

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES

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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 7

HEARING ON MERITS

Thursday, December 15, 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:

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

<p>PAGE 1587</p> <p style="text-align: right;">1587</p> <p>Also Present:</p> <p>MS. NATALI SEQUEIRA, Secretary to the Tribunal</p> <p>MR. ALEX BERENGAUT, Assistant to the Tribunal</p> <p>Court Reporter:</p> <p>MR. DAVID A. KASDAN Registered Diplomate Reporter (RDR) Certified Realtime Reporter (CRR) B&amp;B Reporters 529 14th Street, S.E. Washington, D.C. 20003 (202) 544-1903</p> <p>SRA. ANDREA VERÓNICA AMOR D.R. Esteno Colombres 566 Buenos Aires 1218ABE Argentina (5411) 4957-0083</p> <p>Interpreters:</p> <p>MS. SILVIA COLLA</p> <p>MR. DANIEL GIGLIO</p> <p>MR. CHARLES ROBERTS</p>	<p>PAGE 1589</p> <p style="text-align: right;">1589</p> <p>APPEARANCES: (Continued)</p> <p>On behalf of the Respondent:</p> <p>MR. GUILLERMO PORRAS OVALLE Attorney General</p> <p>MR. ESTUARDO SAÚL OLIVA FIGUEROA MS. SILVIA CABRERA ESTRADA Attorney General's Office</p> <p>MR. ANÍBAL SAMOYOA SALAZAR Deputy Secretary General of the Presidency</p> <p>MR. LUIS VELÁSQUEZ QUIROA MR. MYNOR RENÉ CASTILLO MR. ROMEO LÓPEZ Ministry of Economy</p> <p>MR. FERNANDO de la CERDA MR. JOSÉ LAMBOUR, Embassy of Guatemala, Washington, D.C.</p> <p>MR. DAVID M. ORTA MR. WHITNEY DEBEVOISE MR. DANIEL SALINAS-SERRANO MS. MARGARITA R. SÁNCHEZ MS. GISELLE K. FUENTES MS. DAWN Y. YAMANE HEWETT MS. MALLORY B. SILBERMAN MR. JOSÉ ANTONIO RIVAS MR. JOSÉ BERNARD PALLAIS H. MS. CAMILA VALENZUELA MR. KELBY BALLENA MS. AMY ENDICOTT MR. PEDRO SOTO MS. NICOLE ANN AARONSON Arnold &amp; Porter, LLP 555 Twelfth Street, N.W. Washington, D.C. 20004 (202) 942-5000</p>
<p>PAGE 1588</p> <p style="text-align: right;">1588</p> <p>APPEARANCES:</p> <p>On behalf of the Claimant:</p> <p>MR. C. ALLEN FOSTER MR. KEVIN E. STERN MS. RUTH ESPEY-ROMERO MS. REGINA VARGO MR. P. NICHOLAS CALDWELL MS. PRECIOUS MURCHISON MR. ADRIAN F. SNEAD Greenberg Traurig, LLP 2101 L Street, N.W. Suite 1000 Washington, D.C. 20006 (202) 331-3100</p> <p>MR. JUAN PABLO CARRASCO DE GROOTE Díaz-Durán y Asociados Central-Law 15 Avenida 18-28, Zona 13 Guatemala City, Guatemala C.A.</p> <p>Representing Railroad Development Corporation and Ferrovías Guatemala:</p> <p>MR. ROBERT PIETRANDREA</p> <p>MR. ANDREW BILLER</p> <p>MR. PABLO ALONZO</p> <p>Also Present:</p> <p>MR. MARIO ESTUARDO JOSÉ FUENTES SÁNCHEZ</p> <p>DR. EDUARDO A. MAYORGA</p>	<p>PAGE 1590</p> <p style="text-align: right;">1590</p> <p>APPEARANCES: (Continued)</p> <p>On behalf of the Respondent:</p> <p>MR. CÉSAR PAYÉS, FEGUA Legal Advisor</p> <p>MR. PATRICK J. O'CONNOR The Miami Center 201 S. Biscayne Blvd. Suite 800 Miami, FL 33131 (305) 577-3443</p>

<p>PAGE 1591 1591</p> <p>APPEARANCES: (Continued)</p> <p>CAFTA Non-Disputing Parties:</p> <p>On behalf of the Republic of El Salvador:</p> <p>MR. ENILSON SOLANO Embassy of the Republic of El Salvador</p> <p>MR. LUIS PARADA MR. TOMÁS SOLÍS MR. ERIN ARGUETA Dewey &amp; LeBoeuf, LLP 1101 New York Avenue, N.W. Washington, D.C. 20005-4213 (202) 346-8198</p> <p>On behalf of the United States of America:</p> <p>MR. JEFFREY D. KOVAR Assistant Legal Adviser MR. LISA J. GROSH Deputy Assistant Legal Adviser MR. MARK E. FELDMAN Chief, NAFTA/CAFTA-DR Arbitration Division, Office of International Claims and Investment Disputes MR. NEALE BERGMAN MR. DAVID BIGGE MS. ALICIA L. CATE MR. PATRICK PEARSALL MS. KARIN KIZER MR. GARY SAMPLINER MR. JEREMY SHARPE Attorney-Advisers, Office of International Claims and Investment Disputes Office of the Legal Adviser U.S. Department of State Suite 203, South Building 2430 E Street, N.W. Washington, D.C. 20037-2800 (202) 776-8443</p>	<p>PAGE 1593 1593</p> <p>C O N T E N T S</p> <p>WITNESSES: PAGE</p> <p>ARTURO GRAMAJO</p> <p>Direct examination by Mr. Orta 1594 Cross-examination by Mr. Foster 1605 Redirect examination by Mr. Orta 1646 Questions from the Tribunal 1655 Further redirect exam. by Mr. Orta 1690 Recross-examination by Mr. Foster 1697</p> <p>EDUARDO MAYORA</p> <p>Direct examination by Mr. Stern 1707 Cross-examination by Mr. Orta 1718 Redirect examination by Mr. Stern 1768 Questions from the Tribunal 1775 Recross-examination by Mr. Orta 1788 Questions from the Tribunal 1797 Further recross-exam. by Mr. Orta 1798</p> <p>JUAN AGUILAR</p> <p>Direct examination by Mr. Orta 1801 Cross-examination by Mr. Stern 1810 Redirect examination by Mr. Orta 1856 Questions from the Tribunal 1864 Further redirect exam. by Mr. Orta 1888 Recross-examination by Mr. Stern 1891 Questions from the Tribunal 1894 Further recross-exam. by Mr. Stern 1899</p>
<p>PAGE 1592 1592</p> <p>APPEARANCES: (Continued)</p> <p>On behalf of the U.S. Trade Representative:</p> <p>MS. KIMBERLEY CLAMAN Senior Director</p>	<p>PAGE 1594 1594</p> <p>1 P R O C E E D I N G S</p> <p>2 PRESIDENT RIGO: Good morning, everybody.</p> <p>3 ARTURO GRAMAJO, RESPONDENT'S WITNESS, CALLED</p> <p>4 PRESIDENT RIGO: Good morning, Mr. Gramajo.</p> <p>5 Would you please read the statement you have</p> <p>6 in front of you.</p> <p>7 THE WITNESS: I solemnly declare upon my</p> <p>8 honor and conscience that my statement will be in</p> <p>9 accordance with my sincere belief.</p> <p>10 PRESIDENT RIGO: Thank you very much.</p> <p>11 MR. ORTA: Thank you, Mr. President.</p> <p>12 D I R E C T E X A M I N A T I O N</p> <p>13 B Y M R. O R T A:</p> <p>14 Q. Good morning, Mr. Gramajo. How are you this</p> <p>15 morning?</p> <p>16 A. Very far well, thank you.</p> <p>17 Q. I'd like to ask you a few questions and just</p> <p>18 to set your testimony in its proper context, first of</p> <p>19 all, you have before you declarations, I believe three</p> <p>20 declarations you have submitted in this case. Can you</p> <p>21 please confirm for the Tribunal that the Declarations</p> <p>22 that are before you are, in fact, your declarations</p>

<p>PAGE 1595</p> <p style="text-align: right;">1595</p> <p>09:04:41 1 and that you ratify their contents here before the 2 Tribunal. 3 A. That is correct. I have three statements. 4 Q. And do you ratify the contents of the 5 declarations for the Tribunal? 6 A. Yes, I do. 7 Q. Thank you. 8 Dr. Gramajo, I understand from your prior 9 testimony in this case and the declarations you have 10 submitted that at one point you became the Overseer of 11 FEGUA; is that true? 12 A. That is correct. 13 Q. When did you become the Overseer of FEGUA? 14 A. February 6, 2004. 15 Q. When you entered into that position as the 16 Overseer of FEGUA, did you ask at any point in time 17 for contracts with third parties to be reviewed by 18 your legal staff? 19 A. That is correct. I did that almost right 20 after I started working with FEGUA. 21 Q. Was one of the contracts that was reviewed by 22 the FEGUA legal staff the Contract 143 and its</p>	<p>PAGE 1597</p> <p style="text-align: right;">1597</p> <p>09:08:01 1 This is a letter that I received signed by 2 Mr. Jorge Senn to me, General Manager of Ferrovías, 3 dated April 14, 2004. This is the seal indicating 4 that it was received by FEGUA, and this was a letter 5 in which he was requesting what I mentioned before. 6 Q. And did you respond to this request? 7 A. That is correct. When I received this 8 request, I indicated the Legal Department of FEGUA to 9 examine the letter and to give me a legal opinion 10 about this request. The Legal Department with FEGUA 11 sent me the Legal Opinion about this request, and the 12 answer for Mr. Senn included a copy of this Legal 13 Opinion. 14 Q. Could we put up document R-49, which, for the 15 record, is a letter from Dr. Arturo Gramajo to 16 Mr. Jorge Senn, dated 21 April 2004. 17 And, sir, before you on the screen both in 18 English and in Spanish is a copy of a letter dated 19 April 21, 2004, from you to Mr. Senn. 20 Is this the letter in which you respond to 21 that request that you received from Mr. Senn on 22 14 April 2004?</p>
<p>PAGE 1596</p> <p style="text-align: right;">1596</p> <p>09:05:59 1 amendment, Contract 158, between FEGUA and Ferrovías 2 Guatemala? 3 A. Yes, that is correct. 4 Q. Did there come a time after you began your 5 position as FEGUA's Overseer where you received a 6 communication, a letter from Ferrovías Guatemala 7 requesting access to warehouses and some equipment 8 pursuant to Contract 143 and 158? 9 A. That is correct. I received a letter by the 10 General Manager of Ferrovías Guatemala, requesting 11 access to some warehouses as well as the equipment 12 inside. 13 Q. Would you put up briefly R-7 on the screen. 14 Do we have the Spanish version that we can 15 hand to the witness? 16 Okay. I think what you're going to see on 17 the screen there, Dr. Gramajo, there is a version of 18 it in Spanish and English, and I think you're now 19 being handed a copy of the document in Spanish. 20 First of all, could you identify this 21 document for the record. 22 A. That is correct.</p>	<p>PAGE 1598</p> <p style="text-align: right;">1598</p> <p>09:09:45 1 A. That is correct. This was the answer. 2 Q. And could you just explain to the Tribunal 3 how you responded to Mr. Senn's request. 4 A. The response by FEGUA, as Overseer of FEGUA, 5 was that it was not possible to give him what he had 6 requested, and I also included the Opinion of the 7 Legal Department so that he could see the reasons why 8 his request was not accepted. 9 Q. Would you put up document R-8, which is the 10 Legal Opinion that was attached to this letter and to 11 which Dr. Gramajo just testified. 12 Dr. Gramajo, we are now putting before you up 13 on the screen document R-8, which is the Legal Opinion 14 Number 47-2004, the same one referenced in your 15 21 April 2004 response to Mr. Senn. 16 Is this the document that you attached to the 17 letter response to Mr. Senn? 18 A. Correct. 19 Q. And if we could highlight the conclusion-- 20 MR. ORTA: For the second of time, I'm not 21 going to go through all of the document, but I would 22 submit it to the Tribunal for its consideration.</p>

<p>PAGE 1599</p> <p style="text-align: right;">1599</p> <p>09:11:34 1 BY MR. ORTA:  2 Q. And in this response, in the conclusion, is  3 it correct that you, first of all, denied the request  4 or that you were informed by your Legal Department  5 that you should deny the request made by Mr. Senn?  6 A. That is correct.  7 Q. Okay. And did the Legal Department suggest  8 to you that you should deny or tell you that you  9 should deny the request pursuant to Contract 143 and  10 158 until the irregularities specified in the Contract  11 and as set forth earlier in the body of the Opinion  12 were cured?  13 A. That is correct. That's what the Legal  14 Opinion says.  15 Q. Now, after you sent this request to Mr. Senn,  16 do you recall whether FEGUA and Ferrovías ever entered  17 into any discussions, meetings, communications, whose  18 purpose it was to attempt to cure the irregularities  19 that were signaled to you by your Legal Department in  20 relation to Contracts 153 and 158?  21 A. Yes. We started a series of conversations of  22 discussions at the offices of Ferrovías. Mr. Palacios</p>	<p>PAGE 1601</p> <p style="text-align: right;">1601</p> <p>09:14:31 1 declared lesivo to the interest of the State of  2 Guatemala?  3 A. Upon meeting several times with the attorneys  4 for Ferrovías in an attempt to draft a new contract,  5 and given the failure to reach an agreement, we  6 started to consider that it would be necessary to  7 follow the path that would lead to the Declaration of  8 Lesividad in connection with the Contract. We had  9 made an effort to come to an agreement with Ferrovías  10 and draft the proper contract that would cure the  11 defects that had been there since the very beginning,  12 but we were not able to agree to the final agreement;  13 therefore, we had to continue with the process to  14 finally get to the Lesividad Declaration.  15 Q. Sir, why did you--why did you choose to  16 pursue the lesivo path rather than other possible  17 paths or--see if you could answer that.  18 A. Since no agreement was reached with  19 Ferrovías, we started to discuss with the Legal  20 Department within the Communications Ministry. We  21 presented our information, and we started to assess  22 and request other agencies their Legal Opinion, and</p>
<p>PAGE 1600</p> <p style="text-align: right;">1600</p> <p>09:13:07 1 and Pedro Mendoza Montano, one of the lawyers for  2 Ferrovías who also attended the meetings. We held  3 some meetings, and we also exchanged some preliminary  4 versions of a new contract for the Usufruct of the  5 railway equipment.  6 Q. Given the time limitations, I would submit  7 the Tribunal to documents R-80, R-50, and R-51, which  8 documents speak for themselves, but they put into  9 context the comments just made by Dr. Gramajo about  10 the meetings that were had between the Parties  11 relating to Contract 143 and 158.  12 BY MR. ORTA:  13 Q. Now, Dr. Gramajo, first of all, as a result  14 of those negotiations and those meetings, did the  15 Parties come to an agreement to cure the deficiencies,  16 the legal deficiencies or irregularities in Contracts  17 143 and 158?  18 A. We had several meetings, but we did not reach  19 an agreement.  20 Q. And did there come a time when you considered  21 submitting Contracts 143 and 158 to President Oscar  22 Berger to have that contract and its amendment</p>	<p>PAGE 1602</p> <p style="text-align: right;">1602</p> <p>09:16:20 1 that was the reason why the Ministry of Communications  2 put us in contact with the respectable legal firm in  3 Guatemala, Palacios and Associates, to give their  4 Legal Opinion on the contracts.  5 The result of this Legal Opinion was that the  6 Contract was lesivo, given the interests of the State.  7 And based on this, we requested the Attorney General  8 of the Republic to issue an opinion on the contracts,  9 and the answer by the Attorney General of the Republic  10 was that the contracts were lesivo to the interests of  11 the State.  12 But to further complete our impression that  13 these contracts were lesivo, we requested again an  14 expansion of their decision by the Attorney General;  15 and, once again, we sent the Office of the Attorney  16 General the request to have further clarification of  17 their decision. And once again, the Office of the  18 Attorney General indicated that those contracts were  19 lesivo to the interests of the country. By then, we  20 already had two or three previous decisions that also  21 told us that the contracts were lesivo.  22 After this, the Legal Department with FEGUA</p>

<p>PAGE 1603</p> <p style="text-align: right;">1603</p> <p>09:17:51 1 analyzed the legal opinions from--by the Attorney 2 General's Office; and, based on this we decided to 3 send the request for the Lesividad Declaration to the 4 President of the Republic. 5 MR. ORTA: One additional set of questions, 6 two questions, but in order to put in context, and 7 again because of time, I would remit to the Tribunal 8 documents R-13, C-106, C-108, R-15, R-17, R-20, and 9 R-21, which put into context again the statements just 10 made. These are the documents to put into context the 11 testimony just given by Dr. Gramajo. 12 BY MR. ORTA: 13 Q. Now, Dr. Gramajo, the Tribunal has heard a 14 lot about what happened since the President received 15 your letter requesting that he declare lesivo of the 16 contracts, and so for the sake time, I'm not going to 17 take you through all of that story until up the time 18 when the President issued the Lesivo Declaration, but 19 I would ask you a couple of questions about the day 20 before the Lesivo Declaration was published. On the 21 24th of August 2006, did you attend a meeting at which 22 other Government officials, Mr. Senn on behalf of</p>	<p>PAGE 1605</p> <p style="text-align: right;">1605</p> <p>09:21:17 1 Miriam López had any conduct like this one trying to 2 force the other Party or to compel the other Party, 3 but I could say that given all the situation and the 4 tension arising out of the possibility of having 5 lesividad declared the next day, I would say that the 6 environment, the situation was quite cordial and kind, 7 and no one was pushed or forced to sign anything, but 8 we asked Mr. Senn to examine the minutes. 9 And I even remember that the minutes didn't 10 include any names, that there were blank spaces to be 11 filled by the Parties. It was a negotiation. 12 And once again, we had to negotiate to be 13 able to fill out the Contract, that settlement letter, 14 but I deny the existence of any pressure or extreme 15 pressure. It was not the case. 16 MR. ORTA: We commend the Tribunal to 17 document C-44, which is the draft agreement that was 18 discussed during that meeting. 19 Thank you. 20 PRESIDENT RIGO: Mr. Foster. 21 MR. FOSTER: Thank you, Mr. President. 22 CROSS-EXAMINATION</p>
<p>PAGE 1604</p> <p style="text-align: right;">1604</p> <p>09:19:34 1 Ferrovías Guatemala, and some attorneys that were 2 accompanying him were present? 3 A. That is correct. I attended a meeting with 4 the Ministry of Communications, their own facilities, 5 and this was the meeting the date before the potential 6 publication of the Government Agreement declaring 7 lesividad. We had representatives of the Government 8 as well as Mr. Jorge Senn on behalf of Ferrovías. 9 Q. There has been testimony in this case by 10 Mr. Jorge Senn that during that meeting a lawyer on 11 behalf of the Government, Miriam López, held out a 12 draft of an agreement and sort of--I forget precisely 13 what the testimony was--but either placed it on the 14 table and basically said words to the effect, "Either 15 you sign this document or we will proceed to declare 16 the Contract lesivo--publish the Lesivo Declaration 17 tomorrow." 18 You were at the meeting. Tell the Tribunal 19 briefly, because we're basically out of time, what you 20 recall about that meeting in respect to that 21 allegation. 22 A. There was no allegation. It is false that</p>	<p>PAGE 1606</p> <p style="text-align: right;">1606</p> <p>09:22:55 1 BY MR. FOSTER: 2 Q. Hello again, Dr. Gramajo. 3 A. Good morning, Mr. Foster. It's a pleasure to 4 see you again. 5 Q. And a pleasure to see you, sir. 6 Let me ask you a few questions. You just 7 testified that on August 24 the document that was 8 presented, you thought it needed to be negotiated; 9 correct? 10 A. Yes, that is correct. 11 Q. And did you seriously think that that 12 document could be negotiated in one day? 13 A. I cannot issue an opinion on that because, 14 first of all, I am not an attorney, but the intention 15 was that there were hours still ahead of us, and we 16 could sit down and negotiate, but no agreement was 17 reached, unfortunately. 18 Q. Okay. I'd like to go back to your letter to 19 Mr. Senn that you discussed in your direct 20 examination, which is Exhibit R-49. Can you show me 21 anything in your letter where you say there are legal 22 defects in the contracts?</p>

<p>PAGE 1607</p> <p style="text-align: right;">1607</p> <p>09:24:20 1 A. May I please see the letter in Spanish.  2 Q. It should be in your cross-examination  3 binder. I will give you the tab number. It's Tab 36,  4 and it should be in both English and Spanish for you.  5 A. I have it with me.  6 Q. And can you show me anything in your letter  7 which says there are legal defects in the contracts?  8 A. In this letter--that is the response--it says  9 it is not possible to allow them to have their  10 request, and here it doesn't say anything about legal  11 defects, but we did attach to this letter the Legal  12 Opinion; therefore, Mr. Senn automatically received  13 the response letter with the Legal Opinion. Clearly,  14 this indicated that he had received the information.  15 Q. Okay, sir. Please look at the Opinion that  16 you'd attached. It's R-8, which is at Tab 25.  17 Can you show me anything in the Legal Opinion  18 that says that the contracts have legal defects which  19 affect their validity?  20 A. It says that the Legal Department of  21 Ferrocarriles de Guatemala FEGUA based on the  22 foregoing considerations finds that it is not possible</p>	<p>PAGE 1609</p> <p style="text-align: right;">1609</p> <p>09:27:47 1 Q. Now, does that Legal Opinion anywhere state  2 that Contract 143 had not been entered into with the  3 proper authorization?  4 A. If you allow me to read the paragraph, it  5 says, "Ferrocarriles de Guatemala, FEGUA,  6 Ferrocarriles de Guatemala, FEGUA, and Compañía  7 Desarrollada Ferroviaria, CODEFE, dated March entered  8 into an Usufruct Contract that is included in document  9 41 authorized by Marco Tullio Cornejo Marroquin, which  10 was not approved by the executive agency since this  11 was not approved.  12 And also to find a solution to this,  13 Ferroviaria de Guatemala, FEGUA, in Compañía  14 Desarrollos Ferroviaria Sociedad Anónima, CODEFE  15 entered into a new Usufruct--Onerous Usufruct Contract  16 for the railway equipment included in Public Deed 143  17 authorized in this city on August 28, 2003, by Claudia  18 Mariela Marroquin Luther, which was expanded by Deed  19 158 signed in this city in October 2003, also by  20 Notary Public Claudia Mariela Marroquin Luther.  21 And then it says Ferrocarriles de Guatemala  22 FEGUA is a decentralized autonomous public entity</p>
<p>PAGE 1608</p> <p style="text-align: right;">1608</p> <p>09:26:35 1 to grant the request filed by the representatives--  2 SECRETARY SEQUEIRA: Please slow down--could  3 you speak a little bit answer.  4 MR. ORTA: He was reading the answer. He was  5 just asked to go a little slower, so if he could just  6 be allowed to finish the answer, please.  7 MR. FOSTER: No problem.  8 THE WITNESS: "The Legal Department of  9 Ferrovías de Guatemala, FEGUA, based on the foregoing  10 considerations, finds that it is not possible to grant  11 the request filed by the representatives of Compañía  12 Desarrollada Ferroviaria Sociedad Anónima, CODEFE.  13 Therefore, the request shall be denied by this entity  14 until the irregularities specified in Contract  15 Number 143 as expanded through normal Deed Number 158  16 authorized in this city on August 28 and October 7,  17 2003, by Notary Public Claudia Mariela Marroquin  18 Luther."  19 MR. ORTA: It is not what the doctor was  20 reading. He was reading from the very last page of  21 the document, the conclusions.  22 BY MR. FOSTER:</p>	<p>PAGE 1610</p> <p style="text-align: right;">1610</p> <p>09:29:39 1 governed by the provisions of its Organic Law embodied  2 in Decree Number 6072--  3 MR. FOSTER: Excuse me, Mr. President. He's  4 reading the letter. I asked him a very simple  5 question. Can he show me anything in that Opinion  6 where it says that Contract 143 had been entered into  7 without proper authorization?  8 MR. ORTA: Just for the record, I'm sorry,  9 he's not a lawyer. The letter says what you're  10 asking, so maybe you could direct him to the  11 appropriate paragraph.  12 MR. FOSTER: I don't think the letter does  13 say that. I want to know can he show me anything. He  14 said that that Legal Opinion put FVG on notice of the  15 legal deficiencies in the Contract, and I want him to  16 show me what the legal deficiencies in the Contract  17 are. Can he show me where it says that it was entered  18 into without proper authorization?  19 And then when we get through this with this,  20 I'm going to ask him, what are the legal deficiencies  21 in Contract 143?  22 So, now he knows where I'm going, but let's</p>

<p>PAGE 1611</p> <p style="text-align: right;">1611</p> <p>09:30:41 1 get an answer to this question, first.  2 MR. ORTA: And I remit this to the Tribunal.  3 He's not a lawyer. He was--and I'm not objecting to  4 the question, okay?  5 MR. FOSTER: Then why don't we get him to  6 answer it?  7 MR. ORTA: That's fine. I mean, I can clean  8 it up on redirect, if you would like. The letter says  9 what he said it says.  10 BY MR. FOSTER:  11 Q. Can you show me anything that says that  12 Contract 143--not Contract 41, but Contract 143--was  13 entered into without proper authorization?  14 A. Just a moment. I'm looking for it.  15 In the third paragraph of Page 2, it says, A,  16 that, "the goods are not part of Contract 143 under  17 Deed 158 authorized here in this city in August and  18 October by Notary Claudia Mariela Marroquin Luther."  19 B, "Given that the assets are property of the  20 State, Ferrocarriles de Guatemala shall not deliver  21 them to third parties unless the applicable procedure  22 is complied with and a favorable opinion is rendered</p>	<p>PAGE 1613</p> <p style="text-align: right;">1613</p> <p>09:33:44 1 Luther, showed irregularities as noted in Opinion  2 number 40 D J classification of March 31 this year,  3 since it provides for the disposition of assets that  4 are the property of the State of Guatemala without any  5 authorization. If those assets were owned by private  6 legal entities, such circumstance must be redressed as  7 soon as practicable."  8 Q. Did you provide a copy of the referenced  9 Legal Opinion to Mr. Senn? I believe that's a  10 question that can be answered "yes" or "no,"  11 Dr. Gramajo.  12 A. I don't recall.  13 Q. Is there anything in your letter or in the  14 Legal Opinion which says that the Contract 143 or 158  15 are lesivo to the interest of the State?  16 A. In this letter, I don't see the word  17 "lesivo." However, the term started being used later  18 on.  19 If I'm allowed to clarify, one cannot adduce  20 that Mr. Senn had no knowledge of the fact that these  21 contracts had defects that needed to be cured.  22 Q. Okay. That's now my last question on this</p>
<p>PAGE 1612</p> <p style="text-align: right;">1612</p> <p>09:32:21 1 by the Executive through the State Assets Department  2 of the General Accounts Comptroller's Office."  3 PRESIDENT RIGO: Slower, please.  4 THE WITNESS: Yes.  5 A, "The requested assets are not part of the  6 railway equipment list described in Contract  7 Number 143 as expanded by Notarial Deed Number 158,  8 authorized in this city on August 28 and October 7,  9 2003, by Notary Claudia Mariela Marroquin Luther."  10 B, "Given that the assets are the property of  11 the State, Ferrocarriles de Guatemala shall not  12 deliver them to third parties unless the applicable  13 procedure is complied with and a favorable opinion is  14 rendered by the Executive Branch through the State  15 Assets Department and the General Accounts  16 Comptroller's office."  17 Q. And you're saying?  18 A. Can I go on? There's something else about  19 this.  20 C, Contract 143, as expanded by Notarial Deed  21 Number 158, authorized in this city on August 28 and  22 October 7, 2003, by Notary Claudia Mariela Marroquin</p>	<p>PAGE 1614</p> <p style="text-align: right;">1614</p> <p>09:35:20 1 document: What are the defects in Contract 143 and  2 158?  3 MR. ORTA: I'm going to object to that  4 question. That calls for a legal conclusion. The  5 Doctor at all times had legal counsel. He testified  6 on direct that he was advised by legal counsel and  7 submitted--and submitted letters to the President and  8 others based on that legal advice. I think it's not a  9 proper question for this lay witness as to what the  10 legal defects were per se. We have a number of  11 documents in the record that established what the  12 legal defects were.  13 (Tribunal conferring.)  14 PRESIDENT RIGO: The witness should answer in  15 his own understanding what the legal defects of the  16 Contract were.  17 THE WITNESS: Can I ask for clarification in  18 connection with this? I can answer on the basis of  19 what I understand, not necessarily based on this  20 letter.  21 PRESIDENT RIGO: You can testify to what was  22 your understanding of these defects.</p>

<p>PAGE 1615</p> <p style="text-align: right;">1615</p> <p>09:36:55 1 THE WITNESS: The legal defects--well, the  2 most important ones were that in 143 and in its  3 Amendment 158, which is the Usufruct of railroad  4 equipment owned by Ferrocarriles de Guatemala, well,  5 these were never approved by an Executive Resolution,  6 this according to what the lawyers have indicated to  7 us.  8 The Contract referred to the Bidding Terms.  9 The Bidding Terms mentioned there are those related to  10 Contract 41, Usufruct of Railway Equipment, and that  11 Contract had been entered into years back. It would  12 be logical for Bidding Terms to be used of a contract  13 executed many years ago for a contract for the  14 Usufruct of Railway Equipment. The Bidding Terms of  15 the first Usufruct Contract provide that the Contract  16 must be executed by the Government Notary, and it must  17 be authorized by an Executive Resolution of the  18 President of the Republic.  19 143 says that that authorization is not  20 necessary. On the basis of opinion of lawyers, this  21 is not correct, and that is one of the main defects  22 that Contract 143 has and that is also present in the</p>	<p>PAGE 1617</p> <p style="text-align: right;">1617</p> <p>09:39:49 1 question in a different manner, perhaps I would be  2 able to answer it, but you were asking about legal  3 terminology. I don't handle legal terminology. I'm  4 not a lawyer.  5 Q. Yes, sir, but I'm just asking you, with all  6 your conversations and the many legal Opinions that  7 you received and that you sent to the President of the  8 Republic when you were asking him to declare lesivo,  9 just based upon your understanding, was there any  10 other legal defect in these contracts other than the  11 lack of approval by Executive Resolution?  12 A. Yes. If we can look at the letter that I  13 sent to the President, the letter states the problems  14 the contracts had.  15 Q. And do you recall what those were?  16 A. I would like to see the letter that I sent to  17 the President of the Republic.  18 MR. ORTA: If this helps, also known as R-21.  19 MR. FOSTER: Okay. Let's put up R-21.  20 BY MR. FOSTER:  21 Q. I don't have a paper copy. Can you see it on  22 your screen?</p>
<p>PAGE 1616</p> <p style="text-align: right;">1616</p> <p>09:38:41 1 amended Contract 158.  2 BY MR. FOSTER:  3 Q. Is there any other--to your understanding, is  4 there any other legal defect other than the failure to  5 be approved by Executive Resolution?  6 MR. ORTA: To the extent that that is  7 characterizing the Witness's answer that he just gave,  8 I think that's a mischaracterize of his answer.  9 MR. FOSTER: His exact words were, "It was  10 never approved by Executive Resolution." I wrote them  11 down when he said them.  12 MR. ORTA: There were many other things he  13 said.  14 MR. FOSTER: I understand, there always are,  15 but those were his exact words.  16 BY MR. FOSTER:  17 Q. Now, to your understanding is there any other  18 legal defect in Contracts 143 or 158 other than the  19 lack of approval by Executive Resolution?  20 A. Counselor, you are asking me about legal  21 issues. I am not a lawyer. I would not be able to  22 answer a question as a lawyer. If you asked me a</p>	<p>PAGE 1618</p> <p style="text-align: right;">1618</p> <p>09:41:29 1 A. Yes.  2 ARBITRATOR EIZENSTAT: Could the Tribunal see  3 an English version, please, and do you know which tab  4 this is under?  5 MR. FOSTER: It's not in the  6 cross-examination binder, but we'll find it for you.  7 SECRETARY SEQUEIRA: I have it.  8 MR. FOSTER: You've got it, good. Thank you,  9 Natali. Fine.  10 (Document handed to the witness.)  11 BY MR. FOSTER:  12 Q. So, now, looking at your letter to the  13 President, what is it you say the legal defects in  14 Contracts 143 and 158 were?  15 A. Could I please see that on the screen? Can  16 you maximize it?  17 MR. ORTA: I have a version of it.  18 Unfortunately, it has a little bit of highlighting,  19 but it's in larger print. I think the version he has  20 just been handed has such small print, he's going to  21 have difficulty reading it. If you don't have any  22 objection, I could give him this.</p>

<p>PAGE 1619</p> <p style="text-align: right;">1619</p> <p>09:43:03 1 MR. FOSTER: It's fine.  2 MR. ORTA: Okay. It's just to move things  3 along.  4 MR. FOSTER: Surely.  5 THE WITNESS: This is a letter sent by me in  6 my capacity as Overseer of FEGUA to the President of  7 the Republic of Guatemala, Mr. Oscar Ravelo Perdomo.  8 BY MR. FOSTER:  9 Q. Just tell us, please, what are the legal  10 defects that you asserted in your letter to the  11 President with regard to Contracts 143 and 158.  12 A. Very well. Paragraph 2 said the Contract was  13 not awarded as a result of the bidding process as  14 required by the Government contracts law. The Terms  15 of Reference (established in November 1997) were used  16 for the severance of Contract 41 authorized in this  17 city on March 23, 1999, by Notary Antonio Cornejo  18 Marroquin, which never came into force because the  19 President of the Republic failed to approve it, and it  20 was terminated by mutual assent of the Contracting  21 Parties under the Contract we hereby request to be  22 declared as injurious to the State interests</p>	<p>PAGE 1621</p> <p style="text-align: right;">1621</p> <p>09:45:54 1 the equipment outside the national territory for the  2 term it deems necessary;  3 (c), the Usufructuary does not undertake to  4 return FEGUA's equipment which has been designated  5 cultural-historical property nor the waste material  6 (scrap);  7 (d), no prohibition is imposed regarding the  8 Usufruct or the equipment;  9 (e), the Contract relieves the Usufructuary of  10 the any liability;  11 (f), the Contract provides that the  12 Usufructuary may remove component parts of a piece of  13 equipment to use them as replacements in other  14 equipment;  15 (g), the Contract is valid for a term of 44  16 year, eight months, and 25 days;  17 (h), in consideration of the Onerous Usufruct  18 of the equipment which forms the subject matter of the  19 Contract, the Usufructuary undertakes to make an annual  20 payment to FEGUA of 1.25 percent of the net freight  21 turnover for such equipment. No method was  22 established for calculating the amounts charged for</p>
<p>PAGE 1620</p> <p style="text-align: right;">1620</p> <p>09:44:40 1 (section 1 of Contract 143). Note that even when the  2 Terms of Reference of Contract 41 as mentioned in  3 Contract 143, the conditions of such bidding process  4 were not applied.  5 Q. Okay, Dr. Gramajo. So, the first paragraph  6 says--would it be fair to say that the first paragraph  7 says that the Contract was not awarded pursuant to a  8 public bid?  9 MR. ORTA: I'm sorry, I'm going to object.  10 It says a lot more than that. He's just read it into  11 the record.  12 MR. FOSTER: Skip the question,  13 Mr. President. It speaks for itself.  14 BY MR. FOSTER:  15 Q. Okay. How about is there any other thing in  16 your letter that you advance as being illegal about  17 Contracts 143 and 158?  18 A. In Paragraph 4 it says, Contract 143 contains  19 several irregularities; namely, (a), FEGUA's  20 obligation to grant any new or used equipment or spare  21 parts in Usufruct to the selected entity;  22 (b), the Usufructuary is authorized to move</p>	<p>PAGE 1622</p> <p style="text-align: right;">1622</p> <p>09:47:02 1 freight services, and FEGUA is not allowed to  2 participate in the prior determination of said freight  3 services.  4 PRESIDENT RIGO: Mr. Gramajo, would you  5 please go slower.  6 THE WITNESS: Would you want me to repeat  7 this paragraph?  8 PRESIDENT RIGO: No, no, please don't.  9 THE WITNESS: "(i), Sections 7 and 19 of  10 Contract 143 were amended by Contract 158, authorized  11 in this city on October 7, 2003, by Notary Claudia  12 Mariela Marroquin Luther, to include the valuation of  13 the property subject to Usufruct and a list containing  14 itemized prices which were agreed at the discretion of  15 the contracting parties, without indicating the source  16 of the value assigned to each item or requesting an  17 appraisal of the property, and without taking into  18 account the importance and historical value of the  19 property which has been designated cultural property."  20 Excuse me.  21 There is another defect that is to be found  22 in this letter. May I go on?</p>

<p>PAGE 1623</p> <p style="text-align: right;">1623</p> <p>09:48:26 1 BY MR. FOSTER:  2 Q. Yes, go ahead.  3 A. Even though the subject matter of the  4 Contract involve the disposition of the State property  5 transferred under Onerous Usufruct to a private  6 individual, the Contract was treated as if the State  7 were acting as a private person, in violation of  8 constitutional and other rules governing the transfer  9 of State property and public procurement procedures.  10 Q. Now that we have done that, my first question  11 is: You never sent a copy of this letter or anything  12 like this letter to Ferrovías; isn't that correct?  13 Please answer yes or no.  14 A. No.  15 Q. Thank you.  16 Now, looking at Paragraph 4 Items (a), (b),  17 (c), (d), (e), and (f) and (g) were all included in  18 Contract 41, weren't they?  19 A. I don't have Contract 41 before me. I would  20 not be able to say whether they are included in 41  21 because we are making reference to them in this  22 letter.</p>	<p>PAGE 1625</p> <p style="text-align: right;">1625</p> <p>09:51:46 1 you is, why didn't you just get it approved by the  2 Executive?  3 A. Are you asking me about 143?  4 Q. Yes, sir.  5 Why you didn't you just get the President to  6 approve Contract 143 and solve the problem?  7 A. Counselor, because 143 states that there was  8 no need for authorization by any other Higher  9 Authority, so it would not have been logical for me to  10 ask the President to provide authorization for a  11 Contract of Usufruct of Railway Equipment when the  12 text of the document says that no approval is  13 necessary by a Higher Authority. I cannot send the  14 President a request which is automatically incorrect.  15 The Contract states that there is no need for a Higher  16 Authority to approve it.  17 BY MR. FOSTER:  18 Q. But you disagreed with that. You thought  19 that that was an irregularity in the Contract, so why  20 didn't you just solve the irregularity by getting the  21 President to approve it?  22 A. Because I could not--I repeat, I could not</p>
<p>PAGE 1624</p> <p style="text-align: right;">1624</p> <p>09:49:54 1 Q. Okay. And Item H is not correct, is it? The  2 1.25 percent was on gross freight revenues; isn't that  3 correct?  4 A. I cannot answer the question because I do not  5 remember that.  6 Q. Now, going back to Item one, the new--which I  7 think is in Paragraph 2, the issue of the bidding  8 process, why didn't you solve that problem by having a  9 new public bid?  10 A. Probably there would have been other bidders  11 in that new bidding process. That is the only thing  12 that I can think of right now. If a new bidding  13 process had taken place, perhaps some other company  14 would have been able to become a bidder there.  15 Q. How did that harm the interest of the State  16 to have a competitive bid?  17 A. On the basis of what the attorneys told me,  18 the public bidding process was a requirement for these  19 kinds of contracts.  20 Q. Okay. Looking at the issue of executive  21 approval, which I think is in Paragraph 3 of this  22 letter which you didn't read to us, but my question to</p>	<p>PAGE 1626</p> <p style="text-align: right;">1626</p> <p>09:53:29 1 send the President--well, 143, the Usufruct Contract,  2 says--it's not that the approval is unnecessary by the  3 President of the Republic. Well, I mean, I could not  4 send it to him because it would have been a  5 contradiction. It would have been a contradiction for  6 me to ask the President to authorize a contract when  7 the language in the Contract says that it is not  8 necessary for a Higher Authority to approve the  9 Contract; that is to say, the President of the  10 Republic is not to approve the Contract.  11 Q. How can it be harmful to the interests of the  12 State that the Contract doesn't have a requirement for  13 Presidential approval, but you could have gotten it  14 approved by the President? Doesn't that solve all,  15 any potential harm to the State?  16 MR. ORTA: I'm sorry. That's assuming facts  17 not in evidence.  18 MR. FOSTER: He can clearly answer this  19 question.  20 MR. ORTA: No, he can't. That's not under  21 your question. It's assuming facts not in evidence.  22 He has to ask a different question.</p>

