

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

RAILROAD DEVELOPMENT CORPORATION

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/07/23

CLAIMANT'S MEMORIAL ON THE MERITS

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XV. EXPERT OPINION OF EDUARDO A. MAYORA

XVI. EXPERT OPINION OF W. MICHAEL REISMAN

I. INTRODUCTION

1. In 1997, the Republic of Guatemala decided to privatize the operation of its defunct and neglected national railway by awarding, through an international public bidding process, a 50-year concession, or “onerous usufruct” (the “Usufruct”) to Claimant Railroad Development Corporation’s (“RDC”) investment enterprise, Compañía Desarrolladora Ferroviaria, S.A., which does business as Ferrovias Guatemala (“FVG”).¹ The Usufruct required FVG to rehabilitate and operate a railway that, under the State’s management and operation, had fallen into such a state of deterioration and disrepair that operations had ceased as of 1996.

2. In performing under the Usufruct, RDC invested more than \$15 million in FVG. As a result of RDC’s investment, more than 200 miles of railway were rehabilitated in less than two years, and major commercial railway service resumed in December 1999. For more than eight years, FVG consistently provided the services and made the Canon fee payments to Guatemala required of it under the agreements that comprised the Usufruct. Traffic tonnage shipments were steadily increasing on an annual basis, and FVG successfully negotiated several long-term leases with third parties for use of the right of way. In contrast, the Government of Guatemala completely ignored its principal obligations under the Usufruct. The Government breached its obligation to remove individual and industrial squatters from the right of way, which greatly hindered railway operations and FVG’s ability to develop and lease the real estate properties which were granted as part of the Usufruct. The Government also failed to make its contractually-obligated payments into a trust fund which was to be used by FVG to finance further rehabilitation of the railway. As a result of these breaches, FVG brought local breach of contract arbitrations against Guatemala in June and July of 2005.

3. Despite these breaches by the Government, the Usufruct was still on a steady path to long-term success and profitability for FVG until August 2006, when the President of the Republic of Guatemala, in joint counsel with his cabinet ministers, unilaterally issued a declaration of “*lesivo*” that deemed an essential element of the Usufruct granted to FVG, the Usufruct Contract of Rail Equipment, “INJURIOUS to the interests of the State” (the “Lesivo Resolution”) (Ex. C-1). The Lesivo Resolution has no basis in fact or reality; it was directly contrary to the Government’s prior actions, representations and agreements made over a nine-year period, upon which RDC relied in making its investments in FVG and the Usufruct. Moreover, it was not a good faith measure by which the Government sought to protect legitimate State interests. Rather, its purpose and intent was to further several improper Government objectives: (1) to force FVG to withdraw from its local breach of contract arbitrations brought against Guatemala; (2) to expropriate FVG’s rights to the rail equipment and thereby make it impossible for FVG to perform under and thereby nullify the Usufruct, without paying any compensation; and (3) to cause or facilitate the transfer of FVG’s rights and interests under the Usufruct to a domestic competitor, the sugar oligarch Ramon Campollo, after Campollo had been unsuccessful in his private attempts to intimidate FVG into ceding to him all, or substantially all, of its Usufruct rights and interests.

4. The immediate effect of the Lesivo Resolution was to financially and commercially destroy FVG’s business and RDC’s investment in the Usufruct by causing a

¹ FVG is also frequently referred to as “CODEFE” in many of the source documents.

critical number of FVG's current and prospective customers, suppliers and lenders to refuse to continue to do business or contemplate doing any additional business with FVG. The Lesivo Resolution also caused an overwhelming increase in public interference with the right of way from locals who vandalized and looted the tracks, stole railroad materials and equipment for personal use or financial gain, and set up living quarters as squatters along the tracks and in station yards. As a result, FVG had no choice but to cease railway operations in September 2007, approximately one year after the Lesivo Resolution issued.

5. The Government of Guatemala's action in issuing the Lesivo Resolution and actions taken in furtherance of said Resolution constitute clear violations of the foreign investment protection provisions of Chapter 10, Section A of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"), to which Guatemala became a Party on July 1, 2006. The Lesivo Resolution was an expropriatory, arbitrary, discriminatory, bad faith and non-transparent measure directed at RDC and FVG with the purpose and intent of destroying FVG's business and RDC's investment without due process or compensation. As a result of the Lesivo Resolution, RDC has suffered substantial damages measured by the loss of its covered investment in FVG and the reasonably expected returns from that investment over the life of the Usufruct.

II. THE PARTIES AND RELATED ENTITIES

6. Claimant RDC is a privately held corporation incorporated under the laws of the Commonwealth of Pennsylvania in the United States of America, which is a "Party" as defined by CAFTA.² It is a railway investment and management company which focuses on "emerging corridors in emerging markets," meaning railways plus other complementary businesses, such as ports, fiber optic, electric and petroleum transmissions, and commercial and institutional developments of other uses of railway lines, stations and yards, primarily in developing countries. RDC currently has railway operations in the United States (the Iowa Interstate Railroad), Argentina and Peru and it formerly owned interests in and operated railways in Estonia, Malawi and Mozambique. The company has recently signed a joint venture agreement with Réseau Ferré de France, the French government-owned company that owns and maintains the French national railway network, and Caisse des Dépôts, France's development bank, to structure and operate railway branch lines in France as short lines.³

7. RDC is an "investor of a Party" under CAFTA Article 10.28 in that it is an "enterprise of a Party, that . . . has made an investment in the territory of another Party." CAFTA Article 2.1 (definitions of General Application) defines "enterprise of a Party" as "any entity constituted or organized under applicable law, whether or not for profit . . . including any corporation. . . ."

8. FVG is an enterprise formed under the laws of the Republic of Guatemala that is owned and controlled by RDC. RDC directly owns 82% of the outstanding shares of FVG, with the remaining 18% divided among 65 Guatemalan investors. FVG was formed specifically to be the vehicle for RDC's bidding for, and entering into the railway usufruct contracts with the

² Statement of Henry Posner III ("Posner Statement") ¶ 2.

³ *Id.*

Government of Guatemala, and, thereby, for RDC's covered investment.⁴

9. Respondent Republic of Guatemala is a sovereign State and Party to CAFTA.

10. Ferrocarriles de Guatemala ("FEGUA") is a state-owned enterprise of the Republic of Guatemala which was established in 1969 under Decree No. 22-69 of the Congress of the Republic of Guatemala for the management and exploitation of Guatemala's national railroad system.⁵ In accordance with its Organizational Law, FEGUA is controlled by the Government of Guatemala and, from 1969 until 1996, was responsible for providing rail transport services and managing the national railroad's personal and real property that comprised its assets.⁶

III. CLAIMANT HAS SATISFIED CAFTA'S PROCEDURAL AND JURISDICTIONAL REQUIREMENTS

11. CAFTA Article 10.16.1(a) permits an "investor of a Party," such as RDC, to submit a claim of arbitration "on its own behalf" if it "has incurred loss or damage by reason of, or arising out of" a breach by the respondent of its obligations under Section A of CAFTA Chapter 10. CAFTA Article 10.16.1(b) permits RDC to submit a claim of arbitration "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly" if "the enterprise has incurred loss or damage by reason of, or arising out of" a breach by the respondent of its obligations under Section A of CAFTA Chapter 10. FVG, which is a corporation incorporated in Guatemala, is an "enterprise of the respondent" that is directly controlled by Claimant RDC. Accordingly, RDC is entitled to submit the CAFTA claims against Guatemala discussed herein on behalf of itself and on behalf of FVG.

12. As required by CAFTA Article 10.1, the breaches of Chapter 10 discussed herein arise from measures adopted or maintained by a Party [Guatemala] relating to (a) "investors [RDC] of another Party", and (b) "covered investments". CAFTA Article 2.1 defines "covered investment" to include an "investment" – which is defined in CAFTA Article 10.28 to include (a) "an enterprise" and (b) "shares, stock, and other forms of equity participation in an enterprise" – which was in existence as of the date of CAFTA's entry into force. Therefore, FVG is a "covered investment" of "an investor of another Party" as such terms are defined under CAFTA.

13. Under CAFTA Article 2.1, a "measure" includes "any law, regulation, procedure, requirement, or practice." The Government measures being complained of here took place after CAFTA entered into force between the United States and Guatemala on July 1, 2006.

14. As required by CAFTA Article 10.18.2, and affirmed by the Tribunal in its Decision on Jurisdiction dated November 17, 2008 and Decision on Clarification Request of the Decision on Jurisdiction dated January 13, 2009, RDC and FVG have submitted valid waivers

⁴ *Id.* ¶ 3.

⁵ *Id.* ¶ 5, Ex. C-14, Rules for the National and International Public Bid for the Granting of Onerous Usufruct of Railroad Transportation in the Republic of Guatemala February 1997 ("Bidding Rules"), ¶ 2.2.

⁶ *Id.*, Ex. C-22, Deed 402, Onerous Usufruct Contract for Right of Way, dated 25 November 1997 ("Deed 402"), clause 1.

“in respect of the claim arising from the Lesivo Resolution and from subsequent conduct of the Respondent pursuant to the Lesivo Resolution.”

IV. STATEMENT OF FACTS

A. The Origin of the Railway Usufruct

15. From 1969-96, the Guatemalan national railway was operated and maintained by the Government through its state-owned enterprise, FEGUA. Rail transportation became poorer over time due to its state of obsolescence and to the deterioration of the equipment and premises, as well as the Government’s insufficient investment in the reconstruction or modernization of the system. This decline led to a continuous loss of cargo and passenger carriage, resulting in the financial deterioration of FEGUA to the point that the railroad completely ceased operations in March 1996.⁷ By then, the railway system infrastructure, physical premises and railway equipment were, in the words of Guatemala, “very old, obsolete and in [a] bad state.”⁸

16. In 1997, the Guatemalan Government decided that it was in the economic interest of the nation to re-establish the functions of the national railroad system.⁹ However, Guatemala determined that the only way it could re-establish the system was to do a “complete restructuring under privatized management through a concession.”¹⁰ Accordingly, Guatemala decided to invite foreign private investors to rebuild and operate its railway system through an international public bidding process, and authorized FEGUA to enter into appropriate agreements for the use of the railway infrastructure, real estate and other specified rail assets with the party who submitted the most favorable bid.¹¹

17. Guatemala initiated international public bidding on February 17, 1997.¹² The Government’s Request for Bids and Bidding Rules set forth the Government’s legal basis for and authorization of the bidding process, and included a February 14, 1997 Memorandum to FEGUA’s Inspector from FEGUA’s Legal Advisors which stated, in pertinent part, “That the related bidding rules comply with the main requisites required by the State Contract Law and consequently, they can be approved by the inspector of FEGUA in order to receive from the bidders their corresponding proposals.”¹³

18. The stated purpose of the request for bids was for FEGUA, with the consent of the

⁷ Deed 402, clause 1.

⁸ *Id.* at clause 5, § II. *See also* Ex. C-14, Bidding Rules, Annex 5.2, ¶ 4.1 (“The current railroad system is in very bad conditions, not just physically (the tracks, rolling materials, and equipment are in terrible state), but also when it comes to organization and commerce.”); Ex. C-2, December 1996 FEGUA Track Condition Report (“[I]t is my duty to inform you that the railway is impassable, mainly due to the height of the weeds, the corroded crossties and several landslides in each District that obstruct circulation. Furthermore, it must be taken into consideration that a short term repair is not viable, due to the fact that the bridges are in bad condition. . . . Also, take into account that the Railway has not received maintenance in over two years, which makes it impossible for the trains to circulate.”)

⁹ Deed 402, clause 1.

¹⁰ Ex. C-14, Bidding Rules, Annex 5.2, Introduction.

¹¹ *Id.*

¹² Ex. C-3, Notices of “International Public Bidding Contract of Onerous Usufruct of Railroad Transportation in Guatemala, Government of Guatemala” published in Guatemala newspapers, February 13 and 21, 1997.

¹³ Ex. C-4, Memorandum dated February 14, 1997 to FEGUA’s Inspector from FEGUA Legal Advisors Enma Soza Romero de Funes and Miguel Angel Villagran Bracamonte (“Legal Advisor Memo”).

Government of Guatemala, to grant an “onerous usufruct”¹⁴ for a fixed period of 50 years (with an option to be extended for as long as five additional periods of 10 years each) for the operation and exploitation of the Guatemalan railroad system.¹⁵ Under the Bidding Rules, bids were to be received by FEGUA on May 15, 1997 in two sealed envelopes: (i) Envelope A, which was to contain the Technical Bid, and (ii) Envelope B, which was to contain the Economic Bid.¹⁶ The Rules further provided that the Onerous Usufruct Contract entered into with the winning bidder would “be approved by Government Agreement enacted in Council of Ministers, and subsequently brought for approval by the Congress of the Republic.”¹⁷

B. Awarding of 50-Year Usufruct to Rebuild and Operate the Guatemalan Rail System (the “Usufruct”)

19. On May 15, 1997, FVG, along with one other bidder (an entity named Agenda 2000) submitted sealed bids to Guatemala to restore and operate the railway system. In its Business Plan that was submitted under its sealed bid (Posner Statement ¶ 6, Ex. C-15), FVG proposed rehabilitating the 800 km railway in five distinct phases (sec. 3.0), as shown on the following map:



Phase I called for reopening of the 320 km Atlantic/North Coast corridor, which would involve connecting the Atlantic port cities of Puerto Barrios/Puerto Santo Tomas with Guatemala City.

¹⁴ Black’s Law Dictionary (7th ed. 2000) defines the term “usufruct” as a “right to use another’s property for a time without damaging or diminishing it, although the property might naturally deteriorate over time.” An “onerous usufruct” under Guatemalan law is a usufruct that is conveyed subject to conditions which impose obligations on the usufructary. Guatemalan Civil Code, Title III, Chapter I (Rights and Obligations of the Usufructary), Arts. 703-37.

¹⁵ Ex. C-14, Bidding Rules ¶ 1.1.

¹⁶ *Id.* at ¶¶ 3.3.2–3.3.4.

¹⁷ *Id.* at ¶ 3.64.

Phase II would involve reopening the 200 km Pacific/South Coast corridor from the Mexican border at Tecún Umán to Escuintla and Puerto Queztal. Phase III would involve the construction of a branch line to serve Cementos Progreso, a cement manufacturer and minority shareholder in FVG. In Phase IV, the Pacific and Atlantic corridors would be reunited by restoration of the Escuintla-Guatemala City line, while Phase V would reopen the connection between El Salvador and Zacapa.¹⁸

20. Although FVG's rehabilitation plan was divided into five phases, FVG only committed to completing Phase I, reopening the Atlantic corridor. The remaining four phases were to be completed "according to business conditions" and if the capital investments could be economically justified.¹⁹ The Business Plan also included a comprehensive rehabilitation plan for the FEGUA locomotives and freight cars.²⁰

21. FVG committed in its Business Plan to an initial \$10 million investment for rehabilitation of the Atlantic corridor (Phase I) and the rolling stock (*i.e.*, locomotives and freight cars).²¹ The Plan further stated that FVG had an agreement with its parent corporation, RDC, to provide sufficient financial and administrative support "to accomplish [FVG's] obligations under the bid terms, and the subsequent contractual requirements resulting from the grant of the concession."²²

22. Of the two bids that were submitted, FVG submitted the only bid that was considered responsive and compliant with the bidding terms.²³ The Usufruct was awarded to FVG on June 13, 1997.²⁴ The above terms, together with the economic assumptions and projections of FVG's Business Plan, were incorporated in FVG's bid, carefully reviewed by the Government of Guatemala (the Government's award process accorded 70% of the bid evaluation points to the bidder's Business Plan) and its award of the Usufruct to FVG incorporated the Business Plan and was necessarily based thereon.

23. Subsequently, in November 1997, the Government of Guatemala issued a separate public request for bid proposals for use of the FEGUA rail equipment in onerous usufruct.²⁵ This separate usufruct for the rail equipment was put together as the legal details of the primary right of way usufruct were being worked out and finalized between the Government and FVG, and it was done to accommodate the evolving technical needs of the Government from a legal perspective.²⁶ Per the terms of the Government's request for proposal, FVG submitted its bid proposal to Guatemala on December 11, 1997.²⁷ There were no other bids submitted. The rail equipment usufruct was unanimously awarded to FVG three business days later on December 16,

¹⁸ Posner Statement ¶ 6, Ex. C-15, FVG Business Plan, Envelope A: Technical Offer, § 3.0 (Operation Plan).

¹⁹ *Id.* at § 4.0.

²⁰ *Id.* at § 4.2.

²¹ *Id.* at § 6.1.

²² *Id.* at § 6.0.

²³ Posner Statement ¶ 9.

²⁴ *Id.*, Ex. C-16.

²⁵ *Id.* ¶ 10, Ex. C-17.

²⁶ *Id.*

²⁷ *Id.*, Ex. C-18.

1997.²⁸

24. The Usufruct Right of Way Contract was signed on October 22, 1997 by FVG Chairman Henry Posner III and FEGUA Administrator Andres Porras in a public ceremony on the rear platform of the Presidential coach “Michatoya” which was parked on the non-operating railway line. Guatemala Vice President Luis Flores presided over and spoke at the ceremony. The Right of Way Contract signed on October 22, 1997 was subsequently replaced by an identical contract executed by the parties before a Government notary on November 25, 1997.²⁹ The Usufruct and Usufruct Right of Way Contract were ratified by the Congress of Guatemala by Decree 27-98 on April 16, 1998 and were published in the Official Gazette on April 23, 1998.³⁰ Under the terms of the Usufruct Right of Way Contract, the railroad privatization became effective on May 23, 1998.³¹

C. The Usufruct Contracts

25. The Usufruct consists of three agreements entered into by and between FEGUA and FVG (collectively, the “Usufruct Contracts”), each of which are necessary to operate the railroad:

- (i) Onerous Usufruct Contract of Right of Way, documented by Deed Number 402 dated November 25, 1997 (“Deed 402”) (Posner Statement, Ex. C-22). Deed 402 came into force on May 23, 1998 and has a term of fifty (50) years³²;
- (ii) Trust Fund for the Rehabilitation and Modernization of the Railroad System in Guatemala, documented by Deed Number 820 dated December 30, 1999 (“Deed 820”) (Posner Statement, Ex. C-23), with a term of twenty-five (25) years expiring on December 31, 2025³³; and
- (iii) Onerous Usufruct Contract Involving Railway Equipment, documented by Deed Number 41, dated March 23, 1999 (“Deed 41”) (Posner Statement, Ex. C-24), granting FVG the “use, enjoyment, repair and maintenance of railway equipment” owned by FEGUA for the purposes of rendering railway transportation services.³⁴ Because Deed 41 was never formally approved by Government Resolution, this contract was replaced, at the Government’s request, by Deed Number 143 on August 28, 2003

²⁸ *Id.*, Ex. C-19.

²⁹ *Id.* ¶ 11.

³⁰ *Id.*, Ex. C-20.

³¹ Deed 402, clause 7.

³² Deed 402, clause 7. This clause also provides that the Usufruct could be extended by mutual agreement of the parties for up to an additional 50 years.

³³ Although Deed 820 states that it has a 25-year term, it also states that the term is “as of January 1, 2000 and expiring on December 31, 2025,” *i.e.*, 26 years. Deed 820, clause 5.

³⁴ Deed 41, clause 5.

(“Deed 143”) (Posner Statement, Ex. C-25).³⁵ Deed 143 was further amended on October 7, 2003 by Deed Number 158 (“Deed 158”) (Posner Statement, Ex. C-26). Deed 143 has a term of 44 years, 8 months and 25 days, to May 22, 2048, the termination date of the original 50-year Usufruct.³⁶

26. Under the terms of Deed 402, FVG was obligated, *inter alia*, to provide rail service “adequately and continuously, *pursuant to its business plan contained in the offer presented to the bidding* that originated the present contract . . . ,” and to conserve all assets and elements subject to the contract.³⁷ FVG has the right under Deed 402 to develop and earn income on alternative uses for the right of way and FEGUA real estate assets through the laying of gas pipelines and electric transmission and fiber optics lines, as well as commercial and institutional development of parcels of land held by FEGUA bordering the railroad track.³⁸

27. In return, under Deed 402, FVG agreed to pay (and did pay) FEGUA a Canon fee of five percent (5%) of gross income on rail operations and ten percent (10%) on other income during the first five (5) years of the Usufruct and, starting in year six (6), ten percent (10%) of gross income on both rail transportation income and other income for the remainder of the Usufruct.³⁹ This Canon fee structure and rates were initially proposed by FVG in its submitted Business Plan.⁴⁰

28. Under the first Usufruct Contract for Railway Equipment, Deed 41, FVG agreed to pay a Canon fee to the Trust Fund in the amount of 1% of the gross freight traffic revenue of the railroad, not to exceed 300,000 quetzals per year.⁴¹ This Canon fee structure and rate was initially proposed by FVG in its December 11, 1997 bid proposal.⁴² However, in 2003, when the Government requested that Deed 41 be replaced by Deed 143, it demanded that the Canon fee be increased to 1.25% of the gross traffic revenue, with no annual limitation and paid directly to FEGUA.⁴³ After receiving assurances from the Government that this higher Canon fee was necessary for legal reasons and that the replacement of Deed 41 with Deed 143 would have no other material effect on FVG’s Usufruct rights, FVG acceded to the Government’s demand.⁴⁴

29. Thus, under the Usufruct Contracts combined (Deed 402, to which was later added Deed 41, which in turn was superseded by Deed 143), FEGUA received a total effective

³⁵ Deed 143 states that “in spite of having been endorsed by both parties, [FEGUA and FVG], and having complete validity, [Deed 41] was never in force seeing that it was not approved by the President of the Republic; it was nonetheless a necessary requirement as the Judicial Administrator of [FEGUA] has the necessary capacities to enter into this contract.” Deed 143, clause 1, § V. As a result, at the Government’s insistence, FEGUA and FVG decided to terminate Deed 41 and enter into Deed 143, which provides that “This contract shall be in force as of its endorsement, *without need of subsequent authorization from any other authority.*” *Id.* at clause 6 (emphasis added).

³⁶ *Id.* at clause 6.

³⁷ Deed 402, clause 11 (emphasis added).

³⁸ *Id.* at clause 5; *see also* Ex. C-14, Bidding Rules ¶ 4.1.13.

³⁹ Deed 402, clause 8.

⁴⁰ Posner Statement ¶ 16; FVG Business Plan, Economic Offer.

⁴¹ Deed 41, clause 7.

⁴² Posner Statement ¶ 17, Ex. C-18.

⁴³ *Id.*; Statement of Jorge Senn (“Senn Statement”) ¶ 7.

⁴⁴ Deed 143, clause 7; Posner Statement ¶ 16; Senn Statement ¶ 7.

annual Canon fee payment of 11.25% from FVG.

30. FEGUA obligated itself in Deed 402 to, *inter alia*, make annual payments up to \$500,000 into the Trust Fund established by Deed 820 that was to be used exclusively for rehabilitation and modernization of the railway system.⁴⁵ The source of these Trust Fund payments was to be the income received by FEGUA from right of way leases that it had entered into prior to the execution of Deed 402.⁴⁶ FEGUA was also obligated under Deed 402 “not to hinder the rail and non-rail activities of [FVG], protecting the exercise of its rights against third parties that may intend to have or want to exercise a right on the real estate granted as onerous usufruct, responding promptly to their requirements, complaints or claims regarding this matter.”⁴⁷

D. FVG’s Successful Rehabilitation of Railway

31. True to and well beyond its commitment, from 1998 through 2006, RDC invested approximately \$15.4 million in FVG that was used for, *inter alia*, start-up costs, railway and equipment rehabilitation, operations and maintenance, retention and payment of more than a hundred employees, and provision of railway services.⁴⁸

32. Despite decades of neglect by Guatemala, the complete loss of railway traffic for more than two years prior to entering into Deed 402, extensive invasion of the right of way by squatters, and the destruction caused by Hurricane Mitch in 1998, FVG, through dedicated, disciplined and literally heroic efforts, was able to resume commercial railway service on April 15, 1999, with a short-haul (60 km) symbolic cement movement from El Chile to Guatemala City. In December 1999, the Phase I rehabilitation was completed with the restoration of major commercial service on the 320 km Atlantic corridor line from Guatemala City to Puerto Barrios and Puerto Santo Tomas.⁴⁹

33. Between 1997 and 1999, FVG rehabilitated a total of 206.9 miles (333 km) of railway (41.5% of the total right-of-way), which consisted of the Atlantic Main Line (Puerto Barrios to Guatemala City) (201.9 miles/325 km), a four-mile railway spur from the Atlantic Main Line to Puerto Santo Tomas, and one mile connecting the Tecún Umán Station with the Mexican border. FVG also rehabilitated and repaired a total of 158 bridges in the Atlantic Main Line, the Tecún Umán station at the Mexican border, the Puerto Barrios rail yard, and the Guatemala City zone 12 yard. From 1999 until FVG was forced to suspend railway operations in September 2007, FVG operated 15 engines and 200 railcars.⁵⁰

E. FVG’s Success in Operating Guatemala’s Railroad System

34. From 2000 through 2005 (the year prior to the Lesivo Resolution), FVG was

⁴⁵ Deed 402, clause 8.

⁴⁶ *Id.*

⁴⁷ *Id.* at clause 12.

⁴⁸ Posner Statement ¶ 20. *See also* FVG Annual Reports 1998-2007 (Posner Statement, Exs. 27(a) – 27(j)). RDC’s annual net investment in FVG is set forth in the cash flow statement for each year.

⁴⁹ Posner Statement ¶ 21.

⁵⁰ *Id.* ¶ 22.

successful in steadily increasing railway traffic tonnage shipments⁵¹:

Year	Total Shipments
2000	64,850 tons
2001	94,603 tons
2002	100,391 tons
2003	118,860 tons
2004	122,308 tons
2005	125,466 tons

Railway traffic tonnage, however, was less than the initial projections set forth in FVG's original Business Plan due in large part to FEGUA's failure to remove squatters and failure to make its contractually obligated payments into the Railway Rehabilitation Trust Fund, as discussed below.⁵²

35. In 2006, total tonnage shipments declined from the prior year to only 92,566 tons due to the Government's Lesivo Declaration.⁵³ On June 26, 2007, because the Lesivo Resolution had effectively destroyed any prospect for FVG to pursue its Business Plan, the Board of Directors of RDC terminated its financial support of FVG. Railway operations were discontinued in September 2007.⁵⁴

36. Pursuant to its right to develop and earn income on alternative uses for the right of way, prior to the Lesivo Resolution, FVG entered into long-term easement right contracts with four different companies (Planos y Puntos/Gesur, Zeta Gas, Texaco Guatemala and Genor) and a long-term lease with Chiquita for a port facility at Puerto Barrios.⁵⁵ Those contracts generated over \$700,000 in income for FVG from 2000 through April 2007.⁵⁶ During this time period, FVG also earned \$334,938 from house rentals on station yards, commercial booths and billboards within the stations and right of way.⁵⁷

37. Guatemala also received substantial Canon fee payments from FVG under the Usufruct Contracts. FVG payments to Guatemala from 2000-06 were as follows:

⁵¹ Senn Statement ¶ 12, Ex. C-40.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Posner Statement ¶ 54; Senn Statement ¶ 57.

⁵⁵ Posner Statement ¶ 23, Exs. C-28(a) – 28(e).

⁵⁶ Senn Statement ¶ 13.

