

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 2

HEARING ON MERITS

Friday, December 9, 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 9:05 a.m. before:

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

Also Present:

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Secretary to the Tribunal

MR. ALEX BERENGAUT,  
Assistant to the Tribunal

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

2 PRESIDENT RIGO: Good morning. May I have  
3 your attention. I think we should start the day, and  
4 if you can produce a witness.

5 MR. ORTA: Yes, Mr. Chairman. We will bring  
6 in Mr. Juan Esteban Berger.

7 JUAN ESTEBAN BERGER, CLAIMANT'S WITNESS, CALLED

8 PRESIDENT RIGO: Good morning, Mr. Berger.  
9 Again, good morning, Mr. Berger. Could you please  
10 read the statement, the Witness Statement that you  
11 have before you?

12 THE WITNESS: I solemnly declare on my honor  
13 and conscience that I shall tell the truth, the whole  
14 truth and nothing but the truth.

15 PRESIDENT RIGO: Thank you very much.

16 Respondent has now the floor.

17 MR. ORTA: Thank you very much.

18 DIRECT EXAMINATION

19 BY MR. ORTA:

20 Q. We're going to be conducting a very brief  
21 direct examination of you, and depending on your  
22 comfort level, you may want to put the earphones on,

09:08:06 1 or if you are comfortable enough hearing in English,  
2 whatever your decision, but I'm going to conduct the  
3 examination in English.

4 A. To be as precise as possible, I would like to  
5 address myself in Spanish. Okay.

6 Q. Okay. So there are earphones that you have  
7 before you, and there is an interpreter who will be  
8 interpreting everything that I say into Spanish so  
9 that you can hear in your native language the  
10 question. So if you could put those on, we can get  
11 started.

12 A. Good.

13 Q. Very well. Mr. Berger, could you just very  
14 briefly introduce yourself to the Tribunal and tell  
15 them a little bit about your background?

16 A. My name is Juan Esteban Berger Widmann. I am  
17 a Guatemalan citizen. I am a notary and a lawyer in  
18 Guatemala, and I exercise the profession of lawyering.  
19 And I'm here to serve in these proceedings and answer  
20 the questions that the Parties may pose in this case.

21 Q. Thank you, sir. I understand you have  
22 limited time with us this morning. We appreciate your

09:09:25 1 making yourself available to come and testify before  
2 the Tribunal. I'm going to cut right to the chase  
3 with some questions at the heart of some of the issues  
4 in this case.

5 A. Excuse me if I'm not looking at you. I'm  
6 listening to you in Spanish, so I'm not looking at you  
7 directly, so forgive me for that.

8 Q. The Claimant in this case, Railroad  
9 Development Corporation, has made some allegations  
10 that a Mr. Ramón Campollo was intending to take away  
11 their concession, and that in some way he collaborated  
12 with the Government, perhaps through you, in order to  
13 effectuate that end. Can you please, in your own  
14 words, respond to the Tribunal in relation to that  
15 allegation that they have made in this case?

16 A. With pleasure. I am making reference to the  
17 allegations made by the people from RDC and with a lot  
18 of authority, I will state that this is false. It is  
19 false that Mr. Campollo had used me to reach the  
20 President of the Republic to take away the concession  
21 of railway service. First, I would never avail myself  
22 to harm anybody that has an acquired right and,

09:11:25 1 second, if that had been the intention of  
2 Mr. Campollo, either manifest or indirect, I would  
3 have left the table, and I would have said I am not  
4 interested in supporting you in this issue. At no  
5 time did I hear that Mr. Campollo said directly or  
6 indirectly that he wanted to take away the concession  
7 or any other right that Ferrocarriles de Guatemala  
8 had.

9 Q. Thank you, sir. Did you ever hear Mr. Pinto,  
10 Mr. Hector Pinto--do you know who that is?

11 A. Yes, I did meet him.

12 Q. Did Mr. Pinto ever tell you that he had an  
13 interest in taking away RDC's concession?

14 A. I never heard any of that. Mr. Pinto knew  
15 the way I was, and it would have been an  
16 unproportionate act on his part to have come to me and  
17 said I want to take away the concession. I think this  
18 is actually egregious. I am a very straight shooter,  
19 like my father, and if that had been the intention of  
20 Mr. Pinto, I would have never availed myself for that.  
21 I tried to help, as I tried to help in that case.

22 Q. Thank you, sir.

09:13:13 1 MR. ORTA: I have no further questions. Now  
2 the attorney for RDC may have some questions for you.

3 PRESIDENT RIGO: Mr. Foster.

4 CROSS-EXAMINATION

5 BY MR. FOSTER:

6 Q. Good morning, Mr. Berger. My name is Allen  
7 Foster, and I represent Railroad Development  
8 Corporation. I'll be asking you a few questions this  
9 morning.

10 A. Good morning, Mr. Foster. I am here at your  
11 disposal. I apologize if I am not looking at you  
12 directly, but I am listening to the translation. I'm  
13 trying not to listen in English.

14 Q. No problem.

15 Are you aware that Mr. Ramón Campollo has  
16 submitted two sworn statements in this arbitration?

17 A. Yes.

18 Q. And you've read those statements?

19 A. I read a statement by Mr. Campollo. I don't  
20 remember if I read a Second Statement by Mr. Campollo.

21 Q. When was the last time you spoke to  
22 Mr. Campollo?

09:15:29 1 A. About Ferrovías?

2 Q. About anything.

3 A. I met with him about a month and a half ago.  
4 He was the counterpart of a financing that an  
5 institution that he represented in Guatemala gave a  
6 credit to.

7 Q. Did you have any conversation with him about  
8 this case or about Ferrovías?

9 A. After that meeting, I asked him whether he  
10 knew anything about the case. And he simply said,  
11 Look, that's a problem, and I will probably have to  
12 travel to Washington to defend my name--defend my good  
13 name.

14 Q. Did you have any other substantive  
15 conversation about the case with Mr. Campollo?

16 A. None. No other substantial conversation.  
17 This was an incidental conversation in the hallway and  
18 without any other details.

19 Q. And prior to that time, when is the last time  
20 you spoke to Mr. Campollo about Ferrovías?

21 A. In April, 2005.

22 Q. And what was the substance of that

09:17:05 1 conversation?

2 A. Basically I found out that, indeed, it was  
3 adduced that Mr. Pinto had threatened people from RDC.  
4 I have no personal knowledge of this, and I felt free  
5 to call Mr. Campollo, and I commented this to him. I  
6 found out about that situation, and I, therefore, told  
7 him, "Look, I don't know what's going on, but this is  
8 not what I expected from Mr. Pinto, if that, indeed,  
9 happened, if that was the case."

10 Q. You knew that Mr. Pinto represented  
11 Mr. Campollo; correct?

12 A. No. In my First Statement, I indicated that  
13 I intimated that Mr. Pinto represented Mr. Campollo,  
14 because I met him through him in the Ciudad del Sur  
15 project, but at no meeting that I attended,  
16 Mr. Campollo gave instructions, precise instructions,  
17 to Mr. Pinto to do A, B or C, et cetera. This was a  
18 deduction, as I stated in my First Statement, but I  
19 don't have any personal knowledge of that.

20 Q. You knew that Mr. Campollo owned the Ciudad  
21 del Sur project; correct?

22 A. Correct. I knew that the Campollo family for

09:19:01 1 a long time now, many years, was developing part of  
2 the estate, this cultural estate, to turn it into a  
3 real estate project and was, as I said in my  
4 Statement, universities were there, like Cengicaña e  
5 Intecap, et cetera.

6 Q. And you knew that Mr. Pinto was the general  
7 manager of Ciudad del Sur for Mr. Campollo, didn't  
8 you?

9 A. Excuse me. I was introduced to him as a  
10 person--he was introduced to me as a person who was  
11 involved with a project. I was never given  
12 information that he was the general manager of  
13 anything, nor was he the general manager of Ciudad del  
14 Sur.

15 Q. Now, you're also aware that Mr. Fuxet has  
16 submitted a sworn statement in this arbitration;  
17 correct?

18 A. Correct.

19 Q. And you've reviewed Mr. Fuxet's statement;  
20 correct?

21 A. Correct.

22 Q. Is there anything in Mr. Fuxet's statement



09:20:21 1 that you believe is inaccurate or incorrect?

2 MR. ORTA: I'm sorry. I'm just going to  
3 object to the nature of that question. He's asking  
4 him to verify whether each and every aspect of that  
5 declaration is correct, and I think he should be given  
6 an opportunity to read it here and respond to the  
7 question. Otherwise I think it's not a fair question.

8 MR. FOSTER: I'll change the question.

9 BY MR. FOSTER:

10 Q. As best you remember Mr. Fuxet's statement,  
11 can you recall anything in it when you read it that  
12 you thought was incorrect or incomplete?

13 MR. ORTA: I'm sorry. I'm just going to  
14 assert the same objection; but if you can direct him  
15 to the statement, then maybe he can look at it and  
16 answer your question. It just seems to me it's not  
17 quite a fair statement--question to ask whether  
18 everything in there is correct or not based on his  
19 recollection of it.

20 MR. FOSTER: Adrian, would you please show  
21 him Mr. Fuxet's statement in the binder.

22 PRESIDENT RIGO: If you have, Mr. Foster, any

09:21:24 1 specific points in Mr. Fuxet's statement, it would be  
2 helpful.

3 MR. FOSTER: I'm just going to let him read  
4 Mr. Fuxet's statement.

5 THE WITNESS: In connection with your  
6 question, indeed, I do know of Mr. Fuxet's statements,  
7 but I cannot state precisely things, because I wasn't  
8 present in the meetings that he's making reference to.  
9 He talks about a number of events related to  
10 circumstances and things, and I wasn't there. So this  
11 is not of my personal knowledge.

12 BY MR. FOSTER:

13 Q. Why don't you review Mr. Fuxet's Statement  
14 real quickly? It's not very long.

15 A. Do I refer to a specific section of this  
16 Statement?

17 Q. Please, just look at the whole Statement.

18 MR. ORTA: We just request that he be given  
19 his original Statement in Spanish.

20 BY MR. FOSTER:

21 Q. Looking at this Statement now, do you see  
22 anything in it that is incorrect or incomplete? I'm

09:23:05 1 not asking you to recall things about meetings that  
2 you weren't present. I'm just asking you to look at  
3 it and see if there's anything in it that you, from  
4 your own personal knowledge, recognize as being  
5 incorrect.

6 MR. ORTA: I guess you're asking him to read  
7 the entire Statement first before answering?

8 MR. FOSTER: That's the reason I gave him the  
9 Statement.

10 THE WITNESS: There is some interference with  
11 the mike with my cell phone.

12 BY MR. FOSTER:

13 Q. Now, if you'll look at Mr. Fuxet's Statement  
14 and read through it however much you need to to tell  
15 me whether or not you see anything in it that you  
16 believe to be incorrect.

17 A. I'm going to read the whole Statement, and  
18 then if I find one of those aspects, I will give you  
19 my views on it.

20 Q. Thank you.

21 A. My name is Luis Pedro Fuxet-Ciani. I'm of  
22 legal age, a citizen of the Republic of Guatemala,

09:24:33 1 resident of the city of Guatemala, Guatemala, and I am  
2 competent in all--

3 MR. FOSTER: Skip the question. Skip the  
4 question. Let's do something else.

5 PRESIDENT RIGO: Okay.

6 BY MR. FOSTER:

7 Q. You consider Mr. Fuxet to be a good friend of  
8 yours, don't you?

9 A. Correct.

10 Q. And you've had business dealings with him;  
11 correct?

12 A. I had the opportunity of working with him in  
13 a real estate project. I worked together with him.  
14 It was an interesting project. We did very well.  
15 Unfortunately, since this wasn't our core, we left  
16 that and we came back to our thing. This was back in  
17 '05, '06, if I remember correctly.

18 Q. I'd like to direct your attention to a  
19 December, 2004, meeting in Miami between Ramón  
20 Campollo and Ferrovías. You were invited to that  
21 meeting by Mr. Campollo, according to your statement;  
22 correct?

09:25:47 1 A. That is correct.

2 Q. You were acting as Mr. Campollo's lawyer at  
3 that meeting, weren't you?

4 A. I have never been a legal adviser of  
5 Mr. Campollo, neither historically nor professionally.  
6 At that meeting, I was invited by Mr. Campollo, and I  
7 stated that in my Statement. I was there because I  
8 have background in the Ferrovías case.

9 Q. You didn't tell the Ferrovías representatives  
10 at that meeting that you were not there as  
11 Mr. Campollo's lawyer, did you?

12 A. At that meeting, I was very specific, and I  
13 told them the capacity in which I was acting, as I  
14 stated in my Witness Statement. Now, saying or not  
15 saying that I was a lawyer of Mr. Campollo, I think  
16 that maybe outside the scope of what was said. I was  
17 very specific. I said that I was acting in my own  
18 behalf as Juan Esteban Berger Widmann as an  
19 individual, as a person, and I wasn't representing  
20 anybody. I had a historical interest that linked me  
21 to everything that has to do with railroads.

22 Q. Are you telling us today that you

09:27:15 1 specifically said to the Ferrovías representatives  
2 that you were not there as a lawyer for anybody, that  
3 you were there because of your interests in the  
4 railroad?

5 A. Once again, no comment was made that I was a  
6 lawyer for Mr. Campollo, and no comment was made that  
7 I was there as a lawyer. What was said is that I was  
8 there in my own capacity, individually, as Juan  
9 Esteban Berger, representing Juan Esteban Berger  
10 Widmann, and I wasn't representing any other  
11 individual or third party or authority or any member  
12 of the team of Mr. Campollo. I had never worked  
13 directly or indirectly with him and his team. Once  
14 again, oftentimes I've been the other party working  
15 for the bank that I represent.

16 Q. Mr. Campollo told you that he was interested  
17 in meeting with Ferrovías in connection with his  
18 Ciudad del Sur real estate project; correct?

19 A. Correct.

20 Q. Now, I think you've told us before, but let  
21 me see if I understand you, that his Ciudad del Sur  
22 project involved transforming agricultural land owned

09:28:42 1 by him and his family that were on his sugar mill  
2 property into a mixed-use development of commercial,  
3 industrial and residential activities; correct?

4 A. Correct.

5 Q. And the railway right of way runs right  
6 through the land that comprised the Ciudad del Sur  
7 project; correct?

8 A. Correct.

9 Q. And the right of way--the Railroad right of  
10 way also ran very close to Mr. Campollo's Madre Tierra  
11 sugar mill; correct?

12 A. Could you please repeat the question? The  
13 translation, because I was listening to English only.  
14 Sorry about that.

15 Q. Certainly. No problem.

16 The railway right of way also ran very close  
17 to Mr. Campollo's Madre Tierra sugar mill in Santa  
18 Lucía; correct?

19 A. That is correct.

20 Q. And so both Mr. Campollo's sugar mill and his  
21 Ciudad del Sur real estate project would benefit from  
22 the reopening of the South Coast Railway line;

09:30:05 1 correct?

2 A. I disagree with that. First, because Ciudad  
3 del Sur had already existed, as I said, and as I said  
4 in my Statement, there were--there was a group of  
5 highly prestigious architects in Guatemala who drew up  
6 a pilot plan, and it already, for many years has been  
7 the site of universities, high school institutions,  
8 Intecap and so on. Ciudad del Sur, as such, did not  
9 depend directly on the railway. The railway going  
10 through Mr. Campollo's properties was simply one more  
11 possibility.

12 Q. I didn't ask you whether it was essential or  
13 not. I just asked you: Wouldn't Mr. Campollo's sugar  
14 mill and his Ciudad del Sur project benefit from  
15 having the South Coast of the railway reopened?

16 A. So, basically, the question is: Were they  
17 going to benefit from the rail line? Is that the  
18 question?

19 Q. Yes, sir.

20 A. If at some point in time there were a rail  
21 line going through those properties and it could  
22 provide some service, obviously, I think there would



09:31:35 1 be some benefit.

2 Q. Thank you.

3 Now, in your statement, you say that  
4 Mr. Campollo invited you to the December, 2004,  
5 meeting with Ferrovías in Miami because of your  
6 previous involvement in preparing the bidding  
7 conditions for the Guatemala railroad system; correct?

8 A. Basically, when Mr. Campollo presented Ciudad  
9 del Sur to me and among others, the question of the  
10 vocation of being able to use the rail line came up  
11 because it happens to go through part of the property,  
12 I commented that I had the pleasing experience to  
13 provide support in the owner's usufruct concession,  
14 which in 1997 was granted by the country to Ferrovías.  
15 And that I was familiar with various aspects of that  
16 project.

17 Q. What was your connection with preparing the  
18 bidding conditions for the usufruct that Ferrovías  
19 ultimately got?

20 A. When I ended my Masters--when I got my  
21 Masters in Boston, friends at Shutts & Bowen in Miami  
22 opened the doors for me in an International Associates

09:33:00 1 program in 1996. I went back in late '96, '97 to  
2 Guatemala.

3           And I'm sorry for going on at length, but  
4 it's important to make reference to this. And in  
5 1997, Chris Coleman, the Minister of Communications,  
6 offered that I be the intervener of FEGUA, or the  
7 overseer of FEGUA. And he said that I'd be invited to  
8 support. My father was the Mayor. But I said I  
9 can't. The best thing for me is to step back, not  
10 because I don't want to serve my country, but rather  
11 it doesn't look so good, my father being a public  
12 employee, for me to be involved in other institutions  
13 in the State. And so I recommended that a friend of  
14 mine, Andrés Porrás, who served as Overseer, should  
15 meet him to see if he might be able to fill that spot.  
16 So that's my first observation.

17           And I'll wait to make sure that you get the  
18 translation. I don't know if I can continue.

19           Q. You certainly may continue, but my question  
20 was simply: What was your involvement in the  
21 preparation of the bidding conditions? What did you  
22 do in connection with preparing the bidding

09:34:14 1 conditions?

2       A.    Yes.  Seeing as I did not have a direct  
3 position, I was given an opportunity to work through  
4 the UNDP, which is not a Guatemalan institution, where  
5 I personally, nor did my father, see any conflict of  
6 interest in getting involved in the process in that  
7 way.  And given my legal background, I began to work  
8 in putting together, from a technical/legal  
9 standpoint, the terms of the process for the  
10 concession of the railway service.  It wasn't known  
11 whether the best thing would be to have a usufruct, to  
12 give a concession, to give a right of use, so part of  
13 my input was, among other things, technical/legal  
14 elements, was to seek a structure which would legally  
15 make it attractive for an investor to become  
16 interested and to participate in the bidding process.

17       Q.    So if I understand you correctly, you  
18 basically put together the structure of the bidding  
19 conditions upon which Ferrovías bid; correct?

20       A.    No, I would have been delighted to have  
21 participated in that way, because, perhaps, personally  
22 and because I was younger at that time, I became very

09:35:44 1 impassioned with the whole process, but there were  
2 some aspects of those bidding conditions with which I  
3 disagreed, so I wasn't able to do that. My work was  
4 very much limited to the eminently legal issue.

5 Q. And what was the eminently legal issue that  
6 your work was focused on?

7 A. I worked basically to come up with a legal  
8 structure that could be interesting for an investor,  
9 such as is the case on Onerous Usufruct Contract, and  
10 I worked on the structure of the contract.

11 Q. You had no relationship or involvement in the  
12 economic terms. Do I understand you correctly?

13 A. That's right. The eminently technical  
14 economic aspect, well, I worked with Mr. Guillermo  
15 Conte who helped me out on the legal aspect, but he  
16 was in charge of that, together with the consulting  
17 firm which was contacted at that time specifically to  
18 do that work. It was not up to me, simply because my  
19 contributions in that respect would have been very  
20 limited. I'm not an expert in that area.

21 Q. You do know that Ferrovías didn't have any  
22 input in the preparation of those bidding terms;

09:37:17 1 correct?

2 A. At least in the legal aspect, no, no  
3 participation. And as far as I know, in the process  
4 that was being put together, that there was any  
5 presence of Ferrovías so as to get involved in it at  
6 all, not that, either, but that's what I remember. I  
7 don't have personal knowledge of that.

8 Q. Were you aware of any errors or omissions in  
9 the bidding condition--conditions?

10 MR. ORTA: I'm sorry. I'm going to object.  
11 I think this is going way beyond the scope of the  
12 First and Second Statements that Mr. Berger submitted  
13 in this case. He makes mention of historical context  
14 that he participated in bidding terms, but to ask him  
15 now whether he is aware of any omissions or errors in  
16 bidding terms that were elaborated more than 14 years  
17 ago, I think is both beyond the scope and not entirely  
18 sure what relevance at all it has in these  
19 proceedings.

20 MR. FOSTER: The Respondent is contending  
21 that there were all sorts of errors in connection with  
22 the granting of this usufruct. This gentleman raised

09:38:38 1 the whole issue in his Statement that he was involved  
2 in preparing the bidding conditions. I certainly  
3 think it's an appropriate inquiry to ask him whether  
4 or not he was aware of any errors or omissions in the  
5 bidding conditions.

6 MR. ORTA: If I just may, before you rule,  
7 he's not been tendered as either a factual witness or  
8 an expert in relation to the bidding terms. He's been  
9 tendered as a factual witness in relation to the  
10 allegation that Claimant made about some alleged  
11 conspiracy relating to Mr. Campollo. That's what his  
12 Witness Statement deals with, that he mentions  
13 anecdotally that he had been involved with the  
14 preparation of legal aspects of the bid I don't think  
15 opens the door to him being asked whether there were  
16 any errors associated with the bidding terms.

17 PRESIDENT RIGO: From our perspective, it has  
18 been mentioned that he has been involved. You had  
19 raised issues that there were problems with the  
20 bidding conditions.

21 Mr. Berger, please answer the question to the  
22 extent that you remember the facts.

09:39:59 1                   THE WITNESS:  So basically, the question is  
2                   whether the bidding terms, as such, were plagued by  
3                   some error or were incomplete and so forth, just to  
4                   make sure that I actually do answer the question,  
5                   Mr. Foster, please.

6                   BY MR. FOSTER:

7                   Q.     Yes, that's the question.

8                   A.     The bidding terms, as such, perhaps were  
9                   plagued by being somewhat general in relation to what  
10                  the rail service was at that time.  But in terms of  
11                  whether there was an error, there were authorities of  
12                  the State who analyzed them.  They analyzed the terms,  
13                  and who undertook to remove any errors that there may  
14                  have been in their support of the bidding process.  
15                  That's what I remember, but I have just--I do have one  
16                  very personal view on the bidding terms, which is  
17                  that, in effect, I was not in agreement with the  
18                  10 percent Canon.  But in terms of whether that  
19                  changed, well, I didn't have any further input and it  
20                  wasn't up to me to make that determination.

21                  Q.     What were the terms that you weren't in  
22                  agreement with?

09:41:14 1           A.    Basically, once again, Mr. Foster, I did not  
2    agree with the payment of a 10 percent Canon because  
3    it seemed to be a somewhat confiscatory scheme.  One  
4    would invest, and independent of whether you would  
5    gain or earn money or not, there's automatically a  
6    10 percent charge that goes to the State.  But that  
7    went beyond the legal issues I was dealing with.

8           Q.    Now, going back to the meeting in December of  
9    2004, you say in your statement that you only--that  
10   your only interest in attending that meeting was your  
11   desire to see Guatemala equipped with an efficient  
12   railroad system; correct?

13          A.    Correct.

14          Q.    Didn't you also attend the meeting because of  
15   the interest of your Korean clients in the Ciudad del  
16   Sur project?

17          A.    No.  My Korean clients have nothing to do  
18   whatsoever with Ciudad del Sur and the Ferrovías  
19   question, not at all.

20          Q.    Did you disclose to the Ferrovías people at  
21   the meeting that you were then currently in talks with  
22   Mr. Campollo regarding the interest of your Korean



09:42:51 1 clients in Ciudad del Sur?

2 A. No, I don't recall whether I raised that, but  
3 I doubt that it was an important element in relation  
4 to the Ciudad del Sur and Ferrovías question.

5 Q. But it is a fact, is it not, that you were  
6 then engaged in talks with Mr. Campollo regarding the  
7 interest of your Korean clients in the Ciudad del Sur  
8 project?

9 A. At that time--at that time the interest of  
10 the Koreans with respect to which I visited factories  
11 in Korea was interesting, but--textile factories, but  
12 for a textile factory, power is about 40 percent of  
13 cost, and so Ciudad del Sur wasn't so attractive. And  
14 given that the latitudes of Ciudad del Sur were not  
15 optimal for that, because it's very hot, basically the  
16 possibility of some Korean company establishing itself  
17 there is quite limited and remote. Given that just a  
18 few kilometers away in the north of the country, there  
19 are various feasible microclimates which are  
20 particularly suitable for that, and Ciudad del Sur is  
21 not good for that.

22 Q. That really wasn't my question. I just

09:44:29 1 referred you to the statement in Paragraph 5 of your  
2 Statement, your Second Statement, where you say, "I  
3 attended that meeting with Messrs. Senn and Duggan  
4 because at that time I was in talks with Mr. Campollo  
5 regarding the interest of some Korean clients in his  
6 Ciudad del Sur project." You say that in your  
7 statement, don't you, sir?

8 A. Correct. I attended it, and as I say, I  
9 don't recall whether that issue came up. Nonetheless,  
10 in effect, the impact of the Koreans in Ciudad del Sur  
11 in relation to Ferrovías at that meeting was of no  
12 consequence.

13 Q. At that time or subsequently, did you become  
14 aware of the fact that Mr. Campollo had a narrow gauge  
15 railroad on his sugar property in the Dominican  
16 Republic?

17 A. No, I did not know that. I knew that  
18 Mr. Campollo had a sugar interest in the Dominican  
19 Republic, but I didn't know that, in effect, that the  
20 railway was the backbone for the transfer of the  
21 sugar.

22 Q. You also say in your statement that when your

09:45:50 1 father was the President of Guatemala, he forbade you  
2 to involve yourself as a representative of the  
3 Government in any matter involving the Republic to  
4 avoid any appearance of conflict of interest; correct?

5 A. Correct.

6 Q. Prior to attending the December meeting in  
7 2004, did you speak with your father about your  
8 attendance at this meeting with--between FVG and  
9 Mr. Campollo?

10 A. Never to this day--I've never had any  
11 discussions on the railway issue with my father. Only  
12 one appointment which, with certain reserve, given his  
13 disposition, at the request of Jorge Senn, I made for  
14 him for Mr. Henry Posner--with him for Mr. Henry  
15 Posner. But that's the only dealing I had with my  
16 father with respect to the railway matter, and I very  
17 much respect his disposition, and so I didn't want to  
18 head down that road with him, and so I was--very much  
19 kept to myself in that respect.

20 Q. Don't you think that your showing up at a  
21 meeting with Mr. Campollo and not telling anyone at  
22 the meeting that you were not representing

09:47:20 1 Mr. Campollo, don't you think that gave a quasi  
2 Governmental imprimatur to your appearance?

3 A. Well, every time that I go to a meeting--that  
4 I was going to a meeting at that time when my father  
5 was a public official, the first words that I would  
6 say would be to clarify that I am here, Juan Esteban  
7 Berger, on behalf of Juan Esteban Berger, as a  
8 Guatemalan citizen, whose national ID number is such  
9 and such, acting on my own behalf. And time and  
10 again, this is what I said, as in other meetings,  
11 where some public aspect would come to light with  
12 respect to which my attitude, as has historically been  
13 the case, is to be restrained, to pull back, and so I  
14 was very emphatic in clarifying that I was not  
15 representing anyone, as I state in my Statement.

