

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

-----X
 In the Matter of Arbitration :
 Between: :
 RAILROAD DEVELOPMENT CORPORATION, :
 Claimant, :
 and :
 THE REPUBLIC OF GUATEMALA, :
 Respondent. :
 -----X

Case ARB/07/23

Volume 8

HEARING ON MERITS

Friday, December 16, 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 9:00 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

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Assistant to the Tribunal

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

2 PRESIDENT RIGO: Good morning, everybody. We

3 start today's session.

4 MR. ORTA: Good morning.

5 PRESIDENT RIGO: Good morning, Mr. Marroquin.

6 You have a statement before, if you could please read

7 it out.

8 THE WITNESS: Yes, good morning.

9 MARIO MARROQUIN, RESPONDENT'S WITNESS, CALLED

10 THE WITNESS: I solemnly declare upon my

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11 honor and conscience that I will tell the truth, the
12 whole truth, and nothing but the truth.

13 PRESIDENT RIGO: Thank you very much.

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

15 Mr. Salinas is going to be conducting the examination.

16 PRESIDENT RIGO: Mr. Salinas.

17 MR. SALINAS-SERRANO: Thank you,

18 Mr. President.

19 DIRECT EXAMINATION

20 BY MR. SALINAS-SERRANO:

21 Q. Good morning, Mr. Marroquin.

22 A. Good morning.

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09:02:52 1 Q. Mr. Marroquin, I take it from your witness
2 statements that at one point you were asked to preside
3 at a High-Level Commission that would address certain
4 issues that existed between FEGUA and Ferrovías.

5 A. Towards the end of the first quarter of 2006.

6 Q. Can you tell the Tribunal what the origin of
7 that Commission was.

8 A. After the petition from the President for me
9 to take charge of that Commission, the Parties and
10 Ferrovías had had dealings at high level; and as a
11 result of the exchange, they asked me to follow up on
12 the issues.

13 Q. When you say that Ferrovías had had contacts
14 at the highest level, can you tell the Tribunal what
15 you mean by that.

16 A. Yes, I understand that Ferrovias had had
17 meetings with the Presidency and other important
18 positions in the Government; and, given what was
19 discussed in those meetings in which I did not
20 participate but I understand that they were carried
21 out, I was asked to take charge of the High-Level
22 Commission to make viable the whole question of the

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09:04:11 1 railway.

2 Q. Now, sir, is it your recollection that those
3 meetings happened between March and May of 2006?

4 A. The meetings of the Commission?
5 (Overlapping interpretation.)

6 Q. Wait after my question just a few seconds to
7 answer so that the interpretation can get in there.
8 We'd appreciate it.

9 A. Yes, I'd be pleased to do so.

10 Q. I asked whether it was your recollection that
11 the High-Level Commission meetings happened between
12 March and May of 2006?

13 A. That's right.

14 Q. In these meetings, sir, there's been some
15 testimony at this hearing that there were many issues
16 discussed, not just a single issue. Can you explain
17 to the Tribunal why there were a number of issues
18 discussed during the meetings and what the purpose of
19 those discussions were.

20 SECRETARY SEQUEIRA: I'm going to interrupt
21 you once again. There are some--can you please repeat

22 the answer once again.

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09:05:36 1 THE WITNESS: Now can you hear me better?
2 BY MR. SALINAS-SERRANO:
3 Q. Let me repeat the question.
4 A. Please.
5 Q. Now, in these meetings, there's been some
6 testimony at this hearing that there were many issues
7 discussed not just a single issue. Can you explain to
8 the Tribunal why there were a number of issues
9 discussed during the meetings and what the purpose of
10 those discussions was.
11 A. The purpose of the Commission that was under
12 my responsibility was to make viable the rail
13 operations in the country. Obviously, that entails
14 certain complexity in and of itself, plus the rail
15 operations, and, in this case, the contracts in force
16 with Ferrovías were three. In effect, one thing was
17 tied to the other.
18 Therefore, throughout the meetings, at least
19 the ones that I chaired, several topics were touched
20 upon.
21 Q. Now, you say, sir, that one thing was tied to
22 the other in the context of the three contracts. Can

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09:06:40 1 you tell the Tribunal if during the meetings that you
2 were present and during the Commission that you
3 chaired, was there ever or did you ever receive an
4 instruction from anyone in the Government to negotiate
5 or settle only if all points could be negotiated and
6 settled, or did the--was the Government, as
7 represented by you and others in that Commission, free
8 to negotiate whatever issues could be resolved at any
9 given time?

10 A. In terms of the first question, I did not
11 have instructions to resolve everything all together
12 in a comprehensive package. The purpose was to make
13 viable rail operations.

14 I don't know if this answers your second
15 question.

16 Q. I believe it does, sir.

17 Now, when you say that the purpose was to
18 make the viable rail operations, what do you mean by
19 that? What was your understanding of the issues that
20 the Parties were facing at that time?

21 A. I understand that there was an absence of
22 rail operations in the country that would have enabled

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09:07:52 1 the economy to have an alternative for ritualistic
2 transportation. I understand that that was precisely
3 what was sought--that was my understanding--that what
4 the counterpart at the High-Level Commission thought.

5 That is to say that such operations could
6 been an alternative for transportation in Guatemala

7 and, therefore, all of the time we were trying to come
8 up with a formula or a work plan or a revised
9 operational plan that would make it possible to reach
10 that point.

11 Q. Now, sir, I'm drawing your attention and your
12 recollection to the meeting, the High-Level Commission
13 meeting that took place in 11 May 2006. Are you sort
14 of placed in time?

15 A. Yes, I do remember it.

16 Q. Thank you, sir.

17 There has been some testimony that the
18 Government wielded in its negotiations with Ferrovías
19 the Declaration of Lesivo of the Equipment Contract,
20 the Usufruct Equipment Contract, as a pressure
21 mechanism, as a pressure tool to get concessions or
22 further negotiations on other issues with Ferrovías.

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09:09:21 1 what can you say about that in the context of your
2 negotiations within the High-Level Commission meeting?

3 A. Yes, in the context of the High-Level
4 Commission under my responsibility--oh, I'm sorry. I
5 need to wait. Sorry.

6 SECRETARY SEQUEIRA: You can answer.

7 A. Thank you.

8 In the context of the High-Level Commission
9 under my responsibility, first, I didn't have any
10 knowledge of the question of lesividad until that
11 meeting; and, second, it wasn't my instruction nor my

12 way of negotiating to have--to be pressuring or to
13 anticipating or conditioning aspects of negotiation
14 based on one issue, and that wasn't my instruction.
15 It wasn't how I had intended to go about the
16 negotiation.

17 Q. Now, sir, you say that you didn't know until
18 that point, meaning the May 11, 2006, meeting; is that
19 correct?

20 A. That is correct.

21 Q. How did you find out--

22 SECRETARY SEQUEIRA: If you would like, you

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09:10:28 1 could turn off the microphone, and every time he asks
2 you, you can then put it back--turn it back on.

3 MR. SALINAS-SERRANO: I have the same
4 problem. I think it's the issue of understanding and
5 then trying to respond, and I appreciate that.

6 BY MR. SALINAS-SERRANO:

7 Q. I was saying you mentioned that you hadn't
8 found out until thereabout the meeting of May 11,
9 2006. How did you find out and how was the issue
10 dealt with during that meeting?

11 A. In effect, at that meeting I took note of
12 this process of lesividad at the time that we were put
13 on notice by the other Party, Ferrovías. And this
14 made it such that I suspended the meeting at a certain
15 point in time, and I went out to look into that matter
16 with the Competitiveness Commissioner, Miguel
17 Fernández, who confirmed it for me, but for the sake

18 of maintaining goodwill or framework for negotiation,
19 Commissioner Fernández suggested and offered that he
20 would make an effort to suspend the lesividad process
21 so that we could continue at the high-level
22 negotiating table working.

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09:11:43 1 Q. Do you know, sir, what was Ferrovías's
2 reaction to that offer and statement from Commissioner
3 Fernández at that point?

4 A. Could you explain the question a bit further.

5 Q. How did Ferrovías react to Commissioner
6 Fernández's offer to put the lesivo process on hold so
7 that negotiations could continue?

8 A. Well, it was some time ago that we had this
9 meeting, but first, obviously, there was an issue
10 having to do with having learned that there was a
11 lesividad process, but I would suppose that in the
12 face of our offer there was at least some degree of
13 appreciation that we at the High-Level Commission
14 wanted to have clear and constructive negotiations.

15 Q. Sir, after the High-Level Commission ceased
16 its work, did you have occasion to again become
17 involved somehow with the Ferrovías issue?

18 A. Yes. In effect, in due course, the local
19 partners of Ferrovías, I understand, asked for a
20 study; and, when that study had results, I was asked
21 to attend a presentation of them.

22 Q. When you say "locality partners," sir, do you

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09:13:16 1 know who asked for that study?

2 A. My understanding is that it was Cementos
3 Progreso.

4 Q. And with regards to that study, sir, you say
5 that you were given a presentation. Do you recall
6 what the import of that presentation was?

7 A. Mesoamerica, which is the consulting firm
8 that made that presentation, made a review,
9 particularly the economic and financial considerations
10 of rail operations, and finally made some suggestions
11 about how one could render operations viable in those
12 terms; that is to say, economic and financial terms.

13 But those economic and financial
14 considerations were based on premises that were quite
15 weak or, in any event, that required additional
16 efforts from the State, be it fiscal or efforts or
17 subsidy. As I say, financial premises that really
18 were not consistent with reality.

19 Q. Sir, do you know why Cementos Progreso asked
20 for that study to be done?

21 A. I would assume that it was to get more
22 objective information on how to actually make rail

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09:15:03 1 operations viable--

2 MR. STERN: He's stating testimony based on
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3 assumption, not based on personal knowledge. It's not
4 competent testimony.

5 MR. SALINAS-SERRANO: If he knows. That was
6 the question.

7 MR. STERN: If he knows, but he should not be
8 assuming.

9 MR. SALINAS-SERRANO: I believe counsel's
10 objection is to the witness's answer, not my question.

11 PRESIDENT RIGO: Answer the question to the
12 extent that you know.

13 BY MR. SALINAS-SERRANO:

14 Q. Mr. Marroquin, did you have occasion to speak
15 to anyone at Cementos Progreso about why they
16 commissioned this study?

17 A. Yes, I did have an opportunity to speak with
18 them in due course, yes.

19 Q. And what did they tell you about why they
20 commissioned that study?

21 A. Because they had an interest, as I say, in
22 coming up with an objective reference to establish

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09:16:07 1 whether rail operations would actually be viable or
2 profitable.

3 Q. Apologies that I take you back in time now
4 that we've gone forward, but did you, while you were
5 at the High-Level Commission, have occasion to discuss
6 with Ferrovías their outlook--outlook of investment
7 and profitability and request information of that sort

8 and what was the result of those interactions?

9 A. Yes, the issue of the Ferrovías data was
10 something that we sought out so as to be able to
11 establish properly and technically what the realistic
12 ways of rehabilitating rail operations would be. But
13 in the course of the meetings, at least the ones that
14 I chaired, the high-level meetings, we never had an
15 opportunity to see those figures or those cash flows
16 or other elements that might make it possible to
17 establish an operational plan or a business plan that
18 would be viable in the future.

19 Q. Sir, do you recall what the conclusion of
20 that Mesoamerica Report was?

21 A. In brief, Mesoamerica suggested that
22 financially, economically, what might be--what might

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09:17:45 1 make rail operations viable would be either subsidized
2 interest rates or physical efforts on the part of the
3 Government in different forms. Those would be the two
4 main conclusions.

5 Consequently, there were certain conditioning
6 factors that were not very realistic from making rail
7 operations viable.

8 MR. SALINAS-SERRANO: Mr. President, I have
9 no further questions.

10 PRESIDENT RIGO: Thank you.

11 Mr. Stern.

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

14 BY MR. STERN:

15 Q. Good morning, Mr. Marroquin.

16 A. Good morning.

17 Q. I believe we talked to each other the last
18 time you were here last year.

19 A. Yes, I remember.

20 Q. Now, you were asked by your counsel on direct
21 examination questions about the Mesoamerica study, and
22 this study was conducted by Mesoamerica after the

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09:18:41 1 Government had published the Lesivo Declaration;

2 correct?

3 A. I understand that that is the case.

4 Q. So, it's fair to say that the conclusions of
5 the study that you testified about could not have been
6 a basis for the Declaration of the lesividad; correct?

7 A. Could you repeat the question, please.

8 Q. Sure.

9 The conclusions of the Mesoamerica study--the
10 study was conducted after the Declaration of
11 Lesividad; correct?

12 A. That's right.

13 Q. As a matter of logic, the Mesoamerica studies
14 conclusions could not have been a basis for the
15 Declaration of Lesividad that was issued in August of
16 2006; correct?

17 A. I would assume that that's the case.

18 Q. And as you testified, this study was not

19 conducted at the request of Ferrovías, but at the
20 request of Cementos Progreso; correct?

21 A. I would understand that it was asked for by
22 Cementos Progreso as part of its partnership with

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09:19:49 1 Ferrovías.

2 Q. Did you speak with anyone from Ferrovías to
3 tell you that they had asked for Mesoamerica to
4 conduct this study?

5 A. With my apologies to the panel, but if
6 Cementos was a partner of Ferrovías, then I assumed
7 that if I were speaking with Cementos, I was also
8 speaking with Ferrovías.

9 Q. But did you ever ask anyone from Ferrovías
10 that they had asked for Cementos Progreso to request
11 this study?

12 A. Just to be clear on the question, the
13 question is whether I had any awareness that Ferrovías
14 was in agreement with Cementos Progreso in asking for
15 the study. That, I don't know because I was invited
16 in a meeting to establish the technical solidity of
17 the results of Mesoamerica's work, but I don't know
18 what else might have happened.

19 Q. Okay. And so you went to this meeting with
20 other Government officials sometime in November 2006
21 to see the presentation on the Mesoamerica study?

22 A. That is correct.

09:21:02 1 Q. Okay. And at this meeting the
2 representatives of Mesoamerica, according to your
3 statement, gave an hour and a half PowerPoint
4 presentation on its study?

5 A. It was--the time more or less that, yes,
6 that's right.

7 Q. And they gave a PowerPoint presentation;
8 correct?

9 A. Yes, in effect they did give a PowerPoint
10 presentation.

11 Q. Okay. And just to be clear, this
12 presentation that you saw, this PowerPoint
13 presentation occurred over five years ago; right?

14 A. Yes, November of 2006, five years.

15 Q. And there were no members--representatives of
16 Ferrovías at this presentation; correct?

17 A. I imagine that in terms of Ferrovías,
18 administrative counterparts at the higher level
19 Commission, no.

20 Q. Well, my question was a little simpler--my
21 question was simple or straightforward.

22 were there any representatives from Ferrovías

09:22:16 1 present at the November 2006 meeting that you went to?

2 A. Not that I recall.

3 Q. Now, you were never provided a copy with of

4 the Mesoamerica study?

5 SECRETARY SEQUEIRA: Excuse me, could he
6 repeat the answer, please.

7 THE WITNESS: Not that I recall.

8 BY MR. STERN:

9 Q. Let me repeat my next question. You were
10 never provided a copy of the Mesoamerica study;
11 correct?

12 A. That is correct.

13 Q. And you weren't provided with a copy of the
14 PowerPoint presentation that you saw on--in November
15 2006; correct?

16 A. Not personally. It wasn't given to me.

17 Q. And, in fact, isn't it true that you've never
18 seen the actual written Mesoamerica study?

19 A. That is correct.

20 Q. What you have seen with regard to the
21 Mesoamerica study is the PowerPoint presentation you
22 saw five years ago; correct?

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09:23:27 1 A. Yes, it is correct.

2 Q. And do you know for a fact whether there
3 actually is a written Mesoamerica study?

4 A. For a fact, yes, I do know, in fact, that
5 there is a written Mesoamerica study.

6 Q. And the basis for that is because you saw the
7 PowerPoint presentation; correct?

8 A. No. The basis of knowing that there is such
9 a study is that in effect the counterparts of Cementos

10 Progreso assert this or indicate this.

11 Q. So--but you have never actually seen the
12 document that is the Mesoamerica study; correct?

13 A. I believe I already said that. I did not see
14 the Report.

15 MR. SALINAS-SERRANO: I object to the
16 continued line because it's been asked and answered at
17 least four times now.

18 BY MR. STERN:

19 Q. Okay. Now in your Second Statement you state
20 that--and this is Paragraph 7 of your Second
21 Statement--you state that, "Despite the fact I do not
22 have the study handy at this time, I perfectly

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09:24:37 1 remember that the conclusion of the study was that the
2 Guatemalan railway was simply not profitable in the
3 way Ferrovías planned to operate it."

4 Do you recall saying that in your Second
5 Statement? It's up there on the screen there.

6 A. Yes, I do remember having said this, and I
7 remember that that was the conclusion that I reached
8 from that presentation.

9 Do I need to repeat it?

10 Q. No.

11 Now, by "not profitable," the words you use
12 in your statement, are you talking about accounting
13 profits for Ferrovías?

14 A. An operation that is not profitable, not

15 viable, is an operation in general that's not viable.
16 But if you want a specification, perhaps you could
17 repeat the question in terms of just so that I can be
18 clear on just what your specific doubt is.

19 Q. Well, I'm trying to understand what you mean
20 by--what you meant by "not profitable" in your
21 statement. Profitable in terms of what?

22 A. That there wasn't sufficient revenue to cover

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09:26:00 1 the costs, neither the operating or the financial
2 costs.

3 Q. Well, in terms of how many years are you
4 referring to here? What was your understanding of how
5 many years were not profitable, based on the study?

6 A. I don't understand the question.

7 Q. Well, you said the railroad was not
8 profitable.

9 SECRETARY SEQUEIRA: Excuse me, can you
10 repeat again the answer, please.

11 THE WITNESS: Yes.

12 I did not understand or I don't understand
13 the question.

14 BY MR. STERN:

15 Q. I'm trying to draw down on what you meant by
16 "not profitable" in your statement. When you said,
17 "not profitable," are you referring to the operations
18 of the railway to date are not profitable or that the
19 railway was not going to be profitable at any time
20 over the remaining 42 years of the Usufruct?

21 MR. SALINAS-SERRANO: Just to clarify, the
22 witness has testified about what the presentation of

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09:26:58 1 the Mesoamerica Report was about, not what his opinion
2 on the profitability of the enterprise was. I just
3 want to make sure that the record is clear. Because
4 counsel keeps saying when you say "not profitable,"
5 did you mean over 42 years of the Usufruct--I just
6 want to make that clear.

7 THE WITNESS: Based on what Mesoamerica
8 presented, the railway was not profitable as of the
9 date of operation, and it was likely that it was not
10 going to be profitable unless the Government made the
11 fiscal sacrifices or unless there was a subsidized
12 financial rate in order to make it profitable, whether
13 it's five, 10, or 20 years.

14 I'm not a financial expert. I've worked in
15 finance. I've worked in investment projects, and
16 that's why I'm clear that if you don't have a
17 subsidized rate, if there is not a physical effort on
18 the Government, then there wasn't going to be
19 profitability of the operation in the future, and
20 certainly there wasn't profitability in terms of how
21 it was being offered at that time, based on what I was
22 able to see and conclude.

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09:28:20 1

BY MR. STERN:

2 Q. Now, I want to focus on, in your seventh
3 paragraph, your Second Statement, you wrote that the
4 conclusion--"I remember that the conclusion of the
5 study was that in the manner as Ferrovías planned to
6 operate the railway in Guatemala, the railroad was
7 simply not profitable."

8 Is it your understanding that the Mesoamerica
9 study only focused on the railway operations of the
10 Usufruct when they were referring to in the manner as
11 Ferrovías planned to operate the railway?

12 A. Could you repeat the question, please, so I
13 can be sure that I give you an appropriate answer.

14 Q. Sure.

15 In the manner as Ferrovías planned to operate
16 the railway--those words that you used in your
17 statement there--what was your understanding as to
18 what that was referring to? Was it referring to the
19 operation of the railway?

20 A. In effect, we had a mandate to make rail
21 operations viable, and I focused my attention on that.

22 Q. And you don't know whether the Mesoamerica

1932

09:29:35 1 study considered how Ferrovías could profit from the
2 real estate component of the Usufruct; correct?

3 A. I couldn't say anything about that. It would
4 be a bit speculative. I don't have any basis to
5 properly make a statement on that issue. Though if

6 the Tribunal would allow me, that was also just what
7 we were trying to establish during the high-level
8 meetings. What were the elements that Ferrovías had
9 in general? That was an important issue, but we were
10 never able to determine it.

11 Q. Now, you had no involvement in the
12 preparation of the Mesoamerica study; correct?

13 A. I did not.

14 Q. And you have no idea of what assumptions or
15 inputs went into the study, do you?

16 A. I wouldn't know how to answer that question.
17 Could you please repeat the question so that I'm able
18 to answer the question more appropriately.

19 Q. Well, did you have any--do you know what
20 assumptions or inputs were put into the Mesoamerica
21 study?

22 A. Of course. The ones that Mesoamerica

1933

09:31:01 1 presented in its presentation. It based itself on a
2 number of premises, and it reached a number of
3 conclusions. It is a financial and technical study.

4 Q. Sitting here today, can you tell us what
5 those assumptions and inputs were in the Mesoamerica
6 study?

7 A. I don't know if you would like a full list,
8 but as I said, I saw the study and I looked at it only
9 in general terms; and the premises and the conjectures
10 in which Mesoamerica included, I wouldn't be able to

11 describe. These are things that are a bit more
12 objective. I don't think I would have the possibility
13 of describing them appropriately.

14 Q. You can't describe them appropriately because
15 you don't know, do you, sir, as you sit here today?

16 A. I don't understand the kind of suggestion by
17 you. If you were talking about a premise, for
18 example, to work under a subsidized rate from the
19 financial viewpoint, if by "assumption" or "premise"
20 you are talking about making efforts by the
21 Government, yes, I remember. Those were not so much
22 the premises, but the conclusions of the study as far

1934

09:32:38 1 as I can remember.

2 Q. Okay, but I'm asking you about not the
3 conclusions which you testified to. I'm just asking
4 you, as you sit here today--excuse me, let me finish
5 the question--as you sit here today, can you tell us
6 what were the assumptions--as you recall, what were
7 the assumptions and inputs into the Mesoamerica study?

8 A. As far as I can remember, there were premises
9 in connection with cargo volume, passengers, and
10 projections of that nature in the business.

11 Q. Anything else you recall?

12 A. No, I would be speculating, and this is what
13 I can say appropriately because that is the basis of
14 the exercise of Mesoamerica, to establish the
15 technical and financial viability of the railroad.

16 Q. Do you know where Mesoamerica obtained

17 information from in order to prepare the study?

18 A. I would not be able to speak appropriately
19 about that. I don't know where they got the
20 information.

21 Q. So, you don't know whether they got any
22 information from Ferrovías; correct?

1935

09:34:08 1 A. I would not be able to answer that question
2 appropriately.

3 Q. And you don't know whether in the course of
4 preparing the study they spoke to anyone from
5 Ferrovías; correct?

6 MR. SALINAS-SERRANO: Objection. Asked and
7 answered.

8 MR. STERN: I don't think I asked the
9 question.

10 MR. SALINAS-SERRANO: You asked the broader
11 question, which is where they got the information, and
12 he's already told you he doesn't know.

13 MR. STERN: Right, but my question was
14 whether he spoke to anyone, not whether he got
15 information from them.

16 PRESIDENT RIGO: Please answer the question.

17 THE WITNESS: I would not be able to say that
18 appropriately.

19 BY MR. STERN:

20 Q. Okay. Let's turn to the May 11, 2006,
21 Commission meeting, High-Level Commission meeting

22 which you testified about.

1936

09:34:56 1 As you state in your First Statement, and I
2 believe you stated in response to Mr. Salinas's
3 questions, at the May 11 meeting, that was the first
4 time you learned that there was an ongoing lesividad
5 process against one of Ferrovías's contracts; correct?

6 A. Yes, that's correct.

7 Q. And you were surprised--

8 SECRETARY SEQUEIRA: would you repeat the
9 answer.

10 THE WITNESS: Yes, that's correct.

11 BY MR. STERN:

12 Q. And you were quite surprised when you learned
13 about this at this meeting; correct?

14 A. That is correct.

15 Q. And you were surprised because you as someone
16 who is chairing the meetings on behalf of the
17 Government, this would have been important information
18 for you to know in conducting your discussions and
19 negotiations with Ferrovías, wouldn't it?

20 A. I don't know how to answer your question.

21 would you please clarify it so that I could give you a
22 more appropriate answer to your question.

1937

09:36:04 1 Q. well, sure.

2 In conducting what you describe in your
3 statements in good-faith negotiations with Ferrovías
4 during these meetings, you, as person chairing the
5 meetings, certainly would have thought--you would have
6 preferred to have known in advance of conducting those
7 meetings that there was an ongoing lesividad process
8 against one of Ferrovías's contracts, wouldn't you?

9 A. As a person responsible for High-Level
10 Commission, well, the more information one has the
11 better in order for one to be able to manage the
12 responsibilities that were assigned to one.

13 we had worked for a few months, and we were
14 in this process of collecting information, but to
15 answer your question, yes, it is something that
16 surprised me, and it's something that I would have
17 liked to know at the time, but I was then informed of
18 it at that time.

19 Q. Were you upset about the fact that you hadn't
20 been informed about it prior to the May 11 meeting?

21 A. I was at least surprised.

22 Q. But not upset?

1938

09:37:22 1 A. As a person responsible for negotiation, one
2 should not become emotional. One should try and find
3 a solution to the problem.

4 Q. And after you found out about this
5 information from someone from Ferrovías; correct?

6 A. Ferrovías informed me--informed me of this at

7 the table, and then I corroborated all this with
8 Commissioner Fernández, yes, that's the way it was.

9 Q. And when you talked about corroborating with
10 Commissioner Fernández, that was done over the
11 telephone in a private conversation with him; correct?
12 It wasn't at the meeting in general?

13 A. Yes. Susan Pineda came with me. We left the
14 meeting to talk to Commissioner Fernández to verify
15 the information that had been given to us by the
16 counterpart Ferrovías.

17 Q. And then you went to talk to Commissioner
18 Fernández over the telephone to corroborate or confirm
19 what you had learned at the meeting about the
20 lesividad ongoing against one of Ferrovías's
21 contracts; is that right?

22 A. Yes, that is correct.

1939

09:38:46 1 Q. And Arturo Gramajo was at this meeting;
2 correct?

3 A. That is correct, yes.

4 Q. And when the representatives of Ferrovías
5 disclosed what they had learned about the lesividad
6 process ongoing against one of its contracts,
7 Dr. Gramajo didn't say anything about that at the
8 meeting; correct?

9 A. I do not recall exactly that fact.

10 Q. Well, certainly Dr. Gramajo didn't confirm
11 anything that Ferrovías said about what they had
12 learned at the meeting. You had to go talk to

13 Commissioner Fernández to confirm that; correct?

14 A. Yes. Susan Pineda and I went to confirm this
15 with Commissioner Fernández.

16 Q. Now, after your call with Mr. Fernández,
17 didn't you tell Mr. Bill Duggan of Ferrovías that if
18 what you had heard about the Lesividad Declaration
19 against one of FVG's contracts was going on, then the
20 Government was not--in your opinion, the Government
21 was not negotiating in good faith, and you no longer
22 wanted to be part of the Commission?

1940

09:40:27 1 A. I did not say that in those words.

2 Q. What did you say to Mr. Duggan?

3 A. The official communication was that after the
4 conversation with Mr. Fernández, Commissioner
5 Fernández was going to make sure that he was going to
6 keep on hold lesividad so that our High-Level
7 Commission could continue negotiating. As a
8 consequence, this is what I always suggested and that
9 I stated through a mandate that I was going to
10 negotiate in good faith. And after confirming this
11 with Mr. Fernández, that is to say, that there was a
12 lesividad process that was ongoing, we had to continue
13 upkeeping the negotiation, and Commissioner Fernández
14 at our request was going to try to put that on hold,
15 or try to.

16 Q. Okay. So, if Mr. Duggan testified that you
17 told him after you had your conversation with

18 Mr. Fernández that what you had learned from Ferrovías
19 about lesividad was true, that in your opinion the
20 Government was not negotiating in good faith and that
21 you no longer wanted to be part of the Commission?

22 A. I do not recall having made that comment in

1941

09:41:53 1 those words to Mr. Duggan.

2 Q. Okay, but did you say words to that effect to
3 Mr. Duggan?

4 A. Not to Mr. Duggan.

5 Q. Did you say it to someone else?

6 A. We made comments about the meeting with other
7 people, yes.

8 Q. But my questions were about those specific
9 statements that Mr. Duggan said you made to him. Did
10 you make those types of comments to anyone else?

11 A. I did not make any comments along those
12 lines, and I certainly did not make those comments to
13 Mr. Duggan.

14 Q. Okay. But it's true, is it not, that after
15 the May 11 meeting, according to your statement, you
16 had nothing further to do at the High-Level
17 Commission; correct?

18 A. After the May meeting, yes, indeed, I left
19 the High-Level Commission.

20 Q. And why did you leave the High-Level
21 Commission?

22 A. There were a number of reasons related to the

09:43:04 1 work plans of the Government Plan Presidential
2 Commission. Amongst others at that time, we started
3 working on the task force on country qualification,
4 and I was the person responsible for that. And then
5 there were other issues that required my attention,
6 and there were a number of people involved with the
7 Commission as well, and my value added perhaps was
8 better assigned to other duties.

9 Q. Okay. Now, you are aware, aren't you, that
10 after the May 11 High-Level Commission meeting the
11 next face-to-face negotiation meeting between
12 representatives of the Government and Ferrovías did
13 not take place until August 24, 2006?

14 A. I wouldn't be able to talk with much
15 propriety after May because I was no longer the
16 primary responsible person for that process.

17 Q. And you were not at--and you were not at the
18 August 24, 2006, meeting; correct?

19 A. To the best of my recollection and knowledge,
20 no.

21 Q. And you have no knowledge about what the
22 Government proposed or demanded from Ferrovías at that

09:44:27 1 meeting with regard to the issues between the Parties?

2 A. I would have no knowledge, nor would I have

3 information about it--

4 SECRETARY SEQUEIRA: Repeat it, please.

5 THE WITNESS: I would have no knowledge, nor
6 would I have any knowledge about that.

7 MR. STERN: I have no further questions at
8 this time.

9 PRESIDENT RIGO: Mr. Salinas.

10 MR. SALINAS-SERRANO: Very briefly,
11 Mr. President.

12 REDIRECT EXAMINATION

13 BY MR. SALINAS-SERRANO:

14 Q. Mr. Marroquin, Mr. Stern asked you but the
15 May 11, 2006, High-Level Commission meetings. Do you
16 recall those questions?

17 A. Yes, in general I remember.

18 Q. As you told Mr. Stern and as you told me,
19 that you did not have any knowledge about the internal
20 lesivo process that was being pursued at that time
21 until you were informed by representatives of
22 Ferrovías at that meeting; is that correct?

1944

09:45:27 1 A. That is correct.

2 Q. Is it your understanding, sir, or do you know
3 whether the Ferrovías representatives at that meeting
4 knew about the lesivo process from before that
5 meeting, or was that the first they had heard, at
6 least from your perception at that meeting?

7 A. I wouldn't be able to indicate that, but I
8 remember that they were the ones who put forth this

9 issue at the meeting.

10 Q. Now, sir, if you didn't know about the lesivo
11 process before the May 11, 2006, High-Level Commission
12 meeting, could you possibly have used that lesivo
13 process as a pressure mechanism or threat during the
14 prior meetings of the High-Level Commission?

15 A. No, absolutely not.

16 Q. And if FVG didn't know about the lesivo
17 process prior to that May 11, 2006, meeting, could
18 they have felt pressured by that lesivo process to
19 make concessions prior to the May 11, 2006, meeting?

