

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

Also Present:

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Secretary to the Tribunal

1215 Day 7 Final.txt
MR. ALEX BERENGAUT,
Assistant to the Tribunal

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Senior Director

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1594

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

2 PRESIDENT RIGO: Good morning, everybody.

3 ARTURO GRAMAJO, RESPONDENT'S WITNESS, CALLED

4 PRESIDENT RIGO: Good morning, Mr. Gramajo.

5 would you please read the statement you have

6 in front of you.

7 THE WITNESS: I solemnly declare upon my

8 honor and conscience that my statement will be in

9 accordance with my sincere belief.

10 PRESIDENT RIGO: Thank you very much.

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

12 DIRECT EXAMINATION

13 BY MR. ORTA:

14 Q. Good morning, Mr. Gramajo. How are you this
15 morning?

16 A. Very far well, thank you.

17 Q. I'd like to ask you a few questions and just
18 to set your testimony in its proper context, first of
19 all, you have before you declarations, I believe three
20 declarations you have submitted in this case. Can you
21 please confirm for the Tribunal that the Declarations
22 that are before you are, in fact, your declarations

1595

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

1596

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.

1597

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?

1598

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.

1599

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

1600

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

1601

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

1602

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

1603

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

1604

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

1605

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

1606

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,
Page 17

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?

1607

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

1608

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:

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 itsays Ferrocarriles de Guatemala
22 FEGUA is a decentralized autonomous public entity

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

1611

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

1612

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

1613

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

1614

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.

1615

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

1616

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

1617

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

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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?

1618

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.

1619

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

1620

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 Usufructary is authorized to move

1621

09:45:54 1 the equipment outside the national territory for the
Page 29

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

1622

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?

1623

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.

1624

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

1625

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

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.

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

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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

1629

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.

1630

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.

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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?

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

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

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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?

1635

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?

1636

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

1637

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

1638

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

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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

1640

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

1641

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?

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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

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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.

1644

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

1645

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
Page 49

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--

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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

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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

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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?

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.

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.

1651

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

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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

1653

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 catastro 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

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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

1655

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

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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

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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
Page 59

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

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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.

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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
Page 61

22 conversations with the lawyers, that Contract 143 and

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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,

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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

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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
Page 63

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

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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.

1215 Day 7 Final.txt
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 Ferrovías 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

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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

1665

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

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

10:57:02 1 the Guatemalan Government."

2 ARBITRATOR EIZENSTAT: Okay, and how about
Page 67

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

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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

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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.

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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

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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

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

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

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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

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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?

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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 Porrás, 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

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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.

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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

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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.

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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

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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

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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?

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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

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11:42:04 1 seems to me that you had a situation, as laid out in
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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,

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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

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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

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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 Ferrovías?

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 Ferrovías. 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

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11:48:02 1 was given, the contracts had been drawn up by
2 Ferrovías 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.

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

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 Ferrovías,
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.

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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?

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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

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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

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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

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

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

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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

1698

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.

1699

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 Usufructary 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

1700

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

1701

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

1702

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

1703

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?

1704

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

1705

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.

12:17:57 1 (whereupon, at 12:17 p.m., the hearing was
2 adjourned until 1:15 p.m., the same day.)

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2 PRESIDENT RIGO: So, we are starting the
3 afternoon session. Good afternoon.

4 EDUARDO MAYORA, CLAIMANT'S WITNESS, CALLED

5 PRESIDENT RIGO: Good afternoon, Mr. Mayora.
6 Would you please read the Expert Declaration.

7 THE WITNESS: Yes, Mr. Chairman.

8 Good afternoon to everyone.

9 I solemnly declare upon my honor and
10 conscience that my statement will be in accordance
11 with my sincere belief.

12 PRESIDENT RIGO: Mr. Stern.

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

14 Before I begin, Mr. Foster wanted me to
15 convey his apologies for not being here this afternoon
16 and to assure you that he's not playing hookey. He's
17 working on matters for tomorrow, and that's why he's
18 not here.

19 DIRECT EXAMINATION

20 BY MR. STERN:

21 Q. Good afternoon, Dr. Mayora.

22 A. Hello.

1708

01:20:48 1 Q. Do you have in front of you copies of the
2 three expert opinions you have submitted in this
3 arbitration dated June 18, 2009, October 16, 2009, and
4 March 14, 2011?

5 A. I believe there are only two of those here.

6 Q. We will get you the third one in a second,
7 but we can go on.

8 Do you ratify the three Opinions you have
9 submitted in this proceeding and affirm their
10 truthfulness before the Tribunal?

