

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

- - - - -x  
 :  
 In the Matter of Arbitration :  
 Between: :  
 :  
 RAILROAD DEVELOPMENT CORPORATION, :  
 :  
           Claimant, :  
 : Case ARB/07/23  
           and :  
 :  
 THE REPUBLIC OF GUATEMALA, :  
 :  
           Respondent. :  
 :  
 - - - - -x Volume 1

HEARING ON MERITS

Thursday, December 8, 2011

1818 H Street, N.W.  
MC Building  
Conference Room 4-800  
Washington, D.C.

The hearing in the above-entitled matter came  
on, pursuant to notice, at 9:01 a.m. before:

- DR. ANDRÉS RIGO SUREDA, President
- PROF. JAMES CRAWFORD, SC, Arbitrator
- HON. STUART E. EIZENSTAT, Arbitrator

Also Present:

MS. NATALI SEQUEIRA,  
Secretary to the Tribunal

MR. ALEX BERENGAUT,  
Assistant to the Tribunal

Court Reporters:

MR. DAVID A. KASDAN  
MS. DAWN LARSON  
Registered Diplomate Reporter (RDR)  
Certified Realtime Reporter (CRR)  
B&B Reporters  
529 14th Street, S.E.  
Washington, D.C. 20003  
(202) 544-1903

SR. VIRGILIO DANTE RINALDI, S.H.  
D.R. Esteno  
Colombres 566  
Buenos Aires 1218ABE  
Argentina  
(5411) 4957-0083

Interpreters:

MS. SILVIA COLLA

MR. DANIEL GIGLIO

MR. CHARLES ROBERTS

APPEARANCES:

On behalf of the Claimant:

MR. C. ALLEN FOSTER  
MR. KEVIN E. STERN  
MS. RUTH ESPEY-ROMERO  
MS. REGINA VARGO  
MR. P. NICHOLAS CALDWELL  
MS. PRECIOUS MURCHISON  
MR. ADRIAN F. SNEAD  
Greenburg Traurig, LLP  
2101 L Street, N.W.  
Suite 1000  
Washington, D.C. 20006  
(202) 331-3100

MR. JUAN PABLO CARRASCO de GROOTE  
MS. VERONICA SOFIA GONZALEZ  
MS. LISA ALDANA  
Díaz-Durán y Asociados Central-Law  
15 Avenida 18-28, Zona 13  
Guatemala City, Guatemala C.A.

Representing Railroad Development Corporation  
and Ferrovías Guatemala:

MR. ROBERT PIETRANDREA

MR. ANDREW BILLER

MR. PABLO ALONZO

MR. AUGUSTIN M. POSNER

Also Present:

MR. MARIO ESTUARDO JOSÉ FUENTES SÁNCHEZ

DR. EDUARDO A. MAYORA

## APPEARANCES: (Continued)

On behalf of the Respondent:

MR. LARRY ROBLES  
Attorney General

MR. ESTUARDO SAÚL OLIVA  
MS. SILVIA CABRERA ESTRADA  
Attorney General's Office

MR. ANÍBAL SAMOYOA SALAZAR  
Deputy Secretary General of the Presidency

MR. LUIS VELÁSQUEZ QUIROA  
MR. MYNOR RENÉ CASTILLO  
MR. ROMEO LÓPEZ  
Ministry of Economy

MR. FERNANDO de la CERDA  
MR. JOSÉ LAMBOUR,  
Embassy of Guatemala, Washington, D.C.

MR. DAVID M. ORTA  
MR. WHITNEY DEBEVOISE  
MR. DANIEL SALINAS-SERRANO  
MS. MARGARITA R. SÁNCHEZ  
MS. GISELLE K. FUENTES  
MS. DAWN Y. YAMANE HEWETT  
MR. MALLORY B. SILBERMAN  
MR. JOSÉ ANTONIO RIVAS  
MR. JOSÉ BERNARD PALLAIS H.  
MS. CAMILA VALENZUELA  
MR. HANS HARTELL  
MR. KELBY BALLENA  
MS. AMY ENDICOTT  
MR. PEDRO SOTO  
MS. NICOLE ANN AARONSON  
Arnold & Porter, LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
(202) 942-5000

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. CÉSAR PAYÉS,  
FEGUA Legal Advisor

MR. PATRICK J. O'CONNOR  
The Miami Center  
201 S. Biscayne Blvd.  
Suite 800  
Miami, FL 33131  
(305) 577-3443

APPEARANCES: (Continued)

CAFTA Non-Disputing Parties:

On behalf of the Republic of El Salvador:

MR. ENILSON SOLANO  
Embassy of the Republic of El Salvador

MR. LUIS PARADA  
MR. TOMÁS SOLÍS  
MR. ERIN ARGUETA  
Dewey & LeBouef, LLP  
1101 New York Avenue, N.W.  
Washington, D.C. 20005-4213  
(202) 346-8198

On behalf of the United States of America:

MR. JEFFREY D. KOVAR  
Assistant Legal Adviser  
MR. LISA J. GROSH  
Deputy Assistant Legal Adviser  
MR. NEALE BERGMAN  
MR. DAVID BIGGE  
MS. ALICIA L. CATE  
MS. LISA GROSH  
MR. PATRICK PEARSALL  
MS. KARIN KIZER  
MR. GARY SAMPLINER  
MR. JEREMY SHARPE  
Attorney-Advisers,  
Office of International Claims and  
Investment Disputes  
Office of the Legal Adviser  
U.S. Department of State  
Suite 203, South Building  
2430 E Street, N.W.  
Washington, D.C. 20037-2800  
(202) 776-8443

APPEARANCES: (Continued)

On behalf of the U.S. Trade Representative:

MS. KIMBERLEY CLAMAN  
Senior Director

## C O N T E N T S

	PAGE
OPENING STATEMENTS	
ON BEHALF OF THE CLAIMANT:	
By Mr. Foster	14
ON BEHALF OF THE RESPONDENT:	
By Mr. Orta	73
WITNESSES:	
HENRY POSNER III	
Direct examination by Mr. Foster	145
Cross-examination by Mr. Orta	153
Questions from the Tribunal	196
Redirect examination by Mr. Foster	209
Recross-examination by Mr. Orta	216
OLGA de VALDEZ	
Direct examination by Mr. Sterne	230
Cross-examination by Mr. Salinas-Serrano	239
Questions from the Tribunal	247
Further cross-exam. by Mr. Salinas-Serrano	253

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

2 PRESIDENT RIGO: Good morning, everybody. I  
3 would like to start by asking the representation of  
4 the Claimant to introduce their team. Mr. Foster.

5 MR. FOSTER: Yes, sir, I'll introduce myself.  
6 I've got to get used to this again. I'll introduce  
7 myself, and then I think it'll probably be easier if  
8 we just go down the list for everyone to introduce  
9 themselves. Thank you.

10 I'm Allen Foster representing the Claimant.

11 MR. STERN: Kevin Stern on behalf of the  
12 Claimant.

13 MR. CAREY: Daniel Carey, trial tech for the  
14 Claimant.

15 MR. CALDWELL: Nick Caldwell on behalf of the  
16 Claimant.

17 MR. POSNER: Henry Posner, Chairman  
18 Ferrovías, Guatemala. Juan Pablo Carrasco de Groote,  
19 attorney for the Claimant.

20 MR. PIETRANDREA: Robert Pietrandrea,  
21 Railroad Development Corporation.

22 MR. BILLER: Andy Biller with RDC.

1                   MS. MURCHISON: Precious Murchison for the  
2 Claimant.

3                   MS. VARGO: Regina Vargo for the Claimant.

4                   MS. ESPEY-ROMERO: Ruth Espey-Romero for the  
5 Claimant.

6                   MR. SNEAD: Adrian Snead for the Claimant.

7                   PRESIDENT RIGO: That's all for the  
8 Claimant's side.

9                   Mr. Orta, would you like to introduce your  
10 team?

11                   MR. ORTA: Yes. Thank you, Mr. President.

12                   First off, good morning, and it's a pleasure  
13 to be here with all of you today. Good morning to  
14 folks on the other side of the table.

15                   My name is David Orta, an attorney at  
16 Arnold & Porter, and counsel of record for the  
17 Republic of Guatemala. To my left I have Mr. Whitney  
18 Debevoise, who is also a partner at Arnold & Porter  
19 and also representing the Government of Guatemala in  
20 the case.

21                   I'm going to introduce the representatives  
22 that are here on behalf of the Government of Guatemala

1 and then the rest of the Arnold & Porter team.

2           To my left, somewhere along this table, is  
3 the Attorney General of Guatemala, Mr. Larry Robles,  
4 who is here in representation of the Government of  
5 Guatemala for this proceeding. We are assisting him  
6 in the defense of the case. He also is assisted by  
7 Mr. Saúl Oliva, from the office of the Attorney  
8 General of Guatemala as well; Ms. Silvia Cabrera, also  
9 with the office of the Attorney General; Mr. Anibal  
10 Samoyoa, who is also to my left, Deputy  
11 Secretary-General of the office of the Presidency of  
12 the Republic of Guatemala; Mr. Mynor Castillo, with  
13 the Ministry of Economy of the Republic of Guatemala;  
14 Mr. Romeo López, also with the Ministry of the Economy  
15 of the Republic of Guatemala; we have Mr. José Lambour  
16 here with us today, of the Embassy of Guatemala here  
17 in the United States. And also, not here today but  
18 who will be assisting in some of the hearing days, is  
19 Mr. Fernando de la Cerda, also of the Guatemalan  
20 Embassy here in the United States. And lastly, in  
21 terms of representatives of the Republic of Guatemala,  
22 Mr. César Payés, who is with FEGUA, he's a legal

1 advisor there and here in representation of that  
2 railway agency.

3           In terms of additional members of the  
4 Arnold & Porter team, we have Mr. Daniel  
5 Salinas-Serrano, who is to my left; Ms. Margarita  
6 Sánchez; Giselle Fuentes; Ms. Dawn Hewett; Ms. Mallory  
7 Silberman, who is not here with us today, but may be  
8 here on other days of the hearing; Mr. Hans Hartell,  
9 who, again, is not here today, but may join us other  
10 days; Amy Endicott; Pedro Soto--quite a long list--  
11 José Bernard Pallais; Mr. Kelby Ballena, who is here;  
12 Camila Valenzuela; and Nicole Ann Aaronson.

13           With your indulgence, I wanted to make sure  
14 everyone was on the record. Thank you.

15           PRESIDENT RIGO: Thank you, Mr. Orta. We  
16 have also representation from non-disputing parties  
17 from the U.S. and El Salvador, and I would appreciate  
18 if they could identify themselves.

19           MR. KOVAR: Thank you, Mr. President. I'm  
20 Jeffrey Kovar with the U.S. Department of State. This  
21 is my colleague, Alicia Cate, also from the U.S.  
22 Department of State. Thank you.

1           PRESIDENT RIGO: El Salvador.

2           MR. PARADA: Good morning, Mr. Chairman. My  
3 name is Luis Parada, representing the Republic of  
4 El Salvador as a non-disputing party. With me is Erin  
5 Argueta, also representing El Salvador; and Tomás  
6 Solís, and also from the Embassy of El Salvador,  
7 Mr. Enilson Solano.

8           PRESIDENT RIGO: Thank you.

9           Before proceeding further, I would like to  
10 make a small change in the time schedule of the day.  
11 We have from 9:00 to 5:00 every day. One of the  
12 Members of the Tribunal cannot be here beyond 4:30  
13 today because of a previous commitment. And what I  
14 would propose, not to shorten the time of the hearing,  
15 is that instead of having an hour-and-a-half lunch, we  
16 have only one hour break for lunch.

17           Also, I will also ask the head of both  
18 representations if they could have a few minutes with  
19 the Tribunal before we start the hearing in the  
20 afternoon. So having said that, that's initiative  
21 arrangements, I would ask Mr. Foster to give us his  
22 Opening Statement.

1                   MR. FOSTER: Thank you, Mr. President,  
2 Professor Crawford, Secretary Eizenstat.

3                   OPENING STATEMENT BY COUNSEL FOR CLAIMANT

4                   We'd like to begin with a short overview of  
5 some of the underlying facts. In evaluating RDC's  
6 performance in Guatemala and the reasonableness of its  
7 damages claim, it is important that RDC has a  
8 long-standing track record of success and  
9 profitability in similar circumstances. First, we  
10 would point to the Iowa Interstate. This was an  
11 abandoned--largely abandoned railroad which was  
12 rehabilitated by RDC. It has been a winner of two  
13 Gold Harriman Awards, and it is highly profitable.

14                   Second, the AAL Central in Argentina. This  
15 is the main east/west railroad system in Argentina. A  
16 RDC-led consortium rehabilitated over 3500 miles of  
17 track. There was a successful IPO on the Brazilian  
18 stock market of this railroad. Similarly, the ALL  
19 Mesopotamia in Argentina, which is the railroad--the  
20 prime railroad in the northeast corner from Buenos  
21 Aires to Paraguay, again, an RDC-led consortium  
22 renovated 1680 miles of track, and, again, there was a

1 successful IPO on the Brazilian stock market.

2           Next, the Ferrocarril Central Andino in Peru,  
3 the second highest railroad in the world, and as you  
4 will see, the trestles and bridges are much like those  
5 in Argentina. RDC rehabilitated 332 miles of track in  
6 extremely challenging terrain, and the railroad has  
7 also been profitable.

8           Next, the Central East African Railway in  
9 Malawi, where RDC rehabilitated 495 miles of track  
10 plus the rolling stock. The Aids epidemic in Malawi  
11 was so bad that RDC actually had to import workers  
12 into the country to perform the work for the lack of  
13 local labor. An extremely challenging environment in  
14 which RDC has been profitable and, indeed, the  
15 railroad was sold to a consortium of investors.

16           The CDN in Mozambique, the renovation by RDC  
17 of 542 miles of track, the rolling stock and the  
18 Nacala port facility was in the aftermath, immediate  
19 aftermath, of the Civil War in Mozambique, so, again,  
20 RDC has a record of profitability in extremely  
21 challenging circumstances.

22           Finally in Estonia, the National Railroad,

1 this was a privatization of a former Soviet railway.  
2 RDC replaced a hundred percent of the locomotive  
3 fleet, established profitable operations and resold  
4 the railway--the railroad to the government.

5           Now, let us turn very briefly to the  
6 condition of the railway in what Guatemala, under  
7 FEGUA's leadership and before FVG obtained the  
8 usufruct. The railway was impassable. As you can  
9 see, cross ties were missing. The entire line was  
10 unsafe. And what were the results when FVG replaced  
11 FEGUA? Over 206 miles were restored in slightly over  
12 a year. Phase one rehabilitation was completed in  
13 December of 1999, and daily service was reestablished  
14 from Puerto Barrios to Guatemala City. There was a  
15 new market for container and steel transport. FEGUA  
16 had never transported containers before. RDC  
17 renovated 15 locomotives, 200 rail cars, and began  
18 carrying 125,000 plus tons of traffic. And then what  
19 happened? Having attained positive cash flow, the  
20 Government lay in wait until nearly \$20 million had  
21 been invested and then took the railway, the renovated  
22 railway, away from RDC and FVG.

1           Now, an essential part of our proof is that  
2 the Government intended to take RDC's investment and  
3 to pay nothing for it. And we'll have--we'll be  
4 showing you a number of newspaper articles and video  
5 of the highest officials of the Republic of Guatemala,  
6 the President and the Attorney General, declaring  
7 their expressed intent with regard to this railroad.  
8 The Solicitor General, which is our equivalent of  
9 Attorney General, Mr. Gordillo, commented that in the  
10 next few days, he will undertake measures to file the  
11 process that will eventually render the contract  
12 invalid. He will. Not he might. Who would deal with  
13 FVG after this?

14           The Government of Guatemala, on the other  
15 hand, will tell you that it was FVG's press conference  
16 that caused the problem, not the statements from the  
17 Attorney General of Guatemala.

18           Again, the Attorney General says, if  
19 lesividad is declared, the Contract is rendered  
20 invalid. He doesn't say it may be rendered invalid.  
21 He doesn't say that there is going to be a court  
22 proceeding before it's rendered invalid. He says when

1 the declaration of lesividad occurs, it is invalid.  
2 Further, he says the State has nothing to pay as a  
3 result of suspending the Contract. An affirmative  
4 declaration that the Government will pay nothing.  
5 This Statement by itself makes the expropriation  
6 illegal with major consequences for the Quantum of  
7 damages.

8           The take-it-or-leave-it offer that was  
9 presented by the Government to FVG one day before  
10 lesivo was declared, FVG must invest \$50 million and  
11 surrender the South Coast Line to other investors, a  
12 code phrase for Mr. Campollo. Again, the Government  
13 explicitly states it's true ulterior motive: They  
14 demanded the rehabilitation of the South Coast Line to  
15 benefit other investors, Mr. Campollo. There was  
16 absolutely nothing in the contract that Ferrovías had  
17 with the Government of Guatemala that required the  
18 renovation of the entire South Coast Line.

19           Again, the Government states the real reason  
20 for lesivo, invest 50 million, neither required by the  
21 Contract nor was it commercially reasonable.

22           President Berger says that he proposed that

1 if the company makes an investment of \$50 million, he  
2 would no longer invoke lesivo. Thus, there was a bad  
3 faith use of lesivo to try to force FVG to renegotiate  
4 its obligations under the Contract.

5 MR. FOSTER: Now, can you play the video,  
6 please. I'd like to show you a video of President  
7 Berger.

8 (Video shown)

9 MR. FOSTER: Note, he does not say that FVG  
10 breached first. He concedes that he doesn't even know  
11 who breached first. Note also, he acknowledged that  
12 the Government breached by not paying the money into  
13 the trust fund, the President of the Republic.

14 Again, the declaration of lesividad arises  
15 from the fact that the \$50 million investment under  
16 the contract did not occur, nor was it required.

17 Here, again, invest 50 million. They want  
18 you to believe that RDC's one press conference, which  
19 had virtually no press coverage, was more important  
20 than these declarations by the President and the  
21 Attorney General of the country. The result, lesivo  
22 destroyed FVG. The proof shows that credit from

1 suppliers was turned off; credit from banks was  
2 denied; customers abandoned FVG; potential customers,  
3 investors and lessees were scared away. They were  
4 told--everyone in the country was told that the  
5 company has 90 days to fulfill the commitment. FVG's  
6 business partners knew that it would be out of  
7 business in 90 days.

8           Then in another press conference, the  
9 reporter interprets the words of the President of the  
10 Republic. If Ferrovías wants to continue managing the  
11 Guatemalan railroad, it should start construction of a  
12 wide gauge, otherwise, they should better start  
13 packing up. Everyone now knows that FVG's contract  
14 will be voided. And, in fact, what happened? Texaco,  
15 the big supplier of diesel fuel for the locomotives,  
16 terminated its relationships with FVG. Shell, another  
17 supplier of diesel fuel for locomotives, terminated  
18 its relationship with FVG. Enasa, another small  
19 diesel supplier to whom FVG had to turn, put FVG on  
20 COD. Puma put FVG on COD for diesel fuel. Induex,  
21 supplied cross ties, put FVG on COD. Marquesa, a  
22 supplier of equipment, put FVG on COD. Altraxa,

1 another supplier of heavy equipment, put FVG on COD.  
2 Banks--the two banks denied credit, and Reenter, who  
3 was the company that took the containers from the  
4 station yard to the customers, terminated their  
5 relationship with FVG.

6 FVG was a "dead man walking." And, indeed,  
7 that's precisely what happened. There was a 35  
8 percent drop in railroad revenue, comparing the first  
9 seven months of 2007 to the first seven months of  
10 2006.

11 FVG got a letter, "This is to inform you that  
12 through local press and television media, we have been  
13 alarmed about the declaration made by the Government  
14 of Guatemala on the administrative lesion caused by a  
15 contract on equipment involving Ferrovías. Therefore,  
16 our company has decided to reduce our cargo  
17 distribution through your company."

18 Lesivo scared away potential investors.  
19 There were two potential investors in the South Coast,  
20 in the rehabilitation of the South Coast. Lesivo  
21 destroyed future real estate leasing business.  
22 UniSuper--a decision had been made to build

1 supermarkets beginning in Zacapa but also at the other  
2 major train stations in Guatemala. They terminated  
3 the plan. Parking and office building property at  
4 Gerona; there were plans that were almost finalized to  
5 build an office building and to rent parking at the  
6 Gerona Station. They were terminated. GESUR had a  
7 lease that was ready to be executed on an additional  
8 32 kilometers of electricity lines in the right of way  
9 for an average of \$3200 per kilometer, which was  
10 terminated. Marske canceled its plans to build a cold  
11 storage facility in Zacapa. There was a railroad  
12 theme park; the plans were canceled. Thus,  
13 Dr. Spiller's contention that future leases are  
14 speculated--are speculative is squarely refuted by the  
15 evidence.

16           We will demonstrate to you that immediately  
17 before lesivo, FVG had a value, a business value, of  
18 \$62.4 million and immediately afterwards had a  
19 business value of zero.

20           As you have seen, Respondent admits that its  
21 desire for the completion of the South Coast Line,  
22 Phase 2, was the principle reason for the Declaration

1 of Lesivo. In an attempt to deflect attention from  
2 its extortionate demand that RDC invest an additional  
3 50 million to rebuild the South Coast Line, none of  
4 which was required by the Contract, the Government  
5 invents out a whole cloth, a purported contractual  
6 obligation to complete Phases 2 and 3. Contract 402  
7 did not obligate or require FVG to complete Phase 2 or  
8 any phase after Phase 1 within any specified time  
9 frame. This clause was put in the contract for a  
10 reason. FVG specifically specified and the Government  
11 explicitly agreed to a provision that other work would  
12 be done as business conditions permitted.

13           Indeed, the Government has repeatedly  
14 acknowledged that FVG complied with its contractual  
15 obligations. This is the letter from FEGUA confirming  
16 that FVG's Phase 1 obligations had been--Phase 2  
17 obligations were in compliance. Of course, Phase 1  
18 was already in operation and so there was no question  
19 about that.

20           This next document is a letter from FEGUA  
21 that confirms that Phase 3 had become impossible and,  
22 therefore, FVG was excused from beginning service on

1 that phase. Phases 4 and 5, of course, had not yet  
2 become ripe at the time lesivo was declared.

3 Further, Dr. Gramajo himself will have to  
4 squirm around this letter, or this newspaper report,  
5 when he acknowledged publicly that FVG was in  
6 compliance with its obligation. Thus, the contention  
7 that FVG was not in compliance as a post-hoc  
8 justification for lesivo is refuted by the evidence.

9 Further, as this Tribunal has already  
10 remarked in some of its rulings, Respondent accepted  
11 FVG's performance without a hint of contention that  
12 FVG was in default. Therefore, Respondent is estopped  
13 from contending that FVG was in any way deficient in  
14 its obligations.

15 I'd like to also ask you to include in your  
16 evaluation as you read the witness statements and hear  
17 the evidence, the quality of the evidence. You, of  
18 course, are well aware about the--about Mr. Pérez'  
19 retraction of his original Witness Statement. He  
20 says, "While it is true that the signature at the end  
21 of the document appears to be mine, I have no  
22 knowledge and vehemently deny the contents of this

1 alleged sworn statement." Is that believable, even on  
2 its face?

3           There is a lot of evidence showing that  
4 Mr. Pérez was intimately involved in the preparation  
5 of his Witness Statement. I'm not going to--I'm not  
6 going to go through all of it with you. Mr. Pérez is  
7 not even coming to testify. So that matter, we trust,  
8 is at an end, but it demonstrates the character and  
9 quality, or lack there, of Guatemala's evidence.

10           Then there is the issue of Mr. Campollo's  
11 disavowal of Mr. Pinto. I'm also not going to take  
12 the time this morning to go through the more than two  
13 dozen documented events which tie Mr. Campollo and his  
14 agent, Héctor Pinto, to the plot to take away FVG's  
15 railroad and right of way for the benefit of  
16 Mr. Campollo. Please review the detailed timeline  
17 that you have in your materials here. We believe it  
18 demonstrates that from 2001 from--on, Mr. Campollo was  
19 determined to obtain control over FVG's usufruct,  
20 authorized Mr. Pinto as his agent to obtain that  
21 result, and when his threats did not work, he allowed  
22 Dr. Gramajo and his lesivo idea to go forward in order

1 to obtain--ultimately to obtain the usufruct for  
2 himself.

3           Now, I'd like to turn to the applicable legal  
4 standards. We will demonstrate for you that under  
5 CAFTA, Guatemala is required to expropriate only in  
6 accordance with Treaty standards, accord fair and  
7 equitable treatment, accord full protection and  
8 security, and accord treatment no less favorable than  
9 to Guatemala's own nationals. The Government of  
10 Guatemala has violated every investment protection  
11 provision of CAFTA.

12           Preliminarily, I would also mention that  
13 there is a broad definition of "investment" in CAFTA  
14 in Article 10.28, and it includes both investment  
15 capital and loans, and the value of FVG as a business  
16 enterprise measured by lost profits. We would submit  
17 to you that this broad definition, which includes both  
18 cost and lost profits, has implications for the  
19 measure of damages. I would also point out that  
20 technical illegalities under Guatemalan law do not  
21 deprive RDC of its property rights under CAFTA. And  
22 we give you a number of citations here. And the

1 Government's arguments are totally contradictory.  
2 They can't decide whether they want to argue that the  
3 contracts were void ab initio or whether they were in  
4 full force and effect. What it boils down to is they  
5 don't even know what their argument is about the  
6 illegality of the Contract.

7           Now, let's turn to the first principle that  
8 Guatemala could expropriate Claimant's property only  
9 in accordance with CAFTA Article 10.7 standards. For  
10 an expropriation to be legal, it must be for a public  
11 purpose. It must be done in a nondiscriminatory  
12 manner. It must be accompanied by payment of prompt,  
13 adequate and effective compensation. And it must be  
14 in accordance with due process of law and  
15 Article 10.5. We will demonstrate that Guatemala's  
16 actions in this case satisfies none of these  
17 requirements.

18           The Parties agree that this determination  
19 requires a fact-based inquiry focused on three factors  
20 stipulated in CAFTA and 10-C. That inquiry looks at  
21 the economic impact of the Government action, the  
22 extent of the interference, distinct reasonable

1 investment-backed expectations, and the character of  
2 the Government action. As you have already seen the  
3 documentary evidence of the effect that lesivo had on  
4 FVG and you will hear further about in this hearing  
5 from RDC's witnesses.

6           The first factor, the economic impact, the  
7 Parties agree that customary international law  
8 requires the Claimant to demonstrate that the Lesivo  
9 Declaration caused a substantial non-temporary  
10 interference. The Parties further agree that  
11 substantial interference occurs when the State measure  
12 deprives the investor in whole or in substantial part  
13 of the use or reasonably to be expected economic  
14 benefits of its investment.

15           Now, how long the temporal prong of this test  
16 depends on the specific circumstances of the case.  
17 But a decree which freezes or blights the  
18 possibilities for the owner reasonably to exploit the  
19 economic potential of the property can, if the process  
20 thus triggered is not carried out within a reasonable  
21 time, it can be properly identified as an act of  
22 taking.

1           And here, we are five years gone from the  
2 Declaration of Lesivo and four years gone from the  
3 destruction of the Claimant's business, and if that  
4 isn't a process which has not been carried out within  
5 a reasonable time, I don't know what is. But more  
6 important, the decision of a Government minister,  
7 taken at the end of an administrative process, is one  
8 for which the State is undoubtedly responsible for an  
9 administrative law regardless of any provision for  
10 judicial review. So the fact that there was a  
11 provision for judicial review is irrelevant when the  
12 effect of the administrative action by the President  
13 of the Republic was to destroy FVG's business.

14           The second factor, interference with the  
15 distinct reasonable investment-backed expectations,  
16 the Parties disagree about the expectations that this  
17 factor calls into question. Respondent argues that  
18 RDC could have no reasonable expectation "of the  
19 permanent and irrevocable validity of the Contract"  
20 because of the provision, the legal provision, for  
21 lesivo. Claimant maintains that the real question is  
22 whether the concession, which was totally structured

1 on terms dictated by the Government of Guatemala, was  
2 represented as being legal under Guatemalan law and  
3 that any necessary approvals would be supplied. We  
4 return to the law. Expropriation includes covert or  
5 incidental interference with the use of property which  
6 has the affect of depriving the owner in whole or in  
7 significant part of the use or reasonably to be  
8 expected economic benefit of the property. And we  
9 submit that the evidence amply demonstrates that  
10 lesivo brought a permanent end to FVG's business.

11           The third factor is the character of the  
12 action. Except in rare circumstances,  
13 nondiscriminatory regulatory actions by a Party that  
14 are designed and applied to protect legitimate public  
15 welfare objectives such as public health, safety, and  
16 the environment do not constitute indirect  
17 expropriations. But there is a well-established  
18 caveat: A blanket exception for regulatory measures  
19 would create a gaping loophole in the international  
20 protections against expropriation. And here, as you  
21 will see, the lesivo process in this case cannot in  
22 any way be fit into the definition of police powers

1 over public health, safety or the environment.

2           Now, I'd like to turn to the Shufeldt Case  
3 which, of course, is on virtually all fours with this  
4 case, it being between a usufruct holder and  
5 Guatemala. And indeed, Guatemala declared the tenure  
6 concession in that case, only 10 years as opposed to  
7 50, lesivo on similar grounds. They contended the  
8 minister who executed the documents wasn't authorized  
9 to enter into it. They contended that the Contract  
10 hadn't been approved by necessary branch of  
11 Government. They contended that the Contract required  
12 a public bidding process. They contended that  
13 payments under the concession were inadequate. Does  
14 that sound familiar? The arbitrator, however,  
15 dismissed charges based on Guatemala's acceptance of  
16 benefits and performance under the contract for  
17 several years. That sounds familiar, too. Dismissed  
18 alleged breaches of contract because they were not  
19 previously raised nor cited as grounds for lesivo.  
20 They sure weren't cited as grounds for lesivo here.  
21 Dismissed the justification that local law required  
22 the State to act. Again, they pled here that the

1 President had to do it. Ruled that the decree  
2 deprived Mr. Shufeldt of all his rights under the  
3 Contract, even though Guatemala did not physically  
4 dispossess him. They didn't physically dispossess  
5 FVG; they just destroyed its business.