20 A. I would say no.

21 Q. Now, just so there are no doubts,
22 Mr. Marroquin, Mr. Stern asked you about your reasons

1945

09:46:50 1 for moving on to different duties within the--I
2 struggled with what the word is, but the
3 Commissioner's office that you worked at at that time,
4 and I just want to ask you straight on, did you move
5 on to other duties because of your opinions as to how
6 the Government proceeded internally to pursue the
7 lesivo process?

8 A. I had to adjust to decisions made by the
9 Commissioner and to Government priorities. And,
10 consequently, I left the High-Level Commission, and
11 this was agreed with the other Commissioners and I
12 became responsible of other duties.

13 Q. Did that have to do with your own opinions

14 about how the lesivo process had been handled?

15 A. My opinion on lesividad was inconsequential.

16 MR. SALINAS-SERRANO: I have no further
17 questions.

18 QUESTIONS FROM THE TRIBUNAL

19 ARBITRATOR EIZENSTAT: Just a couple of very
20 quick factual questions.

21 (Tribunal conferring.)

22 ARBITRATOR CRAWFORD: I've just got one

1946

09:48:29 1 question. You said at the end of your Second
2 Statement that Ferrovías was not adequately prepared
3 to fulfill its obligations to restore the railroad in
4 Guatemala. What were the circumstances which made you
5 reach that conclusion?

6 THE WITNESS: I assume that we are making
7 reference to the Mesoamerica study when Mesoamerica
8 presented its numbers, and it presented the ways to
9 facilitate or make more profitable this operation.

10 Mesoamerica submitted a number of rates that
11 didn't exist in the market at the time; therefore, a
12 subsidy was required. That's example number one.

13 Example number two, in connection with income
14 to cover costs, it required the State to make fiscal
15 efforts to cover costs. That would be example number
16 two. And we're talking about a situation in the
17 future, forward-looking situation.

18 ARBITRATOR CRAWFORD: But neither of those
19 points related to any--related to the willingness or

20 ability of Ferrovías, did they? They were questions
21 of Government support, which meant it would have been
22 available, well, that's different.

1947

09:50:04 1 THE WITNESS: I am talking about the figures
2 and the conclusions. I cannot comment about the
3 willingness or attitude of Ferrovías. I was making a
4 comment in connection with the numbers and the
5 conclusions put forth in the Mesoamerica study.

6 ARBITRATOR EIZENSTAT: When you had your
7 conversation on May 11th with Commissioner Fernández,
8 and you learned about the lesividad process, did he
9 tell you the specific reasons why lesividad was being
10 sought, and did he ask you, in your responsibilities
11 with the Commission, to focus on solving those
12 specific problems.

13 THE WITNESS: Commissioner Fernández did not
14 give me many reasons related to the lesividad process,
15 but he was supportive for us to have a constructive
16 negotiation environment, and that is why he tried to
17 put the Declaration on hold. He offered to do it, and
18 that is what we were looking for at the Commission, to
19 have an environment that would allow us to solve the
20 problems that existed.

21 ARBITRATOR EIZENSTAT: Did he give you the
22 reasons why the Government was seeking that and ask to

09:51:36 1 you solve those?

2 THE WITNESS: Not at that time.

3 ARBITRATOR EIZENSTAT: The last question is
4 on Page 3 of my statement, but it's Paragraphs 7 and 8
5 of your First Statement. You mentioned and you
6 elaborated that the goal of the Commission was to
7 re-establish railroad operations, and in Paragraph 8
8 you give a number of subjects, some eight subjects
9 that were on the table for the Commission; is that
10 correct?

11 THE WITNESS: That is correct.

12 ARBITRATOR EIZENSTAT: And, in your opinion,
13 was it necessary in order to have the reestablishment
14 of a functioning railroad the resolution of these
15 issues?

16 THE WITNESS: In general, yes.

17 ARBITRATOR EIZENSTAT: And if you had known,
18 if you had only solved the issue of the alleged
19 defects that gave rise to the lesivo process in the
20 143 and 158 contracts, would that have achieved the
21 objective of the Commission to establish or
22 re-establish railroad operations?

09:53:12 1 THE WITNESS: would the Arbitrator be able to
2 repeat the question so I'm able to answer your
3 question appropriately?

4 ARBITRATOR EIZENSTAT: If you had known about
Page 39

5 what the specific defects were that were giving rise
6 to lesivo for the equipment process, Equipment
7 Contract, would that solution have been sufficient to
8 re-establish railroad operations, or would you have
9 also needed to solve the other issues?

10 THE WITNESS: It would not have been enough.
11 It would also have been necessary to address other
12 issues.

13 ARBITRATOR EIZENSTAT: Okay. Thank you.

14 PRESIDENT RIGO: Mr. Salinas?

15 MR. SALINAS-SERRANO: Just one question,
16 Mr. President, on Secretary Eizenstat's last question.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. SALINAS-SERRANO:

19 Q. Mr. Marroquin, what is your understanding of
20 where the or at least some of the concerns you've
21 outlined in Paragraph 8 came from and why they came to
22 the attention of the Commission?

1950

09:54:21 1 A. These issues were being defined jointly by
2 Ferrovías and by the Government to establish the
3 issues that should be addressed to make viable the
4 operation of the railroad.

5 Q. So, for example, sir, the issue of the
6 squatters, which is Point 2 in your Paragraph 8 and
7 Issue Number 1, which was payments to the Trust Fund,
8 were those payments that were of interest to Ferrovías
9 or to Guatemala?

10 A. Yes, Items 1 and 2 were of the interest of
11 Ferrovías, our counterpart.

12 MR. SALINAS-SERRANO: I have no further
13 questions, Mr. President.

14 PRESIDENT RIGO: Thank you.

15 Mr. Stern?

16 MR. STERN: I have no further questions.

17 PRESIDENT RIGO: Thank you so much, Señor
18 Marroquin. Mr. Marroquin, thank you very much for
19 being here this morning.

20 THE WITNESS: Thank you very much. Thank you
21 very much the Secretary for conducting these
22 proceedings and helping with the translation.

1951

09:55:32 1 (Witness steps down.)

2 MR. SALINAS-SERRANO: A procedural question,
3 if you don't mind. The witness had expressed some
4 interest in seeing oral arguments because he had not
5 seen such a thing in the past. I don't know we had
6 discussed previously, but we had understood that that
7 was okay. I just wanted to reconfirm that it was okay
8 with the Tribunal to do that.

9 MR. FOSTER: We have no problem, and we also
10 have some people who would probably like to see the
11 oral argument as well. So, I don't think--I don't
12 believe any of us plan on recalling any witnesses, and
13 so I certainly don't know of any reason why everyone
14 couldn't watch if they want to.

15 ARBITRATOR EIZENSTAT: Can we sell tickets
Page 41

16 and help pay for this?

17 (Laughter.)

18 MR. FOSTER: That would probably require a
19 Government subsidy.

20 PRESIDENT RIGO: I mean, you are big star,
21 you are being streamed worldwide. Why shouldn't
22 Mr. Marroquin stay in the room.

1952

09:56:26 1 ARBITRATOR CRAWFORD: You would described
2 this or we were described yesterday as a secret
3 Tribunal.

4 MR. SALINAS-SERRANO: Actually there were
5 protesters calling it precisely that outside the world
6 Bank I understand.

7 PRESIDENT RIGO: But it was not for this
8 case.

9 (Laughter.)

10 PRESIDENT RIGO: So, I think that for the
11 persons, for the counsel who are going to give the
12 Closing statements, and you can call it your thoughts,
13 maybe we should have a 10 minutes' recess and to start
14 in 10 minutes.

15 (Brief recess.)

16 PRESIDENT RIGO: We will resume the session.
17 Mr. Foster.

18 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

19 MR. FOSTER: Thank you, Mr. President,
20 Professor Crawford, Secretary Eizenstat, first I know

21 I speak for everyone when I thank all of you for the
22 time and the attention that you have spent listening

1953

10:13:33 1 to the positions of the Parties, and we look forward
2 to your consideration of the evidence that you've
3 heard.

4 I would like to begin by just addressing a
5 few of the Respondent's contentions in their Opening
6 Statement and try to draw your attention to what we
7 believe are the overwhelming facts that refute their
8 contentions.

9 The first contention the Respondent made on
10 its opening PowerPoint slide Number 2 is that RDC did
11 not keep its promise to invest. Respondent told you
12 that Claimant never fulfilled its promise to invest.
13 Respondent told you that after 13--that 13 years after
14 Claimant--after the bid was issued and won by RDC,
15 there is no modernized rail system in Guatemala. The
16 facts are starkly different. What Respondent didn't
17 tell you was that as early as 1999, RDC's investment
18 was significant, and the modernization was well under
19 way. In fact, Claimant had invested over \$9.2 million
20 by the end of 1999, container traffic increased by
21 40.5 percent on average over the years that
22 Respondent--each year, 40.5 percent increase on

1954

10:15:01 1 average over each year that Claimant operated the
2 railroad. The first train ran in December of 1999.
3 By 2006, Claimant had invested almost \$20 million, had
4 restored and operated 15 locomotives, 200 railcars,
5 and had restored over 200 miles of previously
6 abandoned railway.

7 The following are some of the images that
8 Respondent doesn't want you to pay attention to. The
9 first, of course, is what this railroad looked like
10 when FVG and RDC came into possession of it. It was
11 literally in ruins.

12 And in contrast, what RDC did was to install
13 new crossties to rehabilitate the railway. The
14 evidence is overwhelming. Hundreds and hundreds and
15 hundreds of crossties.

16 Bridges were restored.

17 Heavy container traffic began. There had
18 never been containers carried by this railroad before.

19 Heavy steel transport began.

20 RDC kept its promise. Now I'd just like to
21 just show you a piece, unfortunately it would take too
22 long to play the whole video, but just a piece of the

1955

10:16:23 1 video concerning the train ride when Ferrovías had
2 just restored the railroad.

3 (Video played.)

4 MR. FOSTER: And I would like to draw your
5 attention to the terrain. RDC of course had

6 experience, of course, in operating precisely in this
7 kind of terrain.

8 You can judge for yourself the condition of
9 the equipment and the condition of the railroad.

10 I think that's Mr. Senn's car that's being
11 transported on the flat car.

12 Does this look like the decrepit,
13 accident-prone railroad that the Respondent tried to
14 tell you was Ferrovías's product?

15 More crossties on the side, more crossties
16 that are being installed.

17 Another restored bridge. Truly an
18 engineering masterpiece.

19 A retaining wall that was installed by
20 Ferrovías.

21 (End of video.)

22 MR. FOSTER: Thank you, Daniel.

1956

10:18:29 1 Respondent contends that Claimant did not
2 comply with its contractual obligations, and that
3 Guatemala feels misled. This was their second
4 contention in their opening.

5 ARBITRATOR CRAWFORD: Could I ask a question?

6 MR. FOSTER: Sir?

7 ARBITRATOR CRAWFORD: We saw some graphics--I
8 can't remember the name of the witness, one of the
9 Guatemalan witnesses from showing the track in
10 disarray and so on. Do you have any comment on those?

11 MR. FOSTER: The comment is that they're

12 entirely misrepresentative of the actual condition of
13 the railroad. You heard from Mr. Posner that this
14 railroad operated for a year-and-a-half without an
15 accident just before Lesivo. A railroad that is in
16 the condition that that witness tried to portray the
17 railroad in doesn't operate that way. That evidence
18 is simply inconsistent with the facts.

19 PRESIDENT RIGO: Just a clarification for
20 counsel, I mean, the time taken by the Tribunal
21 questions is not counted against your time in this
22 situation.

1957

10:19:39 1 MR. FOSTER: Thank you.

2 In fact, RDC complied with its Usufruct
3 obligations. In fact, what really happened was that
4 the Respondent decided that it didn't like the
5 obligations under the Contract that--into which it had
6 solemnly agreed and set out to renegotiate them,
7 demanding a \$50 million investment, which was never
8 required by the Contract.

9 And, indeed, saying, as the President Berger
10 is quoted, if you make the \$50 million investment, we
11 will sit at the table. We're not even going to
12 negotiate with you until you do what we tell you to
13 do.

14 ARBITRATOR EIZENSTAT: Where in the record is
15 that established?

16 MR. FOSTER: The slides in each case,

17 Secretary Eizenstat, are the record references are
18 marked on the slides, so you will be able to, when we
19 finish this, you will be able to take these slides,
20 and you will be able to go through them and determine
21 for yourself whether I'm misrepresenting the record
22 evidence to you.

1958

10:20:53 1 And, indeed, in an attempt to deflect
2 attention from its extortionate demand of that RDC
3 invest an additional \$50 million to rebuild the South
4 Coast, the Respondent has invented out of whole cloth
5 a purported contractual obligation to complete Phases
6 II and III. Now, you gentlemen have heard the
7 evidence and have seen the record, and you know that
8 Contract 402 did not obligate or require FVG to
9 complete Phase II or any phase after Phase I within
10 any specified timeframe. As Article 13 of Contract
11 402 says, the only obligation is to begin; and, as you
12 will see, from this quote that's in front of you, and
13 offer railway cargo transportation services in at
14 least one segment.

15 So, it's not even necessary under the
16 contractual obligation for FVG to offer railway
17 transportation over the entire segment that we're
18 talking about. I mean, over the entire phase. Only a
19 segment.

20 FEGUA formally acknowledged FVG's compliance
21 with the terms of Contract 402. By an official Letter
22 Number 272-2001, FEGUA formally acknowledged that

1959

10:22:14 1 Phase III was impossible, and, therefore, FVG was
2 excused, official Letter Number 0858a-2003.

3 And as even Dr. Gramajo acknowledged when he
4 testified before you yesterday, these official letters
5 have never been revoked. As a result, they were in
6 full force and effect the day Lesivo was declared.
7 The day Lesivo was declared, FVG was in full
8 compliance with its obligations under these Contracts.

9 Dr. Gramajo, even before his testimony,
10 repeatedly and publicly acknowledged that FVG was in
11 compliance with its restoration obligations. As you
12 see here, Gramajo acknowledges the existence and
13 validity of said notes. That's referring to the
14 letters that affirmed FVG's compliance with the
15 Contract. He didn't like it, but he acknowledged
16 FVG's compliance and never took any steps, as he
17 testified to you, he never took any steps to revoke
18 the letters, nor did he ever write FVG and contend FVG
19 was not in compliance.

20 Now, Respondent's third contention is that
21 Claimant used this case as their golden parachute out
22 of a failed investment. If that was the case, why did

1960

10:23:43 1 Claimant try to convince customers and services to

2 continue business relationships? If that was the
3 case, why did Claimant operate regular service until
4 mid 2007 when traffic decreases and financial
5 difficulties forced, all caused by Lesivo, forced the
6 cessation of railroad operations?

7 If that were the case, why did FVG continue
8 to engage Mr. Cerny for bridge inspections after the
9 Lesivo Declaration?

10 If that were the case, why did FVG vigorously
11 fight the Lesivo Declaration in the local courts?

12 why did FVG challenge the Respondent in the
13 press to reassure its customers and suppliers and try
14 to influence the Government to rescind the resolution?

15 why did FVG participate in the negotiation
16 sessions after Lesivo to try to discover and
17 understand the alleged problems with Contracts 143 and
18 158?

19 ARBITRATOR EIZENSTAT: Is it your position
20 that your press statement was a reassurance to
21 customers or a dire warning to them?

22 MR. FOSTER: No, it is our position, and I

1961

10:24:49 1 think if you read the press statement carefully, it is
2 our position that we were trying to pressure the
3 Government to revoke the Lesivo Resolution. That was
4 the whole purpose of the press campaign and the legal
5 campaign that took place after the Lesivo Declaration.
6 We wanted--we were doing everything we could to get
7 them to take it back.

8 Here you got an example of Claimant's efforts
9 to convince its suppliers to continue to do business
10 relations with the FVG despite the Lesivo Declaration.
11 The Respondent said these were perfunctory. They
12 certainly weren't perfunctory. There we have the
13 testimony of Mr. Jimenez is exactly what, so--on
14 cross. So, they didn't really try to convince you in
15 a hard way. If they did try to convince you, it was
16 kind of perfunctory, and he said no, no, not at all.
17 Respondent's contention number four. RDC
18 made a risky investment on a bare bones budget.
19 Respondent has told you that Claimant made a very
20 risky investment in 1997 to operate and modernize the
21 railway and that it did so at its own risk and
22 expense.

1962

10:26:07 1 But what are the facts? RDC, as you saw in
2 our Opening Statement, is a highly experienced
3 rehabilitator and operator of railroads. Claimant's
4 business model has created value in high risk economic
5 environments around the world. Indeed Claimant has
6 lost money only in Guatemala. And, in fact, RDC
7 invested double what it was obligated to do. The
8 contracts require--only require an investment of
9 10 million. As you know, RDC had invested nearly
10 20 million.
11 Now, in fact, the facts are that Respondent's
12 own breaches inhibited Claimant's growth. The South

13 Coast route was not open because the Respondent didn't
14 have the money to move the squatters, despite their
15 obligation to do so. You heard the testimony of
16 Mr. Valenzuela, and you heard the testimony of
17 Ms. Fernández, where they said the problem was--and
18 these are the quotes from your testimony--the problem
19 was they said, this is money that the Government and
20 FEGUA had to put in. They didn't have it.

21 A large sum was needed, which the Government
22 did not have. The Government did not want to continue

1963

10:27:25 1 the dialogue for making the large investment that was
2 required. Respondent cannot rely upon its own
3 contractual breaches to argue that FVG was not
4 profitable.

5 The fifth contention that they made, RDC knew
6 the Equipment Contract was illegal. They told you in
7 their Opening Statement. Again, you don't have to
8 accept our word for it. They knew they were entering
9 into an illegal Contract, and public International law
10 tells us one cannot profit from their own misconduct.
11 That's what they told you.

12 But, in fact, FVG entered into Contracts 143
13 and 158 at FEGUA's request. There's no credible
14 evidence that the time Contract 143 was entered into
15 that FVG understood or believed that the Contract was
16 illegal and void or was ever informed by FEGUA that it
17 considered the Contract to be illegal and void.

18 As Mr. Senn testified, FEGUA's lawyers were

19 intimately involved in drafting both Contracts 143 and
20 158. If you will remember when Dr. Gramajo testified,
21 he was specifically asked, who drafted the Contracts?
22 And I think you asked him, Secretary Eizenstat, and

1964

10:28:41 1 his response was "I don't know." well, the only
2 evidence on that subject is Mr. Senn's evidence, and
3 he testified repeatedly that FEGUA's lawyers were
4 intimately involved in the drafting of the Contract.
5 Furthermore, both Mr. Franco and Dr. Mayora
6 testified that because FEGUA is an autonomous entity,
7 Presidential approval and public bids were
8 unnecessary. Why would RDC think there was something
9 wrong with the Contracts when imminent lawyers don't
10 believe that any of the Contracts needed Presidential
11 approval or a public bid?
12 Any asserted technical illegalities were
13 fully within the exclusive control of the Respondent
14 to resolve. There was never anything really to
15 negotiate. Claimant couldn't remedy the lack of
16 Presidential signature. Claimant couldn't force the
17 Respondent to hold further public bids for the
18 Equipment Usufruct. These were all things within the
19 control of the Respondent.
20 FEGUA's negotiation points all deal with
21 issues other than Presidential approval or a new
22 bidding process and many involved issues under

1965

10:29:55 1 Contract 402. Look at the exhibits that we've cited
2 here. You will see, and as you just heard this
3 morning, just heard this morning from the witness, it
4 was a comprehensive deal. He said the Contracts were
5 intimately intertwined. We were looking for a total
6 resolution. That's their testimony.

7 Further, as you saw yesterday, when you saw
8 the--Dr. Gramajo's notes on the draft--new contract
9 for 143, his notes didn't have anything to do with
10 obtaining Presidential approval or a new bidding
11 process, and there is no documentary evidence that
12 those notes were ever sent to FVG anyway.

13 Indeed, the negotiations to amend the
14 Contracts to remove so-called "technical
15 irregularities" were a sham. The issues which
16 ultimately prevented agreement had nothing to do with
17 Presidential approval or a new bidding process.
18 Remember Dr. Gramajo's testimony, when I showed him
19 Paragraph 20 from his Statement where he sets forth
20 the items that prevented agreement, they were return
21 of historical railway items, cannibalization of
22 railroad equipment, and valuation of inventory.

1966

10:31:22 1 Nothing having anything to do with the purported
2 technical irregularities of the Contracts.

3 Dr. Gramajo even testified that FEGUA did not
Page 53

4 pursue a new bidding process because it was afraid
5 that someone other than FVG might win the bid. Do you
6 really believe that? They didn't pursue a new bidding
7 process because the entire issue was just the
8 concocted claim to leverage Contract concessions from
9 FVG.

10 At all times, FEGUA's Legal Department
11 considered Contracts 143 and 158 to be in full force
12 and effect, and Canon payments were made and accepted
13 pursuant to that Contract. You saw yesterday during
14 Dr. Gramajo's testimony, the FEGUA internal legal
15 staff's Opinion where they said, Contract 143 as
16 amended by Contract 158 is currently in effect.

17 And extremely importantly, they said the
18 Contract Number 143 which is currently in effect, it
19 is under the terms of this Contract that the
20 usufructuary is using the railway equipment. Their
21 legal staff considered FVG's use of the railway
22 equipment to be pursuant to Contract 143, which they

1967

10:32:46 1 now try to tell you was--there was something wrong
2 with it.

3 Furthermore, if you look at that same Legal
4 Opinion, you'll see where it says, FVG has delivered
5 to FEGUA 596,000 quetzales; and, as a result, it
6 renders the Opinion that Ferrovías is up to date for
7 the payment of fees for the use of railway equipment,
8 which as we've just shown they were up to date in

9 payment of fees for use under Contract 143 which their
10 own Legal Department says was in full force and
11 effect.

12 Respondent accepted FVG's performance under
13 the Usufruct Contracts, including resumption of
14 railway service and millions of quetzales in Canon
15 payments without a hint of contention that FVG was in
16 default. Both Mr. Carrillo and Dr. Gramajo testified
17 that they took the Canon payments without reservation,
18 without any hint that they were going to later contend
19 that somehow or another those Contracts had not been
20 in effect.

21 Indeed, Respondent thus is estopped from
22 contending that FVG was in any way deficient in its

1968

10:34:07 1 performance. Indeed, the Tribunal has already ruled,
2 and I quote from Paragraph 145 of your Second Decision
3 on Jurisdiction, where you say: "who took the
4 initiative to sign a new contract is irrelevant to the
5 Tribunal's conclusion. FEGUA and FVG were faced with
6 a de facto situation which they tried to reflect in
7 Contract 143, and FEGUA benefited from a 25 percent
8 increase in the Canon stipulated in Contract 41."

9 Their contention number six: FVG would have
10 never signed an additional commercial lease during the
11 life of the Usufruct. As you know, when Dr. Spiller
12 was testifying, he responded to Secretary Eizenstat's
13 question: Are you assuming that there would have been
14 no additional easement contracts and no additional

15 commercial leases, and he said right. That's his
16 assumption. Can anyone say that that is a reasonable
17 assumption? I don't think so. And, indeed, the facts
18 are industrial squatting is rampant post-Lesivo.
19 Electricity companies have lined the entire right of
20 way with power lines from coast to coast. To say this
21 right of way is worthless is simply preposterous, and
22 here are the pictures. You've seen these before. I'm

1969

10:35:33 1 not going to dwell on them, but these are power lines
2 over every square foot of this right of way by four
3 separate companies.

4 ARBITRATOR EIZENSTAT: Can you just elaborate
5 on that? Are you today receiving compensation from
6 all four companies?

7 MR. FOSTER: None of them.

8 ARBITRATOR EIZENSTAT: Have you sought to do
9 so?

10 MR. FOSTER: We thought it was a futile act,
11 Secretary Eizenstat. Our experience with everyone we
12 have dealt with after Lesivo is you're a dead man
13 walking, we are not interested in doing business with
14 you. Indeed, Planos y Puntos, as you understood, when
15 we had an extension of their Contract in writing,
16 ready to be signed, said absolutely not. We're not
17 going to do it. We think that to require us to have
18 gone out and sought to collect money from those people
19 would be an unreasonable requirement.

20 PRESIDENT RIGO: Were there any power lines
21 before Lesivo?
22 MR. FOSTER: I'm going to turn to that in

1970

10:36:50 1 just one second.

2 You asked us, as you can see there's tons of
3 pictures of these power lines.

4 Most of the power lines were installed after
5 Lesivo. Remember Mr. MacSwain's testimony, he said he
6 examined the entire right of way except Tecún Umán in
7 mid-2007, and most of the power lines were not there.
8 The pictures you have just seen were taken from 2009
9 to 2011. So, the undisputed--and they offer no
10 testimony to the contrary. Lord knows FEGUA has ample
11 ability to offer contrary testimony. If it was
12 possible to offer truthful contrary testimony, they
13 didn't, because they know they can't. As these
14 pictures prove in connection with Mr. MacSwain's
15 testimony, these power lines went up after Lesivo.

16 Now, you asked the question who are the
17 industrial squatters? As you saw from the pictures,
18 they're DEOCSA and DEORSA, who are subsidiaries of a
19 Spanish company; EEGSA, formerly 100 percent
20 Government-owned, now 14 percent Government-owned;
21 EEMZA, the municipal electricity of Zacapa; and INDE,
22 which is owned by the Government of Guatemala. Thus

1971

10:38:18 1 the Government, through INDE and its partially owned
2 company EEGSA is the principle industrial squatter.

3 Second question: Can Lesivo be negotiated
4 away? You heard yesterday possibly, from Mr. Mayora,
5 possibly, but not in this particular situation because
6 the Declaration of Lesivo has been predicated on
7 alleged illegalities in the Contract at issue; thus,
8 he concludes that the way in which this Declaration of
9 Lesivo was issued, this particular situation, the
10 possibility of entering into negotiations conducive to
11 a settlement became closed door, was made impossible.

12 And your third question: Can the President
13 be held personally liable for failing to declare
14 Lesivo? Dr. Mayora told you, neither the President
15 nor his Cabinet would be found liable for failing to
16 declare Lesivo because it was a discretionary act, not
17 a mandatory act.

18 ARBITRATOR CRAWFORD: Could I ask a question
19 about that?

20 MR. FOSTER: Yes, sir.

21 ARBITRATOR CRAWFORD: We've heard a great
22 deal about the President's liability. In actual

1972

10:39:37 1 experience, how often have Guatemalan President's been
2 held to be financially liable for decisions?

3 MR. FOSTER: We're not aware of any ever, for
4 any decision, whether it was Lesivo or any other

5 decision that a Guatemalan President has made. I
6 think some of them have had some more severe
7 consequences for some of the decisions they've made,
8 but liability hasn't been one of them.

9 Now I would like to turn to the elements of
10 proof.

11 As you know from the discussion of the law in
12 our Opening Statement, there is a substantial overlap
13 of the elements of proof as to the specific claims,
14 and here's a chart which depicts our contentions as to
15 the nature of that overlap. Thus for purposes of this
16 Closing, we have therefore organized the evidence
17 around the elements of proof, which you, as a result,
18 can use in your consideration of each of the various
19 claims.

20 The first element of proof is a substantial
21 lasting economic harm to FVG; and, as you heard the
22 evidence, the Lesivo Resolution made FVG too risky to

1973

10:40:53 1 do business with on an ongoing basis. There was a
2 dramatic decline in the use of the railroad for
3 freight transportation. A 35 percent decline in the
4 first six months of 2007 as compared to the first
5 seven months of 2007 as compared to 2006.

6 Reversal of market share gains versus
7 trucking, withdrawal or denial of credits from
8 suppliers.

9 Failure to be able to secure a single
10 additional lease or easement on our right of way.

11 Prospective commercial tenants consistently cited the
12 Lesivo Resolution as the reason for backing out of
13 negotiations, or Preliminary Agreements with FVG.

14 while the print is roughly difficult to read
15 at the bottom of the page, you will be able to go
16 through and check the testimony to see where each of
17 these elements is amply proven.

18 Theft, vandalism, and squatters dramatically
19 increased after the Government's repudiation of FVG's
20 Usufruct, making it impossible to return to the status
21 quo antsy. Just between the Lesivo Resolution and
22 early 2009, 65 kilometers of rails and track

1974

10:42:11 1 materials, along with cross members of three major
2 bridges, have been stolen. They don't exist anymore.
3 This railroad is never going to reopen because of the
4 Lesivo Declaration.

5 Furthermore, the Contencioso Administrativo
6 Proceedings that are used by the Government to confirm
7 Lesividad offered no reasonable prospects of a ruling
8 within any reasonable timeframe. Of 17 known cases in
9 two decades, only two have ever been decided, one of
10 which was conveniently released just prior to this
11 hearing.

12 In October 2011, you heard Mr. Franco, FVG's
13 lawyer, say he went to Court, and a Court official
14 told him that the Court had been instructed by the
15 Government not to issue a ruling while this

16 arbitration was pending.

17 MR. ORTA: I'm sorry, that misstates the
18 evidence. I've refrained myself, but Mr. Franco never
19 said that there was instruction by the Government.
20 That is simply not in the record.

21 MR. FOSTER: Well, you can check and see
22 whether I've misrepresented. I'm telling you I

1975

10:43:21 1 haven't. In fact, I think we're going to see the
2 quota another slide, so we'll see exactly what he
3 said.

4 Again, you heard Mr. Jimenez who testified he
5 was the--he was the gentleman who moved the containers
6 from the railroad to the customers. He said he quit
7 doing business. He couldn't take the risk anymore.
8 Mr. Senn described in detail the effect on the
9 business.

10 Second factor or second element of proof, no
11 payment or offer of compensation. There has never
12 been an offer of payment or compensation. And
13 contrary to Respondent's claim, there is no private
14 party right to assert a counterclaim or claim for
15 compensation against the Government in the proceeding
16 to confer the Lesivo Decree. Indeed, the Attorney
17 General acknowledged that the Government used the
18 Lesivo process to avoid paying compensation, and you
19 see the quote from the Attorney General on the next
20 slide.

21 Now, let's talk about the frustration of

22 RDC's legitimate expectations. Certainly, it was a

1976

10:44:24 1 legitimate expectation of RDC that the Government
2 structured railroad Usufruct complied with Guatemalan
3 law and had the Government's backing and blessing. I
4 think the Congress promptly approved Contract 402.
5 FVG had won all the necessary public bids. Overseer
6 Porrás, as you heard him testify, urged Presidential
7 approval of Contract 41 numerous times. He said, I
8 don't have the faintest idea why he didn't prove it.
9 He's a lawyer and an MBA who negotiated the Usufruct
10 Contracts, and he knew of nothing illegal or harmful
11 to the interests of the State in Contract 41. It met
12 all the negotiation and bid requirements, and that's
13 why, I, myself, he said, submitted to the President to
14 be approved.

15 FEGUA promptly negotiated an agreement, a
16 letter agreement for FVG to have the use of all
17 equipment on terms exactly like Contract 41. FVG and
18 FEGUA negotiated replacement Contracts, and as we have
19 seen FEGUA accepted payments under Contract 143.

20 The FEGUA Overseer had independent Legal
21 Authority to enter into those Contracts, and FEGUA's
22 Legal Department acknowledged that the Contracts were

1977

10:45:44 1 in effect. Just yesterday, Respondent's Expert said
2 that no less than four FEGUA Overseers were acting
3 illegally. To go to Professor Crawford's point about
4 fraud, surely FDG had the right to believe that they
5 were acting legally, and their actions and the
6 Government's actions in inducing RDC's performance by
7 the expectation of legal action where they now say
8 they're relying on it being illegal must constitute
9 fraud.

10 By accepting performance and payment without
11 protest, Respondent reaffirmed that the Contracts were
12 in effect. The Usufruct had a 50 year term. Surely,
13 RDC was entitled to rely upon the length of the term
14 in establishing and formulating its Business Plan.