⁵⁷ *Id.*

Year	FVG Payments (Quetzals)
2000	714,652
2001	866,602
2002	825,971
2003	1,366,345
2004	2,156,755
2005	1,404,198
2006	901,207

FVG's Canon payments to FEGUA were audited by FEGUA on an annual basis. No FVG underpayments were ever identified during these audits.⁵⁸

F. Guatemala's Breaches of Deeds 402 and 820

38. Despite FVG's remarkable success in rehabilitating and re-opening the national railroad, FEGUA consistently failed to perform its obligations under the Usufruct Contracts. Under Deed 402, FEGUA was obligated "not to hinder the rail and non-rail activities of [FVG], protecting the exercise of its rights against third parties that may intend to have or want to exercise a right on the real estate granted as onerous usufruct, responding promptly to their requirements, complaints or claims regarding this matter." FEGUA consistently breached this obligation by failing to remove individual and industrial squatters⁵⁹ from the right of way.⁶⁰

39. FEGUA also breached its obligations under Deeds 402 and 820 to make annual payments into the Trust Fund that were to be used to help rehabilitate the railroad system. FEGUA never made any payments into the trust and, as of June 2005, the estimated outstanding balance owed to the Trust Fund by FEGUA exceeded \$2.5 million.⁶¹

40. On June 13, 2005, after extensive efforts to convince FEGUA to meet its

⁵⁸ Senn Statement ¶ 14.

⁵⁹ The industrial squatters principally involve private telecommunications and electricity distributors placing or maintaining utility poles and running transmission lines along the right of way without FVG's permission or compensating FVG. *Id.* ¶ 15.

⁶⁰ *Id.*; Posner Statement ¶ 35. A particularly egregious example of unlawful squatting along the right of way that FEGUA failed to address commenced around 1999, when the FVG right of way from Santa Maria to San Jose – a distance of 20.6 miles – was confiscated by sugar industry interests. The rails and crossties were removed and the right of way was compacted so it could be used as a roadway by commercial trucks because it is apparently the easiest and fastest route for the sugar industry and other commercial interests to move their product. Senn Statement ¶ 16.

⁶¹ Senn Statement ¶ 17; Posner Statement ¶ 35.

contractual obligations, FVG initiated a local arbitration action against FEGUA for FEGUA's failure to pay monies owed to the Trust Fund. On July 25, 2005, FVG filed another, separate arbitration claim against FEGUA based on breach for its failure to remove squatters from the railroad right of way pursuant to its obligations under Deed 402.⁶² In both of these arbitrations, FVG has requested that the arbitrators order FEGUA to comply with its contractual obligations in terms of paying into the Trust Fund and removing squatters from the right of way. FVG has also requested an award of monetary damages for the losses FVG has suffered as a result of the breaches.

41. FEGUA has resolutely refused to submit to the local arbitrations, claiming that the Government is not subject to arbitration on constitutional grounds, and has used the Guatemalan courts to engage in a series of improper procedural delaying tactics in order to prevent FVG's claims from ever being arbitrated and decided on the merits. Almost four years after the local arbitrations were initiated by FVG, no hearings on the merits have taken place or been scheduled in either proceeding and, as a result of FEGUA's incessant procedural stalling tactics, there is no indication that such hearings will ever take place.⁶³

G. Guatemala Issues the Lesivo Resolution After FVG Refuses to Surrender Its Usufruct Rights and Withdraw Its Local Arbitrations

42. Although RDC could not have foreseen it at the time, the road to the Lesivo Resolution of August 25, 2006, began seven years before, in late 1999, when the business partners of Ramon Campollo first contacted RDC concerning Campollo's interest in FVG's Usufruct. Ramon Campollo is a Guatemalan sugar oligarch who, in addition to owning one of the largest sugar mills in the country, has a large investment holding in Empresa Electrica de Guatemala, S.A. (EEGSA), the largest electricity generator and distributor in Guatemala, and interests in oil and gas exploration and distribution ventures. A 2006 news article described him as one of the "owners of Central America" and listed him as one of the ten most powerful and influential entrepreneurs in the region.⁶⁴

43. In 1999, Campollo's partners met with RDC's Chairman, Henry Posner III, and explained his desire to construct a natural gas pipeline from the Mexican border to Guatemala City. The project contemplated the use of FVG's right of way for the pipeline and, importantly, assumed that Campollo and his other investors in the pipeline would pay to FVG a fixed fee for the use of the right of way of \$600,000 per year based upon 300 miles usage at \$2,000 per mile.⁶⁵ Campollo offered, and FVG accepted, an upfront payment of \$15,000 from Campollo's investment group, GASISTMO, in July 1999 and an additional \$15,000 payment in February 2000 to maintain a first option on the pipeline easement rights. In July 2000, however, FVG was notified that GASISTMO "no longer desired to maintain its option."⁶⁶ At this point, FVG had no reason to believe that Campollo's interest was other than to obtain the pipeline easement rights in

⁶² Senn Statement ¶ 18; Posner Statement ¶ 36. Deeds 402 (clause 20) and 820 (clause 25) both contain mandatory arbitration provisions for any difference or controversy relating to the application, interpretation or fulfillment of the contracts that arises between the parties.

⁶³ Senn Statement ¶ 19.

⁶⁴ Ex. C-5, *The Owners of Central America*, El Periódico, April 17, 2006.

⁶⁵ Posner Statement ¶ 26.

⁶⁶ *Id.*

return for an annual rental, or to question that Campollo had, for some unrelated reason, decided not to pursue that project.

44. Two years later and after FVG had been operating the railway for more than a year, on April 23, 2001, Mr. Campollo invited Mr. Posner, FVG President Bill Duggan and FVG's then-General Manager, Renato Fernandez, to a meeting at his house in Guatemala City.⁶⁷ Mr. Campollo's front man and go-between, Hector Pinto, also attended the meeting. At that meeting, Campollo made it clear that he was still interested in the railway and its right of way for a variety of reasons and intended to obtain a controlling interest in the Usufruct and railway assets. He asked Mr. Posner to make him an offer. Mr. Posner, however, was uninterested in ceding a controlling, or even a substantial, interest to Mr. Campollo and declined to make any such offer.⁶⁸

45. In late 2004, Mr. Campollo again requested a meeting with FVG, and Mr. Duggan and FVG's General Manager, Jorge Senn, met with him on December 3, 2004, at the law offices of Greenberg Traurig in Miami, Florida. Also attending the meeting on Mr. Campollo's behalf was Juan Esteban Berger, a lawyer and the son of the President of Guatemala, Oscar Berger.⁶⁹

46. It was FVG's understanding that Mr. Campollo had requested the December 3 meeting because he wanted to make an offer to help FVG reopen the South Coast portion of the railroad. However, upon Messrs. Duggan's and Senn's arrival, Campollo immediately turned the tables and said he was at the meeting to listen to what FVG *had to offer him*. He reiterated his intention of obtaining control over the railroad and its assets and discussed his particular interest in the South Coast route from Tecún Umán at the Mexican border through Escuintla to the Pacific port of Puerto Quetzal, which would be valuable to him for more economical transport of his sugar products from his sugar mill at Santa Lucia. Campollo specifically noted that transport by rail would be cheaper than his current truck haulage by approximately \$1 per ton. He also mentioned that he desired to purchase more sugar cane growing areas closer to the Mexican border where land was less expensive and that he intended to use the railway to transport this cane to his mill, a distance of about 100 miles. He stated further that his interest in taking over the railway was also connected with his real estate project, called Ciudad del Sur, where he intended to develop housing and a warehouse and industrial park.⁷⁰

47. In response to Mr. Campollo, Mr. Duggan told him that, although FVG would consider an equity investment by the Campollo group, FVG had no intention of giving up its control of a Usufruct that it had been awarded and had worked very hard with a large investment by RDC to get the North Coast railway up and running. Mr. Duggan added that FVG was not obligated and had no immediate plans to open the railroad on the South Coast (*i.e.*, Phase II) unless it was financially viable to do so. Campollo, however, said that he had a deserved reputation of being a "lone wolf" and did not desire any "partners." He made it clear that he was not offering to purchase an interest in the Usufruct or to invest in FVG; rather, he wanted FVG to

⁶⁷ *Id.* ¶ 27; Statement of William J. Duggan ("Duggan Statement") ¶ 4.

⁶⁸ Posner Statement ¶ 27; Duggan Statement ¶ 4.

⁶⁹ Duggan Statement ¶ 5; Senn Statement ¶ 21. Subsequently, virtually all communication with RDC/FVG on Mr. Campollo's behalf was handled by Mr. Pinto. Mr. Pinto died on January 18, 2008 in a car accident.

⁷⁰ Duggan Statement ¶ 6; Senn Statement ¶ 22.

give him controlling interest in order to avoid his thinly veiled threat of retaliation.⁷¹

48. Sometime in late 2004 or early 2005, FVG first began to receive reports that Mr. Campollo was, through President Berger's son, Juan Esteban, enlisting the Government in his efforts to obtain control of the railroad assets. In particular, FVG heard both from its minority shareholders and a source in the Government, Mario Fuentes, who worked in the office of the Mega-Projects Commissioner, that, at Campollo's insistence, the Government was concocting a claim that FVG's Usufruct Agreements were somehow tainted by some unarticulated illegality.⁷²

49. In early 2005, Mr. Campollo again demanded a meeting with FVG and, prior thereto, on March 9, 2005, Mr. Pinto delivered, by email, a written "offer" to FVG.⁷³ President Berger's son, Juan Esteban, was copied on the offer. The key terms of Campollo's "offer" were as follows:

- (i) Desarrollos G [Campollo's company] was to be granted a 180-day first option "to initiate and develop businesses or projects related to property and rights" granted to FVG by the Usufruct Deeds, with "businesses or projects" defined as "any lucrative activity";
- (ii) FVG compensation would be limited to an amount to be "formalized" in a period "not to exceed 180 days";
- (iii) Desarrollos G would be given the right to take over any existing contracts upon their expiration;
- (iv) FVG would agree not to undertake businesses or projects which competed with Desarrollos G; and
- (v) Desarrollos G would be granted a membership on FVG's Board of Directors "with the objective . . . of understanding business opportunities to be presented by FVG" and a five-year option to purchase any or all of the shares of FVG without stipulating any procedure for determining compensation to FVG.

The "offer" also included a verbal commitment, stated by Hector Pinto, that all of FVG's problems with the Government would be "resolved" once FVG signed an agreement with Mr. Campollo.⁷⁴ In other words, Mr. Campollo's "offer" was a demand to FVG to *give him* FVG's assets and business, or else it would suffer unstated consequences.

50. On March 15, 2005, Messrs. Posner, Duggan, Senn and RDC's President, Bob Pietrandrea, met with Mr. Pinto at the Marriott Hotel in Guatemala City. At this meeting, Mr. Pinto announced that, if FVG did not "cooperate with Mr. Campollo's companies on joint ventures" for both FVG lines of business, *i.e.*, rail operations and real estate development, in

⁷¹ Duggan Statement ¶ 7; Senn Statement ¶ 23.

⁷² Duggan Statement ¶ 8; Senn Statement ¶ 24.

⁷³ Senn Statement ¶ 25, Ex. C-41.

⁷⁴ *Id.*

accordance with the “option” Mr. Pinto had just sent, Mr. Campollo would “take” the business with or without FVG. In response, Mr. Pietrandrea told Mr. Pinto, in no uncertain terms, that RDC had no interest in Mr. Campollo’s “option” as written, but that FVG was willing to consider Mr. Campollo buying into FVG as an investor.⁷⁵

51. Shortly thereafter, on April 5, 2005, Mr. Pinto called Mr. Senn. In the conversation, Mr. Pinto was quite heavy-handed in asserting that there were alleged “illegalities” in FVG’s Usufruct Contracts and that he would come to FVG’s offices to “let us know what is the legal point of view of the Ministry [of Communications] regarding our contract,” but that, “if we reach an agreement maybe we could work out together these illegalities” Mr. Senn responded to Mr. Pinto that RDC/FVG was still uninterested in giving Mr. Campollo the assets of the company as proposed, but repeated that RDC would be open to an investment by Mr. Campollo.⁷⁶

52. On April 12, 2005, Messrs. Duggan and Senn attended a meeting with Mr. Pinto at the offices of FVG’s lawyer, Pedro Mendoza. They took with them Ricardo Silva, an attorney whom FVG had employed to handle the breach of contract arbitrations which were ultimately brought against FEGUA and which FVG was then contemplating. Also attending the meeting were two other men who were not introduced by name, but were described by Mr. Pinto as being from the “commission” put together by the “group” to study the potential of the railroad on the South Coast (where Mr. Campollo’s sugar business and other business interests are). Luis Pedro Fuxet, an attorney from the office of President Berger’s son, Juan Esteban, conducted the meeting. He announced that he was there at the request of President Berger’s son.⁷⁷

53. At the April 12 meeting, Mr. Duggan stated his understanding that Mr. Pinto had called the meeting to talk about the alleged “illegalities” of FVG’s Usufruct Contracts, all in the shadow of Mr. Pinto’s threat “that the government would most likely kick us out should there be no agreement with [Mr. Campollo’s] group.” Mr. Duggan said that FVG considered this to be an obvious threat and he demanded to know what it was about the FVG contracts that Mr. Pinto considered illegal. Mr. Fuxet responded that “there was no threat per se,” but that the Minister of Communications had alluded to such a situation since FVG had not gotten the railroad up to a standard the Government thought was needed regardless of the terms stated in the Usufruct Contracts. Mr. Duggan responded that FVG had performed all its obligations, in contrast to FEGUA, which had not made its \$2.5 million in contractually required payments into the Railway Rehabilitation Trust Fund and that the Government had not provided any assistance in obtaining the financing and commitment to rebuild even a portion of the South Coast segment. Attorney Silva further reiterated that Mr. Campollo’s proposal was neither desired by FVG nor possible due to legal reasons related to FVG’s contractual obligations.⁷⁸

54. Subsequently, on April 15, 2005, Messrs. Duggan and Senn met with President Berger’s son, Juan Esteban, at Attorney Silva’s office. There, Juan Esteban ostensibly apologized for Mr. Pinto’s statements at the April 12 meeting.⁷⁹ Later that day, a letter from Mr.

⁷⁵ Posner Statement ¶ 32; Duggan Statement ¶ 10; Senn Statement ¶ 27.

⁷⁶ Senn Statement ¶ 28.

⁷⁷ Duggan Statement ¶ 11; Senn Statement ¶ 29.

⁷⁸ Duggan Statement ¶ 12; Senn Statement ¶ 30.

⁷⁹ Duggan Statement ¶ 13; Senn Statement ¶ 31.

Campollo was delivered to FVG, stating that Mr. Campollo had decided not to participate in the railway project that was proposed to him in Miami by Messrs. Duggan and Senn due to his participation in other businesses that would require most of his time.⁸⁰

55. As discussed *supra* in paragraph 40, on June 13, 2005, FVG filed its initial arbitration claim against FEGUA for its failure to make its contractually-obligated payments into the Railway Rehabilitation Trust Fund. Behind the scenes, and in apparent response to this filing as well as the ongoing efforts of Mr. Campollo, on June 22, 2005, FEGUA requested that the Attorney General of Guatemala investigate the circumstances surrounding the award of the Usufruct and to issue an opinion on the validity of Deeds 143/158, the Usufruct Contract for Railway Equipment.⁸¹ The timing of FEGUA's "request" was no mere coincidence. Moreover, a request by the Government to its Attorney General for such a baseless investigation carries with it an inherent message of how the Government expects its Attorney General to respond.

56. Under the Administrative Procedure Law of Guatemala, the President in Cabinet Council can issue a resolution called "*lesividad*" which declares an administrative contract or other Government act as detrimental or contrary to the interests of the state and seeks its annulment.⁸² The Government can only issue a declaration of "*lesivo*" within three years of the date of the administrative contract or Government act.⁸³ As of June 2005, when FEGUA made its investigation request to the Attorney General, Deed 143 – which was entered into in 2003 at the Government's request as an administrative replacement of Deed 41 – was the only one of the three Usufruct Contracts that still fell within the three-year limitations period.

57. On August 1, 2005, the Solicitor General of the Attorney General's office issued his *lesion* opinion (Opinion No. 205-2005) in response to FEGUA's request and recommended that the Government declare Deeds 143/158 to be void or rescinded as not in the interests of Guatemala.⁸⁴ In particular, the opinion argued that Deeds 143/158 should be voided because it was not awarded as a result of a new public bidding process, the contract was for an overly long duration and did not sufficiently protect the rail equipment property deemed to be part of Guatemala's cultural patrimony, and the Canon fee payment of 1.25% of net freight invoicing was "unfavorable to the State."⁸⁵

58. On January 13, 2006, FEGUA issued a legal opinion in which it agreed with the Solicitor General's *lesion* opinion and argued that additional provisions of Deed 143 were "unfavorable to the interests of the State of Guatemala."⁸⁶ FEGUA then officially requested in an accompanying letter that the President of Guatemala declare *lesion*.⁸⁷ In response to FEGUA's request, on April 26, 2006, the Consultative Board of the Presidency of the Republic

⁸⁰ Senn Statement ¶ 31, Ex. C-43.

⁸¹ See Ex. C-6, FEGUA Opinion No. 05-2006, 13 January 2006.

⁸² Administrative Procedure Law ("APL"), Decree 119-96, Title II, Ch. 1, Arts. 18-27. As discussed further below in paragraph 145, there is no substantive legal, either constitutional or statutory, authorization under Guatemala law for "*lesividad*"; indeed, the only references to it are procedural regulations in the APL and in the Executive Branch Law, Decree 114-97, Ch. 3, Art. 17b.

⁸³ APL, Decree 119-96, Title II, Ch. 1, Art. 20.

⁸⁴ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 August 2005.

⁸⁵ *Id.*

⁸⁶ Ex. C-6, FEGUA Opinion No. 05-2006.

⁸⁷ Ex. C-8, FEGUA Official Letter No. 031-2006, 13 January 2006.

issued an opinion and recommendation that the President declare that Deed 143, as amended by Deed 158, causes *lesion* to the interests of the State because of various technical “irregularities” with the contract under the Government Contracting Law.⁸⁸ Attached to the Consultative Board’s opinion was a draft Government Resolution of *lesion* for the consideration and approval of the President. During this entire process, no one from the Government sought FVG’s position or opinion with regard to any of Deeds 143/158’s alleged deficiencies, nor informed FVG of the process that was underway.

59. In the meantime, RDC and FVG made consistent efforts to resolve their claims against FEGUA through outreach, consultation and negotiation with the Government of Guatemala. After numerous unsuccessful attempts to reach an understanding with FEGUA, FVG requested a meeting with President Berger, which occurred on March 7, 2006. Among the attendees at the meeting were RDC’s Chairman, Henry Posner III, FVG’s President, Bill Duggan, and FEGUA’s Overseer, Arturo Gramajo. In addition, Frederico Melville and Mario Montano, Directors of Cementos Progreso (which Guatemalan company is a minority investor in FVG) were present.⁸⁹

60. After being introduced by Mr. Melville, Mr. Posner made a presentation concerning the railroad, the work which had been done by FVG to rehabilitate the railroad, and the investments by RDC. Mr. Gramajo spent approximately five of the twenty minutes allotted for the meeting emphasizing the substantial interest of “other private sector parties” in the development of the South Coast route and Ciudad del Sur. Mr. Melville questioned whether the “other private sector parties” were Ramon Campollo, which Mr. Gramajo confirmed.⁹⁰

61. After this discussion, President Berger purported to instruct FEGUA’s Overseer, Mr. Gramajo, to dissolve FEGUA and to comply with the Usufruct Contracts. Unfortunately, but predictably, neither Presidential “instruction” was followed. President Berger also instructed that a new high level railroad commission be established, purportedly to work with RDC and FVG on Governmental support of FVG’s railroad operations and to address the issues of public, private and commercial squatters, as well as theft and vandalism, all of which were hindering railroad operations.⁹¹

62. The new railroad commission was established and a number of meetings took place from March to June 2006. However, while Government representatives attended the meetings, the Government never made a proposal or offered a plan for compliance with the Usufruct Contracts or resolving FVG’s claims.⁹² Within approximately three months of its establishment, the Government suspended the commission meetings, despite multiple requests by FVG to continue negotiations. Meanwhile, without the knowledge of RDC or FVG, President Berger and the Government were apparently planning for and preparing the Lesivo Resolution even as Government officials were pretending to work with FVG. And, after the Government issued the Lesivo Resolution, it convened no more commission meetings, in tacit recognition that the commission had been a sham.

⁸⁸ Ex. C-9, General Secretariat Opinion No. 236-2006, 26 April 2006.

⁸⁹ Posner Statement ¶ 37; Duggan Statement ¶ 16

⁹⁰ Posner Statement ¶ 38, Ex. C-33 (PowerPoint presentation); Duggan Statement ¶ 17.

⁹¹ Posner Statement ¶ 39; Duggan Statement ¶ 18.

⁹² Senn Statement ¶ 34; Duggan Statement ¶ 19; Posner Statement ¶ 40.

63. In early May 2006, Hector Pinto met with Inngmar Iten, a founder and general manager of Maya Quetzal, a successful Guatemalan recycler of scrap metal which at the time was in the process of bidding on the right to recycle scrap metal previously owned by the State of Guatemala, including railway equipment owned by FEGUA. At this meeting, Mr. Pinto told Mr. Iten that it was not going to be too long, probably within the current year, before the Government would “take the railway away from Ferrovias [FVG],” and, therefore, any future purchase of scrap metals derived from railway assets or equipment would have to be negotiated with Mr. Pinto. In addition, Mr. Pinto told Mr. Iten that, in the foreseeable future, he would be able to sell to Maya Quetzal the rails and other metal parts of the railway line from Zacapa to the El Salvador border because the railway assets were going to be awarded to a business consortium managed by him and on behalf of Ramon Campollo.⁹³

64. On July 1, 2006, CAFTA went into effect between the United States and Guatemala.

65. On July 26, 2006, Hector Pinto called Jorge Senn to demand a meeting and threatened that “the rules would change by the end of the month.” The meeting was arranged for that day, and lasted for an hour and a half. In addition to Mr. Senn, Mr. Duggan was present for FVG. Mr. Campollo was represented by Mr. Pinto. Again, Mr. Pinto described Mr. Campollo’s interest in rail service for transport of his sugar products between his sugar mill at Santa Lucia and Puerto Quetzal on the South Coast. Mr. Pinto also stated that Mr. Campollo wanted to build a large container yard at Santa Lucia (the Ciudad del Sur project) and wanted to use rail service for this. Mr. Duggan ended the meeting by telling Mr. Pinto that FVG would study the possibility of rehabilitating that portion of the then-unused South Coast route so long as FVG saw no undercutting of its Usufruct rights and “we were in this as a ‘for profit’ business, not a group to be used or manipulated.”⁹⁴

66. Mr. Campollo’s involvement in the Government’s actions adverse to FVG was further confirmed two days later on July 28, 2006, when Mario Montano, a Director of Cementos Progreso, told Mr. Duggan that “there was a push on within the Government by Ramon Campollo’s group of henchmen” to cancel FVG’s Usufruct and award it to Campollo.⁹⁵

67. Sure enough, on August 11, 2006, Mr. Posner received a call from Federico Melville of Cementos Progreso, who told him that he had been informed that President Berger was in the process of declaring FVG’s concession “*lesivo*” or “injurious to the interests of the State.” Mr. Melville added that this action seemed to be “the doing of Mr. Campollo,” and a step toward revoking the concession. FVG’s counsel, Juan Pablo Carrasco, had a separate conversation with Mario Montano on the same day which echoed Mr. Melville’s report.⁹⁶

68. These reports of Messrs. Melville and Montano proved to be accurate because, in fact, on August 11, 2006, President Berger, in joint counsel with certain of his cabinet ministers, signed Government Resolution No. 433-2006, which declared an essential element of the

⁹³ Statement of Inngmar Walterio Iten Rodriguez, Maya Quetzal dated 12 May 2009. *See also* Senn Statement ¶ 44.

⁹⁴ Senn Statement ¶ 35; Duggan Statement ¶ 20.

⁹⁵ Duggan Statement ¶ 21.

⁹⁶ Posner Statement ¶ 41.

country's 1998 railroad privatization, the usufruct of the rolling stock (the railroad cars and engines) under Deeds 143/158 to cause "*lesion*," *i.e.*, the agreements were "INJURIOUS to the interests of the State of Guatemala."⁹⁷ Interestingly, the arguments in the Solicitor General's August 1, 2005 Opinion regarding the overly long duration of the contract, the lack of sufficient protection for rail equipment property deemed to be part of Guatemala's cultural patrimony, and the unfavorable Canon fee payment of 1.25% were not listed in the President's Explanatory Statement appended to the Resolution.⁹⁸

69. By the week of August 21, 2006, FVG was told by the Government that, unless changes to the Usufruct Contracts that were satisfactory to the Government could be agreed upon before the end of the week, the declaration of *lesivo* would be published, *i.e.*, made official. On August 23, 2006, Mr. Senn met at the Presidential Palace with President Berger; Jorge Arroyave, the President's General Secretary (a lawyer); Alfredo Vila, the President's Private Secretary; Eddy Castillo, the Minister of Communications; Richard Aitkenhead, the Government Planning Minister; Mickey Fernandez, the Competitiveness Commissioner; Mario Marroquin, Mr. Fernandez's assistant; and Mario Fuentes, the assistant to the Mega-Projects Commissioner. When Mr. Senn began a presentation, which included FVG's long term projects with potential joint venture investors, including opening up the South Coast route, President Berger cut Mr. Senn short, asking, "whether there had been any joint ventures between FVG and potential investors so far," and made it clear that the Government's primary interest was in a standard gauge railroad track along the South Coast. It was clear to Mr. Senn that the "potential investors" President Berger was referring to was Ramon Campollo. President Berger then proclaimed that *lesividad* would be officially declared on a very short notice, unless FVG came up with a satisfactory counterproposal which included an investment plan for the South Coast.⁹⁹

70. On that same afternoon of August 23, representatives of FVG and FEGUA met at the Ministry of Communications to discuss the Government's demands. Present at the meeting for FVG were Mr. Senn and FVG's attorneys. Present for the Government were FEGUA's Overseer, Mr. Gramajo, FEGUA's lawyers and lawyers from the Ministry of Communications. At the meeting, the Government stated its position that FVG had to sign a commitment guaranteed by a bond to open the South Coast route. FVG rejected that position, not the least because time constraints made securing a bond impossible. The parties subsequently agreed to reconvene the next day to present negotiating options.¹⁰⁰

71. As agreed, the FVG - FEGUA meeting reconvened with the same participants on August 24, 2006. There, FEGUA presented FVG with a "settlement offer" in which FVG would have had to agree to significantly modify the economic terms of the Usufruct Contracts, drop its local breach of contract arbitrations against FEGUA, and "surrender[] railway sections yet to be restored" (*i.e.*, the South Coast route) "in which other investors may be interested" (as Mr. Campollo had been pressing for almost two years).¹⁰¹ FVG's representatives specifically warned the Government representatives that a declaration of *lesividad* would cause the indefinite suspension of railway operations and have a substantial adverse impact on FVG's current

⁹⁷ Ex. C-1.

⁹⁸ Ex. C-10.

⁹⁹ Senn Statement ¶ 38.

¹⁰⁰ *Id.* ¶ 39.