6           Now, let's turn to the guarantee of minimum  
7 standard of treatment under CAFTA 10.5. The Parties  
8 agree that Claimants must show that Guatemala's  
9 conduct violated the standards set forth in CAFTA,  
10 which is the customary international law minimum  
11 standard of treatment of aliens. Respondent maintains  
12 the lonely position, very lonely, that arbitral awards  
13 cannot be used to demonstrate customary international  
14 law, and that, instead, any Claimant must prove both  
15 State practice and opinio juris de novo in each case.  
16 Respondent's legal position is just plain wrong.  
17 Neither CAFTA nor NAFTA contain any such limitation on  
18 the use of arbitral awards or scholarly writings to  
19 reflect customary international law. No NAFTA case  
20 has ever refused to consider arbitral awards or  
21 scholarly writings as evidence of customary  
22 international law, not even Glamis Gold, from which

1 Respondent omits a critical sentence. Arbitral awards  
2 can serve as illustrations of customary international  
3 law if they involve an examination of customary  
4 international law, as opposed to an autonomous  
5 interpretation.

6 In this regard, NAFTA and CAFTA apply the  
7 same standard after July, 2001, making NAFTA case law  
8 particularly relevant to discerning the contemporary  
9 content of the minimum standard obligation under  
10 customary international law.

11 Now, looking at what the NAFTA tribunals have  
12 said about fair and equitable treatment under  
13 customary international law, the most widely cited, of  
14 course, is Waste Management the II, which, of course,  
15 Professor Crawford is, of course, intimately familiar  
16 with. And it says, "The conduct violates fair and  
17 equitable treatment if it is arbitrary, grossly  
18 unfair, unjust or idiosyncratic, is discriminatory and  
19 exposes the Claimant to sectional or racial prejudice,  
20 or involves a lack of due process leading to an  
21 outcome which offends judicial propriety."

22 It also notes that it's relevant that the

1 treatment is in breach of representations made by the  
2 host state which were reasonably relied upon by the  
3 Claimant. Most recent case being Merrill & Ring.  
4 "Fair and equitable treatment is denied by behavior  
5 that might infringe a sense of fairness, equity and  
6 reasonableness." Indeed, the ADF case expressly  
7 rejects Respondent's asserted standard, which they're  
8 trying to take from a human rights points of view and  
9 put into an investment dispute context. ADF says  
10 there appears no logical necessity and no concordance  
11 state practice to support the view that the Neer  
12 formulation, which is the one the Respondent likes, is  
13 automatically extendible to the contemporary context  
14 of treatment of foreign investments--investors and  
15 their investments by a host state.

16 Let's turn to the issue of bad faith as proof  
17 of a violation of fair and equitable treatment. While  
18 bad faith is no longer required, several NAFTA  
19 tribunals have stated that a failure to act in good  
20 faith is proof of a breach under customary  
21 international law. Arbitral tribunals have identified  
22 situations similar to the facts in this case as

1 violations of good faith in the investment context,  
2 including coercion and harassment, you've got to put  
3 up \$50 million or you better start packing up;  
4 deliberate conspiracy, a secret process for over two  
5 years at the highest level of Government to deprive an  
6 investor of his property without notice or hearing;  
7 threats of rescission, the take-it-or-leave-it offer;  
8 termination of investment for other than the one put  
9 forth by the Government. They said they terminated  
10 because we failed to invest \$50 million. And in fact,  
11 there was no requirement. So there's got to be  
12 another reason.

13           Due process of law is also a stated component  
14 of fair and equitable treatment. CAFTA Article 10.5.2  
15 specifically states it. CAFTA's transmittal papers to  
16 the U.S. Congress explained that the standard  
17 contemplated by this obligation is based on due  
18 process law--rights that are consistent with U.S.  
19 legal principles and practice. And they provide a  
20 high level of protection and due process.

21           Respondent agrees with the reasonableness  
22 standards for due process as defined by the ADC

1 Tribunal. "Some basic legal mechanisms, such as  
2 reasonable advance notice"--there was none here--"a  
3 fair hearing"--there was none here--"and unbiased and  
4 impartial adjudicator"--there was none here. "In  
5 general, the legal procedures must be of a nature to  
6 grant an effected investor a reasonable chance within  
7 a reasonable time"--over five years and no decision  
8 yet--"to claim its legitimate rights and have its  
9 claim heard."

10 In addition, Respondent conveniently leaves  
11 off the last line of the quoted paragraph: "If no  
12 legal procedure of such nature exists at all, the  
13 argument that the actions are taken under due process  
14 of law rings hollow." And it rings hollow here.

15 The guarantee of due process applies to the  
16 administrative proceedings as well. Waste Management  
17 II clearly states that a complete lack of transparency  
18 and candor in an administrative process is a  
19 violation. Instead, Respondent maintains that RDC  
20 must wait until the Court proceedings are concluded  
21 before there can be an international law violation.  
22 Respondent improperly conflates denial of due process

1 with denial of justice. As we saw previously from the  
2 Hellman annulment decision, the decision of a  
3 Government minister at the end of an administrative  
4 process is one for which the State is undoubtedly  
5 responsible at international law, even if there is a  
6 provision for subsequent judicial review.

7           Arbitrary action is also a proper  
8 consideration in determining whether Respondent has  
9 met its fair and equitable treatment obligations under  
10 customary international law. What Guatemala  
11 conditions to dispute, that the obligation to refrain  
12 from acting arbitrarily is part of its CAFTA  
13 undertakings, but not less than 13 NAFTA tribunals  
14 have considered that arbitrary treatment can be  
15 evidence of a violation of the fair and equitable  
16 treatment standard, and we list them there.

17           Arbitration tribunals have identified  
18 situations similar to the facts in this case as  
19 arbitrary in violation of fair and equitable treatment  
20 in the investment context. They include no legitimate  
21 public purpose, no logical relationship between the  
22 expressed goal and the means employed, use of

1 pretextual reasons, lack of legal standards.

2           Stability is also an integral part of  
3 Claimant's legitimate expectations, and that's the  
4 topic we will turn to now. CAFTA's preamble includes  
5 a principal objective of stability. The decree which  
6 ratified--the Guatemalan decree which ratified CAFTA,  
7 stated that one of CAFTA's overall objectives was to  
8 create a stable legal framework to promote and develop  
9 investment. Arbitrary invocation of lesivo certainly  
10 does not promote a stable, legal framework. And  
11 stability is, indeed, an integral part of an  
12 investor's expectations under customary international  
13 law. The Treaty's standard of fair and equitable  
14 treatment and its connection with the required  
15 stability and predictability of business environment,  
16 founded on solemn legal and contractual commitments,  
17 is not different from the customary international law  
18 minimum standard and its evolution under customary  
19 law.

20           Now, let's turn to the Government's  
21 obligation to provide full protection and security  
22 under CAFTA 10.5.2. CAFTA requires each Party "to

1 provide the level of police protection required under  
2 customary international law." The parties agree that  
3 the standard is not of "strict liability." Rather, it  
4 is "due diligence" and of vigilance. Respondent  
5 originally maintained that the standard is one which a  
6 well-administrated Government would be expected to  
7 exercise under similar circumstances. Now, however,  
8 in its Rejoinder, Respondent throws up its hands,  
9 maintaining that Guatemala could not be expected to do  
10 anything, given its financial resources and legal  
11 framework. While this so-called modified objective  
12 standard has been articulated by some commentators, we  
13 have found no one who contends that a country can  
14 avoid its international responsibility by pleading  
15 that it is violent and crime ridden as Respondent does  
16 here.

17           Further, the full protection and security  
18 duty is to take active Measures to protect a foreign  
19 invest from adverse effects. At the very least, full  
20 protection and security forbids the host State itself  
21 from being the perpetrator of the damage. A State is  
22 always responsible for its own actions, and here it is

1 undisputed that after lesivo, the Government itself,  
2 its local agencies and municipalities, became  
3 squatters on the right of way without paying  
4 compensation.

5           Finally, let's consider Guatemala's  
6 obligation to provide no less than national treatment  
7 under CAFTA--Article 10.3. It, of course, states that  
8 "each Party shall accord to covered investments,  
9 treatment no less favorable than it accords in like  
10 circumstances, to investments by its own nationals."  
11 The Parties agree on the three required factors to  
12 demonstrate breach, but not their application. The  
13 factors being that the domestic investor is in like  
14 circumstances, that a discriminatory measure has  
15 adverse effects on the foreign investment, and that  
16 there is no nexus to a rational policy.

17           So having considered the applicable law,  
18 let's turn to the evidence as it bears upon the  
19 foregoing legal principles and standards. And first,  
20 we'll look at the evidence that shows that the  
21 Declaration of Lesivo and Guatemala's subsequent  
22 actions were an illegal expropriation.

1           First, we think the evidence is clear that  
2 Guatemala did not use the process to uphold the rule  
3 of law, but as an instrument to bludgeon Claimant into  
4 surrounding its substantive rights or making an  
5 additional huge investment that was not required by  
6 the terms of the usufruct. It's undisputed that the  
7 lesivo resolution targeted only Claimants' investment.  
8 It should be undisputed that the lesivo process is  
9 utterly lacking in due process, and it is undisputed  
10 that the Government has never offered any  
11 compensation, and that, indeed, the Attorney General  
12 announced that the Government had used the lesivo  
13 process to avoid paying compensation. As we've  
14 further seen, the Lesivo Resolution had a substantial  
15 and lasting economic effect. It caused the  
16 substantial deprivation of the entire usufruct and  
17 rendered RDC's investment worthless. President Berger  
18 publically stated the Government's intentions through  
19 the Lesivo Declaration to take the railway usufruct  
20 away from FVG unless it invested an additional  
21 \$50 million to reopen the South Coast corridor, an  
22 investment that was never a requirement.

1           It also had a substantial and lasting  
2 economic effect. The business community understood  
3 well that the Lesivo Resolution made FVG too risky to  
4 do business with. The result, as you have seen, was a  
5 denial of credit, a denial of services putting FVG on  
6 COD. There was also the immediate and dramatic  
7 decline in the use of the railroad for freight  
8 transportation, 35 percent decrease. Reversal of  
9 customer gains and market share, vis-à-vis the  
10 trucking industry, and, of course, as I've said, the  
11 COD basis of credit. FVG was unable to secure a  
12 single additional lease or easement on its right of  
13 way after lesivo, despite the fact that there were  
14 numerous potential commercial tenants who were ready  
15 to sign leases immediately before lesivo. Theft,  
16 vandalism and squatters dramatically increased after  
17 lesivo.

18           Of course, as I noted previously from the  
19 Hellman annulment decision, the existence of judicial  
20 review is irrelevant when the Government  
21 administrative action itself affects the harm. But,  
22 even if it were a requirement that there be reasonable

1 judicial review, it certainly didn't happen here. The  
2 Contencioso Administrativo proceedings that are used  
3 by the Government to confirm a declaration of  
4 lesividad are a sham. Out of 17 known cases over two  
5 decades, only two have ever been decided, one of which  
6 was conveniently released just prior to this hearing.

7           The sham nature of the judicial review in  
8 this case is clear. There has been only one  
9 evidentiary hearing, and it did not address any  
10 substantive Merits. The Court has failed to meet any  
11 of the mandatory procedural deadlines imposed by  
12 Guatemalan law. With no dilatory action by Claimant,  
13 no decision has been rendered in more than five years,  
14 despite a Guatemalan legal requirement. When you add  
15 up all of the time provisions of the lesivo regulatory  
16 provision, it's slightly over six months. That  
17 process was supposed to be finished in six months, and  
18 it's over five years now. Thus, we submit that the  
19 evidence amply establishes that Guatemala's actions  
20 were an indirect appropriation and violation of CAFTA  
21 10.7.

22           So, let's turn to the evidence of Guatemala's

1 denial of the minimum standard of treatment under  
2 CAFTA 10.5. There was no offer or effort to fix the  
3 alleged deficiencies in the contract. The Government  
4 secretly proceeded with the lesivo process while  
5 acknowledging that the contracts were in effect and  
6 accepting the money. Dr. Gramajo himself in his 2005  
7 option paper identifies the nonamicable  
8 termination--it's a nice phrase--as the Government's  
9 only leverage to achieve the renegotiation of the  
10 Contract, not a desire to fix the alleged defects, but  
11 to renegotiate the terms. Internal legal reviews cite  
12 numerous alleged irregularities that were--but those  
13 irregularities were copied from Contract 41, which the  
14 Government itself had attested to be in accord with  
15 Guatemalan law. The internal legal opinions  
16 include--of the Government include less draconian  
17 remedies that were never explored. The high level  
18 railroad commission meetings were canceled immediately  
19 after RDC and FVG heard the rumors of lesivo, and  
20 there was a three-month hiatus while the Government  
21 admits that it secretly debated how to maximize its  
22 gains from the lesivo resolution. Further, President

1 Berger signed it, signed the resolution, and it was  
2 sprung on the last day to reach a deal with a  
3 take-it-or-leave-it offer. The Government admits  
4 withholding the grounds for lesivo from Claimant as a  
5 negotiating strategy, as they described it, and  
6 initiating court proceedings to advance the  
7 negotiations, threat after threat after threat, to  
8 gain ends that were not justified by the Contract.

9           Respondent has used the threat of issuing the  
10 Lesivo Resolution to try to get the \$50 million, to  
11 get out of its contractual obligations, to remove  
12 squatters and pay into the trust fund, to force FVG to  
13 drop its local breach of contract arbitrations, to  
14 increase the Canon fee percentages, and to force FVG  
15 to surrender some the railroad equipment that had been  
16 granted in usufruct. I will not repeat to you and  
17 will simply note that this Tribunal has already made  
18 findings which are very relevant for the issue of the  
19 Government's bad faith, and I set them forth here on  
20 this page.

21           Indeed, the Respondent's own attempted  
22 justifications underscore its bad faith. They say,

1 "Lesividad was also the least intrusive solution for  
2 the problem for Claimant." It's hard to imagine a  
3 more intrusive solution. They say, "The Lesivo  
4 Declaration was kept secret because it is akin to a  
5 criminal complaint in the common law system." So  
6 Guatemala itself concedes that they treated Claimant  
7 like a criminal.

8           It is undisputed that FVG and Claimant had  
9 the President's buy-in on finding a solution to the  
10 problem. The President's statements were more a  
11 sellout than a buy-in, but what--he demanded was that  
12 RDC buy in with an additional \$50 million investment  
13 that was not required by the Contract.

14           And finally they say, "How many investors can  
15 say that the President of a country stepped in to try  
16 to solve their disputes?" The real question is: How  
17 many investors would want the President of the country  
18 to step in the way President Berger stepped in?

19           Let's look at the evidence with regard to  
20 the--that the lesivo process utterly lacks due  
21 process. It was kept secret for over two years.  
22 There was no notification to FVG of the alleged

1 reasons or the problems. The asserted basis for  
2 lesivo elevate form over substance. There was no  
3 opportunity for FVG to respond. Judicial review  
4 cannot reverse the effects of the Declaration of  
5 Lesivo. FVG's business is gone. There was a  
6 six-month delay in even informing FVG of the grounds  
7 for the decree after the legal action had begun.  
8 There are no legal standards or precedent to determine  
9 harm to the State, and no elaboration by the State or  
10 the Court on how the State's interests were harmed.  
11 No opportunity to cross examine Government witnesses  
12 or otherwise present a defense. Judicial review is a  
13 meaningless rubber stamp. Five years have elapsed and  
14 there is still no ruling by the Court.

15           Now, let's look at the pervasive evidence of  
16 arbitrariness. Again, there are no legal standards,  
17 no logical relationship between the expressed goal of  
18 the Lesivo Resolution and the meanings employed.  
19 There were pretextual reasons. And, again, the lack  
20 of legal standards, Respondent acknowledges that the  
21 concept of lesividad in Guatemalan law has no  
22 objective standards. And it's used, they declared, to

1 reject the investor's right to compensation. Further,  
2 the evidence is that RDC's legitimate expectations  
3 were frustrated by lesivo. RDC had a legitimate  
4 expectation and understanding that, first, FVG would  
5 have the exclusive right to use the rolling stock  
6 during the 50-year term of the usufruct.

7 Certainly FVG had the right to assume that  
8 Respondent would not impede the project by denying the  
9 President's signature on the rolling stock Contract.  
10 Certainly FVG had the right to assume that Deed 143  
11 was awarded, executed and approved in accordance with  
12 Guatemalan law. And certainly FVG had the right to  
13 believe that Respondent would not seek to secretly and  
14 unilaterally repudiate the Contract after years of  
15 performance and prior representations and actions by  
16 the Government, including the consistent acceptance of  
17 the benefits under the Contract by the Government. In  
18 fact, the Respondent insist to this day that, quote,  
19 "Guatemala acted at all times with the intention to  
20 maintain its relationship with FVG."

21 So certainly if they insist upon it today, it  
22 was a right for FVG to have a legitimate expectation

1 that they would act that way before the issuance of  
2 lesivo.

3 Now, I'd like to talk to you about the proof  
4 that Guatemala consistently failed to afford full  
5 protection and security.

6 My lawyer is telling me what to do here.  
7 Excuse me. I missed this line.

8 Guatemala clearly had the ability to afford  
9 full protection and security. Even during the period  
10 of FEGUA's abandonment of the railway, Guatemala took  
11 numerous substantive actions to protect the railroad  
12 assets. And after lesivo, the number and scope of  
13 squatters, theft and acts of vandalism increased  
14 dramatically, but the Government's response then was  
15 paper pushing rather than substantive action. And  
16 that's the charts that we're going to show you now.

17 From the evidence that the Government of  
18 Guatemala has provided in this arbitration, we  
19 constructed these charts to demonstrate to you exactly  
20 what was really going on. And you can see when FEGUA  
21 controlled the railroad and the Government took  
22 substantive actions to protect the railroad property,

1 and those are those actions that are in the bars  
2 before FVG takes control of the railroad. You can see  
3 for yourself what happened during the time that FVG  
4 had control of the railroad. But importantly, after  
5 FVG and RDC initiated this CAFTA arbitration, all of a  
6 sudden, the Government jumps back into action, and the  
7 Government has told you in their papers that they were  
8 busily protecting the railroad property. But let's  
9 look at exactly what actually went on.

10           This is a pie chart demonstrating the actions  
11 the Government took before RDC obtained the usufruct.  
12 And as you will see, substantive actions--there are 33  
13 substantive actions of indictments in criminal cases,  
14 and only 12 paper pushing of opening a case without a  
15 file and complaints filed without follow-up. This is  
16 what they did when FEGUA had possession of the railway  
17 property. Now, let's look at what happened after RDC  
18 brought this CAFTA arbitration. You have 79 examples  
19 of paper pushing and only 27 substantive actions.  
20 This is their own proof, not something that we have  
21 tried to put together.

22           To summarize, Guatemala violated the minimum

1 standard of treatment under CAFTA. There was a bad  
2 faith motivation, an abuse of sovereign power to  
3 repudiate an investment, a secret process that  
4 targeted only the Claimant's investment. There was a  
5 lack of due process. You've seen the details. Lack  
6 of legal standards. There is nothing in the  
7 Guatemalan law establishing a legal standard for  
8 lesivo. It was arbitrary. Pretextual reasons to hide  
9 it's true intent. It was in breach of representations  
10 made by Guatemala, which were reasonably relied upon  
11 by RDC. The Contract signed was signed by an  
12 authorized official indeed. The Contract was signed  
13 in the Presidential car of the railroad amidst great  
14 publicity. It was a blatant failure to provide full  
15 protection and security. All of these things fall  
16 well below the customary international law minimum  
17 standard of treatment of aliens.

18 Now, we turn to the evidence regarding  
19 Guatemala's denial of national treatment, and the  
20 first factor that RDC and Ramón Campollo are in like  
21 circumstances. This factor requires a domestic entity  
22 to operate in the same business or economic sector as

1 the foreign investor. It's undisputed that before  
2 2001 and to this day, Mr. Campollo has owned and  
3 operated a narrow gauge railroad, which as of 2004 was  
4 transporting over 400,000 tons of sugar cane per year.  
5 Juan Esteban Berger admits, that--and this is a quote  
6 from his Witness Statement--"Mr. Campollo, by means of  
7 Héctor Pinto, had a series of meetings with Ferrovías  
8 staff in order to reach an Agreement to exploit the  
9 right of the railway with a view to support his Ciudad  
10 del Sur project." How much more sameness could be  
11 required, that he wanted to exploit FVG's right of way  
12 to benefit his real estate project? Both he and FVG  
13 were in the railroad business and in the real estate  
14 business. In 2005, Mr. Pinto presented the  
15 Desarrollas G offer, which stipulated a first option  
16 to develop any lucrative activity related to FVG's  
17 usufruct property and right. Mr. Campollo wanted to  
18 be in FVG's business. How much more same business or  
19 economic sector could there be?

20 Finally, Mr. Pinto's Ciudad del Sur letter to  
21 Mr. Senn asserts that it stipulates that it would be  
22 Ciudad del Sur, not FVG, who would manage the rail

1 port. In other words, Mr. Campollo--and it's  
2 undisputed that the Ciudad del Sur project is  
3 Mr. Campollo. Mr. Campollo wanted to be in the  
4 railroad business. He was the railroad business. He  
5 wanted to be in the real estate business. He was in  
6 the real estate business. He wanted to operate the  
7 port. RDC operated--had port facilities. Thus,  
8 Mr. Campollo was very comfortable being in the same  
9 business as FVG.

10           The second factor is the discriminatory  
11 intent and adverse effect. In a meeting with  
12 President Berger on March 7, 2006, Dr. Gramajo  
13 confirmed that Mr. Campollo was an interested investor  
14 in the South Coast Line. This admission connects all  
15 the dots between President Berger's statements about  
16 other interested investors and Mr. Campollo. Indeed,  
17 a key condition of Respondent's take-it-or-leave-it  
18 settlement proposal was for FVG unilaterally to  
19 surrender railway sections, quote, "in which other  
20 investors may be interested." The code words for  
21 Mr. Campollo. On September 8, 2006, President Berger  
22 gave a press interview in which he declared that FVG

1 had 90 days to guarantee the \$50 million investment or  
2 he would take the railway concession from FVG and call  
3 for a new bidding process. So Mr. Campollo could bid.

4 Even more important, as amply demonstrated  
5 already, the intended discriminatory effect was  
6 substantially to deprive RDC of its expected economic  
7 benefits under the concession.

8 The third factor is whether or not there was  
9 any nexus to rational public policy. Respondent  
10 issued the Lesivo Resolution to advance three improper  
11 objectives, all without compensating FVG. First, to  
12 force FVG to withdraw from the local arbitration  
13 proceedings, and to renegotiate the terms of the  
14 Usufruct Contracts. All of that is contained in the  
15 take-it-or-leave-it offer.

16 To make it impossible for FVG to perform  
17 under Contract 402, they declared the equipment  
18 contract lesivo. Without the equipment contract RDC  
19 could not provide railway service and thereby satisfy  
20 the terms of the other Usufruct Contracts. And they  
21 clearly did it to enable Ramón Campollo to obtain  
22 control of the railroad.

1           The Tribunal has similarly concluded that the  
2 Government used the lesividad process as "an element  
3 of pressure to achieve other results which were  
4 unrelated to the Lesividad Declaration."

5           Now, finally, I'd like to turn to the issue  
6 of damages. Because of Respondent's violations of  
7 CAFTA, RDC is entitled to full reparations damages,  
8 not just compensation. Respondent's Fair Market Value  
9 measure of compensation applies only to lawful  
10 expropriations, whereas full reparations damages  
11 applies to unlawful expropriations. Indeed, the  
12 Respondent concedes that the full reparations standard  
13 applies to breaches of CAFTA Articles 10.3 and 10.5.  
14 Without a full reparation standard for unlawful  
15 expropriations, an offending State can expropriate an  
16 investment and only be responsible for the same amount  
17 of compensation as if the State had not acted--as if  
18 the State had acted lawfully. The Tribunal should not  
19 conflate compensation for lawful expropriation with  
20 damages for an unlawful expropriation.

21           As far as back as the Factory at Chorzów  
22 case, it was established that reparation must, as far

1 as possible, wipe out the consequences of the illegal  
2 act. And further, the ILC Draft Articles note that  
3 compensation shall cover any financial assessable  
4 damage, including loss of profits. In other words,  
5 loss of profits are not the Measure of financial  
6 assessable damage. They are a factor included within  
7 financial assessable damage.

8           And as Professor Crawford has written, in  
9 many case, the damage that--the damage that may follow  
10 a breach may be distant, contingent or uncertain, but  
11 that does not mean that it cannot be recovered.

12           Numerous decisions in international cases,  
13 including both cases arising in tort and those arising  
14 in contract, have allowed indemnity for both *damnum*  
15 *emergens* and *lucrum cessans*. The commentators agree  
16 that an investor cannot be fully compensated for the  
17 going concern value of his expropriated interest  
18 unless he is awarded both the damage that has been  
19 sustained as a result of the taking and the reasonably  
20 ascertainable profit that has been missed.

21           And, of course, the Shufeldt Case, which we  
22 reviewed earlier, allowed both costs and lost profits

1 to be recovered in almost identical circumstances as  
2 this case.

3           And what that boils down to in this case is  
4 that RDC had an investment of something over  
5 \$19 million, which brought to accumulated value in  
6 2006 is 42 million, almost \$43 million. There were  
7 business termination and wind down costs of  
8 approximately \$1.3 million. There was the reasonable  
9 expectation of future profits, which has been reduced  
10 by amortization of loss investment of \$22 million.  
11 For--and then to subtract the mitigation by lease  
12 income of \$2.7 million, the final damage claim is  
13 \$63,778,000. Now, Respondent damages expert,  
14 Dr. Spiller, argues that Mr. Thompson and Dr. Pratt's  
15 proposed approach continues to double count when it is  
16 amortizing the lost investment amount over the lost  
17 future cash flows. He says, "To implement the  
18 amortization method correctly, the value of each  
19 amortization should be increased by the time value of  
20 money so that the net present value of the  
21 amortization spread over time equals the time value of  
22 the amount invested."

1           But, if you do that, if you use his  
2 methodology in which the value of the investment is  
3 grossed up by WACC and then amortized, that produces,  
4 as a matter of mathematics, nothing but the discounted  
5 cash value--sorry, the discounted value of the future  
6 cash flows, thereby eliminating the distinction  
7 between a legal and illegal expropriation by  
8 mathematical sleight of hand.

9           Now, the case--the commentators--not only the  
10 commentators, but the cases affirm that amortization  
11 of the investment reduces or eliminates the risk of  
12 double counting. Now, the commentators here are  
13 Repenski and Williams. The next slide reflects the  
14 views of Mark Cantor, to the same effect, and then  
15 there is the Emperna decision, which merely says that  
16 there is a proviso--when you award both costs and lost  
17 profits, there's a proviso that the computations  
18 reduce future net cash flows by allowing a proper  
19 measure of damages.

20           Furthermore, Dr. Spiller's criticism assumes  
21 that RDC expected to make back nothing more than its  
22 cost of capital. If that were the case, RDC would not

1 have made its investment in Guatemala, nor would any  
2 other investor. If all you were ever going to get  
3 back was what you put in, you wouldn't make the  
4 investment.

5           So, gentlemen, I would suggest to you that  
6 this, of course, being the first case under CAFTA and  
7 the law being somewhat unsettled on this issue of  
8 damages as between a legal and an illegal  
9 expropriation, I would submit to you that it is going  
10 to be your job and your burden to announce whether or  
11 not a country can take away an investment illegally  
12 and pay nothing more than that which it would have  
13 paid if it had taken it legally.

14           That can't be the law, and we certainly ask  
15 you to rule that there is a difference in the measure  
16 of damages as between a legal and an illegal  
17 expropriation, and that, indeed, it is not necessary  
18 that you precisely agree with the Claimant's  
19 computations or its method of amortization of sunk  
20 costs over the future lost profits, but what we do  
21 urge you to do is to recognize the difference in the  
22 proper measure of damages for an illegal act and

1 to--and you will have the tools at the end of this  
2 hearing to take the numbers that have been given you  
3 by the Claimant, to use the Claimant's damage model  
4 and to adjust it in any way that you think is  
5 appropriate in order to reflect the fact that, in this  
6 case, Guatemala's actions are illegal under the  
7 standards of CAFTA and the standards of customary  
8 international law.

9           Now, I'd like to turn to one of the  
10 fundamental issues that pertains to both sunk costs  
11 and lost profits, and that is the weighted average  
12 cost of capital. Dr. Spiller, his criticism of  
13 Dr. Pratt's 12.9 percent WACC ignored reality.  
14 Indeed, Dr. Spiller's proposed 18.65 percent WACC  
15 assumes facts that do not exist. When those errors  
16 are corrected, Dr. Spiller's 18.65 percent calculation  
17 results in a WACC that is even lower than Dr. Pratt's  
18 12.9 percent.

19           Now, the next thing I'm going to show you is  
20 the computer program which you will have available to  
21 you and that is used to calculate the weighted average  
22 cost of capital. Now, this particular spreadsheet

1 came from Dr. Pratt. It's Dr. Pratt's spreadsheet  
2 because Dr. Spiller, who uses virtually the same  
3 program, but not unexpectedly, Dr. Spiller rounds all  
4 the numbers up. So we thought it might be a little  
5 bit more accurate to use a spreadsheet that didn't  
6 artificially round all the numbers up.

7           Now, as you can see from this spreadsheet, on  
8 the left-hand side, you have a computation for the  
9 WACC applicable to the real estate business. On the  
10 right-hand side, you have a computation for WACC  
11 applicable to the railroad operations. The Parties  
12 agree that the two WACCs should be computed separately  
13 and then blended. Now, in the case of both real  
14 estate and railroad operations, what you now have  
15 before you are Dr. Pratt's inputs and Dr. Spiller's  
16 inputs for both debt and equity.

