

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

- - - - -x
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 In the Matter of Arbitration :
 Between: :
 :
 RAILROAD DEVELOPMENT CORPORATION, :
 :
 Claimant, :
 : Case ARB/07/23
 and :
 :
 THE REPUBLIC OF GUATEMALA, :
 :
 Respondent. :
 :
 - - - - -x Volume 4

HEARING ON MERITS

Monday, December 12, 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 9:03 a.m. before:

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- PROF. JAMES CRAWFORD, SC, Arbitrator
- HON. STUART E. EIZENSTAT, Arbitrator

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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. Ladies and
3 gentlemen. We are having the examination of
4 witnesses, and we thank both Parties for the schedule
5 you've agreed on for the coming days, which will give
6 us some peace of mind that, provided we keep it, which
7 we ask everybody's cooperation.

8 MR. ORTA: Good morning, Mr. Chairman.

9 We take note of the fact that I think this
10 morning, maybe about half an hour ago or so, Claimant
11 submitted via e-mail a copy of this new piece of
12 evidence, the Excel spreadsheet model, the dynamic
13 model as opposed to the PDF piece of paper that they
14 submitted before.

15 I just want to remind the Tribunal we are,
16 from the Respondent's side, just waiting to see
17 whether the Tribunal does want to consider that as a
18 possible piece of evidence, notwithstanding our
19 objection. If that is the case, we would want to have
20 our Expert review it before we finally determine what
21 our position is.

22 I just wanted to remind the Tribunal that we

09:05:43 1 are waiting to hear from the Tribunal on that point.

2 PRESIDENT RIGO: Mr. Foster.

3 MR. FOSTER: Well, again, we can't imagine
4 why anyone would object to merely having the dynamic
5 model. It's something that, of course, I could sit
6 Dr. Spiller in the chair with his calculator and get
7 him to do the same thing. It doesn't make much sense
8 to do it that way when we're trying to be efficient as
9 opposed to long-winded.

10 MR. ORTA: I'm sorry, the objection is the
11 fact that it's being produced now during trial, not in
12 compliance with the rules. We had a set of rules, and
13 so--I mean, the objection is based on that, you know,
14 this is being submitted very late in the day. We
15 haven't even seen it, a dynamic model that we've not
16 seen, had a chance to look at, test, or anything.

17 PRESIDENT RIGO: Obviously, if it was sent
18 half an hour ago, we have not seen it, either, so we
19 will come back to you on that. But your objection is
20 purely that it is extemporaneous.

21 MR. ORTA: Well, and we don't have an ability
22 to make any substantive objection over the model

09:06:58 1 because we haven't seen it yet.

2 PRESIDENT RIGO: We will proceed to the
3 examination of the witness.

4 INNGMAR ITEN, CLAIMANT'S WITNESS, CALLED

5 PRESIDENT RIGO: Good morning, Mr. Iten.

6 THE WITNESS: Good morning.

7 PRESIDENT RIGO: You have a statement before
8 you. Could you read it out, please.

9 THE WITNESS: I solemnly swear, upon my honor
10 and conscience, that I will tell the truth, the whole
11 truth, and nothing but the truth.

12 PRESIDENT RIGO: Thank you very much.

13 MR. FOSTER: Mr. Stern will present the
14 witness.

15 PRESIDENT RIGO: Mr. Stern.

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

17 DIRECT EXAMINATION

18 BY MR. STERN:

19 Q. Good morning, Mr. Iten.

20 A. Good morning.

21 Q. Do you have in front of you the copies of the
22 statements you have submitted in this arbitration on

09:07:39 1 behalf of Maya Quetzal dated May 12, 2009, and
2 March 11, 2011?

3 A. Yes.

4 Q. Okay. Do you ratify those statements and
5 affirm their truthfulness before the Tribunal?

6 A. Now it's fine. Now I can hear.

7 Q. Can you hear now, Mr. Iten, the translation?

8 A. Yes.

9 Q. Mr. Iten, what is your position at Maya
10 Quetzal?

11 A. I'm President of the company.

12 Q. And what types of business does Maya Quetzal
13 engage in?

14 A. We work with all metals for recycling,
15 export, classification--classifying and exporting
16 them.

17 Q. And do you refer--do you work in scrap metal?

18 A. That's right.

19 Q. Now, in the course of your scrap metal
20 business, do you ever--did you ever have occasion to
21 meet or speak with Mr. Héctor Pinto?

22 A. That's right.

09:09:06 1 Q. And how often did you meet or speak with
2 Mr. Pinto?

3 A. I met Mr. Pinto 15 years ago selling other
4 items, leather, and I didn't really like him. He
5 didn't keep his word. He wasn't a proper
6 businessperson.

7 And, in 2006, through Aceros de Guatemala, I
8 was required to engage in business with Ramon Campollo
9 through him. I opposed having a relationship with him
10 because I already knew him. Nonetheless, he was
11 imposed as the intermediary. That was in 2006.

12 Q. Let me take you to your meetings and
13 discussions with Mr. Pinto in 2006. In the course of
14 those meetings and discussions, did he ever indicate
15 to you whether he was representing the interests of
16 Mr. Ramon Campollo?

17 A. He told me that. Plus, the only way that I
18 accepted speaking with him was because he was coming
19 on behalf of Mr. Campollo because I did not consider
20 Pinto to have any credibility.

21 Q. Let me direct your attention to the scrap
22 metal auction which was conducted by the Government of

09:10:27 1 Guatemala in May of 2006, which you described in your
2 statements. Just prior to that action, did you have
3 an occasion to meet with Mr. Pinto?

4 A. That is right.

5 Q. Okay. Could you please describe that
6 meeting, what was said, what happened.

7 A. He tried to convince me that I needed to send
8 to him the spare parts that Mr. Campollo needed to
9 take to Santa Domingo because they had a similar train
10 as the one in Guatemala that they were using for the
11 sugar mill in Santo Domingo, and he wanted to try to
12 convince me that they were going to be the owners of
13 the railway in the future and that all that line and
14 all the cars were obsolete; that he was going to sell
15 them to me to recycle them because they were going to
16 set up a new train system.

17 Q. And the new train system that was referred
18 to, is it your understanding he was talking about the
19 Guatemalan railway?

20 A. Yes, the Guatemalan railway. He said that
21 they were going to take possession of it, and they
22 were going to set up a complex of warehouses in the

09:11:46 1 south that they were going to tie in with the ports,
2 and they were going to try to have a much more
3 profitable arrangement than what was happening with
4 the rails.

5 Q. And you said that they were going to take
6 possession of the railway. Who is the "they"? What
7 was your understanding who the "they" was that he was
8 referring to?

9 A. He said that Ramon Campollo already had
10 arrangements to keep the railroad. He spoke on behalf
11 of the Ramon Campollo because Héctor Pinto didn't have
12 any credibility.

13 Q. Now, after the May 2006 scrap metal auction
14 was conducted by the Government, did you have occasion
15 to deal with Mr. Pinto again?

16 A. Yes. We were taking the scrap from the
17 railway. They were getting--had taken spare parts to
18 take to Santo Domingo, and there were several
19 meetings.

20 Q. Okay. And could you describe just the
21 process by which the scrap was delivered to
22 Mr. Campollo, scrap metal.

09:13:07 1 A. Initially, the auction process--well, it was
2 a public auction in which Maya Quetzal, my company,
3 was awarded the Contract as the buyer. At the
4 auction, well, it was held by the Government of
5 Guatemala through Coyapine (ph.), which is the
6 Commission of State Assets. So, the scrap metal that
7 was going to be delivered to me was from the railway,
8 so FEGUA handed the units over to Coyapine, the
9 Commission on State Assets, and the Commission on
10 State Assets handed over all the recycling materials
11 to me.

12 So there, as I received the units, the
13 personnel from the Madre Tierra sugar mill came in. I
14 understand that was--also belongs to Mr. Campollo with
15 the equipment and all, and we supervised the cutting
16 of the spare parts, and they were going to take it
17 straight from there to the containers that were going
18 to be sent to Santo Domingo. That's it.

19 Q. And what was your understanding as to why the
20 scrap metal, these spare parts had to be sent to Santo
21 Domingo, to the Dominican Republic?

22 A. Because they had a train in Santo Domingo

09:14:30 1 that they used to handle the sugar at Ramon Campollo's
2 sugar mill. They needed those spare parts because
3 they couldn't find them anywhere else.

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

7 PRESIDENT RIGO: Mr. Orta, Mr. Salinas?

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

10 CROSS-EXAMINATION

11 BY MR. SALINAS-SERRANO:

12 Q. Good morning, Mr. Iten.

13 A. Good morning.

14 Q. My name is Daniel Salinas. I'll be asking
15 you some questions. I represent the Government of
16 Guatemala in this proceeding.

17 A. Okay.

18 Q. Mr. Iten, just to put the issue in context,
19 Mr. Pinto is dead, isn't he?

20 A. Yes, that's right.

21 Q. Now, you said that you met Mr. Pinto 15 years
22 ago; is that correct?

09:15:30 1 A. That is correct.

2 Q. And that you met with him in the context of
3 selling him or him selling you some leather; is that
4 correct?

5 A. Fifteen years ago I sold it to a tannery
6 where Ramon's brother was the General Manager, and the
7 purchasing manager was Pinto. That is why I had a
8 relationship with him.

9 Q. You stated Pinto as not being a proper
10 businessperson; is that correct?

11 A. That is correct, due to the fact that at the
12 time, 15 years ago, he was always trying to get
13 commissions. I told this to Magena, Ramon's sister.
14 It became a problem. He was threatened by Pinto, and
15 I was received threats from--it became a problem. I
16 stepped and only negotiated with Magena.

17 Q. Let's take that one step at a time. He was
18 trying to get commissions, you say?

19 A. Correct.

20 Q. Can you tell us a little bit about that.

21 A. The tannery was called La Pequeña, and he
22 would represent purchasing at the tannery on behalf of

09:16:55 1 Campollo's group. When I would deliver to them, I
2 began by negotiating with Magena, but then they
3 imposed him as the purchasing manager, and he wanted
4 to get an extra commission out of me, so not only
5 would I pay for the product, but he would also want me
6 to pay him a commission as though he were--well, that
7 seemed like corruption to me, so I didn't accept it.
8 I went to Magena, but that was an impasse of about a
9 month of being in meetings of confronting him to
10 clarify everything.

11 Q. So, he was trying to extract additional money
12 from you that wasn't contemplated in your business
13 relationship with this person you called Magena; is
14 that correct?

15 A. That is correct.

16 Q. And you say you told this to this person you
17 called Magena?

18 A. That is right. Magena is the sister of Ramon
19 Campollo.

20 Q. And you dealt directly with Magena after
21 that?

22 A. That is correct.

09:17:56 1 Q. So, in that context, Mr. Pinto was going
2 outside his authorized duties and asking you for
3 additional benefits; is that correct?

4 A. That is correct.

5 Q. Now, let's go for a second to the statement
6 you say Mr. Pinto made. You say in your first
7 Declaration--and, sir, you have a binder in front of
8 you which contains documents. Those documents are
9 both in the English and Spanish language. For
10 purposes of the Tribunal we will be projecting on that
11 screen to your left a document, but we will be
12 projecting them in the English language so that the
13 Tribunal has the benefit of reading them in that
14 language, but if you wish to see the Spanish version,
15 it will be before you in the binder, and I will be
16 directing to you the corresponding tabs.

17 And actually I might be proving myself not to
18 be not accurate. Does that binder--well, you have
19 before you both of your statements; correct? Right
20 underneath the binder.

21 A. That is correct.

22 Q. Okay. Now, sir, in your first Declaration,

09:19:12 1 Clause 3, where it says first, second, and third, so
2 second page, you say that one of the things Mr. Pinto
3 told you was that, "It will not be long before the
4 Government of Guatemala will take the railway from
5 Ferrovías and, therefore, any future purchase of scrap
6 metals derived from railway assets or equipment would
7 have to be negotiated with him." Is that correct?

8 A. That is correct.

9 Q. So, Mr. Pinto told you that the negotiations
10 for the purchase of scrap metals would be directly
11 with him, with Mr. Pinto, not with Mr. Campollo;
12 correct?

13 A. Yes, because he would say that he was
14 Campollo's representative.

15 Q. Now, you said--you used the word "jactaba"
16 just now. The translation I think might be a little
17 inaccurate. It says he would say that, but you used
18 the word "jactaba." What do you mean by "jactaba"?

19 A. He liked to repeat that he represented
20 Mr. Campollo. He was very proud of that.

21 Q. I think--so, is it your testimony that he
22 would brag about being Campollo's representative?

09:21:10 1 A. Yes. He liked to go around saying that he
2 represented Campollo.

3 Q. Did he also ever tell you that he represented
4 the entire sugar industry?

5 A. No, never.

6 Q. From what you know of Mr. Pinto, knowing him
7 for 15 year, did you ever know him to represent the
8 entire sugar industry?

9 A. No, never. I always knew that he worked for
10 Ramon Campollo.

11 Q. Now, you say that in your relationship--in
12 your prior relationship with Mr. Pinto when he would
13 sell you leather, when he tried to extract additional
14 benefits from you that were outside his scope of
15 duties or his authorization, you went directly to the
16 person from the Campollo group who was above
17 Mr. Pinto; is that correct?

18 A. I went to Ramon's sister, Magena, who was the
19 General Manager of the tannery.

20 Q. Do you know Mr. Campollo?

21 A. Not personally, but I recognize him. I know
22 who he is.

09:22:26 1 Q. Did you reach out to Mr. Campollo and ask him
2 in this occasion when you heard these statements from
3 Mr. Pinto about whether those statements had been
4 authorized by him in any way?

5 A. But I was pressured by Aceros de Guatemala,
6 which was the key smelting company in Central America
7 to which I hand over most of my product. I was
8 pressured by them to deliver the product to Ramon
9 Campollo because they were friends, so I was certain
10 that it was for Ramon that that product was earmarked.

11 Q. We will get to how that product came to be in
12 the possession of Mr. Campollo's companies, but we
13 will leave that for a minute from now. But I'm still
14 trying to understand the context of the statements.
15 So, am I understanding correctly that you did not
16 reach out to anyone else within the Campollo
17 organization to question them about these statements
18 that Mr. Pinto was making?

19 A. I only spoke with Eduardo Ubico, who was the
20 manager for the Madre Tierra sugar mill, which is a
21 property of Mr. Ramon Campollo, and they are the ones
22 who were coordinating the cutting of the spare parts,

09:23:51 1 and it was confirmed there also that Ramon Campollo
2 was the interested Party.

3 Q. But I want to be very precise here, sir. You
4 say you spoke to Mr. Ubico. Did you tell Mr. Ubico
5 that Mr. Pinto had been telling you that he would from
6 then on, from very near in the future on, you would be
7 dealing directly with him because they, i.e., as you
8 understand it, Mr. Campollo would control the
9 railroad? Did you tell that to Mr. Ubico?

10 A. What Mr. Ubico told me was that I should pay
11 attention to Hector Pinto because he was the person
12 who Ramon Campollo put in charge of all of those kinds
13 of businesses. I did explain that the interested
14 Party on my part would provide all of the scrap from
15 the sugar mill and also from Héctor Pinto.

16 Q. Let me try my question again. Did you tell
17 Mr. Ubico or Mr. Campollo that Mr. Pinto was telling
18 you that Mr. Campollo would control the entire
19 railroad shortly thereafter?

20 A. We did discuss this with Eduardo Ubico. We
21 were discussing what Hector Pinto had been telling me,
22 and he told me that he was the right-hand man for

09:25:16 1 Ramon Campollo. I never did speak with Ramon.

2 Q. So your testimony here is that you, in fact,
3 told Mr. Ubico, who I understand--you understood was
4 employed by Ingeniero (ph.) Tierra Madre that
5 Mr. Pinto had been saying that he was going to control
6 the entire railway?

7 A. Not Héctor. He said that Ramon was going to
8 be the owner and that he was going to be in charge of
9 selling all the scrap. That Héctor Pinto was going to
10 be in charge of selling all the scrap metal.

11 Q. That's what Mr. Pinto was telling you?

12 A. That's what Mr. Pinto told me, and that's
13 what I discussed with Eduardo Ubico.

14 Q. Now, in your Second Statement in Paragraph 5,
15 you mentioned that Mr. Pinto had his offices at
16 Edificio El Triángular in Guatemala City; is that
17 correct?

18 A. That is correct.

19 Q. Now, you say that that building is owned by
20 Mr. Campollo; is that correct?

21 A. Yes, that's what everyone says in Guatemala.

22 Q. But you don't know whether Mr. Campollo owns

09:26:41 1 that for a fact; correct?

2 A. That is correct.

3 Q. Now, what is Maya Quetzal's address,

4 Mr. Iten?

5 A. Avenue Tanatra Sur--

6 THE INTERPRETER: The Interpreter apologizes,

7 it went very quickly.

8 A. Tanatra Sur Avenue, 35-91, Zone 12, Guatemala

9 City.

10 Q. The same address for Ferrovías de Guatemala;

11 correct?

12 A. That is correct.

13 Q. Now, you don't speak for Ferrovías de

14 Guatemala, do you?

15 A. No, sir.

16 Q. You don't represent them for every purpose

17 just because you share office space; correct?

18 A. Excuse me, could you repeat the question?

19 Q. Sure.

20 You don't represent Ferrovías de Guatemala in

21 every respect just because you share office space, do

22 you?

09:27:53 1 MR. STERN: I'm going to object to the
2 question because he said he didn't represent them at
3 all, and the question in every respect suggests that
4 there's--he represents them in some respects. I think
5 that's misleading.

6 MR. SALINAS-SERRANO: I will rephrase the
7 question. Good point, Mr. Stern.

8 BY MR. SALINAS-SERRANO:

9 Q. Just because you share office space doesn't
10 mean that you represent Ferrovías de Guatemala in any
11 respect; correct?

12 A. That is correct.

13 Q. Now, going back to the statements, when
14 exactly did Mr. Pinto tell you this, that it would not
15 be long before the Government of Guatemala would take
16 the railway away from Ferrovías?

17 A. That was due to the fact that I didn't want
18 to negotiate with Mr. Pinto because of my history with
19 him. He wanted to convince me that he was going to be
20 very powerful and that he was going to be able to
21 engage in more business with me selling all the scrap
22 from all the railway because initially when it was

09:29:02 1 imposed on me that I sell the spare parts to Ramon
2 Campollo and that I deal with Héctor Pinto as the
3 intermediary as the person in charge of receiving the
4 spare parts on behalf of Mr. Campollo, I objected to
5 that person because of the history, and I met with him
6 a few times, once at Central Station before the
7 auction and before taking out all the materials, and
8 there he told me that Ramon was going to be the owner
9 of the whole railway and that he was going to be able
10 to sell me all of the iron from the rails and the cars
11 because it was obsolete, and they were going to be
12 changing the system.

13 Q. Thank you.

14 My question was when. When did these
15 statements allegedly take place?

16 A. Days before taking out--days before the
17 auction.

18 Q. So, would that have been on or about
19 May 2006?

20 A. I don't remember the exact date, but it was
21 10 days before we began to pull out all the spare
22 parts and all the scrap metal, more or less.

09:30:21 1 Q. First Statement of Mr. Iten, again, Clause 3.
2 I just want to be precise about the time, Mr. Iten,
3 and I'm going to show you or direct you to your First
4 Statement, third paragraph. You say that you had a
5 meeting with Mr. Pinto at the railway yards of the
6 Central Station located in zone one, and you say
7 second line from the top in the English version, that
8 it was sometime during the first 10 days of the month
9 of May 2006.

10 Does that refresh your recollection as to
11 when it was?

12 A. Yes.

13 Q. Now, were you aware, Mr. Iten, that by that
14 point Mr. Campollo had already communicated directly
15 to Ferrovías that he had no interest in participating
16 in any railway project?

17 A. I did not know that, no.

18 Q. Okay. Now, Mr. Iten, Mr. Pinto told you in
19 May 2006, that, again, quoting, "It would not be long
20 before the Government of Guatemala would take the
21 railway away from Ferrovías," and he also told you
22 that you should wait to hear from him again; is that

09:31:48 1 correct?

2 A. That is correct.

3 Q. Did you ever hear from him again?

4 A. After? After, yes, but we were in contact
5 because we were dealing with the auction that lasted
6 more than a year.

7 Q. About any additional scrap from the railway?

8 A. No.

9 Q. He allegedly also told you that the railway
10 control would pass to Mr. Campollo, to Mr. Campollo
11 Marroquin you say, who would be in charge of
12 negotiating any other business involving the
13 Guatemalan railway in the future.

14 Have you done any additional scrap metal
15 business involving the railway equipment or the
16 railway in general since you spoke to Mr. Pinto?

17 A. I don't know if I understood the question
18 correctly. Please could you ask the question again?

19 Q. Sure.

20 Have you done any additional scrap metal
21 business with the railway equipment after your
22 conversations with Mr. Pinto?

09:33:15 1 A. No. What I bought was Bandegua (ph.), which
2 is Chiquita Banana. This was way before the FEGUA
3 auction, and it wasn't with Mr. Pinto.

4 Q. In your First Statement you say that you know
5 that the Lesivo Declaration was, "months after his
6 meeting with Pinto," your meeting with Pinto, in
7 May 2006, and that's in your first Declaration, again
8 Clause 3.

9 Now, do you know, sir, whether to this day
10 Mr. Campollo has any right or possession of railway
11 equipment?

12 A. Only in Santo Domingo, not in Guatemala.

13 Q. So, your understanding is that Mr. Campollo
14 has absolutely no right or possession of any railway
15 equipment in Guatemala related to Claimant's Usufruct,
16 to the Ferrovías Usufruct?

17 A. That is correct.

18 Q. Now, you mentioned the railroad in the
19 Dominican Republic. Do you know anything about that
20 railroad?

21 A. Just what Mr. Héctor Pinto told me and
22 Eduardo Ubico told me.

09:34:37 1 Q. How did Hector Pinto describe that railroad?

2 A. That it would be used to take the sugar from
3 the sugar mill, just that, and we said that we were
4 going to go there and look at it, but we never went.

5 Q. Did Mr. Pinto mention how long the railroad
6 was?

7 A. I don't remember the details of the
8 conversation.

9 Q. Did Mr. Pinto tell you whether that railroad
10 provided freight transportation for an entire country?

11 A. I do not recall.

12 Q. You don't remember whether Mr. Pinto told you
13 or not?

14 A. That is correct.

15 Q. Now, do you know, Mr. Iten, whether the
16 railroad that Mr. Campollo supposedly operates in the
17 Dominican Republic is roughly about 20 to 30
18 kilometers long?

19 A. I don't know about that, really.

20 Q. During your testimony in answer to questions
21 from Mr. Stern, you classified that railroad as being
22 similar to the railroad in Guatemala. What did you

09:36:10 1 mean by that?

2 A. That it's the same--acts as the same wheels,
3 but I don't know the Santo Domingo railway.

4 Q. But you did understand--and correct me if I'm
5 wrong--that it was an internal railroad that the sugar
6 mill used to move the product; correct?

7 A. That is correct.

8 Q. And you had no understanding as to whether
9 the railroad had commercial operations and provided
10 services for third parties other than the sugar mill
11 that it serviced in the Dominican Republic; correct?

12 A. That is correct.

13 Q. Sir, are you aware that after May 2006, which
14 is when Mr. Pinto allegedly made these statements to
15 you, he contacted people from Ferrovías and even RDC,
16 Mr. Posner, himself, on more than one occasion asking
17 for Ferrovías to provide rail service? Are you aware
18 of that?

19 A. No.

20 Q. Now, let's move on to the actual auction of
21 the rail scrap material, and I just want to understand
22 exactly the operation of it.

09:37:45 1 You bought--your company, Maya Quetzal,
2 bought scrap metal directly from the Government of
3 Guatemala; is that correct?

4 A. Yeah, via an auction, that is correct.

5 Q. Through a public bid. And the public bid was
6 made by the Division of Public Goods of State?

7 A. That is correct.

8 Q. That is correct?

9 A. That is correct.

10 Q. Mr. Campollo did not buy, or Mr. Pinto didn't
11 participate in the bid to buy this equipment directly
12 from the Government, did they?

13 A. That is correct. He did participate.

14 Q. They participated in the bid?

15 A. Yes, that is correct.

16 Q. And they lost out to you?

17 A. That is correct.

18 "Ferrovías de Guatemala" also participated in
19 the bid.

20 Q. And after that Mr. Pinto came to you to buy
21 that scrap metal from you; correct?

22 A. Honestly, he did not come to me. "Ferrovías

09:39:08 1 de Guatemala" came to put pressure on me to sell the
2 spare parts to Campollo, and they imposed Héctor as
3 representative of Campollo, and I did not agree with
4 that.

5 MR. STERN: Could I just interject here. The
6 record, at least in English, seems to indicate that
7 Ferrovías de Guatemala came to put pressure on him,
8 and I don't believe that's what his testimony was.

9 MR. SALINAS-SERRANO: You're right, Kevin. I
10 think the testimony was Aceros de Guatemala.

11 THE WITNESS: That is correct.

12 BY MR. SALINAS-SERRANO:

13 Q. Mr. Iten, you've said this several times;
14 Aceros de Guatemala came to pressure you. Again, I'm
15 just trying to understand here. You just said that
16 Aceros de Guatemala participated in the bid; correct?

17 A. That is correct.

18 Q. And that Mr. Campollo allegedly also
19 participated in the bid?

20 A. It was Héctor Pinto who represented Ramon
21 Campollo, that is correct.

22 Q. And so, Aceros de Guatemala was competing

09:40:12 1 against Mr. Campollo to buy the same equipment; is
2 that correct?

3 A. That is correct.

4 Q. And your testimony to this Tribunal today is
5 that Aceros de Guatemala then later came to you to, as
6 you say, pressure you to give the equipment to Ramon
7 Campollo?

8 A. That is correct.

9 Q. When you say "pressure," what do you mean?
10 What did they do?

11 A. Aceros de Guatemala is a monopoly in
12 Guatemala. It is the largest company for steel
13 foundry in Guatemala, so it is one my company's number
14 one client. They cannot compete in price with me
15 because maybe I export all over the world, Asia,
16 Europe, the United States. However, but I have to
17 have a good relationship with them because in the
18 current administration, there was an Executive
19 Resolution where they cancel people who export too
20 much.

21 So, if I don't turn sell the goods to them or
22 if I don't do good business with them, giving them the

09:41:22 1 most or the largest part and they close the export,
2 Guatemala's a Third World country, and we have a
3 problems with monopolies, so I have to have a good
4 relationship with them. That is what I was making
5 reference to.

6 Q. And again, your testimony just--I just want
7 to make sure I understand this--is that Aceros de
8 Guatemala, who had been competing to acquire the very
9 same material that you had acquired and that
10 Mr. Campollo allegedly was trying to acquire, then
11 came to you and pressured you to give it to
12 Mr. Campollo. That's your testimony?

13 A. That is true.

14 Q. Now, let's go to your allegations as to how
15 this auction was conducted. You say in your Second
16 Statement, Paragraph 6, that, quote, you learned later
17 that a considerable part of the auction material
18 you're referring to here had been granted to Ferrovías
19 under Usufruct and had not been formally surrendered
20 by FEGUA; is that correct?

21 A. That is correct.

22 Q. Who did you learn this from?

09:42:42 1 A. It was Jorge Senn. He was upset because some
2 equipment had been taken that were under their
3 management, but the Government gave this to me, and
4 the people who were there provided things to the
5 Government, and I never found out whether the
6 equipment was from FEGUA or from Ferrovias. I simply
7 received the equipment from the Government.

8 Q. When did Mr. Senn tell you this?

9 A. It was much after the materials had been
10 taken.

11 Q. What do you mean by "much later"? Can you
12 give us a sense of--was it a week later?

13 A. Honestly, I don't remember, but it was after
14 we finished taking everything. He was upset, and we
15 discussed this, and I said, "I have no blame; I'm not
16 responsible. You have to go and place a claim against
17 the Government because the one that gave me the
18 equipment to me was the Government.

19 Q. One week? One month? Six months? Can you
20 give me an estimate of when it is that you found out
21 from Mr. Senn?

22 A. I don't remember.

09:44:04 1 Q. Now, you say that the people who were there,
2 meaning at the meeting where the equipment was given
3 over to you, were people who were in charge of giving
4 equipment for the Government. Do you recall whether
5 you were there personally or whether you had sent a
6 representative of your company?

7 A. I was there at the beginning, at the
8 beginning of the operation I was there, and then I
9 assigned this to different managers.

10 Q. Does a man by the name of Gevenet Flavio
11 Robles López ring a bell?

12 A. He is the General Manager of Maya Quetzal, my
13 company.

14 Q. Now, you gave Mr. Gevenet Flavio Robles López
15 an appointment to represent Maya Quetzal in that
16 session where the equipment was given over to Maya
17 Quetzal; is that correct?

18 A. That is correct.

19 Q. And during that meeting or session where the
20 equipment was given over to Maya Quetzal, there was
21 also a representative of the Government; correct?

22 A. That is correct.

09:45:29 1 Q. And the representative of FEGUA; is that
2 correct?

3 A. That is correct.

4 Q. And a representative of Ferrovias; is that
5 correct?

6 A. Correct.

7 Q. Now, when you found out that the--from Senn
8 that some of the equipment was allegedly part of FVG's
9 or Ferrovias's Usufruct, did you ever do anything to
10 confirm whether that was, in fact, true?

11 A. That is correct.

12 Q. What did you do?

13 A. I went and asked FEGUA--I wanted them to
14 provide them a list of equipment that had been given
15 to me to verify whether a mistake had been made.

16 Q. Now, sir, I'm going to direct your attention
17 to the document labeled R-340 in your binder. R-340.

18 You will see, sir, that starting at Page 2 of
19 that document there is an Administrative Act Number
20 23-2006.

21 A. Yes.

22 Q. And that Act is dated 21 November 2006, and

09:47:08 1 just to save everyone some time, I get the date from
2 the cover letter to this document.

3 MR. SALINAS-SERRANO: And with the Tribunal's
4 indulgence, the document is in Spanish. This is the
5 document that the Tribunal admitted maybe a couple of
6 days before the hearing started. I will try my best
7 to do my rough interpretation of the document into the
8 record, and I'm sure the President will not let me
9 stray too far from the actual text.

10 But the date can be appreciated in the second
11 line from the top down in the cover letter where it
12 references Administrative Act or Acta Administrativa
13 Number 23-2006 of 21 November 2006.

14 BY MR. SALINAS-SERRANO:

15 Q. Are you there with me, Mr. Iten?

16 A. Yes.

17 Q. Now, you see that in the actual acta, page 2
18 of the document, there is a paragraph with a heading
19 "Primero," or first.

20 A. Uh-huh.

21 Q. And there are about one, two, three, four,
22 five, six lines down, you will see that one of the

09:48:19 1 people who appear is Ingeniero Gevenet Flavio Robles
2 López, who is identified as General Manager of Maya
3 Quetzal; is that correct?

4 A. That is correct.

5 Q. Now, he is acting in this session on behalf
6 of Maya Quetzal through an appointment throughout
7 signed without a number from June 2, 2006, signed by
8 you, Inngmar Iten, President of Maya Quetzal; is that
9 correct?

10 A. That is correct.

11 Q. There is also a Carlos Francisco Gueg (ph.)
12 López, who was representing the Public Goods Division
13 of the Ministry of Finance; is that correct?

14 A. That is correct.

15 Q. And a representative of FEGUA, Arnolde
16 Mendicao (ph.) Estrada; is that correct?

17 A. That is correct.

18 Q. And finally, Mr. Aroldo Veliz Pasados, which
19 is identified as the Chief of the Yard, I guess, if
20 that's the best translation, for Ferrovías de
21 Guatemala, and he was acting through an appointment
22 without number, much like the one you gave Mr. Gevenet

09:49:49 1 Flavio Robles Lopez, of 22 November 2006, signed by
2 Jan Malamud, who is identified as Operations Manager
3 for Ferrovías de Guatemala.

4 Is that correct?

5 A. I don't know. I didn't see that appointment.
6 What I can tell you is that Gevenet Flavio Robles
7 Mobil is the General Manager of Maya Quetzal, that he
8 needed no appointment by me. He is the one who
9 manages the company. I'm only the President.

10 Q. Are you saying you didn't sign the
11 appointment for Mr. Gevenet Flavio?

12 A. I don't remember if I signed it or not, but
13 he had the powers to do this with no problem
14 whatsoever.

15 Q. Okay. Now, you will see in the paragraph
16 labeled as Segundo, or second, that during this
17 session there was a physical verification and
18 reception of the rail equipment and material property
19 of Ferrovías de Guatemala; is that correct?

20 A. That is correct.

21 Q. And the next--starting at the bottom of that
22 page and the next one, two, three, four, five, six,

09:51:18 1 seven, eight, nine, 10, 11, 12--14 and a quarter pages
2 contain a detailed inventory of the material that was
3 handed over to you; is that correct?

4 A. That is correct.

5 Q. Now, as you sit here today, do you have any
6 evidence whatsoever that any of this material was
7 anything other than scrap or that it belonged to
8 Ferrovías? Any evidence whatsoever, a document, any
9 letter, anything, that could show that any of this
10 material actually belonged to Ferrovías or was
11 anything other than scrap?

12 A. Honestly, it was the same cars. I'm not an
13 expert, and this is what I think, not a railway
14 Expert, so we look at the scrap, and we destroy
15 everything, so we didn't realize this.

16 Q. This is what Jorge Senn told you; is that
17 correct?

18 A. That is correct, just that he gave me a list
19 of the equipment he had under the Usufruct, and I went
20 to FEGUA to verify this, and the people from FEGUA
21 were scared about--were scared of what they had done.

22 Q. Was there any equipment--do you have any

09:52:47 1 evidence that any of the equipment was anything other
2 than scrap or that it belonged to Ferrovías, any
3 document, any listing, anything?

4 A. No.

5 Q. You also say in your Declaration, Paragraph 7
6 of your second Declaration to be precise--

7 MR. SALINAS-SERRANO: And I direct the
8 Tribunal in the record. It's one, two, three, four,
9 five lines from the bottom, the sentence that starts,
10 "As a matter of fact."

11 BY MR. SALINAS-SERRANO:

12 Q. You say there that you were aware that Aroldo
13 Veliz, who was employed by Ferrovías, pretended to be
14 the legal representative of the company.

15 What evidence do you have, sir, that
16 Mr. Veliz pretended to be the legal representative?

17 A. I always thought that Aroldo Veliz was
18 working for FEGUA. I never thought that he worked for
19 Ferrovías. When Jorge Senn told me that equipment,
20 Usufruct of equipment had been handed to Ferrovías, I
21 found out that he was an employee of Ferrovías and
22 that he had signed without having the power to sign.

09:54:25 1 I understand that just Jorge Senn was the legal
2 representative in Guatemala.

3 Q. And I will ask it one more time. You say
4 that Mr. Veliz--and this is your words, not
5 mine--pretended to be the legal representative of the
6 company. I have just shown you the Administrative Act
7 where your General Manager, a representative from
8 FEGUA, a representative from the Government, and
9 Mr. Veliz in representation of Ferrovías, having an
10 appointment from the Operations Manager of Ferrovías
11 acted on behalf of Ferrovías there.

12 Now, Mr. Aroldo Veliz, at that time, in fact,
13 was employed by Ferrovías; isn't that correct?

14 A. It seems so.

15 Q. And you have absolutely no evidence that the
16 appointment that Mr. Veliz received from Jan Malamud
17 was illegal or falsified, do you?

18 MR. STERN: I'd just like to object for the
19 record. The document does not show the legal
20 representation authorization of Mr. Veliz. All it
21 does is it states something here, but we do not have
22 the actual document in front of the Tribunal, so I

09:55:43 1 think it assumes facts not in evidence, and it's
2 essentially hearsay that he's relying upon to
3 establish that fact.

4 MR. SALINAS-SERRANO: Mr. President, just for
5 the record, reliance on hearsay, if we were not
6 allowed, we wouldn't be here today before this
7 Tribunal; but as to the document itself, I'm just
8 asking the witness whether he--whose testimony it is
9 that Mr. Veliz pretended to be a representative,
10 whether he has any evidence to the contrary. He did.
11 I just to want make sure that the answer is on the
12 record.

13 Now, you say that Mr. Senn told you that this
14 equipment belonged to Ferrovías; correct?

15 THE WITNESS: That is correct.

16 MR. SALINAS-SERRANO: And I'm going to try to
17 press you a little bit on the timing because it's
18 important.

19 Do you have a sense of whether that happened
20 months after the actual auction or bid took place?

21 THE WITNESS: I don't remember exactly, but
22 it was after we took all the scrap metal. I found

09:57:06 1 Jorge was very upset, but I wasn't responsible. The
2 Government gave the units to me. I didn't verify
3 whether the units came from Ferrovías or from FEGUA.
4 I just verified what the Government said.

5 BY MR. SALINAS-SERRANO:

6 Q. Do you remember the discussion with Mr. Senn
7 was in that very same year 2006.

8 A. No, it was after. We spent about a year
9 taking the equipment.

10 Q. Now, when you found out this information from
11 Mr. Senn, did you also offer to return the equipment?

12 A. That was not possible. The equipment that
13 was given to us, we cut it up and exported it, and it
14 was already in China.

15 Q. Did you offer to give him part of the profits
16 you'd made from that equipment?

17 A. No, I wasn't responsible for the mistake.

18 Q. Did Mr. Senn or Ferrovías sue Maya Quetzal
19 over that equipment?

20 A. No, and they wouldn't have been able to
21 because the Government gave the equipment to me.

22 Q. To the best of your knowledge, did Ferrovías

09:58:31 1 sue the Government in relation to those equipments?

2 A. I don't know.

3 MR. SALINAS-SERRANO: Those are all my
4 questions, Mr. President. Thank you.

5 PRESIDENT RIGO: Thank you, Mr. Salinas.

6 Mr. Stern.

7 MR. STERN: Yes, thank you. Just briefly.

8 REDIRECT EXAMINATION

9 BY MR. STERN:

10 Q. Mr. Iten, whether you liked or trust

11 Mr. Pinto, was it always your understanding that he
12 was representing Mr. Campollo when he was dealing with
13 you?

14 A. That is correct.

15 Q. Thank you.

16 MR. STERN: Nothing further.

17 PRESIDENT RIGO: Mr. Eizenstat has some
18 questions.

19 QUESTIONS FROM THE TRIBUNAL

20 ARBITRATOR EIZENSTAT: Mr. Iten, you've

21 indicated on several occasions that you considered

22 Mr. Pinto not to be credible. I think that's the way

09:59:34 1 you put it. Is that an accurate summation?

