--part of  
14 the proceeding.

15           PRESIDENT RIGO: I think the answer to your  
16 questions is yes, we would appreciate to have those  
17 documents. As I said, we will proceed to have them in  
18 A5 size, those, and particularly it's important that  
19 they're together if the two Parties can put them  
20 together and in chronological order with a hard copy  
21 index.

22           So, we may all have a break now. Thank you

11:12:08 1 so much.

2 MR. ORTA: Thank you, Mr. Chairman.

3 (Brief recess.)

4 PRESIDENT RIGO: Sorry, I forgot to say  
5 something which is important in terms of coming back.  
6 When do we come back. How much time do you need,  
7 yourself, for the Expert?

8 MR. FOSTER: Can we shoot for 11:30?

9 PRESIDENT RIGO: Okay. At 11:30 we will  
10 resume. Thank you.

11 (Recess.)

12 SHANNON PRATT, CLAIMANT'S WITNESS, CALLED

13 PRESIDENT RIGO: We are going to resume the  
14 session.

15 Welcome, Mr. Pratt. Good morning. Would you  
16 please read the statement as Expert.

17 THE WITNESS: I solemnly declare upon my  
18 honor and conscience that my statement will be in  
19 accordance with my sincere belief.

20 PRESIDENT RIGO: Thank you.

21 Mr. Foster.

22 DIRECT EXAMINATION

11:33:37 1 BY MR. FOSTER:

2 Q. Thank you, Dr. Pratt.

3 I would like to ask a couple of questions  
4 about some of Dr. Spiller's criticisms of your work.

5 First, he criticizes your selection of the  
6 12.9 percent discount rate to be applied to RDC's sunk  
7 costs to return RDC to the same financial position it  
8 would have been in in the absence of Lesivo.

9 Please explain to the Tribunal why you  
10 believe that RDC's sunk costs should be compounded at  
11 that rate.

12 A. I chose a 12.9 percent for a discount rate to  
13 discount back their future losses, projected future  
14 losses to the December 31st, '06, date. And since  
15 they had already been investing, they had to--they had  
16 to compound their investment up to the same date at  
17 the same rate, so.

18 So the two would balance off. In other  
19 words, the amortization would equal the value of the  
20 sunk cost, so that's the reason for it.

21 Q. Now, Dr. Spiller also says that compensation  
22 cannot be computed based upon the amount invested

11:35:13 1 because a significant portion of the amounts  
2 contributed by RDC and other investors to FVG were  
3 used to cover operational losses. Would you please  
4 comment on whether or not it is appropriate to  
5 consider the monies that were spent to cover  
6 operational losses as an investment which should  
7 be--should be recovered by RDC.

8 A. The answer is yes. RDC, or FVG--FVG was a  
9 startup company, and startup companies often incur  
10 losses in their early years in order to get going,  
11 especially a railroad. So, it was entirely  
12 appropriate to consider those operating losses as part  
13 of their sunk costs.

14 Q. Okay. Now, turning to the dispute over the  
15 proper discount rate, Dr. Spiller criticizes your  
16 selection of RDC's cost of debt as the appropriate  
17 cost of debt for the computation of the Weighted  
18 Average Cost of Capital. Would you please tell the  
19 Tribunal why you chose RDC's cost of debt.

20 A. Well, because that was, in fact, what they  
21 were paying. The--Mr. Spiller would have them  
22 immediately from the time of the Lesivo, would have

11:37:03 1 them turn to local sources, but that would be  
2 uneconomical because local sources can't lend at those  
3 rates. RDC operates railroads around the world and  
4 finances all of them at the same rate, and you can be  
5 sure that the lender takes into consideration what the  
6 monies are being used for, how risky it is.

7 Q. Dr. Spiller, in that same regard, Dr. Spiller  
8 makes a big point of the fact that FVG operated in  
9 Guatemala and, thereby, faced a higher degree of  
10 long-term economic instability. Would you comment on  
11 that criticism.

12 A. Well, we added a company risk factor to our  
13 equity rate, and certainly the lender recognizes these  
14 risks in establishing its lending rate.

15 Q. Now, turning to the issue of the cost of  
16 equity, Dr. Spiller says that your estimation of the  
17 cost of equity is flawed because you used the factor  
18 for the tenth Decile of company size which, according  
19 to Dr. Spiller, does not adequately reflect troubled  
20 and distressed companies like FVG, whereas he uses the  
21 factor for subgroup 10(b) which he says does reflect  
22 adequately troubled and distressed companies.

11:38:49 1                   What is your response to that criticism?

2           A.   Well, it's a little bit technical, but Dr.  
3 Spiller, he uses only Morningstar for his data input.  
4 I use both Morningstar and Duff & Phelps. Now, Duff &  
5 Phelps does screen out the distressed companies,  
6 because--so that's not an issue with Duff & Phelps,  
7 but Morningstar takes all the companies that are  
8 actively traded on the New York Stock Exchange,  
9 American Stock Exchange, and NASDAQ, and ranks them on  
10 their New York Stock Exchange share price times number  
11 of shares outstanding, common shares.

12                   And therefore, the aggregate value of the  
13 common equity becomes a measure of size. Well, a lot  
14 of companies have fallen into that size category not  
15 because they're small, but because they have fallen on  
16 hard times. And so we at Shannon Pratt Valuations use  
17 only the Decile 10 when we're using Morningstar, and  
18 that also has the distressed companies in it the same  
19 as 10(b) because 10(b) is the lower half of Decile 10.

20                   But they don't have as much weight because  
21 they're diluted by the inclusion of upper half of  
22 Decile 10. And my understanding is that they intend

11:40:57 1 to take them out, take the distressed companies out  
2 like Duff & Phelps does, but they haven't done it yet.

3 Q. Now, Dr. Spiller spends a large portion of  
4 his report saying that the Claimant's damages  
5 calculation including both sunk costs and lost profits  
6 results in double counting. You dealt with that in  
7 your Report, and please tell the Tribunal what you  
8 think about that criticism.

9 A. Well, whether that criticism is spot on is up  
10 to the Tribunal, it's not up to me, but the  
11 circumstances are that when expropriations take place  
12 in an unlawful manner, it would be not in the  
13 interests of encouraging good behavior, so to speak,  
14 good income behavior to just let the company get off  
15 with lost profits; in other words, the practice of  
16 recovering of the investment plus the recovery of lost  
17 profits is a significant deterrent to bad behavior  
18 economically.

19 Q. Thank you, Dr. Pratt. Now, if you will  
20 answer any questions that Mr. Debevoise may have for  
21 you, representing Guatemala.

22 PRESIDENT RIGO: Mr. Debevoise.

11:43:00 1 MR. DEBEVOISE: Thank you, Mr. President.

2 CROSS-EXAMINATION

3 BY MR. DEBEVOISE:

4 Q. Good morning, Dr. Pratt. My name is Whitney  
5 Debevoise, and I represent the Republic of Guatemala,  
6 and I'll have a few questions for you today.

7 A. Good morning.

8 Q. Let's start with your Report, if we could  
9 just put up the first page, the first paragraph of the  
10 Report. And blow up the description of the  
11 assignment.

12 As I understand it, sir, you were asked to  
13 opine essential on three items: A discount rate at  
14 which projected cash flows should be discounted back  
15 to present value as of December 31, 2006; an  
16 appropriate pre-judgment interest rate; and whether  
17 the methodology of seeking recovery of both sunk costs  
18 and lost profits is consistent with economic  
19 principles and does not result in double counting. Is  
20 that correct?

21 A. Yes, that's correct.

22 Q. Why don't we start our conversation with the

11:44:23 1 last item, the methodology of seeking recovery of both  
2 sunk costs and lost profits. And by that I refer to  
3 the sum of these two concepts because that is, in  
4 fact, what was done, although there was an adjustment.

5           You state in the first paragraph on Page 1 of  
6 your Report that you were asked to opine on whether  
7 the methodology of seeking recovery of both sunk costs  
8 and lost profits is consistent with economic  
9 principles.

10           Do you see that?

11         A.    Yes.

12         Q.    Okay. You then address this question in Part  
13 4 of your Report on Pages 12 and 13, so why don't we  
14 move to Page 12.

15           (Discussion off the record.)

16         Q.    Interestingly, you begin the discussion of  
17 this subject with reference to a legal standard, not  
18 to an economic standard, don't you? You cite the  
19 Chorzów Factory Case in the Permanent Court of  
20 International Justice; right? Page 12, maybe we could  
21 just blow up the first sentence if it would be helpful  
22 to Dr. Pratt.

11:46:21 1 I apologize, Dr. Pratt. Apparently we don't  
2 have the highlighting capability on this document.

3 I'm just referring to the first sentence in  
4 your analysis here.

5 A. I could read it if you didn't keep  
6 interrupting me.

7 (Witness reviews document.)

8 A. Okay.

9 Q. So, my question was: Do you agree with me  
10 that you begin the discussion of this subject by  
11 reference to a legal standard, not to an economic  
12 standard?

13 A. Yes, I guess that's right.

14 Q. Okay. And I think you recite the holding of  
15 that case, namely that the reparation must as far as  
16 possible wipe out the consequences of the illegal act  
17 and re-establish the situation which would, in all  
18 probability, have existed if that act had not been  
19 committed.

20 Do you see that at the beginning of Page 12?

21 A. Yes, I recall that.

22 Q. Okay. Now, if we were to look at the Chorzów

11:47:46 1 Factory Case, which you cited there in Footnote 9, in  
2 applying the principle of full reparations, the  
3 decision focused on value, the value of an  
4 undertaking. And that's where you and the experts  
5 come in, really; right? Your job is to help the  
6 Tribunal ascertain this value; is that right?

7 A. Yes, that's right.

8 Q. Okay. And it's the value of Ferrovías at the  
9 time of what we're referring to in this case as the  
10 Lesivo Declaration, the alleged expropriatory act; is  
11 that right?

12 A. Well, that's right to a point; in other  
13 words, it's not just the value as of that date. It's  
14 the value of that date--as of that date plus sunk  
15 costs.

16 Q. Well, I think isn't that the question that  
17 we're being asked to address here? We're trying to  
18 find out whether it's consistent with economic  
19 principles to have both sunk costs and a Discounted  
20 Cash Flow analysis?

21 A. Yes. And as I testified, that's not for me  
22 to decide; that's for the Tribunal to decide.

11:49:09 1 Q. Right. Okay, thank you.

2 And in terms of the valuation technique that  
3 was used by Mr. Thompson because he did do this  
4 addition that we're talking about, do you agree,  
5 Dr. Pratt, that the Fair Market Value of Ferrovías at  
6 the time of this Lesivo Declaration is given by the  
7 expected cash flows that it would generate?

8 A. Yes.

9 Q. And that the Fair Market Value of Ferrovías  
10 is the price at which a willing buyer and a willing  
11 seller would agree to change ownership of Ferrovías?

12 A. Yes.

13 Q. Okay. Thank you. Because that's exactly how  
14 you describe it in Chapter 28 of the book that you and  
15 Mr. Grabowski wrote on the Cost of Capital, which is  
16 used.

17 A. Yes.

18 Q. So, would you say that the Discounted Cash  
19 Flow method is the gold standard of methods used to  
20 determine Fair Market Value?

21 A. Yes.

22 Q. Okay. I think Mr. Thompson agrees with you

11:50:32 1 on that, and he complements Dr. Spiller in that regard  
2 saying that he agrees with Dr. Spiller on that, so  
3 it's nice to know we have so much agreement here this  
4 morning.

5           So, basically, then, you would agree with  
6 Dr. Thompson that the value of Ferrovías, absent the  
7 Lesivo would, at least as calculated by Dr. Thompson  
8 using the Discounted Cash Flow method, be \$30.1  
9 million.

10       A. That's correct. There may be--there may have  
11 been some shutdown costs after that.

12       Q. All right. And if the value of Ferrovías,  
13 using the gold standard valuation, generates a certain  
14 number, a certain value, why would Dr. Thompson be  
15 correct in adding more to it? At best, his Net  
16 Capital Contribution method should be an alternative  
17 method of valuation, not a method that produces a  
18 value to be added to an already calculated Discounted  
19 Cash Flow value; right?

20       A. Well, not necessarily, because if you did  
21 that it would be an incentive for governments to  
22 invite investment in the country and then snatch it

11:52:10 1 away just when it was becoming profitable; in other  
2 words, the inclusion of the sunk costs is an economic  
3 deterrent for governments to act badly and,  
4 therefore--in fact, Mr. Thompson does amortize those  
5 sunk costs over the life of the investment.

6           So, it comes out even--the same amount that's  
7 amortized is what was on the books or spent and move  
8 forward at the discount rate, and they balance each  
9 other out.

10       Q.    But if I could go back to the beginning of  
11 that last answer that you just gave, essentially you  
12 were talking at that point about the legal decision  
13 that you think the Tribunal needs to make based on  
14 policy considerations; is that correct?

15       A.    Yes.

16       Q.    Okay.  And if I were to tell you that--well,  
17 let's just leave it there for a minute.

18           Now, do you believe that the Net Capital  
19 Contribution method by itself in this case would  
20 overcompensate the Claimant?  Did you examine the  
21 financial results of Ferrovias as they appeared in the  
22 Financial Statements and the Annual Reports?

11:54:22 1           A.    There were two questions in that, but I think  
2    the answer to both of them is yes.  I believe--what  
3    was your first question?

4           Q.    The application of the Net Capital  
5    Contribution method by itself alone in this case would  
6    overcompensate the Claimant.

7           A.    No, I think not.

8           Q.    Because when Dr. Thompson did that, he came  
9    up with a value of some 42 odd million.

10          A.    Yes, I believe he did, and that was amortized  
11    over the length of the Contract.

12          Q.    All right.

13          A.    Charged off as an expense a little over a  
14    million dollars a year.

15          Q.    We will get to that in a minute.

16                    And--but when you looked at the Financial  
17    Statements, there were nothing but losses from the  
18    time of inception; right?

19          A.    Yes.

20          Q.    And how long a period was that?  That was  
21    about eight, nine years, no?

22          A.    About seven or eight.

11:55:36 1 Q. Right. And there were lots of new capital  
2 contributions to cover these losses because I think  
3 you were asked a question about that by counsel for  
4 Claimant.

5 A. Yes, and there were still investments to be  
6 made, and RDC was still making investments in FVG at  
7 the time and after the breach.

8 Q. And Mr. Thompson, by using the Net Capital  
9 Contribution method, with updating to the date of the  
10 taking using the Weighted Average Cost of Capital that  
11 you calculated has given the investor in Ferrovías a  
12 compound rate of return of 12.9 percent for the  
13 period, and that was during a period when they had  
14 nothing but losses.

15 A. That's correct.

16 Q. Okay. But that doesn't return the investor  
17 to the same financial position it would have been in  
18 absent Guatemala's breach, as you say on Page 13 of  
19 your Report, does it? In fact, it would put RDC in a  
20 much better position.

21 A. Well, no, it would have--it would have put  
22 them in a position to recoup their losses, but it

11:57:19 1 wouldn't put them in a position to be the beneficiary  
2 of future profits.

3 Q. Now, you indicated in your Report that a  
4 correction for double counting was appropriate. I  
5 think that was on Page 13 of your Report. If we look  
6 at the second paragraph on that page. So, in the  
7 second half of that sentence in that paragraph you  
8 said that "when the income stream is limited to a  
9 finite number of years, then the investment must be  
10 recovered and amortized over that number of years;  
11 i.e., annual deductions from the projected cash  
12 flows"; right?

13 A. That's what Mr. Thompson did, yeah.

14 Q. Right. And I think you were saying that you  
15 think that that's appropriate?

16 A. Yes.

17 Q. Yes. You go on to say that Dr. Thompson has  
18 indeed amortized RDC's sunk costs over the remaining  
19 life of the Contract and therefore there is no double  
20 counting--do you see that?

21 A. Yes.

22 Q. Okay. Dr. Pratt, would you say that what

11:59:03 1 Dr. Thompson has done here is a standard practice in  
2 valuation?

3 A. Well, it depends on how you look at it. He  
4 looked at it as to you had to recover the invested  
5 costs, the sunk costs, plus he had to recover the lost  
6 profits. And like I said, it's up to the Tribunal to  
7 decide whether that is reasonable or not in the  
8 interest of justice and economics because if you don't  
9 do that, as I testified, you invite States to invite  
10 investment and then snatch them away.

11 So, that's not a standard method, but it's a  
12 method when that set of facts and circumstances  
13 applies.

14 Q. So, it's not a standard method?

15 A. Well, the standard method, when you're faced  
16 with that situation.

17 Q. Thank you.

18 And the amortization that was done was done  
19 on a straight line basis; correct?

20 A. Yes.

21 Q. Right. So, over the life of the rest of the  
22 Usufruct that Ferrovías had, if we were doing a--using

12:00:51 1 Net Present Values and so forth, there would be a much  
2 bigger portion than what had been added on, which is  
3 not, in fact, amortized.

4 A. I don't think that's correct. I think it's  
5 fully amortized.

6 Q. Fully amortized perhaps in a narrow  
7 accounting sense, but not in an economic sense;  
8 correct?

9 A. Well, I'm not an economist, so I don't speak  
10 for economists, but it's Net Present Value at  
11 12.9 percent is, indeed, less than--is, indeed, less  
12 by the deduction than the sunk costs. In other words,  
13 deductions turn out to be less than the sunk costs  
14 because of the timing.

15 Q. Again, back at the beginning, I think you  
16 stated in your Statement that basically your mission  
17 was to determine whether all of this had been done  
18 consistent with economic principles, so I understand  
19 you're not an economist, but we are talking about  
20 economics here.

21 A. Okay.

22 Q. Now, would a willing buyer pay the present

12:02:45 1 worth of future benefits plus the amortized sunk  
2 costs, or would they just pay the present worth of  
3 future benefits?

4 A. Well, the question is: Is that the standard  
5 of value? I don't think that's a standard of value  
6 here. The standard of value is--in my opinion, the  
7 standard of value is not Fair Market Value. The  
8 standard of value is something else.

9 Q. But when you give me that response, again  
10 you're assuming that the Tribunal might rule a certain  
11 way on the standard.

12 A. Yes.

13 Q. Standard valuation would be the Fair Market  
14 Value; correct?

15 A. The numbers are all there, if they decide  
16 that they want to--as I said many times, that's up to  
17 the Tribunal, and the numbers are all there in case  
18 they want to work it out--

19 Q. If they want to punish Guatemala, they could  
20 do that?

21 A. Yeah.

22 Q. Okay. Let's talk about the cost of debt.

12:04:00 1 The section of your Report concerning the cost of debt  
2 in the Weighted Average Cost of Capital calculation, I  
3 think we should turn to Page 11 of your Report. Could  
4 we scroll a little bit more? We need the heading at  
5 the top there that says "cost of debt."

6 (Discussion off the record.)

7 Q. So, we're going to talk about this cost of  
8 debt.

9 You assumed that RDC would continue, as it  
10 has in the past, with the pre-tax borrowing cost of  
11 7.08 percent. But is that not one of the common  
12 mistakes in valuation? If we're going to measure the  
13 cost of debt of the willing buyer, the willing buyer  
14 would not look at his own cost of debt, but rather the  
15 cost of debt of the target company, the company that  
16 he intends to acquire; right?

17 A. Well, no, that's not generally true in these  
18 situations. It's true in these situations that  
19 companies do finance other countries' construction and  
20 so forth, and they do borrow in their own market and  
21 not in the local countries' market.

22 Q. But I think what we were talking about here

12:05:46 1 was this willing buyer/willing seller concept, no?

2 A. Is there a question there?

3 Q. Yes. I said I thought we were talking about  
4 a willing buyer/willing seller concept; correct?

5 A. Well, I don't believe that, as I testified.  
6 I don't believe that's a correct standard of value,  
7 but you can pursue it as if it were.

8 Q. Okay. Could we put up the Pratt and  
9 Grabowski exhibit on Cost of Capital, please. Maybe  
10 Antonio knows which one that is.

11 MR. FOSTER: Do you have an exhibit number?

12 MR. DEBEVOISE: I'm just looking for that  
13 now. I thought we had it. I think it's cited in the  
14 footnotes of his Report.

15 (Pause.)

16 MR. DEBEVOISE: I apologize for the technical  
17 difficulties here.

18 BY MR. DEBEVOISE:

19 Q. I think that in your book which is cited in  
20 your Statement on the Cost of Capital, you state that  
21 using the acquiring firm's overall cost of capital as  
22 the required return in valuing an acquisition--

12:08:36 1 A. Where are you, sir?

2 MR. FOSTER: I'm sorry, could you show him  
3 what you're referring to?

4 MR. DEBEVOISE: Yes. Why don't you just show  
5 him this? That page right here.

6 ARBITRATOR EIZENSTAT: Could the Tribunal see  
7 that?

8 MR. DEBEVOISE: Yes, of course.

9 PRESIDENT RIGO: Is this a document that is  
10 on the record?

11 MR. DEBEVOISE: This is cited in his Report.

12 MR. FOSTER: But I don't believe what you're  
13 showing him is in the record; correct?

14 MR. DEBEVOISE: Mr. Foster, I believe that if  
15 you look in the Report you'll see that this book is  
16 referred to. I think it's entirely fair game for me  
17 to ask him a question based on his own book when he  
18 cited it in his paper.

19 MR. FOSTER: There is a citation to the book,  
20 but this has never been--this passage has never been  
21 submitted in the record.

22 MR. DEBEVOISE: If you--may I proceed?

12:09:56 1                   PRESIDENT RIGO: I think you should proceed  
2 to the extent that the Report of the Statement, the  
3 Opinion of Mr. Pratt has been based on it.

4                   MR. DEBEVOISE: All right. Thank you.

5                   Maybe I can cure Mr. Foster's problem, if I  
6 may. Why don't we say that this is not an exhibit to  
7 be used in the record, but I'll just use it as a  
8 demonstrative exhibit. This is something that he has  
9 said, and I think it's fair to ask him about it.  
10 We're addressing the cost of debt.

11                   MR. FOSTER: This simply is not in the  
12 record.

13                   PRESIDENT RIGO: If it's not in the record,  
14 can you please phrase your question in terms of the  
15 Statement to which it relates that is on the record,  
16 that's his opinion.

17                   BY MR. DEBEVOISE:

18           Q.    Mr. Pratt--

19                   MR. FOSTER: In the meantime, if you will  
20 take it down.

21                   BY MR. DEBEVOISE:

22           Q.    --you're the author of Cost of Capital:

12:11:14 1 Applications and Examples, third edition, with Mr.  
2 Grabowski; are you not?

3 A. Yes, I am the author of that. Currently,  
4 it's in the fourth edition.

5 Q. Yes, sir I'm aware of that.

6 And do you recall writing in that book that  
7 the correct cost of capital matches the risks in the  
8 expected cash flows being valued, and that one of the  
9 common mistakes in valuation is using the acquiring  
10 firms' overall cost of capital as the required return  
11 in valuing the acquisition?

12 A. Yes.

13 Q. Okay. Thank you very much.

14 A. That does not apply here.

15 Q. I think that it should apply, no?

16 A. Pardon me?

17 Q. It should apply here, no?

18 A. No, there is no acquiring firm, there is no  
19 merger.

20 Q. But again I think you're slipping into this  
21 question of whether Guatemala should be incentivized  
22 or not. If we're talking about a pure valuation, we

12:12:42 1 would be looking at a willing buyer/willing seller  
2 situation.

3 MR. FOSTER: If Mr. Debevoise could ask a  
4 question as opposed to making statements, it would  
5 probably move things along.

6 BY MR. DEBEVOISE:

7 Q. Is that not correct?

8 A. Well, you haven't established a connection.

9 Q. Dr. Pratt--

10 A. There was no acquiring company.

11 Q. Dr. Pratt, can we just go back again to the  
12 very beginning. You were asked, and I think this is  
13 back in the description of your assignment, to  
14 determine the discount rate at which these projected  
15 lost profits should be discounted back to present  
16 value as of December 31, 2006, in conjunction with  
17 this claim; correct?

18 A. Correct.

19 Q. And I think we talked about the Chorzów  
20 Factory standard and the attempt to find value  
21 being--trying to find the Fair Market Value of  
22 Ferrovías; correct?