<p>PAGE 1627</p> <p style="text-align: right;">1627</p> <p>09:54:36 1 PRESIDENT RIGO: Would you rephrase it.  2 BY MR. FOSTER:  3 Q. If you contended that this Contract should be  4 declared lesivo because it had not been approved by  5 the President, why wouldn't you just ask him to  6 approve the Contract?  7 A. Counselor, I think my answer would be  8 redundant. The language of the Contract--and if you  9 would be so kind to read it--you will see it says that  10 it is not necessary for the President or for a higher  11 authority to approve the Contract. If the language of  12 the Contract states that, then it would have been  13 contradictory on my part to send the President a  14 request for him to authorize the Contract when the  15 language in the Contract says that no authorization by  16 the President is necessary.  17 Q. Okay. Then why didn't you just simply ask  18 Ferrovías to renegotiate that clause in the Contract  19 to require Presidential approval and then go get it?  20 A. The answer is as follows: We commenced  21 negotiations with the lawyers of Ferrovías to prepare  22 a new Railway Equipment Usufruct Contract that would</p>	<p>PAGE 1629</p> <p style="text-align: right;">1629</p> <p>09:57:29 1 a few questions before the end of my hour.  2 PRESIDENT RIGO: Mr. Gramajo, try to be  3 succinct in your answers because we don't have a lot  4 of time, and the lawyer has very little time to ask  5 questions.  6 THE WITNESS: I don't have the documents  7 before me, and I don't remember exactly their  8 numbering, but there was an exchange of Draft  9 Contracts with Ferrovías. The first Draft Contract  10 was basically a copy of Contract 143. FEGUA objected  11 this, and you can see on the draft my handwritten  12 notes requesting that that clause be changed so that  13 the Contract is approved via an Executive Resolution.  14 Those drafts are there. We tried to prepare a new  15 contract with Ferrovías that included these conditions  16 so that the President of the Republic could approve  17 the Contract.  18 However, we were not able to reach an  19 agreement in these negotiations. There were  20 differences amongst the Parties. Like in every  21 negotiation, sometimes you reach agreement and  22 sometimes you don't.</p>
<p>PAGE 1628</p> <p style="text-align: right;">1628</p> <p>09:56:16 1 not have the defects that had been identified. Drafts  2 were exchanged of this new Railway Equipment Usufruct  3 Contract. Regrettably, we were not able to reach an  4 agreement. The will to negotiate the new agreement,  5 if you let me, you're asking me why we didn't reach an  6 agreement. Well, we tried to negotiate with  7 Ferrovías; however, like in every negotiation,  8 sometimes you can reach agreement, and sometimes you  9 cannot. So--  10 Q. Excuse me, sir. Can you show me any piece of  11 paper that you exchanged with Ferrovías where you ever  12 said, we've got a problem with this Contract because  13 it provides--because it doesn't require Presidential  14 approval. We can solve the problem if we just change  15 that term. Can you show me any time you ever said  16 that to Ferrovías?  17 MR. ORTA: Mr. Chairman, I would ask that the  18 witness not be cut off in the middle of an answer. If  19 I could just ask Mr. Foster to let the witness finish  20 his answers, please.  21 MR. FOSTER: I would like to ask that the  22 witness answer sufficiently briefly that I can ask him</p>	<p>PAGE 1630</p> <p style="text-align: right;">1630</p> <p>09:58:55 1 BY MR. FOSTER:  2 Q. Yes, sir, you said that several times.  3 Are you telling us that there is a document  4 out there where you asked that the Contract 143 be  5 changed to require Presidential approval so you could  6 go get that Presidential approval? Is that what  7 you're telling us, sir?  8 A. There are contract minutes, and some e-mail  9 exchanges between FEGUA and Ferrovías related to the  10 meetings we were holding.  11 Q. I understand that, sir. I'm asking you a  12 very simple question that can be answered yes or no.  13 Are you telling us that there is a document out there  14 where you requested that Contract 143 be amended to  15 require Presidential approval so that you could go get  16 it? There either is or there isn't. Now, please  17 answer me yes or no.  18 A. The answer is I do not recall.  19 Q. That's fine. That's fine.  20 MR. ORTA: He's cutting off the witness. I  21 mean with all due respect, the witness was trying to  22 answer the question.</p>

<p>PAGE 1631</p> <p style="text-align: right;">1631</p> <p>10:00:12 1 MR. FOSTER: It's necessary to cut the 2 witness off, David. 3 MR. ORTA: With all due respect, you're 4 asking him questions that are important, and he needs 5 to be able to give his full answers. You should not 6 be cutting him off. That's improper. 7 MR. FOSTER: He said he didn't recall, and 8 therefore there can't be any further answer. 9 MR. ORTA: No, that's not true. 10 I would ask the President to please 11 again--this is my second request--please ask 12 Mr. Foster to not cut the witness off in the middle of 13 his answers. 14 PRESIDENT RIGO: I've asked you not to cut 15 him off, but I also would ask the witness to respond 16 as succinctly as possible and as straight as possible. 17 BY MR. FOSTER: 18 Q. I would like to turn to another topic, 19 Dr. Gramajo. I'd like to direct your attention to the 20 Squatter Commission that was formed by the Ministry of 21 Communications in January 2005. You served on that 22 Commission as FEGUA's representative; correct?</p>	<p>PAGE 1633</p> <p style="text-align: right;">1633</p> <p>10:02:24 1 that. 2 Q. And I guess you're going to tell us that you 3 didn't know that Mr. Pinto represented Mr. Campollo in 4 business matters, either; is that correct? 5 A. I did not know that Mr. Pinto was a 6 representative. Indeed, Mr. Pinto never mentioned 7 Mr. Campollo in the course of the negotiations. 8 According to my perception--I would like to clarify 9 that, according to my perception, Mr. Pinto had been 10 invited to participate by Mr. Jorge Senn. That is 11 what I perceived at that time. 12 But I never found out, I never had knowledge 13 that Mr. Pinto had a relationship with Mr. Campollo, 14 who, of course, I don't know. I have never even seen 15 his photograph. 16 Q. The object of the Squatter Commission was to 17 design a plan to relocate squatters occupying the 18 South Coast railway right-of-way in order to 19 facilitate the rehabilitation of the South Coast 20 railway; correct? 21 A. That is right, correct. 22 Q. Now, the Squatter Commission was needed</p>
<p>PAGE 1632</p> <p style="text-align: right;">1632</p> <p>10:01:08 1 A. Yes. 2 Q. And Mr. Héctor Pinto also served on that 3 Commission; right? 4 A. That is right. 5 Q. And you understood that Mr. Pinto was 6 representing the sugar industry and the Ciudad del Sur 7 project when he was serving on that Commission; 8 correct? 9 A. Yes. Mr. Pinto introduced himself as a 10 representative of the agro industry of the southern 11 coast, particularly of one company. We didn't know 12 Mr. Pinto. We didn't know his background, but he did 13 participate. 14 Q. And you knew that Ciudad del Sur is owned by 15 Mr. Ramon Campollo, didn't you? 16 A. No, I did not know that Ciudad del Sur was a 17 project that was owned by Mr. Ramon Campollo. 18 Mr. Campollo's name wasn't mentioned in the course of 19 the negotiations of the Railway Commission. 20 Q. You know that Mr. Campollo is in the sugar 21 business at his Madre Tierra sugar mill, don't you? 22 A. No, I don't know that. I'm not aware of</p>	<p>PAGE 1634</p> <p style="text-align: right;">1634</p> <p>10:03:36 1 because FEGUA had not promoted or requested the 2 eviction of squatters; isn't that right? 3 A. This is partially incorrect. I can tell you 4 that during my period as Overseer of FEGUA, we carried 5 out at least two massive evictions of squatters who 6 were in the right-of-way, the railroad right-of-way, 7 and there's a record of this in some Press Reports 8 where FEGUA authorities, well, we were accompanied by 9 the national police of Guatemala, by the judge, by the 10 Commission on Human Rights, and even on one or two 11 occasions by Ferrovías attorneys, and we carried out 12 massive evictions of squatters on the South Coast. 13 Those happened, so this means that we were 14 concerned about the squatter issue. Indeed--if I 15 may--indeed, FEGUA had a small office with one person 16 in charge of addressing the issue of the squatters. 17 Q. You were the FEGUA Overseer on September the 18 13th, 2004, weren't you? 19 A. That's right. 20 Q. Didn't FEGUA issue a press release as of that 21 date, admitting that they had not promoted or 22 requested the eviction of squatters?</p>

<p>PAGE 1635</p> <p style="text-align: right;">1635</p> <p>10:05:28 1 A. I don't recall that it was during my term 2 that that happened. 3 Q. Please put up C-76. 4 MR. ORTA: Allen, would you tell us which tab 5 number. 6 MR. FOSTER: Tab 13. 7 BY MR. FOSTER: 8 Q. Now, you, as Overseer, authorized this press 9 release, didn't you? 10 A. No, and I'm going to tell you--I'm recalling 11 this right now--if you notice here, the logo of FEGUA 12 doesn't even appear. This was in keeping with what we 13 realized at the time was an apocryphal publication. 14 It was a publication that was done by a person who had 15 nothing to do with FEGUA. 16 Indeed, you can see my name doesn't appear 17 anywhere. 18 Plus, I recall precisely that this 19 publication took us by surprise; that is to say the 20 staff and officials and officers of FEGUA were taken 21 by surprise. We did not make this publication. 22 Q. So, you're saying it's a fake, basically?</p>	<p>PAGE 1637</p> <p style="text-align: right;">1637</p> <p>10:08:32 1 be able to carry out the evictions. Once the 2 conditions were present--that is to say, and if I 3 could elaborate... 4 Q. I just asked you a simple question, and that 5 was that the plan wasn't implemented, and you answered 6 that it was not, so I think that's adequate. 7 It is true, is it not, Dr. Gramajo, that the 8 reason the plan wasn't implemented is that the 9 Government didn't want to pay or didn't have or didn't 10 want to pay the money that was necessary to build the 11 housing so the squatters could be relocated; isn't 12 that right? 13 A. That is not correct. 14 Q. Well, if--Mr. Valenzuela was the Chairman of 15 that Commission, wasn't he? 16 A. That's right. Mr. Valenzuela, Héctor 17 Valenzuela, was appointed Secretary of that Commission 18 by the Vice Minister Jose Luis Gandara, that's what I 19 recall. 20 Q. And Ms. Mabel Hernández was on that 21 Commission, wasn't she? 22 A. Ms. Mabel Hernández was not someone who I</p>
<p>PAGE 1636</p> <p style="text-align: right;">1636</p> <p>10:07:01 1 A. The publication exists, but it was not 2 published by FEGUA. 3 Q. Okay. Now, regardless, it does say in it 4 that FEGUA has not promoted nor requested eviction of 5 any of the settlement groups that currently occupy the 6 right-of-way; right? 7 A. This's what the press release says. 8 Nonetheless, we didn't publish it. 9 Q. Okay. There were approximately 4,000 10 squatters occupying the South Coast right-of-way, 11 weren't there? 12 A. I don't recall the exact number. 13 Q. The Squatter Commission did develop a plan to 14 remove the squatters and relocate them; correct? 15 A. That is correct. 16 Q. But that plan was never implemented, was it? 17 A. It wasn't implemented in the framework of the 18 project for rehabilitation of the southern railway. 19 We did carry out some evictions of squatters in 20 the--along the railway right-of-way. 21 But in the framework of the Commission's 22 work, there were no evictions. Planning was done to</p>	<p>PAGE 1638</p> <p style="text-align: right;">1638</p> <p>10:09:49 1 knew well. I met her at the meetings of the Railway 2 Commission. 3 Q. So, if they testified to this Tribunal that 4 the reason that the plan was not implemented was 5 because the Government didn't have the money, you just 6 wouldn't agree with that; correct? 7 A. I don't agree. That's not true. 8 Q. Okay. Did FEGUA have the money to build 9 housing for the squatters and remove them? 10 A. No. If I can elaborate to explain my answer. 11 Q. I don't think it needs any elaboration, sir. 12 Let me just ask you another question. 13 Was also a part of the plan that was 14 developed by the Commission that a census would be 15 done of the squatters? 16 A. That's right. 17 Q. And the census was never done either, was it? 18 A. I'd like to clarify because in the context of 19 my statement, one finds the answer to the attorney's 20 concerns. 21 First, I would like to tell you that in 22 effect in the Railway Commission, Mr. Oscar Bautista</p>

<p>PAGE 1639</p> <p style="text-align: right;">1639</p> <p>10:11:20 1 and Ms. Mabel Hernández were invited as consultants.  2 Supposedly they were specialists on the issue of  3 eviction of squatters, and they were contacted to  4 carry out a census. They drew up a census plan which  5 included any number of situations which when they gave  6 us the total price for carrying out the census was  7 extremely high cost, and we, the institutions who were  8 attending, didn't have that.  9       Indeed, I would like to tell you that  10 Mr. Senn, a personal oral comment he made to me was  11 that he considered that it was too costly, too  12 expensive--the census project, that is--as being  13 proposed by Ms. Mabel Hernández and Mr. Oscar  14 Bautista. It was a very high sum--I don't remember  15 exactly how much, but it included purchase of  16 vehicles, purchase of bicycles, and so on and so  17 forth.  18       So, an effort began to find some other  19 option. Initially I asked the Financial Department of  20 FEGUA to indicate to me how much money FEGUA could  21 contribute to such a census, and the finance people  22 told me that we had 150,000 quetzales available, which</p>	<p>PAGE 1641</p> <p style="text-align: right;">1641</p> <p>10:14:26 1 Ferrovías breached Contract 402 by not completing  2 Phase II of the renovation of the railroad; correct?  3       A. Yes.  4       Q. And you also allege or assert that Ferrovías  5 breached that Contract by not beginning and completing  6 Phase III of the railroad rehabilitation; correct?  7       A. That is right.  8       Q. Now, you know, do you not, sir, that FEGUA  9 Overseer Minera wrote to Ferrovías acknowledging that  10 Ferrovías had met its obligations with regard to Phase  11 II, don't you?  12       A. Yes, that is right. I learned of that  13 letter.  14       Q. And you know that he also wrote to Ferrovías  15 stating that it was impossible for Ferrovías to  16 renovate Phase III; correct?  17       A. I don't recall whether it was a communication  18 between Mr. Minera and Ferrovías or if it was a  19 communication between Overseer Sarceno and Ferrovías.  20 In effect--  21       Q. Okay. So, you later became aware of these  22 letters; right?</p>
<p>PAGE 1640</p> <p style="text-align: right;">1640</p> <p>10:13:00 1 was not enough for carrying out the census.  2       So, and this is important, I ordered the  3 FEGUA staff to carry out a census, and the FEGUA staff  4 carried out a census in a space of eight to 10 days,  5 and there's a presentation that showed the results.  6       PRESIDENT RIGO: Excuse me, but I ask once  7 again that you give more concise answers.  8       THE WITNESS: Okay. Thank you.  9       BY MR. FOSTER:  10       Q. You tried to get Ferrovías to put up the  11 money for the census, didn't you?  12       A. No, that's not so.  13       Q. Isn't that when Mr. Senn told you he thought  14 the price was pretty high, when you asked him to put  15 up the money?  16       A. I clarified that I did not ask Mr. Senn for  17 them to put up the money. What I did was to state in  18 the meeting that FEGUA had 150,000 quetzals. We never  19 asked anyone else to put up money.  20       Q. Let's turn to another subject quickly, if we  21 can cover it.  22       In your statement, you have asserted that</p>	<p>PAGE 1642</p> <p style="text-align: right;">1642</p> <p>10:15:59 1       A. Of course.  2       Q. And you did not write Ferrovías revoking  3 those letters or telling Ferrovías that those letters  4 were wrong or anything of the sort, did you?  5       A. I did not write any note to Ferrovías in this  6 regard. Nonetheless, Mr. Jorge Senn sent a note to  7 Vice Minister Roberto Diaz in which he set forth some  8 of Ferrovías's concerns, and I was copied on that  9 letter. Nonetheless, I never received it. Vice  10 Minister Diaz sent me the letter for me to make a  11 comment on it. I sent him a comment on behalf of  12 FEGUA, and we always spoke--well, on several  13 occasions, and in that note it says that Ferrovías, in  14 our view, even though there were letters or  15 communications indicating that Ferrovías had a  16 completed second phase of rehabilitation, in our view,  17 that second phase never was rehabilitated.  18       While it's true that there was a protocolary  19 act which inaugurated the rehabilitation work, the  20 truth--and all of us who have seen the railroad in  21 Guatemala know this--the truth is that nothing,  22 absolutely nothing was ever done in terms of</p>

<p>PAGE 1643</p> <p style="text-align: right;">1643</p> <p>10:17:37 1 rehabilitation in Phase II, except for the small 2 stretch from Chiapas-Mayab--from Chiapas-Mayab, 3 Mexico, to the railroad station in Guatemala. But 4 rehabilitation work, it didn't do any. 5 Q. And rail service was offered on that segment; 6 is that not correct? 7 A. In which segment are you asking me about? 8 Q. The one you were just talking about. Rail 9 service was offered on that segment; is that not 10 correct? 11 A. There were just about 1,500 meters that 12 operated on that segment. The Mexican rail would 13 enter, come in to leave cargo at the Tecún Umán 14 station in Guatemala, but if I elaborate--may I very 15 briefly? 16 It is illogical for a State to grant Usufruct 17 to a country to rehabilitate its entire rail network 18 and for only a small part to have been done and to 19 leave the rest of the right-of-way as idle. 20 PRESIDENT RIGO: Thank you, Mr. Foster. 21 MR. FOSTER: Thank you, sir. If I'm out of 22 time, I'm out of time.</p>	<p>PAGE 1645</p> <p style="text-align: right;">1645</p> <p>10:20:03 1 letters of FEGUA, weren't they? 2 MR. ORTA: Allen, just to help you, you said 3 Phases I and II, and you were asking about Phases II 4 and III. 5 MR. FOSTER: Thank you very much, David. 6 BY MR. FOSTER: 7 Q. The letters concerning Phases II and II that 8 we have just been discussing, those were official 9 letters of FEGUA, weren't they? 10 A. Yes, that is true. 11 Q. And they have to this day never been revoked, 12 have they? 13 A. No, they have not been revoked. 14 Q. Throughout, FEGUA received and accepted the 15 Canon payments pertaining to the railway Equipment 16 Contract; is that not correct? 17 A. Yes, that is right. 18 Q. And in accepting those Canon payments, FEGUA 19 never attached any reservations or said we're 20 accepting them under protest or anything of that sort; 21 isn't that correct? 22 A. I can clarify--</p>
<p>PAGE 1644</p> <p style="text-align: right;">1644</p> <p>10:19:05 1 PRESIDENT RIGO: No, no, I'm saying just 2 continue. 3 MR. FOSTER: Oh, thank you. 4 BY MR. FOSTER: 5 Q. I believe your answer was that rail service 6 was offered on that segment; correct? 7 MR. ORTA: Mischaracterizing his testimony. 8 MR. FOSTER: In that case he didn't answer 9 the question. 10 BY MR. FOSTER: 11 Q. Was rail service offered on that segment, yes 12 or no? 13 MR. ORTA: By whom, Allen? By whom? 14 MR. FOSTER: By Ferrovías through any 15 instrumentality. 16 BY MR. FOSTER: 17 Q. Was rail service offered? 18 A. Yes, there was rail service, but it wasn't 19 provided by Ferrovías. It was provided by another 20 company. 21 Q. The two letters from the two Overseers 22 concerning Phases I and II, those were official</p>	<p>PAGE 1646</p> <p style="text-align: right;">1646</p> <p>10:21:19 1 Q. Just answer my question, please, and then you 2 can clarify. 3 PRESIDENT RIGO: Before clarifying, well, you 4 still haven't said anything that could be clarified, 5 so please give a direct answer to the question, and if 6 after that you need to clarify something, you can 7 clarify it briefly. 8 THE WITNESS: Yes, FEGUA received a Canon 9 payment for use of the rail equipment. 10 BY MR. FOSTER: 11 Q. And when you received that Canon payment, you 12 did not receive it under protest or with reservation 13 or with any Declaration that you were reserving any 14 rights, did you? 15 A. That's right. 16 MR. FOSTER: No further questions, 17 Mr. President. 18 THE WITNESS: May I make a clarification? 19 PRESIDENT RIGO: He has no further questions. 20 So, I think whatever counsel has the right to 21 have a redirect here, and, Mr. Orta. 22 REDIRECT EXAMINATION</p>

<p>PAGE 1647</p> <p style="text-align: right;">1647</p> <p>10:22:30 1 BY MR. ORTA:  2 Q. My first question is: Please clarify  3 whatever it is you wanted to clarify in relation to  4 Mr. Foster's question?  5 A. The question as to why the Canon payment was  6 accepted, is that what you're talking about?  7 Q. Yes. Could you clarify your answer.  8 A. The Canon payment was accepted by FEGUA  9 because there were letters for authorization of use of  10 the railway equipment that had been issued by prior  11 Overseers, and logically Ferrovías was using the  12 railway equipment that was FEGUA's property, and it  13 was illogical for it to use it without making any  14 payment in that respect.  15 But the payment was based on the letters of  16 authorization that had been issued by prior Overseers.  17 Q. Did you ever, yourself, admit one of these  18 letters authorizing the use of the equipment?  19 A. No, I didn't issue any letter because the  20 prior letters were in force.  21 Q. You were asked why you didn't submit Contract  22 143 and 158 to the President for his approval. My</p>	<p>PAGE 1649</p> <p style="text-align: right;">1649</p> <p>10:25:15 1 A. Yes, we did carry out at least two massive  2 evictions. This means--  3 MR. FOSTER: Objection. He's already  4 answered this question.  5 MR. ORTA: Well, this is redirect. I'm  6 allowed to ask him about it. He was shown a press  7 release and cut off in his answer.  8 PRESIDENT RIGO: Of course he should answer.  9 He should finish the answer.  10 THE WITNESS: Okay. Very well, FEGUA carried  11 out at least two massive evictions, and when I say  12 "massive evictions," there were at least two or 300  13 people in the right-of-way, and we did this at certain  14 risk because these people generally could become  15 violent. The FEGUA personnel collaborated in  16 dismantling the precarious homes that had been  17 constructed in the right-of-way.  18 Indeed, FEGUA's attorneys were lawyers were  19 present. Likewise, the judge, the human rights  20 Ombudsman interim at that time, and Ferrovías  21 attorneys, who drew up an Act in this regard.  22 So, we were concerned in my time as Overseer.</p>
<p>PAGE 1648</p> <p style="text-align: right;">1648</p> <p>10:23:59 1 first question is: Were you told by your legal  2 advisers that that Contract was illegal?  3 A. Yes, that is right.  4 Q. Would you have submitted a contract that you  5 were told by your lawyers that it was illegal to the  6 President to be approved?  7 A. I clearly could not present to the President  8 for his approval a contract that was illegal. That  9 was contradictory. I couldn't.  10 Moreover, we must bear in mind that the  11 President of the Republic is an attorney who knows the  12 law, and I could not put myself at risk of making a  13 fool of myself by sending him a contract that was  14 illegal.  15 Q. You were shown a press release that you have  16 testified before this Tribunal was not a press release  17 that was issued by FEGUA. That's document C-76. The  18 subject of the press release was whether or not FEGUA  19 had conducted any evictions of squatters on the  20 right-of-way, and my question is: Did FEGUA conduct  21 any evictions of squatters on the right-of-way while  22 you were FEGUA's Overseer?</p>	<p>PAGE 1650</p> <p style="text-align: right;">1650</p> <p>10:26:32 1 We were concerned about evictions.  2 And as regards this note or this publication  3 in the press, this was not done by FEGUA.  4 Q. You were asked questions about Mr. Campollo  5 and Mr. Pinto. In requesting that the President issue  6 a Lesivo Declaration in relation to Contracts 143 and  7 158, did you in any way whatsoever intend to benefit  8 Mr. Ramon Campollo?  9 A. First of all, I never received any order from  10 a higher level authority to carry out all of the  11 studies that the legal departments did, and the whole  12 process--I never received any order from a higher  13 level authority. I never heard that Mr. Ramon  14 Campollo or, I should say, I was never pressured to  15 favor Mr. Campollo. Indeed, Mr. Campollo was never  16 within the sphere of FEGUA actions. I don't know him.  17 I reiterate, I do not know him. I don't really know  18 who he is. I have never seen him.  19 I deny that any action with respect to the  20 process on lesividad was done to favor Mr. Campollo or  21 any other individual institution. That was not the  22 case.</p>

<p>PAGE 1651</p> <p style="text-align: right;">1651</p> <p>10:28:03 1 Q. Sir, you were asked about a plan that was put 2 together by the Railroad Commission to remove 3 squatters in the right-of-way to the Southern Coast of 4 Guatemala City, and you were asked whether the reason 5 that that plan was not implemented was because the 6 Government didn't have the funds in order to 7 effectuate that plan, and you responded, "no." 8 My question is--bear with me--let me get my 9 question out--my question is, what was the reason, to 10 your understanding, that the squatter plan that was 11 elaborated by the Railroad Commission was not 12 implemented? 13 A. Okay. First of all, I want to tell you that 14 the Railway Commission was a Commission made up of 15 serious Government institutions, and, logically, 16 Ferrovías as well, and, as you mentioned, Mr. Pinto. 17 I'd read in some way that they did not 18 believe that this was a serious activity, and I think 19 that that's not the case. It was a totally serious 20 activity. FEGUA did everything that it had to do to 21 work on developing the Ciudad del Sur project, the 22 rehabilitation project in order for the train to get</p>	<p>PAGE 1653</p> <p style="text-align: right;">1653</p> <p>10:31:27 1 relocate the squatters in the new contracts where 2 definitely they were going to have better living 3 conditions than what they had at the time that we were 4 dealing with the situation. After that they indicated 5 to us--Vice-Minister Gandara indicated that they had 6 already located those 33 million for the eviction and 7 the relocation. 8 The economic issue was always a highly 9 debated one, but we already had a proposal. There was 10 33 million to carry out the eviction and the 11 relocation of those persons. 12 Q. So, to your knowledge, why wasn't that plan 13 effectuated to remove the squatters, if you know? 14 A. In that plan, it was necessary to do Registry 15 work, or to do cadastral work. I don't know how you 16 would say that in English. 17 Q. Property Registry? 18 A. Or land Registry of all of the settlements 19 along the right-of-way. 20 FEGUA did this, and it put the request to the 21 Property Registrar of Guatemala, and it located all of 22 the certifications so as to be able to present them to</p>
<p>PAGE 1652</p> <p style="text-align: right;">1652</p> <p>10:29:33 1 to Ciudad del Sur was 38 miles. 2 The economic question is revolving around 3 this whole situation. Approximately 1,750 families of 4 squatters were identified in the right-of-way from 5 Puerto Quetzal to Santa Lucia, and that was the 6 stretch that was supposedly to be rehabilitated. Of 7 those 1,750, well, they were spread out all throughout 8 that time. 9 Now, the Government institution undertook to 10 seek housing projects to which they could be 11 transferred. Three places were identified, one in 12 Puerto San Jose, another near Escuintla, and the other 13 in the proximity of Santa Lucia. Representatives of 14 the Commission spoke with the owners of the projects 15 and established a price that could be negotiable. 16 Then it was necessary to contact the 17 squatters' leaders. At a meeting of the Railway 18 Commission, Vice-Minister Gandara and Mr. Hector 19 Valenzuela indicated that they had gone to a meeting 20 with the squatters and that they had convinced them to 21 be relocated. After that, it was established that 22 approximately 33 million quetzales would be needed to</p>	<p>PAGE 1654</p> <p style="text-align: right;">1654</p> <p>10:33:06 1 the judge. The judge was identified, and it was even 2 thought that one could use a helicopter for the judge 3 to examine the entire invaded right-of-way and for him 4 to--and then the request for eviction was to be drawn 5 up. 6 The Minister of Communications sent an 7 attorney, but with the last name Bravati (ph.), who 8 was a specialist on evictions. 9 We were working in this phase, and let me 10 tell you that to this end Ferrovías helped with 11 Mr. Héctor Tortola, who owned with a company that took 12 aerial pictures, and we had the information all ready 13 for the Registry of all the property-- 14 Q. I apology, but the Tribunal may have some 15 questions for you, and we need to break. If you don't 16 know the answer to the question, then that's fine. 17 But the question is just, to your knowledge, why did 18 the Commission not proceed with the eviction of the 19 squatter plan? That's the main issue that if you 20 could just answer. 21 A. Supposedly, Mr. Héctor Pinto was the 22 representative of the investors, and when we were</p>

<p>PAGE 1655</p> <p style="text-align: right;">1655</p> <p>10:34:32 1 already working on this plan, all of a sudden, I  2 understand that--I don't know if it was Mr. Valenzuela  3 or the Minister received a note indicating that no  4 agreement had been reached with Ferrovías for the  5 railway project. And since there was no agreement  6 with Ferrovías, the investors would be withdrawing  7 from the table.  8 And given the situation, we thought it was  9 not appropriate to continue with the eviction plan  10 because if there was no railway rehabilitation in the  11 short term--that is to say, right after the eviction  12 the lands were going to be taken again, and that was  13 the reason why the project was stalled.  14 Q. Thank you, sir.  15 MR. ORTA: I have no further questions.  16 QUESTIONS FROM THE TRIBUNAL  17 ARBITRATOR CRAWFORD: Mr. Gramajo, you said  18 that you carried out some evictions--not the big ones  19 that we were just talking about, but some other  20 evictions. When were they?  21 THE WITNESS: I don't remember the dates, but  22 I do remember that they were published in the</p>	<p>PAGE 1657</p> <p style="text-align: right;">1657</p> <p>10:37:39 1 are paid salaries by using the vehicles that belong to  2 FEGUA. The national police got to that place through  3 their own means, and the same applied to the lawyers  4 of FEGUA. It wasn't a major expense.  5 ARBITRATOR CRAWFORD: You said later on that  6 there were expenses involved in the relocation of the  7 squatters because they had to have somewhere to go.  8 What happened on this occasion in terms of those  9 expenses?  10 THE WITNESS: In this case there were no  11 expenses because it was quite a recent taking, and we  12 hadn't thought of the relocation in the placement of  13 these squatters somewhere else. We knew that these  14 people were coming from a nearby town, and we carried  15 out the eviction without further problems, and there  16 were no extra expenses.  17 ARBITRATOR CRAWFORD: Thank you.  18 ARBITRATOR EIZENSTAT: Dr. Gramajo, I'd like  19 to sort of take us back to basics, if I may.  20 My understanding, and I want to see if it is  21 yours, is that prior to your assuming your position as  22 Overseer, there had been a contract numbered 41. And</p>
<p>PAGE 1656</p> <p style="text-align: right;">1656</p> <p>10:36:22 1 Guatemalan newspapers because that is an interesting  2 piece of news in Guatemala. When we have evictions of  3 this sort, in general the eviction of squatters  4 usually lead to problems and some sort of violence  5 because the police is acting, et cetera, et cetera.  6 So, we were lucky in the sense that we had  7 police officials from several departments of  8 Guatemala, and the Police Chief was very conscience,  9 and he obtained these evictions without any sort of  10 violence.  11 ARBITRATOR CRAWFORD: So, if we know that  12 they were not violent, but we don't know when they  13 were?  14 THE WITNESS: I don't remember the dates. We  15 had two, but I don't remember the dates.  16 ARBITRATOR CRAWFORD: What sort of funding  17 was put into the relocation of the squatters on those  18 occasions? How much money was spent?  19 THE WITNESS: Are you asking me how much  20 money FEGUA spent?  21 ARBITRATOR CRAWFORD: Yes.  22 THE WITNESS: FEGUA took their workers, who</p>	<p>PAGE 1658</p> <p style="text-align: right;">1658</p> <p>10:39:16 1 when you did the review, you, I think, found, but  2 please tell me. That that contract never came into  3 force; is that correct, as you were reviewing these  4 past contracts?  5 THE WITNESS: That is correct. Contract 41  6 was the very first one for the Usufruct of the railway  7 equipment, and that contract included as one of the  8 clauses that it had to be approved by Government  9 Agreement. And since there was no Government  10 Agreement for the approval, the Parties decided to  11 draft a new agreement, and this Contract was  12 considered terminated.  13 ARBITRATOR EIZENSTAT: If you could turn,  14 please, to your First Statement, Paragraph 11, we have  15 been told by an employee, a senior employee of FEGUA  16 that up to 2000, when the then-President was about to  17 leave office, that he both wrote letters to and  18 personally came to the Office of the President to try  19 to obtain executive approval for that contract. Do  20 you have any knowledge of that?  21 THE WITNESS: No, I don't. I didn't--I  22 wasn't aware of that.</p>

<p>PAGE 1659</p> <p style="text-align: right;">1659</p> <p>10:41:14 1 ARBITRATOR EIZENSTAT: Would it surprise you  2 to know that that is what we were told?  3 THE WITNESS: Yes, it is surprising. I  4 didn't--I wasn't aware of this before.  5 ARBITRATOR EIZENSTAT: In your review of the  6 previous contracts, did you understand that Contract  7 41 had been let for a bid, that there was a bid on 41?  8 THE WITNESS: That is correct.  9 ARBITRATOR EIZENSTAT: And Contract 143 and  10 then later in the same year, in 2003, Contract 158,  11 were not submitted to a bid, as I understand it. Is  12 that correct?  13 THE WITNESS: That is correct. However,  14 Contract 143 refers to the Bidding Terms of Contract  15 41, but there was no bidding process.  16 ARBITRATOR EIZENSTAT: It was your view then  17 at that time that there was no need for another bid  18 since it already referred to Contract 41 which had had  19 a bid, and it was simply a successor agreement  20 incorporating many of the terms of 41?  21 THE WITNESS: No. We thought, based on our  22 conversations with the lawyers, that Contract 143 and</p>	<p>PAGE 1661</p> <p style="text-align: right;">1661</p> <p>10:44:19 1 who did not have the authority to do so."  2 Which contractor are you referring to there,  3 and who was the former Overseer?  4 THE WITNESS: This is referring to Contract  5 143 and 148--and 158, and the Overseer that signed  6 this contract was Mr. Hugo Sarceno.  7 ARBITRATOR EIZENSTAT: You're saying here,  8 and I just want to understand, that Mr. Sarceno, who  9 was the Overseer of FEGUA, signed the Contracts, but  10 you and perhaps your legal department determined that  11 he signed those improperly? Is that what you're  12 saying here?  13 THE WITNESS: That is correct.  14 ARBITRATOR EIZENSTAT: And in your  15 discussions with Ferrovías, did you say to them  16 explicitly that it had been an error for your  17 predecessor, Mr. Sarceno, to have signed these and,  18 therefore, you needed to rectify that particular  19 defect by getting the President to sign or by amending  20 the Contract? On that specific issue, just on that  21 issue.  22 THE WITNESS: Yes. In the discussions we had</p>
<p>PAGE 1660</p> <p style="text-align: right;">1660</p> <p>10:42:52 1 expansion 158 had legal defects. We could not tie  2 them to the Bidding Terms for Contract 41 that had  3 been held several years ago; therefore, we could not  4 attach that to that bidding process, and we thought  5 that the Contract had legal deficiencies. We could  6 even say that it was illegal based on the Opinion of  7 the lawyers.  8 ARBITRATOR EIZENSTAT: But there were then  9 two subsequent contracts dealing with the equipment of  10 41; correct? There was 143, and then later in the  11 year 158; is that correct?  12 THE WITNESS: Yes, but I'm saying is that the  13 contracts had deficiencies. That is, 143 and 158, and  14 Contracts 143 and 148 (sic) could not be linked to the  15 Bidding Terms for a contract that had been carried out  16 years ago. There was 41. But in Contract 143,  17 reference is made to the Bidding Terms which is not  18 correct.  19 ARBITRATOR EIZENSTAT: I would like to refer  20 you back again to Paragraph 11. You say in the last  21 sentence of that paragraph, "This meant that the  22 Contract had been signed by FEGUA's former Overseer,</p>	<p>PAGE 1662</p> <p style="text-align: right;">1662</p> <p>10:45:49 1 with Ferrovías, we did mention that it was fundamental  2 to draft a new contract, establishing that the  3 Contract had to be authorized by the President of the  4 Republic. It was one of the negotiation items that we  5 included for the drafting of a new contract.  6 ARBITRATOR EIZENSTAT: Do you have a copy or  7 perhaps your counsel would have a copy of the Draft  8 Agreement you referred to? Would you be good enough--  9 MR. ORTA: Just to clarify for the record,  10 and just a misstatement, we are not representing  11 Mr.--you said your counsel.  12 ARBITRATOR EIZENSTAT: Counsel for.  13 MR. ORTA: R-50, R-51, and R-80 are the  14 documents. R-50, R-51, and R-80.  15 Are they in those binders? I don't know. I  16 didn't put those binders together.  17 ARBITRATOR EIZENSTAT: I have it in is this  18 one here.  19 MR. ORTA: If you would like, we can put them  20 up on the screen, if you have questions about them.  21 ARBITRATOR EIZENSTAT: What I would ask, and  22 perhaps counsel knows these documents better than we</p>

<p>PAGE 1663</p> <p style="text-align: right;">1663</p> <p>10:47:10 1 do so that we don't have them reading every document,  2 but what I would like to know is if you could look at,  3 let's start with 50, I suppose--that's the first--and  4 would you be good enough to show us where in the Draft  5 Agreement you sought to remedy the lack of both a bid  6 and executive approval.  7 MR. ORTA: Mr. Eizenstat, if I could, just to  8 move the process along, if I could describe briefly  9 what the documents are.  10 ARBITRATOR EIZENSTAT: Yes, that would be  11 useful.  12 MR. ORTA: As I understand it, R-50, which is  13 the document that's up on the screen, is a draft that  14 was sent by counsel for Ferrovias to FEGUA, and then  15 R-51 and R-80 are drafts that went back and forth, I  16 believe, from FEGUA to--  17 ARBITRATOR EIZENSTAT: Thank you.  18 MR. ORTA: So, this draft was not prepared or  19 commented on by FEGUA. It was received by FEGUA, is  20 what we understand from the face of the document and  21 the e-mail.  22 ARBITRATOR EIZENSTAT: Okay. Perhaps it</p>	<p>PAGE 1665</p> <p style="text-align: right;">1665</p> <p>10:52:09 1 need for Executive approval, would you be good enough  2 to help the Tribunal by showing us where in this  3 proposal those are referenced.  4 I see on page, just to help out, this is the  5 first time I've had the pleasure of reading this, but  6 on Page 5, at least in the English version, it says  7 the Contract shall be approved by Executive  8 Resolution.  9 MR. ORTA: Secretary Eizenstat, if you would  10 like my input, I can give it--  11 ARBITRATOR EIZENSTAT: All right.  12 MR. ORTA: Okay, I'm sorry. It's Clause 6 of  13 the Draft Agreement, Clause 6.  14 ARBITRATOR EIZENSTAT: Please, if you  15 refer--this may be one, but I'm simple asking you,  16 these are FEGUA documents. Please tell us where you  17 were seeking to change the Agreement or rectify the  18 two errors that were the basis for lesivo which was  19 the lack of a bidding process, and the need for  20 executive approval. Just please help the Tribunal by  21 showing us where those are here.  22 THE WITNESS: It says six, term of the</p>
<p>PAGE 1664</p> <p style="text-align: right;">1664</p> <p>10:48:26 1 would be more useful, then, to look at the documents  2 that you sent back since that is something that was  3 prepared presumably under your control.  4 MR. ORTA: R-51 would be one of them.  5 ARBITRATOR EIZENSTAT: So, would you be good  6 enough to look at the document that's been referred to  7 as R-51, and if you could illuminate what specific  8 defects you were trying to correct in the original  9 Contract, please, and in particular the Presidential  10 approval and the bidding.  11 THE WITNESS: May I have a copy of the  12 document?  13 MR. ORTA: Again, the copy that we have has  14 some highlighting. It's our copy.  15 I think we have a clean copy for the witness.  16 THE WITNESS: I need a document with a larger  17 font.  18 (Witness reviews document.)  19 ARBITRATOR EIZENSTAT: Would you be good  20 enough to refer us to the particular provisions that  21 dealt with the defects that were ultimately the  22 subject of lesivo, the lack of public funding, and the</p>	<p>PAGE 1666</p> <p style="text-align: right;">1666</p> <p>10:55:27 1 Contract. The term of the Contract is, and the number  2 of years is not readable, and then in between  3 parentheses it says, "In connection with the term of  4 the Contract, this shall be counted so that the term  5 is the same as the one applied to Contract 402, which  6 shall be effective 30 days after the publication in  7 the Official Gazette of the Guatemalan Government, and  8 this agreement shall take effect upon the signing of  9 the instrument."  10 Once again--  11 ARBITRATOR EIZENSTAT: Sir, please, I'm  12 sorry. I just asked you a very simple question.  13 Please refer the Tribunal to the specific references  14 that would correct the defects on the bidding process  15 and on Executive approval, not the duration, but just  16 those defects.  17 THE WITNESS: An important comment is that  18 this is the draft of the Preliminary Agreement, and  19 some of the concerns by FEGUA are included here. It  20 says, "duration of the Contract which shall begin 30  21 days after the publication of the Executive Resolution  22 approving this agreement in the official gazettes of</p>