15 Now, you got quotations here from senior
16 FEGUA officials admitting that there was nothing weird
17 or wrong about FVG's Contract and that FVG had honored
18 its contractual commitments.

19 ARBITRATOR CRAWFORD: One gets the certain
20 impression that after six or seven or eight years of
21 operation the railway really wasn't going anywhere.
22 Now, I say that's an impression, and it's not an

1978

10:47:17 1 impression which I've definitively formed at all, but
2 I would be interested in your comment on that.

3 MR. FOSTER: well, I think the railway was--

4 ARBITRATOR CRAWFORD: If I may say so, it
5 appears to have started well, but doesn't appear to
6 have taken off.

7 MR. FOSTER: Well, indeed, by 2004, the
8 railway, if you include FEGUA's contribution to the
9 Trust, which they should have made, the railroad was
10 cash-flow positive, so I think it's very difficult to
11 say that the railroad wasn't headed in the right
12 direction.

13 Furthermore, the existence of the extension
14 to the Planos y Puntos Right of Way Agreement, which
15 was frustrated at the very last minute by Lesivo, is a
16 further indication that the railway leasing activities
17 were beginning to take off, and now we have the
18 picture of the entire right of way, the demand for
19 that right of way, admittedly the demand may be at
20 least in part because of not having to pay--

21 ARBITRATOR CRAWFORD: Exactly.

22 MR. FOSTER: But the fact is, Professor

1979

10:48:23 1 Crawford, when somebody invests millions and millions
2 and millions of dollars in poles and wires, and when
3 that is, as you heard the evidence, that is the most
4 convenient--the best way to get from point to point
5 because it's uninterrupted, they're not going to
6 remove those poles. And when it's the Government
7 whose entities are the principle industrial squatters,
8 for them to come in here and say that somehow they can
9 rely on their not paying rent in order to show that
10 FVG didn't have a bright and promising future? That's
11 just plain wrong. They're neither legally nor morally

12 entitled to come in here and argue because they're not
13 doing what they ought to do, that that's the reason
14 somehow that FVG was not successful.

15 ARBITRATOR EIZENSTAT: Let me just follow up
16 on Professor Crawford's questions.

17 From what we've understood the actual profits
18 from the railway operation would have been a
19 relatively minor part of the expected rate of return
20 and that most would have come from the leasing of the
21 rights-of-ways; is that an accurate statement?

22 MR. FOSTER: Yes, sir.

1980

10:49:40 1 ARBITRATOR EIZENSTAT: If that's the case,
2 why did the leasing part seem to get off to such a
3 slow start? That is, one would have thought that from
4 Day 1 there would have been an aggressive effort while
5 you were trying to get the railroad operation going,
6 to get this right of way leased, and it doesn't appear
7 that that started until well into the process.

8 MR. FOSTER: Well, actually, a lot of the
9 leases were early in the process, and I think if you
10 look at the evidence, what you see is--and Professor
11 Crawford alluded to this--there was a very good start,
12 the railroad got operating again, there was some
13 leasing, and then the disputes began to arise that
14 were fomented by Dr. Gramajo. The whole concocted bit
15 about the alleged illegalities of Contracts 143 and
16 158. Then the dispute began to arise over the removal
17 of squatters and payments into the Trust Fund, and

18 then the arbitrations were begun by Ferrovías in order
19 to try to remedy that situation. And then the dispute
20 arises about whether or not they should open the South
21 Coast route.

22 I think the direct answer to your question is

1981

10:51:00 1 that there was a substantial diversion of FVG away
2 from its focus. Not only on leasing but actually a
3 diversion of its focus even on operating the railroad
4 because of the activities of the Government, and they
5 want to come in here and blame that on FVG.

6 ARBITRATOR CRAWFORD: There was a period in
7 that middle phase before Lesivo where there was a
8 series of disputes with the Government, but it didn't
9 seem that that had any particular commercial
10 implications in terms of the success of the railway as
11 an enterprise with its relevant elements. Isn't there
12 a concern about that intermediate period?

13 MR. FOSTER: Well, I don't think there should
14 be because despite these diversions, the business was
15 moving steadily to profitability, which it actually
16 attained and would have been profitable again in 2005
17 if it hadn't been for Hurricane Stan.

18 So, I think what we have here is a business.
19 Railroads are not known for being instant cash cows to
20 start with. I don't think Mr. Buffet bought
21 Burlington Northern Santa Fe counting on the money he
22 was going to get from it the first year he owned it.

1982

10:52:15 1 They're not known for being immediate cash
2 cows. These are long-term projects.
3 But what we have here is a relatively short
4 period of time in which the railway was proceeding to
5 good cash flow profitability, and I believe if it
6 hadn't been for the distractions and considering the
7 demand that there was for the railway right of way,
8 that the leasing activities would have been extremely
9 successful. In fact, I doubt that FVG would have even
10 had to pursue them. I think they would have been
11 being pursued by people who wanted to use that right
12 of way.
13 Now, turning to the third element of proof,
14 no credible public interest justification for the
15 Lesivo Resolution. No public purpose was ever stated
16 in the take-it-or-leave-it Settlement Agreement. No
17 public purpose was invoked in the Lesivo Resolution
18 other than a general invocation of public welfare. No
19 public purpose was invoked in the Lesivo Court
20 proceedings other than, again, a general invocation of
21 public interest, without specification.
22 Nowhere do these Government documents state

1983

10:53:33 1 that the Lesivo Action was undertaken to uphold the
2 rule of law or for the common good of the citizens
Page 67

3 through the development and rehabilitation of the
4 railway's transport and use of rail equipment as the
5 standard I think has now been articulated in the most
6 recent Lesivo decision of the Constitutional Court.

7 Moreover, as we have seen, President Berger
8 himself publicly stated that the real intent was to
9 get the \$50 million to open up the South Coast route.
10 And you heard today Mr. Marroquin testify about the
11 High-Level Railroad Commission, and he said it was to
12 make viable the whole question of the railroad. He
13 conceded that many issues were discussed in the
14 High-Level Commission. He conceded, he said, the
15 Contracts were three. In effect, one was tied to the
16 other. He said the purpose was to make viable rail
17 operations, a lack of rail operations in the entire
18 country. That's what was sought. They wanted a
19 revised rail operations plan.

20 what does any of this have to do with
21 technical illegalities in the Contract? The technical
22 illegalities were never the focus of anything the

1984

10:54:48 1 Government did. They were always trying to achieve
2 another objective which they had not achieved through
3 the Contract negotiations.

4 ARBITRATOR CRAWFORD: Do you accept there
5 were technical illegality?

6 MR. FOSTER: Sir?

7 ARBITRATOR CRAWFORD: Do you accept there

8 were technical illegalities?

9 MR. FOSTER: No, sir. No, sir. We do not
10 believe, and as Dr. Mayora testified that there never
11 was a requirement for a public bidding on Contracts
12 143 and 158, and there was no requirement for
13 Presidential approval of any of the Contracts, ever.

14 Then we turn to a denial of due process. We
15 talked about this a lot. I'm not going to go back
16 through it in detail. You know what the lack of due
17 process in the Lesivo proceeding is. There is not
18 even a semblance of anything like due process as it is
19 understood in the major legal systems of the world,
20 and I believe that that is the standard for due
21 process under customary International law.

22 ARBITRATOR EIZENSTAT: Excuse me, although I

1985

10:55:58 1 think this is not an issue you may be able to address
2 here. There was some indication in the documents that
3 there were a number of other countries in Central and
4 Latin America and perhaps in Europe that have
5 something similar to a Lesivo process, and it would be
6 useful, I think, for the Tribunal to know whether in
7 those other countries there were any so-called "due
8 process" built into the Administrative stage as
9 opposed to the subsequent phase with respect to
10 Courts. I don't know whether you can testify to that
11 now or you could perhaps put that as one of the issues
12 that both sides might address.

13 MR. FOSTER: I would love to testify at any

14 time, but--

15 MR. ORTA: So long as I can cross-examine,
16 Allen.

17 MR. FOSTER: That's a deal.

18 The one that I remember, and it's been a long
19 time since I've looked at them, but the one that I
20 remember and I believe I'm remembering accurately is
21 the Spanish Lesivo process, and my recollection is on
22 two respects I remember two things that I think

1986

10:57:10 1 distinguish it completely from the Guatemalan system.

2 Number one, there is a procedure for hearings
3 before the invocation of Lesivo; and, number two,
4 there is a provision for compensation. I think there
5 are undoubtedly other things as well, but you're
6 right, Secretary Eizenstat, it would be more
7 appropriate for us to address that issue not on my
8 memory but on the basis of citations to the Statute.

9 Now here is the quotation from Mr. Franco
10 that there was some question about earlier. He says,
11 yes, yes, oh, yes, yes, yes, the thing is that--this
12 is quoting the Court proceeding--the Court Official.
13 Yes, yes, yes, the thing is, as regards to that
14 proceeding--on that proceeding, there is International
15 arbitration.

16 And then Mr. Franco said, yes, that's
17 correct, but the International arbitration has
18 absolutely nothing to do, nor does it stand in the way

19 at all of there being a ruling and a judgment in this
20 proceeding.

21 And then the Court official said, yes, but
22 that's the instruction we have.

1987

10:58:26 1 ARBITRATOR EIZENSTAT: What weight do you
2 expect the Tribunal to give to an unidentified
3 official who we have no basis to know was speaking on
4 behalf of anyone other than himself?

5 MR. FOSTER: Mr. Franco named the person who
6 is a Court Official. Apparently he's the one who was
7 in charge of this particular proceeding.

8 And in conjunction with the fact that the
9 Government says, oh well we've asked for a decision
10 twice. It's been five years, they had six months
11 under the Statute to, if you add up all the time
12 periods under the Statute, they had six months to
13 render an Opinion, and it's been five years. I would
14 certainly ask the Tribunal to draw the inference, and
15 I think it's a good inference particularly in
16 consideration of this evidence, the inference that the
17 decision is merely awaiting the resolution of this
18 case. And then I can--I think I can predict pretty
19 confidently you'll have it.

20 Now, I would like to turn to the National
21 Treatment issue, the three-prong test. The first of
22 course is the like circumstance, and we'd offered

10:59:47 1 evidence that Mr. Campollo operates in the same
2 business or economic sector as FVG; that is, railroads
3 and real estate. You heard about his railroad. It
4 hauls more tonnage than Ferrovías ever did.
5 Mr. Berger admitted, Mr. Campollo, by means of Héctor
6 Pinto, had a series of meetings with Ferrovías staff
7 in order to reach an agreement to exploit the right of
8 the railway with the view to support his Ciudad del
9 Sur project. And Mr. Campollo himself acknowledged
10 that his interest in the railway was based in
11 principle part on the benefits it would bring to his
12 project.

13 The Desarrollos G offer, and I would ask you
14 to infer if Mr. Berger admits that Mr. Campollo by
15 means of Héctor Pinto had a series of meetings, I
16 would ask you to infer that when he presented--when
17 Mr. Pinto presented the Desarrollos G offer, he was
18 acting again on behalf of Mr. Pinto, and you saw that
19 the cover e-mail for that offer sends a copy of it to
20 the son of Mr. Campollo's personal lawyer.

21 Now, I'm not going to go over--through all
22 these things that Mr. Pinto said and did on behalf of

11:01:08 1 Mr. Campollo. I would just ask you to read the
2 timeline that we give you in the Opening Statement but
3 did not have an opportunity to look at in detail.

4 Read the timeline and see if you can come to any
5 conclusion other than the fact that Mr. Pinto was, in
6 fact, acting on behalf of Mr. Campollo, that
7 Mr. Campollo not only wanted to compete in the same
8 sector as FVG, Mr. Campollo wanted FVG's concession,
9 direct competition.

10 ARBITRATOR EIZENSTAT: May I just ask again
11 in terms of understanding your contention here, if in
12 order for this issue to be relevant of whether Pinto
13 was acting for Campollo, which Campollo said he was
14 not, Pinto, of course, is not alive, do we first have
15 to make a judgment that they were in effect in a like
16 circumstance, that they were actually potential
17 competitors--competition with each other? That is to
18 say, if we don't make that finding, then is any of the
19 Campollo issue relevant?

20 MR. FOSTER: I think it's 180 degrees the
21 other way. You make the determination whether or not
22 they're in the same sector in part upon your decision

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11:02:26 1 as to whether Pinto's statements are attributable to
2 Campollo. But even without those statements, you can
3 still come to the conclusion that they were in the
4 same business from the undisputed proof about
5 Mr. Campollo's railroad and the undisputed proof about
6 his Ciudad del Sur real estate development.

7 ARBITRATOR EIZENSTAT: But I mean, on the
8 railroad, this was in another country, which was not
9 in direct competition with RVG. It was apparently a

10 very small line, and it didn't appear to be a
11 principle part of Mr. Campollo's business, where as
12 for RVG this was their main business. How do you
13 respond to that?

14 MR. FOSTER: They don't have to be direct
15 competitors to begin with. They have to just merely
16 be--the test is that they have to be engaged in the
17 same economic segment, and I don't think it makes any
18 difference whether--what country they're in in the
19 economic segment because what we are saying is that
20 here is a person who was in the same economic segment
21 and who was seeking to obtain RDC's Usufruct.

22 So, I think that you can come--as I say, I

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11:03:46 1 think you can come to that conclusion without relying
2 upon what Mr. Pinto said, but I think it is easier for
3 you if you do connect what his statements to
4 Mr. Campollo.

5 Now, the second prong of the test is that the
6 intended discriminatory effect was substantially to
7 deprive RDC of its expected economic benefits under
8 the Usufruct. Certainly the take-it-or-leave-it
9 settlement offer required FVG to surrender unrestored
10 railway sections in which other investors may be
11 interested. We, of course, contend that that's a code
12 phrase for Ramon Campollo. And, indeed, Ramon
13 Campollo was the only interested investor in the South
14 Coast corridor who was identified by a Government

15 official in the March 2006 meeting with the President.
16 That evidence is, of course, they say that it never
17 happened, but the simple fact is that Mr. Posner has
18 contemporaneous notes before he ever had a clue that
19 this arbitration was going to ensue. He's got
20 contemporaneous notes that say that Mr. Campollo was
21 identified as the other investor at that meeting.
22 ARBITRATOR EIZENSTAT: If the purpose was to

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11:05:09 1 give this railroad to Mr. Campollo, and we're now in
2 2011, you've left in 2007, would one not assume that
3 that might already have happened?

4 MR. FOSTER: I wouldn't. If I were advising
5 the Government of Guatemala, I would tell them that
6 the last thing on earth they should ever do is to
7 prove the other side's case by giving the railroad to
8 Campollo until after this is over.

9 ARBITRATOR CRAWFORD: Didn't seem to be too
10 particularly interested in the highway.

11 MR. FOSTER: That's what he said, and what
12 would you expect him to say? Would you really expect
13 him to come in here and say, oh, yeah, I wanted to
14 take over the railroad. I was conspiring with
15 President Berger the entire time to do it.

16 No, this is obviously not a case in which
17 there's ever going to be any direct evidence. About
18 but as we know circumstantial evidence is just as
19 valuable in proving a fact as direct evidence is. The
20 issue is whether or not you credit it, and you may

21 say, well, it's easier to credit the direct evidence,
22 but the simple fact of the matter is there's not ever

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11:06:28 1 going to be direct evidence because the butler is not
2 going to confess that he did the murder.

3 The Government has never identified any other
4 interested investor. Who were they talking about?
5 why didn't they come to you and say, oh, yeah, when we
6 said other interested investors, we were talking about
7 Smith and Jones. We weren't talking about Campollo.
8 And here are Smith and Jones who are going to tell you
9 that they were interested. But they haven't done
10 that, and the reason they haven't done it is because
11 the other interested investor was Ramon Campollo.

12 The third factor is, and I believe you've
13 already answered this one in your Second Opinion on
14 jurisdiction, when you concluded the Respondent used
15 the Lesivo process as an element of pressure to
16 achieve other results which were unrelated to the
17 Lesividad Declaration, that confirms that there's no
18 nexus between the issuance of the Resolution targeting
19 FVG and rational public policy.

20 Now, we've got some slides in here concerning
21 some of the evidence about Mr. Campollo's railroad and
22 how it's similar to FVG's. I'm not going to go

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11:07:47 1 through it with you, but as Mr. Duggan said, when it
2 looks like a duck and it walks like a duck and it
3 quacks like a duck, it's a duck.

4 Now, the next factor is arbitrariness falling
5 below International standards. You've heard
6 repeatedly from the witnesses that no one can explain
7 to this day why Contract 41 was not signed by the
8 Executive. No one can. And, indeed, Overseer Porras
9 said it could have been signed by any President. It
10 wasn't necessary that it be signed by the President in
11 office at the time. And if you remember the exchange,
12 he went through all the Presidents since that time, he
13 left out President Berger, and I had to remind him
14 that--would President Berger have been able to do it,
15 and he said yes, absolutely. President Berger could
16 have solved this entire problem. All he had to do was
17 sign the Contract, and it's over.

18 And there are lots of other points here
19 concerning arbitrariness that falls far below
20 International standards.

21 ARBITRATOR EIZENSTAT: I believe that your
22 Expert witness himself, Mr. Mayora, when we asked that

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11:09:08 1 question yesterday, may have said that he thought that
2 under the circumstances the President may not have
3 been able to sign 143 and 158.

4 MR. FOSTER: I believe he was saying--I
5 believe he was saying, if what I understand about his

6 testimony--I wasn't here, but it's been described to
7 me. I believe what he was saying was that he didn't
8 think it was necessary. It's clearly his opinion that
9 Presidential approval is not necessary for these
10 contracts. I think that's what he was referring to
11 yesterday.

12 There is a large number of items here that we
13 would like to draw your attention to about
14 arbitrariness, falling below International standards,
15 and the record, in documents, statements, and opinions
16 and hearing testimony is replete with the proof of
17 those elements.

18 And as you know, even Mr. Aitkenhead agreed
19 with regard to some of these, as Arbitrator Eizenstat
20 asked him, you're saying you were seeking a global
21 agreement on the five different items in the minutes.
22 That was the goal. And he said, the ultimate purpose

1996

11:10:31 1 was that, although we could have had intermediate
2 objectives.

3 Now, turning to bad faith, again, we've got a
4 large number of items here with a lot of evidentiary
5 support behind them. We believe that you've seen
6 amply demonstrated to you that throughout the goal of
7 the Government was to renegotiate the terms not to fix
8 the illegalities. They were not proceeding in good
9 faith.

10 Let's turn briefly to failure to provide full

11 protection and security. You saw that there has been
12 a sharp rise in squatters, theft, and vandalism after
13 Lesivo, whereas the Respondent's efforts were directed
14 merely at identification and documentation of third
15 party interference with FVG's rights. I showed you in
16 our Opening Statement the pie charts of the difference
17 in quality of the actions that they took before FVG
18 got the concession when they were concentrating on
19 indictments and criminal prosecutions versus after
20 Lesivo when it was paper-pushing.

21 Again, Mr. MacSwain's evidence
22 concerning--it's set forth in detail here, that the

1997

11:12:03 1 squatters, the industrial squatters, came after
2 Lesivo. And, indeed, FEGUA's Chief engineer,
3 Mr. Samayoa, admitted that the influx of squatters
4 increased after the Lesivo Declaration.

5 Now, let's turn briefly--

6 ARBITRATOR EIZENSTAT: Excuse me, are you
7 contending that this alleged failure to provide full
8 protection and security existed before Lesivo or only
9 after?

10 MR. FOSTER: Well, I think we are limited in
11 this proceeding to contending that it existed
12 afterwards, but if you look at the chart that I showed
13 you in Opening Statement of the actions of the
14 Government, you can see that they took virtually no
15 actions whatsoever during--between the time that we
16 got the concession and the time of Lesivo. But we're

17 not arguing that that inaction during that period of
18 time is a violation of CAFTA.

19 What we are arguing, however, is that the
20 Government cannot come in here and tell you that FVG
21 was unprofitable when one of the reasons or a large
22 portion of the reasons that FVG was not having as

1998

11:13:19 1 great a profit as it could have was its failure to pay
2 into the Trust Fund and its failure to remove
3 squatters which caused all sorts of operational
4 problems. That they can't do.

5 Now, we talked a lot in the Opening Statement
6 about the need for a full reparation standard, which
7 includes, we argue, it includes both the recovery of
8 sunk costs and lost profits. Mr. Spiller admitted
9 when he testified before you that the result of his
10 methodology would be to assign the exact same amount
11 of damages for a legal act or an illegal act. There's
12 no distinction in the way that his damage methodology
13 operates.

14 There are many examples which we cited to
15 you--I won't go through them again--in the literature
16 and in the cases, in which both sunk costs and lost
17 profits are recoverable.

18 Now, I would like to turn to the proof of
19 lost investment.

20 Now, Dr. Spiller remembered, he conceded that
21 the net cash contribution method, which is essentially

22 recovery of sunk costs, is appropriate when the

1999

11:14:46 1 expropriation takes place in close proximity to the
2 investment. I didn't put the citation on this slide.
3 If you would like to make a notation of it, that's in
4 the First Spiller Report at Paragraph 75. Not 74, as
5 noted on the slide. That's a typo.

6 Dr. Spiller admitted when he testified before
7 you that RDC was still making investments, that it had
8 made investments throughout the entire period both
9 before and after Lesivo. He admitted that before he
10 saw where my questions were going. Then he proceeded
11 in some of his--I actually out of curiosity had
12 someone count them, he managed to get out over 7,000
13 words in a little over an hour. I think that's bound
14 to be a record for testimony.

15 In any event, Claimant's proof of sunk costs
16 remains un-rebutted in these proceedings. The
17 Respondent has not--they've contested our entitlement
18 to sunk costs, but they have not either through
19 cross-examination or Expert Witness contested the
20 numbers that make up our sunk costs. They didn't even
21 want to cross-examine Mr. Hensler and Mr. de Leon who
22 presented the evidence of sunk costs, and that

2000

11:16:07 1 evidence was that the sunk costs are approximately
Page 81

2 \$19 million plus another \$1,350,000 in shutdown costs.
3 You know that when you operate the model on the
4 weighted Average Cost of Capital and you bring those
5 sunk costs to the value--to their value at the end of
6 2006, they come to \$42.9 million in sunk costs.

7 And, of course, the Respondent does contest
8 the WACC number, but as we discussed before, you will
9 be able to manipulate that model yourself. If you
10 don't like it the way it is, you can come to your own
11 number for WACC and put it into Mr. Thompson's model.

12 Now, turning to the future profits, it was
13 notable that when Dr. Spiller testified he would
14 accord the same value to a company in which there had
15 been no investment but which had reasonably expected
16 future profits--I give you an example of a McDonald's
17 franchise for that--no investment at all, and he says,
18 okay, it's worth X. Then he says, a company where
19 there had been a substantial investment but with no
20 operating history but reasonably respectable future
21 profits, it's just worth X also, even though they made
22 a huge investment.

2001

11:17:34 1 Then a company that had been a substantial
2 investment with an operating history and reasonably
3 expected future profit, he said that's worth the same
4 thing as the other one. It makes no sense whatsoever
5 how three businesses in totally different
6 circumstances can be worth exactly the same thing to

7 Dr. Spiller.

8 Now, Respondent found it astonishing, they
9 told us, that Claimant's Experts believed rail
10 revenues were going to increase. Well, what's really
11 astonishing is that FVG attained container compound
12 growth rate of 40.5 percent per year on average from
13 the time they started carrying traffic.

14 Real estate income, we contend, we already
15 talked a little bit about this. We contend it would
16 have increased dramatically without Lesivo because of
17 the number and extent of electric utilities alone
18 which used the right of way, and we've got some charts
19 on that. And when you consider this, please consider
20 the testimony you've just heard from Mr. Marroquin
21 that the Mesoamerica Study upon which the Respondent
22 relies so extensively didn't even consider real estate

2002

11:18:47 1 income.

2 Now, you've got two charts here, one of which
3 shows the existing rentals and projected right of way
4 leases versus commercial leases. The next chart
5 merely adds in one other factor, and that adds in the
6 income from Tecún Umán so that you can see how it
7 affects the slope there.

8 Dr. Spiller asserts that because FVG had
9 experienced losses, there can be no certain proof of
10 future profits. Well, I would just ask you to
11 consider from your own knowledge of the business--of
12 the business environment, the number of companies that

13 there are, who make enormous investments and show
14 operating losses for a considerable period of time,
15 and then literally shoot into dramatic profitability.

16 I'm not going to go through the weighted
17 Average Cost of Capital computations again. You saw
18 those before. I'll just give you a summary. Remember
19 the argument over the--

20 ARBITRATOR EIZENSTAT: Just to go back, can
21 you --

22 MR. FOSTER: Yes, sir.

2003

11:19:54 1 ARBITRATOR EIZENSTAT: Can you summarize--I
2 mean, we saw the chart of the projected incomes from
3 the existing leases, but what proof do we have that
4 there would have been this acceleration of profits?
5 What potential contracts were there, what people were
6 you talking to that were near making a decision that
7 would give us any basis to determine that this takeoff
8 and profitability would occur?

9 MR. FOSTER: The ones that were closest to
10 fruition were the Planos y Puntos extension of its
11 right of way lease, 37 kilometers at \$3,200. The
12 principle importance of that is the validation of the
13 rate.

14 The second is, of course, the Gerona parking
15 lot, where there were people who were interested in
16 not only in having a parking lot but building an
17 office building. As you know, that parking lot is the

18 one that the Attorney General's Office sits next to,
19 and those cars that you saw in the pictures are people
20 who work in the Attorney General's Office. Again, the
21 Government is a squatter. In fact, a little piece of
22 his building sticks over on that property, but there's

2004

11:21:16 1 tremendous demand there.

2 You had the UniSuper plans to open the
3 supermarket--the shopping centers actually, starting
4 in Zacapa and extending into seven or eight of the
5 other major stations. Those three projects--those
6 three different projects were literally on the cusp of
7 fruition prior to it.

8 The final piece of evidence that I think we
9 would point to particularly is the actual existence of
10 the demand for the right of way as a result of the
11 industrial squatters, and surely the Government can't
12 come in here and say the companies which it owns or in
13 which it has an interest would not have been willing
14 to pay rent for the lines that they put up in this--in
15 that right of way.

16 So, that's, I think, the proof we would ask
17 you to look at.

18 I just want to just point out the three
19 arguments that there are in connection with the
20 weighted Average Cost of Capital. One has to do with
21 the data that's used for the risk premium, and that's
22 the 10b versus the 10. And as Dr. Pratt points out,

2005

11:22:35 1 the data that he uses already contains the distressed
2 companies that Dr. Spiller would have you concentrate
3 on.

4 The second is the cost of debt. FVG actually
5 obtained its debt financing from RDC and, therefore,
6 RDC's rates should apply. As Dr. Pratt explains, the
7 cost of debt is not a built-up number. It's an actual
8 number. You look at what the company actually did,
9 and it borrowed its money at 7.8 percent, not the
10 18.67 percent that Dr. Spiller posits.

11 And then the blending is based on revenue
12 streams rather than just an arbitrary selection of a
13 50/50 split.

14 I would briefly like to show you one thing.
15 Dr. Spiller gave a bond example, an example of a five
16 year bond in his Report, which he said demonstrates
17 there is severe double counting in our amortization
18 methodology. If you go through that bond and you look
19 at this little sheet that I prepared for you, you'll
20 see that when you actually look at the amortization
21 there's only a 13.41 percent quote as Dr. Spiller
22 would call it double counting. Thus, his fanciful

2006

11:24:04 1 assertion that this is a terrible amount of double
2 recovery for FVG is simply not born out.

3 Also, as you heard from his testimony, his
4 methodology of grossing up the amortization using the
5 weighted Average Cost of Capital as a matter of
6 mathematics just brings you back to where you started.
7 You have nothing left but future profits and you
8 haven't recovered anything for sunk cost, and if you
9 gentlemen decide that in the case of an illegal action
10 by a State that something more than just either on the
11 one hand sunk costs or on the other hand lost profits
12 are appropriate, I would submit to you that the proper
13 result is sunk costs plus lost profits with the sunk
14 costs amortized over the income stream of the lost
15 profits.

16 Now, turning to business termination and
17 wind-down cost, again, it's about 1.35 million.
18 There's no attack by the Respondent on the numbers.
19 They attack whether or not we're entitled to it
20 because they say that a lot of it was spent on
21 operations. well, of course, some of it was spent on
22 operations. FVG had long-term contracts which it was

2007

11:25:23 1 obligated to complete. Starting a business costs
2 money, and winding it down costs money, and it costs
3 1.35 million to respond this one down.

4 On pre-judgment interest, that's I think
5 going to be an interest of law for you as to whether
6 or not it should be compounded or not. We believe
7 that the current authorities are overwhelming that
8 pre-judgment interest should be compounded. One issue

9 is what the rate should be. One of your alternatives
10 is to consider looking at the sunk costs. This has
11 been a forced loan, a coerced loan to Guatemala, and
12 that Guatemala should, therefore, pay the 9.34 percent
13 that is allocable to the times when Guatemala borrows
14 money.

15 That, then, brings us to some options that
16 you have before you. The first is to award sunk costs
17 plus lost profits minus amortization, and then minus
18 mitigation. That would bring you to 63,778,000.

19 The second option is to award lost profits
20 without sunk costs, and that lost profits of
21 30 million minus mitigation would bring you to
22 27,361,000.

2008

11:26:50 1 The third option is return the Claimant to
2 the same position as if the investment had not been
3 made, and that is an investment of 19 million brought
4 up to current value by 12.9 percent WACC plus
5 wind-down costs minus mitigation, that brings you to
6 \$41,589,000.

7 Another potential, a variant on option number
8 three is to use, instead of using the WACC of
9 12.9 percent to use the coerced loan theory at
10 9.34 percent, which would bring you to \$33 million. I
11 would point out to you, however, that if you were to
12 choose the coerced loan theory, that I would submit
13 that you must award legal costs and expenses. Because

14 the only way that you remedy a coerced loan in order
15 to recover their coerced loan, RDC had to hire lawyers
16 and spend money. So, an essential part of the coerced
17 loan theory is the recovery of costs and expenses.

18 Regardless of that, however, we ask
19 you--regardless of which way you go, we ask you to
20 award RDC its costs and attorneys' fees in this case
21 because, as a matter of justice, this is a case in
22 which the Claimant should not have to bear its costs

2009

11:28:28 1 of collecting its money.

2 Now, finally, just as a last comment, I would
3 like to recall to you something that Mr. Thompson
4 said. Here Mr. Thompson is one of the world's
5 foremost Experts on railroads in developing countries,
6 and he said he had never seen anything like what
7 happened here, and he said that he certainly would not
8 have advised the Government to do what they did
9 because it ultimately was so self-destructive.

10 And really, that's what we come down to here.
11 Governments who take--who do arbitrary things for
12 reasons that are not related to public good, you
13 cannot encourage that kind of behavior when you're
14 dealing with International investments, and we would
15 urge--we would urge that your Award should recognize
16 the fact that the purpose--the principle purpose of
17 CAFTA is to encourage investment by the part of
18 foreign nationals into the economies of these
19 countries, and that the only way that that purpose can

20 ever be fulfilled is that the countries which receive
21 those investments must comply with the terms of CAFTA.

22 Thank you very much.

2010

11:29:55 1 Oh, I've got one other thing to give you. I
2 apologize. I promised you that I was going to tell
3 you how to operate Mr. Thompson's model so that you
4 would be able to do that, and I'm not going to
5 describe it to you, but there is--the last slide in
6 the presentation are the operating instructions for
7 Mr. Thompson's model.

8 Thank you, sir.

9 ARBITRATOR CRAWFORD: The Claimant has
10 subsisting interests in Guatemala?

11 MR. FOSTER: I'm sorry?

12 ARBITRATOR CRAWFORD: The Claimant has
13 subsisting interests in Guatemala?

14 MR. FOSTER: Well, they have a presence there
15 at the present time, yes.

16 ARBITRATOR CRAWFORD: The interests of
17 collecting rent, for example?

18 MR. FOSTER: Yes.

19 ARBITRATOR CRAWFORD: What do you propose is
20 to be done in relations to those interests?

21 MR. FOSTER: Your Award would have to include
22 that fact that--if your Award were complete

11:30:48 1 compensation to the Claimant, then obviously the
2 Claimant would have to turn those over to the
3 Government.