12:14:12 1 A. Well, counsel, you did, but I don't think I  
2 ever did.

3 Q. Well, I think if we went back and replayed  
4 the record, I think we would find that in the  
5 beginning of your testimony you had accepted that  
6 proposition; isn't that right?

7 A. I don't think so.

8 Q. All right. Well, I think the Tribunal can  
9 read the record for itself and make their own  
10 decision.

11 A. All right.

12 Q. Now, let's talk about the evidence supporting  
13 the 7.08 percent that you used. You based that on the  
14 value of a Promissory Note.

15 MR. DEBEVOISE: Could we please put up  
16 SPV-03.

17 BY MR. DEBEVOISE:

18 Q. This is an "Amended and Restated Line of  
19 Credit Promissory Note"; which was attached to your  
20 Report, sir; is that right?

21 A. Yes.

22 Q. And could you read me the date on the

12:15:30 1 Promissory Note.

2 A. February 13, 2002.

3 Q. Thank you. And you were asked to value  
4 Ferrovías in September 2006, at the time of the  
5 taking, so this is out of phase, isn't it?

6 A. Well, this particular Note is, but the source  
7 of our rate was the Financial Statements of RDC.

8 Q. Why was it necessary to attach this Note to  
9 your Report, if this was not the foundation for your  
10 rate? I think you included in the footnote to justify  
11 this rate, didn't you?

12 A. I don't know.

13 Q. Could we look at Page--well, I don't want to  
14 interrupt the flow, so we'll come back to this, that  
15 question in a minute when we're out of this document  
16 and into the next.

17 Let's continue looking at the Note. Do you  
18 see the paragraph that says "FOR VALUE RECEIVED"?

19 A. Yes.

20 Q. And who are the Makers of this Note, as you  
21 read it in that paragraph?

22 A. On first glance it would seem to me that it

12:17:44 1 had Henry Posner and Railroad Development Corporation.

2 Q. Correct. And could you continue on in the  
3 parenthetical? Does it say that they're jointly and  
4 severally the Maker?

5 A. Yes.

6 Q. So whose debt were you evaluating when you  
7 looked at this Note? Mr. Posner's or RDC's?

8 A. Well, they're combined.

9 Q. It's joint and several; correct?

10 A. It's joint and several.

11 Q. Right. So, this is not the pure credit of  
12 RDC, is it?

13 A. No, it's not.

14 Q. Thank you.

15 And when you're building a Weighted Average  
16 Cost of Capital to discount over 42 years, you would  
17 properly use a long term borrowing rate, would you  
18 not?

19 A. Yes.

20 Q. All right. Let's take a look at the term of  
21 this Promissory Note. Could we scroll down to Clause  
22 E on Page 6, please, focusing on Clause E, this is a

12:19:15 1 demand Note, isn't it, Dr. Pratt?

2 A. Yes.

3 Q. And that means it's due and payable on any  
4 given days, not in five years, not in 10 years, not in  
5 20. It could be due tomorrow; correct?

6 A. Yes.

7 Q. So, it's not a long term borrowing rate being  
8 reflected in this Note, is it?

9 A. Well, it may be. It may be some people use  
10 Demand Notes for Long-Term Notes.

11 Q. All right. Let's, now, take this down and go  
12 back to Dr. Pratt's Report. If we could go to Page 5,  
13 please. Looking at the paragraph in the middle of  
14 this page called "Cost of Debt for Railroad  
15 Operations." Do you see that, sir?

16 A. Yes.

17 Q. And it says: "As cost of debt for railroad  
18 operations, we used the interest rate paid by RDC on  
19 its lines of credit that was outstanding as of the  
20 valuation date." Footnote 4. And could we scroll  
21 down to Footnote 4, please. Footnote 4, "amended and  
22 restated line of credit Promissory Note between Henry

12:20:48 1 Posner III and Railroad Development Corporation and  
2 Dollar Bank, Federal Savings Bank, February 13, 2002,  
3 Exhibit SPV-03; correct?

4 A. Yes.

5 Q. And that's the Note we just looked at;  
6 correct?

7 A. I think so on here, described as a Line of  
8 Credit Promissory Note, so there it's indicated it's a  
9 line of credit. It's not intended to be short-term.

10 Q. I see. And this is the evidence on which  
11 you're basing this rate that you have selected;  
12 correct?

13 A. Yes.

14 Q. Okay.

15 A. Well, yes, I base mine on the footnotes to  
16 the Financial Statement, but evidently this is the  
17 underlying document.

18 Q. Thank you.

19 The footnotes in which Financial Statements,  
20 sir? The RDC Financial Statements?

21 A. Yes, sir.

22 Q. All right. Could I just note for the record

12:21:59 1 that we requested the RDC Financial Statements, and  
2 what we were given was completely blacked out except  
3 for one or two lines, so I don't know that this is a  
4 foundation on which Dr. Pratt's opinion could be  
5 based.

6 MR. FOSTER: I would note also for the record  
7 that they didn't challenge what we gave them.

8 MR. DEBEVOISE: I think, Mr. President, that  
9 the Witness should not be relying on documents that  
10 haven't been made available to us, just as a matter of  
11 equity in the proceedings.

12 All right. Well, if the Tribunal would like  
13 to rule on it, I'll wait.

14 PRESIDENT RIGO: I was going to ask  
15 Mr. Foster his views.

16 MR. FOSTER: They asked for Financial  
17 Statements. We gave them Financial Statements that  
18 were redacted except as to FVG. They had the  
19 opportunity to ask for additional information if they  
20 wanted it. They've had Dr. Pratt's Report for a long  
21 time. This is a long-term line of credit financing,  
22 as is obvious, the Report says that it was still in

12:23:49 1 existence as of the time of the valuation date. It's  
2 dated 2002. It had been there for over four years.  
3 As of the time of the valuation date.

4 MR. DEBEVOISE: With respect, counsel is  
5 arguing the merits of the dispute at this point. It's  
6 a question of fundamental fairness, Mr. President.  
7 The Expert can't be relying on documents that we  
8 cannot have access to so that we can properly  
9 cross-examine him.

10 PRESIDENT RIGO: Now, as I understand it,  
11 certain Financial Statements redacted have been given  
12 to you. Is the Opinion of Dr. Pratt based on the  
13 those that are redacted or on also the part that had  
14 been redacted? I think that's the question in terms  
15 if you're going to judge on the fairness of the issue.

16 MR. FOSTER: I'm afraid I don't know the  
17 answer to your question as to whether the reference to  
18 the interest rate was part of the redaction or not.  
19 We can determine that.

20 PRESIDENT RIGO: I think the Tribunal, for  
21 the purposes of the examination of Dr. Pratt, who's  
22 here at this moment, will continue as is, but on the

12:25:48 1 assumption that the other Party, meaning the Party  
2 representing Guatemala, will receive all the  
3 documentation on which Dr. Pratt has made his  
4 evaluation.

5 MR. FOSTER: We'll check, and if the Note  
6 he's talking about is redacted, we'll provide it.

7 MR. DEBEVOISE: With all due respect,  
8 Mr. President, we lose the opportunity to  
9 cross-examine him on whatever they provide, and I  
10 think if I showed him these redacted statements,  
11 there's literally pages and pages of black. There is  
12 nothing in here you could rely on, and I don't see how  
13 this in any way cures the problem.

14 (Tribunal conferring.)

15 PRESIDENT RIGO: You had the redacted  
16 statements. You had the Opinion of Dr. Pratt, and you  
17 had not raised the issue. So, from the point of view  
18 of the Tribunal, at this point--I mean, it's true you  
19 may lose the cross-examination of the Expert on those  
20 parts that are redacted, if his opinion is based on  
21 that, but that is also on your side, not having  
22 questioning the matter earlier.

12:27:39 1           So, from the perspective of the Tribunal, I  
2 repeat what I said before: We will continue as is,  
3 and you proceed to your cross-examination on the basis  
4 of the information that is available. The other Party  
5 has agreed to give you the information to redact it to  
6 the extent that there is the information on which  
7 Dr. Pratt has based his statement, and you will have  
8 an opportunity later on in the proceedings, I mean, to  
9 comment as necessary afterwards, after you receive it,  
10 whether it's the closing statement or you receive it  
11 before or in post-hearing statement, et cetera.

12           So, certainly you would have that  
13 opportunity.

14           MR. DEBEVOISE: Well, just--I would like to  
15 just state for the record, Mr. President, that we  
16 didn't learn until today that Dr. Pratt was intending  
17 to rely on these RDC statements, so there is no way we  
18 would have known to press the point. He's essentially  
19 being allowed to amend his Statement and provide a new  
20 foundation for it after the fact. And we will  
21 proceed, but I think that it's not cited--these  
22 financials are not cited in his Statement, so we do

12:29:04 1 really feel surprised by this.

2 MR. FOSTER: Also for the record, I believe  
3 what we're going to find is that the Financial  
4 Statement refers to this Note. I think that's what  
5 we're going to find out. I think they're merely  
6 cumulative, but we'll see when we look at it.

7 MR. DEBEVOISE: Thank you, Mr. President.

8 PRESIDENT RIGO: We have taken note of  
9 everything that has been said, and please,  
10 Mr. Debevoise, continue.

11 BY MR. DEBEVOISE:

12 Q. Dr. Pratt, you have a disagreement with Dr.  
13 Spiller on the weighting to be applied in the Weighted  
14 Average Cost of Capital calculation between the real  
15 estate business and the railway business. In this  
16 regard, you have weighted, according to the EBITDA  
17 developed by Mr. Thompson which, in turn, depends in  
18 part on Mr. MacSwain's analysis of real estate  
19 revenues.

20 So, if the Tribunal were to find  
21 Mr. MacSwain's calculations speculative and  
22 unsubstantiated, there might be a corresponding impact

12:30:22 1 on the weighting factor; correct?

2 A. Yes, sir, that's correct.

3 Q. Okay.

4 A. It would be minor because--it would be minor  
5 because the railroad weighting is very--the railroad  
6 cost of capital is so close that--the real estate  
7 costs of capital, that any change would be minor.

8 Q. So, essentially, you're saying that the  
9 dispute between you over 92/08 versus 50/50 is also  
10 minor?

11 A. Yes.

12 Q. Thank you. I have no further questions,  
13 Dr. Pratt.

14 PRESIDENT RIGO: Thank you, Mr. Pratt.

15 Mr. Foster.

16 MR. FOSTER: Just one question.

17 REDIRECT EXAMINATION

18 BY MR. FOSTER:

19 Q. Does modern economic theory also take into  
20 account policy considerations, Dr. Pratt?

21 A. Counsel, I hate to ask you a question back,  
22 but I'm going to--whose policy considerations?

12:31:44 1 Q. In general, does modern economic theory take  
2 into account policies considerations such as the use  
3 of economics to influence behavior?

4 A. Yes.

5 MR. FOSTER: That's all I have.

6 PRESIDENT RIGO: I will ask my colleagues if  
7 they have any questions.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR EIZENSTAT: I have one question to  
10 clear up an issue in which I thought I heard different  
11 answers to the same issue. And that is the Discounted  
12 Cost of Capital, the gold standard, and the issue of  
13 Fair Market Value, the willing buyer and willing  
14 seller.

15 At one point I thought you said that that was  
16 the appropriate standard and at another it was not.  
17 Perhaps you might explain to the Tribunal.

18 THE WITNESS: Well, Tribunal, it's up to the  
19 Tribunal to make that decision. Evidence has been  
20 presented on Fair Market Value, at least the adequate  
21 numbers have been presented so the Tribunal can make  
22 the determination as of its Fair Market Value.

12:33:10 1                   ARBITRATOR EIZENSTAT:  Yes, sir, but what  
2                   would be the key factor for the Tribunal be to make  
3                   that judgment?

4                   THE WITNESS:  They should--they should  
5                   subtract either the Discounted--either the result from  
6                   the Discounted Cash Flow or the embedded costs.

7                   ARBITRATOR EIZENSTAT:  And is that what  
8                   Mr. Thompson did?

9                   THE WITNESS:  No.

10                  ARBITRATOR EIZENSTAT:  That's different than  
11                  the amortization issue?

12                  THE WITNESS:  Yes.  That's different from the  
13                  amortization issue.  The amortization, although it's  
14                  completely amortized, there's a matter of timing  
15                  difference, which makes the net come out differently.

16                  So, if the Tribunal determines that the lost  
17                  profits are the only thing that should be taken into  
18                  consideration comes out to between 30 and 32 million,  
19                  if the Tribunal decides that only the sunk costs  
20                  become relevant, it should take out the--the answer is  
21                  about 42 million.

22                  ARBITRATOR EIZENSTAT:  If one were to

12:34:54 1 determine that both might be appropriate--

2 THE WITNESS: If both might be appropriate,  
3 the number at the end of my Report is valid.

4 ARBITRATOR EIZENSTAT: Which is...

5 THE WITNESS: I'm not finding it readily, but  
6 it's approximately 62 million.

7 ARBITRATOR EIZENSTAT: 62 million?

8 THE WITNESS: Yeah.

9 ARBITRATOR EIZENSTAT: Okay. Again, I want  
10 to reflect on this. You went into the issue of  
11 whether if there were a finding of an illegal  
12 expropriation--

13 THE WITNESS: Yes.

14 ARBITRATOR EIZENSTAT: --that you would want  
15 to discourage that, and that would lead to combining  
16 both.

17 THE WITNESS: Yes.

18 ARBITRATOR EIZENSTAT: But it's not clear on  
19 what basis the Tribunal, from your perspective, if we  
20 decide not to include both, but either the cost of the  
21 lost profit or the sunk cost, either one or the other,  
22 I would like to know your thinking of what would drive

12:36:31 1 or should drive the Tribunal to one of the--one or the  
2 other of those estimates.

3 THE WITNESS: I think that the sunk costs  
4 would be more appropriate because they're a known  
5 fact.

6 ARBITRATOR EIZENSTAT: Whereas the profits  
7 are more speculative?

8 THE WITNESS: Yes.

9 ARBITRATOR EIZENSTAT: And the sunk costs,  
10 you took the \$15 million that had already been  
11 invested as the basis for that?

12 THE WITNESS: Well, yeah, and moved it  
13 forward by 12.9 percent per year.

14 ARBITRATOR EIZENSTAT: Yes, I understand.

15 THE WITNESS: Yeah. In other words, I should  
16 have said the adjusted sunk costs.

17 PRESIDENT RIGO: Mr. Foster, on the questions  
18 of the Secretary Eizenstat.

19 MR. FOSTER: Nothing further.

20 PRESIDENT RIGO: Mr. Debevoise, on the  
21 question of Mr. Eizenstat?

22 MR. DEBEVOISE: Yes, thank you,

12:37:42 1 Mr. President.

2 RE-CROSS-EXAMINATION

3 BY MR. DEBEVOISE:

4 Q. On this last question that you were just  
5 asked, as between the Discounted Cash Flow and the  
6 sunk costs, I think we discussed in the beginning of  
7 your testimony that the Discounted Cash Flow was the  
8 gold standard; correct?

9 A. Yes, sir.

10 Q. And I guess we have the situation of eight  
11 years of losses which you seem to attribute to the  
12 fact that this is somehow a startup; is that correct?

13 MR. FOSTER: I believe that was what he had  
14 already asked as opposed to responding to a question  
15 from Secretary Eizenstat.

16 THE WITNESS: Well, would you repeat the  
17 question?

18 BY MR. DEBEVOISE:

19 Q. Yes.

20 I believe that I asked whether it was your  
21 view that Discounted Cash Flows should not be used in  
22 this case because you characterized this operation as

12:38:52 1 a startup, notwithstanding eight years of operations.

2 A. Yes, and there are reasons for--the reason  
3 for it being a startup after eight years, for one  
4 thing it had to rebuild the railroad that took two or  
5 three years, but then there were problems with  
6 Guatemala not putting in its share of the Trust Fund  
7 money and not evicting squatters, so it's very much  
8 still a startup company. It's a matter of rebuilding  
9 the freight traffic from a virtual standstill.

10 Q. But in situations where the sunk costs are  
11 used, we're typically looking at a situation where the  
12 company hasn't had any operations whatsoever and,  
13 therefore, the only objective things you could look at  
14 is the sunk costs, but here we have revenue  
15 projections--in fact, projections that were lower than  
16 planned by the company at the beginning of the  
17 operation?

18 A. That's true. In this case, we do have, in  
19 fact--it's unusual to have a company that's still in a  
20 startup phase after eight year, but this is the  
21 situation here.

22 Q. I see.

12:40:49 1                   And there has been--the question of the  
2 policy issue came up again. I think we discussed,  
3 when we were discussing your Statement, the fact that  
4 you began with a legal standard referring to the  
5 Chorzów Factory Case; is that correct?

6                   MR. FOSTER: Objection. That was my  
7 question, not Secretary Eizenstat's question. He's  
8 gone far beyond.

9                   MR. DEBEVOISE: No, I think that Secretary  
10 Eizenstat asked about the policy issue.

11                  PRESIDENT RIGO: I think only Mr. Foster  
12 asked on that. If you can point out where Secretary  
13 Eizenstat asked the question on policy.

14                  MR. DEBEVOISE: Yes. There was a specific  
15 reference here in my notes to the question of illegal  
16 expropriation being asked during the time of the  
17 Tribunal's questions. I believe that's the policy  
18 issue. And I just have one question on this, if I  
19 may.

20                  PRESIDENT RIGO: Just, Mr. Debevoise, just go  
21 ahead and ask the question.

22                  MR. DEBEVOISE: Thank you.

12:42:05 1 BY MR. DEBEVOISE:

2 Q. Are you aware, Dr. Pratt, that in Chorzów  
3 Factory the Court asked several questions, the famous  
4 Questions 1(a) and 1(b) and Question 2, and that if  
5 you applied those questions you would be providing an  
6 economic incentive to countries not to take properties  
7 that were going to increase in value post  
8 expropriation so that the policy issue is addressed in  
9 Chorzów Factory?

10 A. No, I'm not aware of that.

11 MR. DEBEVOISE: Thank you.

12 PRESIDENT RIGO SUREDO: Before I thank  
13 Dr. Pratt, I wanted to make one comment for the  
14 record, and is that Mr. Debevoise at one point said in  
15 case the Tribunal decides to punish Guatemala, I think  
16 that's the wrong characterization of the role of this  
17 Tribunal. We are not here to punish anyone, and we  
18 don't have that capacity under the Treaty under which  
19 the Tribunal was established.

20 THE WITNESS: I wasn't the one that made that  
21 comment.

22 PRESIDENT RIGO: Mr. Debevoise.

12:43:27 1 MR. DEBEVOISE: Thank you, Mr. President, for  
2 making the distinction.

3 MR. FOSTER: We're not asking the Tribunal to  
4 punish Guatemala, either.

5 PRESIDENT RIGO: Mr. Pratt, thank you so much  
6 for being with us.

7 THE WITNESS: Thank you.

8 (Witness steps down.)

9 PRESIDENT RIGO: We will adjourn now and  
10 reconvene at 2:00.

11 I wanted to ask about Dr. Spiller. I  
12 remember that there was an issue that he needed to  
13 testify today. Is there any issue time wise during  
14 the afternoon?

15 MR. DEBEVOISE: Mr. President, no, he's  
16 available all day long today.

17 PRESIDENT RIGO: Okay. Thank you.

18 So, I will see you at 2:00.

19 (Whereupon, at 12:44 p.m., the hearing was  
20 adjourned until 2:00 p.m., the same day.)

21

22



02:07:57 1 that it has no foundation in the record and should not  
2 be used this afternoon.

3 MR. FOSTER: And I said earlier if I planned  
4 to use it, I'd give him a chance to object to it. I  
5 don't know if I will or not, I probably won't, so I  
6 don't think we are going to have to get to that, so  
7 there's no use arguing about it now.

8 MR. DEBEVOISE: Could we perhaps ask that it  
9 be removed from the Tribunal's binders, then, until  
10 such time as you decide to use it?

11 ARBITRATOR EIZENSTAT: The Tribunal promises  
12 not to look at it until you tell us we can.

13 ARBITRATOR CRAWFORD: If we look at it by  
14 accident, we promise not to understand it.

15 THE WITNESS: That may be true in any case.

16 ARBITRATOR EIZENSTAT: It's very tempting to  
17 open it, but we will resist the temptation.

18 PRESIDENT RIGO: It's a forbidden fruit.

19 So, Mr. Foster.

20 MR. FOSTER: Thank you, Mr. President.

21 DIRECT EXAMINATION

22 BY MR. FOSTER:

02:08:59 1 Q. Mr. Thompson, you have in front of you, I  
2 believe, I hope you do, your two Expert Reports that  
3 you've submitted in this arbitration dated May 18,  
4 2009, and March 15, 2011, respectively?

5 A. I have what appears to be the figures from  
6 those reports. The text is not here.

7 Q. Well, in that case we'd better have the text.

8 In any event, to move things along, assuming  
9 that Adrian puts the accurate version of the text in  
10 front of you, do you ratify each of your reports and  
11 affirm their truthfulness before the Tribunal?

12 A. Yes, I do.

13 Q. Okay. What Expert analysis were you asked to  
14 perform in this case, Mr. Thompson?

15 A. I was asked to review the history of the FVG  
16 in Guatemala. I was asked to assess the circumstances  
17 that caused them to go out of business, and I was  
18 asked to assess the damages that they incurred as a  
19 result of this event.

20 Q. Could you please describe to the Tribunal  
21 your background that's relevant to that task.

22 A. Yes, sir, I can. I have a degree in

02:10:09 1 engineering from MIT. I have a degree in business  
2 administration from Harvard. I spent several years as  
3 an engineering consultant. I then worked for the U.S.  
4 Department of Transportation in the Office of the  
5 Secretary dealing with budget analysis and management;  
6 and, in that capacity, I performed a large number of  
7 financial and economic analyses of the budgets of the  
8 Department of Transportation, including the Federal  
9 Railroad Administration. I then was transferred to  
10 the Office of the Secretary for Policy Development,  
11 where I worked again primarily on development of  
12 national policy toward railways and railway  
13 investment.

14           From there, I was a consultant in which we  
15 dealt specifically with economic and financial  
16 analysis and transportation, regulatory proceedings,  
17 particularly.

18           From there, I returned to the Department of  
19 Transportation and the Federal Railroad Administration  
20 where I first ran the Northeast Corridor project,  
21 which was the largest single railway construction  
22 project of the 20th Century, improving the railway

02:11:23 1 line from Boston to Washington. This was a two and a  
2 half billion dollar project that involved a large  
3 number of economic and financial analyses of what to  
4 do and how to build a railway, plus, of course, the  
5 managerial issues of running such a large project.

6           From that point, I was then  
7 appointed--promoted, actually, to handle all of the  
8 lending activities of the U.S. Federal Railroad  
9 Administration. It has a fairly large program of  
10 lending to smaller railways. That involves a great  
11 deal of financial and economic analysis of the railway  
12 and of the proposed project and making sure that the  
13 standards that the Government had set for such railway  
14 lending were met.

15           I was also briefly the Associate  
16 Administrator for--actually I was also the Deputy  
17 Administrator and I was also the Associate  
18 Administrator for Policy. From that position, I left  
19 to join the World Bank as the Railways Adviser, and I  
20 served in that position for 17 years. The job of the  
21 Railway Adviser is basically to review all of the  
22 railway lending that the World Bank does to make sure

02:12:40 1 that it meets the Bank standards, to make sure that  
2 the economic and financial and political and policy  
3 analysis is all performed correctly. In that  
4 capacity, I probably visited 50 different countries  
5 and railways and talked about railway issues in those  
6 countries, and probably worked on another 10 or 15  
7 countries where I didn't go there, but I worked on the  
8 analysis and the decision about the lending.

9           After the World Bank--oh, I want to add that  
10 one of the things that I particularly worked on in the  
11 World Bank was the program of concessioning of  
12 railways. As you may know, in the late 1980s, there  
13 were no railways in Latin America operated by the  
14 private sector. By the end of the Nineties, every  
15 railway, every significant railway, was operated by  
16 the private sector under concession. And it was one  
17 of the more successful programs that the Bank had. In  
18 fact, our team received an award from the President of  
19 Bank for excellence in the Wolfensohn area.