16 Q. Let's turn to another subject.

17 MR. FOSTER: Adrian, would you please show  
18 him Exhibit C-83, Page 11.

19 BY MR. FOSTER:

20 Q. Do you have that before you?

21 A. Yes.

22 Q. Thank you. If you look at that chart, which

09:49:20 1 sets forth the ownership of certain sugar refineries  
2 in Guatemala, to your knowledge, is this chart  
3 correct?

4 A. It is correct. It just has one mistake on  
5 the last line where there are two asterisks where it  
6 says (in Spanish) Madre Tierra. That information is  
7 not correct. It's false.

8 Q. So you're saying that no one in your family  
9 is or has been a shareholder in Madre Tierra sugar  
10 mill; is that correct?

11 A. As far as I know, no member of my family,  
12 Widmann family, has been or has any partnership or  
13 relationship with the Madre Tierra sugar mill.

14 Q. We may be--we may be confusing the language  
15 as between English and Spanish. I actually asked  
16 you--let me rephrase it so it will be clear.

17 You're telling us that no member of your  
18 family has any economic interest whatsoever in the  
19 Madre Tierra sugar mill; correct?

20 A. No. What I answered is that no member of my  
21 family is a partner or a shareholder as the document  
22 says. It says "shareholder," which in Spanish would

09:51:09 1 be socio, so no one, as far as I know, ever in the  
2 Widmann family, has had any such partnership-type or  
3 shareholder-type relationship on the sugar mill issue  
4 or with respect to any other issue, as far as I know.

5 Q. Since you're implicitly telling us that there  
6 is an economic interest, what is the economic interest  
7 that any member of your family has in either Madre  
8 Tierra or the Concepción sugar mills?

9 MR. ORTA: I'm sorry. I'm just going to  
10 object to the characterization of the implication from  
11 his prior answer. I think the witness should be asked  
12 that question directly.

13 PRESIDENT RIGO: Could you please ask the  
14 question?

15 BY MR. FOSTER:

16 Q. Does any member of your family, to your  
17 knowledge, have any economic interest whatsoever in  
18 the Madre Tierra or Concepción sugar mills?

19 A. In Madre Tierra, none. In Concepción, very  
20 proudly, my great grandfather built it screw by screw  
21 and started it up and consolidated it as a corporate  
22 group within Peña Pantaleón. And my maternal

09:52:31 1 grandfather is very proudly a shareholder in  
2 that--grandmother, interpreter corrects himself.

3 Q. So the footnote marked by two asterisks is  
4 correct in that regard; correct?

5 MR. ORTA: I'm sorry. That is a very vague  
6 question. Can you just--

7 MR. FOSTER: I'll try it again.

8 BY MR. FOSTER:

9 Q. So the footnote marked by two asterisks, that  
10 says that the Widmann Group is a shareholder in  
11 Concepción sugar refineries, that is correct?

12 A. In terms of how it's drafted, in effect, the  
13 Widmann Group was a shareholder in the Concepción  
14 sugar refinery. Today that no longer exists. It's now  
15 the Grupo Pantaleón, but at the Concepción sugar  
16 refinery, yes, I reiterate, it was my  
17 great-grandfather and my grandfather who brought it up  
18 from nothing and to maintain interest in that project.

19 Q. So your family is a shareholder in the Grupo  
20 Pantaleón; correct?

21 A. Correct.

22 Q. And am I correct that the Madre Tierra sugar

09:53:54 1 mill is part of the Pantaleón sugar group?

2 A. No. There is no relationship whatsoever.  
3 They are two independent groups with independent  
4 shareholders. There is no property  
5 relationship--property rights relationship between  
6 Madre Tierra and Concepción, as far as I know to this  
7 day.

8 Q. Now, after the December, 2004, meeting that  
9 we've been discussing, it was your understanding that  
10 Mr. Pinto was authorized to negotiate on  
11 Mr. Campollo's behalf with Ferrovías, as you say in  
12 your Statement, in order to reach an agreement to  
13 exploit the right of the railway with a view to  
14 support his Ciudad del Sur project; correct?

15 A. Mr. Pinto was introduced by Mr. Campollo in  
16 the Ciudad del Sur matter, and I never heard  
17 Mr. Campollo had authorized and told him, Look, sit  
18 down with Esteban and negotiate with Ferrovías. I did  
19 not hear that that was the case. I never said that.  
20 I was never part of Mr. Pinto's team, and so I have no  
21 personal knowledge that Mr. Campollo has given direct  
22 instructions to Mr. Pinto along those lines. I



09:55:24 1 deduced, as I said in--at the first meeting, that as I  
2 met Mr. Pinto through Mr. Campollo in the Ciudad del  
3 Sur, that I deduced that Mr. Pinto acted in  
4 representation of Mr. Campollo, but I had no personal  
5 knowledge of that. That was a personal deduction on  
6 my part.

7 Q. Now, did Mr. Campollo ever tell you at any  
8 point that Mr. Pinto was not authorized to negotiate  
9 with FVG on his behalf?

10 A. He never made that comment to me. We never  
11 talked about Ferrovías, that is to say with  
12 Mr. Campollo, other than at the Miami meeting. And  
13 reading the Statements, obviously Mr. Pinto approached  
14 Ferrovías afterwards with Mr. Senn to discuss possible  
15 agreements between the Parties, but I never heard  
16 Mr. Campollo say that he was authorized or that he  
17 wasn't authorized.

18 Q. In your statement, you say that after the  
19 December, 2004, meeting, that there were several  
20 consultations between Mr. Pinto and yourself regarding  
21 the railroad and the usufruct; correct?

22 A. Correct. Basically, when I made the comment

09:56:55 1 on my awareness of the Ferrovías issue through UNDP, I  
2 kept one of the bidding terms as memorabilia, one of  
3 the ones that friends from RDC had, and I think there  
4 were seven other companies. It was an envelope that  
5 had microeconomic information on Guatemala and so  
6 forth. And I gave one of those to Mr. Pinto as a  
7 reference to what the right of Onus Usufruct that had  
8 been granted to the people from RDC included and what  
9 it did not include. So from that, I deduced, but I  
10 did not have any information that Mr. Pinto, referring  
11 to the document, had sought me out for consultations.

12 MR. FOSTER: Adrian, please show him  
13 Exhibit C-41.

14 BY MR. FOSTER:

15 Q. The cover of C-41 is an e-mail of which you  
16 received a copy; correct?

17 A. Correct.

18 Q. And attached to that e-mail is the  
19 Desarrollos G proposal dated March 9, 2005; correct?

20 A. Correct.

21 Q. And you agree in your statement that you took  
22 at least a--you made at least some review of the

09:58:41 1 attached Desarrollos G proposal; correct?

2 MR. ORTA: I'm sorry. I'm just going to  
3 object to the characterization of the statement.

4 BY MR. FOSTER:

5 Q. You did review the attachment, the  
6 Desarrollos G proposal, didn't you?

7 A. I glanced at it for a few short moments.

8 Q. Now, on whose behalf were you glancing at  
9 this for a few short moments?

10 A. In the same nature as the relationship which  
11 I--personally led me to speak with Mr. Pinto when I  
12 gave him the document on the bidding terms. It's a  
13 matter of good faith to say, Here is this. And from  
14 that document, well, eventually, there were doubts,  
15 and he would consult me. But there were many  
16 technical doubts in respect of which I could not give  
17 him answers. I didn't have the technical authority.  
18 I did not have more eminently technical knowledge, so  
19 I would open it up, review it, with--in good faith,  
20 and Juan Esteban Berger, acting as the person hired by  
21 the UNDP to put together the bidding terms and the  
22 legal structure in that process.

10:00:18 1 Q. Were you still acting on behalf of UNDP when  
2 you were reviewing this proposal?

3 A. I did not hear your question. I was acting  
4 on behalf of what?

5 Q. UNDP. You said that the reason you were  
6 involved in all of this is because you had been hired  
7 by UNDP. And my question is: When you reviewed this  
8 proposal, were you still employed by UNDP?

9 MR. ORTA: I'm sorry. I'm going to object to  
10 the characterization of his testimony. He's  
11 mischaracterizing what the witness said today.

12 MR. FOSTER: I don't believe I am.

13 PRESIDENT RIGO: Would you base your question  
14 on the statement on UNDP in Paragraph 5?

15 BY MR. FOSTER:

16 Q. I have a very simple question. When you  
17 reviewed the Desarrollos G proposal, were you still  
18 employed by UNDP?

19 A. No.

20 Q. Then on whose behalf were you reviewing the  
21 Desarrollos G proposal?

22 A. It was--I was doing this personally as a

10:01:31 1 citizen of Guatemala, as a person who had gathered  
2 some information on the railway issue.

3 Q. You knew who the beneficial owner of  
4 Desarrollos G was, didn't you?

5 A. No. I don't know who the owner was for the  
6 Desarrollos?

7 Q. Well, the other party named in the  
8 Desarrollos G proposal is Ferrovías; right?

9 A. Correct.

10 Q. And you weren't acting on behalf of  
11 Ferrovías, were you?

12 A. Correct.

13 Q. So you were reviewing a proposal for some  
14 entity known as Desarrollos G, and you're telling us  
15 that you didn't even know who Desarrollos G was or who  
16 owned it?

17 A. Correct. In connection with Desarrollos G, I  
18 received the document by a Mr. Pinto, and also he  
19 entrusted me with the document. Therefore, out of  
20 good manners, I reviewed the document. But for  
21 Mr. Pinto to tell me, "This is my company. This is  
22 Mr. Campollo's, This belongs to Pedro Pérez," he never

10:03:07 1 did so. And upon reading the document and looking at  
2 the content with due respect, I thought the document  
3 was not pertinent to what the--to what was being  
4 intended.

5 Q. Let's turn to another subject. In April,  
6 2005, you learned about some alleged threatening  
7 statements that Mr. Pinto had made to Ferrovias in  
8 which he invoked your name; correct?

9 A. Would you please repeat your question? I was  
10 thinking about something else.

11 Q. No problem.

12 In early 2005, you learned about some alleged  
13 threatening statements that Mr. Pinto had made to  
14 Ferrovias in which he had used your name; correct?

15 A. Correct. I heard from Pedro Fuxet, my good  
16 friend, that at some meeting a comment was made who  
17 Mr. Pinto had allegedly threatened people from RDC.  
18 That's what I heard.

19 Q. Please accept my representation that in  
20 Mr. Fuxet's Statement, he says that you were the one  
21 who told him that you had heard that Mr. Pinto had  
22 allegedly made these statements. Which is it? Did he

10:04:51 1 tell you or did you tell him?

2 A. He told me. He mentioned to me that that  
3 comment had been made, or that he had heard that that  
4 comment had been made.

5 Q. Mr. Fuxet's Statement also says that you were  
6 very upset that Mr. Pinto would be saying such  
7 threatening statements in relation to you. Is that  
8 correct?

9 A. That is correct. I was--never before had my  
10 name been used in this way, and I cannot verify what  
11 Mr. Pinto did or not because I was not there. But I  
12 think that my history is excellent, and I don't know  
13 why my name was mentioned back then, and I'd like for  
14 my good name to be maintained. And from what I heard  
15 through Mr. Fuxet, what Mr. Pinto said was nothing  
16 positive about me.

17 Q. But you didn't bother to call Mr. Pinto and  
18 talk to him about it, did you?

19 A. I did not talk to Mr. Pinto when this  
20 happened, because, indeed, based on what Mr. Fuxet  
21 told me, and also based on the attitude of Ferrovías'  
22 representatives at that meeting, they described

10:06:33 1 Mr. Berger as someone who had--who was abusive. And  
2 as I'm doing it today, I think that I never approached  
3 Mr. Duggan to clarify this. I think that if something  
4 is in doubt, we should go and face the situation and  
5 try to clarify our own situation.

6 Q. But instead of either talking to Mr. Pinto or  
7 Mr. Duggan, what you did was ask Mr. Fuxet to go to a  
8 meeting between Ferrovías and Mr. Pinto; correct?

9 A. In what case? Because that meeting took  
10 place before I heard about that, so I think it was at  
11 that meeting that Mr. Fuxet heard about that.

12 Q. Didn't you ask Mr. Fuxet to make sure that  
13 the Ferrovías representatives knew that you were not  
14 going to do any of the things that Mr. Pinto had said  
15 you were; isn't that true?

16 A. Mr. Fuxet knows me very well. He knows my  
17 background, and I never need to ask him to speak on my  
18 behalf when he knows that my name is going to be part  
19 of a discussion. So given our affection, I think that  
20 his attitude was clear.

21 PRESIDENT RIGO: Give a second to respond to  
22 the question of Mr. Orta asked how we were on time.



10:08:31 1                   SECRETARY SEQUEIRA: You have about eight  
2 minutes now.

3                   MR. FOSTER: Thank you.

4                   MR. ORTA: Thank you.

5                   BY MR. FOSTER:

6           Q.     But my question in this case, you asked  
7 Mr. Fuxet to clear your name with the Ferrovias  
8 people, didn't you?

9           A.     Based on what was said when Mr.--but  
10 Mr. Fuxet was not there, and given my trust of  
11 Mr. Pedro, I wanted for him to repeat my connection  
12 with the project to help the project, but he  
13 needed--but as for clarification in clearing my name,  
14 that is something I would rather do myself.

15          Q.     But you didn't, did you? You didn't call  
16 Mr. Pinto, and you didn't call anybody from Ferrovias,  
17 did you?

18          A.     Yes, I did talk to Mr. Silva. I drove--I  
19 left my office; I drove my car and met with Mr.--this  
20 person, and I told him that anything that Mr. Pinto  
21 may say or any threat about--Mr. Berger has nothing to  
22 do with the threat, and my name and my good faith to

10:10:04 1 help were always there. This was not a hostile  
2 meeting. This was not an embarrassing meeting. It  
3 was a meeting just to clear the situation, and this is  
4 the same way I'm doing it today.

5 Q. Didn't Mr. Fuxet advise you that you should  
6 personally clarify the situation with Ferrovias?

7 A. Mr. Fuxet, based on that meeting where he was  
8 not present but where it was said that Mr. Pinto  
9 said--made those statements, he made that comment to  
10 me, and my comment was, "I am going to talk to them."  
11 And he said, "I agree."

12 Q. So I'm correct that Mr. Fuxet advised you to  
13 do the clarification personally; correct?

14 A. No. That was my own personal decision to go  
15 and clarify the situation as it was also my decision  
16 to come here and be here with all of you today.

17 Q. And did you subsequently have a meeting with  
18 Mr. Senn and Mr. Duggan?

19 A. No, I did not. I had a meeting with  
20 Mr. Silva and Mr. Duggan at Mr. Silva's office just to  
21 clarify this situation.

22 Q. Did you call Mr. Campollo and talk to him

10:11:47 1 about this situation?

2 A. Yes, I talked to him about what happened, and  
3 I called him. I was very surprised, because I had  
4 heard that Mr. Pinto had decided to make some  
5 statements that were quite sensitive in connection  
6 with a threat.

7 Q. So when Mr. Pinto said something that  
8 involved you, you immediately went to his boss,  
9 Mr. Campollo; isn't that true?

10 A. No, that is not true, because whenever  
11 Mr. Pinto talked to me, I did not turn around and talk  
12 to Mr. Campollo, but in this case, it was because  
13 there was an alleged threat against someone, and it  
14 was important for Mr. Campollo to be informed.

15 Q. Because you thought that Mr. Campollo, as  
16 Mr. Pinto's boss, could do something about it; isn't  
17 that true?

18 A. It goes beyond that. At no time  
19 Mr. Campollo, as the boss of Mr. Pinto, was going to  
20 question Mr. Campollo whether Mr. Pinto is always--is  
21 always making this type of sharp remarks.

22 Q. Yes, sir, but the reason you called

10:13:28 1 Mr. Campollo to get him to--was to get him to do  
2 something about this problem with Mr. Pinto; isn't  
3 that true?

4 A. I did not call him for him to do something,  
5 because I did not call him to complain about  
6 Mr. Pinto. I just called him to let him know that my  
7 name had been mentioned in connection with the threat  
8 and that I was deeply disappointed, but I never told  
9 him, "Please do something in connection with  
10 Mr. Pinto." I just expressed the facts as I had heard  
11 them.

12 Q. Okay. Sir, let me shorten the question then.  
13 You called Mr. Campollo because you knew he was  
14 Mr. Pinto's boss, didn't you?

15 MR. ORTA: I'm sorry. That's been asked and  
16 asked now a couple of times.

17 MR. FOSTER: No, it hasn't.

18 PRESIDENT RIGO: I'm sorry, but he has not  
19 answered that question. So could you please answer  
20 yes or no?

21 THE WITNESS: I called Mr. Campollo because  
22 Mr. Pinto, in some other situation such as, for

10:14:38 1 example, Ciudad Sedalia, had been working with him and  
2 he introduced me to him, and I told him about the  
3 facts, and I also conveyed to him my bad taste about  
4 the situation and how Mr. Pinto had acted.

5 MR. FOSTER: Thank you, Mr. Berger. That's  
6 all the questions I have.

7 Thank you, Mr. President.

8 PRESIDENT RIGO: Thank you.

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

10 BY MR. ORTA:

11 Q. Just to clarify two very minor points, you  
12 were being asked some questions in relation to a sugar  
13 business in Guatemala with the name of Concepción. Do  
14 you recall that?

15 A. What would be the question? I'm sorry.

16 Q. You were asked some questions about  
17 Mr. Foster about a sugar business in Guatemala called  
18 Concepción; correct?

19 A. Correct.

20 Q. And you mentioned that your family used to be  
21 a shareholder in that business; correct?

22 A. Correct.

10:16:09 1 Q. Does the Concepción--to your knowledge, does  
2 the Concepción -- strike that.

3 Let me start the question again.

4 To your knowledge, does Mr. Campollo or  
5 anyone in his family or did Mr. Campollo or anyone in  
6 his family ever have any shareholder relationship or  
7 economic interest in the Concepción sugar mill?

8 A. Based on my knowledge, no, there was no  
9 relationship.

10 Q. I think this issue is set forth in your  
11 Statement, but in relation to the meeting that you  
12 attended in December, 2004, that you were asked about,  
13 or your review, your brief review, of the document  
14 that Mr. Pinto sent you, did you ever request payment  
15 for either of those activities or receive payment for  
16 either of those activities?

17 A. No, never. I did not receive, I did not  
18 request any payment. Professionally, I do not like to  
19 be exposed in areas that are beyond my control. I  
20 never worked or have received a salary or an amount of  
21 any sort from Mr. Campollo. So professionally  
22 speaking, in my connections as a client, in the

10:17:47 1 client/attorney relationship, I did not have that type  
2 of relationship with Mr. Campollo.

3 MR. ORTA: Thank you, Mr. Berger. I have no  
4 other questions at this time.

5 PRESIDENT RIGO: Thank you, Mr. Orta. I  
6 think that Mr. Eizenstat has some questions.

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR EIZENSTAT: First, thank you very  
9 much for appearing personally. I know that it may  
10 have been an inconvenience, and we appreciate it very  
11 much.

12 I want to get a better understanding in  
13 general of your relationship with Mr. Campollo. Are  
14 you--do you have a personal friendship with him? Have  
15 you had any professional relationships? How long have  
16 you known him? Give the Tribunal a sense just of your  
17 overall relationship with Mr. Campollo.

18 THE WITNESS: With pleasure.

19 Mr. Eizenstat, I don't know about--I have to  
20 leave to take a plane in a couple of hours, so I don't  
21 know, David, could you please let me know how much  
22 time I have left.

10:18:53 1 MR. ORTA: Sorry. Just--it's 10:15 now, so  
2 he has a 12:30 flight. And so I just mentioned to him  
3 yesterday that we would try to get him out of here, if  
4 possible, by around 10:30 so he made--it's an  
5 international flight, so that he made it to National  
6 in time. I'm just responding so that he knows where  
7 we are in terms of time.

8 THE WITNESS: In connection with  
9 Mr. Campollo, I met him socially. I never had a  
10 business relationship, and I don't have it now. He's  
11 a very dynamic businessperson. He's very respected in  
12 Guatemala, and as a person, he never approached me for  
13 any sort of elicited proposal or indecent proposal.

14 I do not have any business relationship with  
15 him. I never had that sort of relationship with him.

16 ARBITRATOR EIZENSTAT: To your knowledge, has  
17 he had a political relationship with your father? Was  
18 he a political supporter so far as you know?

19 THE WITNESS: He never had a political  
20 relationship with my father. My father, throughout  
21 his public office, time in public office, never had  
22 any political relationship with Mr. Campollo. I think



10:20:30 1 that there is mutual respect as businesspersons, but  
2 personally, my father never had more than a kind  
3 relationship with him--cordial relationship.

4 ARBITRATOR EIZENSTAT: You mentioned that you  
5 were working on the bidding documents for UNDP.  
6 Because there are a lot of separate documents here, a  
7 lot of separate contracts and deeds, 41, 143, 158,  
8 402, 820 and so forth, which ones did you work on for  
9 UNDP, and what was the nature of your work for them?

10 THE WITNESS: I worked only on the records  
11 for the contract, and that was the one that was later  
12 modified. That was the one used for the bidding  
13 process. And there were some meetings held by RDC and  
14 the ministry, and I never saw the final contract. I  
15 never read it. I was never invited to participate in  
16 those meetings. My job concluded, unfortunately, when  
17 RDC appeared in Guatemala to bid for the usufruct.

18 ARBITRATOR EIZENSTAT: So you worked on the  
19 bidding documents, the RFP, not on any of the specific  
20 deeds; is that correct?

21 THE WITNESS: Correct. I never saw any of  
22 the other documents, and I never read the scope of

10:22:06 1 those documents. I heard about the contracts and the  
2 documents--in the documents, but I never read them,  
3 and I never read what was finally agreed simply  
4 because I got to--my job finished and I lost interest.

5 ARBITRATOR EIZENSTAT: Did you hear about any  
6 legal arguments about defects in any of the contracts?  
7 Did that come to your attention?

8 THE WITNESS: No, I never heard of any legal  
9 defect. I heard of lesivo just through the  
10 newspapers. And I heard from Jorge Senn some of their  
11 bad impression during 2000, 2003, during the  
12 administration of the previous President, where the  
13 relationship was not the best and they had some  
14 issues, but they were not even legal issues, rather  
15 operational issues.

16 ARBITRATOR EIZENSTAT: I would like to have a  
17 better an understanding about the December, 2004,  
18 Miami meeting. Who invited you to the meeting and  
19 why?

20 A. I was invited by Mr. Campollo. He was going  
21 to be there. I had concluded a vacation with my  
22 family, so I was going to be in Miami, so I had no

10:23:40 1 issues in attending that meeting.

2 ARBITRATOR EIZENSTAT: But what do you  
3 believe was his reason for asking you to come? I  
4 mean, there are a lot of others who might have come.  
5 What was his reason for calling you and asking you to  
6 attend? And were you surprised that you were asked to  
7 come?

8 THE WITNESS: I conclude that Mr. Campollo  
9 thought that I had some knowledge when referring to  
10 the railway issue based on the other presentation, and  
11 he thought it was pertinent to go to that meeting with  
12 him because it might have been a good thing for me to  
13 participate.

14 ARBITRATOR EIZENSTAT: What railway issues  
15 would he have possibly imagined you had expertise in  
16 with respect to this particular meeting and the  
17 subject of the meeting?

18 THE WITNESS: I made some comments to him  
19 about Ferrovias and the knowledge I had about the  
20 information I had in connection with the problems, and  
21 also the displacements and the investments in Latrocia  
22 (ph.), but these were personal opinions, and the

10:25:10 1 information I had was not information that he may have  
2 had about the railway system.

3 ARBITRATOR EIZENSTAT: What knowledge would  
4 you have had of problems and from whom?

5 THE WITNESS: Mr. Jorge Senn at a meeting  
6 told me that they were very sad, they thought that  
7 they had no support, that they had been abandoned,  
8 that some of the commitments had not been fulfilled  
9 among the Parties, and that they believed in the  
10 railway system, that they wanted to move forward with  
11 it. And I was very sympathetic to that, because I  
12 have always believed in the railway, and I always  
13 thought that the opportunity in 1997 was a good one to  
14 move forward with the project.

15 ARBITRATOR EIZENSTAT: And Mr. Campollo would  
16 somehow have known of the conversation with Mr. Senn?  
17 Is that the reason why you think you were invited?

18 THE WITNESS: I don't remember telling him  
19 that I had a meeting. I don't even remember whether  
20 the meeting with Mr. Senn was before or after going to  
21 Miami, and I apologize, because it was a very casual  
22 meeting, but it is not clear to me what happened

10:26:40 1 first.

2 ARBITRATOR EIZENSTAT: What were your  
3 contributions at that meeting?

4 THE WITNESS: Basically, I went there to  
5 listen to what was said. I introduced myself. I  
6 explained my role, and I thought that it was  
7 interesting for a businessperson who has a certain  
8 position in Guatemala to meet with businesspersons  
9 from the U.S., and I thought that this energy could  
10 have been positive.

11 ARBITRATOR EIZENSTAT: Was one of the  
12 subjects at the meeting the extension of the railway  
13 line to the south and to the Ciudad del Sur area?

14 THE WITNESS: If my memory serves me right, I  
15 think that one of the topics was to discuss how sugar  
16 could reach the South Coast using the railway, that  
17 railway line or a different one, but it was how the  
18 sugar was would reach the Southern Coast.

19 ARBITRATOR EIZENSTAT: And inform us about  
20 the nature as you remember of that conversation. Who  
21 was saying what about the extension of the railway?  
22 What position was being taken by Mr. Campollo and the

10:28:03 1 others at the meeting?

2 THE WITNESS: Based on my vague recollection,  
3 we discussed issues at 60,000 feet. That is to say,  
4 there was no information. It was very cordial and it  
5 was just an approach to see how we can think about the  
6 issue, but we did not discuss any issue in particular  
7 or in depth.

8 ARBITRATOR EIZENSTAT: Were you aware that  
9 Mr. Pinto was a long-time employee of Mr. Campollo?

10 THE WITNESS: Based on the information I  
11 have, Mr. Pinto worked with Mr. Campollo in different  
12 businesses, but I did not know that he worked with  
13 him. I did not know that he trusted him. And the  
14 issues that I discussed with Mr. Campollo, Mr. Pinto  
15 was never an agent. I am very aware of the managers  
16 in the sugar mills and Mr. Pinto was not an  
17 outstanding figure in those transactions or  
18 businesses.

19 ARBITRATOR EIZENSTAT: On Exhibit C-41, the  
20 e-mail that was referred to, which you said you  
21 glanced at, do you have any idea--this is the  
22 Desarrollos G proposal. Do you have any idea why you

10:29:38 1 would have been copied on that proposal?

2 THE WITNESS: As Mr. Pinto was constantly  
3 talking to me over the phone and having some questions  
4 for me, maybe he sent me a copy for me to glance at it  
5 and make any comments I may want to make.

6 ARBITRATOR EIZENSTAT: What kind of questions  
7 did he have for you? You said he asked you a number  
8 of questions and asked for your comments. What  
9 questions and on what topic?

10 THE WITNESS: I told him about what I did in  
11 connection with the issues that were going on with the  
12 concession and the advances that the concession made.  
13 And one of the arguments that we defended, the  
14 technical group, that is, is that we needed an  
15 operator who was not a fly-by-night person and for the  
16 person to come in and fix it, and then sell it for a  
17 lot of money. So we needed a company that had railway  
18 experience, and that is the company that would exploit  
19 the concession, the railway concession. The spirit of  
20 the concession was for the railway to be activated to  
21 have people and experience and expertise to move the  
22 railway forward, amongst other things.