11 A. Yes, I do.

12 Q. Okay. Now, I want to first ask you a couple
13 of questions that the Tribunal has specifically asked
14 the Parties to address in this proceeding, and the
15 first one I want to ask you is the question of the
16 President's personal liability or potential personal
17 liability under Guatemalan law for not issuing a
18 Lesivo Declaration when it's been recommended to him
19 by his legal advisers. Could you explain your views
20 on that topic.

21 A. Yes. In my Opinion, in the matter of
22 Lesividad, neither the President nor his Cabinet would

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01:22:13 1 be liable for resolving one way or another basically
2 because, although, of course, under our Constitution
3 and our statutes, any public official acting outside
4 the boundaries of the law would be personally liable,
5 severally and jointly liable, with the State for the
6 damages caused to any third party. This is a matter
7 of acting illegally.

8 But the law gives the President and his
9 Cabinet the powers and the discretion to declare
10 whether an act of Government would be contrary to the
11 interests of the State, and this is a matter of
12 discretion. This is a matter where the President and

13 his Cabinet are supposed to deliberate and exercise
14 their best judgment and care.

15 Q. Another question the Tribunal has asked the
16 Parties to address is whether under Guatemalan law is
17 it permissible for the Government and the affected
18 private party to negotiate or reach a settlement
19 agreement on a declaration of lesividad as opposed to
20 having to wait for the Administrative Court to confirm
21 or reject such a declaration. Could you set forth
22 your views on this issue.

1710

01:23:46 1 A. Yes. The law, the statute that regulates the
2 Office of the Attorney General does provide for the
3 possibility of the President of the Republic issuing
4 instructions to the Attorney General's Office to enter
5 into negotiations conducive to a possible settlement.
6 However, in this particular case, it is my opinion
7 that, since the Explanatory Statement that's in the
8 record that supports the issuing of the Declaration of
9 Lesivo has been founded on legal technicalities or on
10 alleged illegalities, then this has made it impossible
11 to enter into negotiations conducive to a settlement
12 because, as it were, you cannot say, well, give me
13 this much money and I'll forget about this legal
14 requirement or that other legal requirement not being
15 necessary.

16 So, therefore, in my opinion, the way in
17 which the Declaration of Lesivo was issued this
18 particular situation, the possibility of entering into

19 negotiations conducive to a settlement became for
20 closed-door--was made impossible.

21 Q. Now, let me ask you a question about a
22 different issue.

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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 is 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

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

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 Ferrovías.

6 In your opinion, were of 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

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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

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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

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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

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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.

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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

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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

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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

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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...

1722

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

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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,

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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.

1725

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

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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?

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- 01:48:37 1 A. Okay.
- 2 Q. And that, just so we're clear, that office or
- 3 that Ministry, I should say, is the Ministry in
- 4 Guatemala that is charged with making determinations
- 5 about legalities of administrative contracts; correct?
- 6 A. No, that is not exactly right.
- 7 Q. Well, isn't that the Ministry--and correct me
- 8 if I'm wrong--you're the Expert on Guatemalan law, but
- 9 isn't that the Ministry who is responsible for
- 10 assuring that administrative contracts are appropriate
- 11 under Guatemalan law?
- 12 A. No, no. That would be--actually, it would be
- 13 rather the Office of the Attorney General. The
- 14 Ministry of Finance has to do with handling the
- 15 budget, handling the finances of the State and
- 16 overseeing the correct execution of the budget, of the
- 17 several public administrations of the State.

18 Q. Now--so in your opinion, do you have an
19 opinion as to why the Contract was sent to that
20 Ministry?

21 A. Well, there is a division or a department in
22 the Ministry having to do with the so-called "Benes

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01:50:00 1 del Estado," you could probably say property of the
2 State, and I recall that it was sent to that
3 department for an opinion.

4 Q. Okay. And I guess in the nature of trying to
5 make a determination about whether property of the
6 State had been harmed as a result of the actions
7 undertaken in relation to Contract 143/158, it would
8 be natural to seek the Opinion of that Ministry and
9 that division within that Ministry to see what their
10 opinion was about whether there had been, in fact,
11 harm to property of the State; correct?

12 A. I wouldn't have, but that's how they
13 proceeded, yeah.

14 Q. And they actually have a Government
15 procurement department within that Ministry, don't
16 they?

17 A. Yes, they do.

18 Q. And that is the department that was consulted
19 on whether Contract 143 and 158 was or was not lesivo
20 to the interests of the State; correct?

21 A. Yeah, I think so.

22 Q. And you recall that there were three separate

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01:51:05 1 persons within the Ministry of Finance who analyzed
2 Contract 143 and 158?