20           After that I left the Bank and formed, as  
21 many of us do when we retire, I formed a small  
22 consulting company, and I've continued to work with

02:13:56 1 consulting clients on many of the same issues, in  
2 depth in Latin America, in depth in Asia and Europe.

3 Q. I hope when you leave here you go back to  
4 improving the corridor from Washington to Boston.

5 A. Right now I'm a member of the peer review  
6 group for the California high-speed rail project. And  
7 that's more than enough, I can tell you.

8 ARBITRATOR EIZENSTAT: We will try not to let  
9 our feelings about your expertise be affected by those  
10 who have to take the Acela route from Penn Station.

11 THE WITNESS: Believe me, sir, I sweated  
12 blood over the Northeast Corridor project, so I know  
13 very well what the issues are.

14 BY MR. FOSTER:

15 Q. Please describe to the Tribunal what you did  
16 to analyze and quantify Claimant's damages in this  
17 case.

18 A. After a thorough analysis of what happened  
19 and what the information was, I prepared a model which  
20 basically contains all of the elements of the  
21 analysis. The model has a section that deals with  
22 lost investment and what investments were put in and

02:15:01 1 how they totaled and how they were brought up to the  
2 present.

3           It had a section that dealt with the model of  
4 railway operations so that I could see what the  
5 revenues and what the costs were going to be as a  
6 function of the traffic and the relationships between  
7 revenues and traffic.

8           And it has a section that deals with the real  
9 estate investments and when they were made and what  
10 the expected revenues were going to be, and then it  
11 has a section that summarizes the results of all of  
12 these.

13       Q.   And in the section that deals with the  
14 railway analysis, did you take into account all the  
15 various inputs of revenues and costs and so forth?

16       A.   The model has actually 28 different  
17 parameters that go into the estimation. It has 27  
18 different places where growth parameter is used.  
19 There are nine different rates of growth depending on  
20 the commodity and the expense. It has a number of  
21 other elements into it; for example, it explicitly  
22 includes the Weighted Average Cost of Capital and how

02:16:07 1 that's incorporated into the overall results.

2 Q. Now, is Thompson Exhibit 1 to your Rebuttal  
3 Report your damages model that you're presenting in  
4 this arbitration?

5 A. Yes, it is.

6 Q. Now, during your time at the World Bank as a  
7 Railway Adviser, did you prepare and analyze similar  
8 types of long-term forecast models for railroads?

9 A. I did that at the U.S. Department of  
10 Transportation. I did it at the World Bank many, many  
11 times on the loan applications that we were  
12 considering, and certainly I have done it since in my  
13 consulting practice.

14 Q. Did the World Bank and the Department of  
15 Transportation rely on your analysis in deciding  
16 whether to commit millions of dollars in loans?

17 A. An honest answer is, I was certainly part of  
18 it, but certainly in the World Bank nobody ever makes  
19 the Final Decision that I found, but yes, it was a  
20 major part of it, yeah.

21 The Railways Adviser at the World Bank  
22 typically has the last word.

02:17:09 1 Q. What did your model reveal in terms of what  
2 would have been the long-term driver of profitability  
3 for FVG in the absence of the Lesivo Resolution?

4 A. Without a question, the real estate. In  
5 fact, this surprised me in the development of the  
6 model, but it's very clear that when you look at the  
7 relative performance, that real estate was the  
8 controlling element in its value.

9 Q. Now, besides your and Mr. MacSwain's  
10 project--well, strike that.

11 Let me ask you, with regard to the real  
12 estate, what did you rely upon for your input?

13 A. Mr. MacSwain's inputs. I discussed his work  
14 thoroughly with him a number of times, and I know he  
15 visited Guatemala, and I relied upon his work.

16 Q. Now, besides your and Mr. MacSwain's  
17 projected values for railway operations and real  
18 estate, respectively, were there any other key inputs  
19 into your calculations of RDC's damages?

20 A. Well, of course, it all comes together  
21 through the Weighted Average Cost of Capital that  
22 Dr. Pratt developed.

02:18:13 1 Q. Please explain to the Tribunal how it all  
2 comes together through the Weighted Average Cost of  
3 Capital.

4 A. Well, the model projects anything in nominal  
5 dollars; that is, the dollars of that year. The way  
6 then they're equated to being dollars of the same year  
7 is through the Weighted Average Cost of Capital, which  
8 also serves economically as a discount rate or as an  
9 accumulation rate if you're bringing values forward.

10 Q. Now, is your model separated into the amount  
11 of the investment or sunk costs versus lost profits?

12 A. Yes, it is. The first section of the model  
13 deals with the lost investment or in the investments  
14 that were made and lost.

15 The second two deal with railway operations.

16 The fourth one deals with real estate, and  
17 the fifth part deals with adding them together.

18 Q. Okay. Look at Table 1 to your Rebuttal  
19 Report, if you will, and that's at Tab 1 in the  
20 notebook.

21 What does that table show?

22 A. That table shows the timing and the amounts

02:19:34 1 of monies that were invested into FVG.

2 Q. And does it bring them up-to-date to 2006  
3 dollars through the use of the Weighted Average Cost  
4 of Capital?

5 A. It does in the final line where it says value  
6 in EOY--sorry, End of Year 2006 dollars.

7 Q. Okay. And the total dollar amount invested  
8 in nominal terms is shown where?

9 A. Two, three lines above that, the 19,025,323.  
10 That's entitled "total dollar investment."

11 Q. Okay. And does this sheet also show shutdown  
12 expenses?

13 A. It does.

14 Q. And then when you use the 12.9 percent  
15 interest rate to bring the investment amounts up to  
16 date in 2006, what's the result?

17 A. Well, the total is 42,943,553.

18 Q. And that's on the last line?

19 A. That is.

20 Q. The fourth column over?

21 A. That's right.

22 Q. Okay. Now look at Table 8 to your Rebuttal

02:20:47 1 Report, and that's the next page.

2 I'm sorry, that's the last page.

3 Tell the Tribunal what Table 8 represents.

4 A. That shows the elements of the claim and then  
5 shows how they are added together. The first element  
6 is the same number you just saw the accumulated value  
7 of the lost investment.

8 The second one is the recovery of shutdown  
9 expenses. These are the expenses they incurred in  
10 order to terminate the business.

11 The third line shows the lost-profits claim,  
12 which is--that's the projection of the operations of  
13 the railway and real estate.

14 The fourth--then you have the total revised  
15 damages claim.

16 And then the lease income received 2000-2010  
17 is a negative item because these are incomes that they  
18 received and should be deducted from the claim.

19 And then the bottom line, which I've colored  
20 green, is total net damages.

21 Q. Now, please explain to the panel how you--how  
22 your model computes the lost the profits.

02:22:07 1           A.    The lost profits forecast the revenues and  
2    costs of the railway forecast, the revenues of the  
3    real estate.  It brings them all together into one  
4    model.  It then calculates the Net Present Value of  
5    the earnings, and then it deducts from that an  
6    amortized amount of the accumulated value of the lost  
7    investment, and then it reports the Net Present Value  
8    of that flow, which is 22,188,540.

9           MR. FOSTER:  Okay.

10          PRESIDENT RIGO:  Thank you, Mr. Foster.

11          Mr. Debevoise.

12                            CROSS-EXAMINATION

13          BY MR. DEBEVOISE:

14          Q.    Good afternoon, Mr. Thompson.  My name is  
15    Whitney Debevoise.  Represent the Republic of  
16    Guatemala in these proceedings, and I will be asking  
17    you some questions about your reports.

18                Mr. Thompson, when were you first retained  
19    for this assignment?

20          A.    I am not sure.  May of 2007, possibly.

21          Q.    Okay.  And--

22          A.    But I don't guarantee that.  That's my

02:23:35 1 recollection.

2 Q. And shortly thereafter, on the 14th of June,  
3 Claimant Requested this Arbitration, submitted its  
4 Request for Arbitration in this case; correct?

5 A. I don't know.

6 Q. Are you aware that the relief and remedies  
7 sought in that Request for Arbitration were for an  
8 amount totaling no less than \$65 million?

9 A. No, I'm not.

10 Q. Okay, for the record, that's Paragraph 70 A  
11 of the Request for Arbitration.

12 In your First Report, Mr. Thompson, you  
13 conclude that the total estimate of damages to RDC as  
14 a result of the lesivo is \$64 million.

15 A. I think so--

16 Q. Let's take a look at your--

17 (Simultaneous conversation.)

18 PRESIDENT RIGO: Please again for both the  
19 counsel and the Expert, wait for each Party to have  
20 finished speaking because we are interpreting  
21 simultaneously and our court reporters, and they have  
22 to be able to identify who it is speaking.

02:24:56 1 THE WITNESS: I apologize. I think we're  
2 both very involved in this.

3 You're correct, it says 64,035,859.

4 Q. Did you help to compute the 65 million-dollar  
5 figure that Claimant put in their Request for  
6 Arbitration?

7 A. I had nothing to do with that.

8 Q. Okay. And when you made your assessment of  
9 damages both in your First Report and in your Second  
10 Report, you were analyzing two different revenue  
11 streams; correct?

12 A. The revenue stream for real estate certainly  
13 changed. The revenue stream on the railway didn't  
14 change at all.

15 Q. But for the real estate revenue stream, you  
16 were relying heavily on the analysis conducted by  
17 Mr. MacSwain; is that correct?

18 A. That's correct.

19 Q. And you were relying exclusively on that  
20 input from Mr. MacSwain, weren't you?

21 A. Subject to discussion with him, but yes.

22 Q. Okay.

02:26:25 1           A.    I certainly didn't develop any of the real  
2    estate estimates myself.

3           Q.    Right.  And did you form an independent view  
4    about the reasonableness of the estimates that he  
5    provided to you?

6           A.    Only that he and I discussed them.  He  
7    discussed his methods and his 40 years of experience  
8    at doing this sort of thing, and I thought that  
9    sounded reasonable, and I didn't question him beyond  
10   that point.

11          Q.    Okay.  Thank you.

12                    Now, I think counsel for the Claimants asked  
13   you about the scope of your engagement, Mr. Thompson.  
14   Do you recall that question?

15          A.    Yes, I do.

16          Q.    And do you recall your answer to that  
17   question?

18          A.    Not verbatim.

19          Q.    Did you say something about the scope of your  
20   engagement being to ascertain the circumstances under  
21   which Ferrovías went out of business?

22          A.    Yes, I did, or at least I think I said that.

02:27:32 1 Q. If I direct you to Paragraph 4 of your First  
2 Report--that would be on Page 3 of the First  
3 Report--do you see that?

4 A. Yes.

5 Q. Could you please read us the content of  
6 Paragraph 4.

7 A. "I was asked by Claimants, Railroad  
8 Development Corporation, (RDC), and Ferrovías  
9 Guatemala, (FVG), to assess the experience of railway  
10 concessioning in Guatemala from the perspective of  
11 FVG, RDC, and the Government of Guatemala, and to  
12 estimate the Fair Market Value of FVG's Usufruct and  
13 RDC's investment in FVG immediately prior to the  
14 Declaration of Lesivo in order to determine the  
15 monetary damages RDC and FVG have suffered as a result  
16 of the Declaration."

17 Q. All right. And is there anything in there  
18 about the circumstances under which Ferrovías went out  
19 of business?

20 A. I was speaking extemporaneously in my first  
21 answer, and this is the way I wrote it, and this is  
22 the way I meant it.

02:28:51 1 Q. And did you have a specific purpose in mind  
2 when you examined the experience of railway  
3 concessioning from the perspective of the Government  
4 of Guatemala?

5 A. Yes, because I had done the same thing in  
6 Argentina, Brazil, Chile, Uruguay, and Mexico, among a  
7 number of other countries.

8 Q. And you felt that was relevant to this  
9 proceeding?

10 A. I felt that the conduct of the Government was  
11 crucial to the way in which concessions are awarded  
12 and succeed.

13 Q. And I noticed in Paragraph 2 of your  
14 statement you said that you had experience working in  
15 railway privatization or concessioning that included  
16 Guatemala; is that correct?

17 A. I did. I did.

18 Q. Could you please tell us about that  
19 experience with Guatemala.

20 A. I was in Guatemala in, I think, 1990--I want  
21 to be absolutely certain of the dates--1995, probably,  
22 at a conference with Government officials in which we

02:29:59 1 discussed potential concessioning of the railway and  
2 the terms under which that concessioning should be  
3 awarded. And my advice to them at that point was that  
4 they should concession the railway because of the  
5 experience elsewhere in Latin America, that the  
6 concessioning terms should be very relaxed because  
7 asking for such things as advance cash payments would  
8 be inappropriate given the fact that the railway had  
9 essentially been destroyed by the Government for the  
10 last 20 years and had been out of service and was  
11 going to be out of service for a long time.

12 I subsequently had meetings with Guatemalan  
13 officials in Washington in which we discussed the same  
14 kind of issues, and had a number of meetings in the  
15 Bank on the same issue, where we considered whether if  
16 Guatemala asked us for a loan we would be willing to  
17 grant it.

18 So, yes, I was involved in this in Guatemala  
19 in some detail.

20 Q. But did you ever undertake any formal, I  
21 guess what the Bank would call Technical Assistance  
22 under--from the Bank, or was this just informal

02:31:13 1 talking?

2 A. No, we did not, for two reasons. Primarily  
3 we did not because the Government of Guatemala never  
4 pursued the opportunity; and, second, because both the  
5 Bank and the IFC, I was uniquely a member of the  
6 Analysis Committee at the IFC as well as the IBRD--  
7 (Cellphone noise.)

8 A. --we concluded that the lack of interest of  
9 the in improving the railway and specifically the  
10 Government's unwillingness or inability to deal with  
11 the squatter issue would simply make it impossible to  
12 have any kind of lending relationship.

13 Q. And that's because the Bank has very strong  
14 policies on relocation of peoples who are affected by  
15 Bank projects; is that correct?

16 A. It has very strong policies, and it is also  
17 willing to assist in the financing of proper  
18 relocation, and I've been involved in a number of  
19 those as well.

20 Q. Right. But it's an expensive proposition,  
21 isn't it?

22 A. I don't know what you mean by "expensive."

02:32:22 1 It depends by the country and the circumstances. It  
2 can be expensive in some countries and, by our  
3 standards, not terribly expensive in others.

4 But the insistence is that it be done fairly  
5 and properly.

6 Q. And I think you described earlier this wave  
7 of concessioning that took place. I think this was a  
8 time when economic theory was perhaps captured by the  
9 expression, "the Washington Consensus." Is that the  
10 case?

11 A. I'm not an economist, and I've never followed  
12 those kind of fashions. I was pushing railway  
13 concessioning because I thought the private sector can  
14 run a freight railway better than the public sector  
15 can.

16 Q. All right. And would it be fair to say that  
17 not all of the concessioning projects that had been  
18 undertaken by countries have been successful?

19 A. Yes.

20 Q. And would it also be fair to say that one  
21 factor which frequently repeats itself in connection  
22 with failed projects is overoptimistic projections on

02:33:58 1 things like traffic by the investor?

2       A.    I certainly think there have been  
3 overoptimistic projection, but frankly if I had to  
4 pick the number one cause of failure, it would be the  
5 government's conduct after the concession. We had  
6 many countries in which governments supported the  
7 concessions in every way, and those concessions, by  
8 and large, did quite well. We had other countries in  
9 which the Government's heart was not in it. They  
10 didn't follow through on their obligations, and the  
11 concession had great difficulty.

12       Q.    Subsequent to leaving the Bank, have you done  
13 any consulting work for RDC?

14       A.    None.

15       Q.    Have you maintained any kind of relationship  
16 with RDC?

17       A.    I see Mr. Posner from time to time at railway  
18 conferences or other meetings, but no.

19       Q.    Would you say that you're sort of a fan of  
20 RDC's? You're trying to--you've tried to promote  
21 their success?

22       A.    Not that I know of, no. I mean, I admire

02:35:07 1 what he's accomplished. He's done a pretty good job  
2 running his railway, but I'm not a fan of theirs any  
3 more than I'm a fan of the Union Pacific or the  
4 Southern Pacific or any other railway.

5 Q. Could we show Exhibit C-74, please.

6 I'm showing you an e-mail from Henry Posner  
7 to Bill Duggan, Jorge Senn, and with apologies to  
8 Mr. Pietrandrea--I have a difficult last name as well  
9 to pronounce, so I apologize to him--with a copy to  
10 Brad Knapp, concerning World Bank contacts for  
11 financing for FVG.

12 Could you read us the paragraph numbered 3 in  
13 that e-mail, please.

14 A. Sure. It says, "Lou Thompson made an  
15 extemporaneous speech to the effect that he could  
16 personally attest"--"Lou Thompson made an  
17 extemporaneous speech to the effect that he could  
18 personally attest that, "Henry's been here numerous  
19 times and tried, and squatters have, in fact, been a  
20 big problem, but where there's a will, there's a way,  
21 and we should try to help him."

22 That's exactly what I remember Henry Posner

02:36:35 1 saying.

2 Q. I believe if I read this e-mail correctly,  
3 that he is quoting you as saying this; is that not the  
4 case?

5 A. Henry--Lou Thompson made an extemporaneous  
6 effect speech to the effect that he, Henry, or I can  
7 attest--okay. I can attest--I misunderstood that. I  
8 can attest that he's been there a number of times and  
9 tried, and squatters have, in fact, been a problem,  
10 but where there's a will, there's a way, and we should  
11 try to help him. That's exactly what I said earlier,  
12 that the Bank had seriously considered working with  
13 Guatemala, either Bank or IFC, and we were frustrated  
14 by the Government's unwillingness either to seek a  
15 loan or to deal with the squatter problem.

16 Q. And you used the word "we" there.

17 A. We, the Bank, or IFC. I definitely--having  
18 promoted railway concessioning in many countries, I  
19 thought Guatemala was a good opportunity to pursue  
20 that.

21 Q. Okay. And the date on this e-mail is...  
22 could you please read that for us.

02:37:52 1 A. It says March the 11th, 2005.

2 Q. Okay. This was after you left the Bank?

3 A. That was after I left the Bank.

4 Q. Yes, okay. Did you ever hear Mr. Posner  
5 express the view that the Bank should give more  
6 concern to traffic safety in Guatemala and less  
7 consideration for squatters?

8 A. Goodness, no. I certainly--in the Annual  
9 Reports that I read, one of the major chapters in his  
10 Annual Report was how much progress he was making on  
11 safety. I don't think any railway operator would ever  
12 sacrifice safety for anything.

13 Q. I didn't mean to suggest that for a minute,  
14 Mr. Thompson. And I've read those Reports, and I  
15 commend Mr. Posner for his concern with safety at the  
16 railroad. My question was whether he felt that road  
17 safety, safety on the highways of Guatemala should be  
18 given a higher value than protection of squatters'  
19 resettlement rights.

20 A. I'm not aware of that.

21 Q. Did you attend a railway symposium here at  
22 the World Bank in 2007, where Mr. Posner was present

02:39:20 1 and gave a presentation?

2 A. Quite possibly. I don't remember that, but  
3 it's quite possible.

4 Q. All right. But he might have taken that  
5 point of view at that symposium?

6 A. I don't know.

7 Q. And he might have submitted a loan  
8 application to the Inter-American Development Bank  
9 suggesting that the squatter rules should be waived  
10 because road safety should take a higher value?

11 A. I have no knowledge of that.

12 Q. All right, thank you.

13 Now, if we return to Paragraph 4 of the  
14 Report, your First Report, where you talked about the  
15 scope of your engagement, you were asked to estimate  
16 the Fair Market Value of the Ferrovías Usufruct and  
17 RDC's investment; is that correct?

18 A. Yes.

19 Q. And you used a Discounted Cash Flow  
20 methodology to do that; is that correct?

21 A. Calculating the Fair Market Value, yes.

22 Q. Yes. And can you--could we put up CLEX-01,

02:40:30 1 please.

2 (Pause.)

3 MR. DEBEVOISE: Could you scroll to Page 451,  
4 please.

5 BY MR. DEBEVOISE:

6 Q. Mr. Thompson, do you see the paragraph which  
7 begins, "Fair Market Value, then."

8 A. Yes.

9 Q. Could you please read us that paragraph.

10 A. Sure.

11 "Fair Market Value, then, is the price a  
12 hypothetical buyer would pay (and at which a  
13 hypothetical seller would sell) based on (1) the  
14 expected economic returns to the interest, (2) the  
15 expected risks of realizing those expected returns,  
16 and (3) consideration of alternative investments and  
17 rates of return available in the marketplace."

18 Q. Thank you.

19 So, is it your conclusion that a hypothetical  
20 buyer would have paid \$63.8 million for Ferrovias at  
21 the time of the Lesivo Declaration?

22 A. That isn't what we said. We said a

02:42:43 1 hypothetical buyer would pay 22 million amortizing the  
2 sunken investments. 63 million is not the  
3 hypothetical value of the operation.

4 Q. So, the expected value of the lost profits  
5 was actually 30.1 million before you applied the  
6 amortization--

7 A. Before the amortization, yes, that's right.

8 SECRETARY SEQUEIRA: Mr. Thompson, can you  
9 make a pause and just make sure that he has finished  
10 the so that it is in the record and your answer is in  
11 the record.

12 THE WITNESS: Surely.

13 SECRETARY SEQUEIRA: Thank you.

14 THE WITNESS: Sorry, again, I'm engaged.

15 BY MR. DEBEVOISE:

16 Q. And yet, even though that was the Fair Market  
17 Value, you added lost investments on top of that;  
18 right?

19 A. That is correct.

20 Q. And then you made an amortization which you  
21 said in your Second Report, I think, would account for  
22 double counting, would take care of that; is that

02:43:56 1 right?

2 A. That's correct.

3 Q. But this question of adding something on and  
4 then amortizing it away is not something that's  
5 mentioned in Dr. Pratt's statement that you read a few  
6 minutes ago, is it?

7 A. No.

8 I would assume that the question had not come  
9 up in this context when he was writing this paragraph,  
10 and I would assume that you had a chance to  
11 cross-examine him on this this morning that you asked  
12 that question of the person who could answer it.

13 Q. So, would it yield the same result had you  
14 not considered lost investments at all?

15 A. I'm not sure I understand your question.

16 Q. Well, the question is about your  
17 amortization.

18 A. Yes.

19 Q. If--

20 A. What's the question?

21 Q. If you took the value of the money invested  
22 and you updated and then you amortized it, should that

02:44:55 1 not come out to the same value as the DCF method that  
2 you used?

3 A. No, not necessarily. The approach that was  
4 used was to calculate the lost investment and bring  
5 that up to its current value, calculate the Discounted  
6 Cash Flow of the earnings and then amortize the lost  
7 investment against the earnings that I--that I  
8 understand that that is a way that has been used to  
9 eliminate what some called "double counting," and  
10 that's exactly the way we did it.

11 Q. All right. So, would you normally recommend  
12 to your clients that they would pay both the DCF and  
13 the investment carried out by the previous owner?

14 A. It would depend on the circumstances.

15 By the way, the question here is not what I  
16 would pay for a railway. It is what the FVG lost in  
17 Guatemala and what they might have earned in the  
18 future, not what I would pay for it.

19 Q. But I thought your instruction was to value  
20 Ferrovías's Fair Market Value.

21 A. I think there is an additional statement that  
22 says, "and the value of their investment." Am I

02:46:06 1 correct?

2 Q. Okay. Now, we talked earlier about the real  
3 estate valuations.

4 A. Yes.

5 Q. Did you notice that his valuations changed  
6 rather significantly between his First Report and his  
7 Second Report?

8 A. Yes, I certainly did.

9 Q. And you considered that his inputs on this  
10 were reasonable the first time he did them?

11 A. I thought they were reasonable the first time  
12 he did them, but he felt that in order to be very  
13 conservative so that no one would challenge him. He  
14 decided to shift some of the things out in time and to  
15 reduce some of the others. He did that, and I didn't  
16 know that I necessarily agreed with him, but I felt  
17 that he was trying to be more reasonable, and that's  
18 why he did it, as far as I know.