2 THE WITNESS: The problem with Mr. Pinto is
3 that he was not an honest person. He did not keep his
4 word, and that is why I didn't feel that he was
5 somebody that I could trust in the business arena.
6 That is what I was making reference to.

7 ARBITRATOR EIZENSTAT: So when he said to you
8 that he was representing Mr. Campollo, did you verify
9 that with someone that you considered more reliable
10 because you must not have taken that seriously if you
11 thought he didn't have credibility?

12 THE WITNESS: That is correct. I talked to
13 the managers of Aceros de Guatemala. This is a formal
14 company and highly respected company in Guatemala.
15 And they guaranteed the operation because I did not
16 have the certainty that Mr. Pinto was going to pay for
17 the products that I was going to deliver him, and they
18 told me that the products were for Mr. Campollo and
19 that they were going to guarantee the transaction.

20 MR. STERN: And with whom in that company you
21 talk to try to verify what Mr. Pinto said?

22 THE WITNESS: The manager for purchasing,

10:01:06 1 that is the one that I usually contact is Rolando
2 Ruiz, and he received the order from Luis Gabriel, a
3 90-year-old gentleman, who is the main owner of the
4 company.

5 ARBITRATOR EIZENSTAT: Would you spell his
6 name for us. I'm not familiar with the person that
7 you are referring to.

8 THE WITNESS: Rolando Ruiz? R-O-L-A-N-D-O,
9 Ruiz, the last name, R-U-I-Z. He's the Manager for
10 purchases with Aceros de Guatemala.

11 ARBITRATOR EIZENSTAT: And that's a Campollo
12 company, you're saying?

13 THE WITNESS: No, it's not. This is the
14 largest metal melting company in Central America, and
15 this is the one that receives most of my products.
16 They're friends with Mr. Campollo.

17 MR. STERN: Was there anyone directly
18 employed by Mr. Campollo that verified for you that
19 Mr. Pinto was representing Mr. Campollo?

20 THE WITNESS: That's correct. Eduardo Ubico,
21 he is the manager for purchases within the sugar mill
22 Madre Tierra that belongs to Mr. Campollo, and in

10:02:42 1 addition to that, all the equipment that they took to
2 cut the wheels and the axles was equipment from the
3 sugar mill.

4 And in the midst of the operation I saw
5 Mr. Ubico for the manager for Mr. Campollo, who was
6 stealing material, so I expelled this person from my
7 premises, and once again they pressured me to provide
8 the spare parts that they needed, and the condition
9 was that I was not going to allow for anyone from the
10 Madre Tierra sugar mill to come in because they were
11 not trustworthy, and I was going to provide them the
12 equipment myself, and all the equipment with me own
13 transportation, my own people, was taken to the sugar
14 mill, Madre Tierra.

15 ARBITRATOR EIZENSTAT: So, the materials were
16 sent to Santo Domingo?

17 THE WITNESS: That is correct.

18 ARBITRATOR EIZENSTAT: Who paid for that? Do
19 you have any kind of a receipt or recollection of who
20 actually paid for that material?

21 THE WITNESS: The person in charge of the
22 operation was Eduardo Ubico.

10:03:59 1 ARBITRATOR EIZENSTAT: And you received a
2 check from his company?

3 THE WITNESS: I received the check from
4 Maprisol that belonged to Mr. Pinto.

5 ARBITRATOR EIZENSTAT: Would you say that
6 again.

7 THE WITNESS: I received a check from
8 Maprisol. That is a company that belongs to Héctor
9 Pinto.

10 ARBITRATOR EIZENSTAT: What's the
11 relationship between that company and the Campollo
12 enterprises in Santo Domingo?

13 THE WITNESS: I don't know.

14 ARBITRATOR EIZENSTAT: When you sent the
15 material to Santo Domingo, was it your understanding
16 you were sending it to an enterprise owned or
17 controlled by Mr. Campollo?

18 THE WITNESS: I did not send the material to
19 Santo Domingo. I gave it to Eduardo Ubico at the
20 central FEGUA station, and then I gave it to the
21 engineer from Madre Tierra, and it was--the material
22 was exported from there.

10:05:10 1 ARBITRATOR EIZENSTAT: And again, the actual
2 payment was received from the company you just
3 referred to, from Mr. Pinto--was a company that you
4 say Mr. Pinto controlled?

5 THE WITNESS: That is correct.

6 ARBITRATOR EIZENSTAT: Now, the pressure from
7 this Aceros de Guatemala, were there three companies
8 competing for this auction, yours, this is Aceros
9 company, and another company controlled by Campollo?
10 Were there three bidders in this process?

11 THE WITNESS: That is correct. There were
12 several options, and several offers, but in this case
13 15 percent had to be deposited at the beginning, and
14 it was a lot of money for small bidders; therefore,
15 the largest three bidders in Guatemala were the only
16 ones to participate.

17 ARBITRATOR EIZENSTAT: I'm trying to
18 appreciate and understand your statement that this
19 Aceros de Guatemala pressured you to give materials to
20 Campollo. Were they not competitors? They were all
21 bidding, so why would they want--why would they
22 pressure you to give this to Campollo when you had

10:06:41 1 three competing bids?

2 THE WITNESS: That is correct. My company in
3 Central America and Guatemala is the largest company
4 that recycles metal, but I do not compete with Aceros
5 de Guatemala because Aceros de Guatemala is the
6 largest foundry. They sell 10 times more than what I
7 sell, and the Government of Guatemala is a Third World
8 country that is manipulated with high powers, and I
9 cannot fight with them. I cannot compete openly or
10 legally with that company. I have to offer some
11 concessions from the business point of view, and once
12 I received the bid, they were not aware of the
13 international price of scrap metal. They did not
14 think I was going to win the bid, and I received a lot
15 of pressure because Mr. Campollo was interested in the
16 material, and Aceros de Guatemala was interested in
17 the scrap metal because it is the best one.

18 The composition of the--of that metal is the
19 best to go through the foundry process and to melt it,
20 and I received pressure that if I was not going to
21 provide this to Mr. Campollo and Aceros de Guatemala
22 was going to have an issue. I had to give some

10:08:12 1 concessions.

2 ARBITRATOR EIZENSTAT: I'm just trying to
3 understand why from your standpoint they would have
4 wanted it to go to Campollo rather than stay with
5 yourself. What advantage would there be to having it
6 go to Mr. Campollo, from their standpoint, as far as
7 you know?

8 THE WITNESS: They're friends, they're close
9 friends. I don't know if they had some sort of
10 business or some sort of business relationship. Just
11 out of friendship. That's what they told me.

12 ARBITRATOR EIZENSTAT: And then you mentioned
13 that some of the FEGUA people, I think you used the
14 term, were "scared." Of what were they scared, and at
15 what point in time, and how did that manifest to you?

16 THE WITNESS: When Jorge Senn showed me the
17 mistake that they had given me equipment that were
18 part of the Usufruct of Ferrovías, I took the list
19 then and I went to FEGUA, and I told them that as part
20 of the list, was this included? And they realized
21 that they had made a mistake, and that's when they
22 were really scared because they had made a mistake.

10:09:34 1 ARBITRATOR EIZENSTAT: Document who at FEGUA
2 indicated that they had made a mistake and that they
3 were scared about having given the wrong equipment,
4 any names of people at FEGUA?

5 THE WITNESS: I don't remember it now.

6 ARBITRATOR EIZENSTAT: But you do have a
7 clear recollection of this incident, even though you
8 can't remember the names of the people?

9 THE WITNESS: Initially, I was also scared
10 because I have been in the midst of a legal problem,
11 and that's when I went to clarify this with FEGUA, and
12 I realized that I had no responsibility. I was not
13 liable because it was the Government, the one that
14 gave me the material, and I had no longer a problem.

15 ARBITRATOR EIZENSTAT: Yes, but I'm saying
16 even though you can't remember the names, you're
17 certain that the FEGUA people felt they had made a
18 mistake?

19 THE WITNESS: That is correct.

20 ARBITRATOR EIZENSTAT: Thank you.

21 PRESIDENT RIGO: Professor Crawford.

22 ARBITRATOR CRAWFORD: Can I take you to the

10:10:51 1 list which is R-340. It's a very long list, 701
2 items.

3 What proportion of the total equipment in the
4 hands of--I suppose it was in the hands of
5 Ferrovías--sorry, FEGUA--did this represent? Did you
6 know that?

7 THE WITNESS: I only remember that it was
8 significant, something like 300 units. I don't
9 remember precisely, but it was a really big mistake.

10 ARBITRATOR CRAWFORD: And you basically cut
11 all this material up for scrap.

12 THE WITNESS: That is correct. As well as
13 the spare parts, and the spare parts for Mr. Campollo.

14 ARBITRATOR CRAWFORD: So, anyone who wanted
15 to run a railway using this equipment could forget it?

16 THE WITNESS: The equipment was quite old,
17 and based on my understanding.

18 ARBITRATOR CRAWFORD: As scrap.

19 THE WITNESS: In my opinion, it was. That's
20 what I do.

21 ARBITRATOR CRAWFORD: You shared the same
22 address at the Claimant was, the local company. Did

10:13:02 1 you have any particular relationship with them?

2 THE WITNESS: I lease real property where I
3 operate a warehouse.

4 ARBITRATOR CRAWFORD: My question was whether
5 you had any special relationship with them because by
6 reason of having the shared address.

7 THE WITNESS: No, none. Just that business.
8 I just lease piece of real property.

9 ARBITRATOR CRAWFORD: Thank you.

10 PRESIDENT RIGO: Mr. Stern, on the Tribunal's
11 questions?

12 MR. STERN: Yes, just one question.

13 FURTHER REDIRECT EXAMINATION

14 BY MR. STERN:

15 Q. Mr. Iten, when did Maya Quetzal began leasing
16 property from Ferrovías?

17 A. I don't remember. I'm sorry. It was four
18 years ago. I don't remember.

19 Q. "Four years ago" meaning approximately 2007?

20 A. If the question is in connection to the
21 following, when we were working on the bid I had no
22 relationship with Ferrovías.

10:15:42 1 A. Yes, that is correct.

2 Q. Now, the pressure you say you received from
3 Aceros de Guatemala was not to just hand over the
4 material to Mr. Pinto; is that correct?

5 A. Correct.

6 Q. You sold the material to Mr. Pinto; correct?

7 A. I wouldn't have had any sort of business with
8 Mr. Pinto because I didn't like him, and I didn't
9 trust him. I just did it because I was pressured by
10 Aceros de Guatemala.

11 Q. He pressured you to sell the equipment; is
12 that correct?

13 A. That is correct.

14 Q. You negotiated a price for the sale of that
15 equipment; is that correct?

16 A. Initially, I did not. Aceros de Guatemala
17 fixed the price, and it was the same price used to
18 sell the scrap metal to Aceros de Guatemala. They had
19 a problem. Everything was going to be given to Aceros
20 de Guatemala. Only small parts were going to be
21 exported. Therefore, if I gave this to Aceros de
22 Guatemala, Aceros de Guatemala had a problem because

10:16:55 1 the spare parts could be damaged. Therefore, I was
2 forced to give it to them earlier, and the price was
3 the same. I did not receive any benefits until I find
4 them stealing my equipment, FEGUA's equipment, and
5 this could lead to a problem. I expelled them from
6 the premises because I was responsible for whatever
7 happened there. And then I was pressured again, and
8 the only agreement we reached is that I was going to
9 give them the units, but at the sugar mill.

10 Therefore, I had one of their supervisors,
11 and with my own equipment I delivered that to Madre
12 Tierra.

13 Q. I just want to make sure I understand. You
14 spoke of a price initially. Did that price change at
15 some point where you paid two different prices?

16 A. When I gave them the product at the sugar
17 mill, the price was much higher.

18 Q. So, you were paid more money when you took
19 the equipment to the Ingeniero Madre Tierra; am I
20 understanding you correctly?

21 A. That is correct because I had to cut and do
22 all the work that they were doing before, and in

10:18:15 1 addition to that transfer the material to the sugar
2 mill.

3 Q. Now, you said you had to cut. What were you
4 cutting, sir?

5 A. They were interested in the wheels and in
6 some axles.

7 Q. So, they asked to you cut the axles?

8 A. They specified certain measurements, and
9 that's what we did.

10 Q. Let's make sure I understand.

11 You had axles from FEGUA which FEGUA and
12 Ferrovías allegedly would have used to operate the
13 narrow gauge trains; is that correct?

14 A. I don't know. I just received from the
15 Government the equipment, and I was asked to take the
16 wheels from the equipment, so we cut them and sent
17 them.

18 Q. But you cut the axles; correct?

19 A. Yes, that is correct.

20 Q. Now, in questions from Professor Crawford,
21 you were asked what proportion of the 701 items in
22 this inventory were supposedly part of Ferrovías's

10:19:36 1 Usufruct. Do you remember those questions?

2 A. Yes, I do remember it.

3 Q. Now, in your statement, Paragraph 6 of your
4 Second Statement, you say that about 85 percent of the
5 equipment was considered scrap metal. Do you know
6 what the other 15 percent was?

7 A. In my opinion, that was my opinion--some
8 opinion could be reused, but I'm not an expert on
9 railway, so I don't know. I just saw that 85 percent
10 of the equipment was really old.

11 Q. So, 85 percent of the 701 items you received,
12 you, as a person in the business of scrap metal, would
13 characterize it as scrap; correct?

14 A. That is correct.

15 MR. SALINAS-SERRANO: I have no further
16 questions, Mr. President.

17 PRESIDENT RIGO: Mr. Iten, thank you very
18 much for your statement. Thank you for coming here
19 this morning, and you're now excused.

20 (Witness steps down.)

21 PRESIDENT RIGO: I have one question that I
22 would like to ask to the Parties but not to the

10:21:20 1 witness as a result of the exchanges. I was looking
2 at the list also, which was very long, as has been
3 noted, and I see that there are 279 furgones, which I
4 suppose those are types of wagon, and 150 plataformas,
5 et cetera, and I wondered at one point if you could
6 tell us--I don't recall it, we may have the
7 information already on file in terms of the Usufruct,
8 how much was given in Usufruct, how many of these
9 boxcars, furgones, FEGUA had. I mean, when you have
10 the Usufruct, because this is a lot of equipment.

11 MR. FOSTER: We will try to get that answer,
12 but I would note that the inventory is in the
13 Equipment Contract.

14 But maybe we can short-circuit your sitting
15 down and comparing the two piece by piece.

16 ARBITRATOR CRAWFORD: We were rather hopeful
17 that you might.

18 MR. FOSTER: But I presume that Mr. Senn
19 would probably be the best person to answer that, but
20 in any event with your permission, we will prepare him
21 or whoever is the one to do it, to answer that
22 question.

10:22:55 1 PRESIDENT RIGO: We can just look at it in
2 the Contract. Of course, if you help us to go through
3 it, it would be nice.

4 MR. FOSTER: Okay, we will do that. Thank
5 you, sir.

6 PRESIDENT RIGO: We will have a 15-minute
7 break for the sake of keeping good time, and then we
8 will see the next witness. Thank you.

9 (Brief recess.)

10 WILLIAM DUGGAN, CLAIMANT'S WITNESS, CALLED

11 PRESIDENT RIGO: We are going to resume our
12 session.

13 Would you mind to read the statement you have
14 as a witness.

15 THE WITNESS: I solemnly declare upon my
16 honor and conscience that I shall speak the truth, the
17 whole truth, and nothing but the truth.

18 PRESIDENT RIGO: Thank you.

19 Who is going to ask the questions?

20 MR. FOSTER: Ms. Murchison will examine.
21 Thank you.

22 PRESIDENT RIGO: Ms. Murchison, go ahead.

10:40:28 1 MS. MURCHISON: Good morning, Members of the
2 Tribunal, Counsel.

3 DIRECT EXAMINATION

4 BY MS. MURCHISON:

5 Q. Good morning, Mr. Duggan.

6 Let's get one thing straight, have I got the
7 pronunciation right? It is Duggan?

8 A. Yes, it is.

9 Q. Do you have in front of you copies of the
10 statements you have submitted in this arbitration
11 dated, June 22, 2009, October 22, 2009, and March 3rd,
12 2011, respectively?

13 A. I do.

14 Q. Do you ratify and affirm the truthfulness of
15 those statements today before the Tribunal?

16 A. I do.

17 Q. Now, Mr. Duggan, Respondent has asserted in
18 this case that Ramon Campollo was never interested in
19 operating the Guatemalan railroad because, among other
20 things, he has never been in the railroad or
21 transportation business; is that true that
22 Mr. Campollo has never been in the railroad

10:41:19 1 transportation business?

2 A. No, it is not.

3 Q. How do you know?

4 A. I was contracted through Ferrovías de
5 Guatemala to go to the Dominican Republic personally
6 as a consultant to look at and give suggestions and
7 ways that Mr. Campollo could better operate his
8 railroad, better maintain his railroad, and have
9 even--so much as to give him the idea of who he might
10 be able to hire to assist him.

11 Q. Okay. Let's take a look at Exhibit C-77, a
12 July 14th, 2004, e-mail from a Steffan Lehnhoff to
13 Ferrovías's General Manager Jorge Senn, inquiring
14 about consultancy work on a rail line.

15 Do you have that in front of you, Exhibit
16 C-77? Okay.

17 PRESIDENT RIGO: It's in the Bundle?

18 MS. MURCHISON: Yes, and it should be coming
19 up on the screen right now.

20 ARBITRATOR CRAWFORD: Which tab?

21 MS. MURCHISON: It's Tab 7seven, I believe.

22 THE WITNESS: Yes, I do have that in front of

10:42:48 1 me.

2 BY MS. MURCHISON:

3 Q. First of all, who is Steffan Lehnhoff?

4 A. Steffan Lehnhoff was an employee of Mr. Ramon
5 Campollo's.

6 Q. Do you see the first sentence in the second
7 paragraph that refers to a rail line in the Dominican
8 Republic?

9 A. I do.

10 Q. What rail line was Mr. Lehnhoff referring to
11 in that e-mail?

12 A. He was referring to a rail line that is
13 within the sugar plantation that Mr. Campollo owns in
14 the Dominican Republic.

15 Q. Now, do you see the part on Exhibit C-77 that
16 says "we are moving approximately 400,000 metric tons
17 of sugarcane."

18 Do you see that part?

19 A. I do.

20 Q. Were you ever able to confirm that at that
21 time, and this is a 2004 e-mail, Mr. Campollo's
22 railroad was moving approximately 400 metric tons?

10:43:51 1 A. 400,000 metric tons, and the proof that I
2 have is through conversations on site with
3 Mr. Campollo's nephew who is the General Manager of
4 the sugar mill, while I was on site doing my due
5 diligence of the property.

6 Q. Did Ferrovías ever move as much as 400,000
7 metric tons in one year?

8 A. No, we did not. We had not yet at the time
9 that we shut it down.

10 Q. You mentioned that at some point you went
11 down and you did some consulting on behalf of
12 Ferrovías for Mr. Campollo's railroad; is that right?

13 A. Yes, that is correct. At the request of
14 Mr. Lehnhoff who is the representative of
15 Mr. Campollo, and during that--I told the General
16 Manager, Jorge Senn that I would do it personally
17 under Ferrovías de Guatemala, that I would take care
18 of doing the consulting work that they requested.

19 I did go ahead and go down and do that after
20 a meeting with Mr. Lehnhoff personally in Guatemala to
21 find out the scope of the request. And while I was in
22 the Dominican, I met and had dinner with Mr. Campollo

10:45:22 1 at Mr. Campollo's house on the plantation in the
2 Dominican.

3 Q. When did you go to the Dominican Republic to
4 do the consulting work related to Mr. Campollo's rail
5 line?

6 A. I can't remember the exact date without
7 finding it, but it was late August of 2004.

8 Q. Okay. Let's take a look at Exhibit C-78,
9 which is going to be in the binder under Tab 8.
10 That's a entitle documented "consultancy on possible
11 methods of upgrading the railroad operations within
12 the sugar mill to increase efficiency and sugarcane
13 traffic performance."

14 Is Exhibit C-78 the Consulting Report that
15 you prepared and that Ferrovías provided to
16 Mr. Campollo?

17 A. Yes, it is.

18 Q. Now, looking at Exhibit C-78, let's go to the
19 page--and there are page numbers at the bottom, it's
20 marked RDC004556.

21 A. Yes, ma'am.

22 Q. In the Consultancy Report that you prepared,

10:46:36 1 did you indicate how long Mr. Campollo's rail line was
2 in 2004?

3 A. I do. It's 44 kilometers total length.

4 Q. What gauge is Mr. Campollo's railroad?

5 A. It's also a narrow gauge railroad.

6 Q. When you visited Mr. Campollo's railroad in
7 2004, how many locomotives and wagons were there on
8 that 44 kilometers of track?

9 A. Eight.

10 Q. In comparison, how many locomotives and
11 wagons did Ferrovías operate on the right of way?

12 A. We had 15 locomotives and approximately 122
13 to 150 wagons of different styles and designs.

14 Mr. Campollo had eight locomotives and 400 wagons in
15 his fleet.

16 Q. Mr. Duggan, I want to ask you some questions
17 about a study that Mr. Roberto Morales said he
18 completed for Ferrovías in 2003.

19 Now, do you know who I'm talking about when I
20 say Roberto Morales?

21 A. I do know who he is, yes.

22 Q. Mr. Roberto Morales claims that in 2003

10:47:54 1 Ferrovías hired him to conduct a Feasibility Study to
2 determine the viability of operating the railroad
3 services for the sugar industry along the South Coast
4 in particular.

5 Is that true? Did Ferrovías hire Mr. Morales
6 to complete a Feasibility Study?

7 A. No, it is not true.

8 Q. What did Ferrovías actually hire Mr. Morales
9 to do back in 2003?

10 A. Ferrovías talked to Mr. Morales about doing a
11 study that would locate for us the best locations on
12 the railroad to be able to put in loading points for
13 the sugar plantations. There's absolutely no way that
14 you can justify a railroad running into each and every
15 farm and each and every situation. The concept was to
16 find locations that were best suited for all the mills
17 to be able to bring their product to the main line,
18 and it would be loaded at that point, not unlike you
19 see with the grain and the way that the farmers in the
20 U.S. and the midwest, bring the grains to the
21 elevators for loading.

22 What you have to know is the quantities of

10:49:26 1 sugar that is made, that is manufactured at each
2 location, something that we understood Mr. Morales
3 knew of, and he had also been involved in
4 transportation for trucking the sugar, but that's all
5 we asked for, was some assistance in doing that.

6 Q. Let's go to Exhibit C-84. That's going to be
7 under Tab 11 in your book. That's a copy of an Excel
8 spreadsheet file entitled "Sugar Transport Project:
9 Ferrovías Transfer System."

10 Is this the study that Roberto Morales
11 provided to Ferrovías in 2003 in response to its
12 requests for a study of ideal loading points?

13 A. It is the study. I have never seen it on
14 paper, you can't read it for all practical purposes on
15 paper, it was given to our company, Ferrovías de
16 Guatemala, on a disk.

17 Q. And have you now had an opportunity to review
18 a copy of this Excel spreadsheet?

19 A. Yes, I have.

20 Q. Now, Roberto Morales claims that he concluded
21 that the sugar mills most likely would not be
22 interested in investing in the South Coast Railway. I

10:51:00 1 want you to turn to the information index--a copy of
2 that is up on the screen--and do you see--it would be
3 at Tab 14, the part that mentions "Conclusions and
4 Recommendations."

5 Do you see that and the index?

6 A. I do.

7 Q. Let's pull up that page, "conclusions and
8 recommendations."

9 Mr. Duggan, were there any conclusions or
10 recommendations in this Excel spreadsheet that
11 Mr. Morales provided to Ferrovías in 2003?

12 A. No.

13 MS. MURCHISON: No further questions at this
14 time.

15 PRESIDENT RIGO: Thank you, Ms. Murchison.

16 Mr. Orta.

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

18 CROSS-EXAMINATION

19 BY MR. ORTA:

20 Q. Good morning, Mr. Duggan. How are you?

21 A. Well, thank you.

22 Q. I would like to start with the very first

10:52:05 1 topic actually that you were asked about in direct
2 examination, and that is the railroad that you
3 mentioned that Mr. Campollo operates or that is
4 operated in his sugar plantation in the Dominican
5 Republic.

6 First of all, to your knowledge, does
7 Mr. Campollo operate any railway, any railroad in
8 Guatemala?

9 A. Not to my knowledge.

10 Q. Now, in relation to the consultancy that you
11 were asked to do, you were, as I understand it from
12 your testimony and your Declaration, you were asked to
13 come to the Dominican Republic to help Mr. Campollo
14 and his business there in the Dominican Republic,
15 figure out how to better operate the railroad there;
16 is that correct?

17 A. That is correct.

18 Correct one thing. Ferrovías Guatemala was
19 requested to do some consulting. I did the consulting
20 for Ferrovías Guatemala. As the President of
21 Ferrovías Guatemala.

22 Q. Fair point. You weren't asked personally.

10:53:23 1 You were doing it on behalf of Ferrovías de Guatemala?

2 A. Correct.

3 Q. So, Mr. Campollo you say asked Ferrovías de
4 Guatemala to come to--to send a representative to the
5 Dominican Republic; correct?

6 A. They were--they were requested could they do
7 such a consulting project, and was contacted. We
8 didn't have the people available on the property. I
9 said I will talk to them, find out the scope of the
10 consultancy request when I get to Guatemala--because I
11 never lived in Guatemala--and, as such, I will take
12 care of it as something that we can and desire to do,
13 so yes.

14 Q. Okay. And what Mr. Campollo, per your
15 testimony, asked Ferrovías to do was to send someone
16 who could help them to--was it to restore the railway,
17 was it to help make the railway run more efficient?
18 Which was it?

19 A. For more efficiency. They were already
20 operating.

21 Q. To your knowledge, did Mr. Campollo have
22 anybody working for him at his sugar plantation in the

10:54:48 1 Dominican Republic that could do this consultancy that
2 Ferrovías was being asked to do?

3 A. He had several employees down there, and I
4 remember a fellow from France, how he got there or
5 what he was doing I really don't know, but he was the
6 one that was trying to manage--to work with the sugar
7 mill, and it wasn't working out for them.

8 And I did meet this gentleman. His English
9 was as limited as my French, and we were able to
10 communicate somewhat, but he did have an employee on
11 site, yes.

12 Q. Okay. But to your knowledge, did that
13 employee have the level of expertise, for example,
14 that you have in terms of running railways?

15 A. Not as far as I'm concerned, no.

16 Q. Okay. And obviously Mr. Campollo felt he
17 needed assistance from the outside, which is why we he
18 reached out to Ferrovías, I would assume, to your
19 knowledge?

20 A. To my knowledge.

21 Q. Okay. Now, you would agree with me, wouldn't
22 you, that the railroad that operates within the sugar

10:56:05 1 plantation that Mr. Campollo has in Guatemala is
2 materially different than the railroad that RDC agreed
3 to restore in Guatemala; correct?

4 A. Not materially different, no. The difference
5 only being that he didn't--he was his own customer, to
6 run, to build railroad, to operate trains on it, to
7 maintain it, to the costs associated with it are all
8 the same. The difference is he is his own customer.

9 Q. Okay. Let's talk about some of the
10 differences, I believe are there, and you can agree
11 whether or not whether they are differences.

12 First of all, as I think as you just said,
13 the railroad in the Dominican Republic is for internal
14 use only; in other words, for use by Mr. Campollo's
15 sugar plantation and no one else; is that correct?

16 A. That's my--to my understanding, that's right.

17 Q. The railroad operated in Guatemala, on the
18 other hand, is for use by third-party customers;
19 correct? It's not for internal use of any particular
20 business. It's for third parties to utilize; correct?

21 A. Yes, that's what I explained just a little
22 bit ago.

10:57:19 1 Q. The railroad operated in the Dominican
2 Republic, per your Report, is 44 kilometers; correct?

3 A. Correct.

4 Q. The railroad that RDC agreed to rehabilitate
5 in the Dominican Republic is more like 500 kilometers;
6 isn't that right?

7 A. We didn't agree to do anything in the
8 Dominican Republic.

9 Q. Perhaps my question was incorrect.
10 The railroad that RDC agreed to rehabilitate
11 in Guatemala was not 44 kilometers but more like 500
12 kilometers; correct?

13 A. Or more, yes.

14 Q. Actually, I think I have it wrong. It's more
15 like 800 kilometers?

16 A. The total property in the country is around
17 800, yes.

18 Q. Okay. In other words, when you say "the
19 total property in the country," the total property
20 that was given in Usufruct to RDC to rehabilitate the
21 railway was approximately 798 kilometers; correct?

22 A. Correct.

10:58:24 1 Q. Now, Mr. Campollo uses his railway or the
2 railway in the Dominican Republic to transport sugar;
3 correct?

4 A. Correct.

5 Q. RDC, on the other hand, in Guatemala
6 transports a number of other products that are not
7 sugar; correct?

8 A. Ferrovías Guatemala does this. RDC is the
9 Majority Shareholder.

10 Q. So, Ferrovías Guatemala transports a number
11 of other products that are not sugar in its rail
12 operations in Guatemala; correct?

13 A. Correct.

14 Q. In fact, it doesn't transport sugar in
15 Guatemala?

16 A. We have transported sugar, yes.

17 Q. You have?

18 A. Oh, yes, sir.

19 Q. Okay. To the Atlantic coast?

20 A. Yes, sir. And from the Atlantic coast into
21 Guatemala.

22 Q. Okay. In terms of the tonnage, you said

10:59:21 1 that, I think in response to questions by Counsel for
2 Claimant, that Ferrovías Guatemala has never
3 transported the equivalent of 400 metric tons of
4 cargo?

5 A. 400,000 metric tons. No, we have not.

6 Q. You have not?

7 A. No.

8 Q. In your eight years of operation, you've
9 never reached that level of tonnage?

10 A. Not annually. Our annual gross tons was
11 approximately 125,000, give or take a little bit.

12 Q. So, in your estimation, the railroad that
13 Mr. Campollo--that Mr. Campollo's sugar mill operates
14 is able to haul more tonnage in that 44-kilometer
15 stretch than Ferrovías is able to haul in Guatemala?

16 A. Not correct. We had the ability to haul
17 more, but we were waiting on our--we had to wait and
18 acquire the customers to haul it.

19 Q. I see. You didn't have enough customers to
20 justify that level of tonnage?

21 A. Not at that time, no.

22 Q. And when you say "at that time," that's the

11:00:34 1 entire time that RDC--I'm sorry, that Ferrovías
2 Guatemala was operating in the country?

3 A. Yes, sir.

4 Remember, I would also like to state that
5 Ferrovías Guatemala started with the first train in
6 December of 1999, with one wagon loaded traffic in
7 December. Between the 1st of January of Year 2000 and
8 the 15th of March the Year 2000, we hauled 17 wagons.

9 So, yes, we did dramatically increase it, and
10 so that's--when we got to 125,000 tons, we thought we
11 were doing pretty good, and we were continuing to grow
12 the business.

13 Q. Okay. In terms of the consultancy that you
14 offered to Mr. Campollo in the Dominican Republic,
15 what was the service ultimately that you offered to
16 him?

17 A. Strictly consultant, to give him ideas, and
18 it's all in the written Report that was mentioned
19 here, of--from maintenance of the wagons to locations
20 to purchase materials at the best price that I had
21 found in my work in Central America, to also giving
22 him the name of an individual who had previously

11:02:02 1 worked for me personally and for our company--our
2 companies who was also a Spanish speaking person, and
3 would be able to assist him.

4 They passed--I know that they passed back CDs
5 between one another, but I don't--but he never did
6 hire him.

7 Q. Okay. Did Mr. Campollo accept any of the
8 services that you offered other than the initial
9 consultancy?

10 A. I don't know. I did my job. He paid us, and
11 I didn't follow up. There was no reason to.

12 Q. I mean, other than that initial consultancy
13 that you were paid for by Mr. Campollo, did you or, to
14 your recollection, Ferrovías offer any other services
15 in relation to his--in relation to the railroad in the
16 Dominican Republic?

17 A. We never offered any other services. I think
18 he even went as far, if I'm not mistaken, it seems
19 like I remember that he requested maybe we could
20 operate it for him, and we had all we needed on our
21 plate in Guatemala. We didn't need a 44-kilometer
22 sugar railroad that only operated during the harvest

11:03:24 1 season. We didn't need that in our business.

2 Q. So, you declined that request?

3 A. Yes, I did.

4 Q. Okay. Now, I would like to now change topic
5 and go to a different point.

6 In addition to the allegations that have been
7 made in this case by RDC regarding Mr. Campollo, you
8 claim in your Declaration in a number of different
9 places that it was your understanding that
10 Mr. Campollo had made some kind of threat to take away
11 the FVG Guatemala's Usufruct rights; correct?

12 A. He stated such in my person, so yes, call it
13 a threat. If "threat" is the word that I used, then I
14 would have to re-read it right now, that's what I felt
15 it to be.

16 Q. Let's go through that point by point.

17 So, when is the first time that you met with
18 Mr. Campollo where he said this to you?

19 A. It was in the Spring of 2001 at a meeting
20 called by Mr. Campollo for the opportunity to meet
21 Mr. Posner.

22 Q. And you referred to this in your first

11:04:58 1 Declaration, Paragraph 4--we could put that up,
2 please--you should have it in front of you, sir.

3 A. I do.

4 Q. Okay. First Declaration, Paragraph 4.

5 Now, in terms of what you say in your
6 Declaration, you say that at the meeting, Mr. Campollo
7 said that he was interested in the railway and its
8 right of way for a variety of reasons.

9 And then you say: "He bluntly stated that he
10 intended to obtain a controlling interest in the FVG
11 Usufruct and its asset, including the real estate."

12 Correct?

13 A. Correct.

14 Q. Do you remember him saying that at the
15 meeting?

16 A. I do.

17 Q. How did you respond to that?

18 A. I didn't make the response. It was
19 Mr. Posner's place to make that response, and he did,
20 and his offer at that point was that that wasn't--we
21 had no intentions of selling or giving the whole thing
22 to him, but that we were more than open to taking on

11:06:27 1 equity partners.

2 Q. Okay. Now, in the context of the statement
3 you claimed that Mr. Campollo made at that meeting, he
4 did say that he wanted you to make him an offer,
5 according to what you say; correct?

6 A. He did, if that's what I said, then yes,
7 that's what I said.

8 Q. Well, I mean, is that what you remember?

9 A. Yes, that's what I remember.

10 Q. Okay. So at least at that point he wasn't
11 saying he wanted to take away your Usufruct rights for
12 nothing?

13 A. He didn't say it possibly in so many words as
14 I don't believe I said that he said it. It was very
15 blunt and very understanding to myself and to
16 Mr. Posner that the intent of his comment was that he
17 was planning to take it away, if we didn't come to an
18 agreement that pretty much satisfied him.

19 Q. Well, did he say that? Because you don't say
20 that in Paragraph 4 of your Declaration, sir.

21 A. I said "that he bluntly". Did I not say
22 "that he bluntly"?

11:07:38 1 Q. You sure did. You say that he bluntly stated
2 that he intended to obtain a controlling interest, and
3 he asked you to make him an offer. That's what you
4 say. You don't say, "he intended to take it away for
5 nothing."

6 So, I'm asking you, is that what he said or
7 is that not what he said during that meeting?

8 A. He didn't tell--he did not say in the meeting
9 that he intended to take it away for nothing at that
10 time.

11 Q. Okay?

12 A. He bluntly said that he intended to get
13 control of the railroad.

14 Q. All right. Now, did he tell you during that
15 meeting of how he intended to get control of the
16 railway, other than by asking you to make him an
17 offer?

18 A. No, he did not.

19 Q. The next time--and I believe--and you can
20 correct me if I'm wrong, the only other time that you
21 met with Mr. Campollo was in December--I take that
22 back.

11:08:33 1 You've testified you met with him in relation
2 to the Dominican Republic, but in relation to the
3 issues about the FVG Usufruct rights, the only other
4 time you met with him was in December of 2004;
5 correct?

6 A. No.

7 Q. You met with Mr. Campollo another time
8 besides December 2004?

9 A. Yes, in my statement, I think I also stated
10 that I met with him in the early Winter of 2005.

11 Q. All right. We will get to that in a second.
12 Let's go to the meeting of December 3, 2004.

13 Now, you attended a meeting with Mr. Campollo
14 and Mr. Senn and Mr. Juan Esteban Berger in Miami;
15 correct?

16 A. And there were two another gentlemen there
17 also, one was a contractor that rehabilitated railway
18 track equipment, and another fellow who worked for
19 Mr. Campollo, and if I'm not mistaken, I think he
20 worked for Mercury Finance or something, so they were
21 all there.

22 Q. Now, in Paragraph 5 of your Declaration you

11:09:40 1 described this meeting; correct? Paragraph 5 of your
2 first Declaration.

3 A. Yes.

4 Q. You didn't mention these other two gentlemen
5 that you just told us were there, did you?

6 A. No, I did not.

7 Q. And at that meeting, You describe it, I
8 believe in Paragraph 6 of your first Declaration, you
9 say that Mr. Campollo turned the tables on you; right?

10 A. That's not what I said, is it? But that's
11 what I meant.

12 Q. Well, it's what you said. I'm looking at
13 Paragraph 6, second sentence, "however, upon arrival
14 Mr. Campollo immediately turned the tables and said
15 that he was at the meeting to listen to what FVG had
16 to offer to him."

17 A. That's exactly what happened.

18 Q. So, you went there with an expectation he was
19 going to be making some kind of proposal to you; is
20 that correct?

21 A. That is correct.

22 Q. But, instead, he asked you what proposal you

11:10:40 1 had for him?

2 A. That's correct.

3 Q. And you say that in the context of that he
4 reiterated has intention of obtaining control of the
5 railroad and its assets and discussed in particular
6 his interest in the South Coast route, and you go on
7 to describe it a little bit more.

8 What exactly did he say? I mean, this is a
9 paraphrase. To your recollection, what exactly did he
10 say to you in terms of his intentions of obtaining
11 control of the railroad and its assets?

12 A. He said he wanted control of that railroad
13 and the assets. That's what he said.

14 Q. Just like that?

15 A. It's been--what's it been? Nine years. I
16 can't exactly tell you that that was verbatim. I
17 won't say that that was verbatim. But that's what he
18 said.

19 Q. Now assuming as you say, that that's what he
20 said, he said it in the context of a statement where
21 he asked you to make an offer to him; right?

22 A. No, he wanted to know what our offer was to

11:11:41 1 him. That's what I said in this paragraph.