4 ARBITRATOR CRAWFORD: Thank you.

5 PRESIDENT RIGO: Thank you, Mr. Foster.

6 We will have literally five minutes' break
7 before we have the next closing statements.

8 (Brief recess.)

9 PRESIDENT RIGO: We are going to continue our
10 morning session.

11 Mr. Orta for the Respondent.

12 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

13 MR. ORTA: Thank you, Mr. Chairman. I would
14 like to start off also by thanking the Members of the
15 Tribunal, the Secretary of the Tribunal, the ICSID
16 staff, and all of the folks who have worked to put
17 this hearing together. I'd like to thank opposing
18 counsel, and we have gone down a long road in this
19 case that started back in 2007, when Claimant filed
20 their Notice of Intent to Arbitrate and eventually
21 their Request for Arbitration.

22 To put us in context, you might recall that

11:40:33 1 in the opening I started off with a series of points
2 about what this case is really about, and here we're
3 boiling it down even to its more basic form.

4 In 1997, Claimant, through their local

5 enterprise, participated in a bid to modernize and
6 restore the Guatemalan railway. I think the evidence
7 demonstrates that they didn't have sufficient capital,
8 and their projections in terms of demand, in terms of
9 funding sources were optimistic and turned out to be
10 completely off the mark, so things didn't work out
11 between the Parties.

12 Now, as you're going to hear in a second,
13 none of the actions that have been signaled by
14 Claimant in relation to conduct by Guatemala
15 constitute actions that would substantiate any of the
16 Treaty claims that they are asserting in this case.
17 There simply have been no Treaty violations proven.
18 We think the hard evidence proves that, and we hope
19 that throughout the course of this case and the eight
20 or nine days of hearings that we have had that the
21 evidence has borne that out for the Tribunal.

22 Now, you've heard some testimony from various

2013

11:42:14 1 witnesses that there is a local proceeding pending in
2 relation to the Declaration of Lesividad, and you've
3 also heard that there are local arbitrations pending
4 regarding many of the issues that have been complained
5 about here, and the Tribunal ruled early on in this
6 case that those issues pending in the local
7 arbitrations were outside the bounds of its
8 jurisdiction in this case, given the terms of CAFTA.

9 At the end of the day, it's our contention

10 that the appropriate conclusion for this Tribunal to
11 reach is that there has been no violation by Guatemala
12 of its undertakings with respect to CAFTA, and the
13 issues between the Parties can and should be resolved
14 locally.

15 Now, when we started this hearing, we
16 mentioned that there were basically two issues that we
17 believed that this Tribunal needed to decide. The
18 first is whether Guatemala violated its CAFTA
19 undertakings when it applied the lesivo law, which the
20 evidence shows has been part of Guatemalan law for
21 over a hundred years, to declare the Usufruct
22 Equipment Contract lesivo. In the face of the

2014

11:43:48 1 decision that President Berger made and given all of
2 the circumstances associated with that decision when
3 it was taken, that's what we believe this Tribunal is
4 being asked to answer. Because, after all, when
5 Claimant framed their case, they claimed it based on
6 the issuance of the Lesivo Declaration and the
7 consequences thereof. That's how they framed their
8 case to this Tribunal.

9 Looked at in context, we also contend that
10 what is in essence really happening here is that the
11 Tribunal is being asked to shift to Guatemala the
12 responsibility for Claimant's failed and risky
13 business venture. And we say that because we believe
14 the evidence shows that Claimants, in fact, did enter
15 into a very risky business venture, and that business

16 venture failed long before the Lesivo Declaration was
17 issued.

18 And we further believe that the evidence
19 demonstrates that when CAFTA went into effect and the
20 Lesivo Declaration was issued, Claimant immediately
21 seized upon that as its exit strategy from a failed
22 venture in Guatemala.

2015

11:45:16 1 Now, I would like to start where I think the
2 Tribunal will be focusing a good portion of its time
3 when it deliberates in this case, and that is the
4 Lesivo Declaration and whether the actions taken by
5 Guatemala in relation to the issuance of the Lesivo
6 Declaration violate Guatemala's undertakings under
7 CAFTA, and I want to remind the Tribunal it is our
8 contention that this Tribunal need not decide whether
9 the Lesivo Declaration was properly issued under
10 Guatemalan law. That issue is before the
11 Administrative Court in Guatemala.

12 Now, looking at the actions that were taken
13 by the Government, we know that between April 2004 and
14 June 2005, the Parties undertook negotiations in
15 relation to the possible amendment or undertaking of a
16 new Equipment Contract because very shortly after
17 Dr. Gramajo took over as the Overseer of FEGUA, he
18 notified Claimant through FVG that the Contract
19 suffered--the Equipment Contract, the one at issue
20 here, suffered from legal defects. And we know that

21 because there has been testimony to that effect from
22 Dr. Gramajo. There have been Draft Agreements shared

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11:46:47 1 with the Tribunal. They're a part of evidence, R-50,
2 R-51. And there are e-mail exchanges between the
3 Parties in relation to those Draft Agreements, and I
4 think both sides admit that there were negotiations
5 going on, but that those negotiations ultimately did
6 not prosper. Now--

7 ARBITRATOR CRAWFORD: Before you move on, you
8 said the Tribunal need not decide whether the Contract
9 is lesivo, but you accept that we could decide that;
10 is that right?

11 MR. ORTA: Well, it's our contention that
12 that issue--in other words, whether it's actually
13 lesivo under Guatemalan law is not really relevant to
14 the undertakings of determining whether Guatemala
15 violated its CAFTA obligations.

16 ARBITRATOR CRAWFORD: I mean, certainly, as
17 you say, it would be possible to decide the case
18 without deciding it, but if we were to decide that the
19 President was entitled as a matter of Guatemalan law
20 to declare the Contract lesivo, that would surely have
21 a considerable relevance to a fair and equitable
22 treatment claim.

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11:48:01 1 MR. ORTA: I think that's correct. I think
2 that's correct. The only point we're making, and I
3 think this goes to the first aspect of your
4 observation, Professor Crawford, is that you need not
5 get there in the sense that the conduct that is at
6 issue can, we believe, demonstrate that Guatemala did
7 not violate fair and equitable treatment standard or
8 any other of the claims that are at issue here.

9 (Comment off microphone.)

10 MR. ORTA: Yes, sir.

11 Now, in relation to the timeline, in or
12 around June 2005, actually dating back even a little
13 bit earlier into April of 2005, we know that at that
14 point negotiations between the parties had not
15 prospered, and both sides in essence began considering
16 what legal options they had in relation to some of the
17 problems that they were--that they had between each
18 other. We know, for example, that Ferrovías began
19 planning their local arbitrations. We have seen
20 e-mail exchanges. They were part of the record in
21 this case. Witnesses were questioned about them where
22 Ferrovías's witnesses said that they were launching

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11:49:17 1 their attack against FEGUA. This is a direct
2 statement made by Mr. Senn in one of his e-mails in
3 April of 2005. And that attack was the local
4 arbitrations that they were filing in relation to the
5 issue of squatters and Trust Fund payments that this

6 Tribunal is well aware of.

7 Now, Dr. Gramajo has testified both through
8 his oral testimony before you and through his witness
9 Declarations that in April 2005, recognizing that the
10 Parties had reached an impasse in relation to trying
11 to resolve the legal defects associated with Contract
12 143 and 158, he began making inquiries to first the
13 Legal Department within the Ministry of
14 Communications--that's the Ministry to whom the
15 railway agency responds--and eventually consulting
16 with outside counsel, the Attorney General of
17 Guatemala. And all of that led him to receive a
18 number of very consistent opinions from these legal
19 advisers, including from the highest Legal Authority
20 for the State in Guatemala that the Contract at issue
21 had a number of important legal infirmities.

22 And time and time again Claimant likes to

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11:50:47 1 call them legal technicalities, but I think if we're
2 being fair, these are much more than legal
3 technicalities. Whether or not the Contract should
4 have been put to a public bid is not a technicality.
5 Public Contracting Laws are very important for
6 Governments, especially developing Nations, and
7 upholding those contracting laws is not a matter of
8 just a mere technicality.

9 ARBITRATOR EIZENSTAT: Wasn't that the
10 Government's responsibility to do? I mean, if this
11 was something that was important, why didn't they do

12 that?

13 MR. ORTA: Well, Secretary Eizenstat, in
14 relation to the execution of Contract 143 and 158, we
15 don't know why the Overseer of FEGUA at the time did
16 not celebrate a public bid. We don't know why he
17 chose--and this is of record--you have the declaration
18 of Mr. Mario Cifuentes, who was his legal adviser at
19 the time within FEGUA. We don't know why he chose to
20 ignore his legal advisors' advice and sign an
21 agreement that did not comport with Guatemalan law.

22 Now, I want to be fair. His legal adviser at

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11:52:04 1 the time did not say him a public bid was necessary.
2 He did say Executive approval was necessary, and I
3 think when you examine the documentation, you will see
4 in the record that the initial reaction to this
5 Contract, both from the legal adviser to Mr. Sarceno
6 before he entered into the Contract and when the legal
7 team that was advising Dr. Gramajo after he entered in
8 as the Overseer, when they analyzed the Contract,
9 neither of them initially recognized that a public bid
10 was necessary. Rather, they both took issue with the
11 fact that in the original Bidding Terms for Contract
12 41, there was a necessity for there to be a public
13 bid. It was a requirement of the Bidding Terms, and
14 we believe the contracting law requires it because
15 when you're giving State assets to a third party for
16 their use, the contracting law requires that a bid

17 take place.

18 Now, in relation to the issue of
19 incorporating those Bidding Terms into Contract 143
20 and 158, both the adviser for Mr. Sarceno and the
21 legal team for Dr. Gramajo immediately recognized that
22 it was a violation of Guatemalan law to incorporate

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11:53:27 1 those Bidding Terms into the Contract when those
2 Bidding Terms say that a bid is required and when
3 those Bidding Terms say that Executive approval is
4 required, and then to unilaterally write into the
5 Contract out--to write out in the Contract the
6 requirement for Executive approval. That's the main
7 defect that was immediately spotted by both of those
8 legal advisers.

9 Once Dr. Gramajo elevates this to outside
10 counsel and the Attorney General's office, that's when
11 he is first informed about the public bidding
12 requirement from outside legal advisers, the fact that
13 that had not happened.

14 So, earlier on, the record will establish he
15 wasn't told that.

16 ARBITRATOR EIZENSTAT: But didn't Ferrovías
17 have a right to rely on the signature of an Overseer
18 to the contracts under which it was operating and the
19 fact that pursuant to that the Government was
20 accepting or FEGUA was accepting Canon fees? I mean,
21 isn't there a reliance issue here that needs to be
22 addressed?

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11:54:40 1 MR. ORTA: And I'm going to address that
2 later in the slides, but just to directly address your
3 questions, Secretary Eizenstat, the answer is that we
4 believe reliance under international law, public
5 international law, has to be reasonable, and one
6 cannot rely upon their own misconduct in asserting a
7 claim under CAFTA, and here we believe the evidence
8 demonstrates amply that at the time that Ferrovías was
9 executing or entering into the Contract 143 and 158,
10 they knew full well that Executive approval was
11 required. Why did they know that? Because the
12 Bidding Terms for Contract 141 required it. Their
13 letters to Overseers throughout the years acknowledged
14 that Contract 41 never went into effect because they
15 didn't have that Executive approval. And yet,
16 notwithstanding that they incorporate the very same
17 Bidding Terms which require Executive approval in the
18 Contract 143, they say in the Contract that that
19 Executive approval is not going to be required.
20 Now, admittedly, Overseer Sarceno overstepped
21 his bounds. He should not have done that, and we've
22 heard that here, but the point in response to your

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11:56:00 1 question is that Ferrovías understood that was not in

2 compliance with Guatemalan law, and they cannot
3 reasonably rely upon the acquiescence by the FEGUA
4 overseer at that time when they, themselves, knew that
5 that was not in compliance with Guatemalan law.
6 That's our contention.

7 And in relation to the issue of the
8 acceptance of payments, you heard from Dr. Gramajo
9 that from his perspective, the payments were being
10 accepted by FEGUA pursuant to the letter
11 authorizations.

12 Again, even if you were to accept that FEGUA
13 was, after the execution of Contract 143 and 158,
14 accepting payments pursuant to that contract, which
15 they--which FEGUA itself had told Ferrovías was not in
16 compliance with the law, Ferrovías--FVG cannot be
17 excused based on that because again they, themselves,
18 knew that they were making payments, even if it's
19 pursuant to the Contract, pursuant to a contract that
20 they, themselves, knew was not in compliance with
21 Guatemalan law at the time they entered into it.

22 And we've cited the principle in our system,

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11:57:17 1 the doctrine of unclean hands. There is a similar
2 principle in public international law, and they can't
3 benefit from that misconduct, if you want to say it
4 that way, or from their knowing that they were doing
5 something that was not in compliance with Guatemalan
6 law, and they cannot invoke that here to excuse their
7 conduct in entering into an agreement that they knew

8 was not in compliance with the law.

9 Now, going back to the issue of the
10 reasonableness of the decision made by President
11 Berger to issue the Declaration, we know that in
12 January of 2006 President Berger receives a letter
13 from Dr. Gramajo in which Dr. Gramajo cites a number
14 of grounds as to why he understood the Contract was
15 lesivo to the interests of the State, and he asks the
16 President to consider making that Declaration.

17 Now, the evidence shows that the President
18 didn't seize upon this letter and immediately sign a
19 declaration, immediately instruct anyone to sign a
20 declaration, or instruct anyone to do anything other
21 than have his legal team look into the question that
22 was posed by Dr. Gramajo. And his legal team did

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11:58:45 1 that. Between January and April of 2006, they asked
2 the Ministry of Public Finance, which we heard is the
3 Ministry dealing with public contracting, they had
4 three separate advisers that looked into--three
5 separate legal advisers within that Ministry that
6 looked into the question of whether the contracts were
7 lesivo, and with what we believe is, you know, a good
8 amount of consistency between the other opinions,
9 notwithstanding that they were conducted
10 independently--and the record evidence is that these
11 determinations by these various different officials
12 were conducted independently, and that's unrebutted in

13 this case, reached the Opinion that Contract 143 and
14 158 was lesivo, to the interests of the State. Those
15 opinions get transmitted back to the legal advisers
16 for President Berger. They conduct their own
17 independent analysis.

18 And at the end of the day what we have are
19 nine separate independent legal opinions that are put
20 before President Berger, telling him that these
21 contracts suffer from important fundamental legal
22 defects under Guatemalan law, and telling him that he

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12:00:07 1 should issue the Lesivo Declaration.

2 Now, again, there is no dispute that these
3 opinions were all based on technical-legal analyses by
4 these different public officials.

5 we also know, and this is undisputed, that
6 President Berger was counseled that in light of this
7 Contract containing these illegalities, that not only
8 should he declare the Contract lesivo, but if he
9 failed to do so, he would incur personal liability
10 himself. Now, there has been much questioning from
11 the experts as to whether, in fact, President Berger,
12 under Guatemalan law, would be subject to personal
13 liability. We believe the answer is yes. We
14 understand you've heard two different Opinions from
15 Guatemalan Law Experts on that, and we've cited you to
16 the law. We would remit you to the Articles 153
17 through 155 of the Guatemalan Constitution and the
18 other sources of law cited by Professor Aguilar,

19 Mr. Aguilar.

20 But I think the real inquiry here again is
21 was it reasonable for the President to make the
22 assumption that he was going to be subject to personal

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12:01:35 1 liability when he's being told that by the equivalent
2 of the White House Counsel, the equivalent of the
3 Chief lawyer in the Office of the Presidency, and we
4 believe the answer to that is yes.

5 And so, when you put all of those things
6 together, and when you take into account that none of
7 these other factors, okay, that have been cited here
8 by Claimant as the real reason that the Lesivo
9 Declaration we believe were really at issue, that none
10 of those were at issue, we believe that the issuance
11 of the Lesivo Declaration was reasonable and,
12 therefore, we believe that there are no violations of
13 CAFTA.

14 ARBITRATOR EIZENSTAT: There seems to be
15 replete in the record, including Mr. Marroquin's
16 statement today that it just comes in time and time
17 again was that there was comprehensive negotiation to
18 deal with a whole variety of issues related to the
19 railroad operation, and that this particular set of
20 defects--I think we shouldn't characterize or
21 mischaracterize them as technical because that already
22 evidences some indication, but the defects themselves

12:02:59 1 were not really central parts of the negotiation, and
2 had they focused on trying to correct those two
3 defects, the bidding and the Presidential thing, you
4 might have had a potentially different outcome, but
5 instead they were focused on the whole broad range of
6 decisions, the South Coast and a whole variety of
7 other issues, and that, I thought, was also what
8 Mr. Marroquin said this very day, and that correcting
9 the legal defects would not have achieved, for
10 example, he said the goal of the High-Level
11 Commission, which was to get the railroad back in
12 operation.

13 Could you respond to that concern.

14 MR. ORTA: Sure. Secretary Eizenstat, I
15 think again we should look at what the evidence shows.
16 Ask yourself why is it that the Parties are in the
17 context of the discussions that were taking place from
18 the High-Level Commission and in the context of the
19 settlement discussions that were taking place just
20 before the Lesivo Declaration. Why are these other
21 issues participants of the equation? And I think that
22 the evidence will demonstrate that the reason they

12:04:10 1 were part of the calculus by the Parties was, first of
2 all, because Claimant, through Mr. Posner, through
3 their local partners, through Cementos Progreso, they

4 requested a meeting with the President of Guatemala in
5 March of 2006. This is unrefuted.

6 And the purpose of that meeting was to put
7 before the table all of the issues that were plaguing
8 the Parties' relationship so that those issues could
9 be dealt with and resolved by the Parties.

10 Now, I think that speaks volumes as to why it
11 was that those issues were being discussed. We can't
12 blame Guatemala under CAFTA for demonstrating their
13 good faith in opening the Office of the President to
14 Mr. Posner, hearing him out, letting him make a
15 presentation, and then the President making an
16 instruction, let's form a High-Level Commission to
17 decide--to try to resolve these issues that are at
18 issue between the Parties.

19 And certainly it makes sense that the
20 President would be focusing on having a functioning
21 railway, and it makes sense that his top legal
22 advisers would see that as the ultimate end game, but

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12:05:28 1 you also heard very clearly from Mr. Aitkenhead; from
2 Mr. Marroquin, who testified today; from Dr. Gramajo;
3 from Astrid Sosin, who is one of the witnesses you
4 didn't hear from at the hearing because they chose not
5 to cross-examine her, but in her Declaration she also
6 supports this; from Mr. Fuentes.

7 You heard that, first of all, that the
8 Government was negotiating in good faith. You also

9 heard directly from Mr. Aitkenhead and Mr. Marroquin
10 that there was no instruction, no order given, you
11 must resolve all of these issues or else we proceed
12 with lesivo. Rather, the evidence is that they were
13 all being discussed in tandem again because Claimant
14 made the request that all of these issues be discussed
15 or that the issues plaguing the parties be discussed,
16 and they made that request directly from the
17 President, and he responded to it, but there was
18 nothing impeding the Parties from reaching a
19 resolution just as to the issues of Contracts 143 and
20 158.

21 And the other thing, and I think this is very
22 important in relation to the question that you posed,

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12:06:42 1 is that when actual offers to sit down and negotiate
2 and negotiate the issue of Contract 143 and 158 were
3 put before FVG, what we know is they weren't able to
4 reach agreement in the April 2004-2005 time frame when
5 that was the only issue that was being discussed, that
6 contract.

7 And we further know that when the Claimants
8 are confronted with a request to negotiate that issue,
9 if you look at C-44, and I ask you to look at that
10 document carefully, that is the settlement proposal
11 that was put before Mr. Senn on 24 August 2006, the
12 day before the Lesivo Declaration was published. The
13 evidence, I think, is unrebutted that while that
14 agreement dealt with a number of issues, there is

15 nothing in that agreement that said you have to settle
16 all of them or we won't settle any one of them.

17 And the other thing is that when you look on
18 the face of the Agreement as to each and every point,
19 including the issue of Contract 143 and 158, what the
20 Government was offering was to sit and negotiate a way
21 out of the problems. There are no demands made in
22 that document. Every one of the subpoints in the

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12:08:05 1 documents say "points to be discussed or negotiated,"
2 and that evidences that the Government was willing to
3 sit down and negotiate those points, and there is
4 nothing that the document that says you have to
5 negotiate them all or you will not be able to
6 negotiate away the issues with respect to the Lesivo
7 Declaration.

8 ARBITRATOR EIZENSTAT: Just enlighten me on
9 one last point. Did we not hear that, in a sense,
10 from both experts that there was virtually no way to
11 remedy the defects, particularly with respect to the
12 Presidential approval? Once you identified it, it
13 couldn't be remedied. Is that what the record shows?

14 MR. ORTA: I don't believe so, but if I could
15 just make one minor point closing out on the prior
16 question, which is, in relation to that proposal, C-44
17 that was put forth to Mr. Senn, the evidence is
18 un rebutted that he didn't really study it. He made no
19 counterproposals, and he said he had no authority to

20 negotiate any of the points in there on the day before
21 lesivo was published. And that even lesivo, R-37
22 proves this point. Even after lesivo, when confronted

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12:09:25 1 with the issue of the Equipment Contract, Mr. Senn
2 said to the Government officials that issue is of
3 secondary priority because the main point here, which
4 is trying to see if there is a way to rehabilitate the
5 Phase II, is a standard gauge railway in which they
6 wouldn't be able to use the rail equipment.

7 In response to your other question, Secretary
8 Eizenstat, the testimony from Dr. Aguilar is that
9 there was a way to settle, that the Government could
10 settle. What he said was you couldn't cure Contract
11 143 itself because that suffered from illegalities.
12 But you could enter into a settlement whereby you
13 entered into a separate new Equipment Contract, which
14 is what was being proposed in C-44 and in the
15 negotiations that are exhibited in R-36 and R-37. So,
16 you could reach a settlement, and that would involve
17 potentially a new public bid and a new Equipment
18 Contract that didn't suffer from legal defects.

19 Now, let's look at the issues of the supposed
20 motivations for the issuance of the Lesivo Declaration
21 as contended by RDC in this case. First of all, you
22 know, they've said from the beginning of this case and

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12:10:52 1 they continue to maintain it today, that the
2 Government was looking to benefit Mr. Ramon Campollo
3 and that that was the real motivation in issuing the
4 Lesivo Declaration. With all respect, we believe the
5 evidence on this is clear, and that is, there is
6 absolutely no evidence to support this allegation.
7 None. You heard directly from Mr. Campollo. He said
8 he had no interest in the railway, never expressed an
9 interest in the railway, never made any threats. To
10 the extent Mr. Pinto said anything that could have
11 been perceived by the other side as threats, he never
12 authorized him to do that, and we know that as of
13 April 15, 2005, a letter was sent directly to Claimant
14 by Mr.--to FVG, I should say, by Mr. Campollo saying
15 he had no interest in the railway project. There is
16 no evidence of any communications between the
17 Government and Mr. Campollo or anyone on his behalf or
18 Mr. Campollo or anyone on his behalf with the
19 Government in relation to the allegation that he
20 wanted to take the railway Usufruct, and last of all,
21 we know as we sit here today, Mr. Campollo has no
22 rights in the Usufruct at all.

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12:12:14 1 On the use of the 50 million, and we are
2 going to get into this in a little bit more detail
3 again, this is based on a number of things that are
4 really just press reports and nothing more.

5 And lastly, on the issue of the use of the
6 Lesivo Declaration to force Claimants to renegotiate,
7 I believe I just dealt with that in response to
8 questions from Secretary Eizenstat. And again, we
9 will deal with it in a little bit more detail.

10 Claimants, again, in order to make their
11 CAFTA claim, attempt to assert in this case that their
12 investment was profitable. The evidence shows just
13 the opposite, and that Guatemala took away their
14 entire investment, and again I think the evidence
15 shows just the opposite.

16 In assessing the case, I think it's important
17 that you assess the quality of the evidence that's
18 been presented to you in this case by Claimant. Most
19 of it is hearsay evidence, what somebody believes they
20 heard from somebody else or from somebody else, and
21 all of the hearsay evidence is, in essence, being
22 purported by Claimant's representatives or their

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12:13:25 1 lawyers.

2 Huge inferential leaps, we hear words like
3 sugar and private investor, and we're being
4 asked--you're being asked to interpret that to mean
5 Mr. Ramon Campollo. You are being asked to conclude
6 that it's clear that that means Ramon Campollo. We
7 submit that's not the case, and most of their evidence
8 comes from newspaper clippings.

9 Now, Claimant has talked about their success
10 and how that should evidence what they would have done

11 here if they would have been allowed to carry out
12 their investment, and Mr. Foster, in his opening and
13 again today talked about a number of other operations
14 that RDC had and said, you know, you should assume
15 that the success, to the extent there was success in
16 these other rail ventures, was going to be replicated
17 here.

18 But what was left out--and this is in
19 document R-322--is that Mr. Duggan has admitted that,
20 as a matter of fact, they had never, ever implemented
21 a project like this before. They had never, ever
22 tried to revive an abandoned railway. Again, don't

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12:14:41 1 take our words for it. It's Mr. Duggan telling you
2 this. R-322.

3 On the issue of Campollo, again, what I would
4 like to stress here--and this is, I believe,
5 important--I think I've already said what the lack of
6 evidence is, but I would like to remit you to the
7 direct evidence because you heard Mr. Foster say in
8 response to a question from Professor Crawford that
9 the question is whether you want to credit the
10 evidence that they have put forward and whether you
11 want to credit the inferential or circumstantial leaps
12 that they would like for you to make based on that
13 evidence. And I submit to you that if you look at the
14 documents that we have put before you--and these are
15 mostly all documents that they have submitted in this

16 case, communications between Mr. Pinto and Mr. Posner
17 or Mr. Senn, look at them in chronological order.
18 We've put them for you here in chronological order.

19 And what you're going to see when you study
20 them, one by one in chronological order, is that
21 Mr. Pinto wasn't making any threats to take their
22 railway. Mr. Pinto, even if you assume he was acting

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12:15:53 1 on behalf of Mr. Campollo, which we say to you the
2 evidence does not allow you to make that leap, even if
3 you make that assumption, you will see that what, in
4 essence, was going on is that Mr. Pinto was inquiring
5 as to whether there would be rail service provided by
6 FVG to the southern coast, and he was asking for
7 quotes for sugar transport to see whether that might
8 be viable for--whether that might be viable.

9 And again, when you look at the evidence,
10 read the e-mails that they have provided in context,
11 you're going to see that Mr. Posner, himself, responds
12 to an e-mail from Mr. Pinto on 3 August 2006, just
13 before the Lesivo Declaration, and he tells Mr. Pinto
14 that he's anticipating positive results for everyone
15 in relation to the possible rail transport to the
16 south. Positive results for everyone.

17 The other communications, again, demonstrate
18 a request about the possibility of FVG providing
19 transport services to the south, not Mr. Campollo
20 wanting to take the railway, not any insistence on the
21 Desarrollos G proposal.

22 And I think it's important that you look at

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12:17:10 1 this and judge the quality of the evidence that's
2 being put before you. The Desarrollos G proposal
3 itself, which is--which has been talked about in this
4 case, take a look at that proposal and take a look at
5 C-44, which is the settlement proposal. Those are the
6 two main documents that they ask you to look at when
7 they say there have been threat allegations. The
8 Desarrollos G proposal is merely that: A proposal,
9 and nothing more. Again, Mr. Campollo said he had
10 nothing to do with it. But even if you believed he
11 had something to do with it, it is a proposal and
12 nothing more. And the evidence shows that Mr. Pinto
13 asked for a counterproposal to which FVG decided not
14 to provide. You heard they didn't provide one.
15 Mr. Senn told you that.

16 So, there is simply nothing to their
17 allegations about Mr. Campollo. It's a complete
18 nonevent in this case, but I will tell you it is their
19 featured claim of conspiracy and of discriminatory
20 intent in relation to the Lesivo Declaration, and it
21 completely falls on its face when you look at the
22 evidence.

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12:18:20 1 Now, there are other indicia of the
2 unreliability of the evidence that is before you. You
3 heard Mr. Mario Fuentes testify, and that is a witness
4 that the Claimant proffered in this case, that he
5 never told Claimants about any supposed plot by Juan
6 Esteban Berger to be taking or to be manufacturing or
7 drumming up illegalities to take away the railroad.
8 Now, why is that important? Because Mr. Senn,
9 Mr. Duggan, and I believe Mr. Posner tell you that the
10 reason they believe this is because they heard it from
11 Mr. Fuentes, from Mr. Melville, and Mr. Montano.
12 well, the problem that they have is that Mr. Fuentes
13 denied having ever made such a statement to them,
14 ever, and that's on the record, and you have the cites
15 here.
16 Mr. Melville and Montano submitted witness
17 Declarations, and they also deny having any ability to
18 confirm what they call "speculation" by Claimant. And
19 Juan Esteban Berger told you no such thing ever
20 happened. So, that is important when you are
21 analyzing the rest of the evidence that they've put
22 before you.

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12:19:41 1 So, in conclusion, on the issue of
2 Mr. Campollo, there is--really, we submit it's a
3 nonissue in this case. There is no evidence to
4 support it.
5 On the issue of the 50 million-dollar
6 threat--okay, this is another issue that's been put

7 before you, and they claim President Berger demanded
8 \$50 million or else he would proceed with the Lesivo
9 Declaration--demanded \$50 million or else he would
10 proceed with the Lesivo Declaration in relation to the
11 railway equipment, and the \$50 million was demanded,
12 as they say, for purposes of investment in the
13 railroad.

14 what you see is that they are citing to
15 nothing more than newspaper clips, and newspaper clips
16 that were issued post-lesivo and newspaper clips
17 reporting on what President Berger said. And even
18 worse newspaper clips that themselves are inconsistent
19 about what President Berger said or didn't say. The
20 newspaper clips, when you analyze them in context, and
21 there is another slide coming up that does that, some
22 of them report that Mr. Berger were simply saying they

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12:20:52 1 never had the \$50 million they needed for investment
2 in the railroad, and some of them say that what the
3 Claimants say, that he said that they needed
4 \$50 million or else they were going to proceed with
5 the Lesivo Declaration. But again, inherently
6 unreliable.

7 And what can't be denied is that there is no
8 communication from the Government to FVG that there
9 was ever a request by the Government to either invest
10 50 million in the railroad or else the Lesivo
11 Declaration would be issued. There is no evidence to

12 that, and Claimant's Expert--witnesses, I'm sorry,
13 have told you that.

14 We've submitted here a quote from Waste
15 Management that talks about the inherent unreliability
16 of statements made by political figures in the heat of
17 public debate, and again we will get to a little bit
18 more about that issue later.

19 Now, on the issue of renegotiation, again, I
20 think in relation to the question posed by Secretary
21 Eizenstat, I ran through a good amount of this, I
22 again ask you to really focus on the fact that the

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12:21:59 1 reason these issues were being discussed in tandem is
2 that Claimant asked President Berger for him to
3 conform a Commission to resolve all the issues between
4 the Parties, and it's natural that if that were to
5 happen, all the issues were going to be on the table.

6 Again, other, I think, important signposts of
7 evidence on this issue, the Lesivo Declaration--you
8 heard it from Mr. Marroquin again--when Claimants
9 complain about this in early May of 2006, what does
10 the Government do? Well, their Chief negotiator
11 didn't know about the Lesivo Declaration, obviously
12 couldn't have been using that as a threat--he told you
13 that today. But moreover, at the highest levels of
14 the Government, the President, himself, stopped the
15 lesivo process back in May in order to give the
16 Parties time to negotiate. Again, as I said in
17 opening, that is the direct opposite of using the

18 Lesivo Declaration as a threat mechanism or a pressure
19 mechanism to renegotiate their agreements.

20 I talked already about what happened on the
21 24th of August in that Settlement Agreement. I ask
22 you to just look at the Settlement Agreement and the

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12:23:23 1 testimony relating to that.