3 A. Yes.

4 Q. And you recall as well that those three
5 persons reached the Opinion, after doing an
6 independent analysis, that Contract 143 and 158
7 was--well, one, suffered from a number of important
8 legal defects; correct? And if you don't recall, we
9 can look at the Opinion.

10 A. I'm sorry, you were asking me or just
11 describing what's in the documents?

12 Q. I'm asking you if you have a recollection
13 that three separate persons within the Ministry of
14 Finance, the Department of Public Procurement analyzed
15 Contract 143 and 158 and reached, each of them, a
16 determination, an opinion that Contracts 143 and 158
17 suffered from a number of important legal defects. Do
18 you recall that?

19 A. They issued a few very succinct Opinions to
20 that effect, yeah.

21 Q. Okay. And by saying they were succinct
22 opinions, you're not in any way suggesting they didn't

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01:52:21 1 do a careful analysis, are you?

2 A. That's how it looks on the face of those
Page 119

3 statements to me, yeah.

4 Q. It looks as though they didn't do a careful
5 analysis?

6 A. Didn't do a sufficient analysis, yes.

7 Q. Okay. Let's put up document R-24, for
8 purposes of the Tribunal. Let's go ahead to the
9 beginning of the Opinion.

10 Are you aware that one of the persons who
11 authored this Opinion has testified in this case?

12 A. No.

13 Q. If we could go down to the very end of this
14 document. And America Gonzalez, who you can see is
15 one of the persons who--this is obviously the English
16 translation of the document, but one of the persons
17 who conducted the analysis and signed this Legal
18 Opinion; correct?

19 A. Yeah, I see her name there.

20 Q. And she submitted a--and we're going to show
21 you in a second her Declaration. She submitted a
22 declaration in this case saying that she conducted, as

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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?

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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

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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

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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?

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

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

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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

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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

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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
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21 was the Legal Adviser for the Technical Board of the
22 General Secretariat of the Presidency, as well as

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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

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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

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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

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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

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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
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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.

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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

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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,

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02:13:01 1 stipulate to facts and ask if he as a legal expert
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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

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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

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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

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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.

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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.

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

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

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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

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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

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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

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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

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

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
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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

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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

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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
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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

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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

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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.

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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.

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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

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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

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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?

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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

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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

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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

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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

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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

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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
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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

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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?

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

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

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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

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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,

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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?

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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

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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

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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

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03:02:00 1 nullity.

2 ARBITRATOR EIZENSTAT: We're, of course,
3 not--we're making a judgment, as Professor Crawford
4 said, under CAFTA, so this is a separate decision that
5 we have to make. What criteria are there for invoking
6 lesividad? Are there stated criteria beyond the
7 President's making a determination of the interest of
8 the State? What types of judgments must be made to
9 make that determination that a particular act or
10 contract is contrary to the interest of the State, or

11 is it a purely discretionary matter? Do you know of
12 what criteria in terms of previous either statutorily
13 or by Court decisions over the years?

14 THE WITNESS: There isn't any criteria, no
15 settled criteria as to what might be harmful to the
16 interests of the State within the context of
17 lesividad. There can be four people and six opinions
18 as to that in a room at any given point in time; and,
19 unfortunately, the few cases that in the last 25 years
20 or so have made it to the Administrative Court have
21 not, in my opinion, shed any light on that.

22 ARBITRATOR EIZENSTAT: If FEGUA had decided,

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03:03:26 1 as they presumably did, that an executive approval was
2 required for these contracts to be fully effective and
3 the alleged illegality removed, would the President
4 have been authorized to grant that approval as opposed
5 to granting lesividad, or would that have been beyond
6 his authority to do.

7 THE WITNESS: In my opinion, that probably
8 would have been the harder solution because again
9 there aren't any specific legal provision
10 on--provisions on the basis of which the President can
11 issue such ratification, and the President or any
12 other public official requires a legal basis for
13 action, and where is the provision on the basis of
14 which the President could have issued such
15 ratification.

16 So, that is why the reason why I venture in
17 my opinion that the easiest way would have been to
18 clarify the record to the effect that no ratification
19 is required only because someone decided in the
20 Bidding Terms that it was a good idea to have that.

21 ARBITRATOR EIZENSTAT: Is there such a thing
22 in Guatemalan law as no-bid contracts? Do you have

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03:04:53 1 that as a possible avenue for public contracts?

2 THE WITNESS: There are some exceptions in
3 the Public Procurement Act where contracts can be
4 entered into without a bidding, cases of emergency or
5 national security or where there is only one supplier
6 or there is an intuitu persona kind of situation, but
7 most of them are exceptions to the general rule that a
8 bidding is required.