2 Q. In relation to his obtaining control over the
3 railroad and its assets; right, that's what the offer
4 --

5 A. He wanted to know what we had to offer him.

6 Q. Bear with me because I have to get the
7 question out so it's a clear record?

8 A. You're trying to put words in my mouth and
9 make me say something that I didn't mean.

10 Q. No, I'm not trying to do that.

11 A. Yes, you are. Go ahead.

12 Q. No, I'm not, sir. I'm asking you questions
13 based on what you wrote. This is your sworn statement
14 to the Tribunal, and I'm asking you questions based on
15 what you wrote to the Tribunal. I'm not putting words
16 in your mouth.

17 A. Go ahead.

18 Q. In your statement, Paragraph 6, you say that
19 during that meeting he reiterated his intention of
20 obtaining control of the railroad and its assets;
21 correct?

22 A. Yes.

11:12:29 1 Q. And asked FVG what offer they would make to
2 him in that regard; correct?

3 A. Say the question one more time, please.

4 Q. That in respect of Mr. Campollo's statement
5 about, as you say, obtaining control over the railroad
6 and its assets--and we're talking about the railroad
7 in Guatemala that FVG operates--that Mr. Campollo
8 asked to you make an offer to him about that issue;
9 correct?

10 A. Where does it say in that Paragraph 6 that I
11 said that he said that he asked for an offer?

12 Q. Well, sir, this is your statement. What
13 did--did Mr. Campollo ask you for an offer or not
14 during the December 2004 meeting?

15 A. No.

16 Q. Okay. So, when you said in Paragraph 6 that
17 "he turned the tables and said that he was at the
18 meeting to listen to what FVG had to offer him," you
19 were mistaken, he didn't actually ask for an offer
20 during the meeting; is that correct?

21 A. No, I didn't ask for an offer. I went to
22 that meeting with the understanding that he had an

11:13:56 1 offer for us.

2 Q. I understand that, but then--

3 A. That's it.

4 Q. Well, that's not only it because your
5 statement says something more. What your statement
6 says is that the tables were turned because
7 Mr. Campollo asked FVG, Ferrovías, what it--it,
8 Ferrovías--had to offer to him; correct?

9 MS. MURCHISON: Objection. That misstates
10 the record, and the statement which says he was at the
11 meeting to listen to what FVG had to offer, not that
12 he asked about the offers.

13 BY MR. ORTA:

14 Q. So, what do you have to say?

15 A. I went there to hear an offer from Campollo.

16 (Sound interference.)

17 A. To Ferrovías Guatemala. I went there to hear
18 an offer from Campollo. I got there. He wanted to
19 know what we had to offer him. There's a big
20 difference. He continued, and my answer was not
21 unlike the one that he got in the Year 2001 that we
22 were certainly looking for preferably local Guatemalan

11:15:32 1 equity investors. He stated that he did not have any
2 intentions of investing equity in the company, but he
3 did have a desire to control and to have--to take the
4 right of way and control it.

5 Q. And in relation to that statement, he asked
6 FVG for an offer; correct?

7 A. If he did, then it doesn't say--I didn't say
8 that.

9 Q. Well, but did he or didn't he?

10 A. No, he did not.

11 Q. So, what was the offer--when you say that
12 when you went to the meeting, he said that
13 Mr. Campollo said "he was there to listen to what FVG
14 had to offer him," if it didn't have to do with his
15 intention of obtaining control over the railroad and
16 its assets, what offer was he referring to, to your
17 knowledge?

18 A. I have no idea. I didn't go there to
19 listen--to give him an offer. I went there to hear
20 his offer.

21 Q. Well, in the meeting in December of 2001 or
22 whenever it was back in 2001, April of 2001, you say

11:16:45 1 that he did state his control to want to have--or
2 state his intention to have control over the railroad
3 and its asset, and that he asked FVG to make an offer;
4 correct?

5 A. That's what he said.

6 Q. Then, in December of 2004, he stated the same
7 intention; correct?

8 A. I don't remember him saying at all that he
9 wanted us--I didn't go there to give him an offer. I
10 don't care what he wanted. I went there to hear what
11 he had to say to me. That's what it was. What was
12 his offer to me. We didn't go there. I didn't go
13 prepared to make an offer to him.

14 Q. At that meeting in December of 2004,
15 Mr. Campollo never said to you he was going to take
16 away the railway for nothing, did he?

17 A. That's what he said. We could either get him
18 what he wanted or he was going to take it.

19 Q. That's not what you say in Paragraph 6 of
20 your statement, sir. Take a look at it. What you say
21 is that he asked FVG for an offer--he was there to
22 listen to what FVG had to offer him, and that he

11:18:18 1 reiterated his intention of obtaining control of the
2 railroad and its assets. That's what you say?

3 A. That's correct.

4 Q. So, which is it? Is it correct how you said
5 it in your Declaration or what you're saying today?

6 A. The Declaration.

7 Q. Okay. So, at that meeting, then,
8 Mr. Campollo stated his intention of obtaining the
9 railway and asked for an offer. Did FVG ever make an
10 offer to him in that regard?

11 A. In what regard?

12 Q. In regard to what you say was Mr. Campollo's
13 intention of obtaining control over the railroad and
14 its assets? Did FVG ever make an offer to Mr.
15 Campollo?

16 A. We never made an offer to Mr. Campollo for
17 him to take over control of the railroad and its
18 assets. No. We always made an offer to
19 Mr. Campollo--any offers that were made to
20 Mr. Campollo were just as I stated, not once, but
21 maybe six times in the last 30 minutes that the offer
22 was we would accept equity partners.

11:19:30 1 Q. So you were willing to take him on as an
2 equity partner?

3 A. Correct.

4 Q. You said that you met with Mr. Campollo again
5 after this meeting; is that correct?

6 A. At his request.

7 Q. Okay. And when was that meeting?

8 A. January-February of 2005.

9 Q. If you could help us because I have read your
10 Declarations and I don't recall you stating, but maybe
11 I missed it, that you had another meeting directly
12 with Mr. Campollo. You do mention a meeting that you
13 had with Mr. Pinto--

14 MS. MURCHISON: Excuse me, for the record,
15 and to save time, we can go to the Third Statement and
16 Paragraph 9.

17 MR. ORTA: Okay.

18 BY MR. ORTA:

19 Q. Sorry, if my question wasn't precise enough,
20 I'm asking about meetings that you had in relation to
21 the Guatemalan railway, not the consultancy you did in
22 relation to the Dominican Republic, okay?

11:21:00 1 THE WITNESS: Okay.

2 MS. MURCHISON: For the record I'm referring
3 you to the Third Statement, Paragraph 9, referring to
4 a 2005 meeting.

5 MR. ORTA: Counsel, just so that the record
6 is clear, Paragraph 9 of the Third Statement refers to
7 a meeting that took place in August of 2004, and it
8 refers to a meeting that relates to the trip or the
9 consultancy that Mr. Duggan already testified to about
10 not the Guatemalan railway but about the consultancy
11 for the Dominican Republic railway.

12 MS. MURCHISON: You're right. It's the First
13 Statement, Paragraph 9. Excuse me.

14 BY MR. ORTA:

15 Q. All right. Let's go to that. Paragraph 9,
16 the First Statement.

17 First of all, this talks about a meeting that
18 you had with Mr. Pinto; correct? Not with
19 Mr. Campollo. Paragraph 9.

20 A. The first sentence of Paragraph 9, I state
21 that in early 2005, Campollo again demanded a meeting
22 with FVG prior to a March 9th, 2005 meeting where

11:22:18 1 Pinto delivered by e-mail a written option offer.

2 Q. So, you say the meeting was demanded by
3 Mr. Campollo. How did he do that? How did he make
4 that demand?

5 A. I believe he had Pinto call Jorge Senn.
6 Jorge Senn talked to me, set up a time when I was
7 going to be in Guatemala, and we went to the--we went
8 to the meeting in Guatemala City in one of Campollo's
9 offices.

10 Q. So, your personal knowledge is that someone
11 told you that Mr. Pinto called Mr. Senn to ask for a
12 meeting; correct?

13 A. Jorge Senn told me.

14 Q. So, Jorge Senn told you that Mr. Pinto called
15 him; right?

16 A. That's the way I remember it, yes.

17 Q. So, to your knowledge, you have no idea
18 whether Mr. Campollo knew or didn't know about
19 Mr. Pinto's outreach?

20 A. Oh, I know that he did.

21 Q. How do you know that?

22 A. Because they were waiting for us when we got

11:23:19 1 there.

2 Q. Who was waiting for you?

3 A. Campollo, in his office. I remember very
4 dramatically going through three air locks of security
5 to get into his office.

6 Q. Okay. Let's look at what you said in your
7 statement, sir. Let's highlight both Paragraphs 9 and
8 10.

9 Paragraph 9, you refer in your first
10 sentence, as you say, to this demand by Mr. Campollo
11 which you just told us you heard about from Mr. Senn
12 who got a call from Mr. Pinto; correct?

13 A. Yes.

14 Q. And you mentioned a meeting that took place
15 on March 15th, 2005; correct?

16 A. That's separate--a different meeting.

17 Q. So, was there another meeting that you forgot
18 to write about here in your Declaration?

19 A. Evidently.

20 Q. So, when was this meeting?

21 A. It was in January-February of 2005.

22 Q. Okay. So, what happened at that meeting,

11:24:29 1 sir? We didn't--

2 A. Campollo asked if Ferrovías Guatemala had any
3 changes in giving up control of the South Coast to
4 him.

5 Q. "Any changes"? What does that mean?

6 A. Because the last meeting I left--the one in
7 December, I left with the understanding that we had no
8 intentions of giving up control or giving up the right
9 of way to that South Coast or any other part of the
10 railroad, but that we would take on equity investors.

11 At this meeting in 2005, he again stated, did
12 we have any change of heart or change of mind in
13 allowing him to have control of that railroad, and
14 again I stated no, we did not.

15 Q. So, he asked for an offer, if you will, and
16 you said there was no offer.

17 A. I said that there was still the same offer of
18 taking--being an equity partner, put some money up,
19 don't talk about it, put the money on the table, and
20 we would certainly be willing to talk to him, and his
21 answer was that he had--at that meeting or one of the
22 others, which I think at that meeting also he

11:25:48 1 responded as he had in previous meetings that he had
2 the reputation of being a lone wolf and didn't like
3 partners.

4 Q. First of all, just so that we're clear
5 because apparently you forgot to tell us about this in
6 the three Declarations--

7 A. I mentioned it here, but I guess I didn't get
8 the sentence or the paragraph completed.

9 Q. Any other meetings with Mr. Campollo besides
10 this one that you mention in early January 2005?

11 A. No.

12 Q. So, it was three meetings that you had with
13 him in total that you can recall?

14 A. Four.

15 Q. Okay. When was the fourth?

16 A. First one in 2001, the second one in August
17 of 2004, the third one in December 2004, the fourth
18 one in early 2005.

19 Q. Again, my question wasn't as precise. I'm
20 talking about only in relation to the FVG Usufruct.

21 A. I'm sorry, because you said meetings with
22 Campollo.

11:26:40 1 Q. So, three only in relation to his intention
2 to want to have control over the FVG Usufruct;
3 correct?

4 A. Yes, sir.

5 Q. So, was anything else said in that
6 January 2005 meeting with Mr. Campollo? Anything else
7 that you think is worth telling the Tribunal about?

8 A. No--no.

9 Q. All right. So, at that meeting, Mr. Campollo
10 then didn't tell you he was going to take away the
11 concession for nothing; right? He, instead, asked you
12 whether you had a change of heart; correct?

13 A. Yes.

14 Q. And you said no?

15 A. Yes.

16 Q. All right. Who else attended that meeting,
17 by the way, besides yourself?

18 A. Jorge Senn.

19 Q. Anyone else?

20 A. I don't believe so.

21 Q. All right. Now, after that meeting, you
22 reference a meeting that you had in March of 2005 with

11:27:30 1 Mr. Pinto; correct?

2 A. Mr. Pinto was involved several times in 2005,
3 but the--yes, there was a meeting. I didn't have a
4 meeting with him on March 9th, as Paragraph 9 states,
5 which it doesn't state that I did, but on March 15th,
6 yes, I did have a meeting with him.

7 Q. And at that meeting there were--in addition
8 to yourself, Mr. Senn was there, you say?

9 A. Correct.

10 Q. And Mr. Posner?

11 A. Correct.

12 Q. And Mr. Pietrandrea?

13 A. Correct.

14 Q. And the only other person there was

15 Mr. Pinto?

16 A. No, we had our whole Board of Directors was
17 there.

18 Q. So, there were other people from Ferrovías?

19 A. Not from Ferrovías. I said Board of
20 Directors. Of Ferrovías Guatemala.

21 Q. So they were from Ferrovías, they were
22 members of the Board of Directors of Ferrovías?

11:28:22 1 A. Okay, okay.

2 Q. Is that correct?

3 A. Okay, yes.

4 Q. Okay. And who were those people? That you
5 can recall?

6 A. One of our corporate attorney at the time,
7 Pedro Mendoza, Carolinas Asturias, who was also a
8 board member.

9 Q. Okay. And the only other--the only person
10 other than Ferrovias board members and/or operations
11 people were--was Mr. Pinto?

12 A. Correct.

13 Q. And at this meeting you say that Mr. Pinto
14 said that either--if FVG did not cooperate with
15 Mr. Campollo's company's on joint ventures, so that's
16 in quotes. You remember he said that exactly?

17 A. Yes.

18 Q. And didn't--and didn't agree with the option,
19 and if FVG didn't agree with this option that
20 Mr. Pinto had sent; correct?

21 A. Yes, go ahead.

22 Q. That Mr. Campollo would take the business

11:29:33 1 with or without FVG?

2 A. That was a statement upon leaving, yes.

3 Q. He made that statement as he was leaving, you
4 say?

5 A. In Spanish, and this is--it was translated
6 for the balance of the board as he was leaving.
7 That's the statement that was made.

8 Q. So, you didn't understand the statement at
9 the time it was made because it was made in Spanish,
10 and you don't speak Spanish; is that correct?

11 A. That's correct.

12 Q. So, somebody translated that for you?

13 A. Correct, as everything else that I've done
14 during Spanish speaking times of this job.

15 Q. Was that Mr. Senn who made the translation or
16 someone else?

17 A. I don't know if it was Mr. Senn or if it was
18 Mr. Mendoza or just exactly who it was. I don't
19 remember.

20 Q. Now, that was in March of 2005; correct?

21 A. Correct.

22 Q. First of all, you said he made the statement

11:30:32 1 as leaving. Was there an opportunity for anybody to
2 respond to that statement?

3 A. Yes, there was.

4 Q. During that meeting?

5 A. There was. There was a response during that
6 meeting from Mr. Pietrandrea, Mr. Posner, that his
7 offer was no good to us as it was written. We had no
8 intentions of giving up full control for no funds
9 whatsoever, the South Coast of the railroad, and
10 that--he could come back with an offer that was
11 satisfactory or forget it.

12 Q. Okay. And you mentioned an option, an option
13 offer that was--that was sent by Mr. Pinto; correct?

14 A. Speaking in reference of what? On the
15 March 15th meeting?

16 Q. Yes, sir.

17 A. Yes.

18 Q. Okay.

19 Let's go ahead and put up C-41.

20 This is the option; correct? Well, this is
21 an e-mail, for the record, C-41 is an e-mail from
22 "Maprisol@Intelnett.com." And it's sent to Mr. Senn,

11:32:26 1 Mr. Berger, Mr. Buitron, with a copy to Héctor Pinto,
2 and Juan Esteban Berger; correct?

3 A. Yes.

4 Q. And if we could go to the next page, please.
5 Now you should have in front of you--could we put up
6 the English version? I think if we go to the
7 translation?

8 ARBITRATOR EIZENSTAT: What tab is the
9 English translation is?

10 MR. ORTA: It is C-41. I don't know the tab
11 number--it's not in that binder. We have sort of a
12 large set of three Core Bundle documents, which
13 unfortunately are quite heavy.

14 ARBITRATOR CRAWFORD: They're quite large.

15 MR. ORTA: Yes. C-41. Bates number RDC2405.

16 BY MR. ORTA:

17 Q. Now, sir, looking at the English translation
18 of this document that was provided by your counsel,
19 this is the option agreement that Mr. Pinto had sent
20 and which you say in your testimony today was their
21 agreement to take away the concession for nothing;
22 correct?

11:34:28 1 A. This is the first time I've seen this in many
2 years. I would like to read it, please.

3 Q. All right. Well, while you're taking a look
4 at it, I'm going to highlight some things and ask you
5 some questions about.

6 On the first page, you can see that this is a
7 proposed agreement; right? It's in draft form, it
8 says "Draft Agreement" up top; correct?

9 A. Yes.

10 Q. And it's a Draft Agreement between
11 Desarrollos G, Sociedad Anónima. That's one of the
12 Parties or proposed Parties to this agreement;
13 correct?

14 A. Yes.

15 Q. And the other is Ferrovías; correct?

16 A. Yes.

17 Q. Now, if we go to--go to the second page,
18 2406, is the Bates number, under second, Roman Number
19 I--let's highlight the whole Roman Number I. Or as
20 much as you can, there, Kelby. The rest of that page
21 is fine.

22 In this document, what's being proposed is

11:35:57 1 that Ferrovías would grant a first option or first
2 choice or preferential right, is the translation, to
3 initiate and develop businesses or projects related to
4 the property and rights that, and just to paraphrase,
5 that--relating to Ferrovías Usufruct contracts;
6 correct?

7 A. Yes, that's what it said.

8 Q. Okay. That's not a demand to take away the
9 business for nothing, is it?

10 A. What does "grant" mean to me? Grant means
11 that it's given for free.

12 Q. Well, let's look a little bit further down
13 and see if that's, in fact, what the document says.
14 It says, "whenever Desarrollos G decides to initiate a
15 business or project, communication will be had with
16 Ferrovías"--I'm sorry. "Communications with Ferrovías
17 will be needed in order to negotiate the grounds under
18 which the business or project will be developed."

19 Right? That's what it says.

20 A. That's what it said.

21 Q. So it's talking about if Desarrollos G were
22 to exercise a first choice or preferential right to

11:37:21 1 initiate or develop a business in relation to the
2 Usufruct rights that Ferrovías had, it would--it would
3 be obligated under this Draft Agreement to communicate
4 with Ferrovías; correct?

5 A. That's what it says.

6 Q. And negotiate the grounds under which the
7 business or project will be developed; right? That's
8 what it says?

9 A. That's what it says.

10 Q. It doesn't say Desarrollos G will take it
11 away for nothing, and we will pay Ferrovías nothing,
12 does it?

13 A. What does "grant" mean to you?

14 Q. Well, sir, we're not here to talk about what
15 grant means to me?

16 A. I'm telling you what it means to me, what it
17 means to me is what we're here to talk about; correct?

18 Q. Sure.

19 A. And grant, to me, means that it's given. If
20 I grant you something, I give it to you. If you grant
21 me something, you give it to me.

22 Now, anything else--and if that is asked for,

11:38:19 1 that's one thing, but if someone walks in with a
2 contract like this and says this is what I want is a
3 grant, that's a threat, especially with the verbiage
4 that's given at the end of the meeting.

5 Q. So, this was, in your view--because it uses
6 the word "grant," in your view this was a threat; is
7 that what you're saying?

8 A. The whole thing was a threat, but this grant,
9 don't come to me wanting me to give me something,
10 Mr. Pinto. Come to me with what you're willing to put
11 up for it.

12 Q. Okay. And does your assessment of this as a
13 threat, is that at all affected by the fact that the
14 document itself says that this company, Desarrollos G,
15 would be communicating with Ferrovías to negotiate the
16 grounds under which the business or project will be
17 developed? Does that affect your assessment of
18 whether this is a threat or not, or no?

19 A. It was enough for us, Ferrovías Guatemala, to
20 say we were not interested in this Contract in the way
21 it was wrote, period.

22 Q. All right. Now, sir, Desarrollos G, you

11:39:46 1 never spoke with Mr. Campollo about that company;
2 correct?

3 A. I don't--no, I never spoke to him.

4 Q. You have no personal knowledge whether
5 Mr. Campollo has any personal interest in that
6 company; correct?

7 A. Nor would I probably be able to find out with
8 the way the bearer of shares law is in Guatemala up
9 until 2013 and '14, when they make them put their
10 names on it.

11 Q. You have no knowledge whether Mr. Campollo
12 ever authorized Mr. Pinto to send this document to
13 you, do you?

14 A. I can't imagine. I don't know that--I don't
15 have that--no, I don't have that.

16 Q. Okay. And in relation to the communications
17 that you had with Mr. Campollo, you mentioned the
18 three meetings. Go to R-173. You recall that there
19 was a point in time after this option offer was sent
20 to you by Mr. Pinto where Mr. Campollo sent a letter
21 to Mr. Senn and communicated that he had no further
22 interest in having any discussions with Ferrovías

11:41:04 1 Guatemala; correct?

2 A. You're talking about the April 15th, 2005,
3 letter.

4 Q. Yes, sir: It's up on the screen.

5 A. Yes.

6 Q. And in this letter, Mr. Campollo communicates
7 to Ferrovías Guatemala that he has decided not to
8 participate in the railway project that was presented
9 to him in the City of Miami; correct? That's what he
10 says.

11 A. Yes.

12 Q. So, you knew at least, based on this letter,
13 that as of this date, Mr. Campollo was saying he had
14 no desire to participate in the railway project that
15 was presented to him by your company; correct?

16 A. That's what that letter said.

17 Q. And that's what was communicated to you by
18 Mr. Campollo; correct?

19 A. On April 15th, 2005.

20 Q. Right.

21 A. Now, you want the timeline leading up to that
22 letter?

11:41:59 1 Q. No, we're going to talk about what happened
2 after this letter.

3 After April 15th, 2005, did you ever have any
4 communications with Mr. Campollo about the railway
5 Usufruct?

6 A. I did not.

7 Q. After April 15th, 2005, to your knowledge,
8 did Mr. Senn have any communications directly with
9 Mr. Campollo about the Usufruct?

10 A. Not that I'm aware of.

11 Q. Same question for Mr. Posner.

12 A. I don't know whether--I don't know of all
13 Mr. Posner's communications.

14 Q. Are you aware of any that he had with
15 Mr. Posner after April 15--

16 A. I'm not aware--

17 Q. Excuse me?

18 A. I'm not aware but I can't speak for
19 Mr. Posner.

20 Q. Are you aware of any other FVG employee,
21 Board of Director member who had a conversation
22 directly with Mr. Campollo about FVG's Usufruct rights

11:42:53 1 after April 15, 2005?

2 A. No, I'm not, but Mr. Campollo very seldom did
3 any communication of that sort in person. He always
4 used go-betweens. Always. The meeting in December
5 of--or in December wasn't set up by Mr. Campollo. It
6 was set up by someone else. The meetings for the work
7 that was done in the Dominican Republic was set up by
8 someone else, one of his workers. The original
9 meeting was set up by someone else, not Mr. Campollo.

10 Q. And, sir, after April 15, 2005, there were a
11 series of communications that Mr. Pinto had with
12 Mr. Posner and Mr. Senn; correct?

13 A. Correct.

14 Q. And in those communications, Mr. Pinto never
15 said that he was going to take away the railway, take
16 away FVG's Usufruct rights; correct?

17 A. In writing, you're saying?

18 Q. That's correct. All of the documents that
19 have been provided here by your counsel--there are a
20 number of them. I don't have time to go through them,
21 but I will list them for the record, C-45, C-109,
22 C-110, C-111--

11:44:08 1 A. Nor would I expect those to have the same
2 type of threat.

3 Q. C-113, C-116, C-117, R-323--we looked at them
4 all. And when you put them in chronological order
5 they tell a story, but they tell a very different
6 story than the one that you've told to this Tribunal.
7 Not once in any of those letters does Mr. Pinto ever
8 say that he is going to take away FVG Usufruct rights,
9 does he?

10 A. He doesn't have to. He would not put it in
11 writing, nor would you or nor would I. I knew that he
12 worked for Campollo, I knew that.

13 Q. But he never--Mr. Pinto in writing, never
14 communicates to FVG after April 15, 2005, about this
15 supposed intention to take away the railway, does he?

16 A. Not in writing.

17 Q. In your Declaration, any of your
18 declarations, do you ever make an allegation that the
19 Government was proposing--was asking FVG to pay
20 \$50 million in order to abandon the Lesivo
21 Declaration?

22 A. That's not in my Declaration.

11:45:29 1 Q. In none of them; right?

2 A. Not in mine, no.

3 Q. And you don't have any personal knowledge
4 about that issue then?

5 A. Oh, yes, I do.

6 Q. How do you have personal knowledge?

7 A. I saw the TV clip.

8 Q. Are you talking about the TV clip of
9 President Berger--excuse me, let me get the question
10 out.

11 After the Lesivo Declaration was issued. Is
12 that the one you're talking about?

13 A. Correct.

14 Q. Is that the only evidence you have of that
15 point?

16 A. There's also some newspaper clips that have
17 been translated, that were translated for me, an El
18 Periodico article in early September. There was--I
19 remember La Hora newspaper article, there was
20 possibly--there was several of them, and they all
21 mentioned 50 million.

22 Q. Now, that was never mentioned during the

11:46:20 1 direct negotiations you had with Government officials,
2 you and Mr. Senn and others leading up to the Lesivo
3 Declaration, was it?

4 A. This was after Lesivo.

5 Q. I'm just establishing for the record, it was
6 never mentioned by any Government official to your
7 knowledge, leading up to the Lesivo Declaration;
8 correct?

9 A. 50 million?

10 Q. Yes, sir.

11 A. Not to my knowledge, no.

12 Q. Okay. And after the Lesivo Declaration, it
13 was never mentioned directly to you or anyone at
14 Ferrovias or RDC by any Government official, this
15 alleged 50 million-dollar demand?

16 A. Not 50 million as a number, no.

17 Q. Or any number. All you've referenced are
18 newspaper clippings. I'm asking you--

19 A. And personal television spoken words of the
20 President. That's not a newspaper clipping.

21 Q. Sorry. Newspaper clippings, television
22 articles--television reports, you never had any direct

11:47:26 1 communications with any Government official where they
2 made that demand from you; correct?

3 A. No.

4 Q. Now, the Contract was declared Lesivo in
5 August of 2006; correct?

6 A. Correct.

7 Q. And as we've seen in this case, the very
8 first business day after, 28 August, 2006, Ferrovías
9 put out a press release in the newspapers in
10 Guatemala; correct?

11 A. I don't remember the date. If you got that,
12 I don't remember the date that we put that out in the
13 newspapers. I don't remember.

14 Q. For purposes of time, it's dated--the press
15 release is dated 28 August, 2006.

16 A. When was it published?

17 Q. Well, it's our understanding it was published
18 that very day in the newspapers?

19 A. I don't remember of a newspaper published on
20 that date.

21 Q. Well, my question really doesn't relate to
22 when it was published. My question relates to

11:48:35 1 something else.

2 Now, Ferrovías made the decision, did it not,
3 shortly after the Lesivo Declaration was issued to
4 begin to put together this arbitration; correct?

5 A. No, that is not correct.

6 Q. When did you begin planning this arbitration?

7 A. It was clear up in--beyond up into 2007 at
8 some point.

9 Q. Okay. You don't remember that, and I'm
10 asking, do you have a recollection that in
11 November 2006, the Government was negotiating with
12 you, with Ferrovías, through its local partners and
13 directly with Ferrovías on the basis of the
14 Mezo-America Study to try to reach an agreement with
15 Ferrovías in order to fix or resolve all of the
16 problems it had with Ferrovías? You don't remember
17 that?

18 A. I don't know--that was our problem. We
19 didn't know what all the problems were that they had
20 with us. What were their problems?

21 Q. No, but I'm asking you a question: Do you
22 have a recollection that in or around November 2006,

11:49:49 1 there was a proposed agreement between the Government
2 and Ferrovías relating to a study that had been
3 conducted by Mezo-America in which the Government was
4 trying to settle all its problems--

5 A. No, no.

6 Q. You don't remember that?

7 A. No, no. No.

8 Q. And you don't remember that a proposal was
9 made but that Ferrovías turned it down?

10 A. Well, we certainly did. The proposal that we
11 saw, we certainly did turn down.

12 Q. And turned it down saying that it decided to
13 proceed with this arbitration?

14 A. No, no.

15 Q. You don't have a recollection of that?

16 A. I don't have a recollection because it didn't
17 happen that way, Mr. Orta.

18 Q. Let's put up R-327, please.

19 Your local partners in Guatemala--let's
20 highlight the last paragraph, please, and let's also
21 highlight the first paragraph.

22 First of all, this is a letter written by

11:51:05 1 Federico Melville, who was Chairman of the Board at
2 the time of your largest Minority Shareholder in
3 Ferrovías; correct? Cementos Progreso?

4 A. Correct.

5 Q. And in this document he says to you that
6 Cementos does not agree with the decision to pursue
7 this international arbitration; correct?

8 A. They did not want to, no.

9 Q. Let's just highlight the date for the record
10 of this letter. This is a letter--

11 A. May 2007.

12 Q. Thank you, sir.

13 A. As I stated, we didn't talk about this
14 arbitration until late into 2007.

15 Q. Well, this letter--this letter tells us that
16 certainly by May 2007 a decision had been made to
17 pursue an arbitration; correct?

18 A. That's what I said. You were talking about
19 November 2006 and September 2006 and August of 2006.
20 I was talking about 2007, and this is true.

21 Q. And the last paragraph of this letter says
22 that an agreement was reached with the Government in

11:52:19 1 November 2006, which was a good one, giving the
2 business a reasonable chance of achieving an
3 operational turnaround.

4 Do you see that?

5 A. I see it.

6 Q. So I was asking you if you remembered about
7 an agreement in November 2006 that was reached with
8 the Government, and you said you had no recollection
9 of that; correct?

10 A. I don't recollect it, no. I don't remember
11 that.

12 Q. So, you have no idea what Mr. Melville is
13 talking about here when he said there was a good
14 agreement reached with the Government in November 2006
15 giving the business a reasonable chance of an
16 operational turnaround? You have no idea?

17 A. I cannot for the life of me figure out what
18 the good agreement that he's talking about was, the
19 Agreement that was proposed to us, presented to us,
20 was not a good agreement.

21 Q. And you rejected it?

22 A. We rejected it.

11:53:04 1 MR. ORTA: All right. I don't have any
2 further questions at this time.

3 PRESIDENT RIGO SUREDO: Thank you, Mr. Orta.
4 Ms. Murchison.

5 MS. MURCHISON: Thank you. We can actually
6 leave up this exhibit for a moment.

7 We saw that the date--can we just show the
8 date again of this exhibit. It's May 2nd, 2007.

9 REDIRECT EXAMINATION

10 BY MS. MURCHISON:

11 Q. Do you remember the first time that you met
12 with your counsel from Greenberg Traurig?

13 A. It was in the--sometime in the Summer early
14 in the Summer of 2007. I cannot remember for sure.

15 Q. Mr. Duggan, were RDC or Ferrovías's local
16 partners authorized to act on the company's behalf?

17 A. No, no.

18 Q. Let's take this exhibit down.

19 Mr. Orta asked you some questions about
20 meetings that you had with Mr. Campollo about who was
21 there and about what was said. I want to talk to you
22 a little bit about that. How many total times did you

11:54:13 1 meet with Mr. Campollo?

2 A. Four.

3 Q. Who was--let's do this. Let's put up your
4 First Statement. I think it was Paragraph 4 that
5 Mr. Orta put on the screen earlier. Let's go to that
6 same paragraph.

7 Who was at the first meeting with
8 Mr. Campollo? Who was with Mr. Campollo when he told
9 you that he intended to obtain a controlling interest
10 in FVG Usufruct and its assets, including the real
11 estate?

12 A. Mr. Pinto.

13 Q. Now, you told us about a second meeting in
14 the Dominican Republic when you were consulting with
15 him or his railroad; is that right?

16 A. Yes.

17 Q. When was your third meeting with
18 Mr. Campollo?

19 A. In December of 2004.

20 Q. Who was with Mr. Campollo during your third
21 meeting with him in December 2004?

22 A. A gentleman from Mercury Finance, whose name

11:55:30 1 I don't recall, a gentleman from the railroad
2 equipment rebuilding company in the Carolinas that I
3 never heard of before, and I cannot remember his name,
4 but I do remember Mr. Juan Esteban Berger was at that
5 meeting when I walked in.

6 Q. Who is Mr. Juan Esteban Berger?

7 A. He is an attorney in Guatemala, the son of
8 President Berger.

9 Q. Did you know that President Berger's son was
10 going to be at your meeting with Ramon Campollo?

11 A. Absolutely not.

12 Q. Do you know why he was there?

13 A. No, other than he had to have been working
14 for Mr. Campollo. Everybody else at that meeting did.

15 Q. Who invited Mr. Berger, President Berger's
16 son to the meeting?

17 A. It had to have been Mr. Campollo.

18 Q. At this meeting with Mr. Campollo and
19 President Berger's son, what did Mr. Campollo say to
20 you about the South Coast railway line?

21 A. That he wanted to have the opportunity to
22 obtain controlling interest in it and to be able to

11:56:46 1 utilize it for his own benefit to move sugar from the
2 Mexican lines or from the Mexican border over towards
3 the sugar mills that he had, and for several reasons,
4 one, because he said he could buy property cheaper
5 along the border area.

6 He also had Ciudad del Sur project going on
7 close to his property in Santa Lucia.

8 The way I understood it, that Berger was
9 handling some of that particular project for him.

10 Q. Did Mr. Campollo actually mention during this
11 meeting with the President's son Ciudad del Sur?

12 A. Yes.

13 Q. Now, after your first meeting with
14 Mr. Campollo at which Mr. Pinto was present in 2001,
15 when was the next time that you saw Mr. Pinto?

16 A. Say again, please.

17 Q. After the first time that you saw Mr. Pinto
18 when he was with Mr. Campollo at the meeting in 2001--

19 A. Yes.

20 Q. --when was the next time that you saw
21 Mr. Pinto?

22 A. I don't remember seeing Mr. Pinto again

11:58:11 1 personally. I know that there was communication
2 between he and Ferrovías Guatemala, the General
3 Manager. I don't remember seeing him again personally
4 until March of 2005.

5 Q. When you saw him, Mr. Pinto, in March 2005,
6 was that the board meeting that you told us about
7 earlier?

8 A. Correct.

9 Q. Now, let's go back to your--

10 MR. ORTA: I'm going to object to the
11 characterization of that meeting. I don't think it
12 was called a board meeting. You just characterized it
13 as a board meeting.

14 MS. MURCHISON: That's what the witness
15 testified. The shareholders were there.

16 BY MS. MURCHISON:

17 Q. So, we can call it a shareholders meeting;
18 right?

19 A. Yes.

20 Q. Now, if you go back to your First Statement
21 and you look at Paragraph Number 9, I think Mr. Orta
22 asked you some questions about this, too.

11:59:01 1 Do you see the first sentence in Paragraph 9
2 where you say: "in early 2005, Mr. Campollo again
3 demanded a meeting with FVG."

4 Do you see that?

5 A. Yes.

6 Q. Did that meeting that Mr. Campollo demanded
7 in early 2005, does it happen?

8 A. Yes.

9 Q. So, you met with Mr. Campollo in early 2005?

10 A. Yes.

11 Q. Was that the last meeting that you had with
12 Mr. Campollo?

13 A. Yes.

14 Q. Now, Mr. Orta asked you questions about a
15 letter that Mr. Campollo sent to you, to FVG or
16 Ferrovías in April 2005, and he put that up on the
17 screen.

18 Why would Ferrovías continue to communicate
19 with Mr. Pinto after Mr. Pinto sent the--Mr. Campollo
20 sent the April 2005 letter?

21 A. Say that again, please, Ms. Murchison.

22 Q. Sure.

12:00:06 1 Mr. Orta put on the screen an April 2005
2 letter from Mr. Campollo, and if you look in your
3 exhibit binder--I think you have it there as well.

4 A. Yes.

5 Q. Do you remember a letter that Mr. Campollo
6 sent to Ferrovías saying that he wasn't interested
7 anymore?

8 A. I do.

9 Q. Now, why would Ferrovías continue to
10 communicate with Mr. Pinto after having received that
11 letter from Mr. Campollo?

12 A. The major communication with Mr. Pinto was,
13 as I said, in March, on March 9th, March 15th, and
14 later, in late March, early April, our office was
15 contacted, our General Manager was contacted by
16 Mr. Pinto--this is early April--prior to
17 Mr. Campollo's April 15th letter, that we had
18 illegalities in our contracts and that he was going to
19 get the railroad from us with the help of the Minister
20 of Communications transportation at the time because
21 they had stated that there were illegalities in our
22 Contract. He wanted to meet with us, and he would

12:01:24 1 tell us what I asked.

2 Jorge Senn, I said find out what the
3 illegalities are that they are claiming. He said he
4 would meet with us and tell us.

5 And I said, well, I'll meet with you, but
6 I'll only meet with you off-site.

7 So, I set the meeting up with Mr. Pinto at
8 our lawyer's office, Mr. Pedro Mendoza, who was at the
9 time our corporate lawyer. I also brought along
10 another attorney by the name of Ricardo Silva.

11 The meeting was originally suppose to also
12 include Juan Esteban Berger.

13 We got to the office, went to the meeting,
14 and Mr. Berger wasn't there, an attorney by the name
15 of Fuxet was there, representing at the request of
16 Mr. Berger, and at Mr. Berger's request he was
17 representing Mr. Berger.

18 Again, the demand was made by Mr. Pinto and
19 Mr. Fuxet and the whole group. Mr. Fuxet, if I
20 remember right, was introduced as one of the leaders
21 of Ferrovías renewal project, or something like that,
22 something that I never heard of.

12:03:00 1 What they wanted was for us to give up our
2 rights and turn them over to Héctor Pinto and Ramon
3 Campollo and the whole group.

4 Mr. Ricardo Silva, who was also an attorney
5 working for us, and was also a professor who had
6 taught Mr. Fuxet and some more of them that were in
7 the room, gave them a lesson on the fact that it could
8 not be done legally.

9 I also demanded to know what the illegalities
10 were that they were responding to because I wanted to
11 know. If it's illegal, then let's do something about
12 it. There weren't any illegalities. There weren't
13 any. They never said any of it up. It was all talk,
14 couldn't show me one illegal thing about our
15 Contracts.

16 Q. Mr. Duggan, the demands that you said
17 Mr. Pinto made, how did they compare with the
18 statements that Mr. Campollo had made during your
19 meetings with him?

20 A. They were the same statement, the same
21 statement.

22 Q. Let's put up Exhibit C-41, which is the

12:04:28 1 Option Offer I think you talked about. Can we make
2 that a little bit bigger and go to that first choice
3 language that was up a little while ago. Page 2.

4 Do you see the part where it says, Ferrovías
5 should grant Desarrollos G first choice or
6 preferential right? Do you see that part?