2 And, lastly, again I remit you to R-36 and
3 R-37, and in particular in R-37 you will see that, and
4 that's not before you on the screen now, but in R-37
5 you will see that--and there's testimony to this
6 effect from Dr. Gramajo, from Mr. Fuentes, their
7 witness, that during the negotiation meetings Mr. Senn
8 said the issue of fixing the legal defects to FVG was
9 a secondary priority. They didn't really care about
10 it because they were more focused on the other issues
11 that the Parties were discussing.

12 The statement made by the Attorney General
13 during the private meeting, I talked about it in
14 opening, it didn't really feature much during the
15 hearing, but it was referred to again, and again it's
16 a statement made in a private meeting. It was not
17 communicated to them. They put up a clip of the
18 Attorney General in relation to another issue,
19 expropriation. Again, unreliable. It's a newspaper
20 clipping of something that he purportedly said. No
21 evidence, we believe, as to this, which has in essence
22 become the central point of their case now that the

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12:24:48 1 Government was somehow using the Lesivo Declaration to
2 force them to renegotiate their rights in the other
3 agreements.

4 ARBITRATOR CRAWFORD: Mr. Orta?

5 MR. ORTA: Yes, sir.

6 ARBITRATOR CRAWFORD: One of the concerns
7 that one might have about the whole lesividad issue
8 was that it was never very clearly explained--okay,
9 people pointed to these legal difficulties, but the
10 Claimants had been through a bid process. It had
11 rights--we were only concerned with one Contract. It
12 had rights independently of that, which were valuable.
13 It had made an investment. None of that seems to have
14 factored in the decision making at all.

15 Now, you may say, well, there is simply no
16 discretion. There was debate between the legal
17 experts on that, but frankly, I find it very hard to
18 understand how when it comes to a matter such as the
19 interests of the State in relation to a declared
20 interest and a manifest interest in the State and
21 having a functioning railroad how those factors were
22 irrelevant. I just find that hard to understand.

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12:26:02 1 MR. ORTA: Professor Crawford, I don't think
2 that the evidence suggests that those factors were

3 irrelevant, and we don't have testimony from President
4 Berger as to exactly how he factored in the issue of
5 how this Lesivo Declaration would affect the rest of
6 the investment.

7 what we do know, however, is that the
8 President was counseled that this Contract was illegal
9 and that action had to be taken. We also know that
10 the President asked on a number of occasions his other
11 public officials to sit at the negotiating table and
12 try to resolve a resolution of this issue and other
13 issues with FVG.

14 And we further know that, just in terms of
15 the evidence that's before the Tribunal, that when
16 presented with a possible settlement of these issues,
17 the response was, I have no authority from Mr. Senn.
18 There was no--again no counterproposal, there is no
19 statement from Mr. Senn during the meeting on
20 24 August. Let's put the other issues to one side and
21 just resolve today the lesivo issues. I mean, that's
22 absolutely missing. In fact, what you heard from him

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12:27:20 1 is he didn't make any counterproposals. He viewed
2 C-44 as a threat, and he basically walked out of the
3 meeting. He didn't even bother to call Mr. Posner or
4 Mr. Duggan or anyone else who he was reporting to to
5 see whether there was a way to resolve just the issue
6 of the Lesivo Declaration.

7 And you further heard from the Government

8 witnesses at that meeting that they never said you
9 have to resolve all of them or we won't resolve the
10 lesivo issue. Rather, they put before Mr. Senn and
11 his lawyers a proposal that would have resolved had
12 the Parties been able to reach negotiation that day,
13 the issues in relation to Contract 143 and 158, but
14 what they were met with was a response that there
15 would be--there was no authority, and they didn't want
16 to proceed with any further negotiation.

17 I hope that's addressed your question.

18 ARBITRATOR CRAWFORD: Thank you very much.

19 MR. ORTA: In relation to what the evidence
20 shows again, I think there's ample evidence that the
21 Government was acting in good faith at all times. In
22 these negotiations, you see it time and time again

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12:28:35 1 from the President's instruction to form the
2 High-Level Commission, his decision to suspend the
3 lesivo process, his instruction to his public--his
4 advisers to continue to negotiate with FVG to avoid
5 the possibility of the publication of the Lesivo
6 Declaration and to continue to negotiate with them
7 afterwards in an effort to resolve the issues before
8 the Administrative Court action was starting. Or
9 would start, I should say.

10 On the issue of damages, what we know is
11 that, I think it's pretty undisputed here
12 notwithstanding the comments otherwise, the Claimant
13 was never profitable. Their investment produced only

14 losses. On the issue of the supposed future possible
15 leases and easements and other thing, what is the hard
16 evidence before you? You have a number of letters
17 that were all sort of organized immediately after the
18 Lesivo Declaration was issued. We find it somewhat
19 remarkable that all of these letters were sent in such
20 a short time span, but be that notwithstanding, you
21 have no contracts. Where are the contracts? Where
22 are the documents that would support that all of these

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12:29:57 1 supposed deals were about to happen or would have just
2 happened? They're simply not there. You have
3 evidence before you that from one of the witnesses
4 that it took them over two years to try to come up
5 with a lease, and they couldn't come up with one until
6 just before the Lesivo Declaration was issued.

7 And, further, that in relation to the
8 contracts that actually did exist pre-lesivo, that
9 they still have them, they're still benefiting from
10 them, and their revenues have, in fact, gone up since
11 the Lesivo Declaration.

12 On the issue of what really happened, again I
13 think it goes to the second question that we've put
14 before you. We know that there was a defunct railroad
15 with, notwithstanding the efforts made by FVG.
16 However you want to characterize them, they simply
17 were not sufficient. And what we do know is that when
18 they're seeking 63, \$65 million from this Tribunal,

19 they're in essence not only trying to use CAFTA as
20 their insurance for their failed investment, but
21 they're asking you to award them a 22 percent annual
22 return on this failed investment. That's calculated

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12:31:13 1 directly based on the number they're asking for.

2 Again, this case is being used as their
3 golden exit strategy. The statements from the, I
4 believe, the financials are very telling. Mr. Posner
5 telling his shareholders--

6 ARBITRATOR EIZENSTAT: Excuse me, could you
7 point us either now or at some point to where you're
8 contending they were asking for a 22 percent.

9 MR. ORTA: Yes, that's a calculation made
10 based on the \$65 million that the investment they made
11 and the \$65 million that they are claiming in this
12 case.

13 Now, statements from Mr. Posner
14 to--contemporaneous statements before the lesivo issue
15 came up, he tells his Shareholders that they're
16 treading water, that their cash-flow negative, that
17 they're having difficulty obtaining financing. And
18 what we do know is that immediately upon the issuance
19 of the Lesivo Declaration they began planning this
20 case. We have an e-mail on the 11th of August where
21 Mr. Carrasco, one of their lead lawyers in this case,
22 is saying we are working on the international legal

12:32:30 1 proceeding that might be available to us. I will
2 remind you this is the only international legal
3 proceeding they have filed in relation to the Lesivo
4 Declaration.

5 Just a day before, and this is quite telling,
6 a couple of days before the Lesivo Declaration is
7 published, they are signing a long-term contract with
8 Gesur, and that is evidence of the fact that they knew
9 they were going to continue to profit from this, even
10 they were going--meaning the Usufruct, even though
11 they were going to try to put this claim together.

12 Mr. Senn showing up without negotiating
13 authority on the day before the Lesivo Declaration is
14 published. The publishing of the paid advertisement
15 on 28 of August, the first business day after the
16 Lesivo Declaration is issued, and that's substantiated
17 by R-36. And in that statement, Mr. Posner telling
18 the world that the Government of Guatemala had just
19 begun an expropriation of RDC's investment in
20 Guatemala. That's directly taken from the paid press
21 release.

22 Statements at the negotiating table on the

12:33:39 1 28th of August, asking Mr. Senn to please instruct FVG
2 to stop the media campaign in relation to the Lesivo
3 Declaration, given that there were negotiations going

4 on.

5 Press conferences called by Mr.--by FVG at
6 which Mr. Posner traveled to Guatemala to attend. And
7 the statements for those press conferences, you have
8 them on the record, and we've cited them here,
9 mischaracterized the effect of the Lesivo Declaration.

10 They cite to comments by President Berger.
11 They were clearly made after the press conference and
12 in response to their press conference, and if you
13 listen to it carefully, you'll see that he says so.

14 And very shortly after that, they're hiring
15 their damages experts. Mr. MacSwain said to you he
16 was hired in 2006. That doesn't sound like a company
17 who's trying to salvage their investment.

18 March of 2007, they filed their Notice of
19 Arbitration, and then June of 2007, the Request for
20 Arbitration.

21 We've talked about the issue of estoppel, and
22 I think I've addressed this in relation to the

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12:34:54 1 questions posed by Secretary Eizenstat, so I won't
2 rehash all of the issues here, but I think it's
3 important for you to focus on the fact that Claimant
4 knew, FVG knew at the time it executed Contract 143
5 that it was entering into a contract that did not
6 comply with Guatemalan law.

7 You heard Mr. Aguilar and Mr. Mayora--both
8 were consistent on this point--it is improper to
9 incorporate Bidding Terms into a contract and then to

10 deviate from bidding requirements in that contract,
11 and that is precisely what happened in Contract 143 in
12 relation to the issue of Government approval. I want
13 to say that again because that is the direct proof
14 that FVG knew that they were violating Guatemalan law
15 when they entered into that contract. They cannot
16 claim ignorance of the Public Contracting Law here.
17 They can't say, well, Mr. Sarceno was willing to do
18 it, the FEGUA Overseer, and therefore it's okay. They
19 knew that it was against the law, and they did it
20 anyway.

21 And so they shouldn't have any reasonable
22 expectation that Guatemala is not going to use the

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12:36:03 1 lesivo law to address that and other important
2 illegalities.

3 Now, we've talked about the issue of public
4 bidding. Again, they also knew a public bid or should
5 have known a public bid--

6 ARBITRATOR EIZENSTAT: Excuse me, just on
7 that point, even if Ferrovías knew or should have
8 known of the requirement incorporated into the
9 Contract for 41 on the bid, if both Parties, in
10 effect, proceeded on the basis that it was not needed,
11 notwithstanding that, why is it, then, that Ferrovías
12 should have known that one of the two Parties, namely
13 FEGUA, was going to change from what seemed to have
14 been perhaps from your own statement a consensus both

15 new, both proceeded on that basis, why would Ferrovías
16 have reason to think that at some later date that
17 FEGUA was going to change its opinion?

18 MR. ORTA: Well, it's our contention, why are
19 they entering into a contract--if you look at the
20 evidence, up until August 2003, how were they using
21 the rail equipment? They were using it based on these
22 letter agreements that had been exchanged with the

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12:37:27 1 Overseer. And again, this evidence is unrefuted.
2 what were they paying for the use of the railway
3 equipment up until August 2003? Nothing. They had
4 letter agreements saying they would pay--they proposed
5 the letter agreements, and you heard from Mr. Aguilar
6 yesterday they proposed the letter agreement, I think
7 it was, 17 days after the Contract 41 went into effect
8 when they knew that, at a minimum, it was going to
9 take time to get--some time to get the Government
10 approval and that the Contract would not go into
11 effect until 30 days after that approval was obtained.
12 That's right in Section 6 of Contract 41 and in the
13 Bidding Terms.

14 So, they knew that they shouldn't be
15 requesting the use of the equipment through the Letter
16 Authorizations, but they nonetheless did so, and then
17 they proceeded to use the equipment for almost four
18 years without paying for it.

19 So, a few--and this is important. A few
20 months, just three months before the end of the

21 administration, the prior Presidential administration,
22 they enter into backdated leases with the Overseer in

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12:38:48 1 order to pay to make up payments--the payments for
2 their use of the equipment for that interim four years
3 where they weren't making any payments. They make
4 those agreements and then immediately terminate them
5 and enter into this other agreement.

6 Now, in light of that, in the face of that,
7 and in the face of their knowledge that this
8 requirement was necessary and, hence, why they were
9 operating under these letter agreements for the prior
10 four years, they can't benefit from that conduct here
11 in asserting their CAFTA claim.

12 And the other response to your question,
13 Secretary Eizenstat, is that a few months, a few short
14 month, and you even heard Mr. Senn say it was almost
15 immediately, and you know it was because it was
16 unrebutted here, in March of 2004 or April 2004, which
17 is literally three months or four months after--five
18 months, something like that, after the amended
19 Contract 158, they make a request from Overseer--from
20 the new Overseer, there is a new administration coming
21 in, and I--my conjecture, it's conjecture that the
22 reason this Contract gets signed when it did is

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12:40:08 1 because there was a new Presidential administration
2 coming in, and they wanted to regularize their use of
3 the equipment. Again, that's my conjecture based on
4 the facts.

5 Now, what happens is they make a request for
6 use of the equipment to the new Overseer, and what
7 does he say? And this is unrebutted, he sends back a
8 letter saying, I have to deny your request, see
9 attached Legal Opinion, and the attached Legal Opinion
10 talks about a few legal defects, including the lack of
11 Executive approval.

12 So, what reasonable--I don't think it was
13 reasonable for them, I contend, to rely upon this,
14 this acceptance of this Contract by the Overseer in
15 the face of what they had done in the four years
16 proceeding and in the face of the fact that they
17 immediately were told by the new administration that
18 contract is out of bounds and against the law.

19 PRESIDENT RIGO: Excuse me, I would ask that
20 you be succinct as possible in the replies because we
21 are--we have no time.

22 MR. ORTA: I understand that, and I will do

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12:41:14 1 my best.

2 ARBITRATOR EIZENSTAT: Last point on this.
3 Is there any relevance to the fact that a prior
4 Overseer in the Year 2000 under 41 went directly to
5 the President to try to get him to sign 41 and

6 testified to us that it's mystifying to him as to why
7 that wasn't done, and then under 143 it doesn't get
8 done. There seems to be this pattern of not getting
9 Presidential approval.

10 So, is there any relevance to his testimony?

11 MR. ORTA: For the issues that are being
12 decided in this case, I don't think so because I think
13 the question--I mean, this is not a case about whether
14 the Government declared lesivo Contract 41. The
15 Parties, together, terminated Contract 41 when they
16 entered into Contract 143, and the legal opinions all
17 say, you know, that's a terminated Contract that the
18 Parties have by their consent terminated, so you can't
19 revive that one, to my understanding.

20 And as it relates to Contract 143, as you
21 heard, you can't submit an illegal Contract to the
22 President and ask him to approve it. You had to enter

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12:42:27 1 into a new contract, and you had to have a new public
2 bid and cure the legal deficiencies.

3 So, moving along, we believe that the record
4 establishes, you know, that there really--there should
5 not be any estoppel as has been requested by Claimant
6 for the reasons we've argued and the reasons that I've
7 just asserted in terms of the conduct from the
8 Claimant. On the--and I'm going to move through some
9 of these things. There are points that I've made to
10 the Tribunal already, you know. Claimant recognizes

11 after they are told that the Contract is deficient
12 immediately by the Overseer. They knew the Contract
13 wasn't being accepted. They wrote to the
14 Vice-Minister of Communications telling him that,
15 asking him to formally acknowledge the Contract and
16 talking about the fact that they were in negotiations
17 to enter into a new contract. They knew at the time
18 that the Government wasn't accepting the Contract.
19 They've crafted a different argument here for
20 litigation, but that's not what the evidence shows.
21 This is document R-9.
22 I have been through the issue of the

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12:43:43 1 President's decision being reasonable, so I'm not
2 going to go into that. I will point out to you, and I
3 think this is important--the theory of the case has
4 changed. When you look at the press release that
5 Claimant put out that's most close in time to the
6 issuance of the Lesivo Declaration, the alleged
7 Government motivation for the Lesivo Declaration was
8 withdrawal of the local arbitration process,
9 appropriate the Claimant's investment without payment,
10 and the giving of the Usufruct to, they say, private
11 interests, and we assume they meant Mr. Campollo,
12 although that they didn't name him.
13 Same in the Request for Arbitration, but then
14 when they get to the Memorial for the merits, then
15 they begin to talk about the Lesivo Declaration as a
16 threat instrument to get them to renegotiate

17 Contracts, so by that point, you know, now with the
18 benefit of their lawyers, they come up with this
19 different theory.

20 And then not until the Reply in this case do
21 we first hear about this 50 million-dollar business,
22 so I think that is quite telling in terms of what they

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12:44:52 1 really think.

2 The other thing that we will point out very
3 quickly is that the amount that they have claimed in
4 this case has been remarkably consistent, and we
5 believe it's a remarkable coincidence that in the
6 Notice of Arbitration they sought 65 million, claiming
7 50 and 15--50 in lost profits and 15 in lost
8 investment, and this is before their Expert was
9 involved, and you heard him say, Mr. Thompson, he had
10 no involvement at all in these figures, but yet the
11 experts today come up with the same number, 65 million
12 in essence.

13 I do want to raise one legal point which I
14 think is important, and that is this Tribunal has
15 already ruled that the issues in relation to squatters
16 and the eviction of the squatters and the trust
17 payments is out of this case, and that those measures
18 cannot form the basis for any finding of liability in
19 this case, and we just reassert that point here
20 because there has been a lot of discussion about
21 pre-lesivo conduct by the Government here.

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12:46:11 1 you to look at that for context, certainly the
2 doctrines, well respected doctrines of *ratione*
3 *temporis*, which I don't need to tell this Tribunal
4 about, don't allow you to point to or rely on
5 Government conduct pre-entry into CAFTA in order to
6 find the Government liable under CAFTA.

7 Now, let's talk about the legal claims, okay?
8 We, as I contended at the beginning, we believe they
9 haven't proven any of them, and I'm going to spend the
10 most time talking about fair and equitable treatment
11 because I think that with respect to the other claims,
12 while I will discuss them very briefly, I think that
13 there is absolutely no evidence at all for any of
14 their claims, but in particular for these others, I
15 think they're very easily disposed of by the Tribunal.

16 On the issue of indirect expropriation, the
17 Claimants have conceded it's a matter of record here
18 that Guatemala as a legal matter didn't interfere with
19 any of their contracts. They have every right that
20 they ever had under Contract 143 and 158 today. They
21 have possession of the rail equipment. They have
22 every right they ever had under Contract 402, the

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12:47:24 1 Right of way Contract. They have that today, and they
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2 continue to profit from it.

3 The why, and this is a very interesting
4 question for the Tribunal, the why they haven't gone
5 out and tried to continued to exploit their rights
6 under that agreement, the why they're not going out
7 and trying to collect rent from all these industrial
8 squatters, well, Guatemala shouldn't be liable for
9 that. They decided unilaterally to leave the country
10 in a very public way with a public announcement with
11 Mr. Posner being in the front pages of the newspaper
12 in September of 2007. They announced it in March of
13 2007, and we, meaning the Government of Guatemala,
14 should not be responsible for their decision to leave
15 the country and not exploit their Usufruct rights that
16 they again still have today.

17 On the issue of interference, again I think
18 based on what I just said, as a legal matter, their
19 property rights have not been interfered with. They
20 claim they have an inability to generate economic
21 returns from that investment, but again we believe
22 that that's not the case. The reason they're not

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12:48:38 1 generating any more economic investment from their
2 Usufruct rights is because they've decided not to
3 pursue them. They left the country. They're not out
4 there trying to collect rents from the squatters. You
5 heard from them 92 percent of their investment is
6 their right to exploit the right of way for real

7 estate values. But they're not going out there and
8 doing it. That's not Guatemala's fault. Guatemala is
9 not preventing them from doing it.

10 So, you know, we claim that they have not
11 offered evidence on the issue of interference. They
12 have also not offered evidence on the issue of the
13 substantiality of the effect of the expropriatory,
14 what they claim is the expropriatory act here, the
15 Lesivo Declaration. Their revenues have gone up
16 post-lesivo.

17 On the issue of discriminatory intent, I
18 think we've already dealt with it. They simply have
19 not proven it.

20 On the issue of the Shufeldt case which they
21 cited in their opening, I will just leave you to the
22 slide, but it was not a case like this one. In that

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12:49:46 1 case, which was quite a long time ago, the legislative
2 Decree on its own had the immediate effect of bringing
3 their Contract to an end. That's not this case.
4 Their contract rights are still in their possession,
5 and they can exploit them. They have just chosen not
6 to.

7 On the issue of whether this is an unlawful
8 expropriation, I'm only going to, you know--we have
9 been through the other elements. Certainly we believe
10 that upholding the Guatemalan Constitution, upholding
11 Public Contracting Laws are reasons that are in the
12 public purpose and for the public interest, and that

13 is the evidence as to why the President made the
14 decision he made to declare the Agreement lesivo.

15 The issue on due process, I think, is again a
16 nonissue here. You heard Mr. Franco's testimony, and
17 I think that speaks for itself.

18 And on the issue of prompt and adequate
19 compensation, under CAFTA that's not due yet, and
20 again we don't think there has been any expropriation
21 here, but that claim is not right because under CAFTA
22 that compensation is not due. And you also saw that

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12:51:03 1 they do have the ability to obtain back any monies
2 that they paid through the Usufruct if the
3 Administrative Court confirms the Lesivo Declaration.
4 And you also heard from their own witness, Mr. Franco,
5 that they have the ability to file a separate action
6 to seek damages, even if you don't believe they can
7 seek damages in the administrative action.

8 ARBITRATOR EIZENSTAT: Is there some point in
9 time after a number of year delay Administrative Court
10 not ruling that one could come to the conclusion that
11 there is not going to be a ruling and, therefore,
12 prompt and adequate compensation should be due?

13 MR. ORTA: I suppose that would be possible.
14 I don't think we're even close to there yet, because
15 what the record evidence establishes is that the
16 proceedings closed back in 2010, so they have been
17 waiting for a ruling, I believe--I don't want to

18 misspeak, but somewhere around a year. It's not
19 entirely uncommon for ICSID tribunals to take a year
20 to issue rulings. I don't think it can be said that
21 in Guatemala the fact that there isn't a ruling yet,
22 especially in the face of requests by the Government

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12:52:17 1 for a ruling to be issued that that should be given
2 any weight here.

3 On the issue of fair and equitable treatment,
4 I want to spend a little bit of time, not much, on the
5 standard because I want to highlight again as I did in
6 opening that this is the first Tribunal who's going to
7 make a determination about what the fair and equitable
8 treatment standard means under CAFTA. Again, both
9 Parties agree, customary international law, but they
10 disagree on what that means, and I think that is a
11 very important issue that this Tribunal will have to
12 struggle with.

13 We have said that the standard can't be what
14 the Claimant has articulated. It can't be whatever
15 you find in any arbitral award because those arbitral
16 awards, in order for them to be relevant for this
17 Tribunal, you need to first reach the conclusion that
18 those arbitral awards were making a decision on what
19 customary or applying international minimum standard
20 of treatment under customary international law, and
21 Claimant has cited a number of awards that are not
22 doing that, and so we believe the standards they have

12:53:25 1 articulated in that regard should not be utilized
2 here.

3 The standard under 10.5, and I will read
4 from--it's not up on the screen, but Annex 10b says
5 that the CAFTA parties, in asking tribunals to apply
6 customary international law, they say it has to be
7 something that results from a general and consistent
8 practice of states that they follow from a sense of
9 legal obligation. That's not arbitral awards citing
10 autonomous standards. That has to be established by
11 the Claimant, and we believe that the Glamis Gold
12 Award, UPS Award, and others that we've provided to
13 the Tribunal are ones that articulate the right
14 standards. Again, you should not be looking at
15 autonomous standards to determine what the minimum
16 standard of treatment is for fair and equitable
17 treatment in this Treaty.

18 On the issue of the minimum standard of
19 treatment, we submit to you the Cargill Award--these
20 are in our briefs. This is the standard as to which
21 Guatemala's conduct should be applied. We cite to you
22 here RL-175, Paragraph 296. The question is whether

12:54:45 1 the conduct at issue here is grossly unfair, unjust,
2 or idiosyncratic, arbitrary beyond a merely

3 inconsistent or questionable application of
4 administrative or legal policy--I want to pause there
5 because I think that's very relevant for what you're
6 being asked to determine here, the standard that's
7 articulated here in Cargill--and it has to be conduct
8 that is so unexpected so as to be a shocking
9 repudiation of a policy. The application of an
10 existing law made at the time that they invested
11 simply does not meet that standard.

12 we also cite you to S.D. Myers, which we
13 think is very relevant for your decision making.
14 Tribunals could not be second-guessing government
15 decision making, and the standard really is a high one
16 when you're being asked to do that, and here you're
17 being asked to second-guess a decision that's made by
18 the highest official in Guatemala, the President.

19 So, this is the standard, and we believe
20 that, as applied to that standard, we've proven we
21 haven't violated it. The reason Government opinions
22 informed the President's decision, he took the actions

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12:56:02 1 for important reasons, for protection of the public
2 interest. He would incur personal liability, or at
3 least he was told he would if he didn't take it, and
4 that does not establish a fair and equitable treatment
5 violation under CAFTA. Far, far from it.

6 On the standards that Claimant has
7 articulated, as we said in opening, we believe that we
8 meet the standards that should be applied, and those

9 are the ones that I just talked about, but even if you
10 judge Guatemala's conduct based on the standards that
11 Claimant has asked you to judge him against, we
12 believe that the evidence shows that we have not
13 violated any of them.

14 In the interest of time, I'm not going to go
15 through all of the evidence here. I submitted it to
16 you. Everything that we have cited here is backed up
17 by quotes or cites to the Declaration--I'm sorry, to
18 the evidence in the case.

19 Now, again, no violation of due process, no
20 arbitrary conduct by the Government in relation to the
21 issuance of the Lesivo Declaration. No frustration of
22 their legitimate expectations. Again, we claim they

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12:57:21 1 don't have a legitimate expectation not to have the
2 Contract that they knew was illegal challenged by the
3 Government.

4 On the issue of transparency, again, the
5 lesivo law was on the books, and they signed up for it
6 when they invested in Guatemala. Nobody made any
7 assurances to them that this lesivo law would be
8 applied as to their investment. No one.

9 Full protection and security, I think again
10 I'm not going to spend much time here because the real
11 issue is did the Government act with due diligence,
12 did they take reasonable measures, and we believe that
13 the evidence shows that they took reasonable measures.

14 The best that Claimant has been able to
15 muster is point to a few instances where they suggest
16 Guatemala didn't act as quickly as they wanted.
17 That's not a violation of full protection and security
18 under CAFTA. Again, it doesn't even come close, in
19 our estimation.

20 On the issue of squatters, and I want to
21 pause here again very briefly just to say underscore
22 the point we made both during the hearing and in

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12:58:39 1 opening, there is no evidence--no, no, evidence, we
2 think, reliable, credible evidence about the
3 industrial squatters, when they got there and whether
4 they were there pre- or post-lesivo. And perhaps an
5 even more important point, no evidence that those
6 industrial squatters didn't decide to go and invade
7 the right of way when Claimant made the very public
8 announcement that they were abandoning their
9 investment and leaving the country. All of the
10 pictures that were remitted to you were from 2009 to
11 2011, and that is more than two years after Claimant
12 publicly told all of Guatemala that they were packing
13 up their bags and heading back to Pittsburgh.

14 So, no violation of full protection and
15 security.

16 On the issue of national treatment, again I
17 think this is a nonevent, an easy claim to dispose of.
18 It's a different railway. It's not the same kind of
19 business. There has been no showing that Mr. Campollo

20 is in like circumstances or that he received any more
21 favorable treatment as compared to them.

22 with the few minutes I have left, I want to

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01:00:01 1 talk very briefly about damages.

2 On the issue of damages, again I think that
3 the evidence before this Tribunal is quite stark, and
4 again I want to remind you the context in which you're
5 being asked to award Claimant \$65 million. They had
6 made an investment. They had only restored one phase.
7 They had only been able to procure very limited Right
8 of way Contracts for the real estate, and it's
9 un rebutted that they had only losses, only losses,
10 from Day 1 until the day they left the country. Only
11 losses.

12 Now, notwithstanding that they're asking you
13 for 65 million--and again, we point out the remarkable
14 coincidence between the numbers that they've sought
15 from Day 1 and that their experts have validated for
16 them, their experts have remarkably reached the same
17 number that they were asking for before they hired
18 their experts, the setting at the time of the Lesivo
19 Declaration was a business that produced only losses,
20 a huge, huge problem in relation to the building out
21 of Phase II because they couldn't get funding for it,
22 and the evidence is undisputed that, at a minimum--at

01:01:31 1 a minimum they would need at least a hundred million
2 dollars to build Phase II, and their estimates are
3 much higher. I remit you to document 322 where
4 Mr. Duggan makes estimates at right around
5 \$100 million.

6 And the question is would a willing buyer
7 really be willing to pay a willing seller anything for
8 that? Anything? When the only way they stayed out of
9 bankruptcy was asking their shareholders for capital
10 contributions each and every year. Warren Buffett's
11 name was invoked here. What would Warren Buffett pay
12 for this investment on the day of Lesivo Declaration?
13 I think the answer is nothing.

14 There has been some suggestion in terms of
15 the damages Award that somehow the Tribunal should
16 Award a different--a different set of damages in order
17 to somehow punish Guatemala for their conduct. I
18 realize the Chairman made a statement on the record
19 that, of course, under CAFTA that's not allowed, but
20 our point is that it looks like the Claimants' experts
21 are seeking exactly that, based on their testimony in
22 this case.

01:02:51 1 On the issue of the future profits claimed,
2 again we believe that they're highly, highly
3 speculative, and that there's no real evidence of it.
4 Again, what you have before you here in C-27 is their

5 actual record of operations. They lost money every
6 single year.

7 In relation to, again what you're being asked
8 to believe what had happened, they're asking you to
9 believe that their real estate revenues would have
10 gone up because they would have dramatically changed
11 and altered what happened in the first eight years
12 that they were in business. You have been given no
13 proof or evidence to really reach that conclusion.
14 Again, where are the contracts? Where are
15 the--where's the hard evidence that any of this was
16 anything other than something that they hoped for or
17 something that was more of a pie in the sky
18 projection? There is none.

19 On the issue of the real estate revenues--I'm
20 sorry, the railroad revenues, again same thing, and
21 especially when you consider that they had--as of the
22 date of the Lesivo Resolution, they had no viable

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01:04:10 1 sources for funding for the rail project.

2 Same thing, just look at their own
3 statements, we remit them to you here. Look at their
4 contemporaneous statements where they tell you that
5 there was no demand for their right of way, no demand
6 for their rail operations.

7 On the issue of what is the Fair Market Value
8 of their investment? Again, we don't believe that
9 they have proven that it's anything other than

10 negative value. They cite to a lot of these
11 industrial squatters. I've made the point about them.
12 They sent you pictures about them. You might have
13 wondered why I maintained my objection as to the
14 authenticity of some of to them. Well, the fact
15 is--and I don't remember which slide it's in here, but
16 25 percent of those pictures, nine out of the 36 of
17 them, were taken apparently by somebody else because
18 Mr. Senn's testimony is he took them within a
19 two-month time frame, but again, 25 percent of them
20 were not by their--if you just believe the date of the
21 picture, were not taken on those dates. So we don't
22 know who took them, we don't know where they're from,

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01:05:29 1 and that is why if you were wondering I maintained my
2 objection as to the authenticity.

3 So, in closing, we maintained that the Fair
4 Market Value of the investment as, I think,
5 correctly--correctly--projected by Dr. Spiller is that
6 at the time of the Lesivo Declaration their business
7 had a negative \$2.7 million value; and, as a result,
8 when judging what would a willing buyer pay a willing
9 seller for that investment, for that asset, at that
10 period of time, we believe the answer is zero, and
11 Claimants have failed to prove otherwise.