¹⁰¹ Senn Statement ¶ 40, Ex. C-44.

dealings with potential investors and lenders in the various real estate projects then being negotiated.¹⁰²

72. Later that evening of August 24, there was a meeting between Mario Fuentes, the Mega-Projects Commissioner's assistant who had been chairing the negotiations between FVG and FEGUA, and Jorge Arroyave, the President's General Secretary. Mr. Arroyave informed Mr. Fuentes that "if no agreement is reached on the above terms [a commitment to agree to the "settlement offer"], we [the Government] already have a strategy designed to undermine and terminate the other two [Usufruct] contracts as well because, as the Government, we have the power to do so." As expressed by Mr. Arroyave, the Government's strategy was that, by declaring the Usufruct Contract for Railway Equipment to be *lesivo*, FVG would be forced to default on the "providing service" obligations of the primary Right of Way Usufruct Contract, Deed 402. Mr. Fuentes reported this conversation with Mr. Arroyave Reyes to Mr. Senn.¹⁰³

73. FVG refused the Government's "take it or leave it offer" and *lesividad* was officially declared the next day, on August 25, 2006, by publication in the Guatemala Official Gazette.¹⁰⁴ Tellingly, the *lesividad* was issued the last business day before the expiration of the three-year period during which, under Guatemalan law, it could have potentially been declared as to Deed 143 under Guatemalan law.

74. Less than two weeks later, on September 5, 2006, Hector Pinto, on behalf of Mr. Campollo, wrote Emmanuel Seidner Aguado, an official working for Mickey Fernandez, the Minister of Competitiveness, informing him that railway service between Puerto Quetzal to Ciudad del Sur in Santa Lucia would be restored shortly for the purposes of transporting sugar from Mr. Campollo's mill to the Port. Rubbing FVG's nose in it, Mr. Pinto sent a blind copy of his correspondence to Mr. Senn.¹⁰⁵

75. On November 24, 2006, the Government of Guatemala filed a claim against FVG in the Administrative Court of Guatemala ("Sala Primera de lo Contencioso Administrativo," Claim No. 389-2006) seeking the court's confirmation of the Lesivo Resolution, an order seizing the rolling stock transferred by FEGUA to FVG pursuant to Deeds 143/158, an order denying the FVG general manager the right to travel outside of Guatemala, and the seizure of FVG accounts (hereinafter, the "*lesivo* action").¹⁰⁶ After delaying the filing of official notice of its claim for six (6) months, on May 15, 2007, the Government served its claim on FVG. FVG filed its initial objections to the claim on May 21, 2007. As of the date of this Memorial, the Administrative Court has not yet confirmed the Lesivo Resolution.

H. The Lesivo Resolution Was Intended to Further Improper Government Objectives

76. The foregoing evidence overwhelmingly demonstrates that the Government of Guatemala issued the Lesivo Resolution to advance at least three improper Government

¹⁰²

Id.

¹⁰³

Id. ¶ 41.

¹⁰⁴

Senn Statement ¶ 42; Posner Statement ¶ 44.

¹⁰⁵

Senn Statement ¶ 43, Ex. C-45.

¹⁰⁶

Ex. C-11.

objectives. First, as discussed above, the timing and the circumstances surrounding FEGUA's initial request for an investigation of the awarding of the Usufruct and Deed 143 – *i.e.*, eight years after the Usufruct was first awarded to FVG and shortly after FVG brought its initial arbitration against FEGUA for breaches of the Usufruct Contracts – strongly suggest that it was intended to force FVG to withdraw from the local arbitration proceedings and abandon its right to have its claims heard in the forum which had been agreed as an integral part of the Usufruct Contracts. Indeed, the Government's "take it or leave it" offer to FVG made right before the Lesivo Resolution issued specifically required FVG to dismiss its local arbitrations.

77. Second, by declaring Deed 143, the rolling stock Usufruct Contract, as "injurious to the interests of the State," the Government intended to make it impossible for FVG to perform under the basic right-of-way Usufruct Contract (Deed 402) and thereby allow it to expropriate all of FVG's business and RDC's investment without paying compensation.¹⁰⁷ Thus, if FVG was deprived of the rolling stock, it would not be able to provide rail service, and Guatemala could void the entire Usufruct. President Berger's General Secretary, Jorge Arroyave Reyes, specifically admitted this to Mario Fuentes, the Mega-projects Commissioner, that this was in fact the Government's strategy in declaring *lesivo*.¹⁰⁸

78. Third, the Government was motivated to issue the Lesivo Resolution as the first step in enabling Ramon Campollo to obtain control of the railway and FVG's railroad assets without compensating FVG after Campollo had been unsuccessful in his private attempts to intimidate FVG into ceding to him all, or substantially all, of FVG's rights and interests under the Usufruct. When repeated demands, accompanied by some subtle, some not-so-subtle, threats, did not induce FVG to allow Campollo's interests to take over the Usufruct without compensation, Campollo, using his apparent influence on President Berger through his son, Juan Esteban, was a prime mover in concocting the scheme whereby the Government would declare Deeds 143/158 to be *lesivo* and, thereby, force FVG to default on its service obligations under the Right of Way Usufruct Contract, Deed 402. During the discussions between FVG and the Government leading up to the Lesivo Resolution, President Berger and other Government officials were wholly candid and specific that, in order to avoid *lesivo*, FVG had to commit to a restructuring of its railway rehabilitation commitment to include, for the first time, the obligation to reopen immediately the South Coast corridor regardless of the business potential or cost, which would have directly benefited Mr. Campollo's sugar business and his other business interests located there. Throughout this period, Mr. Campollo was the only "interested investor" in the South Coast corridor ever identified by a Government official.

I. Deeds 143/158 Are Not "Injurious to the Interests of the State"

79. The Government has set forth various grounds in support of the Lesivo Resolution, *i.e.*, that Deeds 143/158 are "injurious to the interests of the State." However, while the Government's stated grounds for *lesivo* have changed and evolved over time, at no time has the Government ever alleged that FVG breached any of its obligations under this or any other Usufruct Contract or taken any specific action that was harmful to the country's interests.

¹⁰⁷ Clause 18 of Deed 402 provides that, if FVG does not provide rail transportation service, the contract would be terminated and void.

¹⁰⁸ Senn Statement ¶ 41.

80. Moreover, none of the Government's stated grounds for *lesivo* have any basis in fact. For instance, the Government alleged in the Lesivo Resolution that, in awarding Deed 143, FEGUA acted without the authorization of the Executive Branch, failed to call for public bidding, and that neither the Executive nor the Legislative Branches approved Deed 143. But the rolling stock was indeed included as an essential component of the public bid on the right of way usufruct conducted by Guatemala in May 1997.¹⁰⁹ That bidding process was expressly authorized by the Executive Branch and deemed by FEGUA's legal advisors to be in compliance with State contract law. Furthermore, the Government awarded the rolling stock usufruct to FVG in December 1997 through a separate public bidding process that was undertaken at the Government's request. Not surprisingly, since FVG held the exclusive rights to provide rail service, there were no other bidders. The contract that resulted from FVG's successful bid, Deed 41, was executed by FVG and FEGUA's Overseer in March 1999. However, due to a failure on the Government's part and through no fault of FVG, Deed 41 was never approved by Government Resolution.¹¹⁰ Therefore, again at the Government's request, FVG agreed to replace Deed 41 with Deed 143 in 2003 in order to correct the Government's failure.

81. The material terms of Deed 143 are substantively identical to Deed 41, with two notable exceptions: First, Deed 143 provides for a *higher* Canon fee payment to FEGUA than in Deed 41 (1.25% vs. 1%). Second, unlike Deed 41, Deed 143 expressly states that it *does not* require a Government Resolution or further Executive or Legislative Branch approval for it to be enforceable: "This contract shall be in force as of its endorsement, *without need of subsequent authorization from any other authority*."¹¹¹ Thus, the Government's arguments regarding the invalidity of Deed 143 willfully ignore the circumstances surrounding the award and execution of Deed 41 and the actual terms of Deed 143.

82. In any event, Guatemala's contention that Deed 143 had to be awarded pursuant to a new and separate public bidding process in 2003 represents the complete elevation of form over substance and certainly does not demonstrate that the contract was injurious to the State. To the extent that Guatemalan law technically required Deed 143 to be awarded pursuant to another public bidding process, it is entirely the *Government's fault*, not FVG's, that this was not done. Furthermore, by the time Deed 143 was executed, FVG already had been using the rolling stock to operate the railway for *four* years. There is absolutely no reason to believe that, had a new bidding process on the use of the rolling stock been conducted in 2003, there would have been any other bidders besides FVG, just as there were no other bidders on the rolling stock in 1997. Moreover, had the rolling stock been awarded to an entity other than FVG, Guatemala would have been in clear breach of Deed 402, which gives FVG the right "[t]o obtain the rail and non-rail equipment, property of FEGUA, that it deems convenient for its operations"¹¹²

¹⁰⁹ See Ex. C-14, Bidding Rules ¶ 4.1.6 ("The bidders will be allowed to inspect the Rail Equipment and the non-direct Rail Equipment property of *Ferrocarriles de Guatemala*. The said equipment will be put out to tender on an appropriate date after awarding the Contract of Onerous Usufruct, and the contractor will have the opportunity to acquire those which he deems convenient for his operations.").

¹¹⁰ Clause 6 of Deed 41 states "The contract is subject to a FIFTY (50) –YEAR TERM that shall be effective thirty days after the Government Resolution approving this contract is published in the Official Journal of Guatemala." The contract does not provide what would be the legal consequences if the contract was not approved by Government Resolution.

¹¹¹ Deed 143, clause 6 (emphasis added).

¹¹² Deed 402, clause 10.

83. The Government also has argued as grounds for the Lesivo Resolution that Deed 143 is invalid because the rolling stock usufruct was actually an administrative concession granting the entire infrastructure to render a public service and, therefore, it was agreed for a term exceeding the lawful 25 years.¹¹³ The Government's current position is directly contradicted by the prior conclusions of its own legal advisors, as set forth in their February 14, 1997 Memorandum to FEGUA's Inspector addressing the legality of Usufruct Bidding Rules:

Having conducted a study on the bidding rules for the execution of the Railroad Transportation System in Guatemala, we have found that the basic principles of said rules point out the purpose of the usufruct and the legal base for the negotiation, in accordance with Article 706 of the Civil Code, which in its second paragraph states that the usufruct contract cannot be for life and cannot exceed 30 years if constituted in favor of legal entities, *exception made for NATIONAL ASSETS, in which case it can be up for 50 years.*¹¹⁴

84. The Government has also argued that Deed 143 is injurious to Guatemala's interests because Guatemala is receiving a Canon fee of only 1.25% under the contract.¹¹⁵ The Government's argument ignores the fact that the 1.25% Canon fee in Deed 143 is higher than the 1% Canon fee that was originally negotiated by the parties in Deed 41, and that this higher fee was *proposed by the Government* when the Government demanded that Deed 143 be executed as a replacement for Deed 41 in 2003. The Government's argument also conveniently ignores the fact that the rolling stock Canon fee is in addition to the 10% Canon fee that FVG is contractually obligated to pay Guatemala under the principal right of way contract, Deed 402, making a total effective annual Canon payment of 11.25%, which FVG has consistently paid.

85. The Government has also argued that Deed 143 is injurious to the interests of the State because the terms of Deed 143 do not sufficiently protect certain rolling stock which is part of "the cultural and historical patrimony of the Nation." But the Government never officially declared or designated any of the FEGUA rolling stock to be part of the country's cultural and historical patrimony prior to the Lesivo Resolution.¹¹⁶ In any event, FVG was specifically obligated in Deed 143 to "respect and abide by the legal dispositions and all those dispositions arising from the Office of Cultural Patrimony, related to the assets that are deemed part of the Nation's historical and cultural patrimony by said Institution,"¹¹⁷ and this is, in fact, what FVG did at all times. At the time the Usufruct was awarded to FVG, the Guatemalan national railway system had been defunct for over a year "due to its state of obsolescence and to the deterioration of the equipment and premises, as well as the insufficient in the reconstruction or modernization of the System." It was only because of RDC and FVG's heroic efforts that Guatemala even had a functioning railroad and its rolling stock was restored.

¹¹³ See Ex. C-11, Government's Administrative *Lesion* Claim, ¶ 3.3.

¹¹⁴ Ex. C-4, Legal Advisor Memo (emphasis added).

¹¹⁵ See Ex. C-7, PGN (AG) Opinion No. 205-2005.

¹¹⁶ Posner Statement ¶ 24. The Law for the Protection of the Cultural Heritage of the Nation, Decree Number 26-97, Ch. IV, Art. 25 (Ex. C-12) provides that a declaration of an item as part of the nation's cultural heritage must be issued through Ministerial Resolution and published in the Official Gazette. No such resolution or publication has ever been issued for any of the rolling stock granted in usufruct to FVG.

¹¹⁷ Deed 143, clause 10.

86. Indeed, Guatemala has never identified any specific piece of “patrimonial” rolling stock that FVG failed to protect sufficiently. To the contrary, prior to the Lesivo Resolution, the Government and Government officials recognized and honored RDC and FVG’s pivotal role in this restoration of the country’s cultural and historical patrimony. In August 2003, Guatemala and FVG entered into a Cultural Cooperation Agreement, in which FVG granted FEGUA the right to display several historical locomotives and rail cars that had been restored by FVG at the Guatemala City and Zacapa Railroad Museums.¹¹⁸ More importantly, in March 2005, FEGUA’s Overseer, Arturo Gramajo, presented RDC’s Chairman, Henry Posner, with an award on behalf of Guatemala’s Railroad Museum, which is an affiliate of FEGUA. The award states “The Railroad Museum awards this acknowledgement to Mr. Henry Posner III for his impartial collaboration in the rescue and restoration of the Historic Railway Patrimony of Guatemala.”¹¹⁹

J. The Impact of the Lesivo Resolution on RDC and FVG

87. The Lesivo Resolution placed unbearable financial pressure on FVG by causing a critical number of FVG’s customers, suppliers and lenders to refuse to continue to do business with a private entity in a legal battle with the Government of Guatemala. Through the Lesivo Resolution, the Government sent a chilling message to creditors, investors, suppliers and customers of FVG that they continue to do business with FVG at their own peril. It was entirely foreseeable to the Government that FVG’s lenders, individual customers and suppliers would be deterred from challenging their own Government by continuing to support a now-targeted private enterprise. The Lesivo Resolution, by the Government’s mere declaration that FVG’s long-term lease of the rolling stock is void, destroyed the business prospects of FVG and RDC’s eight-year investment in rehabilitating the railway system that had been completely abandoned by Guatemala. Prior to the Lesivo Resolution, based solely on the investment and work of RDC, and despite the obstacles placed in its way by the Government’s actions and inaction, over 40% of the national railroad was rebuilt and reopened, and had been operated by FVG for almost seven years.

88. As a result of the Lesivo Resolution, FVG suffered an immediate and permanent loss of customers for transport of goods. This loss was reflected in the immediate dramatic decline in use of the railroad for freight transportation.¹²⁰ Once *lesividad* was declared, the environment in which FVG had to market to prospective and existing customers became one of profound uncertainty. Local companies refused to enter into or continue agreements, either as suppliers (unless for cash up front) or for future carriage by the railroad. FVG also met stiff resistance from customers who refused to contract exclusively with FVG or for any term longer than meeting immediate needs. Many of FVG’s hard-won regular customers switched their business to truck transportation providers, although railway had previously been a preferred transportation mode given its lower cost and FVG’s safety and security performance.¹²¹ The Lesivo Resolution effectively destroyed FVG’s eight years of marketing efforts and its underlying transportation advantage of reliability. As a result, after six years of steady traffic increases, for the first time in FVG’s operational history, a precipitous reduction of the yearly

¹¹⁸ Posner Statement ¶ 24, Ex. C-29.

¹¹⁹ *Id.*, Ex. C-30 (emphasis added).

¹²⁰ Posner Statement ¶ 47; Senn Statement ¶ 46.

¹²¹ See Posner Statement ¶ 47, Ex. C-34.

tonnage was experienced from 125,466 tons in 2005 to only 92,566 tons in 2006.¹²²

89. The Lesivo Resolution also caused FVG's principal suppliers to significantly reduce or withdraw their credit terms and/or services to FVG and prevented FVG from securing new credit lines with either financial institutions in country or new suppliers of essential goods and services.¹²³ Local Guatemalan banks that had heretofore lent money or provided credit to FVG or expressed willingness to lend money now considered FVG non-credit-worthy,¹²⁴ based not on FVG's performance or credit history, but due to the rightfully-perceived imminence of its demise as a result of the Government's actions in declaring *lesivo*.

90. Prior to the Lesivo Resolution, FVG had been engaged in leasing of real estate within the right of way and station yards, such activities being expressly contemplated and allowed under the Usufruct and essential to FVG's overall business plan in order to subsidize the rail transport. During this time FVG was also engaged in active discussions and negotiations with various parties who had expressed interest in leasing or partnering with FVG to develop the right of way, rail stations and yards and other large parcels of land controlled by FVG for commercial use. However, after the Lesivo Resolution, these potential customers and joint venture partners immediately backed away from such negotiations and discussions, choosing instead to wait to see *when (not whether)* FVG would succumb to the Government's pressure and be forced into bankruptcy or shut down operations as a result of the operating losses flowing directly and proximately from the Lesivo Resolution.¹²⁵ As just some examples, the Lesivo Resolution caused FVG to lose new leases for electric lines on the right of way and a large supermarket chain to back out of a potential investment that would have converted most of the large station yards into commercial centers with supermarkets.¹²⁶ It also caused potential joint venture partners to back out of projects to rebuild and reopen the South Coast corridor because, as one of the potential partners put it, the "disagreement between the Government of Guatemala and your organization is an obvious impediment to the Project on a going forward basis which will, in our view, obstruct your ability to attract investors."¹²⁷

91. Another direct result of the Lesivo Resolution was that even common legal issues now resulted in Guatemalan judges issuing injunctions and other precautionary measures against FVG based on an expectation that FVG was going to declare bankruptcy, be dissolved or face a

¹²² *Id.*; Senn Statement ¶ 46.

¹²³ Statement of Mario Roberto Cifuentes Aguilar, Maquinas Cifuentes dated 14 January 2009; Statement of Maximo Antonio Jimenez Jerez, Reinter dated 4 February 2009; Statement of Amador Carballido Orriols, Banco G&T Continental dated 30 April 2009 ("Carballido Statement"); Statement of Marco Antonio Recinos Sandoval, Alquiler De Tractores dated 12 March 2009; Posner Statement ¶ 48, Exs. C-35(a) – 35(g); Senn Statement ¶ 47.

¹²⁴ Carballido Statement; Exs. C-35(d), 35(g).

¹²⁵ Posner Statement ¶ 49; Senn Statement ¶ 48.

¹²⁶ Statement of Edgar Alfredo Ordoñez Gomez, Planos y Puntos and Rolando Paredes Sarmiento, Generadora del Sur dated 23 June 2009 ("Gesur Statement") (describing how Lesivo Resolution caused Planos y Puntos/Gesur to back out of preliminary agreement with FVG to add 32 km of electric lines to its existing easement contract at an average rate of \$3,200 per km); Statement of Alejandro Arriola Taracena, Grupo Unisuper dated 20 May 2009 ("Arriola Statement") (describing how the Lesivo Resolution caused Grupo Unisuper to back out of joint venture with FVG to open supermarkets at several rail stations); Posner Statement ¶ 50, Ex. C-36; Senn Statement ¶ 48.

¹²⁷ Statement of Freddie Perez Tapia, Expogranel dated 19 May 2009 (describing how Lesivo Resolution caused Expogranel to back out of a potential \$100 million joint venture with FVG to rehabilitate and reopen the South Coast railway); Posner Statement ¶ 50, Ex. C-37(a), Sept. 19, 2006 letter from Expogranel; Ex. C-37(b), Sept. 11, 2006 email from ITI Development Corporation to FVG.

Government-imposed shut down and transfer of its assets. For example, in September 2006, FVG was sued by an adjacent landowner claiming invasion to his property on a river bank where dredging work had been carried out by FVG to protect the Carrizo railroad bridge. The landowner petitioned the court to attach FVG's bank accounts, arguing that the Lesivo Resolution meant that FVG could no longer continue to operate the railroad system and railway equipment and that this could eventually cause the company to cease operations and become insolvent. The judge, *ex parte*, issued a preliminary injunction against FVG without providing so much as an opportunity for FVG to be heard. The injunction provided for, among other measures, attachment of FVG's bank accounts and an order precluding FVG's General Manager from traveling outside Guatemala.¹²⁸

92. Another direct result of the Lesivo Resolution was that the basic services of the local police to protect FVG's property and assets all but melted away. The public perception became that, because FVG was no longer a viable entity and was unavoidably heading toward bankruptcy or dissolution in a face-off with the Government, there was no reason for the police or local law enforcement authorities to protect FVG's property rights. As a result of this lack of protection and security, FVG faced a substantial increase in public interference from locals who vandalized the tracks, stole railroad materials for personal use or financial gain, and set up living quarters as squatters along the tracks, in some cases in collaboration with local authorities.¹²⁹

93. Additionally, FVG faced an increased epidemic of private and public sector entities using and taking over the right of way without FVG permission or paying compensation. One prime example occurred in 2007, when the Guatemalan army took over the Palin station in Escuintla and proceeded to rename it the "4th Squadron," where it remains to this day.¹³⁰

94. Another egregious incident took place in 2008, when the Municipality of Puerto Barrios paved over the railroad tracks in the town center and permanently converted the right of way into a public street and "green spaces," thereby directly expropriating the right of way from FVG. When FVG protested these actions to the Mayor of Puerto Barrios, he told FVG that he did not care about the Municipality's lack of authorization for its actions and challenged FVG to file a claim in the local courts. FVG did file a claim in April 2008, but the court has taken no action since then except to excuse the Mayor from responsibility for the Municipality's actions.¹³¹

95. Another example of a local municipality taking unilateral action against FVG's Usufruct property rights because of the Lesivo Resolution occurred in January 2009, when the Council of the Municipality of San Antonio La Paz authorized its Mayor to carry on with the installation of a drinking water pipeline alongside the railway without FVG's permission or authorization "due to the fact that [FVG] is not able to grant authorization" as a result of the Lesivo Resolution.¹³²

¹²⁸ Senn Statement ¶ 55, Ex. C-52.

¹²⁹ Senn Statement ¶¶ 49-50, Ex. C-46 (compilation of reports of acts of theft, vandalism and squatter invasions after Lesivo Resolution submitted by FVG to Public Ministry); Posner Statement ¶¶ 51-52, Ex. C-38.

¹³⁰ Senn Statement ¶ 51, Ex. C-48.

¹³¹ *Id.* ¶ 52, Exs. C-49(a), C-49(b).

¹³² *Id.* ¶ 53, Ex. C-50.

96. FVG's efforts to secure evictions of and compensation from trespassing entities and persons had been met in the past with delaying tactics by squatters in the easily-manipulated local court system, but these tactics were further emboldened and enabled by Government officials after the issuance of the Lesivo Resolution. For example, in 2003, FVG instituted a criminal invasion law suit against Empresa Eléctrica (EEGSA) – the electricity distribution company in which Ramon Campollo holds a large stake – for maintaining illegal electric utility poles along various sectors of the right of way, in violation of FVG's rights under Deed 402. In 2008, however, just as the court was about to rule on the merits of the suit, the District Attorney filed a motion on EEGSA's behalf claiming that, because of the Lesivo Resolution, FVG had no enforceable contract rights and, therefore, no legal standing to make a claim against EEGSA or, for that matter, any one else for trespassing on the right of way.¹³³

97. The Lesivo Resolution also had a devastating impact on the morale and performance of FVG's workforce. Workers became concerned that their jobs were in jeopardy and started looking for employment elsewhere. In addition to the actions described above, these results were the direct and foreseeable consequences of the Lesivo Resolution and had the effect of making it impossible for FVG to carry out its business plan and materially contributed to the indirect expropriation of FVG's business and RDC's investment.¹³⁴

98. By mid-2007, the traffic decreases and financial and operational difficulties had reached such a point that FVG had no choice but to shut down railroad operations in September 2007.¹³⁵

99. In sum, the Lesivo Resolution and Guatemala's subsequent conduct pursuant to the Lesivo Resolution destroyed RDC's investment and FVG's business by effectively depriving FVG of its ability to operate the railway system and destroying its business prospects and reasonably expected economic benefits flowing from the Usufruct.

V. STATEMENT OF LAW

100. The Preamble to CAFTA provides the Parties' underlying objectives in entering into the Agreement and provides context for the provisions that follow. Particularly noteworthy for this dispute are the Parties' resolutions to "**ENSURE** a predictable commercial framework for business planning and investment" and to "**PROMOTE** transparency ...in international ...investment." (emphasis in original) In Chapter One (Initial Provisions), the Parties agree to interpret and apply CAFTA's provisions "in the light of the objectives set out in paragraph 1 and in accordance with applicable rules of international law."¹³⁶ Amongst the stated objectives of CAFTA, "as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency," are to "promote conditions of fair competition" and to "substantially increase foreign investment opportunities in the territories of

¹³³ *Id.* ¶ 54, Ex. C-51. Particularly noteworthy is the fact that the District Attorney argued that FVG lacked standing to enforce the Right of Way Usufruct Contract (Deed 402) even though *lesivo* was only declared as to the Usufruct Contract for Rail Equipment, Deed 143.

¹³⁴ *Id.* ¶ 56; Posner Statement ¶ 53.

¹³⁵ Posner Statement ¶ 54; Senn Statement ¶ 57.

¹³⁶ CAFTA Art. 1.2.2.

the Parties.”¹³⁷

101. Further, the very purpose of CAFTA Chapter 10 is to protect foreign investors and investment. Here, Guatemala’s declaration of the Lesivo Resolution and its subsequent conduct pursuant to the Lesivo Resolution constitute breaches of three provisions of Chapter 10 designed to protect RDC’s investment in FVG and the Usufruct.

A. RDC’s Rights in, and Anticipated Returns From, the Usufruct Are Covered Investments Protected by CAFTA

102. CAFTA Chapter 10 protects a foreign investor’s rights, interests and expectations emanating from concession agreements and similar arrangements for long-term economic development projects such as the Usufruct.

103. As required by CAFTA Article 10.1, the breaches of Chapter 10 described below arise from “measures adopted or maintained by a Party” relating to “covered investments” made by “investors of another Party.” “Investment” is defined broadly by means of a list of examples in Article 10.28, which expressly includes an enterprise, equity participation in an enterprise, loans, concessions and the rights granted under them:

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
* * *
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; [and]
* * *
- (h) other tangible or intangible, movable or immovable property, and related property, and related property rights, such as leases, mortgages, liens, and pledges . . .

¹³⁷ CAFTA Art. 1.2.

As defined by CAFTA, therefore, RDC's protected investments include income generated under the Usufruct, investment capital and loans committed to FVG under the Usufruct, and the value of FVG as the business enterprise operating the Usufruct.

104. RDC and its enterprise FVG have also suffered "loss or damage by reason of, or arising out of" a breach by Guatemala of its obligations under Section A of CAFTA Chapter 10.¹³⁸ RDC invested more than \$15.4 million in FVG to secure and operate the Usufruct and the exclusive right to earn income under the Usufruct for fifty years. After FVG fully performed its obligations under the Usufruct Agreements over an eight-year period, Guatemala abruptly repudiated RDC's covered investment and, with the Lesivo Resolution and its subsequent measures taken pursuant to the Resolution, effectively revoked FVG's Usufruct. As a result, RDC lost its investment and was denied substantially all of the promised and reasonably expected returns on its investment. The measures taken by Guatemala here constitute breaches of CAFTA Articles 10.7 (Expropriation), 10.5 (Minimum Standard of Treatment) and 10.3 (National Treatment).

B. Guatemala Has Expropriated RDC's Investment in Violation of CAFTA Article 10.7

105. CAFTA Article 10.7.1 broadly prohibits participating States from taking actions which deprive a foreign investor of the value of a CAFTA-protected investment without adequate compensation. It stipulates four conditions for an expropriation to be deemed lawful:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
- (d) in accordance with due process of law and Article 10.5.

The language in Article 10.7.1 closely mirrors the expropriation provisions of NAFTA Article 1110(1), except that NAFTA uses the term "tantamount to expropriation" instead of "equivalent to expropriation."