7 A. Yes.

8 Q. Is there any language in Exhibit C-41, this
9 Option Offer, that talks about Desarrollos G or anyone
10 else paying anything to Ferrovías for first choice or
11 preferential right?

12 A. No.

13 Q. Is there anything in this document, Exhibit
14 C-41, that mentions Desarrollos G or anyone else
15 paying anything to Ferrovías?

16 A. No.

17 MS. MURCHISON: No further questions.

18 PRESIDENT RIGO: Thank you.

19 QUESTIONS FROM THE TRIBUNAL

20 ARBITRATOR EIZENSTAT: Mr. Duggan, you
21 mentioned at the late 2004, December 3, 2004, meeting
22 that Mr. Juan Esteban Berger was present, and he

12:06:08 1 appears in several other instances in your statement,
2 what do you understand his interest in this matter to
3 be? Why was he there? Who was he representing? And
4 what position was he taking regarding the matters that
5 were being discussed?

6 THE WITNESS: Sir, the only--it's my
7 understanding that he worked for Campollo; otherwise,
8 he wouldn't have been available, he wouldn't have been
9 there. At the--

10 ARBITRATOR EIZENSTAT: But did he say so?

11 THE WITNESS: He kept saying that he was
12 there working for his clients. That's what he said.

13 If we go to the meeting that more or less
14 justifies my feelings. If we go to the meeting of
15 April in Mr. Mendoza's office that I was just
16 describing and I lost my temper possibly, and I knew
17 that Mr. Berger was involved in the whole drawing up
18 of the letters and the demands, and I so stated that,
19 it was only two days later that Mr. Berger asked for a
20 meeting with us in Mr. Ricardo Silva's office at which
21 time he apologized for not being at the meeting, that
22 he didn't like what he had heard that Mr. Pinto had

12:07:48 1 said, that it shouldn't have--he never should have
2 made statements like that.

3 He did this in front of Mr. Silva because
4 Mr. Silva had been a professor of his at the
5 University when he was in law school, and that's why
6 he wanted that to happen that way, but he did
7 apologize profusely.

8 He also did say that he was threatened by his
9 father not to participate, but he was in--he was
10 always around, always involved with the Campollo
11 meeting, his name came up in different times, and I
12 just couldn't help but understand that he was working
13 for Campollo.

14 ARBITRATOR EIZENSTAT: When he said he was
15 representing clients, did you ever ask him which
16 clients they were, or did he ever name them?

17 THE WITNESS: He had a lot of maquila
18 clients. He never named them. I know that in Ciudad
19 del Sur they discussed putting in a transloading
20 facility for maquila stuff. There was also some
21 talk--I think they were possibly Korean clients. I
22 don't know. He didn't say and I guess I don't know.

12:09:08 1 ARBITRATOR EIZENSTAT: You mentioned that at
2 the 2001 meeting, that Mr. Campollo and Mr. Pinto were
3 present; is that correct?

4 THE WITNESS: Yes, sir.

5 ARBITRATOR EIZENSTAT: At your subsequent, I
6 guess you had three others, two connected to the rail
7 way here and the third was the consulting Contract in
8 the Dominican Republic, at those other three meetings
9 was Mr. Pinto present with Mr. Campollo?

10 THE WITNESS: No.

11 ARBITRATOR EIZENSTAT: Then he reappears in
12 2005 with this proposal from Desarrollos G; is that
13 correct?

14 THE WITNESS: Yes, sir.

15 ARBITRATOR EIZENSTAT: On what basis do you
16 connect Mr. Pinto and Desarrollos G in that offer to
17 Mr. Campollo?

18 THE WITNESS: I understand that Desarrollos G
19 is a company that's under the umbrella of
20 Mr. Campollo.

21 ARBITRATOR EIZENSTAT: And on what basis do
22 you understand that? What evidence is there? What

12:10:06 1 documents were there? Tell the Tribunal--

2 THE WITNESS: Sir, I'm sorry, I do not have
3 the hard evidence on that. It's so difficult to find
4 in Guatemala who the actual owners are because of the
5 opportunity that they have to bear shares anonymously,
6 and we could not prove it, but we were told by Pinto
7 that it was a Campollo company.

8 ARBITRATOR EIZENSTAT: So, in 2005, when
9 Mr. Pinto made this Desarrollos G offer, you're saying
10 that he said it was a Campollo company?

11 THE WITNESS: Yes, sir. He brought up
12 Campollo's name many times.

13 ARBITRATOR EIZENSTAT: Is that in your
14 statement, your written statement?

15 THE WITNESS: I don't know, sir. I don't
16 think so.

17 I believe it is, too. I do believe I did--it
18 is.

19 ARBITRATOR EIZENSTAT: Perhaps you could be
20 good enough, or maybe Counsel could point that to us
21 more quickly.

22 MS. MURCHISON: I think if we look at the

12:11:12 1 First Statement, Paragraph 10, we will see the mention
2 of a quote about Campollo's name during the
3 March 15th, 2000 meeting at which this Option Offer
4 was actually on presented.

5 MR. ORTA: If I may, as I understand
6 Secretary Eizenstat's question, the question is
7 whether Mr. Duggan stated in his statement that
8 Mr. Pinto had told him that Desarrollos G had to do
9 with Mr. Campollo, that's what I understood the
10 question to be, and, and to the extent that counsel is
11 saying that that's what's referenced in Paragraph 10,
12 I would object to that characterization of
13 Paragraph 10. It doesn't say that.

14 MS. MURCHISON: For the record, I would note
15 that it has "option" in parentheses in this paragraph,
16 but I think we've been all calling this an Option
17 Offer in C-41.

18 ARBITRATOR EIZENSTAT: So, in Paragraph 10 of
19 your First Statement, this option, is this the same as
20 the Desarrollos G proposal, or not?

21 THE WITNESS: Yes, sir, it is.

22 ARBITRATOR EIZENSTAT: You mentioned--a

12:12:25 1 discussion has been made of a November 2006 agreement
2 or proposed possible agreement. Do you know the
3 issues that were covered by that November 2006
4 proposal, what areas they were covering? Was this
5 covering all the contracts? 802, et cetera? 143,
6 158? What issues were being proposed for settlement?

7 THE WITNESS: It's my understanding--it was
8 my understanding that all the contracts were being
9 discussed in that proposed settlement, that we would
10 give up all of the right of way, all of the easement
11 rights, all of the property rights on anything where
12 we were not presently--present day operating trains.

13 That we would begin to pay more money in the
14 Canon--if I'm not mistaken, that was part of it
15 without reading it, sir, again; it was also that the
16 property that we were not present day operating trains
17 on, being the South Coast, that that property would
18 then be available to be disbursed to other
19 individuals. That's my recollection of the
20 November 6th agreement.

21 It would take away all of our incentive, and
22 it was not a viable offer.

12:14:07 1 ARBITRATOR EIZENSTAT: Was any
2 counterproposal made?

3 THE WITNESS: They were not--no, sir. No.
4 There was no counterproposal made. They were not
5 interested in a counterproposal.

6 ARBITRATOR EIZENSTAT: Again, let me just go
7 back to this Pinto relationship.

8 Concretely, in 2005, what evidence do you
9 have for the Tribunal that when Pinto made this
10 particular proposal on behalf of Desarrollos G, that
11 he was representing the interests of Mr. Campollo?
12 Was it his statement?

13 THE WITNESS: Only Mr. Pinto's statements.

14 ARBITRATOR EIZENSTAT: There was no other
15 basis for that?

16 THE WITNESS: No, sir, I'm sorry.

17 ARBITRATOR EIZENSTAT: Okay. Now, going back
18 to your Paragraph 18 and President Berger wanted to
19 create a new High-Level Railroad Commission, which you
20 mentioned at Paragraph 19 that was in existence for
21 about three months, permit me to ask you a few
22 questions about that.

12:15:24 1 THE WITNESS: Yes, sir.

2 ARBITRATOR EIZENSTAT: When the President
3 issued the instruction to set this Railroad Commission
4 up, was it an attempt to resolve the outstanding
5 differences between Ferrovias and the Government?

6 THE WITNESS: The only outstanding difference
7 at the time this was set up was the fact that the
8 FEGUA had not paid into the trust the funds that they
9 were supposed to pay, which at the time was somewhere
10 between two-and-a-half and 3 million U.S. dollars. We
11 wanted that money. The other thing that was involved
12 in that trust or in this High-Level Commission
13 was--there was some complaints, not illegalities, but
14 complaints from people that we weren't moving fast
15 enough, that we weren't spending enough money to
16 rehabilitate the South Coast, that we just weren't
17 moving fast enough. We had met all of our
18 obligations, so there weren't illegalities.

19 The High-Level Commission was supposedly
20 developed to assist us in better being able to
21 finance--to find financing and utilize international
22 financing and to satisfy these complaints that the

12:17:04 1 President Berger was getting, whether it be from the
2 FEGUA interventor, whether it be from Campollo and
3 Ciudad del Sur, whether it be from others in the sugar
4 industry who may have wanted to have the right of way
5 for roads, whether it was the electric company that
6 wanted the right of way for free easement on power
7 lines, but that's what it was set up for, was to try
8 to be a go-between, between us and the Government.

9 ARBITRATOR EIZENSTAT: Did you attend several
10 meetings that you referenced in Paragraph 19 from
11 March to June, did you personally participate in those
12 meetings?

13 THE WITNESS: I did participate in a couple
14 of them, yes, sir.

15 ARBITRATOR EIZENSTAT: And you mentioned in
16 18 that they were also interested in issues of theft
17 and so forth, squatters.

18 What was happening in these meetings? Who
19 were participating? What was the goal of the
20 meetings, and what did they accomplish?

21 THE WITNESS: There wasn't much accomplished,
22 sir.

12:18:23 1 The meeting was set up, as we discussed,
2 after President Berger instructed it to be set up.
3 This was after a meeting with Mr. Posner, myself, a
4 couple of representatives from the cement company
5 attended, and Mr. Berger's instructions were that he
6 pointed his finger at the interventor of FEGUA and
7 told him to dissolve FEGUA. FEGUA had grown into a
8 bloated bureaucracy of 40 people to monitor the 98
9 people who were operating the railroad. They were
10 always wanting more money.

11 He was also--we had some issues on squatters,
12 and he wanted that to be taken care of, the commercial
13 squatters and the private squatters.

14 In the meetings that I attended we didn't get
15 much accomplished. It was one of the--second meeting,
16 third meeting after the meeting with President Berger
17 of the High-Level Commission of wherein I got word
18 from Mr. Mario Fuentes by telephone through Jorge Senn
19 that there was a piece of paper floating around the
20 Government at that time of the day of that meeting,
21 and it was to initiate the taking back of our
22 Usufruct.

12:20:10 1 I went into that meeting beyond which I
2 understand was set up to be of a good quality
3 High-Level Commission, and they wanted to know what we
4 could do, why don't we drop our lawsuit against the
5 two-and-a-half million, or whatever the exact number
6 was.

7 ARBITRATOR EIZENSTAT: Who asked that?

8 THE WITNESS: The lawyers for FEGUA.

9 I told them that if they paid that money that
10 we would drop all the other charges that we had
11 against them. If they would also drop their
12 countersuit. They said no, they couldn't pay the
13 money, and they would not drop the countersuit, that
14 we would just have to trust them.

15 And it was at that point that I asked how I
16 could trust them when not 45 minutes earlier I had
17 gotten a phone call from someone who I did trust to be
18 telling the truth that there was something floating
19 around the Ministers sent out by the President, to
20 initiate taking away our Usufruct Agreement.

21 Two of the people got up from the table, made
22 a phone call and came back and said they weren't able

12:21:45 1 to contact the person they wanted to to solidify my
2 statement, to say that it was correct. One of them
3 told me personally that if it was correct, that he
4 would take his name off and he wouldn't be on the
5 Commission meeting if it wasn't being handled
6 truthfully and up front.

7 We never had another Commission meeting after
8 that. The next thing we got four months later--four
9 months I think it was, we got the Lesivo Declaration.

10 ARBITRATOR EIZENSTAT: Do you have any reason
11 to doubt the sincerity of President Berger in setting
12 up this Commission to try to resolve these
13 differences?

14 THE WITNESS: Well, it was President Berger
15 that started within 60 days--60 days of our meeting
16 and setting up the Commission meetings that they were
17 already evidently discussing Lesivo and passing the
18 paperwork through. That's the only thing that I can
19 say.

20 ARBITRATOR EIZENSTAT: But if he weren't
21 interested in a resolution, why would he have wanted
22 to set the Commission up?

12:23:04 1 THE WITNESS: I honestly don't know, sir. I
2 honestly don't know.

3 ARBITRATOR EIZENSTAT: Okay.

4 THE WITNESS: And somebody could have talked
5 him into it at a later date. I don't know.

6 ARBITRATOR EIZENSTAT: Thank you.

7 PRESIDENT RIGO: Ms. Murchison, on the
8 Tribunal questions?

9 MS. MURCHISON: Just a couple of follow-up
10 questions.

11 FURTHER REDIRECT EXAMINATION

12 BY MS. MURCHISON:

13 Q. If we look back at Exhibit 41, the email
14 transmitting the Offer Option that we have been
15 talking about, Mr. Duggan, do you have any idea why
16 the President's son would have been copied on or why
17 he would have received this Option Offer?

18 MR. ORTA: I will object. I don't believe
19 the Tribunal asked about this particular issue.

20 MS. MURCHISON: I think we talked about an
21 Option Offer, and we talked about whether this was an
22 Option Offer, and now I'm going to the e-mail that's

12:24:08 1 transmitting it. Secretary Eizenstat also asked
2 questions about why Mr. Duggan would have believed and
3 on what basis he would have believed that Mr. Pinto
4 was communicating on behalf of Mr. Campollo, and we've
5 already heard some testimony from Mr. Berger about who
6 else was copied on this e-mail transmitting the Option
7 Offer, which is apparently an attorney associated with
8 Mr. Campollo.

9 PRESIDENT RIGO: You may answer the question.

10 THE WITNESS: The only thing--the only reason
11 that I can imagine that he would have been copied is
12 if he was working as an attorney or legal
13 representative of Desarrollos G, Héctor Pinto and, as
14 I said before, I accept it to be also for Ramon
15 Campollo.

16 BY MS. MURCHISON:

17 Q. Okay. Secretary Eizenstat also asked you
18 questions about President Berger and communications in
19 terms of negotiations with Ferrovías.

20 Did you have any reason to doubt the
21 sincerity of President Berger's statements when he
22 demanded \$50 million?

12:25:30 1 A. Not at all.

2 MR. ORTA: I will object. There has been no
3 evidence that Mr. Duggan has any personal knowledge of
4 any demands by President Berger of \$50 million. He
5 testified to that. He said that he only saw some
6 stuff in the news reports.

7 MS. MURCHISON: That's incorrect, and if I
8 could inquire, I believe the Witness would testify to
9 the same.

10 MR. ORTA: No, I think the Witness's
11 testimony stands, and I think it's a
12 mischaracterization of the testimony of the Witness.

13 PRESIDENT RIGO: The objection is sustained.

14 BY MS. MURCHISON:

15 Q. Did you--

16 A. Yes.

17 Q. -- hear any--

18 MR. ORTA: The objection was sustained. That
19 means you have to move to another question.

20 MS. MURCHISON: That means I can ask another
21 question, which begins with "did you."

22 BY MS. MURCHISON:

12:26:36 1 Q. Did you hear anything other than news reports
2 about what President Berger had said?

3 A. Yes. I saw television clips that had been
4 translated with Mr. Berger's comments verbatim.

5 Q. Did you have any reason to doubt President
6 Berger's statements?

7 THE WITNESS: No.

8 MR. ORTA: Same objection. There is
9 absolutely zero foundation for this, other than the
10 fact that Mr. Duggan read or saw translated copies of
11 new reports on the television, that's not a foundation
12 at all for this question.

13 PRESIDENT RIGO: Objection is sustained. So
14 move on to the next question.

15 MS. MURCHISON: We have no further questions.

16 PRESIDENT RIGO: Mr. Orta.

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

18 RE-CROSS-EXAMINATION

19 BY MR. ORTA:

20 Q. Mr. Duggan, you were asked by Secretary
21 Eizenstat about whether when the President, President
22 Berger, formed the High-Level Commission, what issues

12:27:51 1 were in discussion between the Parties, what was
2 discussed during those High-Level Commission meetings,
3 and I believe you answered--well, you gave your answer
4 as to what issues were discussed, but you didn't
5 mention the issue of the Equipment Contract; correct?
6 In response to Secretary Eizenstat's questions about
7 that issue?

8 A. No, sir. It never came up.

9 Q. Okay.

10 A. The Equipment Contract never came up.

11 MR. ORTA: Put up R-9, please.

12 BY MR. ORTA:

13 Q. First of all, for the record, this is a
14 letter dated November 15, 2004, and it is from
15 Mr. Jorge Senn to Vice-Minister Roberto Diaz, Minister
16 of Communications.

17 Scope all the way down so we can see who it's
18 from.

19 This is obviously the translation, as the
20 letter is written in Spanish, and copied is Oscar
21 Berger--highlight is there, please--as well as a
22 number of other high-level officials.

12:29:16 1 Now, if we go to Paragraph 2--

2 MS. MURCHISON: Objection.

3 MR. ORTA: I haven't asked a question yet,
4 counsel.

5 MS. MURCHISON: Objection to reference of
6 this exhibit that has nothing to do with the
7 High-Level Commission meetings or anything that
8 Secretary Eizenstat inquired about. Beyond the scope;
9 that's my objection.

10 MR. ORTA: This has a lot to do with what
11 happened at the High-Level Commission meetings because
12 this sets the stage for the request for the formation
13 of the High-Level Commission meetings. This is a
14 letter that Mr. Senn sends to the Vice-Ministers of
15 Communications copying President Berger, the person
16 who set up the Commission meetings where he's
17 complaining about a number of issues that ultimately
18 get discussed during the Commission meeting.

19 MS. MURCHISON:

20 (Tribunal conferring.)

21 PRESIDENT RIGO: Mr. Orta, why don't we leave
22 this question for Mr. Senn, who we are going to see

12:30:28 1 early this afternoon.

2 MR. ORTA: Okay. I will note that Mr. Duggan
3 was copied on the letter as well, but I take the
4 Tribunal's directive, and we can ask Mr. Senn about
5 this.

6 I do want to put up I believe it's R-29.
7 These are minutes from the High-Level Commission
8 meeting.

9 BY MR. ORTA:

10 Q. First of all, this the High-Level Commission
11 meeting that took place on May 11, 2006, and at which
12 you were present; correct?

13 ARBITRATOR EIZENSTAT: Excuse me, could you
14 please reference the document here?

15 MR. ORTA: Yes, I'm sorry. It's Exhibit
16 R-29.

17 BY MR. ORTA:

18 Q. Sir, these are minutes of one of the
19 High-Level Commission meetings. It's a meeting that
20 took place on May 11, 2006; correct?

21 A. That's the date, yes.

22 Q. And you were present at that meeting, up top

12:31:50 1 it shows the persons attending?

2 A. Yes.

3 Q. Okay. And if we could just go a little bit
4 lower here, if we can highlight the second-to-last
5 paragraph on the first full page--first page,
6 second-to-last paragraph, you see at the bottom of
7 that paragraph it talks about that it was acknowledged
8 that there were three points that had arisen that
9 needed to be resolved so as to be able to negotiate;
10 correct?

11 A. That's what it says.

12 Q. And one of the points, point number three was
13 the Lesivo nature of the Contract?

14 A. That's what it says.

15 Q. And it also says that Mr. Fernández--you
16 understand that to be Mr. Mickey Fernández?

17 A. Yes.

18 Q. And he was a High-Level Presidential
19 Commissioner, wasn't he?

20 A. He wasn't at the meeting with me.

21 Q. My question was: Did you understand him to
22 be a High-Level Presidential Commissioner?

12:32:58 1 A. In some people's minds, yes.

2 Q. In your mind was he a Presidential
3 Commissioner?

4 A. No.

5 Q. He didn't have that appointment, to your
6 knowledge?

7 A. He had an appointment, but you have to earn
8 my respect. You just don't get it.

9 Q. Okay. And Mr. Fernández offered to stop the
10 Lesivo process, with the intention of showing the
11 State's good faith; correct? That's what that
12 document says.

13 A. This letter came in Spanish. I don't
14 remember seeing this letter in English. That's what
15 the letter, the e-mail is saying. It that what it
16 was, it was e-mail; right?

17 Q. No, these are minutes of the meeting on
18 May 11, 2006.

19 A. I do not remember seeing it in English, ever.
20 So, it's been translated for this hearing. I do
21 not--I'm not aware of this paragraph and this
22 particular meeting.

12:34:14 1 Q. Okay. Now, did you participate in any of the
2 negotiations that took place leading up to the Lesivo
3 Declaration?

4 A. No, only a couple of the High-Level
5 Commission meetings.

6 Q. Was it reported to you that one of the issues
7 discussed in those meetings was curing the
8 deficiencies in the contract that made it Lesivo?

9 A. No.

10 Q. That was never reported to you?

11 A. No, not in the meetings that I was at.

12 Q. Did you ever see the draft Settlement
13 Agreement that was proposed the day before the Lesivo
14 Declaration was published?

15 A. I did see it.

16 Q. You did?

17 A. I did--I do remember seeing that.

18 Q. Do you recall that it has language in there
19 in which the Parties were to negotiate resolutions of
20 the Lesivo--of the causes that made the Contract
21 Lesivo?

22 A. We were never told what the causes of the

12:35:17 1 Contract--that made the Contract Lesivo were.

2 Q. That wasn't my question, sir. My question
3 was: Do you recall that one of the points that was
4 proposed in that agreement to be negotiated between
5 the Parties was curing the deficiencies that made the
6 Contract Lesivo?

7 A. Yes. And to cure it, we had to rewrite also
8 the other contracts for the property and everything
9 else. That was the only cure. So, no, that wasn't
10 the cure. That was just another threat.

11 Q. You responded to questions by Secretary
12 Eizenstat that with relation to the November 2006
13 proposal, the proposed Settlement Agreement or
14 proposed Settlement. To your knowledge, you say that
15 part of that proposed Agreement was to give up areas
16 where you were not operating. Do you recall that?

17 A. That's the way I understood it.

18 Q. And that that would take away all of our
19 incentive, you said.

20 A. Yes.

21 Q. What did you mean by that?

22 A. If you give up--to give up 65 percent of your

12:36:39 1 Usufruct, that's what we would be doing, would be
2 giving up around 65 percent of it.

3 Q. And you would be left with what? Phase I?

4 A. That's it.

5 Q. That's the phase that wasn't producing any
6 profits from day 1 until the time you left?

7 A. I don't like that question, but the fact is
8 that it was doing very well, that in 2004 it almost
9 broke even.

10 Now, we did work on situations down there
11 that we couldn't handle, like the hurricanes and some
12 of that. It did cause us problems. We were very,
13 very proud of the fact that that railroad, working
14 with 98 employees had gone from zero to 128,000 tons
15 in that same four-five-year period.

16 We were also very proud of the fact that our
17 safety record had gone 572 days without a personal
18 injury, something that the Government of Guatemala,
19 from 1985 until 1990 was having four to five
20 fatalities a year and 10 percent of their workforce,
21 40 people at a time, were out due to injuries.

22 So, yes, we were very proud of it. It may

12:37:59 1 have not yet made money, but it would.

2 Q. I would like to now turn your attention, sir,
3 to another issue that you were questioned about by
4 Secretary Eizenstat, and that is a meeting that took
5 place in April of 2005 at which Mr. Fuxet--remember
6 you testified about a meeting where Mr. Fuxet was
7 there, and you had expected President Berger's son,
8 Juan Esteban Berger to show up but he wasn't there?
9 Do you recall that?

10 A. I do.

11 Q. Okay. Now, in that meeting, I believe you
12 told Secretary Eizenstat that another threat was made
13 during that meeting to take away the concession. I
14 believe that's what you testified to.

15 A. I didn't say that that was a threat. I said
16 that what they had done is they came in with another
17 offer not unlike the one we had on the screen here,
18 from Desarrollos G, and it was for all practical
19 purposes the same offer. We couldn't have signed it
20 if we wanted to, and we didn't want to. And that is
21 what Mr. Silva took them back to college on and
22 explained to him that it couldn't be done.

12:39:21 1 It was also during that meeting that I asked
2 for the proof of any illegalities that they were
3 claiming, that that was the threat, and that
4 particular instance the threat was the illegalities
5 that they were claiming were in our Contract.

6 Q. Let's put up C-102, please.

7 Do you recall that you wrote a
8 contemporaneous e-mail in relation to that meeting?

9 Let's go ahead and highlight the whole thing
10 in yellow.

11 MR. ORTA: For the Tribunal, this is document
12 C-102, and it's a series of e-mails between
13 Mr. Duggan, Mr. Posner, Mr. Senn, and Mr. Pietrandrea.

14 THE WITNESS: That's Pietrandrea.

15 BY MR. ORTA:

16 Q. Thank you. It's very difficult to pronounce.

17 Now, sir, I'm calling your attention to the
18 e-mail that you sent. It says, from Bill Duggan to
19 Henry Posner and others, dated the 15th of April of
20 2005; correct?

21 A. That's correct.

22 Q. And in here you're summarizing the meeting

12:40:42 1 that we were just discussing, that you had talked to
2 Secretary Eizenstat about; correct?

3 A. Correct.

4 Q. Toward the end of sort of what looks to be
5 the first paragraph, you say that the meeting started
6 out by Fuxet saying that he was there at the request
7 of President Berger's son, but he wanted to emphasize
8 that this was not a Government threat.

9 Do you see that?

10 A. I see that.

11 Q. So that's what you recall him saying at that
12 meeting, correct?

13 A. That's what he said, but if I could go on
14 further, he didn't have to say it. He didn't have to
15 say it. I have been around long enough that if it
16 looks like a duck and it walks like a duck and it
17 quacks like a duck, it's a duck. That's what he was
18 doing. He was threatening.

19 Q. Who was he threatening?

20 A. It says here that he wanted to emphasize that
21 this is not a Government threat. So, if that's the
22 case, that's not the way I read it.

12:41:46 1 Q. So, when he told you, this is not a
2 Government threat, you interpreted it as a threat?

3 A. Yes, sir, personally.

4 Q. Okay. Now, a little bit later on, in your
5 description of the meeting, you talk about the fact
6 that--that it was your understanding--you say, after
7 about 20 minutes--I will skip the rest of the
8 language--I threw my hardhat and said that it was my
9 understanding that Héctor Pinto had called for the
10 meeting that was originally supposed to take place
11 last week for him to tell us about the illegalities of
12 our Contract with FEGUA that he had learned of, and
13 that if we did not sign his proposed Contract that the
14 Government would most likely kick us out should there
15 be no agreement with his group.

16 Now, you were referencing there to the prior
17 meeting you had had with Mr. Pinto where you say he
18 made that allegation; correct?

19 A. Correct.

20 Q. And you further characterized that in this
21 meeting you say the response naturally was that there
22 was no threat per se but that the Minister of

12:43:02 1 Communication had alluded to such a situation since we
2 had not gotten the railroad up to the standard they
3 thought was needed; correct?

4 A. That's what I said.

5 Q. And you further say, you say, I also stated
6 that Héctor Pinto was told in no uncertainty terms on
7 the morning of March 15--that's when you had that
8 meeting with Mr. Pinto; correct?

9 A. Correct.

10 Q. --that RDC had no interest in the proposal as
11 written at the time but was given an alternative to
12 buy in as an investor; right?

13 A. Correct.

14 PRESIDENT RIGO: Excuse me, Mr. Orta, you
15 have been more than 15 minutes now and if you are
16 going to keep to the schedule, I would appreciate if
17 you have any really--give me an idea of how much time
18 do you need.

19 MR. ORTA: If I could have the Tribunal's
20 indulgence just to finish this line of questioning, I
21 may be done, which about another two questions; or
22 less.

12:44:09 1 PRESIDENT RIGO: If you finish in five
2 minutes, just to keep to the schedule.

3 MR. ORTA: I promise to keep it to less than
4 five.

5 BY MR. ORTA:

6 Q. Now, after this meeting, there was a meeting,
7 as you testified to, wherein you met with President
8 Berger's son, Juan Esteban Berger?

9 A. That's correct.

10 Q. And if we could go to the very top of this
11 document, there's an e-mail to you written by Jorge
12 Senn, if we could just highlight that, and if you
13 could highlight the text of the e-mail, it says:
14 "Henry and Bob"--it's written by Jorge
15 Senn--"everything said is accurate," and he's
16 referring to the text of your e-mail. He says, "And
17 don't need my comments except to add the fact that we
18 had a meeting with Berger's son today in Silva's
19 office."

20 Do you recall that you were at that meeting,
21 Mr. Duggan?

22 A. Yes.

12:45:20 1 Q. And it says, "He," meaning President Berger's
2 son, Juan Esteban Berger, "greatly apologized for the
3 misunderstanding and continued to offer us his help in
4 whatever manner he could but without getting publicly
5 involved for obvious reasons."

6 Do you see that?

7 A. That's correct.

8 Q. So, at that meeting, Mr. Berger offered to
9 help you and said that those threats that you all
10 claimed were made by Mr. Pinto had nothing to do with
11 him; right?

12 A. Say again, please?

13 Q. Mr. Berger told you at that meeting that the
14 threats or supposed threats by Mr. Pinto had nothing
15 to do with him, should not be attributed to him?

16 A. I stated that earlier, yes.

17 Q. Okay. And it goes on to say: "We will
18 continue with our strategy to go after FEGUA."

19 What does that mean?

20 A. To get them to do what they were supposed to
21 do, according to the Contract.

22 MR. ORTA: Okay. I have nothing further.

12:46:23 1 PRESIDENT RIGO: Thank you.

2 Thank you so much, Mr. Duggan. You may
3 leave, take leave, of the Tribunal. Thank you.

4 THE WITNESS: Thank you, sir.

5 (Witness steps down.)

6 (Tribunal conferring.)

7 PRESIDENT RIGO: We are going to adjourn now,
8 and in the interest of keeping this schedule, try to
9 be here at 2:00. It's a little bits shorter than the
10 lunch that we scheduled in the order, but if you bear
11 with me, I think it would be useful to start with
12 2:00.

13 And if I may have the attention of the two
14 Parties for a second.

15 (Discussion off the record.)

16 (Whereupon, at 12:47 p.m., the hearing was
17 adjourned until 2:00 p.m., the same day.)

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02:00:53 1 formulas in the cells, we would let you know about
2 that tomorrow morning. Assuming no problem, we would
3 have our response for you by tomorrow morning, because
4 we can consult our Expert this evening.

5 PRESIDENT RIGO: Thank you. Thank you so
6 much.

7 MR. FOSTER: One other quick procedural
8 matter, Mr. President. Mr. Orta and I have agreed
9 that when we get to the point of Closing Argument, if
10 the Tribunal is at that point satisfied that it is not
11 going to call back any of the witnesses for further
12 testimony for any reason, we've agreed that the
13 witnesses could attend the Closing Arguments.

14 MR. ORTA: Correct.

15 PRESIDENT RIGO: We are in your hands, so
16 they are most welcome to stay.

17 MR. FOSTER: Thank you, and Mr. Stern will
18 present the witness.

19 PRESIDENT RIGO: Thank you.

20 JORGE SENN, CLAIMANT'S WITNESS, CALLED

21 PRESIDENT RIGO: Mr. Senn, good afternoon.

22 Would you please read the statement you have as a

02:02:27 1 witness in front of you.

2 THE WITNESS: I solemnly declare that I shall
3 speak the truth, the whole truth, and nothing but the
4 truth.

5 PRESIDENT RIGO: Thank you very much.

6 DIRECT EXAMINATION

7 BY MR. STERN:

8 Q. Good afternoon, Mr. Senn.

9 Do you have in front of you copies of the
10 three statements you have submitted in this
11 arbitration dated June 23, 2009, October 23, 2009; and
12 March 22, 2011, respectively?

13 A. Yes, I do.

14 Q. Do you ratify each of these statements and
15 affirm their truthfulness before the Tribunal?

16 A. Yes, I rectify them.

17 Q. Now, I would like to ask you a few questions
18 about I would like to ask you about the damage that
19 caused to Ferrovias by the lesivo. First, let me ask
20 the question about the loss of credit that the
21 companies suffered, and the first thing I would like
22 to show you is Exhibit C-35(a), and you have also hard

02:03:31 1 capes of these exhibits in your binder.

2 MR. ORTA: Counsel, sorry, we have not been
3 provided a notebook.

4 MR. STERN: Apologies.

5 MR. ORTA: Thank you.

6 BY MR. STERN:

7 Q. Tab 4, I'm sorry, Tab 5 of your notebook.

8 Now, Exhibit C-35(a) here is a letter that is
9 dated August 29, 2006, from a company called MACQISA.
10 Could you describe what this letter concerned.

11 A. MACQISA was one of our suppliers of earth
12 moving equipment, small earth moving equipment, that
13 we used to clean the washouts and the landslides in
14 the right-of-way. We had a line of credit with them,
15 and they were putting us in a cash in advance basis
16 through this letter.

17 Q. And did they make a decision because of the
18 Lesivo Resolution?

19 A. Yes, it was because of the Lesivo Resolution
20 that they decided to take back the credit.

21 Q. Okay. And how did this affect the company's
22 operations?

02:04:53 1 A. It complicated our operation since the
2 services from this company were oftenly hired on
3 weekends or at night. We were running a 24/7
4 operation, and when they put us in cash in advance,
5 that complicates things because we will have to wait
6 until Monday to issue an advance payment to hire their
7 services, and that delayed trains, traffic, and
8 complicated our operation.

9 Q. Okay. Could you now turn to Tab 7 in your
10 binder, which is Exhibit C-35(c), which is a
11 September 7, 2006 letter from a company called
12 ALTRACSA in which they state, due to the Lesivo
13 Resolution, they have decided that any future leases
14 of machinery from FVG had to be paid in cash up front.

15 Could you describe what effect this had on
16 FVG's business.

17 A. Yes. ALTRACSA is a company that leases earth
18 moving equipment, except that this is large equipment.
19 It's a similar situation than with MACQISA. We used
20 their equipment to dredge the rivers in advance of the
21 rainy season to avoid washouts in certain points of
22 the track.

02:06:18 1 As of lesivo, we were also put cash in
2 advance, and that also--it posed complications to our
3 operation since we couldn't call them to do this in
4 advance. We had to call them to do it short notice,
5 which didn't work, and we started having washouts, and
6 this complicated things because it was more expensive
7 to repair washouts than to prevent them. And we
8 delayed trains, and we had to stop traffic once every
9 other happening.

10 Q. Okay. Could you now turn to Tab 6 in your
11 binder, which is Exhibit C-35(b), which is a
12 September 24, 2006 letter, from ENASA, in which they
13 required orders for diesel fuel to be paid cash on
14 delivery going forward due to the Lesivo Resolution.
15 Could you explain what effect this letter had on FVG's
16 business.

17 A. Same thing. ENASA is a fuel supplier which
18 we had as a--it was not on our prime supplier, so to
19 speak, in reference to companies like Shell and
20 Texaco. This was company where we had been using
21 eventually for the orders of smaller amounts of fuel,
22 but when we lost the credit with our prime suppliers,

02:07:49 1 we started working more with these people. They were
2 more expensive, but they were the only ones who would
3 supply us lower volumes of fuel, but it was also cash
4 in advance. At least they were willing to do it, so
5 this made our operation more expensive, and we had to
6 raise the money first before purchasing the fuel.

7 Q. You mentioned loss of credit with some of
8 your bigger fuel suppliers. Which companies are you
9 referring to there?

10 A. We were working with three or four major
11 suppliers: Shell, Texaco, Puma Oil or Puma
12 Energy--they had both names at one time, amongst some
13 of them.

14 Q. Now, let's go to Exhibit C-35(e), which is
15 Tab 9 in your binder.

16 A. Okay.

17 Q. And this is a September 12, 2006 letter from
18 INDUEX; correct?

19 A. Yes.

20 Q. And what did this letter concern?

21 A. INDUEX was the only supplier that we could
22 work with for the purpose of buying ties after lesivo

02:09:12 1 was declared because tie suppliers were a little
2 different. They required besides cash in advance upon
3 delivery, and required cash in advance before
4 delivering the ties because they had to buy the wood
5 and start preparing it, and take a little time.

6 So, at least this company--they always put us
7 in cash in advance for at least they were willing to
8 deliver everything, the full order, upon the payment
9 of this money without asking for an advanced payment,
10 but it was always cash upon advance upon delivery, and
11 it's basically the only company we could work with
12 when lesivo, after lesivo was declared.

13 Q. Now, let's go to Exhibit C-35(f), which is
14 Tab 10, and this is an October 10, 2006, letter, from
15 REINTER, in which it refused to provide further
16 intermodal cargo transportation services to FVG
17 because of the Lesivo Resolution.

18 Could you describe what effect REINTER's
19 decision had on FVG's business.

20 A. REINTERs were our provider of truck
21 transportation for the containers we imported from the
22 port for our customers--REINTER is a company that

02:10:41 1 dedicates to transportation, and we hired them to do
2 the transportation of containers from our Guatemala
3 City yard to our customers' locations and vice versa.
4 They just decided not doing any further business with
5 us. After lesivo was declared, they had concerns
6 about our long-term ability to stay in business.

7 So, we had to hire other truckers, smaller
8 companies. That complicated also our operation
9 because we were dealing--instead of dealing with one
10 supplier, we were dealing with three or four different
11 people, which complicated the coordination of the
12 deliveries, plus it was more expensive. These people
13 didn't have insurance, we had to pay for it, and it
14 also complicated our operation.

15 Q. Is it fair to say that as a result of the
16 Lesivo Declaration all of Ferrovías's major goods and
17 service suppliers either stopped doing business with
18 the company or required any future goods and services
19 be paid for with cash up front?

20 MR. ORTA: I'm sorry. I'm going to object.
21 That assumes facts in evidence--not in evidence,
22 excuse me. He said all of Ferrovías's major suppliers

02:12:03 1 and customers, and that's not in evidence. We have
2 some evidence of some customers but not all, so I
3 object to the nature of the question.

4 MR. STERN: I'll rephrase.

5 BY MR. STERN:

6 Q. Can you describe overall what was the result
7 of the Lesivo Resolution with regard to the company's
8 business relationship with its major goods and service
9 suppliers.

10 A. Most of the major suppliers cut our credit,
11 and they put us in a cash in advance basis, and people
12 like REINTER just wouldn't deal with us anymore after
13 this. That imposed complications to our operations
14 since we were obligated to raise the money first
15 before hiring their services. This caused delays, as
16 I were explaining. The delays had further effects on
17 our customers, and a company like ours, a railroad
18 company, cannot operate cash in advance, not in the
19 long term, at least.