10:31:07 1                   ARBITRATOR EIZENSTAT:  When you say "we  
2 needed," who is "we" in this case?

3                   THE WITNESS:  When did I say that exactly?

4                   ARBITRATOR EIZENSTAT:  You just said in an  
5 answer to my question that "we" felt we needed  
6 something that was not fly by night and that would be  
7 capable of going in.  I'm just asking who the "we" is  
8 in this case.

9                   THE WITNESS:  Mr. Guillermo Garcia and the  
10 consulting company and the other people that supported  
11 us during this process of preparing the bidding  
12 conditions back in '97.

13                   ARBITRATOR EIZENSTAT:  This is many years  
14 later.  So, I mean, the bid is done.  Are you still  
15 referring back to the same company that prepared the  
16 bid years earlier when you say "we"?

17                   THE WITNESS:  That is correct.  I'm talking  
18 about the effort, a one-year-long effort.  We were  
19 analyzing the best scheme, Guillermo Garcia and the  
20 other people that were with us.  We firmly believed  
21 that the guarantee would be a railway operator.  That  
22 is why I said "we."



10:32:28 1                   ARBITRATOR EIZENSTAT: What knowledge before  
2 you got the e-mail did you have of this Desarrollos G  
3 proposal? Did this come as a complete surprise when  
4 you were copied on it?

5                   THE WITNESS: More than surprised.  
6 Well--more than surprised, excuse me. More than  
7 surprised. Well, basically, he sent me an e-mail and,  
8 you know, I answered his phone calls when he had a  
9 question. I thought it was something incidental and  
10 somewhat infantile.

11                   ARBITRATOR EIZENSTAT: With respect to the  
12 April 5, 2005, meeting where you mentioned that you  
13 were concerned about the nature of Mr. Pinto's  
14 statements and that you then called Mr. Campollo. Why  
15 you would have called Mr. Campollo? He was not  
16 present at the meeting. What was the reason for  
17 calling Mr. Campollo?

18                   THE WITNESS: I heard that my name was being  
19 used, and I called Mr. Campollo just to share my  
20 experience of what had happened, and ask him, in  
21 passing, whether Mr. Pinto operates in this way,  
22 whether he has had outbursts of this nature, whether

10:34:06 1 he has the authority or whether he had made these  
2 kinds of accusations, if that was really the case,  
3 right.

4 ARBITRATOR EIZENSTAT: What was  
5 Mr. Campollo's response to your questions?

6 THE WITNESS: Mr. Campollo was stupefied. He  
7 was more surprised than I was when hearing these  
8 events--when hearing about these events. And then he  
9 took action and he said, Well, to protect your good  
10 name, I'm going to make sure that they know that I'm  
11 not directly involved in this.

12 ARBITRATOR EIZENSTAT: I'm not quite clear on  
13 why your good name was involved. I understand the  
14 threats that were made, but they were made--were they  
15 made about you or were they made about Ferrovías? I'm  
16 not sure why you felt your name was being somehow  
17 indicted. Maybe you can clarify that for us.

18 THE WITNESS: Of course.

19 As it is stated in the Statements and as it  
20 is stated by the people from RDC, one can lead to  
21 believe that when Esteban Berger in good faith helped  
22 Mr. Pinto, Mr. Pinto has access to Mr. Berger to take

10:35:31 1 out and put in concessions, and this is absurd. That  
2 is why my name is--my name appears in this process.

3 ARBITRATOR EIZENSTAT: I'm sorry. Did  
4 someone at the meeting make that accusation?

5 THE WITNESS: From what I understand on the  
6 basis of the accusation of that meeting--well, I  
7 wasn't there. I wasn't present there. I cannot make  
8 sure that that happened, but out of the information  
9 that Mr. Fuxet gave me, he was a friend. He said,  
10 "Look, I heard that a comment was made about your  
11 person, about you, in such and such terms."

12 ARBITRATOR EIZENSTAT: And what did Mr. Fuxet  
13 say--tell you that they were saying about you that got  
14 you concerned?

15 THE WITNESS: That indeed, comments had been  
16 made in that meeting. He was not present at the  
17 meeting, but that the concession was going to be taken  
18 away from them via a threat, and the RDC people  
19 adduced, from what I understand, is that since I had  
20 supported Mr. Pinto when clarifying some doubts for  
21 Mr. Pinto, et cetera, that that was going to happen  
22 via Mr. Berger.

10:36:59 1                   ARBITRATOR EIZENSTAT: And somehow RDC was  
2 alleging that you were going to intervene with the  
3 concession? Is that what Mr. Fuxet was trying to tell  
4 you?

5                   THE WITNESS: No. That when Mr. Juan Berger  
6 as a person, who independently had given some  
7 thoughts, that unfortunately, because of the fact that  
8 I was the son of the President, perhaps one could  
9 believe that he had some way of having an incidence on  
10 his father, but this is just conjecture--this was just  
11 conjecture, purely.

12                   ARBITRATOR EIZENSTAT: And you felt obviously  
13 that that was incorrect, that you wouldn't have such a  
14 role to play?

15                   THE WITNESS: Basically, and I'm very proud  
16 to say, I am 41 years old, and I have never threatened  
17 anyone. I had never been involved in, you know, the  
18 public sector trying to cause direct or indirect  
19 damage to anyone. So I was--I felt alluded to  
20 personally when this transpired.

21                   ARBITRATOR EIZENSTAT: Okay, and then the  
22 last question, and I will let you get your plane. The

10:38:33 1 allusion to you was made, as you understood it from  
2 Mr. Fuxet, by whom?

3 THE WITNESS: Mr. Fuxet was not present at  
4 that meeting. And he was--he didn't--he was quite  
5 tight lipped. It was almost like a gossip. He said,  
6 "Look, I heard that this happened, that these threats  
7 were being made." And that out of Mr. Fuxet, I got  
8 that on the basis of what he heard. And because I  
9 trust him, it is that I felt that I had been alluded  
10 to.

11 ARBITRATOR EIZENSTAT: And he didn't tell you  
12 from whom he might have heard this, or did he?

13 THE WITNESS: He did not tell me, correct.

14 ARBITRATOR EIZENSTAT: Thank you very much.  
15 I hope you'll have a good flight.

16 PRESIDENT RIGO: Mr. Orta, do you have any  
17 questions?

18 MR. ORTA: I do not.

19 PRESIDENT RIGO: Mr. Foster, do you have any?

20 MR. FOSTER: I have one question.

21 BY MR. FOSTER:

22 Q. Secretary Eizenstat referred you to Exhibit

10:39:54 1 C-41, the e-mail concerning Desarrollos G and that you  
2 were copied on. In addition to yourself, that e-mail  
3 shows that a gentleman by the name of Juan Buitron was  
4 copied. You know that Mr. Buitron is Mr. Campollo's  
5 personal lawyer, don't you?

6 A. The person copied here is the son of  
7 Mr. Buitron. Juan Buitron is not a lawyer. He's not  
8 an attorney at law. His father, José, is a lawyer,  
9 and is the adviser of Mr. Campollo. But Juan Buitron  
10 was copied here.

11 MR. FOSTER: Thank you.

12 PRESIDENT RIGO: Mr. Berger, thank you very  
13 much for being here with us and for cooperating with  
14 the Tribunal, and I hope that you make your flight.

15 THE WITNESS: Thank you very much. With all  
16 due respect, thank you, Mr. Foster, thank you to all  
17 the Parties, and I always try to provide support and  
18 clarify as much as we can. We wish to do that in  
19 Guatemala. I'm sorry I have to rush out, but this is  
20 the only way in which I was able to come here and meet  
21 this commitment. We are at the disposal of the  
22 Tribunal to provide our support in anything that we

10:41:33 1 may.

2 PRESIDENT RIGO: Thank you very much. You  
3 may step down.

4 (Witness steps down.)

5 PRESIDENT RIGO: We now have the 20-minute  
6 break per the Procedural Order 11, and then we will  
7 convene--let's reconvene at 5 of that clock. That  
8 clock is a little bit late, so let's reconvene at 5 to  
9 11:00 of that clock, and we will break, as I had  
10 mentioned earlier this morning, at 12:20. Thank you.

11 (Brief recess.)

12 PRESIDENT RIGO: Mr. Franco, I think we are  
13 ready to restart.

14 Mr. Foster, whomever you designate.

15 MR. FOSTER: Thank you, Mr. President.

16 Mr. Stern will present this witness. Thank you.

17 CARLOS FRANCO, CLAIMANT'S WITNESS, CALLED

18 PRESIDENT RIGO: We welcome you, Mr. Franco,  
19 and I'm going to ask you to read out the Witness  
20 Statement.

21 THE WITNESS: Thank you, Honorable Members of  
22 the Tribunal.

11:04:09 1 I solemnly swear upon my honor and conscience  
2 that I will tell the truth, the whole truth and  
3 nothing but the truth.

4 PRESIDENT RIGO: Thank you very much.

5 DIRECT EXAMINATION

6 BY MR. STERN:

7 Q. Good morning, Mr. Franco.

8 Do you have in front of you a copy of the  
9 statement you have submitted in this arbitration dated  
10 March 10, 2011?

11 A. Yes, I do.

12 Q. Do you ratify that statement and affirm its  
13 truthfulness before the Tribunal?

14 A. Yes, of course I ratify it.

15 Q. Mr. Franco, since 2007, have you been the  
16 lead lawyer representing Ferrovías Guatemala in the  
17 Lesividad Litigation before the Contencioso  
18 Administrativo Court?

19 A. Yes, that's correct.

20 Q. Do you hold any teaching positions?

21 A. Yes, that is correct. I am a university  
22 Professor, principal Professor at a university in



11:05:18 1 Guatemala City, the Universidad Mariano Galvez. I  
2 have been and I am at this time a full professor for  
3 the courses in Administrative Law 1 and 2,  
4 Administrative Procedural Law, Constitutional Law of  
5 Guatemala, Constitutional Procedural Law of Guatemala  
6 and Civil and Commercial Procedural Law, and General  
7 Theory of Procedure.

8 (Technical difficulties.)

9 BY MR. STERN:

10 Q. Mr. Franco, do any of the courses that you  
11 just mentioned that you teach, do they involve  
12 teaching the law procedure of lesividad in Guatemala?

13 A. Yes, of course. The Administrative Law  
14 classes and specifically the points as developed in  
15 the law, rather than on the course on administrative  
16 procedure.

17 Q. Okay. Let me switch topics quickly.

18 Mr. Franco, when did the State of Guatemala  
19 commence the Contencioso Administrativo action to  
20 confirm the Declaration of the Lesividad against  
21 Contracts 143 and 158?

22 A. The action was presented by the Guatemala

11:07:15 1 state through the Office of the Attorney General on  
2 the 24th of November 2006.

3 Q. And when was Ferrovías first served with the  
4 complaint in that action?

5 A. The notification of the first resolution in  
6 the content of the complaint was notified about six  
7 months after it was filed. The notice was given of it  
8 in May 2007.

9 Q. Now, as of today, more than five years since  
10 the Lesividad Action was commenced, has the  
11 Contencioso Administrativo Court rendered its judgment  
12 in the case?

13 A. No. To date, after more than five years  
14 since the complaint was filed, we still do not have a  
15 judgment from the Contencioso Administrativo Court.

16 Q. How many motions has Ferrovías filed in the  
17 Administrative Court proceedings since its  
18 commencement in 2006?

19 A. Four challenges have been presented.

20 Q. And did any of those motions, those four  
21 motions, cause any -- cause delays of any significance  
22 in the proceedings?

11:08:47 1           A.    No, none of them did.  They were processed  
2           and resolved without provoking any undue delay in the  
3           procedure.

4           Q.    Thank you, Mr. Franco.  You can now answer  
5           questions from Guatemala's counsel.

6                    PRESIDENT RIGO:  Is it Mr. Orta who will ask  
7           questions?

8           Mr. Orta, go ahead.

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

10                   CROSS-EXAMINATION

11                   BY MR. ORTA:

12           Q.    Good morning, Mr. Franco.  How are you today?

13           A.    Good morning.  Fine.  Thank you.  Good  
14           morning to you all.

15           Q.    Just setting the context of your appearance  
16           here today, you, I think as you mentioned in response  
17           to some of the questions from Mr. Stern--you've been  
18           acting as a lawyer on behalf of Ferrovías since the  
19           year 2007; is that correct?

20           A.    Yes, that is correct.

21           Q.    Did you do any other legal work for Ferrovías  
22           before you agreed to serve as their lawyer in the

11:09:49 1 current Contencioso Administrativo action that's  
2 pending in Guatemala?

3 A. Yes, a Constitutional motion.

4 Q. When was that?

5 A. That was in September of 2007.

6 Q. Was that a Constitutional action that you  
7 filed in relation to the Contencioso Administrativo  
8 action that is pending and in which you are the  
9 lawyer?

10 Did it relate to that action?

11 A. Yes, that's right, against the order of  
12 lesividad issued by the President of the Republic.

13 Q. Could you just explain briefly to us what the  
14 arguments were that you made in that Constitutional  
15 filing, what you were seeking?

16 A. Yes, of course.

17 Under Guatemalan legislation, all acts by  
18 administrative agencies should be based on full  
19 compliance with the law, the Constitution and the  
20 statutes.

21 In this case, what we have put forth and what  
22 is at issue in that Constitutional action is that the

11:11:30 1 President of the Republic did not have sufficient  
2 authority to have declared lesividad for various  
3 reasons.

4           What are these? First, what the law  
5 establishes is that the President can declare the  
6 lesividad of acts and resolutions that it clearly so  
7 establishes; if you carefully read the article, it  
8 says acts and resolutions. At no times does it  
9 mention "contracts"?

10           What's the difference? Well, an act or a  
11 resolution is a unilateral declaration of will by an  
12 organ or an agency; whereas, an agency [sic] is an  
13 agreement involves the meeting of the minds of two  
14 parties. That was one of the points.

15           Another of the main points is that the  
16 President of the Republic, based on judgments handed  
17 down by the Court, has the power to declare lesivos  
18 acts which emanate from the executive exclusively. It  
19 cannot declare lesivo acts that do not emanate from  
20 the executive.

21           In this case, FEGUA is an autonomous entity  
22 with a distinct juridical personality from that of the

11:12:37 1 State.

2           And, third, there was a discussion about the  
3 contracts that were declared lesivo. Well, it was  
4 said that they established two alternative means for  
5 dispute resolution: Conciliation and arbitration.

6           So those were the main arguments in that  
7 declaration, or, rather, in that Constitutional  
8 action.

9           Q. Thank you, sir.

10           Did the Supreme Court hear--I'm sorry, did  
11 the Constitutional Court hear those claims?

12           A. Yes, it did.

13           Q. We'll get to it in a second, but just--if you  
14 could just tell us, did the Constitutional Court  
15 accept or deny your arguments?

16           A. Here we have to explain something that is  
17 quite important. In order bring a Constitutional  
18 action, there's a principle called the Principle of  
19 Definitiveness, which the Constitution regulates,  
20 which establishes that prior to having--bringing an  
21 amparo action, one must exhaust regular remedies.

22           Nonetheless, in the instant case, there was

11:14:06 1 no regular administrative remedy to exhaust.

2           Why? Because clearly Article 9 of the law on  
3 the Contencioso Administrativo regulates that no  
4 remedy may be brought against a resolution by the  
5 President or Vice President. So in this case, on  
6 establishing that clear violation, we went to the  
7 Constitutional jurisdiction.

8           We must be very clear that the Constitutional  
9 Court did not rule on the Merits. That is to say, it  
10 did not say that it was inadmissible, but, rather, the  
11 Administrative Court, what it established was that the  
12 points that we argued as clear violations of the  
13 rights of the Ferrovías had to be just brought to the  
14 Contencioso Administrativo jurisdiction.

15           That's how it was.

16           Q. So if I understand you correctly, the  
17 Constitutional Court declined to--well, let's go step  
18 by step. The Constitutional court denied the  
19 petition, but, in doing so, allowed Ferrovías to raise  
20 those very same arguments before the Contencioso  
21 Administrativo Court, the Administrative Court; is  
22 that correct?

11:15:29 1 A. Yes, that is correct.

2 Q. All right. Returning to the first area of  
3 questions, other than the action that you're currently  
4 handling for Ferrovías in the Administrative Court,  
5 and the action that you filed before the  
6 Constitutional court, have you done any other work for  
7 Ferrovías?

8 A. Yes. Correct. I have been the lead attorney  
9 in some other proceedings underway in Guatemala.

10 For example, let's see, at some point in time  
11 an action was brought, a tax claim, against Ferrovías.  
12 Also, an executive proceeding for the collection of an  
13 alleged debt for the sending of materials and  
14 merchandise.

15 In addition, defense in the criminal  
16 proceeding which, without any basis, was brought  
17 against the legal representative of Ferrovías, which  
18 was already resolved and this person was acquitted.  
19 It was totally out of place.

20 Q. Any others?

21 A. Yes. At this moment, those are the ones I  
22 recall.



11:17:07 1 Q. And you also are a member of the Diaz-Duran &  
2 Asociados Central Law law firm; correct?

3 A. Yes, that is correct.

4 Q. And your partner is Mr. Carrasco, sitting  
5 over there across--or next to Mr. Posner; is that  
6 true?

7 A. Partner of mine? Not directly. I am an  
8 attorney who is an associate with the firm, but I'm  
9 not a partner of the firm. I work for the firm.

10 Q. I'm sorry. So you are an associate at the  
11 Diaz-Duran & Asociados firm, and Mr. Carrasco, sitting  
12 over there next to Mr. Posner, is one of your bosses?

13 A. Yes, that is correct.

14 Q. In relation to your declaration--in your  
15 declaration, you claim that Ferrovías has not been  
16 afforded due process in the Administrative Court  
17 proceeding that is currently underway; is that  
18 correct?

19 A. Yes, that is correct.

20 Q. And you understand that Ferrovías, in this  
21 case, in part through your partner and Greenberg  
22 Traurig, are arguing that they have not been afforded

11:18:39 1 due process in the Administrative Court proceeding?

2 A. Yes, that is correct.

3 Q. And so through your declaration, you are  
4 supporting their arguments in this case; is that  
5 correct?

6 A. Yes, that is correct, that due process was  
7 not afforded.

8 Q. Now, just so that we understand the  
9 parameters of your declaration, it is correct, is it  
10 not, that Ferrovías has been notified of the  
11 Administrative Court proceeding?

12 A. Yes, that is correct. It was notified  
13 approximately six months after the complaint was  
14 initiated.

15 Q. And in that interim six-month period, there  
16 were no decisions made adverse to Ferrovías, were  
17 there?

18 A. Prior to notice? Well, since there was no  
19 legal resolution, it not been handed down even though  
20 the Court was under an obligation to do so, but it  
21 never did hand down such a decision.

22 MR. ORTA: We can put up RL-73, please.

11:19:59 1 BY MR. ORTA:

2 Q. I'm going to be putting up a document on the  
3 screen.

4 For purposes of the examination, we're also  
5 going to be putting the Spanish version of the  
6 document before you so that you may read it.

7 MR. ORTA: For the purposes of the Tribunal,  
8 we're putting the English version up on the screen so  
9 that they may follow along in English as well.

10 BY MR. ORTA:

11 Q. Now, before you entered your appearance on  
12 behalf of the Ferrovías in the Administrative Court  
13 proceeding, the Administrative Court did issue an  
14 order dated February 23, 2007; correct?

15 A. Yes, that is correct. And that was in the  
16 record, even though we did not have knowledge of it.

17 Q. The Administrative Court, in part, denied a  
18 request for injunctive measures and for provisional  
19 suspension of Contract 143 and 158 that had been filed  
20 by the Attorney General's Office of Guatemala;  
21 correct?

22 A. Yes, that is correct. Nonetheless, it is

11:21:27 1 important to clarify that this resolution--well, no  
2 one knew about it. Ferrovías didn't know about it.  
3 We didn't know about it as their attorneys, nor did  
4 the persons in general. The only thing that one knew  
5 was that in August of 2006, a Declaration of Lesividad  
6 had been published. So that's what was known.

7 This resolution, of course, not until notice  
8 of it was given in May of 2007.

9 Q. And my question is: This ruling does not  
10 prejudice Ferrovías in the case, does it?

11 A. Yes, it does prejudice Ferrovías because, as  
12 I repeat, before people, before the public and all,  
13 it's a Declaration of Lesividad. It was declared. It  
14 was published in the Official Gazette. And so people  
15 don't understand that this has to follow a legal  
16 process with certain stages. So, it did prejudice the  
17 company.

18 In addition, in other proceedings that we're  
19 involved in when we complete the Hearing or  
20 petitions--file petitions, including in several of the  
21 proceedings that I was involved in, I would bring  
22 copies of the newspaper where it was indicated that

11:22:52 1 the Contract had been declared lesivo. It's an  
2 indication that the newspaper didn't actually reflect  
3 what was actually happening in the courts, such as  
4 this resolution.

5 So, yes, it did have a negative impact on  
6 Ferrovías.

7 Q. I wasn't asking you about anything other than  
8 this ruling. This ruling by the Court, the  
9 administrative court of February 2007.

10 My question was: Did this ruling prejudice  
11 Ferrovías?

12 A. Yes, it did prejudice Ferrovías from the  
13 moment that the lesividad was declared. As I repeat,  
14 it prejudices in that the declaration of lesividad had  
15 come several months earlier, and this wasn't known  
16 until May.

17 So in itself, the detrimental impact--let me  
18 explain. It's the declaration of lesividad that is  
19 detrimental itself.

20 PRESIDENT RIGO: I'm sorry to interrupt.

21 But it would be helpful for the Tribunal if  
22 you could put on the screen the actual text rather

11:24:14 1 than the bottom it was since we can't read it.

2 MR. ORTA: Yes, my apologies.

3 If you could just scroll so that the  
4 Tribunal--this is also in RL-073. The problem is,  
5 that's a very large exhibit. Oh, no, this one is not.  
6 I'm sorry.

7 So RL-37 in your core bundle as well.

8 Apologies.

9 BY MR. ORTA:

10 Q. Sir, my question, again, is not about the  
11 declaration of lesividad.

12 Okay? Can we agree on that? I'm not asking  
13 you about that right now. Okay?

14 A. Yes.

15 Q. Okay. Not the declaration of lesividad, this  
16 ruling by the Administrative Court doesn't prejudice  
17 Ferrovías in any way, does it?

18 A. It does not prejudice it as a matter of law;  
19 but as a matter of fact, it does.

20 Q. As I understand this ruling, the judge denied  
21 a request for provisional measures that was filed by  
22 the Attorney General, and, in particular, denied a

11:25:32 1 request that the Attorney General made to  
2 provisionally suspend Contract 143 and 158.

3 Can you explain how that, as a matter of  
4 fact, is prejudicial to your client?

5 A. Yes. As I had already said, with the  
6 declaration of lesividad--because let's recall that  
7 this resolution specifically, the other persons, the  
8 other attorneys in the other proceedings, didn't know  
9 about this. In several proceedings in which I was  
10 involved in defense of Ferrovías, when we would put a  
11 petition to the Court--for example, to establish a  
12 bond, to give an example of something which has  
13 happened in one case--what the other Party would do in  
14 that specific case would be to oppose, arguing our  
15 motion by saying that the contract had been declared  
16 lesivo.

17 So, I reiterate that in law, no; but in fact,  
18 yes, this resolution, because in other proceedings the  
19 rights of Ferrovías were limited without any awareness  
20 that there had been a provisional suspension of the  
21 contract. So that's why.

22 Q. But as a Professor of administrative law, you

11:27:00 1 understand that the Lesivo Declaration doesn't have  
2 any--by the President, doesn't have any immediate  
3 effect on the legal rights of Ferrovías under Contract  
4 143 or 158; correct?

5 A. Yes, that is correct. The thing is that, so  
6 long as the declaration of lesividad is from an act or  
7 resolution that emanates from the Executive; but that  
8 is not the situation in this case because it's a  
9 contract.

10 Q. I understand you have legal arguments that  
11 you put before the Supreme Court--or the  
12 Constitutional court. I wasn't asking you about  
13 those.

14 I'm just saying, you understand, as a  
15 Professor that deals with issues of lesivo law, that  
16 that declaration by the President did not affect in  
17 any way the legal rights that your client has in  
18 Contract 143 and 158, whatever they may be; correct?

19 A. Yes. It is a step prior to the declaration  
20 of lesividad.

21 Q. And unless and until the Administrative Court  
22 issues a ruling confirming that the Lesivo Declaration



11:28:15 1 is proper, your client will continue to have every  
2 right, legal right, that they may have ever had in  
3 Contract 143 and 158; correct?

4 A. Yes. Correct. Nonetheless, that's one of  
5 the violations that's been argued, that the complaint  
6 was filed, and all of the stages of the proceeding  
7 went through, and the ruling is not handed down.

8 So that's one of the violations that we've  
9 also discussed.

10 There is no legal certainty for the rights of  
11 Ferrovias in terms of when is this going to be  
12 resolved. There is no impediment, legal or material,  
13 for the Court to hand down a judgment. Nonetheless,  
14 to date, has not done so.

15 Q. We'll get to that issue in a second, but  
16 simply going back to the point about the fact that you  
17 say that this ruling may have had some factual  
18 prejudice to your client, you, as their lawyer in any  
19 other proceeding that you appear in, are quite capable  
20 of communicating to any court or any other official  
21 that the Lesivo Declaration did not have any effect,  
22 legal effect, on your client's rights under their

11:29:33 1 contract; correct?

2 A. No. In the procedural stage, no, because  
3 what went along with it was the publication, and it's  
4 the Court that decides whether it grants a given  
5 measure based on that.

6 Further, I'd like to clarify a point that is  
7 it quite important, because there's--it's like a  
8 doubt. The thing is, I could not communicate this  
9 resolution in any other proceeding when Ferrovias was  
10 never given notice of it. The mere fact of presenting  
11 the filing of the complaint--and, as you can see, the  
12 complaint was filed in November. The resolution has  
13 the date of February, but notice of it was given in  
14 May.

15 So we're saying that more than six months  
16 elapsed with total legal uncertainty as to whether the  
17 complaint had been admitted, whether it had not been  
18 admitted, whether measures had been issued, decreed,  
19 whether--or injunctive relief, whether it was issued  
20 or not. So we did not know anything about it and I  
21 could not have done--I could not have monitored  
22 something that I did not know about.

11:30:39 1 Q. Let's try again. Because I think you're  
2 misunderstanding my question, so I'm going to try it  
3 again. Okay?

4 As Ferrovías' lawyer, and knowing, as you've  
5 already admitted to us here, that the President's  
6 Lesivo Declaration had no legal effect on Ferrovías'  
7 rights under Contract 143 and 158, you are quite  
8 capable of making that argument to any other court or  
9 any other official in any other proceeding in which  
10 Ferrovías is involved; correct?

11 A. No, is not correct. I just explained that I  
12 had no knowledge of the resolution and since no notice  
13 was served, the resolution for several months did not  
14 exist. And evidence of that is the date on the  
15 resolution. I had no knowledge of the resolution  
16 until I was informed in May 2007.

17 Q. I'm not asking you whether you knew or when  
18 you knew about the resolution. I'm simply making the  
19 point that whether or not you knew about the  
20 resolution, you knew that the Lesivo Declaration by  
21 the President did not affect your client's legal  
22 rights under Contract 143 and 158.