<p>PAGE 1667</p> <p style="text-align: right;">1667</p> <p>10:57:02 1 the Guatemalan Government."  2 ARBITRATOR EIZENSTAT: Okay, and how about  3 the need for a re-bid? Is that referenced in here?  4 THE WITNESS: On Page 4, there is handwritten  5 text by the counsel for FEGUA, and she emphasizes the  6 Bidding Terms.  7 ARBITRATOR EIZENSTAT: Are you saying that  8 this called for a re-bid?  9 THE WITNESS: We consider that that was one  10 of the conditions that had to be met according to the  11 attorneys.  12 ARBITRATOR EIZENSTAT: I thought you answered  13 Mr. Foster when he asked about a re-bid, saying--he  14 asked you why you didn't re-bid, and you said because  15 there might be other bidders that came in. Am I  16 incorrect in remembering that?  17 THE WITNESS: That was not the intent behind  18 my statement. What I said is that based on the  19 Opinion of the counsel, this type of Contract has to  20 have its own Bidding Terms. And since the intent was  21 to have a new contract for the Usufruct of the railway  22 equipment, the attorneys are telling us that we need</p>	<p>PAGE 1669</p> <p style="text-align: right;">1669</p> <p>11:00:57 1 necessarily going to be the final document. We put  2 forth proposals that we felt should be put forth, and  3 we received the counterproposals by Ferrovías. This  4 is not the final agreement. This is a draft Contract.  5 ARBITRATOR EIZENSTAT: But is it the case  6 that in the context of this new contract you were  7 seeking, you were trying to reach a more comprehensive  8 agreement with Ferrovías that dealt with a whole range  9 of issues, including the terms of Canon payments and  10 other issues that went beyond the specific need that  11 you saw for executive approval and for a bid, that you  12 were seeking a more comprehensive agreement?  13 THE WITNESS: That is correct. We were  14 trying to prepare a contract that met the expectations  15 of FEGUA and of Ferrovías. The intention was at all  16 times to negotiate so that both Parties could agree as  17 to the language included in the Contract. That is why  18 we put forth proposals and Ferrovías also put forth  19 proposals. This was an agreement that had more  20 comprehensive proposals, but this was a Draft  21 Agreement. Like I said, we were open to any  22 suggestion, to any proposal by Ferrovías.</p>
<p>PAGE 1668</p> <p style="text-align: right;">1668</p> <p>10:59:07 1 to have Bidding Terms based on the law, and that is  2 the legal advice; therefore, it was necessary to have  3 Bidding Terms, specific Bidding Terms, for the new  4 contract.  5 ARBITRATOR EIZENSTAT: This draft seems to  6 include things that go beyond the Bidding Terms and  7 Executive approval. For example, in--sorry. Again,  8 it looks like Paragraph 6, the one with duration.  9 There's a reference to the amount of 1.25 percent of  10 net freight turnover.  11 MR. ORTA: Secretary Eizenstat, I believe  12 that's in Paragraph 7.  13 ARBITRATOR EIZENSTAT: Thank you very much.  14 So, are there certain terms in here that go  15 beyond including this, the basis for lesividad, which  16 was the absence of a bidding process and the absence  17 of Presidential approval?  18 THE WITNESS: There's an important issue  19 which is the fact that this is a Draft Contract. This  20 was being negotiated with Ferrovías's lawyers. These  21 were proposals that we were putting forth, and we  22 received proposals in return. This was not</p>	<p>PAGE 1670</p> <p style="text-align: right;">1670</p> <p>11:02:40 1 And I understand that they as well wanted to  2 receive our proposals.  3 ARBITRATOR EIZENSTAT: If you would refer to  4 Paragraph 43 of your first statement, I think that  5 reinforces this point, but I just want to make sure  6 that I fully understand it.  7 THE WITNESS: What paragraph?  8 ARBITRATOR EIZENSTAT: Paragraph 43, please.  9 Now this is, of course, dealing with  10 discussions after lesividad, not before, and here you  11 mentioned the need to negotiate a comprehensive  12 agreement aimed not only at rectifying the  13 aforementioned contracts, legal defects, but also at  14 approving relations between Ferrovías and FEGUA. Am I  15 reading that correctly?  16 THE WITNESS: Let's see, sir, counselor.  17 This makes reference to the meeting we had before the  18 Declaration of Lesividad was issued.  19 Please repeat the question, if you will.  20 ARBITRATOR EIZENSTAT: Okay. For you let me  21 try to encapsulate it.  22 Both before lesividad was declared and after</p>

<p>PAGE 1671</p> <p style="text-align: right;">1671</p> <p>11:04:32 1 lesividad was declared, was FEGUA and the Government  2 trying to reach a comprehensive new agreement with  3 Ferrovías that went beyond the legal defects and dealt  4 with other concerns that the Government had?  5 THE WITNESS: That is correct. We held  6 meetings, negotiation meetings, before and after the  7 Declaration of Lesividad was issued and published.  8 It is true we discussed other proposals both  9 by FEGUA and by Ferrovías.  10 ARBITRATOR EIZENSTAT: Might it not have been  11 easier, at least in retrospect, to simply cure the  12 specific defects that were identified with respect to  13 143 and 158 rather than tying them in to a broader,  14 more comprehensive renegotiation?  15 THE WITNESS: What we had to renegotiate was  16 143. 143 was an illegal Contract, and a new contract  17 had to be entered into. Since we were not able to  18 reach an agreement in connection with the new Draft  19 Contract and prepare a new Railway Equipment Agreement  20 and we did not reach an agreement with Ferrovías, we  21 considered that the Contract was illegal.  22 So, this situation did not have to do with</p>	<p>PAGE 1673</p> <p style="text-align: right;">1673</p> <p>11:07:36 1 lawful railway operation?  2 THE WITNESS: Because we were not able to  3 reach an agreement with Ferrovías. We tried on  4 several occasions and meetings to reach an agreement  5 with them, but we were not able to reach an agreement.  6 We were unable to do that.  7 ARBITRATOR CRAWFORD: If you said to  8 Ferrovías, "Okay, we've discovered some legal problems  9 with this--with the existing Contract: First, it  10 hasn't been ratified by the Executive Decree; and,  11 second, although there was a bid process, it didn't  12 relate to this Contract. Now, we propose to fix those  13 two points up." Ferrovías would have agreed to that,  14 surely.  15 THE WITNESS: Probably it would have agreed,  16 and those were the proposals that we put forth. We  17 wanted to make the situation--some situations more lax  18 in favor of Ferrovías. If you look at the meetings  19 after the lesividad, we see a series of flexible  20 attitudes both on the part of the Government and of  21 Ferrovías. We tried to do what you are saying, but no  22 agreement was reached. There was no final agreement</p>
<p>PAGE 1672</p> <p style="text-align: right;">1672</p> <p>11:06:23 1 just amending 143. We were looking at preparing a new  2 railway Equipment Contract without the irregularities  3 that had been identified.  4 ARBITRATOR CRAWFORD: Could I try on this?  5 ARBITRATOR EIZENSTAT: Yes.  6 ARBITRATOR CRAWFORD: Could I try and ask  7 that question again because I don't think you quite  8 understood, if I may say so, the points of Secretary  9 Eizenstat's question.  10 There were two deficiencies in the original  11 Contract which made it illegal.  12 THE WITNESS: Yes.  13 ARBITRATOR CRAWFORD: Now, it's one thing to  14 have a new contract which rectifies those  15 deficiencies. It's another thing to have a new  16 contract that completely renegotiates the terms on  17 which the enterprise is going to carry out its  18 business. Why didn't you do the first? Why did you  19 insist on the second? Why didn't you just stick to a  20 contract which just dealt with--a new contract which  21 just dealt with the two points of deficiency and leave  22 the rest to be sorted out later on in the context of a</p>	<p>PAGE 1674</p> <p style="text-align: right;">1674</p> <p>11:09:08 1 in spite of the fact that a number of options were  2 laid on the table to try and reach an agreement. The  3 Agreement was never reached.  4 ARBITRATOR EIZENSTAT: I understand. Well,  5 first of all, now we know why he's a Professor and I'm  6 just a Secretary because he could certainly more  7 accurately state things, but it seems to me that the  8 reason that there wasn't an agreement, and this is not  9 saying there is fault on either side, is because a  10 whole range of issues that went beyond the bidding and  11 the executive approval were being negotiated. Is that  12 not the case?  13 THE WITNESS: When it comes to the lesivo  14 nature of the Contract, we didn't really tie into any  15 other agreement to this. We only worked with the  16 Contract of Usufruct of Railway Equipment. Although  17 it's true there were other aspects that we wanted to  18 negotiate, well, everything was centered, however, on  19 the Railway Equipment Contract.  20 ARBITRATOR EIZENSTAT: Between 2003 when 143  21 and 158 were signed by Mr. Sarceno and Ferrovías in  22 2006, was there the ability of Ferrovías to use</p>

<p>PAGE 1675</p> <p style="text-align: right;">1675</p> <p>11:10:46 1 equipment pursuant to 143 and 158, notwithstanding the 2 legal defects that you mentioned? 3 THE WITNESS: Ferrovías was using the railway 4 equipment, but not on the basis of 143 and 158. 5 Ferrovías had a letter that authorized it to use their 6 railroad equipment which was issued by an Overseer 7 before me. So, Ferrovías used the railway equipment 8 on the basis of an authorization issued out of a 9 former Overseer. 10 ARBITRATOR EIZENSTAT: Now, you have said 11 already that that former Overseer did not have the 12 authority to sign the Agreement. Do you feel that 13 these letters of authorization by him are also 14 inappropriate? 15 THE WITNESS: You say lack what exactly? 16 ARBITRATOR EIZENSTAT: You had already said 17 that Mr. Sarceno signed the agreements but didn't have 18 the authority to do so, so I'm asking now, since they 19 were using equipment, in your testimony, pursuant to 20 letters of authorization, were those letters of 21 authorization from Mr. Sarceno or subsequent Overseers 22 before you came?</p>	<p>PAGE 1677</p> <p style="text-align: right;">1677</p> <p>11:13:56 1 identified, well, what that showed was the goodwill of 2 the officers of FEGUA at the time, the goodwill that 3 they had not to block the use of the railway equipment 4 by Ferrovías. This was evidence of good faith in my 5 opinion and of cordial relations because they 6 authorized them to use their railway equipment. 7 ARBITRATOR EIZENSTAT: Just a couple more 8 questions, thank you. Just a couple more questions. 9 (Tribunal conferring.) 10 ARBITRATOR EIZENSTAT: I think the President 11 would prefer that we take a short break now, and I 12 will be at his pleasure. 13 PRESIDENT RIGO: Since we have been going on 14 for more than two hours, and also in deference to the 15 Court Reporters and the interpreters, we will have a 16 break now, and we will reconvene at 11:30. 17 And the witness should not be approached by 18 either side. Thank you. 19 MR. ORTA: Thank you, Mr. Chairman. 20 (Brief recess.) 21 PRESIDENT RIGO: We are going to continue 22 this session this morning.</p>
<p>PAGE 1676</p> <p style="text-align: right;">1676</p> <p>11:12:35 1 THE WITNESS: Yes. These were authorizations 2 that allowed Ferrovías to use the railway equipment. 3 They were not Contracts. They were just authorization 4 letters. 5 ARBITRATOR EIZENSTAT: By whom? 6 THE WITNESS: By the former Overseers. I 7 wasn't involved in the issue because I did not issue 8 any of those letters. 9 ARBITRATOR EIZENSTAT: Were there more than 10 one of your predecessors who issued those letters of 11 authorization? 12 THE WITNESS: As far as I understand, yes. I 13 understand that Mr. Andreas Porras, and I don't 14 exactly remember whether Eddy Minera also did. There 15 were authorization letters before my tenure in FEGUA. 16 ARBITRATOR EIZENSTAT: Do you think that that 17 was inappropriate, as you look at it from your 18 perspective, that they shouldn't have given those 19 letters of authorization? 20 THE WITNESS: I don't think it was improper. 21 I think it was a matter that had to do with the fact 22 that, well, if a contract had problems that had been</p>	<p>PAGE 1678</p> <p style="text-align: right;">1678</p> <p>11:32:01 1 MR. ORTA: Thank you. 2 PRESIDENT RIGO: Secretary Eizenstat had a 3 number of questions. 4 ARBITRATOR EIZENSTAT: Thank you. 5 As I understand it, the term "Lesivo" means 6 that something is contrary to the interest of the 7 State. Is that an appropriate understanding? Or 8 perhaps if it's not, you might give me an 9 understanding of what this term means? 10 THE WITNESS: As one who is not an attorney, 11 I understand that Lesivo is something that is against 12 the interests of something or someone; in this case, 13 the Guatemalan State. I could not give you any legal 14 detail because I'm not an attorney. 15 ARBITRATOR EIZENSTAT: Do you consider it, 16 from your perspective, as having been at the time the 17 Overseer of FEGUA to be a consequential, an important 18 decision to declare something Lesividad? 19 THE WITNESS: Yes, it is important because 20 one is carrying out the law, to begin with, and in 21 addition because it makes it possible for there to 22 be--well, how could I say it? It makes it possible</p>

<p>PAGE 1679</p> <p style="text-align: right;">1679</p> <p>11:33:54 1 for others to learn or to find that in Guatemala it's  2 also possible to respect the law and that one should  3 respect the law.  4 I do think that it is very important,  5 Declaration of Lesividad of this sort because it's an  6 important matter for the country.  7 ARBITRATOR EIZENSTAT: Did you or your  8 attorneys ever consider any other options to cure the  9 specific defects--that is, the absence of bid and the  10 absence of executive approval--for example, going into  11 Court for breach of contract or anything that was  12 perhaps less consequential than a Lesivo Declaration?  13 THE WITNESS: Let's recall that initially the  14 Opinions issued by the Office of the Attorney General  15 were already telling us that the Contract was Lesivo.  16 If the Office of the Attorney General indicates to us  17 that a Contract is Lesivo, then we have to follow the  18 process. We cannot go back and make some other  19 arrangement because there's already an opinion that is  20 telling us that there is Lesividad before going to  21 seek Declaration of Lesividad from the President of  22 the Republic.</p>	<p>PAGE 1681</p> <p style="text-align: right;">1681</p> <p>11:37:07 1 validity of the Contracts when you determined that  2 negotiations were not succeeding, rather than take the  3 step of Lesividad?  4 THE WITNESS: Yes, we had some meetings, and  5 we did have discussions on this. Nonetheless, since  6 the attorneys indicated to us that if we found any  7 defect in any of the contracts, our obligation was to  8 seek the Opinion of the Attorney General of the  9 Nation, and that is why we did that.  10 Nonetheless, it is quite clear that before  11 anything else we sat down to negotiate with Ferrovías  12 to try to cure these problems. No agreement was  13 reached.  14 ARBITRATOR EIZENSTAT: I understand that  15 Ferrovías initiated some local arbitrations. Did  16 FEGUA, on any of the issues here, initiate a local  17 arbitration?  18 THE WITNESS: I don't remember exactly.  19 Nonetheless, this whole context is not related to the  20 problem of 143. This is a problem that we were  21 dealing with specifically. I don't recall exactly  22 whether arbitration was begun. I believe that</p>
<p>PAGE 1680</p> <p style="text-align: right;">1680</p> <p>11:35:28 1 ARBITRATOR EIZENSTAT: And your Second  2 Statement, Mr. Gramajo, Paragraph Number 6, please.  3 You mentioned there, I believe, that instead of  4 initiating legal actions to challenge the validity of  5 Equipment Usufruct Contract 143/158, FEGUA tried to  6 carry out negotiations in good faith in an attempt to  7 rectify legal defects. Am I reading that correctly?  8 THE WITNESS: Yes, that's right.  9 ARBITRATOR EIZENSTAT: So, was there a  10 consideration given to legal actions to challenge the  11 validity of the Contract? Rather than a Declaration  12 of Lesividad?  13 THE WITNESS: Could you please repeat the  14 question so that I can be sure I'm understanding the  15 context?  16 ARBITRATOR EIZENSTAT: Yes, sir.  17 This mentions that instead of taking legal  18 action to challenge the validity of these contracts,  19 you tried to carry out negotiations to rectify them,  20 and I'm asking, given what you've said here, were  21 there discussions that you had with your Legal  22 Department or with others at FEGUA to challenge the</p>	<p>PAGE 1682</p> <p style="text-align: right;">1682</p> <p>11:38:44 1 arbitration was begun before the Arbitration Centre of  2 the Chamber of Commerce based on--well, I don't  3 remember very well if it was Contract 402, but I don't  4 remember exactly.  5 ARBITRATOR EIZENSTAT: Okay. If you would  6 look at your First Statement, Paragraph 16 and 17.  7 This seems to reference a letter of April 12, 2005, as  8 to the Legal Coordinator of the Minister of  9 Communications talking about issues in dispute with  10 Ferrovías, and in particular the legal defects in the  11 Usufruct Contract. Is that your understanding of what  12 this letter was about?  13 THE WITNESS: Yes.  14 ARBITRATOR EIZENSTAT: Then in Paragraph 17,  15 it appears that there were a number of communications  16 with Ferrovías, which again seem to go beyond the  17 issue of a re-bid and executive approval to include  18 nonfulfillment of the railway refurbishing plan,  19 issues related to the Trust Contract.  20 So, you were seeking here a sort of global  21 comprehensive agreement, as I understand it; is that a  22 fair characterization of what you're saying here?</p>

<p>PAGE 1683</p> <p style="text-align: right;">1683</p> <p>11:40:39 1 THE WITNESS: No, that is not the case.  2 While it's true that we had some conversations with  3 the Legal Department of the Ministry of  4 Communications, in those conversations different  5 topics were touched upon, but the question of the  6 Railway Equipment Contract was a very well-defined  7 issue that did not affect the other issues that we  8 were discussing.  9 Logically, when we went to the Ministry of  10 Communications, we would talk about all of the  11 problems, including noncontractual problems that FEGUA  12 might have, but the issue of the Usufruct Contract for  13 the Rail Equipment was a specific issue, and it was  14 treated specifically.  15 Logically, in the context of the  16 conversations that were held, other issues were also  17 discussed, but each one was addressed specifically.  18 ARBITRATOR EIZENSTAT: Let me close with  19 trying to better understand this issue of executive  20 approval. We have a term here after a famous book,  21 Catch-22. I don't know if you've ever heard of that,  22 but it's an English-American term perhaps, but it</p>	<p>PAGE 1685</p> <p style="text-align: right;">1685</p> <p>11:43:26 1 the ones who prepared the text. That is the  2 information that I have. Of course, I wasn't there,  3 but according to what I've been told by the lawyers,  4 these texts were drawn up by the lawyers for  5 Ferrovías.  6 ARBITRATOR EIZENSTAT: So the lawyers from  7 Ferrovías drafted three defective contracts, and yet  8 they were the ones who then came to you and said  9 they're defective, and we have to change them; am I  10 missing something?  11 THE WITNESS: That is correct. It is my  12 understanding that they were the ones who drafted the  13 contracts; and, nonetheless subsequently, they,  14 themselves, tried to have--make contact in order to  15 draw up a new Usufruct Contract.  16 ARBITRATOR EIZENSTAT: So, they made the  17 mistake three times and then they came back and said  18 we realized we made a mistake three times, and this  19 Contract is going to be Lesivo unless we correct our  20 own mistake? Is that a fair way of putting it?  21 THE WITNESS: I think that in the case of  22 Contract 41 the only thing missing was authorization</p>
<p>PAGE 1684</p> <p style="text-align: right;">1684</p> <p>11:42:04 1 seems to me that you had a situation, as laid out in  2 your letter of January 13, 2006 to which you've  3 already referred, in which first you had Contract 41  4 which did not have executive approval, so it was  5 abandoned, or it didn't go into legal effect; correct?  6 THE WITNESS: That is right.  7 ARBITRATOR EIZENSTAT: Then you have 143 you  8 tried again, 143 and 158, and it didn't have--it  9 wasn't written to require executive approval. You  10 said several times it expressly did not require that;  11 is that correct?  12 THE WITNESS: That is right, even though it  13 should have been an essential requirement given the  14 type of contract. In the Contract it said, in the  15 text, that approval by the highest level of authority  16 was not necessary.  17 ARBITRATOR EIZENSTAT: So who is drafting  18 these contracts? 41, 143, 158? Who was drafting  19 them? Under whose supervision? Was it FEGUA that was  20 doing it or the Ministry of Communications?  21 THE WITNESS: As I understand it, the ones  22 who drafted the Contracts were the Ferrovías lawyers,</p>	<p>PAGE 1686</p> <p style="text-align: right;">1686</p> <p>11:44:57 1 by the President of the Republic. I don't know why it  2 wasn't approved. Nonetheless, in Contract 143 and  3 158, the Contract was drawn up inadequately with the  4 defects which subsequently were sought to be cured by  5 drawing up a new contract.  6 So, from the outset, in my view--I'm not an  7 attorney--and based on the information that our  8 attorneys told me, Contracts 143 and 158 were drawn up  9 with a substantial error or material error, and that  10 is why for us they were illegal contracts.  11 ARBITRATOR EIZENSTAT: But did you ever ask  12 those attorneys if they had now determined that this  13 was so serious an error as to declare Lesividad, why  14 they had made the mistake in drafting the contracts  15 themselves without this?  16 THE WITNESS: Logically, I didn't have such  17 fluid communication with the Ferrovías lawyers to ask  18 them this.  19 ARBITRATOR EIZENSTAT: Not Ferrovías'  20 lawyers. Your own lawyers. They're the ones that  21 drafted the Contract. Did you say to them, why are  22 you now saying that we need executive approval when</p>

<p>PAGE 1687</p> <p style="text-align: right;">1687</p> <p>11:46:22 1 you drafted contracts which didn't require that?  2 THE WITNESS: It is my understanding that  3 Contract 143--it's my understanding that Contract 143  4 and 158 were not drawn up by FEGUA's lawyers, but  5 rather they were drawn up by the other Party's  6 lawyers, and they were presented to the FEGUA Overseer  7 on that occasion.  8 Indeed, I remember having had conversations  9 with the legal counsel to FEGUA at that time who  10 indicated to the Overseer Sarceno that he should not  11 sign that Contract because it wasn't correct, and  12 Overseer Sarceno didn't pay attention to that advice  13 and signed the Contract.  14 ARBITRATOR EIZENSTAT: So, I'm a little  15 uncertain about this. You're now saying that 143 and  16 158 were not initiated by FEGUA but by Ferrovias?  17 THE WITNESS: The text, as I understand it,  18 according to what was communicated to me, the text was  19 drawn up by attorneys for Ferrovias. That is what I  20 understand. I repeat, I wasn't there. I didn't see  21 it. I don't know if it was really them who drew up  22 the Contract, but according to the information that I</p>	<p>PAGE 1689</p> <p style="text-align: right;">1689</p> <p>11:49:33 1 Did you make any effort to go to the  2 President and say, "we have a defect here with respect  3 to signature. If you'll sign this, it will correct  4 that defect"?  5 THE WITNESS: I did not do so because, in the  6 first case that you mentioned, Contract 41 did have  7 all of the elements that were correct, except for  8 authorization by the President of the Republic. I  9 don't know why it wasn't signed by the President of  10 the Republic at the time, but in the case of Contract  11 143 and its Amendment 158, I could not ask the  12 President to sign an authorization for that Contract,  13 since in the text of the Contract it says that  14 authorization by the President of the Republic is  15 unnecessary, which, according to the lawyers, is not  16 correct.  17 ARBITRATOR EIZENSTAT: Thank you.  18 PRESIDENT RIGO: Mr. Orta. On the Tribunals  19 questions.  20 MR. ORTA: Thank you, Mr. Chairman.  21 Secretary Eizenstat, for the benefit of the  22 Tribunal, since you asked about this, in relation to</p>
<p>PAGE 1688</p> <p style="text-align: right;">1688</p> <p>11:48:02 1 was given, the contracts had been drawn up by  2 Ferrovias lawyers.  3 ARBITRATOR EIZENSTAT: Did you see--were you  4 shown any document from the legal advisors to FEGUA in  5 which they said to Mr. Sarceno you must not sign this  6 because it would be illegal to do so without executive  7 approval?  8 THE WITNESS: I don't remember exactly. I  9 think that I did read on some occasion a note directed  10 to Overseer Sarceno by the lawyer. I don't remember  11 the name exactly. Nonetheless, on some occasion I  12 spoke with this attorney, and he told me that in  13 effect he had warned Overseer Sarceno that those  14 contracts weren't proper and that he shouldn't sign  15 them. Nevertheless, Overseer Sarceno ignored that  16 warning and signed them. The reasons why he decided  17 to do so, well, that I can't tell you.  18 ARBITRATOR EIZENSTAT: I mentioned that we've  19 heard testimony from one of your predecessors about  20 efforts he made in I believe it was the Year 2000 to  21 get the then-President to sign the Contract and was  22 unsuccessful.</p>	<p>PAGE 1690</p> <p style="text-align: right;">1690</p> <p>11:51:14 1 the lawyer who advised Mr. Sarceno, there is a  2 statement of his on the record. It's a sworn  3 statement by Mario Cifuentes, and then the document  4 where he gave Mr. Sarceno his conclusions about having  5 reviewed the draft is Document R-4.  6 ARBITRATOR EIZENSTAT: Thank you.  7 FURTHER REDIRECT EXAMINATION  8 BY MR. ORTA:  9 Q. Dr. Gramajo, you were asked some questions by  10 Secretary Eizenstat about the Draft R-51--the draft of  11 a potential new contract for the railway equipment  12 that was being discussed between FEGUA and Ferrovias,  13 and Secretary Eizenstat asked you about the Section 7  14 of that clause relating to the Canon payments. If we  15 could put up, if possible, Kelby, C-51, Section 7--I'm  16 sorry, R-51, Section 7, and C-25, which is the  17 Contract 143, and just compare the text of the two to  18 see if there are any differences.  19 I believe the question that was asked to you  20 was whether and why there were new Canon payments  21 being discussed in the context of this potential new  22 Railway Equipment Contract.</p>

<p>PAGE 1691</p> <p style="text-align: right;">1691</p> <p>11:52:53 1 So, if we compare Clause 7 regarding the  2 amount of the Contract with the text of Clause 7--I'm  3 sorry, Clause 7, top hand document is R-51, which is  4 the document that was being negotiated between the  5 Parties after the execution of Contract 143 and 158,  6 and then actual Clause 7 of Contract 143/158, which is  7 Document C-25, and the question is whether the Canon  8 payment there was any different between the two  9 contracts, from your estimation, looking at both of  10 them.  11 They're up on the screen, sir also.  12 A. Could you put the Spanish language version  13 up?  14 Q. I think you may have all documents in front  15 of you in Spanish.  16 Camilla, if you could assist.  17 A. Yes, but it's very small print.  18 Q. I think, sir that they're bringing you copies  19 of the agreements.  20 Sir, in Contract 143, which is C-25, was the  21 Canon payment 1.25 percent of the net value of the  22 freight?</p>	<p>PAGE 1693</p> <p style="text-align: right;">1693</p> <p>11:56:57 1 and on what basis?  2 A. 1.25 percent for the exclusive use of the  3 equipment, said percentage shall equal 1.25 percent.  4 Q. And over what base?  5 A. Of the net freight turnover or net value of  6 freight.  7 Q. If you could look at Contract R-51, which is  8 a Draft Agreement exchange between the Parties after  9 the execution of 143 and 158 and tell us what is the  10 Canon payment that was to be paid pursuant to that  11 Draft Agreement?  12 A. Seven, amount of the negotiation.  13 Q. Don't read the whole thing. Just tell me  14 what was the net freight--I'm sorry, what was the  15 freight--the Canon payment, excuse me, that was to be  16 paid.  17 A. This percentage shall be 1.25 percent of the  18 net value of the freight invoicing.  19 Q. Is it the same freight in both the executed  20 143 and the Draft Agreement?  21 A. Yes, it is. It's the same.  22 Q. You were asked some questions by Secretary</p>
<p>PAGE 1692</p> <p style="text-align: right;">1692</p> <p>11:55:07 1 A. I'm sorry, I have R-50 and R-51.  2 Q. I'm sorry. We need C-25, and R-51 it appears  3 he already has.  4 MR. ORTA: We have a copy of C-25 here. But  5 it has a little bit of highlighting, I don't know if  6 that's a problem. If it is, we'll look for one that  7 has no highlighting. If the Tribunal has no  8 objection, we'll provide it to--  9 PRESIDENT RIGO: If Mr. Foster has no problem  10 with it, that's fine with us.  11 We have highlighting on the screen.  12 BY MR. ORTA:  13 Q. Okay. Now you have before you Contract 143,  14 and my question is: What is the Canon payment to be  15 paid pursuant to that Contract?  16 (Lost interpretation.)  17 Q. It is Section 7. I believe I handed you the  18 document with Section 7.  19 A. Here it says disputes--no, I'm sorry, that's  20 17. Seven, the amount of the negotiations.  21 Q. I just want you to answer for the Tribunal  22 what is the percentage of the Canon that is to be paid</p>	<p>PAGE 1694</p> <p style="text-align: right;">1694</p> <p>11:58:49 1 Eizenstat about why it was that the Parties were  2 negotiating a number of issues in 2006, and leading to  3 the eventual Declaration, Lesivo Declaration,  4 regarding the Equipment Contracts. I believe  5 Professor Crawford also asked you some questions about  6 that.  7 Do you recall attending a meeting in March of  8 2006 at the or with President Berger at which  9 representatives of Ferrovías were there?  10 A. Yes, I do.  11 Q. And during that meeting did Ferrovías ask  12 President Berger to address a number of disputes  13 between the Parties, including the issue of the  14 payments to the Trust Fund and the issue of their  15 allegation that FEGUA was not sufficiently complying  16 with its obligation to evict squatters?  17 A. That is right. Those issues were raised by  18 Mr. Posner.  19 Q. At that meeting, did Mr. Posner also raise  20 with President Berger the issue of lack of financing  21 with respect to the project and seek assistance from  22 President Berger with respect to financing so that</p>

<p>PAGE 1695</p> <p style="text-align: right;">1695</p> <p>12:00:19 1 they could carry out the restoration of the railway?  2 A. I remember that at that meeting what was  3 discussed was that Ferrovías needed local investors to  4 be able to carry out its railway projects.  5 So, that was one of the situations Ferrovías  6 said--Mr. Posner said that the railway projects needed  7 investors to--in order to be able to carry them out.  8 I don't remember anything else about this issue of  9 investments.  10 PRESIDENT RIGO: One last question.  11 MR. ORTA: Thank you.  12 BY MR. ORTA:  13 Q. If we could quickly put up R-37, please, and  14 if you have a Spanish version for--is this the only  15 Spanish version we have here? R-37? If you can put  16 it up, perhaps maybe in both Spanish and English just  17 to save some time.  18 And, sir, while the document is being put up,  19 for the record R-37 is--are meeting minutes of  20 negotiation meetings that were taking place between  21 the Government and Ferrovías, and this particular  22 meeting minutes are for meetings taken place on the</p>	<p>PAGE 1697</p> <p style="text-align: right;">1697</p> <p>12:03:40 1 without the defects that we had previously identified.  2 At that meeting, Mr. Senn said that the drafting of a  3 new contract was not fundamental because the future  4 expansion plans for Ferrovías included wide gauge or  5 standard gauge equipment, that he was no longer  6 interested in having this new Usufruct Contract for  7 the railway equipment.  8 MR. ORTA: I have nothing further. Nothing  9 further.  10 (Pause.)  11 PRESIDENT RIGO: I thought you were thinking  12 because of the translation. The time it needs to be  13 interpreted.  14 MR. FOSTER: No.  15 Thank you, Mr. President.  16 RE-CROSS-EXAMINATION  17 BY MR. FOSTER:  18 Q. Dr. Gramajo, you told Secretary Eizenstat  19 that Contracts 143 and 158, you said we could even say  20 that they were illegal, and then at another time you  21 said Contract 143 was an illegal Contract, and it had  22 to be renegotiated, and then another time you said</p>
<p>PAGE 1696</p> <p style="text-align: right;">1696</p> <p>12:02:04 1 4th of October 2006.  2 MR. FOSTER: I object to the characterization  3 of there being meeting minutes. These are internal  4 notes of the Government which were never given to  5 Ferrovías.  6 BY MR. ORTA:  7 Q. Okay. Now, sir, looking at the section of  8 the meeting minutes dated--I'm sorry, looking at the  9 section of the minutes that referred to Contract  10 143--Kelby, if you could just highlight that--and also  11 the Spanish version, and then my question.  12 Again, sorry, for the record, these are dated  13 4 October 2006.  14 During these or during this particular  15 meeting, do you recall Mr. Jorge Senn expressing the  16 view that from Ferrovías' standpoint, the drafting of  17 a new equipment contract was of secondary priority,  18 given the plans to change the railroad system to wide  19 gauge?  20 A. Yes, that is correct. As part of the  21 meetings, we were proposing as usual to negotiate a  22 new contract for the Usufruct of the railway equipment</p>	<p>PAGE 1698</p> <p style="text-align: right;">1698</p> <p>12:04:52 1 that FVG was not using the railway equipment pursuant  2 to Contract 143.  3 Would you please look at an opinion you got  4 from the Attorney General of Guatemala? It is C-108  5 at Tab 20.  6 I'm sorry, I said the wrong thing. It's from  7 the Legal Department of FEGUA, your Legal Department  8 that you say you were relying on. Yes, Tab 20.  9 MR. ORTA: Just so that the record is clear,  10 I believe he testified that he was relying on a number  11 of legal opinions not just this one.  12 MR. FOSTER: We note your argument, David.  13 MR. ORTA: It's just a correction for the  14 record, Allen.  15 BY MR. FOSTER:  16 Q. Do you have that in front of you? Look at  17 the portion that says "Regarding Subsection A".  18 And that first sentence reads--  19 A. I'm sorry, but I'm not sure this is the  20 document. This is a request by the Attorney General  21 of the Republic. That's what I have here.  22 Q. He'll give you the correct document.</p>

<p>PAGE 1699</p> <p style="text-align: right;">1699</p> <p>12:06:58 1 MR. STERN: Page 3, Tab 20.  2 BY MR. FOSTER:  3 Q. Now, can you find the portion that says  4 "Regarding Subsection A"?  5 A. Yes.  6 Q. And the first sentence reads: "The Contract  7 involving railway equipment entered into with CODEFE  8 on August 28, 2003, as documented by Public Instrument  9 Number 143, as amended by Contract 158, both  10 authorized by Claudia Mariela Marroquin Luther,  11 Notary, is currently in effect."  12 And then the last sentence says:  13 "Accordingly, the Contract relevant to FEGUA's  14 petition to the Solicitor General's Office is  15 documented by Public Instrument Number 143, which is  16 currently in effect; it is also under the terms of  17 this Contract that the Usufructuary is using the  18 railway equipment."  19 Did I read that correctly?  20 A. Yes, you read it correctly.  21 Q. Thank you.  22 Now, you were also asked some questions by</p>	<p>PAGE 1701</p> <p style="text-align: right;">1701</p> <p>12:10:00 1 points being negotiated was in connection with the  2 railway historical equipment.  3 Q. And wasn't another point that you wanted to  4 negotiate, didn't it have to do with the  5 cannibalization of equipment and what you contended  6 was inadequate equipment appraisals?  7 A. That is correct.  8 Q. And weren't you also trying to obtain a  9 Technical Commission to be set up to determine the  10 real value of the equipment?  11 A. Correct.  12 Q. And aren't these the things that you say in  13 Paragraph 20 of your First Statement were the reasons  14 that you failed to reach agreement in connection with  15 the renegotiation of Contracts 143 and 158?  16 A. Let me look at my statements.  17 Would you please tell me again the page, the  18 paragraph number?  19 Q. Paragraph 20 in your First Statement.  20 A. Yes, I have it in front of me.  21 Q. And my question is: Weren't the matters that  22 I was just bringing to your attention that you agreed</p>
<p>PAGE 1700</p> <p style="text-align: right;">1700</p> <p>12:08:19 1 Secretary Eizenstat about whether or not the  2 negotiations concerning the amendment of Contracts 143  3 and 158, whether you desired a global solution to a  4 number of problems.  5 It's a fact, is it not, sir, that you wanted  6 to obtain a return of certain nonoperational  7 historical assets that had been granted to FEGUA--to  8 Ferrovías under the Usufruct? Wasn't that one of your  9 negotiating desires?  10 A. One of the negotiation points was for  11 Ferrovías to return to FEGUA the historical--rather,  12 the historical railway equipment that was  13 nonoperational.  14 Let us also remember that there is a Cultural  15 Cooperation Agreement between FEGUA and Ferrovías that  16 stated the same. That is to say that Ferrovías could  17 return to FEGUA historical equipment that was not  18 operational upon request.  19 But in spite of several requests it was not  20 possible to do so; therefore, one of the concerns we  21 had during our activities as Overseers was to preserve  22 some of the historical equipment, and one of the</p>	<p>PAGE 1702</p> <p style="text-align: right;">1702</p> <p>12:11:49 1 were the subject of the negotiation, weren't they the  2 reasons that you say that the Parties failed to reach  3 agreement?  4 MR. ORTA: Allen, if you could just clarify  5 it as to timeframe, please, so that the record is  6 accurate.  7 MR. FOSTER: Well, the timeframe is the one  8 he sets forth in his Statement, 2004, when they were  9 renegotiating.  10 THE WITNESS: It is true, it is correct. One  11 of our concerns, as I was mentioning before was the  12 preservation of the historical railway equipment, and  13 one of the negotiation points was for FEGUA to  14 preserve the historical railway equipment that was  15 nonoperational; that is to say, that it was not useful  16 to Ferrovías, and that was one of the points that we  17 were unable to reach an agreement on, and that's what  18 I also mentioned.  19 BY MR. FOSTER:  20 Q. And nowhere in Paragraph 20 where you're  21 discussing the reasons you were unable to reach  22 agreement do you say anything about the fact that</p>