20 Q. Okay. Let's go to Exhibit C-35(d), which is
21 Tab 8 in your binder.

22 A. Okay.

02:13:39 1 Q. Exhibit C-35(d), it's a September 11, 2006,
2 letter from Banco de la Republica. What does this
3 letter concern?

4 A. That was a loan we had requested to develop a
5 parking lot project in one of our station yards, which
6 is the Gerona in the City of Guatemala. We were
7 denied the credit due to the Lesivo Declaration, so we
8 couldn't develop the project, and we lost the
9 opportunity of having additional income.

10 Q. Did the Lesivo Resolution make it impossible
11 for Ferrovías to obtain any loans or other sources of
12 credit financing from the banks?

13 A. Surely. All banks have similar procedures
14 and requirements to grant loans, and this is an
15 example of that at the moment we understood that we
16 were no--were not subject to credit anymore from the
17 banks.

18 Q. Okay. Let's talk briefly about how the
19 Lesivo Resolution affected FVG's business with its
20 existing rail customers. Turn to Exhibit C-34, which
21 is Tab 4 in your binder.

22 A. Okay.

02:15:07 1 Q. And this is a September 13, 2006, letter from
2 Aimar. Could you tell us what this letter was about?

3 A. This is--Aimar represents one of the largest
4 shipping lines in the world, APL, American President's
5 Line. They were confirming to us that as of the
6 Declaration of lesivo they would start reducing their
7 business and with us, and we started losing customers.
8 That's an example of what happened with them and other
9 customers.

10 Q. Did other existing rail customers reduce
11 their business with Ferrovías after the Lesivo
12 Resolution?

13 A. Yes. The container business was greatly
14 reduced, especially our long-term contracts like the
15 ones which were the ones we were really interested in
16 because we could forecast our sales. We knew in
17 advance we had yearly contracts like all the NGOs
18 working under USAID, Catholic Relief Services, Save
19 the Children, CARE, Share. We had Contracts with all
20 of them. We were the only transportation company in
21 the country of Guatemala that was working with all of
22 the shipping lines, and these long-term contracts were

02:16:27 1 just not renovated or renewed at the beginning of the
2 following year. We lost them.

3 Q. Okay. Let's talk a little bit about the new
4 business opportunities that were lost because of the
5 Lesivo Resolution.

6 First, could you just describe--well, did the
7 Lesivo Resolution also cause Ferrovías to lose
8 potential new business?

9 A. Yes. We always had the opportunities of
10 growing in the railroad side and on the real estate
11 side, and we just couldn't keep growing. Our business
12 was destroyed.

13 Q. Okay. Would you just quickly go through,
14 this is a slide that was used in the Opening
15 Statement, just to aid your testimony, just describe
16 briefly what each of these lost opportunities were.

17 A. Okay. Grupo UniSuper is a chain of
18 supermarkets, an important one. They had a plan of
19 setting up new stores in different towns. They were
20 thinking of using our yards. They approached us. We
21 visited them, but after the Lesivo Resolution they
22 just decided not going forward.

02:17:40 1 Parking and Office Leases at Gerona. After
2 we were turned down by the bank to set up the parking
3 lot, we thought of looking for people to do it, and
4 just leasing the property instead of setting up the
5 business which would have meant more income for us.
6 These are the three people that approached us at that
7 time. They showed the interest in doing it, but
8 finally we couldn't close any deal because they were
9 concerned about making long-term investments in the
10 property due to the Lesivo Resolution.

11 Retalhuleu Theme Park, that's Mr. Ricardo
12 Ralejos (ph.). He has one of the nicest theme parks
13 in the South Coast. He's the holder of the second
14 largest collection of Star Wars memorabilia in the
15 world, and he was interested in developing the
16 railroad, the esteemed railroad from his location at
17 Retalhuleu to the Champarico (ph.) port, and he just
18 was not--he was discouraged to do such investment
19 after the Lesivo Resolution.

20 Maersk, one of the largest--

21 MR. ORTA: I apologize that I'm interrupting
22 the answer, but I just want to make sure that I get my

02:18:52 1 objection on the record.

2 Mr. Senn is testifying here as to the reasons
3 that these various different people decided to stop
4 doing business with Ferrovías, you know. I have no
5 idea how he knows that. No foundation has been laid
6 for that.

7 And moreover, none of these persons have been
8 provided to Respondent so that we could question them
9 about why, if they actually had an intention to do
10 business with RDC Ferrovías going forward, whether the
11 Lesivo Declaration in fact is the reason why they
12 stopped, whether they--what they were told about the
13 effect of the Lesivo Declaration, and a number of
14 other factors that this Tribunal should be given the
15 opportunity to evaluate before you simply accept the
16 declarations here of Mr. Senn about what effect this
17 had on their business.

18 So we would ask that the Tribunal either
19 strike all of this evidence and not take it into
20 consideration or, at a minimum, take into
21 consideration the, you know, the serious deficiencies
22 of the evidence, given what I have just said.

02:20:05 1 PRESIDENT RIGO: Mr. Stern?

2 MR. STERN: Well, first of all, the Tribunal
3 has heard from Mr. Spiegelger from GESUR, so you have
4 that testimony here in this hearing room. With regard
5 to Grupo UniSuper, we have submitted two sworn
6 statements from a representative of the company. You
7 also have a letter which you have just seen--

8 MR. ORTA: We did ask to cross him, but he
9 was not produced.

10 MR. STERN: That is correct, as Respondent
11 had several witnesses that are not being produced as
12 well for cross-examination.

13 And regarding the other ones, you can place
14 whatever weight you want to on Mr. Senn's testimony.
15 He can certainly describe the basis for his knowledge
16 as to the reason why these individuals decided not to
17 proceed. I think he was in the process of describing
18 that in his testimony before he was interrupted, but
19 again the Tribunal is certainly able to weigh the
20 sufficiency or the value of the evidence based on
21 what's been submitted.

22 (Tribunal conferring.)

02:21:17 1 PRESIDENT RIGO: We will attempt it on the
2 record. We obviously have heard both Parties and will
3 weigh it accordingly.

4 In terms of time, just to keep to the
5 schedule, we are--the 15 minutes are gone now.

6 MR. STERN: If I could just allow, since he
7 was interrupted in the middle of his answer to this,
8 then if he could finish it, then we would rest. Thank
9 you.

10 PRESIDENT RIGO SUREDO: All right. Mr. Senn,
11 if you could finish your reply.

12 THE WITNESS: Thank you, Mr. President.

13 I will just mention quickly Maersk, because
14 it's a well-known shipping line, maybe the largest in
15 the world. They were interested in setting up a
16 refrigerated container facility in the station of
17 Cicapa (ph.) for fruit export, mainly melon, and they
18 also decided not moving forward with this. There's
19 many others, but these are the ones I could mention.

20 MR. STERN: Thank you, Mr. Senn. You can now
21 answer questions from Mr. Orta.

22 THE WITNESS: Okay.

02:22:15 1 PRESIDENT RIGO: Thank you.

2 Mr. Orta.

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

4 CROSS-EXAMINATION

5 BY MR. ORTA:

6 Q. Good afternoon, Mr. Senn. How are you?

7 A. Fine, thanks. Good afternoon.

8 Q. I would like to start with a few questions
9 regarding the issues about which you just testified on
10 direct examination.

11 You mentioned that Ferrovías, as a result of
12 the Lesivo Declaration, was denied or that it was made
13 impossible for Ferrovías to obtain credit from any
14 banking institution. Do you remember that?

15 A. Yes.

16 Q. Now, what's been provided in evidence is a
17 letter from one bank, that's C-35(d), Exhibit C-35(d),
18 which you were asked about by Mr. Stern.

19 Other than this one letter that you've
20 submitted to the Tribunal dated 11 September 2006, do
21 you have evidence of any other banks who denied credit
22 to Ferrovías after the Lesivo Declaration?

02:23:26 1 A. This--this bank particularly was the only one
2 who was willing to take our application. We didn't
3 have the need to request credit before all this
4 happened. Our credit, regardless of if it's coming
5 from a bank or from a supplier, we were creditworthy
6 persons, and the credit we had, like, for example,
7 with our fuel suppliers, was much higher than what we
8 had--than we were requesting with Banco de la
9 Republica, and we lost it.

10 So, I think the concerns for granting a
11 credit are similar, whether it's fuel supplier or a
12 banking institution, we made personal contact, and in
13 one case, one personal contact and one telephone
14 contact with other banking institutions, and I sensed
15 them, and I asked them would you be willing to
16 consider a loan, and they say--don't even bother
17 trying it. These people told us that they would
18 consider it, so that's why we tried it, and we were
19 turned down.

20 Q. So, my question remains: Do you have any
21 evidence for the Tribunal of any other bank besides
22 Banco de la Republica who--for which you applied

02:24:45 1 credit after lesivo and were denied credit? Do you
2 have any such--

3 A. We were verbally denied--

4 Q. Let me just finish the question just so that
5 we have a clean record. Okay?

6 A. Sorry.

7 Q. Do you have any other evidence to provide to
8 the Tribunal other than with respect to this bank,
9 Banco de la Republica, where you were denied credit
10 based on an application you submitted after the Lesivo
11 Declaration?

12 A. Not in writing.

13 Q. Okay. Now, I noticed that most of the
14 documents--most of the letters about which you were
15 asked by Mr. Stern are dated--I think the earliest
16 one, save one that was in August, is on
17 4 September 2000, and all the rest are dated after
18 4 September 2006. This was after the paid
19 advertisement that Ferrovías put out in all of the
20 Guatemalan newspapers was published; correct?

21 A. We had a publication on the 4th of September.
22 That's what you're saying--you're asking me?

02:26:02 1 Q. Well, I think there's some question about
2 when exactly the paid advertisement went out, but we
3 know at the latest it was the 4th of September 2006,
4 based on what we have in evidence, and my question is:
5 All of these letters that were submitted to you by
6 these customers and suppliers and other things are
7 dated after the paid advertisement that Ferrovías put
8 in the paper; correct? Save one exception, which is
9 C-35(a), every other one is dated after that date;
10 correct?

11 A. Yes, that's correct.

12 MR. STERN: Just for the record, there is one
13 dated September 4, 2006, the ENASA letter, so...

14 BY MR. ORTA:

15 Q. And the press release that you issued has a
16 date on it of 28 August 2006; correct? It's R-105.
17 We have it up on the screen here.

18 This is, as you can see, and so that's the
19 date, August 28, 2006; correct?

20 A. That's correct.

21 Q. And if we could just move over to the right,
22 please, I just want to highlight something, make it a

02:27:19 1 little--there you go. A little more, all the way.

2 Okay. Could you highlight where it says "paid post"
3 there.

4 This is advertising for which Ferrovías paid
5 to be put in the Guatemalan newspapers; correct?

6 A. Yes, that's correct.

7 Q. Okay. And at least this one is dated
8 September 4, 2006, and it appears as though this one
9 was published in Prensa Libre, which is one of the
10 most popular newspapers in Guatemala; correct?

11 A. That is correct.

12 Q. Now, Mr. Senn, I want to ask you about a
13 different topic. If we could go to C-22, which is
14 Contract 402, and highlight, if we can, Clause 13.

15 It's my understanding that--

16 MR. STERN: Sorry, David, do you have
17 handouts for the witness?

18 MR. ORTA: Oh, yes, sorry. It should have
19 been. It's the three binder set. I think it's there
20 on the floor. We can have--Camilla, I don't know if
21 you might be able to come up and assist Mr. Senn.

22 While Camilla is looking for the document, we

02:28:54 1 also have it up on the screen, but you can look at it
2 in whichever way you think is most convenient.

3 BY MR. ORTA:

4 Q. And it's my understanding, Mr. Senn, that
5 Ferrovías and RDC are taking the position in this case
6 that you only had an obligation to restore Phase I of
7 the railway restoration project of the five phases,
8 and that you only had an obligation to restore Phases
9 II, III, IV, and V if and when in your own discretion
10 you determined it was economically feasible. Is that
11 the position you're taking?

12 A. No, that is not the position. We had
13 deadlines in each of these phases.

14 Q. Okay, so explain to me what you thought your
15 restoration obligations were.

16 A. We committed to restoring certain segments of
17 the right-of-way to completely or partially, depending
18 on the phase, that's how it was agreed, and there was
19 a deadline for each of them. That's what I
20 understand. That's exactly what the Contract says.

21 Q. And so which ones did you agree to restore
22 completely and which ones did you agree to restore

02:30:21 1 partially?

2 A. I would need to read. I understand that
3 Phase I was agreed to restore completely, and the rest
4 I would need to read the phases, if I'm allowed here.

5 Q. Okay. So, I'm pointing you now to
6 Clause 13--and if we could highlight, Kelby, if you
7 can, as much of Clause 13 as you can, I think you
8 should be able to get most of it in there up on the
9 screen. At least get through Phase IV. There we go.

10 Now, I submit to you that every one of the
11 restoration phases has similar language. They each
12 refer to the restoration of segment whatever it is,
13 Phase I, Phase II, Phase III, Phase IV--

14 A. Okay.

15 Q. --it says, "shall begin within a certain
16 period of time," and they each have
17 different--different dates, and then it says, "railway
18 cargo transportation referred to in that phase shall
19 be offered at least in one segment within a six-month
20 term as of the date phase whatever it is begins, and
21 they all have the same--they repeat the same verbiage.

22 A. Okay.

02:31:50 1 Q. So, is it your contention, is it your
2 company's contention in this case that you only had an
3 obligation to begin restoration in a particular phase
4 and only restore--and only restore the railway for one
5 segment whatever that means, and you weren't required
6 to actually complete the phase? Is that your
7 contention?

8 A. No, that's not my understanding. My
9 understanding is that, and that's what the Contract
10 states, that we were obliged in some of these phases
11 to start rehabilitation and then provide service in a
12 portion of it that we had a deadline for it.

13 This is a 50-year contract, and the
14 Government and us agreed to certain minimum
15 restoration work in different parts of the
16 right-of-way, during the first 15 years which is where
17 this phase is applied. We could have done more upon
18 needed, not less, more, and there is even a portion of
19 the right-of-way that's not even mentioned here, not
20 that we don't have it and that we don't have the right
21 to do something with it, but these were the minimums
22 that we agreed that should be carried out.

02:33:19 1 Q. Do you agree that your company had an
2 obligation to, once you started restoring a phase, to
3 continue and finish the restoration of that phase?

4 A. It was our decision depending on if it was
5 needed or not. This was a business. We were not just
6 going to spend money burying it on the ground if it
7 was not needed. We committed, and the Government
8 agreed to it, it was a mutual agreement, that we'd
9 comply restoring and providing service. Phase I was
10 for the entire length of it, and the other phases
11 there was a deadline in which we had to comply with a
12 minimum, and that's what it states.

13 Q. But the language regarding Phase I is the
14 same as the language regarding Phase II, III, IV, and
15 V. They all say that you are to begin restoration by
16 a certain date and that you are to begin
17 transportation services within a six-month term from
18 when you were required to begin restoration. They all
19 say the same thing?

20 A. Exactly.

21 Q. So, is it--but it was your understanding that
22 as to Phase I, you had to restore the whole thing, but

02:34:38 1 as to the other phases you didn't?

2 A. That's what it says.

3 Q. Well, the Tribunal can judge, I guess, on
4 their own what it says, but it seems to me they all
5 say the same thing. They all--in other words, Phase
6 I--if your understanding was you had to complete Phase
7 I based on the language, then I would assume your
8 understanding or should be the same as to Phases II,
9 III, IV, and V because they all use the same verbiage?

10 A. What's your question?

11 Q. Really, I'm trying to understand here is
12 Guatemala put out a bid to have their railway restored
13 and modernized, and I'm trying to understand, is it
14 the company's position that it could, for example,
15 begin restoration for a mile of, let's say, 80 miles
16 that would constitute a phase, and so long as it
17 restored the track and had rail transport for that
18 mile, then it completed its contractual obligations
19 under the Agreement. Is that your position?

20 A. Its obligation to fulfill that requirement
21 within those deadlines, yes. We could do more, and we
22 could have--that's why we had 50 years. But what we

02:35:56 1 were getting was a right-of-way, basically. We had to
2 set up the tracks, so we had to be very careful how we
3 spent and invested our money because--and that's why
4 it was agreed that way, I understand, because you
5 cannot just make the investments without knowing if
6 you--if the company will be having the business as
7 expected. These are very large investments.

8 And I understand that's why it was
9 negotiated. We were not--the intention was just not
10 to do a mile and then--I mean, all of this had to be
11 agreed mutually, and in order to accomplish these
12 phases, we couldn't just report it to the Government.
13 We had to have their acknowledgement and approval, and
14 we have it.

15 Q. And the Tribunal's going to hear from the
16 Overseer at the time, who has, I think, a different
17 viewpoint about this, but I'm just again focusing on
18 your understanding.

19 So, based on your understanding of the way
20 this--of what your obligations were or the company's
21 obligations were under this Contract, at the end of
22 the 50 years of the Contract, it was perfectly

02:37:13 1 acceptable that Guatemala, in your estimation, would
2 not have a nationwide railway; correct?

3 A. We were devoted to restore as much as we can,
4 but the phases only mean that we were required to do
5 so much within the first 15 years, and there were no
6 deadlines for whatever we wanted to do after that.

7 Q. Okay.

8 A. That's--

9 Q. Do you have an understanding that if you
10 didn't carry out restoration of a particular phase
11 that you were obligated to restore, the lands that
12 were given to you to carry out restoration in that
13 phase to FEGUA?

14 A. If it was mutually agreed, yes.

15 Q. Well, what if--let's go to Clause 16. Forget
16 about whether it was mutually agreed or not. If you
17 failed to carry out restoration of a particular phase,
18 weren't you required under this Contract to return the
19 land to FEGUA?

20 A. I would need to read that clause to properly
21 respond your question.

22 Q. Okay. I turn your attention, then, to Clause

02:38:25 1 16(2)--just highlight the whole clause.

2 A. Sixteen you said; right?

3 Q. Yes, sir.

4 MR. ORTA: And just for the record, this is
5 Clause 16 of Contract 402, which is Exhibit C-22, in
6 English titled "Penalties."

7 (Witness reviews document.)

8 A. Okay, I read it.

9 Q. Okay. So, is it your understanding that you
10 were required to surrender back to FEGUA the lands in
11 which you did not restore rail service?

12 A. In which we didn't rehabilitate and provided
13 service, and this has to be in accordance to the
14 requirements of each phase.

15 Q. Right. So, if you did not carry out and
16 restore service in a particular phase, then you had to
17 return the lands to FEGUA; correct?

18 A. Yes, correct.

19 Q. All right. Now, let me ask you a little bit
20 about Phase II. Let's put up C-61.

21 I understand you've argued in this case that
22 you completed your obligations to restore Phase II; is

02:40:03 1 that your contention?

2 When I say, "your," by the way, I'm talking
3 about the company. I don't mean you personally.

4 A. Yes.

5 Q. Is that FVG's contention?

6 A. Yes.

7 Q. The answer is yes?

8 A. Yes.

9 Q. Okay. Let's--and I understand that this
10 document is what you put up as the evidence, I
11 believe, to support that conclusion.

12 Before we get into what the document says, I
13 have a question for you about what exactly was done in
14 Phase II.

15 It's my understanding that in Phase II your
16 company laid down some track--and you could correct me
17 if I'm wrong--laid down some track so that the train
18 that operates in Mexico can enter Guatemala territory,
19 unload cargo, and leave Guatemala territory. Is that
20 the extent of the restoration that was done in Phase
21 II?

22 A. At that time, yes.

02:41:09 1 Q. When you say, "at that time," has there been
2 more restoration that has been done to Phase II?

3 A. You're referring to this letter. This letter
4 is the approval of what was done upon the reaching the
5 deadline.

6 Q. No, no, I said before we get to the letter?

7 A. Okay.

8 Q. Before we get to the letter--

9 A. Sorry, I was given the letter.

10 Q. That's okay.

11 My question is: What actual restoration has
12 been done by the company for Phase II? And as I said,
13 my understanding is that some track was laid down--

14 A. It was rehabilitated--

15 Q. --in the--or rehabilitated along the border
16 between Guatemala and Mexico so that the Mexican train
17 can enter into Guatemalan territory, unload cargo, and
18 go back to Mexico; is that correct?

19 A. Yes, but we did more. There were other 10
20 miles, maybe, of track rehabilitated into the
21 Guatemalan territory to serve other customers.

22 Q. To serve, I'm sorry?

02:42:16 1 A. Other customers.

2 Q. Does RDC/Ferrovías Guatemala actually operate
3 a train in Phase II, as we speak?

4 A. No, we had a deal with the Mexican train.

5 Q. So, the Mexican train comes in, unloads
6 cargo, and leaves?

7 A. Yes.

8 Q. And it's your contention that that satisfied
9 your restoration obligations under Phase II?

10 A. Yes, because it was acknowledged by FEGUA.

11 Q. And is it also your contention that as a
12 result of that, you can keep and exploit the rest of
13 the land in Phase II from now until the end of the
14 50-year Usufruct however you like in accordance with
15 the Contract?

16 A. We could--we met the deadline to rehabilitate
17 minimums, and the Government accepted it, and we were
18 looking to rehabilitate more after that. It's not
19 that I am--I mean, it's a 50-year contract. The idea
20 would have been from the beginning, if it was
21 convenient, for the company and for the customers to
22 do more, we would have done it, and that's exactly

02:43:34 1 what we always considered regarding the South Coast.

2 Q. Right. And I understand--and there has been
3 much evidence about the fact that there were plans to
4 restore the railway to the South Coast, which is part
5 of Phase II--

6 A. Yes.

7 Q. --but my question is: Is it your contention
8 today in this case, that whether or not those plans to
9 restore the South Coast were successful or not that
10 the company could keep all of that land and continue
11 to use it for real estate purposes and others, even
12 though there would will be no RDC/Ferrovias train
13 operating on that track--

14 A. Well--

15 Q. --or in that land.

16 A. Well, the Contract doesn't state anything
17 different.

18 Q. So, is that your contention?

19 A. Yes.

20 Q. Okay. Put up C-62.

21 Now, with respect to Phase III, the company
22 Ferrovias/RDC--and RDC, or RDC I should say, in this

02:44:54 1 case, has submitted this document, which is C-62--this
2 is a translation of it--and in this document--well,
3 first of all, your contention is that or--what is your
4 contention with respect to Phase III? Have you
5 completed it? Do you have an obligation to complete
6 it?

7 A. We had the obligation under the Contract, in
8 the same way the Government had the obligation to
9 provide us with the right-of-way. After submitting
10 technical Reports and information to the Government of
11 the impossibility of doing it without the
12 right-of-way, we could not rehabilitate the
13 right-of-way if it never existed such amongst other
14 concerns. We were waived from the responsibility of
15 complying with that phase in that specific date.

16 Q. Okay. And so is it the company's contention
17 that it was not then going to restore, do any
18 restoration in Phase III?

19 A. Not at this date.

20 Q. Or ever?

21 A. No. The letter states here that, therefore,
22 it's imperative for both companies to keep constant

02:46:22 1 communication in order to determine the commercial
2 feasibility of Phase III in the future. That's
3 obviously refers to the length of the Contract.

4 Q. So, in your view, when would your obligation
5 to surrender the lands in relation to Phase III back
6 to FEGUA, when would that be triggered?

7 A. Never. There was no land. There was no
8 land.

9 What land are you referring to? That's
10 exactly the problem. There was no land. What is your
11 question referring to? The land under Phase III?
12 There was no FEGUA land that was not given to us, so I
13 don't understand your question.

14 Q. So, it's your contention that all of the land
15 that was given in relation to Phase III was actually
16 land not owned by FEGUA? That's your point?

17 A. That was part--that was exactly the problem.
18 There was no land.

19 Q. Okay. So, as we sit here today, you don't
20 have any rights in any of the land with respect to
21 Phase III?

22 A. No, we don't.

02:47:22 1 Q. Okay. And what about Phase IV and V?

2 A. That's different.

3 Q. Well, when would your obligation to return
4 that land be triggered under the Contract based on
5 your understanding? Because as I understand it, the
6 company has said that they had no intention of
7 restoring Phases IV and V.

8 MR. STERN: Objection.

9 THE WITNESS: That's not my understanding.

10 MR. STERN: That's a statement by Mr. Orta.
11 That's not the evidence in the record, so I object.

12 BY MR. ORTA:

13 Q. Well, as to Phase IV, you were supposed to
14 have started restoration in 2007.

15 A. Yes--

16 Q. And here we are in 2011.

17 A. I'm sorry, we have been discussing different
18 things here. I need to understand your question right
19 now.

20 Q. So, do you agree at this point you're
21 obligated to restore the lands from Phase IV to FEGUA?

22 A. And that is--I would like to--

02:48:39 1 Q. Phase IV under Clause 13 should have
2 initiated in 2007.

3 A. I just need to remind what portion of the
4 right-of-way that refers to.

5 Q. And I think my question may have been a bit
6 inaccurate.

7 Do you agree that at this point you're
8 obligated to surrender or return those lands to FEGUA,
9 having not complied with the obligation to restore
10 railway service in that territory four years after the
11 Agreement took place?

12 A. I would just like to know exactly here what
13 portion of that land is because I believe that has
14 already been complied with--I mean, the obligation.

15 Q. Phase IV? You're contending here that you've
16 actually restored rail service in Phase IV?

17 A. Yes. I need to confirm it.

18 (Witness reviews document.)

19 Q. RDC has said in this case, sir, that they
20 have not initiated restoration in Phase IV, and that
21 they--so, is it your contention it's to the contrary?

22 A. No, I would just like to make a comment here

02:50:36 1 regarding that portion. It says that this clause only
2 states the phases without indicating which portion of
3 the--

4 Q. But, sir, you're the General Manager. You
5 obviously know what has started, where restoration has
6 had--

7 A. There is a phase--

8 Q. --sir, you're cutting me off. Let me just
9 get the question out because otherwise we're going to
10 talk over each other.

11 A. Sorry.

12 Q. You don't really need to read the Contract.

13 (Discussion off the record.)

14 Q. You don't need to read the Contract to know
15 whether you've restored Phase IV or not. You are the
16 General Manager of Ferrovías. You know that you
17 haven't done that.

18 A. I know we had restored or rehabilitated in
19 advance a portion of that track segment because--and
20 that's the portion that runs from the Central Station
21 towards the South Coast, and we rehabilitated five
22 miles in that portion in advance of the deadline

02:51:44 1 expiring. That's what I wanted to say.

2 Q. And have you restored train service there?

3 A. We had train service there. Until we
4 had--until we were forced to stop operations.

5 Q. Okay. So, do you agree now that you should
6 surrender that land back to Guatemala?

7 A. We met the deadline.

8 Q. So, it's yours for the rest of the 50 years?
9 That's your contention?

10 A. Under the terms of the Contract, yes.

11 Q. Okay. All right, let's turn to a different
12 topic. You--your clients--your company, pardon--has
13 made certain allegations regarding what has been
14 alleged in this case to be some conspiracy to benefit
15 Mr. Ramon Campollo by taking away your concession
16 through the Lesivo Declaration.

17 We've had some discussion about an alleged
18 threat that was made by Mr. Pinto at a meeting in
19 March of 2005. I would like to--I'm sorry, as well as
20 an Option Agreement that was sent by Mr. Pinto to your
21 company. You're familiar with that Option Agreement;
22 correct?

02:53:11 1 A. I'm familiar with a proposal he presented.

2 Q. Okay. Let me direct you to C-100, which is
3 an e-mail that you write in relation to that proposal.
4 C-100. That's the wrong document. C-100.

5 And, for the record, this is an e-mail, sir,
6 that you wrote to Henry Posner on April 6, 2005, with
7 a copy to Bill Duggan and Bob Pietrandrea.

8 A. Correct.

9 Q. Now, in this document, you are referring to a
10 call you got--you were reporting on a call that you
11 received from Mr. Héctor--is this Héctor Pinto?

12 A. Yes.

13 Q. And in it you're reporting that Mr. Pinto
14 called you to say that, regardless of what Ferrovías
15 decides about signing this document--and just so that
16 we're clear, the document you're referring to there is
17 the proposal that you had received from Mr. Pinto
18 Desarrollos G?

19 A. That's correct.

20 Q. And so he says to you, "Regardless of what we
21 decide about signing that proposal, it can't be
22 signed--it cannot be signed now, maybe later, because

02:54:41 1 of some illegalities in our Contract."

2 Do you see that?

3 A. Yes, I see it.

4 Q. Okay. So, Mr. Pinto called you on the 5th of
5 April to report that to you; is that correct?

6 A. That is correct.

7 Q. And he said he wanted to stop by to see you
8 on that very day, the 6th of April, to let you know
9 the legal point of view of the Ministry regarding your
10 Contract; is that correct?

11 A. Yes.

12 Q. And he further said to you that he wanted to
13 see if he could help or if you could reach agreement
14 with him to try to work out these illegalities; is
15 that correct?

16 A. I need to read that part.

17 (Witness reviews document.)

18 Q. It says if--he said he would like to stop by
19 today and let us know what is the legal point of view
20 of the Ministry regarding our Contract and that if we
21 both reach an agreement, maybe we could work out
22 together these illegalities.

02:55:49 1 A. Okay, yes. That's what I report.

2 Q. Okay. He also asked you to have your lawyer
3 there, Pedro, Pedro Mendoza?

4 A. Yes.

5 Q. Is that correct?

6 A. That's correct.

7 Q. Okay. And you said that you were curious to
8 see what he had to say.

9 A. Yes.

10 Q. And that you had invited the new lawyer who
11 was handling the arbitration--is that the arbitration
12 that you were at that point putting together to file
13 against FEGUA?

14 A. The local arbitration, yes.

15 Q. I mean, it wasn't filed by them. They were
16 filed in June; right? So, at this point you're
17 putting that arbitration together?

18 A. That's correct.

19 Q. And so did that meeting take place? Did
20 Mr. Pinto actually come by on the 6th of April to see
21 you?

22 A. We had a--not that day. Not that day. I

02:56:39 1 remember we had a meeting after this at Pedro's
2 office.

3 Q. Is that the one where Mr. Louis Fuxet
4 appeared?

5 A. I believe so, yes.

6 Q. Okay. All right. So, we've already had some
7 testimony about that meeting. I want to ask you a
8 little bit more about this e-mail, though. If we go a
9 little bit further down beginning with, "But after
10 all," it says: "But after all, Héctor asked me to
11 make a counter proposal if we didn't like the document
12 they submitted."

13 And again, this is the--when you say document
14 there, you're referring to the proposal between
15 Desarrollos G and Ferrovías?

16 A. Let me take this copy out of here.

17 Yes.

18 Q. Is that correct? So, Mr. Pinto had asked you
19 to make a counterproposal in relation to that proposal
20 that we have seen here from Desarrollos G?

21 A. Yes.

22 Q. Did you make a counterproposal?

02:57:59 1 A. We had already made a proposal, and that is
2 that we invited Mr. Campollo to join our company as a
3 partner. Then Héctor came with this different
4 proposal, and he started, as you said, pointing out
5 some illegalities, and as I said here, I was curious
6 to hear about those illegalities.

7 Q. My question was whether you made a
8 counterproposal. That's the question.

9 A. That's your question, okay. I'm responding
10 it--

11 Q. It's a yes or no. Did you make a
12 counterproposal?

13 A. No, I need to explain it. I need to explain
14 it.

15 We couldn't make a counterproposal to--I
16 mean, he's mixing things here. I understand that
17 that's the question you asked, but the thing is that
18 he called, saying that there were some illegalities in
19 our Contract and that he wants a counterproposal.

20 I felt that he was telling us, threatening us
21 about having some illegalities in our Contract, which
22 he never mentioned, not even at that meeting. He

02:59:12 1 never mentioned them.

2 Q. Did you make a counterproposal, sir? Can you
3 answer that question?

4 A. We--our lawyers explained to him at that
5 meeting that it was not possible to agree to this
6 document because this--his proposal had some
7 illegalities, so that's why we didn't counter-propose
8 to it.

9 Q. Okay. So, you did not counter-propose?

10 A. No, because it was proposing illegal things
11 here.

12 Q. Now, you said that you had offered to
13 Mr. Campollo to be an equity partner in Ferrovías.
14 Did you present him with any Business Plan associated
15 with that offer?

16 A. No. When he said that he was interested, we
17 told him that we would consider it because he never
18 really said he was interested in buying the company;
19 right? He said he was interested in having some
20 control of the company, so we thought that the right
21 thing to do was to offer him and open the door for a
22 partnership.

03:00:18 1 And during that meeting or one of meetings we
2 had with him, he clearly said that he was something
3 like a lone wolf and that he didn't like partners, so
4 why should we present him with a proposal.

5 Q. All right. You did not present him with a
6 business plan, then?

7 A. No, we did not.

8 Q. Did you ever present him with any financials
9 for the company, Ferrovías?

10 A. No, we presented him with plenty of
11 information regarding the company.

12 Q. When did you do that?

13 A. It was through Héctor Pinto after we
14 had--after and before we had meetings with
15 Mr. Campollo.

16 Q. The only meeting you ever had with
17 Mr. Campollo was in April 2001, right, directly with
18 Mr. Campollo?

19 A. April 2001?

20 Q. Yes.

21 A. I was not even working at the company.

22 Q. Did you ever have any meeting directly with

03:01:06 1 Mr. Campollo, then?

2 A. Twice.

3 Q. The one--which one? When?

4 A. Well, we met in December 2004 in Miami, and
5 then we had a further meeting in January in Guatemala.

6 Q. You were at the December 2004 meeting?

7 A. In Miami, yes.

8 Q. Okay. And other than that meeting, when was
9 the other meeting?

10 A. We had another meeting at his office in
11 Guatemala early in 2005. I believe it was January.

12 Q. Okay. In your e-mail, a little further on,
13 when you talk about potentially making a
14 counterproposal, you say: "This has to be addressed
15 directly to Ramon and no one else to avoid failing in
16 his misunderstandings game."

17 Do you see that?

18 A. Yes.

19 Q. And a little further down you say: "Let's
20 face it, Ramon will never express personally his full
21 intention of taking over our company without putting
22 any money down. He doesn't like partners, and we

03:02:29 1 don't want to fight him."

2 Do you see that?

3 A. Yes, I see it.

4 Q. Okay. So, a couple of questions about that.

5 First of all, after this was written in

6 April 2005, I take it from your testimony then you

7 never addressed anything directly with

8 Mr. Campollo--is that correct?--in terms of in-person

9 discussions with him.

10 A. No, it was all made through Héctor Pinto.

11 Q. Okay. And did you ever receive a letter from

12 Mr. Campollo telling you that Mr. Pinto was authorized

13 to act on his behalf?

14 A. No, but it was pretty obvious.

15 Q. It was obvious--

16 A. That he worked for him, and that he was--

17 Q. But did you--I understand that you believe he

18 worked for him, you understood he worked for him, but

19 did you ever receive a written communication from

20 Mr. Campollo to let you know that Mr. Pinto was

21 authorized to deal on his behalf in relation to the

22 discussions you were having with him?

03:03:33 1 A. I didn't need that to accept Mr. Pinto's
2 proposals and comments regarding him being authorized
3 by Mr. Campollo. I was sharing information with him
4 because we were seriously considering doing something
5 with them. I shared the information with Héctor
6 regarding our leases, our contracts, and many other
7 kind of private information of the company. And when
8 we had the meetings with Mr. Campollo, he was aware of
9 it, so it was obvious that he was reporting with him
10 and he was--I mean, he set up the meetings with Ramon
11 in Miami and in Guatemala, so why should I doubt that.
12 I mean, it was obvious--

13 Q. When you say he was aware of it, were you
14 talking about Mr. Campollo was aware that you were
15 meeting with Mr. Pinto?

16 A. Both. Mr. Pinto and Mr. Campollo--

17 Q. How do you know that Mr. Campollo knew about
18 the meetings you were having with Mr. Pinto? Did you
19 ever speak to Mr. Campollo about that?

20 A. Yes.

21 Q. When?

22 A. At the meeting in Miami and in Guatemala. He

03:04:33 1 was already aware of many things I had discussed only
2 and disclosed to Hector.

3 Q. The meeting that you mentioned is
4 December 2004 in Miami; correct.

5 A. Yes.

6 Q. And the other meeting in Guatemala was when?

7 A. Early 2005, maybe January.

8 Q. Okay. So, after those meetings, did you ever
9 have any communication with Mr. Campollo wherein he
10 said to you, it's okay for you for Héctor Pinto or
11 Héctor Pinto's authorized to have discussions with you
12 on my behalf in relation to any potential business
13 regarding the railway?

14 A. I didn't meet with Mr. Campollo after that,
15 after those two meetings.

16 Q. Okay. Let's go to R-173, please.

17 Do you recall receiving this letter from
18 Mr. Campollo dated April 15, 2005?

19 A. Yes, I recall.

20 Q. Okay. And in it, Mr. Campollo says to you
21 that--he says: "I have decided not to participate in
22 the railway project that was presented to me in

03:05:55 1 Miami." Correct?

2 A. Correct.

3 Q. "By certain officers of your company"--by
4 certain officers of the company you represent."

5 Correct?

6 A. That's correct.

7 Q. So, he tells you here that he wants no
8 further participation in the railway project that
9 Ferrovías presented to him in Miami; correct?

10 A. That's correct.

11 Q. And the reason he gives is he says that his
12 participation in other businesses and the time that he
13 has to spend on them would not allow him the necessary
14 effort required to make whatever project was presented
15 to him a reality; right?

16 A. That's what the letter says.

17 Q. Okay. And that's what he told you in this
18 letter?

19 A. Yes. He was not interested in becoming our
20 partner. He said he was not interested in what we
21 proposed in Miami.

22 Q. Now, let's look at R-174, please.

03:06:57 1 For the record, R-174 is your letter
2 responding to Mr. Campollo's letter; correct?

3 A. Give me a second, please.

4 (Witness reviews document.)

5 Q. It's up on the screen, sir.

6 A. Okay.

7 Q. Do you see it there? It's dated April 18,
8 2005.

9 A. Yes.

10 Q. And in it you say, "I hereby acknowledge
11 receipt of your correspondence dated past April 15."
12 Correct?

13 A. Correct.

14 Q. "In which you inform us of your decision not
15 to participate in the railway project that was
16 presented to you in Miami by our company." Correct?

17 A. Correct.

18 Q. You also say that it was your understanding
19 and that of Mr. Duggan's is that there was a mutual
20 interest in jointly developing the southern coast
21 railroad span following the initial approach we had
22 several months ago from Héctor Pinto. Correct?

03:08:15 1 A. That's correct.