106. In CAFTA Annex 10-C, the Parties confirm their shared understanding that Article 10.7.1 addresses two situations – direct and indirect expropriation – and is "intended to reflect customary international law concerning the obligation of States with respect to expropriation."¹³⁹ The Parties also set forth in Annex 10-C three specific factors that need to be considered in determining whether a government's actions constitute an indirect expropriation:

¹³⁸ CAFTA Arts. 10. 16.1(a) and (b).

¹³⁹ CAFTA Annex 10-C, ¶¶ 1, 3.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the *economic impact* of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action *interferes with distinct, reasonable investment-backed expectations*; and
 - (iii) the *character* of the government action.¹⁴⁰

107. In the present case, the Lesivo Resolution meets none of the Article 10.7.1 conditions for a “lawful” expropriation. Further, each of the Annex 10-C factors serve to establish that the Government’s conduct in issuing the Resolution constitutes an *indirect* expropriation of RDC’s investment in FVG and its reasonably expected economic benefits from the Usufruct.

108. With respect to the first Article 10.7.1 condition that the expropriation be for a public purpose, the Government’s concern over FVG’s stewardship of Guatemala’s alleged “cultural and historical patrimony” is belied by, *inter alia*, the Government’s failure to officially designate any of the rolling stock granted in Usufruct as “cultural and historical patrimony” and by the award the Government presented FVG in March 2005 “. . . for the rescue and restoration of the Historic Railway Patrimony of Guatemala.” The Government’s complaint that the 1.25% Canon fee on the rolling stock was too low not only purposefully ignores the total effective annual Canon payment on the Usufruct Contracts of 11.25 %, but, as it is the Canon fee insisted upon by the Government, reduces the complaint to one that the Government struck a bad bargain. Finally, the integrated structure of the Usufruct Contracts makes ridiculous the contention that another round of public bidding on the rolling stock would have produced a serious competing bid or made any difference in the “award” of Deed 143. The Lesivo Resolution simply fails to assert any credible public interest justification or provide any factual evidence of harm to the State.¹⁴¹ To the contrary, all of the credible evidence shows that the primary goal of the Resolution was to put FVG out of business or cause it to surrender its Usufruct rights in order to serve and benefit the private interests of the oligarch Ramon Campollo.

109. With regard to the second condition of non-discrimination, the Lesivo Resolution was obviously discriminatory in that it was specifically targeted at FVG and only FVG. On its

¹⁴⁰ *Id.* at ¶ 4 (emphasis added).

¹⁴¹ See Opinion of Eduardo A. Mayora dated June 18, 2009 (“Mayora Opinion”), ¶¶ 9.4 – 9.6. As stated in *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (27 Sept. 2006), “In the Tribunal’s opinion, a treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.” ¶ 432.

face, the Lesivo Resolution cannot be legitimately characterized as a nondiscriminatory regulatory measure by Guatemala designed to protect legitimate public welfare objectives. Moreover, the Government's demand just prior to Lesivo that FVG "surrender[] railway sections yet to be restored in which other investors may be interested" (whether Ramon Campollo or to individuals unknown) reveals the Government's intention to act against FVG's interests in favor of other nationals or third parties.

110. With regard to the third condition, the Government has not offered any compensation to RDC or FVG for its expropriatory measure (much less prompt, effective and adequate compensation).¹⁴² In fact, under Guatemalan law, an affected party has no right to compensation for its losses resulting from a *lesividad* declaration.¹⁴³ The failure to accompany an expropriation with a provision for the payment of just compensation is unlawful *per se* under CAFTA.

111. With regard to the fourth condition, the *lesivo* procedure in Guatemala is a procedure that, in both form and practice, is utterly lacking in due process. As explained by Professor W. Michael Reisman:

In this idiosyncratic Guatemalan *lesivo* regime, the President of the Republic in Cabinet Council can freely decide what such interests of the State are, and, due to the lack of standards for review, the administrative court which is then asked to confirm his decision will have a hard time articulating any reasons to counteract the President's judgment. In particular, the interests of the State which are adduced may not even amount to illegalities of contract formation and content. The private party to whom the resolution is directed has no opportunity to be heard – to be informed of and respond to the charges prior to the issuance of the decree. Under Article 584 of the Procedural Code, the Government is even prohibited from desisting from a *lesivo* claim once it has been filed.¹⁴⁴

Moreover:

Waiting for the administrative court to [confirm a declaration of *lesivo*] can take years; it typically never occurs. The alternatives are then, most probably, "waiting for Godot," or receiving a confirmation of the President's resolution. In any event, the economic damage has already been done, as demonstrated in this case, with the Chief Executive's declaration of injury to the State.¹⁴⁵

112. With regard to the Annex 10-C indirect expropriation factors, as the NAFTA tribunal in *Archer Daniels Midland Co. v. Mexico* noted, the "severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to

¹⁴² In fact, RDC is not aware of any expropriation based on a declaration of *lesivo* in which the Government of Guatemala paid compensation to the defendants.

¹⁴³ Mayora Opinion ¶ 8.2.3.

¹⁴⁴ Opinion of W. Michael Reisman dated June 11, 2009 ("Reisman Opinion"), ¶ 34.

¹⁴⁵ *Id.* ¶ 36; *see also* Mayora Opinion ¶¶ 8.2.1 – 8.2.2.

expropriation has taken place.”¹⁴⁶ Other tribunals have stated that an indirect expropriation occurs where the value of the business has been “virtually annihilated” by the State’s actions or the actions have a “substantial” impact on the investment.¹⁴⁷

113. Here, it is indisputable that the issuance of the Lesivo Resolution had an immediate, devastating impact on FVG’s ability to reasonably operate the Usufruct in a profitable manner. In particular, the Resolution had the following damaging effects on FVG’s business:

- (i) It caused a critical number of FVG’s railway customers to refuse to continue to do business with FVG;
- (ii) It caused FVG’s principal suppliers of goods, services and short-term financing to significantly reduce or eliminate their credit terms and/or services to FVG;
- (iii) Potential new customers, lenders, investors and joint venture partners immediately backed away from negotiations and discussions with FVG after having previously expressed interest in doing business with FVG; and
- (iv) Local courts, police and municipalities consistently relied upon the Lesivo Resolution as a basis to deny protection to, issue rulings against and allow theft of and vandalism against FVG’s Usufruct property.

114. In short, as a result of the Lesivo Resolution, FVG came to be viewed by all those concerned as a “dead man walking,” an entity that, almost overnight, became too risky to do business with and whose property and rights were deemed to be no longer entitled to protection by the State. And this was exactly what Guatemala expected and intended to happen when it declared *lesividad*. It is also exactly what FVG forewarned the Government would happen the day before the Resolution was made official.

115. Second, the Lesivo Resolution interfered with RDC’s distinct, reasonable investment-backed expectations. RDC’s investment enterprise, FVG, was awarded a 50-year Usufruct to operate the Guatemalan railroad system and develop and exploit the system’s assets. Use of the rolling stock was an express component of the award and, obviously, a necessary component to operating the railroad and complying with FVG’s obligations under the Usufruct. RDC obviously would not have chosen to bid on the Usufruct if it did not include the exclusive right to use FEGUA’s rolling stock during the entire term of the Usufruct.¹⁴⁸

116. RDC also had a reasonable investment-backed expectation that each of the Usufruct Contracts – which were drafted entirely by Guatemala – were awarded, executed and

¹⁴⁶ *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4 Award (21 Nov. 2007), ¶ 240.

¹⁴⁷ *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16 Award (28 Sept. 2007), ¶ 285; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 Decision on Liability (3 Oct. 2006), ¶ 191.

¹⁴⁸ Due to the Guatemala railway’s narrow gauge, there was no other existing rolling stock besides FEGUA’s that could be acquired and substituted by FVG. Louis S. Thompson, “Evaluation of the Railroad Development Corporation/Ferrovias Guatemala Usufruct of Rail Right-of-Way and Equipment in Guatemala” (“Thompson Report”), ¶ 78.

approved in accordance with Guatemalan law. In connection with the Usufruct bidding, Guatemala provided RDC and other potential bidders with a legal opinion from FEGUA's legal advisors that the Bidding Rules – which expressly provided that the winning bidder would have full use of the railroad equipment to operate the railroad – fully complied with Guatemalan law.¹⁴⁹ Each of the Usufruct Contracts, including Deed 143, specifically sets forth the legal capacity of FEGUA's representative to enter into the subject contract and the legal basis for such contract. In addition, Deed 143 expressly states that “This contract shall be in force as of its endorsement, *without need of subsequent authorization from any other authority*,”¹⁵⁰ an express representation by the Government which is directly contrary to the Government's subsequent assertion in the Lesivo Resolution that Deed 143 is void because it was not awarded pursuant to a separate public bidding process and because it was not authorized or approved by Government Resolution. Thus, for *nine years* prior to the Lesivo Resolution, from 1997 until 2006, Guatemala consistently represented to RDC that the Usufruct award and Usufruct Contracts – including Deed 143 – were perfectly legal and proper, and there was never any serious question as to their legitimacy under Guatemalan law. RDC reasonably relied upon the Government's representations and actions in making its initial and subsequent investments in FVG and the Usufruct.

117. In a similar situation in *ADC Affiliate Ltd. v. Hungary*, the respondent charged that a lease was invalid due to the inappropriate legal form of the company. The claimant countered that after almost nine years since the execution of the Operating Period Lease, the respondent's argument should be time-barred. The tribunal found “Even if the Tribunal were wrong in concluding the above, the Respondent would still be time-barred to challenge the validity of the Operating Period Lease. In considering this contention, the Tribunal cannot ignore the fact that the whole structure of these complex interwoven agreements was insisted upon and voluntarily entered into by organs of the Hungarian Government.... It is difficult for the Tribunal to conclude that such a defect as is alleged would not have been noticed.”¹⁵¹ Still later, when considering whether the conclusion of the Terminal Management Agreement violated the Public Procurement Act and therefore became unlawful, the tribunal found this contention “unsustainable”:

Again an attempt is being made to challenge the validity of an agreement which was entered into with the full approval of the Respondent and which formed part of a complex structure of agreements. The whole corporate structure was insisted upon and/or fully approved by those representing the Respondent. ATAA took the benefits conferred by the Terminal Management Agreement and made no complaint about it at the time.... If in fact the Project company should have gone through some public procurement system, it can only be the fault of ATAA and the Respondent that they did not.¹⁵²

¹⁴⁹ The Bidding Rules and all documents that contain the basis for the bidding were expressly incorporated into Deed 402 by reference. Deed 402, clause 15.

¹⁵⁰ Deed 143, clause 6 (emphasis added).

¹⁵¹ *ADC*, *supra* note 141, ¶ 456.

¹⁵² *Id.* ¶ 474. It is worth noting that the Republic of Hungary only raised these arguments in response to the claimant's claim for damages, not as a defense under customary international law. How much worse in this case

118. Moreover, Deed 143 was only entered into by the parties in 2003 because the Government had neglected – through no fault of FVG – to approve formally its predecessor agreement, Deed 41, even though the parties had performed under that agreement for four years. Thus, because Guatemalan law only allows the Government to declare an administrative contract or concession *lesivo* within three years of its issuance, it was only because of Guatemala’s own failure with regard to formal approval of Deed 41 that it even had the ability under Guatemalan law to declare *lesion* against Deed 143 in 2006, nine years after the Usufruct was formally awarded to FVG.

119. RDC also had a reasonable investment-backed expectation that the financial terms of Deeds 143/158 were, contrary to the Lesivo Resolution, sufficiently adequate to and not harmful to the interests of Guatemala. In the original Usufruct Contract for Rail Equipment, Deed 41, FVG agreed to pay a Canon fee to the Trust Fund in the amount of 1% of the gross traffic freight of the railroad, not to exceed 300,000 quetzals per year. However, when the Government sought in 2003 to have Deed 41 replaced by Deed 143, it demanded that the Canon fee be renegotiated and *increased* to 1.25%, with no annual limitation *and paid directly to FEGUA*. FVG acceded to the Government’s demand, and the Government accepted Canon fee payments from FVG under Deed 143 *for more than three years* without protest or complaint. Thus, Guatemala cannot credibly claim that the 1.25% Canon fee was somehow insufficient and against its interests when it *demand[ed] this precise fee* in Deed 143 and this rate was *higher* than what the Government had originally agreed to in Deed 41. More important, the rolling stock Canon fee was in itself a concession made by FVG at the Government’s request for purported technical legal reasons and just a small part of the total economic package to the Government under the Usufruct, which was primarily the 10% Canon fee under the principal Right of Way Usufruct Contract, Deed 402.

120. Prior to the Lesivo Resolution, RDC also certainly had no reason to believe that it was not adequately protecting Guatemala’s purported “historical and cultural patrimony” interest in certain rolling stock and rail equipment. First, FVG had no notice of what specific rolling stock the Government had designated as cultural patrimony because the Government never officially declared or designated under its Cultural Patrimony Law any of the FEGUA rolling stock to be part of the country’s cultural and historical patrimony. Second, even if the Government had made such a designation, prior to FVG taking over the railroad system in 1998, the system, including the rolling stock, was, in Guatemala’s own words, “in a state of obsolescence” and in a “terrible state.”¹⁵³ By 2003, Guatemala was so pleased with FVG’s rehabilitation and restoration of the railroad equipment that it entered into an agreement with FVG to display several FVG-restored historical locomotives and rail cars at the national railroad museums. Two years later, in 2005, and approximately a year and a half prior to the Lesivo Resolution, FEGUA’s Overseer presented RDC/FVG’s Chairman with an award on behalf the FEGUA-affiliated Railroad Museum for “*the rescue and restoration of the Historic Railway Patrimony of Guatemala*.” (emphasis added). Thus, Guatemala’s own words and actions demonstrate that, contrary to the Lesivo Resolution, it believed that RDC and FVG were at all times adequately protecting and preserving the country’s purported historical and cultural

where the Republic of Guatemala is relying upon similar such arguments as a justification for the expropriation itself.

¹⁵³

Deed 402, clause 1; Ex. C-14, Bidding Rules, Annex 5.2, ¶ 4.1.

patrimony interest in the rolling stock, and RDC and FVG reasonably relied upon these words and actions in continuing to invest in the Usufruct and repairing and rehabilitating the rolling stock.

121. Most importantly, in making its Usufruct investment, RDC had a reasonable and legitimate expectation that Guatemala would not take any precipitous, arbitrary actions against FVG that would undermine and destroy such investment, especially where there has never been any allegation or contention that, prior to the Lesivo Resolution, FVG was in breach of any material term of the Usufruct Agreements, including Deed 143. In contrast, the Government's declaration of *lesividad* wholly frustrated RDC's expectations and destroyed its investment.

122. Third, the character of Guatemala's actions further demonstrates that an indirect expropriation has occurred here. If Guatemala, in fact, had legitimate concerns about the legality of Deed 143 or the "fairness" of its terms, it could have chosen to take other, less draconian measures to address and resolve such concerns, rather than issuing the Lesivo Resolution. For instance, if the Government had been truly concerned about any of the purported technical legal deficiencies surrounding the award, execution or terms of Deed 143, it could have easily taken corrective legal actions to address and resolve them beforehand without publicly declaring the entire agreement "injurious to the interests of the State," and, therefore, void.¹⁵⁴ Indeed, that is precisely what the Government did when it replaced Deed 41 with Deed 143 because Deed 41 had not been formally approved by Government Resolution.

123. Likewise, if the Government had been truly concerned about the fairness of the 1.25% Canon fee in Deed 143 or that the contract did not sufficiently protect the nation's "cultural and historical patrimony" interest in the rolling stock, it could have attempted to renegotiate those provisions with FVG just as it had previously done when it renegotiated the Canon fee from 1% in Deed 41 to 1.25% in Deed 143. The Government also could have chosen to invoke the mandatory arbitration provisions of the contract to have these issues resolved.¹⁵⁵ The Government chose to do none of these things because its purported concerns about and objections to Deed 143 were nothing more than a mere pretext and excuse to allow it to declare *lesivo* and thereby expropriate RDC's investment in and expected returns from the Usufruct without providing compensation.

124. The timing and circumstances surrounding the issuance of the Lesivo Resolution are further evidence of its expropriatory nature and intent. The Resolution was issued after RDC had refused to accede to the Government's heavy-handed demands to modify significantly the terms of the Usufruct Contracts, drop its local breach of contract arbitrations, and surrender its exclusive rights to "other [interested] investors." The Government never gave FVG the opportunity to challenge or contest the asserted grounds of *lesion* prior to the issuance of the Resolution. And Guatemala chose to issue the Lesivo Resolution on the last business day it could legally do so, on August 25, 2006, which was right before the expiration of the three-year period during which it could have potentially been declared for Deed 143 under Guatemalan law.

¹⁵⁴ Mayora Opinion ¶ 9.6.

¹⁵⁵ Clause 17 of Deed 143 provides that "[b]oth FEGUA and the USUFRUCTARY agree that all conflict arising from the present contract, both during its validity and upon termination, for any cause shall be settled by means of a conciliation process. . . . Having elapsed thirty days without reaching an agreement, conciliation shall be settled by means of arbitration of fairness."

125. Extensive international investment jurisprudence further establishes that Guatemala's action in issuing the Lesivo Resolution constitutes an indirect expropriation. International tribunals have consistently held that an indirect expropriation occurs where a measure (or measures) taken by a State deprives the investor in whole or in significant part of the reasonably-to-be expected economic benefits or value of its investment.¹⁵⁶ An indirect expropriation can occur even though the investor still retains nominal or legal ownership of the investment or investment assets.¹⁵⁷ Furthermore, a State's actions can constitute an indirect expropriation under international law even where such actions are determined to be legitimate or in compliance with the host State's domestic laws.¹⁵⁸

126. Here, there can be no doubt that Guatemala's action in issuing the Lesivo Resolution constitutes an indirect expropriation under customary international law. The Lesivo Resolution had an immediate and profound effect on FVG's ability to operate the railway system and its business prospects, thereby destroying FVG and RDC's reasonably expected economic benefits flowing from the Usufruct. This was so even though FVG still retained nominal control of the rolling stock after the Government declared *lesivo* because, under Guatemalan law, the Government could not legally seize the equipment until it obtained a court order confirming the Lesivo Resolution.¹⁵⁹ The precipitous drop in railway business, together with the immediate

¹⁵⁶ *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6 Award (12 Apr. 2002), ¶ 107 (an indirect expropriation occurs "[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment . . ."); *Archer Daniels, supra* note 146, ¶ 240 ("An [indirect] expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment."); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 Award (29 May 2003) (hereinafter "*Tecmed*"), ¶ 115 (To establish whether a State measure is equivalent to expropriation, it must first be determined if the Claimant, due to the measure, "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – had ceased to exist."); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (30 Aug. 2000), ¶ 103, 40 I.L.M. 36, 50 (2001) ("[E]xpropriation under NAFTA includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host State."); Restatement (Third) of Foreign Relations Law § 712 cmt. g (1987) ("A state is responsible for an expropriation of property . . . when it subjects alien property to taxation, regulation, or other action which is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.").

¹⁵⁷ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3 Award (30 Apr. 2004) (Crawford, President), ¶ 143, 43 I.L.M. 967, 995 (2004) (hereinafter "*Waste Management II*") ("[W]here a measure tantamount to expropriation is alleged, there may have been no actual transfer, taking or loss of property by any entity, but rather an effect on property which makes formal distinctions of ownership irrelevant."); *Tecmed, supra* note 156, ¶ 116; *Middle East Cement, supra* note 156, ¶ 107.

¹⁵⁸ *Tecmed, supra* note 156, ¶ 120 (citing and quoting James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 84 (2002)).

¹⁵⁹ As discussed *supra* at paragraph 75, as of this Memorial, the Lesivo Resolution has still not been confirmed by the Administrative Court, more than two and a half years after the Government's *lesivo* action was first filed in November 2006. The lack of resolution of the *lesivo* action is hardly surprising given the Government's ability to easily manipulate and control the courts. Indeed, with almost no exceptions, *lesivo* claims are never officially confirmed in the Guatemalan courts. Instead, the proceedings drag on for years in the Administrative Court with no resolution. See Mayora Opinion ¶ 8.2.1 n.xix. The lack of confirmation of the Lesivo Resolution in this case also allows the Government to continue to maintain that it has not formally seized and, therefore, directly expropriated the rolling stock, and that the failure of FVG's business had nothing to do with the Lesivo Resolution, precisely the defenses RDC expects.

cessation of negotiations for leases of right of way properties, demonstrates beyond peradventure that the declaration of *lesivo* itself was the death knell of FVG's business and RDC's investment.

127. The circumstances in the present case are closely analogous to the indirect expropriation that was determined to have taken place in *Middle East Cement Shipping & Handling Co. v. Egypt*. That case involved an expropriation of investment claim brought by a Greek cement company against Egypt pursuant to a bilateral investment treaty. The claimant had been granted a ten-year license by the Egyptian government to import and store bulk cement in floating silos at a Red Sea port and had invested approximately \$13 million pursuant to such license. Three years and eight months before the expiration of the license, the Egyptian government issued a decree prohibiting the import of all kinds of Portland cement either through the public or private sector, with the exception of cement imports under Egypt's Border Agreement and those covered by existing contracts of the Egyptian Cement Office. As a result of the decree, the claimant was not allowed to continue its steady flow of sales to the Egyptian market or to honor its commitments to either its suppliers or customers. Although the cement import prohibition decree was subsequently revoked in 1992, the damage the claimant sustained was a "mortal blow" to its investment. The claimant could not resume its activities after the import ban was lifted, as it had no assurance that another government prohibitive intervention would not take place again.¹⁶⁰

128. Based upon Egypt's *de facto* revocation of the claimant's license, the *Middle East Cement* tribunal found that an indirect expropriation had taken place: "When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of its investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a creeping or indirect expropriation This is the case here, and, therefore, . . . Respondent is liable to pay compensation therefor."¹⁶¹ *A fortiori* where, as here, the Government continues to seek to enforce the Lesivo Resolution.

129. In addition, the tribunal rejected Egypt's argument that the claimant had a duty to mitigate its damages by resuming its activities after the cement import ban was lifted in 1992: "An investor who has been subjected to a revocation of the essential license for its investment activity, three years earlier, has good reason to decide that, after that experience, it shall not continue with the investment activity, after the activity is again permitted."¹⁶²

130. The measure which was determined to constitute an indirect expropriation in *Middle East Cement* is closely akin to the government measure at issue here, the Lesivo Resolution. Like Egypt's decree banning cement importation, the Lesivo Resolution had the effect of depriving RDC of the benefits, use and enjoyment of its investment in the Usufruct even though it still retained nominal ownership of the rights that comprise the investment. The Lesivo Resolution was rightfully perceived by not only persons and entities that did business with FVG or were considering doing business with FVG, but also the local courts, police and municipalities, as a *de facto* (if not *de jure*) revocation of FVG's right and ability to operate and continue to do business in Guatemala. Just as Egypt's cement import ban was a "mortal blow" to

¹⁶⁰ *Middle East Cement*, *supra* note 156, ¶ 82.

¹⁶¹ *Id.* ¶ 107.

¹⁶² *Id.* ¶ 169.

the claimant's business in *Middle East Cement*, the Lesivo Resolution was a mortal blow to FVG that caused it to give up hope that it could ever operate the Usufruct in a profitable manner or in accordance with the reasonable expectations RDC had when it made its investment.

131. An indirect expropriation was also found to have taken place in *Tecmed v. Mexico*. Claimant Tecmed, a Spanish concern, acquired a hazardous waste landfill in Mexico in 1996 by public auction through its Mexican subsidiary, Cytrar. The official authorization to operate the landfill and the subsequent permits granted by Mexican environmental authorities had projected that the landfill would have a ten-year life. Cytrar's acquisition included the landfill's tangible assets and permits. In 1996, the Mexican agency in charge of Mexico's national policy on ecology and environmental protection and also the regulatory body on environmental issues, INE, issued a one-year operating permit to Cytrar. The permit could be extended every year at the applicant's request thirty days prior to its expiration. In 1998, INE refused to extend Cytrar's permit and ordered the closing of the landfill through a government resolution. Tecmed claimed that INE's action constituted an indirect expropriation of its investment, contending that the resolution deprived Cytrar of its rights to use and enjoy the landfill in accordance with its sole intended purpose, put an end to the operation of the landfill as an ongoing business, and completely destroyed its value.¹⁶³

132. The *Tecmed* tribunal held that INE's actions in refusing to renew the landfill permit and ordering the landfill's closure were attributable to Mexico and constituted an indirect expropriation. In particular, the tribunal found that INE's measures fully and irrevocably destroyed Cytrar's commercial operations in the landfill and the benefits and profits expected and projected by Tecmed as a result of such operations.¹⁶⁴ In so holding, the tribunal placed great emphasis on the fact that, even if the government was seeking to protect legitimate public interests in denying the renewal of the landfill permit, the deprivation of rights and economic loss sustained by the foreign investor caused by such measure was disproportionate and, therefore, unreasonable.¹⁶⁵

133. The tribunal in *Tecmed* also took into account that the denial of the landfill permit frustrated the claimant's legitimate investment-backed expectations:

Both the authorization to operate as a landfill, dated May 1994, and the subsequent permits granted by INE, including the Permit, were based on the Environmental Impact Declaration of 1994, which projected a useful life of ten years for the Landfill. This shows that even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent – as well as the Resolution – violate the Agreement, such expectations should be considered

¹⁶³ *Tecmed*, *supra* note 156, ¶¶ 38-41.

¹⁶⁴ *Id.* ¶¶ 117, 151.

¹⁶⁵ *Id.* ¶¶ 117, 132, 149.

legitimate and should be evaluated in light of the Agreement and of international law.¹⁶⁶

134. Here, like the government resolution in *Tecmed*, the Government of Guatemala issued a resolution that irrevocably destroyed FVG's business and RDC's expected benefits and profits in such business, and did so without providing compensation. As discussed above, the Lesivo Resolution frustrated RDC and FVG's legitimate expectations which were reasonably based upon Guatemala's promises, representations and assurances made and actions taken in connection with the bidding and award of the Usufruct, in the Usufruct Contracts themselves, and during the course of the parties' performance under the Usufruct Contracts over a nine-year period. But for these promises, representations and assurances, RDC would have never bid upon or made its investments in FVG and the Usufruct.

135. Moreover, as discussed above, the means employed by Guatemala in issuing the Lesivo Resolution were completely disproportionate to its stated aim. Guatemala could have easily taken other, less extreme actions that would not have destroyed RDC's investment if it had been truly interested in protecting the public interests upon which it purports to rely to justify the Lesivo Resolution. Indeed, each of the alleged deficiencies in the consummation of Deed 143 or in its specific terms was entirely the fault and within the exclusive control of the Government and, most importantly, none of these alleged deficiencies actually caused any tangible injury to the State. In fact, by causing FVG to shut down its operation of the railway system, Guatemala has served to harm the very public interests that it claims it was trying to protect by declaring the Usufruct Contract for Rail Equipment "injurious to the interests of the State."¹⁶⁷

136. In sum, based upon both the factors set forth in CAFTA Annex 10-C as well as customary international law as set forth in the authorities discussed above, the actions of the Government of Guatemala here constitute an obvious indirect expropriation. Furthermore, because this indirect expropriation served no public purpose, discriminated against RDC/FVG, the Government failed to pay compensation, and was not done in accordance with due process of law, it was an unlawful indirect expropriation under CAFTA Article 10.7.1, and Guatemala is obligated to pay for the damages suffered by RDC as a result.