<p>PAGE 1703</p> <p style="text-align: right;">1703</p> <p>12:13:04 1 there had not been executive approval of the Contract  2 or the fact that no public bidding had been--had been  3 conducted? None of that is in there, is it, sir?  4 A. In this paragraph precisely? That  5 information is not included, but the meetings we held  6 had the Parties participate to discuss the  7 non-authorization by the higher authority. So, these  8 were auxiliary negotiations that we were having with  9 them.  10 Q. You were also asked about the local  11 arbitrations that Ferrovías brought against FEGUA.  12 Did FEGUA ever consider counterclaiming in those local  13 arbitrations for any alleged breaches, that Ferrovías  14 was in breach of any of its agreements?  15 A. I don't remember right now.  16 Q. In any event, we do know that you never did  17 file any counterclaim, don't we?  18 A. I don't remember.  19 Q. You were referred to drafts of the revised  20 Contracts 143, in particular Exhibits R-51 and R-80.  21 Do you have any evidence to show that either  22 one of those documents was ever sent to Ferrovías?</p>	<p>PAGE 1705</p> <p style="text-align: right;">1705</p> <p>12:16:43 1 they could include their observations, too.  2 Q. I know you say you resent it to Ferrovías,  3 but the question I'm asking you is: Do you have any  4 evidence, any written evidence, to show that you sent  5 it to them?  6 A. I don't have any written evidence, but I  7 assure you that that was the case.  8 PRESIDENT RIGO: Thank you.  9 Mr. Gramajo, thank you very much for your  10 Statement. You can now leave the room.  11 THE WITNESS: Thank you very much, and have  12 all a nice day.  13 (Witness steps down.)  14 PRESIDENT RIGO: You know, we have two expert  15 witnesses on the legal side. I would suggest from the  16 Tribunal to break now and to meet early in the  17 afternoon, in an hour's time, at 1:15. Would that be  18 convenient to everybody?  19 MR. ORTA: Yes, from the Respondent.  20 MR. FOSTER: Yes, sir.  21 PRESIDENT RIGO: Okay. Very good. So, let's  22 break now, and we will reconvene at 1:15. Thank you.</p>
<p>PAGE 1704</p> <p style="text-align: right;">1704</p> <p>12:14:56 1 A. One of these documents was sent by Ferrovías  2 to FEGUA for it to be discussed by the Legal  3 Department.  4 There's also a communication by FEGUA where  5 we show that the document was received, and the Legal  6 Department of FEGUA is asked to examine the document  7 and also to make the observation deemed pertinent.  8 MR. FOSTER: Maybe my question, if I could  9 just ask it a slightly different way, Mr. President.  10 BY MR. FOSTER:  11 Q. The Exhibit R-51 shows a number of comments  12 on it by what appears to be someone in FEGUA. Do you  13 have any evidence to show that you ever sent that  14 commented-upon document to Ferrovías?  15 A. I have here in my hands a copy of the e-mails  16 sent by Ferrovías' counsel, and I have my own notes to  17 the Legal Department of Ferrovías, and I also  18 indicated that the meeting to address this issue had  19 to be held at FEGUA's location or at some neutral  20 point and that FEGUA's attorneys had to attend or the  21 financial head, if possible. We corrected this Draft  22 Agreement, and we resent this to Ferrovías so that</p>	<p>PAGE 1706</p> <p style="text-align: right;">1706</p> <p>12:17:57 1 (Whereupon, at 12:17 p.m., the hearing was  2 adjourned until 1:15 p.m., the same day.)  3  4  5  6  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22</p>

<p>PAGE 1707</p> <p style="text-align: right;">1707</p> <p>1 AFTERNOON SESSION</p> <p>2 PRESIDENT RIGO: So, we are starting the</p> <p>3 afternoon session. Good afternoon.</p> <p>4 EDUARDO MAYORA, CLAIMANT'S WITNESS, CALLED</p> <p>5 PRESIDENT RIGO: Good afternoon, Mr. Mayora.</p> <p>6 Would you please read the Expert Declaration.</p> <p>7 THE WITNESS: Yes, Mr. Chairman.</p> <p>8 Good afternoon to everyone.</p> <p>9 I solemnly declare upon my honor and</p> <p>10 conscience that my statement will be in accordance</p> <p>11 with my sincere belief.</p> <p>12 PRESIDENT RIGO: Mr. Stern.</p> <p>13 MR. STERN: Thank you, Mr. President.</p> <p>14 Before I begin, Mr. Foster wanted me to</p> <p>15 convey his apologies for not being here this afternoon</p> <p>16 and to assure you that he's not playing hookey. He's</p> <p>17 working on matters for tomorrow, and that's why he's</p> <p>18 not here.</p> <p>19 DIRECT EXAMINATION</p> <p>20 BY MR. STERN:</p> <p>21 Q. Good afternoon, Dr. Mayora.</p> <p>22 A. Hello.</p>	<p>PAGE 1709</p> <p style="text-align: right;">1709</p> <p>01:22:13 1 be liable for resolving one way or another basically</p> <p>2 because, although, of course, under our Constitution</p> <p>3 and our statutes, any public official acting outside</p> <p>4 the boundaries of the law would be personally liable,</p> <p>5 severally and jointly liable, with the State for the</p> <p>6 damages caused to any third party. This is a matter</p> <p>7 of acting illegally.</p> <p>8 But the law gives the President and his</p> <p>9 Cabinet the powers and the discretion to declare</p> <p>10 whether an act of Government would be contrary to the</p> <p>11 interests of the State, and this is a matter of</p> <p>12 discretion. This is a matter where the President and</p> <p>13 his Cabinet are supposed to deliberate and exercise</p> <p>14 their best judgment and care.</p> <p>15 Q. Another question the Tribunal has asked the</p> <p>16 Parties to address is whether under Guatemalan law is</p> <p>17 it permissible for the Government and the affected</p> <p>18 private party to negotiate or reach a settlement</p> <p>19 agreement on a declaration of lesividad as opposed to</p> <p>20 having to wait for the Administrative Court to confirm</p> <p>21 or reject such a declaration. Could you set forth</p> <p>22 your views on this issue.</p>
<p>PAGE 1708</p> <p style="text-align: right;">1708</p> <p>01:20:48 1 Q. Do you have in front of you copies of the</p> <p>2 three expert opinions you have submitted in this</p> <p>3 arbitration dated June 18, 2009, October 16, 2009, and</p> <p>4 March 14, 2011?</p> <p>5 A. I believe there are only two of those here.</p> <p>6 Q. We will get you the third one in a second,</p> <p>7 but we can go on.</p> <p>8 Do you ratify the three Opinions you have</p> <p>9 submitted in this proceeding and affirm their</p> <p>10 truthfulness before the Tribunal?</p> <p>11 A. Yes, I do.</p> <p>12 Q. Okay. Now, I want to first ask you a couple</p> <p>13 of questions that the Tribunal has specifically asked</p> <p>14 the Parties to address in this proceeding, and the</p> <p>15 first one I want to ask you is the question of the</p> <p>16 President's personal liability or potential personal</p> <p>17 liability under Guatemalan law for not issuing a</p> <p>18 Lesivo Declaration when it's been recommended to him</p> <p>19 by his legal advisers. Could you explain your views</p> <p>20 on that topic.</p> <p>21 A. Yes. In my Opinion, in the matter of</p> <p>22 lesividad, neither the President nor his Cabinet would</p>	<p>PAGE 1710</p> <p style="text-align: right;">1710</p> <p>01:23:46 1 A. Yes. The law, the statute that regulates the</p> <p>2 Office of the Attorney General does provide for the</p> <p>3 possibility of the President of the Republic issuing</p> <p>4 instructions to the Attorney General's Office to enter</p> <p>5 into negotiations conducive to a possible settlement.</p> <p>6 However, in this particular case, it is my opinion</p> <p>7 that, since the Explanatory Statement that's in the</p> <p>8 record that supports the issuing of the Declaration of</p> <p>9 Lesivo has been founded on legal technicalities or on</p> <p>10 alleged illegalities, then this has made it impossible</p> <p>11 to enter into negotiations conducive to a settlement</p> <p>12 because, as it were, you cannot say, well, give me</p> <p>13 this much money and I'll forget about this legal</p> <p>14 requirement or that other legal requirement not being</p> <p>15 necessary.</p> <p>16 So, therefore, in my opinion, the way in</p> <p>17 which the Declaration of Lesivo was issued this</p> <p>18 particular situation, the possibility of entering into</p> <p>19 negotiations conducive to a settlement became for</p> <p>20 closed-door--was made impossible.</p> <p>21 Q. Now, let me ask you a question about a</p> <p>22 different issue.</p>

<p>PAGE 1711</p> <p style="text-align: right;">1711</p> <p>01:25:33 1 Respondent's Guatemalan Legal Expert  2 Mr. Aguilar has opined that Contracts 143 and 158 were  3 absolutely null and void ab initio under Guatemalan  4 law, and he further insists that a declaration of  5 lesividad was the only legal means available to the  6 Government of Guatemala to seek the nullification of  7 Contracts 143 and 158. In your opinion, is  8 Mr. Aguilar correct?  9 A. I must respectfully disagree with my  10 colleague because the legal order of Guatemala, as I  11 believe is the case in most continental European legal  12 systems affords specific actions in order to claim  13 that there is either absolute nullity or relative  14 nullity.  15 And in case it would be an administrative  16 Contract that is believed to be either voidable or  17 absolutely null, the action would have to be taken to  18 the Administrative Court, the Tribunal de Contencioso  19 Administrativo, and in case it were a civil contract,  20 the Usufruct happens to be a civil Contract, the  21 matter should issue taken to a civil judge in order  22 for the judge to declare whether there is absolute</p>	<p>PAGE 1713</p> <p style="text-align: right;">1713</p> <p>01:28:52 1 in Paragraph 83 of his Second Expert Report he argues  2 that the specific State interests that were harmed by  3 Contract 143 were the loss of usage and Usufruct of  4 the railroad equipment, which was appropriated by  5 Ferrovias.  6 In your opinion, were any of these alleged  7 State interest appropriate grounds for declaring  8 Contracts 143 and 158 harmful to the interests of the  9 State?  10 A. No. In my opinion, neither could be  11 reasonably considered as being a basis for such  12 Declaration of Lesividad.  13 As it pertains to the principle of the rule  14 of law, this is a very fundamental principle of the  15 whole legal system and the Constitution and in the  16 laws of the Republic. It is a lot more important and  17 of a lot greater entity than just the interest of the  18 State. It is the fundamental basis of the whole  19 system, and it's the notion that every public  20 official, that every governmental agency, that every  21 State entity must abide by law, and that where any  22 infringement or any violation would take place, then</p>
<p>PAGE 1712</p> <p style="text-align: right;">1712</p> <p>01:27:11 1 nullity.  2 In my opinion, a Declaration of Lesividad is  3 an exceptional means to analyze any kind of nullity,  4 whether absolute or relative, because it is more, in  5 my opinion, a legal means for the State to  6 exceptionally go back and repudiate its own acts  7 because it considers the consequences of those acts to  8 be contrary to the interests of the State. And this  9 is an exception in a number of ways, but most  10 importantly it is an exception because usually, as it  11 is provided for in our Civil Code, usually the one  12 Party that has intervened to create or to at least  13 produce a cause leading to nullity cannot pursue an  14 action to have that declared.  15 So, lesividad is clearly an exception, and it  16 is exceptionally utilized in order to examine whether  17 some act has been contrary to the interests of the  18 State.  19 Q. Let me ask you about a different subject. In  20 Paragraph 21 of his First Expert Report, Mr. Aguilar  21 argues that the specific State interest does which was  22 harmed by Contract 143 was the rule of law, and then</p>	<p>PAGE 1714</p> <p style="text-align: right;">1714</p> <p>01:30:23 1 the affected Parties would have access and recourse to  2 an independent Court of Justice so that the wrongs be  3 righted.  4 So, the rule of law is an overriding  5 principle, and it's a lot more important in every  6 sense than the interest of the State.  7 Secondly, as regards the laws of usage as  8 it's being worded in the paragraph that you mentioned,  9 well, I fail to understand how this could be a reason  10 to declare the Contract harmful to the interests of  11 the State because you cannot possibly, as our  12 Government did, you cannot possibly call for an  13 international public bidding process in order to hand  14 the administration and the operation of the railway  15 system to the private sector without losing the usage  16 of the railway equipment. It would be a contradiction  17 in terms to say, well, I want the railway system to be  18 run by a private company, and then at the same time I  19 want to keep the usage of the railway equipment. It  20 is simply not possible.  21 Q. Respondent's Expert on Mr. Aguilar argues  22 that Contracts 143 and 158 were lesivo and absolutely</p>

<p>PAGE 1715</p> <p style="text-align: right;">1715</p> <p>01:32:03 1 null and void under Guatemalan law because the  2 Contract was not awarded pursuant to a new public  3 bidding process, and it was never approved by the  4 President by Executive Resolution. Do you agree with  5 Mr. Aguilar?  6 A. No. I think that is not right. I don't  7 agree with that view for some few reasons. The first  8 one is that the bidding process that's being discussed  9 here is a process that led to the negotiation of the  10 Usufruct Contract. If one looks at the Bidding Terms  11 of Reference, what one finds that the winning bidder  12 had the right to sit down and negotiate a Usufruct  13 Contract within a certain framework; therefore, there  14 was there was a clear winner. No one has contested  15 that Ferrovías was the winner of the bid, and so they  16 sat down to negotiate Contract 41. And then, as the  17 Tribunal knows and has heard arguments in a number of  18 presentations, this led to a number of events that  19 finally materialized in Contracts 143 and 158.  20 And the way I see it is that this is a  21 process of negotiation that, as it is declared  22 explicitly in those two contracts, is the consequence</p>	<p>PAGE 1717</p> <p style="text-align: right;">1717</p> <p>01:35:40 1 record, explaining why the Government had decided that  2 a number of services and State companies had to become  3 privatized, or at least incorporated as it was also  4 called. It explains why the Government had decided to  5 go on and pursue this path of privatization.  6 And if one reads the Terms of Reference for  7 the bidding process, one finds again that it is the  8 Government of the Republic, not the Overseer of FEGUA,  9 that has decided to pursue this privatization and to  10 pursue this bidding process and these agreements or  11 contracts with the winner of the bid. And so, there  12 is clearly a Presidential approval there. It is  13 explicit in most all of those documents leading to the  14 bidding process and its consequences.  15 So to be more precise, what's being claimed  16 here is, I think, that an ex post ratification didn't  17 take place. Now, the point is that there isn't any  18 rule, there isn't any statute requiring an ex post  19 ratification, but an approval there was, and it is  20 mentioned everywhere, and this is a project that our  21 Government was promoting and trying to get to  22 completion.</p>
<p>PAGE 1716</p> <p style="text-align: right;">1716</p> <p>01:33:53 1 of that bidding process. This is not an independent  2 negotiation. These are not independent Contracts that  3 have been signed or executed by FEGUA's Overseer on  4 his own volition. These are the ultimate consequence  5 of that bidding process.  6 And as to whether these contracts are  7 absolutely null and void because of a lack of a second  8 bidding process, well, I think that this is, again,  9 contradictory because if one alleges that a second  10 bidding process is required, one is saying that the  11 initial one didn't suffice to enter into the agreement  12 that is being examined.  13 So, in my opinion, the notion that a second  14 bidding process was required misses the point that  15 this has been a continuum leading ultimately to those  16 two contracts.  17 Q. And just what about executive approval?  18 A. Oh, yes.  19 Well, yet again, I think that to say that the  20 President or his Cabinet or the Government didn't  21 approve of this process is impossible. The President  22 and his Cabinet issued an accord that is in the</p>	<p>PAGE 1718</p> <p style="text-align: right;">1718</p> <p>01:37:25 1 Q. Thank you, Dr. Mayora. You can now answer  2 questions from Guatemala's counsel.  3 PRESIDENT RIGO: Mr. Orta.  4 MR. ORTA: Thank you, Mr. Chairman.  5 CROSS-EXAMINATION  6 BY MR. ORTA:  7 Q. Good afternoon, Dr. Mayora. How are you?  8 A. Fine, thank you. Good afternoon, counselor.  9 Q. I'd like to reconstruct a little bit what may  10 have been the situation for President Berger when he  11 took this decision. In order to do that, I want to  12 walk you through a little bit of the chronology of  13 what happened leading up to the point where President  14 Berger was asked to make the Declaration of Lesividad  15 with respect to Contracts 143 and 158.  16 To do that, I'd like to show you some  17 documents. We are putting before you some notebooks.  18 Don't be alarmed by their size. I will point out to  19 you the documents that we're going to discuss, and we  20 will also put them up on the screen, okay?  21 A. Yes, sir.  22 Q. All right. First of all, you're aware that</p>

<p>PAGE 1719</p> <p style="text-align: right;">1719</p> <p>01:38:26 1 the decision made by the President to declare  2 Contracts 143 and 158 lesivo arise from a request made  3 by the Overseer of FEGUA; correct?  4 A. Yes, sir.  5 Q. And that request was made to the Overseer of  6 FEGUA in January of 2006, in particular 13th of  7 January 2006. Do you recall that?  8 A. Made to the Overseer or by the Overseer?  9 Q. Made by the Overseer to the President on that  10 date, January 13, 2006.  11 A. I don't know the exact date, but it's about  12 that time, yes.  13 Q. Okay. And do you recall that--I assume you  14 studied the record in some detail?  15 A. Yes, I did.  16 Q. So, then you probably recall that the  17 Overseer of FEGUA, Dr. Gramajo, started looking into  18 the defects with Contracts 143 and 158 when he was  19 first told about those by his Legal Department back in  20 the beginning of 2004, just after he entered into his  21 charge as the Overseer. Do you recall that?  22 A. I have seen letters or opinions of FEGUA's</p>	<p>PAGE 1721</p> <p style="text-align: right;">1721</p> <p>01:41:10 1 letter where he was seeking her advice on the issue of  2 whether the Contract 143/158 was lesivo or not.  3 A. Yes.  4 Q. And do you recall as a result of that  5 inquiry, the Ministry of Communications hired an  6 outside law firm, Palacios and Asociados, which is a  7 law firm based in Guatemala; correct?  8 A. I recall seeing documents signed by them. I  9 don't know whether there was any hiring as a  10 consequence of this, but it sounds like a normal thing  11 to do, yeah.  12 Q. Okay. And do you recall seeing, I think it's  13 the Exhibit C-105, an opinion that they rendered  14 telling the Ministry of Communications and the  15 Overseer of FEGUA that in their opinion, in their  16 professional opinion, Contracts 143 and 158 were  17 lesivo for a number of reasons?  18 A. Are we talking about the Palacios Opinion?  19 Q. Yes, sir. We have it up on the screen now.  20 This is document C-105.  21 A. I'm not sure that I have seen this Opinion,  22 but...</p>
<p>PAGE 1720</p> <p style="text-align: right;">1720</p> <p>01:39:47 1 Legal Department to that effect.  2 Q. Okay. And after a series of negotiations  3 with Ferrovías in an attempt to reach a resolution of  4 some of the legal defects associated with Contract 143  5 and 158, there came a time when the Parties basically  6 reached an impasse in relation to those negotiations.  7 Do you remember generally seeing that in the record?  8 A. I understand that there were meetings and  9 there were negotiations. Whether those meetings and  10 negotiations were, you know, leading to curing  11 legal-technicalities or leading to other sorts of  12 purposes, I don't know.  13 Q. Okay. Fair, you didn't participate in them.  14 A. Right.  15 Q. Okay. Now, in April of--let's take a step  16 back.  17 In April of 2005, do you recall seeing in the  18 record that Dr. Gramajo sought the Legal Opinion from  19 the Chief legal counsel of the Ministry of  20 Communications?  21 A. Yes, I do remember that.  22 Q. Gabriela Saxon. Do you remember seeing that</p>	<p>PAGE 1722</p> <p style="text-align: right;">1722</p> <p>01:42:24 1 Q. Okay. Well, you don't doubt, do you, that  2 this law firm was asked by the Ministry of  3 Communications to conduct an independent inquiry into  4 whether Contract 143 and 158 was lesivo and they came  5 back with the Opinion that for a number of reasons as  6 set forth in document C-105, they were of the view  7 that the document, A, suffered from a number of  8 important legal defects; and, B, that it was lesivo.  9 Those defects made the document--the Contract 143 and  10 158 lesivo to the interests of the State?  11 A. They might have been hired for that, and they  12 might have given that Opinion, yeah.  13 Q. When you say they were hired for that, you're  14 not suggesting that they were hired to reach that  15 conclusion, are you?  16 A. No, to inquire into those matters.  17 Q. Okay. Now, once this Opinion was transmitted  18 back to the Ministry of Communications, Overseer  19 Gramajo reached out to the Attorney General's Office;  20 do you recall that? In June of 2005 he sent a request  21 to the Attorney General of Guatemala--and just so that  22 we're all clear, that is the highest Legal Authority</p>

<p>PAGE 1723</p> <p style="text-align: right;">1723</p> <p>01:43:51 1 in Guatemala; correct? For Guatemalan law.  2 A. Well, highest Legal Authority depends--  3 Q. For the State, I should say?  4 A. As an adviser for the State, yeah.  5 Q. Okay. Fair enough, because there's a  6 Constitutional Court and others that may be deemed  7 higher, would be deemed higher.  8 So, you recall that in August of 2005, the  9 Attorney General's Office of Guatemala sent back their  10 Opinion and reached the conclusion that Contracts 143  11 and 158, for a number of reasons, was lesivo to the  12 interest of the State.  13 A. I do remember having read an opinion on  14 behalf of the office of the Attorney General, yeah.  15 Q. Okay. Let's put up R-15.  16 Do you recall that the Opinion read basically  17 reached that conclusion that I just set forth for you?  18 A. Yeah.  19 Q. Okay. And in their opinion or in his  20 opinion, the Attorney General and his staff who  21 assisted him with this analysis highlighted a number  22 of important legal defects in Contract 143 and 158,</p>	<p>PAGE 1725</p> <p style="text-align: right;">1725</p> <p>01:46:02 1 Q. I'm simply setting the stage for what fell at  2 the President's doorstep when he was asked to declare  3 this Contract lesivo, and one of the things that was  4 at his doorstep was the fact that the Attorney General  5 of Guatemala, the highest legal adviser of the State,  6 reached the Opinion that this Contract 143 and 158 was  7 full of a number of important legal defects; correct?  8 A. That was his opinion, yes.  9 Q. And that, therefore, it was lesivo to the  10 interest of the State; correct?  11 A. Well, not that it was, but it should be  12 declared.  13 Q. So, in his opinion, he told the President,  14 through this Opinion, that he thought the President  15 should declare the Contract lesivo, given the legal  16 defects that had been identified in the Opinion?  17 A. Yeah, that's right.  18 Q. Now, after this Opinion was transmitted back  19 to the FEGUA Overseer on the 1st of August 2005,  20 eventually the FEGUA Overseer, after consulting with  21 his in-house legal department and outside lawyers,  22 wrote to the President--and we talked about this</p>
<p>PAGE 1724</p> <p style="text-align: right;">1724</p> <p>01:45:07 1 including the fact that it didn't result from a  2 separate bidding process; correct?  3 A. Yes. They do mention those kinds of  4 arguments. I don't find them important or wouldn't  5 qualify them as important in the context of this case,  6 but, yeah.  7 Q. Well, they certainly are important in the  8 context of this case because this is part and parcel  9 of the information that was given to President Berger  10 when he made his decision; isn't that correct?  11 A. Yeah, but it is not important that there  12 wasn't a subsequent ratification when one is  13 considering the very fundamental question of the  14 interests of the State.  15 Q. We understand that's your Opinion?  16 A. Yeah, that's all I'm saying.  17 Q. Right, and I'm not asking you--  18 A. It might have been their opinion, but it is  19 not mine.  20 Q. Very good. I'm not asking you for your  21 opinion about that conclusion right now?  22 A. Okay.</p>	<p>PAGE 1726</p> <p style="text-align: right;">1726</p> <p>01:47:25 1 before--on January 13, 2006, and asked the President  2 to declare the Contract lesivo; right?  3 A. Right.  4 Q. And the Tribunal has seen the letter, and  5 you're familiar with it, I assume. Correct?  6 A. I am.  7 Q. And that letter identified a number of legal  8 defects and sought the President's determination about  9 declaring that Contract 143 and 158 lesivo to the  10 interests of the State; correct?  11 A. Um-hmm.  12 Q. You have to answer verbally.  13 A. Yes, correct.  14 Q. And when the President received that request,  15 he then dispatched his legal office to study the  16 question; right?  17 A. That's right.  18 Q. And one of the things they did was they sent  19 the Contract to the Office of the Ministry of Public  20 Finance--I'm not sure if I'm misstating the name but--  21 A. No, that's correct.  22 Q. Is that correct?</p>

<p>PAGE 1727</p> <p style="text-align: right;">1727</p> <p>01:48:37 1 A. Okay.</p> <p>2 Q. And that, just so we're clear, that office or</p> <p>3 that Ministry, I should say, is the Ministry in</p> <p>4 Guatemala that is charged with making determinations</p> <p>5 about legalities of administrative contracts; correct?</p> <p>6 A. No, that is not exactly right.</p> <p>7 Q. Well, isn't that the Ministry--and correct me</p> <p>8 if I'm wrong--you're the Expert on Guatemalan law, but</p> <p>9 isn't that the Ministry who is responsible for</p> <p>10 assuring that administrative contracts are appropriate</p> <p>11 under Guatemalan law?</p> <p>12 A. No, no. That would be--actually, it would be</p> <p>13 rather the Office of the Attorney General. The</p> <p>14 Ministry of Finance has to do with handling the</p> <p>15 budget, handling the finances of the State and</p> <p>16 overseeing the correct execution of the budget, of the</p> <p>17 several public administrations of the State.</p> <p>18 Q. Now--so in your opinion, do you have an</p> <p>19 opinion as to why the Contract was sent to that</p> <p>20 Ministry?</p> <p>21 A. Well, there is a division or a department in</p> <p>22 the Ministry having to do with the so-called "Benés</p>	<p>PAGE 1729</p> <p style="text-align: right;">1729</p> <p>01:51:05 1 persons within the Ministry of Finance who analyzed</p> <p>2 Contract 143 and 158?</p> <p>3 A. Yes.</p> <p>4 Q. And you recall as well that those three</p> <p>5 persons reached the Opinion, after doing an</p> <p>6 independent analysis, that Contract 143 and 158</p> <p>7 was--well, one, suffered from a number of important</p> <p>8 legal defects; correct? And if you don't recall, we</p> <p>9 can look at the Opinion.</p> <p>10 A. I'm sorry, you were asking me or just</p> <p>11 describing what's in the documents?</p> <p>12 Q. I'm asking you if you have a recollection</p> <p>13 that three separate persons within the Ministry of</p> <p>14 Finance, the Department of Public Procurement analyzed</p> <p>15 Contract 143 and 158 and reached, each of them, a</p> <p>16 determination, an opinion that Contracts 143 and 158</p> <p>17 suffered from a number of important legal defects. Do</p> <p>18 you recall that?</p> <p>19 A. They issued a few very succinct Opinions to</p> <p>20 that effect, yeah.</p> <p>21 Q. Okay. And by saying they were succinct</p> <p>22 opinions, you're not in any way suggesting they didn't</p>
<p>PAGE 1728</p> <p style="text-align: right;">1728</p> <p>01:50:00 1 del Estado," you could probably say property of the</p> <p>2 State, and I recall that it was sent to that</p> <p>3 department for an opinion.</p> <p>4 Q. Okay. And I guess in the nature of trying to</p> <p>5 make a determination about whether property of the</p> <p>6 State had been harmed as a result of the actions</p> <p>7 undertaken in relation to Contract 143/158, it would</p> <p>8 be natural to seek the Opinion of that Ministry and</p> <p>9 that division within that Ministry to see what their</p> <p>10 opinion was about whether there had been, in fact,</p> <p>11 harm to property of the State; correct?</p> <p>12 A. I wouldn't have, but that's how they</p> <p>13 proceeded, yeah.</p> <p>14 Q. And they actually have a Government</p> <p>15 procurement department within that Ministry, don't</p> <p>16 they?</p> <p>17 A. Yes, they do.</p> <p>18 Q. And that is the department that was consulted</p> <p>19 on whether Contract 143 and 158 was or was not lesivo</p> <p>20 to the interests of the State; correct?</p> <p>21 A. Yeah, I think so.</p> <p>22 Q. And you recall that there were three separate</p>	<p>PAGE 1730</p> <p style="text-align: right;">1730</p> <p>01:52:21 1 do a careful analysis, are you?</p> <p>2 A. That's how it looks on the face of those</p> <p>3 statements to me, yeah.</p> <p>4 Q. It looks as though they didn't do a careful</p> <p>5 analysis?</p> <p>6 A. Didn't do a sufficient analysis, yes.</p> <p>7 Q. Okay. Let's put up document R-24, for</p> <p>8 purposes of the Tribunal. Let's go ahead to the</p> <p>9 beginning of the Opinion.</p> <p>10 Are you aware that one of the persons who</p> <p>11 authored this Opinion has testified in this case?</p> <p>12 A. No.</p> <p>13 Q. If we could go down to the very end of this</p> <p>14 document. And America Gonzalez, who you can see is</p> <p>15 one of the persons who--this is obviously the English</p> <p>16 translation of the document, but one of the persons</p> <p>17 who conducted the analysis and signed this Legal</p> <p>18 Opinion; correct?</p> <p>19 A. Yeah, I see her name there.</p> <p>20 Q. And she submitted a--and we're going to show</p> <p>21 you in a second her Declaration. She submitted a</p> <p>22 declaration in this case saying that she conducted, as</p>

<p>PAGE 1731</p> <p style="text-align: right;">1731</p> <p>01:53:25 1 well as her colleagues, very careful analysis of  2 Contracts 143 and 158.  3 MR. STERN: I'm going to object to the  4 extent--if he wants to show the Witness Statement,  5 that's fine, but I object to him characterizing a  6 statement of a witness which hasn't even testified  7 orally in these proceedings. He can testify he hasn't  8 seen the statement at all.  9 BY MR. ORTA:  10 Q. So, Dr. Mayora, Ms. Gonzalez has testified--  11 MR. STERN: Would the Tribunal please address  12 my objection.  13 MR. ORTA: You know what, I will just move on  14 without characterizing her testimony for the sake of  15 speed. I will put up her Declaration in a second.  16 BY MR. ORTA:  17 Q. So, Ms. Gonzalez has testified in this case,  18 and we will show you her Declaration in a second, but  19 nonetheless she and her colleagues reached an opinion  20 that there were grounds to invalidate Contract 143 and  21 158 through the issuance of a Lesivo Declaration;  22 correct?</p>	<p>PAGE 1733</p> <p style="text-align: right;">1733</p> <p>01:55:26 1 agreement through a Lesivo Declaration; correct?  2 A. That's correct.  3 Q. Now, you were not there when they conducted  4 their analysis of this Opinion; right?  5 A. No.  6 Q. You have no idea how many hours they spent on  7 it?  8 A. No.  9 Q. So, when you say it's a succinct Opinion,  10 you're rendering that conclusion based on your review  11 of this document, but again, you have no idea how  12 intensive an analysis they each conducted to arrive at  13 this Opinion; right?  14 A. No. That's why I said that on the face of  15 this Opinion, there was a very superficial analysis of  16 this problem.  17 Q. Right. But as I say, you have no personal  18 knowledge as to the extent of the analysis that they  19 conducted so you can't render an opinion that it was  20 superficial; correct?  21 A. I don't know how many hours they spent, no.  22 Q. Okay. Now, this Opinion also was also sent</p>
<p>PAGE 1732</p> <p style="text-align: right;">1732</p> <p>01:54:28 1 MR. STERN: Again, objection. He has not  2 seen her statement. He knows nothing about it.  3 MR. ORTA: I'm asking him whether he knows  4 what her testimony is.  5 PRESIDENT RIGO: Either you put the testimony  6 up; otherwise, you have what the Opinion is here, and  7 you just are limited to that.  8 And he's a Legal Expert, and you have the  9 opinion of the person in question sign here.  10 MR. ORTA: I think it's just a matter of a  11 misstep on my part, Mr. Chairman. I meant to ask  12 about the opinion itself and not about the testimony.  13 I will get to the testimony in a second.  14 PRESIDENT RIGO: Why don't you ask about the  15 Opinion.  16 MR. ORTA: Sure.  17 BY MR. ORTA:  18 Q. So, you don't dispute that she and her  19 colleagues issued an opinion analyzing that--and  20 reaching the conclusion that the Contract 143 and 158  21 suffered from a number of legal defects that rendered  22 or provided the State with grounds to invalidate that</p>	<p>PAGE 1734</p> <p style="text-align: right;">1734</p> <p>01:56:23 1 back to the Office of the Secretary-General. And just  2 so that the Tribunal understands, the Office of the  3 Secretary-General within the Office of the Presidency  4 is the office that is in charge principally of legal  5 affairs for the Office of the Presidency; correct?  6 A. Well, they had to review from several  7 different perspectives, including the legal  8 perspective, the dispatch that goes to the President.  9 Q. And there's a figurehead--not a  10 figurehead--that's not the correct term--there is a  11 Chief lawyer, the equivalent of what would be, for  12 example, White House Counsel here in that office, and  13 that is the Secretary-General; correct?  14 A. The Secretary-General has a head of his legal  15 department.  16 Q. He is head of the Legal Department for the  17 Office of the President?  18 A. The secretary-General is Secretary-General  19 and he has a legal department, and there's a Chief of  20 that legal department.  21 Q. Okay. And he's the boss or the--he's a  22 lawyer, usually; right?</p>

<p>PAGE 1735</p> <p style="text-align: right;">1735</p> <p>01:57:31 1 A. Usually, yeah.  2 Q. And they are the boss of the Chief lawyer for  3 the Office of the Presidency for the Office of the  4 Secretary-General; correct?  5 A. That's right.  6 Q. And that is the top legal adviser, if you  7 will, for the President, for the Office of the  8 Secretary-General?  9 A. Well, you know, I think that it depends on a  10 number of circumstances. But because the Attorney  11 General, as we have concurred, is the Chief legal  12 adviser, so, you know, I think it depends on the  13 circumstances and the context, but you can say the  14 Secretary-General is a very important official in  15 terms of what the President does or doesn't do,  16 including within the context of the legality of the  17 discharge of his functions in office.  18 Q. And including, for example, with respect to  19 the person--the President, excuse me, making a  20 determination about whether or not to declare a  21 contract lesivo?  22 A. I would rather--in terms of what are the</p>	<p>PAGE 1737</p> <p style="text-align: right;">1737</p> <p>01:59:47 1 Declaration?  2 MR. STERN: Objection. Again, this is not a  3 question of Guatemalan law. It's a question of the  4 dealings between the President and his advisers and  5 some unnamed administration.  6 PRESIDENT RIGO: Sustained, as before.  7 MR. ORTA: Very good.  8 ARBITRATOR CRAWFORD: If I can help, the  9 question is not what he might do, which is  10 speculation. The question is what he's entitled to  11 do, surely.  12 MR. ORTA: Well, I will just move on, and  13 then we will get to that in a second.  14 BY MR. ORTA:  15 Q. Okay. So, this Opinion was returned to the  16 Office of the Secretary-General; correct?  17 A. Yes.  18 Q. And they then conducted their own independent  19 analysis based on all of the information they had  20 received as to whether Contracts 143 and 158 were  21 lesivo; right?  22 A. They did conduct an analysis. How wide and</p>
<p>PAGE 1736</p> <p style="text-align: right;">1736</p> <p>01:58:37 1 rules and what's the framework within which the  2 President and his Cabinet ought to make that  3 determination or not.  4 Q. Right, but my question wasn't about the rules  5 and the determinations. It was about whether that  6 person's Opinion would carry significant weight in the  7 President's determination about whether to carry  8 forward with a declaration of lesividad in relation to  9 a contract.  10 MR. STERN: Objection. Calls for speculation  11 about whether some unnamed persons would carry  12 significant weight in the President's determination.  13 It's an improper question.  14 PRESIDENT RIGO: We will uphold the  15 objection.  16 BY MR. ORTA:  17 Q. Let's try it again.  18 In your opinion, based on what you know about  19 Guatemalan law, would the President, in your opinion,  20 place important weight on the Opinion of the  21 Secretary-General in the Office of the Presidency on  22 the issue of whether or not to issue a Lesivo</p>	<p>PAGE 1738</p> <p style="text-align: right;">1738</p> <p>02:00:49 1 how deep, I don't know.  2 Q. Okay. And they reached the Opinion--and I  3 don't know if we can put that up--it's R-25--on the  4 26th of April 2006. The Technical Board of the  5 Presidency within the Office of the Secretary-General  6 reached the Opinion that Contracts 143 and 158 were  7 lesivo to the interest of the State; correct?  8 A. Wrongly they did, yeah.  9 Q. And they reached that conclusion based on a  10 number of legal defects that they identified in  11 Contracts 143 and 158; right?  12 A. Yeah, again wrongly they did, yeah.  13 Q. No, I realize you--just so that we are clear,  14 all of these different persons that did these  15 analyses, the Attorney General of Guatemala, the three  16 persons within the Ministry of Finance, the outside  17 law firm, the persons within the Technical Board of  18 the Presidency, they all concurred that Contracts 143  19 and 158 suffered from legal defects that rendered the  20 Contract lesivo, you believe they were all wrong?  21 A. No. I believe that the determination of  22 whether an act of Government leading to a contract is</p>

<p>PAGE 1739</p> <p style="text-align: right;">1739</p> <p>02:02:18 1 or not harmful to the interests of the State, it's a  2 matter of policy, and it's a matter of analysis and  3 judgment for the President and his Cabinet to make  4 within the rules of the Constitution and within the  5 legal framework of the State.  6       What the legal adviser has to advise on is  7 whether the conditions, the legal conditions to enter  8 into such analysis leading to a possible determination  9 that that act of Government or that Contract or  10 whatever are harmful to the interest of the State is  11 the limit of their competence. They are not there to  12 tell the President, Mr. President, I think you should  13 declare this lesivo, because that is none of their  14 competence. The competence to make such determination  15 is that of the President of the Republic and his  16 Cabinet.  17       Q. All right. I understand that is your  18 opinion. Let's go to the conclusion here. If we  19 could highlight the Opinion.  20       And the Opinion of Celena Ozaeta, who then  21 was the Legal Adviser for the Technical Board of the  22 General Secretariat of the Presidency, as well as</p>	<p>PAGE 1741</p> <p style="text-align: right;">1741</p> <p>02:04:57 1 would have been attached to this Opinion?  2       A. I assume that's what's meant here.  3       Q. And so they reached the Opinion that after  4 analyzing the applicable Legal provisions and the  5 other documentation which they analyzed, that the  6 Executive Resolution declaring lesivo to the interests  7 of the State, the contracts should be submitted to the  8 President for approval; correct?  9       A. Um-hmm.  10       Q. For his approval in Cabinet of Ministers;  11 right?  12       A. Yes.  13       Q. Have you reviewed the testimony, for example,  14 of Mr. Duarte and Ms. Ozaeta?  15       A. No, I don't recall having read those  16 testimonies.  17       Q. Let's go ahead and put up Ms. Ozaeta's  18 testimony just as an example. You have all of this,  19 sir, before you in your binder if you'd like to look  20 at it in paper copy, but we are also putting it up on  21 the screen.  22       Okay. This is a translation of the statement</p>
<p>PAGE 1740</p> <p style="text-align: right;">1740</p> <p>02:03:49 1 Manuel Duarte, both of whom have rendered testimony in  2 this case through declarations, is that, after  3 analyzing the accompanying documentation and they cite  4 it earlier up in the Opinion, and the applicable Legal  5 provisions, this Consultative Committee understands  6 that the draft Governmental Agreement--and just so  7 that the Tribunal is clear because this is  8 translation--when they say draft Governmental  9 Agreement, they're talking about the Draft Executive  10 Resolution declaring the Contract lesivo; right? That  11 would have been attached to this document.  12       A. I'm sorry, I thought you were talking about  13 the Tribunal.  14       Q. No, I'm asking you a question. I will ask it  15 again.  16       A. Would you ask again?  17       Q. Sure.  18       When in the Opinion they refer here to the  19 fact that they understand that the draft Governmental  20 Agreement which declares lesivo to State interest the  21 Contracts, that is a reference to the Draft Executive  22 Resolution declaring the Contract lesivo; right? That</p>	<p>PAGE 1742</p> <p style="text-align: right;">1742</p> <p>02:06:10 1 of Celena Ozaeta. Let's go down. She states her  2 qualifications there. Keep going down, please. Keep  3 going.  4       Okay. Let's look at the Opinion, what she  5 says about her opinion.  6       All right.  7       So, she says she reviewed a number of things  8 in order to reach her opinion, and she states them  9 there in Paragraph 13; correct?  10       A. Take a minute to read it.  11       (Witness reviews document.)  12       A. Well, what I see that she read here was four  13 or five opinions, not the entire file, but anyway.  14       Q. Okay. And in Paragraph 15, she states what  15 her conclusions were as well as that of the other  16 persons who signed her Opinion; right?  17       MR. STERN: I object to the relevance of this  18 testimony. If he's asking him to comment on Witness  19 Statements that he hasn't read and has not offered any  20 views or opinions on in his reports.  21       MR. ORTA: Well, the relevance is pretty  22 clear. We're here, in part, to determine whether the</p>