17           There are three principal areas of  
18 disagreement. The first area of disagreement pertains  
19 to the cost of debt. Naturally, the cost of debt  
20 applies to both the real estate side and the railroad  
21 side. Dr. Pratt use RDC's cost of debt, because FVG  
22 obtained 99.9 percent of its financing through RDC.

1 FVG would never have used Guatemalan financing because  
2 of the high cost of debt in such countries.  
3 Dr. Spiller, on the other hand, makes the totally  
4 unrealistic assumption that FVG would switch from  
5 inexpensive financing through RDC to expensive  
6 financing in Guatemala. We submit that Dr. Spiller's  
7 assumption is nothing more than a way to achieve the  
8 result he wants.

9           The second area of disagreement is what's  
10 called the size premium. Economists agree that  
11 smaller companies have higher rates of return and,  
12 therefore, higher WACCs. The issue is the source of  
13 data that is used to estimate that difference.  
14 Dr. Spiller has used a subset of the tenth decile.  
15 Now, the companies are arranged in size by deciles,  
16 and the tenth decile includes the very smallest  
17 companies by market capitalization. There is also a  
18 subset of the tenth decile, which is for financially  
19 troubled companies.

20           Dr. Spiller insists that this subset should  
21 be used. Dr. Pratt says we believe far more  
22 reasonably that the tenth decile already includes the

1 subset and so to concentrate on the subset would  
2 inappropriately overweight distressed companies and,  
3 therefore, artificially increase the WACC.

4 Dr. Pratt's conclusion, we submit, is underscored by  
5 the fact that FVG was always financially backstopped  
6 by RDC.

7           The third area of dispute has to do with the  
8 weight accorded to each side. You remember I said  
9 that the Parties agree that the two WACCs should be  
10 computed separately and then blended. So the issue  
11 becomes what is the weight that is to be accorded to  
12 each side when you blend them. Dr. Pratt naturally  
13 bases his weighting on the projected EBITDA from each  
14 line of business as calculated by Mr. Thompson and  
15 Mr. MacSwain. And I say that he naturally bases it on  
16 that because we believe that the law is that you are  
17 to put the investor back in the position that he was  
18 in immediately before the lesivo. So when you look at  
19 position the investor was in immediately before  
20 lesivo, he had an expectation of future cash flows  
21 from each of these lines of business, and, therefore,  
22 the weighting that you should accord should be the

1 weighting of the reasonable expectations of the  
2 investor immediately before lesivo.

3 Dr. Spiller, on the other hand, merely  
4 weights them 50/50. The central point on all these  
5 three inputs is that Dr. Spiller takes the most  
6 extreme position every time, and needless to say, it  
7 has the effect of increasing the WACC and thereby  
8 decreasing the lost profit.

9 Now, I'm going to show you what happens to  
10 Dr. Spiller's WACC when we substitute the proper  
11 inputs. First, we'll look at the size premium factor  
12 of the cost of equity on the real estate side. And  
13 you see what happens to the WACC as a result of just  
14 the change in this input. Second is the cost of debt  
15 on the real estate side. And you see that, again, the  
16 WACC goes down when the cost of debt is corrected.

17 Now, let's move to the same corrections on  
18 the railroad side. And now finally, we adjust the  
19 blending ratios. Now, as you can see, when thus  
20 adjusted, Dr. Spiller's WACC is actually lower than  
21 Dr. Pratt's by a miniscule amount.

22 Now, I'm not going to encourage you to become

1 an economist when you're considering your decision in  
2 this case, but with your understanding of these three  
3 areas of dispute, you can actually compute the WACC,  
4 whichever way you deem as being the most appropriate.  
5 You can manipulate this computer program to make the  
6 decisions yourself as to what you have decided are the  
7 appropriate factors to go into the calculations of  
8 WACC. And then once you have computed the WACC, as  
9 Mr. Thompson will show you when he testifies, you can  
10 take his program, which evaluates all of the factors,  
11 the real estate factors as developed by Mr. MacSwain  
12 and the railroad factors as developed by Mr. Thompson,  
13 and apply the WACC as developed by Dr. Pratt, you can  
14 do the same thing with your decision. You can decide  
15 each one of the factors in Dr.--Mr. Thompson's  
16 analysis, and then you can input the WACC that you  
17 determine by your decision on--using Dr. Pratt's  
18 program.

19 So what this gives you the ability to do is  
20 actually to weigh the evidence, and that's what we're  
21 asking you to do on each one of these factors is to  
22 carefully weigh the evidence and make a reasoned

1 decision that produces a result that is consistent,  
2 not only with the legal standards, but with the proof  
3 that you have heard.

4           Now, I'd like to turn to another point or two  
5 on the issue of damages, and the first one is  
6 Mr. MacSwain's opinions concerning future leases,  
7 Mr. Thompson's opinion concerning future railroad  
8 activity, and Mr. Thompson's calculation of damages.  
9 Dr. Spiller continues to maintain there that there is  
10 no evidence to support lost profits from real estate  
11 operations.

12           Well, first, the evidence is Mr. MacSwain's  
13 expertise and 46 years of experience speak for  
14 themselves. It is notable Guatemala--despite these  
15 real estate assets being in their own country,  
16 Guatemala offers no expert evidence to counter  
17 Mr. MacSwain's opinions. And look at the experience  
18 that Mr. MacSwain and Mr. Thompson have. Mr. MacSwain  
19 handled right-of-way leasing for Florida East Coast  
20 Railway. He handled right of way and station leasing  
21 for Guilford Transportation Industries, the  
22 northeast's largest railroad holding company.

1 Mr. MacSwain did real estate leasing for the Canadian  
2 National Railway, for the Chicago Northwestern.  
3 Mr. Thompson was the federal railway representative on  
4 the board of Amtrak. Mr. MacSwain did real estate  
5 leasing for CSX. Mr. Thompson was the acting deputy  
6 administrator of the Department of Transportation's  
7 \$2.5 billion freight and passenger service between the  
8 District of Columbia and Boston.

9 Mr. Thompson has 17 years of experience as  
10 railway adviser to the World Bank. Mr. Thompson wrote  
11 the infrastructure note section on transportation for  
12 the World Bank. Mr. Thompson and Mr. MacSwain have  
13 over 89 years of combined experience in the railroad  
14 and railroad real estate leasing business.

15 Respondent presents no railroad or real  
16 estate expert to counter Claimant's expert testimony,  
17 and it's undisputed that Dr. Spiller is an economist,  
18 and I'm sure a fine one, but he has no relevant  
19 experience in the railroad industry.

20 There are over 600 hundred railroads in the  
21 United States alone. Thousands worldwide with  
22 thousands and thousands of expert personnel who could

1 have testified in this case, yet, Respondent tenders  
2 no expert witness with knowledge of railroads or  
3 railroad leases.

4 I am certain that one of these fine lawyers  
5 on the other side would have found an expert witness  
6 if they could, and the fact that they present no  
7 relevant expert opinions speaks volumes.

8 And contrary to what Dr. Spiller says,  
9 Mr. MacSwain does present evidence to support his  
10 conclusions about future right of way leases. You  
11 have already seen the slide describing the numerous  
12 leases that were literally in the process of  
13 preparation and ready for signing at the time of  
14 lesivo. But this that you're looking at here, and  
15 you'll have a larger version--is an FVG system map on  
16 which the areas that are currently occupied by  
17 industrial squatters are noted in yellow. And you can  
18 see without going into detail that virtually the  
19 entire system is already occupied with industrial  
20 squatters who would pay rent if lesivo had hadn't been  
21 declared. And the following slides are just a couple  
22 of pictures. Look at the power lines. This is the

1 main line at Escuintla. Power lines all over the  
2 right of way. In fact, that's a truck over there, an  
3 electricity company truck that's installing a new line  
4 in the right of way. The truck on the left-hand side  
5 that you see is a sugar truck that's using the highway  
6 right of way--using the railroad right of way as a  
7 highway. Industrial squatting by sugar and electrical  
8 entities is rampant throughout the right of way.

9           And it is absolutely improper for the  
10 Respondent to come in here and say that we are unable  
11 to prove our case because we cannot demonstrate that  
12 we had leases for those industrial squatters, when  
13 throughout the existence of this usufruct, it was  
14 their obligation to clear out squatters. That is not  
15 a part of our claim, but they surely cannot be allowed  
16 to found a defense on their violation of their solemn  
17 obligation to prevent these people from squatting on  
18 our property and not paying rent.

19           This next picture, once again, the road has  
20 been laid over with--the tracks have been laid over to  
21 transport sugar and the power--and the right of way is  
22 full of electricity lines. All of these people would

1 be paying rent today if they had thought that there  
2 was any way that FVG was going to be able to continue.

3           Similarly, with regard to the--there is ample  
4 evidence of demand for the station yards. The Gerona  
5 Station is a wonderful example. On the upper left,  
6 you see the outline of the Gerona Station. On the  
7 upper right, these are the cars that are parked in the  
8 Gerona Station. Immediately prior to lesivo, there  
9 were three people, as you saw in that earlier slide,  
10 who were ready to build office buildings and to  
11 develop parking in the Gerona Station, and only lesivo  
12 prevented that. Indeed, the Attorney General's own  
13 office building, which you see in the lower left, a  
14 portion of it intrudes upon the right of way and his  
15 employees park in the parking lot. The Attorney  
16 General himself is a squatter.

17           And as we have seen, UniSuper was prepared to  
18 build shopping centers in the railway stations,  
19 starting in Zacapa, and they terminated their interest  
20 as a result of the lesivo. Thus, the only thing that  
21 actually derailed FVG's leasing program was lesivo.

22           Now, the first head of our damages, again, is

1 the value of our investment. RDC has a nominal  
2 investment of something over \$15 million, which  
3 accumulated to the date of lesivo is 32.2 million.  
4 Other shareholders--and we've argued in our brief and  
5 I think the law is ample--that we are entitled to  
6 recover on behalf of all the investors--other  
7 shareholders nominal investment is 3.9 million which  
8 brought up to value as of the date of lesivo is  
9 10.7 million, for a total of 42.9 million investment.  
10 We're entitled to our shut-down costs of 1.35 million.  
11 And we're entitled to lost profits, computed as the  
12 net present value of future railroad operations, plus  
13 the net present value of real estate income, with the  
14 investment amortized, for a net of 22,188,000. So the  
15 total damages come to the 63,778,000 that we talked  
16 about before.

17 Let me say one other thing about the  
18 amortization issue that I forgot to say earlier, and  
19 that is that Dr. Spiller, of course, is arguing that  
20 you gross-up the investment to--before you amortize  
21 it. There is no economic or accounting support  
22 whatsoever for ever grossing up any amount prior to

1 amortization. Amortization and depreciation is always  
2 on the basis of cost. It would--accountants would  
3 roll over in their graves if you told them you were  
4 going to gross-up the investment before you  
5 depreciated or amortized it.

6           Thus, finally, every latitude should be  
7 accorded to Claimant to prove its damages. RDC  
8 encouraged substantial immediate costs in order to  
9 earn future profits over a well-understood long term.  
10 It performed its obligations honorably and completely  
11 under very difficult circumstances. On the other  
12 hand, Guatemala expropriated RDC's investment in bad  
13 faith for reasons not related to the public good or  
14 interest and without any offer of compensation.  
15 Indeed, a declaration that they had no intention of  
16 paying any compensation. Guatemala has violated its  
17 CAFTA obligation to deal fairly and equitably by  
18 arbitrary action, bad faith, a lack of due process and  
19 a destruction of the investor's legitimate  
20 expectations.

21           Thank you very much.

22           PRESIDENT RIGO: Thank you, Mr. Foster. We

1 will take a break of 20 minutes as we set forth in the  
2 Procedural Order, and then it will be the turn of the  
3 Respondent. So we shall reconvene at 10 to 11:00.

4 (Brief recess.)

5 We will resume the session, and the  
6 representation of the Respondent has the floor.

7 It's your turn, Mr. Orta.

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

9 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

10 Heavy on rhetoric and very light on proof. I  
11 say that again; very heavy on rhetoric and very light  
12 on proof. That's the other side's case. They've  
13 tried to assemble a case--given the lack of real  
14 proof, and you've seen it in their presentation--based  
15 on newspaper articles, supposed comments made by  
16 President, the Attorney General, after the Lesivo  
17 Declaration, and they do so because there is no  
18 evidence of the allegations that they would like for  
19 you to sustain. None.

20 We're going to talk about the actual  
21 evidence. It's a serious case. They are seeking  
22 \$65 million from the Republic of Guatemala. It's the

1 first CAFTA case ever filed, and I submit to you that  
2 when you dig in and look at the actual proof, the  
3 reliable proof, what was really said between the  
4 Parties, what was really discussed, what documents  
5 were really exchanged, that you will come to the  
6 conclusion that while Claimant has made a number of  
7 very serious allegations against the Republic of  
8 Guatemala, three and a half years later they've been  
9 unable to prove them.

10 I submit to you that relying upon newspaper  
11 articles--we all know how unreliable the press can be  
12 in reporting what is said to them. I submit to you  
13 that if that's the best they can do, that speaks  
14 volumes for the lack of proof in their case.

15 What is this case really about? RDC, in  
16 1997, submitted to a public bid that was put out by  
17 the Government of Guatemala to have their railway  
18 modernized and restored. That's what the Government  
19 of Guatemala was asking for in its public bid, and  
20 that's what RDC, through FVG, its local enterprise,  
21 bid for, and that's what it won. And it promised to  
22 modernize and restore the railway.

1           Now, they've told you it was a very risky  
2 investment. They told you that the railway was in a  
3 bad state, inoperable, full of squatters. They knew  
4 all this. Their presentation says so. The documents  
5 that were in the bid tell you that.

6           Now, RDC never fulfilled its promise to its  
7 investment. Never fulfilled the promise that it laid  
8 out in its proposal. Okay. The Government of  
9 Guatemala expected to get a modernized and  
10 rehabilitated railroad. As we sit here today, over 13  
11 years after that bid was issued and won by RDC, there  
12 is no modernized rail system in Guatemala. None.

13           As we're going to talk about in a little bit,  
14 that's not what this tribunal is here to decide, but  
15 it is relevant. It is relevant because--as we'll talk  
16 about in a bit--it makes perfect sense that the  
17 Government of Guatemala and Claimant were discussing a  
18 host of issues that they had in dispute between them.

19           There's been a lot of talk and a lot made  
20 about a settlement proposal that was given the day  
21 before the Lesivo Declaration was published. There is  
22 absolutely nothing strange about the fact that the

1 Government of Guatemala and Claimant were trying to  
2 settle a number of issues they had in dispute.

3           Now, the investment never fulfilled the  
4 promise for a number of important reasons. They made  
5 a number of projections, RDC did, about demand for its  
6 services in Guatemala, about the possible tonnage,  
7 about real estate revenues that they thought that they  
8 were going to be able to obtain, and about funding  
9 both from private and funding sources that they  
10 thought they would have. The problem is that as to  
11 each and every projection they made, they were off the  
12 mark. And you don't have to accept my word for it;  
13 you don't have to accept Guatemala's word for it. All  
14 you need to do is look at their business plan, look at  
15 what they actually achieved, and look at their  
16 reports--their annual reports to their shareholders.  
17 Just read through them, and you'll come to that  
18 conclusion.

19           Now, today, as I mentioned, Guatemala is  
20 still waiting for a modernized railway. They've only  
21 rehabilitated one of the five phases. It's the one  
22 that's in red here. And the undisputed evidence in

1 this case--it's not rebutted--is that that's the only  
2 phase that they were able to complete between the time  
3 they started and the time they left the country  
4 unilaterally on their own in 2007. And they tell you  
5 that they, in fact, have no real intention of doing  
6 any of the other phases.

7 I submit to you that the evidence is a bit  
8 different. The evidence, what it will support, is  
9 that they rehabilitated the first phase, but the  
10 problem that they had was that the second, third, and  
11 fourth and fifth phases presented big problems to  
12 them.

13 And I put the picture back up just to  
14 highlight for you--what is in green on the screen,  
15 that is the second phase. And it's--there is  
16 undisputed evidence in this case that there was a lot  
17 of effort made, mobility on behalf of the Government  
18 and some effort made on behalf of RDC, to try to make  
19 that second phase a success, to try to put it into  
20 action, but there was a very important limitation.  
21 Okay. They took this investment on and they agreed,  
22 both in the contract and through the bidding terms, to

1 do it at their own risk and expense. That's what the  
2 contract says, at their own risk and expense.

3           And the problem that they had is that they  
4 never were able to come up with the funding to do the  
5 second phase. The reason that was such a problem for  
6 them is that the only phase that they did  
7 rehabilitate, phase one, produced nothing but losses  
8 for them from inception until they left the country.

9           So without being able to do the second phase,  
10 which they themselves admit they had no funding to do,  
11 they were stuck with a failed investment. And this  
12 all happened--all--before The President declared  
13 lesivo their Equipment Contract.

14           Now, putting into context a little bit what  
15 we're here to talk about, let's remember the Claimants  
16 have--Claimant has, excuse me, an investment, and they  
17 tell you that their investment is not the Equipment  
18 Contract. Their investment a much broader set of  
19 agreements to restore the railway, and part of that  
20 was the Equipment Contract that was declared lesivo.  
21 Now, that's important because when we get into the  
22 business of analyzing whether or not Guatemala has

1 violated any of its undertakings under CAFTA, and  
2 particularly when we get into analyzing whether  
3 there's been an expropriation, we will see that they  
4 admit freely that the largest part of their  
5 investment, Contract 402, and the most important part  
6 of that investment--their ability to generate real  
7 estate revenues--is wholly unconnected with the  
8 Contract that was declared lesivo.

9           And the evidence, we submit, shows that the  
10 leases that they were able to obtain pre-lesivo they  
11 still have, and the revenues from those leases have  
12 gone up. They stipulated to that. That is  
13 un rebutted.

14           Now, going back to the historical important  
15 points of this matter, separate and aside from the  
16 real estate restoration contract that they had, they  
17 participated in and won a bid for rail equipment. We  
18 all know that. The Contract never came into  
19 force--the initial contract never came into force--and  
20 it didn't because there was a very important  
21 requirement, and that's something that was stipulated  
22 to in the bid conditions, and it was repeated in the

1 contract. Before the FEGUA Overseer could grant to  
2 them and usufruct the equipment, he had to have  
3 approval from the President and the Cabinet. And that  
4 approval had to come after the Contract was signed.

5 Now, that contract was never signed, and it's  
6 important to remember that that is not this case.  
7 This case is not about that contract. That contract  
8 was not declared lesivo. This case is not about  
9 whether or why the Government, The President and his  
10 Cabinet, did not approve that agreement. Why?  
11 Because FVG and the then-Overseer of FEGUA signed a  
12 new agreement that terminated the prior Contract.  
13 Okay. That agreement is not the subject of this case.  
14 What is the subject of this case is what Claimant did  
15 after that. Okay.

16 They have the ability--and this is something  
17 that we went through during the jurisdictional  
18 phase--they have the ability to seek through the  
19 judicial--through judicial means, to seek an  
20 understanding as to why The President didn't approve  
21 the first contract and to go to the courts and compel  
22 The President to say why he didn't, and to determine,

1 yes or no, whether he would approve. That was the  
2 legal remedy that they had available to them in the  
3 absence of approval of that contract.

4           And I think it's important to highlight here  
5 that during the time that they didn't have approval,  
6 the Government, through--well, the railway agency,  
7 nonetheless, did give them access to the equipment,  
8 did let them operate through these letter  
9 authorizations that we've talked about. Whether right  
10 or wrong from a legal standpoint, it is clear that the  
11 Government didn't stand in their way. The Government,  
12 in good faith--the railway agency, allowed them to use  
13 the equipment through these letter authorizations.  
14 But, importantly, all of that, while it does set the  
15 stage for some of the issues that are to be discussed  
16 in this case, this case is not about Contract 41.

17           It is also important to realize that while we  
18 can speculate about the reasons, something compelled  
19 the prior Overseer to enter into Contract 143 and 158  
20 even though--and this is part of the record--we know  
21 that his then lawyer in FEGUA advised him not to do so  
22 and told him that that agreement didn't complete

1 comply with Guatemalan law.

2           Now, what happened after that? Well, upon  
3 discovering--and this is just months after they signed  
4 this--the contract that is at issue in this case, the  
5 Equipment Contract--Guatemala used its lesivo law,  
6 which was and had been in place for over 100 years  
7 before Claimant made its investment. So Claimant  
8 should have known about that law when it made its  
9 investment, and it agreed to abide by all Guatemalan  
10 laws when it made its investment, including the lesivo  
11 law. And it used that law to challenge this contract  
12 because it suffered from a number of very important  
13 illegalities.

14           The Government, through The President, after  
15 being asked by the FEGUA Overseer to declare that  
16 contract lesivo and after taking very careful steps to  
17 analyze whether the Contract was lesivo through a  
18 number of Government agencies, declared it lesivo.  
19 And let's remember what that means.

20           A declaration of--a declaration by The  
21 President that a contract, an administrative contract,  
22 is lesivo is nothing more than an administrative--an

1 internal determination made by The President that the  
2 Contract suffers from some defects that caused lesion  
3 to the country of Guatemala. And it's his way, and  
4 his only legal way, to signal to the Attorney General  
5 that is there something wrong with the contract and  
6 that the Attorney General, as the lawyer for the  
7 State, should take that contract and bring it to the  
8 judiciary, the independent judiciary, so that the  
9 Court can then determine whether the Contract is or is  
10 not lesivo and whatever remedies might result from  
11 that determination.

12           So the point is, at the time The President  
13 declares the Agreement lesivo, it has no effect on  
14 Claimant's legal rights under the agreements, none,  
15 and that's not disputed. Both experts on both sides  
16 agree to that in this case.

17           Now, notwithstanding that that was the case,  
18 notwithstanding that Claimant, as we sit here today,  
19 has every single right that it ever had, whatever they  
20 may be, under the Agreement that was declared lesivo,  
21 and has every right under the larger part of their  
22 investment, the Railway Restoration Contract, which

1 was not declared lesivo, notwithstanding that they  
2 have all of those legal rights, they seized upon the  
3 Declaration of Lesivo, and one business day after that  
4 declaration was filed, they published to the world  
5 that their investment had been destroyed and that they  
6 were going to be forced to leave the country.

7           That's a matter of record in this case. They  
8 used this case as their golden parachute out of a  
9 failed investment. That, at bottom, is what this case  
10 is really about.

11           Now, what are the primary issues? We all  
12 know that there are a number of legal issues under  
13 CAFTA that we are going to have to discuss, but what  
14 is the, at bottom, when you strip everything away,  
15 what is it that you're really being asked to decide?

16           We submit to you that what you're really  
17 being asked to decide is what's up on the board here  
18 as point number 1, whether Guatemala violated any  
19 CAFTA undertakings when it applied its preexisting  
20 lesivo law to declare the Equipment Contract lesivo  
21 when that contract failed to meet several essential  
22 requirements of Guatemalan law.

1           That's the real issue.

2           And separately, but relatedly, whether  
3 Claimant should be allowed to shift to Guatemala,  
4 through this claim, responsibility for its failed and  
5 risky investment.

6           We submit to you that when you look at the  
7 evidence, you have to conclude that Claimants'  
8 investment in Guatemala was a failure. They made a  
9 number of projections, but those projections were very  
10 off the mark. They never achieved what they thought  
11 they would achieve, and they were in much, much  
12 trouble in 2006 when the Lesivo Declaration was  
13 issued.

14           All right. Going through, now, some of the  
15 factual points in a bit more detail. We've talked  
16 about the fact that the Claimant made a very risky  
17 investment in 1997 to operate and modernize the  
18 railway and that it did so at its own risk and  
19 expense. Now, again, the problem, it did so with  
20 limited capital and funding. They tell you that.  
21 They tell you they only ever agreed to invest  
22 \$10 million. And they tell you they invested a little

1 bit more than that, but that was much, much, too  
2 little money for the project that they undertook.

3           How do we know that? Because they themselves  
4 admit that it was going to take over a hundred million  
5 dollars to do Phase 2 of the five-phase project, over  
6 a hundred million. Now, if you look at their business  
7 plan, they talk about all sorts of third-party funding  
8 that they were contemplating getting, and they made  
9 all sorts of promises about funding. But none of that  
10 funding came to fruition. They had a bare-bones  
11 budget, an agreement, they say, to invest only  
12 \$10 million, and that got them no more than  
13 restoration of the first phase of the project.

14           And we know--we don't have to accept my word  
15 for it--we know from the facts that that Phase 1  
16 produced only losses for them.

17           How did they keep from bankruptcy? We know  
18 that, too, and they've admitted it, and, again, their  
19 financial records tell you so. Every year they had to  
20 get their shareholders to contribute more capital to  
21 keep them afloat, to keep them from going into  
22 bankruptcy.

1           They looked at the restoration of the second  
2 phase, and if you read the statements of their  
3 witnesses, and if you read some of the evidence that  
4 we submitted, they understood that they had to restore  
5 the second phase in order to make this a viable  
6 investment. But as I said before, they didn't have  
7 the funding for that project.

8           And, again, they couldn't get the funding.  
9 So they were stuck with, as I've mentioned, a failed  
10 investment. Again, they're using this case as their  
11 exit strategy.

12           Now, there has been much made about the fact  
13 that the Claimant says that Guatemala should not be  
14 entitled--should be estopped from making arguments  
15 about the illegality of Contract 143 in this case.  
16 They say they reasonably relied upon representations  
17 of the FEGUA Overseer at the time to enter into that  
18 agreement, but that is not true. That is just simply  
19 not true.

20           How do we know that? Again, you don't have  
21 to accept our word for it; they knew they were  
22 entering into an illegal contract, and public

1 international law tells us that one cannot profit from  
2 their own misconduct.

3           How did they know that they were entering  
4 into an illegal contract? Well, this contract had a  
5 precursor, and that's why Contract 41 is relevant  
6 here. And that precursor contract, Contract 41,  
7 required a public bid before Claimant could have  
8 access to the equipment and required a contract that,  
9 by its terms, would not enter into force unless and  
10 until The President and his Cabinet ministers approved  
11 that agreement.

12           They knew that when they signed Contract 143  
13 and 158. Not only did they know it, but they put in  
14 the terms of the Agreement that that requirement was  
15 unnecessary, even though they incorporated the very  
16 bid terms that set that forth as a requirement, even  
17 though the Constitution of Guatemala requires that  
18 President--that Executive and Cabinet approval before  
19 the FEGUA Overseer can give the equipment and  
20 usufruct.

21           So they knowingly disregarded an essential  
22 requirement of law in Guatemala when they entered into

1 that agreement, not only as it relates to the  
2 executive approval but as it relates to the need for  
3 another public bid. This other contract was entered  
4 into six years after the first public bid.

5           You're going to hear, and you've heard from  
6 Dr. Juan Luis Aguilar, Guatemala's expert on  
7 Guatemalan law, who tells you that whenever you give  
8 equipment, State equipment, whenever you give it to a  
9 third party, including through a usufruct--including  
10 through a usufruct--it requires a public bid, and it  
11 matters not that there was an original public bid six  
12 years earlier. Conditions change. So Guatemalan law  
13 requires that if you're going to have a separate  
14 contract, especially a contract that varies the bids  
15 of the initial bidding terms, you've got to celebrate  
16 another public bid. And compliance with public  
17 bidding laws is a serious thing.

18           Of course that relates to a public purpose.  
19 It's not something--it is not some mere technicality,  
20 as Claimant would have you believe.

21           So when they entered into this Agreement,  
22 they did so without conducting a public bid,

1 incorporating bidding terms that they disregarded,  
2 and, interestingly, entering into a number of  
3 backdated leases to justify payments of canons that  
4 they owed to FEGUA based on these letter  
5 authorizations that they had executed.

6           Now, they claim estoppel. They claim, "Gosh,  
7 we entered into this Agreement. The FEGUA Overseer  
8 told us it was okay. How can you declare it lesivo?"  
9 Well, look at their actions. Look at what actually  
10 happened. The agreements are entered into--the first  
11 one in August of 2003, the second in October of 2003.  
12 That was right before the change of an administration  
13 in Guatemala.

14           President Berger assumes office in  
15 2000--excuse me, in 2004, and there's a new FEGUA  
16 Overseer appointed, Dr. Gramajo. The very first  
17 request they make to Dr. Gramajo under the new  
18 contract, what does he do with it? He responds to  
19 them, "Sorry, you've asked for equipment under this  
20 contract, but the contract suffers a number of  
21 illegalities, and those illegalities need to be cured,  
22 and, therefore, I cannot honor your request."

1           So the Government didn't ratify the Contract.  
2     The Government immediately told them that there were  
3     problems with it. And the course of dealing between  
4     the Parties from the very first request they make to  
5     the new FEGUA Overseer in early 2004, only months  
6     after they entered into the Agreement, all the way  
7     through and after the Government declared that  
8     contract lesivo, showed that the Government never  
9     ratified the Agreement, and their conduct shows that  
10    they understood that the Government never ratified the  
11    Agreement.

12           The payments that FEGUA received for their  
13    use of the equipment throughout this period was per  
14    the letter authorizations that they themselves had  
15    proposed to the Government and which the Government in  
16    good faith accepted so that they could have use of the  
17    equipment while the issue of the contract was sorted  
18    out.

19           And, importantly, you know, Monday-afternoon  
20    quarterbacking is very easy. When you look at the  
21    contemporaneous evidence--and that's really what we  
22    need to look at here to make the decision, right--when

1 you look at the contemporaneous evidence, where is the  
2 evidence that they were claiming between 2003 and 2006  
3 that the Government should be estopped from declaring  
4 that contract illegal or from--should be estopped from  
5 saying that that contract was not in force? Where is  
6 their letter that says that? Where is their complaint  
7 that says that? That's a litigation-driven theory.  
8 That's something that was put together for purposes of  
9 this case. But there is no contemporaneous evidence  
10 of that.