12 with that, I will in about 10 seconds here
13 just tell you about our prayer for relief. Again, we
14 believe that we have proven that they have not made
15 out a case for any of the CAFTA violations that

16 they've asserted in this case, and we therefore
17 believe that Guatemala should be found to have not
18 violated CAFTA, and its attorneys' fees and costs in
19 interest should be awarded. I think especially when
20 you judge the quality of the evidence before you. If
21 you Award any damages, we say that those damages
22 should first be conditioned on their renouncing all of

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01:06:56 1 their rights under the Usufruct contracts. This went
2 directly to the question posed by Professor Crawford
3 to Mr. Foster at the end of his presentation and--that
4 might be the end of my presentation, but unexpectedly,
5 but we again believe that the number here, if you were
6 ever to get the damages, should be zero, and we would
7 remit to you the Biwater Gauff Case where there was a
8 similar scenario in relation to--in that case the
9 Tribunal found liability but found that the Fair
10 Market Value of the investment at the time of the
11 alleged violation was negative and, therefore, awarded
12 zero.

13 Again, we believe there has been no
14 establishment that there has been any violation of
15 CAFTA, but if you get to damage, that is what we
16 believe the right result is. I want to thank you for
17 your time this morning.

18 PRESIDENT RIGO: Thank you, Mr. Orta.

19 we will have a break now, and we will
20 reconvene at 2:15, so have a good time at lunch.

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

22 (Whereupon, at 1:07 p.m., the hearing was

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01:08:11 1 adjourned until 2:15 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT RIGO: Good afternoon. We resume
3 this session for rebuttals.

4 Mr. Foster has the floor.

5 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

6 MR. FOSTER: Thank you, Mr. President. I
7 hope you will excuse my presentation if it's kind of
8 on the bullet point style as opposed to maybe
9 logically organized. It's more organized in
10 chronological order from what Mr. Orta said as opposed
11 to a great logical analysis, and so I would like to
12 start with the first comment he made.

13 He said that FVG didn't have sufficient
14 capital and that its projections were overly
15 optimistic. I think we need to remember that we are
16 dealing here--FVG is RDC's investment vehicle under
17 CAFTA, and, therefore, we're not just looking at FVG.
18 We're looking at FVG and RDC, and there certainly can
19 be no credible assertion that RDC was insufficiently
20 capitalized.

21 Furthermore, in each one of the accounting
22 certifications of the company of FVG's books, the

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02:22:52 1 accountants note that RDC has committed to provide the
2 funds necessary for the operation of FVG, and so there
3 is an explicit commitment as well as the legal point
4 about FVG being the investment vehicle.

5 And also I think we need to remember, insofar

6 as thin capitalization is concerned, that FVG was
7 only--RDC through FVG was only required to invest
8 \$10 million. It invested 20. That's hardly what you
9 would call the result of thin capitalization.

10 Insofar as the so-called "overly optimistic
11 projections," please note the difference between RDC's
12 projections concerning railroad revenues and the
13 Government's own projections. The Government's
14 projections, as contained in the documents put out to
15 bid were far more optimistic than RDC's projections
16 about freight traffic. So, the RDC actually had more
17 conservative projections than the Government itself.

18 I think it's also important for us to
19 remember that we're talking about a 50-year period of
20 time. This is a 50-year concession for a reason.
21 There is an explicit recognition by the Government
22 that in order to get people to make this kind of

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02:24:30 1 investment, all of which is up front, let's remember,
2 there has to be a sufficient period of time for the
3 business to be developed and for that investment to be
4 recovered together with a profit.

5 So, the length of the concession I think is
6 particularly important when you're considering these
7 questions.

8 We talked a little bit about the fact that
9 RDC was initially focused more on the railroad than on
10 the real estate. Well, of course, they were. The
11 railroad was the key to unlocking the value that was

12 in the real estate. RDC had responsibilities to begin
13 restoration of phases of the railroad and to operate
14 trains on segments. If they didn't do that, they were
15 in the position of being defaulted under Contract 402,
16 and losing the real estate. Therefore, of necessity,
17 they had to be more focused in the first instance on
18 railroad activities, knowing full well that they had a
19 50-year period of time to unlock that value. Let's
20 all just think of our own experiences. This is kind
21 of like a golf course community. No one really
22 believes that anyone builds a golf course to make

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02:25:49 1 money operating the golf course. They make the money
2 selling the lots that surround the golf course, and
3 those lots don't all sell out in one year, and they
4 build the golf course first, and they concentrate on
5 making sure that the golf course is operating well so
6 that people want to come and buy the lots that adjoin
7 the golf course. So, I think it was a perfectly
8 natural thing.

9 I would also point out that it was the
10 honorable thing. They could have done a slipshod job,
11 invested \$10 million instead of 20 million, skimped on
12 what they were doing with the railroad, and spent all
13 their time concentrating on that which was going to
14 put the most money in their own pockets. But instead
15 they concentrated on that aspect of the project that
16 was most important to the country of Guatemala.

17 So, what I think Mr. Orta is asking you to do
18 is to fault RDC for taking the honorable course, not
19 the quick course, the cheap course, or the
20 self-profiting course.

21 Professor Crawford also asked the question
22 about if you, the Tribunal, were to decide that the

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02:27:06 1 Contract was lesivo, wouldn't that have considerable
2 effect on a fair and equitable treatment claim? Well,
3 I would ask you also to consider the possibility that
4 you conclude that the Contract was not lesivo; or that
5 you conclude that the reasons advanced for lesividad,
6 these legal defects are not a proper ground; or that
7 you conclude that the lesivo process, itself, did not
8 afford due process; or you conclude that the process
9 of lesivo, keeping it secret for many years was done
10 in bad faith. I would suggest to you that those
11 conclusions would have an equal, if not greater effect
12 upon your consideration of fair and equitable
13 treatment.

14 Mr. Orta told you that a public bid was not
15 just a technicality. Well, it's interesting that a
16 little bit later in his presentation he admitted that
17 in the original evaluation of the contract, the issue
18 of the public bidding was not even mentioned. It was
19 focused on Presidential approval, not public bidding.

20 So, what we have here is a course of conduct
21 by the Respondent through nine secret opinions of
22 various lawyers creating a Catch-22 for themselves.

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02:28:36 1 They created a lack of public bidding problem for
2 themselves as an excuse to declare lesivo; and, once
3 they create that problem, it, unlike the Executive
4 approval, can't be solved so easily.

5 So, if, instead of creating these problems
6 for themselves when they identified the lack of
7 Executive approval of the Contract as being a problem,
8 if they had simply done that which was well within
9 their own power, and that is secure the Executive
10 approval either from that President or any other
11 President that came into office thereafter, then we
12 wouldn't be faced with what we're faced with today.

13 But the absurdity of this whole idea is
14 demonstrated by Dr. Gramajo's testimony, when he was
15 asked why didn't you get another public bid, his
16 answer was, "We were afraid FVG wouldn't win it." It
17 is incomprehensible that the real reason that they
18 didn't get the public bid was because they were afraid
19 FVG wouldn't win it, under the conditions--you heard
20 Dr. Gramajo and how determined he was in his campaign
21 over many years and with nine separate secret legal
22 opinions to get this Contract declared lesivo, and

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02:30:07 1 he's trying to tell you that the real reason they

2 didn't want a public bid was they were afraid FVG
3 wouldn't win it?

4 Now, as to the issue of whether FVG or RDC
5 had any idea that any of these contracts had contained
6 illegalities, there is not a shred of evidence that
7 FVG in any way knew that Contract 41 that was signed
8 with Overseer Sarceno was in any way illegal. If they
9 had ever thought that it was in any way illegal, would
10 they have agreed to replace it with 143 and 158 if
11 they had thought there was going to be a possible
12 illegality in 143 and 158 as well? No one would do
13 that. Why? It's undisputed that 41 was executed, and
14 we had several opinions from the Overseer at the time
15 who negotiated it saying there wasn't a thing wrong
16 with that contract. Why would anyone agree to
17 renegotiate a contract that everybody said had nothing
18 wrong with it if they thought they were going to
19 renegotiate it with an illegal Contract? That makes
20 absolutely no sense.

21 And furthermore, isn't FVG entitled to rely
22 on the fact that FEGUA's own Legal Department opined

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02:31:37 1 that Contract 143 was in effect and that FEGUA was
2 accepting Canon payments under that contract? Surely
3 they can't come in here today and tell you that FVG
4 knew the Contract was illegal when their own Legal
5 Department was saying that it was in effect and they
6 were receiving Canon payments under it.

7 Mr. Orta posits what I would describe as the
Page 153

8 ridiculous assertion that we can rely on letter
9 authorizations to use the equipment prior to Contract
10 143, but they're we are not entitled to have
11 reasonable reliance on the contracts themselves. That
12 also makes absolutely no sense.

13 Mr. Orta, on numerous occasions and in slides
14 cites these nine separate Legal Opinions that they
15 secured--in secret, of course. Can't we rely upon the
16 fact they never showed any of them to us? If they
17 thought that we already knew that Contracts 143 and
18 158 were illegal, what advantage would there have been
19 to keeping those opinions secret? Why wouldn't they
20 have just given them to us? And furthermore, on the
21 issue of good faith, if they had honestly wanted to
22 resolve any problems that there were in connection

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02:33:11 1 with that Contract, why wouldn't they have come to us
2 and said here's the Legal Opinion that we just got
3 from so-and-so or the Attorney General or the
4 attorneys for the Ministry of Communication, and they
5 point out these problems in the Contract. Why don't
6 we get together and solve these problems? But none of
7 that was ever done.

8 And, indeed, on this issue of good faith,
9 even after lesivo was declared, it was six months
10 before they ever told us what the technical
11 difficulties were with the contracts. Now, if there
12 was any desire whatsoever to negotiate in good faith

13 to resolve the difficulties with these contracts,
14 wouldn't the appropriate course of action have been to
15 come to us and say, "Here are the problems. What can
16 we do, working together, to solve them?"

17 Mr. Orta also tells you that the reason all
18 these issues were in negotiation between the Parties
19 was because the Claimant wanted all the issues to be
20 negotiated at the same time. That's nonsense. The
21 President created the High-Level Commission. At the
22 same time he was creating the High-Level Commission,

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02:34:37 1 if you remember Dr. Gramajo wrote him the letter
2 asking him to declare the Contract lesivo in early
3 January of 2006. You have the letter before you. The
4 presidential--meeting with the President was on March
5 the 9th, if my memory serves me correctly. He
6 appointed the High-Level Railroad Commission.

7 Mr. Orta tells you, oh, the President was
8 trying to solve these problems by appointing the
9 High-Level Railroad Commission. Well, what the
10 President didn't do was to say, "By the way, since
11 January the 6th, I have been considering a request
12 from this guy who's standing right over here at this
13 meeting that we're having today. I have been
14 considering a request from him to declare your
15 Contract lesivo for a couple of months now. So, why
16 don't you sit down and talk about that when you're
17 talking in your High-Level Railroad Commission?"

18 Indeed, the absence of telling anybody about
Page 155

19 the lesivo process while the High-Level Railroad
20 Commission was meeting cuts against them, not for
21 them. If they had been negotiating in good faith, all
22 of these things would have been out on the table, and

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02:35:53 1 FVG would have had the opportunity to say, "wait just
2 a minute. Those contracts are not lesivo. You say
3 they're lesivo for X reason, but that's not right.
4 You say they're lesivo for Y reason, but that's not
5 right. You say they're lesivo for Z reason, let's fix
6 it." None of that was done.

7 The idea that the President would create a
8 Commission and appoint someone to run it and not even
9 tell that person that for two months he's been
10 considering the possibility of declaring this Contract
11 lesivo, the idea that that is proceeding in good faith
12 toward the Concessionaire is ridiculous.

13 And look at the issues that Mr. Orta would
14 have you believe we brought to the table. Do you
15 really honestly believe that we brought to the table
16 the issue of changing the Contract to eliminate the
17 payments to the Trust Fund? We brought to the table
18 getting paid under the Trust Fund. They're the ones
19 who want to eliminate the requirement for payments to
20 the Trust Fund. Do you honestly believe that we
21 brought to the table an idea that we would eliminate
22 the requirement of FEGUA to remove squatters? Of

02:37:15 1 course not. We brought to the table the absolute
2 obligation of FEGUA to remove squatters and their
3 total and complete abdication of that responsibility.
4 They're the ones who wanted to remove it from the
5 Contract.

6 And in this regard I'd like to direct you to
7 C-44 which I had right here--here it is. Thank you,
8 Nick. I want to read you something from C-44. This
9 is the proposal which we call it the
10 take-it-or-leave-it proposal. They don't like those
11 words, but I want to read you something from this
12 document. On Page RDC002428, they say: "In line with
13 the privatization process, FEGUA called private
14 companies to take part in a public bidding process to
15 receive in onerous usufruct the repair, maintenance,
16 use, and exploitation of the railway equipment owned
17 by FEGUA." Now, they're reciting in this document
18 drafted by them that there was a public bidding
19 process for the Equipment Contract.

20 "As a result of said process, Ferrovías was
21 awarded the Onerous Usufruct Contract Involving
22 Railway Equipment as documented by public Deed

02:39:06 1 Number 143." They're reciting in this document that
2 Contract 143 was awarded by public bid. I submit to
3 you gentlemen that the reason this document says that
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4 is because that's the way they had decided to fix the
5 problem. If they got Ferrovías to agree to all the
6 other demands in this document, they were going to fix
7 the public bidding process by just declaring that it
8 had happened.

9 Now, there are only two possibilities: That
10 they didn't read what they wrote or that that's what
11 they meant and that's what they were going to do. I
12 don't believe you will be able to conclude that they
13 didn't mean what they wrote or that they didn't read
14 it.

15 Now, then go on from that, if you will,
16 please, to the next page in this document, and look
17 what it is that they want us to sign. That day,
18 remember they gave it to us on the 24th, and lesivo is
19 going to be declared tomorrow, so their protestations
20 that there was going to be time for any significant
21 negotiations simply ring hollow. We had one day.
22 That was it. And at the top of this, they're talking

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02:40:24 1 about renegotiating Contract 42, to restructure the
2 national railway network restoration plan, surrender
3 railway sections yet to be restored in which other
4 investors may be interested, surrendering real
5 property not destined to railway use, receiving
6 railway sections that are currently free of squatters.
7 That's all Contract 402.

8 The next thing they deal with--not Contract

9 143. This is Contract 402. The first thing they talk
10 about is renegotiating Contract 402. Then they talk
11 about renegotiating Contract 820, when they talk about
12 modifying fees for railway and different from
13 railway activities and FEGUA not being bound to
14 further evictions. And that's all--none of this has
15 anything to do with the railroad equipment.

16 And then, finally, they get down to 143, and
17 they want to modify the trust--that's 820 also, I'm
18 sorry--modifying the payment trust regarding the
19 actual amount that FEGUA has to contribute to the
20 trust.

21 They finally get down at the very bottom of
22 the page to Contract 402: Modifications to the

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02:41:52 1 Contract involving railway equipment in order to
2 rectify the terms which are deemed to cause lesion,
3 and they don't tell us what they are.

4 And then, of course, you get to the part they
5 really were interested in, which is modifications to
6 the amount of the fees.

7 Now, they then tell us that we have to post a
8 bond in order to guarantee. That's the next provision
9 in here. We have to post a bond to guarantee that we
10 will renegotiate these terms.

11 And then if you turn over to the last
12 paragraph, General Acceptance, "the appearing Parties
13 in their corresponding acting capacities declare to
14 expressly accept the contents of this instrument and

15 are bound to fully comply the terms of this
16 agreement." I submit to you that that is a
17 take-it-or-leave-it offer.

18 Let's also consider the circumstances that
19 are involved in the meeting where the
20 take-it-or-leave-it offer was presented. Mr. Senn was
21 called early one morning, the day before the meeting
22 was going to occur. He was told to show up at the

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02:43:17 1 meeting. He was not told what the meeting was going
2 to be about, and he was not told that he was going to
3 receive a settlement demand, and they fault Mr. Senn
4 for going to the meeting and saying that he wasn't
5 authorized to sign the document on the spot?

6 Let's talk just a second about the personal
7 liability of the President. The personal liability of
8 the President, that reason is not included in any one
9 of the nine opinions that they got with regard to
10 lesivo. This is an after-the-fact invention of the
11 Respondent to try to justify what they did. It
12 certainly was not a basis on which anyone ever said
13 lesivo needed to be declared.

14 Now, let's talk about the 50 million-dollar
15 investment that the President demanded that we make.
16 Gentlemen, you watched a video clip of the President
17 making the demand. You heard, although of not good
18 quality, an audio clip of the President making the
19 same demand on the radio. We showed you no less than

20 eight newspaper articles, all of which have one
21 variety or another of the same demand.
22 But most important, these unreliable

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02:44:57 1 newspapers reports include the Government's official
2 newspaper. C-131 is the publication in the Diario de
3 Centro America. That is the official publication, and
4 it says President Berger: Berger explained that the
5 Declaration of Lesividad arises from the fact that the
6 50 million investment under said Contract did not
7 occur. Their official publication. They want you to
8 believe that these were just some crazy reporters
9 wandering around reporting things that had never been
10 said. I would submit to you that the consistency of
11 the reports of the newspapers themselves is excellent
12 evidence of the fact that President Berger actually
13 said it. But the idea that they want to disavow their
14 own official publication is simply astounding.

15 Now, Mr. Orta told you he thought it was
16 strange that all of the letters from suppliers,
17 customers, and others came right after lesivo. If
18 they hadn't come right after lesivo, Mr. Orta would
19 have said I certainly think it's strange if they were
20 so worried about lesivo that they wouldn't have
21 written them right after lesivo. He can't have it
22 both ways.

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02:46:22 1 I would also point out that in Mr. Orta's
2 timeline of the events involving Mr. Campollo, he has
3 inexplicably left out the meeting of March the 15th,
4 '05, when Mr. Pinto explicitly threatened FVG. In
5 fact, he said that FVG might be allowed to participate
6 in their own deals--a very generous offer from
7 Mr. Pinto.

8 A small point, but Mr. Orta tried to say that
9 Mr. MacSwain was hired in 2006. In fact, he was hired
10 in 2007, and his testimony explicitly says he was
11 hired either in late 2006 or in early 2007.

12 what we have here, gentlemen, is a situation,
13 a problem created entirely by the Government. They
14 wanted to replace Contract 41 with contracts that had
15 more favorable terms to them. They got FVG to enter
16 into contracts 143 and 158 at an increased Canon
17 payment and a Canon payment that then went entirely
18 into FEGUA rather than to the Trust Fund for the
19 renovation of the railway.

20 The Contract specifically says that
21 Presidential approval was not required, and the
22 testimony is that even if it was required, any

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02:47:59 1 President could have approved it. A new bidding
2 system process was entirely within their control, and
3 they say that they were worried that FVG wouldn't win.
4 On the issue of collections, the arbitrators

5 raised the issue of why aren't you out there
6 collecting. Why isn't the Government, who is the
7 principal squatter, out there paying? That's the real
8 issue. They can't come in here and defend and say our
9 damages claim suffers from a lack of proof when they
10 are the principal squatter who's not paying.

11 Mr. Orta talked about the Shufeldt case. If
12 you read it, you will find out that while the
13 legislature said the Contract was immediately brought
14 to an end, the arbitrators specifically note that
15 Mr. Shufeldt, like FVG, was still in possession of the
16 usufruct; and, despite the fact that he was in
17 continued possession, they found, the arbitraries
18 found that it had been a taking.

19 On the issue of compensation, they would like
20 you to believe they have offered compensation. They
21 say that we can get our money back in the lesivo
22 proceeding, but the only money we can get back is the

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02:49:26 1 Canon fees we paid, not the compensation for the
2 taking or for the lack of fair and equitable
3 treatment. And that being the only compensation we
4 can get, it is certainly not adequate, and there is no
5 case which has ever held that a five-year delay in
6 making payment was prompt compensation under the terms
7 of the Treaty. They have clearly not provided prompt
8 and adequate compensation, and that failure alone
9 makes them liable for an indirect expropriation.

10 On full protection and security, Mr. Orta

11 says that we cited a few instances where we didn't
12 think the Government acted quickly enough. It's
13 important to note that all of those figures that we
14 gave you with regard to the governmental actions, both
15 before we got the Usufruct and after lesivo, all of
16 those instances are compiled not from our data, but
17 from the Government's own data that they provided in
18 this arbitration.

19 On the issue of damages, Mr. Orta says it is
20 unrebutted that we had only losses. He repeated that
21 five times. He was wrong the first time, the second
22 time, the third time, the fourth time, and the fifth

2100

02:50:50 1 time. In fact, in 2004, as you know, if you take into
2 account the money FEGUA was supposed to pay into the
3 Trust Fund, we were profitable.

4 So, it is absolutely incorrect ever to say
5 that this is a business that has never been
6 profitable. In fact, if you look at the record of the
7 EBITDA of the company, the EBITDA of the company was
8 on a nice upward slope. It had actually attained
9 positive EBITDA in 2004, and except for Hurricane
10 Stan, would have been the same in 2005.

11 Now, as to the Award, when you conclude, as I
12 think you will and I certainly urge you to, when you
13 conclude that RDC is entitled to an award on the
14 merits, at that point you will have concluded three
15 themes that RDC is right: Twice on jurisdictional

16 points and once on the merits. Under those
17 circumstances I would submit to you that it is not
18 only appropriate that the facts cry out for the Award
19 of Costs and attorneys' fees to RDC and FVG in
20 connection with this proceeding.

21 Thank you very much.

22 PRESIDENT RIGO: Thank you, Mr. Foster.

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02:52:18 1 Mr. Orta, it's your turn.

2 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

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

4 I also, like Mr. Foster, am going to proceed
5 a little bit extemporaneously here based on a series
6 of sticky notes that I put together when he was making
7 his presentation.

8 So, I actually did put together a bit of a
9 slide presentation, though, but that's not going to
10 take me through the whole 30 minutes.

11 Let's go to the first slide. And going back
12 to basics, okay. When you heard Mr. Foster's
13 presentation, it sure seemed to me as though he was
14 asking the Tribunal to shift the burden to Guatemala
15 on a number of issues, so going back to basics,
16 Claimant filed this case. They have the burden of
17 proof and the burden of persuasion. Guatemala does
18 not. So, we ask the Tribunal to please keep this in
19 mind as you consider the evidence and deliberate and
20 render your Award. We think this is very, very
21 important. I don't think it's a mistake that the

22 burden of proof is being--there's an attempt to have

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02:53:24 1 it shifted over to Guatemala because as I mentioned,
2 there is a serious problem with the proof that has
3 been presented here by the other side.

4 Quality of the evidence, I mentioned it in
5 the original presentation. I think it's worth
6 underscoring yet again, and the presentation that's
7 been made both here and throughout the hearing and in
8 the papers I think will back up what we are saying in
9 terms of the evidence that has been presented by
10 Claimant for its case, the newspaper articles, the
11 inferential leaps, the speculation, that does not make
12 out a CAFTA claim. We ask that the Tribunal focus on
13 the contemporaneous evidence, the documents, the
14 e-mails, the contracts, the lesivo opinions, the
15 declarations by witnesses. We ask that you focus on
16 those things as especially as corroborated by the
17 contemporaneous writings, and we believe that when you
18 do that, you will reach the same conclusion we have,
19 which is the Claimants have not established any of the
20 elements of their CAFTA claim.

21 Now, there has been discussion about
22 Presidential liability, and because we do think it

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02:54:48 1 does bear on the issue of the reasonableness of the
2 action taken by President Berger at the time that he
3 issued the Lesivo Declaration, we wanted to highlight
4 again for you the appropriate Articles, Articles 153
5 to 155 of the Guatemalan Constitution. We believe
6 that they established that any public official,
7 including the President--and you heard Mr. Mayora tell
8 you yesterday, Claimant's Expert, that those clauses
9 do apply to Presidential action, as Mr. Aguilar also
10 confirmed for you.

11 And the question is whether when confronted
12 with a situation where your advisers are telling you
13 you have a Contract that is illegal, is the President
14 compelled to take action there; and, if he doesn't,
15 does he face the risk of personal liability? We
16 believe these articles confirm that the President does
17 incur that risk and would be liable or would face the
18 risk of liability for failing to take action. There
19 was a question asked, it's been asked several times,
20 are there any cases where a President has been
21 confronted with a request for a Lesivo Declaration
22 where that resulted in personal liability to the

2104

02:56:09 1 President? And both experts told you that they
2 weren't aware of any such case, and we're not aware of
3 one either.

4 But it's probably not surprising because
5 there probably aren't too many Presidents who
6 disregard the advice of their legal advisers when

7 confronted with an illegality. Probably, they follow
8 that advice, as President Berger did here. Whether he
9 had discretion to take the action or not, we
10 understand this Tribunal has ruled already in the
11 context of jurisdictional hearings that you believe
12 the President has discretion to take action. Well,
13 whether the President has discretion to take action or
14 not is really--really doesn't address the question of
15 whether the President would be liable for failing to
16 respond to an illegality. He may or may not have had
17 the discretion. Even if you assume that he did, the
18 exercise of that discretion to not respond to an
19 illegal situation can place the President at risk of
20 personal liability under Article 153 through 155. You
21 read those articles. Nowhere do they say there is an
22 exception for public officials when they have

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02:57:22 1 discretion to decide, to make decisions. Nowhere do
2 they say that.

3 We thought it instructive to point to you
4 testimony from Mr. Mayora on the issue of what a
5 public official should do when confronted with an
6 illegal contract. Again, while Mr. Mayora claims that
7 a President has no liability for failing to declare an
8 illegal contract lesivo, as I understand his opinion,
9 because he has discretion to make that decision, his
10 prior testimony does suggest that public officials
11 must, and I underscore that word, "must" take action

12 when confronted with an illegal Contract in order to
13 elevate that illegal document to the Competent
14 Authority for it to be dealt with. And I cite to you
15 here transcript from the jurisdictional hearing where
16 Mr. Mayora, in his own words, tells you that very
17 thing.

18 And that is what President Berger did here.
19 He acted in the face of advice that the FEGUA Overseer
20 had executed a contract that was illegal. He elevated
21 the issue to the appropriate Competent Authority, and
22 that was the Attorney General of Guatemala, who then

2106

02:58:42 1 took it to the Judicial Branch for the Judicial Branch
2 to make the decision about whether the Contract is or
3 is not lesivo.

4 I'm going to leave the screen up, which talks
5 about damages. I'm going to get to a few other issues
6 before I get to damages.

7 First of all, on the issue of planning for
8 this case, I think we highlighted a number of things
9 on Claimant's immediate planning for bringing this
10 action once the Lesivo Declaration was issued.
11 Mr. Foster said that the record is going to
12 substantiate that Mr. MacSwain said he was hired in
13 2006 or 2007. I submit to you that it's clear in the
14 record that he admitted he was hired in 2006. He was
15 then asked when in 2006. He said he wasn't sure, but
16 he said it was in 2006.

17 And again, the fact that they're hiring their
Page 169

18 damages Expert, their real estate damages Expert,
19 just--it has to have been short months, even if you
20 give them the benefit of the doubt, after the Lesivo
21 Declaration. That was issued basically the end of
22 August.

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02:59:52 1 So, just very short months after that, giving
2 them every benefit of the doubt, that tells you that
3 they were planning to bring this case then as opposed
4 to responding to the situation, as opposed to trying
5 to salvage their investment if they really thought it
6 was at risk, as opposed to going out and trying to
7 obtain from customers and reassure them that the
8 business was going to go forward.

9 On the issue of the investment that was made
10 and the phases, we've heard time and time again that
11 Claimant only made a promise to invest \$10 million,
12 and they tell us that they only ever were obligated to
13 complete Phase I. We don't believe that's what was
14 promised, and that's in part why we said in our
15 opening slides that Guatemala feels misled. You heard
16 the testimony from the FEGUA Overseer who negotiated
17 the Agreement, and he told you that is certainly not
18 what he negotiated, and certainly not what he believed
19 he was getting.

20 And on that point, I think it bears again,
21 raising the rhetorical question, which I think is a
22 really an interesting one: Is Claimant really

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03:01:16 1 asserting in this case that they only had to build out
2 200 miles of an 800-mile or a 500-mile--excuse me--a
3 500-mile restoration project. They were given over
4 500 miles' worth of land to restore in the railway.
5 Is it really their contention that they only have to
6 build out 200 of those miles and they get to keep the
7 rest of the Government land for 50 years to exploit
8 however they like? Is that really what they believe
9 what they got from the Government?

10 On the issue of industrial squatters, in
11 addition to the points that we made earlier and I
12 think that it's perhaps worth mentioning the one or
13 one of the ones that I think is perhaps most
14 resonating, which is that they cannot prove that the
15 industrial squatters were there because of the Lesivo
16 Declaration. All of the industrial squatters that
17 they claim are there post-lesivo. And again, we
18 believe there is deficiency of proof in whether they
19 are there pre- or post-lesivo. We don't think they
20 have actually submitted evidence to prove actually
21 that they were there post-lesivo, but even if you
22 believe that, what is to you say that those industrial

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03:02:36 1 squatters didn't go there when Claimant announced that
2 they were leaving the country publicly or as a result

3 of that or because of that? That happened in 2007,
4 mid-2007, and then very publicly in September 2007.
5 And all of the pictures that you have been provided
6 postdate that event by at least two years.

7 On the issue of Government, whether any of
8 those industrial squatters are Government squatters,
9 even if you get past the other hurdles that we've
10 mentioned, Claimants have ignored that in Contract 402
11 under Clause 11, they, under Clause 11 I, they agreed
12 to provide access to the right of way in the event of
13 public need, okay? Clause 11 which is titled
14 "obligations of the Usufructary," Clause I says,
15 provide access--one of the obligations. Among other
16 obligations, the Usufructary shall be bound to do the
17 following: Provide access to right of way in the
18 event of public need, including the access to
19 vehicles, passage, or pipe installation for carrying
20 drinking water or other liquids, for agricultural,
21 irrigation, drainage, installation and conduction of
22 power, or telephone cables; right? They're

2110

03:04:05 1 complaining about public telephone or power cables
2 being put on their property, but they had an
3 obligation to provide that pursuant to Contract 402
4 Section I. I'm sorry, Clause 11, Section I.

5 On the issue of the Presidential quote, they
6 cited to you C-131. They said that was a Government
7 newspaper. Well, you know, reporters make mistakes

8 whether they work for a Government newspaper or not,
9 and I just want to correct something for the record.
10 When it was read into the record by Mr. Foster, he
11 said and I quote, and then he went ahead to read the
12 President's--what he said was the President's words,
13 but if you look at C-131, when they report what the
14 President purportedly said, there are no quotes--I
15 repeat, no quotes--around those words, so it's
16 incorrect to say that there was a direct quote of the
17 President in that exhibit.

18 And just to remind the Tribunal, that goes to
19 the issue of whether there was any supposed
20 50 million-dollar demand made by the President for
21 restoration of the railway.

22 On the issue of whether they made a

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03:05:28 1 sufficient investment, again, they promised
2 10 million. It's, I think, established in the record
3 that the amount that they invested, whatever it
4 actually is, was not enough to make this into a
5 profitable investment. It just simply was not. And
6 it wasn't enough to do the job that they promised, and
7 at least according to the Government's version, an
8 understanding of what they promised. And we know that
9 because they, themselves, admit that it was going to
10 cost at least a hundred million dollars--at least--to
11 build out the second of five phases that they agreed
12 to restore. At least a hundred million dollars.

13 And by the way, when they tell you that they

14 had completed Phase II and they rely on that letter,
15 well, you heard the testimony from Dr. Gramajo, but
16 ask yourself why are they going to President Berger in
17 March of 2006 to seek funding for the restoration of
18 Phase II if they really believed that they had
19 completed their obligations under that phase? Does
20 that make any sense?