19 Q. But the question before the Tribunal today  
20 isn't whether something is more conservative than  
21 something else, is it?

22 A. The question before the Tribunal, as I

02:47:22 1 understand it, is ultimately what is a reasonable  
2 compensation for what was done, and I believe that's  
3 exactly what Mr. MacSwain was trying to do.

4 Q. And there was still a fairly significant  
5 swing in value, so did you ask yourself what could  
6 possibly account for that? Did you disagree with him?

7 A. No, I did not. He and I discussed this, and  
8 he convinced me that in order to be as conservative as  
9 he could that he should make these adjustments.

10 Q. Okay.

11 A. I was acting against the interest of FVG. We  
12 discussed it, and it seemed reasonable.

13 Q. Are you aware that he forecasts--forecasted  
14 in the First Report a 12-fold increase in real estate  
15 earnings in the very first year?

16 A. And I never calculated the multiple, but that  
17 doesn't surprise me, no.

18 Q. And did you ask him if this was possible?

19 A. Yes, and his answer was that--as I recall,  
20 the answer was that with the support of the Government  
21 they would start receiving a lot of the right-of-way  
22 monies that were being generated informally and that

02:48:48 1 they would be able to receive them formally. When  
2 you're starting from a very small base, you can  
3 multiply anything by 12 and not end up with a great  
4 deal more.

5 Q. Did he show you any evidence that made you  
6 think that was reasonable?

7 A. I didn't really question him on that. I had  
8 again you had a chance to cross-examine him on that.

9 Q. And then in his Second Report he introduced a  
10 ramp-up theory for the revenues which were introduced  
11 into your model; is that correct?

12 A. That's correct.

13 Q. Okay. Did he do that because Dr. Spiller  
14 criticized him?

15 A. No, I don't think so. I think that  
16 he--again, it was the same motivation as before: In  
17 order to present something that was--that was  
18 reasonable and defensible.

19 Q. But the evolution in terms of the ramp-up of  
20 the flows is significantly different between the two  
21 reports. How could you think that both were  
22 reasonable?

02:50:04 1           A.    I thought the first one was reasonable.  I  
2        would still defend it.  It was his judgment in order  
3        to present numbers that would not be challengeable at  
4        all, that he should adopt a little bit more  
5        conservative approach.  That was his judgment, not  
6        mine.

7           Q.    Okay.  And the revenues from the railroad  
8        side of this business are very small in your results;  
9        correct?

10          A.    The net income from the railway side is  
11        relatively small.  The contribution to net present  
12        value is relatively small, yes.

13          Q.    So, of a total valuation of \$65 million, is  
14        that really your conclusion on damages, or is that  
15        Mr. MacSwain's conclusion on damages?

16          A.    I'm not sure I understand that question.  
17        That doesn't--that's not formulated properly.  What  
18        are you asking?

19          Q.    All right.  Let's take a look at Exhibit  
20        Number 1, which counsel directed you to before.

21                    If we look down under the 2006 column--

22          A.    Are you talking Table 1 now?

02:51:36 1 Q. I thought this was Exhibit 1 to your Second  
2 Report, but I could be wrong.

3 A. There were a number of tables in that  
4 exhibit. It's the table reference that I need.

5 Q. It's the lost investment claim calculation.  
6 I think it's the one that's in the book that was given  
7 to us today that we already talked about.

8 A. That's Table 1 of Exhibit 1.

9 Q. Table 1 of Exhibit 1, excuse me. Thank you  
10 for helping us out.

11 If we look down the column for 2006, we see a  
12 certain amount of net investment for the year; is that  
13 correct? Could you tell us what that net investment  
14 was for the year.

15 A. 1,353,630.

16 Q. And do you see below that the number of years  
17 before End of Year 2006?

18 A. Yes.

19 Q. And you put in one there; is that correct?

20 A. Yes.

21 Q. And then you have the WACC multiplier?

22 A. That's correct.

02:52:42 1 Q. 1.129?

2 A. In this case, yes.

3 Q. Okay. So, is the implication of what you  
4 have done there that the entire \$1,353,630 came into  
5 the company on January 1, 2006?

6 A. That is the way that is worked, yes, so that  
7 to that extent, it may well overstate the Net Present  
8 Value slightly.

9 I could have used half year escalators. I've  
10 actually recalculated that based on half year  
11 multipliers, and it really doesn't make very much  
12 difference.

13 Q. But that is a bias toward RDC in this case,  
14 no?

15 A. Well, yes, but if you'll look at the other  
16 column, the 1350, you will note that I did not  
17 discount that, and I should have, and had I discounted  
18 that the same way, that would have removed almost as  
19 much in value as I would have added by using half  
20 years.

21 Mathematically, there are so many different  
22 calculations that need to be performed that worrying

02:53:40 1 about half years was not going to change anything.

2 Q. But the more common valuation technique is to  
3 use half years, is it not?

4 A. Not that I know of.

5 Q. Let's talk for a minute about the Weighted  
6 Average Cost of Capital in your reports.

7 A. All right.

8 Q. In your First Report you applied a 10 percent  
9 discount rate to your calculations; is that correct?

10 A. That's correct.

11 Q. And I think if we turn to Paragraph 54 of  
12 your Report, we'll see the bases on which you  
13 justified using the 10 percent discount. If we look  
14 in the last sentence of Paragraph 54; is that correct?

15 A. Yes.

16 Q. You said that 10 percent is a common standard  
17 for use in analyzing and valuing long-term  
18 infrastructure investments.

19 A. That's correct.

20 Q. All right. And did you have any source for  
21 that number?

22 A. Yes, I did.

02:54:42 1 Common practice at the World Bank was to use  
2 10 percent. I believe the Government of Guatemala  
3 used 10 percent in its analyses. I've subsequently  
4 done some research on this, and I was surprised to  
5 find out that in the U.S. Government, OMB Circular 894  
6 actually requires the U.S. Government to use a  
7 7 percent rate, although they permit sensitivity  
8 analysis between 4 and 10, but I did not regard  
9 10 percent as an improper rate, and I still don't.

10 Q. And, in fact, the second justification you  
11 cited here because there is no citation for the first  
12 one, the second justification was that this was the  
13 discount rate that was used by Ferrovías in its  
14 Usufruct bid proposal; is that correct?

15 A. That was certainly my understanding, yes.

16 Q. Okay.

17 A. And acceptable to the Government.

18 Q. And, in fact, it was required by the  
19 Government, was it not?

20 A. Well, yes.

21 Q. But that's not what you said in your Report.  
22 You said that that was Ferrovías's?

02:55:53 1           A.    Let me make that more precise.  That  
2   Ferrovías was required by the Government to use still  
3   doesn't make 10 percent sound unreasonable.

4           Q.    I see.

5                    You think that's the rate that Ferroviás  
6   would have used--that Ferroviás would have used, left  
7   with its own devices?

8           A.    That, I do not know.

9           Q.    Now, the third reason that you state there  
10   was that it's common use in real estate valuation  
11   analysis; is that right?

12          A.    That was the rate that Mr. MacSwain used  
13   always in order to convert a fixed payment into a  
14   series of annual payments.

15          Q.    Okay.  Why don't we take a look at  
16   Mr. MacSwain's Report, his First Report,  
17   Paragraph 4.2.  Would you put that up on the screen,  
18   please.

19                    On Page 3 of the Report, please.

20                    If we could focus on Page 3, Paragraph (c),  
21   do you see that there?  Paragraph (c).

22          A.    Yes.

02:57:37 1 Q. Okay. "I have assumed that simple ground  
2 leases would have to have a minimum annual rate of  
3 return of at least 10 percent." So, he wasn't saying  
4 that 10 percent was the rate, was he?

5 A. It's the rate he was using.

6 Q. But it could have been a lot more, couldn't  
7 it?

8 A. I'm sure any investor would like more. I'm  
9 sure they would like the highest return they could  
10 get.

11 Q. And, in fact, when Dr. Pratt did his  
12 analysis, he came out with a higher rate, didn't he?

13 A. He came out with 12.9 percent.

14 Q. Um-hmm. And I think in your Second Report in  
15 Paragraph 20--if we could bring that up, please, this  
16 is on Page 7, Paragraph 20. Here you're responding on  
17 the question of the discount rate, and you're saying  
18 that Dr. Pratt has calculated that a more appropriate  
19 Weighted Average Cost of Capital should be slightly  
20 higher, 12.9 percent, and you deferred to that. Do  
21 you see that?

22 A. Yes, um-hmm.

02:59:03 1 Q. Okay. And you're telling us that the  
2 difference of almost 30 percent is only slightly  
3 higher when we're talking about discount rates?

4 A. Yes.

5 Q. 300 basis points?

6 A. It's a lot less than 18.7 percent, which is  
7 what Spiller wants to do.

8 Q. Um-hmm. But in any case, even though you  
9 justified your 10 percent assumption in your First  
10 Report, it turned out not to be the right one; right?

11 A. No, I think that's incorrect. I would be  
12 happy to continue to defend 10 percent. But in order  
13 again to make the best use of Dr. Pratt's expertise, I  
14 agreed to use his number.

15 Q. I think if we look at--I apologize. I have  
16 forgotten already, Tab 1 to Exhibit 1, is that the--

17 A. Table 1.

18 Q. Table 1. I will write it down so I could  
19 remember this time. Table 1.

20 You have, if we look at the shutdown expenses  
21 column, a value of \$1,350,429; is that correct?

22 A. Yes, that's correct.

03:00:46 1 Q. Could we please put up CLEX-06 from Second  
2 Spiller.

3 I direct your attention to the numbers at the  
4 bottom of this page, which I think are the components,  
5 the major components of this item. Suppliers and  
6 operations expenses, \$710,000.

7 A. Yes.

8 Q. And the railroad was still running in 2007,  
9 until October; correct?

10 A. The railway was. I think the last train ran  
11 in September of 2007.

12 Q. September of 2007.

13 A. Yes.

14 Q. And payroll?

15 A. I see that.

16 What I don't see there is any indication of  
17 exactly when it was expended--

18 Q. But you certainly looked into in your model  
19 because you had all the numbers month by month.

20 A. The model is not month by month, but the  
21 model is based on the data that was furnished to me by  
22 Mr. Hensler, and I cite that in my report. I did not

03:02:35 1 attempt to argue with his accounting determination of  
2 what was--what was what.

3 Q. Okay. And the last item here is the FEGUA  
4 Canon and Trust Fund payments, 125,000; correct?

5 A. Yes.

6 Q. And that's directly related to the  
7 functioning of the railroad; correct?

8 A. I honestly don't know how to characterize  
9 that.

10 Q. All right. So, among this total of more than  
11 a million dollars, you claim that this is all shutdown  
12 expenses?

13 A. That is what I have added into the model.  
14 This is what was provided to me by the accountants,  
15 and I did not argue with them on this.

16 Q. You did not argue with them?

17 A. No.

18 Q. You just took it at face value, very good.

19 A. That's correct.

20 Q. So, it would be certainly open to the  
21 Tribunal to rethink this one.

22 A. I think everything is open to the Tribunal to

03:03:28 1 rethink, if they wish to.

2 Q. Now, in your analysis, you formed some views  
3 about the economic wisdom of pursuing the  
4 rehabilitation of the South Coast line, did you not?

5 A. Yes, I formed a conclusion about both the  
6 financial and the economic wisdom.

7 Q. And was your conclusion from the perspective  
8 of Ferrovías as an investor, that they should not  
9 pursue that investment?

10 A. My conclusion was that the total Net Present  
11 Value of the cash flow of the operation of the railway  
12 would be slightly less if they pursued the Pacific  
13 side than if they did not.

14 Q. Okay. And in your Second Report you noted in  
15 Footnote 3, did you not, on Page 4, that the values  
16 you had calculated were End of Year 2007 as opposed to  
17 End of Year 2006; is that right?

18 A. That refers to the First Report. In fact,  
19 the values in the Second Report are EOY 2006.

20 Q. That's correct.

21 A. That's correct.

22 Q. I'm just kind of left wondering why you did

03:05:49 1 the first one with 2007 if your assignment as you  
2 stated in the beginning of your First Report was to  
3 define the value at the time of the lesivo.

4 A. Well, I honestly cannot answer that question  
5 for you. I believe that we at that point were under  
6 the apprehension that there would be some kind of  
7 decision around 2007, and so we should look at End of  
8 Year 2007 as the appropriate index year. That  
9 clearly--we now know that wasn't true, and all of my  
10 numbers have now been--and this is something that  
11 deserves emphasis, by the way--that all of the numbers  
12 are, as best I can determine them, End of Year 2006,  
13 and any post-Award interest, if there is any, would be  
14 computed on that basis, not 2007.

15 Q. And I think in response to this last question  
16 you just said "we." Who is the "we"? Yourself and  
17 who else?

18 A. Mr. MacSwain, I'm sure.

19 Q. Mr. MacSwain. You thought--Mr. MacSwain  
20 thought the railroad was going to close down in 2007?  
21 You were discussing that with him?

22 A. We discussed the whole issue.

03:06:59 1 I don't know. It's an interesting question  
2 who "we" is.

3 Q. I think that we in the Tribunal are probably  
4 equally interested in the answer to that question.  
5 Can you answer the question?

6 A. I know that we held extensive discussions of  
7 this Report, and this is with counsel and Mr. MacSwain  
8 and the other people who were looking at this, RDC as  
9 well, FVG as well, and I know that we had originally  
10 concluded that I should express my numbers, and my  
11 assignment as End of Year 2007, and then subsequently  
12 decided to reset all of the numbers to 2006, and  
13 that's what's been done.

14 Q. Okay. And then if I can direct you to  
15 Paragraph 21 of your Second Report, you see there  
16 where it says that it's not surprising that experts  
17 will reach somewhat different conclusions in  
18 projections over 42 years in a small, Developing  
19 Country like Guatemala?

20 A. Yes.

21 Q. Isn't that the real vulnerability in the  
22 analysis here?

03:08:22 1 A. I'm not sure I know what you mean.

2 Q. Well, if you continue on to read that  
3 paragraph, you said something about, I believe that  
4 for every factor or parameter in my projections there  
5 is arguably overly optimistic, there are many others  
6 that are overly pessimistic, and therefore you think  
7 the net result is reasonably possible.

8 That's a kind of a rough justice argument,  
9 isn't it?

10 A. Well, actually, Dr. Spiller in his Second  
11 Report says, if I might paraphrase it, I think it's in  
12 Footnote 44 or Footnote 47 of his Report. He says,  
13 basically that it is well settled here, quoting  
14 himself with approval, I think, it is well settled  
15 that forecast profits are either certain or  
16 speculative, and I think that's a very false  
17 dichotomy.

18 In fact, there is no certain projection of  
19 profits. There can be speculative ones, but, in fact,  
20 there's a lot between certain and speculative. There  
21 is reasonable and professional, and I believe that the  
22 forecasts that I developed are reasonable and

03:09:31 1 professional.

2 I would not expect any two economists to  
3 agree on any 42-year forecast. Certainly that was my  
4 experience at the World Bank, and I'm sure that that  
5 would be the case here.

6 Q. In preparing your Report, did you take a view  
7 on the question of competition between the railroad  
8 and trucks?

9 A. Inherently, yes.

10 Q. No, in the specific case of Guatemala?

11 A. I did not use a modal split model using the  
12 coefficients that one might use for a modal split  
13 model, no.

14 Q. And why was that?

15 A. Because the data do not exist to do such a  
16 thing. We can only base a forecast on what has been  
17 happening and then what might happen in the future. I  
18 did not attempt to model trucking competition per se.

19 It is modeled indirectly in that in the  
20 forecast that I had, I showed that the railway traffic  
21 at the port never rose to more than about 7 or  
22 8 percent of the traffic from the part. The rest of

03:10:37 1 the traffic would be truck, but I didn't have an  
2 explicit model of rail versus truck.

3 Q. And did you take note of the statements in  
4 the Annual Reports, particularly the letters written  
5 by Mr. Posner about the stiff competition from trucks?

6 A. I certainly did.

7 Q. And that didn't affect your analysis in any  
8 way?

9 A. No. I mean, it does in the sense that you  
10 have to look realistically what the railway can  
11 achieve, and that's exactly what I think I did.

12 Q. Now, in Paragraph 34 of your Second Report,  
13 you use as a comparison the fuel efficiency of U.S.  
14 Class I railroad industry; is that correct?

15 A. Yes, I did.

16 Q. But Ferrovias was a low Class II railroad,  
17 wasn't it?

18 A. Yes, that's correct.

19 Q. And you still think that was a proper  
20 comparison?

21 A. Oh, absolutely.

22 In fact, the U.S. railway--the ratio of U.S.

03:12:01 1 railway fuel to expenses is about 11 percent, Class I  
2 railways. My model allowed the FVG percent to rise to  
3 almost 50 percent, which I knew was unrealistic, but I  
4 left it there because I wanted to make sure that the  
5 expense base for other things would be adequate. If,  
6 in fact, you allowed that FVG ratio to be maintained  
7 at 35 percent rather than 11 percent, it would  
8 increase the value of the company by about  
9 \$4.3 million, and if you allowed it to be held to  
10 30 percent, which is still almost three times the U.S.  
11 percentage, the value of the company Net Present Value  
12 would increase by about \$7 million.

13 Q. And in Paragraph 36 of your Second Report you  
14 referred to a little discussion that you and  
15 Dr. Spiller had about the capacity of Ferrovías to--

16 A. I didn't have the discussion with  
17 Dr. Spiller.

18 Q. Well, that was a metaphor for the exchange of  
19 Expert Reports.

20 And I think he suggested that you had not  
21 included any investment to increase capacity to handle  
22 the higher traffic that you were projecting, and you

03:13:29 1 responded that it was not explicitly addressed in the  
2 model, but you had sort of taken care of it anyway.

3 A. Yes, that's correct.

4 Q. Is that the hallmark of good valuation  
5 analysis?

6 A. This model has 28 explicit variables. It has  
7 27 different places where growth rates are used. It  
8 has about nine different growth rates. It has a  
9 number of other variables. It's an extremely complex  
10 model. Trying to build into it an explicit investment  
11 part of the model I thought would be too complex, and  
12 I thought it would just build another area to argue.

13 However, as I pointed out in my Report, first  
14 of all, I allowed the expenses for maintenance of  
15 Rolling Stock and right-of-way to increase faster than  
16 other expenses, and as I just pointed out, that the  
17 fuel expenses are probably much higher than they need  
18 to be. Either of those would make up for any  
19 shortfall in the maintenance of the right-of-way.

20 As Dr. Spiller pointed out, the U.S. Class I  
21 railways tend to spend around 20 percent of their cost  
22 on maintenance and capital expenditure; however, the

03:14:57 1 density of traffic on U.S. railways is 117 times what  
2 it would have been in Guatemala, and so I would expect  
3 them to spend a little bit more.

4           But even if you brought the Guatemala ratio  
5 up to the same 20 percent, which I think is not going  
6 to be necessary, that would have required an addition  
7 of \$4.3 million or so to the Net Present Value of the  
8 railway, and that would easily be overwhelmed by  
9 savings on fuel, as I pointed out, or there were--the  
10 Trust Fund that should have been funded between  
11 2000--I mean, 1999 and 2007, there was the Trust Fund  
12 contributions from COBIGUA, and there were the future  
13 Trust Fund contributions having to do with real  
14 estate, the 10 percent of the real estate.

15           The sum of those over the period of time  
16 would be \$50 million or present value of a little over  
17 \$8 million. Any one of those, as I said, implicitly  
18 would be more than enough to make up for any shortfall  
19 in right-of-way maintenance or capacity.

20           Q. Now, you've had another one of these  
21 metaphorical discussions with Dr. Spiller about the  
22 question of amortization of the buildup in the NCC

03:16:26 1 model. Do you have any comment about that, or do you  
2 leave that to Dr. Pratt?

3 A. That's not a question. I don't know how to  
4 comment on that.

5 Q. Would you care to comment on that?

6 A. No. I mean, give me a question, and I will  
7 answer it.

8 Q. I think I have one final question for you, if  
9 I can find the proper reference. Would you please put  
10 up the Annual Report for 2005. It's Exhibit C-27(h).  
11 And if we could go, sorry, to RDC001277, please.

12 And I direct your attention to the right-hand  
13 column to the last sentence of the second full  
14 paragraph that begins with, "The longer answer is."  
15 Could you please just read that.

16 A. "The longer answer is we're supporting a  
17 business whose ultimate value we do not yet know."

18 Q. Okay. Thank you very much.

19 MR. DEBEVOISE: I have no further questions.

20 PRESIDENT RIGO: Mr. Foster, redirect?

21 MR. FOSTER: I don't have any further direct.

22 I think it probably would be more productive

03:18:32 1 for the time to be spent on any questions the panel  
2 has than for me to be posing my questions.

3 I just would like to point out one thing in  
4 connection with some of the questions from  
5 Mr. Debevoise. He was questioning the issue of the  
6 calculation of the shutdown cost and the numbers that  
7 went into the shutdown costs. Those numbers all came  
8 from Mr. Hensler and Mr. de León, whom the Respondent  
9 chose not to cross-examine.

10 THE WITNESS: Thank you.

11 MR. DEBEVOISE: Now that we've had testimony  
12 from Claimant's counsel on the issue, I will just let  
13 the Tribunal look at the exhibit for itself and make  
14 its own conclusions, thank you.

15 QUESTIONS FROM THE TRIBUNAL

16 ARBITRATOR EIZENSTAT: Mr. Thompson, you in a  
17 sense have a sort of unusual and unique perspective  
18 here. You're obviously retained by the Claimant, but  
19 you had had a prior association with the Government of  
20 Guatemala. Was that in your capacity with the World  
21 Bank when they were considering privatization?

22 THE WITNESS: Yes, sir, it was.

03:20:08 1           ARBITRATOR EIZENSTAT: And in reading your  
2 statement, you gave them certain advice about how to  
3 structure the Usufruct in terms of flexibility and not  
4 seeking too much in up-front payments and so forth.

5           THE WITNESS: That's correct.

6           ARBITRATOR EIZENSTAT: Can you summarize that  
7 and why you made that judgment.

8           THE WITNESS: By then, this was in the mid-  
9 to late Nineties. A pattern of railroad concessioning  
10 was being established, and some of the earlier lessons  
11 that we had learned were that the--it was not proper  
12 to ask that a concessionaire pay a lot of money up  
13 front and then try to make it back over the years  
14 because it tended to reduce the number of competitors  
15 that we got, and it also tended to increase the risk  
16 of the person making the investment. That's why it  
17 reduced the number of competitors.

18           And especially in Guatemala where, as I said,  
19 the Government had essentially demolished the railway  
20 over the past 20 to 25 years, and where the railway  
21 had been out of business for over three years, I  
22 simply felt that no one would be willing to take that

03:21:25 1 on if they had to invest a lot of money up front, and  
2 it would be far better to ask them for a percentage of  
3 gross revenues, which is easy to account for. Net  
4 revenues are always hard to account for because your  
5 accountants are in charge, but the gross--percentage  
6 of gross revenues in that that would induce the  
7 largest number of competitors, which it did, I think.

8           ARBITRATOR EIZENSTAT: And at least when you  
9 had your World Bank hat on, and given the role that  
10 you played at the Bank, you saw Railroad Development  
11 as being an important driver of economic development  
12 in Developing Countries, I take it.

13           THE WITNESS: Well, in fact, sir, I think the  
14 tragedy here was not development alone, but also  
15 Guatemala because I felt--and the Government of  
16 Guatemala, when they announced the concession, they  
17 said--

18           MR. DEBEVOISE: I would like to object to  
19 this. We are not here to pass judgment on the country  
20 in this type of context.

21           THE WITNESS: I don't believe I passed any  
22 judgment on Guatemala. I simply said it was a tragedy

03:22:30 1 for Guatemala, and I mean that exactly as I said it.

2           The Government had an opportunity in economic  
3 terms to save a lot more money than actually FVG was  
4 ever going to make in profits, and because of  
5 increased highway safety, reduced highway wear,  
6 improved economics of transportation, and that  
7 opportunity was lost.

8           ARBITRATOR EIZENSTAT: If you could turn to  
9 Page 19 of Paragraphs 76, 77, and 78 of your First  
10 Statement, please.