11           The evidence is different. The evidence  
12 shows you that the Parties, immediately after  
13 Dr. Gramajo told them that there was a problem with  
14 this contract, started exchanging draft agreements.  
15 We have e-mail correspondence from their lawyer  
16 sending a draft agreement to FEGUA in which they're  
17 trying to come up with a new contract that would fix  
18 some of the illegalities.

19           Again, you don't have to accept Guatemala's  
20 word. Let's look at the evidence.

21           They wrote, in November of 2004, to the  
22 Vice-Minister of Communications, copying The President

1 of the country and a number of other high-level  
2 officials. And what did they ask for, in part?  
3 Official and formal recognition of their contract.

4           Here is the letter. Okay. Dated 15  
5 November 2004. They're asking for official and formal  
6 acknowledgment of their contract. And they say, "The  
7 Government's failure to acknowledge these contracts."  
8 That's clearly not the Government ratifying those  
9 contracts. They're acknowledging the Government is  
10 doing just the opposite; it's telling them the  
11 contracts have problems, legal problems, important  
12 ones, that need to be fixed before the Government will  
13 acknowledge them, before the Government will operate  
14 under them.

15           This is their letter. And they also  
16 acknowledge in the second paragraph that the  
17 Government and they were in negotiations to try to fix  
18 these problems. This is not the Government ratifying.  
19 This is not estoppel. They acknowledge it, and they  
20 themselves say that they're negotiating with the  
21 Government to come up with a new contract or a  
22 modified contract that would address the Government's

1 concerns, that would address FEGUA's concerns. So  
2 they knew that the Government had told them there were  
3 problems, and they were trying to fix them along with  
4 the Government. They were meeting with the  
5 Government.

6           So it's just not the case that the Government  
7 ever ratified this illegal contract. What the  
8 Government did, though--and the evidence does show  
9 this--is that from 2004 up to and including the period  
10 when the Contract was declared lesivo and after--the  
11 Government in good faith tried to negotiate a  
12 resolution of the issues that caused that agreement to  
13 be lesivo as well as a number of other issues that  
14 were in dispute between the Parties.

15           Now, there's been much back and forth between  
16 the Parties about whether the Claimant performed its  
17 obligations or Guatemala performed its obligations  
18 under the various contracts. As I mentioned before,  
19 that issue is not one that the tribunal need decide.  
20 But it is important for the Tribunal to understand  
21 that that issue does have relevance in case, and in  
22 terms of the legal issues that need to be decided by

1 this Tribunal, the most relevant aspect of this is  
2 that the parties were negotiating a number of  
3 different disputes between them. Guatemala asked for  
4 a railroad, put a bid out for it, and it feels misled  
5 because while Claimant promised to restore and  
6 modernize the railway, Guatemala to this day does not  
7 have that promise fulfilled.

8           And there are a number of other promises and  
9 we list them here: payments, you know, they made  
10 certain projections about what necessary would pay,  
11 and those projections were far short of what Guatemala  
12 actually received. And a number of other promises.  
13 But, again, important that you recognize that that's  
14 not an issue that you need to resolve, but when you  
15 look at some of the things that they're pointing  
16 out--why was the Government discussing with them the  
17 broader problems with the railway during the same time  
18 that they were discussing the Lesivo  
19 Declaration--well, there is no surprise as to why,  
20 because that was an issue in dispute between the  
21 Parties.

22           Now, as it relates to the issue of the Lesivo

1 Declaration, we submit to you--again, there has been a  
2 number of expert reports back and forth about whether  
3 the Contract--the Equipment Contract is, in fact,  
4 lesivo. That issue is before the local Guatemalan  
5 court. That is not an issue that this Tribunal need  
6 decide. The question is, we think, whether Guatemala  
7 violated CAFTA in determining that the contract was  
8 lesivo, in the process leading up to the Declaration  
9 of Lesivo; what did Guatemala do and what was it  
10 trying to remedy?

11 Now, on that issue, it's undisputed  
12 evidence--now, it's undisputed in this case that the  
13 persons who were analyzing whether the Equipment  
14 Contract was lesivo; that is, the persons in each of  
15 the different offices of the Government that were  
16 asked to do that, they all independently concluded  
17 that the Contract was lesivo. You've seen their legal  
18 opinions. None of them--and they've all put in a  
19 declarations. Claimant has chose not to cross any of  
20 them. None of them received an instruction to reach  
21 that conclusion, that the contract was lesivo. They  
22 independently after, objective analyses, reached that

1 Opinion. And none of them knew about this alleged  
2 and, we submit, completely unproven conspiracy to give  
3 the concession to Mr. Campollo. They've all told you  
4 that by way of written declarations, and the other  
5 side has chosen not cross any of them.

6 Now, talking about the issue of Mr. Campollo.  
7 I mean, stripped again, away, to its essence, what  
8 Claimant says in this case is that the Government had  
9 certain improper motivations in declaring the Contract  
10 lesivo. One of them, they say, is to benefit  
11 Mr. Ramón Campollo, who is a businessman in Guatemala  
12 who is in the sugar industry, not the railroad  
13 industry.

14 Their allegation in this regard is unproven.  
15 Again, I submit to you it's very easy to level  
16 allegations, but when it comes down to it, where is  
17 the evidence? Where is the proof? Claimant has  
18 produced no document, no evidence that demonstrates  
19 that Mr. Campollo or anyone on his behalf asked the  
20 Government to take away the railway concession from  
21 Claimant to give it to Mr. Campollo. That's their  
22 allegation, but there is not one piece of evidence

1 that will support that conclusion.

2           They've produced no evidence that the  
3 Government has given or offered to give the concession  
4 to Mr. Campollo. Here we are, four years after  
5 Claimant left the country, five years after the  
6 Contract was declared lesivo, where is the evidence  
7 that Mr. Campollo went to the Government and said,  
8 "Hey, great. We've achieved our objective to declare  
9 their contract lesivo. Now, give me the concession."

10           Where is the evidence that even asks for the  
11 concession, even without an admission like that? It's  
12 nonexistent because it is a theory that is unproven.  
13 It simply didn't happen.

14           All of the Government officials involved at  
15 the highest levels, respected individuals in the  
16 administration of Mr. Berger, as well as Mr. Campollo,  
17 as well as President Berger's son deny that this was  
18 ever a motive of Government. It wasn't, and there is  
19 no evidence to prove it.

20           The other pillar of their improper motivation  
21 argument is that the Government used the Lesivo  
22 Declaration as a threat instrument. There is a series

1 of fundamental flaws with that argument that they've  
2 made. Again, it's a theory, but it's unproven because  
3 it didn't happen.

4           The President issued the Lesivo  
5 Declaration--and this is what the evidence  
6 shows--because the contract at issue suffered from a  
7 number of important defects, and the President was  
8 consistently told that. The evidence shows that he  
9 was told that by the Attorney General of the country,  
10 by the Overseer of FEGUA who independently had that  
11 issue analyzed by internal lawyers and external  
12 lawyers. And what did the Government do when he  
13 received the request from the FEGUA Overseer to  
14 declare the Contract lesivo? Does he immediately sign  
15 a declaration and declare the Contract lesivo? No.  
16 He has the issue analyzed by his internal legal team  
17 who, in turns, sends it to the Ministry of Public  
18 Finance. And they have it analyzed by three separate  
19 lawyers, all of whom conclude that the contract is  
20 lesivo to the interests of Guatemala for a number of  
21 fundamental and important reasons. And the President  
22 is told that if he does not declare the Contract

1 lesivo, that he will face legal consequences.

2           That's why the Lesivo Declaration was issued,  
3 not because, as they say, there was any conspiracy to  
4 benefit Mr. Campollo and not because, as they say, the  
5 Government was using the Lesivo Declaration as some  
6 kind of instrument or weapon to force them to  
7 renegotiate their contracts.

8           Again, where's the evidence? What does the  
9 evidence actually show?

10           Well, we know--and this is uncontested--that  
11 in May of 2006, they got wind of the fact that the  
12 Government was analyzing the possibility of declaring  
13 one of their contracts lesivo. We now know it's the  
14 Equipment Contract. And how did they learn this?  
15 Because a Government official, somebody within the  
16 Berger administration, picked up the phone and called  
17 them and told them that.

18           What was the Government's response when they  
19 complained about it?--this is uncontested--the  
20 Government stopped the lesivo process. The Government  
21 said, "We'll put it on hold and, as a measure of good  
22 faith, we're going to give the Parties more time to

1 try to negotiate a solution."

2           Where is the evidence that the Government  
3 used the Lesivo Declaration as a threat instrument?  
4 It's the opposite. The Government put the lesivo  
5 process on hold to give the Parties time to negotiate.  
6 It's just the opposite of what they're saying.

7           Now, Claimant also tells you, in an effort to  
8 sustain their arguments on fair and equitable  
9 treatment, that the Government didn't tell them about  
10 the Lesivo Declaration until a day before it was set  
11 to be published and after The President had signed it.

12           I submit to you the following question: How  
13 can one use as a threat something that they don't tell  
14 the other side about? The answer is, you can't. When  
15 you threaten somebody with something, you obviously  
16 tell them about it. You wield it over their head, and  
17 you say "Either you do this, or I'm going to do that."  
18 There is no evidence that the Government did that with  
19 the Lesivo Declaration; just the opposite, and their  
20 allegations prove it.

21           Now, they point to the Agreement that was  
22 exchanged on the 24th of August, the day before the

1 Lesivo Declaration was set to be published, and they  
2 say, "This is evidence that the Government used the  
3 Lesivo Declaration against us as a threat instrument."  
4 No, it's not.

5 All that that is is the Government's effort,  
6 as it had been doing ever since they first got  
7 involved with FVG and Claimant, to try to come up with  
8 a solution, a negotiation to try to resolve the  
9 disputes. And I submit to you that there is nothing  
10 unusual about the fact that that Agreement addresses  
11 globally a number of issues that the Parties had in  
12 dispute. Nowhere in that agreement does it say,  
13 "Unless you do X, we will issue the Lesivo  
14 Declaration."

15 The only other document they cite for this  
16 theory other than these unreliable newspaper  
17 articles--or the one reliable newspaper article--are  
18 minutes from post-lesivo meetings that the Government  
19 had with them. And, again, I submit to you, it makes  
20 no sense. If what they're saying is true, if the  
21 Government's incentive here was take the concession  
22 away from them to give it to another Party, why would

1 The President be asking his Government and his  
2 officials to continue to negotiate with them to try to  
3 get a working railroad?

4           It makes no sense. And as it relates to this  
5 particular document that they cite, R-36, it's minutes  
6 of a private meeting wherein there's a record--there's  
7 a note taken that the Attorney General then of  
8 Guatemala told other Government officials, where  
9 Claimant had no representatives, that he had to  
10 proceed with the filing of the case before the  
11 Administrative Court. And we all know that--it's been  
12 established under Guatemalan law--he had three months  
13 to do that or else he would lose the right to do that;  
14 the Government would lose the right to proceed to  
15 present the case before the Administrative Court.  
16 It's a statute of limitation issues.

17           And the statement, I submit to you, when you  
18 analyze it carefully, all that it says is, "I have to  
19 proceed with this case and perhaps the filing of that  
20 case might act as a bit of pressure to get the Parties  
21 to come together as to the settlement issues." That's  
22 what it says.

1           It doesn't say, "We're using the Lesivo  
2 Declaration as an instrument to pressure the Claimants  
3 to renegotiate their agreement."

4           And more importantly than that, it's a  
5 statement made in a private meeting. It's not a  
6 threat made to them. Where's the evidence that they  
7 knew that, that somebody communicated that statement  
8 from the Attorney General to them at the time? It's  
9 not there. They tell you themselves that they first  
10 learned about that during this litigation. There is  
11 no evidence.

12           So, on this point, sum up with the following:  
13 There is no evidence to prove that the Government has  
14 used the Lesivo Declaration as a threat instrument,  
15 and had there been, we would have expected Claimant at  
16 the time to have complained to the Government about  
17 it.

18           Again, I submit to you, in the same way that  
19 they didn't do so in relation to Mr. Campollo, they  
20 didn't do so here because it just didn't happen.

21           Now, as to the issue of the effect that the  
22 Lesivo Declaration had, it's important to set, again,

1 the stage on some issues that are not in dispute.

2           Claimant admits that today it has every legal  
3 right that it had before the Lesivo Declaration in  
4 relation to Contract 143 and 158, and obviously the  
5 same as it relates to Contract 402 because that was  
6 not even the subject of the Lesivo Declaration. It  
7 concedes that the most substantial part of its  
8 investment is not the Contract that was declared  
9 lesivo, but the Rail Restoration Contract, and that  
10 the Government has taken no action as it relates to  
11 that contract. Notwithstanding that they come here  
12 and tell you that their entire investment is wiped  
13 out, they still have every right under those  
14 agreements; they are still benefiting from those  
15 agreements; they are still generating revenue from  
16 those agreements. And, in fact, they have conceded  
17 that their revenues have increased since the Lesivo  
18 Declaration from those agreements.

19           As we sit here today, they remain in  
20 possession, not only of their rights for the railway  
21 for the rail right of way, the real estate, they also  
22 remain in possession of all the rail equipment. And

1 all of the documents from the Government after the  
2 Lesivo Declaration all show you that the Government  
3 continues, until the process plays itself out in the  
4 Guatemalan courts, to respect whatever rights they may  
5 have under those agreements.

6           Now, in terms of what could Guatemala have  
7 done. Guatemala could not simply have confiscated  
8 their rail equipment. Some questions were raised  
9 during the jurisdictional phase, "Why didn't Guatemala  
10 just go and take the equipment back if the Agreement  
11 was illegal, if it was a nullity in Guatemala's  
12 Opinion?"

13           Well, because there's a legal process to be  
14 followed in Guatemala. It couldn't just declare the  
15 Contract a nullity. It couldn't walk in and take  
16 their equipment. Had they done so, Claimant would  
17 have been in here arguing that there was a violation  
18 of international law, direct expropriation. There was  
19 a process to be followed, and that process required an  
20 analysis of whether the Contract was against the  
21 interest of the State. It required a request to the  
22 President, a determination by The President that the

1 contract was lesivo, and an opening of a court  
2 proceeding so that an independent judiciary could make  
3 a determination as to whether the Contract is or is  
4 not lesivo and what remedies may lie in light of that  
5 determination.

6           And that's what the Government did. It  
7 followed its laws as Claimant should have expected it  
8 to do.

9           There were no other legal remedies available.  
10 Claimant has made much of the fact that there were  
11 other legal remedies that maybe the Government should  
12 have taken. Well, both experts agree that at the time  
13 that the Lesivo Declaration was issued, in 2006, the  
14 only remedy available to the Government legally under  
15 its laws was to move forward with the lesivo process.  
16 It was either that or accept the illegal contract and  
17 ratify it by inaction. That was simply not an action  
18 that the Government could take.

19           Now, Claimant alleges \$65 million in damages.  
20 We're going to get to it in a little bit more detail,  
21 but I think there are two important factual points  
22 that you need to keep in mind when you're assessing

1 their damages.

2           Number one, I've said it before, they  
3 produced nothing but losses from Day 1 until the time  
4 they left the country.

5           Number two, the Fair Market Value of their  
6 investment was negative 2.7 million.

7           And, number three--and this is again very  
8 important, this is just a--it's a factual point, but  
9 it's important for you to realize--they had developed  
10 Phase 1. Phase 2, it's uncontested, they ran into a  
11 number of problems, and they could not--they could not  
12 do Phase 2. They didn't have the funding. So they  
13 were stuck with a failed investment. And in order to  
14 restore Phase 2, they themselves tell you you need an  
15 investment of more than a hundred million dollars.

16           So the real question to this Tribunal is:  
17 What would a willing buyer have paid for that  
18 investment? What would a willing buyer have paid for  
19 that business knowing that only one line was  
20 operating, that they were only able to generate  
21 certain revenues from real estate, that none of that  
22 had produced any positive profits for them, and that

1 that willing buyer was going to have to come up with  
2 at least a hundred million dollars in investment  
3 before they could even consider maybe making a profit?

4           Lastly, we believe--and we've proven--that  
5 there is no causation, even if you find that there is  
6 damages associated with the Lesivo Declaration.

7           Now, let's talk about the legal issues.

8           Indirect expropriation, the question is--and  
9 this is a claim of indirect expropriation--has  
10 Guatemala violated its obligations under Article 10.7  
11 of CAFTA and indirectly expropriated their investment?  
12 The answer is no.

13           In terms of the minimum standard of treatment  
14 claims under Article 10.5, has Guatemala afforded fair  
15 and equitable treatment to Claimant? The answer is  
16 yes.

17           Has Guatemala afforded full protection and  
18 security to Claimant? The answer is yes.

19           Has it fulfilled its obligations for National  
20 Treatment under Article 10.3 of CAFTA? The answer is  
21 yes.

22           And Claimant has not proven its damages.

1           Now, let's go into indirect expropriation.  
2 We all know the standard, and the key question is  
3 whether Guatemala indirectly expropriated the  
4 investment made by Claimant. The main issue, whether  
5 or not there has been unjustified and permanent  
6 interference with their investment, we submit to you  
7 the answer to that is no.

8           And what we think is sort of the clear  
9 admission that requires a denial of this claim: Has  
10 Claimants' investment been rendered worthless as a  
11 result of the actions taken by Guatemala? The answer  
12 is no.

13           They tell you that 92 percent of their income  
14 comes from Contract 402. They still are generating  
15 income today. And as it relates to the concrete  
16 contracts that they had in place before the Lesivo  
17 Declaration, they're all still in place today and  
18 they're all generating more income today than they  
19 were before the Lesivo Declaration.

20           Claimant has conceded all of the points that  
21 we put up here on the board, some of which I just  
22 discussed. These are key points--key points that tell

1 you that they cannot make out a claim for indirect  
2 expropriation.

3           What is Claimants' investment? Again, I  
4 think a key important issue for you to keep in mind  
5 when you're analyzing their case, they told you the  
6 most important part: The bulk of their revenues comes  
7 from real estate. That's Contract 402. That contract  
8 is in place, per their admission. That contract is  
9 wholly unconnected--wholly unconnected--to their  
10 railway operation business. 92 to 8 ratio is what  
11 they say.

12           So according to their admission, 92 percent  
13 of the investment that generates the most important  
14 revenues for them is unconnected with the issues in  
15 this case.

16           Claimant alleges expropriatory intent. And  
17 we've talked about their issues, their theories as it  
18 relates to Mr. Campollo and as it relates to the use  
19 of the Lesivo Declaration as a threat instrument.  
20 Again, they're unproven.

21           As it relates to the expropriation claim,  
22 both Parties agree that the issue of intent alone is

1 insufficient and, in fact, you don't need to find  
2 expropriatory--excuse me, discriminatory intent in  
3 order to find expropriation, but you do have to find  
4 that there's been interference, and that it's--that  
5 that interference was substantial enough to constitute  
6 an indirect expropriation, equivalent to Guatemala  
7 going in and taking their assets away, equivalent to a  
8 direct expropriation.

9           The Parties concede, both sides, that there  
10 was no legal effect on their rights from the Lesivo  
11 Declaration. And the very nature of a Lesivo  
12 Declaration tells you that.

13           With respect to the--their rights under the  
14 Contracts, the Parties agree that they still have  
15 those rights.

16           Now, there is also no proof of permanency.  
17 What do we mean by that? The matter before the  
18 Contencioso Administrativo Court is still pending,  
19 which means the Court has not yet determined whether  
20 or not the Contract is lesivo. If the Court  
21 determines that it is not lesivo, then Claimants have  
22 and continue to have every right that they had in the

1 Equipment Contract, and they could go and they could  
2 do a press release and tell all of Guatemala that the  
3 Government was wrong when it declared their contract  
4 lesivo.

5           The point is, at the stage at which we are  
6 now, we don't know what's going to happen. The  
7 Government--the judiciary has not made a determination  
8 yet. And until they do, they retain all of their  
9 rights in their Contract 143.

10           And, again, important to underscore that  
11 whatever the determination is by the judiciary in the  
12 administrative proceeding, they maintain, irrespective  
13 of that ruling, all of their rights under  
14 Contract 402.

15           There is no proof--there has to be proof that  
16 there is substantial interference and that it is  
17 severe enough such that there has been a substantial  
18 deprivation of their investment. They can't prove  
19 that because they have admitted to you that they are  
20 still generating revenues, they still have their  
21 rights from the agreements, and, hence, they cannot  
22 prove, as they allege here, that their investment has

1    been rendered worthless.

2                   We submit to you that when you look at the  
3    actual evidence that they have submitted, it shows  
4    nothing more than letters from some of their clients  
5    about potentially speculative investments or projects  
6    into the future.  None are backed by contracts.  None  
7    are backed by concrete proposals.  None are backed by  
8    concrete business plans, and that tells you that these  
9    were all speculative potential projects in discussion  
10   and nothing more.

11                   There is no causal link between the Lesivo  
12   Declaration and their alleged damages.  And there are  
13   a number of points up there that demonstrate that, but  
14   I cite to you the last two.  You know, the fact that  
15   they, one day the after the Government declares lesivo  
16   their contract, come out with this press release, one  
17   business day, and tell the world that the Government  
18   has taken action against their Agreement tells you  
19   that they were planning for this case to be their exit  
20   strategy out of the country.

21                   The fact that only months after the  
22   Government declared the Contract lesivo, they are

1 presenting this case before ICSID and conducting  
2 another press release before the Guatemalan press  
3 telling the Guatemalan world that they are leaving the  
4 country, suspending operations, holding all their  
5 legal documents in hand, tells you what their true aim  
6 was.

7           Even if you were to find that there is an  
8 expropriation, we submit to you everything we have  
9 just told you proves that there wasn't. That  
10 expropriation is lawful, and they are due no  
11 compensation. And it is so because the Government has  
12 met all of the elements for a lawful expropriation  
13 under CAFTA.

14           The Lesivo Declaration was issued for a  
15 public purpose. You can point to a number of  
16 different things in the Lesivo Declaration, but it's  
17 very hard to argue that upholding public bidding laws  
18 is not taking action for a public purpose. It's very  
19 hard to argue that upholding the Guatemalan  
20 Constitution and the Organic Law of FEGUA that  
21 requires executive approval before equipment is given  
22 in usufruct is not upholding the public purpose.

1           We've talked about the lack of evidence in  
2 relation to their allegations of discrimination. So  
3 Guatemala has proven that actions taken were for a  
4 nondiscriminatory purpose. And as it relates to  
5 Claimant's allegation that they have not been afforded  
6 due process, we know that the Guatemalan law requires  
7 that Claimant be afforded due process in the  
8 Contencioso Administrativo Court proceeding, and we  
9 know--it's undisputed--that Claimant has made a number  
10 of filings, has had its position heard, has won some  
11 issues and lost some issue, but the point is they've  
12 been given an opportunity to be heard, and are being  
13 heard, and are exercising that opportunity, and you  
14 need only look at their filings in that case. We've  
15 put some of them before you in Exhibit R-336 to prove  
16 that. So can Claimant has been afforded due process  
17 and an opportunity to be heard.

18           Now, lastly, on the issue of prompt and  
19 adequate compensation, they say, "The Government has  
20 not given us any compensation." Well, the answer is  
21 that the Government hasn't expropriated anything from  
22 them and, moreover, they have every opportunity to

1 seek any damages that they may say is owing from an  
2 incorrect determination of their contract as lesivo in  
3 the Administrative Court proceeding.

4           And you will hear from Dr. Aguilar. You've  
5 already heard from him in his Expert Report. He tells  
6 you they can seek damages there, whatever the finding,  
7 and they can seek damages even in a separate  
8 proceeding after.

9           Fair and equitable treatment, here the  
10 standard is articulated in Article 10.5. The  
11 important thing to highlight, both Parties agree that  
12 it's the customary international law minimum standard  
13 of treatment that is applicable in CAFTA. Where they  
14 disagree--where we disagree is on what that means and  
15 what that standard is. And I submit to you that one  
16 of the very important issues that you will decide  
17 legally in this case is this question, because this is  
18 the first CAFTA case to deal with this issue.

19           We claim it imposes a very high burden.  
20 There is a very high burden on Claimant to prove what  
21 is the customary international law standard that's  
22 applicable in this case. And it is their burden; it

1 is not ours.

2           As it relates to their reliance on a number  
3 of cases that rely on obligations set forth in a  
4 number of Bilateral Investment Treaties, the Cargill  
5 Award tells you that you can't rely on cases that rely  
6 on autonomous BITs where those BITs don't reflect  
7 customary international law.

8           We're not saying it's never proper to rely on  
9 a case that makes a determination as it relates to a  
10 Bilateral Investment Treaty; we're saying you can only  
11 do so where those BITs reflect customary international  
12 law and not other standards that were negotiated  
13 between the contracting states. To do so would be  
14 injecting into the minimum law--minimum standard of  
15 treatment, customary international law standard,  
16 something other than what should be there.

17           What is the right standard? Well, we submit  
18 to you it is the standards that are up on this  
19 Slide 56, gross denial of justice, manifestly  
20 arbitrary conduct, arbitrary beyond a merely  
21 inconsistent or questionable application of an  
22 administrative or legal policy, an utter lack of due

1 process so as to defend--offend, excuse me, judicial  
2 propriety. That's the standard against which we  
3 should judged in this case.

4           Now, judged against that standard, I think  
5 based on the evidence and the comments I've made  
6 already, it should be fairly obvious that Guatemala  
7 has not violated its undertakings under Article 10.5.  
8 But even if the Tribunal were to hold us to the  
9 standards that Claimant says are applicable, we have  
10 not--Guatemala has not violated Article 10.5 of CAFTA.

11           Here are the standards that Claimant puts up  
12 before this Tribunal.

13           Obligation to afford due process, provide  
14 transparency, to not act in bad faith, to not engage  
15 in arbitrary or discriminatory conduct, and to not  
16 frustrate legitimate expectations.

17           Again, we say these are not part of the  
18 minimum standard of treatment under customary  
19 international law; however, even as it relates to  
20 these standards, we have not violated them.

21           The evidence in terms of a finding of bad  
22 faith is simply not there. Guatemala acted at all

1 times in good faith. This is not anything like  
2 conduct in the Cargill case where the Court--where the  
3 Tribunal there found bad faith. We submit to you that  
4 the facts in this case are very different. What they  
5 support is that Guatemala acted in fact good faith.

6           Again, Claimants cite to their conspiracy  
7 theories which have not been proven regarding  
8 Mr. Campollo and the use of the Lesivo Declaration as  
9 a threat instrument. Those allegations do not--I  
10 repeat--do not have merit.

11           Guatemala, on the other than hand, if you  
12 look at the actual evidence, it shows that they at all  
13 times notified Claimant that there were problems with  
14 the contract, sat down and negotiated with them, tried  
15 to arrive at a negotiation that would cure the legal  
16 deficiencies. They never overlooked the defects in  
17 the Equipment Contracts. And, at the highest levels  
18 of the Government, they were given every opportunity  
19 to sit down with the Government and negotiate a  
20 resolution. The President himself asked his Cabinet  
21 to put together a commission to try to resolve the  
22 problems, and both up to and after the publication of

1 the Lesivo Declaration, the Government at all times  
2 acted in good faith.

3           On the issue of due process--I'm not going to  
4 repeat it again--I think we've provided ample evidence  
5 that they have been afforded an opportunity to have  
6 their Opinion heard about whether the Contract is  
7 lesivo. That they sit here and complain that they  
8 should have been given an opportunity to do so before  
9 the Government, before The President made its  
10 determination, that complaint, I think, rings hollow.  
11 They signed up for and agreed to abide by Guatemalan  
12 law when they made their investment. The Lesivo Law  
13 was on the books, and they had absolutely no right  
14 under Guatemalan law to participate in the process  
15 leading up to the President's decision that the  
16 contract was lesivo. Their right to participate came  
17 after, and they've been afforded that opportunity.

18           Now, their argument that the Lesivo  
19 Declaration is arbitrary hinges on their argument that  
20 the Lesivo Declaration, in essence, is an ambiguous  
21 determination, that it doesn't--it's not tied to any  
22 defined legal standards. They also say that the

1 declaration was not made for a public purpose.

2 I'm going to focus, really, on the first  
3 point because points two and three I've already  
4 addressed. But as we've said, none of these have any  
5 merit.

6 Now, on the issue of whether is the decision  
7 is an arbitrary one, we submit to you that if you look  
8 at the evidence and what was actually done, you will  
9 conclude that there was nothing arbitrary about the  
10 process. It was a very deliberate process. A number  
11 of Government agencies looked at this issue. I've  
12 already cited them. Independent determinations made.  
13 All of this was passed to The President, and with all  
14 of this in hand, The President made a determination  
15 that the agreements were lesivo. It wasn't some  
16 nebulous determination about whether there was harm to  
17 the State; it was a legal determination made and given  
18 to the President that important legal requirements  
19 were not met in signing this contract.

20 It either is or is not a requirement of  
21 Guatemalan law, whether the lesivo--whether the  
22 Contract should have been done after a second public

1 bid. It is or is not a requirement of Guatemalan law  
2 whether executive approval is required before that  
3 contract can be effective. Those are legal  
4 determinations. Those are not nebulous  
5 determinations. Those are not whimsical personal  
6 determinations or preferences.

7           The President was advised that important  
8 legal requirements had not been met and that he would  
9 incur personal liability if he didn't declare the  
10 Agreement lesivo because it suffered from these  
11 defects. And so he took action.

12           As I said, I'm not going to go over the  
13 issues of public purpose and discriminatory intent  
14 because I've already covered them, and we leave you to  
15 our evidence and the slides on those points.

16           I will just highlight for you that, as it  
17 relates to the various different agencies that looked  
18 at this issue within the Government, there is--while  
19 there are some differences in the conclusions they  
20 reached, there is a remarkable level of consistency in  
21 the decisions that are reached.

22           International law doesn't require every

1 agency in Guatemala that looks at this issue to come  
2 up with the exact analysis.