11:32:02 1                   Is that a true statement?

2           A.    Correct.  From the legal standpoint, yes, and  
3    from the factual standpoint, no, because of what I  
4    just said.

5           Q.    You were capable, obviously, of communicating  
6    that legal conclusion in any proceedings in which your  
7    client was involved; correct?

8           A.    Since I did not know whether the Contract had  
9    been suspended, I didn't--I was not able to  
10   communicate this because this is a decision by the  
11   Tribunal--this is--by the Court.  It goes beyond  
12   knowing the declaration of the President and whether  
13   that was going to suspended Contract or not.  The  
14   Court had to decide on that.

15          Q.    Did anyone ever notify you, as counsel for  
16   Ferrovías, or Ferroviás, to your knowledge, that their  
17   rights under Contract 143 and 158 were suspended at  
18   any time?

19          A.    No.

20          Q.    I'd like to take you to Document Number C-11,  
21   please.

22                   Sir, I'm sorry, before we go to that

11:33:47 1 document, I'm going to ask you one--hopefully one  
2 additional question or a couple of minor questions on  
3 that same line of questioning before.

4           You mentioned that notwithstanding that the  
5 Attorney General's petition was filed in November of  
6 2006, that Ferrovías wasn't notified until, you said,  
7 May of 2007; correct?

8           A.    That is correct.

9           Q.    In the steps taken by the Court leading up to  
10 the notification, including the various steps--you're  
11 familiar with the file. Are you claiming here that as  
12 a matter of Guatemalan Law that notification came to  
13 you too late?

14          A.    Yes, that is correct.

15          Q.    What basis?

16          A.    The basis that any resolution--based on  
17 Guatemalan Law, any resolution should be communicated  
18 to the Parties; otherwise, their rights cannot be  
19 affected. But the law by the judicial body  
20 establishes the terms when the resolution has to be  
21 notified. And in the case instant, after the  
22 resolution was passed, it should have been notified

11:35:17 1 within one day upon approval of the resolution, that  
2 is to say, the following day.

3 Q. And that's as it relates to any orders that  
4 affect a Party's rights; correct?

5 A. That is correct. And that is established in  
6 the law.

7 Q. Are you able to point us to any orders before  
8 you were notified in May of 2007 that affected  
9 Ferrovías' rights?

10 A. An order by who? The Court or who?

11 Q. Administrative court.

12 A. None.

13 Q. Okay. Let me point you to C-11, please.

14 MR. ORTA: For the record, C-11 is the  
15 petition that was filed by the Attorney General's  
16 Office of Guatemala on 24th of November, 2006. It's  
17 quite a long document, but my questions are going to  
18 go to just certain aspects of it.

19 BY MR. ORTA:

20 Q. First, sir, can you confirm that my  
21 representation is correct; that this is the petition  
22 that was filed on the 24th of the November, 2006, by

11:36:42 1 the Attorney General's Office, before the  
2 Administrative Court in relation to the Lesivo  
3 Declaration that had been declared by the President?

4 A. Yes, this is the one.

5 Q. Am I correct that the Government of  
6 Guatemala--the Attorney General of Guatemala had 90  
7 days from the time that the Lesivo Declaration was  
8 published in the Official Gazette, 90 days' period of  
9 time within which the Attorney General could initiate  
10 this action before the Administrative Court?

11 A. Just to clarify, under Guatemalan law, it is  
12 not the same to speak about 90--to say 90 days or  
13 three months, because when we say 90 days or days, we  
14 are referring to workdays, when the Court is carrying  
15 out business; that is to say, Monday through Friday.  
16 But when we are saying three months, these are  
17 calendar days so it is not the same for the  
18 Contencioso Administrativo, which is not the same. It  
19 is not 90 days but three months.

20 Q. Do you recall that the publication of the  
21 Lesivo Declaration occurred on the 25th of  
22 August 2006?

11:38:37 1 A. That is correct.

2 Q. So, this action was filed on the day before  
3 the time period would have run for the Attorney  
4 General to be able to initiate this action; correct?

5 A. That is correct.

6 Q. In other words, the Attorney General waited  
7 almost a full three months before filing this action;  
8 correct?

9 A. Correct.

10 Q. Now, in this action there are two defendants;  
11 correct?

12 A. Correct.

13 Q. In addition to Ferrovías, the other Party to  
14 Contract 143 and 158, FEGUA is also named as a  
15 defendant in this action; is that right?

16 A. That is correct.

17 Q. And both have been joined in the action by  
18 the Attorney General of the Republic of Guatemala;  
19 correct?

20 A. I do not understand. What do you mean  
21 "joined"?

22 Q. I believe there is a translation issue.



11:40:02 1 Both defendants were sued by the Attorney  
2 General of the Republic of Guatemala in this action;  
3 correct?

4 A. Yes, they were sued. Yes.

5 MR. ORTA: And if we could turn to--so, let's  
6 see. In the Spanish version, it's going to be  
7 RDC-172. Bear with me.

8 Okay. And in the English version, it is  
9 RDC-223, for purposes of the Tribunal.

10 And if we could just--I apologize, Kelby, but  
11 if you could please scroll up to where it says  
12 "Petitiones," or, in the English version, "Petitions,"  
13 just so that the Tribunal can see in context where we  
14 were in the document.

15 BY MR. ORTA:

16 Q. Sir, these are a number of petitions or  
17 requests made by the Attorney General of Guatemala  
18 when they filed this action; correct?

19 A. That is correct.

20 Q. Request Number 7 asks--or in Request Number  
21 7, I should say, the Attorney General asks that FEGUA  
22 be notified of this proceedings; correct?

11:42:57 1 A. Yes, correct.

2 Q. Now, in relation to--if you could turn, I'm  
3 sorry, in your version to RDC-175, RDC-175; and then  
4 in the English version it would be RDC-225.

5 In this part of the petition, the Attorney  
6 General's Office is seeking various forms of relief  
7 from the Court; correct?

8 A. I don't understand.

9 Q. In this part--in this part of the petition,  
10 the Attorney General is seeking relief from the  
11 Administrative Court. It's basically telling it what  
12 it wants it to do through this petition; correct?

13 A. Yes, correct.

14 Q. And in relation to the Contract 143--well,  
15 strike that.

16 In terms of the very first--the very first  
17 Request for Relief, it's asking for the Court to  
18 determine that the Lesivo Declaration was correct, was  
19 proper?

20 A. What number?

21 Q. Number 1.

22 A. That is correct.

11:45:43 1 Q. And if we could go down to number 2, please.

2 In number 2, the Attorney General's Office is asking  
3 the Court to declare having found--assuming Number 1  
4 is granted, having found that the Lesivo Declaration  
5 is corrected, the Attorney General's Office is asking  
6 the Court to declare Contract 143 and 158 null and  
7 void as a matter of law; correct?

8 A. Correct.

9 Q. And in relation to Request Number 3, the  
10 Attorney General's Office is asking the Court to also  
11 order, assuming Requests 1 and 2 were granted, that  
12 things as between Ferrovías and FEGUA should return to  
13 their original state as if the Contract had never been  
14 entered into; correct?

15 A. Yes, that is correct.

16 Q. And, specifically, they are asking  
17 FEGUA--they're asking the Court to order FEGUA to  
18 return all monies that it received from Ferrovías in  
19 relation to this contract to--

20 A. Correct.

21 Q. Sorry. I wasn't finished with the question.  
22 Let me try that again.

11:47:20 1                   In Request Number 3, the Attorney General's  
2 Office is asking the Court to order FEGUA to return  
3 all monies that it received from Ferrovías to  
4 Ferrovías; correct?

5           A.    Yes, that is correct.

6                   But you can see that it is important also to  
7 understand that they are requesting to return the  
8 money, but they're asking for no compensation or  
9 damages for the damages discussed.

10          Q.    We'll get to that point.  But before we  
11 finish this point, in addition, the Attorney General's  
12 Office is asking Ferrovías to return the equipment in  
13 relation to Contract 143 and 158 to FEGUA; correct?

14          A.    Correct.

15          Q.    Now, in relation to the point you just made,  
16 Ferrovías, when it participates in this proceeding, is  
17 entitled to ask for an Award of Damages; correct?

18          A.    As part of this process, is that the  
19 question?  Or is it outside the process?

20          Q.    The first question is in this proceeding.

21          A.    No, absolutely not.

22                   From the technical and legal point of view,

11:48:44 1 that is impossible. Because under Guatemalan law, a  
2 claim for damages should be filed before a civil court  
3 as part of an ordinary proceeding. But this is a  
4 Contencioso Administrativo Court, so from the legal  
5 point of view, that is not correct. That is not  
6 right.

7 Q. If the Court declares that the Lesivo  
8 Declaration is or was proper and orders the relief in  
9 Number 3, and yet Ferrovías still believes that it has  
10 damages in addition to what was ordered by this Court,  
11 Ferrovías is able to later file an action in the civil  
12 proceedings to seek damages; correct? Or before the  
13 civil court, I should say, to seek damages?

14 A. Yes. As long as a decision--as long as there  
15 was an award, a Final Award, but those are the  
16 violations that we have been.

17 The process has been going on for a long time  
18 without any visibility to solve it, but--but this  
19 process has not been solved yet. This proceeding is  
20 still unsolved.

21 MR. ORTA: Let's go back to--was it Number 7  
22 under petitions?

11:50:40 1 For you, sir, it's RDC-172.

2 And for the Tribunal, it's 223.

3 BY MR. ORTA:

4 Q. I neglected to ask you something about  
5 Petition Number 7.

6 In the same--in the very same paragraph where  
7 the Attorney General asks that FEGUA be notified about  
8 these proceedings, they also and that Ferrovías be  
9 notified about these proceedings; correct?

10 A. Correct.

11 Q. And in relation to the timing of the notice  
12 that you received, you have no evidence, do you, that  
13 Ferrovías--I'm sorry, that the Attorney General's  
14 Office asked that notice to Ferrovías be delayed, do  
15 you?

16 A. No, of course not.

17 Q. Now, in relation to the--in relation to the  
18 Supreme Court action that you filed, do you recall  
19 that you and a number of people on the other side of  
20 the table called a press conference?

21 Do you remember that?

22 A. Yes, correct.

11:52:23 1 Q. And you asked the press to attend the filing  
2 of this event; correct?

3 A. Not me.

4 Q. Do you know who did? Do you know who invited  
5 the press to come?

6 A. No, I don't know.

7 Q. Okay.

8 MR. STERN: I'm going to object to this line  
9 of questioning. It's beyond the scope of his  
10 Statement, and certainly beyond the scope of his  
11 involvement in the Constitutional case.

12 MR. ORTA: Just for the record, before you  
13 rule, this is a video of a press conference that the  
14 other side called to notify the world that they were  
15 presenting this petition before the Supreme Court.  
16 It's quite relevant to the issues that we've been  
17 discussing in this case.

18 MR. STERN: And it has nothing to do with  
19 Mr. Franco's testimony. And I'm not even sure I've  
20 seen this exhibit, to be honest with you.

21 PRESIDENT RIGO: As a matter of  
22 administration of the proceedings, if you don't turn

11:53:28 1 off your light here, one doesn't take anybody else's  
2 light. So there is no way for me other than making  
3 big signs to interrupt.

4 So I think--was he present, I mean, at the  
5 press conference, the witness? I mean, is that--that  
6 would be relevant; but if not, I mean, then, it is not  
7 going to hear in terms of his testimony.

8 MR. ORTA: Well, he just answered that he  
9 was--that he understood that there was a press  
10 conference. He can tell us whether he was present or  
11 not; I believe he was, but since I just met him, I  
12 can't vouch for the fact that he's on the video.

13 I can tell you that, in relation to  
14 Mr. Stern's question, this is their exhibit; C-132.

15 PRESIDENT RIGO: We are not discussing the  
16 video of the press conference. We are discussing the  
17 testimony of the witness here. So if you could limit  
18 the questions to his testimony.

19 MR. ORTA: Right. And just so that we're  
20 clear, the question was whether he had called a press  
21 conference at the time that they filed the challenge  
22 before the Supreme Court, and the witness said yes.



11:54:43 1 And so I'd like to play at least a clip of the press  
2 conference.

3 PRESIDENT RIGO: Well, I mean, we can check  
4 the record whether the witness said yes, but that's  
5 not what I understood.

6 MR. ORTA: Oh. Well, let me ask him, again,  
7 then, if it's okay.

8 BY MR. ORTA:

9 Q. Are you aware that there was a press  
10 conference at which you attended in relation to the  
11 filing of the action that you filed before the Supreme  
12 Court challenging the Administrative Court proceeding?

13 A. I knew that there was some press conference,  
14 but I did not attend that press conference. That's  
15 what I responded; that I knew of a press conference,  
16 but I did not attend the press conference, and I did  
17 not call the press conference.

18 I did not call the press conference, and I  
19 did not attend that press conference.

20 Q. So in the press conference, you're saying  
21 that in the action that was filed before the Supreme  
22 Court where the amparo was presented, you were not

11:55:57 1 there when that filing was made?

2 A. In the presentation--in the filing of the  
3 amparo, I was there, but I was not at the press  
4 conference.

5 MR. ORTA: For purposes of the Tribunal, it  
6 is my understanding--now, perhaps I'm incorrect--that  
7 the video that we're about to play is the moment in  
8 which they presented the amparo to the Supreme Court.  
9 That's at least what the reporter says on the video.

10 So if I could beg the Tribunal's indulgence  
11 to play this momentarily.

12 PRESIDENT RIGO: Mr. Orta, just play the  
13 video.

14 MR. ORTA: Thank you.

15 THE WITNESS: Just to clarify, before  
16 watching the video, once again, based on the  
17 translation in the press conference, I did not call  
18 any press conference, but I did participate in the  
19 filing of the amparo. That's what I would like to  
20 clarify. But I did not call the press conference. I  
21 did not call the press conference as such.

22 PRESIDENT RIGO: May I ask, before you show

11:57:49 1 the video, is about the press conference or the  
2 presentation?

3 MR. ORTA: It's my understanding that it is a  
4 public presentation of the amparo, the very document  
5 that he said he is the lead lawyer in, where,  
6 apparently, they called a press--when I say "a press  
7 conference," I mean the press was there and they're  
8 videoed presenting this document to the Court.

9 That's my understanding of what the video is.

10 MR. STERN: Well, again, this a news report;  
11 it is not a press conference. I think what he's  
12 conceding here.

13 So, again, it's nothing do with his testimony  
14 that's been presented here. What he's trying to do is  
15 show you a news report about an event that happened at  
16 the time in which there were reporters present. There  
17 was not a press conference involving the filing of the  
18 amparo action.

19 MR. ORTA: Okay. Well, you know, I'm not  
20 asking for Mr. Stern's testimony about the document.  
21 We can play the document and just show it to the  
22 Tribunal, and you can have your own conclusions about

11:58:50 1 it.

2 MR. STERN: What I object to is his efforts  
3 to mischaracterize the evidence in order to be able to  
4 present the evidence.

5 PRESIDENT RIGO: So let's see the event.

6 (Video played.)

7 BY MR. ORTA:

8 Q. Sir, this was the moment in time when there  
9 was a presentation of the amparo, the challenge before  
10 the Constitutional court, correct, in relation to the  
11 Administrative Court proceeding?

12 A. That's not the case. Before the  
13 administrative Tribunal, no. This is a Constitutional  
14 Tribunal. It is different from the administrative  
15 process. And I already made my statement in  
16 connection therewith.

17 There is a difference. I would like to  
18 clarify. You asked me if I had called a press  
19 conference. That is not a press conference. That is  
20 the presentation of the Constitutional action before  
21 the Constitutional Court. It is not the contentious  
22 proceeding, lesividad.

12:01:17 1 Q. (Overlapping translation) --how the news  
2 reporters found out about that event?

3 A. No, I do not know.

4 Q. So they just happened to be there when you  
5 showed up?

6 A. Yeah. I have no personal knowledge of that.  
7 I didn't talk to anybody. I never knew. I don't  
8 know. That is not within the field of my knowledge.

9 MR. ORTA: If we could put up Exhibit R-336,  
10 please.

11 BY MR. ORTA:

12 Q. I believe we only have this in English.

13 Are you able to read English? If not, we can  
14 go to a different document.

15 A. No, I cannot read English.

16 Q. Okay. We'll go to a different document,  
17 then, sir.

18 In the Administrative Court proceeding, you  
19 filed on behalf Ferrovías an answer to the petition;  
20 correct?

21 A. Could you please repeat the question?

22 Q. In the Administrative Court proceeding, you

12:03:05 1 filed an answer to the Attorney General's petition on  
2 behalf of your client, Ferrovías; correct?

3 A. That is correct.

4 MR. ORTA: Let's put up RL--I'm sorry, R-292.  
5 I apologize. R-292.

6 BY MR. ORTA:

7 Q. R-292 is the Answer that you filed on behalf  
8 of Ferrovías in the Administrative Court proceeding  
9 initiated by the Attorney General of Guatemala;  
10 correct?

11 A. Correct.

12 Q. And you answered the petition by  
13 declaring--or answering it in the negative; correct?

14 In other words, you denied the relief sought  
15 by the Attorney General in his petition; correct?

16 A. That is not correct. I wasn't denying the  
17 relief requested. Under Guatemalan law, when a  
18 complaint is brought and notice is given, the  
19 Respondent can respond by the negative.

20 What does it mean? It means that it's  
21 contradicting these statements made by Claimant. In  
22 this case, when we replied in the negative, if the

12:04:55 1 State is saying that the Contract is lesivo, when we  
2 answer in the negative, Ferrovías is saying the  
3 opposite, saying that the contract is not lesivo.

4 Q. In addition to making that argument or that  
5 allegation, through this petition you also stated that  
6 your client was not going to be proffering evidence in  
7 the proceeding; correct?

8 A. Yes, that is correct.

9 Why? Well, because in a process of  
10 lesividad, the Party declaring lesividad is the State  
11 of Guatemala via the President of the Republic. So  
12 the burden of proof lies exclusively on the Claimant.  
13 If the State is saying that the contract is lesivo,  
14 then the State needs to prove that lesividad exists.

15 Under Guatemalan Law, we call that burden of  
16 the proof, and there's an article stating that the  
17 Claimant or the Parties have the obligation of showing  
18 the statements of fact. If you affirm something, you  
19 need to prove it. So the State is saying that the  
20 Contract was lesivo. So the State needs to prove  
21 that. Ferrovías does not have to prove that the  
22 contract is not lesivo. That is why this was written

12:06:30 1 this way.

2 Q. So you made a decision not to present  
3 evidence because it is your contention that the  
4 Attorney General has the burden of proof in the case;  
5 correct?

6 A. That is correct.

7 MR. ORTA: Could you put up R-331? And it  
8 is--well, they're not going to have the page numbers.  
9 We'll put up on the screen. It is Page 86 of the  
10 document, but you're not going to be able to find it  
11 in your core bundle because the pages are not numbered  
12 themselves.

13 And in the Spanish version, it is 314.

14 BY MR. ORTA:

15 Q. This is--well, you're looking at the Spanish  
16 version of it. And this is an English translation  
17 that's up on the screen, but in this--first of all,  
18 this is an order by the Administrative Court; correct?  
19 A resolution by the Administrative Court?

20 A. That is correct. It is a Memorial that was  
21 issued by the Administrative Tribunal.

22 MR. STERN: I just want to make sure that he



12:08:06 1 has available to him the entire document so he can,  
2 you know, make sure he understands the entire context  
3 of what's being presented here.

4 We only have partial translations of the  
5 documents.

6 MR. ORTA: So he has the entire Spanish  
7 version before him, Kevin.

8 MR. STERN: Okay. Thank you. I did not know  
9 that.

10 THE WITNESS: Excuse me, the document that I  
11 have is not the document that appears on the screen.

12 BY MR. ORTA:

13 Q. The document up on the screen, the  
14 translation that is up the screen, is the same  
15 document that you're looking at now, sir?

16 A. Yes, that is correct.

17 Q. And, again, this document is a resolution by  
18 the Administrative Court?

19 A. Yes.

20 Q. And the Administrative Court is ruling on  
21 procedural objections that were filed by Ferrovías in  
22 the matter?

12:09:17 1 A. Correct.

2 Q. And part of the relief that you sought  
3 through the filing of the objections, the procedural  
4 objections, was suspension of the proceeding?

5 A. I would like to clarify--well, that is not  
6 correct. The suspension of the process is not the  
7 same as the suspension of a hearing, of an evidentiary  
8 hearing. This was during the 30-day evidentiary  
9 period.

10 Just to give you an example, today this a  
11 witness testimony hearing. For example, my own. If  
12 my statement were to be suspended, that doesn't mean  
13 that other witnesses cannot present their statement if  
14 the Tribunal wanted so.

15 This was the suspension of one hearing, not  
16 the process. The process did not stop and was not  
17 stopped. This was the suspension of one hearing only.  
18 Yes, it did. Correct.

19 PRESIDENT RIGO: Mr. Orta, we are out of  
20 time.

21 MR. ORTA: Well, that's fortuitous because I  
22 have no more questions.

12:10:55 1                   PRESIDENT RIGO: That's excellent. So very  
2 well timed.

3                   QUESTIONS FROM THE TRIBUNAL

4                   MR. CRAWFORD: Can I ask: How common is the  
5 Lesividad Procedure in administrative matters in  
6 Guatemala?

7                   THE WITNESS: In actuality, it is not very  
8 common. I've been able to conduct an investigation to  
9 look at information, and we have about 15 or 16  
10 lesividad processes, so it's not very common.

11                   The common thing is that no ruling is ever  
12 made. No final judgment is ever obtained. Only in a  
13 couple, maybe, a ruling--a final ruling was obtained.

14                   ARBITRATOR CRAWFORD: You say 15 or 16. Do  
15 you mean in your experience or in Guatemalan  
16 experience?

17                   THE WITNESS: In experience of the country of  
18 Guatemala in general, so approximately that's the  
19 number.

20                   ARBITRATOR CRAWFORD: You say that there were  
21 only final judgments in a few of those cases. How  
22 long did those final judgments take to be given?

12:12:34 1                   THE WITNESS: In one of the ones that I have  
2 knowledge of and that I remember--and I should say, in  
3 passing, that this is a case that involved two  
4 agencies of the State. So, from the bringing of the  
5 claim until the judgment was handed down, 13 months  
6 elapsed approximately I remember, from the time the  
7 first claim was brought until the ruling was handed  
8 down.

9                   ARBITRATOR CRAWFORD: Taking the 15 or 16  
10 cases that are part of the Guatemalan legal  
11 experience, did any of those other cases involve  
12 contracts?

13                   THE WITNESS: Yes. Yeah, they were related  
14 to contracts that were entered into, yes, that is  
15 correct.

16                   This is one of the issues that we discussed.  
17 There is very little regulation in Guatemala in  
18 connection with this legal concept. It is a bit  
19 ambiguous or obscure, this concept of lesividad, and I  
20 have discussed this with my students in class and  
21 during research. There is no legislative technique  
22 where legislators created this notion of lesividad.

12:14:08 1 Well, they did not provide standards. They did not  
2 provide the requirements for submitting lesividad:  
3 Why should lesividad be brought? What are the steps  
4 necessary for the President to issue lesividad?

5 This is unregulated.

6 There is only one Article that deals with  
7 lesividad. It's only eight sentences long, and the  
8 Article clearly states that the President may declare  
9 lesividad of acts or resolutions. At no time does it  
10 mention contracts.

11 However, this kind of decisions have been  
12 left in the hands of the President. And I think,  
13 personally, that this violates the rights of the  
14 Parties to a contract, because there is no legal  
15 certainty for the investor--for the investor's rights  
16 to be respected.

17 If there is a change in the administration,  
18 the President, because of a decision that is made or  
19 because his advisers tell him so, declares lesividad,  
20 and then the investor is left defenseless.

21 ARBITRATOR CRAWFORD: Has your academic work  
22 in relation to lesividad procedure extended to any

12:15:36 1 comparative work with other Central American  
2 jurisdictions?

3 THE WITNESS: No. I don't think any  
4 comparison could be drawn. No comparative law can be  
5 established here because there are no standards.  
6 There are no requirements to bring forth lesividad.

7 ARBITRATOR CRAWFORD: In other words, as far  
8 as you know, there is no equivalent to the Guatemalan  
9 lesividad procedure in other Central American  
10 jurisdictions?

11 THE WITNESS: That is correct. At least as  
12 far as I've been able to see, that is the case.

13 I also wanted to add that the Court has  
14 handed down rulings to try and cure the deficiency,  
15 and the Constitutional court has said that even though  
16 the President of the Republic, via an Executive  
17 Resolution in Cabinet, can declare lesividad,  
18 lesividad can only be declared related to acts that  
19 were done by the Executive Branch. Because perhaps we  
20 can find the President that declares lesivo acts  
21 issued out the legislative branch, such as a law, or  
22 the President may declare lesivo a judgment.

12:17:14 1                   So, from the viewpoint of legal technique,  
2                   that is not possible. So, the Constitutional court  
3                   has stepped in and said lesividad can only be declared  
4                   in connection with the resolution or an act if and  
5                   only if this is an act of the Executive Branch.

6                   This was not the case. This was a contract,  
7                   and this was an autonomous agency such as FEGUA.

8                   ARBITRATOR EIZENSTAT: If I may just follow  
9                   up on Professor Crawford's points.

10                   First, he asked you about whether you knew  
11                   about other lesividad processes in Central America.  
12                   We've been told in some of the briefing materials that  
13                   there is a similar procedure of lesividad in other  
14                   countries, Spain and others.

15                   Are you aware of other countries? And might  
16                   you compare, if you are, their lesividad process with  
17                   the one in Guatemala?

18                   THE WITNESS: I do not have knowledge of  
19                   that.

20                   ARBITRATOR EIZENSTAT: You mentioned the 15  
21                   or 16, and then you said there were only one or two in  
22                   which there, I think, was a final judgment.

12:18:43 1                   Can you tell us, in your review, were there  
2 any final judgments which overturned the lesividad  
3 decision by the President of Guatemala? That is to  
4 say, the final judgments, did they affirm or were  
5 there any that overturned and overruled a lesividad  
6 finding?

7                   THE WITNESS: Yes. Coincidentally, the  
8 ruling that I was talking about--the judgment that I  
9 was talking about denied lesividad.

10                   We have to take into account that this  
11 involved two State agencies, two Government agencies,  
12 and this was solved during the time established by  
13 law, the timeline established by law, 13 months, and I  
14 mentioned this.

15                   ARBITRATOR EIZENSTAT: Other than that case,  
16 was there any other case in which lesividad was  
17 overturned?

18                   THE WITNESS: Just in that one case, as far  
19 as I can recall right now.

20                   ARBITRATOR EIZENSTAT: You were asked also  
21 about the--by Professor Crawford about the time frame  
22 involved.



12:20:13 1                   Just in terms was your experience with  
2 administrative law, I mean, we have our own courts  
3 that don't always act as promptly as we might wish.  
4 The time involved here, four or five years, is this a  
5 typical time delay from the time of a filing? Is it  
6 longer than normal?

7                   What is your experience as a Professor in  
8 terms of examining this for your students in your  
9 course?

10                  THE WITNESS: That is correct, it is not  
11 normal.

12                  It is important to state that in the Court  
13 where the proceedings were brought--well, if you go to  
14 this Court and you ask for this process,  
15 389-2006--2006 is the year the claim was brought.