9 ARBITRATOR EIZENSTAT: Do you have any
10 opinion under Guatemalan law as to whether there
11 having been a bid for Contract 41, which was then
12 superseded by 143 and 158, there was a requirement for
13 a re-bid of 143 and 158?

14 THE WITNESS: In my opinion, it is very
15 important to point to the very specific object of the
16 bidding. The bidding was in order to acquire the
17 right to negotiate a Usufruct Contract with FEGUA.
18 So, the winning of the bid was supposed to go and sit
19 down within the general terms of the bidding process,
20 then negotiate and conclude a contract.

21 So, I think that this being the object of the
Page 165

22 bidding process, there is reasonable grounds to look

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03:06:37 1 at Contracts 143 and 158 as the final stage in these
2 negotiations that one would want to think of as bona
3 fide negotiations leading to that sort of final
4 concretion of the process.

5 A second bidding would have, I think, been an
6 implicit recognition that no rights existed, that the
7 whole process had been somehow null, and hadn't
8 produced any effects, and I fail to see how that would
9 have been a cure. I think that would have been
10 another way to kill a process that was certainly
11 promoted by our own Government.

12 ARBITRATOR EIZENSTAT: One last question.
13 Under Guatemalan law, but also your experience in the
14 country, we have a situation here in which there were
15 two separate contracts: One, 402, which granted
16 certain rights-of-way and control of rights-of-way,
17 which was not implicated in the lesividad, and the
18 second, the equipment, 143 and 158. Do you have an
19 opinion as to whether if there had been a re-bid of
20 just the Equipment Contract, there would have been a
21 likelihood of another bidder bidding on that when that
22 bidder would not have controlled the right-of-way for

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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

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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 REXCROSS-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

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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 Ferrovías

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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
Page 169

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

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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

1792

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

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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.

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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

1795

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?

1796

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

1797

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

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 RECROSS-EXAMINATION

20 BY MR. ORTA:

21 Q. You agree, don't you, that it is the
22 Administrative Court who ultimately decides whether

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

1800

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,
Page 177

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.

1801

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

1802

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 deporativa autonima (ph.).

1803

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?

1804

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

1805

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
Page 181

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

1806

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

1807

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

1808

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

1809

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

1810

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.

1811

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

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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

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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

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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

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

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?

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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
Page 191

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

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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.

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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

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- 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

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

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

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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

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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
Page 197

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

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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

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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.

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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.

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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

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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

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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

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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

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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?

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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

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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

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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

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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.

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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

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 Alvaraldo, 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

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

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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,

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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

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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.

1843

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

1844

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

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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

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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.

1847

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.

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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.

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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

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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

1851

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

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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 20006, 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

1853

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

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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

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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."

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05:10:24 1 But the Contract, which was not declared
2 lesivo is absolutely null, and one can follow that
Page 223

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:

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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

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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

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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,

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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.

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.

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

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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

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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

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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

1866

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

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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

1868

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

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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

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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
Page 235

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,

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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

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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

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05:37:25 1 chain of responsibilities includes the advisors, and
Page 237

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

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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

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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?

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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.

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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

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

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.

10 ARBITRATOR EIZENSTAT: why couldn't this
11 whole issue have been resolved by just perpetual
12 letters of authorization?

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?

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.

22 PRESIDENT RIGO: what's the problem?

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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--

6 ARBITRATOR EIZENSTAT: I thought that's what
7 I heard.

8 THE INTERPRETER: The interpreter may have
Page 243

9 misunderstood the witness. I apologize.

10 ARBITRATOR EIZENSTAT: Okay.

11 So, not only was 143 and 158 illegal, but
12 this stream of authorizations were also illegal. Is
13 that your testimony?

14 THE WITNESS: That is correct.

15 ARBITRATOR EIZENSTAT: And it was FEGUA that
16 was issuing these authorizations as well?

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.

21 ARBITRATOR EIZENSTAT: So, this is
22 Mr. Sarceno, I think; correct?

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05:49:07 1 THE WITNESS: That is correct, and Mr. Porrás
2 is also one of the persons.

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?

6 THE WITNESS: Absolutely.

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.

19 So, this is part of the legal actions used to
20 dispose covertly of FEGUA's assets.

21 ARBITRATOR EIZENSTAT: Just to understand
22 your testimony, you're saying that because you

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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."

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?

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.

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.

19 PRESIDENT RIGO: I need to correct again for
Page 245

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

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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

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.

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.

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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?

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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

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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

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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

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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 Ferrovías should return the

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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 REXCROSS-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

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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

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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?

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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.

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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.

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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.

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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

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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 Ferrovías
21 used these rights. It put forth a motion for lack of
22 competence--lack of jurisdiction; said that the

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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 RECROSS-EXAMINATION
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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

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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.)

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