11           THE WITNESS: What were the paragraph  
12 numbers, sir?

13           ARBITRATOR EIZENSTAT: 76 through 78,  
14 Pages 18 and 19.

15           THE WITNESS: Yes, sir.

16           ARBITRATOR EIZENSTAT: You indicate that  
17 first it's manifestly impossible to operate a railway  
18 without Rolling Stock.

19           Now, at least it's my understanding that even  
20 after lesivo that FVG continued to control the Rolling  
21 Stock in this situation. Is that something you're  
22 aware of?

03:24:06 1           THE WITNESS: Yes, I believe they continued  
2 to control it.

3           ARBITRATOR EIZENSTAT: And do you have any  
4 perspective on why they might not have operated the  
5 Rolling Stock that they had?

6           THE WITNESS: I would--if I were a railway  
7 operator, I would be very reluctant to operate Rolling  
8 Stock that might be taken away from me in the short  
9 term because I wouldn't want to maintain it. I  
10 wouldn't want to take the responsibility for  
11 maintaining Rolling Stock that suddenly might be taken  
12 away.

13           As soon as that Rolling Stock was under  
14 threat, the ability to invest in the railway or to  
15 plan to operate it was equally under threat.

16           ARBITRATOR EIZENSTAT: Now, four years later  
17 and the Rolling Stock still has not been taken away.  
18 I don't know if--does that change your view?

19           THE WITNESS: No.

20           ARBITRATOR EIZENSTAT: You also make it clear  
21 in your economic analysis that the great bulk of the  
22 revenues would come not from the operation of the

03:25:10 1 railroad and the Rolling Stock, but from the  
2 exploitation of the rights-of-way under separate  
3 Contract 402.

4 THE WITNESS: Yes, sir.

5 ARBITRATOR EIZENSTAT: And is it your  
6 understanding that 402 was not declared lesivo?

7 THE WITNESS: I really can't render an  
8 opinion on that. I don't know.

9 ARBITRATOR EIZENSTAT: Do you know of any  
10 reason why the railroad could not have continued or  
11 cannot continue today to exploit their right-of-way by  
12 charging revenues for those who are using it?

13 THE WITNESS: Oh, I think they should.

14 ARBITRATOR EIZENSTAT: And do you know  
15 whether they have been doing so.

16 THE WITNESS: Well, we showed real estate  
17 revenues that had been derived since 2007 through  
18 2010. We deducted those from the claim--I deducted  
19 them from the claim.

20 ARBITRATOR EIZENSTAT: They're quite modest,  
21 though, are they not?

22 THE WITNESS: What is it, \$2.2 million, over

03:26:14 1 the five-year period.

2           ARBITRATOR EIZENSTAT: Mr. MacSwain talked  
3 about industrial squatters on the right-of-way and  
4 also the leasing of--excuse me, the use of  
5 transmission, electric transmission, lines and poles  
6 on the right-of-way. Is that something you're aware  
7 of?

8           THE WITNESS: I have discussed it with  
9 Mr. MacSwain, but I'm really not a railway  
10 right-of-way Expert or real estate Expert. It has  
11 always been my argument that railways should do their  
12 best to exploit whatever real estate assets they have.

13           ARBITRATOR EIZENSTAT: In Paragraph 77, I  
14 just want to try to probe, and maybe you can give the  
15 Tribunal just your perspective because you did consult  
16 with the Government. In many ways they followed your  
17 advice in terms of how to first making a decision to  
18 privatize the railroad; second, in structuring the  
19 Usufruct. Is that correct?

20           THE WITNESS: I'm not sure it would be fair  
21 say they followed my advice, but certainly what they  
22 did was consistent with my advice.

03:27:25 1                   ARBITRATOR EIZENSTAT:  And you felt that the  
2  Usufruct--

3                   (Overlapping conversation.)

4                   ARBITRATOR EIZENSTAT:  You felt that the  
5  Usufruct was a reasonable construct and not--and  
6  consistent at least with the kind of advice you had  
7  given?

8                   THE WITNESS:  Yes, I did.

9                   ARBITRATOR EIZENSTAT:  You talked throughout  
10 your statement about the damage done to the Government  
11 in the Declaration of Lesivo and what's transpired.  
12 I'm trying to get a perspective; certainly would help  
13 me try to understand because again you dealt with the  
14 Government.  What would be--from your knowledge, what  
15 would be the advantage to them of declaring the  
16 railway Rolling Stock part lesivo?  What might they  
17 see as a gain to them?  Countries don't normally act  
18 in ways that are against their interests.  What  
19 interest would you see from your working with them  
20 with your World Bank hat on in making that?

21                   THE WITNESS:  I have wracked my brain, sir,  
22 and I cannot come up with a good answer.  I do know

03:28:58 1 that had the World Bank been involved in a loan to the  
2 Government of Guatemala, we would have expressed  
3 extreme disapproval if they had done something like  
4 this. But what their motivations were, I don't know.

5 ARBITRATOR EIZENSTAT: You mentioned in 77  
6 under normal circumstances any alleged technical and  
7 in this case insignificant defects in these contracts  
8 presumably could and should have been resolved by  
9 negotiation or simple agreement, especially when, in  
10 this case, it should have been in the obvious interest  
11 of both Parties to correct any alleged defects.

12 That's the statement you made?

13 THE WITNESS: Yes, sir, and I believe that  
14 very strongly.

15 ARBITRATOR EIZENSTAT: Have you--again, I'm  
16 asking you to put your World Bank hat on. You've had  
17 experience with other countries. Have you seen this  
18 kind of situation in other Developing Countries who  
19 would privatize their railroads? And can you give us  
20 any perspective from other experiences that you might  
21 have had.

22 THE WITNESS: I have never seen this kind of

03:30:04 1 thing in any other country. I know that in Bolivia,  
2 when the Government changed, there has been a change  
3 in attitude about the private sector, and that has not  
4 been good for the concessions, but I know of no other  
5 country in which the Government effectively forced the  
6 railway out of business.

7           ARBITRATOR EIZENSTAT: And in Paragraph 78  
8 and more broadly, are you telling the Tribunal that  
9 notwithstanding the fact that the railroad continued  
10 to control the Rolling Stock that, from your  
11 perspective, you think that trying to operate the  
12 Rolling Stock after lesivo would somehow have not been  
13 a reasonable thing to do?

14           THE WITNESS: I think that lesivo put the  
15 operation of the railway at very great threat, and I  
16 think it caused the railway then to wonder what would  
17 happen with money they put into maintaining the  
18 railway stock, if it were taken away. I think it made  
19 the customers ask why should we contract with the  
20 railway to ship cargo when the railway may not have  
21 its Rolling Stock. I think it could have caused  
22 any--it could have caused the real estate investors to

03:31:30 1 have the same attitude.

2 I think as soon as the Government's attitude  
3 toward the railway was made clear by lesivo that it  
4 put the entire operation under threat, and I think it  
5 probably frustrated the operation of the railway.

6 ARBITRATOR EIZENSTAT: There is a  
7 doctrine--whether it applies here or not is another  
8 story, but there's sort of a doctrine that we have in  
9 American jurisprudence about mitigating damage. Now,  
10 here under Contract 402, which was the Right-of-Way  
11 Contract--and I know you're not--that's not your  
12 expertise, the exploitation of rights-of-way, but from  
13 your experience and your knowledge of this particular  
14 situation, and the fact that Mr. MacSwain has told you  
15 that there are a lot of industrial users and utilities  
16 that are using this right-of-way, would it have been  
17 prudent for RDC to more aggressively try to continue  
18 to exploit its right-of-way, particularly since again,  
19 in your own studies, this is a substantial  
20 part--indeed, the substantial part--of their expected  
21 profits?

22 THE WITNESS: I believe it would have been

03:32:54 1 prudent for them to exploit their right-of-way as  
2 effectively as they could, subject to trying to run  
3 the railway and subject to the investment resources  
4 that they had available. They had on to make choices,  
5 but, yes, I think they should have tried to--

6 ARBITRATOR EIZENSTAT: Are you saying in any  
7 way that the Declaration of Lesivo on the Rolling  
8 Stock affected their ability to do so?

9 THE WITNESS: It would in the sense that any  
10 potential partner would take the Declaration of Lesivo  
11 and the Government's attitude toward the company  
12 itself into account if they were thinking about a  
13 50-year investment project and you don't know what the  
14 Government's attitude is, you're going to be careful.  
15 That doesn't mean they might not go ahead, but they  
16 would think a lot about it before they did.

17 ARBITRATOR EIZENSTAT: The figures for  
18 overall damages when you take both the loss, sunk  
19 value--sunk investment and profits comes to some  
20 \$60 million.

21 THE WITNESS: Yes, sir.

22 ARBITRATOR EIZENSTAT: This is on a base in

03:34:02 1 which the company had not turned a profit in any one  
2 year up to the point they left. Is that your  
3 understanding?

4 THE WITNESS: That's correct.

5 ARBITRATOR EIZENSTAT: So, on what basis  
6 would you assume that they could have turned things  
7 around so dramatically not having been able to  
8 generate a profit for the first six years or seven  
9 years or eight years?

10 THE WITNESS: I'm not sure that reflects a  
11 turnaround. If you look at their performance in the  
12 first five years before--through 2005, before, as  
13 Dr. Spiller admits, the performance in 2006 was  
14 affected by lesivo, but if you look at their  
15 performance 2000 through 2005, they grew faster during  
16 that period of time, the railway did, than any other  
17 concession in Latin America did in its first five  
18 years. Their container growth was 40.5 percent  
19 compounded annually, which is pretty spectacular.  
20 They actually had broken even in 2004, and the trend,  
21 up through 2004 at least, was pretty positive.

22 There's no reason to assume that a great

03:35:18 1 turnaround was required, just continued progress in  
2 the direction they were going.

3           ARBITRATOR EIZENSTAT: What do you consider,  
4 since we'll be hearing from him shortly,  
5 Dr. Spiller's--and I have read the statements and  
6 wouldn't expect you to summarize each one, but what do  
7 you consider the most central critique he makes of  
8 your calculation, and what is your response to that  
9 fundamental critique? Is it the overestimation of  
10 capacity? Is it the percentages that were used by  
11 Dr. Pratt? As you look--you're an experienced person.  
12 What do you see as the heart of his critique, and  
13 what's your response to it?

14           THE WITNESS: It's very hard for me to answer  
15 that question, sir. I really--he critiqued.

16           ARBITRATOR EIZENSTAT: It may be hard for  
17 you, it may be harder for us.

18           THE WITNESS: He had three critiques, I  
19 think. One of them was the investment issue, which I  
20 think I've answered. One of them was the traffic  
21 growth issue, which again I think I've answered. And  
22 the third was the issue of the so-called "double

03:36:42 1 counting," and I think that's been discussed in  
2 detail. And so I don't--I wouldn't--I don't know how  
3 to characterize them beyond that.

4           ARBITRATOR EIZENSTAT: Well, let me go back  
5 then to the double counting. I want you to  
6 explain--perhaps explain yet again why you believe  
7 that this calculation of adding both the investment  
8 return, sunk investment accumulated over the years and  
9 the profit is not from your perspective double  
10 counting.

11           THE WITNESS: Well, because what we actually  
12 did was to take the lost investment and write it off  
13 against the future profits, so that value has been  
14 written off and, therefore, strictly speaking, there  
15 is no double counting. Dr. Spiller's argument.

16           ARBITRATOR EIZENSTAT: And you did that by  
17 the amortization?

18           THE WITNESS: And we did that by the  
19 amortization, which is exactly the way the finance  
20 profession or the accounting profession would do this.  
21 The economics profession would argue, as Dr. Spiller  
22 does, that you should write off the Net Present Value

03:37:58 1 or rather--you should readjust the value each year,  
2 but that is not what is done in accounting and is not  
3 what is done in normal financial analysis of rates of  
4 return.

5 ARBITRATOR EIZENSTAT: So, we're facing here  
6 a really difference in philosophy between the way the  
7 accounting profession treats the issue and the way the  
8 economics profession--

9 THE WITNESS: Yes, sir.

10 ARBITRATOR EIZENSTAT: And from your  
11 perspective, has he accurately portrayed the economic  
12 profession's view of how to look at this?

13 THE WITNESS: He has, but it's interesting.  
14 His version creates a nullity of the idea of  
15 amortization because if you follow his approach and  
16 revalue each year by the value of the money,  
17 arithmetically the value that you write off is exactly  
18 equal to the value you start with, and so you may as  
19 well not do it in the first place. That's the  
20 mathematical result of the way he's arguing.

21 ARBITRATOR EIZENSTAT: On Page 34, Table 11,  
22 you have two scenarios: Real estate plus Atlantic

03:39:51 1 operations, and real estate plus plant and Pacific.

2 Would you believe that the Scenario 2, particularly  
3 with the Pacific, is even more conjectural because  
4 Phase I had already been completed, and Phase II, the  
5 southern coast hadn't, or is that not your view?

6 THE WITNESS: Well, I think the problem was  
7 that probably operations on Phase I had been more  
8 recent than operations in Phase II, and quite possibly  
9 the state of the infrastructure on the Pacific side  
10 was much more destroyed and in worse shape.

11 Also, the proposal on the Pacific side was  
12 convert the railway from 3-foot gauge to 4'8 and a  
13 half, which involved a much greater investment and,  
14 therefore, a much more difficult project to undertake.

15 ARBITRATOR EIZENSTAT: Okay. Thank you.

16 PRESIDENT RIGO: Mr. Foster?

17 MR. FOSTER: No, sir.

18 PRESIDENT RIGO: Mr. Debevoise, on Secretary  
19 Eizenstat's questions?

20 MR. DEBEVOISE: Thank you.

21 FURTHER CROSS-EXAMINATION

22 BY MR. DEBEVOISE:

03:41:29 1 Q. Mr. Thompson, I think that Secretary  
2 Eizenstat reviewed with you Paragraph 77 of your First  
3 Report, and he focused on the language about technical  
4 problems, and you said, I believe, in the fourth line  
5 there in this parentheses, and in this case  
6 insignificant defects.

7 A. Are you a Guatemalan Government lawyer?

8 A. No.

9 Q. But you have advised a lot of Governments,  
10 haven't you?

11 A. Yes, I have. Normally not on legal matters,  
12 but--

13 Q. Right, exactly. So, you're not really in a  
14 position to determine whether a legal concern raised  
15 by Guatemalan lawyers is significant or insignificant,  
16 are you?

17 A. No.

18 Q. Thank you. And if the President of a country  
19 were being told that he might have personal liability  
20 if he didn't do something, you would call that  
21 insignificant?

22 A. If I were the President, I would not.

03:42:36 1 Q. Okay. Thank you.

2 You talked about the approach that was taken  
3 here, and you said that it was basically followed, an  
4 approach that you would have followed. Would you have  
5 accepted a bid response which, in response to a  
6 request to furnish prior year's financials said, we  
7 are a private company; therefore, we're not going to  
8 give you our financials?

9 A. I don't know. It would be determined by the  
10 terms of the bidding. If the bidding said you have to  
11 finish and you didn't, I would have been concerned,  
12 but I don't know.

13 MR. FOSTER: I apologize, but I don't see how  
14 that followed from anything Secretary Eizenstat asked  
15 him.

16 PRESIDENT RIGO: The question had not been  
17 asked.

18 MR. DEBEVOISE: I believe that he was asked  
19 by Secretary Eizenstat about his experience as a World  
20 Bank adviser to countries, and he testified that he  
21 thought that what the Guatemalan Government had done  
22 had been to follow advice that he would have given,

03:43:42 1 and I'm asking a question about the very bidding that  
2 was conducted here, and the record will reflect that  
3 an answer that I described was precisely the answer  
4 RDC and Ferrovías gave when they participated in the  
5 bid.

6 THE WITNESS: If I might say, I never said  
7 that I gave the Government of Guatemala any legal  
8 advice whatsoever, nor did I say that I advised on the  
9 exact terms of the concessioning. I only advised them  
10 on the general terms of the concessioning. If they  
11 had asked me should they have a term either requiring  
12 or not requiring a company to furnish years of prior  
13 Financial Reports, I wouldn't have had any advice at  
14 all.

15 BY MR. DEBEVOISE:

16 Q. So, your position was that, notwithstanding  
17 the fact that it takes a substantial amount of capital  
18 wherewithal to rehabilitate an 800-kilometer railroad,  
19 the financial capability of the bidder was not a  
20 relevant matter?

21 A. I didn't say that. I said that I wouldn't  
22 have advised them one way or the other on including

03:44:43 1 such a provision in the concessioning documents.

2 Q. And my final question, Mr. Thompson?

3 A. I'm about to run out of water.

4 Q. We can get you some more, but this is the  
5 final question. We're all going to take a break here  
6 in a minute, I hope. My question is that you were  
7 asked by Secretary Eizenstat about the differences  
8 between the approach of the accounting profession and  
9 the economics profession.

10 Is accounting your profession?

11 A. No. I have an MBA from Harvard, and I have  
12 studied accounting issues and techniques, but, no, I'm  
13 not an accountant.

14 Q. Okay, thank you. No further questions.

15 PRESIDENT RIGO: So, well, Mr. Thompson,  
16 thank you so much.

17 THE WITNESS: Thank you.

18 PRESIDENT RIGO: You may leave.

19 (Witness steps down.)

20 PRESIDENT RIGO: I have a question but for  
21 you, for the counsel.

22 MR. FOSTER: Do you want us up there?

03:46:52 1           PRESIDENT RIGO: No, no, no, no. For the  
2 record.

3           We asked you to address in your closing  
4 statement a particular issue, as you may recall, and  
5 which was whether the lesividad could be negotiated  
6 away.

7           Now, it has come up, and it is something that  
8 we have seen in the reports and the various Memorials,  
9 the issue of the liability that the President would  
10 incur in relation to the Declaration of Lesivo, and I  
11 think we would appreciate some clarification in that  
12 respect, and that's related--that's related to the  
13 question that I had asked earlier, whether lesividad  
14 can be negotiated away, what are the implications for  
15 the President in that respect.

16           And the other question, I think, that we  
17 would appreciate is now we have seen all these poles  
18 in the pictures and various buildings and so forth, I  
19 mean, particularly when it comes to the industrial  
20 squatters, as they are called, which is, we are told,  
21 power companies, power lines, to the extent that you  
22 know, who owns these companies? Who is the owner? I

03:48:25 1 mean, you don't need to answer now, but if you have  
2 to--if you know it, I mean, by all means.

3 MR. FOSTER: The chart that you have shows  
4 the name of the company, or the initials, the acronym,  
5 for the power company in question. We can--we will  
6 try to find out who are the owners of the power--of  
7 those various power companies, but the chart shows the  
8 names of the power companies, and we will see if we  
9 can't supply you with something like that.

10 PRESIDENT RIGO: Okay. Thank you.

11 Mr. Orta.

12 MR. ORTA: Just since you've raised that  
13 issue, it is Respondent's contention that the Claimant  
14 has not established the authenticity of those photos,  
15 meaning while they have dates that have been  
16 superimposed by someone, it's our contention that they  
17 have not proven that those are pictures of industrial  
18 squatters post-lesivo, notwithstanding the dates that  
19 included on those pictures.

20 PRESIDENT RIGO SUREDO: But who--you are  
21 questioning whether they are there, or that they are  
22 there at the time that is--

03:49:35 1           MR. ORTA: Well, in order to establish, as I  
2 understand it from an evidentiary standpoint, in order  
3 to establish that those are pictures of industrial  
4 squatters on the right-of-way, they need to have  
5 somebody who comes in here and says, on such-and-such  
6 a date I was on the right-of-way. I took the picture,  
7 and, you know, and these are squatters that were not  
8 here pre-lesivo. I don't believe that that has been  
9 established as a matter of evidence yet.

10           And, further, that these are squatters that  
11 are there as a result of the Lesivo Declaration. I  
12 don't think any of those predicates have been  
13 established on the record.

14           MR. STERN: May I respond to those  
15 assertions?

16           PRESIDENT RIGO: Yes, you may respond.

17           MR. STERN: The Third Statement of Jorge  
18 Senn, which is in the record as sworn testimony,  
19 authenticates all of these photos. This is Annex 3 to  
20 his statements, and he authenticates all of these  
21 photos in that statement. So, I don't think there is  
22 any question of foundation of authenticity of any of

03:50:40 1 the photos on the record.

2 I was prepared to have him answer questions  
3 when he came to testify here, but I didn't have enough  
4 time. That was actually the one topic I didn't get  
5 to.

6 ARBITRATOR EIZENSTAT: Would it be possible  
7 to point us to the specific references in Statement 3.

8 MR. STERN: Yes, we can find them and  
9 respond.

10 And then just on the additional point about  
11 the question of whether they were there before or  
12 after lesivo, the purpose of this evidence is not  
13 necessarily for that point. It's to support  
14 Mr. MacSwain's testimony that there is sufficient  
15 demand for the use of the right-of-way by these types  
16 of businesses to use the right-of-way.

17 Mr. MacSwain, as he testified today, it was  
18 his recollection for a lot of these photos he did not  
19 observe those when he visited in 2007, so I think  
20 there is also evidence in the record regarding that as  
21 well, but the main purpose of these photos is to show  
22 the demand for the use of the right-of-way to support

03:51:44 1 Mr. MacSwain's testimony and opinions.

2 PRESIDENT RIGO: Mr. Orta?

3 MR. ORTA: I'm fully aware of the Third  
4 Statement of Jorge Senn, and my objections to the  
5 evidence stand notwithstanding; we can address it in  
6 closing.

7 PRESIDENT RIGO: Just in terms of the  
8 evidence, that has been on the record for a certain  
9 amount of time, or--

10 MR. ORTA: This was filed with Mr. Senn's  
11 Third Statement, I believe. That doesn't change the  
12 legal point that I've just made. In other words,  
13 we've argued in our Memorials--in all of our  
14 Memorials, they have not established causation,  
15 including on the issue of pre- and post-lesivo  
16 squatting. That's a matter of argument we have  
17 included in our--

18 ARBITRATOR EIZENSTAT: Causation may be a  
19 legal determination that we have to make, but I think  
20 the question is: Are you questioning based on  
21 Mr. Senn's Third Report, which again I don't have  
22 fully in my mind in the photos, that these were taken

03:52:50 1 after the Declaration of Lesivo? Are you questioning  
2 that?

3 MR. ORTA: I'd have to reserve it carefully  
4 and I can answer you either later this afternoon or  
5 first thing in the morning, but on the issue of  
6 whether they're pre- or post-lesivo squatters, which I  
7 think is a key issue given the way they have framed  
8 their case, I still believe there is an absolute void  
9 of evidence on that point.

10 ARBITRATOR EIZENSTAT: So, in your judgment,  
11 there's nothing in the record that indicates that  
12 these squatters aren't weren't there pre-lesivo?

13 MR. ORTA: Or that they are there because of  
14 the Lesivo Declaration. It's both points.

15 ARBITRATOR EIZENSTAT: One is a factual issue  
16 and one is a causation issue, which is a legal issue.  
17 I'm just asking you factually, are you suggesting  
18 because if that's the case, then we need to establish  
19 whether this fact can be determined. Are you making  
20 the argument that factually they have not shown that  
21 the squatters were not already there pre-lesivo?

22 MR. ORTA: Right, correct. Nor have they

03:54:01 1 alleged it in the record with evidence. And had they,  
2 then we would have responded with evidence, but they  
3 haven't done that.

4           So, just in response to your point, Secretary  
5 Eizenstat, about whether that is something that they  
6 can now establish for the first time, we would be  
7 prejudiced because we wouldn't have the ability to  
8 respond to with evidence to that point.

9           PRESIDENT RIGO: Mr. Stern.

10           MR. STERN: They had an opportunity to  
11 cross-examine Mr. Senn while he was there and chose  
12 not to cross-examine him on these photographs.