21 we were told there was not one shred of
22 evidence that the Claimants were told that FVG was

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03:06:43 1 told that Contract 143 and 158 had legal defects.
2 well, I think the record establishes that they were
3 told that immediately upon Dr. Gramajo being informed
4 of that. We would cite to you again R-8 and R-49,
5 that's Dr. Gramajo's letter to Mr. Senn in April 2004;
6 and R-9, which is a letter by Mr. Senn to
7 Vice-Minister Diaz which confirms that they knew that
8 the Government had problems with the Contract, and
9 they were sitting down and negotiating with the
10 Government about those problems.

11 On the issue of C-44, I would like to put
12 that document up, if we could. And, again for the
13 record, C-44 is the settlement proposal that was
14 given--that was given to Mr. Senn during the meeting
15 that took place on 24 August 2006.

16 First, for Mr. Foster to say that Mr. Senn
17 did not know that he was showing up there to discuss
18 settlement is contrary to both the testimony of

19 Mr. Senn and the testimony of all the other witnesses
20 who attended that meeting, including Mr. Fuentes, who
21 told you that he had been commissioned by the
22 President to try and find a solution to this, and that

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03:08:09 1 he was at that meeting and understood that it was
2 supposed to be a settlement meeting. So, the
3 statement by Mr. Foster is contradicted by the
4 evidence of record.

5 The fact that in the precursor of the
6 document it says that Deed 143 and 158 were submitted
7 to a public bidding process simply reflects that this
8 is a Draft Agreement. People make mistakes when they
9 draft. For him to suggest here without any shred of
10 evidence that that means that the Government was
11 simply going to bypass the very important requirement
12 of a very important bidding process is simply
13 nonsense. We know it's a draft. All you need to do
14 is look at the document. There are a number of blanks
15 on it. You could see it on the screen.

16 If we go to the portion of the document that
17 talks about--please, Kelby, I think it's Section 3 or
18 four--bear with me--highlight four for a second.

19 Again, we've made this point--and just that
20 paragraph--the document, on its face, shows it's a
21 draft. It talks about the issues to be negotiated
22 between the Parties. Of course, it's going to contain

03:09:33 1 mistakes.

2 Go down a little bit more and go down to
3 Clause Sixth, please. Okay. And let's highlight that
4 again.

5 You heard from Mr. Foster that during that
6 meeting no one told them--no one told Mr. Senn or the
7 other representatives there on behalf of FVG that what
8 the illegalities were, what the issues were that were
9 motivating the Lesivo Declaration. Let's highlight
10 all of Clause 6, please. You can see on the face of
11 the document it says issues to be settled in
12 connection with the Onerous Usufruct Contract, and
13 then it talks about the Parties negotiating and
14 deciding upon a number of things, and A says:
15 "Modification to the Onerous Usufruct Contract
16 Involving Railway Equipment in order to rectify the
17 terms which are deemed to cause lesions to the
18 interests of the State of Guatemala according to the
19 opinions rendered by," and then it sets forth three
20 opinions there. Now, if Mr. Senn had, rather than
21 simply rejecting outright the possibility of entering
22 into a negotiation on this, rather than doing that,

03:10:54 1 which is what the record evidence shows that he did,
2 if he would have engaged in a dialogue about this, I'm
3 sure they would have discussed the issues that were

4 set forth in the opinions; otherwise, there's no way
5 they could have reached an agreement as to those
6 points. They had to, by their very nature, discuss
7 them. But the evidence is that he simply rejected the
8 notion of entering into negotiations.

9 On the issue of whether a public bid was
10 required for entering into force of Contract 143, they
11 made mention--Mr. Foster made mention of the fact that
12 I accurately represented the record on the issue of
13 when Dr. Gramajo was first informed or notified that a
14 public bid was required for Contract 143, and he
15 says--I'm not entirely sure what the point is that
16 he's establishing, other than some lawyers made
17 mistakes. Lawyers do make mistakes. We all know
18 that, that some lawyers who first looked at Contract
19 143 and 158 assessed that it had some illegalities and
20 didn't pick up on others doesn't prove anything. Once
21 the Government became aware that this was an issue--in
22 other words, once under the Berger administration and

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03:12:13 1 FEGUA Overseer became aware that this was an issue, it
2 was an issue that was brought--that was brought to the
3 attention of the Parties, and it was an issue that
4 they focused on. They didn't disregard it.

5 Again, on the issue of causation and damages,
6 I ask you to focus on the issue of their abandoning
7 publicly their position in Guatemala and what that did
8 in relation to any potential damages, and I ask again
9 why aren't they out there today trying to collect

10 rent?

11 On the issue of the testimony from Mr. Franco
12 about what some official in the Court told him about
13 whether or not the lesivo--the opinion from the
14 Administrative Court on the lesividad would be issued,
15 again I think it's inherently unreliable. We don't
16 know what the public official--what instruction the
17 public official was given, if any, by whom. We know
18 that Mr. Franco is a lawyer who has been working for
19 the Claimant for quite a long time, and we know that
20 his boss is sitting across from us at the table and is
21 one of the lawyers in this case.

22 So, we ask you to take all of that into

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03:13:53 1 consideration when you assess that statement from
2 Mr. Franco.

3 On the issue of--and this was raised in one
4 of the questions, I believe, by Secretary
5 Eizenstat--the other countries that have lesivo laws,
6 well, we cited to you in the First Report of Professor
7 Aguilar, I believe it's Section 1, Paragraph 1, that
8 there are a number of countries who have lesivo laws.
9 It's not just Guatemala. Spain, France, Mexico, Costa
10 Rica, Ecuador, Argentina. And in relation to Spain's
11 lesivo law, you heard from Mr. Foster that that law
12 mentions or provides for an opportunity for the person
13 who's affected by the Lesivo Declaration to be heard
14 before the Lesivo Declaration is issued. Well, it's

15 made clear in Paragraph 48 of Mr. Aguilar's Opinion,
16 First Opinion, the reason that is provided for in
17 Spain's law is that unlike Guatemalan lesivo law, the
18 Executive has the ability to declare null and void a
19 contract on its own without submitting it to the
20 Judicial Branch; and, under that circumstance, it
21 makes a lot of sense as to why there is an opportunity
22 to be heard given to the person who might be affected.

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03:15:25 1 Here, on the other hand, the issue is
2 submitted to an independent Judiciary, as you've now
3 heard several times, and the Judicial Branch through
4 the Administrative Court makes the determination about
5 whether the Contract is or isn't lesivo, and the
6 Claimant, as you know, or the affected Party is
7 provided an opportunity to be heard there.

8 Now, on the issue of profitability or lack of
9 profitability of Claimant's investment through FVG,
10 again we've heard that in 2004 there is a calculation
11 that shows according to Mr. Foster that there was
12 profit in that year. First of all, I want to point
13 out to the Tribunal that he's referring to an exhibit
14 that was provided by Mr. Posner, and that exhibit says
15 nothing about profit. If we could put up the exhibit,
16 it says nothing about profit. What it shows is the
17 EBITDA of the company throughout a number of years
18 when you factor in the Trust payments that they claim
19 should have been provided, and you see that in the
20 very last line: As estimated FEGUA trust payments."

21 And what's important to point out is that
22 says nothing about profit. That says what the

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03:17:04 1 earnings would be before you talk about income,
2 depreciation, taxes, and when you factor all those out
3 is only when you can determine whether or not there's
4 profit. So, that number tells you nothing about
5 whether the company was profitable in 2004.

6 And you see that even--even adding in the
7 FEGUA Trust payments, one year later you have a
8 negative number somewhere in the range of over
9 \$400,000.

10 We can now put up the slides, please, or go
11 back to the slides that we prepared.

12 There was mention made of the bond--the
13 particular example that was put up or that was put up
14 by Professor Spiller, and suggesting that somehow
15 Professor Spiller incorrectly is estimating the effect
16 of amortization, and the problem with the example that
17 was put up is that it was conducted over a five-year
18 period and not a 42-year period, which is the correct
19 period to be estimated here, given the length of the
20 usufruct. And when you apply the correct discount
21 rate, you can see, based on this slide, that there is
22 still double counting to the tune of 82 percent.

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03:18:33 1 On the issue of pre-award interest, we
2 believe it should not be compounded. On the issue of
3 forced loan, the forced loan theory, we don't think
4 that is the proper standard that should be utilized by
5 this Tribunal. The proper standard should be the
6 reinvestment rate, if any damages are granted and
7 pre-award interest is awarded, and we believe that the
8 correct rate is the one that we have suggested to you,
9 which is the commercially reasonable rate such as
10 LIBOR plus 2 percent. And we cite to you here some
11 awards that have used that rate.

12 This point, I have already made, which is the
13 lack of profitability.

14 I would also like to point out that while
15 they talk about a 10 million-dollar investment and
16 they talk about the fact that their real estate
17 revenues were soon to be going very upwardly in a
18 positive trajectory, that they promised in their bid
19 that they would be using the real estate revenues in
20 order to service \$5 million of the what they say is
21 promised 10 million-dollar investment. They said
22 5 million in equity and 5 million in debt, and they

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03:19:50 1 were supposed to recover that 5 million in debt
2 through earnings from the easement revenues, but they
3 were never able to do so. And that speaks volumes
4 about the lack of demand based on the projections that
5 they had for the real estate easement revenues.

6 There were questions raised about the
7 possibility of awarding damages based on sunk costs or
8 historical costs. We have included here some slides
9 in relation to this issue. It is our contention that
10 that standard would not be appropriate here. That
11 standard to the extent it's been used and it has been
12 used by some tribunals as pointed out by Professor
13 Crawford, is more appropriate or apt for an investment
14 that is cut off at the knees at its infancy. That is
15 not this case. This investment was ongoing for more
16 than eight years, and we won't belabor the point.
17 We've included a number of slides here, but the point
18 is we do not believe that that is the appropriate
19 standard. And based on the appropriate standard, as
20 we've told you, we believe the Fair Market Value of
21 the investment at the time of the alleged
22 expropriatory act or wrongful conduct by Guatemala,

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03:21:09 1 again the alleged wrongful conduct is zero. And with
2 that, I thank you again for your time.

3 PRESIDENT RIGO: Thank you.

4 QUESTIONS FROM THE TRIBUNAL

5 PRESIDENT RIGO: I have a question on C-44
6 that you had on the screen just a moment ago, if I may
7 have your attention. You have C-44.

8 At the bottom of the document, at least on my
9 screen that you had to underline, it says
10 modifications--

11 MR. ORTA: I believe it's Clause 6, if we can
12 go to that, please.

13 PRESIDENT RIGO: They say they shall decide
14 on the following issues: Modifications to the Onerous
15 Usufruct Contract, et cetera. Yesterday, we were told
16 that the Contract was null and void by your Expert,
17 that it could not be corrected or made legal, to say
18 it in simple terms. Why would you bother to modify
19 it?

20 MR. ORTA: As I pointed out, Mr. Chairman, I
21 believe that this is a draft document, so from
22 everything that we understand what the modification

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03:22:26 1 would mean would not be a modification of the existing
2 agreement because that agreement, on its face, based
3 on the illegalities, can't be remedied. But the idea,
4 as I understand it was for the Parties to enter into a
5 settlement in order to execute a new Usufruct
6 Equipment Contract and celebrate a new public bid that
7 would take away or basically deal with the problems
8 that caused the Agreement to be lesivo. As evidence
9 of that, I point you to R-36 and R-37, where
10 immediately post-lesivo, when the Parties actually do
11 sit down to discuss the issue of the Equipment
12 Contract and its illegalities, that is precisely what
13 the Parties were discussing. They were discussing the
14 execution of a new Equipment Contract.

15 And as I pointed out before, document
16 R-37--and you will see, if you go through it, the

17 minutes R-36 and R-37 of the meetings that took place
18 just after the Lesivo Declaration, in R-37 you see
19 that FVG, through Mr. Senn, said that they really
20 weren't too interested in doing that because, as
21 Mr. Senn said, that was of secondary priority to them,
22 given that they wouldn't need the rail equipment for

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03:23:49 1 Phase II because that would be standard gauge.

2 PRESIDENT RIGO: Thank you.

3 ARBITRATOR CRAWFORD: Mr. Orta, the Parties
4 are agreed that if the Tribunal were to award damages,
5 it would be appropriate for the Claimants to return
6 its assets, cancel its contracts, et cetera, in
7 Guatemala. Now, one can understand the juridical
8 basis for that in the event that we found an
9 expropriation, and you might say if the Parties are
10 agreed, then it's not a problem finding a juridical
11 basis.

12 But let's assume the Parties are not agreed.
13 Let's assume that the breach that was found was a
14 breach of the fair and equitable treatment standard.
15 On what basis could we condition an award of damages
16 in relation to the return of the property?

17 MR. ORTA: Just bear with me one second.

18 (Pause.)

19 MR. ORTA: Professor Crawford, again we think
20 that the appropriate standard under CAFTA is the Fair
21 Market Value analysis. And so, I think again, based

22 on that question, the Tribunal would be answer what is

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03:26:00 1 the Fair Market Value of the investment at the time of
2 the Act. why do I say that? Because the Discounted
3 Cash Flow analysis, as we've pointed out both in our
4 Memorials and in the Report of Professor Spiller, does
5 provide full reparation to the Parties and in this
6 case in this instance to the Claimant. So we believe
7 that that would be in the first instance the correct
8 standard for the Tribunal to apply.

9 ARBITRATOR CRAWFORD: Somehow it probably
10 implies that you've lost the investment, whereas you
11 could have a breach of FET which leaves with the
12 investment. The investment may be worth less, it
13 might be a lot less than it would have had there been
14 no breach, but it's not necessarily worth nothing.

15 The problem--and I would be interested in
16 further enlightenment because in another case I
17 basically left the Tribunal--the Tribunal basically
18 left the Claimant in situ having paid--having awarded
19 damages for breach of fair and equitable treatment and
20 therefore didn't resolve the dispute between the
21 Parties. Now, I understand this is slightly academic
22 because you agreed between you that whatever the basis

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03:27:25 1 for recovery might be, if there is any, that condition
Page 185

2 should be attached to it, but I'm interested in the
3 theory of the claim, bearing in mind that you could
4 have a breach of fair and equitable treatment, which
5 led to a recovery of small amount of money or the
6 recovery of virtually the entire investment.

7 MR. ORTA: Thank you, Professor Crawford. I
8 have two different things to suggest there. The first
9 is--and this relates to, I guess in part, the slides
10 that we put up just toward the end, but if the
11 Tribunal under that circumstance, for example, were
12 wanting to consider a remuneration or I guess an
13 evaluation of a possible remuneration to Claimant
14 based on the--on their capital contributions, their
15 net capital contributions, I think in this particular
16 case you would have to take into account the fact that
17 the Claimant made investment early on in 1999 and
18 2000, and I think as we heard from Professor Spiller
19 there were some perhaps minor additional investments
20 of about 500,000 in 2000 and 2001, and then the
21 investment stopped. And what you have after that is
22 simply capital contributions to cover losses.

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03:29:05 1 So, I mean, I think in that circumstance it
2 would be--it would be difficult to determine what, if
3 anything, the Claimant in this case should be awarded
4 because by the time you get to 2006, you know, through
5 just the actions that took place in relation to their
6 investment in Guatemala, the lack of demand and lack

7 of financing and funding and other things, they had
8 really basically already burned up the investment that
9 they had made, and they were staying afloat, as I say,
10 by asking their shareholders, in particular their
11 principal shareholder, to contribute to keep them
12 afloat.

13 ARBITRATOR CRAWFORD: Now the concern relates
14 to the question what would have been the subject of an
15 expropriation in the event the Tribunal were to find
16 an expro.

17 The Equipment Contract is a separate legal
18 document, and in the event that there was an indirect
19 expropriation, it is at least arguable that it was
20 limited to the Equipment Contract or to the legal
21 interests associated with it. After all, at least in
22 theory, the Claimant retained its rights in relation

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03:30:39 1 to the right of way for other purposes, and it's
2 agreed that the value of the commercial interests
3 associated with the right of way were potentially
4 greater than in relation to the conduct of the
5 railway. It would be a somewhat Solomonic verdict to
6 say that the expropriation was limited to the
7 Equipment Contract, but I would be interested in your
8 comments on that.

9 MR. ORTA: Professor Crawford, I think we
10 agree in this case that the Contract that's at
11 issue--we understand the Claimant has a different
12 viewpoint, but the Contract that's at issue that was

13 declared lesivo is the Equipment Contract, and we
14 believe that there have been a series of concessions
15 made in relation to Contract 402 that established by
16 Claimant's own words that it's wholly unconnected
17 to--well, the substantial part of their revenue of the
18 real estate is wholly unconnected to the entire
19 railway operation.

20 Now, getting directly to your question, the
21 Equipment Contract at issue here was entered into in
22 2003. And as I mentioned, by that point in time the

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03:32:00 1 Claimant was no longer making any investment per se
2 into the railroad operations. They were simply
3 funding through capital contributions the shortfalls
4 that they were having in order to stay afloat.

5 So, I think, in relation to the Declaration
6 of Lesivo of that agreement, what we're really faced
7 with is an issue where they could only use that
8 equipment to operate Phase I, and Phase I, by their
9 own admission, produced only losses.

10 In relation to the operation of the train in
11 any other phase, you've heard that, as to Phase II it
12 would require different equipment. So, this has no
13 effect on that. To the extent there is an
14 expropriation or some wrongful conduct under CAFTA in
15 relation to the Railway Equipment Contract, it doesn't
16 affect their ability to operate in any of the other
17 phases per their own admissions.

18 So, you're faced with an issue where you have
19 equipment that perhaps they can't utilize in Phase I,
20 although again we claim they have every right to do
21 that today. They could be operating the trains today
22 in Phase I if they hadn't left the country.

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03:33:18 1 But in any event, it's in relation to a phase
2 of operations that, as a matter of record evidence,
3 they have admitted on a number of occasions produced
4 only losses. So, again, if you apply Fair Market
5 Value to that, you're still going to get a negative
6 value.

7 ARBITRATOR CRAWFORD: My last question
8 relates to the role of this Tribunal relative to the
9 question of the Declaration of Lesividad. Now,
10 obviously, as an investment Tribunal, this Tribunal is
11 entitled to apply Guatemalan law, provided it can be
12 satisfied as to what it is. And in effect it might be
13 argued that what we are having to do is to do what the
14 Guatemalan courts should have done if they'd decided
15 the Claimant's case on the lesivo issue at an
16 appropriate time rather than delaying, as they seem to
17 have done.

18 But it's not beyond the bounds of possibility
19 that one might say that the lesivo decision, though it
20 seems from the outside to be harsh and unreasonable,
21 was a decision which Guatemalan law mandated. If we
22 were to take that view, what room is there for any

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03:35:13 1 recovery at all? This goes back to a question I asked
2 you this morning, where you said we didn't need to
3 decide the lesivo issue, and I said we might not need
4 to decide it, but if we did decided, it surely would
5 be relevant to the case. I mean, I don't want to put
6 your case higher than you put it, but I would
7 appreciate any comment you have on that scenario.

8 I should say that these questions are asked
9 to the Claimant as well.

10 MR. ORTA: If you just give me one second to
11 ponder that, Professor Crawford.

12 ARBITRATOR CRAWFORD: These questions are
13 asked to you as well, so you may in due course like to
14 comment on them.

15 MR. FOSTER: You mean I can't sleep?

16 ARBITRATOR CRAWFORD: You might have to. It
17 has to be done today.

18 (Pause.)

19 MR. ORTA: All right, here is my best shot.

20 So, if this Tribunal were to determine that
21 the Lesivo Declaration was proper--

22 ARBITRATOR CRAWFORD: In terms of Guatemalan

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03:37:25 1 law.

2 MR. ORTA: In terms of Guatemalan law, then

3 it's our contention that there would be no conduct--no
4 conduct that would have offended the claims under
5 CAFTA because, first, as it relates to expropriation,
6 there would--they still would be in possession of what
7 they have admitted as the biggest part of their
8 investment.

9 So, even if you admit or even if you allow
10 for the position that this has affected their ability
11 to conduct railway operations in the first phase,
12 which is the only phase as a matter of record that
13 they would be using that equipment to begin with,
14 that, per their own admission, would represent no more
15 than 8 percent of their revenues, and so there would
16 be no expropriation because it wouldn't be substantial
17 enough.

18 And in any event, you're ruling that it's
19 proper so there is no improper conduct that would be
20 violative of CAFTA to begin with, and I think that
21 would take care of the inquiry with respect to fair
22 and equitable treatment.

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03:38:34 1 And with respect to the other claims, full
2 protection and security and national treatment, again
3 I think those fall away just by their inability to
4 meet the elements. But on the expropriation, given
5 the substantiality requirement, I think that claim
6 would fall away because they couldn't meet the
7 threshold element that it would have to be substantial
8 enough, the effect, so as to allow for compensation to

9 begin with.

10 ARBITRATOR CRAWFORD: Thank you very much.

11 MR. FOSTER: I'm afraid we're going to get a
12 bill from Cambridge at the end of this for this
13 seminar.

14 ARBITRATOR CRAWFORD: If it came from
15 Cambridge, it would be a very modest bill.

16 MR. FOSTER: Let me go back to one of your
17 first questions about the effect of a decision on the
18 existing leases. The way I answered the question this
19 morning was, and I hope it was because I intentionally
20 chose my words carefully as opposed to sheer accident,
21 but what I said was that if you awarded full
22 reparation, however you define that, if you awarded

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03:40:03 1 full reparations, whether it's--for whatever State
2 action that violates international law, once you Award
3 full reparations, then the payor of those reparations,
4 the State, is subrogated to all of our rights under
5 the Contract, its Contract, it seems to me.

6 And therefore, it seems to me that the
7 fashioning of your Award to the extent that you'd
8 concluded that what you were awarding were full
9 reparations, fashioning it in that fashion you would
10 automatically cause Guatemala to be subrogated to our
11 rights under the leases. So, that would be my comment
12 on that one.

13 On your more recent question, I believe it

14 was one of the drafters of the Articles on State
15 responsibility--I certainly hope it was you, but I
16 can't remember which one it was, but I think one of
17 the things that was said was that a Government can't
18 rely upon necessity under its own internal laws to
19 justify breach of international law, and so even if
20 the Declaration of Lesivo might have been legal under
21 Guatemalan law, then you still have to examine it
22 under the applicable principles of international law.

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03:41:36 1 I mean, except for--for example, except for the time,
2 putting the time period aside, they have apparently
3 complied with what they think Guatemalan law is in
4 connection with the Declaration of Lesivo, but that
5 doesn't mean it satisfies the requirements of
6 customary international law.

7 ARBITRATOR CRAWFORD: It was Professor Ago,
8 but I agreed with him, so the rule survived.

9 ARBITRATOR EIZENSTAT: I think that what I
10 would like to do is we're going to ask my questions,
11 rather than going one by one giving each of you a
12 series of questions, and I have every reason to
13 believe you'll both take good notes and that unlike
14 some of the witnesses you will be direct in answering
15 rather than feeling you're paid by the word.

16 So, let me for the Claimant ask the
17 following, and these likewise are in no particular
18 order and I have gone over some of this in your
19 original presentations, and I will try to avoid being

20 repetitive.

21 First is whether there is a tension in your

22 two themes of why Guatemala issued the lesivo

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03:43:21 1 Declaration. On the one hand, you seem to argue that
2 the process was designed to extract additional
3 concessions that went beyond 143 and 158, \$50 million,
4 for example, development of the South Coast and so
5 forth. On the other hand, you argue that the purpose
6 of the exercise was to transfer control to
7 Mr. Campollo, and I would like to ask whether there is
8 any seemingly conflicting objective here and an
9 inconsistent argument about what their motive might
10 have been.

11 Second to the Claimant is that once lesivo
12 was declared and you issued your--had your press
13 conference and your press release, one might have
14 thought, since the principal benefit of your Contract
15 was in 402 and the right of way, which was at least
16 not directly related, that you might have tried to
17 reassure your financiers, your suppliers, your
18 customers, that you were there to stay in Guatemala to
19 develop this most valuable piece of your Contract,
20 that you already have contracts which continue to this
21 day and which, as we have seen, have increased in
22 revenue, and that you become in effect a real estate

03:45:27 1 developer.

2 Now, you mentioned earlier that you wanted to
3 do the right thing and give Guatemala an operating
4 railroad, and that's why you really invested more than
5 the minimum amount you could, but at this point it's
6 difficult for me to understand the thinking behind
7 your declaring that you were a dead man walking
8 because that would seem to make it more difficult for
9 you to obtain rentals in the future or to keep
10 squatters off or collect from squatters even now.

11 Third, and this may relate to something James
12 got into, but if we were to conclude that the
13 Government acted unreasonably but did not sufficiently
14 impair your investment, how would you propose that we
15 go about looking at a damage analysis? How would it
16 differ from the damage analysis, if at all, if there
17 were an expropriation? And how would that damage
18 analysis be implicated by your obligation to mitigate
19 your damages?

20 Then for the Respondent, there seems to be a
21 clear difference in what Party believed the original
22 Contract obligated Ferrovías to do, the one phase

03:47:42 1 versus the five phases, but the Contract seems to talk
2 about initiating rather than completing work, and
3 there was evidence introduced by the Claimant in which
4 it appears that FEGUA specifically confirmed that

5 Ferrovías had sustained its obligations on phases, at
6 least on Phase II and perhaps at Phase III--it was not
7 possible to succeed, so I would like to have your
8 thoughts on that, not what you hoped to get, but what
9 did the Contract actually require and why was it that
10 FEGUA seemed to put its imprimatur on the Claimant's
11 fulfillment of that?

12 I would like to hear you--and this actually I
13 think both is on the power and authority of the
14 Overseer of FEGUA when he signed 143 and 158, signed a
15 letter authorizations, accepted Canon payments. If
16 you're saying that he acted in some ultra vires way,
17 nevertheless what should the Tribunal conclude in the
18 fact that he was an official of the Contracting Party
19 here.

20 Next, to the Respondent, it appears to me
21 that there were sort of three opportunities to get
22 this Contract right, which was Contract at least

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03:50:15 1 seemed to me to be initiated by FEGUA, and it's
2 certainly signed by it. In 41 they didn't apparently
3 get the Presidential approval.

4 And perhaps because they didn't, they then
5 wrote 143 and 158 not to require it, at least that's
6 what Mr. Gramajo I thought said several times very,
7 very strongly, did not require Presidential approval,
8 and maybe the reason it didn't is because they had
9 tried to get it under 41, and the previous Overseer

10 was at the door as the hourglass was running out on
11 the administration, which I've participated in, too,
12 and couldn't get it, and maybe that was why.

13 And then in C-44, when you come up with this
14 proposal which went well beyond, well beyond
15 correcting the defects of 143 and 158, you yourself
16 said that there was a mistake made, there was a draft,
17 certainly you can see it was a draft as you point out,
18 and saying that mistake with respect to whether there
19 was a requirement for a bid. I mean, how many
20 mistakes can one keep making here. The lawyers who
21 presumably wrote 143 and 158 not to require
22 presidential, then come up with the notion that it is

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03:51:53 1 required, and there is no way to get it, apparently,
2 under Guatemalan law without rewriting the Contract.
3 So if you could address that, that would be
4 appreciated.

5 Then I want to see if you can make our job a
6 little bit easier on some of these standards if we
7 have to get to it. Under the fair and equitable
8 treatment standard there is a very vigorous debate
9 about what customary international law means here, but
10 for our purposes, is there essentially an agreement,
11 and whether you look at a free-standing standard or
12 others, that it'd be still applying a standard that
13 would incorporate protections against arbitrariness,
14 nontransparency, and frustration of legitimate
15 expectations? And I would ask both Parties that.

16 And the last issue where again you might be
17 able to make our life a little easier, if we can
18 narrow the differences, and that is the standard, if
19 we were to find an indirect expropriation, the
20 Respondent cites to a paragraph in RDC's Reply that
21 quotes the following language from Vivendi III: "This
22 Tribunal will have to determine whether they affected

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03:53:50 1 a substantial permanent deprivation of Claimant's
2 investments or the enjoyment of those investments'
3 economic benefits."

4 So, is there an agreement between you that
5 that is essentially the standard we should be looking
6 at for indirect expropriation.

7 And then I guess the last issue I would
8 really go back, although I think you've answered it,
9 but it's still a question in my mind of why if the
10 defect was in 143 and 158 so much time was spent on
11 issues that involved 402 and 820. In that respect my
12 last question would be just factually, has either
13 Party--my understanding is that under 802 there was an
14 obligation on both Parties to pay under the Trust
15 Fund. Did either Party pay under the Trust Fund and
16 when?

17 I'm going to conclude with that, but I would
18 be remiss if I didn't add one other personal thing,
19 and that is I think that the quality of the legal
20 presentations has been extraordinary on both sides. I

21 think you've each done a tremendous job of
22 representing your clients, both in the written

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03:55:17 1 presentations and the questions and the demeanor
2 you've presented and the insightfulness of your
3 arguments, and I want to congratulate you for really a
4 very, very high quality of representation of your
5 clients.

6 That's not a question.

7 (Laughter.)

8 MR. FOSTER: But it deserves an answer.

9 Thank you.

10 David is looking at me as though he wants to
11 take the second shot rather than the first shot, so I
12 will take the first shot.

13 And your first question was about a potential
14 tension as between our themes, and I think it will
15 come as no surprise to you when I say that I don't
16 think that there is a tension. There was a perfect
17 storm of confluence of interest here. On the one
18 hand, Dr. Gramajo wanted control. He didn't like at
19 all the fact that Ferrovías had control of assets that
20 he wanted to have control of.

21 On the other hand, Ramon Campollo, he didn't
22 really care whether we invested the \$50 million or a

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03:56:41 1 hundred million dollars or how much ever it was in
2 order to rebuild the South Coast for his benefit, or
3 he took it away from us and could then do with it as
4 he wanted for his benefit. He was clearly interested
5 in the South Coast aspect of the line, and so he
6 didn't care, and that coincided perfectly with
7 Dr. Gramajo's interest because he wasn't interested in
8 the South Coast because it was going to be a wide
9 gauge railroad, and his interest was in the old
10 locomotives and the old cars for the FEGUA Railroad
11 Museum.

12 So, I think that, in fact, the--and I think,
13 as I read the evidence in any event, those paths,
14 while they started out differently and perhaps without
15 coordination, as time went on they converged, and I
16 think what you see from the timeline of the
17 Campollo/Pinto involvement, if you go back and look at
18 it, that they started out, I think Mr. Campollo was
19 pretty much a lone wolf back in 2001, and that was
20 before Dr. Gramajo even got involved, but Campollo was
21 interested in the deal, then Gramajo gets involved
22 when he becomes the Overseer, and he has an interest

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03:58:08 1 in getting rid of Ferrovías. Campollo has an interest
2 in getting rid of Ferrovías, and their paths
3 inexorably converge.

4 Thank you, Kevin. Your second question had
5 to do with the press release, and you said since the

6 prime benefit was in Contract 402, why didn't we do
7 more reinsurance and so forth. Well, remember that a
8 lot of, as you said, the financiers, suppliers and
9 customers, well, the customers, the railroad customers
10 as to which we presented evidence, they weren't
11 concerned with 402, except in a way that I will
12 explain, they were concerned in operation of the
13 railroad and the Equipment Contract specifically would
14 have been their interest. The financiers wouldn't
15 have cared which contract was under threat, and all of
16 this is if anyone really understood what was going on.
17 You will notice in those various and sundry press
18 Reports, the President doesn't say, "I'm declaring
19 Contract 143/158 lesivo, but I want 50 million-dollar
20 investment under Contract 402." Nobody was focusing
21 upon that technicality at that time. That
22 technicality or that difference is something that

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03:59:56 1 we're focusing on here.

2 And the fundamental issue, I think, is that
3 they were, as the witnesses have, I think, on both
4 sides have described, they were inextricably
5 intertwined. If we don't have the equipment, we can't
6 run the trains. If we can't run the trains, we
7 default under default 402 because we can't provide
8 service, so we lose the real estate one way or
9 another. It doesn't make any difference.

10 Now, turning to the press release itself,
11 Kevin says, and I think he's right, that you really

12 need to read this press release in its entirety so you
13 get the flavor of what was being said.