C. Guatemala Has Violated the Minimum Standard of Treatment Under CAFTA Article 10.5

137. CAFTA Article 10.5.1 obligates host States to provide a minimum standard of treatment to foreign investors and their investments: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

138. "For greater certainty," CAFTA Article 10.5.2 sets forth more specific definitions and limitations on what constitutes "fair and equitable treatment" and "full protection and security" under Article 10.5.1. First:

¹⁶⁶ *Id.* ¶ 150.

¹⁶⁷ *See* Thompson Report ¶ 70.

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that [customary international law minimum] standard, and do not create additional substantive rights.

Secondly:

“[F]air and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

139. In addition, in CAFTA Annex 10-B, the Parties define customary international law:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6 and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

1. Guatemala Has Not Provided Fair and Equitable Treatment

140. “In their ordinary meaning, ‘fair’ and ‘equitable’ . . . mean ‘just,’ ‘even-handed,’ ‘unbiased,’ ‘legitimate.’”¹⁶⁸ The NAFTA tribunal in *Waste Management, Inc. v. Mexico* (“*Waste Management II*”) surveyed prior NAFTA awards that addressed fair and equitable treatment claims and summarized the standard for such claims as follows:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety -- as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.¹⁶⁹

141. In *Tecmed*, the tribunal described the standard for fair and equitable treatment as requiring

¹⁶⁸ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/1 Award (23 June 2006) (Sureda, President), ¶ 360 (citing Oxford English Dictionary).

¹⁶⁹ *Waste Management II*, *supra* note 157, ¶¶ 98-99.

the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.¹⁷⁰

142. Other tribunals have similarly stated that fair and equitable treatment requires treatment by the host State that does not affect the reasonable and legitimate expectations that were taken into account by the foreign investor to make the investment and have been relied upon by the investor and that the conduct of the State must be transparent, consistent, non-discriminatory, and not based on unjustifiable distinctions or arbitrary.¹⁷¹

143. Furthermore, as the tribunal in *Azurix Corp. v. Argentina* observed, the minimum standard for fair and equitable treatment under customary international law is an *objective standard*, unrelated to whether the State has had any deliberate or malicious intention or bad faith in adopting the measures in question, although such intention or bad faith can aggravate the situation.¹⁷²

144. Here, there can be no question that, in issuing the Lesivo Resolution and taking (or not taking) subsequent actions in furtherance of the Resolution, Guatemala has violated the minimum standard of fair and equitable treatment under customary international law.

145. As explained by Professors Reisman and Eduardo A. Mayora (an expert in Guatemalan law), the *lesivo* procedure under Guatemalan law is a broad and essentially

¹⁷⁰ *Tecmed*, *supra* note 156, ¶ 154.

¹⁷¹ *Biwater Gauff Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22 Award (24 July 2008), ¶ 602; *Sempra Energy*, *supra* note 147, ¶ 298 (fair and equitable treatment means that “the foreign investment must be treated in a manner such that it will not effect the basic expectations that were taken into account by foreign investor to make the investment”); *MTD Equity Sdn. v. Republic of Chile*, ICSID Case No. ARB/01/7 Award (25 May 2004) (Sureda, President), ¶ 113 (“fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.”).

¹⁷² *Azurix*, *supra* note 168, ¶ 372. *See also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 Award (6 Feb. 2007) (Sureda, President), ¶ 299; *Biwater*, *supra* note 171, ¶ 602 (the “[fair and equitable treatment] standard includes the general principle recognised in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation.”).

unfettered power that lacks any foundation under substantive Guatemalan law. It allows the President of the Republic to annul administrative contracts the Government has previously entered into without providing any compensation, legitimate justification or due process to the affected contracting party/investor.¹⁷³ The *lesivo* procedure does not define or place any limit on what makes a contract or Government act “detrimental to the interests of the State.”¹⁷⁴ In practice, this lack of any legal definition or limitation means that, within three years of the granting of an administrative contract, the Government can declare such contract *lesivo* for any reason, including, as it did in this case, reasons that (i) are not supported by the facts; (ii) were solely the fault of and within the exclusive control of the Government; (iii) were entirely improper favoritism toward powerful local political interests; and (iv) regardless of whether the contract is actually harmful to the interests of the State.

146. Moreover, as discussed above, Guatemalan law affords no due process to the investor/contracting party against whom a *lesivo* resolution is directed. It does not require or allow the investor an opportunity to contest or respond to the Government’s allegations of *lesion* prior to the issuance of the resolution.¹⁷⁵ And although Guatemalan law ostensibly requires that a *lesivo* resolution must be confirmed by the Administrative Court for it to be considered “official” and enforceable, this authority is illusory because the court has no criteria for performing any meaningful judicial review of the Government’s determination and the proceedings take years and typically never reach final resolution.¹⁷⁶ Indeed, a review of all claims for administrative lesion made by the State of Guatemala since 1991 shows that only one claim has ever been officially confirmed by the Administrative Court; in all of the remaining cases, either final judgments remain pending or the claims have been settled out of court on terms favorable to the State.¹⁷⁷ And there apparently exists no case over the last twenty years where an Administrative Court has denied or refused to confirm a Government *lesion* claim when made within the requisite three-year window for such claims.¹⁷⁸ It is for these many reasons that Professor Mayora is of the opinion that the *lesivo* procedure should be declared unconstitutional under Guatemalan law.¹⁷⁹

147. What all of this means in practice is that the Government of Guatemala can use and, as FVG’s case demonstrates, does in fact use its *lesivo* power as a means to avoid or force renegotiation of valid administrative contracts without having to compensate the investor. The Government here specifically demanded that, in order to avoid a declaration of *lesivo*, FVG had to agree, for no consideration, to modify significantly the economic terms of the Usufruct

¹⁷³ Reisman Opinion ¶¶ 33-39; 94-96; Mayora Opinion ¶¶ 8.2.1 – 8.2.3; 8.3.1 – 8.3.5.

¹⁷⁴ Reisman Opinion ¶ 33; Mayora Opinion ¶ 8.3.5.

¹⁷⁵ *Id.* ¶ 34; Mayora Opinion ¶¶ 8.2.1 – 8.2.2.

¹⁷⁶ *Id.* ¶ 95; Mayora Opinion ¶ 8.2.2.

¹⁷⁷ Mayora Opinion ¶ 8.2.2 n.xix.

¹⁷⁸ *Id.* Indeed, *lesivo* is little more than a thinly guised methodology for state-sponsored extortion. In particular, although the State can settle *lesivo* cases with approval of the Executive Branch as established in Article 2161 of the Guatemala Civil Code, there is no record of any settlement of a *lesivo* claim under which the State paid any compensation to the defendant or otherwise sought to resolve the contracting private entity’s claims. Settlements have only occurred where the private entity has agreed to compensate the State or do what the State is coercing it to do. Moreover, the State is prohibited under Guatemalan law (Article 584 of the Procedural Code) from desisting from a *lesivo* claim once it is filed, so the only way the Executive Branch can justify settling a *lesivo* claim is if the settlement is on terms favorable to the State. See Reisman Opinion ¶¶ 34, 95.

¹⁷⁹ Mayora Opinion ¶ 9.8.

Contracts, drop its local breach of contract arbitrations, and release undeveloped railway segments to other interested parties (*i.e.*, Ramon Campollo). The Government did this because it knew and understood that, once a *lesivo* resolution is issued against an administrative contract, that contract is, as a practical matter, rendered worthless even if the resolution has no legal or factual basis.

148. Moreover, it is indisputable that, in issuing the Lesivo Resolution, the Government of Guatemala acted maliciously and in bad faith towards FVG. Notwithstanding the Government's claim that it was acting to protect the "interests" of Guatemala, the Resolution did nothing of the sort. In reality, the Lesivo Resolution was the result of a radical shift in the Government's policy regarding the development and operation of the national railroad system and its attitude concerning the terms of the Usufruct that was awarded and negotiated by previous administrations. As demonstrated by the pretextual, baseless (and, in many instances, nonsensical) grounds for *lesion* and the circumstances surrounding and timing of its issuance, the Lesivo Resolution was not motivated by an objective determination by the Government that Deed 143 was injurious to Guatemala's interests or that the contract or FVG had caused any actual harm to Guatemala. Rather, as discussed above, the Government issued the Lesivo Resolution to accomplish other highly improper and discriminatory goals.

149. Accordingly, when applied against a foreign investor, the *lesivo* procedure in Guatemala clearly does not conform with Guatemala's obligation under CAFTA to provide fair and equitable treatment in accordance with customary international law. From any objective standpoint, the measure, both in form and as used by Guatemala in this case against FVG and RDC, is demonstrably "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory . . . [and] involves a lack of due process leading to an outcome which offends judicial propriety." In particular, Guatemala breached its obligation to provide fair and equitable treatment to FVG and RDC by, *inter alia*:

- (i) Basing the Lesivo Resolution on grounds that are directly contrary to the facts and prior actions, representations and agreements of the Government;
- (ii) Basing the Lesivo Resolution on grounds that were entirely the fault of the Government and easily within the Government's control to address and correct (if even necessary) through less extreme measures;
- (iii) Issuing the Lesivo Resolution just prior to the expiration of the three-year limitations period after FVG refused the Government's demands that it agree, for no consideration (other than the Government abandoning the Lesivo Resolution), to modify the economic terms of the Usufruct Contracts to the Government's benefit and surrender substantial rights under the Contracts;
- (iv) Declaring Deeds 143/158 detrimental or injurious to the interests of the State when no demonstrable injury to the State existed;
- (v) Failing to provide FVG with any due process to challenge or contest the Lesivo Resolution before an independent and neutral decision maker prior to or even shortly after its issuance; and

- (vi) Failing to act in good faith towards RDC and its investment by implementing a measure with intent to discriminate and knowledge of the unlawfulness of such implementation.

150. Furthermore, as indicated by the *Tecmed* tribunal, the standard of fair and equitable treatment includes the concept of transparency. According to Professor Christoph Schreuer,

[t]ransparency means that the legal framework for the investor's operations is readily apparent and that any decision affecting the investor can be traced to that legal framework. . . . The investor's legitimate expectations will be based upon this clearly perceptible legal framework and on any undertakings and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment.¹⁸⁰

151. Lack of transparency towards a foreign investor was the basis for a fair and equitable treatment claim in *Metalclad*, a NAFTA case. There, the Federal Government of Mexico and the State Government of San Luis Potosi had issued construction and operating permits for the investor's landfill project. The investor was led to believe by the federal government that the federal and state permits allowed for the construction and operation of the landfill, and it started constructing the landfill with the full knowledge of the federal, state and municipal governments. However, several months thereafter, the municipality issued a stop work order because the investor had failed to obtain a municipal construction permit. The municipality then refused to grant a construction permit for reasons that had nothing to do any problems associated with the physical construction of the landfill or to any physical defects therein.¹⁸¹

152. The *Metalclad* tribunal held that the investor was entitled to rely on the representations of the federal officials and that Mexico had "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment," in violation of the fair and equitable treatment standard under NAFTA Article 1105(1).¹⁸²

153. Just like Mexico in *Metalclad*, Guatemala here failed to ensure a transparent and

¹⁸⁰ Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357, 374 (2005).

¹⁸¹ *Metalclad*, *supra* note 156, ¶¶ 85-93.

¹⁸² *Id.* ¶¶ 89, 99-101. The Supreme Court of British Columbia subsequently set aside the award in *Metalclad* on grounds that the tribunal had improperly based it on transparency even though that principle is not contained in Chapter Eleven but in Chapter Eighteen of NAFTA. *United Mexican States v. Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports, ¶¶ 70-76. Professor Schreuer, however, has characterized the decision of the British Columbia Supreme Court as "questionable" for at least two compelling reasons: (1) Under Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in its context, which includes its entire text; and (2) Article 1131 of NAFTA directs that a NAFTA Chapter Eleven tribunal is to decide the dispute "in accordance with this [entire] Agreement," not just its Chapter Eleven, "and applicable rules of international law." Schreuer, *supra* note 180, at 376 n.106. In the present case, we note that the promotion of transparency is highlighted in CAFTA's Preamble and that CAFTA Article 1.2 states that the Parties shall interpret and apply the provisions of the Agreement in light of its objectives, "as elaborated more specifically through its principles and rules, including . . . transparency." (emphasis added).

predictable framework for FVG's business and, with the Lesivo Resolution, served to undermine RDC's reasonable and legitimate investment-backed expectations. These expectations were based upon the Government's representations, promises and actions over a period of more than nine years. As discussed above, the expectations that were undermined by the Lesivo Resolution included, *inter alia*:

- (i) RDC's expectation that FVG would have the exclusive right to use the rolling stock during the entire 50-year term of the Usufruct;
- (ii) RDC's expectation and understanding that Deed 143 was awarded, executed and approved in accordance with Guatemalan law;
- (iii) RDC's expectation and understating that the economic terms of Deeds 143/158 were acceptable to the Government;
- (iv) RDC's expectation and understanding that Deeds 143/158 adequately protected the Government's purported "historical and cultural patrimony" interests in the rolling stock;
- (v) RDC's expectation that the Government would, pursuant to its obligation under Deed 402, not "hinder the rail and non-rail activities of [FVG]," and "protect[] the exercise of [FVG's] rights against third parties that may intend to have or want to exercise a right on the real estate granted as onerous usufruct";
- (vi) RDC's expectation and understanding that any disputes between it or FVG and the Government would be addressed and resolved through negotiation or binding arbitration rather than unilateral Government action; and
- (vii) RDC's expectation and understanding that Guatemala would not take any precipitous or arbitrary actions against it that would serve to harm RDC's investment or FVG's business, especially where there is no allegation or contention that FVG has breached any obligation under the Usufruct Contracts and there is no evidence that Deeds 143/158 were injurious to the interests of the State.

154. In sum, RDC obviously would never have made its investments if it had known at the time that Guatemala could, if it so chose, arbitrarily and unilaterally declare any of the Usufruct Agreements void after several years of performance based upon unsupported grounds that are directly contradicted by the objective facts and the Government's prior representations and actions. That the Government did so without providing FVG with any "actual and substantive" due process to contest or overturn the Lesivo Resolution either prior to or immediately after its issuance, further establishes the objectively unfair and inequitable nature of the Government's actions under customary international law.¹⁸³

¹⁸³ "Some basic legal mechanisms, such as reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator to access the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an

2. Guatemala Did Not Provide Full Protection and Security to RDC's Investment

155. Guatemala has also violated the minimum standard of treatment by failing to provide RDC's investment with "full protection and security" after the Lesivo Resolution, as required under CAFTA Article 10.5.1. Full protection and security "requires each Party to provide the level of police protection required under customary international law."¹⁸⁴

156. Here, the evidence shows that the local police's efforts to protect FVG's property and assets became practically nonexistent after the Lesivo Resolution issued, as local authorities determined that there was no need to protect an investment that the Government had declared to be "harmful to the interests of the State." As a result, after the Lesivo Resolution, FVG faced an overwhelming increase in public interference with the right of way from locals who vandalized and looted the tracks, stole railroad materials and equipment for personal use or financial gain, and set up living quarters as squatters along the tracks and in station yards. Since the Lesivo Resolution, at least 65 kilometers of rails and track materials, along with cross-members of three major bridges, have been stolen.¹⁸⁵ In some instances, these criminal activities were done by, or in collaboration with, the local authorities.¹⁸⁶ Law enforcement authorities also intervened in legal actions brought by FVG to enforce and protect its property rights against squatters to argue that, as a result of the Lesivo Resolution, FVG no longer had any enforceable contract rights and, therefore, no legal standing to bring such actions.¹⁸⁷

157. Furthermore, whenever a theft, act of vandalism or squatter invasion was discovered by FVG, it would send a written, documented report to the Public Ministry. From July 2007 to present, more than a hundred reports were submitted.¹⁸⁸ FEGUA was also served with copies of the reports.¹⁸⁹ The Government and the local law enforcement authorities consistently ignored these reports. Indeed, FVG is not aware of a single documented arrest or prosecution that has occurred in response to any of its reports.¹⁹⁰ This well-documented failure of Guatemala's law enforcement system to provide any semblance of physical or legal protection to FVG's Usufruct property rights and assets after the Lesivo Resolution constitutes a failure to provide full protection and security under customary international law in breach of CAFTA Article 10.5.1.

affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claim heard." *ADC*, *supra* note 141, ¶ 435.

¹⁸⁴ CAFTA Art. 10.5.2(b).

¹⁸⁵ Posner Statement ¶ 51, Ex. C-38, "Thieves Strike Guatemala Railways," *International Railway Journal*, March 2009.

¹⁸⁶ See, e.g., paragraphs 93-94, *supra*, discussing the takeover of the Palin station in Escuintla by the Guatemalan army, and the Municipality of Puerto Barrios permanently converting a portion of the right of way into a public street and "green spaces."

¹⁸⁷ See, e.g., paragraph 96, *supra*, discussing Empresa Eléctrica case.

¹⁸⁸ Senn Statement, Ex. C-46, (compilation of reports FVG submitted to the Public Ministry).

¹⁸⁹ Senn Statement, Ex. C-47, (October 16, 2008 letter from FVG to FEGUA forwarding copies of complaints submitted by FVG of crimes that have occurred on its right of way properties since Lesivo Resolution).

¹⁹⁰ Senn Statement ¶ 50.

D. Guatemala Has Violated the National Treatment Standard of CAFTA Article 10.3

158. The Government of Guatemala's declaration of *lesivo* here also constituted a breach of the national treatment standard under CAFTA. CAFTA Article 10.3.1 requires member states to accord foreign investors of the other member states treatment that is no less favorable than that given to domestic investors in like circumstances: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." This provision mirrors the national treatment standards set forth in Article 1102 of NAFTA.

159. According to the NAFTA tribunal in *Archer Daniels*, "The basic function of the [national treatment standard] is to protect foreign investors vis-à-vis internal regulation affording more favorable treatment to domestic investors." It is an "application of the general prohibition of discrimination based on nationality, including both *de jure* and *de facto* discrimination," *i.e.*, measures that on their face treat entities differently and measures which are neutral on their face, but which result in differential treatment.¹⁹¹

160. "The ordinary meaning of the word 'circumstances' under [the national treatment standard] requires an examination of the surrounding situation in its entirety." Thus, "the application of the national treatment standard involves a comparative measure; and all 'circumstances' in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator."¹⁹²

161. Nationality discrimination is established by showing that a foreign investor unreasonably has been treated less favorably than domestic investors in like circumstances.¹⁹³ A domestic entity is considered "in like circumstances" with a foreign investor if the firms operate in the same business or economic sector.¹⁹⁴ Discriminatory treatment is typically determined by the measure's adverse effects on the foreign investor rather than on the intent of the host State, although the measure's intent and effects can both demonstrate its discriminatory nature.¹⁹⁵

162. RDC and Ramon Campollo here are foreign and domestic investors in "like circumstances" within the meaning of Article 10.3.1. Both are competitors in the same economic sector in that they have been competing against each other to invest in and operate the Guatemalan railroad Usufruct, including leasing and developing the railroad's real estate assets. Campollo's direct competition with RDC was expressed and manifested through the various "offers" he made to RDC, either directly or through his intermediaries and Government officials

¹⁹¹ *Archer Daniels*, *supra* note 146, ¶ 193.

¹⁹² *Id.* ¶ 197 (citing *Methanex Corp. v. United States*, UNCITRAL Final Award (7 Aug. 2005), ¶ 37).

¹⁹³ *Archer Daniels*, *supra* note 146, ¶ 205. See also *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 Award (16 Dec. 2002), ¶ 170 ("In the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances.") (emphasis added).

¹⁹⁴ *Archer Daniels*, *supra* note 146, ¶ 198 (citing *S.D. Myers v. Government of Canada*, UNCITRAL Final Award (13 Nov. 2000), ¶ 251); *Feldman*, *supra* note 193, ¶ 171 ("the universe of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the [same] business.").

¹⁹⁵ *Archer Daniels*, *supra* note 146, ¶ 209 (citing *S.D. Myers*, *supra* note 194, ¶ 254).

over a period of several years leading up to the Lesivo Resolution. In these proposals, Campollo demanded that he be allowed, without compensating FVG, to take over the Usufruct in whole or in part and be granted the exclusive right to use, develop and exploit the Usufruct assets, particularly along the South Coast corridor where Campollo's sugar business and other business interests and investments are concentrated. Direct competition could hardly be clearer.

163. The discriminatory measure taken against RDC here was the Lesivo Resolution. Overwhelming direct and circumstantial evidence demonstrates that one of the Government's principal motivations behind the Lesivo Resolution was to help facilitate Ramon Campollo's takeover of the Usufruct from FVG. The Government's discriminatory intent is demonstrated by the following actions and the statements of Hector Pinto and Government officials leading up to the Lesivo Resolution:

- (i) In April 2005, Mr. Pinto asserted to FVG that there were alleged "illegalities" in FVG's Usufruct Contracts and that he would come to FVG's offices to "let [FVG] know what is the legal point of view of the Ministry [of Communications] regarding our contract," but that, "if we reach an agreement maybe we could work out together these illegalities"
- (ii) In March 2006, FEGUA representatives told President Berger at a meeting with RDC and FVG that Ramon Campollo had substantial interest in developing the South Coast corridor.
- (iii) In May 2006, Mr. Pinto told a third party who was bidding on obtaining the railroad's scrap metal business that it was not going to be too long, probably within the current year, before the Government would "take the railway away from Ferrovias [FVG]."
- (iv) On August 23, 2006, President Berger expressed the Government's interest in opening the South Coast route and questioned FVG regarding whether there had been any joint ventures so far between it and potential investors for development of that route. The "potential investor" had been previously specifically identified as Ramon Campollo. President Berger then told FVG in no uncertain terms that *lesividad* would be declared unless FVG agreed to substantive changes to the Usufruct Contracts.
- (v) The Government then presented FVG with a "take it or leave it" proposal in which FVG would have had to agree to significantly modify the terms of the Usufruct Contracts and release unrestored railway segments (*i.e.*, the South Coast corridor) to "other investors [which] may be interested." After FVG rejected the Government's demands, the Lesivo Resolution issued the next day.
- (vi) Less than two weeks after the Lesivo Resolution issued, Hector Pinto, on behalf of Mr. Campollo, wrote to a Government official at the Ministry of Competitiveness informing him that railway service between Puerto Quetzal to Ciudad del Sur in Santa Lucia would be restored shortly for the purposes of transporting sugar from Mr. Campollo's mill to the port.

164. Thus, the Lesivo Resolution was a Government measure that afforded less favorable treatment to RDC in violation of CAFTA Article 10.3. Its discriminatory purpose and intent was to directly or indirectly take away RDC's Usufruct investment and award it, either directly or indirectly, to a favored domestic investor in like circumstances, Ramon Campollo. As this measure was exclusively directed towards RDC's investment, its severe adverse effects obviously fell exclusively upon RDC and not upon the domestic investor in like circumstances, Ramon Campollo.

165. Moreover, even absent the complicity between the Government and Mr. Campollo, Guatemala discriminated against RDC when it sought to coerce RDC into surrendering unrestored rail segments in favor of "other [interested] investors" in exchange for the Government abandoning the Lesivo Resolution.

VI. RDC MUST BE COMPENSATED FOR THE FAIR MARKET VALUE OF ITS INVESTMENT, INCLUDING BOTH THE AMOUNT OF THE INVESTMENT AND FVG'S FUTURE LOST PROFITS

A. The Legal Framework for Damages

166. In Articles 10.7.2 and 10.7.3, CAFTA stipulates the damages payable in the case of a "lawful" expropriation. However, as RDC has already established in paragraphs 107 to 111 *supra*, the Lesivo Resolution does not meet the standards in CAFTA Article 10.7.1 for a lawful expropriation. Therefore, under these circumstances, the Tribunal must look elsewhere besides the "just compensation" standard in Articles 10.7.2 and 10.7.3 for guidance in determining damages in this case. Because CAFTA does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation or other Chapter 10, Section A violations, the correct standard defaults to CAFTA's article on Governing Law. CAFTA Article 10.22.1 provides that when the respondent has breached an obligation under Section A, "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." The amount of appropriate compensation is one such "issue in dispute." The only other CAFTA provisions that are relevant to the question of compensation can be found in CAFTA Article 10.26 on "Awards." But for general authority, the Tribunal will need to apply the customary international law standard for the assessment of damages resulting from the Respondent's unlawful acts.

167. The well-established customary international law standard for damages was originally formulated by the Permanent Court of International Justice in the *Factory at Chorzów* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹⁹⁶

¹⁹⁶ *Factory at Chorzów*, Judgment No. 13 (Claim for Indemnity - The Merits), Perm. Ct. Int'l Justice, 13 Sept. 1928, at 40, http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1/.

168. This principle has been applied and extended by NAFTA and other BIT tribunals to not only unlawful expropriations but also breaches of the minimum standard of treatment. For example, in *ADC*, the tribunal rejected the BIT's "just compensation" standard because it referred to only "lawful" expropriations, and instead applied the *Factory at Chorzów* standard for compensation, namely "payment of a sum corresponding to the value which a restitution in kind would bear."¹⁹⁷ In *Azurix*, the tribunal noted that NAFTA "does not provide for a measure of compensation" when a standard of protection was breached but no expropriation had occurred, and cited *S.D. Myers* for the proposition that "the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to tribunals to determine it in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA."¹⁹⁸ In such cases (*i.e.*, breaches of minimum standards of treatment), "the standard of compensation formulated in [the *Factory at*] *Chorzów*" is appropriate.¹⁹⁹

169. The *Siemens A.G. v. Argentina* case reflects current customary international law regarding the appropriate standard and measure of damages for the CAFTA violations by Guatemala here. In that case, the tribunal found that Argentina had illegally expropriated Siemens' investment and had violated its obligations to provide fair and equitable treatment and full protection and security under the Germany-Argentina BIT.²⁰⁰ The tribunal determined that "[t]he Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty" and, therefore, "the law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law."²⁰¹

170. In *Sempra Energy*, the tribunal described this principle as follows:

It must be noted that this provision [Article IV of the BIT which defined "compensation" for expropriation] addresses specifically the case of expropriation which the Tribunal has concluded has not taken place in the present case. The Treaty does not specify the damages to which the investor is entitled in case of breach of the Treaty standards different from expropriation. Although there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.²⁰²

171. Similarly, in *Metalclad*, the tribunal ruled that "the damages arising under

¹⁹⁷ *ADC*, *supra* note 141, ¶¶ 483-95.

¹⁹⁸ *Azurix*, *supra* note 168, ¶¶ 421-22.

¹⁹⁹ *Id.* ¶ 423.

²⁰⁰ The provisions of Articles 10.7 and 10.5 of CAFTA are almost identical to the expropriation and minimum standard of treatment provisions in the Germany-Argentina BIT.

²⁰¹ *Siemens*, *supra* note 172, ¶ 349.

²⁰² *Sempra Energy*, *supra* note 147, ¶ 403.

NAFTA, Article 1105 [denial of minimum standard of treatment] and the compensation due under NAFTA Article 1110 [expropriation] would be the same since both situations involve the complete frustration of the [investment] and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment."²⁰³

172. Accordingly, the damages that RDC should recover should be determined by customary international law, and, as discussed herein, such damages must be the fair market value of its investment, including (i) the adjusted amount of the investment as of the date of expropriation and other substantive violations of CAFTA – in this case as of 2006; (ii) consequential damages of lost profits from that date to the terminal date of the Usufruct; and (iii) compound pre-award interest at a commercially reasonable rate.