3 I think it is remarkable that there is such  
4 consistency between the various opinions. And as it  
5 relates to the important public interest issues in  
6 involved, the lack of a public bidding, the lack of  
7 approval by The President, the lack of conservation of  
8 important State assets, they are all in agreement that  
9 these issues were the not met and, hence, that the  
10 contracts were lesivo.

11 And we've put together a table for you--which  
12 I won't go through now, but--which shows to you the  
13 remarkable consistency in the various analyses made,  
14 notwithstanding that it's uncontested, that these  
15 determinations were made independently.

16 On the issue of transparency, the requirement  
17 is that--and we all agree on that this--that Claimant  
18 know beforehand the rules and regulations that will  
19 govern its investment. The rules and regulations that  
20 govern Claimant's investment were on the books. The  
21 fact that if they entered into a contract, an  
22 administrative contract, that violated Guatemala law,

1 that they would be subject to a lesivo process is  
2 something that they should have known and that they  
3 assumed when they went to Guatemala to do business.

4 The law was on the books. There is no  
5 allegation here that the law was modified or changed  
6 in some way to adapt to their situation. The law that  
7 was on the books when they made their investment was  
8 the law that was applied to them to declare the  
9 Agreement lesivo.

10 Now, as it relates to their--again, their  
11 argument that there are no standards, and that they  
12 didn't know what the rules were, again, we say that  
13 they knew what the rules were. They knew that, in  
14 relation to obtaining the equipment, they needed to go  
15 through a public bid, they knew that they needed to  
16 have executive approval before that contract would be  
17 effective. There is ample evidence of that in the  
18 record from their own letters requesting letter  
19 authorizations, from how they acted after the  
20 Government told them there were problems with the  
21 contract.

22 Now, the other thing that they argue in terms

1 of lack of transparency is they say, "The Court has no  
2 way to judge whether The President is right or wrong  
3 when he makes the determination about whether the  
4 Contract is lesivo." And they say, "That shows you  
5 there's a lack of transparency and, therefore, a  
6 violation." The problem with that is that, in this  
7 case, as it relates to the issues that this Court has  
8 to decide--I'm talking about the Administrative  
9 Court--they're very concrete issues. Again, whether  
10 or not a public bid was required, whether or not  
11 executive approval is required to give these assets in  
12 usufruct. Those are concrete issues that the Court  
13 has to decide.

14           If it turns out that those were requirements  
15 and that those requirements weren't met, then the  
16 Court is likely to find that the President properly  
17 declared the Contract lesivo. If he finds that those  
18 weren't requirements, then he might find that it  
19 wasn't--that the President's determination was  
20 incorrect. The point is, there are objective factual  
21 determinations that are going to be made by the  
22 Tribunal in Guatemala.

1           And their argument, by the way, that it's  
2 just a rubber stamp, is unproven. And we've submitted  
3 to you a recent court case from 2010 where a  
4 Guatemalan court found that the determination by The  
5 President that a contract was lesivo or that an  
6 administrative act was lesivo was incorrect. And that  
7 shows you that obviously the courts do have standards  
8 upon which to overturn presidential determinations  
9 about lesividad of administrative acts.

10           Now, as it relates to legitimate  
11 expectations, they talk about having a number of  
12 legitimate expectations. Legitimate expectation not  
13 to have the Contract taken away from them to give it  
14 to Mr. Campollo. There is simply no evidence that  
15 that happened.

16           Legitimate expectation that the Agreement  
17 should not be used as a threat instrument. Again, no  
18 evidence that that happened.

19           They also talk about a legitimate expectation  
20 in not having Contract 143 overturned by a Lesivo  
21 Declaration. I submit to you they don't have any  
22 reasonable legitimate expectation in relation to that

1 because, as I mentioned before, when they signed that  
2 Agreement, they knew they were signing an agreement  
3 that did not comply with the very bidding terms they  
4 incorporated into the Agreement and with Guatemalan  
5 law or with the very process that they themselves  
6 agreed to follow and did follow in relation to  
7 Contract 41.

8           So there has been no frustration of their  
9 legitimate expectations. Their fanciful conspiracy  
10 theories put aside, there is simply no evidence to  
11 support them and no evidence for this Tribunal to  
12 conclude that there has been any violation of the fair  
13 and equitable treatment standard based on those  
14 unproven allegations.

15           Moving to full protection and security, the  
16 important issue here is whether or not--and, again,  
17 the minimum standard of treatment applies--but the  
18 important issue here is whether or not Guatemala took  
19 reasonable measures to protect their investment. And  
20 the key word there is "reasonable." Okay. It is not  
21 a strict liability standard as Claimant would like for  
22 this Tribunal to say. They don't argue it's a strict

1 liability standard, but they point to isolated  
2 instances of interference, and they say, "Guatemala  
3 has objected to--or has not fulfilled its full  
4 protection and security requirements." The evidence  
5 is that Guatemala did effectuate reasonable measures  
6 to protect Claimant's investment.

7           Again, mere interference, mere allegation of  
8 a contractual breach is not sufficient.

9           In terms of their allegations about squatting  
10 on the railway, first of all--and this is very  
11 important--while Claimants have put forth pictures and  
12 all sorts of other things to say to you that there has  
13 been some squatting and some thefts post-lesivo, there  
14 is no evidence--I repeat, no evidence--from where you  
15 can conclude that the squatting and the--the alleged  
16 squatting and the alleged thefts have increased  
17 post-lesivo, other than their bare allegation. But  
18 that's not evidence. None. There is no empirical  
19 evidence that has been put before to you show there  
20 are, in fact, more thefts after lesivo than before or  
21 more squatting after lesivo than before. None  
22 whatsoever. And there is no ability for you to

1 conclude that even though they've asked you to do so.

2           They've also not provided any evidence to  
3 link any post-lesivo squatting or thefts to the Lesivo  
4 Declaration itself.

5           There is ample evidence that they themselves  
6 were before the press with press releases and telling  
7 the world that they were leaving, and, quite frankly,  
8 months after the Lesivo Declaration, they abandoned  
9 the country and did a press release. Who is to say  
10 that that's not what encouraged the squatters and the  
11 thefts?

12           Now, in terms of the reasonable measures that  
13 Guatemala put in place, we have put before the  
14 Tribunal a number of documents that show that  
15 Guatemala did act in good faith. It responded to a  
16 number of situations. We cite here some of the  
17 documents that prove it. It initiated criminal  
18 proceedings. It filed actions before the Guatemalan  
19 courts. It was diligent in protecting the--in taking  
20 measures to protect Claimant's investment. And the  
21 protestations otherwise simply don't establish a lack  
22 of reasonable measures put in place.

1           We cite for you other actions taken by  
2 Guatemala here, all supported by documented evidence,  
3 and they all show that Guatemala took a number of  
4 steps--a number of steps--which, given the standard  
5 that's applied in CAFTA, Guatemala complies with its  
6 obligation to put in place reasonable measures.

7           On the issue of National Treatment--before we  
8 get into damages--the issue here, sorry, is whether or  
9 not treatment less favorable was accorded to Claimant  
10 than to a competitor or comparator in the country who  
11 was in like circumstances.

12           There are three essential elements: They  
13 have to prove that there was a domestic comparator  
14 that was in like circumstances; that they received  
15 less favorable treatment as compared to that  
16 competitor; and that that treatment related to the  
17 establishment, acquisition, expansion, et cetera, of  
18 investments.

19           As it relates to this claim, we think it's  
20 fairly easily disposed of. They're not able to meet  
21 either elements one or two.

22           In relation to their allegation that

1 Mr. Campollo is in the railroad business, we submit to  
2 you that that allegation is completely unproven. He  
3 is in the sugar industry. He is not a railroad  
4 operator. He doesn't operate a railroad in Guatemala.  
5 He doesn't operate a commercial railroad in the  
6 Dominican Republic. They cite to you the fact that  
7 there's an internal railroad that's operated in the  
8 Dominican Republic for his own use, not for commercial  
9 use. We submit to you that is a very, very different  
10 thing than what Claimants took on in the railway  
11 project in Guatemala.

12           Again, it's in a different country, and we're  
13 talking about an internal railway for internal  
14 transport that is no more than 12 to 18 miles long as  
15 opposed to the 500-mile-long railway that they took on  
16 in Guatemala.

17           He's also not in the--this is just more on  
18 the issue of the railway industry, but, again, not in  
19 commercial operations; substantially different  
20 railroads. It's not the same thing at all, not in  
21 like circumstances.

22           As it relates to their allegation that

1 Mr. Campollo was in the real estate business, there is  
2 no evidence that Mr. Campollo was their competitor as  
3 it relates to their real estate right-of-way business  
4 that they had that was a corollary to their  
5 Contract 402, and, again, what they say is the most  
6 important part of their investment.

7           Mr. Campollo, there is no evidence that he  
8 was their competitor for that real estate business.  
9 The only real thing they cite to is a proposal by a  
10 company called Desarrollos G which they received from  
11 Mr. Pinto, they say. Mr. Campollo has said he doesn't  
12 know that company. That not his company. He didn't  
13 authorize Mr. Pinto make that proposal. And so,  
14 again, there is no evidence that he is their  
15 competitor there.

16           But even if you were to believe that  
17 Mr. Campollo was involved in the submission of that  
18 proposal, there is no evidence that he's their  
19 competitor.

20           What does that proposal say? I submit to you  
21 you should read it very carefully. It is simply a  
22 preliminary proposal, and nothing more, a proposal

1 about some possible business ventures between the  
2 company Desarrollos G and FVG.

3           There is absolutely no evidence, even if you  
4 were to reach the conclusion that they met the first  
5 element in defining a competitor in like  
6 circumstances--none--that Mr. Campollo has received  
7 more favorable treatment or that they have received  
8 less favorable treatment than Mr. Campollo.

9           Again, where is the evidence that  
10 Mr. Campollo is now in possession of their usufruct  
11 rights? Where is the evidence that he even asked for  
12 it? Where is the evidence that the Government even  
13 suggested they would give it to him? It is completely  
14 absent.

15           That deals with their legal claims.

16           Now let's talk briefly about damages. I'm  
17 not going to into all of the different issues that  
18 Mr. Foster put up. I will say to you that we found it  
19 interesting that he's asking the Tribunal for every  
20 latitude when it comes to their damages. And I  
21 propose to you that that probably has something to do  
22 with the fact that their damages claims are in real

1 trouble in this case.

2           In terms of--before we get into some of the  
3 issues that we want to discuss on damages, we do want  
4 to point out to you something that we think is quite  
5 important for this Tribunal to take note of. In the  
6 Memorial on the Merits, Claimants sought \$64 million,  
7 and they said they had lost profits of the 36 million  
8 and a lost investment of 27 million. And after we  
9 made mention in our Memorial, our counter-Memorial,  
10 that their our lost profits were wholly  
11 speculative--we'll talk about that in a second--we  
12 believe they are wholly speculative--they  
13 flip-flopped, and they took a number--a large amount  
14 of their damages claim out of the lost profits  
15 category and they stuck it in the lost investments  
16 category. And we submit to you that that is something  
17 you should look very carefully at and speaks volumes  
18 about their damages arguments in this case.

19           Two fundamental questions: If you assume  
20 that there is liability in this case, has Claimant  
21 proven that there are quantifiable compensable damages  
22 that they have suffered as a result of the Lesivo

1 Declaration; and whether those damages, again, were  
2 proximately caused by the issuance of Lesivo  
3 Declaration.

4 We submit that the answer is no to both.

5 And, again, when you're looking at their  
6 damages arguments, it's important for you to remember  
7 two important facts: Number one, business produced  
8 nothing but losses from Day 1; number two, a  
9 substantial, more than hundred-million-dollar  
10 investment had to be made before they could ever  
11 consider being anything other than a business that  
12 produced losses.

13 We submit to you that those two facts, those  
14 two facts show that the analysis done by Dr. Spiller  
15 is the correct analysis. Would a willing buyer really  
16 pay \$65 million for that business? That's what  
17 they're asking you to conclude. Really?

18 What's the appropriate standard? The  
19 appropriate standard, as Dr. Spiller has told you, is  
20 Fair Market Value. And he tells you that the Fair  
21 Market Value standard that he utilizes does, assuming  
22 that this Tribunal reaches the conclusion that the

1 Chorzów Full Reparation standard is part of  
2 CAFTA--which we have not conceded, contrary to what  
3 Claimant says--but if you reach that conclusion, what  
4 Dr. Spiller has told you is that the Fair Market Value  
5 as calculated by him using the discounted cash flow  
6 method, that that gets you to the same place where  
7 Chorzów does.

8           In other words, they are fully repaired,  
9 fully receive a remedy for their potential damages in  
10 this case.

11           Now, we have argued that Claimant misapplies  
12 the Chorzów standard, and that leads to a  
13 double-counting of damages in case. And the  
14 concept--the portion that we argue has been  
15 double-counted is their lost investment. And the  
16 reason that we argue that it's been double-counted is  
17 that when you do a discounted cash flow analysis of  
18 the Fair Market Value of the investment in this case,  
19 that takes into account both the possible lost  
20 investment and the possible projected lost profits  
21 associated with the Governmental action.

22           What Claimants have done is they have done

1 that analysis and then they've added the lost  
2 investment back into it again. And that results into,  
3 as Dr. Spiller tells you, counting the same  
4 concept--i.e., lost investment--twice, and thus,  
5 overcompensating Claimant.

6 We submit to you that the discounted cash  
7 flow calculation is the proper calculation, as  
8 Dr. Spiller has told you. And we submit to you some  
9 of the cites that Dr. Spiller put before you. And  
10 that this does the job of determination what the Fair  
11 Market Value is of Claimant's investment at the time  
12 of the alleged wrongful conduct by Guatemala and that  
13 this would, as calculated by Dr. Spiller, fairly  
14 compensate Claimant for the damages they seek in this  
15 case.

16 Important for you, again, to realize the  
17 history of unprofitable operations. Again, that is a  
18 very, very important factor in your analysis of  
19 damages. It's also important for you to realize that  
20 the business termination costs have not been proven in  
21 this case.

22 On the issue the lost profits, tribunals,

1 time and time, again, are reluctant to grant claims  
2 for lost profits when they are speculative, and  
3 notwithstanding that Claimants have talked to you  
4 about the years of experience that Mr. MacSwain has,  
5 50 years they say, I submit to you he has no  
6 experience in Guatemala, none. And the experience he  
7 does have in the U.S. is not translatable to  
8 Guatemala. And your best evidence of the speculative  
9 nature of the profits that Claimant put before you are  
10 its historical operations. And these charts tell the  
11 story.

12           To the left of the line is what Claimants  
13 were able to do during the time they were in business,  
14 and to the right of the line is what they tell you  
15 would have happened, miraculously, had the Government  
16 not issued a Lesivo Declaration.

17           Look at what actually was going on at the  
18 time of the Lesivo Declaration, look at the  
19 desperation the Claimants were in in terms of their  
20 business, and ask yourself whether it's reasonable to  
21 conclude that they were going to generate all of these  
22 easements and leases and other contracts. The answer

1 is no.

2           And same as it relates to their rail revenue.  
3 It's quite astonishing that their experts tell you  
4 that notwithstanding that they were in operations for  
5 over eight years in the country, that their--if the  
6 Government hadn't issued the Lesivo Declaration, they  
7 were going to shoot up in terms of rail revenue.  
8 Again, it's not consistent with the facts. It's not  
9 consistent with their admission that they had no way  
10 to build the second phase and that there only was one  
11 phase, which produced only losses for them.

12           In terms of the double-counting, we've made  
13 the point already, and it's important for you to  
14 realize--and you're going to have a chance to hear  
15 from Dr. Spiller and from Dr. Thompson and  
16 Mr. MacSwain and the other experts, and I'm sure  
17 you'll have many questions for them--but as  
18 Dr. Spiller has told you, Claimant's effort to remedy  
19 the double-counting by engaging in the amortization  
20 procedure that they engaged in in their Reply brief  
21 doesn't cut muster, doesn't take rid of--get rid of  
22 the double-counting error in their damages

1 calculations.

2           On the issue of termination costs, we submit  
3 to you Dr. Spiller's analysis, and basically most of  
4 these costs were not associated--at least no proof has  
5 been put forth that they were associated with  
6 termination and wind-down; rather, it was operations  
7 costs and, therefore, not appropriate damages.

8           Our conclusion, if you assume that--if you  
9 reach the conclusion, excuse me, that there is  
10 liability, which we submit to you the evidence does  
11 not support, you, nonetheless, should conclude that  
12 there are no damages. There are a number of other  
13 cases--and we've cited you to some of them--where  
14 tribunals have concluded that there is liability, but,  
15 nonetheless, have concluded that Claimants have not  
16 proven damages. And we submit to you, if you get to  
17 damages in this case, that is the appropriate  
18 conclusion.

19           Summing up, Claimants have failed to prove  
20 that Guatemala took any measure that has permanently  
21 interfered with their investment, and there has been  
22 no interference with the main part of their

1 investment, certainly no legal interference. They  
2 have every right in every one of the contracts that  
3 they ever got from Guatemala, and there is absolutely  
4 no proof, even if you assume that there is  
5 interference, that that interference rendered their  
6 investment worthless.

7           On the issue of fair and equitable treatment,  
8 again, their conspiracy theories are not proven; they  
9 are theories and nothing more. We ask you to please  
10 take a very careful look at the evidence, and we hope  
11 you will come to that conclusion because that is the  
12 conclusion we have reached.

13           On the issue of full protection and security,  
14 Guatemala at all times used reasonable measures to  
15 protect their investment. Again, the query is not did  
16 Guatemala take action with respect to this particular  
17 interference or that particular action in terms of a  
18 squatter or theft; it's whether reasonable measures  
19 were put in place.

20           And I think that the evidence proves that  
21 reasonable measures were, in fact, put in place by  
22 Guatemala.

1           On the issue of National Treatment, again,  
2 Claimants have been unable to prove that there is a  
3 competitor in like circumstances or that any such  
4 competitor--here they have only cited Mr. Campollo, so  
5 that's who you need to look to--that they have  
6 received less favorable treatment as compared to him.

7           On the issues of Damages, again, we submit to  
8 you, no causal link, no damages have been proven.  
9 Claimants still have their contracts. Claimants are  
10 today still generating revenues from their contracts.  
11 The undisputed evidence is that the revenues have gone  
12 up post-lesivo. And to the extent that Claimants  
13 aren't generating more revenue from those agreements  
14 today, it's because they took a unilateral decision to  
15 leave the country in 2007. Remind you they left the  
16 country in 2007 and abandoned their investment. They  
17 weren't told to do so; they did so themselves.

18           We believe they are not entitled to any  
19 damages--okay. Sorry. We had miscalculated. I will  
20 wrap up then.

21           And in terms of prayer for relief, I just  
22 want to highlight one thing, which is that in addition

1 to asking you not to award Claimants any damages, we  
2 do submit to the Tribunal that should you determine  
3 that any damages are awarded, you should determine  
4 that they must first give back the Contractual rights  
5 which they currently have--again, they still have  
6 them; that it would be completely unfair for them to  
7 be given damages to for rights and agreements that  
8 they still have.

9 Thank you very much for your time.

10 PRESIDENT RIGO: Thank you very much,  
11 Mr. Orta.

12 So we will recess now and come back in an  
13 hour's time, at 1:20.

14 And if the Tribunal would see Mr. Orta and  
15 Mr. Foster for maybe five minutes before we start, at  
16 1:15.

17 Okay. Thank you.

18 (Whereupon, at 12:26 p.m., the Hearing was  
19 adjourned until 1:26 p.m., the same day.)

20

21

22



1 and affirm their truthfulness before the Tribunal?

2 A. Yes.

3 Q. Now, Respondent and Respondent's damages  
4 expert, Dr. Spiller, says that on the eve of the  
5 Lesivo Resolution, FVG was a distressed company that  
6 had never made a profit and was worth nothing to  
7 anyone. Would you please give the Tribunal your  
8 evaluation of the financial condition of FVG and its  
9 cash flow generating capacity immediately prior to  
10 lesivo?

11 A. Well, first of all, I would certainly dispute  
12 the statement that we were a distressed company.  
13 First of all, the company was backed by RDC as the  
14 principal investor, but more to the point, if you  
15 exclude the funds that were diverted by FEGUA, we were  
16 actually cash-flow positive, and I think that's an  
17 important point to make.

18 A couple of other things I want to mention  
19 are that from a management perspective, we had  
20 succeeded in achieving an industry key indicator,  
21 which is quite important, which is that we had  
22 operated for 1.5 years with no personal injuries.

1 That measure is a good indication of your ability to  
2 manage, and more importantly, it reflects--if you're  
3 running a safe railroad, you're providing good  
4 service. You're more likely to be growing the  
5 business and becoming profitable.

6 Equally, I think it's important to mention  
7 that we had a number of real estate deals in the  
8 pipeline ranging from additional electricity  
9 distribution projects as GESUR to a parking lot  
10 project in Gerona and even a supermarket project with  
11 UniSuper.

12 Q. Dr. Spiller also computes his weighted  
13 average cost of capital by, among other things,  
14 assuming that FVG would borrow money in Guatemala at  
15 18.67 percent interest rather than borrowing money  
16 through RDC at 7.08 percent interest. Did FVG ever  
17 intend to finance any significant portion of its  
18 operations from borrowing in Guatemala?

19 A. No, because we could borrow at substantially  
20 lower rates from the USA.

21 Q. How long have you been in the railroad  
22 business, Mr. Posner?

1           A.     Since I was a sophomore in college, which  
2 would have meant since the summer of 1975.

3           Q.     Has RDC ever had an operating railroad  
4 investment that was not profitable after a few years  
5 of investment, restoration and operation?

6           A.     No.

7           Q.     Have you made profitable railroad investments  
8 in delapidated railroads in Third World or developing  
9 countries?

10          A.     Yes. We were investors in Mozambique and  
11 Malawi, in the Nacala corridor. We are investors in  
12 Argentina in two railways, ALL Central, and ALL  
13 Mesopotanico. We are investors in the Central Railway  
14 of Peru. And I would describe all of those as fitting  
15 that description.

16          Q.     Have you also made profitable railroad  
17 investments in the United States?

18          A.     Yes. Our flagship railroad, the Iowa  
19 Interstate, which was depicted this morning, generates  
20 approximately a hundred million dollars of annual  
21 revenue, is quite profitable, and is continuing to  
22 grow. It's our flagship.

1 Q. Has the Iowa Interstate also won awards?

2 A. Yes. We won the Gold Harriman Safety Award  
3 twice in recent years, which is the highest honor for  
4 railroads in the USA.

5 Q. Do you receive inquiries from throughout the  
6 world asking you to make investments in dilapidated  
7 railroads and provide the expertise to renovate and  
8 operate them?

9 MR. ORTA: I'm sorry. I have an objection to  
10 that question. I'm not entirely sure what the  
11 relevance is to these proceedings of any such offers.

12 MR. FOSTER: They've alleged that we don't  
13 know what we were doing and that we did a bad job in  
14 Guatemala, and the recognition of this company as one  
15 of the leading railroad companies in the world is  
16 certainly relevant to that question.

17 PRESIDENT RIGO: Go ahead. Reply to the  
18 question.

19 A. Yes, we were contacted quite often about  
20 railroads in other countries. As a matter of fact,  
21 one of the things we're looking at right now is a  
22 3-foot gauge mountain railroad in Latin America.

1 BY MR. FOSTER:

2 Q. The Respondent also criticizes the quality of  
3 FVG's rehabilitation of the railroad assets which FVG  
4 got from FEGUA as a result of the usufruct contracts.  
5 Please comment on that claim.

6 A. Well, just let me start by saying that  
7 Guatemala is a country that did not have a railroad  
8 when we got there. And the possibility of an expert  
9 existing in Guatemala was, by definition, remote, but  
10 I think some historical context is in order because  
11 the era of private sector railroad management in  
12 Guatemala ended in the '60s when IRCA was  
13 nationalized. And so from a management perspective,  
14 there were actually two generations separating the  
15 last private sector operation of a railroad in  
16 Guatemala from when we came on the scene. So I think  
17 the ability of anybody from Guatemala to describe  
18 themselves as a railroad expert is not possible.

19 But one of the other things that I think is  
20 worth mentioning, now that we're using the word  
21 "railroad expert," we went out of our way to induce  
22 world railway experts to come and visit our railroad.

1 We would run an annual trip with our steam  
2 locomotives, and as a result of that, we were able to  
3 get visitors from literally all over the world who  
4 were railroad industry experts to come and take a ride  
5 on our famous narrow gauge mountain railroad. The  
6 price of the ticket was they had to give us a report  
7 on how they thought we were doing and what they  
8 thought we could be doing better.

9           So, you know, we recognized that we didn't  
10 have all the ideas, and so we did an outreach program  
11 to try to get world experts to come down, and there  
12 were two results. One was they confirmed that we were  
13 doing a good job, but, also, we got some good ideas.  
14 So we were constantly trying to achieve global best  
15 practices, you know, to the extent you have global  
16 best practices for that environment.

17       Q.    Is one of those visitors going to testify in  
18 the next day or two, Lou Cerny?

19       A.    Yes, Lou Cerny actually is known as the Yoda  
20 of railway engineering. He is literally the world's  
21 foremost authority on railroad bridges, and he was the  
22 guy who first mentioned the words Guatemala, because I

1 remember reading one of his articles in the American  
2 Railway Engineering Association magazine about 20  
3 years ago.

4 MR. FOSTER: Thank you, Mr. Posner. Answer  
5 any questions that Mr. Orta might have for you.

6 PRESIDENT RIGO: Mr. Orta, it's your turn.

7 MR. ORTA: Yes, sir. Might I have one  
8 second? I want to make sure we have the notebooks.

9 PRESIDENT RIGO: Yes.

10 MR. ORTA: Bear with me.

11 Mr. Chairman, we're just getting the  
12 documents up. There are a number of issues that we  
13 may discuss, and so we were over inclusive in the  
14 number of documents, but don't let the mountain of  
15 paper scare you. We're going to live within the hour  
16 limitation that you've set.

17 PRESIDENT RIGO: I was going to suggest that  
18 next time we put it on the Kindle or an i-Pad. It  
19 would be easier if they're going to bring a couple of  
20 bags in.

21 MR. ORTA: I think we're ready, Mr. Chairman.

22 PRESIDENT RIGO: Okay. Go ahead.

1 CROSS-EXAMINATION

2 BY MR. ORTA:

3 Q. Good afternoon, Mr. Posner.

4 A. Good afternoon, Mr. Orta.

5 Q. How are you today?

6 A. Ready.

7 Q. All right. Excellent. Let's hope I'm ready,  
8 too.

9 I understand you're from Pittsburgh; correct?

10 A. Yes.

11 Q. And as you mentioned to the Tribunal, you  
12 have been involved in the railroad business for quite  
13 some time?

14 A. Yes, since the summer of 1975.

15 Q. You have a passion for railroads?

16 A. I do.

17 Q. I noticed in one of your declarations you  
18 mentioned that you acquired a steam engine from China  
19 and brought it to the United States; is that right?

20 A. Actually, two steam locomotives.

21 Q. Okay. And was that a personal acquisition or  
22 was that something that you did on behalf of RDC?

1           A.    As part of RDC's activities--to answer the  
2 question, yes, it was done by RDC.  But one of the  
3 things that RDC does is take an active role in railway  
4 preservation and culture, and this was one of the many  
5 projects that RDC has been involved in that reflect  
6 that.

7           Q.    And so, sir, you recognize the importance of  
8 preserving railway assets?

9           A.    Yes, I do.  I am personally committed to  
10 railway preservation.

11          Q.    Let me show you--put up on the screen,  
12 please, Mr. Posner's Third Declaration, the first  
13 annex.

14                   (Comments off microphone.)

15           MR. ORTA:  Okay.  That will work.

16           BY MR. ORTA:

17          Q.    All right.  Now, sir, this is Annex 1 to your  
18 Third Declaration in this proceeding; correct?

19          A.    Yes.

20          Q.    Okay.  You have a paper copy of it in front  
21 of you.  You can just refer to the paper copy, if you  
22 like.

1           In 2000, did you have a profit or loss based  
2 on what you report here in Annex 1?

3           A.    Loss.

4           Q.    Okay.  Of how much?

5           A.    Approximately 6 million Quetzales.

6           Q.    Okay.  How about 2001?  Profit or loss and  
7 how much?

8           A.    A loss of 3.49 million Quetzales.

9           Q.    Okay.  How about 2002, profit or loss and how  
10 much?

11          A.    Loss of 5 million Quetzales.

12          Q.    How about 2003?

13          A.    Loss of 1.9 million Quetzales.

14          Q.    2004?

15          A.    Approximately 1.1 million Quetzales loss.

16          Q.    Is that a loss or is that supposed to be a  
17 positive figure?

18          A.    I'm sorry.  You're right.  It was a profit.

19          Q.    Now, is that a profit or is that revenue?

20          A.    It's a profit.

21          Q.    Okay.  How about 2005?

22          A.    327 million Quetzales loss.

1 Q. And 2006?

2 A. 6.1 million Quetzales loss. The only thing  
3 that I would like to emphasize here is that  
4 these--these statements are in Quetzales.

5 Q. Right. And these are numbers that reflect,  
6 as you point out in Annex 1 in the title, what the  
7 actual numbers would have been had you received the  
8 trust payments that you claimed FEGUA owed you; right?

9 A. Yes.

10 Q. So the actual--the actual performance was  
11 worse in terms of less revenue, or higher losses, than  
12 what is actually reported on this annex; is that  
13 correct?

14 A. Please give me a minute to study these so I  
15 can refamiliarize myself with the annex, because I  
16 want to make sure I give you an appropriate answer.

17 Q. Mr. Posner, if you like, we can just move on  
18 to the next issue.

19 A. Okay. The reason I'm hesitating is because  
20 there's something about these numbers that--something  
21 about them that I don't recall, but let's move on. We  
22 can come back to them.