<p>PAGE 1743</p> <p style="text-align: right;">1743</p> <p>02:07:59 1 President, when he declared the Executive  2 Resolution--when he declared, I'm sorry, Contracts 143  3 and 158 lesivo to the interests of the State did so  4 reasonably, and part and parcel of that decision was  5 the information that was put before the President when  6 he made that decision, so I'm entitled to ask about  7 this on their Expert on the issue of whether or not  8 lesivo was proper.  9 MR. STERN: That's not the question that Mr.  10 or Dr. Mayora has opined on. He's asked as a legal  11 matter of guarantee under Guatemalan law, whether the  12 President was compelled as a matter of law, which  13 their witness has asserted both factually and experts  14 as a matter of law to issue the Declaration because it  15 was recommended to him by his advisers. It's not  16 whether it was reasonable or not reasonable. He has  17 no testimony in that regard or any opinions on that  18 regard.  19 PRESIDENT RIGO: The objection is sustained.  20 MR. ORTA: Okay.  21 BY MR. ORTA:  22 Q. Now, sir, you understand, do you not, that</p>	<p>PAGE 1745</p> <p style="text-align: right;">1745</p> <p>02:10:40 1 MR. ORTA: Well, I will show you the  2 testimony now.  3 MR. STERN: Which witness is this?  4 MR. ORTA: This, counsel, is Mr. Fuentes, who  5 testified in this case, Mario Fuentes, and I'm putting  6 before this witness the testimony of Mr. Fuentes where  7 he said he spoke to Mr. Arroyave who told him that he  8 had advised the President that he had to sign the  9 Lesivo Declaration to avoid any future legal  10 consequences.  11 MR. STERN: That is not firsthand testimony  12 from Mr. Arroyave saying he told the President that.  13 It remained a conversation of Mr. Fuentes he described  14 in his testimony, so that is not competent evidence to  15 ask the witness questions about this.  16 MR. ORTA: If that is not competent evidence,  17 with all due respect, their entire case is built on  18 hearsay, their entire case. Everything. Everything  19 they put before you is what somebody told somebody  20 else who told somebody else.  21 I'm entitled to question this witness. This  22 is unrefuted in the record that the President's top</p>
<p>PAGE 1744</p> <p style="text-align: right;">1744</p> <p>02:09:14 1 after the President or after this Opinion was issued,  2 it was given to the President--well, it was given to  3 the Secretary-General, who then had to advise the  4 President on what he believed at the time the  5 President should do in relation to declaring the  6 Contract lesivo or not; correct?  7 A. Yes. The ordinary course of those kinds of  8 proceedings is the legal opinions go to the  9 Secretary-General, yeah.  10 Q. And you're aware, I assume, that--do you know  11 Jorge Arroyave? Do you know who he is?  12 A. I don't think I do.  13 Q. Well, at the time he was the  14 Secretary-General to President Oscar Berger.  15 A. Okay.  16 Q. And Mr. Arroyave informed President Berger  17 that it was his opinion that the President should  18 declare Contract 143 and 158 lesivo or he would incur  19 personal responsibility. Are you aware of that?  20 MR. STERN: Objection. There is no testimony  21 in the record on that. That is counsel testifying in  22 this case.</p>	<p>PAGE 1746</p> <p style="text-align: right;">1746</p> <p>02:11:57 1 legal adviser was of the Opinion that Contracts 153  2 and 158 were lesivo, that he counseled the President  3 about that. This was testimony that the Tribunal has  4 heard.  5 ARBITRATOR CRAWFORD: It's a question of fact  6 what the President was advised.  7 MR. ORTA: Right.  8 ARBITRATOR CRAWFORD: This witness is not  9 here as a fact witness. He's here as an expert  10 witness on Guatemalan law. You haven't asked him a  11 question of Guatemalan law up to now.  12 MR. ORTA: Right. I'm leading up to the  13 question where I'm going to ask his opinion on it. I'm  14 setting the foundation for that.  15 ARBITRATOR CRAWFORD: Surely you can  16 stipulate. These are questions of fact. You  17 stipulate the fact this cloud of witnesses--cloud of  18 opinions was given, and if there was then a question  19 of Guatemalan law, which--for which that is a  20 predicate, you can ask it, but at present all you're  21 doing is asking him questions of fact.  22 ARBITRATOR EIZENSTAT: In other words,</p>

<p>PAGE 1747</p> <p style="text-align: right;">1747</p> <p>02:13:01 1 stipulate to facts and ask if he as a legal expert  2 agrees with what the Attorney General purportedly  3 advised.  4 MR. ORTA: And with all due respect,  5 Secretary Eizenstat, I don't--it's not, in my view, so  6 relevant whether he agrees with what the Attorney  7 General concluded. I believe what's relevant--and the  8 Tribunal can tell me if they're not interested in  9 hearing about this--is what information was before the  10 President when he was asked to declare the Contract  11 lesivo?  12 ARBITRATOR CRAWFORD: He's not an expert on  13 that question. He's not an expert on that question.  14 You are entitled to stipulate. If it's in the record,  15 that's fine.  16 MR. ORTA: Okay.  17 ARBITRATOR CRAWFORD: This information is  18 before him. What you want to do is he's a Legal  19 Expert on Guatemalan law. You have to put to him a  20 proposition of Guatemalan law that follows from those  21 premises.  22 MR. ORTA: Very good. So, I will get to</p>	<p>PAGE 1749</p> <p style="text-align: right;">1749</p> <p>02:15:10 1 require a public bid. The bottom line here is that  2 every other person who at the time looked at the issue  3 reached the opinion that the contracts were lesivo.  4 The President was advised that and told that he would  5 incur personal liability if he didn't declare the  6 Contract lesivo, and I would like to know if this  7 Expert is of the view that it was unreasonable for the  8 President to reach the conclusion that he should  9 declare the Contract lesivo.  10 ARBITRATOR CRAWFORD: That's a question in  11 the case because we're not concerned with the  12 liability under Guatemalan law. We're concerned with  13 the liability under the CAFTA.  14 MR. ORTA: Right, and I would like to know  15 under Guatemalan law--  16 ARBITRATOR CRAWFORD: He's putting himself  17 forward as an expert on CAFTA.  18 MR. ORTA: Right, and I'm not asking him as a  19 matter of public international law, I'm asking as  20 matter of Guatemalan law, does he believe it's  21 unreasonable for the President to have reached the  22 determination to declare the contracts lesivo given</p>
<p>PAGE 1748</p> <p style="text-align: right;">1748</p> <p>02:14:02 1 that.  2 BY MR. ORTA:  3 Q. So, Dr. Mayora, in the face of assuming that  4 the record establishes that the President was advised  5 by his Secretary-General that he would incur in  6 personal liability if he didn't declare Contracts 143  7 and 158 lesivo, that he had an opinion from his  8 Secretary, the Technical Secretary Board that the  9 agreement was lesivo, assuming those facts and  10 everything else that I have just set forth in the  11 questions, do you think it was reasonable for the  12 President to reach the conclusion that he should  13 declare Contracts 143 and 158 lesivo?  14 MR. STERN: Objection. This is--again it's  15 not a question of Guatemalan law. This is a question  16 of reasonableness, which is not something that  17 Dr. Mayora's opined about. It's not a question of  18 Guatemalan law.  19 MR. ORTA: I thought I was cross-examining an  20 expert. I think it's quite fair to ask him that  21 question. I mean, he can tell us what his opinions  22 are about whether the contracts require or didn't</p>	<p>PAGE 1750</p> <p style="text-align: right;">1750</p> <p>02:16:05 1 all of the facts that we have just set forth?  2 MR. STERN: And reasonableness is not a  3 standard or a law under Guatemalan law. There is  4 nothing at issue here with regard to reasonableness as  5 a matter of Guatemalan law.  6 (Tribunal conferring.)  7 PRESIDENT RIGO: Just go ahead and ask the  8 question. You have asked it, but the witness may  9 answer.  10 THE WITNESS: In my opinion, assuming those  11 facts, the President would have been wrong to believe  12 that he is or would have been liable because again,  13 the very few legal provisions having to do with a  14 Declaration of Lesividad are based on the notion of  15 harm to the interest of the State and the  16 determination of whether those harms to the interests  17 of the State have taken place or not are the  18 competence of the President and his Cabinet, not the  19 competence of legal advisers, or the  20 Secretary-General. They have to tell the President  21 what's the legal framework within which him and his  22 Cabinet can make any such determination.</p>

<p>PAGE 1751</p> <p style="text-align: right;">1751</p> <p>02:17:31 1           Going in one direction or the other is a 2 matter of judgment, and that judgment, the one who's 3 called to exercise the judgment under the oath that he 4 took is the President and his Cabinet. 5           BY MR. ORTA: 6       Q. Do you believe it was unreasonable for the 7 President to--under Guatemalan law, for the President 8 to have made the determination to declare Contracts 9 143 and 158 lesivo in the face of the facts that we've 10 just discussed? Yes or no. 11       A. Yes, I do, and I do because it would have 12 been very unreasonable as well if the 13 Secretary-General tells him, look, as a matter of 14 financial policy or labor policy, I think they're 15 going to be liable unless you raise the minimum salary 16 to this point. That's a matter of policy. That is a 17 President's call, not the call of his advisers or of 18 the Secretary-General. 19       Q. Do you agree, sir, that public officials in 20 Guatemala, when they take their oath, they take an 21 oath to uphold the Constitution? 22       A. Yes, it's in the Constitution.</p>	<p>PAGE 1753</p> <p style="text-align: right;">1753</p> <p>02:19:41 1 means available to the President under the appropriate 2 laws in Guatemala for him to instruct the Competent 3 Authority to take legal actions against that contract? 4 Isn't that correct? 5       A. No, that is not correct. As a matter of 6 fact, it's been maintained that there was absolute 7 nullity here, and the Statute of Limitations for 8 absolute nullity never expires, and the Attorney 9 General that only has the power, but the obligation to 10 pursue any such action if he thought that there was 11 absolute nullity. 12       Q. Declaring the Contract lesivo certainly was 13 one option the President had; right? In order to have 14 the Competent Authority determine whether the Contract 15 was lesivo; isn't that correct? 16       A. I think your question is circular, but 17 probably you can clarify it to me because are you 18 leading to nullity or to lesividad? Because lesividad 19 cannot be a declaration in order to establish 20 lesividad. 21       Q. Well, in order to reach the question of 22 nullity, the President--one of the options he had was</p>
<p>PAGE 1752</p> <p style="text-align: right;">1752</p> <p>02:18:47 1       Q. And they take an oath to uphold the laws of 2 the Republic? 3       A. Yes. 4       Q. And do you agree that when a public official 5 comes into knowledge that a contract appears to be 6 illegal or absolutely null or nullable, then that 7 public official has to take a number of actions in 8 order for--in order to have the Competent Authority 9 within Guatemala initiate legal actions against that 10 contract? 11       A. It has to take the appropriate actions 12 through the appropriate proceedings; and, if he 13 wouldn't, he would be lying. 14       Q. Okay. And here, the President took the 15 action of declaring the Contract lesivo, having been 16 told that the Contract was illegal; right? 17       A. And that is an inappropriate action, in my 18 opinion. 19       Q. Inappropriate? 20       A. Yeah. 21       Q. But isn't it true, sir, that at the time that 22 the President took that action, that was the only</p>	<p>PAGE 1754</p> <p style="text-align: right;">1754</p> <p>02:20:53 1 declaring the contracts lesivo; correct? 2       A. Not in my opinion. You see, a problem of 3 legality is for the Court and the other officers and 4 officials of the Republic that are charged with the 5 what we call control of legality. A determination of 6 whether the interest of the State had been harmed is a 7 matter of judgment of the utmost importance that's 8 been placed in the Office of the President of the 9 Republic and his Cabinet. It is weighing interests of 10 the State. It is not a matter of legality. 11       Q. Okay. Let's go to your First Opinion, I 12 believe, and let's look at Paragraph 9.6, please. If 13 we could blow up Paragraph 9.6--not that much--and 14 let's go ahead and highlight it in yellow. It's no 15 big deal if you can't. 16           All right. Now, you say in Paragraph 9.6, 17 you say, "These questions or any other legal question 18 could have been raised by the Office of the Attorney 19 General when it examined the documents and proceedings 20 prior to the public bidding, or before the expiration 21 of the Statute of Limitations (of two years, according 22 to Article 1312 of the Guatemalan Civil Code) in order</p>

<p>PAGE 1755</p> <p style="text-align: right;">1755</p> <p>02:22:30 1 to file a civil action seeking a declaration that 2 Contract 143 and 158 be declared null and void." 3           You go on to say: "The reason why none of 4 this was done is of no relevance, except that the 5 failure of the Office of the Attorney General to take 6 any legal action (supposing any of these allegations 7 warranted such a thing) within the timeframe specified 8 by law, rendered the whole matter firm and 9 definitive." 10           And then you conclude by saying: "The only 11 way to seek the nullification of Contracts 143 and 158 12 was to show that their execution or provisions were 13 harmful to the interests of the State, not merely 14 illegal." 15           Correct? 16        A.    Correct. 17        Q.    And so what you're saying there is that the 18 only way to seek nullification of the Contract was for 19 there to be a determination that the contracts were 20 lesivo; right? That's what you said. 21        A.    What I've said now answering your question 22 and what's written here are both correct and are not</p>	<p>PAGE 1757</p> <p style="text-align: right;">1757</p> <p>02:24:57 1 are illegalities and there are harms to the interests 2 of the State can, of course, coexist. 3        Q.    And in this case the President made the 4 determination that the illegality did coexist with the 5 harm, didn't he? 6        A.    I don't think he did that. 7        Q.    Well, sure he did because he declared the 8 Contract lesivo, didn't he? 9        A.    On the basis of legal technicalities. 10       Q.    Well, you called them legal technicalities, 11 sir, but the President reached the conclusion that 12 those legal defects caused harm to the State, didn't 13 he? 14       A.    No. I think that what he did, if one pays 15 attention to the Explanatory Statement, is to make it 16 one and the same thing lesividad and illegality, and 17 that's technically wrong, and he was wrongly advised, 18 unfortunately. 19       Q.    Okay. Now, sir, you testified about the fact 20 that the President--is it your opinion, under 21 Guatemalan law, that the President had no obligation 22 to respond to the advice that he was given that</p>
<p>PAGE 1756</p> <p style="text-align: right;">1756</p> <p>02:23:36 1 contradictory. And what I'm saying is that if it were 2 true that there was absolute nullity, which is not 3 what's being referred to here, this is relative 4 nullity, which there is a Statute of Limitations spun 5 in two years, but if it were true that there was 6 absolute nullity, then there was no Statute of 7 Limitations. 8           And I'm also saying here what I just 9 mentioned to the Tribunal; namely, that a declaration 10 of lesividad does not pertain to questions of 11 legality. It pertains to the interests of the State. 12 That's why it is given to the President and his 13 Cabinet to make such determination and not to a court 14 of law. If there's a problem of legality, then it is 15 a court of law that must determine that. 16        Q.    And legalities, as you've told us here before 17 when you testified here in the prior hearing, a 18 legality can cause--an illegality, I should say, can 19 cause harm to interests of the State; correct? Or are 20 you of view that an illegality under Guatemalan law 21 can never cause harm to interests of the State? 22        A.    Well, I think that a situation where there</p>	<p>PAGE 1758</p> <p style="text-align: right;">1758</p> <p>02:26:15 1 Contracts 143 and 158 were illegal? Is that your 2 testimony? 3        A.    Can you repeat it, please. 4        Q.    Sure. Is it your testimony in this case that 5 President Berger had no responsibility, had no--didn't 6 have to, let's say it that way--had no obligation to 7 respond to the advice that he was given that Contracts 8 143 and 158 were illegal? 9        A.    He was under no legal or constitutional 10 obligation to declare them lesivos. 11       Q.    Did he have an obligation to respond to the 12 advice that he was given that the contracts were 13 illegal? 14       A.    He had an obligation to consider with his 15 Cabinet that question given the fact that there had 16 been a proceeding leading to bring that question to 17 him and his Cabinet. 18       Q.    So, you agree he had an obligation to take 19 action? 20       A.    To deliberate and to decide, whether to 21 declare or not to declare. 22       Q.    Okay. And you obviously take issue with his</p>

<p>PAGE 1759</p> <p style="text-align: right;">1759</p> <p>02:27:28 1 decision to declare; right?  2 A. I take issue with the foundations that led to  3 his decision and his Cabinet's decision.  4 Q. But then--I see. So, you believe he was  5 misinformed, but you don't take issue with his  6 decision to declare it lesivo; is that correct?  7 A. I think that to have exercised his judgment  8 on the basis of illegalities or legal technicalities  9 was not even a right exercise of judgment. It was not  10 valid under our Constitution and our laws.  11 Q. All right. Let's pull up Article 154 of the  12 Constitution. Mr. Mayora has cited it in some of his  13 opinions. And this is RL-45, I believe, is the  14 English version.  15 MR. ORTA: Okay. And for the Tribunal, these  16 are two articles that we believe, Article 154 and 155,  17 and it is I believe RL-45 is the English translation  18 of portions of these articles. These are Articles 154  19 and 155 of the Guatemalan Constitution. So, not 153.  20 154 and 155.  21 BY MR. ORTA:  22 Q. So, Article 154, sir, states that Government</p>	<p>PAGE 1761</p> <p style="text-align: right;">1761</p> <p>02:30:20 1 breaks the law to the detriment of the State or a  2 State entity or a private individual, he could be  3 jointly liable for damages as a result of that  4 conduct?  5 A. Well, it says here, "to the detriment of a  6 private individual."  7 Q. Or to the detriment of the State; correct?  8 A. The State or a State entity, yes.  9 Q. Right. So, it could be to the detriment of  10 just the State, if he breaks the law just to the  11 detriment of the State, he could be personally liable;  12 correct?  13 A. I think we had better look at the Spanish  14 version of it.  15 Q. No problem. I believe it's in your notebook  16 under C--  17 A. I think I'm right. It's only to the  18 detriment of the private individual.  19 Q. Could you read out loud just for the record  20 that paragraph in Spanish, please, so it can be  21 translated for the record.  22 A. Yes, sir. Article 155, "Liability due to</p>
<p>PAGE 1760</p> <p style="text-align: right;">1760</p> <p>02:29:10 1 employees are vested with the authority--with  2 authority and are legally responsible for their  3 official conduct; correct?  4 A. That's correct.  5 Q. And you agree that this article applies to  6 the President?  7 A. Of course.  8 Q. So, you agree that he's legally responsible  9 for his official conduct?  10 A. He's legally responsible for his official  11 conduct, yes.  12 Q. And Article 155, if we can highlight the  13 first full paragraph of it, this article says, "When a  14 State dignitary, State official, or State employee, in  15 the exercise of his or her position, breaks the law to  16 the detriment of a private individual, the State, or  17 State entity where the dignitary, official, or  18 employee serves--and this is actually a fairly--it's a  19 poor translation. It should say, "he shall be jointly  20 liable for damages." You can read the Spanish version  21 if you like, but it says "cerra mobile."  22 Do you agree with that, that if the President</p>	<p>PAGE 1762</p> <p style="text-align: right;">1762</p> <p>02:31:38 1 breaches of the law. Whenever an official employee in  2 exercise of his own--by complying with his own duties,  3 infringes the laws in the exercise of his position to  4 the detriment of a private individual, the State, or  5 State entity where the dignitary, official, or  6 employees should be jointly liable for damages."  7 Q. And it is your opinion, it is your Legal  8 Opinion that the interpretation of that clause is that  9 only when a State official excises his or her position  10 and breaks the law to the detriment only of a private  11 individual is he jointly liable for damages; is that  12 your opinion?  13 A. Counselor, what this rule in the Constitution  14 is establishing is precisely how a public official is  15 liable jointly with the State or a State entity  16 vis-à-vis private parties, when that official causes  17 damages to that private party. There are other  18 sections in the Constitution and in the laws of the  19 Republic to the effect of how they are  20 administratively, civilly, and criminally liable for  21 whatever infringement in the exercise of their duties  22 in office, but this is a provision to the effect of</p>

<p>PAGE 1763</p> <p style="text-align: right;">1763</p> <p>02:33:10 1 how a public official is liable to a private party if 2 that public official causes damages to that private 3 party. 4 Q. All right. So, it's your opinion--we've 5 cited the wrong provision, but nonetheless you agree 6 with the principle that the President, if he, in the 7 exercise of his function, commits some or breaks the 8 law in some way to the detriment of the State that he 9 could be jointly liable for those damages? He could 10 be liable for those damages civilly and even 11 criminally? 12 A. Well, I didn't say he would be jointly liable 13 because administrative legal liability is--pertains to 14 the public official in his capacity as such, so there 15 is, of course, no joint liability there. 16 Q. So, you agree he would be liable, himself, 17 either civilly-- 18 A. What I'm trying to do is to clarify for the 19 Tribunal that this is a provision that makes any 20 public official, including the President, liable to a 21 private party when in the exercise of his powers he 22 has illegally caused damages to that private party.</p>	<p>PAGE 1765</p> <p style="text-align: right;">1765</p> <p>02:35:50 1 Q. If we could put up RL-172. 2 You are aware, are you not, sir, that the 3 Guatemalan Constitutional Court has, in fact, 4 addressed the issue of whether the lesivo law is 5 unconstitutional under Guatemalan law? 6 A. I am aware of this amparo proceeding where 7 the Court was asked to consider if there had been a 8 constitutional or legal injury as a consequence of the 9 application of those provisions pertaining to 10 lesividad. 11 Q. And you're aware that the Court determined 12 that there were no constitutional problems with the 13 lesivo law in this Opinion? 14 A. I think that the concrete opinion of the 15 Court in this case is that there wasn't an injury that 16 would call for granting the amparo, as we say. 17 Q. Okay. The person who filed this--first of 18 all, an amparo for purposes of the Tribunal, that's a 19 constitutional challenge to a law; correct? 20 A. Not exactly. We have a dual system in 21 Guatemalan constitutional law. We have the review of 22 constitutionality in the abstract, which is a</p>
<p>PAGE 1764</p> <p style="text-align: right;">1764</p> <p>02:34:32 1 Q. And there are other provisions in the 2 Constitution that would make the President liable--not 3 jointly, excuse me--liable either civilly or 4 criminally for actions taken to the detriment of the 5 State; correct? 6 A. Not to the detriment of the State. For 7 actions taken illegally. 8 Q. For actions taken illegally, okay. 9 Now, sir, you are of the view in this case 10 that the lesivo law is unconstitutional; right? 11 A. Those provisions establishing lesividad are 12 contrary to some of the constitutional provisions of 13 my country, yeah. That is my opinion. 14 Q. All right. And you in your prior testimony 15 to this Tribunal and in your written declarations said 16 that you believe that if the issue were considered by 17 the Constitutional Court of Guatemala, that they would 18 agree that the issue or that the law is 19 unconstitutional. Do you remember saying that? 20 A. No, I remember saying that it should be 21 declared unconstitutional, not that they would declare 22 it unconstitutional, but that they should.</p>	<p>PAGE 1766</p> <p style="text-align: right;">1766</p> <p>02:37:27 1 proceeding, and the proceeding, actually, as the Court 2 has repeatedly clarified, it is the proceeding to 3 submit to the Court, to the Constitutional Tribunal 4 that a provision in the law is unconstitutional. Then 5 the amparo is, in the language of our Constitution, a 6 constitutional guarantee, meaning that it is there to 7 guarantee that the laws and the regulations of the 8 Republic be enforced and applied not in violation or 9 contradiction of the Constitution or constitutional 10 rights. 11 So, the amparo is not to review the 12 constitutionality, but to protect individual Parties 13 against unconstitutional enforcement or application of 14 laws or regulations. 15 Q. You agree that the constitutional challenge 16 to the lesivo law was rejected by the Constitutional 17 Court in this case? 18 A. No, I cannot agree in such broad terms. I 19 could agree that the Court, in this ruling, did 20 consider whether the provisions--the very few 21 provisions having to do with lesividad as enforced or 22 applied to the matter brought before the Court had not</p>

<p>PAGE 1767</p> <p style="text-align: right;">1767</p> <p>02:38:58 1 created an injury as claimed by the person who filed 2 his amparo. 3 Q. And so the constitutional challenge in this 4 case failed? 5 A. The amparo failed. 6 Q. Which was a constitutional challenge to the 7 lesivo law; correct? 8 A. Well, I tried to clarify that for the 9 Tribunal. And I think I have, I hope. 10 PRESIDENT RIGO: One last question. 11 BY MR. ORTA: 12 Q. Okay. Sir, you are aware, are you not--if we 13 could put up R-198. 14 You are aware that the case that we're about 15 to put up on the screen, R-198, that in this case-- 16 MR. STERN: Excuse me, David, I think it's 17 RL-198 just for the record. 18 MR. ORTA: Excuse me, RL-198. 19 BY MR. ORTA: 20 Q. That in this case that we have currently put 21 up, the Administrative Court in Guatemala overturned 22 the Lesivo Declaration by the Government?</p>	<p>PAGE 1769</p> <p style="text-align: right;">1769</p> <p>02:41:45 1 acknowledgement of its condition as lesivo to State 2 interests, early termination, annulment, or mutual 3 agreement, taking all measures necessary to avoid 4 incurring in acts that may cause greater damage to the 5 assets under Usufruct." 6 Q. So, is it your understanding that in this 7 Opinion from the Attorney General's Office they were 8 advising, I guess, FEGUA that there was more than one 9 option to deal with the alleged illegalities in 10 Contracts 143 and 158 beyond declaring lesivo? 11 A. Yes, that's exactly what I read here, yeah. 12 Q. Okay. And let's look at R-24, which is the 13 Finance Board Opinion that you were asked questions 14 about, or the Ministry of Finance Opinion. 15 A. Yes. 16 Q. And if you could turn to the last page of 17 that, under the heading, "Six, Opinion." 18 A. Yes, sir. 19 Q. And could you read item Roman little I there. 20 A. Yes, it reads as follows: "First, that the 21 State of Guatemala had sufficient grounds to 22 invalidate Notarial Deeds Number 143 and 158 through</p>
<p>PAGE 1768</p> <p style="text-align: right;">1768</p> <p>02:40:26 1 A. Yes, I'm aware of that. 2 MR. ORTA: I have nothing further at this 3 time. Thank you. 4 PRESIDENT RIGO: Mr. Stern? 5 MR. STERN: Thank you. 6 REDIRECT EXAMINATION 7 BY MR. STERN: 8 Q. Dr. Mayora, you were asked some questions 9 about some of these legal opinions that led up to the 10 President's Declaration of lesividad. 11 Could you please turn to R-15 in one of the 12 binders that you have there. 13 A. Yes, sir. 14 Q. Do you have that? 15 Could turn to the last page of that document, 16 the Opinion, under the heading "Opinion." 17 A. Yes, sir. 18 Q. And could you read for the record the first 19 sentence there of that paragraph. 20 A. It says as follows: "As explained above in 21 this opinion, the Contract is considered lesivo to the 22 interests and must be set aside through formal</p>	<p>PAGE 1770</p> <p style="text-align: right;">1770</p> <p>02:43:10 1 Lesivo Declaration, rescission, annulment, or mutual 2 agreement of the Parties." 3 Q. So, is this Opinion here consistent with the 4 Attorney General's Opinion you just looked at? 5 A. It seems to be the same Opinion, yes. 6 Q. Okay. Could you turn to R-25, which was the 7 Technical Board of the Presidency Opinion which you 8 were asked questions about. 9 A. Yes, sir. 10 Q. And is it your understanding that this was 11 the Opinion which the President received a 12 recommendation to declare 143 and 158 Lesivo? 13 A. This appears to be the one. 14 Q. Okay. And if you could go to the analysis 15 section? 16 A. Yes. 17 Q. And under item two there, could you read that 18 paragraph. 19 A. Yes. It reads as follows: "Two, pursuant to 20 the Supreme Law of the country, the President of the 21 Republic may issue decrees in accordance with the 22 Constitution and approve any Accords, regulations, and</p>

<p>PAGE 1771</p> <p style="text-align: right;">1771</p> <p>02:44:18 1 orders which may be necessary to execute the laws  2 without departing from their spirit; preside over the  3 Cabinet of Ministers; and manage public finances in  4 accordance with the law. Additionally, the Executive  5 Branch law provides that the Cabinet of Ministers  6 shall cooperate with the President of the Republic in  7 establishing if administrative acts or actions are  8 lesivo for the purposes of bringing an administrative  9 recourse."  10 Q. Is it your understanding that in this Opinion  11 the Technical Board of the Presidency was advising the  12 President that he may issue a Lesivo Decree?  13 MR. ORTA: Excuse me. He's leading the  14 witness. Objection.  15 MR. STERN: Okay, let me ask it a different  16 way.  17 BY MR. STERN:  18 Q. What is your understanding as to what the  19 Technical Board of the Presidency was telling the  20 President in this paragraph here?  21 A. I think their analysis here is that they must  22 provide the President and his Cabinet that is with the</p>	<p>PAGE 1773</p> <p style="text-align: right;">1773</p> <p>02:46:52 1 Cabinet of Ministers."  2 Q. Okay. So, in this Opinion, was the Technical  3 Board of the Presidency advising or stating that the  4 President--that the Lesivo Decree must be submitted to  5 the President for approval?  6 A. That is right, yeah.  7 Q. Excuse me, must--  8 A. That it should be submitted to the President  9 of the Republic for approval and Cabinet of Ministers.  10 Q. Now, you were asked questions about  11 Articles 154 and 155 of the Guatemalan Constitution  12 about the President's potential legal liability,  13 personal legal liability for not declaring lesivo in  14 that context. Let me ask you this: Can the President  15 of Guatemala break any law by not declaring a contract  16 lesivo when it's been recommended to him by his legal  17 adviser?  18 A. Not in my opinion because that determination  19 requires the true exercise of judgment on behalf of  20 the President and his Cabinet of Ministers. Not even  21 politically can he be held responsible because under  22 our system, it would be his Ministers who could be</p>
<p>PAGE 1772</p> <p style="text-align: right;">1772</p> <p>02:45:29 1 elements necessary such that the President and his  2 Cabinet may take the appropriate determination in  3 terms of declaring harmful an act of Government,  4 harmful to the interests of the State.  5 Q. Okay. Could you turn to the next page, the  6 last page under the Section 5 Opinion.  7 A. Yes.  8 Q. And could you read that paragraph, please.  9 A. Yes, it reads as follows: "After analyzing  10 the accompanying documentation and the applicable  11 legal provisions, this Consultative Committee  12 understands that the draft Governmental Agreement,  13 which declares lesivo to the interests of the State  14 the Contract for Onerous Usufruct of Railroad  15 Equipment owned by Ferrocarriles de Guatemala entered  16 into between Ferrocarriles de Guatemala and Compañía  17 Desarrollada Ferroviaria Sociedad Anónima, documented  18 as Notarial Deed Number 143 of August 28, 2003, as  19 amended by Notarial Deed Number 158 of October 7,  20 2003, both authorized in this city by Notary Public  21 Claudia Mariela Marroquin Luther, should be submitted  22 to the President of the Republic for approval in</p>	<p>PAGE 1774</p> <p style="text-align: right;">1774</p> <p>02:48:09 1 called before Congress to explain how or why they have  2 adopted any decision that in the Opinion of any  3 Congressman would have been not conducive to the best  4 interests of the State.  5 So, the President there, when analyzing a  6 matter that is being presented as harmful to the  7 interests of the State, must exercise his best or her  8 best judgment and determine whether that is or not the  9 case. He's the Chief of State. He's the highest  10 authority of the Executive Branch, and together with  11 his Ministers, that is the moment and an occasion when  12 he is to exercise discretion concerning the interests  13 of the State. Matters of legality are for his legal  14 advisers, for the Attorney General, for the courts.  15 This is a matter of State that it is up to the  16 President to analyze and determine with his Cabinet of  17 Ministers.  18 Q. Are you aware of any instance in which the  19 President has been sued or alleged to be personally  20 liable for not declaring a certain Contract or  21 Government act lesivo pursuant to the recommendations  22 of his legal advisers?</p>

<p>PAGE 1775</p> <p style="text-align: right;">1775</p> <p>02:49:36 1 A. I don't know of any such case, sir.  2 Q. Okay. Thank you. Nothing further.  3 QUESTIONS FROM THE TRIBUNAL  4 ARBITRATOR CRAWFORD: You have given your  5 Opinion that the President, in deciding on lesividad  6 is exercising a discretion.  7 THE WITNESS: That's correct, Professor  8 Crawford.  9 ARBITRATOR CRAWFORD: And you say that  10 because of that, the advice that he's given by the  11 Secretary-General and others has to be advised about  12 the framework or parameters and not advised about the  13 ultimate question. I don't see why. I mean, if the  14 President has to make a particular decision, surely  15 I'm entitled to say to him these are the grounds for  16 making the decision, one way or the other. I'm not  17 substituting my discretion for his. I'm simply giving  18 him advice as to how to exercise his discretion,  19 aren't I?  20 THE WITNESS: I think that the legal advisers  21 are to give the President and his Cabinet advice on  22 the legal framework within which they must analyze the</p>	<p>PAGE 1777</p> <p style="text-align: right;">1777</p> <p>02:52:26 1 time.  2 Do you agree with that analysis, or not?  3 THE WITNESS: I basically do, but I would add  4 to that analysis that the only place where an ex post  5 ratification of Contract 41 is mentioned is the  6 Bidding Terms because if one looks at the law that  7 regulates FEGUA and the law that created the  8 receivership, it is the Overseer that exercises the  9 powers of the board of FEGUA; and then if one goes to  10 the Public Procurement Act, what one finds there is  11 that it is up to the highest authority of a State  12 entity--and FEGUA is an entity, it is not an agency of  13 the central government--it is an autonomous entity--it  14 is for that authority to execute the Contract and  15 create, as in this case, a Usufruct.  16 So, I agree with your analysis, but I don't  17 think that, A, one can create an obligation for the  18 President to ratify a contract through of an Executive  19 Decree; and, B, that the lack of such Decree or accord  20 is not going to have, or shouldn't have any  21 consequence in terms of the validity of the Contract.  22 ARBITRATOR CRAWFORD: Let me give you a</p>
<p>PAGE 1776</p> <p style="text-align: right;">1776</p> <p>02:51:02 1 substance of the problem, but I agree with you that a  2 diligent Chief of State, a diligent President would  3 seek the advice and opinions of people knowledgeable  4 about the substance of the problem that's being  5 brought to him and his Cabinet for consideration.  6 ARBITRATOR CRAWFORD: One of the problems we  7 have in this case, which is described by my colleague  8 Secretary Eizenstat as a Catch-22 situation, is that  9 it was very unclear once things got started how to get  10 out of them. The original Contract 41 had been the  11 subject of a bid procedure, and the only thing  12 standing in its way was that it hadn't been finally  13 endorsed by a Cabinet Resolution.  14 Now, I mean, in accordance with the sort of  15 legal system that I'm used to, that meant that it was  16 probably ineffective as a contract, but it doesn't  17 seem to me that it was--at least I wouldn't have  18 analyzed it as being substantively unlawful. The  19 Executive still had to do something to make it into a  20 final Contract. Whether a conduct done pursuant to it  21 was lawful or not was a separate question, but the  22 Contract itself was simply unperfected at a certain</p>	<p>PAGE 1778</p> <p style="text-align: right;">1778</p> <p>02:53:57 1 hypothetical, which the relationship of which to the  2 present case can remain unresolved for the purposes of  3 the question to you. Let's assume that a foreign  4 investor engages in the bid process, wins the bid  5 fairly and squarely, makes the substantial investment,  6 does everything that is required to be done under the  7 Contract which is then negotiated, but the Contract  8 is, for some reason, not ratified by Government  9 resolution as it should be. Does that mean that, as a  10 matter of Guatemalan law, there is no alternative but  11 a Declaration of Lesividad in relation to that  12 contract, or alternatively, the conduct of a  13 completely new and open bid procedure which a putative  14 investor may lose?  15 THE WITNESS: In my opinion, there are  16 several courses of action that the Government and the  17 State entity in this case, FEGUA, and the private  18 Party to the Contract could have pursued in order to  19 cure or resolve the alleged lack of ratification, and  20 very probably the easiest one would have been to just  21 amend that contract and remove the requirement that it  22 be ratified by Executive Decree because, again,</p>

<p>PAGE 1779</p> <p style="text-align: right;">1779</p> <p>02:55:41 1 neither in just the Terms of Reference of a bidding 2 process nor in a contract can anyone make the 3 President obligated to issue an Executive Decree 4 ratifying the Contract that an autonomous entity has 5 the right through its highest authority to enter into 6 and negotiate. 7         ARBITRATOR EIZENSTAT: Just adding further to 8 this hypothetical of Professor Crawford, you mentioned 9 amending the Contract and removing the requirement of 10 executive ratification. We're told by the prior 11 witness, the Overseer, Mr. Gramajo, explicitly that 12 this Contract that is 143 and 158, did not require 13 Executive approval by its terms, and that the FEGUA 14 lawyers, after it was in effect, then concluded that 15 it did require Executive approval. In other words, 16 it's not a question of correcting the Contract which 17 did require Executive approval and then changing it. 18 In his testimony, the Contract did not require 19 Executive approval, and the lawyers determined, FEGUA 20 lawyers, that it did require it. That's what I call 21 the Catch-22. 22         But how do you deal with that situation?</p>	<p>PAGE 1781</p> <p style="text-align: right;">1781</p> <p>02:58:57 1 know, it can only be said in a very formalistic sense, 2 and so I think that there would have been several ways 3 to amend the Contract and to correct this 4 technicality. 5         ARBITRATOR EIZENSTAT: Without a declaration 6 of lesivo. 7         THE WITNESS: Right. 8         ARBITRATOR EIZENSTAT: Do you have--do you 9 know whether under Guatemalan law there is something 10 equivalent to a sort of common law concept of estoppel 11 or reliance when one Party has relied on the actions 12 of another? Is that a doctrine that is embedded also 13 in Guatemalan law? 14         THE WITNESS: Yes, Secretary Eizenstat, it 15 is. It is in our Civil Code, and clearly stated in it 16 is the notion that a Party that has contributed in any 17 way to the creation of a cause for nullity cannot 18 invoke that in order to obtain a declaration that the 19 Contract is null and void. That's the reason why I've 20 maintained that a Declaration of Lesividad can only be 21 considered as an exception to that rule because the 22 general rule is that of the common law notion of</p>
<p>PAGE 1780</p> <p style="text-align: right;">1780</p> <p>02:57:22 1 What is your opinion on that? 2         THE WITNESS: Well, it seems to me that the 3 nature of the problem stems from the inclusion in the 4 Terms of Reference of the bid that any such 5 ratification was required, and I ignore why such thing 6 might have been included. Probably they were seeking 7 to provide the whole process with more formality in 8 having the President and his Cabinet issuing any such 9 ratification. 10         But it seems to me that the two Parties to a 11 contract acting in good faith and trying to converge 12 in making the situation work can find several ways to 13 amend the situation because in my opinion, this was 14 really a legal technicality. In substance, the 15 President, his Cabinet, the whole Government not only 16 approved of this process, they promoted it. They 17 organized it. An Overseer of FEGUA or any other State 18 entity couldn't have conceivably, not possibly, 19 started a process to privatize the service. This was 20 wanted and promoted by the Government, by the 21 President, himself. 22         And so, to speak of a lack of approval, you</p>	<p>PAGE 1782</p> <p style="text-align: right;">1782</p> <p>03:00:18 1 estoppel, which we have a similar sort of principle or 2 rule in our Civil Code. 3         ARBITRATOR EIZENSTAT: We've heard at least 4 some testimony that the FEGUA Overseer signed 5 Contracts 143 and 158 after by mutual agreement, 6 Contract 41 was set aside as being null and void for 7 the absence of Presidential approval, and the Overseer 8 presumably signed that agreement, signed by both 9 sides, and there was action pursuant on both sides to 10 that contract. 11         Is that a situation, in your opinion, in 12 which this doctrine under Guatemalan law of estoppel 13 would have relevance? 14         THE WITNESS: I think so because this is a 15 situation where the Party exercising control over the 16 fact or the factor that would have cured the problem 17 is the very Government. In other words, the private 18 party cannot do anything to have the President ratify 19 Contract 41 or any of the other contracts. This is 20 something that's in the control of the Government, and 21 they decide not to do it, well, then I would think 22 they are estopped from bringing that as a cause for</p>