B. RDC Should Recover Both Its Lost Investment and Lost Profits

173. The *Siemens* tribunal noted that the International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts ("Draft Articles") "are currently considered to reflect most accurately customary international law on State responsibility." Article 36 on "Compensation" provides:

1. The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.²⁰⁴

The tribunal explained that these provisions of Article 36 "rel[y] on the statement of the [Permanent Court of International Justice] in the *Factory at Chorzów* case on reparation."²⁰⁵

174. The Tribunal in *Duke Energy Electroquil Partners v. Ecuador* came to the same conclusion:

In the circumstances, the Tribunal considers that the principle of the *Factory at Chorzów* according to which any award should "*as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*" constitutes good guidance. The Tribunal notes that the principle of "full" compensation has been further codified in Article 31 of the International Law Commission Articles Responsibility of States for Internationally Wrongful Acts and sees no reason not to apply this provision by analogy to investor-state arbitration.²⁰⁶

175. Thus, the issue in *Siemens* was whether the scope of damages for a violation of

²⁰³ *Metalclad*, *supra* note 156, ¶ 113.

²⁰⁴ *Siemens*, *supra* note 172, ¶ 350.

²⁰⁵ *Id.* ¶ 351.

²⁰⁶ *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19 Award (18 Aug. 2008), ¶ 468 (emphasis in original).

international law was greater than the provisions for compensation under the BIT. The tribunal resolved that issue in favor of the investor, Siemens:

The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and . . . the Treaty is that, under the former, compensation must take into account “all financially assessable damages” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of . . . the date of expropriation . . . *plus any consequential damages*.²⁰⁷

176. Under this formulation, Siemens claimed both the value of the investment at the date of expropriation (*damnum emergens*) and lost profits (*lucrum cessans*),²⁰⁸ whereas Argentina argued that the “fair market value” provided by the Treaty and customary international law did not include lost profits.²⁰⁹ The Tribunal stated Siemens’ position as follows:

The claimant has proposed that compensation be calculated on the book value of the investment and that *lucrum cessans* be arrived at through discounting an estimate of profits calculated as a percentage of the revenues that [it] would have received if the Project would have run its course . . . [as] set forth in the Contract. . . . Normally, the two methods are regarded as an alternative means of valuing the same object. Here, however, Siemens expert has applied the two in tandem because, under the terms of the Contract, all Siemens’ costs would be incurred before the first peso of revenue would be realized. . . . In other words, Siemens claims: (i) the present value of its estimated lost profits or *lucrum cessans*, plus (ii) the costs it actually incurred, which were ‘wasted’ in the effort to produce the revenues from which those profits would have been derived.²¹⁰

177. The Tribunal squarely approved Siemens’ contention that it was entitled under customary international law to recover both the fair market value of its investment *and* lost profits.²¹¹ However, it ultimately found that Siemens had not adequately proved the lost profits

²⁰⁷ *Siemens*, *supra* note 172, ¶ 352 (emphasis added). See also Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, IV The Valuation of Nationalized Property in International Law 31, 61-62 (Richard B. Lillich ed., 1987) (“International arbitral decisions rendered before and after *Chorzów Factory* have declared as ‘universally accepted rules of law’ that an investor cannot be fully compensated for the going-concern value of his expropriated interests unless he is awarded both the ‘damage that has been sustained’ as a result of the taking and the reasonably ascertainable ‘profit that has been missed.’”) (citations omitted).

²⁰⁸ Siemens sensibly argued in the alternative: on the one hand, it claimed that fair market value of the investment (*damnum emergens*) included lost profits (*lucrum cessans*) (¶ 326); on the other hand, it contended that recovery of lost profits in addition to the fair market value of the investment at the time of expropriation was part of “consequential damages” which the Tribunal found to be appropriate because of the unlawful nature of the expropriation (¶¶ 329, 342).

²⁰⁹ *Siemens*, *supra* note 172, ¶¶ 328, 331-32.

²¹⁰ *Id.* ¶ 355.

²¹¹ *Id.* ¶ 357 (“the Tribunal understands the reasons for the admittedly unusual approach followed by Siemens and considers that it has merit in the particular circumstances of this case, . . .”). While the Tribunal in *Siemens* does not explicitly so state, it seems apparent from the decision that it was influenced by the egregiousness of Argentina’s

in question.²¹²

178. In this case, “the particular circumstances” of the *Siemens* case which led the tribunal there to hold that both the value of the investment and lost profits, if proven, were the proper measure of damages, are closely replicated. First, similar to *Siemens*, a substantial portion of RDC’s \$15.4 million investment was made “before the first peso of revenue [was] realized.”²¹³ Thus, the investment was “‘wasted’ in the effort to produce the revenues from which those profits would have been derived.”

179. Second, as RDC’s damages experts Robert MacSwain and Louis Thompson have opined in their accompanying reports, RDC’s investment in the rehabilitation of the railroad was wholly unconnected to the profits FVG would have earned over the life of the Usufruct from its program to lease the right of way and adjacent real estate parcels for non-railway purposes.²¹⁴ In other words, because the potential demand for leasing the properties and easement contracts along the right of way is not dependent on whether the railroad would have been in operation, it was not necessary for FVG to have an operating railway in order to lease and develop successfully the vast majority of the railway real estate that had been granted in usufruct. Indeed, as Mr. Thompson’s analysis demonstrates, the Usufruct would have been more profitable if FVG only leased the right of way and adjoining real estate parcels without having to rehabilitate and operate the railway.²¹⁵ As explained by Professor Irmgard Marboe, “[d]ouble counting does not occur if wasted costs and expenses are not directly related to the expected profits.”²¹⁶

180. Furthermore, RDC’s investment in the rehabilitation of the railroad was almost exclusively a benefit to Guatemala, not to RDC. As Mr. Thompson concludes, over the remaining term of the Usufruct (2007-48), the existing Atlantic/North Coast railway operations by itself would have generated profits to FVG of only approximately \$1.35 million whereas the value to Guatemala of having an operating railroad on the Atlantic/North Coast corridor would

breaches of the treaty and international law, and commentators have interpreted the decision in this way. See Charles N. Brower & Michael Ottolenghi, *Damages in Investor-State Arbitration*, 4 Transnat’l Dispute Mgmt., Nov. 2007, at 1, 9, 11-13. In a very thoughtful article, Professor Irmgard Marboe develops the distinction between compensation for lawful expropriation and damages for internationally wrongful acts: “In the context of State responsibility, however, the central obligation after a breach of an international obligation is ‘reparation’. This represents the more comprehensive obligation of which ‘compensation’ is only a part.” She emphasizes that “[t]he distinction between compensation as an element of lawful behavior is only important if it has practical effects” and concludes that, “[w]ith regard to the general preventive function of law, it would not be desirable if legal and illegal behavior led to the same financial consequences.” Irmgard Marboe, *Compensation and Damages in International Law: The Limits of “Fair Market Value”*, 4 Transnat’l Dispute Mgmt., Nov. 2007, at 723, 726. As a result, she advocates a “subjective” approach (rather than the objective view of the traditional fair market value appraisal) which takes the specific competences of the owner into consideration and includes consequential damages. *Id.* at 733.

²¹² *Siemens*, *supra* note 172, ¶¶ 379-85; see also *AGIP Co. v. Popular Republic of the Congo*, 21 I.L.M. 726, 737 (1982) (determination of damages was based upon the full compensation standard under the French Civil Code, which required compensation for both actual damages (the investment) and lost profits).

²¹³ Approximately \$8.5 million of RDC’s \$15.4 million investment was invested before RDC begin to earn revenue from railway operations in 2000.

²¹⁴ Robert F. MacSwain, “Valuation of Right of Way, Yard and Station Real Estate Granted in Usufruct to Ferrovias Guatemala,” (“MacSwain Report”), ¶ 4.2(a); Thompson Report ¶¶ 50-56.

²¹⁵ Thompson Report ¶¶ 56-57.

²¹⁶ Marboe, *supra* note 211, at 746.

have been more than \$60 million.²¹⁷ Put another way, the *quid pro quo* or consideration to Guatemala for granting the Usufruct to FVG was RDC's investment in the rehabilitation of the Atlantic railway corridor. While unstated, as a logical matter, it would have been expected that this investment would be recovered by RDC through the operation of the railroad for 50 years, that recovery would have been accompanied by only a minor profit on railroad operations. As a result, as to the railroad operations themselves, the Lesivo Resolution destroyed only RDC's ability to recover its significant upfront investment plus a small profit. More importantly, however, the Lesivo Resolution also destroyed the separate and severable (and far larger) *quid pro quo* or consideration which RDC received – the reasonably certain and expected income stream from the leasing of the right of way and adjacent parcels that were granted in Usufruct.

181. It is also important that FVG's Business Plan was explicitly based upon its ability to make substantial profits from real estate leasing and demonstrated that the operation of the railroad, by itself, could not justify the investment. Thus, it was certainly RDC's reasonable expectation that, upon award of the Usufruct, the leasing of the right of way and adjoining properties would not be interfered with by the Government and, moreover, it was the Government's necessary expectation that, absent that expected income, there would be no investment. In other words, the Government must have reasonably anticipated the income stream that RDC reasonably anticipated and, therefore, such income stream must be "reasonably certain" for the purpose of lost profits analysis.

182. Under these circumstances, in order to "wipe out the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed," in accordance with the principles of *Factory at Chorzów* and *Siemens*, RDC must recover not only the value of its investment as of the date of the Lesivo Resolution *but also* its reasonably expected lost profits.

C. Valuation of RDC's Lost Investment

183. In order to determine the proper fair market value of RDC's lost investment, the historical book value of that investment (*i.e.*, the historical cost of the assets) must be adjusted at an appropriate rate (or rates) so that it reflects the current book value of that investment as of the date of expropriation/violations of minimum standard of treatment and national treatment.²¹⁸ Thus, the tribunal in *SEDCO, Inc. v. National Iranian Oil Co.* adopted the claimant's current cost accounting method to the valuation of the fixed assets at issue, a method based on the calculation of the "current book value" of the assets, which adjusted the historical book value to reflect

²¹⁷ Thompson Report ¶¶ 56, 58.

²¹⁸ In the determination of the valuation of an investment at the time of expropriation or related violation, historical book value is not an appropriate measure because of "its reliance upon historical figures which may not have any relevance in the valuation context." Brower & Ottolenghi, *supra* note 211, at 15. See also Brice M. Clagett & Daniel B. Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 Int'l Law. 35, 65 (1988) ("Because the value of an asset does not depend on historical factors such as cost or past usefulness, measures of that value that look backward – such as book value and capitalization of historic income – are inappropriate and inadequate in a determination of the just compensation required by international law for an ongoing business."); *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1 Award (31 May 1990), ¶ 100 ("It can immediately be seen that [net book value] is a method unsuited to placing a party in the position of his contract having been performed.").

inflation through application of the consumer price indices for both Iran and the United States.²¹⁹ Another variant of this analysis is often referred to as the Adjusted Book Value method or Adjusted Net Asset method in which asset and liability values are adjusted to their fair market value.²²⁰

184. In order to determine a properly adjusted value of its lost investment, RDC offers three approaches. First, Mr. Thompson obtained from FVG's audited financial statements (Exs. C-27(a) – 27(i)) the amounts and dates of RDC's investments from 1998 to 2006 (Thompson Report, Table 12), which are set forth in the following table:

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006
Investment	1,996,994	6,533,023	1,378,684	1,812,594	1,133,212	410,471	294,450	780,207	1,047,551
Cumulative	1,996,994	8,530,017	9,908,701	11,721,296	12,854,508	13,264,979	13,559,429	14,339,636	15,387,187

In addition, in 2007, RDC contributed an additional \$1,033,823 to FVG for business termination and wind-down costs, for a total nominal investment of \$16,421,010.²²¹

185. Having determined the amount and timing of RDC's investment, Mr. Thompson then adjusted that investment to its 2006 value (*i.e.*, the value as of the date of expropriation/Government breach) using three methodologies: First, as the tribunal did in *SEDCO*, he brought the dollars invested by RDC up to their 2006 constant value using the Consumer Price Index for Guatemala as published by the Bank of Guatemala. This approach simply returns to RDC the purchasing value of the money it invested in FVG, and yields an adjusted value of \$24,249,943.²²²

186. Second, Mr. Thompson adjusted the RDC investment through application of the regulatory cost of capital rates of the U.S. Surface Transportation Board ("STB") for the period in question.²²³ Each year, the STB calculates the weighted average cost of debt carried by the U.S. Class I railroads. The STB also calculates the cost of equity for U.S. Class I Railroads based on the STB's assessment of the combination of dividends plus growth in equity value that the Class I Railroads need to generate in order to raise and sustain equity capital. The two costs are then weighted by the percentage of debt and equity to develop the total regulatory cost of capital for each year. RDC currently has investments in other railways, including the Iowa Interstate Railroad in the United States, and the capital it invested in Guatemala could readily have been invested in the Iowa Interstate and been subject to the STB regulated cost of capital rates. In other words, the regulatory cost of capital is equivalent to a rate of return which RDC would reasonably have expected to earn on a similar investment elsewhere in the same industry. Indeed, because Iowa Interstate is a Class II railroad, its cost of capital is somewhat higher than

²¹⁹ *SEDCO, Inc. v. National Iranian Oil Co.*, 15 Iran-U.S. Cl. Trib. Rep. 23 (1987), ¶¶ 304-13.

²²⁰ Mark Kantor, *Valuation for Arbitration: Uses and Limits of Income-Based Valuation Methods*, 4 Transnat'l Dispute Mgmt., Nov. 2007, at 1, 4.

²²¹ Posner Statement ¶ 20, Ex. C-27(j); Thompson Report, Table 12.

²²² Thompson Report ¶ 64, Table 12.

²²³ These regulatory cost of capital rates are set forth in *Railroad Facts* (Association of American Railroads), 2008, at 18.

that of Class I railroads, making this valuation conservative. Using the U.S. Class I Railroad regulatory cost of capital rates for the relevant time period, RDC's loss of investment value is \$30,319,825 in 2006 dollars.²²⁴

187. Third, Mr. Thompson adjusted the RDC investment using a constant ten percent rate. This rate was used because it is the same discount rate used in the real estate valuation and discounted cash flow analysis discussed *infra*. Ten percent is also the standard typically used in analyzing and valuing long-term infrastructure investments. Using this rate, the adjusted 2006 value of the lost investment is \$26,840,908.

188. In summary, the portion of RDC's damages based upon the adjusted value of its lost investment, as determined by these three methodologies, is as follows:

Inflation Adjusted Investment – \$24,249,943

Regulatory Cost of Capital Adjusted Investment – \$30,319,825

Adjusted Investment @ 10% interest – \$26,840,908

Thus, based upon the close convergence of these three valuations, a reasonable and properly adjusted value of RDC's lost investment is \$26,840,908 plus \$1,033,823 in business termination costs incurred in 2007 for a total value of **\$27,874,732** before adding pre-award interest.²²⁵

D. Valuation of FVG's Lost Profits

189. The next section of this Memorial addresses the portion of the fair market value of RDC's investment which pertains to lost profits. The view that international law requires compensation for lost profits in circumstances such as this case is supported by a number of arguments. First, it is asserted that contracts must be enforced, because to do otherwise would undermine the reasonable expectations of the parties, in particular the non-breaching party's expectations.²²⁶ Future profits are also justified because corporations which make significant up-front investments to acquire concessions which run for lengthy periods of time thereby have "acquired rights" in the host state.²²⁷ The host state also should not be unjustly enriched by expropriating the investment before the investor has had a reasonable time to recoup it and make an adequate return.²²⁸ Furthermore, an external standard, such as lost profits, must exist to prevent host states from "opportunistic expropriation."²²⁹

190. The discounted cash flow (DCF) method of calculation is almost universally recognized in international investment cases and in the learned commentary as the most appropriate measure of lost profits:

²²⁴ *Id.* ¶ 63, Table 12.

²²⁵ *Id.* ¶ 68.

²²⁶ James W. Weller, *International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 Hofstra L. Rev. 323, 329 (1987).

²²⁷ *Id.* at 329-30.

²²⁸ *Id.* at 330.

²²⁹ *Id.*

The DCF is the most common methodology used in valuation analyses. First, it is widely supported by the professional literature, and its workings are well understood. Indeed, most investors rely on a DCF analysis to determine whether or not to undertake a particular project. Second, the DCF approach is widely accepted by international agencies, such as the World Bank, as a valid means to estimate damages and fair market valuations in international disputes.²³⁰

* * *

For businessmen and economists there is no mystery; the value of income-producing property is equivalent to the present value of the property's future income. This value is known as going concern value. . . . [G]oing concern value is best established through the use of discounted-cash-flow analysis. At any given time, the value of an income-producing asset will depend upon the net cash flows it is expected to generate in the future, "discounted" (reduced) to "present value" (value as of the valuation date) at a percentage rate that fully accounts for the time value of money and for all relevant risks.²³¹

191. The World Bank Guidelines on the Treatment of Foreign Direct Investment specifically recognize that compensation for a breach of internationally recognized obligations will be regarded as "adequate" if it is based upon fair market value as determined immediately before the taking, and that the discounted cash flow value is an appropriate method to determine fair market value of a "going concern." "Discounted cash flow value" is defined in the Guidelines as:

the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.

A "going concern" is defined as:

an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.²³²

192. In his article on the international law of expropriation, Peter Choharis observes "[T]he discounted cash flow method, which takes into account future profits and risk, is widely regarded as appropriate for sophisticated international business transactions where a project is

²³⁰ Manuel A. Abdala, *Key Damage Compensation Issues in Oil and Gas International Arbitration Cases*, 24 Am. U. Int'l L. Rev. 539, 548-49 (2009).

²³¹ Clagett & Poneman, *supra* note 218, at 63-65.

²³² World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline IV, § 6.

producing revenues and cash flow can be reasonably estimated.”²³³ Thus, there is no requirement of “profits,” only that the project at the time the breach occurs is “producing revenues” and cash flow can be reasonably estimated. The definition of “going concern” under the World Bank Guidelines is entirely consistent with this conclusion.

193. Indeed, international investment tribunals have occasionally awarded lost profits which were reasonably expectable and calculated pursuant to the discounted cash flow method, *even when the enterprise in which the investment was made had not yet gone into operation or achieved any level of income or profits*.²³⁴ Furthermore, it is well-recognized that lost profits should be awarded unless the calculation would be too speculative or the breach occurs at a very early stage.²³⁵ As Judge Brower stated in his oft-quoted concurring opinion in *Amoco Int’l Fin. Corp. v. Iran*:

[W]here the expropriated property consists of contract rights, the compensation must be defined by the anticipated net earnings that would have been realized, as well as one can judge, had the contract been left in place until completion.²³⁶

194. Thus, the only requirements for the recovery of lost profits through the discounted cash flow methodology are (a) an enterprise consisting of income producing assets, (b) which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and (c) which could have been expected with reasonable certainty to continue to produce income over its useful life.

195. The FVG enterprise satisfies all of these prerequisites. It is undisputed that FVG was an enterprise which consisted of income producing assets. And, it should be undisputed that, by the time of the Lesivo Resolution, FVG had been in operation for a sufficient period of time to generate the data required for the calculation of future income which could be expected with reasonable certainty. Indeed, there are numerous major factors which demonstrate that future profits were reasonably anticipated, expected and measureable:

- (i) FVG’s Business Plan was reasonable, indeed, conservative, and set forth its anticipated income from both railroad operations and real estate leasing in detail;
- (ii) The Government of Guatemala reviewed, evaluated and approved the FVG Business Plan relating to projected railway traffic and revenues and incorporated the approved plan into the Right of Way Usufruct Contract; the Government is,

²³³ Peter Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. Cal. L. Rev. 1, 76 (2006) (emphasis added).

²³⁴ See *S.D. Myers v. Canada*, Second Partial Award (21 October 2002), ¶¶ 173-74 (awarding discounted value of lost net income stream). See also *McKesson Corp. v. Iran*, 116 F. Supp. 2d 13, 30 (D.D.C 2000), *aff’d in part and rev’d on other grounds sub nom. McKesson HBOC, Inc. v. Iran*, 271 F. 3d 1101 (D.C. Cir. 2001), *vacated and remanded in part on other grounds*, 320 F.3d 280 (D.C. Cir. 2003), where the court included projected income from three new projects, none of which had even been completed, let alone gone into operation, on the theory that “a reasonable investor would value the company with the potential [income from the new projects] more highly than the same company without such potential.”

²³⁵ See *Metalclad*, *supra* note 156, ¶ 121 (denying lost profits because the claimant’s landfill “was never operative and any award based on future profits would be wholly speculative”).

²³⁶ 15 Iran-U.S. Trib. Rep. 189 (1987), ¶ 15 (Brower, J., concurring).

therefore, estopped from contesting its reasonableness. Further, the FVG Business Plan constitutes the reasonable expectations of the parties upon which damages are legitimately based;²³⁷

- (iii) The Government of Guatemala fully understood that the expected income from real estate leasing was a critical part of the economic calculus by which it induced RDC to bid and that, indeed, without that income, there would be no bid, no investment and no railroad for Guatemala;
- (iv) FVG's demand forecasts in its business plan were considerably more conservative than the Government's own projections in its *Licitacion* (Request for Bids);²³⁸
- (v) After the award of the Usufruct and the execution of the Usufruct Contracts, FVG, supported by RDC, performed admirably for seven years, restoring the railroad to operation on the Atlantic corridor and even being recognized and given awards by the Government and Guatemalan business community for its performance;
- (vi) During its performance, FVG demonstrated over the course of seven years a professional and highly respected business reputation and well-established relationships with its suppliers and repeat customers;²³⁹
- (vii) Despite serious breaches of contract by the Government prior to the Lesivo Resolution, which cannot be allowed to diminish the amount of compensation due RDC,²⁴⁰ FVG, through its own efforts, was on track to achieve its long-term business plan up to the Lesivo Resolution;
- (viii) The audited financial statements of FVG demonstrate a steady, upward trajectory of actual receipts and net income;
- (ix) FVG has a reliable historical record of leasing its right of way at rates and for terms that fully support its projections of future leasing income;
- (x) Demand for long term right of way utility easements is further demonstrated by

²³⁷ See Pamela Gann, *Compensation Standard for Expropriation*, 23 Colum. J. Transnat'l L. 615, 636 (1985) (discussing the *AMINOIL* case and noting that "[the tribunal] thought that compensation in the particular case should be consistent with the expectations of the parties involved" and as reflected in the 1973 agreement between the parties).

²³⁸ Thompson Report ¶ 30.

²³⁹ Thompson Report ¶¶ 41-44. See *Metalclad*, *supra* note 156, ¶ 120 (noting that future profits can be recovered where the enterprise has operated a sufficiently long time – normally at least two to three years – to establish a performance record).

²⁴⁰ See *Tecmed*, *supra* note 156, ¶ 193 (tribunal refused to allow the respondent's actions in violation of the parties' agreement to have an adverse effect on valuation of compensation); Choharis, *supra* note 233, at 76 ("One rule of general application is that the expropriating country should not be permitted to benefit from declining market conditions that it created."); Clagett & Poneman, *supra* note 218, at 66 ("It is a well-established rule of customary international law that the compensable value of an expropriated enterprise or broken contract cannot be diminished by governmental conduct that leads to fear of expropriation or breach of contract or is otherwise designed to reduce the value of the target property.").

the presence of several industrial squatters on the right of way, who were able to use FVG's property only because of the Government's breach of its obligations under the Usufruct Contracts;²⁴¹ and

- (xi) Prior to the Lesivo Resolution, FVG was engaged in active discussions and negotiations with various parties who had expressed interest in leasing the right of way for additional utility easements and station yard properties controlled by FVG for commercial development.

196. As demonstrated below, the minimum fair market value of the "going concern" or "lost profits" portion of RDC's damages is measured by a discounted cash flow analysis of the reasonably anticipated and expected income FVG would have earned from the Usufruct over the remaining 42 years as of 2006, the date of the Lesivo Resolution. These expected profits have been estimated by RDC's experts to total **\$36,161,127** and would have consisted of two principal components: (i) profits earned from the leasing and development of the railway real estate granted in Usufruct; and (ii) profits earned from railway operations.²⁴²

1. Valuation of FVG's Real Estate Leasing and Development Rights

197. In order to determine a reasonably expected value of the profits FVG would have earned from real estate leasing and development under the Usufruct, RDC retained Robert F. MacSwain, a railroad real estate expert with extensive experience in leasing and development of railroad rights of way. To conduct his analysis, Mr. MacSwain reviewed FVG's business plan, the Right of Way Usufruct Contract (Deed 402), which gave FVG the right to develop and earn income (and, therefore, profits) on alternative commercial uses of the right of way and adjacent real estate parcels during the 50-year term of the usufruct, and detailed maps of those right of way and adjacent real estate parcels. Mr. MacSwain then personally toured and inspected the entire FVG right of way in Guatemala (including the non-rehabilitated segments), together with all of the adjacent real estate parcels and station yards, and had extensive discussions with local developers, persons who were leasing or who had expressed the intention to lease or interest in leasing portions of the real estate prior to Lesivo, financial institutions which would have been appropriate for development financing, and local real estate professionals regarding the commercial development of FVG's real estate properties pursuant to the Usufruct Contract.²⁴³

198. Based upon his experience and investigation in this case, Mr. MacSwain determined the following:

- (i) At the time of Lesivo, FVG had to legal right to lease and/or develop the right of way and adjacent parcels for 42 more years. As a result, his valuations were based upon a 42-year additional time line.²⁴⁴
- (ii) The FVG longitudinal rights of way have substantial value based upon the unobstructed ability for telecommunications, electrical, pipeline and other utility

²⁴¹ See Senn Statement ¶ 15.

²⁴² Thompson Report ¶ 66, Table 11.

²⁴³ MacSwain Report ¶¶ 3.1-3.2.

²⁴⁴ *Id.* ¶ 4.2.

providers to plant their utility poles and run their lines and pipes over great distances without the hindrance of obstructions or negotiations with multiple landowners and, in most instances, with an ease of construction and efficiency of costs due to already existing land clearance. These conclusions were confirmed and reinforced by the success which FVG had achieved in consummating such leases during the period from the inception of the Usufruct to the date of Lesivo and by the fact that industrial squatters had installed power lines and roadways on unused portions of the right of way before Lesivo.²⁴⁵

- (iii) Because of the central location of the large right of way and station parcels in the large urban communities and small countryside towns of Guatemala, the best uses for these properties would have been ground leases for retail or industrial purposes. Prior to the Lesivo Resolution, FVG was engaged in active discussions and negotiations with parties who had expressed interest in leasing and commercially developing rail stations and station yard properties controlled by FVG.²⁴⁶
- (iv) Valuations of the properties located on the Pacific corridor segment and the rural spur lines (*i.e.*, the Mexican border at Tecún Umán through Escuintla to Puerto Queztal/San Jose, Zacapa to Anguiatú) are not dependent upon whether FVG would have opened up these segments of the railway, because the potential demand for leasing the right of way properties and easement contracts along these segments is not dependent on whether the railroad would have been in operation.²⁴⁷

199. In each case, Mr. MacSwain's determinations are conservative, *i.e.*, they contemplate leasing or development time-lags and significant vacancy rates (ranging from 20-33%) which serve as reasonable proxies for delays in the commencement of leasing, marketing time and time loss between tenants. Further, he assumes that ground leases would have minimum annual rates of return of 10% because land is a non-depreciable asset and leases might well have to be subordinated to mortgage financing.²⁴⁸ Similarly, the lease terms and renewal options are consistent with his extensive experience and his investigation and discussions with developers and potential tenants in Guatemala. He did not project leasing beyond the initial 50-year Usufruct term, any residential use (a higher yield potential), other significant FVG development activities (another higher yield potential), inflation adjustments or, in most cases, even rental increases.²⁴⁹

a. Valuation of Existing FVG Leases Prior to the Lesivo Resolution

200. The first component of Mr. MacSwain's analysis is the valuation of the future rents FVG would have earned over the remaining term of the Usufruct from *existing* long and

²⁴⁵ *Id.* ¶¶ 7.1.1-7.1.2.