1 Q. Okay. I think we established back at the  
2 jurisdictional hearing, when you agreed to participate  
3 in the bid for the Railway Restoration Contract, you  
4 agreed to abide by all Guatemalan laws that were in  
5 effect at that time; correct?

6 A. Yes.

7 Q. And the same when you agreed to participate  
8 in the separate public bid for the railway equipment?

9 A. Yes.

10 Q. And you meant it when you say you agreed, I  
11 mean, you honestly wanted to comply with all  
12 Guatemalan laws that were in effect at that time?

13 A. Yes. And we did comply with Guatemalan law  
14 at that time.

15 Q. Okay. Now, in relation to the bid for the  
16 railway equipment, you recall you participated in the  
17 bid back in 1997, November of 1997, for the initial  
18 Railway Equipment Contract that you had?

19 A. Yes.

20 Q. And that ultimately led to a signing of a  
21 contract in March of 1999, or thereabouts, if you  
22 don't remember the precise date. We can show it to

1 you, if you like.

2 A. Yeah, if you could show me that, that would  
3 help jog my memory. I would appreciate that.

4 Q. Okay. It is document number C-25--I'm sorry,  
5 C- --bear with me. Well, the bid is C-17, and the  
6 contract itself--bear with me. Let me make this  
7 easier since we're limited with time while we're  
8 looking for it. The date is not as important as the  
9 question. You remember you entered into a separate  
10 contract for the railway equipment.

11 A. Yes.

12 Q. And that resulted from that initial, separate  
13 bid that you participated in; correct? For the  
14 railway equipment?

15 A. Yes.

16 Q. And you put in a separate offer to obtain the  
17 railway equipment when you participated in that  
18 separate bidding process as part of that bidding  
19 process?

20 A. Yes.

21 Q. Okay. And ultimately you signed the  
22 Contract, Contract Number 41 that's up on the screen,

1 and that agreement never came into force or into  
2 effect; correct?

3 A. Not correct. It did come into effect as far  
4 as we were concerned.

5 Q. Okay. Let's put up Contract 143. As we're  
6 looking for this contract, do you recall that one of  
7 the essential requirements for this contract to come  
8 into force was that the Contract needed to be approved  
9 by the President and his Cabinet?

10 A. No, I don't recall.

11 MR. ORTA: Okay. Let's go back to Contract  
12 41. Sorry. Go to, I believe it's Clause 6. You've  
13 got to go up to the body of the document. Okay.  
14 There we go.

15 BY MR. ORTA:

16 Q. So you read some Spanish?

17 A. Yes, I may ask for help, but I've got a  
18 pretty good knowledge of Spanish.

19 Q. Okay. Rough translation, the document says  
20 that the term of the Contract will be for 50 years and  
21 will begin to run 30 days after the publication in the  
22 Official Gazette of the--acuerdo gubernativo (ph) or

1 executive resolution through which this Agreement is  
2 approved. Is that a fair reading?

3 A. Yes.

4 Q. And so the Agreement would not come into  
5 effect, it's term would not begin until there was a  
6 executive resolution confirming the Contract and that  
7 was published in the Official Gazette; correct?

8 A. Please repeat your question so that I can  
9 give you a--make sure I understand what I'm saying,  
10 replying to.

11 Q. Sure. The Agreement would not come into  
12 effect unless and until it was approved through an  
13 executive resolution which was published in the  
14 Official Gazette. That's what that clause says.

15 A. Okay. My technical legal Spanish is not good  
16 enough to interpret this, so I'm going to have to  
17 respond, I don't know.

18 Q. Okay. You ultimately, though, entered into a  
19 separate Equipment Contract; right?

20 A. Yes.

21 Q. And part of the reason you did so was because  
22 the prior Equipment Contract wasn't in effect, wasn't

1 in force.

2 A. No. As far as we were concerned, it was in  
3 force.

4 Q. Okay. Let's put up Contract 143, please.

5 MR. ORTA: If you could, Kelby, go to the  
6 initial text. Bear with me right there. All right.  
7 Go to the next page, please. Next page. Next page.  
8 Sorry. Okay. Here we go.

9 BY MR. ORTA:

10 Q. Okay. Go ahead and start with the word "by"  
11 and, if you could, Mr. Posner, we're also going to put  
12 it up on the screen for you, just sort of do the next  
13 seven, eight lines.

14 MR. ORTA: A little lower. You've got to get  
15 a little more text there, Kelby. I'm sorry.

16 BY MR. ORTA:

17 Q. If you could read the text. This is the  
18 English translation. And this document says that the  
19 Contract 41 did not take effect because it not been  
20 approved by the President of the Republic.

21 A. But the rest of the sentence says, "even  
22 though that was an unnecessary requirement," et

1 cetera, et cetera.

2 Q. Okay. But it was in the bidding terms that  
3 you agreed to; right? In other words, the requirement  
4 for Government approval was in the bidding terms, and  
5 you agreed to that when you agreed to participate in  
6 the bid and accept the bidding terms.

7 A. I do not recall that detail, so I'll have to  
8 answer, I don't recall.

9 Q. Okay. We can show you the bidding terms, but  
10 I think you previously testified to that in the  
11 jurisdictional hearing, so rather than do that, let's  
12 move on.

13 In relation to this Contract 143, you agree  
14 this was signed six years after--six years after the  
15 original bid that you participated in for the railway  
16 equipment, correct, between 1997 and 2003?

17 A. Yes, more or less.

18 Q. And you did not do a separate public bid for  
19 this Contract, did you?

20 A. I'm sorry. I don't understand your question.

21 Q. You didn't participate in a separate public  
22 bid when this Contract was signed in 2003?

1 A. I don't recall.

2 Q. As you sit here today, you don't recall if  
3 there was another bidding process in 2003 for this  
4 Contract?

5 A. To be honest with you, no, because there were  
6 several contracts which evolved from our original  
7 deal, and this was one of them.

8 Q. Okay. Fair.

9 With respect to executive approval of this  
10 Contract, did you ever receive executive approval of  
11 this Agreement, 143?

12 A. I don't recall.

13 Q. Did you ever receive executive approval of  
14 Contract 41?

15 A. No, we did not, because what's written in  
16 this agreement is what it says, it was not approved by  
17 the President of the Republic.

18 Q. Okay. Did you ever speak with your lawyers  
19 about what remedies you might have in relation to  
20 obtaining approval of Contract 41?

21 A. As I recall, there were many complex  
22 discussions over the years with FEGUA.

1 Q. I asked about your lawyers.

2 A. Okay. Well, if you could please repeat the  
3 question.

4 MR. FOSTER: In that case, I object. You're  
5 asking for invasion of the attorney-client privilege.

6 BY MR. ORTA:

7 Q. Well, did you ever inquire as to whether  
8 there were any remedies, legal remedies, available to  
9 you in Guatemala associated with the nonapproval of  
10 Contract 41?

11 MR. FOSTER: Objection, if it calls for what  
12 his lawyer told him.

13 MR. ORTA: Question asked if he inquired.

14 PRESIDENT RIGO: Just reply to the question,  
15 please.

16 A. Okay. Please ask me the question once more,  
17 and I will give you a yes or no.

18 BY MR. ORTA:

19 Q. Did you ever inquire as to whether there were  
20 any remedies associated with the nonapproval of  
21 Contract 41 under Guatemalan law?

22 A. No, to the best of my recollection, because

1 that was being handled at the local level with FEGUA.

2 Q. And when you say it was being handled at the  
3 local level, you mean by other persons who were  
4 representing you?

5 A. For a negotiation of this type, it typically  
6 would have involved our general manager and our legal  
7 counsel.

8 Q. Okay. And your general manager at the time  
9 was Mr. Senn?

10 A. Yes.

11 Q. Okay. Turning to another topic, in relation  
12 to the allegation you've made in this case that the  
13 Government was in some way trying to take your  
14 concession to give it to Mr. Campollo, do you have any  
15 evidence, as you sit here, that Mr. Campollo today has  
16 any rights in your usufruct agreement, be it the 402  
17 Railway Agreement or the Rail Equipment Agreement?

18 A. Could you please repeat the question?

19 Q. Do you have any evidence, as you sit here  
20 today, to prove to this Tribunal that Mr. Campollo or  
21 anyone on his behalf has any rights in your usufruct  
22 agreements in Guatemala as you sit here today?

1           A.    I can't answer that question, because that's  
2    a conversation between Mr. Campollo and the  
3    Government.

4           Q.    Right. My question is: Do you have any  
5    evidence that shows that there have been any such  
6    conversations?

7           A.    As I recall your question, you were asking me  
8    do I know if there's anything in place today, and I  
9    don't know what might be in place today.

10          Q.    So the answer is: You have no evidence of  
11   anything being in place today; correct?

12          A.    Yes. I have no evidence of there being  
13   anything in place today.

14          Q.    Okay. And do you have any evidence of  
15   Mr. Campollo ever having gone to the Government to  
16   tell them that he wanted the Government to take away  
17   their concession so that he could have it, take away  
18   your concession so that he could have it?

19          A.    Yes.

20          Q.    You do have evidence?

21          A.    Yes.

22          Q.    What is it?

1           A.    Among other things, the meeting that I was at  
2   with the President of the Republic in which  
3   Mr. Campollo's name was mentioned.

4           Q.    Okay.  Why don't we take--you did some  
5   minutes in relation to that meeting; correct?

6           A.    Yes.

7           Q.    So we're going to direct you to those  
8   meetings notes, which are C-57.

9           MR. ORTA:  Yes, C-57, I'm sorry.  And we also  
10   have it up on the screen.

11          BY MR. ORTA:

12          Q.    Okay.  Now, sir, first of all, this is  
13   document C-57.  It was provided by you and your team  
14   in this case.  These are meeting notes that you  
15   prepared after the meeting with President Berger in  
16   March of 2006.

17          A.    Yes.

18          Q.    And just to set the stage, this is a meeting  
19   that you requested to have with the President.

20          A.    No, we did not request the meeting.

21          Q.    Okay.  Did the President request the meeting  
22   with you?

1           A.    No.  The meeting was requested by our  
2 partners, Cementos Progreso.

3           Q.    And what was the purpose of the meeting?

4           A.    The purpose of the meeting was to explain to  
5 the President the current situation and potential  
6 situation for the railway company.

7           Q.    Okay.  And based on your knowledge up until  
8 this time, had Mr. Campollo threatened to take away  
9 your concession by this point?

10          A.    Yes.

11          Q.    Okay.  And in the meeting, did you tell the  
12 President that Mr. Campollo had threatened to take  
13 away your concession?

14          A.    No, I did not.

15          Q.    And that's not reflected anywhere in these  
16 meetings notes, is it?

17          A.    Yes, it is reflected, because Mr. Campollo's  
18 name is in these notes.

19          Q.    Well, his name is in the notes, but let's  
20 read what it actually says.  What it says, based on  
21 your notes, is that there was a comment made by  
22 Arturo, who I assume is Arturo Gramajo, the overseer

1 of FEGUA at the time.

2 A. Yes.

3 Q. And your notes say that he commented that  
4 there was substantial interest of other private-sector  
5 parties in the development of Ciudad del Sur, right,  
6 that's what that says?

7 A. Yes.

8 Q. That doesn't say that Mr. Gramajo said that  
9 there was substantial interest of private parties in  
10 the taking away of your usufruct right, does it?

11 A. No, it does not, and I can see with the  
12 benefit of hindsight that what I should have written  
13 was the South Coast.

14 Q. Well, I'm not asking you to rewrite the  
15 document, sir. I just asked you what the document,  
16 the contemporaneous document says. That's all I'm  
17 asking. I'm not asking you to do a rewriting of the  
18 document. If you could go down a little bit further--

19 A. Could I just clarify what I just said?

20 Q. I haven't asked you to clarify it. I think  
21 it was fairly clear. I'm asking you what you wrote  
22 down.

1           A.    Well, I'd just like to make a point which I  
2    think is important for the Tribunal, and that is to  
3    the extent that I would be talking about a real estate  
4    project owned by Ramón Campollo, that is none of my  
5    business.  And taken out of context, what this really  
6    means is the development of the railway to Ciudad del  
7    Sur, and in that respect, I should have written it  
8    with those additional words, but did not.  So I'd like  
9    to clarify that for the Tribunal.

10          Q.    Okay.  Now, if we look a little bit further  
11    down, you provided your personal observations on what  
12    you thought the President's reaction was to the  
13    meeting; correct?

14          A.    Yes.

15          Q.    And you say at the time that your personal  
16    observations are that "the President is genuinely  
17    interested in seeing us succeed"; correct?

18          A.    Yes.

19          Q.    And that the follow-up is very much in your  
20    hands; correct?

21          A.    Yes.

22          Q.    Now, you did have, and you testified in your

1 declaration, that you had some discussions with a  
2 Mr. Hector Pinto about the railway service toward the  
3 south?

4 A. Yes.

5 Q. Okay. And you recall, do you not, that  
6 Mr. Pinto sent a letter to you--I'm  
7 sorry--Mr. Campollo sent a letter to you in which he  
8 commented that he had no further interest in having  
9 any negotiations with you or with FVG?

10 A. Yes.

11 Q. Okay.

12 MR. ORTA: Can you put R-173 up, please?

13 Okay.

14 BY MR. ORTA:

15 Q. This is a letter, translation of a letter,  
16 that Mr. Campollo wrote to Jorge Senn on 15  
17 April 2005; correct?

18 A. Yes.

19 Q. And Mr. Senn was your general manager, the  
20 genral manager of FVG, Ferrovías, at the time?

21 A. Yes.

22 Q. And in this letter, Mr. Campollo says that he

1 has decided not to participate in the railway project  
2 that was presented to me--meaning to him--in the city  
3 of Miami; correct?

4 A. Yes.

5 Q. And he says that project, whatever it may be,  
6 was presented to him by certain officers of the  
7 company you represent, meaning Ferrovías; correct?

8 A. Yes.

9 Q. You have seen a copy of this letter before  
10 today; right?

11 A. Yes.

12 Q. And Mr. Campollo is fairly clearly saying he  
13 doesn't want to participate in any railway project  
14 here; correct?

15 A. Yes.

16 Q. Now, Mr. Senn sent a response to this letter,  
17 didn't he?

18 MR. ORTA: Let's put up R-174, please.

19 BY MR. ORTA:

20 Q. You've seen this response before?

21 A. Yes.

22 Q. Okay. And in it, Mr. Senn, on behalf of

1 Ferrovías, responds that--acknowledging receipt of  
2 Mr. Campollo's letter; right?

3 A. Yes.

4 Q. And acknowledging that Mr. Campollo informed  
5 Ferrovías that he had decided not participate in the  
6 railway project; correct?

7 A. Yes.

8 Q. And he confirms that it was a railway project  
9 that was presented to Mr. Campollo in Miami by  
10 Ferrovías.

11 A. Okay. Please ask me that question again,  
12 because I want to give you a specific reply.

13 Q. Well, sure. The letter says, "I hereby  
14 acknowledge receipt of your correspondence dated this  
15 past April 15 in which you inform us of your decision  
16 not to participate in the railway project that was  
17 presented to you in Miami by our company"; correct?

18 Did I read that right?

19 A. Yes.

20 Q. So he's talking about a railway project that  
21 was presented to Mr. Campollo by Ferrovías in Miami.

22 A. Yes.

1 Q. By this point in time, is it your testimony  
2 that Mr. Campollo had threatened to take away your  
3 company, your concession?

4 A. Yes.

5 Q. Okay. Can you explain to us why Mr. Senn  
6 doesn't say anything about that in this letter?

7 A. I can't comment as to what Mr. Senn would  
8 have been thinking, but it would seem to be in politic  
9 in a letter of this type to reference threats. If I  
10 were writing this letter, I can't say I would have  
11 worded it any differently.

12 Q. Okay. Mr. Senn does say in the second  
13 paragraph that, "we," meaning Ferrovías, "regret your  
14 decision and understand your reasons." Correct?

15 A. Yes.

16 Q. And the decision you were regretting was his  
17 decision not to participate in the railway project.

18 A. Yes.

19 Q. Now, after this, according to your testimony  
20 in your declaration, you received some additional  
21 e-mails from Mr. Pinto.

22 A. Yes.

1 Q. Okay. Let me ask you before we get into  
2 those e-mails, after receiving those e-mails, having  
3 received a letter from Mr. Campollo telling you that  
4 he had no further interest in participating in the  
5 railway project and he had decided not to participate  
6 in the railway project, did you reach out to  
7 Mr. Campollo to ask him why you were still receiving  
8 communications from Mr. Pinto?

9 A. No. We assumed that Hector Pinto, as in the  
10 past, was continuing to represent him.

11 Q. Did you receive any furtherer communication  
12 from Mr. Campollo instructing you that he had decided  
13 to reinitiate discussions about this project?

14 A. No, because Mr. Pinto is representing him.

15 Q. Okay. Did you receive anything from  
16 Mr. Campollo is my question?

17 A. No.

18 Q. Did you receive a call from Mr. Campollo  
19 where he said, "I've reconsidered and I've asked  
20 Mr. Pinto to reach out to you about these issues"?

21 A. Not to me, no.

22 Q. To anyone that you're aware of?

1 A. Not that I'm aware of.

2 Q. Okay. Now, in relation to the communications  
3 you received from Mr. Pinto--

4 MR. ORTA: Let's go to C-109, please.

5 BY MR. ORTA:

6 Q. This is a letter that's been provided in this  
7 case by your lawyers, C-109, and it's a letter dated  
8 February 28, 2006, purportedly from Mr. Pinto to  
9 Mr. Senn; correct?

10 A. Yes.

11 Q. Okay. In this letter--first of all,  
12 Mr. Campollo is not copied in this letter, is he?

13 A. No, nor would I expect him to have been  
14 copied.

15 Q. You were copied, though, right?

16 A. Yes.

17 Q. And in the letter, he talks about expressing  
18 an interest. He says "my interest" in connecting  
19 Ciudad del Sur to Puerto Quetzal; right?

20 A. Yes.

21 Q. He says it's his interest. He says "my  
22 interest"; correct?

1 A. Yes.

2 Q. He doesn't say it's Mr. Campollo's interest  
3 here, does he?

4 A. No, but we assumed it to be.

5 Q. Okay. You made the assumption. I'm saying  
6 he didn't say that, though. He just talks about his  
7 own interest.

8 A. Mr. Pinto used Mr. Campollo's project.

9 Q. Right.

10 A. Which is another way of saying that he was  
11 acting on behalf of Mr. Campollo.

12 Q. You're making that assumption; right? That's  
13 an assumption you're making?

14 A. Yes. And under the circumstances, I think it  
15 was the right assumption.

16 Q. Okay. But as I said, you have no knowledge  
17 whether Mr. Campollo even knows that this letter was  
18 sent, do you?

19 A. No, and I would not expect that Hector Pinto  
20 would have told him about his weekly dinner plans.

21 Q. Okay. In relation to the letter, what he's  
22 talking about here is obtaining information on the

1 options of service, "right-of-way lease or  
2 transportation solution that Ferrovías can offer us";  
3 correct?

4 A. Yes.

5 Q. Okay. He doesn't say here he wants to take  
6 away your concession, does he?

7 A. No, and nor would I expect that to be  
8 contained in a letter like this.

9 Q. Okay. In fact, you don't have any letter  
10 where Mr. Pinto said he wanted to take away your  
11 concession.

12 A. No, and nor would I expect that we would ever  
13 get a letter to that effect from Mr. Pinto or  
14 Mr. Campollo.

15 Q. Okay. No one from the Government is copied  
16 on this letter; correct?

17 A. Correct. And, again, this is a pretty casual  
18 follow-up letter.

19 MR. ORTA: Let's go to C-110, please.

20 BY MR. ORTA:

21 Q. This is an e-mail, it appears, from Mr. Jorge  
22 Senn from Ferrovías to Mr.--well, CCing Mr. Pinto,

1 CCing yourself, and it looks like maybe being sent to  
2 an address associated with Mr. Pinto.

3 A. Yes.

4 Q. And he's talking about--well, first of all  
5 he's responding to Mr. Pinto's letter; correct?

6 A. Yes. He's responding to an e-mail. I just  
7 don't know which e-mail. It doesn't say.

8 Q. Okay. And he's providing some particulars  
9 about the possibility of rail service in relation to  
10 providing rail service in relation to some aspect of  
11 Mr. Pinto's business.

12 A. Yes.

13 Q. Okay. Nowhere in this letter does Mr. Senn  
14 say anything about any supposed threats to take away  
15 the usufruct rights, does he?

16 A. No. And, again, I think it's highly unlikely  
17 that that type of discussion would be in a letter like  
18 this.

19 Q. Okay.

20 A. I can't speak for Mr. Senn as general  
21 manager, but if I was communicating like this, I  
22 certainly would not have included the words "threats"

1 or other things in this context.

2 MR. ORTA: Okay. Put that up. Okay. We're  
3 going to skip a few here just to move along and go to  
4 C-117.

5 BY MR. ORTA:

6 Q. This is another document that has been put  
7 forth in your--by your lawyers in this case. Now,  
8 just so that everyone is clear, Mr. Pinto is deceased;  
9 correct, to your knowledge?

10 A. Yes, to the best of my knowledge.

11 Q. Okay. And so all of these communications,  
12 obviously, Mr. Pinto can't respond to any of these  
13 things. In relation to this e-mail, this was an  
14 e-mail that was sent to you?

15 A. Yes.

16 Q. And in it, Mr. Pinto, assuming he sent this  
17 e-mail, addresses the e-mail to you, and the subject  
18 line--can you just interpret that for us in English,  
19 please? Subject, line, sir.

20 A. Yeah, the subject line is basically tariffs  
21 for the provision of freight transportation of sugar.

22 Q. Okay. This is after the President of

1 Guatemala has declared lesivo your Equipment Contract;  
2 correct?

3 A. Yes.

4 Q. And after the resolution, executive  
5 resolution was published.

6 A. I do not recall the date of the publication  
7 of the Presidential Resolution.

8 Q. I mean, it's in the record, but I will tell  
9 you that it was published on the 25th of August, 2006,  
10 and assuming that that representation is correct, you  
11 would be receiving this e-mail after that; right?

12 A. Yes.

13 Q. Okay. And were you also making the  
14 assumption here that Mr. Pinto was writing on behalf  
15 of Mr. Campollo?

16 A. Yes.

17 Q. Again, he doesn't copy Mr. Campollo to this  
18 e-mail, does he?

19 A. This is a request for a quote for freight  
20 transportation. If I were Mr. Campollo, I would be  
21 pretty upset being copied on something like this.

22 Q. My question was, was he copied, to your

1 knowledge?

2 A. No.

3 Q. To your knowledge, did he ever receive a copy  
4 of this e-mail? Has he ever seen this e-mail, to your  
5 knowledge? Mr. Campollo, that is.

6 A. No, to my knowledge.

7 Q. Okay. And in it, there is no comments of  
8 threats to take away your usufruct rights, is there,  
9 in this e-mail?

10 A. This is a threat.

11 Q. Can you explain where the threat is in this  
12 e-mail? Because we're looking at the text.

13 A. This is a quite specific threat in that he's  
14 requesting prices for freight transportation on the  
15 South Coast Railway, which at the time did not exist.

16 Q. Okay. That's the threat right there? I just  
17 want to make sure I understand what you're saying.

18 A. I took it as a threat.

19 Q. Okay. And you took it as a threat to mean  
20 what exactly?

21 A. As I recall, the word I used was "fishing  
22 expedition."

1 Q. So the threat was that he was fishing,  
2 Mr. Pinto?

3 A. No. It was my belief, and I don't recall how  
4 I communicated it to my colleagues, but I do recall  
5 when I received this e-mail in context and the way  
6 this was constructed, was clearly intended to prove  
7 that we had somehow fallen short as far as the South  
8 Coast.

9 Q. And you take all that from the text in this  
10 e-mail?

11 A. Yes, I do.

12 Q. Okay. Very good.

13 Other than this document and what some of the  
14 other documents I've showed you, again, there is no  
15 other piece of evidence that you can point to that the  
16 Government ever spoke with Mr. Campollo or  
17 Mr. Campollo ever spoke to the Government about taking  
18 your concession away; correct?

19 A. I forget the number of times that  
20 Mr. Campollo's name was mentioned by Government  
21 people. The one that I recall the most clearly was  
22 the meeting with the President in which his name was

1 mentioned at the meeting with the President. I  
2 remember that very clearly.

3 Q. Good. And we discussed that already. Let's  
4 go to--

5 MR. ORTA: What document is this? I'm sorry.  
6 R-321, please.

7 BY MR. ORTA:

8 Q. Okay. I want to call your attention to, in  
9 this string of e-mails, an e-mail that you received  
10 from Mr. Juan Pablo Carrasco de Groote, dated 11  
11 August 2006, time of the e-mail, 5:51 p.m. Do you see  
12 that e-mail.

13 A. Yes.

14 Q. And he sends it to you and entitles it "Dear  
15 Henry".

16 A. Yes.

17 Q. In it he is talking about the Declaration of  
18 Lesividad; correct?

19 A. Yes.

20 Q. And towards the bottom, Mr. Carrasco says to  
21 you, they can declare the lesivity of the Court  
22 Resolution, so we will have to find out what it is

1 they are technically planning to issue. In any  
2 event--I'm sorry--in any case, the lesivity is not an  
3 automatic procedure. It's a process that, indeed,  
4 will be lengthy, since after the resolution is issued,  
5 the annulment of the Contract must be approved by a  
6 court. Do you see that?

7 A. Yes.

8 Q. So on the 11th of August, you were being told  
9 that whatever resolution was going to be issued by the  
10 President was not an automatic procedure; correct?  
11 The lesivity is not an automatic procedure, he says.

12 A. Yes.

13 Q. And that it would have to be approved by a  
14 court; correct? The annulment of the Contract would  
15 have to be approved by the Court.

16 A. Well, actually it says approved by "a court,"  
17 and to me that suggests that at this stage we weren't  
18 even quite sure what we were dealing with. If it  
19 named a specific court, I would--the way I read it is  
20 we're not quite sure what we're dealing with here,  
21 because it says it must be approved by a court.

22 Q. Right. But he's telling you that it's not

1 automatic, right? I mean, those are his words. I'm  
2 not making that up, that's what he said, not an  
3 automatic procedure.

4 A. Those are his words.

5 Q. And he tells you that the annulment of the  
6 Contract must be approved by a court; correct?

7 A. Yes.

8 Q. Okay. He also tells you, interestingly, if  
9 we go down to the very last sentence, please, of that  
10 very same e-mail, "We are also working on the local  
11 and international legal proceeding that might be  
12 available to us"; correct?

13 A. Yes.

14 Q. So by the 11th of August, you're--by the way,  
15 just to make sure that we have this right,  
16 Mr. Carrasco was your lawyer at the time dealing with  
17 problems with the Government; correct?

18 A. Yes.

19 Q. And he's your lawyer, one of your lawyers in  
20 this proceeding?

21 A. Yes. He's one of our best lawyers.

22 Q. Okay. Kudos to him.

1           But the point is, he's telling you at this  
2 time that he is working on international legal--an  
3 international legal proceeding that might be available  
4 to you, to your company; correct?

5           A.    Yes.

6           Q.    So you must have authorized him to work on  
7 that at some point before this, the date of this  
8 e-mail; correct?

9           A.    Yes. His e-mail came three hours after I  
10 sent the e-mail that triggered the threat of  
11 conversation.

12          Q.    So you're saying you gave him that  
13 authorization three hours--within those three hours?  
14 Is that what you're trying to tell us?

15          A.    No. I don't want to speak for Juan Pablo,  
16 but it looks to me like what he was doing was already  
17 the wheels were spinning trying to figure out what was  
18 going on in the three hours since I had told him that  
19 there was something going on.

20          Q.    Okay. Very good.

21               MR. ORTA: What's that? R-105. Can you put  
22 up R-105, please.

1 BY MR. ORTA:

2 Q. Sir, this is a document you've seen before;  
3 correct?

4 A. Yes.

5 Q. This is a press release.

6 MR. ORTA: Kelby, I don't know if there's a  
7 way to put all of the--there you go. Thank you.  
8 There we go. I need to see the whole title. There we  
9 go.

10 BY MR. ORTA:

11 Q. Press release issued jointly by RDC and  
12 Ferrovías; correct?

13 A. No, it was released by Ferrovías.

14 Q. It's got RDC's name on it, doesn't it?

15 A. Yes, it says it's an affiliate of RDC.

16 Q. Okay. And you are listed at the bottom as  
17 one of the contact persons; right?

18 A. Yes, though my name is misspelled.

19 Q. And it also--right. You're Henry. You're  
20 not Harry, right?

21 A. Last time I checked.

22 Q. Good.

1           It has all your contact info here in the  
2 U.S.; correct?

3           A.    Yes.

4           Q.    And in it--first of all, it's dated  
5 August 28, 2006; correct?

6           A.    Yes.

7           Q.    And that is the first business day after the  
8 Government published the Declaration of Lesividad on  
9 the 25th of August; correct?

10          A.    I don't recall the date of publication.  The  
11 way I read this, which I assume is correct, is the  
12 declaration as opposed to publication of lesivo.

13          Q.    Well, if you accept for purposes of the  
14 question that on the 25th of August the Declaration of  
15 Lesividad was published in the Official Gazette--I'm  
16 not asking you to confirm that, I'm just asking you to  
17 accept it--then this release was issued on the first  
18 business day after that, which is Monday, August 28,  
19 2006; correct?

20          A.    Correct.

21          Q.    Okay.

22                MR. ORTA:  Let's put up R-327, please.

1           If I could just ask the Tribunal how much  
2 time I have left.

3           (Comments off microphone.)

4           MS. SEQUEIRA: You have about four minutes.

5           MR. ORTA: Okay. Thank you.

6           BY MR. ORTA:

7           Q. Mr. Posner, this is a letter that you  
8 received from--if you could just put the person who  
9 sent it, please, Kelby, just scroll down a little bit.