<p>PAGE 1783</p> <p style="text-align: right;">1783</p> <p>03:02:00 1 nullity.</p> <p>2 ARBITRATOR EIZENSTAT: We're, of course,</p> <p>3 not--we're making a judgment, as Professor Crawford</p> <p>4 said, under CAFTA, so this is a separate decision that</p> <p>5 we have to make. What criteria are there for invoking</p> <p>6 lesividad? Are there stated criteria beyond the</p> <p>7 President's making a determination of the interest of</p> <p>8 the State? What types of judgments must be made to</p> <p>9 make that determination that a particular act or</p> <p>10 contract is contrary to the interest of the State, or</p> <p>11 is it a purely discretionary matter? Do you know of</p> <p>12 what criteria in terms of previous either statutorily</p> <p>13 or by Court decisions over the years?</p> <p>14 THE WITNESS: There isn't any criteria, no</p> <p>15 settled criteria as to what might be harmful to the</p> <p>16 interests of the State within the context of</p> <p>17 lesividad. There can be four people and six opinions</p> <p>18 as to that in a room at any given point in time; and,</p> <p>19 unfortunately, the few cases that in the last 25 years</p> <p>20 or so have made it to the Administrative Court have</p> <p>21 not, in my opinion, shed any light on that.</p> <p>22 ARBITRATOR EIZENSTAT: If FEGUA had decided,</p>	<p>PAGE 1785</p> <p style="text-align: right;">1785</p> <p>03:04:53 1 that as a possible avenue for public contracts?</p> <p>2 THE WITNESS: There are some exceptions in</p> <p>3 the Public Procurement Act where contracts can be</p> <p>4 entered into without a bidding, cases of emergency or</p> <p>5 national security or where there is only one supplier</p> <p>6 or there is an intuitu persona kind of situation, but</p> <p>7 most of them are exceptions to the general rule that a</p> <p>8 bidding is required.</p> <p>9 ARBITRATOR EIZENSTAT: Do you have any</p> <p>10 opinion under Guatemalan law as to whether there</p> <p>11 having been a bid for Contract 41, which was then</p> <p>12 superseded by 143 and 158, there was a requirement for</p> <p>13 a re-bid of 143 and 158?</p> <p>14 THE WITNESS: In my opinion, it is very</p> <p>15 important to point to the very specific object of the</p> <p>16 bidding. The bidding was in order to acquire the</p> <p>17 right to negotiate a Usufruct Contract with FEGUA.</p> <p>18 So, the winning of the bid was supposed to go and sit</p> <p>19 down within the general terms of the bidding process,</p> <p>20 then negotiate and conclude a contract.</p> <p>21 So, I think that this being the object of the</p> <p>22 bidding process, there is reasonable grounds to look</p>
<p>PAGE 1784</p> <p style="text-align: right;">1784</p> <p>03:03:26 1 as they presumably did, that an executive approval was</p> <p>2 required for these contracts to be fully effective and</p> <p>3 the alleged illegality removed, would the President</p> <p>4 have been authorized to grant that approval as opposed</p> <p>5 to granting lesividad, or would that have been beyond</p> <p>6 his authority to do.</p> <p>7 THE WITNESS: In my opinion, that probably</p> <p>8 would have been the harder solution because again</p> <p>9 there aren't any specific legal provision</p> <p>10 on--provisions on the basis of which the President can</p> <p>11 issue such ratification, and the President or any</p> <p>12 other public official requires a legal basis for</p> <p>13 action, and where is the provision on the basis of</p> <p>14 which the President could have issued such</p> <p>15 ratification.</p> <p>16 So, that is why the reason why I venture in</p> <p>17 my opinion that the easiest way would have been to</p> <p>18 clarify the record to the effect that no ratification</p> <p>19 is required only because someone decided in the</p> <p>20 Bidding Terms that it was a good idea to have that.</p> <p>21 ARBITRATOR EIZENSTAT: Is there such a thing</p> <p>22 in Guatemalan law as no-bid contracts? Do you have</p>	<p>PAGE 1786</p> <p style="text-align: right;">1786</p> <p>03:06:37 1 at Contracts 143 and 158 as the final stage in these</p> <p>2 negotiations that one would want to think of as bona</p> <p>3 fide negotiations leading to that sort of final</p> <p>4 concretion of the process.</p> <p>5 A second bidding would have, I think, been an</p> <p>6 implicit recognition that no rights existed, that the</p> <p>7 whole process had been somehow null, and hadn't</p> <p>8 produced any effects, and I fail to see how that would</p> <p>9 have been a cure. I think that would have been</p> <p>10 another way to kill a process that was certainly</p> <p>11 promoted by our own Government.</p> <p>12 ARBITRATOR EIZENSTAT: One last question.</p> <p>13 Under Guatemalan law, but also your experience in the</p> <p>14 country, we have a situation here in which there were</p> <p>15 two separate contracts: One, 402, which granted</p> <p>16 certain rights-of-way and control of rights-of-way,</p> <p>17 which was not implicated in the lesividad, and the</p> <p>18 second, the equipment, 143 and 158. Do you have an</p> <p>19 opinion as to whether if there had been a re-bid of</p> <p>20 just the Equipment Contract, there would have been a</p> <p>21 likelihood of another bidder bidding on that when that</p> <p>22 bidder would not have controlled the right-of-way for</p>

<p>PAGE 1787</p> <p style="text-align: right;">1787</p> <p>03:08:20 1 the use of that equipment?  2 THE WITNESS: In my opinion, the probability  3 would be very, very low, close to nil, because of the  4 other bidder would have--would have had only one other  5 Party to enter a contract with for the use of the  6 right-of-way, and so I wonder who would enter into a  7 situation where there is only another Party in the  8 world to contract with in order to use that equipment.  9 I find it very, very improbable.  10 ARBITRATOR EIZENSTAT: Okay. Thank you.  11 PRESIDENT RIGO: Dr. Mayora, you said in  12 respect of the Contract 143, et cetera, in terms of  13 possible ratification by the President that there was  14 no specific provision under which the President could  15 act, which is why you suggested other ways to solve  16 this problem. Nonetheless, under Contract 402, it was  17 ratified, was approved by Acuerdo Gubernativo after  18 bidding, so it was something that had been done  19 before. Do you have any comment on that in terms of  20 your statement right now on this matter.  21 THE WITNESS: Mr. Chairman, I think if I'm  22 not mistaken, that 402 was ratified by Congress, and</p>	<p>PAGE 1789</p> <p style="text-align: right;">1789</p> <p>03:11:10 1 your Legal Opinion that he couldn't approve it because  2 there was no basis upon which his Executive approval  3 should have been sought in the first instance?  4 A. Yes, it is my opinion there aren't provisions  5 in the laws of Guatemala or the regulations on the  6 basis of which such Presidential ex post ratification  7 could be given.  8 Q. And as you said, your recollection is that  9 Contract 402 was only submitted to Congress for  10 approval. You don't have a recollection that it was  11 also submitted to the President for approval?  12 A. I don't have that recollection right now.  13 Q. Okay.  14 A. I do know that Congress did pass a resolution  15 ratifying 402. But whether it was also sent to the  16 President, I don't recall right now.  17 Q. Thank you.  18 In terms of options that were available, you  19 said there were a number of options, and now we're  20 talking about Contract 41 for a second. You said  21 there were a number of options available to the  22 Parties. Was one of those options that Ferrovias</p>
<p>PAGE 1788</p> <p style="text-align: right;">1788</p> <p>03:10:01 1 probably that was done on the basis that Congress  2 approves concessions. I don't know, to be frank. But  3 if there would have been also an Executive Decree  4 ratifying Contract 402, it might well have been  5 considered an ultra vires action on behalf of the  6 President.  7 PRESIDENT RIGO: I don't recall whether it  8 was Congress or was the Government at this point, so  9 it just occurred to me as I heard your statement that  10 it had been approved of the previous Contract.  11 Thank you. Mr. Stern, do you have any  12 questions on the Tribunal questions?  13 MR. STERN: No, I have no further questions.  14 Thank you.  15 PRESIDENT RIGO: Mr. Orta?  16 MR. ORTA: Thank you, Mr. Chairman.  17 RE-CROSS-EXAMINATION  18 BY MR. ORTA:  19 Q. Just following up on some of the Tribunal  20 questions, I'm going to start with the question by the  21 Chairman. So, is it your view that the President, if  22 the Contract were submitted to the President, is it</p>	<p>PAGE 1790</p> <p style="text-align: right;">1790</p> <p>03:12:26 1 could have formally petitioned the Office of the  2 President for approval, having not received approval  3 of the Contract, that it could formally have  4 petitioned Office of the President for it to approve  5 Contract 41?  6 A. On the basis of a technical petition or a  7 petition on the basis of technical-legal grounds, I  8 don't see how that was possible because again, you  9 have to go to the Secretary-General and say I come  10 here to petition on the basis of Article A, B, and C,  11 that Mr. President shall ratify this Contract. And  12 so, what's the basis?  13 The strongest basis again would have been  14 there are these terms of reference for this bidding  15 process, and it says that Mr. President must ratify  16 this, so I petition that he does.  17 Q. So, let's assume for a second that you're  18 incorrect in terms of your opinion that Executive  19 approval is not required. There has been another  20 Opinion rendered in this case by a different  21 Guatemalan Legal Expert who has opined, on the basis  22 of other Guatemalan laws, including the Organic Law of</p>

<p>PAGE 1791</p> <p style="text-align: right;">1791</p> <p>03:13:46 1 FEGUA and the Constitution that Executive approval was  2 required. So, for purposes of this question, assume  3 that that is the correct Opinion of whether Executive  4 approval is required.  5 If you make that assumption, and there was no  6 approval from the President forthcoming for Contract  7 41, could Ferrovías have petitioned the Office of the  8 Presidency for Executive approval--for approval of  9 Contract 41?  10 A. For a second time, you mean, or just once?  11 Q. Having not received approval from the  12 President--  13 A. Initially, you mean?  14 Q. No, no, no. Once the Contract was signed;  15 okay?  16 A. Um-hmm.  17 Q. That's the starting point.  18 A. Okay.  19 Q. Once the Contract was finally negotiated and  20 signed--  21 A. Um-hmm.  22 Q. --and let's assume again that Executive</p>	<p>PAGE 1793</p> <p style="text-align: right;">1793</p> <p>03:15:59 1 either the "no" or the effective "no" through  2 administrative silence?  3 A. Well, probably not to the Administrative  4 Court. Perhaps it would have been more of an amparo  5 action, but again, the fundamental point here is that  6 if there were any provisions in our statutes mandating  7 that Presidential ratification, I suspect that we  8 wouldn't be sitting here.  9 Q. Now, you said that no Executive approval was  10 required because, in part, you say the Executive gave  11 his approval when he agreed to the bidding process;  12 correct?  13 A. No, I'm saying that to maintain that there  14 wasn't a governmental approval of the whole process is  15 impossible to maintain; that the only thing that one  16 could discuss is whether a formal Presidential  17 ratification was legally required or not because it  18 was the very President and his Government who promoted  19 the privatization processes not only of the railroad  20 system, but the post office, the telecommunications  21 company, the electric sector, and on and on, so this  22 was a national project at the time.</p>
<p>PAGE 1792</p> <p style="text-align: right;">1792</p> <p>03:14:43 1 approval in this hypothetical is required for this  2 Contract in order for it to become effective.  3 Was one of the options available for  4 Ferrovías to petition the President at that point to  5 approve the Contract under Guatemalan law? Was that  6 an option they had?  7 A. You know, on your assumption, it was an  8 option because, of course, the assumption is the  9 highest premise, yes.  10 Q. Okay. And under Article 16 of the  11 administrative law, if the President had not answered  12 that petition within 30 days, that would have been the  13 equivalent of saying no to that petition; correct?  14 It's the principle of administrative silence?  15 A. That's correct, yeah.  16 Q. And if Ferrovías had made such a petition,  17 and had either received a "no" or received no response  18 after 30 days, they could then have filed an action in  19 the Guatemalan Courts to compel the President to sign  20 or to make a determination, I should say, about  21 whether or not to approve the Contract; correct? That  22 would have been a remedy that they had after they got</p>	<p>PAGE 1794</p> <p style="text-align: right;">1794</p> <p>03:17:47 1 So, to characterize this as lacking  2 Presidential approval, in my opinion, can only be set  3 in a very narrow, formalistic sense and as a  4 ratification ex post, not ex ante.  5 Q. Now, you did say, though, that the Parties,  6 according to the Bidding Terms, could negotiate  7 certain terms of the Equipment Contract; right?  8 A. What I said is that the Terms of Reference of  9 the bidding process had as their object the right to  10 sit down and negotiate the Usufruct Contract with  11 FEGUA.  12 Q. And that's certainly--whatever those terms  13 were that were eventually negotiated by the Parties,  14 that's not something that the President could have  15 given approval of in advance; correct? Because he  16 wouldn't have known about what those terms were going  17 to be that the Parties would eventually negotiate?  18 A. I'm sorry, I'm not sure I'm understanding  19 your question. Whether the President would have  20 approved in advance the Terms of Reference?  21 Q. Not the Terms of Reference. The subsequent  22 additional terms that the Parties were to negotiate</p>

<p>PAGE 1795</p> <p style="text-align: right;">1795</p> <p>03:18:58 1 between each other. That's certainly not something  2 the President could approve in advance; correct? He  3 wouldn't have known what those terms were going to be.  4 A. No. And he was not required to do that under  5 law.  6 Q. Okay. In terms of the bidding law, first of  7 all, you do agree that the Bidding Terms, Article 6.4,  8 of Contract 41 required Presidential approval;  9 correct? You said that before.  10 A. They've included that, yeah.  11 Q. And you always recognize, don't you, that the  12 bidding--those very Bidding Terms were incorporated in  13 Contract 143.  14 A. Yeah.  15 Q. And so, by incorporating those Bidding Terms  16 into Contract 143, they were incorporating all of the  17 terms, including the one that required Executive  18 approval; correct?  19 A. Yeah, you could say that, yeah.  20 Q. And you're familiar with Article 89 of the  21 bidding law; correct? Or of the Public Contracting  22 Law?</p>	<p>PAGE 1797</p> <p style="text-align: right;">1797</p> <p>03:21:25 1 the Terms of Reference are no legal means to amend  2 statutes or to amend regulations.  3 Q. Okay.  4 MR. ORTA: I have nothing further, thank you.  5 QUESTIONS FROM THE TRIBUNAL  6 ARBITRATOR EIZENSTAT: I just have one more  7 question that we didn't get into.  8 One of the issues that we have to face here  9 is whether the Declaration of Lesividad was, in  10 effect, a final action or simply a process given the  11 fact that it could be appealed and that the  12 Administrative Court has to make a final judgment, and  13 I think this has been pending around four years now.  14 Do you have any opinion about the finality or  15 impact of the Lesividad Declaration when you have a  16 judicial review that is available and is still going  17 on as we speak?  18 THE WITNESS: Well, in my opinion, the whole  19 design of the institution of lesividad is of such  20 nature that, as I've argued in my statements in my  21 Reports to the Tribunal, it becomes almost final, and  22 that is, in part, due to the object of the Declaration</p>
<p>PAGE 1796</p> <p style="text-align: right;">1796</p> <p>03:20:03 1 A. The one in force at the time?  2 Q. Yeah, the one in force in 2003.  3 A. Yeah, I'm familiar with it.  4 Q. And Article 89 of the public bidding law  5 requires that a contract that arises out of a public  6 bidding process comply with the Bidding Terms;  7 correct?  8 A. Yeah.  9 Q. So, in other words, it would be incorrect to  10 incorporate terms of a bidding Contract that required  11 one to do X, but then one to not do X. That would be  12 incorrect under Article 89 of the bidding law, of the  13 Public Contracting Law?  14 A. Yes. Of course, as we all know, on the basis  15 of the rules of logic, 89 cannot possibly be construed  16 to allow for the inclusion of Bidding Terms above the  17 law.  18 Q. Right. And I guess the basic point is if the  19 Bidding Terms say you have to do X and you incorporate  20 those Bidding Terms into a contract, then you have to  21 do X in that contract?  22 A. If it's legally required or mandated, because</p>	<p>PAGE 1798</p> <p style="text-align: right;">1798</p> <p>03:22:40 1 of Lesividad; namely, harmfulness to the interests of  2 the State.  3 And B, given the very unfortunate situation  4 that the Court system in our country is currently not  5 providing the adequate protection of the law, in  6 general I think this is a notorious fact and something  7 that makes us very sad and very concerned, but it is a  8 reality.  9 And so, in that setting, a Declaration of  10 Lesividad has almost the practical effect of  11 destroying the business or making it very unlikely  12 that it could be viable again after years and years of  13 litigation.  14 PRESIDENT RIGO: Mr. Stern, anything on that  15 question?  16 MR. STERN: No, I have nothing further.  17 PRESIDENT RIGO: Mr. Orta?  18 MR. ORTA: Just one.  19 FURTHER RE-CROSS-EXAMINATION  20 BY MR. ORTA:  21 Q. You agree, don't you, that it is the  22 Administrative Court who ultimately decides whether</p>

<p>PAGE 1799</p> <p style="text-align: right;">1799</p> <p>03:24:07 1 the Contract is lesivo or not?  2 A. Whether there are legal grounds for the  3 Declaration of Lesividad.  4 Q. And whether lesividad exists. You agree that  5 it is up to the judicial Administrative Court to  6 decide whether lesividad exists, don't you?  7 A. Well, again, I've honestly tried to explain  8 the difference. The Declaration of Lesividad is made  9 by the President and his Cabinet. It is submitted by  10 the Attorney General to the Administrative Court for a  11 review of that Declaration, but the Declaration of  12 Lesividad is made by the President and his Cabinet.  13 Q. Okay. Do you recall testifying before this  14 Tribunal back in 2010?  15 A. Yes, I was here, yeah.  16 Q. Can we put up Page 823 of that testimony.  17 And this is testimony that you, sir, gave before this  18 Tribunal on March 3rd of 2010 in the Hearing on  19 Jurisdiction, and if we could highlight, please,  20 Lines 12 through 14.  21 Now, you were asked a question then, and the  22 question was: "It's the judicial Court who ultimately</p>	<p>PAGE 1801</p> <p style="text-align: right;">1801</p> <p>03:26:41 1 PRESIDENT RIGO: You can step down.  2 THE WITNESS: Thank you.  3 (Witness steps down.)  4 PRESIDENT RIGO: We will have a recess now  5 and reconvene here at quarter to 4:00.  6 MR. ORTA: Thank you.  7 (Brief recess.)  8 JUAN AGUILAR, RESPONDENT'S WITNESS, CALLED  9 PRESIDENT RIGO: Good afternoon. We are  10 going to resume our session.  11 Good afternoon, Mr. Aguilar.  12 THE WITNESS: Good afternoon.  13 PRESIDENT RIGO: Could you please read out  14 the Expert oath that you have in front of you.  15 THE WITNESS: I would be pleased to do so.  16 I solemnly declare upon my honor and  17 conscience that my statement this afternoon will be in  18 accordance with my sincere belief.  19 PRESIDENT RIGO: Thank you very much.  20 Mr. Orta.  21 MR. ORTA: Thank you, Mr. Chairman.  22 DIRECT EXAMINATION</p>
<p>PAGE 1800</p> <p style="text-align: right;">1800</p> <p>03:25:39 1 decides whether lesividad exists. Is that the case?"  2 And you answered: "Ultimately, yes."  3 Correct?  4 A. Correct.  5 Q. So, which version is correct? The one that  6 you gave to the Tribunal then or the one that you  7 rendered today? You gave a different answer today.  8 A. I don't find it different. I find that I'm  9 trying to explain that the Declaration of Lesividad,  10 which is the Act of Government as defined in the ley  11 de los Contencioso Administrativo and in the  12 Administrative Law Act, that is for the Government to  13 make, for the President and his Cabinet. That goes  14 for review to the Administrative Court, and ultimately  15 the Administrative Court decides on that.  16 Q. Decides whether the lesividad exists;  17 correct?  18 A. Yes.  19 Q. Thank you.  20 PRESIDENT RIGO: Thank you very much,  21 Mr. Mayora.  22 THE WITNESS: Thank you, Mr. President.</p>	<p>PAGE 1802</p> <p style="text-align: right;">1802</p> <p>03:47:21 1 BY MR. ORTA:  2 Q. Good afternoon, Mr. Aguilar. How are you?  3 A. Fine, thank you.  4 Q. Mr. Aguilar, I'm going to ask you a series of  5 questions regarding your--the opinions you have  6 expressed in your two Expert Reports. The first  7 question is whether you have before you the two Expert  8 Reports that you have rendered in this case.  9 A. Yes, that is correct.  10 Q. And do you ratify the contents of both of  11 those reports before this Tribunal?  12 A. Yes, I do, with one caveat, which is that in  13 the first of these I indicated as one of the sources  14 the fiscal code, whose content--the content doesn't  15 change the substance of the Report, but it has been  16 abolished and replaced by two other laws, or rather it  17 was vouched by the Procurement Law.  18 In the Second Report, I would ratify it but I  19 would note that there was erroneous cite to a  20 proceeding in which the Republic of Guatemala brought  21 a contentious administrative proceeding against the  22 contederacion deparativa autonima (ph.).</p>

<p>PAGE 1803</p> <p style="text-align: right;">1803</p> <p>03:48:44 1 PRESIDENT RIGO: Sorry for interrupting you.  2 Since you are being simultaneously interpreted, if you  3 read and when you speak but especially when you read,  4 you need to bear this mind. Slower, slower.  5 THE WITNESS: In the Second Report, I  6 erroneously cited the number 379-2006 when I referred  7 to the administrative proceeding brought by the  8 Republic of Guatemala against the Autonomous Sports  9 Federation. The correct number is 371-2009.  10 Otherwise, I ratify in their entirety the two  11 Reports that I had submitted.  12 BY MR. ORTA:  13 Q. Thank you, Mr. Aguilar.  14 I would like to ask you a series of questions  15 based on issues that have been under discussion in  16 these proceedings. The first is there have--there has  17 been questions--or there have been questions raised  18 about the lack of Governmental approval, lack of  19 executive approval of Contract 41.  20 Having reviewed the record, do you have any  21 opinions as to why it is that that Contract may not  22 have been approved by the executive?</p>	<p>PAGE 1805</p> <p style="text-align: right;">1805</p> <p>03:52:57 1 notes that all those Acts and Contracts in which the  2 Guatemalan State is involved must be formalized before  3 a Government Notary. The Government Notary is a  4 public officer who provides services free of charge.  5 But this notwithstanding, Article 49 of the Law on  6 Public Procurement also indicates that interested  7 Parties may request that a Notary other than a  8 Government Notary be the one to formalize the  9 Contract. Contract 41, I repeat, was not formalized  10 by the Government Notary.  11 It's important to note that this Contract for  12 Usufruct of the Railway Equipment, at its Clause  13 Number 20, provides for the obligation to register the  14 Usufruct Contract in the General Property Register.  15 Guatemala follows the system of public registry or  16 registration of property through a public office which  17 is the General Property Registry, where Acts and  18 Contracts that affect real property rights over real  19 and movable property is to be registered.  20 Specifically in the case of railways, there  21 is a provision in the Civil Code, which requires the  22 entry in the Registry of any act related to movables</p>
<p>PAGE 1804</p> <p style="text-align: right;">1804</p> <p>03:50:34 1 A. Yes. Contract 41 was signed on 23--I don't  2 have the exact date, but it was signed in 1999, on the  3 23rd of March, before Notary Marco Antonio Cornejo  4 Marroquin; and, to this day, after almost 12 years,  5 the Contract wasn't approved by the Guatemalan State.  6 This question also raises at the same time  7 two additional questions, which are why did Ferrovías  8 not uphold its right to demand of the President of the  9 Republic approval of that Contract?  10 And the third question is, in whose interest  11 was it that that Contract not be approved? And, in  12 order, I'm going to refer to the first issue.  13 Contract 41, which refers to Onerous Usufruct  14 of the Railway Equipment was formalized before an  15 independent Notary, not a Government Notary, which  16 meant that Ferrovías had chosen this Notary and,  17 consequently, it had the obligation to pay the  18 Notary's fees and to attend to all the obligations  19 that arise after the Contract.  20 Now, here I would like to highlight one  21 particularity on State Law Contracts. Article 49 of  22 the Law on State Contracts or a public procurement</p>	<p>PAGE 1806</p> <p style="text-align: right;">1806</p> <p>03:55:24 1 related to the railway. The key and important aspect  2 of everything that I'm describing is that, according  3 to Article 1129 of the Civil Code, no authority,  4 including the public--the President of the Republic,  5 no authority may receive or value or characterize a  6 contract which, subject to registration, has not been  7 registered.  8 The response to the question as to why the  9 Government of Guatemala did not approve Contract 41 is  10 because it does not appear that that Contract was  11 entered in the General Property Registry; and,  12 consequently, as there's a provision that prohibits  13 the authorities from receiving or attending to a  14 Contract not in the Property Registry, it was  15 impossible, legally, for the Guatemalan State to be  16 able to approve that Contract. This explains the  17 first question.  18 And the second, which goes to the issue as to  19 whether Ferrovías had some legal action available to  20 it to exercise its right to have that Contract  21 registered, in the Guatemalan Constitution there is a  22 provision on the right to petition under which the</p>

<p>PAGE 1807</p> <p style="text-align: right;">1807</p> <p>03:57:11 1 State or the authority must resolve within 30 days  2 following a petition put forth pursuant to the right  3 to petition. Ferrovías did not present a Usufruct  4 Contract that was registered in the Railway Property  5 Registry, nor did it remedy the situation through a  6 right of petition.  7 As regards the particularities associated  8 with the fact that Ferrovías has not requested  9 authorization nor obtained the registration, it's  10 important to note the letters which I cited in my  11 respective reports which gave rise to an illegal  12 possession of the railway equipment by Ferrovías, and  13 particularly I refer to the letter of 9 April 1999.  14 In its context, that letter was directed to  15 the Overseer of Ferrovías de Guatemala to 17 days  16 after Contract 41 of 23 March 1999 was signed. In  17 that letter, Ferrovías asked that prior to taking  18 possession of the railway equipment, or rather that it  19 take possession of the railway equipment, even though  20 it knew that the Contract would not enter into force  21 pursuant to Clause 6 until 30 days after its approval  22 by the President of the Republic and Council of</p>	<p>PAGE 1809</p> <p style="text-align: right;">1809</p> <p>04:01:44 1 for the use of equipment, and accepted for payment to  2 be done monthly.  3 In August 2002, Ferrovías is requested to pay  4 the amounts that they were asked to pay but that were  5 never paid up to August 12th, 2003.  6 Q. Mr. Aguilar, I apologize for interrupting  7 your answer, per rules set by the Tribunal, and  8 accepted by the Parties, we only had 15 minutes to  9 have questions and answers, and I'm told I only have a  10 minute or so left. So I think, and I assume you're  11 going to be asked questions about the issue that you  12 were just testifying about when the Tribunal and  13 opposing counsel have an opportunity to ask you  14 questions, I wanted to ask you an additional question,  15 which is, to your understanding, and if you could try  16 to limit your response to no more than a minute so  17 that we're within our timeframe, to your understanding  18 would the President of Guatemala incur in any personal  19 liability if he had not proceeded with the Declaration  20 of Lesividad in relation to Contract 143 and 158 when  21 that issue was presented to him by his legal advisors  22 within the Secretary-General's Office of the Office of</p>
<p>PAGE 1808</p> <p style="text-align: right;">1808</p> <p>03:59:27 1 Ministers.  2 In the letter, it is asked that the equipment  3 be delivered to it, and that it be the guarantor of  4 their maintenance. On the 12th of April, which is to  5 say three days later, and 20 days after the Contract  6 which had not yet come into force was signed,  7 Ferrovías received from FEGUA the railway equipment  8 without any provisions of public or transparent  9 provisions having been set such as those that had been  10 undertaken in Contract 41.  11 It was not until the 16th of February 2000  12 that Ferrovías insisted that the authorization outside  13 of the framework of the Contract for the use of the  14 equipment be maintained and without there being any  15 particular methodology, paid the sum of 7,500  16 quetzales for the use of the equipment in a proportion  17 that assigned that value for the use of equipment in  18 the month of January 2000.  19 In that letter, key conditions are changed of  20 Contract 41, and it is stated that payments would be  21 carried out monthly. Ferrovías Overseer in the letter  22 dated February 25th, 2000, ratified the authorization</p>	<p>PAGE 1810</p> <p style="text-align: right;">1810</p> <p>04:03:43 1 the Presidency?  2 A. There was absolutely liability, and also the  3 President had the obligation to declare Lesividad  4 because of the simple reason that because of the  5 separation of power as stated in Guatemala, the  6 Declaration of Lesividad only refers to declaring that  7 there is damage, which cannot be judged or assessed by  8 the President since the only ones to do so are the  9 Court or the judicial system. And if he had decided  10 upon his own discretion not to declare Lesividad, he  11 would have caused a problem with the jurisdiction and  12 because of his powers he had to declare Lesividad  13 because, otherwise, based on Articles 153 and 154 of  14 the Constitution he would have had personal liability.  15 Q. Thank you, sir.  16 MR. ORTA: I have no further questions at  17 this time.  18 PRESIDENT RIGO: Mr. Stern.  19 MR. STERN: Thank you, Mr. President.  20 CROSS-EXAMINATION  21 BY MR. STERN:  22 Q. Good afternoon, Mr. Aguilar.</p>

<p>PAGE 1811</p> <p style="text-align: right;">1811</p> <p>04:05:19 1 A. Good afternoon.  2 Q. In your direct testimony in response to  3 Mr. Orta's question, you testified that--you attempted  4 to explain why you believe the President never  5 approved Contract 41, but you never spoke with  6 President Arzu and asked him why he never approve  7 Contract 41; correct?  8 A. I didn't have any need to talk to him because  9 I am resorting to the Civil Code, and the Civil Code  10 of Guatemala demands for a contract to be qualified by  11 the authority to be recorded in the Property Registry.  12 Q. Okay. First of all in answering my  13 questions, I would just ask that you please try to  14 answer my questions as precisely as possible since I  15 have a limited amount of time to ask you questions. I  16 would appreciate that.  17 And again, just to be clear, you did not  18 speak with President Arzu. I understand you said you  19 didn't have a reason to, but you never spoke to  20 President Arzu and had him explain to you why he never  21 approved Contract 41; correct?  22 A. I did not talk to President Arzu, and I</p>	<p>PAGE 1813</p> <p style="text-align: right;">1813</p> <p>04:08:41 1 absolutely no discretion under Guatemalan law to  2 refuse to issue the Declaration of Lesividad; correct?  3 A. That is correct.  4 Q. Okay. And in Paragraph 37 of your First  5 Report, you cite as the basis for that Opinion in  6 Footnote 24 Articles 153 and 154 of the Constitution  7 and Article 16 of the Law of the Executive; correct?  8 A. That is correct.  9 Q. Okay. Could you now turn in the binder you  10 have to RL-70, and that is on Tab 18 of that binder.  11 Do you have that, sir?  12 A. Yes, but this is the Political Constitution  13 of the Republic; correct?  14 MR. ORTA: You're saying Tab 17?  15 BY MR. STERN:  16 Q. I'm sorry. I apologize. Tab 18.  17 I apologize. Let me ask you this way, and  18 you could tell me if I'm wrong: Isn't it true that  19 Article 153 of the Guatemalan Constitution states that  20 the rule of law extends to all persons in the  21 territory of the Republic?  22 A. For some reason that I do not know, that is</p>
<p>PAGE 1812</p> <p style="text-align: right;">1812</p> <p>04:07:04 1 didn't have a need to do so because my analysis is  2 based on the laws of Guatemala and the laws of  3 Guatemala from a practical standpoint determined that  4 no authority can examine or assess a contract when it  5 is not recorded in the Property Registry.  6 Q. All right. Let me ask you some questions  7 about your response to the second question Mr. Orta  8 asked you regarding the President's legal liability,  9 if he doesn't declare a contract lesividad.  10 In Paragraph 37 of your First Report--do you  11 have that in front of you?  12 A. Yes.  13 Q. It's there in your First Report, in Paragraph  14 37 is where you state that the President would have  15 incurred personal liability if he did not declare  16 Contracts 143 and 158 Lesivo before the three year  17 deadline of August 25th, 2006; correct?  18 A. That is correct.  19 Q. And, in other words, it's your opinion that  20 once the President had been advised by his lawyers and  21 advisors, that they considered Contracts 153 and 158  22 Lesivo, the President and his Cabinet Ministers had</p>	<p>PAGE 1814</p> <p style="text-align: right;">1814</p> <p>04:11:37 1 not--that rule is not at this Tab, but basically it is  2 about the rules that govern the responsibility of  3 public officials saying that they're not above the law  4 and that they are subject to liability. But that is  5 not here. That is not at this Tab.  6 PRESIDENT RIGO: Certain pages are missing in  7 the Tab.  8 MR. STERN: I apologize. There has been an  9 error in that regard. I apologize.  10 BY MR. STERN:  11 Q. Okay. And correct me if I'm wrong, is it  12 your understanding that Article 154 of the  13 Constitution states that Government employees are  14 vested with the authority, legally responsible for  15 their official conduct, subject to the law and never  16 above it?  17 A. Yes, that is correct. It implies that no  18 one, including the authorities, are above the law;  19 therefore, they're responsible for all of their  20 actions that could be against the law.  21 Q. So, there is nothing in that Article which  22 states that the President is subject to personal</p>

<p>PAGE 1815</p> <p style="text-align: right;">1815</p> <p>04:13:01 1 liability if he fails to declare a contract Lesivo  2 once he's been so advised; correct?  3 A. No, that is not correct. The concept of  4 Lesividad is linked in this law to the damage or harm  5 caused as stated in the Spanish dictionary. The  6 President of the Republic as an official who heads the  7 executive, and that's the reason why I also cited  8 Article 16 of the executive--Law of the Executive,  9 states that he should act according to the law.  10 And also in the Declaration of Lesividad, the  11 actions, the legal actions, to repair damages are  12 intended to be started; otherwise, he would be  13 impeached as stated by the Courts, and the Courts  14 would be the ones determining the Declaration or the  15 legal aspect of the Declaration.  16 Q. So, it's your testimony that Article 154  17 provides for all of that what you just testified to,  18 that if the President doesn't declare Lesivo upon  19 being so advised by his advisors that those are the  20 consequences? Is that your testimony?  21 A. What I'm saying is that the rule applies to  22 all public officials. Authorities, the President has</p>	<p>PAGE 1817</p> <p style="text-align: right;">1817</p> <p>04:16:32 1 A. I never quoted it, and it was not the subject  2 matter of my Opinion.  3 Q. Let me change topics.  4 It's your opinion, Mr. Aguilar, that  5 Contracts 143 and 158 were absolutely null and void  6 under Guatemalan law; correct?  7 A. That is correct.  8 Q. And, in fact, you wrote in Paragraph 43 of  9 your Second Report, "Contract 143/158 is not even a  10 valid Contract. It is a nonexisting Contract because  11 it never fulfilled the requirements under Guatemalan  12 law to legally exist."  13 Did I read that correctly? Paragraph 43 of  14 your Second Report.  15 A. Yes, it is correct.  16 Q. Now, in connection with rendering your Expert  17 Opinions in this case, you reviewed all of the  18 parallel legal opinions that the Government rendered  19 and obtained regarding Contracts 143 and 158, didn't  20 you?  21 A. Yes.  22 Q. Okay. Could you turn to Exhibit C-106, which</p>
<p>PAGE 1816</p> <p style="text-align: right;">1816</p> <p>04:14:54 1 the power, and he's responsible from the legal point  2 of view for the acts carried out against the law. And  3 when there are opinions that indicate that there is  4 any harm to the interest of the State, the President  5 cannot qualify, whether such harm was real or not.  6 That is--he's the executive, he represents the  7 executive, he heads the executive; therefore, he  8 should move on to a claim, and it would be the Courts  9 the one determining whether there was harm or not.  10 Q. Are you aware of any precedent in Guatemalan  11 law--Legal Opinions, Court decisions, anything--in  12 which a President has been charged with personal legal  13 liability for not issuing a Declaration of Lesividad  14 once so advised by his legal advisors?  15 A. No, I don't know of any situation like that.  16 Q. So, as far as you know, it's never happened  17 once in Guatemala; correct?  18 A. I think it is different, the fact that I may  19 not know of a situation, and this is different from  20 this actually not happening.  21 Q. Well, certainly in rendering your opinion  22 here you didn't find anything; right?</p>	<p>PAGE 1818</p> <p style="text-align: right;">1818</p> <p>04:18:04 1 is Tab 9 in your binder.  2 Do you have that there?  3 A. Yes, I imagine it is the request by Oscar  4 Gramajo; is that correct?  5 Q. Yes. This is the request from June 22nd,  6 2005, from FEGUA Overseer Dr. Gramajo to the Attorney  7 General's Office requesting a legal opinion regarding  8 Contracts 143 and 158; correct?  9 A. Yes, it is correct.  10 Q. And if you now could turn to Tab 10, which is  11 Exhibit C-107, and Exhibit C-107 is a June 28th, 2005,  12 letter from the Attorney General's Office to FEGUA in  13 which it returned the case file to Dr. Gramajo and  14 requested further information--and requested further  15 information on the status of Contract 143, which it  16 said was necessary for it to render its Opinion;  17 correct?  18 A. Yes, that is correct.  19 Q. And among the questions the Attorney General  20 asked FEGUA in this document here were, one, whether  21 Contract 143 was currently effective or not; correct?  22 A. That is correct.</p>

<p>PAGE 1819</p> <p style="text-align: right;">1819</p> <p>04:20:03 1 Q. And another question they asked was what was 2 the total amount of fees paid by Ferrovías to the 3 State under the terms of Contract 143; correct? 4 A. Yes. 5 Q. Okay. And another question they asked was 6 whether Ferrovías had complied with making the fee 7 payments or not and whether those payments were 8 timely; correct? 9 A. Correct, that's the question. 10 Q. Okay. Now, please turn to Tab 11. 11 A. Yes. 12 Q. In Tab 11 is Exhibit C-108, and this was 13 FEGUA's July 18th, 2000, response to the Attorney 14 General's inquiry; correct? 15 A. Would you please say the date again? 16 Q. Sure. If you look on the second page of the 17 note or the letter from Dr. Gramajo? 18 A. Yes. 19 Q. July 18, 2005. 20 Do you see that? 21 A. Yes, I saw it. It is correct. 22 Q. And Dr. Gramajo attached to his letter a</p>	<p>PAGE 1821</p> <p style="text-align: right;">1821</p> <p>04:22:52 1 quoted, it says, "accordingly, the Contract relevant 2 to FEGUA's petition to the Solicitor General's Office 3 is documented by Public Instrument Number 143, which 4 is currently in effect. It is also under the terms of 5 this Contract that the Usufructuary is using the 6 railway equipment." 7 Correct? Did I read that right? 8 A. Yes, you read it correctly. 9 Q. So, here, FEGUA's Legal Department certainly 10 didn't think that Contract 143 was null and void, did 11 it? 12 A. No, I think that here the issue has to do 13 with the terms used. Article 1301 of the Civil Code 14 states that contracts that are null do not have a 15 legal effect, so we need to make a difference between 16 the legal effect from the practical implementation of 17 Contracts that are null, and this Contract is null. 18 And just to give you an example, they changed 19 the Canon, the payment for the use of equipment from 20 1 percent, that was the original amount that was 21 agreed, based on net invoice into 1.25--from gross 22 invoicing to net invoicing 1.25 percent after the</p>
<p>PAGE 1820</p> <p style="text-align: right;">1820</p> <p>04:21:29 1 July 15, 2005, Opinion from FEGUA's Legal Department; 2 correct? 3 A. Correct. 4 Q. And you're familiar with this Opinion; right? 5 You reviewed it and understood it in providing your 6 opinions in this case; correct? 7 A. That's correct. 8 Q. Now, in this Opinion, in Exhibit C-108, in 9 response to the Attorney General's question on whether 10 Contract 143 was currently effective, this Opinion 11 states, "the Contract involving railway equipment 12 entered into with CODEFE on August 28, 2003, as 13 documented by Public Instrument Number 143 as amended 14 by Contract 158 both authorized by Claudia Mariela 15 Marroquin Luther, Notary, is currently in effect." 16 So, here, FEGUA's Legal Department in 17 response to a request from the Attorney General's 18 Office regarding Contracts 143 and 158 acknowledge 19 that those contracts were currently in effect; 20 correct? 21 A. Yes. 22 Q. And also at the end of this paragraph I just</p>	<p>PAGE 1822</p> <p style="text-align: right;">1822</p> <p>04:24:19 1 deduction of taxes. Indeed, 143, Ferrovías exempted 2 itself from the payment of taxes and also reduced the 3 Canon due to the payment of the-- 4 Q. Excuse me, sir-- 5 A. Due to the payment owed. 6 Q. I don't think your answer here is responsive 7 to my question, so I'm going to move on, okay? 8 A. There is a connection here because we are 9 referring to the implementation and to the legal 10 effect. 11 What I wrote at Clause 43 of my Opinion is 12 that based on Guatemalan law, a contract that is null 13 doesn't have a legal effect, but you're asking me 14 here, and you're asking me to see here that a contract 15 was implemented, and that contract was and is against 16 the Guatemalan laws and, therefore, it is null. We 17 are referring to implementation, which is quite 18 different from legal effect. What I wrote in my 19 Opinion is that based on the law, a contract that is 20 null does not have a legal effect, and I ratify this. 21 Q. Okay. So, if I understand your testimony, 22 are you saying that FEGUA's Legal Department, their</p>