13           And to answer Secretary Eizenstat's question  
14 about where in Mr. Senn's Third Statement does he  
15 authenticate these photographs, I can read from  
16 Paragraph 83 of that statement, and I will read: "In  
17 February and March 2011, I traveled the length of the  
18 entire right-of-way, both the main and rural spur  
19 lines to assess what was the current state of  
20 industrial squatting on the right-of-way in the form  
21 of unauthorized utility poles and power lines. I  
22 discovered that industrial squatters, namely, the

03:55:13 1 power companies EEGSA," E-E-G-S-A; "INDE," I-N-D-E;  
2 "DEORSA," D-E-O-R-S-A; "and DEOCSA," D-E-O-C-S-A, "are  
3 present on essentially the entire right-of-way  
4 including in many instances on both sides of the  
5 right-of-way. After I completed my assessment, I  
6 helped prepare a detailed map which identifies these  
7 industrial squatters and where their unauthorized  
8 utility poles and power lines are currently located  
9 along the right-of-way. That map is Annex 1 to the  
10 Rebuttal Report of Robert F. MacSwain. In addition, I  
11 took several photographs of these industrial squatters  
12 which are identified and described in Annex 3 to this  
13 statement."

14 PRESIDENT RIGO: Do you have anything else to  
15 add, Mr. Orta?

16 MR. ORTA: No. The same evidentiary point  
17 stands.

18 PRESIDENT RIGO: Still also my question  
19 stands, to the extent that you can find out who the  
20 owner of the poles is.

21 So thank you so much. We will break for a  
22 brief moment. Let's start not later than 4:15. Thank

03:56:44 1 you.

2 (Brief recess.)

3 PABLO SPILLER, RESPONDENT'S WITNESS, CALLED

4 PRESIDENT RIGO: We are continuing our

5 session of this afternoon.

6 Good afternoon, Dr. Spiller. I'm going to

7 ask you please--

8 THE WITNESS: How are you?

9 PRESIDENT RIGO: I'm fine.

10 Could you please read the Statement that you

11 have before you the Witness Statement.

12 THE WITNESS: I solemnly declare upon my

13 honor and conscience that my statement will be in

14 accordance with my sincere belief.

15 PRESIDENT RIGO: Thank you.

16 Mr. Debevoise.

17 MR. DEBEVOISE: Thank you, Mr. President.

18 DIRECT EXAMINATION

19 BY MR. DEBEVOISE:

20 Q. Good afternoon, Dr. Spiller.

21 Dr. Spiller, do you have before you the two

22 Expert Reports you have submitted in this case, and do

04:17:17 1 you ratify them and confirm that the Opinions you  
2 express therein represent your objective and  
3 independent professional opinion?

4 A. Yes, these are my Reports.

5 Q. Dr. Spiller, are your professional  
6 qualifications for the assignment you were given set  
7 forth in Exhibit LECG 01 attached to your Report  
8 containing your curriculum, publications and major  
9 presentations and conferences and seminars?

10 A. Well, it's not attached here--it's not  
11 attached here, but I believe that's what it is.

12 Q. Okay. Thank you. Please describe, Dr.  
13 Spiller, for the Tribunal your understanding of the  
14 exercise you were asked to undertake?

15 A. Yes. I was asked to provide my independent  
16 opinion on Claimant's Expert damages assessment.

17 Q. Dr. Spiller, the Tribunal has before it  
18 reports Mr. MacSwain, Dr. Pratt, and Mr. Thompson,  
19 experts presented by the Claimants, as well as two  
20 reports from you. Would you please tell the Tribunal  
21 what the major differences are between the two sets of  
22 reports.

04:18:55 1           A.    Okay.  Let me provide you with the next--with  
2  a slide--

3                   MR. FOSTER:  Excuse me.  I apologize for  
4  objecting, but these slides were just provided to us.  
5  We would have been happy to check them, if we provided  
6  slides that we planned on using last night so that  
7  they could check to make sure that they were  
8  consistent with the evidence, I'm seeing them for the  
9  first time.  I have absolutely no ability to check  
10 these slides, and we object to their use.

11                  MR. DEBEVOISE:  Mr. Foster, I think you  
12 should wait until you see the slides.  I think you  
13 will see the numbers are very familiar.

14                  MR. FOSTER:  I don't have any idea.  I don't  
15 have time to check them, and it's simply if--if you  
16 had supplied them to me last night, I would have been  
17 happy to look at them and determine whether or not we  
18 could do this without objection.  You chose not to do  
19 that.  I object.

20                  MR. DEBEVOISE:  Mr. Foster, I certainly  
21 wasn't going to give them before your experts had  
22 testified?

04:20:00 1           MR. FOSTER: We gave you slides before your  
2 experts testified. This is just isn't the way we do  
3 things.

4           MR. DEBEVOISE: They're all based on record  
5 evidence.

6           PRESIDENT RIGO: Are these slides part of the  
7 record?

8           MR. DEBEVOISE: They're all based on record  
9 evidence, Mr. President. There's nothing new and  
10 invented here.

11          PRESIDENT RIGO: But the slides themselves  
12 are not on the record?

13          MR. DEBEVOISE: Slides themselves are not on  
14 the record, but every single number that appears in  
15 them is in the record.

16          And they're not submitted as evidence  
17 themselves. They're demonstrative to help the  
18 Tribunal understand the numbers that have been  
19 presented to them.

20          (Tribunal conferring.)

21          PRESIDENT RIGO: What the Tribunal proposes  
22 is that we have a brief recess, that you check the

04:21:55 1 slides, there are six slides. And if the figures are  
2 all on the record, I mean, something--and you tell us  
3 how long you need.

4 ARBITRATOR EIZENSTAT: Could I make a  
5 suggestion?

6 If we're going to do this, I mean, I think  
7 that Mr. Debevoise, you should supply to all of us  
8 where in the record each of these figures is shown so  
9 that we can verify that they're substantiated by other  
10 parts of the record.

11 MR. DEBEVOISE: I think you'll see that the  
12 first slide comes from Mr. Spiller's Second Report,  
13 Table 3.

14 ARBITRATOR EIZENSTAT: It's just a copy of  
15 the same Report?

16 MR. DEBEVOISE: It's the same data from those  
17 reports, yes.

18 MR. FOSTER: I don't have any idea how long  
19 it will take us to check these. Our experts have gone  
20 back, have left.

21 The problem is, heretofore, the rules have  
22 been that if you have something that you're going to

04:23:20 1 present, you present it to the other side, and for  
2 some strange reason the rules seem to change now.

3 (Tribunal conferring.)

4 PRESIDENT RIGO: The Tribunal will sustain  
5 the objection. If something that cannot be done  
6 briefly, and we were looking at it, then that's  
7 probably correct, that it cannot be done just quickly  
8 enough.

9 BY MR. DEBEVOISE:

10 Q. Dr. Spiller, could I ask you, please, to  
11 explain the major differences between the damages  
12 assessments in particular also by reference to Figure  
13 Number 1 on Page 16 of your Second Report. You may  
14 start with the major differences and go from there.

15 A. There are four fundamental differences, and  
16 if I may point the Tribunal to Table 3 in the Second  
17 Report in Page 51.

18 In Table 3 of Page 51 there is the  
19 reconciliation between Claimant's experts and my  
20 assessment of damages. In this Table 3, you will see  
21 that Claimant's experts assess damages at--sorry,  
22 assess the Fair Market Value and damages essentially

04:25:31 1 at \$63.8 million of December 2006, while I assess it  
2 at negative 2,715,000.

3 Now, in this table I provide various items  
4 that reconcile the difference, but fundamentally there  
5 are four. The first one is the double counting. As I  
6 Report in my--as I provide in my First and Second  
7 Report, Claimant's experts double count damages  
8 because, to their Fair Market Value--their own  
9 assessment of the Fair Market Value of Ferrovías, they  
10 add to that the--they add to that the--what they  
11 called the lost investments of RDC in Ferrovías.

12 Now, in Table 3, essentially you have these  
13 44--minus 44,294--which are--which is--I cannot use  
14 this math, but in principle will be in the first line  
15 of the second part of the--the second part of that  
16 table.

17 Now, this 44 is netted out later on by 7.8  
18 and other numbers, but the moment you take away that  
19 double counting, a substantial portion of the  
20 difference, more than half of the difference disappear  
21 between Claimant's experts and me.

22 The second large component of difference is

04:27:26 1 that the damages are assessed by Mr. Thompson based on  
2 the real estate assessment of Mr. MacSwain. In my  
3 opinion, Mr. MacSwain had substantial amount of  
4 unsubstantiated real estate revenues, and in this  
5 table you can see that I assessed these  
6 unsubstantiated revenues at approximately \$27 million.

7           So, in between the double counting and the  
8 double counting of losses and the overstatement of  
9 real estate revenues, you have essentially most of the  
10 difference between Mr. Thompson and me.

11           There are two remaining differences, one is  
12 the fact that Mr. Thompson has what I believe a little  
13 aggressive rate of growth of volumes in the railroad  
14 business, but as Mr. Thompson himself explains, the  
15 railroad business does not contribute too much to the  
16 value of Ferrovías; as a consequence, this is a very  
17 minor issue.

18           The final point of difference is discrepancy  
19 with Mr. Pratt on what the discount rate ought to be.  
20 And again, once you take away the double counting and  
21 the unsubstantiated real estate revenues, there is  
22 very little difference between the two Parties, and

04:29:20 1 therefore the WACC plays a very small role after you  
2 clean up these two major problems of double counting  
3 and unsubstantiated real estate revenues.

4 Q. Thank you, Dr. Spiller. Now, you identified  
5 double counting as the largest difference. Could you  
6 please elaborate for the Tribunal.

7 A. Yes.

8 Maybe the Tribunal would benefit by going to  
9 Figure I of Table 16 of my First Report.

10 In essence, Claimant's experts double count  
11 damages. Why? Because there is no disagreement  
12 between Claimant's experts and me in that the Fair  
13 Market Value of Ferrovías ought to be reflecting  
14 essentially what a willing buyer and a willing seller  
15 will agree on the price for changing ownership of  
16 Ferrovías. That's the Fair Market Value of Ferrovías.  
17 That's what a willing buyer will have paid just prior  
18 to the Lesivo for that asset. There is no  
19 disagreement on that. Where we disagree on that is on  
20 what the value is on that particular Fair Market  
21 Value. Claimant's experts attach 30 million to that.  
22 I think the company was worth--the equity value was

04:30:50 1 zero.

2           Now, where there is another--a more  
3 fundamental I would say, disagreement--conceptual  
4 disagreement is that Claimant's experts are, to the  
5 Fair Market Value, these lost investments, which they  
6 value at \$42.9 million.

7           Now, in my First Report, I pointed that these  
8 two concept, the last investments and the Fair Market  
9 Value are essentially two ways of trying to approach  
10 the same thing, which is what is the value of these  
11 investments? What is the value of Ferrovías? One way  
12 you can look at that is by the willing buyer/willing  
13 seller standard, which is the more traditional  
14 standard, that's according to medium (ph.). You could  
15 also make the point that if the rate of return,  
16 internal rate of return of this business was, in fact,  
17 the WACC, the Weighted Average Cost of Capital, then  
18 what they invested in the company brought up the cost  
19 of capital ought to be more or less the same as the  
20 value of Ferrovías. Therefore by adding these two  
21 concepts together, you are doubling the damage, the  
22 alleged damage.

04:32:10 1           Well, Mr. Thompson agreed that there was  
2 double counting in the Second Report, and therefore he  
3 provided a solution to that or a way to get out of  
4 that solution. The way he suggested this can be dealt  
5 with was in the following way, by using what he called  
6 an amortization. That is, he took the \$42.9 million  
7 and he amortized that over a period of 42 years. How?  
8 By essentially dividing 42.9 by 42. And each one of  
9 those amortizations, he computed the present value of  
10 each of those as of 2006.

11           So, now, the present value of \$1 million, one  
12 plus a little bit more in 2007, as of 2006, is not  
13 one, it's around 850,000. 2008 is 800,000. 2011 is  
14 half a million. 2048 is essentially zero.

15           So, he goes and then sums that up. Summing  
16 up those two amortizations in present-value terms is  
17 around, using WACC, approximately 7.9. In the second  
18 column you see now that if you added to the Fair  
19 Market Value the whole lost investment of 42, and then  
20 you adjusted that 7.9, you still have substantial  
21 amount of double counting on the order of 35.1, as you  
22 can see in this chart over there.

04:34:13 1           So, in the first column you have full double  
2 counting. In the second column you have more than  
3 four-fifth of double counting because 7.9 is less than  
4 20 percent of 42.9. So, Mr. Thompson, doing these  
5 particular artificial accounting, if you wish, adds to  
6 the value of Ferrovías 35.1.

7           Now, it is clear that this is  
8 overcompensation. Why is that? Because if you are  
9 trying to bring Claimant to the same position it would  
10 have been absent the Lesivo, you ought to pay him not  
11 more than what Claimant could get from selling  
12 Ferrovías to a willing buyer, and Mr. Thompson  
13 assessed that at 30.1.

14           So, any amount in addition to 30.1 ought to  
15 be, according to this traditional standard of wiping  
16 out the consequences of the measures overcompensation,  
17 and they more than doubled the damages. They add 35.1  
18 to 30; as a consequence, there is more than doubling  
19 of losses.

20       Q.   Thank you, Dr. Spiller.

21           We've talked about the first major difference  
22 between the experts. Now let's talk about the second

04:35:42 1 major difference: Projections of real estate revenues  
2 and why you maintain that they are speculative and  
3 unsubstantiated.

4 A. Okay. I say Mr. MacSwain's estimate of  
5 revenues are unsubstantiated. I may want to bring you  
6 to Figure V of my Second Report. Figure V is in  
7 Page 29, and it's presented in here in this  
8 slide--sorry, in this page.

9 Figure V starts by looking at historical  
10 performance of Ferrovías concerning real estate  
11 operations. As you can see in this chart, Ferrovías,  
12 since its beginning, was involved in real estate  
13 operations and was able to sell or to lease not more  
14 than half a million dollars per year. In fact, these  
15 columns in gray that you see in this chart up  
16 until 2006 are real estate operations.

17 There are two type of real estate operations:  
18 Leasing of right of ways which approximately \$150,000  
19 a year, and leasing of facilities, which is the  
20 COBIGUA facility in Puerto Barrios, which is  
21 approximately \$350,000 a year.

22 So, overall, during the pre-Lesivo period,

04:37:37 1 real estate operations were relatively flat with no  
2 discernible trend at around \$500,000--half a million  
3 dollars per year.

4           Now, in his First Report--one additional, if  
5 I may, one additional note is, the amount of railway  
6 kilometers leased by 2006 were 74, 72.4 kilometers,  
7 okay? Which consisted of essentially four  
8 right-of-way leases, one being the largest at 54 or 52  
9 kilometers and one minimum of just 18 meters, another  
10 one of 1.6 kilometers, and another one of 16 or so  
11 kilometers. 72 at \$150,000 is around, say, \$2,000 a  
12 kilometer per year. That's approximately the business  
13 of rights of way.

14           Now, in his First Report, Mr. Thompson  
15 assumed that from 2006 to 2007, Ferrovias will be able  
16 to sell \$6 million in 2007, and that it will be able  
17 to catapult the number of kilometers from 74  
18 kilometers to around 1200 or 1400 kilometers in one  
19 year. I mention in my Second--in my First Report that  
20 such growth is unheard of, but more than that it's  
21 essentially unsubstantiated.

22           So, in the Second Report, Mr. MacSwain

04:39:30 1 provided a revision in which he provided this type of  
2 chart. As you can see, this chart achieves the  
3 6 million--close to \$6 million by 2012, and at a rapid  
4 growth in leasing as well as in new leasing of  
5 facilities, the 22 facilities, that they have as well  
6 as in the right of way.

7           And in essence, Mr. MacSwain assumes that by  
8 the end of 2012 or so, the whole network, both the  
9 main lines and the rural lines will be leased out  
10 completely having two sets of right of ways leased,  
11 telecommunications, one by telecommunications and one  
12 by electricity distributions.

13           Now, the fundamental problem with the Second  
14 Report of Mr. MacSwain is still it's unexplained how  
15 what Ferrovías was unable to do until 2006, then  
16 suddenly it is able to.

17           Now, normally, when you see--when you expect  
18 a rapid growth is because either the market booms, so  
19 you expect to grow with the market, but the market in  
20 Guatemala for right of ways, Mr. MacSwain provides no  
21 evidence that there is a sudden increase in the market  
22 for right of ways or for real estate in general or

04:41:15 1 because you suddenly provide--have a particular asset  
2 that you can sell that you didn't have before. So,  
3 now Apple invents the iPad and captures a huge market  
4 of iPad, or Apple invents the iPhone and gets millions  
5 sold.

6           There is no innovation here. The  
7 innovation--Ferrovias exists since 1998, and it can  
8 provide the same services that in 2007 as it can  
9 provide in 2000--in 2000-2001.

10           And the failure of MacSwain is to provide any  
11 substantiation to how this will take place.

12           MR. DEBEVOISE: Thank you very much, Dr.  
13 Spiller.

14           PRESIDENT RIGO: Thank you. We can keep to  
15 the time. Thank you.

16           Mr. Foster.

17           MR. FOSTER: Thank you, Mr. President.

18                           CROSS-EXAMINATION

19           BY MR. FOSTER:

20           Q. Good afternoon, Dr. Spiller. I'm Allen  
21 Foster and I represent the Claimant, and I'll be  
22 asking you a few questions this afternoon.

04:42:19 1           While we're on your Figure V on Page 29, let  
2 me just ask you something that might clear up an issue  
3 that was brought up before.

4           Looking at your chart, you were talking about  
5 the COBIGUA lease at Puerto Barrios?

6           A.    Yes.

7           Q.    And you don't--there's no question in your  
8 mind that that lease goes beyond 2015; correct?

9           A.    In fact, in 2015, there is an increase in  
10 revenues.

11          Q.    The revenues double in 2015, and the lease  
12 keeps going until--how long does it keep going?

13          A.    My understanding is until the end of the  
14 concession, and in Figure V you see precisely that  
15 increase in the lease as you see the green--the  
16 green--the green bars are my own assessment of growth  
17 in the Ferrovías real estate business, and what you  
18 see is that the growth until 2015, I project around a  
19 9 percent growth per year, and then in 2015 it has a  
20 jump. That jump comes from precisely the Puerto  
21 Barrios going from 2 percent of Puerto Barrios revenue  
22 or COBIGUA revenues from the facility to 4 percent,

04:43:47 1 and that is perfectly reflected in this chart.

2 Q. Okay. I'm going to try to sum up our  
3 differences with just a few questions, so if I can do  
4 that we'll move right along.

5 If I understand your Report correctly, your  
6 conclusion concerning Fair Market Value and computing  
7 it pursuant to the Discounted Cash Flow method of  
8 assessing future cash flows, that methodology would  
9 produce the same result whether the expropriation was  
10 legal or illegal; correct?

11 A. Correct.

12 Q. Okay. And let me try to do another one for  
13 you.

14 I believe I understand correctly that your  
15 contention with regard to the amortization issue is  
16 that you should gross up the amortized amounts by the  
17 Weighted Average Cost of Capital when they are  
18 subtracted or amortized in the future years; correct?

19 A. Well, let's make this very clear. The  
20 amortization exercise is unheard of.

21 Q. That wasn't my question.

22 A. Excuse me.

04:45:12 1 Q. No, sir.

2 A. No.

3 MR. FOSTER: Mr. President, would you ask him  
4 to answer my question?

5 PRESIDENT RIGO: You have to answer what you  
6 are asked.

7 THE WITNESS: But he asked me for my opinion.

8 MR. FOSTER: No, I didn't.

9 PRESIDENT RIGO: Please repeat the question  
10 so that there is no confusion.

11 BY MR. FOSTER:

12 Q. Your argument is that the amortization  
13 amounts should be grossed up by the Weighted Average  
14 Cost of Capital and then subtracted from the future  
15 income flows; correct?

16 A. No. My argument is that if you are going to  
17 perform this particular exercise by which you are  
18 first adding the absolute value of the lost  
19 investment, and then deducting amortization from the  
20 cash flows, as Mr. Thompson is doing, then you ought  
21 to increase the amortizations by the cost of capital,  
22 by the same factor that you are going to compute the

04:46:21 1 present value of those amortizations in the future,  
2 because otherwise what you're doing is you're  
3 distorting the double counting because you can't claim  
4 that you're eliminating double counting simply by a  
5 trick of discounting.

6           So, if you are adding something and then  
7 forcing that to be depreciated over years, over 42  
8 years--and this is a long period of time--then you  
9 ought to take into account as Rapinsky and Williams  
10 says, the value of time because otherwise you're  
11 creating just for pure artifice of accounting a value  
12 that doesn't exist.

13       Q.    I thought the first part of your answer was  
14 precisely what I was asking you, that your position is  
15 that if you're going to award both the investment and  
16 lost profits that you could gross up the amortization  
17 amounts by the time value of money measured by WACC  
18 and thereby eliminate the double counting; correct?

19       A.    Well, not really.  Again, you know, you have  
20 to be very precise because if you're going to add--if  
21 the exercise--the Tribunal can do whatever it wants in  
22 damage, but if an expert is going to add the value of

04:47:51 1 lost investments and then perform a particular  
2 amortization over 42 years so as to eliminate any  
3 double counting, you have to take into account the  
4 fact that, as Rapinsky and Williams say, an  
5 amortization 10 years in the future is not the same as  
6 the money today, so you have to take into account the  
7 time value of money.

8           As a consequence, the only way to take into  
9 account the time value of money is by increasing the  
10 amortization by the same factor that you're going to  
11 discount it, in that way--in that way you don't create  
12 artificial differences because, as I show, by simply  
13 doing this particular trick, you create double  
14 counting.

15       Q.   And by doing your, if you will excuse me in  
16 calling it a trick, as you've called my experts, by  
17 doing your trick, you eliminate completely the sunk  
18 costs or the investment; correct?

19       A.   No, you eliminate double counting.

20       Q.   But isn't--don't you eliminate the sunk costs  
21 or the investment?

22       A.   You eliminate the double counting. You can

04:49:08 1 compute your damages based on sunk costs if you wish,  
2 and we can discuss that, or you can compute your  
3 damages based on the Fair Market Value. You're fair  
4 to do that, and both are legitimate approaches, and we  
5 can discuss those. What you cannot do is say I have  
6 two ways to measure the value of this apple, and  
7 therefore the value of this apple is the sum of these  
8 two measures or a particular--I get one apple, I take  
9 a bit of it, and I sound one bite less, but I'm  
10 summing up two apples. That you cannot do.

11 But if you wish, we can discuss whether it's  
12 okay to award Claimants lost--what they called the  
13 lost investment.

14 Q. And we will.

15 A. Or not.

16 Q. And we will.

17 All I'm trying to make sure that you and I  
18 understand each other completely, and that is if you  
19 gross up the authorized amounts, what you end up with  
20 is nothing more than the lost profits discounted by  
21 the Weighted Average Cost of Capital.

22 A. Yes, sir.

04:50:13 1 Q. Okay. Now, let me ask you something else.

2 Suppose I told you--I want you to assume for the  
3 purpose of this question that there are electric  
4 company poles and wires over almost the entire right  
5 of way, okay?

6 A. Okay.

7 Q. And assume that these are electric companies  
8 who can afford to pay \$3,200 per kilometer for all of  
9 the poles and wires that they've installed on the  
10 right of way. Got that one?

11 A. I got that one.

12 Q. Okay. And suppose--I want you to assume that  
13 the Tribunal concluded that these electric companies  
14 would pay rent but for the issuance of the Lesivo  
15 Declaration, okay?

16 A. Okay.

17 Q. Now, based upon those assumptions, you would  
18 have to conclude, would you not, that Mr. MacSwain's  
19 calculations of real estate income are not  
20 speculative?

21 A. Well, no, no, not at all because  
22 Mr. MacSwain's analysis is not based on the fact that

04:51:24 1 he assumes the Tribunal will make a determination of  
2 fact such as, A, that these individuals will pay  
3 because the fact is that Mr. MacSwain doesn't know  
4 what the Tribunal is going to do.

5           And, second, I would say more, the fact is  
6 that many of these electricity companies, according to  
7 Mr. Senn and Mr. MacSwain's testimony were there  
8 before the Lesivo. And as far as I understand, and  
9 Mr. MacSwain doesn't say otherwise, these companies  
10 are not paying Ferrovías anything, were not paying  
11 before the Lesivo.