10           Okay. This was sent to you by Frederico  
11 Melville; correct?

12           A. Yes.

13           Q. And he was one of your minority--or is one of  
14 your minority partners in Ferrovías?

15           A. Yes.

16           Q. Okay. If we could go up, please. This is  
17 dated May 2, 2007; correct?

18           A. Yes.

19           Q. This was sent just before you initiated this  
20 proceeding, this CAFTA proceeding; correct?

21           A. Yes.

22           Q. If we can highlight the first sentence,

1 please. In the first sentence, Mr. Melville says that  
2 "The purpose of this message as minority shareholder  
3 in Ferrovías is to let you know that we do respect  
4 your decision to pursue an international arbitration  
5 process against the Government of Guatemala, but by no  
6 means we agree with it."

7 Correct?

8 A. Yes.

9 MR. ORTA: If we can go down a little bit.  
10 Let's highlight the entire last paragraph.

11 BY MR. ORTA:

12 Q. Mr. Melville also tells you that "The  
13 Agreement we reached with the Government of Guatemala  
14 in November 2006 was a good one, both in giving the  
15 business a reasonable chance of achieving an  
16 operational turnaround as well as giving all parties a  
17 new opportunity to start over."

18 Do you see that?

19 A. Yes.

20 Q. And, he further says, "Accepting a start-up  
21 with a clean slate would have given all stakeholders a  
22 chance to be part of a success story and a benchmark

1 case to the world."

2 Correct?

3 A. Yes.

4 Q. And he further says, "I'm afraid that your  
5 decision to pursue litigation will mean that we have  
6 to forfeit this opportunity, placing Guatemala as a  
7 Republic and its private capital in a very difficult  
8 position in respect to the CAFTA."

9 Correct?

10 A. Yes.

11 Q. In this letter, he says nothing about the  
12 Government taking away your concession and giving it  
13 to Mr. Campollo, does he?

14 A. No, nor I would expect it.

15 Q. And he says nothing in this letter about the  
16 Government using the Lesivo Declaration as a means to  
17 coerce you into accepting some kind of deal, does he?

18 A. No, nor I would expect it.

19 Q. He does say the Government reached some kind  
20 of good agreement with you in November 2006, doesn't  
21 he?

22 A. Yes, but that's not correct.

1 Q. Okay.

2 A. There was no agreement. And what was  
3 discussed was nothing like something we felt was good  
4 for the company. So I just want to highlight to the  
5 Tribunal, when it talks about an agreement here, that  
6 there was never an agreement.

7 Q. The Government did continue to negotiate with  
8 you after the Lesivo Declaration; right?

9 A. I would not characterize that as a  
10 negotiation. I'd characterize that as an extortion.

11 Q. You characterize what as an extortion?

12 A. The discussions we had with the Government --

13 Q. Really?

14 A. -- after the declaration of lesivo.

15 MR. ORTA: Can we put up the minutes?

16 Just beg your indulgence one second just to  
17 respond to that.

18 Can you please put up the minutes to the  
19 negotiations that took place after.

20 BY MR. ORTA:

21 Q. As they're looking for the document I just  
22 asked for, did you ever send a letter to the

1 Government complaining about their extorting you after  
2 the Lesivo Declaration?

3 A. Did I personally send a letter to the  
4 Government?

5 Q. Yeah.

6 A. No. That was done through our management  
7 team.

8 Q. Which letter are you referring to, sir?

9 A. Any discussions we would have had with the  
10 Government were through our management team.

11 Q. As we sit here today--and I'm fairly familiar  
12 with the record--I don't recall any letter wherein  
13 anybody on behalf of Ferrovías sent a letter to the  
14 Government accusing them of extorting RDC or Ferrovías  
15 in any negotiations discussions.

16 Do you recall such a letter having been sent?

17 A. No, I don't personally recall.

18 Q. These are the minutes--and I'll end my  
19 questions here.

20 These are the minutes in relation to  
21 the--what is this document? R-36--in relation to the  
22 meetings that took place after the Lesivo Declaration.

1           Mr. Senn was your general manager at the  
2 time; correct?

3           A.    Yes.

4           Q.    Okay.  And these are the minutes wherein you  
5 say--these are the negotiations in which you say the  
6 Government was trying to extort you?

7           A.    Yes.

8           Q.    Okay.

9           MR. ORTA:  Well, the minutes speak for  
10 themselves.  I would just ask the Tribunal to take a  
11 look at those minutes in assessing that comment.

12           THE WITNESS:  May I comment as to those  
13 minutes?

14           MR. ORTA:  I haven't asked you a question  
15 about them, but your counsel may have an opportunity  
16 to do so.

17           THE WITNESS:  Okay.  Thank you.

18           MR. ORTA:  I have no further questions at  
19 this point.

20           PRESIDENT RIGO:  Thank you.

21           The members of the Tribunal have some  
22 questions.

1           MR. ORTA: I'm sorry. Are the questions  
2 going to go before redirect, or are both counsel going  
3 to have opportunity to question after the Tribunal  
4 questions?

5           PRESIDENT RIGO: We reserve the right of the  
6 Tribunal to ask questions at any time. Of course you  
7 will be entitled, both Parties, to question on what  
8 the Tribunal had asked.

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

10          PRESIDENT RIGO: That would be the usual  
11 thing.

12                           QUESTIONS FROM THE TRIBUNAL

13          ARBITRATOR CRAWFORD: Mr. Posner, you said  
14 that prior to March 2006 you had had a threat from  
15 Mr. Campollo to take the concession or take the  
16 Contract.

17                   What form did that threat take?

18          THE WITNESS: In March of 2005, we met with  
19 Hector Pinto, Ramón Campollo's guy for the railway  
20 business at the Marriott in Guatemala City. And at  
21 that meeting, there was discussion of the--basically a  
22 deal whereby we would be allowed to remain

1 shareholders in our business in exchange for handing  
2 over 50 percent of it to Mr. Campollo.

3 And as part of a sidebar discussion, we were  
4 told that if we didn't agree, they would take it. I'm  
5 sorry, "We will take it." Sorry. "We will take it."

6 ARBITRATOR CRAWFORD: "We" being Mr. Pinto?

7 THE WITNESS: "We" being the Campollo group  
8 as represented by Mr. Pinto.

9 ARBITRATOR CRAWFORD: They never took it?

10 THE WITNESS: They did not take it.

11 ARBITRATOR CRAWFORD: Thank you.

12 THE WITNESS: Could I just follow up on that?

13 They didn't take it in that context, but  
14 there were follow-on threats, indications that  
15 something was going to happen, and the end result of  
16 that was lesivo. I should have spent more time  
17 answering that question.

18 ARBITRATOR EIZENSTAT: Mr. Posner, I  
19 understand that there was a meeting of April 23, 2001,  
20 in which Mr. Campollo invited and you Mr. Duggan to a  
21 meeting.

22 Do you recall that meeting, and you can

1 describe it.

2 THE WITNESS: That was an introductory  
3 meeting at his house. It was in the evening. It was  
4 after hours but before dinner, and it was basically a  
5 get-acquainted session in which we were introduced to  
6 him as somebody who was interested in a wide variety  
7 of businesses on the South Coast, including the  
8 railway.

9 ARBITRATOR EIZENSTAT: At that meeting, did  
10 he express an interest in gaining control of the  
11 railroad?

12 THE WITNESS: As I recall, he signaled that  
13 he was not somebody that liked to do business with  
14 partners, but we didn't get into that detailed of a  
15 discussion.

16 Hector Pinto was there, Bill Duggan was there  
17 and, as I recall, our general manager was also there.

18 ARBITRATOR EIZENSTAT: What evidence do you  
19 have that Mr. Pinto represented Mr. Campollo?

20 THE WITNESS: The first evidence was that we  
21 met him at Mr. Campollo's house in 2001. He was  
22 introduced as Mr. Campollo's representative. There

1 was a follow-up meeting in Miami in which Bill Duggan  
2 met with him. Various meetings involving Héctor Pinto  
3 with us, the mention of Ramón Campollo by name in the  
4 meeting with the President. A long list.

5 ARBITRATOR EIZENSTAT: Did Mr. Campollo  
6 himself indicate to you in your presence that  
7 Mr. Pinto was his representative?

8 THE WITNESS: It was made clear to us in 2001  
9 that he was his representative for the South Coast,  
10 because that was really the introductory meeting that  
11 kicked off all the discussions that followed in the  
12 subsequent years.

13 ARBITRATOR EIZENSTAT: This is something  
14 Mr. Campollo himself said in your presence?

15 THE WITNESS: You know, to be honest, I don't  
16 recall all the details of that meeting as far as the  
17 exact conversation, but it was made clear to us that  
18 Mr. Campollo was relying upon Mr. Pinto for  
19 railway-related matters. And certainly their actions  
20 after that supported that.

21 ARBITRATOR EIZENSTAT: After the lesividad  
22 which was pointed at Contracts 143/158, you continued

1 to have your Deed 402, which was not the subject of  
2 lesividad, and there's at least an indication in some  
3 of your company's records that you considered 402 to  
4 be the more valuable of the two deeds; is that  
5 correct?

6 THE WITNESS: Well, not really, because you  
7 can't have a railway without rolling stock, and the  
8 two were like Siamese twins. You can't have a  
9 railroad--you can't have track without rolling stock;  
10 you can't have rolling stock without track.

11 So they were--economically speaking, they  
12 were joined at the hip. It's really, from an economic  
13 perspective, very difficult, if not impossible, to  
14 separate the two.

15 ARBITRATOR EIZENSTAT: When the Lesividad  
16 Declaration was issued, was there any consideration  
17 given to the fact, rather than issuing the press  
18 release the day after, of just simply continuing to  
19 operate under 143/158 and 402?

20 THE WITNESS: We tried.

21 ARBITRATOR EIZENSTAT: Could you describe  
22 that and the results of what the efforts were.

1           THE WITNESS: Well, in the first several  
2 weeks, we were trying to figure what was going on and  
3 we were trying to do, really, three things all at the  
4 same time. One was to run the railroad; the other was  
5 to manage our finances, given that all of a sudden we  
6 found ourselves getting cut off by suppliers and  
7 customers; and the third was to deal with lesivo,  
8 which was a word that we had never heard.

9           So we were trying to do a lot all at once,  
10 and it was very difficult.

11           ARBITRATOR EIZENSTAT: But I'd like to have a  
12 better understanding, since you indicated these two  
13 were very intimately tied, you published this press  
14 release the day after the lesivo announcing to your  
15 customers, basically, that as a result of the lesivo,  
16 you were going to have difficulty operating.

17           Why did you make that decision the day after  
18 rather than wait and see what the effect of the  
19 publication was on your actual ability to operate?

20           THE WITNESS: Well, it's tough to reconstruct  
21 exactly what you were thinking blow by blow, but at  
22 the time, you know, this was big news; the President

1 was saying on national television that we were  
2 finished, and we felt that we needed to communicate  
3 something--I like to use the word "measured response,"  
4 to let not just our customers and creditors know, but  
5 we had shareholders and also--this is a very  
6 interesting story at the world level. Nobody has ever  
7 taken a national railway and put it back in operation  
8 from an abandoned state.

9           So it was a measured response on our part, in  
10 an environment where, at the same time, the Government  
11 was sending out all kinds of signals that they were  
12 coming after us. So we felt we needed to do  
13 something, and the press release was the "something"  
14 we did as a measured response, intermediate step.

15           ARBITRATOR EIZENSTAT: Can you tell us what  
16 your understanding was of the railroad's obligations  
17 in terms of Phases 2 through 5 and under what  
18 circumstances and conditions you were to be able to  
19 proceed after you rehabilitated Phase 1, the North  
20 Atlantic?

21           THE WITNESS: Yes. Our obligations were to  
22 initiate work on those phases and to build them out as

1 market conditions permitted. And we have signed  
2 letters from FEGUA to the effect that we had initiated  
3 the work for Phase 2, and that as far as Phase 3 was  
4 concerned, that we had demonstrated that the  
5 commercial reality at that instant did not support  
6 initiation of that work.

7 But it was clear from the economics of the  
8 deal that the additional phases were contingent on  
9 market conditions and that we would build them out in  
10 conjunction with other--investors as conditions  
11 permitted. And that's what we did.

12 ARBITRATOR EIZENSTAT: Did Mr. Gramajo in  
13 2005 indicate, I think, through a letter, that he felt  
14 you were in compliance with your further obligations  
15 on Phase 2?

16 Do you have any recollection of that?

17 And, more broadly, did the Government ever  
18 indicate to you that they felt you were in violation  
19 of your obligations under the future phases, beyond  
20 Phase 1?

21 THE WITNESS: It's kind of hard to remember  
22 all the correspondence with Arturo Gramajo. I'd

1 rather answer that part of it with the "I don't  
2 recall."

3           But as far as the signals from the  
4 Government, up until the time of lesivo, they  
5 were--there was no indication that they were up to  
6 what lesivo turned out to be. It was a complete  
7 surprise to us and, like I said before, I'd never  
8 heard the word "lesivo" until it was being declared.

9           ARBITRATOR EIZENSTAT: Do you take the  
10 position that, in terms of releasing the rights-right  
11 of way-way--which was certainly a valuable part of  
12 your concession under 402--that in order for that to  
13 be valuable, you needed to have the railway operating  
14 in that part, or could you independently lease the  
15 right of wayright of way in the south, even though the  
16 railway wasn't in operation?

17           THE WITNESS: We were free to develop the  
18 right of way for whatever economic purposes we could  
19 develop, be that rail operations, pipelines,  
20 electricity distribution, industrial roads, leasing of  
21 stations, et cetera. It's a common business for  
22 railways.

1                   ARBITRATOR EIZENSTAT: Have you done so?

2                   THE WITNESS: We had some deals in place and  
3 were--we had more in the pipeline, but since the  
4 Declaration of Lesivo, we have not been able to do  
5 anything more.

6                   ARBITRATOR EIZENSTAT: How soon after the  
7 lesivo was published did your customers and suppliers  
8 begin to express concerns about continuing to do  
9 business with you?

10                  THE WITNESS: The next working day.

11                  ARBITRATOR EIZENSTAT: And you continue, to  
12 this day, to have control of the equipment under 143  
13 and 158?

14                  THE WITNESS: That's a good question. The  
15 physical reality is that the rolling stock has been  
16 marshalled into the shop complex in the center of  
17 Guatemala City in kind of a circle-the-wagons mode.

18                  Literally, the railway itself has been  
19 stolen. If you can imagine a steel trestle 150 feet  
20 high disappearing segment by segment, this is a World  
21 Civil Engineering Monument, and if you can imagine  
22 those scenes in Peru, which were shown in the

1 original, you can imagine those bridges disappearing  
2 segment by segment. Literally, there is nothing left.  
3 The railway is being stolen.

4 ARBITRATOR EIZENSTAT: I understand you  
5 personally may not be involved in all these  
6 negotiations that Mr. Senn--and we'll have time to  
7 talk to him about this--but the Lesivo Declaration  
8 with respect to 143 and 158 was on two precise issues,  
9 as I understand it: The lack of a public bid and the  
10 absence of Presidential and Cabinet-level approval.

11 Is that your understanding?

12 THE WITNESS: Yes, more or less. I'm not a  
13 lawyer, so I should probably give you more a precise  
14 answer, but those are two key issues.

15 ARBITRATOR EIZENSTAT: What I'm trying to  
16 understand is: If those were the two precise issues,  
17 why was it necessary to have two years of negotiation?  
18 What is it that you understood the negotiations were  
19 about if those were the two precise issues, simply  
20 rebidding and then getting Presidential approval?

21 Why couldn't that have been agreed to  
22 promptly?

1                   What was the nature this two-year  
2 negotiation, 2004 to 2006, that was taking all this  
3 time, if those were the two precise reasons for the  
4 Lesivo Declaration?

5                   THE WITNESS: Well, as I understand it, the  
6 Government kept coming back and saying there are these  
7 technical problems with what we'd already agreed to  
8 and what we were functioning under, and we needed to  
9 work together to solve them.

10                  And so, at the Government's request, we  
11 entered into these subsequent agreements which were  
12 intended to fix their problems.

13                  ARBITRATOR EIZENSTAT: That's a very general  
14 answer. I'm really trying to understand, again, these  
15 were two very precise issues that seems to be very  
16 resolvable. Now, we hear statements about \$50 million  
17 being demanded.

18                  I mean, was this all part of the mix? Were  
19 these being put into the discussion about 143 and 158?

20                  Try to illuminate the Tribunal on what the  
21 nature of these negotiations were, whether they were  
22 mixing in 402 obligations for developing the South

1 Coast or were these limited to what became the  
2 lesividad focus, which was 143 and 158?

3 THE WITNESS: Well, as I recall--and I would  
4 ask my colleagues to respond when it's time for them  
5 to talk about this as well--

6 ARBITRATOR EIZENSTAT: I only ask what you  
7 knew.

8 THE WITNESS: Okay. So let me give you a  
9 very simple answer. It was a never-ending story and a  
10 continuous swirl of microissues which did not have a  
11 major impact on the economics of our deal, but which  
12 the Government said was important to them, and so we  
13 entered into this second and third negotiation because  
14 they asked to us. And eventually we got to the era of  
15 lesividad.

16 ARBITRATOR EIZENSTAT: One last question.  
17 I'm sorry.

18 The Respondents have put up some charts  
19 indicating that you were losing money up to the point  
20 of lesividad. Illuminate us as to what would have led  
21 to a burst of profitability in later years.

22 THE WITNESS: Well, we were actually making

1 money if you add back the money that was diverted from  
2 the infrastructure trust. And on the eve of  
3 Lesividad, there were a number of real estate projects  
4 in the pipeline. These projects usually take multiple  
5 years to develop, and just to name a few, there was a  
6 supermarket company. There was some urban parking  
7 opportunities. There was more electricity  
8 distribution by people who would pay, and other  
9 similar things. It was a portfolio of opportunities,  
10 all of which require multiple-year gestation periods.

11 But more to the point, we were optimistic  
12 about the future of the company.

13 PRESIDENT RIGO: Mr. Foster has proposed on  
14 the questions of the Tribunal in redirect, and then we  
15 will ask you on the questions of the Tribunal.

16 For the record, when I said "you," I refer to  
17 Mr. Orta.

18 MR. ORTA: Thank you.

19 REDIRECT EXAMINATION

20 BY MR. FOSTER:

21 Q. Thank you, sir.

22 Following up on one of Secretary Eizenstat's

1 questions, Mr. Posner, when the Government was talking  
2 about the alleged technical problems with the deeds,  
3 in that same conversation, were they asking you to put  
4 up more money? To invest \$50 million?

5 A. No. That came later. That was a parallel  
6 discussion.

7 Q. But when they declared--his specific question  
8 was, when they declared lesivo on two very specific  
9 grounds, were they, at the same time, demanding that  
10 he put up 50 million?

11 A. At the same time that we were dealing with  
12 these equipment contracts, et cetera?

13 Q. Whether they declared lesivo, stating--this  
14 is Secretary Eizenstat's question: When they declared  
15 lesivo, asserting two specific grounds for lesivo,  
16 were they, at the same time, asking you to put up  
17 \$50 million?

18 A. Yes. And they put a deadline on it also. It  
19 was basically commit immediately to spending  
20 \$50 million or you're out of business.

21 Q. And was there any requirement in the  
22 contracts that you had with the Government that you to

1 put up this \$50 million?

2 A. No.

3 Q. And at the same time the Government was  
4 asserting these two very specific reasons for lesivo,  
5 were they also demanding that you pay more money under  
6 Contract 402 telling you that they weren't getting  
7 enough money out of Contract 402?

8 A. That was part of the discussion.

9 Q. And were they also, at the same time they  
10 were asserting these two technical grounds, were they  
11 telling you--demanding that you drop your local  
12 arbitrations?

13 A. Yes.

14 Q. Okay. Now, Mr. Orta asked you some questions  
15 about your commitment to abide by the laws of  
16 Guatemala.

17 When you committed to abide by the laws of  
18 Guatemala, did you expect them to be applied without  
19 discrimination, without arbitrary action and with due  
20 process?

21 MR. ORTA: I'm sorry. I'm going to--that is  
22 a very leading question. I understand this is--I

1 mean, you know, this is his lawyer asking questions  
2 here.

3 PRESIDENT RIGO: Could you rephrase it,  
4 please.

5 MR. FOSTER: Okay. I'll put it in the  
6 opposite so he can answer no to it. So it won't be  
7 leading.

8 BY MR. FOSTER:

9 Q. Did you expect that the laws would be applied  
10 against you discriminatorily?

11 A. Certainly not.

12 Q. Did you expect the Government to take  
13 arbitrary action with regard to you?

14 A. No.

15 Q. Did you expect that you would be accorded due  
16 process of law?

17 A. Yes.

18 Q. We saw some documents concerning the Ciudad  
19 del Sur project, and Mr. Pinto was writing you about  
20 the Ciudad del Sur project.

21 Who owned Ciudad del Sur?

22 A. Ramón Campollo.

1 Q. When Mr. Pinto contacted you concerning  
2 Ciudad del Sur, did he tell you who he was acting for?

3 A. He didn't need to. Ciudad del Sur was Ramón  
4 Campollo's project.

5 Q. Okay. Now, Mr. Orta also showed you a  
6 document where Mr. Carrasco told you that lesividad  
7 was not automatic and it had to be approved by a  
8 court. That document was dated August 11, 2005.

9 When you got that document--sorry, 2006.

10 When you got that document from Mr. Carrasco,  
11 did you know the reaction that your customers and  
12 suppliers and your prospective lessees were going to  
13 have when lesivo was declared a couple weeks later?

14 A. We had an idea, which was that we were in for  
15 big trouble.

16 Q. And when Mr. Carrasco da Groote was telling  
17 you he was investigating international legal  
18 proceedings, do you recall, what was the international  
19 legal proceeding that he was talking about?

20 A. No, I don't, and that's probably because it  
21 was so new that we had no idea. I mean, my  
22 communication with Juan Pablo was probably an hour

1 after I had the conversation with Frederico Melville.  
2 So we really had no idea what we were dealing with.

3 Q. You mentioned--you were asked about a meeting  
4 that you had with Mr. Campollo--Secretary Eizenstat  
5 asked you about a meeting you had with Mr. Campollo on  
6 April 23rd, 2001. And you also mentioned another  
7 meeting that you had with Mr. Campollo on December 4,  
8 2004.

9 At the meeting in December, 2004, this was  
10 with Mr.--I believe this was with Mr. Duggan, was that  
11 meeting reported to you by Mr. Duggan?

12 A. I believe so.

13 Q. And did you--did Mr. Duggan report to you any  
14 statements that Mr. Campollo had made concerning his  
15 interest in the railroad?

16 A. I don't recall.

17 Q. Okay. Did Mr. Pinto, out of the presence  
18 Mr. Campollo, ever say to you that Mr. Campollo would  
19 take the railroad business away from you?

20 A. Could you repeat that?

21 Q. Yes. Did Mr. Pinto, whether or not in the  
22 presence of Mr. Campollo, did he ever say to you that

1 if you didn't make a deal with Mr. Campollo, that  
2 Mr. Campollo would take the railroad from you?

3 A. Yes.

4 Q. When you wrote in your notes after your  
5 meeting with the President, with President Berger in  
6 March 2006, that you thought that the President was  
7 generally interested in seeing you succeed, did the  
8 President at that meeting tell you that Dr. Gramajo  
9 had already sent him communications asking him to  
10 declare the railroad usufruct lesivo?

11 A. No. That would have been shocking.

12 MR. FOSTER: No further questions, sir.

13 PRESIDENT RIGO: Thank you.

14 Mr. Orta, on the questions of the Tribunal?

15 MR. ORTA: Yes, sir. Thank you,

16 Mr. Chairman.

17 Could you put the press release back up,  
18 please? Thank you.

19 And just for the record, this is R-105. If  
20 you could just highlight--bear with me--the part about  
21 the customers. I think it's the third paragraph;  
22 left-hand column, third paragraph.



1 A. Yes.

2 Q. And that's when it was released; correct?

3 A. I don't recall.

4 Q. Is there any reason you would be backdating a  
5 press release?

6 A. I can't think of one.

7 Q. Okay.

8 A. That would be dishonest.

9 Q. Okay. In relation to the third paragraph,  
10 left-hand column, it says, "In the short term, under  
11 the terms of the usufruct, the Government cannot force  
12 the company out of business. However, its actions  
13 have placed greater pressure on FVG by making its  
14 customers and suppliers wary of continuing to do  
15 business with it."

16 Do you see that?

17 A. Yes.

18 Q. And this is something that you sent to your  
19 customers and suppliers; correct? That's who it's  
20 addressed to, in part?

21 A. Yes.

22 Q. All right. In relation to these questions

1 that were asked about the \$50 million demand --

2 MR. ORTA: Let's put up C-131.

3 BY MR. ORTA:

4 Q. Actually, this is a newspaper article;  
5 correct?

6 A. I don't see anything on that page that talks  
7 about us.

8 Q. Okay.

9 MR. ORTA: Go down, please. All the way  
10 down. Okay.

11 BY MR. ORTA:

12 Q. Do you see that?

13 MR. ORTA: Do we have the English version of  
14 this?

15 Okay. Let's show the date for a second,  
16 please.

17 BY MR. ORTA:

18 Q. This is dated September 5, 2006, assuming the  
19 English format for using dates.

20 MR. FOSTER: Objection. I don't believe this  
21 responds to questions from the Tribunal.

22 MR. ORTA: He was asked about the \$50 million

1 demand by Mr. Eizenstat.

2 THE WITNESS: Please repeat the question.

3 BY MR. ORTA:

4 Q. Okay. This is it dated September 5, 2006;  
5 correct?

6 A. Yes.

7 Q. All right. And this is the document  
8 that--wait.

9 Yeah. This is the document that your counsel  
10 relied upon for this notion of there being some  
11 \$50 million demand being made by the Government.

12 My question is: Do you have any other  
13 document that supports that, that allegation?

14 A. I don't, no.

15 Q. Okay. Are you aware of any other document  
16 that supports that allegation that has been produced  
17 in this case?

18 A. I don't recall.

19 Q. Okay. This is after the press release, the  
20 dated press release; correct?

21 A. Yes.

22 Q. And this is after the Government issued the

1 Lesivo Declaration and had it published in the  
2 Official Gazette; correct?

3 A. Yes.

4 Q. And this is--just so that we're clear, this  
5 is a newspaper account of statements that supposedly  
6 were made by President Berger; correct?

7 A. Okay. Could you repeat that question?

8 Q. This is a newspaper account of statements  
9 that supposedly were made--or of a conversation with  
10 President Berger, better characterized?

11 A. Yes.

12 Q. And the information there about the  
13 \$50 million demand, that is a reporter's  
14 characterization of a conversation he had with  
15 Mr. Berger; correct?

16 A. I don't know. I didn't write the article.

17 Q. Okay. There are no quotes around that,  
18 around that statement, are there, attributing that  
19 directly to President Berger?

20 A. No. There are no quotation marks.

21 Q. Okay. You mentioned in response to questions  
22 by Mr. Eizenstat about the December 2004 meeting;

1 correct?

2           There was a December 2004 meeting with  
3 Mr. Campollo I think you were asked about?

4       A.    Yes.  And that's a meeting that I did not  
5 attend.

6       Q.    And my question goes exactly to that.  You,  
7 in your response to Mr. Eizenstat, said that Mr. Pinto  
8 was at that meeting; correct?

9       A.    No.  What I said was that Mr. Pinto was at  
10 the 2001 meeting at Ramón Campollo's house.

11       Q.    Okay.  Maybe I misheard you.  But to your  
12 knowledge, Mr. Pinto was not at the December 2004  
13 meeting, was he?

14       A.    I don't know who was at the meeting.  All I  
15 know is that I wasn't there.

16       Q.    Mr. Duggan would be a better person to be  
17 able to answer that question?

18       A.    Yes.

19       Q.    You mentioned--in relation to questions from  
20 Mr. Eizenstat, you mentioned about some potential real  
21 estate deals that you said would take multiple years  
22 to develop; correct?

1 A. Yes.

2 Q. And you mentioned something about a parking  
3 lot project and some potential deal with UniSuper?

4 A. Yes.

5 Q. For purposes of the evidence in this case,  
6 you've not submitted any contracts associated with any  
7 of those deals, have you?

8 A. Not to my knowledge.

9 Q. And, to your knowledge, there weren't any  
10 contracts associated with those deals, were there?

11 A. I was not negotiating with them, so I don't  
12 know what stage each of those deals was.

13 Q. Sorry. Again, in relation to--I think this  
14 is maybe, perhaps, the end my inquiry--some questions  
15 posed to you by Mr. Eizenstat--

16 MR. ORTA: If we could put up Contract 402  
17 and go first to Clause 16--I think it's 16.2. And  
18 this is C-22 for the record.

19 All right. If we can go down, please.

20 BY MR. ORTA

21 Q. First of all, this is Contract 402. This is  
22 the English translation.

1           That's the railway right of way contract;  
2 correct?

3           A.    Correct.

4           MR. ORTA: All right. If we go to clause  
5 number 2, please. It's a little bit lower, Kelby.

6           Very good. If you could to me a favor and  
7 highlight the entire Clause 2.

8           All right.

9           BY MR. ORTA:

10          Q.    Now, again, this is under a heading section  
11 called "Penalties"; correct?

12          A.    I'd have to look at the--

13          Q.    We're showing it to you. "Sixteenth:  
14 Penalties." Do you see it?

15          A.    Could I request that I see this in paper  
16 form? Because I find it very difficult to scroll up  
17 and down on something that spans several pages.

18          Q.    Not a problem.

19          A.    So I'd really like to see the context of this  
20 whole page.

21          Q.    It's document C-22. We're getting it for you  
22 now.

1           MR. ORTA: Kelby, put the highlighted  
2 language up, please.

3           BY MR. ORTA:

4           Q. My specific question is going to  
5 Clause 16(2).

6           A. Okay. I see the clause.

7           Q. Okay. In it, you agreed, on behalf of  
8 FVG--or FVG agreed that if it failed to restore the  
9 railway and failed to render cargo transportation  
10 services under the terms of Sections 2, 3, 4, 5, 6,  
11 and 13 of the contract, that FVG would agree to--well,  
12 it says--"The usufructuary," which would be FVG here,  
13 "shall surrender to FEGUA the real property where the  
14 railway yet to be restored is located, and any such  
15 property shall no longer be the subject to this  
16 usufruct."