<p>PAGE 1823</p> <p style="text-align: right;">1823</p> <p>04:25:37 1 lawyers were not telling the Attorney General, the top 2 legal officer in the country, that Contract 143 was 3 currently in effect, legally in effect; is that what 4 you're telling us? 5 A. They were saying that it was being 6 implemented, that it could have effects but not legal 7 effects because legal effects are not recognized in 8 the Civil Code at Article 1301, and that is what I 9 wrote in my Opinion. 10 Q. Okay. But in this Opinion here, it doesn't 11 say anything about implementation, does it? 12 A. In what Opinion? My Opinion? 13 Q. The FEGUA Legal Opinion we've been talking 14 about, sir. 15 A. The Opinion was about facts. It was not a 16 legal opinion. They were doing what it was agreed, 17 and they are saying yes, this is being complied with, 18 it has been implemented, but it does not mean that the 19 Contract is a valid Contract. It is the Contract--the 20 Contract is null because it went against key laws in 21 Guatemala, of the Guatemalan State. 22 Q. Just so we're clear, it's your testimony that</p>	<p>PAGE 1825</p> <p style="text-align: right;">1825</p> <p>04:28:08 1 Attorney General of Guatemala that Ferrovías had paid 2 FEGUA to date 596,817 in Canon fees for use of the 3 FEGUA equipment; correct? 4 MR. ORTA: Could you just clarify that that's 5 quetzales. 6 BY MR. STERN: 7 Q. Yes, I'm sorry. Let me state it again. 8 Now, this Opinion, it also acknowledges that 9 Ferrovías had paid FEGUA to date 596,817 quetzales and 10 Canon fees for use of the FEGUA equipment which 11 included the fees Ferrovías had paid pursuant to the 12 terms of Contract 41; correct? 13 A. I would like to clarify something because 14 this is something that's very important. 15 Ferrovías paid on February 20th, 16 2000--7,500-- 17 Q. Excuse me, sir, the question just had to do 18 with what the Opinion states. 19 MR. ORTA: Could I be heard, please? 20 PRESIDENT RIGO: Yes. 21 MR. ORTA: He said in his question pursuant 22 to Contract 41, and the Witness is responding directly</p>
<p>PAGE 1824</p> <p style="text-align: right;">1824</p> <p>04:26:57 1 this document, Exhibit C-108, this Legal Opinion, this 2 Opinion from FEGUA's Legal Department is not stating 3 that Contract 143 is legally in effect; is that your 4 testimony? 5 MR. ORTA: The question has been asked and 6 answered a couple of times. I think we can move on. 7 BY MR. STERN: 8 Q. Okay. I'll move on. You would agree that an 9 absolutely null and void Contract under Guatemalan law 10 cannot be in effect; correct? 11 A. I totally agree. It cannot have an effect, 12 but it cannot be ratified, either. 13 Q. Okay. So, is it your opinion that Exhibit 14 C-108, the FEGUA Legal Opinion, is wrong? 15 A. No, the Legal Opinion by FEGUA is not a legal 16 opinion on the Contract; rather, it refers to a 17 factual relationship that has to do with 18 implementation of something that was agreed in a 19 Contract which is null. It is very different from 20 saying that this was a legal Contract on the validity 21 or not of the Contract. 22 Q. Now, this Opinion also acknowledges to the</p>	<p>PAGE 1826</p> <p style="text-align: right;">1826</p> <p>04:29:25 1 to that portion of the question. Now, Mr. Stern may 2 not like what he's going to hear, but he should be 3 allowed to respond, the Expert. 4 PRESIDENT RIGO: Or he may correct the answer 5 if he made a mistake. 6 MR. ORTA: No, he's cutting him off when the 7 Witness was answering directly the question that was 8 posed to him. He in his question said that FEGUA 9 received payments pursuant to Contract 41, and the 10 Witness is responding to that. 11 PRESIDENT RIGO: Please complete your answer. 12 THE WITNESS: I would like to state that 13 Ferrovías acquired the control of the equipment and 14 paid 7500 quetzales in January 20th, 2000, and used 15 the equipment for free during 2000 and 2001 and 16 August 2003 for only 7500 quetzales. They received 17 two request letters, two letters requesting payments 18 sent by FEGUA on August 23rd, 2002, and they failed to 19 pay. And whatever they paid they paid it as a change 20 in the conditions that introduced in Contract 143 by 21 changing the calculation basis from gross invoice into 22 net invoice and then excluding the payment of taxes.</p>

<p>PAGE 1827</p> <p style="text-align: right;">1827</p> <p>04:30:47 1 That's the reason why I said that in that Contract  2 they granted themselves tax benefits because they  3 changed the basis for the calculation, and that is  4 something that is against the laws of the country and  5 that renders that Contract null.  6 BY MR. STERN:  7 Q. Okay. I'm just going to just read the last  8 sentence of the Opinion under the heading "regarding  9 Subsection B." It says, "As a result up to  10 December 31st, 2004, the State of Guatemala, through  11 FEGUA, has received from the Usufructuary the total of  12 596,817 quetzales and 87 cents as payment of fees for  13 the use of railway equipment."  14 Did I read that correctly?  15 A. Yes, you read it correctly.  16 Q. Now, under the heading "Subsection C" of this  17 Opinion, FEGUA further acknowledges that Ferrovías was  18 up to date in the payment of Canon fees for use of the  19 railway equipment; correct?  20 A. The letters that I cited of August 2002 show  21 otherwise. Ferrovías was--collected the money several  22 times, but it wasn't updated.</p>	<p>PAGE 1829</p> <p style="text-align: right;">1829</p> <p>04:33:39 1 because of the fact that this was a null and void  2 Contract was asked to surrender the monies that it got  3 from Ferrovías.  4 Q. I'm not sure you answered my question. You  5 talked about some filing that's been made in the  6 Court. My question was, again: Is it proper, under  7 Guatemalan law, for the Government to accept  8 performance and benefits under--  9 THE INTERPRETER: Could you repeat the  10 question and go a little bit slower, please. I'm not  11 able to interpret at this rapid pace, sorry, sir.  12 MR. STERN: Okay.  13 BY MR. STERN:  14 Q. Is it proper under Guatemalan law for the  15 Government to accept performance and benefits under a  16 Contract that it has determined to be null, void, and  17 of no effect?  18 A. The Government did not accept to benefit from  19 that Contract; and, as a consequence of Lesividad and  20 on the basis, and I repeat on the basis of  21 Article 1312 of the Civil Code, the Government of  22 Guatemala gave back the monies that it received under</p>
<p>PAGE 1828</p> <p style="text-align: right;">1828</p> <p>04:32:14 1 Q. Okay. But this is from July of 2005. Do you  2 have any reason to disagree with the statement here in  3 the Opinion that Ferrovías was up to date in its  4 payment of Canon fees for the equipment?  5 A. Yes, of course, because the payment is the  6 fulfillment of an obligation, and the obligation was  7 actually denatured because they went from a gross  8 invoice to a net invoice.  9 Q. Is it proper under Guatemalan law for the  10 Government to accept performance and benefits under a  11 contract that is determined to be null and void and of  12 no effect?  13 A. In my Opinion specifically, I said that when  14 Guatemala required the Lesividad of the Contracts in  15 the petition of the Court ruling and under  16 Article 1312 of the Code of Guatemala, the State of  17 Guatemala surrendered back to Ferrovías the amounts of  18 monies that were incorrectly and illegally awarded to  19 it because the effect of the null and void nature of  20 this situation is for things to go back to the  21 original status, and this is a petition that was put  22 forth to the Tribunals where the State of Guatemala</p>	<p>PAGE 1830</p> <p style="text-align: right;">1830</p> <p>04:34:42 1 a Contract that was null and void and illegal.  2 In answer to your question, no. The State of  3 Guatemala did not enrich itself, nor has it benefited  4 from monies that come from a null and void Contract.  5 Q. Are you saying that the Government of  6 Guatemala has returned to Ferrovías the Canon fees  7 that Ferrovías paid to it under Contracts 143 and 158?  8 Is that your testimony, sir?  9 A. What I'm saying to you is that in the Court  10 proceedings where the Lesivo Declaration is being  11 discussed, one of the things that the Guatemalan State  12 required was the surrendering back of those Canon  13 fees.  14 Q. Has the money been given back, to your  15 knowledge? To this day, has the money been given  16 back?  17 A. No. What happens is that this is a process  18 that's going on, and the judgment has not been handed  19 down. The surrender is done according to the laws of  20 the country with interest.  21 Q. Now, if I understand your testimony in your  22 reports, because Contracts 143 and 158 were absolutely</p>

<p>PAGE 1831</p> <p style="text-align: right;">1831</p> <p>04:35:59 1 null and void, the defects in these contracts could  2 not be cured or resolved through negotiation between  3 the Parties; correct?  4 A. In connection with that Contract  5 specifically, 143 and 158, no.  6 Now, in connection with the disposition and  7 dues of the property, well, the State of Guatemala  8 asked the owner, the State of Guatemala can negotiate.  9 (Pause.)  10 PRESIDENT RIGO: We can continue.  11 BY MR. STERN:  12 Q. Okay. Let me ask this question again because  13 I'm not sure I understood your answer.  14 Let's look at Paragraph 77 of your Second  15 Report. You wrote here in Paragraph 77--do you have  16 that, sir?  17 A. Yes, I found it.  18 Q. Okay. You wrote: "by contrast in the case  19 of absolute nullity, the defect cannot be cured  20 because it affects an essential requirement for the  21 existence of the Contract. In this regard, Contract  22 143/158 suffers from defects that cannot be cured and</p>	<p>PAGE 1833</p> <p style="text-align: right;">1833</p> <p>04:40:25 1 A. As far as I understand and I know, the  2 Government of Guatemala never negotiated the curing of  3 the defects of 143 and 158.  4 What the Government did, as the owner of the  5 property, was to negotiate the rights that it had over  6 its property in a legal manner, something that was  7 different from the manner which they had been  8 negotiated under 143 and 158.  9 In other words, the issue was not to cure the  10 defects of 143 and 158. Those cannot be cured. The  11 issue was to regulate under the law the use of the  12 equipment. This is a very important conceptual  13 difference.  14 Q. So, explain to me how did the Parties use the  15 equipment--how did Ferrovías use the equipment that  16 was different from the terms of Contracts 143 and 158  17 after the Contracts were entered into in August of  18 2003?  19 A. Basically, as I indicated, in a letter dated  20 9 April 1999, Ferrovías took the equipment knowing  21 that the Contract had not been in effect. And it had  22 them under its use and possession without an approved</p>
<p>PAGE 1832</p> <p style="text-align: right;">1832</p> <p>04:38:42 1 which emphasize the absolute nullity of the  2 negotiation.  3 Did I read that correctly?  4 A. That is correct.  5 Q. See if I can understand your testimony. Is  6 it your testimony that because Contracts 143 and 158  7 were absolutely null and void, the defects in these  8 Contracts could not be cured or resolved through  9 negotiation between the Government and Ferrovías?  10 A. Contracts 143 and 158 cannot be cured because  11 they're null and void. Contracts 143 and 158.  12 I would like to highlight this because what  13 the Government was able to negotiate was the  14 disposition of its property by using them in the  15 manner that the violated laws had set forth.  16 Q. So, assume that the facts were in this case  17 that the Government and people and officials from  18 FEGUA attempted to negotiate with Ferrovías a way to  19 cure the illegalities of Contract 143 and 158, assume  20 that was the facts--would that have been--in your  21 view, would that not be a proper or proper under  22 Guatemalan law?</p>	<p>PAGE 1834</p> <p style="text-align: right;">1834</p> <p>04:41:59 1 Contract. Then it entered into 143 for Onerous  2 Usufruct without Bidding Terms, without transparency,  3 without public requirements that are needed for the  4 disposition of Government property. That's is why I  5 say Contract 143 and 158 cannot be cured, neither  6 could they be the subject of any negotiation, or can  7 be negotiated, even today, are the provisions under  8 which Ferrovías would have been legally able to use  9 the equipment owned by FEGUA. That is what was on the  10 table, not the consolidation of null and void  11 contracts.  12 Q. So, you're saying it's your understanding of  13 the facts that Ferrovías, after August of 2003, when  14 Contracts 143 and 158 were entered into, they  15 continued to use the railway equipment pursuant to the  16 terms of the letter authorizations that were given by  17 FEGUA back in 1999; is that right?  18 A. That's not exactly correct. Let's separate  19 this issue of use.  20 Ferrovías continued to use the equipment from  21 2000 after the Onerous Usufruct Contract was entered  22 into, but it didn't do it in the same conditions that</p>

<p>PAGE 1835</p> <p style="text-align: right;">1835</p> <p>04:43:22 1 were established in Contract 41. There was an  2 exchange of letters, and there was a change in the  3 Canon fee payment, from a yearly to a monthly payment,  4 and then we went from net invoicing, from gross  5 invoice to net invoicing. So it continued to use the  6 equipment, changing the conditions, and doing it  7 besides the law because there was no transparency, the  8 public requirement was not established, and there was  9 no Bidding Terms, either.  10 Q. All right. Let's go to a different topic.  11 My first question on this topic is: It's  12 your opinion, or you maintain, that Contracts 143 and  13 158 are Administrative Contracts; correct?  14 A. That is correct.  15 Q. And it's your opinion, according to your  16 Expert Opinions, that the Declaration of Lesividad was  17 the only legal means available by which the Government  18 could deal with the alleged illegalities of Contracts  19 143 and 158; correct?  20 A. That is correct.  21 Q. And as you point out, for instance, in  22 Paragraph 65 of your Second Report, the Contencioso</p>	<p>PAGE 1837</p> <p style="text-align: right;">1837</p> <p>04:46:03 1 Q. And the Contencioso Administrativo Court can  2 hear claims by the State for breach of an  3 Administrative Contract; correct?  4 A. Correct.  5 Q. And the State doesn't have to declare a  6 contract Lesivo before bringing a breach of contract  7 action in the Administrative Court; correct?  8 A. That is not correct. The State always has to  9 promote the Declaration of Lesividad to then go to the  10 Contencioso Administrativo Court. And if you want, we  11 can go and see Article 20 of the Administrative Law  12 that states that when the State sues in the  13 administrative arena has to put forth previously a  14 Declaration of Lesivo.  15 Q. Okay. So, if I understand your testimony, if  16 there has been a breach of an Administrative Contract,  17 the State has to declare Lesivo before filing suit in  18 the Administrative Court?  19 A. That is correct.  20 Q. Okay. Let's look at Exhibit R-308, it's  21 Tab 13 in your binder.  22 Now, Exhibit R-308 is a table or chart that</p>
<p>PAGE 1836</p> <p style="text-align: right;">1836</p> <p>04:44:49 1 Administrativo Court has exclusive jurisdiction over  2 matters involving Administrative Contracts; correct?  3 A. That is correct.  4 Q. And, as you point out in Paragraph 66 of your  5 Second Report, under Article 221 of the Guatemalan  6 Constitution, the Contencioso Administrativo Court  7 "has the competence to hear disputes resulting from  8 administrative acts or resolutions and from State  9 decentralized and autonomous entities as well as  10 disputes resulting from an Administrative Contracts  11 and concessions."  12 Correct?  13 A. That is correct.  14 Q. Now, as Article 21 states, the one I just  15 quoted from, the Contencioso Administrativo Court  16 doesn't just have jurisdiction over actions to confirm  17 declarations of Lesividad; correct?  18 A. That is correct.  19 Q. The Contencioso Administrativo Court has  20 jurisdiction over any dispute or controversy involving  21 an Administrative Contract; correct?  22 A. Correct.</p>	<p>PAGE 1838</p> <p style="text-align: right;">1838</p> <p>04:48:01 1 was prepared by Guatemala in this case which purports  2 to state all the known Declarations of Lesividad  3 actions that have been brought in Guatemala  4 since--well, since 1991 at least.  5 Are you familiar with this chart?  6 A. Yes, yes, I'm familiar with it.  7 Q. And by my count, there are 17 cases listed in  8 this chart from 1991 to present day; correct?  9 A. That is correct.  10 Q. And these are the only known Contencioso  11 Administrativo actions regarding Declarations of  12 Lesividad that have been brought in Guatemala since  13 1991; correct?  14 A. This table is based on the Second Opinion of  15 Alvarado, I think.  16 Q. That wasn't my question. My question is:  17 The 17 cases that are listed here in this chart  18 prepared by Guatemala are the only known actions  19 brought in Guatemala before the Contencioso  20 Administrativo Court since 1991 to confirm the  21 Declaration of Lesividad; correct?  22 A. No. This table was not prepared by the State</p>

<p>PAGE 1839</p> <p style="text-align: right;">1839</p> <p>04:49:46 1 of Guatemala. This was prepared by Eduardo Mayora in  2 his Witness Statement. On the basis of this table, we  3 analyzed the status of these proceedings, so I cannot  4 say that these are the only ones. I cited the ones  5 that Eduardo Mayora included in his Statement.  6 Q. Okay. Are you aware of any other cases  7 besides the ones listed in here?  8 A. I don't know, no.  9 What we were doing was to cite each one of  10 the cases in the way in which Eduardo Mayora cited  11 them in his Opinion. The purpose of the State of  12 Guatemala was not to say that these were the only  13 ones. We only used as a basis the ones that Eduardo  14 Mayora included in his Opinion.  15 Q. So, again, you didn't make any effort,  16 whatsoever after seeing Dr. Mayora's chart, to find  17 out if there are any additional Lesividad actions that  18 have been brought since 1991; is that what you're  19 telling us?  20 A. That was not what I was asked to opine on. I  21 was asked to opine on the Opinion of Mr. Mayora, and  22 Mr. Mayora is the one who prepared this table. In my</p>	<p>PAGE 1841</p> <p style="text-align: right;">1841</p> <p>04:52:19 1 are the only case in the last--breach of contract, any  2 Contract actions relating to Administrative Contract  3 had been brought by the Government in Guatemala in the  4 last 20 years? Is that what you're telling us?  5 A. What Eduardo Mayora--no. What Eduardo Mayora  6 is saying in his Opinion is that the administrative  7 proceedings do not end in Guatemala. The proceedings  8 are excessively long and almost none of them reach  9 Decision against the interests of the State of  10 Guatemala.  11 The disputed issue was that, and we did a  12 study of the cases he presented, and we showed, that  13 in one of them there was a case against the State of  14 Guatemala, and that judgment had already been handed  15 down as of the date Mayora had issued his Opinion.  16 We wanted to underscore the fact that the  17 State of Guatemala respects the Courts of Justice, and  18 that it can also lose in cases such as this where the  19 case analyzed where there was enough juridical basis  20 for the harm. In the case that we cited, the State of  21 Guatemala lost the action in the Administrative Court.  22 And we also added in the column that it is</p>
<p>PAGE 1840</p> <p style="text-align: right;">1840</p> <p>04:51:00 1 Legal Opinion the purpose was not to establish whether  2 we had some, many or a lot of these cases. It had to  3 do with opining on Mr. Mayora's Opinion.  4 Q. And is it your understanding or belief that  5 there are a lot of other Lesivo cases that have been  6 brought in the last 20 years?  7 A. I don't think so, and that speaks highly of  8 the State of Guatemala.  9 Q. Based on your testimony, that in order to  10 bring a breach-of-contract action--the Government to  11 bring a breach-of-contract action in the Contencioso  12 Administrativo Court, they had to declare Lesividad;  13 right?  14 A. Yes. My basis is Article 20 of the  15 Administrative Law, which provides the requirements  16 for the Parties to bring a case before the  17 Administrative Court. The State of Guatemala has to  18 have a previous Declaration of Lesividad related to  19 the act or contract that that it's going to sue under.  20 Q. And so, is it your understanding that the  21 cases that are listed in Exhibit R-308 and perhaps a  22 few more that you weren't able to--didn't look for,</p>	<p>PAGE 1842</p> <p style="text-align: right;">1842</p> <p>04:53:52 1 called "current state of the process" to show that  2 some of these cases had been terminated because  3 judgment had been handed down or because the Parties  4 had decided to dismiss the case, and it had nothing to  5 do with the delay indicated by Mayora in his Opinion.  6 He was trying to show the State of Guatemala was  7 completely inefficient in these kinds of disputes.  8 Q. Okay. Other than--in Exhibit R-308, it's  9 true, is it not, that there are only two cases of the  10 17 that are listed here in which the Administrative  11 Court reached a final decision; correct?  12 A. Yes, that is correct.  13 You can also see that there are cases that  14 ended there because of negotiation.  15 Q. So there were only two in which the Court  16 actually reached a decision; correct?  17 A. That is correct, and that impairs the State  18 of Guatemala.  19 Q. And in one of the cases--of the two cases,  20 one of them the Court did rule in favor of the State  21 of Guatemala; correct? The earlier one?  22 A. Uh-huh.</p>

<p>PAGE 1843</p> <p style="text-align: right;">1843</p> <p>04:55:14 1 Q. Is that a yes?  2 A. Yes.  3 Q. Last 20 years you were only aware of two  4 cases in which a Declaration of Lesividad has been  5 brought in which the Court, the Administrative Court  6 has reached a final decision; correct?  7 A. On the basis of Mayora's Report, yes. I'm  8 basing my answer on Mayora's Report. That's correct.  9 Q. And you're not aware of any other cases;  10 isn't that right, sir?  11 A. That was not the purpose of my opinion. I  12 don't know. I don't have that in mind.  13 Q. And you're not aware; right?  14 A. Yes, basically, I repeat, Eduardo Mayora  15 included this in his Opinion. We updated Mayora's  16 Opinion showing issues that he had not shown, so what  17 we did is include the ending of proceedings and the  18 handing down of final judgments, and it wasn't true  19 that there was a delay and the proceedings were not  20 terminated.  21 Q. Okay. Now, if the State wishes to nullify an  22 Administrative Contract, well, let me ask you this</p>	<p>PAGE 1845</p> <p style="text-align: right;">1845</p> <p>04:57:42 1 private parties?  2 A. That is correct.  3 Q. Again, under the Guatemalan Civil Code, the  4 Attorney General can bring such a nullification action  5 at any time, including, for example, 10 years after  6 the Contract was first executed; correct? Contract  7 involving private parties.  8 A. Perhaps it's a question of terminology. I  9 wanted to clarify something. When you're talking  10 about annulment, we're talking about relative nullity.  11 Q. No, no, no, sir, I'm asking about absolute  12 nullity, the situation you claim existed with Contract  13 143.  14 So let me ask the question again.  15 Assuming--an action for absolute nullity under  16 Guatemalan Law, the Attorney General can bring such an  17 action at any time where the Contract involves private  18 parties?  19 A. That is correct.  20 Q. Okay. So, the Attorney General could bring  21 an action for absolute nullity of a Contract involving  22 private parties 10 years after the Contract was first</p>
<p>PAGE 1844</p> <p style="text-align: right;">1844</p> <p>04:56:39 1 question: Under Guatemalan law you would agree that  2 there is no statute of limitations for bringing a  3 legal action for absolute nullity of a Contract;  4 correct?  5 A. That is correct.  6 Q. That's Civil Code Article 1301; correct?  7 A. That is correct.  8 Q. And then Article 1302 of the Civil Code also  9 provides that evident nullity can be declared ex  10 officio by the Court. Nullity can also be alleged by  11 the interested Party of the Attorneys General's  12 office; correct?  13 A. That is correct.  14 Q. So, the Civil Code, the Guatemalan Civil Code  15 provides that an action for absolute nullity can be  16 brought at any time by not only one of the Parties to  17 the Contract but also by the Attorney General on  18 behalf of one of the Parties; correct?  19 A. That is correct.  20 Q. And the Attorney General can bring such a  21 nullification action even for nonadministrative  22 contracts where both Parties to the Contract are</p>	<p>PAGE 1846</p> <p style="text-align: right;">1846</p> <p>04:58:47 1 executed; correct?  2 A. Yes, they never had any effects, nor are they  3 revalidated.  4 Q. Okay. And you could do it 20 years, as long  5 as the Contract is still going, it could be 20 years;  6 correct?  7 A. Are we talking about absolute nullity? Yes,  8 they produce notice effects.  9 Q. Okay. Now, under Guatemalan Law, a Lesividad  10 Declaration against an Administrative Contract must  11 issue no later than three years after the execution of  12 the Contract; correct?  13 A. That is correct.  14 Q. And under Guatemalan Law, if the President  15 fails to issue the Lesivo Decree, within that  16 prescribed three year timeframe, the State loses  17 forever any opportunity to declare the Administrative  18 Contract Lesivo; correct?  19 A. Basically, I feel that I know where your  20 question is headed. It has to do with the nature of  21 the Civil Administrative Contract.  22 Q. You don't have to guess where I'm heading.</p>

<p>PAGE 1847</p> <p style="text-align: right;">1847</p> <p>04:59:57 1 You can just answer my questions.  2 So, the answer is correct?  3 A. In what sense?  4 Q. Let me ask the question again. If the  5 President fails to issue a Lesivo Declaration within  6 the prescribed three-year timeframe, the State loses  7 forever any opportunity to declare the Administrative  8 Contract Lesivo; correct?  9 A. It depends on the nature of the harm, yes,  10 because Article 23 of the Law on Administrative  11 Procedure sets three years for declaring Lesividad.  12 Q. So, for example, assuming the present case  13 involving Contract 143, the grounds for absolute  14 nullity of Contract, of that Contract, were not  15 discovered by the Government until September of 2006.  16 Under Guatemalan Law, the Government would not have  17 been able to seek nullification of that Contract  18 because the three years had passed from the entering  19 into that Contract; correct?  20 MR. ORTA: I'm sorry, I'm going to object.  21 You're misstating the facts in evidence in terms of  22 when the Government discovered the grounds for Lesivo.</p>	<p>PAGE 1849</p> <p style="text-align: right;">1849</p> <p>05:01:58 1 Q. Well, I don't know the translation, so I  2 apologize for that, but let's be clear, and this  3 assumption we're talking about grounds for absolute  4 nullity in all my questions, okay?  5 A. Okay.  6 Q. So, assume again that in September 2006 the  7 Government discovered grounds for absolute nullity of  8 Contract 143. Do you understand that assumption?  9 A. Yes, I do.  10 Now, look, I know where you're headed.  11 Q. Let me ask my questions.  12 A. Okay.  13 Q. Now, if I understand your opinions and  14 testimony, under Guatemalan law, under that  15 assumption, that factual assumption, the Government  16 would have been unable to seek the nullification of  17 that Contract because the three-year time period to  18 declare Lesividad had already passed; correct?  19 A. No, if you give me an opportunity to explain,  20 then I would be most thankful.  21 Q. Okay. Please explain.  22 A. We're talking about personal liabilities of</p>
<p>PAGE 1848</p> <p style="text-align: right;">1848</p> <p>05:01:05 1 I don't know if you meant that as a hypothetical or  2 you stated it as a fact.  3 MR. STERN: Yes, this is a hypothetical, I  4 said, for example.  5 MR. ORTA: I think you should restate the  6 question then because that's not how I read this.  7 BY MR. STERN:  8 Q. I will asked the word "assume" to my  9 hypothetical here.  10 So, Mr. Aguilar, assume for me that in the  11 present case, the grounds for absolute nullity of  12 Contract 143 were not discovered by the Government  13 until September 2006. Do you understand what I'm  14 saying? Do you understand that assumption?  15 A. I do understand.  16 Something is happening with interpretation  17 because I understand that you are referring to  18 absolute nullity, but in the interpretation I'm  19 hearing the term anulaci3n. And anulaci3n is not the  20 same as absolute nullity, so it's likely that we might  21 be missing out on a connection between the question  22 and the answer because of that.</p>	<p>PAGE 1850</p> <p style="text-align: right;">1850</p> <p>05:03:07 1 the President and we're talking about a term of three  2 years that he has to declare Lesividad. If the  3 President does not act within those three years, then  4 he incurs personal liability.  5 Under the theory of absolute nullity, even if  6 he had not made the Declaration within the three  7 years, that does not imply that he would not be able  8 to seek absolute nullity because the Contract, as we  9 have been saying from the outset, cannot have legal  10 effects. And a contract which is absolutely null is  11 not going to be revalidated by the fact that there was  12 a failure to declare Lesividad within three years.  13 What is noteworthy is that there is someone  14 responsible who did not make that Declaration, and  15 that person with responsibility is called the  16 President of the Republic, but not because of that  17 will an absolutely null contract be revalidated  18 because of an omission. That's what I wanted to point  19 out. I wanted to note that the President had the  20 obligation to issue the Declaration of Lesividad  21 because it was an act which was under his  22 responsibility within the period of the law and during</p>

<p>PAGE 1851</p> <p style="text-align: right;">1851</p> <p>05:04:13 1 his Presidency.  2 PRESIDENT RIGO: A bit slower.  3 THE WITNESS: Excuse me. From where I should  4 I repeat? It's a question of separating.  5 PRESIDENT RIGO: You don't need to repeat  6 anything. Just to bear that in mind.  7 But basically the fact is the President of  8 the Republic is liable if he doesn't issue a  9 Declaration of Lesividad within the framework  10 indicated by law, but the fact that he doesn't doesn't  11 make it an absolutely null act or doesn't validate it  12 as an absolutely null act. That's my answer.  13 BY MR. STERN:  14 Q. Are you saying the President could have  15 issued Declaration of Lesividad against Contracts 143  16 and 158 after the three-year Statute of Limitations?  17 A. That's correct, but he would have already  18 incurred liability.  19 What the Attorney General would have done,  20 and as you said specifically, was bring an action and  21 seek absolute nullity; because otherwise it wouldn't  22 make any sense for the legal order to note that a</p>	<p>PAGE 1853</p> <p style="text-align: right;">1853</p> <p>05:06:52 1 personal legal liability; is that your testimony?  2 A. That is correct. Had he not made that  3 Declaration.  4 Q. But he could have done it; is that what  5 you're saying?  6 He could declare lesividad on August 26,  7 2006; is that what you're saying?  8 A. No. He had the responsibility to do so  9 before the three years had elapsed.  10 Q. I understand your testimony about his  11 responsibility to do so by August 25.  12 My question was whether he had the power and  13 the right to declare lesividad on August 26, 2006.  14 A. No, because the law says that the Declaration  15 should occur within three years.  16 Q. Oh, so you're now saying he had to do it  17 within three years; right? Because I thought you said  18 he could do it afterwards just a little while ago,  19 just he would incur personal legal liability if he did  20 it afterwards. Is that what you're saying?  21 A. No, that's not what I'm saying. I'm saying  22 what the law says, and if we refer to it, I think that</p>
<p>PAGE 1852</p> <p style="text-align: right;">1852</p> <p>05:05:31 1 contract is absolutely null and has no legal effect if  2 the fact that there was no Declaration of Lesividad  3 could give it legal life.  4 We are, in my opinion, highlighting that the  5 President of the Republic had an obligation to  6 liability and he did not do so within the three-year  7 period.  8 Q. So, if I understand from your testimony, the  9 only reason the President--President Berger had to  10 declare Contracts 143 and 158 lesivo by August 25,  11 2006, was to protect him against personal legal  12 liability; is that your testimony?  13 A. No, not at all. His responsibility is to  14 execute, as the head of the Executive, all those  15 actions that tend to uphold the rights of the  16 Guatemalan State. And here, basically, it was a  17 question of vindicating the property rights of those  18 who had them improperly, as with the case Ferrovías  19 which had equipment that had not been granted and  20 delivered as mandated by the country's law.  21 Q. So, if the President declared lesividad on  22 August 26, 2006, he would have been subject to</p>	<p>PAGE 1854</p> <p style="text-align: right;">1854</p> <p>05:08:13 1 will clear up the doubt very much.  2 Article 20 and 23 speak exactly of the time  3 period within which the Declaration of Lesividad  4 should take place.  5 Q. Okay.  6 A. Or must take place.  7 Q. Let me just make sure I'm clear, so the  8 Tribunal can understand what you're telling us.  9 Could the President declare lesividad against  10 Contracts 143 and 158 after August 25, 2006? It's a  11 simple question, sir.  12 A. No, he couldn't, because the law clearly  13 states what the term is.  14 Let me clarify. The date that you're telling  15 me is after the three years?  16 Q. Yes.  17 A. Okay. He couldn't.  18 Now, that doesn't mean that the Contract  19 would become valid. What the Office of the Attorney  20 General would have done there, in representation of  21 the State, was to initiate an action of liability for  22 not having initiated the action within the legal term</p>

<p>PAGE 1855</p> <p style="text-align: right;">1855</p> <p>05:09:14 1 and to bring an action to seek the absolute nullity of  2 a contract that could have effects, but that's not  3 what happened.  4 What President Berger did was what the law  5 mandated; which was that he produce the Declaration  6 within the three-year period.  7 MR. STERN: Could I have one more question,  8 and then I will be done.  9 BY MR. STERN:  10 Q. So, if the President could not declare lesivo  11 after August 25, 2006, and the only means by which,  12 according to your opinion, the State can seek the  13 absolute nullification of an administrative contract  14 is through a Declaration of Lesividad, how is it  15 possible that the Government, the State, could seek  16 absolute nullification of Contracts 143 and 158 after  17 August 25, 2006?  18 A. Basically, based on the legal principle that  19 one cannot revalidate or confirm such contracts nor  20 can such contracts have any legal effect. So what the  21 State does is to say, "Mr. President, you did not  22 comply with your responsibility."</p>	<p>PAGE 1857</p> <p style="text-align: right;">1857</p> <p>05:12:07 1 Q. So, you said that, if I understood your  2 testimony correctly, you said that pursuant to this  3 Article 20, the Government--the Government had to  4 declare lesivo the Equipment Contract, 143 and 158, in  5 order to have it declared null and void. Is that  6 correct?  7 A. That's correct.  8 Q. And can you tell us where in this Article 20  9 you're basing that Opinion.  10 A. It's the last paragraph.  11 Q. Can you read it into the record--because we  12 don't have an English translation, so if you read it  13 into the record, then the arbitrators will see the  14 English translation and will be able to follow the  15 text, please.  16 If you could please read it into the record  17 and then provide your answer.  18 A. The last paragraph reads as follows: "If the  19 proceeding is brought by the Administration for its  20 Acts or Resolutions, it will not be necessary for the  21 requirements indicated to be met so long as the Act or  22 Resolution has been declared lesivo or harmful to the</p>
<p>PAGE 1856</p> <p style="text-align: right;">1856</p> <p>05:10:24 1 But the Contract, which was not declared  2 lesivo is absolutely null, and one can follow that  3 avenue based on certain principles of the law.  4 And I can cite the case of Costa Rica, where,  5 according to Costa Rican legislation, one can declare  6 absolute nullity of a contract, even though it has not  7 been declared lesivo because there is no principle for  8 confirming acts against--that are against the law.  9 MR. STERN: Thank you.  10 PRESIDENT RIGO: Mr. Orta.  11 MR. ORTA: Thank you, Mr. Chairman.  12 Just for the record, we are putting up RL-72,  13 which is the Article 20 that Mr. Aguilar has been  14 referencing.  15 I'm informed we only have the Spanish version  16 of the document, so I'm going to put it up and ask the  17 witness to read it, and then that will produce an  18 English translation. I apologize, we don't have the  19 English translation of this Article. We can't supply  20 it to the Tribunal.  21 REDIRECT EXAMINATION  22 BY MR. ORTA:</p>	<p>PAGE 1858</p> <p style="text-align: right;">1858</p> <p>05:13:45 1 interests of the State in an Executive Resolution  2 issued by the President of the Republic in Council of  3 Ministers. This Declaration may only be made within  4 three years following the date of the Resolution or  5 Act that gives rise to it."  6 Under this provision, I indicated that the  7 Guatemalan State has to issue a Declaration of  8 Lesividad, and it is issued by the President of the  9 Republic in Council of Ministers. And that is why I  10 noted that it is the responsibility of the President  11 not to issue it--or to issue it within the three-year  12 period following the Resolution, as indicated by the  13 last paragraph of Article 20, which I've just read  14 out.  15 Q. Okay. So, if President Berger had not  16 declared the Contract lesivo--the Contract at issue,  17 143 and 158--within the three-year period referenced  18 in Article 20, are you saying that there was an  19 ability for the Government to nonetheless challenge  20 that contract after that date?  21 A. That's right. What was on the table for  22 discussion was whether President Berger had an</p>

<p>PAGE 1859</p> <p style="text-align: right;">1859</p> <p>05:15:29 1 obligation or did not have an obligation to issue the  2 Declaration and if he would incur liability for not  3 doing so. That's why I invoked Article 20, because it  4 notes specifically that it's the President of the  5 Republic in Council of Ministers who is responsible  6 for issuing the Declaration within three years.  7 That's Part 1 of my answer.  8 Part 2, which is where we are following the  9 whole issue of whether it was absolute nullity and  10 whether it was--could be revalidated, the fact that  11 that Declaration is not made does not give legal life  12 to nor does it revalidate Contracts that are  13 absolutely null. And there are legal avenues for  14 seeking a Declaration of Absolute Nullity, but in this  15 case there was personal responsibility for the  16 President.  17 Q. And the--and you mentioned the Attorney  18 General would be able to bring an action to declare  19 the absolute nullity of the Contract even after the  20 three-year period. Before what Court would that  21 action be raised?  22 A. According to Article 462 of the Civil Code,</p>	<p>PAGE 1861</p> <p style="text-align: right;">1861</p> <p>05:18:11 1 Q. Would that mean, in your opinion, that it  2 would be impossible for the President to give  3 approval, his approval, through an Executive  4 Resolution to that Agreement 143 and 158?  5 A. Yes. It is impossible, legally speaking, for  6 him to have done so because that Contract originated  7 in violation of the statutes that regulate State-owned  8 properties, specifically in violation of Article 89 of  9 the Law on--or Public Procurement.  10 Q. Would, nonetheless, the Government and  11 Ferrovías have entered into a settlement whereby they  12 would agree to, by way of example, celebrate a new  13 public bid and enter into a new and separate Contract  14 that was not lesivo to the interests of the State?  15 A. Yes. Of course, they could negotiate, and  16 they can negotiate, because the ownership of the  17 assets that are of the Government and that it can  18 dispose of are separate from the way in which  19 Contracts 143 and 158 were drawn up. But the  20 Guatemalan State and Ferrovías could negotiate  21 re-establishing the legality of the use of the  22 equipment.</p>
<p>PAGE 1860</p> <p style="text-align: right;">1860</p> <p>05:16:44 1 property that is owned by the Guatemalan State is  2 governed by special laws. In this case, the dispute  3 has to do with a contract that has to do with goods  4 that are state property.  5 Article 221 of the Constitution says that the  6 Contentious Administrative Court is the only Court  7 with jurisdiction to hear such disputes, and  8 Guatemalan civil law that applies on a--in a  9 subsidiary manner goes beyond the Attorney General of  10 the Nation, because it indicates that any person who  11 has an interest can bring a suit seeking a Declaration  12 of Absolute Nullity of a contract; and, in this case,  13 the Court with jurisdiction is the Administrative  14 Court.  15 Q. Thank you.  16 I want to ask you about a different topic  17 that you were asked about. Mr. Stern asked you  18 whether it would be possible, through a settlement, to  19 revalidate or to cure the--to revalidate Contracts 143  20 and 158, and I believe you answered to his question  21 that that would be impossible.  22 A. That is correct.</p>	<p>PAGE 1862</p> <p style="text-align: right;">1862</p> <p>05:19:46 1 Q. And is that something that they could have  2 done before--sorry, after the President signed the  3 Executive Resolution of Lesividad but before he  4 published the Executive Resolution?  5 A. They could do it before and after, just as  6 they could do it now, today, because the Declaration  7 of Lesividad refers to Contracts 143 and 158. But  8 that doesn't stand in the way of the State negotiating  9 with respect to those assets and their use becoming  10 regularized in terms of legality.  11 Q. Sir, on what basis do you contend that the  12 President or that--I'm sorry, that the Administrative  13 Court has an ability to determine that an  14 Administrative Contract such as this one, 143 and 158,  15 is or is not lesivo or does or does not cause lesion  16 to the interest of the State?  17 MR. STERN: I am going to object as this is  18 beyond the scope of his cross-examination. I didn't  19 ask him any questions about this.  20 PRESIDENT RIGO: The witness should answer.  21 THE WITNESS: The legal basis is Article 221  22 of the Constitution of Guatemala which establishes</p>