16                  So you have cases in 2006; right? And  
17 there's no judgment. The others have.

18                  So it is not common to have this undue delay  
19 such a long time. That's not--that's not common.

20                  ARBITRATOR EIZENSTAT: But this is an active  
21 case, is it not? I mean, there have been proceedings  
22 filed, there was a rest in 2010 for, I think, a

12:21:35 1 statement of the Parties. So it hasn't been entirely  
2 dormant.

3 Has anything happened since that request in  
4 2010 for a statement? What do you understand the  
5 status of this matter?

6 THE WITNESS: With all due respect, I have to  
7 say that the inactivity by the Court has been evident.

8 You make reference to 2010, but just to give  
9 you an example, there was an evidentiary hearing in  
10 2010 and also other hearings in May 2010, but the case  
11 was brought in '06, so to get to those proceedings in  
12 2010, a long time elapsed.

13 The last submission was May 2010, which was  
14 just a hearing. No decision has been made to date.  
15 Guatemalan Law clearly established that courts cannot  
16 deny the administration of justice.

17 So, the judge has 15 days to hand down the  
18 judgment, and 13 months have elapsed now. There is  
19 nothing impeding the Tribunal to hand down a judgment.

20 I guess there, perhaps, what I understand is  
21 that they're waiting for this case to be resolved.

22 ARBITRATOR EIZENSTAT: Were you involved at

12:23:11 1 all in the issues surrounding the alleged illegality  
2 of 143 and 158; that is, the absence of a public bid  
3 and the absence of executive approval?

4           Were those issues that you were involved in  
5 in any way?

6           THE WITNESS: No, no. No way was I involved  
7 in that. Not at that time. I was not a member of the  
8 law firm. I did not participate, no.

9           ARBITRATOR EIZENSTAT: And you would have no  
10 judgment or opinion as a Professor as to why those  
11 deficiencies could--weren't cured?

12           THE WITNESS: In that regard, what I could  
13 say--because of the analysis that I conducted--is that  
14 a public bidding took place. The right of use--right  
15 of way use was granted under 402, but no reference was  
16 made to the use of railroad equipment.

17           I understand that it is not necessary for a  
18 new call for bids to exist. I don't think it's  
19 necessary for the President of the Republic to sign  
20 this document.

21           I said before, this is an independent agency.  
22 It has a different legal personality from the State,

12:24:51 1 so this agency needs no authorizations from the  
2 President. There are judgments from the  
3 Constitutional court in that regard.

4           This is what we put forth in the  
5 Constitutional case that we brought in order to end  
6 this. That is why we went to that court before going  
7 to the Administrative Court, because it's a much  
8 faster way to do things. We felt that the Court  
9 should take these things into account.

10           It is not that the Court hasn't taken this  
11 into account; it is not that it denied the amparo  
12 proceedings just because. The Court says--said that  
13 the certain proceedings were necessary first.

14           In the Government procurement law, which is  
15 the specific law that regulates all these contracts,  
16 there is no article that says that the President of  
17 the Republic is the one that needs to sign an  
18 Executive Resolution or authorize a contract by an  
19 independent agency, so the answer is no.

20           ARBITRATOR EIZENSTAT: I'll ask a question  
21 just from, again, your background in teaching  
22 administrative law.

12:26:13 1                   One of the issues here is whether or not the  
2                   Lesivo Declaration was, in effect, a final declaration  
3                   that affected rights or whether or not it was simply a  
4                   step in the process, and that only when the Court  
5                   makes a ruling could there be a finality.

6                   From your experience in administrative law  
7                   with respect to Lesivo Declarations, do you have any  
8                   judgment on that? What eff--is there effective  
9                   judicial review such that this is only a step in the  
10                  process? Is there a finality to it?

11                  Or, again, if you have any judgment, is this  
12                  something that you address in your administrative law  
13                  cases -- courses, excuse me?

14                  THE WITNESS: Right. In connection with the  
15                  first question where this is a previous step, yes, it  
16                  is a previous step because that is what the law  
17                  provides. And the law then states that the  
18                  administrative proceeding should start.

19                  But I wanted to be clear about this. I want  
20                  to be clear about this, because this has been the  
21                  subject of discussion with my students. What does the  
22                  law say?

12:27:38 1                   Article 19 of the Administrative Law  
2                   establishes the different cases in which  
3                   administrative proceeding may be brought. The last  
4                   paragraph of that Article states clearly that the  
5                   proceedings will move forward if the acts or  
6                   resolutions were not remedied by administrative  
7                   proceedings.

8                   So, in order to go to the Administrative  
9                   Court, the person had to first look at the different  
10                  remedies set forth by the law. And this is opposed to  
11                  Article 9 of this law, and I think it would be a good  
12                  idea for us to see that law, for me to show you the  
13                  law, so you see this contradiction very clearly.

14                  Article 9 says that when there are  
15                  resolutions handed down by the President and the  
16                  Vice President of the Republic, no remedy can be  
17                  brought.

18                  Article 19 says that in order to go to the  
19                  Administrative Court, you should have exhausted all  
20                  administrative proceedings. But Article 9 says that  
21                  no remedies can be brought against the decisions made  
22                  by the President.

12:28:54 1                   And then Article 19(2) says that--well, if  
2                   those remedies were not necessary, well then, why?  
3                   Because an administrative agency is not going to bring  
4                   a remedy against a resolution issued by the agency  
5                   itself; right?

6                   So, there are no legal standards that says  
7                   how things are done.

8                   First, we need to define what is lesividad.  
9                   Second, we need to decide why lesividad takes place  
10                  and what are the necessary requirements that need to  
11                  be met for the President to declare lesividad.

12                  And to clarify that if we have, for example,  
13                  contracts by the executive body, if it's an  
14                  independent agency, perhaps the manager of that agency  
15                  or the board of that agency or the Overseer will come  
16                  into play. There are all these deficiencies.

17                  There are no legal standard to declare  
18                  lesividad. It is a discretionary act that is left up  
19                  to the President.

20                  PRESIDENT RIGO: All right. The Tribunal has  
21                  no more questions.

22                  Mr. Stern, do you have any questions?

12:30:27 1 MR. STERN: No questions. Thanks.

2 PRESIDENT RIGO: Mr. Orta?

3 MR. ORTA: Just a few, Mr. Chairman.

4 FURTHER CROSS-EXAMINATION

5 BY MR. ORTA:

6 Q. Mr. Franco, you were asked some questions by  
7 Mr. Eizenstein about filings that--Eizenstat, excuse  
8 me, I apologize, by Mr. Eizenstat about the filings  
9 that have been made in 2010.

10 He asked you whether there were any activity  
11 after the hearings that took place in 2010. Do you  
12 recall that?

13 A. Yes, that's right.

14 After the hearing held in May of 2002, there  
15 were two requests from the Office of the Attorney  
16 General to issue judgment.

17 I should clarify that that is not even  
18 necessary. The law says that once the Hearing has  
19 been held, the Court will have 15 days to hand down a  
20 judgment. And those petitions to which he makes  
21 reference are two petitions, if I'm not mistaken, that  
22 were presented by the Office of the Attorney General



12:31:58 1 asking that the judgment be issued.

2 Q. Thank you.

3 In relation to that point, as you just  
4 testified to, the Attorney General has twice filed  
5 motions before the Administrative Court asking the  
6 Administrative Court to issue a final ruling; correct?

7 A. Correct.

8 Q. And one of those requests was made in June of  
9 2011; correct?

10 A. Correct. More or less--well, I understand  
11 more or less that that's right, but from memory, I  
12 can't tell you the date, but approximately yes.

13 Q. And another was in September of 2011?

14 A. Yes, yes, that's correct.

15 Q. Ferrovías has not filed any requests with the  
16 Court asking it to issue a final judgment, has it?

17 A. Yes, orally, yes. Particularly, I have done  
18 so before the Court because, as I repeat, it is not  
19 necessary based on the principle of the notion that  
20 the judge knows the law; the judge knows that once the  
21 Hearing is completed, he has to proceed to hand down a  
22 judgment. There doesn't need to be any written

12:33:15 1 petition for the judgment to be handed down when that  
2 is the act that brings me into the proceeding.

3 Q. But you have not submitted a written request,  
4 have you? A written request to the Court asking it to  
5 issue a final judgment?

6 A. Written? No, but I have gone personally  
7 before the Court to ask that they hand down the  
8 judgment. Indeed, the last time I went, which was in  
9 mid-October, they told me--and I thought that was  
10 quite unusual -- I went there, I asked for the file,  
11 file 389 of 2006, and they say, "No, sir," the  
12 official said. "No, the judgment was already handed  
13 down in that proceeding."

14 And I said, "No, that's not possible."

15 "Well, at this Tribunal, we don't have any  
16 proceeding of that date on which a judgment has not  
17 been handed down. No. Which one is it?"

18 "No," I said. "This is a lesividad  
19 proceeding."

20 And he says, "Oh, Yes, yes, yes. The thing  
21 is, as regards to that proceeding--on that proceeding,  
22 there is international arbitration."

12:34:25 1 "Yes, that's correct. But the international  
2 arbitration has absolutely nothing to do, nor does it  
3 stand in the way at all, of there being a ruling and a  
4 judgment in this proceeding."

5 "Yes, but that's the instruction we have.  
6 Until the arbitration is resolved, no judgment is  
7 going to be handed down."

8 That is what they told me.

9 Q. And who said this to you?

10 A. The official--the official in charge of the  
11 proceeding.

12 Q. Who was that?

13 A. If I'm not mistaken, the name is William  
14 Rivera. He's the official in charge of the  
15 proceeding.

16 Q. Who gave him the instructions that you're  
17 testifying to about today?

18 A. Which instruction? To the official or to me?

19 Q. The official, the one that you just testified  
20 about.

21 A. He said that that was the instruction that  
22 they had been given there at the Court.

12:35:22 1 Q. You don't know who gave him the instruction?

2 A. No, I don't.

3 Q. In relation to your testimony that--in  
4 response to questions by Professor Crawford--

5 MR. ORTA: If we could put up the chart, the  
6 exhibit, R-331. No, no, sorry. It's this chart.

7 So we are putting up on the screen--it's a  
8 chart that's in Paragraph 300 of the Reply on the  
9 Merits--is it the Reply or the Rejoinder?

10 Their Reply. Okay. Sorry. This is in their  
11 Reply. This is a submission filed by Ferrovias in  
12 this case.

13 I'm sorry, Paragraph 300.

14 PRESIDENT RIGO: The document?

15 MR. ORTA: Yes. I'm sorry. The Reply  
16 Memorial filed by the Claimant in this case, and it's  
17 Paragraph 300 of that document, Page 153.

18 MR. STERN: Excuse, me. Is he showing the  
19 witness the Reply brief to ask him questions about?

20 Is that what you're--

21 MR. ORTA: Yes. That's precisely what I'm  
22 doing.

12:36:51 1 MR. STERN: All right. The Reply brief is in  
2 English. He can't read this document.

3 MR. ORTA: I'm going to ask him questions  
4 about the chart, which has numbers in it. He should  
5 be able to read that, I would think. If he can't,  
6 then he can just tell me so.

7 BY MR. ORTA:

8 Q. Well, it's up on the screen, sir, so that can  
9 you see the chart.

10 This is a chart that was prepared by counsel,  
11 and it was apparently taken from an opinion that was  
12 filed in this case by Dr. Mayora.

13 Now, in this chart, if you can just follow  
14 with me for a second, the first case was filed--these  
15 are--according to Dr. Mayora, these are cases, lesivo  
16 cases that were filed and have been filed in the  
17 Republic of Guatemala. Okay?

18 Number 1 is a case that, according to  
19 Dr. Mayora, was filed in 1991.

20 MR. STERN: I'm going to object this line of  
21 questioning. It's not a chart he prepared. It's in  
22 English. I think it's beyond the scope of the

12:38:27 1 questions raised by the Tribunal.

2 I mean, where are we going with this?

3 MR. ORTA: Yeah, so just to answer the  
4 question that counsel just raised, this witness told  
5 Professor Crawford that it was quite odd that a  
6 proceeding would last four years--a proceeding of this  
7 type would last four years, and this chart, prepared  
8 by their expert, directly contradicts that statement.

9 So the questions were going to go to that  
10 issue, because--since he's holding himself out as  
11 somebody who happens to know about lesivo proceedings,  
12 apparently he's not aware of how long they last in  
13 Guatemala.

14 PRESIDENT RIGO: I will suggest, given that  
15 the witness doesn't understand, really, the language,  
16 that you address that issue--and it is an issue that  
17 has come out as part of questions raised by the  
18 Tribunal--that you address that issue in the final  
19 submission or the closing remarks at the end of the  
20 Hearing.

21 MR. ORTA: Very good. We will do that.

22 In terms of questions that were posed to this

12:39:42 1 witness on issues of Lesivo Law, he's not been  
2 tendered as an expert on the lesivo process. He did  
3 mention today, and we heard for the first time today,  
4 that he's taught some courses on that.

5           We--we're not prepared to cross-examine him  
6 on the opinions he gave, and so we would just let the  
7 Tribunal know that we don't accept his opinions and we  
8 don't think that they ought to be taken in  
9 consideration because we do have experts on those  
10 issues.

11           And by doing that, we'll save a ton of time  
12 in terms of questioning. And I think, with that, I  
13 have no further questions.

14           PRESIDENT RIGO: Thank you. And thank you.

15           Thank you very much, Mr. Franco. You may  
16 stand down.

17           THE WITNESS: Thank you very much.

18           PRESIDENT RIGO: We'll reconvene here at  
19 2 o'clock off that clock, which is--runs late, but  
20 it's the one that everybody sees. So thank you.

21           (Whereupon, at 12:41 p.m., the Hearing was  
22 adjourned until 2:00 p.m., the same day.)





02:06:25 1 our perspective, potentially new evidence, and, you  
2 know, at a minimum--at a minimum--and we haven't  
3 determined what our position is, we would certainly  
4 want our expert to be able to look at the model and  
5 determine whether it's something that we think is  
6 appropriate or not for the Tribunal to have.

7 PRESIDENT RIGO: Mr. Foster.

8 MR. FOSTER: You already have it. It's the  
9 damages model that was provided to you with  
10 Mr. Thompson's testimony, electronically. You have  
11 it.

12 MR. ORTA: Okay. Very good. We will  
13 determine--but you do intend to have that--ask the  
14 Tribunal to work with that model in some way.

15 MR. FOSTER: I think the Tribunal already has  
16 the damages model. And all I was saying in Opening  
17 Statements is they will be free to manipulate it any  
18 way they want to.

19 MR. ORTA: And you said it's Mr. Thompson's  
20 model.

21 MR. FOSTER: That's correct.

22 MR. ORTA: Okay. I think the confusion stems

02:07:20 1 from the fact that I thought we heard you say  
2 yesterday that it was a model by Mr. Pratt.

3 MR. FOSTER: The model by Mr. Pratt was the  
4 WACC model that we put on the--that we put on the  
5 board, which you also have.

6 MR. ORTA: I'm sorry. Which is it that you  
7 intend to give the Tribunal, just so we understand, so  
8 we can--

9 MR. FOSTER: Both. They already have them.

10 MR. ORTA: Okay. All right. Thank you.  
11 We'll consider the issue and if there's something to  
12 be said, we'll raise it before the Tribunal later.  
13 Thank you.

14 HECTOR VALENZUELA, CLAIMANT'S WITNESS, CALLED

15 PRESIDENT RIGO: Mr. Valenzuela, good  
16 afternoon. You have a statement in front of you.  
17 Could you please read it?

18 THE WITNESS: I solemnly declare upon my  
19 honor and conscience that I shall speak the truth, the  
20 whole truth, and nothing but the truth.

21 PRESIDENT RIGO: Thank you very much.

22 Mr. Stern.

02:08:19 1 MR. STERN: Thank you, Mr. President.

2 Before I ask Mr. Valenzuela questions, I  
3 would state that he is one of the witnesses that the  
4 Respondent did not list as one of the witnesses  
5 intended to cross-examine.

6 DIRECT EXAMINATION

7 BY MR. STERN:

8 Q. Good afternoon, Mr. Valenzuela.

9 Mr. Valenzuela, do you have in front of you a copy of  
10 the statement you have submitted in this arbitration,  
11 dated March 11, 2011?

12 A. Yes, I have it here.

13 Q. And do you ratify that Statement and affirm  
14 its truthfulness before the Tribunal?

15 A. Yes, I totally ratify it.

16 Q. And Mr. Valenzuela, are you familiar with the  
17 work of the Railroad Commission which was organized by  
18 the Government of Guatemala in January, 2005?

19 A. Yes, I am aware of them.

20 Q. How are you familiar with that Commission?

21 A. In January, 2005, the Vice-Minister of  
22 Housing asked me to accept--to be the Secretary of the

02:09:45 1 Commission that was being created in January, and the  
2 first meeting was held on 11, 5, 2005, and starting  
3 then, I chaired the meeting up to June.

4 Q. What was the name of the Vice-Minister of  
5 Housing who appointed you?

6 A. José Luís Gándara.

7 Q. When did these Commission meetings take  
8 place? What was the time frame in which they took  
9 place?

10 A. The first session was held on January 11, and  
11 the last one was on May 31, 2005.

12 Q. Why was this Commission organized by the  
13 Government?

14 A. The information I was given--rather, the  
15 instructions to be able to create this Commission  
16 mentioned that there were some plans to have the  
17 railway work in the South Coast from Santa Lucía  
18 Cotzumalguapa up to the San José port, going through  
19 Escuintla, that is the main department city, so that  
20 the railway would be working in that area in  
21 particular.

22 Q. And for what purpose was the Commission

02:11:35 1 organized in relation to the rehabilitation of the  
2 South Coast Railway?

3 A. Basically, information I received and was  
4 later verified, the sugar group had the intention of  
5 having the railroad operate starting in an area that  
6 they called Ciudad del Sur, located in Santa Lucía  
7 Cotzumalguapa, and that was going to be used to  
8 transport the production from the south to the San  
9 José port.

10 Q. Was the issue of removal of squatters one of  
11 the issues that the Commission was asked to address?

12 A. The Commission was created only with the  
13 purpose of carrying out the process to move all of the  
14 families that were invading that area of the railway.

15 Q. Do you recall Mr. Héctor Pinto participating  
16 in some of the Railroad Commission meetings?

17 A. I remember that Mr. Pinto attended the second  
18 meeting. The second meeting was held on January 20,  
19 and the day before that Commission--that meeting, the  
20 Vice-Minister called me to let me know that Mr. Pinto  
21 would be attending. As part of my procedure, I  
22 drafted the agenda and included the List of

02:13:43 1 Participants to have them sign that list as having  
2 participated in the meeting, and the same day, on the  
3 same day, everything was translated or was transcribed  
4 and everyone received a copy, all the participants at  
5 the meeting, that is.

6 And Mr. Pinto attended the second meeting  
7 held on January 20. He arrived to the meeting,  
8 presented a personal card from Corporacion Manatí, and  
9 explained that his presence was because they were  
10 representing the sugar group. That was it. That's  
11 all that was said during the meeting. And he  
12 participated in that meeting.

13 Q. How many other meetings do you recall  
14 Mr. Pinto participating in besides the one you just  
15 described?

16 A. He attended most of the meetings. They were  
17 held one week apart or two weeks apart, and he stopped  
18 attending after April 13. That was the date when he  
19 sent a letter to the Vice-Minister indicating that he  
20 was no longer going to attend. He sent a letter, and  
21 the Vice-Minister sent me a copy of that letter. As  
22 part of the copy, there was a sticker that was

02:15:35 1 handwritten by Mr. Pinto where he was requesting me to  
2 read the letter and destroy it. And professionally, I  
3 couldn't do that because he had not attended all the  
4 meetings. So I sent that--I filed it so that the  
5 letter would remain on file.

6 Q. Okay. And we'll get to that letter in just a  
7 moment. Let me just ask you a couple more questions.

8 Did Mr. Pinto, at these meetings he attended,  
9 did he indicate that he was there on behalf of a real  
10 estate development named Ciudad del Sur?

11 A. Yes, that's what he always said.

12 Q. And was it your understanding that Mr. Pinto  
13 represented interests that were--that thought that  
14 they could benefit from the reopening of the South  
15 Coast Railway?

16 A. He said that he was representing the sugar  
17 group, sugar producers group. He did not specify the  
18 sugar mill or anything. He just said the sugar  
19 producers group. That was the reason why he was  
20 there, and he also said that it was--that it would be  
21 beneficial to them to have the railway working in the  
22 South Coast so that the sugar could be sent to the

02:17:08 1 port.

2 Q. Okay. Now, could you take your notebook  
3 right there and turn to the letter that is there,  
4 Exhibit R-189. Do you see that letter?

5 A. Yes.

6 Q. Okay. And this is Exhibit R-189. Now, is  
7 this the that letter you described a little while ago  
8 from Mr. Pinto in which he informed you he would no  
9 longer be attending the Railroad Commission meetings?

10 A. Yes. This is the letter, and that is the  
11 sticker with Mr. Pinto's handwriting where he  
12 indicated to me to please destroy the communication.

13 Q. And did you comply with Mr. Pinto's request  
14 to destroy the communication?

15 A. I did not, because he had participated for  
16 almost five-and-a-half months, therefore, this was  
17 just another piece of the process. It was another  
18 piece of what we were doing.

19 Q. Did Mr. Pinto attend any meetings of the  
20 Railroad Commission after you received this letter?

21 A. No, he did not. The last one was the one  
22 held before April 13, and he did not attend any other



02:19:01 1 meetings afterwards.

2 Q. After receiving Mr. Pinto's letter, did the  
3 Commission continue to meet?

4 A. Yes. The Commission continued to meet until  
5 May 31.

6 Q. Was the Railroad Commission ever successful  
7 in coming up with and implementing a plan to remove  
8 and relocate squatters from the South Coast?

9 A. All the work that we conducted throughout six  
10 months was based on project minutes, but we did not  
11 implement any plan. We had minutes to be able to have  
12 that plan implemented. The plan never worked.  
13 Everything was just left on paper.

14 Q. Did the Commission fail because Ferrovías had  
15 indicated that it did not have sufficient financing or  
16 investment lined up to rehabilitate the South Coast?

17 A. The Commission never dealt with the economic  
18 feasibility of the project. The Commission was  
19 intended to develop a plan to remove the families that  
20 were in the area of the railway. I know that at no  
21 point, no observations were--there were no  
22 observations at no point, whether there were financial

02:20:52 1 means to develop the railway because this was beyond  
2 the scope of action of the Commission.

3 Q. Thank you, Mr. Valenzuela. I have no further  
4 questions. You may now answer questions from  
5 Guatemala's counsel.

6 PRESIDENT RIGO: Thank you. Mr. Salinas.

7 MR. SALINAS-SERRANO: Thank you,  
8 Mr. President.

9 CROSS-EXAMINATION

10 BY MR. SALINAS-SERRANO:

11 Q. Mr. Valenzuela, good afternoon. My name is  
12 Daniel Salinas, and I'll be asking you some questions  
13 on behalf of the Republic of Guatemala.

14 Mr. Valenzuela, you were asked about the  
15 genesis of the Commission that you chaired. Remember  
16 those questions from Mr. Stern?

17 A. Yes, I do remember that.

18 Q. The Commission was the Government's idea;  
19 correct?

20 A. That is correct.

21 Q. The Government assembled it and put it in  
22 place; correct?

02:21:57 1 A. Are you referring to the Commission? Yes,  
2 the Commission was assembled by the Government of  
3 Guatemala.

4 Q. Are you aware, sir, that prior to the  
5 formation of the Committee, representatives from  
6 Ferrovias had written to the Vice-Minister of  
7 Communications complaining, among other issues, about  
8 the issue of squatters being present on the right of  
9 way?

10 A. No, the only information I have is whatever  
11 was done starting on January 11, 2005. Any document  
12 or any information prior to that is something I am not  
13 aware of because that was not part of our work. Our  
14 work was to organize the Commission, to have all the  
15 structures to remove the squatters from the railway,  
16 and that was the commitment of the Government of  
17 Guatemala.

18 Q. But you do have personal knowledge about the  
19 Commission being formed by the Government of  
20 Guatemala; correct?

21 A. Would you please repeat your question?

22 Q. Sure, with pleasure.

02:23:17 1                   You do have personal knowledge about the fact  
2                   that it was the Government of Guatemala that came up  
3                   with and assembled the Commission that you chaired;  
4                   correct?

5           A.    Yes.  I have no doubts about it, because it  
6           was the responsibility of the Government.  And as an  
7           official of the Ministry, the Commission was assembled  
8           for the Government to conduct their work.  And in this  
9           case, it was under the representation of FEGUA.

10          Q.    Apologies if you see me pausing after each  
11          question, but there's a translation going on, so I  
12          have to wait until the question--the translation  
13          finishes.

14                    You also mentioned in response to questions  
15          by Mr. Stern that the Commission's only purpose was to  
16          assemble or put in place a plan to remove the families  
17          that were occupying the right of way.  I believe the  
18          words you used in Spanish were "única y  
19          exclusivamente."

20                    Do you remember that?

21          A.    Yes.  The Commission was assembled with only  
22          one objective:  To create the process to be able to

02:24:45 1 remove the families that were occupying the right of  
2 way. That was the reason, and all the meetings  
3 held--had the same goal. That is to say, to create a  
4 plan and also to have that plan work, but everything  
5 was done except for having that plan work. We had six  
6 months for planning that remained on paper, but  
7 nothing was done because there was no authorization by  
8 the Government for that plan to be implemented because  
9 of the cost involved.

10 Q. Now, is it your testimony, sir, that the only  
11 issues that were discussed during these Commission  
12 meetings were issues related to the removal of  
13 squatters?

14 A. Yes. That was the sole objective. There was  
15 no other objective, no other goal, that is to say, to  
16 have those families removed so that Ferrovias could  
17 have the train operate along that line. Otherwise, it  
18 was impossible to work in that area because the train  
19 could not run over the people.

20 Q. So there were no discussions  
21 about--disagreements about compliance with contracts?

22 A. During the first meeting, I clearly remember

02:26:29 1 the one held on January 11. The people from Ferrovías  
2 and FEGUA were trying to address contract issues, but  
3 I was not even informed of that. So during the  
4 session, an agreement was reached with the  
5 Vice-Minister so that any legal issues or any  
6 differences between FEGUA and Ferrovías would not be  
7 dealt with at the table, because the Commission was  
8 only intended to remove the squatters from their right  
9 of way. So if you're asking me about legal documents,  
10 there were no legal documents, because that was not  
11 the purpose behind our work. We were in charge of  
12 technical work to conduct the technical removal of  
13 these squatters.

14 Q. I'm not going to ask you about  
15 technical/legal documents, but you do remember that  
16 the discussions during that first meeting were  
17 extensive about the disagreements about compliance  
18 with the Parties' obligations with contracts.

19 A. Is that a question?

20 Q. Yes. I'm asking whether your recollection is  
21 that the discussion during that first meeting about  
22 the disagreements between the contracts was extensive.

02:28:03 1           A.    The truth of the matter is, that since I was  
2 appointed with one real goal, when other issues were  
3 mentioned or discussed, I was not even aware of those  
4 issues, and I was not even interested, because they  
5 were legal issues.  If you're asking me if I remember  
6 that, my answer is, I do not remember that because  
7 that is not my area of specialization.  I work with  
8 engineering issues and also technical issues, and  
9 that's the reason why, during the same meeting, a  
10 decision was made to isolate the discussion so that we  
11 could work towards our objective.  That is to say, to  
12 remove the squatters from the right of way.