2 Q. And that's the business opportunity that
3 you're referring to, the mutual interest in jointly
4 developing the southern coast railroad development
5 span?

6 A. Yes. Ramon was interested in doing something
7 in the South Coast. That was made clear to us through
8 Héctor, and then he confirmed it during our meeting.
9 We told him that we had--could open the doors for him
10 and consider him as a partner.

11 Q. It says mutual interest. It doesn't say just
12 an interest by Mr. Campollo. FVG had an interest in
13 developing the South Coast, too, didn't they?

14 A. Of course.

15 Q. All right. And the very last paragraph you
16 sign off by saying: "Regardless of the absence of
17 successful communication at the meetings we held with
18 you and other executives of your business group on
19 several occasions, we regret your decision and
20 understand your reasons."

21 That's what you said to him?

22 A. That's what I said.

03:09:10 1 Q. Okay. And this is after supposedly he had
2 made a number of threats to take your company;
3 correct?

4 A. Well, he presented us with that Desarrollos G
5 offer under conditions that were not just not
6 acceptable.

7 Q. And is that--when you're saying in this case
8 that there was a threat by Mr. Campollo to take the
9 company, you're referring to that Desarrollos G
10 proposal?

11 A. It was a threat because Héctor clearly said
12 it. He didn't like it that we rejected it. He was
13 not presenting any monetary contribution to the
14 company. He was just saying I want your rights, and I
15 will help you solve your problems with the Government,
16 and, so how money are you willing to put down, and
17 he--that's the proposal we made to him. We asked him
18 to become a partner putting money down. What he
19 proposed is having the rights, our rights, which, by
20 the way, was also illegal, as our lawyers explained
21 earlier, without contributing with any money to the
22 partnership.

03:10:27 1 Q. Well, do you recall--and I'm not going to put
2 it up on the screen for sake of time because the
3 Tribunal's already seen it, but do you recall that in
4 that Desarrollos G proposal there was--it talked about
5 the possibility sharing in business opportunities
6 regarding the Usufruct and that there would be future
7 negotiations about any monies to be paid to Ferrovías
8 and what the terms would be of any such future
9 business opportunities? Do you recall that?

10 A. I remember the general terms of his proposal,
11 wanting all of our rights through first options
12 without any economic compensation.

13 Q. Well, the Agreement referred to that the
14 issue of economic compensation would be negotiated in
15 the future, didn't it?

16 MR. STERN: Objection. He should be shown
17 the document before he's asked questions about it.

18 MR. ORTA: I've asked for his recollection.
19 I'm not going to show him the document because I want
20 to move on.

21 MR. STERN: Well, then I object that he's
22 misstating the evidence.

03:11:35 1 MR. ORTA: The Tribunal has already seen it.

2 MR. STERN: I object that you're misstating
3 the evidence. The word compensation doesn't move on--

4 MR. ORTA: I'm going to go ahead and move on
5 because I think the Tribunal has already seen it, and
6 I prefer not to waste the Tribunal's time on this.

7 BY MR. ORTA:

8 Q. After--well, I'm sorry, before we leave this,
9 is there any particular reason you don't make any
10 mention of threats in your letter to Mr. Campollo?

11 A. Well, I was just trying to be kind in my
12 response. His letter was in the same line of
13 kindness, and I say, okay, if you're not interested,
14 well, we're not interested, either, and I was thanking
15 him for both mutual interest. There was no sense in
16 leaving the conversation in bad terms, and that would
17 have certainly leave us in bad terms. He knew what he
18 had proposed us. We knew about it. We didn't like
19 it. He knew we didn't like it, so if he said he was
20 not interested, well, we weren't interested, either,
21 so that's how we left it.

22 Q. And why would you be kind to somebody who was

03:12:41 1 threatening to take away your business?

2 A. Because he was retreating. If there was no
3 sense in keep fighting. I mean, he said--okay. I
4 mean, he tried, and he--he tried, and he couldn't get
5 to us accept that, so why should I be harsh about his
6 threat. I mean, he wasn't threatening to do something
7 against me personally.

8 I mean, he tried. He said he wanted many
9 things without any monetary compensation, and then
10 he--when he was made--when it was made obvious at that
11 last meeting and when we even told his representatives
12 that what he proposing was illegal, maybe he felt
13 embarrassed, and he just wrote the kind letter, so I
14 responded in the same terms.

15 Q. All right. Now, I would like to take you now
16 to the day before the Lesivo Declaration was
17 published. Actually two days before. You recall you
18 attended a meeting at the Office of the President?

19 A. Yes, I recall it.

20 Q. And in your Declaration--bear with me--you
21 say--while I'm looking for it--you say in your
22 Declaration that there was--while you were giving a

03:14:07 1 presentation, the President asked you whether there
2 had been any joint ventures with any companies for the
3 Southern Coast. Do you recall that?

4 A. I don't remember exactly, but...

5 Q. Do you remember that? Do you remember that
6 meeting?

7 A. I remember attending the meeting, yes.

8 Q. Okay. And do you remember that during that
9 meeting the President asked you about possible
10 proposals?

11 A. He must have.

12 Q. Okay. It's First Declaration, Paragraph 38.

13 A. You mean my statement?

14 Q. Yep.

15 We're going to put it up on the board for
16 you.

17 A. Okay.

18 Q. In there you say, when I began a
19 present--first of all, you're talking about the
20 meeting on 23 August 2006, at the Presidential palace.
21 You say Mr. Aitkenhead was there and a number other
22 people, including the President and yourself.

03:15:12 1 A. Excuse me, what's the paragraph number?

2 Q. Thirty-eight, sir.

3 A. Okay, thank you.

4 Q. Pages 10 and 11, and in particular I'm
5 focusing on the text on Page 11. You say, when I
6 began a presentation which included FVG's long-term
7 projects with potential joint venture investors,
8 including opening up the South Coast route"--this was
9 part of your presentation--"you said President Berger
10 cut me short asking me, "whether there had been any
11 joint venture between FVG and potential investors so
12 far."

13 That's what you remember the President
14 saying; right?

15 A. Yes.

16 Q. And later on you say: "It was clear to me
17 that potential investors--that the potential voters
18 the President was referring to was Ramon Campollo."

19 A. Yes.

20 Q. Okay. Did the President use Ramon Campollo's
21 name during that meeting?

22 A. No, I'm not sure he used Ramon's name, but he

03:16:16 1 did mention some of the businesses in which Ramon is
2 involved, and he did mention also something about
3 Santa Lucia, which is where Ramon had his interests--

4 Q. He mentioned that at that meeting?

5 A. It became obvious that what he said
6 that--were many things said. He was referring to the
7 area where Ramon has his interests, and to the
8 businesses in which he has been engaged, but he did
9 not say it openly. It was my interpretation.

10 Q. You didn't say any of that in your
11 Declaration, sir. You didn't say anything about him
12 mentioning businesses owned by Ramon Campollo in your
13 Declaration, did you? You say the President said; the
14 only statement you attribute to the President is that
15 he said whether there had been any joint ventures
16 between FVG and potential investors. That's what you
17 attributed to the President in your Declaration.

18 A. Yes.

19 Q. You didn't say anything about this other
20 stuff that you just mentioned about him mentioning
21 businesses owned by Ramon Campollo, did you?

22 A. No, he mentioned the products that should be

03:17:41 1 transported. He mentioned palm oil and sugar, and
2 things, which I know Mr. Campollo is involved in.

3 Q. So, he mentioned sugar, and because he
4 mentioned the transportation of sugar you thought he
5 meant Ramon Campollo?

6 A. Not only because of that. We had been having
7 conversations with him about the possibility of doing
8 something together. His son was involved there, so I
9 made that interpretation.

10 Q. Let me take you to C-44.

11 A. Okay.

12 Q. This is the document that has been presented
13 here by counsel for RDC as the settlement document
14 that was presented to you on the 24th of August 2006,
15 and it's been characterized here as a
16 take-it-or-leave-it offer.

17 A. I would even call it a threat. That's what I
18 said during the last time here.

19 Q. You would call it a threat, this document?

20 A. Yes, sir.

21 Q. All right. Isn't it correct, sir, that in
22 this document the Government is highlighting points to

03:18:56 1 be negotiated between the Parties?

2 A. No, they are basically making a list of
3 demands that were not related to any of our previous
4 meetings or conversations.

5 Q. Okay. Let's take a look at the demands the
6 Government was making per your testimony. Let's
7 highlight Clause 4. C-44, sir. C-44.

8 ARBITRATOR EIZENSTAT: My C-44 is the
9 April 15 letter.

10 MR. ORTA: C-44?

11 ARBITRATOR EIZENSTAT: C-044?

12 MR. ORTA: If we can get you another copy of
13 it. I believe it might be that that notebook has an
14 error.

15 (Pause.)

16 MR. ORTA: The print is very small on that
17 one, though.

18 Secretary Eizenstat, when you tell me you've
19 got it in front of you, I will resume the questioning.

20 BY MR. ORTA:

21 Q. You said the Government was making demands in
22 this document. Let's take a look at Clause 4. And it

03:21:16 1 reads: "Issues to be negotiated in connection with
2 the terms of the onerous Usufruct Contract involving
3 property owned by Ferrocarriles de Guatemala for
4 rendering railway transportation services."

5 Then it lists a number of issues to be
6 negotiated; correct?

7 A. Yes.

8 Q. And this is the language--this is the
9 document where you say the Government was making
10 demands?

11 A. Yes.

12 Q. Isn't it the case, sir, that the Government
13 was simply highlighting issues to be negotiated
14 between the Parties?

15 A. Yes, but it doesn't sound right that they're
16 making this as we discussed before, one day before
17 they declared lesivo.

18 They told us--by this time, they already told
19 us that they were going to declare lesivo. So, if you
20 consider that we had been meeting prior to this, and
21 all of these issues highlighted here were never part
22 of the agenda, why should I consider that this is

03:22:14 1 something that they want to negotiate? I mean, they
2 came up with this frivolous thing about lesivo, and we
3 were never told what were the grounds for lesivo. Up
4 to this date in which we were given this document,
5 they were--all we were told is that they were going to
6 declare lesivo, and all of these things here--I mean,
7 lesivo of the Equipment Contract, and you see that
8 there's many things here that are not related to that
9 contract.

10 Q. Well, it does in Clause 6 talk about--it
11 says, "issues to be settled in connection with the
12 onerous Usufruct Contract involving railway
13 equipment," and Clause A says, "modifications to the
14 Usufruct Contract involving railway equipment in order
15 to rectify the terms which are deemed to cause lesion
16 in the interest of the State of Guatemala."

17 And it goes on to reference the Opinions of
18 the Solicitor General's Office, FEGUA, and the
19 Ministry of Public Finance; correct?

20 A. Yes, but those documents were never disclosed
21 to us, and they could have been mentioned here.

22 Q. Well, sir, it's my understanding that at this

03:23:36 1 meeting you were handed this document and that you
2 said to the participants on behalf of the Government
3 that you had no authority to negotiate or to agree to
4 anything at that meeting; isn't that correct?

5 A. If you see this, this involves
6 multiplications to the Equipment Contract, to the
7 Trust Fund Contract, and to the Right-of-Way Contract,
8 and those--all of those Contracts were our concession.
9 Those were parts of the Bidding Terms. We were a
10 qualified bidder to participate in that bidding
11 process, and we were awarded the concession, and
12 therefore, we signed these three contracts.

13 They wanted to change all of the--all the
14 Contract, all the conditions. I mean, this had
15 already been negotiated amongst the Parties when the
16 contracts were signed. Why should we on a very short
17 notice because this is not a proposal--I mean, where
18 they put a gun on your head and tell you have to sign
19 this or otherwise we will publish lesividad tomorrow
20 or we will declare it, that is not a proposal.
21 Besides, it involves all of the three contracts.

22 And if you see, if they were claiming that

03:24:50 1 the problem was the equipment contract, why are they
2 mentioning other things here, coincidentally the
3 things that were on dispute in the local arbitrations?
4 This was a threat. It's very obvious. It's very
5 obvious, and those alleged claims about illegalities,
6 about not having the Presidential approval and not
7 having a bidding process, not even them accept--they
8 don't even believe it. They were just excuses, and
9 this document is the proof of that.

10 Q. Okay. My time is essentially up, but I just
11 want you to answer my question, which was: Did you
12 tell them you had no authority to enter into this
13 agreement and answer one more question, which is: Did
14 you pick up the phone and call Mr. Posner or call
15 Mr. Duggan or Mr. Pietrandrea and say they proposed a
16 settlement to us, what should I do? Did you do either
17 of those--did you do those things?

18 A. I proposed them--I proposed them that we
19 could meet the next day, that I would need to make
20 this phone call and inform my superiors of this. I
21 would need to have it translated and send them over.
22 They're always traveling and they're busy, and they

03:25:57 1 just said no, it has to be done right now, so I didn't
2 agree to it. I didn't think it was right for me to
3 sign something like this under--on certain terms,
4 really. I don't think it was--

5 If you consider all of the procedures
6 involved in a bidding process to get the concession,
7 and this was just like starting all over again in a
8 five-, six-page document, that was not right, and they
9 had been, as I said earlier, saying that the
10 illegalities under which the grounds for--that they
11 finally said for declaring lesivo were problems with a
12 Presidential approval and with a bidding process, and
13 this document clearly states that they didn't believe
14 it. That's not true. Those were the grounds for the
15 claim of lesivo, and these documents here states it is
16 proposing that Contract 143 had a bidding process. I
17 invite you to read it.

18 Q. I've read it, sir. What the document says--

19 A. Not in that part--

20 Q. Just bear with me, sir.

21 What the document says is that--

22 MR. STERN: I object to object. He's passed

03:27:05 1 his time--

2 BY MR. ORTA:

3 Q. What the document says is that the Government
4 was proposing to modify the Equipment Contract to
5 rectify the terms that caused lesion as set forth in
6 these various Government opinions. That's what it
7 says, sir.

8 A. Yes, but they were not attaching those
9 opinions here.

10 And what it is here--can we please
11 move--Mr. President, would you indulge me with an
12 additional minute here to explain this? Can we move
13 it up, please, in the introduction part--up, up,
14 first, second, third page where it refers to Contract
15 143, please. Okay, here.

16 Q. I would just say if he's going to be allowed
17 to make a statement, then I just want to be able to
18 ask him a follow-up question on it.

19 PRESIDENT RIGO: He's allowed to answer your
20 question regarding this Contract, and then I'm going
21 to give the floor to the other Party.

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

03:28:01 1 THE WITNESS: Next page, please.

2 Okay, here.

3 PRESIDENT RIGO: So, Mr. Senn, if you can
4 remember it, just reply to--

5 THE WITNESS: I would like to read what this
6 says because this is what I read when I was at that
7 meeting. I know what you're saying, but I mean we
8 don't have to take things out of context here. This
9 is a document of several pages, and I want to remind
10 you what this says here regarding Contract 143. It
11 says here in (c), it says, "In line with the
12 privatization process, Ferrocarriles de Guatemala
13 FEGUA called private companies to take part in a
14 public bidding process, to receive in onerous Usufruct
15 the repair, maintenance, use, and exploitation of the
16 railway equipment owned by FEGUA. As a result of said
17 process, obviously, the bidding process, compania
18 Desarrollos Ferrovías was awarded onerous Usufruct and
19 as documented by public bid number 143. Why in the
20 world would they be proposing that Contract 143, and
21 they wanted to sign it this way, had a bidding
22 process? Because they knew Contract 143, through

03:29:11 1 Contract 141 did have a bidding process, and they're
2 not mentioning anything about Presidential approval
3 here.

4 So, I mean, it was clear to me that they
5 didn't believe in those such illegalities, and those
6 were the grounds to declare lesivo so now besides
7 saying that they're demanding other things, so this is
8 clearly a threat.

9 PRESIDENT RIGO: Thank you.

10 Mr. Stern.

11 MR. STERN: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. STERN:

14 Q. Mr. Senn, at this August 24, 2006, meeting,
15 could you describe for the Tribunal exactly how this
16 offer was presented and what the Government
17 representatives told you with regard to what your
18 options were to avoid the Declaration of lesividad
19 this day, including who told you these things?

20 A. This Government--this document, sorry, was
21 handed to me by Attorney Miriam López. She was here
22 at present at the last hearing. We were in that

03:30:14 1 meeting, and we had met already the previous day, and
2 we agreed to meet the following day like the last day
3 that we could do it, and we were discussing about this
4 and that and all the things that were discussed
5 previously at the meeting with the President.

6 And all of a sudden he came out--she came out
7 and pulled out this document, and she raised it in the
8 table and said, "There's a proposal here. Either you
9 sign it or we declare lesivo tomorrow," and she handed
10 it to me, and then she handed additional copies to
11 other members of the meeting room.

12 I read it. I quickly read it, and as I
13 started reading it, I was--I mean, through my mind
14 what was going was--what they wanted to do was take
15 back several things. They wanted to avoid local
16 arbitration. I mean, it looked so much like what they
17 wanted to do with that Desarrollos G proposal, but in
18 a different way, and I told them, I cannot sign this.
19 I was surprised of how they were so obvious in doing
20 it. We had not been discussing this for the past
21 months, and I said I will need to read it and call my
22 superiors. And she said, no, you either sign it today

03:31:37 1 or we declare lesivo tomorrow. So, that's what
2 happened, they declared lesivo. That's how it
3 happened.

4 Q. And prior to the August 24 meeting, had the
5 Government ever presented any written proposal to you
6 to resolve any of the issues between the Parties?

7 A. No.

8 Q. And at the August 24, 2006, meeting, did the
9 Government disclose what were the asserted grounds for
10 the pending Declaration of lesividad?

11 A. No, never.

12 Q. Other than what's stated in Exhibit C-44 and
13 the take-it-or-leave-it proposal, was there any
14 discussion or mention of the Equipment Contracts?

15 MR. ORTA: I'm sorry, I'm going to object to
16 the characterization of the document as a
17 take-it-or-leave-it proposal. Nowhere does it say
18 take-it-or-leave-it. It's not titled that. This is
19 just rhetoric.

20 MR. STERN: I will withdraw the
21 take-or-leave-it characterization.

22 PRESIDENT RIGO: Rephrase the question.

03:32:41 1 MR. STERN: Yes.

2 BY MR. STERN:

3 Q. Other than what's stated in Exhibit C-44,
4 which is the proposal the Government presented to you
5 at the August 24, 2006 meeting, was there any
6 discussion or mention of the equipment contracts at
7 the meeting?

8 A. No, there wasn't.

9 Q. Did the Government ever present to you,
10 Ferrovías Guatemala, at any point either at this
11 meeting August 24, 2006, or after the Declaration of
12 lesividad a proposal offer to fix the illegalities, in
13 Contracts--the alleged illegalities in Contracts 143
14 and 158 in order to make--to withdraw the Declaration
15 of lesividad?

16 A. No. They didn't, because they knew there was
17 no such illegalities in my opinion. This were just
18 trying--this document demonstrated that that was not
19 the purpose of declaring lesivo; right? They were
20 trying to obtain other changes in the other contracts
21 that they could not declare lesivo anymore, so they
22 were just using this as a tool, as a threat instrument

03:33:42 1 to get the other things they were expecting from the
2 other contracts. There was no such illegalities in
3 Contract 143, nor 41 as they had been saying, and that
4 demonstrates it. They never believed they were
5 illegalities.

6 Q. At the August 24, 2006 meeting did the
7 Government ask that you return the copy of the
8 proposal that they had provided to you at the meeting?

9 A. Yes, they did.

10 Q. And what did you do?

11 MR. ORTA: This is not in his witness
12 statement. None of this is in his Witness Statement,
13 so he's now offering brand-new evidence that we have
14 not ever had--that's never been privy, never been
15 produced in this case.

16 PRESIDENT RIGO: Mr. Stern?

17 MR. STERN: I think it's important since
18 Mr. Orta spent so much time trying to characterize
19 what was going on at the meetings for the Tribunal to
20 get a full understanding of all the facts that
21 occurred at the meeting so they can truly make a truly
22 informed decision as to the facts in this case, and

03:34:47 1 that's why I'm asking the question.

2 PRESIDENT RIGO: Objection sustained.

3 BY MR. STERN:

4 Q. All right. Let's look at Exhibit R-173,
5 quickly.

6 Mr. Orta asked you a lot of questions about
7 what Mr. Campollo said or didn't say in this letter.

8 Just so it's clear, did Mr. Campollo tell you
9 in this letter, Exhibit R-173, that Mr. Pinto was not
10 authorized to act on his behalf?

11 A. No, he's not saying that.

12 Q. Did you ever receive any communication from
13 Mr. Campollo at any point either before or after
14 receiving this letter of April 15, 2005, which stated
15 that Mr. Campollo--I mean Mr. Pinto--was not
16 authorized to act on his behalf when engaging in
17 discussions with you?

18 A. No. He never did. In fact, when we met in
19 Miami during the conversation and then in Guatemala
20 again, we mentioned that we had provided information
21 to Héctor, and he claimed being aware of it, and we
22 discussed about it.

03:36:02 1 The main point in those meetings was not
2 really discussing if I gave it to Héctor and he gave
3 it to him. We were discussing the business
4 possibilities; right? So, I mean, we did--it was
5 mentioned, but he never said that he didn't work for
6 him or nor that he was not authorized to act on his
7 behalf, and it was pretty obvious that he was because
8 Mr. Campollo was fully aware of all the information we
9 had presented. Mr. Campollo is a busy businessman,
10 and he was not going to spend time with me and review
11 all this information. He did it through Hector, and
12 when we had the meeting, he was already aware of it.

13 Q. You were asked some questions about the
14 threats that you received from Mr. Pinto during this
15 time period, March, April 2005. Do you recall a
16 meeting on March 15, 2005, that you and others had
17 with Mr. Pinto at the Marriott in Guatemala City?

18 A. Yes. It was--we were have that day our board
19 meeting, and we decided to have it in a very private
20 place, so it was held in the Presidential Room of the
21 Marriott Hotel in Guatemala City. All of our board
22 members were there.

03:37:22 1 And before starting our board meeting, we
2 allowed Mr. Pinto to come in and make his proposal.

3 Q. And what did Mr. Pinto say to you at that
4 meeting regarding your discussions with him?

5 A. He was again trying to impose this
6 Desarrollos G proposal. He was trying to convince us
7 that that was the best option that we could have
8 because he referred to our company as being a sick
9 dog. That's what he said. He was using it as a
10 characterization to mean that we were in trouble, and
11 that whether we needed their help to become a healthy
12 animal.

13 And he said that they would help us resolve
14 our problems with the Government, which we never
15 understood which one were really until later, and when
16 he was asked how much money were they willing to put
17 down as part of an eventual partnership, which he was
18 proposing, he said that they were not--that that was
19 not their proposal. Their proposal didn't state any
20 economic terms, but that we would look for joint
21 businesses and this and that.

22 And his proposal further states that if they

03:39:00 1 found business opportunities, they would invite us to
2 participate. And I remember very clearly one of our
3 Directors saying, Mr. Pietrandrea, that that didn't
4 sound right. He was not going to invite us to
5 participate in businesses of our own company without
6 putting any money.

7 So, he was told that we weren't certainly not
8 interested in his proposal under those terms, and he
9 didn't like it because it was like not the first
10 attempt that he was doing to get us convinced, and he
11 was pissed off, and he said that they would be getting
12 the company with or without us, and he left.

13 Q. And did he tell you that directly?

14 A. Yes, he did tell me that.

15 Q. Let me take you to--ask you a few questions
16 about the phases of the railway restoration.

17 Did FEGUA ever assert that FVG was in breach
18 of its restoration obligations under Phase II and
19 Phase III?

20 A. No, never.

21 Q. Did FEGUA ever bring an arbitration claim
22 against FVG for not complying with its restoration

03:40:12 1 obligations?

2 A. No, of course not--

3 Q. Let me finish my question.

4 --for Phase II or Phase III.

5 A. No.

6 Q. Did FEGUA ever assert that it was entitled to
7 reclaim any lands or property granted in Usufruct to
8 FVG because it hadn't completed Phase II or Phase III?

9 A. That was never brought up to any of our
10 conversations.

11 MR. STERN: I have nothing further.

12 PRESIDENT RIGO: Thank you.

13 Mr. Crawford? No?

14 Secretary Eizenstat.

15 QUESTIONS FROM THE TRIBUNAL

16 ARBITRATOR EIZENSTAT: I would like to try to
17 concentrate some questions initially on the various
18 contracts.

19 Were you with FVG and your General Manager's
20 position at the time of the letting of Contract 41?

21 THE WITNESS: Yes, I was. No, 41, no, sorry,
22 I was not. I thought you were asking the other

03:41:29 1 Contract.

2 ARBITRATOR EIZENSTAT: When you came in--when
3 did you come with the company?

4 THE WITNESS: July 2002.

5 ARBITRATOR EIZENSTAT: With respect to
6 Contract 41, did it come to your attention when you
7 joined the company or somewhat thereafter that
8 Contract 41 had been bid but had never gone into legal
9 effect?

10 THE WITNESS: When I joined the company, I
11 was made aware, I was made aware, and I think the
12 first time it was by FEGUA, that there was something
13 pending regarding that contract. I mean, that was the
14 Presidential approval.

15 ARBITRATOR EIZENSTAT: And the Presidential
16 approval had not been given, and that's the reason
17 that 41 didn't go into effect?

18 THE WITNESS: It did--it did go into effect.
19 It was just an administrative formality that was
20 missing, and my understanding is that we just had to
21 wait until the President signed it. We did have a
22 letter from the Overseer authorizing us to use the

03:42:53 1 equipment while that authorization could be obtained.

2 ARBITRATOR EIZENSTAT: And that authorization
3 never came?

4 THE WITNESS: No, never.

5 ARBITRATOR EIZENSTAT: And based on the
6 Overseer's authorization, notwithstanding that you
7 continued to operate under that contract, or was that
8 then succeeded by 143 and 158?

9 THE WITNESS: We continued to operate under
10 that contract until we--it was replaced by 143.

11 And then a little later they came again to
12 us, indicating that there was another requirement to
13 fulfill that they had overlooked that they had to put
14 a value to each piece of equipment to comply with a
15 requirement of being able to register the Contract.
16 They said that--so then we signed the Amendment 158.

17 ARBITRATOR EIZENSTAT: And while 143 and then
18 158 were coming into effect, you were continuing to
19 operate under the contracts.

20 THE WITNESS: Yes.

21 ARBITRATOR EIZENSTAT: Given the fact that
22 there hadn't been an executive approval for 41 and

03:44:23 1 that this seemed to be an issue, did Ferrovías,
2 yourself, ever feel that you ought to get that
3 Presidential approval or executive approval so that
4 you wouldn't have any concerns at a later date?

5 THE WITNESS: It was more of a Government
6 concern, which I didn't really understand because it
7 was totally within their authorities to obtain it. It
8 was them who released the bid--the Bidding Terms,
9 the--everything. I mean, they were the ones who
10 requested that authorization, and it was within their
11 powers to obtain it.

12 ARBITRATOR EIZENSTAT: When 143 and then 151
13 succeeded 41, did FEGUA or anyone else from the
14 Government say to you that now that we're doing these
15 new superseding contracts, we should re-bid or that we
16 should get executive approval in order to make sure
17 that they fully comply with Guatemalan law?

18 THE WITNESS: We were--we were mentioning
19 about these concerns they had, but the way these
20 things happened, Mr. Eizenstat, is that it was pretty
21 obvious. Every time we went to them to ask them to
22 comply with their contract obligations under 402 or

03:45:58 1 the Trust Fund, they didn't like it. They liked
2 receiving the money we were paying them, but they
3 didn't like having to honor their obligations.

4 So, that was like a shield they were using.
5 That was their reaction. They were being defensive.
6 So, we questioned them, so when are you going to evict
7 the squatters? When are you going to make payments to
8 the trust? Hey, by the way, that Contract is illegal.
9 There's no such thing, I mean, or you're lacking
10 Presidential approval.

11 After their insistence that that had to be
12 amended, we agreed, and there was a team of lawyers
13 that participated in this.

14 ARBITRATOR EIZENSTAT: And when would that
15 have been, roughly?

16 THE WITNESS: That was in 2002, 2003, when I
17 had just joined the company.

18 And they were always concerned, but the way
19 it happened is that it was always a reaction after we
20 were asking for the eviction of the squatters and the
21 Trust Fund payments. It was a reaction. So, we knew
22 it was--there was nothing there of substance. In all

03:47:11 1 of our dealings with FEGUA and the Government in
2 general regarding those alleged illegalities of the
3 contracts and the Presidential approval, it was always
4 the same thing. It was form over substance.

5 And why do I know this? Because the lawyers
6 told us. I remember that while drafting 143 and then
7 158, we were having conversations with my lawyers and
8 with their lawyers, and I asked them, listen, why is
9 it that this requirement has to be fulfilled, and they
10 in no uncertain terms they just replied, "because the
11 Overseer didn't want to sign the Contract on his own.
12 He doesn't want to be held responsible," so they think
13 that's a wrong understanding of the politicians in my
14 country, that if no one else signs the Contract, they
15 will get in trouble at a later date.

16 So, I said, and what about the congressional
17 approval from 402? Yeah, there are some requirements
18 in the law, but after all, FEGUA is an autonomous
19 entity, and it was their opinion that not even the
20 congressional approval was required is because the
21 Overseer decided it had to be that way. Why? Because
22 if in a later date someone says, who signed the

03:48:32 1 Contract, he said, well, I signed it, but the Congress
2 approved it. In the same way when they signed
3 Contract 41, the Overseer didn't want to sign it on
4 his own. He said okay, I will have the President sign
5 it. But then the President didn't want to sign it.

6 But we didn't care who the President was;
7 right? But the problem is that these things came up
8 every time they had a new Overseer, every time there
9 was a new Government in--being elected. They came
10 with different concerns.

11 So, we accept that because we were always
12 willing to collaborate that they should correct these
13 deficiencies in Contract 41. We accepted it, and we
14 engaged into this time-consuming task of drafting new
15 contracts and having all of our team of lawyers
16 approve them, so it was not fair that just months
17 later when Overseer Gramajo took over again the same
18 thing. I was asking him for the parts. Okay, I want
19 my part. Oh, by the way, there's something with the
20 Contract. I mean, it's a part of our system,
21 unfortunately. There was no problem with the
22 Equipment Contract. You can see in their final

03:49:50 1 proposal here. This was drafted entirely by
2 Government lawyers. They're indicating that contract
3 143 was awarded to us under a bidding process. Why
4 would they put it here in that proposal? Because they
5 knew--it was not illegal. That was a minor--that was
6 a minor thing. The most important thing is to get the
7 railroad operating, running, and growing, and that is
8 why we needed the squatters evicted.

9 But that meant financial cost, and they
10 didn't want to do it. Why didn't want to make the
11 payments into a Trust Fund? Because they didn't want
12 to give away the money.

13 ARBITRATOR EIZENSTAT: I want to go back
14 again to the 143/158. If lawyers sat down, given the
15 fact that they mentioned to you that there was an
16 issue with executive approval and bidding, it doesn't
17 seem to be a terribly difficult thing to work out, I
18 mean, not mentioning the 402 and the 820 and so forth.
19 That specific issue on which lesivo was declared
20 doesn't seem to me a terribly complicated issue.
21 Either you get an executive approval or you don't.
22 Either you have to re-bid it or you don't.

03:51:03 1 So, tell us, please, what the substance of
2 the conversations were when these lawyers got together
3 and they raised the issue.

4 THE WITNESS: I totally agree with you.
5 There is no reason why the President couldn't say,
6 okay, let's have it signed. Let's get over it. Let's
7 move forward, but it's the same thing again. The
8 government had already changed. President Arzu is the
9 one who released the bid, and there was President
10 Portillo. He was obviously not going to sign
11 something from the Arzu Government. He could have--of
12 course he could have done it, and they asked him, (in
13 Spanish) went and asked him through his Secretary,
14 understand, and he said, no, he was not willing to do
15 it.

16 So, since they were insisting that that had
17 to be corrected, we engaged in this series of meetings
18 and conversations trying to correct it. And finally,
19 in a goodwill gesture, we agreed to redraft it and
20 sign something new with lawyers' approval from our
21 company and from the Government.

22 ARBITRATOR EIZENSTAT: Redrafting only 143

03:52:14 1 and 158, or the other contracts--

2 THE WITNESS: No, Contract 41.

3 ARBITRATOR EIZENSTAT: Excuse me?

4 THE WITNESS: Contract 41.

5 ARBITRATOR EIZENSTAT: This is before 143 and
6 158--

7 THE WITNESS: Yes. If your question was
8 regarding 143, that was different. That did not
9 require Presidential approval, so now they came back
10 to the bidding process.

11 MR. STERN: I think the witness is maybe a
12 little bit confused, and I'm not sure why, but I
13 understand Mr. Eizenstat is asking questions about why
14 143 and 158 were never approved by the President or
15 there was no public bidding, and the witness appears
16 to be answering questions regarding Contract 41 and
17 the issue. The record I think is a little unclear.

18 ARBITRATOR EIZENSTAT: My question, Mr. Senn,
19 is related to 143 and 158 because those are the ones
20 to which lesivo was applied, and so what I'm asking is
21 your best understanding of why the two defects that
22 formed the basis of the lesivo were not corrected by

03:53:22 1 the two Parties, lack of a public bid and, if it was
2 necessary, executive approval.

3 THE WITNESS: Contract 143 did not require a
4 public bidding process, and if the Government would
5 have told us that by doing a public bidding process
6 again, we would have resolved the problem, we would
7 have been more than happy to consider it and engage
8 into it, but it was never proposed to us that way.

9 ARBITRATOR EIZENSTAT: And you're saying
10 that--your belief is it didn't require any executive
11 approval?

12 THE WITNESS: That's what the reason for
13 redrafting the Equipment Contracts from 41 to 143
14 because if the President was not willing to sign it,
15 then they came up with the idea, which for me would
16 have been much easier to just get him to sign it.
17 Then they came with this proposal of redrafting the
18 Contract that did not require this.

19 ARBITRATOR EIZENSTAT: My understanding is
20 that 143 and 158 provided higher Canon fee payments to
21 the Government than 41, or is that--

22 THE WITNESS: No, that's correct.

03:54:47 1 As you can see, again they were claiming that
2 they didn't have Presidential approval, so we said
3 okay, what can we do? And they came up with about
4 this idea of redrafting it and not requiring the
5 Presidential approval. Oh, by the way, we would like
6 to modify this and this and that. So, it was not only
7 the signature, they wanted other things. It was
8 always involving money. That's the problem. It was
9 always involving money. That 1 percent we were
10 paying, it was supposed to go to the Trust Fund as
11 initially agreed under Contract 41, so they said that
12 they wanted that initial 1 percent for them to keep
13 it, not go into the Trust Fund, but was intended to
14 improve the rehabilitation of the right-of-way.
15 So, we agreed to that. We agreed, okay,
16 let's do it. Oh, but we want to increase it, they
17 say. We don't want 1 percent. We want 5 percent. We
18 already pay you 10 percent in the other Contract. Now
19 we want 5 percent. I have to be able to show that
20 there was an improvement. You're already improving it
21 by hundred percent because that 1 percent was going to
22 a trust and now you are receiving it completely.

03:56:04 1 So, after several negotiations they accepted
2 only 1.25 because they came down to three, to two, to
3 one-and-a-half, and finally they say, just give me
4 something else, he said, and I said, well, would you
5 be willing to accept 1.25 percent? And he said yes.
6 He said because it was because of further auditing
7 processes. I never believed it was necessary in the
8 way he expressed it, but that's how it happened.

9 ARBITRATOR EIZENSTAT: Now, once lesivo was
10 declared on 143 and 158, you still had the right to
11 use the right-of-way and to lease under 402, and you
12 continued to do that, as I understand it. Is that
13 correct?

14 THE WITNESS: Yes. We tried to deal with it
15 because we had contracts with customers that we had to
16 honor, so we had to do it. But as explained during my
17 examination here, it became just impossible to keep
18 operating. Lesivo is something that is intended in my
19 country that the intention is to shut down a company
20 or take back a contract. The grounds for lesivo were
21 never disclosed to us until a very late date in 2007,
22 and in relation to the Equipment Contract. But when

03:57:38 1 the President was approached by the press, he kept
2 saying things that were not related to the Equipment
3 Contract. So, if President of a country says that if
4 they don't make a 50 million-dollar investment, we're
5 going to take back their Contract, people listen to
6 that. They listen to that, and everybody just
7 interpreted that we were going to be shut down, and
8 they stopped doing business with us, credit and all
9 that story, so we were forced to stop operations, but
10 you are right, we didn't stop immediately. We still
11 tried to keep operating until we just couldn't do it
12 anymore.

13 ARBITRATOR EIZENSTAT: Did your lawyers
14 inform you that you had the right to continue even
15 with lesivo to operate under 143 and 158?

16 THE WITNESS: Yes, we were told that we could
17 keep operating, but that eventually the initiation of
18 an administrative suit called the Contencioso
19 Administrativo would end up ruling against us. That
20 was the possibility.

21 So, we couldn't just wait until happen to see
22 the ruling which, by the way, we never got an

03:58:54 1 understanding. It is on hold. We were forced to shut
2 down operation in advance of that ruling.

3 ARBITRATOR EIZENSTAT: You issued a press
4 statement shortly after lesivo notifying your
5 customers and indicating that you felt the company was
6 imperiled. What would be the advantage to you doing
7 so? One would think one you would want to reassure
8 your customers that you could continue to operate?

9 THE WITNESS: Lesivo was declared just before
10 the weekend, and although it was published only in the
11 Official Gazette, a lot of companies have lawyers that
12 read that Official Gazette as part of their jobs;
13 right? And everybody, I mean, within the lawyers'
14 sector was made aware of the Declaration, so these
15 lawyers called the owners or managers of the company,
16 they warned them about it, and all of a sudden I was
17 spending my weekend receiving calls from a lot of
18 persons. Next week was even worse because we were
19 receiving calls from our Shareholders, and then it
20 started appearing in the newspapers, and then finally
21 the President acknowledged it.

22 So, we thought it was right to tell our

04:00:24 1 customers and our Shareholders what had happened.

2 They had the right to know about this and that we were
3 not going to shut down their operation immediately.

4 We had the intentions to keep operating. So, that was
5 the intention of that publication. It happened more
6 than a week later, after lesivo was declared.

7 ARBITRATOR EIZENSTAT: But the publication--
8 (Tribunal conferring.)

9 ARBITRATOR EIZENSTAT: I understand what
10 you're saying about the lawyers reading the gazette
11 and the calls you got, and Mr. Duggan mentioned the
12 letters and so forth, but the press release preceded
13 those calls, it seems to me, time-wise.