²⁴⁶ *Id.* ¶¶ 4.2(a), 7.2.

²⁴⁷ *Id.* ¶ 4.2(a).

²⁴⁸ *Id.* ¶ 4.2(c).

²⁴⁹ *Id.* ¶¶ 4.2(f)-(i).

short term leases. Prior to the Lesivo Resolution, FVG was able to execute four diverse and representative long-term right of way utility easement contracts for electrical and gas transmission along the right of way. The parties to and terms of those agreements (Exs. C-28(a) – 28(d)) were as follows:

- a. Planos y Puntos/Gesur – 52.40 km easement for electric transmission. This lease was entered into in 1998 for a 50-year term. It provides for a rent increase in 2010 and increases every 7 years thereafter. The rental income over the term of the agreement would have been as follows: 2007-10: \$80,200 per annum; 2011-17: \$92,504 per annum; 2018-24: \$109,113 per annum; 2025-31: \$128,802 per annum; 2032-38: \$151,987 per annum; 2039-45: \$179,345 per annum; 2046-48: \$211,626 per annum.
- b. Texaco Guatemala – 1.66 km easement for gas transmission. This lease was entered into in 1998 for a term of 48 years, or until 2046. The rent from 2007-22 is \$4,150 per annum. Starting in 2023, the rent is to be increased annually based upon the U.S. inflation rate but cannot be increased less than 3% or greater than 5%. Assuming an average annual rent increase of 4% from 2023-46, this lease would have generated \$257,649 in income over its remaining term.
- c. Zeta Gas de Centroamerica, S.A. – 18.20 m (0.0182 km) easement for gas transmission. This lease was entered into in 2001 for a term of 20 years. The annual rent is \$500 per annum. Absent Lesivo, it is reasonable to assume that this lease would have been renewed at the end of its initial term and would have continued through the remaining term of the Usufruct, with 5% rent increases every five years.²⁵⁰
- d. Genor – 18.75 km easement for electric transmission. This lease, which covers one easement in two properties, was entered into in 1998 and is for 20 years. It provides for rent increases every five years according to a schedule. In 2007, the rent is \$25,781.50 per annum. From 2008-12, the rent is \$28,125 per annum. From 2013-18, the rent is \$32,812.50 per annum. Absent Lesivo, it is reasonable to assume that this lease also would have been renewed and would have continued through the remaining term of the Usufruct, with 5% increases every five years.²⁵¹

201. In addition, in 2000, FVG entered into a 48-year agreement with Chiquita to lease a port facility at Puerto Barrios (Ex. C-28(e)). The annual rent is 2% of Chiquita's gross revenues generated at this facility, increasing to 4% in March 2015. Based upon rental payments received by FVG prior to the Lesivo Resolution, the annual rent would have been \$382,684 per annum through February 2015 and \$765,368 per annum thereafter through the remaining term of the Usufruct Contract, assuming no increase in Chiquita's gross revenues (an extremely conservative assumption).²⁵²

202. Also, as of the date of Lesivo, FVG was receiving approximately \$25,000 per

²⁵⁰ *Id.* ¶ 5.1.

²⁵¹ *Id.*

²⁵² *Id.* ¶ 5.2.

year for short term rentals of shacks, billboards and commercial booths along the right of way, which FVG expected to continue to receive over the remaining 42 years of the Usufruct. These rentals further support the probability of additional commercial tenancies on the real estate properties in urban and town centers.²⁵³

b. Reasonably Expected Additional Right of Way Easement Contracts Which Were Lost as a Result of the Lesivo Resolution

203. Based upon FVG's success in entering into the above long-term right of way easement contracts with utilities prior to Lesivo, not to mention the presence of several industrial/utility squatters along the right of way,²⁵⁴ there can be little doubt that there was strong demand for these contracts and, absent the Lesivo Resolution, it is reasonably, indeed, virtually, certain that FVG would have entered into additional agreements of this kind.

204. The Atlantic/North Coast right of way and the Pacific/South Coast right of way enable utility companies virtually to span the entire country with main transmission lines and pipelines that, in turn, can be sued to support "feeder" lines to the rural areas of Guatemala. In addition, rail spur segments such as Zacapa to Anguiatú provide access to El Salvador, and the spurs to Port Quetzal and from Santa Maria and Champerico to the Port of San Jose provide Pacific Ocean access to the main transmission lines that would have been constructed on the Puerto Barrios to Guatemala and Guatemala to Tecún Umán rights of way.²⁵⁵

205. Thus, the appropriate use and value of these rights of way would be from electric and telecommunications transmission. Because FVG had, as early as 1998, entered into several easement contracts, and because, immediately prior to the Lesivo Resolution, FVG had negotiated a preliminary agreement with the power supplier Gesur to add 32 km to its existing easement contract which would have averaged \$3,200 per km over the term of the agreement,²⁵⁶ that most current rate of compensation should serve as the basis for a standard arms-length, negotiated value. Thus, it is reasonable to conclude that, absent Lesivo, the two main rights of way, which stretch from Puerto Barrios to Tecún Umán, a total of 495 km, would have had at least one electric and one telecommunications main transmission line on each side of the right of way, these two lines would have each generated income of \$1,584,000 per year (\$3,200 per km for 495 km), a total of \$3,168,000 per year for the first five years. The rural spurs, a total of 185.4 km in length, would have also had one main electric and one main telecommunications lines, at a rate of \$1,200 per km, for \$222,480 in income per line per year, or a total of \$444,960 per year for five years.²⁵⁷

206. Furthermore, in Mr. MacSwain's experience, most right of way easement contracts for transmission lines are for at least twenty years with two to three five-year renewal options.²⁵⁸ It is therefore his opinion that, but for the Lesivo Resolution, FVG would have

²⁵³ *Id.* ¶ 5.3.

²⁵⁴ Senn Statement ¶ 15.

²⁵⁵ MacSwain Report ¶ 7.1.3.

²⁵⁶ Gesur Statement; Posner Statement ¶ 50; Senn Statement ¶ 48.

²⁵⁷ MacSwain Report ¶ 7.1.4.

²⁵⁸ *Id.* ¶ 4.2(e).

entered into two utility easement contracts along the right of way for an initial 20-year term with normal 5% increases every five years, and three 5-year renewal options.²⁵⁹ Therefore, the two (2) main rights of way, totaling 495 kilometers, would have generated the following cash flow:

495 kilometers @ \$3,200 per kilometer

Years 1-5	\$3,168,000 per annum
Years 6-10	\$3,326,400 per annum
Years 11-15	\$3,492,720 per annum
Years 16-20	\$3,667,356 per annum
Years 21-25	\$3,850,724 per annum – 1 st 5-year renewal
Years 26-30	\$4,043,260 per annum – 2 nd 5-year renewal
Years 31-35	\$4,245,423 per annum – 3 rd 5-year renewal

And the rural spur lines would have generated the following cash flow:

185.40 kilometers @ \$1,200 per kilometer

Years 1-5	\$444,960 per annum
Years 6-10	\$467,208 per annum
Years 11-15	\$490,568 per annum
Years 16-20	\$515,096 per annum
Years 21-25	\$540,851 per annum – 1 st 5-year renewal
Years 26-30	\$567,894 per annum – 2 nd 5-year renewal
Years 31-35	\$596,289 per annum – 3 rd 5-year renewal

c. Reasonably Expected Additional Station and Station Yard Leases Which Were Lost as a Result of the Lesivo Resolution

207. Prior to the Lesivo Resolution, FVG was engaged in active discussions and negotiations for leases of rail stations, station yards and other large parcels of land controlled by FVG for commercial development. There was tremendous commercial real estate potential in station yards because they are located in downtown, high density urban areas. For example, the second largest supermarket chain in Guatemala, Grupo Unisuper, spent several months in discussions with FVG regarding a potential investment that would have converted most of the large station yards into commercial centers with supermarkets, the first being Zacapa. The Lesivo Resolution, however, killed all interest in such leases and negotiations were terminated immediately by Grupo Unisuper.²⁶⁰

208. In Mr. MacSwain's opinion, had it not been for the Lesivo Declaration, it is reasonably certain that FVG would have been successful in leasing the following real estate parcels under the following terms and that such leases would have, therefore, produced the associated cash flows:

²⁵⁹ *Id.* ¶ 7.1.5.

²⁶⁰ Arriola Statement; Senn Statement ¶ 48; Posner Statement ¶ 50.

a. Puerto Barrios

Puerto Barrios is Guatemala's international gateway on the Atlantic Ocean. The FVG-controlled property consists of 1,308,973.12 square feet or 30.05 acres. As discussed above in paragraph 201, the majority of this property (892,099 square feet) has been leased to Chiquita for an annualized income of approximately \$ 0.43 per square foot per year, which increases to approximately \$0.86 per square foot per year in 2015. The remaining 416,874 square feet (9.57 acres) has substantial railroad-related commercial use value, particularly for staging and loading of imported bulk cargo for preparation for shipment on the 197.4 mile segment to Guatemala City. FVG was already taking steps to secure such leases by investing approximately \$90,000 for compaction and ballast to better handle bulk cargo, such as coils of flat steel and wire. This well positioned parcel would have commanded 10-year leases based upon a value of no less than \$2.50 per square foot,²⁶¹ and a 10% annual return, or \$104,219 per year. Applying a 25% vacancy factor, the resulting reasonably expected and probable cash flow from this parcel would have been \$78,164 per year for 42 years (not assuming any rent escalation at the end of successive 10 year terms).²⁶²

b. Bananera/Morales

Bananera's value is also tied to the railway's connection to the Port of Puerto Barrios. This 94,999.22 square foot (2.18 acres) yard presents a reasonably expected opportunity for a small warehouse facility for distribution of bulk products imported at the Port, via on-the-ground transloading of bulk cargo from rail to truck, then to be distributed to local communities. Here, the value is, conservatively, \$1.50 per square foot so that, at a 10% annual return, the reasonably expected and probable rent would be \$14,250 per year. After a 25% vacancy factor, the lost cash flow from this parcel is \$10,688 per year for 42 years (again, not assuming any rent escalators).²⁶³

c. Quirigua

This 149,999.92 square foot (5.74 acres) parcel is long and narrow. While closely resembling the Bananera property, described above, this property does not have sufficient width on either side of the right of way to allow for similar development on both sides of the railway. The best use of the property is for a transloading facility on the west side of the right of way and, on the east side, a roadway. This station yard, like most of FVG's urban properties, is located virtually in the center of the community and an unobstructed roadway would be an advantage to community traffic flow. The reasonable value of this property is \$1.00 per square foot and, at a 10% return per year, has a reasonably probable rental value of \$25,000 per year. Adjusting for a 25% vacancy rate, the reasonably expected cash flow from this property is \$18,750 per year for 42 years, assuming no rent escalators.²⁶⁴

²⁶¹ Based upon the current income from the Chiquita lease, the value per square foot would be much higher and, based upon the Chiquita lease income from 2015 forward, the value per square foot would be almost four times greater than \$2.50 per square foot.

²⁶² MacSwain Report ¶ 7.2(a).

²⁶³ *Id.* ¶ 7.2(b).

²⁶⁴ *Id.* ¶ 7.2(c).

d. Gualán

The Gualán station yard is extremely well located with obvious retail and warehousing uses because of its central city location. This property has extensive width outside of the right of way. The parcel contains 244,999.71 square feet (5.62 acres) and considerable vehicle and foot traffic occur on and around the site. The land west of the right of way (approximately 1.3 acres) intersects with 4th and 5th Streets and is a particularly good retail location. The eastern portion (3.5 acres) has very good warehouse potential. This parcel has a value of \$2.00 per square foot for the retail portion and \$1.50 per square foot for the warehouse area. As a result, the lease of 56,628 square feet of retail space, with a 10% annual return, would produce cash flow of \$11,326 per year. After adjustment for 25% vacancy, the lost cash flow from this portion is \$8,495 per year for 42 years. Similarly, the lease of 152,460 square feet of warehouse space, at a 10% annual return, would produce cash flow of \$22,869 per year. After adjustment for 25% vacancy, the lost cash flow from this portion is \$17,152 per year for 42 years. Neither figure takes rent escalation into account.²⁶⁵

e. Zacapa

This 1,490,534.5 square foot (34.22 acres) parcel is an extraordinary property for mixed use development with strong potential for street retail development and obvious use for transloading and warehouse purposes. Bulk cargo from Puerto Barrios could be easily transferred from rail to truck and the property is perfect for intermodal traffic. In addition, certain parts of the parcel could be and would have been developed for residential purposes. Absent Lesivo, this is a property that FVG would have easily developed the infrastructure of the entire parcel for retail, residential and intermodal, transloading and warehouse distribution, or would have leased to a retail real estate developer who would have developed it into the same uses. As discussed above, the second largest supermarket chain in Guatemala was, at the time of Lesivo, working with FVG to develop a market and other potential retail at the Zacapa station, but the interest disappeared after the Government's Declaration of Lesivo.²⁶⁶

Based upon Mr. MacSwain's consultations with local real estate professionals and upon review of correspondence in FVG's files, Mr. MacSwain conservatively established a value for the 5.5 acre (239,580 square feet) station section most appropriate for retail at \$2.80 per square foot, unimproved, and a value of \$2.40 per square foot for the rail-oriented western and central portions of the property (1,251,043 square feet or 20.72 acres). Indeed, Maersk intended to develop a project to load containers at the Zacapa station but, after the Lesivo Resolution, the deal was not consummated.²⁶⁷

As to the retail area, Mr. MacSwain is of the opinion that FVG would have pursued the infrastructure development itself in order to have maximized its return on this very attractive property. After taking financed infrastructure cost into account but including the profit on the return of that cost, the retail portion of this parcel would have produced a net annual return of \$76,666 per year for the first 10 years. Adjusting for a 20% vacancy factor, the lost cash flow from this parcel was \$61,333 per year for those 10 years. Applying a rental increase to \$75,000

²⁶⁵ *Id.* ¶ 7.2(d).

²⁶⁶ *Id.* ¶ 7.2(e)(1).

²⁶⁷ *Id.* ¶ 7.2(e)(2).

at the end of the first 10 years, and \$5,000 per year for successive periods of ten years (and using the same 20% vacancy factor), the lost cash flow from the retail parcel for years 11 through 42 is:

Years 11-20	\$ 60,000 per annum ²⁶⁸
Years 21-30	\$ 64,000 per annum
Years 31-42	\$ 68,000 per annum

In addition, the industrial and distribution portion of this property would have been developed by FVG similarly to the retail portion. The reasonably expected and probable income from this portion, after taking into account development costs and the expected return on that expenditure during the first 10 year period, would have been \$322,769. Applying a 20% vacancy factor, the annual cash flow loss during the first ten years is \$258,212 per year. Annual cash flow losses for the remaining years of the Usufruct (years 11 through 42), not assuming any rental increases but applying a 20% vacancy factor, are:

Years 11-20	\$ 252,210 per annum ²⁶⁹
Years 21-30	\$ 264,901 per annum
Years 31-42	\$ 278,146 per annum

f. El Rancho

El Rancho is a 414,999 square foot (9.53 acre) parcel located near the Rio Grande River and only about sixty miles from Guatemala City. The property has various small buildings and shacks which are leased to individuals. As with Zacapa, the proper use of the property is for distribution/warehouse and retail because of its central location in the town of El Rancho. Mr. MacSwain received value quotes from local real estate professionals in the \$2.75 per square foot range. Using that value and applying it to 414,999 square feet and a 10% annual return, the lost rent from this property is \$114,412 per year. In all likelihood, as in Zacapa, FVG would have done the infrastructure development itself, thereby profiting on the 3% spread in the rate between infrastructure borrowing and recovery and producing an annual cash flow of \$126,862 per year for the first 10 years. Applying a 20% vacancy factor, the lost cash flow is \$101,490 for the first 10 years, and \$91,530. For the 32 remaining years of the Usufruct, the estimated lost cash flows are:

Years 11-20	\$ 96,106 per annum
Years 21-30	\$ 100,912 per annum
Years 31-42	\$ 105,958 per annum ²⁷⁰

²⁶⁸ *Id.* Net income falls in the second 10-year period because, the infrastructure investment having been recovered over the first 10 year period and in a balloon payment at the end thereof, there is no longer the profit on the financing of that infrastructure.

²⁶⁹ *Id.* Again, the rental income drops after the first ten years because there is no longer a profit on the financing of the infrastructure cost which has been recovered.

²⁷⁰ *Id.* ¶ 7.2(f).

g. Gerona

The Gerona station, which consists of 1,049,832 square feet, is an extremely well-located property, only one mile from the center of Guatemala City. It has significant value for either parking or commercial development (or both) and many developers expressed interest in developing it prior to the Lesivo Resolution, which caused all of those interested to withdraw their proposals. Mr. MacSwain is of the opinion that the most viable option for FVG would have been to finance and develop the property itself. Based upon a 10% return per year, and the 3% spread on the cost of improvements of \$1,049,832, the cash flow in years 1 through 10 would have been \$346,445 per year. After adjusting for a 25% vacancy, the lost cash flow for the first ten years is \$259,834. This property would have achieved a 5% rental increase every five years; as a result, the lost cash flow during the subsequent periods is:

Years 11-15	\$ 248,023 per annum
Years 16-20	\$ 260,425 per annum
Years 21-25	\$ 273,439 per annum
Years 26-30	\$ 287,119 per annum
Years 31-35	\$ 300,898 per annum
Years 36-42	\$ 315,972 per annum ²⁷¹

In addition, because of new prosecutor offices opening in 2006 on a portion of the Gerona Station property not controlled by FVG, many people expressed interest in developing a 300-car parking lot on an adjacent portion of the FVG-controlled property. FVG was actively considering doing the development on its own account until, after Lesivo, all credit and financing institutions denied such financing.²⁷² As a result, FVG sought to mitigate its damages by leasing the property to a developer, but the developers also revoked their proposals, citing the Lesivo Resolution. On a ground lease for a parking lot, the project would have produced at least \$153,156 per year, without any factor for vacancies, plus 5% rental increases every five years.²⁷³

h. Chiquimula

Chiquimula is a community that has experienced substantial economic and population growth over the last several years prior to Lesivo. As a result, its station yard was very well situated for retail development. According to Mr. MacSwain, this 226,041.90 square foot parcel would have easily attracted developers for retail development. A conservative valuation for this property was \$2.00 per square foot, resulting in cash flow of \$45,208 per year. After adjustment for a 25% vacancy factor, the lost cash flow from this property was \$33,906 per year for 42 years.²⁷⁴

²⁷¹ *Id.* ¶ 7.2(g)(1).

²⁷² *See* Posner Statement ¶ 48, Ex. C-35(d) (Sept. 11, 2006 Banco de la Republica letter denying FVG credit application for financing construction of Gerona parking lot because of Lesivo Resolution).

²⁷³ MacSwain Report ¶ 7.2(g)(2).

²⁷⁴ *Id.* ¶ 7.2(h).

i. Impala

Impala has not experienced the growth and vibrancy of Chiquimula; therefore, Mr. MacSwain's valuation is less, although the station is very well located for retail and development. The property consists of 227,499 square feet, conservatively valued at \$1.00 per square foot. As a result, at a 10% rate of return, the expected cash flow from this rental would have been \$22,750 per year. A delayed start time as reflected by a higher vacancy factor of 25% results in a lost cash flow of \$17,063 per year for 32 years.²⁷⁵

j. Anguiatú

Anguiatú is located next to the border with El Salvador and, like Impala above, is valued very conservatively. Mr. MacSwain, however, believes that the central location and size of the property would have inevitably led to development. The parcel consists of 329,999 square feet which Mr. MacSwain has valued at \$1.00 per square foot. At a 10% rate of return, it would have produced \$33,000 per year. A 30% vacancy allowance takes into account that the start time for retail use has been extended into the future and results in a lost cash flow of \$23,100 per year for 32 years.²⁷⁶

k. Zona 12 - Guatemala City

This centrally located property of 372,872 square feet is located in a former Shell Oil logistics facility. It is a perfect rail-served inner city property which shippers and forwarders would have found extremely viable for intermodal use. Mr. MacSwain's valuation of \$3.50 per square foot reflects its central Guatemala City location and the active rail spur for intermodal and transloading use. The property would not need significant infrastructure improvement for its intended use. The annual rent would be \$130,505 which, adjusted for a 20% vacancy factor, reflects a lost cash flow of \$104,404 for ten years. Successive ten year rentals would enjoy a 2% rental increase, as follows:

Years 11-20	\$ 106,493 per annum
Years 21-30	\$ 108,622 per annum
Years 31-42	\$ 110,795 per annum ²⁷⁷

l. Amatitlan

Amatitlan is a 267,499 square foot property very centrally located on the Rio Michatoya, with very probable retail development uses. Mr. MacSwain has valued it at \$2.70 per square foot, which, at a 10% rate of return, produces an annual income of \$72,225. Adjusted for 25% vacancy (which includes a delay in development and leasing), the lost cash flow is \$54,169 per year for 42 years.²⁷⁸

²⁷⁵ *Id.* ¶ 7.2(i).

²⁷⁶ *Id.* ¶ 7.2(j).

²⁷⁷ *Id.* ¶ 7.2(k).

²⁷⁸ *Id.* ¶ 7.2(l).

m. Palin

Palin Station is located approximately 28 miles from downtown Guatemala City and the station is a large parcel of 399,999 square feet, containing sufficient width for warehouse and residential development. Palin does not command the values evidenced in Amatitlan above, nor the value of nearby Escuintla because of the size of the community. However, Mr. MacSwain believes its size and central location would have made growth and development inevitable. The delayed start for development is reflected in the 30% vacancy rate. Based upon the parcel size, its valuation and a 10% rate of return, the expected return is \$60,000 per year, which, when adjusted for a 30% vacancy factor, results in lost cash flow of \$42,000 per year for 36 years.²⁷⁹

n. Escuintla

The Escuintla station and yard is a very significant parcel due to its size (647,499 square feet) and center city location. It is ready for retail and residential use, with a small distribution potential. Mr. MacSwain is of the opinion that FVG would have fronted the infrastructure costs (at \$1.00 per square foot) and would have recovered same through amortization and a balloon payment in year 10, making a spread (4%) on the development financing, as well as the ground rent for the parcel. Based on a value of \$3.25 per square foot and a 10% rate of return, the rental income for the first ten years would have been \$236,356. After adjustment for a 20% vacancy, the lost cash flow is \$189,085 for years 1 - 10. The remaining years, including a 5% rental increase every 10 years, are:

Years 11-20	\$ 176,767 per annum
Years 21-30	\$ 185,606 per annum
Years 31-42	\$ 194,886 per annum ²⁸⁰

o. Mazatenango

Mazatenango is another very large parcel (527,921 square feet) located in the central area of the community. The property has obvious retail use on the west side of the right of way and the east side is suitable for warehouse and distribution use. At a value of \$2.75 per square foot and a 10% rate of return, the annual rent expectancy is \$145,178 which, adjusted for a 25% vacancy (including some delay in development), represents lost cash flow of \$108,884 per year for 42 years.²⁸¹

p. Retalhuleu

This is a large (136,752 square feet) and centrally located parcel with obvious retail uses on both sides of the right of way. The property does not have the size to have the community impact as most of FVG's properties, but Mr. MacSwain believes that it is so well located to the populace that it would have been readily accepted for store fronts and small shops. At a value of

²⁷⁹ *Id.* ¶ 7.2(m).

²⁸⁰ *Id.* ¶ 7.2(n).

²⁸¹ *Id.* ¶ 7.2(o).

\$2.75 per square foot, figuring a 10% rate of return, the rental value of the property is \$37,608 per year. After adjustment for a 25% vacancy, which, again, takes delay in development into account, the lost cash flow is \$28,206 for 42 years.²⁸²

q. Coatepeque

This property has a central location but some time would have been required for the community to be ready for retail and small distribution development. Its 189,837 square feet has been valued at \$2.00 per square foot and, when a 10% rate of return is applied, would have produced \$37,967 per year. Applying a 33.3% vacancy, to include delayed development, the lost cash flow is \$25,324 per year beginning in year 6 through the remaining 36 years of the Usufruct.²⁸³

r. Tecún Umán Station

This parcel is very large (629,999 square feet) and situated at the Mexican border. It serves as a transloading point between the Mexican railway and the Guatemalan railway and highways. It has obvious development potential for intermodal, transloading, industrial use and storage. Valued conservatively at \$1.75 per square foot, and applying a 10% rate of return, the annual rental would be \$110,250. Adjusted for a 20% vacancy, the lost cash flow is \$88,200 per year for 42 years.²⁸⁴

s. San Jose

This property is located directly on the Pacific Ocean with waterfront access. It had both aesthetic and economic value in the reasonably near future. Within a minimal time, the property (375,592 square feet) would have had resort, marina and beach front use. Valued by Mr. MacSwain at \$4.00 per square foot and using a 10% rate of return, the annual rental would have been \$150,237. Adjusted for a 25% vacancy, the lost cash flow is \$112,678, beginning in year 10 through the remaining 32 years of the Usufruct.²⁸⁵

2. Discounted Cash Flow Valuation of Lost Profits from Railroad Operations and Real Estate Leasing

209. The real estate leasing valuations by Mr. MacSwain have been taken and applied by RDC's other damages and railroad expert, Louis S. Thompson, to calculate the estimated lost profits FVG has suffered as a result the Lesivo Resolution under a discounted cash flow analysis. Mr. Thompson is an internationally recognized expert on railroad operations, particularly in developing countries. He has been involved in the investment in and the development and financing of domestic and foreign railroads and railroad policy for over 40 years, most of which was with the United States Department of Transportation and the World Bank. At the World Bank, he served as the Railways Adviser and oversaw lending for railway projects in all of the Bank's borrowing countries. He presently runs his own consulting company that specializes in

²⁸² *Id.* ¶ 7.2(p).

²⁸³ *Id.* ¶ 7.2(q).

²⁸⁴ *Id.* ¶ 7.2(r).

²⁸⁵ *Id.* ¶ 7.2(s).

rail policy and rail financial development issues around the world.

210. Mr. Thompson has particular expertise in the privatization and concessioning of railways in Latin America, Africa and elsewhere, and has advised on railway concessioning programs in Guatemala, Argentina, Brazil, Chile, Mexico, Peru, Bolivia, Uruguay, South Africa, Tanzania, Zambia and Estonia. In Guatemala, he met with Government officials in late 1995 and continuing through 1996 and 1997, where he specifically discussed and advised the responsible Government officials on Guatemala's plans for concessioning the railroad at issue in this case. Mr. Thompson is, therefore, uniquely qualified to opine on the lost profits suffered by FVG as a result of the Lesivo Declaration.²⁸⁶ As discussed below, Mr. Thompson has calculated these damages to be \$36,161,127 as of the end of 2006.

a. FVG's Proposal and Business Plan Were Reasonable and Conservative

211. As Mr. Thompson explains in his report, the terms for the Usufruct as advertised and awarded by the Government of Guatemala were in line with the World Bank's recommendations and similar railway concessioning experiences elsewhere. The Government offered the railway as an integral usufruct with very little regulation and with almost complete freedom for the concessionaire to make maximum use of all railway assets, including rights-of-way for ancillary commercial activities, in order to develop the full potential value of the assets and, thus, improve the venture's chances for success.²⁸⁷

212. In addition, unlike some railway concessions elsewhere (Argentina, Brazil and Mexico, for example) where the traffic potential, operating cost and physical condition of the railway were relatively well established by past experience, the Guatemalan Government rightly did not ask for a fixed payment up front, or even a guaranteed annual payment from the concessionaire. Instead, potential concessionaires were asked to bid on the maximum percentage of gross revenues to be paid to the Government. This approach minimized the concessionaire's up-front risk while maximizing the Government's eventual returns if the concession were successful. Mr. Thompson concludes that the Government of Guatemala's approach to the concessioning of the railway system was consistent with experience elsewhere and with the concessionaire's reasonable expectations, assuming that the Government performed its obligations after award of the Usufruct and did not interfere in the management or operation of the venture.²⁸⁸

213. After careful evaluation, Mr. Thompson concluded that FVG's Bid Proposal and Business Plan, which were prepared and submitted in May 1997 in response to the Government of Guatemala's request for bids, were reasonable.²⁸⁹ Given fully open information and

²⁸⁶ Mr. Thompson has also analyzed and calculated the measurable harm to Guatemala and the Guatemalan economy caused by the Lesivo Resolution and the Government's destruction of RDC's covered investment to demonstrate that the Usufruct Contracts were not injurious to the State (indeed, they were highly beneficial) and, therefore, he necessarily concludes that the Lesivo Resolution had to have been motivated by other, non-economic or cultural patrimony considerations. See Thompson Report ¶¶ 58-59, 70-75.