13           Q.    I'm sorry, sir, but my question was not  
14 whether you were paying attention or not to the  
15 substance of the discussions, but whether, in fact, in  
16 that first meeting, there were extensive discussions  
17 about the disagreements between the Parties and their  
18 respective contractual obligations.

19           A.    The answer is no because meetings were held  
20 for no more than one hour.  Therefore, things were  
21 dealt with in a very straightforward way.  We only had  
22 one hour.

02:29:25 1 Q. Now, sir, you mentioned that before and after  
2 every meeting of the Commission, you prepared an  
3 agenda and then minutes of that meeting. Do you  
4 remember that testimony to Mr. Stern's questions?

5 A. If I prepared each of the documents that I  
6 sent after the meeting? Is that the question?

7 Q. That's okay, sir. Don't worry about it.

8 My question was whether you recall telling  
9 Mr. Stern that before each meeting, you prepared an  
10 agenda for the meeting of that day or the next day,  
11 and that after that meeting, you prepared minutes  
12 recounting what was discussed during those meetings.

13 A. Yes. I prepared the agenda and I described  
14 the result of each meeting.

15 MR. SALINAS-SERRANO: Camila, if you could  
16 give it to the witness first. Thank you.

17 BY MR. SALINAS-SERRANO:

18 Q. Sir, you're being handed a binder with some  
19 documents that I'll be referring to. Some of these  
20 documents--I don't know what your proficiency with  
21 English, with written English is, if you can read it.  
22 The documents are in both Spanish and in English. We



02:30:51 1 will be projecting the English version in that screen  
2 that you have to your left for the benefit of the  
3 Tribunal, but if you prefer to refer to the Spanish  
4 version, you have that in the binder after a blue  
5 sheet. And I will refer you to a document that is  
6 labeled R-177.

7 A. Yeah.

8 Q. Do you have the document in front of you? I  
9 refer you, sir, to the first paragraph under the  
10 heading "Completion of Ferrovías Contract" or, in  
11 Spanish, "complemento de contrato de Ferrovías."  
12 Please tell me when you've located that part of the  
13 document.

14 A. I'm looking at it.

15 Q. You prepared this Minute, right, sir? The  
16 second page is signed by you.

17 A. Yes, I prepared this.

18 Q. Can you please read for the Tribunal that  
19 first line of that first paragraph?

20 A. "This was an extensive presentation by the  
21 Parties. The conclusion being drawn that there is a  
22 need to enlarge on this matter with documents and

02:32:54 1 comments within a Legal Framework with representatives  
2 from FEGUA, Ferrovías and the Legal Coordination Group  
3 of the Ministry of Communications, Infrastructure and  
4 Housing. Outside the item two, planning around the  
5 table with respect to they eviction of settlements  
6 along the right of way." That is what I've been  
7 saying. This issue was dealt with, but nobody  
8 understood what was going on. And we  
9 automatically--we decided not to deal with this and we  
10 submitted it to other legal experts. We weren't  
11 talking about who was right or who was wrong. We  
12 said, Here, okay, if you have any kind of controversy,  
13 then you can go to the legal department of the  
14 Ministry of Communications and this is a technical  
15 Commission. This is not a legal Commission.

16 Q. So you agree with me, then, that there was an  
17 extensive discussion about those issues during the  
18 first meeting; correct?

19 A. Extensive discussions? What do you mean?

20 Q. "Complia expocisión," extensive presentation  
21 by the Parties. Your words, not mine, sir; right?

22 A. That is true.

02:34:20 1 Q. And then the issue was then delegated to  
2 another round of negotiations or another set of people  
3 who would be discussing the issue amongst themselves;  
4 correct?

5 A. That is correct, yes.

6 Q. But by the first meeting, you were aware that  
7 there were disagreements between the Parties as to the  
8 contracts that existed among them, even though you  
9 might not have known the details of those  
10 disagreements; correct?

11 A. I had no knowledge of legal problems amongst  
12 them. I heard they were beginning to talk about that  
13 and, you know, we said, Stop, this is not the venue to  
14 talk about legal issues. But before setting up the  
15 Commission, that I knew the fact that there were legal  
16 problems, no, I had no knowledge of that.

17 Q. Now, would you agree, sir, then, as you were  
18 telling Mr. Stern, that the purpose of the Commission  
19 was to remove the squatters from the Southern Coast of  
20 the railway; correct?

21 A. Yes, that is correct.

22 Q. And the purpose of that was that Ferrovias

02:35:30 1 needed that southern portion of the railway to be  
2 profitable; correct?

3 A. Let me explain. This was the responsibility  
4 of the State. The State had a responsibility to evict  
5 the squatters that were invading the railway. Whether  
6 this was profitable or not profitable for Ferrovías,  
7 that's another issue. We're not talking about that  
8 here, whether it was profitable or not profitable. Do  
9 you understand what I'm saying?

10 Q. Perfectly, sir, I have to wait for the  
11 translation. I'm sorry if I pause after the question.

12 I understand you perfectly. So is it your  
13 testimony here today before this Tribunal that you  
14 were not aware whether FVG needed the Southern Coast  
15 to be profitable or not?

16 MR. STERN: I'm going to object to this line  
17 of questioning. It is beyond the scope of his direct.  
18 He did not testify anything about whether the South  
19 Coast line needed to be profitable or unprofitable for  
20 Ferrovías. It's clear that he's intending to go  
21 through the rest of this agenda here to ask questions  
22 that are unrelated to his direct.

02:36:51 1 MR. SALINAS-SERRANO: Mr. President, with due  
2 respect, the witness testified that the purpose of the  
3 Southern Coast was to benefit the (in Spanish), or the  
4 sugar industry, and he also said there were no  
5 discussions about any economic impacts or  
6 considerations during the hearings. I will show that  
7 there, in fact, were discussions about those issues  
8 during the meetings.

9 PRESIDENT RIGO: I'm sorry. Where did he  
10 testify to this right now? Is that right in the  
11 record now?

12 MR. SALINAS-SERRANO: Yes, sir.

13 PRESIDENT RIGO: In the last few minutes?

14 MR. SALINAS-SERRANO: Yes, sir.

15 PRESIDENT RIGO: Could you read it to me?

16 MR. SALINAS-SERRANO: If I can find it.

17 PRESIDENT RIGO: Yes.

18 MR. SALINAS-SERRANO: Mr. President, just for  
19 the record, it was directly in--the witness was  
20 responding to questions from Mr. Stern. And if the  
21 Tribunal will indulge me, I will search the transcript  
22 for it.

02:37:47 1 PRESIDENT RIGO: Please.

2 MR. SALINAS-SERRANO: Thank you, sir.

3 Mr. President, here's the first portion, and  
4 I'll continue to look for. In answer to a question  
5 from Mr. Stern, the witness testified, "Basically,  
6 information I received and was later verified, the  
7 sugar group had the intention of having the railroad  
8 operate starting in an area that they called Ciudad  
9 del Sur, located in the San Lucía Cotzumalguapa, and  
10 that was going to be used to transport the production  
11 from the south to the San José port."

12 PRESIDENT RIGO: Where is the--is the issue  
13 whether that was necessary for the railway company to  
14 be profitable? I think that's what is objectionable  
15 from the other Party.

16 MR. SALINAS-SERRANO: Yes, Mr. President.  
17 Two things; first, there was also testimony--and I'll  
18 continue to look for it--about no economic discussions  
19 at all during the meetings. But directly to your  
20 question, to the extent that the witness was  
21 suggesting that the purpose of opening the South Coast  
22 was because the sugar industry was interested in it,

02:39:28 1 FVG's interest in that Southern Coast is directly  
2 relevant to the testimony of the witness. And it's  
3 substantiated by documents that I am presenting to the  
4 witness now, and that the witness has already  
5 recognized and legitimated.

6 PRESIDENT RIGO: I think the witness has  
7 stated many times that there were--that this  
8 Commission objective was to clear the squatters. I  
9 have not heard, and that's why I'm asking you to read  
10 it to me, that the objective was to clear the  
11 squatters to make the railway company profitable.

12 MR. SALINAS-SERRANO: Well--

13 PRESIDENT RIGO: This link, I have not heard  
14 it this afternoon.

15 MR. SALINAS-SERRANO: But, Mr. President,  
16 with due respect, the witness has been testifying--

17 PRESIDENT RIGO: Where has he been  
18 testifying?

19 MR. SALINAS-SERRANO: Well, I just read to  
20 the Tribunal a portion where the witness testified  
21 about on whose interest the Southern Coast would be  
22 open. Certainly if it would benefit FVG by making it

02:40:34 1 profitable, it would be to FVG's interest to have the  
2 Southern Coast open. The witness testified that it  
3 was because the sugar industry wanted it open. And  
4 the witness also said--

5 PRESIDENT RIGO: Okay, fine.

6 MR. SALINAS-SERRANO: To a question from  
7 Mr. Stern about Mr. Pinto, Mr. Stern was given  
8 latitude to ask about Mr. Pinto and Ciudad del Sur and  
9 the sugar industries, and the sugar industry's  
10 interest in the railroad and the Southern Coast. He  
11 said, "Mr. Pinto was representing the sugar group,  
12 sugar producers group. He did not specify the sugar  
13 mill or anything."

14 Certainly the testimony is the Southern Coast  
15 was being opened because the sugar industry was  
16 interested in it. Now, to the extent that FVG was  
17 interested in that Southern Coast, the question is not  
18 only directly linked to the testimony of the witness  
19 in direct examination, but also directly relevant to  
20 the issues in this proceeding.

21 PRESIDENT RIGO: Okay. Why don't you repeat  
22 the question for the witness, and we will dismiss the



02:41:59 1 objection.

2 MR. SALINAS-SERRANO: Yes, Mr. President.

3 Thank you.

4 BY MR. SALINAS-SERRANO:

5 Q. I'll repeat the question because I don't  
6 expect you to remember after all that.

7 MR. SALINAS-SERRANO: And I'm sorry,  
8 Mr. President, just for the record, so as to preserve  
9 the clarity of this, the witness also testified on  
10 direct "That the Commission never dealt with the  
11 economic feasibility of the project. The Commission  
12 was intended to develop a plan to remove the  
13 families."

14 Again, there was discussion about the  
15 economics of this.

16 PRESIDENT RIGO: I really--I mean, frankly,  
17 that is not a discussion of economics. I mean, he has  
18 not discussed anywhere about the economics of the  
19 project. He has discussed about the removal of the  
20 squatters. And, you know, this is very peripheral,  
21 and as you know, we don't have a lot of time, so  
22 please concentrate on the issues that are really

02:42:51 1 relevant to the direct testimony of this witness. I  
2 will let it go with the question that you are asking.  
3 Please rephrase it exactly as you had it before. But  
4 as for future questioning, please limit it to the  
5 direct testimony. Without too many adjective  
6 ancillary sort of consequences of it. I mean, you  
7 know, don't go too far in terms of relationship to the  
8 actual statement.

9 MR. SALINAS-SERRANO: I will do my best, and  
10 I'm sure Mr. Stern won't let me stray too far.

11 PRESIDENT RIGO: Okay.

12 BY MR. SALINAS-SERRANO:

13 Q. Mr. Valenzuela, I'll ask you again: You were  
14 also aware that FVG was interested in the Southern  
15 Coast of the railroad because it was important to make  
16 its business profitable, were you not?

17 A. What did you say? FVG, you said? FVG? Are  
18 you talking about Ferrovías?

19 Q. Yes, sir.

20 A. Yes.

21 Q. You want me to repeat the question?

22 A. Yes, please.

02:44:00 1 Q. You were also aware that the opening of the  
2 Southern Coast was important to Ferrovías because it  
3 was the only way to make its business profitable;  
4 isn't that correct?

5 A. That is not correct. I did not have any  
6 access to information whether this was good or bad for  
7 the company, for the railroad company. My purpose was  
8 to have the infrastructure there to evict those  
9 families from the railroad right of way. Everything  
10 else, the legal aspect, the economic aspect, all of  
11 that, well, personally, I did not direct the  
12 Commission to get to know more or less about those  
13 areas that you're asking about. Anything I were to  
14 say in that regard would be a lie, because I have no  
15 knowledge of that.

16 Q. Page 2 of that first meeting minutes, first  
17 paragraph on the second page.

18 MR. STERN: Objection. He says he has no  
19 knowledge of it, and I think what he's going to try to  
20 do is read a statement from Mr. Senn, according to the  
21 minutes.

22 MR. SALINAS-SERRANO: He prepared these

02:45:08 1 minutes, Mr. President.

2 MR. STERN: Again, it is not based on his  
3 personal knowledge. He just wrote it down.

4 MR. SALINAS-SERRANO: It's based on his  
5 personal knowledge of Mr. Senn speaking in his  
6 presence and he prepared his minutes.

7 MR. STERN: Counsel is free to ask Mr. Senn  
8 questions about that when he's here to testify.

9 MR. SALINAS-SERRANO: Scroll up, please.  
10 Thank you. Can you highlight the text that begins  
11 with "on this occasion?"

12 BY MR. SALINAS-SERRANO:

13 Q. Mr. Valenzuela, again, you prepared these  
14 minutes; correct?

15 A. That is correct.

16 Q. And you write, "On this occasion, Mr. Jorge  
17 Senn"--you recognize Mr. Jorge Senn as Ferrovías'  
18 general manager; correct?

19 A. That is correct.

20 Q. Mr. Senn was clear in stating that the  
21 railroad on the Atlantic route is not profitable;  
22 correct?

02:46:15 1 A. Excuse me, what--

2 Q. You can look at the document yourself, sir.  
3 Mr. Jorge Senn was clear in stating that the railroad  
4 on the Atlantic route is not profitable; is that  
5 correct?

6 A. Yes, he's talking about the Atlantic route.

7 Q. Let's go to the second clause in that  
8 sentence. And that the heaviest freight load would be  
9 in the future when the Pacific route is in operation,  
10 given the volume of freight they would transport  
11 there; is that correct?

12 A. That is correct.

13 Q. So the heaviest freight load for Ferrovias  
14 would be with the opening of the Southern Coast,  
15 right? That is, the Pacific route is the same as the  
16 Southern Coast; correct?

17 A. Let us understand each other. This is what  
18 he said, word for word, but this is not what concerns  
19 me. I'm not sure of what he's saying. This is not  
20 within my area. I don't know if the railroad is good  
21 or is bad. This is not my area. The Commission was  
22 set up only to evict the families from the right of

02:47:38 1 way of the Southern area. Many, many things may have  
2 been commented on. I wrote it here because it was  
3 part of the meeting, but there was no investigation  
4 whether to say that this was correct or not correct.  
5 This has nothing do with my work or my profession.

6 This was only saying what--stating what was  
7 said there. Whether the railway was good or bad,  
8 because Jorge Senn said it, that's his opinion. I  
9 cannot say that this is correct or not correct.  
10 Because I have no knowledge of whether this is true or  
11 not true. I don't know if you understand me. I don't  
12 know if we're understanding each other.

13 Q. I understand you perfectly. I wasn't asking  
14 you whether it was correct or not, but we understand  
15 each other.

16 A. Okay.

17 Q. Now, moving on, Mr. Valenzuela, you spoke of  
18 a plan that never was and that was never implemented  
19 in terms of removing squatters from the right of way;  
20 correct?

21 A. That is correct.

22 MR. SALINAS-SERRANO: R-178, please.

02:48:55 1 BY MR. SALINAS-SERRANO:

2 Q. Mr. Valenzuela, these are the agenda and  
3 minutes of the January 20, 2005, Commission meeting;  
4 is that correct?

5 A. Yes, that was held on January 20.

6 Q. Again, on the third page of this--these  
7 minutes is your signature; correct?

8 A. That is correct.

9 Q. Now, if you go to the agenda for this  
10 meeting, some of the issues that were discussed  
11 included a presentation of the Ferrovías company with  
12 respect to all areas of activity; correct?

13 A. Yes, that is correct.

14 Q. A presentation by FEGUA with respect to its  
15 studies of the settlements located within the right of  
16 way on the rail line on the Pacific branch in the  
17 Republic of Guatemala; correct?

18 A. That is correct, yes.

19 Q. So FEGUA conducted a study about those  
20 families; correct?

21 A. No. No. FEGUA did not have any updated  
22 studies. The director of FEGUA reported that FEGUA's

02:50:24 1 registers had caught fire. There was a fire. And now  
2 they were reconstructing the information. This was  
3 not updated information. This is what was said.  
4 Ferrovias and FEGUA presented information of what they  
5 knew existed as occupied areas. We had no way to  
6 verify whether this was true or not true, because this  
7 was just a paper presentation. They both did that.  
8 And Arturo Gramajo, the director of FEGUA at the time,  
9 said that they were presenting this, but this was a  
10 reconstruction, because FEGUA's records had caught  
11 fire. They had been lost in a fire. So they had to  
12 conduct a census and get studies of every single place  
13 to make absolutely sure how many families were  
14 occupying the right of way.

15 Q. FEGUA and Ferrovias made presentations during  
16 that meeting?

17 A. Yes.

18 Q. R-181, sir, please, in your binder.

19 A. Yes.

20 Q. Do you recognize these agenda minutes?

21 A. Yes, I do.

22 Q. They're from the February 17, 2005, meeting



02:51:57 1 of the Commission.

2 A. That is correct, yes.

3 MR. STERN: I would object. This is going  
4 beyond the scope of his direct. He's clearing asking  
5 questions relating to his statement and not his direct  
6 testimony.

7 MR. SALINAS-SERRANO: I'm sorry,  
8 Mr. President, but this time, I mean, you yourself  
9 said his testimony was about removal of squatters from  
10 the right of way. This is minutes from the agenda,  
11 and they are directly relevant to what the--what  
12 FEGUA, the Government and FVG did to put that plan in  
13 place.

14 MR. STERN: I didn't ask him any questions  
15 about those specific items during his direct. There  
16 has to be some limit.

17 MR. SALINAS-SERRANO: I'm sorry. The  
18 testimony was that it was on paper, nothing was done,  
19 and I certainly am allowed to cross-examine about that  
20 with the actual evidence there is on the record, other  
21 than his bare statements about what happened or didn't  
22 happen.

02:52:57 1 PRESIDENT RIGO: Go ahead.

2 MR. SALINAS-SERRANO: Thank you,  
3 Mr. President.

4 BY MR. SALINAS-SERRANO:

5 Q. Mr. Valenzuela, again, these are the minutes  
6 from the February 17, 2005 meeting of the Commission;  
7 correct?

8 A. Correct.

9 Q. And at Pages 2 and 3 of these minutes, you'll  
10 see what you call a synopsis of the issues that were  
11 discussed during the meeting; correct?

12 A. Yes, that is correct.

13 Q. And at Pages 4 and 5 there is a somewhat  
14 detailed chronogram, I guess, for lack of a better  
15 term, of the procedure for completion of the  
16 relocation of the inhabitants of the railroad line.  
17 Is that correct, sir?

18 A. What is your question?

19 Q. At Pages 4 and 5 of these minute, there's a  
20 detailed chronogram of the procedure for completion of  
21 the relocation of the inhabitants of the railroad  
22 line; correct?

02:54:15 1           A.    Okay.  That confirms what is said at the  
2           beginning.  This was done, it was scheduled, and that  
3           was it.  It was never implemented.  It was scheduled  
4           during that meeting.  At that meeting, it was said,  
5           Okay, we're going to do this and that and the other.  
6           So we prepared a schedule, but everything was left on  
7           paper.  Nothing was done.  Absolutely nothing.

8           Q.    Did you, in any of the minutes of this  
9           Commission, include a statement about complaining that  
10          there was no action being made by the Government, that  
11          you were mad that the Government wasn't doing  
12          anything, wasn't willing to spend money or anything  
13          along those lines in any of the minutes that you  
14          prepared?

15          A.    Is that a question?

16          Q.    Yes.

17          A.    First of all, I'm not mad with the Government  
18          or with anyone.  I'm here to talk about the work that  
19          I performed.  I'm not blaming anyone.  I'm just saying  
20          that work was done.  This was administrative work,  
21          desk work, to try and see whether we could reach an  
22          objective, but we didn't meet our objective.  When we

02:55:43 1 had all this ready, I think it was April, and when we  
2 had to put up the money to make this work, the money  
3 never appeared, and this never materialized. The work  
4 was done. The preparatory work was done. I'm not  
5 mad. Just to be clear, you said I was mad. No.  
6 You're putting words in my mouth. And I never said  
7 that. I'm not mad at anyone. I am here to say, Okay,  
8 I conducted this work. It was technical in nature.  
9 We work as brutes, every Saturday even--I'm sorry to  
10 use that expression--when we're trying to benefit my  
11 country. That's what I was looking for. I was trying  
12 to benefit my country, and at the end of the day,  
13 nothing was done. Are you listening to me?

14 Q. Yes, of course, yes, perfectly well.

15 Now, granted, "mad" was my word and not  
16 yours. You're absolutely right, sir.

17 Now, you do seem a little frustrated that  
18 nothing was done. Is that a fair statement?

19 A. I don't know what your Spanish is, but  
20 frustrated and mad, they are two different things. I  
21 never felt frustrated or mad. I came here to tell the  
22 truth about the work that I did. That's what I'm

02:57:11 1 doing. Did I feel frustrated that it wasn't done?  
2 Gentlemen, if you work six months in a project and at  
3 the end, when you need to have the money for the  
4 project to be developed, how would you feel?

5 Q. I'm sorry, I'm asking you the question.

6 A. So the same thing that you may feel, I'm  
7 feeling. It was something that would benefit my  
8 country. I don't know about the benefit of Peter,  
9 Paul or Joe, but after everything was done, nothing  
10 happened. There were hours of work, and working on  
11 Saturdays, and different sessions, preparing plan,  
12 visits, and I said, Okay, let's move forward, let's  
13 put the money in order to remove those squatters from  
14 the right of way. The money wasn't there. The work  
15 was not done. That was it.

16 Q. Okay. So what you're saying is that you're  
17 not here to assign blame. It is neither Ferrovías' or  
18 FEGUA's blame from your perspective; correct?

19 A. Oh, my God. I don't understand. I don't  
20 know if you're not understanding me. I'm not here to  
21 fight or to feel frustration or anger. I am here to  
22 say this is the work I conducted. This was the

02:58:37 1 purpose.

2           The Government of Guatemala asked me to set  
3 up a Committee to remove those squatters from the  
4 right of way. It wasn't done, because at time it  
5 should have been done, after May, the money was not  
6 put up for the work to be implemented. I'm talking  
7 about the work that you're showing me. I'm talking  
8 about logistical issues and all the work, and that was  
9 the end of that. That is what happened. The store  
10 closed. There was nothing else to be sold.

11       Q.    You're saying, (in Spanish), who are you  
12 referring to, sir?

13       A.    The responsibility of removing the people  
14 from the right of way was the responsibility of the  
15 people from FEGUA, Ferrovías Guatemala. That is--that  
16 was their responsibility.

17       Q.    How do you know that, sir?

18       A.    Because the Vice-Minister told me that we  
19 were going to work towards removing the squatters from  
20 the railway right of way because that was the  
21 responsibility of the State.

22       Q.    Which Vice-Minister told you that it was the

02:59:52 1 responsibility of the State?

2 A. What Vice-Minister? My immediate superior.  
3 He was the Vice-Minister of Housing.

4 Q. As you sit here today, you don't know why  
5 FEGUA--and I take it it's your position that it was  
6 FEGUA's responsibility to put the down the money. As  
7 you sit here today, you don't know why FEGUA didn't  
8 put the money; correct?

9 A. I repeat: This is something that needs to be  
10 clarified by FEGUA, not by me. I don't know why they  
11 didn't put up the money. The only thing that I know  
12 is that there was no money to conduct the work on the  
13 field. After conducting all the planning work and  
14 research, et cetera, nothing was done because we  
15 didn't have the money to buy the land or move the  
16 families or build housing. This is money that the  
17 Government and FEGUA had to put in, but I don't know  
18 why. I don't work for FEGUA, I don't represent FEGUA.

19 Q. So you don't know?

20 A. No.

21 MR. SALINAS-SERRANO: I have no further  
22 questions, Mr. President.

03:01:19 1 PRESIDENT RIGO: Thank you, Mr. Salinas.

2 Mr. Stern?

3 MR. STERN: I have no questions. Thank you.

4 QUESTIONS FROM THE TRIBUNAL

5 ARBITRATOR EIZENSTAT: Mr. Valenzuela, you  
6 mentioned and we saw something in writing about  
7 destroying this letter from Mr. Pinto. Do you have  
8 any idea of why you were asked to destroy the letter?  
9 Was there something in it that was particularly  
10 sensitive? What is your understanding of the reason  
11 Mr. Pinto asked that this be destroyed?

12 THE WITNESS: Quite frankly, I can tell you  
13 that I never even looked into why it was sent. He  
14 sent it to the Vice-Minister, not to me directly. He  
15 sent me a copy. I received the copy with that note  
16 stuck to the letter. I read it, I took and I put it  
17 away. I want you to know that I have never gone about  
18 looking into things that are not my business. That  
19 was Mr. Pinto's matter. Why he did that, who knows.

20 ARBITRATOR EIZENSTAT: You mentioned he gave  
21 you a card for a particular corporation he was  
22 representing or working for. Do you know the--could



03:03:00 1 you repeat the name again, and if you know, the owners  
2 of that corporation that he was purportedly  
3 representing when he was at the meeting?

4 THE WITNESS: No. He just came and he  
5 distributed it. I recall that it was called  
6 Corporacion Manatí, Mananí. I'm sorry. It was  
7 something like that. And that he represented Ciudad  
8 del Sur, which was a center of operations. They  
9 wanted to open in Santa Lucía so as to  
10 concentrate--well, that's what they were saying--the  
11 output of the sugar mill so as to be able to transport  
12 it to the port of San José. Mananí, Manatí, something  
13 like that.

14 ARBITRATOR EIZENSTAT: Why did the Commission  
15 come to an end? Had you finished your plan and the  
16 rest was implementation? Why did the Commission end  
17 when it did?

18 THE WITNESS: It ended because, after having  
19 done all of the work of the plan and having everything  
20 ready to be able to move the families from the right  
21 of way, it was time to actually have the economic  
22 capacity that required. And there not being such

03:04:30 1 economic capacity, the Commission stopped operating.  
2 It died at that time, quite simply because everything  
3 that might have come after could not be done because  
4 of the lack of money required to do it. Now, what  
5 money am I talking about? The expenditure for taking  
6 a physical census of the families, the expense in  
7 purchasing the lands to which the families were to be  
8 moved, the cost of putting up housing for those  
9 families, that's the money I'm talking about.

10 ARBITRATOR EIZENSTAT: Just one last  
11 clarification: The work of the Commission, was it  
12 focused on squatters only in this Southern Corridor,  
13 or were you also looking at the Northern line, the  
14 so-called Phase 1 line?

15 THE WITNESS: No, just the Southern area.  
16 The Commission was formed for that objective, not for  
17 the rest of the rail line.

18 ARBITRATOR EIZENSTAT: Thank you.

19 PRESIDENT RIGO: Mr. Stern, any question on  
20 Mr. Eizenstat?

21 MR. STERN: I have no questions. No further  
22 questions.

03:05:47 1 PRESIDENT RIGO: Mr. Salinas?

2 MR. SALINAS-SERRANO: No questions,  
3 Mr. President.

4 PRESIDENT RIGO: Thank you, Mr. Valenzuela.  
5 Thank you very much for your testimony. You may now  
6 stand down.

7 (Witness steps down.)