14 And one of the things that was said in this
15 press release--and just before I say this, let me
16 point out, that remember the press release when it was
17 issued on August the 28th was in English, and it
18 appeared only on RDC's Web site. It was not published
19 in Spanish until the publication on September 4, in
20 Prensa Libre. So, I point that out, not that I think
21 it's critical for the question you're answering, but
22 just to get the context right.

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04:01:24 1 But the press release goes on to say, "This
2 is now more than an investment for us; it is a
3 struggle for justice. We remain convinced that the
4 railway plays an important role in a country that
5 abandoned its railway in 1996 and currently does not
6 depend on either unrealistic schemes or Government
7 subsidies. For this reason, we will not only continue
8 to advocate for the implementation of our Business
9 Plan as we originally conceived it, but also to fight
10 for the right to do so against a Government that has
11 gone out of its way to obstruct our progress by
12 violating the terms of the railroad infrastructure
13 trust and begin something that will ultimately result
14 in the expropriation of our Usufruct. This is a
15 commitment we have to our 62 Shareholders, our
16 customers, and our employees."

17 "We also have this commitment to our country,
18 not only as a company formed to provide much needed
19 strategic transportation infrastructure, but as
20 individuals opposed to a culture of corruption and
21 denial of justice."
22 So, this press release was saying two things:

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04:02:39 1 Number one, it was assuring our customers, our
2 suppliers, and others that we were committed to this
3 fight. We weren't packing up and leaving, as Mr. Orta
4 would have you believe. We were saying publicly that
5 we were not going to pack up and leave. We're going
6 to stay and fight.

7 And, number two, I think that from the
8 language of this press release, it is very obvious
9 that the purpose that I described earlier today that
10 we were trying to put pressure on the Government in
11 order to cause the Government to reverse its decision.
12 And that's the thrust, I think, that reading the press
13 release as a whole and fairly interpreting it.

14 Those are the two thrusts of the press
15 release.

16 Now, the third question was if the Government
17 acted unreasonably but did not sufficiently impair the
18 usufruct, how do you look at the damages analysis, is
19 it different, and how is it implicated by the
20 obligation to mitigate? Let us suppose, for example,
21 you concluded that the denial of fair and equitable
22 treatment was such, and in particular that it was

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04:03:58 1 based upon a frustration of legitimate expectations,
2 and that in effect we had been led down the river and
3 ambushed. And you concluded that in that case, for
4 example, you might conclude either one of two ways of
5 looking at damages. One, you could conclude that that
6 denial of fair and equitable treatment was so complete
7 because the Declaration of lesivo so completely
8 destroyed the business that you were going to award
9 the budget of measure damages that we've urged you to
10 award, which is both the return of the investment and
11 lost profits with the amortization of the investment.

12 On the other hand, you also could conclude
13 that you were going to put us back in the position as
14 if we had never made the investment. This was the
15 suggestion that Professor Crawford made the other day
16 as a potential way to look at a measure of damages,
17 and I think it's particularly relevant to a fair and
18 equitable treatment analysis.

19 Now, if you decided to do that, to put us
20 back as if we hadn't made the investment, then it
21 seems to me that you've got to do three things:
22 Number one, you've got to give us our investment back.

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04:05:22 1 Number two, you have to give us what we would have

2 earned on that investment if we had had it, and we are
3 in the business of doing what we do, and you have a
4 weighted Average Cost of Capital computation for that
5 business, and I would suggest that you have to use
6 that to bring the investment to its value in 2006.

7 And the third thing, if you're putting us
8 back in as though we hadn't made the investment, then
9 we wouldn't have spent the legal fees and had the cost
10 and expenses of the arbitration, either.

11 So, I think there is--there are implications
12 for the necessary components of the Award. In other
13 words, I think that fees and expenses are a critical
14 component if you look at it that way, whereas--and
15 they don't even go to the question of looking at it to
16 see, you know, the general balancing test that you
17 would use for awarding fees and expenses.

18 And mitigation, I think mitigation applies to
19 everything. We're not contending that Professor
20 Crawford intimated that an argument could be made that
21 in a fair and equitable treatment analysis, if you
22 found that it hadn't completely destroyed the value of

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04:06:55 1 the investment, that then in those circumstances we
2 might be left in the position of continuing to collect
3 under our leases. I think that is an accurate
4 analysis if you came to that conclusion. But if you
5 come to the conclusion that we are urging you to come
6 to, that the denial of fair and equitable treatment
7 essentially destroyed the investment, then I think

8 mitigation always applies.

9 So, the issue of mitigation will depend upon
10 how you approach this whole question of what portion,
11 if not all, of the investment was destroyed.

12 Power and authority of the Overseer, I'm not
13 sure whether that's a question you directed to us, but
14 I will briefly say something about it. As you know,
15 our expert has testified that this is an autonomous
16 entity; and, as an autonomous entity, the Overseer of
17 FEGUA has all of those powers and authorities, and
18 that's the reason why our Expert testified that no
19 Presidential approval was required, because it's not
20 necessary. The Overseer has those powers.

21 You asked the question about how many
22 mistakes can be made, well, candidly, I don't think

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04:08:17 1 they were mistakes, but that's more a question devoted
2 to Mr. Orta than to me.

3 Trying to agree on a standard under customary
4 international law with regard to fair and equitable
5 treatment, we certainly think--we certainly believe
6 that both arbitrariness and bad faith--you didn't
7 mention bad faith in your recitation of the standards,
8 but we certainly think that bad faith is a part of it.
9 Nontransparency and frustration of legitimate
10 expectations, we believe all of those are important.

11 Insofar as the standard of indirect
12 expropriation, I believe the Parties agree that it's a

13 substantial--I don't know that we agree it has to be
14 permanent. I think it has to be of substantial
15 duration. In fact, I don't think the cases support
16 the idea that it has to be permanent, but it does have
17 to be of substantial duration. Deprivation of the
18 investment or the enjoyment of the reasonably
19 expected. I believe the cases used the term
20 "reasonably expected" benefits of the investment, and
21 we think that's what the standard is.
22 Your last question was, did we pay into the

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04:09:44 1 Trust Fund, and the answer is yes.

2 PRESIDENT RIGO: Thank you, Mr. Foster.

3 The Court Reports have asked for a few
4 minutes break, however limited, so I will--but five
5 minutes, I'm not suspending the session. Whomever
6 needs to leave the room may leave, but come back right
7 away.

8 MR. FOSTER: Now I know why David wanted me
9 to go first.

10 MR. ORTA: You have the burden, Allen.

11 (Brief recess.)

12 PRESIDENT RIGO: We are continuing with
13 Mr. Orta.

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

15 I'd like to start with thanking Secretary
16 Eizenstat for the observation he made at the end of
17 his comments about the presentations we made, and I
18 think I speak on behalf of the entire team on the

19 Respondent's side. We very much appreciate the
20 comment.

21 In response to the first question, as I
22 understood it, Secretary Eizenstat, you asked what our

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04:20:31 1 view is in relation to what the restoration
2 obligations were under Contract 402 in relation to
3 precisely what the Contract says and, also I believe
4 you asked about the letter in relation to Phase II
5 that had been--that's been a matter of record.
6 I will start with acknowledging that in the
7 Contract, it's Contract 402, and it's Paragraph 13 or
8 Article 13 of the Contract, every single one of the
9 Restoration Clauses in relation to Phase I through
10 Phase 5 they all have the same verbiage, and they all
11 state that the Usufructuary has the obligation to
12 begin--bear with me. Let's make sure I get the
13 language correct--so, it's up on the screen now. It
14 says--and notice it's the same in relation to Phase I
15 which in the very first one as it is in relation to
16 Phase II, III, IV, and V, and they have the exact same
17 verbiage: "Shall begin restoration within X period of
18 time," and it defines a different period of time for
19 each phase.
20 And then at the end of each it says that--so
21 it says that--bear with me--railway cargo
22 transportation shall be offered in relation to the

04:22:38 1 Phase, shall be offered in at least one segment within
2 a six month term as of the date that that Phase is
3 supposed to begin.

4 Now, we start with the Clause doesn't say
5 when the restoration is supposed to be completed--or,
6 quite frankly, on its terms whether it's supposed to
7 be completed. But from our understanding of what was
8 bid out and what was negotiated, the Guatemalan
9 Government put out a bid for restoration of its
10 railway and gave the land to FVG in order to carry out
11 the restoration.

12 Now, it appears that in the drafting of this
13 Contract there is a lacuna. It doesn't say when
14 exactly the Phases are to be completed, but it doesn't
15 say they're not to be completed, it doesn't say they
16 are not to be completed.

17 And it's our understanding, to start with
18 what our understanding of Guatemalan law is, in a
19 situation like this where you have a void in the terms
20 of the Contract that make is such that--again, it's a
21 stark difference between Civil Law systems and Common
22 Law systems in relation to this issue in some regards,

04:24:04 1 and in Civil Law systems like Guatemala system, when
2 you have a void like this, and when interpretation of
3 the Agreement is--you're unable to do so or the

4 interpretation would be unreasonable, given the void,
5 and we contend that the interpretation that's been
6 given here by Claimant, which is that they only had an
7 obligation to begin rail restoration service in the
8 first Phase and to complete it, but not in any other
9 Phases, first of all, is internally inconsistent
10 because, as I mentioned, the language is the same as
11 to Phase I.

12 Phase I doesn't say you have to complete it
13 by a certain date, but they take the position that
14 they were obligated to complete Phase I. So if you
15 look at just the language in the Contract, I suppose
16 you could ask well, why are they concluding that they
17 have to complete Phase I but not the other Phases when
18 the language is precisely the same for each Phase.

19 And going back to the interpretation point,
20 given that there's a void here, and given that the
21 purpose of the agreement was to restore the Guatemalan
22 railway system, and that the land that was given--I

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04:25:17 1 should say the right to exploit the right of way was
2 an auxiliary or secondary right that was given in
3 relation to the railway restoration, I think we have
4 to look to what the Parties intended.

5 And when you look to what the Parties
6 intended in order to fill that void, the only evidence
7 that we have of record or I should say the evidence
8 that we have of record that we think is most

9 persuasive on this is the Overseer Porrás' testimony,
10 and he tells you both in his written statement and
11 based on his testimony here before the Tribunal that
12 it was always contemplated that they were going to not
13 just start the Phases but carry them out, and that
14 Guatemala would never have given all of this land to a
15 third party to have them exploit for its benefit
16 without also requiring that they carry out the
17 restoration of the railway.

18 So, that's as it relates to the issue of
19 contract interpretation, and I'm obviously not a
20 Guatemalan lawyer, but I understand that's how the
21 issue would play itself out. And if the Tribunal is
22 interested in hearing about that more, we would be

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04:26:29 1 pleased in Post-Hearing Briefs to talk about the issue
2 of how this would be interpreted under Guatemalan law
3 because I don't think that that has actually been
4 briefed by the Parties.

5 On the issue of the letter as to Phase II,
6 the letter, and I don't have it before me, but it says
7 that they have completed with the initiation of Phase
8 II and the rendering of service within six month of
9 that initiation. That doesn't, however, in our view,
10 answer the question that I just answered before, which
11 is whether they have to complete it and what they have
12 to do, and I believe that Phase II demonstrates the
13 unreasonableness of the interpretation that's been
14 given to this Clause by RDC because, as you've heard

15 the uncontradicted testimony is, that there was some
16 track that was laid down in relation to Phase II at
17 the border of Mexico, and the Mexican train and the
18 Mexican operator brings the train in for a certain
19 amount of distance, unloads cargo and goes back out.
20 To say that that fulfills RDC's--and FVG's
21 responsibility to restore Phase II seems to me to be
22 unreasonable. Now, I realize the letter there and the

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04:27:58 1 letter--I don't know the circumstances under which it
2 was executed so I can't offer you any insights about
3 that, but I can say that to interpret that to mean
4 that they then, therefore, get to conclude that
5 they've carried out the restoration of Phase II and
6 that they get to keep that land seems unreasonable,
7 and therefore, we'd go back to the initial analysis.

8 And I would also point out that they were
9 looking into financing for funding Phase II, and it
10 seems a bit contradictory to say they had nothing more
11 to do in Phase II, but at the same time they were
12 looking for financing and funding in order to carry
13 out restoration in Phase II.

14 Now, in relation to the--I think the second
15 question was the power and the authority of the FEGUA
16 overseer when he signed the letter authorizations and
17 signed the different Contracts I believe you were
18 asking about, so we would remit you there to the Legal
19 Opinion of Mr. Aguilar.

20 In Public Law systems like this one, a public
21 official can only carry out whatever powers have been
22 expressly given to him or her. The FEGUA Overseer is

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04:29:24 1 part of the Executive Branch and the--FEGUA Overseer
2 is part of the Executive Branch. And I understand it
3 there are certain powers that the Executive, it's
4 Chief being the President, delegates to the FEGUA
5 Overseer. And those are set forth in FEGUA's Organic
6 Law.

7 Article 3 of FEGUA's Organic Law states that
8 the object and purpose of FEGUA is to provide rail
9 transport service. And as I understand Mr. Aguilar's
10 Opinion, nowhere in the Organic Law of FEGUA has there
11 been a delegation of power to the FEGUA Overseer to
12 contract out to third parties goods of the State. The
13 FEGUA property, meaning the--the railway property, I
14 should say, excuse me, the railway property, meaning
15 both the land and the rail equipment is property of
16 the State as defined by Article 121 of the Guatemalan
17 Constitution.

18 So, the Opinion of Mr. Aguilar is basically
19 that FEGUA's Overseer was never delegated the right to
20 contract out to third parties Government land or this
21 Government property; and, hence, in order to do so,
22 and for that to be valid, there has to be approval by

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04:30:59 1 the President of any such contracts. It's my
2 understanding that that is why, when the first bid was
3 put out, Contract 41, that it required Executive
4 approval in section 6.4 of the Bidding Terms.

5 So, what that means, and this is what
6 Mr. Aguilar's Opinion is, is that when the letter
7 authorizations were signed by the FEGUA Overseer
8 giving property rights, in essence to RDC, the right
9 to use and benefit from the railway equipment, the
10 FEGUA Overseer overstepped his bounds. He didn't have
11 the--that authority had never been delegated to him to
12 do that unilaterally. He can do that so long as he
13 complies with the law, and the law requires that the
14 Executive approve of any such--a grants of property
15 interests in State property such as the land or the
16 railway equipment.

17 Proof of that in part is that when Contract
18 402 was executed, it required Government Executive
19 approval, and I believe this was a question that was
20 posed by the Chairman yesterday, and it's my
21 understanding that Contract 402 not only was approved
22 by Congress but also had Executive approval. I

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04:32:19 1 believe that to be correct.

2 And I should say I did not cite all of the
3 provisions that Mr. Aguilar cited for his Opinion on
4 this issue of Executive approval, but they are set

5 forth in his Expert Report, and we would remit you to
6 that, and we would know happy to provide you with
7 those Clauses, if you would like to see them.

8 The third question that was asked was in
9 relation to the different contracts for the railway
10 equipment, and I believe Secretary Eizenstat you
11 referenced Contract 41 and Contract 143, and then you
12 mentioned the Draft Settlement C-44, and you mentioned
13 that there were errors in relation to all three and
14 had asked what--basically for me to try to explain
15 what happened there.

16 As I understand it, Contract 41 was signed,
17 bids--it was signed by both Parties, required
18 Executive approval, and the lack of Executive approval
19 is the only thing that prevented that Contract from
20 being perfected and entering into force. As we
21 mentioned in the Closing Statements and as was
22 mentioned by Mr. Aguilar yesterday, before there would

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04:33:58 1 be even an opportunity to obtain the requisite
2 Executive approval, FVG approached the FEGUA Overseer
3 and asked for authority to utilize equipment pursuant
4 to letter authorize. You can see that in the record
5 because you can compare the dates when the Contract
6 was signed and you can see that not even 20 days later
7 FEGUA receives a letter requesting the use of the
8 equipment.

9 The why Contract 41 didn't get approved, I
10 don't have an answer to that. All we know is what's

11 in the record, which is Mr. Porrás has said he asked
12 for Government approval. I don't know what
13 considerations were given to that by the President and
14 why the President made that decision. You heard from
15 Mr. Aguilar yesterday his understanding as to why he
16 thought it might not have been approved, and he
17 mentioned that it lacked a registration and that he
18 thought that the President would not be able to
19 approve that agreement for that reason.

20 And you heard from Dr. Mayora that approval
21 is not necessary at all, and that hence when it was
22 sent to the President that there would be no juridical

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04:35:16 1 basis upon which the President could approve it and so
2 he thought that the President couldn't approve it
3 because there would be no basis in law for that. We
4 disagree with that, and again we would point to
5 Contract 402 as the example of approval that was
6 obtained of a similar scenario where State property
7 was given to a third party. But I don't have the
8 answer for you on why it wasn't approved.

9 As to Contract 143, my understanding, and, of
10 course, the record, you could review it, and obviously
11 the Tribunal will come to its own conclusions is, is
12 that what Dr. Gramajo was testifying to yesterday is
13 that the Agreement incorporated the terms--the Bidding
14 Terms from Contract 41 which required Executive
15 approval, but then expressly said that Executive

16 approval would not be required for purposes of that
17 Contract from entering into force.

18 As I understood Dr. Gramajo's testimony, he
19 was saying that he could not submit that agreement to
20 the President for approval because it expressly said
21 that Presidential approval was not required. That's
22 not to say that he was of the understanding that that

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04:36:35 1 agreement didn't need to be approved. I hope that
2 distinction is clear because he was told immediately
3 upon, being made aware of that Contract that
4 Presidential approval was required and as a result he
5 wrote to Ferrovías and explained that that was a
6 requirement that would require the Parties to
7 renegotiate the Contract and enter into a different
8 one that would be approved by the President. So, I
9 think that's an important distinction. I'm not so
10 sure how clear that came out in Dr. Gramajo's
11 testimony, but that's what I understand the issue to
12 be.

13 why that agreement itself was never approved,
14 Contract 143, which I believe was part of your
15 question. It was never submitted to the President, as
16 you heard from Dr. Gramajo because that agreement on
17 its face can't be approved because it suffered from
18 illegalities. It's my understanding if that agreement
19 would have been elevated for Presidential approval,
20 they never would have received it because it suffered
21 from a number of legal defects, and we know that in

22 part because once it came to the knowledge of the

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04:37:43 1 legal advisors of the President that that Contract
2 existed, their analysis of it, which we have in the
3 record was that the Contract suffered from defects
4 that rendered it Lesivo, so I don't believe that
5 agreement on its own would ever have been approved or
6 could have been approved by the President, but a
7 separate agreement, if they could have negotiated one
8 that fixed the problems, including an agreement to
9 celebrate a new public bid I think could have cured
10 the issue.

11 As to C-44, on its face, it's a mistake. We
12 all know that there was no bid that took place in
13 relation to Contract 143 and 158, and I submit to you
14 that there are probably a number of other mistakes in
15 the document. It's a Draft Agreement. And what we
16 know from the testimony of Astrid Sosen, again she is
17 a lawyer from the Ministry of Communications who was
18 involved in relation to the drafting of that
19 agreement, and Mr. Burduo, both of whom have submitted
20 witness Declarations here, they say that agreement was
21 put together basically the night before, and then they
22 were looking to negotiate it with Ferrovías, with FVG;

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04:38:55 1 on the day of the 24th, so it's not surprising to me
2 that it has a mistake.

3 The next question is on the issue of the
4 standard under Fair and Equitable Treatment and
5 Article 10.5 of CAFTA. And the particular question, I
6 believe that you posed Secretary Eizenstat, is whether
7 we agree--whether Guatemala agrees that arbitrariness,
8 non-transparency and legitimate expectations --

9 (Pause.)

10 MR. ORTA: So, in relation to your question,
11 so very succinctly, we do not agree that
12 arbitrariness, arbitrary conduct or arbitrariness on
13 its own is part of the minimum standard of treatment
14 under customary International law. However, we do
15 agree that manifestly arbitrary conduct is, and we
16 cited the Tribunal there to a number of Opinions,
17 Glamis Gold, which is at RL-102, Paragraph 616;
18 Cargill, which is at RL-175, Paragraph 296;
19 International Thunderbird, Paragraph 194; and Waste
20 Management, Paragraph 98.

21 I believe I gave you the wrong RL numbers.
22 Just so the record is clear, Glamis Gold is RL-102,

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04:41:17 1 Cargill is RL-175, International Thunderbird is
2 RL-104, and Waste Management is RL-136.

3 So, manifestly arbitrary conduct, we believe,
4 is within the minimum standard of treatment, for Fair
5 and Equitable Treatment.

6 Now, non-transparency, we do not believe, is
Page 219

7 part of the customary International law minimum
8 standard of treatment under Article 10.5, and neither
9 is the legitimate expectations of the--of the
10 investor, and we would point you there to the text of
11 Article 10.5 wherein it says that the customary
12 International law minimum standard of treatment is the
13 one that applies and that in particular the CAFTA
14 Parties agreed that no additional substantive
15 obligations are to be created beyond that minimum
16 standard.

17 Now, having said that, Secretary Eizenstat, I
18 believe, that and as we've argued already that the
19 conduct at issue here would satisfy even those other
20 standards, even though we don't believe they come
21 within Article 10.5.

22 The second-to-last question, indirect

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04:42:43 1 expropriation, you asked whether under the Vivendi III
2 substantial and permanent deprivation of Claimant's
3 interests in the enjoyment of their property would be
4 sufficient, and again we believe it has to be a
5 substantial deprivation of their property interests in
6 their investment, and it has to be sufficiently
7 substantial such as to constitute the equivalent of a
8 full expropriation, and I think we've cited a number
9 of cases in our brief in relation to that issue.

10 The last question I have already answered in
11 some detail, so I'll try not to repeat much of what I

12 said, but I'll leave you with this: The question, as
13 I understand it, was why was the Government spending
14 time focusing on issues in relation to Contract 402
15 and 820 in the settlement discussions leading up to
16 the Lesivo Declaration? And the answer to that is
17 what I stated earlier. There was a fundamental series
18 of problems between these Parties, and Claimant,
19 through their enterprise FVG and through Mr. Posner
20 and others, asked President Berger for a meeting, and
21 the purpose of the meeting, as I understand it, was
22 Claimant wanted to get the intervention and assistance

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04:44:22 1 of the President to resolve the problems it had in
2 relation to the relationship, and there were a number
3 of them, and there's a presentation--I don't know if
4 any of my colleagues can get me--I don't want to put
5 the presentation up, but just the cite to the
6 presentation that was made by Mr. Posner during the
7 meeting, but I think it's very telling because that
8 will show you what the PowerPoint slides were and what
9 issues he was raising at that meeting, and I think
10 when you look at that PowerPoint slide and you look at
11 the notes that were made by Mr. Posner following the
12 meeting, what you'll see is that he was talking to the
13 President about a number of issues. I believe C-33 is
14 the cite to the PowerPoint presentation. And the
15 issues under discussion were a number of them, and
16 they included the lack of funding for Phase II, the
17 problems with squatters, the problems with the Trust

18 Fund and a number of things.

19 So, it's no surprise that as a result of that
20 meeting and starting then and afterward, when the
21 President took up Mr. Posner on his request to
22 intervene and help that the Government officials that

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04:45:49 1 were involved were discussing all of those issues and
2 not just Contract 143 and 158 in isolation.

3 As I also pointed out before, that's not the
4 first time that FVG had sought intervention at a
5 higher level in the Government. We pointed to R-9,
6 which is the letter to Vice-Minister Diaz which was
7 copied to President Berger, wherein they were seeking
8 help with a number of issues, including funding for
9 the Phase II southern coast, removal of squatters for
10 Phase II, payment of--Trust Fund payments and
11 remedying Contract 143 and 158. I think that letter
12 is fairly instructive because Claimant in that letter
13 puts all three issues on the table and asks for
14 assistance from Vice-Minister Diaz from the Ministry
15 of Communications.

16 I hope that responded to your questions.

17 ARBITRATOR EIZENSTAT: I had asked if FEGUA
18 ever factually made a payment into the 802 Trust Fund.

19 MR. ORTA: My understanding is that FEGUA has
20 not made payments into the 802 Trust Fund. That is
21 the subject of the arbitrations--in Guatemala, excuse
22 me.

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04:47:20 1 I hope that responded to your questions. Let
2 me make sure my colleagues don't have any other points
3 of view. Just bear with me half a second.

4 (Pause.)

5 MR. ORTA: We don't have anything else,
6 unless the Tribunal has other questions. Thank you.

7 PRESIDENT RIGO: Mr. Foster asks to say a
8 word.

9 MR. FOSTER: Extremely briefly in response.

10 First, on the issue of the approval of
11 Contract 402, there was no Presidential approval.
12 There is nothing in the record that indicates
13 Presidential approval. If you look at Exhibit C-20,
14 you will see that there was Congressional approval,
15 but no Executive approval of 402.

16 Secondly, with regard to the terms of
17 Article 13 of Contract 402 concerning the obligation
18 of Ferrovías to do repairs, number one, in Phase I in
19 contrast to what you just heard, if you just read it,
20 it requires the renovation of the railroad all the way
21 from Guatemala City to the Port. It is not the same
22 obligation as relates to the other two Phases.

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04:48:51 1 But the obligation in Article 13 has to be
2 understood in terms of the other provisions of the
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3 Contract. We were only obligated to invest
4 \$10 million. For someone to say that there was a
5 reasonable expectation regardless of the words of the
6 Contract that somehow or another there was an
7 expectation that we were going to renovate the entire
8 railroad, that one doesn't pass the red-face test.

9 Also, remember again it's a 50-year contract.
10 The Contract explicitly says that other actions in
11 addition to the specific obligations of the Contract
12 will be done as business conditions permit, so the
13 Contract explicitly contemplates that, as we go
14 through the 50 years of this Usufruct, business
15 conditions may well justify investments in addition to
16 the minimum requirements under the Contract.

17 Also, the letter from the Overseer doesn't
18 just say that you've satisfied the beginning or
19 anything--the startup obligation. It says that the
20 obligations of Subsection 3 of Clause 13--that's the
21 Clause that refers to the obligation in connection
22 with Phase II, says that all of those obligations have

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04:50:20 1 been met, so it's not just saying that you began
2 service on a small segment. It is saying that what
3 you have done so far meets your obligations under
4 Clause 13 with regard to Phase II.

5 Third, on Fair and Equitable Treatment and
6 the standards, I would just refer you to the following
7 slides in our Opening Presentation for our position

8 with regard to what the standards are, and I won't
9 take your time by going through them, but insofar as
10 arbitrariness, if you will look at slide 62 and 63;
11 bad faith, slide 58; due process, slides 59 through
12 61; and legitimate expectations, slides 64 and 65.
13 That sets forth what we believe the standard under
14 customary international law is with regard to Fair and
15 Equitable Treatment.

16 Now, finally, on the issue of what went on at
17 this meeting with the President and what that has to
18 do with the whole inner play that was going on at that
19 time, what is extraordinary about the meeting with the
20 President is that not what was discussed but what
21 wasn't discussed. There was never a mention of the
22 fact that there were illegalities in Contracts 143 and

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04:51:49 1 158 or that there was any Lesivo process even being
2 considered. That's the key point as to what was
3 happening at that Presidential meeting, and I'll stop
4 there. You've been very patient with us, and thank
5 you very much.

6 PRESIDENT RIGO: Thank you, Mr. Foster
7 Mr. Orta, have you anything?

8 MR. ORTA: In the interest of allowing you
9 more time to ask additional questions or deliberate, I
10 have nothing further.

11 PRESIDENT RIGO: Thank you.

12 And the CAFTA, the non-disputing parties, may
13 make oral or written submissions. We have with us

14 representative of two non-disputing parties, and I
15 would like them to come forward. I will invite them
16 to come forward in case they would add anything
17 themselves.

18 Mr. Parada. Mr. Parada representing El
19 Salvador here.

20 MR. PARADA: Good afternoon, Mr. President,
21 and Members of the Tribunal. My name is Luis Parada,
22 and I'm appearing on behalf of the Republic of El

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04:53:14 1 salvador.

2 First, I would like to thank you and
3 appreciate the effort of the Tribunal to preserve the
4 right of non-disputing parties to make oral and
5 written submissions to the Tribunal regarding issues
6 of treaty interpretation. At this time El Salvador
7 will not be making an oral submission, however, El
8 Salvador would like to reserve the right to make a
9 written submission on the issues of treaty
10 interpretation that you will have to decide for this
11 case.

12 with regard to the time limit, we would just
13 like to briefly express three factors that, in our
14 view, are relevant for this time limit. One is the
15 importance of the issues that will be considered by
16 this Tribunal. As you know, this case is the first
17 CAFTA arbitration that reaches the merits phase, and,
18 therefore, you will be deciding for the first time

19 very important issues of treaty interpretation that I
20 think are very important not only for the Parties in
21 the dispute but also for the non-disputing parties.

22 The second is that there are four other

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04:54:17 1 non-disputing parties, although they are not present
2 here at the hearing, once they receive the transcript
3 of the hearing, which will be shortly, what they may
4 always be considering their participating with their
5 own written submissions. And these written
6 submissions by the non-disputing parties require a lot
7 of coordination between different Ministries within
8 the Government, and we are at a particularly busy time
9 of the year not only because it's the end of the
10 calendar year, but also because in many countries it's
11 the end of the Fiscal Year.

12 Therefore, Members of the Tribunal, I would
13 like to suggest a time limit of 31 January for the
14 submissions, any written submissions by the
15 non-disputing parties. Thank you very much.

16 PRESIDENT RIGO: Thank you, Mr. Parada.

17 Also with us is Mr. David Bigge of the State
18 Department of the United States, if you would come
19 forward.

20 MR. BIGGE: Thank you, Mr. President, Members
21 of the Tribunal. My name is David Bigge. I'm an
22 attorney adviser of the United States Department of

04:55:34 1 State, on behalf of the United States, I would also
2 like to thank the Tribunal, the Secretary to the
3 Tribunal, and the Parties for accommodating our
4 observation of the hearings over the past 8 days.

5 we also will not be making an oral submission
6 at this time on issues of treaty interpretation, but
7 we also reserve the right to make a written submission
8 on issues of Treaty interpretation under Article 1022.
9 Thank you.

10 PRESIDENT RIGO: Thank you, Mr. Bigge.

11 (Tribunal conferring.)

12 PRESIDENT RIGO: The Tribunal will send a
13 communication, as we did at the time of the Decision
14 on Jurisdiction to the non-disputing parties, inviting
15 them to make any comments that they wish to make. We
16 consider January 31st as a reasonable, given the
17 circumstances of the season we are in, as a reasonable
18 time limit. And, of course, the disputing parties
19 will have an opportunity to comment. I would suggest
20 within 15 days of receipt of any communication in case
21 we receive any from the non-disputing parties.

22 Having said that, if there's nothing else, I

04:57:45 1 really would like to subscribe to Secretary Eizenstat
2 compliments to counsel and to the teams of both
3 Parties, I think you have done a very high quality

4 representation, to use his own words.

5 I would like also to thank all the services
6 we have here, particularly the Court Reporters and the
7 Interpreters. I think they do a magnificent job. I
8 don't know how they could do it for so many hours at a
9 time.

10 And particularly Natali Sequeira for making
11 this moving very smoothly. But also complimenting
12 counsel, I appreciate how you have helped, apart from
13 the quality of representation that you have been very
14 cooperative with the Tribunal, and you have been very
15 reasonable in terms of solving any minor incidents
16 that may have occurred during the proceeding.

17 So, thank you so much to all, and the session
18 is closed.

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

20 (Whereupon, at 4:57 p.m., the hearing was
21 adjourned.)

22

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter,
do hereby certify that the foregoing proceedings were
stenographically recorded by me and thereafter reduced
to typewritten form by computer-assisted transcription
under my direction and supervision; and that the
foregoing transcript is a true and accurate record of
the proceedings.

1216 Day 8 Final.txt

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