²⁸⁷ *Id.* ¶ 22.

²⁸⁸ *Id.* ¶¶ 22-23.

²⁸⁹ *Id.* ¶ 24.

appropriate advertising of the request for bids, the Proposal and Business Plan were obviously deemed reasonable from the Government's point of view in that the Government judged FVG's bid to be consistent with the Government's Licitación (Request for Bid) terms and, in an evaluation which awarded up to 70% of total points to the bidder's business plan, the Government found FVG's plan to be superior to the other bid submitted. Further, the FVG Proposal and Business Plan are incorporated into Deed 402. Thus, its projections of reasonably expected and anticipated cash flow from railroad operations were explicitly approved by the Government and cannot now be appropriately challenged as speculative.

214. With regard to its bid on the railway usufruct in Guatemala, RDC used the same discipline it has employed in other railway concession transactions – namely, beginning with reasonable revenue projections and building a business model around them. Table 2 of the Thompson Report contains a description of the Phases (I through V) FVG planned to undertake in reopening the railway, as set forth in FVG's Business Plan. FVG, however, only committed to completing Phase I, *i.e.*, reopening the Atlantic/North Coast corridor. The remaining four phases were to be completed "according to business conditions" and if the capital investments could be economically justified.²⁹⁰

215. Tables 3 and 4 of the Thompson Report show the total demand projections for tons and revenues. Table 5 contains an estimate of FVG's annual traffic in ton-kilometers and estimates the revenue/ton-km. The total projected tonnage, 994,500 tons at the end of Phase V, was only 13.3% of the Government's estimate 7,500,000 tons of traffic as set forth in its February 1997 *Licitación* (described as "Atraible por ferrocarril" in the section entitled "Situación Actual del Sistema Ferroviario de Guatemala"). Moreover, the "Estudio Plan Maestro Nacional de Transporte," (included in the *Licitación*), estimated potential total rail demand in the year 2010 of 3.5 million tons (low) to 5.0 million tons (high). In other words, the demand forecasts in the FVG Business Plan were only 13.3% of the Government's estimates of the total market of traffic potentially attractable to rail, and they were only 20% to 28% of the rail demand actually forecast by the Government in the National Master Plan for Transport. And although the FVG Business Plan used higher market shares (20% to 80%) than did the Government's estimates, these shares were applied to very specific markets and were, in Mr. Thompson's estimation, not unreasonable for the low-value commodities they represented.²⁹¹

216. Mr. Thompson also found the FVG Business Plan's railway revenue per ton estimates at approximately 0.4542 quetzals/ton-km or \$0.059, as shown in Table 6, to be well within a reasonable range when compared with other railways in Latin America and with the smaller European Union railways and given FVG's relatively small size and its short average length of haul. He also considers the physical scope of the Business Plan – essentially rehabilitation of up to 700 kilometers of track and related rolling stock – to be entirely feasible. The track rehabilitation plan called for restoring the track to U.S. Federal Railroad Administration Class II track (about 40 km/hr), which is reasonable for the type of traffic forecast, the conditions in Guatemala and the capabilities of the rail and rolling stock. In addition, both the locomotive and wagon rehabilitation programs were reasonable given that the

²⁹⁰ Ex. C-15, FVG Business Plan at § 4.0

²⁹¹ Thompson Report ¶ 30. The only high value commodity to be carried by FVG, containers, represented FVG achieving only a 20% market share of projected container traffic between Guatemala City and Puerto Santo Tomás.

rolling stock had been neglected for years. It was also certainly feasible to plan on rehabilitating 5 locomotives and 54 platform wagons at the outset, and the entire projected fleet was smaller than the fleet of most short line railroads in the United States.²⁹²

217. FVG's operating plan called for 77 to 80 employees to operate the railway in Phase I. Table 7 of the Thompson Report shows that the resulting productivity per employee, in terms of employees per km of line, would have been somewhat below Latin American railway concession practice, but that is because the traffic density (ton-km/km of line) would have been well below most of the other concessions. The conservative nature of these assumptions is demonstrated by the fact that, if labor productivity levels comparable to Argentina could have been achieved, the entire railway up through Phase V could have been operated with the same 77 people. Thus, FVG's labor estimates were quite reasonable. In fact, according to Mr. Thompson, FVG could have reasonably projected higher labor productivity and lower labor costs than what was projected in its Business Plan.²⁹³

218. In addition, FVG, through RDC, had access to, and consistently benefited from, a fully experienced railway management team, with particular experience in operating short line railways (which is the most similar experience to railway operations in Guatemala) under a variety of conditions. In Mr. Thompson's view, there was nothing in the operations of FVG that posed any unusual technical or managerial challenge in short line railway terms, and the team that RDC and FVG acquired was fully up to the job.²⁹⁴

219. In its Business Plan, FVG committed to an initial \$10 million investment to rehabilitate the railway line and rolling stock, even though the Government's Licitación did not require any fixed payment up front. FVG had an agreement with its parent corporation, RDC, to provide sufficient financial and administrative support "...to accomplish [FVG's] obligations under the bid terms, and the subsequent contractual requirements resulting from the grant of the concession." In fact, FVG actually received much more financial support from RDC than could have been reasonably expected and the total investment, not including interest thereon, far exceeded FVG's commitment.²⁹⁵

220. Crucially, the structure of the Usufruct, with FVG making Canon payments to the Government based on gross revenues, appropriately matched risk with reward for all participants. In Mr. Thompson's opinion, it would have been unreasonable for Guatemala to require FVG to make significant payments up front because of the uncertainties in demand growth and asset conditions. At the same time, it would have been fruitless for the Government to ask for a share of net income, because the accounting issues in determining net income are complex and unpredictable (and, of course, if there were no net income – as had been the case since at least the time at which FEGUA was created – the Government would have received no payment at all). Moreover, gross revenues are easily verified.²⁹⁶

221. At the same time, basing the Canon payments on gross revenue reduced FVG's

²⁹² *Id.* ¶ 32.

²⁹³ *Id.* ¶ 33.

²⁹⁴ *Id.* ¶ 34.

²⁹⁵ *Id.* ¶ 35.

²⁹⁶ *Id.* ¶ 36.

risk because the payments would only be incurred to the degree that the revenues actually materialized. It is also important to emphasize that the Canon fees also applied to real estate development as well as railroad operations. That is, the Government had the same stake in the success of real estate development that it did in the freight business and the more successful FVG was in generating real estate revenue, the more money the Government would receive. Equally important, the Usufruct was for 50 years, with a potential extension for up to another 50 years, which ensured that the typical start-up uncertainties could eventually be overcome within the longer time frame. Given the uncertainties of restarting a railway in Guatemala, the long time frame was essential in securing a responsible investor.²⁹⁷

222. In addition to the normal commercial issues involved in business planning, the FVG Business Plan was inherently based on two assumptions, both of which were reasonable: (i) full use of the railroad rehabilitation trust fund monies to be generated by payments from FEGUA (as subsequently reflected in Deed Number 820 dated December 30, 1999), and (ii) rapid and effective action by FEGUA (backed by the Government) to deliver and maintain clear access to the right of way as and when requested. Failure on each of these had an adverse impact on the success of the Usufruct prior to the Lesivo Resolution. Indeed, FVG's ability to execute its business plan despite the Government's abject failure to comply with either of these obligations is a testament to the conservativeness of the plan and the dedication of FVG's management and employees, as well as the financial support from RDC.²⁹⁸

b. FVG was on the Path to Success Prior to the Lesivo Resolution

223. By December 1999, FVG completed the rehabilitation of the Atlantic corridor (Phase I) and the necessary rolling stock, although the effort was made more difficult by the Government's failure to remove squatters and make its contractually obligated payments to the Trust Fund. RDC eventually invested approximately \$16.4 million in FVG, which was well above the \$10 million commitment that it had made in the Business Plan. Forty-five months after FEGUA's collapse in March 1996, trains began to run again in Guatemala.

224. Immediately prior to the Lesivo Resolution, FVG was on the path to achieve the long-term objectives of its Business Plan. Because of FVG's marketing and maintenance efforts, traffic was growing steadily and accident rates were falling. As shown in Table 6 of the Thompson Report, FVG's traffic tonnage grew between 2000 and 2005 at a faster rate than any of the other Latin American concessions had achieved in their initial years. As Table 10 shows, through 2004 (when rail revenue peaked) and much of 2005 (when tonnage and non-rail revenue peaked), there was no reason to believe that FVG's long-term success was not achievable or likely. In addition, safety is a sensitive measure of management competence and determination. As Table 9 of the Thompson Report shows, from 2000 to 2005 accidents and days of work lost due to injuries remained stable or declined. As promised in the Business Plan, FVG made a strong effort to develop railway traffic from all sources, and it aggressively tried to develop, and had achieved success in developing, non-rail sources of income from real estate leases. Unfortunately, despite the progress it was achieving, FVG was ultimately stymied in its efforts by the Government's Lesivo Resolution.

²⁹⁷ *Id.* ¶ 37.

²⁹⁸ *Id.* ¶ 38.

c. Estimated Discounted Cash Flow at the Time of the Lesivo Resolution

225. Mr. Thompson has calculated the pre-Lesivo fair market value of FVG's expected income over the remaining term of the Usufruct through use of a discounted cash flow methodology that is based on the economic conditions that existed at the time combined with a reasonable business model.²⁹⁹ Normally, such value determinations are based upon the investment concessionaire's own business plan, especially where that business plan has been fully disclosed to and accepted by the government prior to its award of the concession, as was the case here. In this case, because the quality of the FVG Business Plan was worth up to 70% of the weighting factors used by the Government in determining the winning bidder (and was specifically incorporated as an exhibit to Deed 402, the Right of Way Usufruct Contract), Mr. Thompson deemed it particularly reasonable to utilize the Business Plan as a foundation for his discounted cash flow analysis.³⁰⁰

226. Mr. Thompson's DCF model is an Excel spreadsheet, modified from the original FVG business planning model, that starts with the actual FVG results through 2006 and then, using the relationship between various types of costs and operating variables and their growth rates, projects what would have been the enterprise's performance over the remaining 42 years of the Usufruct. For example, the cost of fuel is related to the number of tons carried and to the price of energy. By forecasting the tons carried and the price of energy, the model forecasts the cost of fuel. Similar calculations are performed for all categories of cost to produce a total estimated cost for operating the railway.³⁰¹

227. Mr. Thompson's DCF model consists of three major components: (i) a projection of the North Coast/Atlantic operations; (ii) a projection of the South Coast/Pacific corridor operation plans, including the estimated investment that would have been required to put this segment into operation; and, (iii) an projection of the expected income from leasing and development of the right of way and real estate properties included within the Usufruct. The real estate income values in the model, which were analyzed and determined separately by Mr. MacSwain are set forth above and, in greater detail, in his expert report.³⁰²

228. The model analyzes the period from 2007 (the first full year after the Lesivo Resolution) through the year 2048, the last year of the Usufruct.³⁰³ The model estimates railway demand based on FVG's actual experience prior to the Lesivo Resolution and on its plans for the Pacific corridor operations. The demand estimates take into account trends by commodity as well as the expected rail shares in flows (such as import containers from the Atlantic ports to Guatemala City) where rail and trucks compete. Based on the traffic flows developed by the demand models, the model estimates the various investments needed, along with the financial

²⁹⁹ *Id.* ¶ 48.

³⁰⁰ *Id.* ¶ 49.

³⁰¹ *Id.* ¶ 50.

³⁰² *Id.* ¶ 51.

³⁰³ The model conservatively assumes that the Usufruct would not have been extended beyond the initial 50-year term even though the contracts allowed for extension by mutual agreement for up to an additional 50 years and such extensions are common in railway concessions. Indeed, this is exactly what has happened for RDC in Peru, where its affiliate FCCA has been granted two 5-year extensions on its 30-year concession so far.

and operating costs for each year.

229. The model's results are grouped into two Scenarios. Scenario One shows the estimated results of real estate leasing and development for the entire right of way along with railway operation only on the Atlantic route. In this scenario, the connection at Tecún Umán remains as a cross border facilitation operation between Guatemala and Mexico, but does not carry rail traffic further south. In Scenario Two, the results of opening railway operations on the Pacific corridor are added to the real estate and the Atlantic side railway operation. In this scenario, because the Pacific side would have been converted to standard gauge consistent with the rest of North America, Tecún Umán would become a rail connection extending to Esquintla and Puerto Quetzal and not just a border crossing point for interchange with trucks and the Mexican connecting railway.³⁰⁴

230. The output of the DCF model is an income statement and a set of physical indicators (tons, ton-km, etc.) that serve as the basis for the parametric cost and revenue projections.³⁰⁵ The results are summarized in Table 11 of the Thompson Report, which shows the estimated values of the two Scenarios. Table 11 also shows three other important values: (i) the value to FVG that would have been generated had the Government elected to jointly apply with FVG for a World Bank loan to finance the re-opening of the South Coast/Pacific segment; (ii) the value to the Guatemalan economy from having rail service that is about 30 percent cheaper than trucking (that is, how much does the railway save the economy as compared with all-truck transport); and (iii) the projected savings to Guatemala in road maintenance costs that the rail traffic would permit. Table 11 shows these values when subjected to a discount rate of ten percent.³⁰⁶

231. Mr. Thompson applied a ten percent discount rate for a number of reasons: (i) ten percent is a common standard for use in analyzing and valuing long-term infrastructure investments; (ii) it is the discount rate that was used by FVG in its Usufruct Bid Proposal which was specifically evaluated and approved by the Government of Guatemala and which is a part of, and thereby a contractual term, of Deed 402³⁰⁷; and (iii) as explained by Robert MacSwain (MacSwain Report ¶ 4.2(c)), it is the rate that is commonly used in real estate valuation analysis.³⁰⁸

232. Table 11 shows that, under a discount rate of ten percent, the estimated after-tax and after-fee income to FVG (in 2006 dollars) under Scenario One from 2007 through 2048 is approximately \$36,161,127, and under Scenario Two is \$35,520,624. The Government of Guatemala would have received over the life of the Usufruct about \$11.7 million in income taxes under Scenario One and it would have received approximately \$7.1 million in income taxes

³⁰⁴ Thompson Report ¶ 52.

³⁰⁵ *Id.* ¶ 54.

³⁰⁶ A discount rate is a way of comparing cash flows in future years with their value if received today. Though the calculations are complex, the general effect is that, for a given future cash flow, higher discount rates will reduce the present value, as will postponing the flow until later years.

³⁰⁷ See Ex. C-15, FVG Envelope B proposal (Economic Offer), which sets forth its ten percent Canon fee proposal (5% for the first 5 years) and where FVG used a ten percent discount rate to determine that the current value of the estimated Canon payments to FEGUA during the term of the Usufruct would amount to approximately 38 million quetzals.

³⁰⁸ See Thompson Report ¶ 54.

under Scenario Two. The Government also would have received approximately \$14.9 million in Canon fees from real estate and Atlantic rail operations (Scenario One), and \$32.9 million in fees from real estate, Atlantic and Pacific operations (Scenario Two). Thus, the total value of benefits and net income from the Usufruct (summing both the value to Government and to FVG) under the ten percent discount rate in 2006 dollars would have been approximately \$62.8 million under Scenario One, and \$75.5 million under Scenario Two.

233. Further, under Scenario One the estimated after tax value of the income from real estate alone is \$34.8 million. This demonstrates that the real estate, not the railway operations, was the critical economic underpinning of the Usufruct. Addition of the Atlantic railway operations increases the net present value of the total Usufruct by only \$1,354,127.³⁰⁹

234. Next, Scenario Two shows that the Pacific operations would have required significant investment at first, followed by a multi-year period of development before such operations became fully profitable. As a result, Table 11 shows that the net value to FVG of adding the Pacific operations would have been minimal or even slightly negative (at a ten percent discount rate, the net present value of FVG's future profits would have actually decreased by \$640,503). Thus, the ability of FVG to conduct the Pacific rail operations would have been critically dependent on access to low cost finance because it would have been unreasonable to take on the significant extra risk for no added value to FVG.³¹⁰ This conclusion, again, was expressed in FVG's original Proposal and Business Plan provided to the Government, which clearly stated that FVG was only committed to Scenario One, *i.e.*, Atlantic operations (Phase I) along with leasing of real estate assets, with addition of the Pacific operations (Phase II) being possible only with the availability of favorable Government or third party financing.

235. Thus, as Table 11 shows, the Declaration of Lesivo caused significant monetary damages to FVG and RDC. Because FVG was not committed to re-opening the Pacific operations unless favorable financing was provided (and it was not), it is reasonable and proper to use Scenario One as the basis for measuring the fair market value of FVG's lost profits as of the Lesivo Resolution. Using a ten percent discount rate yields lost profits of **\$36,161,127**.

VII. RDC SHOULD RECEIVE PRE-AWARD INTEREST ON ITS DAMAGES AT THE RATE PAID BY THE REPUBLIC OF GUATEMALA ON ITS PRIVATE DEBT OBLIGATIONS, COMPOUNDED SEMI-ANNUALLY

236. The fair market value of RDC's total damages – **\$64,035,859** (\$27,874,732 for adjusted value of investment plus \$36,161,127 in lost profits) – has been determined as of the Lesivo Resolution, *i.e.*, the end of 2006. CAFTA Article 10.3 provides that “if the fair market value is denominated in a freely usable currency [here, US\$], the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”³¹¹

³⁰⁹ *Id.* ¶ 56.

³¹⁰ *Id.* ¶ 57.

³¹¹ The World Bank Guidelines on the Treatment of Foreign Investment deal with the issue of prejudgment interest under the definition of “prompt payment.” There, as in CAFTA Article 10.7.2, compensation is considered

237. Of course, Article 10.3 applies to a “lawful” expropriation, not an unlawful expropriation, but prejudgment interest, as a part of damages, is no less clearly required. For example, in *Siemens*, the tribunal applied the interest provision pertaining to the “legal expropriation” provision of the German-Argentine BIT to the “illegal expropriation” which it found there.³¹²

238. Similarly, as an expression of customary international law as applied to the breaches of international obligations, Article 38 of the ILC Draft Articles provides:

1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

239. Indeed, prejudgment interest on awards for breach of international obligations does not appear to be questioned by any tribunal or commentator.

The fundamental role of prejudgment interest is to fully compensate claimants for the delay between the date of the harm suffered and the award of damages. Prejudgment interest is, thus, an integral part of compensating the claimant for its injury. A properly calculated award should return the claimant to the position had the injury not occurred. The failure to grant prejudgment interest at a proper rate thus thwarts justice for claimants.³¹³

240. As a result, the only question for determination by the Tribunal here is what a “commercially reasonable” rate is. And, “in determining the applicable interest rate, the guiding principle is to ensure ‘full reparation for the injury suffered as a result of the internationally wrongful act.’”³¹⁴

[I]f the prejudgment interest rate is too low, a party may have an incentive to breach an unfavorable contract realizing that if the delay between the harm and the award is long, the financial cost of the breach may be significantly less than the cost of complying with the terms of the contract. . . . In addition, once a

“prompt” in normal circumstances if paid without delay. In exceptional circumstances, deferred payment may not extend beyond five years and must include “reasonable market-related interest applie[d] to the deferred payments . . .” Guideline IV § 8.

³¹² See *Siemens*, *supra* note 172, ¶¶ 394-97. The BIT provided that interest from the time of taking to the time of the award be paid at “the usual bank rate” and Siemens did not propose an alternative rate. *Id.* ¶ 391.

³¹³ Jeffrey M. Colón & Michael S. Knoll, *Prejudgment Interest in International Arbitration*, 4 Transnat’l Dispute Mgmt., Nov. 2007, at 1, 3. *Accord*, *Marboe*, *supra* note 211, at 755 (“As international law provides for full reparation after a violation of an international obligation, any calculation of interest that falls short of this standard is not in accordance with international law.”); Restatement (Third) of Foreign Relations Law § 712(1) (for compensation to be just, it must be paid at the time of taking or within a reasonable time thereafter “with interest from the date of taking”); *Sempra Energy*, *supra* note 147, ¶ 486; *Metalclad*, *supra* note 156, ¶ 128.

³¹⁴ *Siemens*, *supra* note 172, ¶ 396 (citing and quoting Crawford, *supra* note 156, at 239).

dispute has begun, if the interest rate is set too low, the respondent may have the incentive to prolong arbitration³¹⁵

241. Here, as a result of Guatemala's steadfast refusal to provide "prompt" compensation for its internationally wrongful acts, RDC has, in essence, been compelled to make a "forced loan" to Guatemala in an amount that the Tribunal ultimately determines should have been paid "promptly."

This approach – adjusting the award by the respondent's unsecured borrowing rate – implicitly treats the harm of the respondent as a forced borrowing by the respondent. In the economics and legal literature, it is referred to as the *coerced loan theory*. The claimant has loaned to respondent an amount equal to the harm respondent caused. When the award is rendered, the loan must be repaid. Since the *loan* was made to respondent, the claimant would insist that it bear the same interest rate as other unsecured debt of the respondent.³¹⁶

242. As described by Manuel Abdala in his survey of international arbitration compensation issues, the coerced loan works as follows:

Suppose there is a finding that the respondent caused \$10 million in damages at an earlier date (i.e., the valuation date). The damaged party should have had an additional \$10 million during the time since the valuation date. However, respondent used the deprived \$10 million, so the situation can be made tantamount to an involuntary loan. Thus, if this can be viewed as a loan, then the pre-judgment interest rate is the unsecured borrowing rate that respondent would pay to borrow the \$10 million amount.³¹⁷

243. Thus, to determine the commercially reasonable rate, the Tribunal should give substantial, if not determinative, weight to the rate which Guatemala pays on its sovereign debt to commercial parties. The opposite approach – prejudgment interest at the return which RDC could have earned or the interest rate paid by RDC – ignores the fact that, if RDC were to offer the judgment on the market, the discount rate used to value the IOU would be the Respondent's borrowing rate, not RDC's return or borrowing rate. Thus, RDC's incremental cost of capital is the Respondent's borrowing rate. Similarly, prejudgment interest at a risk free market rate most certainly undercompensates RDC because the rate does not take default risk into account and any short term risk free rate does not take inflation into account. Because the Respondent's borrowing rate takes all these factor into account, it is the most appropriate to use for prejudgment interest.

244. The World Bank maintains a databank for countries which issue sovereign debt concerning the amount, currency, term, maturity and rate of such commercial debt. For

³¹⁵ Colón & Knoll, *supra* note 313, at 3.

³¹⁶ *Id.* at 11-12 (emphasis in original).

³¹⁷ Abdala, *supra* note 230, at 564.

Guatemala, there are the following statistics³¹⁸:

Year	1995	2000	2003	2004	2005	2006	2007
Rate	8.0	11.0	9.3	8.1	9.2	9.4	9.6

Thus, the average interest rate paid by Guatemala on its private commercial debt (93.4% of which was issued in US\$) during the years in question was 9.228%, and this is the commercially reasonable rate because it is, in fact, the rate paid by Guatemala on similar debt during the same period of time.³¹⁹

245. Furthermore, this rate is also close to the ten percent discount rate applied in RDC's DCF analysis and, accordingly, is a reasonable proxy for RDC's risk adjusted return during the period.³²⁰

246. RDC is also entitled to compound pre-award interest.³²¹ In this case, interest should be compounded semi-annually because Guatemala pays interest on its private commercial debt semi-annually and, therefore, RDC would have had the opportunity to reinvest the interest semi-annually.

247. Finally, RDC requests that the Tribunal, pursuant to its power under CAFTA Article 10.26, award RDC its costs and attorneys' fees incurred in prosecuting its arbitration claims.

VIII. CONCLUSION

248. In accordance with the foregoing, Claimant RDC respectfully requests that the Tribunal make the following determinations:

³¹⁸ Ex. C-13. As Exhibit C-13 demonstrates, Guatemala did not issue sovereign debt to commercial creditors in all the years included in the Table. As a result, it was necessary to compare the rate Guatemala paid on private commercial debt to the rate it paid on official debt [owed to other country governments or international financial institutions such as regional development banks, the World Bank, etc.] for the years for which there were statistics for both types of debt. An analysis demonstrates that Guatemala regularly pays an average of 380 basis points more on its private commercial debt than it does on its official debt. Thus, the rate it would have paid on private commercial debt in the years when it did not issue that type debt can easily be computed. The table contains the actual interest rates for 2003 and 2004 and the computed interest rates for 1995, 2000, 2005, 2006 and 2007. RDC will offer testimony at the hearing to support these computations.

³¹⁹ Of course, this is the rate that Guatemala paid on private commercial debt *which it did not dispute*. In order to determine the commercially reasonable rate for debt which Guatemala disputed, it would be necessary to locate examples of Guatemalan sovereign debt which it had repudiated or on which it had defaulted, and determine the discount at which such debt traded. RDC has, so far, been unable to locate such debt.

³²⁰ See Abdala, *supra* note 230, at 567, citing *Compania de Aguas del Aconquija S.A. v. Argentina*, ICSID Case No. ARB/97/3 Award (20 Aug. 2007) ¶ 9.2.7 (noting that the rate of interest would correspond to the "discount rate applied to the DCF analysis and the quoted rate on the Argentine Treasury bond.").

³²¹ *Azurix*, *supra* note 168, ¶ 440 ("The Tribunal considers that compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor."); *Siemens*, *supra* note 172, ¶¶ 399-401; *Tecmed*, *supra* note 156, ¶¶ 196-97; *Sempre Energy*, *supra* note 147, ¶ 486.

- a. That Claimant is an “investor of a Party” protected by CAFTA;
- b. That Claimant’s “covered investments” under CAFTA include (i) income generated under the Usufruct, (ii) investment capital and loans committed by RDC to FVG under the Usufruct, and (iii) the value of FVG as the business enterprise operating the Usufruct;
- c. That the Lesivo Resolution and subsequent conduct of the Republic of Guatemala pursuant to the Resolution described herein constitute an indirect expropriation of Claimant’s rights in the Usufruct, in violation of CAFTA Article 10.7.1;
- d. That through these measures, the Republic of Guatemala violated the minimum standard of treatment of CAFTA Article 10.5 by failing to provide, in accordance with customary international law, fair and equitable treatment and full protection and security to Claimant’s covered investments;
- e. That the Republic of Guatemala has violated the national treatment standard of CAFTA Article 10.3;
- f. That the Republic of Guatemala shall pay Claimant \$64,035,859 in damages plus compound pre-award interest at the average interest rate paid by Guatemala on its private commercial debt; and
- g. That that the Tribunal, pursuant to its power under CAFTA Article 10.26, award Claimant its costs and attorneys’ fees incurred in prosecuting its CAFTA claims.

Respectfully submitted,



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