<p>PAGE 1863</p> <p style="text-align: right;">1863</p> <p>05:22:10 1 that the Contentious Administrative Court has  2 jurisdiction to hear issues having to do with the  3 legality of acts of the public administration and,  4 specifically, disputes having to do with  5 Administrative Acts or Resolutions.  6 PRESIDENT RIGO: You still have a last  7 question? This is your last question.  8 MR. ORTA: Thank you. This is my last  9 question.  10 BY MR. ORTA:  11 Q. Is the--is the issue of injury, injury to the  12 State, is that defined in any way under Guatemalan  13 Law, in your opinion?  14 A. Yes, it is defined. Article 10 of the Law on  15 the Judiciary indicates that the words of the law  16 should be interpreted in keeping with the dictionary  17 of the Spanish Royal Academy. "La lesividad" as  18 defined in the dictionary of the Royal Spanish Academy  19 comes from Latin "lesion," which means harm or  20 prejudice.  21 And the definition of damages is specified  22 Article 1334 of the Civil Code, where it indicates</p>	<p>PAGE 1865</p> <p style="text-align: right;">1865</p> <p>05:25:50 1 registration, required Ferrovías to present the  2 document for its entry in the Registry, and that is  3 why I was very specific in citing Article 1129 of the  4 Civil Code, which notes that no authority, no Court of  5 the Republic can admit documents that are not entered  6 or reasoned by the Property Registry.  7 Consequently, Contract 41 was not approved  8 because they never presented a document entered in the  9 Property Registry.  10 In the case of Contract 143 and 158, as they  11 were formalized without new Bidding Terms, without  12 there having been public bidding, they could not  13 revalidated because they come up against Article 89 of  14 the Law on Public Procurement. That's the reason why  15 the effects of 143 and 158 could not be revived and  16 why--and that is why--because Contract 41 had to have  17 been entered in the Property Registry.  18 This is indicated in Clause 20 of Contract  19 41, where the Parties accepted the obligation to enter  20 the Contract in the Registry.  21 ARBITRATOR EIZENSTAT: Whose responsibility  22 was it to enter that in the Registry? Was it a dual</p>
<p>PAGE 1864</p> <p style="text-align: right;">1864</p> <p>05:23:47 1 that harm is a detriment or property-related loss, and  2 prejudice is a lawful gain that is not received  3 because of a harm. So there is a definition of the  4 Guatemalan legal word.  5 MR. ORTA: I have no further questions.  6 QUESTIONS FROM THE TRIBUNAL  7 ARBITRATOR EIZENSTAT: My understanding,  8 Mr. Aguilar, is that the Government submits that one  9 of the defects in Contracts 143 and 148 is that it was  10 not submitted to a public bid; is that your  11 understanding?  12 THE WITNESS: That's correct.  13 ARBITRATOR EIZENSTAT: Given that the  14 predecessor Contract 41 was submitted to a public bid,  15 and given that the other contracts and the Usufruct  16 had already been signed with Ferrovías, why is it that  17 you would have to have yet another bid for 143 and  18 158?  19 THE WITNESS: Because, as I recounted at the  20 beginning of my Statement, Contract 41 was not entered  21 in the General Property Registry. This requirement,  22 because these are movables that are subject to</p>	<p>PAGE 1866</p> <p style="text-align: right;">1866</p> <p>05:27:31 1 responsibility of FEGUA and Ferrovías, or whose  2 responsibility is it to make that entry?  3 THE WITNESS: Absolutely of Ferrovías. That  4 is why I cited Article 89 of the Law on Public  5 Procurement because in the contracts in which the  6 State participates, the official, the Notary who is  7 responsible, is the Government Notary.  8 But there is an exception. When the  9 Interested Party contracts a Notary who is not of the  10 Government, then this Interested Party is the one who  11 assumes the responsibility for the payment of fees and  12 for seeing to it that Notarial obligations are  13 fulfilled.  14 The Guatemalan State did not Contract Notary  15 Cornejo Jorge Marroquin. He's an independent Notary.  16 The Notary of the Guatemalan State was Byron Dias  17 Orellana, who was the Notary who formalized Deed 402,  18 which was registered, and all of the rights of  19 Usufruct were entered in the Property Registry, but  20 this was not done with this railway equipment.  21 ARBITRATOR EIZENSTAT: Was this just a  22 mistake they called a private rather than a public</p>

<p>PAGE 1867</p> <p style="text-align: right;">1867</p> <p>05:28:55 1 Notary?  2 THE WITNESS: No. It was a right that  3 Ferrovías had under the law to choose the Notary.  4 ARBITRATOR EIZENSTAT: Why would it have made  5 a difference to them who the Notary is?  6 THE WITNESS: Basically to have control over  7 the Deed. A Notary who they knew and not one who was  8 a public official of the State.  9 Whatever the reason, what's clear is they did  10 choose the private Notary.  11 ARBITRATOR EIZENSTAT: Is there any--in a  12 situation, as you've described, you believe there is a  13 requirement for a re-bid--you have an encyclopedic  14 knowledge of the Constitution and Administrative Law,  15 which is much appreciated--is there any provision, in  16 a situation like this, where there is a no-bid  17 contract given these circumstances? Under the public  18 procurement laws?  19 THE WITNESS: The general rule is that, no.  20 Nonetheless, there are some exceptions to public  21 calamity or private situations where there are natural  22 disasters or--contracts between private persons and</p>	<p>PAGE 1869</p> <p style="text-align: right;">1869</p> <p>05:31:40 1 part; is that correct?  2 THE WITNESS: That is correct. And  3 basically--I'm sorry, but because of the separation of  4 powers as stated in Article 140 of the Constitution  5 for the State itself, the Executive--  6 ARBITRATOR EIZENSTAT: I'm sorry, please.  7 THE WITNESS: --the Executive has to execute  8 and head or lead the executive structure of the State.  9 They're not in charge of solving any disputes or  10 qualifying controversial situations, but this  11 responsibility to apply justice is in the hands of the  12 Court, the Judiciary, the Supreme Court. Therefore,  13 the President of the Republic does not have any  14 discretion to qualify whether an event may lead to  15 harm or not; otherwise, he would be taking up a  16 responsibility that is not within his jurisdiction.  17 He is responsible for declaring lesividad  18 whenever harm has been identified, and then the  19 Judiciary is to qualify this because of the separation  20 of powers; otherwise, this would have been an action  21 due to omission, and that would have--he would have  22 been against the law, and it's only the courts that</p>
<p>PAGE 1868</p> <p style="text-align: right;">1868</p> <p>05:30:18 1 the State in the case of natural disasters, but that  2 wasn't the case of Ferrovías and, therefore, they had  3 to abide by the requirements of Article 89.  4 ARBITRATOR EIZENSTAT: You mentioned several  5 times that there would have been personal liability on  6 the part of the President had he not issued lesividad;  7 correct?  8 THE WITNESS: It is completely correct.  9 ARBITRATOR EIZENSTAT: Based on your broad  10 knowledge of administrative law, can you tell the  11 Tribunal if there have been any instances in which a  12 President has been held personally responsible for  13 failure to issue a lesividad?  14 THE WITNESS: I do not have previous  15 information that I can mention here to the Tribunal.  16 ARBITRATOR EIZENSTAT: One of the issues that  17 divides your Opinion from the preceding Expert is the  18 question of what discretion the President may have  19 when he is provided with a legal opinion from his  20 subordinates.  21 And if I correctly understand you, you're  22 saying that there is no discretion on the President's</p>	<p>PAGE 1870</p> <p style="text-align: right;">1870</p> <p>05:33:09 1 are to determine the nonapplication of something. It  2 would have been against the rule, that would have been  3 personal liability.  4 And in the theory of the principle, it has to  5 do with the nondiscretionary powers of the public  6 administration.  7 ARBITRATOR EIZENSTAT: The Declaration of  8 Lesividad is not an action to be taken lightly, I  9 assume, because you're making a finding that it's  10 harmful to the interests of a State. That's not an  11 everyday occurrence; correct?  12 THE WITNESS: That is correct.  13 ARBITRATOR EIZENSTAT: And it is the  14 President of the Republic who must issue that  15 Declaration; is that correct?  16 THE WITNESS: Yes, that's in Article 20 that  17 I read.  18 ARBITRATOR EIZENSTAT: And in your  19 interpretation, the President of the Republic, in  20 making that kind of consequential decision, is really  21 a total functionary. I mean, he might as well be a  22 bump on a log or a Secretary or a Third Secretary,</p>

<p>PAGE 1871</p> <p style="text-align: right;">1871</p> <p>05:34:20 1 because once his lawyers in the Executive Branch have  2 identified a legal defect--here the absence of  3 Presidential approval and a bid--he can't say, "Well,  4 I think this Contract is important to the interest of  5 the State, it's not harmful." He has absolutely no  6 discretion; his lawyers totally guide whatever he  7 does, and he has to sign, he has no discretion,  8 absolutely no discretion, even though he's been  9 elected by the people, and he's making a public  10 Declaration of harm to the interests of the State.  11 That's your testimony? That's your  12 understanding of the law?  13 THE WITNESS: Articles 153 and 154 of the  14 Political Constitution of the Republic do not exclude  15 the responsibility of the officials and public  16 servants. The legal advisors are part of that chain  17 of responsibility, and they sign the legal opinions  18 where they highlight the acts and actions that cause  19 harm to the State. And in each of their opinions,  20 they refer to the laws that are used as basis so they  21 cannot be used as conspiracy against the public--the  22 President of the Republic, who is forced to sign a</p>	<p>PAGE 1873</p> <p style="text-align: right;">1873</p> <p>05:37:25 1 chain of responsibilities includes the advisors, and  2 this links in particular FEGUA's advisors to the  3 advisors to the Attorney General. The Attorney  4 General, the Legal and Technical Advisors with the  5 Secretary of the--within the Office of the Secretary  6 of the President of the Republic, therefore, the  7 President, just receives a chain of responsibilities  8 that are used to--for this decision.  9 And also, a court of justice will verify  10 whether that chain of responsibilities was based on  11 the law, and the decision will be the one to determine  12 whether the President and the advisors acted  13 responsibly.  14 If it was a responsible situation, there will  15 be a decision that is favorable or positive to this;  16 otherwise, there will be a situation in which this  17 decision will clearly show that the decision by the  18 President and the advisor who was wrong and against  19 the law.  20 ARBITRATOR EIZENSTAT: Mr. Aguilar,  21 Mr. Gramajo told us earlier today--in fact, it seems  22 it was earlier last year--it's been a long day--he</p>
<p>PAGE 1872</p> <p style="text-align: right;">1872</p> <p>05:35:54 1 Declaration of Lesividad, but is rather a chain of  2 responsibility based on the law.  3 In addition to that, the effect of the  4 Declaration does not have an executive effect against  5 the Party; and, as stated in the rule and checks and  6 balances, the Lesividad Declaration forces the State  7 of Guatemala not to use its power other than with a  8 legal basis to be able to resort to the Court. And  9 that's the reason why Article 20 always states that  10 all the Actions have to be preceded by the Declaration  11 of Lesividad. This is a stop for the authority, a  12 break for the authority.  13 ARBITRATOR EIZENSTAT: Would you agree that  14 the President of the Republic is the premier figure in  15 the Executive Branch?  16 THE WITNESS: He heads--he leads the  17 Executive. He's the head.  18 ARBITRATOR EIZENSTAT: So,  19 lawyers--lawyers--can make a decision on the ground of  20 what is a defect in a contract and bind the President  21 of the Republic to follow their recommendation?  22 THE WITNESS: As I mentioned before, the</p>	<p>PAGE 1874</p> <p style="text-align: right;">1874</p> <p>05:38:49 1 told us earlier today that, in his understanding,  2 Contracts 143 and 158 did not require, explicitly did  3 not require, the approval of the President.  4 As you read those contracts, do you agree  5 with Mr. Gramajo's interpretation?  6 THE WITNESS: Absolutely not. I do not agree  7 because, as part of the constitutional laws,  8 Article 121 of the Constitution, Subsection C states  9 that the assets that belong to the State include the  10 assets of autonomous and decentralized institutions;  11 therefore, FEGUA's assets belong to the State. And  12 any disposition of those assets require the approval  13 of the Executive because the State does not usually  14 use--Award those assets as part of a Usufruct and the  15 Executive should approve any negotiation to that end.  16 ARBITRATOR EIZENSTAT: I don't want to you  17 misunderstand my question.  18 What Mr. Gramajo said, to my understanding,  19 was that the contracts, on their face, didn't require  20 Presidential approval, but after he came into his  21 office, the lawyers in FEGUA said that it did; even  22 though the Contract didn't require it, that there was</p>

<p>PAGE 1875</p> <p style="text-align: right;">1875</p> <p>05:40:33 1 a requirement under Guatemalan law. That's my 2 understanding. 3 So, I guess I'm asking you first whether your 4 reading of the Contract itself required Presidential 5 approval--not whether the Law of Guatemala did, but 6 whether the contracts themselves required Presidential 7 approval on their face. 8 THE WITNESS: If we're referring to Contracts 9 143 and 158, those contracts are null, absolutely 10 null. They cannot be approved by the President of the 11 Republic. This is different from what happened in 12 Contract 41. 13 And why am I saying that Contract 143 and 158 14 could have never been approved by the President? 15 Because they were done in a covert way. There was no 16 bidding process, there was no publicity of these. 17 They were not made public, and it was a clear breach 18 of Article 49 for Public Procurement of the State that 19 orders the information-- 20 ARBITRATOR EIZENSTAT: The Government 21 controlled that process--FEGUA controlled that 22 process, did they not?</p>	<p>PAGE 1877</p> <p style="text-align: right;">1877</p> <p>05:43:39 1 FEGUA's law, Article 3, states that their 2 responsibility is to provide railway services. They 3 have no authority to sell or rent or give their assets 4 in Usufruct. 5 Therefore, Contract 143 and 158 were entered 6 into by the Overseer of FEGUA, but he was not 7 representing the State or FEGUA. It was illegal. 8 ARBITRATOR EIZENSTAT: I understand that you 9 think he acted improperly, but he signed the Contract 10 with Ferrovías as the Overseer, did he not? 11 THE WITNESS: And he signed them without 12 legal powers. 13 As a matter of fact, in the claim brought 14 by--brought against Ferrovías by the State, there is a 15 special section indicating that personal liability 16 will be exempted (ph.) to the Overseer of FEGUA 17 because of the legal actions. 18 ARBITRATOR EIZENSTAT: You mentioned that 19 there were Letter Authorizations to try to correct 20 this defect so that the equipment could continue to be 21 used; is that correct? 22 THE WITNESS: It was not to--correct, but I</p>
<p>PAGE 1876</p> <p style="text-align: right;">1876</p> <p>05:41:59 1 THE WITNESS: It is not true. FEGUA's 2 Overseer assumed responsibilities that were not within 3 his power, and the Overseer is not, and was not, the 4 Government of Guatemala. 5 ARBITRATOR EIZENSTAT: So FEGUA, in your 6 opinion, through the Overseer, acted improperly or 7 perhaps illegally by entering into that Contract with 8 Ferrovías. 9 THE WITNESS: In my opinion, FEGUA's Overseer 10 acted clearly illegally. These were personal 11 decisions made by the Overseer that did not represent 12 FEGUA or the State of Guatemala. 13 And let me elaborate. 14 FEGUA's oversight that was decreed in 1976, 15 approximately--rather, 1982, meant that the Overseer 16 was going to have the powers of the management and the 17 Executive Board. Therefore, for practical means, the 18 Overseer was the Executive Council and the management. 19 But when we go back to the law, to the statutes of 20 FEGUA, we see that neither the Board nor the 21 management have the authority to decide on the 22 disposition of FEGUA's assets.</p>	<p>PAGE 1878</p> <p style="text-align: right;">1878</p> <p>05:45:04 1 think that I highlighted the letters led to the breach 2 of the Agreement in Contract 41, and that's the reason 3 why I referred to the terms. 4 Contract 41, which was not approved, was 5 signed on March 23, 1999. The first letter to breach 6 what was agreed in the Contract was directed by 7 Ferrovías on April 9, 1999, barely 17 days after 8 Contract 41 had been signed, and where Clause 6 had 9 stated that the Contract was going to enter into force 10 30 days after its publication. 11 And even though this was well-known, 12 Ferrovías took possession of the equipment, and I also 13 mentioned that they used equipment without paying for 14 its use during three years, except for the 7500 15 quetzales that they paid in 2000. 16 These letters were not to cure the defect, 17 but they were a breach of the Agreements stated in the 18 Bidding Terms and also in the Law. 19 ARBITRATOR EIZENSTAT: But there were more 20 than Letter of Authorization for Ferrovías; is that 21 correct? 22 THE WITNESS: That is correct. And these</p>

<p>PAGE 1879</p> <p style="text-align: right;">1879</p> <p>05:46:27 1 letters were completely illegal, and they even  2 modified how the payments were made because the  3 Agreement, in Article--in Contract 41 was the Canon of  4 1 percent over gross invoicing, and letters dated in  5 2002--in 2000, that was changed to monthly payments,  6 and it was estimated at 7,500 quetzales. There was  7 several letters; one dated, April 9, April 12,  8 February 20, February 25, August 22nd, and October  9 3rd.</p> <p>10 ARBITRATOR EIZENSTAT: Why couldn't this  11 whole issue have been resolved by just perpetual  12 letters of authorization?</p> <p>13 If you say they were legal; correct? You  14 think the letters from the FEGUA were legal and gave  15 Ferrovías the right to use the equipment, they could  16 have just been used perpetually, couldn't they?</p> <p>17 THE WITNESS: That is incorrect. That is  18 incorrect. I never said that those letters were  19 legal. Quite the opposite. I said that those are  20 illegal, and they did not authorize to legally use the  21 equipment.</p> <p>22 PRESIDENT RIGO: What's the problem?</p>	<p>PAGE 1881</p> <p style="text-align: right;">1881</p> <p>05:49:07 1 THE WITNESS: That is correct, and Mr. Porras  2 is also one of the persons.</p> <p>3 ARBITRATOR EIZENSTAT: He was just doing one  4 illegal act one after another, signing Letters of  5 Authorization, all of these illegal, in your opinion?</p> <p>6 THE WITNESS: Absolutely.</p> <p>7 It is also important for you to observe the  8 date of August 13 of 2003, where three Contracts are  9 signed, two lease contracts for the equipment for 15  10 days between the action--the overseeing of FEGUA and  11 Ferrovías. These are Contracts that are--have no  12 legal basis. And leases are set without no basis.  13 And on the same day, there is a term for 15 days to  14 lease the equipment, then that equipment is considered  15 null, the amount is changed, and then, as part of Deed  16 Number 5, another Contract is drafted for only 13 days  17 of use of that equipment just days before Contracts  18 143 and 158 are entered into.</p> <p>19 So, this is part of the legal actions used to  20 dispose covertly of FEGUA's assets.</p> <p>21 ARBITRATOR EIZENSTAT: Just to understand  22 your testimony, you're saying that because you</p>
<p>PAGE 1880</p> <p style="text-align: right;">1880</p> <p>05:47:57 1 MR. ORTA: The translation was wrong, on the  2 transcript he said the Letter of Authorizations were  3 completely illegal, but the transcript said completely  4 legal, and that causes--I wanted to get that in  5 before--</p> <p>6 ARBITRATOR EIZENSTAT: I thought that's what  7 I heard.</p> <p>8 THE INTERPRETER: The interpreter may have  9 misunderstood the witness. I apologize.</p> <p>10 ARBITRATOR EIZENSTAT: Okay.</p> <p>11 So, not only was 143 and 158 illegal, but  12 this stream of authorizations were also illegal. Is  13 that your testimony?</p> <p>14 THE WITNESS: That is correct.</p> <p>15 ARBITRATOR EIZENSTAT: And it was FEGUA that  16 was issuing these authorizations as well?</p> <p>17 THE WITNESS: Yes. All started with a  18 request by Ferrovías. And it was not FEGUA, it was  19 the Overseer, FEGUA's Overseer, that was doing this  20 illegally.</p> <p>21 ARBITRATOR EIZENSTAT: So, this is  22 Mr. Sarceno, I think; correct?</p>	<p>PAGE 1882</p> <p style="text-align: right;">1882</p> <p>05:50:50 1 consider 143 and 158 to be a nullity, that there was  2 no way to remedy that, even if the President had said,  3 "I think that these contracts were the best things  4 since sliced bread for my country," there was no way  5 in which he could have, himself, said, "I'm going to  6 sign the thing; if that's the problem, I'm just going  7 to sign it."</p> <p>8 There's no way they could have done that. Is  9 that your testimony, under your understanding of the  10 law, what you're instructing us on?</p> <p>11 THE WITNESS: Yes, it is correct. The  12 President of the Republic cannot ratify a contract  13 that originated against the laws of the country. It's  14 impossible.</p> <p>15 But if we separate the Contract from the  16 right to dispose of the assets, the Government can  17 conduct any licit negotiation as long as the laws of  18 the country are complied with.</p> <p>19 PRESIDENT RIGO: I need to correct again for  20 the record, just the last two lines before Secretary  21 Eizenstat asks the last question, and the concluding  22 lines of the Expert it says "legal actions." He</p>

<p>PAGE 1883</p> <p style="text-align: right;">1883</p> <p>05:52:10 1 really said, in Spanish, "illegal action."  2 Again, it's the opposite.  3 But I think Secretary Eizenstat followed up  4 as if it he had illegal, but it's not what's on the  5 record.  6 ARBITRATOR EIZENSTAT: I mean, the  7 distinction between legal and illegal in English is a  8 pretty important one, and I'm sure it is in Spanish,  9 what is the word?  10 Why are we getting this continued--  11 THE INTERPRETER: Sir, this is the  12 interpreter. It's just because of the way it's  13 pronounced, sometimes he says--he joins two words, and  14 the "I" in front of "legal" it sounds like "and," and  15 so it's just sometimes because of the way the words  16 are put together, but the difference is very clear  17 when the words are pronounced in isolated fashion.  18 ARBITRATOR EIZENSTAT: On these things, great  19 acts can occur, so thank you for that.  20 Two more clarifications.  21 Do you think, from your perspective, that  22 Ferrovías had any right to rely on the signature of</p>	<p>PAGE 1885</p> <p style="text-align: right;">1885</p> <p>05:55:03 1 Therefore, Ferrovías knew and accepted that  2 only they could dispose of the assets with the  3 Authorization of the President of the Republic and the  4 Council of Ministers.  5 ARBITRATOR EIZENSTAT: Did FEGUA have any  6 responsibility in this as well?  7 THE WITNESS: FEGUA's Overseer does have  8 responsibility, and it is so indicated in the  9 proceeding started against FEGUA in the country.  10 ARBITRATOR EIZENSTAT: And my last question  11 is, just to go back to the bidding issue, you  12 mentioned that there were certain extraordinary  13 circumstances in which a re-bid could be  14 avoided--natural disasters and so forth.  15 Are there any other exceptions to the general  16 rule that public procurement contracts must be  17 publicly bid? For example, if there's only one  18 potential contractor? Is that an exception?  19 THE WITNESS: No. In public laws, there are  20 different states that go from natural catastrophes,  21 natural disasters to other events that clearly defined  22 exceptions.</p>
<p>PAGE 1884</p> <p style="text-align: right;">1884</p> <p>05:53:22 1 the Overseer of Ferrovías to 143 and 158 and then to  2 subsequent authorizations by letter to use the  3 equipment?  4 THE WITNESS: I'm sorry, but I did not  5 understand the content of the question.  6 ARBITRATOR EIZENSTAT: It didn't involve  7 either "legal" or "illegal," I can assure you that.  8 I'm asking you, did, in your opinion,  9 Ferrovías have any right to rely upon the signature of  10 the Overseer of FEGUA in 143 and 158 and then the  11 subsequent Letters of Authorization to use certain  12 equipment?  13 THE WITNESS: They did not have any right,  14 and it is very important to state that in several  15 letters Ferrovías acknowledges that Contract 41 was  16 not authorized. Ferrovías knew that they did not have  17 a legal authorization to use the equipment, and they  18 also knew that the use of equipment had to be approved  19 by the President of the Republic because that was  20 stated in the terms of 1996, 6.4 of the Bidding Terms,  21 that were included in Contracts 143--to Contracts 143  22 and 158.</p>	<p>PAGE 1886</p> <p style="text-align: right;">1886</p> <p>05:56:33 1 ARBITRATOR EIZENSTAT: And those exceptions  2 would be found in what part of the law? I know you  3 memorized all of this.  4 THE WITNESS: That would be in the Law of  5 Public Order.  6 ARBITRATOR EIZENSTAT: And where would the  7 exceptions be found?  8 THE WITNESS: Whenever there are disasters  9 and calamities, the Congress of the Republic so  10 decides or the President of the Republic with the  11 Council of Ministers so decides based on the level of  12 disaster and also the level of--the number of  13 purchases to be done as part of a bidding process, but  14 these are exceptions.  15 ARBITRATOR EIZENSTAT: And no other  16 exceptions?  17 THE WITNESS: No.  18 ARBITRATOR EIZENSTAT: Okay. Thank you very  19 much.  20 PRESIDENT RIGO: We have no further  21 questions.  22 Mr. Orta, on the questions of the Tribunal?</p>

<p>PAGE 1887</p> <p style="text-align: right;">1887</p> <p>05:57:35 1 MR. ORTA: Thank you, Mr. Chairman.  2 If we could put up R-331.  3 We're just getting a Spanish version of this  4 document for the witness. If we could just go to the  5 first page so I could identify it for the record,  6 please, Kelby.  7 Just go to the very top of the document, and  8 then we will come back down.  9 If you could go back up a little bit, I want  10 to identify for the record, please. All the way to  11 the top. I want to show the caption.  12 This, for the record, is Exhibit R-331, and  13 it is the Complaint filed by the Attorney General of  14 Guatemala before the Administrative Court regarding  15 Contract 143 and 158. This is the--this is the  16 English translation that's up on the screen.  17 Now, if we could go down to the Relief, all  18 the way down to the relief sought by the Attorney  19 General of Guatemala, in particular I would like to  20 highlight and ask the witness a question about numbers  21 5 and 6 of the Petitions.  22 Apologies, it's only going to be a question</p>	<p>PAGE 1889</p> <p style="text-align: right;">1889</p> <p>06:02:13 1 going to be asked about so--whether I can object or  2 not, if it's beyond the scope of the Tribunal's  3 questions.  4 MR. ORTA: It goes directly to the question  5 that Secretary Eizenstat asked about liability of the  6 FEGUA Overseer for the illegal acts committed, and  7 there was a question answered by the witness about  8 that, and he said that there was relief sought in the  9 Administrative Court action regarding that illegality,  10 and I would like to ask the witness a question about  11 that.  12 (Comment off microphone.)  13 MR. ORTA: We will when we identify it, but  14 as I mentioned, we're having difficulties getting the  15 English version up on the screen.  16 BY MR. ORTA:  17 Q. So, Mr. Aguilar, if you could--first of all,  18 have you found this section where the Attorney General  19 seeks relief from the Administrative Court in the  20 document?  21 A. Yes, I did.  22 Q. Can you inform the Tribunal what relief is</p>
<p>PAGE 1888</p> <p style="text-align: right;">1888</p> <p>06:01:06 1 or two, and I will be done.  2 Sorry, while we're getting the English  3 version up, to move this along...  4 FURTHER REDIRECT EXAMINATION  5 BY MR. ORTA:  6 Q. You have a Complaint filed by the Attorney  7 General prior to the Administrative Court; is that  8 correct?  9 A. That is correct. That is correct.  10 Q. Okay.  11 A. That is correct.  12 Q. And if you could look down to the Petitions,  13 the relief sought by the Attorney General, and in  14 particular numeral 5 and 6 of the relief sought toward  15 the end of the document, can you identify that, and  16 please let me know once you've done that.  17 MR. STERN: Is there a way I could see the  18 English version?  19 THE WITNESS: I found it.  20 MR. ORTA: I'm going to have the witness read  21 what--  22 MR. STERN: I would like to know what he's</p>	<p>PAGE 1890</p> <p style="text-align: right;">1890</p> <p>06:03:20 1 sought in Petition Number 5 by the Attorney General.  2 A. In Petition Number 5, the Attorney General's  3 Office requests the Tribunal to rule on civil  4 liability against the individuals that were involved  5 in the negotiations that were declared lesivo.  6 Q. Thank you, sir.  7 What about Petition Number 6? What relief is  8 sought there?  9 A. A relief is sought for the legal costs and  10 the costs--cost under the contracts that produced harm  11 to the State of Guatemala.  12 (Overlapping interpretation and question.)  13 A. In the Spanish version, it is.  14 Q. What relief is sought by the Attorney General  15 in Petition Number 6 that was filed by the Attorney  16 General?  17 A. The petitions and reliefs go from Number 3 to  18 Number 7.  19 In Number 3, is for things to go back to  20 their original state; that is to the state that they  21 were in before the lesivo contracts were entered into,  22 and that meant that Ferrovias should return the</p>

<p>PAGE 1891</p> <p style="text-align: right;">1891</p> <p>06:05:08 1 property and that the money be surrendered. That's  2 Petition Number 3.  3 Petition Number 4 is for the payment of  4 damages for the lesivo contracts.  5 Petition 5 is for civil liabilities be  6 declared against those who participated in the  7 negotiations.  8 Number 6 is that Court costs and legal  9 expenses should be paid by Claimants.  10 And number 7 is for a Criminal Court to be  11 contacted if criminal activities have occurred.  12 These are the Petitions of the State of  13 Guatemala in its action.  14 Q. Thank you.  15 MR. ORTA: I have no for questions.  16 PRESIDENT RIGO: Mr. Stern.  17 MR. STERN: Thank you.  18 RECCROSS-EXAMINATION  19 BY MR. STERN:  20 Q. I think the record needs to be cleared up.  21 Isn't it true, sir, that the Letter  22 Authorizations that you testified to, there were--no</p>	<p>PAGE 1893</p> <p style="text-align: right;">1893</p> <p>06:07:45 1 he discovered these issues with the Contracts;  2 correct?  3 A. Yes. I did not have before me any letter,  4 nor do I have personal knowledge of that.  5 Q. Let me ask you some further questions about  6 the discretion or lack thereof of the President to  7 issue a Lesivo Declaration once receiving a  8 recommendation from his advisors.  9 Now, President Berger, he's a lawyer; right?  10 A. Yes, of course.  11 Q. So, if I understand your testimony, if  12 President Berger--let's assume these facts--if  13 President Berger had received recommendations from his  14 legal advisors that Contracts 143 and 158 were, in  15 their opinion, lesivo, and President Berger took a  16 look at the Contracts and the Opinion and said, "You  17 know what, I disagree with my advises, I think they're  18 wrong. As a lawyer, I think they've got it wrong  19 here," is it your opinion that under those  20 circumstances President Berger would have had no  21 discretion whatsoever to disregard his legal advisors'  22 Opinion and not issue a Lesivo Declaration?</p>
<p>PAGE 1892</p> <p style="text-align: right;">1892</p> <p>06:06:16 1 further letters were issued by FEGUA authorizing FVG's  2 use of the equipment after Contract 143 and 148 were  3 entered into?  4 A. That is correct.  5 Q. All the Letter Authorizations that were  6 issued by FEGUA for use of the equipment were when  7 Contract 41 was still there; right?  8 A. No. They were granted by the Overseer in an  9 illegal manner, in a covert manner, and what was  10 signed under--what was signed under 143 and 158 was  11 illegal, and the letters of 9 and 12 April and  12 February 2000 and August and October 2003 as  13 well--20002.  14 Q. Dr. Gramajo, after he became FEGUA Overseer  15 and discovered the alleged defects in Contracts 143  16 and 158, he didn't issue any additional Letter  17 Authorizations to Ferrovías to use the equipment;  18 correct?  19 A. I don't know what actions Mr. Gramajo did or  20 did not do.  21 Q. But you weren't aware of any letters,  22 Authorization Letters, that Dr. Gramajo issued after</p>	<p>PAGE 1894</p> <p style="text-align: right;">1894</p> <p>06:09:04 1 A. Obviously, what I've said, once again, is  2 that if the President would have said that there is no  3 lesivo, he would have issued a judgment, and that's  4 something that can only be done by a court of law.  5 The advisors have indicated defects, legal  6 defects, and he has to issue the lesividad because, if  7 not, he is personally--civilly liable because, if not,  8 if he would have assumed powers that are powers of the  9 Judiciary, and that would not be correct.  10 Q. Okay. So, again, if I understand your  11 answer, that means, under my hypothetical that I just  12 gave you where the President, as a lawyer, looked at  13 the contracts, himself, and said, "You know, I  14 disagree with my legal advisors, I don't think these  15 are lesivo," under that circumstance, he still had to  16 issue the Declaration of Lesivo; correct?  17 A. Let us not talk about the fact that he's a  18 lawyer.  19 According to the laws of the country, no  20 one--a lawyer, an engineer, no one--can ignore the  21 contents of the law of the country. President Berger  22 would have incurred liability.</p>

<p>PAGE 1895</p> <p style="text-align: right;">1895</p> <p>06:10:18 1 Q. And he could not ignore the recommendations 2 of his legal advisors; correct? No matter what? 3 A. Yes. No matter what, because that is why we 4 have courts of law. They verify or qualify during 5 illegal action whether there was a violation of the 6 law or not. 7 Q. Is it your testimony that a breach of an 8 administrative contract is always harmful to the 9 interests of the State? 10 A. When there is a harm--in a bilateral 11 agreement, there's always a harm, and that is why we 12 have principles of termination of contracts. 13 Q. Okay. So, again, when there has been a 14 breach of an administrative contract, the Government 15 says the other side's breached an administrative 16 contract, under all circumstances under Guatemalan 17 law, that is, by definition, harmful to the interests 18 of the State; is that what you're saying? 19 A. What I am saying to you is any breach of the 20 bilateral contract produces legal consequences. Those 21 legal consequences may or may not be reparable. If 22 they are, we are before this possibility of annulment.</p>	<p>PAGE 1897</p> <p style="text-align: right;">1897</p> <p>06:13:17 1 Q. Now, you testified in response to Secretary 2 Eizenstat's questions about this issue of the Notary 3 and the registering the equipment under Contract 41. 4 Do you recall that testimony? 5 A. Yes, I remember perfectly well. 6 Q. Can you show us where in your Expert Reports, 7 either your First or Second Expert Reports, where 8 that's discussed, this issue about Contract 41 and the 9 Notary not properly registering the equipment? 10 It's not in there, is it, sir? 11 A. The question issued out of the reason why the 12 State of Guatemala had not authorized it. It was the 13 first question that was posed to me, and that is the 14 answer and the conclusion that I gave. 15 Q. Okay. But it's not in either of your Expert 16 Reports; correct? 17 A. No, because that was not part of my task. 18 This was a question that was not only posed by the 19 Tribunal, but by someone else here today. 20 Q. Thank you. 21 MR. STERN: I have no further questions. 22 QUESTIONS FROM THE TRIBUNAL</p>
<p>PAGE 1896</p> <p style="text-align: right;">1896</p> <p>06:11:50 1 But if the defects cannot be cured, then one has to go 2 to the courts, and the courts need to issue a 3 declaration recognizing the absolute nullity. That is 4 what I'm saying. 5 Q. You testified earlier that when there has 6 been a breach of an administrative contract, under all 7 circumstances, the President must declare--issue a 8 Declaration of Lesividad before a suit can be brought 9 in the Administrative Court; correct? 10 A. What I said was what I read out of Article 20 11 of the Administrative Law. Guatemala, whenever it 12 wants to sue under a contract, needs to declare 13 lesividad. That is what I said. 14 Q. So, even in a breach of contract, it's always 15 got to be declared harmful to the interests of the 16 State; is that what you're telling us? 17 A. Yes, and that is based on estoppel, where the 18 regulated party is protected, and the State has a 19 limit, a time limit, to do this. This does not favor 20 the State. It imposes burdens on the State because 21 the private party can go directly to a court without 22 any kind of Declaration--prior Declaration needed.</p>	<p>PAGE 1898</p> <p style="text-align: right;">1898</p> <p>06:14:34 1 ARBITRATOR EIZENSTAT: You said quite 2 eloquently that in your opinion the President can't 3 substitute a decision which ultimately belongs to the 4 Court in terms of lesivo; is that correct? 5 THE WITNESS: Yes, that is correct. 6 ARBITRATOR EIZENSTAT: Does it give you any 7 pause to hear that the Court, four years after, hasn't 8 rendered an Opinion. 9 THE WITNESS: In this specific case? Are you 10 asking about this suit? 11 ARBITRATOR EIZENSTAT: My understanding is 12 that we're now four years into this, and the Court has 13 not yet rendered a decision. Does that give you any 14 concern in terms of how this whole lesivo process 15 operates? 16 THE WITNESS: There are several scenarios 17 that are put forth in the law related to the 18 administrative proceedings. 19 The first scenario is the scenario called 20 "deprivation by dilatory exceptions," and Ferrovias 21 used these rights. It put forth a motion for lack of 22 competence--lack of jurisdiction; said that the</p>

06:15:53 1 Administrative Courts did--the Court did not have  
 2 jurisdiction.  
 3 They suspended the normal course of the  
 4 proceedings, and then the Tribunal said that it did  
 5 have jurisdiction to hear this dispute.  
 6 During the evidentiary period, Ferrovías put  
 7 forth two nullity actions, so this delayed the process  
 8 as well. Ferrovías used its rights of defense. It  
 9 answered the Complaint. And if we look at a time  
 10 parallel between what's going on here and what's  
 11 happening in Guatemala, I don't see a huge difference.  
 12 The process right now is at the state in which the  
 13 Court is ready to hand down a judgment.  
 14 ARBITRATOR EIZENSTAT: Thank you.  
 15 PRESIDENT RIGO: Mr. Orta, on that question?  
 16 MR. ORTA: No, no questions, thank you.  
 17 PRESIDENT RIGO: Mr. Stern?  
 18 FURTHER RE-CROSS-EXAMINATION  
 19 BY MR. STERN:  
 20 Q. Mr. Aguilar, were you aware--are you aware  
 21 that Ferrovías's lawyer in the Contencioso  
 22 Administrativo proceedings was told by a court

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

06:17:11 1 official in October of 2011 that the reason the Court  
 2 hasn't issued its Opinion is because of this  
 3 arbitration proceeding you're testifying here today?  
 4 MR. ORTA: I'm not sure that accurately  
 5 portrays Mr. Franco's testimony, but it is what it is.  
 6 BY MR. STERN:  
 7 Q. Can you answer my question? Are you aware?  
 8 A. I don't have any knowledge of that.  
 9 MR. STERN: Thank you.  
 10 PRESIDENT RIGO: I don't think there are any  
 11 other questions.  
 12 Thank you very much, Mr. Aguilar, for being  
 13 here. You can step down.  
 14 THE WITNESS: Thank you very much.  
 15 (Witness steps down.)  
 16 PRESIDENT RIGO: If I may have your  
 17 attention, we will close for the day right now. We  
 18 will resume tomorrow morning at 9:00, and also if I  
 19 may have the Tribunal a private word with all of you  
 20 for a second.  
 21 (Whereupon, at 6:24 p.m., the hearing was  
 22 adjourned until 9:00 a.m. the following day.)

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