8 MABEL HERNÁNDEZ, CLAIMANT'S WITNESS, CALLED

9 PRESIDENT RIGO: Good afternoon,  
10 Ms. Hernández. I'm going to ask you to read out the  
11 statement that you have before you.

12 THE WITNESS: Good afternoon. I solemnly  
13 swear upon my honor and conscience that I shall tell  
14 the truth, the whole truth and nothing but the truth.

15 PRESIDENT RIGO: Thank you very much.  
16 Mr. Stern.

17 MR. STERN: Thank you. Ms. Hernández was  
18 also a witness that Respondents did not include on  
19 their witness list on witnesses they intended to  
20 cross-examine.

21 DIRECT EXAMINATION

22 BY MR. STERN:

03:10:04 1 Q. Ms. Hernández, good afternoon.

2 A. Good afternoon.

3 Q. Do you have in front of you a copy of the  
4 Statement you have submitted in this arbitration,  
5 dated May 14, 2011?

6 A. Yes, that's right.

7 Q. Do you ratify that Statement and affirm its  
8 truthfulness before the Tribunal?

9 A. Yes, I ratify it and affirm that what was  
10 included in the Statement is the truth.

11 Q. Ms. Hernández, what is your occupation?

12 A. At this time, I am a Professor and researcher  
13 at the research center of the School of Architecture,  
14 Universidad San Carlos, Guatemala.

15 Q. Are you familiar with the work of the railroad  
16 Commission which was first organized by the Government  
17 of Guatemala in January of 2005?

18 A. Yes, that's right. I am familiar with that.

19 Q. How are you familiar with it?

20 A. Because I was invited to participate in  
21 several of the meetings of that Commission.

22 Q. And who invited you to participate?

03:11:30 1 A. On behalf of the coordinator of the  
2 Commission, we were invited to participate in it.

3 Q. And what was your understanding as to why you  
4 were invited to participate in the Commission?

5 A. I was invited to be part of this Commission  
6 in relation to drawing up a plan for evicting the  
7 squatters in the rail right of way.

8 Q. And why did they think that you would be able  
9 to help in the Commission's work? What was your  
10 understanding of that?

11 A. I've been coordinating a research project on  
12 the real property of the rail lines in Guatemala for  
13 the purposes of conservation and use, and this  
14 included the question of dealing with squatters on the  
15 railroad right of way.

16 Q. Do you recall Mr. Héctor Pinto participating  
17 in some of the Railroad Commission meetings?

18 A. Yes, I do.

19 Q. And how many meetings do you recall him  
20 participating in?

21 A. At least--I think he participated in at least  
22 two of the meetings when I was there.

03:13:11 1 Q. Whose interest did you understand Mr. Pinto  
2 was representing at the Railroad Commission meetings?

3 A. Yes, I recall that he mentioned that he was  
4 representing the sugar sector and some relationship  
5 with a real estate project called Ciudad del Sur in  
6 the area where work was taking place.

7 Q. And was it your understanding that the  
8 interests Mr. Pinto purported to be representing were  
9 interested in the restoration of rail service on the  
10 South Coast?

11 A. Evidently, yes, because the proposal for  
12 rehabilitation for them was going to mean taking the  
13 merchandise, and it had to do with this real estate  
14 development project.

15 Q. Was the Railroad Commission ever successful  
16 in coming up with and implementing a plan to relocate  
17 squatters from the South Coast right of way?

18 A. No, it was not successful in that regard.  
19 There was a need to do many things, obtain lots,  
20 negotiate with the squatters, and the Commission  
21 failed in that dialogue.

22 Q. Was there an issue about having sufficient

03:14:58 1 financing and money available to remove and relocate  
2 the squatters?

3 A. That's right. A very large sum was needed  
4 which the Government did not have so as to be able to  
5 make an investment and make effective the eviction of  
6 the squatters, because it was necessary to purchase  
7 new lands, build housing, provide infrastructure and  
8 equipment, and the Government didn't have that.

9 Q. Did the Commission fail because Ferrovías had  
10 indicated that it did not have sufficient financing or  
11 investment lined up to rehabilitate the South Coast  
12 right of way?

13 A. I think that the Commission did not fail  
14 because Ferrovías didn't have the resources, but  
15 rather because the Government did not want to continue  
16 the dialogue for making the large investment that was  
17 required.

18 Q. Thank you, Ms. Hernández. I have no further  
19 questions.

20 PRESIDENT RIGO: Mr. Orta? Mr. Salinas?

21 MR. SALINAS-SERRANO: Very briefly,  
22 Mr. President.

03:16:11 1 PRESIDENT RIGO: Okay.

2 CROSS-EXAMINATION

3 BY MR. SALINAS-SERRANO:

4 Q. Ms. Hernández, thank you very much for being  
5 here today. My name is Daniel Salinas. I'll be  
6 asking you some questions about your testimony here  
7 today.

8 You mentioned to questions from Mr. Stern  
9 that there wasn't sufficient money to implement the  
10 plan to remove the squatters; is that correct?

11 A. That's right, there wasn't enough money.

12 Q. Do you know why FEGUA didn't put the money  
13 down to remove the squatters or why there wasn't  
14 sufficient funding?

15 A. I don't know what the motive was. It's just  
16 that that's what we were told in the Commission, and  
17 my participation was merely as representative of an  
18 academic institution.

19 Q. You were also asked just at the end of  
20 Mr. Stern's questions whether you knew whether the  
21 failure of the Commission, as you called it, was due  
22 to Ferrovías' failure to obtain financing to rebuild



03:17:15 1 the Southern Coast. Do you remember those questions?

2 A. Yes, I recall, but could you repeat to me  
3 your exact question?

4 Q. Only if you remembered that line of  
5 questions.

6 A. Yes, I do remember.

7 Q. Thank you, Ms. Hernández.

8 With regards to those questions, you have no  
9 knowledge, isn't it true, what it would have taken for  
10 Ferrovías to rebuild the Southern Coast; correct?

11 A. Could you repeat the question, please?

12 Q. Sure.

13 You don't know what it is that Ferrovías  
14 would have had to do to rebuild the entire Southern  
15 Coast; correct?

16 A. I understand that participation in the  
17 Commission was precisely to reach agreement and for  
18 there to be a consensus so as to be able to carry out  
19 the project. Nonetheless, the one that had to make  
20 the investment for this part, eviction of the  
21 squatters, was the Government of Guatemala, not  
22 Ferrovías.

03:18:36 1 Q. But the one obligated to invest, to  
2 rehabilitate the Southern Coast of the railroad,  
3 wasn't FEGUA; it was Ferrovías; correct?

4 A. On this part, yes, the part that we're  
5 talking about of relocation of the squatters, yes.  
6 All the other technical aspects, I don't know.

7 Q. You don't know how much it would have cost  
8 Ferrovías to rebuild the railroad to the Southern  
9 Coast; correct?

10 A. No, I don't know that information, just what  
11 was discussed in the Commission having to do with  
12 relocation of the squatters.

13 Q. You also don't know whether Ferrovías had  
14 funds or financing to rebuild the Southern Coast;  
15 correct?

16 A. I don't know that because there wasn't time  
17 for discussion of that in the Commission.

18 Q. Ms. Hernández, you would agree with me,  
19 right, that the origin of the problem of the squatters  
20 on the right of way is because the train had stopped  
21 working; correct?

22 A. Not necessarily. In Guatemala, there are

03:20:02 1 many other social reasons that could be addressed at  
2 greater length, but I can't affirm that.

3 Q. But certainly if the train doesn't operate,  
4 it's easier for the squatters to be on the right of  
5 way; correct?

6 MR. STERN: Objection; beyond the scope of  
7 her direct.

8 MR. SALINAS-SERRANO: She testified about  
9 who's fault--I'm sorry, about why the Commission  
10 failed, and about whether FVG had or had not financing  
11 to rebuild the Southern Coast. This is directly  
12 related to the squatter problem, what would have  
13 happened if the train and the rehabilitation had never  
14 happened.

15 PRESIDENT RIGO: Answer the question.

16 THE WITNESS: I think, as I indicated, that  
17 it's a social problem in the country due to conditions  
18 of poverty and development, so it's not necessarily  
19 the case that it has to be on the right of way. We  
20 have many situations of squatters in Guatemala in  
21 different areas, both privately held and  
22 Government-owned, that have been invaded. So it's not

03:21:20 1 just over the right of--the railroad right of way.

2 There are many examples.

3 BY MR. SALINAS-SERRANO:

4 Q. Of course, but with respect to squatters or  
5 invasions along or on the right of way, you would  
6 agree with me that one of the factors that contributes  
7 to that is the train not moving through the right of  
8 way; correct?

9 A. In part. I can't agree with you fully for  
10 the reasons that I've stated. There are many  
11 circumstances.

12 Q. And just to be clear, I think we're in  
13 agreement--I'm not saying it's the only factor--but it  
14 is certainly one factor; correct?

15 A. Yes, and not just in Guatemala but in other  
16 countries as well.

17 Q. Absolutely.

18 Now, you would also agree with me that, for  
19 example, with respect to squatters, both people and  
20 any other type of squatter right along the right of  
21 way, if the train is passing, it is harder for those  
22 squatters to remain there; correct?

03:22:32 1           A.    Not in the case of Guatemala.  Squatters  
2           continue being along many risky places--in many risky  
3           places including in the right of way, even when the  
4           train is moving through.  This has been a problem  
5           forever, ever since this form of transportation has  
6           existed in the country.

7           Q.    So then even if the Government removed the  
8           squatters, and even if FVG rehabilitated the right of  
9           way, and even if the train was operating along the  
10          Southern Coast, there still would have been a squatter  
11          problem in your opinion?

12          A.    I cannot state that with certainty.  It would  
13          be a problem that might or might not come up.  I don't  
14          think it would necessarily have to be the case.  It's  
15          likely that the population, if they see that they're  
16          in a risky area, and if trains, especially higher  
17          speed trains, begin to run through there, will leave  
18          the right of way.

19                   MR. SALINAS-SERRANO:  Thank you,  
20          Ms. Hernández.  Mr. President, I have no further  
21          questions.

22                   PRESIDENT RIGO:  Thank you, Mr. Salinas.  No

03:24:01 1 questions from the Tribunal. Do you have anything  
2 else yourself?

3 MR. STERN: No further questions.

4 PRESIDENT RIGO: Thank you, again. You may  
5 stand down.

6 PRESIDENT RIGO: We will have a 10-minute  
7 pause and come back at 3:30 on that clock.

8 (Brief recess.)

9 PRESIDENT RIGO: We will continue our  
10 session.

11 RICARDO SPIEGELER, CLAIMANT'S WITNESS, CALLED

12 Good afternoon, Mr. Spiegelер.

13 THE WITNESS: Good afternoon.

14 PRESIDENT RIGO: I'm going to ask you to read  
15 the statement that you have before you. It's a  
16 Witness Statement. You have a statement before you,  
17 please read it. It's on the table.

18 THE WITNESS: I solemnly declare on my honor  
19 and conscience that I will speak the truth, the whole  
20 truth and nothing but the truth.

21 PRESIDENT RIGO: Thank you very much.

22 Mr. Foster? Mr. Stern?

03:38:01 1 MR. STERN: Thank you, Mr. President.

2 DIRECT EXAMINATION

3 BY MR. STERN:

4 Q. Good afternoon, Mr. Spiegeler. How are you  
5 doing?

6 A. Very well, thank you.

7 Q. Do you have in front of you a copy of the  
8 Statement you have submitted in this arbitration on  
9 behalf of Generadora del Sur, S.A. and Planos y Puntos  
10 dated March 14, 2011?

11 A. Yes, it's right in front of me.

12 Q. And Generadora del Sur is also referred  
13 to--is also often referred to as GESUR; correct?

14 A. That is correct. It is known as GESUR, also.

15 Q. Do you ratify that Statement and affirm its  
16 truthfulness before the Tribunal?

17 A. Yes, I fully ratify its contents.

18 Q. Now, in Paragraphs 1 and 3 of your March 14,  
19 2011, Statement, you reference and ratify the First  
20 Statement that was rendered in this arbitration on  
21 behalf of GESUR and Planos y Puntos dated June 17,  
22 2009; correct?

03:39:25 1 A. That is correct. It's also right here.

2 Q. Okay. So have you a copy of that statement  
3 in front of you?

4 A. Yes, I have a copyright right before me.

5 MR. DEBEVOISE: I'd like to say at this  
6 point--and I apologize for interrupting this  
7 direct--but we have some serious questions about one  
8 witness ratifying another witness's Statement,  
9 particularly when the other Statement was really a  
10 Statement of two witnesses. And we'll explore that on  
11 cross-examination, but I just didn't want to let it  
12 pass unnoticed at this point.

13 Thank you.

14 PRESIDENT RIGO: Thank you.

15 Continue, Mr. Stern.

16 MR. STERN: Thank you.

17 BY MR. STERN:

18 Q. Mr. Spiegel, do you ratify the Statement of  
19 June 17, 2009, and affirm its truthfulness before the  
20 Tribunal?

21 A. Yes, I do, and I fully corroborate it.

22 Q. Mr. Spiegel, what types of businesses do



03:40:27 1 GESUR and Planos y Puntos engage in?

2 A. Planos y Puntos are companies that develop  
3 electricity programs for generation/distribution of  
4 electricity in the Republic of Guatemala.

5 Q. In paragraph 3 of your Statement, you  
6 describe a preliminary electricity transmission  
7 easement agreement that GESUR had with Ferrovías which  
8 GESUR backed out of because of Declaration of  
9 Lesividad.

10 Could you explain--please explain what were  
11 the terms of this Preliminary Agreement?

12 A. There are different trenches of railway, and  
13 we have a contract with Ferrovías for its use--and  
14 usufruct. We put up posts and we have electricity  
15 power lines that is currently operating. We had five  
16 contracts that we had for 52 kilometers of railway.

17 Q. Okay. Now, could you describe the  
18 Preliminary Agreement that you reference in  
19 Paragraph 3 of your Statement that you backed out of  
20 because of the Declaration of Lesividad.

21 What were the terms of that Agreement?

22 A. That's correct. After the Government

03:42:20 1 declared lesividad of the Contract that it had with  
2 Ferrovías, both GESUR and Planos y Puntos--well, we  
3 had an agreement to extend our Usufruct Contract for  
4 railway for another 32 kilometers. This Contract that  
5 we had was canceled because of the Declaration of  
6 Lesividad and in connection with the Agreement that we  
7 originally had with Ferrovías.

8 Q. What was the financial terms of that  
9 Preliminary Agreement that you backed out of with  
10 Ferrovías?

11 What was the price you had negotiated?

12 A. This was an agreement--and initially it was  
13 going to be at a price of \$1,000 per kilometer. And  
14 during the life of the contract, it was going to be,  
15 on average, \$3200 per kilometer of each line that we  
16 had under the Usufruct Contract.

17 Q. And why did--your company refuse to conclude  
18 this further easement agreement after the Declaration  
19 of Lesividad?

20 A. In order to try and continue with this line,  
21 we needed to have the legal certainty that Ferrovías  
22 was going to continue using the train and the railway

03:44:14 1 because what we needed for placing the posts and the  
2 power lines--well, that entailed a very high price.  
3 And at that time, we didn't want to run the risk until  
4 such time as we knew the conditions that Ferrovías was  
5 going to be operating in in Guatemala, and if it was  
6 going to be still operating in Guatemala.

7 Q. And why was your company concerned about  
8 whether Ferrovías was going to still be operating in  
9 Guatemala?

10 A. Basically, because we already have 52  
11 kilometers, and we are using the line there. We have  
12 customers and users there, electricity users, and they  
13 are expecting to us continue providing them with  
14 service.

15 If this Agreement between Ferrovías and the  
16 Government and was no longer was valid, we had--we  
17 would have had a problem, and we would no longer be  
18 able to provide power for our clients.

19 Q. But for the Declaration of Lesividad, would  
20 GESUR have gone forward with its Preliminary User  
21 Agreement with Ferrovías?

22 A. That is correct. If this Declaration of

03:45:51 1 Lesividad had not existed, both Planos y Puntos and  
2 GESUR would have gone on with the construction of  
3 lines south to the city of Escuintla. That was a--a  
4 project that we had in mind.

5 Q. Is GESUR still paying Ferrovías for the  
6 easement agreements it entered into prior the  
7 Declaration of Lesividad?

8 A. That is correct. Both GESUR and Planos  
9 y Puntos continued performing under the Contracts that  
10 they had entered into because we felt that the risk of  
11 not performing under our Contracts would have been  
12 much larger if we had stopped payment. We felt that  
13 since we are still paying under these Contracts, we're  
14 going to have the possibility of continue to use the  
15 line.

16 Q. Now, Guatemala's counsel, at the beginning of  
17 your testimony, referenced that they have some issues  
18 or some questions about the circumstances which led  
19 you to executing your Statement when the First  
20 Statement on behalf of your company was executed by  
21 two other individuals.

22 Q. Could you explain the circumstances which led

03:47:22 1 you to executing the Second Statement instead of the  
2 two individuals who executed the First Statement on  
3 behalf of your companies?

4 A. Yes. The people who had signed this First  
5 Statement are individuals who are still working there  
6 for the organization. These are individuals that were  
7 not at the time able to come here and ratify this, and  
8 that is why I am doing it on their behalf, fully.

9 MR. STERN: Thank you. I have no further  
10 questions.

11 PRESIDENT RIGO: Mr. Debevoise.

12 MR. DEBEVOISE: Thank you, Mr. President.

13 CROSS-EXAMINATION

14 BY MR. DEBEVOISE:

15 Q. Mr. Spiegel, my name is Whitney Debevoise  
16 and, I'm here on behalf of the Republic of Guatemala,  
17 and I'll be asking you some questions about your  
18 Statement and the questions that you've just had from  
19 counsel for the Claimants.

20 I'll be asking you these questions in  
21 English, and there'll be a simultaneous translation  
22 for you into Spanish.

03:48:54 1                   Mr. Spiegelger, looking at your Statement, the  
2 one that you signed, could you point me to a place  
3 where you identify who your employer is?

4           A.    Yes.  If you go to the Statement and you go  
5 to Point 2, I am saying that I am testifying on behalf  
6 of GESUR and behalf of Planos y Puntos.  These are the  
7 institutions that have given me express authorization  
8 to appear on behalf of these proceedings.

9           Q.    Mr. Spiegelger, let me ask you:  From whom do  
10 you receive your paycheck?

11          A.    I work for a company that is now called  
12 Generadora del Este, S.A.

13                    It is a part of this group that is also made  
14 up of GESUR and Planos y Puntos.

15          Q.    Could you please explain the relationship  
16 between Planos y Puntos and your current employer?

17          A.    Planos y Puntos is a company that mainly  
18 deals in realty, and it is the owner of the land that  
19 holds the power plant for Generadora del Este, and it  
20 also holds Generadora del Sur.  It is a real estate  
21 company that is the owner of the land in which these  
22 facilities are located.

03:51:09 1 Q. And you also referred to Generadora del Sur  
2 or Azur.

3 What is the relationship between that company  
4 and your employer?

5 A. Generadora del Sur is a company that, apart  
6 from generating electricity, also distributes  
7 electricity. And our clients receive electricity from  
8 Generadora. It is the company which is a company that  
9 also puts up posts and transmission and distribution  
10 lines.

11 Q. You mentioned a company whose name has not  
12 appeared in these proceedings before as your current  
13 employer.

14 Could you tell us, again, the name of that  
15 company, the company from which you get your paycheck?

16 A. The name is Generadora del Este, Sociedad  
17 Anonima. It is company that, together with these  
18 other the companies, is a part of a group dedicated to  
19 the generation, transmission and distribution of  
20 electrical power.

21 Q. And is this group comprised only of the three  
22 companies we have talked about so far?

03:52:43 1           A.    No.  There are other companies that are also  
2  members of the group.  Those companies are not  
3  mentioned here.  They are not my direct employer.  
4  Generadora del Este is my direct employer, so I felt  
5  that it wasn't worth it to mention them.

6           Q.    Mr. Spiegel, I'm trying to find out exactly  
7  on whose behalf you are speaking here today, and I  
8  think it's relevant to know the full reach of the  
9  group with which you are associated.  So could you  
10 please answer the question?

11          A.    Yes.  Basically, this group is made up of  
12 different companies that have hotels, real estate  
13 developments and other kinds of companies that are not  
14 necessarily related to the power-generation sector.  I  
15 can talk about the section that refers directly to the  
16 generation, transmission and distribution of  
17 electricity.  That is my field.

18          Q.    Is there a textile company in this the group?

19          A.    That's correct, there is a textile company in  
20 this group.

21          Q.    What is the name of that company?

22          A.    The name of the company is Industrias



03:54:04 1 Textiles del Lago, SA.

2 Q. Does that company own the company that  
3 generates electricity, that employs you?

4 A. Each of the companies has a board of  
5 directors, and I wouldn't be able to assure that  
6 Industrias del Lago is the owner of Generadora del  
7 Este. These are companies that belong to a group of  
8 investors who are the owners of a number of companies.  
9 Industrias Textiles del Lago is not necessarily the  
10 owner of Generadora del Este.

11 Q. How many electricity-generating plants are  
12 there in this group?

13 A. Basically, there is a location where there  
14 are 120 megawatts of power that is being generated by  
15 different power plants in one single location.

16 Q. And is that near the textile factory?

17 MR. STERN: I'm going to object to this line  
18 of question. I'm not sure what the relevance is of  
19 textile factories and what power plants do and their  
20 locations and all these other matters have to do with  
21 who he's testifying for in this proceeding.

22 It seems like a fishing expedition. It has

03:55:44 1 nothing do with this testimony.

2 MR. DEBEVOISE: Mr. Stern, this is not a  
3 fishing expedition. I happen to know some facts, and  
4 I think if the witness will cooperate, we will bring  
5 them out quickly and you'll see the relevance.

6 PRESIDENT RIGO: Go ahead.

7 MR. DEBEVOISE: Thank you.

8 BY MR. DEBEVOISE:

9 Q. The electricity-generating facilities, does  
10 these begin as cogeneration facilities for the textile  
11 plant there?

12 A. There is a place called Parques del Lago.  
13 It is an industrial complex, and apart from textile  
14 plants, they have "maquiladoras" and also power  
15 generation plants. This is an industrial complex, and  
16 all these elements are incorporated into it.

17 You talked about cogenerator. That  
18 designation is no longer used for these generation  
19 plants. We just call them generators.

20 A cogenerator is a company generating power  
21 for itself and selling the remains of the power to the  
22 network or to other users. In the case of Generadora

03:57:01 1 del Este, it sells power directly to the electrical  
2 line and also to users that are connected to it by  
3 its--by their own lines.

4 Q. Tell me by Generadora del Sur, because you're  
5 purporting to speak today on behalf of del Sur, not  
6 Generadora del Este, your actual employer?

7 A. That's correct. Generadora del Sur is the  
8 company that at the time installed the power  
9 distribution system privately for the plants in the  
10 Parque del Lago area. Generadora del Sur transfers  
11 and distributes electricity from its generation  
12 plants.

13 Q. And Generadora del Sur generates more  
14 electricity than can be used by that park in that  
15 plant, so it has electricity left over which it sells  
16 to other customers; correct?

17 A. That's correct.

18 Q. This electricity is not sold through the main  
19 Guatemalan grid; correct?

20 A. That's correct.

21 Q. Thank you very much.

22 Now, let's talk about your Statement in which

03:58:40 1 you said that you have been expressly authorized to  
2 appear on their behalf in these proceedings, referring  
3 to GESUR and Planos y Puntos.

4 Who authorized to you appear?

5 A. Basically the individuals who are directors  
6 of Planos y Puntos and GESUR. They're the ones who  
7 authorized me to appear here because I am one of the  
8 people who has the most experience--has the longest  
9 experience in this line of work. I know the history  
10 of the transportation lines in the area that we're  
11 working in.

12 Q. And I believe you testified in response to a  
13 question from Mr. Stern that you provided a Second  
14 Affidavit because the two gentlemen who provided the  
15 First Written Statement were not available to come  
16 here today and testify; is that correct?

17 A. Yes, that is correct.

18 Q. Mr. Spiegel, I'd ask you to take a look at  
19 Statement that you did sign at the second page near  
20 your signature.

21 Would you please read for me the date right  
22 before your signature?

04:00:36 1 A. March 14, 2011.

2 Q. So your appearance with this Written  
3 Statement has nothing do with whether the two  
4 gentlemen who signed the First Statement could be here  
5 today or not because you signed this Statement eight  
6 months ago; correct?

7 A. Yes. At this point, I cannot answer why  
8 they're not here, but I am confirming my statement and  
9 also their statements.

10 Q. Well, let's talk a little bit about their  
11 Statement for a minute. The Statement was signed by  
12 Mr. Rolando Paredas Sarmiento on one hand, and by  
13 Mr. Edgar Alfredo Ordonez on the other hand; correct?

14 A. That is correct.

15 Q. Who is Mr. Edgar Alfredo Ordonez?

16 A. Mr. Edgar Alfredo Ordonez is an executive who  
17 worked for the GESUR generation company and Planos  
18 y Puntos.

19 Q. What exactly is his position?

20 A. He's an administrator.

21 Q. Manager, what kind of a manager?

22 A. Here it clearly states that Edgar Alfredo

04:02:45 1 Ordonez is the only manager and legal representative  
2 for Planos y Puntos.

3 Q. What does that really mean, Mr. Spiegeler?

4 Is he the gentleman who commands the company,  
5 who runs the company and makes all the decisions?

6 A. The manager is the person who represents the  
7 interests of the owner, and the person who also has to  
8 conduct work that has to do with the administration,  
9 with the management of the premises that are part of  
10 Planos y Puntos.

11 Q. What about Mr. Rolando Paredes Sarmiento?  
12 What is his position at GESUR?

13 A. Along the same lines, there is a paragraph  
14 that says that this person, Rolando Sarmiento, is the  
15 only manager of these generating--generation companies  
16 for the south.

17 Q. What does that mean that his real  
18 responsibilities are?

19 A. Their responsibilities as managers, they're  
20 the ones who need to monitor the assets of company.

21 Q. I understand he has responsibility for that.  
22 Does he also make all the decisions about how to do

04:04:39 1 that?

2 A. This is a decision made jointly, not only by  
3 them, but also by the owners and the people who work  
4 with them.

5 Q. So he's not really the person who makes the  
6 decisions in the company?

7 A. When you're saying that this is not the  
8 person who makes decisions in the company, I don't  
9 know what you're referring to because I don't know  
10 whether these are decisions to hire staff or to buy  
11 other shares or what to do.

12 So you're referring to this in a very general  
13 way, and you're not referring to what you mean by  
14 saying "the one making the decisions."

15 Q. Let's talk about easements, easements for  
16 electric wires.

17 Would he, alone, make a decision about  
18 whether to enter into a Contract for an easement for  
19 electricity transmission?

20 A. Basically, as part of the mandate of the sole  
21 manager, there is obligation of signing Contracts  
22 entered into to distribute power, so this person is

04:06:14 1 responsible for signing the Contract.

2 Q. I understand he is the person who signs the  
3 Contract, but who makes the decision to enter into the  
4 Contract?

5 A. The decision to sign a Contract or not, or  
6 the decision to make a--to decide something of this  
7 nature is related to the responsibility of the owners  
8 of the company or in conjunction with the engineers  
9 and the people who are in charge of making sure where  
10 the power has to be conveyed.

11 Whenever there is a request by users to have  
12 electrical services--electric services, the different  
13 paths to get to that goal are analyzed and the  
14 Contracts are entered so as to provide coverage to the  
15 clients. This is not only the decision by the owners  
16 or the managers; rather, this is a decision made  
17 jointly by all the staff working for a company.

18 Q. Same is true for a decision to cancel a  
19 Contract?

20 A. That is correct. When a decision is made  
21 about the inadequacy of a Contract, for example,  
22 because there is no longer a user or a client, it is



04:07:48 1 not proper to continue to have the electric power  
2 service, so, therefore, a joint decision is made to  
3 render a Contract null.

4 Q. Now, Mr. Spiegeler, you're not the  
5 administrator of GESUR; correct?

6 A. No.

7 Q. You are not the administrator of Planos  
8 y Puntos; correct?

9 A. Correct, I'm not.

10 Q. So in what capacity did you sign the  
11 Statement that you signed?

12 A. The Statement I signed was signed as manager  
13 in charge of power generation, but also of power  
14 distribution to our users. That is to say, the person  
15 in charge of managing Contracts, that would be me.

16 Q. So are you Mr. Ordoñez's boss?

17 A. Yes.

18 Q. Are you Mr. Sarmiento's boss?

19 A. Correct.

20 Q. Mr. Spiegeler, you said that--in your  
21 Statement that you're ratifying the other Statement of  
22 your two inferior employees in the group; correct?

04:09:41 1 A. That is correct.

2 Q. If I direct you to Paragraph 2 of your  
3 Statement, the one that you signed, you said that they  
4 were based on your personal knowledge?

5 A. Correct.

6 Q. And the two gentlemen who signed the other  
7 Statements said that their Statement was based on  
8 their personal knowledge; correct?

9 A. That's correct.

10 Q. So how can your personal knowledge ratify  
11 their personal knowledge?

12 A. As I mentioned before, when a Statement of  
13 this sort is made, this is beyond one person. There  
14 are several persons making a Statement now to  
15 determine whether this is appropriate or not for the  
16 investment group.

17 In this case, if we have users that need to  
18 be provided service, electric power service, and as  
19 manager I need to guarantee that that service  
20 continues to be provided to the users. Before I need  
21 to have -- I need to be aware of all the factors that  
22 may impact the feasibility of continuing to offer

04:11:26 1 service to our users.

2 MR. DEBEVOISE: Mr. President, I don't know  
3 whether you want this to count against my  
4 cross-examination time or whether we should take this  
5 up later, but I think we've established on the record  
6 that Mr. Spiegelger gave a Statement in his name, but  
7 that he really should not be incorporating a Statement  
8 of two other gentlemen who are not here and who  
9 manifestly were just changed because that was  
10 convenient.

11 I don't believe that this is an appropriate  
12 type of proof to have in a proceeding like this.

13 MR. STERN: With all due respect, this is  
14 nonsense. He has personal knowledge. The people that  
15 worked underneath him, his inferior employees, have  
16 personal knowledge of the same facts. They know the  
17 same thing, and that's what he's testified to.

18 This has nothing to do with him lacking  
19 personal knowledge of the same facts that his inferior  
20 employees have knowledge of.

21 PRESIDENT RIGO: I think on behalf of the  
22 Tribunal, you should continue with your

04:12:58 1 cross-examination, and we will make--in respect of all  
2 evidence admitted, we'll make our own judgment about  
3 it.

4 MR. DEBEVOISE: Thank you, Mr. President.

5 BY MR. DEBEVOISE:

6 Q. Mr. Spiegelger, I believe that in your  
7 Statement you indicated that there was a Preliminary  
8 Agreement between GESUR and Ferrovías for a new  
9 easement; is that correct?

10 A. That is correct.

11 Q. What are the characteristics of a Preliminary  
12 Agreement? Is this an Agreement between gentlemen?  
13 Unwritten?

14 A. I usually think that Agreements have to be  
15 drawn among gentlemen, but when there is a  
16 Preliminary Agreement, it is based on the  
17 distance--since this is an easement, the distance to  
18 be established--and also the value--the duration of  
19 the Contract, as well as the final price or the  
20 average price for this Contract.

21 This is a Preliminary Agreement, and the  
22 reasons why the Contract is to be extended are

04:14:53 1 specified.

2           Let me remind you that so far we have five  
3 Contracts with them, and this would have been the  
4 sixth one to be signed between Planos y Puntos, GESUR  
5 and Ferrovías had there been no Lesividad Declaration  
6 by the Government.

7           Q.   Mr. Spiegel, thank you. I understand the  
8 generic, but you stated in your Statement that this  
9 Agreement would have been negotiated. That means the  
10 Agreement had not yet been negotiated; correct?

11          A.   The arrangement was negotiated in terms of  
12 distance, in terms of price, but after the Lesividad  
13 Declaration, was it not possible to sign the Contract  
14 because it was a financial risk, a significant risk  
15 for Planos y Puntos as well as for GESUR. It was  
16 risky to sign a new Contract on something that is  
17 being discussed and whether the concession is going to  
18 continue or not.

19               Likewise, the Contracts that we currently  
20 have entail the same concern; that is to say, whether  
21 this is going to be valid or not in the upcoming  
22 years, since our users are hoping that the Contracts

04:16:43 1 we entered into with them are going to be continued  
2 and they will continue to be valid while they require  
3 our services.

4 Q. Your existing Contracts are 50-year  
5 Contracts; correct?

6 A. I don't have here the terms for each of the  
7 Contracts, but they're about 50 years.

8 Q. And the so-called Preliminary Agreement, was  
9 there an Agreement on the term for that Contract?

10 A. Yes. The term of the Contracts that we had  
11 signed, the previous ones and the one that we were  
12 thinking of signing, could not last longer than the  
13 Easement Contract that Ferrovías had. That is to say,  
14 they were going to conclude at the same time.

15 Q. Thank you. And you said that the reason that  
16 the company did not proceed with this Preliminary  
17 Agreement was because of legal uncertainty about the  
18 continuation of the rights of Ferrovías.

19 You also said that there was a question about  
20 the continuing rights of Ferrovías with respect to  
21 your existing Contracts; correct?

22 A. Before the Lesividad Declaration by the

04:18:43 1 Government of Óscar Berger for the Contract with  
2 Ferrovías, we had the utmost certainty in guarantees  
3 that the Contract we had signed with them was going to  
4 be fully valid during the concession period.

5 But when the time came to have a new  
6 Agreement, if there was no legal certainty that the  
7 Contracts were going to be fulfilled, we were unable  
8 to start a new Contract since we had some doubts as to  
9 the continuation of the Contract.

10 Q. You continue to pay rents under the old  
11 Contracts; correct?

12 A. That is correct. Planos y Puntos and GESUR  
13 always fulfill their Contracts, and that's the reason  
14 why we considered that it was better to continue with  
15 the payments as agreed consistently rather than  
16 suspend payment, because the risk was lower by paying  
17 than failing to pay and then have other problems in  
18 the future.

19 Q. (Overlapping translation.) --and is a class  
20 of its own, people who whom it sells electricity;  
21 correct?

22 PRESIDENT RIGO: Just--Mr. Debevoise, just

04:20:16 1 simply an administrative matter, please pause because  
2 of the interpretation.

3 MR. DEBEVOISE: Well, if the witness would  
4 just answer my question and not give a speech, it  
5 would be easier.

6 BY MR. DEBEVOISE:

7 Q. You have clients, customers, to whom you sell  
8 electricity, correct, at GESUR?

9 A. That is correct. Those are clients and  
10 customers that are from the private sector and they  
11 are part of the easement.

12 Q. And does GESUR have a license to sell that  
13 electricity?

14 MR. STERN: I'm going to object to the  
15 relevance of that question.

16 MR. DEBEVOISE: Mr. President, I think he has  
17 testified to his concern about the legal insecurity of  
18 proceeding with a relationship with Ferrovías.

19 I think there could be a reciprocal side of  
20 that insecurity if they are not authorized to sell  
21 electricity. They might be thrown out of their  
22 business as electricity distributor, and Ferrovías



04:21:19 1 would lose the income from those easements. So I  
2 think this is entirely fair game.

3 The question of legal security has been  
4 raised by them.

5 MR. STERN: I'm sorry. Did you overrule the  
6 objection?

7 I don't know why--how the issue of whether  
8 GESUR has a license to sell electricity to whomever  
9 has anything to do with their decision to continue or  
10 enter into an additional Agreement with Ferrovias or  
11 to continue to pay rent under existing Agreements.

12 I don't see the connection or the relevance  
13 whatsoever.

14 PRESIDENT RIGO: The objection is sustained.

15 BY MR. DEBEVOISE:

16 Q. Mr. Spiegel, you indicated that GESUR does  
17 not sell electricity into the grid, but that the other  
18 company that is your current employer does sell  
19 electricity into the grid; correct?

20 A. I did not mention whether they sold to the  
21 grid or not. I barely indicated--basically indicated  
22 that GESUR, as such, has individual clients

04:22:54 1 through--throughout the railway line, and that's the  
2 reason why we are working on that.

3 Q. And is the reason that they don't sell into  
4 the grid because they're not authorized to do so?

5 MR. STERN: Again, same objection that the  
6 Tribunal sustained. There is no relevance whatsoever.  
7 He's talking about--this has nothing to do with the  
8 issues before the Tribunal.

9 MR. DEBEVOISE: I don't know how Ferrovías  
10 can understand that they're going to continue to  
11 receive rents for an easement for 50 years from a  
12 company that is not licensed to provide electricity.

13 MR. STERN: They have a Contract, first of  
14 all. And, again, this is trying to smear GESUR and,  
15 by extension, smearing Ferrovías.

16 MR. DEBEVOISE: The witness has stated that  
17 legal security was their concern. Legal security can  
18 work both ways.

19 MR. STERN: Excuse me. I didn't know I was  
20 engaged in colloquy with Guatemala's counsel.

21 Again, I object to the relevance of this  
22 question.

04:24:18 1                   PRESIDENT RIGO: Basically we sustain the  
2 objection as we have sustained the previous one.

3                   If you could move on.

4                   BY MR. DEBEVOISE:

5           Q. All right. Well, Mr. Spiegel, why don't  
6 we talk about your personal involvement in negotiation  
7 of this Preliminary Agreement.

8                   How many meetings did you attend in  
9 connection with the negotiation of this Agreement?

10          A. This Preliminary Agreement, as well as the  
11 previous Agreements, were carried out with Mr. Senn,  
12 as well as Mr. Juan Pablo Carrasco at one point, to be  
13 able to indicate the requirement we were going to have  
14 in terms of easement for the remaining 32 kilometers.  
15 And, clearly, we had several meetings to be able to  
16 continue with the--with the expansion of our easement  
17 requirement.

18          Q. Did you have a signed term sheet for this  
19 deal?

20          A. There is an Agreement with them, but the  
21 Contract was not signed because of lesividad. The  
22 Contract is drafted and--until all the legal

04:25:49 1 conditions are there, but a Preliminary Agreement is  
2 something that addresses the relevant issues and,  
3 later on, these issues are reflected in a Contract  
4 when it gets finally decided that it is feasible.

5 Q. Mr. Spiegel, I would like to refer you to  
6 document--document--well, we'll wait. We'll lay a  
7 predicate for that.

8 How did you learn about the Lesivo  
9 Declaration?

10 A. The Lesividad Declaration was basically  
11 something very public in Guatemala. It became known  
12 through statements in the press, of the radio. And  
13 before we learned about this publicly, we had talked  
14 to Ferrovías. And, initially, they had given us the  
15 certainty that we would be able to continue, as we  
16 have continued so far with our Contracts, but that  
17 they were concerned because they did not know whether  
18 they were going to have some continuity in their  
19 dealings with the Government.

20 Q. Did they tell you that their legal rights  
21 under their Concession were still in force,  
22 notwithstanding the lesivo?

04:28:06 1           A.    They mentioned to us that as long as the  
2           possibility to reach an agreement with the Government  
3           was still valid, we could continue with our Contracts  
4           as we have done so far.

5           Q.    Were you aware that, with the Declaration of  
6           Lesivo, they didn't lose their legal right to the  
7           concession?

8           A.    The Lesividad Declaration in a country such  
9           as Guatemala is very concerning because it means that  
10          a Government, at that point in time, may have the  
11          desire to terminate a specific Concession; that is to  
12          say, it is something that cannot be taken lightly, but  
13          it is quite concerning, in particular, if part of our  
14          business is a Contract that we have with Ferrovías.  
15          Therefore, we were also very concerned, and we  
16          continue to be concerned to date, in the sense that  
17          the Government could make a unilateral decision to  
18          terminate these Contracts.

19          Q.    These Contracts you have in GESUR with  
20          Ferrovías, these are in what we refer to in this  
21          proceeding as Phase 2, the southern line, Southwest of  
22          Guatemala City; correct? Or Escuintla?

04:29:45 1 A. That is correct.

2 Q. And the Declaration of Lesivo was with  
3 respect to a Concession for rolling stock, for railway  
4 cars and engines; correct?

5 A. The Lesividad Declaration that prevents a  
6 company from continuing their business is the  
7 beginning of the end of a Global Contract. It is not  
8 just a small portion of what was declared lesivo, but  
9 since they cannot operate, there are some other  
10 problems--and we have already experienced them, and it  
11 has to do with the squatters along the lines, along  
12 the railway lines, since the train is no longer  
13 operating.

14 Q. You said in your Statement that GESUR and  
15 Planos y Puntos had invested more than \$10 million in  
16 the easement; is that correct?

17 A. What--what is invested for that amount that  
18 you indicated refers to the line for transmission,  
19 distribution and substations that are installed along  
20 the railway line. That's the amount that's been spent  
21 thus far; not only on the line, but on all the  
22 equipment required for being able to distribute to the

04:31:21 1 users.

2 MR. DEBEVOISE: Could we have Exhibit R-259,  
3 please.

4 BY MR. DEBEVOISE:

5 Q. And would you please confirm for me that this  
6 document dated June 10, 2003, Guatemala City. It's  
7 addressed to Mr. Sarceno, the Overseer of FEGUA; is  
8 that correct?

9 A. That is correct.

10 And I can also ratify for you that that's the  
11 first--this is the first time I'm looking at this  
12 document. I don't know what it's about, and I don't  
13 know what its relevance is.

14 MR. DEBEVOISE: Can we scroll down, please.

15 BY MR. DEBEVOISE:

16 Q. And this is coming from Mr. Miguel Angel  
17 Samayoa, Chief, Engineering Planning and Projects  
18 Department at FEGUA; correct?

19 A. Okay. Yes, that's how it appears here.

20 MR. DEBEVOISE: If we could scroll back to  
21 Page 3, please.

22

04:32:43 1 BY MR. DEBEVOISE:

2 Q. You'll see a photograph there of the right of  
3 way, of Ferrovías' Concession between Palín and  
4 Escuintla, the area where you had your easement. And  
5 you'll see that the poles are right in the middle of  
6 the right of way; correct?

7 MR. STERN: I'm going to object. The witness  
8 says he has never seen this document. He's not an  
9 author of the document. He's asking to him to  
10 authenticate and agree to photographs that he didn't  
11 take and hasn't had any involvement in.

12 MR. DEBEVOISE: Well, he can certainly say  
13 whether these poles are in the middle of the easement.  
14 The photograph is right there.

15 MR. STERN: Then I object to the relevance to  
16 the question.

17 MR. DEBEVOISE: The relevance will become  
18 quite obvious with my next question.

19 MR. STERN: Then I would request that you get  
20 to the relevance.

21 PRESIDENT RIGO: Mr. Debevoise, why don't you  
22 explain to the witness what exactly the document is,



04:33:53 1 and then ask both questions at the same time, one  
2 after the other.

3 BY MR. DEBEVOISE:

4 Q. Mr. Spiegelger, this report, as you can read  
5 here, is a report to the Overseer of FEGUA from the  
6 Chief Engineer reporting on encroachments on the right  
7 of way. And it shows photographs taken during a  
8 survey of the right of way, including electric poles  
9 and wires in the right of way.

10 Now, you said that your company invested  
11 \$10 million--not all of it in poles--but a  
12 considerable sum of money, and if the poles are in the  
13 middle of the right of way, how will you have any  
14 security if Ferrovías constructs a railroad?

15 You're going to have to move those poles,  
16 won't you?

17 MR. STERN: Objection; no foundation.

18 MR. DEBEVOISE: The photographs are there for  
19 everyone to see.

20 MR. STERN: No foundation to connect any of  
21 this evidence to this witness or knowledge of this  
22 witness.

04:35:16 1                   MR. DEBEVOISE: I believe we're talking about  
2 the investment that would be--that has been made and  
3 would be wasted if Ferrovias were to comply with its  
4 Contract.

5                   MR. STERN: Again, there is no foundation for  
6 this document to ask the witness questions about this;  
7 none.

8                   PRESIDENT RIGO: We will dismiss the  
9 objection, and you may go ahead.

10                  BY MR. DEBEVOISE:

11                  Q. Mr. Spiegelger, then, the question is: If  
12 Ferrovias decided to construct Phase 2 under their  
13 Concession, GESUR would need to move any poles that  
14 were in the right of way; correct?

15                  A. That is correct. If at a given point in time  
16 there is a post--such as that you're indicating  
17 there--that's in the middle of the right of way and  
18 some--and it needs to be moved in order to have the  
19 way cleared, once the squatter settlements--which you  
20 can see right there--are no longer there, at that  
21 time, GESUR would have no problem whatsoever moving  
22 any type of post which, at a given point in time,

04:37:07 1 might need to be moved in order to leave a clear  
2 passageway for the train.

3 Q. And that would cost your company a lot of  
4 money; correct?

5 A. What needs to be done to guarantee that  
6 Ferrovias will continue using the rail line--well, we  
7 have no difficulty whatsoever doing what needs to be  
8 done because it figures in our Contracts that once  
9 Ferrovias requires the moving of some posts, we want  
10 to make sure it's not in the way, there is no problem  
11 doing that.

12 Q. Are you aware that there was a pending court  
13 decision in which a judge is determining whether the  
14 Declaration of Lesividad properly issued?

15 Yes or no. Are you aware?

16 A. No, I'm not aware of it.

17 Q. Are you aware that the Court can find that  
18 the Lesivo Declaration should not have been issued?

19 Yes or no?

20 A. No, I'm not aware of that.

21 Q. Under Guatemalan Law, the Court can overturn  
22 the Declaration of Lesivo. If that were to happen,

04:38:48 1 would there be any threat at that point to your  
2 easements?

3 A. That's why I'm here, because at this time,  
4 they there could eventually be some kind of problem  
5 with the Declaration of Lesividad that would impair  
6 our interest. As you yourself is showing in the  
7 photos, we are using the right of way which we  
8 have--which has been recognized with Ferrovías for the  
9 use and usufruct of this part of the transmission  
10 line. So we are concerned that, in effect, this could  
11 come to pass.

12 Q. And you're also concerned about your existing  
13 easement?

14 A. That is correct. What's most--what concerns  
15 us most at this time is the existing easement.  
16 Logically, for that very reason--and it's because of  
17 the uncertainty--we were unable to enter into the  
18 Contract for extension of the line.

19 Q. But if the Court were to rule in favor of  
20 Ferrovías, would you resume negotiations?

21 A. I would answer in the affirmative,  
22 immediately.

04:40:16 1 Q. I think in your Statement you indicated that  
2 you learned about this Declaration of Lesivo in the  
3 press; is that correct?

4 A. That is correct. We had just recently signed  
5 the last Contract that we have with Ferrovías, and if  
6 you look at the documents, it's from the same year,  
7 2006, as the Declaration of Lesividad.

8 For that very reason, we are very much--we're  
9 looking at any situation that might affect the  
10 interests that we had to this right of way.

11 Q. And I think you also indicated in your  
12 Statement that what you heard in the press indicated  
13 to you that the Government was against Ferrovías, and  
14 you attributed that to statements of--from people in  
15 the Government; is that correct?

16 A. That is correct, beginning with the President  
17 of the Republic, who was the first one who came out  
18 publicly to make such indications to both the written  
19 and broadcast media.

20 Q. Right. And I'd like to show you a little  
21 video and see if you ever saw this video.

22 (Video shown.)

04:43:01 1 MR. DEBEVOISE: For the record, by the way,  
2 that is Exhibit C-132.

3 BY MR. DEBEVOISE:

4 Q. Did you recognize any of the people in that  
5 video, Mr. Spiegelner?

6 A. Yes. Mr. Juan Pablo Carrasco, who is here in  
7 the room, appears there and also Mr. Henry Posner and  
8 Jorge Senn.

9 Q. Thank you very much. Did you recognize the  
10 backdrop in that video, what was written on the wall  
11 behind the people who were speaking?

12 A. No, I didn't notice that.

13 Q. We can put it back up, if you like, but I  
14 think it's clear to all that it said "Ferrovías."

15 So this was a press conference that was being  
16 conducted at some premise where they wanted the press  
17 to know that it was Ferroviás' press conference.

18 Does that look right, in the frame you're  
19 seeing now?

20 A. Correct. I can see it says "Ferroviás"  
21 behind him.

22 Q. News doesn't get into newspapers and radio

04:44:12 1 and TV unless someone puts it there, someone releases  
2 it; correct?

3 A. I can't say for sure.

4 Q. Okay. Thank you.

5 PRESIDENT RIGO: Mr. Debevoise, your time is  
6 up.

7 MR. DEBEVOISE: Our time calculator gave me  
8 eight more minutes, but I apologize.

9 PRESIDENT RIGO: I should say, as a matter of  
10 administration of the proceedings, that we are  
11 counting the time; while if the Tribunal would  
12 interrupt and ask questions, we are not counting this  
13 time as the Parties' time.

14 Nonetheless, we count any incident during the  
15 cross-examination in which there are objections or the  
16 Tribunal has to decide as part of the  
17 cross-examination. So that may be the reason.

18 But if you have one question more--also, as I  
19 said, we have to sort of stop just shortly before  
20 5:00, and I would like if the Tribunal has any  
21 question or the other Party for redirect.

22 MR. DEBEVOISE: Thank you, Mr. President, for

04:45:57 1 clarifying.

2 PRESIDENT RIGO: Thank you.

3 Do you have any?

4 MR. STERN: Briefly, please.

5 REDIRECT EXAMINATION

6 BY MR. STERN:

7 Q. Mr. Spiegelger, do you have personal knowledge  
8 of all the facts contained in your Statement?

9 A. Where I have made a Statement, yes.

10 Q. And do you have personal knowledge of all the  
11 facts contained in the First Statement that was  
12 rendered by Mr. Ordoñez and Mr. Paredes?

13 A. That is correct. I also have such knowledge.

14 Q. And were you personally involved in the facts  
15 that are stated in both of these Statements?

16 A. That is correct, in the affirmative.

17 Q. And that would include the decision of your  
18 companies not to go forward with the Preliminary  
19 Agreement with Ferrovías which is described in both of  
20 the Statements?

21 A. It was decided not to continue until there  
22 were legal certainty that, in effect, it would be



04:47:23 1 possible to continue with the already existing  
2 Contracts and with a new Contract.

3 Q. Again, have you personal knowledge of that  
4 decision? You were involved in that; correct?

5 A. That is correct.

6 MR. STERN: Thank you. Nothing further.

7 PRESIDENT RIGO: Thank you.

8 QUESTIONS FROM THE TRIBUNAL

9 ARBITRATOR EIZENSTAT: We saw a video of the  
10 Ferrovías press conference, and I believe there was  
11 also a press release.

12 Did you first learn of the Lesivo Declaration  
13 from this press conference and from the press release  
14 from Ferrovías?

15 THE WITNESS: No. I had already learned of  
16 it prior to this press release at the time when the  
17 Declaration of Lesividad was made. The President of  
18 the Republic, Óscar Berger, well, when he made that  
19 Declaration, that's when we found out about it. This  
20 video came long after the date of Declaration of  
21 Lesividad by the President.

22 ARBITRATOR EIZENSTAT: Was the President's

04:48:46 1 Declaration publicized by the media at the time?

2 THE WITNESS: That is correct. It was widely  
3 publicized.

4 ARBITRATOR EIZENSTAT: Mr. Debevoise asked  
5 about the different Contracts.

6 Were you aware that, under two of these  
7 Deeds, 143 and 158, that Ferrovías continued to have  
8 the right to operate the railway, notwithstanding the  
9 Declaration?

10 THE WITNESS: Our last Contract is dated  
11 August 2006, and it was entered into before the  
12 Declaration of the Lesividad of the Contracts.

13 In other words, the Contracts that we have  
14 signed were before this was declared by the President.

15 ARBITRATOR EIZENSTAT: Did Ferrovías, when  
16 you indicated that you were not going to proceed with  
17 this next Contract, try to dissuade you and tell you  
18 that they still maintained the right to the equipment  
19 and, under Deed 402, could legally have continued to  
20 operate?

21 THE WITNESS: Yes, but not so much with  
22 respect to the equipment because the equipment isn't

04:50:12 1 all that important for us; but, rather, the right of  
2 way for the train, along the train line. In other  
3 words, what's of interest for us is to be able to  
4 continue with the Territorial Concession, which is  
5 where our line runs. The difficulty, once one no  
6 longer has the equipment, is that operations are  
7 suspended and this entails people beginning to invade  
8 the land, squatters. So the one thing brings along  
9 the other.

10           So once the train no longer run, then people  
11 invade the lands, and this stands in the way of us  
12 maintaining our transmission and distribution lines.

13           That is the problem subsequent to this  
14 Declaration.

15           ARBITRATOR EIZENSTAT: Who told you that the  
16 trains would no longer run?

17           THE WITNESS: With the Declaration of  
18 Lesividad by the President, logically, the company,  
19 Ferrovías, as such, did not continue operating its  
20 trains, and, therefore, this led people to begin to  
21 invade places where they had not done so before. And  
22 this is prejudicial to us as regards maintaining the

04:51:48 1 lines.

2 PRESIDENT RIGO: Any questions, Mr. Stern, on  
3 the questions of Mr. Eizenstat?

4 MR. STERN: Nothing further.

5 PRESIDENT RIGO: Mr. Debevoise?

6 RECROSS-EXAMINATION

7 BY MR. DEBEVOISE:

8 Q. Mr. Spiegel, you were asked again by  
9 Mr. Eizenstat about how you learned about the Lesivo  
10 Declaration.

11 Did you read the Official Gazette when this  
12 came out?

13 A. That is to say, before it came out of the  
14 Official Gazette, it was already publicly known that  
15 President Óscar Berger was against this Concession.

16 Subsequently, since it was a very important  
17 matter for us, we were paying close attention to any  
18 matter that might be related to the easements we had;  
19 and anything that might affect Ferrovías would  
20 indirectly affect us as well.

21 MR. DEBEVOISE: I have no further questions.

22 PRESIDENT RIGO: Very good. Thank you.

04:53:16 1                   How do you pronounce your name? Do you say  
2 Speegler (ph.) or Speigeler (ph.)?

3                   THE WITNESS: (Pronouncing)

4                   PRESIDENT RIGO: Mr. Spiegeler, thank you  
5 very much for your testimony. You may stand down.

6                   THE WITNESS: Thank you. Very kind of you.

7                   PRESIDENT RIGO: As I said at the beginning  
8 of the session, that we would adjourn shortly before  
9 5:00, and this is sort of right on the spot. And we  
10 will reconvene on Sunday, 2 o'clock in the afternoon  
11 from--our session from 2:00 to 6:00.

12                   Thank you so much. Enjoy the break.

13                   (Whereupon, at 4:55 p.m., the hearing was  
14 adjourned.)

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## 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.

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DAWN K. LARSON