14 THE WITNESS: Some of these calls were before
15 our press release, and even after making the press
16 release where you started, I kept receiving calls and
17 communications, but they became more obvious after it
18 was made public in the press.

19 ARBITRATOR EIZENSTAT: One last question, and
20 that is this 50 million-dollar statement gets bandied
21 about a great deal, and I just want to make sure that
22 we try to nail this down. Did you or anyone you know

04:03:11 1 of in the company actually see the President of the
2 country make that statement, or was this a report in
3 the press or on television that he was alleged to have
4 made this? Did actually see him make the statement on
5 television, or was there a written account of his
6 statement? Tell us about this 50 million-dollar--we
7 used to have a show many years ago called, "The
8 64-dollar Question," so this is the 50 million-dollar
9 question.

10 THE WITNESS: The news was quoting the
11 President in their publications, but then I started
12 receiving calls. It was very obvious. I mean, many
13 of the news media was publishing the same statements.
14 They were saying that the President said this and
15 that, and that was because they were saying like they
16 had declared it, but that they were still willing to
17 consider starting the administrative suit upon a
18 50 million-dollar investment.

19 So, here it made obvious to me again why it
20 was so important the legal requirements and the
21 illegalities and the effects, if the Government was
22 willing to offset to fix it for \$50 million? As I

04:05:05 1 said earlier, they never--they never--believed that
2 there were such illegalities.

3 So, when I heard this from people who were
4 calling me and I saw it on the newspapers, we decided
5 doing some research, and we found that the President
6 actually said--it was presented as part of the
7 exhibits here, a radio news clip in which the
8 President clearly said that if they don't put up
9 \$50 million, they will continue with lesivo and enter
10 into a new public bidding and take the Contract away
11 from us and give it to someone else. It has been
12 presented as an exhibit here. It's a radio news clip.

13 ARBITRATOR EIZENSTAT: My last question is,
14 when you went over the Contract with a--the proposal
15 with Mr. Orta, it was made to you, your point on the
16 Point 4 is that this covered issues beyond the terms
17 of the Lesivo Declaration and included other
18 contracts. Is that the point you were trying to make?

19 THE WITNESS: Yes. That was my point, that
20 there were things included in the other two contracts
21 that were never mentioned before in any of the
22 meetings, and now they are using them here trying to

04:06:38 1 make them seem like it was part of the negotiation
2 when it really wasn't.

3 PRESIDENT RIGO: Mr. Stern.

4 MR. STERN: Thank you, briefly.

5 FURTHER REDIRECT EXAMINATION

6 BY MR. STERN:

7 Q. You were asked by Secretary Eizenstat about
8 the timing of the publication of the press release by
9 Ferrovías, and just so the record is clear, did you
10 receive--meaning Ferrovías receive--phone calls from
11 customers and suppliers of the company in the weekend
12 following the August 25 Declaration of Lesividad?

13 A. Yes.

14 Q. Could you describe those phone calls.

15 A. The ones I remember the most were from
16 suppliers. We had outstanding bills that they were
17 highly concerned that we were going to pay them or
18 not, and I was able to somewhat let them know that we
19 will be honoring all of our obligations, and precisely
20 MACQISA was one of them. That's the one I remember
21 because I remember where I was. At that time, I was
22 with my family in a playground park, and then someone

04:08:10 1 else I can remember, I think I it was--yes, it was the
2 General Manager of Maersk, the shipping line, Rob
3 Waterman. He's Australian, or he's somewhere--I
4 remember he's not from Guatemala, and we had become
5 good friends.

6 He was made aware--excuse me, I don't
7 remember exactly where he's from, but I think he's--

8 (Comments off microphone.)

9 A. He's either British or Australian, I don't
10 remember, but we had become good friends with him, and
11 he--they had a complete law firm working for them, I
12 guess. And he was told even in advance, and he said
13 as his lawyer told him in advance, I don't know how he
14 knew about it, and then when it was actually
15 published, he called him--I mean, this person, he
16 called me.

17 Those are the two calls I remember at least
18 from Rob Waterman from Maersk, and Mario Cifuentes
19 from MACQISA.

20 Q. Let me ask you a different question. I just
21 want the record to be clear on this. Either prior to
22 or after the Lesivo Resolution, did FEGUA or anyone

04:09:37 1 from the Government ever raise the issue of lack of
2 Presidential approval or lack of a public bid for
3 Contracts 143 and 158 as a point of negotiation
4 between the Parties?

5 A. No. What we had been discussing was what we
6 always discussed. The eviction of the squatters and
7 the payments to the Trust Fund, but not--not--not
8 really the Presidential approval.

9 Q. Or the public bidding?

10 A. Or the public bidding.

11 Q. Thank you.

12 PRESIDENT RIGO: Mr. Orta?

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

14 RE-CROSS-EXAMINATION

15 MR. ORTA: If we could put up R-49, please.

16 BY MR. ORTA:

17 Q. Now, you were asked questions both by
18 Secretary Eizenstat and by Mr. Stern about whether you
19 were ever notified that the Government took issue with
20 the fact that contract 143 lacked governmental
21 approval; right?

22 A. Yes.

04:10:58 1 Q. And you said the Government never said that
2 to you, either before or even after lesivo is what you
3 said; correct?

4 A. Yes.

5 Q. Okay. In this letter--this is a letter dated
6 April 21, 2004. This is just a few months after you
7 signed Contract 158 amending Contract 143; correct?

8 A. Correct.

9 Q. And here, the Overseer of FEGUA, Mr. Gramajo,
10 Dr. Gramajo says that he acknowledges receipt of your
11 letter from April 14, and at the bottom he says, "This
12 Department made the respective inquiries with FEGUA's
13 Legal Department, which have advised through the
14 Report in Official Letter Number 47-2004, copy
15 attached," it says, "that it is not possible to grant
16 your request."

17 Correct?

18 A. Correct.

19 Q. And you were asking there in your April 14th
20 letter in part, you were asking about access to some
21 of the FEGUA rail equipment; correct? It says in the
22 top paragraph, "spare parts, warehouses, and other

04:12:11 1 things that related to that contract; correct?

2 A. That's correct.

3 Q. Okay. Let's look at the copy before you take
4 that off the screen. So Dr. Gramajo says to you,
5 sorry, we cannot grant your request because of what is
6 set forth in the attached Legal Opinion. Now, let's
7 look at the Legal Opinion. That's R-8.

8 And go to the part--first of all, this is the
9 same Legal Opinion, 47-2004, the one that was
10 referenced in Dr. Gramajo's letter, and go to the part
11 where they talk about executive approval, please. So
12 that this is in full context.

13 Okay. Highlight that top paragraph, the last
14 full paragraph there on Page 1. It says: "FEGUA is a
15 decentralized autonomous public entity which provides
16 that as in this case in order to undertake obligations
17 secured by the State, the Overseer must request prior
18 authorization to the Executive. Therefore, the
19 Overseer shall not dispose of assets owned by FEGUA
20 without prior authorization of or favorable opinion
21 from the Executive."

22 That's what it says there; correct?

04:13:48 1 A. That is what it says there, yes.

2 Q. And so, through this Opinion, you were being
3 told that the Overseer of FEGUA could not grant your
4 request under Contract 143 because that contract had
5 not been approved by the Executive?

6 MR. STERN: I object. That mischaracterizes
7 the Opinion. The request was for access to the spare
8 parts warehouse, and that's what the Opinion is
9 addressing. It's not about the Contract in and of
10 itself.

11 MR. ORTA: That's absolutely not true. He's
12 mischaracterizing. There was a request made under
13 Contract 143 for access to equipment. The witness
14 just said it. The Overseer denied the request--

15 MR. STERN: Objection. He did not say access
16 to equipment at all. It's spare parts, warehouse, as
17 the letter states.

18 MR. ORTA: Access to spare parts warehouse
19 under Contract 143. The Overseer denied the request
20 based on this opinion. The opinion communicates
21 directly to FVG, to Ferrovías, that it was being
22 denied because the contract was not approved by the

04:14:58 1 Executive. This goes directly to what Secretary
2 Eizenstat asked about directly.

3 MR. STERN: And the provision that he's
4 citing in the Opinion does not state that, so I object
5 to that as well.

6 MR. ORTA: Yes, it does state it.

7 (Tribunal conferring.)

8 PRESIDENT RIGO: I think we denied your
9 objection, and you can continue with the question. I
10 mean, it has been a matter that has been covered that
11 was never notified Ferrovías of what the individual
12 problems were, and that is the Legal Opinion to
13 Mr. Gramajo's letter, so please go ahead.

14 BY MR. ORTA:

15 Q. Sir, you can answer my question.

16 A. I apologize. Can you give me your question
17 again. It was whether I had been made aware or
18 notified?

19 Q. Well, through this document, you're being
20 notified--go ahead and put the highlighted text up
21 that was up there before. You're being notified by
22 the Overseer in April 2004 that Contract 143 lacked

04:16:26 1 Executive approval, and as a result he is denying your
2 request for access to spare warehouse parts under
3 Contract 143; isn't that correct?

4 A. That is what it says here, but--I mean, let
5 me explain. I cannot--

6 Q. Well, I just asked you if that's what you
7 were being notified, and I think you've answered it
8 already.

9 Let's go to R-9, please.

10 As a result of the fact that FEGUA was not
11 honoring Contract 143 and 158, you held a series of
12 meetings along with Mr. Posner and Mr. Duggan with
13 Vice-Minister Diaz, from the Ministry of
14 Communications; correct?

15 A. Correct.

16 Q. And if we go to that paragraph--and those
17 meetings dealt with a number of issues, including the
18 claim that Ferrovías had that it wasn't being paid
19 monies from the Trust Fund; correct?

20 A. Yes.

21 Q. And let's go to number two. Did we identify
22 the date? I'm sorry. The date of this letter is

04:17:43 1 November 2004, and it's a letter, sir, from you to
2 Vice-Minister Diaz; correct? Ministry of
3 Communications?

4 A. Yes, that's correct.

5 Q. And in addition to the Trust Fund issue, if
6 we go to number two--let's highlight that--you titled
7 that heading, "official and formal acknowledgement of
8 Contract for Usufruct of equipment Number 143 and
9 158." Correct?

10 A. Correct.

11 Q. And you say, "As we explained in our meeting,
12 the Government's failure to acknowledge these
13 contracts creates a lack of legal certainty for
14 potential investor investors." Correct?

15 A. Correct.

16 Q. And you state later that you have
17 started--you say. "We have started communications with
18 FEGUA's Legal Department on this matter so as to be
19 able to arrive at a joint proposal that satisfies both
20 the Government's concerns through FEGUA and those of
21 our company." Right?

22 A. That's right.

04:18:40 1 Q. And you later say that if the results of the
2 initiative, of this initiative are successful,
3 together with FEGUA, we would be presenting an
4 amendment to the Contract, and you're talking about
5 Contract 143 and 158; right?

6 A. Yes.

7 Q. Or a new contract; correct?

8 A. I'm sorry, yes--

9 Q. That's what it says there.

10 A. Yes.

11 Q. So, you were telling Vice-Minister Diaz you
12 were trying to negotiate either an amendment to
13 Contract 143 and 158 or a new contract to address, in
14 part, FEGUA's concerns about that contract; right?

15 A. I need to explain this.

16 Q. Just answer my question. Is that what you
17 were telling Vice-Minister Diaz?

18 A. No, because I need to explain it.

19 Q. That's not what you were telling him? That's
20 what the letter says, isn't it, sir?

21 A. Yes, but it's a different context. You are
22 just reading a paragraph of the letter, and the letter

04:19:39 1 cites other matters--

2 SECRETARY SEQUEIRA: Can you slow down for
3 the transcript?

4 THE WITNESS: I apologize. I apologize.
5 Thank you. If you notice, those are obligations that
6 FEGUA had not complied with in the three contracts. I
7 would have wrote a different letter if I thought this
8 was an illegality. I was not talking about
9 illegalities here. I want them to acknowledge their
10 obligations, in the same way I am referring to
11 Contract 402 and 820. They had to evict the
12 squatters, they had to make the payments to the trust,
13 and they had to give me my parts.

14 Now, what's the difference? The difference
15 is this Contract had just been signed few months ago.
16 The other one--the other two contracts are originals.
17 From the original concession, they had more than five
18 years by this time. So, later, after we didn't get
19 these issues resolved, we filed for arbitration.
20 These were genuine disputes. I'm referring to
21 Contract 402 and 820.

22 Now, this 143 and 158 is a new contract that

04:20:57 1 our lawyers and their lawyers had redrafted and signed
2 last year. Last year. Now, I mean what I was telling
3 him is that I need them to acknowledge in the same
4 sense I am referring to 402 and 820, their obligations
5 under such Contract, and again I'm willing, and I open
6 to listen to them if they want to amend something, but
7 I'm not saying that this doesn't have acknowledgement
8 because it's illegal or because it's lacking approval.
9 I'm not saying that here.

10 BY MR. ORTA:

11 Q. But you are saying that part of the reason
12 you were looking to enter into a new contract--

13 PRESIDENT RIGO: This is your last question.

14 BY MR. ORTA:

15 Q. You are saying that part of the reason that
16 you wanted to enter into the new contract was to
17 satisfy the Government's concerns about the Contract;
18 right? That's what you say here.

19 A. I'm saying that because one more time they
20 came to me with silly, stupid responses about not
21 giving me the parts. I already said before that we
22 were a 24 by seven operation, and I needed the parts

04:22:05 1 immediately. I was not going to be waiting for months
2 for these guys to decide to give me the parts. I am
3 referring to the parts here. The previous Contract
4 said all of the equipment and accessories. So, the
5 Overseer said, well, accessories doesn't mean parts.
6 Okay, let's put it clear. We redrafted the Contract,
7 and it says parts.

8 What was the problem? The Overseer that
9 signed the previous Contract left, and Dr. Gramajo,
10 which is a specialist in something else other than
11 trains, comes over and says, you know, yes, it says
12 parts, but now we have a new lawyer on board, Carrillo
13 is the one. And she's giving me a legal opinion. How
14 can it be, how can you run a business, how can you
15 enter into long-term deals with a country that every
16 time an Overseer comes and takes over an entity, he
17 hires his friends, new lawyers, and they have
18 different opinions. It was just less than a year ago
19 that we had signed this Contract, and their lawyers
20 agreed to it.

21 Sorry, Mr. President.

22 So, what I want to leave clear here and set

04:23:11 1 it for the record because we have already discussed
2 this in the last hearing, I never thought it was an
3 illegal contract. I was willing to work with them and
4 resolve their concerns. But if you see in the context
5 of the letter the other two paragraphs mentioned that
6 they were not complying with their obligations. So,
7 that is exactly the case here.

8 Thank you.

9 PRESIDENT RIGO: Mr. Senn, thank you so much
10 for your testimony. You may take leave. Thank you.

11 THE WITNESS: Thank you very much,
12 Mr. President.

13 (Witness steps down.)

14 PRESIDENT RIGO: We'll have a break. We need
15 to, so let everybody can have a little bit of rest,
16 particularly the Court Reporters and the interpreters.
17 So we will reconvene at a quarter to 5:00. Thank you.

18 MR. ORTA: Just to let you know that we have
19 Mr. Richard Aitkenhead here and ready to testify.
20 Thank you.

21 PRESIDENT RIGO: Thank you.

22 (Brief recess.)

04:43:17 1 PRESIDENT RIGO: Good afternoon,
2 Mr. Aitkenhead.

3 RICHARD AITKENHEAD, RESPONDENT'S WITNESS, CALLED

4 PRESIDENT RIGO: Good afternoon.

5 THE WITNESS: I solemnly declare upon my
6 honor and conscience that I shall speak the truth, the
7 whole truth, and nothing but the truth.

8 PRESIDENT RIGO: Muchas gracias.

9 Mr. Orta.

10 DIRECT EXAMINATION

11 BY MR. ORTA:

12 Q. Good afternoon, Mr. Aitkenhead. How are you
13 today?

14 A. Very well, thank you.

15 Q. Mr. Aitkenhead, you have before you the
16 statement you have rendered in this case. First is
17 just can you confirm that this is your Declaration to
18 this Tribunal.

19 A. Yes, this is my statement.

20 Q. And do you ratify the contents of the
21 Declaration before this Tribunal?

22 A. Yes, I do. Everything that's written here is

04:47:47 1 correct. There is just one thing: When I wrote the
2 information regarding my public post, I made a typo.
3 I was Minister of Finance and of the Economy in
4 Guatemala from '91 to 1994, not 1990.

5 Q. Thank you for that correction.

6 Could you just briefly describe for the
7 Tribunal your public service record in Guatemala.

8 A. My public service career started in 1991. In
9 January, I was the Minister of the Economy in my
10 country. I was the Minister of the Economy for four
11 months--for four months. And in the new
12 administration, the Minister of the Economy--the
13 Minister of Finance stepped down and the President
14 asked me to be the Minister of Finance, and I was
15 Minister of Finance for three years and eight months.
16 I was charged with coordinating the Economic Cabinet
17 and everything that had to do with macroeconomic
18 policies, the negotiation of the internal and foreign
19 debt of the country, and the management of the public
20 debt finances.

21 In 1994, I retired and went back to the
22 private sector, conducted activities in the private

04:49:22 1 sector.

2 And, in 1996, the new President asked me to
3 be involved in the negotiation of the peace
4 agreements. Guatemala was negotiating the peace
5 agreements with the insurgent armed group after many,
6 many years of armed conflict, and I was a member of
7 the negotiating team for a year.

8 And then until December 1996 the Peace Accord
9 was signed in Guatemala, and I went back to the
10 private sector again.

11 And, in January '06, Oscar Berger, the
12 President-elect, asked me to coordinate the plan of
13 the Government, and I was--I was appointed President
14 Commissioner to work together with the Ministry, and I
15 was there until January 2008. After that I went back
16 to the private sector.

17 Q. In your capacity as Presidential Commissioner
18 under the administration of President Oscar Berger,
19 did you have access to the President on a weekly
20 basis?

21 A. Well, yes, definitely. The idea was for me
22 to assist the President in coordinating the social and

04:50:55 1 economic issues that were part of the economic plan.

2 I met with the President three or four times a week.

3 Sometimes we had lunch together, and I participated in

4 the general Cabinet meetings of the Government and in

5 the Economic Cabinet that was coordinated by the Vice

6 President, this under Guatemalan law. The Vice

7 President was Mr. Eduardo Stein.

8 Q. Did there come a time when the President

9 asked you to become involved in disputes in between

10 FEGUA and Ferrovías in relation to the railway project

11 in Guatemala?

12 A. Yes. In January 2006--in March 2006, the

13 President asked me to make up a Commission of

14 high-level officers to negotiate with Ferrovías the

15 different issues that had to do with the operation of

16 the railway in Guatemala. Because of the activities

17 that I was involved with, I suggested to the President

18 that Mario Marroquin be the one involved in the

19 negotiations. He was the Adjunct Commissioner. He

20 participated in those meetings actively.

21 But I was kept abreast of the moving forward

22 of the meetings in the period the meetings took place

04:52:25 1 between March and May '06. Later on, I was still
2 involved in them, and I was more actively involved in
3 this until the end of that year.

4 Q. And we're going to get to that in a second,
5 but what was your--to your understanding, what was the
6 purpose of the formation of the High-Level Commission
7 that you just described?

8 A. There were disputes that had expanded between
9 the FEGUA and Ferrovías.

10 In 2006, there had been an internal
11 arbitration process, and FEGUA had not made payments
12 to the Trust Fund, so conversations were around that
13 issue.

14 On the part of Ferrovías, there was a little
15 bit of a malaise because of people settling in the--in
16 areas of the railway, and this State was seen as
17 someone who had to do more activities in order to
18 prevent that, and the idea was for the railway in
19 Guatemala to work in full capacity, connecting the
20 cities with the Atlantic Coast and the Pacific
21 Coasts--coast, and the Government wanted to push forth
22 the rehabilitation plan, and there were legal defects

04:54:14 1 related to a contract signed in 2003 related to the
2 Rolling Assets and also the Rolling Stock that were
3 the property of FEGUA.

4 Q. And to your understanding, was the purpose of
5 the High-Level Commission to help resolve all of those
6 disputes that you just testified about?

7 A. Well, the precise instructions of the
8 President were as follows: I am interested in the
9 context of the competitiveness program and the
10 development of the country to have a working railway
11 system, to have a better logistics as a country, to
12 have imports and exports that are transported via the
13 railway with more competitive costs, and this was my
14 priority within these eight points that President
15 Berger had in his Government Plan. That was his main
16 purpose.

17 Then there were other purposes such as
18 finding a solution to different disputes that FEGUA
19 and the Ministry of Communications had, and the
20 company, Ferrovías. The President told us at all
21 times that this negotiation had to be in good faith
22 and that the result of this negotiation should be

04:55:44 1 positive for all involved and above all for us to get
2 an efficient railway system in Guatemala.

3 Q. Now, there came a time toward the end of that
4 year--when I say in August of that year, where the
5 President signed an Executive Resolution declaring the
6 Equipment Contract lesivo, and ultimately that
7 Executive Resolution was published in the Official
8 Gazette by the President's staff.

9 To your knowledge, why did the President take
10 that decision?

11 A. As I recall, from that time, well, the
12 Overseer of FEGUA talked to the Secretary-General of
13 the President and said that, in his understanding, the
14 Contract executed in '03 failed to comply with the
15 requirements set forth in Guatemalan law, and the
16 Contract deficiencies should be cured because in the
17 way in which it was operating it generated harm for
18 Guatemala.

19 So, legal studies were conducted, and the
20 President always tried to find a negotiated solution
21 to any dispute, including this one, but there was a
22 deadline by which he had to declare lesivo. If not,

04:57:41 1 he would be personally responsible for any problems
2 arising from the Contract.

3 Given the situation in August 2006, the
4 Executive Resolution declaring lesividad was
5 published--lesividad of the Contract was published.

6 Q. To your knowledge, Mr. Aitkenhead, was there
7 a point in time earlier in that year when the
8 President took the decision to suspend or stop the
9 process to declare that contract lesivo for a period
10 of time?

11 A. Yes. I recall this on the basis of
12 information given to me by Mario Marroquin, the
13 communication I had with Commissioner Fernandez, that
14 in May 2006, during the negotiation process, there was
15 a meeting where it was said that this Lesivo
16 Declaration was being circularized among of the
17 Ministers, and that seemed to be an act of bad faith
18 in the context of the negotiations that were taking
19 place.

20 There was a request, and Mr. Fernández talked
21 to President Berger, and he told him that it was
22 important for these negotiations to go on for the

04:59:18 1 approval of lesividad to be suspended. Mr. Berger was
2 ready to suspend them, saying, however, that the
3 negotiations were to go on, but there was a deadline.
4 And if there was no cure to the defects in the
5 contracts, he would be forced to signing the lesividad
6 because he didn't want personal responsibility in
7 connection with those problems in Guatemala.

8 Q. After the Executive Resolution was published,
9 the Executive Lesivo Resolution was published, could
10 you describe for the Tribunal what involvement, if
11 any, you had in attempting to reach a settlement of
12 the problems that had occurred between Ferrovías and
13 FEGUA.

14 A. Yes. After August '06, the President asked
15 us again to try and move forward and to negotiate and
16 to try to find an acceptable solution for all the
17 Parties involved, a solution that solved not only one
18 aspect but all of the aspects related to the railway
19 projects in the country.

20 Now, I held some conversations with the local
21 partners in Ferrovías in Guatemala, and we insisted to
22 them--

05:00:53 1 MR. STERN: None of these post-Lesivo
2 Declaration discussions are described or referenced in
3 his statement.

4 MR. ORTA: His statement--

5 PRESIDENT RIGO: Mr. Orta.

6 MR. ORTA: Sorry.

7 His statement refers to the fact that the
8 President asked him to be involved both before and
9 after the Lesivo Resolution in dealing with these
10 issues, and this goes directly to allegations they've
11 made about what happened post-lesivo.

12 (Tribunal conferring.)

13 PRESIDENT RIGO: The witness should answer
14 the question, and beyond that the time is over for the
15 direct.

16 Please go ahead.

17 THE WITNESS: As I had already mentioned, the
18 President asked us to continue. We had a couple of
19 meetings and the local partners hired an investment
20 bank in Central America called Mezo-America.
21 Mezo-America is the leading investment bank, and they
22 conducted a study on the railway system in the

05:02:08 1 country, and they presented that at a meeting and
2 expressed their doubts about the viability of the
3 system without strong investment.

4 Upon conclusion of that meeting, in which I
5 participated at the beginning but I did not stay
6 throughout the meeting, the President asked me for
7 follow-up by talk to the local partners and I was
8 asked whether I could meet with Mezo-America directly.

9 With Commissioner Fernández, I had several
10 meetings together with Mezo-America; and, around
11 November 16-17, 2006, they approached us at our
12 offices, made a presentation. We discussed it with
13 them, and we established the basis of an agreement to
14 present to the President on November 20. They held
15 consultations with--that is to say, Mezo-America with
16 the local partners, and they also had consultations
17 with international partners, and on Saturday--

18 MR. STERN: This is beyond his Witness
19 Statement. This is beyond evidence--

20 PRESIDENT RIGO: I agree. Let's move on,
21 please, and have the cross-examination.

22 MR. STERN: Thank you.

05:03:20 1

CROSS-EXAMINATION

2 MR. STERN: Thank you.

3 BY MR. STERN:

4 Q. Good afternoon, Mr. Aitkenhead. We have some
5 documents in a binder that is being handed to you I
6 will be asking you some questions about.

7 Now, as you answered in your direct testimony
8 in response to Mr. Orta's question, you testified that
9 on average you would meet with President Berger on
10 average about three or four times a week; is that
11 right?

12 A. That is correct.

13 Q. Is it fair to say that you were one of
14 President Berger's closest advisors during his term?

15 A. I cannot qualify how close I was, but I was
16 an important advisor to the President.

17 Q. Okay. Fair enough.

18 Now, according to your statement and your
19 testimony today, you insist that the Government always
20 negotiated in good faith with Ferrovias both before
21 and after the issuance of the Lesivo Declaration;
22 correct?

05:04:52 1 A. That is correct.

2 Q. And you also dispute--well, you don't
3 dispute, according to Paragraph 11 in your statement,
4 that the Government was only willing to stop the
5 lesividad process against the Equipment Contracts if
6 Ferrovías and the Government had reached an agreement
7 that would have provided not only a cure for the
8 alleged legal defects in the Equipment Contracts but
9 also a plan that would ensure the rehabilitation and
10 functioning of the railroad on the South Coast
11 corridor; correct?

12 A. What I can confirm is that the main objective
13 of the President of the Republic was for the railroad
14 system to work properly. And as part of that
15 solution, specific problems had to be solved,
16 including the use of equipment and fixed assets that
17 were the property of FEGUA's under Usufruct to
18 Ferrovías.

19 Q. Well, I just want the record to be clear.
20 Let's look at Paragraph 11 of your statement. Do you
21 have that in front of you?

22 A. Yes, I have it here.

05:06:13 1 Q. Okay. And I just want to be clear. The
2 statement you submitted to the Tribunal here was
3 written in English; correct?

4 A. Yes.

5 Q. Okay. You didn't submit a Spanish version;
6 right?

7 A. No, I didn't.

8 Q. And you wrote your own statement?

9 A. Yes, but I always had people who helped me on
10 drafting and style. I can communicate in English or
11 Spanish. I am doing it in Spanish because this is the
12 official language of the country we represent.

13 Q. Okay, thank you.

14 Now, again, I just want to be clear, in
15 Paragraph 11, I'm looking at the third sentence of
16 your--of that paragraph, and I will just read it here.
17 It says: "Had the Parties reached an agreement that
18 would have provided for the cure of the legal defects
19 of the equipment contracts and for a plan that would
20 ensure the rehabilitation and functioning of the
21 railroad--the Government's desired and ideal
22 outcome--the lesividad process could and would have

05:07:22 1 been stopped."

2 Did I read that correctly?

3 A. Yes.

4 Q. And that's a true statement; right? The
5 Parties had to reach an agreement with the Government
6 that not only cured the legal defects in the Equipment
7 Contracts, they also had to agree to a plan that would
8 ensure the rehabilitation and the functioning of the
9 railroad in order for the Government not to declare
10 the Equipment Contracts lesivo; correct?

11 A. That was the general intention of the
12 Government.

13 Q. And, in fact, the next sentence in your
14 statement says, because this did not happen, the
15 Parties did not reach agreement on those points, the
16 President declared lesivo of the Equipment Contract;
17 correct?

18 A. That is correct. The Government did so for
19 those reasons and to avoid personal liability.

20 Q. Okay. We will get back to the personal
21 liability question in a little bit.

22 Now, again, just to make clear what your

05:08:37 1 testimony is, it is true, is it not, that the
2 Government would not have been willing to stop the
3 lesividad process against the Equipment Contracts if
4 the Government and Ferrovías were only able to reach
5 an agreement that cured the alleged legal defects in
6 the Equipment Contracts; correct?

7 A. Correct.

8 Q. And it was your understanding that the
9 alleged legal defects in the Equipment Contracts were
10 two things: One, the lack of a public bid in the
11 awarding of that contract and the lack of Presidential
12 approval of that contract; is that right?

13 A. One of the main points considered by the
14 President was that that Contract had been published
15 without--has been on offer without the approval of the
16 Council of Ministers--that was the main issue--and,
17 second, the bidding process. There had been a
18 bidding--a bid in 1997 that was confirmed in 1999, but
19 in 2003 they were still working on the basis of the
20 one issued in 1997.

21 Q. Okay. So, those were the two defects: The
22 lack of Presidential approval and the lack of a new

05:10:06 1 public bid for those contracts; correct?

2 A. Based on my knowledge, that is correct, but
3 the person in charge of advising legally the President
4 is the Secretary General, not the person who is in
5 charge of advising him on financial issues.

6 Q. And it's true, is it not, that at no time did
7 the Government, to your knowledge, ever make a
8 stand-alone offer to Ferrovías either before or after
9 the Lesivo Declaration was issued to stop the
10 lesividad process by curing these two alleged defects
11 in the contracts; correct?

12 A. I don't have information on that; and, as I
13 mentioned before, I was not sitting at the high-level
14 negotiating table. That was Mr. Marroquin who was
15 there, and I do not have any knowledge that they were
16 able to discuss specific items rather than general
17 ones.

18 Q. Well, again, my question just was to your
19 knowledge, and I just want to confirm it. To your
20 knowledge, the Government--no one from the Government
21 ever made a stand-alone offer to Ferrovías to stop the
22 lesividad process against the Equipment Contracts by

05:11:34 1 curing the two alleged defects in the Contract, the
2 lack of a public bid and the lack of Presidential
3 approval; correct?

4 A. Based on my knowledge, I don't know whether
5 they did it or not.

6 Q. And certainly, as one of President Berger's
7 close advisor--important advisors, I think you
8 said--you never recommended that President Berger put
9 the Equipment Contract--put the Equipment Contract to
10 a public bid; right?

11 A. But back then I did not suggest what you're
12 saying.

13 Q. And you never recommended to President Berger
14 that he approve the Equipment Contracts. He and his
15 Cabinet Ministers approved those contracts; correct?

16 MR. ORTA: I'm going to object just because
17 this witness has already testified those were issues
18 that were under the competence of the
19 Secretary-General and not his competence, so he's
20 asking him questions about which he would not have
21 been advising the President to begin with.

22 MR. STERN: This is clearly within the scope

05:12:52 1 of his testimony. He has discussed about the reason
2 why his President has declared lesivo, and he knows
3 about these thing, he knows about the defects. This
4 is clearly within the scope of his testimony. And he
5 can answer the question whether he did or didn't
6 without any problem. It's a perfectly fair question.

7 (Tribunal conferring.)

8 PRESIDENT RIGO: The witness should answer
9 the question.

10 THE WITNESS: Would you please repeat the
11 question?

12 BY MR. STERN:

13 Q. Sure.

14 My question was: You never recommended or
15 urged President Berger to approve--he and his Cabinet
16 Ministers to approve the Equipment Contracts; correct?

17 A. What Equipment Contract?

18 Q. Ferrovías's Equipment Contract, the ones that
19 were declared lesivo, sir.

20 A. Are you referring to the Contract after the
21 Declaration of Lesivo?

22 Q. No. I'm talking about the Ferrovías

05:14:10 1 Equipment Contracts which President Berger declared
2 lesivo because, for among other reasons, the Contracts
3 lacked Presidential approval.

4 Do you understand which contracts I'm
5 referring to?

6 A. Yes, but those Contracts, when signed, should
7 have been approved by the Council of Ministers in
8 2003.

9 Q. That's fine, but my question was: Once you
10 learned about the lack of Presidential approval being
11 one of the defects of the Equipment Contracts as
12 grounds for the Lesivo Resolution, you did not advise
13 or urge President Berger to approve those contracts;
14 right?

15 A. No, I didn't.

16 Q. Now, isn't it a fact that the reason
17 President Berger issued the Declaration of Lesivo was
18 not because of defects in the legal contracts, but
19 Ferrovias did not have a sufficient amount of money to
20 rehabilitate the South Coast corridor?

21 A. No. That is your own speculation.

22 The President insisted that we needed to

05:15:38 1 improve the operation of the system, and we also
2 needed to solve the old problems and how we could move
3 forward with rehabilitation Phases II, III, IV, and V
4 as stated in the Contract, and Ferrovías never made a
5 proposal as how Phases II, III, IV, and V were going
6 to be conducted.

7 Q. Okay. So, weren't you aware that there
8 reports at the time after the Declaration of Lesivo
9 was published stating that President Berger said the
10 reason he declared lesivo was because Ferrovías had
11 not made a \$50 million investment in the South Coast
12 corridor?

13 A. The President never indicated that to me to
14 any of meetings I attended or any of the Cabinet
15 meetings.

16 Q. The question was were you aware of Reports in
17 the press, in the Guatemalan press, about such
18 statements by President Berger?

19 A. I don't remember, but it would be impossible
20 for me to remember what the President said at one
21 point in time, given all the statements throughout his
22 administration. But Commissioner Fernández, as far as

05:17:10 1 I know, never mentioned that information that you
2 mentioned to the President--about the President of the
3 Republic.

4 Q. Okay. Again, my question just was not what
5 you may have heard from President Berger directly or
6 from Commissioner Fernández, but were you aware of
7 public Press Reports about President Berger stating
8 that the reason he declared lesivo was because
9 Ferrovías had not invested \$50 million to rebuild the
10 South Coast?

11 MR. ORTA: I object just because that
12 question has already been answered.

13 MR. STERN: I don't think he has answered it.

14 MR. ORTA: The answer is right in the record,
15 and he has answered it. I would be happy to read it
16 after--the answer: "I don't remember, but it would be
17 impossible for me to remember what the President said
18 at one point in time given all the statements
19 throughout his administration. But Commissioner
20 Fernández, as far as I know, never mentioned that
21 information that you mentioned to the President--about
22 the President of the Republic."

05:18:18 1 I am not entirely sure if that's 100 percent
2 accurate as to what he said because I was listening in
3 Spanish, but, nonetheless, it's been answered. But if
4 he wants to ask it again, he can, because I don't
5 think that that transcription of what was said is
6 accurate.

7 PRESIDENT RIGO: Why don't you please--if you
8 know the question; if not, it should be repeated.

9 MR. STERN: I will try a fourth time.

10 BY MR. STERN

11 Q. Again, my question is not referring to any
12 statements you may or may or may not have heard from
13 the President himself from Commissioner Fernández or
14 anyone else in the Government. My question was: Were
15 you aware of Public Reports--newspaper, TV, radio, et
16 cetera--which reported that the President had stated
17 that the reason he declared lesivo was because
18 Ferrovías had not invested \$50 million to rebuild the
19 South Coast?

20 A. I don't have any recollection of that piece
21 of news that you're mentioning.

22 Q. Okay. If those reports existed, would that

05:19:19 1 surprise you?

2 A. If they were reports, internal reports by the
3 Government, documents by Government officials, I would
4 be extremely surprised.

5 If this is a report by a journalist in the
6 press, the Guatemalan press says a lot, I wouldn't be
7 surprised. But if there was a public document, I
8 would be extremely surprised because I never knew of
9 it.

10 Q. Okay. Well, let's look at Exhibit C-131,
11 which is Tab 4 in your binder.

12 Do you have that?

13 A. Yes, I have it here.

14 Q. And this is an article from Diario de Centro
15 America dated September 5, 2006.

16 I just asked you a question. I wanted you to
17 confirm this is a September 5, 2006, article from
18 Diario de Centro America.

19 A. I cannot confirm it. I read it, but how can
20 I confirm that?

21 Q. Well, I don't know if you're looking at the
22 English translation or not, but if you're looking

05:21:08 1 behind, there is a blue page and then the original in
2 Spanish.

3 Go to the next page.

4 Do you see that?

5 A. Yes, I can see it.

6 Q. Diario de Centro America, that's the Official
7 Gazette of Guatemala; is that correct?

8 A. It is the newspaper that belongs to the
9 State, yes, to the Government.

10 Q. So, it's a Government-published newspaper;
11 correct?

12 A. It is a newspaper published by the
13 journalists that are employed at the Diario de Centro
14 America, and that belongs to the Government. Those
15 are two different things.

16 Q. The Government-owned newspaper?

17 A. Correct.

18 Q. And you consider this to be a reliable source
19 of information, don't you?

20 A. It is in general terms, but I cannot know
21 whether this topic in particular is correct, but it is
22 a journalistic source.

05:22:54 1 Q. So, you don't consider it to be a reliable
2 newspaper? That was my question.

3 A. I don't think you're understanding me.

4 I said that even though it is a reliable
5 newspaper, I cannot guarantee that all the information
6 published is correct. I can only guarantee that I do
7 consider it a reliable source of information.

8 Q. And, indeed, the Government published the
9 Declaration of Lesividad against Ferrovías's Contracts
10 in this newspaper; correct?

11 A. That is the second role of the newspaper.
12 There are two roles about the newspaper. One is to
13 inform about news in Guatemala, and the second one is
14 to be the vehicle to publish any Agreement or Decree
15 by the Government of the Republic.

16 But these are two parts to the same means of
17 information. The official part is the Declaration of
18 the Governmental Agreements, and the journalistic
19 portion have to do with the news.

20 Q. Okay. Now, looking at the article that is
21 cited here in the Exhibit C-131--and do you have that?
22 I'm looking at the third paragraph.

05:24:26 1 And it states here: "Berger explained that
2 the Declaration of Lesividad arises from the fact that
3 the \$50 million investment under said Contract did not
4 occur. However, he added, Ferrovías has a 90-day term
5 to enter into dialogue with the corresponding
6 authorities."