12           In fact, what makes Mr. MacSwain even more  
13 speculative is that Mr. MacSwain says in the Second  
14 Report that, absent the Lesivo, Ferrovías would have  
15 entered into contracts with these utilities, and the  
16 question is why Ferrovías didn't enter into contracts  
17 before? That's why I say that MacSwain is  
18 unsubstantiated because it makes statements that do  
19 not fit what the experience of Ferrovías was: If  
20 Ferrovías could have entered into a contract, then we  
21 should see it.

22           Q. I understand your arguments, and you're

04:52:51 1 taking issue with the assumptions of my hypothetical,  
2 and that's fine for you to do that, but if you assume  
3 the facts that I've given you in the hypothetical,  
4 don't you have to conclude that Mr. MacSwain's  
5 calculations with regard to real estate revenues are  
6 not speculative?

7 A. Sure, because how could--

8 Q. Thank you.

9 A. --the fact that they will remain equally  
10 speculative.

11 Q. Now, I believe I'm correct, am I not, that  
12 nowhere in your Reports do you identify the standard  
13 of compensation that you assert is appropriate for a  
14 violation of the Fair and Equitable Treatment  
15 standard?

16 A. No. I compute damages to Ferrovías from the  
17 claim that by issuing the Lesivo, the business lost  
18 all its value.

19 Q. But nowhere do you say in your Report what  
20 you think the appropriate standard of damages is for a  
21 violation of the Fair and Equitable Treatment  
22 obligation. You're dealing in your Report with the

04:54:12 1 expropriation damages; isn't that correct?

2 MR. DEBEVOISE: I object, Mr. President.

3 It's calling for a legal conclusion.

4 MR. FOSTER: Well, he spends the large  
5 portion of his Report talking about what the  
6 appropriate standard of damages is when a property is  
7 expropriated, and I'm just asking him, is there any  
8 place in his Report where he makes any assertion about  
9 the appropriate standard of damages for violation of  
10 the Fair and Equitable Treatment standard?

11 (Tribunal conferring.)

12 PRESIDENT RIGO: Mr. Spiller, you should  
13 answer the question.

14 THE WITNESS: Yeah, sure.

15 BY MR. FOSTER:

16 Q. Can you show me where that is in your Report,  
17 sir?

18 A. I don't make a distinction between--from the  
19 economic perspective between expropriation of a  
20 business or an impact--any alternative measure that  
21 has the equivalence of destroying a business. From  
22 the perspective of the Claimant, the loss is the loss.

04:55:24 1 Q. Thank you, sir.

2 Now, let's talk a little bit about the Net  
3 Cash Contribution method. I promised you that I was  
4 going to chat with you about that.

5 When do you say that RDC stopped making  
6 investments in this case?

7 A. RDC continued making investments throughout  
8 the period of contributions to Ferrovias throughout  
9 the period prior and after the Lesivo, and it is--I  
10 think these numbers amounts that have been put into  
11 the company are not necessarily in dispute except for  
12 a few thousand dollars.

13 Q. Okay. In your Report, you say that the NCC  
14 approach is appropriate when the expropriation occurs  
15 close to the time of the original investment; right?

16 A. Correct, and, in fact--

17 Q. So, in this case--

18 A. Well, if I may--

19 Q. I'm sorry, I thought you were--

20 A. If I may, the NCC, what I don't know  
21 exactly--we can look at it what they say--but,  
22 essentially what I have written on this is that the

04:56:44 1 NCC is appropriate when you have a company that has  
2 not yet started operating and is in the period of  
3 investment, and prior to starting operating the  
4 company is expropriated or is terminated, in that case  
5 we argue that the NCC could be considered because you  
6 just can't have a measure of performance. In the case  
7 of Ferrovías you have eight years of performance; as a  
8 consequence, the role of the NCC is substantially  
9 diminished because you can see what the company has  
10 done through this period, which is fundamental to be  
11 able to assess use of the Discounted Cash Flow, the  
12 Fair Market Value.

13 Q. You just told me that RDC had not even  
14 completed the investment period yet when the Lesivo  
15 occurred.

16 A. Well, the problem is that Ferrovías was never  
17 able to recover its costs. So, because Ferrovías was  
18 losing money every year, the Claimants provided  
19 particular--essentially a subsidy to cover the cost.

20 And, in fact--in fact, the Ferrovías stopped  
21 investing in 2000 or 2001, and from then on all the  
22 contributions that are received to Ferrovías was

04:58:16 1 purely to cover operation losses. So it's not that  
2 Ferrovías stopped investing. Ferrovías stopped  
3 investing quite while back, but it was unable to cover  
4 its costs.

5 Q. When do you say that Ferrovías stopped  
6 investing?

7 A. Well, you can look at this in a chart, and  
8 you will see that readily. If I have here--look at  
9 Chart 2, Figure II in Page 21. On Page 21, you will  
10 see capital contributions and fixed asset investment.  
11 And you can see that the main investment of Ferrovías  
12 was in 1999 in which it invested 6 million plus of  
13 U.S. dollars. Then it invested in 2000 a little bit  
14 less than half a million, and 2001 a less bit less  
15 than half a million, and then in 2002 I would say it's  
16 almost nothing, 2003, '04, '05, and '06 there is no  
17 record in the accounting books of any investments.

18 So, the additions to fixed assets that the  
19 accounting book shows, show essentially an investment  
20 in '99, six plus million dollars by Ferrovías, and  
21 that's it. From then on, it was just the minimum  
22 investment in 2000-2001 or a little bit.

04:59:50 1           Now, you can see also that--where the money  
2 went from RDC. You can see that in this chart because  
3 in '99 RDC invested or contributed to Ferrovías  
4 something like six-and-a-half million dollars, which  
5 is a little bit more than the fixed assets, but not  
6 that much. But from then on Ferrovías invested less  
7 than half a million, but in 2000 RDC invested more  
8 than 1 million, in 2001 almost 2 million. So the  
9 difference between the investment--the contribution,  
10 sorry, of RDC and the addition to fixed assets of  
11 Ferrovías is to cover the deficit.

12           So, it's not that the amounts--the  
13 contributions of RDC were to go to adding rail stock  
14 or adding improvements in facilities, but rather to  
15 cover operating costs.

16           MR. FOSTER: Mr. President, I know we all  
17 want to hear all of Dr. Spiller's views, but I have a  
18 very limited time, and I would appreciate it if you  
19 would ask him to try to restrain the length of his  
20 answers so that I can try to cover at least a few of  
21 the points that I would like to cover with him.

22           PRESIDENT RIGO: Dr. Spiller, if you can be

05:01:40 1 as succinct as possible, thank you.

2 BY MR. FOSTER:

3 Q. So, if I understand you correctly, Dr.

4 Spiller, let's take a company, as you just said, that

5 had never started business yet and it was

6 expropriated, and the Tribunal thought that it was

7 appropriate to award damages in that case, and they

8 would award damages based upon the discounted value of

9 future cash flows; right?

10 A. If the Tribunal wants to compute the

11 discounted cash flow, fine.

12 Q. Okay. Now, their other alternative would not

13 be to use the NCC method because there has been no

14 investment; right?

15 A. If there is no investment, there is no NCC.

16 Q. Now, let's take another company that has made

17 a substantial investment but has not yet commenced

18 business. If I understand you correctly, that is the

19 business that you say it is appropriate for the NCC

20 method to be used to value.

21 A. Well, you could use the NCC in that case.

22 Q. Okay. Now, let's take a company that has

05:03:00 1 made a substantial investment and has operated a few  
2 years, and for the purposes of this example, let's  
3 assume that they've operated a few years profitably.  
4 Your position would be that the value of that company  
5 is nothing more than the future cash flow?

6 A. You would expect if once the company is in  
7 operation and you can ascertain what future cash flows  
8 are, then a willing buyer will be based--always a  
9 willing buyer bases in future cash flow, always. The  
10 question is how sure you are on that.

11 Q. So, by your methodology, the damages would be  
12 precisely the same for a company that had made no  
13 investment and had not started into business versus a  
14 company that had made a substantial investment but had  
15 not started into business versus a company that had  
16 made a substantial investment and operated a few  
17 years, you get the same results; right?

18 A. I don't see how it follows. It really  
19 depends on what the expectation of the business is.

20 Q. Well, assuming that the expectation of all  
21 three businesses was the same. You would value them  
22 precisely the same way?

05:04:24 1       A.    If the expectations--if a willing buyer is  
2 willing to pay the same for a company in business than  
3 for a company not in business, then the two companies  
4 are different animals; right? Because a company that  
5 is in business already invested has clients, you don't  
6 have to perform the investment. A company that has  
7 not yet invested in a business you have to invest, and  
8 then have you to cut your clients. So the fact that  
9 they have the same value means they are different  
10 animals, not the same company. One may be a computer  
11 company, and another a telecommunications company.  
12 They both maybe value a hundred million. That's okay.  
13 But if you have the same--the same asset before  
14 investment is one thing; after investment is another  
15 thing. Because after investment, much of your  
16 uncertainty is realized. Now we know what this  
17 company is all about. I have a lot more certainty.

18            If the company doesn't exist, it's all in the  
19 paper, well, how do I know how much it's worth?

20        Q.    Okay. Suppose a company made a very  
21 substantial investment and operated for one year at a  
22 loss and was expropriated. Suppose they made a

05:05:46 1 hundred-million-dollar investment, they were start up,  
2 they operated at a loss for a year and was  
3 expropriated. Are you telling us they're worth  
4 nothing?

5 A. No. It really depends again what the  
6 expectations of future cash flows are.

7 Q. Okay.

8 A. Say, for example, we have a lot of startups,  
9 most startups fail. That's the truth. I come from  
10 Berkeley. In the area, you have startups galore, and  
11 none of those remain. So all of them investors  
12 invest, and after a few years the value disappear. It  
13 happens. It happens all the time. You make your bed,  
14 and some beds are good, some beds are bad. Facebook  
15 made a killer, but "startup.com" lost their shirt. It  
16 happens all the time.

17 Q. So, let's suppose you have a company that  
18 makes an extremely large investment and operates two  
19 years, and it's not profitable. Are you telling us  
20 that has no value?

21 A. Again, it depends on what the expectations of  
22 the business is. If it has great expectations and

05:06:53 1 there is agreement that this is a great business may  
2 have a lot of value.

3           The fact that currently lost one year or two  
4 years is not major evidence. The point is if you have  
5 sustained period of losses, well, that should tell you  
6 something about the future. The future cannot be so  
7 rosy if this is a company that is unable to attract  
8 customers.

9           Q. But what you're telling us is that the  
10 valuation of the future prospects is a question of  
11 judgment based upon all of the evidence; correct?

12          A. Based on the evidence, always based on the  
13 evidence.

14          Q. Okay, thank you.

15           Now, let me ask you a little bit about the  
16 Weighted Average Cost of Capital, and in particular I  
17 want to talk to you about the cost of debt. You have  
18 used a cost of debt of something over 18 percent;  
19 correct?

20          A. Correct.

21          Q. And the only example you give of debt in  
22 Guatemala where FVG borrowed money was one loan that

05:08:12 1 was at 16 percent; correct?

2 A. Well, that's one loan. There are other loans  
3 that early on in 1999-98, which were 22, 23 percent.

4 Q. You don't give any of those examples in your  
5 Report, do you, sir?

6 A. They're in the record, in the Annual Reports  
7 of '98 and '99.

8 Q. You didn't consider them important enough to  
9 cite them in your Report, though, did you, sir?

10 A. Well, they are in the record.

11 Q. Did you consider what kind of loan that one  
12 loan at 16 percent was?

13 A. Well, the 16 percent is actually a  
14 collateralized loan, so that it was a loan for a  
15 pickup truck, collateralized on the pickup truck.  
16 Normally collateralized loans are cheaper than  
17 noncollateralized. You can add to that 3, 4 percent  
18 for risk of failure.

19 So, easily, if you're getting a loan at  
20 16 percent, that means your cost of debt without  
21 collateral should be 18, 19, 20 percent, and therefore  
22 that shows in the first Annual Reports--sorry, in the

05:09:27 1 '99--'98, '99, and I think in the 2000, you can see  
2 loans that RDC issued between 20 and 23 percent.

3 Q. You said it was a collateralized loan and it  
4 was a pickup truck. It was \$15,900 loan for a used  
5 pickup truck; isn't that right?

6 A. I don't know if was used.

7 Q. And are you telling the Tribunal that  
8 you--that you're asserting used car loans, interest  
9 rates on used car loans, whether they're  
10 collateralized or not, are higher than business loans?  
11 I mean, are lower than business loans? I'm sorry.

12 A. Well, the--

13 Q. That's not your experience, is it, sir?

14 A. Excuse me, counsel.

15 Essentially whether a company takes a loan or  
16 not depends on whether he can get easier access to  
17 capital. That's the fact. If you can get a loan  
18 cheaper than 16 percent, you get it.

19 Q. And, indeed, in this case--

20 A. Excuse me.

21 Q. You weren't done?

22 A. Not done.

05:10:40 1 Q. That doesn't surprise me, sorry.

2 A. In this case, Ferrovías is a company which,  
3 given its lack of profitability, given that the  
4 accounting--the audited statement says that every year  
5 that the future is uncertain, its losses exceeds more  
6 than--may exceed more than the legal amount--legal  
7 limit of 60-something percent, to issue loans under  
8 those circumstances are very difficult, very  
9 difficult.

10 So, we assess the cost of capital--the cost  
11 of loan, the cost of debt based on the standard, which  
12 is to look at a company which will be rated C, look at  
13 the margins for a rated-C Company, and the margins  
14 essentially give you loan--cost of debt of  
15 approximately 15 percent, 16 percent, to which you add  
16 the country risk, can which is around 2 percent or  
17 less. You're up to 18, 18-and-a-half, 19 percent.

18 Q. Yes, sir. If you could just try to restrain  
19 yourself, I would appreciate it.

20 Let me ask you just a little bit about the  
21 size premium issue.

22 You've used the 10(b) decile, and Dr. Pratt

05:12:04 1 used the 10 decile in its entirety; is that correct?

2 A. That's correct, yes.

3 Q. And you would agree with me that the tenth  
4 decile, in its entirety, includes the 10(b) decile  
5 figures?

6 A. Yes. And it includes companies which are  
7 many, many times larger than Ferrovías. If you look  
8 at the companies in the 10 decile, you have companies  
9 which are 10 or more larger than Ferrovías market  
10 capitalization. According to Mr. Thompson, the market  
11 capitalization absent, and the decile is 30 million.

12 Now, in 10(b), you have companies that size.  
13 In 10, you have companies way above 300 million. So,  
14 it is very risky to compare the size premium for a  
15 company that Claimants claims value is 30 attach  
16 companies that is large.

17 In any case, the companies within 10 are  
18 also--companies within 10(b) are also within 10, so  
19 some of the companies there are small, some are in  
20 financial trouble--it's a mixed bag.

21 Q. Now, another area that you and Mr. Thompson  
22 have disagreed upon is the relative weighting between

05:13:37 1 the real estate side and the railroad side; correct?

2 A. Well, it's not that we disagree, really,  
3 because--it's not Mr. Thompson. This is with  
4 Mr. Pratt, and--

5 Q. I'm sorry, I meant Dr. Pratt.

6 A. Dr. Pratt and I apply the same method. We  
7 take the size of each relative business. You see, the  
8 size in my case you have essentially the two--the two  
9 contribute approximately the same. You know,  
10 railroads, in my case contribute, more revenue,  
11 two-thirds of the revenue. In Mr. Thompson, it  
12 contributes 90 percent of the revenue. So, Mr. Pratt  
13 takes essentially the same approach. Well, how big  
14 each business is, I attach that as the weight.

15 So, it's not a conceptual difference. The  
16 only conceptual difference we have with Mr. Pratt is  
17 the size premium, which we just discussed, and the  
18 cost of debt, which Mr. Pratt uses 7 percent.

19 Q. In any event, though, you disagreed on the  
20 appropriate weighting; correct?

21 A. Well, it's a natural disagreement. It's not  
22 a conceptual agreement.

05:14:55 1 Q. Isn't the answer to my question yes?

2 A. Yeah, but it's a result of the other work.  
3 It's not that I have an issue with weighting. It's  
4 that the weighting results naturally from the rest of  
5 the work. It's not a conceptual disagreement with  
6 Mr. Pratt. Because Claimants have higher value and  
7 higher revenues for--for real estate, naturally, you  
8 create a higher weight of real estate.

9 Q. And that was based upon Mr. MacSwain's  
10 projections with regard to real estate revenues;  
11 right?

12 A. Correct, exactly.

13 Q. And if the Tribunal were to decide that his  
14 projections with regard to real estate revenues were  
15 appropriate to be used in this case, then the natural  
16 result of that would be that the weighting that  
17 Dr. Pratt uses would be the appropriate one?

18 A. Exactly, correct, yes.

19 MR. FOSTER: Thank you. I don't have any  
20 more questions.

21 PRESIDENT RIGO: Thank you, Mr. Foster.

22 Mr. Debevoise.

05:16:13 1 MR. DEBEVOISE: Thank you, Mr. President.

2 REDIRECT EXAMINATION

3 BY MR. DEBEVOISE:

4 Q. Dr. Spiller, I wasn't going to bring you into  
5 this, but since the Claimant counsel asked you a  
6 question about it, they were trying to drag you into  
7 the legal discussion about illegal versus illegal. I  
8 think they have some notion that there is--

9 MR. FOSTER: I thought he was going to ask a  
10 question.

11 MR. DEBEVOISE: I was going to ask the  
12 question, if you permit me.

13 MR. FOSTER: I object to the editorializing,  
14 then. Please just let him just ask the question,  
15 then.

16 MR. DEBEVOISE: All right.

17 BY MR. DEBEVOISE:

18 Q. Dr. Spiller, the Chorzów Factory case  
19 contains several Questions 1(a), (b), 2.

20 Is it your understanding those questions take  
21 care of any possible incentive that a country might  
22 have to engage in a frivolous expropriation?

05:17:15 1           A.    Well, the Chorzów doctrine--and I have  
2    written on that, actually--but the logistical  
3    rationale for the Chorzów doctrine is precisely that  
4    by looking at the value of the enterprise as of the  
5    date of the Award rather than as of the date of  
6    expropriation, you may capture increasing value of the  
7    enterprise from the time of the taking to the time of  
8    the Award, and, therefore, if a Government attempts to  
9    expropriate a business who is having a rapid increase  
10   in value, these component of Chorzów will take care of  
11   that.

12           Q.    Thank you.

13           ARBITRATOR CRAWFORD:    Could I make a minor  
14   but very important point?  It's pronounced "HORTS-OV"  
15   (ph.).  It should be pronounced as the Poles pronounce  
16   it.

17           MR. DEBEVOISE:  We apologize to the Poles.  
18   We are here in the Western Hemisphere, and obviously  
19   not educated enough to be able to pronounce that.

20           ARBITRATOR CRAWFORD:  I haven't even given up  
21   on the United States.

22           MR. DEBEVOISE:  Thank you.

05:18:58 1 I think I have no further questions.

2 PRESIDENT RIGO: I want to know if Professor  
3 Crawford had any other further questions other than  
4 instructing us how to pronounce it.

5 ARBITRATOR CRAWFORD: No, thank you.

6 QUESTIONS FROM THE TRIBUNAL

7 ARBITRATOR EIZENSTAT: I appreciate very much  
8 appreciate your professionalism, and I will try and  
9 ask some questions that will help illuminate for me  
10 some of your assumptions.

11 In assessing if there are to be damages--and  
12 that's obviously a separate issue--but if there are to  
13 be damages, are you essentially assuming that the  
14 actual revenues from 2000 to 2006 from the  
15 transmission lines and so forth, as well as the  
16 industrial part--the two pieces you described as being  
17 the exploitations of the Rights of Way--would not have  
18 increased at all? Or did you make assumptions that  
19 they would increase but at a lesser rate than MacSwain  
20 and Thompson?

21 THE WITNESS: I essentially adopt MacSwain's  
22 assumptions about existing contracts. The existing

05:20:35 1 contracts, some are for 20 years. For example, I  
2 think the Genor Contract is for 20 years. I think  
3 Taxac (ph.) is also for 20 years. MacSwain assumes  
4 they will be renewed, and I also assume that. I take  
5 MacSwain's assumptions in assessments about existing  
6 contracts as they are.

7 ARBITRATOR EIZENSTAT: Yes, sir. That I  
8 understand. I understand your chart--may I address  
9 this to you, please, Page 29, Figure V.

10 THE WITNESS: Yes.

11 ARBITRATOR EIZENSTAT: You explained to us  
12 that you assume a 9 percent growth rate in 2015, and,  
13 then, because of this one large Contract, to grow.

14 So I understand that the green part of the  
15 bar is actual contracts projected out.

16 THE WITNESS: Exactly.

17 ARBITRATOR EIZENSTAT: What I'm asking,  
18 please, is: Are you assuming, with respect to the red  
19 that is additional easement contracts and the blue,  
20 additional commercial leases, in your assumption of  
21 damages, are you assuming there would have been no  
22 additional easement contracts and no additional

05:22:05 1 commercial business?

2 THE WITNESS: Right.

3 ARBITRATOR EIZENSTAT: And why do you make  
4 that assumption between now and 2025, let alone 2042,  
5 there wouldn't have been one easement, not one lease?

6 I'm trying to understand your thinking on  
7 that.

8 THE WITNESS: What I have done is look at the  
9 evidence MacSwain provided, and what the evidence  
10 MacSwain has provided is not convincing in terms of  
11 what do I base to add contracts?

12 MacSwain has failed to explain to me--and  
13 probably to you as well--in my mind, why is it that a  
14 company that failed to capture a single new client  
15 since 2000--the Contract in 2001 is for \$500 a year,  
16 so you can forget about that--that failure to capture  
17 a single customer since 2000 suddenly can capture new  
18 clients.

19 There is no explanation of what was the  
20 reason. And because in both of his reports he has no  
21 explanation of what was the reason, my inference is  
22 that he doesn't have one. And if he doesn't have an

05:23:26 1 explanation as to why Ferrovias was unable to lease,  
2 then my sense is that it can't because there is no  
3 demand, others can use it, there is plenty of supply.

4 That's the problem.

5 ARBITRATOR EIZENSTAT: Let me ask you if  
6 there's anything between the devil and the deep blue  
7 sea here. That is, even if you assume that  
8 Mr. MacSwain's estimates are overly optimistic, is  
9 there not some likelihood that there would have been  
10 some easements and leases during this time period?

11 THE WITNESS: There is a likelihood, but  
12 there is no evidence on A, what they will be, what  
13 terms will they be, for how long will they be. There  
14 is no analysis in MacSwain of the competition. There  
15 is no analysis of what other sources of right of way,  
16 for example, or other facilities are out there that  
17 compete. MacSwain has no analysis of the market for  
18 right of way.

19 ARBITRATOR EIZENSTAT: One of the things that  
20 we've heard--and we have to judge in the end whether  
21 this is something we give credence to or not--is that  
22 the allegations are made by the railroad, that part of

05:24:57 1 the problem they had was the alleged failure--I  
2 underscore "alleged failure"--of the Government to pay  
3 several million dollars into the Trust Fund which  
4 would enable the railroad to be rehabilitated to a  
5 greater degree. And they allege that the Government  
6 failed to remove squatters and that that impeded their  
7 capacity to operate.

8           If you assume that those allegations are  
9 well-founded--and again, we haven't made that judgment  
10 yet at all--would that affect your view of what a  
11 willing buyer and willing seller would have provided?

12           In other words, one of the reasons that you  
13 say that there was no value at all--a willing buyer  
14 would have paid zero--is because you look at the  
15 record and you say, "Well, there's no profit." If you  
16 assume that the Government itself, as they allege, is  
17 partly responsible for that because of the squatter  
18 issue and the other--the failure to pay into the Trust  
19 Fund, would that affect your view of Fair Market  
20 Value?

21           THE WITNESS: Okay. One qualification, and I  
22 will answer your question.

05:26:23 1           The reason why I assess zero value is not  
2 because in the past they had zero profits, but,  
3 rather, because you don't see a business growing. You  
4 don't see a business that is on the verge of success.

5           In other words, you don't see this mountain  
6 coming in here. In fact, in the company, my forecast,  
7 we start making money down the road, okay? So, it  
8 will--but that's a minor issue.

9           Let's take the FEGUA contributions to the  
10 Trust Fund. I think this is an important issue to  
11 clarify, because my understanding is that these  
12 contributions were between 300- and \$400,000 a year,  
13 okay? These are not contributions that make any  
14 difference in the value of the company.

15           The Claimants claim the value of the company  
16 at 30 million. If FEGUA failed to provide 300-,  
17 \$400,000 a year would not--will barely change the  
18 analysis. It could have, then, facilitated, RDC would  
19 not have to make some contributions. As I show you,  
20 RDC made contributions of 300, a million,  
21 million-and-a-half, you know, every year it would have  
22 reduced those contributions a little bit. Nothing

05:27:54 1 would have changed for Ferrovías. Nothing.

2           So, yeah, these--so, the same reason why  
3 neither Thompson looks at those values nor MacSwain  
4 looks at it, essentially, you can--my opinion is that  
5 it's a red herring. It's a contractual dispute, it's  
6 fine, you know, at the end, \$38 million--it's not  
7 peanuts.

8           It's an issue, but it's not at the core of  
9 the dispute in terms of value between Claimant's  
10 Experts and me.

11           ARBITRATOR EIZENSTAT: And the squatter  
12 issue?

13           THE WITNESS: The squatter issue is  
14 interesting because the squatter issue raises a  
15 fundamental issue of value; that is, if you're a  
16 squatter--and let's talk about the industrial  
17 squatters which are easier to deal than with the  
18 civilians, you know, housing squatters--those are more  
19 complicated--but the industrial squatters are people  
20 who benefit--well, everybody benefits--but these  
21 people benefit, I would say, a little bit more, and  
22 they, in principle, could pay; right? They could pay.

05:29:04 1           So, then have you to ask the question why the  
2 squatters were not paying before. That is,  
3 Mr. MacSwain provides evidence that there was  
4 something like 460 kilometers of railway used by  
5 industrial squatters, and the first question you have  
6 to ask is: Why was that FVG failed to enter into a  
7 contract with them?

8           And what's so interesting is that  
9 Mr. MacSwain says in the absence of the lesivo, FVG  
10 would have entered into Contracts with them, and I  
11 don't see that reason, that if they didn't enter into  
12 Contract by 2006, what was the reason they didn't  
13 enter? Well, maybe because, you know, it was not that  
14 worth for them to pay 2,000 or \$3,000 per kilometer a  
15 year. Why it's not? Well, there may be substitutes  
16 or other ways by which they could get the service. Or  
17 maybe--we really don't know, you see.

18           And unless I have evidence, substantive  
19 evidence, that these people will not move away, if  
20 they had to pay. And also we have the problem of the  
21 squatters, were they there before or they came  
22 afterwards. There is some--in the record, for me,

05:30:30 1 some lack of understanding about that. But some may  
2 have come afterwards, and they may have come  
3 afterwards because Ferrovías was not operating and,  
4 therefore, they don't pay, zero price, but they didn't  
5 come before in Contract with Ferrovías because they  
6 had to pay a price. So it's kind of reflecting  
7 willingness to pay.

8           You see, if you drink Coke when they're  
9 giving a party but you don't buy Coke, it means that  
10 you don't like Coke that much. So, there is an  
11 willingness to pay issue here that needs to be  
12 addressed.

13           So, the squatters, I think, is an interesting  
14 problem, but to me doesn't give me an answer to know  
15 that Ferrovías's network has been used, because the  
16 fundamental question is "Well, if it is being used and  
17 people are willing to pay, probably you should have  
18 entered into Contract," because companies don't like  
19 to be in a precarious situation.

20           If these poles and transmission lines are  
21 complicated business, and if I have to remove them,  
22 it's going to cost me a lot of money, and I risk that,

05:31:48 1 then maybe I should enter into a contract and pay  
2 Ferrovías a little bit of money.

3           But if my alternative is to take them  
4 elsewhere--who knows, you know, highways or  
5 whatever--and not pay or pay very little, then I don't  
6 want to pay \$3,200 per kilometer.

7           So, the evidence, the problem in the record  
8 is that Claimants have not made a case, a sufficient  
9 case, I believe, that this is property that has the  
10 values that is being assessed.

11           ARBITRATOR EIZENSTAT: And I understand your  
12 point about FEGUA. I would suggest, since I chaired  
13 the International Advisory Board of Coca-Cola, I would  
14 drink as much Coca-Cola as I have to pay for it as I  
15 get it free. Maybe you'll use another example in the  
16 future.

17           What about the companies that can't move?  
18 They have sunk an investment in now. There are,  
19 apparently, some of those.

20           How do you take that into account?

21           THE WITNESS: Well, again, the question is  
22 whether this came before or after; right? That is, if

05:32:59 1 they came after, they came because zero price, and the  
2 question is why they didn't come before and pay  
3 Ferrovías? Well, then that decision itself tells you  
4 willingness to pay. If they came before the  
5 lesivo--if they came before the lesivo, the question  
6 is why they didn't enter into a Contract with  
7 Ferrovías. What prevented that?

8           Now, there are two potential explanations for  
9 that. One is that they say, "Well, maybe no one will  
10 evict me, and I have all the bargaining power. No one  
11 will evict me now because no one will evict me." Then  
12 they will never pay.

13           The other is "Because I don't care if I'm  
14 being evicted. If I'm being evicted, I will just go  
15 elsewhere and put my lines elsewhere, but I'm not  
16 going to pay the \$3,200 per kilometer per year."

17           So, one needs to understand what is the  
18 reason by which these industrial squatters were--let's  
19 put it this way: Why is it that Ferrovías unable to  
20 reach an understanding with them? That is the  
21 evidence that's missing in this record. That is, if I  
22 have to make my claim based on the fact that here is

05:34:24 1 the squatters, I should get money from them, I have to  
2 explain to you why I have been unable to do that; and,  
3 in the record, I don't find that convincing  
4 explanation.

5 ARBITRATOR EIZENSTAT: You suggested that you  
6 could use either in assessing damage a sunk-cost  
7 assumption or a Fair Market Value assumption, but want  
8 both. That's the thrust of what I understand you to  
9 say; is that correct?

10 THE WITNESS: Yes, sir.

11 ARBITRATOR EIZENSTAT: From the Tribunal's  
12 standpoint, illuminate for us which you think is the  
13 most appropriate. Obviously, you're arguing against  
14 combining, but as I understand it, the Fair Market  
15 Value assumption, you come up with zero; in fact, less  
16 than zero. Right?

17 THE WITNESS: Correct.

18 ARBITRATOR EIZENSTAT: So, they would have  
19 invested \$15 million, and they get nothing. Under the  
20 sunk cost, what is your calculation?

21 THE WITNESS: I didn't perform that  
22 calculation, okay, because essentially my assessment

05:35:42 1 is--there is no evidence that this company is--is a  
2 viable company. In other words, this is a bad--and I  
3 believe Mr. Posner stated that in some of his own  
4 writings, that this is a bad company or a bad  
5 investment.

6           But be that as it may, I think that  
7 Claimant's Experts will also agree that the  
8 appropriate approach is the Fair Market Value, and for  
9 the following reason: If you look at their  
10 assessment, they compute the Fair Market Value at  
11 \$30.1 million, and they compute the lost investment of  
12 \$42.9 million. It cannot be that the value of lost  
13 investment exceeds the value of the enterprise; that  
14 is, you can never lose more than what you assess the  
15 company is. So, at some point, your investments went  
16 bad.

17           So, the fact that they assess the value of  
18 the investments--because the nominal value is what you  
19 said, 15, 16 million; right? But by accumulating at  
20 the cost of capital, which they claim is 12.9, they  
21 get 42.9 million. But that cannot be higher than what  
22 the company is worth, because if the company's worth

05:37:10 1 less than their computation of loss of investment, is  
2 that the rate of return cannot be that high. This  
3 company would not be making--will not be covering its  
4 cost of capital. That's why it's 30.1 and not 42.

5 So, they will also agree that lost  
6 investment, as they compute it, overstates value.

7 ARBITRATOR EIZENSTAT: I appreciate that, but  
8 I'm trying to ask, perhaps, a slightly different  
9 question.

10 We have a company that, I think, as you say,  
11 the facts pretty much establish that they contributed  
12 about 15--a little over \$15 million. If one assumes  
13 it's--and again, we certainly haven't come to that  
14 determination--that the Declaration of Lesivo was  
15 inappropriate, that there was inappropriate action by  
16 the State, would you say, then, in your calculation,  
17 that the Claimant would have proved its case but would  
18 be entitled to nothing?

19 THE WITNESS: That happens, too; right? It  
20 happens often that you have a bad investment, and this  
21 is a way to get out. That it's bad luck and you're  
22 out of it.

05:38:27 1                   ARBITRATOR EIZENSTAT: That's not the  
2 assumption. I'm asking you to assume--again, tressing  
3 we haven't made this judgment at all--but if one  
4 assumes that the Government of Guatemala acted  
5 inappropriately in canceling the Contract on the  
6 grounds that they did, are you suggesting that having  
7 invested \$15 million that the railway should get  
8 nothing, or under those circumstances would you say  
9 they should get something and here's how I would  
10 calculate it?

11                   THE WITNESS: Well, I think the appropriate  
12 way to compensate in this case, when eight years has  
13 passed since the company started operations, when a  
14 cost--operational improvements have taken place,  
15 safety improved dramatically, costs went down, the  
16 company did as much as it can do, but there is a  
17 fundamental problem of demand, the demand just is not  
18 there, then you know this railroad is not going to  
19 make money. Even Mr. Thompson says that the  
20 railroad-only side of the business is not worth more  
21 than a million-and-a-half.

22                   So, even Mr. Thompson agrees that the

05:39:51 1 railroad is not really there as a substantive issue.  
2 So, everything else is things in the sky; that is,  
3 "Well, I could sell this, I could sell that," but in  
4 reality it's not there.

5           So, if you wish to say, "Well, the  
6 business"--it's--Claimants say, "The business, the  
7 real business, will never collect more than a  
8 million-and-a-half," and we assess the railroad at  
9 less than a million-and-a-half, not--essentially also  
10 a negative value, but--it's a bad business.

11           ARBITRATOR EIZENSTAT: We have to, again,  
12 make a judgment about whether these projections are  
13 overly speculative. I'm asking a different question.

14           I'm asking--you're suggesting that even under  
15 that assumption that, you know, they were never going  
16 to become profitable, if there was a finding by the  
17 Tribunal that the Government acted inappropriately in  
18 terminating the Contract or in declaring  
19 lesivo--again, we haven't made that, but if you assume  
20 that--are you suggesting that there's no way in which  
21 you think the railway should get back its initial  
22 investment or at least its--or its investment

05:41:12 1 projected forward?

2           THE WITNESS: As an economist--I'm here as an  
3 economist, expert economist. I'm not a lawyer. I'm  
4 not going to add to you an assessment of fairness or  
5 not fairness. I'm going to give you my professional  
6 opinion.

7           And my professional opinion is that if the  
8 business was not a viable business and it got  
9 expropriated, then compensation should be zero.

10          ARBITRATOR EIZENSTAT: So, this is  
11 where--this notion that you have, which is a perfectly  
12 legitimate argument, and I understand your point, that  
13 there should be no difference in--from an economic  
14 standpoint, of a legal and illegal expropriation.  
15 It's a bad business. You're basically saying that  
16 from your perspective, if the expropriation is  
17 illegal, that there should be no difference in our  
18 Tribunal's view than if it had been a perfectly legal  
19 expropriation, the two sides get together and they  
20 decide that we're taking this over for right of way or  
21 whatever and it's done in a perfectly legal way, that  
22 from your standpoint there shouldn't be any difference

05:42:29 1 at all in how one calculates the damages.

2           THE WITNESS: If I may, just before telling  
3 you that you're right, but for just one preamble, the  
4 way I like to look at this in general is to assess  
5 damages in the following way: Is to really put the  
6 Claimant in the same situation it would be absent the  
7 lesivo. And I think this is the fairest way to deal  
8 with it. It's not, "Well, we have to give them money  
9 because we have to give it." No. The fairest way is  
10 to put the Claimant in the position it would have been  
11 absent the lesivo.

12           Absent the lesivo, Claimants have a business  
13 that is, in my professional opinion, is not viable.  
14 We disagree with the other side. But I believe that  
15 Mr. Thompson, at the end of the day, will agree with  
16 me that this is not a viable business, a business that  
17 even Mr. Thompson's assessed railroads at \$1 million,  
18 million-and-a-half, is not a viable business.  
19 Long-term investment of 50 years, worth a million.  
20 It's not.

21           So, we both agree it's a business that--well,  
22 in my professional opinion, it's a business that is

05:43:52 1 not worth--then expropriating it takes the problem out  
2 of their hands.

3           ARBITRATOR EIZENSTAT: But remember that you  
4 agree, and I think the other witnesses do, that the  
5 real value of this enterprise, to the extent there is  
6 a value, is on the real estate side, not on the  
7 operations side.

8           THE WITNESS: The real value in  
9 Mr. MacSwain's assessment, and the problem with  
10 Mr. MacSwain is that, in my opinion, it's highly  
11 unsubstantiated. And that's my personal opinion.  
12 There is nothing in the record that can provide--

13           ARBITRATOR EIZENSTAT: One last thing, and I  
14 appreciate it again, is this chart, Figure V, you're  
15 again assuming only that the real estate value comes  
16 from the existing Contracts and there would be no  
17 additional leases or easement contracts. That's your  
18 assumption.

19           THE WITNESS: Right. I only take those  
20 Contracts that MacSwain was able to show that have  
21 validity.

22           ARBITRATOR EIZENSTAT: Okay. That's very

05:45:07 1 helpful in illuminating your viewpoints. Thank you.

2           ARBITRATOR CRAWFORD: If I could just make an  
3 observation. You might have a situation in which the  
4 wrongful act on the part of the State was such that  
5 the quantum of damages is not what would put the  
6 Claimant in the position if the Act had not been  
7 committed, but what would put the Claimant in the  
8 position if the investment had not been made.

9           THE WITNESS: That's a different standard.  
10 Yeah. It's very good.

11           ARBITRATOR CRAWFORD: Thank you.

12           There may be situations--I'm not saying this  
13 is one of them--where there would be the appropriate  
14 balance. You would say, in effect, "The behavior of  
15 the State has pulled the rug out from under the  
16 investments; therefore, it's inappropriate to treat  
17 the Claimant as having assumed any risk."

18           THE WITNESS: I think, Professor Crawford,  
19 that's a very good and interesting problem, because in  
20 the absence--if the Contract should not have been  
21 signed in a sense, and in a sense you could say,  
22 "Well, somehow Claimant entered into Contract without

05:46:20 1 knowing exactly what it was, and it was an illegal  
2 Contract, it should not have been signed," this and  
3 that, then you are going to revert the Claimant to the  
4 position it would have been in '97--'97, then it would  
5 be \$15 million better off, because it would not have  
6 made those \$15 million investment.

7           So, it's not the Fair Market Value issue any  
8 longer.

9           ARBITRATOR CRAWFORD: Let's assume for the  
10 sake that you were in a situation in which you would  
11 say--I mean, if there's fraud in the making of the  
12 Contract or something like that, ab initio, and eight  
13 years have passed, 15 million has been expended, what  
14 would you do to adjust that 15 million to give  
15 the--put the Claimant in the position that it would be  
16 in if the investment had not been made?

17           Would you simply take the case value of  
18 15 million and ignore time value of money? What do  
19 you do?

20           THE WITNESS: Well, in that case, you cannot  
21 use the cost of capital as we have done here because  
22 there will not be any risk associated with the

05:47:37 1 15 million. So, probably you will have to use some  
2 risk-free short-term rates, LIBOR or so on.  
3 Obviously, because the--both Mr. Pratt and I take into  
4 account industry risk, so you have to take that out  
5 because it will not be appropriate to compensate for a  
6 risk that would not have been there, so it will be  
7 like that, yeah.

8 ARBITRATOR EIZENSTAT: Let me just ask, I'm  
9 sorry, one other question that I had. And I think you  
10 said this was not as crucial as the other points  
11 you've made, but this is on this average cost of  
12 capital using the assumption of 18 percent, I think  
13 that's the--

14 THE WITNESS: Cost of debt?

15 ARBITRATOR EIZENSTAT: Cost of debt.

16 RDC, as I understand it, is a large company,  
17 the owner of RVG, that has railway operations around  
18 the world. Would it not be a reasonable assumption to  
19 assume that they would borrow at the lowest rate they  
20 could get worldwide? They wouldn't--in using the  
21 Guatemalan rate with the risk factor and the other  
22 C-rated company, that we should really be looking,

05:49:04 1 instead, at what RDC could borrow at and what, indeed,  
2 it does borrow at around the world for its various  
3 enterprises?

4           Is that a reasonable thing?

5           THE WITNESS: No. And, in fact, Mr. Pratt  
6 calls it one of the main errors in valuation. And in  
7 valuation have you to look at the cost of capital of  
8 the target company, the company you're going to  
9 acquire. So, if you're looking at the Fair Market  
10 Value of something, you look at the target--Fair  
11 Market Value of the target. You look at the cost of  
12 capital of the target because if you're giving--if  
13 you're giving a loan to the target at lower than the  
14 target can collect, you're giving a subsidy, and a  
15 subsidy has a cost. In other words, you, the  
16 Shareholder, are taking an additional risk by giving a  
17 subsidized rate.

18           So, in a sense, if you're a C-rated company,  
19 your cost of capital in Guatemala--sorry, cost of debt  
20 in Guatemala is 18. Why 18 and not 7? Well, because  
21 that's the cost of failure for a C Company. If you  
22 are giving a seven, you are essentially taking a risk

05:50:25 1 of 11 percent on addition of the normal risk. That's  
2 why you always have to look, in valuation, at the cost  
3 of debt of the target.

4 ARBITRATOR EIZENSTAT: But when you look at  
5 the cost of the target--I mean, here the target is a  
6 wholly owned company of major a multinational company.  
7 It's not just a stand-alone enterprise. And, indeed,  
8 you mentioned yourself that RDC was funding the  
9 operation.

10 So, you wouldn't distinguish between a target  
11 being a stand-alone Guatemalan company and one that's  
12 wholly owned and itself sustained by an A-rated  
13 company.

14 THE WITNESS: That's an excellent question.

15 ARBITRATOR EIZENSTAT: I'm glad I finally  
16 asked one that you will answer.

17 THE WITNESS: No, no, this is a serious  
18 question you asked, but because fundamentally, when  
19 you look at Fair Market Value, you are making the  
20 assessment of a willing buyer--willing buyer, willing  
21 seller. So, you're looking at this as if you were  
22 going to sell the company at this moment, how much

05:51:34 1 someone will pay for it.

2           And when someone looks at it, it will pay for  
3 it independently of whether you're a fully owned--the  
4 target is a fully owned or is a diversified  
5 shareholding. It looks at it as a target, as a  
6 project.

7           And different projects always have different  
8 cost of capital, and it always depends on the risk  
9 independently of who is the owner.

10           For example, let's say that the buyer will be  
11 Facebook. Well, Facebook has a cost of capital  
12 completely independent of regular business. Will it  
13 value railroad in Guatemala with the cost of capital  
14 of a software company? No. It will use the cost of  
15 capital of a railroad company in Guatemala.

16           So, it's always, as Mr. Pratt calls it, you  
17 know, the basic flow in valuation, to value a company  
18 with your own cost of capital rather than with its  
19 cost of capital.

20           So, it's fundamental to use the cost of  
21 capital of the company you're buying.

22           ARBITRATOR EIZENSTAT: Mr. President, I've

05:52:45 1 figuratively and literally exhausted my questions.

2 PRESIDENT RIGO: Mr. Debevoise?

3 MR. DEBEVOISE: I have no further questions  
4 for the witness.

5 MR. FOSTER: Nothing from us.

6 PRESIDENT RIGO: You said it before I asked.

7 MR. FOSTER: I'm really trying to shorten  
8 things.

9 PRESIDENT RIGO: I see that.

10 Dr. Spiller, thank you very much for being  
11 with us this afternoon. Thank you very much.

12 (Witness steps down.)

13 (Tribunal conferring.)

14 PRESIDENT RIGO SUREDO: We will adjourn now.

15 We are very good time in terms of the schedule of the  
16 Procedural Order, as amended, for the hearings, and we  
17 will meet tomorrow morning at 9:00.

18 Yes?

19 MR. ORTA: Excuse me, Mr. Chairman, I  
20 actually have a question just in terms of the order of  
21 the proceeding tomorrow.

22 Am I correct that tomorrow we have two fact

05:55:06 1 witnesses in the morning and then the two Guatemalan  
2 Law Experts in the afternoon? I just want to make  
3 sure we have the correct order.

4 PRESIDENT RIGO: We have--in the order I have  
5 here, Arturo Gramajo, Roberto Morales, Eduardo Mayora,  
6 and Juan Luis Aguilar.

7 MR. ORTA: Okay. So, we can confirm for the  
8 Tribunal that, notwithstanding our best efforts, Mr.  
9 Roberto Morales is unable to come to Guatemala and was  
10 only--excuse me, is unable to come to Washington, D.C.  
11 from Guatemala and was only available via video  
12 conference, so the Tribunal had already ruled on that.  
13 So, he's not available tomorrow morning.

14 And so I guess the question is, of the  
15 witnesses that were here that Claimant had requested  
16 the right to cross-examine, are there any of those  
17 that you want to do tomorrow morning after  
18 Dr. Gramajo? Or, if not, we just go right into the  
19 Guatemalan Law Experts?

20 MR. FOSTER: Can you ask me about Marroquin?  
21 We have him on Friday morning. Is he coming?

22 MR. ORTA: Yes, but he will only be available

05:56:16 1 Friday morning. I think his flight arrives at, like,  
2 1:00 in the morning tomorrow. In other words, 1:00 in  
3 the morning Friday. He's unable to get here any  
4 sooner, unfortunately.

5 PRESIDENT RIGO: But he will be here at 9:00?

6 MR. ORTA: Yes, sir.

7 PRESIDENT RIGO: Because it will be very  
8 important for your Closing Statements and for us to  
9 have some time.

10 MR. ORTA: He will be here, ready to testify  
11 at 9 a.m. on Friday morning, yes, sir.

12 PRESIDENT RIGO: There is Mr. Oswaldo Morales  
13 that you had to postpone.

14 MR. FOSTER: We will decline to cross.

15 PRESIDENT RIGO: You will decline.

16 MR. FOSTER: Yes, sir.

17 ARBITRATOR EIZENSTAT: Mr. Orta, what  
18 was--just remind us, Mr. Morales's position.

19 MR. ORTA: Okay. So, Mr. Roberto Morales or  
20 Oswaldo Morales?

21 ARBITRATOR EIZENSTAT: Roberto, who you said  
22 was unable to come. What had his position been?

05:57:19 1           MR. ORTA: Mr. Roberto Morales is a third  
2 party who conducted a study that was commissioned by  
3 Ferrovías and determined that the--basically, the rail  
4 business for--well, it's our contention his study  
5 proves that the rail business was not of interest to  
6 the sugar industry in the south for a number of  
7 reasons as set forth in his Report.

8           (Tribunal conferring.)

9           PRESIDENT RIGO: So, we will have--we will  
10 see three people of the four I have listed, and we  
11 will see them in sequence, and we'll adjourn whenever  
12 we have finished. Is that okay?

13           MR. FOSTER: Yes, sir.

14           MR. ORTA: Yes.

15           PRESIDENT RIGO: So, it will be Señor  
16 Gramajo, Señor Mayora, and Señor Aguilar?

17           MR. ORTA: Yes, sir.

18           PRESIDENT RIGO: Thank you. Have a good  
19 evening.

20           (Whereupon, at 5:58 p.m., the hearing was  
21 adjourned until 9:00 p.m. the following day.)

22

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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DAVID A. KASDAN