17           Correct?

18           A. Not correct. May I explain?

19           Q. No. I'm asking you--this is the Agreement  
20 you signed; correct?

21           A. Yes.

22           Q. Okay. If we could also go to--

1           A.    May I explain?

2           Q.    I don't think--I'm not asking you for your  
3 legal interpretation. I just wanted to know whether  
4 you signed this Agreement and it says what it says.

5           A.    I'm not going to give you a legal  
6 interpretation, I'm going to read the complete  
7 sentence.

8                   And the complete sentence begins "the  
9 usufructory's failure to begin railway restoration and  
10 failure to render cargo transportation services." We  
11 did that. And we were given letters by FEGUA to the  
12 effect that we did that.

13                   That's why I think it's important for me to  
14 read that sentence.

15           Q.    Well, you certainly didn't do it for Sections  
16 3, 4--you certainly didn't do it for Phases 3, 4, and  
17 5, did you?

18           A.    As I recall, for Section 3, there was a  
19 specific understanding--and I would have to defer to  
20 my colleague Jorge Senn on that--that because there  
21 was one customer on the line and that customer, at  
22 least temporarily, was not going to be able to use the

1 service, that we were construed to have complied with  
2 that aspect of Contract 402.

3 Q. Well, and documents have been submitted, and  
4 the Tribunal can assess them on their own.

5 So in relation to--let's go to Clause 18.  
6 This is my last question, 18, Termination.

7 And you mention this in your Third Statement  
8 in this case. You had a right--or FVG had a right, I  
9 should say, to the terminate the Agreement in the  
10 event--

11 MR. ORTA: And let's go to Number 3,  
12 Clause 18, Number 3, if you can try to highlight the  
13 whole thing, Kelby, if possible.

14 BY MR. ORTA:

15 Q. Again, this goes directly to a question posed  
16 by Mr. Eizenstat.

17 First of all, it's a--and you have the  
18 Contract in front of you. This is Clause 18, sorry,  
19 which is titled "Termination"; correct?

20 A. Correct.

21 Q. And we're still talking about the Railway  
22 Restoration Contract 402?

1           A.    Yes.

2           Q.    And in it you bargained for and obtained a  
3 right to terminate the Agreement in the event that  
4 Ferrovias, FVG, is "unable to exercise the conferred  
5 write it is entitled to with regards to the railway  
6 equipment according to the contract and bidding terms  
7 referred to in the second clause of this contract";  
8 correct?

9           A.    Correct.

10          Q.    "Or having exercised those rights"--it says  
11 "them," but--"having exercised them"--meaning those  
12 rights--"it is not able to acquire the railway  
13 equipment in accordance with what is established in  
14 tenth clause of this contract, and, as a consequence,  
15 it is not able to comply with the purpose of this  
16 contract for reasons not attributable to it"; correct?

17          A.    Correct.

18          Q.    So you had a right to terminate the Agreement  
19 if you didn't have the ability to obtain the  
20 Guatemalan railway equipment; right?

21                    Is that right?

22          A.    Yes.

1           Q.    But your obligations under this  
2 Agreement--your obligations under this Agreement ran  
3 whether or not you obtained that equipment absent your  
4 exercising your right to terminate; correct?

5           A.    Please repeat your question.

6           Q.    The obligations to restore the railway, you  
7 had them unless and until you exercised this  
8 termination right; correct?

9           A.    Since I'm not a lawyer, I don't want to  
10 interpret this. I can respond to you as to how the  
11 economics work or other aspects of it.

12          Q.    It's okay.

13          A.    Because I'm a lawyer--I think the question is  
14 complex enough that I must, as a nonlawyer, say I  
15 can't answer it.

16          Q.    That's all right. We thank you for your  
17 time, sir.

18               MR. ORTA: We have no further questions.

19               MR. FOSTER: If I could just ask one question  
20 in follow-up to those questions?

21               PRESIDENT RIGO: Well--

22               MR. FOSTER: I didn't use all my time.

1                   PRESIDENT RIGO: It's not a matter of time.  
2 I think it's a matter of keeping some order between  
3 who asked questions on what and how long you go  
4 because then the other Party may ask questions on what  
5 you ask. So it can be endless. So I think we all  
6 have the same opportunity to ask questions on each  
7 other's questions.

8                   Thank you.

9                   Mr. Posner, thank you so much for being here  
10 with us and collaborating with us.

11                  THE WITNESS: Thank you for the opportunity  
12 to be part of this important tribunal.

13                  PRESIDENT RIGO: We'll have--since we are  
14 going to adjourn at 4:30, as I announced this morning,  
15 we will have a very short break now, five minutes, I  
16 mean, literally five minutes, and then we will  
17 continue.

18                  (Brief recess taken.)

19                  PRESIDENT RIGO: We are going to resume.  
20 Thank you for being back promptly.

21                  Good afternoon, Ms. de Valdez. If you could  
22 please read the statement you have before you.

1           THE WITNESS: I hereby state on my honor and  
2 conscience that I will tell the truth, the whole truth  
3 and nothing but the truth.

4           PRESIDENT RIGO: Thank you very much.

5           Mr. Foster?

6           MR. FOSTER: Mr. Stern will examine.

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

8                           DIRECT EXAMINATION

9           BY MR. STERN:

10          Q. Ms. de Valdez, good afternoon.

11          A. Good afternoon.

12          Q. Ms. de Valdez, do you have in front of you a  
13 copy of the statement you have submitted in this  
14 arbitration dated February 25, 2011?

15          A. I can't hear the translation.

16          Q. Can you hear me now, the translation?

17                   (Technical difficulties.

18          BY MR. STERN:

19          Q. Ms. de Valdez, can you hear the translation  
20 now?

21          A. Yes, I do.

22          Q. Great. All right.

1           Ms. de Valdez, do you have in front of a copy  
2 of the statement you have submitted in this  
3 arbitration dated February 25, 2011?

4           A.    Yes, I do.

5           Q.    And do you ratify that statement and affirm  
6 its truthfulness before the Tribunal?

7           A.    Yes.

8           Q.    Ms. de Valdez, did you previously work for  
9 Mr. Hector Pinto?

10          A.    Yes.

11          Q.    And what did you do for him?

12          A.    I was his secretary and assistant.

13          Q.    How long did you work for Mr. Pinto?

14          A.    I worked from 1976 to 2008, when he died.

15          Q.    And if I'm doing my math correctly, that  
16 would be approximately 32 years?

17          A.    That's right.

18          Q.    Now, during the 32 years that you worked for  
19 Mr. Pinto as his secretary, for whom did Mr. Pinto  
20 work?

21          A.    He worked for the Campollo companies.

22          Q.    When you say "the Campollo companies," are

1 you referring to companies owned or controlled by  
2 Mr. Ramón Campollo?

3 A. Yes.

4 Q. And what were the names of some of the  
5 companies, the Campollo companies that Mr. Pinto  
6 worked for?

7 A. First it was Huerta, then, La Teneduría, La  
8 Pequeña or Guatemala de Negocios, and finally,  
9 Corporacion Manatí.

10 Q. Did Mr. Pinto also work on anything, a  
11 project known as Ciudad del Sur for Mr. Campollo?

12 A. Yes, in Santa Lucía Cotzumalguapa.

13 Q. Now, what types of business did Mr. Pinto  
14 engage in on Mr. Campollo's behalf?

15 A. Mostly administrative.

16 Q. The corporation man take, what kind of  
17 business did corporation man take engage in?

18 A. It was real estate development.

19 Q. And where were your and Mr. Pinto's offices  
20 located?

21 A. Seventh Avenue, 653, Zone 4, the of Guatemala  
22 City, triangle building, Edificio Triangulo.

1 Q. And to your knowledge, who owned the office  
2 space where you and Mr. Pinto had offices?

3 A. It's my understanding that it's Don Ramón and  
4 his siblings.

5 Q. Mr. Campollo; is that correct?

6 A. Yes, that's right.

7 Q. And did Mr. Campollo also have offices at the  
8 Triangle Building?

9 A. Yes.

10 Q. Now, during the 32 years that you worked for  
11 Mr. Pinto, did he communicate with Mr. Campollo on a  
12 regular basis?

13 A. No. It was very much from time to time.

14 Q. How did they typically communicate with each  
15 other?

16 A. By fax, e-mail or telephone.

17 Q. And did they on occasion have face-to-face  
18 meetings as well?

19 A. Yes, but very occasionally.

20 Q. Do you recall Mr. Pinto having communications  
21 and discussions with representatives of Ferrovías  
22 Guatemala during 2005 and 2006?

1           A.    Yes.

2           Q.    And during that time, do you recall Mr. Pinto  
3    ever telling you that he was not authorized or no  
4    longer authorized by Mr. Campollo to have such  
5    communications or discussions with Ferrovías?

6                   MR. SALINAS-SERRANO:  Objection,  
7    Mr. President.

8                   I think Mr. Stern is going even beyond the  
9    scope of his own Witness Statement.  I think it's  
10   improper scope for direct examination in this hearing.

11                   MR. STERN:  Ms. de Valdez is responding to  
12   assertions made in the Rejoinder which we obviously  
13   did not have an opportunity to respond to in writing  
14   on Mr. Campollo about his authorization of Mr. Pinto  
15   to act on his behalf, and that's the basis for this  
16   testimony.

17                   THE WITNESS:  No.  I never found out about --

18                   THE INTERPRETER:  Wait just a moment.

19                   PRESIDENT RIGO:  Could you please rephrase  
20   the question?

21                   BY MR. STERN:

22           Q.    To your knowledge, was Mr. Pinto ever not

1 authorized by Mr. Campollo to have any communications  
2 or discussions with Ferrovías?

3 MR. SALINAS-SERRANO: Same objections,  
4 Mr. President, plus it assumes facts that are not in  
5 evidence.

6 He has not established that she knew that  
7 Mr. Campollo actually authorized him to speak on  
8 behalf with Ferrovías.

9 PRESIDENT RIGO: Why don't you move on to  
10 your next question?

11 BY MR. STERN:

12 Q. Did Mr. Pinto ever tell you that Mr. Campollo  
13 was upset with him for ever having had unauthorized  
14 discussions with Ferrovías?

15 MR. SALINAS-SERRANO: Mr. President, again,  
16 I'm sorry; same subject, same objection.

17 MR. STERN: This is her personal knowledge  
18 I'm asking her about.

19 And, again, it's a response to assertions  
20 made in the Rejoinder and in the statement of  
21 Mr. Campollo to which we've not had an opportunity to  
22 respond.

1           MR. SALINAS-SERRANO: Mr. President, if I  
2 may, as we all know, the subject of direct examination  
3 in these arbitrations here is limited; that is why  
4 statements are submitted in writing. If there were  
5 things that were within Ms. de Valdez's personal  
6 knowledge, she should have testified about them in  
7 writing. This is not the opportunity to broach new  
8 subjects with Ms. de Valdez which we have not been put  
9 on notice about.

10           MR. STERN: These are not new subjects; these  
11 are assertions they made in their submissions, in  
12 Mr. Campollo's own testimony.

13           They submitted something in late October that  
14 we saw for the first time, and that is why we are  
15 responding at this time to those assertions.

16           PRESIDENT RIGO: Yes. You are responding to  
17 that, but the issue here is not whether the assertion  
18 has been made or not, but whether the witness had made  
19 that type of assertions in the Witness Statement.

20           MR. STERN: And my response to that is that  
21 she did not have an opportunity to make that response  
22 because it was raised in the Rejoinder, and we did not

1 have an opportunity to respond in writing to the  
2 Rejoinder.

3 MR. CRAWFORD: If I can try and be  
4 helpful--something I'm not used to--in her statement  
5 she asserts that there was communications by e-mail in  
6 the course of business the between Mr. Pinto and,  
7 inter alia, Mr. Posner.

8 Can you really take it much further than  
9 that?

10 MR. STERN: If the question is whether my  
11 question is within the scope of her original  
12 statement, the answer is no; but, again, my questions  
13 are directed to assertions made in the Rejoinder by  
14 Mr. Campollo to which she is responding to.

15 PRESIDENT RIGO: To get out of the issue, the  
16 Tribunal is going to ask the question right now.

17 So I'll ask the same question, but you'll  
18 have to help me out. The computer I have right in  
19 front of me isn't working. Let's see. Maybe I can  
20 read it right here. It's further up.

21 The question is whether you had any knowledge  
22 of the communications with Ferrovías not being

1 authorized at the time.

2 THE WITNESS: No, I never had any such  
3 information.

4 BY MR. STERN:

5 Q. Ms. de Valdez, do you recall Mr. Pinto ever  
6 having discussions or communications with Mr. Campollo  
7 regarding Ferrovías?

8 MR. SALINAS-SERRANO: Objection; again, goes  
9 beyond the scope of her direct examination.

10 THE WITNESS: Yes.

11 MR. SALINAS-SERRANO: Mr. President, if I  
12 may, Claimants seem to be trying to rewrite a witness  
13 statement that was presented months ago. We  
14 understood, and we're proceeding under the assumption,  
15 that the direct testimony was the direct testimony  
16 presented in writing by the witnesses.

17 If we are now going to have witnesses testify  
18 about additional subjects not covered in their direct  
19 testimony, I think we would be--we will be in a very  
20 different proceeding that will take significantly  
21 longer than we had originally planned.

22 PRESIDENT RIGO: So I think as a general

1 matter to move the proceedings forward, is that you  
2 restrict the questions to what is in the Witness  
3 Statement.

4 MR. STERN: Okay. Thank you.

5 BY MR. STERN:

6 Q. I just have one final question, Mrs. de  
7 Valdez. Was Mr. Pinto still working for Mr. Campollo  
8 at the time of his death in January of 2008?

9 A. Yes.

10 MR. STERN: Thank you. I have no further  
11 questions.

12 PRESIDENT RIGO: Mr. Orta.

13 MR. SALINAS-SERRANO: Thank you,  
14 Mr. President.

15 CROSS-EXAMINATION

16 BY MR. SALINAS-SERRANO:

17 Q. Ms. de Valdez, good morning. It's way past  
18 morning.

19 A. Good afternoon.

20 Q. I'm going to ask you some questions about the  
21 questions that you just answered for Mr. Stern, if  
22 that is okay with you.

1           You spoke, and Mr. Stern asked you about,  
2 your working relationship with Mr. Pinto.

3           Do you remember those questions?

4           A.    Yes, that I was his secretary and assistant.

5           Q.    The working relationship that you had was  
6 with Mr. Pinto, not Mr. Campollo; correct?

7           A.    That is correct.

8           Q.    You also spoke of --

9           MS. SEQUEIRA: I will ask you to make a pause  
10 because of the translation. We need to -- at the same  
11 time.

12           MR. SALINAS-SERRANO: Yes. Thank you. I'm  
13 sorry.

14           BY MR. SALINAS-SERRANO:

15           Q.    You were also asked about the  
16 responsibilities that Mr. Pinto had for Mr. Campollo.

17           Do you remember those questions?

18           A.    Yes.

19           Q.    Mr. Pinto had other businesses aside from his  
20 work for Mr. Campollo; isn't that correct?

21           A.    Yes, as a personal matter. But they were  
22 small businesses: Bicycle sales, spare parts, pumps

1 for fumigation.

2 Q. Some were for even in the Triangulo building;  
3 correct?

4 A. Yes, on first floor. The stores were on the  
5 first floor.

6 Q. For example, you said he had a bike business,  
7 a bike sales business?

8 A. That's right.

9 Q. Now, you described Mr. Pinto's obligations  
10 within the businesses of Mr. Campollo as  
11 administrative; correct?

12 A. That is correct.

13 Q. You did not describe them as Mr. Pinto being  
14 a representative of Mr. Campollo; is that correct?

15 A. He worked as general manager in the  
16 Corporacion Manatí.

17 Q. Anything in particular?

18 A. Yes. He was general manager of that company.

19 Q. But Mr. Pinto didn't speak for Mr. Campollo  
20 for all matters; correct?

21 A. No, no, just on certain occasions when he  
22 would entrust him with something to do. Then I

1     imagine he would go in his representation.

2           Q.     When you say (in Spanish), you mean when  
3     Mr. Pinto was told to represent him by Mr. Campollo;  
4     is that correct?

5           A.     Yes.

6           Q.     So if Mr. Campollo would have told Pinto not  
7     to do something, Mr. Pinto would have been expected  
8     not to do it; correct?

9           A.     That's right.  But I was never aware whether  
10    he on some occasion told him that he was not going to  
11    participate in a given business.  I never knew that.

12          Q.     Ms. de Valdez, I'm showing you on the screen  
13    a document that has been presented in this  
14    arbitration.

15                   MR. SALINAS-SERRANO:  Kelby, would we be able  
16    to show her the Spanish version of this letter,  
17    please?

18                   Yes, Professor Crawford.

19                   MR. STERN:  I would object to showing her  
20    this document.  It's not within the scope of her  
21    direct, and it's not addressed even in her Witness  
22    Statement.

1           I would also add that Respondent chose not to  
2 list Ms. de Valdez as a witness it intended to  
3 cross-examine and, therefore, this question--counsel's  
4 question should be limited only to the scope of her  
5 direct testimony today.

6           MR. SALINAS-SERRANO: My response,  
7 Mr. President, is that this goes directly to the  
8 President's question to Ms. de Valdez, and her  
9 testimony right now on cross-examination.

10           I certainly am allowed to confront her with  
11 documents arising from her answers to my questions.

12           MR. STERN: And I don't see how any of her  
13 answers to any of the questions posed by counsel lead  
14 to the introduction of this document.

15           MR. SALINAS-SERRANO: Again, that--I'll leave  
16 it at this, but she said, "I was not aware of," and  
17 this is precisely the evidence that what she was not  
18 aware of actually happened.

19           MR. STERN: Again, I don't see the connection  
20 between the two.

21           PRESIDENT RIGO: Thank you.

22           We believe that the letter is obvious by

1     itself. I mean, I don't think you need to reinforce  
2     that with the witness.

3                   MR. SALINAS-SERRANO: Thank you,  
4     Mr. President. I'll move on.

5                   BY MR. SALINAS-SERRANO:

6           Q.     Ms. de Valdez, you spoke of the Edificio  
7     Triangulo; correct?

8           A.     Yes.

9           Q.     Is it your testimony before this Tribunal  
10    today under oath that that building belongs to  
11    Mr. Campollo in its entirety?

12          A.     I don't have personal knowledge that it is  
13    entirely his, but some of the offices have his  
14    businesses and are his.

15          Q.     But not the entire building; correct?

16          A.     That's right.

17          Q.     Now, you were asked about e-mails that you  
18    sent on behalf Mr. Pinto to Mr. Senn, Posner and I  
19    believe, Mr. Duggan as well.

20                   Do you remember those questions?

21          A.     Yes.

22          Q.     And, in fact, you list those e-mails in

1 Paragraph 5 of your written statement which you have  
2 before you; correct?

3 A. Yes.

4 Q. You didn't copy Mr. Campollo on any of those  
5 e-mails; is that correct?

6 MR. STERN: I would again object. This is  
7 not within the scope of her direct testimony. He's  
8 referring to her statement, and she did not testify on  
9 her direct about e-mails Mr. Pinto sent to Ferrovías.

10 MR. SALINAS-SERRANO: I'm sorry, but I'm  
11 fairly certain that Mr. Stern specifically asked her  
12 whether she had sent e-mails to Messrs. Posner, Duggan  
13 and Senn on behalf of Mr. Pinto.

14 MR. STERN: I did not ask her any question  
15 like that on direct.

16 PRESIDENT RIGO: We think that the question  
17 should be limited to whom, of it, the e-mails that she  
18 sent, but the question that had been asked was whether  
19 she was--whether Mr. Pinto was communicating and how  
20 often was he communicating with Mr. Campollo. That  
21 was really the question that was being asked.

22 MR. SALINAS-SERRANO: And perhaps I

1 misremembered, Mr. President, but if that's the  
2 Tribunal's recollection--my recollection is she was  
3 asked if she had sent e-mails on behalf of Mr. Pinto  
4 to Messrs. Posner, Duggan, and Senn.

5 PRESIDENT RIGO: We can check the record.

6 MR. SALINAS-SERRANO: That's fine,  
7 Mr. President. I don't there is any need. I think  
8 the e-mails speak for themselves.

9 BY MR. SALINAS-SERRANO:

10 Q. Ms. de Valdez, unless my colleagues tell me  
11 otherwise, this will be my last question: You were  
12 asked by Mr. Stern about how Mr. Pinto would  
13 communicate with Mr. Campollo; is that correct?

14 A. Yes.

15 Q. And you mentioned that they communicated  
16 sometimes via fax; is that correct?

17 A. Yes.

18 Q. This despite that your testimony is that they  
19 were located in the same building; is that correct?

20 A. Yes.

21 Q. You also mentioned via telephone; correct?

22 A. Yes.

1 Q. And you also said that they sometimes  
2 communicated in person, but only very occasionally; is  
3 that correct?

4 A. Yes, that is correct.

5 MR. SALINAS-SERRANO: I have no further  
6 questions, Mr. President.

7 PRESIDENT RIGO: Thank you.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR EIZENSTAT: Ms. de Valdez, the  
10 relationship between Mr. Pinto and Mr. Campollo is an  
11 important issue in this matter. So permit me to ask  
12 you a few questions based on your long association  
13 with Mr. Pinto.

14 THE WITNESS: That's okay.

15 ARBITRATOR EIZENSTAT: You mentioned that  
16 Mr. Pinto was the general manager with respect to one  
17 of Mr. Campollo's companies, I believe; is that  
18 correct?

19 THE WITNESS: Yes, that is correct.

20 ARBITRATOR EIZENSTAT: Do you know whether or  
21 not they worked together on the possible development  
22 of the Ciudad del Sur real estate development in the

1 South Coast of Guatemala?

2 THE WITNESS: Yes.

3 ARBITRATOR EIZENSTAT: And in what way did  
4 you understand they worked together on that project?

5 THE WITNESS: When Mr. Héctor had to do  
6 something about Ciudad del Sur, he asked for  
7 authorizations to Mr. Ramón or Mr. Reeter, who was his  
8 brother, to make any progress on that project.

9 ARBITRATOR EIZENSTAT: So this was a project  
10 on which, to your knowledge, they worked together;  
11 that is, that Mr. Pinto worked with Mr. Campollo on  
12 that project?

13 THE WITNESS: Yes.

14 ARBITRATOR EIZENSTAT: Do you know what his  
15 duties were with respect to that particular project on  
16 behalf of Mr. Campollo?

17 THE WITNESS: I do not know their direct  
18 responsibilities, but he was dealing with the progress  
19 made in the project and, for example, in case of  
20 Ferrovías, in land transportation, the idea was to use  
21 Tecnología del Sur and also to create a free zone in  
22 the south -- in Ciudad del Sur.

1                   ARBITRATOR EIZENSTAT: Were they also  
2 interested in the railroad development in that area,  
3 the development and extension of the railroad to the  
4 Ciudad area?

5                   THE WITNESS: Yes, because that was going to  
6 be good for the transportation of sugar to the port.

7                   ARBITRATOR EIZENSTAT: And this is something  
8 you knew of by your association with Mr. Pinto and by  
9 looking at various correspondence? How did you know  
10 that that was the purpose of the development?

11                   THE WITNESS: Because of the situation and  
12 because I sometimes saw the correspondence written by  
13 Mr. Pinto, I used to write it or maybe he made a  
14 comment to me about what the intention was behind that  
15 project.

16                   ARBITRATOR EIZENSTAT: And Mr. Campollo had  
17 sugar interests in that area?

18                   THE WITNESS: Yes. That was the sugar mill  
19 Madre Tierra, but I am not sure about his  
20 participation. I know that he has some interests in  
21 Madre Tierra, but I'm not sure how big that interest  
22 is.



1 answer in that way?

2 THE WITNESS: Because he often told me I am  
3 going to do such a thing. Mr. Campollo asked me to do  
4 such and such a thing, let's write a note or something  
5 else. That's the reason why, but in general terms, he  
6 did not offer me any further explanations.

7 ARBITRATOR EIZENSTAT: Thank you, ma'am.

8 THE WITNESS: Thank you.

9 ARBITRATOR CRAWFORD: Mr. Pinto used to sell  
10 bicycles, I understand.

11 THE INTERPRETER: Can you say that again,  
12 please.

13 ARBITRATOR CRAWFORD: Mr. Pinto used to sell  
14 bicycles, I understand.

15 THE WITNESS: Yes, that was part of his  
16 business.

17 ARBITRATOR CRAWFORD: What else did he do in  
18 that line?

19 THE WITNESS: He sold spare parts, tires for  
20 motorcycles, tires for vehicles, and plants for--and  
21 pumps for pesticides.

22 ARBITRATOR CRAWFORD: He had a substantial

1 business of his own?

2 THE WITNESS: It wasn't so substantial. He  
3 was a small business, but his sons were the ones in  
4 charge of those sales.

5 ARBITRATOR CRAWFORD: Is it an accurate  
6 description of what you've said that he acted in  
7 relation to the Ciudad project on instructions from  
8 Mr. Campollo on each occasion?

9 THE WITNESS: What are you referring to with  
10 your question?

11 ARBITRATOR CRAWFORD: You said that he would  
12 receive instructions from Mr. Campollo to do certain  
13 things, and I was asking whether it followed from  
14 that, that when he did things for Mr. Campollo, he was  
15 doing so on instructions on that occasion.

16 THE WITNESS: Yes.

17 ARBITRATOR CRAWFORD: Thank you.

18 PRESIDENT RIGO: Mr. Stern?

19 MR. STERN: I have no further questions.

20 PRESIDENT RIGO: Mr. Salinas?

21 MR. SALINAS-SERRANO: I do, very briefly,  
22 Mr. President.

1                                   FURTHER CROSS-EXAMINATION

2                                   BY MR. SALINAS-SERRANO:

3                   Q.    Ms. de Valdez, just a couple more questions,  
4 if you don't mind, on the Tribunal's questions.

5                   PRESIDENT RIGO:  On the Tribunal's questions?

6                   MR. SALINAS-SERRANO:  Yes, Mr. President.

7                                   BY MR. SALINAS-SERRANO:

8                   Q.    Ms. de Valdez, you were asked by Secretary  
9 Eizenstat some questions about whether Mr. Pinto and  
10 Mr. Campollo worked together in Ciudad del Sur.

11                                   Do you remember those questions?

12                   A.    Yes.

13                   Q.    Now, you don't know what participation, if  
14 any, Mr. Pinto had in Ciudad del Sur; correct?

15                   A.    Yes.  I don't know.

16                   Q.    Now, you were also asked--as a matter of  
17 fact, just now by Professor Crawford, the arbitrator  
18 sitting the farthest to your left--that whether a  
19 logical extension of your testimony before this  
20 Tribunal was that when Mr. Pinto did things or  
21 purported to do things for Mr. Campollo, he was doing  
22 so on Mr. Campollo's instructions.

1           Do you remember that question? That was the  
2 last question that was just asked of you.

3           A.    Yes.

4           Q.    Now, what you knew about Mr. Pinto's  
5 conversations with Mr. Campollo was coming from  
6 Mr. Pinto; isn't that correct?

7           A.    Yes.

8           Q.    You didn't ask Mr. Campollo if he was acting  
9 on his instructions; correct?

10          A.    No, I never asked him that.

11          Q.    You didn't sit in meetings between Mr. Pinto  
12 and Mr. Campollo about instructions that Mr. Campollo  
13 might or might not be giving Mr. Pinto; is that  
14 correct?

15          A.    Yes.

16          Q.    Nor were you present during calls between  
17 Mr. Pinto and Mr. Campollo; is that correct?

18          A.    Yes.

19          Q.    Perhaps you would have received faxes from  
20 Mr. Campollo to Mr. Pinto; is that correct?

21          A.    Yes.

22          Q.    And you're not aware of any fax from

1 Mr. Campollo to Mr. Pinto instructing him to negotiate  
2 with Ferrovías before or after April 15, 2005; is that  
3 correct?

4 A. Yes.

5 Q. It is correct that you're not aware of any  
6 fax of that type; correct?

7 I just want the record to be clear. I  
8 apologize.

9 A. No. I never saw that fax.

10 Q. Okay. And, to your knowledge, no such fax  
11 exists; correct?

12 A. No, not that I remember.

13 PRESIDENT RIGO: This goes beyond what has  
14 been asked.

15 MR. SALINAS-SERRANO: And just for the  
16 record, the word "fax," when used was f-a-x; I'm told  
17 it is incorrectly transcribed.

18 But that is the end of my intervention,  
19 Mr. President.

20 PRESIDENT RIGO: Thank you.

21 Thank you very much, Ms. de Valdez. You're  
22 excused.

1           Given the time, I propose that we adjourn now  
2 and we reconvene tomorrow morning at 9:00. And I  
3 would like--what I would appreciate is that, from you,  
4 is the names of the witnesses that you will expect  
5 that we will have time in tomorrow. If we are going  
6 through the list as is, or if there are any changes  
7 from the list that you sent us on November 17.

8           MR. FOSTER: The only change of which I'm  
9 aware is that Mr. Berger will testify first tomorrow  
10 because of his schedule. And then we will go back  
11 into the schedule that we sent you earlier.

12           PRESIDENT RIGO: Okay. Thank you.

13           MR. ORTA: No other changes from the  
14 Respondent. Thank you.

15           PRESIDENT RIGO: From your side. Very good.

16           Thank you very much. So this session is  
17 adjourned, and we'll see you tomorrow morning. Thank  
18 you.

19           MR. FOSTER: Thank you, Mr. Chairman.

20           MR. ORTA: Thank you, Mr. President.

21           (Whereupon, at 4:16 p.m., the hearing was  
22 adjourned.)

## CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR, 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.

---

DAWN K. LARSON