7 Does that refresh your recollection if you
8 saw any news reports at the time shortly after the
9 Declaration of the Lesividad was issued that President
10 Berger declared lesivo because of the \$50 million
11 investment was not made?

12 A. It doesn't help me remember, but it does help
13 me see a publication by the press that makes that
14 announcement. That's all I can say. I do not
15 remember reading that article.

16 Q. Okay. Let's look at Exhibit C-133, which is
17 at Tab 5 of your binder.

18 A. Okay.

19 Q. And the English translation is at the
20 beginning of the tab; and, like the other tabs, the
21 original is behind, if you want to look at that.

22 So, Exhibit C-133 purports to be a

05:25:59 1 September 8, 2006, article from La Hora newspaper; is
2 that right?

3 A. Yes. It seems to be the--it seems to be from
4 La Hora.

5 MR. ORTA: I'm just going to ask that the
6 witness look at Spanish version because it appears
7 that the English translation is not accurate.

8 BY MR. STERN:

9 Q. Yes. Feel free to look at the Spanish
10 version.

11 And, again, I would point out in this
12 article, it again states the President--it says the
13 first sentence, "The President, Oscar Berger,
14 considers that Ferrovías does not have the \$50 million
15 funds required to carry out railway operations in the
16 country. 'I believe they do not have financial
17 capacity to do what needs to be done,' said the
18 President. His statement was given after a meeting
19 with representative of Ferrovías to discuss the issue.
20 The President expressed his concern regarding the
21 corporation's lacking financial resources. 'We do not
22 intend to cause any harm. If they come to us saying

05:27:18 1 they will invest \$50 million, and then I see works
2 being carried out on the broad-gauge railroad, they
3 will have our support.'" "

4 So, again, you were not aware at the time of
5 these types of news articles--this news article and
6 others--reporting on President Berger stating that the
7 reason he declared lesivo was because the \$50 million
8 investment had not been made on the South Coast?

9 MR. ORTA: That is a complete
10 mischaracterization of this article, so I object to
11 that characterization of the article. It speaks for
12 itself, and it doesn't say what Mr. Stern just said.

13 BY MR. STERN:

14 Q. Let me just ask the question: You were not
15 aware of this article at the time, September 8, 2006;
16 correct?

17 A. I don't remember it.

18 I think that what I see here is very
19 consistent with what the President said; that is, that
20 the railroad system had to work fully and that
21 progress had been made along the line going to the
22 Atlantic, and they wanted to make progress along

05:28:29 1 the--on the Pacific line.

2 And based on what I see here in the article,
3 it is important to mention that Ferrovias had stated
4 that it was not--that the railway system they were
5 using was not profitable, and also the study by
6 Mezo-America concluded that \$300 million had to be
7 invested as opposed to 50 million, and that was the
8 conclusion of the study in November. And I hope--we
9 wished that \$50 million would have been enough.

10 Q. Okay. If the President demanded that
11 Ferrovias had to invest \$50 million in order to--in
12 the South Coast in order for the Government to
13 withdraw the Declaration of the Lesividad--in order to
14 withdraw the Declaration of Lesividad, would you
15 consider that to be the negotiating in good faith by
16 the Government?

17 MR. ORTA: That assumes facts not in
18 evidence. There is no evidence that the President
19 ever made that Declaration to Ferrovias or anyone
20 else.

21 MR. STERN: I'm asking him a hypothetical,
22 based on multiple news reports that are in the record.

05:29:41 1 MR. ORTA: He's not an expert witness.

2 MR. STERN: He's expressed a strong opinion
3 that the Government negotiated in good faith with
4 Ferrovías.

5 MR. ORTA: That's not an appropriate
6 question. This is not an expert witness.

7 MR. STERN: I guess we need an expert on good
8 faith.

9 (Tribunal conferring.)

10 PRESIDENT RIGO: The witness should answer
11 the question.

12 THE WITNESS: I would be pleased to do so.

13 The only thing I can say is that the
14 President, through the four years that I worked there,
15 always had good faith in this and other negotiations.
16 He always expressed that. And it seems unusual to me
17 that a comment in the press is given more importance
18 than a discussion it might have had. I don't know if
19 this statement was ever made by some member of
20 Ferrovías or if it was made elsewhere, because in the
21 Economic Cabinet, the General Cabinet meetings, I
22 never learned of this request of having to invest

05:30:48 1 \$50 million.

2 BY MR. STERN:

3 Q. Okay. That wasn't my question.

4 My question was: If the President said or
5 demanded that in order for the Government to withdraw
6 the Declaration of Lesividad against the Equipment
7 Contracts, Ferrovias would have to put up \$50 million
8 to rebuild the South Coast railway, would you consider
9 that to be negotiating in good faith by the
10 Government?

11 A. With my apologies to the Tribunal, I have no
12 reason to interpret hypothetically what a press
13 statement by the President says.

14 I can make reference to the orders that I
15 received from him and the discussions that we had, and
16 he always displayed good faith with me. I cannot
17 hypothetically say whether this means something other
18 than good faith.

19 I apologize, but you'll have to ask someone
20 who has heard it first-hand.

21 Q. So, you can't answer my question, sir; is
22 that what you're saying?

05:32:05 1 A. I cannot get into trying to interpret what
2 you want me to interpret. You can interpret what you
3 will. I cannot answer--I cannot answer your question
4 in the terms in which you would like.

5 Q. Okay. Let's look at Exhibit C-132, please.
6 And this is a video. It's not going to be--it's an
7 audio recording. It's from a radio broadcast.

8 So, you're going to see it on the screen and
9 hear it.

10 PRESIDENT RIGO: For the record, before you
11 play it, could you say the date.

12 MR. STERN: Yeah, it should have the date. I
13 will show it.

14 PRESIDENT RIGO: Okay.

15 MR. STERN: The date of the broadcast is
16 September 8, 2006.

17 (Video recording played.)

18 MR. ORTA: I have several objections.

19 One, I couldn't hear a word of that. It's
20 difficult for me to formulate further objections based
21 on what just was done.

22 Number two, there has been no authentication

05:35:11 1 of this audio that has just been played, who was on
2 the tape, who--who's reporting this, how it was made.

3 I just have a complete objection to any line
4 of questioning in relation to this audio.

5 MR. STERN: Could I ask the witness to see if
6 he understands?

7 PRESIDENT RIGO: I couldn't understand it,
8 and I'm a native Spanish speaker, but maybe it would
9 be helpful to know the origin of it--I mean, the
10 source, and perhaps to have a transcript. I don't
11 know whether--what exhibit is the transcript.

12 MR. STERN: There is a transcript in
13 Exhibit 132, which is on the screen here.

14 PRESIDENT RIGO: Okay.

15 MR. STERN: And it's a broadcast from El
16 Independiente, September 8, 2006.

17 PRESIDENT RIGO: And according to you,
18 Mr. Stern, this is the President speaking?

19 MR. STERN: Yes. That's what the broadcast
20 purports to have.

21 MR. ORTA: Can I just point out that the
22 transcript, which we have no ability at this moment to

05:36:25 1 verify whether it's an accurate representation of what
2 the audio says, states in the first three lines, four
3 lines, five lines, that there's a number of
4 unintelligible things that apparently that were said
5 that were not recorded, so I just object to this
6 entire line of questioning based on this audio and
7 this transcript of the audio.

8 MR. STERN: Well, I would point out that they
9 have had this broadcast and transcript for quite some
10 time and have never had any objection on it.

11 MR. ORTA: Right, but you're using it for the
12 first time as evidence in this proceeding.

13 PRESIDENT RIGO: It's been in evidence so you
14 have it.

15 MR. ORTA: I meant in this proceeding, I mean
16 during the hearing.

17 PRESIDENT RIGO: Well, many things have been
18 used in this hearing that--I mean, you had them long
19 before. Amongst other things, what you agreed last
20 week, certain exhibits at the last minute, that we
21 added to the proceeding. The rest has been with
22 either Party for a very long time, and does not raise

05:37:41 1 any objections.

2 I can understand that there are some
3 objections because of whether it's comprehensible;
4 that, of course--but I don't think at this point
5 points an objection to the whole thing.

6 MR. ORTA: Right. I just meant he's asking
7 questions--I'm not saying it was submitted late, if
8 that's what you're asking me. My objection is not
9 based on that. My objection is based on the fact that
10 it's unintelligible, and even if we accepted the
11 transcript of the audio is a correct transcript, by
12 its very--it's now been blocked by the person--if you
13 could move that--by its very nature it says there were
14 at least 17 seconds of unintelligible recording and
15 another 19 seconds and then another 42 seconds and
16 then another 44 seconds. Nor do we have any way to
17 confirm that that was the President actually speaking.

18 PRESIDENT RIGO: I think we would like to
19 move on. I mean, we take it for what it is, and we
20 understand it is understandable and the objections
21 have been raised, but it has been a part of the record
22 for quite a while. But given the limitations it has

05:39:04 1 in itself, I think--and you have explored this, seeing
2 also these Press Reports, et cetera.

3 In the interest of time, also, I think it
4 would be useful to move on.

5 MR. STERN: May I ask him--one question I
6 want to ask him?

7 PRESIDENT RIGO: Yes.

8 BY MR. STERN:

9 Q. Mr. Aitkenhead, do you recognize--during the
10 broadcast here, could you record whether that was the
11 voice of the President, President Berger speaking or
12 not?

13 A. The use of the "R" might be him or somebody
14 speaking with the same tone of voice that he uses.

15 Q. Let me ask you a few questions about the
16 High-Level Railroad Commission that you were appointed
17 to oversee, along with Commissioner Fernández.

18 Do you recall your testimony about that?

19 A. Yes, it's here in the Statement. We were
20 asked to participate, not necessarily to chair.

21 Q. And follow up on your answer, neither you nor
22 Commissioner Fernández ever actually attended any of

05:40:47 1 the High-Level Commission meetings; correct?

2 A. Incorrect. Commissioner Fernández did
3 participate, and he participated in at least a couple
4 of sessions. The First Session I'm sure he
5 participated in it, and he gave the
6 opening--pronounced the opening words.

7 And at that time, and the others, he always
8 stated the importance of coming up not only with the
9 solution to a particular problem, but a solution to
10 all of the problems, even if step by step, the idea
11 was to tackle the entire agenda of issues with
12 Ferrovías and with the rail system in Guatemala.

13 Q. But you didn't attend any of these meetings;
14 correct?

15 A. I did not attend, that is correct. But have
16 you to understand, just to see, it's impossible, there
17 being all of these issues, for one to be present at
18 all meetings. A Deputy Presidential advisor is
19 basically the number two in the area that I was
20 working in, and he was there.

21 So, since he was there, he had broad
22 authority to negotiate. The only two limitations he

05:42:11 1 had is that he could not enter into any Agreement in
2 those meetings that would imply fiscal resources
3 without having previously had approval from the
4 Economic Cabinet, or that would involve legal
5 provisions without having had authorization by the
6 Secretary-General of the Republic.

7 But he had my full Delegation of Authority to
8 participate actively in those meetings.

9 Q. So, didn't you attend any of the High-Level
10 Commission meetings. The only knowledge you have
11 about what was discussed, raised, proposed at these
12 meetings is based on what others have told you or told
13 you about them; correct?

14 A. Prior to the Decision on Lesividad, yes, I
15 did participate, as I mentioned to the Tribunal a
16 moments ago, after the signing of Lesividad, when the
17 study was carried out in the Mezo-America case.

18 Q. Excuse me, are you now saying that you did
19 attend some of the High-Level Commission meetings
20 prior to the Declaration of Lesividad?

21 A. No, perhaps the translation was mistaken.
22 What I said, and I'm going to say it slowly,

05:43:28 1 was that I did not participate in the direct meetings
2 of the High-Level Commission before the Declaration of
3 Lesividad. After the Declaration, the President asked
4 me to continue to be involved in the issue, and I did
5 meet with the local partners and representatives of
6 Mezo-America after the Declaration of Lesividad, not
7 before.

8 Q. Sir, you never had any--during this entire
9 time, either before or after the Declaration of
10 Lesividad, you never met with anyone from Ferrovías,
11 did you?

12 A. No, not in the context of the meetings of the
13 High-Level Commission.

14 Clearly, in some of the visits that have been
15 made to the Presidential house, I may have been
16 present. At some meeting, someplace, I may have been
17 present. But at those meetings of the High-Level
18 Commission, I never participated in any of those
19 meetings, as is reflected in the Aide Memoires of
20 those meetings.

21 Q. Now, at the time President Berger appointed
22 you and Mr. Fernández to oversee the High-Level

05:44:51 1 Commission in March of 2006, it's true, is it not,
2 that President Berger was already in receipt of FEGUA
3 Overseer Gramajo's request to declare the Equipment
4 Contracts lesividad; correct?

5 A. It is correct that in January 2006 he
6 received a request from Mr. Gramajo.

7 Q. Okay. And so at the time the President
8 formed the High-Level Commission, he was aware that
9 there was a request from the FEGUA Overseer to declare
10 the Equipment Contracts lesividad; correct?

11 A. The President, in response to that request,
12 what he asked his Secretary-General, and he commented
13 this to me, was to undertake the legal studies to see
14 whether the request by Mr. Gramajo in that regard was
15 correct or was not correct. And as of January, it's
16 my understanding those studies were made.

17 Q. I'm running out of the time. I just want you
18 to answer my question. And my question was: At the
19 time President Berger formed the High-Level Commission
20 in March of 2006, he was in receipt of the FEGUA
21 Overseer's request to declare the Equipment Contracts
22 lesivo; correct?

05:46:28 1 A. Mr. President of the Tribunal, I just have
2 one observation. I am trying to answer specifically.
3 It seems to me that he should let me finish my
4 sentences, but he is asking something concrete, I'm
5 going to answer concretely.

6 It is correct, as appears in the record, that
7 Mr. Gramajo had asked the President to declare the
8 Contract lesivo in the month of January; that is
9 correct, and it so appears in the document.

10 Q. Thank you.

11 And it's also true that at the time you were
12 asked to oversee the High-Level Commission in March of
13 2006, the President didn't inform you or Commissioner
14 Fernández about this request from Dr. Gramajo, did he?

15 A. Once again, there are two distinct issues.
16 One is the request to the President. Another is the
17 moment when a decision was made as to how to proceed
18 with lesividad.

19 What Commissioner Fernández and, in my case
20 myself and in the instructions from Marroquin, the
21 President did not inform us that there was a decision
22 to declare the Contract lesivo when we began the

05:48:02 1 conversations. That is what happened. He did not
2 tell us because there was no decision to it declare
3 the Contract lesivo. What there was was a request
4 from the FEGUA Overseer. They are two different
5 things.

6 Q. And isn't it a fact you didn't learn about
7 the President's decision to declare the equipment
8 contracts lesivo until May of 2006?

9 A. That is correct.

10 Q. Don't you think it would have been important
11 for the people participating on the High-Level
12 Railroad Commission to know whether or not there was
13 an outstanding request to declare one of the
14 Ferrovías's contracts lesivo as part of their
15 discussions?

16 A. I'm sorry, but you're trying to tie two
17 things together. They were sitting down at the table
18 in good faith negotiating, and at that negotiating
19 table they found out that there was a process to seek
20 an agreement with the Ministers to declare the
21 Contract lesivo. They informed Commissioner Fernández
22 of this. He consulted with the President, and the

05:49:30 1 President confirmed for him that the process was going
2 on, but that if negotiations were continuing forward,
3 he was willing to suspend the process for the
4 negotiations to go forward, and that's what happened.
5 It was suspended until August in order for the
6 negotiations to continue. That's what happened, and
7 that's what my statement says.

8 Q. But isn't it a fact that after the High-Level
9 Commission meetings were suspended in May--on May 11,
10 2006, the next negotiation session between the
11 Parties, the Government and Ferrovías, was August 24,
12 2006, the day before the Declaration of Lesividad had
13 to be published?

14 A. That does not mean that from May there were
15 no further efforts in conversation, but meetings for
16 one reason or another no longer took place, meetings
17 where all--everyone sat down together to discuss the
18 issues. This wasn't a decision just of the
19 Government. It was part of the conditions and the
20 things being said by each of the Parties, but the
21 intent continued, and there were personal contacts
22 with some persons--or contacts with Parties. The

05:50:55 1 Commission as such did not report having had any new
2 official meeting.

3 Q. Well, isn't true you can't tell us if any
4 discussions, whether they were face to face or by
5 written communication or by telephone, that occurred
6 between the Government and representatives of
7 Ferrovías between May 11, 2006, and August 24, 2006?

8 A. As an official meeting of the High-Level
9 Commission, no. But from the reports we received,
10 there were conversations, there were contacts between
11 the Parties.

12 But as I tell you, since it wasn't me, or
13 since I wasn't there, I can't tell you exactly what,
14 whom, or how.

15 Q. Okay. Let's go to Exhibit C-44 in your
16 binder, which is at Tab 3.

17 Do you know what Exhibit C-44 is?

18 Well, let me ask you this question, and maybe
19 we can move forward. Do you recognize Exhibit C-44 as
20 the settlement offer or proposal that the Government
21 presented to Ferrovías on August 24, 2006?

22 A. I'd have to look at it in more detail. If

05:53:02 1 you give me some time, I could look over it and then
2 give you an answer, but I can't read the entire
3 document in just two minutes. I don't know what you
4 prefer or how the Tribunal would like to proceed.

5 Q. Let me ask you this question: Were you
6 at--you weren't at the August 24, 2006, meeting
7 between representatives of the Government and
8 Ferrovías; correct?

9 A. No, I did not say in my statement that I was
10 present because I'm not certain that I was there.

11 Q. So, you may have been there?

12 A. I tried to remember, see if I had any notes
13 from being there. I didn't have anything, so I cannot
14 say what I don't recall. I can't guarantee that I
15 wasn't there, but I don't have any recollection of
16 having been at that meeting.

17 Q. Well, do you recall being at a meeting where
18 the Government presented Ferrovías with a proposal the
19 day before the Declaration of Lesividad?

20 A. Once again, I recall the existence of that
21 meeting. I was aware that the meeting occurred. I
22 don't know if I was physically present because at that

05:54:35 1 time we were having another economic problem that was
2 major and that I had to deal with directly; therefore,
3 I cannot say that I was there on that date. Had we
4 not been involved in the issue that we were looking at
5 and which involved a financial situation of banking
6 institutions in the country, then I could recall
7 whether I was there.

8 But, as I say, I don't mention it because I
9 know that that meeting happened, but I can't verify
10 that I was there. It's most likely that I wasn't
11 there because I don't remember it. But, as I say, I
12 can't assure you of this 100 percent.

13 Q. Okay. But you do know that the Government
14 presented Ferrovías with a written proposal on
15 August 24, 2006, the day before the Declaration of
16 Lesividad had to be published; correct?

17 A. I know that there was the utmost desire to
18 reach an agreement and that work was underway on a
19 proposal, but I cannot ensure you, as I say, that it
20 was this. But if other persons from the Government
21 say that it was, then it was this.

22 Q. Do you recall hearing any reports about that

05:56:03 1 meeting and what happened at that meeting?

2 A. As my statement says clearly, at
3 paragraph--it says--my statement says that up until
4 one day before the Declaration, the Government was
5 trying to reach agreement, and the Government had once
6 again tried to reach agreement before the lesividad
7 was declared. So, I do know that some offer was being
8 presented in order to try reach an agreement.

9 Q. Okay. Now, in your Witness Statement--and
10 I'm referring to Paragraph 6 in particular--you insist
11 that the Government's goal in its negotiations with
12 Ferrovías was always to guarantee that Guatemala would
13 have a working railroad; correct?

14 A. That was the key objective of the whole
15 process, that it be operative and that it extend to
16 the Atlantic and to the Pacific.

17 Q. Okay. And Declaration of Lesivo that the
18 President--that President Berger issued was against
19 Ferrovías's Railroad Equipment Contract; correct?

20 A. In August of 2006, that is correct.

21 Q. And you would agree that the Government as a
22 result of the Declaration of Lesividad, took the

05:57:57 1 equipment away from Ferrovías, FVG could not operate
2 the railroad; correct?

3 MR. ORTA: Objection. That calls for a legal
4 conclusion. The legal documents set forth the answer
5 to that.

6 PRESIDENT RIGO: Would you rephrase the
7 question.

8 BY MR. STERN:

9 Q. Well, you would agree that if the Declaration
10 of Lesividad was upheld by the Court, the Government
11 would then have the right to take away Ferrovías's
12 railroad equipment; correct?

13 MR. ORTA: Again it calls for a legal
14 conclusion.

15 MR. STERN: I'm asking for his understanding.

16 MR. ORTA: He's not a lawyer. He's an
17 economist.

18 MR. STERN: Well, we've asked plenty of
19 witnesses about legal documents that aren't lawyers.

20 PRESIDENT RIGO: Objection is sustained.

21 MR. STERN: All right.

22 BY MR. STERN:

05:58:57 1 Q. Well, you know that Mr. Aitkenhead, about a
2 year after the Declaration of Lesividad, Ferrovías
3 stopped operating the railroad; correct?

4 A. Correct.

5 Q. And since that time there has been no working
6 railroad in Guatemala?

7 A. Correct, there has not been a working rail
8 service, but the concession continues in force.

9 Q. Okay. Could you please explain to the
10 Tribunal how declaring the Usufruct Equipment
11 Contracts harmful to the interests of the State helped
12 to guarantee that Guatemala had a working railroad.

13 A. Putting things in context and decision on
14 lesividad has to give rise to a Contencioso
15 Administrativo proceeding, which has to be decided by
16 the court. What a Declaration of Lesividad says is
17 that that contract did not meet or comply with the
18 country's legal rules for being able to operate and to
19 be advisable for the Guatemalan State.

20 So, the fact that the Declaration is issued,
21 what that does is it makes that issue like the issue
22 of FEGUA's nonpayment, like the other issues that had

06:00:43 1 been raised by Ferrovías and that the Government
2 wanted to talk about, it meant that one had to sit
3 down at the negotiating table and reach an agreement,
4 either an agreement between the Parties or await the
5 judicial resolutions.

6 But there's just one part that's not clear to
7 me about the question. In your previous question, you
8 indicated to me that if they took the equipment from
9 Ferrovías, isn't there any other equipment that might
10 be able to be used to make the railway operational?
11 Because I don't think that's the only wide gauge
12 equipment that--railway equipment that exists in the
13 world, or might it be--might that be the case. So I
14 don't know why a legal issue having to do with
15 Contract and equipment meant the impossibility of the
16 Contract going forward. I don't really know--see
17 where your question is directed.

18 Q. So, just to wrap up, one more question. So
19 if I understand your testimony, the Government thought
20 that by declaring the Equipment Contracts lesivo, it
21 would force Ferrovías to negotiate with the Government
22 on all issues related to the railway; isn't that

06:01:53 1 right?

2 A. That is not what I said. What I said was
3 that the purpose at the inception for President Berger
4 was to try and solve the problems related to the
5 operation that Ferrovías and FEGUA had, and to agree
6 with the Parties a plan to move forward with the
7 rehabilitation of the railway and to make it possible
8 for us to have an efficient railway system.

9 In fact, in the Mezo-America study, it was
10 said that the State was ready to support the financing
11 so that the narrow gauge could become a wide gauge.
12 That was an issue that was still put on the
13 negotiation table. But you are saying that the main
14 objective of the Government was not the termination of
15 a particular Contract, but rather to solve the
16 problem, which was the lack of railway service in the
17 country both going--rather going to the Pacific Coast.

18 PRESIDENT RIGO: Thank you.

19 As you know, we have scheduled the sessions
20 up to 6:00. We can proceed for a short while, and in
21 that respect so that we finish the examination of
22 Mr. Aitkenhead, the Secretary will inform us of

06:03:34 1 arrangements in terms of transcription and so forth
2 available after a certain time.

3 SECRETARY SEQUEIRA: We may not have live
4 transcript in Spanish. I hope that's not a problem
5 because we initially had arranged that to be provided
6 until 5:00. Our court reporter needs to leave at 6:30
7 to catch a plane, but the rest of the days we will
8 have live transcription services. So, to the extent
9 possible, if we could finish by 6:30.

10 PRESIDENT RIGO: Let's agree that we extend
11 the session up to 6:30 and that we stop at 6:30.

12 MR. ORTA: That's agreeable.

13 MR. FOSTER: And as I understand it, the
14 questions of the lawyers following up after the
15 Panel's questions will be limited to no more than 10
16 minutes per side.

17 PRESIDENT RIGO: That's right.

18 Yes, of course. It's your turn.

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

20 REDIRECT EXAMINATION

21 BY MR. ORTA:

22 Q. Mr. Aitkenhead, I think I just have questions

06:04:59 1 about one issue.

2 If--and I understand you said you were not
3 aware of what offers went back and forth exactly to
4 the tee before the Lesivo Declaration was issued, but
5 if the lesivo--if the Government had proposed a--let's
6 state it differently. Let me restart the question.

7 If the Government and Ferrovias had reached
8 an agreement to--or could have reached an agreement
9 before the Lesivo Declaration was published to cure
10 the causes of the--the causes that led the Government
11 to issue the Lesivo Declaration and have it published
12 but had not reached a resolution of the other issues
13 that the Parties were discussing regarding Contract
14 402 and Contract 820, the Trust Fund Agreement, do you
15 know whether the Government would have been willing,
16 under those circumstances, to stop the issuance of the
17 Lesivo Declaration; in other words, the publication of
18 the Lesivo Declaration?

19 A. The President had told us that he was willing
20 to take risks of the nonpublication of the lesividad
21 if there was an agreement as to how to proceed in that
22 issue in particular even though the other issues may

06:06:51 1 have been left unresolved.

2 MR. ORTA: I have no further questions.

3 QUESTIONS FROM THE TRIBUNAL

4 ARBITRATOR EIZENSTAT: I understand your last
5 answer, but I'm trying to square that with what you
6 said in Paragraph 11 of your statement in which you
7 indicate that there was an effort to reach an
8 agreement that would have provided for the cure of the
9 legal defects of the Equipment Contracts and for a
10 plan that would insure the rehabilitation and
11 functioning of the railroad, and you said twice now
12 that the President wanted to have service both to the
13 Atlantic and Pacific Coasts, and that that was the
14 purpose of the negotiation.

15 So, can you tell me again, what did you
16 understand, based on what you said in Paragraph 11 and
17 your statements twice that the President wanted to
18 achieve service in both Atlantic and Pacific areas,
19 the purpose of those negotiations under the High-Level
20 Commission.

21 THE WITNESS: The High-Level Commission
22 established very clearly five items that were

06:08:15 1 important and that had to be dealt with. One was the
2 claim by Ferrovías regarding the nonpayment by FEGUA
3 of certain Canons that FEGUA had to pay.

4 Second, every solution regarding the lack of
5 support by the Government because of the squatters in
6 the right of way of the railway.

7 Third, a request by the Government to solve
8 the issue related to the legal defects of the
9 Equipment Contract.

10 Fourth, to try and find a joint resolution
11 related to the railway and the viability of the
12 railway.

13 And, five, what would be the plan to extend
14 the service and also to meet the agenda of the
15 productivity plan up to 2015 to obtain railway
16 services that went to the border with Mexico.

17 Those were the five objectives mentioned by
18 the President.

19 Could we have reached partial agreements?
20 Yes, according to certain issues, but the effort of
21 the Government was to try and solve the five of them,
22 but at no time were we told you have to stop solving

06:09:40 1 one if you cannot solve all of them. That was never
2 told to me.

3 ARBITRATOR EIZENSTAT: Okay, but you're
4 saying what you were seeking was a global agreement on
5 these five, if that was possible. That was the goal.

6 THE WITNESS: The ultimate purpose was that,
7 although we could have had intermediate objectives.

8 ARBITRATOR EIZENSTAT: The original Contract
9 41 was concluded in 1999 and then the successor
10 Contracts, 143 and 158, these were the equipment
11 contracts of 2003. Do you know why there was a
12 three-year period in which Ferrovías was permitted to
13 operate the railroad and use the equipment if there
14 was a defect with respect to the bidding and the lack
15 of a Presidential or Council of Ministers signature?
16 Is that something you have any knowledge about?

17 THE WITNESS: I don't have knowledge, deep
18 knowledge, of the legal issues. I know that both in
19 1999 and 2003 there were mistakes and the Contract
20 were not perfected, but I don't have knowledge of
21 that. I don't know why things were operational
22 without the Contract.

06:11:29 1 ARBITRATOR EIZENSTAT: And were you part of
2 the Council of Ministers in your very high position
3 with the Government?

4 THE WITNESS: During 2004 and 2008, yes, I
5 was a member of the Council of Ministers, and I went
6 to the economic and general Cabinet meetings, the
7 Economic Cabinet meetings where few people were
8 involved.

9 ARBITRATOR EIZENSTAT: But the actual legal
10 defects for 143 and 158 were, as you described, the
11 lack of public bid and the lack of a Presidential
12 signature. Why weren't those able to be solved in
13 your knowledge within this three-year period? They
14 don't seem to be terribly difficult.

15 The other issues I understand are very
16 complex, but those two legal defects, can you explain
17 to the Tribunal why those couldn't have been promptly
18 corrected?

19 THE WITNESS: A critical issue is the fact
20 that in '99 the Contract could have been perfected
21 because there was a call for bids, and then Ferrovías
22 won the other Contract for the General Usufruct of the

06:12:59 1 railway. In that case, there was a call for bids, and
2 the Contract was not perfected. The error in 2003 was
3 that the Contract was made without the bidding process
4 and without the approval of the Council of Ministers.

5 In 2003, we should have made an agreement
6 with Ferrovías for them to conduct a bidding process,
7 again the equipment during the period as stated by the
8 Government, and if they had agreed, then the call for
9 bids would have been established, well, no one would
10 have wanted to get any equipment for a railway that
11 doesn't exist elsewhere in the country. So, they
12 would have won the call for bids.

13 But in connection with Berger's
14 administration, well, they accepted as good a process
15 that had existed for eight years from the original
16 bidding date, but there was no agreement in that
17 regard.

18 If you allow me to give you a personal
19 opinion, what I feel is that regrettably--this happens
20 in negotiations--the Parties were very aware of their
21 legal options, and they were not as aware of their
22 negotiation options--extrajudicial negotiations, if

06:14:35 1 you will--and they should have pushed those more
2 actively.

3 ARBITRATOR EIZENSTAT: And do you know why
4 the bidding process--because you say that you assume
5 that they would have won--why wasn't there an
6 agreement simply to go through the formality of a bid,
7 have the President sign it and be done with that
8 issue?

9 THE WITNESS: Basically, in my opinion,
10 because there was never an agreement.

11 Let me give you an example. I'm talking
12 about other agreements. We are talking about other
13 issues now that seem minor; for example, the historic
14 heritage. Ferrovías wanted the administrative
15 proceeding to be stopped and not to be restarted. In
16 this case it wasn't a legal process that was ongoing,
17 and they did not want to stop the Ferrovías
18 arbitration. Each Party was looking at risks that may
19 have existed related to their vested rights, and there
20 was no agreement based on trust. If that agreement
21 would have existed, we would have advanced the
22 negotiation of the other issues, but unfortunately we

06:16:03 1 failed in that negotiation.

2 ARBITRATOR EIZENSTAT: Thank you.

3 PRESIDENT RIGO: Any further questions on
4 either side?

5 MR. ORTA: None.

6 PRESIDENT RIGO: Mr. Stern?

7 MR. STERN: Yes, briefly.

8 RECROSS-EXAMINATION

9 BY MR. STERN:

10 Q. Mr. Aitkenhead, when the Government of
11 Guatemala originally awarded the original Equipment
12 Contract to Ferrovías, that was done pursuant to a
13 public bid; correct?

14 A. In 1997, yes, there was a public bidding.

15 Q. And at the time they put the public bid for
16 the Equipment Contract, Ferrovías already had been
17 awarded the--another public bid, the Right of Way
18 Usufruct; correct?

19 A. As I said, I wasn't a member of the
20 administration at the time. I cannot give you the
21 details, but they were awarded the general Usufruct of
22 the railway system, and then there was another trust

06:17:28 1 agreement, and then you also mentioned another
2 Contract related to the Usufruct of the equipment.

3 Q. And at the time the Government awarded or did
4 the initial public bid for the equipment Usufruct, the
5 Government did not first obtain Ferrovias's consent to
6 put it out to a public bid, did they?

7 MR. ORTA: Sorry, but this is going beyond
8 the scope of the questions from the Tribunal.

9 MR. STERN: I'm getting to the point of
10 Secretary Eizenstat's questions.

11 MR. ORTA: I believe it's beyond the scope.

12 MR. STERN: I mean I can cut to the chase if
13 that will move things along.

14 PRESIDENT RIGO: We sustain the objection.
15 You are going beyond that, and he was not in
16 Government at the time.

17 MR. STERN: Okay.

18 BY MR. STERN:

19 Q. Well, what I'm trying to understand is there
20 was nothing--there was nothing that required the
21 Government to get Ferrovias's consent to put the
22 Equipment Contract out to a new public bid once it

06:18:42 1 realized that Contract 143 and 158 had not been
2 subject to a new public bid, was there?

3 MR. ORTA: I'm sorry, that calls for a legal
4 conclusion and is beyond the scope of the questions
5 that were asked by the Tribunal.

6 PRESIDENT RIGO: We again sustain the
7 objection. It's on the same grounds. Those are legal
8 questions.

9 MR. STERN: With all due respect, he's
10 answered numerous questions regarding his legal
11 understanding of several documents in response to
12 Mr. Orta's questions and to the Tribunal's questions,
13 and it's just a very simple question. He testified in
14 response to Secretary Eizenstat's questions that the
15 reason they couldn't resolve or put the Contract out
16 to a new bid is because they had to negotiate that
17 issue and consent from Ferrovías. And my question is
18 simple. There is no basis for that statement.

19 MR. ORTA: It's an incredibly complicated
20 question that calls on legal issues. We can ask the
21 experts about it, and they've opined about it. I mean
22 to ask this person who is an economist is really out

06:19:51 1 of bounds and is going to muck up the record.

2 (Tribunal conferring.)

3 PRESIDENT RIGO: Just ask him a factual
4 question as far as he knows, whether the consent of
5 Ferrovías was required. Just a question, frankly, is
6 a bit--very legalistic and convoluted.

7 MR. STERN: I will try again.

8 BY MR. STERN:

9 Q. Do you recall in answering questions from
10 Secretary Eizenstat that you said in order for the
11 Parties--in order for the Government to put Contracts
12 143 and 158, the Equipment Contracts, out to a new
13 public bid it required Ferrovías's consent? Do you
14 recall that testimony?

15 MR. ORTA: Sorry, I have to protect the
16 record here. That's not what the witness said. He
17 was asked by Secretary Eizenstat why he understood
18 that the Parties were not able to correct the two
19 deficiencies after Contract 143 and 158 were executed,
20 and the witness answered that to his knowledge, the
21 Parties were never able to reach agreement on the
22 terms. That a factual point. He's now asking a legal

06:21:37 1 question, and I'm sorry; it's beyond the scope and
2 it's not proper for this witness.

3 PRESIDENT RIGO: We are sustaining the
4 objection.

5 MR. STERN: All right. Well, I have no
6 further questions.

7 PRESIDENT RIGO: Mr. Aitkenhead--I don't know
8 if I'm pronouncing your name correctly or not--but I
9 would like to thank you for being here this afternoon,
10 and you can step down.

11 THE WITNESS: Thank you. Good afternoon.

12 (Witness steps down.)

13 PRESIDENT RIGO: Before we break, I have
14 three points, and my colleagues may have additional
15 ones.

16 In terms of looking forward to your closing
17 statements, we would like that you address the issue
18 whether from a legal point of view in Guatemala you
19 can negotiate away lesividad, as a legal matter.

20 The other item is whether you could give us
21 the timeline of the various contested issues in terms
22 of the effect it may have on suppliers, bankers, et

06:23:23 1 cetera, when was the decision on lesivo published and
2 where. You have given us video clips, audio clips--or
3 one audio clip--and a number of statements on the
4 matter, to adjust the timeline from everybody
5 involving everything.

6 The third matter is probably the most
7 difficult one, is that you have submitted voluminous
8 and heavy Core Bundle binders. We will be very
9 grateful if you could put them on an A5 size with a
10 spiral, like in book form. The ones that you have
11 been using during the testimony would be enough--the
12 examination of the witnesses, I think we would be
13 grateful because they're so large that if you open
14 them, everything will pop out. I mean, it's very
15 difficult then to keep it in order. I know we have it
16 electronically, but people have different ways how we
17 work, so it would make our life easier.

18 And I will ask if there are any other things
19 that we want to raise, certainly vis-à-vis Friday and
20 the closing statements so that you have enough
21 warning.

22 (Tribunal conferring.)

06:25:56 1 PRESIDENT RIGO: I think, Mr. Foster, you
2 wanted to speak.

3 MR. FOSTER: I was just going to ask about
4 the ring, the binders that you were requesting, and
5 I'm going to suggest that perhaps each Party would
6 supply you, that that not necessarily be limited to an
7 exhibit that was used in the testimony but that we try
8 to identify for you what we perceive as the core
9 documents upon which we're relying, and I don't know
10 that we'll--my colleague is telling me that this is
11 all well and good to offer since I go home early, but
12 that doesn't bother me in the least because that's why
13 God made young people.

14 MR. ORTA: Might I add, as one of the young
15 people in the room, maybe or maybe not, I agree
16 wholeheartedly. There are a number of documents that
17 we haven't used because they've chosen not to cross
18 some of our witnesses that we think are crucial for
19 the case.

20 PRESIDENT RIGO: I certainly will be most
21 happy if you can give us the three volumes reduced in
22 size to A5, and then with the binder and the spiral.

06:27:21 1 What do you call--I can't find the word now.

2 MR. FOSTER: Instead of the Core Bundle, the
3 core documents.

4 PRESIDENT RIGO: Yes. But I meant about the
5 spiral, so that we understand what I mean.

6 MR. FOSTER: Yes.

7 ARBITRATOR EIZENSTAT: There will also be
8 obviously some reputation because, for example, the
9 April 2005 letter, the last offer was used by both
10 sides, so--I mean, we know that there will be some
11 repetition.

12 MR. ORTA: And we can certainly make an
13 effort to reduce the number of documents, not give you
14 everything, but what we think is most important.

15 ARBITRATOR EIZENSTAT: And I would say to
16 Mr. Foster that it's important for senior lawyers to
17 set an example for their junior associates.

18 MR. FOSTER: And I used to do that, sir. My
19 reputation is legend.

20 PRESIDENT RIGO: On this humorous note,
21 notwithstanding a long day, which is appreciated, I
22 think we can close the session and see you tomorrow at

06:28:32 1 9:00.

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

3 (Whereupon, at 6:28 p.m., the hearing was

4 adjourned until 9:00 a.m. the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN